IN THE WATER TRIBUNAL OF SOUTH AFRICA

[HELD AT PRETORIA]

Case NO. WT05/10/2010

In the matter between:

OOSGRENS LANDGOED (PTY) LIMITED Appellant

and

THE DIRECTOR-GENERAL OF THE

DEPARTMENT OF WATER AND SANITATION First Respondent

THE MANAGER: LETSEMA PROJECT Second Respondent

MATSAMO COMMUNAL PROPERTY

ASSOCIATION Third Respondent

DECISION AND REASONS

INTRODUCTION

[1] This is an appeal in terms of Section 148(1)(f) of the National Water Act, 36 of 1998, as amended ("the NWA / the Act") against the decision of Ms. D. Mochotlhi in her capacity as the Manager of Letsema Project (hereinafter referred to as ("the Manager") under delegated authority and as such the Responsible Authority as contemplated in the Act.

[2] The decision under appeal, communicated to the representatives of Oosgrens Landgoed (Pty) Limited (hereinafter referred to as "Oosgrens" or "Appellant") by letter dated 14 August 2010, emanates from the refusal to grant a request for transfer of water use entitlement in term of Section 25(2) from certain Inala Farms (in liquidation) to the appellant's farm Portion 2 Quagga 432JU as well as issuance of a licence to use water applied for in terms of Section 40 read with Section 41.

[3] The appeal is opposed by all respondents. The first and second respondents will be referred to as "the Department" and as "the Manager" when reference is being made to the Project Manager of Letsema Project. The Third respondent will be referred to as "Matsamo CPA".

[4] This appeal was lodged on 05 October 2010 and has an unfortunate history of High Court interventions to have it heard. The first court application in June 2011 was for an order to compel the Tribunal to allocate a date of hearing. The application was removed from the roll after the matter was set down for hearing in August 2011. It was postponed at the request of the Department's representative. The subsequent set down of December 2011 was aborted because of objections from the appellant with regard to service of the notice on potential witnesses and other issues.

Subsequently, the Appellant approached the High Court during September 2012 and obtained an order against the Tribunal under case number 50843/12 on 09 October 2012 that reads as follows:

> *"1. That the respondent is directed to hear the appeal by the applicant against the decision taken by the Project Manager: Letsema. Appeal number WT: 05/10/2010 WITHIN 30 (THIRTY) days and finalise the appeal within 90 (NINETY) days from date of this order;*
>
> *2. That the respondent is directed to serve notice of the sitting on the applicant and all other persons affected by the subject matter of the Appeal and subpoena for questioning any person who may be able to give information relevant to the issues at least 21 (TWENTY ONE) days prior to the scheduled sitting and that such a notice reflect the manes of the parties, the subject matter of the Appeal and the date, time and venue fixed for such sitting;*
>
> *3. If the Water Tribunal fails to obey the order as set out above, leave is granted to the applicant to approach the Court on the same papers, as supplemented, to hear the appeal noted by the applicant against the decision of the Project Manager: Letsema.*
>
> *4. The respondent is ordered to pay costs of this application.*

[5] It has now become common cause that this court order coincided with the end of term of the erstwhile Water Tribunal. It appears from the record that subsequent to this court order the parties were engaged in settlement negotiations and even attempted mediation in terms of Section 150 of the Act.

The Director-General and the Manager of Letsema Project were joined in the High Court proceedings on 12 August 2013 as second and third respondents respectively.

Matsamo Communal Property Association, on advice of the Department, sought and was granted leave to intervene in the High Court proceedings on 04 March 2014 as fourth respondent.

The Minister was joined on 30 March 2015 as fifth respondent.

[6] The appellant approached the High Court during 2015 in terms of paragraph 3 of the order of 09 October 2012.

The current Water Tribunal that was constituted in June 2015 only became aware of the 2012 court order sometime in July 2016 when the matter had already been set down for hearing. It duly filed an affidavit to explain why the court order of 09 October 2012 was not complied with and that it was ready and available to hear this appeal.

[7] The matter came before Judge J Fabricius on 30 August 2016 and the following order was made:

" *1. The first respondent Water Tribunal is directed to hear the appeal against the decision taken by the third respondent Project Manager: Letsema Project to which the appeal number WT 05/10/2010 HAS BEEN ALLOCATED.*

2. The record of this application will serve as the record of the appeal to serve before the first respondent.

3. Any party hereto will be allowed to supplement the above-mentioned record by no later than 09 September 2016 by serving a copy of such supplementation on the registrar of the first respondent and all other parties hereto.

4. Any party wishing to submit new and further evidence at the hearing of the appeal before the first respondent shall submit such evidence (including witness statements of each witness to be called) by serving a copy of such proposed evidence on the registrar of the first respondent and all other parties hereto by no later than 30 September 2016.

5. The appeal before the first respondent is hereby enrolled for hearing on 03 November 2016 to 04 November 2016 and on 10 November 2016 to 18 November 2016.

6. The first respondent shall make its ruling on this appeal and provide the parties with such ruling together with full reasons in writing by no later than 20 January 207.

7. The fourth respondent shall consent to the other parties' representatives and experts having access to the subject matter properties of the fourth respondent for purposes of compiling expert reports.

8. The second and fifth Respondents, jointly and severally, the one paying the other to be absolved, shall pay the applicant's costs of this application including the costs of two counsel, on the scale of attorney and client.

9. This application is postponed sine die, with the question of costs as between the applicant and the fourth respondent being reserved.

THE FACTUAL BACKGROUND

[8] The facts appear from the Supplementary affidavit and annexures that were filed by the appellant in the High Court application. Save for the explanatory affidavit that was filed by the Water Tribunal, none of the respondents has filed answering affidavits. Therefore, the facts pertaining to how the appellant acquired the water use entitlement and the sale of the properties of Inala Farms (in liquidation) are largely common cause.

[9] The main point of opposition mounted by the respondents is based on the alleged prejudice that the Matsamo CPA will suffer if the transfer of the water entitlement is granted. It is therefore necessary to give a

brief factual background of the various agreements that were entered into with respect of the properties that form Inala Farms (Pty) Limited (in liquidation) that comprises of amongst others the following properties:

(a) The Remaining Extent of Portion 3 of the Farm Lomati 466, measuring 599.5724 ha.

(b) The Remaining Extent of the Farm Lomati 466, measuring 8.5658 ha.

(c) The Remaining Extent of the Farm Jacobus 481, measuring 641,3297 ha.

(d) Portion 5 (a Portion of Portion 2) of the Farm Weltevrede 454, measuring 131,5731 ha.; and

(e) The Farm Overzicht 482, measuring 101.8802 ha.

The sale of the water use entitlements

[10] The properties have existing irrigation water use rights as contemplated in Section 32(1) of the NWA.

[11] The liquidators decided to dispose of certain percentages of the water rights entitlements to pay a water charge debt with Lomati River Irrigation Board in order to obtain clearance to pass transfer of the properties to the purchaser, the Department of Rural Development and Land Reform (hereinafter referred to as "the DRDLR").

A public auction to sell the water use entitlements was duly advertised .It took place on 15 August 2008. The appellant was the successful bidder, subject to a 14-day acceptance period by the liquidators.

[12] On 27 August 2008, Matsamo CPA who at that time had lodged land claims over the properties in terms of the Restitution of Land Rights Act, 22 of 1994 (the Restitution Act), lodged an objection against the sale of the water use entitlement with the liquidators. None of the parties has explained what happened to the objection.

The allegation by the appellant that the DRDLR, being the purchaser of the properties was afforded an opportunity to purchase the water use entitlement during the 14-day acceptance period was not challenged.

[13] After expiry of the acceptance period, the Liquidators of Inala Farms (In Liquidation) and the DRDLR entered into an "Agreement to transfer water use entitlement" on 16 September 2009. Against payment of a price consideration of Five Million one hundred seventy five rand (R5 175 000,00) the Liquidators agreed to transfer a total of 230ha of water from the four properties made up as follows;

(a) 70 ha. From Portion 3 Lomati 466 JU;

(b) 50 ha from Remainder of Jacobs 481 JU;

(c) 50 ha. From Portion 5 Weltevrede 454 JU; and

(d) 60 ha. from Remainder of Overzicht 482 JU.

[14] The above properties, as indicated in the preceding paragraphs, are entitled to an existing lawful water use in terms of Section 32(1) of the NWA for the taking of 395,3 ha, 157 ha, 100 ha and 81 ha respectively.

It is therefore important to note that the transfer of the 230-ha water entitlement from Inala Farms (In Liquidation) to the appellant's Quagga 2 was not going to leave the properties without water use entitlements.

[15] In compliance with the provisions of Section 25(2) of the NWA, the contracting parties also agreed that the transfer was subject to approval of the application in terms of Section 25(2) by the responsible authority and that pending finalization of that application, the appellant would be entitled to temporary use of the water entitlement in terms of Section 25(1) of the NWA, subject to consent of the Water Management Institution. It is common cause that the appellant has obtained this consent, as well as a recommendation for the Section 25(2) transfer.

[16] This agreement is valid for 24 months, subject to further extension by the parties. We were advised that it has been extended from time to time.

[17] Another relevant term in the agreement is clause 6, which provides for a reduced transfer of the volumes of water requested in the event of the responsible authority refusing to allow the transfer of volumes indicated above.

Agreements of sale of properties (Inala farms)

[18] It is common cause that Matsamo CPA succeeded in its land claim with regard to three properties, being; the Remaining Extent of Farm Jacobus, Portion 5 of Farm Weltevrede and Farm Overzicht.

[19] On 14 March 2009, and against a price consideration of Nine Million Five Hundred sixty-seven thousand and six hundred and ninety rand (R9 567 690), the Liquidators agreed to sell the said properties to the DRDLR. The properties were acquired for the purpose of settling the claims and were transferred directly to Matsamo, which transfer took place on 14 March 2009.

Matsamo accepted, through its representative, Mr. Mhlupheki Moses Thumbathi, the benefit of the *stipulatio alteri* set out in the agreement and undertook to adhere to the terms of the agreement in as far they are applicable to it.

For present purposes, Clause 13 is relevant and it is necessary to reproduce it in full:

> " *13: WATER USE ENTITLEMENTS*

13.1 Notwithstanding any warranty or stipulation contained in this agreement, the Purchaser hereby acknowledges that it is aware that, prior to the conclusion of this agreement, and on or about 16 September 2008, the Seller concluded an agreement with Noodgrens Landgoed (Pty) Ltd (Registration number: 1996/013248/07), a subsidiary of Oosgrens Landgoed (Pty) Ltd (Registration number: 1999/025541/07, the owner of Portion 2 of the Farm Quagga 432, Registration Division JU, the Province of Mpumalanga, to transfer water use entitlements to it from the properties defined herein, in the following proportions:

13.1.1 From Overzicht (described in 2.1 above) 60ha of the existing lawful water use entitlement of 81ha;

13.1.2 From Jacobus (described in 2.2 above) 50ha of the existing lawful water use entitlement of 157ha.

13.1.3 From Weltevrede (described in 2.3 above) 50ha of the existing lawful water use entitlement of 100ha.

13.2 To the extent necessary, the Purchaser agrees that it (and conversely the CPA) will do all things required from it by any authority, body, department or Noodgrens Landgoed (Pty)

Ltd and/or Oosgrens Landgoed (Pty) Ltd or its representative to give effect to the final transfer of the above water use entitlements to Oosgrens Landgoed (Pty) Ltd.

13.3 The Purchaser consequently declares itself aware that its rights to water use in respect of the said properties will comprise the balance of the existing lawful water use after transfer of the stipulated quantities to the said Oosgrens Landgoed (Pty) Ltd.

[20] The land claims against the remaining properties, namely; Remaining Portion 3 of Farm Lomati 466 and Remaining Extent of Farm Lomati 466 were at that time still pending. The DRDLR nevertheless purchased these properties from the Liquidators of Inala Farms (In Liquidation) with a view to transfer them to the successful claimants. An agreement in this regard was entered into between the parties on 23 March 2009 for a price consideration of Thirteen Million Rand (R13 000 000, 00).

Except for the *stipulatio alteri* clause, the material terms, in particular clause 13 relating to water use entitlement are similar to the agreement relating to the purchase of the farms discussed above.

Application for water use licence and permanent transfer of an existing water use authorisation /entitlement

[21] The application was lodged by Vulamanzi Resource Law Advisor by letter dated 23 June 2009 and addressed to the Regional Director: DWAF Mpumalanga. The documents attached were indicated as:

"1. License application forms and feesR114,00

2. Deeds searches

3. Approval by Lomati River Irrigation Board (follows)

4. Report by DALA

5. LCC report

6. Surrender form in terms of s25(2)

7. Resolutions

8. Indemnity by Oosgrens

9. Oosgrens EME verification

10. Section 27 report "

[22] The documents that require further examination are the ones indicated in paragraphs 4,5,6 and 10 of the letter. I proceed to deal with their contents briefly:

Item 4: Report by DALA

[23] This report, dated 26 January 2009 was compiled by PJL Bierman, a Control Industrial Technician at Sustainable Resource Management

Ehlanzeni, Department of Agriculture, and Land Administration, Mpumalanga Provincial Government.

He acknowledged that Inala farms had a water deficit and that when they resume full production, they will need the full compliment of their water allocation. He nevertheless recommended the application *"for the accelerated development of agriculture in the region".*

On the other hand, it appears from his analysis that the appellant's Quagga Farm was in a greater need of water.

His recommendations, have created controversy and even criticisms in the Department as I have alluded to above.

It is therefore necessary to reproduce the contents of the report in as far as he has discussed the present land use and water allocations of the four farms that form what he referred to as "Inala Farming Company" and the appellant's Quagga Farm.

" ***Present land use Lomati 466 JU Portion 3***

Sugar cane	*230,1ha*
Bananas	*87.1ha*
Mangos	*12.5ha*
Litchis	*8.9ha*
Potential lands	*36.0ha*
Total	*374.6ha*
Water allocation	*395,3ha*

Surplus water	*20.7ha*

Present land use Overzicht 482 JU

Bananas	*13,5ha*
Mangos	*43.9ha*
Litchis	*12.0ha*
Potential lands	*0ha*
Total	*69.4ha*
Water allocation	*81.0ha*
Surplus water	*11.6ha*

Present land use Jacobus 481 JU and Weltevrede 454 JU Portion 5

Sugar cane	*58.0ha*
Bananas	*114.4ha*
Mangos	*164.6ha*
Litchis	*1.3ha*
Potential lands	*0ha*
Total	*338.8ha*
Water allocation	*257.0ha*
Shortage water	*81.3ha*

In total for Inala Farms there are shortages of 55.6ha of water.

At the moment, little farming activities are taken place because Inala Farms Company Ltd is in liquidation.

If the above farms are in full production again they will need all the allocated water.

Oosgrens Landgoed Pty Ltd is the owner of Quagga 432 JU Portion 2.

Present Land use Quagga 432 JU Portion 2

Sugar cane	*411.0ha*
Potential lands	*589.0ha*
Total	*1000.0ha*
Water allocation	*140.0ha*
Shortage water	*860.0ha*

These farms are urgently in need of additional water and got suitable soil to utilize the water.

Of the 589 ha of potential lands 160 ha are already prepared and ready for the establishment of sugar cane.

Further development cannot take place before additional water rights are secured.

For the accelerated development of agriculture in the region this office will support the transfer of 230ha of water rights from Inala Farms to Oosgrens Landgoed

PJL BIERMAN

Control Industrial Technician Ehlanzeni "

Item 5: LCC report

[24] These are letters, dated 12 January 2009 from the Commission of Restitution of Land Rights in respect of the four properties. They indicate the status of each land claim and at the end, general comments are

made with regard to the permission sought. The nature of the permission that was sought is however not indicated.

Except for Portion 3 of Lomati 466 JU that is indicated as "Gazetted", the claims with regard to the other properties are indicated as "Settled".

The Regional Land Claims Commissioner made the following concluding standard remarks with regard to all the properties:

> *"It is not within the powers of the Commission on Restitution of Land Rights to grant or withhold permission for the development or alienation in respect of land being claimed until such a claim has been gazette, unless such development would constitute an obstruction to the achievement of the aims and objectives of the Restitution of Land Rights Act 22 of 1994. In such instances application, can be made in the Land Claims Court in terms of Section 6(3) of the Restitution Act; this can be done at any stage after the claim has been lodged_ even before the publishing of such a claim in terms of Section 11 of the Restitution of Land Rights Act 22 of 1994..."*

Item 6: Surrender Form in terms of s25(2)

[25] This is a standard form, indicating the details of the property, the extent of the existing lawful water use, proposed transfer and remaining balance as well as details of existing lawful water use in the receiving property.

Item 10 Section 27 report

[26] I propose to reproduce the contents of this document which is titled "**DECLARATION FOR PURPOSES OF SECTION 27 OF THE NWA, 1998**"

"The following information, for purposes of section 27 of the NWA, 1998, is applicable to the application for the transfer of 1 955 000 m^3 water use entitlement from Portions 3 Lomati 466, 5 Weltevrede 454, Jacobus 481 and Overzicht 482 JU to Portion 2 Quagga 432 JU, in terms of section 25(2) of the Act:

(a) The water use entitlement to be transferred is an existing lawful water use as defined for purposes of section 32 of the Act. It has been scheduled with the Lomati River Irrigation Board as part of an allocation in terms of section 62 of the previous Water Act, 1956, it has been in use in the qualifying period, all rates and taxes had been paid in respect thereof, and as such it is recognized under NWA.

(b) The purpose of the proposed transfer of water, is to facilitate optimal water use on the farms of the applicant. As the farm, originally bought with very little water rights, is in need of much water to be optimally developed and economically viable, and

the water resource is already stressed, the transfer of water is the only feasible manner to economically develop the farm. The applicant is a level 4 EME for purposes of BBBEE.

(c) The farm Quagga is in very favourable position to be fully developed for sugarcane production, which will eventually make an important contribution to cane production, which will eventually make an important contribution to cane production in the Nkomazi area. It is in the public interest to make optimum use of land and water in order to serve agricultural needs.

(d) The transfer of the water will ensure sustained agro-economical viability of the farming enterprise, with resulting socio-economic benefit. However, should the transfer be refused, the lack of well-balanced resource could harm productivity, with resulting needs to reduce labour, with harmful socio-economic impact.

(e) A catchment management strategy has not yet been declared for the area.

(f) As the water is already in use and has been so in use for more than 25 years, the authorization of the transfer or the

entitlement will not have any harmful impact of the resource or other users. This use has been recommended by the Irrigation Boards who take care of the resource and the various uses in the vicinity.

(g) Class and resource quality objectives have not yet been determined.

(h) The investment in this use has already been made, as the water is used on Quagga in terms of a temporary transfer (s25(1)). The water cannot be retained on the transferring farms, because the development input to abstract the water for development on the farms, is too high – the farms are suffering under financial stress, and the sell-off of the water, without negatively affecting production potential on the transferring farm, is in the interest of the farm.

(i) The economic viability of the farming enterprise is dependent on optimal resource and water use on the farm. If this transfer is not authorized, the water will not be effectively used within the goals of the farm.

The proceedings before the Manager (Consideration of the application)

[27] I have considered the documents filed as the appeal record that was attached to the initial High court application as well as Annexure "PS 14 to the appellant's supplementary affidavit that was attached to the subsequent application in terms of the court order of 09 October 2012.

The documents were duplicated several times in the record before us, thereby making the record unnecessarily bulky. The chronology since the application was lodged appears from the record.

[28] Save for the objection that was lodged by Matsamo Tribal Authority and the recommendations made by DALA, there is no evidence in the appeal record that any of the other issues arising from the documents attached in the letter of application (paragraph 21 above) were investigated or requests made for further information or clarification.

I therefore accept that the Manager was satisfied that, save for the objection by Matsamo Tribal Authority and the concerns raised with regard to the recommendations that were made by Bierman, the application complied, substantively with all requirements.

[29] The record at the application stage comprises of mostly letters exchanged between the appellant's consultant who lodged the

application, Advocate Maritza Uys and various officials of the Mpumalanga Provincial Government's Department of Agriculture and Land Administration (referred to as DALA). There were conflicting reports with regard to whether an entity within DALA known as Mpumalanga Co-ordinating Committee for Agricultural Water (MCCAW) had recommended the application or not. This, according to the oral evidence of the Manager is apparently a technical committee.

The appellant was initially advised by letter dated 01 April 2009 signed by the Chairperson, one Ms. N.L Sithole, that the application was not supported by the MCCAW. Two days later, on 03 April 2009, a fax signed by the Director: Technology Research and Development, one Mr. R. Matare was sent to Ms. Uys advising her that certain applications, including the one in question were recommended by the MCCWA.

On 16 April 2009 Ms. Uys directed a letter to the Chairperson of the MCCWA and requested to be supplied with reasons in terms of Section 5 of the Promotion of Administrative Justice Act, 2000 on why the MCCWA rejected the recommendations of Mr. Bierman. Ms. Sithole replied to this letter on 23 April 2009 and stated, amongst other things that Mr. Bierman makes his personal recommendations that are not necessarily accepted. She concluded her response in paragraph 3 of the letter by stating that *"It surely will be a sad day if we transfer water from an existing developed farm and leave it dry and be responsible for its failure.*

The fact that the farm is in liquidation does not give us the right to rob it of its water. In other words, Inala will need all the water when it is in full production.

[30] Months later, Ms. Uys received an email dated 09 February 2010 from one Tshepo Lefifi from the Department of Water Affairs who advised her that the application was approved, but that it would be sent to Head Office for further processing.

[31] Ms. Uys and the Manager: Letsema Project exchanged emails during April 2010 with regard to the delays in finalization of the application. On 29 April 2010, the Manager advised Ms. Uys that she has addressed the matter with the Region and has perused the file herself and discovered that "*the matter is more than you are putting to me*".
She went on to state that "*The affected community has lodged a complaint against this authorization application to the Department. Thus the matter needs further investigation and engagement. The region has undertaken to deal with the matter and we will (sic) finalized by end of May this year* "

[32] Ms. Uys also made contact with an official of the Land Claims Commissioner (Department of Rural Development) on 06 July 2010 who had apparently promised her that he was going to schedule a meeting with the land claimants. This official, Mr. Mdisheni Lucas Mufamadi

responded to Ms. Uys's email on the same date and advised her that he had held discussions with officers who deal with settlements and the claimants and that the latter had indicated that they were not consulted about the sale of the water use entitlements to the appellant. He concluded the email by stating that *"The community has therefore declared a dispute with the Regional Land Claims Commission. Unfortunately, it looks like the matter will end up in court".*

[33] The objection that was lodged by Matsamo Tribal Authority was dealt with by the appellant's attorneys by letter dated 23 July 2010, which was later copied to several recipients, including the Manager: Letsema Project and the Regional Land Claims Commissioner by letter dated 27 July 2010.

The gist of the response was that Matsamo Tribal Authority was never the legal owner of the properties and that the Matsamo CPA only received transfer thereof on 31 March 2010, after the objection was lodged.

The letter went on to address the merits of the objection in as far as it could have been raised with the mandate of the Matsamo CPA. In this regard the Tribal Authority was referred to the objection that was lodged by the Matsamo CPA with the liquidators and the fact that a representative of the latter signed the land sale agreement as I have indicated in the preceding paragraphs.

The CPA, the response noted, threatened legal action if the transfer of the water use entitlement went through but did nothing to realize this threat.

[34] There is no evidence to suggest that the objection and the other issues were investigated as indicated by the Project Manager in the email I have referred to above.

[35] Further correspondence was addressed to the Department with regard to the delay in finalizing the application and also to enquire about the status and nature of investigations that were being conducted. There is no evidence in the record before us that any investigation was conducted on the issues relating to the objection or how it was finally dealt with.

The decision

[36] The decision was communicated to the appellant's representative as I have already stated above by letter dated 14 August 2010. The reasons for refusal to grant the appellant a licence and transfer of the water use entitlement are recorded in three bullet points that read as follows:

> . *You have not sufficiently demonstrated that the donating property will not be adversely affected by the proposed transfer of water. The letter dated 26 January 2009, from the*

Department of Agriculture and Land Affairs clearly states that Inala Farms are in deficit on water to the extent of 56.6 ha. Further it states that once the farms are in full operation, then they will need all the allocated water in order for the farms to operate economically.

. *The transfer will not be in the public interest as envisaged by section 27(1)(c) of the Act.*

See a letter from Matsamo Tribal Authority that is attaché hereto as Annexure "A"

. *The issuance of the licence will have no positive impact on the need to redress the result of past racial and gender discrimination as envisaged by section 27(1)(d) of the Act."*

[37] Annexure "A" is a letter dated 09 March 2010 from Matsamo Tribal Authority addressed to the Regional Head of the Department of Water Affairs, Nelspruit. It reads as follows:

"We as the Matsamo Tribal Authority as owners of Inala Farm, we object to any transfer of Water rights from Inala Farm to any other property. The reason being we were never consulted on the matter. To our knowledge the land claim process is still on, hence we are not in agreement on what is being proposed."

[38] On 25 August 2010, the appellant's attorneys of record directed a letter to the Manager and sought reasons for the decision. No response came through.

[39] Having sketched this factual background, I will address the remaining issues as follows:

(a) The appeal record, the nature of this appeal and decision to be made by the Tribunal. I will address the submissions made by the parties' representatives.

(b) Legislative framework with regard to applications for transfer of water use entitlements and use of water licences.

(c) The oral evidence that was presented on the merits of the appeal as well as the respective parties' closing submissions.

(d) The pending litigation at the Land Claims Court between certain occupiers of the Inala Farms (in liquidation) and amongst others the Matsamo CPA.

(e) Make findings with regard to contentious issues and decide on the appeal before us.

THE APPEAL RECORD, THE NATURE OF THIS APPEAL AND DECISION TO BE TAKEN BY THE TRIBUNAL

[40] Item 5 (3) of Part 2 of Schedule 6 of the NWA reads as follows:

"A responsible authority or a catchment management agency against whose decision or offer an appeal or application is lodged must , within a reasonable time-

(a) send to the Tribunal all documents relating to the matter, together with the reasons for its decision; and

(b) allow the appellant or applicant and every party opposing the appeal or application to make copies of the documents and reasons."

[41] Item 6(3) of Part 2 of the Schedule referred to above read as follows:

"Appeals and applications to the Tribunal take the form of a rehearing. The Tribunal may receive evidence, and must give the appellant or applicant and every party opposing the appeal or application an opportunity to present their case."

[42] The provisions of Item (6(3) were reproduced as they are in Rule 7(1) and (7(2) of the Water Tribunal Rules. The additions are in paragraph 7(3) that reads as follows

" The Chairperson of the Tribunal must allow the Appellant or applicant to present his or her case, first, whereafter any affected party must be afforded an opportunity to present their case, and thereafter the Appellant or Applicant must be afforded an opportunity to respond to any information or representations forthcoming from any affected person".

[43] It would appear that from a reading of the provisions relating to subpoenas and evidence that the only new evidence that may be tendered in an appeal hearing, other than the replies or responses of the appellant and affected parties to the documents tendered by the

responsible authority is that which the Tribunal would have obtained in terms of Item 7 of the Schedule read with Rule 7.

The both provisions read the same and provide, in part, as follows:

> *"7(1) The Water Tribunal may_*
>
> *(a) subpoena for questioning any person who may be able to give information relevant to the issues; and*
>
> *(b) subpoena any person who is believed to have possession or control of any book, document or object relevant to the issues, to appear before the Tribunal and to produce that book, document or object."*

[44] I have already bemoaned the state of the appeal record in the preceding paragraphs. Other than the Notice of appeal and annexures, it comprises of correspondence between the parties pertaining to the delays in finalizing the appeal, court applications to compel the Tribunal to hear the appeal and joinder of parties' applications, the exchange of letters, emails between the appellant's representatives and the department with regard to the objections lodged and request for reasons why the technical report of Bierman was not accepted.

[45] The only document relating to the appeal record is a letter dated 06 October 2010 from the Registrar of the Tribunal to the Director: Legal Services, Department of Water Affairs and Forestry. The addressee was advised that an appeal has been lodged. The letter reads further that *"in terms of sub-item (3)(a) of item 5 of Schedule 6 of the National Water Act, 1998 (Act no.36 of 1998) you are requested to furnish to the Registrar of*

the Water Tribunal within 30 (thirty) days from the date of this letter all documents relating to the matter together with the reasons for the decision"

[46] The appellant's representatives were advised by letter of the same date that the appeal was received and that the responsible authority has been requested to submit documents, which would be submitted to them once they are received.

[47] We were advised that the record that was received from the Registrar appears in the Consolidated index as Annexure "PS 9".
I have looked at the initial index and pagination in this annexure, and it confirms my concern about the nature of the appeal record that was filed by the responsible authority.
It will become clear hereunder when I deal with the oral evidence of the Manager that this record is incomplete because according to her, she signed a memorandum that was presented to her (Record of Recommendation or "ROR") which has not been included in the record before us. She also testified about some technical reports that we have not had sight of.

[48] As I have already stated above, this appeal is being heard in terms of the court order that was issued by Fabricius J on 30 August 2016

under the directives given therein. I wish to reproduce, again, the relevant paragraph pertaining to the appeal record that should serve before us;

> *"2. The record of this application will serve as the record of the appeal to serve before the first respondent.*
>
> *3. Any party hereto will be allowed to supplement the abovementioned record by no later than 09 September 2016 by serving a copy of such supplementation on the registrar of the first respondent and all other parties hereto.*
>
> *4. Any party wishing to submit new and further evidence at the hearing of the appeal before the first respondent shall submit such evidence (including witness statements of each witness to be called) by serving a copy of such proposed evidence on the registrar of the first respondent and all other parties hereto by no later than 30 September 2016."*

[49] The record before us comprises of the following:

(a) The original documents in the High Court application that culminated in the court order of 09 October 2012 (In this is included the Notice of appeal and related documents),

(b) The appellant's supplementary affidavit dated 05 May 2015 that include the various joinder applications, the various sale agreements pertaining to the property and water use entitlement;

(c)] The supplementary or new evidence presented by both the appellant and Matsamo. This comprises of their respective experts reports (and other documents), joint expert minutes and witnesses' statements.

[50] I deliberately sketched the factual background with regard to the manner in which the application for transfer of the water entitlement and licence was handled and subsequently decided because there are differing views between the parties (the appellant and Matsamo CPA' Counsel on the one hand and the representative of the Department on the other) with regard to the nature of the appeal before us.
The latter's argument is that we should consider only the evidence that served before the responsible authority and must interrogate her decision and reasons thereof and make a finding with regard to the correctness thereof and only reconsider the facts if we find that she was wrong.

The argument on the other hand is that we should only consider the evidence that served before the responsible authority or her reasoning in as far as it may provide background to the issues. In essence, the correct approach, so the argument goes, it to consider the appeal afresh without

first making reference to the errors in the decision of the responsible authority.

[51] We are indebted to the parties' representatives, in particular Counsel for the Appellant, Messrs Oosthuizen and Thulare for the wealth of authorities and comprehensive heads of argument presented to us with regard to this issue and other legal issues arising from this appeal.

[52] The Water Tribunal is an independent tribunal established in terms of section 146 of the National Water Act (NWA) 1998. In terms of section 148 (1) (f) and subject to section 41(6) of the NWA the Water Tribunal has jurisdiction to hear appeals against decisions of a responsible authority. In terms of the same section an appeal may be lodged firstly, by the applicant; and secondly by *"any other person who has timeously lodged a written objection against the application."*

[53] The question whether the appeal before administrative tribunals, like the Water Tribunal, is an appeal in the narrow or the wide sense has been dealt with by the courts in several cases and has exercised the minds of eminent administrative law scholars.

[54] As a starting point, Counsel for the appellant referred us to the instructive case of **Tikly v Johannes NO 1963 (2) SA 588 (T),** and in

particular the meaning of the word "appeal". In terms of this judgment, the word "appeal" has three distinct meanings. It can be an appeal in the wide sense which entails a hearing *de novo* of the matter, with or without fresh evidence, an appeal in the ordinary or narrow sense where an administrative tribunal is restricted to making a decision based on the record of the responsible authority, and lastly, it can be a review where the purpose is to consider whether procedures were complied with and the requisite discretion applied correctly.

[55] Counsel for the appellant further submitted that given that the Water Tribunal is an administrative tribunal with a mandate to conduct wide appeals, it can thus disregard the proceedings before, and the decision of a responsible authority. This is not, however, borne out by legal authority.

[56] While there is legal certainty in terms of the definition of an appeal in the wide sense, there is need to clarify that the decision appealed against does not become completely irrelevant. In the case of **Sea Front for All and Another v MEC, Environmental and Development Planning, Western Cape and Others**[1] the court reiterated the nature of the proceedings before an appeal tribunal. The court, citing Baxter, *Administrative Law* noted that "the precise form that an administrative

[1] Sea Front for All and Another v MEC, Environmental and Development planning, Western Cape and Others 2011 (3) SA 55 (WCC) para 22-23.

appeal must take, and the powers of the appellate body, will always depend on the terms of the relevant statutory provisions."[2] In this matter section 148 of the NWA is therefore primary in determining whether the wide nature of the appeals before the Tribunal are such that the decision of the responsible authority is wholly negated once an appeal is noted.

[57] The court notes in *Sea Front for All* that one of the indicators that a tribunal has wide powers is whether or not the appeal lies to an authority that is "*within the departmental hierarchy*" for instance an appeal to the Minister of a government department.[3] In that case, the court was dealing with an appeal in terms of section 35 of the Environmental Conservation Act (ECA) which directed appeals to the MEC against decisions made by the Director: Integrated Environmental Management, Department of Environmental Affairs and Development Planning in the Western Cape in terms of section 22 of the ECA to grant or refuse environmental authorisations.

[58] A typical feature of the cases in which the courts have interpreted a tribunal or authority having an appeal in the wide sense is that these were largely internal appeals either to Boards, Councils, Ministers or MECs. An appeal envisaged in section 148 of the NWA is not strictly an

---

[2] Baxter, Administrative Law (1984) 255.
[3] Sea Front for All and Another v MEC, Environmental and Development planning, Western Cape and Others 2011 (3) SA 55 (WCC) para 23.

internal appeal if it is accepted that the Water Tribunal is not an internal structure of the Department of Water and Sanitation but an independent and autonomous body.

[59] If it is accepted that the Water Tribunal is an autonomous and independent tribunal before which even the Minister of Water and Sanitation may be required to appear, then one of the key indicators of a tribunal having wide appeal powers should be qualified. However, **Cora Hoexter, *Administrative Law in South Africa***[4] correctly notes that the internal nature of the appeal authority is not the only indicator of its powers.

Again, citing Baxter, she notes that in addition, the lack of a record, procedural powers for instance to summon witness, and decisional powers are other factors that indicate wide appeal powers.[5] While the Water Tribunal may be independent from the Department, it is largely a tribunal that has wide procedural and decisional powers.

[60] A view that treats the Water Tribunal strictly like an internal appeal structure potentially creates legal confusion and disarms the Tribunal of its authority to deal with appeals as an independent tribunal. Although it can subpoena any witnesses, the Water Tribunal does not

---

[4] Cora Hoexter, *Administrative Law in South Africa* (2012) 69; Schedule 6 (3) of the NWA in fact expressly provides that "Appeals and applications to the Tribunal take *the form of a rehearing*. The Tribunal *may receive evidence*, and must give the appellant or applicant and every party opposing the appeal or application an opportunity to present their case." (emphasis added).

[5] Ibid

necessarily have access to resources to make polycentric decisions that responsible authorities have at their disposal. The pool of national and regional experts that submit expert reports and prepare recommendations for the Minister or delegated responsible authority are not at the command of the Water Tribunal. It can therefore be seen that the Water Tribunal is different from the authorities at issue in most of the cases where the courts have ruled that the tribunals had wide appeal powers to conduct fresh hearings and consider matters afresh with new evidence to come to an original decision.

If the Water Tribunal conducts a hearing *de novo*, it still cannot properly make a fresh determination on a water use licence especially the precise terms and conditions at the same level as a responsible authority seized daily with making such decisions.

[61] Indeed, section 146 (4) of the NWA provides that *"Members of the Tribunal must have knowledge in law, engineering, water resource management or related fields of knowledge."* Nevertheless, these special skills cannot substitute for the knowledge and day-to-day experience of bureaucratic decision makers who are the responsible authorities.

Therefore, in any one matter before the Tribunal it could be that the matter must be referred back to the responsible authority for reconsideration. In some matters, depending on the nature of the issues,

the Tribunal may be able to hear the matter afresh and come to a new decision that replaces the decision of the responsible authority.

[62] Whilst everyone, including the Water Tribunal, agrees that the nature of the hearing before us is a rehearing and a fresh reconsideration of the facts, with or without new evidence, the controversy centered around the issue of the relevance of the decision of the Responsible Authority as I have already stated above.

In this context, the Water Tribunal is of the firm view that the decision of the second respondent (the Manager) in this matter cannot therefore be totally disregarded. Doing so renders the scheme in the NWA in terms of which the responsible authority is the primary decision-maker redundant.

Rather, the decision appealed against is the point of departure for the Tribunal considering the appeal, before proceeding to entertain any new evidence and new submissions by the parties.[6] A view that the testimony of the responsible authority is "totally irrelevant"[7] in untenable. As

---

[6] *Sea Front for All and Another v MEC, Environmental and Development planning, Western Cape and Others* 2011 (3) SA 55 (WCC) para 28 "In these circumstances, I incline to the view that the MEC, in dealing with an appeal in terms of s 35(3) and (4) of the ECA, does not exercise appeal powers in the ordinary legal sense, but in the wider sense, *which empowers her not only to substitute her own findings of fact and legal conclusions for those of the second respondent, but to conduct a rehearing of the matter.* Whilst I agree with Mr. *Newdigate* that the 96 appeals which were lodged *would be the MEC's point of departure*, she was, in considering the appeals, entitled to consider, and in the instant case did consider, On Track's application *afresh.* That is why the review before this court is a review of the decision of the MEC taken in terms of the 2007 ROD, and not a review of the original ROD." (emphasis added).

[7] Applicant's Heads of Argument, 7.

correctly conceded by Counsel for the appellant in oral submissions, the decision appealed against must be considered together with any new evidence. The Tribunal is not bound to either upheld or overrule the decision of the responsible authority, but it must consider it among the new evidence presented in the re-hearing and come to its own decision which may or may not be the same as that of the responsible authority.

[63] The evidence of the second respondent, the Manager, who was the responsible authority in terms of the NWA clearly demonstrated that the responsible authority did not apply her mind to all factors as provided for in section 27 of the NWA.

In addition, the responsible authority also in evidence confirmed that she relied on the recommendations received from experts and the provincial functionaries and did not herself engage with the many files that contained information about the application by the appellant. To this end, this Tribunal proceeded to hear evidence of the responsible authority responding to the grounds of appeal and new evidence from the parties and expert witnesses regarding the issues raised in the appeal.

[64] The issue for determination is whether or not the appellant is entitled to a water use licence in terms of section 41 as read with 25(2), 2, 27(1) of the NWA. Collectively, these provisions provide for the transfer of water use entitlements from one person (surrendering person or donor

property) to another (receiving person), subject to the recipient applying for, and being granted approval by the responsible authority.

[65] In considering an application premised on section 25(2) transfer of title, the responsible authority must take into account the purpose of the NWA in section 2, give effect to the National Water Strategy in terms of section 7 and consider the factors listed in section 27(1). The factors in section 27(1) are not exhaustive and the responsible authority must take into account "all relevant factors." Such other relevant factors may include factors peculiar to the case, policies and strategies and frameworks made in terms of the NWA, other relevant laws such as the principles of environmental management in section 2 of the National Environmental Management Act 107 of 1998 (NEMA).[8]

THE LEGISLATIVE FRAMEWORK

[66] Section 2 of the NWA provides as follows:

> *"The purpose of this Act is to ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled in ways which take into account amongst other factors–*

[8] The NWA is a 'specific environmental management Act' in terms of section 1(1) of the NEMA. The principles of environmental management in section 2 shall "guide the interpretation, administration and implementation of this Act, and any other law concerned with the protection or management of the environment." In exercising its functions in terms of section 148 of the NWA the Water Tribunal is interpreting a law concerned with the protection or management of water resources as part of the 'environment'.

(a) meeting the basic human needs of present and future generations;

(b) promoting equitable access to water;

(c) redressing the results of past racial and gender discrimination;

(d) promoting the efficient, sustainable and beneficial use of water in the public interest;

(e) facilitating social and economic development;

(f) providing for growing demand for water use;

(g) protecting aquatic and associated ecosystems and their biological diversity;

(h) reducing and preventing pollution and degradation of water resources;

(i) meeting international obligations;

(j) promoting dam safety;

(k) managing floods and droughts,

and for achieving this purpose, to establish suitable institutions and to ensure that they have appropriate community, racial and gender representation."

[67] Section 25, titled "Transfer of water use authorisations" reads as follows:

(1) A water management institution may, at the request of a person authorised to use water for irrigation under this Act, allow that person on a temporary basis and on such conditions as the water management institution may determine, to use some or all of the water for a different purpose, or to allow the use of some or all of that water on another property in the same vicinity for the same or similar purpose.

(2) A person holding an entitlement to use water from a water resource in

respect of any land may surrender that entitlement or part of that entitlement –

(a) in order to facilitate a particular licence application under section 41 for the use of water from the same resource in respect of other land; and

(b) on condition that the surrender only becomes effective if and when such application is granted. (highlighted for emphasis)

(3) The annual report of a water management institution or a responsible authority, as the case may be, must, in addition to any other information required under this Act, contain details in respect of every permission granted under subsection (1) or every application granted under subsection (2)."

[68] Section 27 titled "Considerations for issue of general authorisations and licences" provides as follows

(1) In issuing a general authorisation or licence a responsible authority must take into account all relevant factors, including –

(a) existing lawful water uses;

(b) the need to redress the results of past racial and gender discrimination;

(c) efficient and beneficial use of water in the public interest;

(d) the socio-economic impact –

(i) of the water use or uses if authorised; or

(ii) of the failure to authorise the water use or uses;

(e) any catchment management strategy applicable to the relevant water resource;

(f) the likely effect of the water use to be authorised on the water resource

and on other water users;

(g) the class and the resource quality objectives of the water resource;

(h) investments already made and to be made by the water user in respect of the water use in question;

(i) the strategic importance of the water use to be authorised;

(j) the quality of water in the water resource which may be required for the Reserve and for meeting international obligations; and

(k) the probable duration of any undertaking for which a water use is to be authorised.

(2) A responsible authority may not issue a licence to itself without the written approval of the Minister.

[69] Applications for a licence to use water are made in terms of Section 40 that reads as follows:

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

(2) Where a person has made an application for an authorisation to use water under another Act, and that application has not been finalized when this Act takes effect, that application must be regarded as being an application for a water use under this Act.

(3) A responsible authority may charge a reasonable fee for processing a licence application, which may be waived in deserving cases.

(4) A responsible authority may decline to consider a licence application for the use of water to which the applicant is already entitled by way of an existing lawful water use or under a general authorisation.

[70] The procedure for licence applications is prescribed in Section 41, and deals with amongst others the obligations of the responsible authority in assessing licence applications. The relevant provisions for our purpose are subsections 1 to 4 and they read as follows:

(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 the processing fee determined by the responsible authority.

(2) A responsible authority –

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

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

(ii) an assessment by a competent person of the likely effect of the proposed licence on the resource quality; and

(iii) an independent review of the assessment furnished in terms of subparagraph (ii), by a person acceptable to the responsible authority;

(b) may conduct its own investigation on the likely effect of the proposed licence on the protection, use, development, conservation, management and control of the water resource;

(c) may invite written comments from any organ of state which or person who has an interest in the matter; and

(d) must afford the applicant an opportunity to make representations on any aspect of the licence application.

(3) A responsible authority may direct that any assessment under subsection (2)(a)(ii) must comply with the requirements contained in regulations made under sections 24(5) and 44 of the National Environmental Management Act, 1998 (Act No. 107 of 1998).

(4) A responsible authority may, at any stage of the application process, require the applicant –

(a) to give suitable notice in newspapers and other media –

(i) describing the licence applied for;

(ii) stating that written objections may be lodged against the application before a specified date, which must be not less than 60 days after the last publication of the notice;

(iii) giving an address where written objections must be lodged; and

(iv) containing such other particulars as the responsible authority may require;

(b) to take such other steps as it may direct to bring the application to the attention of relevant organs of state, interested persons and the general public; and

(c) to satisfy the responsible authority that the interests of any other person having an interest in the land will not be adversely affected.

[71] In terms of Section 42, the responsible authority is required to give reasons for decisions promptly after he has reached a decision on a licence application, and notify the applicant and any person who has

objected to the application; and at the also give written reasons when requested to do so.

THE PENDING LITIGATION AT THE LAND CLAIMS COURT INSTITUTED BY CERTAIN OCCUPIERS OF INALA FARMS (IN LIQUIDATION) AGAINST DRDLR AND MATSAMO CPA.

[Elton Ndzimande and 129 Others v The Director-General of the Department of Rural Development and Land Reform & 4 Others; Case number: LCC 41/2011]

[72] This matter was brought to our attention on the second day of hearing of this appeal by Counsel for the appellant, Mr. Oosthuizen as we were about to commence with hearing of the oral evidence. Mr. Oosthuizen started his report by stating that as an officer of court, he felt obliged to inform the Water Tribunal about this matter, which he only became aware of the previous day whilst in consultation with his attorneys.

The long and short of it is that since about 2014, an impression was created by Matsamo CPA, through its attorneys, that it had or was going to launch eviction proceedings at the Land Claims Court (LCC) against certain persons that were identified as illegal occupiers of the Inala Farms that form the subject matter of this appeal. This assertion has

been made even in court papers when leave was sought to intervene in the High Court proceedings in terms of the court order of 09 October 2012.

The appellant's attorneys of record have on several occasions requested, to no avail, a copy of the eviction proceedings at the LCC. They went as far as attending the LCC in Randburg to search if Matsamo CPA issued any eviction application. The search did not yield any positive results.

[73] According to Mr. Oosthuizen, in the evening after the first date of hearing of this appeal, an email copy of a LCC application was forwarded by Matsamo CPA attorneys to the attorneys of the appellant.

It turned out that this application was not an eviction application, and in fact it was not an application that was instituted by Matsamo CPA. The applicants, who are previous employees in the Inala Farms (in liquidation), have approached the LCC to review and set aside the decision of the Land Claims Commissioner to settle the land claim of Matsamo and the transfer of the properties in question to them.

[74] Mr. Oosthuizen went on to explain that Matsamo CPA has been telling his attorneys since 2014 that they are going to launch eviction proceedings at the LCC, but now all that they can say is that "No, sorry, there is no eviction application".

[75] After listening to Mr. Oosthuizen, the Tribunal afforded each party an opportunity to make submissions with regard to their views on how this appeal should proceed having heard of the existence of this LCC application.

[76] The attitude of Counsel for the Matsamo CPA, Mr. Hitchings, was to say the least, very surprising, more so in view of the fact that his clients were alleged to have misled their opponents and the High Court by creating an impression that they were in the process of taking action against people who have unlawfully occupied their land.

He did not see anything wrong with the alleged misrepresentations that were purportedly made by his clients. He insisted that whether or not there are eviction proceedings , it did not change anything. What matters is that the Matsamo CPA is the registered owner of the land and, referring to the well known Oudekraal judgment, until the administrative decision is set aside, it remains valid. According to him even if the present occupants were to succeed in the review application that is pending at the LCC , the issue of the transfer of the water rights will remain because it is the same water that would have been taken away from landowners, irrespective of their identity.

On behalf of the Department, Mr. Sedibe's only submission was that the issues raised did not affect his position and mandate with regard to the

appeal.

[77] The Tribunal adjourned the proceedings to peruse the LCC documents that were made available and marked Exhibit C. After a brief adjournment and having quickly browsed through it, it was gathered that the notice of motion is dated 14 April 2011. Matsamo Communal Property , the Third respondent in this appeal is the Fifth Respondent. The Land Claims Commissioner is the Third Respondent.

[78] The relief sought against the DRDLR is that they should provide the applicants with certain specified records pertaining to the acquisition of the lands and/or farms known as the Inala farms under the Settlement Land Acquisition Grant programme.

They also seek an order to review and set aside the decision of the DRDLR to accept and settle the Matsamo land claims by buying and transferring to them the Inala Farms (In Liquidation) under circumstances where the said farms had initially been acquired on their behalf in terms of the Settlement Land Acquisition Grant during 1996.

[79] The applicants also seek a declaratory order to the effect that they are the sole beneficiaries of the lands and /or farms known as Inala farms.

[80] They also sought interim relief orders, one of which was to be

allowed undisturbed occupation and possession of the farm as they already are.

[81] Having glanced through the answering affidavit that has already been filed on behalf of the Matsamo CPA, one can comfortably, and safely conclude that the background facts pertaining to how these farms changed hands. The applicants were initially workers in the said farms. The farms ran into financial troubles, and were liquidated. The government bought the farms on their behalf using a subsidy scheme in terms of which grants ranging from R15 000,00 were allocated to each worker. The workers then became farm owners. A manager was appointed to manage the farms. They were issued with share certificates so that they could become shareholders/workers. The farms ran into financial trouble again. Then came the second liquidation that is referred to in the appeal before us.

[82] Apparently the grants that were used to purchase the farms for the applicants were financed through a Land Bank Loan, hence occasionally the Minister of Land Affairs (now known as DRDLR) would table the financial statements of the farms in Parliament. When the farms ran into financial trouble for the second time, Government bought the farms for the second time from the liquidators, but this time to settle the land claims of Matsamo, which was duly constituted to Matsamo CPA, the Third Respondent in this appeal before us.

[83] It is clear that the applicants have an interest in the matter before us, but for some reason this LCC application, which was issued in 2011 was never mentioned in these proceedings as well as the proceedings before the High Court.

Matsamo CPA's answering affidavit was filed on 16 October 2014. The deponent is the same person who testified in the appeal before us, Moses Thumbathi. We were only provided with the founding papers and Matsamo CPA's answering affidavit, as such we do not know if any of the other respondents, particularly DRDLR, have filed answering affidavits.

[84] We made a ruling to the effect that the appeal hearing should proceed but that if at any stage during the course of the evidence we are of the view that we have or must have witnesses to deal with the issues arising form this LCC application, we were going to adjourn the proceedings and exercise our powers in this regard.

[85] Having gone through the bundle of documents before us and listening to the oral evidence, we were satisfied that there was no need to hear further evidence pertaining to this issue over and above what we have gleaned from the copy of the application that we have perused, moreso because there is no dispute with regard to the fact that the both alleged "unlawful" occupiers and Matsamo CPA are competing for ownership of the properties in question.

This Tribunal has no powers to decide on their competing claims of ownership of the property or even the claim by Matsamo CPA that the water rights should not have been auctioned off by DRDLR and transferred to the appellant. There are valid contracts emanating from various administrative decisions, and as Mr. Hitchings previously told us, ("tongue in cheek" so to speak), these decisions remain valid until they are set aside by competent authority. The Tribunal is not such an authority.

This, however, does not mean that the fact that the Liquidator and the DRDLR entered into a water entitlement sale agreement automatically entitles the appellant to the water licence without further consideration of other factors listed in Section 27(1).

[86] I now proceed to deal with the oral evidence that was presented before us.

ORAL EVIDENCE

The experts

[87] As part of the new evidence in terms of the court order, both the appellant and Matsamo filed reports from expert witnesses and prepared a bundle that was handed in and marked Exhibit A. It comprises of the

reports of their respective experts, Messrs Schoeman and Bosua respectively. The experts held a meeting and discussed their respective reports. They prepared a joint minute indicating their areas of agreement and dispute. Only Mr. Schoeman testified, and only to clarify certain issues arising from his report.

The joint minute

[88] The experts recorded the following material agreements in their joint minute:

(a) The total irrigable area for Lomati 466 JU Portion 3 is 462 ha.

(b) They agree on the irrigation areas figures as per DALA report in Overzicht 482 JU, Jacobs 481 and Weltevrede 454 Portion 5.

(c) There is a potential of 167ha. in Jacobs 481 and Weltevrede.

(d) The choice of irrigation systems may not reflect what the future irrigation on the farms may look like. More efficient systems may be installed to allow for lesser water use for effective irrigation in soil that appears to be marginal.

(e) Their differences stem from the different approaches they

have used and this is a matter for argument by the respective legal representatives as to which approach should be preferred.

Bosua's approach focuses on the total potential of the land and water. Reliance for the potential approach stems from the Bierman report where he stated that the reasons these farms are not being productive is because they are in liquidation (which is common cause) and that and if they are in full production again, they will need all the allocated water.

Schoeman's approach focuses on the actual existing land and water use from 2009 to 2016 to arrive to answer the question as to whether there was water that could be transferred then and now.

(f) Lastly, they agree on engineering and hydrological facts as well as the factual allegations relating thereto, however, their relevance must be argued.

[89] Their disputes relate to;

(a) Whether the extent and quality of the irrigation development on the receiving property has any bearing on the merits of this appeal.

According to Bosua, it does not. This was in response to Schoeman's analysis of the impact that that transferred water of

would have on the receiving property if the application were granted. He looked at the development in the appellant's property that was achieved with a water allocation of 140 ha from Komati Irrigation Board at a quota of 9 950 m3 /ha/annum. The temporary entitlement helped the appellant to make up for the shortfall.

Schoeman argues that efficient and effective use of water in the public interest is a relevant consideration.

(b) The next contentious issue between them is whether unused water goes to waste. Bosua says it does not, *"but is used by downstream users when such water reaches their abstraction points, not to exceed their metered quotas, but to improve assurance of availability".*

This was in response to one of Schoeman's opinions recorded in his report as follows:

" 24.2 I am of the opinion that most irrigation on the donor properties have been abandoned since 2010-2011. This means that large volumes of allocated water have not been used since that time and that it ran downstream to go to waste.

24.3 I find the non-use of allocated irrigation water not to be

corresponding to section 2(a) on the National Water Act, Act 36 of 1998 (NWA). ..."

[90] In his oral testimony, Mr. Schoeman clarified the following issues;

(a) There is a quota of 8 500 and 9 500 cubic meters of water per hectare per year at Lomati and Komati Irrigation Board respectively. If a crop needs more than the quota, the farmer will have to make other means.

(b) The water in question has been scheduled for irrigation purposes and if it is to be used for other purposes, some other authorization in terms of the NWA must be obtained.

(c) Referring to the "Schedule of Rateable Areas that was handed in as Exhibit "B", it was established that the current water entitlement of Matsamo CPA is 3 270.5 ha.

It was also established from this document that the CPA has not been listed anywhere as water user, though as landowner it has leased or transferred certain water rights entitlement to other farms.

(d) There is no requirement for an environmental impact assessment for an application to transfer water from one farm to another.

It is common cause though that although it is not a listed activity in terms of NEMA, the Minister may direct that it should be undertaken. It is also common cause that there has been no such request.

[91] In his written report Mr. Schoeman expresses an opinion on the proposed transfer of 230 ha (or 1 955 000 m^3/annum of water) from the Inala Farming Company (LTD) to Oosgrens Landgoed (PTY) Ltd.
This report is based effectively on a desk-top study using January 2009 information provided mainly by the Mpumalanga Department of Agriculture and Land Administration. The data presented and conclusions made by the author of the report are *also* based on a single visit to the area on 26 September 2016.

[92] The three tables below are a summary from the report. Table1 shows the land use area of the farms involved in this case together with their current water allocation.

Table 1	**Name of farm**	**Land use area**	**Water allocation**	**Total water allocation**
Inala Farming Company	a) Lomati 466 JU portion 3	374.6 ha	395.3 ha	8 500 m^3/ha/annum
	b) Overzicht 482 JU	69.4 ha	81.0 ha	
	c) Jacobus 481 JU	338.3 ha	257.0 ha	
	d) Weltevrede 454 JU portion 3			
Oosgrens	Quagga 432 JU portion 2		140.0 ha	9 950 m^3/ha/annum

Landgoed				

[93] As indicated above, the difference in annual quotas is because Inala Farms fall under Lomati Irrigation Board where the quota is 8 500 cm/ha/annum whereas Oosgrens falls under Komati with a quota allocation of 9 500 cm/ha/annum.

[94] Crop irrigation demands in the respective farms are determined in this report using the conventional or standard SAPWAT 4 software programme developed by South African agricultural engineers in conjunction with the Water Research Commission.

[95] The results from the SAPWAT 4 model indicate that crop irrigation demand varies from 6 910 m^3/ha/annum for mangos to 7 180 m^3/ha/annum for litchis, to 9 270 m^3/ha/annum for bananas and 11 130 m^3/ha/annum for sugar cane.

[96] The January 2009 calculated water balance between water required for irrigation and the scheduled water available is presented in Table 2.

This table illustrates that in January 2009 there was a deficit between water requirements in the Inala Farming Company and the water allocated.

Table 2	**Irrigable area**	**Water requirements, m^3/annum**	**Water allocation, m^3/annum**	**Balance available, m^3/annum**
Lomati 466 JU portion 3	338.6 ha	3 518 707	3 360 050	-158 657 i.e. no water available for transfer
Overzicht 482 JU	69.4 ha	514 654	688 500	173 846 Available but not utilised in 2009
Jacobus 481 JU and Weltevrede 454 JU	338.3 ha	2 852 748	2 184 500	- 668 248 i.e. no water available for transfer
Total	**746.3**	**6 886 109**	**6 233 050**	**-652 059**

[97] The expert witness report further illustrates annual water use volumes in the years 2010-2011, 2013 and 2016. The information is determined by *"quantitative interpretation of satellite Google Earth imagery"* to estimate, by interpretation of the images, the possible degree of irrigation on particular dates. This determination of crop irrigation is at best, an estimate and one that could be subject to different interpretation by different people. The author of the report acknowledges

this himself. There is no indication what type (or magnitude) of error this could yield in the final calculation on how much the Inala Farming Company (LTD) was irrigated during these years.

[98] What Table 3 illustrates, however, is that during the years 2010-2011, 2013 and 2016, there was enough available water from Inala Farming Company (LTD) for transfer to irrigate 230 ha of land at Oosgrens Landgoed.

[99] It is not in dispute that the surplus water is as a result of "*serious decline in the irrigation development on the donor properties*". We now know this happened because the Matsamo Communal Association never took occupation of the Inala Farm.

Table 3

	Period				
	Allocation	2009	2010-2011	2013	2016
a) Inala Farm annual total irrigation volumes, m^3	6 233 050	6 886 109	3 850 628	1 198 230	887 538
b) Available volume for transfer, m^3		-653 059	2 383 628	5 034 820	5 345 538
c) Proposed irrigation transfers to Oosgrens Landgoed, m^3		1 955 000	1 955 000	1 955 000	1 955 000

[100] It is clear from Table 3 that, except for 2009, there is enough water available for irrigation to meet the proposed volume of 230 ha for Oosgrens Landgoed.

[101] Issues arising from his cross-examination are that;

(a) If his opinion had been sought during the initial application stage, he would have looked at whether the water at Inala Farms was being used beneficially, and if it was, he would not have recommended taking water from one beneficial user to another.

(b) At the moment, even if they were in full production, Inala Farms do not require all of the available water. The application is not to take all of the water, but a certain percentage because taking all the water diminishes the potential.

(c) He only used the Bierman report to get the areas of who owned the farm, further than that his methodology was as explained above.

[102] Documentary evidence in the form of a letter purportedly from Lomati Irrigation Board and dated 10 November 2016 that was presented by the appellant to show that Matsamo CPA owed the Irrigation Board substantial arrear water charges (R3,093,567.14) turned up to be unreliable because the same Board has issued summons in the Regional

Division of Mpumalanga, Mbombela, against the Matsamo CPA in May 2016 demanding payment of an amount of R238 481.24 , being *"arrear water rates and charges"*. In any event, it is doubtful whether arrear charges would be a factor under the current occupation status of the farms.

It is common cause that since 2009 Matsamo has not taken occupation of the farms. On the other hand there is evidence to the effect that Matsamo CPA is in joint venture with some companies, and furthermore, that the water is being used by other farms. Although the latter arrangement may not be lawful, the question would be under all these circumstances, who has used the water relating to the charges mentioned in the letter of 10 November 2016.

[103] The appellant did not call further oral evidence (witnesses).

First and second respondents' oral evidence

[104] Mr. Sedibe indicated that he initially did not intend to call witnesses but seeing that issues were being raised about the manner in which the responsible authority dealt with the appeal, he wanted to call her as a witness. He was allowed to procure a statement from her to comply with the directives of the court as indicated above. The statement was marked Exhibit "C". The witness, Ms. Deborah Mochotlhi, was at the time of the decision occupying the post of Chief Director, management of

Letsema Project. It is common cause that she made the decision under delegated authority as indicated in the introductory paragraphs. Her current position in the Department is Deputy Director-General: Water Planning.

Despite the fact that a few days had elapsed between the time that we were advised that she was going to testify and her actual testimony, it was clear that both the witness and the evidence leader had not prepared for their respective roles. I had to adjourn the proceedings at some point to allow the witness an opportunity to familiarize herself with the documents that were before us. At some point she became restless and requested that the matter be postponed, which request I refused. She continued to testify and to answer questions, but overall, her testimony was not of any assistance because she could not remember what was before her when she made the decision under appeal. She also referred to documents that she was certain were before her but that obviously had not been included in the bundle. Mr. Sedibe had had ample time to prepare the evidence that he wanted to lead through her, with her. In fact, as the decision-maker, the appeal record should have been filed with her knowledge and participation.

[105] Back to her testimony, she explained that the purpose of Letsema Project was to fast track the backlog of Water Use Licence applications. She moved from this responsibility in 2010. She has no clear recollection

of the matter but has read the documents to refresh her mind.

[106] She testified that she received a report from Mpumalanga Department of Agriculture and an objection from Matsamo. She investigated the objection.

[107] Asked what considerations she took into account when deciding on the licence application, she referred to Section 27(1) of the NWA and proceeded to read the provisions of the section until I stopped her because it was clear that she was looking at some document and reciting the contents.

[108] When asked if she had taken into account any other consideration, she referred to technical investigations, but was not specific about the nature thereof.

[109] On the state of the water resource at the time in question, she indicated that the catchment was already under stress and she believe that this is the reason for the transaction to sell the water entitlement.

[110 Mr. Sedibe pressed her about any other considerations she could have taken into account and her answer was an emphatic NO. She then, on second thought mentioned what she referred to as "equity" because in the Preamble to the NWA, "equity" is a consideration. She also mentioned that "redress" is part of section 27(1).

[111] She also took into account the authorization that Oosgrens had at the time.

[112] **Cross-examination by counsel for the appellant**, Mr. Oosthuizen, yielded the following responses;

[113] Although she advanced three reasons in her letter of refusal, she cannot say that as far as other considerations in section 27(1) she was satisfied that there was nothing to prevent granting of the licence. She denied the suggestion that the fact that the water entitlement was purchased in an auction made the application before her peculiar in any way. She admitted though that the circumstances of the sale, which she cannot say whether she looked at or not were peculiar. In her view the "deal" should have been struck with the Department.

[114] When asked if the record that was supplied by the Department, Annexure PS 9 was indeed the record that served before her and why there was no memorandum setting out her reasons for refusal of the licence application but just a letter that does not show how she dealt with the matter, she explained that in terms of their processes, she normally receives a file with a submission that is referred to as a Record of Decision or ROD (later changed to Record of Recommendation). She does not read contents of files, but just a summary in the submission. She signs this ROR and it stays in the file.

When told that this ROR is not part of the record supplied to the appellant despite repeated requests, Ms. Mochotlhi explained that she was coming to the hearing for the first time and did not know what was provided by the Department. She accepted though that she couldn't exonerate herself from blame.

[115] She was asked if she knew about what used to be referred to as the "Pietersburg" Principle in the Old Water Act, which in all fairness was not a fair question. Anyway, the point that was being made to her was that the reality is that in every farm there is always going to be an area that has potential for irrigation but only a portion thereof will actually be irrigated because of availability of water. This is because each piece of land receives its proportionate share of water irrespective of their potential for irrigation.

[116] She was asked in relation to her first ground of refusal why it was a problem for her if a certain portion of Inala farm that has a potential is not going to be irrigated. She did not know if there had been a comparison between irrigable potential in Quagga 2 and Inala farms. She did not know which model the technicians used. She did not rely on the Bierman (technical) report. In fact, she did not read it herself.

When asked if, now, having seen this report and realizing that there was much water deficit on the appellant's Quagga portion, she would change

her decision. She answered that she cannot change her decision because of one issue.

[117] On the second reason of refusal, she denied that by public interest she was referring to Matsamo Tribal Authority's objection. Reference to Matsamo was simply to indicate that there was an objection, not that it was a reason to refuse the application.

[118] She denied that she had adopted an attitude of wait- and-see when dealing with a catchment that was under stress instead of acting in the public interest by making beneficial use of water that was not being used. Her stance is that if Inala Farms decide to farm or is in a position to do so after 5 years, there should be water available for that purpose. Besides, the water can be used for other purposes, not just agriculture. The reaction of Counsel on the last sentiments expressed was that on the facts of this case, we are dealing with an existing lawful water use, that has been scheduled for irrigation purposes, and nothing else.

[119] It was put to her that if she had investigated the Matsamo CPA objection and found that it could have taken them 5 years to get their house in order, she could have issued the licence for 5 years. Ms. Mochotlhi agreed with the latter assertion relating to issuance of a licence for a lesser and limited period. This, she said, can de done.

[120] She was referred to Exhibit B to the expert bundle that

demonstrate that at the time she took the decision in question, Matsamo CPA had access to use 27.8m^3 of water per year and that this information should have played a role in her decision.

She pointed out that she had just seen this document and does not believe that she would have arrived at the decision. When told that the respondents' representatives, including Mr. Sedibe did not challenge this document, her response was that perhaps the information would have played a role in her decision.

[121] Referring to Exhibit B again, it was put to her that according to the areas highlighted in blue, the evidence led showed that a total of 113.2ha of water has been transferred from Inala and this, logically has increased the deficit. The transfers went through.

[122] **Under cross-examination by Counsel for Matsamo,** Mr. Hitchings, Ms. Mochotlhi testified that she was not bound by Bierman's recommendations. Technical reports, such as Bierman's, are subjected to technical assessment. This was in response to a question as to whether Bierman dealt with land distribution or agricultural issues. On whether a water licence is issued to an individual or property, she explained that it is issued to an individual if the applicant is a company, however the licence will specify or describe the land.

[123] She testified further that she took into account other factors in

Section 27 of the NWA even though she only recorded the ones indicated in the letter of refusal.

[124] She cannot remember the amount of water Quagga had, but this information must have been presented to her in the ROR.

[125] She does not believe that the manner in which Oosgrens acquired the water entitlement is important or as in her own words, highly rated.

[126] Mr. Oosthuizen requested and was granted permission to show Ms. Mochotlhi a document titled "National Water Policy Review" and to identify if it is a departmental document. She indicated that it was difficult to identify it as an official document because it had no signature. She undertook to bring an official version. This was later handed in and marked Exhibit "E". Mr. Hitchings referred to it when addressing the issue of whether the NWA allows trade in water. In a nutshell, and with regard to transfer of water entitlement, it appears that in future the principle of "use it" or "lose it" will be applied.

[127] There was no re-examination.

[128] In response to questions from the panel, she testified that at times she goes beyond the submissions in the ROR if there is something that needs clarification. She cannot recall if in this matter she engaged the expert teams whose reports were presented to her.

[129] The manner in which the water entitlement was obtained is relevant, but not highly rated as she has testified.

[130] She assumed that the document attached to the application titled "Declaration for purposes of section 27 " was before her when she made the decision.

[131] She cannot remember whether she satisfied herself that an investigation on the issues raised with the appellant at application of the licence stage were investigated because she does not have the report that served before her.

[132] She explained that where she indicated (in the witness statement) that there is no sufficient water to transfer she meant that the transfer would increase the deficit, even though it is only 30% of the water entitlement that is being requested.

[133] When asked why the issue of "redress" featured in her reasons for refusal and whether she knows who the owners of Inala farms were, she responded by saying that by just looking at the catchment area, logic dictates that water is in the hands of previously advantaged persons.

It was put to her that Inala Farms were government owned and the workers had shares.

[134] On further questions from Mr. Oosthuizen, she indicated that the

engineers that consider applications translate ha of water into volumes.

In her response to a question as to whether she engaged the appellant with regard to adverse comments on the application, she referred to an email from Lefifi dated 09 February 2010 to show that indeed adverse comments are referred to applicants for water licences for their comment. There is also proof in the record that she at least on one occasion did communicate with the appellant's representative in the said email with regard to the objection of Matsamo Tribal Authority.

Matsamo CPA came to the picture after she had made her decision, hence in her letter of refusal she referred to the Tribal Authority.

Third respondent (Matsamo Communal Property Association)

[135] Three witness statements on behalf of Matsamo CPA were filed in terms of the court order. Only one witness testified., namely, Mr. Moses Mhlupheki Thumbathi. He is the Chairperson of the CPA. It has lodged multiple claims with the DRDLR for loss of ownership rights in various properties, including Inala Farms. He has signed various agreements of sale with the Regional Land Claims Commission in Nelspruit on behalf of the CPA.

[136] On 23 March 2009 he was invited by one George Mathedimosa to the offices of the RLCC to sign the agreement with regard to the

properties that form the subject matter of this appeal. He affixed his signature where Mathedimosa showed him to.

He was not informed about the sale or transfer of the water rights nor was he informed about the existence of a clause to this effect in the agreement.

He has never signed an agreement with this type of clause. The CPA had previously objected to the transfer of the water rights by writing a letter to the liquidators on 27 August 2008.

[137] Even if the clause had been pointed out to him, he would not have had authority to sign such an agreement.

[138] Addressing Exhibit B, he testified that the CPA has leased its farms to individuals and has also formed joint ventures with companies.

The reason the CPA is currently not farming is because they never took occupation of the properties as there are people who are in occupation. The farms were in a better condition in the 80's but have since deteriorated since they were placed in liquidation. The CPA has strategic partners such as Tomahawk and they farm in litchis and sugarcane. The water allocated to Inala has ben transferred to other farms.

[139] If they were to take occupation of the properties, they would start farming immediately because the business plans are ready. The Matsamo

beneficiaries are opposed to the transfer of the water entitlement.

[140] Under cross-examination by Mr. Oosthuizen, he acknowledged that the CPA has a debt with the irrigation Board, but disputed the suggested amount of about R1.8Million.

[141] Although he was aware that that there was a potential sale of the water rights to which he has objected, he did not read the sale agreement before signing as he has testified. He initialed each page, but only read where he put his signature.

He appended his signature in the "Acceptance Form", and that is where he read. He accepted all terms of the agreement by signing that page. After it was pointed out to him that actually there was nothing to read in this page, he remained silent and after a long pause, he made a roundabout turn and indicated that he erred in his previous answer that he only read where he placed his signature.

[142] He was aware that the liquidators did not respond to his objection and that in the objection letter he had threatened legal action to protect the CPA's rights.

When told that the CPA has not instituted any legal action since 2008, his response was that he was under the impression that their legal advisors had taken legal action with regard to the objection on the sale of

the water rights.

He is now aware that there are no eviction proceedings pending at the Land Claims Court. When he deposed to the intervention affidavit, he was under the impression that the CPA legal advisors had launched eviction proceedings against the occupiers of their property at the Land Claims Court.

[143] **Under cross-examination by Mr. Sedibe,** he testified that the CPA comprises of 1500 beneficiaries. The number of families and beneficiaries is over 3 500. Someone else who had signing powers when he was not available signed the letter of objection that was sent to the Liquidators in 2008. He knew about the letter and aligned himself with the contents. There are small groups of non-commercial farmers in the area, but they cannot farm to a large scale like in India because f lack of expertise. The projected number of employees in the farms close to Matsamo community is about 800. The number is small in farms that are about 50 km away. Before he signed the sale agreement indicated above he was told to browse through it. He was under the impression that there are no new clauses from what he knows.

[144] There was no re-examination.

[145] Responding to questions from the Panel on whether he would object to a limited transfer of the water entitlement until the Land Claims

matter was finalized, Mr. Thumbathi's response was that it was difficult to answer the question because all that is in his mind is to go and farm.

The affidavit of the Liquidator, Mr. Lazarus Mpoyana Ledwaba

[146] He and his joint-Liquidators, Messrs Mario Bento N.O. and Farouk Sharief were appointed by the Master of the High Court on 09 October 2007 as liquidators of Inala Farms (Pty) Ltd (in liquidation).

[147] He confirmed the sale of the water use entitlement that he described as pivotal in obtaining subsequent approvals from creditors to allow them to sell immovable properties of Inala by way of private treaty to the Government. The deposit paid by the appellant was used for amongst other things to pay a preferential claim of the Lomati Irrigation Board to allow subsequent registration and transfer of the immovable properties.

[148] He explained further that should the application for transfer not be successful, the sale of the water entitlement agreement would have to be cancelled and the status quo *ante* (before) the sale agreement will have to be restored. The transactions that were facilitated by the agreement will be reversed, for example, the transfer of the immovable properties to the Government and Matsamo CPA.

CLOSING SUBMISSIONS, ANALYSIS AND FINDINGS

[149] In response to the criticisms leveled by the Department on the agreement to sell the water entitlement, Mr. Oosthuizen referred us to the book titled *"Water Law, a Practical approach to resource management & the provision of services"* authorized by Hubert Thompson with regard to the regulation of water in terms of the Water Act 54 of 1956 and the background of the current Section 25 of the National Water Act.

[150] Under the heading "Trading"[9], the author stated the following:

"Direct and indirect trading of entitlement took place. A register for the entitlements traded did not exist.

Direct trading usually took place by way of agreements. If an entitlement to public water was traded to a non-riparian owner, the permission of a water court was needed. If an entitlement to private water was traded, a permit issued by the Minister was needed.

Indirect trading of public water usually took place by way of an application to the water court, which granted entitlements and made an order that compensation be paid to those whose rights were reduced.

As no real framework was in place and the law did not prohibit trading, combinations and alternatives of these were applied in practice.

...."

---

[9] Page 92-93

[151] He argued further that since we are dealing with an existing lawful water use in terms of Section 34 and continuation of use thereof is permitted in terms of Section 22, referring to Section 25 thereof as a mechanism to trade in water is in order. The person holding the water entitlement was the Liquidators, and not Matsamo CPA.

[152] The argument was taken further by referring to Section 25 of the Constitution and that on a proper reading, water is a new property.

[153] The water sale agreement has a resolute condition to the effect that the transfer is subject to approval of the licence application. This agreement has been extended by mutual consent to allow finalization of the appeal proceedings.

[154] Another consideration to be taken into account is the absence of a National, or catchment management strategy.

[155] The affidavit of the Liquidator, Mr. Ledwaba, is proof that but for the sale of the water entitlement, transactions such as the transfer of the properties to Matsamo would not have taken place.

[156] The litigation that is currently pending at the Land Claims Court may take years to resolve. Cancellation of the various agreements that the Liquidators entered into with regard to the Farms may also take years to be finalized.

[157] It has been shown in Exhibit B that Inala farms have enough water. The State has an obligation to ensure equitable water use. The water is allocated for agricultural purposes, and nothing else.

[158] As I have already stated above, the nature of opposition that was mounted by the respondents is hinged on the correctness or morality of the sale agreement of the water entitlement. Whilst Matsamo CPA's submissions in this regard were mild, using terms such as "competing rights", the Department's officials were not diplomatic about it.

[159] Referring to the agreement to sell the water entitlement, Ms. Mochotlhi in her testimony indicated that "*the deal should have been struck with the Department*". In his heads of argument, Ms. Sedibe stated, amongst other things that;

(a) Bierman's recommendations were "*flawed, irrational, illogical and suffered from the lack of consistency with their facts*".

(b) He went on to state that *"The reasons and the manner in which this water was surrendered to the Appellant leave one with more questions than answers.*

Firstly, if the Mpumalanga Land Claim Commission fully applied its mind and appreciated the consequences of not acquiring the water that was put up for sale, it could have

endeavored to purchase the farm with the water in issue. Secondly, it is hereby placed on record that the Irrigation Board collects water charges on behalf of the First Respondent and if before the auctioning of this water was brought to the attention of the First Respondent, an alternative arrangement on the liquidation of this debt could have been thrashed out in the interest of transforming the water sector"

[160] Mr. Hitchings submitted that there are competing claims on the water in question and the experts are in agreement that there is water stress. (Mr. Oosthuizen shot this submission down in reply. There is only one and no other application for a transfer of water and water licence before the Tribunal.)

The core issue, according to Mr. Hitchings, is whether in deciding who get this water one should take into account the facts as of today, or look at the future potential.

The Matsamo CPA relies on two grounds to oppose or object to the transfer of the water right entitlement. These are recorded as follows in the heads of argument;

" 20.1 The need to redress the results of past racial and gender discrimination; and

20.2 The fact that the appellant is able to use the relevant water immediately on its farm, pending its taking occupation of the Inala farms".

[161] The high watermark of the opposition is similar to the arguments advanced by the Department, namely; that Matsamo CPA need the water to achieve the purpose for which the land was restored and that the reason they are currently not utilizing the water is not out of choice but is as a result of occupation of the farms by other persons.

[162] The agreement to sell the water entitlement almost captured the entire appeal proceedings. We can write a thesis on the submissions made. Mr. Sedibe did not want to concede anything on this issue, even on the face of legal authorities to the effect that agreements that were validly entered into remain in place until they are set aside. Counsel for Matsamo agrees with this legal position and even referred us to authorities.

[163] These proceedings should not be used to frustrate the enforceability of agreements. However, the fact that the appellant and the Liquidators of Inala Farms concluded an agreement for the transfer of water use entitlement in terms of section 25(2) of the NWA does not automatically guarantee that the transfer will be approved by the responsible authority. This was emphasized by the court in **Trustees for**

the time being of the Lucas Scheepers Trust, IT633/96 v MEC for the Department of Water Affairs, Gauteng[10];

"Although parties can agree that the water entitlement of one user may be used by another farmer on another farm, section 25(2)(b) sets out clearly that where one person surrenders his entitlement for use of water from the same source in respect of other land, it only becomes effective if and when an application is granted. ***A mere agreement between the parties, as in this instance, does not suffice."***

This much the appellant conceded and confirmed that by entering into the agreement of sale of the water use entitlements it took a business risk. The expert witness for Matsamo CPA correctly observed that appellant by making huge investments on the receiving farm (Quagga 2) are taking a huge risk on the basis of conditional water use rights that the third respondent cannot be held responsible for or be requested to alleviate. This, the Appellants also conceded.

[164] However, it was also common cause that surplus water on Inala Farms has been growing over the past eight years with no resolution of the impediments to production in the foreseeable future. While the liquidators of Inala Farms and the Land Claims Commissioner could not legally, by their mutual act, in concluding a sale agreement of the water

---

[10] 2015 JDR 0774 (GP) , para 22, emphasis added.

use rights, without consulting the first and second respondents, constrain the exercise of their discretion and statutory mandates in terms of the NWA.

[165] The Tribunal, now stepping into the shoes of the Responsible Authority, took into account the legal and factual context, the future potential for beneficial use on Inala Farms, the period it has taken Matsamo CPA to date to resuscitate production on the farms (unsuccessfully), and the growing unused amounts of surplus water on Inala farms. To answer the question that was posed by the experts and deferred for argument by the parties, the Tribunal aligns itself with the approach espoused by Mr. Schoeman, which, in a nutshell entails looking at the facts as they are at the moment and not the future potential in the land.

OTHER CONSIDERATIONS

[166] We have been referred to at least two judgments[11] that provide guidelines when deciding on appeals of this nature. The correct approach is to take into account all relevant factors, including the factors specifically mentioned in section 27 of the NWA and to strike a balance

---

[11] Gugulethu Family Trust v Chief Director, Water Use: Department of Water Affairs and Forestry, unreported. delivered on 27 October 2011 under case number A566/2010, North Gauteng Division, Pretoria.
SCA judgment in the matter of Makhanya NO v Goedewellington Boerdery (Pty) 2013 ALL SA 526 (SCA)

with a view to achieve the purpose of the Act.

I do not want to repeat what I have stated already, but in my opinion, we have already taken into account all relevant factors in reaching the conclusion that the Schoeman approach makes sense and thus is preferable.

[167] The factors listed in section 27(1) must be considered holistically and balanced against each other to the extent that they are relevant in any given case.

The factors that appear most relevant to this matter include whether the water at issue is being used efficiently, sustainably and beneficially in the public interest. We have considered the submissions that were made by the appellant in terms of Section 27, starting from the Declaration that was attached to the application form, the affidavit filed in the court application, the heads of argument and oral submissions.

[168] Accordingly, the appeal succeeds.

The duration of the licence

[169] Section 128(1) of the NWA reads as follows:

> *28. Essential requirements of licences*
> *(1) A licence contemplated in this Chapter must specify –*
> *(a) the water use or uses for which it is issued;*
> *(b) the property of area in respect of which it is issued;*
> *(c) the person to whom it is issued;*

(d) the conditions subject to which it is issued; Page 39 of 178

(e) the licence period, which may not exceed forty years; and

(f) the review periods during which the licence may be reviewed under section 49, which must be at intervals of not more than five years. " (highlighted for emphasis)

[170] Section 49 of the NWA deals with reviews and amendment of licences and it reads as follows:

"49. Review and amendment of licences

(1) A responsible authority may review a licence only at the time periods stipulated for that purpose in the licence.

(2) On reviewing a licence, a responsible authority may amend any condition of the licence, other than the period thereof*, if –*

(a) it is necessary or desirable to prevent deterioration or further deterioration of the quality of the water resource;

(b) there is insufficient water in the water resource to accommodate all authorised water uses after allowing for the Reserve and international obligations; or

(c) it is necessary or desirable to accommodate demands brought about by changes in socio-economic circumstances, and it is in the public interest to meet those demands.

(3) An amendment contemplated in subsection (2) may only be made if the conditions of other licences for similar water use from the same water resource in the same vicinity, all as determined by the responsible authority, have also been amended in an equitable manner through a general review process.

(4) If an amendment of a licence condition on review severely prejudices the economic viability of any undertaking in respect of which the licence was issued, the provisions of section 22(6) to (10) apply. Page 58 of 178

(5) A responsible authority must afford the licensee an opportunity to be heard before amending any licence condition on review. [171] We asked the representatives of the parties to address us on the suitable period that we may grant the licence for. Mr. Oosthuizen suggested 40 years and has submitted a draft in this regard. He further submitted that even if Matsamo CPA were to

take occupation of the land, they will still have water from the remainder of what is being requested.

[172] Mr. Sedibe refused to make submissions with regard to the licence period, firstly because he wants the water to be left as is until the Land Claims Court application is finalized. His view is that if those applicants succeed, they must have water. Secondly, he cautioned us that the Tribunal has no authority to prescribe the period. According to him the Tribunal is not a "Responsible Authority". We should, according to Mr. Sedibe refer this matter back to the "Responsible Authority" to deal with the issue of the licence period and conditions.The short answer to Mr. Sedibe's sentiments is what we have already stated above, namely, that the Tribunal, as it should, has stepped in the shoes of the "Responsible Authority" and having made a determination that the appeal should succeed, is in a better position to deal with the remaining issue, duration of the licence.

[173] Mr. Hitchings was more realistic and suggested that the Tribunal can in terms of Section 28 grant the licence for a limited period, not longer than 40 years. However, he was still hopeful that Matsamo CPA may be able to take occupation of the farms and utilize the water. The problem here is no one knows when the Land Claims Court matter is going to be finalized.

[174] We cannot completely ignore the fact that water is a scarce commodity and that the State has an obligation to ensure equitable allocation to all. As Mr. Oosthuizen correctly submitted, even if the appellant had failed in this appeal, it is not a guarantee that the water would be locked away waiting for its return to Matsamo CPA.

The State has an obligation, in the exercise of its review powers in terms of Section 49, to consider extensions for licence period, and in this regard, it may be justifiable to consider new applicants for the water that has already been allocated. Accordingly, Matsamo CPA or any other water user may at some point compete with Oosgrens for the same water.

[175] It is a reality though that if those applicants or Matsamo CPA succeed in their challenge against the DRDLR, then all decisions, including the outcome of this application may be declared null and void.

[176] The period that this Tribunal authorizes the licence for should take into account the factors that are relevant for the purpose for which the water is sought. A short licence period will not be in the interest of development of the Appellant's Quagga 2 farm.

[177] On the other hand, there is evidence that the water resource is under stress. Although licences are subject to review, the period cannot be amended. Section 28(3) provides that a licence period can be extended by the responsible authority.

[178] In my view, the schematic arrangement of Section 28 read with Section 49 caters for the apprehensions that have been expressed by the respondents in this matter, namely, change of circumstances. The following subsections of Section 28 deal with extensions of licences and factors that may be taken into account.

> *" (3) Subject to subsection (4) and notwithstanding section 49(2), a responsible authority may extend the licence period of a licence if this is done as part of a general review of licences carried out in terms of section 49.*
> *(4) An extension of a licence period contemplated in subsection (3) may only be made after the responsible authority has considered the factors specified in section 49(2) and all other relevant factors, including new applications for water use and has concluded that there are no substantial grounds not to grant an extension.*
> *(5) An extension of a licence period in terms of subsection (3), may only be given for a single review period at a time as stipulated in subsection (1)(f).*

[179] Taking into account all the factors I have discussed above, the licence period that I propose is Fifteen (15) years, and subject to 5 yearly reviews.This period was determined with reference to and taking into account the future sustainability and potential of the Inala Farms counterbalanced against current losses and investments made by Quagga 2. A longer licence period locks away access of water by Inala Farms and other users while a shorter period can be a constraint on the Appellant.

[180] I have already referred to the Draft Order that was submitted by the appellant. The Draft must be amended in Paragraph 3 (e) by deleting Fourty (40) years and substituting it with Fifteen (15) years.

Accordingly, the decision that we make is that;

[180.1] The appellant is granted a licence in terms of the Draft, as amended on terms and conditions set out in the Appendix attached to the Draft Order.

Adv. TAN MAKHUBELE SC

Chairperson, Water Tribunal

I agree, and it is so ordered

PROFESSOR TUMAI MUROMBO

Member, Water Tribunal

Appendix attached to the Draft Order.

Adv. TAN MAKHUBELE SC

Chairperson, Water Tribunal

I agree, and it is so ordered

PROFESSOR TUMAI MUROMBO

Member, Water Tribunal

I agree, and it is so ordered

PUMEZO JONAS

Member, Water Tribunal