

HELD ONLINE

In the appeal of:

African Realty Trust (Pty) Ltd

Appellant

And

**Acting Director-General:
Department of Water and Sanitation**

Respondent

APPEAL DECISION

DATE HEARD: 1 – 2 February 2021

DECISION: 9 March 2021

APPEARANCES

Coram: T. Murombo – Additional Member (Chairperson).
U. Mbeki – Additional Member.

For the Appellants: Adv. Marius Oosthuizen SC, with Adv. Natasha Fourie instructed by Stewart Maritz Basson, Attorneys (Willem F. Basson).

For the Respondent: Adv. Matthews Mojapelo instructed by the State Attorney (M. Moloto)

INTRODUCTION AND CONTEXT

1. The Appellant company applied for a water use license for the construction of two storage dams, otherwise referred to as holding dams, given the specific purpose of the dams. The Appellant undertakes the business of Valencia citrus fruit farming on the Letaba Estate in Limpopo Province. This business has been operating for over 100 years. Its orchards are irrigated using water from the Letaba canal which draws water from the Letaba River. The canal is licensed to, and operated by the Letaba Water Users Association, of which the Appellant is a member. African Realty Trust has an existing total allocation of 16 357 988m³/a per year from the Letaba Water Users Association for abstraction of water from the canal traversing the site, for irrigation purposes.
2. Due to various climatic conditions and the water situation in the whole Great Letaba area, the canal has not been able to sustain irrigation activities of all users if they simultaneously abstract water from the canal. The result is that, at times, the Appellant has to draw water from the canal at night-time because during the morning and the day there is pressure on the canal. However, during the night the demand is reduced. Due to its age the canal is also shut down for maintenance for two weeks annually.
3. These constraints impact the Appellant's agricultural activities, and to alleviate this problem the Appellant decided to construct two holding dams to draw water from the canal during the night and use it when the canal is closed on weekends¹ or when there is increased demand on the canal. The proposed dam sites are located

¹ Record p231.

on the Remaining Extent of the farm Letaba Estates 525- LT near Tarentaal and, approximately 21 km south-east of Tzaneen, in the Limpopo Province. According to 2004 documents, the Great Letaba catchment with respect to which the application is lodged was recorded to be under severe stress with a deficit of around 26Mm³/a. A recent Hydrological Study indicated that the proposed dams will have negligible impacts. The proposed dams have a combined capacity of 762 000m³,² which is well within the Appellant's existing water use entitlement amount to 16 357 988m³.

4. The application was for the following activities, which are classified as water uses in terms of the National Water Act 36 of 1998 ('NWA'), which requires authorization by the Respondent,

Section 21(b): Storage of water.

Dam1: located on the Geographical locations S23° 51' 02.42" E30° 19' 06.33". Dam 1 is expected to be classified as a small-size, Category II dam with a significant hazard potential rating. It is proposed to have a dam wall of maximum of 12m high, a maximum base width of 63m and an embankment length of 305m (including spillway). The surface area will be approximately 14.38ha at full supply level and gross storage capacity ±647 200m³. An open side channel spillway is proposed on the left bank.

² Replying Affidavit: Khosa; Bundle 1, page 29, paragraph 15.

Dam2: located on the Geographical locations S23° 51' 02.42" E30° 19' 06.33". Dam 2 is expected to be classified as a small-size, Category I dam with a low hazard potential rating. It is proposed to have a dam wall of maximum 9.5m high, a maximum base width of 51m and an embankment length of 310m (including spillway). The surface area will be approximately 3.29ha at full supply level and gross storage capacity 115 000m³. An open side channel spillway is proposed on the right bank.

Section 21(c): Impeding or diverting the flow of water in a watercourse.

Section 21(i): Altering the beds, banks, course or characteristics of a watercourse.

5. The Appellant lodged its water use licence application on 8 March 2016. Upon receipt of the application the Respondent eventually wrote a letter to the Appellant in which it confirmed the following:

- 5.1. That the application met all the requirements.
- 5.2. That the application was been accepted for further processing; and
- 5.3. That should the Department require any additional information during the processing of the African Realty's water use licence application, that the Department will notify the African Realty thereof in writing.³

6. On the 25th of October 2019, the Respondent declined the water use licence application. The reason advanced by the Respondent were stated as follows:

"Kindly be informed that your application is unsuccessful because *the Letaba River System is under severe stress* such that no additional Dams are allowed.

³ Record p278-279.

This is witnessed through the *major Dams in the system failing to get to full supply capacity over a couple of years.*"⁴ (our emphasis).

7. The Record of Recommendation also states that

"This application is recommended for a decline due to the fact that:

- The Letaba system is under severe stress such that no additional storage dams can be allowed.
- The major Dams In Letaba are also struggling to get to full capacity as a result of small farm dams in the area which then affects the flow of water in the Letaba River system.
- The applicant has enough storage dams that can be continuously used for the purpose of the irrigation."⁵

8. Upon receiving the letter of decline, the Appellants commissioned a Hydrological Study to evaluate the extent of the water stress in the Letaba Estate Area and the potential impact on water resources of the proposed two holding dams. The appellant thereafter lodged an appeal to the Water Tribunal being unconvinced with the reason proffered by the respondent for its negative decision.

ISSUES FOR DETERMINATION

9. This appeal raises two issues which, together with additional information provided to us, constitutes the full facts on the basis of which we have to decide on the water use licence application afresh.

The issues raised to be determined are as follows:

⁴ Record 1 p.12.

⁵ Record 1 p.43-44.

- a) Whether the Respondent was correct in declining the water use licence application on the basis of the two reasons advanced.
- b) Whether, and if, on the evidence information and reports before us, the Appellants have made a good case and complied with the legislative requirements for the granting of a water use licence.

10. We address these two broad issues through an evaluation of the evidence led by the parties, existing and the new documents provided to the Tribunal as part of the appeal hearing process.

Appellant's Submissions and Evaluation

11. The Appellants led evidence from seven witnesses, namely the Chief Executive Officer of Letaba Estates, an engineer responsible for the irrigation system at Letaba Estate, the Chairperson of the Letaba Water Users Association, a manager from Letaba Estate, a civil engineer responsible of designing the two dams at issue, the environmental practitioner who oversaw the water use licence application.

12. Overall, the Appellant's evidence and document submitted confirmed the following facts:

13. The Letaba Estate is entitled to use water from the canal which is under the control of the Letaba Water Users Association. However, due to constraints already noted above, the Appellant is unable to fully use its water use entitlement to the detriment of its operations.

14. The proposed two dams are to be constructed on two drainage lines (streams) and south of the canal to enable water to flow by gravity from the canal to the dams. It is possible that some rain run-off on these two drainage lines will also be captured by the two proposed dams. The two drainage lines are categorized as non-perennial episodic streams and in terms of the NWA, defined as 'watercourses' in respect of which a water use licence would be required for undertaking licensable activities. This is regardless of the fact that the streams are non-perennial and only flow rarely when there are heavy rains.
15. The purpose of the two proposed dams is not to affect any additional abstractions of water from the Letaba river or any water resource; rather they are primarily intended to store and hold water from the Letaba canal.
16. The Appellant commissioned civil engineers to do site inspections and investigations leading to the selection of suitable sites for the two dams as well as production of preliminary designs. The Appellant also hired wetland specialists to conduct a wetland assessment and, upon request by the Respondent a Fish Migration Study was also conducted.
17. The Appellant led evidence from the environmental consultant who confirmed that she undertook the environmental authorization studies and successfully applied for an environmental authorisation in terms of the National Environmental Management Act 107 of 1998 ('NEMA') from the Limpopo Department of Economic Development, Environment and Tourism.⁶ The consultant also conducted the public participation process for the environmental authorisation and the water use

⁶ Record 2 p.208-219 (Environmental Authorization).

licence application.⁷ We note that the findings and recommendations of the competent environmental authority are a relevant consideration in terms of section 27(1) of the NWA. The environmental authorities considered extensive documents and studies and concluded that the storage dams could be authorised. It is noteworthy that the Chief Director: Water Authorisation in his affidavit does not list the Environmental Impact Assessment Report (EIAR) or the approved Environmental Authorisation among the documents considered by the Respondent.⁸ However, the Supervisor who testified confirmed that he had the Environmental Authorisation among the documents considered. He testified that he did not consider the Respondent bound to follow recommendations therein concerning water resources.⁹

18. A few objections and comments were received from other water users during public participation, most of which were successfully explained or addressed by the Appellant.¹⁰ The witness confirmed that, once the application for the water use was lodged, and apart from an initial rejection due to a system error, the Respondent wrote to her acknowledging the application and confirming its completeness. She testified that from that moment until the decision was issued, the Respondent never asked for any further information or directed the Appellants to provide any further information, conduct any further studies or assessments or any similar request mandated in term of section 41(2) of the NWA.

19. The consultant gave evidence that she was taken aback by the negative decision and the reasons advanced, given that the Respondent had at no time asked for

⁷ Record 2 p.268.

⁸ Record 1 p.28.

⁹ Transcript p.244-245.

¹⁰ Record 2 p. 164-165.

the information absent which informed a negative decision. In particular, the witness testified that no request was ever made for a hydrological study or current state of existing storage dams. The witness confirmed the findings of studies submitted in support of the water use licence filed of record. Among these were site investigations, consideration of three potential sites – all of which lay in drainage lines that are pathways for non-perennial streams.

20. In fact, hydrologically all potential storage dam sites would have to be some low-lying valley which naturally provides drainage for rain run-off when it rains. None of the findings in the documents submitted in support of the water use application were or are disputed by the Respondent. The narrowing down of potential sites from the initial three to the final two demonstrates that the Appellant considered the potential impacts of the siting of dams on the catchment receiving environment as well as biodiversity. Alternative siting was considered. The reason site number three was abandoned was due to its lying in a Critical Biodiversity Area (CB1)¹¹ in the Limpopo Biodiversity Conservation Plan (LBCEP).¹²

21. The environmental consultant further confirmed the findings of a specialist wetland study which also showed no significant impact.¹³ In particular, one of the findings was that while dams have documented environmental impacts, such impacts are likely to be insignificant where non-perennial, episodic streams are concerned.¹⁴

22. Furthermore, the environmental impact study and risk ratings indicated that impacts on flow regime, changes in water quality, loss or disturbance of

¹¹ Record 2 p.111.

¹² Record 2 p.110.

¹³ Record 2 p.126 and 149 (Wetland/Riparian Delineation and Functional Assessment, Limosella Consulting, September 2017).

¹⁴ Record 2 p.139.

watercourse habitat and vegetation, and changes in sediment entering or existing the water system were low.¹⁵ Any impacts that were considered moderate or high were addressed sufficiently in proposed mitigation measures outlined in the water use licence application.¹⁶

23. The specialist Fish Migration study requested by Respondent's internal experts¹⁷ concluded that,

"Permanent flows that currently occur in the tributaries originate as releases from the irrigation canal. Under natural conditions these tributaries would only have exhibited surface flows for brief periods following rains. The existing dams represent migration barriers in the catchment that prevent the upstream migration of fish from the Letaba River into the upper catchment.

*Therefore, it can be concluded that the historical and continued presence of fish in the tributaries and in the existing dams is completely dependent on the downstream movement of fish from the canal. Construction of fish ways or any other engineering designs designed to facilitate upstream migration of fish into the proposed dams is therefore considered to be unnecessary."*¹⁸ (our emphasis).

24. Apart from findings related to fish migration patterns, the study also found that the non-perennial streams rarely flow, except for overflows from the canal or the occasional run off when it rains. This study and its findings were uncontroverted when the application considered. Before us, no data or information was provided to dispute these findings.

¹⁵ Record 2. p.141-146.

¹⁶ Record 2. p.141 et seq.

¹⁷ Transcript p.17 and 138-139. The Respondent's witness denied that such a report was requested by the Respondent (p. 245).

¹⁸ Record 2 p.162.

25. The appellant also led expert evidence that the impact of the proposed two dams on the catchment area and downstream users would be insignificant and negligible.¹⁹ The expert witnesses testified that the hydrological impact on downstream users, if any, would be less than 1%. Furthermore, the catchment footprint of the two dams would be less than 1km² (Dam 1- 0.74km², and Dam 2- 0.66km²)²⁰ of the total Great Letaba System which 60 000km². Even if the dams are not constructed, any rain run-off from the two streams or drainage line is currently being captured by the Kramer Dam which lies within the Appellant's estate.

26. The hydrologist testified that the two proposed dams lie downstream all three major dams in the Letaba Catchment and have no impact on the major dams in terms of whether they fill up or not. The state of the major dams in the area was and is determined largely by rainfall patterns and a series of draughts had caused the dams not to fill up to capacity.²¹ The study provided undisputed data of rainfall patterns from 1979 to 2019 and the respective dam levels. The expert study concludes that,

“It is apparent that low dam levels coincide with low rainfall and occur approximately every 10 years. During the mid-1980s, 1990s and 2000s, as well as recently, levels below 10 % have been reached. The current low dam levels are therefore not an uncommon occurrence in the catchment.”²²

In conclusion the reports states that,

“Should [the Appellant] abstract water from the canal within their allocated and restricted amount, and that the abstraction volumes are strictly measured and monitored, then it has been shown in this study, that *the proposed dams will*

¹⁹ Record 2 p.295.

²⁰ Record 2 p.292.

²¹ Record 2 p.289-290 (Hydrological Assessment)

²² Record 2 p.289.

have negligible impact on reducing the quantity and flows within the Letaba catchment."²³ (our emphasis).

This scientific evidence therefore put into doubt the reasons advanced by the Respondent that the proposed storage dams and other existing farm dams in the water management area adversely impact the major dams in the area or impacts downstream water users.

27. The Chief Executive Officer of the Appellant gave evidence of the social and economic contribution by the Appellant. It had a turnover of ZAR700 million and employed a majority of black employees, both permanent and seasonal. Through a qualifying transaction the Appellant had also achieved a BBBEE status of 25% black ownership although there were no black shareholders as such. An investment of ZAR10 million was earmarked for the construction of the dams which would see the Appellant also being able to expand the citrus orchards without going beyond their existing water use entitlement. This would be made possible by the efficient water use created by the construction of the two holding dams and a drip irrigation system.

28. Evidence was led to demonstrate the current hardship faced by the Appellant in terms of employees having to work during the night in order to be able to draw water from the canal. Also, the canal water was not suitable for the pumps being used because of the debris in flowing water which blocks drip irrigation.²⁴ The two proposed storage dams would enable the Appellants to irrigate during the day

²³ Record 2 p.297.

²⁴ Transcript p.135.

without adding pressure onto the canal and thereby enabling downstream canal users to also be able to draw water from the canal.

29. Appellant's counsel also highlighted certain inadequacies in the processing and evaluation of the water use licence application. Among other things, evidence was led to show that the Respondent had used outdated reports and failed to consider later policy and technical documents.²⁵ These include the Internal Strategic Perspective (ISP) of Luvuvhu Letaba Water Management Area, 2004, the reserve determination of 2006, and the National Water Strategy of 2004. Regarding the latter the Respondent considered the 2004 strategy when there was a recent 2013 strategy document. Similarly, a reserve determination of 2006 was used instead of a later 2018 determination.²⁶

30. In addition, the Appellant submitted that despite raising issues *ex post facto* with the sufficiency of the documents and information submitted with the water use licence application, the Respondent failed and or neglected to use its powers under section 41(2)(a)²⁷ and (b)²⁸ of the NWA. The Respondent at no stage requested for further information or specialist studies from the Appellant. The Respondent also did not bother to conduct its own investigation or assessment of the potential impacts of approving the water uses applied for.

²⁵ Record 1 p.29-30.

²⁶ Reserve Determination of Water Resources for the Catchments of the Olifants and Letaba, GN 932 in GG 41887 of 7 September 2018. The Record of Recommendation (ROR) was prepared on 5 September 2019 and the water use licence application was only decided on 25 October 2019.

²⁷ Section 41 (2) (a) "(2) A responsible authority – (a) may, to the extent that it is reasonable to do so, require the applicant, at the applicant's expense, to obtain and provide it by a given date with – (i) other information, in addition to the information contained in the application; (ii) an assessment by a competent person of the likely effect of the proposed licence on the resource quality; and (iii) an independent review of the assessment furnished in terms of subparagraph (ii), by a person acceptable to the responsible authority."

²⁸ Section 41 (2)(b) "(2) A responsible authority – (b) may conduct its own investigation on the likely effect of the proposed licence on the protection, use, development, conservation, management and control of the water resource."

31. On the contrary, the Appellants went out of their way to commission a specialist hydrologist to conduct a Hydrological Study to verify the claims in the reasons for decision provided by the Respondent. As noted above we record that the hydrological study does not indicate significant negative impacts on the water resources or the immediate catchment of the proposed storage dams. The study shows negligible impact on the non-perennial streams. It also highlights the true causes of the non-filling of major dams in the area, which in any case lay upstream of the proposed dams. The proposed dams therefore hydrologically have no measurable impact on the three major dams in the Great Letaba water management area.

32. The water stress and issues pertaining to dams not filling up were explained by other reasons and not the proliferation of small farm dams in the area. Specifically, the two proposed dams had no provable effect on the major dams. Even then, the proposed storage dams also had no effect on the drainage lines where two non-perennial streams lay because most of the water to fill the dams will be water drawn from the canal, in respect to which the Appellants already has a water use allocation.

33. It was the Appellant' case that the Respondent had no reasonable, legal, or rational basis to decline its licence application. The Appellant submitted that its application met the relevant requirements of section 27(1)²⁹ read together with section 2 and 3 of the NWA. Not approving the storage dams would result in a continued inefficient use of water and prevent the Appellant from beneficially using its existing water allocation. The Letaba Water Users Association confirmed that it approved

²⁹ Record p268-272.

the proposed construction of two balancing dams as it could monitor water use by the Appellant; and as long as it would be within its existing allocation the proposed dams had no impact on other water users within the Association.³⁰

Respondent Submissions and Evaluation

34. In support of the decision to refuse the water use licence, and to further support its position that the Tribunal should refuse the licence, the Respondent called one witness and made submissions on the law.

35. The Respondent called one witness: the Supervisor responsible for water use authorisations. He was, among other things, responsible for supervising Case Officers who receive, assess and evaluate water use licence applications before they are submitted to specialists units and the Water Use Authorisation Assessment Advisory Committee (WUAAAC). The witness in fact chaired the meetings of the WUAAAC that presided over the Appellants' application. The witness confirmed that he quality checked and signed off the Record of Recommendation Checklist.³¹ Among other things, the checklist confirms the respondent was satisfied that "the assessor obtain[ed] all specialist input",³² and that all water uses applied were captured and that the application was ready for consideration by WUAAAC.

36. The witness explained the process for receiving, assessment, evaluation and determination of water use licence applications. He had considerable experience

³⁰ Transcript p106 (Kruger's testimony).

³¹ Record p.36.

³² Record p.36

dealing with water use licence applications. His evidence was that the Great Letaba water management area is under severe stress and no more dams can be allowed to be constructed. This was based on the 2004 National Water Strategy recommendations.³³ No effort was made to distinguish between dams that would result in new abstraction of water from a water resource, and the specific case of the Appellant where their dams would be balancing dams to store water from the canal premised on existing water use allocation.

37. It was the witness's evidence, based on presiding over the Appellant's WUAAAC meetings, that he considered the water use licence application to have been complete and ready for adjudication.³⁴ The witness further testified that no hydrological study or other information was requested from the Appellant,³⁵ although upon questioning he thought that it would be a useful study where dams were being proposed. The witness conceded that the major dams in the Great Letaba were upstream of the proposed storage dams, which are downstream cannot possibly have an impact on a upstream dams.³⁶

38. The witness gave evidence that the Respondent was not amused by the inconsistent decisions by the Letaba Water Users Association in terms of supporting or objecting to, some applications for water use in its area.³⁷ It was agreed that whether or not a Water User Association supports or fails to support any particular application is not decisive because the ultimate decision rests with the Respondent.

³³ Transcript p.204, 209,

³⁴ Transcript p.221 (10).

³⁵ Transcript p220 (15-16).

³⁶ Transcript p 233 (5-10).

³⁷ Transcript p209 (5) 213(10); see also Transcript p.110 (1) where the Chairperson of the water user's association confirmed and justified the association's decision in an y given application.

39. The Record of Recommendations records that the In-Stream internal experts of the Respondent recommended approval of the application subject to certain conditions. However, such conditions were not captured and when we directed the Respondent to provide the recommendations by the In-Stream unit, the Case Officer swore to an explanatory affidavit deposing that this paragraph in the Record of Recommendations was a mistake as it was carried over from a previous template.³⁸ What the case officer states bears repeating:

“I forgot to remove the statement on paragraph 3.2.1 of the Record of Recommendation bearing subject ‘Resource Directed Measures’ which stated that “Based on the comments submitted by In Stream Water Use (IWU) dated 24/06/2019 recommending the approval of this application on the basis of the following conditions.” *I did not request specialist inputs from In Stream Water Use as I deemed it unnecessary following the notion that the catchment is under severe water stress.*”³⁹ (our emphasis).

40. What this shows is that the water use application was not subjected to the In-Stream use experts who would have provided the Respondent with expert input on the impacts of the proposed storage dams on the non-perennial streams. Rather the Case Officer and the Supervisor were content using outdated documents to conclude that the area is water stressed and no more dams of any type will be allowed. It is surprising that the case officer and supervisor thought it wise not to seek In-Stream Use expert input, yet they raise in-stream related impacts as grounds to decline the water use licence. That a water management area is under stress is no rational basis for failing to properly obtain expert assessment of an application.

³⁸ Explanatory affidavit of Malaka para

³⁹ Explanatory Affidavit of Malaka, para 7-8.

41. The Respondent also submitted an affidavit by the Acting Chief Director: Water Use Authorisations⁴⁰ whose central testimony was that the water use licence should not be granted because the Letaba Water System is stressed, that the Appellants have many other storage dam in their estate and they have not provided reports to show they needed additional storage, that approving the storage dams would disable the Respondent from effectively implementing compulsory licensing in terms of section 43 of the NWA. None of these reasons were put to the Appellant during the water use licence process hearing and WUAAAC meetings.

42. In the affidavit the Acting Chief Director confirms reliance on the 2004 National Water Strategy and the Internal Strategic Perspective (ISP) of Luvuvhu Letaba Water Management Area, 2004⁴¹ both of which indicate that the Letaba Water Management Area is water stressed or rather was stressed when they were compiled. It was accepted that since compilation of these documents numerous water use licences have been granted in the Letaba water management area despite these findings.⁴² In addition to the reasons for decision provided to the Appellant, the Acting Chief Director now also added, in this 2021 affidavit that,

“Approval of storage dams for water allocated as Existing Lawful Water Use (ELU) presents a serious challenge for CL [compulsory licencing] because it means that such dams may have to be demolished or reduced when the allocations are curtailed during CL.”⁴³

⁴⁰ Record 1 p.23.

⁴¹ Record p.28-30.

⁴² Transcript p.105-106.

⁴³ Record p.31.

43. The reference to section 43 of the NWA, which provides for compulsory licensing as a tool to manage water in water stressed areas was not referred to or considered during consideration of the Appellant's application in 2019. At no stage did the Respondent indicate to the Appellant, or during the hearing, whether in fact there was any compulsory licencing being implemented in the Letaba Water Management Area. This struck us as rather an afterthought or excuse to justify a legally indefensible decision.

44. The Acting Chief Director further deposed that the application was and should still be declined because there was no hydrological study to assess the impacts of the storage on downstream users.⁴⁴ Bear in mind that the downstream users are firstly the Kramer Dam which is registered to the Appellant.

45. The Acting Chief Director, and the Supervisor testified that the Appellants could continue its irrigation using existing allocation and storage dams. However, none of them could confirm any expertise in irrigation of orchards or whether they had in fact investigated the adequacy of the existing arrangement for water storage. This evidence was also controverted by the testimony of the Chief Executive Officer, and the engineer responsible for irrigation on the Letaba Estate.

FINDINGS AND DETERMINATION

46. It is clear from the evidence provided both written and oral that the Letaba Water Management Area was under stress since the time the National Water Strategy and other internal documents were prepared in 2004. However, it is also clear that

⁴⁴ Record p.32. Contrast Record p.292-294 Hydrological Study conclusion disputing this conclusion with expert opinion.

since 2004 many water use licences have been issued in the Letaba area, including in areas under the Letaba Water Users Association.

47. The evidence presented by the Appellant in the original water use licence application and the new reports provided demonstrate that the Appellant has a need for more storage in order to exercise its existing water entitlement beneficially and efficiently in furtherance of a long-standing irrigation venture which has supported many jobs and the economy of South Africa. The Letaba Estate are a leading producer and exporter of Valencia oranges and processed products. They employ 450 permanent employees and approximately 1 750 seasonal employees annually.⁴⁵ The experts who testified confirmed that, to sustain its operations the Appellant needs the additional storage of water which in any case is not an additional abstraction of water from any water source.

48. The storage dams are intended to store water drawn from the Letaba canal in respect of which the Letaba Water Users Association has existing water use rights and the Appellant, being a members are entitled to in all to 16 357 988m³/a of water which they are currently underutilising because of the storage constraints and the inefficiencies caused by the aging canal infrastructure. The canal is closed during weekends and during some draught periods. There is great demand for water in the morning forcing Appellant to irrigate at night. The storage dams have been proven to be a possible solution to the Appellant's water challenges without adding any additional stress or demand on the Letaba Water Management Area or the Great Letaba river.

⁴⁵ Transcript p.54-55.

49. The reasons provided by the Respondent to reject the application are irrelevant, immaterial, and unsubstantiated. This is inconsistent with section 2, 3, 27 (1) and 41 of the NWA. The reasons assume that the proposed dams are like new dams being constructed in-stream of perennial streams, that would extensively affect the water balance and resources in the water system. There was no effort to consider the unique nature of the proposed dams as balancing storage dams aimed to store water from the canal. Little is considered by the Respondent regarding Appellant's existing entitlement and that the storage dams will not result in the Appellant using more water than it is entitled to by law.
50. The irrelevance of the reasons can be demonstrated by the submission, which was persisted with to the end that the two proposed storage dams are part of farm dams that are affecting the capacity of the major dams in the Letaba area from being met. The undisputed evidence presented by the Appellant was that the Tzaneen, Ebenezer and Magoebaskloof dams are all upstream Letaba Estates and the proposed storage dams have no impact on these dams.
51. The Appellant provided an undisputed Hydrological Study which mapped the footprint of the two storage dams, which is insignificant in the big picture of the 61 000 m³ Letaba Water System. The study also confirmed that any impacts of the proposed dams on the episodic non-perennial streams was miniscule and insignificant.
52. Downstream users who objected to the application were concerned that the dams may result in the Appellant abstracting more water from the canal in excess of their entitlement. However, the Letaba Water Users Association, Chairperson explained

in detail how the water user rights, and abstraction are monitored in real time using modern technology leaving no chance for any user to exceed their entitlement.⁴⁶

53. At the beginning of the canal where water is diverted from the Letaba river into the canal there are gauges and at each farm there are electronic gauges that measure flow and abstraction rates which are reconciled weekly to monitor usage.⁴⁷ There is no reason to doubt that the association and the appellant will ensure that the Appellant stays within its allocated water when drawing water from the canal to fill the storage dams.

54. Furthermore, the Respondent failed to consider recent reports that could better inform its decision. Apart from failing to consider the 2013 National Water Strategy, the Respondent and their witness throughout maintained reference to the 2004 documents and ignore the later documents. The National Water Strategy of 2013 emphasises that,

“The NWRS2 is developed within a changing environment and acknowledges that monitoring and collecting relevant data will not only affect the accurate assessment of the status of water resources and the magnitude of water problems but will vastly improve planning and policy formulation processes.”⁴⁸

55. The emphasis on “changing environment” and “accurate assessment of the status of water resources” puts paid the decision to rely on a 2004 Strategy by the Respondent simply to find and maintain an argument that the water management area is water stressed and therefore no more dams can be constructed.

⁴⁶ Transcript p.108.

⁴⁷ Transcript p.108.

⁴⁸ National Water Strategy GN 845 of 2013 GG 36736 of 16 Aug 2013, p.iv. (‘National Water Strategy (2013’))

56. In addition, the goal of 2013 National Water Strategy is to ensure that “water is efficiently and effectively managed for equitable and sustainable growth and development.”⁴⁹ Among its objectives we find the following,

“Water supports development and elimination of poverty and inequality. Water contributes to the economy and job creation; and Water is protected, used, developed, conserved, managed and controlled sustainably and equitably.”⁵⁰

We find that the purposes for which the Appellant requires the two additional storage dams resonates with these national water strategy objectives.

57. While the strategy recognises the challenges of lack of transformation in water use allocation, and the persistence of historical imbalances in terms of access to water – no real dispute was raised in this appeal regarding the contribution by the Appellant to empowering previously disadvantaged persons as well as employing a majority of black person in its operations. It is up to the Respondent to effectively use relevant provisions of the NWA to address historical injustices and imbalances following proper procedures. While using section 43 of the NWA as a belated defence, the Respondent could pro-actively use that underutilised section to address the transformation issues raised by counsel.

58. In addition, reliance was placed on the Groot Letaba River Water Development project (GLEWAP)-volume 2, May 2010. Indeed, it confirms that the Letaba Water Management Area is water stressed. But that is where its relevance ends as far as this specific application for a licence is concerned. The plans and projects to augment water supply and conservation in the Letaba Water Management Area

⁴⁹ National Water Strategy (2013) p.iv.

⁵⁰ National Water Strategy (2013) p.V.

do not direct that no more dams should be licenced. More specifically nothing in the said plans and documents informs against the construction of balancing storage dams that have insignificant impact on non-perennial streams. These documents have no bearing on an application by an existing holder of water use rights, to reorganise its storage infrastructure to maximise and ensure more efficient and beneficial use of allocated water.⁵¹ They would be relevant to a new allocation and new in-stream dams that would directly impact the water resources in the water management area.

59. The Respondent ignored the recent *Reconciliation Strategy for the Luvuvhu and Letaba Water Supply System* (completed in 2015) which has up to date information on the water management area than the 2004 documents.

60. Apart from attempts to discredit the Broad-Based Black Economic Empowerment (BBBEE) ratings systems mandated by law; and in terms of which the Appellant is certified to have 25% black ownership, nothing of substance was submitted to dispute the Appellant's section 27(1) motivation. The Appellant satisfactorily addressed how the application meets the criteria in section 27(1) of the NWA. Based on the evidence presented and the documents before us, we are convinced that this is an application which should have been approved. If we properly apply our minds to all relevant factors, the legislative framework (NWA) and the strategic use of water in the area there is no other decision but to approve the application.

61. It appears from the evidence that the Respondents were peeved by the Letaba Water Users Association approving this application yet withholding their consent

⁵¹ Section 27(1)(c), (d), and (h) NWA.

to some other application which the Respondent presumably looks favourably on. However, the information provided demonstrates that the licence being referred is quite different from storage dams. Converting existing eucalyptus plantations to avocado plantation is a stream flow reduction activity which has direct potential impact on the water resources. The Chairperson of the Water Users Association explained that they only oppose licence application where the application is for new or additional abstraction which causes impacts on the already stressed water system.⁵²

62. Many of the reasons raised against the water use application are after thoughts that show that the Respondent did not fully apply their mind to documents submitted in support of the application. Despite having extensive powers in terms of the NWA to request additional information, direct the undertaking of further specialist studies or in fact undertaking those studies or investigation itself – the Respondent chose not to use those powers.

63. This confirms to us that there is nothing more that was required of the Appellant. Regardless, out of its own volition the Appellant commissioned a hydrological study⁵³ which has been especially useful in providing us with complete information on the potential impacts of the proposed two dams on the water resources and downstream users. There is no reason to doubt the findings of this report and the Respondent did not seek to put it into doubt. Neither did the Respondent ask for additional time to attempt to secure their own experts or use their internal experts to controvert the findings of this specialist study. We therefore can rely on this study

⁵² Transcript p.110.

⁵³ Record p 280 et seq.

to conclude that the proposed storage dams will have no significant impacts on the water resource or downstream water users.

64. Counsel for the Respondents proposed that should we find that the Respondent failed in its statutory duties to carefully consider the application, we should remit the matter for a reconsideration. We note, however, that for the appeal to be set down by the Tribunal and for the Respondent to provide necessary documents the Appellant had to approach the High Court on 14 August 2020.⁵⁴ The court application was withdrawn when the Respondent provided the records and requested that the matter be withdrawn.⁵⁵

65. The Appellant correctly submitted that there are four factors considered in decided whether or not to remit for a reconsideration. A court would not remit a matter where,

- a) the end result is a foregone conclusion.
- b) further delays would cause unjustifiable prejudice to the applicant.⁵⁶
- c) the functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again; and
- d) the tribunal is in as good a position to make the decision itself.

66. These factors were also considered by the court in the *Makhanya* case.⁵⁷ The court in *Makhanya* emphasised that the exercise of discretion to substitute its decision

⁵⁴ African Realty Estates (Pty) Ltd v Acting Director General: Department of Human Settlement, Water and Sanitation and others Case number 35958/2020.

⁵⁵ Record -Bundle 3 p13-14. Letter of Withdrawal dated 1 October 2020.

⁵⁶ It is nearly four years since the Appellants commenced with the preparatory work and studies for the application.

⁵⁷ *Makhanya NO v Goede Wellington Boerdery (Pty) Ltd* [2013] 1 All SA 526 (SCA) para 41-44.

was available in exceptional circumstances, especially where a court was dealing with an appeal from a specialised administrative tribunal. However, for the Water Tribunal the threshold is even lower because we are mandated by the NWA and the Rules of the Tribunal to step into the shoes of the Responsible Authority and decided on a water use licence application afresh. The nature of the appeal before us is such that no further technical input is required, and the issues raised as well as the legal context is within our competence. The delays occasioned in this matter are self-evident from the history of the case. The Appellant continue to suffer prejudice by each day that passes with no affirmative decision to construct the two storage dams. We therefore decide that we are in as good (and better) a position as the Respondent to decide on the application afresh. We have new reports available to us and had the benefit of assessment the information and evidence provided by both parties synchronously.

67. In the end we come to the decision that the Appellant must succeed and that the Respondent have not provided any meaningful reasons for refusing the water use licence. We have considered the documents submitted, relevant factors and documents, witness testimony, and legal arguments by counsel.

ORDER.

68. The appeal is upheld.

69. The Respondent be and is hereby directed **within thirty (30) days**, to issue to the Appellant a Water Use Licence in accordance with documents submitted in application number **WU7973**, file number **27/2/1/B381/7/2** submitted on 28 March

2018, subject to the standard, and any further specific conditions applicable to the nature of storage dams proposed.

70. In issuing the water use licence the Respondent shall not impose any conditions that are not based on the documents forming part of the record of appeal including the transcript of evidence and argument.

71. The water uses to be licenced in the licences shall include the following:

71.1. Section 21(b): Storage of water. Construction of two storage dams namely:

Dam 1: located on the Geographical locations $S23^{\circ} 51' 02.42'' E30^{\circ} 19' 06.33''$. Dam 1 is classified as a small-size, Category II dam with a significant hazard potential rating. The dam will have an authorised a dam wall of maximum of 12m high, a maximum base width of 63m and an embankment length of 305m (including spillway). The surface area will not exceed 14.38ha at full supply level and gross storage capacity $\pm 647\ 200\text{m}^3$. An open side channel spillway shall be constructed on the left bank.

71.2. Dam 2: located on the Geographical locations $S23^{\circ} 51' 02.42'' E30^{\circ} 19' 06.33''$. Dam 2 is classified as a small-size, Category I dam with a low hazard potential rating. The dam will have a dam wall of maximum 9.5m high, a maximum base width of 51m and an embankment length of 310m (including spillway). The surface area will not exceed 3.29ha at full supply level and gross storage capacity $115\ 000\text{m}^3$. An open side channel spillway shall be constructed on the right bank.

71.3. Section 21 (c): Impeding or diverting the flow of water in a watercourse.

71.4. Section 21(i): Altering the beds, banks, course or characteristics of a watercourse.

71.5. All the authorised water uses (Section 21 (b), 21(c), and 21 (i)) shall be as detailed in *Table 3* of the *Record of Recommendations*⁵⁸ dated 25 September 2019.

72. The Appellant shall install equipment to measure, monitor and regularly report on the amount of water held in Dam1 and Dam 2; and ensure that the primary source of water for the storage dams shall be the Letaba canal.

73. Subject to the *Regulations Regarding the Safety of Dams* in terms of section 123(1) of the NWA (Act No. 36 of 1998), in the event that a water use licence is not issued within thirty (30) days as directed, the Appellant shall be entitled to commence with construction of the dams subject to this decision, the conditions in the environmental authorisation, and all the mitigation measures in the water use licence application filed of record.

THUS HANDED DOWN AT PRETORIA ON THIS 9th DAY OF MARCH 2021.



T. Murombo
Panel Chairperson

I agree and it is so ordered:



U. Mbeki
Additional Member

⁵⁸ Record p.40.