

SOUTH AFRICA / JUDGMENT

Escarpment Environment Protection Group and Another v Department of Water Affairs and Another (WT 03/06/2010) [2011] ZAWT 13 (21 July 2011)

[2011] ZAWT 13

COURT

Water Tribunal

BEFORE

LJ Lekale, H Thompson, A.S Makhanya

CASE / FILE NUMBER

WT 03/06/2010

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IN THE WATER TRIBUNAL

HELD AT PRETORIA

CASE NO: WT 03/06/2010

In the matter between:-

ESCARPMENT ENVIRONMENT PROTECTION GROUP1ST APPELLANT

WONDERFONTEIN ENVIRONMENTAL COMMITTEE2ND APPELLANT

and

DEPARTMENT OF WATER AFFAIRS1st RESPONDENT

EXXARO COAL (PTY) LTD2ND RESPONDENT

APPEAL RULING : 2011-07-21

APPEARANCES:

Coram: LJ Lekale (Mr) - 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. L.I Vorster

DETAILS OF HEARING AND REPRESENTATION:

- [1] The appeal hearing was held on the 11 July 2011 at Pretoria. [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. L I Vorster instructed by CLS Consulting Services (Pty) Ltd. **ISSUE TO BE DECIDED:** [4] The preliminary question anticipated by the appellants on the basis of previous cases in pari materia is whether or not the appellants have locus standi to lodge the present appeal regard being had to the fact that the Second Respondent was not required to and, in fact, did not publish a notice calling for objections in the media 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 Tribunal is in law obliged to non-suit the appellants and to dismiss the appeal accordingly. **BACKGROUND TO THE ISSUE:**
- [6] In 2008 the Second Respondent applied for a water use licence after it had secured a mining right in Belfast from the Department of Minerals and Energy to which the appellants had objected.
- [7] The appellants engaged with the Second Respondent in a series of meetings over the application for a water use licence until they lodged a written objection to the grant of the said licence with the First Respondent on the 2 September 2008. [8] The First Respondent however granted the relevant licence on the 25th January 2010.
- [9] The appellants felt aggrieved by the decision to grant the relevant licence and lodged an appeal with the Tribunal. [10] On the 6th June 2011 the appellants delivered Heads of Argument on the issue of locus standi in the light of the rulings of the Tribunal in similar cases. **SURVEY OF EVIDENCE AND ARGUMENT:**
- [11] No oral evidence was tendered. The parties made verbal submissions and the appellants further relied on Heads of Argument delivered on their behalf. [12] Mr Wilks submits to, inter alia, the following effect for the appellants: the First Respondent failed to exercise the discretion bestowed upon it by section 41(2)(c) of NWA when it did not call for comments on the Second Respondent's application;

in terms of the Constitution the appellants have the right to an environment that is not harmful to health or well being, among others; the Constitution further grants the appellants the right to administrative action that is lawful, reasonable and procedurally fair; the Tribunal is constitutionally obliged to promote the spirit, purport and objects of the Bill of Rights when it interprets NWA;

an interpretation which does not recognise the appellants' standing as appellants does not fall within the constitutional bounds and should not be followed as was pointed out in investigating Directorate: SEO v Hyundai Motor Distributors 2001(1) SA 545 (CC) @ para 23; (f) the relevant provisions of NWA should be read subject to the National Environmental Management Act 107 of 1998 (NEMA) because same was enacted to give effect to section 24 of the Constitution; (g) the appellants lodged written objections without being prompted thereto-. and the First Respondent was, as such, obliged to partake in a public participation process; (h) the appellants therefore have locus standi to lodge the present appeal. [13] Mr. Sedibe on behalf of the First Respondent effectively submits that the First Respondent abides the decision of the Tribunal and does not take issue with the appellants' locus standi. [14] Mr Vorster on the other hand contends to the following effect on behalf of the Second Respondent: (a) it is not apparent ex facie the appeal documents that the appellants are legal entities capable of suing and being sued;

- (b) the appellants are non-suited on the foregoing ground alone; (c) the strict interpretation of the relevant provisions of NWA is applicable with the result that the appellants have no locus standi.

ANALYSIS

OF EVIDENCE AND ARGUMENT: [15] The parties are ad idem that the appellants lodged a written objection without the same having been called for as contemplated by section 41(4) of NWA.

- [16] The question is, therefore, whether or not the said objection is the one contemplated by section 148(1)(f) of NWA for the purposes of clothing the appellants herein with the requisite status of persons who have lodged an objection timeously.

- [17] The parties are further in agreement that a strict literal interpretation of the relevant provisions of NWA results in the appellants not having the requisite standing to commence the present proceedings.

- [18] Mr. Wilks contends that the strict interpretation is not in conformity with the Constitution as read with the provisions of NEMA.

- [19] Mr Wilks, however, correctly concedes that the said literal interpretation does not limit any of the appellants' rights of recourse to courts of law and further 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.

[20] In the Tribunal's view the literal construction of the relevant provisions does not offend the Constitution and only serves to recognise and implement the extension of the right to appeal to the Tribunal by only those persons who have been identified by the legislature as deserving of such a right.

[21] The construction which the appellants advocate for can, with respect, not reasonably be ascribed to section 148(1)(f) read with the provisions of section 41 of NWA insofar as: [21.1] to extend the right to appeal to any other objector would amount to usurping the legislative powers of the legislature by creating

another class of appellants; [12.2] the Constitution does not provide for internal appeal rights; [12.3] the Promotion of Administrative Justice Act (PAJA) which was enacted in order to give effect to the right to lawful, reasonable and procedurally fair administrative action does not provide for internal appeal procedures as a matter of right either.

[1] The appeal hearing was held on the 11 July 2011 at Pretoria.

[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. L I Vorster instructed by CLS Consulting Services (Pty) Ltd.

ISSUE TO BE DECIDED:

[4] The preliminary question anticipated by the appellants on the basis of previous cases in pari materia is whether or not the appellants have locus standi to lodge the present appeal regard being had to the fact that the Second Respondent was not required to and, in fact, did not publish a notice calling for objections in the media 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 Tribunal is in law obliged to non-suit the appellants and to dismiss the appeal accordingly.

BACKGROUND TO THE ISSUE:

[6] In 2008 the Second Respondent applied for a water use licence after it had secured a mining right in Belfast from the Department of Minerals and Energy to which the appellants had objected.

[7] The appellants engaged with the Second Respondent in a series of meetings over the application for a water use licence until they lodged a written objection to the grant of the said licence with the First Respondent on the 2 September 2008.

[8] The First Respondent however granted the relevant licence on the 25th January 2010.

- [9] The appellants felt aggrieved by the decision to grant the relevant licence and lodged an appeal with the Tribunal.
- [10] On the 6th June 2011 the appellants delivered Heads of Argument on the issue of locus standi in the light of the rulings of the Tribunal in similar cases.

SURVEY OF EVIDENCE AND ARGUMENT:

- [11] No oral evidence was tendered. The parties made verbal submissions and the appellants further relied on Heads of Argument delivered on their behalf.
- [12] Mr Wilks submits to, inter alia, the following effect for the appellants:
- the First Respondent failed to exercise the discretion bestowed upon it by section 41(2)(c) of NWA when it did not call for comments on the Second Respondent's application;
- in terms of the Constitution the appellants have the right to an environment that is not harmful to health or well being, among others;
- the Constitution further grants the appellants the right to administrative action that is lawful, reasonable and procedurally fair;
- the Tribunal is constitutionally obliged to promote the spirit, purport and objects of the Bill of Rights when it interprets NWA;
- an interpretation which does not recognise the appellants' standing as appellants does not fall within the constitutional bounds and should not
- be followed as was pointed out in investigating Directorate: SEO v Hyundai Motor Distributors 2001(1) SA 545 (CC) @ para 23;
- (f) the relevant provisions of NWA should be read subject to the National Environmental Management Act 107 of 1998 (NEMA) because same was enacted to give effect to section 24 of the Constitution;
- (g) the appellants lodged written objections without being prompted thereto-. and the First Respondent was, as such, obliged to partake in a public participation process;
- (h) the appellants therefore have locus standi to lodge the present appeal.
- [13] Mr. Sedibe on behalf of the First Respondent effectively submits that the First Respondent abides the decision of the Tribunal and does not take issue with the appellants' locus standi.
- [14] Mr Vorster on the other hand contends to the following effect on behalf of the Second Respondent:
- (a) it is not apparent ex facie the appeal documents that the appellants are legal entities capable of suing and being sued;

- (b) the appellants are non-suited on the foregoing ground alone;
- (c) the strict interpretation of the relevant provisions of NWA is applicable with the result that the appellants have no locus standi.

ANALYSIS

OF EVIDENCE AND ARGUMENT:

- [15] The parties are ad idem that the appellants lodged a written objection without the same having been called for as contemplated by section 41(4) of NWA.
- [16] The question is, therefore, whether or not the said objection is the one contemplated by section 148(1)(f) of NWA for the purposes of clothing the appellants herein with the requisite status of persons who have lodged an objection timeously.
- [17] The parties are further in agreement that a strict literal interpretation of the relevant provisions of NWA results in the appellants not having the requisite standing to commence the present proceedings.
- [18] Mr. Wilks contends that the strict interpretation is not in conformity with the Constitution as read with the provisions of NEMA.
- [19] Mr Wilks, however, correctly concedes that the said literal interpretation does not limit any of the appellants' rights of recourse to courts of law and further 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.
- [20] In the Tribunal's view the literal construction of the relevant provisions does not offend the Constitution and only serves to recognise and implement the extension of the right to appeal to the Tribunal by only those persons who have been identified by the legislature as deserving of such a right.
- [21] The construction which the appellants advocate for can, with respect, not reasonably be ascribed to section 148(1)(f) read with the provisions of section 41 of NWA insofar as:
 - [21.1] to extend the right to appeal to any other objector would amount to usurping the legislative powers of the legislature by creating another class of appellants;
 - [12.2] the Constitution does not provide for internal appeal rights;
 - [12.3] the Promotion of Administrative Justice Act (PAJA) which was enacted in order to give effect to the right to lawful, reasonable and procedurally fair administrative action does not provide for internal appeal procedures as a matter of right either.

- [22] The appellants are, therefore, not the kind of objectors contemplated by section 148(1)(f) of NWA for the purpose of lodging appeals with the Tribunal and are, as such, non-suited to bring the present appeal.
- [23] In the light of the foregoing finding it is not necessary, in the Tribunal's view, to determine whether or not the appellants are "persons" in terms of section 1 (xiv) of NWA. DECISION:
- [24] In the result the appellants have no standing to lodge the present appeal. [25] [25] The appeal is, therefore, dismissed. L.J. LEKALE (CHAIRPERSON)
- [22] The appellants are, therefore, not the kind of objectors contemplated by section 148(1)(f) of NWA for the purpose of lodging appeals with the Tribunal and are, as such, non-suited to bring the present appeal.
- [23] In the light of the foregoing finding it is not necessary, in the Tribunal's view, to determine whether or not the appellants are "persons" in terms of section 1 (xiv) of NWA.

DECISION:

- [24] In the result the appellants have no standing to lodge the present appeal. [25] [25] The appeal is, therefore, dismissed.

L.J. LEKALE

(CHAIRPERSON)

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