

**IN THE WATER TRIBUNAL  
(HELD VIRTUALLY)**

**CASE NO: WT01/21/GP**

**In the appeal of:**

**JOSEPH KLOPPERS**

Appellant

And

**DEPARTMENT OF WATER AND SANITATION**

Respondent

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**APPEAL DECISION**

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**Date heard:** 26<sup>th</sup> May 2022

**Date of decision:** 4<sup>th</sup> July 2022

**APPEARANCES**

**Presiding Officers:** Robert Mokgalabone  
Unathi Mbeki

**For the Appellant:** Adv. Thompson

**For the Respondent:** Adv. Mgwetyana

**INTRODUCTION**

- 1 This is an appeal brought by the Appellant, in terms of section 148(1)(f) of the National Water Act of 1998 (hereafter referred to as the NWA), against a decision of the Acting Director-General: Department of Water and Sanitation (the Respondent), which decision was taken on the 4<sup>th</sup> December 2020.

- 2 In terms of the said decision, the Respondent, refused to grant a water use license to the Appellant, in relation to dams 4 and 5, out of the seven dams which were the subject of the Appellant's water use application.
- 3 The reasons which were given by the Respondent for the refusal to grant a water use licence to the Appellant, were:
  - 3.1. The area where the Appellant's properties are situated is a water stressed area.
  - 3.2. Dams 4 and 5 are situated instream and approving the impoundment of water through the said dams would have a negative impact on downstream users.

### **BACKGROUND**

- 4 The Appellant's properties are located 20 kilometres, northwest of the town of Vaalwater, Lephalale Local Municipality, Waterberg District, Limpopo Province. The water use extends over one portion of a farm owned by the Appellant, namely: the remainder of Farm Doornspruit 215 KQ. The application falls within the A42E quarterly drainage region (QDR) of the Limpopo Water Management Area and access to the said properties is gained through the R517 road.
- 5 The Appellant was in the process of verifying existing lawful water volumes (ELU) allocated to the respective farms by the Respondent when it was brought to his attention that, apart from verifying the ELU of the respective properties, the construction of dams for the storage of the ELU would also need environmental authorization in terms of the relevant laws, as well as a new water use license from the Respondent.
- 6 The Appellant secured the services of Spoor Environmental Services (Pty) Ltd (Spoor) to apply for a water use license for the storage of water in dams.

Spoor, then assisted the Appellant with the application for new impounds in the primary in-stream locations of the Sterkstroom River. The dams are outlined in Table 1: Storage Dam Detail, in page 2 of the Appellant's bundle of documents. The said table 1, shows a total of seven dams.

- 7 The Water Use Licence (WUL)<sup>1</sup>, in terms of section 21(b) of the NWA,<sup>2</sup> was issued to the Appellant by the Respondent on 12<sup>th</sup> December 2020, under reference number: 07/A42E/BCIBCI/10043. The said licence was issued by the Respondent in respect of the properties, Boschpoort 249 KQ Ptn 3 and Doornspruit 215 KQ Ptn's 0 and 2. The license was issued for a period of twenty (20) years from the date of issue and will be reviewed on intervals of not more than five (5) years. The said licence was issued subject to the conditions stated in Appendix I,<sup>3</sup> and Appendix II,<sup>4</sup>. The conditions specified in Appendix II of the licence are as follows:

7.1 The Appellant is authorised to store water in the off-channel dams as follows,<sup>5</sup>:

<b>Water Use(s)</b>	<b>Purpose</b>	<b>Capacity</b>	<b>Property Description</b>
Dam 1 Boschpoort	Irrigation	75 000 cubic meters	Boschpoort 249 KQ Ptn 3
Dam 2 Doornspruit	Irrigation	45 000 cubic meters	Doornspruit 215 KQ Remainder (Ptn0)
Dam 3 Interfokus	Irrigation	110 cubic meters	Doornspruit 215-KQ Remainder (Ptn0)
Dam 6 Doornspruit C	Irrigation	50 000 cubic meters	

<sup>1</sup> WUL refers to a Water Use License

<sup>2</sup> National Water Act, 38 of 1998

<sup>3</sup> General Conditions for the License

<sup>4</sup> Specific Conditions for the Licence( Section 21(b) of NWA: Storing of Water)

<sup>5</sup> Appellant's bundle, page 11

			Doornspruit KQ Remainder (Ptn0)
Dam 7	Irrigation	100 000 cubic meters	Doornspruit

7.2 The Appellant was given these further conditions in terms of Appendix II:

*“1.2 The Licensee is not exempted from compliance with any applicable Dam Safety Regulations.*

#### *2. Monitoring Requirements*

*2.1 To compile a water balance to manage the use of water optimally the Licensee shall monitor the quantity of water transferred into and from each of the dams set out in Condition 1.1 of Appendix II on a daily basis and submit this to the Provincial Head bi-annually.*

*2.2 The Licensee shall provide information on the method on the flow measurement within one year from the date of issuance the licence.*

*2.3 All flow gauging devices shall be maintained in a sound state of repair.*

*2.4 All flow gauging devices shall be calibrated by a competent person, at intervals not exceeding one year.*

*2.5 The installation of flow meters shall comply with the specifications of the manufacturer with regard to distance from obstructions in the pipeline upstream and downstream of the meter to ensure accurate measurements.*

*2.6 Records confirming proof of the calibration must be kept and made available to the Provincial Head upon request...*

#### *4. Site specific conditions*

*4.1 Proposed off channel dam must be constructed outside of 1:100 year flood line or delineated riparian habitat whichever is the greatest;*

*4.2 Final master layout plan consist of a relationship between proposed off channel dam and 1:100 year flood line and delineated*



*riparian habitat whichever is the greatest must be submitted to Department before commencement of proposed activity.”*

- 8 The Appellant had applied for the approval of seven dams, however two(2) dams were not approved, namely,<sup>6</sup>:

Dam ID	Farm Name	Volume	Status
Dam 4 Doornspruit A	Doornspruit 215 KQ Remainder (Ptn0)	120 000 cubic meters	Existing (Upgraded)
Dam 5 Doornspruit B	Doornspruit 215 KQ Remainder (Ptn0)	80 000 cubic meters	Existing

- 9 Out of seven dams applied for approval by the Appellant, the Respondent only approved five dams. The combined capacity of the two dams not approved by the Respondent is 200 000 cubic meters.

### **ISSUES TO BE DECIDED BY THE WATER TRIBUNAL**

- 10 The Water Tribunal is required to decide the on the following issues:
- 18.1. Whether the Respondent was correct in declining the application for water use brought by the Appellant.

### **THE APPELLANT’S CASE**

#### **The Appellant’s Witness: JC Van Rooyen (Spoor Environmental Services)**

- 11 The witness stated that he holds a B.SC and M.SC Degrees and has approximately 19 years’ experience as an environmental practitioner. He stated that Mr. Joseph Klopper, the Appellant herein, is his client and he is the one who assisted Mr. Joseph Klopper to apply for the water use license.

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<sup>6</sup> Appellant’s bundle, page 2

- 12 The witness stated that he assisted the Appellant to apply for a water use license for the approval of the construction of seven dams with the purpose of storing water on the basis of the existing water use licence. The said seven dams were supposed to be located in three properties belonging to the Appellant. The three properties already have an existing water use licence.
- 13 The witness referred the Tribunal Appellant's existing water use licence, showing the quantity of water the Appellant is allowed to draw from the Sterkstroom River, for irrigation purposes. The witness indicated that there is no unlawful water use on the part of the Appellant, as he is complying and respecting all the existing environmental laws.
- 14 The witness indicated that he compiled the water use licence application on behalf of the Appellant, for the construction of the seven dams, aimed at storing water in line with the existing water use license. The witness indicated that during the initial stages of the construction of the seven dams, dam engineers were involved for the purpose ensuring dam safety. The said application was submitted by the witness to the Respondent, on behalf of the Appellant for consideration and decision.

### **The Appellant's Grounds of Appeal**

- 15 The witness stated that currently there are two dams which are without water use licences<sup>7</sup>, due to the fact that out of the seven dams for which licence applications were submitted to the Respondent, the Respondent only gave approval and licences for five dams<sup>8</sup>.
- 16 The witness stated that the decision of the Respondent to decline the approval and licencing of the remaining two dams was not a correct decision for the reasons which have been advanced by the Appellant in the notice of appeal. The witness emphasised that during the initial stages of the water use

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<sup>7</sup> Page 8 of the Appellant's bundle

<sup>8</sup> Page 13 of the Appellant's bundle, the Respondent's decision which is the subject of this appeal proceedings.

licence application process, the Respondent's own official recommended that the Appellant may store water in the other dams, but **not** in the two unlicensed dams<sup>9</sup>.

17 The witness stated that the Respondent, provided as reasons for not approving the water use licenses for the two remaining dams on the basis that the Respondent was concerned that the Appellant would impede or divert water flow on a water course and therefore the Appellant would store additional water, exceeding the amount of water allocated to the Appellant in terms of the existing water use license.

18 The witness indicated that should there be more rainfall in a particular year, there is a need for additional water storage. The witness stated that the environmental concerns by the Respondent with regard to the environmental degradation, the diverting of water and additional storage of water were unfounded, as the Appellant was prudent enough to seek the services of an environmental specialist. According to the witness, an environmental impact assessment was conducted.

### **Cross-examination**

19 The witness stated that dams 1 to 6 have already been constructed and are in existence. It is only dam seven which has not yet been constructed. The witness stated that the dams were built in 2018 by the Appellant, before his appointment, as an environmental specialist.

20 The witness admitted that the application for the approval and licencing of the dams came after the fact, that is, after the dams,<sup>10</sup> had already been built.

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<sup>9</sup> Page 36 to 49 of the Appellant's bundle, Recommendations by the Limpopo Department of Water and Sanitation

<sup>10</sup> Dams 1 to 6



- 21 The witness stated that based on the Appellant's existing water use license volumes, the Appellant deserved to be granted the licence to store water even in the two dams which were not approved.
- 22 The witness stated that, even though he is not a legal expert, he knows that the existing water use licence was issued under the previous legislation,<sup>11</sup>.
- 23 The witness stated that the Appellant, under the existing water use licence is allowed to store only 13 963 cubic meters of water.
- 24 The Respondent put a version to the witness that since the Appellant was only allowed to store 13 963 cubic meters of waters, the Appellant, by building more dams sought to store more volumes of water that allowed by the existing water use license and that would be an unlawful act on the part of the Appellant, thereby curtailing the flow of water and thereby negatively affecting water users downstream. The witness responded by stating that the Appellant proposed certain activities, which would reduce the flow altering of the water course,<sup>12</sup>.
- 25 The witness stated that the current appeal is not with regard to the application for Additional water use, however the storage of the volumes allocated by the Respondent, in terms of the existing water use license.
- 26 The witness conceded that the Appellant is currently breaching the conditions of the existing water use licence by storing more than 13 963 cubic meters of water. The Appellant is storing more water that allowed by the existing water use license.

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<sup>11</sup> The Water Act 54 of 1956

<sup>12</sup> Page 56, paragraph 15 of the Appellant's bundle.



- 27 The witness further stated that the Appellant erred by storing more water than permitted in terms of the existing water use license. He further stated that the Appellant was fined by the government, for the breach of the environmental integrity of the area.
- 28 The witness conceded that the Respondent has a duty to enforce the laws in order to protect other water users downstream.
- 29 The Respondent stated to the witness that Mr. Khosa,<sup>13</sup> will testify that the conduct of the Appellant in building more storage dams than permitted has had a negative impact on water users who are downstream. The Respondent put to the witness that dams 4 and 5 exist without the necessary authorisation, to which assertion the witness conceded.
- 30 The witness conceded that with regard to dams 4 and 5, the Appellant might have been tempering with a water course without the required authorisation from the Respondent.
- 31 The witness conceded that five impounding structures (dams) were approved and two structures were not approved. The letter from the Respondent declining the construction of the dams clearly stated that no additional structures may be constructed,<sup>14</sup>.
- 32 The witness conceded that there was no impact assessment which was conducted before dams 4 and 5 were constructed and further stated that recommendations are not necessarily decisions of the Respondent, however inputs from various officials of the Respondent or Directorates of the Respondent.

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<sup>13</sup> An official of the Department of Water and Sanitation

<sup>14</sup> Page 36 of the Appellant's bundle, Recommendation, Stated that Dams 4 and 5 are not recommended for the storage of water.

33 The witness could not respond when asked by the Respondent's legal representative that the Respondent was correct in declining the approval of dams 4 and 5, in order to lessen the negative impact on downstream users.

### **Re-examination**

34 The witness stated that the reason the Appellant approached the Water Tribunal was with a view to make dams 4 and 5 lawful, as they were currently unauthorised.

### **Clarity questions from the presiding panel**

35 The witness responded to the clarity question by Ms. Mbeki whether construction can precede the application and approval processes by stating that the application and the approval process must come before construction of the dams commences.

### **RESPONDENT'S CASE**

#### **Respondent's First Witness: Ms. Takalelo Tshiruvhele**

36 The witness stated that she is employed by the Respondent as an Environmental Officer, based in the Department of Water and Sanitation, Regional Office in Limpopo Province. She further stated that she holds a B.SC and Master's Degree in Aquatic Health.

37 The witness stated that she is aware of the matter currently before the Water Tribunal, as she was involved in the handling of the said application. She indicated that she did a site visit to the properties of the Appellant and one of her observations was that some of the dams, which were the subject matter of the application process had already been built.

- 38 The witness stated that out of the seven dams which were part of the application, five dams were approved for licensing, while two dams were declined. She indicated that dams 4 and 5 were the dams which the Respondent declined for licencing.
- 39 The witness described “instream”, as a water which is located within a water course, whether perennial,<sup>15</sup> or non-perennial,<sup>16</sup>. She stated that the dams which were declined,<sup>17</sup>, were located on a non-perennial water course.
- 40 The witness stated that the catchment in the area is already stressed and could not have an unauthorised impoundment. She further stated that the construction of the two unauthorised dams by the Appellant was contrary to the National Water Strategy<sup>18</sup>. She further stated that this government policy<sup>19</sup>, is a public document which members of the public can access.
- 41 The witness stated that the Respondent is correct to refer to the National Water Strategy of 2004 and not the National Water Strategy of 2013, as the latter policy has not repealed the 2004 Strategy.
- 42 The witness stated that the Respondent’s main aim through the National Water Strategy of 2004,<sup>20</sup> is to preserve water for future generations.
- 43 The witness stated that the Appellant’s conduct, by constructing two unauthorised dams, has a negative effect on other water users, such as the neighbouring properties and neighbouring countries, such as Botswana.

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<sup>15</sup> Water course which flows throughout the year

<sup>16</sup> Water course which does not flow throughout the year.

<sup>17</sup> Dams 4 and 5

<sup>18</sup> National Water Strategy, 2004

<sup>19</sup> The National Water Strategy, 2004

<sup>20</sup> Page 52 of Appellant’s bundle



44 The witness stated that the recommendation to decline the Appellant's additional two dams was a correct decision, on the part of the Respondent, as the area is a water stressed area.

### **Cross-Examination**

45 The witness stated that if the two dams,<sup>21</sup> which were not approved, were off-channel or off-stream, the Respondent would have approved the Appellant's water use application in respect of the said two dams.

46 The witness stated that in the area in question, no instream impoundments are authorised, due to the water stressed nature of the area.

### **Respondent's Second witness: Mr. Mulalo David Nethengwe**

47 The witness stated that he is employed by the Respondent and that he is the manager responsible for water use management, in the Limpopo Province, Regional Office of the Respondent. He stated that he holds a Master's Degree in Hydrology, specialising in both ground and surface water. The witness stated that he is the supervisor to Ms. Tshiruvhele and further that he chairs the adjudication committee for water use licenses in the Regional Office.

48 The witness stated that with regard to the current matter before the Water Tribunal, the five dams were approved by the Respondent and two dams were declined for licensing and the two dams in question are dams 4 and 5.

49 The witness stated that dams 4 and 5 were not approved for licensing, based on the National Water Strategy and dams 4 and 5 were declined for approval, as they are situated instream, in line with the said national government policy.

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<sup>21</sup> Dams 4 and 5



- 50 The witness stated that approving dams 4 and 5 would have had a negative impact on the already stressed water area.
- 51 The witness disputed the Appellant's contention that the two unapproved dams,<sup>22</sup> were meant to store the already approved water volumes in terms of the existing water use license. He stated that the Respondent approved five dams for the purposes of water storage by the Appellant, as these five approved dams do not have a negative impact on downstream water users. He stated that instream, storage would cause reduced flow on the downstream users.
- 52 The witness stated that the river in question, flows into the Limpopo river and any unauthorised tempering with the water flow would have a negative effect on neighbouring states, such as Zimbabwe and Botswana.
- 53 The witness stated that the Appellant should have made the application for the two unapproved dams before constructing the said two dams. He stated that the two dams are currently storing water unlawfully.
- 54 The witness stated that the Respondent is responsible for enforcing compliance with the National Water Act,<sup>23</sup>. He stated that in cases where there is non-compliance on the part of water users, the Respondent, through its officials would issue compliance notices.
- 55 The witness stated that the case, which is currently before the Water Tribunal, was referred to the Respondent's Compliance Division.

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<sup>23</sup> National Water Act, 1998

56 The witness stated that where the affected party has been issued with a compliance notice and still the said party does not comply, the Respondent would usually resort to approaching the Court to seek appropriate relief.

57 The witness stated that the Respondent was well aware that the Appellant's application was not about seeking approval for additional water and referred to the letter declining the Appellant's application for the two dams,<sup>24</sup>. He stated that the Respondent was fully aware what the Appellant's application was all about.

58 The witness stated that there are no approvals for impoundments in the area where the two dams were constructed, as they would impound water which is supposed to flow downstream.

59 The witness stated that the Appellant's current water use licence allows him to store 13 963 cubic meters of water and exceeding the permitted allocation on the part of the Appellant would be unlawful.

### **Cross-examination**

60 The witness stated that he was involved in the adjudication of the Appellant's application, which led to the declining of the construction and storage of water in dams 4 and 5. The witness stated that adjudication for water use licence applications is conducted at regional level and not at national offices of the Respondent. He stated that the Chairperson of the adjudication committee makes the decision.

61 The witness stated that Ms. Tshiruvhele prepared the record of recommendations,<sup>25</sup>.

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<sup>24</sup> Page 16, Appellant's bundle, letter declining the application for the approval of dams 4 and 5. Section 21(b)(c) and (i)

<sup>25</sup> Page 36, Appellant's bundle, Record of Recommendations.

62 When asked by the Appellant's legal representative, as where does the record of recommendations deal with ecological issues, the witness stated that table 4 of the bundle, the National Water Strategy and Internal Strategic Perspectives deal with ecological issues.

**Respondent's third witness: Mr.Tsunduka Baldwin Khosa**

63 The witness stated that he is employed by the Respondent as Director of Water Use Licensing. He stated that he holds a Master's Degree in Agricultural Sciences.

64 The witness stated that according to the National Water Strategy, water is a scarce resource and therefore it should be preserved for future generations. The witness stated that half of the water management areas in the country are water stressed, including the area which is the subject matter of this current appeal before the Water Tribunal.

65 The witness stated that in water stressed areas, additional dams are not encouraged nor approved in respect of instream water courses, as they reduce the flow of water to downstream users. He indicated that the Respondent's standpoint is informed by the fact that the cumulative impact of building dams instream may have a negative impact overall on other water users.

66 The witness stated that the Appellant's proposed mitigation strategies, would not be sufficient to minimize the negative impact on the downstream water users. He stated that in water stressed areas, the Respondent has adopted declining, an avoidance strategy, over mitigation measures.



67 The witness stated that dams 4 and 5 which have been constructed and are being used by the Appellant are unlawful.

### **Cross-Examination**

68 The witness stated that the main reason that the approval of dams 4 and 5 was declined, was due to concerns of the quality of water downstream.

69 The witness stated that mitigation strategies will not assist in minimizing the negative impact on the downstream water users. He stated that the system must not be tempered with.

70 The witness stated that currently there are no approved water use licenses for dams 4 and 5. He stated that the location of dams 4 and 5 is not the same as the other approved dams as they are situated instream, while the other approved five dams are not situated instream.

### **ANALYSIS OF SUBMISSIONS**

71 The Appellant called and led evidence of a single witness Mr. JC Van Rooyen, whose evidence has been detailed herein above. Van Rooyen is from an environmental company called, Spoor Environmental Services. The Appellant himself did not present evidence during the hearing of this matter.

72 The Respondent, on the other hand called three witnesses, whose evidence is also detailed herein above.

73 The Appellant brought a case against the Respondent contending that the Respondent's decision to deny him the approval of the licensing to store water in dams 4 and 5 was incorrect and therefore such decision stands to be appealed and corrected by the Water Tribunal. Out of the seven dams that the Appellant sought to get approval for, from the Respondent, only five were



approved for licensing by the Respondent and the other two dams were not approved.

74 The Appellant's main grounds of appeal were that this appeal focuses only on the two unapproved dams, namely dams 4 and 5 and is not concerned with the other five dams which were approved by the Respondent. The Appellant's main contention is that contrary to the reasons advanced by the Respondent for declining the approval of dams 4 and 5, the two dams have not been built instream, however in a tributary of the Sterkstroom River and further that the catchment of this tributary is very small. The other dams which were approved by the Respondent were built "off-channel", in that no surface water flows into these five dams.

75 The Appellant, however, does not dispute the Respondent's assertion that the area where the Appellant has his properties, in the Lephalale area, is a water stressed area. The Appellant emphasises in his appeal that the application for a water use licence in respect of the two dams<sup>26</sup> was not for the allocation of additional water, but for the storage of water according to the allocated water volumes in terms of the existing water use licence.

76 The Appellant also stated that the Respondent did not take into account the proposed mitigation strategies, with regard to lessening the negative impact of the two unapproved dams on downstream water users.

56 In the case of **African Realty Trust (Pty) Ltd**,<sup>27</sup> the Appellant (the Trust) which operates operating a citrus fruit farming operation draws water from the Letaba River. Due to a combination of climatic conditions and the abstraction of water from the Letaba River by various other users, the water source has been too constrained. This water constrains were negatively impacting on the farming activities of the Trust and a decision was taken to construct two holding dams to

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<sup>26</sup> Dams 4 and 5

<sup>27</sup> WT03/20/LMP, Water Tribunal, Pretoria, 9 March 2021

draw water from the canal during the night, when abstraction by other users is at low levels, so that the stored water can be used during weekends or when there is increased demand on the canal. The proposed dams' carrying capacity were to be within the Trust's existing water use entitlement. In March 2018, the Trust applied for a water use license and upon receipt of the Trust's water use license application, the Department of Water and Sanitation (the Department), acknowledged receipt of the said application and confirmed that the water use license application meets all the requirements. In October 2019, the Department refused to grant the water use license application. The record of recommendation showed that the Department declined to grant the water use license citing the fact that the Letaba water system is under pressure, as a result of small farm dams in the area and further citing the fact that the Trust has enough storage dams for irrigation purposes. The Water Tribunal, through a judgment prepared by Prof. T Murombo, found among other things that:

*“(48) The storage dams are intended to store water drawn from the Letaba canal in respect of which the Letaba Water Users Association has existing water use rights and the Appellant, being members are entitled to in all to 16 357 988 cubic meters /a of water which they are carefully underutilising because of the storage constraints and the inefficiencies caused by the aging canal infrastructure. The canal is closed during weekends and during some draught periods. There is great demand for water in the morning forcing Appellant to irrigate at night. The storage dams have been proven to be a possible solution to the Appellant's water challenges without adding any additional stress or demand on the Letaba Water Management Area or the Great Letaba River.*

*(49) The reasons provided by the Respondent to reject the application are irrelevant, immaterial, and unsubstantiated. This is inconsistent with section 2, 3, 27(1) and 41 of the NWA. The reasons assume that the proposed dams are like new dams being constructed in-stream of perennial streams, that would extensively affect the water balance and resources in the water system. There was no effort to consider the unique nature of the proposed dams as balancing storage dams aimed to store water from the water canal. Little is*



*considered by the Respondent regarding Appellant's existing entitlement and that the storage dams will not result in the Appellant using more water than it is entitled to by law.*

*(50) The irrelevance of the reasons can be demonstrated by the submission, which was persisted with to the end that the two proposed storage dams are part of farm dams that are affecting the capacity of the major dams in the Letaba area from being met. The undisputed evidence presented by the Appellant was that the Tzaneen, Ebenezer and Magoebaskloef dams are all upstream Letaba Estates and the proposed storage dams have no impact on these dams.*

*(51) The Appellant provided an undisputed Hydrological Study which mapped the footprint of the two storage dams, which is insignificant in the big picture of the 61 000 cubic meters Letaba Water System. The study also confirmed that any impacts of the proposed dams on the episodic non-perennial streams was miniscule and insignificant...*

*(54) Furthermore, the Respondent failed to consider recent reports that could better inform its decision. Part from failing to consider the 2013 National Water Strategy, the Respondent and their witness throughout maintained reference to the 2004 documents and ignore the later documents. The National water strategy of 2013 emphasises that:*

*"The NWRS2 is developed within a changing environment and acknowledges that monitoring and collecting relevant data will not only affect the accurate assessment of the status of water resources and the magnitude of water problems but will vastly improve planning and policy formulation process."*

*(56) In addition, the goal of 2013 National Water Strategy is to ensure that "water is efficiently and effectively managed for equitable and sustainable growth and development". Among its objectives we find the following,*

*"Water supports development and elimination of poverty and inequality.*

*Water contributes to the economy and job creation; and  
Water is protected, used, developed, conserved, managed and controlled  
sustainably and equitable.”*

*We find that the purposes for which the Appellant requires the two additional storage dams resonates with these national water strategy objectives...*

*(58) In addition, reliance was placed on the Groot Letaba River Water Development project (GLEWAP)-volume 2, May 2010. Indeed, it confirms that the Letaba Water Management Area is water stressed. But that is where its relevance end as far as this specific application for a license is concerned. The plans and projects to augment water supply and conservation in the Letaba Water Management Area do not direct that no more dams should be licensed. More specifically nothing in the said plans and documents informs against the construction of balancing storage dams that have insignificant impact on non-perennial streams. These documents have no bearing on an application by an existing holder of water use rights, to recognise its storage infrastructure to maximise and ensure more efficient and beneficial use of allocated water, they would be relevant to a new allocation and new in-stream dams that would directly impact the water resources in the water management area.*

*(59) The Respondent ignored the recent Reconciliation Strategy for the Luvuvhu and Letaba Water Supply System (completed in 2015) which has up to date information on the water management area than the 2004 documents.*

*(62) Many of the reasons raised against the water use application were after thoughts that show that the Respondent did not fully apply their mind to documents submitted in support of the application. Despite having extensive powers in terms of the NWA to request additional information, direct the undertaking of further specialist studies or in fact undertaking*



*those studies or investigation itself-the Respondent chose not to use those powers...*

*(67) In the end we come to the decision that the Appellant must succeed and that the Respondent have not provided any meaningful reasons for refusing the water use license..."*

77 The appeal in the African Realty Trust case was successful and upheld by the Water Tribunal due to the reasons advanced by Prof Murombo, which have been quoted in great detail herein. The difference between the African Realty Trust and the current case is that, in the African Realty case the Department of Water and Sanitation did not provide adequate and sufficient reasons for declining and the water use license in respect of the two proposed dams which were meant for the storage of water from the Letaba River, whilst in this current case there are a few notable things which present some challenges to the Appellant's case, including that:

77.1 The Appellant constructed the dams and commenced the storage of the water before approaching the Respondent for the necessary authorisation and licensing.

77.2 There is no dispute that the two dams<sup>28</sup>, which were not approved by the Respondent were built instream, contrary to the National Water Strategy and the Respondent's own policy that no dams which are built instream within the area in question will be approved for licensing.

77.3 The Appellant conceded that it was storing water unlawfully in dams 4 and 5, even before the Respondent declined the Appellant's application in December 2020. The Appellant was storing water beyond the allocated volumes of 13 963 cubic meters, in terms of the existing water use licence.

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<sup>28</sup> Dams 4 and 5

77.4 The Appellant's unlawful water storage in respect of dams 4 and 5 was negatively affecting the downstream water users. The Appellant's proposed mitigation strategy was contrary to the Respondent's policy of avoidance, that is to decline all water use licence application for dams located in stream.

77.5 The two unapproved dams were built in a non-perennial water course.

77.6 The reasons which were advanced by the Respondent's officials regarding declining the Appellant's application for the approval and licensing of dams 4 and 5 were based on sound and valid reasons informed by facts. The Respondent's officials conducted site visits and conducted a thorough analysis of the Appellant's application.

77.7 The record of recommendations which was prepared by the officials of the Respondent was not significantly challenged by the Appellant, except to point out that the record of recommendations does not allude to any ecological degradation, whilst that was the reason which was advanced by the Respondent as a reason for declining the approval of dams 4 and 5.

78 The Appellant in the current case, in contrast to the African Realty Trust, has some difficulties in discharging its onus of proof to show that the decision of the Respondent in this matter was incorrect. The Water Tribunal is mindful of the fact that the Appellant approaches the Water Tribunal not with clean hands. The Appellant was already breaking the law by storing more water than permitted in terms of the existing water use license.

## **FINDINGS**

- 78 According to the law of evidence the Appellant bears the burden of proof to show that the Respondent's decision to decline the application for a water use licence, stands to be appealed and set aside. The Appellant stated the reasons which according to them, show that the decision of the Respondent is legally not justifiable.
- 79 Based on the evidence, which was presented before the Water Tribunal, the Appellant built dams 4 and 5 before approaching the Respondent with an application for a water use license. The Appellant commenced using the said dams,<sup>29</sup> by storing water without the necessary water use license from the Respondent. There is no dispute that dams 4 and 5 are located instream and there is no dispute that the area where the dams have been built is a water stressed area.
- 80 Based on the evidence which has been presented in this matter, there is no reason to conclude that the decision which was taken by the Respondent in declining the Appellant's water use licence in respect of dams 4 and 5 is an incorrect decision.
- 81 The Appellant's own witness, Mr. JC Van Rooyen conceded to the fact that the Appellant is currently using dams 4 and 5 unlawfully, as he started doing so, before acquiring the necessary licence from the Respondent.
- 82 In the light of the above, the Appellant has failed to discharge his onus of proving that the decision of the Respondent is incorrect.

### **RULING AND ORDER**

- 83 After taking into account all the facts of this case, the submissions made by Counsel for the Appellant and Counsel for the Respondent, the following ruling and order are hereby made:

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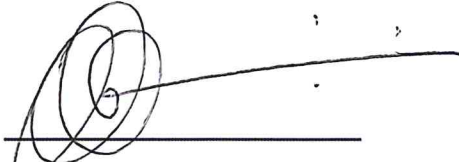
<sup>29</sup> Dams 4 and 5



83.1 The Appeal is hereby dismissed

83.2 There is no order as to costs

Thus handed down in Pretoria on the 06 July 2022

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

**Mr. Robert Mokgalabone**

Chairperson of the Panel

So I agree.

A handwritten signature in black ink, featuring a circular loop at the beginning followed by several vertical and horizontal strokes.

**Ms. Uriathi Mbeki**

Panel Member of the Tribunal.

**For the Appellant:**

Mr. H Thompson  
Spoor Environmental Services  
Pretoria  
Instructed by Joseph Klopper

**For the Respondent:**

Adv. Mgwetyana  
Briefed by the State Attorney