

**IN THE WATER TRIBUNAL OF SOUTH AFRICA  
HELD IN BELVILLE, CAPE TOWN**

**CASE NO: WT12/22/WC**

In the matter between:

**KNAPDAAR BELEGGINGS TRUST**

**Appellant**

and

**CHIEF DIRECTOR: DWS**

**Respondent**

Date heard: 17 and 18 October 2023

Date of judgement: 4 April 2024

Coram: Adv Puseletso Loselo, Chairperson of the Water Tribunal

Ms Lahlane Malema, Additional Member of the Water Tribunal

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**JUDGEMENT**

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*Introduction*

1. This is an appeal brought by the appellant in terms of s 148(1)(f) of the National Water Act, 36 of 1998 (*'the Act'*) against the refusal by the respondent to grant a

water use license application ('WULA') (No.27/2/14/G1010/9/2) on 12 September 2022 ('the decisions').

2. The appellant applied for a water use license a ('WUL') which is the subject of this appeal on 8 October 2019.
3. In this matter, this Water Tribunal ('*Tribunal*') is asked to determine whether or not the basis on which the respondent rejected the appellant's WULA is legally sound. The WULA was rejected on the basis that there was insufficient surface water in the Boesmans River ('*the river* ') for the enlargement of the dam for a storage of 961,000 m<sup>3</sup>/a.
4. The appeal was lodged on 12 September 2022 in respect of the decision by the Respondent. The application was lodged with the Respondent on 8 October 2019, for water use license in terms of s 21(b), (c) and (i) of the Act which, in respect of this matter, was for the enlargement of the dam, so as to store the water the extraction of which has already been authorised. The abstraction or taking of water from a water resource was not part of the applicant's application. This is so because the taking of the water from the water resource had already been licensed in 2016. I deal with this aspect later.
5. The WULA was for the expansion of an existing in-stream irrigation Zuurfontein Dam 2 ('*the dam* '), from a storage capacity of 287,000 m<sup>3</sup>/a to 961,359 m<sup>3</sup>/a with a

15.2 m wall height. The dam is located on a minor tributary of the Boesmans River, Piketberg RD, Western Cape province. The water to be stored in the dam sought to be enlarged is to be extracted from the river in terms of the 2016 WUL.

### *Background*

6. The appellant owns Portion 5 of Zuurfontein 139 and holds a WUL number 24/GI0K/ABCI/4918 which was issued on 28 November 2016. The WUL authorised the appellant to use water in terms of s 21(a), 21(b), 21(c), and 21(i) of the Act, which is taking water from a water resource; storing water; impeding or diverting the flow of water in a watercourse, and altering the bed, banks, course or characteristics of a watercourse, respectively.
7. The water use in terms of 21(b) of the Act authorised the appellant to abstract 961,359 m<sup>3</sup>/a of water from the river to be used for irrigation of crops. Of the total volume of authorised water, 48,000 m<sup>3</sup>/a was to be abstracted from the surface water run-off in the catchment from the Kuilders/Boesmans river.
8. The 394,000 m<sup>3</sup>/a of the authorised water was to be stored in the dam which was to be of the same capacity. However, the Appellant only constructed a dam with a storage capacity of 287,000 m<sup>3</sup>/a. Given the fact that the Appellant already had authorisation for the storage of 394,000 m<sup>3</sup>/a, the proposed enlargement of the dam

was to increase capacity for the storage of the remainder of the 961,359 m<sup>3</sup>/a, namely 567,359 m<sup>3</sup>/a of surface water.

9. There are some conditions which are relevant to this appeal attached to the 2016 WUL. It provides that the authorisation to take water from a water resource does not guarantee the availability of the quantities or qualities of the authorised water. Further the WUL is valid for a period of 20 years from the date of issuance and is reviewable at an interval of five years.
10. As indicated above, the WULA was rejected on 4 August 2022, on the basis that there was insufficient surface water in the catchment. The refusal of which led to the current appeal.

*Reasons for the refusal of WULA*

11. The stated reason for the refusal of the 2022 WULA, as set out in the Record of Recommendations, is that the irrigation demand in the catchment is greater than its Mean Annual Runoff and as a result of which there is insufficient surface water available in the river to fill the proposed dam; that the yield balance for the Berg Water Management Area, 2004 indicates that the area is severely stressed in terms of surface water and that as a result additional surface water cannot be allocated; that the allocation of additional abstraction of surface water out of the Boesmans River will place additional stress on the catchments surface water resources and

detrimental impact on the existing water users and the environmental water requirements for the Boesmans and Berg Rivers; and that the Berg River's ecological systems are in a threatened state and insufficient water is reaching the Berg River Estuary.

12. It is worth noting that the study relied upon predates the 2016 WUL and the 2022 WULA.

*The grounds of appeal*

13. The Appellant's grounds of appeal against the refusal of the WULA are that its application does not require additional water abstraction and that the Respondent was wrong to state that additional surface water cannot be allocated; that the fact that abstraction of water for storage in the dam will take place during high flow winter conditions, as opposed to during low flow summer conditions, will have a positive impact on the water resource; that its farming operations will benefit by abstracting and storing during the high flow winter conditions; and that there will be minimal, if any, adverse ecological effects from the proposed water use.
14. The gist of the Appellant's grounds of appeal was that the abstraction of the 961,000 m<sup>3</sup>/a from the Boesmans River had already been authorised by means of a WUL of 28 November 2016 to which I have already referred above. Thus, no additional water will be taken from the Boesmans River. Further that because no additional

water will be taken from the river the reserve will not be affected adversely by the abstraction and storage of the water already authorised. The Appellant also contends that the storage of water during high flows is considered justifiable in a water scarce country.

15. The Appellant supplemented its grounds of appeal on 20 October 2022. First, it is stated that the Appellant abstracted 951,207 m<sup>3</sup> of water per annum and 897,920 m<sup>3</sup> of water per annum over the period 2 January 2020 to 6 January 2021 and 7 January 2021 to 29 December 2021, respectively. As a result, the Appellant contends that the 961,359 m<sup>3</sup>/a of water which has already been authorised is indeed available for abstraction for direct irrigation or storage. Second, that the Appellant is currently unable to store this volume of water which will be a far more effective and beneficial manner in which to utilise water. I referred only to the grounds which I consider relevant for the purpose of this appeal. This shall become clear later.

#### *Grounds of opposition*

16. The Respondent's grounds of opposition is a restatement of the grounds of refusal as recorded in the Record of Recommendations to which I have already referred above. In addition, the Respondent states, as a ground of opposition, the fact that if the WULA is granted for the storage 'based on the existing water use entitlement for abstraction', it will have an impact on downstream water users; that the water that *'the Appellant is entitled to abstract in terms of its water use entitlement is not*

*available as it is evident in the Appellant's need to apply for storage is motivated in the WULA to ensure water security'.*

17. Stripped to its bare bones, the Respondent's main ground of opposition is that there is insufficient surface water available for abstraction and storage in the proposed dam.

*The applicable legal framework*

18. Section 27 of the Act sets out the factors which must be considered by the responsible authority in the issuance of a water use license or a general authorisation. These include existing lawful water uses; the socio-economic impact of the water use or uses if authorised; the likely effect of the water use to be authorised on the water resource and on other water users; the class and the resource quality objectives of the water resource; and the quality of water in the water resource which may be required for the Reserve and for meeting international obligations, amongst others.
19. The above-mentioned factors invariably require that the responsible authority must take into account the availability of water before a WUL, or a general authorisation is issued. Inherently, the responsible authority is entitled to refuse to grant the water use license, if upon consideration of the factors stated above, he comes to the conclusion that the issuance of such a licence will negatively impact the

environment, other authorised water users, and the Republic's international obligations.

20. Section 40(2) of the Act empowers the responsible authority to take certain steps when considering an application for a water use license. This includes requiring an applicant, to, at his expense, obtain and provide him with other information, in addition to the information contained in the application; to subject the information to an assessment by a competent person of the likely effect of the proposed licence on the resource quality; and require that assessment be subjected to an independent review by a person acceptable to the responsible authority.
21. The responsible authority may also conduct its own investigation on the likely effect of the proposed licence on the protection, use, development, conservation, management and control of the water resource.
22. Upon having considered the provisions of s 27 and s 40 and any other relevant provision of the Act, the responsible authority, may either refuse or grant the water use license. Insofar as the 2016 WUL is concerned, the responsible authority was satisfied that the requirements for the issuance of that licence had been met. Had this not been the case the responsible authority would not have issued the 2016 WUL.



23. Section 49(1) of the Act empowers the responsible authority to review a licence. However, such a licence is only reviewable at the time periods stipulated for that purpose in the licence.
24. Section 49(2) provides that in reviewing a licence, the responsible authority may amend any condition of the licence, other than the period thereof, if it is necessary or desirable to prevent deterioration or further deterioration of the quality of the water resource; if there is insufficient water in the water resource to accommodate all authorised water users after allowing for the Reserve and international obligations; or if it is necessary or desirable to accommodate demands brought about by changes in the socio-economic circumstances; and if it is in the public interest to meet those demands.
25. Section 49(3) of the Act circumscribes the circumstances subject to which a licence conditions may be reviewed and amended. It provides that an amendment may only be made if the conditions of other licences for similar water use from the same water resource in the same vicinity, as determined by the responsible authority, have also been amended in an equitable manner through a general review process.
26. I shall return later to the import of these provisions on the current appeal.

*The evidence*

27. Both parties called several witnesses to testify mainly about whether the catchment has sufficient surface water.
28. The view that we take is that the issue of the availability of surface water, insofar as it relates to the application for the enlargement of the dam, does not arise. The 2016 WUL has already authorised the abstraction of that volume of water. It is thus unnecessary to deal with this evidence insofar as it is directed at the question of whether or not there is sufficient surface water for storage in the dam sought to be enlarged. This is so because there was no dispute regarding the availability of surface water when the 2016 WUL was issued to the Appellant.
29. It is telling that the respondent relies, in its defence, on a study conducted in 2004 when the 2016 WUL was granted notwithstanding that study. It can only be concluded that when the 2016 WUL was granted there was sufficient surface water.
30. More importantly the 2016 WUL authorised the Applicant to abstract 961,359 m<sup>3</sup> of water per annum from the Boesmans River and 48,000 m<sup>3</sup>/a of which was to be sourced from the surface water runoff in the catchment. Of that total volume of water 394,000 m<sup>3</sup>/a was to be stored in the dam for the purpose of irrigating crops.<sup>1</sup>
31. In addition, in the Respondent's own words the water to be stored in the dam will be sourced from the river in terms of an existing water use license for the taking of

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<sup>1</sup> page 359, paragraph 7 of the record.

961,315 m<sup>3</sup>/a. Further that this water is currently used for the irrigation of 60 ha of onions, 40 ha of potatoes and 50 ha of citrus.<sup>2</sup> I have indicated in paragraph 15 above the volumes of water abstracted from the river by the appellant during the period 2 January 2020 to 6 January 2021 and 7 January 2021 to 29 December 2021. This assertion has not been disputed by the respondent. It begs the question, if this water was unavailable to the respondent, where was this water being extracted during the period set out above.

32. This proposition finds support in the concession made by Mr Neels Du Buisson, a witness for the Respondent, who is also a chief engineer for the Respondent. Mr Du Buisson conceded that when the 2016 WUL was granted, the Respondent was satisfied that there was sufficient surface water otherwise the licence would not have been issued.<sup>3</sup>
33. That the 2016 WULA could not have been granted if there was insufficient water find support in the provisions of s 27 and s 41 of the Act which I have already dealt with above. The responsible authority is required to take a number of factors into account before issuing a licence. He obviously must have done so.
34. Having admitted that the 2016 WULA could not have been issued if there was no sufficient surface water available, it must follow, as correctly conceded by the Respondent, that when the licence was issued there was sufficient surface water.

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<sup>2</sup> Record File 1, page 39, para 1.1.

<sup>3</sup> Transcript 2023 October 17, page 21, line 25 and page 22, line 1 to 13.

35. To the extent that subsequent to the issuance of the 2016 WUL, the water availability changed adversely, the Respondent is empowered to review the licence conditions periodically as provided for under s 49 read with s 27(2) of the Act.
36. If indeed there is insufficient water in the catchment or sub-catchment, this is the route that the Respondent ought to follow. Paragraph 5 of the 2016 WUL states that the licence is valid for a period of 20 years from the date of issuance and may be reviewed after every five years.<sup>4</sup> It appears that the Respondent has not opted to follow this legal mechanism to address the challenges contemplated in s 49(2).
37. In any case, to the extent that there was any basis to review the appellant's licence conditions, it would have to be done in accordance with s 49(3) of the Act. In other words, the rest of the other licences holders for similar water use from the same water resource in the same vicinity, as determined by the responsible authority, also have to be subjected to the review and amendment of the licence conditions. This must be done in an equitable manner through a general review process.
38. Insofar as the general review of the licence conditions and amendment thereof may result in the economic viability of any undertaking in respect of which the licence was issued, being severely prejudiced, the provisions of s 22(6) to (10) will apply<sup>5</sup>. In other words, such a licence holder will be entitled to compensation.

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<sup>4</sup> *Record File 1, page 359 of the record.*

<sup>5</sup> *s 49(4).*

*Powers of the Tribunal on appeal*

39. The appeals before the Tribunal take the form of a rehearing. The Tribunal may, thus, receive new evidence.<sup>6</sup> 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.<sup>7</sup> Under this type of appeal the Tribunal is not confined to the record of the body *a quo*.
40. With specific reference to appeals to the Tribunal under the Act in the matter of *Mining and Environmental JCN v Minister of Environmental Affairs*<sup>8</sup> it was held that all the parties agreed that all appeals in terms of NEMA, the MPRDA and the Act fall into the category of the so-called wide appeals. Further that this consists of reconsiderations of the original decisions and authorisations, and new evidentiary material may be introduced.<sup>9</sup>
41. Therefore, this appeal is a wide appeal in terms of which the matter is reconsidered afresh and in terms of which new evidentiary material may be introduced. The appeal is not confined to the record of the impugned decision.
42. The Tribunal can, therefore, after having reconsidered the application, replace the decision of the responsible authority with that of its own. In substituting its decision

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<sup>6</sup> item 6 (3) of Schedule 6 to the Act read with rule 7(1) of the Water Tribunal Rules.

<sup>7</sup> *Tikly and Others v Johannesburg, N.O., And Others* 1963 (2) SA 588 (T) at 590G.

<sup>8</sup> 2019 (5) SA 231 (GP).

<sup>9</sup> *ibid* para 11.10.2.

for that of the responsible authority 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.

43. These may include 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.<sup>10</sup>

44. I consider it appropriate that this Tribunal substitutes the decision of the respondent for that of the Tribunal.

45. First, the issue for determination is very narrow and easy to determine, namely, whether there is insufficient surface water which warranted the decline of the WULA. I have already dealt with this matter. There is no dispute about the availability of water given the fact that the 2016 WUL dealt with aspect of water availability. Therefore, the Tribunal is in as good a position as the responsible authority to make a decision on whether or not to grant the WULA.

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<sup>10</sup> *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.

46. Second, it goes without saying that the only decision that the responsible authority can make, if this matter is remitted to him, is to grant the WULA. This is an incapable conclusion.
47. Third, if we do not make the decision on whether or not to grant the WULA and remit the matter to the respondent, there will be a further inordinate delay. The application for the WUL was made on 8 October 2019 and the decision on the application was made about three years later, on 4 August 2022. The appeal was launched promptly on 12 September 2022. The respondent only filed its statement of opposition on 22 May 2023 which is a period of eight months from the date on which the appeal was lodged. The appeal was heard 16 and 17 October 2023. Between the time when the application for the WUL was made and the date on which the appeal was heard, a period of just over four years had elapsed.
48. Therefore, to remit this matter to the responsible authority for his consideration will add a further delay of an indeterminate period of time. Substituting the decision for that of the Tribunal will minimise future loss of time.<sup>11</sup> A decision to substitute the decision of the respondent for that of the Tribunal is informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair.<sup>12</sup>

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<sup>11</sup> *Johannesburg City Council v Administrator, Transvaal* 1969 (2) SA 72 (T) at 77D.

<sup>12</sup> *Gauteng Gambling Board v Silverstar Development Ltd & others* 2005 (4) SA 67 (SCA) para 28.

49. That the Tribunal has the power to step into the shoes of the respondent and make a fresh decision was confirmed by the SCA in *Makhanya* as follows:

[27] *The Tribunal effectively had to rehear the application for the water licence. It is well recognised that an application of that nature will ordinarily qualify as administrative action, since the advent of the Constitution. Administrative appeals usually allow for the reconsideration of an administrative decision by a higher authority. Indeed, Hoexter, writing in general, says that the 'person or body to whom the appeal is made steps into the shoes of the original decision-maker, as it were, and decides the matter anew. 'However, each Tribunal falls to be considered relative to its empowering legislation.'*

50. The Constitution enshrines everyone's rights to lawful, reasonable and procedurally fair administrative action.<sup>13</sup> The Tribunal has to have regard to considerations of fairness. Remittal to an administrative authority in cases where such a step will operate procedurally unfairly is not to be countenanced.<sup>14</sup>
51. Lastly, in light of factors already considered above, I conclude that it will be just equitable not to remit this matter to the respondent.

### *Conclusion*

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<sup>13</sup> Section 33(1) of the Constitution provides: "Everyone has the right to administrative action that is lawful, reasonable and procedurally fair."

<sup>14</sup> *Commissioner, Competition Commission v General Council of the Bar of South Africa & others* 2002 (6) SA 606 (SCA) para 14. (See also *Makhanya NO v Goede Wellington Boerdery (Pty) Ltd and Another* (230/12, 233/12) [2012] ZASCA 205; [2013] 1 All SA 526 (SCA), at paragraph 41 to 44).



52. Based on an exposition of the law and the facts above the Tribunal concludes that:

52.1 an application for the taking of water from a water resource, in terms of s 21(a), was not before the Respondent. The reason therefor is that the taking of water from the water resource had already been authorised in terms of the 2016 WUL;

52.2 the decision regarding the availability of water had already been made when the 2016 WUL was granted;

52.3 the contention that there was insufficient surface water in the river is not borne out by evidence. This is s because there is undisputed evidence that the appellant extracted 951,207 m<sup>3</sup> and 897,920 m<sup>3</sup> of water per annum from the river during the period 2020 and 2021, respectively;

52.4 an application which was before the Respondent was an application in terms of s 21(b), (c) and (i) of the Act, namely, storing water; (c) impeding or diverting the flow of water in a watercourse; and altering the bed, banks, course or characteristic of a watercourse; and

52.5 in light of what I have said in paragraphs 52.1 to 52.4 above, the question whether or not there was sufficient surface water for the purpose of approving an application in terms of s 21(b), 21(c) and 21(i) of the Act,

does not arise in this appeal. The respondent erred in considering an application which was not before him.

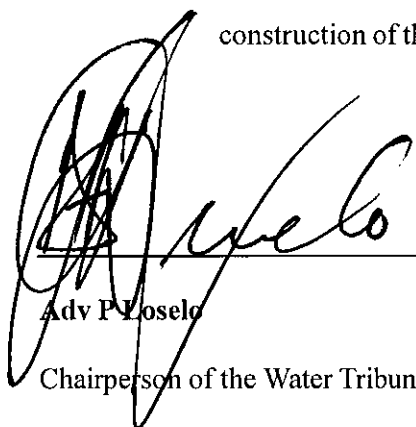
*Order of the Tribunal*

53. Consequently, the following order is made:

- (a) the appeal is upheld.
- (b) the decision of the respondent to refuse the appellant's WULA, file number WU11033 (No.27/2/14/G1010/9/2) dated 8 October 2019, is set aside.
- (c) the respondent is directed to, within 30 days of this order, issue a WUL to the appellant for the enlargement of the dam to a storage capacity of 961,000 m<sup>3</sup>/a.
- (d) the WUL shall be granted in respect of the same water uses referred to in Table 3, page 46 and 47 of the record of recommendations.
- (e) the WUL must be granted subject to the any applicable law, standard and any specific conditions applicable to the type and size of the proposed dam.

(f) The respondent shall not impose any conditions that are not based on the documents forming part of the record of appeal including the record of the proceedings before the Tribunal.

(g) Should the respondent fail to issue the WUL within the period referred to in paragraph (c) above, the appellant shall be entitled to commence with the construction of the dam subject to this judgement, and all the applicable laws.

  
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**Adv P Loselo**  
Chairperson of the Water Tribunal

I agree

  
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**L Malema**

Additional member of the Water Tribunal

Appearances:

For the Appellant: Adv CON Joubert SC

Instructed by Edward Nathan Sonnenberg Inc (J Brand)

For the Respondent: Adv ES Dingiswayo

Instructed by State Attorney Pretoria (I Masango)