

SOUTH AFRICA / JUDGMENT

# Guguletto Family Trust v Department of Water Affairs and Forestry (WT16/07/2009)

## [2010] ZAWT 1 (18 May 2010)

[2010] ZAWT 1

## COURT

Water Tribunal

## BEFORE

L.J Lekale, W Singo, H Thompson

## CASE / FILE NUMBER

WT16/07/2009

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IN THE WATER TRIBUNAL HELD AT PRETORIA

CASE NO: WT16/07/2009

In the appeal between:-

GUGULETTO FAMILY TRUST .....APPELLANT

and

THE DEPARTMENT OF WATER AFFAIRS

AND FORESTRY .....RESPONDENT

APPEAL DECISION: 2010-05-18

## APPEARANCES

Coram: L.J Lekale (Mr) - Chairman Dr. W Singo - Deputy Chairperson Mr. H Thompson - Member

For the Appellant: Mr. M Grutter from Martin Grutter Attorneys

Telephone No: (012)664 3559

Fax No.: 086 6179 611

For the Respondent: Mr. T Mashala from Respondent's Legal Services Directorate in Pretoria

## DETAILS OF HEARING AND REPRESENTATION:

[1] The appeal hearing was held at Pretoria on the 5 May 2010.

[2] The appellant was represented by Mr. Martin Grutter, a local attorney while the respondent, on its part, was represented by Mr. Teffo Mashala, a legal officer from its Legal Services Directorate in Pretoria.

[3] The proceedings were recorded mechanically on 2 (two) audio tapes.

#### ISSUE TO BE DECIDED:

[4] The question raised by the appeal is whether or not the appellant is entitled to a water use licence regard being had to the following salient questions:-

[4.1] whether or not in determining the appellant's application for a water use licence the respondent complied with the provisions of the Promotion of Administrative Justice Act No. 3 of 2000 (PAJA);

[4.2] whether or not section 27(1) of the National Water Act (NWA), as read with the relevant provisions of the Middle Vaal Water Management Strategies, is in favour of such a licence being issued to the appellant.

#### BACKGROUND

##### TO THE ISSUE:

[5] The appellant applied unsuccessfully for a water use licence with the decision refusing the same being communicated in terms of a letter signed on the 2nd June 2009.

[6] The appellant, thereafter, lodged an appeal against the said decision on the 14th July 2009. In the light of the fact that, *stricto sensu*, the appeal was lodged outside the prescribed 30 (thirty) day period the appellant applied successfully for condonation which was granted on the 9th December 2009.

[7] The appeal was, eventually, scheduled for a hearing on the 5 May 2010.

##### SURVEY OF EVIDENCE AND ARGUMENT:

[8] The parties submitted the following in addition to the bundle compiled by the Registrar of the Water Tribunal:-

[8.1] Exhibit A The respondent's bundle of documents;

[8.2] Exhibit B : The appellant's Heads of Argument.

[9] The respondent, furthermore, adduced the oral evidence of TEBOGO MANYAMA who testified under oath to, *inter alia*, the following effect:

- (a) he is employed as Assistant Director: Administration by the respondent and on the 23rd March 2009 the latter directed a letter to the appellant effectively inviting it to advise on how the granting of the relevant licence would address the transformation factors set out in section 27(1)(b) of NWA, among others; (b) the appellant duly responded by way of a letter from its erstwhile attorneys dated the 11th May 2009 and contained in Exhibit "A" as page 1; (c) the respondent expected the appellant to touch, in its response, on ownership of the farm and management of the same, among others, in line with the Code of Good Practice issued by the Department of Trade and Industry (DTI) in terms of the Broad-Based Black Economic Empowerment Act No. 53 of 2003 (B-BBEE Act); (d) the appellant in its response, however, did not deal with the relevant factors although it is apparent from its said response that it understood what was required of it; (e) the appellant's application was only processed after the relevant fees were paid on the 4th August 2008 which is the date regarded as being the effective application date; (f) all factors set out in section 27(1) of NWA were considered; (g) he cannot dispute that the document referred to on page 12 and in paragraph 16.8.2 of the appellant's Heads of Argument is to the effect set out therein; (h) NWA seeks to promote equitable access to water and takes precedence over the National Water Resource Strategy; (i) the respondent regards the 7(seven) elements set out in the DTI document with regard to B-BBEE as legal requirements and they include ownership and management, among others; (j) the said DTI document cannot be ignored although the Middle Vaal Water Management Area Strategies referred to in the appellant's Heads of Argument provide that "[t]he specific need to move water into the hands of the historically disadvantaged is not seen as the focus in the Vaal River System and there are no immediate pressures in this WMA to make allocations to Black farmers..."; (k) there are no pockets in South Africa as a whole where it can be said that equity does not apply.

[10] On behalf of the appellant Mr. Grutter submitted to, inter alia, the following effect:

- (a) the relevant decision amounts to an administrative action but was not arrived at in line with section 33 of the Republic of South Africa Constitution and PAJA; (b) the definition of "Tribunal" in PAJA covers the Water Tribunal and, as such, the latter has the power to review the actions of the respondent;

- (a) he is employed as Assistant Director: Administration

by the respondent and on the 23rd March 2009 the latter directed a letter to the appellant effectively inviting it to advise on how the granting of the relevant licence would address the transformation factors set out in section 27(1)(b) of NWA, among others;

- (b) the appellant duly responded by way of a letter from

its erstwhile attorneys dated the 11th May 2009 and contained in Exhibit "A" as page 1;

- (c) the respondent expected the appellant to touch, in

its response, on ownership of the farm and management of the same, among others, in line with the Code of Good Practice issued by the Department of Trade and Industry (DTI) in terms of the Broad-Based Black Economic Empowerment Act No. 53 of 2003 (B-BBEE Act);

(d) the appellant in its response, however, did not deal

with the relevant factors although it is apparent from its said response that it understood what was required of it;

(e) the appellant's application was only processed after

the relevant fees were paid on the 4th August 2008 which is the date regarded as being the effective application date;

(f) all factors set out in section 27(1) of NWA were considered;

(g) he cannot dispute that the document referred to on

page 12 and in paragraph 16.8.2 of the appellant's Heads of Argument is to the effect set out therein;

(h) NWA seeks to promote equitable access to water

and takes precedence over the National Water Resource Strategy;

(i) the respondent regards the 7(seven) elements set out in the DTI document with regard to B-BBEE as legal requirements and they include ownership and management, among others;

(j) the said DTI document cannot be ignored although the Middle Vaal Water Management Area Strategies referred to in the appellant's Heads of Argument provide that "[t]he specific need to move water into the hands of the historically disadvantaged is not seen as the focus in the Vaal River System and there are no immediate pressures in this WMA to make allocations to Black farmers...";

(k) there are no pockets in South Africa as a whole

where it can be said that equity does not apply.

[10] On behalf of the appellant Mr. Grutter submitted to, inter alia, the following effect:

(a) the relevant decision amounts to an administrative action but was not arrived at in line with section 33 of the Republic of South Africa Constitution and PAJA;

(b) the definition of "Tribunal" in PAJA covers the Water Tribunal and, as such, the latter has the power to review the actions of the respondent;

(c) the National Water Resources Strategy clearly excludes the relevant Water Management Area (WMA) from the focus of the specific need to redress the results of past racial discrimination;

(d) the appropriate relief is for the relevant administrative action to be set aside and for the matter to be remitted to the respondent, as the administrator, with directives to grant and issue the relevant licence and to pay the appellant's costs on a scale as between party and party. ANALYSIS OF EVIDENCE AND ARGUMENT:

[11] An appeal hearing before the Water Tribunal takes the form of re-hearing of, inter alia, the licence application in terms of item 6 (3) of schedule 6 to NWA.

[12] In terms of section 1 of PAJA a "tribunal" is any independent and impartial tribunal established by National Legislation for the purpose of judicially reviewing an administrative action in terms thereof viz. PAJA. [13] According to NWA Chapter 15 thereof "establishes the Water Tribunal to hear appeals against certain decisions made by a responsible authority, catchment management agency or water management institution under [NWA]..." (see summary of the effect and purpose of Chapter 15 of NWA just above section 146 of NWA which establishes the Water Tribunal).

[14] In the light of the above the Tribunal is of the view that the "Tribunal" contemplated by PAJA is the one established specifically for the purpose of judicially reviewing an administrative action in terms of PAJA. In this regard it should be noted that the Water Tribunal is specifically empowered to hear appeals in terms of section 148 of

NWA and that, as correctly noted by Mr. Grutter in his submissions, NWA is silent on the issue of review in terms of PAJA.

[15] The Water Tribunal is, itself, clearly subject to PAJA and is obliged to comply therewith in the exercise of its powers and appellate jurisdiction, (see sections 1 and 5 of PAJA).

[16] In the light of the fact that the Water Tribunal exercises original or wider appeal powers when it hears appeals, an enquiry into whether or not the respondent, as the responsible authority, complied with PAJA when it decided on the appellant's application does not arise before the Tribunal because it is, on its part, obliged as of law to observe the provisions of PAJA in the course of its business. In the Tribunal's view the foregoing position is equally applicable to the argument that the respondent did not consider all the factors set out in section 27(1) of NWA. An enquiry into that issue would, with respect, be futile as the Tribunal is, in any way, obliged to consider such factors when it determines the present appeal by way of a hearing de novo.

[17] It follows, therefore, from the above that the Tribunal does not have the power or jurisdiction to determine whether or not the respondent complied with PAJA when it made the relevant decision.

[18] The real enquiry before the Tribunal is, thus, whether or not in the light of the relevant Water Management Strategies for the relevant WMA, as considered against the transformation factors in S27(1)(b) of NWA, the appellant is entitled to the relevant licence.

- [19] The relevant management strategy, on closer scrutiny, reveals the following: [19.1] that the extract relied upon by the appellant is, in fact, an excerpt from Appendix A to Version 1 of a document titled "Internal Strategic Perspective: Middle Vaal Water Management Area dated July 2004" (the ISP); [19.2] the said ISP advises as follows under "Invitation to Comment"; "This report will be updated on a regular basis until it is eventually superceded by the Catchment Management Strategy..." (see page 1 of the ISP) [19.3] the ISP, further, pronounces as follows under "Latest Version": "This report is a living document and will be updated on a regular basis. If the version of this report is older than 12 months, please check whether a later version is not available." (see page ii of ISP);
- [20] Section 8(1) of NWA provides for the mandatory establishment of a catchment management strategy "for the protection, use, development, conservation, management and control of water resources within its water management area."
- [21] Such a catchment management strategy may, according to section 8(3)(a) of NWA, be "established in a phased and progressive manner and in separate components over time." NWA does not provide for and refer to an ISP.
- [22] It follows, in the humble view of the Tribunal, that: [22.1] the relevant ISP is, most probably, a phase in the progressive process of establishing a catchment management strategy which is expressly provided for by NWA; [22.2] the relevant ISP is not a national water resource strategy which is contemplated in section 5 of NWA and which, unlike the catchment management strategy, is not limited to a water management area but relates to the whole country; [22.3] the ISP does not enjoy the same legal status as a catchment management strategy and, as such, does not and cannot take precedence over the provisions of section 27(1) of NWA which oblige the responsible authority in the position of the respondent herein to take the factors set out therein into account when it considers a licence application. In this regard it should be noted that NWA neither recognizes nor requires such an authority to consider an ISP which, in the Tribunal's view, is a possible embryonic stage of a catchment management strategy.
- [23] The Tribunal was not made aware of and could not, on its own, find any recent version of the relevant ISP. In the Tribunal's opinion, where there is conflict between a statutory provision such as section 27(1) of NWA and an operational instrument such as an ISP, the statutory provision takes precedence and, as such, prevails.
- [24] In the light of the thrust of Manyama's evidence, there is, in the Tribunal's observation, a possible conflict between section 27(1)(b) of NWA which provides for a need to redress the results of past racial and gender discrimination and the ISP herein which provides that the focus is not on equity in the relevant water management area. It must be reiterated that section 27(1)(b) of NWA makes transformation factors and other factors set out in that section, a focal point in the determination of a licence application.

- [25] It is not disputed for and on behalf of the appellant that the respondent places high premium on and applies the 7 (seven) empowerment elements set out in what was referred to as the DTI Code of Good Practice in deciding licence applications. In the light of Mr. Manyama's evidence in the foregoing regard it is probable that the respondent's position has changed since July 2004 when the relevant ISP was published. Mr. Manyama gave the respondent's operational position as at the date of the appeal hearing while the ISP gave such a position as at July 2004 and was apparently, *ex facie* the same, intended to apply for 12 months at the very most. [26] Although such a document is not placed before the Tribunal, the Tribunal is aware of the same from previous decisions in *pari materia* such as *Silver Charm Investment 114 (Pty) Ltd v Department of Water Affairs and Forestry & Ano* Case No. WT 07/08/2008;
- [27] The said document is, in fact, the AGRIBEE SECTOR CHARTER ON BLACK ECONOMIC EMPOWERMENT issued by the Minister of Trade and Industry in terms of section 12 of the B-BBEE Act No. 53 of 2003 with effect from the 20th March 2008.
- [28] The said Transformation Charter for Agriculture (AgriBEE) applies to, *inter alia*, "any Enterprise which derives the majority of its turnover from:
- The production of agricultural products; (see clause 2 of AgriBEE)
- [29] Clause 2.6 of AgriBEE exempts Enterprises with a 5 year moving average turnover of less than R5 million from the scope of application of the AgriBEE whilst encouraging them "to contribute to transformation in agriculture, particularly in the areas of skills development and corporate social investment..."
- [30] The 7 (seven) elements of empowerment in question relate to ownership, management control, employment equity, skills development, preferential procurement, enterprise development and rural development, poverty alleviation and corporate social investment (CSI). (see clause 5 of AgriBEE)
- [31] There is no evidence whatsoever before the Tribunal that the appellant subscribes to or satisfies the said elements or is exempted from the scope of application of AgriBEE. The only reference to empowerment in its communication with the respondent is to be found in Exhibit A where it responded to the respondent by pointing out that the relevant empowerment group in the area was approached with an enquiry after whether or not it was interested in the transfer of the relevant water and its response was in the negative.
- [32] It is clear to the Tribunal that, on available evidence, documentation and applicable law, it cannot be said that the transformation factors in section 27(1) of NWA are in favour of the granting of the relevant licence to the appellant.
- [33] In conclusion it is worth mentioning and reiterating that the AgriBEE came into effect some years after the relevant version of the ISP and, most probably, reflects the respondent's current operational position as effectively testified by Mr. Manyama. DECISION:

[33] In the result the appeal fails and the file shall be closed. DATED AT PRETORIA ON THIS 31 DAY OF MAY 2010.

- (c) the National Water Resources Strategy clearly excludes the relevant Water Management Area (WMA) from the focus of the specific need to redress the results of past racial discrimination;
- (d) the appropriate relief is for the relevant administrative action to be set aside and for the matter to be remitted to the respondent, as the administrator, with directives to grant and issue the relevant licence and to pay the appellant's costs on a scale as between party and party.

#### ANALYSIS OF EVIDENCE AND ARGUMENT:

[11] An appeal hearing before the Water Tribunal takes the form of re-hearing of, inter alia, the licence application in terms of item 6 (3) of schedule 6 to NWA.

[12] In terms of section 1 of PAJA a "tribunal" is any independent and impartial tribunal established by National Legislation for the purpose of judicially reviewing an administrative action in terms thereof viz. PAJA.

[13] According to NWA Chapter 15 thereof "establishes the Water Tribunal to hear appeals against certain decisions made by a responsible authority, catchment management agency or water management institution under [NWA]..."

(see summary of the effect and purpose of Chapter 15 of NWA just above section 146 of NWA which establishes the Water Tribunal).

[14] In the light of the above the Tribunal is of the view that the "Tribunal" contemplated by PAJA is the one established specifically for the purpose of judicially reviewing an administrative action in terms of PAJA. In this regard it should be noted that the Water Tribunal is specifically empowered to hear appeals in terms of section 148 of

NWA and that, as correctly noted by Mr. Grutter in his submissions, NWA is silent on the issue of review in terms of PAJA.

[15] The Water Tribunal is, itself, clearly subject to PAJA and is obliged to comply therewith in the exercise of its powers and appellate jurisdiction, (see sections 1 and 5 of PAJA).

[16] In the light of the fact that the Water Tribunal exercises original or wider appeal powers when it hears appeals, an enquiry into whether or not the respondent, as the responsible authority, complied with PAJA when it decided on the appellant's application does not arise before the Tribunal because it is, on its part, obliged as of law to observe the provisions of PAJA in the course of its business. In the Tribunal's view the foregoing position is equally applicable to the argument that the respondent did not consider all the factors set out in section 27(1) of NWA. An enquiry into that issue would, with respect, be futile as the Tribunal is, in any way, obliged to consider such factors when it determines the present

appeal by way of a hearing de novo.

[17] It follows, therefore, from the above that the Tribunal does not have the power or jurisdiction to determine whether or not the respondent complied with PAJA when it made the relevant decision.

[18] The real enquiry before the Tribunal is, thus, whether or not in the light of the relevant Water Management Strategies for the relevant WMA, as considered against the transformation factors in S27(1)(b) of NWA, the appellant is entitled to the relevant licence.

[19] The relevant management strategy, on closer scrutiny, reveals the following:

[19.1] that the extract relied upon by the appellant is, in fact, an excerpt from Appendix A to Version 1 of a document titled "Internal Strategic Perspective: Middle Vaal Water Management Area dated July 2004" (the ISP);

[19.2] the said ISP advises as follows under "Invitation to Comment";

"This report will be updated on a regular basis until it is eventually superceded by the Catchment Management Strategy..."

(see page 1 of the ISP)

[19.3] the ISP, further, pronounces as follows under "Latest Version":

"This report is a living document and will be updated on a regular basis. If the version of this report is older than 12 months, please check whether a later version is not available."

(see page ii of ISP);

[20] Section 8(1) of NWA provides for the mandatory establishment of a catchment management strategy "for the protection, use, development, conservation, management and control of water resources within its water management area."

[21] Such a catchment management strategy may, according to section 8(3)(a) of NWA, be "established in a phased and progressive manner and in separate components over time." NWA does not provide for and refer to an ISP.

[22] It follows, in the humble view of the Tribunal, that:

[22.1] the relevant ISP is, most probably, a phase in the progressive process of establishing a catchment management strategy which is expressly provided for by NWA;

[22.2] the relevant ISP is not a national water resource strategy which is contemplated in section 5 of NWA and which, unlike the catchment management strategy, is not limited to a water management area but relates to the whole country;

[22.3] the ISP does not enjoy the same legal status as a catchment management strategy and, as such, does not and cannot take precedence over the provisions of section 27(1) of NWA which oblige the responsible authority in the position of the respondent herein to take the factors set out therein into account when it considers a licence application. In this regard it should be noted that NWA neither recognizes nor requires such an authority to consider an ISP which, in the Tribunal's view, is a possible embryonic stage of a catchment management strategy.

[23] The Tribunal was not made aware of and could not, on its own, find any recent version of the relevant ISP. In the Tribunal's opinion, where there is conflict between a statutory provision such as section 27(1) of NWA and an operational instrument such as an ISP, the statutory provision takes precedence and, as such, prevails.

[24] In the light of the thrust of Manyama's evidence, there is, in the Tribunal's observation, a possible conflict between section 27(1)(b) of NWA which provides for a need to redress the results of past racial and gender discrimination and the ISP herein which provides that the focus is not on equity in the relevant water management area. It must be reiterated that section 27(1)(b) of NWA makes transformation factors and other factors set out in that section, a focal point in the determination of a licence application.

[25] It is not disputed for and on behalf of the appellant that the respondent places high premium on and applies the 7 (seven) empowerment elements set out in what was referred to as the DTI Code of Good Practice in deciding licence applications. In the light of Mr. Manyama's evidence in the foregoing regard it is probable that the respondent's position has changed since July 2004 when the relevant ISP was published. Mr. Manyama gave the respondent's operational position as at the date of the appeal hearing while the ISP gave such a position as at July 2004 and was apparently, *ex facie* the same, intended to apply for 12 months at the very most.

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[28] The said Transformation Charter for Agriculture (AgriBEE) applies to, *inter alia*, "any Enterprise which derives the majority of its turnover from:

- The production of agricultural products;

(see clause 2 of AgriBEE)

- [29] Clause 2.6 of AgriBEE exempts Enterprises with a 5 year moving average turnover of less than R5 million from the scope of application of the AgriBEE whilst encouraging them "to contribute to transformation in agriculture, particularly in the areas of skills development and corporate social investment..."
- [30] The 7 (seven) elements of empowerment in question relate to ownership, management control, employment equity, skills development, preferential procurement, enterprise development and rural development, poverty alleviation and corporate social investment (CSI). (see clause 5 of AgriBEE)
- [31] There is no evidence whatsoever before the Tribunal that the appellant subscribes to or satisfies the said elements or is exempted from the scope of application of AgriBEE. The only reference to empowerment in its communication with the respondent is to be found in Exhibit A where it responded to the respondent by pointing out that the relevant empowerment group in the area was approached with an enquiry after whether or not it was interested in the transfer of the relevant water and its response was in the negative.
- [32] It is clear to the Tribunal that, on available evidence, documentation and applicable law, it cannot be said that the transformation factors in section 27(1) of NWA are in favour of the granting of the relevant licence to the appellant.
- [33] In conclusion it is worth mentioning and reiterating that the AgriBEE came into effect some years after the relevant version of the ISP and, most probably, reflects the respondent's current operational position as effectively testified by Mr. Manyama.

#### DECISION:

- [33] In the result the appeal fails and the file shall be closed.

DATED AT PRETORIA ON THIS 31 DAY OF MAY 2010.

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