

**IN THE WATER TRIBUNAL OF SOUTH AFRICA  
HELD AT PRETORIA ON THE 18<sup>TH</sup> OF JULY 2017**

**CASE NO. W002/16/FS**

In the Appeal between:

**DEON SMIT**

Appellant

And

**THE PROVINCIAL HEAD: FREE STATE REGION**

**DEPARTMENT OF WATER AND**

**SANITATION**

First Respondent

And

**THE DEPARTMENT OF WATER AFFAIRS**

**AND SANITATION**

Second Respondent

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**APPEAL DECISION**

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**APPEARANCES:**

<b>Coram</b>	<b>:</b>	<b>Mr F ZONDAGH</b>	<b>Chairperson</b>
	<b>:</b>	<b>Ms M. NKOMO</b>	<b>Member</b>

**FOR THE APPELLANT:** **Mr Deon Smit (in person)**  
**(assisted by D J Holson)**

**FOR THE RESPONDENTS:** **Advocate C. Mavunda**  
**Instructed by the State Attorney**

**1. DETAILS OF HEARING**

1.1 This is an Appeal before the Water Tribunal brought in terms of Section 148(1)(e) of the National Water Act 1998 (Act No.36 of 1998) (N.W.A) against a decision of

the Responsible Authority made in terms of Section 35(4) of the above referred Act in respect of the farm WATERVAL 55, ALIWAL NORTH.

1.2 The hearing was held and conducted at the Office of the Department of Water and Sanitation, Pretoria on the 18<sup>th</sup> July 2017. The proceedings were electronically recorded.

## 2. **ISSUES TO BE DECIDED**

2.1 The Tribunal was required to decide, given the basis of the Appeal set out in the Respondents' Notice of Appeal dated the 27<sup>th</sup> September 2013 together with the amended Notice of Appeal, dated the 26<sup>th</sup> July 2016 whether or not there existed the facts necessary to sustain the decision taken by the Responsible Authority in terms of Section 35(4) of the National Water Act 1998 (Act 36 of 1998) (NWA) in which the water use on the Remainder of Waterval 55, District Aliwal North, (Waterval) derived in terms of the Repealed Water Act (Act No. 54 of 1956) from the Kraai River and Dams on the farm was limited to reflect the extent and lawfulness of his "possible existing lawful water use" as being 175000 m3 per annum from a Dam, and omitting the taking of water from the Kraai River as a water source. It also stipulated that no water use in excess of the determined water use may be used on the property. The storage of water was determined and confirmed as being 33600 m3.

2.2 In the event of the foregoing being decided in the negative, the Water Tribunal was inter alia requested to:-

2.2.1 Confirm the entitlement of the Appellant as a continuation of an existing lawful water use to irrigate a field crop area of 70 hectares on the Remainder of Waterval 55, District Aliwal North.

2.2.2 Confirm the entitlement of the Appellant to the water from the Kraai River and the Dams (4) on the farm at a volume of 560000 m3 per annum.

### **3. BACKGROUND TO THE ISSUE**

3.1 On the 2<sup>nd</sup> October 2002 following a process in which the Appellant was requested to register his Water Use, a Water Use Certificate No. 26016490 was issued to the Appellant in terms of the National Water Act (Act 36 of 1998) recording the following:-

3.1.1 Section 21(b) for the storage of 33600 m3 in four Dams. (Water use no. 1).

3.1.2 Section 21(a) for taking water for irrigation purposes from a Dam the total volume being 87500 m3 per annum. (Water use No. 2).

3.1.3 Section 21(1) for taking water for irrigation purposes from the Kraai River, the total volume being 87500 m3 per annum. (Water Use No. 3)

3.2 On the 27<sup>th</sup> March 2013 a notice in terms of Section 35(1) of the National Water Act 1998 (Act 36 of 1998) (NWA) was addressed to the Appellant advising that the Respondent was engaged in the verification of all water uses in the Orange Proto CMA. It invited the Appellant to apply for the verification of its water use in order to confirm the lawfulness and extent thereof as provided for in the NWA.

3.3 Table 2 of the Section 35(1) Notice under the heading "*Water use entitlements and water uses during the qualifying period*", sets out the extent of the lawful water use authorised in terms of Sections 9 and 10 of the now Repealed Water Act 1956 (Act 54 of 1956) (RWA). It confirms the water entitlement in respect of

the Remainder of Waterval 55, Aliwal North at the time as being 175000 m<sup>3</sup> per annum for a field area measuring 70 ha. but omits any reference to the water source indicated on the Registration Certificate as being the Kraai River.

3.4 Table 2 further provided for what was referred to as “*water used during the qualifying period*”. The extent hereof was indicated as being 70 ha in respect of the field and crop area and confirmed an extraction volume of 175000 m<sup>3</sup> per annum from 4(four) Dams. The volume so indicated was thereafter recommended as the “*possible existing lawful water use*”. Once again no reference is made in respect of the water source or the field and crop area, notwithstanding the registered use confirming the source as “Dam/Kraai River”.

3.5 The source of the information utilised in support of this recommendation was, according to the notice, the following:-

- (i) Appellant’s Registered Water Use;
- (ii) Field surveys;
- (iii) Satellite images; and
- (iv) Applicable Government Notices.

4. The notice reminded the Appellant to apply for verification of its water use in order to confirm the lawfulness and extent thereof as provided for in Section 35(1) of the Act, such application to reach the Responsible Authority on or before the 8<sup>th</sup> of May 2013. It also referred the Appellant to the Responsible Authority’s power to request further information relating to the application whilst affording the Appellant the opportunity of making further representations. [Vide Section 35(3) (a) to (d) of the NWA].

5. The application form attached to the Section 35(1) Notice makes provision for the submission of “any documentation in support of the Appellant’s representation only in the event of disagreement with the “*possible existing lawful water use*” set out in paragraph 5 (A – D). In this event the Appellant is requested to complete paragraph

6 and 7 of the notice and in support of its disagreement the following documentation may be included:-

*2(a) Any permit, water court decision, servitude, agreement or other legal proof allowing you to abstract or store water.*

*(b) Any determination in terms of Section 33 of the National Water Act, 1998, declaring your water as existing lawful water use.*

*(c) Evidence or proof of why you should be allowed to irrigate a larger area or may abstract/store more than the allowable volume on the property or any proof of authorisation or transfer of water use entitlements (temporary or permanent).*

The Appellant formally responded to the contents of the 35(1) Notice by indicating on the form returned to the Department of Water and Sanitation on the 11<sup>th</sup> of April 2013 that he did not agree with the "Irrigation (m3/annum)" set out in paragraph 5(A) of the notice clearly indicating his disagreement by entering "NO" in the relevant tick box provided. However he did not avail himself of the invitation to complete the rest of the form neither did he submit any documents in support of his disagreement having confirmed during the Registration process only irrigating 38 ha in 2000 to 2001. His disagreement clearly relates to his water use during the Qualifying Period that far exceeded the volume indicated on the Registration Certificate and contained in the Section 35(1) notice.

6. On the 24<sup>th</sup> May 2013, the Appellant wrote a note to the Responsible Authority in which he conditionally accepted the contents of the Section 35(4) notice dated the 27<sup>th</sup> March 2013, subject to a later application in the event of requiring an increase in the volume of his water use.
7. On the 18<sup>th</sup> of July 2013 the Responsible Authority formally confirmed its recommendation by issuing a notice in terms of Section 35(4) of the Act to the Appellant in terms of which the recommended "*possible existing water use*" referred

to in Table 2 of the Section 35(1) notice was determined and confirmed as being the “*extent of the existing lawful water use*” contemplated in terms of Section 32(1) of the Act. It limited the taking of water for irrigation purposes to 175000 m3 per annum and the source as “Dam” thereby omitting any water use from the previously authorised source being the Kraai River. The storing of water was confirmed as being 336000 m3. It also forbids any water use on the property in excess of the use determined therein.

8. On the 25<sup>th</sup> September 2013 the Appellant having now realised that the allocation in terms of the Section 35(4) notice and the omission therein of the Kraai River as a water source was incorrect. This together with the failure to include all the irrigated areas on the diagrams (Pages 66 and 67 of the record) herein after referred to as the “Diagrams” that was revealed during a meeting with the Respondent’s officials on the 17<sup>th</sup> September 2013, compelled the Appellant to file an Appeal against the determination on the 27<sup>th</sup> September 2013.
9. Subsequent to the filing of the Appeal on the 27<sup>th</sup> September 2013, no further communication either telephonically or in writing was received from the Responsible Authority. Only on the 3<sup>rd</sup> February 2016 at the instance of the Appellant was contact made with the Registrar of the Water Tribunal.

#### 10. **THE BASIS OF THE APPEAL**

- 10.1 On the 26<sup>th</sup> July 2016 the Appellants filed, as they are entitled to do in terms of Rule 3(2) of the Rules of the Tribunal, an amended (amplified) Notice of Appeal setting out further grounds on which it would rely in appealing the decision of the Respondent. The grounds set out in the amplified Notice of Appeal are recorded hereunder:-

- 10.1.1 On the 31<sup>st</sup> July 1981 a subsidy was granted for the development of a sprinkler irrigation system whereby 17Lt/Sec could be taken from the Kraai River for this purpose. (Extraction Position 1).
- 10.1.2 On the 28<sup>th</sup> November 1983 a further subsidy was received to develop a flood irrigation system whereby 68.1Lt/Sec could be taken from the Kraai River for this purpose. (Extraction Position 2).
- 10.1.3 These subsidies entitled the legal irrigation of 70 ha using a combination of flood and sprinkler irrigation that was used since the granting thereof right throughout the Qualifying Period and thereafter.
- 10.1.4 Although the Section 35(1) notice correctly indicated the field and crop area as being 70 ha the water use indicated as being 175000m3 from Dams and the Kraai River was incorrect.
- 10.1.5 Notwithstanding the Appellant's disagreement with the contents of the notice the Responsible Authority, in the subsequent Section 35(4) notice, persisted in its view by confirming the taking of Water for irrigation purposes as being 175000 m3 from a source referred to as "Dam" and omitted the Appellant's longstanding entitlement and extraction from the Kraai River.

## **11. THE RESPONSE BY THE RESPONSIBLE AUTHORITY**

11.1 On the 20<sup>th</sup> December 2016 the Responsible Authority filed a response to the Notice of Appeal received by them only on the 19<sup>th</sup> September 2016 in which the following was confirmed:-

11.1.1 The Registered Water Use of the Appellant as it appears on the Water Use Authorisation and Registration Management System (WARMS) under Registration No. 23040436L -

WATER USE 1 Taking 336000 m3 in 4 (four) Dams;

WATER USE 2 Taking 87500 m3 per annum from Dam;

WATER USE 3 Taking 87500 m3 per annum from Kraai River.

11.1.2 The issuing of the Section 35(1) on the 27<sup>th</sup> March 2013.

11.1.3 The request in terms of Section 35(3) (a) to (d) on the 16<sup>th</sup> May 2013 to furnish further information in view of the Appellants disagreement with the contents of the notice.

11.1.4 The final determination in terms of a Section 35(4) notice on 18<sup>th</sup> July 2013 following the Appellants acceptance of the determination contained in a letter from the Appellant dated the 24<sup>th</sup> May 2013.

11.2 That The Appellant failed to comply with the provisions of Section 32 as an Existing Lawful Water User in that during the qualifying period:-

11.2.1 He did not utilise all the existing water use allocated from the Kraai River. (Vide paragraph 1.8 of the reply).

11.2.2 That the Appellant on his own admission during consultations with the Department of Water and Sanitation's appointed consultants confirmed that only 38 ha. on the farm was being irrigated and that this information was captured on the Water Use Summary and therefore indicates that the Appellant did not use all his water during the Qualifying Period. (Vide paragraph 1.9 of the reply).

11.2.3 That the remote sensing information (Satellite images) gathered by the Responsible Authority only identified water use from the Dams during the Qualifying Period. This it is alleged corresponds with the information received from the Appellant during the consultation process as well as the information reflected in the Section 35(1) notice issued by the Respondent. (Vide paragraph 1.10 of the reply).

11.2.4 That the Appellant failed to furnish any additional information in terms of the Section 35(3) request in support of his application.



11.2.5 That the Appellant on the 24<sup>th</sup> May 2013 accepted the allocation determined by the Responsible Authority in writing.

11.2.6 The Responsible Authority thereafter and based on the above, confirmed the determination in terms of Section 35(4).

## **12. THE PROCEEDINGS**

12.1 It is clear from the response provided by the Respondent's that it takes no issue with the requirement that an Existing Lawful Water Use as defined in Section 32(1) (b) (i) of the NWA is that

*"which was authorised by or under any law which was in force immediately before the date of commencement of this Act".*

In this regard the Section 35(1) notice confirms the water use as being authorised in terms of the Repealed Water Act 1956 (Act 54 of 1956) (Sections 9 and 10) and therefore this requirement is not in dispute.

12.2 In addition to the requirement referred to above, an existing Lawful Water Use is further defined in terms of Section 32(1(a) of the NWA as that

*"which has taken place at any time during a period of 2 (two) years immediately before the date of commencement of this Act".*

12.3 It is this latter requirement exercised during the Qualifying Period, in this instance the 1<sup>st</sup> October 1996 to 30<sup>th</sup> September 1998, that the Appellant is required to satisfy and the Respondents, via the process provided for in Section 35 of the Act, must establish to enable a determination envisaged in Section 35(4) of the Act, Act 36 of 1998. This is the subject of the Appeal.

## **13. THE EVIDENCE: (DEON SMIT)**

The Appellant in support of his Appeal testified as follows that:-

- 13.1 The farm known as the Remainder of Waterval 55, Aliwal North was acquired by his father in 1973 from the previous owners who had been irrigating the lands from Dams situated on the farm.
- 13.2 The Appellant commenced with irrigation during 1997 extracting from the Kraai River by way of diesel pump. A power point was later provided by Escom from which the irrigation on the farm was continued utilising electrical power. This power point is herein later referred to as Extraction Point No. 1. A second power Point referred to as Extraction Point No. 2, was installed at a later stage when authority to extend the irrigation on the farm was granted.
- 13.3 This authority authorised in 1982 by the then Department of Agriculture extended the crop area by increasing the existing +- 26 ha with an additional +-41 ha thus bringing the total crop area under irrigation to +- 67 ha.
- The irrigated field areas were planted at various stages and throughout the year with maize, oats, lucerne, sorghum and grasses. The irrigation was conducted by way of a system of sprinkler and flood irrigation. The irrigation took place via the 2 (two) extraction points on the Kraai River referred to as Extraction Points 1 and 2 as can be seen from Exhibit No 7 and 8.
- 13.4 The subsidy provided to the Appellant was measured in Lt/sec and was allocated as follows:-
- The original +- 26 ha @ 17Lt/sec and
- The additional +- 41 ha @ 68 Lt/sec.
- This allocation entitled the Appellant to an annual water use of 132192 m<sup>3</sup> per annum in respect of the original crop area and 529416 m<sup>3</sup> in respect of the additional crop area. The total annual extraction therefore equates to the extraction of 661608 m<sup>3</sup> per annum from the Kraai River.
- 13.5 The Appellant confirmed that the full allowable extraction volume from the Kraai River and the Dams was utilised from 1982 throughout the Qualifying Period and continued until 2000. In support thereof he referred the Tribunal to

the satellite images Exhibit 7 and 8 produced at the time that reflects the totality of the lands irrigated from extraction Points 1 and 2. It shows the total field area irrigated at the time and identifies the contoured areas as being those under flood irrigation. The total field area indicated on the images according to the Appellant represents approximately 67 ha.

In the year 2000, all flood irrigation ceased in view of the cost implication and the extraction of water from Point 2 was also discontinued for the same reason.

Extraction however continued from extraction Point 1.

13.6 During 2001 and 2002 the Department embarked on a Water Registration process and utilised the services of consultants with whom the Appellant interacted and to whom he explained his water use at the time. Having at that stage discontinued the extraction activities from the Kraai River at Extraction Point 2, the information contained in the Registration Certificate was clearly prepared and issued following these meetings and was based on the information disclosed by the Appellant that at that stage only 38 ha was being irrigated. This water use did not relate to the Appellant's actual water use during the Qualifying Period. A Registration Certificate was issued based on this information.

13.7 During March 2013 the Responsible Authority embarked on a Verification and Validation process and the required documentation indicating the "possible existing water use" was provided to the Appellant to which he was required to respond. It is common cause, that except to indicate his disagreement with the allocated annual volume and the source thereof, he failed to furnish the Responsible Authority with any document or evidence called for in terms of Section 35(3) (a) to (d). Without any further response to the report he confirmed in a letter dated the 24<sup>th</sup> May 2013 to the Responsible Authority his conditional acceptance of the "*kwota soos aan my toegeken 27 Maart 2013*" on the basis that should he increase his water use at a later stage, he would make the necessary application.

The Appellant explained that only after his father, in whose name the Remainder of Waterval 55 was registered, passed away in 2011, was he placed in a position to develop those field areas in respect of which the irrigation was discontinued in the year 2000 and so to continue with the water use as it occurred during the Qualifying Period. The Responsible Authority thereafter, communicated its determination in the Section 35(4) notice dated the 18<sup>th</sup> August 2013 to the Appellant.

13.8 Soon after the receipt of the Section 35(4) notice, the Appellant realised that he had been mistaken in accepting the determination on the basis set out in the Section 35(4) notice, particularly in view of the fact that the Kraai River as a lawful source of his water use, was omitted. Although he made several attempts to engage the officials of the Department of Water and Sanitation to discuss the actual state of affairs and notwithstanding meetings scheduled for the 3<sup>rd</sup> and 17<sup>th</sup> September 2013 with Mr Schrader, an official of the Department of Water and Sanitation, the first meeting was postponed and the latter inconclusive. The assistance of other officials to which he was referred did not lead to a resolution of the matter. He then, immediately after these failed attempts, filed a notice of his intention to Appeal the decision. His Appeal although not on the approved form, was lodged on the 27<sup>th</sup> September 2013.

Only during 2016 did he manage to communicate with the Registrar of the Water Tribunal and filed the amplified reasons of Appeal.

13.9 On completion of his evidence in chief, and during cross-examination by the Respondent's Counsel he confirmed that:-

13.9.1 He had disagreed with the information reflected in the Section 35(1) notice to the extent that the information relating to his water use was incorrect. He admitted that he had not replied to the request for additional information and had only accepted conditionally the determination contained in the Section 35(4) notice.

- 13.9.2 He admitted having accepted the determination provided in the Section 35(4) notice but had done so conditionally on the basis that his water use be extended to that which was utilised during the Qualifying Period on application at a later stage. He reiterated that having realised the implication hereof he immediately went to great lengths to discuss the matter with the Responsible Authority's official, but received no response.
- 13.9.3 The "Diagrams" presented to him during a meeting with Mr Schrader on 17 September 2013, were illustrations of the irrigated field areas prepared by the consultants from information he supplied during the consultation process but according to his evidence did not reflect the entire field area irrigated at the time. The handwriting thereon was also that of the consultants and not his.
- 13.9.4 The relevant "Diagrams", were both completed on 22<sup>nd</sup> March 2012 and the Diagram on Page 66 indicates the following: - "*Tans word 38 ha besproei*" thus relating to the current field areas under irrigation while the "Diagram" on Page 67 contains the comment "*70 ha was besproei*" vloed mielies en sorghum" clearly referring to the field area irrigated during the Qualifying Period. These "Diagrams" would prove to be most significant during later evidence.
- 13.9.5 He confirmed having extracted the full volume of water based on the subsidy calculations during the Qualifying Period and that the field areas irrigated during that period is evidenced by the satellite images entered into evidence as Exhibits 7 and 8.

#### **14. EVIDENCE ADDUCED BY THE RESPONDENT: (CARLO SCHRADER)**

- 14.1 The Respondent called Mr Carlo Schrader, a Control Engineer and Technician in the Department of Water and Sanitation responsible for water

resource management in the Orange Proto-CMA (Catchment Management Agency) who testified that:-

- 14.1.1 The Respondent conducted a consultative registration programme during 2001 and 2002. The purpose was primarily to establish a Departmental Data Base of the water users and the extent of their water use. This process was carried out by departmentally appointed consultants and the information gathered from the water users informed and underpinned the WARMS (Water Use Authorisation and Registration Management System) data base which inter alia enabled the Responsible Authority to identify correctly the user and the water use. In addition it enabled the Respondents to issue Registration Certificates to water users and was also later used to inform and present the preliminary determination provided in the Section 35(1) Notice sent to the Appellant in 2013.
- 14.1.2 The contents of the WARMS documentation and in particular the source documents available to the Department of Water and Sanitation was made available and explained to the water users during public consultations. It was according to the witness the duty of the water users to indicate the correctness or not of the captured information and to make such corrections as what was necessary for the Department of Water and Sanitation to accurately complete the information. Any dispute relayed to the consultants during the public consultations, would have resulted in the information contained in the WARMS Data Base to either be confirmed or amended. This information, together with that appearing on the Registration Certificate, the information extracted from the use of their remote sensing capability (Satellite images and computer modelling programmes (SAPWAT) would be utilised to present the preliminary determination contained in the Section 35(1) notice.

- 14.1.3 In respect of this evidence he referred to the Water Use Summary report (Pages 60 to 65 of the record). This particular document was presented to the Appellant during the public consultation to inform the Appellant of the information relating to his water use during the Qualifying and subsequent periods. The process also invited the Applicant to confirm its correctness or otherwise.
- 14.1.4 Although the Appellant confirmed on the Water Use Summary Report that he was in agreement with the allocated storage, he failed to indicate his disagreement with the water source reflected as being a Dam neither did he indicate his disagreement relating to the volume of water he could extract. He concluded that the Appellant in view of this failure gave no indication that the preliminary information contained in the WARMS data base was wrong.
- 14.1.5 He conceded that the WARMS Registration, as part of the Abstraction-Irrigation Data (Page 64 of the record) of the Water Use Summary, confirmed the field and crop area as being 70 ha in total of which lucerne represented 36 ha and summer pastures represented 35 ha all irrigated by the flood furrow method or by way of a quick coupling sprinkler irrigation system. This was all achieved from a water source registered as being a Dam and the Kraai River from which 175000 m<sup>3</sup>/per annum could be extracted. He testified that the farm Waterval 55, Aliwal North did not form part of a Government Water Scheme, was not subject to any "proclamation" or a particular determination limiting the extent of the Appellant's water use. The alleged extraction by the Appellant of 661000 m<sup>3</sup> during the qualifying period could therefore represent an existing lawful use provided that it represented the maximum use during the Qualifying Period.

14.1.6 He testified that the WARMS data reflected in the Water Use Summary (Page 64 of the record) shows that although 70 ha was indicated as the field area during the Registration process, their data, based on the collective information emanating from satellite images, computer modelling and user information concluded that during the Qualifying Period only +- 33.5 ha of field area was being irrigated from Dams (4). This information he contends was provided by the Appellant when compiling the "Diagrams" and differed from the extent of the field area allegedly irrigated, as well as the water source from which the water was taken during the Qualifying Period. As a result the reasons for omitting the Kraai River as a water source from the Section 35(4) determination, was based on the Appellant's failure to correct the WARMS documentation that incorrectly omitted the Kraai River as a water source and the Appellant's failure together with the Satellite imaging that the Respondent had at its disposal, confirmed its omission as well as the field area irrigated at that time. Notwithstanding the Registration Certificate indicating the Kraai River as a water source, the witness contended that it was merely a claim of the Water User. His failure to stipulate the water source as being the Kraai River during the consultation process coupled with the absence of any indication that the Appellant was using the Kraai River as a water source during the Qualifying Period informed the contents of the WARMS data base that resulted in the determination reflected in the Section 35(4) notice, the Kraai River as a water source was omitted.

[Vide Page 95 (15 – 24) of the Transcription]

[Vide Page 99 (15 – 25) of the Transcription]

[Vide Page 100 (5 -15) of the Transcription]



## **15. RE-EXAMINATION**

- 15.1 The Appellant took issue with the evidence of Schrader and pointed out that during the consultations he provided the consultants with all the relevant information relating to his past and present water use. He put it to the witness that the information, particularly the field areas shown on the "Diagrams", showing the irrigation that took place during the Qualifying Period is not accurately reflected.
- 15.2 He put it to the witness that during the Qualifying Period he had used the full allocation and irrigated 70 ha from the Kraai River. In answer the Respondent replied that the satellite images did not confirm the allegation and that all their information on which they based their determination was made available during consultations and it is still available in their file. This information he confirmed, consists of the source documents in particular the Satellite images available to the Responsible Authority that informed the Water Use Summary in reaching the final determination. The determination was based on the collective information received but in particular, on the information displayed on the "Diagrams".
- 15.3 The witness when challenged conceded that these source documents, in particular the Satellite imagery and computer based modelling that included SAPWAP calculations were not made available to the Tribunal or the Appellant during the hearing. This documentation was however allegedly made available during the public consultations.
- 15.4 In view of the absence and the failure of the Respondent to produce these documents in evidence and faced with the possibility of a postponement to allow the Respondent the opportunity to present the documents before the Tribunal, two (2) satellite images (Exhibit 9 and Exhibit 10) were handed up by the Respondent. Mr Schrader identified Exhibit 9 as being a satellite image of the irrigated areas on the farm Waterval during the Qualifying Period, while Exhibit 10

represents a satellite image in respect of the irrigation during the period in which the Verification and Validation process took place.

15.5 The Appellant confronted the witness with the images apparent on Exhibit 9 and put it to the witness that it was quite clear from Exhibit 9 that the field area irrigated during the Qualifying Period far exceeds that which appears in the "Diagrams" on which the Responsible Authority relied to inform the contents of the Water Use Summary and led to the assumption that the Kraai River was not utilised by the Appellant as a water source.

15.6 Having traversed and interrogated this latest piece of evidence presented to the Tribunal, the Respondent, conceded that the irrigation as shown on the satellite image (Exhibit 9) indeed took place during the Qualifying Period and that the areas irrigated clearly visible thereon were substantially in excess of the 38 ha originally determined by the Responsible Authority. The witness also conceded that the assumption that the Appellant was not using the Kraai River as a water source was therefore incorrect.

## **16. ANALYSIS OF THE EVIDENCE**

16.1 The Appellant appealed the correctness of the Respondents' Section 35(4) determination on the basis that the irrigation that took place on the farm Waterval 55 since 1980, at first for a field area of +-26 ha and later during 1982 increased with +-40ha, was authorised for a total extraction volume of 85 lt/sec, thus enabling a water use of 661000 m<sup>3</sup> per annum that could be legally extracted from the Kraai River and Dams on the farm in respect of field areas measuring 70 ha.

16.2 The full extraction according to the Appellant took place throughout the Qualifying Period until the year 2000 when part of the irrigation activities were discontinued. In proof of this allegation the Appellant tendered Exhibits 7 and 8.

In the year 2000, irrigation as a function of cost was reduced to a field area of 38 ha. This information was furnished to the Respondents' consultant during the Registration process that was conducted during 2001 to 2002. In the light of the reduced field area under irrigation, the extraction volume was reduced and registered as being 175000 m<sup>3</sup>/per annum that appeared to be sufficient at that time. However the registered field area remained as 70 ha. The information thus conveyed to the consultant, was inserted into the Respondents' WARMS data base.

- 16.3 The Section 35(1) process that commenced in 2012, once again conducted by consultants, produced the information contained in the Water Use Summary Report on which the Respondent relied to finalise its determination. In addition to the summary, the consultants produced the "Diagrams" that according to the evidence of the Respondent supported the contents of the Water Use Summary Report, particularly that which is referred to under the heading "Abstraction-Irrigation" (Page 64 of the record). The "Diagrams", according to the Respondents' evidence formed the basis of the final determination and was prepared from information supplied by the Appellant and underpinned by utilising Satellite imagery (Landsat). The conclusion drawn from this and the failure by the Appellant to indicate any disagreement with the information contained in the Water Use Summary resulted in the final Section 35(4) determination.
- 16.4 The Appellant's evidence supported by the Satellite images Exhibits 7 and 8, both of which were tendered as proof of the Appellant's water use from the Kraai River during the Qualifying Period, was challenged by the Respondent using the "Diagrams" as the basis of disputing the Appellant's claim.
- 16.5 However the production of Exhibits 9 and 10 by the Respondents on its own accord, confirms that its content is at variance with the evidence tendered in support of the Section 35(4) determination having conceded that Exhibit 9, a satellite image of the irrigation that took place on the farm during the Qualifying

Period, supports the Appellant's reasons for the Appeal. It follows that the information on which the Respondents based its decision, was incorrect and the Section 35(4) notice stands to be set aside.

17. The Respondent in view of its concession indicated their willingness to agree to an amended determination.

18. **DECISION**

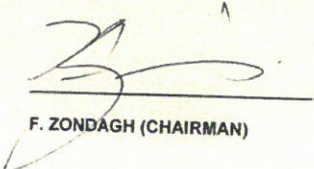
On the evidence before the Tribunal decides that:-

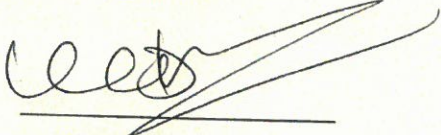
18.1 The Appeal is upheld and the notice in terms of Section 35(4) dated the 18<sup>th</sup> of July 2013 is set aside;

18.2 In terms of Section 22(1) (a) (ii) read with Section 32(1) (a) and 32(b) (ii) of the National Water Act (Act 36 of 1998) the extent and lawful water use on the Remainder of the farm Waterval 55, Aliwal North is determined as being 592,800 m<sup>3</sup> per annum for a field area measuring 52 ha from the Kraai River and the Dams (4) four.

18.3 The Respondent is directed to issue an amended notice in terms of Section 35(4) of the National Water Act 1998 (Act No. 36 of 1998) in accordance with the above determination.

HANDED DOWN AT PRETORIA ON THE 15TH DAY OF NOVEMBER 2017.

  
F. ZONDAGH (CHAIRMAN)

  
M. NKOMO (MEMBER)