IN THE WATER TRIBUNAL

In the appeal of:

SHALOM TRUST	FIRST APPELLANT
SUSANNA ELIZABETH MATHEWSON	SECOND APPELLANT
SUSANNA ELIZABETH MATHEWSON	THIRD APPLELLANT
CATHERINE ISABEL BROOKES	FOURTH APPELLANT
CHARLISE HELENE LOUW	FIFTH APPELLANT

And

DEPARTMENT OF WATER AND SANITATION	FIRST RESPONDENT
DEPARTMENT OF AGRICULTURE, LAND REFORM AND RURAL DEVELOPMENT	SECOND RESPONDENT
ORANGE PROTO CATCHMENT MANAGEMENT AGENCY	THIRD RESPONDENT

JUDGMENT

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1. Before this judgment could be written in a manner that makes sense and deal directly with the matters raised in the appeal, extensive sifting, reorganisation and categorisation of the Notice of Appeal had to be done. Insofar as that was necessary counsel for the Appellant carries the blame because the notice of appeal, to put it mildly was confusing.

For purposes of expediency I will refer to the rights mentioned in this paragraph as old order water rights.

4. The letter from the First Respondent dated 17th March 2016 is silent about old order water rights. Regrettably, Appellants did not attach their original application to the Notice of Appeal. It is therefore impossible to determine whether the alleged old order water rights of the First Appellant were petitioned for before the First Respondent.

5. In terms of Rule 7(1) Water Tribunal Rules, Government Gazette Number 28060 published on the 23 September 2005 appeals and applications to the Tribunal take the form of a re-hearing. It is therefore important for the Tribunal to have sight of both the failed application and the impugned decision. As things currently stand it would seem that Appellants did not canvass these alleged old order water rights when they applied for water rights to the First Respondent. In the premises the Water Tribunal ought not to consider any argument on the old order water rights since those arguments are brought before this Water Tribunal for the very first time. However for purposes of completeness these alleged old order water rights are addressed in this judgment.

THE GROUNDS OF APPEAL AS SET OUT IN THE NOTICE OF APPEAL

6. The first ground of appeal reads as follows:-

"The First Respondent (being the Department of Water and Sanitation) failed to set aside, reconsider or amend the decision of the Department of Water Affairs

made on the 7th December 1987 by refusing the Second Appellant the right to exercise the right afforded her in terms of Government Notice 1676, published in the Government Gazette of the Republic of South Africa No 9869 Volume 243 published on the 26TH July 1985 in Pretoria."

7. GG Notice 1676 appears on page 226 of the appeal record. A reading of that Notice indicates clearly that for a person to derive rights in respect of a Government Water Control Area that person must be the registered owner of the land.
8. The Appellants' Notice of Motion under the heading "Parties" refers to the Second Appellant as Susanah Elizabeth Matthewson. Because there are two Susanah Elizabeth Matthewson in the papers I will refer to the Second Appellant as Susanah the Senior. It is difficult to understand how Susanah the Senior could have had the locus standi in 2014 to bring an application to set aside, reconsider or amend the decision of the First Respondent denying her water rights in respect of the farm Stoffelhoek 81 Hopetown district because on that date she was no longer the registered owner of that farm. The Notice of Appeal places ownership of the farm Stoffelhoek 81 with the First Appellant Shalom Trust.
9. Consequently, the first ground of appeal is incompetent due to absence of locus standi on the part of the Second Appellant, Susanah the Senior.
10. That is however not all. First Respondent, when it refused Susanah the Senior water rights on the 7th December 1987 was exercising an administrative function,

consequently it became functus officio, as such it would be impossible for it to set aside, reconsider or amend its decision.

11. The other valid argument against reviving the application for water use rights refused in December 1987 is that raised by the First Respondent in paragraph 1.5 of its reply, page 701 of the indexed and paginated papers, a time lapse of twenty nine years. The validity of this submission was conceded to by counsel for the Appellants in that he abandoned this ground of appeal in paragraph 3 of his Heads of Arguments dated 28th February 2018.

12. In making that concession counsel for the Appellants however took with the one hand what he had given with the other in that he introduced in his Heads of Arguments a new appeal ground stated as follows "..... that by operation of section 40(2) of the 1998 Act, the appeal in respect of the 1987 decision should be dealt with as being an application for water use under this act"

13. To answer this latterly formulated challenge one must turn to the provisions of section 40(2) of the 1998 National Water Act and same provide as follows:-

"40(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, the application must regarded as an application under the Act".(own underlining)

14. Appellants have attached to their own papers a letter from the erstwhile Department of Water Affairs, dated 7 December 1987 refusing the water use rights. The attachment is marked annexure B and appears on page 221 of the

Appeal record. Further they themselves in page 191 of the record refer to the latter attachment as "unsubstantiated refusal of application." Refusal of the application under the old Act means that, that application was finalised.

15. In the circumstances counsel's Heads of Argument are at odds with both the Appeal record and the National Water Act. Therefore this attempt to rescue the ill-fated 1987 application also fails.

16. I now turn to the second ground of appeal which is formulated as follows:-

"The First Respondent performed their administrative functions improperly in not considering the recommendation by the Second Respondent (Department of Agriculture, Land Reform and Rural Development) as to the water held or availability thereof."

17. Appellants do not in their notice of appeal refer us expressly to the alleged recommendation. It is therefore impossible to evaluate this "recommendation from the Department of Agriculture"

18. What however complicates matters for the Appellants is the following:- On the 27th January 2017 they filed " a reply and amplification of the Appellants' grounds of appeal in terms of Rule 3(2) of the Water Tribunal Rules. In the latter document Appellants deal with a letter from the Second Respondent, the Department of Agriculture and attach same as annexure "I". Annexure "I" is found in pages 179 and 180 of the appeal record.

19. Annexure "I" advises the attorneys of the Appellants that all water in the Orange River Development has been allocated and give details of the allocation.

20. Therefore, the only recommendation from the Second Respondent placed before the Water Tribunal was that all water has been allocated, ergo, there is no water available for allocation to the First Appellant. I am deliberately referring to the First Appellant because for reasons that will be explained hereunder Second to Fifth Appellants have no locus standi to bring this appeal before the Water Tribunal.

21. The Third ground of appeal in the notice of appeal reads as follows:-

"The Second Respondent (Department of Agriculture Land Reform and Rural Development) submitted to the First Respondent (Department of Water and Sanitation) information regarding the availability of water without allowing the Appellants to present a Business Plan for and in support of the granting of a water license."

22. This ground of appeal is based on erroneous reasoning :- the Business Plan is irrelevant where application for a water use license occurs in respect of a water resource where water allocation has already been exhausted. I will deal herewith under with the relevant provisions of the National Water Act supporting this contention.

23. The Fourth ground of appeal contains three distinct statements and I will for purposes of facilitating analysis deal with each statement separately. The first statement reads as follows: - "The First Respondent failed to determine or properly determine the availability of water held by the Second Respondent and or the Third Respondent" In order to properly understand the meaning of this

statement it must be dealt with in the context of the applicable legislation, the National Water Act of 1998.

24. Although both Appellants and the officials of the First Respondent (and by association Counsel for First Respondent) seem to resort under the impression that the Appellants' application for a water use license under the National Water Act is governed solely by section 40 read with section 41 thereof , that is not so because of the following:-

25. Sections 40 and 41 are of general application to all license applications. The National Water Act however goes further and distinguishes two separate categories of license applications with the following respective headings:-

Part 7: Individual applications for licenses, and
Part 8: Compulsory license for water use in respect of a specific resource.

26. To understand the difference between the two parts it is helpful to reproduce hereunder the relevant portion of the explanatory note for each part.

The explanatory note for Part 7 provides as follows:

"This sets out the procedures which apply in all case where a license is required to use water, but where no general invitation to apply for licenses has been issued under Part 8...."

27. For Part 8 the explanatory note provides as follows:-

This Part establishes a procedure for a responsible authority to undertake compulsory licensing of any aspect of water use in respect of one or more water resources within a specific geographic area..."(own underlining)

28. Appellants' application clearly falls under Part 8 because of the following reasons:-

(i) In their now abandoned ground of appeal, appeal against refusal of water use under the 1956 Water Act, Appellants relied on Government Notice number 1646, published on the 26th July 1985, the latter document appears on page 225 of the appeal record. The Notice has the following heading " ORANGE RIVER (VANDERKLOOF), MIDDLE ORANGE RIVER, ORANGE RIVER (NAMAQUALAND), LOWER ORANGE RIVER, GREAT FISH RIVER AND FISH-SUNDAYS RIVER GOVERNMENT WATER CONTROL AREA. The heading clearly refers to specific water resources within a government water control area, the latter denoting a specific geographic area.

(ii) In the record of recommendation for the license application of the Appellants, a document of the Chief Directorate Water Use Authorisation, at paragraph 2.2: Project Description, the following appears "This water use license application is for taking water from Orange River to use for agricultural purposes."

(iii) In the circumstances it seems to be common cause between the parties that the water will come from the Orange River, a water resource (own underlining) within a specific geographic area as provided for in Part 8 of the National Water Act.

29. In terms of the National Water Act, a water use application falling under Part 8 is governed specifically by sections 43,44,45,46 and 47 insofar as substantive provisions for the application are concerned.

30. For the Appellants' case the following sections of Part 8 are important:-

"Section 43, Compulsory license application- (i) If it is desirable that water use in respect of one or more water resources within a specific geographic area be licenced-

(a) To achieve a fair allocation of water from a water resource in accordance with section 45

(i) .....

(ii) When it is necessary to review prevailing water use to achieve equity in allocation.....

The responsible authority may issue a notice requiring persons to apply for licenses for one or more types of water use contemplated in section 21..."

"Section 45 Proposed allocation schedules.

1. A responsible authority must after considering:-

(a) All applications received in response to the publication of a notice in terms of section 43(1) ;

(b) Any further information or assessment obtained; and

(c) The factors contemplated in section 27.

2. A proposed allocation schedule must , subject to subsection 3 (own underlining) reflect the quantity of water to be-

   (a) .....

   (b) .....

   (c) Allocated to each of the Applicants to whom licenses ought to be issued in order to redress the result of past racial and gender discrimination in accordance with the constitutional mandate for water reform.....

3. A responsible authority is under no obligation to allocate all available water" (own underlining)

"46 Preliminary allocation schedule:-

(1) after considering all objections received on the proposed allocation schedule, on or before the date specified in the notice contemplated in section 45(4) the responsible authority must prepare a preliminary allocation schedule and publish a notice in the Gazette____

(a) ...

(b) Stating that an appeal in respect of any unsuccessful objection to the preliminary allocation schedule may be made in accordance with chapter 15(Chapter 15 establishes the Water Tribunal for the express purpose of hearing appeals against certain decisions made by a responsible authority .....under the National Water Act.)

(2) If an appeal under section (1)(b) succeeds, the responsible authority must amend the preliminary allocation schedule as directed by the Water Tribunal.

31. Section 47 Final allocation schedule- (1) a preliminary allocation schedule becomes a final allocation schedule-

(a) (i) If no appeal is lodged within the time limit;

(ii) If it has been amended following every successful appeal or

(iii) If every appeal lodged is dismissed; and

(b) On publication by the responsible authority of a notice in the Gazette-

(i) Stating that a preliminary allocation schedule has become final; and

(ii) .....

32. A responsible authority must, as soon as reasonably practicable after a preliminary allocation schedule becomes final, issue licenses according to the allocations provided for it"

33. I have conscientiously reproduced the salient provisions of Part 8 of the National Water Act because it seems to me as stated before that none of the counsel representing the parties were aware of the importance of determining whether Appellants' application for water use was governed by Part 7 or resorted under Part 8.

34. In my evaluation the fact that the water use license application of the Appellants resort under Part 8 has the following consequences and or implications.

(i) In their third ground of appeal (I repeat it here for clarity) Appellants stated that the Second Respondent (being the Department of Agriculture, Land Reform and Rural Development) submitted to the First Respondent information regarding the availability of water without allowing the Appellants to present a Business Plan for, and in support of the granting of a water license.

35. Regrettably a business plan however excellent might not have been of any use in the specific circumstances of the Appellants' water use application because the Second Respondent in its letter dated 11 January 2016(Annexure 1 to the Notice of Appeal) addressed to the attorneys of the Appellants, Messrs Matthewson Gess Inc spells out in detail that all water has been allocated. Annexure "I" is to be found at page 179 of the appeal record.

36. Section 47(2) cited above makes it clear that once the allocation schedule is final the next step is issuing of licenses to the allocatees.

37. No evidence of allocation to the Appellants was presented to the Water Tribunal and in the absence of such evidence I am compelled to accept that Appellants had no water allocation that could be converted to a licence in terms of section 47(2)

38. Further, because of the provision of section 45(3) (a responsible authority is under no obligation to allocate all available water) Appellants cannot without following the objection procedure set out in section 46(1) complain about non allocation.

39. However, the nail in the coffin for the Appellants is section 46(1) (b) which provides that where there is dissatisfaction with the preliminary allocation schedule and an objection has been unsuccessful, the affected party may appeal to the Water Tribunal.

40. In the present proceedings the Water Tribunal has no jurisdiction because the Appellants are appealing against a final allocation whilst the Water Tribunal is only granted authority in terms of the National Water Act to handle appeals against preliminary allocation schedules.

41. To be fair to the Appellants, an argument may be raised to the effect that the First Respondent has not raised in its papers and during argument this whole issue of Part 8 and how allocations are done. That may be so, unfortunately however there is only one section in the National Water Act that deals with allocations and that is Part 8, consequently the Appellants' appeal must of necessity be dealt with under this part of the Act. Also, the evidence however limited presented to the Water Tribunal is sufficient to enable me to make a conclusion that the allocation was done following the process set out in the afore-cited sections of Part 8.

42. I am fortified in my conclusions by the legal maxim that all administrative acts are presumed to have been done in an administratively correct and proper manner.

43. Reverting back to the Fourth ground of appeal, I now proceed to deal with the second statement contained in this ground. That statement is as follows:-

"...furthermore ignoring the fact that the Second Appellants' rights transferred and vested in the First Appellant were further violated ....."

44. This statement is erroneous in both law and fact. Second Appellant never acquired any water use rights under the 1956 Water Act. It is common cause that she was refused such right, hence the initial ground of appeal. Prudently, counsel for the Appellants withdrew that ground of appeal. Because Second Appellant never had water use rights it is therefore trite that there were no rights to transfer to the First Appellant, and by the same reasoning no water use rights vested in the First Appellant.

45. This erroneous reasoning is an echo of a letter written by the attorneys of the Appellants Messrs Matthewson Gess Inc dated 9 June 2014 to the Department of Water and Sanitation (First Respondent herein) wherein the attorneys asked the Minister to reconsider the application of Mrs Matthweson in terms of section 33 of the National Water Act 36 of 1998. Section 33 is clear. It assists people who are already lawfully using the water in terms of the 1956 Water Act to continue with that lawful water use under the National Water Act and if they so wish have it licensed. There is no doubt on the viva voce evidence submitted to the Water Tribunal that Mrs Matthewson Senior never had water use rights under the 1956 Water Act.

46. I now turn to the last statement of the fourth ground of appeal, and same reads as follows:-

"... and by implication violated the rights of the Second, Third, Fourth and Fifth Applicants, who are all Historically Disadvantaged Individuals.

47. This statement brings me to the issue of locus standi of the First, Second, Third , Fourth and Fifth Appellants in these proceedings. Commencing with the First Respondent, same is a Trust. A Trust does not have legal standing per se, ergo, First Appellant could not bring these proceedings, it should have acted through its trustees. In the circumstances what saves the locus standi of the First Appellant in these proceedings is the fact that a Trustee, Susanah Matthewaon Senior represented it.

48. Second, Third, Fourth and Fifth Applicants have no locus standi as beneficiaries of the Trust in a representative action on behalf of the Trust It is common cause that the farm Stoffelhoek 81 is now owned by Shalom Trust, consequently the water use rights sought will belong to Shalom Trust.

49. I do not deem it necessary to deal with the fifth ground of appeal, which ground is premised on the allegation that by refusing water rights to Shalom Trust the First Respondent has refused water use rights to Second, Third , Fourth and Fifth Appellants because even if one accepts that because the Trust beneficiaries are predominantly female then the Trust is female, because of my findings stated above on the applicability of Part 8 of the Water Act and its provisions, more specifically the fact that the allocation schedule is now finalised and the only time

an appeal to the tribunal is competent is during the preliminary allocation schedule.

50. In the premises I make the following order.

1. The appeal is dismissed, the Water Tribunal having no jurisdiction to hear an appeal against refusal of a water use license based on allocatable water in a specific water resources where a final allocation schedule exist in terms of section 47 of the National Water Act, Act No. 36 of 1998, alternatively where all water has been allocated.

LMBANJWA
DEPUTY CHAIRPERSON
WATER TRIBUNAL

Mr P Jonas unfortunately passed away during March 2019 and the decision of the panel is thus that of Mr F Zondagh and Ms L Mbanjwa.

Please note that the Tribunal has reached a decision dismissing the Appeal however based on different reasons. Both decisions are attached hereto.

SIGNED AT PRETORIA ON THE 29TH MARCH 2019.

MR F. Zondagh: (Panel Chair)

Ms L. Mbanjwa: (Panel member)

Deputy Chairperson

IN THE WATER TRIBUNAL

CASE NO: WT259/16/CPT

In the appeal of:

SHALOM TRUST	FIRST APPELLANT
SUSANNA ELIZABETH MATHEWSON	SECOND APPELLANT
SUSANNA ELIZABETH MATHEWSON	THIRD APPLELLANT
CATHERINE ISABEL BROOKES	FOURTH APPELLANT
CHARLISE HELENE LOUW	FIFTH APPELLANT

And

DEPARTMENT OF WATER AND SANITATION	FIRST RESPONDENT
DEPARTMENT OF AGRICULTURE, LAND REFORM AND RURAL DEVELOPMENT	SECOND RESPONDENT
ORANGE PROTO CATCHMENT MANAGEMENT AGENCY	THIRD RESPONDENT

DECISION

Please note that the Tribunal appointed to adjudicate this matter consisted of the following: -

1. MR F ZONDAGH (Panel Chair)
2. MS L MBANJWA (Panel member)
3. MR P JONAS (Panel member)

THE WATER TRIBUNAL OF SOUTH AFRICA

HELD AT PRETORIA

CASE NO. WT 259/16CPT

In the appeal of:

SHALOM TRUST APPELLANT	FIRST
SUSANNA ELIZABETH MATHEWSON (SENIOR) APPELLANT	SECOND
SUSANNA ELIZABETH MATHEWSON	THIRD APPLELLANT
CATHERINE ISABEL BROOKES	FOURTH APPELLANT
CHARLISE HELENE LOUW APPELLANT	FIFTH

And

DEPARTMENT OF WATER AND SANITATION	FIRST RESPONDENT
DEPARTMENT OF AGRICULTURE, LAND REFORM AND RURAL DEVELOPMENT	SECOND RESPONDENT
ORANGE PROTO CATCHMENT MANAGEMENT AGENCY	THIRD RESPONDENT

DECISION AND REASONS

APPEARANCES

Coram	:	Mr F Zondagh	Panel Chair

:	Ms L Mbanjwa	Panel member
:	Mr P Jonas	Panel member

FOR THE APPELLANT:	Advocate H Schölzel instructed by Mathewson Gess Inc
FOR THE RESPONDENTS:	Advocate C Mavunda instructed by the State Attorney

THE PROCEEDINGS

1. Prior to the commencement of the Appeal and in terms of a written request by the Appellants, the Tribunal issued a subpoena instructing the First Respondent in terms of Rule 7(1) of Schedule 6 of the NWA to provide the following information and documentation at the hearing: -

"Any document which may include advice, opinion, policy recommendations, discussions, information or considerations in respect of the following:

(i) The exact amount of hectares of water licence that has been granted to the Applicants for 4000 HA;

(ii) The names of the recipients of the water licences;

(iii) The farms where the water licence and water usage is used;

(iv) The number of female applicants who have received water licences;

(v) Whether any allocations were made after the 17th of March 2016;

(vi) Whether strategies were put in place to ensure gender equality in the allocation of water licences;

(vii) The number of female applicants who are also the owners of the farmers where the water rights will be used;

(viii) Any other information or considerations taken into account or relevant to the decision;

(ix) Any recommendation received from the Coordinating Committee on Agricultural Water Northern Cape (CCAW);

(x) *The date and place where Shalom Trust Business Plan was considered by the Department of Agriculture Land Reform & Rural Development as well as the parties who made representations on behalf of Shalom Trust if this is alleged;*

(xi) *The recommendation made to the Department of Water and Sanitation and/or Orange PROTO Catchment Management Agency after the consideration of Shalom's Trust's business plan;*

(xii) *The details of any further water that has been made available after the decision was made in March 2016, specifically in January 2017."*

2. In response to the Subpoena the First Respondent in an undated memorandum addressed to the Tribunal explained the background of the programme relating to surplus water that was made available within the Orange River System, earmarked for use by resource poor farmers for the development of 12000 ha of irrigation allocated to various Water Management Areas (WMA's). The First Respondent replied *ad seriatem* to the requests formulated in the subpoena and included the following documents: -

(i) *"A detailed schedule containing particulars of all the allocations and licences approved in respect of the allocation of 4000 ha of irrigation right in the Lower Orange Water Management Area. (See Annexure "A").*

(ii) *A copy of the Water Allocation Reform Strategy (2008). (See Annexure "B").*

(iii) *A letter dated 11th January 2016 from the Second Respondent to the Appellant's attorneys Mathewson Gess Inc attorneys. (See Annexure "C").*

(iv) *A Memorandum approving the allocation of additional water in addition to that already earmarked for the facilitation of the licence application from H.D.I'S in the Orange River Catchment. (See Annexure "D")."*

3. The Second Respondent filed a Notice to Abide and was not represented during the hearing. (A Notice to Abide was not included in the record).
4. The Appeal commenced on 20th November 2017, was postponed on the day thereafter and completed on 29th January 2018.
5. The proceedings were electronically recorded.

INTRODUCTION

6. The Tribunal is presented with a two-pronged Appeal by -

   (i) SHALOM TRUST, the First Appellant, against the decision taken by the Responsible Authority during March 2016 in which its WULA was refused; and

   (ii) Susanna Elizabeth Mathewson (Senior) the Second Appellant, in her personal capacity against the failure of the Responsible Authority to set aside, reconsider and amend a decision taken by it during December 1987 in which she was refused the right to participate in the allocation of certain water rights.

7. The nature of the Second Appellant's Appeal given its history and the grounds upon which it relies was considered to be ideally suited to be dealt with *in limine*. However, the parties not having prepared argument to do so at the commencement of the Appeal, subsequently provided written Heads to assist the Tribunal in dealing with it.

8. Having considered the written submissions presented by Counsel in respect of her Appeal, it is preferable to deal with it in the manner set out immediately hereunder.

WATER RIGHTS (1987)

9. The Appeal noted by the Second Appellant in her personal capacity is based on the contents of a letter dated 9th June 2014 in which the First Respondent is enjoined to set aside, reconsider and amend a decision of the then Department of Water Affairs taken on 7th December 1987.

   (Record Page 210)

10. That decision denied her the right afforded in terms of Government Notice No 1676 published in the Government Gazette, No. 9869, Volume 243 published on the 26th July 1985 in Pretoria to participate in the allocation of water rights determined for allocation and provided for in Section 63(2)(b) read with Section 63(2) of Act 54 of 1956 and Section 3 of the Orange River Development Project Act 78 of 1969 which refers to water use in areas affected by Act 78 of 1969 as

well as any allocation made in terms of the determinations published in the Government Gazette Notice 2473 of 13 November 1981 and 1406 of 1 July 1983.

11. The nature of the dispute dealt with in detail in paragraph 2 of the Notice of Appeal centres around the purchase of a water use entitlement for irrigation of 200ha of land situated in the Vanderkloof Government Water Scheme in respect of her property known as the farm Remainder of Stoffelshoek 81, in the district of Hopetown. The decision reached on the aforementioned date concluded that:-

"Daar is geen besproeibare grond op die voorgestelde onderverdeling van Stoffelshoek 81, gevind nie".

In view hereof the Second Appellant's application was refused.

12. It is this decision that the Second Appellant required the Responsible authority to set aside, reconsider or amend. Her request was formalised in the aforementioned letter but mistakenly based on Section 33 of the NWA. That provision relates to the declaration of a water use as an existing lawful use. (Record Pages 210 – 228)

13. The Appellant submits in the letter that she is a historically disadvantaged individual. She contends that the previous Government rejected her valid application on grounds that were unfair, unfounded and displayed gender-based discrimination. The Appellant apparently received no response to this request resulting in the Appeal.

14. The Appellant contends that the Respondents failed in their Constitutional duties as provided for in Section 25(4) and 25(8) of the Constitution of the Republic of South Africa (Act 108 of 1996) in that they collectively and/or individually ignored their Constitutional obligation set out in Section 2 (c) of the NWA Act 1936 of 1998.

15. The reasons advanced for allegedly failing to properly allocate available water was: -

(a) *"The fact that the decision reached on 7th December 1987 was based on discriminatory grounds, as the previous refusal had been without any foundation and based on inherently discriminative gender practices.*

(b) *The fact that the First Respondent did not consider, or consider properly the previous discriminative practices and failed to rectify these past discriminatory practices.*

(c) *The fact that the First Respondent made a finding without the recommendation of the Second Respondent."*

Reference to the *"recommendation of the Second Respondent"* relates to an issue dealt with by the First Appellant in its Appeal and was in all probability included here in error. This particular aspect of the Appeal will be dealt with herein later.

(Appeal Record Pages 10 - 11).

DECISION (with regards to the 1987 water rights)

16. The tribunal is an independent body established in terms of Section 146(1) of the National Water Act, Act 36 of 1998 and as such is only authorised to hear appeals emanating from those matters referred to in Section 148(a) to (m).

17. This Appeal is brought before the Water Tribunal for the very first time and falls outside the parameters of its enabling provision. In the premises the Water Tribunal ought not to consider an Appeal of this nature, however, having heard argument in this regard and for purposes of completeness, these alleged *"rights"* are dealt with in this decision.

18. The right on which the Second Appellant's alleged entitlement is based on the authority of the Minister of Water Affairs at the time to determine: -

"In respect of an owner of land which is situated in a Government water control area mentioned in the Schedule herewith, the maximum right to additional scheduling which may be purchased in terms of this notice ....."

The notice indicates clearly that to derive rights in respect thereof a person must be the registered owner of the land reflected in the schedule and if so, an allocation can be made to a maximum of 80% (eighty percent) of the irrigable land on the property.

(Record Page 226 Government Notice 1676)

19. The Appellants' Notice of Appeal under the heading (Parties) cites the Second Appellant as Susanah Elizabeth Matthewson (Senior). It is difficult to understand how the Second Appellant could have acquired *locus standi* to apply to the First Respondent on 9th June 2014 to set aside, reconsider or amend its decision denying her the alleged water rights in respect of the farm Stoffelshoek 81, Hopetown district, as on that date, she was no longer the registered owner of the farm Stoffelshoek 81.

20. The Notice of Appeal clearly places ownership of the farm Stoffelshoek 81 at that time with the First Appellant Shalom Trust and consequently, the appeal is ill founded due to the absence of *locus standi* on the part of the Second Appellant.

21. In any event the First Respondent, when it refused the Second Appellant water rights on 7th December 1987, was exercising an administrative function and having done so, became *functus officio*. As such it would not be competent for it to set aside, reconsider or amend its own decision.

22. The other valid argument against reviving the application for water use rights refused in December 1987, is the time lapse of 29 (twenty nine) years, raised by the First Respondent in paragraph 1.5 of its reply. A decision made some 29 years ago in terms of the now repealed Water Act (Act 54 of 1956) based on the alleged absence of irrigable land on the property, should have been dealt with in accordance with the Appeal procedures provided for therein and cannot be entertained in terms of the current Appeal procedures provided in Section 148 of the National Water Act (Act 36 of 1998 of NWA). Counsel for the Appellant, having conceded the validity of this submission, graciously abandoned this ground of Appeal.

(Record Page 70).

23. However, having done so, Counsel introduced in his submission *in limine,* a new ground of appeal formulated as follows: -

> *"..... that by operation of Section 40(2) of the 1998 Act, the appeal in respect of the 1987 decision should be dealt with as being an application for water use under this act".*

24. To answer this latterly formulated challenge, one must turn to the provisions of Section 40(2) of the 1998 National Water Act that states the following: -

> *"40(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, the application must be regarded as an application under the Act". (own underlining)*

25. In their papers the Appellants attach a letter from the erstwhile Department of Water Affairs, dated 7th December 1987 refusing the water use rights. (Record Page 221 Annexure "B"). They refer to Annexure "B" in the table of contents (Record Page 191) as an "unsubstantiated refusal of application." This formal refusal of the application and the absence of any subsequent Appeal under the repealed Water Act (Act 54 of 1956), can only mean that the application was finalised and therefor the provision of Section 40(2) of the NWA does not apply.

26. In any event, the introduction of this new and belated ground of Appeal represents a substitution of the abandoned ground of Appeal. Not only does it fall outside the ambit of Rule 3(2) that only allows for amplification, but having now been raised for the first time would require a formal application for condoning the late filing thereof. No such application for condonation was placed before the Tribunal.

27. In the circumstances and for the reasons advanced, this Appeal is at odds with the National Water Act as well as the Rules of the Tribunal and therefore this attempt to rescue the ill-fated 1987 application for water rights, must fail.

THE WULA DECISION (2016)

28. This is an Appeal noted by the First Appellant in terms of Section 148(1)(f) of the National Water Act (Act 36 of 1998) (NWA) against the decision of the Responsible Authority to refuse the Appellant a Water Use Licence and is formulated in a manner that seeks to establish whether the refusal of the First Respondent to grant the Appellant a Water Use Licence in terms of Section 21(a) in respect of the farm Stoffelshoek 81, Hopetown RD, was based on: -

(i) The recommendation of the Second Respondent namely the Department of Agriculture Land Reform and Rural Development (ALRRD); or

(ii) Any other authority vested with powers or delegated by the Department of Water and Sanitation (DWS).

The expunged decision, taken on 17th March 2017 was confirmed in a letter that reads as follows: -

> *"Kindly be informed that your application is unsuccessful because the catchment in respect of which the application is made is fully allocated such that there is no additional water to accommodate the proposed water use."*

(Appeal record Page 114)

29. The grounds for Appeal relate to the failure of the First Respondent to grant the First Appellant the Water use Licence applied for in terms of Section 41(1) of the NWA and in doing so the First Appellant contends that: -

(i) *"The First Respondent performed their administrative functions improperly in not considering the recommendation by the Second Respondent Department of Agriculture, Land Reform and Rural Development (DALRRD) as to the water held or availability thereof."*

(ii) *The Second Respondent (DALRRD) submitted to the First Respondent (DWS) information regarding the availability of Water without allowing the Appellant to present a Business Plan for and in support of the granting of a Water Licence.*

(iii) *The First Respondent failed to determine or properly determine the availability of water held by the Second Respondent and/or the Third Respondent.*

(iv) *The First Respondent ignored the fact that the Second Appellant's rights transferred and vested in the First Appellant were violated based on past*

discriminatory and gender-based practices, thus by implication also violated the rights of the Third, Fourth and Fifth Appellants.

(Page 10 of the Record).

The Second Appellant never acquired any water use rights under the 1956 Water Act as it is clear that she was refused such rights, hence the appeal. Consequently, there were no rights to transfer and no water rights vested in the First Appellant. Prudently Counsel for the Appellants withdrew that appeal.

RESPONDENT'S REPLY TO THE GROUNDS OF APPEAL

30. The First Respondent's reply confirms that the Appellant's licence application formed part of the water rights set aside for the development of 4000 ha of irrigation by historically disadvantaged resource poor farmers that was made available within the Orange River system (Gariep and Vanderkloof dams) for the development of irrigation in the Upper Orange Water Management Area. The licence application, lodged in terms of Section 40 of the NWA Act 36 of 1998 was for taking water from the Orange River for the development of double cropping 600 ha of wheat and maize on the farm Stoffelshoek 81.

(Appeal Record Page 52)

31. To consider the proposed agricultural development the First Respondent required inputs, comments and a recommendation from the Department of Agriculture Land Reform and Rural Development. This requirement was dealt with via an agency within the Department known as the Northern Cape Co-Ordinating Council for Agricultural Water (CCAW). Their recommendation with regards to this specific WULA was imperative.

32. The First Respondent contends that although it is trite that pursuant to Section 41(1)(f) of the Constitution Act 105 of 1998 only the First Respondent had the right to issue licences, it is also authorised to act in terms of Section 41(2) and (3) of the NWA to call for and receive inputs and recommendations from other stakeholders as well as interested and affected parties when considering the granting of a WUL. In this regard the Department of Agriculture, Land Reform

and Rural Development was required to provide the First Respondent with its input relating to the agricultural projects presented to it by way of a recommendation from the CCAW.

33. The First Respondent denies the Appellant's contention that in refusing the WUL it had ignored its Constitutional obligation set out in Section 2 of the NWA that enjoins the First Respondent to address the result of past racial and gender discrimination and to eradicate same.

34. The First Respondent submits that its decision to refuse the WULA was based purely on the fact that there was no water left to be allocated in that catchment at the time of the decision based on the Second Respondent's confirmation that all the allocated water rights had been dealt with.

35. The Respondent's reply to the Second Appellant's Appeal addressed all the issues raised in support thereof, but having withdrawn the Appeal, the First Respondents rebuttal of the grounds relied on by the Second Appellant, is not further dealt with herein.

APPELLANT'S REPLICATION AND AMPLIFIED GROUNDS OF APPEAL

36. The Appellant's replication, for a great part thereof, concentrated on the merits of the Second Appellant's 1987 water rights appeal. However, having withdrawn that appeal and in light of the dismissal of the subsequent attempt by the Appellant to introduce a new ground of Appeal, the arguments in support thereof are not further traversed herein.

37. In response to the First Respondent's reply the Appellant amplified its grounds of Appeal in terms of Rule 3(2) of the Water Tribunal Rules and is now framed as follows: -

"13 In respect of the 2016 decision, the Appellant's rely on the following grounds of Appeal: -

a. *The fact that the First Respondent did not consider, or did not consider properly, the previous discriminative practices and failed to rectify these past discriminatory practices; and/or*

b. *The fact that the First Respondent made a finding without the recommendation of the Second Respondent, alternatively that the First Respondent did not give sufficient weight to the recommendation of the Second Respondent; and/or*

c. *The Second Respondent's recommendation, alternatively the Third Respondent's recommendation, alternatively both the Second and Third Respondent's (either separately or in their representative capacities in CCAW) recommendation failed to consider or properly consider the previous discriminative practices and failed to rectify these past discriminatory practices by, inter alia, failing to have regard to the Appellant's business plan; and/or*

d. *That the First Respondent had no regard alternatively did not have sufficient regard to the existing composition of holders of Water Licences and failed to redress previous discriminative practices in its consideration of the Appellant's application.*

(Page 125 and 126 of the Record)

38. These additional grounds of Appeal do not appear to be in the nature of amplified grounds allowed in terms of Rule 3(2) of the Rules of the Tribunal and inasmuch as some or all fall within this category, their admission will be dealt with hereinafter.

(Record Pages 125 – 126)

39. The document raises various issues on the merits of the 2016 decision, repeating unnecessarily the chronological sequence of events that is apparent from the Appeal record and introduces argument that with respect has no place in a document that professes to define the Appellant's case. These matters are best dealt with in evidence and argument and to the extent that they may be correct or relevant, will be dealt with later in this decision.

THE FACTUAL BACKGROUND

40. The background to the Water Use Licence and subsequent events are for all intents and purposes common cause. The facts appear from the Appeal Record, the information contained in the Subpoena Bundle provided by the First Respondent and the oral evidence of the witnesses.

41. In response to a subpoena issued by the Tribunal at the request of the Appellant, the First Respondent provided documentation in which the background to and the manner in which surplus water made available in the Orange River System (Gariep and Vanderkloof dams), earmarked for use by resource poor farmers for the development of 12000 ha of irrigation, was dealt with. It confirmed that 4000 ha of irrigation was allocated for use in the Upper Orange Water Management Area (WMA), 4000 ha in the Fish to Tshikamma WMA and 4000 ha in the Lower Orange WMA.

42. While the Free State Provincial operation is responsible for Water Resource Management within the previously demarcated Upper Orange Water Management Area that lies predominately within the Free State, it also occupies portions of the Northern Cape Province in which the farm Stoffelshoek 81 is situated and from where this licence application originated. The Northern Cape Provincial operation is responsible for water resource management within the previously demarcated Lower Orange Management Area that lies predominantly in the Northern Cape.

43. All the water in the Lower Orange Water Management Area was set aside for use in a provincial agricultural initiative referred to as the Orange River Emerging Farmers Settlement and Development Project (OREFSDP) created for the purpose of giving effect to the development of irrigation opportunities by resource poor farmers set aside in the NWRS 2. It was managed and implemented by the Second Respondent through the establishment of a departmental forum referred to as the Co-Ordinating Committee on Agricultural Water (CCAW). Any application received from the Northern Cape Province as part of the OREFSDP initiative, was required to be considered by this committee and recommended to the First Respondent, prior to the issuance of a Water Use Licence to approved applicants.

44. Annexure "A" attached to the report of the First Respondent in answer to the subpoena issued by the Tribunal, tabulates Water Licences issued and the development status of the applications processed and approved as part of the

OREFSDP initiative. It is important to note that this report referred to as the "OREFSDP report on Water Licences issued and Development Status: 28 May 2014", reflects the position in respect of Licences issued by the DWS on a date 20 days before the Appellant's WULA was lodged. At that stage 3278 ha of the available 4000 ha had already been licensed. A final report as part of Annexure "A" concludes that as at 22nd April 2016, 3337 ha of the available 4000 ha allocation had been licensed. The remaining 663 ha was set aside for use in a project referred to as the Namaqua Irrigation Development Plan.

45. On 17th June 2014, the First Appellant lodged an application for a WULA in terms of Section 21(a) of the NWA to the Northern Cape Regional Operation of the DWS to double crop 600 ha of maize and wheat under irrigation on its property known as Stoffelshoek 81, in the district of Hopetown. The application for taking water from the Orange River was transferred to the Free State Regional Operation as the relevant authority responsible for the processing of licence applications in terms of properties geographically situated in the Upper Orange Water Management Area. Only two licence applications, that of the Appellant Shalom Trust and Dixoway (Pty) Limited were received from the Northern Cape Provincial operation, both in respect of the same source (Orange River) and the same property namely Stoffelshoek 81. It is common cause that the Appellant's application formed part of the OREFSDP initiative and as such was required to be referred to and recommended by the CCAW.

46. On the 3rd June 2015 the Appellant extended an invitation to the Second Respondent to meet with the Appellants on the farm Stoffelshoek 81 with the view to establish their suitability and to enable compliance with the requirements of the project, thereby ensuring the issuance of a recommendation as a prerequisite to the approval of a Water Use Licence. Unfortunately, the Second Respondent did not respond to the invitation.

(Record Pages 154 – 157)

47. On the 14th of August 2015 the First Respondent formally notified the Appellant that it had assessed the Water Use Licence Application and that in order to

proceed with processing the application, it required the recommendation from the Northern Cape CCAW to be submitted before the 14th of September 2015, failing which a decision will be made based on the information that was then available.

48. On 9th September 2015 the Appellant received a letter from the Second Respondent stating that their application was presented to a meeting of the technical committee of the OREFSDP at which it resolved that the Appellant be given time to prepare a business plan for presentation at the next committee meeting where after the Appellant's application could be referred to the CCAW. (Record Page 166)

49. An attempt by the Appellant on 11th September 2015 to arrange a meeting with the CCAW, on a mutually convenient date, failed. The Appellants subsequently confirmed that it had completed the required business plan for presentation to the OREFSDP at its next meeting. Advice received from the Second Respondent indicated that such a meeting would take place during the first quarter of 2016. (Record Pages 170 – 171)

50. This meeting however did not materialise and importantly, a letter from the Departmental Head in the Department in the Department of Agriculture Land Reform and Rural Development (Second Respondent) dated 11th January 2016 addressed to the Appellant recorded the following: -

(i) *It referred to an announcement made by the Minister of Water Affairs, the late Professor Kader Asmal on or about 2000 that emanating from the Orange River re-planning study, the Orange River system still had reserve available for the development of 12000 ha of new irrigation.*

(ii) *The principles and criteria applicable to the development that included the water rights, were to be used inter alia for promoting and reinforcing economic development amongst historically disadvantaged farmers and communities and should also address the principles of land reform.*

(iii) *That the applications received far exceeded the 4000 ha allocation, 3300 ha of which had already been allocated to equity schemes and the remaining +-700 ha of water rights were to be used for new irrigation in the Namaqua Development*

Plan for which an additional 1200 ha of water rights would still be needed. This Plan had been endorsed by the MEC for Agriculture, Land Reform and Rural Development and some of the identified projects had been announced. The letter clearly concludes the following: -

"in effect this means that the 4000 ha allocation is exhausted".

(iv) Noting that the current available allocation had been exhausted any additional application for water rights can only be recommended should the DWS extend the 4000 ha and make more water available from various programmes.

(v) It suggests that the Appellant provides the Second Respondent with its business plan and relevant documents to enable the assessment of its feasibility and to liaise with DWS to determine whether there exists a possibility that additional water could be made available from which the projects that could not be accommodated from the 4000 ha allocation, can in future still be considered.

(Record Page 179 – 180)

51. In response to the confirmation that the allocation had been exhausted the Appellant's legal representation in a letter to the Second Respondent dated 27th January 2016 noted the following: -

"We recognise that our application for water rights of 950 ha will result in the Department exceeding the 3300 ha that they have made available for allocation"

and

"Should the Department be unable or unwilling to increase the maximum allocation beyond 3300 ha, we believe that we are still able to achieve some of our goals, though on a much smaller scale and with less impact, if we are awarded the balance of the water rights that remain unallocated". (My underlining)

In closing the Appellant requests that: -

"Your office considers making such a recommendation at your next meeting".

The letter also confirmed that the business plan would be lodged shortly.

(Record Page 184 – 186)

52. At this juncture it must be noted that the Appellant's reply is factually incorrect. Its licence application was for irrigation of 600 ha and not 950 ha as stated.

What is clear is that 4000 ha of irrigation rights were allocated for use in the Lower Orange Water Management Area. This allocation was exhausted as at that stage approximately 3300 ha was committed to various equity schemes and the balance was set aside for the Namaqua project and thus the Appellant could not be

"awarded the balance of the water rights that remained unallocated".

53. Following the advice of the Second Respondent, the Appellant lodged its business plan at the offices of the Second Respondent in Kimberley on 10th March 2016 blissfully unaware that during the intervening period, the First Respondent had on the 8th of February 2016 formally requested the Northern Cape CCAW to submit the required recommendation no later than the 15th of February 2016. Mr Carlo Schrader an official of the First Respondent had, followed up on the delay and during a visit to Kimberley met with the chairperson of the CCAW on the 11th February 2016 where he was handed a copy of the communication sent to the Appellant confirming that the water rights dealt with in terms of the OREFSDP, an initiative in which the Appellant participated, had been exhausted.

(Record Page 54)

54. On the 17th of March 2016, the First Respondent addressed a letter to the Appellant confirming that the application had been processed and noted the following: -

"Kindly be informed that your application is unsuccessful because the catchment in respect of which the application is made, if fully allocated such that there is no additional water to accommodate the proposed water use".

(Record Page 165)

55. Notwithstanding the date of the decision, the contents of the letter only came to the attention of the Appellant on 14th June 2016 and in light of the decision to refuse the licence application an Appeal was noted during July 2016.

SUBSEQUENT EVENTS

56. Following the refusal of the Appellants' licence application and after the noting of the Appeal, the First Respondent on its own volition, applied for an allocation of water totally unrelated and in addition to that which was allocated for use in the Northern Cape. The circumstances surrounding this application was fully set out in a motivation addressed to the Deputy Director General: Water Sector Regulation. It was made possible as a result of the institutional changes that combined the Upper and Lower Orange River Water Management Areas.

(Transcript Pages 55 to 56)

(Subpoena Bundle Annexure "D")

57. In order for the Orange Proto Catchment Management Agency to satisfy the needs that exist in the Northern Cape Province, the application recommended that the Deputy Director General: -

> *"Approve the application of 11 million m3 (1000 ha) of water to previously historically disadvantaged individuals in addition to the 4000 ha of water use entitlements earmarked in the Orange River for development in the Northern Cape."*

This recommendation was approved by the relevant official on 23rd December 2016.

(Subpoena Bundle Annexure "D")

58. On 27th January 2017 the Appellant's legal representative addressed a letter to the First Respondent in which they confirm having been informed of this latest development. It records their understanding that historically disadvantaged individuals will also qualify for this water and that the Appellants fall within this category. The letter confirms that: -

> *"We have further been advised that all applicants who were previously considered through the proper process and refused purely on the basis that no water was available, will also now be reconsidered."*

The letter continues by reminding the Second Respondent of the pending Water Tribunal Appeal and then notes the following: -

"The writer requests that you kindly reconsider the above application with all the other applicants who were previously refused on the same basis, namely that no water is available. We will continue with the appeal, however we believe that unnecessary costs are being incurred in the further prosecution of this appeal in light of the thousand (1 000) hectares of water that have been made available and the fact that the remainder of the water that was previously made available from the four thousand hectares (4 000) previously allocated is also still available.

We would like you to reconsider this application and thank you in anticipation. ***Kindly advise as a matter of urgency*** *whether the original application will be reconsidered or whether a new application with all annexures will need to be submitted for such consideration." (My underlining).*

(Record Pages 240 – 241)

59. The record shows that in response to this communication, the First Respondent confirmed in writing on the 1st February 2017 that the application will be reconsidered with all other applications previously declined based on water availability and stated disingenuously that there is no need for the Appellants to submit a new application.

60. The manner in which the Appellant's letter to the First Respondent was couched, read with the First Respondent's reply indicating that a fresh application was not required, created the impression that the refused application would be "reconsidered" and led to the Appellant's understanding that the additional 1000 ha of irrigation water that now became available would be dealt with in conjunction with the remainder of the water that according to the Appellant, was still available. The reconsideration of the WULA was apparently seen by the Appellant as part of the project in respect of which their application was refused based on the unavailability of water.

61. The application by the First Respondent for an additional allocation of irrigation right, clearly did not form part of the water available in the OREFSDP initiative in respect of which the Appellant's WULA was made and notwithstanding the First Respondent's advice, could and was not capable of being reconsidered.

It is settled law that the Responsible Authority having made an administrative decision, was thereafter *functus officio* and therefore could not reconsider its own decision.

(Transcript Volume I page 60)

(Transcript page 55 lines 6 – 17)

THE LEGISLATIVE AND POLICY FRAMEWORK

62. Section 2 of the National Water Act (Act 36 of 1998) defines the purpose of the Act as follows: -

Purpose of the Act

"2. The purpose of this Act is to ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled in a way which takes 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, rural and gender representations".

63. Section 3 of the Act places the trusteeship of the nation's water resources in the hands of the Minister and decrees that: -

3. (1) As the public trustee of the nation's water resources the National Government, acting through the Minister, must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate.

(2) Without limited subsection (1), the Minister is ultimately responsible to ensure that water is allocated equitably and used beneficially in the public interest, while promoting environmental values.

(3) The National Government, acting through the Minister, has the power to regulate the use, flow and control of all water in the Republic.

64. To ensure the proper and thorough consideration of a Water Use Licence Application the Act provides the following: -

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

(a) existing lawful water use;

(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 authorise 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 to be made by the water users 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 probably duration of any undertaking on 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.

65. Section 41(1) to (4) describes the procedure to be adhered to in the licencing process and Section 41(2) provides as follows: -

(2) A responsible authority –

(a) may to the extent that 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.

66. The introductory passage of chapter 2 of the NWA provides for the development of Water Management Strategies to facilitate the proper management of water resources input and entrusts the Minister as follows: -

"Part I requires the progressive development by the Minister, after consultation with society at large of a national water resource strategy. The national water resource strategy provides the framework for the protection, use, development, conservation, management and control of water resources for the country as a whole. It also provides the framework within which water will be managed at regional or catchment level, in defined water management areas. The national water resource strategy, which must be formally reviewed from time to time, is binding on all authorities and institutions exercising powers or performing duties under this Act." (My underlining) (Preamble to Part 1 of Chapter 2).

67. Currently the National Water Resource Strategy (NWRS 2) identifies all Water Management Areas country-wide and its perspective of the Orange Water Management Area, comprising inter alia of the Upper and Lower Orange Water Management Area mentions the following: -

> *"The Orange River is the country's major artery and a resource that must be managed with great care. The available yield for this system has been fully allocated and there is no prospect of additional water for allocation without storage volumes being increased. This will come at significant costs."*

(NWRS 2 Annexure A page 2 paragraph 2)

68. Dealing with the water balance in the Orange River and its dams, NWRS 2 identifies several uses of the water that includes inter alia -

> *"Water for irrigation of 12000 ha of land by resource poor farmers. This was set aside in 1998, although very little of this water has been taken up."*

The current water balance calculation takes account of the future water needs and provides inter alia for: -

> *"the water needed to irrigate the 12000 ha for resource poor farmers – if and when this is taken up"*

(NWRS 2 Annexure A Paragraph 2 Orange Water Management Area page 3).

69. Chapter 6 of the NWRS 2 lays down the principles of equitable allocation of the country's water resources to ensure that substantial progress towards equity is made. In support hereof, a Water Allocation Reform (WAR) programme was established as a primary focus, dedicated to adhere to the strategic objective of redressing inequity (race and gender), imbalances in the allocation of water and to eradicate poverty.

70. Implementation of the WAR programme may entail and be accomplished by the following programmes: -

water set aside, general authorisation, partnerships, development support, water-based business enterprises and compulsory licensing.

(NWRS 2 Chapter 6 Page 45 paragraph 6.1.4)

(Subpoena Bundle Annexure "B")

71. The core principles of the National Water Policy being equity, sustainability and efficiency underpin the protection, use, development, conservation, management and control of water resources and water allocation will be done in terms of these priorities.

These principles collectively inform the intended means to achieve water allocation reform and its envisaged objective, the first of which relate to redressing race and gender imbalances as a primary focus that also includes the reduction of poverty and iniquity in the country.

(NWRS 2 Chapter 6 page 48 paragraphs 6.2 and 6.3)

72. NWRS 2 provides for the critical strategic actions that would enable the acceleration of the water sector reform agenda designed to create and ensure sector stability in support of poverty eradication, reduction in iniquity, social economic development and sustainable water resource use set out as follows: -

- *Alignment with key government initiatives such as Land Reform and the Comprehensive Rural Development Programme.*
- *Establishing partnerships with key role-players and ensuring the effective involvement of relevant stakeholders (for example, sector charters such as the Mining and Forestry Charters) in the implementation of the WAR.*
- *Elevating the WAR programme to the executive level within the DWA to give impetus to its integrated and coordinated implementation.*
- *Legislative review to provide for the development of regulations for water equity purposes.*

(NWRS 2 Chapter 6 Page 48 paragraph 6.4)

73. Activities that support these critical strategic actions entail inter alia cooperation with the Departments of Rural Development, Land Reform and Agriculture, Forestry and Fisheries and (provincial departments of agriculture) to achieve a coherent programme of land, water and agrion reform by-

- *Assimilation or coordination of current structures to fully accommodate joint project implementation and reporting protocols.*

- *Signing of Memoranda of Understanding to ensure commitment to the joint implementation mechanisms.*

To provide for the effective implementation of the Water Reform Strategy implementation plans will involve consultation with relevant government departments and stakeholder groups, particularly in view of that a key theme of NWRS 2 is that government cannot achieve the stated objectives on its own and that partnerships with other organs of state and key stakeholders will be needed to achieve the objective of the strategy.

(NWRS 2 Chapter 6 Page 48 paragraph 6.4.1 and 6.4.2)

THE APPELLANT'S EVIDENCE

74. The Appellant's presented oral evidence by the Second Appellant Mrs Susanna Elizabeth Mathewson (Junior) cited in the Notice of Appeal in her capacity as an Income and Capital beneficiary of the Shalom Trust (Appellant). It also called in evidence Mr Ben Mathewson, the Appellants' attorney of record and it is assumed, a close relative of the Second, Third and Fourth Appellants.

75. The evidence of Mrs Mathewson (Junior) in essence provided insight into the history of events on the farm Stoffelshoek, dealt with the historic application for water rights, the difficulties encountered over time, her perception of discriminating practices and her understanding of the current application in terms of the chronological occurrence of events and the particulars of the licence applied for.

76. She explained the relationship with Genade Boerdery with whom the Appellant had entered into a lease agreement and expanded on the nature and terms thereof. In this regard she referred the Tribunal to the Appellant's business plan wherein this arrangement was explained. Neither her evidence in chief nor that in cross examination displayed any contentious issues and any confusing aspects relating to Genade Boerdery and its relationship with the Appellant was left to the Appellant's second witness Mr Ben Mathewson to explain.

(Appeal Record Page 196)

77. His evidence confirmed and defined the nature of the relationship between the Appellant and Genade Boerdery. It is common cause that a plough certificate to irrigate 1166 ha on the farm Stoffelshoek 81 was issued in favour of Genade Boerdery and that in terms of their joint venture arrangement, the Appellant would apply for a water licence to irrigate 600 ha and Genade Boerdery in the name of Dixoway (Pty) Limited, would apply for a Water Use Licence to irrigate 350 ha. The total irrigation area applied for in separate licence applications in respect of irrigation projects on the Appellant's farm Stoffelshoek 81 therefore amounted to 950 ha and was confirmed in the ROR as such.

(Appeal Record Page 50).

78. His evidence went some way to assist the Tribunal in unravelling the confusion that existed in relation to the number of licence applications made by various entities in respect of the farm Stoffelshoek 81. These applications, based on my understanding of the evidence appear as follows: -

(i) An application by the Appellant (Shalom Trust) to irrigate 600 ha of land situate on the farm Stoffelshoek 81 and currently the subject of this Appeal;

(ii) An application by Dixoway (Pty) Limited to irrigate 350 ha of land also situate on the farm Stoffelshoek 81 and referred to in the ROR.

It is common cause that both the licence applications by Shalom Trust and Dixoway (Pty) Limited, in respect of separate water uses for the development of irrigation on the farm Stoffelshoek 81, were refused for the same reason i.e. that there was no available water left in the catchment.

(iii) An application by Shalom Trust for a Water Use Licence to irrigate 950 ha on the farm Stoffelshoek 81 in conjunction with Genade Boerdery lodged with the First Respondent on 9th November 2017.

This application was presented following the approval of an unrelated water allocation applied for by the First Respondent. Other than confirming that such an application was lodged with the First Respondent no further evidence with regards to its outcome was presented.

(iv) An application for a water use licence that was later identified as Botebo Farming (Pty) Limited and approved for irrigation of 100 ha in conjunction with Genade Boerdery in terms of a joint venture. This licence application had no effect on the Appeal before the Tribunal except insofar as that its approval resulted from the additional 1000 ha of irrigation subsequently approved.

79. In answer to a question by a member of the Tribunal exploring the implication of a successful conclusion to the Appellant's new Water use Licence application following the Department's advice in January that additional water had become available, Mr Mathewson replied that notwithstanding the new Water use Licence application, the Appeal would "stand" because it (the refusal) was based on the wrong reasons and the new licence application would also "stand" because the Appellant had been invited (to apply). This evidence was confirmed in writing in a letter addressed to the First Respondent by the Appellant's legal representative.

(Transcript Page 63 Volume 1)

THE FIRST RESPONDENT'S EVIDENCE

80. The only witness called by the First Respondent was Carlo Schrader. He confirmed that he is a control engineering technician responsible for resource management function in the Department of Water Affairs and Sanitation (First Respondent), and his functions included inter alia the processing of Water Use Licences. He confirmed that he was the appointed assessor dealing with the Appellant's licence application in what was previously known as the Upper Orange Water Management Area prior to the amalgamation of the Upper and Lower Orange Water Management Areas. He is currently an official of the Orange Proto Catchment Management Agency.

81. The witness explained that the Appellant's WULA was for taking water from the Orange River for irrigation purposes on the farm Stoffelshoek 81, situated in the

Northern Cape Province as part of a 12000 ha irrigation project reserved in the whole of the Orange River and allocated for use in three provinces as follows: -

4000 ha in the Northern Cape;

3000 ha in the Free State; and

5000in the Eastern Cape.

82. To understand his evidence in this regard, he referred to the introductory paragraph of the Memorandum addressed to the Tribunal for clarity on the administrative responsibilities of the various Water Management Areas that overlap provincial boundaries.

83. His testimony revealed that water resource management in the Upper Orange Water Management Area lies predominantly within the Free State but also includes (occupies) portions of the Northern Cape Province, all of which is dealt with by the Free State Provincial operation. The Northern Cape Provincial operation is responsible for water resource management in the previously demarcated Lower Orange Water Management Area that lies predominantly in the Northern Cape Province.

84. The 4000 ha allocated to the Northern Cape was, according to the documentation filed with the subpoena bundle, referred to as the Orange River Emerging Farmers Settlement and Development Programme (OREFSDP) mainly covered applications for irrigation projects in the Lower Orange Water Management Area.

(Subpoena Bundle Annexure "A")

85. He explained that the farm Stoffelshoek 81 fell within the Northern Cape and was part of the Upper Orange Water Management Area. This WMA, was administratively managed in Bloemfontein as the majority of their users were situated in the Free State Province. The farm Stoffelshoek 81, although situated in the Northern Cape Province, was included in their mandated area and in view thereof, it was necessary to liaise with departmental officials in the Northern Cape office situated in Kimberley to assist in communicating with the Northern Cape Co-Ordinating Committee on Agriculture Water (CCAW) from whom a

recommendation was required prior to granting a Water use Licence. The witness confirmed that-

> *"ultimately the Department's decision was based on the recommendation from the CCAW Northern Cape".*

(Transcript Page 5 line 4 – 6)

86. The witness confirmed that the licence application of the First Respondent fully complied with the requirements for a Water Use Licence, but having received a copy of the letter from the CCAW that was *"unfavourable"*, ultimately based its decision on this unfavourable recommendation and declined to grant the WUL. The contents of the letter indicated that a substantial portion of the allocation had already been allocated to and licenced in favour of various compliant projects and the remainder of the available irrigation, was reserved for a project within the Northern Cape referred to as the Namaqua Irrigation Development Plan.

87. Mr Schrader when asked, explained the relationship between the Department and CCAW thus: -

> *"The CCAW is a forum within the Department of Agriculture, where they have various partners that sit on the CCAW, Water Affairs is part of it, Agriculture, as well as external stakeholders. And they, when the 12 000 was announced it was like given to Agriculture, for agricultural projects, so they would identify projects and then implement based on the water available from the Orange River. But when people come to the department, they just go there to get the recommendation to allocate water from the Orange River.*
>
> (Transcript Page 5 line 16 – 23)

88. Explaining the requirements for the granting of a WUL the witness testified that one would firstly need water availability and secondly there must be compliance with the requirements of Section 27 of the NWA (Act 36 of 1998) before it can be licenced. However, when allocating water from the Orange River System a recommendation from the CCAW was an additional and necessary requirement. (Transcript Page 6 line 13 – 25)

89. He confirmed that based on the information before him there was no alternative but to decline the licence application and did so in respect of the Shalom application as well as that of another applicant in respect of the same property, later to be identified in evidence as Dixoway Trading (Pty) Limited. These were the only two licence applications received by the Lower Orange WMA for licensing in the Northern Cape (Upper Orange WMA).

(Transcript Page 7 line 4 – 18)

90. Asked to explain the DWS's input and involvement with the application, Mr Schrader testified that any application, other than that from the Orange River would not require any consultation or recommendation from the relevant CCAW. The DWS would evaluate the licence, establish the water availability and make the decision based on the information available to it. However, in the Orange River system the relevant CCAW's advised the Department on the manner in which the allocation from and within that system was managed.

(Transcript Page 8 line 14 – 21)

91. Mr Schrader continued that the arrangement with the Second Respondent emanated from the applicability of an Internal Strategic Perspective (ISP) and a Memorandum of Understanding (MOU) entered into with the Department of Agriculture (Second Respondent) that relates to the 12000 ha of water reserved in the Orange River. Although the authority to issue a licence still remained with the First Respondent, a recommendation from the CCAW relating to the acceptability of an application in respect of this particular agricultural project, was imperative. This MOU was not made available to the Tribunal. However, the evidence of Mr Schrader regarding its existence and contents was not placed in issue and its exact terms and provisions were not established.

(Transcript Page 8 line 23 – 25)

(Transcript Page 9 line 1 – 3)

92. Responding to a question from the Tribunal the witness confirmed that the suitability of an application for a WUL is based on the considerations presented in Section 27(1) of the NWA (Act 36 of 1998). The Memorandum of

Understanding (MOU) between the DWS and the Second Respondent to which he had referred to earlier, relates to water resource management and is applicable in respect of the 12000 ha reserved in the Orange River for purpose of that project.

(Transcript Page 10 line 13 - 20)

93. He continued by stating that Section 27(1)(e) in respect of a catchment management strategy was not considered as no catchment management strategy had been established in this water management area. Water availability was dealt with in terms of the ISP's applicable to the relevant water management area.

(Transcript Page 11 line 16 – 25)

(Transcript Page 12 line 1 – 2)

94. Pressed by the Tribunal to confirm whether the Department had authority to interfere with these allocations, Mr Schrader once again confirmed that in the Northern Cape approximately 3000 ha had been allocated (licenced) in terms of licences issued to 963 beneficiaries and that the balance of the irrigation water was reserved for the Namaqua project situated within the Northern Cape.

95. Although not fully dealt with by Counsel during Mr Schrader's evidence in chief, the witness had prepared and delivered at the request of the Tribunal in response to a subpoena, the documents referred to in the introduction to this decision specifying in detail the licences issued in the Northern Cape in respect of water reserved in the Orange River and allocated for use in the Upper Orange Management Area.

(Subpoena bundle inclusive of Annexure "A" to "D")

96. Counsel for the Appellant examined the authority of the First Respondent to grant Water use Licences. In this regard the witness agreed that the final decision rests with and remains that of the First Respondent.

97. Counsel in cross- examination summed up the procedure correctly when he put the following to the witness: -

"*Counsel:* *So that is, do you agree with me, that provides us the answer, the Department is the body that makes a decision.*

Witness: *Yes.*

Counsel: *Right. It makes a decision, as the Chairman pointed out, by taking into consideration recommendations from other bodies amongst which the CCAW. Is that correct?*

Witness: *Yes".*

(Transcript Page 15 line 2 – 14)

98. The witness having confirmed that the decision was based solely on the pronouncement of the CCAW, nevertheless concurred with Counsel that he had taken into consideration all those requirements specifically provided for in Section 27(1) of the Act. This appeared from the following interaction between Counsel and the witness: -

Counsel: *When you say that you based your decision solely or if it is said that the decision is solely based on the CCAW's recommendation, that is not the only thing that was taken into consideration, am I correct?*

Witness: *Yes*

Counsel: *You as a responsible body, that has to manage the water, has followed the prescripts of the act, specifically Section 27(1), is that correct?*

Witness: *Yes.*

Counsel: *You have dealt with all the requirements and I must compliment there on this report drafted by you, you will find that in the bundle, on page 50 of the bundle, I am very impressed with the whole of your report, except for the recommendation at the end, for obvious reasons. It is on page 50, it starts Background to the Application, that is a document that was compiled by yourself, is that correct:*

Witness: *Yes, it is a record of (indistinct). (Recommendation)*

Counsel: *Yes. When you said that you dealt with, personally dealt with this application, this is what you mean, you did all the groundwork and .....*

Witness: *---Yes.*

Counsel: *It is your report provided to the first respondent that eventually puts the case before the first respondent to make the decision, is that correct?*

Witness: *--- Yes, right.*

Counsel: *And I see that you have dealt with all the factors, enumerated in Section 27(1) in this report."* .....

Witness: *"Yes".*

(Transcript Page 16 line 1 – 24)

The witness concluded that, having **fully** traversed and considered all the requirements of Section 27(1) nothing militated against the issuance of a licence to the Appellant except receipt of a recommendation from the CCAW.

99. Having extensively traversed the Record of Recommendation with Mr Schrader (Record pages 47 – 59) the following excerpts from the cross-examination relating to the availability of water is self-explanatory: -

Counsel: *".....every single one (consideration) is favourable, except your recommendation in the end says you do not recommend that the licence be issued. Is that correct?*

Witness: *Yes*

Counsel: *"you do not recommend that the water licence be issued"*

Witness: *"yes"*

Counsel: *"and that is based solely on the fact that there is no water available"*

Witness: *"Yes"*

Counsel: *"That is the recommendation by the CCAW and that is what you mean that the decision is based solely on that decision"*

Witness *"Yes"*

Counsel *"That does not mean that the decision was the only factor that was taken into consideration, you considered everything that you had to consider"*

Witness: *"considered everything but if you talk about water licences, the most important is water availability"*

(Transcript Page 18 line 20 – 25) and later

Counsel: *"I, just to make sure everything that needed to be considered has been considered and found favourable except there was no water and that is why you say it is the only reason why it was declined"*

Witness: *"Yes, in terms of water availability".*

(Transcript Page 19 line 8 - 13)

100. In cross-examination, the witness once again repeated his evidence that no catchment management strategy had been established and the Department used the relevant ISP and the NWRS 1 and 2 as guidelines when it comes to water allocation. Reverting to the reservation of the 12000 ha in the Orange River system, Mr Schrader repeats his evidence in chief and confirms that the 12000 ha was reserved for future allocation in respect of specific projects.

(Transcript Page 23 lines 2 – 12)

101. Counsel then proceeded to examine the availability of all the water available in the Orange River system and finally understood that in respect of the allocation made to the various provinces, each provincial CCAW was required to provide the First Respondent with a recommendation.

(Transcript Page 25 line 1 – 25)

(Transcript Page 26 line 1 - 13)

102. Reviewing the availability of water allocated to the Northern Cape Province, Counsel accepted that of the 4000 ha allocated to the Northern Cape 3300 ha (approximately) had been allocated (licenced). The remainder of 700 ha reserved for the Namaqua Irrigation Project still had to be allocated (licensed). This he put to the witness was the position as at the 17th March 2016 being the date on which the licence was declined. The witness agreed.

(Transcript Page 26 line 12 – 25)

103. Counsel contended that the additional allocation of 1000 ha made available from the Orange River system subsequent to the 17th March 2016 increased the total availability of water in the Northern Cape to 5000 ha. This contention was strenuously denied by the witness who explained that the Orange Catchment Proto Management Agency approached the Department to avail 1000 ha of irrigation water to those users that were unable to be accommodated from the 4000 ha originally allocated and was therefore totally separate from and had nothing to do with the original allocation.

(Transcript Page 27 line 1 – 5)

104. The witness confirmed that the availability of this irrigation water was made possible as a result of an institutional realignment in which the country's WMA's were reduced from 19 to 9 WMA and had as part of the reduction in number, resulted in the amalgamation of the Upper and Lower Orange Management Area into a single water management area known as the Orange Proto Catchment Management Agency.

(Transcript Page 27 line 6 – 14)

In this regard the witness was at pains to explain that Counsel's contention that this or any additional water, whatever its origin may be, could be dealt with by the Department as part of the WULA under consideration was incorrect as requirements differ and-

"you cannot put it in one boat".

(Transcript Page 28 line 3 – 18)

105. In response to an intervention from the Tribunal, Counsel contended that the Tribunal was authorised to direct that the licence be granted as a result of the subsequent availability of the additional 1000 ha of irrigation water. This he argued was possible as the nature of the proceedings was a rehearing and therefore an Appeal in the "wide sense" capable of taking into consideration facts and information that become available subsequent to the decision that formed the basis of the Appeal.

Evidence given by Mr Mathewson in this regard confirmed that the Appellant had lodged a new Water Use Licence application for 950 ha of irrigation as a result of the additional water availability. Counsel agreed to address this aspect later in argument.

(Transcript Page 29 line 3 – 5)

(Transcript Page 30 line 13 – 24)

(Transcript Page 31 line 3- 11)

106. Counsel's cross-examination was then directed to the 700 ha that was "unallocated" but had according to Mr Schrader been reserved for future

development. It was put to the witness that nothing had happened to it and it was therefore to still flowing into the sea. The witness replied that he could not comment on the statement, as he was not part of the Northern Cape operation that dealt with water management in the Lower Orange WMA, situated in Upington. He once again confirmed that his responsibility remained in the Upper Orange Water Management Area.

(Transcript Page 32 line 5 – 24)

107. In an attempt by a member of the Tribunal to understand the terms and definitions used by Counsel and the witness in describing the principles applicable to the manner in which the allocated water was dealt with, the witness explained that of the 4000 ha allocated to the Northern Cape Province, licences had been issued (allocated) to various applicants (approved by the CCAW) and amounting to +- 3300 ha and the remainder (700 ha) not yet licenced, had been reserved for use by the Northern Cape Province Government for use in a particular agricultural initiative. He agreed with the Tribunal that from inception the water allocated to the Northern Cape Province supported the principle of a "set aside."

(Transcript Page 34 line 19 – 25)

(Transcript Page 35 line 1 – 4)

(Transcript page 35 line 5 – 11)

108. This reply led to a question by Counsel for the witness to explain what had led to the removal of 700 ha of irrigation water "out of the pool" and what steps were taken to do so. Mr Schrader once again reiterated that the remaining 700 ha was reserved for use in the Namaqua Irrigation Development Plan, thus confirming his previous testimony that in respect of water rights from the Upper Orange River, consultation with the CCAW in the Northern Cape was a requirement.

(Transcript Page 40 line 6 – 10)

109. This requirement was confirmed by the contents of a letter dated 14th August 2015 in which the First Respondent had requested the Appellant to

provide such a recommendation prior to the 15th September 2015, failing which the Department would make its decision of the available information. Compliance with this requirement was, in the evidence of Mr Schrader, the duty of the Appellant. Counsel when presenting the contents of a letter from the Second Respondent to the Appellant requesting the lodgement of a business plan for presentation to the Orange River Emerging Farmers Settlement and Development Project (OREFSDP) elicited no response from the witness. Later evidence given by Mr Schrader confirmed that the First Respondent did not require or request a business plan, but merely a response from the CCAW.

110. At the request of Counsel, Mr Mathewson the Appellant's legal representative continued the cross-examination of Mr Schrader and immediately put it to the witness that the CCAW could not make any decision without the business plan and that in the absence thereof, the 700 ha of irrigation water was still available and capable of being dealt with differently, notwithstanding it having been ring-fenced. Mr Schrader disagreed.

(Transcript Page 43 line 17 – 21)

111. Mr Mathewson put it to the witness that between the date of the receipt by the Second Respondent of the Appellant's business plan on the 14th March 2016 and the refusal letter dated the 17th March 2016, a mere three days had elapsed thus no CCAW meeting could have taken place allowing for the consideration of the business plan. Mr Schrader however replied that as soon as the Second Respondent's letter of the 11th January 2016 had been received, it together with the licence application was presented to the Department's Water Use Application and Adjudication Committee (WUAAC) for a decision. The delegated authority formally declined the licence application on the 17th March 2016.

(Transcript Page 46 line 1 – 10)

112. Notwithstanding the reply, Mr Mathewson persisted with his line of cross-examination and put it to the witness that the First Respondent could only make a decision after receipt of a recommendation, based on the business plan

presented by the Appellant. In answer to a question whether the First Respondent had received a recommendation Mr Schrader responded that he was at the time employed by the First Respondent within the Upper Orange Water Management Area and was not part of the Northern Cape CCAW. He merely requested a recommendation from them and in response to the request he received a copy of the letter addressed to the Appellant. He concluded by stating that it is unacceptable to make him accountable for the proper procedures or lack thereof of the Second Respondent. The Tribunal agreed that it is not possible for the witness to answer matters relating to the administration conducted by the CCAW.

(Transcript Page 46 line 20 – 25)

(Transcript Page 47 line 1 – 12)

113. Pressed to explain once again his relationship with the CCAW he confirmed that he was not a part of the Northern Cape CCAW, and had no sitting on it. He explained that he was a member of the Free State CCAW and that at the time this application was dealt with by offices situated in two separate and different operational areas that was explained in detail in earlier evidence. The letter addressed to the Appellant instructing it to obtain a recommendation from the CCAW in the Northern Cape was part of the department's due diligence.

(Transcript Page 49 line 11 – 25)

(Transcript Page 50 line 15 - 21)

114. He explained that in view of the delay in finalising the application, he had taken it on himself to call on the Second Respondent's offices in the Northern Cape to ascertain the reason why the delay had occurred and was there handed a copy of the letter addressed to the Appellant. Persisting in his attempt to persuade the witness that the due diligence letter required a business plan to be presented, Mr Schrader replied that he requested a recommendation and that it should not be confused with the manner in which the CCAW conducted its affairs. In reply to a question from a member of the Tribunal he confirmed that

he did not enquire whether the CCAW had considered a business plan as he would not question the integrity of other officials.

(Transcript Page 51 line 12 – 20)

(Transcript Page 51 line 21 – 25)

(Transcript Page 52 line 1 – 5)

115. Mr Mathewson confirmed that subsequent to the refusal of the Appellant's licence application, a licence had in fact been issued for water use on Stoffelshoek 81. This licence was formally applied for in the name of Botebo Farming (Pty) Limited as a joint venture between Genade Trust and the Applicant for water use on the farm Stoffelshoek 81 from the 1000 ha of additional irrigation made possible following the restructuring of the Upper and Lower Orange Management Areas.

(Transcript Page 56 line 20 – 25)

(Transcript Page 57 line 1 – 5)

116. Counsel referred the witness to the preamble of the NWA (Act 36 of 1998) relating to inequalities and iniquities of the past that require to be addressed and should be borne in mind when considering the provisions of Section 27(1)(b) of the Act in granting new licences. Pressed to respond to a request to explain what strategies the First Respondent had put in place, Mr Schrader referred the Tribunal to the Water Allocation Reform Strategy document attached to the subpoena bundle as Annexure "B".

(Transcript Page 63 line 1 – 20).

(Transcript Page 63 line 1 – 5)

The witness accepted that Section 27(1)(b) of the NWA addressed the need to redress the results of past racial and gender discrimination and confirmed that in answer to Counsel's enquiry, the First Respondent had included the Water Allocation Reform Strategy document in which the First Respondent's strategy is comprehensively set out. In any event regard should be had to Counsel's concession and commendation that the witness had attended admirably to the considerations provided in Section 27(1)(b) of the NWA.

(Question No. 6 subpoena bundle Annexure "B")

117. Counsel's suggestion that water allocation (licensing) is the basis used to strive for and address the racial and gender inequalities occasioned by past discriminatory practices was corrected by Mr Schrader who pointed out that water allocation (licensing) is not a tool for water allocation reform. Water allocation was guided by the Water Allocation Reform Strategy (WARS) on its own, comprehensively dealt with in the document included in his response to the subpoena as Annexure "B".

This response prompted Counsel to enquire what is meant by water allocation. Mr Schrader explained that water allocation is an authorisation to use water in the manner provided for in Chapter 4 of the NWA. However, in redressing the racial and gender discrimination iniquities of the past, the Water Allocation Strategy is applied using the strategic mechanisms provided therein and implemented using programmes directed towards its strategies and objectives.

(Transcript Page 63 line 17 – 25)

(Transcript Page 64 line 13 – 22)

118. The Tribunal commented by reminding Counsel that Mr Schrader had given evidence that the WUL was refused as there was no water available whereas it now appeared that Counsel embarked on a matter relating to policy issues that he (Mr Schrader) does not formulate. Counsel reiterated that it is the witness that implements the policy and the Appellant is entitled to know why the licence was refused as according to it 700 ha of irrigation was still available and they do not see any reason why it should be ringfenced for the Namaqua project as opposed to be awarded to the Appellant.

(Transcript Page 67 line 16 – 25)

(Transcript Page 68 line 12 – 17)

(Transcript Page 68 line 20 – 24)

119. The Tribunal enquired whether it was the Appellant's case that evidence given by Mr Schrader that the 700 ha irrigation was reserved for use in the Namaqua project, was false or incorrect, Counsel replied as follows: -

Counsel: *"My case is that water had not been allocated and is going to waste and that a duty on the department, that water is not used and that is why we asked him, has that been allocated and he cannot give us that information".*

(Transcript Page 69 line 17 – 24)

120. This submission was put to Mr Schrader as follows: -

Counsel: *"Mr Schrader, we dispute that the700 ha that is left of the 4000 that was earmarked or ringfenced or set aside for Namaqualand has been issued (licensed).*

Witness: *I cannot confirm that, as true. I am responsible for the Upper part, the Lower part, it could be that the licence is issued, it could be that the licence is not issued. We need to confirm."*

He explains that as the geographic location of the Namaqua Development Project is situated in the Northern Cape (Lower Orange) he would not know whether any licence had been issued in respect of that project.

(Transcript Page 71 line 18 – 22)

(Transcript Page 73 line 1 – 6)

(Transcript Page 73 line 6 – 13)

121. Following the dispute surrounding the status of the remaining alleged available water, Counsel launched into a new attack by explaining to the witness the following: -

Counsel: *"The Appellants' are alleging that the decision was wrong, you made the wrong decision. I am talking about your department, not you personally. One of the reasons why we say it is wrong is we say that what water licences you issued were issued to the wrong people and if you set any water aside, whether licences have been issued or not, it should not have been set aside for that, it should be issued to the Appellants". That is your (our) own case. The reason why we ..... Do you understand?*

Witness: *Yes.*

Counsel: *Okay. Please feel free to comment at any stage, I just wanted to put my case before you"*

(Transcript Page 75 line 1 – 12)

Mr Schrader denied this statement and confirmed that the licences were dealt with properly as shown by the information contained in the spreadsheet where all the beneficiaries were HDI's.

(Transcript Page 76 line 4 – 8)

122. To underscore the Appellant's view in this regard, the witness was referred to a letter of the 11th January 2016 in which the Second Respondent had indicated that the application for irrigation far exceeded the 4000 ha allocation. At that stage however more than 90% of the allocated water rights of approximately 3300 ha was for equity scheme projects where the shareholding of the beneficiaries was far below 50% with little chance of them becoming majority shareholders (owners) for many years to come. This information led the Appellant to the conclusion that this statement signified a "complaint" and confirmed the Appellant's view that the licences were "allocated" or issued to beneficiaries who have no opportunity of becoming owners, that they are token beneficiaries and in doing so, the spirit and purport of the NWA was not really satisfied. Mr Schrader disagreed.

(Transcript Page 76 line 14 – 25)

(Transcript Page 77 line 1 -7)

123. The Appellant's interpretation of the statement and the conclusion reached culminated in the belief that the licences to various Applicant's, contrary to the intention of the set criteria of the project, was far less favourable or "meritorious" than the Appellant's application.

Mr Schrader answered by confirming that he is unable to comment as he is not *au fait* with the set of criteria required to be applied by the CCAW nor with the contents of the Appellant's proposal.

Fortunately, Counsel decided to defer these opinions to later argument.

(Transcript Page 77 line 15 – 25)

(Transcript Page 78 line 5 – 18)

124. In dealing with the business plan Counsel conceded that the First Respondent could not be expected to comment thereon. He did however pose the question whether the First Respondent was in possession of a recommendation from the CCAW, Mr Schrader replied that the only letter he received was that which the CCAW addressed to the Appellant's attorneys. This Mr Schrader confirmed was ultimately viewed as the recommendation.

(Transcript Page 80 line 20 – 25)

(Transcript Page 81 line 1 – 13)

The Appellant contends that the correspondence received by the First Respondent did not constitute a recommendation but was merely ongoing correspondence discussing the possibility of future water availability. Mr Schrader replied that the letter, a copy of which he received confirmed that there was no water available. After receiving the letter, he informed Mr Mathewson, the Appellant's legal representative and explained its consequences.

(Transcript Page 81)

125. In an attempt to understand the Appellant's insistence that the remainder (700 ha) was still available for allocation (Licensing) a question was posed by the Tribunal whether the Responsible Authority having testified via its employee Mr Schrader that it is bound by the pronouncement of the Second Respondent could have ignored it contents and allocated this water to anybody. Counsel's reply to this enquiry reiterates that it is the Appellant's case that firstly the Second Respondent can only make a recommendation and that a final decision rests with the First Respondent and secondly, they did not comply with their duty to eradicate the inequality of past discriminatory practices. Lastly the decision was made without a recommendation thereby basing their decision on incomplete information. The reply was also best left for argument.

(Transcript Page 89 line 1 – 25)

(Transcript Page 90 line 1 – 23)

126. In reply to this statement by Counsel in which the Appellant's case was summarised, Mr Schrader pointed out that if it is argued that the First Respondent should ignore the contents of the Second Respondent's letter based on the assumption that it was not a recommendation or alternatively that the letter contained incomplete information and therefore the discussions between the Appellant and the Second Respondent was still ongoing, the licence would in any event have been declined for the lack of the required recommendation.

(Transcript Page 91 line 14 – 19)

(Transcript Page 92 line 4 – 12)

ARGUMENT AND CONCLUSION

127. The Appeal of the Second Appellant in respect of the 1987 refusal, was dismissed following the receipt of separate written Heads of Argument presented by the parties *in limine* and any argument repeated in the main Heads of Argument in support thereof, will not be dealt with again.

128. The Appellant concedes that the main issue in this Appeal is limited to the availability of water. In support thereof, the following submissions were presented in argument: -

(i) "Firstly, it would be argued that, at the time when both the applications were made, there was water available to grant such a licence.

(ii) Should the Tribunal find that there was no, alternatively insufficient, water at the time it will be argued that the Tribunal may, and must take into consideration any water available subsequently that may satisfy the application for a licence.

(iii) Even if it is found that there was no water available at the time of the decision and even if the Tribunal found that there is insufficient water that was made available subsequently, it will be argued that the Tribunal may and should make an order granting a licence to the Appellant as it is not bound by the National Water Resource strategy or other considerations to which the Department was bound."

(Appellant's Heads of Argument page 7 paragraphs 21 (2) – 21 (4)]

129. In support of the mentioned submission the Appellant quotes with approval a comment made by the Tribunal: -

"The key question now is going to be, based on the information we have received, can we say the Deponent (First Respondent) refused to allocate a Water Use Licence, whereas there was water available. I think that is the issue."

(Transcript Page 68 line 11 – 14)

(Appellant's Heads of Argument page 5 – 6 paragraph 17)

130. Mr Schrader for the First Respondent agreed during his evidence that the Appellant's WULA had been properly considered, that there was nothing preventing the First Respondent from granting a licence, provided however that there was water available to do so. In agreement with this evidence Counsel stated that water availability is one of the most important requirements because if there is no water it cannot be allocated. Summarised it is clear that the parties to the Appeal are in agreement that in the absence of any allocable water in a catchment water licences cannot be granted or issued and it follows that in such an event it would be the end of this Appeal.

(Appellant's Heads of Argument Page 6 paragraph 25)

131. Having limited its Appeal to the availability of water, the Appellant refers to its availability at the time when" both" applications were made. These applications relate to the application by the Second Appellant in respect of water rights to which she was allegedly entitled but refused at the time and subsequently dismissed on Appeal by this Tribunal.

The remaining application and the subject of this appeal, was for the taking of water from the Upper Orange River for use on the farm Stoffelshoek 81 and formed part of an agricultural initiative that had its origin in the NWRS as an equity programme referred to as the Orange River Emerging Farmers Settlement and Development Project (OREFSDP). It is trite that the OREFSDP initiative envisaged specifically the development of economically sustainable agricultural opportunities in respect of resource poor farmers whilst simultaneously addressing the past inequalities of racial and gender discrimination.

132. The First Respondent dealt comprehensively with the manner in which this long-standing project was managed and described the administrative

complexities and requirements in dealing with the 4000 ha irrigation that it had allocated to the Northern Cape Province for use in the OREFSDP project.

The overlapping of various Water Management Areas (WMA's) with provincial boundaries required that licence applications emanating from the Upper and Lower Water Management Areas were in some instances administratively managed by different provincial operations.

The geographical location of the Appellant's property although situated in the Northern Cape (Upper Orange) was managed by the Free State Provincial operation (Lower Orange) situated in Bloemfontein while all the remaining properties that participated in the project were dealt with by the Northern Cape provincial operation (Upper Orange) situated in Kimberley. These facts were not in dispute.

133. Undisputed evidence adduced by the First Respondent confirmed that at the time there was no catchment management strategy in place within the WMA and water resource management was guided by the applicable Internal Strategic Perspective (ISP) and the Water Allocation Reform Strategy (WARS). The imperatives of the WARS strategy dictate that: -

> *"A need to understand the water allocations strategic objectives in the context of the NWA and the NWRS is a major imperative in the development of the WAR strategy. This provides a framework from which the water allocation issues with respect to the need for redress and achieving equity objectives in water allocation for beneficial use by emerging users."*

(Annexure "B" Page 12)

134. The WAR strategy provides various strategic actions that align the programme with key government initiatives such as land reform and rural development. To formalise and accelerate implementation of the programme, it is envisaged that the First Respondent will work with the Department Agriculture, Rural Development and Land Reform, (inclusive of its provincial departments) to achieve a coherent programme of land, water and agrarian reform. To do so it allows for the assimilation and coordination of current structures to fully accommodate joint project implementation and envisages the

signing of Memoranda of Understanding (MOU) to ensure commitment to the joint implementation mechanisms.

Evidence presented in this Appeal confirms that the nature of this project is a prime example of exactly that which the WAR strategy has in mind.

(NWRS 2 Chapter 6 Page 48 paragraph 6.4.1)

135. The involvement of the Second Respondent in its official capacity emanates from the strategic objectives of the projects envisaged in the NWRS and the WAR strategy. It provides for the implementation of the WAR strategy by inter alia entering into partnerships with organs of State such as the Second Respondent with a view to formalise, accelerate and implement those projects envisaged in the NWRS. For this reason, the NWRS notes that: -

> *"The key theme of the entire water allocation reform programme stems from the realisation that government cannot achieve the objectives on its own and that partnerships with other organs of State and with key stakeholders will be needed to achieve the objectives of the strategy."*

(NWRS 2 Chapter 6 Page 51 paragraph 6.4.2)

136. The guiding principles of Water Resource Management, stipulated in the NWA are equity, sustainability and efficiency of which equity has not received the deserved attention. This principle is sought to be addressed by the WAR strategy and was intended to: -

> *"serve as the strategic link between policy intent and the prescribed implementation of the provisions of the NWA providing the implementation targets toward the realisation of the NWA."*

The arrangements with and the participation of the Second Respondent based on the principles, strategic actions and methods of implementation referred to earlier, is a manifestation of what is envisaged in the WAR strategy and gives effect to the practical aspects required to enable and implement the principles and objectives set out therein.

137. In the present instance evidence before the Tribunal confirmed that such a partnership between the First and Second Respondent was established for the purpose of evaluating the suitability, efficiency and sustainability of those

applications aligned to the OREFSDP that complied with the set criteria. Thereafter consideration would be given to the concomitant application for a Water Use Licence and provided that such application complied with the requirements provided for in the NWA would qualify for the granting and issuing of a WUL.

138. It is clear that in respect of this partnership arrangement the relevant parties to it had separate and distinct obligations. The Second Respondent being limited to the investigation and recommendation of those agricultural related projects best suited to be decided by it, in view of the agricultural experience and expertise of its officials, while the First Respondent was required to issue a water use licence subject to a favourable recommendation from the Second Respondent and compliance with those considerations required for the approval of a WUL set out in Section 27(1) of the NWA. This arrangement does not have the effect that the First Respondent abrogated its authority or obligations provided for in the NWA in granting a WUL, similarly the Second Respondent acquired no authority to allocate water as its obligation was merely to assess the compliant nature of the various agricultural projects presented to it for consideration and approval to participate in the OREFSDP. The co-operation between the First and Second Respondents was a collaborative attempt to achieve that which the WAR strategy had in mind.

139. It is accepted by the Appellant that 4000 ha of irrigation was allocated by DWS for use in the Northern Cape province in respect of this specific agricultural initiative and that the First and Second Respondents were the role players in managing the implementation of those projects that required and could be recommended for licensing. The 4000 ha originally made available was a finite amount and no water in excess thereof was available from the Orange river in respect of the Northern Cape Province. (Upper Orange WMA).

140. Applications from various applicants and entities to participate in this agricultural initiative (OREFSDP) was assessed by a committee referred to as the Coordinating Committee on Agriculture Water (CCAW) supported by a technical

team, officials of the First Respondent and other stakeholders. This committee was identified as being the best suited entity to evaluate, consider and recommend to the First Respondent deserving and compliant applications. Clearly any application whether deserving, compliant or not, could only be formally recommended in the event that sufficient water remained from the 4000 ha of irrigation originally allocated. This recommendation served as a hurdle for any applicant wishing to participate in the initiative.

141. Confirmation of this requirement by the Appellant is evidenced in correspondence between the First Respondent and it, the Appellant's response in accepting the obligations by acting on the instruction of the First Respondent and the interaction between the Appellant and the Second Respondent regarding the CCAW's requirements to enable it to provide a recommendation. The undisputed duty to arrange and obtain a recommendation rested with the Appellant and to this end evidence before the Tribunal showed a committed effort by the Appellant to do so.

142. As part of the documentation supplied to the Tribunal the First Respondent included a schedule in respect of the applications that were received for participation in the ORESFDP confirming that, as at 28th May 2014 a mere 20 (twenty) days before receipt of the Appellant's licence application, Water Use Licences had been issued to various applicants in favour of a host of beneficiaries that covered 3278 ha allocated to the Northern Cape Province.

143. It is common cause that in response to the licence application the Second Respondent confirmed in writing on the 11th January 2016 that the bulk of the irrigation had been dealt with and the remainder, now known to be 722 ha of irrigation, was earmarked for use in a project referred to as the Namaqua Irrigation Development Plan for the development of new irrigation in respect of land owned privately by the beneficiaries or state land already occupied by beneficiaries. It confirmed that this project complied best with the original set of criteria identified for development and the plan had been formally endorsed by the MEC for Agriculture Land Reform and Rural Development during the

2015/2016 provincial budget. The letter confirmed that the original allocation of 4000 ha of irrigation originally allocated to the Northern Cape province was therefore depleted and consequently the Appellant's application for water rights could not be accommodated. Mr Schrader confirmed in evidence that: -

> *"They have already allocated a portion of the water and that there was a certain portion still available but was reserved for a project within the Northern Cape Province."*

(Transcript Page 5 lines 10 – 14)

144. Counsel argued during the hearing that the letter was not a "recommendation" upon which the First Respondent could rightfully act. Contemporaneous correspondence between the Appellant and the Second Respondent he submitted, was an indication of ongoing negotiations between the parties and that in consequence the First Respondent's refusal of the licence based on the contents was premature.

Evidence given during the hearing explained how this information came to the notice of the First Respondent and the allegation by the Appellant that Mr Schrader had "eavesdropped" on the correspondence between the Appellant and the Second Respondent was unfortunate and stands to be ignored.

145. The letter given under the hand of the head of department of the provincial office of the Department of Agriculture, Land Reform and Rural Development not only advised the Appellant that its application could not be accommodated at that stage but also explained the origin of the reserve available in the Orange River system and succinctly set out the principles and criteria for its use.

It is common cause that 4000 ha of allocable water from the Orange River system was set aside by the DWS to be used by the Northern Cape provincial government in agricultural projects identified and administered by the provincial Department of Agriculture Land Reform and Rural Development in accordance with the set criteria referred to by the Chief Director in his letter and in support of the WAR strategy. No evidence of the set criteria was presented.

146. It follows that control of the water allocated by DWS to the Northern Cape province was exercised jointly by the First Respondent and the provincial Department of Agriculture Land Reform and Rural Development where the OREFSDP was established. Together they could decide on projects and applications that would qualify for participation in that initiative in accordance with statutory and policy requirements and imperatives. To achieve this purpose evidence by Mr Schrader explained the importance of the CCAW and its role in selecting compliant applications and confirmed that a recommendation from the CCAW was imperative in considering whether a WUL could be issued.

147. The decision by the Respondents to reserve the remainder (722 ha) of the water for use in the Namaqua Irrigation Development Plan was therefore in order and as that particular area is geographically location in the Upper Orange Water Management Area, was dealt with by the provincial operation of the First Respondent situated in Kimberley.

148. The argument advanced by the Appellant that the remainder of the irrigation water was unjustifiably taken from the pool, cannot be support in view of the evidence that 4000 ha of irrigation water had been allocated by the DWS to the Northern Cape provincial government with authority to advise on whom eventually would be licensed by the First Respondent to enable the approved applicant or entity to exercise and use the water rights earmarked for the ORESFDP. The remainder of the available irrigation was still included in the original 4000 ha and was not taken from the pool but as the Appellant submitted set aside by the provincial government as it was entitled to do. Having confirmed that the 4000 ha of irrigation was exhausted by the issuance of licences and the reservation of the remainder, at that stage apparently unlicensed but reserved for use in the Namaqua project, the First Respondent quite correctly concluded that no water was available for the purpose of issuing a licence to the Appellant and was then formally advised of its decision.

149. The Appellant further submitted that in the event of a finding that the Northern Cape allocation was depleted (exhausted) the Tribunal could take into

consideration any water made available subsequently that may satisfy the Appellant's licence application. This submission was made on the strength of the availability of the 1000 ha of irrigation authorised by the First Respondent following the refusal of the Appellant's licence application.

150. In support of this submission the Appellant referred the Tribunal to the oft quoted comment by the authors of "Water Law" (quoting Baxters Administrative Law) that an appeal before the Water Tribunal is not a typical judicial appeal that requires consideration of the record only, but takes on the form of a new hearing or a so called "wide appeal". The Appellant further quoted from a quote by M A Rabe in THRHR, that the Tribunal may call for or accept or consider information that the Responsible Authority did not consider when the original decision was made. The view of this Tribunal is not at variance with the view espoused by these learned authors.

The facts presented in this Appeal is however distinguishable from that which the authors and the Appellant in its submission had in mind. It is different in the sense that a new water licence application based on this subsequent water availability was formally lodged by the Appellant on 9th November 2017 for a water use licence to irrigate 950 ha on the farm Stoffelshoek 81. This was confirmed by Mr Mathewson when responding to the possibility of a successful conclusion of both the Appeal and this licence application.

(Transcript Volume 1 Page 63)

151. In doing so the Appellant was precluded from submitting that the availability of the additional water was subsequent information that could be considered by the Tribunal as part of an Appeal in a wide sense when deciding the outcome thereof. This new licence application was not on Appeal before the Tribunal and no consideration could be given to it.

152. It is also necessary to address the Appellant's submission that, in the absence of any water being available at the time of the application or for that matter any time thereafter, or insufficiency of the water that became available subsequent to it, the Water Tribunal should make an order granting the licence

to the Appellant based on the argument that the Tribunal is not bound by the National Water Resource Strategy or other considerations to which the Department is bound, could possibly be correct.

(Heads of Argument Page 7 paragraph 21.4)

It is trite that if there is no water available a licence application cannot be considered in terms of the NWA and no licence application can be entertained or issued. The Appellant is also referred to the introductory passage of Chapter 2 Part 1 of the NWA that states the following: -

> *"The National Water Resource Strategy which must be formally reviewed from time to time, is binding on all authorities and institutions exercising powers or performing duties under this Act."* (My underlining).

The Water Tribunal established in terms of Section 146(1) of the NWA is such an authority, is bound by its provisions and the strategies contained in the NWRS as well as any other considerations to which the Department is bound.

153. The Appellant submits that in the present circumstances it is relevant to determine where the onus of proof lies given the general principle that whoever avers must prove. For purpose of completeness I have repeated those paragraphs in respect of the First Respondent is alleged to carry an onus.

> *"50. At the risk of belabouring the point, it serves to again point out that the onus to prove that any decision or recommendation by any other entity removed the water from the pool, thereby rendering water unavailable to be awarded by licence to the Appellants, rests upon the Respondents. The Respondents did not acquit themselves of this onus.*
>
> *51. In summary, when the decision was made by the First Respondent to refuse the application of the Appellants in 2016, it did so without the recommendation of the CCAW or Second Respondent and at a time that there was at least 722 ha of water available to grant a licence over. No evidence has been put before the Tribunal by the Respondents (who carries the onus in this regard) to show that the CCAW or the Second Respondent had the authority to remove the water from the pool of available water (in fact, the evidence was that it did not have authority, only a recommendation function) or did recommend to*

the First Respondent that it be removed either at the time of the decision or at any time since.

52. The only indication of what any recommendation could have been, had it been given, is the content of correspondence between CCAW and the Appellants which the Appellants, being party to that train of correspondence says was not a final decision as negotiations were ongoing and which was not gainsaid by the Respondents.

53. In the absence of the Respondents acquitting themselves of this onus it falls to be found that there was still 722 ha of water available at the time of the decision."

(Appellant's Heads of Argument Page 16).

It is submitted that our Courts do not impose on administrative Tribunals such as the Water Tribunal the same duty and judicial procedure of proof-taking. The concept "onus of proof" is not considered as being appropriate in a hearing by an administrative Tribunal.

154. This principle finds application in a judgment that has been referred to and applied countless times.

In Johannesburg Local Road Transportation Board v David Morton Transport (Pty) Limited 1976 (1) SA 887(A)903H-904C the Supreme Court of Appeal (as it is now known) Holmes J A stated the following with regard to onus of proof in proceedings before an administrative tribunal (own underlining and bold added for the sake of emphasis):

"The so-called onus of proof.

In my view the expression 'onus of proof' is apt to be misleading in regard to proceedings before a local board and the Commission. In civil proceedings that expression has a recognised connotation, and the onus is fixed by the pleadings, and the latter govern the evidence which is led. These considerations do not apply in proceedings before a local board and the Commission, which are not bound by rules of judicial procedures: see, with special reference to the Commission, the concluding paragraph under the heading: 'The constitution and function of local boards and the Commission" supra

In proceedings before those bodies sec. 13(1) of Act 39 of 1930 requires publication of an application, so that interested parties may object. Regs.4 and 5 provide how the application is to be made and published. Sec 13(3) of the Act prohibits the issue of a certificate if, in the opinion of the board, existing facilities are satisfactory and sufficient. If that prohibition is surmounted, there is a list of factors which the board shall take into consideration; see sec 13(2).

The most that can be said is that an application should place before the board relevant facts in favour of his application; and an objector (e.g. an existing operator who invokes sec. 13(3)) should place before the board relevant facts in support of his objection. After due hearing, the local board comes to its opinion."

In support of this judgment Wiegers in his "administrasiereg" (1984) sums up his view on the principle as follows: -

"Omdat interne beroep nie regspraak is nie, behoort dieselfde streng reëls van bewyslewering wat gewoonlik in die geval van geregtelike verrigtinge deur die burgerlike howe geld, nie vereis te word nie. Gewoonlik geld die beginsel by interne beroep dat daar nie sprake van bewyslas in die formele sin van die word is nie; die partye moet alle feite voor die hersienende liggaam lê en die liggaam moet self besluit watter oorwegings die swaarste weeg".

These legal principles are by analogy also applicable to the proceedings before the Water Tribunal.

155. The Appellant in its papers stated that: -

"the one concern is the availability of water".

Although not conceding that there was no water available to grant the Appellant a licence, acknowledged the fact that there are many applications for limited water and that demand surpassed supply.

156. In summary the refusal of the Appellant's application was correctly based exclusively on the lack of any allocable water that remained from the 4000 ha of irrigation made available in support of and the implementation of government policy imperatives given the finite amount of irrigation made available for use in the Northern Cape.

DECISION

157. In view of the findings made herein based on the *viva voce* evidence and written submissions and argument presented to the Tribunal, the decision is as follows: -

(i) THE APPEAL IS DISMISSED.

DATED AT PRETORIA ON THIS 29th OF MARCH 2019

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F ZONDAGH: (Panel Chair)

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