IN THE WATER TRIBUNAL OF SOUTH AFRICA

HELD AT PRETORIA ON THE 31ST OF OCTOBER 2016

CASE NO. WT001/15/NW

In the Appeal between:

HENTIQ 2850 (PTY) LIMITED Appellant

And

THE PROVINCIAL HEAD: NORTH WEST,

DEPARTMENT OF WATER AND

SANITATION First Respondent

And

THE DEPARTMENT OF WATER AFFFAIRS

AND SANITATION Second Respondent

APPEAL DECISION

APPEARANCES:

Coram	:	**Mr F ZONDAGH**	**Chairperson**
	:	**Ms M. NKOMO**	**Member**

FOR THE APPELLANT: **Advocate J H SAUNDERS instructed by Attorney Foster of Ottosdal**

FOR THE RESPONDENTS: **Mr T M SEDIBE from the Respondents' Legal Directorate**

DETAILS OF HEARING

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.

2. The hearing was held at the Head Office of the Department of Water and Sanitation, Pretoria on the 31st of October 2016 and the 1st of November 2016 and was electronically recorded.

3. **ISSUES TO BE DECIDED**

3.1 The Tribunal was required to decide, given the basis of the Appeal set out in both the Notice of Appeal together with the amended Notice of Appeal, 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 registered water use of the farm Scherppunt 32, Registration Division I.P. North West Province, (Scherppunt) stipulated in Water Use Certificate No. 26016490 reflected as being 1875200 m3 per annum in respect of a field area of 240 ha was reduced to 164972 m3 per annum for a field area of 23.3 ha. This reduced determination represented the recommended *"extent of the possible existing lawful water use"* for the property. The decision made no provision for the storage of water and stipulated that no water use in excess of the determined water use may be used on the property.

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

3.2.1 Review the notice given in terms of Section 35(4) in terms of the Promotion of Administrative Justice Act 2000 (Act 3 of 2000) whereafter it should be set aside.

3.2.2 Confirm the Appellant as an existing lawful user in terms of Section 22 (1)(a)(ii) read with Sections 32(1)(a), 32(1)(b)(i) and 34 of the NWA.

3.2.3 Confirm the entitlement of the Appellant to irrigate a crop area of 144.4 hectares on the remaining extent of the farm Scherppunt 32, Registration Division IP.

4. **BACKGROUND TO THE ISSUE**

4.1 On The 3rd December 2013 a Water Use Certificate No. 26016490 was issued to the Appellant in terms of the Regulations promulgated under Section 26(1)(c) of the National Water Act confirming the Appellant's registered water use entitlement as being 1875200 m3 per annum in respect of an area measuring 240 hectares.

4.2 On the same date 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 Crocodile (West) Marico Water Management Area. 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.

4.3 Annexure "A" attached to the said Notice in terms of Section 35(1), sets out in table 2 thereof the extent of the lawful water use authorised in terms of the now Repealed Water Act 1956 (Act 54 of 1956) (RWA). It confirms the ground water entitlement from the Bo-Molopo Subterranean Government Water Control Area (Proclamation 1324 of 1963) in respect of the farm Scherppunt as being 541500 m3 per annum for a field area measuring 72.7 ha.

4.4 Annexure "A" further provided for what was referred to as *"water used during the qualifying period"*. The extent hereof was indicated as being 23.3 ha in respect of the field and crop area and confirmed an extraction volume of 164972 m3 per annum. The area and volume so indicated was thereafter recommended as the *"possible existing lawful water use"*.

4.5 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) Irrigation requirements were calculated and obtained by means of a computer programme (SAPWAT) based on climate zones (Rainfall and evaporation) and the irrigation system used on the property.

5. 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 3rd of February 2014.

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].

Annexure "C" to the notice makes provision of 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 responded by referring the Responsible Authority to its water use certificate.

6. On the 10th January 2014 prior to the cut-off date set by the Respondents, the Appellant duly applied for the verification of its water use and relied on the contents of its Water Use Certificate No. 26016490 to establish and confirm its existing lawful Water Use. In view of the contents of the Section 35(1) notice recommending a

vastly reduced water allocation, the Appellant disagreed with the recommendation set out in Annexure "A" of the Section 35(1) notice and requested the Responsible Authority to reinstate the entitlement referred to in the Water Use Certificate. This request by the Appellant was inter alia based on the mistaken belief that the water use certificate represented a confirmation of its existing lawful water use and constituted legal proof to abstract water as per the Certificate. Later evidence would show that this mistaken belief was common amongst water users and well known to the Respondent.

7. This knowledge notwithstanding, the Responsible Authority did not avail itself of its rights in terms of Section 35(3) (a) to (c) to request further information relating to the verification application. Neither did it request or afford the Appellant an opportunity to make further representations on any aspect of the application as provided for in Section 35(3) (d).
8. On the 26th of March 2014 the Responsible Authority however, 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 Annexure "A" 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 164972 m3 per annum and made no provision for the storing of water. It also forbids any water use on the property in excess of the use determined therein.
9. This notice for some unknown and inexplicable reason only reached the Appellant on the 15th February 2015, nearly one year later. Immediately upon receipt thereof on the 17th February 2015, the Appellant noted an Appeal in terms of Section 148(1) (e) of the National Water Act, against the determination. This notice was sent by prepaid registered post to the Respondents on the 13th March 2015.
10. On the 11th of February 2016 the Respondents replied to the Appellant's Notice of Appeal by way of an Answering Affidavit setting out its response. The Appellant, as it

was entitled to do, lodged an Amended (Amplified) Notice of Appeal dated the 22nd April 2016. No response in answer to the amended Notice of Appeal was filed by the Respondents and the matter was set down for hearing on the 31st of October and the 1st of November 2016.

11. THE BASIS OF THE APPEAL

11.1 The Appellant's first Notice of Appeal dated the 17th of February 2015 was primarily based on the provisions of the Promotion of Administrative Justice Act 2000 (Act No. 3 of 2000) PAJA. The Appellant stated that it was entitled to fair, lawful and reasonable administrative justice and in the absence thereof entitled to reasons for such administrative actions that affected it negatively.

11.2 Having, at the request of the Respondents, diligently paid the prescribed water use tariff based on the volume of water stipulated in the Water Use Certificate, the Appellant alleged that a right was so created that could not summarily be withdrawn or reduced. Reasons for any change had to be provided to the person deprived of such rights and the Respondent's failure to do so, caused the Appellant prejudice. In the light thereof the Appellant would be entitled to relief by having the Notice in terms of Section 35(4) reviewed and set aside. In this regard the Tribunal was referred to several reported cases in support of its submissions.

11.3 On the 11th of February 2016 in response to the Appeal, the First and Second Respondents replied by filing an opposing affidavit deposed to by Marthinus Lourens Johannes Botha, a Chief Engineer Water Resource Management within the Department.

11.4 On the 22nd day of April 2016 following receipt of the Respondent's reasons attested to by Botha in his replying affidavit, the Appellants filed, as they are entitled in terms of Rule 3(2) of the Rules of the Tribunal to do, 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 Notice of Appeal are fully recorded hereunder:-

1.1 *The Second Respondent did not take into account the existing lawful water use exercised by the Appellant's predecessor in title;*

1.2 *The Second Respondent failed to take into account that the Appellant's predecessor in title planted more than one crop in any given year during the qualifying period;*

1.3 *The Second Respondent failed to take into account the fact that, the then Minister of environmental Affairs made a determination on 3 March 1982 in terms whereof it was determined that the Appellant or its predecessor in title may irrigate 9% of the total physical size of the land as it was registered on 15 January 1976;*

1.4 *The Second Respondent failed to take into account that the remaining extent of the farm Scherppunt 32, Registration Division was first transferred during 1897;*

1.5 *The Second Respondent therefore failed to take into account that the remaining extent of the farm Scherppunt 32, Registration Division IP, existed on 15 January 1976, which is the date that was determined by the Minister of Environmental Affairs on 3 March 1982;*

1.6 *The Second Respondent failed to take into account that the total area of the remaining extent of the farm Scherppunt 32, Registration Division, IP, measured at least 802,135 ha on 15 January 1976;*

1.7 *The Second Respondent failed to take into account that 9% of the total area of the remaining extent of the farm Scherppunt 32, Registration Division IP being at least 802,135 ha, is therefore at least 72,2 ha that may have been irrigated on the remaining extent of the farm Scherppunt 32, Registration Division IP;*

1.8 *The Second Respondent failed to take into account that the crop area that the Appellant's predecessor in title was therefore entitled to irrigate, amounts to at least 144,4 ha, when it is taken into account that the Applicant's predecessor in title irrigated two crops during any given year during the qualifying period;*

1.9 *The Second Respondent failed to take into account that the Minister of Environmental Affairs determined the duty in the area as 7 500 m3 per hectare;*

1.10 *The Second Respondent failed to take into account that, in terms of the provisions of Section 34 of the National Water Act, 1998 (Act No. 36 of 1998) the Appellant, as the successor in title of the previous owner, is entitled to proceed with this water use;*

1.11 The Second Respondent failed to take into account that the actual rainfall figures during the period 1 October 1996 to 1 October 1998 was very low in the area where the property is situated.

1.12 The Second Respondent failed to take into account that the last-mentioned fact required the Second Respondent had to take note that more water was used during the qualifying period for irrigation purposes, by the Appellant's predecessor in title, and that the Appellant's predecessor in title would therefore have used the full quota that was allocated to him;

1.13 The Second Respondent therefore failed to use the correct figures when determining the actual use during the period 1 October 1996 to 1 October 1998;

1.14 The Second Respondent in coming to the decision set out in Annexure "A" did not conduct a proper investigation, as the Second Respondent made use of satellite images in an attempt to ascertain what the existing lawful water use would have been;

1.15 The Second Respondent in so using satellite images failed to take into account that the said satellite images do not provide any indication of how much water was used during the qualifying period but could only be used as an indication of the land area that was arable;

1.16 The Second Respondent failed to make use of expert opinion in interpreting the satellite images at its disposal, but chose to make use of departmental officials and consultants that are not experts in the interpretation of satellite images with the result that the interpretation of the satellite images, on which the Second Respondent based its assessment, is flawed and unreliable.

1.17 The Second Respondent failed to take into account the submissions made to it by the Appellant on 10 January 2014, when the Appellant completed Annexure "C" that accompanied the notice for verification in terms of Section 35(4) of NWA.

12. Notwithstanding the amplified grounds of Appeal set out in the Appellant's amended Notice of Appeal, no response, written or otherwise in respect thereof was presented by the Respondent prior to the hearing of the Appeal.

13. <u>THE PROCEEDINGS</u>

13.1 The NWA in Section 22(1) (a) (ii) provides that a person may only use water without a licence if that water use is a continuation of an *"existing lawful use"*. Such use is defined in the NWA as that:-

"which has taken place at any time during a period of two years immediately before the date of commencement of this Act" (NWA)" [Section 32(1) (a)] and which

"was authorised by or under any law which was in force immediately before the date of commencement of this Act (NWA)". [Section 32(b) (i)].

13.2 By way of introduction and prior to leading any *viva voca* evidence, Mr Saunders on behalf of the Appellant, proceeded to traverse the legal landscape that would render the water use exercised by the Appellant compliant with the requirements referred to in Section 32(b) (i) quoted above. In doing so he referred the Tribunal to the following:-

13.1.1 By virtue of the powers and authorities vested in terms of Section 25 of the now Repealed Irrigation and Conservation of Water Act 1912 (Act No 8 of 1912) (RICWA), certain areas in the Province of the Cape of Good Hope, Transvaal and the Orange Free State, were in terms of Proclamations 68 and 69 of 1913, published in the Union Gazette of the 4th of April 1913, declared to be Dolomitic Geological Areas.

[Vide Exhibit 4]

13.1.2 Section 28(2) of the now Repealed Water Act 1956 (Act 54 of 1956) (RWA) provided that any area declared to be a Dolomitic Geological Area in terms of RICWA, shall be deemed to have been declared a Subterranean Water Control area in terms thereof. [Vide Exhibit 7]

13.1.3 Those areas specified in the annexure to the Regulations published in Government Gazette Notice No. 1324 of the 30th of August 1963 in respect of those Subterranean Water Control Areas referred to in the RWA, were extended by notice in the Government Gazette No. 1432 on the 29th of April 1966 to include several farms in the Marico District, Province of Transvaal. The farm Scherppunt 32 IP (330) was included therein. [Vide Exhibit 5]

13.1.4 Having been so included the farm Scherppunt 32 IP was now part of the Subterranean Government Water Control Area that forms part of the Bo-Molopo Subterranean Water Control Area and in terms of Section 30(1) of the RWA the owner of such land is:-

"entitled to abstract or obtain any subterranean water thereunder for his own use for any purpose on that land" subject to the provisions of sub-Section 30(2). This sub section provides authority for the Minister to make such regulations for exercising control over the drilling of boreholes, the sinking of wells and the quantity of water that may be extracted therefrom.

14. In order to stimulate agricultural development in the area designated as the Bo-Molopo Subterranean Water Control Area the Minister of Environment Affairs on 3 March 1982 approved a determination that inter alia provided as follows:-

"3 *Ten einde boerderyontwikkelling te bevorder, het dit dringend noodsaaklik geword dat die bepaling vir besproeiingsdoeleindes ook vir die res van die beheergebied gemaak word en met die oog op eenvormigheid word dit aanbeveel dat dieselfde basis soos vir die Grootfonteinkompartement goedgekeur, op die gebied as geheel van toepassing gemaak word. Sodanige bepaling maak voorsiening vir 'n waterkwota van 7500m3 per hektaar per jaar, sodat die maksimum jaarlikse toekenning dan bereken word deur die jaarlikse kwota van 7500m3 per hektaar te vermenigvuldig met 'n oppervlakte bereken op die voordeligste van die volgende drie bassisse,*

(a) Die totale oppervlakte wat werklik op 30 Augustus 1963 met ondergrondse water op 'n bepaalde afsonderlike opgemete grond, soos in die Akteskantoor geregistreer is, besproei is"

of

(b) nege persent (9%) van die totale fisiese oppervlakte van die totale fisiese grootte van die afsonderlike opgemete stuk grond soos dit op 15 Januarie 1976 (dit wil sê die datum van goedkeuring van hierdie bepaling ten opsigte van die

Grootfonteinkompartement deur die toenmalige Minister in die Akteskantoor geregistreer was;

of

(c) twintig (20) hektaar per geregistreerde eienaar soos in die Akteskantoor op 15 Januarie 1976 geregistreer. [Vide Exhibit 3]

15. To ascertain the applicability of the options specified in this determination for the farm Scherppunt 32, IP, the prescribed duty of 7500 m3 per hectare must be multiplied by the most advantageous of the following three scenarios, i.e.

15.1 the total area that was irrigated with underground water on 30 August 1963 [only if that area was larger than (b) or (c)]; or

15.2 if there was no irrigation, 9% of the total physical area of the property as registered on 15 January 1976; or

15.3 if there was no irrigation, and 9% of the property is smaller than 20 ha, then 20 ha per registered owner as registered on 15 January 1976.

16. It is clear that the most advantageous of the options specified in the determination would, in respect of the relevant property, be option 3(b). In order to give effect to the determination it would be required to multiply the actual size of the property (803.135 ha) by the percentage stipulated in paragraph 3(b) (9% percent) being the most advantageous of the options provided and thereafter multiplying the result with the duty (waterkwota) of 7500 m3 per ha allowed in terms of the determination.

(803.135 x 9% = 72.1921 hectares x 7500 m3 per/ha = 541440.72 m3 per annum).

The result would equate the extent of the annual lawful water use for the farm Scherppunt 32 IP.

17. Chapter III of the RWA No 54 of 1956 relating to the Control and use of the Subterranean Water and Water found underground, was replaced in toto by Section 17(1) of the Water Amendment Act 1987 (Act 68 of 1987) (WAA). This amendment replaced Sections 27 to 33 of the RWA. It authorised the Minister to declare defined areas as Subterranean Government Water Control areas by publication in the

Government Gazette and placed the control, extraction and use thereof under the authority of the Minister, provided for the Minister's authority to issue permits, placed upon him the obligation to establish the volume of water that would sustainably be available within a particular Subterranean Government Water Control Area, to establish that portion of available volume that would be extracted annually in respect of each individual property and to make such allocations subject to such conditions as he may impose.

18. In terms of Section 32 B2 (a) thereof the Minister is obliged to publish by notice in the Government Gazette a list of all properties in respect of which an allocation of water has been made together with details of the allocated volume that may be extracted in respect of that property as well as the conditions upon which such allocation has been made.

19. Mr Saunders submitted that notwithstanding extensive research no such publication in the Government Gazette in respect of the farm Scherppunt 32 IP could be found and he therefore contends that in the absence of any evidence to the contrary, this determination by the Minister in respect of those ones referred to as the Bo-Molopo Subterranean Water Control Area remains valid, and is the only legitimate manner in which the Lawful Water Use of the Appellant in respect of the farm Scherppunt 32 IP is established and can be calculated.

    In the light of the above, Mr Saunders concludes that the lawful water use on the farm Scherppunt 32 IP, for the period 1/10/1996 to 1/10/1998 was 541440.25 m3 per annum in respect of the field area measuring 72.7 ha.

20. This conclusion finds support given the contents of Table 2 of Annexure "A" attached to the Section 35(1) notice in which the existing lawful use determined by the Responsible Authority in its Section 35(1) notice (Table 2 of Annexure "A") authorised in terms of the RWA 1956 (Act 54 of 1956) as part of the Bo-Molopo Subterranean Government Water Control Area (Proclamation 1324 of 1963), calculated in terms of the Minister's determination referred to above.

It clearly confirms the lawful water use as being 541500 m3/ per annum in respect of a field area measuring 72,7 ha and exactly equates the water use calculated in terms of the determination.

21. Notwithstanding the above the Appellant must however still adduce evidence in support of the additional requirement defined as follows:-

Section 32(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.

The Section 35(1) notice in Annexure "B" defines this period as being the 1st October 1996 to 30th September 1998. The qualifying period so defined, relates to ground water i.e. water from boreholes.

22. In support of this requirement, Mr Saunders on behalf of the Appellant presented the Tribunal with three (3) affidavits respectively signed by Mr George Edmund Coetzee the erstwhile owner of the farm Scherppunt 32 IP and Mr and Mrs Wessels, members of the Appellant, the current owner of the farm.

Not having served these affidavits on the Respondent or the Tribunal at any time prior to the hearing, an objection to their admission was raised by the Respondent.

23. During the hearing the Respondent raised the under mentioned issue relating to the conduct and the continuation of the hearing:-

23.1 Mr Sedibe objected to the affidavits on the basis that he was not afforded the privilege of having traversed their contents prior to the hearing. Seeing that the Respondent's case was based on the documentation that formed part of the Appeal bundle that did not include these affidavits, he was disadvantaged.

23.2 He further voiced his objection to the documents presented by Mr Saunders during his opening statement. These exhibits (Exhibits 1 – 11) (referred to as Annexures), consisted of various Proclamations, Government Gazettes, excerpts from a reference book, copies of Sections of the RWA, the NWA, a copy of the Title Deed of the relevant property and an aerial photo of the farm in question

covered by a transparent overlay on which the witness had demarcated the area of dry land, irrigated land and the mother-lines used for purposes of irrigation. The Respondent's objection was premised on the basis that the inclusion of such documentation was prejudicial to his case and that by now allowing these documents as part of the Appeal presentation of the Appellant, the Respondent would be ambushed. The Respondent in order to review these documents and prepare a proper response, moved for a postponement of the proceedings.

23.3 In support of his request for a postponement Mr Sedibe argued that the response to the Appellant's appeal was informed by consultation and entirely based on the documents contained in the Appeal bundle that he had received. This bundle did not contain the affidavits or the exhibits referred to by Mr Saunders in his opening address. These he argued should have been provided to the Respondent prior to the hearing and represented evidence that could not be dealt with in this matter.

23.4 In reply Mr Saunders pointed out that the exhibits provided to the Tribunal during his opening statement were documents setting out the current law applicable to the issues raised in the Notice of Appeal and cannot possibly be alleged to have resulted in an ambush. The prepared affidavits reflect information that could be introduced by way of *viva voce* evidence in support of the Appellant's Appeal and need not be disclosed at any stage prior to the hearing.

23.5 The Tribunal found favour in the argument presented by Mr Saunders that in preparation of the Section 35 process it was the duty of the Respondent to consider the law and the facts on which the decision had been made. It is not competent for the Respondent to now, having failed to respond fully or in any manner to the amended (amplified) Notice of Appeal, be entitled to a postponement so as to be afforded the opportunity to consult and to defend the Respondent's decision. The application for a postponement was refused.

24. As both Mr and Mrs Wessels were present at the hearing, the admission of their affidavits was refused and the Tribunal ordered that *viva voca* evidence be heard.

Mr Saunders advised the Tribunal that the Appellant's witness, Mr Wessels was less fluent in English, this being the reason for tendering an affidavit in evidence. Not having received proper notification in terms of Rule 2(2) of the Rules of the Tribunal, the witness was required to give evidence in English as is provided in Rule 2(1). Notwithstanding the absence of a translator, his lack of fluency and understanding, he proceeded to give evidence.

25. **EVIDENCE PRESENTED BY THE APPELLANT**

MR JOHANNES WESSELS:

25.1 Mr Wessels in his evidence in chief confirmed that he was the owner of a neighbouring farm known as Greefslaagte where he had resided for the past 15 to 16 years. He was a close neighbour to Mr Coetzee who was the then owner of the farm Scherppunt 32 IP.

25.2 Mr Wessels testified that Mr Coetzee, the then owner of the farm Scherppunt 32 IP experienced financial difficulties during 1996 and as a close neighbour he assisted him in his farming activities by supplying a range of farming equipment that included tractors and related equipment. He testified that the farm consisted of both dry land and irrigated areas. He confirmed that Mr Coetzee continued farming all the available areas under irrigation estimated to be between 50 and 70 ha, all of which was planted to Smitsvinger, lucerne, potatoes, vegetables and nectarines. The irrigation areas were situated to the left, the right and above the position of the house indicated by a circle on the overlay. He however mainly assisted by concentrating on the cultivation of the arable dry lands approximately 300 ha in extent.

25.3 He explained that the irrigation system utilised by Coetzee consisted of two (2) mother-lines to which quick-couple water pipes (Gou-koppelpype) could be attached. There was also evidence of drip irrigation. The witness had

demarcated the irrigated areas on the overlay that covers the aerial photograph with blue crosses and the mother-lines used to supply water to the irrigated areas were demarcated by drawing in the position of the lines in orange. This was the irrigation system in operation during the time the witness assisted Mr Coetzee and took place during the qualifying period.

25.4 Under cross examination Mr Wessels confirmed his evidence that during the qualifying period he assisted in the agricultural activities conducted on the available dry lands as well as assisting Mr Coetzee with the cultivation of the land under irrigation.

25.5 Mr Wessels confirmed that the farm Scherppunt 32 IP was eventually sold by way of public auction and the Appellant acquired the ownership thereof. Although Mr Wessels was somewhat vague about the actual date of purchase, the title deed attached to the Appellant's representations made in reply to the Section 35(1) notice, confirms the date of purchase as being 24 November 2000. He testified that after he acquired the farm, his agricultural activities were mainly limited to plantings of maize and sunflower and he resumed with irrigation activities approximately four years after the acquisition of the farm.

26. EVIDENCE PRESENTED BY THE RESPONDENT

MR MARTINUS JOHANNES LOURENS BOTHA

26.1 In response to the evidence presented by the Appellant, the Respondent called Mr Botha a Chief Engineer Water Resources Management within the Department and stationed at its Gauteng Provincial office. In his affidavit he traversed the rationale for the verification and validation process and confirmed that as a precursor to the Section 35 process, the Appellant was required to register as a water user provided for in Section 26(1) (c) of the NWA. The information required for this purpose is provided by the Applicant (Appellant in this case) and is based solely on what the Applicant considers as its rightful and lawful water entitlement. The Water Use Certificate issued by the Department is

therefore based on information supplied to it by the Appellant and it (the Water use Certificate) therefore clearly indicates that the lawfulness of its contents must still be determined.

26.2 Following the registration process and in order to confirm the lawfulness of the water use as an existing lawful use that can continue without a licence, the Appellant must comply with the requirements provided for in Section 32(1) (a) and 32(1) (b) (ii).

26.3 The contents of the Section 35(1) Notice issued to the Appellant reflects that the farm Scherppunt formed part of the Upper Molopo Subterranean Government Water Control Area and was in terms of Proclamation 1324/1963 entitled to a water use of 541500 m3 per annum in respect of an area measuring 72.7 ha. and is confirmed by Mr Botha.

26.4 However to establish the actual water use on the farm Scherppunt during the qualifying period Mr Botha confirms the use of LANDSAT imagery and a computer based programme referred to as SAPWAT. LANDSAT (Satellite) images are used as an indication of the extent of the irrigation area while SAPWAT, a computer programme, produced an indication of the crop irrigation requirement based on specific climatic zones (rainfall and evaporation) and the irrigation system. The combination of these indicators informed the preliminary recommendation set out in the Section 35(1) notice. Thereafter, having examined the Appellant's representations its final decision was determined and set out in the Section 35(4) notice. In the present case the result so obtained confirmed that during the qualifying period an irrigated area of 23.3 ha was identified by LANDSAT images and the associated water requirement for this area that was actually used as being 164972 m3 per annum. This determination is achieved via the verification and validation process.

26.5 Confronted during his evidence in chief with the submission made by Mr Saunders in his opening address that the use of SAPWAT was only appropriate

when attempting to ascertain the unknown and seeing that a specific allocation had been made in respect of the farm Scherppunt 32 IP the use of SAPWAT was not competent, Mr Botha defended its use as an indication to establish whether the field actually irrigated during the qualifying period required water that would equate the determination made in terms of the Bo-Molopo Subterranean Government Water Control Area.

These findings were presented to the Applicant with a view of obtaining its agreement alternatively its comments on why the findings were unacceptable.

26.6 The Appellant duly noted their disagreement with the findings on the basis that the findings differed from the contents of the Water Use Registration and confirmed their disagreement in Annexure "B" to the Section 35(1) notice. Mr Botha confirmed that the mistaken belief relating to the legality of the contents of the Water Registration Certificate was common amongst water users.

26.7 In dealing with the alleged failure by the Responsible Authority to adhere to those principles provided for in PAJA based on the allegation that the Appellant was not afforded the opportunity to participate in the Section 35 process, he testified that in order to assist water users in the Crocodile/Marico Water Management Area various work sessions were arranged to assist them in completing the required documentation. As proof of this he referred the Tribunal to a fax dated the 23rd January 2014 addressed to the Respondents and its consultants Messrs Schoeman & Vennote in which the Appellant confirms the authority given to the TLU SA to act on its behalf in a declared dispute relating to the determination made in terms of the Section 35(4) notice. Subsequently however, in a letter addressed directly to the Respondent dated the 29th of January 2014, the Appellant requested the Respondent to ignore the contents of the faxed document and to continue with the Section 35 validation and verification process.

27. In cross examination Mr Botha was robustly challenged to concede that in the light of the determination made in respect of the Bo-Molopo Subterranean Government Water Control Area the use of SAPWAT was not competent and the water use in respect of the farm Scherppunt 32 IP should be treated in a similar manner as those properties dealt with in terms of a Government Water or Irrigation Scheme. Mr Botha refused to accept the correctness of what was contended on the basis that the Bo-Molopo Subterranean Government Water Control Area does not qualify as a Government Water or Government Irrigation Scheme and therefore the Appellant could not rely on the determination to relieve itself of the obligation to provide evidence of the water use that had taken place at any time during a period two years immediately before the date of commencement of the NWA.

27.1 The Respondents relied solely on the evidence of Mr Botha to support the decision of the Responsible Authority and in doing so confirmed the use of LANDSAT imaging as an indication of the extent of the irrigated areas and SAPWAT as an indication of the crop irrigation requirement during the qualifying period, the combination of which informed the preliminary validation decision and the final decision reflected in the Section 35(1) and 35(4) notices. No attempt however was made to place before the Tribunal any documentation relating to LANDSAT images or the results obtained by using the SAPWAT. System. Mr Botha during cross examination, in any event conceded that he is not an expert in the proper interpretation of the information relating to both LANDSAT and SAPWAT systems and cannot give expert evidence in respect thereof.

27.2 When faced with the submission that evidence was led confirming the irrigation of 50 – 70 ha during the qualifying period, he conceded that he could neither agree nor disagree with the submission save to say that information of this nature should have been placed before the Respondents during the verification process.

27.3 It also became apparent during his evidence that Mr Botha did not at any stage prior to the hearing have sight of the amended Notice of Appeal and neither was he made aware or informed of the date of the hearing.

27.4 At the completion of Mr Botha's evidence, Mr Sedibe on behalf of the Respondent again moved for a postponement to enable the Respondent to source the required expert evidence to enable it to introduce it in evidence. Rule 6(2) of the Tribunal Rules authorises the Chair-person to grant a postponement of a hearing if he is satisfied that there is good cause for the requested postponement. In this instance the Respondent having failed to respond in any manner to the amended Notice of Appeal and having failed to produce expert evidence in support of its use of the systems it relies on to reach a decision, failed to show good cause and the postponement was refused. Notwithstanding its refusal the Tribunal invited the Respondent to introduce the required evidence by way of expert testimony at the continuation of the hearing the following morning. The Respondent failed to do so.

27.5 The Respondents, when faced with the possibility that the Tribunal may vary the decision of the Responsible Authority, proposed an order for the matter to once again be referred to the Responsible Authority. Such an order, it was argued, would enable the Appellant to provide the information previously omitted and would afford the Responsible Authority the opportunity to reconsider its decision.

28. ANALYSIS OF THE EVIDENCE AND ARGUMENT

28.1 The only evidence tendered by the Appellant is that of Mr Wessels and for the Respondents Mr Botha was called in evidence. Both representatives at the request of the Tribunal prepared Heads of Argument.

28.2 The Appellant invited the Tribunal to review and set aside the decision made in terms of Section 35(4) of the NWA by the Responsible Authority, based on the

provisions of PAJA. The power to undertake such an exercise is by definition conferred upon a court of law or a Tribunal established for that purpose. The empowering provisions of the Water Tribunal limits its jurisdiction to those set out in Section 148 (1) (a - m) of the NWA and it therefore acts neither as a court of law nor a Tribunal established for the purpose of judicially reviewing an administrative action in terms of the Act. The question as to whether or not the Respondents complied with the provisions of PAJA when the Section 35(4) notice was issued does not in this instance arise because the Tribunal effectively hears the matter *de novo* and does not exercise any review jurisdiction. In terms of the provisions of Items 6(3) of Schedule 6 of the NWA, Appeals and Applications before the Water Tribunal takes the forms of a rehearing and is subject to the provisions of PAJA and in so doing it must comply with an observe the provisions of that Act.

28.3 The Appellant contends that it complies with the requirements of Sections 32(1)(a) and 32(1)(b)(i) of the NWA and is therefore entitled to use water without a licence as its water use is permissible as a continuation of an existing lawful use provided for in Section 22(1)(a)(ii) of the Act. The argument placed before the Tribunal by Mr Saunders in which the history of those areas that currently form part of the Bo-Molopo Subterranean Water Control Area has been detailed and extensive and the lawfulness of the existing water use based on his argument was admitted by Mr Botha in his evidence as well as Mr Sedibe in his Heads of Argument. In this regard the information contained in the Section 35(4) notice (Annexure "B") supports the Appellant's contention that the lawful water use on the farm Scherppunt 32 IP equates to 541440 m3 per annum in respect of a field area measuring 72.7 ha. It therefore follows that the Appellant's use in terms of Section 32(1) (b) (i) complies with the condition of lawfulness as it was authorised "*by or under any law which was in force immediately before the date of amendment of this Act*".

28.4 Having jumped this hurdle it is necessary for the Tribunal to decide whether the Appellant had acquitted itself of the onus in providing proof that its water use had taken place at any time during a period of two years immediately before the date of commencement of this Act and it therefore was entitled to a decision confirming its right to irrigate a crop area of 144.4 ha on the farm based on a system of double cropping.

28.5 Mr Saunders was at pains to establish that the determination made by the Minister in respect of those areas included in the Bo-Molopo Water Control Area, should be treated in a similar fashion as those which form part of a Government Water Scheme or a Government Irrigation Scheme. In so doing he would relieve the Appellant from the obligation to comply with Section 32(1) (a).

By virtue of circular 18 of 2001 published by the Director General of Water Affairs on the 26 of March 2001, the use of water in Government Water and Government Irrigation Schemes, where the extent of land that may be irrigated by means of water from such a scheme has been determined by the relevant authority and allocated for use on a particular property, the extent of the water use so determined is to be treated as an existing lawful water use in terms of Section 33(2) of the National Water Act regardless of whether the water is actually used on that property or not.

The attempts by Mr Saunders to include the Bo-Molopo Water Control Area as part of those Government Water or Irrigation Schemes that should be treated as an existing water use in terms of Section 33 of the NWA, cannot be accepted. Mr Botha in his evidence refused to accept that the areas included in the Bo-Molopo Water Control Area can be treated as a Government Water Scheme or a Government Irrigation Scheme provided for in the circular. It follows that evidence relating to the water use in compliance with Section 32(1) (a) was required.

28.6 To establish its water use during the qualifying period, the Appellant relied on the evidence of Mr Wessels which confirmed his assistance to the erstwhile owner in cultivating approximately 300 ha of dry land and the use of the existing irrigation in continuation of the farming activities on approximately 50 to 70 ha by the previous owner. The agricultural activities conducted by way of the available irrigation related to plantings of Smitsvinger grass, lucerne, nectarines, potatoes and other vegetables. He confirmed that his assistance commenced during 1996 and lasted for a year. Although the witness was unsure as to the date on which the Appellant acquired the farm Scherppunt, according to the papers it was acquired on the 24th November 2000.

28.7 In support of the decision set out in the Section 35(1) notice the Respondents called Mr Botha who confirmed inter alia that in reaching the preliminary decision set out in the Section 35(4) notice the Responsible Authority inter alia made use of various modelling methods to ascertain the extent of the existing water use that took place during the qualifying period. As an indication of the area irrigated during the qualifying period Mr Botha confirmed the use of LANDSAT images and in respect of the water use during the qualifying period reliance was placed on a computerised irrigation water use model referred to as SAPWAT. This model according to the 35(4) notice is based on specific climatic zones (rainfall and evaporation) and the irrigation system used. By employing both LANDSAT images and SAPWAT calculations the Responsible Authority estimated both the irrigated area and the water use of the Appellant in respect of the farm Scherppunt during the qualifying period. By utilising this method the proposed existing lawful use was calculated to be 164972 m3 per annum in respect of an irrigated area of 23.3 ha.

28.8 The Respondents had criticised the Appellant for not having provided in its original application the evidence it now relied on to provide proof of its water use during the qualifying period and in failing to do so the Responsible Authority

confirmed its decision in the absence thereof. The use that actually took place during the qualifying period is an intrinsic requirement for the establishment of an existing lawful use and the common law rule of *audi alterem partem* reinforced by PAJA in safeguarding the interest or legitimate expectations of an individual, supports the requirement that not only should an individual fully understand the nature of the pending decision and impact on its interest, but care should be taken by officials to carefully explain the nature and impact thereof. Notwithstanding affirmation of the general lack of understanding of the validation and verification process by members of the public and even in the legal fraternity, the Respondent failed to provide any evidence that it availed itself of the authority provided for in Section 35(3)(a – d) to establish such information in compliance of the principles referred to above.

28.9 The Respondent produced no evidence on which it based its decision emanating from the use of these modelling systems allegedly used as the source of information in support of the recommendation of the Responsible Authority in establishing the water use which had taken placed at any time during a period of two years immediately before the date of commencement of the NWA. Even if it had done so its witness conceded that he was not in a position to interrogate its correctness as he was not an expert. It is also noteworthy that the Responsible Authority in conducting the verification and validation exercise in the Groot Marico district made use of consultants (experts) to conduct the investigation and notwithstanding their expert knowledge were not called upon to testify. It follows therefore that the Appellant has also acquitted itself in compliance with its obligation provided for in Section 32(1) (a) of the NWA.

28.10 Having had ample notice of the nature and basis of the Appeal, the Respondents failed to place any evidence before the Tribunal in support of its decision reflected in the Section 35(4) notice.

28.11 The Respondent's request for the matter to be referred to the Responsible Authority cannot be entertained as, having made a final decision it rendered the Responsible Authority *functus* and it is for this very reason that the Tribunal, empowered by the provisions of the NWA must adjudicate the facts *de novo*. The rules of the Tribunal clearly stipulate that an Appeal before the Tribunal takes the form of a re-hearing.

29. **DECISION**

On the evidence before it the Tribunal makes the following decision:-

29.1 That the Appellant is an existing lawful water user in terms of Section 22(1)(a)(ii) read with Sections 32(1)(a), 32(1)(b)(ii) of the NWA;

And

29.2 That the existing lawful water use on the farm Scherppunt 32 IP is confirmed as being 541500 m3 per annum for a field area measuring 72,7 ha.

HANDED DOWN AT PRETORIA ON THE 17TH DAY OF MARCH 2017.

F. ZONDAGH

Member: Water Tribunal Chairing

M. NKOMO

Member: Water Tribunal