

IN THE WATER TRIBUNAL

In the matter between:

CASE NO: WT 13/03/2006

**WESSELS, G.M.**

Appellant

and

**DEPARTMENT OF  
WATER AFFAIRS AND FORESTRY**

Respondent

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**DECISION**

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1. This appeal is against a directive issued by the Respondent on 13 February 2006. The directive calls on the Appellant to cease the following Activities: taking of water (section 21 (a)); storing of water section 21 (b)); impeding the flow of water in watercourse section 21 (c)); and altering the it did e bed, banks, course or characteristics of the watercourse section 21 (i)). Mr. van Rooyen appeared for the Appellant. Mr. Luyanda appeared for the Respondent.
2. The Appellant constructed a dam in the Otterspruit Marsh in the district of Kroonstad. The Otterspruit Marsh is a tributary of the Vaal River. The Appellant concedes in his

notice of appeal that the dam was built without the necessary authorisation. The Appellant also states, in that notice, that he built the dam whilst being ignorant of the exact procedure regarding approval processes when erecting a dam.

3. The Respondent states, in its written objections to the appeal, that: the Respondent must approve any dam that is to be constructed; that the dam is having a negative impact on downstream property owners, and the Appellant was advised that his use of the water including the construction of the dam was unauthorised and should be stopped but that the Appellant continued using the water in the dam.
4. A number of third parties have objected (in writing) to the construction of the dam. his includes objections by the Eerstehuyze family. The complaint by the Eerstehuyze, who own property downstream to the dam, is that the dam has resulted in less water being available for the use of their animals. I do not consider this and other complaints by third parties to be material given the reasons in determining this appeal.
5. The Respondent wrote to the Appellant in November 2003 and told the Appellant that the Respondent could not establish the legality of the water-use by the Appellant. The Respondent then advised the Appellant to apply for "... verification of the lawfulness and extent of your water use." In terms of section 35 () of the national water Act. The Respondent then, in the same letter, requested the Appellant to provide the Respondent with (in the application by the Appellant to establish the lawfulness of the water used by the Appellant) information (to prove that you are lawfully irrigating/storing water". The Appellant was to provide this information by 12 December 2003. The Respondent, also in the same letter, told the Appellant that the Appellant would be advised of the lawfulness of his water use after which the

Appellant would be given the opportunity to make representations on the outcome of the investigation to be done by the Respondent.

6. The Respondent eventually issued a directive against the Appellant to stop storing and taking water from the dam. The directive specified the water-use taking place. The directive also mentioned that the water-use was not in terms of section 32 or 40 of the Act.
7. It was submitted that the Appellant had applied for a licence to regularise the construction of the dam and to use water from that dam. The parties were unable to tell the Tribunal when the application was made. For the Appellant, it was submitted that the Respondent has not made any formal decision on the license application. Indeed, it was further submitted on behalf of the Appellant that it was only on the 8 December 2004 that the Appellant first received intimation that the license application was not to be favourably considered. This was in terms of a letter by the Respondent put the Appellant. A copy of this letter was not in the record but the Respondent did not dispute the submission concerning this letter.
8. There is an undated record of decision by the Respondent concerning an application by the Appellant. The application deals with the storage of water. The following appears in the record of decision:
  - 8.1 that there was uncertainty at the time regarding how to deal with the unlawful water use by the Appellant and that "the applicant was afforded the opportunity to apply for a licence, of which was not a good option, a directive should have been issued";
  - 8.2 that "the license process is taking a long time, this delay has given the department a bad image to the affected parties in the area and they feel that the department is unable to look after their interests and take

control of the irregularities are common to the mandate of the NWA (Act 36 No. of 1998"; and

- 8.3 that the people downstream of the dams have been pleading with the Department to act.
9. A recommendation is then made, in the same record of decision, against "the issuing of the license for Malgaskraal...for the above-mentioned reasons". The record of decision is neither signed nor dated. The recommendation does not seem to deal with the subject-matter of the application: the recommendation is in respect of "Malgaskraal", whereas the application for a licence is specified to be in respect of, as specified on the first page of the record of decision, "the owner of Rietgat 73 portion 8, registration division Kroonstad" who applies "... for a licence for a recently built existing storage Dam for irrigation purposes". On the face of the record of decision, it appears that the recommendation refusing to license was in respect of property other than the property in respect of which the Appellant sought authorisation.
10. The emphasis on the submissions on behalf of the Appellant was that the directive came as a surprise to the Appellant. This was, according to the appellant, due to the fact that the appellant laboured under the view that he had applied for authorisation and that such authorisation and that the appellant had not been advised of the outcome of that application. Accordingly, the appellant submitted the Respondent could not have issued a directive against the appellant and that is premature of the Respondent to have issued a directive whilst the application for authorisation is pending.
11. It was submitted on behalf of the appellant that the respondent requested the appellant to provide the Respondent with an environmental impact study concerning the dam. This request was made after the Appellant had applied for authorisation.

The environmental impact study was sent to the Respondent in February 2005. The Respondent did not reply to the environmental impact study but issued the directive that is the subject of this appeal. It was also submitted on behalf of the appellant that the appellant was at all times, prior to the directive, under the impression that the respondent was considering his licence application. The respondent could not, under those circumstances, and according to the appellant, have issued the directive.

12. The other submissions on behalf of the Appellant was that the dam was built under the impression that no licence was required. Secondly, that the Appellant applied for a licence prior to the Dam been declared unlawful (in the sense that the application preceded the directive).
13. Apart from taking "law points", the following additional submissions were made on behalf of the appellant: that Malgaskraal is not part of Rietgaat; the Dam on Rietgaat is not cross the Otterspruit Marsh but is on its tributary; rainwater that falls south of the highway does not fall in the Dam; the Eerstehuyze farm is approximately 60 km from the dam wall and that the effect of the dam downstream to the Eerstehuyze property was minimal. The Respondent did not challenge these submissions. I therefore accept them as factual.
14. The appellant also submitted that it would be more advantageous to retain the dam and that the respondent ought, instead, to consider that "a proper plan" be put in place concerning the use of water in the dam. Indeed, the Appellant also submitted that the Respondent is confronted with a factual situation (namely the existence of the dam) and that the Respondent must first ascertain whether or not it would be advantageous to the environment to remove the dam prior to implementing the directive. To this end, the Appellant also submitted that the respondent could impose conditions on how the water in the dam could be used in the interim.

15. The Appellant emphasised that he provided the Respondent with reasoned opinion by experts that it would not be good for the environment to remove the dam. The appellant emphasised that the respondent has not dealt with his report on this issue. In dealing with an environmental considerations pertaining to the Dam, the Appellant submitted that he has produced an environmental impact study that shows that it would be in the long-term interest of the environment that the dam remain as opposed to the dam being destroyed. I do not consider that the Tribunal can make a determination on this issue as part of deciding this appeal. The mandate of the Tribunal is simply to ensure that those activities under the Act, over which the Tribunal has jurisdiction, take place in accordance with the Act. The Tribunal has no jurisdiction to take into account submissions that an activity may or may not affect the environment in an adverse manner.
16. The Appellant concluded his submission by stating that he must be afforded the opportunity to exhaust his remedies regarding his licence application. In addition, the appellant submitted that the dam cannot be demolished pending the outcome of his license application to regularise both the construction of the dam and the use of water in the dam.
17. Submissions on behalf of the Respondent were, in substance, that the Appellant has engaged in an unlawful water use. According to the Respondent, the fact that the Appellant has applied for a licence does not mean that the Appellant can continue with the dam or with the water use. With regard to the environmental impact study that was referred to by the Appellant, the Respondent submitted that the study deals with the license application. The Respondent emphasised that this appeal is an appeal against the directive and not an appeal against the issuing or non-issuing of a licence to the Appellant.

18. The Tribunal then requested the Respondent to address the Tribunal on whether the Tribunal can, in making its decision on this appeal, take into account considerations of prejudice that could be suffered by the Appellant in the event that the appeal is dismissed. The Respondent's view was that the duty of the Tribunal is to weigh first, what the law says and, second, consider the facts. In this regard, the Respondent submitted that Act is straight forward in that section 22 says that a person requires that a person must be authorised to undertake specified activities. In addition, the Respondent submitted that the Respondent, as the responsible authority, is enjoined by section 53(1) of the Act to issue a directive and that the Respondent does not have a discretion on the issue. It was also some admitted on behalf of the Respondent that the Tribunal would be committing an error if the Tribunal were to read the word "may " in a section 53 (1) to confer discretion on the Respondent in its capacity as the responsible authority.
19. The Respondent submitted that the Tribunal should reject the submission on behalf of the appellant that the directive be suspended pending a consideration by the Respondent of the license application. This was, according to the Respondent, due to the fact that the appeal is against the directive and not against the license application.
20. The Appellant, in reply, sought to lay much emphasis on the fact that the Respondent, as the responsible authority, does in fact have the discretion and that the directive is not absolute. The Appellant also submitted that the balance of convenience favours him. In this regard, it was submitted on behalf of the Appellant that the principle of the balance of convenience is ingrained in our law. To this end, it was further submitted that the Tribunal must have regard to the fact that the dam was built in 2003 and that the balance of convenience and prejudice favours the Appellant.

21. It was also submitted on behalf of the Appellant that the environmental study showed that experts engaged by the appellant are of the view that destroying the dam would be harmful to the environment as well as being harmful to downstream land owners. It was submitted on behalf of the Respondent that the directive obliged the appellant to submit a rehabilitation and environmental management plan for the removal of the dam. As I understood the submission on behalf of the Appellant, the Appellant has produced such a plan which, according to its experts, say that the destruction of the Dam would be harmful as indicated above.
22. The preceding paragraphs describe my understanding of the evidence and submissions made on behalf of the parties. The following issues are common cause: that the Appellant is using water other than as required by the Act; that the Appellant has applied for a licence and that such a licence has not been determined; and that this appeal is against the directive and not against the license application. Having established that there is "water use" by the Appellant contrary to the Act (in the sense that the Appellant is not authorised to take water (section 21 (a)); store water section 21 (b)); impede the flow of water in watercourse section 21 (c)); and alter the bed, banks, course or characteristics of a watercourse section 21 (i)), the Tribunal must determine whether the Appellant should not fail in his appeal.
23. The first part to this Ruling deals with the various submissions by the parties on the factual situation that obtains. Those facts constitute an important background to the decision that the Tribunal must make. Ultimately however, the Tribunal must make its decision having regard to the provisions of Act and any other law that, of necessity, must inform the decision-making by the Tribunal. In this appeal, the Appellant concedes that he is not authorised to engage in the water use as specified in the directive. That should ordinarily result in the appeal being dismissed.



24. I agree with the Respondent that the Appellant has framed this appeal in terms of the directive and not in terms of his application for authorisation to use the water. However, the application for the licence is intrinsically linked to the directive. This is particularly so when one has regard to all events that followed the investigations by the Respondent that a dam had been constructed and uncertainties on the part of the Respondent whether the construction of the dam and the use of water in the dam was authorised. The submissions and evidence on record is that the Respondent advised the Appellant to apply for a licence concerning the construction of the dam and the use of water in that dam.
25. The Respondent concedes that the Appellant applied for the licence prior to the Respondent issuing this directive. The dam was constructed in 2003 and a directive issued in February 2006. It was during the period between those dates that the Respondent advised the applicant to apply for authorisation concerning the dam and the use of water in that dam. During that time (i.e. prior to the application by the Appellant) the Respondent had made no determination concerning the lawfulness or otherwise of the dam. As it was submitted on behalf of the Appellant, the Appellant did not know of the outcome of his application for a licence until at the time of the issuing of the directive. Indeed, the Respondent, as the responsible authority, has not determined the licence application.
26. With this facts at hand, the Tribunal must decide whether the directive was properly issued having regard to the exchanges between the Respondent and the Appellant and where those exchanges led to the application for a licence by the Appellant, together with the fact that the Respondent has not determined that licence application. I am of the view that, in the circumstances of this case, the Respondent (as the responsible authority) could not have properly issued the directive.

27. The Appellant made submissions that the principle of a balance of convenience is ingrained in our law and that such a principle obliges that the directive not be enforced. It seems to me that a proper grounding is that it is implied, having regard to the duties imposed on the Respondent as the responsible authority, considered together with the decision-making processes expected of the Respondent, that a administrative justice, as stipulated in the Constitution, is the more appropriate principle that the Tribunal must consider when deciding whether or not the Respondent should have issued the directive without having dealt with the appellant's licence application and where such an application was made, as it were, at the behest of the Respondent.
28. I am therefore of the view that, once the Respondent had advised the Appellant to apply for a licence, the Respondent could not have (prior to determining the licence application) properly issued a directive prohibiting the very activity that is the subject of the license application. This conclusion requires me to deal with the submissions on behalf of the Respondent concerning section 53 of the Act. The Respondent is of the view that that section, once it is found that there any "water use" not in accordance with the terms of the Act, obliges the Respondent to issue a directive. Indeed, the Respondent took the view that the section does not grant the responsible authority with a discretion.
29. I have referred to the Respondent's submission section 53 does not give the responsible authority a discretion and that the responsible authority must, according to the Respondent, issue a directive prohibiting particular conduct whenever such conduct is established. I disagree with this submission and find that the word "may" in section 53 is not mandatory but directory. My conclusion is buttressed by the fact that the section is not prescriptive of the remedy that the responsible authority must insist on in the event of non-compliance. This, in my view, contemplates that the Act

obliges the responsible authority to properly apply its mind before calling on a party to "take any action" as may be specified by the responsible authority. Section 53, therefore, grants the responsible authority a discretion.

30. The Respondent was mistaken if it issued the directive on the view that the Respondent lacked a discretion. However, I am of the view that my finding would still be the same even if the Respondent had issued the directive by virtue of exercising its discretion. The point, in the latter instance, is that the exercise of such discretion must be lawful. It would have been unlawful, in my view, for the Respondent to have exercised its discretion by issuing the directive after having advised the Appellant to apply for a licence and then issuing the directive prior to determining that licence application.

31. I therefore rule that the appeal should succeed. The Appellant is entitled to a determination of his application. I am mindful that that application is not the subject of this appeal. I have held, however, that this appeal and the licence application are intrinsically linked. Otherwise, the Appellant may well be prejudiced by being obliged to destroy the dam and only for his licence application to be approved after such destruction. The following order is made:

31.1 The appeal is upheld;

31.2 The directive of the Respondent is suspended pending a determination by the Respondent of the application by the Applicant regarding the construction of the dam and the use of water in the dam at Rietgat 73 Portion 8, Kroonstad;

31.3 The directive is suspended for a period of 6 months;

31.4 The appellant may approach the Tribunal for a suitable ruling in the event that the application by the appellant has not been determined within a period of six months from the date of this ruling.

O MOOKI

A handwritten signature in black ink, consisting of a large capital letter 'O' followed by the name 'MOOKI' in a cursive style.

We agree with the Order and the reasons for the Order: Dr W Singo and Ms L Steele