

SOUTH AFRICA / JUDGMENT

Mondi Shanduka Newsprint v Department of Water Affairs and Forestry (WT01/02/2008)

[2010] ZAWT 3 (26 May 2010)

[2010] ZAWT 3

COURT

Water Tribunal

BEFORE

L.J Lekale, W Singo, H Thompson, A.S Makhanya

CASE / FILE NUMBER

WT01/02/2008

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IN THE WATER TRIBUNAL

HELD AT PRETORIA

CASE NO: WT01/02/2008

In the appeal between:-

MONDI SHANDUKA NEWSPRINT.....APPELLANT

MONDI SHANDUKA NEWSPRINT

.....

APPELLANT

THE DEPARTMENT OF WATER AFFAIRS

AND FORESTRY.....RESPONDENT

AND FORESTRY

.....

RESPONDENT

APPEAL DECISION INCORPORATING CONDONATION RULING

APPEARANCES

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

For the Appellant Ms. B Vermaak

For the Appellant

Ms. B Vermaak

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

DETAILS OF HEARING AND REPRESENTATION:[1] The matter served before the Water Tribunal on the 12 May 2010 in Pretoria.[2] The appellant was represented by Ms. B. Vermaak, a compliance specialist from Mondi Limited while the respondent, on its part, was represented by its legal officer, Mr. Teffo Mashala.[3] The proceedings were recorded mechanically on 1 (one) audio tape.

ISSUE TO BE DECIDED:[4] The preliminary question raised by the Tribunal of own accord was whether or not good cause existed for condonation of late lodgement of an appeal against a directive issued in terms of section 53 (1) of the National Water Act (NWA).[5] In the event of the foregoing question being decided in the affirmative, the next enquiry was whether or not the Tribunal can, in law, legalise an unlawful water use in terms of its appellate jurisdiction as set out in section 148 (1)(j) of NWA.[6] In the further event of the question in paragraph [5] above being decided in the affirmative, the final enquiry was whether or not, on the facts presented by the matter, a directive issued by the respondent fell to be interfered with for the purpose of enabling the appellant to continue with a stream flow reduction activity (SFRA) without a water use licence.

BACKGROUND TO THE ISSUE:[7] The appellant enterprise, which is engaged in establishing a timber plantation at, inter alia, Portion 4 of Middleton 4924 in KwaZulu-Natal, was issued with a directive in terms of section 53(1) of NWA dated the 7th August 2007 requiring it to remove 7 hectares of timber plantation from the said property on the basis that it constituted an unlawful afforestation.[8] The appellant felt aggrieved by the said directive and lodged an appeal against the same with the Tribunal in terms of a letter dated the 14th August 2007.[9] The letter in question, however, only reached the office of the Registrar of the Water Tribunal on the 24th January 2008.[10] The respondent, eventually, furnished the reasons for the directive on the 6th March 2008 after the appellant had submitted a service affidavit confirming that the letter of appeal was sent to the office of the Registrar on the 14th August 2007 per mail and deposing, further, that it had no knowledge of the reasons for such a long delay in the Post Office delivery service.[11] At the commencement of the appeal proceedings the Tribunal raised the issue of condonation *mero motu* and the respondent had no objection to the same being granted.[12] There was nothing before the Tribunal to gainsay the appellant's deposition and the Tribunal was satisfied that good cause existed for condonation.[13] The real issue between the parties was, thus, limited to whether or not it was competent for the Tribunal to direct the respondent to issue a water use licence viz Stream Flow Reduction Activity licence to the appellant in the context of an appeal against a section 53(1) directive.

SURVEY OF EVIDENCE AND ARGUMENT:[14] The parties submitted the following documents in addition to the bundle of documents compiled by the Registrar:[14.1] Exhibit "A" The appellant's bundle of documents;[14.2] Exhibit "B" The respondent's bundle of documents.[15] No oral evidence was adduced and the parties made submissions to, inter alia, the following effect:[15.1] The appellant's contentions: Ms. Vermaak submitted to the following effect, among others: (a) the appellant had long interactions

with the relevant section of the respondent regarding the issue of a small area of 7 hectares which was over-planted after a tree planting permit was applied for and granted on the 21st October 1998; (b) the said section of the respondent, eventually, advised the appellant to apply for a licence in respect of the said area; (c) the appellant duly obliged and applied on the 18th October 2006 but on the 6th February 2007 the respondent's relevant section responded that its KZN Stream Flow Reduction Activity Licence Assessment Advisory Committee had decided that the relevant plantation should be removed because the appellant had not complied with the conditions set out in its permit; (d) the respondent, in effect, did not decide on the application because it advised that its section dealing with Unlawful Afforestation will investigate the matter further; (e) the appellant wished to retain the relevant plantation and was no longer requesting a stay of removal for 3 (three) years calculated from 2007 as requested in the letter of appeal; (f) the appellant does not dispute the fact that the plantation was unlawful in that it went beyond the authorized area; (g) the appellant is not sure if the Tribunal has the requisite jurisdiction to authorise or legalise the relevant activity but hopes that it may assist by directing the respondent to do so.

DETAILS OF HEARING AND REPRESENTATION:

- [1] The matter served before the Water Tribunal on the 12 May 2010 in Pretoria.
- [2] The appellant was represented by Ms. B. Vermaak, a compliance specialist from Mondi Limited while the respondent, on its part, was represented by its legal officer, Mr. Teffo Mashala.
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ISSUE TO BE DECIDED:

- [4] The preliminary question raised by the Tribunal of own accord was whether or not good cause existed for condonation of late lodgement of an appeal against a directive issued in terms of section 53 (1) of the National Water Act (NWA).
- [5] In the event of the foregoing question being decided in the affirmative, the next enquiry was whether or not the Tribunal can, in law, legalise an unlawful water use in terms of its appellate jurisdiction as set out in section 148 (1)(j) of NWA.

- [6] In the further event of the question in paragraph [5] above being decided in the affirmative, the final enquiry was whether or not, on the facts presented by the matter, a directive issued by the respondent fell to be interfered with for the purpose of enabling the appellant to continue with a stream flow reduction activity (SFRA) without a water use licence.

BACKGROUND

TO THE ISSUE:

- [7] The appellant enterprise, which is engaged in establishing a timber plantation at, inter alia, Portion 4 of Middleton 4924 in Kwazulu-Natal, was issued with a directive in terms of section 53(1) of NWA dated the 7th August 2007 requiring it to remove 7 hectares of timber plantation from the said property on the basis that it constituted an unlawful afforestation.

- [7] The appellant enterprise, which is engaged in establishing a timber plantation at, inter alia, Portion 4 of Middleton 4924 in Kwazulu-Natal, was issued with a directive in terms of section 53(1) of NWA dated the 7

August 2007 requiring it to remove 7 hectares of timber plantation from the said property on the basis that it constituted an unlawful afforestation.

- [8] The appellant felt aggrieved by the said directive and lodged an appeal against the same with the Tribunal in terms of a letter dated the 14th August 2007.

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August 2007.

- [9] The letter in question, however, only reached the office of the Registrar of the Water Tribunal on the 24th January 2008.

- [9] The letter in question, however, only reached the office of the Registrar of the Water Tribunal on the 24

January 2008.

- [10] The respondent, eventually, furnished the reasons for the directive on the 6th March 2008 after the appellant had submitted a service affidavit confirming that the letter of appeal was sent to the office of the Registrar on the 14th August 2007 per mail and deposing, further, that it had no knowledge of the reasons for such a long delay in the Post Office delivery service.

- [10] The respondent, eventually, furnished the reasons for the directive on the 6

March 2008 after the appellant had submitted a service affidavit confirming that the letter of appeal was sent to the office of the Registrar on the 14

August 2007 per mail and deposing, further, that it had no knowledge of the reasons for such a long delay in the Post Office delivery service.

[11] At the commencement of the appeal proceedings the Tribunal raised the issue of condonation *mero motu* and the respondent had no objection to the same being granted.

[11] At the commencement of the appeal proceedings the Tribunal raised the issue of condonation

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and the respondent had no objection to the same being granted.

[12] There was nothing before the Tribunal to gainsay the appellant's deposition and the Tribunal was satisfied that good cause existed for condonation.

[13] The real issue between the parties was, thus, limited to whether or not it was competent for the Tribunal to direct the respondent to issue a water use licence viz Stream Flow Reduction Activity licence to the appellant in the context of an appeal against a section 53(1) directive.

SURVEY OF EVIDENCE AND ARGUMENT:

[14] The parties submitted the following documents in addition to the bundle of documents compiled by the Registrar:

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documents.

[15] No oral evidence was adduced and the parties made submissions to, *inter alia*, the following effect:

[15.1] The appellant's contentions:

[15.1]

The appellant's contentions:

Ms. Vermaak submitted to the following effect, among others:

Ms. Vermaak

submitted to the following effect, among others:

- (a) the appellant had long interactions with the relevant section of the respondent regarding the issue of a small area of 7 hectares which was over-planted after a tree planting permit was applied for and granted on the 21st October 1998;
- (a) the appellant had long interactions with the relevant section of the respondent regarding the issue of a small area of 7 hectares which was over-planted after a tree planting permit was applied for and granted on the 21

October 1998;

- (b) the said section of the respondent, eventually, advised the appellant to apply for a licence in respect of the said area;
- (c) the appellant duly obliged and applied on the 18th October 2006 but on the 6th February 2007 the respondent's relevant section responded that its KZN Stream Flow Reduction Activity Licence Assessment Advisory Committee had decided that the relevant plantation should be removed because the appellant had not complied with the conditions set out in its permit;
- (c) the appellant duly obliged and applied on the 18

October 2006 but on the 6

February 2007 the respondent's relevant section responded that its KZN Stream Flow Reduction Activity Licence Assessment Advisory Committee had decided that the relevant plantation should be removed because the appellant had not complied with the conditions set out in its permit;

- (d) the respondent, in effect, did not decide on the application because it advised that its section dealing with Unlawful Afforestation will investigate the matter further;
- (e) the appellant wished to retain the relevant plantation and was no longer requesting a stay of removal for 3 (three) years calculated from 2007 as requested in the letter of appeal;
- (f) the appellant does not dispute the fact that the plantation was unlawful in that it went beyond the authorized area;
- (g) the appellant is not sure if the Tribunal has the requisite jurisdiction to authorise or legalise the relevant activity but hopes that it may assist by directing the respondent to do so.

[15.2] The respondent's submissions: (a) The appeal before the Tribunal is against the directive and not against a refusal to grant a water use licence; (b) The Tribunal has no jurisdiction to grant the relief requested by the appellant; (c) Water is a scarce resource and every drop counts; (d) The activity being carried on by the appellant remains unlawful and no cause exists for interfering with the relevant directive; (e) The appeal should be dismissed; (f) The appellant had effectively managed to secure the stay of removal for 3 (three) years which it had initially asked for in 2007 because the directive was never enforced. ANALYSIS OF EVIDENCE AND ARGUMENT: [16] The responsible authority is, in law, entitled to issue a directive against a water user, who is, inter alia, engaged in a water use activity without a licence or a general authorization as required by section 22 of NWA (see generally section 53(1) of NWA). [17] It was common cause between the parties

that the appellant is engaged in the form of SFRA.[18] It was, further, not disputed for the appellant that the only way to legalise such an activity was for a licence to be issued to the appellant.[19] As correctly submitted by Mr. Mashala, for the respondent, the appeal serving before the Tribunal was against the directive and not against a refusal of a water use licence.[20] The Tribunal may observe, without deciding the issue, that the letter of the 6thFebruary 2007 directed to the appellant by the respondent in response to the former's application for a SFRA licence was, probably, intended as a decision on the relevant application because:[20.1] it conveyed the decision of a committee to the effect that the plantation should be removed, among others;[20.2] it further advised the appellant that the respondent's section dealing with unlawful afforestation will investigate the matter further;[20.3] on the 18thJune 2007 the respondent wrote to the appellant advising it of its intention to issue a directive on the basis that the relevant activity was an unlawful water use.[21] Whether or not the said letter of the 6thFebruary 2007 is, in fact, a decision of the responsible authority for appeal purposes is simply irrelevant to the determination of the present matter. It is for the appellant to pursue the matter further if it is so advised.[22] Section 148(1)(f) of NWA expressly provides for an appeal against a refusal of a water use licence while section 148(1)0of NWA allows an appeal to lie against a directive such as the one involved herein.[23] In its letter of appeal the appellant specifically announces that it "wishes to lodge an appeal against this directive in terms of section 148(1)(j) of the National Water Act".[24] There is no appeal before the Tribunal against the decision refusing the appellant a licence. Such an appeal has to be lodged properly in terms of NWA and the rules of the Tribunal. [25] in the Tribunal's view, an invitation for the Tribunal to deal with the merits of the application for a licence or to legalise an otherwise unlawful SFRA is, in effect, an attempt to smuggle an appeal against a refusal of a licence into the proceedings without it going through the normal appeal procedures.DECISION;[26] For the foregoing reasons the Tribunal does not have jurisdiction to legalise the relevant water use in terms of its S 148(1)(j) appeal powers.[27] The appeal is, thus, dismissed and the file shall be closed.DATED AT PRETORIA ON THIS 26th.DAY OF MAY 2010.Lepono LekaleChairperson

[15.2]The respondent's submissions:

[15.2]

The respondent's submissions:

- (a) The appeal before the Tribunal is against the directive and not against a refusal to grant a water use licence;
- (b) The Tribunal has no jurisdiction to grant the relief requested by the appellant;
- (c) Water is a scarce resource and every drop counts;
- (d) The activity being carried on by the appellant remains unlawful and no cause exists for interfering with the relevant directive;
- (e) The appeal should be dismissed;

- (f) The appellant had effectively managed to secure the stay of removal for 3 (three) years which it had initially asked for in 2007 because the directive was never enforced.

ANALYSIS OF EVIDENCE AND ARGUMENT:

- [16] The responsible authority is, in law, entitled to issue a directive against a water user, who is, inter alia, engaged in a water use activity without a licence or a general authorization as required by section 22 of NWA (see generally section 53(1) of NWA).
- [17] It was common cause between the parties that the appellant is engaged in the form of SFRA.
- [18] It was, further, not disputed for the appellant that the only way to legalise such an activity was for a licence to be issued to the appellant.
- [19] As correctly submitted by Mr. Mashala, for the respondent, the appeal serving before the Tribunal was against the directive and not against a refusal of a water use licence.
- [20] The Tribunal may observe, without deciding the issue, that the letter of the 6th February 2007 directed to the appellant by the respondent in response to the former's application for a SFRA licence was, probably, intended as a decision on the relevant application because:
- [20] The Tribunal may observe, without deciding the issue, that the letter of the 6 February 2007 directed to the appellant by the respondent in response to the former's application for a SFRA licence was, probably, intended as a decision on the relevant application because:
- [20.1] it conveyed the decision of a committee to the effect that the plantation should be removed, among others;
- [20.2] it further advised the appellant that the respondent's section dealing with unlawful afforestation will investigate the matter further;
- [20.3] on the 18th June 2007 the respondent wrote to the appellant advising it of its intention to issue a directive on the basis that the relevant activity was an unlawful water use.
- [20.3] on the 18 June 2007 the respondent wrote to the appellant advising it of its intention to issue a directive on the basis that the relevant activity was an unlawful water use.
- [21] Whether or not the said letter of the 6th February 2007 is, in fact, a decision of the responsible authority for appeal purposes is simply irrelevant to the determination of the present matter. It is for the appellant to pursue the matter further if it is so advised.
- [21] Whether or not the said letter of the 6 February 2007 is, in fact, a decision of the responsible authority for appeal purposes is simply irrelevant to the determination of the present matter. It is for the appellant to pursue the matter further if it is so advised.

[22] Section 148(1)(f) of NWA expressly provides for an appeal against a refusal of a water use licence while section 148(1)(j) of NWA allows an appeal to lie against a directive such as the one involved herein.

[22] Section 148(1)(f) of NWA expressly provides for an appeal against a refusal of a water use licence while section 148(1

of NWA allows an appeal to lie against a directive such as the one involved herein.

[23] In its letter of appeal the appellant specifically announces that it "wishes to lodge an appeal against this directive in terms of section 148(1)(j) of the National Water Act".

[23] In its letter of appeal the appellant specifically announces that it

"wishes to lodge an appeal against this directive in terms of section 148(1)(j) of the National Water Act".

[24] There is no appeal before the Tribunal against the decision refusing the appellant a licence. Such an appeal has to be lodged properly in terms of NWA and the rules of the Tribunal.

[25] in the Tribunal's view, an invitation for the Tribunal to deal with the merits of the application for a licence or to legalise an otherwise unlawful SFRA is, in effect, an attempt to smuggle an appeal against a refusal of a licence into the proceedings without it going through the normal appeal procedures.

DECISION;

[26] For the foregoing reasons the Tribunal does not have jurisdiction to legalise the relevant water use in terms of its S 148(1)(j) appeal powers.

[27] The appeal is, thus, dismissed and the file shall be closed.

DATED AT PRETORIA ON THIS 26th.DAY OF MAY 2010.

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Lepono Lekale

Chairperson

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Prepared on 12 October 2026 · Esheria