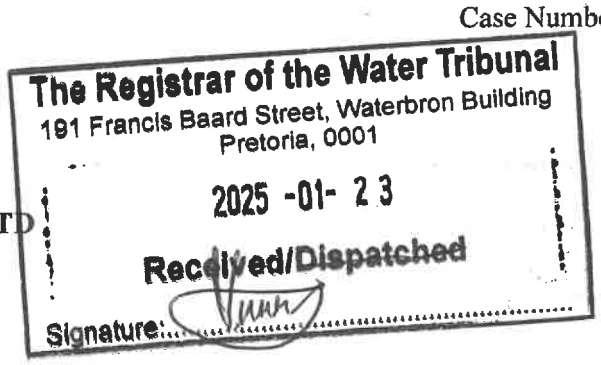
IN THE WATER TRIBUNAL OF SOUTH AFRICA

HELD IN WESTERN CAPE, GEORGE

Case Number: **WT01/23/WC**



In the Appeal between:

BALDERJA (PTY) LTD Appellant

AND

DEPARTMENT OF WATER AND SANITATION Respondent

Date of Hearing: 11 and 12 April 2024

Date of oral submissions: 14 June 2024

Date of delivery of judgement: 23 January 2025

Coram: Adv P. Loselo, Chairperson of the Water Tribunal

Adv N. Lekgetho, Additional Member of the Water Tribunal

JUDGEMENT

Introduction

1. Balderja (Pty) Ltd ('*the Appellant*') brings this appeal in terms of s 148(1)(f) of the National Water Act ('*the NWA*') against the decision of the Respondent dismissing its water use licence application ('*WULA*') on 16 February 2023.

2. On 28 March 2021, the Appellant began constructing a water storage dam without obtaining the required environmental authorization ('the *EA*') and water use license ('*the WUL*').

3. On 18 October 2022, the Appellant lodged a WULA with the Respondent. The WULA was declined on 16 February 2023 on the basis that the proposed water uses do not satisfy the requirements of s 27(1)(c) of the NWA; that an approval of the WULA would lead to excessive water storage, and that it will cause significant water losses; that the Appellant already has an adequate water allocation; and that if the WULA is granted it will lead to an overallocation of water ('*the decision*').

4. The Appellant lodged its appeal to the Water Tribunal ('*the Tribunal*') on 31 May 2023. The Appellant supplemented its grounds of appeal on 15 September 2023. The Respondent filed its grounds of opposition on 8 December 2023. The grounds of opposition were set out in the rejection letter.

5. The Tribunal is called upon to determine whether the Respondent's decision was factually and/or legally justified.

Background

6. The Appellant is the owner of Portions 12, 15, and 17 of Balderja Farm Redford 232, Knysna Road ('*the farm*') located approximately 2 km West of the Grags. The area is in Bitou Municipality 15 km North-East of Plettenberg Bay, Western Cape Province and within the Quaternary Catchment K60E of the Breede Gouritz Water Management

Area (*'the BGWMA'*). The proposed dam and borehole are in Portion 17/232, which is bordered by the Whiskey Creek Nature Reserve to the South.

7. The Appellant is in a process of developing macadamia orchards on the farm (*'the project'*). For this project, the Appellant plans to obtain a continuous supply of water by storing water in the proposed dam to ensure water supply even during drought seasons.

8. According to the Appellant, in order to cultivate the 28ha macadamia orchard under drip irrigation, the estimated mean annual irrigation requirements is approximately 81,000 m^3/a, with a maximum demand of 116 000 m^3/a. Water for irrigation would be from three sources. First, water will be sourced from the three portions of the farm, each of which has 1:31 share of a furrow allocation through Rondebosch River Water User Association (*'the RRWUA'*). The total volume is approximately 50 277 m^3/a.

9. The evidence presented during the appeal hearing indicates that the Appellant later revised this volume to 25 000 m^3/a. Second, water will be sourced from the surface run-off water from the BGWMA, which is approximately 12 200 m^3/a. Third, 69 000 m^3/a will be sourced from underground water through a borehole on portion 17/232 of the farm.

10. The Appellant asserts that the water storage in the proposed dam with a capacity of 70 000 m^3 was calculated to be sufficient for the irrigation of the planned macadamia orchards. As already indicated above, on 28 March 2021, the Appellant began clearing vegetation and excavation of an in-stream non-perennial drainage line on a tributary of the Whiskey Greek with the intention of constructing a dam for storage of water for

irrigation purposes. Initially the intended dam capacity was estimated at 300,000 m^3. However, after several specialist studies were completed the dam size was reduced to 70,000 m^3. As shall become apparent later, the construction of the proposed dam required a WULA.

11. The construction of the dam commenced without the required WUL and the EA. The construction was halted following the Respondent's intervention, after receiving a complaint alleging unlawful water use activities taking place at the farm. According to the Respondent, the complaint alleged that the contemplated dam would have a dam wall of about 17m in height and a storage capacity of 300,000 m^3.

12. In response to the complaint, the Respondent constituted an investigation team which conducted a site visit at the farm on 21 July 2021. The investigation team discovered that the construction of a dam activities taking place at the farm triggers water uses in terms of sections 21 (c) and (i) of the NWA and are in contravention of s 22 of the NWA, because these water uses were not authorised.

13. It was further determined, by the investigation team, that the Western Cape Provincial Department of Environmental Affairs and Developmental Planning (*'the DEADP'*) had issued a pre-compliance notice to the Appellant on 27 May 2021, in terms of which the Appellant was informed that it was confirmed that the Appellant has commenced with the alleged unlawful development of a dam within a watercourse, which is causing/has caused significant degradation to the environment. The Appellant was then given an opportunity to make a representation as to why it should not be issued with a directive in terms of s 28 (4) of the National Environmental Management Act 107 of 1998 (*'NEMA'*).

14. Around June 2021, the Appellant made representations to the DEADP and simultaneously made an application for rectification of the unlawful commencement of a listed activity in terms of s 24G of NEMA. On 12 July 2021, the DEADP issued the Appellant with a compliance notice on the basis that the Appellant's action of constructing a dam has triggered activities listed in the Regulations made in terms of NEMA. In terms of the compliance notice the Appellant was required to immediately cease with the listed activities and comply with s 24G within the specified timeframes. It is common cause that, at the time of hearing of the appeal, the s 24G NEMA process had not yet been finalised. Nothing turns on the application under NEMA.

15. It is undisputed that, on 23 August 2021, the Respondent issued a notice of its intent to issue a directive to the Appellant under section 53 of the NWA. In this notice, the Appellant was invited to provide representations explaining why the Respondent should refrain from exercising its powers under section 53(1) of the NWA concerning the Appellant's alleged unlawful commencement of water use activities without a WUL.

16. The Appellant submitted representations, but these were deemed insufficient. Consequently, in December 2021, the Respondent issued a directive instructing the Appellant to cease all unlawful water use activities and to apply for a WUL for those activities. It is undisputed that the Appellant complied by ceasing the unlawful water uses.

17. By the time construction activities were halted, the Appellant had already excavated and disturbed approximately 1.2 hectares of the non-perennial tributary, having cleared vegetation, topsoil, subsoil, and rocks within the watercourse.

18. The Appellant applied for a WUL on 21 July 2022 for taking water from a watercourse; impeding or diverting the flow of water in a watercourse; altering the bed, banks, course or characteristics of a watercourse; and storing water. The water uses applied for are those contemplated in s 21 (a), s 21 (b), s 21 (c), and s 21 (i).

19. The WULA was to also authorise the construction of a 70 000 m³ capacity dam with a 17m wall height (*'the proposed dam'*). The water to be stored in the proposed dam was to be sourced from the existing furrow allocations, which was claimed by the Appellant as an existing lawful water use (*'the ELWU'*) in terms of s 32 of the NWA, borehole on portion 17 of the farm and the surface water run-off.

20. According to the Respondent, the Appellant's ELWU amounts to 155,129 m³ per annum, comprising 60,337 m³ per annum on portion 12, 47,303 m³ per annum on portion 15, and 47,489 m³ per annum on portion 17. While this ELWU has been claimed, it has not yet been verified and determined in accordance with section 35. It is common cause between the parties that the verification and determination of the ELWU remain outstanding.

21. The Respondent rejected the Appellant's WULA on 16 February 2023. The Appellant subsequently filed an appeal with the Tribunal on 31 March 2023. This appeal is the subject of the present judgment.

Grounds of appeal

22. The Appellant's raised several grounds of appeal. First, the Appellant states that the combined estimated furrow allocation for the farm is not sufficient to meet the irrigation demands of 28h of macadamia nut trees, which requires a minimum of 80

000 m³/a and a maximum of 116 000 m³/a. Second, the Appellant contends that its claim for an ELWU has never been verified and that its estimated ELWU in its Hydrological Report, which states that estimating the hydrology of the furrow was very challenging, should be considered in the absence of a verification and determination of its ELWU. Third, the Appellant claims that the Respondent failed to consider the option of requiring the decommissioning of the existing small dam as a condition for approval.

23. Fourth, that the reason provided by the Respondent does not explain why the approach adopted in the Appellant's Hydrological Report is not correct. Fifth, that the Respondent failed to consider a common practice of storing borehole water in dams. In support of this ground of appeal the Appellant states that its Hydrological Report provided a comprehensive analysis regarding evaporative loss of water, and that, as a result, storing borehole water is justified because the monthly irrigation demands of the macadamia nuts will frequently exceed the sum of surface inflows from the catchment area and furrow.

24. Sixth, the Appellant further asserts that the Respondent did not consider or attach sufficient weight to its expert reports (agricultural, aquatic specialist, dam design and survey, geohydrology report, hydrology and technical summary reports) and the material and relevant information pertaining to the strategic and socio-economic importance of the Appellant's water use.

25. The Appellant supplemented its grounds of appeal on 15 September 2023. First, the Appellant stated that the Respondent failed to apply the principle enunciated by the Supreme Court of Appeal in the matter of *Makhanya N.O and Another v Goede*

Wellington Boerdery (Pty) Ltd[1], which stated that NWA or s 27 does not attribute more weight to any of the factors mentioned in s 27. As a result, the Respondent cannot on a whim decide to elevate one factor to pre-eminence, so goes the Appellant's argument. According to the Appellant the Respondent failed to apply the principle set out in *Makhanya* in that the Respondent specifically referred to s 27(1)(c) as the reasons why the WULA was refused.

26. Second, the Appellant states that the Respondent failed to take into account the fact that the Appellant is entitled to an ELWU of 154, 943 m³/a from the RRWUA, which water is provided via canals to the Appellants' properties. Thus, the Appellant contends it was entitled to store water received in terms of the ELWU, which it is currently underutilizing as a result of limited storage of 2500 m³/a at the Appellant's portion 12 of the farm.

27. Third, the Appellant further stated that the Respondent failed to consider the Tribunal's judgement in the matter of *African Realty Trust (Pty) Ltd V The Acting Director-General: Department of Water and Sanitation*[2] *('African Realty')*, where it was held that where a storage dam is intended to store water from a canal in respect of which a water user's association has existing water use rights, and the appellant is a member of such an association the WULA should be favourably considered.

28. Fourth, the Appellant stated that the Respondent failed to appreciate that the Appellant's application to abstract underground water for irrigation purposes is to provide for the eventuality that the Appellant may experience shortages from the

[1] *2013 (1) All SA 526 (Makhanya).*
[2] *(WT03/20/LMP) [2021] ZAWT 1 (9 March 2021).*

canals from which the Appellant receives its ELWU. The Appellant contends that in the event that such an eventuality it will irrigate from the borehole.

29. Fifth, it is contended that the Respondent failed to appreciate that macadamia nut trees are perennial plants with a minimum lifespan of approximately 40 years and they need water during their entire life cycle. Further, the water demand of the crops that were already planted by the Appellant will increase as the macadamia trees grow and mature. Thus, the current storage of 2500 m^3 p/a and the inflow from the canal will be insufficient for the purposes of irrigating the adult macadamia trees.

Grounds of opposition

30. The Respondent's grounds of opposition are a restatement of the grounds of refusal as recorded in the Record of Recommendations (*'the ROR'*), and the letter of rejection. The Respondent contends that the proposed water uses do not meet the requirements of s 27(1)(c) of the NWA, because if authorised it will result in excessive water storage, high loss of water, and an over-allocation of water.

31. It is further asserted that the water balance on the Appellant's property, does not support the proposed s 21(c) water use when assessed against the 'confirmed'[3] ELWU volumes which show that the property already has sufficient water supply to meet the water demand. The Respondent further asserted that Appellant did not consider the existing dam in the sizing of the proposed dam and that the volume requested from groundwater was included in the long term-instream sizing of the proposed dam and

[3] *We have already indicated that it is common cause that the ELWU is yet to be verified and determined, thus referring to 'confirmed' must be understood to mean claimed.*

that this is considered as an inefficient use of water resource as it is prone to overestimation.

32. According to the Respondent, the proposed abstraction of 81 200 m³/a of water was considered acceptable as the water demands for macadamia, as calculated, using the South African Procedure for the Estimation of Irrigation Water Requirements (*'the SAPWAT3'*) model, a tool used to estimate crop water requirements based on climate, crop type, and soil data, to calculate the irrigation requirements for the Appellant's crops. The estimation was 81 737 m³/a.

33. However, the proposed water demand did not factor or subtract the ELWU. The Respondent contends that the Appellant only considered 69 000 m³/a of ground water to be abstracted from the proposed borehole, and the 12 200 m³/a of surface water run-off in the catchment area but failed to consider the 155 129 m³/a of the Appellant's ELWU. As a result, the ELWU of 155 129 m³/a exceeds the proposed water demand of 81 200 m³/a by 74 129 m³/a. Consequently, the new taking could not be justified as it will result in the overallocation of water to the Appellant, so goes the Respondent's argument.

34. In the main the Respondent was not satisfied with the hydrological study compiled by the Appellant's specialist, Dabrowski. The hydrological study found that the Appellant's volume of an ELWU to be 50 277 m³/a and later revised to 25,000 m³ /a, whereas the Respondent found, through Mr Zimu, a volume of the ELWU to be 78 000 m³/a.

35. In addition, the Respondent states, as a ground of opposition, that prior to the WULA the Appellant had already commenced with the construction of an unauthorized dam

with a capacity of 300 000 m³ and a wall heigh of 17m. The dam construction ceased because of the issuance of a directive by the DEADP to the Appellant.

The law

36. In terms of NWA, a person is entitled to use water if the use is permissible under the Act. Chapter 4 of NWA regulates water use, including equitable allocation and beneficial use of water. This Chapter provides for various types of licensed and unlicensed water uses and sets out general principles for regulating water use. These water uses include, taking water from a water resource; storing water; impeding or diverting the flow of water in a watercourse; engaging in a stream flow reduction activity; altering the bed, banks, course or characteristics of a watercourse; and using water for recreational purposes. Section 21 of NWA permits a person to use water without a licence if that water use is permissible as a continuation of an existing lawful use.

37. The Appellant applied for WUL in terms of s 21(a), (b), (c), and (i) of NWA, or what is colloquially called an Integrated Water Use License ('*an IWUL*'), which refers to a WULA which involves consideration of several water uses at the same time, such as the abstraction of water from a watercourse; storing water in reservoirs or dams; and impeding or diverting the flow of water and altering the natural course of a watercourse.

38. Section 27 of NWA sets out all relevant factors which must be considered by the responsible authority in consideration of a WULA or a general authorisation. These

include, among other things, ELWU; the need to redress the results of past racial and gender discrimination; efficient and beneficial use of water in the public interest; the socio-economic impact of the water use or uses if authorised; or of the failure to authorise the water use or uses; the likely effect of the water use to be authorised on the water resource and on other water users; investments already made and to be made by the water user in respect of the water use in question; and the quality of water in the water resource which may be required for the Reserve and for meeting international obligations.

39. Section 40 of NWA regulates the WULA. It requires that any person or entity intending to use water in a manner described in s 21 must apply for a license. An ELWU is defined in s 32 of the NWA. The relevant part of that definition for the purpose of this appeal provides as follows:

> *'(1) An existing lawful water use means a water use-*
>
> *(a) which has taken place at any time during a period of two years immediately before the date of commencement of this Act and which-*
>
> *(i) was authorised by or under any law which was in force immediately before the date of commencement of this Act; '.*

40. Verification of an ELWU is provided for in s 35(1) of NWA which requires a responsible authority to require any person claiming an entitlement to that water use to apply for a verification of that use.

41. Section 53 of NWA provides that:

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

(a) any provision of this Chapter;

(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.'

The evidence

42. The Appellant called three witnesses, two expert witnesses and one factual witness. The first witness called was Mr Stephanus Philipus Schoeman ('*Schoeman*'), a macadamia and a subtropical crop agronomist, holds BSc Agriculture in Plant Production and Soil Sciences and MSc Agriculture from the University of Pretoria. He has an experience of over 22 years.

43. His expertise is in the production of macadamia nut trees, irrigation systems, and water demand for macadamia nut trees. Schoeman testified that he did a modelling of potential water use required by the Appellant for the macadamia development. The modelling showed that the macadamia nut trees would require around 2000m^3 per ha/a of water, which he calculated to be up to 60 000m^3 p/a for the 28 hectares. He testified that based on his modelling a storage dam of 70 000 m^3 was thought to be sufficient. In his modelling he did not do any hydrological studies.

44. According to Schoeman, macadamia growers cannot work from a canal system only but require water to be stored so that it can be used when required. This is so because, very few areas can grow macadamia successfully with rainwater only. Most production areas, including the area where the proposed dam is to be constructed, require supplementary irrigation. Schoeman testified that there are critical stages in a macadamia nut tree, namely, flowering, early part of fruit setting, and cell division stage. He testified that the driving factor during these stages is climate change which can only be addressed through irrigation.

45. He further testified that during transpiration of plants water is lost through the leaves. To address this water loss, irrigation is vital. He further testified that in that area where macadamia trees are proposed to be planted, historical rainfall is not very stable and the biggest demand of water for the macadamia crop would be during spring and summer months of the year. This is why storage of water is required, he testified. On water supply, he testified that 60% of the Appellant's water supply comes from rainfall and 40% from the canal system.

46. Under cross examination Mr Schoeman confirmed that he was not aware that the Appellant's property will not solely depend on the canal system for water supply but that it also had access to groundwater. He also indicated that he did not do an independent dam sizing exercise but was told by the Appellant's representatives. He also conceded that in his modelling he did not consider the 2500 m^3 storage dam in the Appellant's property.

47. Mr Schoeman further indicated that he did not consider the Appellant's claimed ELWU in his modelling because it was not brought to his attention. What he was

asked to do was to do a modelling to determine how much water the Appellant would require for the proposed planting of macadamia nut trees. In his modelling of the water requirements, he considered the climatic data at his disposal, and he modelled macadamia specific water requirements. He, however, reiterated that the dam size required by the Appellant of 70 000 m^3 is sufficient because it can store the demand required by the plants, and it will also make provision for potential silt buildup because one cannot suck water from the bottom of the dam but should suck from the top. This evidence was uncontested by the Respondent.

48. On the issue of the ELWU, Mr Schoeman stated that a right to a water allocation does not mean the water is available. The water needs to get to the farm, whether via borehole or canal or dam or whatever means.

49. The second witness called was Mr Jan Brink (*'Brink'*), who holds B Eng (Civil Engineering) degree, and M Eng (Civil Engineering) degree acquired in 2003 and 2007, respectively. He is a registered professional civil engineer since 2008, and he has been an Approved Professional Person for Dam Safety related tasks since 2009. He specialises in dam safety assessments, and new dams designs and upgrades of old dams.

50. Brink testified that he provided a concept design of the Appellant's proposed dam during the WULA process. The concept design provided information on how such a dam would be constructed and what it would consist of. He testified that the dam capacity was 73 000 m^3, with a dam wall height of 17m, and that the total surface area of the proposed dam was 12 000 square metres (1,2 ha).

51. Under cross examination Mr Brink confirmed that he provided the volume of the proposed dam design based on the water demand calculated in the hydrology study of Dabrowski. Nothing contentious turned on his evidence other than whether the dam sizing was correct.

52. The third witness called was Ms Denina Jacquiline Bernard ('*Bernard*'), who is the owner and director of the Appellant. Bernard testified that on 28 March 2021, the appointed earthworks contractor commenced with the clearing of the site for the construction of the proposed dam, by scraping out the basin area which accounts for approximately the top narrow half of the non-perennial watercourses and comprised of steep vegetated valley sites and a non-perennial water course at the bottom of the valley.

53. Two weeks later she received a call from Ms Diane Mouton, an official of the DEADP who informed her that they had received a complaint that she (Bernard) had started with the clearing of a site in view of constructing a dam without the necessary EA.

54. She further testified that the proposed dam construction activity commenced on 28 March 2021 and was halted around 17 April 2021. The total area excavated and disturbed covers approximately 1.2 hectares of approximately 2.2 hectares within the non-perennial water course that was cleared off impenetrable alien vegetation.

55. Bernard confirmed that the dam construction was halted, after she received a directive from the Respondent and a compliance notice from DEADP. The notices from both departments confirmed that a site visit was conducted by officials from the two departments, and it was discovered that the Appellant had commenced with an

unlawful development of a dam within a watercourse and degradation to the environment without an EA and a WUL.

56. She testified further that upon receipt of the directives and a compliance notice, she immediately constituted a multidisciplinary team of consultants to assist with the WULA and an application for an EA under s 24G of NEMA. A Section 24G application is essentially an application for rectification or correction of commencement of a listed activity without an EA.

57. Under cross examination Bernard, confirmed that the site remains unrehabilitated because she received legal advice that if she continues to comply with the directives that required her to rehabilitate the site, she would be triggering another listed activity in terms of NEMA, and that it will cause problems with the Appellant's s 24G application process. She further testified that she was instructed by DEADP officials that she was not allowed to do anything to the site until all her authorisations have been granted.

58. According to Bernard, macadamia crops required a lot of resources and funds were expended in preparation for the farming activity. Such preparations included large solar setup, pump house and infrastructure, extra vehicles, another tractor, road grader, and a chipper. In the WULA, it was estimated that nearly R20 million has already been spent on the project. Additional expenditure is anticipated.

59. She further testified that this was her first farms, and she was not aware of the regulatory requirements relating to the activity she sought to undertake. Nothing contentious turned on her testimony.

60. The fourth witness for the Appellant was Dr James Michael Dabrowski (*'Dabrowski'*). Dabrowski holds a BSc degree in Zoology and Botany from Stellenbosch University, BSc Honours degree in Zoology from Stellenbosch University, a MSc degree (Cum Laude) in Zoology from Stellenbosch University, and a PhD from University of Cape Town. He has expertise in aquatic ecology, water quality, ecotoxicology and hydrology.

61. When asked by the Tribunal he confirmed that he was not a hydrologist and that his main experience would be more on the water quality and environmental pollution.

62. His testimony was about a hydrological assessment report he compiled dated 10 June 2022 (*'the report'*). The purpose of the report was to conduct an assessment to determine the quantity/volume of water required to irrigate the macadamia nut trees; the size of the proposed dam; whether the Appellant had any ELWU in the form of water from the canals/furrows (water diverted out of the Rondebosch River); and if so what the quantities where, and whether any additional water will be required over and above the ELWU.

63. He testified that he used the SAPWA. Based on SAPWA he estimated the irrigation requirements for the 28 hectares of macadamias nut trees under drip irrigation at a minimum of 81 000 m^3/pa and a maximum of 116 000 m^3/pa during below average periods of rainfall. He explained that he reached this conclusion on the basis that there is still 75% of the catchment area that is undeveloped, and considering it is a non-perennial stream, the impacts on the aquatic ecosystem downstream of the dam is relatively low, and also there are no other users downstream of the proposed dam. So, by capturing that water in the catchment, it would not adversely affect any other users downstream of that dam.

64. Dabrowski confirmed that he did not consider a small dam on portion 12 of the Appellant's farm. He explained that it was an oversight from his part, but that such a dam is insignificant.

65. In estimating how much water the Appellant's three properties could realistically receive from the furrow he looked at the catchment area above the furrow, and used the Water Resources Simulation Model (*'the WRSM'*) or Pitman model, a key component of the broader water resource management framework used in the country which assesses and manages water resources, to estimate flows coming down that river until it meets the point where the furrow diverts water out of the river.

66. Dabrowski confirmed that he was using it to calculate the surface water allocation that would go to the farm, and based on that estimate, he would then know how much water would have to be abstracted from groundwater. He testified that the model was not used to estimate the volume of water required from groundwater. He first delineated the catchment area which he concluded that it was 0.14 km^2. According to him the proposed dam covers 25% of the total catchment drainage area.

67. He testified that the furrows could convey a maximum of 0.078 m^3 p/s. Regarding his final report of June 2022, he testified that Mr Zimu of the Respondent indicated to him that he does not believe that his estimated volume of 50377 m^3 (the mean monthly flow volumes diverted out of the Rondebosch River) will reach the Appellant's farm. In other words, Zimu was of the view that less water will reach the farm. As a result of Zimu's view, Dabrowski testified that he then went back to the information which was provided to him.

68. He further stated that during the whole process of the WULA, he had been trying to get information from the RRWUA, relating to the measurement of the flow of water on the furrow system, to assist him with his estimation. The RRWUA was unwilling to provide that data. However, one farmer who was a member of the RRWUA provided him with his own measurements relating to his farm (the farmer's farm).

69. Based on his experience in the catchment and having seen what was going on in the catchment in terms of irrigation activities, and since he was already concerned that his model was indeed an overestimate, he then used these spot measurements that were provided by one farmer referred to above, to recalibrate his model predictions. He then reduced the initial estimate of 50 377 m^3/a, by 50% to a mean monthly flow of 25 189 m^3/a.

70. When asked, by counsel for the Respondent, whether he could not agree with Mr Zimu on the 50 000 m^3/a, Dabrowski indicated that, there are merits to using 50 000 m^3 because it is essentially a middle figure between his lower estimate of 25 000 m^3 and the estimate of 78 000 m^3/a that Zimu produced. If there was any further uncertainty, the 50 000 m^3/a could be used as a compromise value. His estimated mean monthly surface flows (surface run-off) from the catchment area of the dam, was 12 200 m^3.

71. When asked why he did not follow the same method that is normally used to calculate ELWU, he stated that he has quite a lot of experience in doing verifications of ELWUs for various landowners. The method he used involves looking at an aerial photograph of crops that are grown on a property, estimating that area, and then applying a crop factor, based on what crop it is, to estimate the total volume of water that would be used for irrigation of that crop. In his view, the best way of trying to get any idea of what the ELWU for Appellant's properties was to estimate what the hydrology was

and how much water they would receive. Under questioning by counsel for the Respondent, Dabrowski further stated that the best way would be to get some long term measured data, as the first option. The second option would be what he has done in his hydrology report and the third option is the Council for Scientific and Industrial Research (*'the CSIR'*) methodology.

72. Under cross examination, Dabrowski was referred to an email from the Respondent authored by Zimu. In the email Zimu stated to Dabrowski (in relation to his hydrological report) that he was not convinced that the estimated volume of 50,377 m^3 will reach the Appellant's farm and also enquired if he had done any spot measurements on the furrow end. Zimu further stated that he thinks for larger systems or new system with larger abstractions they will need to discuss the information expected and the methodology thereof. Dabrowski confirmed that he did not revert to the Zimu.

73. Dabrowski was further referred by counsel for the Respondent to the ELWU volumes proposed by the CSIR in October 2022 to be 155,129 m^3/a. His response was that in his opinion that volume is impossible and that it does not exist.

74. Counsel for the Respondent put it to Dabrowski that the methodology used for the measurement of the water flow and rain fall did not provide any scientific method. His response was that the methodology was clearly described and that it is a model that is widely used for estimating hydrology throughout the country that has been calibrated for each catchment area throughout the country. Further that the outputs of the model were produced in tables and graphs in the report.

75. He also emphasised that there are no specific guidelines available on what exactly is required in the hydrological report, and that he would rely on his best knowledge. He testified that this is the reason why he engaged with Zimu, by sending him the report in advance to give him an opportunity to review it and confirm that all the necessary information was included. Based on Zimu's response, he was led to believe that he was satisfied with the content of the report.

76. In defending the model used, Dabrowski explained that his approach was to use a modelled approach, which is described in the report. Another option was to measure the flow, but that would require repeated measurements over an extended use, and this was beyond the scope of what he could typically do for the Appellant, based on the time and budget available. So, ideally, he would have preferred a long term measured. He did try to obtain the long term measured data from the RRWUA but with no success. The contentious issues arising from his evidence was whether he used a correct model to measure the ELWU which would reach the Appellant's farm from the canals.

77. The Respondent called three witnesses. The first witness called was Ms R M Mphahlele ('*Mphahlele*'), who holds a National Diploma and B Tech in Water Care. She works as a water officer and was also responsible for assessing the Appellant's WULA.

78. Mphahlele testified that on 21 July 2021, they went to the Appellant's farms where they observed an attempt to construct the proposed dam, and furrows conveying water. The proposed dam's capacity was 300 000 m^3. When the Appellants was requested to produce proof of authorisation for the proposed water uses, the Appellant submitted three certificates from the RRWUA showing water use entitlement in respect of

Portions 12, 15 and 17 of the farms. These certificates did not show the actual volumes or scheduled quota of water the Appellant was entitled to. The volumes for each of the three properties were indicated in a ratio of 1:31. In addition she indicated that the Respondent has no record of these entitlements in their system as the RRWUA is not registered with the Respondent.

79. According to Mphahlele the Respondent considered these entitlements as ELWU, which were still in the process of being verified by the CSIR, an agent of the Respondent, so that the responsible authority could determine the extent and/or lawfulness of the water uses. While still awaiting verification of its ELWU, the Appellant 'verified' its own ELWU and came to the conclusions to which we have already referred above regarding the volumes thereof.

80. She further testified that on 18 October 2022, the Appellant received a notice in terms of s 35(1) in respect of the three properties from CSIR, who were acting on behalf of the Respondent. The notices invited the Appellant to apply for the verification of the lawfulness or extent of the claimed ELWUs. The volume for the water uses which are to be verified, as captured in the notices, are 60 337 m^3/a, 47 303 m^3/a, and 47 489 m^3/a. The total volumes add up to 155 129 m^3/a.

81. Ms Mphahlele testified that by signing the s 35 (1) notices, the Appellant accepted the proposed volumes of water uses which was to be verified and determined. She further confirmed that, to her knowledge, the Appellant never challenged the proposed ELWU. She further conceded that the water uses have not yet been determined in terms of s 35(4).

82. According to her testimony, the Appellant's farms had no historic irrigation and that they were dryland pastures. Under cross examination Ms Mphahlele clarified that the freshwater ecologist recommended the license from a s 21(c) and s 21 (i) perspective because in terms of that aspect, the WULA met the requirements, but it was declined mostly based on the hydrological and civil engineering aspects.

83. When asked by counsel for the Appellant whether the Appellant was given an opportunity to improve or provide further information in support of its WULA, Mphahlele responded in the affirmative. The information received from the Appellant was sent to a specialist of the Respondent for screening.

84. The Tribunal enquired from Mphahlele whether the Respondent should not have first finalise the verification and determination of the Appellant's claim for an ELWU before considering the WULA, she indicated that is something that can be done internally. Further that with the system they were using, they had an ongoing project in terms of which the CSIR will determine the ELWU.

85. It was further put to Mphahlele that the NWA requires the responsible authority to verify the extent and/or lawfulness of the ELWU and that only once this has been done could the determined ELWU be used in a WULA. Mphahlele struggled to respond to this question and kept insisting that the Appellant's ELWU had been determined by the CSIR. Yet she conceded that the verification and determination in respect of the Appellant's ELWU was yet to be finalised.

86. The second witness called by the Respondent was Mr Lwamkelo Sodladla ('*Sodladla*'), who is a compliance officer. He holds a BSc and BSc Honours degrees in Environmental Science. His responsibilities entail conducting water use audits,

pollution incidents, suspected unlawful water uses, and making comments on s 24G applications.

87. He testified that on 21 July 2021, he, together with some officials of the Respondent, went to conduct an investigation of alleged unlawful water uses in the Appellant's farms. This investigation came about as a result of a complaint that the Appellant had commenced with the construction of an in-stream dam without the necessary authorisations.

88. His investigation revealed that the Appellant cleared vegetation and excavated a watercourse, without a water use authorisation. After the investigation a report was compiled and a decision was taken to issue a notice of intention to issue a directive in terms of s 53 of the NWA on 20 August 2021. The notice invited the Appellant to make representations as to why the Appellant should not be issued with a directive calling upon him to cease all the unlawful water uses and rehabilitate the affected area.

89. On 16 September 2021, the Appellant submitted its representation in which it acknowledged that it commenced with the sections 21 (c) and (i) water uses on portion 17/232 without the necessary EA and WUL. According to him, the Appellant alluded to the fact that a s 24G process and the WULA have been commenced with.

90. Sodladla, in relation to rehabilitation, testified that the Appellant stated that it was not possible to rehabilitate the excavated area in such a short timeframe as that rehabilitation is complex and will require significant technical inputs.

91. Having considered the representations, on 4 November 2021 the Respondent issued a directive in terms of s 53 of NWA informing the Appellant of the rejection of its

representations. The directive was hand delivered to the Appellant on 14 December 2021.

92. In terms of the directive's the Appellant was directed to, among other things, immediately cease with the unlawful water use activities within a period of 14 working days; appoint a suitably qualified SACNASP registered aquatic/freshwater specialist to assess the impact of the excavated river basin on the non-perennial stream that is a tributary of Whiskey Creek; compile and submit an impact assessment and a rehabilitation plan for the affected areas of the watercourse for approval by the Respondent within 30 working days; rehabilitate the impacted area within 60 working days from the date the rehabilitation plan has been approved by the Respondent; and submitted an action plan within five working days upon receipt of the directive which must include a detailed time schedule on how the Appellant will implement the provisions of the directive.

93. According to Sodladla, the directive was never complied with by the Appellant and in May 2023, the officials from the Respondent conducted a follow up site inspection. The site remained as it was in 2021. As a result, on 19 May 2023, the Respondent opened a criminal case against the Appellant at the Plettenberg Bay police station.

94. The third witness called by the Respondent is Mr Mkhanyiseni Zimu ('*Zimu*'), who holds a BSc Engineering degree, is registered with the Engineering Council of South Africa as a professional engineer in water resources management and is also a registered with the South African Irrigation Institution. He also attended the PITMEN model and various water resource management courses. He is responsible for verification of water use; assessment of WULAs from a hydrological, environmental,

and social perspectives; dam safety evaluation, assessment, and monitoring on a continuous basis; amongst other things.

95. He testified that his first engagement with the case was on 21 July 2021, when he visited the site with the rest for the Respondent's investigation team. Since that visit he did not have any further engagement with the WULA until he received a call from Dabrowski around June 2022 regarding the hydrological reports, dated May 2022 and June 2022, which Dabrowski, submitted in support of the WULA. He testified that in his assessment of the WULA he relied on the June 2022 hydrological report. He further testified that he understood the hydrological report to be a dam sizing exercise and not an estimation of the ELWU.

96. Zimu indicated that the first time he learnt that the Appellant had an ELWU was through an agricultural business plan report. The report states, on page 211, paragraph 3, that:

> *'Calculations of the precise volumes of water available through the furrow system are difficult to confirm. Two approaches were used in the Hydrology report. The modelled volumes from the catchment split into 31 totalled 16 972 m^3/a per portion, with a total for all three portions of 50 377 m^3/a. Transmission losses and uncertainty around the volumes of water that bypass the furrow system probably over-estimate this value and measured flows by a furrow user were as much as 50% lower than this figure. A more likely value proposed in the hydrological report is therefore 25,000 m^3/a.'*

97. According to Zimu, the primary methodology is a DWS standard guideline which uses various remote sensing techniques, satellite images, and sometimes in various

catchment, you include long term surface water runoff, but that is not the primary way of estimating existing lawful use.

98. He further testified that based on the established methodology, his estimated volume of 78,000 m^3/a for the ELWU would be closer, and because he operates in a regulated environment, in his assessment, he must follow the prescribed methodology. If there is additional information that a user or anyone wants to adduce to motivate why the estimation using a standard methodology is incorrect, that should be put in the process for the verification of the ELWU so that it could be properly considered. His contention was that the hydrological study can be part of the information used for the verification of an ELWU, but it is not the primary method of verification.

99. In disagreeing with Dabrowski on the Pitman model, Zimu stated that he accepted the general methodology in terms of the Pitman modelling up to the aqueduct and that is where the Pitman model ends. Also, that the Pitman model cannot be used to assess groundwater. However, when he read the Appellant's hydrology report he noted that in estimating the yield of the dam, the report referred to the Pitman model that was used to estimate the yield which had a combination of the groundwater component.

100. Zimu further testified that the overall summary of the Appellant's report was that the sizing of the dam was done using long term modelled data, which is streamflow, but which eventually included groundwater or combined with groundwater component. He testified that it was not possible to use the Pitman model to estimate groundwater.

101. Zimu explained that generally in making recommendations to the committee, he is required to look at the volumetric aspects, meaning how much water balance, how

much to allocate and how much is needed, and consider existing lawful use or potential existing lawful use.

102. In the case of the Appellant, he was left in doubt because the volume as estimated by the Appellant using the hydrological study was a novel method to estimate ELWU. Further that there was no registered water use that one could see a perspective of what was claimed previously so as to quantify the claimed volumes. The only part that was available as part of the WULA was the certificates from the RRWUA, which did not have any volumes. But on further analysis of the Appellant's hydrology report, he did not dispute the water use as proposed by the Appellant.

103. Zimu testified that he mostly accepted the Appellant's methodology in terms of estimating the runoff, but on the furrow measurement, it was not detailed at all for his understanding and the actual data was not provided. He also took issue with how the rainfall was measured, and that the modelling exercise ends in 2009.

104. Regarding the dam size of the volume between 20,000 m^3 and 30,000 m^3, Zimu indicated that he used a very quick check, which is more within the average water balance, to get a rough estimation. Further that the size of the proposed dam is always influenced by the inflows.

105. He testified that, in his view, the change in inflows would influence the size. His view was that the better approach was to finalise the verification and determination of the ELWU. This, he testified that ought to have been finalised prior to the consideration of the WULA as this would have assisted in making a recommendation on the volume to be allocated under s 21(a) of NWA and a more feasible dam size. This volume of

an ELWU, once determine, will assist in determining whether the Appellant has sufficient water to meet the irrigation demand.

106. His testimony was further that where applicants rely on an ELWU for a WULA, applicants are advised to start with the verification and determination of ELWU prior submitting their WULAs. On the size of the dam, he testified that the experts are in agreement that the capacity of the proposed dam, based on the proposed current location, cannot exceed 70,000 m^3/a.

107. He also testified that there was a difference between the hydrological method used by the Appellant and the methodology prescribed in the Respondent's guidelines. The Appellant's methodology estimated the potential water that will reach the Appellant's properties. The Respondent's guideline focuses on estimating water use on those properties and looks at other infrastructure on the property such as storage or other additional sources.

Discussions

108. As we see it, this matter turns on whether the Respondent was correct in dismissing the Appellant's WULA on the basis that the Appellant's property already has sufficient water supply to meet the water demand for the proposed 28 ha macadamia orchards when regard is had to the Appellant's 'confirmed' ELWU volumes. In turn the answer to this question is dependent on whether or not the ELWU had been determined in terms of s 35 (4).

109. There is no dispute between the parties regarding the water demand for the 28 hectares macadamia nut trees. It is accepted that a farm of this size would require a minimum demand of 81 200m^3/a, and a maximum demand of 116 000m^3 p/a. Counsel for the Respondent submitted during the opening address that the Respondent appreciates that the Appellant requires an additional storage.

110. What is in dispute is whether the proposed water demand of 81 200m^3/a, which is made up of the proposed new taking of 69,000 m^3/a of groundwater; and 12 200 m^3 p/a of surface water, can be met without any additional water allocated to the Appellant.

111. The Respondent contends that the information in the Appellant's hydrological report, which was submitted in support of the WULA, had major gaps resulting in the underestimation of the Appellant's ELWU. According to the Respondent it is this underestimation of the ELU that has resulted in the design of the proposed dam which will lead to the Appellant storing more water than is necessary.

112. The Respondent led evidence that the ELWU process was commenced with by commissioning the CSIR, which proposed that the Appellant's total ELWU was 155 129m^3/a. The Appellant confirmed the proposed volume by signing the s 35(1) notice issued by the Respondent. However, in its hydrological report, the Appellant suggested an ELU volume of 25 000 m^3/a. As at the date of the hearing of the appeal, the actual volume of the appellant's ELWU had still not been verified and determined by the Respondent. That process is currently underway.

113. The Respondent argues that the proposed water demand of 81,200 m^3/a did not consider the Appellant's ELWU of 155,129 m^3/a. According to the Respondent, when factoring in the Appellant's ELWU, the proposed water usage would exceed the required demand by 74,129 m^3/a. This, the Respondent contends, would result in an overallocation of water beyond the Appellant's actual water demands.

114. However, Zimu and Dabrowski agreed in their joint minute that the ELWU volumes were not finalized during the technical assessment of the WULA, and therefore there was no confirmed ELWU. They also agreed that the ELWU volume of 155,129 m^3/a proposed by CSIR is overstated.

115. The Appellant contends that it requires additional water to be allocated. In its written submissions, it is submitted that the ELWU had not been determined. This is common cause. It is further submitted that the Appellant was issued with three notices in terms of s 35(1) with the proposed ELWU volumes for the Appellant's properties, which volumes the Appellant accepted provisionally. Further that a s 35(1) notice is the first step in the verification process and only after a determination thereof has been made in terms of s 35(4) would the Appellant's water use have been determined as an ELWU.

116. At the end of the trial the Tribunal requested counsel for both parties to, in their written submissions, address specific questions including whether the WULA, which was dependent on a claim of an entitlement to an ELWU, could be adjudicated by the Respondent prior to the finalisation of the determination of the extent and/or lawfulness of the Appellant's ELWU.

117. In response, the Appellant's written submissions do nothing more than refer the Tribunal to the evidence of Mphahlele, which was to the effect that the Respondent could have first determined the extent and/or lawfulness of the ELWU before deciding on the WULA.

118. The Respondent did not make any submissions in this regard. Instead, the Respondent reiterated the evidence already heard by the Tribunal regarding the ELWU allocation from the RRWUA. Counsel for the Respondent urged the Tribunal to rather consider the impact of the granting of the WULA on the rights of other lawful water users and the Appellant's non-compliance with the s 53(1) NWA directive.

119. An ELWU is defined in s 32 of the NWA thus:

> ***'Definition of existing lawful water use***
>
> *(1) An existing lawful water use means a water use-*
>
> *(a) which has taken place at any time during a period of two years immediately before the date of commencement of this Act and which-*
>
> *(i) was authorised by or under any law which was in force immediately before the date of commencement of this Act;'*

120. The High Court in the matter of *Forestry South Africa*[4] interpreted the meaning of a two-year period referred to in s 32(1)(a), which is colloquially called the qualifying period. In *Forestry South Africa,*[5] it was held that the qualifying period referred to in s 32(1), which is the period for the verification of an ELWU, is the period between 1 October 1996 and 30 September 1998.

---

[4] *Forestry South Africa v Minister of Human Settlements, Water & Sanitation and Others (19684/2019) [2021] ZAWCHC 164; [2022] 1 All SA 169 (WCC) (23 August 2021).*
[5] *para 164.*

121. Section 34 makes provision for the continuation with an ELWU under certain conditions. It also empowers the responsible authority to require registration of an ELWU subject to regulations made under s 26(1)(c).

122. We have already indicated above that the verification and determination of an ELWU is provided for in s 35. In terms of s 35 (4) once the responsible authority has made a determination of the extent and/or lawfulness of an ELWU, such a determination limits the extent and lawfulness of the water use. In other words, if it turns out that the claimed ELWU is unlawful, then the applicant shall have no claim to an ELWU. Secondly, if the determination of an ELWU is found to be lawful but the volume is lesser than the volume claimed by the applicant, the applicant's claim to an ELWU shall be limited to the volume which shall have been determined.

123. A person who has been required to apply for the verification of an ELWU and whose application has been refused or who did not apply, is prohibited from exercising a water use which is subject of such an application for verification.[6]

124. There appears to be a dispute about whether in fact, the Appellant can establish its entitlement to an ELWU as defined in s 32. This much is clear from Mphahlele's uncontroverted evidence that the Appellant's farms had no historic irrigation and that they were dryland pastures. This calls into question whether there was any water use in the said properties by the Appellant or its predecessor during the qualifying period. If it turns out that there was no ELWU which took place between the period 1 October 1996 and 30 September 1998, and which was authorised by or under any law which was in force immediately before the date of commencement of the NWA, then there

[6] *s 35(4).*

can be no claim by the Appellant for an ELWU. However, this can only be resolved through the verification and determination of the ELWU under s 35.

125. It is clear, therefore, that the Respondent could only find that the Appellant already has sufficient water if the Respondent had determined whether the Appellant has established a claim for an ELWU and if so, once the Respondent has made a determination of the Appellant's ELWU. If this had been done, the Respondent would have known whether the Applicant's ELWU is lawful and if so, what is the extent (volume) thereof. It is common cause that the determination is still under consideration. Thus, it is inconceivable that the Respondent could have found that the Appellant has sufficient water without having made a determination in terms of s 35 (4).

126. For these reasons, we find that the Respondent was wrong to find that the Appellant's property already has sufficient water supply to meet the water demand sought in terms of the WULA.

Non-compliance with s 53(1) NWA directive

127. As indicated above, counsel for the Respondent implored the Tribunal to take into account the failure to comply with directive in terms of s 53 (1) of the NWA by the Appellant. It is common cause that the Appellant has not complied with the directive rehabilitating of the site. The Appellant cites legal advice to the effect that such rehabilitation action might trigger another listed activity in terms of NEMA which can only be undertaken once an EA has been granted.

128. For the purposes of this appeal, nothing turns on the non-compliance with the s 53 (1) directive. The recourse to the Respondent does not lie with the Tribunal but rather the Respondent's recourse is to be found s 53 (2) of the NWA which provides that if the action is not taken within the time specified in the notice, or any longer time allowed, the responsible authority may 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 apply to a competent court for appropriate relief.

129. The Tribunal has no power to enforce compliance with a directive issue under s 53.

The impact of the WULA if granted

130. The Appellant presented evidence that granting the WULA would not negatively impact other authorized water users. This ground of appeal was predicated on the Respondent's finding that if the additional water was allocated over and above the Appellant's purported 155 129 m^3/a of ELWU, such water would be in excess of what the Appellant needs.

131. Based on our finding that existence or otherwise of the ELWU as contemplated in s 32(1)(a)(i) and that the ELWU is yet to be determined, we find that this ground of appeal falls to be upheld.

Conclusions

132. Although the Appellant raised several grounds of appeal, the dispute between the parties comes down to the actual volumes of the Appellant's ELWU. In other words,

whether the Appellant's ELWU is 25 000 m³/a as contended by the Appellant or 78,000 m³/a as contended by the Respondent, or 155 129 m³/a as suggested by the CSIR. Once the volumes of the ELWU have been verified and determined in accordance with s 35 of the NWA, the question of whether the Appellant already has sufficient water and thus does not need any additional water or whether if the proposed taking is authorised, it would lead to overallocation, will be determinatively resolved. This will also resolve some, if not all, of the grounds of appeal.

133. It is common cause that the Appellant's ELWU has not been verified and determined by the responsible authority. Both parties' experts eventually agreed that a middle figure of 50,000 m³/a is a more workable volume than the 155,000 m³/a proposed by the CSIR. However, this does not amount to a determination of the extent and/or lawfulness of the Appellant's ELWU as provided for in s 35 (4) of the NWA. This can only be a recommendation to the responsible authority regarding determination of the extent and/or lawfulness of the ELWU. As already indicated above, the process under s 35 is informed by whether the Applicant is a claim for an entitlement to an existing of water use is contract plated in s 32 (1) (a) (i) has been established.

134. In the absence of such a determination, the Respondent could not make a decision on whether the Appellant's proposed taking and storage would lead to an overallocation, and storage in excess of the Appellant's water demands. In other words, the Respondent could not make a decision to the effect that the Appellant already has sufficient water allocated to meet the irrigation demands of the proposed 28 hectares of macadamia orchards.

135. For these reasons, we agree with the Appellant that the Respondent was incorrect to reject the WULA on that basis that the Appellant already had sufficient water in the form of an ELWU, which had not yet been verified and determined. Consequently, the Appellant's ground of appeal succeeds.

136. Insofar as the Appellant's grounds of appeal to the effect that the combined estimated furrow allocation for the Appellant's three properties of 25,000 m^3/a is not sufficient to meet the irrigation demands of 28 hectares of macadamia trees, which requires a minimum of 80 000 m^3/a and a maximum of 116 000 m^3/a, we find that this ground of appeal is disposed of by upholding of the Appellant's ground of the appeal already dealt with above, namely that the Respondent ought to have first verified and determined the ELWU in order to determine the sufficiency or otherwise of the water already allocated to the Appellant.

137. Our finding above also disposes of the ground of appeal relating to the dispute around the sizing of the proposed dam in that once the verification and determination of the Appellant's ELWU is finalised, it should not be difficult to determine the size of the proposed dam as the size of the dam will be informed by the volumes of water that the Appellant is entitled to take and store.

138. We find that the Appellant's ground of appeal in relation to the finding by the Respondent that the proposed water use does not meet the requirements of s 27 (c) has no merit. Similarly, the reliance on *Makhanya* is misplaced. In *Makhanya* the appellant, Goede Wellington, was found by the Tribunal to meet all the requirements save for the requirements relating to s 27 (b). The SCA found that there was no

indication in the NWA that s 27(1)*(b)* is to be regarded as in any way more important than the other factors.[7]

139. The SCA also found that the need to redress the results of past racial and gender discrimination is only one factor in a non-exhaustive list of several factors that have to be taken into account when issuing a WUL. Further that it could not even be said with any degree of certainty that Goede Wellington did not satisfy the s 27(1)*(b)* requirement.[8]

140. What is required to be done is to ensure that a reasonable balance is struck between all the factors set out in s 27*(b)*, and some not mentioned in the section, owing to its inclusive nature, held the SCA. It must be pointed out that the case of *Makhanya*[9] also speaks to the difficulty faced by officials of decision makers in making a balancing act on the consideration of all factors prescribed in s 27(1) as follows:

> '*Much like the situation facing the court in Bato Star, section 27(1)(b) contains a wide number of objectives and principles. Some of them may conflict with one another, as they cannot be fully achieved simultaneously. There may also be many ways in which each of the objectives stand to be achieved. The section does not give clear guidance on how the balance an official must strike is to be achieved in doing the counter weighing exercise that is required.*'

141. In the current appeal, the Respondent's rejection of the WULA was not based solely on the requirements s 27 (c). The rejection was based on the purported resultant over

---

[7] *Ibid para 33.*
[8] *paragraph 37.*
[9] *paragraph 33.*

allocation of water, the over estimation of the required capacity, that the Appellant already had sufficient water based on its ELWU, and the inclusion of groundwater into the long-term in-stream dam sizing, amongst other things. For this reason, this ground of appeal is dismissed.

142. The Appellant further contended that the Respondent failed to appreciate that the building of a dam on its property will be used to store the Appellant's ELWU. For this proposition the Appellant relies in the *African Realty* judgment.

143. The reliance on the on the Tribunal's judgement in the *African Realty* case is misplaced. The facts of that case are distinguishable from the fact of this case. This is so because in that case the issue was whether the relevant catchment had sufficient water for further allocation or not. In this case, the issue is whether further allocation to the Appellant will result in overallocation or not. There is no dispute as to whether the Appellant is entitled to store its ELWU, if the ELWU meets the requirements of s 32 (1) (a) (i) and it has been verified and determined in terms of s 35. The issue is what are the actual volumes of the ELWU, which in turn will inform the sizing of the dam. But that can only happen once the ELWU has been verified and determined in terms of s 35.

144. In light of our finding in respect of determination of the ELWU, this ground of the appeal cannot the sustained.

145. Regarding the contention by the Appellant that its current storage of 2500 m^3 p/a is not sufficient to irrigate its macadamia orchards, it is clear that the Appellant believes that the Respondent is opposed to it storing water into the proposed dam. The contention

by the Respondent is that the Appellant has not factored in its ELWU when estimating its water demand. This dispute is intrinsically linked to the verification and determination of the Appellant's ELWU. For this reason, this ground of appeal is dismissed.

Powers of the Tribunal on appeal

146. An appeal before the Tribunal takes the form of a rehearing. The Tribunal may, thus, receive new evidence.[10] In other words, it is an appeal in the wide sense, which is a complete rehearing and redetermination of the merits of a case, with or without additional evidence or information.[11] Under this type of appeal the Tribunal is not confined to the record of the body a *quo*.

147. The Tribunal can, therefore, after having reconsidered the appeal, replace the-decision of the responsible authority with that of its own. In doing so the Tribunal must take into account several factors. First, it must consider whether it is in as good a position as the responsible authority to make the decision. Second, whether the decision of an administrator is a foregone conclusion. Third, it must consider other relevant factors, such as the delay, bias, and the incompetence of an administrator. Finally, it must consider whether a substitution order is just and equitable. This involves consideration of fairness to all the implicated parties. In each matter all the relevant factors must be examined on a case-by-case basis.[12]

---

[10] *Tikly and Others v Johannes, N.O., And Others 1963 (2) SA 588 (T) at 590G. See also item 6 (3) of Schedule 6 to the Act read with rule 7(1) of the Water Tribunal Rules.*
[11] *at 590G.*
[12] *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another (CCT198/14) [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) (26 June 2015), para 47.*

148. The Appellant argued that it would be a waste of time to remit the WULA to the responsible authority for reconsideration, as further delays will prejudice the Appellant as the macadamia nuts tree have already been planted and require additional water as soon as possible.

149. In this appeal the technical reports relating to the verification and determination of the Appellant's ELWU are not before us. In any case, the process of verification and determination of an ELWU is of a technical nature and the Tribunal is not in position nor was it called upon to adjudicate the dispute relating to the determination of the ELWU.

150. We find that in light of the fact that the resolution of the dispute between the parties is contingent upon the finalisation of the verification and determination of the Appellant's ELWU, the Tribunal is not in the same position as the responsible authority in determining the ELWU. Additionally, the Tribunal is not ceased with the dispute relating to the determination of the ELWU. It can only do so once the responsible authority has made a determination, and the Appellant is dissatisfied with such a decision.

151. For these reasons we find that remittal of the matter to the responsible authority is the most appropriate remedy.

Order of the Tribunal

152. The Tribunal makes the following order:

a. The appeal is upheld insofar as Appellant's grounds of appeal have not been dismissed as set out above.

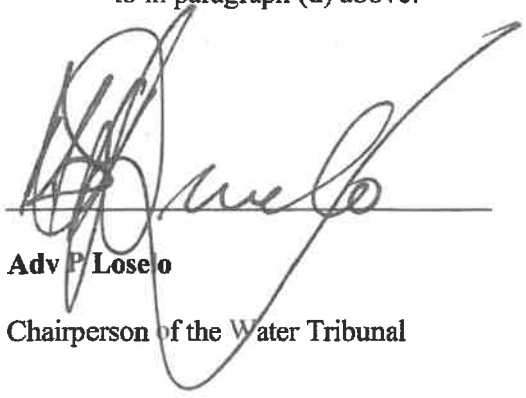
b. The decision of the Respondent to refuse the Appellant's WULA under file number WU21607 (NO.27/2/1/K560/3/1) dated 21 July 2022, is set aside, subject to paragraph (a) above.

c. The Appellant's WULA is remitted to the Respondent for reconsideration.

d. The Respondent is directed to verify and determine the Appellant's ELWU in accordance with s 35 of the NWA within a period of 60 calendar days of this order.

e. The Appellant is directed to submit any additional information or report to the Respondent in respect of the reconsideration of its WULA, within 30 calendar days of this order, if the Appellant so chooses.

f. The Respondent is directed to reconsider the Appellant's WULA within a period of 60 calendar days from the period referred to in paragraph (e) above, subject any appeal under s 148(1)(e) of the NWA in respect of the verification and determination referred to in paragraph (d) above.



Adv P Loselo

Chairperson of the Water Tribunal

I agree

Lekgetho

Adv N. Lekgetho

Additional Member of the Water Tribunal

Appearances:

For the Appellant:	Adv JHA Saunders
	Instructed by: Adams & Adams
For the First Respondent	Adv N. Rasalanavho
Instructed by:	State Attorney, Pretoria