

IN THE WATER TRIBUNAL

CASE NO: WT01/17/MP

In the appeal of:

Michael Poemedie & Pniel CPA

APPELLANT

DEPARTMENT OF WATER AND SANITATION

FIRST RESPONDENT

RUSHTAIL TRAINING 115 (PTY) LTD

SECOND RESPONDENTS

Heard on:

24th May and 8th June 2021.

Final closing submissions:

8th June 2021

Judgement delivered on:

9th July 2021.

Panel

Adv. Maake N (Member & Panel Chair).

Appearances

Appellant: Adv. Jacobs. Instructed by Appellant

First Respondent: Adv. Mpshe H. Instructed by the State Attorney

Second Respondent: Mr. A. Horwitz of Adrian B Horwitz & Associates

NB: Page numbering:

| Page Numbers | Descriptions |
|---------------------|--|
| 1 to 506. | The indexed and paginated file prepared by the Appellant. |
| 507 to 544. | Mandate documents submitted by Mr. Poemedie as per the Directive of the 24th May 2021. |
| 545 to 559. | HoA by the Appellant. |
| 560 to 590. | HoA by the First Respondent. |
| 591 to 610. | HoA by the Second Respondent |

RULING ON THE JURISDICTION OF WATER TRIBUNAL & THE LOCUS STANDI OF THE APPELLANT

INTRODUCTION

1. This ruling pertains to the preliminary issues that were raised by Counsel for the Appellant regarding the locus standi of the Appellant. The First and Second respondents also advanced their legal arguments in which they assailed the locus standi of the Appellant. This matter is an appeal heard before the Water Tribunal in terms of section 148(1) (f) of the National Water Act,¹ 36 of 1998 (“the Act”) against the granting of the WUL by the First Respondent to the Second Respondent (Licence No.08/C9E/ACGI/5353) on the 7th May 2017². The licence was issued to the Second Respondent pursuant to the application which was lodged on 17th March 2016.³ The Appellant filed their notice of appeal on the 11th May 2017⁴. Section 148 (3) states as follows: “An appeal must be commenced within 30 days after –
 - (a) publication of the decision in the Gazette;
 - (b) notice of the decision is sent to the appellant; or
 - (c) Reasons for the decision are given, whichever occurs last.”
2. Upon receiving the Notice of Appeal from the Appellant, the Registrar of Tribunal advised the Appellant in a correspondence dated the 17 May 2017, where-by he

¹148. Appeals to Water Tribunal

(1) There is an appeal to the Water Tribunal –

(f) subject to section 41(6), against a decision of a responsible authority on an application for a licence under section 41, or on any other person who has timeously lodged a written objection against the application”

² For the Water Use Licence and its conditions, see pages 28-49 of 610 of the Bundle of record.

³ For the Licence application by the Second Respondent, see page8-27 of 610 of the Bundle of record

⁴ For the Notice of the Appeal and the reasons thereof, see page3-6 of 610 of the Bundle of record.

stated amongst others that “Your notice of appeal against the decision of the responsible authority is acknowledged. Kindly note that in terms of the Water Tribunal Rules, your appeal must be lodged in a prescribed form and failure to lodge your appeal in the said format may result in your appeal being declined by the Water Tribunal.” We attach hereto a copy of an appeal format for ease of reference.”⁵ There appears no records in the Bundle of Records that the Appellant acceded to the Registrar’s advice nor did the Appellant formally responded to the Registrar’s correspondence dated the 17th May 2017.

3. Even though the hearing in this matter did not get to the merits of the case, it is important that I enumerate all the grounds for the Appeal⁶. I will also refer to the number of correspondences that were exchanged between the Appellant and the various officials of the First Respondent. This will ensure that the reasons of my ruling will give a complete picture to all the parties, including the High Court, should any party appeal against the ruling on a point of law.⁷ The grounds of appeal are as follows:

3.1. Public Participation; Section 41(4)(a)(b)(c)

- a) The notices issued to the claimants and inviting all the relevant stakeholders to a meeting regarding an application for water licence to do prospecting on Pniel 281.
- b) The invitation, minutes, attendance register, and the resolution taken in the meeting with majority votes.

⁵ See page 7 of 610 of the Bundle of the Records.

⁶ See pages 1-6 of 610 of the Bundle of records.

⁷ Section 149 of the National Water Act stipulates that “Appeals from decisions of Water Tribunal

(1) A party to a matter in which the Water Tribunal –

(a) has given a decision on appeal under section 148, may, on a question of law, appeal to a High Court against that decision,”

- c) The list of the claimants and the details in the water licence application as well as verification confirmation from the Department of Rural Development and Land Reform regarding the attached list.
- d) There need to be a consent letter from the CPA and the Department of Rural Development and Land Reform.
- e) There need to be in site inspection report and pre-qualification consultation meeting.
- f) Joint Venture Agreement and the finale resolution taken in a public meeting regarding the percentage benefiting the community.
- g) Discussion points of that meeting like; identify the scope and procedures for the entire project and discuss the procedure and approach. This includes water, closure, royalties, skill development, mitigation, relocations, compensation, etc.
- h) Identify additional interested and affected parties, such as the farmers, relevant governments, small business etc.
- i) Provide feedback on the findings of the assessment made on the impact on the environment; and allow the community to comment on the development plans and assessment.
- j) What will the distance of the project's area be from the community because prospecting is taking place close to the residence?
- k) How many times a day does the mine plan on blasting and how will this impact the community? What will the noise levels be? Will roads, cropping and grazing land be diminished? Will this have a negative impact on infrastructure and services?
- l) Bank account of the CPA and how the realities will be distributed to the beneficiary.

4. **3.2. Socio Economic Development; Section 49 (2) (C)**

- a) Section 27 (1) (C) efficient and beneficial use of water in the public interest; The social plan needs indicating how the community will benefit during the water licence period for prospecting. The report performance needs to be evaluated from time the project started until today. (From 2015 until the issuing of the licence). During the period that the water has been stolen from the mentioned company the community has been and are still paying R12.00 form normal domestic use.
- b) The Labour plan on how the community will be employed and if the residence will have first preference to be employed by the mine.

3.3. Pollution Prevention

- a) How will the project be done in a that prevents pollution of water resources before we have notes water pollution before the issuing of the license?
- b) Waste discharging plan; section 26(1)(g) regulating or prohibiting any activity in order to protect a water resource or in stream or riparian habitat.
- (h) prescribing waste standards with specify the quantity, quality and temperature of waste which may be discharged or deposited into or allowed to enter a water resource.
- (i) prescribing the outcome or effect which must be achieved through management practices for the treatment of waste, or any class of waste, before it is discharged or deposited into or allowed to enter a water resource.
- (j) requiring that waste discharged or deposited into or allowed to enter a water resource be monitored and analysed, and prescribing methods for such monitoring and analysis.

5. 3.4. Environmental Impact Assessment plan.

- a) The rehabilitation plan compared to what has already taken place on the farm before the issuing of the licence and if it is the standard according to the Environmental Act.
- b) The fact that prospecting has been taking place in the farm on Pniel 281 and the approval for the water usage thereof.
- c) The possibility that the mining company destroying indigenous species on the farm.
- d) The demarcated areas were the applicant indicated prospecting will be taking place.

5. 6. 3.5. Rushtail 31 (Pty) Ltd

- a) We as the community are not sure on what the joint venture agreement this licence has been agreed too, because the one we know is before the court.
- b) The Chairperson of the CPA is a director in the company as well as his relationship with the owner of Rushtail 31.
- c) The applicant (owner) has not considered doing the application in the name of the CPA to develop the community.
- d) Review of the financial records of the company for the 12 months in operation to have an idea on how the community benefitted compared to the minerals removed from our land.
- e) No paper agreement is in place to benefit the community and there is no transparency in the whole process.
- f) The 2007 court order questions the chairperson interest and the joint venture agreement and it is not finalized.

3.6. Award of damages: Section 153

- a) Water being used unlawfully, while the community have to pay for domestic use.
- b) Selective community members benefited from prospecting operation and no proper procedure to distribute royalties has been agreed on.
- c) Environmental damage and removal of minerals before the water licence can be issued.
- d) Social economic development plan not execution according to how the application indicates.

Various correspondences between the Appellant and officials of the First Respondent as well as several Community meetings (Sequence of events).

6. Counsel for the Appellant has already confirmed that the Appellant Mr. Poemedie is not one of the claimants of Pniel CPA. He acted in accordance with the powers that were purportedly granted to him when his aunt, Ms. Coetzee transferred her family's royalty benefits to him by way of the affidavit which she deposed of on the 1st October 2017.⁸ Mr. Poemedie and Mrs. Coetzee had already started communicating with various officials of the First Respondent including the Minister herself (Minister N. Mokonyane, former Minister of Water & Sanitation). On the 28th March 2017, Mr. Poemedie signed as a claimant, a Memo to the Department of Water and Sanitation-Regional Manager-NC.⁹ The purpose of that memorandum reads as follows "We as the community of Pniel 281 want the water use licence that has been issued to Rushtail for Pniel to be withdrawn and cancelled immediately." Although one can forgive Mr. Poemedie for using the inappropriate word such as withdrawing and

⁸ See page 353 of 610 of the Bundle of records.

⁹ See page 508-509 of 610 of the Bundle of record. NB: all the records from page 507 to 544 are records that Mr. Poemedie was directed to submit to the Registrar of the Tribunal during the hearing on the 24th May 2021. This was the main reason for postponing the hearing to the 8th of June 2021.

cancelling the Water Use Licence issued to Rushtail immediately, the reality is that the water use licence was not issued to Rushtail on the 28th March 2017, and therefore, the Department did not have any licence to withdraw nor cancel. At that time there was no resolution whatsoever to give Mr. Poemedie the authority to act on behalf of the residents of Pniel CPA. He was only acting with his aunt.

7. On the 11th April 2017 during a well-attended meeting by members of the community who call themselves Pniel Concern Claimants, Mr. Poemedie was given the authority to represent the concern claimants of Pniel CAP/05/0864/A. The one sentence delegation of authority does not indicate issues that Mr. Poemedie was granted the authority to act on behalf of the concern claimants of Pniel.¹⁰ The grievances that the concern claimants had, did not have include anything to do with the objection towards granting the Water Use Licence to the Second Respondent, Rushtail (Pty)Ltd. Upon thorough scrutiny of the documents, I observed that from page 520 to 543, there are several attendance registers of the meetings which have headings and comments on the bottom part of the pages. None of the agenda points from page 520 to 543 mentioned any issue regarding the objection nor the appeal against the issuance of the Water Use Licence to the Second Respondent.

8. From page 520 to 543, the agenda points are as follows:

- ✓ 1. Suspension of the LADCOM/CPA Executive immediately.
- ✓ 2. Placing the LADCOM/CPA under Administration.
- ✓ 3. Re-election of the LADCOM/CPA process to be implemented.
- ✓ 4. Hand-over report from LADCOM/CPA Executive.

¹⁰ See page 518 of 610 of the Bundle of documents.

- ✓ 5. Review of the court order.
- ✓ 6. Financial claimant payment.
- ✓ 7. Establishment of the Pniel community forum.
- ✓ 8. Objection of the bridge on Pniel.
- ✓ 9. Agriculture project benefits.

On the bottom part of the attendance register there is a statement which said, "Removal of Pniel LADCOM." It is also worthy to mention that the memorandum mentioned on pages 522 was addressed to the Department of Rural Development and Land Reform. It is irrelevant in this appeal hearing.

9. On the 22nd April 2021, some members of the Pniel community gave Mr. Poemedie a clear mandate to represent them about complaint for Non-payment of their royalty benefits.¹¹ On the 6th May 2021, there was another community meeting where-by Mr. Poemedie was present. The heading on the agenda of that meeting states the following: Residence, Land & Financial Claimants.¹² There is also another attendance register attached of the meeting dated the 27th May 2017. There is no heading nor agenda points on the attendance registers.¹³ I am now satisfied that as the Tribunal panel, I have perused all the numerous documents which Mr. Poemedie has submitted as directed on the 24th May 2021, and I am in a position give them a thorough legal analysis as part of my ruling on this matter.

10. Mr. Poemedie had already communicated with officials of the First Respondent, as early as March 2017, ostensibly mandated by some members of the Pniel CPA. On the 13th April 2017, an employee of the First Respondent, G. van Dyk issued a letter to

¹¹ See pages 523 to 531 of 610 of the Bundle of records.

¹² See pages 532 to 538 of 610 of the Bundle of records.

¹³ See pages 539 to 544 of 610 of the Bundle of records.

Mr. Poemedie where-by he/she indicated to Mr. Poemedie the department has investigated the alleged unlawful use of water and that the department will issue a Directive to the alleged perpetrators in terms of section 53 (1) of the National Water Act.¹⁴ Mr. Poemedie was assured that the department will revert back to him in due course.¹⁵ On the 5th July 2017, the former Minister of Water & Sanitation, Ms.NP Mokonyane acknowledged Mr. Poemedie and Ms. Coetzee's e-mail dated the 10th May 2017 under the heading "Request to suspend and withdraw the issued water use license to Rushtail 31(Pty) Ltd on the Remaining Extend of the farm Pniel 281. The Minister indicated to Mr. Poemedie and Ms. Coetzee that the Department will take the necessary action to ensure that the Licensee does not proceed with the authorized water uses.¹⁶

LEGAL QUESTIONS TO BE ANSWERED IN THIS RULING

11. On the 24th May 2021, both parties addressed me purely on the issue regarding the Appellant's locus standi (Counsel for Appellant) or the lack thereof. Based on the legal arguments by both parties, should I decide that the Appellant does have a locus standi in this matter, then the matter will be post-poned to an agreed date so that parties should address me on the merits of the case. That is if neither of the party would not want to take my decision on appeal based on the question of law¹⁷. Alternatively, should I decide that the Appellant does not

¹⁴ 53 (1). 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; (...)"

¹⁵ See page 143 of 610 of the Bundle of records.

¹⁶ See page 145 of 610 of the Bundle of records.

¹⁷ See footnote 5 above.

have locus standi in this matter, that would be the end of the matter, unless the Appellant will decide to take my decision on appeal based on the point of law.¹⁸ Another correspondence was sent to Ms. Coetzee and Mr. Poemedie by Mr. AAM Abrahams dated the 1st June 2017, where-by the latter implored Mr. Poemedie as the Appellant to proof to the Responsible Authority that he has served the licence holder with the copy of the Appeal before the Department can take any action, as per the provisions of Section 148 of the National Water Act.¹⁹

12. Counsel for the Appellant submitted that the Appellant, Mr. Poemedie was acting on behalf of the Pniel CPA having been approached by some of the members of the Pniel CPA, especially Mrs. Johanna Coetzee, his aunt who had disposed an affidavit on the 1st October 2017.²⁰ It is important to place on record that Ms. Coetzee's affidavit is a one liner in which she stated that she hands over her royalties to Mr. Poemedie. Although, there is no supporting documents to this fact, Counsel for the Appellant submitted that Ms. Coetzee transferred her royalties to Mr. Poemedie with the consent of her family members. There is no other member of Ms. Coetzee's family who deposed a confirmatory affidavit to support her decision to hand over her family's royalties to Mr. Poemedie. Ms. Coetzee's affidavit does not state that she gives Mr. Poemedie the mandate to represent her and/or to litigate on her behalf in relation to the royalties benefits that are due to her family.

¹⁸ Ibid.

¹⁹ See page 146 of 610 of the Bundle of the Records.

²⁰ See page 335 of 610 of the Bundle of the Records.

13. During the second day of the hearing of this matter on the 8th June 2021, I asked Counsel for the Appellant if Ms. Coetzee has children of her own, and the answer was in the affirmative. I further asked Counsel for the Appellant whether the children of Ms. Coetzee were consulted before Ms. Coetzee could depose of her affidavit, and if they were consulted, can the Appellant submit any copy of the minutes or resolution of that family meeting. Counsel for the Appellant responded that his instructions are that a family meeting was held, where-by this issue was discussed and all family members agreed that Mrs. Coetzee could hand-over the royalties benefits of the family to Mr. Poemedie, but the agreements were only verbally concluded and not written anywhere.
14. Appellant further indicated that the whole arrangement was based on trust and the fact that most members of the Coetzee family are not educated and Mr. Poemedie, who is a descendant of the Coetzee family is educated, hence there was no written resolution to hand over the royalties benefits to Mr. Poemedie. Counsel for the Appellant further submitted that should the Tribunal so direct, another family meeting can be arranged, and a family resolution to hand over the royalties benefits to Mr. Poemedie can be reduced to writing. The horse has bolted. It is way too late to knit together the bones of the past.
15. The affidavit deposed by Ms. Coetzee, so submitted Counsel for the Appellant, qualified Mr. Poemedie to be a member and a shareholder of the Pniel CPA. This is because Ms. Coetzee is a member of schedule A of the list of the Land Claimants in Pniel CPA and that she represents the interests of her family and

that she also acted in her personal capacity²¹. Counsel further referred me to the following articles of the Constitution of the Pniel CPA²²:

Item 6. QUALIFICATION OF MEMBERS

Members of the association are the people listed in Schedule A & B of the registrar of members annexed hereto irrespective of whether such members reside on the land or is employed by the association.

Item 7. CLASS OF MEMBERS:

7.1. The members of the association are categorized as in Schedule A and B of the register of members.

7.2. Members in Schedule “A” are members in their own right and are also the representative of the members of their households as listed in Schedule B and shall have the right to vote in their personal capacity and in their representative capacity.

7.3. Members in Schedule B are members in their own right and do not have a right to vote and cannot act in a representative capacity unless so lawfully authorised in writing by all the members of the household to act as such.

Item 8. RIGHTS OF MEMBERS

8.1. All the members of the association shall be entitled to but not limited to the following:

8.1.1. a right to tenure which would be legally secure;

8.1. 2. a right to a fair participation in the usage and the management of the communal land;

²¹ See page 339 of 610 of the Bundle of records.

²² Item 6 to 9 is found on pages 169 to 170 of 610 of the Bundle of Records.

8.1.3. a right to jointly and equally share the profits and income of the common land;

8.1.4. a right to vote in accordance with the provisions of paragraph 7 above and to participate in the general meetings.

ITEM 9. REPRESENTATION OF MEMBERS IN MEETINGS

9.1. The Schedule A members shall represent the Schedule B members of their respective households in all meetings.

9.2. A representative shall always promote the interests of his/her household in the meetings.

9.3. A consent signed by all the members of the household shall, whenever it becomes necessary, be required from the said representative. (Very important clause in this appeal matter). I will deal with this clause sapientially during the exegesis of the Appellant's submission.

16. Mr. Poemedie has also submitted a letter to the Department of Water and Sanitation dated the 8th September 2017, where-by amongst others he explained his relationship with Ms. Coetzee as well as the issue regarding his father's use of the surname Poemedie and not Coetzee. It is also noteworthy to indicate that in this letter dated the 8th September 2017, Mr. Poemedie introduced himself as a claimant by virtue of his relationship with his aunt Ms. Coetzee.²³ Mr. Poemedie further assailed the validity of Mr. Corie Solomon's status as the Chairperson of the Pniel CPA, due to the irregularity that surrounded the election of Mr. Solomon as the Chairperson of the Pniel CPA.²⁴ The only time where Mr. Poemedie talks about the Water Licence issue,²⁵ is in relation to the failure by the Department to order the Applicant to conduct a public

²³ See page 180 of 610 of the Bundle of records.

²⁴ See page 181 of 610 of the Bundle of records

²⁵ Ibid.

participation meeting before prior to the licence being issued in favour of Rushtail 31(Pty).²⁶ When concluding his submission, Counsel for the Appellant reiterated that Mr. Poemedie did not impose himself to act on behalf of those members of the Pniel CPA, he was approached by his aunt Ms. Coetzee and some family members because they trust him and that he was the only person in the bigger family that is educated. This is because Mr. Cornelius Solomons takes advantage of the fact that most of the members of the Coetzee family are not educated. The other reason is that Mr. Poemedie is a descendant of the Coetzee family even though he is not a resident at the Pniel farm.

SUBMISSION BY THE FIRST RESPONDENT

17. Counsel for the First Respondent submitted two parts arguments which dealt with the issues regarding the Appellant's lack of locus standi and the Tribunal's lack of jurisdiction in this matter as part A & B, respectively. Submission regarding the Tribunal's lack of jurisdiction in this matter was submitted on the eve of the second day of the hearing, vid the 7th June 2021. There was no sign of a gun-short approach nor delaying tactics by Counsel for the First Respondence, and therefore the late submission of part B by Counsel for the First Respondent was condoned and heard. On the first day of the hearing vid. 24th May 2021, the First Respondent addressed me in relation to the Appellant's lack of locus standi in this matter, simply because the Appellant did submit an objection against the issuance of the Water Use Licence to by the First Respondent to the Second Respondent. The First Respondent appropriately

²⁶ See page 182 of 610 of the Bundle of records

referred me to the stipulations of 148 (1) (f) of the National Water Act,²⁷ which stipulates thus:

- (1) There is an appeal to the Water Tribunal –
- (f) subject to section 41(6), against a decision of a responsible authority on an application for a licence under section 41, or on any other person who has timeously lodged a written objection against the application.

18. The First Respondent further referred me to one of her Statement of Grounds of Appeal, which clearly indicated that the Appellant did not lodge an objection towards the granting of the Water Use Licence by the First Respondent to the Second Respondent.²⁸ She further submitted that there was no evidence in the Appellant's bundle of record that rebuts the statement that the Appellant failed to submit an objection towards the granting of the Water Use Licence by the First Respondent to the Second Respondent. The Appellant only lodged its Notice of Appeal on the 11th May 2017, without first having objected towards the granting of the Water Use Licence and consequently the Appellant does not have locus standi. She further submitted that in a matter where-by the Appellant does not have locus standi to prosecute the Appeal because the Appellant did not object towards the issuance of the Water Use Licence by the First Respondent to the Second Respondent, the tribunal automatically does not have any jurisdiction to adjudicate on such a matter. I will deal with the issue regarding the jurisdiction of the Tribunal in due course.

19. The First Respondent further submitted that, it is unexplainable that the Appellant purports to represent some members of the Pniel CPA in this appeal to oppose the

²⁷ Act 36 of 1998.

²⁸ See page 65-66 of 610 of the Bundle of Records.

issuance of the Water Licence to the Second Respondent in respect of a mining operation of which the same Pniel CPA is a Black Economic Empowerment (BEE) partner of the Second Respondent vid. Rushtail. She referred me to a resolution taken by the CPA on the 12th January 2006, where-by the Pniel CPA supported the Second Respondent's application for a mining/prospecting permit on the property described as Pniel farm 281.²⁹ The First Respondent then cogently referred me to a sufficiently convincing number of case-laws in the Water Tribunal jurisprudence in support for the submission that an Appellant who did not lodge an objection against the issuance of a Water use licence before the decision maker at the Department of Water & Sanitation awarded/issued the Water Use Licence to the Applicant does not have a locus standi to prosecute an appeal in accordance with section 148(1)(f) of the NWA.

20. In the matter between Carolyn Nicola Shear v The Regional Head: Gauteng Regional Department of Water Affairs and Eye of Africa Development (Pty) Ltd³⁰, Section 148 (1)(f) of NWA and the whole appeal scheme of the NWA envisage the following: -

That appeal may only be lodged by the person mentioned in Section 148(1)(f) of NWA; and that where no notice calling for objection was published in the media as contemplated by Section 41(4) of the NWA, no right to lodge an appeal in terms of Section 148(1)(f) of NWA arises in favour of any objector.

First Respondent further submitted that in the Tribunal's view which is traceable in the appeal between Gideon Anderson t/a Zoneboom Boerdery Enterprise (Pty) Ltd, a close scrutiny of the relevant section and the whole appeal scheme of the NWA reveals that what is envisaged is the following: -

²⁹ See page 69 of 610 of the Bundle of records.

³⁰ Case number WT19/02 2009.

Appeals may only be lodged by the person mentioned in Section 148(1)(f) of the NWA; and that people who may appeal are the aggrieved applicants for a license made in terms of Section 41 of NWA or to which Section 41 of NWA applies and any person who lodged a written objection against such an application timeously. He added that the period for lodging written objections against Section 41 license application is determined by the Applicant for such a license in a suitable notice published in newspapers and other media inviting objections; and that such a notice inviting objections can only be given by the Applicant if required to do so by the responsible authority. In this matter the Responsible Authority, being the Vaal River Catchment Management Agency did not request the Second Respondent (Rushtail 31 (Pty) Ltd), to embark on public participation process for the simple reason that the Pniel CPA is the BEE partner of Rushtail in the mining operation Special Purpose Vehicle (SPV).

21. It is only an objector who would have objected before the Water Use Licence was issued who has the right to appeal. Section 41(4) deals with objection and as such, only Section 41 and no other Section of NWA grants the right to object against an application under certain circumstances. Section 148(1)(f) should be read with Section 41(4) for the purpose of identifying the objector contemplated therein. An objection contemplated by Section 148(1)(f) of NWA should always be preceded by a notice inviting objections and prescribing the time periods within which such objection may be lodged. First Respondent further submitted that the Tribunal, as a creature of statute, exercise sporadic as opposed to inherent jurisdiction. It can as such only do that which its enabling Act authorizes it to do. It can, therefore, only entertain appeals lodged by those on whom the NWA confers the right to appeal to it as an appellate body. Where a party feels aggrieved by a decision and/or the way a decision was made by the responsible authority and such a party does not have the right to appeal

to the Water Tribunal against such a decision but is free to explore other legal avenues available to him or her such as having recourse to the High Court.

22. In the matter of Escarpment Environmental Protection Group and Another v Department of Water Affairs and Another the Tribunal concluded that: -“An interpretation which extends the right to appeal to any person or objector other than the one contemplated in section 148(1)(f) of NWA would unduly strain the words of the statute and cannot be reasonably ascribed to the section.” The same conclusion was reached in the case of Federation for Sustainable Environment v Department of Water Affairs and Others.³¹ The Tribunal in that matter held that: - “After the Tribunal has considered all the relevant information, the Water Tribunal is of the opinion that it has no jurisdiction to hear an appeal by a person other than the applicant for the license for water use, if the responsible authority did not require from the applicant to give suitable notice in newspaper or other media within the contemplation of section 41(4) of the NWA. The Tribunal is therefore satisfied that the Tribunal has no jurisdiction to hear the matter. The appellant therefore has no locus standi in the matter to present the appeal.”

23. In Werda Handel (Pty) Ltd v Director General of the Department of Water and Sanitation,³² the Tribunal noting the High Court’s decision in Escarpment Environment Protection matter held as follows: -

What is clear from the High court and the Tribunal’s decisions is that Section 148(1)(f) of the NWA is broad enough to include a person who has lodged an objection timeously to the responsible authority before a decision is made on the NWA application. This interpretation is consistent with the discretionary

³¹ WT08/02/2011(2011) ZAWT (20 December 2011).

³² WT25/03/2015.

nature of Section 41(1) of the NWA and the requirement of procedural fairness and public participation.” The Tribunal then concluded as follows: -

“However these nuanced interpretation explained above cannot be extended to a limitless class of person to include those who have not lodged any objection at all before a decision on an WUL application is made.

This is an important decision because it delimits the stage at which a liberal interpretation of Section 148(1)(f) would open flood gates and thwart the intention of the legislature delimiting the class of persons who may lodge an appeal to the Tribunal. It cannot be that the legislature intended any interested and affected person to come after the responsible authority, after the responsible authority has made the decision and seek to first object to the application and lodge an appeal to the Tribunal. An objector is a person who has participated in the WUL application process whether on invitation or on the own volition. A person who has not lodged an objection is not an objector contemplated in Section 148(1)(f) of the NWA regardless of the reasons why they could not object.”

24. The common cause facts in this appeal are that: -

24.1. The responsible authority did not require the Third Respondent to issue a notice in the newspaper or other media inviting objection, if any, to its water use license application; and

24.2. That the Appellant did not object to the Third Respondent’s water use license application.

In the circumstances, we submit that the legal principle enunciated in the case law referred to above are sound and therefore ought to be applied to the facts of this case. As at the date that the decision was taken on the water use license application of the Second Respondent, the Appellant had not objected thereto. Regardless of the

reasons why the Appellant did not object to the license application, the fact of the matter is that absence of the Appellant's written objection, the Appellant has no locus standi to bring the current appeal and consequently this Tribunal does not have jurisdiction to entertain the appeal.

25. In the circumstances we submit that the appeal ought to be dismissed without even considering the merits.

First Respondent submission regarding the Tribunal's lack of Jurisdiction in the Michael Poemedie case.

26. During Day 2 of the hearing on the 8th June 2021, the First Respondent also addressed me about the lack of the Tribunal's jurisdiction to hear this appeal, as a matter of cause because the Appellant lacks the locus standi to prosecute the appeal. In short, the First Respondent introduced her supplementary heads of argument as follows:

"2. While the filed heads of arguments address the Appellant's lack of locus standi to institute the current proceedings, the First Respondent omitted to address the issue relating to this Water Tribunal's lack of jurisdiction to entertain the appeal. The Appellant's lack of locus standi to institute the current appeal is inextricably linked to the Tribunal's jurisdiction to entertain the appeal. 3. Put differently, once it is found that the Appellant has no locus standi to institute an appeal as contemplated in Section 148(1)(f) of the NWA, it would follow that the Tribunal has no jurisdiction to hear the matter. 4. The supplementary heads

of arguments are filed to address the Tribunal's lack of jurisdiction to entertain the appeal"³³.

27. First Respondent then referred me to several judgements which define what jurisdiction mean,³⁴ when is jurisdiction determined,³⁵ the legal requirement that must be met for the court or tribunal to have jurisdiction over a matter, especially regarding the *points in limine*,³⁶ which is the subject matter of this ruling.³⁷ Of all the legal principles advanced in the judgements which the First Respondent relied on in her argument, the most compelling argument was that the tribunal, like the Magistrate Court does not have inherent jurisdiction bestowed on it.³⁸ She further submitted the Tribunal (like a Magistrate's Court) exceeds its jurisdiction, at common law, the consequence is that such order is null and void.³⁹ It is only the High Court, the Supreme Court of Appeal and the Constitutional Court that have inherent jurisdiction as per the prescripts of section 173 of the constitution, so argued the First Respondent.⁴⁰ She further submitted that the Water Tribunal is a creator of statutes and may only make orders in terms of the legislation that expressly authorises it to do so.⁴¹ Simply put, First Respondent submitted to me that the Tribunal does not have any discretionary powers and that its powers are confined within the four corners of section 148 of the National Water Act.

³³ See pages 580-581 of 610 of the Bundle of records.

³⁴ See pages 581 of 610 of the Bundle of records.

³⁵ *Communication Workers Union v Telkom SA Ltd* (1999) 2 All SA 113 (T), 1999 (2) SA 586 (T).

³⁶ *Gcaba v Minister of Safety and Security* 2010 (1) BCLT 35 (CC), 2010 (1) SA 238 (CC) para 75

³⁷ *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* 2013 (3) BCLR 251 (CC) [2012] ZACC 28.

³⁸ *Ndamase v Functions* 4 All 2004 (5) SA 602 (SCA) para 5.

³⁹ *The Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO and Others* 2012 (3) SA 325 (SCA) para 12, *Nedbank Ltd v Jones and Others* 2017 (2) SA 473 (WCC).

⁴⁰ See pages 584 of 610 of the Bundle of records.

⁴¹ *Ndamase v Functions* 4 All 2004 (5) SA 602 (SCA) para 5.

Submission by the Second Respondent

28. The Second Respondent is Rushtail 31 (Pty) Ltd a Private Company duly incorporated under the Companies Act 71 of 2008 which carries on the business of Diamond Exploration and Mining and is a holder of a valid Diamond Prospecting Right granted under Reference Number NC30/5/1/1/2/187PR in terms of Section 17(1) of the Mineral and Petroleum Resources Development Act No. 28 of 2002 (“the MPRDA”) over Remaining Extent of the Farm Pniel Number 281, Barkly West which it acquired by Cession from the ELCSA Property Management Company (Pty) Ltd, the owner of the Surface of the Land prior to its expropriation in 2006 for the benefit of the CPA Members. Ministerial Consent to the Cession was granted on 11 April 2016. The CPA holds 42% (Forty Two Percent) of the Shares in Rushtail and Pniel Estates NPC, a non-profit Company established for the benefit of the Community living on the Farm 9% (Nine Percent).⁴²
29. The Appellant launched this Appeal by notice dated 11 May 2017 and presumably lodged with the Water Tribunal on or about this date but waited until 3 May 2019 before serving the Appeal upon the Licence Holder notwithstanding being directed to do so long before this date. In the premises the Appeal was delivered outside the 30 (Thirty) day period allowed in Section 148(3) of the Water Act for the commencement of an Appeal.⁴³ Both the First and Second Respondents filed Statements of Grounds of Opposition in which they submitted

⁴² See page 91 of 610 of the Bundle of records.

⁴³ See page 91 of 610 of the Bundle of records.

that the Appellant was not properly before the Tribunal since he had not lodged an objection as contemplated in Section 148(1)(f) to the Application for the Water Licence. In addition, the Second Respondent raised the point that the Appellant, Mr. Michael Poemedie had no authority to act in the name of or on behalf of the CPA and further argued that in the absence of a condonation application by the Appellant for the late delivery of the Appeal, the Appeal falls to be dismissed.⁴⁴

30. The First Respondent has pointed out in Paragraph 32 of his Statement of Grounds of Opposition (“Opposition to the Appeal”),⁴⁵ that the Appellant does not claim in his papers that he was not aware of the Licence Application by Rushtail and therefore cannot claim he was not afforded an opportunity to object. The First Respondent further intimates at Paragraph 36 of his Opposition to the Appeal that the CPA held a further consultation meeting with the affected Members of the Community duly represented by their chosen delegates on the 2nd February 2016.⁴⁶ From page 4 thereof it is clear that Ms. Johanna Coetzee, from whom Appellant claims to have derived his standing in this matter as per the Affidavit to be found at page 335 of the Record, was an attendee and there is no record of her raising any objections towards the granting of the Water Licence Application either during this meeting or subsequent thereto and before the Licence was granted as aforesaid on the 4th May 2017. Absent such an Objection, it is submitted that neither Johanna Coetzee or Michael Poemedie had standing under Section 148(1)(f) to deliver the current Appeal and neither do any of the persons he might now claim have mandated him to bring the Appeal have any standing.

⁴⁴ See pages 64 to 66 and 97 of 610 of the Bundle of records.

⁴⁵ See pages 68 of 610 of the Bundle of records.

⁴⁶ See pages 604 to 607 of 610 of the Bundle of records.

**MICHAEL POEMEDIE’S LACK OF AUTHORITY TO ACT IN THE NAME OF
OR PURPORTEDLY ON BEHALF OF THE CPA**

31. Appellant purports to act on behalf and in the name of the Pniel Communal Property Association (“CPA”), a juristic person with the capacity to sue and be sued as contemplated in Section 6 of the CPA Act duly registered in terms of Section 8 of the said Act under Registration Number CPA/05/0864/A. Second Respondent disputes that he has any standing or authority to act on behalf of the CPA. Second Respondent has pointed out that Mr. Poemedie is neither a Member of the CPA or a verified Restitution Claimant, which is the qualification for Membership. In argument before the Tribunal on the 24th May 2021 he claimed to derive a right to Membership based on having taken cession of Ms. Johanna Coetzee’s right to royalties in the CPA as per her Affidavit to be found at page 335 of the record and to be acting on behalf of other residents or CPA Members in respect of which it appears that he has now filed some sort of corroboration that they have given him a mandate.
32. The CPA is a Registered Juristic Person under the CPA Act with the capacity to sue and be sued in its own name. As such, it is in effect no different from a non-profit Company and can only act through its organs which are in terms of its Constitution the Members in General Meeting (Paragraphs 20 to 21) and the Land Administration Committee or LADCOM (Paragraphs 14 and 15) which is the body that convenes the Members in General Meeting.⁴⁷ Neither Mr. Poemedie nor Ms. Coetzee nor any nor any of the other people purporting to

⁴⁷ See pages 172 to 173 and pages 175 to 176 of 610 of the Bundle of Records.

mandate Mr. Poemedie have been authorized by the LADCOM or the Members of the CPA in General Meeting to bring the Appeal and have not tendered any Resolutions of these bodies authorizing them to act on behalf of or in the name of the CPA. If they have Minutes or Resolutions of meetings of persons purporting to authorise them to do so, such meetings were neither convened by the LADCOM or Chaired by the Chairman of the LADCOM or the Deputy Chair or any other Member of the Committee as required by Paragraph 20.4 of the Constitution and any Resolutions taken thereat are accordingly invalid in so far as they purport to empower Mr. Poemedie or Ms. Coetzee to act on behalf of or in the name of the CPA.⁴⁸ At most such Resolutions or Minutes would authorize Mr. Poemedie or Ms. Coetzee to act on behalf of the individuals concerned not as Members of the CPA but only in their individual capacities and in such case, such persons do not have standing in terms of Section 148(1)(f) of the Water Act since they never lodged written objections during the Application process.

33. Second Respondent cogently submitted that it is a bedrock principal of Company and Association Law that the Members are bound by the decisions of the majority. In *Sammel vs President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A) at 678 H, Trollip, J.A. said in this regard that: *“By becoming a shareholder in a company a person undertakes . . . to be bound by the decisions of the prescribed majority of the shareholders, if those decisions on the affairs of the company are arrived at in accordance with the law, even where they adversely affect his own rights as a shareholder.”*

⁴⁸ See pages 175 of 610 of the Bundle of Records.

34. In “Majority Rule and Minority Protection under the Companies Act 1956” (India) published in the “International Journal of Research (ILR) Dr Sukhvinder Singh Dari explains the principle thus:

“In a democracy you indeed have to win by a majority. Similarly, a company which is a large group of individuals acts in accordance with the decisions taken by the majority of its members - the dissenting minority (if there is one) is bound to accept any such decisions unless and until he is able to show that the power which vests with the majority, has been abused. The members of a company can express their wishes at general meetings by voting for or against the resolutions proposed. However, it (the resolution) binds all the members, even those who voted against it.”

35. The Members of the Pniel Community, in particular the CPA took a resolution as far back as 12 January 2006 to support the Second Respondent’s application for a mining/prospecting right in respect of the Farm Pniel Number 281 Barkly West.⁴⁹ This Resolution has never been rescinded and therefore still binds the CPA and its Members and in supporting the application for a mining/prospecting right, the Resolution by necessary implication supports the Application for a Water Right since it is trite that you cannot prospect or mine without Water.

36. Finally in this regard it is important to note that when it comes to juristic persons, the proper plaintiff or applicant or appellant is the juristic person itself and not individuals purporting to act on its behalf. In *Frances George Hill Family Trust vs South African Reserve Bank and Others* 1992(3) SA 91(A) at 97 B-C, Hoexter JA stated that: - *It is trite that a company with limited liability is an independent legal person and separate from its shareholders or directors. In general, therefore,*

⁴⁹ See pages 17 of 610 of the Bundle of Records.

when a wrong is alleged to have been done to a company the proper plaintiff to sue the wrongdoer is the company itself.”

LATE DELIVERY OF THE APPEAL

37. The Appellant launched the Appeal by Notice dated the 11th May 2017. However, it was not until 3 May 2019 that the Appellant served the appeal upon the Licence Holder, notwithstanding being directed to do so long before this time by the Tribunal.⁵⁰ This was nearly 2(Two) years after the period allowed for commencing an Appeal in terms of Section 148(3)(b) had expired. Rule 3(3) of the Rules of the above Honourable Tribunal provide that *“An appealmust be commenced by serving a copy of a written notice of appeal or application on the relevant Responsible Authority and to other affected parties and lodging the original with the Tribunal.”*

38. It follows that until the Notice of Appeal has been served on the Responsible Authority and the other affected parties which would include the Holder of the licence, it has not been commenced as contemplated in Section 148(3) of the Water Act and this Appeal was accordingly commenced nearly 2(Two) years late. Furthermore, the Appellant(s) have not applied for condonation of the late commencement and in the absence of condonation having been granted it is submitted that the Appeal stands to be dismissed.

⁵⁰ See pages 99 of 610 of the Bundle of Records.

ANALYSIS OF EVIDENCE AND LEGAL ARGUMENTS

39. Counsel for the Appellant's open address was to clarify the locus standing of Mr. Michael Poemedie, the Appellant. Appellant solely relied on a one-page affidavit that was deposed of by his aunt Ms. Johanna Coetzee on the 1st October 2017.⁵¹ The intention of Ms. Coetzee with that affidavit was to transfer her royalties to Mr. Poemedie and that Ms. Coetzee took that decision with the full consent of the family. This is because the family members of Ms. Coetzee are not educated, and they trusted Mr. Poemedie to act on their behalf and to protect the interests of the Coetzee family regarding their mining royalties in the Pniel mining operation. What is most surprising is that there is nothing in writing be it the minutes or a family resolution where the members of the Coetzee family gave Ms. Coetzee the authority to transfer the royalties of the Coetzee family to Mr. Poemedie.
40. Counsel for the Appellant tried in vain to replant Mr. Poemedie into the beneficiary list of the Pniel CPA because of the affidavit deposed by Ms. Coetzee by relying on the prescripts of Article 6 of the constitution of the Pniel CPA. I must indicate that the attempt by Counsel for Appellant in relying on article 6 of the constitution of Pniel CPA, is nothing but a scrapping of the barrel to make somebody who is not a member of the Pniel CPA to qualify as a shareholder and subsequently to represent the Coetzee family based on an affidavit that does not even have any terms and condition on how the royalty benefits of the Coetzee family will be administered by Mr. Poemedie.

⁵¹ See page 335 of 610 of the Bundle of records.

41. Ms. Coetzee appears on number 45 of Schedule A members of the Pniel CPA.⁵² She has a right to vote in her personal capacity and as a representative of the Coetzee family household. Article 9.3. of the Constitution of the Pniel CPA reads “A consent signed by all the members of the household shall, whenever it becomes necessary, be required from the said representative”. Ms. Coetzee had a duty to get the written consent of all the members of her household before she could depose of her affidavit to transfer her royalties and that of her household to Mr. Poemedie. Mr. Poemedie was invited by his aunt to come and help them in dealing with the administration of the Coetzee household because they trusted him, and he is educated. Mr. Poemedie had a duty to advise his aunt and the Coetzee household regarding Ms. Coetzee’s obligation to seek a written consent from all the Coetzee household members before she could depose her affidavit, purportedly to transfer the royalties of the Coetzee household to himself. Counsel for the Appellant hopelessly and unmeritoriously tried to hide behind the fact that members of the Coetzee family are not educated, hence Ms. Coetzee transferred the family royalties to Mr. Poemedie. This line of reasoning is tinkering on an insult to the other members of the Coetzee family. The fact a person has not been to school does not mean that that person cannot think, and that he/she must be bypassed when important family decision is being taken. Basic commonsense dictates that the written consent of the members of the Coetzee family household must have been sought before Ms. Coetzee could transfer the royalties of the Coetzee household to Mr. Poemedie.
42. I buttress the submission of the Second Respondent that any member of the Pniel CPA who would like to dispose of or sell his/her rights, that member must give

⁵² Page 339 of 610 of the Bundle of records.

the other members of the CPA the first right of refusal. Article 12 “Sale of the Rights” of the Pniel CPA constitution states the following:

12.1. Any member intending to sell his rights in the association shall be obliged to give the other members the rights of first option in writing for a period of twelve months.

12.2. Whenever the association fails to exercise such right within the period of twelve months then the member may sell the said rights to the public.

12.3. Whenever the rights in the association are sold to the public the person buying the said rights shall become a member of the association and shall be bound by the rules of the association”.

Ms. Coetzee failed to comply with this article when she was transferring her rights to Mr. Poemedie by way of deposing an affidavit to that effect. The articles of the Pniel CPA are considerably basic and simple to understand. Even though there was no evidence led regarding the qualifications of Mr. Poemedie, any person who can read would have been able to understand the requirements of articles 6,7,8 and more especially 9 and 12 of the constitution of the Pniel CPA.⁵³

43. Mineral and Petroleum Resources Royalty,⁵⁴ is one of the suites of the statutes in the mining sector that give guidance regarding the management and administration of mineral royalties in the country. The purpose of the Act states as follows: *“To impose a royalty on the transfer of mineral resources and to provide for matters connected therewith”*. Accordingly, “transfer” means— (a) the disposal of a mineral resource (...) [i]f that mineral resource has not previously been disposed of, exported, consumed, stolen, destroyed or lost. The disposal of a rights to

⁵³ See pages 169 to 170 of 610 of the Bundle of the records.

⁵⁴ Act 28 of 2008.

royalties should be properly done by way of written contract that has terms and conditions.

44. The straw that broke the camel's back regarding the requisite of prior written consent from the members of Ms. Coetzee's household came when I asked Counsel for the Appellant whether Ms. Coetzee does have children and whether those children, gave the required written consent for their mother to transfer the royalty benefits to Mr. Poemedie. Counsel for the Appellant confirmed that Ms. Coetzee has children and that if the Tribunal will so direct, a family meeting can be arranged, and such a decision can be reduced to writing. That would have been an *ex post facto* consent contrasted against a prior written consent as prescribed in term of Article 9.3 of the Constitution of the Pniel CPA. The submission regarding the purported transfer of rights from Ms. Coetzee to Mr. Poemedie which was the main argument that was advanced by Counsel for the Appellant does not comply with the constitution of the Pniel CPA as well as the general law of application, and consequently should be dismissed. Mr. Poemedie is not a claimant nor a shareholder in the Pniel CPA which the BEE partner of Rushtail 31 (Pty) Ltd and therefore does not have a *locus standi* to litigate on behalf any member of the Pniel CPA to prosecute an appeal against the issuance of the Water Use Licence that was granted to Rushtail 31 (Pty) Ltd on the 5th May 2017. Second Respondent also submitted an affidavit deposed by Mr. Jakobus van Wyk (dated the 31st May 2021) who is one of the residents of Pniel CPA who denied that neither him nor his children mandated anybody to act on their behalf in this matter.⁵⁵ The affidavit was co-signed by four people whom Mr. van Wyk indicated that they are his children. This affidavit clearly indicates that the

⁵⁵ See page 607 to 610 of the Bundle of records.

decision by Mr. van Wyk to depose of this affidavit was discussed with family members, hence his children co-signed the affidavit. This was not the case with Ms. Coetzee's affidavit.

45. In the interest of access to justice, I deliberately gave the Appellant a second chance to bolster his case by allowing him to submit the set of documents which he indicated on the first day of the hearing that they gave him a mandate from some of the members of the Pniel CPA to represent them in this appeal matter. I have expanded extensively on the status of these documents which Mr. Poemedie submitted on the 31st May 202, in paragraphs 7-10 above. I made the following two observations regarding the conduct of Mr. Poemedie. He was able to submit the said documents well in-time to the office of the Tribunal Registrar, and all the documents did not have any sign of tempering or unlawful altering. This confirmed the honesty and bona fide on the persona of Mr. Poemedie. The only problem with those documents which gave Mr. Poemedie the mandate to represent the said members of the Pniel CPA is that they are irrelevant in this appeal. More than 90% of the grievances that the community members have raised against the management and/or administrative of the Mining operations at the farm Pniel 281 are mainly about the acute lack of financial benefit to the said community members. This was also confirmed in Paragraph 2.4 the heads of argument filed by Counsel for the Appellant. It reads as follows:

“BACKGROUND TO THE INSTANT APPEAL.

According to a Kimberley High court judgment dated 2 March 2018 an application was brought by the Regional Land Claims Commissioner, Free State and Northern Cape on 26th September 2006 under case number 1149/2006. (..)

[T]he main reason was to investigate whether a joint venture involving the land

*committee (LADCOM) of the CPA and certain others to obtain a mining right to mine diamonds on the CPA land was in the best interests of the CPA*⁵⁶. I am loath to traverse deeply into the financial affairs of the Pniel CPA and Rushtail, because this is beyond the Tribunal's jurisdiction, but it is clear that the issue regarding the financial affairs of the parties is at the heart of this appeal albeit its irrelevance.

46. The farm Pniel 281 which community members received through the Land Claims Court is their ancestral land which they hoped to benefit from. There were very few comments/grievances regarding the objection towards the First Respondent granting the water use licence to the Second Respondent. The agenda points of those community meetings where-by Mr. Poemedie was given the mandate were about financial management of the mining operation. Their expectations as the descendants of the original owners of the land are indeed legitimate. The Water Tribunal is not an appropriate forum to ventilate those kinds of grievances. The appeal that was filed against the granting of the Water Use Licence to Rushtail, which according to the Joint Venture Agreement is a minority shareholder in terms percentage shareholding in that company,⁵⁷ is an inappropriate vehicle towards resolving the financial management related grievances that are the real subject of their dissatisfaction. *(my emphasis)* It does not make sense that part of the majority shareholder of a mining company can lodge an appeal against the granting of a water use licence that will permit their SPV company to draw water from a water resource to support their own mining operation.

⁵⁶ See page 550 of 610 of the Bundle of document. See also para

⁵⁷ See the Shareholder Certificate on page 199 of 610 of the Bundle of Certificate.

47. Appellant also unmeritoriously submitted that the First Respondent did not request the Second Respondent to conduct a public participation during the consideration of the Second Respondent's application for a Water Use Licence as per the prescripts of section 41 of the National Water Act. It is factually correct that the Responsible Authority did not request Rushtail, the Applicant for the Water Use Licence to conduct a public participation process for the said application. The members of the Pniel CPA had already taken a resolution on the 2nd February 2006,⁵⁸ to support the Second Respondent's application for prospecting and mining rights on their farm. Ms. Coetzee is the Deputy Chairperson of the Pniel CPA and a chief negotiator in the Joint Venture discussions with Rushtail. In several correspondences with the officials of the First Respondent, Ms. Coetzee introduced herself as Deputy Chair and Chief negotiator in the CPA.⁵⁹ What is glaringly clear in this matter is that all the communication between Ms. Coetzee and Mr. Poemedie and officials of the First Respondent are only addressed to the two of them. The correspondences from Ms. Coetzee and Mr. Poemedie that have been addressed to officials of the First Respondent don't have any letterhead, however the several attendance registers where-by some members of the Pniel CPA gave a mandate to Mr. Poemedie have some identical features that can be associated to a category of the Pniel CPA.⁶⁰ Coetzee was also present during a meeting that was convened by Rushtail (the Second Respondent). As the Second Respondent has accurately submitted, Ms. Coetzee was present at that meeting that was convened by Rushtail on the 2016. There is no evidence led by the Appellant suggesting that Ms. Coetzee objected

⁵⁸ See pages 604-607 of 610. Ms. Coetzee's name is on the 1st row of the Attendance register on page 607.

⁵⁹ See pages 146, 158-163, 508-509

⁶⁰ See pages 510-544 of 610.

towards the issuance of the Water Use Licence. It would have been pointless and an unnecessary cost exercise for the official of the First Respondent to do that. It would also not be in the interest of the project to lengthen the period to award the Water Use Licence unnecessary by embarking on a Public Participation process where-by the very same members of the public are the majority owner of the Company that will be issued with a water use licence required for its mining activities. There is a plethora of grievances by the concerned members of the Pniel CPA. They are mostly about financial management. I cannot make any comments regarding the veracity of these grievances because I will be acting beyond my mandate. The Appellant's legal team must report these grievances to the appropriate authorities.

For reasons stated in this paragraph, the appeal ground of failure by the First Respondent to request the Second Respondent to embark on public participation process in support of the Water Use Licence application by the Second Respondent should fail.

48. Regarding the Appellant's lack of locus standi and late deliver of the Appeal, I cannot agree more with the cogently articulated submissions of the First and the Second Respondents. It will not enrich these ruling should I add more authorities to support the submissions of the Second Respondents on these two grounds. For the reasons articulated in paragraphs 38, the Appellant does not have any locus standi to prosecute this Appeal. The purported appeal was delivered late and is in contravention of section 148 and Rule 5 of the Water Tribunal.
49. I now deal with the First Respondent's submission regarding the lack of the jurisdiction by the Tribunal to hear this matter. I disavow the legal argument

submitted the by the First Respondent. Section 146 of the National Water Act states that: Establishment of Water Tribunal

(1) The Water Tribunal is hereby established.

(2) The Tribunal is an independent body which –

(a) has jurisdiction in all the provinces of the Republic; and (b) may conduct hearing anywhere in the Republic.

(3) The Tribunal consists of a chairperson, a deputy chairperson and as many additional members as the Minister considers necessary.

(4) Members of the Tribunal must have knowledge in law, engineering, water resource management or related fields of knowledge.

(5) The chairperson, the deputy chairperson, and the additional members of the Tribunal are appointed by the Minister on the recommendation of the Judicial Service Commission contemplated in section 178 of the Constitution and the Water Research Commission established by section 2 of the Water Research Act, 1971 (Act No. 34 of 1971) (...).

50. The Tribunal was formed with the intention of dealing with complex appeal matters regarding the issuance of a Water Use Licence for the purpose of large infrastructure projects mostly in the extractive and agriculture industries. The members of the Tribunal are appointed based on their specialized knowledge in area mentioned in section 146(4) of the National Water Act. The Tribunal is expected to empire upon water-related appeal matters as a specialized court of first instance, hence its status is compared to that of the Magistrate Court. Section 149 (4) states that “The appeal must be prosecuted as if it were an appeal from a Magistrate’s Court to a High Court”. “In terms of this Act a Water Tribunal was created which ought to have enhanced water security and to have provided a settled forum to adjudicate disputes and to assist in

developing the jurisprudence of water law".⁶¹ The Tribunal is also expected to deal with the water related appeal matters as expeditiously as possible, with the intention to enhance Legal and Policy certainty in the country. The Tribunal, especially this panel chaired by the Chairperson of the Tribunal cannot refer matters based on points *in limine* to the High Court without listening to the submission of the parties' arguments and not making a sound judgement based on the law. This will defeat the purpose of the Legislature in forming the Water Tribunal. It will have the unintended consequences of turning the High Court into the court of the first instance in relation to water related appeal matters. Should I refer this matter which deals with preliminaries to the high court, I would have abdicated my duties as has been meritoriously nuance by Kidd M,⁶² The argument advanced by the First Respondent in paragraph 27 above is dismissed based on this point.

51. First Respondent accurately submitted the Water Tribunal like the Magistrate court does not have inherent jurisdiction as compared to the High Court, the Supreme Court of Appeal, and the Constitutional court.⁶³ This submission by First Respondent which states that because the Water Tribunal is created by the NWA and therefore that it can only listen to matters that are stipulated within the NWA is out of sync with the provisions of section 34 of the Constitution. The issue of whether the jurisdiction of the Magistrate Court and Tribunals is limited simply because they are creatures of statutes was ventilated in *Nedbank Limited v Thobejane [2018] 4 All SA 694 (GP)*, the court once again supported the notion that the Magistrates' Courts' lack of jurisdiction to adjudicate application procedures obstructs the constitutional right of access to justice.

⁶¹ E Couzens et al; Water Security and Judicial and Administrative Confusion in South Africa: The Trustees of the Time Being of the Lucas Scheepers Trust, IT 633/96 v MEC for the Department of Water Affairs, Gauteng 2015 ZAGPPHC 211 (17 April 2015)" PER / PELJ. 2017(20) at page 1.

⁶² E Couzens et al; Water Security and Judicial and Administrative Confusion in South Africa; supra at page 11.

⁶³ See paragraph 27 above.

The court further stated that enrolling applications in the high court places a heavy burden on the high courts, even when the lower courts have an obligation to ensure that justice is easily accessed by everyone. The court in the *Nedbank Limited v Thobejane* matter further indicated that the costs for legal fees in the High Court are prohibitively costly than the fees at the Magistrate court and obviously at the Water Tribunal.⁶⁴ The *Thobejane* decision further bolstered my decision and echoed the provisions of section 146(4), regarding the fact that the Tribunal members must have special skills to deal with water related appeal matters before they refer the matter to the High Court.⁶⁵ The apex court then sealed this issue in *Barkhuizen v Napier 2007 (5) SA 323 (CC)* at paragraph 55: *'[O]ur democratic order requires an orderly and fair resolution of disputes by Courts or other independent and impartial tribunals. This is fundamental to the stability of an orderly society. It is indeed vital to a society that, like ours, is founded on the rule of law. Section 34 gives expression to this foundational value by guaranteeing to everyone the right to seek the assistance of a Court. Section 34 therefore not only reflects the foundational values that underlie our constitutional order, it also constitutes public policy.'*⁶⁶

52. As the Chairperson of this panel, and this Tribunal, if I accept the First Respondent's submissions, I will be abdicating my responsibility and will be demonstrating a lack of understanding of the real reason why the legislature introduced the Water Tribunal, as a forum to deal with water-related disputes in an expeditious manner without prejudicing any party in the matter.

⁶⁴ *Nedbank Limited v Thobejane* [2018]; supra at paragraph 113.

⁶⁵ *Nedbank Limited v Thobejane* [2018]; supra at paragraph 79.

⁶⁶ Chamberlain L; *Standing in the Water Tribunal: Access to justice 2014 SAJHR (543)* at page 6 of 9.

Based on the above reasoning, the submission by the First Respondent that the Tribunal does not have jurisdiction to hear this matter simply because the Appellant lacks locus standi in this matter is dismissed.

53. Based on the submission and the legal arguments submitted by both parties the parties the appeal is dismissed, and the following is the order of this panel.

53.1. The purported transfer of the royalty rights of Ms. Coetzee and family to Michael Poemedie is null and void and therefore Mr. Poemedie does not have a right to act on behalf of some community members, about the filling of the appeal regarding the issuance of the Water Use License Rushtail 31 (Pty) Ltd.

53.2. The Appellant does not have the locus standi to prosecute this appeal matter on behalf of any of the members of the Pniel CPA. Appellant did not submit an objection as per the prescripts of section 44(1) of the NWA before the Water Use Licence was issued, and therefore Appellant is not an objector.

5.3.3. The Appellant only filed and delivered his appeal to the Second Respondent after nearly two years out of time.

5.3.4. The Water Tribunal has a jurisdiction to listen to this matter.

54. Should the Appellant decide to take the decision on review, it should so indicate this to the Tribunal Registrar on or before the 10th of August 2021.

I handed down the judgement in Pretoria on the 9th July 2021.

A handwritten signature in black ink, appearing to read 'Ntika Maake', with a stylized flourish at the end.

Adv. Ntika Maake

Chairperson of the Panel and of the Water Tribunal

