

IN THE WATER TRIBUNAL OF SOUTH AFRICA

[HELD AT DURBAN]

Case NO. WT10/12/2014

In the matter between:

ADHEEL SANDS CC

First Appellant

KWAZULU BULK LOGISTICS CC

Second Appellant

and

MINISTER OF WATER AND SANITATION

Respondent

DECISION AND REASONS

INTRODUCTION

[1] This is an appeal in terms of Section 148(1)(j) of the National Water Act, 36 of 1998, as amended ("the NWA / Act") against a directive that was issued by the KwaZulu Natal Provincial Head of the Department of Water and Sanitation ("DWS"), Mr. Ashley Starkey, in his capacity as the responsible authority as contemplated in Section 53(1) of the Act.

[2] The appeal is opposed by DWS and opposing papers in this regard were duly filed.

Coram and appearances for the parties

[3] The appeal panel (“Tribunal”) was chaired by **Adv. TAN Makhubele SC** and two additional members of the Tribunal, Messrs. Ferdinand Zondagh and Pumezo Jonas assisted her.

[4] The appellants’ appeal documents were prepared by Veronica Singh Attorneys. On the first two days¹ of the hearing, the appellants were represented by Advocate Khuboni on instructions of Veronica Singh Attorneys. The respondent was represented by Advocate T.V Norman SC, with Advocate Ngcobo, on instructions of the State Attorney, Durban.

[5] On 12 August 2015, the Tribunal received an email notice from the Adheel Baniparsadh to the effect that the appellants had terminated the mandate of Veronica Singh Attorneys and were in the process of *“giving instructions to another attorney”*.

[6] A notice of withdrawal as attorneys of record was duly served on the Tribunal.

[7] When the hearing resumed on 27 August 2015 Ms Baniparsadh requested to address the Tribunal. She introduced herself as an employee of both the appellants as Transport and General Manager.

¹ 23 and 24 July 2015

[8] She explained that the appellants intended to request a postponement of this hearing but that it would be pointless as settlement negotiations with DWS did not yield any positive results. She went on to explain that the appellants had abandoned the idea of engaging an attorney and instead, she was going to represent them. The Tribunal explained to her the consequences of proceeding without legal representation, which she understood. I will deal with this issue later on in this document.

NOTICE TO ISSUE THE DIRECTIVE

[9] On 24 February 2014, Mr. Starkey issued a notice² to *“Adheel Sands, Kwazulu Bulk Logistics cc, and Mr. Adheel Baniparsadh in your capacity as the owner Adheel Sands and Kwazulu Bulk Logistics cc”*.

In terms of the Notice, the persons/ entities mentioned therein were informed that he intended to issue a Directive in terms of Section 53(1) of the Act that relates to certain contraventions of Section 22(1) thereof.

[10] The intention to issue a Directive was apparently premised on the belief that Starkey had reasonable grounds to believe that the recipients had commenced with activities that were defined as water use in terms of Section 21(c) and Section 21(i) of the Act without an authorization in terms of Section 22 of the Act.

² Paginated papers, p.220

[11] Mr Starkey went on to inform the recipients that his opinion was based on the findings of a site inspection³ that was conducted at Umvoti River on 30 September 2014 by officials of DWS, Umgeni Water and KwaDukuza South African Police Services.

[12] The findings were amongst others the following;

[12.1] The recipients, and Ms Baniparsadh, who was found on the site were involved in sand mining operations.

[12.2] A Tractor Loader Backhoe (TLB) machine was observed on the Mooi River Channel removing sand from the riverbanks and loading it on a truck.

[12.3] The effect of the sand mining operations was that; bed banks had been altered and there was destruction of the riverbank formation and riparian vegetation.

[12.4] Traces of grease were observed on the banks.

[12.5] Stockpiles of sand were left inside the river channel diverting the flow, and on the flood line.

³ The Site Inspection report is in Paginated page 209 to 219

[12.6] The workers were not able to produce proof of Water Use Authorization for the sand mining at Umvoti River as well as proof of authorization in terms of Section 27 of the Mineral and Petroleum Resources Development Act of 2002.

[12.6] Ms Baniparsadh produced a copy of an Environmental Management Plan (EMP) from the Department of Mineral Resources dated 12 December 2005.

This document had comments from DWS. Condition 6 thereof provides that *“The Umvoti River must not be diverted by sand mining and if any diversion has to take place an authorization is required from the Department of Water and Sanitation”*.

[13] The recipients were given an opportunity in terms of Section 3(2)(b) of the Promotion of Administrative Justice Act, Act 2 of 2000 *“to make representations in writing to me and to provide proof of water use authorization for the water use activities outlined above within five (5) working days of receipt of this Notice if you believe that there are compelling reasons why a Section 53(1) Directive of the National Water Act of 1998 should not be issued to you. The Directive will require you to;*

6.1 Immediately (within 24 hours) cease all sand mining activities in Umvoti River.

6.2 *Within fourteen (14) days of receipt of the Directive, appoint at your own expense, an independent Environmental Assessment Practitioner (EAP) to assess the extent of the environmental damage caused by your actions on the Mvoti River and compile a Rehabilitation Plan to be submitted to this Department for approval prior to being implemented.*

6.3 *Within fourteen (14) days of appointment of the Environmental Practitioner, submit the Rehabilitation Plan.*

6.4 *Within thirty (30) days of the Departmental approval implement all the recommendations outlined in the approved Rehabilitation Plan.*

6.5 *Report as per the agreed frequency, on the programs of implementation of the approved Rehabilitation Plan to the Department.*

RESPONSE TO THE NOTICE

[14] The response⁴ to the Notice to issue the Directive is dated 31 October 2014, and on a letterhead of “KWAZULU Bulk Logistics CC”, and signed Mr Adheel Baniparsadh, who identified himself as “Member”.

⁴ Paginated page 224.

Throughout the response (titled “Appeal against notice to issue a Directive”) Mr Baniparsadh referred to the parties on whose behalf he was responding as “we”.

[15] The summary of the response / appeal is that:

[15.1] they denied diverting or impeding the flow of water, or altering the river bank course.

[15.2] they are holders of a 20 year mining lease at the site in question and they believe in sustainable and responsible mining. They do not mine various parts of the river and damaging the environment. They mine in one site for a long-term.

[15.3] they are willing to apply for a water use licence and request time to do so.

[15.4] DWS (then DWAF) did not in its comments to their EMPR, mention that they were required to hold a water use licence, *“neither was it brought to our attention by DMR”. We cannot stop a running business as we were unaware of any such requirements and any loss of production may lead to legal action from our clients. We do not actually use water in our production process, however,*

should it be a compulsory requirement since we are mining in the river, we would be glad to comply.

We have contributed more than R500 000 towards toward Poverty Alleviation, Local Economic Development etc in the Mgigimbe community and even assisted in bringing piped water to parts of the Community who had been trying the municipality for years unsuccessfully. Hence we are committed to the upliftment of our community, care for our environment and look after our employees and customers since we seek to operate a sustainable SMMME. In saying so we appeal against your issuing us with a directive of any kind and request your assistance with our application for a water use licence”⁵

REJECTION OF REPRESENTATIONS (APPEAL AGAINST ISSUING OF DIRECTIVES)

[16] In rejecting⁶ the appellants’ representations / appeal against issuing of a directive, Mr. Starkey indicated, amongst other things that:

[16.1] There was evidence “*on the observed diversion and impeding of Mvoti River by your sand mining activity*”.

[16.2] the recipients should familiarize themselves with the conditions of their authorization in terms of the EMP from

⁵ Paragraph 5 of the response.

⁶ Letter dated 13 November 2014, Paginated page 226

Department of Mineral Resources dated 12 December 2005, and in particular DWS comments. He referred to Condition 5 of the EMP that reads as follows:

“the watercourse may not be impeded, altered or diverted without approval from the Department of Water Affairs and Forestry. Such an activity will have to be licensed according to section 21(c) or section 21(i) of the National Water Act (Act No 36 of 1998”

THE DIRECTIVE

[17] On 13 November 2014, Mr Starkey issued a Directive⁷ in terms of Section 53(1) of the Act to Mr Adheel Baniparsadh in his representative capacity⁸.

[18] The Directive is along the lines indicated in the Notice (pre-directive) and as such I do not deem it necessary to reproduce it, save to highlight the fact that the recipients were also notified about the implications of non-compliance as well as their right of appeal and in this regard they were advised that the Minister was in the process of reconstituting the Water Tribunal. They were advised to notify the Chief Director, Legal Services, if they were amenable to subject to mediation and negotiation as contemplated in Section 150 of the Act.

⁷ Paginated page 228

⁸ As the owner of Adheel Sands and Kwazulu Bulk Logistics cc

THE GROUNDS OF APPEAL

[19] The appellants were not yet in possession of material documents and evidence that Mr Starkey relied on to issue the Directive, hence it is understandable that they were not in a position to properly formulate their grounds of appeal when they filed the original Notice of Appeal⁹. They stated in this notice for example that they did not know the “*credentials of the observers*” and were not aware whether Mr Starkey relied on any scientific or analytical reports.

[20] Nevertheless, they formulated their grounds of appeal as follows;

Ad first appellant

[20.1] Mr Baniparsadh is not the owner of the first appellant (“Adheel Sands”), nor is he a director or shareholder.

[20.2] Adheel Sands is “*merely a subcontractor engaged solely in assisting the Second Appellant (“Kwazulu Bulk Logistics”) at times with laborers but primarily in assisting with transportation of the sand*” and has never been engaged in any unlawful sand mining activities.

Ad second appellant

⁹ dated 03 December 2014, Paginated page 1

[20.4] KwaZulu Bulk Logistics acquired Mining Rights in terms of Section 23(1) of the Mineral and Petroleum Resources and Development Act, 28 of 2002 ("the MPRDA") 19 October 2006 to conduct lawful mining activities in the mining area called *"Remainder of the Farm Welverdient No. 2632 situated in the KwaDukuza Magisterial District measuring 7.18 hectares in extent, fully depicted in ST diagram annexed to the Mining Rights which is annexed hereto marked "AS 1"*.

[20.5] It has never contravened any provisions of *"the aforementioned Act by conducting any Mining activities out of its designated area not in a manner that would require authorization by the Department of Water and Sanitation."*

[20.6] Kwazulu Bulk Logistics is *"neither a water user, nor is in contravention of the Act"*.

[20.7] It is aware of the Condition in its EMP from DMR dated 12 December 2005 that provides that *"the Mvoti River must not be diverted by sand mining and if any diversion has to take place an authorization is required from the Department of Water and Sanitation"*

[20.7] Relying on a dictionary meaning of the words “diverting flow” or impeding flow”¹⁰, the second appellant argued that it did not require authorization because it was *“not engaged in an activity that impedes or diverts the flow of water in a water course as envisaged in the Act”*.

[20.8] with regard to the validity of the findings that were allegedly made during the on-site inspection as indicated in the Notice and the Directive, the second appellant argued that they were *“based on superficial observations. There are no substantiated visual or documentary evidence depicting the characteristics of the river prior to the granting of the mining right up to and including the date of observation that can be used to compare the differences. The observations are therefore speculative and without foundation”¹¹*

[21] The remaining grounds of appeal¹² were based on the fact that the second appellant complied with the requirements set by the Minerals Act before issuance of an EMP.

The second appellant’s argument in this regard is that it complied with all relevant legislation and regulations with regard to provision of information on impact of the mining activities on the environment,

¹⁰ Paginated Page 11, paragraph 17.

¹¹ Paragraph 18 of the Notice of Appeal, paginated page 12.

¹² Paragraphs 19-21 of the Notice of Appeal, paginated page 13-14.

socioeconomic conditions of persons who might be directly affected and measures that it would take to modify, remedy or control the negative impacts. The second appellant argued that since it started its mining activities in 2006, the river banks have not been eroded away as alleged. It concluded by stating that it was not necessary for it to obtain authorization from DWS because its activities did not impede or divert the flow of water in a watercourse.

SUPPLEMENTARY GROUNDS OF APPEAL¹³

[22] The appellants were still not in possession of a record of proceedings. The grounds of appeal were however supplemented as follows:

[22.1] The authority of Mr. Starkey to issue the Directive.

The argument in this regard was that the Minister has, on 23 June 2005¹⁴, and in terms of Section 63 of the Act, delegated the relevant powers to the Chief Engineer. Mr. Starkey, according to his letter of appointment¹⁵, is not a Chief Engineer, but a Chief Director/ Regional Head: KwaZulu Natal, DWS.

A copy of the DWS organogram¹⁶ was attached to prove this point.

[22.2] It was also alleged that by ordering the appellants to “shut down all sand mining activities”, Mr Starkey acted outside the

¹³ Dated 13 July 2015, paginated page 20.

¹⁴ Annexure “A”, paginated page 32

¹⁵ Annexure “B”, paginated page 34

¹⁶ Annexure “C”, paginated page 35.

empowering legislation (Section 53). Section 53(2) provides for the steps to be taken by the responsible authority.

[22.3] the Appellants argued that their water use was covered by the General Authorization in terms of Section 39 of the Act, and in particular, it was covered by the various Government Notices¹⁷ issued in terms thereof.

[22.4] Mr Starkey went against the information placed before him in the investigation report that was compiled by Mr. Candia Chirambo and Mr. Jacob Phukubye and recommendations therein when he issued the Directive.

RESPONDENT'S OPPOSITION

AD original Notice of Appeal

[23] Section 27 of the Constitution, Act 108 of 1996 provides that everyone has the right to have access to amongst other things, sufficient food and water. The state is enjoined to take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.

¹⁷ Paginated page 26

The Directive, issued in terms of Section 53 of the NWA is one such measure that is intended to protect the right to water by providing mechanisms for rectifying contraventions related to unlawful water use.

[24] The factual circumstances around which the inspection was conducted were also placed on record. In particular, the fact that the DWS was notified about sand mining operations in the Mvoti River on 03 August 2014. On 18 November 2014, DWS sought and was granted a warrant¹⁸ by Magistrate KwaDukuza in terms of Section 125 of the Act to remove berms and to protect the water quality and to investigate whether there has been any contravention of any condition in the Act.

[25] After investigations were conducted, the findings were recorded in a report as I have already mentioned when I dealt with the Notice to issue a Directive.

[26] The result of water diversion was that the people in the surrounding areas were not receiving water. This exacerbated the drought situation in KwaZulu Natal.

[27] The appellants are amongst about six (6) other transgressors that have been issued with the Directives. The appellant's attitude was that it would not remedy the situation, hence remedial work was carried by DWS and Umgeni Water.

¹⁸Annexure "C", paginated page 235.

[28] Remedial work can only be done when the site is clean and with no mining activities. This commenced on 27 and 28 November 2014.

[29] The response¹⁹ by DWS to the applicants' Environmental Management Scoping Report dated 28 December 2005 is important because the appellants' mining right to mine sand is conditional upon compliance with other laws, including the provisions of the Act in question.

[30] The findings of the site inspection were recorded in a "CD"²⁰.

[31] The appellants failed to produce proof of its water use authorization.

[32] The Directive is an administrative action which is valid until it is set aside. Under the circumstances, it is rational and was intended to halt an unlawful act from continuing. Furthermore, it is for the public good. When balanced with the competing interests, it should stand to protect the public and the environment.

Ad Supplementary Notice of appeal

[33] The respondent dealt with the issues raised in the Supplementary

¹⁹ Annexure "DWAA7", paginated page 242.

This letter was constantly referred to rebut the appellants' claim that they were not aware that they had to obtain an authorization in terms of the National Water Act .

²⁰ Annexure "DWAA10.

This formed the basis of the evidence of Mr. Sibusiso Skhosana.

grounds of appeal as follows:

Ad delegated authority of Mr. Starkey

[34] Although the Minister assigned the powers to be exercised to the Chief Engineer, the delegation specifically says that “*A reference to the incumbent of a particular post also includes the incumbent of a post senior to the said post in the functional line. The incumbent of a senior post shall only exercise the powers and duties herein delegated with good reason and shall be accountable for his or her decision to do so; such exercise of authority must be recorded in writing*”.

Therefore, Starkey has acted in accordance with the delegation and did not exceed his powers. A correct Organogram²¹ was attached. Starkey is the Provincial Head and the Chief Engineer reports to one of his subordinates.

Ad ultra vires

[35] In terms of section 53, the responsible authority is authorised to take any other action necessary to rectify the contraventions. Allowing the appellants to continue with water use activities would have been unlawful.

[36] The appellants were referred to several clauses in their EMP in

²¹ Paginated page 255

terms of which they undertook to comply with the provisions of any other law²². Furthermore, the appellants indicated, amongst other things that the flow of the river would not be affected or restricted in any way, the river would not be diverted, river bank would not be disturbed, river channel would not be impeded, altered, restricted or diverted. Again, reference was made to the paragraph 5 of DWS response to the applicants' application for a mining right where they undertook not to impede, alter or direct a watercourse without the approval of DWS and that such activities require licensing in terms of Section 21(c) or 21(j) of the Act.

Ad reliance on General authorization in terms of Section 39 of the NWA read with Government Notice GN 1199 OF 18 December 2009.

[37] A person who uses water in terms of the General Authorization must submit a registration form for registration of the water use. The appellants have failed to produce any proof of submission of a form, registration certificate or that they are registered for water use in terms of general authorization.

Ad information placed before Mr. Starkey

[38] Mr Starkey took into account all the information placed before him as well as photographs that depict the sites and the contraventions.

²² Clauses 2 and 16

Evidence in terms of Rule 7(2) would be tendered by the witnesses; Ms Zanele Msimang, Mr Sibusiso Skhosana, Mr. Jacob Phukubye and Dr. Roets.

[39] According to the respondent, the issues for decision are;

[39.1] Whether the appellant has authority to engage in water use activities at Mvoti River. The appellants admitted when they made representations against issuing of the Directive that they did not have one and requested time to do so.

[39.2] Whether the appellant is engaging in water use activities at Mvoti River.

[39.3] whether the Directive was properly issued and not whether water has been polluted.

[40] In conclusion, the respondent submitted that there was a need for oral evidence to determine the question of whether or not the appellants were engaged in water use activities.

RELEVANT LEGISLATIVE FRAMEWORK

[41] I now proceed to quote the relevant provisions of the National Water Act, Act 36 of 1998 as amended.

Section 21: **Water use**

For the purpose of this Act, water use includes –

- (a) taking water from a water resource;*
- (b) storing water;*
- (c) impeding or diverting the flow of water in a watercourse;*
- (d) engaging in a stream flow reduction activity contemplated in section 36;*
- (e) engaging in a controlled activity identified as such in section 37(1) or declared under section 38(1);*
- (f) discharging waste or water containing waste into a water resource through a pipe, canal, sewer, sea outfall or other conduit;*
- (g) disposing of waste in a manner that may detrimentally impact on a water resource;*
- (h) disposing in any manner of water that contains waste from, or which has been heated in, any industrial or power generation process;*
- (i) altering the bed, banks, course or characteristic of a watercourse;*
- (j) removing, discharging or disposing of water found underground if it is necessary for the efficient continuation of an activity or for the safety of people; and*
- (k) using water for recreational purposes.*

Section 22: Permissible water use

(1) A person may only use water –

(a) without a licence –

(i) if that water use is permissible under Schedule 1;

(ii) if that water use is permissible as a continuation of an existing lawful use; or

(iii) if that water use is permissible in terms of a general authorisation issued under section 39;

(b) if the water use is authorised by a licence under this Act; or

(c) if the responsible authority has dispensed with a licence requirement under subsection (3).

Section 39: General authorisations to use water

(1) A responsible authority may, subject to Schedule 1, by notice in the Gazette –

(a) generally;

(b) in relation to a specific water resource; or

(c) within an area specified in the notice,

authorise all or any category of persons to use water, subject to any regulation made under section 26 and any conditions imposed under section 29.

(2) The notice must state the geographical area in respect of which the general authorisation will apply, and the date upon which the general authorisation will come into force, and may state the date on which the general authorisation will lapse.

(3) A water use may be authorised under subsection (1) on condition that the user obtains any permission or authority required by any other specified law.

(4) Before issuing a general authorisation, the responsible authority must –

(a) publish a notice in the Gazette –

(i) setting out the proposed general authorisation; and

(ii) inviting written comments to be submitted on the proposed general authorisation, specifying an address to which and a date before which comments are to be submitted, which date may not be earlier than 60 days after publication of the notice;

(b) consider what further steps, if any, are appropriate to bring the contents of the notice to the attention of interested persons, and take those steps which the responsible authority considers to be appropriate; and

(c) consider all comments received on or before the date specified in paragraph (a)(ii).

(5) An authorisation to use water under this section does not replace or limit any entitlement to use water which a person may otherwise have under this Act.

Section 53: Rectification of contraventions

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

(a) any provision of this Chapter;

(b) a requirement set or directive given by the responsible authority under this Chapter; or

(c) a condition which applies to any authority to use water,

direct that person, or the owner of the property in relation to which the contravention occurs, to take any action specified in the notice to rectify the contravention, within the time (being not less than two working days) specified in the notice or any other longer time allowed by the responsible authority.

(2) If the action is not taken within the time specified in the notice, or any longer time allowed, the responsible authority may –

(a) carry out any works and take any other action necessary to rectify the contravention and recover its reasonable costs from the person on whom the notice was served; or

(b) apply to a competent court for appropriate relief.

Section 63: Delegation of powers and duties by Minister

(1) The Minister may, in writing and subject to conditions, delegate a power and duty vested in the Minister in terms of this Act to –

(a) an official of the Department by name;

(b) the holder of an office in the Department;

ORAL SUBMISSIONS AND EVIDENCE

[42] The appeal was heard on the following dates:

[42.1] 23 July;

[42.2] 24 July;

[43.3] 27 August;

[43.4] 28 August;

[43.5] 04 November;

[43.6] 05 November; and

[43.7] 06 November

[43] The delays in finalizing this appeal had nothing to do with the capacity or efficiency of the Tribunal. Some of the contributory factors are the following;

[43.1] When this Tribunal was constituted (in June 2015), there was already a court application between the parties that was pending at the KwaZulu Natal High Court under Case Number 14236/2014. Although the Water Tribunal was not provided with the Notice of Motion, we were placed in possession of a Rule 37 questions and answers, the Pre-trial minutes and the court order²³

²³ Exhibit 5A

The court order provides, amongst other things, that the Applicant (Kwazulu Bulk Logistics) undertakes that pending the adjudication of the appeal by the Water Tribunal, it would abstain from engaging in water use activities as envisaged in Section 21(c) and (i) read with Section 22(1) of the NWA .

dated 25 June 2015 that was issued by Acting Justice Mr. Topping.

[43.2] The Tribunal was informed that as part of the settlement of the pending court application, an undertaking was made by the Registrar of the Tribunal that this appeal would be one of the first cases that would be heard by it. It was then setdown for hearing on 27 and 28 July. The Tribunal did not have an opportunity to give directives with regard to filing of documents. In fact, the Supplementary Grounds of review and opposing papers were filed a few days before the date of hearing.

[43.3] The appellants withdrew the mandate of their attorney of record after the first two days of hearing. Their representative, Ms Baniparsadh indicated that she would like to request a postponement to consider her position, but later changed tune and chose to represent the appellants because according to her, the appellants just wanted to explain what happened. In the next five days of hearing, she tried to resile from the Pre-Hearing Minute that was admitted into evidence on the first date of hearing.

The appellants' attorneys of record had already placed on record that except for the evidence of the expert, there would be no factual witnesses for the appellants. As a result of this, it was agreed that

since the respondent bore the onus to justify the validity of the Directive, it should start to lead oral evidence.

[43.4] When the hearing resumed on 27 August, Ms Baniparsadh who was present throughout the hearing when the appellants were still being represented by Ms Singh and Advocate Khuboni, decided, for the first time to raise an objection on a point of procedure. It took almost half a day to resolve the objection.

Her contention was that it was wrong for the Tribunal to have allowed the respondent to lead evidence first because the Rules provided otherwise.

[43.5] This was not only opportunistic on her part, but also puts to question her motives. She sat close to Ms Singh, the erstwhile attorney for the appellants throughout the proceedings on the first two days of hearing. The two of them were in conversation even when their counsel, Khuboni was making submissions. They occasionally interrupted him, to such an extent that the Chairperson had to adjourn proceedings now and then to allow them to give him instructions. Ms Baniparsadh was aware of what was happening and had an opportunity to brief her legal team. In fact, she and Ms Singh were more in control than their counsel, Mr Khuboni who appeared to be just a conduit pipe between them and

the Tribunal. The reasons given for terminating their mandate was purely based on financial constraints.

[43.6] Finally, and only in the interests of justice, the Tribunal decided to allow Ms Baniparsadh to lead factual evidence. It was then agreed that she would first finalize the cross –examination of Skhosana. Thereafter, she called Mr Baniparsadh and led him in evidence.

[43.7] A huge percentage of the evidence that was led by the appellants was actually not relevant to the issues that the Tribunal was called upon to decide or has jurisdiction²⁴ . Some of these issues would constitute mitigating factors in criminal prosecution.

THE PRE-HEARING MINUTE

[44] At the commencement of the Appeal the parties were invited to, and by agreement, presented the Tribunal with a Pre-Trial minute setting out common cause facts and all the issues in dispute with a view to curtail the proceedings. It reads as follows:-

1.

COMMON CAUSE FACTS

²⁴ For example, the conduct of DWS officials during what is referred to as the “raid” on the appellants’ mining site, the alleged inconsistency in dealing with companies that operate without water licences and the parliamentary questions with regard to water licences.

- 1.1 *The Second Appellant has a mining right.*
- 1.2 *The First Appellant does not have a mining right.*
 - 1.3 *The parties shall for the purposes of the appeal rely on the organogram marked Annexure "A" appearing at pages 255 to 266 and will not make reference to the organogram appearing at page 35 marked Annexure" C".*

2.

ISSUES IN DISPUTE

- 2.1 *The Appellants place in issue the authority of Mr Starkey to issue the Directive which is the subject matter of the appeal.*
- 2.2 *Whether or not the Appellants were or are engaged in water use activities in terms of section 21 of the National Water Act, 1998*
- 2.3 *Whether the Appellants and in particular, the Second Appellant falls within the general authorisation in terms of section 39 of the National Water Act, 1998.*
- 2.4 *Whether or not the Directive was issued properly*
- 2.5 *The Appellants intend to call Professor Turton as an expert. The Respondent objects to him being called as an expert on the issues at hand.*

2.6 The Appellants object to the photographs attached to the report by the Respondent appearing at pages 213 to 219 and a CD compilation thereof marked Annexure "DWAA10" referred to at page 62 paragraphs 30.9.

DATED AT DURBAN ON THE 22ND DAY OF JULY 2015.

[45] The minute was signed by a representative of Veronica Singh & Associates and the State Attorney on behalf of their respective clients. After it was presented to the Tribunal, and after the parties' respective submissions and clarification questions from the panel on the issues arising from each point, it was amended as follows:

Ad paragraph 1.3

By addition of a sentence that reads: "The contents of the organogram are not in dispute. The Chief Engineer reports to or fall in the same line function as Mr. Starkey

Ad paragraph 2.2

The parties acknowledged that there are factual disputes with regard to the question of whether or not the appellants were engaged in water use activities. The appellants indicated that they would rely on the evidence of their expert (it allowed).

The respondent indicated that it would call about three witnesses to testify about this aspect.

Ad paragraph 2.3

The appellants indicated that the first appellant is not involved in mining, as such only the second appellant was going to make submissions in this regard.

Ad paragraph 2.6

By addition of a sentence that read; "*with regard to the investigation report before Mr. Starkey starting at page 209, bottom of page 211 is the relevant part*". Finally, a sentence that read; "*The authenticity of the photos is placed in dispute*" was added.

SUBMISSIONS ON THE POINTS IN LIMINE

[46] It was decided to first hear argument on the points "*in limine*" in respect of those disputed issues referred to in paragraph 2.1 and 2.4 of the Pre-Trial Minute and to give a ruling in this regard.

After hearing arguments from the both parties, the points in limine were dismissed. The reasons appear in the findings made in the discussion of each point hereunder.

Ad paragraph 2.1

[47] The Appellants contend that the authority of Mr Starkey, in his capacity as the provincial director of the Respondent, to issue the directive, was unlawful and invalid.

In terms of Section 63 of the National Water Act 36 of 1998 the Minister is authorised to delegate his/her powers and duties. In this instance these powers and duties were delegated as follows:-

DELEGATION OF POWERS AND DUTIES IN TERMS OF THE NATIONAL WATER ACT, 1998

By virtue of the powers vested in me by Section 63 of the National Water Act, 1998. (Act No. 36 of 1998). I, Buyelwa Sonjica MP, in my capacity as Minister of Water Affairs and Forestry, hereby delegate the powers and duties fully described hereunder, to the incumbents and future incumbents of the under mentioned posts.

A reference to the incumbent of a particular post also includes the incumbent of a post senior to the said post in the functional line. The incumbent of a senior post shall only exercise the powers and duties herein delegated with good reason and shall be accountable for his or her decision to do so; such exercise of authority must be recorded in writing.

I reserve the right at any time to amend or withdraw any delegation and at any time exercise directly the powers vested in the delegate and may at any time give a directive to the delegates as to the performance of any function.

Buyelwa Sonjica, MP

Minister of Water Affairs and Forestry

Date: 23 June 2005

[48] The delegation stipulated that the authority to issue a directive in terms of Section 53(1) was granted to the Chief Engineer and reads as follows:-

“By notice in writing to a person who contravenes the conditions set out in sub-paragraphs (a), (b) and (c) direct that the person or owner of the property in relation to which the contravention occurs, take the action specified in the notice to rectify the contraventions within the time period specified in the notice”. (Vide Page 33 of the record)

[49] The Appellants’ contention of the invalidity and unlawfulness of the delegation first raised in its supplementary grounds of Appeal was based on the principle that no one may exercise a power to or perform a duty beyond that conferred upon that person by law and inter alia relied on the following:-

[49.1] The post senior to that of the incumbent did not fall in the functional line as is required;

[49.2] The requirements to exercise the powers by the incumbent of a senior post was not done with good reason and neither was it recorded in writing;

[49.3] The delegation by the Chief Engineer constituted a sub-delegation that cannot be entertained in Law based on the principle *“delagatus delegare non potest”*.

[50] Mr Khuboni on behalf of the Appellants argued that any exercise of the delegated authority must be done with good reason and that such

reason must be recorded in writing. These formalities he argued must be complied with and are not interchangeable. In addition, the power to delegate and sub-delegate, must have a genesis from a lawful authority and while not disputing the Minister's power to delegate, the question remains to whom the power had been delegated. It is on this basis that the Appellants contend that the delegation to Starkey was invalid and it follows that the directive should be set aside.

[51] In reply Ms Norman SC for the Respondents countered that the Appellants' case was based on the incorrect belief that the delegation in terms of which Starkey issued the directive was a sub-delegation. On a proper construction of the delegation, the Appellants' argument is clearly incorrect as the delegation does not constitute a sub delegation which would fall foul of the "*delegatus*" principle. It is not the "*Chief Engineer*" that delegates to Starkey but the Minister clearly indicating that a reference to the Incumbent (Chief Engineer) includes the Incumbent of a post senior to that.

[52] The Appellants conceded that the organogram upon which they relied in alleging that the respective posts are not in the functional line was incorrect and accepted the organogram filed by the Respondent (See page 255 to 266 of the record) in which the functional reporting line is

set out clearly reflecting that Starkey is the “incumbent” of a post senior to the said post in the functional line.

[53] By accepting that the delegation is a proper delegation to Starkey as being “the incumbent of a post senior to the said post (Chief Engineer) in the functional line” the directive issued in terms thereof is self evident in so far as compliance with the conditions “with good reason, and shall be accountable for his/her decision to do so; such exercise of authority must be recorded in writing“ is concerned.

[54] The Tribunal ruled that Mr Starkey was properly authorised to issue the directive.

Ad paragraph 2.4

[55] The wording chosen by the parties to describe this particular issue in dispute is somewhat unfortunate. By posing the question whether the directive was issued “properly” leads to its interpretation as having reference to the contents of the directive and in particular Starkey’s power to instruct the Appellants and Adheel Baniparsadh to cease their sand mining activities in the Umvoti River, as well as complying with all the other further conditions set out in the directive. In this regard the Appellant contends that the actions of Starkey are *ultra vires* (Page 228 to 230).

[56] The directive issued in terms of Section 53(1) of the NWA deals with the rectification of the alleged contraventions fully described in the Inspection Report (Page 209) in which a series of contraventions of the conditions of the Act and the EMP, were listed. Following the report, a Notice of its intention to issue a directive was addressed to the Appellants and Mr Baniparsadh confirming the DWS' contention that the mining operation conducted by the Appellant was in contravention of Section 21 (c) & (i) of the Act. The observations and findings of the officials were succinctly detailed therein and the Respondents were invited to make representations in reply to the notice.

[57] In reply the Appellants in a letter dated 31 October 2014 stated inter alia as follows:-

1. *We have not diverted or impeded the flow of the river whatsoever.*
2. *We have not altered the river banks or course in any way.*
3.
4. *We are willing to apply for a water use licence and request the required time to do so.*

[58] These representations were duly rejected and a directive (Pages 228 to 230) issued to the Appellants in which the Responsible Authority directed the Appellants to:-

1. *Immediately (within 24 hours) cease all sand mining activities in Umvoti River.*
2. *Within fourteen (14) days of receipt of the Directive, appoint at your own expense, an independent Environmental Assessment Practitioner (EAP) to assess the extent of the environmental damage caused by your actions on the Umvoti River and compile a Rehabilitation Plan to be submitted to the Department for approval prior to being implemented.*
3. *Within fourteen (14) days of appointment of the Environmental Assessment Practitioner, submit the Rehabilitation Plan.*
4. *Within thirty (30) days of the Departmental approval implement all the recommendations outlined in the approved Rehabilitation Plan.*
5. *Report as per the agreed frequency, on the progress of implementation of the approved Rehabilitation Plan to this Department.*

[59] The first issue raised by Mr Khuboni was the authority of Starkey to call for the Appellant to cease all sand mining activities in the Umvoti River. This Mr Khuboni argued, was an attack on the Appellants mining right it being a “real right” that is enforceable against the whole world. In support of his argument he referred the Tribunal to Section 5(1) of the MPRDA Article 23 of 2002 in which the nature of the Second Appellants’ right is described. Although Mr Khuboni referred in argument to a “real right” the Act stipulates the right as being the following:-

5(1) A prospecting right, mining right, exploration right or production right granted in terms of this Article is a

limited real right in respect of the mineral or petroleum
and the land to which such right relates.

[59.1] He referred the Tribunal to Section 47 of the Act in which is set out the circumstance and procedures under which it may be revoked, cancelled or suspended. He contends that the power to revoke, cancel or suspend the Appellants' mining right vests in the Minister responsible for the administration of the MPRDA. He concludes that Starkey cannot exercise that right and therefore Mr Starkey's directive is invalid and unlawful and the directive stands to be set aside.

[60] To follow the history, content and limitations of the Appellants' mining right, requires an extensive investigation of the Appellants application for such rights. The Environmental Management Programme for the "Kumbavoti" mine, dated 12 December 2005, provided in support of the application for a Mining Right on the Remainder of the Farm Welverdiend No. 2632, was lodged with the DMR and finally approved on 19 October 2006. This Environmental Management Programme was preceded by a Scoping Report that required comments by the DWS. In respect thereof DWS on the 5th January 2005 replied to the DMR. Exacting and onerous conditions set out in paragraph 1 to 5 of the letter were imposed. (Pages 128 – 129 and also Pages 242 - 243 of the record). It reads as follows:-

The Department would like to comment as follows:-

1. *Sections 19, 20, 21, 22 and particularly 26(1) (b), (g) and (l) of the National Water Act (Act 36 1998) which deals specifically with small mining operations, must be complied with. These sections relate to water usage, pollution control and mining product storage.*
2. *The proposed mining must have no unacceptable effect on the quantity and quality of public water, which would include erosion of land and roads resulting in river siltation. The runoff from the site including that from the settling ponds on site may not impact on the water quality of the stream in terms of raising the suspended solid content and siltation.*
3. *The relocation of wetland areas in the area must be done in consultation with wetland and habitat specialists and wildlife specialists.*
4. *No mining shall take place on the banks of any river, stream, dam, pan or lake without the necessary permission in terms of the Minerals Act and related regulations. Every effort must be made to prevent erosion on site.*
5. *The watercourse may not be impeded, altered or diverted without approval from the Department of Water Affairs and Forestry. Such an activity will have to be licenced according to section 21(c) or section 21(i) of the National Water Act (Act 36 of 1998).*

[61] These conditions were included as part of the “*comments on the Scoping Report*” as well as being repeated in the subsequent approved

Environmental Management Programme. (Exhibit 1). As an integral part of the approved Environmental Management Programme and its addendum, Mr Baniparsadh on behalf of the Second Appellant committed to an undertaking in terms of which he acknowledged to have understood the contents of the EMP in its entirety (Page 208) and undertook to adhere to the conditions set out therein. The Mining Right was duly notarised and registered with the Mineral and Petroleum Registration office on 19/10/2006 under No. 41/2006. It inter alia contains a condition that stipulates the following:-

2. *Granting of Mining Right*

Without detracting from the provisions of sections 5 and 25 of the Act, the Minister grants to the Holder the sole and exclusive right to mine, and recover all the mineral/s in, on and under the mining area for the Holder's own benefit and account, and to deal with, remove and sell or otherwise dispose of the mineral/s, subject to the terms and conditions of this mining right, the provisions of the Act and any other relevant law in force for the duration of this right.

The MPRDA in Section 5(4) directs that:-

"No person may prospect for or remove, mine, conduct technical co-operations, recognisance operations, explore for or produce any mineral or petroleum or commence with any work incidental thereto on any area without

4 (a) An approved Environmental Management Programme or approved Environmental Management Plan as the case may be.

[62] The approved EMP in relation to the conditions imposed by the DWS and accepted in writing by the Second Appellant, is not a mere “restriction” as is referred to in the Appellants’ Heads, but rather constitutes a prohibition to mine in a manner at variance with the stated conditions.

[63] On a proper interpretation of Section 5(1) and Section 5(4) of the MPRDA read with the provision contained in the mining right and the conditions imposed by DWA, it remains clear that the Mining right was issued subject to the provisions of “any other relevant law in force for the duration of the right”.

[64] Having specifically stipulated the conditions in terms of which it would be amenable to the issuance of a Mining Right, the Second Appellant remained subject to the conditions set out in the NWA (Act 36 of 1998) as provided for in the letter (Pages 128 to 129) referred to above and repeated in the comments to the Scoping Report as well as in the conditions contained in the approved EMP. (Exhibit 1).

[65] The purpose of the NWA fully described in Section 2 thereof is to ensure that the nation’s water resources are protected, used, developed, conserved, managed and controlled by taking into account several factors that inter alia includes:-

2(g) protecting aquatic and associated eco systems and their biological diversity.

2(h) reducing and preventing pollution and degradation of water resources.

[66] Section 3 of the Act describes the obligation of the Minister to achieve the purpose of the Act and confirms his/her ultimate responsibility to ensure that the water is inter alia used beneficially in the public interest whilst promoting environmental values. The National Government through the Minister has the power regulate the use, flow and control of all water in the Republic and that confers upon the Minister a wide discretion to make such regulations and to put in place such measures so as to comply with his/her Constitutional duty. In this regard regulation 26(1) (g) provides as follows:-

26(1)(g) regulating and prohibiting any activity in order to protect any water resource or instream or ripian habitat .

[67] As part of the measures provided for in the Act to comply with this regulation Section 53(1) and (2) describes the power of a Responsible Authority to ensure rectification of any contravention of any provision of chapter 4 of the Act or any requirement set or given by the Responsible Authority under the chapter or a condition which applies to any authority to use water.

[68] Having taken the view after considering the report by Mr Sikhosana that the Appellants were in contravention of those conditions set by the DWS and contained in the EMP relating to Section 21 (c) and

21(i) and refusing to accept the written representation made by the Appellants, the Responsible Authority invoked the powers delegated to him to issue the directive in its present form.

[69] The reference “*to take any action*” referred to in Section 53(1) confers upon the Minister wide discretionary powers to determine what measures she may impose as the public trustee of the nation’s water resources to ensure that water is inter alia protected, conserved and managed in a sustainable and equitable manner for the benefit of all.

[70] Ms Norman on behalf of the Respondent confirmed that Starkey in his directive relied on the provision of Section 53(1) in which the Responsible Authority is authorised “to take any action” specified in the directive that would rectify the contravention and by implication such action would include an instruction to stop mining activities in the Umvoti River.

[71] It is inconceivable that the Legislaturer could ever have intended the Minister of Water Affairs, as custodian of the nation’s water resources could abdicate her/his constitutional duty in favour of the Minister responsible for the administration of the MPRDA. It is clear that by imposing the conditions the Minister did not abdicate her/his constitutional duty to promote, protect and safeguard the natural

resources. The authority of the Minister to *take any action*” is evidenced by the contents of the directive and was therefor in this regard issued *“properly”*.

[72] The Appellants allege in their Heads of Argument that the directives were incorrectly addressed to the First Appellant and to Mr Adheel Baniparsadh as neither of them had a mining right, that they were not engaged in mining activity but were merely assisting the Second Appellant in conducting the sand mining activities in the Umvoti River and therefore the directive was not issued *“properly”*.

In support hereof the First Appellants produced a lease agreement entered into between the First and the Second Appellant dated the 29th of May 2015 (Exhibit 12) from which it appears that the Second Appellant leased machinery and equipment from the First Appellant.

[73] The Respondent handed in the CK documents for both Appellants as (Exhibits 3 and 4) in which the principle business of the Appellants is reflected. In the case of the First Appellant the principle business is stated as being;

“extraction and supply of sand as well as bulk transport via 10, 20 and 30 cubic metre tippers and the

Second Appellant as being

“transportation, mining and construction”.

[73.1] In fact, Mr Adheel Baniparsaddh held himself as owner of both appellants in his response to the pre-directive as indicated above.

[74] Although it is common cause that neither the First Appellant nor Mr Baniparsadh had a mining right, the regulations on use of water for mining and related activities aimed at the protection of Water Resources published on 12 February 2010 Government Gazette Vol. 408 No. 20119 dated 4 June 1999 being Government Notice No. 704 defines the following:-

“activity” means

(a) any mining related process on the mine including the operation of washing plants, mineral processing facilities, mineral refineries and extraction plans; and

(b) the operation and use of mineral loading and off-loading zones, transport facilities and mineral storage yards, whether situated at the mine or not,

(i) in which any substance is stockpiled, stored, accumulated or transported for use in such process;

(ii) out of which process any residue is derived, stored, stockpiled, accumulated, dumped, disposed of or transported.

“person in control of a mine or activity”, in relation to a particular mine or activity, includes the owner of such mine or activity, the lessee and any other lawful occupier of the mine, activity or any part thereof; a tributer for the working of the mine, activity or any part thereof; the holder of a mining authorisation or prospecting permit and if such authorisation or permit does not exist, the last person who worked the mine etc.

[75] It is apparent from the evidence produced before the Tribunal by Mr Skhosana as supported by Plates 1 to 5 of the photos taken during the inspection, the report dated the 30th September 2014 as well as the admission made by the First Appellant in paragraph 2.6 page 3 of its Heads of Argument that it *“provided the machinery which was used for mining purposes”* and labourers, that the First Appellant was indeed engaged in mining activities as defined in the Regulations referred to above. Therefore, Directive against the First Appellant was “properly” addressed and issued to it.

[76] Similarly the correctness and validity of the Directive issued against Mr Adheel Baniparsadh is attacked on the basis that it was issued to a natural person and not to the Second Appellant and therefore is invalid. See paragraph (a) page 2 of the Second Appellants Heads of

Argument. Both the pre-directive as well as the directive stipulates the following:-

“I, Ashley Starkey, in my capacity as the Provincial Head, KwaZulu Natal Provincial Office of the Department of Water And Sanitation and duly authorised in terms of the powers delegated to me by the Minister, hereby give Adheel Sands, KwaZulu Bulk Logistics CC and Mr Adheel Baniparsadh in your capacity as the owner Adheel Sands and KwaZulu Bulk Logistics CC written notice of my intention to”

[77] On a proper construction of the definitions contained in Regulation 1(a) (b)(i) and (ii) clearly demonstrates that the admitted “*activity*” of Adheel Sands is provided for in the Regulations as being part of a mining related process and that the directive in its present form was correctly issued to the First Appellant as well as the Second Appellant. Similarly, it is common cause that Mr Adheel Baniparsadh was the “*person in control of a mine or activity*” and it follows that in this instance the directive was also “*properly*” issued to him.

[78] With regard to the 24 hour deadline, Mr Starkey issued a pre-directive on 24 October 2014 and requested the appellants to produce proof of permits / authorizations. He also told them what the directive that he intends to issue will say. In their response, the appellants denied having diverted the water and affected river beds and banks but offered

to apply for water use licence.

If the very mining permit does not allow diversion of water and alteration of river beds and banks, and the recipient of a directive from DWS denies diverting water flow, and alteration of river banks, then there is no other option but to issue a Directive in the terms such as the one in question.

[79] On why in the light of the severity of the allegations and damage to the river, Starkey did not avail himself of an opportunity to go to court, Ms Norman submitted that the DWS only became aware of the contraventions around September 2014. He asked the appellants to make representations and they denied the activities. He therefore relied on the authority contained in Section 53(1) that stipulates that he can take “any action”. It is common cause that the court application was suspended pending the finalization of these appeal proceedings.²⁵ Ms Norman argued further that the only way to rectify the contraventions under the facts was to order the appellants to cease what they were doing²⁶.

[80] After the Directive was issued A warrant was obtained from the Magistrate KwaDukuza in terms of Section 12(2) as mentioned above for the purpose of amongst other things to “*undertake work necessary for*

²⁵ Exhibit 5 is court order dated...

²⁶ See: **HARMONY GOLD MINING CO LTD / REGIONAL DIRECTOR, FS DWA & OTHERS 2014 (3) SA 149 (SCA).**

*cleaning, clearing, stabilizing and repairing the water resource to wit; remove berms*²⁷

[81] It is evident from the reasons given above that Adheel Sands, KwaZulu Bulk Logistics and Adheel Baniparsadh is correctly cited in both the pre-directive as well as the directive and therefore the contention of the Appellants of the unlawfulness of the directive on the basis alleged, must fail.

MERITS: SUBMISSIONS

Ad paragraph 2.2

[82] At the heart of this matter lies the question whether or not the Appellants were or are engaged in water use activities in terms of Section 21 of the National Water Act (No 36 of 1998) and in particular Sections 21 (c) and (i).

The Appellants have steadfastly and categorically before and during the Tribunal hearings, denied that their sand mining activities in any way constituted a water use as provided for in the Act. This view was confirmed in the representations provided to the DWS by Mr

²⁷ Paginated page 234

Baniparsadh. In this regard the evidence of Mr Baniparsadh was firm in its denial.

It is also noteworthy that the Appellant, as directed, ceased with their mining activities but failed to address the directive in so far as they failed to appoint an Environmental Assessment Practitioner to assess any damage that their activities may have caused. Such a report could have supported their view that the DWS had erred in their assessment of the activities conducted by the Appellants. In support of their denial they relied on the lack of a comprehensive, scientific or analytical report and pointed out the failure by DWS to produce any evidence of the alleged contraventions.

[82.1] The evidence given by Mr Sikhosana supported by the inspection report together with the photographic record of the Appellants activities clearly illustrates the effects of the mining activities on the banks of the river as well as the riparian habitat and led to Sikhosana to conclude that the mining activities were clearly in contravention of Section 21(c) and (i) of the National Water Act.

His subsequent report verified by Ms Zanele Msimang led to the issuance of the notice of intention as well as the directive that followed.

[82.2] In support of their contention the Appellants gave notice of their intention to call as an expert witness Dr. Anthony Richard Turton, a political scientist (hydro politics) to give evidence at the Trial. His report dated the 21st of July 2015 was duly handed in and accepted as Exhibit 7.

[82.3] In reply to the Appellants 'expert witness the Respondents gave notice of its intention to call Dr Wietsche Roets (PR.SCI.MAT) in support of their contention that the Appellants activities constituted a water use as contemplated in the Act. His report was handed in as **Exhibit 7A**.

[83] The Tribunal at the request of the parties conducted an inspection "*in loco*" at both sites 1 and 2 referred to in Mr Sikhosana's report to enable the Tribunal by way of observation to assess the effects of the mining activities conducted by the Appellants.

After having had the benefit of an inspection *in loco* on the mining sites in the Umvoti River and having completed the evidence of Mr Baniparsadh, the experts were requested to confirm whether they had between them reached any agreement. They confirmed that they had not but were given the opportunity to do so and proceeded to draft and present in evidence the following note:-

Both Dr Anthony Turton and Dr Wietsche Roets agree on the following:

**AGREEMENT ON COMMON CAUSE ISSUES: SAND MINING ACTIVITIES
OF APPELLANT CONSTITUTE WATER USES IN TERMS OF SECTION
21(C) AND (I):**

(a) That the sand mining activities of the appellant does pose a quantum of risk to the resource quality characteristics by virtue of water use (c) impeding and diverting flow of water in the watercourse, and (i) changing the bed banks course characteristics of a watercourse.

(b) The quantum of risk being posed to the above in terms of section 21 (c) and (i) water uses are not clear without properly assessing these risks/impacts.

(c) The water use authorisation process is structured to do exactly this by determining the quantum of risk.

(d) The NWS, associated General Authorisations (GA) and other regulations such as GN 704 that relates specifically to mining activities accepts that any perception of a potential risk automatically constitutes a water use. In this regard the default

position is based on the precautionary approach and risk aversion until actual risks have been assessed.

(e) This risk based approach implies close collaboration between regulator and water user.

Both parties acknowledge that:

(a) Differences of interpretation exists of what constitutes the following:

- a. Impeding flow*
- b. Diverting flow*
- c. Altering bed banks etc.*

Given that differences in interpretation exists around these three issues, the only scientifically defensible way forward would be to accurately measure and interpret data relevant to these three factors which implies collaboration between the regulator and applicant on appropriate entitlement during the water use authorisation process (it could be that there is no need for a water use authorization process).

Signed by Dr A Turton

Signed by Dr W Roets

Date 4 Nov 2015

[84] Having had the benefit of the evidence of Mr Sikhosana, Ms Msimang, the agreement reached by the experts and its conclusion, and the inspection report supported by a contemporaneous photographic record reflecting the effects activities of the Appellants on the day of the inspection, and having conducted an inspection in loco ²⁸and confirmed , one can only conclude that the Appellants were engaged in water use activities as provided for in Section 21(c) and (i) of the Act and contravened the conditions laid down by DWS.

Ad paragraph 2.3

[85] The Appellants, somewhat belatedly in their Supplementary grounds of Appeal, placed in issue Mr Starkey's failure to take into account the provisions of Section 39 of the Act.

²⁸ After the inspection in loco, the following findings were placed on record:

General observations at the entrance:

1. There is sign that reads "**DANGER MINING AREA**"
2. There is grass that according to the investigation team was not there on 30 September 2014. Apparently the open pathway on left of planted grass was not there. There was natural vegetation before.
3. The area where grease and oil was observed has now been covered with rocks and sand and little stones.
4. The river has widened.
5. There is no vegetation . There are rocks instead.

Site 1:

1. Stockpile of sand next to the road that gets into the river.
2. The riverbank has widened.
3. Shown area where berms were removed.
4. Shown area where the excavator was seen digging inside the river channel.

In terms of this provision a Responsible Authority may authorise all or any category of persons to use water subject to any regulation made under Section 26 and any condition imposed under Section 29. Such a notice contemplated in Section 39 was published in the Government notice. 398 dated 23rd of March 2004 and in the Government Gazette No. 26187 in respect of Section 21 (c) and (i) of the Act. This General Authorisation was in force at the time of the granting of the Appellants' Mining Right.

The purpose of this authorisation reads as follows:-

1.1 The authorisation permitted in terms of this schedule replaces the need for a water user to apply for the licence in terms of the National Water Act for a water use provided that the use is within the conditions set out in this notice.

The General Authorisation referred to above provides inter alia for the following exclusions, areas of applicability, duration of authorisation, definitions, registration, precautionary practices, inspections and offences.

The schedule authorises the following water uses:-

1. Impeding or diverting the flow of water in the water course Section 21(c).

2. Altering the bed, banks or characteristics of a water course 21(i).

These are the water uses in terms of which it is alleged the Appellants have failed to exercise in accordance with the restriction provided for in the comments to the Scoping report that forms part of the EMP. See page 128 of the record as well as those specifically referred to in the G.A

[86] The Act authorises the Minister to make regulations on the following basis.

Section 26(1) Subject to sub-section (4) the Minister may make regulations.

(a) Limiting or restricting the proposed manner or extent of water use.

(b).....

(c) Requiring that any water use be registered with the Responsible Authority.

(d) Regulating or prohibiting any authority in order to protect a water resource or instance or riparian act.

[87] The Act also provides in Section 29 for conditions for issuing general authorisations and licences. It provides inter alia the following:-

Section 29(1) a Responsible Authority may attach conditions to every general authorisation or licence

(a) Relating to the protection of

(i) The water resource in question;

(ii) The stream flow regime;

(iii) Other existing and potential water users.

*(b) Relating to water management by
(vi) in the case of general authorisations requiring the registration of the water use with the Responsible Authority and the payment of a registration fee as a pre-condition of that use.*

[88] The General Authorisation Government Notice No. 398 dated 26 March 2004 was replaced by the General Authorisation Government Notice 1199 of 18 December 2009. It also regulated water use provided for in Section 21(c) and 21(i). It describes inter alia the circumstances in respect of which the general authorisation is excluded, the conditions under which impeding or diverting the flow or altering the bed, banks, course or characteristics of a water course is allowed.

It is clear from both the 2004 GA, as well as the 2009 GA that the registration of the water user is required. The relevant section in respect of the 2004 GA in respect of Section 21(i) reads as follows:-

Registration

2.8(1) A person who uses water in terms of the authorisation must submit a registration form for the registration of the water use if the alteration involves issuing related or access within a distance of 1000 metres from any other alteration measured along the water course.

With regards to 2009 GA in respect of Section 21 (c) and 21(i) the following registration requirement is provided:-

Registration

10.(1) subject to sub-paragraph 10(2) a person who uses water as contemplated in this Notice must register such water use with the Responsible Authority.

10(2)

10(3) Upon completion of registration, the Responsible Authority will provide a certificate of registration.

[89] Reference has already been made earlier that in the case of a General Authorisation requiring the registration of a water use and the payment of a registration fee is a pre-condition of that use. (Regulation 29(1) (a)(vi).

It is clear that during the period in which the Appellants' Mining Right Application was under consideration, DWA was invited to consider the impact that the granting of the Application would have on water use.

This is evidenced by the following:-

1. DWS's letter to the Department of Minerals & Energy dated 5th January 2005 (Page 128).
2. The inclusion of the conditions set by the DWA in the amendments to the Scoping Report.

3. The approval of the Environmental Management Programme subject to the addendum which provides for the conditions set by DWA in paragraph 2.12 to 2.15 (Exhibit 1) and read as follows:-

2. Natural Environment

- 2.1 *You shall comply with the following conditions:*

2.1.1 *Sections (19), (20), (21), (22) and (26) (l) (g) of the National Water Act, 1998 (Act 36 of 1998) must be complied with. These sections relate to water usage, pollution control and prevention as well as mining product conditions.*

2.1.2 *The proposed mining must have no unacceptable effect on the quantity and quality of public water, which would include erosion of land and roads resulting in river siltation. The runoff from the site including that from settling ponds on site may not impact on the water quality of the stream in terms of raising the suspended solid content and siltation.*

2.1.3 *The relocation of wetland areas in the area must be done in consultation with wetland and habitat specialists and wildlife specialists.*

2.1.4 *No mining shall take place on the banks of any river, stream, dam, pan or lake without the necessary permission in terms of Mineral and Petroleum Resources Development Act (Act 28 of 2002) and related*

regulations. Every effort must be made to prevent erosion on site.

2.1.5 The watercourse may not be impeded, altered or diverted without approval from the Department of Water Affairs and Forestry. Such an activity will have to be licenced according to section 21 (c) or section 21 (i) of the National Water Act (Act 36 of 1998)

[90] Throughout the correspondence trail no mention was made of the necessity of licencing the proposed water use activities of the Second Appellant and the only reference to the general authorisation appears in paragraph 4.9 of the EMP approval that reads as follows:-

4. General

4.9 The conditions attached according to the general Authorisation in terms of section 39 of the National Water Act 1998 (Act No 36 of 1998) Section 2(l), altering the bed banks or characteristics of water course must be adhered to all the time.

[91] It is safe to assume that DWS, in providing the conditions for inclusion in the EMP, did not consider it necessary to require the Second Appellants to licence the activity in terms of Section 47 of the Act. If it so required, it would have said so in no uncertain terms. In view of this it follows that the activity proposed by the Second Appellant would have been covered by the relevant GA when granting the Mining Right, subject

to the conditions set out therein and the additional conditions set out in the documentation previously referred to.

The Second Appellant having formally declared in writing on the 3rd May 2006 that he understood the contents of the addendum to the EMP and committed to comply therewith probably placed the DWS at ease and no formal licence conditions were imposed except that provided for in paragraph 5 of the letter dated 5th January 2006 that reads as follows:-

“the water course may not be impeded, altered or diverted without approval of the Department of Water Affairs and Forestry. Such an activity will have to be licenced according to Section 21 c) or Section 21(i) of the National Water Act, Act 36 of 1998”.

[92] Mr Baniparsadh in his evidence was at pains to persuade the Tribunal that he was at all material times under the impression that his mining activities were covered in terms of the then applicable General Authorisation. In this regard he confirmed that he was informed by Mr Sikhosana that his activities were covered by a General Authority.

Even assuming that the Appellants were entitled to carry out their mining activities in terms of a General Authorisation the registration requirement provided for in the relevant regulations makes registration pre-emptory and it is common cause that the Second Appellant never

submitted the required documentation or paid the prescribed fees that would have entitled him to conduct his activities lawfully in terms of the General Authorisation.

It is clear that the activities carried out by the Appellants cannot be said to have been carried out in terms of a General Authorisation and that the Respondent was entitled to issue the directive in which the Appellant was ordered to cease its mining activities.

[93] The Respondent quotes with approval from the matter of -
Minister of Water Affairs and Forestry v Stilfontein Gold Mining Ltd and Other 2006 (5) SA 33 (W) at Page 352 para 16.9 where the Court stated: *“The object of the directives is to prevent pollution of valuable water resources. To permit mining companies and their directors to flout environmental obligations is contrary to the Constitution, the Mineral Petroleum Development Act and to the National Environmental Management Act. Unless courts are prepared to assist the State by providing suitable mechanisms for the enforcement of statutory obligations, an impression will be created that mining companies are free to exploit the mineral resources of the country for profit, over the lifetime of the mine; thereafter they may simply walk away from their environmental obligations. This simply cannot be permitted in a constitutional democracy which recognizes the right of all of its citizens to be protected from the effects of pollution and degradation.”*

Ad paragraphs 2.5 and 2.6

[94] At the commencement of the Trial and in terms of paragraph 2.6 of the Pre-Trial minute the Appellant objected to the photographs attached to the report prepared by the Respondent (page 213 to 219) of the record as well as the CD compilation thereof Annexure "DWAA10" referred to at page 62 paragraph 30.9. In this regard they placed the authenticity of the photographs in dispute.

[94.1] The disputed photographs attached to the reports by Mr Sibusiso Sikhosana dated the 30th September 2014 and the 23rd of December 2014 and in support thereof (**see Exhibit 8 and Exhibit 9**) were however, by agreement, presented in evidence and afforded the Appellants the opportunity of extensively addressing their concerns regarding the authenticity thereof and although the Tribunal did not formally address the issue with regards to this dispute, the photographs were formally presented in his evidence in chief and was subjected to extensive cross-examination by Mr Khuboni for the Appellants.

[94.2] However, the cross examination focused on whether DWS has taken samples of the water, the various states of the river, the ecosystem, the interface between surface and ground water, characteristics of water quality.

All these issues are not relevant to the main issue for consideration in this appeal.

[95] It was also contended on behalf of the appellants that the pools of water actually come from a pipe from a nearby farm. The panel and the parties looked, in vain, for this pipe during the inspection in loco.

[96] When Ms Baniparsadh took over the cross examination, the challenge to Skhosana's evidence shifted to the procedures for compiling of investigation reports., in particular whether the signatory was actually a qualified scientist. Skhosana was also accused of having advised Mr Baniparsadh that the appellants are covered by the General Authorisation. An attempt to hand in a recorded conversation moments before the appeal was adjourned for a decision, and long after the testimony of Skhosana was rejected by the panel as it would not have taken the matter any further.

[97] The photographs²⁹ taken at Mvoti River revealed the following;

[97.1] Plate 1: shows Adheel Sands machine in operation.

[97.2] Plate 2: The machine is shown altering the riverbanks and course. Water can be seen seeping out into the bank. Pool of water can also be observed. The vegetation is drying /dying.

²⁹ Paginated page 213-219, photos identified as Plate 1-Plate 7

[97.3] Plate 3: Shows an excavator removing sand on the bed and banks of the river. The flow of the water appears to be impeded and diverted.

[97.4] Plate 4: A sand berm that has been placed in the water channel can be seen. A truck is waiting to load sand.

[95.5] Plate 5: This is Site 2. It shows a screening machine and a front loader machine. It is a stock pile area. Piled stones can be seen too. There is a road that goes into the river.

[97.6] Plate 6: It shows damaged bed and banks of the river. Vegetation has been removed.

[97.7]plate 7: It shows traces of grease and oil on the banks of the river.

COSTS

[98] In their heads of argument, the respondent's counsel made a submission that the appeal should be dismissed with costs. This issue was not canvassed during the hearing.

The NWA provides for appeals to be heard at the regions, where the relevant decision was made. If there is any reason why costs should be awarded, the issues need to be ventilated properly with regard to the nature of costs and reasons why any party should be ordered to pay costs. During one of the hearings, the panel made a suggestion to move the hearing to Gauteng in order to curtail costs. However, and after taking into account the current legislative provisions, the option was not pursued. Accordingly, no order of costs will be made.

CONCLUSION

[100] The Directive in terms of Section 53(1) issued by Mr. Starkey to Adheel Baniparsadh in his capacity as a representative of Adheel Sand CC and Kwazulu Bulk Logistics CC, the appellants in this matter is hereby upheld. The appeal is dismissed.



ADVOCATE TAN MAKHUBELE SC

Chairperson, Water Tribunal

14 March 2016

I agree;



MR. FERDINAND ZONDAGH
Additional Member, Water Tribunal

I agree,



MR. FUMEZO JONAS
Additional Member, Water Tribunal

APPEARANCES:

APPELLANTS: **ADVOCATE KHUBONI** instructed by Veronica Singh & Associates, Durban (23 and 24 July 2015), thereafter: **MS BANIPARSADH** in her capacity as Transport and General Manager for the both appellants.

RESPONDENT: **ADVOCATE T.V NORMAN SC**, with **ADVOCATE M.J NGCOBO**, instructed by State Attorney, Durban.