

IN THE WATER TRIBUNAL OF SOUTH AFRICA

[HELD AT PRETORIA]

CASE NUMBER: WT05/17/MP

Date Heard: 25 May 2021

Delivery of Judgment: 28 June 2021

In the matter between:

MICHDEN FAMILY TRUST

APPELLANT

and

THE ACTING PROVINCIAL HEAD:

RESPONDENT

MPUMALANGA DEPARTMENT OF WATER AND SANITATION

JUDGMENT

1. In this appeal, Appellant is appealing a directive issued in terms of Section 53 (1) of the National Water Act, Act no 36 of 1998 (the NWA) by the Respondent. For purposes of this Judgment when reference is made to “the Directive” it will be to this Directive, unless otherwise specified.
2. Appellant is a Trust that conducts farming activities, which involve inter alia, if not mainly, cultivation of fruit trees. To conduct its farming activities Appellant uses water which it abstracts from water resources under the control/ authority of the Respondent. That water is however public as opposed to private water.

RESPONDENT'S POINT IN LIMINE

3. The Directive is dated the 11th September 2017. It is Annexure A to the Appellant's Notice of Appeal and appears on pages 4, 5 and 6 of the record. The following page thereon is page 7 and has a 4 line table titled "*Acknowledgement of Receipt*". The reasonable inference is that what would be acknowledged as received is the Directive, and acknowledging receipt would be the Appellant or its representatives, it being a Trust. Unfortunately, the 4 line table was not completed as intended. There is therefore no mention of who received the directive, the names of the company on whose behalf the receipt was made, the date of receipt and it there is also no signature.
4. In the circumstances it is not possible to ascertain when the Directive was received by the Appellant. Appellant's Notice of Appeal is dated 11 October 2017. There is no indication on the face of it when it was transmitted to the Water Tribunal and it bears no mention of the Respondent. However the Tribunal was placed in possession of an e-mailed letter dated 11 October 2017, issued from the office of attorneys of the Appellant with paragraph 2 that reads as follows:-

"Please find attached hereto a Notice of Appeal in terms of Section 148 (1) of the National Water Act, 1998 (Act no 36 of 1998) for your attention"

It is therefore clear that the Appeal was lodged with the Tribunal within 30 days of the date of the Directive.

5. Respondent is represented by the State Attorney and in his opposition to the Notice of Appeal Respondent raised the following point in limine.

"[4.2] The Defendant's decision is dated 11th September 2017 and this date is deemed to be the date on which the decision was taken in terms of Rule 4 (3) of the Rules. This is also deemed to be the date on which the notice of the decision was sent to the Appellant.

[4.3] The Appellant, therefore in terms of Rule 4.1 (Water Tribunal Rules) had to lodge its appeal against the decision within 30 days of such decision.

[4.4] The appeal however was only lodged and served on the State Attorney on 5th February 2018. This appeal is therefore, lodge (sic) outside the permitted time frame prescribed by the Rules. The appeal is more than 5 months out of time. The Appellant has thus failed to comply with the applicable Rules"

6. To my knowledge there is no provision in the NWA or Rules of the Tribunal for appeals against the Respondent to be served on the State Attorney. Counsel for the State Attorney also did not refer in his papers to the source of such a requirement. Date of service on the State Attorney is therefore not relevant in computing the time periods for filing the appeal.
7. This point in limine was however not persisted with during oral argument and in the written Heads of Argument filed later. Its abandonment seems prudent given lack of knowledge of when the Directive was sent to and received by the Appellant and also the apparent timeous filing with the Tribunal.

THE ACTUAL DISPUTE

The directive has the following contents:-

“[1] Reasons for decision to issue directive

The Directive issued in terms of Section 53 (1) of the National Water Act (Act No 36 of 1998) hereinafter referred to as “the NWA” to you Mr King in your capacity as trustee of the Michden Family Trust, relates to your unlawful water use which is in contravention of the provisions of chapter 4, specifically section 22 of the NWA.

- (i) You have commenced with water use activities in terms of the following section of the NWA, Section 21 (a); taking water in a watercourse and section 21 (b) of the NWA, storing water without an authorisation as required in terms of Section 22 of the NWA (the alleged section 21 (b) contravention was not persisted with during hearing of this matter, nor was it raised in the Heads of Argument. It has therefore been ignored in framing this judgment but appears in the order as confirmed existing lawful water use)*
- (ii) A notice of intention to issue a directive in terms of section 53 (1) of the NWA was issued on the 11 April 2017 to Mr P. King in your capacity (sic) as trustee of the Michden Family Trust, which afforded you an opportunity to make representations within 14 (fourteen) working days from the date of receipt of the Notice in accordance with Section 3 of the Promotion of Administrative Justice Act, Act no 3 of 2000. To date no response was received.*

(iii) *Department of Water and Sanitation officials Mr Mkhabela Solly, and Mr Alfred Hutamo conducted a follow up site inspection at the Michden Family Trust Farm for unlawful activities on the 15th August 2017 and the finding was as follows:-*

[1.1] The Michden Family Trust Farm is taking water from the Damara River (Ga-Tamari) and using it for irrigation on the farm But –An-Ben 586 LT.

[1.2] Analysis of the field survey information conducted on behalf of the Department during the latter part of the 1990's, did not indicate any abstraction of Water from the Damara River for irrigation purposes.

[1.3] During the validation and verification of water use entitlements, the information provided by yourself indicated that the development of fields on the Southern section of the farm (next to Damara river) only began during the latter part of the 2020.

[1.4] This means that no water was abstracted from the Damara River during the qualifying period (1 October 1997 to 30 September 1999) and the existing lawful use from Damara River is therefore not applicable.

[1.5] The Department has no record that authorisation had been obtained in terms of the National Water Act 1998 for the use of water from the Damara River on the above mentioned property.

The directive issued relates to the following contraventions for engaging in water use activities without authorisation.

[2] DIRECTIVE

I, Masala Mlaudzi in my capacity as the Acting Provincial Head: Mpumalanga Provincial Office of the Department of Water and Sanitation (DWS) and duly

authorised in terms of the powers delegated to me, hereby direct you, as the Trustee of the Michden Family Trust Farm, in terms of Section 53 (1) of the NWA to:-

[2.1] Provide proof of authorisation for all the above mentioned water uses at the Michden Family Trust Farm within seven (7) working days from the date of this directive

[2.2] Cease all unlawful water uses immediately should you fail to provide proof of authorisation within 7 days.

.....

[4] Kindly be advised that in terms of section 148 (1) of the Act you may appeal against this directiveto the Water Tribunal

8. Appellant has filed a notice of Appeal stating the following:

[1] It is specifically denied that the Appellant is acting in contravention of Section 21 (a) of the Act and exercising an unlawful water use as alleged by the Respondent for the following reasons:-

[1.1] There is an existing lawful use over the Damara River in favour of the Appellant, as defined in Section 32 of the Act.

[1.2.] The existing lawful water use has been verified by the Department of Water and Sanitation on 10 October 2016 in terms of Section 35 (4) of the Act. In confirmation thereof a copy of the National Register of Water Use Registration Record 27103161 is attached hereto as Annexure B.

[1.3] The Appellant is therefore authorised to continue to exercise the existing lawful water use in terms of Section 33 of the Act.

[1.4] In terms of Annexure B the Appellant is authorised of use 23237.5m³ per year for irrigation purposes out of the Damara River.

[1.5] The Respondent has therefore erred in finding that the appellant is acting in contravention of Section 21 (b) of the Act in unlawfully storing water.

9. Respondent in its reply to Appellant's Notice of Appeal had this to say (only those paragraphs of the reply that join issue with the Appellant's appeal will be reproduced hereunder):-

In paragraph C of its reply, titled "THE LEGAL FRAMEWORK" Respondent says:-

[3.1.] the following provisions of the Act are applicable in this appeal:-

[3.1.1.] Section 21 (a) of the Act (Water use) For the purpose of this Act, water use includes "taking water from a water resource"

[3.1.2] Section 21 (b) of the Act (Water use) "Storing water"

[3.1.3] Section 32 (i) of the Act (Definition of existing use)

"An existing lawful water use means water use:-

(a) Which has taken place at any time during a period of two years immediately before the date of commencement of this Act, and which

(i) was authorised by or under any law which was in force immediately before commencement of this Act.

(ii) *Is a stream flow reduction activity contemplated in section 36 (i), or*

(iii) *Is a controlled activity contemplated in section 37 (1); or*

(b) which has been declared an existing lawful water use under section 33

[3.1.4] *Section 36 (1) of the Act (Verification of existing water use)*

“The responsible authority may in order to verify existing water use, by written notice require any person claiming an entitlement to that water use to apply for verification of that use.

[3.1.4] *A responsible authority may determine the extent and lawfulness of a water use contemplated in section 32 (1)”*

10. I am in full agreement with the Respondent as to the applicable sections of the Act in adjudication of this matter. The issue however is proper application of the legal provisions, and in order to achieve proper application the Appellant’s claim to water use must be viewed in its proper context.

11. THE BASIS OF THE APPELLANT’S CLAIM TO ENTITLEMENT TO LAWFUL WATER USE

11.1. Respondent in paragraph 3.1 of his Heads of Argument concludes that *“the dispute between the parties concerns the determination of “historical facts”. The enquiry into what constitutes an existing water use requires a “retrospective” consideration of a water user’s “use of water during the qualifying period”*

11.2. Respondent’s Heads of Argument take their cue from the Directive of 11 September 2017(the Directive). The contents of the Directive are

reproduced in full in paragraph 8 above. The Directive was preceded by “the Notice of intention to issue a directive dated 11 April 2017”

11.3. However, before 11th September 2017, i.e. the date of issuing of the Notice of Intention to issue the Directive, the following events as gleaned from documentation provided in the appeal had already taken place. The sequence is as follows:-

11.3.1. Appellants bought the farm But-An-Ben in 2007. A copy of the title deed appears on pages 77 to 79 of the record. As a result thereof the previous owner being a certain Fourie closed his water use account. The document issued by the Responsible Authority at closure of the water use account by Fourie appears at pages 73 to 75 of the record. This document under the heading “Lawfulness Authentication” has the following finding: **LAWFULNESS STILL TO BE DETERMINED**

11.3.2. It is therefore common cause that as at the termination of Fourie’s ownership of the Farm But-An-Ben there had as yet been no verification of the lawfulness of water use as provided for in sections 35 (1) and 35 (4) of the Act. The provisions of this section are reproduced in paragraphs 4.1.5 and 4.1.6 of the Respondents Heads of Argument.

11.3.3. It is perhaps important at this stage to look into the actual process of verification.

11.3.4. Section 35 VERIFICATION OF WATER USE

[1]The responsible authority may, in order to verify the lawfulness or extent of an existing water use, by written notice require any person

claiming an entitlement to that water use to apply for a verification of that use.

[2]A notice under subsection (1) must –(own underlining)

(a)have a suitable application form annexed to it;

(b)specify a date before which the application must be submitted;

(c)inform the person concerned that any entitlement to continue with the water use may lapse if an application is not made on or before the specified date; and

(d)be delivered personally or sent by registered mail to the person concerned.

[3]A responsible authority –

(a)may require the applicant, at the applicant's expense, to obtain and provide it with other information, in addition to the information contained in the application;

(b)may conduct its own investigation into the veracity and the lawfulness of the water use in question;

(c)may invite written comments from any person who has an interest in the matter; and

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

[4]A responsible authority may determine the extent and lawfulness of a water use pursuant to an application under this section, and such

determination limits the extent of any existing lawful water use contemplated in section 32(1).

[5]No person who has been required to apply for verification under subsection (1) in respect of an existing lawful water use may exercise that water use –

(a)after the closing date specified in the notice, if that person has not applied for verification; or

(b)after the verification application has been refused, if that person applied for verification.

11.4. There is no indication on the papers, nor was it stated during oral argument that Respondent had ever issued Appellant with a notice in terms of section 35 (1).

11.5. A notice of an intention to issue a section 53 (1) notice is not a notice for verification of lawfulness of water use.

11.6. Section 53 is titled “Rectification of contraventions” and has the following provisions.

“(1) A responsible authority may, by notice in writing to a person who contravenes –

(a)any provision of this Chapter (Section 53 is located in Part 10 of the Act. Part 10 is titled Contraventions of a failure to comply with authorization)

(b)a requirement set or directive given by the responsible authority under this Chapter; or

c) a condition which applies to any authority to use water, direct that person, or the owner of the property in relation to which the contravention occurs, to take any action specified in the notice to rectify the contravention, within the time (being not less than two working days) specified in the notice or any other longer time allowed by the responsible authority.

(2) If the action is not taken within the time specified in the notice, or any longer time allowed, the responsible authority may –

(a) carry out any works and take any other action necessary to rectify the contravention and recover its reasonable costs from the person on whom the notice was served; or

(b) apply to a competent court for appropriate relief.”

12. APPELLANT'S APPLICATION FOR VERIFICATION OF WATER USE

12.3. The record has at page 88 a document, Annexure C with the following heading:-

APPLICATION FORM IN TERMS OF SECTION 35 (1) FOR THE CONFIRMATION OF THE LAWFULNESS AND EXTENT OF EXISTING WATER USE ON PROPERTY, IN TERMS OF THE NATIONAL WATER ACT, 1998, (ACT 38 OF 1998)

12.4. Referring back to the provisions of section 35, this document is most probably the application mentioned in section 35 (2)(a). Therefore it came from the Responsible Authority.

- 12.5. Already typed in the form under possible existing lawful surface water use was 140 058, and Appellants' Representative, a certain King changed that in hand to 92 950.
- 12.6. The document has block 6 named, EXISTING WATER RIGHTS OR ENTITLEMENTS and the following columns:- Type of Water Resource, Reference no, m³/annum. Nothing is written in any of the aforesaid columns. More specifically, the water resource from which 92 950 m³ volume of water is sourced is not identified.
- 12.7. Block 7 is the block for Remarks/Comments, and the following is handwritten thereon.
- “Our entire crops consist of fruit trees being avocados and litchi. As fifty nine percent of the hectares used are under dry land we have reduced the lawful water use to 92 950m³. The water use for the dry land is calculated at twenty percent of the irrigable figures”*
- 12.8. Appellant's application is dated 18th July 2016.
13. In page 90 of the record is a letter written on the letterheads of the Department of Water and Sanitation. The letter is addressed to the Appellant.
- 13.3. The heading of the letter is as follows:-
- But-An-Ben 586 LT PORTION 0 SIZE 55.74 ha CONFIRMATION OF THE EXTENT AND LAWFULNESS OF WATER USES IN TERMS OF SECTION 35 (4) OF THE NATIONAL WATER ACT, 1998 (Act 36 OF 1998)*
- 13.4. Its opening unnumbered paragraph reads as follows:-

“You are hereby informed that the extent and lawfulness of the water uses on the above mentioned property have been determined by me as the delegate of the Minister of Water and Environmental Affairs in terms of Section 35 (4) of the National Water Act as follows:- (thereafter a table indicating the type of water use as irrigation –surface and possible

- borehole

Existing lawful water use as 92 950”, i.e. the same volume applied for by the Appellant. The column for the source of the water was left blank.

- 13.5. The letter goes on to explain the legal basis for the lawfulness of the water use and states thus:-

“In terms of section 35 (4) of the Act this determination is also the extent of the existing lawful water use as contemplated in section 32 (a) for this property , which may be continued with under section 34 (1) subject to any existing conditions or obligations attaching to the use until a licence replaces it.”

- 13.6. The letter is signed by the Acting Chief Executive Officer: Olifants Catchment Management Agency (CMA). It is common cause that But-An-Ben is situated within the jurisdictional parameters Olifants Catchment Management Agency.

- 13.7. Appellants have attached to their Notice of Appeal, Annexure B, a document titled “National Register of Water Use Registration Record 27103161”. It appears from pages 8 – 18 of the record. The attached document however has some missing pages. The full and complete record of Annexure B was

however handed in on the 1st day of the hearing and was marked EXHIBIT A. I will therefore for the purposes of this judgment refer to the whole document handed in as Exhibit A. It is also important to point out that the transcribed record does not include the proceedings of the 1st day of hearing which dealt only with preliminary issues. Exhibit A is therefore also not mentioned in the transcribed record, it having been handed in on the 1st day of the hearing. Henceforth I will refer to this document Exhibit A/Annexure B

13.7.1. Page 6 of Exhibit A/ Annexure B contains the following pertinent

information:-

Validation

Validations Status Finalised

Validation Status – Date Allocated 2016/10/10

Lawfulness Authentication

Finding: Lawful

Finding Date: 2016/09/02

*Finding Reason: Existing Lawful Water Use under S.35 (4) of the
NWA (Act no 38 of 1998)*

13.7.2. The witness who testified on behalf of the Respondent explained that Exhibit A/Annexure B is a document used for billing purposes.

13.7.3. Respondent in his oral argument and paragraph 8.10 of his Heads of Argument attacked Exhibit A/Annexure B on the basis that it is not a

legal document and does not confer any rights or entitlement to any person because it contains the following disclaimer:-

“Disclaimer

This Registration Record:

- 1. Is not an acknowledgement of an entitlement to the registered water use;*
- 2. May not be used to create an impression that it is proof of water use entitlement. By virtue of section 22 (1) of the National Water Act, the only document that may be used as part of a water entitlement use, are:*
 - 2.1. A licence*
 - 2.2. An official document stating the extent of existing lawful water use pursuant to section 33 or 35 of the National Water Act;*
 - 2.3.”*

13.8. I do not understand what is meant by Respondent’s counsel when he says that Exhibit A/Annexure B is not a legal document. What I can say is that it is a legitimate document, it bearing the official stamp of the Regional Office: Mpumalanga CMA: Olifants Catchment Agency. I however accept that by virtue of the disclaimer it is not a document giving entitlement to water use.

13.9. Exhibit A/Annexure B does however have some relevance. It is not a document that came out of the blue. It is stamped 10 October 2016. It states the date of lawfulness authentication of water as the 2 September 2016. The date of the 2 September 2016 is also the date appearing on the document

titled: CONFIRMATION OF THE EXTENT AND LAWFULNESS OF WATER USES referred to in the preceding paragraphs of this judgment. It is therefore part of the evidential material placed before the Tribunal by the Appellant in its submissions that it was entitled to use water, and was therefore not abstracting water illegally.

13.10. The documents referred to in the preceding paragraphs of this judgment indicate that Appellants did engage in the verification set out in section 35 of the NWA, which verification process led to confirmation of existence of lawful water use by the Acting Chief Executive Officer: Olifants CMA on the 2nd September 2016.

14. The Directive of the Respondent, Annexure A to Appellant's Notice of Appeal is dated 11 September 2017 i.e. more than a year after Appellant finalised the verification process and was issued with confirmation of existing lawful water use.

14.3. The Directive is to my mind not in accordance with the provisions of the NWA for the following reasons:-

14.3.1. Respondent did not give Appellant a written notice to apply for verification of water use as provided for in section 35 (1) NWA. This is evident from the record and Heads of Argument. Instead Appellant was issued with a notice of contravention in terms of section 53 (1) of the Act.¹

¹ Paragraph 2.2 Respondent's Reply page 20, Record, Paragraph 2.2 Respondent's Heads of Argument.

14.3.2. Respondent therefore did not follow the verification procedure set out in Section 35 of the NWA.

14.4. The following paragraphs of the Directive are not necessarily correct;

[1.2] Analysis of field survey information conducted on behalf of the Department during the latter part of the 1990s did not indicate any abstraction of water from the Damara River for irrigation purposes.

[1.3.]During the validation and verification of water use entitlements, the information provided by yourself indicated that the development of the fields on the Southern Section of the Farm next to Damara River) only began during the latter part of the year 2010.

[1.4] This means that no water was abstracted from the Damara River during the qualifying period (1 October 1997 to September 1999) and the existing lawful use from the Damara River is therefore not applicable.

14.4.1. Paragraph 1.2 of the Directive seems to require evidence of abstraction of water from the Damara River for irrigation purposes in the latter part of the 1990s from the Appellant in order for it to establish existing water use.

14.4.2. I have underlined “evidence of water abstraction from the Damara River” because the Directive is not attacking water use entitlement per se but the fact that that water use is being exercised in respect of a specific resource, Damara River.

14.4.3. My conclusion in this regard is supported by the following:-

(a) Respondent's reply to the Notice of Appeal, paragraph 4.16 thereof states the following:-

"It could therefore be concluded that no water was abstracted from the Damara River during the qualifying period (i.e. 2 years) prior to the commencement of the Act. The abstraction from years 2010 was after the qualifying period and thereafter could not be taken into consideration when an existing lawful use was determined as defined."

(b) Respondent in his heads of argument at paragraph 3.11 thereof makes the following submissions:-

"Nowhere before this erroneous capturing had Damara River ever featured as a water resource in any of the correspondence or discussions between the parties."

14.5. I must admit that I have difficulties with this interpretation of water use entitlement that requires identification of the specific resource in respect of which water use entitlement is exercised for reasons set out below.

14.6. Section 1 of the NWA deals with Definitions and Interpretation. Section 1 (3) provides as follows:

"When interpreting a provision of this Act, any reasonable interpretation which is consistent with the purpose of the Act as stated in section 2, must be preferred over any alternative interpretation which is inconsistent with that purpose"

14.7. Section 2 deals with "Purpose of Act" and states :

“The purpose of this Act is to ensure that the nation’s water resources are protected, used, developed, conserved, managed and controlled in ways which take into account amongst other factors (there is thereafter listed 11 objectives of the act, I will however mention only 2 which for me are pertinent to this judgment) same are:-

(a).....

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

(e) facilitating social and economic development

14.8. Existing water use is defined in section 32 of the Act. There is no mention as a requirement the name of the water resource.

14.9. Section 35 deals with verification of existing water use. There is no reference and or mention of a name of a water resource.

14.10. Where the Act in its provisions requires mention of a specific water resource it does so expressly. In this regard the following sections and their provisions bear witness to that.

Section 39 General authorisation to use water

A responsible authority may, subject to Schedule 1, by notice in the Gazette—

(a) generally;

(b) in relation to a specific water resource; or (own emphasis)

(c) within an area specified in the notice, authorise all or any category of persons to use water,.....

14.10.1. It very important to note that even where the Act provides as a requirement mention of a specific water resource as in (b) of the quoted section 36 it still provided specification of the area as an alternative to specific mention of the water resource.

14.11. Section 43 deals with compulsory licence applications and in specifying the required notice section 43 (2) provides as follows:-

“A notice in terms of subsection 1, must-

(a) Identify the water resource and the water use in question.....”

14.12. Based on the above exposé referencing the Act I do not agree that the failure to mention Damara River as the point of abstraction is fatal to Applicant’s success in proving existing lawful water use.

14.13. I am fortified in this reasoning by the following:-

14.13.1. The letter addressed to the Applicant confirming the extent and lawfulness of water use(s) in terms of section 35 (4) appearing on page 90 of the record is signed by the Acting Chief Executive Officer of the Olifants CMA. It does not mention the water resource in respect of which water use entitlement is exercised. CMAs are provided for in Section 77 of the Act and are special purpose vehicles for specific water management areas. One would therefore accept the expertise of its top official on the required content and or particulars of a water use authorisation.

14.13.2. Respondent has attacked the aforesaid confirmation as irregular.

In point of fact it recognised its validity to such an extent that it deemed it necessary to withdraw it.

14.13.3. The Notice of Intention to withdraw the confirmation is attached to the Notice of Appeal and appears on page 37 of the record. There seem to have been no actual withdrawal but the issue appears moot in the face of a clear acceptance by both parties that the Applicant is deemed by the Respondent to be exercising unlawful water use.

15. Paragraphs 1.3 and 1.4 of the Directive read together put forward the conclusion that because Appellant gave information that the development of the fields on the Southern section of the farm (next to Damara River) only began during the latter part of the year 2010 that means that no water was abstracted from the Damara river during the qualifying period (1 October 1997 to 30 September 1999, the existing lawful use from the Damara River is therefore not applicable.

15.3. This conclusion is however not entirely correct because it is premised on only the definition of existing lawful water use set out in section 32 (1)(a). It ignores the other relevant definition of existing lawful water use which is set out in section 32(1)(b), and same reads as follows:-

“An existing water use means a water use which has been declared an existing water use under section 33”

15.4. Section 33 is titled “Declaration of water use as existing water use”, and provides as follows:-

“[1] A person may apply to a responsible authority to have a water use which is not one contemplated in section 32(1)(a), declared to be an existing lawful water use.

[2] A responsible authority may, on its own initiative, declare a water use which is not one contemplated in section 32(1)(a), to be existing lawful water use.

[3] A responsible authority may only make a declaration under subsections (1) and (2) if it is satisfied that the water use –

(a) took place lawfully more than two years before the date of commencement of this Act and was discontinued for good reason; or

(b) had not yet taken place at any time before the date of commencement of this Act but –

(i) would have been lawful had it so taken place; and

(ii) steps towards effecting the use had been taken in good faith before the date of commencement of this Act.

15.5. During oral hearing of the appeal Appellant called its only witness, Mr Willem Vorster (RS Production and VAP Technologist, with specific field of expertise in satellite image processing). Vorster’s Report: “Assessment and analysis of field irrigation near Tzaneen”, was handed in during hearing and formed part of the record. I will hereinafter refer to it as the Vorster report.

15.6. The Vorster report stated its purpose in paragraph 1.2 thereof which reads as follows:-

“The subject matter of this field irrigation investigation on the farm But-an-Ben no 586 remainder in the Tzaneen area in Limpopo, and the specific request was to establish with the aid of satellite imagery whether the area was irrigated before the qualifying period between 1 October 1996 and 1 October 1998” (own emphasis)

15.7. The conclusion is in paragraph 4 and same reads as follows:-

“It is the expert’s opinionthat the following can be stated with a reasonable degree of confidence.”

[4.1] Assuming that all fruit bearing (sic) trees are irrigated and plantations are not irrigated. The trees of a field with fruit bearing (sic) trees are planted in rows.

[4.2] In 1951 (figure 5), no fruit trees were found, only fields with plantations.

[4.3] In 1968 (figure 6) trees were planted in rows (probably fruit trees) on various fields. Those trees were found in the central part of the farm and the southern parts. (own emphasis). A dam was identified in the south eastern parts of the farm.

[4.4] In 1986 (figure 7), it looks like fruit trees are visible on at least one field in the northern parts. The central and southern parts, the fruit trees are still visible, because of the row effect. A second dam is visible in the southern parts of the farm. The dam that was found in 1968 was probably dry.”

15.8. In 2003 (figure 10), fruit trees were found in the northern parts and in the southern parts, but not on all mapped fields. The two dams (not mapped) were again visible in 2003.

15.9. I have repeatedly underlined “southern” because it became common cause during oral presentation of evidence that the Damara River borders Appellant’s farm on the southern side. Consequently the probability is that irrigation of the fruit trees on the Southern side was with water from the Damara River. In point of fact that was Appellant’s case and same was not attacked by the Respondent.

15.10. Giving further credence to the aforestated conclusion is the following:-

15.8.1. When Appellant’s expert witness was giving evidence he testified that there was a bottom dam.² On the figures presented, bottom is south. See also my clarification questions as chairperson.³

15.8.2. Further, the expert testified that the dam was within a drainage.⁴

15.8.3. Respondent had also called only one witness, Mr Van Aswegen, a former employee of the Department of Water Affairs and Sanitation, qualified as having a BSC Civil Engineering and Master’s Degree in irrigation. Most importantly however is that Van Aswegen was the Acting Chief Executive Officer of Olifants CMA who is the

² line 9 page 21 transcribed record.

³ Lines 10-19 page 2 transcribed record

⁴ Lines 7-9 transcribed record.

stated reference official for the document dated 2nd September 2016 confirming that Appellants had existing lawful water use.

15.8.4. Van Aswegen confirmed that the “drainage” on which the southern dam was situated was the Damara River.⁵

15.8.5. Counsel for the Appellant made the following submission during argument:- *“I will argue that both these dams (i.e. the northern and southern dam) existed since at least 1986 and that the orchards that was (sic) planted there also existed as early as 1986”*⁶

15.8.6. I accept that argument because at no stage did counsel for the Respondent challenge expert evidence on the issue of there being in existence a dam on the Damara river. Also not challenged was evidence that before 1997 there was irrigation and damming of water from the Damara River for purposes of irrigation.

15.8.7. In point of fact Van Aswegen confirmed that the dam was on the Damara River.⁷

16. From the above synopsis it is clear that there was evidence which remained unchallenged that Appellant’s farm did use water from the Damara river albeit not during the two years immediately before commencement of the Act, that being the requirement of section 32 (1)(a).

17. An argument can be put forward that the letter dated 2 September 2016 confirming that Appellant had existing water use does not refer to section 33 at all which

⁵ Lines 23-25 page 54, crossing to the next page, lines 1-13 page 55 transcribed record, see also lines 20-24, page 69 transcribed record

⁶ Lines 12-15 transcribed record.

⁷ Lines 18-24 transcribed record

means that existing water use was not recognised in terms of that section. That argument will not assist the Respondent because a hearing before the Water Tribunal amounts to a rehearing. Evidence provided during the hearing makes it clear that there was existing water use which could be declared as such in terms of section 33.

18. RESPONDENT'S NOTICE OF INTENTION TO WITHDRAW CONFIRMATION OF EXISTING LAWFUL WATER USE

18.1. As previously stated in this judgment I was not placed in possession of the actual withdrawal document. It is however accepted that the confirmation dated 2 September 2016 was withdrawn.

18.2. The Notice of Intention to withdraw confirmation of existing water use is dated 6 March 2018 and appears in page 37 of the record. The stated reason for the withdrawal is that same was wrongfully issued.

18.3. Strangely however during the hearing of this matter at no stage was it stated in evidence by the witness of the Respondent (who incidentally was the referenced official of the Responsible Authority in the confirmation dated 2 September 2016) that Appellant was not entitled to use 92950 m³ of water for irrigation purposes.

18.4. It is therefore clear that the confirmation of existing water use was withdrawn for reasons set out in the Directive. I am not satisfied that those reasons were correct, because of the following:-

19. The Directive ignored the provisions of section 33, possible declaration of existing lawful water use. In point of fact the Directive painted the Respondent and his counsel into a corner by insisting on only one interpretation of existing lawful water use, to wit the definition contained in Section 32 and ignoring Section 33.
20. Further when the Directive in its paragraph 1.5 stated that "The Department has no record that authorisation had been obtained in terms of the National Water Act for the use of water from the Damara River it was stating an incorrect requirement for existing lawful water use. As stated elsewhere in this judgment mention of a specific resource is not part of the provisions of section 32, 33 and 35.
21. Appellant has in its Heads of Argument under what it has titled "*The effect of the withdrawal of the verification*" (sic) argued as below (In my view it is referring to the document appearing on pages 37-38 of the record, same being the Notice of Withdrawal of Existing lawful Water Use).

*"Verification of the Appellant's existing lawful water use is an administrative action, and even through these administrative actions may be erroneously decided, an administrative action that was erroneously taken do (sic) not amount to a nullity. The verification of the existing lawful water use exist (sic) in fact and has legal consequences. The solution is to challenge the decision on review".*⁸ Applicant then cites Member of the Executive Council for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute 2014930 SA 481 CC at 90 and 97.

⁸ Paragraph 20, Appellants Heads of Argument

22. Respondent countered with the following argument. *“The Department submits and accepts that the validation and verification process including the confirmation of the existing lawful water use [section 35 (4)] constitutes an administrative action taken by the Department. This administrative actions (sic) were contained in the following decisions:-*
- (a) That Appellant is entitled to the existing lawful water use to the volume of 92 950m³ of surface water.*
- (b) That such water would be abstracted from the spring/dam”⁹*
23. I do not agree with the Respondent that the Department took the decision mentioned in (b) i.e. “that such water would be abstracted from the spring dam”. The confirmation of existing lawful water use being the letter dated 2 September 2016 mentioned the volume of 92 950m³ but was silent on the source. In the circumstances Respondent’s submission is incorrect on facts.
24. Respondent then goes on to argue that *“As a result Kirland is not applicable to the particular facts of this matter as there was no decision taken by the Department to allow or authorise the Appellant’s abstraction of water from the Damara River which would constitute a decision that would need to be set aside by a court of law.”*
25. I am in the fortunate position that I do not have to grapple with the issue of whether Kirland is applicable or not in this matter for the reasons stated below.
26. In my considered view that encompassed a close reading of the relevant provisions of the NWA, more specifically section 32 I have come to the conclusion that it is not

⁹ Paragraph 8.3 Respondent’s Heads of Argument.

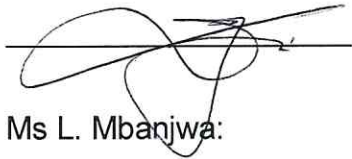
a requirement of section 32 that existing lawful water use must be in respect of a specific identified water resource.

27. Piggy backing on Respondent's own phraseology:- In the circumstances there never was a reason for the Department to take an administrative decision that recognises Appellant's existing lawful water use pertaining to the abstraction of water from the Damara River
28. A hearing before a tribunal amounts to a rehearing. In the circumstances it is not necessary for the Water Tribunal to examine issues of review because it has had the benefit of a rehearing.
29. Lastly, I need to touch on an issue of the Directive that was not raised on the papers and in oral argument, namely the alleged unlawful storing of water by the Appellant. Because this alleged contravention was not pursued in the papers and during oral argument by the Respondent but was argued for by the Appellant who also provided evidence of existence of dams I find no impediment to finding in favour of the Appellant in this regard.

In the circumstances the following order is made:-

1. Respondent's Directive in terms of Section 53 (1) of the National Water Act, 1998 (Act no 36 of 1998) dated 11 September 2017 is hereby set aside.
2. Respondent's Notice of Intention to Withdraw confirmation of existing lawful water use on Farm But-An-Ben 586 L Portion O and the subsequent Withdrawal are hereby set aside.

3. Respondent's existing lawful water use is inter alia exercisable in respect of Damara River
4. Respondent's existing lawful water use includes storing of water as set out in Section 21(b) of the Act.



Ms L. Mbanjwa:

(Water Tribunal Member)

22/06/2021