

SOUTH AFRICA / JUDGMENT

Ncandu River Dam Consortium (Pty) Ltd and Another v Minister of Water Affairs and Forestry and Others (WT 18/08/2008) [2008] ZAWT 3 (4 December 2008)

[2008] ZAWT 3

COURT

Water Tribunal

BEFORE

L.J Lekale, W Singo, Hubert Thompson, A.S
Makhanya, A.S Hadebe

CASE / FILE NUMBER

WT 18/08/2008

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IN THE WATER TRIBUNAL

HELD AT NEWCASTLE

CASE NO: WT /18/02/2008

In the appeal between:

NCANDU RIVER DAM CONSORTIUM (PTY) LTD

FIRST APPELLANT

NCANDU RIVER DAM PROPERTIES (PTY) LTD SECOND

APPELLANT

and

THE MINISTER OF WATER AFFAIRS &

FORESTRY FIRST

RESPONDENT

THE DIRECTOR -GENERAL DEPARTMENT

OF WATER AFFAIRS & FORESTRY SECOND RESPONDENT

KWAZULU-NATAL DEPARTMENT OF AGRICULTURE

AND ENVIROMENTAL AFFAIRS THIRD

RESPONDENT

KWAZULU -NATAL NATURE CONSERVATION

SERVICE BOARD FOURTH

RESPONDENT

NCANDU RIVER HOLDINGS (PTY) LTD FIFTH

RESPONDENT

NEWCASTLE LOCAL MUNICIPALITY SIXTH

RESPONDENT

UTHUKELA WATER (PTY) LTD SEVENTH

RESPONDENT

APPEAL DECISION: 04-12-2008

Appearances:

Coram : Mr. L.J LEKALE (Chairperson)

Dr. W Singo (Deputy Chairperson)

Mr. Hubert Thompson (Member)

Mr. A.S Makhanya (Member)

Mr. A.S Hadebe (Member)

For Appellants Adv. A Botha

For First and Second Respondents

Adv. T. Bokaba SC with him

Adv. N.Makopo

For Sixth Respondent Ms.

T. Kelly

For Seventh Respondent Mr.

F.M Cele

1. DETAILS OF HEARING AND REPRESENTATION:

1.1. This is a unanimous decision in the appeal hearing held on the 2nd December 2008

at Newcastle;

1.2. The hearing effectively proceeded in the absence of the appellants after their representative, Adv. A Botha, withdrew from the proceedings after an unsuccessful application for a postponement;

1.3. The First and Second Respondents were represented by Adv. T. Bokaba SC who was assisted by Adv. N Makopo on instructions of the State Attorney, Pretoria;

1.4. The Sixth and Seventh Respondents were represented by Ms. T. Kelly and Mr.

F.M Cele respectively whose roles were limited to observing the proceedings;

1.5. The Third to Fifth Respondents were not represented although it was clear from the documents in the Registrar's possession that they had been properly notified of the date, time and venue of the hearing as required by Rule 5 of the rules of the Water Tribunal.

2. ISSUE TO BE DECIDED:

2.1. The preliminary question raised by the Tribunal of own accord was whether or not the Water Tribunal had the requisite jurisdiction to hear the appeal regard being had to the fact that it was clear from the documents filed with the Tribunal that the decision contemplated by section 148(1) (f) of the National Water Act (the Act) had not been made as at the date of hearing;

2.2. In the event of the foregoing question being decided in the affirmative, the next enquiry was whether or not the appellants were entitled to the licences they applied for with the First Respondent..

3. BACKGROUND TO THE ISSUE:

On the 11th December 2006 the First Respondent applied for an impoundment licence while the Second Appellant applied for an abstraction licence in respect of the Ncandu River with the First Respondent.

The First Respondent, however, failed and I or neglected to give decisions on the said applications until the appellants, effectively, lodged a joint appeal with the Water Tribunal after sending numerous communications to the First Respondent in vain.

The appeal was first noted by the First Appellant on the 30th June 2008 following a letter sent to the First Respondent on the 5th May 2008 in which it intimated that failure by the First Respondent to announce a decision on the application by the 30th May 2008 would be assumed to be a refusal of such an application. On the 18th August 2008 the notice of appeal was amended with, inter alia, the Second Appellant intervening in the proceedings and the date of the application by the First Appellant being changed from the 6th December 2006 to the 11th December 2006.

The appeal was, eventually, scheduled for a hearing on the 2nd December 2008 and all the parties were notified accordingly.

At the commencement of the proceedings the parties effectively informed the Tribunal that they had agreed on a postponement with a view to interacting with each other in order to enable the First Respondent to, eventually, make decisions on the two applications.

The application was, however, dismissed with the Tribunal finding, *inter alia*, that no good cause, as contemplated by Rule 6 of the Water Tribunal rules, existed for the postponement insofar as the parties were, effectively, seeking an opportunity to establish the requisite jurisdictional fact which should, in fact, have existed as at the date on which the appeal was noted.

The appellants' representative, thereafter, withdrew from the proceedings and assumed a role of an observer after taking instructions from his instructing attorney.

The hearing, thereafter, effectively proceeded in the absence of the appellants in terms of Rule 9 of the Water Tribunal rules as it was clear to the Tribunal that they were properly notified and the reason for their absence was not acceptable.

4. SURVEY OF EVIDENCE AND ARGUMENT:

4.1. Evidence:

No oral evidence was adduced and the First and Second Respondents made oral submissions through their representative.

4.1.1. Documents submitted:

- Bundle from the Registrar of the Tribunal;
- Copy of a letter from the appellants' attorney to First Respondent dated the 1st December 2008.

4.2. Argument:

Adv. Bokaba submitted to, *inter alia*, the following effect:

- (a) no decisions have yet been made by the First Respondent against which an appeal may lie in terms of section 148(1) of the Act;
- (b) such decisions are necessary to confer jurisdiction on the Tribunal;
- (c) the appellants were, at all times material to the issue, aware that their remedy lay in the provisions of the Promotion for Administrative Justice Act (PAJA) when the First Respondent was failing and/or neglecting to give a decision on an application;
- (d) there exists sufficient case law to show that lack of a jurisdictional fact deprives a court of appeal of jurisdiction;

5. ANALYSIS OF EVIDENCE AND ARGUMENT:

The onus was on the appellants, as the appealing party, to prove that the Tribunal had jurisdiction over the matter.

The appellants were, however, in default. The Tribunal was, thus, limited, in its enquiry as to jurisdiction, to the documents properly

before it as well as the submissions made for the First and Second Respondents.

It was clear from the documents filed by the appellants with the Tribunal that:

- * since the submission of the applications no decisions as contemplated by section 42 of the Act were communicated to the appellants;

- * the appellants approached the Tribunal by way of section 148(1)(f) of the Act on the basis of an assumption out of, inter alia, the frustrations they were experiencing with inaction or indecision on the part of the First Respondent;

When all was said and done the Tribunal was satisfied, from available documents and applicable law, that:

- * the appeal was premature insofar as no decisions existed as at the date when it was noted and such decisions were still outstanding as at the date of the hearing;

- * the existence of such decisions was a jurisdictional fact without which no appeal may lie to the Tribunal in terms of section 148(1) of the Act;

- * the appellants may only approach the Tribunal in terms of its appellate jurisdiction after decisions on their applications have

been made;

- * where the appellants feel aggrieved by a delay in making a decision on their applications they have the option of approaching the High Court in

terms of PAJA or in terms of its inherent jurisdiction for a mandamus.

6. DECISION:

6.1. In the result the Water Tribunal does not have jurisdiction over the matter;

6.2. The file shall, therefore, be closed.

L.J LEKALE

We agree.

DR. W. SINGO

H. THOMPSON

A.S HADEBE

A.S MAKHANYA

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