

IN THE WATER TRIBUNAL

HELD AT PRETORIA

APPEAL NO.: WT05/23/MP

In the matter between:

GREATER LAKENVLEI PROTECTED ENVIRONMENT

LANDOWNERS' ASSOCIATION

Appellant

and

DIRECTOR GENERAL: DEPARTMENT OF WATER

AND SANITATION

First Respondent

WILLIAM PATRICK BOWER (PTY) LTD

Second Respondent

Date heard: 28 and 29 October 2024

Date of judgment: 14 March 2025

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

Ms Rainy Disebo Mashitisho, Additional Member of the Water Tribunal

JUDGMENT

Introduction

1. This is an appeal lodged by the Appellant against the decision of the First Respondent to issue a water use licence to the Second Respondent in respect of water uses associated with the mining operations undertaken on portion 6

and 23 of the farm Groenvlei 353 JT and portion 12 of the farm Lakenvlei 355 JT, near Belfast in the Mpumalanga Province.

Background

2. William Patrick Bower (Pty) Ltd ("the Second Respondent") is the operational arm of Groenvlei Coal (Pty) Ltd that applied for a mining right as well as a water use licence authorisation to mine coal on the farm Groenvlei 353 JT and the farm Lakenvlei 355 JT near Belfast in the Mpumalanga Province. Both farms are owned by the Second Respondent. The mining right was issued in 2012.
3. A renewal of the mining right was lodged with the Department of Mineral Resource and Energy in 2017 and was subsequently approved under reference MP 10185 MR. The mine was also issued with a water use licence authorisation which lapsed during October 2020. The water use licence was extended until 30 September 2022.
4. Consequently, the Second Respondent applied for the renewal of the integrated water use licence. The Appellant¹, Bird Life SA² and other interested and affected parties³ objected to this application.
5. Despite these objections, on 04 September 2023, the First Respondent's Chief Director: Water Use Authorisation Management granted the licence to the Second Respondent⁴.
6. The water use licence authorised the Second Respondent to use water in terms of s 21(a), 21(c), 21(g), 21(i), and 21(j) of the Act, which is taking water from a

¹ See pages 32-33 of the Index 1 (Appeal Proceedings 1).

² See pages 34-115 of the Index 1 (Appeal Proceedings 1).

³ See Table 18 titled "Outcome of the public participation" on pages 265-268 of Index 3 (Records 1).

⁴ See pages 196-229 of the Index 3 (Records 1).

water resource; impeding or diverting the flow of water in a watercourse; disposing of waste in a manner which may detrimentally impact on a water resource; altering the bed, banks, course or characteristics of a watercourse; and removing, discharging or disposing of water found underground, respectively.

7. On 11 September 2023, Bird Life SA requested written reasons from the First Respondent's Chief Director: Water Use Authorisation Management for his decision to grant the water use licence to the Second Respondent⁵ and the reasons were furnished to the Appellant on 03 October 2023⁶.
8. Thereafter, on 23 October 2023, the Appellant appealed to this Water Tribunal in terms of section 148(3) of the Act.

Grounds of Appeal

9. The Appellant's grounds of appeal as set out in its Notice of Appeal⁷ are that:
 - 9.1 The First Respondent failed to consider mandatory provisions of the Act and National Environmental Management Act No. 107 of 1998 ("NEMA") and the subsequent decision to renew the water use licence was:
 - 9.1.1 Unreasonable and procedurally unfair;
 - 9.1.2 Taken despite mandatory and material procedures and/or conditions prescribed by the Act not having been complied with and/or;
 - 9.1.3 Taken because of irrelevant considerations or relevant considerations were not considered;

⁵ See page 117 of the Index 1 (Appeal Proceedings 1).

⁶ See page 118 of the Index 1 (Appeal Proceedings 1).

⁷ See pages 6-9 of the Index 1 (Appeal Proceedings 1).

- 9.1.4 Failure to adequately address the potential impact of the re-issue of the water use licence on the Greater Lakenvlei protected area and associated threat to water resources and ecosystems;
 - 9.1.5 Failure to apply the precautionary principle;
 - 9.1.6 Shortcomings in public consultation process;
 - 9.1.7 Inadequate and vague reasons provided by the First Respondent with regard to the re-issue of the water use licence;
 - 9.1.8 The action itself was not rationally connected to the information before the administrator and the reasons given;
 - 9.1.9 The exercise of power of the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, was so unreasonable that no reasonable person could have so exercised the power or performed the function;
 - 9.1.10 The action was unconstitutional and unlawful by failing to apply the necessary discretion in terms of Section 41(2)(c) of the Act.
- 9.2 The First Respondent failed to exercise its statutory duty and subsequent decision to renew the water use licence in favour of the Second Respondent was:
- 9.2.1 Unlawful, unreasonable and procedurally unfair;
 - 9.2.2 Taken despite mandatory and material procedures or conditions prescribed by the Act not having been complied with; and/or
 - 9.2.3 Taken because of irrelevant considerations or not considering relevant considerations;
 - 9.2.4 The action itself was not rationally connected to the information before the administrator and the reasons given;

- 9.2.5 The exercise of power or the performance of the function authorised by the empowering provisions, in pursuance of which the administrative action was purportedly taken, was so unreasonable that no reasonable person could have so exercised the power or performed the function;
- 9.2.6 The action was unconstitutional and unlawful; and made without reason.
- 9.3 The First Respondent failed to consider the irreversible, detrimental impact that ongoing coalmining operations will have on the Greater Lakenvlei protection area and the wider area.
- 9.4 The First Respondent failed to consider the environmental and social economic harm that coalmining operations will cause and the likelihood of acidic decant from the mine affecting already vulnerable ground and water resources.
- 9.5 The Second Respondent failed to provide assurance that they have the financial resources or commitment to satisfactorily mitigate and/or rehabilitate after the mining activity, the negative impact on the area as required in terms of the Mineral and Petroleum Resources Development Act No. 25 of 2002.
- 9.6 The Second Respondent's under-estimation of costs for the rehabilitation and shortcomings in the calculation of the quantum included the financial Closure Quantum Report.
- 9.7 The fact that the technical reports and support of the application did not provide sufficient evidence of compliance, nor did they meet the statutory imposed requirements to ensure a robust basis for the decision making on the part of the Department of Water and Sanitation.
- 9.8 The fact that the rehabilitative measures described in the rehabilitation strategy and implementation plan were drawn from an outdated EMPR and were

consequently generic rather than risk averse and therefore highly unlikely to eliminate the risk.

- 9.9 The First Respondent had the authority and statutory duty in terms of section 27(1) of the Act to consider, inter alia, the accumulative impact of mining activities and the associated water use, together with impact of future and past activities on water resources, in the Olifants- and Crocodile Catchment. As such the Second Respondent failed to investigate the cumulative impact of the mining activities and associated water use together with the impact of future and past activities on water resources in the Olifants- and Crocodile Catchment.

Grounds of Opposition

10. The nub of the First Respondent's opposition is that the allegations made by the Appellant in its Notice of Appeal were bold, unsubstantiated and were without any factual and/or legal basis.
11. The alleged First Respondent's failures mentioned in paragraphs 2 and 3 of the Notice of Appeal were also bold, unsubstantiated and were without any factual and/or legal basis.
12. Save for paragraphs 8.9, 9.3.3 and 9.5, it was difficult if not impossible to discern from the affidavit deposed to by Bruce Joseph Boshoff the precise grounds upon which the Appellant's appeal was premised.
13. The averments in paragraph 8.9 of the said affidavit ignored conditions set out in paragraphs 2.37 and 2.38 of the water use licence.
14. Paragraph 3.2 of the Record of Recommendations (ROR) adequately addressed the issue pertaining to the wetland thereby addressing averments made in paragraph 9.3.3 of the affidavit.

15. Lastly, paragraph 5.2 of the ROR dealt with the objections and concerns raised during the public participation process thereby addressing the averments made in paragraph 9.5 of the affidavit.

Preliminary Issues

16. Both parties agreed, after making submissions, that notwithstanding the fact that the Appellant's Notice of Appeal, Bruce Joseph Boshoff's affidavit and Bird Life SA's report raised technical issues, and ROR relied on expert reports, they will not lead witnesses on expert and scientific issues.
17. The First Respondent successfully objected against the use of Bird Life SA's report, arguing it was hearsay evidence as Bird Life SA was not going to testify during the appeal⁸.

⁸ In deciding on the objection, the Tribunal considered the provisions of section 3 of the Law of Evidence Amendment Act No. 45 of 1988, which provides that:

***3. Hearsay evidence**

- (1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless—
- (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
 - (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
 - (c) the court, having regard to—
 - (i) the nature of the proceedings;
 - (ii) the nature of the evidence;
 - (iii) the purpose for which the evidence is tendered;
 - (iv) the probative value of the evidence;
 - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
 - (vi) any prejudice to a party which the admission of such evidence might entail; and
 - (vii) any other factor which should in the opinion of the court be taken into account,is of the opinion that such evidence should be admitted in the interests of justice.
- (2) The provisions of subsection (1) shall not render inadmissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.
- (3) Hearsay evidence may be provisionally admitted in terms of subsection (1)(b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (e) of that subsection.

Appeal hearing

18. The Appellant called two witnesses, namely Messrs Bruce Joseph Boshoff ("Mr Boshoff"), Franco Naude Krige ("Mr Krige") and after it closed its case, the First Respondent applied, unsuccessfully, for absolution of instance and consequently, closed its case without leading any evidence, arguing that the Appellant has failed to discharge the onus of proof and therefore there was nothing to rebut.
19. For the reasons that will appear more fully below, it is not necessary to summarise the evidence of the Appellant's witnesses.

Analysis

20. The Second Respondent applied for the renewal of the integrated water use licence in terms of section 40(1) of the Act⁹. The Appellant¹⁰, Bird Life SA¹¹, Koos Pretorius, Melissa Lewis and Peter Ardene¹² objected against the application.
21. Despite these objections, on 04 September 2023, the First Respondent granted the said application to the Second Respondent.
22. After receiving the reasons for its decision on 03 October 2023, the Appellant lodged this appeal on 23 October 2023.

(4) *For the purposes of this section—*
"hearsay evidence" means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence;
"party" means the accused or party against whom hearsay evidence is to be adduced, including the prosecution." [Our emphasis]

⁹ Section 40(1) of the Act provides that:

"A person who is required or wishes to obtain a licence to use water, must apply to the relevant responsible authority for a licence."

¹⁰ See footnote 2 supra.

¹¹ See footnote 3 supra.

¹² See Table 18 titled "Outcome of the public Participation" on pages 265-268 of the Index 3 (Records 1)

23. In the main, the Appellant argued that there were shortcomings in the public consultation process; the First Respondent had a statutory obligation to consider factors listed in section 27 of the Act, yet it failed to do so, the First Respondent failed to consider the environmental and socio economic impact that mining operations will cause on the Greater Lakenvlei protected area ("wetland"); and it also failed to ensure that the Second Respondent made adequate financial provision for rehabilitation after mining activities had ceased.
24. On the other hand, the First Respondent argued that the grounds of appeal were vague, unsubstantiated and lack factual and/or legal basis; they also failed to consider conditions set out in the water use licence; and the ROR addressed the issue pertaining to wetland and also dealt with objections and concerns raised during the public participation process.
25. The appeal before the Tribunal takes the form of a rehearing, and the Tribunal may receive evidence¹³. 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 information¹⁴. This means that the Tribunal is not confined to the record of the body a quo.
26. In *Mining and Environmental Justice Community Network of South Africa and Others v Minister of Environmental Affairs and Others*¹⁵, 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

¹³ Item (3) of Schedule 6 to the Act read with rule 7(1) of the Water Tribunal Rules.

¹⁴ *Tikly and Others v Johannes NO and Others* 1963 (2) SA 588 (T) at 590G

¹⁵ (50779/2017) [2018] ZAGPPHC 807; [2019] 1 All SA 491 (GP) (8 November 2018) at para 11.10.2.

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 Johannes 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]."

27. Accordingly, in addition to the record of the impugned decision, this Tribunal had to consider the evidence of the Appellant's witnesses to determine whether the Appellant has succeeded in discharging the onus of proof.
28. However, on proper analysis of their evidence, the Appellant failed to discharge the onus of proof.
29. Mr Boshoff, conceded to the following:
 - 29.1 He was just a large-scale farmer with no expertise on water, environmental technical and financial issues.
 - 29.2 The Appellant's grounds of appeal were premised on Bird Life SA's report.
 - 29.3 The expertise was vested with Bird Life SA, yet the Appellant did not call Bird Life SA as a witness.
 - 29.4 Apart from his personal feelings that more should have been done, the provisions of sections 27, 41(2)(c) and 41(4) of the Act were complied with.
 - 29.5 He was not aware that the mining activity was located in a different catchment area and that it was not going to affect the Greater Lakenvlei protected area¹⁶.
30. Mr Krige's evidence did not advance the Appellant's case at all.

¹⁶ See paragraph 3.2 titled "Methods statement (only for 21 (c) and (i) activities" on page 240 of the Index 3 (Records 1), which provides as follows: ".....The Lakenvlei wetland falls within olifants catchment and will not be affected by the mining activity because it is located in the Olifants catchments and the mining activities are located in the Goenvlei catchment which is located in the Crocodile catchment."

31. His insistence that the Mpumalanga Tourism & Parks Agency ("MPTA") should have been consulted was not supported by any documentary evidence and as such, should be rejected.

Conclusion

32. Based on the above, the Tribunal concludes that:
- 32.1 The Appellant has failed to discharge the onus of proof herein.
- 32.2 The ROR¹⁷ and the licence conditions¹⁸ adequately dealt with all the issues raised by the Appellant in its Notice of Appeal.
- 32.3 The ROR considered the following:
- 32.3.1 Assessment of adequacy of suggested mitigation measures¹⁹.
- 32.3.2 Inputs from other Sections of Department of Water and Sanitation²⁰;
- 32.3.3 Objections/concerns during Public Participation Process²¹;
- 32.3.4 Section 27(1) factors²²; and
- 32.3.5 Summary Key Findings²³.
- 32.4 On the other, the water use licence imposed the following relevant licence conditions:
- 32.4.1 Closure and Post Closure Mine Water Management²⁴; and
- 32.4.2 Budgetary Provisions²⁵.

¹⁷ See ROR on pages 230-276 of the Index 3 (Records 1).

¹⁸ See Licence No. 05/X21F/ACGIJ/3663 on pages 196-229 of the Index 3 (Records 1).

¹⁹ See paragraph 4.4 titled "*Assessment of the adequacy of suggested mitigation measures*" on pages 259-260 of the Index 3 (Records 1).

²⁰ See paragraph 4.5 titled "*Inputs from other Sections of Department of Water and Sanitation*" on pages 261-265 of the Index 3 (Records 1).

²¹ See paragraph 5.2 titled "*Objections/ concerns during Public Participation Process*" on pages 265-268 of the Index 3 (Records 1).

²² See paragraph 5.3 titled "*Section 27(1) factors*" on pages 268-274 of the Index 3 (Records 1).

²³ See paragraph 6 titled "*SUMMARY KEY FINDINGS*" on page 274 of the Index 3 (Records 1).

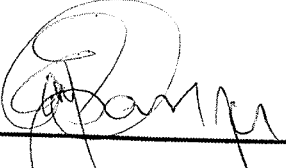
²⁴ See paragraphs 2.37, 2.38 and 2.39 on page 209 of the Index 3 (Records 1).

²⁵ See paragraph 5 titled "*BUDGETARY PROVISIONS*" on page 217 of the Index 3 (Records 1).

Order of the Tribunal

33. Consequently, the following order is made:

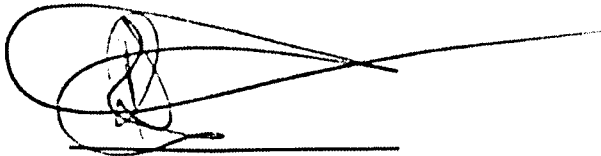
(a) The appeal is dismissed.



Mr Emmanuel Mpanza

Additional Member of the Water Tribunal and Chairperson

I agree



Ms Rainy Disebo Mashitisho

Additional Member of the Water Tribunal

Appearances:

For the Appellant:

Adv. I N Kruger

Instructed by Stegmanns Inc.

For the First Respondent:

Adv. H Mpshe

Instructed by State Attorney, Pretoria

For Second Respondent:

No Appearance