

IN THE WATER TRIBUNAL

APPEAL NUMBER: WT0/21/EC

In the Appeal of:

DIE LOUIS & MADELIZE VAN ZYL TRUST

APPELLANT

and

DEPARTMENT OF WATER AND SANITATION

FIST RESPONDENT

And

**ACTING CHIEF DIRECTOR:
WATER USE LICENCE ADMINISTRATION**

SECOND RESPONDENT

**CORAM: ADV. N. MAAKE
HEARD: 9 February 2023; 27-28 February 2023.
DELIVERED: 11 April 2023**

Order

1. The appeal is successful.
2. The application for a Water Use Licence by the appellant is hereby remitted to the Respondents for a proper determination.
3. The evaluation of the Water Use Licence application must be completed within 90 days from the date of this order.

Judgement

1. INTRODUCTION

This is an appeal to the Water Tribunal in terms of Section 148(1)(f) of the National Water Act 36 of 1998 (“the National Water Act”) against the decision of the Second

Respondent to decline DIE LOUIS & MADELIZE VAN ZYL TRUST's ("the Appellant's") application for a water use licence to abstract surface water for irrigation purpose.

2. The Appellant applied in terms of section 40(1) of the National Water Act for the taking of water from a water source in accordance with section 21(a) as follows:

2.1 To abstract ground water for an aquifer through six existing boreholes for a maximum value of 363 318m³ per annum;

2.2 To abstract a total volume of 810 000m³ per annum from the Great Fish River Canal, which forms part of the Orange Fish to Sundays Transfer Scheme ("OFSTS").

3. The area in which the appellant has applied for a water use licence falls within the hydrological sub-area known as the Fish Sub-Area and within the Groot Brak Catchment Area (quaternary catchment area Q11D).

4. The application for the abstraction of ground water was approved but the application for a licence for the abstraction of surface water was declined. The decision to decline the surface water application is the subject of this appeal.

5. The reasons for the decision to decline the water use licence for the abstraction of surface water appear from a letter dated 25 February 2021 written by the Second Respondent to the Appellant.¹ This judgement, and the

¹ Record of the Appeal, p 001-3.

reasons thereof, will only be in relation to the decision to decline the water use licence pertaining to surface water.

6. The bedrock of appellant's grounds of appeal is that the Department did not conduct a hydro calculation exercise pertaining to the application to abstract surface water,² and consequently, the decision of the Acting Chief Director: Second Respondent Water Use Licence Administration to decline this application is irrational.³
7. The appellant further submitted that the Respondents erred and misdirected itself by categorizing the applicant for the Water Use Licence, Die Louis & Madelize Van Zyl Trust as a Historically advantaged individual, despite the fact that the trust is controlled by three white women, and they intend to include people from previously disadvantaged groups.⁴

8. **Legal Position and the Powers of the Tribunal**

Section 148 of the NWA reads as follows regarding appeals to the Water Tribunal:

- (1) There is an appeal to the Water Tribunal –
 - (f) subject to section 41(6), against a decision of a responsible authority on an application for a licence under section 41, or on any other person who has timeously lodged a written objection against the application.

9. The Act states the following regarding the composition of the members of the Water Tribunal in terms of section 146 (3) to (5) of the NWA which reads as follows;

² See page 001-01 of the bundle of documents.

³ See pages 001-06 of the bundle of documents.

⁴ Ibid.

- (3) The Tribunal consists of a chairperson, a deputy chairperson and as many additional members as the Minister considers necessary.
 - (4) Members of the Tribunal must have knowledge in law, engineering, water resource management or related fields of knowledge.
 - (5) The chairperson, the deputy chairperson, and the additional members of the Tribunal are appointed by the Minister on the recommendation of the Judicial Service Commission as contemplated in section 178 of the Constitution and the Water Research Commission established by section 2 of the Water Research Act, 1971.
9. The Water Tribunal was formed as a specialized forum to deal with water-related disputes. The Tribunal can be easily accessed and dispense justice to the affected and interested parties on an expeditious basis. It has been granted broad powers, and it is capacitated by people with special qualifications who are able to deal with the difficult process of approving water use licence applications. Cora Hoexter saliently posits the powers of the Water Tribunal by adopting a point of departure which locates the Water Tribunal as administrative appeals.⁵ She said “Unlike judicial reviews, such appeals are established specially to challenge the merits of a particular decision. The person or body to whom the appeal is made will step into the shoes of the original decision-maker, as it were, and decide the matter anew.”⁶
10. This description of the administrative appeals by Hoexter C, is consonant to the provisions of section 146 (3-5) soritical to different qualifications and

⁵ Hoexter C; *Administrative Law in South Africa* (2nd edition) (2021 edition) Juta at page 65.

⁶ *Ibid.*

background required for people to be appointed as members of the Water Tribunal.

11. Prof Michael Kidd, meritoriously characterised the position and the powers of the Water Tribunal as follows: “In the absence of any other relevant provisions in the NWA (for example, provisions setting out the decisional powers of the tribunal), section 6 (3) of Schedule 6 would be sufficient authority for a conclusion that the appeal jurisdiction of the Water Tribunal is a so-called “wide appeal” which entails a complete rehearing and redetermination of the merits of the case with or without additional information”⁷

12. This unique feature of the Water Tribunal was also confirmed by Counsel for the Respondents, by stating that “Furthermore, where an appeal is a rehearing, the person or body hearing the appeal must step into the shoes of the original decision-maker and decide the merits anew”.⁸ Furthermore, the powers and jurisdiction of the Water Tribunal were also confirmed in the matter of *Tikly v Johannes NO*.⁹ The Honourable Trollip J stated the following: “An appeal in the wide sense, or wide appeal, refers to a complete rehearing and redetermination on the merits of a case, with or without additional evidence or information. This means that the appellate body is not confined to the record of the body *a quo*.”¹⁰

13. Hoexter C furthermore, crystallises the powers of this Tribunal by stating that: “The distinction becomes significant when the question arises whether an appellate body is entitled to correct illegalities committed by the administrator - in other

⁷ Kidd M; *Fairness Floating Down the Streams? The Water Tribunal and Administrative Justice* (2012) 19 SAJELP (25) at page 27.

⁸ See page 8 of the Respondent’s heads of argument.

words it allowed to review the decision as well as pronounce on its merits”¹¹. I credit Counsel for the Respondents for the meritorious submission on this aspect.

14. The proceedings in the Water Tribunal have the status of a Magistrate Court;¹² hence the NWA stipulates that a litigant who is not satisfied with the decision of the Water Tribunal can appeal to the High Court. This unique status of the jurisdiction of the Tribunal was meritoriously articulated by the apex court in *Barkhuizen v Napier 2007 (5) SA 323 (CC)* at paragraph 55: *'[O]ur democratic order requires an orderly and fair resolution of disputes by Courts or other independent and impartial tribunals. This is fundamental to the stability of an orderly society. It is indeed vital to a society that, like ours, is founded on the rule of law. Section 34 gives expression to this foundational value by guaranteeing to everyone the right to seek the assistance of a Court. Section 34 therefore not only reflects the foundational values that underlie our constitutional order, it also constitutes public policy'*.

15. Tribunals are more accessible and less formal than courts. The members of the tribunal apply the rules of the court and rules of the tribunal in a more relaxed and flexible manner; that is, if rules are not complied with, they look at the effect and severity of the non-compliance in order to proceed to hearing the matter fully.¹³

⁹ 1963 (2) SA 588 (T) at 590F-591A.

¹⁰ See also *Rand Ropes (Pty) Ltd v Commissioner for Inland Revenue 1944 AD 142* at par.150.

¹¹ See *Hoexter C; Administrative Law in South Africa*; supra at page 68.

¹² Section 149 (4) The appeal must be prosecuted as if it were an appeal from a Magistrate's Court to a High Court.

ISSUES TO BE DECIDED BY THE TRIBUNAL

16. The two main issues to be decided by the Tribunal were:

16.1. Whether the respondent erred by not conducting a hydro calculation exercise pertaining to the application to abstract surface water, and consequently, the decision of the Acting Chief Director: Second Respondent Water Use Licence Administration to decline this application is irrational.

16.2. Whether the Respondents erred and misdirected itself by categorizing the applicant for the Water Use Licence, Die Louis & Madelize Van Zyl Trust as a Historically advantaged individual, despite the fact that the trust is controlled by three white women, and they intend to include people from previously disadvantaged groups.

16.3. Whether the decision by the Acting Chief Director: Water Use Licence Administration was irrational as not all facts were placed before her. The WULACC raised the lack of Hydro Calculations and Water balances to justify the reasons for declining surface water which was not corrected for the decision maker to make an informed decision which makes **such decision irrational**.¹⁴

EVIDENCE BEFORE THE TRIBUNAL AND THE ANALYSIS THEREOF

17. The appellant relied on the testimony of a single witness, Mr. Joseph Jacobs, who is a former employee of the Department of Water & Sanitation and was based in Ghebeqa. His position was a Senior Administrative Clerk. He liaised with a lot of applicants for water use licences when he was still employed by the Department of Water & Sanitation. Mr. Jacobs testified that his qualification is matric and some certificates in Environmental Management, but he could not mention the name of the certificates that he has obtained, despite being asked several times.

18. Another glaring feature in Mr. Jacobs's testimony was that Mr. Jacobs submitted the Water use licence for the appellant in his capacity as a consultant using his private company, Jacobs Global Solutions (Pty) while he was still employed by the first respondent.¹⁵ He stated that he had submitted his declaration of interest forms to the management, and he then proceeded to submit the application on behalf of the

¹³ Rashri Baboolal-Frank; LLD thesis A critical analysis of tribunals in South Africa to create a harmonised tribunal system. See https://repository.up.ac.za/bitstream/handle/2263/70112/Baboolal-Frank_Critical_2019.pdf. page 62

¹⁴ **Diedericks Heads**

appellant, despite the fact that at the time he submitted the application for the appellant, he did not receive an approval from the Management for him to conduct private work. Even if Mr. Jacobs would have received approval from his manager to do private work in consulting for the applicant for a Water Use Licence, common sense would dictate that he should have recused himself from dealing with this application in his capacity as a department's representative in this matter. This is because Mr. Jacobs would be the same person who submitted the application on behalf of the appellant, and the same Mr. Jacobs was the person (government official) who would have to receive and evaluate the same application that he would have submitted for his client, Die Louis & Madelize Van Zyl Trust. It goes without saying that Mr. Jacobs was very much conflicted, and it would have been highly improbable that he would have dealt with the application in a fair and impartial manner because as a government official, he was processing an application that was submitted by his consulting firm to his office.

19. Mr. Jacobs's testimony was centred around the fact that the first respondent did not conduct a hydro calculation exercise in relation to the part of the application to abstract water from surface water resources, but a hydro calculation exercise was conducted pertaining to the ground water resources. This part of his testimony was never disputed by the respondents. In fact, this part of Mr. Jacobs testimony was corroborated by the respondents as it is stated in the minutes of the EP-WULAAC that was held on 23 September 2020.¹⁶ The following paragraph in the in the minutes carries an indomitable weight that I cannot ignore in this judgement. "The the committee enquired about the lack of hydro-calculations to motivate the decision to decline the surface water abstraction. The need to be references to the water balance to justify the decision.¹⁷ The minutes further stated the following: "On the reasons for recommendations, only ground water recommendations is mentioned, and no mentioned is made about the reasons for not recommending the surface water abstractions."¹⁸

20. Mr. Jacobs also referred in his evidence to a surface water licence application granted to Arengo 316 (Pty) Limited in 2014 for the purposes of the construction of an

¹⁵ See page 002-28 of the bundle of documents.

¹⁶ See pages 002-22 to 002-29 of the bundle of documents.

¹⁷ See page 002-29 of the bundle of document.

¹⁸ Ibid.

ethanol plant. Mr. Diedricks, submitted during the hearing that since the ethanol plant has not been constructed, the allocation is not being optimally utilised and, accordingly, and therefore this allocated but unused water resources should be allocated to the Appellant. This issue was also raised as a ground of appeal in the Appellant's pleadings.¹⁹ I agree with the Counsel for Respondents that this panel in this case does not have any legal basis to transfer the water rights from the rights holder Arengo 316 (Pty) Ltd to the Appellant.²⁰ The facts in this case do not warrant the panel deal with the provisions of section 25 of the National Water Act. The rights holder, Arengo 316 (Pty) Ltd is not involved in this matter.

21. Mr. Jacobs further testified that after the application for water use licence by the appellant was declined, the respondents still approved new application for water use licence by other applicants, and those applicants were allocated licences from the same water resources. He stated that applications in respect of subtraction of surface water were approved in the matter of Sun Orange Farms and The San Miguel SA (Pty) Ltd which was approved in and during October 2021.²¹

22. This part of the testimony by Mr. Jacobs was so vehemently disputed by Counsel for the respondents, as demonstrated during the cross-examination of Mr. Jacobs.²² This led to the representative of the appellant to inform the panel he was going to formally apply for the re-opening of the appellant's case and recall Mr. Jacobs to further testify in the matter. Mr. Diedricks submitted that it was his instructions that he should apply to recall Mr. Jacobs to the witness stand, because Mr. Jacobs did not expect his testimony to be denied by the respondents. Upon being asked whether it is not the standard procedure that a witness should be asked relevant questions test the credibility of a witness testimony, which is the main reason for giving the opponent to take a witness through cross-examination, Mr. Diedricks then abandoned his application to recall Mr. Jacobs to the witness box to come and testify further in the matter.

¹⁹ See page 16 of the Respondents heads of argument.

²⁰ Ibid.

²¹ See page 15 of the Respondents heads of argument.

²² Ibid. "More particularly these new licences were issued in respect of the Lower Sundays subdivision and the N quaternary catchment area, while the Appellant's application related to the Fish River and the Q11D catchment area."

Respondents' witnesses

23. The Respondents case relied on the testimony of three witnesses who were present during the EP-WULAAC that was held on 23 September 2020.²³ The first witness was Mr. Hasan Chauke, who is been employed as a Hydrologist and Production Scientist by the Department since 2009. He has a bachelor's degree in Hydrology and Water Resource Management obtained from the University of Venda.²⁴ According to his own testimony, Mr. Chauke indicated that he was one of the senior people in the Department and the Case Officer of the Appellant's application worked under his authority and supervision. During the testimony, it became clear that Mr. Chauke is a very knowledgeable and experienced man. The difficulty with Mr. Chauke's testimony was that he was at times evasive when answering questions. He was advised several times to answer a question that was asked to him and not anticipate the next question that would come from Mr. Diederiks, for the Appellant.

24. Mr. Chauke's intimate knowledge of Fish – Sundays River System as well as the Hydrological subdivisions as contained in National Water Resource Strategy and Internal Strategic Perspective,²⁵ is without doubt. The low light of his testimony came when he was asked about the absence of the explanation regarding the lack of hydrological calculations pertaining to the surface water. He did not give a satisfactory answer. The Case Officer worked under his supervision, and he was duty bound to ensure that the action that the Case Officer was asked by the Committee on 23 September 2020,²⁶ was closed to the satisfaction of the Committee. According to the testimony of all the three witnesses of the Respondents, the minutes of the Committee do not reflect the explanation of the lack of the hydrological calculation.

25. The second witness of the Respondents was Mr Bhekokwakhe Kunene. He is also employed by the First Respondent as a Hydrologist and Production Scientist and holds a bachelor's degree and Honour's Degree in Hydrology obtained from the University of Zululand.²⁷ He was present at WULACC meeting of the 23 September 2020. His knowledge of the Fish – Sundays River System as well as the Hydrological subdivisions as contained in National Water Resource Strategy and Internal Strategic

²³ See pages 002-22 to 002-29 of the indexed and paginated bundle.

²⁴ See page 12 of the Respondent's witness bundle.

²⁵ See page 278-279 of the Respondent's witness bundle.

²⁶ See page 002-29 of the indexed and paginated bundle.

Perspective, is also impressive and without doubt. He was further helpful to the panel in explaining how to read the reconciliation of the current and future water requirements of the Fish -Sunday River System being part of the Internal Strategic Perspective.²⁸

26. Mr. Kunene was appointed as the quality checker of the application in this appeal.²⁹ Mr. Kunene also failed to explain the absence of the explanation in the minutes regarding absence of the hydro calculations pertaining to the surface water. As a quality checker, Mr. Kunene could not explain why the minutes did not capture the absence of the hydro calculations pertaining to the surface water. He further conceded that there was an error on the side of the first Respondent regarding the classification of the Appellant as a Historically Advantage Individual (HAI) instead of being classified as Historically Disadvantaged Individual (HDI). In conceding this fact, he stated amongst others that what may have confused the officials working on this application could be the fact that the name of the Applicant was Die Louis & Madelize Van Zyl Trust. This explanation by Mr. Kunene is an epitome of an honest witness.

27. The third witness of the Respondent was Mr. Andrew Lucas, the Chairman of the WULACC that considered the Appellant's application. He has been employed by the First Respondent for over 40 years and his current designation is Director: Compliance, Monitoring and Enforcement.³⁰ His testimony was more on the procedure and administrative side of the Appellant's application for the Water use Licence. Mr. Lucas clearly testified that a hydro calculation report should be submitted in all the applications to be considered by the WULAACC. He then changed his version and stated that it is not necessary for a hydro calculation to be done in every application. When he was changing his version, he was at pains to explain to the Tribunal why a sudden change of heart when earlier stated that a hydro calculation should be conducted for every application.

28. Mr. Lucas further made another statement, though very honest but the statement was to the detriment of the Respondents. He stated that they were under pressure from Head office to finalize the outstanding applications. This honest statement of Mr.

²⁷ See page 12 of the Respondent's witness bundle.

²⁸ See page 279 of the Respondent's witness bundle.

²⁹ See page 002-29 of the Indexed and paginated bundle.

³⁰ See page 12 of the Respondent's witness bundle.

Lucas is in line with the comments that was made by Mr. Kunene during the WULAACC meeting. “Mr. Kunene informed the Committee that the Region has been instructed by Head Office to finalize all outstanding applications.”³¹ This statement has a direct link with the minutes of the meeting that were not properly captured. Although it is good for the first Respondent to ensure that applications are concluded within certain time frames, this should not compromise the quality of the work to be done, especially where issues of governance are involved.

29. Mr. Lucas was further at pains to explain to the Tribunal why the minutes of the meeting which he chaired were not properly captured especially regarding the explanation of the lack of hydrological calculations for purposes of the Reserve Determination as the basis for declining the Surface water application. It was during moment that he stated that even though the minutes were not properly capture, all the Committee members present made the decision in an honest manner and with good intentioned. The testimony of Mr. Lucas, especially his contradiction regarding the requirement of a Reserve Determination for every application, strengthened the Appellant’s case to the detriment of the Respondent’s case.

30. According to the attendance register,³² the Acting Chief Director: Water Use Licence Administration was not present in the meeting of 23 September 2020. The Acting Chief Director: Water Use Licence Administration only signed of the Record of Recommendation on 25 February 2021.³³ This then begs the question, if the explanation regarding the lack of hydraulic calculations was not captured in the minutes of the 23 September 2020, which was five months after the EP-WULACC meeting was held, who explained to the Acting Chief Director: Water Use Licence Administration, the justification of the decline of the granting of the licence in relation to the Surface Water. This is the basis of the third ground of appeal be the Appellant, being, Acting Chief Director: Water Use Licence Administration the irrational decision to decline the licence pertaining to the Surface Water. No evidence was led during the hearing which explained how the Acting Chief Director: Water Use Licence Administration, was explained regarding the lack of hydro calculations as the justification for the decline of the Surface Water.

³¹ See page 002-23 of the Indexed and Paginated bundle.

³² See page 002- 22 of the indexed and paginated bundle.

Evaluation of the Evidence

31. The testimony of Mr. Joseph was riddled with a lot of contradictions and also smirched by the fact that he submitted the application on behalf of the Appellant through his company, Jacobs Global Solutions (Pty) Ltd,³⁴ while he was still an employee of the first Respondent. Furthermore, he did not obtain approval to do private jobs by the time he submitted the application on behalf of the Appellant. His testimony regarding the fact that the Respondents approved Water Use licences for the abstraction of Surface Water in the same quaternary, even after the Respondent decline the application from the Appellant, which is the subject of this appeal is without any basis. I agree with the submission of Counsel for the applicant on this basis.³⁵

32. The only part of Mr. Jacobs testimony which carried the Appellant's case was the issue of the lack of the hydro calculations for the purpose of determining the Reserve Determination in the quaternary Q11. His testimony on this aspect was not satisfactory assailed by Counsel for the Respondents. Mr. Lucas testimony solidified Mr. Jacobs testimony on this aspect. The lack of the Reserve Determination in the submission to the WULAACC meeting, is not a mere procedural aspect as submitted by Counsel for the Respondent on page 20 of the Respondents' heads of argument. This issue is at the heart of this appeal matter.

33. The minutes of WULAACC meeting states the following "The Committee enquired about the lack of hydro calculations to motivate for the decline of the application of Surface Water abstraction. There needs to be a reference to the water balance to justify the decision."³⁶ The minutes further stated that "On the reasons for recommendations, only the ground water recommendations are mentioned is made about the reasons for not recommending surface water abstraction."³⁷ I disagree with Counsel for the Respondents that this concern was raised by one person.³⁸ It was the Committee and not one person. Furthermore, there was no evidence led to the effect that this concern was raised by just one person. One cannot put any interpretation of

³³ See Page 002-21 of the Indexed and paginated bundle.

³⁴ See page 002- 28 of the Indexed and Paginated bundle.

³⁵ See page 15 of the Respondent's witness bundle.

³⁶ See page 002-29 of the Indexed and Paginated bundle.

³⁷ Ibid.

³⁸ See page 10 of the Respondents heads of argument.

these minutes in any manner, except to give this minutes their lateral interpretations. The Supreme Court of Appeal in the Natal Joint Municipal Pension Fund v Endumeni Municipality,³⁹ stated the following:” Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production”. The minutes in its current stated that the Committee and not an individual enquired about the lack of hydro- calculations in the report pertaining to the abstraction of Surface Water.

34. A decision to approve or decline an application for a Water use licence is an Administrative Action. It is defined in Section 1 of the Promotion of Access to Just Administrative Act (PAJA) as any decision taken, or any failure to take a decision, by-

(a) an organ of state, when-

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation.⁴⁰

35. Section 5 PAJA reads as follows: Reasons for administrative action

(1) Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90

days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.

(2) The administrator to whom the request is made must, within 90 days after receiving the request, give that person adequate reasons in writing for the administrative action.

(3) If an administrator fails to furnish adequate reasons for an administrative action it must, subject to subsection (4) and in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was

³⁹ [2012] ZASCA 13 at paragraph 18 on page 15.

⁴⁰ See Section 1 of the

taken without good reason. further requires that any person who makes an administrative action, must put the decision and the decision must accompanied by the reasons for that decision.

36. The concern raised by the Committee regarding the lack of hydro calculation, was intended to have proper reasons for declining to recommend the abstraction of surface water. For this reason, it is my ruling that the decision by the Acting Director Water Licence Administration failed to meet the requirements of section 5 of PAJA, it was taken without having any scientific basis to decline it.

The Water Tribunal as a re-hearing of the matter

37. I agree with the submission of Counsel for the Respondents⁴¹ and Appellant,⁴² respectively, that matters at the Tribunal take the form of a re-hearing. Both parties were given the opportunity to submit new evidence should they so wish, since the appeal matters at the Tribunal take the form of re-hearing. The testimony of the Appellant's only witness was credible only with regard to the issue of the Reserve Determination, which the main contention in this appeal. Counsel for the Respondents failed to assail the credibility of Mr. Jacobs on this aspect.

38. On the other hand, the witnesses of the Respondents contradicted one another on very crucial aspect of the matter. Mr. Chauke and Kunene, both very knowledgeable individuals maintained throughout their testimonies that there was no need to conduct a hydro calculation for the purpose of Reserve Determination in every application, if the Department will rely on historical data for that purpose. When Mr. Lucas took the stand, he contradicted the two first witnesses. He clearly stated that all the applications must be accompanied by a Reserve Determination report, but then he suddenly changed his tune and said that where historical data is available the application does not have be accompanied by a report for a Reserve Determination.

39. The Respondents through the testimony of the three witnesses could satisfy the Tribunal, which seats as a re-hearing, why a Reserve Determination is not required for

⁴¹ See page 3 of the Respondents heads of argument.

⁴² See 7.2 of the Appellant's heads of argument.

all the applications for a Water Use Licence application, because of these glaring contradiction amongst the three witnesses.

38. The honest concession by Mr. Kunene regarding the wrong classification of the Appellant as a Historically Advantaged Individual (HAI) instead of Historically Disadvantaged Individual (HDI) also indicate that this application was not properly done, although not by any intentions from the officials. Mr. Lucas's honest concession that the Committee members were under pressure to finalise the application is in line with Kunene's concession and has been recorded in the minutes of the meeting. The Tribunal cannot ignore this part of the evidence that is so glaringly visible in this matter.

39. The fact that the Respondents through the three witnesses could make their case before the Tribunal regarding the lack of the Reserve Determination in this matter relating to the abstraction of surface, then begs the question: Was the decision of the Acting Chief Director: Water Use Licence Administration irrational when he/she decided to decline the application relating to the abstraction of the Surface Water. Put differently, was the decision of Acting Chief Director: Water Use Licence Administration accompany by any reasons for the decision flowing from the report of the WULAACC meeting. The answer is NO. Even though the Respondents had the opportunity to present new evidence at the Tribunal, they could make a case to justify the dismissal of this aspect.

40. Counsel for the Respondents referred to a previous decision by a panel of this Tribunal in Water Tribunal dated 24 April 2009, issued under Case No. WT04/07/2007. I agree with the decision of that case pertaining to the set of facts that were before the panel. The basis of my decision come from the facts in this matter. Each and every case must be dealt with according to its merits. The decision in the 2009 case is irrelevant in this matter, because there is no mentioned made in that case of witnesses of the Department that were contradicting one another. The issue of the Applicant of the Water Use Licence being incorrectly categorized as an HAI in stead of HDI was not dealt with in that judgement. That judgement did not deal with the issue of minutes of a Committee not properly captured by the Secretariat a Committee.

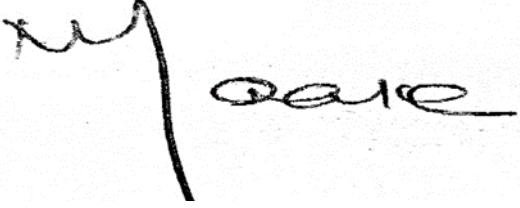
41. This judgement is not only based on one aspect of the case. Section 27 of the National Water Act read as follows: It is trite that when a decision is taken to either award or decline a Water Use Licence, all the following considerations in section 27 of the National Water must be equitably considered.

- (a) existing lawful water uses;
- (b) the need to redress the results of past racial and gender discrimination;
- (c) efficient and beneficial use of water in the public interest;
- (d) the socio-economic impact –
 - (i) of the water use or uses if authorised; or
 - (ii) of the failure to authorise the water use or uses;
- (e) any catchment management strategy applicable to the relevant water resource;
- (f) the likely effect of the water use to be authorised on the water resource and on other water users;
- (g) the class and the resource quality objectives of the water resource;
- (h) investments already made and to be made by the water user in respect of the water use in question;
- (i) the strategic importance of the water use to be authorised;
- (j) the quality of water in the water resource which may be required for the Reserve and for meeting international obligations; and
- (k) the probable duration of any undertaking for which a water use is to be authorised.

42. The issue of the water balance in the water resource where the Appellant applied for a Water Use Licence is one of the considerations that must be looked at before a decision to award or decline a licence should be made. This was confirmed by the Supreme Court of Appeal in the well-traversed matter of *Makhanya N.O. and another v Goede Wellington Boerdery (Pty) Ltd.*⁴³

43. For the reasons stated above, the appeal is upheld.

I hand down the judgement.

A handwritten signature in black ink, appearing to read 'Ntika Maake'. The signature is written in a cursive style with a large initial 'N'.

Adv. Ntika Maake

Chairperson of the Water Tribunal and the panel

11 April 2023

⁴³ [2013] 1 All SA 526 (SCA) at para 37.