THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 1052/2023

In the matter between:

KANGRA COAL (PTY) LTD **APPELLANT**

and

THE TRUSTEES OF THE TIME BEING OF THE CORNEELS GREYLING TRUST **FIRST RESPONDENT**

MOOIBANK BOERDERY (PTY) LTD **SECOND RESPONDENT**

THE MINISTER OF WATER AND SANITATION **THIRD RESPONDENT**

THE CHIEF DIRECTOR: WATER USE LICENSING MANAGEMENT – DEPARTMENT OF WATER AND SANITATION **FOURTH RESPONDENT**

Neutral citation: *Kangra Coal (Pty) Ltd v The Trustees of the Time Being of the Corneels Greyling Trust and Others* (1052/2023) [2025] ZASCA 09 (06 February 2025)

Coram: MOCUMIE, HUGHES, WEINER and MOLEFE JJA and CHILI AJA

Heard: 15 November 2024

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal

website, and by release to SAFLII. The date and time for hand-down is deemed to be 11h00 on 06 February 2025.

Summary: Appeals in terms of s 148(3) of the National Water Act 36 of 1998 (the NWA) against water use licences (the WUL) – suspension of licence pursuant to lodging of appeal – *locus standi* to interdict a mining company from undertaking any water use pending upliftment of the suspension of the WUL by the Minister of Water and Sanitation or the outcome of the appeal to the Water Tribunal.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (per Du Plessis AJ), sitting as a court of first instance.

1 The appeal is upheld with costs including the costs of two counsel where so employed.

2 The order of the high court is set aside and substituted with the following:

'The application is dismissed with costs, including the costs of two counsel where so employed.'

JUDGMENT

Mocumie JA (Hughes, Weiner and Molefe JJA and Chili AJA concurring):

Introduction

[1] This is an appeal against the judgment and order of the Gauteng Division of the High Court, Johannesburg (high court), per Du Plessis AJ, with leave of that court. The appeal revolves around whether the first and the second respondents, commercial farmers in the vicinity of the Kusipongo Colliery can successfully interdict the appellant, Kangra Coal (Pty) Ltd (Kangra), a mining company, from continuing with its water use licence (WUL) and mining activities pending an appeal against its water use granted by the fourth respondent, the Chief Director of the Department of Water and Sanitation (the Chief Director).

Factual background

[2] The factual background is briefly as follows. The appellant, Kangra, operates an underground coal mine at the Kusipongo Colliery, some 50 kms west of Piet Retief, Mpumalanga. It applied to the Department of Water and Sanitation (the Department) for an integrated water use license (the WUL) for associated infrastructure and

underground mining at the Balgrathen A adit (the adit),[1] which it uses to access the Kusipongo coal seam (the mine). The adit land used by Kangra is situated near the properties owned by the first and second respondents (the respondents). The respondents objected to the application for the WUL, citing among other reasons that they depend on the water from 24 (twenty-four) natural springs in the area to irrigate and grow commercial crops, to rear their livestock (cattle and sheep) for commercial and domestic purposes. They contended that the water use by Kangra will reduce the water flow in the area, pollute the water resources and result in acid mine drainage which will impact the quality of the water resources, so adds the respondents. In addition, this was a threat to the ground and surface resources on which they depend.

[3] Despite the objections by the respondents, on 25 October 2021, the Chief Director granted the WUL to Kangra. Dissatisfied with the decision of the Chief Director, the respondents appealed to the Water Tribunal (the Tribunal) on 12 July 2022 in terms of s 148(3) of the National Water Act 36 of 1998 (the NWA).[2] According to the respondents, once they appealed, the effect of their appeal was to suspend the decision to grant the WUL as provided for in s 22(1)*(b)*.[3] Despite this position, Kangra continued to exercise its rights under the WUL, with its water uses and mining activities.

[4] On 14 December 2021,19 January 2022 and 13 April 2022 respectively, and in terms of s 42 of the NWA, the respondents requested reasons from the Chief Director for his decision to grant Kangra the WUL. However, the Chief Director did not respond to the request made in respect of the objections raised by the respondents against the WUL application by Kangra.

[5] In the Tribunal, Kangra contended that the appeal was brought more than eight months late and was thus void or invalid. The respondents applied for condonation for

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[1] An opening on the surface which serves as an entry to the mine.
[2] Section 148(3) of the NWA provides:
'(3) An appeal must be commenced within 30 days after-
(a) publication of the decision in the *Gazette*;
(b) notice of the decision is sent to the appellant; or
(c) reasons for the decision are given, whichever occurs last.'
[3] Section 22(1)*(b)* of the NWA provides:
'(1) A person may only use water-
…
(b) if the water use is authorised by a licence under this Act.'

the late filing of the application for the appeal. In their application for condonation, and without conceding that the appeal was out of time, they blamed the Chief Director for not providing them with the reasons when they sought them within the prescribed period of 30 (thirty) days after his decision was made. Because they were not furnished with reasons after several requests, the respondents filed their appeal, without reasons on 12 July 2022. They therefore submitted that they were not out of time.[4]

[6] In their appeal, they raised the following grounds:

(i) The WUL was granted without the landowner's consent.

(ii) The Chief Director failed to consider all the relevant factors required by s 27 of the NWA.

(iii) The Chief Director failed to apply the precautionary principle given the material gaps and deficiencies in the WUL application.

(iv) The public participation process concluded was inadequate, in contravention of the NWA and WUL regulations.

(v) Not all proposed water uses were authorised by the WUL.

Before the high court

[7] In July 2023, before the Tribunal could decide the appeal, the respondents approached the high court for an interdict. Although the application was couched in the language of an interim interdict in the notice of motion, the high court granted a final interdict and Kangra was interdicted from conducting any mining operations at the adit, pending the determination of the appeal before the Minister. It then granted leave to appeal directly to this Court on what it perceived to be a novel issue of law: the interpretation regarding s 148(3) of the NWA as 'there might be uncertainty about the issue of *locus standi* in terms of the NWA that needs clarification.'

Issues for determination before this Court:

[8] Kangra seeks to appeal on the basis that the respondents had no legal standing to seek the interdict; that they failed to establish how they would suffer harm if the

[4] Section 148(3)*(c)* read with regulation 4(1)*(c)* of the Tribunal Rules provides that an appeal may be submitted within 30 days after the reasons for the decision are given. They reasoned that at the time that they lodged their appeal, without the reasons from the Chief Director, they were within the 30-day prescribed period.

interdict was not granted; their appeal against the decision to grant the WUL was late and therefore invalid; it did not have the effect of suspending the WUL; and the grant of the interdict would cause Kangra to suffer more harm than the respondents would, if they could show any.

[9] Although the high court immersed itself in the interpretation of the National Environmental Management Act 107 of 1998 (NEMA), the core issue for determination in this appeal as it was before the high court is whether the respondents had legal standing to approach the high court for an interdict against Kangra, a licensee of a purportedly suspended WUL, to prevent them from performing water use and mining activities under the license. Flowing from that, whether the respondents satisfied all the requirements of an interdict.

The law

[10] In *Commercial Stevedoring Allied Workers Union and Others v Oak Valley and Another*,[5] the Constitutional Court with reference to the seminal judgment of *Setlogelo v Setlogelo*,[6] recently affirmed the law on final interdicts as follows:

'The requirements for a final interdict are settled. An applicant for such an order must show a clear right; an injury actually committed or reasonably apprehended; and the absence of similar protection by any other ordinary remedy.'

[11] Given the conclusion that I have reached in this matter, I do not need to dwell on the issue of the relevant provisions of the NEMA, nor do I have to spend much time on the first requirement mentioned above. It would suffice to say that they apparently base this right on s 32(1)*(a)* of NEMA.[7] For purposes of this judgment, I accept the finding of the high court without deciding the issue, that the respondents have a clear right to the protection of the environment under s 32(1)*(a)* of NEMA. Thus, they have satisfied the first requirement of a final interdict.

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[5] *Commercial Stevedoring Agricultural and Allied Workers Union and Others v Oak Valley Estates (Pty) Ltd and Another* [2022] ZACC 7; [2022] 6 BLLR 487 (CC); 2022 (7) BCLR 787 (CC); 2022 (5) SA 18 (CC) para 18.

[6] *Setlogelo v Setlogelo* 1914 AD 221 at 227. Injury in this sense means an unlawful infringement (actual or threatened) of the applicant's clear right.

[7] Section 32 of NEMA provides:

'(1) Any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment or the use of natural resources-

(a) in that person's or group of persons own interest; …'

[12] Regarding the second requirement for granting a final interdict, it must be determined whether the respondents have shown that their right is being interfered with by the appellant. Essentially, they must show, at least, that a reasonable apprehension of injury exists. For this, they are required to set out the facts grounding this apprehension in their founding affidavit to show the link between the unlawful conduct and the apprehended injury.

[13] The main thrust of the respondents' case in seeking the interdict is the allegation that Kangra's mining activities and the unlawful use of the WUL, are a pollution threat to natural spring water in the area where Kangra conducts their mining activities and that the respondents rely on this water, to raise their livestock. They alleged that as neighbouring landowners, they will be 'impacted' by the mining and water use at the adit. For this, they rely on a report by OMI Solutions dated 12 April 2022 prepared by Ms Chantal Uys (Ms Uys). Para 11 of the report states:

'Although gaps were identified, the overall conclusion of this review is that the specialist studies were not fatally flawed whereby the majority of the anticipated impacts can be effectively mitigated. It is further anticipated [that] background studies, which were not reviewed for this project, are available, such as the geotechnical investigation by associated GFK Consulting Engineers.

The recommendation for exclusion zones made by Goldier (2018) is however considered an extremely important recommendation which should be implemented. Not implementing this recommendation is considered a fatal flaw.'

Therefore, they argue that immediate intervention is required.

[14] However, what does not appear from the respondents' founding papers, is that Kangra has operated the mine for over six years without any reduction of water and pollution thereof. More importantly, in the interim, Kangra has been operating in terms of the WUL granted and the water use has not prejudiced the water supplies to the respondents. In addition, there is constant monitoring of the water use and remedies available if same causes actual harm. The closest they come to alleging harm to them in their founding affidavit is that 'my concern which is exacerbated by the paucity of the information provided in the Balgarthen A WUL application as described below, is that Kangra's mining operations may well cause dewatering of the shallow perched aquifer, which in turn will affect the flow of water in the springs. Should the springs dry

up, the farming operations will be severely impacted as will the lives of the people who live on the properties and who depend on the clean water that is provided by the springs'.

[15] The contention on behalf of Kangra is an obvious one that the respondents have not alleged any actual harm or apprehension of harm they have suffered. Instead, they rely on possibilities that may occur in the future. Ms Uys' report, which is described as 'unscientific', when considered in its entirety, does not point to actual or apprehension of harm. Her report does not say anything significantly different from what Kangra submitted and what the Chief Director considered with other important information pertaining to granting of a WUL. For instance, she does not refute that Kangra did the preliminary investigations contemplated under the regulations and submitted several reports. Nor does she mention that there were community consultations, and that Kangra acknowledged the impact on the surface, but that there was minimal impact which can be mitigated. And in fact, the Kangra report indicates how mitigation will be undertaken and thereafter the area rehabilitated.

[16] Even if the respondents' version is accepted as correct, they support the version of Kangra in that Ms Uys' report confirms the reports of Kangra submitted with its application. Only thereafter, Ms Uys identifies gaps in the application. Among those gaps, she mentions that the recommendation for exclusion zones must be implemented. Then on the *Plascon Evans* principle that version must be accepted as correct. That should dispose of the respondents' application for an interdict.

[17] For the approach I have adopted in the preceding paragraphs, it is unnecessary to consider other issues raised by the respondents, such as whether the landowner's consent was obtained and the precautionary principle.

[18] However, something needs to be said about the gaps in the Environmental Authorisation (EA).[8] The respondents attempted to create the impression that if there

[8] In South Africa an Environmental Authorisation (EA) is required for certain activities that have the potential to significantly impact the environment. The authorisation process is governed by the National Environmental Management Act (NEMA),1998 (Act No 107,1998) [as amended] as its regulations, Environmental Impact Assessment (EIA) Regulations (2014). This falls under the Ministry of Foresty, Fisheries and Environment.

are gaps in an EA before it is granted, the Chief Director is barred from granting it. Yet it is common practice and in line with the Environmental Impact Assessment Regulations of 2014 (the regulations), that if there are any problems in the implementation of the plan submitted, and what they call ‘gaps identified’, those are addressed incrementally in terms of the regulations by *inter alia* the EA being suspended to address all the queries and or objections or the gaps identified. The process is an ongoing assessment until there is complete compliance, but the work continues as provided for under the regulations. An EA once granted cannot be withdrawn in its entirety, as in this instance work which had already commenced, based on a WUL lawfully granted, should not be halted.

[19] To the extent that the respondents could, admittedly, not point to any harm or potential harm to themselves or others in the surrounding area or even the environment, they have failed to prove the second requirement of an interdict; that of harm or apprehension of potential harm. On this leg alone, the appeal ought to succeed.

Legal standing

[20] Despite my finding that the respondent has legal standing in terms of s 32 of NEMA, the issue of ‘apprehended harm’ is directly linked to the issue of legal standing which the appellant raised squarely before the high court. In their founding papers, the respondents admittedly did not allege legal standing expressly. They only alleged that their farms are neighbouring the adit that Kangra uses to access the mine and that their livestock will be affected by polluted water from the mining activities. Further, the water levels will be reduced in the future. Only on appeal, did they allege that they had standing under s 32 of NEMA which provides that anyone who has an interest and alleges harm in the interest of justice may approach the court.

[21] They, however, admitted that they did not plead this legal standing in their founding papers and sought to impress upon this Court to accept that even if they did not do so expressly, from a reading of the pleadings, the facts show that they have legal standing. This is not how pleadings are drafted, or a case is pleaded.

[22] In *Pilane and Another v Pilane and Another*,[9] the Constitutional Court stated:

'The [applicant] must stand or fall by their founding papers.'

This means that, an applicant/plaintiff must set out their full case in their founding papers. Essentially, they must plead issues expressly for the respondent/defendant to respond properly in their defence and not be ambushed. The high court did not raise the issue *mero motu*. It follows that it erred by spending much time in interpreting the relevant provisions of NEMA instead of dealing with the crisp issue before it: the interdict sought.

[23] The respondents referred the high court and this Court to a judgment of the Western Cape high court, *Witzenberg Properties (Pty) Ltd v Bokveldskloof Boerdery (Pty)Ltd and Another (Witzenberg)*,[10] as authority that the high court was correct to hold that the respondents had legal standing to be granted the interdict. *Witzenberg* is distinguishable from this case on the facts and the law. In *Witzenberg* the dispute was between private entities. Here it is between a private entity and a state organ: one of the private entities challenging an organ of government responsible for implementing NEMA. *Witzenberg* is a judgment of a provincial division by a single judge. It is trite that a decision of a provincial division cannot be binding on another provincial division, albeit strongly persuasive if it is on all fours with that decision. In this instance, it is not. This case does not assist the respondents.

[24] When this appeal was heard, Kangra had appealed against the order of the Tribunal granting condonation thereby extending the period within which the respondents ought to have filed their appeal. The parties have been given dates, meaning that the appeal is pending. This meant that, at a practical level, this appeal ought not to have been entertained. The parties, if so wisely advised, should have waited for the appeal against the grant of condonation to get underway and a decision to be made either way before they proceeded with this appeal. However, the respondents maintained that the appeal should proceed.

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[9] *Pilane and Another v Pilane and Another* (CCT 46/12) [2013] ZACC 3; 2013 (4) BCLR 431 (CC) (28 February 2013) para 49.

[10] *Witzenberg Properties (Pty) Ltd v Bokveldskloof Boerdery (Pty)Ltd and Another* [2018] ZAWCHC 83; 2018 (6) SA 307 (WCC).

[25] Lastly, it is clear on a reading of s 148(3) of the NWA that the Tribunal did not have the power to consider the application for condonation *post facto*. The Minister decides whether to grant the WUL. Until that decision has been rescinded or set aside on any ground by a court of law, it stands. No other avenue can be pursued to undermine the decision by the Minister which can amount to such incompetent action being legitimatised by a court of law. The Tribunal ought not to have entertained the application for condonation or even extended the period within which the condonation should have been sought. It simply had no jurisdiction to do so.

[26] In the result, the following order issues.

1 The appeal is upheld with costs including the costs of two counsel where so employed.

2 The order of the high court is set aside and substituted with the following:

‘The application is dismissed with costs, including the costs of two counsel where so employed.’

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B C MOCUMIE

JUDGE OF APPEAL

Appearances

For the Appellant	P F Louw SC (with G J Scheepers SC)
Instructed by	Van der Merwe Van den Berg Attorneys, Pretoria
	McIntyre van der Post, Bloemfontein
For the first and Second Respondents	N C Ferreira (with T H Skosana)
Instructed by	Malan Scholes Inc, Johannesburg
	Claude Reid Inc, Bloemfontein