

SOUTH AFRICA / JUDGMENT

Escarpment Environment Protection Group and Another v Department of Water Affairs and Another (WT25/11/2009)

[2011] ZAWT 11 (20 July 2011)

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COURT

Water Tribunal

BEFORE

LJ Lekale, Dr W Singo, H Thompson, A.S Makhanya

CASE / FILE NUMBER

WT25/11/2009

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IN THE WATER TRIBUNAL

HELD IN PRETORIA

CASE NO: WT25/11/2009

In the matter between:-

ESCARPMENT ENVIRONMENT PROTECTION GROUP1st APPELLANT

LANGKLOOF ENVIRONMENT COMMITTEE2nd APPELLANT

and

DEPARTMENT OF WATER AFFAIRS1st RESPONDENT

WERM MINING (PTY) LTD2nd RESPONDENT

APPEAL RULING: 2011-07-20

APPEARANCES:

Coram: LJ Lekale (Mr) - Chairperson

Dr W Singo - Deputy Chairperson

Mr H Thompson - Member

Mr A.S Makhanya – Member

For Appellants: Adv. G Wilks instructed by the

Legal Resources Centre -Johannesburg

For the First Respondent: Mr T.M Sedibe from its Legal

Services Directorate – Pretoria

For the Second Respondent: Adv. Peter Lazarus instructed by Werkmans - Attorneys

DETAILS OF HEARING AND REPRESENTATION:

- [1] The appeal hearing was held at Pretoria on the 6th April 2011.
- [2] The appellants were represented by Adv. G Wilks instructed by the Legal Resources Centre - Johannesburg, while the First Respondent, on its part, was represented by Mr T.M Sedibe from its Legal Services Directorate in Pretoria.
- [3] The Second Respondent, on the other hand, was represented by Adv. P Lazarus instructed by Messrs. Werkmans
- Attorneys of Sandton.

ISSUE TO BE DECIDED:

- [4] The preliminary question raised by the Tribunal mero motu is whether or not the appellants have locus standi to lodge an appeal with the Tribunal regard being had to the fact that the Second Respondent was not required to and, in fact, did not invite objections within the contemplation of section 41(4) of the National Water Act (NWA).
- [5] In the event of the foregoing question being decided in the negative, the First Respondent requires the Tribunal to dismiss the appeal.

BACKGROUND

TO THE ISSUE:

- [6] On the 24 October 2008 the First Respondent issued a water use licence in favour of the Second Respondent without at any stage inviting written comments from interested parties as envisaged by Section 41(2) (c) of NWA.
- [7] The appellants felt aggrieved by the granting of the said licence and, eventually, lodged an appeal with the Tribunal on the 12th November 2009.
- [8] The appeal was prima facie lodged outside the prescribed 30 day period and, as such, the appellants applied successfully for condonation which was granted on the 4th June 2011
- [9] At the commencement of the appeal hearing the Tribunal raised an issue of locus standi of own accord and the parties agreed to submit written arguments on the matter by no later than the 6th June 2011.

SURVEY OF EVIDENCE AND ARGUMENT:

[10] The parties submitted Heads of Arguments as agreed to, inter alia, the following effect:

[10.1] The appellants:

- (a) The First Respondent did not call for written comments regarding the water use licence in question despite the fact that appellants lodged objections with it before the licence could be issued;
 - (b) Throughout the relevant process the appellants made continuous attempts at engaging meaningfully with the respondents in their objection to the issuing of the licence;
 - (c) The appellants, like everyone else, have the constitutional right to, inter alia, an environment that is not harmful to health or well being;
 - (d) The appellants further have a constitutional right to administrative action that is lawful, reasonable and procedurally fair;
 - (e) In interpreting the NWA 'he Tribunal Is constitutionally obliged to promote the spirit, purport and objects of the 3111 of Rights;
 - (f) A literal reading of Section 41(2)(c) of NWA prima facie leads to the conclusion that the appellants have no locus standi to bring the present appeal;
 - (g) In line with a decision of the Constitutional Court the Tribunal must prefer an interpretation which falls within constitutional bounds;
 - (h) An interpretation of NWA which excludes public participation of interested and affected parties does not accord with the objects and purport of the Constitution and must be rejected;
 - (i) The National Environmental Management Act 107 of 1998 (NEMA) gives effect to section 24 of the Constitution and NWA must, therefore, also be read subject to NEMA;
 - (j) Section 2(3) (g) of NEMA provides that the interests, needs and values of all interested and affected parties must be taken into account when decisions are made;
 - (k) Once an interested party has lodged an objection with the responsible authority any discretion which the First Respondent may be found to have with regard to public participation falls away and the responsible authority becomes obliged to partake in a public participation process in line with NEMA and the Constitution;
- (I) The appellants, therefore, have the necessary locus stands.

[10.2] The First Respondent:

- (a) The tribunal as a creature of statute is obliged to adhere fully to the applicable statutory requirements;

- (b) The appellants are non-suited to bring an appeal insofar as they are not persons who have timeously lodged a written objection as was found by the Tribunal in other decisions in *pari materia* such as *Carolyn Nicola Shear v The Regional Head: Gauteng Region - Department of Water Affairs and Eye of Africa Development (Pty) Ltd* Case No. WT 19/02/2009. [10.3] The Second Respondent:
- (a) The Second Respondent has never ever placed the appellants' locus standi in issue;
- (b) The Second Respondent was aware from early on in the licence application process that the appellants objected to the grant of the licence in question and it interacted with the appellants accordingly;
- (c) The Second Respondent is aware of the cases in *pari materia* where the Tribunal held that persons in the position of the appellants herein lacked locus standi such as *Gideon Anderson t/a Zonnebloem Boerdery and Department of Water and Environmental Affairs and Vuna Enterprises (Pty) Ltd* Case No. WT 24/02/2010;
- (d) If the Tribunal were to follow the reasoning in the *Gideon Anderson* matter, the appellants would not fall within the ambit of an objector as contemplated by Section 148(1)(f) of NWA:

[10.2] The First Respondent:

- (a) The tribunal as a creature of statute is obliged to adhere fully to the applicable statutory requirements;
- (b) The appellants are non-suited to bring an appeal insofar as they are not persons who have timeously lodged a written objection as was found by the Tribunal in other decisions in *pari materia* such as *Carolyn Nicola Shear v The Regional Head: Gauteng Region - Department of Water Affairs and Eye of Africa Development (Pty) Ltd* Case No. WT 19/02/2009.

[10.3] The Second Respondent:

- (a) The Second Respondent has never ever placed the appellants' locus standi in issue;
- (b) The Second Respondent was aware from early on in the licence application process that the appellants objected to the grant of the licence in question and it interacted with the appellants accordingly;
- (c) The Second Respondent is aware of the cases in *pari materia* where the Tribunal held that persons in the position of the appellants herein lacked locus standi such as *Gideon Anderson t/a Zonnebloem Boerdery and Department of Water and Environmental Affairs and Vuna Enterprises (Pty) Ltd* Case No. WT 24/02/2010;
- (d) If the Tribunal were to follow the reasoning in the *Gideon Anderson* matter, the appellants would not fall within the ambit of an objector as contemplated by Section 148(1)(f) of NWA:

- (e) Owing to the good prospects of success in having appellants' appeal dismissed on merits, the Second Respondent would prefer the matter to be decided on the merits so as to avoid a further appeal to the High Court on the question of locus standi alone. ANALYSIS OF EVIDENCE AND ARGUMENT:
- [11] As correctly contended for the First Respondent, the Tribunal is a creature of statute and exercises sporadic as opposed to inherent jurisdiction. It can only do that which its enabling legislation empowers it to do.
- [12] It is common cause that the First Respondent never required the Second Respondent to and the Second Respondent, in fact, did not call for objections in the media as contemplated by section 41(4) of NWA before the licence was issued.
- [13] As the Tribunal found in, inter alia, *Carolyn Nicola Shear v The Regional Head: Gauteng Regional Department of Water Affairs and Eye of Africa Development (Pty) Ltd* (supra), section 148(1) of NWA and the whole appeal scheme of NWA envisage the following: [13.1] that appeals may only be lodged by the persons mentioned in section 148(1) of NWA; [13.2] that where no notice calling for objections was published in the media as contemplated by section 41(4) of NWA no right to lodge an appeal in terms of section 148(1)(f) of NWA arises in favour of any objector.
- [14] Mr Wilks for the appellant feels that the foregoing Interpretation is not in conformity with the Constitution and relies on, Sntor alia, the following dictum cv L&riga DP in liv*Gs\$iiige&ng Directorate: SEO v Hyundai Motor Distributors 2001(1) SA 545 (cc) @ para 23: "Accordingly judicial officials must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section."
- [15] The said dictum is, however, no authority for proposing or implying that the Tribunal may usurp the powers not bestowed, either expressly or by necessary implication, on it by NWA as its enabling statute.
- [16] The relevant interpretation, in the Tribunal's view, does not, in any way, offend the Constitution and only recognises the extension of the right to appeal to the Tribunal to a class of persons specified by NWA.
- [17] There further exists no justification, in the Tribunal's opinion, for subjecting the provisions of NWA to NEMA when both statutes are of equal standing and seek to achieve and regulate different situations.
- [18] The Promotion of Administrative Justice Act (PAJA) was passed in order to give effect to section 33(3) of the Constitution. PAJA does not confer or make provision for the right to internal appeal procedures. Anyone who wishes to review an administrative action remains free to approach a court of law or an independent tribunal established for that purpose. The interpretation herein does not curtail any such right of recourse to courts of law. The Tribunal is further not a tribunal established for purposes of administrative review

contemplated by PAJA.

[19] In conclusion the Tribunal may note that an interpretation which extends the right of appeal to any person or objector other than the one contemplated by Section 148(1)(f) of NWA would unduly strain the words of the statute and cannot reasonably be ascribed to that section. DECISION:

[19] in the result the appellants are non-suited to bring the relevant appeal;

[20] The appeal is, therefore, dismissed. L J LEKALE (CHAIRPERSON)

(e) Owing to the good prospects of success in having appellants' appeal dismissed on merits, the Second Respondent would prefer the matter to be decided on the merits so as to avoid a further appeal to the High Court on the question of locus standi alone.

ANALYSIS OF EVIDENCE AND ARGUMENT:

[11] As correctly contended for the First Respondent, the Tribunal is a creature of statute and exercises sporadic as opposed to inherent jurisdiction. It can only do that which its enabling legislation empowers it to do.

[12] It is common cause that the First Respondent never required the Second Respondent to and the Second Respondent, in fact, did not call for objections in the media as contemplated by section 41(4) of NWA before the licence was issued.

[13] As the Tribunal found in, inter alia, *Carolyn Nicola Shear v The Regional Head: Gauteng Regional Department of Water Affairs and Eye of Africa Development (Pty) Ltd* (supra), section 148(1) of NWA and the whole appeal scheme of NWA envisage the following:

[13.1] that appeals may only be lodged by the persons mentioned in section 148(1) of NWA;

[13.2] that where no notice calling for objections was published in the media as contemplated by section 41(4) of NWA no right to lodge an appeal in terms of section 148(1)(f) of NWA arises in favour of any objector.

[14] Mr Wilks for the appellant feels that the foregoing Interpretation is not in conformity with the Constitution and relies on, inter alia, the following dictum in *Liv*Gs\$iiige&ng Directorate: SEO v Hyundai Motor Distributors 2001(1) SA 545 (cc) @ para 23:*

"Accordingly judicial officials must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section."

[15] The said dictum is, however, no authority for proposing or implying that the Tribunal may usurp the powers not bestowed, either expressly or by necessary implication, on it by NWA as its enabling statute.

- [16] The relevant interpretation, in the Tribunal's view, does not, in any way, offend the Constitution and only recognises the extension of the right to appeal to the Tribunal to a class of persons specified by NWA.
- [17] There further exists no justification, in the Tribunal's opinion, for subjecting the provisions of NWA to NEMA when both statutes are of equal standing and seek to achieve and regulate different situations.
- [18] The Promotion of Administrative Justice Act (PAJA) was passed in order to give effect to section 33(3) of the Constitution. PAJA does not confer or make provision for the right to internal appeal procedures. Anyone who wishes to review an administrative action remains free to approach a court of law or an independent tribunal established for that purpose. The interpretation herein does not curtail any such right of recourse to courts of law. The Tribunal is further not a tribunal established for purposes of administrative review contemplated by PAJA.
- [19] In conclusion the Tribunal may note that an interpretation which extends the right of appeal to any person or objector other than the one contemplated by Section 148(1)(f) of NWA would unduly strain the words of the statute and cannot reasonably be ascribed to that section.

DECISION:

- [19] in the result the appellants are non-suited to bring the relevant appeal;
- [20] The appeal is, therefore, dismissed.

L J LEKALE

(CHAIRPERSON)

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