

IN THE WATER TRIBUNAL

HELD AT HOWICK

APPEAL NO.: WT04/24/KZN

In the matter between:

GARETH AND SUSAN PYNE-JAMES

Appellants

and

THE PROVINCIAL HEAD: KWAZULU-NATAL

DEPARTMENT OF WATER AND SANITATION

First Respondent

MINISTER OF WATER AND SANITATION

Second Respondent

GWENS STREAM ESTATE (PTY) LTD

Third Respondent

Date heard: 11, 12 and 13 June 2025

Date of judgment: 14 November 2025

Coram: Mr Emmanuel Mpanza, Additional Member of the Water Tribunal
and Chairperson

Mr Maxwell Sirenya, Additional Member of the Water Tribunal

JUDGMENT

Introduction and Background

1. This is an appeal lodged by the Appellants in terms of section 148(1)(f) of the National Water Act No. 36 of 1998 ("the Act") against the decision of the First Respondent to issue a water use licence ("WUL") to the Third Respondent in respect of water uses associated with the residential development on Portion

167 (of 10) of the Farm Hilton No. 12304 in uMngeni Municipality, KwaZulu-Natal Province.

2. On or about 21 December 2023, Gwen's Stream Estate (Pty) Ltd ("the Third Respondent") submitted an application to the First Respondent for water use activities in terms of section 21(c), (g) and (i) of the Act.
3. On or about 21 May 2024, the First Respondent granted the application for a water use licence ("WUL") to the Third Respondent.
4. The WUL authorised the Third Respondent for water use activities that will be taking place while establishing and operating the proposed residential development called The Dairy at Hilton Residential Development. The water use activities to take place within the development are in terms of section 21(c), (g) and (i) of the Act, which is impeding or diverting the flow of water in a watercourse; disposing of waste in a manner which may detrimentally impact on a water resource; and altering the bed, banks, course or characteristics of a watercourse.
5. The proposed infrastructure associated with the authorised water uses included the construction of 78 residential stands, a clubhouse and workshop, potable water supply from the existing Hilton College WTW, installation of an on-site water storage reservoir with a capacity of 120m³, internal sewer reticulation, construction of three sewer pumpstations as well as a 2.5 km long bulk sewer line linking the Dairy residential development to the existing Hilton College WWTW, installation of electricity via an Eskom supply (the Eskom supply is confirmed and paid for and will be installed during the pre-construction phase of the development), construction of a stormwater management plan including stormwater pipes, channels or swales which will discharge into on-site

attenuation structures, and construction of an entrance road off the D494 District Road, which will be upgraded to blacktop, and main entrance gate, guardhouse and internal road network.

6. The road upgrade includes resurfacing with a black topping and upgrading of an approximately 1.5km long section of the D494 road from the intersection with the P139 road to the eastern boundary of Portion 167 (of 10) of the Farm Hilton No. 12304, including the upgrading and widening of an existing watercourse crossing (culvert) located along the D494 road to improve road user safety.
7. The proposed development is located on Portion 167 (of Portion 10) of the Hilton Farm No. 12304, within quaternary catchment U20E of Mvoti to Mzimkhulu Water Management Area in the KwaZulu- Natal Province.
8. On or about 25 June 2024, the Appellants lodged an appeal against the WUL dated 21 May 2024¹.
9. The Third Respondent delivered its statement of defence on 06 August 2024² and the First and Second Respondents delivered their statement of defence on 13 November 2024³.
10. On 15 January 2025, the Appellants replied to the First and Second Respondents' statement of defence⁴ and it also replied to the Third Respondent's statement of defence on 05 May 2025⁵.

¹ See pages 1-101 of the Index.

² See pages 268-296 of the Index.

³ See pages 102-120 of the Index.

⁴ See pages 121-267 of the Index.

⁵ See pages 297-428 of the Index.

11. Thereafter, the Appellants amplified their grounds of appeal by adding a fifth ground of appeal⁶.
12. Subsequently, the Appellants delivered their application for condonation for late filing of the appeal documents⁷.
13. On 02 June 2025, the Appellants submitted their application for an inspection *in loco*⁸.
14. At the hearing of this appeal, the Appellants brought there (3) applications, namely, (a) the application for condonation for late delivery of the additional documents ("first application for condonation"); (b) the application for condonation for late delivery of the additional fifth ground of appeal ("second application for condonation"); and (c) the application for an inspection *in loco*.
15. The first application for condonation was not opposed and after hearing submissions from Appellants' representatives, the Tribunal granted the said application.
16. The second application for condonation was opposed by the Respondents, and after hearing submissions from all parties, the Tribunal dismissed the application on the basis that the Appellants failed to satisfy the test for condonation⁹.

⁶ See pages 429-551 of the Index.

⁷ See pages 552-621 of the Index.

⁸ See pages 761-765 of the Index.

⁹ The test for condonation as laid down by the Constitutional Court in *Van Wyk v Unitas Hospital and Another (Open Democratic Advice As Amicus Curiae)* (CCT 12/07) [2007] ZACC 24 in paragraph 20 is as follows:

"[20] This Court has held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. **Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success.**" [Our Emphasis]

17. The application for inspection in loco was not opposed and after hearing submissions from the Appellants' representative, the Tribunal granted this application. The site inspection enriched the Tribunal and all parties to contextualise arguments and decision making.

Grounds of Appeal

18. The Appellants raised four (4) grounds of appeal in their Appeal Memorandum¹⁰.

- 18.1 **THE FIRST GROUND OF APPEAL: no reasons for the decision to authorise the water uses were provided in the Licence and some of the reasons for the issue of the Licence in the Record of Recommendation are false**. This ground of appeal was in respect of lack of reasons being provided for the licence ("**the first part**"); in respect of paragraph 6.3 ("**the second part**")¹¹ and 6.9 ("**the third part**")¹² of the Summary Key Findings in the Record of Recommendation (RoR).

- 18.1.1 The gist of the **first part** pertains to the lack of reasons being provided for the grant of the licence. The Appellants contended that the Licence does not include a notice informing of the right to request reasons as required by section 3 of Promotion of Administrative Justice Act No. 3 of 2000 ("PAJA").

- 18.1.2 The gist of the **second part** is that the statement as it pertains to the protection of the wetlands is invalidated by a decision of the Third Respondent to reduce the measure of the wetland to terrestrial buffer from an approved width of

¹⁰ See pages 8-25 of the Index.

¹¹ See page 642 of the Index.

¹² See pages 642-643 of the Index.

approximately 90m to 25m.

18.1.3 The gist of the **third part** is that:

- (a) The Case Officer recommended that the First Respondent issue the WUL because all administrative requirements were met.
- (b) The administrative documents are found in section 2.1 of the RoR, which are,
 - (i) Appendix 1a: Certified copy of Applicant Registration Certificate; (ii) Appendix 1b: Identity Document of Applicant Representative; (iii) Appendix 2: Copy of Affected Property Title Deeds and Property Consents; (iv) Appendix 3a: Servitude Agreements; (v) Appendix 3b: Service Level Agreement for Water and Waste Treatment; and (vi) Appendix 3c: Municipal Service Level Agreement.
- (c) Appendix 2 purportedly contains copies of the affected properties and letters of consent from the owners of land not owned by the Third Respondent.
- (d) One of the properties over which section 21(c) and (i) water use activities is proposed is portion 35. A road servitude in favour of the Department of Transport lies over portion 35.
- (e) No evidence is available in Appendix 2 that the Third Respondent obtained consent from the owners of portion 35 for the water use activities over portion 35.
- (f) There is no evidence in the application or in the RoR that the owner of portion 35 consented to the authorisation of water use activities over portion 35.
- (g) Consent from the owners of portion 35 is necessary on two accounts, namely:
 - The D494 will be upgraded within the width of the road servitude over portion 35, and
 - The upgrade will require that the width of the road servitude is revised

to accommodate the increase in width of the road at the watercourse crossing.

- (h) The latter matter, that is the increase in width of the road at the water course crossing, is not disclosed in the RoR and in the Engineering Report found in Appendix 22a to the application for a WUL.
- (i) The demands placed on portion 35 are depicted in engineering designs for D494 found in Appendix 22c of Appendix 22 to the Application for a WUL. The widening of the road extends outside of the road servitude.
- (j) The civil engineering drawings of the upgrade of D494 at the watercourse crossing were not included in the RoR, therefore, the case officer was not aware that the widening of D494 at the watercourse crossing had greater implications for the owner of portion 35 than an upgrade of D494 within the road servitude over their property.
- (k) The Appellants note that section 3.2.1.1. of the Bulk and Internal Services Report (Appendix 22a) merely state that D494 will be upgraded.
- (l) The information about D494 in section 3.1 of the RoR states only that the upgrade will include the widening of the stream crossing. The RoR does not disclose that the upgrade will require a revision of the width of the road servitude over portion 35 by 10 or 15 meters to accommodate the upgrade of D494 at the water course crossing. Therefore, the administrative process has a greater consultation demands and legal implications than merely obtaining landowners consent.
- (m) The Appellants contend that the fact remains that the owner of Portion 35 did not give consent to the authorization of water use activities over portion 35.

18.2 THE SECOND GROUND OF APPEAL: The Licence is not compliant with the Environmental Authorisation (EA)

18.2.1 The gist of this ground is that:

- (a) The WUL is not compliant with the EA issued on 12 June 2020 to the Third Respondent by the Department of Economic Development Tourism and Environmental Affairs.
- (b) The EA was one of the factors considered when recommending the First Respondent to issue the WUL.
- (c) In condition 2.7.1 of Appendix II to the Licence, the First Respondent authorised a 25m wide wetland to terrestrial buffer.
- (d) The authorisation of the 25m wide wetland buffer does not comply with the width of the wetland to terrestrial buffer approved in condition 4.5.1. of the EA.
- (e) The EA is not one of the documents in the list of documents in the WUL that the Third Respondent must take into account when carrying out the water use activities in section 1.1 of Appendix II of the WUL.

18.3 THE THIRD GROUND OF APPEAL: section 21(g) water use activities in Appendix III of the water use license are unenforceable

18.3.1 The Appellants are appealing against the authorisation of the disposal of a maximum volume of 535 m³ of water containing waste per annum generated by the development.

18.3.2 According to the Engineering Report for the Dairy Development prepared by Umsunguli Project Management CC, the expected volume of wastewater

generated by the development is 117 m³ per day which equates to 42 705 m³ per annum.

18.3.3 Therefore, the Third Respondent is NOT authorised to dispose of 42 170 m³ of water containing waste per annum.

18.3.4 The maximum volume of water containing waste authorised in Condition 1 of Appendix III of the Licence is unenforceable.

18.4 THE FOURTH GROUND OF APPEAL: No consent has been issued by the Minister of Agriculture to subdivide Portion 10 to create Portion 167

18.4.1 The Appellants' contention in this ground of appeal is that:

- (a) Clause 1.2 of Appendix I of the Licence states that: "the license shall not be construed as exempting the Licensee from compliance with the provision of any other applicable Act, Ordinance, Regulations or By-Law".
- (b) Portion 10 of the farm Hilton No. 12304 is subject to the provision of Subdivision of Agricultural Land Act, 1970 (Act No. 70 of 1970).
- (c) There is no evidence that the Minister of Agriculture has consented to location and extent of portion 167 (of 10) of the farm Hilton No. 12304 ("Portion 167") as indicated in the application and unlikely due to the valuable characteristics of the land that the Minister of Agriculture will give consent for the subdivision and change of land use.
- (d) The subdivision of agricultural land without the consent of the Minister of Agriculture is unlawful. Therefore, the subdivision of Portion 10 to create Portion 167 without the consent of the Minister of Agriculture is unlawful.
- (e) Consequently, the approval of development over Portion 167 is unlawful.
- (f) Under the circumstances, the issue of the WUL is irrational.

Appeal hearing

19. At the hearing the Appellants did not pursue the first part of their first ground of appeal, instead they criticised the RoR. They also unconditionally abandoned the second part of their first ground of appeal and their second ground of appeal (both of which concerned the wetland and terrestrial buffers).
20. Therefore, this judgment will only focus on the remaining grounds of appeal.
21. The Appellants did not call any expert or factual witness whereas the First and Second Respondents called Ms Bhavisthra Dukhea ("Ms Dukhea") and the Third Respondent called Ms Jean Baverstock ("Ms Baverstock") as witnesses.

Analysis

22. THE FIRST GROUND OF APPEAL

- 22.1 The Appellants' first ground of appeal now centred on one issue, namely that the owner of Portion 35 did not give consent to the authorisation of water use activities over Portion 35.
- 22.2 This aspect is now academic in the sense that the owners of Portion 35, namely, Ayden Ashley Shrives and Ryan Hilton Shrives ("Shrives") formally withdrew their appeal on 17 March 2025.
- 22.3 The Appellants failed to demonstrate before the Tribunal that they were duly authorised to represent the owners of Portion 35¹³.

¹³ See Rule 8 of the Water Tribunal Rules, which provides as follows:

"(1) A party to an appeal or application may be represented by a person of that party's choice provided such representation is duly authorised by the Appellant or Applicant.

(2) When an Appellant or Applicant chooses to be represented, his or her representative ***must*** submit a written proof together with notice of appeal or application to the Tribunal....."
[Our Emphasis]

- 22.4 The Tribunal is satisfied that the Letter of Consent¹⁴ submitted by the Head: Department of Transport in KwaZulu-Natal ("DoT") in support of the WUL met the requirements of regulation 17(3)(b)(i) of the Regulations Regarding the Procedural Requirements for Water Use Applications and Appeals¹⁵.
- 22.5 The evidence of Ms Dhukea, which the Tribunal accepts, was that the First Respondent was satisfied with the aforesaid Letter of Consent from DoT as it was in control of the land comprising the D494 road reserve.
- 22.6 The consent from Shrives is not necessary or required by the Third Respondent, since D494 road reserve is in control of DoT, and DoT accordingly gave the Third Respondent a compulsory Letter of Consent required in support of the application for WUL.

23. THE THIRD GROUND OF APPEAL

- 23.1 The Appellants contention in this ground of appeal was conceded by the Third Respondent and the Respondents agreed that it was an error which could be corrected by an amendment in terms of the Act.
- 23.2 The Tribunal is satisfied that that the failure to reflect the correct authorised total capacity or maximum volume for disposal in the development is a clerical mistake and/or unintentional error which the First Respondent may, in terms of section 158¹⁶ of the Act amend.

¹⁴ See page 295 of the Index.

¹⁵ Regulation 17(3)(b)(i) provides as follows: ".....
(3) Notice of the application must be provided to interested and affected parties by:.....
(b) giving written notice to:
(i) the owner or person in control of that land, if the applicant is not the owner or person in control of that land;....."

¹⁶ Section 158 of the Act provides that: "**Amendment or substitution of instruments**
(1) For the purposes of this section, "instrument" includes any regulation, strategy, licence, directive or notice made, determined, issued or given in terms of this Act.

24. **PARAGRAPHS 6.3.3 TO 6.5.4 OF THE APPELLANTS' REPLY TO THE
THIRD RESPONDENT'S STATEMENT OF DEFENCE¹⁷**

- 24.1 In the main, the Appellants contended that the Third Respondent lodged its application prematurely without knowledge of the outcome of the application for a water use licence by the Hiltonian Society in circumstances where the outcome of the licence submitted by the Hiltonian Society as it pertains to the Water Treatment Works (WTW) and Waste Water Treatment Works (WWTW), and as a result the licence contained many errors which rendered it unenforceable.
- 24.2 They contended further that although the Department of Economic Development, Tourism and Environmental Affairs (EDTEA) approved Option 2, there is no evidence in the licence the First Respondent supports and has authorised Option 2 for the enclave of suites near the wetland.
- 24.3 Although the Respondents objected to this contention, the Tribunal is alive to the fact that the appeal before it takes a form of a rehearing, and the Tribunal may receive evidence¹⁸. This is an appeal in a wide sense, which is a complete rehearing and redetermination on the merits of a case, with or without additional evidence or information¹⁹. This means that the Tribunal is not confined to the

(2) *If the proposed amendment or substitution of an instrument*

- (a) *is not likely to alter the rights and obligations of any person materially;*
- (b) *corrects any clerical mistake, unintentional error or omission in an instrument;*
- (c) *corrects any figure miscalculated in an instrument; or*
- (d) *corrects any misdescription of any person, thing or property,*

the amendment or substitution may be made without following the procedure required for establishing or giving effect to the instrument."

¹⁷ See pages 331-337 of the Index.

¹⁸ Item 6(3) of Schedule 6 to the Act read with Rule 7(1) of the Water Tribunal Rules.

¹⁹ *Tikly and Others v Johannes NO and Others* 1963 (2) SA 588 (T) at 590G

record of the body a quo and if necessary, it may even call for, accept or consider information that the responsible authority did not consider when the original decision was made²⁰.

24.4 In *Mining and Environmental Justice Community Network of South Africa and Others v Minister of Environmental Affairs and Others*²¹, the Court said the following with regards to appeals to the Tribunal under the Act “*The parties were ad idem that all the appeals in terms of NEMA, the MPRDA and the National Water Act fall into the category of so-called "wide appeals", i.e. they consist of re-considerations of the original decisions and authorisations and new evidentiary material may be introduced. "Wide appeals" refer to appeals in the "wide sense" as characterised in Tikly v Johannesburg NO 1963 (3) SA 588 (T) at 590G - 591A. See also, in the environmental sphere and Sea Front for All and Another v MEG, Environmental and Development Planning and others 2011 (3) SA 55 (WCC) at [24] - [28].*”

24.5 Accordingly, in addition to the record of the impugned decision, this Tribunal had to consider the evidence of Respondents' witnesses to determine whether these contentions are valid.

24.6 Ms Baverstock, relying on her written submission²², conceded that the disposal volume from sewer pumpstation 3 should have been 162m³/day and not 405m³/day as reflected in the WUL. This evidence was not contested by the Appellants.

²⁰ See Hubert Thompson 'Water Law: A Practical Approach to Resource Management and the Provision of Services', Juta 2018 at p610.

²¹ (50779/2017) [2018] ZAGPPHC 807; [2019] 1 All SA 491 (GP) (8 November 2018) at para 11.10.2.

²² See pages 770-772 of the Index.

24.7 Ms Dukhea also testified on this aspect and her evidence was not contested by the Appellants.

24.8 The evidence of Mesdames Dukhea and Baverstock regarding the Appellants' second contention was also not rebutted by the Appellants.

24.9 Accordingly, The Tribunal is also satisfied with the Third Respondent's explanation that the errors raised by the Appellants in these paragraphs are administrative errors which are capable of being corrected.

25. THE FOURTH GROUND OF APPEAL

25.1 The Appellants failed to rebut the evidence of Ms Dukhea that the Third Respondent submitted proof of ownership in a form of a title deed **T22225/2023**²³ in support of application for water use licence.

25.2 Apart from making bold and unsubstantiated allegations that the subdivision of portion 10 to create portion 167 without the consent of the Minister of Agriculture was unlawful, they failed to lead evidence to prove that this portion was subject to provisions of the Subdivision of Agricultural Land Act, 1970 (Act No. 70 of 1970).

25.3 It is trite that an administrative decision, even if unlawful, remains legally effective until it is set aside by a court of law²⁴.

²³ See pages 95-97 of the Index.

²⁴ See *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) at paras 26 and 27, where the SCA stated that: "[26]

Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern state would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognized that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.

[27] The apparent anomaly (that an unlawful act can produce legally effective consequences) is sometimes attributed to the effect of a presumption that administrative acts are valid, which is explained as follows by Lawrence Baxter: Administrative Law 355: 'There exists an evidential

25.4 Seeing that the Appellants have not set the registration and transfer of portion 167 (of 10) to the Third Respondent aside in a court of law, it is not open to the Tribunal to so do, as correctly pointed out in *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd*²⁵, “The fundamental notion - that official conduct that is vulnerable to challenge may have legal consequences and may not be ignored until properly set aside - springs deeply from the rule of law. **The courts alone, and not public officials, are the arbiters of legality.**”

Conclusion

26. Based on the above, the Tribunal concludes that:

- 26.1 The case of the Appellants was weakened by not having expert or factual witnesses resulting in their representative playing many roles including legal while not being a trained or practising legal practitioner.
- 26.2 It was further weakened by affected Shrivs withdrawing from the appeal which led to the withdrawal of their second ground of appeal.
- 26.3 Ezemvelo Trust would have been useful expert witnesses to support their first ground of appeal as they deal with issues of wildlife.
- 26.4 Finally with regard to the Department of Agriculture they seem to have distanced themselves as has been the DoT.
- 26.5 On the wetland and terrestrial buffers there is no evidence of the EDTEA having been solicited.

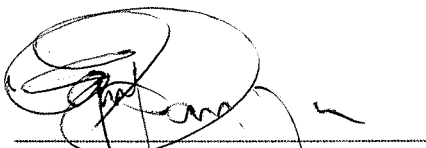
presumption of validity expressed by the maxim omnia praesumuntur rite esse acta; and until the act in question is found to be unlawful by a court, there is no certainty that it is. Hence it is sometimes argued that unlawful administrative acts are ‘voidable’ because they have to be annulled.”

²⁵ 2014 (3) SA 481 (CC) at para [103].

Order of the Tribunal

27. Consequently, the following order is made:

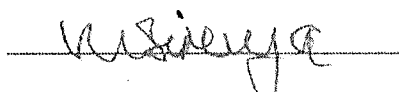
- (a) The appeal is dismissed.
- (b) The First Respondent and/or Third Respondent is to make an application to correct the errors identified in the WUL in terms of section 158 of the Act.



Mr Emmanuel Mpanza

Additional Member of the Water Tribunal and Chairperson

I agree



Mr Maxwell Sirenya

Additional Member of the Water Tribunal

Appearances:

For the Appellants:	Ms Nora Choveaux t/a Land Matters
For the First and Second Respondents:	Adv. RC Netsianda Instructed by State Attorney, Pretoria
For the Third Respondent:	Mr Norman Brauteseth of Norman Brauteseth & Associates