

IN THE WATER TRIBUNAL OF SOUTH AFRICA

WT03/19/LMP

HELD AT PRETORIA

RAMALIANE TRUST

APPELLANT

AND

THE DEPARTMENT OF WATER AND SANITATION

RESPONDENT

APPEAL DECISION

Coram: T. Murombo (Panel Chairperson, Additional Member)

Heard: 26 April 2022

Delivered: 14 July 2022 (Delivered electronically)

Appearances:

For the appellants: A. Venter (Adriaan Venter Attorneys)

For the respondents: Adv. S.M Malatji (Groenkloof Chambers)

Instructed by: The State Attorney

INTRODUCTION AND BACKGROUND

1. The appeal was set down and heard on 26 April 2022 and the parties submitted written closing submissions by 24 May 2022. The background is that the appellant applied for a water use licence in September 2015 for various water uses on the Remainder of the Farm De Loskop 205 LS near Dendron, Limpopo Province, situated in the Quaternary Catchment Area A71E. This property falls within the broader Limpopo Primary Catchment Area and Sand River Sub-catchment (A71). The water use licence application states that it was intended to obtain approval of the following water uses:
 - a) Section 21(a) 'taking of water from a water resource' in the form of an existing weir on the Hout River and an existing water channel. This use also included an existing borehole on De Loskop 205 LS.
 - b) Section 21(b) 'storage of water' in an existing dam (Dam 1) and a new dam (Dam 2) which was construed unlawfully by the Appellant in 2012.¹ The small dam has a capacity of 86 326m³, while the Dam 2 has a capacity of 650 000m³.
 - c) Section 21(c) and (i) being the 'impeding or diversion of water flow and alteration of the bed, banks, or course of a watercourse.' These uses were in respect of the proposed upgrading of the existing weir and canal on Portion 9 of the farm Kalkbank 552 LS (Kalkbank) and Portion 1 of the Farm Waterval 553 LS (Waterval). Both Kalkbank and Waterval are owned by the Government of South Africa through the Department of Rural Development and Land Reform.²
2. The historical weir was damaged by floods in February 2000. The channel was constructed in the 1970s and diverts water from the Hout River into the existing small dam (Dam 1).³

Regarding the channel, the appellant's application states that:

A section 21 (a) water use is applied for, for taking water from the Hout River via the upgraded weir and channel. due to the water use not being covered under a General Authorisation as published in Notice 399 dated 26 March 2004, as extended in Notice 313 of March 2009, as extended in Notice 837 dated September 20 10, as extended in Notice 970 of November 2012. The General authorisation does not apply to abstraction from rivers situated in the Limpopo Primary Region.

¹ Some parts of the record state the construction was done in 2014.

² Record p11.

³ Record p374 to 375.

3. The above water uses were included in a consolidated water use licence application, but they have different legal statuses. The storage of water in the small dam (Dam 1) and uses resulting from the weir and channel as well as the boreholes are all historical. Whether or not they are existing lawful water uses is not an issue before the Tribunal. There are documents on record, and in possession of the parties, which clearly explain the legal status of the historical uses.⁴ Therefore the Tribunal will not pronounce on whether or not any of the historical uses legally qualify as existing lawful water uses (ELWU).

4. The new Dam 2 was constructed by the appellant without a water use licence and is the subject of a new application which was integrated or consolidated with the existing uses. The parties are not agreed as to whose initiative it was to come up with a consolidation of the historical water uses and the new unlawful dam. The legal reality is that any confirmed ELWU will remain as such if a water use licence is not issued, while any new uses depend on whether or not a new authorisation is granted. Any ongoing illegal uses must be dealt with by the respondent in terms of section 53 and 151 of the National Water Act.

5. Documents on record show that the appellant applied for a section 24G rectification under the National Environmental Management Act 107 of 1998 (the NEMA), for both the weir and Dam 2.⁵ These are listed activities that require an environmental authorisation before they are commenced with. The Limpopo Department of Economic Development,

⁴ Record p16, 20, 21, and 378. There is a registered borehole (Water Use Registration Certificate 27042432) for the abstraction of 482,500m³ water per annum situated on Portion 3 of De Loskop 205 LS. However the lawfulness of that borehole is still to be determined. Secondly, another borehole is registered (Water Use Registration Certificate 27009219) for the abstraction of 588, 634m³ water per annum situated on Remainder of De Loskop 205. The water use is registered as existing lawful water use under section 35(4) of the National Water Act 36 of 1998.

⁵ Record p54-57. There is no evidence on record or led by the parties on the outcome of the NEMA section 24G application. This implies that there is currently no environmental authorization for both the upgrading of the weir and the big dam.

Environment and Tourism (LDEDET) wrote two letters in response to the section 24G application requesting for more information in order for the rectification application to be considered. These letters are dated 24 July 2013 and 3 April 2014. An Environmental Assessment Report was then submitted on 5 January 2015 to which the LDEDET responded on 14 January 2015 querying among others that,

It is a concern that for an application pending since 27 June 2013 when it was initially made that there is still specialist information outstanding for a complete report to be submitted, especially since there is no commitment to when it may be available.⁶

6. Several objections were raised by interested and effected parties against the section 24G NEMA application which do not appear to have been addressed satisfactorily in the environmental assessment report and which in any case remain unresolved to the extent that there is no decision on the section 24G NEMA rectification application. As required by section 24G of the NEMA, the appellant was levied a fine by LEDET on the 31st of August 2015 to the value of R105 000.00 and which was paid in September 2015.⁷
7. For the record the appellants did not produce an environmental authorisation and it is one of the critical documents that should be available, and be considered, when considering a water use licence application. Therefore, the outcome of the section 24G application is uncertain on the record, yet it is a relevant fact to be considered per section 27(1).
8. Given the contravention of the National Water Act by the appellant, a directive was issued on 7 October 2016 in relation to the new Dam 2.⁸ The directive was preceded by a Notice of Intention to issue a directive served on appellant on 17 November 2014 and to which appellant responded on 9 December 2014. Part of the directive was for the appellant to

⁶ Record p57.

⁷ Record p294 and 368.

⁸ Record p380-381.

prevent water from overflowing into Dam 2 from the Dam 1 through the channel. Appellant confirmed that the new canal connecting the dams was closed, but that Dam 2 will still fill up with rainwater when there are good rains. A Rehabilitation Plan⁹ was prepared to comply with the directive. The appellant's environmental consultants state that the channel and weir will no longer be necessary to divert water into the new dam as it can fill up with rain run-off.¹⁰

9. The water use license application was considered by the respondent in 2018 and a Record of Recommendation (ROR), an internal decision-making document, was prepared in preparation for a decision on the application. However, the record shows two RORs one dated 3 May 2018)¹¹ and a second dated 28 December 2018. The RORs have the same internal technical information and expert recommendations except the comments by the responsible authority and articulation of the recommendations. The first ROR (3 May 2018) contains the following recommendations and reasons for the decision:

4.REASONS FOR RECOMMENDTAION AND DECISION

The application is recommended for a decline to consider the existing lawful uses. The activity as undertaken unlawfully since the applicant was not having an authorization and
The catchment in respect of which the dam was constructed is already stressed.

5. RECOMMENDTAIONS AND DECISION

Based on the information above, it is recommended that the water use licence application for Ramaliane Trust be declined to consider Existing Lawful Entitlements.¹²

10. In the 3 May 2018 RORs the responsible authority did not decide as recommended by the Water Use Authorisation Assessment Advisory Committee (WUAAAC). The Deputy

⁹ Record p654.

¹⁰ Record p294.

¹¹ Record p721 *et seq.*

¹² Record p836.

Director-General (DDG) commented thus, ‘Please advise why a licence is not to be issued to replace the Existing Lawful Use.’¹³ It appears, and the respondent’s witness testified that, the ROR was then returned to the case manager to respond to this comment, which led to the revised ROR dated 28 December 2018. When the second ROR landed before the DDG the application is declined as recommended but para 4 was revised as follows:

The application is recommended for a decline. The section 21 (c) and (i) applied for as existing lawful uses could not be verified as such by the Department because prior to the National Water Act, 36 of 1998, section 21(c) and (i) were not authorised or register (sic) by the Department. Section 21(b) for the newly constructed dam is not supported since the catchment in respect of which the application is made is already stressed.¹⁴

11. However, the DDG still raised a query as follows ‘The reasons for decline are not consistent with the activity being applied for Para 1.1 and par 2.2.1. What are you doing to assist the applicant regarding the unlawful activity? (Dam 2).’¹⁵ Paragraph 1.1 on the ROR details what the purpose of the application is. It states that the application is for ‘water uses associated with the upgrading of a weir which was...damaged during the year 2000 floods as well as a newly build dam that was constructed in 2014.’ Other parts of para 1.1 explain the details of existing lawful water uses and registered uses that the appellant holds. Paragraph 2.2.1 headed ‘**Details of the Project**’ details all the construction projects that the appellant had applied for from upgrading the weir channel and the new dam and how water was to be abstracted from the Hout River. The apparent confusion was caused by attempts to combine ELWU with the new use (big dam) and upgrading of the weir.

12. Eventually, the water use licence was not granted, and appellant was notified by letter dated 29 March 2019.¹⁶ The reason provided for the rejection of the application were as follows:

¹³ Record p837.

¹⁴ Record p819-820.

¹⁵ Record p820.

¹⁶ Record p703.

‘Kindly be informed that your application is unsuccessful because the catchment in which the water use applied for is *under stress* and to *allow for continuation of existing lawful water uses.*’ (emphasis added).

A further letter was sent explaining the reason by the Provincial Department on 26 April 2019.

It states that:

The Department wishes to advise you that your WULA has been declined on 29 March 2019 due to the reason that that the catchment in respect of which the application is made is already stressed, such that no additional water allocation can be made, see attached decline letter and your proof of Existing Lawful Water Use for your convenience.¹⁷

GROUNDS OF APPEAL

13. Upon receiving the outcome of the application the appellant noted an appeal. The appeal is based essentially on two broad grounds although these are stated laboriously in the amplified notice of appeal.¹⁸ These grounds are that:

13.1. Firstly, that the decision by the respondent is vague and unclear. Appellants avers that it is unclear from the decision and RORs whether the water use licence application was declined because the catchment is stressed to the extent that it could not accommodate both existing lawful water uses and the new uses, or whether the application failed because appellant holds ELWU.

13.2. Secondly, the appellant alleges that the respondent misconceived the purpose of its application and failed to consider the supporting documents submitted in support of its application, thereby breaching section 27(1) of the National Water Act. Failure to properly apply its mind to the factors in section 27(1), in the context of scientific reports submitted by the appellant led to an irrational, arbitrary and capricious decision

¹⁷ Record p704.

¹⁸ Record p862 to 899.

by the respondent. Therefore, according to the appellant this is an error of law and fact justifying upholding the appeal.¹⁹

14. In explaining these grounds, the appellant claims that the respondent ignored the advice and recommendations of their internal experts, some of whom recommended issuance of the licence subject to various conditions.²⁰ For example, inputs from the **Civil Design** section of the respondent recommended the licence be issued subject to the appellant,

- a) Getting the designs and construction for the new dam 2 approved by Dam Safety Office.
- b) Clarifying the method relating to how damage to the watercourse will be minimised during upgrading of the weir.
- c) The flow diversion method to be detailed if the Hout River is a perennial river.
- d) Details of downstream culvert design and impacts on the watercourse of the culverts.
- e) A professional engineer to sign off on all designs and drawings.²¹

15. The **Abstraction and Instream Use** section recommended issuance of the licence subject to the following conditions:

- a) That the Environmental Management Plan/Rehabilitation must be implemented.
- b) Flow abstraction from the weir to the canal to be measured.
- c) The reserve to be implemented and abstraction rates determined.
- d) Flow control on the canal by means of a sluice or gate.
- e) Submission of a Maintenance Plan.
- f) Respondent's Provincial office to finalise the section 53 (1) Directive and levy a fine on the appellant.
- g) Dam Safety and Civil Engineer to comment.²²

The internal expert sections of the respondent provide these recommendations narrowly based on their expertise. In other words, they do not review and pronounce on the whole water use licence application. Theirs is to give specialist input culminating in the ROR which is an integrated internal report.

¹⁹ Record p876-877.

²⁰ Record p816 to 817.

²¹ Record p817.

²² Ibid.

QUESTIONS BEFORE THE TRIBUNAL

16. In order to dispose of this appeal the Tribunal must act in terms of its Rules which stipulate that appeals to the Tribunal take the form of a rehearing and includes admission of new evidence. A party may call witness and lead evidence as they wish, provided the other party has an equal opportunity to test the evidence and witness led.
17. Arising from the first ground of appeal, the Tribunal must decide if that ground is well-founded in law and fact. Specifically, whether there is an lack of clarity regarding whether the decision by the respondent rejected the application due to the catchment being stressed and the effect of that decision on appellant's ELWU.
18. Secondly, whether the decision show a failure to substantively do a section 27(1) analysis and consideration of the scientific documents submitted by the appellants. Furthermore, whether this failure led to errors in law and fact, and irrational decision.

SUBMISSIONS BY THE PARTIES

19. The appellant's case has already been outlined above where I explained the grounds of appeal.
20. The appellant did not call any witnesses, rather elaborating the facts and scientific documents on the basis of which the grounds of appeal were formulated. The appellant submitted that it never intended to apply for authorisation of its ELWU but only the new dam. It claimed that the respondents officer suggested a consolidation which it later bungled by failing to consider the material documents provided as suggested by the respondent. This resulted in the respondent not only, misconstruing the nature of the application, but also arriving at the wrong decision factually and legally. This included a failure to do a proper section 27(1) analysis or demonstrating that the stress of the

catchment was considered in the context of policy and technical documents. In this regard, the appellant content that the reference to the catchment being stressed was an afterthought and irrelevant consideration because the RORs do not mention which documents the respondent relied on in arriving at that decision.

21. The appellant challenged the respondent's reliance on the National Water Resource Strategy [1] and the Internal Strategic Perspective (ISP)²³ for the catchment both of which indicated that the Quaternary Area A71E was water stressed as most water had been allocated and no further new surface use licences were to be issued.²⁴ The appellant argued that these reports are outdated and contradicted by their own Hydrogeological and Water Yield Reports that demonstrated that the catchment had enough water to be allocated. Thus, the appellants argued that there was sufficient water in the Hout River to fill the new Dam 2 during a 1 in 5 year or greater flooding event.²⁵
22. The appellant submitted eight specialist studies as requested by the respondent, but the appellant argued that the decision only shows that only three were considered to any length by the respondent. In addition, the appellant argued that the respondent did not have any data to support its decision. There was no WARMS data, no data on illegal uses, no reserve determination, or the nature and quantity of ELWU.²⁶
23. The appellant submitted that the application fulfilled the criteria in section 27(1) of the National Water Act in that the expanded agricultural operation would provide ninety-one

²³ Record p962 to 1053, the whole Internal Strategic Perspective: Limpopo Water Management Area (ISP) Version 1 of November 2004 is reproduced.

²⁴ Record p1223 to 1224, and p 968 (ISP).

²⁵ Record p426 to 427.

²⁶ On the record extensive data was presented. The appellant's own section 27(1) motivation relies on data held by the respondent, see Record p42.

permanent jobs and twenty new jobs. In addition the appellant also contribute to food security. In detail the appellant's section 27(1) motivation consists of the following:²⁷

Section 27(1) (a) existing lawful water uses

Refer to Section 5 for a discussion on existing water use rights. Registration certificate 27009219 for abstracting water from borehole for irrigation purposes has been validated as existing lawful water use. The owner has existing irrigation rights associated with the weir.

Section 27(1) (b) the need to redress the results of past racial and gender discrimination

The applicant is a farmer who provides employment and housing to locals in the agricultural sector. Potable water for human consumption is provided by the farmer to labourers residing within the study area.

Section 27 (1) (c) efficient and beneficial use of water in the public interest

Due to the proposed development, local people will receive temporary (for duration of construction period) employment opportunities and food production (potatoes, onions, and other vegetables) will increase for local (South African) consumption.

Section 27 (1) (d) the socio-economic impact-(i) of the water use or uses if authorised;

Job creation - due to the proposed development, local people will receive temporary (for duration of construction period) employment opportunities. A further estimated 20 permanent employment opportunities will be created by means of increased food production if the water use is authorised.

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

Further permanent employment opportunities will not be created if the water use is not authorised.

Section 27(1) (e) any catchment management strategy applicable to the relevant water resource

The National Water Resource Strategy Rev 2 for South Africa was published in August 2013 proposing 9 Water Management Areas for South Africa. The study area falls within the Limpopo-North West Catchment Management Area.

The Limpopo-North West Catchment Management Agency was established on 23 May 2014 only, and therefore no management strategy exists yet for the catchment.

²⁷ Record p41 to 44.

Section 27 (1) (f) the likely effect of the water use to be authorised on the water resource and on other water users

The construction of the breached weir falls within the 1:100 year flood line of the Hout River, and the construction of the dam falls within the aquatic buffer zone of the Hout River.

Water abstraction might result in less water being available to downstream users.

Section 27 (1) (g) the class and the resource quality objectives of the water resource

According to the Limpopo Water Management Area: Water Resource Situation Assessment Report. The Default Ecological Management Class (DEMC) is Class D - (largely modified), The Present Ecological Status is Class B - largely natural, and the suggested future management class is a Class A – unmodified natural.

Section 27 (1) (h) investments already made and to be made by the water user in respect of the water use in question

Upgrading of the weir- R 465, 000

Construction of the dam - estimated at R 250, 000

Consultant fees - estimated at R 250, 000

Section 27(1)(i) the strategic importance of the water use to be authorised

The Hout River is a Phase 2 FEPA identified in moderately modified (C) rivers. The condition of these Phase 2 FEPAs should not be degraded further, as they may in future be considered for rehabilitation once good condition FEPAs (in an A or B ecological category) are considered fully rehabilitated.

Section 27(1)(j) the quality of water in the water resource which may be required for the Reserve and for meeting international obligations

Surface water quality

The proposed development should have no residual impact on the water quality of the Hout River if recommendations pertaining to construction of the dam and the weir made in the IWQQMMP (Refer Annexure 1) are implemented.

According to the Limpopo Water Management Area: Water Resource Situation Assessment Report (2003), the Hout River ecological reserve was determined as being $0,2 \cdot 10^6 \text{ m}^3$ per annum, and the human reserve to be $1,07 \cdot 10^6 \text{ m}^3$ per annum, with the total potential yield of the Hout River being $3,9 \cdot 10^6 \text{ m}^3$ per annum.

The Hout River is a tributary of the Sand River, which is a tributary of the Limpopo River. The Limpopo River basin is shared by Botswana, Zimbabwe, South Africa, and

Mozambique and therefore SA has to meet international obligations including the SADC Protocol on shared watercourses.

Section 27 (1) (k) the probable duration of any undertaking for which a water use is to be authorised.

As the financial investment already affected is significant, it is proposed that the license be issued for the upper limit period of 40 years.

24. Public participation is an integral requirement for the water use licence application process.

The appellant explained that they conducted public participation for the section 24G NEMA rectification application in May 2014, with the public participation notices being published on 14 May 2014.²⁸ The water use application documents show that on 15 August 2013 (before the notices referred to above) the appellant conducted a Focus Group Meeting with downstream farmers.²⁹

25. In response, the respondent called on witness the Chairperson of the WUAAC, a

Departmental Scientist for the respondent based in Limpopo Province. The witness testified that he held the degrees of Bachelor of Science, Bachelor of Science Honours.³⁰ The witness testified that the water use licence application by the appellant was of various activities which included new uses (Dam 2) and consolidation of that new use with several existing uses in relation to the weir, canal and dam 1. The witness explained that the respondent did not coerce the appellant into a consolidated application, but they gave the appellant standard pre-application advice on the efficiency of having one water use licence providing for all their entitlements. At no stage during the application process did the appellant indicate disagreement with the consolidation approach.

²⁸ Record p45.

²⁹ Record p46.

³⁰ The testimony regarding the qualifications of the witness was not queried by the appellants during the hearing. They sought to obtain certification way after the hearing which request the Tribunal deemed immaterial and a distraction.

26. The Tribunal heard evidence explaining the decision by the respondent. It was stated that there should be no confusion because ELWU cannot be affected by a subsequent negative decision. The witness explained that the appellant has confirmed ELWU for the small Dam 1, and a borehole.³¹ However, the weir and channel (section 21(c) and (i) uses) were not confirmed to be lawful, and in this application could not be confirmed, hence the decision alluded to continuation of existing uses. The weir and channel must be dealt with through the validation and verification process which the appellant is still going through. This is indicated by one of the boreholes that has been registered but the lawfulness of which is not yet determined.³² It appears the appellant was hoping that by consolidating the application it could also at once get licenses for registered uses whose lawfulness has not been confirmed. For example, the wate use application states that ‘a Section 21 (c) water use is applied for, for the upgrading of the breached weir, which impedes flow in the Hout River.’³³

27. The witness testified further that all water is connected in the water cycle and any purported distinction between underground water and run-off is unscientific. This was in response to the appellant’s claim that the new Dam 2 was meant to capture only run-off during heavy rains, and not to divert water from the Hout River. He commented that capturing run-off reduces water yield and flows in a catchment. In any case the application was clear that Dam 2 weas meant to capture overflow from Dam 1.

³¹ Record p20

³² Record p21 and 28 to 30.

³³ Record p29. The upgrading is an activity that require authorization but was already undertaken before this water use license application.

28. Evidence led confirmed that the National Water Resources Strategy [1] of 2004 and ISP provides information on water assessments done by the respondent. These assessments included water availability in all catchments, and reconciliation of available and licenced water. The planning horizon of the 2004 Strategy is up to 2025. The new National Water Resources Strategy [2] of 2013 builds upon the 2004 Strategy and does not seek to, nor was it developed to update information and data in the 2004 Strategy. The appellant had contended that even assuming it was legitimate for the respondent to rely on the National Water Resources Strategy 2004 data was outdated. The water balance and reconciliation assessments done in 2004 are still used by the respondent in decision-making together with documents submitted by applicants. Information before the Tribunal shows that such water use data was updated in 2006.
29. The respondent's witness commented that the documents which are considered when evaluating a water use licence application are broader than what is listed in RORs.³⁴ This was because, apart from the ROR the water use licence application has extensive annexures, and the respondent also considers extensive internal policy and technical documents and reports relevant to an application and catchment area to arrive at a decision.
30. The witness stated that there was a full section 27(1) evaluation as reported in both RORs and explained why there were two RORs as detailed in this decision above.³⁵ He continued to explain that the recommendations by internal expert sections of the respondent are just recommendations limited to the speciality of the section concerned. The section experts do not necessarily consider all documents and internal strategies or reports which may not be

³⁴ Record p810 (List of Documents in ROR).

³⁵ Record p817-819. Showing how respondent considered the full scope to section 21(1) in relation to the appellant's water use application.

relevant to the aspect of the application they are required to consider. For example, Civil Engineers focus purely on the design of the waterworks and could recommend approval of the designs as being sound even if there may in fact be no water available in the catchment concerned.

31. The witness explained further contrary to the appellant's submissions,³⁶ there were downstream water users who had objected to the application, and also the respondent considers the ecological reserve or ecosystem uses downstream which may be impacted with or without complaints from other users. In this case however, there were many objections by downstream farmers.
32. The witness also explained that the recommendations to the DDG did not seek to void the appellant's ELWU which cannot be revoked through an application. Rather, his recommendation was that the new use for Dam 2 and upgrading of the weir (as an ELWU) be declined because they could not find proof that the weir was an ELWU. Otherwise, the verified ELWU for the small dam (Dam 1) and boreholes remain intact and the appellant is at liberty to obtain verification of other historical uses should it so decide.

ANALYSIS

33. The documents submitted before the Tribunal are extensive and include documents relating to the rectification Environmental Authorisation for the new Dam 2. The water use licence application contains various specialist studies. These include the following which the Tribunal has considered,

- a) Environmental Audit Summary November 2016
- b) Aquatic Specialist Report (Confluent Environmental) November 2016
- c) Hydrological Assessment Report (Engeolab) 29 November 2016

³⁶ Record p897. (Appellants submitted that: 'The speculative, adverse impacts on downstream users as a **Reason for Refusal** is a red herring. The **Respondent** has no data available by virtue of which such alleged users have been identified and the quantum of the water users have been determined.'

- d) The Comment and Response Report for the Construction of an Irrigation Dam.
- e) Action Plan, 21 October 2016.
- f) Rehabilitation Plan
- g) Flood Yield Study Report (FJ De Lange and G De Villiers of Nyeleti) 6 January 2018.
- h) Hydrological Calculations for the De Loskop Weir.
- i) Integrated Water Quality and Quantity Management and Monitoring Plan for the De Loskop Dam and Weir (Bokamoso) July 2015.

34. In addition, the Tribunal also considered the National Water Strategy documents as mandated by section 7 of the National Water Act, relevant provisions of the Act, and section 27(1) criteria. The Tribunal also considered the Internal Strategic Perspective Report publicly available.

35. In relation to the first broad ground of appeal, based on the evidence and documents submitted by the parties, there is no basis for any confusion as to what the respondent's decision entailed for the appellant's ELWU. This is a non-issue given that, by operation of law if an application which seeks to consolidate ELWU and new water uses fails, the vested rights are not affected. The letter communicating the decision clearly states that the new use application is refused due to the catchment being under stress and that refusal was made '...to allow for continuation of existing lawful uses.'³⁷ Therefore, as the respondent confirmed, there is no confusion that the appellants remain entitled to ELWU that have been properly validated by the respondent.³⁸ Any outstanding registered but unconfirmed existing uses should be dealt with in terms of the legislation and the Tribunal is not seized with such issues in this appeal.

36. The second main ground of appeal is that the respondent failed to properly consider the reports before it as well as apply section 27(1) properly resulting in errors of law and fact and an incomprehensible decision.

³⁷ Record p821.

³⁸ Record p

37. The documents submitted by the appellant in support of its application³⁹ are at odds with the technical and strategic reports compiled by the respondent. In particular, the *Hydrological Assessment Report* (2016) by Engeolab attempts to assess water availability, flow analysis and recommends the amount of water that may be available for abstraction from the Hout River through the weir. This report is based on a study of the Hout River Catchment only, which is limited relative to the Sand Catchment Area and the Limpopo Water Management Area. The specialist report makes no reference whatsoever to the public available reports and studies by the respondent on water availability and reconciliation documented in the National Water Resources Strategy[1] or the ISP report.

38. While indicating that there may be water available, the report is clear that surplus water is only available in January with optimum abstraction months generally being from November to March.⁴⁰ At the weir the amount of water available in January would be 476 488m³/year.⁴¹ The report states further that this amount accounts for upstream water users and the downstream ecological environmental reserve. However, in addition to determining the available water the specialist report cautions that:

The volumes of water being diverted from the Hout River to the off-channel storage dam needs to be accurately monitored and measured at the point of diversion so as to ensure the environmental reserve for the downstream users of the river is not affected.⁴²

This is a critical word of caution and demonstrates that despite the appellant's disagreements with the respondent, the catchment area is water stressed and receives little rainfall. What is important to note also is that the total amount that the appellant foresees storing in the small (86 326 m³) and big dam (650 000m³)⁴³ exceeds the amount available

³⁹ Record p582-702.

⁴⁰ Record p338.

⁴¹ Ibid.

⁴² Record p340.

⁴³ Record p827.

annually for abstraction. The National Water Resources Strategy and the ISP report are not merely national level reports, as they contain principles, norms, and specific water availability assessments for each catchment and reconciliation of uses.⁴⁴

39. In terms of a later the Sand Catchment Area in the Limpopo Water Management Area's water availability status is recorded as follows:

The Sand catchment

The Sand catchment is a dry catchment with very limited surface water resources. However, it has exceptional groundwater resources, which have been fully and possibly over-exploited in certain areas. **No surplus water is available for allocation.**⁴⁵

The reports present specific tabulated information about the state of each catchment and Sand has no water available when the rainfall, and surface flow yields are reconciled with allocated uses. The ISP is more assertive in its findings, stating as follows:

The Sand Key Area is a dry catchment with *very limited surface water resources*. However, it has exceptional groundwater reserves which have been fully and *possibly over-exploited*. The water requirements are large compared to the rest of the WMA, but again irrigation is the largest water user, with a requirement of 185 million m³/a. Urban requirements, estimated at 24 million m³/a, are supplied mostly from transfers in from other WMAs.

The catchment is in *serious deficit due to the over-development of irrigators* relying mostly on groundwater and the *very sparse surface water resource*. There is a very real concern that the groundwater resource has been over-exploited but this will require further studies to confirm this. In the interim, *no new licences should be issued except for domestic use*. In the longer term, if can be shown that the groundwater resource has been over-exploited, compulsory licencing may be required in order to reduce abstractions from groundwater to sustainable levels.⁴⁶

⁴⁴ See Record p968, 1025-1027 for Sand Catchment Area data and tables.

⁴⁵ Directorate: National Water Resource Planning, 'Water Available for Allocation per Water Management Area (WMA)' 23 February 2006 p1. This reports states that 'the information given for the water balances of the 19 Water Management Areas (WMAs) are those contained in the recently published Internal Strategic perspective (ISP) reports for these areas, or information from studies conducted subsequent to the ISP studies. It is therefore the most recent available information. It reflects the yield from the current dams (from small farm dams to the large dams supplying big systems), as well as run-of-river use.' (Emphasis original).

⁴⁶ Record p968 (Internal Strategic Perspective Report, 2004) read with the Table 4.15 to 4.17 at p1026 to 1027.

40. Regarding the section 27(1) analysis, the motivation presented by the appellant is shallow and lacks important information necessary to demonstrate that the new Dam 2 is a sustainable and beneficial use of water in the public interest.
41. The appellant's section 27(1) motivation reproduced above⁴⁷ shows, for example, that the appellant regards employment of a few (20) new employees, providing them housing and portable water as sufficient to demonstrate that appellant's water use is contributing to addressing historical injustices.⁴⁸ While this factor is only one factor to be weighed together with the section 27(1) factors,⁴⁹ the application and the documents show insufficient articulation of how the appellant is assisting redressing historical discrimination. No information is provided on how, at a substantive level, historically disadvantaged individuals are part of its enterprise, or how the enterprise plans to include historically disadvantaged persons in substantive benefit from the enterprise's use of public water. Providing a few (20) new farms jobs goes nowhere near meeting the threshold of section 27(1) (b).
42. Indeed, as required by section 27(1)(a) the appellants explain what existing water uses they are entitled to. What is missing is how the ELWU are insufficient to meet the operational water uses required by the appellant. Similarly, the evidence and reports before the Tribunal show that sustainable water use would better be served if the appellant retains its ELWU. In other words as per section 27(1)(d), the socio-economic impacts of refusing the application are negligible relative to the impact of granting the new uses applied for in area where water is overallocated and there is currently no space to accommodate any new water

⁴⁷ See para 22 above. Appellant's section 27(1) Motivation.

⁴⁸ Ibid.

⁴⁹ *Makhanya NO v Goede Wellington Boerdery (Pty) Ltd and Another* [2013] 1 All SA 526 (SCA), para 33, 37 and 39.

users. The latter are invariably historically marginalised emerging farmers whose socio-economic conditions can better be improved by allowing access to water resources and denying holders such as the appellant, the opportunity to further accumulate water use entitlements. These are all relevant factors in terms of section 27(1) beyond the listed considerations.

43. Section 27(1) (c) require the appellant, respondent, and the Tribunal to demonstrate how the proposed water uses advance the objects of the National Water Act in section 2 by promoting use of scarce resources in such a way as to maximise the public interest benefit. The information before the Tribunal and appellant's submissions are unconvincing that approving the new Dam 2 is the most efficient use of the scarce water resources in the Hout River. This is in the context of the water availability and reconciliations in the catchment area. The motivation of employment and food production⁵⁰ provided by the appellant falls short of demonstrating beneficial use which justifies disregarding the documented impacts on the water resources of approving the licence.

44. While the appellant has already invested over R900 000 in the water uses applied for, it is important to clarify that these funds were expended on illegal activities, namely upgrading the weir and construction of the new Dam 2. The appellant understood the risk it was assuming by proceeding illegally with construction and undertaking a water use contrary to sections 4, 21, 22, 40 and 41 of the National Water Act. It was inevitable that section 53 and 151 enforcement powers would be triggered and indeed the possibility of those investments being lost was always real to the appellants. It was not their first time to deal with the respondent and should have reasonably been aware of the need to secure approval before commencing with the activity. This is in a context where other water users had

⁵⁰ See para 22 above.

advised the appellants to do studies and obtain approval as shown in the public participation report.

- 45.** Locking the amount of water requested by the appellants for forty (40) years⁵¹ when the objective of the National Water Act is to enable the respondent to rationale access to water resources and dislodging water held by those historically advantaged is not consistent with the objects of the legislation. Furthermore, the proposed uses are not strategic in the context of the status and situation of water supply and balance in the catchment. The uses are equally not strategic when considered in the context of national water strategic objectives elaborated in the National Water Resources Strategy [2] and section 2 of the National Water Act.
- 46.** Section 27(1)(f) requires us to consider ‘the likely effect of the water use to be authorised on the water resource and on other water users.’ To fully understand these effects, I deal below with the objections received and how they demonstrate that the appellant has not shown how the water uses applied for will not prejudice downstream users as well as the ecological reserve.
- 47.** A glaring flaw of the appellant’s application is that information used in the section 24G NEMA public participation is presented as if it was conducted for the water use licence application. The feedback from the interested and affected parties shows that they were mainly concerned with water impacts. However, even discounting the lack of a targeted public participation process, most of the comments from the interested and affected parties equivocate the appellant’s key submissions. While the appellant claims that there are no downstream water users, the record has sharp objections from downstream water users in

⁵¹ Section 27(1) (k), see para 22 above.

the Hout River. I note, in particular, the objections complained generally of lack of sufficient information from the documents provided by the appellants. The users also expressed disappointment that at the Focus Group Meeting held convened by the appellant there was consensus that there was not enough water for further abstraction from the Hout River.

48. An interested an affected party noted that,

During our recent meeting at Richard Schulenburg's home a conclusion was reached that no water was to be diverted from the Hout river. *This was agreed by all the parties that attended the meeting.* In failure to keep to the agreement by not completing the impact study and also allowing the unlicensed dam to reach 100% capacity, your party is withholding the downstream farmers' their right to water.

Without river flow through and to the downstream farms, underground water caves are unable to full up that lead to lower water levels that result in higher nitrate levels. This has a massive effect on crops due to the effect that too high level of nitrate causes plants to die. Allowing the river to flow, the caves mentioned can fill up and suppress the nitrate levels to a manageable level. *It is worth mentioning that this is the first descent amount of rain in 4 years* that would allow the river to flow, unfortunately some elements are preventing the normal flow.⁵²

These objections point to water scarcity, poor rainfall, and the need for water users in the area to do most with their existing entitlements.

49. It therefore appears that the water users around the Hout River are agreed that there is not much for allocation. Seemingly, the appellant reneged on this agreed position. Another downstream water user objected as follows,

Refer your notice received by mail on the 13 September 2016 regarding the Draft Environmental Assessment Report for Rectification in terms of Section 24G. [We]...do hereby object to the complete draft report and therefore please do not submit the report for approval.

⁵² Record p343-345 (emphasis added).

The crucial aspects were not handled in the report with various contradicting statements. I am only going to in light certain aspects to keep the complaint short. It does not mean that I agree with all the other statements made.

WEIR AND CHANNEL

The weir and channel that was repaired is not situated on the property of the applicant. Did the applicant obtained permission from the government to conduct the said works?

- I agree that there was an existing weir and channel and I do not object to the repair there of as such only to the upgrading and alteration to the weir and channel.
- The current situation is that the river course is diverted from its original course, *the weir that is currently upgraded divert the total capacity of the river and not the access as stated.*
- The newly upgrading of the weir and channel divert the water to dam 1 and once the dam is full the overflow runs off to dam 2, *only when dam 2 is full the overflow eventually runs back to the river.*
- As with the previous water right and construction principals of offset dams and weirs, it was as such that once dam 1 is full *the inflow becomes the outflow, and the water will keep to its natural flow.* (Refer to above par)...⁵³
- This means that he *will utilized much more water than what he is applying for.*
- This can happen several times per season and no water will reach downstream farmers.⁵⁴

50. These objections on record, which the appellant does not address anywhere, indicate the general consensus by water users in the catchment that there is water scarcity and indeed as the respondent concluded there is no water to allocate, unless existing users surrender some entitlements. These objections also show how the appellants failed to motivate sufficient in terms of section 27(1)(f).⁵⁵ Indeed in its own documents the appellants acknowledges that '[w]ater abstraction might result in less water being available to downstream users.'⁵⁶

⁵³ Record p347.

⁵⁴ Record p349 (emphasis added).

⁵⁵ Section 27(1) (f), 'the likely effect of the water use to be authorised on the water resource and on other water users.'

⁵⁶ Record p43.

51. The conclusion that can be drawn from applying the objects, principles and framework of the National Water Act to the information and specialist documents before the Tribunal is that there is no water available in the catchment for further allocation. However, even assuming there was water available for allocation, the water use licence application does not pass the threshold in section 27(1) and the appellant has failed to convince the Tribunal that granting new uses is strategic, efficient, and beneficial use in the public interest or in the interests of the socio-economic context of the catchment and country. The water uses do little to redress the results of past racial and gender discrimination.
52. Procedurally, the appellants also did not conduct a satisfactory public participation process for the water use licence application. Not only did it use the documents for the section 24G NEMA environmental authorisation but failed to effectively address the comments and objections received most of which relate to the water scarcity. The specialist reports do not sufficiently address the objections raised.

ORDER

53. The appeal be and is hereby dismissed.

HANDED DOWN AT PRETORIA ON THIS 14th DAY OF JULY 2022.



T. Murombo

Panel Chairperson, Additional Member of the Water Tribunal