

SOUTH AFRICA / JUDGMENT

Escarpment Environment Protection Group and Another v Director General : Department of Water and Sanitation and Another (WT 03/17/MP) [2017] ZAWT 1 (27 November 2017) [2017] ZAWT 1

COURT

Water Tribunal

BEFORE

T. Murombo, L. Mbanjwa, F. Zondagh

CASE / FILE NUMBER

WT 03/17/MP

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IN THE WATER TRIBUNAL

HELD AT PRETORIA

APPEAL NO: WT 03/17/MP

In the appeal of:

ESCARPMENT ENVIRONMENT

1ST Appellant

PROTECTION GROUP

WONDERFONTEIN COMMUNITY

2ND Appellant

ASSOCIATION

And

DIRECTOR GENERAL:

1ST Respondent

DEPARTMENT OF WATER AND SANITATION

ANALISA MINING INDUSTRIAL SERVICES CC

2ND Respondent

APPEAL RULING ON APPELLANTS' LOCUS STANDI

DATE HEARD: 27 November 2017

APPEARANCES

Coram:

Prof. T. Murombo – Additional Member (Chairing).

Ms. L. Mbanjwa – Deputy Chairperson.

Mr. F. Zondagh – Additional Member.

For the Appellants: Adv. O. Motlhasedi instructed by Mr. L. Limacher of the Legal Resources Centre.

For 1st Respondent: Mr. T. Mashala from the State Attorney, Pretoria.

For 2nd Respondent: No Appearance.

INTRODUCTION

AND BACKGROUND

1. This is an appeal by the Appellants against a decision by the first respondent to issue a Water Use License (WUL) (Licence No: 05/X11D/AGJ/1583) to the second respondent. The WUL was issued on 8 April 2013 and was valid for three (3) years with a review after two
- (2) years. The WUL authorized the second respondent to conduct specified water use activities in connection with open cast coal mining (Lefa Coal Mine (Pty) Ltd) on portion 4 of the farm Kaalplaats 453 JS near the town of Belfast in Emakhazeni, Mpumalanga Province. The coal mining was in accordance with a mining right granted by the Department of Mineral Resources on 5 July 2010 for a five (5) year period.
2. On 27 May 2008 the second respondent published a notice in the Middleburg Observer stating its intention to start an opencast mine and describing water uses to accompany such mining. A public participation meeting in relation to the application for a mining right was held at Wonderfontein Farm Hall on 28 May 2008. Among other participants at this meeting was Koos Pretorius a representative of the first appellant. He raised comments relating to environmental and water impacts of the proposed mine. At this stage the second respondent had not yet applied for a water use licence. The meeting and public participation process related to the mining right application. Nevertheless several comments raised related to the impacts of the proposed mine on the water resources and the wetlands in the target area.
3. Upon securing the mining right in 2010, the second respondent proceeded to apply for, and was granted a WUL as noted above.

4. It is the appellants' averment that beyond the public participation process in May 2008 relating to the mining right, they were never notified of or provided with information relating to the application for a WUL by the second respondent.
5. As a result of the non-involvement of the appellants in the WUL application process the appellants were unable to secure information about the application and thus could not have lodged any objection to the WUL application.
6. The appellants only become aware of the issuing of the WUL on 3 August 2015 about two and four months after the granting of the WUL. On 9 September 2015, the appellants were provided with a copy of the WUL by the Inkomati-Usuthu Catchment Management Agency. No reasons or record of decision were provided up until the date of this present hearing.
7. The appellants purported to lodge an appeal in terms of section 148
- (1) of the National Water Act ('NWA') on 9 October 2015. This was two and a half years since the date of issue of the licence and thirty (30) days after being provided with a copy of the WUL.
8. Among many other grounds of appeal the appellants aver that the first respondent acted unreasonably and unfairly in that the first respondent failed to comply with "mandatory and material procedures or conditions prescribed by the NWA and NEMA..."

The appellants further aver that the first respondent failed to take into account relevant considerations and acted unconstitutionally and unlawfully in granting the WUL, without considering cumulative impacts and sustainability of the mining operations and associated water uses.[1] In summary, the appellants contend that in failing or neglecting to exercise its discretion to cause the second respondent to conduct a public participation process in terms of section 41 (2) (c) of the NWA they were prejudiced.

9. The appeal was set down for hearing from 27-28 November 2017. On the first day of the hearing the parties had already conferred and agreed to a postponement given that the record was delivered on 24 November
2017. The appellants and the first respondent had also agreed on timelines for filing answering affidavits and heads of argument. However, we advised the parties that before endorsing their postponement agreement and given the importance of finalising matters expeditiously in the interests of justice we wanted the parties to address us on certain preliminary matters which the appellants had raised that could be dispositive of the matter. All the panel members had fully prepared for the hearing and had read the record which consisted of documents already in the possession of the parties.

10. The second respondent did not appear, and the appellants indicated that they had been served with the notice of appeal. However, there was no date indicating when the notice of appeal had been served on the second respondents. Despite persistent requests, the first respondent had neither filed any response to the notice of appeal nor provided the appellants with the reasons and record of the decision supporting the WUL.
 11. In their founding papers the appellants submitted that they had legal standing to lodge the appeal despite admitting that they had never lodged an objection to the application for a WUL by the second respondent. We therefore deemed it necessary to dispose of the preliminary issue first.
 12. The appellants averred that since they were not aware of the WUL application they had never been able to secure information to enable them to lodge any objection. Regardless, the appellants were able to lodge an appeal with grounds of appeal despite not having been provided with the reasons for the decision to grant the WUL.
 13. This decision relates to the preliminary issue of whether or not the appellants qualified as objectors in terms of section 148
- (1) (f) of the NWA.

ISSUES

AND LEGAL FRAMEWORK

14. The issue for determination is whether or not the appellants have locus standi to lodge this appeal given that they never lodged any objection as required by section 148 (1) (f) of the NWA.
15. The legal framework for Water Tribunal appeals is governed by section 148 of the NWA read with Schedule 6 to the Act and the Water Tribunal Rules ('Rules')[2] Section 148 (1) (f) of the NWA provides that;
"There is an appeal to the Water Tribunal –
 - f. subject to section 41(6),[3] against a decision of a responsible authority on an application for a licence under section 41, or on any other application to which section 41 applies, by the applicant or by any other person who has timeously lodged a written objection against the application;" (emphasis).
16. This tribunal and the High Court have authoritatively interpreted the meaning of "any other person who has timeously lodged a written objection against the application." In the matter of Werda Handel (Pty) Ltd and Another v Director General: Water and Sanitation and Tshedza Mining Resources (Pty) Ltd this Tribunal noted that,

“In a recent decision, the High Court ruled that the objection referred to in section 148(1)(f) of the Act is not necessarily an objection lodged in terms of section 41(4)(a)(ii) of the Act; otherwise, so the court held, the legislature could have explicitly made that reference. We agree with this correct interpretation of section 148(1) (f) of the Act, which ended the position in a long line of Water Tribunal decisions that sought to confine section 148(1) (f) to objections lodged in terms of section 41... only – a too restrictive interpretation when it is considered that the obligation to issue a directive by the Minister in section 41 (4) is discretionary.”[4]

17. The High Court decision referred to above is the matter of Escarpment Environment Protection Group v Department of Water Affairs [2013] ZAGPPHC 505 especially para 37. The Tribunal decisions referred to are decisions in which this Tribunal had held that granting locus standi to persons who had lodged objections against a water use licence application, in the absence of a section 41(2) or (4) invitation or ministerial directive, would unduly widen the class of persons with standing to approach the Tribunal.[5] We disagreed with this interpretation of the section.
18. What is clear from the High Court and Tribunal decisions is that section 148 (1)(f) of the NWA is broad enough to include a person who has lodged an objection of their own accord as long as that objection is lodge timeously to the responsible authority before a decision is made on the WUL application. This interpretation is consistent with the discretionary nature of section 41 (1) of the NWA and the requirements of procedural fairness and public participation.
19. However, this nuanced interpretation explained above cannot be extended to a limitless class of persons to include those who have not lodged any objection at all before a decision on a WUL application is made. This is an important distinction because it delimits the stage at which a liberal interpretation of section 148 (1)(f) would open floodgates and misconstrue the intention of the legislature in limiting the class of persons who may lodge an appeal to the Tribunal. It cannot be that the legislature intended any interested and affected person to come after the responsible authority has made a decision, and seek to first object to the application and subsequently lodge an appeal to the Tribunal. An objector is a person who has participated in the WUL application process whether on invitation or of their own volition. A person who has not lodged an objection is not an objector contemplated by section 148 (1) (f) of the NWA, regardless of the reasons why they could not object. This is particularly the case where the purported objector has other legal remedies available to seek information that could enable them to participate in the WUL application. Such other

remedies include seeking mandamus under the Promotion of Administrative Justice Act 4 of 2000 ('PAJA') or making an application in terms of the Promotion of Access to Information Act 2 of 2000 ('PAIA') to obtain the reasons and records for decisions.

SUBMISSIONS

BY THE PARTIES

20. The appellants argued that they have legal standing in terms of section 148 (1) (f) of the NWA “despite not having submitted a written lodged objection.”[6] In support of this submission, the appellants argued that an interpretation that non-suits them is narrow, restrictive, and would

frustrate the purposes of the NWA, the Constitution and lead to an absurdity. The appellant urged upon us to adopt what, to them, is a purposive approach which was taken by Tuchten J in *Escarpment Environment Protection Group v Department of Water Affairs*. [7] In detail;

20.1. The appellants argued that they did not lodge any written objection because of no fault of their own.

20.2. They submitted that the failure of the respondents to invite the public to submit comments in terms of section 41 (4) of the NWA explains their failure to lodge an objection. They were never aware of the WUL application.

20.3. They submitted further that despite repeated requests the second respondent failed to provide them with information relating to the integrated waste and water management plan (IWWMP) and the environmental management plan (EMP). Similarly, the first respondent “failed to consult or create avenues for public participation despite statutory obligations to that effect.”[8]

20.4. Lastly, the appellants submitted that they were only informed of the granting of the WUL two years after it was granted when mining had already commenced. For these reasons the appellants could not lodge any meaningful objection in the sense this Tribunal articulated in *Werda Handel (Pty) Ltd and Another v Director General: Water and Sanitation and Tshedza Mining Resources (Pty) Ltd*. [9]

21. The first respondent declined to submit written heads of argument on the preliminary issue of whether the appellants had locus standi. In a letter dated 12 December 2017 the first respondent stated that,

“In the course of consultation it was brought to our attention that the Regional Water Use Licence (WUL) was issued on 8 April 2013 for a period of three years. It is quite clear that the validity of the licence has in the meantime lapsed due to the passage of time. As such the First Respondent is of the opinion that the dispute between the parties has become moot and the result of the appeal would have no practical effect.”[10]

21.1. However, during the hearing the first respondent submitted that the provisions of section 148 (1)

- (f) of the NWA are clear that, only a person who has “objected timeously” has standing. They submitted that on their own admission, the appellants did not lodge any written objection to the WUL application. Therefore, the first respondent submitted that appellants do not have standing to lodge this appeal.

ANALYSIS

OF SUBMISSIONS AND FINDINGS

22. It is common cause that section 148 (1) (f) of the NWA, which gives legal standing for persons to lodge appeals to the Tribunal, applies to the applicant for a WUL or other persons who have lodged written objections against the WUL application in proper time before the responsible authority has made its decision on the application.[11]
23. The appellants admitted that they never lodged any written objections due to several reasons detailed in their submissions. Such reasons may very well be valid but insufficient to not bestow standing on the appellants. However, the appellants argued that despite not having complied with the requirement of section 148 (1) (f) this Tribunal should adopt a purposive approach which broadens the class of persons with the right of appeal to the Tribunal. The authorities cited in support of this exhortation unfortunately do not support the argument advanced. The decision of the High Court in *Escarpment Environment Protection Group v Department of Water Affairs* dealt with persons who had lodged written objection with the responsible authority. Those objections had been ignored. Equally, in *Werda Handel* this Tribunal was dealing with persons who had lodged written objections that the responsible authority and the WUL applicant had

decided to disregard.

24. The facts of this appeal are distinguishable from the sources referred to in that in this case the appellants have never lodged any written objection to the WUL application. The appellants adopted the approach of writing several letters to Department of Mineral Resources and Catchment Management Agencies (CMA) asking of reasons why the second respondent was granted a WUL. In one response to such a letter the Registrar of the Tribunal advised the appellants to make use of the PAIA to seek the information they needed. [12] Such advice appears not to have been heeded.
25. The appellants while asking us to treat them like objectors in terms of section 41, failed to make use of section 42 (b) of the NWA. Section 42 of the NWA entitled “Reasons for decisions” provides that,

“After a responsible authority has reached a decision on a licence application, it must promptly-

- (a) notify the applicant and any person who has objected to the application; and

- (b) at the request of any person contemplated in paragraph (a), give written reasons for its decision.” (emphasis)

When quizzed by the panel why they did not use this remedy and, if necessary, pursuing it through an appropriate court application, the appellants stated that section 42 only applies to objectors and they did not feel that they were objectors who could rely on the section.[13] This contradiction clearly demonstrated the even the appellants doubt their eligibility to be treated as objectors.

26. The appellants nonchalantly chose a route which did not yield the outcomes they expected to the exclusion of possible remedies in terms of the National Environmental Management Act 108 of 1998, the PAJA or the PAIA. This Tribunal has no jurisdiction to adjudicate or provide remedies under these statutes and the appellants cannot seek such remedies before us. In particular the appellants cannot use the appeal process in section 148 of the NWA to obtain information and reasons for a decision from the first respondent.
27. Rule 12[14] of the Rules on subpoenas, which the appellants sought to rely on, applies only to subpoenaing of witnesses and evidence in preparation

of the hearing of a valid appeal pending before the Tribunal. It cannot be used by a person who is still seeking to validate their

standing to lodge an appeal. Only the Tribunal may, in its discretion use Rule 12(1) in pursuit of an appeal properly before it.

28. When one considers that the deponent of the founding affidavit to the appeal was a participant in May 2008 in the public hearings on the application for mining rights, it baffles the mind for the same person and organisation to now allege that they were never aware that a WUL had been applied for. The second respondent’s consultants advised the appellants that they would apply for a WUL in due course. It was incumbent on the appellants to participate in that process even without a section 41 ministerial directives, given their awareness of the impending application by the second respondent.
29. In *Escarpment Environment Protection Group and Another v Department of Water Affairs and Others* the court clearly stated that,

“A considerable degree of flexibility is accorded to the responsible authority to achieve procedurally fair administrative action. It will be noted that none of the provisions of s 41 are mandatory in the sense that a responsible authority is bound by the provisions of the section to take any of the steps specified in the section. In each of the instances provided for in s 41, the responsible authority “may” take the step described. In my view, the word “may” should be read as a complete discretion to the responsible authority to decide whether or not to require publication, coupled with a duty to do so in a proper case.”[15] (emphasis)

Despite the above, the appellants seem to erroneously construe section 41 of the NWA as being mandatory in all circumstances.[16]

30. An interpretation of section 148 (1) (f) of the NWA which seeks to extend standing to persons who have never lodged any written objections against a water use licence application is, in our view, an impermissible extension of the purport of the legislation. Such an interpretation would truly open floodgates for the Tribunal to be bombarded with appeals by person who neglect to use the consultative processes in the NWA or administrative legislation aimed at facilitating participatory decision- making.
31. The procedural issues raised by this appeal, although raised by appellants without standing, are important and are in the interests

of justice. The issues raised are not dependent on the validity of the WUL as they pertain largely to procedural fairness; and the rights of interested and affected parties to participant in decision-making. It is in the interests of justice for the Tribunal

to clarify the extent of the class of persons with locus standi to lodge appeals. The determination of the appeal has a practical effect on persons similarly situated to the appellants who intend or have already lodged appeals to the Tribunal when they have never lodged written objections as required by section 148 (1) (f) of the NWA. Hence, in our view, the matter is not moot as argued by the first respondents.

ORDER

32. In view of the above findings, and the submissions by the parties we find as follows:

32.1. That the appellants upon their admission did not timeously, or at

all, lodge any written objections to the water use licence application by the second respondent.

32.2. As a result the appellants do not have legal standing to lodge
this appeal.

32.3. The appeal is hereby dismissed.

Prof. T. Murombo

Additional Member (Panel Chair)

Mr. F Zondagh

Additional Member

I agree and it is so ordered.

Ms. L. Mbanjwa

Deputy Chairperson

I agree and it is so ordered

- [1] Page 10 Record.
- [2] Published in GN 926 in GG 28060 of 23 September 2005.
- [3] Section 41(6) NWA provides that, “Notwithstanding the provisions of section 148, any applicant for a water use licence arising out of the integration process contemplated in subsection (5), who is aggrieved by a decision of the responsible authority, may lodge an appeal to the Minister against the decision.”
- [4] Appeal No: WT25/03/2015, para 23.
- [5] Such decisions include *Gideon Anderson t/a Zonnebloem Boerdery v Department of Water and Environmental Affairs*, and Another Case No: WT 24/02/2010 para 23 (23.10-23.12); *Escarpment Environment Protection Group and Another v Department of Water Affairs and Another* Case No: WT 03/06/2010 para 19 holding that “a liberal interpretation may lead to the opening of a floodgate which could not reasonably possibly have been intended by the legislature when it enacted section 148(1)(f) of NWA.”
- [6] Page 5, Appellants’ Heads of Arguments.
- [7]
- [2013] ZAGPPHC 505 (GNP).
- [8] Page 6 Appellants’ Heads of Arguments.
- [9] Appeal No: WT25/03/2015.
- [10] Letter from Office of the State Attorney dated 12 December 2017.
- [11] *Escarpment Environment Protection Group and Another v Department of Water Affairs and Others*
- [2013] ZAGPPHC 505 (GNP) para 32.
- [12] Page 60-61 Record (Annexure JP16).
- [13] Page 34 Record of Hearing.
- [14] Rule 12 on Subpoenas and evidence provides that, “(1) The Water Tribunal may- (a) subpoena for questioning any person who may be able to give information relevant to any of the issues; or (b) subpoena any person who is believed to have possession or control of any book, document or object relevant to any issue, to appear before the Tribunal and to produce that book, document or object.”
- [14] Rule 12 on Subpoenas and evidence provides that, “(1) The Water Tribunal may-
 - (a) subpoena for questioning any person who may be able to give information relevant to any of the issues; or

- (b) subpoena any person who is believed to have possession or control of any book, document or object relevant to any issue, to appear before the Tribunal and to produce that book, document or object.”

[15]

[2013] ZAGPPHC 505 (GNP) para 23.

[16] Page 10 Record (para 29 Notice of Appeal); Page 6 Appellants’ Heads of Arguments.

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Prepared on 12 October 2026 · Esheria