THE WATER TRIBUNAL

IN THE WATER TRIBUNAL OF SOUTH AFRICA

HELD IN PRETORIA

Case Number: **WT03/20/GP**

In the Appeal between:

GREATER KYALAMI CONSERVANCY	Appellant
AND	
THE DEPARTMENT OF WATER AND SANITATION	First Respondent
GAUTENG DEPARTMENT OF ROADS AND TRANSPORT	Second Respondent

Lat date of Hearing:	10 May 2024
Date of oral arguments:	26 July 2024
Date of delivery of judgement:	4 December 2024
Chairperson of the Water Tribunal	Adv P. Loselo
Deputy Chairperson of the Water Tribunal:	Ms U Mbeki

JUDGEMENT

Introduction

1. The applicant brings this application in terms of s 148(1)(f) of the National Water Act ('*the NWA*') against the decision of the first respondent to issue a water use licence ('*WUL*') to the second respondent on 22 October 2020. The WUL was granted in respect of water uses in terms of s 21 (c) and s 21 (i) of the NWA. These water uses entail impeding or diverting of the flow of water in a watercourse; and altering the bed, banks, course or characteristics of a watercourse, respectively.

2. The activities which triggered the water uses in terms of sections 21 (c) and s 21 (i) include the construction of K56 road ('*the road*'), the infrastructure associated with the instruction of the road, bridges and culverts. The road is proposed to cross or encroach a number of watercourses.

3. The WUL was preceded by the granting of an environmental authorisation ('*the EA*') by the Gauteng Department of Agriculturte and Rural Development ('*GDARD*') in terms of s 24 of National Environment Management Act, 107 of 1998 ('*NEMA*') on 31 March 2016. The EA was granted for the construction of part of K56 road by the second respondent. The K56 road is to be constructed from Erling Road to Main Road

and from William Nicol to Erling Road. The road will be a divided 4-lane dual carriageway with a road reserve of a with of 48.4 m. Erling Road will be a divided 4-lane dual carriage roads with a road preservation of the width of a maximum of 32 m.

4. It is clear from the EA that the competent authority considered specialist reports, including the flora and fauna habitat assessment, and the wetland and non-perennial river assessment.

5. Several conditions are attached to the EA addressing, among others things, road construction activities and their impacts on the surrounding environment. This includes wetlands and fauna found in these wetlands. The conditions[1] show that the competent environmental authorities were considered reports and matters related to the biophysical environmental impacts before granting the EA.

6. The relevant specific conditions attached to the EA include the fact that the edge of a wetland must be clearly demarcated in the field with pegs or poles that will last for the duration of the construction phase and must be colour-coded in two different colours, namely in red and in orange. The red should indicate the edge of the riparian zone and should be placed along the entire length of the property/site. The orange should indicate the edge of the buffer zone (32 m buffer within urban area).

---

[1] *Record pg. 821*

7. Another specific condition of the EA is that the crossing of the watercourse must be through a span bridge. Further, no development other than the authorised activities is allowed within the 32 m buffer zone of the watercourse, measured from the edge of the watercourse/temporary wetland zone.

8. Some of the general conditions of the EA are that any changes to or deviations from the activities set out in the EA must be approved in writing before such changes or diviasions may be effected. It is further provided that should the proposed changes or diviasion be significant, the holder of the EA may have to apply for further authorisation in terms of the Environmental Impact Assessment Regulations, 2010 (*'the EIA Regulations'*).

9. The EA demonstrates that the competent authority considered, among other things, and Environmental Impact Assessment Report which included the Flora and Fauna Habitat Assessment report, the Wetland and Non-perennial River Assessment report, the Heritage Impact Assessment Report, and the Social Impact Assessment Report. It is also indicated that there was a public participation process which complied with the requirements of Chapter 6 of the Environmental Impact assessment Regulations, 2010.

10. The appellant, aggrieved by the granting of the EA, appealled against that decision to the Member of the Executive Committee for Economic Development, Environment, Agriculture and Rural Development (*'the MEC of EDEARD'*). The appeal was dismissed.

11. I refer to the EA process not because this Water Tribunal ('*the Tribunal*') is called upon to consider whether the EA was done regularly or otherwise. I do so purely as a background to this matter. In any case, the Tribunal has no jurisdiction to adjudicate the regularity or otherwise of the EA. The first respondent similarly has no authority to reconsider the EA.

Grounds of appeal

12. Not happy with the decision to grant the WUL, the appellant lodged the current appeal on 1 December 2020. The grounds of appeal were supplemented on 31 August 2022. Initially the appellant raised several grounds of appeal. These grounds of appeal were narrowed down to two grounds at the pre-trial conference held on 1 March 2024, namely failure to conduct wetland assessment, and failure to protect the African Grass Owl ('*the AGO*').

13. However, at the beginning of trial, counsel for the appellant raised the following grounds of appeal. *First*, that the decision by the first respondent was irrational as it was based on studies completed in 2012. *Second*, that the WUL contained various conditions which are vague and unenforceable. *Third*, that there was failure to assess the impact on the AGO.

14. *Fourth*, that the first respondent's decision was not procedurally fair as the wetland offset conditions were not subjected to a public participation process. *Fifth*, that there was failure to give effect to the provisions of NEMA in that the risk averse principle

was not applied in relation to the AGO. *Sixth*, that the wetland study did not comply with the Water Use License Application and Appeal Regulation, 2017 published under Government Notice R267 in Government Gazette 40713 dated 24 March 2017 ('*the 2017 Regulations*'). *Sixth*, that there was non-compliance with the provisions of s 27 of the NWA in that the first respondent did not take into account the effect of the proposed water uses on other users.

15. As shall become apparent below, all these grounds of appeal come down to a dispute relating to the wetland assessment, and the protection of the AGO as recorded in the minute of the pre-trial conference referred to above. For this reason, I do not consider it necessary to decide the rest of the grounds of appeal. I shall, however, to the extent necessary, deal briefly with some of these grounds of appeal.

16. This appeal is opposed by both respondents.

Issues for determination

17. The Tribunal is called upon to determine (a) whether the first respondent granted the WUL when there was no assessment of the wetlands; and (b) whether there was no protection for the AGO.

The applicable legal scheme

18. The genesis of this matter is traceable to s 24 of the Constitution of the Republic of South Africa, 1996 ('*the Constitution*'), which provides that everyone has the right to an environment that is not harmful to their health or well-being; the right to have the environment protected through reasonable legislative and other measures that prevent pollution and ecological degradation, conservation, and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development, amongst other things.

19. Some of the legislation referred to in s 24 of the Constitution is NEMA which, in s 2, sets out the principles to be applied throughout the Republic in respect of actions of all organs of state that may significantly affect the environment.

20. These principles are to apply alongside all other appropriate and relevant considerations including the state's responsibility to respect, protect, promote and fulfil the social and economic rights in Chapter 2 of the Constitution; serve as a general framework within which environmental management and implementation plan has must be formulated; serves as a guideline to organs of state when taking decisions in terms of NEMA or any statutory provision concerning the protection of the environment; and guide the interpretation, administration and implementation of NEMA and any other law concerned with the protection or management of the environment, amongst other things.[2]

---

[2] *Section 2(1) of NEMA.*

21. Section 2 (2) of NEMA provides that environmental management must place people's needs at the forefront of its concern, and serve the physical, psychological, developmental, cultural and social interests equitably. In terms of s 2 (3) development must be socially, environmentally and economically sustainable. Section 2(4) of NEMA provides that sustainable development requires a consideration of all relevant factors and that environmental management must be integrated.

22. Section 23 of NEMA requires the promotion of the integration of the national environmental management principles into decisions that may significantly affect the environment, identification, prediction and evaluation of the actual and potential impact on the environment, socio-economic conditions and cultural heritage.

23. Another legislation relevant for the purpose of consideration of an application for WUL is the NWA. It provides for the different types of water uses in s 21. Of relevance to this matter are the provisions of s 21 (c) and s 21 (i) which I have already dealt with above. These are the water uses for which the second respondent was granted a WUL which is a subject of this appeal.

24. Section 27 of the NWA sets out the factors which must be consider by the responsible authority before decing on a WULA or a general authorisation. These factors include consideration of the existing lawful water uses; the socio-economic impact of the water use or uses if authorised; the likely effect of the water use to be authorised on the water resource and on other water users; the class and the resource quality objectives of the water resource; and the quality of water in the water resource which may be required

for the Reserve and for meeting international obligations, investments already made and to be made by the applicant for the WUL, amongst other things.

25. The Record of Recommendation clearly identifies what the impacts of s 21(c) and s 21(i) water use on the environment are. It states them as relating to erosion, sedimentation and flooding, surface water, stormwater run-off, soil compaction, and groundwater quality.[3] These impacts are remotely related to the alleged direct effects on the AGO. Indeed one or more of these impacts of the specified water uses may well impact the wetland as a habitat of the owls hence WUL condition that this must be protected.

26. In considering a WULA the first respondent is not called upon to consider the impacts of, and authorisation of the road project as a whole. The first respondent is only required to consider activities reasonably connected to water uses contemplated in the sections 21 (c) and s 21 (i) read with s 27 of the NWA. The other environmental impacts unconnected to these water uses fall within the province of other organs of state charged with environmental assessment and EA of such a project.

Powers of the Tribunal on appeal

27. The appeals before the Tribunal take the form of a rehearing. The Tribunal may, thus, receive new evidence.[4] In other words, it is an appeal in the wide sense, which is a

---

[3] *ROR Record pg1398-1399.*
[4] *item 6 (3) of Schedule 6 to the Act read with rule 7(1) of the Water Tribunal Rules.*

complete rehearing and redetermination of the merits of a case, with or without additional evidence or information.[5] Under this type of appeal the Tribunal is not confined to the record of the body a *quo*. That being said, the record of proceedings before the respondent authority will be an important part of the evidence to be considered by an administrative appeal authority.[6]

28. With specific reference to appeals to the Tribunal under the NWA in *Mining and Environmental JCN v Minister of Environmental Affairs*[7] it was held that all the parties agreed that all appeals in terms of NEMA, the MPRDA and the NWA fall into the category of the so-called wide appeals. Further that this consists of reconsiderations of the original decisions and authorisations, and new evidentiary material may be introduced.[8]

29. In *Makhanya*[9] it was held that:

> *'[27] The Tribunal effectively had to rehear the application for the water licence. It is well recognised that an application of that nature will ordinarily qualify as administrative action, since the advent of the Constitution. Administrative appeals usually allow for the reconsideration of an administrative decision by a higher authority. Indeed, Hoexter, writing in general, says that the 'person or body to*

---

[5] *Tikly and Others v Johannes, N.O., And Others 1963 (2) SA 588 (T) at 590G.*
[6] *SACCAWU v President, Industrial Tribunal 2001 (2) SA 277 SCA para 7 (see also Administrative Law in Africa, Coral Hoexster and Glenn Penfold,Third Edition page 753.*
[7] *2019 (5) SA 231 (GP).*
[8] *ibid para 11.10.2.*
[9] *Makhanya NO v Goede Wellington Boerdery (Pty) Ltd and Another (230/12, 233/12) [2012] ZASCA 205; [2013] 1 All SA 526 (SCA).*

whom the appeal is made steps into the shoes of the original decision-maker, as it were, and decides the matter anew.' However, each Tribunal falls to be considered relative to its empowering legislation.' (footnotes omitted)

The standard and onus of proof

30. In an administrative appeal, the burden or onus of proving the facts that constitute an illegality rests on the appellant, as the person who alleges the existence of an illegality on a balance of probabilities or preponderance of probabilities. Once that has been done, the burden of rebuttal will shift to the party alleging the contrary.[10] In other words, the respondent authority will then bear the onus of refuting a *prima facie* case of illegality (the burden of rebuttal).[11]

Summary and analysis of evidence

31. The appellant called three witnesses. The first witness was Mr Lourens Erasmus Retief Grobler ('*Grobler*'), a wetland and watercourse ecologist who testified about the assessment and delineation of wetlands. Grobler testified that Scientific Aquatic Services ('*the SAS*'), the wetland specialists appointed by the second respondent, did not assess the Individual Ecological Importance and Sensitivity ('*the EIS*') of wetlands 1 to 4. He further testfied that the wetland assessment report by SAS only makes

[10] *DDP Valuers (Pty) v Makhado Municipality and Others (0924/2014) [2014] ZAGPPHC 58 (25 July 2014) para 58*
[11] *Administrative Law in Africa, Coral Hoexster and Glenn Penfold,Third Edition page 753.*

reference to the EIS at a much larger area, namely Quaternary Catchment A21C based on the information provided in 1999.

32. His main issue was that the EIS was not done for individual wetlands and that, as a result, it was unclear how the ecological importance was determined. According to him, if this was done the determination or identification of rare species would have happened. According to his testimony a report by SAS did not define the hydrogeomophobic classification system (*'the HGM'*) as is typically done.

33. He further testified that the Present Ecological State (*'the PES'*) and the EIS classes are a requirement for wetland delineation report.[12] As a result of these alleged shortcomings the presence or likelihood of occurrence of the Red Data Species or species of conservation concern (which includes the AGO) were not considered or addressed in any meaningful manner in the SAS report in respect of the four wetlands.

34. According to Grobler's testimony, the EIS is important for three reasons. First, EIS determines the presence of Red Data species. Second, it determines the protection status of the vegetation type. Lastly, it determines the diversity of habitat types present in the wetlands. These factors are highlighted by the appellant to demonstrate how, in its view, the construction of the road through the wetlands will impact the AGO as a vulnerable species.

---

[12] *Annexure D to the Water Use Licence Application and Appears Regulations, 2017, published under Government Notice R 267 in Government Gazette 40713 dated 24 March 2017.*

35. Grobler during his testimony and cross-examination indicated that he does not have a major issue with the assessment of the wetlands and that the range of the assessment was within the acceptable range. He, however testified that the sensitivity assessment was lacking a bit. He conceded that the method used was valid. He did not take issue with the wetland delineation done by the second respondent's experts.

36. Grobler further testified that a wetland offset plan, in respect of condition 1.17 of the WUL, should have been presented to the first respondent for consideration in respect of wetlands which were to be destroyed. He testified that wetlands which were to be lost ought to have been thoroughly assessed in order to develop and offset plan. The wetlands which were to be destroyed had to be recreated along the dams and the watercourses. He testified that it was difficult to recreate a wetland for the AGOs as there are no such wetlands in the Midrand area.

37. Under cross examination he insisted that an wetland offset plan ought to have been a precondition for the WUL. Under cross examination by counsel for the second respondent, he was directed to section C of the SAS report which deals with faunal assessment, which lists the AGO at page 377 as a threatened species. The report at page 366 recommends the faunal management and mitigation plans in order to preserve faunal habitat. His contention about the recordal of the AGO was that it was listed in a very large quaternary.

38. Under re-examination he testified that the efficiency in the EIS assessment was non-compliant with the 2017 Regulations. Lastly the appellant's expert submitted that the

proposal for the wetland offset as a mitigation measure was flawed because such an offset requires comprehensive accurate baseline information as well as a public participation process.

39. The second witness called by the appellant was Mr Anton van Niekerk (*'van Niekerk'*), who was a factual witness. van Niekerk testified that he is a professional photographer and a videographer and that he heads the appellant's biodiversity division. He testified that they conducted a study on the AGO in the affected area from 2014 and that such a study is still ongoing. The purpose of this study was to determine the presence of the AGO, observe and determine its breeding cycle and the success rate of its breeding cycle.

40. He specifically testified about the sightings of an AGO (tag number A44) and nesting/breeding sites in wetland 3 (Exhibit 2, map 5). He testified that this bird, had four chicks three of which died from fire, flew from wetland 3 to wetland 1.

41. The issue relating to the exact sightings of the AGO in wetland 3 was contested by the respondents. As a result, an inspection in loco was conducted on 9 May 2024. The outcome of which was the the areas where the AGO's nesting was purportedly sighted were outside the route of the proposed K56 road but within the wetland. Although the parties could not agree on the distance of the sightings in relation to the proposed K56 road, in my estimation it was in the region of 150 metres.

42. The last witness called is Mattheuns Delport Pretorius (*'Pretorius'*), who has MTech degree in Nature Conservation and is a Registered Professional Natural Scientist. He

studied the AGO between 2008 and 2019. He testified that he was able to discover 75 nests over the period of study some of which were in the Greater Kayalami, including wetland 3. He also gave evidence relating to the flightpath of a particular female AGO which used wetland 3 as its habitat. According to his testimony as presented in Exhibit 8, the bird which flew from wetland 3 to the northern farms spent a lot of time in the northern farms.

43. He testified that the proposed development will have an impact on the breeding area of the AGO and that they might be struck by a vehicle at night. According to his testimony the habitat of the AGO might be fragmented. Further that the removal of the breeding habitat cannot be easily restored or offset. He contended that the proposed route for the construction of the road will transgress the conditions relating to the protection of the habitat of the AGO and that it is not possible to comply with such a condition.

44. Under cross examination by counsel for the first respondent he testified that the AGO is a resilient bird which can always come back to its habitat once the habitat becomes suitable.

45. The first respondent called only one witness, Mr Vhongane Mhinga ('*Mhinga*'). Mhinga holds an honours degree in Hydrology and Water Resources. Mhinga testified that he was the assessor and case officer for the appellant's WULA and was, as a result, responsible for coordinating input from all other units within the Department. He testified that the impacts relating to the WUL were assessed and that the proposed

mitigating measures were considered adequate. With regards to inputs from other interested or affected parties, he testified with reference to page 1401 of the Record that there was a public participation process and that GDARD granted the EA on 15 July 2017.

46. Regarding the concerns raised during the public participation process he testified that such concerns were to be addressed by the imposition of conditions in the WUL. The conditions imposed for the protection of the environment and the habitat included that the hydropedological study must be implemented to inform the proposed 32 m wetland buffer zone so that a buffer can be determined; that a wetland destructed must be recreated along the dams and watercourses especially on the northern side where there is an open space; that AGO, rabbit, and frog habitat must be protected; that the civil design must be amended so that all bridges will be on pillars over the width of the watercourse; and that the EA that has been granted by GDARD must be adhered to.[13]

47. Insofar as any wetland was to be destroyed by the proposed development, Mhinga testified that the WUL makes provision for further studies to be conducted and information to be provided. In this regard he referred the Tribunal to paragraph 2.10 of the WUL which provides that a wetland rehabilitation plan must be submitted for approval.[14]

---

[13] *page 1383, paragraphs 1.7, 1.8, 1.9, 1.15, 1.17 and. 1.19, volume 6 of the record; page 1403, paragraph 4 (i), (ii) and (iv); and page 1404, paragraph 4 (xxi), volume 6 of the Record.*
[14] *page 1384, volume 6 of the Record.*

48. Under cross-examination by counsel for the appellant, he testified that a condition of the WUL which required that the habitat of the AGO, frog and rabbit must be protected was not vague and was sufficient to ensure that the AGO's habitat is protected. He further testified reference in annexure D to the 2017 Regulations,[15] that the inclusion of wetland offsets was only applicable insofar as there was a need for offsetting. In other words, it was only required if any wetland was to be destroyed. He repeated this statement under cross examination by counsel for the second respondent.

49. During questioning by the Tribunal, Mhinga testified that if a wetland is to be destroyed a wetland rehabilitation plan must be submitted for approval and that if the Department was not satisfied with the proposed rehabilitation plan and the protection of the habitat the activity will not be allowed to proceed. This statement was made with reference to condition 1.17 of the WUL to which I have already referred above. This condition requires that a wetland offset plan indicating where wetlands lost will be recreated must be submitted prior to construction.

50. The second respondent called Mr De Wet Botha ('*Botha*'), a specialist environment practitioner and a registered Professional Natural Scientist. He testified about the wetland assessment and the calculation of the impact area. In his testimony he indicated that when dealing with hierarchy impact mitigation the first level is prevention which aims to avoid impacts completely. In this regard he testified that the impacts associated with K56 cannot be avoided for reason that the original route of the road is the preferred route and that the alignment of the road could not be changed.

---

[15] *Regulations Regarding the Procedural Requirements for Water Use Licence Applications and Appeals, 2017.*

According to him, this, from an engineering viewpoint, was considered the most viable route.

51. The second level of mitigation involves the reduction of the impact. That is to say, the minimisation of the impacts. This includes the construction of the span bridge over the Jukskei River, the minimisation of activities outside the designated area and the buffer zone, and that the road was designed in such a way as to allow for the continued flow system and thus reducing impacts.

52. The third level of mitigation is remediation of the environmental impacts. In other words, rehabilitation of the areas which have been impacted. To this extent, he testified that an Aquatic Resource Rehabilitation Plan has been drawn and will be implemented. The last level of impact mitigation is compensation which according to him is implemented for the purpose of compensating the loss of an entire feature and not localised impacts. This is what is called offset. Regarding the offset he testified that no offset measures were included as mitigating measures for the proposed K56 road, as the reduction and remediation measures referred to above are thought to be sufficient.[16] The proposed rehabilitation is contained in the Aquatic Resources Rehabilitation Programme.[17]

53. Regarding the calculation of the impact area, he testified that whilst a percentage of wetland habitat will be lost, approximately 22 ha of Farm Zevenfontein 407 will

---

[16] *Record, Volume 5, pages 1051 and 1052. See also Record, Volume 5, page 1052, Table 3.*
[17] *Record, Volume 3, page 571.*

function as an open space and will be substantially utilised as part of the Century Open Space Plan. Botha testified that the loss at wetland 3 was 30%. That although 13 ha will be impacted, 22 ha would be gained and thus resulting in an overall increase of 8.86 ha (17.7 %).[18]

54. Regarding the allegation that the specialist reports were dated, Botha testified that the conditions of the study areas would not have changed significantly since the studies were conducted. Thus, the specialist reports remained relevant at the time of the consideration of the WULA, he testified.

55. Botha, further testified that wetlands 2, 3 and 4 have a low function (with a PES class D, meaning they were largely modified), and that wetland 1 has a higher function (with a PES class B, meaning it was largely natural with few modifications). When questioned by the Tribunal regarding the ratings of the wetlands he indicated that if the ratings were higher more detailed and specific mitigation measures would have to be undertaken. This would have to be preceded by a further assessment of the area, he testified.

56. He also testified that Grobler did not take issue with the classification of the wetlands by the second respondent's experts. Regarding some of the studies, he testified that based on Grobler's testimony, it was clear that Grobler had not read the second respondent's Floral and Faunal assessment reports. Regarding the presence or

[18] *Record, Volume 5, page 1052, paragraph 7.*

otherwise of the AGO on wetland 3, Botha testified that he cannot deny that they are present thereon.

57. During cross-examination by counsel for the appellant, Botha stuck to his version and further testified that there was no need for the revision of the faunal study as the EIA process took this into account and that there was no major changes since the EIA was concluded. He, however admitted to not having considered the impact on the AGO for reason that it was not observed during the assessment. The faunal, floral, wetland and aquatic assessment report states that some faunal species may not have been identified due to behavioural patterns that changes from season to season.[19]

58. Under cross examination by counsel for first respondent, Botha testified that the EIA reports, which were submitted during the EA process, were still valid and relevant for the purpose of the WULA and that as a result there was no need to do new EIA reports. That the EA was still valid is borne out by paragraph 3.4 (d) of the EA which states that the activities must be commenced within a period of 10 years from date of issue and that if this is not done the EA lapses. In such an instance a new EA application must be made.[20]

59. When asked how the appellant was going to give effect to clause 1.9 of the WUL, which required that AGO's habitat be protect, amongst other things, he responded by stating that this can be done by ensuring that there is no ingress into the wetland either by people or equipment.

---

[19] *Record, Volume 1, page 232*
[20] *Pleadings Bundle, page 251.*

Discussions

60. The appellant's main grounds of appeal are that wetland assessment reports relied on upon by the second respondent were outdated (and that as a result there was failure to assess wetlands), and that there was a failure by the second respondent to assess the impact of the WUL on the AGO's habitat.

61. This matter turns, in the main, on a proper interpretation of s 24 of the Constitution, the relevant provisions of NEMA and the NWA. The Constitutional Court in *Fuel Retailers Association*[21] held that s 24 recognises the obligation to promote justifiable economic and social development. Further that economic and social development is essential to the well-being of human beings. The Constitutional Court further held that these rights are vital to the enjoyment of other human rights guaranteed in the Constitution. The environment and development are inexorably linked. [22]

62. The Constitutional Court held that the Constitution recognises the interrelationship between the environment and development and the need for the protection of the environment while at the same time it recognises the need for social and economic development. That the Constitution contemplates the integration of environmental protection and socio-economic development, and the balancing of environmental

---

[21] *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others 2007 (6) SA 4 (CC), para's 74, 75 and 77.*

[22] *Ibid at paras 44 and 75.*

considerations with socio-economic considerations through the ideal of sustainable development.[23]

63. NEMA is a statute which was enacted to give effect to s 24 of the Constitution. NEMA defines sustainable development as 'the integration of social, economic and environmental factors into planning, implementation and decision-making for the benefit of present and future generations.[24] The Constitutional Court in *Fuel Retailers*, held that this definition incorporates two of the internationally recognised elements of the concept of sustainable development, namely, the principle of integration of environmental protection and socio-economic development, and the principle of inter-generational and intra-generational equity.[25]

64. The factors that are relevant to decisions on sustainable development are not exhaustive.[26] What needs to be done under NEMA is that people and their needs are to be placed at the forefront of environmental management and that all developments must be socially, economically and environmentally sustainable. NEMA also requires that there be integration of environmental protection and economic and social development; and balancing of the two. [27]

65. The NEMA principles to which I have already referred above provide guidelines that should guide state organs in the exercise of their functions that may affect the environment; and provide guidance for the interpretation and implementation not only

---

[23] *Ibid at para 45.*
[24] *Section 1(1)(xxix).*
[25] *paras 75.*
[26] *Section 2(4)(a) of NEMA.*
[27] *Fuel Retailers, paras 60 and 61.*

of NEMA but any other legislation that is concerned with the protection and management of the environment. They must, thus, be observed as they are of considerable importance to the protection and management of the environment.[28]

66. Recently, it was decided, in relation to the provisions of s 23 of NEMA, that the National Environmental Management Principles do not demand a so called zero standard (presumably referring to zero-sum game) which frown upon any kind of impact on the environment.[29] It is a process to strike a balance and harmony between competing state objectives.[30]

67. In *South Durban Community Environmental Alliance*[31] the court upheld a challenge to the EA which imposed a condition which required that a final wetland offset plan be submitted prior to commencement with construction. The court held that the EA and the conditions attached to it must be read together with the obligations imposed upon a person who is the holder of an EA as set out in sections 24N(7)(a)[32] and (d)[33] which impose direct obligations upon the holder regarding environmental impacts.[34]

68. As regards the NWA, s 27 rehearses a number of factors to be taken into account when considering a WULA. In this regard the SCA in *Makhanya* held that all the factors

---

[28] *Ibid, at para 67.*
[29] *Endangered Wildlife Trust and Another v Director General: Department of Water Affairs and Sanitation and Another [2023] JDR 1584 GP at para 136.*
[30] *Thungela Operations (Pty) Ltd v Chief Director, Water Use License Management: Department of Water and Sanitation and Others (WT04/22/GP) [2023] ZAWT 1 (26 April 2023), para 88.*
[31] *South Durban Community Environmental Alliance and Another v Minister of Forestry, Fisheries and The Environment and Others (17554/2021) [2022] ZAGPPHC 741 (6 October 2022).*
[32] *Provides that: (a) must at all times give effect to the general objectives of integrated environmental management laid down in section 23".*
[33] *Provides that: (d) must monitor and audit compliance with the requirements of the environmental management programme".*
[34] *South Durban Community Environmental Alliance at paras 67-70.*

enumerated under s 27 must be considered to find an appropriate balance in reaching a decision on a WULA.[35]

69. In light of the evidence and the authorities cited above, I now turn to consider the two grounds of appeal raised by the appellant.

Failure to conduct wetlands assessment

70. The appellant argued that because the expert reports relied upon by the second respondent were compiled between 6 and 8 years prior to submission of a WULA, such reports should not have been relied upon as the way outdated , irrelevant or incomplete. Thus, there was failure to conduct wetland assessments, so argues the appellant.

71. There is no merit in this ground of appeal. Botha's evidence, which is uncontroverted, is that no changes took place between the time these reports were compiled and time when the application for a WUL was made. As a result, he testified these reports remain relevant and valid and there was thus no need to compile new reports or update the existing expert reports.

72. Grobler agrees that the assessment of wetlands was within range but that the sensitivity assessment was lacking a bit. He also took no issue with the wetland delineation and the method of assessment.

---

[35] *At paras 22, 32 and 40.*

73. The divergence comes where the appellant argues that the wetland studies did not sufficiently consider the *PES* and EIS classes of all four wetlands. According to the appellant's expert, PES is required because the applicable regulation requires that the PES be considered as part of wetland delineation.

74. The appellant, while complaining of the time lapse between the Wetland Reports and WULA decision, did not provide any evidence to show that there have been material environmental changes to the wetlands and the ecosystem warranting an update of the studies. The mere effluxion of time by itself and without more, does not make a specialist study outdated. Given the nature of the proceeding before the Tribunal, it was open to the appellant to lead evidence in support of this proposition. It chose not to do so.

75. The respondents demonstrated through cross-examination that while the wetland studies in relation to the PES and EIS may not have followed the 2017 Regulations, the methods adopted by the experts are acceptable to the profession and have been commonly used. As argued by the respondents it is important though to note that the appellant's experts acknowledged that the present ecological status (PES) assessment, albeit it being an archaic assessment version or method, do not require HGM units to be defined. This method is an acceptable and published assessment method.

76. The expert reports submitted by the second respondent proposed several mitigation measures. The first measure seeks to minimise the impact by, amongst other things, proposing to construct a span bridge over the Jukskei River, minimising activities

outside the designated area and the buffer zone, and designing the road in such a way so as to allow for the continued flow system and thus reducing impacts.

77. The second measure proposed is the remediation of the environmental impacts. as proposed in the Aquatic Resource Rehabilitation Plan. To this extent the WUL imposed a condition requiring the second respondent to submit a wetland rehabilitation plan for approval.[36]

78. The third mitigation measure proposed by the second respondent, which in my view, is conditional, is compensation of any wetland which might be lost. This is conditional because compensation will only happen should it be found that any wetland will be lost. In such case a wetland offset plan must be submitted prior to construction.[37] The requirement to submit a wetland offset plan, should it become necessary, is consistent with *South Durban Community Environmental Alliance* to which I referred above.

79. That this is an acceptable practice is confirmed by the more specific Wetlands Offset Guidelines which states that '*prior to the authorisation of the proposed development, it would be unreasonable to require detailed management plans for wetland offset sites.*'[38]

80. But even if I was wrong, the EA which was granted following the consideration of the expert reports states, as one of its conditions, that the authorised activities must be

---

[36] *Record, Volume 6, page 1384, clause 2.10.*
[37] *ibid, page 1383, clause 1.17.*
[38] *South African National Biodiversity Institute (SANBI) & Department of Water and Sanitation, Wetland Offsets: A Best Practice Guideline for South Africa. (2016,pg 11).*

commenced within a period of 10 years from the date of issue failing which the EA will lapse.[39] In other words, once the activities are commenced with within the aforesaid period the EA remains valid. It would then make no sense that the reports relied upon when applying for an EA can be said to be outdated when they are used for the purpose of considering WULA in respect of the assessment of wetlands, but remain current and valid for the purpose of an EA. This construction will lead to an absurdity.

81. In any case, the appellant bears the onus of proof on a balance of probabilities that these expert reports outdated.[40] The appellant has failed charge this onus of proof.

82. Consequently, I find that this ground of appeal must fail.

Failure the protection of the African Grass Owl

83. The appellant contends that the WULA contained no information on or assessment of the AGO. On this basis the appellant submits that there was failure to protect the AGO.

84. In support of this proposition, Grobler, who testified on behalf of of the appellant, disagreed with the EIS of wetlands 1 to 4. In this regard he contends that wetland assessment report by SAS only makes reference to the EIS at a much larger area, namely Quaternary Catchment A21C based on the information provided in 1999.

---

[39] *Pleadings Bundle, page 1351, paragraph 3.4 (d).*
[40] *DDP Valuers (Pty) v Makhado Municipalityat para 58.*

Further that if the EIS was done for individual wetlands, the rare species would have been identified.

85. I find that there is no merit in this ground of appeal. There are sufficient measures put in place to protect the AGO.

86. First, although the second respondent has admitted that it did not find the AGO during the assessment period, the SAS report lists the AGO as a species of conservation concern. Second, and a result, the SAS report recommended faunal management and mitigation plans in order to preserve the faunal habitat. Third, the respondents accepted, during trial, that AGO uses some of the wetlands as its habitat, although there was no agreement on the extent of the use.

87. Third, the first respondent has imposed conditions in the WUL, relating to the protection of the habitat of the AGO.[41] Fourth, the WUL requires the implementation of the hydropedological study for the purpose of informing the 32m wetland buffer zone.[42] Fifth, the WUL has imposed a condition requiring the submission of a wetland offset plan in respect of a wetland which might be lost prior to construction.[43] Sixth, the WUL imposes an obligation on the appellant to comply with the EA.[44] Botha also testified that clause 1.9 of the WUL will also be given effect to by ensuring that there is no ingress into the wetland and that the wetland will be fenced off during construction phase.

---

[41] *Record, Volume 6, page 1383, para 1.9.*
[42] *Ibid at para 1.7.*
[43] *ibid para 1.7.*
[44] *ibid para 1.9.*

88. Similarly, I find that appellant has failed to discharge its onus of proof on a balance of probabilities. Thus, this ground of appeal falls to be dismissed.

89. The findings that the two main grounds of appeal have no merit are dispositive of this matter for reason that the remaining grounds of appeal are intertwined with these two grounds of appeal. However, I will deal briefly with some of these ancillary grounds of appeal. First, the contention by the appellant that there was no public participation process is both factually and legally unsustainable. The record is replete with references to public participation process including with specific reference to the AGO.[45]

90. Second, the contention by the appellant that the conditions attached to the WUL are unlawful, irrational, vague and/or contradictory are similarly without any merit. I have dealt with these conditions above and I have found them to be legally sound and legally permissible.

91. Third, although the second respondent admitted that it did not come across the AGO when conducting its studies, the conditions attached to the WUL are sufficient to protect the habitat of the AGO. Thus, the purported absence of information or assessment of the impact of the AGO is, in light of these conditions, immaterial.

92. Fourth, the submission by the appellant that the decision to issue the WUL did not comply with the 2017 Regulations, is also found to be without any merit. I have already found that, although the wetland studies in relation to the PES and EIS may

[45] *Record, Volume 6, pages 1375, 1349, 1362, 1260, 1237 (items 540, 496, 500, 387, and 336, respectively.*

not have followed the 2017 Regulations, the methods adopted by the specialists are accepted by the profession and have been commonly used. In other words, there was substantial compliance with the law. In adition, the expert reports relied upon predate the 2017 Regulations and would have been unreasonable to expect the second respondent to conduct fresh studies and compile new reports.

93. Fifth, there is also no merit in the ground of appeal to the effect that the decision by the first respondent was procedurally unfair or was not taken in an open and transparent manner. Based on this ground of appeal the appellant argues that it has been denied an opportunity to comment on the wetland offset report which was made a condition of the WUL.

94. As indicated earlier the impugned condition[46] requires that the wetland offset plan must be submitted prior to construction. It must follow that, if such a wetland offset plan is to be submitted, a public participation process will be conducted. To argue as the appellant is arguing is to put the cart before the horse.

Social economic benefits of the proposed develop

95. Save for the two main grounds of appeal, the appellant has not sought to impugn the social economic benefit of the proposed road. The second respondent testified that proposed road construction will reduce traffic congestion, shorten travelling time, job

[46] *Pleadings Bundle, page 209, clause 1.17 of the WUL.*

creation, and lead to property development, amongst other things, resulting in major capital expenditure.

96. He testified that if the proposed water uses are not authorised, the proposed development will not proceed. The implications are that the positive impacts related to the CAPEX spend of the project will not be felt. In particular, there will be a loss of the R1 043.8 million in increased production and new business sales. There will also be a loss of R402.9 million to the GDP. The job creation associated with construction and the multiplier effects of the CAPEX spend (2 009 jobs over two years) (1005 jobs per year) will not take place. He concluded by stating that there will be a loss of the potential R170.4 million of additional income.

97. This remains unchallenged. I, therefore, find in the context of the relevant provisions of NEMA and the Constitution, that the approach by the first respondent, in its environmental management, placed the people's needs at the forefront of its concern.

98. A review of the arguments by the appellant and the appalent's evidence shows that the appellant addressed only the environmental aspects of the WULA, namely impacts on wetlands and the AGO. These are purely environmental considerations. But the decision of the Tribunal and the decision of the first respondent are made in the context of the principle of sustainable development which requires harmony to be struck between environmental, social and economic considerations. Both respondents made

extensive submissions on all of the three aspects. The second respondent fully motivated for the WUL by considering all the s 27(1) factors to be taken into account.[47]

99. The appellants at no point controvert and do not attempt to demonstrate this constitutionally mandated integrated approach. At no point does the appellant's heads of arguments even respond to the social, economic and developmental factors. The appellant's entire argument and case revolves around the wetlands and the AGO to the exclusion of all other factors.[48] This approach is tangential to the integrated holistic approach aligned to the principle of integration that underpins s 24 of the Constitution as amplified in s 2(4) of NEMA and s 27(1) of the NWA read with its objects in s 2.

100. There is no doubt that the social economic benefits of granting the WUL outweigh by far whatever negative impacts might be on the environment.

Conclusion

101. I find that the first respondent in considering and issuing the WUL carefully balanced the need for the protection of wetlands and vulnerable species and the social and economic needs of communities.

---

[47] *See Record pg. 806-815 read with ROR Record pg. 1461 and Record, Volume 1: pages 64 to 68; and Record, Volume 5, pages 1053 to 1054.*

[48] *See Appellants Heads para 1 to 102 – none of which discusses or considers the section 27(1) NWA factors.*

102. The appellant has failed to discharge the onus of proof on a balance of probabilities in relation to its grounds of appeal.

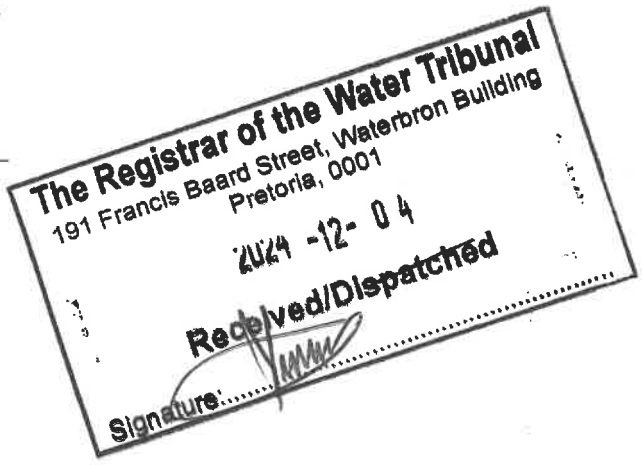
103. Insofar as the appellant seeks to invite the Tribunal to reconsider the granting of the EA, I find that the Tribunal does not have jurisdiction to adjudicate the granting of EA as it isnot the relevant appeal authority vested with that power.

Order of the Tribunal

1. The appeal is dismissed.

Adv P Loselo

Chairperson of the Water Tribunal



I agree

U Mbeki

Deputy Chairperson of the Water Tribunal

Appearances:

For the Appellant:	Adv Kuben Samy
	Instructed by JLR Attorneys and Associates (JJ Le Roux)
For the First Respondent:	Adv M Mojapelo SC and Adv F Thema
	Instructed by State Attorney Pretoria
For the Second Respondent:	Adv G L Grobler SC
	Instructed by Malatji and Co Attorneys (Mr K Sekati)