

IN THE WATER TRIBUNAL

Case number: 05/19/KZN

Delivered on: 31 MAY 2022

In the appeal of:

EDWIN RONALD DRIEMEYER

APPELLANT

AND

DEPARTMENT OF WATER AND SANITATION

RESPONDENT

JUDGMENT-MARA APPEAL

1. INTRODUCTION:-

1. This matter concerns an appeal before the Water Tribunal brought in terms of section 148(1)(j) against the decision of the Respondent to issue a directive in terms of section 53 of the National Water Act 36 of 1998 (“the Act”).
2. The correct Applicant ought to have been Zenco Farming Brothers CC, the entity that conducts the farming activities and built the dams that are at issue in this appeal. However, the appeal was brought in the name of Erwin Driemeyer, the responsible person for Zenco Brothers CC. There was no challenge to this procedural aspect and as such I accept that Mr Driemeyer is the “Appellant”. I must however state that in an affidavit titled

*“Appellants’ Affidavit”*¹ it is stated that Zenco Farming Brothers CC is the appellant. The judgment is therefore in respect of Zenco Farming.

3. It is to be noted that the footnote above refers to the Eldorado Appeal Bundle although this judgment is about the Mara Appeal. Appellant used one affidavit for both appeals. Also, the same evidence was led for both appeals. When asked about possible consolidation both parties recorded the preference that the two appeals should have separate judgments.
4. Mara is a farm which for purposes hereof is made up of the following portions:-
 - 3.1. Portion 3 Waayplaats
 - 3.2. Remainder of Portion 1 Strydpoort.
5. At issue is the following:-
 - 3.3. Building of a water storage dam without authorisation; and
 - 3.4. Building of two slurry dams without authorisation.
6. Respondent is the Department of Water and Sanitation. It is the custodian of the National Water Act 36 of 1998 (NWA) and is responsible for its implementation.
7. On the 5th September 2018 Respondent issued a “Notice of Intention to issue a directive in terms of Section 53(1)(a) of the NWA”² (the Notice).
8. The Notice listed the following contraventions of the NWA (contraventions in the sense that the mentioned activity was done without proper authorisation or authority in terms of the NWA)

¹ paragraph 1, page 122, Eldorado Appeal Bundle

² Annexure AA1, page 19, Mara Bundle

- *Section 21 (a) Taking water from a water resource.*
- *Section 21 (b) storing water*
- *Section 21 (c) impeding or diverting the flow of water in a watercourse.*
- *Section 21 (i) altering the bed, banks, course or characteristics of a watercourse without authorisation*
- *Section 21 (g) disposing of water in a manner which detrimentally impacts on a water resource” (two slurry dams)*

9. The Notice went further and stated that the dam (as opposed to the two slurry dams) was an in-stream dam. An in-stream dam is a dam that is built on a watercourse. This means that the dam may impede the flow of water to or in a river.

10. The last contravention was stated to be as follows:-

“Failing to release water from Mara Dams 1-3: Uthukela District Municipality”

2. ANALYSIS OF THE CONTENTS OF THE NOTICE OF INTENTION TO ISSUE A DIRECTIVE

11. The notice of intention to issue a directive is premised on section 22 (1) of the NWA, same is as follows:-

“A person may only use water-

(a) without a licence

(i) if that water use is permissible under schedule 1,

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

(iii) *if that water use is authorised by a licence under this Act; or*

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

12. It was common cause on the papers and during the hearing that Appellant's water use in the following dams was not in accordance with Section 22 (1) of the Act:-

1.12.1. The dam called Mara dam 3. The Notice refers to this dam as the unlawful dam on Portion 3.

1.12.2. Two slurry dams. The Notice to issue a directive merely stated that "two slurry dams were observed" However, during the hearing it became clear that these two dams were not authorised.

13. Apart from the unauthorised activities pertaining to Mara dam 3 and the two slurry dams, the Notice also made mention of two other dams in Mara and these were dam 2 and dam 3. The Notice does not say in what manner did these two dams contravene the NWA.

14. However for both dam 2 and dam 3 the following two line comment is made:-

- *This is an in-stream dam and the dam was observed full of water*
- *Pump house observed below dam wall but no release of water was observed on the dam.*

15. The Notice then went further and stated:-

In accordance with Section 3 (2)(b) of the Promotion of Administrative Justice Act, Act no 3 of 2000, I hereby afford you an opportunity to make representations in writing to me within 5 (five) working days of receipt of this Notice if you believe there are any compelling reasons why a Section 53 Directive should not be issued to you; and or provide proof of water use authorisation for the water use activities outlined above (own underlining)

16. At this juncture it is important to refer to the structure of the National Water Act and therefore the context of the Section 53 Directive.

3. LOCATION OF SECTION 53 IN THE NWA

10. Section 53 is found in Chapter 4 of the Act. The title of chapter 4 is “Use of water” and has the following explanatory note.

“As this Act is founded on the principle that National Government has overall responsibility for and authority over water resources management, including the equitable allocation and beneficial use of water in the public interest, a person can only be entitled to use water if the use is permissible under the Act. This Chapter is therefore of central significance to the act, as it lays the basis for regulating water use. The various types of licenced and unlicensed entitlements to use water are dealt with in detail.”

11. It is important to note that the explanatory note informs inter alia that Section 53 is used for regulating water use.
12. Section 53 itself is in Part 10 of Chapter 4, Part 10 is titled “contravention of or failure to comply with authorisations” and has the following explanatory note.

“This part deals with the consequences of the contraventions of the licence conditions. These range from the responsible authority requiring the licensee to take remedial action, failing which it may take the necessary action and recover reasonable costs from that person, to the suspension or withdrawal of a licence....

13. From this explanatory note we learn that Section 53 is for dealing with contraventions of water use authorisations.

14. Section 53 itself provides as follows:-

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

(a) any provision of this Chapter;

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

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

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

15. The operative word that triggers section 53 is “Contravene”. The Collins dictionary gives the following meaning of contravene:- *to contravene a rule is to do something that is forbidden by the law or rule.*

16. In building dam 3 and storing water in it Appellant engaged in the following water uses

- Section 21 (a) – taking water from a water resource
- section 21 (b) –storing water

- Section 21 (c) - impeding or diverting the flow of water in a water course
- Section 21 (i) altering the bed, banks, course or characteristics of a watercourse without authorisation.

17. None of the above water uses were authorised. That is common cause.

18. Appellant did not therefore “contravene a condition which applies to any authority to use water” as envisaged in section 53 (a)(c). In the circumstances Appellant’s situation is strictly speaking not the one falling under Section 53. What may however bring Appellant within the ambit of section 53 is section 22, NWA.

4. SECTION 22, NWA

19. Section 22 is also part of Chapter 4, Water Use and is titled “Permissible Water Use”

This section sets out three circumstances under which a person may use water without a licence. Appellant is not covered by any of those circumstances.

20. In the circumstances Appellant could build Dam 3, and engage in the associated water uses mentioned in paragraph 19 above only if it had a licence.

21. Appellant’s contravention then was that it did not have a licence. To rectify that Appellant would have to apply for a licence.

5. APPLICATION FOR LICENCE

22. Part 7, Chapter 4 is titled “ individual applications for licences” and has the following explanation:-

“This part sets out the procedures which apply in all cases where a licence is required to use water, but where no general invitation to apply for licences has been issued

under Part 8..... In considering an application, a responsible authority may require additional information from the Applicant, and may also require the Applicant to undertake an environmental or other assessment, which assessment may be subject to an independent review.”

23. The proposal by Nature Stamp, an environmental assessment entity to do a study as part of its representations in respect of the Notice to issue a directive was therefore in conformity with the NWA. In other words one of the actions that Appellant would have to do in order to get a licence would be an environmental impact assessment.
24. Section 40 of Part 7 Chapter 4 has the following provisions:-
 - The title is “Application for licence”
 - (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) *A responsible authority may decline to consider a licence application for the use of water which the applicant is already entitled to by way of an existing lawful water use or under a general authorisation.*
25. From the above provisions of Section 40 Appellant’s position would be as follows:-
 - 25.1. As a person wishing to obtain a licence to use water Applicant was compelled to apply to the relevant authority for a water use licence.
 - 25.2. The relevant authority would in terms of Section 40 (a) consider the licence application.
 - 25.3. Because Appellant was not already entitled to water use by way of an existing lawful water use or under general authorisation the relevant

authority would have to consider his water use application. Respondent does not have a discretion not to consider the licence application. It was therefore incorrect of the Respondent to refuse to consider Appellant's application for a water use licence.

6. *THE NOTICE OF INTENTION TO ISSUE A DIRECTIVE (THE NOTICE)*

26. Having set out the context of the Section 53 Directive. I now turn to the Notice to issue a Directive. The notice is Annexure AA1, Mara Bundle.
27. Although it is only Dam 3 in Mara that is unlawful and as such a contravention of section 22 (1), the Notice lists 4 dams which it refers to as Dam 3, Dam 2 unlawful dam on Portion 3 (this is the dam Appellant calls dam 3 and is the subject of this Appeal) and Dam 1.
28. The Notice does not state in what manner are dams 1,2 ad 3 in contravention of section 22 (1) of the Act.
29. Because the Notice does not say that any of the 3 dams are unlawful (as opposed to dam 3 on portion 3 which is alleged to be unlawful) the assumption is that the Notice accepts that the 3 dams are lawful. The hearing was thus conducted on that basis.
30. The Notice stated that all three dams were observed full of water and in all three dams no release of water was observed. Further it was noted that all three dams are in-stream dams. It was explained during hearing that in-stream dams are dams that are built on a water channel.
31. It is to be noted that the releasing or not releasing of water is not an indicated water use in terms of Section 22 (1) of the National Water Act.

31.1. The requirement for releasing water is found in General Notice 538 of 2016 in *Government Gazette* 40243 dated 2 September 2016, commencement date 2 March 2017.

31.2. Section 5.1 of the above Notice has the following provision:-

“1. Water stored in terms of this authorisation may only be stored off channel. The 3 dams in Mara were all in-stream, i.e. in channel dams.”

31.3. The above dams were therefore not covered by the General Authorisation but were governed by the licences. It is common cause that these dams were authorised either in terms of a licence or because they were constructed prior to the NWA coming into force and constituted existing lawful uses. There is no indication in the directive that the dam licences had the condition that water must be released.

31.4. However, it is difficult to comprehend how non-release of water per se could be seen as a contravention even in terms of the General Authorisation because the General Authorisation provides as follows:-

“5.1.2. retaining structures for the storing of water in terms of this authorisation that are constructed after this authorisation comes into effect must have outlet works that enable the full storage volume to be released within 30 days”

32. In the circumstances the Notice to issue a directive was clearly erroneous in including Mara Dam 1, and Mara Dam 2 in its stipulation as to contraventions of water use. This was the first source of confusion. Unfortunately it also puts a question mark on how well the Responsible Authority understood application of the NWA.

33. The second source of confusion pertains to the two slurry dams. All that the notice states is that two slurry dams were observed. There is no mention of a contravention.
34. The erroneous nature of the Notice is relevant because in its paragraph 3 it provides as follows:-
- “In accordance with Section 3 (2)(b) of the Promotion of Administrative Justice Act, Act no 3 of 2000, I hereby afford you an opportunity to make representations in writing to me within 5 (five) working days of receipt of this Notice if you believe there are any compelling reasons why a section 53 (1) Directive of the National Water Act of 1998 should not be issued to you; and or provide proof of water use activities outlined above”*
35. Appellant could not provide water use authorisation for not releasing water on Mara Dam 1, 2 and 3, there being no such water use authorisation needed in terms of the NWA. Therefore no representations would be forthcoming thereto.
36. Appellant would therefore have to make representations only in respect of the unlawful dam built on Portion 3 and the two slurry dams. However, there was no clarity as regards the contravention of the two slurry dams.
37. Section 53 of the NWA does not make provision for making of representations hence reliance on the Promotion of Administrative Justice Act, Act no 3 of 2000 (PAJA).
38. Section 3 of PAJA is titled “procedurally fair administrative action affecting any person and provides as follows:-
- “(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.*
39. (a) *A fair administrative procedure depends on the circumstances of each case.*

(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection 4, must give a person referred to in subsection (1)- (i) an adequate notice of the nature and purpose of the proposed administrative action.

(ii) a reasonable opportunity to make representation.

40. The Water Tribunal is not a reviewing body but is a so called wide appeal body. In my mind applied to the present facts this means that what we will be adjudicating on is the following:-

40.1. Whether Appellant was afforded the procedural fairness stipulated in Section 3 of PAJA in the sense of being given a reasonable opportunity to make representations;

40.2. Whether any representations were made by the Appellant, or on behalf of the Appellant, and if same were taken into consideration in making the decision to issue the Directive; and

40.3. Whether the decision to issue the Directive was reasonable in the circumstances, having regard also to the considerations set out in section 27 of the NWA. These are considered further below.

7. REPRESENTATIONS MADE BY NATURE STAMP ON BEHALF OF APPELLANT

41. During the hearing Appellant presented the same evidence for both appeals. I had from the onset voiced my concerns about such an approach due to possibility of confusion. The general feeling from both counsel however was that, that was the most efficient approach.

42. Appellant in its affidavit filed in support of both appeals avers as follows in paragraph 15 thereof:-

In 2015 Appellant appointed Nature Stamp, an environmental assessment entity, to assist the appellant to regularise its position. Nature Stamp approached the Department of Economic Development, Tourism and Environmental Affairs in 2015 to rectify the position in respect of Dam 3. The approach was also made in respect of Dam 1 Eldorado.

43. The above statement is incorrect insofar as it implies that Nature Stamp compiled a report in respect of Dam 3. This observation is reinforced by the following:-

- 43.1. At page 12, unnumbered paragraph two from the top, the IWULA report (this report appears on page 54 et seq. Mara Appeal bundle) avers as follows:-

“The 2014 dam, which is “Dam 3”, was omitted from the initial Section 24 (G) application by Nature Stamp since the property on which “Dam 3” was built was only purchased by Zenco Farming Brothers CC in 2015 and was considered a separate farming entity. Zenco Farming Brothers CC did not inform Nature Stamp of “Dam 3” because Zenco Farming Brothers CC thought that the Waayplaats farm (on which “Dam 3” was built) had to be treated as a different entity because it is on a different title deed than the property on which “Dam 1” was built.

- 43.2. At page 25, second paragraph of the IWULA report titled “Existing Impacts” the following appears:-

“According to the Watercourse Assessment that was conducted by Nature Stamp in June 2020, the following existing impacts were identified in regards to the watercourses in the proximity of Dam 3.”

- 43.3. Note must be taken that the Nature Stamp report on Dam 3 was only done in 2020.
44. Respondent was therefore correct when in paragraph 9 of its statement of grounds of opposing the appeal it cryptically stated *“The Appellant did not make any representations.”*
45. Section 3 of the Promotion of Administrative Justice Act no 3 of 2000 is titled *“Procedurally fair administrative action affecting any person”* and subsection 2 (b) (a) (ii) thereof provides as follows:-
“In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection 4, must give a person referred to in subsection (i) a reasonable opportunity to make representations.”
46. The person referred to in subsection 1 is a person whose rights or legitimate expectations would be materially and adversely affected by the administrative action. In my mind Appellant is such a person.
47. The exception mentioned on subsection 4 applies where it is reasonable and justifiable in the circumstances for an administrator to depart from the requirements of procedural fairness. Respondent did not raise any exceptional circumstances in both its papers and during the oral hearing.
48. The Notice to issue a directive gave Appellant 5 working days within which to give compelling reasons why the Section 53 (1) Directive should not be issued.

49. The Notice to issue a directive had also contained in it what would be the contents of the Directive. Those contents would be:-

“[3.1] Within 2 working days cease all unlawful water use activities.

[3.2] Within fourteen(14) working days of issue of a directive, appoint at your own expense a relevant environmental specialist to assess the impacts of the unlawful dam constructed on portion 3....., two slurry dams and compile an Impact Assessment, Decommission and Rehabilitation Plan for Departmental approval prior to commencing with the demolition and rehabilitation process. The Impact Assessment must also assess the impact caused by failing to release water from 3 Mara Dams on the Stream.

[3.3]]Within thirty (30) working days of appointment of a relevant environmental specialist, submit the impact Assessment, Decommission and Rehabilitation Plan for Departmental approval prior to commencing with the process of the demolition and rehabilitation.

[3.4] Within thirty (30) working days of departmental approval, commence with all recommendations outlined in the approved impact Assessment, Demolition and Rehabilitation Plan.

[3.5] Within ninety (90) working days of commencement, complete the Decommission and Rehabilitation process of all areas affected by the two (sic) unlawful dam structures.

[3.6] Within thirty (30) working days of Decommission and Rehabilitation completion submit to the Department a post rehabilitation report, and a monitoring report yearly thereafter for a duration of two (2) years.

[3.7] Report as per agreed frequency on the progress of implementation of the approved Decommission and Rehabilitation Plan to this Department.

50. Faced with the above barrage of threatened actions and expectations the Environmental Consultant engaged by the Appellant made a prudent request to the Responsible Authority, to be allowed an extension of 120 days within which to compile studies.
51. During the hearing, and looking at the report of Nature Stamp submitted for the Eldorado farm and the report of Nature Stamp incorporated in the IWULA application, it is patently clear that the representation could not be done within five (5) working days.
52. In the circumstances the Notice simply failed to give Appellant reasonable time within which to make representations.
53. However, the hearing before the Water Tribunal allows submission of new evidence, it being a full rehearing. This judgment therefore takes into account the full representations made during the hearing as well as information contained in the IWULA report.
54. Because of the above this judgment will refer to all the documents that were furnished to the Tribunal and attached to the Appeal papers.
55. The first document is the Environmental Impact Assessment Report, Annexure AA5. It should be noted that this annexure is in the Eldorado Appeal bundle. As stated before the evidence and documentation submitted overlapped to a significant degree. I must however state that when Appellant's Counsel presented this

document during the hearing, he referred to it as a document that was in response to the Notice to issue a directive dated 5th September 2018, i.e. the Notice pertaining to the unlawful Mara Dam 3 . That was however not the case. The Nature Stamp EIA had been for Eldorado dam.

56. In essence Annexure AA5 is the report that was compiled by Nature Stamp in response to the partially constructed dam in Eldorado, i.e. in respect of the other appeal.
57. This report of Nature of Stamp is relevant for this appeal because the circumstances leading to the building of both dams are the same, there was severe draught in 2015/2016. The dairy farm needed to grow its own maize and fodder in order to prevent the culling of livestock
58. Explaining the socio economic circumstances that pertained to building of the Eldorado dam, which circumstances apply with equal force on the building of Mara dam in this appeal Appellant averred in the report as follows:-

"I am a dairy farmer with two sons and their families who employ thirty six staff in total. With staff's dependants, this comes to one hundred and seventy eight people that rely on an income from my operation. My objective to stabilise and survive, is to make as much home grown food and silage as possible, to overcome future hardships and droughts.

The process of making the dam and lands was crucial to the making of extra food for the dairy operation, so I continued with this, after having experienced virtually no co-operation and huge delays by department of water affairs, where it took a

previous dam eight years before I had a permit. Had I not had the extra food produced from that farm, I would at this very moment have no food left for cows. I would have had to drastically reduce my irrigation, because this last year our original dams only had forty five percent of volume that can be held. We would be in serious trouble as we have had a sixty cents per litre reduction in milk price and there is talk of another thirty cents per litre drop.

59. The report went on to address local and regional spatial planning. It then stated that:-
“The dam and cultivation activities are in line with the IDP, with the site mapped to be in an area with “good” agricultural potential in the SDF for the Okhahlamba Local Municipality. By improving the land productivity and water security of the agricultural enterprise, the proponent is aligning to the IDP and SDF in utilizing good agricultural potential”
60. The report further stated that lack of water security is a constraint to farmers in the area, and that the Appellant was taking action to mitigate or resolve this constraint to agricultural and economic development.
61. Although this report was for the dam in Eldorado the aspects highlighted herein also applied to the dam in Mara, because Mara and Eldorado are situated next to each other. The two farms are run as one operation. That was the version of the Appellant during the hearing and same was not disputed or challenged by the Respondent.
62. If one looks at the reproduced aspects of the Nature Stamp Report the dams were built to circumvent draught and to ensure preservation of livelihood for a significant number of people.

63. Chapter 1 of the National Water Act is titled “Interpretation and Fundamental Principles”, and has the following explanatory note.

“This chapter sets out the fundamental principles of the Act. Sustainability and equity are identified as central guiding principles in the protection, use, development, conservation, management and control of water resources. These guiding principles recognise the basic human needs of present and future generations the need to promote social and economic development through the use water. (The underlinings are mine)

64. Albeit the report of Nature Stamp was for a different dam, i.e. the Eldorado dam, its contents were relevant for consideration by the Responsible Authority (*the directives for Mara and Eldorado were issued close to each other. The Notice to issue the Directive is dated 15 August 2018. In the circumstances the information on Eldorado was available when the Mara issue was being considered*) insofar as they emphasised the following:-

64.1. That KwaZulu Natal, the area where Appellant farms went through a severe draught and was declared a disaster area.

64.2. That Appellant built dams out of necessity to capture what little rain fall was there. This meant that the dams were useful in ensuring sustainable use of water.

64.3. The dams were built in an area where agricultural development was identified as a desirable policy goal.

64.4. Nature Stamp included in its submissions an extract from the Department of Agriculture and Rural Development (23 November 2016). The contents are:-

“It is also acknowledged that the Environmental Authorisation and WUL processes should not be to the detriment of the survival of livestock and food production, especially during severe draught experienced during the stated period. However, this acknowledgment does not imply or promote unlawful acts committed by the Applicant.

64.5. The above extract highlights the need to strike a balance.

IS SECTION 53 APPLICABLE TO THE APPELLANT’S CONTRAVENTIONS

65. Section 53, the statutory provision in terms of which the Directive is issued is titled “rectification of a contravention”. The Collins dictionary defines rectifications as follows:-

“The rectification of something that is wrong is the act of changing it to make it correct or satisfactory”

66. The Notice to issue a Directive stated clearly that insofar as the unlawful Mara dam was concerned the contravention was non-compliance with section 22 (1) of the NWA, i.e. use of water without a licence.

67. The NWA does not define ‘rectify’. In the circumstances the dictionary meaning, of course within the context of the Act is applicable. Therefore rectification would mean that Appellant must apply for a water use licence in order to rectify its use of water without a licence.

68. Further Section 53 appears directly under Part 10 which is titled “*Contravention of or failure to comply with authorisations*”. The explanatory note itself states “*This Part deals with the consequences of the contraventions of the licence conditions*” (the underlining is my own)
69. It is common cause that Appellant did not have a licence for the unlawful dam as well as the two slurry dams. The begging question then is on what basis did the Responsible Authority invoke section 53.
70. The answer in my view is twofold.
- 70.1. Firstly Section 53 (1)(a) talks of “*a contravention of any provision of this Chapter*” That would include use of water without a licence.
- 70.2. Secondly there is no other provision in Chapter 4 that talks to the specific contravention herein, i.e. using water without a licence. In the circumstances the Responsible Authority has used this Section as a default section in view of the lacuna that is in the NWA. Interestingly, the National Environmental Management Act No. 107 of 1998 (NEMA) has Section 24G which allows an applicant to apply for environmental authorisation where he has commenced operations without the necessary authorisation. A similar provision, with suitable disincentives for abusing this process is desirable in the NWA.
- 70.3. In my view the lacuna is as follows.
- The Act provides expressly for rectification of contraventions of licence conditions.

- The Act however does not provide for rectification of steps taken without having a licence.
- 70.4. The implications contained in the above two different scenarios are significant.
- 70.5. Where there has been a contravention of a licence condition there is by implication approval of the basic infrastructure. This is so because, for instance in the case of building of the dam, the building of the dam itself would have been approved. This means that the process of rectification would at least not mean demolition of the very dam.
- 70.6. Where there is no licence at all it means that the very infrastructure built is in itself an infringement.
- 70.7. Given the above two scenarios the question then is, is it correct for the Responsible Authority to invoke Section 53 where there is no contravention of a licence condition per se.
71. Due to absence of any other section that deals with contraventions pertaining to water use without a licence, Section 53 seem to be the only available tool in the hands of the Department. However, in decidin to invoke Section 53 in the particular circumstances of this matter the following provisions of the NWA need to be kept in mind.
72. Part 7 of Chapter 4, NWA deals with situations where a licence is required to use water. Part 7 has the following sections:-
- Section 40- Application for licence
 - Section 41- Procedure for licence application

- Section 42- Reasons for decision.

73. Nowhere does Part 7 address the situation where a person commenced with water use without a licence.

74. There are sections in the NWA that envisage or imply that licensing may follow upon water use that has already been commenced with, those are:-

- Section 240-Licenses for use of water found underground on property of another person.

A licence may be granted to use water found underground.

75. Section 43 of the NWA is titled "*Compulsory licence application*". It has the following pertinent clauses.

"(1) If it is desirable that water use in respect of one or more water resources within a specific geographical area be licenced-

(a) to achieve a fair allocation of water from a water resource in accordance with section 45-

(i) which is under water stress, or

(ii) when it is necessary to review the prevailing water use to achieve equity in allocations.

(b) to promote beneficial use of water in the public interest (It is common cause that the dam built by Applicant would promote beneficial use of water in the public interest)

(c) to facilitate efficient management of the water resource.

.....

the responsible authority may issue a notice requiring persons to apply for licences for one or more types of water use contemplated in section 21”.

Clearly section 43 deals with situations where before there were no licences for water use being undertaken.

76. It is common cause that Appellant’s water use contraventions pertain to section 21.

77. Section 44 of the NWA also deals with compulsory water use licence applications and provides as follows:-

“A responsible authority may for good reason, condone a late application and charge a reasonable additional fee for processing the late application”

78. Clearly during the period of non-submission of the licence application but after publication of the Notice calling for compulsory licensing the water user would be using water in contravention of Chapter 4, more specifically section 21.

79. In my view, existence of the above sections means that the Department should be prepared to apply Section 53 in a manner that takes into account the specific circumstances of each matter placed before it.

8. *RELEVANT SECTIONS OF NWA THAT INDICATE FACTORS THAT MUST BE TAKEN INTO ACCOUNT BY A RELEVANT AUTHORITY IN DECIDING WHETHER OR NOT TO GRANT A WATER USE LICENCE*

80. Section 45 NWA is titled “*proposed allocation schedules*” and sets out what the responsible authority must (own emphasis) consider in its evaluation of compulsory license applications.

81. Section 45 (1) NWA provides as follows:-

“(1) A responsible authority must , after considering-

(a) All applications received in response to the publication of a notice in terms of section 43 (1).

(b) Any further information or assessment obtained; and

(c) The factors contemplated in section 27 (own emphasis) prepare a proposed allocation schedule specifying how water from the water resource in question will be allocated.

82. *A proposed allocation schedule must subject to subsection (3) reflect the quantity of water to be*

....

(c) allocated to each of the applicants to whom licences ought to be issued in order to redress the results of past racial and gender discrimination in accordance with the constitutional mandate for water reform.

(d) allocated to each of the applicants taking into account the factors set out in section 27 (own emphasis)

83. What is clear from the above exposition of the provisions of sections 40 up to and including 45 is the following:-

(a) That the NWA contemplates that in some circumstances a person who is using water without a licence may be afforded an opportunity to apply for a water use licence.

(b) That in determining if a licence ought to be granted or issued, the responsible authority takes into account the factors mentioned in Section 27.

84. Section 27 is contained in Part 2 of Chapter 4. Part 2 is titled “*considerations for issue of general authorisations and licences*”.
85. Part 2 contains the following explanation
- “This Part deals with matters relevant to all general authorisations and licences issued under the Act. It guides responsible authorities in the exercise of their discretion to issue and to attach conditions to general authorisations and licences. It also set out the essential features of licences, such as effective periods, purposes and places for which they may be issued, and the nature of conditions that may be attached to them. The granting of a licence does not imply any guarantee regarding the availability or quality of water regarding the availability or quality of water which it covers”* (all underlinings are mine)
86. Section 27 lists 12 considerations that the responsible authority must take into account in considering a licence application. It refers to these factors as relevant factors.
87. It is important to take note that the fact that an applicant for a water use licence is already engaged in unlawful use is not a relevant factor to be taken into account in terms of the Act.
88. Hereunder I reproduce only those factors appearing in section 27 which were also raised by the Appellant in its submissions during the Appeal hearing. They are:-
- (a) existing lawful water uses
 - (b)...
 - (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.

(f) The likely effect of the water use to be authorised on the water resource and on other water users.

(j) investments already made and to be made by the water user in respect of the water use in question. (own underlining)

89. Paragraph 3 of the Directive states as follows:-

“Representations dated 17 September 2018 was received by this office on the 17th September 2018 from your Environmental Consultant Ms Susan Machpesh of Nature Stamp Environmental Consulting requesting an extension of 120 days to compile studies and are rejected as there are no compelling reasons illustrated why a directive should not be issued.”

90. We know from a reading of section 27 of the NWA that from there Appellant would derive the compelling reasons for the directive not to be issued. The reason is simple, Appellant was in contravention of engaging in water use without a licence. Section 27 sets out what the responsible authority must consider when faced with a water use application.

91. We also know that whenever a water use licence application is envisaged there is almost invariably a need for an Environmental Impact Assessment. The Environmental Impact Assessment Report is a detailed study that needs time, hence the request by Nature Stamp after receiving the Notice to be afforded 120 days to compile a report.

92. Further, the factors set out in Section 27 needed to be marshalled in a proper report. We now have two such reports, the IWULA report compiled by IWULA (Pty) Ltd incorporating the Watercourse assessment on Dam 3 compiled by Nature Stamp.
93. As previously stated, the Responsible authority rejected the request for extra time. Additionally, according to the testimony of Mrs Machpesh when she attempted to engage the Department on the possibility of applying for a licence, she was first told that there was a verification process underway and no licence applications could be entertained prior to its finalisation. Secondly after that process was finalised she was told that Appellant cannot apply for a water use licence where there is already a directive against unlawfulness. I personally could not find a provision in the NWA forbidding licence applications where there is a section 53 Directive.
94. I specifically asked Counsel for the Respondent to direct me to such a provision but he also could not point out to me such a provision.
95. I am therefore of the firm view that Respondent's officials were in error in refusing to accept Appellant's licence application for water use in respect of Mara Dam 3 and the two slurry dams.
96. The Responsible Authority rejected outright the request by the Environmental Consultant, Ms Susan Machpesh of Nature Stamp Environmental Consulting requesting an extension of 120 days to compile studies on the ground that there are no compelling reasons illustrated why a directive should not be issued. There was therefore premature rejection of the proposed study without knowing what compelling reasons it could contain.

97. The official and the office of the Responsible Authority knew that there had been a severe drought in 2015/2016 that had led to among others declaration of KwaZulu Natal a disaster area. This was not disputed in evidence by the Respondent.
98. The unlawful dam at Mara was not a small dam. It has a water storage capacity of 339 150 m³, wall height of 6,75m, length of wall 473m surface area at full supply 12.92 La, Depth at full supply level 6.75m.
99. From the evidence led by the Appellant, it cost approximately 1.9 million rands to build the dam. The Respondent did not dispute this figure. The inspecting official would of course not have been aware of the exact costs of building the dam but he could see the dimensions and get a sense of the probable costs.
100. Section 27 of the Nation Water Act states that in issuing a licence a responsible authority must (own underlining) take into account all relevant factors, including.
- ...
- (c) efficient and beneficial use of water in the public interest.*
- (d) the socio economic impact-*
- (i) of the wate use or uses if authorised;*
- (ii) of the failure to authorise the water use or uses;*
-
- (h) investments already made and to be made by the water user in respect of the water use in question.*
101. Granted the size of the dam, it was clearly a significant investment that ought to be considered in evaluating a licence application and the fact that the dam was used for irrigation purposes in a dairy farm, it seems to me that the least that the

Responsible authority ought to have done was to allow Nature Study to conduct its study and make its representations because already self-evident to the inspecting officials were certain criteria mentioned in Section 27 which would motivate the granting of a water use licence.

102. The study by Nature Stamp would have served to highlight these criteria and as such present the necessary compelling evidence against the issuing of the directive.

103. The environmental practitioner for Nature Stamp, Ms Machpesh testified during the hearing before the tribunal, and she shared the following uncontradicted evidence.

“The unlawful Mara dam is in terms of the National Water Act built on a water channel. The water channel is however not a permanent water channel where there is a perennial flowing river. The dam site is already eroded dongas and the building of the dam ostensibly assisted in preventing further degradation.”

104. During hearing Appellant presented evidence from a certain J.C Van Rensburg, the person who prepared the IWULA integrated water use license application. Van Rensburg’s organisation is called IWULA Integrated Water Use Application Management Pty Ltd (IWULA Management Pty).

105. The report prepared by IWULA Management Pty appears on page 141 in the Eldorado Bundle. As previously stated documentation in these two appeals overlaps to a significant degree.

106. The Report states the following about the unlawful Mara dam:-

- This dam is situated on Portion 3 of the farm Waayplaats 5690 (Mara Farm)
- There are 3 tributaries of the Kaalspruit that run through Portion 3 of the farm Waayplaats 5690. Dam 3 was constructed on “tributary 1”.

- Because dam 3 (Mara dam) is situated on “tributary 1” a water course, a water course assessment was done by the environmental entity Nature Stamp in June 2020.
- Nature Stamp found that the watercourse around “Dam 3” was intact but that the wetland/ drainage system adjacent to the dam had been significantly historically modified.
- Nature Stamp noted that erosion was even worse on these steeper systems especially in the proximity of dam 3.
- On impacts and mitigation related to Dam 3 the report has the following contents:-

“Impacts identified and mitigation measures proposed by the Watercourse Assessment that was conducted by Nature Stamp Pty Ltd for Dam 3 (Annexure 15)

According to the Watercourse Assessment that was conducted by Nature Stamp in June 2020, the existing watercourses in the proximity of “Dam 3) have not been significantly impacted by the construction of the dam, although some changes in the hydrological regime have occurred.

- The report also found that the water quality downstream of “Dam 3” was of a relatively good quality. It was noted by the report that the presence of “Dam 3” has likely improved the water run off that flows towards the dam from the Mqedandaba Settlement which is located upstream off the dam. It was noted that the improvement in water quality was likely due to the settling time and dilution that takes place within Dam 3.

- As part of the report, a “GN509 Risk Assessment” was also undertaken to determine the risk rating of each of the identified impacts. The results of the Risk Assessment indicated that the risks associated with the dam were “low” with the impact on the flow regime being the only impact with a “moderate” risk.
- It was noted by the report that the “low” risk rating of the impacts was due to the fact that the catchment area of the dam is small as well as the fact that the site of the dam is in a poor historical state and that the best practice management measures have been adopted at the location of the dam.
- It was noted by the report that there is still however a risk to surface water and that that risk is particularly relevant given the water shortage in the province. It was noted by the report that the activities associated with the dam need to be addressed through a monitoring plan to ensure that the risks are mitigated.
- The Nature Stamp report then went on to list 7 general mitigation measures, and 10 water quality protection measures.
- Most important for purposes of this judgment are the mitigation measures pertaining to Dam water releases. The provisions thereto read as follows:
“Water should be released from the dam throughout the year to simulate natural flow regimesIdeally a flow meter should be adhered to.

107. The impacts on the environment and water caused by building of the dam as presented by the IWULA report relying on inter alia the study by Nature Stamp was

never challenged by the Responsible Authority in both its papers and during viva voce evidence.

108. The only cogent evidence that the Respondent presented concerning water use and the built dam pertained to what were called complaints by downstream water users. However, the evidence of Ms Machpesh demonstrated that those downstream water users were not affected by the Mara dam due to the position of their dams vis a vis the Mara Dam.

109. Further, there was no explanation coming from the Respondent why the complaint of downstream users if any could not be dealt with by the release of water, or any possible licence condition.

110. Further, according to the IWULA report there seems to be existing lawful use for the Appellant. That existing lawful water is set out as follows:-

“It was determined in terms of section 35 (3) of the National Water Act that a total volume of 1 148 820 m³ per annum may be abstracted from the tributaries of the Kaalspruit in Portion 3 of the farm Waayplaats 5690 (this is Mara farm where the unlawful Dam 3 is situated) of the determined ELU (Existing lawful Water Use) volume of 1 148 820 m³ per annum, 384 820 m³ is already authorised in terms of formal water use licence. The remaining ELU volume of 764 000 m³ on the property will be diverted from Dam 3 to Dam 4.”

110.1. The IWULA report continued as follows:-

“The purpose for constructing of Dam 3 was to catch the remaining ELU entitlement of 764 00 m³ per annum so that it could be attenuated and

diverted to "Dam 4" on the Remaining Extent of Portion 1 of the farm Strydpoort 1136, from where it can be utilised for irrigation purposes."

111. Lastly, it states that *"No water will be abstracted from Dam 3, abstraction will only happen in Dam 4"*. Dam 4 is legal.

112. In finalising this judgment it is important to bring forth the arguments of the Respondent if only to demonstrate why they have been deemed not cogent enough to stave off success of the appeal.

113. Respondent's statement of ground of opposing the appeal commences on page 7 of the Appeal Bundle. In paragraphs 8 and 9 thereof Respondent avers that the Department issued a notice of intention to issue a directive to the Appellant, Appellant was given an opportunity to make representation. Appellant did not make any representations. I have already traversed the fact that Respondent refused to grant Appellant the requested extension of 120 days. I have also pointed out that that refusal was in violation of Appellant's right to a reasonable opportunity within which to make representations.

114. Further, what Respondent misses is the following:-

- Respondent in the Directive that it later issued writes as follows in paragraph 3 thereof.

"Representations dated 17 September 2018 were received by this office on the 17th September 2018 from your environmental Consultant Susan Machpesh of Nature Stamp Environmental Consulting requesting an extension of 120 days to compile studies

and are rejected as there are no compelling reasons illustrated why a directive should not be issued.

- From the above it is clear that the Responsible Authority issued the directive because it was of the view that there were no compelling reasons preventing the issue of the Directive.
- I have quoted extensively the provisions of section 27, National Water Act which indicate the factors that a responsible authority must take into account in deciding whether or not to grant a licence. Those relevant factors were present in the circumstances of the Appellant and Respondent did not afford Appellant an opportunity to marshal and present them properly.
- It is of course true that this judgment had in addition to the report of Machpesh incorporated in the IWULA report also relied on the report of IWULA (Pty) Ltd as well as the oral testimony during the hearings.

115. Respondent argues that it is common cause that users were in violation of the provisions of section 21 of the NWA.

116. Respondent's position and response to the Appellant is summed up in its paragraph 20 which states as follows:-

"The Appellant is obliged to abide by the law: Allowing the Appellant to seek condonation of his wrongful conduct would lead to anarchy and would render the provisions of the Act nugatory."

117. In my view the above paragraph shows the following:-

- Respondent is of the view that where there is unlawfulness the only directive that can be issued is to remove whatever it is that has been created unlawfully. The fact that in the Appellant's case it happened to be a R1.9 million dam is irrelevant.
- Respondent did not take into account that Section 53 of the NWA the provision in terms of which the Directive is issued gives it a discretion. Exercising a discretion clearly means that the official who is seized with authority must apply his mind to the facts before him. The Responsible authority in casu did not apply his mind at all to the facts and or circumstances presented to him. It is for this reason that I also pointed out some of the confusing aspects of the Notice of Intention to issue a directive.

118. Further, as stated before I have doubts about the applicability of Section 53 in the specific circumstances of the Applicant.

119. What I found to be of great concern is the rigid manner in which Respondent interpreted section 53. Section 53 speaks of rectification. Respondent has not explained in both its papers and during the testimony of its officials why it could not order Appellant to apply for a licence. Because Appellant's contravention was use of water without a licence it seems to me that the most obvious and less wasteful directive would be to order Appellant to apply for water use licences. I cannot comment on other temporary ancillary measure like for instance ordinary release of water at stipulated intervals. That is the province of the Regulator. However, it does appear to me that there were other measures available to mitigate any harm to the

environment and to water resources and other users while the licence application was being considered.

120. What however came out during the oral hearing was that Appellant was advised that due to its having commenced unlawful activities it was barred from applying for a licence. I have trawled through the various provisions of the NWA and I could not find a provisions that states that if a water user is engaged in unlawful activity he is not allowed to apply for a water use licence in respect of that use. I have indicated in this judgment that there are instances where the Act seems to accept that a licence would be applied for where there is already existing albeit unauthorised water us e.

121. The Water Tribunal does not have the power to review. the Department. Consequently, I will not comment on whether the orders contained in the Directive pass the muster of reasonableness and fairness. What I can however state with conviction is the following:-

- Insofar as the Directive orders an Environmental Impact Assessment for the dam the same EIA would most probably also be a requirement in an application for a licence. There is therefore no reason why this EIA should not be used for the purposes of applying for a license.
- Insofar as the Directive did not request the Appellant to submit the EIA to it in order to evaluate the nature of the impact before deciding if it would be necessary to order demolition of the dams the Responsible official was not paying attention to his duty to see to it that water is used beneficially for the public. He also ignored the

provision contained in section 27 i.e. that existing investment must be taken into account.

- Insofar as the Department seemed not to have cared about loss of cattle due to drought, as well as possible job losses, it failed to pay due regard to economic considerations set out in section 27 of the NWA.

122. This is not to say that the Responsible Authority may not ever order a person who constructs an unlawful dam to demolish it. Whether or not such a directive would be reasonable is dependent on the information before the Responsible Authority and remains within the discretion of the Responsible Authority. He or she must exercise his or her discretion in that regard by taking into account the objectives of the NWA and the considerations in section 27. In the case before us, all the factors I have referred to above including:

122.1. the absence of proven harm or prejudice to downstream users or to the water resource;

122.2. the state of disaster in the province due to severe drought;

122.3. the investments made by the Applicant in the water use;

122.4. the likely impacts on the Applicant's employees and the surrounding community if the Applicant's business failed;

122.5. the fact that the Applicant was granted an authorisation in terms of section 24G of NEMA; and

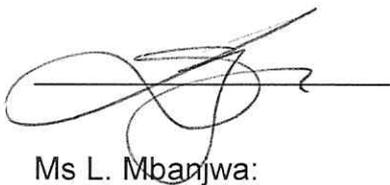
122.6. the existing entitlements of the Applicant to use the water stored in the dam

mean that it was reasonable in the circumstances that he should be given the opportunity to apply for a licence and not reasonable to direct him to demolish the dam before his application had been considered.

123. The judgment has not said much about the two slurry dams because there was not much evidence about them. Further the Department did not say in what manner they were harmful to the environment. In any event they together with the unlawful dam were water use activities undertaken without a licence. Rectification would mean that Appellant must apply for them to be licenced, it is sufficient that the order includes them.

The order therefore is as follows:-

1. The Directive dated 12 February 2019 issued by the Respondent against the Appellant is hereby set aside.
2. Respondent must permit Appellant to follow the application process prescribed in terms of the National Water Act for licensing of both unlawful Mara Dam 3 and the two slurry dams.



Ms L. Mbanjwa:

(Water Tribunal Member)

So I agree



SD Kvalsvig

(Additional Member)

For the Appellant

: Adv A. de Wet SC

Instructed by McCarthy & Associates

For the Respondent

: Adv. M. Tjiana

Instructed by the State Attorney, Pretoria