

IN THE WATER TRIBUNAL

CASE NO.. WT12/L2/01

IN THE APPEAL OF:

CHRISTIAAN JOHANNES LOUW

APPELLANT

AND

THE DIRECTOR-GENERAL
DEPARTMENT OF WATER AFFAIRS AND FORESTRY

RESPONDENT

DECISION

1.

1.1 This is an appeal against a declaration issued in terms of section 33 of the National Water Act 36 of 1998 ("the Act") to D.G. Willemse, for the irrigation of 30 hectares of land on Portions 21 and 23 Kruys Rivier No. 80 Swellendam RD, by way of a leading turn for four days out of seven from an existing furrow and waterworks from a nameless stream which has its origin on Portion 1 De Erf (Jonkersfontein) No. 82.

1.2 Douw Gerbrand and Susara Willemse joined to oppose the appeal.

2. DECISION

2.1.1 The Water Tribunal has come to the following decision:

2.1.1.1 The declaration in terms of section 33, under reference B2/1 W, issued on 6 June 2001, is set aside, for the following reasons:

- 2.1.1.1.1 The Responsible Authority has not applied procedural fairness, by failing to grant a party whose rights would be affected by an administrative act, an opportunity to be heard, for the reasons set out in 3.1 hereunder.
- 2.1.1.1.2 The water use which was declared to be an existing lawful water use, was not a lawfully exercised water use which was discontinued for good reason, as required by section 33 of the Act, for the reasons set out in 3.2 hereunder.
- 2.1.1.1.3 The declaration of archaic water uses, which had not been utilised over many years and by various land users (for various reasons which have to do with various uses of and objective with the land), to be lawful existing water uses, is not in line with the purpose of section 33 of the National Water Act (1998), regarded against the objectives of water resources management in terms of the Act, for the reasons in 3.3 hereunder.
- 2.1.1.2 **The owner of Kruys Rivier should have, in his attempt to establish a water use entitlement on the farm, considered the following options, and the Responsible Authority should have advised and assisted him to do so:**
- 2.1.1.2.1 The entire farm Kruys Rivier was included in the Duivenhoksrivier Government Water Control Area, where water use was prohibited unless under permit in terms of section 62 of the Water Act, 1956. In 1974, when these permits were allocated, the owners of portions 21 and 23 Kruys Rivier did not apply for permits. By Government Notice No. 347 dated 23 February 1990, the deputy minister made a determination in terms of section 63(2) read with section 63(2A) to the effect that up to 15 hectares of each piece of land within the GWCA could be irrigated (irrigation potential permitting). Since any water in a public stream in the GWCA is deemed, in terms of section 63(2A), to be supplied by the Government water work, this may have had the effect that use on portions 21 or 23 Kruys River could have become lawful. Subject to an investigation into the history of the reasons why the owners/users of the respective portions of Kruys Rivier have never taken up these rights, a possible total of 30 hectares may possibly have been established for irrigation under this scheme, and the licensing thereof should be investigated.

2.1.1.2.2 An application for a licence in respect of the water (low flow) which must be released from the dam on Jonkersfontein, i.e. the water that may not be impounded in the dam as part of the lawful existing water use on Jonkersfontein, should be investigated. Although this volume of water could be trivial in view of the insignificant low flow of the stream, proper impounding could reinstate at least domestic and gardening supplies.

3. REASONS

3.1 Reasons for 2.1.1

3.1.1 Subsection 33(4) makes section 33 of the NWA subject to section 41.

Section 41 is an empowering section that gives the responsible authority wide-ranging powers to investigate the circumstances of an application before coming to a decision. Using this section, the decision-maker can place a considerable onus on the applicant to gather information. Although the relevant sections are discretionary there is a necessary implication that an investigation of considerable scope is needed before decisions are taken concerning the entitlements of individuals.

3.1.2 Louw's contention is that he was not heard before the decision was made. The common law rule of *audi alteram partem* comes into effect whenever the interests or legitimate expectations of an individual are at issue. The Promotion of Administrative Justice Act now reinforces this. A core requirement of the rule is that the individual should fully understand the nature of the pending decision and the impact on their interests. Moreover, the individual should be given an opportunity to consult others in the preparation of any response. Current policy requires state officials to carefully explain the nature of the pending administrative action.

3.1.3 The tribunal finds that the depth of investigation envisaged by the NWA was not undertaken and moreover the requirements for *audi alteram partem* were not met. The reasons for this finding are:

3.1.3.1 None of the powers afforded by section 41 were invoked by DWAF and the official's report was superficial.

- 3.1.3.2 The meeting with Dirk Louw took place before the application by Willemse for the section 33 declaration.
- 3.1.3.3 This meeting was informal without any discussions or explanations of the nature of a section 33 declaration.
- 3.1.3.4 The discussion recorded by the DWAF official was with Dirk Louw and not the owner C.J. Louw.
- 3.1.4 The Tribunal considers that the minimum action required from DWAF would have been -
 - 3.1.4.1 written notice to Louw of the application by Willemse;
 - 3.1.4.2 an explanation to Louw of the nature of the pending section 33 declaration; and
 - 3.1.4.3 an invitation and opportunity for Louw to submit information to the DWAF.
- 3.1.5 Had this been done the need for further investigation and to invoke the investigative authority in terms of section 41 would have become apparent.
- 3.2 Reasons for 2.1.2
 - 3.2.1 In his application for the section 33 declaration, the applicant relied on a water use that took place not later than 1975 and was exercised by his predecessors in title. He submitted that the water use, which is claimed, was discontinued due to the construction of a dam on Jonkersfontein in 1996, which intercepted the flow of water in the stream from which the water use was exercised by the owners of Kruys Rivier.
 - 3.2.2 However, at the time of the construction of the dam in 1996, the water use exercised by the users of portions 21 and 23 of Kruys Rivier in respect of the stream which was impounded, was no longer the same as was the case in the era of the Rall brothers, and the only water use which eventually took place, was the use of water which flowed in the furrow or the stream after rain.

Although the user of Kruys Rivier possibly restricted abstraction to 4 days per week, this was by custom, and no longer in application of the personal agreement between the erstwhile owners of the respective farms.

3.2.3 The construction of the dam to impound the surplus water which the appellant could beneficially use, as well as his reasonable share in the normal flow of the stream, was a lawful application of his statutory water right, and was not contrary to any agreement to which he was bound. However, he remained responsible to release any other water, to which he was not statutorily entitled, into the stream.

3.2.4 The failure of the appellant to release the water from the stream to which he was not statutorily entitled, caused the problems which Gunther encountered, namely that he could not longer properly water his gardens or draw household water, therein that he was then dependent on the surplus water which naturally and from time to time flowed in the stream below the dam.

3.2.5 The dam was not, as was alleged, the reason for the termination of large scaled irrigation on Kruys Rivier. This discontinuance to use four-sevenths of all the water in the stream to irrigate up to 30 hectares of commercial lands, was due to several other reasons, including natural disasters (drought, an alleged earthquake), the land use and resulting lack of interest in commercial farming by the successor-in-title, the termination of the agreement to share water between predecessors, and the disintegration of the furrow and other waterworks used for the leading of the water.

3.2.6 The water use which is, however, relevant for purposes of considering a section 33 declaration, is the most recently exercised water use, the discontinuance of this most recent use should be the reason why the water use did not take place in the two years immediately preceding the commencement of the National Water Act (referred to for purposes of this as the qualifying period).

3.2.7 A purposive interpretation of "good reason" would moreover need to refer to the objects of the NWA set out in section 2 and particularly to:

- "2(a) promoting equitable access to water;
- (c) redressing the results of past racial and gender discrimination;
- (g) protecting aquatic and associated ecosystems and their biological diversity;"

The legislator did not intend all prior uses to be readily recognised or resurrected and hence imposed the restrictive criteria in section 33 so that unless there was good reason, unused and available water could be used to further the objects in section 2 rather than vest in a use that had been lawful in terms of the Old Water Act but had been unused or not "beneficially used" in the terms used in that act.

3.2.8 "Good reason" should also be measured objectively i.e. based on what the average person would expect taking all the surrounding circumstances into account.

3.2.8.1 The tribunal takes the construct that as the life right holder's (Gunther's) use of the farm declined, the administrator of the estate or the potential beneficiaries of the estate could be expected (objective measure) to have taken steps to protect the assets and (at that time under the old Water Act) the associated entitlements to water use. Such expectation could have objectively been expected to have continued in the period between Gunther's death in 1996 and the transfer of the farm to Louw in 2000.

3.2.8.2 A decision by the title holder not to re-establish water use which was suspended by the land user, because this will cause unnecessary delays in his attempts to dispose of the land and defray his aspirations with the land, and then to sell the land on the express condition that it has no water use entitlements, cannot, in an objective test and for purposes of section 33, be interpreted as good reason for discontinuing water use. The failure to re-establish the water use entitlements would moreover likely affect the value of the land, which may be accepted to have been duly considered and conceded to by the owners.

3.2.9 During the qualifying period, there was no good reason for non-use, the only reason being the apathy to use the water on the land.

3.3. Reasons for 2.1.3

3.3.1 The NWA de-links the entitlement to use water for irrigation purposes from land ownership ("riparian principle") in favour of an administered licence system which, considering the objectives of the NWA in section 2, the creation of the Reserve in section 16 and the "trustee" provision in section 3, follows fairly closely the *res communes* principles of Roman Law. Clearly for practical reasons the change could not occur immediately, so the legislature provided for the temporary continuance of existing lawful use in section 4(2), 32, 33, 34, 35, 22(1) and elsewhere. Ultimately the responsible authority may compel any person to apply for a licence (section 43) unless their use falls under Schedule 1 or a general authorisation issued in terms of section 39. Section 27 sets out the factors that a responsible authority must take into account when considering a licence. One of these factors is existing lawful use.

3.3.2 Section 33 is part of the transitional system of recognising and managing existing lawful uses until the stage of universal authorisations or licences envisaged by section 43, is reached:

3.3.2.1 Section 32 establishes *ex lege* a use as an "existing lawful use" where such use took place at any time during the two years prior to the commencement of the NWA. This provides relatively easy access for this class of uses to be recognised as an existing lawful use. Section 33 which deals with uses that occurred more than two years prior to commencement, is more restrictive and sets the criteria analysed herein.

3.3.2.2 The purpose of section 33 is to extend the category of lawful water users in terms of previous legislation who may continue their water uses under section 32 of the National Water Act (1998), to also include those whose water uses were for some good reason not exercised in the qualifying period. If the purpose of section 33 was to allow owners or users of land to rely on long-desisted water uses (where the reasons for termination of those uses were unrelated to the reasons why those uses were not exercised during the qualifying period) to establish water use entitlements on land under the National Water Act, not only would the very purpose of the new water management system be negated, but it would lead to absurdities in the attempted application of section 33 and water use management in general.

3.3.3 The revival of long unused water uses as an alternative method for a new owner of land to vest water use entitlements in the land, is therefore regarded by this tribunal as against the spirit and purpose of the new statutory water management system.

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B. HOLLINGWORTH, M. UYS, E. DAVEY
(ADDITIONAL MEMBERS)