

IN THE WATER TRIBUNAL

CASE NUMBER:WT02/18/LMP

In the appeal of:

LABONTE 5 (PTY) LTD

APPELLANT

And

THE MINISTER OF WATER AND SANITATION

FIRST RESPONDENT

THE DEPUTY DIRECTOR GENERAL:

SECOND RESPONDENT

DEPARTMENT OF WATER AND SANITATION

THE CHAIRPERSON OF THE WATER USE AUTHORIZATION

THIRD RESPONDENT

THE REGIONAL HEAD: LIMPOPO REGION

FOURTH RESPONDENT

MOLOKO WATER USERS ASSOCIATION

FIFTH RESPONDENT

JUDGMENT

INTRODUCTION

The Appellant is Labonte 5 (Pty) Ltd .There are 5 (Five) Respondents, four of whom are the Minister of Water and Sanitation, together with the responsible functionaries for water use authorisation in his Department. The Fifth Respondent is Mokolo Water Users Association. The latter had objected to granting of the water use licence to the Appellant but later withdrew its opposition. Therefore, it is not part of this appeal.

1. The appeal grounds are numerous. The gist of the appeal is however simple. It is a letter signed by the Deputy Director General, Second Respondent in this appeal. In essence, the letter refused Appellant the water use licence. In the letter two reasons are given for failure of Appellant's Application for a water use licence. They are:-

"(1) the application failed to meet the critical aspect of the National Water Act , (Act no 36 of 1998), i.e. Section 41(a) for submission of DW 902 for majority of the affected properties and proof of ownership/lease agreements.

(2)The application will not fulfil the Departmental information Management System."

2. For a proper perspective and context it is necessary to first explain the DW 901 and DW 902 forms.

- 2.1. These are forms mentioned in the Water Use Licence Application and Appeals Regulations, 2017, promulgated in Government Notice R267, Government Gazette 40713 dated 24th March 2017. They appear in Annexure B to the Regulations. Annexure B has the following subtext "Forms and reports to be completed in respect of particular (sic) water use application." (Own underlining) Annexure B has 25 such forms. 15 of the forms refer to specific water use, 4 of the forms prescribe the technical data

that must be supplied where the Applicant is taking water from a water resource using different mechanical methods. Two (2) of those forms appear to be of general application to all water use applications. They are forms DW901 and DW902. Form DW 901 contains details of the property where water use occurs. Form DW902 contains details of the property owner. In essence, for purposes of this appeal these forms would pertain to the farms (properties) encompassed by the water use license.

- 2.2. Therefore, the regulations for water use application prescribe that certain information must be furnished by the Applicant through forms DW901 and DW902. With the above proper background and context the rejection letter from the Second Respondent can now be examined.

3. Reason 1 of the refusal calls firstly for a factual enquiry. Thereafter the legal basis will be attended to. Did the Appellant fail to submit forms DW 902 for a majority of the affected properties and proof of ownership/ lease agreements for all the affected properties?.

4. The answer lies in the evidence tendered. The Appellant, as part of the Appeal Record, placed before us, the Water Tribunal, Bundle B. The index to Bundle B has the heading "*BUNDLE B: SUBMISSIONS OF DW 901 AND DW 902 FORMS*".

Number 1 of the index refers to a one page document, "*Proof of submission of DW 901 and DW 902 forms – 14 January 2014*".

Ex facie this one page document there were 136 DW 901 and DW 902 forms. The document is dated 14th January 2014. There is no evidence that the DW 902 forms allegedly submitted were inspected by the Department. During the one day hearing of Tribunal, Appellant did not tender any evidence concerning receipt of the DW 902 forms on the 14th January 2014 by the Respondent Department. Also, the DW 902 forms allegedly submitted were not attached.

5. Appellant's attempts to secure a water use licence date back to 2010.¹ Even then there were queries about insufficiency of information submitted. The Department requested further information and amendment to the application. That was done in 2012.²

6. There is no clear explanation for the time lapse between 2012 and the submission of the DW 902 forms on the 14th January 2014. A clue may however be gleaned from a letter written by a certain Messrs Jacoroos, Appellant's attorneys of record in this appeal. This letter gives the background to the submission of DW 901 and 902 forms on the 14th January 2014.³ It does so by making reference to "Annexure

¹ Paragraph 3, Appellant's Notice of Appeal, Bundle A page 33, Appeal Record.

² Paragraph 1.1. Record of Recommendations, Bundle A, page 6, Appeal Record.

³ Paragraph 4.6. Annexure NA9, Bundle A page 161, Appeal Record.

A", a letter dated 18th January 2013 written by the then Director General.⁴ In Annexure A, the then Director General recommended issuance of the licence to the Applicant, but set down two conditions. Only one of the conditions is relevant for this appeal. It is condition 1 stating that:-

"Consent use of land / land ownership as required in the application forms DW901 and DW902, with their respective title deeds. The Act specifies this requirement in Section 28 (1) (b) (Table 1). (own underlining). This licence cannot be issued without this information that must be captured in the licence."

7. It was therefore apparently in response to this condition 1 that Appellant submitted the DW 902 forms on the 14th January 2014.
8. Still on the factual enquiry, one needs to ask how many DW902 forms ought to have been submitted. A perusal of the Appeal record gives varying numbers. In the Department's Record of Recommendations (ROR) Table 1, the affected farms are 122.⁵ The ROR was prepared on the 12th February 2018. In the water use application submitted by the Appellant in 2020 the number of farms is 118.⁶ This submission was on the 3rd August 2010. The proof of submission dated 14 January 2014 included in the appeal record indicates 136 farms.⁷ There is therefore a

⁴ Annexure A, Appellant's Notice of Appeal, Bundle A, page 165, Appeal Record

⁵ Record of Recommendations, Table 1, pages 8-16, Bundle A, Appeal Record.

⁶ Water use application by the Appellant, page 123 Bundle A, Appeal Record.

⁷ Page 1, Bundle B, Appeal Record .

recurring inconsistency in the number of farms allegedly encompassed by the Appellant's Water Use Application. Consequently, then it is impossible to determine with certainty how many DW902 forms ought to have been submitted. What is of concern however, is that, this very crucial exercise was not done by the Appellant, both in its papers, and during evidence. In the circumstances it is difficult if not impossible for the Appellant to gainsay the Fourth Respondent's contention that not all DW 902 forms were submitted.

9. Further, there are unexplained categorizations in the Appellant's papers concerning the submitted DW902 forms. The Appellant's submission dated 14 January 2014 refers to farm groupings.⁸ There are seven such farm groupings in the Appellant's submission dated 20th March 2018. The DW902 forms therein are grouped as Annexure East 1.1 to East 8.3.⁹ In the Appellant's submission dated 3 August 2010¹⁰ the farms are grouped as W1, W2, W3, W7, W8, W9, W10, W11, E1, up to E8.

10. Faced with this varying categorization it is difficult if not impossible to cross reference the submitted DW902 forms to the 3 separate periods of submission i.e. the submission done on the 14th January 2014, the submission done on the 20th

⁸ Page 1 Bundle B, Appeal Record

⁹ Page 2, Bundle B, Appeal Record.

¹⁰ Page 123- 126 Bundle A, Appeal Record

March 2018 and the submission done on the 23rd March 2018. Cross referencing would help in reaching the total number of forms submitted.

11. That there were difficulties in either accessing the owners of the farms or correctly identifying the farms is however clear. Bundle B of the Appeal Record is a dedicated Bundle containing DW902 forms submitted by the Appellant. Included in it, is a letter from Messrs Pratt Luyt and De Lange Attorneys.¹¹ Inclusion of this letter was clearly an oversight on the part of the Appellant. It is not mentioned in the index. Messrs Pratt Luyt and De Lange informed the Appellant of their inability to find the contact details through Windeed, of three separate Trusts. These Trusts were ostensibly farm owners. The attorneys also informed about the change of ownership in one of the farms.

12. There were also, it seems, difficulties in properly populating the information blocks appearing on the DW 902 forms. Take for instance the DW 902 form categorised for submission as East 5.3¹². Allegedly, the farm is owned by an Engineering Services Close Corporation. The whole of paragraph 2, "*Declaration by Property Owner*" is blank. There is quite a sizeable number of DW902 forms left blank in a similar manner in the Appellant's Bundle B, the Bundle dedicated to prove proper submission of the contested DW 902 forms.

¹¹ Page 222 Bundle B, Appeal Record.

¹² Page 213 Bundle, Appeal Record

13. The difficulties in populating the blocks provided in the DW902 forms also manifested in some instances as negligent disregard on the part of the Appellant, for instance form DW 902 for the farm Eendepan 719 LQ¹³ is populated as follows:

Nature of Property Owner: - individual,

Surname if the owner is an individual:- unknown,

Marital Status:- married out of community of property. How could marital status be known if the surname is unknown?

14. The above expose' shows that the Appellant failed to effect proper submission of DW 902 forms to the Department. Either the forms were not properly completed or not all the forms were submitted.

15. Further, perusal of the various applications submitted by the Appellant for water use license lends credence to the above conclusion.

16. Appellant first submitted the application for a water use license on 3 August 2010.¹⁴ A perusal of the 4 page submission letter indicates that there were no DW 902 forms attached. The second submission was on the 30th October 2012.¹⁵ The table of contents thereon does not make reference to DW 902 forms.

¹³ Page 194 Bundle B, Appeal Record

¹⁴ Page 123, Bundle A, Appeal Record

¹⁵ Annexure NA4, page 100 et seq, Bundle A, Appeal Record.

17. Appellant only started submitting the DW 902 forms in January 2014 and again submitted them in March 2018. The DW902 forms submitted in January 2014 are not included in the record. Therefore, they could not be perused.

18. The DW902 forms submitted in March 2018 are in the dedicated Bundle B. Their shortcomings have already been pointed out.

19. The next question addresses the legal aspects and is:- was the Department correct in refusing the water use application on account of the defective DW 902 forms, alternatively insufficiency in the number of DW902 forms submitted. To answer the question the legislative basis and content of DW 902 forms must be looked at.

On the 18th January 2013, the then Director General recommended issuance of the water use licence to the Appellant.¹⁶ He however put a condition, "*Condition 1. Consent use of land/land ownership as required in the application forms DW 901 and DW 902, with their respective title deeds. The Act specifies this requirement in Section 28 (1)(b)(Table 1). This licence cannot be issued without this information that must be captured in the licence*".

¹⁶ Annexure A, page 165, Bundle A, Appeal Record.

Section 28 is titled "Essential requirements of licences. Section 28 (1)(b) thereof states that " a licence contemplated in this chapter must specify the property of (sic) area in respect of which it is issued.

20. The letter rejecting the water use application of the Appellant is dated 1 August 2018. Similar to the letter recommending granting of the water use application it takes issue with non-submission of DW 902 forms and proof of ownership/lease agreement. It however cites a different provision of the Act, namely S 41(1)(a).

Section 41 is titled "*Procedure for licence applications*". Section 41 (1)(a) provides that "*An application for a licence for water use must be made in the form.*"

21. Although the letter did not refer to section 41 (1) (b) it is necessary to also cite the provisions of that section. Section 41 (1)(b) states that "*An application for a licence for water use must contain the information.*"

22. Appellant accepts the contents of the letter dated 18th January 2013. Rightly so, it recommended that it be granted the water use license. Again, justifiable from its position, it rejects the contents of the letter dated 1 August 2018. Are the two letters irreconcilable. The answer is no. The 2 (two) letters are reconcilable, they both require submission of DW 902 forms.

23. The Appellant however views the matter somewhat differently. In its Notice of Appeal¹⁷ it averred as follows:-

"The second respondent erred in failing to take into account that the Director General requested the fourth respondent to obtain the information in terms of DW901, and that the Director General did not request same from the Appellant."

In making the above submission Appellant is relying on the following wording of the letter dated 18th January 2013¹⁸. That wording is as follows:-

"The licence concerning section 21 (c) & (i) water uses is attached. Kindly note the following information must be sourced by yourself to be included in the licence conditions".

24. The information to be sourced in terms of the letter was *"consent use of land/land ownership as required in the application forms DW 901 and DW 902, with their respective title deeds"*.

25. At this juncture it is important to recapture a few facts. The letter dated 18TH January 2013 was in response to the water use application lodged by the Appellant

¹⁷ Paragraph 9, Appellant's Notice of Appeal, page 29, Bundle A, Appeal Record.

¹⁸ Annexure NA5, page 128, Bundle A, Appeal Record.

on the 3rd August 2010. It is common cause that, that water use application was not accompanied by any DW901 and DW 902 forms. The appeal record confirms this, Bundle B of the Appeal Record is a Bundle dedicated to proofs of submission of DW 901 and DW 902 forms. The first proof of submission is in 2014 i.e. a year after the letter of the 18th January 2013. Consequently then, the letter of the Director General was in fact also stating that no DW901 and DW 902 forms had been submitted.

26. The letter is addressed to the office of the Fourth Respondent. It is for the specific attention of a Mr Maregodhi Malatji, clearly the relevant departmental official at the time. The "*yourself*", in the sentence "*Kindly note the following information must be sourced by yourself to be included in the licence conditions*", therefore referred to Mr Malatji.

27. Previously in this judgment, reference has been made to a letter written to the Appellant by a Messrs Pratt Luyt and De Lange Attorneys.¹⁹ The letter is in respect of title deeds and information that could not be found. The attorneys were engaged specifically to look for this information. If one accepts the view of the Appellant concerning the letter of the 18th January 2013, it ought to have been Mr Malatji who was doing that work. Alternatively it was Mr Malatji's obligation to engage attorneys to source that information.

¹⁹ Page 222, Bundle B, Appeal Record.

28. Sourcing the information required for DW901 and DW 902 was clearly a cumbersome task. In an e-mail written to the appellant by a certain Jenny Stamp²⁰ the following telling extract appears:-

"Good day James, Prior to requesting the copies of the title deeds from the Deeds Office, we have done searches on the properties and in the interim report to you as follows:

May we request that you provide us with payment of our costs in respect of the first batch."

29. Back to the letter. Would it be Mr Malatji's obligation to pay? That is of course not possible.

30. Strictly on facts and practicalities involved, it is difficult to agree with the Appellant that it was the Fourth Respondent who was tasked with securing the DW901 forms and title deeds.

31. Further, a reading of the National Water Act, Act 36 of 1998 (the Act) militates against the Appellant's view of the letter of the 18th January 2013.

32. Part 7 of the Act deals with individual applications for licenses. Section 41 thereof deals with the procedure for licence applications and states that:-

²⁰ E-mail from Jenny, page 375, Bundle B, Appeal Record.

(1) An application for a licence for water use must

(a) be made in the form;

(b) contain the information; and

(c) be accompanied by a processing fee, determined by the responsible authority.

Section 41 (2) provides that:- the responsible authority-

(a) may, to the extent that it is reasonable to do so, require the applicant, at the applicant's expense, (own underlining) to obtain and provide it by a given date with

_____.

(i) other information in addition to the information contained in the application.

In another section of the Act, section 33, Declaration of water use as existing lawful water use, the following provisions are relevant:-

33 (1) A person may apply to a responsible authority to have a water use which is not one contemplated in section 32 (1)(a) to be an existing water use:

Section 33(3) A responsible authority –

(a) may require the Applicant, at the Applicant's expense, (own underlining) to obtain and provide it with other information, which is in addition to information contained in the application.

33. It would seem that various provisions of the Act clearly support the contention that the duty to furnish information and DW 902 forms lay with an Applicant for a water use licence, *in casu*, the Appellant.
34. In any event the contention that the information on the DW 902 forms ought to have been sourced by the Fourth Respondent appears to be a later invention on the part of the Appellant.
35. In a letter dated 15th March 2018²¹, Appellant agreed to furnish the Fourth Respondent with copies of the DW 901 and DW 902 forms within the "next week".
36. It is of course surprising that the Appellant offered to deliver copies of DW 901 and DW 902 in March 2018, because, according to the Appellant the DW 902 forms were submitted as far back as 14 January 2014²².
37. The above is not the only inconsistency in the version of the Appellant. Exigo, is a company that was engaged by the Appellant for among other things, to take minutes in its meetings with the Department²³. The meeting was held on the 17th January 2018. An employee of Exigo, Herman Geldenhuys took the minutes.

²¹ Annexure NA 11, page 170, Bundle A, Appeal record

²² Page 1, Bundle B, Appeal record

²³ Annexure NA8, page 157, Bundle A, Appeal Record

38. The minutes record that James Coetzee (JC) from the Appellant provided the history of the water use licence application. JC advised the meeting that not all the forms were received by DWS (own emphasis) as landowner consents could not be obtained for all the properties. Here one needs to pause, and take note that for the Respondents the issue was not absence of consent but absence of the required forms.

39. From the minutes it is clear that as at 17th January 2018 on Appellant's own version not all the DW 902 forms had been submitted.

40. In the circumstances it is impossible not to endorse the conclusion of the Respondents' Statement of Opposition to the Appeal²⁴ stating that:-

"It is common cause that the Appellant failed to submit forms DW902 in respect of all the properties. It is also common cause that Appellant submitted forms DW902 only in respect of some of the properties"

41. The provisions of Section 41 (1)(a) and (b) of the Act have already been reproduced above. For ease of reference they are reiterated. *"An application for a licence to use water must be made in the form, contain the information determined by the responsible authority."*

²⁴ Paragraph 64 Respondent's Statement of Opposition, page 315 Bundle A, Appeal Record.

42. Even without the Regulations (more about same later) the Department would on the strength of the provisions of Section 41 (1)(a) and (b) be entitled to insist on submission of duly completed DW 901 and DW 902 forms. In point of fact the letter dated 18th January 2013²⁵ put as a condition, submission of information required in application forms DW 901 and DW 902. The Regulations were only promulgated on 24th March 2017 in Government Gazette no 40713. However, the letter of the then Director General dated 18 January 2013 also demanded the DW902 forms. Obviously then the requirement of DW 902 forms predated the Regulations promulgated on the 24th March 2017. It is therefore not necessary in this judgment to consider the issue of retrospectively or non-retrospectively of the Regulations raised in the Appellant's papers.

43. For completeness the relevant provisions of the regulations are reproduced hereunder:-

Regulation 2:-

"The purpose of these Regulations is to prescribe the procedure and requirements for water use licence applications as contemplated in Section 41 of the Act as well as an appeal in terms of Section 41 (6) of the Act.

Regulation 3:- *"An Applicant for a water use license must make such an application to a responsible authority as prescribed in these regulations."*

²⁵ Annexure NA5, PAGE 128 Bundle A, Appeal Record.

44. Forms DW901 and DW902 appear in Annexure B of the Regulations, paragraph 3 of form DW902 has a list of documents that must be attached. The documents are inter alia a certified copy of the property ownership document, certified copy of the "*power of attorney*" or appropriate supporting documentation.

45. None of the indicated documents were attached to the DW 902 forms submitted by the Appellant. That is clear from the appeal record.

46. Lastly, I turn to consider the arguments contained in the Appellant's Notice of Appeal. Appellant filed two Notices of Appeal. The Notice initiating the Appeal and a supplement thereof. Regrettably both notices miss the point.

47. The Notices deal at large with the same argument. The argument, presented in various permutations is simply this – "*It is not necessary for a person who applies for a licence to use water in terms of the NWA, to have access to the land on (sic) which the licence is issued*".²⁶

48. Rightly or wrongly Appellant did not ask the Fourth Respondent for written reasons for rejection of its application for a water use licence. In the Appeal reliance was placed on the letter received from the Second Respondent rejecting the

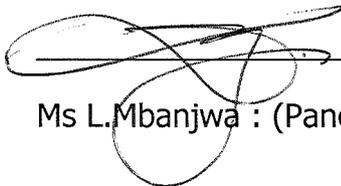
²⁶ Paragraph 2, page 27, Notice of Appeal, Bundle Record.

application²⁷. No other document evidencing refusal of the application for a water use licence was placed before the Tribunal.

49. The letter relied on did not refer to lack of access to the land and or consent of the owner as a reason for refusal of the licence. The reason stated in the letter is failure to submit DW 902 forms for a majority of the affected properties. In terms of the legislation and regulations cited above these forms are a necessary requirement in all licence applications.-

50. Having found that Appellant failed to prove that it had properly submitted the DW 902 forms Appellant's application has failed and the following order is made.

1. Appellant's appeal is dismissed.



Ms L. Mbanjwa : (Panel Chair)



Ms U. Mbeki: (Panel Member)

²⁷ Letter from the Deputy Director General, p1, Bundle A, Appeal Record.