REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: Yes☐/ No ☒
(2) OF INTEREST TO OTHER JUDGES: Yes☐ / No ☒
(3) REVISED: Yes ☐ / No ☒

Date: 11 August 2023

WJ du Plessis

CASE NO: 2023 / 069111

In the matter between:

THE TRUSTEES FOR THE TIME BEING OF THE CORNEELS GREYLING TRUST	**FIRST APPLICANT**
MOOIBANK BOERDERY (PTY) LTD	**SECOND APPLICANT**

and

THE MINISTER OF WATER AND SANITATION	**FIRST RESPONDENT**
CHIEF DIRECTOR: WATER USE LICENCE AND MANAGEMENT DEPARTMETN OF WATER AND SANITATION	**SECOND RESPONDENT**
KANGRA COAL (PTY) LTD	**THIRD RESPONDENT**

JUDGMENT

DU PLESSIS AJ

Introduction

[1] This is an application for an urgent interdict to prevent the Third Respondent (Kangra) from conducting mining activities pending the determination of a condonation application and appeal by the Water Tribuna (Tribunal)l, established in terms of section 146(1) of the National Water Act[1] (NWA), for a water use licence ("WUL") that was granted to the Third Respondent.

[2] The Applicants contend that the mining activities pose a risk to the quantity and quality of the water that the Applicants rely on for farming. They lodged an appeal against the WUL. The lodging of an appeal against the WUL suspends the WUL pending the finalisation of the appeal.[2] Since the appeal is not finalised, the Applicants aver Third Respondent's water use is unlawful.

[3] The Third Respondents argue that the appeal was lodged out of time, which means no valid appeal exists. They also raise the issue of *locus standi*.

[4] At the hearing the Applicant made two important concessions narrowing the issues. Firstly, it accepts that the relief it asks for has a final effect and needs to meet a case for a final interdict. Secondly, it acknowledges that condonation for late filing of an appeal does not suspend the working of the WUL.

[5] This court must thus decide three issues: urgency, locus standi and whether the Applicants proved the interdictory requirements. If either of the first two are decided for the Respondents, there is no need to consider the merits.

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[1] 36 of 1998.

[2] S 148(2)(b) of the NWA.

The parties

[6] The First Applicant is a Trust that is the registered owner of portion 1 of the farm Blinkwater in the Mpumalanga Province. The Second Applicant is Mooibank Boerdery Property Limited, formerly Ukuchuma Farming Proprietary Limited ("Mooibank") and the owner of the farm Donkerhoek, also in Mpumalanga.

[7] The First Respondent is a member of the executive responsible for South Africa's water resources, and the Second Respondent is the delegate of the Director-General of the Department of Water and Sanitation. No relief is sought against the Second Respondent. Neither the First nor the Second Respondent entered an appearance. The Third Respondent is Kangra Coal Proprietary Limited, a company that conducts mining activity also in the area where the Applicants farms are situated.

[8] For ease of legibility, the Applicants are referred to as "the Applicants", the First Respondent the "Minister", the Second Respondent the "Department", and the Third Respondent as "Kangra".

Background

[9] Kangra operates an underground coal mine in the region of the town Piet Retief (also known as eMkhondo), near the Applicants' properties. Kangra has a mining right granted and approved in July 2017. Around 2020, Kangra applied at the Department for an Integrated Water Use Licence (WUL) in respect of Balgarthen A Adit ("the Adit"), as it was deemed the most feasible access to the underground coal resource. The Applicants opposed the granting of the licence.

[10] Developing this Adit involves the building of infrastructure and underground mining. This Adit is situated near the Applicants' properties, and the mining takes place below the Applicants' farms.

[11] The WUL was granted on 25 October 2021, and on 3 December 2021 the Third Respondent's attorneys informed the Applicants' attorney of this.

[12] The Applicants informed the Department on 14 December 2021 that they intended to appeal against the granting of the licence and requested reasons for issuing the WUL. They advised the Department that they would appeal within 30 days of receipt of the reasons. They did not receive a response from the Department and wrote again on 19 January 2022 and 13 April 2022, requesting reasons. They received no response.

[13] They then appealed against the granting of the WUL on 12 July 2022, even if they had not received reasons, and reserved their rights to supplement the WUL when the Department provided the reasons. When filing the appeal, they applied for condonation of late filing "but only out of an abundance of caution".[3] Kangra states that notwithstanding receiving a notice as per s 42(a) of the NWA or reasons as per s 42(b), "the Greylings apparently decided to make up their own rules and served ‘an appeal’ on the Department on 14 July 2022 and apparently lodged ‘an appeal’ with the Tribunal".[4]

[14] On 21 July 2022, Kangra wrote a letter to the Applicants stating that the appeal was lodged out of time. They argue that they informed the Applicants that the appeal is of no force and effect and does not have the effect of suspending the licence. The letter stated, "[a]s a result of the failure to adhere to the prescribed timeframes, we contend that no proper appeal has been filed". They wrote that they will oppose the appeal. They requested to be informed of the document filed and the dates for the hearing.[5] They argue that since that letter, the Applicants are aware that Kangra does not recognise the appeal and that they will give effect to their rights under the MPRDA to continue mining. They have been mining since October 2022.[6]

[15] Kangra did not indicate in the letter that because it regards the appeal as invalid they will continue to mine, nor have they requested the Minister to uplift the (possible)

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[3] RA para 6.6.5.

[4] RA para 10.6.

[5] CL 09-83.

[6] RA para 10.10.

suspension in terms of s 148(2)(b). They deemed the appeal to be lodged out of time, which in turn means that the WUL is not suspended, which in turn means that they are allowed to mine.

[16] The Applicants eventually received reasons for the decision ("record of decision") on 17 November 2022 from the Registrar of the Tribunal, and the Applicants supplemented their grounds of appeal on 31 January 2023. In February 2023, a pretrial hearing was arranged but never took place. From June 2023, the Applicants noticed activity at the mine for the first time, which they deem contra the suspension of the WUL, as they argue they have complied with s 148(3) of the NWA and lodged the appeal in time. They sent a letter on 30 June 2023 to Kangra's attorneys, requesting Kangra to cease mining, but received no reply. They, in turn, deemed the mining to be unlawful because the valid appeal suspends the WUL.

[17] The Applicants raise various problems regarding the granting of the WUL in the appeal to the Water Tribunal. The issues of appeal are not for this court to decide. The only question before this court as far as the appeal is concerned is whether the appeal was lodged in time.

Ad urgency

[18] The application was issued on 14 July 2023, and the answering affidavit was expected on 21 July 2023. The replying affidavit was filed on 26 July 2023, with the matter set down for hearing on 2 August 2023. These are constrained timelines but in terms of the *Luna Meubel Vervaardigers v Makin,*[7] the least constrained timelines.

[19] Urgency is a procedural issue allowing a court to dispense with the forms and service provided for in the rules. It is for the applicant to show the circumstances that renders the matter urgent and the absence of substantial redress if the matter is not heard as a matter of urgency. [8] This is not the equivalent of irreparable harm required

[7] [1977] 2 All SA 156 (W).

[8] *Mogalakwena Local Municipality v Provincial Executive Council, Limpopo* [2014] ZAGPPHC 400.

before granting interim relief, but something less.[9] In *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd* this court stated

> "It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his cases in that regard."

[20] In this regard, the issue of harm and the issue of substantial redress should not be conflated. The question with urgency is whether the applicant will be afforded substantial redress in due course. This implies that a situation will be considered urgent if the applicant can provide evidence that they require immediate court intervention and that if their case is not heard sooner than the regular course, any potential future court order would no longer offer them the necessary legal protection.

[21] Consequently, harm alone is not the basis for urgency; rather, harm serves as a precondition to urgency. In cases where harm is present, seeking a remedy for that harm may not automatically qualify as urgent. Urgency only applies when the applicant cannot receive substantial redress in due course.[10] Therefore, harm sets the stage for urgency, but urgency doesn't necessarily follow from harm. Urgency follows if there is no substantial redress in due course. Harm is only decided on the merits.

[22] The Applicants aver that the unlawful use of the WUL poses a risk of polluting the flow of water from 24 natural springs on which the Applicants depend to irrigate cops and use for livestock and domestic purposes. The expert opinion by OMI Solutions shows that the aquifers' dewatering will negatively affect the 24 natural springs on the property, influencing the farming operations and the livelihoods that depend on these springs.[11] The mine's water use and possible acid mine drainage might affect

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[9] [2012] JOL 28244 (GSJ) at [7].

[10] *Mogalakwena Local Municipality v Provincial Executive Council, Limpopo* [2014] ZAGPPHC 400.

[11] Annexure FA 7.

the quality of the water resource. This is a harm to the environment that cannot be undone.

[23] Kangra argues that the Applicants did not prove the harm in its papers, particularly questioning the expert opinions filed. They rely on Mr Van der Merwe's expert affidavit that states that there are no real prospects of the applicant's surface water being affected by the mining activities and repeating the findings in the report that the impacts on the environment can be mitigated. There is no certainty or prospect that the current activities will impact the water between now and the probable hearing of appeal.[12]

[24] The Applicants state that Mr Van der Merwe's allegation is a bare denial, and even if it is not, they have satisfied the test for a reasonable apprehension of harm in an application for interim relief. Furthermore, where unlawful conduct is admitted, then for an interdict, harm to the applicants is presumed.

[25] I am satisified that the Applicants showed harm. Moreso, if their version prevails, the harm to the water cannot be undone, and there will be no substantial redress. It might well be that one "needs to crack eggs to make an omelette", as counsel for Kangra Coal argued regarding the inevitable disturbance mining causes to the environment and water resources.[13] Such disturbances, however, must only be tolerated if the proper permissions, permits, or licences were granted, for one, and if there is no valid appeal that suspends such a licence. I do not wish to go into the merits of the appeal yet to be heard by the Tribunal. I am satisfied that the possibility of actual harm is proven on the papers before the court.

[26] This possible harm is thus a precondition to the urgency, leading to the question that if such a harm does occur, whether there will be substantial redress in due course

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[12] CL 09-65 para 8.

[13] RA par 14.

available to the Applicants. I think not. This means that the matter is sufficiently urgent to consider the merits.

Point *in limine*: *locus standi*

[27] Kangra raises the point *in limine* that the Applicants do not have the necessary standing to bring this application as they have not shown that they have experienced loss or damage. The NWA does not specifically protect the Applicants, they argue. It is enacted for the general public and not for a specific class of people. Loss is therefore not assumed. Furthermore, they are own interest litigants seeking interdict regarding something that does not belong to them, namely water, because water is now in public trust.

[28] The Applicants disagree. They argue that they did establish loss and damage. Despite that, they also say they do not have to prove harm to establish standing to bring the application. This is because where legislation is enacted to protect an individual or a class of persons, and an action prohibited by that legislation occurs, harm is presumed. They cite *Patz v Greene*[14]

> "Everyone has the right . . . to protect himself by appeal to a Court of law against loss caused to him by the doing of an act by another, which is expressly prohibited by law. Where the act is expressly prohibited in the interests of a particular person, the Court will presume that he is damnified, but where the prohibition is in the public interest, then any member of the public who can prove that he has sustained damage is entitled to his remedy."

[29] Thus, the Applicants argue that they must show either that the provision was enacted in the interests of persons in their position or that they have suffered loss or damage due to the breach.[15] They say they have lodged an appeal against WUL and thus have an interest in the decision that the WUL be suspended pending the appeal. They are, therefore, persons from a class of people that the legislation seeks to protect and need not show loss or damage.

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[14] 1933 AD 87 at 96.

[15] *Makgosi Properties (Pty) Limited v Fichard NO* [2016] ZAGPJHC 374 paras 11 – 12.

[30] Kangra disagrees. They state that the legislation is not enacted to protect an individual or a class or persons, and there is no prohibition where the licence has not been set aside. *Patz v Greene*[16] thus does not apply. In *Tavakoli v Bantry Hills (Pty) Ltd* [17] the Supreme Court of Appeal stated

> "The starting point is thus to ascertain whether item 40(c) was enacted for the benefit of a specific class to which the appellants belong. It is not sufficient, in this regard, that the item in fact operates to the advantage of a class of persons to which the appellants belong. It must appear that the lawmaker had the interests of the particular class in mind in enacting the provision".

[31] Respondents also referred to *Giant Concerts CC v Rinaldo Investments (Pty) Ltd*[18] where the Constitutional Court stated

> [33] The separation of the merits from the question of standing has two implications for the own-interest litigant. First, it signals that the nature of the interest that confers standing on the own-interest litigant is insulated from the merits of the challenge he or she seeks to bring. An own-interest litigant does not acquire standing from the invalidity of the challenged decision or law, but from the effect it will have on his or her interests or potential interests. He or she has standing to bring the challenge even if the decision or law is in fact valid. But the interests that confer standing to bring the challenge, and the impact the decision or law has on them, must be demonstrated.
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> [34] Second, it means that an own-interest litigant may be denied standing even though the result could be that an unlawful decision stands. This is not illogical. As the Supreme Court of Appeal pointed out, standing determines solely whether this particular litigant is entitled to mount the challenge: a successful challenge to a public decision can be brought only if "the right remedy is sought by the right person in the right proceedings". To this observation one must add that the interests of justice under the Constitution may require courts to be hesitant to dispose of cases on standing alone where broader concerns of accountability and responsiveness may require investigation and determination of the merits. By corollary, there may be cases where the interests of justice or the public interest might compel a court to scrutinise action even if the applicant's standing is questionable. When the public interest cries out for relief, an applicant should not fail merely for acting in his or her own interest.
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> [35] Hence, where a litigant acts solely in his or her own interest, there is no broad or unqualified capacity to litigate against illegalities. Something more must be shown. [own emphasis]

[32] Kangra further asserts that no actual harm is shown on the papers, in which case they cannot rely on the Act for standing or to presume harm.

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[16] 1933 AD 87 at 96.

[17] 2019 (3) SA 163 (SCA) para 19.

[18] [2012] ZACC 28; 2013 (3) BCLR 251 (CC).

[33] I disagree. The Applicants are a class of persons that the NWA seeks to protect in this instance through the licence provisions. They have an interest in the suspension of the WUL pending the appeal. Even if I am wrong on this, I am satisfied that the Applicant has made out a proper case for actual harm suffered for locus standing, as set out in its Founding Affidavit, based on the expert opinion in the OMI report.[19] I am also satisfied that the Applicants did demonstrate how the decision and the possible unlawful conduct impact them and that there is a real possibility of harm.

[34] I also considered the judgment of *Witzenberg Properties (Pty) Ltd v Bokveldskloof Boerdery (Pty) Ltd*[20] that Kangra referred the court to. In that case, the respondent was appealing a decision to limit its water use. The neighbouring applicant then applied for an interdict against the respondent (who appealed the decision) to prevent them from taking water from a borehole until it is issued a water use licence.

> [24] Given that Witzenberg seeks interdictory relief in pursuit of its own interests, the issue of legal standing is approached in accordance with the principles set out in *Patz v Green & Co* read with *Roodepoort-Maraisburg Town Council v Eastern Properties (Pty) Ltd*, which were encapsulated in *Laskey and Another v Showzone CC and Others*. In essence these principles are:
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> [24.1] When it appears that a statute was enacted in the interest of a particular person or any class of persons, a party who shows that he or she is one of such class of persons, and seeks judicial intervention by way of interdictory relief premised on the statute, is not required to show harm as a result of a contravention of the statute, such harm being presumed.
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> [24.2] However, when a statutory duty was imposed, not in the interest of a particular person or a particular class, but in the public interest generally, the applicant must show that he or she has sustained or apprehends actual harm in order to obtain interdictory relief on the ground of breach of the statute. [footnotes omitted]

[35] The Applicants thus argue for the first principle, while Kangra argues that the second principle applies.

[36] Witzenberg argued that it has legal standing because it is the owner of the neighbouring farm, not on the basis that it is appealing a WUL. They could also not prove harm. The Applicants in this case are not relying on their right of ownership,

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[19] Caslines 04-124 onwards.

[20] 2018 6 SA 307 (WCC).

they are relying on the right to suspend the WUL pending the appeal for their standing. They have also proven harm.

[37] Lastly, the Applicants referred the court to s 32 of the National Environmental Management Act,[21] which was not dealt with in the *Witzenberg* decision, except to say that "[u]nlike […] the National Environmental Management Act, which expressly legislates for the legal standing of private persons to enforce environmental laws for own interest or in public interest, the NWA contains no comparable provisions". That is correct, there is no comparable provision in the NWA. However, s 32 of NEMA that deals with standing, provides that "[a]ny person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of this Act […] or of any provision of a specific environmental management Act", also for its own interest. A "specific environmental management Act" in s 1 of NEMA includes the NWA. The standing is thus not found in the NWA, but by reading s 32 of NEMA with the NWA. This gives the Applicants a statutory standing.

[38] In deciding the issue of *locus standi* I am also heeding the warning of Cameron J in the *Giant Concerts* case to be hesitant to dispose of cases on standing alone, where broader concerns of accountability and responsiveness may require a determination on the merits.

[39] This leaves the court to consider the merits.

Ad merits: The arguments by the parties on the merits

[40] Initially the Applicants relied on an interim interdict but conceded that the based on *Andalusite Resources (Pty) Ltd v Investec Bank Ltd*[22] case it must meet the requirements for a final interdict as the decision whether an appeal is lodged in time, and the WUL therefore suspended is a decision that only this court will decide on.

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[21] 107 of 1998.

[22] 2020 (1) SA 140 (GJ).

Clear right

[41] The Applicants state that they have a right to be protected by the licence provisions in the NWA. They are the category of persons that the legislation was enacted to protect. This is a clear right. They have lodged a valid appeal in terms of s 148(1)(f) of the NWA in time, which has the effect of suspending the WUL as per s 148(2)(b). Any water use while the WUL is unlawful, and the Applicants have a right to prevent this illegality as the legislation was enacted to protect them.

[42] Kangra states that the Applicants have failed to prove their own right in water or any actual interference with their water usage. Thus, they seek to protect "some undefined administrative right to condonation and appeal to the Tribunal". This is inadequate. However, the Applicants framed it rather as a right to be protected by the licence provisions in the NWA, namely a right to prevent Kangra from mining pending an appeal. It is protection against unregulated water use activities that threaten water supplies.

[43] Much of this requirement rests on the question of whether the appeal was indeed lodged on time (thus suspending the WUL) as per s 148(3) of the NWA set out below. In this regard, the Applicants state that they lodged an appeal against the WUL on 12 July 2022 without receiving any reasons. The reasons were only received on 17 November 2022. The applicants thus had until 17 December 2022 to lodge the appeal. They lodged the appeal in advance of reasons being given – and thus lodged it five months before it was required to be lodged. This is not out of time. Their condonation application was out of an abundance of caution.

[44] Moreover, the Water Tribunal is processing the appeal and is engaging with both parties about the hearing. It has requested the Department to file its defence (which it failed to do to date). The Applicants state this shows a live appeal before the Water Tribunal, which is being processed.

[45] Kangra denies that an appeal process has been initiated in line with the requirements of the NWA. They refer to s 42 of the NWA that states

> 42. Reasons for decisions.—

> 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 or its decision.

[46] Kangra says that S 42(a) applies only when the licence is granted. That is because the licence itself sets out everything important, enabling the holder to exercise its rights and the objectors to lodge an appeal based on that information if they so wish. However, if the licence is refused, an applicant for the licence might want to know why and then request the reasons. This is reflected in s 148(3), which refers to decisions sent to the appellant or reasons for the decision given as points in time that trigger the 30 days.

[47] The short time for commencing an appeal is in the interest of certainty, Kangra argues, and in the public interest that the rights be exercised expeditiously. This all indicates the purpose of the NWA, expressed in its words, seen in context, namely that there should be minimum interference with the exercise of a licence that a responsible authority has granted after a complicated application process.[23]

[48] They continue stating that the Department did not inform the Applicants of the licence as they are obliged to do in terms of s 42(a), and the trigger event for s 148(3)(d) has not been met. It has also not been triggered with Kangra's attorneys informed the Applicants' attorneys.

[49] Furthermore, no reasons, as contemplated in s 42(b), has been given, so s 148(3)(c) has also not been triggered because the reasons are only required when the licence is *not* granted. They argue that the record that the Department provided is furthermore not reasons under s 42 but compliance with item 5(3) of Part 2 of Schedule 6. Thus, no right to appeal has arisen, and there has been no appeal.

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[23] RA para 25.

[50] The second concession the Applicants made is that if there is no valid appeal, an application for a condonation would not suspend the WUL.[24] This court will thus not belabour this point.

[51] This leaves the court only with the question: Was an appeal lodged in time? Since Kangra is not denying that it is mining at the moment, that would mean that *if* the court finds that there is a valid appeal, then the mining will be unlawful.

Harm

[52] As for harm, the Applicants argue that harm is presumed as the NWA was enacted to protect persons such as the applicants whose water resources are threatened by the activities of their neighbours who have lodged an appeal against the WUL. Again, they rely on *Patz v Greene*[25] that states

> "Where the act is expressly prohibited in the interests of a particular person, the Court will presume that he is damnified, but where the prohibition is in the public interest, then any member of the public who can prove that he has sustained damage is entitled to his remedy."

[53] They state that even if the harm is not presumed, they have shown the harm the water use will have on their property and livelihood. This is indicated by the evidence in the founding affidavit and the expert OMI report, that they aver was only met by a bare denial of the conclusions and thus does not throw serious doubt in the Applicants' case.

No other remedy

[54] The appeal process set out in ss 148 – 149 of the NWA is the dispute resolution mechanism in the NWA, which the Applicants used. The informal remedies, including a request not to mine pending the appeal, also failed. A request to the Department to conduct an inspection and issue a directive to prevent the unlawful use of water also failed. They thus have no other remedy. Kangra states that they

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[24] *Panayiotou v Shoprite Checkers (Pty) Ltd* 2016 3 SA 110 (GJ).

[25] 1933 AD 87.

can either ask that Kangra be prosecuted for offences in the NWA, or they can approach the court for a mandamus to give reasons for the decisions.

[55] These arguments will be evaluated in light of the relevant legal principles set out below.

Discussion

[56] The NWA brought about a total regime change to South African water law by doing away with the distinction between public and private water, replacing it with the public trust doctrine regulated by statute. This new regime recognises water as a natural resource that belongs to all the people of the country. It statutorily introduced the notion of public trusteeship in s 3 of the Act to give effect to these aims.

[57] The preamble of the NWA sets outs its aims, and s 2[26] its purpose. It places the water regulatory regime under the responsibility and authority of the National Government, which must regulate water use for, inter alia, distribution and conservation goals.[27]

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[26] Purpose of Act.—The purpose of this Act is to ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled in ways which take into account amongst other factors—
(a) meeting the basic human needs of present and future generations;
(b) promoting equitable access to water;
(c) redressing the results of past racial and gender discrimination;
(d) promoting the efficient, sustainable and beneficial use of water in the public interest;
(e) facilitating social and economic development;
(f) providing for growing demand for water use;
(g) protecting aquatic and associated ecosystems and their biological diversity;
(h) reducing and preventing pollution and degradation of water resources;
(i) meeting international obligations;
(j) promoting dam safety;
(k) managing floods and droughts,
and for achieving this purpose, to establish suitable institutions and to ensure that they have appropriate community, racial and gender representation.

[27] *Minister of Water and Sanitation and Others v Lotter N.O. and Others; Minister of Water and Sanitation and Others v Wiid and Others; Minister of Water and Sanitation v South African Association for Water Users Associations* (CCT 387/21) [2023] ZACC 9; 2023 (6) BCLR 763 (CC); 2023 (4) SA 434 (CC)

[58] The state has a fiduciary responsibility to allocate and regulate the use of water resources in the public interest through permits and licences per the Act, [28] as happened in this case. Effectively the state mediates different water uses through the granting of licences. These decisions lie with the Department and the Minister as they are polycentric. When making these decisions, they are guided by the NWA in doing so. They are required to place the public interests (e.g. distribution and conservation) above private (often commercial) interests, to achieve the purpose of the NWA as set out in s 2. This is the framework in which the NWA must be understood.

[59] Still, this court is not tasked to pronounce on the substantive issues raised in the appeal. The focus in this case is solely on whether a valid appeal was lodged by the Applicants, in line with s 148(3), and whether the requirements are met.

[60] An applicant seeking a final interdict must show a clear right, an injury committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy.[29] The applicant must prove the right they seek to protect on a balance of probability.[30]

[61] Since the Applicants case hinges on a valid appeal (the so-called "core issue"), the first question that needs to be determined is whether a valid appeal was lodged. To do that, it is important to understand how the different sections of the NWA operate together.

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[28] Viljoen, G. (2022). The Transformed Water Regulatory Regime of South Africa [Discussion of South African Association for Water User Associations v Minister of Water and Sanitation [2020] ZAGPPHC 252 (19 June 2020)]. *Stellenbosch Law Review*, 33(2), 148-160.

[29] *Setlogelo v Setlogelo* 1914 AD 221 at 227, as endorsed by the Constitutional Court in *National Treasury and Others v Opposition to Urban Tolling Alliance* (CCT 38/12) [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC).

[30] *Free State Gold Areas Ltd v Merriespruit (Orange Free State) Gold Mining Co Ltd* 1961 (2) SA 505 (W) at 524C.

[62] S 42 falls under part 7 which deals with applications for licences. It explains the duty of the Department to furnish reasons.

> 42. Reasons for decisions.—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.

[63] The duty to furnish reasons is not only to the applicant, but also to "any person who has objected to the application". It is thus wrong to state that s 42(b) is only for an applicant whose application for a licence was unsuccessful. This notification and decision link in with s 148(3) which deals with appeals.

[64] S 148(3) states:

> An appeal must be commenced within 30 days after—
>
> (a) publication of the decision in the Gazette;
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> (b) notice of the decision is sent to the appellant; or
>
> (c) reasons for the decision are given,
>
> whichever occurs last.

[65] The appeal "commences" in terms of item 5(1) of Part 2 of Schedule 6 to the NWA by serving a copy of a written notice of appeal on the relevant responsible authority and lodging the original with the Water Tribunal. Item 5(2) provides that the Tribunal may condone the late lodging of an appeal or application. Once an appeal commences in terms of item 5(1), the Department must send all documents relating to the matter and its reasons for its decisions to the Tribunal.[31]

[66] Section 42(b) reasons are thus on application by the applicant or a person who objected to the licence. If a party decides to take the decision on appeal, it is relied upon to commence the appeal in terms of s 148(3)(c). The reasons in item 5(2) are the reasons that the Department is obliged to send the Tribunal when an appeal has

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[31] Item 5(2)(a).

already commenced. I would assume the reasons will be the same, whether sent to the appellant or the Tribunal.

[67] *Trustees of the Groundwork Trust v Acting Director - General: Department of Water and Sanitation*[32] is helpful to explain what documents are required. In this case, the applicants appealed a water use licence granted to the second respondent. When the respondent applied for the licence, a record of recommendation was sent to the Department to make an informed decision.

[68] In that case, the WUL was issued on 7 December 2017. The appeal was lodged on 8 August 2018 and supplemented on 18 February 2019 with the caveat that they reserve the right to further supplement their papers once they obtain the documents, what they called, the record of recommendation. The Tribunal, however, corrected this, stating:

> 6. The ROR is an internal document developed by the case officer and specialists on the basis of which a decision is recommended to the responsible authority, the Director-General. Therefore, we should state upfront that persistent requests for the complete ROR and its supporting documents as the "reasons for the decisions" are misplaced. While the documents before the decision maker are supposedly the basis for a decision, they are not necessarily the reasons for the final decision.
>
> 7.It is for the responsible authority to compile for the appellant what his/her reasons for making the decisions were. That is why we referred to the trail of documents recorded at page 35 of the Tribunal Record. Once the ROR was finalised on 27 October 2017 and submitted to the responsible authority, the latter could make a decision other than that recommended in the ROR or vary the recommendations therein. It is the reasons for the decision made on 7 December 2017 by the responsible authority that the NWA refers to in sections 42 and 148(3)(c) and not the complete ROR or supporting documents and reports.
>
> 8. Nevertheless, to conclude on this procedural aspect we ruled that the appellants had sufficient documents to lodge an appeal and also that they had locus standi as a person who had lodged an objection to the WUL application timeously.

[69] I am satisfied that the "record of decision" that the Registrar of the Water Tribunal sent to the parties on 17 November 2022 is the “reasons” referred to in s 148(3)(c). Since that event occurred last, the 30 days started on 17 November 2022. That

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[32] [2020] ZAWT 1 (21 July 2020).

leaves only one question: does the appeal lodged earlier by the Applicants on 12 July 2022 comply with s 148(3)?

[70] There is no case law on how to interpret section 143(3). Various Water Tribunal determinations help understand how the NWA operates. For instance, in *Norsand Holdings (Pty) Ltd v Department of Water Affairs and Forestry*[33] the Tribunal stated:

> What is envisaged, in the Tribunal's understanding, is that after a decision has either been published in the Gazette or sent to the appellant, the appellant has a choice of either commencing an appeal within 30 (thirty) days after the date of publication or dispatch of the decision or requesting reasons for the decision. Where the appellant decides to lodge an appeal after the publication or dispatch of the decision, the prescribed period starts running from the date of such an event viz. publication or dispatch of the decision. Where; however; the appellant requests reasons for the decision before he can lodge an appeal the 30 (thirty) day period is postponed and only starts running from the date on which the reasons for the decision are given.

[71] In other words, if the appellant elects the notice of the decision as the trigger event for the appeal, then the appeal must commence within 30 days of that dispatch of the decision. However, where the appellant requests reasons before they can lodge, then the 30-day period is postponed to the giving of reasons.

[72] Reasons for an administrative decision such as this is important in the context of an appeal for two main reasons: Firstly, it allows an appellant to consider if it wants to challenge the decision. In other words, knowing the reasons may obviate the need for an appeal. Secondly, it allows the appellant to determine on what ground it will challenge the appeal.[34]

[73] In this case, it was not the notice that starts the running of the 30 days, but the reasons. When the Appellants were informed of the WUL, they almost immediately requested reasons in terms of s 42 from the Department, which it did not receive. It

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[33] [2009] ZAWT 9 (13 February 2009).

[34] See Hoexter, C. (2012). *Administrative Law in South Africa*. Juta and Company Ltd at t 463 and De Ville, J. (2005). *Judicial review of administrative action in South Africa*. Butterworth at 287

requested reasons again on 19 January 2022 and 13 April 2022. It informed the Department that it would lodge an appeal 30 days after the reasons.[35]

[74] While waiting for the reasons, the Appellants lodged the appeal on 12 July 2022 with the caveat that they will supplement their papers when the reasons are received. The Water Tribunal received the appeal on 14 July 2022, and provided them with the reasons on 17 November 2022. The appeal thus commenced *after* the decision but four months *before* receiving the reasons. Was it launched before the decision was made, it would be premature, as there would be nothing to appeal.[36]

[75] Must s 148(3) be understood, as Kangra contents, that an appeal may only commence *after* the most recent of one of the events in s 148(3) occurred? In other words, can the Appellants only commence an appeal after 17 November 2022 once they have received reasons? I think not.

[76] My reading of s 148(3) requires the appeal process to be initiated within 30 days of the most recent event. In other words, if the appeal is launched before the reasons are given, it can still be considered valid as it falls within the 30-day timeframe from the most recent event once the reasons are given.

[77] The trigger for the appeal is the decision to issue the WUL. Once the decision is taken, it is possible to appeal. This appeal must, however, happen within a certain time. To repeat, s 148(3) states an appeal must be commenced *within* 30 days after the most recent of the three events. The *last* day to launch an appeal is 30 days after the most recent events. The section is not there to limit the time within which the appeal may commence. It is there to say before when it must commence. I thus disagree that the emphasis is on the word *after* and find that it should rather be on the word *within*.

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[35] RA par 6.6.1.

[36] *Bhugwan v JSE Ltd* 2010 3 SA 335 (GSJ); *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works* 2005 6 SA 313 (SCA) at para 22.

[78] A holistic reading of section further supports this interpretation. Nowhere in the section is a person prohibited from launching an appeal earlier. The provision does not state that "an appeal *may only* be commenced". It says it must.

[79] An interpretation that requires an appeal only to be commenced once one of the events in s 148(3) takes place can lead to an absurdity. For instance, it can lead to a situation where the Department fails to do either of the three actions meaning that *no* appeal can be lodged. It would be then not possible (without perhaps applying for a mandamus to compel the Department to give reasons), for an aggrieved party to take the decision on appeal. The appeal mechanism is also there to hold the Department accountable to its decisions.

[80] Such an interpretation is furthermore in line with various case law that requires a court to determine the question of compliance in light of the purpose for the provision. It is not a strict and mechanical approach to compliance but rather a matter of substantial compliance.[37] The Applicants substantially complied with s 148(3) by lodging an appeal before receiving the reasons for the decision, with the proviso that they would supplement their papers once they had received the reasons. They have thus lodged the appeal *within* the 30-day period. They have exercised their rights expediously.

Conclusion

[81] I therefore find that the Applicants complied with s 148(3). This means that in terms of s 148(b) of the NWA the WUL is suspended. Since Kangra does not deny that it is mining, it is mining unlawfully since it has no licence. This is a breach of the Applicants' rights.

[82] Apart from mining without a licence, the mining does cause actual harm, as set out in the Founding Affidavit and the OMI report. Damage to the environment can

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[37] *African Christian Democratic Party v Electoral Commission* [2006] ZACC 1; 2006(3) SA 305 (CC); 2006(5) BCLR 579 (CC) para 25.

perhaps be mitigated but cannot be undone. The Applicants are only expected to tolerate this harm if it is done based on a WUL issued by an administrator, weighing up the policy considerations involved in issuing such a licence. Currently that WUL is suspended, pending the outcome of the appeal. There is no other remedy but to approach the court for an interdict. I find that the Applicant has made out a case for the interdict.

Order

[83] I, therefore, make the following order:

1. The forms and service provided for in the Rules of Court are dispensed with and the matter is heard as an urgent application in terms of Rule 6(12) of the Rules of this Court.

2. The Third Respondent is interdicted from undertaking any water use in terms of section 12 of the National Water Act 36 of 1998 at the Balgarthen A Adit.

3. The interdict granted in terms of paragraph 2 is to operate until either:

   3.1. The First Respondent uplifts the suspension of Kangra's Water Use Licence under Licence No: 05/W51B/ACFGIJCI/10967; File No: 27/2/2/W251/4/1 ("Water Use Licence); or

   3.2. The Applicant's appeal against Kangra's Water Use Licence is dismissed by the Water Tribunal.

4. The costs of this application are to be paid by the Third Respondent.

WJ DU PLESSIS

Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be sent to the parties/their legal representatives by email.

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Instructed by:	Van der Merwe and Van den Berg attorneys
Date of the hearing:	02 & 03 August 2023
Date of judgment:	11 August 2023