

IN THE WATER TRIBUNAL OF SOUTH AFRICA

HELD ONLINE

CASE NO: WT 04/19/KZN

In the appeal between:

DAVID GACE

APPELLANT

And

DEPARTMENT OF WATER AND SANITATION

RESPONDENT

APPEAL DECISION

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

Heard: 16-17 May 2022

Delivered: 31 May 2022
(Delivered electronically)

Appearances:

For the appellants: Adv. A. De Wet (Pietermaritzburg Bar)
Instructed by: R. McCarthy (McCarthy & Associates)

For the respondents: Adv. C.M Nqala (Chambers, Durban)
Instructed by: The State Attorney (KZN)

I. INTRODUCTION: WHAT HAPPENED?

1. The Appellant, who is a trustee of the Corona Farm Trust, conducts farming activities on Portion 0 of Bergview Farm No. 15150, situated at Winterton, under uThukela District Municipality in the Province of KwaZulu-Natal. The Appellant has an existing licence to use water on the farm granted in terms a water use licence (WUL) issued on 4 December 2006 for 530 000m³/ annum. This 2006 WUL is for a section 21(b) National Water Act 1998 (the NWA) use, namely storage of water in a dam. The existing dam shall be referred to as Dam 1 and the new dam as Dam 2.

2. In 2016 the Appellant purported to apply for a water use licence to build a new dam on Bergview Farm. It appears from the record and submissions by the parties that nothing became of the attempted water use licence application (WULA). However, despite not having a licence, the Appellant proceeded to consult an engineer to design a dam. Secondly, the Appellant also approached the Respondent's Dam Safety Section to obtain a dam safety classification, which was issued by letter dated 3 February 2017.¹ On 28 January 2019 the Respondent received a complaint through the Legal Department of the Department of Rural Development and Land Reform that the Appellant had commenced construction of a dam which was threatening four (4) graves of former employees.²

¹ Record p108 and 113.

² Record p95.

3. On 30 January 2019, the Respondent's compliance, monitoring and enforcement unit sent an officer to conduct a site inspection of the Appellant's farm. The Inspection Report documented that the Appellant admitted that Dam 2 construction commenced on 10 January 2019. However, the Decommission and Rehabilitation Plan notes that Dam 2 'was constructed at the end of 2018.'³ The Appellant indicated that all regulatory compliance was handled by his brother Bradley Gace who was not present during the site inspection.

4. A subsequent meeting was held between the Respondent and Bradley Gace on 1 February 2019 whereat Bradley Gace indicated that there was no water use authorisation for the construction of Dam 2, but that he had applied for the registration of the dam in 2016. Indeed, only one Form (DW762) was provided by the Appellant which concerns registration of a new dam.⁴ Bradley Gace also confirmed at the meeting that Dam 2 had a capacity of 300 000m³ with a wall 9.08m high.

5. After the site inspection of 30 January 2019 and the further meeting of 1 February 2019, the Respondent issued a Notice of Intention to Issue a Directive in terms of section 53 (1) of the NWA to the Appellant.⁵ The notice advised the Appellant that there were reasonable grounds for the Respondent to believe that a contravention of section 22 (1) of the NWA was occurring. The contravention was that the Appellant had unlawfully commenced with water uses specified in section 21 of the NWA without authorisation. The specific uses

³ Record p139.

⁴ Record p191, see also Record p97 (Inspection Report.) None of the other Forms provided to the Appellant could be produced as evidence that a complete WULA had been lodged in 2016.

⁵ Record p119.

are (b) storing water, (c) impeding or diverting the flow of water in a watercourse, and (i) altering the bed, banks, course or characteristics of a watercourse;

6. The Notice of Intention invited the Appellant to make any representations in terms of section 3(2)(b) of the Promotion of Administrative Justice Act 3 of 2000, as to why a directive should not be issued in the terms detailed in the notice.⁶ The Appellant responded by letter dated 14 February 2019 in which they specifically mentioned that in making representations they wished to state that:

1. Mr Gace wishes to co-operate with all requirements of the DWS;
2. Mr Gace will cease immediately with all water use activities relating to the dam that may have, and could potentially, impact the watercourse;
3. Mr Gace will with immediate effect commence with the Water Use License Application (WULA) process and associated DWS requirements relating to Section 21 (b), (c) & (i) water uses.⁷

These representations were rejected by the Respondent as not sufficiently addressing the unlawful water use complained of and why a directive should not issue.⁸

7. Thereafter the Respondent issued the directive on 13 March 2019 in terms of section 53 (1) of the NWA. The directive required the Appellant and Corona Farm Trust to do the following:

⁶ Record p121.

⁷ Record p124.

⁸ Record p125.

- 2.1. Within two (2) working days cease all unlawful water uses activities (construction of the unlawful dam).
- 2.2. Within fourteen (14) working days of issue of a Directive, appoint at your own expense, a relevant environmental specialist to compile a Decommission and Rehabilitation Plan for Departmental approval prior to commencing with the demolition and rehabilitation process.
- 2.3. Within thirty (30) working days of appointment of a relevant environmental specialist, submit the Decommission and Rehabilitation Plan for Departmental approval prior to commencing with the process of the demolition/decommissioning and rehabilitation.
- 2.4. Within thirty (30) working days of departmental approval, commence with all recommendations outlined in the approved Decommission/demolition and Rehabilitation Plan.
- 2.5. Within ninety (90) working days of commencement, complete the Decommission and Rehabilitation process of all the areas affected by the unlawful dam structures.
- 2.6. Within thirty (30) working days of Decommission and Rehabilitation completion, submit to this Department a post-rehabilitation report, and a monitoring report yearly thereafter for duration of two (2) years.
- 2.7. Report as per the agreed frequency, on the progress of implementation of the approved Decommission and Rehabilitation Plan to this Department.

8. It is recorded that the Directive was served on Bradley Gace by S. Sikhosana, Z. Msimang and N. Buthelezi on 14 March 2019.⁹ In May 2019 the Appellant prepared and submitted Decommission and Rehabilitation Plan required by the Directive, the essence of which was that the Appellant refused to demolish the dam wall and would rather pursue a WULA which it would use to assess and evaluate the impact of the unlawful structure.

⁹ Record p131.

9. On 6 June 2019 the Appellant lodged an appeal with this Tribunal against the Directive referred to above in terms of section 148(1)(j) of the NWA.¹⁰ At this stage it is important to record that, on the papers the appeal was lodged more than thirty (30) days¹¹ after the delivery of the Directive, and no effort was made by the Appellant to explain the late filing of the appeal or to apply for condonation. Such delay therefore continues to date and remains an open issue between the parties as we heard no argument on it.¹² Having already heard the appeal we decided to deal with the merits in the interests of justice and speedy resolution of appeals to the Tribunal.

10. The main ground of appeal raised by the Appellant is that the section 53(1) Directive was irrational, unreasonable, and unconstitutional. The latter ground, added during the hearing, is based on the claim that the demolition of the unlawful dam amounts to deprivation of property. Below we deal with the law governing the issues raised in this appeal, the nature of the contraventions by the Appellant, evaluate the evidence and information before us and rule on the appeal.

II. THE LAW AND CONTRAVENTIONS AT ISSUE.

11. The NWA is the primary legislation regulating the use of water in South Africa. In terms thereof a person may only use water as part of Schedule 1 domestic basic uses, or as continuation of an existing lawful water use under section 34

¹⁰ Section 148 (1)(j) provides that, "There is an appeal to the Water Tribunal-... (j) against a directive issued by a responsible authority under section 53 (1), by the recipient thereof."

¹¹ Section 148(3) of the NWA.

¹² *Mulaudzi v Old Mutual Life Assurance Company (South Africa) Limited* 2017 (6) SA 90 (SCA) at para [26].

of the NWA, or under a licence issued in terms of the NWA or finally under a general authorisation.¹³

12. Section 3 of the NWA bestows a mandate on the Respondent as a trustee of the nation's water resources to ensure 'that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate.' Section 3 (2) provides further that the Respondent 'is ultimately responsible to ensure that water is allocated equitably and used beneficially in the public interest, while promoting environmental values.' Lastly, to enable the effective exercise of the mandate in section 3 (1) and (2) as well as the objects in section 2 of the NWA, section 3 (3) gives the Respondent and only the Respondent, 'the power to regulate the use, flow and control of all water in the Republic.'

13. This regulation of water use is facilitated by, among others, section 40 and 41 which outline the procedures for applying for a water use licence. The procedures detailed in section 41 is augmented by various forms, guidelines and other documents that must be completed by an applicant. An application for licence therefore entails an extensive process, involving form-filling, detailed specialist studies, public participation, environmental authorisation, and site visit by the Respondent's Officers. In the case of dam construction there are dam safety requirements and regulations¹⁴ with engineering drawing and

¹³ Section 4 read with section 22 (1) NWA.

¹⁴ Section 177 to 123 of the NWA, read with Regulations regarding the Safety of Dams GNR139 of 2012 published in *Government Gazette* 35062 of 24 February 2012.

specifications that must be complied with prior to authorisation and construction.

14. If a person unlawfully commences with a regulated water use, such conduct is *per se* unlawful and a criminal offence in terms of section 151 (1) of the NWA. In addition, the NWA empowers the Respondent with compliance and enforcement powers to enable it to effectively regulate the use of water in pursuance of the objects in section 2 of the NWA. Among the enforcement provisions is section 53(1) which empowers the Respondent to issue a directive to a person suspected of having contravened a licence, any provisions of the Act or a directive 'to take any action specified in the notice to rectify the contravention, within the time (being not less than two working days) specified in the notice or any other longer time allowed by the responsible authority.'

15. Based on voluntary admissions by the Appellant and information before us, it is undisputed that the Appellant has contravened and continues to contravene several laws.

15.1. First, the Appellant wilfully and knowingly embarked on three water uses unlawfully by constructing Dam 2 in 2018. Water uses are defined in section 21 of the NWA and there is no dispute that the construction of Dam 2 by the Appellants constitute several regulated water uses.¹⁵

¹⁵ Section 21(b), 21(c) and 21(i) of the NWA.

15.2. Second, the design and capacity of Dam 2 makes it a listed activity in terms of the National Environmental Management Act 1998 (the NEMA) which may not be commenced without an environmental authorisation. Such an authorisation is granted after extensive studies to inform decision making that promotes sustainable use of natural resources. The Appellant is equally in violation of these NEMA requirements as well.¹⁶ However, section 24G of the NEMA provides a specific process to rectify activities unlawfully commenced with. Section 24G was added to the NEMA in 2004 after the Respondent discovered that it had no statutory authority to retrospectively issue environmental authorisations for unlawful activities.¹⁷ The Appellant *in casu* has embarked on a section 24G rectification application for Dam 2 whose outcome is still pending.

15.3. Third, having been issued with a Directive on 13 March 2019, the Appellant was, and remains, bound by law to comply with the Directive. That the Appellant to date has failed and or refused to comply with the terms of the Directive is itself an ongoing contravention regardless of its validity or reasonableness.¹⁸ In terms of section 148(2)(a) of the NWA the noting of an appeal to this Tribunal by the Appellant 'does not suspend a directive given under section 19(3), 20(4) (d) or 53(1).' Our courts have authoritatively ruled that a directive, just like a compliance notice, cannot be ignored, even if it is open to some challenge or legally invalid.¹⁹ In this case, however, there is

¹⁶ For this a NEMA section 31L Compliance Notice was issued against the Appellant on 8 February 2019, see Record p226-230.

¹⁷ Section 3 of the National Environmental Management Amendment Act 8 of 2004, published in GG 26570 of 14 July 2004 (effective 7 January 2005.)

¹⁸ *Khabisi NO and Another v Aquarella Investment 83 (Pty) Ltd and Others* 2008 (4) SA 195 (T) para 21-22.

¹⁹ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) para 26.

no claim that the Directive is invalid or unlawful, merely that it is irrational and unreasonable from the Appellant's perspective.

15.4. Lastly, a contravention of the NWA, as admitted by the Appellant, also constitutes a criminal offence in terms of section 151(1) of the NWA and the Appellant confirmed they have a pending criminal case in connection with Dam 2.

16. What explanation was provided by the Appellant for commencing with, and continuing with unlawful conduct? Is there any substance to the contention on appeal by the Appellant that the Directive issued by the Respondent is irrational, unreasonable, and unconstitutional?

III. ANALYSIS OF SUBMISSIONS BY THE PARTIES.

17. In support of its appeal, the Appellant testified that they are fully aware of the legal requirements to be complied with before a water use commences with a regulated water use. He testified that in 2016-2017 there was a devastating draught in KwaZulu-Natal which threatened the sustainability of agricultural activities. Therefore, Dam 1 became insufficient as a source of water to support the Appellant's farming business. In his affidavit the Appellant also stated that 'the intention of the new dam was to transfer water from the 2006 dam to the new dam since the [new dam] is situated near a feedlot below the homestead.'²⁰

²⁰ Record p55.

18. In his evidence and affidavit, the Appellant indicated that in 2016 they attempted to lodge a WULA but that the application did not elicit a response from the Respondent.²¹ Appellant further testified that at no point were they advised of what was required for a WULA to be complete and valid. Upon being questioned as to what actions were taken in response to the Directive, the Appellant stated that it stopped construction of the dam, and immediately commenced with the WULA. He stated that any water held by the dam was released.

19. Confronted with testimony from the Respondent's Officers, the Appellant did not dispute that during a follow-up second site inspection on 27 January 2021,²² three years after the issue of the Directive, Dam 2 was found full of water, with a nearby maize field. The inspection also revealed a pipe on the dam wall with live electricity pumping water. A valve was also observed released water into a nearby stream. However, such release would not be enough in terms of volume to release all water unlawfully held by the dam.

20. Regarding whether the 2016 alleged application, the Respondent's Officers provided correspondence between the Respondent and the Appellant prior to the construction of the illegal dam. This correspondence demonstrated that the Appellant was provided with guidance, advice and all the relevant forms and list of requirements that had to be complied with before the dam could be constructed.²³ As of 1 November 2016 Mr Mathonsi sent an email copying

²¹ Record p54.

²² Record p144.

²³ Record p395, emails from Mr Mathonsi on behalf of the Respondent to the Appellant dated 22 and 23 August 2016.

Appellant inquiring internally if any of the Respondent's Officers had received the Appellant's WULA. That email clearly indicates there was no WULA before the Respondent and Appellant took no further steps to respond to that red flag.

21. The Appellant in addition to the draught argument, submitted that they had obtained Dam Safety authorisation which they assumed would be sufficient. Yet the letter referred to is very clear in its advice as to what legal steps the Appellant should take to obtain approvals for the dam project.²⁴

22. The Dam Safety letter dated 3 February 2017 explicitly states, after classification information, what further laws the Appellants should comply with. It bears reproducing the contents of that letter because it is critical for an understanding of whether Appellant's unlawful conduct was wilful, and the dam constructed knowing it to be illegal.

The letter states in relevant parts that:

C. REQUIREMENTS BEFORE RAISING/ALTERING BERGVIEW DAM

- 1.1. No construction work as stipulated in regulation 4, 10 and 22 of the said regulations [Dam Safety] may commence before the appropriate steps have been followed:
- 1.2. [An applicant] must acquire the services of a professional person to design the proposed project and to draw up plans specifications for it...The person you appoint, must submit an application to the Dam Safety Office of this Department on the enclosed form (DW699E) to be approved.
- 1.3. Apply on an official application form (DW695E) for a licence to construct/alter/enlarge by submitting to the Director-General a proposed design complying with acceptable dam engineering practices.

²⁴ Record p113-114.

- 1.4. In terms of regulation 25 an application for a licence to impound after completion of the dam on the enclosed form (DW696E) must be submitted. Impoundment of the water in the dam may not commence until you are in possession of a licence to impound issued by this Department.
2. In terms of section 120 of the National Water Act, 1998 the registration information of the dam must be updated at the Dam Safety Office of the Department within 120 days of the date on which the dam becomes capable of containing, storing or impounding water. The form (DW693E) must be completed and be submitted to the Dam Safety Office for this purpose.

D. THIS LETTER SHALL NOT BE CONSTRUED AS CONFERRING EXEMPTION FROM COMPLIANCE WITH THE FOLLOWING:

1. The provisions of *Chapter 4 of the National Water Act, 1998, pertaining to the lawful water use*. Address inquiries and applications in this regard to [the Chief Director: KwaZulu-Natal]...(Water use licence requirements).
2. The provisions and regulations of the National Environmental Management Act, 1998 (Act no, 107 of 1998) regarding *control of activities which may have a detrimental effect on the environment*. (Environmental authorisation requirements).²⁵

23. The language in the above extract is unambiguous that before the Appellant commenced with the construction of Dam 2 they were fully aware of the legal requirements to obtain not only approvals relating to dam safety, but also a water use licence in terms of Chapter 4 of the NWA and an environmental authorisation (EIA) in terms of the NEMA.

24. In addition to the February 2017 letter, and prior to this letter, the Respondent's Officer testified that by email dated 23 August 2016 the Appellant was provided with over ten (10) forms and documents with advice that all those forms had to be completed and be submitted for a WULA. Among the documents sent to the Appellant in August 2016 are section 27 NWA Motivation document, forms

²⁵ Record p114.

such as DW756, 762, 763, 787, and 790. Another document lists the 'format and requirements' for a WULA, which list several specialist studies²⁶ that must be conducted and reports from which should be submitted with a WULA. No evidence was provided to demonstrate that the Appellant had complied with the advice or undertaken the extensive specialist studies in 2016.

25. The Appellant claimed to have submitted all required documents, but they could only produce one completed Form to the Tribunal. They could not produce any specialist studies reports which would have been required for the WULA to be complete. It was clear from their testimony that they did not conduct any specialist studies prior to the attempted 2016 application. By an email dated 19 September 2016 an Officer of the Respondent, who testified, advised the Appellants that he had only received a copy of an identification document, letter of authority and completed DW762 form.²⁷ The email advised the Appellants that its purported application was incomplete, and they should submit all the documents required as per email dated 23 August 2016.

26. The Appellant testified that had sent the documents by ordinary post, and no information was provided to show they followed up on that application if indeed a complete application was lodged. The escapable conclusion is that the Appellants tried to lodge a WULA but abandoned that process and decided to commence with the dam construction anyway.

²⁶ These include Wetland Studies: Wetland Delineation, Functional Assessment, Geotechnical Studies, Aquatic Assessment, Geohydrological Studies, Hydrological Studies (by a qualified Hydrologist), Water Balance, Stormwater Management Plans, Public Participation, EIA (or letter from Environmental Affairs indicating that no EIA required).

²⁷ Record p355, see Record p191 for the DW762 Form.

27. The Appellant's witness, an environmental consultant, who they have now hired to lodge a proper WULA testified that the Appellant commenced with the unlawful dam construction because they had learnt from the 2006 application process that the WULA process is lengthy and fraught with delays – therefore they decided to commence construction and hope for an opportunity to rectify by presenting the Respondent with a *fait accompli*.²⁸ A documented expert study in the Thukela River basin concludes that this trend 'is *per se* a contestation of the formal processes, and can be considered a *strategy to force licensing*, while illustrating [DWS's] limited monitoring capacity and enforcing authority.'²⁹ The effect of condoning such conduct is to pre-empt the Respondent's administrative discretion thereby undermining the objects of the NWA in section 2. It unduly influences regulatory discretion and should be discouraged. Otherwise, the Respondent will not be able to effectively exercise its trusteeship in terms of section 3 of the NWA.

28. In addition, in the representations submitted by the Appellant in February 2019, responding to the Notice of Intention to issue the directive the Appellant stated that they would 'with immediate effect, commence with the Water Use Licence Application process and associated Department of Water and Sanitation requirements relating to Section 21 (b), (c) and (i) water uses.' If a proper WULA had been made in 2016 there is no reason why in 2019 the Appellant undertook

²⁸ There have been authoritative studies showing that in the catchment area at issue in this appeal many holders of water use rights mostly commercial farmers have taken to illegally constructing reservoirs and dams prior to obtaining authorization to force authorization by presenting the responsible authority with completed projects, see Méndez-Barrientos, L. E., Kemerink, J. S., Wester, P., & Molle, F 'Commercial farmers' strategies to control water resources in South Africa: An empirical view of reform. (2018) 34 *International Journal of Water Resources Development*, 245, 252-253 and further studies there cited.

²⁹ *Ibid* (our emphasis).

to commence a new WULA. Subsequently, however a WULA was lodged prepared and lodged in November 2021. The pending WULA is not a matter before the Tribunal therefore nothing revolves around it, and we shall not address the pending WULA further.

29. Similarly, an alert about Dam 2 was raised because of the potential flooding on nearby graves, a matter which required a Heritage Assessment and was dealt with by the relevant provincial authority. We therefore do not deal with the issue of the flooding of the graves, save to highlight that it adds to the conduct of the Appellant to ignore regulatory requirements.

30. The Appellant submitted that section 53 (1) of the NWA does not authorise the Respondent to issue an order to demolish a dam. They claim and argue that removing the dam wall will constitute deprivation of property contrary to section 25 of the Constitution of South Africa.

31. They further argued and submitted that the Directive is unreasonable because in terms of section 53(1) the Respondent could have directed any other steps to be taken apart from removal of the dam wall. In particular, they submitted that the Respondent should accept and process a WULA submitted by the Appellant before ordering removal of the dam. They raised the pending WULA as a condition precedent for the rehabilitation or removal of the dam, or simply compliance with the Directive.

32. What the Appellant fails to appreciate is that the Directive was issued on 13 March 2019 at which point there was no WULA before the Respondent. The reasonableness, rationality of the Directive as an administrative act must be assessed in the context of the jurisdictional factors present on 13 March 2019 and the information available to the Respondent included any representation made by the Appellant.

33. Apart from claiming that the Respondent should consider their pending WULA, the Appellant did not make any submissions that demonstrate how the Directive is irrational, unreasonable or unconstitutional. This is the core issue before us. The Appellant's environmental consultant who testified was directed towards offering an opinion that a WUL would be granted as a definite certainty- which is immaterial to the legal issues before us. The Appellant therefore failed to demonstrate why their unlawful conduct should constrain the exercise of enforcement discretion by the Respondent through a section 53(1) Directive.

34. The Appellant presented us with an illustrative Directive issued against a water user who had constructed an unlawful dam in the North-West Province. The purpose was to show panel that the Respondent, *in casu*, should have ordered steps, other than removal of the dam. Without the full context of that North-West case, the water resources situation in the concerned catchment, and the specific circumstances of that case – the example provided is irrelevant. Administrative functionaries exercise their discretion differently and indeed as it should be to demonstrate that they have applied their mind. There is no policy or norm to routinely condone illegal structures by the Respondent proven on

the record. On the contrary, in 2021 the Deputy Minister in the Respondent expressed grave national concern about persisting construction of illegal dams and indicated that enforcement action would be enhanced.³⁰ That is far from regularisation being the default means of enforcement as claimed by the Appellant.

35. The Respondent's core submission is that the Appellant unlawfully commenced with the use of water in circumstances where they were fully aware of the requirements of the law. Having decided to undertake an unlawful activity the Appellant were served with an invitation to make representations as to why the Respondent should not exercise the enforcement powers in section 53(1) of the NWA.³¹

35.1. The Appellant's representations and the subsequent Decommissioning and Rehabilitation Plan constituted non-compliance with the Directive. Rather the steps taken constitute an attempted rebuttal and refusal to comply, despite the Appellant stating its willingness to cooperate with the Respondent.

35.2. Lastly the Respondent submitted that the Respondent exercised its powers in terms of section 53(1) lawfully, rationally and constitutionally.³² Deprivation of property is neither here nor there as the dam is firstly an

³⁰ Department of Water and Sanitation 'Deputy Minister David Mahlobo warns against illegal water use' 2 December 2021 < <https://www.gov.za/speeches/deputy-minister-david-mahlobo-warns-against-illegal-water-use-2-dec-2021-0000> > It is reported that the Deputy Minister 'added that the Department through its Compliance, Monitoring and Evaluation Unit, is making significant progress to ensure transgressors are held accountable through regular dam safety inspections and proactive investigations where illegal dam owners are directed to demolish the illegal dams.'

³¹ Record p338, 365.

³² Record p352.

unlawful structure outlawed by a law of general application, the NWA, but secondly ordering removal of the dam does not amount to deprivation – the Appellant is not deprived of any property merely by the removal of a dam that was constructed in contravention of the law and which is also a criminal offence.

35.3. Even if by any remote suggestion the removal of the Dam would amount to deprivation of property, the Appellant submit that such deprivation would not be arbitrary as section 53(1) of the NWA provides sufficient reason of such deprivation. The raising of this constitutional issue mid-hearing, which was not part of the grounds of appeal is the Appellant clutching at straws to salvage themselves from the consequences of the unlawful conduct

IV. FINDINGS: WAS THE DIRECTIVE LAWFUL, REASONABLE AND FAIR?

36. Ultimately, this appeal requires us therefore to evaluate on the available information, testimony and the relevant legal framework, whether the Directive issued by the Respondent is lawful, rational and constitutional.

37. Section 53 (1) of the NWA empowers the Respondent to direct a person 'to take any action specified in the notice to rectify³³ the contravention...'. The contention by the Appellant that 'rectification' cannot include demolition is incorrect, particularly where the contravention is not contravention of an existing authority, but an outright illegal act – whether negligent or wilful.

³³ By definition, 'rectify' means 'to set right' 'remedy' or 'to correct by removing errors' (Merriam Webster Dictionary online < <https://www.merriam-webster.com/dictionary/rectify> >

Contrary to the Appellant's submission 'any action' literally means the Respondent has a wide discretion to order 'any' steps included demolition of a dam wall and rehabilitation or restoration of the environment to its *status quo ante*. In fact, the Appellants claimed that they had complied with the Directive by restoring the *status quo*³⁴ – yet as long as the dam exists there is neither rectification of the contravention nor compliance with the Directive.

38. The jurisdictional factors for the exercise of the powers in section 53 (1) are that there must be a person who is contravening the NWA, or a requirement set/ given by the Respondent or a licence condition. The Respondent content, correctly, that a rectification by way of retrospective water use authorisation is not envisaged by section 53(1). Any interpretation of rectification as opportunity to comply refers to contravention of an existing WUL. Otherwise, a directive issued in response to an outright illegal activity or unlawful use of water is aimed at stopping the unlawful use. There is no underlying licence or authorisation by reference to which the Appellant can seek to be allowed to rectify the situation.

39. The Dam is an illegal structure, and it cannot be retrospectively authorised. Unlike the NEMA, the NWA does not have the equivalent of section 24G which allows for retrospective authorisations. In dealing with a situation prior to the introduction of section 24G of the NEMA the court in *Silvermine Valley Coalition*³⁵ held that retrospective compliance with EIA provisions was not an option as it was not statutorily mandated.

³⁴ Record p64-65.

³⁵ *Silvermine Valley Coalition v Sybrand Van Der Spuy Boerderye and Others* 2002(1) SA 478 (C)

40. Researchers writing on the subject have concluded that in the absence of an express retrospective authorisation provision, the administrative authority is left with the option of civil remedies by way of interdicts or criminal remedies where the legislation provides same (e.g., section 151 NWA) or rehabilitation, which means restoring the environment to the *status quo ante*. It is stated persuasively that, 'a developer who constructed a dam without conducting an EIA and *in the absence of authorisation should demolish the dam and rehabilitate the land before lodging a new application* and, if approval is granted, reconstruct the dam'³⁶ The *Silvermine* quandary was resolved by section 24G of the NEMA where environmental authorisations are concerned, but for water use licencing the situation remains that the Respondent is left with enforcement provisions in its tool box. As the court stated in *Silvermine Valley Coalition*,

It would appear that, in general, a person who performs an identified activity unlawfully without authorisation cannot be forced to comply with the procedure applicable to one who has in fact sought authorisation. The unlawfulness of the conduct determines the remedy. In other words the legal relief required may be different.³⁷

The Appellant cannot seek to blame anyone for the natural sequel of their illegal conduct where the chosen enforcement measure is exercised lawfully, reasonably, and procedurally.

41. Section 7 of the NWA requires this Tribunal and any water management institution to give effect to the National Water Resources Strategy (NWRS) in

³⁶ Basson, J.H.E. 'Retrospective authorisation of identified activities for the purposes of environmental impact assessment.' (2003) 10 *South African Journal of Environmental Law and Policy*, 133, p138.

³⁷ *Silvermine Valley Coalition v Sybrand Van Der Spuy Boerderye and Others* 2002(1) SA 478 (C) p488C

exercising any statutory functions in terms of the Act. The 2013 National Water Resources Strategy in obligatory terms states that,

enforcement is required to support water allocation and water allocation reform to ensure that water is used according to authorisation conditions, and by legally authorised water users. *This requires strong action to be taken against illegal water users.*³⁸

Excusing wilful unlawful use of water is inconsistent with this obligation on us as such disobedience to law jeopardises lawful allocation of water resources.

42. The Respondent acted upon a complaint that the Appellant had commenced with water uses without authorisation, in that they constructed a dam on their farm. The Appellant makes an admission that the construction of the dam contravened the law, and the dam is unlawful. No reasonable or lawful justification was provided for such unlawful conduct. The drought of 2016-2017 cannot be a just excuse to ignore the law which is aimed at ensuring sustainable use of water resources. Contrary to the Appellant's contention the drought situation called for limitation of further use of water. In line with this the Respondent issued a water use restriction notice in 2016 for the catchment area where the Appellant constructed the unlawful dam.

43. On 24 March 2016 the Respondent gazetted the water restrictions. Such water restriction notices are promulgated to curtail the exercise of water uses to enable users to adapt to a drought situation. Item 6 Schedule 3 to the NWA which authorises the water restrictions provides as follows:

³⁸ Department of Water Affairs (2013) National Water Resources Strategy (2013, 2nd ed), p50 < <https://www.dws.gov.za/documents/Other/Strategic%20Plan/NWRS2-Final-email-version.pdf> >

6. Catchment management agencies may temporarily control, limit or prohibit use of water during periods of water shortage.

(1) If a catchment management agency on reasonable grounds believes that a water shortage exists or is about to occur within an area it may, despite anything to the contrary in any authorisation, by notice in the *Gazette* or by written notice to each of the water users in the area who are likely to be affected-

- (i) *limit or prohibit the use of water;*
- (ii) require any person to release stored water under that person's control;
- (iii) prohibit the use of any waterwork; and
- (iv) require specified water conservation measures to be taken.³⁹

A situation where a water user, proceeds to construct a dam unlawfully on the basis that there is a drought when drought control water limitations are in force flies in the face of sustainability and legality.

44. Apart from the water restrictions and the drought situation, the conduct of the Appellant is flagrantly in violation of the good environmental governance and the rule of law. As Respondent rightly argues, allowing water users to commence unlawful activities and construct illegal structures, and then forcing authorisation based on such unlawful conduct is not permissible and has potential to cause regulatory chaos.⁴⁰ The Respondent retains the statutory mandate to regulate the use, flow, and control of all water in the country (section 3 (3) NWA). That power may not be adversely subjected to the whims of water users who decide to knowingly ignore the prescripts of the law. Apart from the above issue, illegal water use is a major problem impacting the effective

³⁹ Pongola-Mzimkhulu Water Management Area - Limiting the Use of Water in terms of Item 6 of Schedule 3 for Irrigation, Domestic and Industrial Purposes from Various Dams and River Systems in KwaZulu-Natal *Government Notice* 369 of 2016 published in *Government Gazette* 39860 of 24 March 2016.

⁴⁰ Record p389.

implementation of measures aimed at rationalising water allocation under the NWA.⁴¹

45. The information before us does not show that the Respondent acted unlawfully or unreasonably in issuing the Directive. The Appellant was given sufficient notice and an opportunity to make representations to the Respondent before the Directive was issued. The terms of the proposed Directive, and as it was subsequently issued, are clear and unambiguous on what was required of the Appellant.

46. The aim of the Directive and what it seeks to achieve is rationally connected to the power in section 53 (1) of the NWA and the objects in section 2 of the NWA. An order to rehabilitate the environment by restoring the *status quo ante* through removal of the dam in an environmentally sound manner regulated by a proper Decommissioning and Rehabilitation Plan is not only rational, but also one of several reasonable steps that can be ordered. That the Respondent could have ordered any other steps favourable or agreeable to the Appellants does not *per se* imply that the steps orders are irrational or unreasonable. As the court stated in *Fair-Trade Independent Tobacco Association*

The question before us is not so much whether the Minister could have adopted less restrictive means. The question that is before us is rather whether the means used were rational *and not whether other or better-suited means could have been adopted by the Minister*. We find that the argument on potentially less restrictive measures tendered by FITA is misplaced given that in terms of rationality review the question is not whether better, or less restrictive means could have been adopted but rather whether the means that were adopted

⁴¹ Ginster, M., et al 'Views on unlawful water abstractions along the Liebenbergsvlei River, South Africa.' (2010) 6 *TD: The Journal for Transdisciplinary Research in Southern Africa*, 1-24.

forged a rational connection with the intended end. We find that here too the means adopted do indeed forge a rational connection with the intended end.⁴²

While applying our minds to the matter afresh, in the context of the water legislation, and the testimony before us, we would arrive at the same conclusion as the Respondent and reinforce the Directive.

47. The Appellant persisted with the argument that an expert hydrologist who prepared the Decommissioning and Rehabilitation Plan which effectively sought to change what was ordered, should be given weight.⁴³ However, instead of advising and directing such expertise towards enabling the Appellant to comply with a lawfully issued Directive, the hydrologist, Dr B Scott Shaw, sought to demonstrate that he had better, but contrary, ideas of solving the problem than the Respondent. The section entitled 'Decommissioning of Water Use Activities' is a complete rebuttal of the Directive which is the opposite of compliance.⁴⁴ The very environmental problems that the expert hydrologist alleged would result from a demolition of the dam, were the precise reasons why the Respondent directed the Appellant to hire an expert to prepare a decommissioning and rehabilitation plan for the removal of the dam. For the Appellant to claim the dam could not be removed due to environmental problems, is the opposite of what was ordered and pure intransigence.

⁴² *Fair-Trade Independent Tobacco Association v President, RSA and Another* 2020 (6) SA 513 (GP) para 50 (our emphasis).

⁴³ Record p373-374.

⁴⁴ Record p139.

48. Water law and policy evidenced by the National Water Resources Strategy shows that the enforcement means chosen by the Respondent, which we endorse, meets the threshold of rationality set by our courts. Nothing in Appellant's submission proves procedural irrationality. The issue of a section 53(1) Directive is rationally connected to the legitimate objects of the NWA. Without the power to issue the Directive, the Respondent would be unable to effectively exercise its statutory powers.

49. To present day, the Appellant persists in their unlawful conduct in that an appeal to the Tribunal does not suspend the Directive and the Appellant should be taking steps to comply, failing which the Respondent should take such steps and recover any attendant cost from the Appellant. When there is rain, the dam fills with water which amounts to storage of water, impeding flow of a water course and altering the bed, banks of a water course. Despite undertaking in its representations to cease all unlawful water uses, the Appellant's refusal to remove the dam *de facto* implies a continuation of the section 21(b), (c) and (i) uses. Such uses jeopardise other water uses including ecosystem or ecological needs.

50. While Appellant appears to labour under the error that only other human water users should complain about there to be prejudice, the unlawful water use is potentially threatening to ecological needs downstream and the ecological reserve for which no one but the Respondent is the custodian. That no other downstream water user has complained does not mean the water uses are not harming the catchment area and water resources in the area. Any water

captured by the dam impacts on the water balance and availability in the ecosystem as the water cycle is connected rain run-off feeds into surface and ground water.

V. ORDER.

51. The appeal is hereby dismissed.

52. The Directive issued by the Respondent on 13 March 2019 is hereby confirmed and the Appellant is directed to comply with the Directive within fourteen (14) days.

HANDED DOWN AT PRETORIA ON THIS 31ST DAY OF MAY 2022.

T. Murombo

Panel Chairperson

I agree and it is so order:

U. Mbeki

Additional Member of the Tribunal