

IN THE WATER TRIBUNAL
HELD AT KIMBERLEY

APPEAL NO.: WT08/18/NC

In the matter between:

ANDREW MEINTJIES CONROY

Appellant

and

THE DEPARTMENT OF WATER AND SANITATION OF

THE REPUBLIC OF SOUTH AFRICA

First Respondent

NORTHERN CAPE REGION: ORANGE WATER

MANAGEMENT AREA

Second Respondent

Date heard: 22 and 23 July 2024

Date of judgment: 14 May 2025

Coram: Mr Emmanuel Mpanza, Additional Member of the Water Tribunal
and Chairperson

JUDGMENT

Introduction

1. This is an appeal¹ lodged by the Appellant against the verification² of the Appellant's existing water use in terms of section 35(4) of the National Water Act No. 36 of 1998 ("the Act").

¹ See pages 1-7 and 14-23 of the Index: Appeal Documents.

² See Annexure "A": Notice in terms of section 35(4) on pages 8-9 and 24-25 of Index: Appeal Documents.

2. This verification excluded the supply of water consisting of 600 000 m³ per annum by the Appellant for domestic purposes to Ubuntu Local Municipality (“the Municipality”).

Background

3. The Appellant is the owner of the farm Biesjesfontein 186 in the district of Victoria West Northern Cape under Title Deed No. T03005/1967.
4. On 04 October 2013, the First Respondent’s Regional Head, Northern Cape, issued the Notice in terms of Section 35(1)³ of the Act to the Appellant requesting him to apply for verification of the lawfulness and extent of his water use on his farm⁴.
5. On 28 January 2014⁵, the Appellant submitted his application in terms of section 35(1) of the Act using the prescribed form.
6. Under paragraph 5 titled ‘EXISTING AUTHORISATIONS / ENTITLEMENTS’, the Appellant referred to a section 21(b) ground water entitlement of 115 000 m³ per annum.
7. In addition, the Appellant applied for the verification of his water use of 600 000 m³ per annum⁶.
8. On 21 July 2015, the First Respondent’s Provincial Head, Northern Cape issued the preliminary determination of the Appellant’s extent and lawfulness of his water use on his farm and determined “... *that the Section 21(a) water*

³ Section 35(1) provides as follows:

“35. Verification of existing water uses

(1) *The responsible authority may in order to verify the lawfulness or extent of an existing water use, by written notice require any person claiming an entitlement to that water use to apply for a verification of that use.”*

⁴ See pages 391-395 of Index Trial Bundle: Volume 2.

⁵ See pages 397-398 of Index Trial Bundle: Volume 2.

⁶ See paragraph 3 of the Addendum on page 399 of Index Trial Bundle: Volume 2.

use (taking water from a water resource) was exercised by the Victoria West/Ubuntu Municipality for purposes of domestic water supply. The requirements as stipulated in Section 5 of the Water Act 1956 was not complied with and the aforementioned water use does not constitute existing lawful water use.”

9. After the exchange of various correspondence between the Appellant and the First Respondent’s Provincial Head, Northern Cape, the Appellant disputed the contention that he did not have permission to sell water to the Municipality arguing that the Department of Water Affairs (“the DWA”) gave him express permission to sell water to the Municipality⁷.
10. On 27 August 2018, the First Respondent’s Provincial Head, Northern Cape issued the final determination in terms of Section 35(4)⁸ of the Act confirming the Appellant’s extent and lawfulness of his water use on his farm⁹, as follows:
 - 10.1 22 500 m³ per annum from borehole for irrigation purposes.
 - 10.2 18 000 m³ per annum from borehole for non-irrigation purposes.
 - 10.3 115 000 m³ for storing purposes.
11. However, this determination excluded *“the water use for domestic purposes by the Ubuntu Local Municipality for Victoria West which would continue in accordance with the “Agreement for the supply of borehole water” between AM Conroy and Ubuntu LM (14 Dec 2016).”*

⁷ See Appellant’s Affidavit and Supplementary Addendum on pages 726-734 of Index Trial Bundle: Volume 3.

⁸ Section 35(4) provides as follows:

“35. Verification of existing water uses

(4) *A responsible authority may determine the extent and lawfulness of a water use pursuant to an application under this section, and such determination limits the extent of any existing lawful water use contemplated in section 32(1).”*

⁹ See footnote 2 supra.

12. It is against this determination that the Appellant lodged his appeal to the Water Tribunal¹⁰.

Issue to be determined

13. The issue to be determined is whether the Appellant had a permit in terms of section 5¹¹ of the Water Act No. 54 of 1956 ("the 1956 Act") to sell water to the Municipality. Put differently, is whether the Appellant's water use, was authorised under the 1956 Act or not and that it was an existing lawful water use in terms of section 32(1)(a)(i) of the Act¹².

¹⁰ See footnote 1 supra.

¹¹ Section 5 of the 1956 Act provided as follows:

"5. Use of private water-

- (1) *Subject to the provisions of subsection (2) ... and rights lawfully acquired and existing at the commencement of this Act, the sole and exclusive use and enjoyment of private water shall vest in the owner of the land on which such water is found:....*
- (2) *A person who is, as contemplated in subsection (1), entitled to the use and enjoyment of private water found on any land of which he is the owner, **shall not, except under the authority of a permit from the Minister and on such conditions as may be specified in that permit, sell, give or otherwise dispose of such water to any other person for use on any other land, or convey such water for his own use beyond the boundaries of the land on which such water is found...** [Our emphasis]*

¹² Section 32 provides as follows:

"32. Definition of existing lawful water use

- (1) *An existing lawful water use means a water use—*
- (a) *which has-taken place at any time during a period of two years immediately before the date of commencement of this Act, ... and which-*
- (i) ***was authorised by or under any law which was in force immediately before the date of commencement of this Act...** [Our emphasis]*

Appeal hearing

14. The Appellant called three (3) witnesses, namely, himself, Mr Henning Jacobus Rust ("Mr Rust")¹³ and Mr Wynand Viljoen ("Mr Viljoen")¹⁴ and the Respondents called Mr Gawie Stefanus Du Toit van Dyk ("Mr van Dyk")¹⁵.
15. The Appellant testified that he did not have a permit to sell water to the Municipality, and he relied on the agreement¹⁶ between him and the Municipality.
16. Mr Rust testified that the DWA was aware that the Municipality was buying water from the Appellant and to that extent it even subsidised the construction of the pipeline infrastructure. However, he conceded that the subsidy went to the Municipality and not the Appellant. He also conceded that he did not see a permit authorising the Appellant to sell water to the Municipality and that he assumed that by subsidising the project the DWA permitted the sale of the water.
17. Mr Viljoen, on the other hand, testified that he sent two (2) of Promotion of Access to Information Act No. 2 of 2000 ("the PAIA") requests to the First Respondent, the purpose of which was to request old files of this project including a permit or letter that gave the Appellant authority to sell water to the Municipality. However, that information was not provided to him and the reason proffered was that they could not be located due to the lapse of time. He, however, did not know whether a permit existed, and when he asked the

¹³ Mr Rust was the Town Clerk of Victoria West from April 1981 to August 1997.

¹⁴ Mr Viljoen is the legal representative of the Appellant and started dealing with this matter in 2006.

¹⁵ Mr van Dyk was the Director: Water Use and Regulation at the First Respondent's Kimberley office. He was initially employed by the First Respondent's Northern Cape Region in 1991 until 2010 and thereafter returned in 2014.

¹⁶ See pages 60-74 of Index: Appeal Documents.

Appellant for one, he could not produce same stating that he did not know about a permit, he could not find it and did not know that he had to have a permit to sell water to the Municipality.

18. Lastly, he testified that the Appellant never applied for a permit, and was working on an assumption that the DWA will have it in the files they requested.
19. Mr van Dyk testified that the old files could not be located because in the 1980s the current office was divided into three (3) regions and Victoria West was handed by the Cape Town region and as such they could have been on different places.
20. Lastly, although there might have been documents under reference number B13/1/463 in the 1980s, however, there were no files with this reference when he returned in 2014.

Analysis

21. In the main, the Appellant argued that although he did not have a permit from the Minister to sell water to the Municipality, the DWA was aware and it actively enabled him to sell the water to the Municipality by, among other things, subsidising the construction of the pipeline infrastructure.
22. Therefore, he showed substantial compliance with the provisions of section 5(2) of the 1956 Act and with what was envisaged in Section 32(1)(a)(i) of the Act.
23. On the other hand, the Respondents argued that the Appellant did not have a permit from the Minister to sell water to the Municipality and furthermore, the 1956 Act was repealed by the Act and consequently at the time of the verification, the Appellant's water use was non-compliant with the legislative

prescripts and was unlawful¹⁷.

24. The appeal before the Tribunal takes the form of a rehearing, and the Tribunal may receive evidence¹⁸. This is an appeal in a wide sense, which is a complete rehearing and redetermination on the merits of a case, with or without additional evidence or information¹⁹. This means that the Tribunal is not confined to the record of the body a quo.
25. In *Mining and Environmental Justice Community Network of South Africa and Others v Minister of Environmental Affairs and Others*²⁰, the Court said the following with regards to appeals to the Tribunal under the Act “*The parties were ad idem that all the appeals in terms of NEMA, the MPRDA and the National Water Act fall into the category of so-called "wide appeals", i.e. they consist of re-considerations of the original decisions and authorisations and new evidentiary material may be introduced. "Wide appeals" refer to appeals in the "wide sense" as characterised in Tikly v Johannes NO 1963 (3) SA 588 (T) at 590G - 591A. See also, in the environmental sphere and Sea Front for All and Another v MEG, Environmental and Development Planning and others 2011 (3) SA 55 (WCC) at [24] - [28].*”
26. Accordingly, in addition to the record of the impugned decision, this Tribunal had to consider the evidence of the Appellant’s and the Respondents’ witnesses to determine whether the Appellant has succeeded in discharging the onus of proof.

¹⁷ See paragraphs 28-34 on pages 83-84 of Index: Appeal Documents.

¹⁸ Item (3) of Schedule 6 to the Act read with rule 7(1) of the Water Tribunal Rules.

¹⁹ *Tikly and Others v Johannes NO and Others* 1963 (2) SA 588 (T) at 590G.

²⁰ (50779/2017) [2018] ZAGPPHC 807; [2019] 1 All SA 491 (GP) (8 November 2018) at para 11.10.2.

27. However, on proper analysis of their evidence, the Appellant failed to discharge the onus of proof that his pre-commencement water use was an authorised²¹ water use, in that:

27.1 He did not have a permit from the Minister to sell water to the Municipality;

27.2 He was not subsidised by DWA for the construction of the pipeline infrastructure; and

27.3 The agreement he relied upon had expired in 2006.

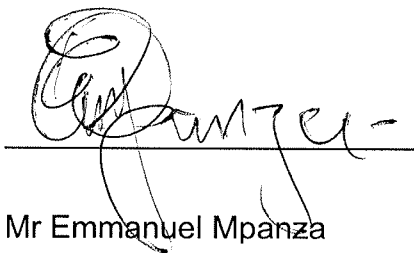
Conclusion

28. Therefore, his argument that he had permission from the Minister to sell water to the Municipality is rejected.

Order of the Tribunal

29. Consequently, the following order is made:

(a) The appeal is dismissed.

A handwritten signature in black ink, appearing to read 'Emmanuel Mpanza', is written over a horizontal line.

Mr Emmanuel Mpanza

Additional Member of the Water Tribunal and Chairperson

²¹ See *Forestry South Africa v Minister of Human Settlements, Water and Sanitation and Others* (777/2022) and *Minister of Human Settlements, Water and Sanitation and Others v Forestry South Africa* (824/2022) [2023] ZASCA 153 (15 NOVEMBER 2023) at para 43 where the SCA held that: "...I revisit what is meant by **authorised use**. Conceptually, and ordinarily, **authorisation is a permission to do something, given by an authority that enjoys the power to authorise the doing of that thing...**" [Our emphasis]

Appearances:

For the Appellant:

Adv. H J Benade

Instructed by Kempen and Kempen
Attorneys

For Respondents:

Adv. Z Z Matebese with Adv. M X Shibe-
Nkosi

Instructed by State Attorney, Pretoria