

IN THE WATER TRIBUNAL

In the matter between:

CASE NO: WT15/03/2006

**HHH BOERDERY TRUST on behalf of
OSBORNE BOERDERY (PTY) LIMITED**

Appellant

and

**THE DIRECTOR GENERAL: DEPARTMENT OF
WATER AFFAIRS AND FORESTRY**

Respondent

DECISION

1. The Tribunal made an order on 6 October directing the responsible authority to grant a licence to Osborne Boerdery (Pty) Limited ("Osborne Boerdery"). The Tribunal indicated at the time that the reasons for the order would follow in due course. These are the reasons for the order.
2. The appellant appeals against a decision by the respondent of 13 March 2006 wherein the respondent refused the licence application made by Osborne Boerdery to obtain water through a surrender by **HHH** Boerdery (Pty) Limited ("HHH Boerdery") of its lawful water use. The surrender was in respect of the Remaining Extent of Portion 7 of Houghamdale North 341 ("Houghamdale") and the surrender was to

Portion 1 of Middelplaats 83 ("Middelplaats"). The surrender is in terms of Section 25(2) of the National Water Act, Act 36 of 1998 ("the Act").

3. As. regards the abovementioned properties, Middelplaats was the *"receiving property"* and Houghamdale was the property *"surrendering"* the water use. The water proposed to be surrendered to Middelplaats was for use for irrigation purposes in terms of Chapter 4 of the Act.
4. The grounds of appeal include that the decision by the responsible authority refusing the application did not take into account various considerations, including the framework for the trading of water use entitlement provided for in terms of Section 25(2) of the Act; that Northern Cape farmers could make beneficial use of the water being sought to be surrendered; and that the Eastern Cape had access to additional bulk allocations of water. from the Orange River and that such water had still to be taken up. In respect of the latter ground, such water was apparently allocated for use by poor farmers in that province.
5. In refusing the application, the responsible authority stated that it was not advisable for the responsible authority *"to go against the recommendations of the regional structures"*. Reference to *"regional structures"* is to provincial authorities in the Eastern Cape who are involved in the decision-making process regarding the use of water under the Act.
6. The evidence before the Tribunal was that Mr Holtzhausen of HHH

Boerdery, had previously asked the provincial authorities whether those authorities were interested in obtaining the water that Mr Holtzhausen was entitled to use. Mr Nyondo, on behalf of the provincial authorities (Eastern Cape) indicated to Mr. Holtzhausen, according to the evidence, that those authorities were not interested in obtaining this additional water supply. Subsequent to the offer by **HHH** Boerdery being refused, that water was then offered to Osborne Boerdery. The respondent did not contest this evidence.

7. I pause here to indicate that **HHH** Boerdery was based in the Eastern Cape whereas Osborne Boerdery was based in the Northern Cape. In order for Osborne to receive this water, Osborne had to apply in terms of Section 41 of the Act. That application was made: In accordance with the scheme set out in the Act, the water applied for by Osborne was already allocated to **HHH** Boerdery. For Osborne to have lawful use of this water, **HHH** Boerdery had to surrender its lawful use. This surrender was made.
8. Osborne Boerdery applied for a licence sometime on 2 June 2005. Subsequent to the application being made, the Department of Agriculture (Eastern Cape) confirmed that the land being used by **HHH** Boerdery and in respect of which **HHH** Boerdery sought to surrender its water-use, would remain economically viable should the water be transferred to Osborne. Boerdery. Similarly, it was also determined that Osborne

Boerdery, as the receiving property, needed the water that is the subject of the licence application.

9. Once the application had been made, Mr Keke, an official from the Department of Water Affairs and Forestry in the Eastern Cape, recommended that the application be refused. It is not clear why Mr Keke recommended that the application be refused. It appears that various explanations were given. Those explanations include that the water sought to be transferred to Osborne Boerdery should instead be used in the Eastern Cape, and in particular, be used in a Beet Project that apparently was an initiative by the Eastern Cape authorities to uplift farmers in that province.

10. Mr Human, the legal advisor at the Department of Water Affairs and Forestry, requested Mr Keke to substantiate the refusal of the application. Specifically, Mr. Human directed the following enquiry to Mr. Keke: "The reasons why you were not in a position to recommend [i.e. the application to transfer the water] were all based on the fact that the Provincial Agriculture Department announced that no further water transfers should take place". Mr. Human continued as follows in the same letter:

"We as a department cannot declare under oath the position of Agriculture because we do not know the position at first hand. The situation can be addressed in one of two ways. Either the Department of Agriculture petitions the Tribunal to allow them to intervene or Advocate Nyondo must provide us with an affidavit

setting out the position, naming the projects where water is a problem, explaining why available sources cannot be used, explaining why the water is needed now and not in 5 years time, how he intends getting hold of the entitlement and seeing that the three months grace period requested in your letter has lapsed, the position of Minister Didiza"

11. No such substantiation was forthcoming from Mr. Keke. Mr. Human, who represented the respondent during the hearing of the appeal, did not make submissions on why no substantiation was forthcoming from Mr. Keke.
12. Once the application for a licence was refused, the responsible authority gave reasons for its refusal. The reasons were given on 31 March 2006 in response to a letter written by the appellant on 28 March 2006. I quote part of the reason that was given for the refusal:

"The responsible authority did not approve the Section 25(2) licence application from Osborne Boerdery (Pty) Limited because the Acting Chief Director: Southern Cluster did not recommend the application. The responsible authority is of the opinion that it is not advisable to go against the recommendations of regional structures because they know the situation at ground level the best. The letter from the Acting Chief Director, dated 16 February 2006, setting out the reasons for not recommending the licence is attached hereto as part of the relevant documentation. "

13. By reference to "regional structures", the responsible authority was

indicating an apparent decision and/or policy (if those are the correct descriptions) apparently put in place by the Eastern Cape authorities.

The head of the Department of Agriculture in the Eastern Cape apparently indicated in July 2005 that no further water transfers should take place out of the Eastern Cape. As part of the process for considering the licence application, the Department of Agriculture was invited to comment on the licence application and the MEC for Agriculture is stated as having personally attached his objection to the licence applications.

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14. The documentation supporting the reasons given state that *"in view of this objection (by the MEC for Agriculture, Eastern Cape) the regional management cannot recommend the licenses - as we support our provincial department in their endeavours to achieve meaningful development in the Eastern Cape. A recommendation would be counter productive and would go against the expressed objection of the MEC"*.

The supporting documentation further states that the head of the Department of Agriculture had communicated with the National Minister and was awaiting *"political intervention at the highest level"*. The conclusion reached was that *"in view of this, it would be problematic if the regional management of the Department of Water Affairs and Forestry were to recommend the transfer of water pending an intervention that may embarrass our own Minister"*.

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15. The stated reasons by the responsible authority raise a number of concerns. First, it is clear that the responsible authority (as that office is defined in the Act) failed to apply its mind to the application before it. Second, it is also clear that, in failing to apply its mind, the responsible authority deferred to decisions by persons who have no authority in determining whether or not a licence application is approved. It is true that the responsible authority would seek the advice and assistance of a number of officers in coming to his determination on the licence. However, the reasons given for refusing the application seems a clear indication of a total failure to apply the mind where the responsible authority states that *"it is not advisable to go against the recommendations of regional structures because they know the situation at ground level the best"*.
16. The evidence before the Tribunal on behalf of the responsible authority was that Mr Human, on behalf of the responsible authority, had asked the regional structures to provide substantiation for the various claims upon which the regional structures recommended that the application be refused. As I indicated earlier, no such substantiation was forthcoming. During the hearing of this matter Mr Human, on behalf of the responsible authority, sought to indicate to the Tribunal that the decision by the responsible authority must be seen in the light of co-operative governance and in particular that the responsible authorities could not stop the Eastern Cape officials from developing how officials of that

province consider the best way to develop their farmers.

17. In addition, Mr Human made submissions that the responsible authority took into account the requirements for various empowerment legislations and that the Eastern Cape authorities needed the water sought to be transferred for use by emerging farmers. These latter submissions by Mr. Human do not form part of the reasons given by the responsible authority in refusing the application. The Tribunal can only consider an appeal on the basis of the written reasons given by the responsible authority: the Act obliges the responsible authority to give his reasons in writing.
18. The Tribunal is not convinced by these submissions. As I mentioned earlier, the evidence on behalf of the appellant was that the water was first offered for sale to the Eastern Cape authorities and that that sale was refused. In addition, no evidence has been led demonstrating that there were any active projects in respect of which the Eastern Cape authorities required the water in order to support emerging farmers.
19. In the main, the trust placed by the responsible authority on the regional structures was not only misplaced, but was an abdication of the part of the responsible authority of his obligation to independently apply his mind in considering the application by Osborne Boerdery. What the responsible authority did was merely refuse the application because the responsible authority "could not go against recommendations by regional structures." The Act obliges the responsible authority to apply his mind.

The Act does not require the responsible authority to blindly sanction a decision taken by functionaries who, according to the Act, do not have a say on whether or not a licence is to be granted.

20. The failure by the responsible authority to apply his mind must be seen in the light of the acknowledgment by the Eastern Cape authorities that the land from which the water was to be transferred would remain viable after the transfer. This is a requirement for licence applications. Similarly, the responsible authority did not have regard to a similar finding that the land to which the water was being transferred was demonstrated to require the water.
21. There is one further aspect that the Tribunal wish~s to comment on. HHH Boerdery, according to the notice of appeal, had made "an application" to surrender its lawful water use under section 25(2). Section 25(2) does not require that an application be made where a lawful water user wishes to surrender his use of the water. All that is required of such a user is to advise the responsible authority of the wish to make the surrender. Such notification, according to the scheme in the Act, is intended to be made simultaneously with an application by a party to be a lawful water user in respect of the water that is being surrendered. It was therefore unnecessary for HHH Boerdery to make "an application" to the responsible authority.
22. In the premises, the responsible authority has not satisfied the Tribunal of

any cogent reason why the licence by Osborne Boerdery should be refused. The Tribunal therefore finds that the appeal must succeed and that the responsible authority be ordered to grant the licence as applied for.

O MOOKI

7 NOVEMBER 2006

I agree.

DR W SINGO

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Appellant

And

THE DIRECTOR GENERAL: DEPARTMENT OF WATER AFFAIRS AND FORESTRY

Respondent

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ORDER OF THE WATER TRIBUNAL

Date of Order: 6 October 2006

The Water Tribunal makes the following Order:

- (1) The Responsible Authority is ordered to grant a licence to Osborne Boerdery (Pty) Limited in terms of the application by Osborne Boerdery (Pty) made to the Responsible Authority.
- (2) Reasons for the decision will follow.

By Order of the Water Tribunal

REGISTRAR OF THE WATER TRIBUNAL

WATER TRIBUNAL

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