IN THE WATER TRIBUNAL

[HELD AT PRETORIA]

Case No: WT 22/06/15

In the matter between:

IAN MURDOCH MACDONALD Appellant

and

THE DIRECTOR GENERAL: DEPARTMENT OF WATER AND SANITATION First Respondent

THE REGIONAL DIRECTOR: DEPARTMENT OF WATER AND SANITATION KWAZULU NATAL Second Respondent

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DECISION AND REASONS

APPEARANCES:

Coram	**:**	**Adv. TAN MAKHUBELE SC**	**Chairperson**
		Ms. M NKOMO	**Member**
For the appellant:		**Adv. M VAN DER LINDE**	
		Instructed by Attorney Mr. M. Grütter	
For the respondents:		**Attorney Mr. TM SEDIBE**	

Introduction and nature of dispute

[1] This is an appeal in terms of section 148(1)(f) of the National Water Act, 36 of 1998, as amended (NWA), against the decision of the first respondent (DG) dated 08 April 2015 in terms of which the applicant's application for a water use licence in terms of sections 21(c), (e) and (i) of the NWA was declined.

[2] The letter reads, amongst other things as follows:

"Whilst considering your application and supporting documents, some information was found to be outstanding and you were requested in a meeting dated 26 September 2014 to provide such. Critical information outstanding includes the following:

i. Lease agreement from the land-owner.

ii. Methodology of power generation.

iii. Master layout plan detailing the entire infrastructure.

iv. Civil Engineering drawings for the infrastructure.

v. An environmental Authorization from the Department of Environmental Affairs.

vi. Approval from the Department of Energy.

vii. Motivation in terms of Section 27(1) of the National Water Act, regarding the need to redress the results of the past gender and racial discrimination.

viii. A report detailing the impact of the proposed activity on the water resource and the mitigation measures.

To date the Department has not received all the requested information from you and it is therefore my contention that you have been afforded enough time to respond.

Kindly note that the Water Use Licence Application is declined and the file closed due to the reasons mentioned above."

[3] It is clear from a reading of the above letter that the application was not declined on the merits but rather on the basis that the applicant has not submitted "all the requested information".

[4] The immediate question arising from this is whether there can be an appeal against a refusal of a water use licence when such refusal, as in this appeal before us, was based on alleged lack of information.

[5] The answer is yes. When performing their functions, state organs are enjoined to apply fair processes and procedures. The decisions of state organs' functionaries are administrative action as defined in the Promotion of Administrative Justice Act, 2000 (Act No.3 of 2000) (PAJA).

[6] It is settled law that the decisions of the Water Tribunal constitute administrative action that are reviewable in terms of PAJA **(See: Makhanya NO v Goede Wellington Boerdery (Pty) Ltd**[1]).

[7] The effect of *Makhanya* judgment in my view is that in considering appeals before it, the Water Tribunal is not only concerned with the merits of the application, but also the procedures adopted by

[1] (230/12)[2012] ZASCA 205 (30 November 2012)

the decision makers in reaching a decision. The National Water Act, 1998 (No. 36 of 1998), as amended (NWA), prescribes procedures for application of water use licences.

[8] The whole dispute in this appeal revolves around the information or documents that are deemed to be relevant by the decision-maker, how they were requested and the response of the appellant. The enquiry focuses on compliance with procedures. Section 41 of the NWA prescribes the *'Procedure for licence applications'*. I will elaborate more on this issue when I deal with the legislative framework.

[9] The next question is the nature of the decision that the Water Tribunal can, under these circumstances, make. Not being concerned with the merits, the outcome of an appeal of this matter is in my view one that looks at whether the DG was correct in reaching the conclusion and decision that there was insufficient information to adjudicate the water use licence application.

[10] On assessment of the issues and exchanges between the parties, a question arises as to whether the decision of the DG should have been to decline the application or to refuse to adjudicate the application. If the decision were the latter, the applicant would have been entitled to approach the court directly in a review application.

[11] That review power in the circumstances of this case lies with the Water Tribunal because the DG has reached a final decision with regard to the whole application. If this were a court application, a decision that is based on failure by the party who bears an onus to provide sufficient evidence to sustain a claim is referred to as an *'absolution from the instance'*, meaning that a door is open to the applicant to bring in the relevant documents or information. However, a final decision to reject an application has been made in this instance, and my view is that even if the applicant were to approach the court, he is likely to be referred back on the basis that the Water

Tribunal is the correct arbiter with regard to a decision to decline a water use licence.

Delays in finalizing this appeal

[12] This appeal was brought to the attention of the Chairperson of the Water Tribunal by letter from Martin Grütter (the appellant's attorney of record) dated 10 August 2016, in which he complained about what he alleged was lack of progress in the appeal and failure by the Regional Head to comply with the Registrar's request for reasons for the decision.

[13] It was however established during a meeting[2] attended by both the Registrar and the attorney, and on further investigations, that the reasons and the respondents' reply to the appeal had in fact been transmitted to the Registrar during December 2015. However, there was no proof that the Registrar transmitted these documents to the appellant. It was agreed that he would do so on the same day and that the appellant would as soon as possible, indicate whether he intended to reply to the respondents' documents.

[14] Despite receiving the reasons for the decision, the appellant failed to supplement his grounds of appeal and to respond to the respondents' 'reply', as agreed in the meeting. Instead, a request was made for the matter to be setdown for hearing.

[15] The first hearing took place on 19 April 2017. On this date, the appellant was represented by his attorney. It turned out that the documents that the appellant wanted to rely on were not were not part of the record before the Panel. The appellant insisted that he had provided the documents that are alleged to be outstanding as indicated in the letter declining the water use licence (WUL) application.

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[2] 24 August 2016

[16] The Panel spent time going through the documents that were provided as the record to establish exactly what the issues or outstanding documents were.

[17] The appellant's attorney was not able to make submissions with regard to the nature of the alleged documents that were submitted to the department but excluded from the record of proceedings. His view on the matter was that he only came on record during 2015 and as such, he could only account for what happened thereafter.

[18] One such document that was alleged to have been excluded from the record is a full report of the Feasibility Study conducted by consultants known as 'Ninham Shand'. However, on reading the narrative in the Index, the omission was the fault of the appellant because he only provided 4 pages of a 20 page document and indicated that the *'Full Report will be made available at hearing'*. Despite this undertaking in the index, the 'Full Report' was not made available. The legal representative of the respondent indicated that he was aware of this 'Full report' and he had a copy in his possession.

[19] The matter was postponed by agreement to allow the appellant and his attorney to sort out the outstanding documents and to submit copies of all relevant documents to the Registrar and the respondents' legal representative to enable the latter to take instructions.

[20] The hearing resumed on 25 October 2017. This time the appellant had briefed counsel to represent him. It was agreed that the hearing should start afresh because nothing other than sorting out documents was done in the first hearing. The hearing could not be finalized in one day and was postponed to 11 and 12 December 2017. The Panel agreed to allow the parties to file supplementary written submissions to deal with issues raised by the respondents' legal representative, which were not part of the defences in the written reply or exchanges during the licence application. These are:

a) validity of the Settlement Agreement between the parties,

b) whether the appellant's oral evidence was 'hearsay'; and

c) whether environmental authorization from the Department of Environmental Affairs is a requirement for issuing of a WUL.

I will deal with these three issues in turn at a later stage.

[21] The supplementary written submissions were due on 15 January 2018. However, the appellant's were only filed on 19 February 2018. Due to other work commitments and conflicting schedules, the Panel was not able to deliberate on the merits and to prepare reasons for the decision until now.

Background facts (in chronological order)

[22] The facts pertaining to the lodgment of the licence application and subsequent events appear from the bundle of documents before the Panel and are to a large extent, common cause or not seriously in contention. The only dispute of course is whether the information listed in the letter of refusal of the application was outstanding as alleged by the respondents, or was before the responsible authority as alleged by the appellant.

[23] The oral testimony of the appellant was in the main to identify and point to where according to him the alleged outstanding information was located in the bundles before the panel.

[24] Most of the documents were in the bundle that was provided to the panel during the first hearing of 19 April 2017, although they were not in a chronological sequence. When the hearing resumed on 25 October 2017, a few other documents were added. Most of them are written exchanges between the parties as well as a complete copy of the Feasibility Study.

[25] **Hereunder is the sequence of events** as they appear in the documents before us.

[26] On 21 May 2002, a consulting firm known as Ninham Shand acting on behalf of the appellant (then trading as 'Agriman Shand Partnership') lodged the application for a water use licence in Form DW 771) with the Regional Director of DWS, Durban. It appears from the information supplied in the form that the type of water uses applied for are;

> *'DW 777 Engaging in a controlled activity generated by a water work'* referred to as " *non-consumptive water use for hydro electric power generation"*
>
> *'DW 78 Using water for purposes of generating electricity power.*

The water resource where the waste or water containing waste would be used or discharged is described as *"Pongola River below Jozini dam"*

[27] It appears from correspondence from Ninham Shand dated 02 December 2003 and 25 May 2004 that the Department of Water, Agriculture and Forestry (DWAF) were engaged during the preparation and investigations regarding the Feasibility Study. This was particularly with regard to the use of government infrastructure, the designs and drawings.

[28] The DWAF (Regional Director of Water Resource Management: Kwazulu-Natal) responded by letter dated 08 December 2003 and indicated, amongst other things that the matter would be referred to Mr Jaap Kroon *'for comment on the design aspects and for liason with our land matters section'*

[29] It appears from a covering letter dated 04 June 2004 signed by one P. Ballantine that a draft Feasibility Study Report from Ninham Shand was forwarded to Agriman / Macdonald for comments.

[30] The final Feasibility Study in respect of Pongolapoort Hydro - Study of Civil Engineering and Electro-Mechanical works is dated September 2004. It appears nothing happened between June 2004 and April 2008.

[31] The Umhlosinga Development Agency, an entity of the uMkhanyakude District Municipality placed an advert in the newspapers for Request for proposals: Jozini (Pongolapoort) Hydro-electric project. The closing date was indicated as 14 April 2008.

[32] The appellant submitted what he referred to as a *'Water license application 2(E) & 2(C) (DW777 & DW 775)"* on 23 June 2008, and in a letterhead of Agriman & Associates. Form DW777, is described as *'Licensing Part 2C for "Impeding or diverting the flow of water in a water course".* Form DW 775 was not in the bundles before us. There is no dispute with regard to whether the appellant has submitted this form or not. We do not intend to raise issues that the parties appear to be content with.

[33] On 04 March 2009 the appellant's then attorneys, Naude and Britz, addressed a letter to Umhlosinga Development Agency, and uMkhanyakude District Municipality in response to a letter dated 23 June 2008 (copy not attached) and to the newspaper call for proposals for hydro-electric project at Jozini. It appears from the tone of the letter that the parties were in discussions with regard to whether the municipality was engaged in a competing project or not. The appellant's attorneys were of the view that it was a competing bid and contended that the project was infringing the copyright with regard to the Feasibility Study conducted by Ninham Shand on behalf of the appellant. They also submitted that if the Request For Proposals is not a competing bid, in their view, the parties should enter into negotiations for Mr. Macdonald and this project to work together.

[34] An entity known as NEMA Consulting appears to have been appointed by SSI Engineers in terms of the request for proposals indicated above to conduct amongst others a feasibility study for Jozini Dam. They prepared a document titled 'Background Information document for proposed hydro-electrical Scheme, Jozini Dam" dated April 2009.

[35] On 14 July 2009, the appellant (then trading as Agriman & Associates) applied to the DWAF to utilize government waterworks and safety licence. He referred to the application for non-consumptive water licence that he had submitted and explained that it would use the normal flow release from Pongolapoort Dam to generate electricity by way of turbines. He applied for a 'Safety Licence' and for authorization to use DWAF land and to make use of the relevant DWAF infrastructure for this project. He also requested to enter into long-term legal agreements such as:

> *1. ' 1.A long-term renewable Land and infrastructure Lease Agreement*
>
> *2. A long-term renewable Memorandum of understanding (MOU) or an Operational Agreement.*
>
> *3. A right of way Servitude to gain access to the power station."*

[36] On 05 August 2009 the Director-General addressed a letter to the appellant regarding what was referred to as the unsolicited bid to utilize government waterworks to generate hydropower. This letter refers to the appellant's application of 14 July 2009 referred to above, and a letter dated 28 February 2009 (not in the bundles). It also refers to discussions between him and persons identified as Mr. F. van der Merwe, Mr. N Ward (Telecom) and Ms H. Anderson on 30 April 2009. The appellant was reminded that the Department has to comply with the requirements of the Public Finance Management Act, 1999 (Act No.1 of 1999) and Treasury Regulation 16. It was also confirmed that Mr. Pillay of National Treasury's Business Development and Public Private Partnerships was consulted. Taking into account what had already been discussed with him, the appellant was advised that the proposal was rejected by Deputy Director-General of National Water Resources Infrastructure. He was also advised that the department would not use Macdonald's intellectual property in the bid / proposal, which was being returned with the letter. Furthermore, he was informed that the department may call for expression of interest in future.

[37] The appellant and the Minister signed a Settlement Agreement on 20 March 2013, under the auspices of the Mediation Panel of the Department of Water and Environmental Affairs comprised of Messrs Zondagh, Mokonyane and Pietersen. The Settlement Agreement reads as follows:

'WHEREAS

1. The Applicant and Respondents have negotiated and agreed a settlement of the dispute under the auspices of the Mediation Panel emanating from applicant's complaint to the Public Protector.

2. The Applicant applied to the then DWAF for a non-consumptive individual water license (WL) to generate hydro-power from DWA's continuous water release regime from the Pongolapoort Dam on the 21st May 2002. The applicant contends that this application has merit. DWA has not issued a WUL as the Respondents are committed to comply with their legal obligations in terms of the National Water Act and has been unable to deal with the water use license application of the complainant in light of the legal requirement of the Respondents of having to conduct a reserve determination for the river flow downstream of the Dam.

NOW THEREFORE UNDER THE AUSPICES OF THE MEDIATION PANEL IT IS AGREED AS FOLLOWS;

1. The Parties agree that the current license application is valid and is pending consideration by the responsible authority.

2. Prior to the consideration by the responsible authority of the water use license the applicant, in view of the effluxion of time and without prejudice, be entitled to amplify his application to the extent that he deems necessary and in compliance with the statutory requirements.

3. Upon receipt of the documentation aforementioned or upon confirmation by the applicant that he has elected not to amplify his application the Water Use Application Adjudication Committee (WUAAC) then can proceed with its adjudication.

4. The Water Use Application Adjudication Committee (WUAAC) must commence without delay with the adjudication process of the application to be concluded within 45 days from receipt of the application or such confirmation.

5. The department hereby undertakes to call upon the applicant to submit written representations in terms of section 41(2) of the National Water Act on any aspect of the license application under consideration prior to its final decision of the WUAAC.

6. The applicant shall be afforded a reasonable time to respond to WUAAC's request.

7. Upon adjudication and arriving at the final decision the department undertakes to communicate said decision to the applicant without delay.

8. The conclusion of this agreement does not in any way limit or prejudice the applicant's rights.

9. This agreement shall be presented to the Chair of the Mediation Panel Ms B Mabandla for formal ratification whereupon this agreement will be tabled to the Minister of Water and Environmental Affairs for her to note"

[38] The Settlement Agreement bears three signatures, that of the applicant, the respondent and the Chairperson of the Mediation Panel, Mr. Zondagh.

[39] On 03 July 2013, the parties signed an Addendum to the Settlement Agreement. The Mediation Panel was not involved.
It reads as follows:

" The Applicant and the Respondents have negotiated and agreed a Settlement Agreement for the dispute regarding a Water License application and have agreed to add the following clauses as an Addendum to the Settlement Agreement.

1. DWA hereby agrees that the previous reasons given for delaying the granting of the water use license, being;

a. The need for a Reserve Determination

b. The need for a PPP

Are no longer valid, required or relevant for this water use license application.

2. DWA hereby agrees that "the law is not retrospective" and that the application will be assessed on its merits as at the time that the application was made i.e. May 2002.

3. Upon adjudication and arriving at the final decision the department undertakes to communicate said decision to the applicant without delay and if positive then to proceed immediately with drafting agreements on;

a. the supply of water

b. the use of DWA land and infrastructure in order that the proposed project may proceed without further delay.

c. The consideration of utilizing simulated flood releases more effectively as proposed in 7.2 of the Feasibility Study.

[40] On 24 October 2013, Norman Ward (Chief Engineer: DWAF KZN) directed an email to Sayed Abdulla and Walther van der Westhuizen. The contents are a bit vague, particularly because he refers to documents that are not part of the record. The part that is understandable is where he requests the recipients to *'respond so that we can proceed with the WUL or not'*. He also informed them that *'it seems that it has been taken out of our hands'*, and asked *"what the way forward with regard to the land use agreement'.*

[41] Van der Westhuizen responded to the above email on the same day (24 October 2013) and advised him that the Department of Energy now lead the process to install mini hydro power plants at infrastructure belonging to the Department of Water Affairs. It seems he attached proposed alternative procurement to this email. He listed the following as *"the bottom line'*

(a) PPP not applicable, but a revised method will be in place,

(b) Mr. Macdonald was informed at the time that the NWRI branch rejected his request to install infrastructure on DWA's infrastructure was rejected,

(c) He is welcome to bid for this opportunity when the opportunity is advertised as per attached procedure

(d) We cannot differentiate between applicants and must follow the same procedure.

He ended his email by stating that:

' From my side I will still not support this request to install infrastructure on the DWA infrastructure. I do not have any objection to the water use licence application to generate hydro power taking water from the river which we release'

[42] Norman Ward addressed an email to Walther Van der Westhuizen and others (and copied the appellant) on 12 November 2013 and informed him that he has been instructed to fast track the licence application and that the intention of the region was to issue the licence for water use subject to lease agreement and operational agreement with Infrastructure branch. He also advised them that he had arranged a site meeting for 25 November 2013 and that it would be *'advantageous to have all parties on site at the same time, so that initial discussions on technical issues could begin before formal arrangements can be made with the branch'*. He also requested the attendance of *'representation from infrastructure branch at that meeting to discuss positioning of structures and connections to the outlets as well as contact persons for further negotiations on leases etc.'*

[43] Norman Ward addressed an email to the appellant on 13 November 2013 and advised him that it seemed *'that bids will be called in 2014. I think that we should proceed our process separately if infrastructure do not want to attend'*. He started this email by cautioning the appellant to be cautious and treat the contents carefully as he has been accused of *'about releasing too much information on other issues'*.

[44] The site meeting appears not to have taken place on 25 November as arranged by Ward, but on 29 November 2013 according to the 'Notes of discussions' compiled by JC Perkins of Aurecon dated 02 December 2013. The notes indicate the background on the appellant's WUL application, the rejection of his request to utilize government infrastructure and the decision of the Water Tribunal that it had no jurisdiction over the matter because the licence had not been rejected, the referral to the Public Protector, and the Settlement

Agreement. The attendees raised issues such as dam safety rehabilitation and the new Department of Energy regulations. The former was regarded as a non-issue because the expected DWA implementation schedule would possibly be 10 years and 'any effects would be at Mr. Macdonald's risk'. The new Department of Energy regulations were deemed to not be relevant for several reasons, amongst which was the fact that they were still proposals and not policy, and furthermore, the Settlement Agreement indicated that the law was not retrospective.

Mr. Ward informed the meeting that;

(a) He would proceed and recommend that the WUL be issued,

(b) Macdonald could plan for a $7m^3$ per second release regime,

(c) It would be better for the proposed scheme to connect up to the first large flange at the base of the dam, rather than to one of four, further along the pipeline, as it would reduce the amount of shared infrastructure;

(d) He believed raising the spillway would not be cost effective, as the use of the water would be agriculture.

The attendees inspected the crest of the dam visually after the meeting and there was consensus that *' the remedial work on the spillway was unlikely to impact on the proposed power station'.*

[45] On 4 February 2014, Norman Ward sent an email to MacDonald, Abdulla, Perkins and Van der Westhuizen and advised them that the Licence was being drafted. He recommended that the applicant (Macdonald) should use Webber Wentzel to *'put forward an agreement, as they are familiar with DWA requirements. The alternative would be that DWA draft the agreement, but this could cause delays due to capacity constraints'*. On the same day the appellant addressed an email to one James Perkins and Bertrand Collet and enquired if they could do this task.

[46] The appellant sent an email on 6 February 2014 to Walther Van der Westhuizen and requested an update on the way forward in respect of Webber Wentzel. He also requested the name of the contact person at Webber Wentzel to 'kick start' the drafting of the agreement as suggested by Ward.
Walther Van der Westhuizen replied on the same day and advised the appellant amongst other things that MacDonald is moving prematurely because of the outstanding issues regarding authorization to use government infrastructure. He advised Macdonald to request official approval from acting DG to link into the department's infrastructure as the DDG had previously refused the application. In his view, a higher authority would have to reconsider the request, and if approval is granted, Webber Wentzel would be recommended to draft the agreement after the technical issues were sorted out.

[47] Macdonald replied to the email of Van der Westhuizen on 7 February 2014requesting that the technical issues be addressed concurrently pending the request to acting DG. He also asked for an official form, and details of the Acting DG, among other things.

[48] On the same day, Macdonald made a formal request to the Acting DG, Mr. Trevor Blazer, to link the hydro-power to DWA infrastructure and also informs the Acting DG that he planned to participate in the Renewable Energy Independent Power Producer (IPP) 4th application window that was closing in August 2014.

[49] On 12 February 2014 Van der Westhuizen advised Macdonald by email that he was changing his previous advice and strongly suggesting that Macdonald not to spend money and time on the proposal until he gets and official response from DWA regarding the request to link to the DWA infrastructure. He refused to divulge the reasons when Macdonald asked him to give reasons.

[50] After making several enquiries about the progress of his application to connect to the department's infrastructure and escalating the matter to DG and Anil Singh (Legal section of the DWS),

the anticipated response from Van der Westhuizen was ultimately received on 24 March 2014. He informed Singh that:

(a) he had drafted a response some time ago, which was referred to legal services by the DDG, and legal services made substantive comments;

(b) DDG was not in favor to allow hydro power at DWA installations until a policy was developed to regulate it,

(c) his revised draft response now says that once they have policy, the Department of Energy process must start, and Macdonald can put in a bid like any one else.

(d) the new draft will be send to central point for language whereafter it will once again run the route

[51] The appellant sent an email to Van der Westhuizen on 25 March 2014, and expressed his disappointed that the DWA was still at policy development stage. He reminded him about the addendum to the settlement agreement, and advised him to take note of the contents of the settlement agreement.

[52] The Chief Director: Legal Services was requested by the Directorate: Integrated Environmental Engineering to advice *on whether the Minister or Ingwenyama Trust has the authority on the land within the purchase boundary of the governmental waterworks in KwaZulu Natal that have been built on Traditional Authority land prior to 24 April 1994.* The opinion is dated 28 March 2014 and the advice was that the Minister, and not the Ingwenyama Trust had the authority.

[53] An undated Section 21(e) Licence No. 07/W45A/File No.27/2/2/W454A/1/5 for Macdonald was issued with conditions. The licence was issued for *"Practising a controlled activity (Hydropower) subject to the conditions set out in Appendices I and II".*

[54] The licence appears to be based on a "Record of recommendation and decision for section 21 Water use" dated 06 May 2014 that was prepared by the assessor, N.A Ward who recommended issuance of the licence.

[55] Another Record of recommendation and decision was prepared by the same assessor and edited by S.B Mathonsi. The recommendation here is for "decline" on the basis that the "*applicant failed to submit required information for assessment of the application*". This is the recommendation that was subsequently approved by the WUAAC, the Provincial Head and the DG during 2015. It is the subject of this appeal.

[56] On 31 July 2014, one Mr. SO Naidoo, KwaZulu Natal Regional Head of the Department of Water Affairs, directed a letter to MacDonald and requested that he submit the water use licence application. This was because the May 2002 submission does not satisfy the requirements of section 41 of the Water Act, as well as the information per section 21 (1) of the Act. Macdonald replied on 22 August 2014 Naidoo and reminded the department about the settlement agreement. He also responded to specific requested information. These two documents are central to the dispute before us and as such deserve to be dealt with in greater detail.

[57] On 22 October 2014, the DDG of the NWRI, Ms. Z Mathe, directed a letter to Provincial KZN Head (Mr. Sibusiso Mathonsi) and offered comments regarding the appellant's Water Use Licence application. The NWRI reiterated its previous rejection of the application during 2009 because:

(a) NWRI Branch (NWRIB) is in the process of developing a policy with conditions under which others can be allowed to link the Department's Infrastructure for power generation.

(b) The Department of Energy will lead the process once the policy is finalized by utilizing a fair open tender process, and Macdonald will be allowed to bid then.

(c) NWRIB has received a number of requests to link its infrastructure at countrywide locations, and allowing Macdonald at this stage will be unfair towards other applicants.

[58] It appears from emails dated between January and March 2015 that the parties were in correspondence with the Public Protector with regard to a complaint about the delays in finalizing the application. The Chief Director: Legal Services (Mr. Loselo) wrote to the parties and indicated that he was awaiting information from the Regulations Branch regarding the licence application complaint. He also requested a copy of the settlement agreement. Obviously, the appellant was not happy with this and reminded him that the department was over 500 days in breach of the 45 days stated in the agreement.

[59] The record indicates that the appellant is in possession of a Verification of BEE Certificate (Level 4) dated 28 February 2015, which is in his own name and trading as Scatterings from Africa. He is exempt Micro Enterprise as the turnover is less than R10m per annum

[60] It appears from emails exchanged between January and March 2015 (a month before the licence application was rejected) that the appellant approached the Public Protector once again, but this time with regard to the failure by the respondents to adjudicate his application within the agreed period of 45 days. The DWS Chief Director of Legal Services, Mr. Loselo pleaded for more time to collate information with regard to the delays.

[61] On 12 March 2015, the Public Protector sent an email to all parties and advised that a decision has been taken to conduct a hearing into the matter and was busy drafting section seven notices in terms of the Public Protector Act against amongst others the DG and the Chief Director of Legal Services. The record does not show what happened after the Public Protector's email, except for a letter written to the appellant by the Registrar dated 15 October 2015. This letter refers to a meeting that was held in the Public Protector's office on 14 October 2015 with regard to expediting the appeal.

[62] The DG wrote to the appellant on 8 April 2015 and advised him that the Water use licence application has been **declined** and the file was being closed due to critical information that is outstanding.

[63] On 19 April 2015, the DG replied to Macdonald's letter dated 7 February 2014 in which he sought authorization to connect to the Departmental Infrastructure. Macdonald was advised that the previous decision by the Department to reject the application is upheld. He was further advised that the Department is in the process of developing a hydropower policy to provide standardized guidance in permitting hydropower projects at the Department's water infrastructure, and how permits will be administered. The Department will follow a competitive procedure to link with its infrastructure for power generation purposes, and Macdonald was invited to submit a bid when the process is advertised by the Department of Energy.

[64] Macdonald replied to the letter from the DG on 22 May 2015 and requested a reconsideration of the rejection of the WULA.

[65] An email was directed to MacDonald on 23 May 2015 from Project Office IPP Renewables. It is a response to certain questions that he had asked (not attached) with regard to whether he should be in possession of a Water Use Licence, a Land Lease Agreement and an EIA before submitting a Department of Energy bid. He also asked about the costs. The answer was YES, and the advice was that he should first obtain a WUL, which is less costly than the others and there is no refund if he is not successful.

[66] Macdonald wrote to the DG again on 24 May 2015 and referred to the latter's letter of 4 May 2015. He charged that the department is non-compliant with the Act and in breach of its duty to care. He gave the department 14 days to re-assess the rejection of the WULA or he will make an urgent application to the High Court for an order to enforce the Department and the Water Tribunal to comply with the Settlement Agreement and the National Water Act.

Reasons for declining the application

[67] Despite the fact that the Registrar requested reasons from the Responsible Authority (DG), none have been provided. The DG only

signed off the recommendation in the Record of Recommendation (RoR), without indicating whether he/she has considered the issues in contention and the rationale for the decision.

[68] The respondents only provided reasons from the second respondent on why he did not recommend granting of the WUL. These reasons appear from the RoR prepared by the assessor, Mr. Ward and edited by Mr. Mathonsi as well as the letter from the Provincial Head KZN dated 26 April 2016 directed to Registrar Water Tribunal.

I will address the reasons given by the assessor in the RoR under the heading ***'The Record(s) of Recommendation (RoR) and decision'***

[69] The Provincial Head started his letter of 01 December 2015 by explaining his role in the assessment of a WULA and how he makes recommendations to the Delegated Authority in this regard. The recommendation is made *'after a full technical assessment of the water use licence has been completed'*. The application is then *'presented by a case officer to the Departmental Water Use Assessment Advisory and Authorisation Committee'*.

[70] The Provincial Head cited two issues in his letter dated 01 December 2015 as factors that he took into account when he recommended that the licence should not be granted. These are;

(a) the objections raised by the NWRI in the letter dated 22 October 2014. This relates to the refusal of the appellant's application for authorization to utilize government waterworks infrastructure. The application was rejected in 2009.

(b) The appellant was given sufficient time to provide outstanding information that was requested by letter dated 31 July 2014 as well as during the meeting held on 26 September 2014.

[71] He concluded by stating that the *'WUAAC could not fully assess the WULA due to lack of additional information'*.

Appeal to the Water Tribunal

[72] The appellant submitted his initial appeal to the Water Tribunal on 7 May 2015. In the main his grounds of appeal were based on what he believed to be a breach of the Settlement Agreement and that the information requested by the Department was not relevant / applicable to a WULA at this point in time.

[73] He argued that the information requested has to be provided by the department hence appellant could not provide such. According to him the department was required to complete certain tasks prior to appellant being able to respond

[74] He submitted that he was not informed of the outstanding information and thus did not get an opportunity to respond to the new 8 points listed as *'outstanding information'*.

[75] The department was according to him in possession of some of the requested information, and therefore did not apply its mind to the documents already in its possession.

[76] He accused the department of having acted in bad faith and of negligence and unlawful conduct. He complained about the delays in finalizing the application that was submitted during 2002.

[77] After he came on record, the appellant's attorney of record (Martin Grütter) wrote to the Registrar on 04 August 2015 and requested reasons from the DG for the decision in terms of section 5 of PAJA, but not replacing the request for reasons in terms of section 42 of National Water Act as requested on 28 July 2015. He submitted that a single set of reasons for purposes of both PAJA and NWA would be sufficient.

[78] The Registrar forwarded the reasons for the decision on 31 August 2015.

[79] The Registrar wrote to the attorneys of record on 15 October 2015 and requested that a comprehensive appeal be lodged with supporting documents.

[80] The appeal under consideration was filed on 09 November 2015.

[81] The appellant in the main argues that the alleged outstanding information was before the respondents or was not necessary in terms of the Settlement Agreement reached between the parties in a mediation process brokered by the Public Protector after he had complained about the delays in processing his water use licence application.

[82] He refers to letters exchanged between the parties and the record of recommendation (RoR) to illustrate the point that he submitted all required information.

[83] He also attached an earlier RoR that was not signed, to illustrate the point that the decision of the DG was a 'sudden change of mind' and a deviation from 'the conditions of the settlement agreement'.

[84] He also made a submission that the decision to decline his application after 13 years is not just and fair and as such it is reviewable in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

The respondents' reply to the grounds of appeal

[85] The respondents' attorney of record (Mr. Tony Sedibe) was until recently employed by the DWS and stationed in the legal department. The respondents' reply in this appeal bears his name as the reference/contact person. Although the appellant did not raise issues of conflict, the manner in which both the respondents' reply to the appeal was drafted and the case was presented leaves one with the impression that certain information was withheld because concessions

were made after 'consulting' with persons who were initially mooted as potential witnesses but never called to testify.

[86] The panel did raise issues with the kind of defences raised during the hearing, which introduced matters not raised in the written reply or any of the letters exchanged between the parties. The fact that an appeal of this nature is a hearing *de novo* does not mean that the background information or how the decision was arrived at is completely disregarded. It serves as a starting point, particularly so in this appeal because the appellant contends that the alleged outstanding information was in fact before the decision maker who either ignored it or did not apply his/her mind to it.

[87] The respondents' reply to the grounds of appeal is couched in a sarcastic and condescending tone with words such as "it boggles one's mind', 'how on earth', 'appellant has the guts'. After running battles of over a decade it is only fair to also state that the appellant's attitude towards the respondents was equally condescending. This is clearly evident in the tone of his letters and emails.

[88] The gist of the respondents' reply to the appeal is that:

[88.1] The appellant should have supplemented his application *'due to effluxion of time'* as provided for in the Settlement Agreement. He should have alerted the respondents if he chose not to amplify, as he did.

[88.2] The appellant was called to supply 'crucial information' by letter dated 31 July 2014, but he responded in a 'dismissive way in his letter dated 22 August 2014'.

[88.3] The respondents could not be expected to 'fairly assess the water use application without having considered the following from the appellant:

(a) Lease Agreement from the land owners;

(b) Master plan detailing the entire infrastructure;

(c) Civil Engineering drawings of the infrastructure;

(d) Impact and mitigation measures to water resources;

(e) Copy of EIA and comments related to EIA process;

(f) Approved EMP; and

(g) A list of objections received, the objectors and explanation on how each objection was resolved.

[88.4] The reply went on to justify reasons or relevance of documents requested. For example, the lease is required because the water licence is attached to a land, which must be described, and also the fact that a licence may be issued with conditions arising from the requested information.

[88.5] The reply also sought to attack the Settlement Agreement in as far as it may have taken into account what Mr. Sedibe (or whoever drafted the reply) referred to as covering *'the interests of the Appellant without considering the practical requirements of assessing a water use license application'*. An example is given of paragraph 3.10 of the Settlement Agreement which is described as pre-emptive in nature because it provides that *"DWA hereby agrees that the previous reasons given for delaying the granting of the water use license being..."*

[88.6] The appellant was also criticized for ignoring the respondents' request to him to provide more information as provided for in clause 3.5 of the Settlement Agreement.

[88.7] With reference to the unsigned earlier RoR that recommended issuance of the WUL, the respondents described the appellant as having *'guts to reveal that he is in possession of 'internal Departmental documents to which it is unknown how the appellant gained access to them'*.

[88.8] The appellant was also criticized for invoking PAJA to request reasons under circumstances where the NWA makes provision for the responsible authority to provide reasons, which, according to the respondents were provided.

[88.9] It was further submitted that the letter dated 31 July 2014 from Mr. Naidoo was in fact intended to implement the Settlement Agreement. The outstanding information that he requested is the same as that which the DG relied on to decline the application for water use.

[88.10] The respondents contend that the outstanding information is neither in the Settlement Agreement nor in the Feasibility Study that the appellant referred to when asked to provide further information.

[88.11] It was also argued that the respondents were entitled, in terms of clause 3.5 of the Settlement Agreement to invoke the provisions of section 41(2(d) of the NWA to request further information even on things that had been agreed upon. An example of the lease agreement was cited. In this regard, the respondents argue that the appellant had a duty to approach the relevant section of DWS to conclude the lease agreement.

[88.12] The letter dated 19 April 2015 from the DG in terms of which the appellant was advised that the department was still developing a hydropower policy, was described as not having *'evidential value as it is preceded by the letter of decision dated 8 April 2015 issued by the same Director General'* and that *'whatever subsequent grounds advanced by the Director General following the said letter, has no force and effect due to the fact that an administration (sic) decision had already been taken and the Director-General is regarded to be functus officio'*

The request for information (31 July 2014) and appellant's reply (22 August 2014)

[89] The only request for additional information directed to the appellant in the bundle of documents before the Panel is the letter dated 31 July 2014. It refers to the application received in 2002 that

according to DWS did not satisfy the requirements of Section 41 of the NWA. It lists 15 items.

The last sentence of the letter reads as follows;

> *'Please be informed that should a response not be received within 30 days of the date of this letter, your application will be declined.'*

[90] The appellant's response is dated 22 August 2014. He addressed each and every one of the alleged outstanding items.

[91] In his reply, the appellant referred to the provisions of the Settlement Agreement and argued that certain items requested were not necessary before the WUL was adjudicated. He also referred to specific pages in the Feasibility Study (FS) to direct the respondents' attention to the information he was being asked to provide.

[92] He lashed at the respondents and called the request "frivolous" "and /or a deliberate strategy".

[93] Hereunder is a table comprising of the relevant request and the appellant's response. Almost half of the alleged outstanding items were left out in the letter to decline the application (dated 08 April 2015) that lists 8 items of outstanding information.

Letter from S.O Naidoo dated 31/07/2014	**Macdonald's reply dated 22/08/2014**
1. Application for Section 21(i) water use (complete DW768);	N/A. D768 is not applicable as I completed and submitted D775, D777 & D778 upon DWA's request in 2008 and D768 is not required if water is diverted. Refer to the Special Note on top of Form D768.
2. Completed DW902 and DW901 application forms;	N/A. D901 & D902 were never requested previously as a requirement and may not have been in existence in 2002 and thus point 2 of the Settlement Agreement Addendum renders them N/A. The FS SHOWS THE PROJECT LOCATION refer TO PG 6-8, PARA 6.2-6.6. The takeoff point and site location are within the area surveyed by DWAF. D902 is N/A as the landowner Govt. (DWA) must sign this form not me.

3. Lease agreement from land owner;	N/A, point 2&3 of the Settlement Agreement. Lease Agreements to be done after issuing the WUL
4. Methodology of power generation;	N/A, this info is in the FS report submitted in 2005.pg 9-12,Para 7.0-8.3
5. Mater plan detailing the entire infrastructure;	N/A, this info is in the FS report submitted in 2005.pg 13-16,para 9-10.3.8
6. Civil engineering drawing of the infrastructure;	N/A, this info is in the FS report submitted in 2005. Appendix 4 & 9
7. Copy of EIA and comment related to EIA process;	N/A, point 2&3 of the Settlement Agreement. EIA done after issuing the WUL. FS Page 16, Para 11-11.2
8. Approved EMP;	N/A point 2 & 3 of the Settlement Agreement. EIA done after issuing the WUL.
9. Impact and mitigation measures to water resources;	N/A, as it's non-consumptive, this info is in the FS report pg. 17 Para 11.2 submitted in 2005.
10. Report detailing water needs versus power generation or output;	N/A, this info is in the FS report submitted in 2005. Non-consumptive water use. FS Exec Summary, Page iii Technical Aspects & Pg. 9, Para 7.1 and Pg. 17 Para 11.2 and Page 10, Table 7.1
11. Comments or authorization from Eskom;	N/A, point 2 & 3 of the Settlement Agreement and FS report Appendix 2 Letter to Mike Pallet (Eskom). Eskom were part of the Steering Committee for the project.
12. Comments or authorization from Department of Energy;	N/A, point 2 & 3 of the Settlement Agreement. The DM&E and NER were informed of the project in 2005.
13. Comments or authorization from Department of Environmental Affairs;	N/A, point 2 & 3 of the Settlement Agreement. EIA done after issuing of the WUL
14. BBBEE certificate; and	N/A , I am a sole proprietor under the minimum required turnover. Certification of this will follow.
15. Motivation report to address the following considerations of Section 27(1) of the National Water Act: Listed i-vi items covering the provisions of Section 27(1)(a), (b), (c), (d), (f), (h) and (k)	I did not write the Motivation Report and am unaware of its content, however here are my responses: ***NB: It is not necessary to deal with the responses because this request was abandoned***

The Record(s) of Recommendation (RoR) and decision

[94] As indicated above in the chronology of events, there are two records of recommendation(s) (RoR) and decision before the panel, both prepared by the same assessor, one N.A ward on 06 May 2014. The appellant was criticized by Mr. Sedibe for being in possession of the first RoR and questioned about how he came to possess it. The appellant's explanation, which was not gainsaid was that it was given to him at the meeting of 26 September 2014.

In the first RoR, the recommendation was that *' ...authorization of Section 21(e) water use associated with construction of PGS for Mr. Ian Murdoch Macdonald be issued'.*

[95] A Section 21 water use licence was prepared, however, the authorized official did not sign it at the time, identified in the document as Acting DG Trevor Blazer. There is also no approval by the WUAAAC, the Regional Head and the DG.

[96] It is important to note that the unsigned licence was issued with conditions attached to most of the are issues that are currently in contention, with the respondent's representative arguing that they are a requirement before the licence is issued.

[97] Both RoRs refer to the historical background leading to the signing of the Settlement Agreement. However, there is no mention of the Feasibility Study in the first RoR, whereas this is indicated amongst the 'reports and technical information assessed' in the second one.

[98] In the second RoR, (edited by S.B Mathonsi), the Assessor recommend a "Decline" on the basis that the *"Applicant failed to submit required information for assessment of the application".* The reasons for the recommendation are indicated as follows;

'1. Applicant did not submit the following required information

- *Lease agreement from the landowner.*
- *Methodology of power generation.*
- *Master layout plan detailing the entire infrastructure.*
- *Civil Engineering drawings for the infrastructure.*
- *Copy of EIA and comment related to EIA process*
- *Approved EMP;*
- *Impact and mitigation measures to water resources;*
- *Report detailing water needs versus power generation or output;*
- *Comments or authorization from Eskom;*

- *Comments or authorization from Department of Energy;*
- *Comments or authorization from Department of Environmental Affairs;*
- *BBEE certificate*

The above listed outstanding information is critical for further assessment of the WULA. On the meeting held at Pretoria Department of Water and Sanitation Head office on 26 September 2014, applicant informed the Department to use the information originally submitted at the time of the initial application submission in 2003 for assessment, and assess the application, as it would have done in 2004. Hence, applicant did not submit the required information, hence the application could not be fully assess due to lack of additional information.

[99] Although the date of preparation of the second RoR is indicated as 06 May 2014, it appears to have been continuously updated until the effective date of 08 April 2015. The request for information from the Regional Head, Mr. SO Naidoo was issued on 31 July 2014. The response from appellant to the request for information is dated 22 August 2014.

[100] The parties met on 26 September 2014. According to what is recorded in the RoR[3] the meeting was about to "success letter dated 31 July 2014 and response letter dated 16 August 2014".

The outcome of this meeting is recorded as follows;

"Assessor had to request comments from NWRI, Land matters, Legal service inputs on the settlements agreement and PPP. Assessor to request Eskom and NERSA, what were requirements of micro power generation as at 2002. ***For other information requested, it was suggested that assessor should use feasibility study and whatever is in the file"*** *(highlighted for emphasis).*

[101] There is no indication in the RoR as to who made the suggestion that the information from the Feasibility Study should be used, and whether it was agreed upon or rejected.

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[3] Recommended for rejection by Assessor (N.A Ward), the WUAAC , the Head of Provincial Operations and the decline approved by the DG

[102] The RoR indicates the following inputs from *'other sections of the department ..'*

[102.1] The request for a reserve was outstanding.

[102.2] The proposed civil engineering structure must be designed by a qualified engineer, and layout plans to be submitted for verification. The engineers must supervise the specifications. The licence was recommended for approval subject to this.

[102.3] The National Water Resource Infrastructure raised objections and had previously rejected the application during 2009. The basis for the objection is that it was in the process of developing a policy for utilization of departmental infrastructure for economic purposes.

[102.4] Reference was made to the existence and terms of the Settlement Agreement.

[102.5] Reference was made to the legal opinion obtained from Legal Services with regard to the authority over the land within the purchase boundary of the government waterworks. The conclusion was that the Minister of Water and Environmental Affairs has the authority.

[102.6] Environmental and recreation recommended granting of the authorization, subject to *'bi-monitoring according to Reserve requirements'.*

[102.7] At the time of drafting of the RoR Eskom had not yet responded to request from the department to *'comment on or clarity about the rules or requirements for green energy project'.*

[102.8] Positive responses or answers were given in response to factors to be taken into account in terms of section 27(1)(a)-(k) of the NWA.

[103] The recommendation to decline the WUL was approved by the WUAAAC, Head of Provincial Operations: Kwa-Zulu Natal and the DG on 17 March 2015, 19 March 2015 and 08 April 2015 respectively.

[104] There is no indication in the RoR or explanation from the respondents as to why some of the alleged outstanding information indicated in the RoR did not make their way to the letter rejecting the application. These are:

(a) Section 27(1) motivation,

(b) BBEE certificate,

(d) comments or authorization from Eskom, and

(d) an approved EMP.

Legislative framework

[105] The Addendum to the Settlement Agreement reads amongst other things as follows;

> *"DWA hereby agrees that "the law is not retrospective" and that the application will be assessed on its merits as at the time that the application was made i.e. May 2002.'*

[106] This statement is misleading because, as the legal representative for the respondents has correctly pointed out, the application for water use licence was lodged after the coming into operation of the NWA. However, it appears from a further reading of other clauses in the agreement that the apprehension about 'retrospective ' application of the law actually refers to policies and procedures relating to requirements that were subsequently waived, such as the 'reserve determination' and 'PPP'.

[107] Section 2 of the NWA provides as follows:

> *"The purpose of this Act is to ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled in ways which take into account amongst other factors–*
>
> *(a) meeting the basic human needs of present and future generations;*
>
> *(b) promoting equitable access to water;*

(c) redressing the results of past racial and gender discrimination;

(d) promoting the efficient, sustainable and beneficial use of water in the public interest;

(e) facilitating social and economic development;

(f) providing for growing demand for water use;

(g) protecting aquatic and associated ecosystems and their biological diversity;

(h) reducing and preventing pollution and degradation of water resources;

(i) meeting international obligations;

(j) promoting dam safety;

(k) managing floods and droughts,

and for achieving this purpose, to establish suitable institutions and to ensure that they have appropriate community, racial and gender representation."

[108] Section 27 of the NWA is titled "Considerations for issue of general authorizations and licenses" and reads as follows:

(1) In issuing a general authorization or licence a responsible authority must take into account all relevant factors, including –

(a) existing lawful water uses;

(b) the need to redress the results of past racial and gender discrimination;

(c) efficient and beneficial use of water in the public interest;

(d) the socio-economic impact –

(i) of the water use or uses if authorised; or

(ii) of the failure to authorize the water use or uses;

(e) any catchment management strategy applicable to the relevant water resource;

(f) the likely effect of the water use to be authorised on the water resource and on other water users;

(g) the class and the resource quality objectives of the water resource;

(h) investments already made and to be made by the water user in respect of the water use in question;

(i) the strategic importance of the water use to be authorised;

(j) the quality of water in the water resource which may be required for the Reserve and for meeting international obligations; and

(k) the probable duration of any undertaking for which a water use is to be authorised.

(2) A responsible authority may not issue a licence to itself without the written approval of the Minister.

[109] Applications for a licence to use water are made in terms of Section 40, which reads as follows:

"(1) A person who is required or wishes to obtain a licence to use water must apply to the relevant responsible authority for a licence.

(2) Where a person has made an application for an authorization to use water under another Act, and that application has not been finalized when this Act takes effect, that application must be regarded as being an application for a water use under this Act.

(3) A responsible authority may charge a reasonable fee for processing a licence application, which may be waived in deserving cases.

(4) A responsible authority may decline to consider a licence application for the use of water to which the applicant is already entitled by way of an existing lawful water use or under a general authorization.

[110] Section 41 of the NWA prescribes the procedure for licence applications. It reads as follows:

(1) An application for a licence for water use must –

(a) be made in the form;

(b) contain the information; and

(c) be accompanied by the processing fee determined by the responsible authority.

(2) A responsible authority –

(a) may, to the extent that it is reasonable to do so, require the applicant, at the applicant's expense, to obtain and provide it by a given date with –

(i) other information, in addition to the information contained in the application

(ii) an assessment by a competent person of the likely effect of the proposed licence on the resource quality; and

(iii) an independent review of the assessment furnished in terms of subparagraph (ii), by a person acceptable to the responsible authority;

(b) may conduct its own investigation on the likely effect of the proposed licence on the protection, use, development, conservation, management and control of the water resource;

(c) may invite written comments from any organ of state which or person who has an interest in the matter; and

(d) must afford the applicant an opportunity to make representations on any aspect of the licence application.

(3) A responsible authority may direct that any assessment under subsection (2)(a)(ii) must comply with the requirements contained in regulations made under sections 24(5) and 44 of the National Environmental Management Act, 1998 (Act No. 107 of 1998).

(4) A responsible authority may, at any stage of the application process, require the applicant –

(a) to give suitable notice in newspapers and other media –

(i) describing the licence applied for;

(ii) stating that written objections may be lodged against the application before a specified date, which must be not less than 60 days after the last publication of the notice;

(iii) giving an address where written objections must be lodged; and

(iv) containing such other particulars as the responsible authority may require;

(b) to take such other steps as it may direct to bring the application to the attention of relevant organs of state, interested persons and the general public; and

(c) to satisfy the responsible authority that the interests of any other person having an interest in the land will not be adversely affected.

[111] Section 42 provides that an applicant for a water use licence and any person who has objected thereto is entitled to be informed about the decision, (and reasons if they are required) as soon as it has been reached.

[112] Item 5 (3) of Part 2 of Schedule 6 of the NWA reads as follows:

"A responsible authority or a catchment management agency against whose decision or offer an appeal or application is lodged must, within a reasonable time-

-send to the Tribunal all documents relating to the matter, together with the reasons for its decision; and
-allow the appellant or applicant and every party opposing the appeal or application to make copies of the documents and reasons."

[113] Item 6(3) of Part 2 of the Schedule read as follows:

"Appeals and applications to the Tribunal take the form of a rehearing. The Tribunal may receive evidence, and must give the appellant or applicant and every party opposing the appeal or application an opportunity to present their case."

[114] Item 6(3) is mirrored in Rule 7(1) and (7(2) of the Water Tribunal Rules. The additions are in paragraph 7(3) that reads as follows;

" The Chairperson of the Tribunal must allow the Appellant or applicant to present his or her case, first, whereafter any affected party must be afforded an opportunity to present their case, and thereafter the Appellant or Applicant must be afforded an opportunity to respond to any information or representations forthcoming from any affected person".

*"7(1) The Water Tribunal may_*
-subpoena for questioning any person who may be able to give information relevant to the issues; and
-subpoena any person who is believed to have possession or control of any book, document or object relevant to the issues, to appear before the Tribunal and to produce that book, document or object."

Legal principles with regard to the nature of the appeals before the Water Tribunal

[115] The NWA and the Rules of the Water Tribunal are clear with regard to the fact that the appeal is a hearing de novo.

[116] The controversy in the matter at hand, at least from the respondents' submissions as it will be shown hereunder is whether the decision being appealed is completely ignored in pursuit of new evidence (even if it does not exist).

[117] This Tribunal settled this controversy in its decision in the appeal between ***Oosgrens Landgoed (Pty) Limited v The Director-General of the Department of Water and Sanitation***[4] in a judgment that was handed down during January 2017.

I wish to refer to the following paragraphs in that decision.

" [56] While there is legal certainty in terms of the definition of an appeal in the wide sense, there is need to clarify that the decision appealed against does not become completely irrelevant. In the case of Sea Front for All and Another v MEC, Environmental and Development Planning, Western Cape and Others the court reiterated the nature of the proceedings before an appeal tribunal. The court, citing Baxter, Administrative Law

[4] Case No. WT05/10/2010

noted that "the precise form that an administrative appeal must take, and the powers of the appellate body, will always depend on the terms of the relevant statutory provisions." In this matter section 148 of the NWA is therefore primary in determining whether the wide nature of the appeals before the Tribunal are such that the decision of the responsible authority is wholly negated once an appeal is noted.

[57] The court notes in Sea Front for All that one of the indicators that a tribunal has wide powers is whether or not the appeal lies to an authority that is "within the departmental hierarchy" for instance an appeal to the Minister of a government department. In that case, the court was dealing with an appeal in terms of section 35 of the Environmental Conservation Act (ECA) which directed appeals to the MEC against decisions made by the Director: Integrated Environmental Management, Department of Environmental Affairs and Development Planning in the Western Cape in terms of section 22 of the ECA to grant or refuse environmental authorizations.

[58] A typical feature of the cases in which the courts have interpreted a tribunal or authority having an appeal in the wide sense is that these were largely internal appeals either to Boards, Councils, Ministers or MECs. An appeal envisaged in section 148 of the NWA is not strictly an internal appeal if it is accepted that the Water Tribunal is not an internal structure of the Department of Water and Sanitation but an independent and autonomous body.

[59] If it is accepted that the Water Tribunal is an autonomous and independent tribunal before which even the Minister of Water and Sanitation may be required to appear, then one of the key indicators of a tribunal having wide appeal powers should be qualified. However, Cora Hoexter, Administrative Law in South Africa correctly notes that the internal nature of the appeal authority is not the only indicator of its powers. Again, citing Baxter, she notes that in addition, the lack of a record, procedural powers for instance to summon witness, and decisional powers are other factors that indicate wide appeal powers. While the Water Tribunal may be independent from the Department, it is largely a tribunal that has wide procedural and decisional powers.

[60] A view that treats the Water Tribunal strictly like an internal appeal structure potentially creates legal confusion and disarms the Tribunal of its authority to deal with appeals as an independent tribunal. Although it can subpoena any witnesses, the Water Tribunal does not necessarily have access to resources to make polycentric decisions that responsible authorities have at their disposal. The pool of national and regional experts that submit expert reports and prepare recommendations for the Minister or delegated responsible authority are not at the command of the Water Tribunal. It can therefore be seen that the Water Tribunal is different from the authorities at issue in most of the cases where the courts have ruled that the tribunals had wide appeal powers to conduct fresh hearings and consider matters afresh with new evidence to come to an original decision.
If the Water Tribunal conducts a hearing de novo, it still cannot properly make a fresh determination on a water use licence especially the precise terms and conditions at the same level as a responsible authority seized daily with making such decisions.

[61] Indeed, section 146 (4) of the NWA provides that "Members of the Tribunal must have knowledge in law, engineering, water resource management or related fields of knowledge." Nevertheless, these special skills cannot substitute for the knowledge and day-to-day experience of bureaucratic decision makers who are the responsible authorities.

Therefore, in any one matter before the Tribunal it could be that the matter must be referred back to the responsible authority for reconsideration. In some matters, depending on the nature of the issues, the Tribunal may be able to hear the matter afresh and come to a new decision that replaces the decision of the responsible authority.

[62] Whilst everyone, including the Water Tribunal, agrees that the nature of the hearing before us is a rehearing and a fresh reconsideration of the facts, with or without new evidence, the controversy centered around the issue of the relevance of the decision of the Responsible Authority as I have already stated above.

In this context, the Water Tribunal is of the firm view that the decision of the second respondent (the Manager) in this matter cannot therefore be totally disregarded. Doing

so renders the scheme in the NWA in terms of which the responsible authority is the primary decision-maker redundant.
Rather, the decision appealed against is the point of departure for the Tribunal considering the appeal, before proceeding to entertain any new evidence and new submissions by the parties. A view that the testimony of the responsible authority is "totally irrelevant" in untenable. As correctly conceded by Counsel for the appellant in oral submissions, the decision appealed against must be considered together with any new evidence. The Tribunal is not bound to either upheld or overrule the decision of the responsible authority, but it must consider it among the new evidence presented in the re-hearing and come to its own decision which may or may not be the same as that of the responsible authority.

Oral evidence

Macdonald

[118] The appellant testified and as I have indicated above, his testimony was geared towards identifying the alleged outstanding information in the record of proceedings that was before the decision maker. This has already been highlighted in the chronology of the events above.

[119] Most of the questions raised during cross-examination were issues that were never put to the appellant whilst the application was pending or in the request for information letter. Even if one were to argue that new matters may be raised on appeal, the manner in which this was done would not qualify as a hearing *de novo* because the Responsible Authority did not consider theses issues at all. It is not one of the reasons that the WUL application was rejected.

[120] Hereunder is the summary of the questions and the appellant's responses:

(a) whether the Settlement Agreement was valid in view of the fact that it was not ratified by one Ms Mabandla identified as the Chairperson of the Mediation Panel.

This question was considered unfair by the Panel because the issue of validity of the Settlement Agreement was never raised. The parties were allowed an opportunity to file supplementary written submissions to deal with this belated objection.

(b) Whether Mr. Macdonald had the necessary locus standi to lodge an appeal in view of the fact that the

WUL application was lodged under the name of 'Agriman'.

This has never been an issue. In fact, the record shows that the department dealt with Mr. Macdonald in his personal capacity. He explained that Agriman was not a juristic entity, but a trading name that he was using for his business.

(c) Why the application for the WUL was not supplemented as provided for in the Settlement Agreement.

The Settlement Agreement does not compel the appellant to supplement the application. It is an indulgence that was given to him, should he have wished to do so, due to effluxion of time. He explained that the Addendum was such a supplementation.

(d) The identity of the Departmental officials who attended the meeting of 26 September 2014.

Mr. Sedibe appeared to contradict the department's own documents. The letter of declining the application refers to a meeting held with the applicant. The RoR also refers to a meeting of 26 September 2014. It does not make sense for the legal representative to seek answers on issues that are common cause.

(e) What was discussed in this meeting.

The record clearly states the issues discussed.

(f) The appellant should have referred the land lease issue to the 'Land Matters Unit' directly. This omission is the reason why this issue was not finalized.

The email exchanges in the sequence of events clearly show the efforts made by the appellant in dealing with the land lease issue.

(g) How did appellant comply with the methodology of power- generation.

Mr. Sedibe conceded that this issue was not outstanding.

(h) Whether the Feasibility Study Report was discussed with the officials of the DWS. It was put to Mr. Macdonald that the person who wrote the letter to decline the application would testify that the department did not receive the information. This was further qualified by a statement to the effect that the appellant should not have relied on what is in the Feasibility Study, but should have submitted separate information.

Again, this question contradicts the RoR.

(i) The department also conceded that information pertaining to "Master layout plan" was not outstanding.

[121] At the end of the cross examination and after a thorough process of traversing the record of proceedings and concessions made by Mr. Sedibe, this is the information that is still outstanding:

(a) Civil engineering drawings,

(b) Lease agreement with the land owner,

c) Environmental Authorisation from Department of Environmental Affairs; and

(d) Approval from Department of Energy.

[122] Mr. Sedibe argued that an EIA was a requirement for a WULA. The parties were allowed an opportunity to address this issue in their supplementary written submissions.

[123] Another contentious issue that arose during cross examination was a submission by Mr. Sedibe that the evidence of Mr. Macdonald constituted hearsay because he relied on the contents of the Feasibility Study report, which he is not an author of.

This too was addressed in the supplementary written submissions.

The respondents' oral evidence, submissions and analysis thereof

[124] Mr. Sedibe called Mr. Tshenyetso Archington Thobejane, an engineer in the hydrological section of the department to testify about civil engineering drawings and particularly to comment on the drawings submitted by the appellant.

[125] Mr. Thobejane was not involved in the decision to decline the WUL application. Not being the person who inspected the appellant's drawings, Mr. Thobejane's evidence was deemed hearsay. Mr. Sedibe was not happy with this assertion by the panel, and that is when he started to label the appellant's evidence as 'hearsay' because he is not the author of the Feasibility Study but was allowed to testify about it. The parties were allowed to address this issue in their supplementary written submissions.

[126] Briefly, Mr. Thobejane testified that;

[126.1] The difference between civil and mechanical drawings is that the former has to do with structures where cement is used whereas in the latter the structures consist of steel. In the context of DWS mechanical drawings would be for instance steel pipes.

[126.2] He was asked to look at the appellant's drawings titled 'Schematic Layout of proposed Hydropower Plant' in the bundle of documents and to comment on them. According to him the drawings have a combination of civil, mechanical and electrical engineering.

[125.3] Civil engineering drawings should indicate specifications (measurement) of each component, such as deepness of the foundation and thickness of a wall. The appellant has only provided a schematic layout (overview) of what he intends to build but has not given the specifications.

[125.4] He was shown a drawing titled 'Powerhouse and Arrangement Plant and asked to comment on it. He described it

as a mechanical drawing because it is cluttered and appears to have some electrical components. It also has civil engineering components such as the turbines but it does not give details of the platform.

[127] After the whole exercise, it would appear, from the version of the witness, that most drawings have a combination of mechanical and civil engineering.

[128] An attempt by Mr. Sedibe to present Mr. Thobejane's evidence as 'expert opinion' was met with an objection from Mr. Van der Linde, which was upheld on the basis that he had not filed any expert notice or summary of the evidence to allow the appellant to consider his options.

[129] Cross-examination yielded the following responses;

[129.1] The drawings should be supported by a report or studies. He conceded that the Feasibility Study report in the record suffices for such purpose. However, it lacked sufficient details with regard to the civil engineering drawings.

[129.2] There are elements of civil engineering in some drawings, such as the plan for the foundation.

Written submissions

[130] The issues addressed in the initial written submissions are covered in the factual background and in the analysis of the oral evidence above.

[131] The issues addressed in the supplementary written submissions arose as a consequence of Mr. Sedibe's arguments with regard to the following:

(a) whether the evidence of Mr. Macdonald is hearsay or he should have called the authors of the Feasibility Study and the first RoR, and

(b) the validity of the Settlement Agreement; and

(c) whether the EIA (authorisation from DEA) and approval from Department of Energy was a requirement for granting of the WUL.

[132] The assertion that the evidence of the appellant is hearsay is to say the least opportunistic because the documents in question are part of the record of proceedings before us. The Feasibility Study is clearly indicated as one of the documents that was considered in the second RoR. The appellant testified that he obtained a copy of the first RoR in the meeting of 26 September 2014.

[133] Besides his personal knowledge as the owner of the project, the appellant pointed out where the alleged outstanding information was situated in the Feasibility Study. He also referred to the department's own documents such as letters and emails.

[134] The nature of the proceedings before us was not geared towards proving the merits, but simply that the information was before the decision maker.

[135] Mr. Sedibe criticized the Panel for what he referred to as *'shifting of goalposts'* when we enquired whether the decision-maker has exercised the discretion as contemplated in subsections 2 and 3 of Section 41 of the NWA, on submission of additional documents and information, conducting of assessment on likely effect of the proposed licence on the water resource, and whether the appellant was directed to conduct an EIA as contemplated in NEMA Regulations.

He sought to rely on a previous decision of this Tribunal to justify his attack on us for enquiring about how the DG had exercised the discretion in Section 41. In his supplementary heads of argument he wrote amongst other things that;

> *" 4.4 The position adopted by the panel further went contrary to the pronouncement made in a recent Water Tribunal ruling in the interlocutory application on the appeal case of Werda Handel (PTY) (LTD) and Fournel (PTY) (LTD) / Director General: Department of Water and Sanitation and Tshedza Mining Resource (PTY) (LTD) under case No. WT25/03/2015 where the panel in a unanimous decision on page 9 paragraph 24 pronounced as follows: "The*

National Water Act is one of the Specific Environmental Management Act listed in section 1 of NEMA. The inclusion of the NWA as a specific Environmental Management Act means that it is subject to the overarching principles of environmental management in section 2 of the NEMA"

[136] Mr Sedibe's reliance on the decision in the Werda Handel matter that he refers to in his supplementary heads of argument is misplaced; firstly, it is not the rationale for the decision but a statement outlining the applicable law, and secondly, the issue in that matter was whether the appellant had lodged their appeal in time. One of the issues that the Tribunal took into account to reach that decision was the role of an Environmental Assessment Practitioner in the dispute and the procedures for lodging objections.

[137] He (Mr Sedibe) argued that the letter of 31 July 2014 from Naidoo constitute request in terms of Section 41 of NWA.
I do not agree. The parties held a meeting on 26 September 2014 to discuss the outstanding information in the context of the letter of 31 July 2014 and MacDonald's response thereto dated 22 August 2018. Logic dictates that any request for further information would have come after the meeting.

[138] Mr. Sedibe also referred to Regulations in terms of NEMA and argued that an EIA was a requirement for a WUL. It is worth noting that he initially relied on the provisions of the ECA to advance the argument that EIA was a requirement. This elicited a lesson from Mr. Van der Linde on the chronology of the amendment of Environmental legislation, who also dealt with the issue at length in his supplementary written submissions.

[139] Whether or not an EIA is a requirement for granting of a WUL is not an issue because Section 41(3) of the NWA is clear in this regard. The Responsible Authority has a discretion to require such an assessment. The appellant can only be said to have failed if so requested.

[140] It is common cause that an EIA is conducted on the land where the activity is to take place. There is evidence that such land in this matter belongs to the department, which was still to give him permission. He also established that an EIA is a costly exercise, and as such it was desirable to

do it at a later stage. All this information was communicated to the department in the letter of 22 August 2014.
There is no indication that these answers were considered and rejected.

[141] The appellant also indicated that he was willing to conduct an EIA but the practicalities thereof meant that it had to be done after the granting of the WUL. He is still tendering to do it if so required.

[142] On the belated challenge on the validity of the Settlement Agreement, it is worth noting that the department did not, at any stage, challenge its lawfulness, least of all on the basis of the defences mounted by Mr. Sedibe. In fact, like the Feasibility Study, it features in the engagements between the appellant and the officials. Even if he wanted to challenge its validity, the powers of the Water Tribunal are restricted to what has been legislated in Section 148(1) of the NWA.

Findings on the alleged outstanding information

Lease agreement from the Land-owner

[143] The discussions regarding the lease agreement were ongoing and there is evidence that the department even went as far as to obtain a legal opinion on whether it has authority over the land in question. Accordingly, this information was presented to the responsible authority when she was making the decision on the application for a WUL.

Instead of deciding on the issue, the responsible authority simply indicated this as one of the reasons for declining the WUL. In any event, having considered the Settlement Agreement and Addendum thereto, I am satisfied that the lease agreement with the land-owner would be consequential when the water use license is granted.

Methodology of power generation

[144] The Respondents conceded during the hearing that this information was available when the decision maker made its decision.

Master layout plan dealing the entire infrastructure

[145] The Respondents conceded during the hearing that this information was available when the decision maker made its decision.

Civil Engineering drawings for the infrastructure

[146] I am satisfied that the drawings were available when the decision maker made its decision. If the respondents were of the view that the drawings that were submitted did not meet certain standards, they should have communicated this fact to the appellant and indicate what the requirements were.

In view of the contents of the first RoR, it is clear that this requirement could be made one of the conditions in the WUL.

An environmental Authorisation from the Department of Environmental Affairs (DEA)

[147] The environmental authorisation from the DEA was not available at the time the decision was made. However, this aspect would have been part of the Environmental Impact Assessment, which as I have indicated above is conducted at the discretion of the Responsible Authority. No such discretion was exercised.

Approval from the Department of Energy (DOE)

[148] The approval from the DOE was not available at the time the decision was made. This would have been dealt with in a similar manner as the authorisation from DEA discussed in the preceding paragraph.

Motivation in terms of Section 27(1) of the National Water Act, regarding the need to redress the results of the past gender and racial discrimination

[149] It is common cause that this was available as I have indicated above when I discussed the content of the second RoR. There were no negative comments and if there were shortcomings in the content of the motivation, the respondents should have advised the appellant accordingly.

Report detailing the impact of the proposed activity on the water resources and mitigation measures

[150] There is no indication that the Responsible Authority has requested such a 'detailed report'. The appellant relies on the Feasibility Study, which indicated minimal impact. It was up to the Responsible Authority to exercise its discretion in terms of the NWA to direct a full blown or extensive investigation.

Conclusion

[151] Taking into account the provisions of the NWA and PAJA, all read in the context of Sections 24 and 33 of the Constitution of the RSA, and in the context of the factual background and evidence presented by the parties, I am satisfied that at the time of making the decision to decline the WUL application, the alleged outstanding information was either in the hands of the department or there was a reasonable explanation for its absence.

[152] The decision maker (Responsible Authority) failed to interrogate the reasons for not recommending the granting of the WUL given by the assessor and endorsed by the WUAAC and the second respondent. Reading the RoR properly, it is clear that there were certain tasks that were still to be performed by the assessor and a decision to be made with regard to a request to utilize the information in the Feasibility Study.

[153] The decision maker failed to appreciate the nature of powers imposed on her in terms of Section 41 of the NWA during the application stage of a WUL.

For the sake of convenience, I wish to reproduce the relevant subsections. I have highlighted the relevant parts for emphasis.

' *(2) A responsible authority –*

> ***(a) may, to the extent that it is reasonable to do so, require the applicant, at the applicant's expense, to obtain and provide it by a given date with –***
>
> > ***(i) other information, in addition to the information contained in the application***

(ii) an assessment by a competent person of the likely effect of the proposed licence on the resource quality; and

(iii) an independent review of the assessment furnished in terms of subparagraph (ii), by a person acceptable to the responsible authority;

b) may conduct its own investigation on the likely effect of the proposed licence on the protection, use, development, conservation, management and control of the water resource;

(c) may invite written comments from any organ of state which or person who has an interest in the matter; and

(d) must afford the applicant an opportunity to make representations on any aspect of the licence application.

(3) A responsible authority may direct that any assessment under subsection (2)(a)(ii) must comply with the requirements contained in regulations made under sections 24(5) and 44 of the National Environmental Management Act, 1998 (Act No. 107 of 1998).

(4) A responsible authority may, at any stage of the application process, require the applicant –

(a) to give suitable notice in newspapers and other media –

(i) describing the licence applied for;

(ii) stating that written objections may be lodged against the application before a specified date, which must be not less than 60 days after the last publication of the notice;

(iii) giving an address where written objections must be lodged; and

(iv) containing such other particulars as the responsible authority may require;

(b) to take such other steps as it may direct to bring the application to the attention of relevant organs of state, interested persons and the general public; and

(c) to satisfy the responsible authority that the interests of any other person having an interest in the land will not be adversely affected.

[154] Without going into a deep academic analysis, it is clear, just from a reading of the highlighted subsections of Section 41 of the NWA that the submissions of Mr. Sedibe with regard to whether or not an EIA or environmental authorisation is a requirement are flawed.

[155] The appellant has proven that he has submitted the basic information on the issues in the Feasibility Study Report. There was even a request in the meeting of 26 September 2014 that this information should be utilized. The onus then shifted onto the Responsible Authority to exercise its discretion in terms of the NWA as indicated above. There is no indication in the record of proceedings or evidence before us that the request was entertained or whether the Responsible Authority exercised its discretion as contemplated in the NWA. Reliance on the letter of 31 July 2014 is simply not helpful.

[156] Accordingly, for all the reasons indicated throughout this judgment, the decision of the Director-General dated 08 April 2015 to decline the WUL on the basis of alleged outstanding information is set aside.

The relief sought and order

[157] The relief sought by the appellant in the Notice of Appeal dated 09 November 2015 is that;

(a) the appeal be upheld;

(b)the respondents be ordered to authorize the granting of a licence in terms of section 21 (e) of the NWA,

Alternatively;

(c) the respondents be ordered to provide adequate reasons for the administrative action within 90 days from date of order per PAJA section 5.

(d)the first respondent be ordered to pay the appellant's taxed costs as between attorney and own client

[158] In the Supplementary written submissions the appellant's counsel made a submission that the licence be granted with or without conditions.

[159] The question is whether under the circumstances of this matter the Water Tribunal is in a position to grant WUL, order the responsible authority to grant one or refer the matter back to the decision maker for reconsideration.

[160] The appellant's counsel referred to the Western Cape judgment under *case number 12736/2014 in the matter between Hans Ulrich Plotz N.O and MEC; Environmental Affairs & Development Planning, Western Cape and Others* wherein Judge Van Staden directed the attention of the parties to the Constitutional Court decision in the matter of *Trencor Construction v Industrial Development Corporation of South Africa Limited 2015 (5) SA 245 (CC)*. In the former, Judge Van Staden had requested the parties to make submissions as to whether it would be competent to order substitution in terms of section 8(1)(c)(ii)(aa) of PAJA.

The Constitutional Court decision in the Trencor matter in effect reiterated the *exceptional circumstances* requirements that would justify a substitution order after setting aside an administrative action. These are:

(a) whether the court would be in a good position as the decision maker to make the decision,

(b) whether the decision was a foregone conclusion,

(c) the delay, and

(d) bias or incompetence on the part of the decision maker.

[161] I have considered the circumstances under which the impugned decision in the matter before this Tribunal was made and it is clear from the background facts that the department's officials were not certain about how the application for utilizing government infrastructure (the land and water works) would impact on the WUL application.
The requests to utilize state infrastructure should have been separated from the processes for a WUL application. However, the appellant's WULA was dragged over a decade because of this. The appellant received the DG's decision with regard to the application to connect to state waterworks infrastructure on 19 April 2015. It appears from a reading of the letter that there was a previous decision, which was being 'upheld'. The decision is not part of the appeal before us because it is not one of the reasons for declining the WULA as indicated in the letter of 08 April 2015. The fact that the issue of infrastructure was separated from the decision under appeal is indicative of the fact that the application was delayed for unnecessary reasons.

[162] The appellant has a right to take the DG's decision of 19 April 2015 on judicial review. Similar considerations would apply if ever there is a decision with regard to utilization of state land.

[163] The only constraint that this Tribunal would have to substitute the decision of the DG of 08 April 2015 is based on the fact that the WULA was declined not on the merits, but on alleged outstanding information.

Secondly, and as already indicated above, the main relevant outstanding issue is with regard to the discretion that must still be exercised with regard to assessments of the impact of the activity on the water resource.

[164] Accordingly, this Tribunal is not in a position at this stage to decide on the merits of the WUL application.

[166] The appellant has also sought a cost order against the respondents. The Rules of the Water Tribunal do not make provision for a cost order. The basis appears to be the delays in processing the application. No arguments

were presented before us with regard to whether there is discretion in this regard.

In any event, the appellant had a remedy over the years to approach the court for an order to compel the department to adjudicate his application. It is common cause that he chose to approach the Public Protector and thereafter a Settlement Agreement was reached under the auspices of the Mediation Panel. I have not seen a copy of the complaint that the appellant has filed with the Public Protector or the relief that he sought. The Panel was only advised that the matter is still pending at the Public Protector and that a report was expected to be released in due course.

Decision of the Water Tribunal

[167] Under the circumstances, the decision of the Tribunal is as follows;

[167.1] the appeal is upheld;

[167.2] the matter is referred back to the Responsible authority to assess the WUL application under the following directives;

(a) To consider whether there is a need for the appellant to conduct the assessments on the impact of the activity on the water resource, and to advise him accordingly;

(b) The appellant has a right to make representations in this regard and to exercise his remedies in terms of PAJA should he not be satisfied with the decision of the DG.

(c) The issues with regard to infrastructure must be separate from the merits of the application, and should the WUL be granted, the appropriate conditions must be imposed on the licence.

ADV. TAN MAKHUBELE SC
Chairperson, Water Tribunal

I agree, and it is so ordered;

MS M. NKOMO
Water Tribunal Member