

IN THE WATER TRIBUNAL OF SOUTH AFRICA

HELD AT PRETORIA

CASE NO: WT05/22/GP & WT06/22/GP

In the consolidated appeal of:

INKWE BERRIES (PTY) LTD

APPELLANT

and

**DIRECTOR-GENERAL: DEPARTMENT OF
WATER AND SANITATION**

RESPONDENT

Date of Hearing: 13 May, 21-26 June, 24-25 July and 07 August 2024

Date of Judgement: 14 February 2025

Coram: Adv N Lekgetho, Additional Member (Chairing the Hearing)
Mr. M Sirenya, Additional Member of the Water Tribunal

JUDGEMENT

A. INTRODUCTION

1. This appeal challenges the Respondent's decision to reject the Appellant's Water Use Licence (WUL) application. The Respondent denied the WUL on the grounds that the catchment area in question is fully allocated, leaving no additional surface water available to support the proposed water use.

2. The Appellant argues that the basis for denying the WUL is flawed and has lodged an appeal with the Water Tribunal ("the Tribunal"). Specifically, the Appellant contends that the Internal Strategic Perspective ("ISP 2004") and the National Water Resource Strategy ("NWRS 2004"), which the Respondent relied upon, are outdated. Both documents are nearly 18 years old, and their continued use to justify the rejection of the WUL is questionable.

B. BACKGROUND/COMMON CAUSE FACTS

3. The Appellant owns two farms, Vrischgewaagdt 173/0 KR ("Farm 1") and Houtboschkloof 309/0-309/1 KR ("Farm 2"), situated approximately 27.58 km north of Mookgopong town within the quaternary catchment A50A in the Limpopo Water Management Area, Limpopo Province. These farms are primarily used for agriculture and limited cattle grazing. The Appellant intends to cultivate blueberries on 100 hectares across both farms and requires water for irrigation.
4. A non-perennial tributary of the Lephalale River flows through both farms, where two historically constructed instream dams are located Dam 1 on Farm 1 and Dam 2 on Farm 2. These dams will be utilized for the proposed blueberry irrigation project. According to the Appellant, water will be pumped directly from Dam 2, stored, and distributed via drip irrigation to a 100-hectare blueberry farm. Notably, Dam 1 has a storage capacity of 246,000 m³, while Dam 2 holds 45,000 m³, resulting in a total storage capacity of 291,000 m³.
5. On 20 July 2020, the Appellant, through its consultant Tricorn Agric Services, applied for two Water Use Licences (WULs) under Section 21 of the National Water Act 36 of 1998 ("NWA"). The application covered the following water uses for Dam 1: section 21(b) – storing water, section 21(c) – impeding or diverting the flow of water in a watercourse, and section 21(i) – altering the bed, banks, course, or characteristics of a watercourse. For Dam 2, the Appellant applied for a WUL for section 21(a) – taking water, section 21(b) – storing water, section 21(c) –

impeding or diverting the flow of water in a watercourse, and section 21(i) – altering the bed, banks, course, or characteristics of a watercourse.

6. Specifically, the Appellant, through two applications, sought a WUL to store 246,000 m³ of surface water in Dam 1, abstract 672,210 m³ of surface water from the Lephalale River, and store 50,000 m³ of surface water in Dam 2 for irrigation purposes.
7. In October 2021, the Respondent rejected the Appellant's WUL applications for both farms, citing insufficient water availability for additional allocations.
8. The Appellant lodged an appeal against the Respondent's decision, contending that the source documents used to assess water availability are outdated and do not accurately reflect the current conditions. The appeal deals with the Respondent's decisions for both farms as one appeal.

C. COMMON CAUSE ISSUES

9. It is common cause that the Appellant's two instream dams on the farms have existed since their construction in 1987. At the time of the WUL applications, the dams were not being used for water abstraction but had been storing water since their construction.
10. The instream dams will serve as the primary water source for the proposed irrigation scheme for the cultivation of blueberries. Both dams are registered with the Respondent, Dam 1 with a registered volume of 246,000 m³, effective from 1 January 1987 and Dam 2 with a registered volume of 50,000 m³, effective from 1 October 1987.
11. Both dams are currently storing water. The current water storage in both dams constitute water use under Section 21 of the NWA and qualifies as an ELWU in

terms of section 32 of the NWA. This classification applies to water uses that occurred at any time during the two years preceding the enactment of the NWA.

12. It is further common cause that the verification process of the ELWU and the extent of the water use, as provided under section 35 of the NWA, has commenced but remains incomplete at this stage.

D. ISSUES

13. The Tribunal is tasked with determining whether there is sufficient water available to allow the Appellant to abstract and store water for irrigation purposes.
14. During the appeal hearing and in its written submissions, the Appellant argued that the Tribunal should also consider granting licences for the two dams. As it will become clearer later in this judgment, the question of authorisation for the construction of the two dams is rather academic at this point, because the dams were registered with the Respondent since 1987 and have since existed without any modifications or alterations. Furthermore, the Respondent has confirmed the existence of the dams and their capacities during a V & V process, and what remains is the verification of the water uses associated with the dams.
15. Similarly, the question of whether the Appellant has an ELWU is not a question before Water Tribunal for determination. This is because the Respondent is currently engaged in the verification process of that ELWU.

E. GROUNDS OF APPEAL

16. In its Notice of Appeal, the Appellant cites the following as being the basis for appealing against the Respondent's decision to decline its WUL applications:

- 16.1 The basis for Respondent's refusal of the WUL that the Lephalale Catchment is stressed was a blanket reason which fails to afford the Appellant its rights in terms of NWA;
- 16.2 The internal strategic perspective and national water resource strategy relied upon by the Respondents of 2004 are outdated and their applicability to the Appellant's application is questionable;
- 16.3 The Respondent's rejection of the WUL application failed to consider the relevant factors, as prescribed in section 27(1) of NWA;
- 16.4 The Respondent's rejection of the Appellant's WUL application in terms of section 21(c) and (i), is inconsistent with the Respondent's Instream Water Committee Unit, which had recommended the granting of the WUL;
- 16.5 The Respondent's decline of the Appellant's WUL applications in terms of section 21 (b), is baseless because the Respondent's ROR states in page 11, thereof that the Respondent is required to Verify and Validate the ELWU for section 21(a) and (b) water uses; and
- 16.6 The Respondent's ROR does not seem to have properly considered the relevant information, which was requested and submitted by the Appellant, in its reports.

F. GROUNDS OF OPPOSITION

- 17. In its response to the appeal, the Respondent repeated its reasons as per the ROR and rejection letter that:

- 17.1 In terms of both the NWRS 2004 and their ISP 2004 the Limpopo Water Management Area where the Appellant's 2 farms are situated, has a deficit of 23Mm³ for the year 2025. Both the NWRS and the ISP are forecast, which cover the period 2000 to 2025. They are not outdated and there has been no other water reconciliation strategy that has been conducted beyond the NWRS 1st edition ,2004. These are the Respondent's sole guides insofar as water resource management is concerned.
- 17.2 In Lephalale itself, where the Proposed water use will take place, the water resources have a negative balance of 1,000, 000 m³ per annum for the year 2000 through to 2025. The catchment in respect of which the application was made is fully allocated to the extent that there is no additional surface water to accommodate the proposed water uses.
- 17.3 It is the Respondent's observation that the Appellant has already constructed the dam that is being applied for. It is a requirement that water users obtain authorisation before they undertake water uses. The rejection of the applications implies that the Appellant should demolish the unlawfully constructed dam.
- 17.4 The Appellant's applications were considered on their merits inclusive of all the documentation that the Appellant submitted.
- 17.5 When the Respondent declined the allocation on the basis that there is no additional surface water from which to make further allocation, it took this decision having been informed by scientific appraisals of the water condition in the area concerned. The Tribunal is referred to its previous appeal decision in the matter of **Joseph Klopper v department of water and sanitation (case number WT 01/ 21/ GP)** in which the issue of insufficient surface water for further allocation was upheld.

G. LEGAL PRINCIPLES

National Water Act, 1998 ("NWA")

18. In its preamble the NWA provides that:

*"RECOGNISING that water is a scarce and unevenly distributed national resource which occurs in many different forms which are all part of a unitary...
ACKNOWLEDGING the National Government's overall responsibility for and authority over the nation's water resources and their use, including the equitable allocation of water for beneficial use, ..."*

19. Section 4 of NWA provides for entitlements to use as follows:

- "(3) A person may use water in terms of a general authorization or licence under this Act.*
- (4) Any entitlement granted to a person by or under this Act replaces any right to use water which that person might otherwise have been able to enjoy or enforce under any other law-*
- (a) to take or use water;*
 - (b) to obstruct or divert a flow of water;*
 - (c) to affect the quality of any water;*
 - (d) to receive any particular flow of water;*
 - (e) to receive a flow of water of any particular quality; or*
 - (f) to construct, operate or maintain any waterwork."*

20. For proper management of water resources, chapter 2 of NWA, requires the progressive development, by the Minister, after consultation with society at large, of a National Water Resource Strategy ("NWRS"). The NWRS provides the framework for the protection, use, development, conservation, management and control of water resources for the country. It also provides the framework within which water will be managed at regional or catchment level, in defined water management areas. The NWRS must be formally reviewed from

time to time and is binding on all authorities and institutions exercising powers or performing duties under NWA.

21. Chapter 2 of NWA further provides for the development of the Catchment Management Strategies (“CMS”) which must be in harmony with the NWRS. Similarly, the CMS must be reviewed from time to time and should include a water allocation plan and set principles for allocating water to existing and prospective users, considering all matters relevant to the protection, use, development, conservation, management and control of water resources.
22. In terms of NWA, a person can only be entitled to use water if the use is permissible, and chapter 5 of NWA sets out general principles for regulating water use. Water use is defined broadly, and includes taking and storing water, activities which reduce stream flow and altering a watercourse.
23. In general, a water use must be licenced unless it is an existing lawful use, is permissible under a general authorisation, or if a responsible authority waives the need for a licence.
24. Section 27 of the NWA sets out the factors which must be considered by the responsible authority in the issuance of a WUL or a general authorisation. These include ELWU, the socioeconomic impact of the water use or uses if authorized; the need to redress the results of past racial and gender discrimination; the likely effect of the water use to be authorized on the water resource and on other water users, and the resource quality objectives with the water resource, and the quality of water in the water resource which may be required for the reserve and for the meeting of international obligations amongst others.
25. Section 32 of NWA defines existing lawful water use as follows:

“An existing lawful water use means a water use-

- (a) *which has taken place at any time during a period of two years immediately before the date of commencement of this Act and which-*
 - (i) *was authorised by or under any law which was in force immediately before the date of commencement of this Act;*
 - (ii) *is a stream flow reduction activity contemplated in section 36 (1); or*
 - (iii) *is a controlled activity contemplated in section 37 (1); or*
- (b) *which has been declared an existing lawful water use under section 33.*
- (2) *In the case of-*
 - (a) *a stream flow reduction activity declared under section 36 (1); or*
 - (b) *a controlled activity declared under section 38,*

an existing lawful water use means a water use which has taken place at any time during a period of two years immediately before the date of the declaration.

26. In terms of section 35 of NWA, a responsible authority may verify an ELWU by requiring any person claiming an entitlement to that water use to apply for a verification of that use. A responsible authority may conduct its own investigation into the veracity and the lawfulness of the water use in question. No person who has been required to apply for verification in respect of an ELWU may exercise that water use if that person has not applied for verification; or after the verification application has been refused.
27. The High Court in the matter of *Forestry South Africa*¹ interpreted the meaning of a two-year period referred to in s 32(1)(a), which is colloquially called the qualifying period. In *Forestry South Africa*,² it was held that the qualifying period referred to in s 32(1), which is the period for the verification of an ELWU, is the period between 1 October 1996 and 30 September 1998.

H. MERITS AND EVIDENCE

¹ *Forestry South Africa v Minister of Human Settlements, Water & Sanitation and Others* (19684/2019) [2021] ZAWCHC 164; [2022] 1 All SA 169 (WCC) (23 August 2021).

² At para 164.

28. The Appellant led oral evidence through its witnesses, (Mr. Gilbey, Ms. Mpetle, Mr. Genis & Ms. Markie). The Respondent led four witnesses (Mr. Mahlangu, Mr. Malungani, Ms. Tshiruvhela and Mr. Nethengwe).
29. Mr. Gilbey's testimony related to the Appellant's two WUL applications which were prepared and submitted by Tricon Agric Services Pty Ltd ("Tricon"), as the Appellant's consultant, in relation to the Appellant's two farms. Mr. Gilbey was requested, early 2022, to assist with the lodging of an appeal for the two WUL applications which were declined by the Respondent. His testimony was uncontested by the Respondent and formed the common cause facts of this matter. Similarly, the testimonies of both Mr. Mike Genis's and Ms. Markie, were substantially uncontested and accepted as common cause facts.

Construction and registration of the 2 DAMS

30. In its ROR, the Respondent stated that the Appellant intends to construct an instream dam with a capacity of 246,000m³, in relation to Dam 1. In its appeal, the Appellant asserts that Dam 1 is already constructed and registered under registration number 27020321, with a storage capacity of 246,000m³, effective from 1987. Regarding Dam 2, the Appellant claims that it is registered under the same registration number, 27020321, with a storage capacity of 50,000m³, effective from 1987.³ The Respondent did not dispute this aspect.
31. According to Mr. Genis, the estate manager of Lepalala Berries also responsible for managing the Appellant's two farms, he was informed by the previous owner of the Appellant's farm Mr. Van Schalkwyk, that Dams 1 and 2 were constructed in the 1970's and have remained unaltered since their initial construction. Mr. Van Schalkwyk did not use the water from the two dams for irrigation and around 2006 Mr. van Schalkwyk deregistered the water use of dam 1.

³ *Appeal Record, Bundle 2, pg. 18, para 24*

32. Mr. Mahlangu (responsible for Water Use Registration Database ("WRMD") system within Limpopo regional office of the Respondent), stated that the registration of water users in the database only began between the years 1999 and 2000. According to WRMD, the Appellant's Dam 1 was registered in 1987 for water use under section 21(a) of NWA (taking of water), but the water uses were later deregistered in 2006. Regarding Dam 2, the Respondent's registration certificate shows that it was registered in 2001 for Section 21(b) (water storage) use.⁴
33. While Mr. Mahlangu could not confirm the lawfulness of both dams, he acknowledged that they had existed since at least 1987. Notably, he also conceded that the WRMD plays a crucial role in the WUL application process and that anyone involved in processing a WUL application would be granted access to that system to check and confirm an applicant's water uses.
34. Under cross-examination, Ms. Tshiruruvhela, testifying for the Respondent, rightly conceded that the Respondent's statement in its ROR was incorrect. The ROR had mistakenly stated that the dams were to be constructed, despite their existence at the time of the WUL application and the absence of any planned construction.
35. The Respondent's investigation report detailing the findings of an inquiry conducted by the then Department of Water Affairs and Forestry (DWAF), now the Respondent, on 14 September 2006, revealed that...:

"Water use on the farm Vrischgewaagdt KR 173/0

... the dam is built in the upper palala river, close to the watershed. The dam was constructed by a farmer, under the supervision of DWAF and according to plans drawn up by DWAF. The only water uses that occur are for schedule 1 uses... the dam is registered with dam safety..."

⁴ Appeal Record, Bundle 1, pg. 83-84

36. This demonstrates that the Respondent was aware of Dam 1 on the Appellant's farm at all relevant times, and at the very least, since 1987. The dam was even registered with the Respondent's Dam Safety section. Although the investigation report identified a few issues related to the dam's safety and maintenance, which were brought to the attention of Mr. Van Schalkwyk, it was noted that he would address them. Nothing in the report indicated that the Respondent intended to demolish the dam due to its alleged illegal construction.
37. Furthermore, the Respondent correctly conceded that the two dams do exist and that they are registered with the Respondent. *Albeit* the Respondent contends that the registration of the dams is not an entitlement for a section 21 of NWA water use.
38. The Tribunal also concludes that the construction of the dams is not in issue in this appeal. The two dams in question had already been built and registered with the Respondent. In any case, the Respondent did not adduce any evidence to support an allegation that the dams are illegal.
39. As previously noted, it is undisputed that the water use related to Dam 1—specifically, the abstraction of water from a watercourse—was deregistered in 2006. As a result, the Appellant was required to reapply for this water use and other water uses, which it did through the WUL applications, which are the suspect of the appeal. It must be noted that the section 21(b) (storing water) water use was never deregistered by the previous owner of the Appellant's farm. However, since these uses were registered prior the enactment of NWA, same had to be verified as existing lawful water uses under sections 32-35 of NWA.

Existing Lawful Water Use ("ELWU")

40. Regarding the Appellant's Existing Lawful Water Use ("ELWU"), both parties agreed that the Appellant did not possess any ELU, nor did they hold a registration certificate or licence confirming ELUs. Furthermore, in its WUL applications for

Dams 1 and 2,⁵ the Appellant explicitly stated that no ELWU was associated with either dam. The confirmed registration of both dams' states that:

"the registration record is not an acknowledgement of an entitlement to the registered water use, may not be used to create the impression that it is proof of a water use entitlement. By virtue of section 22(1) of the NWA, the only documents that may be used as proof of a water use entitlements are:

- a. a license;*
- b. an official document stating the extent of existing lawful water use pursuant to section 33 or 35 of NWA;*
- c. a general authorisation as published in the Gazette; or*
- d. schedule 1 of the national Water Act..."*⁶

41. Mr. Malungani (Chief Director responsible for Validation and Verification ("V&V") of ELWU) testified for the Respondent that the Appellant's ELU has not yet been verified in accordance with section 35 of the National Water Act (NWA). This is due to the Respondent's capacity challenges in addressing the backlog for the validation and verification of ELUs.
42. According to Mr. Malungani, the Government Gazettes from 1984 and 1997 listed the Appellant's two farms under the relevant catchment area, but neither an irrigable area nor any recognized irrigation development was identified on the Appellant's farm. As a result, the Appellant's dams should not have been used for water storage. If the Appellant's dams are storing water in any volume exceeding what was recorded in the 1997 Government Gazette, such use would be in violation of the gazette and deemed unauthorized.
43. Importantly, Mr. Malungani confirmed that the verification process had not yet commenced in the catchment area where the Appellant's farms are located, nor had the Appellant submitted any request during the period in which the WUL

⁵ *Appeal record, bundle 1, Vrischgewaagd & Houtboschkloof, pg. 4, para-A*

⁶ *Appeal Record, Exhibit 9, pg. 79 & 83*

applications were being considered. He stated however, that the Respondent can conduct a V&V process for any claimed ELU even if the affected applicant had not made a request for same to be conducted.

44. Mr. Malungani further confirmed that, since the start of the appeal hearing, the Respondent has initiated the V&V process for the Appellant's water uses concerning the storage of water in the already constructed dams on its farms. However, the Appellant has not yet been informed about either the process or its outcome. To date, the validation process has been completed, confirming that the two dams and their claimed capacities exist and have been properly registered. However, the verification process, which addresses the issue of prior lawful water use, has begun but is not yet finished.
45. The Appellant contends, in its appeal that the Respondent's decline of the WUL application on the basis that the existing dam use was unlawful is baseless because the Respondent did not lead any evidence of unlawful use of the dams. We agree with the Appellant since the Respondent has also confirmed that the verification of the lawfulness of the water uses has not been finalised. Furthermore, the Appellant argues that there is no limitation imposed by NWA on who may apply for a WUL and the circumstances under which such application can only be made. After all, the Appellant needed to apply for WUL in respect of new water uses (abstraction of water, impeding or diverting the flow of water in a watercourse and altering the bed, banks, course or characteristics of a watercourse).
46. The preamble of Part 3, Chapter 4 of NWA which deals with the ELWU states that:

"An existing lawful water use, with any conditions attached, is recognised but may continue only to the extent that it is not limited, prohibited or terminated by this Act. No licence is required to continue with an existing lawful water use until a responsible authority requires a person claiming such an entitlement to apply for a licence. If a licence is issued it becomes the source of authority for the water use. If a licence is not granted the use is no longer permissible."

47. No licence is required to continue with an ELWU, until a responsible authority requires the claimant to apply for such a licence. If the licence is issued, it becomes the authority for the water use and conversely if a licence is not granted the use is no longer permissible.
48. It is a well-established fact that Dam 1 and Dam 2 on the Appellant's farm have been storing water since their construction. The Appellant has also confirmed that the dams were not used for abstraction of water. The taking and storage of water is a water use in terms of section 21(a) and (b) of NWA. The Respondent has confirmed that a process to verify the lawfulness of that water use has commenced and has not been finalised.
49. The registration records indicate that the lawfulness of the water use has yet to be determined. It is evident that the Appellant was required to apply for a water use licence under Section 21(a), (b), (c), and (i) of the NWA for both dams, respectively. Such water use licence applications were made by the Appellant and declined by the Respondent in 2021. The basis for the decline is that the relevant Catchment Management Area, is stressed and lacks sufficient water for further allocation.
50. It is common cause that the two dams have been storing water since their registration, hence the need to verify whether the storage of water is lawful or not. NWA requires the responsible authority to verify the extent and/or lawfulness of the ELWU and that only once this has been done could the determined ELWU be used in a WULA. This is not surprising because, the volume of water uses to be authorised under a WUL application is important to avoid over allocation.
51. Verification of an ELWU is provided for in s 35(1) of NWA which requires a responsible authority to require any person claiming an entitlement to that water use to apply for a verification of that use. In terms of section 35(3)(b) of NWA a responsible authority may conduct its own investigation into the veracity and the lawfulness of the water use in question. It must be noted that a responsible

authority in determining the lawfulness of the water use may also determine the extent (or volume) of the water use. A determined and verified extent or volume of ELWU will assist in determining further allocations.

52. As already indicated, the verification and determination of an ELWU are governed by Section 35. According to Section 35(4), once the responsible authority has determined the extent and/or lawfulness of an ELWU, that determination establishes the limits of both the extent and legality of the water use. In other words, if the claimed ELWU is found to be unlawful, the applicant has no entitlement to an ELWU. Furthermore, if an ELWU is deemed lawful but the determined volume is less than the amount claimed by the applicant, the applicant's entitlement is restricted to the verified volume.

SUFFICIENT WATER FOR FURTHER ALLOCATION

53. The Appellant's WUL application seeks authorisation to abstract 672,210.00 m³ of surface water from the instream dam and to store 50,000 m³ in a dam. The Respondent declined the WUL applications on the basis that the catchment area for which the applications are made is fully allocated such that there is no additional surface water available to accommodate the proposed water use. The Respondent came to that conclusion, relying on the ISP for the Limpopo Water Management Area of November 2004 and the NWRS 1st edition of 2004.
54. The Respondent's rejection letter for the Appellant's WUL applications stated that:

"As indicated on page 37-40 of the Internal Strategic Perspective: Limpopo WMA dated November 2004, Lephalale catchment appears to be stressed, and no new licences should be issued from surface water for irrigation purposes.

According to appendix D page D1.1 to page D1.5 of the NWRS 1st edition dated September 2004 attached as Annexure B Lephalale catchment where the proposed water use will take place, the water resources have a negative balance of 1Mm³/for year 2000 and the year 2025 base and a negative balance of 1Mm³/for high scenarios.

The analysis above suggests that there is no additional water for allocation in the water management area and the Lephalale catchment."

55. Ms. Matsatsi Mpetle ("Ms. Mpetle") testified that she is an employee of Tricon since September 2023 and was responsible for providing technical support for the Appellant's WUL applications for both farms. She testified that Tricon requested her expert opinion on the Respondent's decision to decline the WUL applications due to insufficient water for further allocation. She disagrees with the Respondent's reasoning and vehemently denied that the Appellant requires authorisation for construction of an instream dam because those dams had been constructed since years back.
56. Ms. Mpetle testified that the Respondent's justification—that the catchment is fully allocated and cannot accommodate the Appellant's section 21(a), (b), (c), and (i) water use licence applications for both dams—does not make sense. In her view, since the Appellant's dams were constructed in 1987 and have been storing water ever since, the water flow in the catchment would have already accounted for water in the existing dams. Furthermore, these existing dams will not have an impact on the future catchment flow in the area.
57. She noted that the Respondent's decision to deny the WUL was based on the NWRS, 1st edition, 2004. However, she disagrees with this reasoning, emphasizing that more recent data on catchment flow is now available, surpassing the information contained in the NWRS, 1st edition, 2004 and the ISP (2004).
58. To support her view, Ms. Mpetle referred the Tribunal to the NWRS 2004, which stipulates that it should be updated every five years. The preamble of Chapter 2 of the NWA explicitly states that the NWRS should be reviewed periodically. Section 5(4)(b) of the NWA states that the NWRS must be reviewed at intervals of not more than five years.

59. Ms. Mpetle emphasized that the water availability data in the NWRS 2004 study, which the Respondent relied on to reject the Appellant's WUL, is relatively coarse and derived from a national perspective and that it was inappropriate to use this broad data for assessing individual projects.⁷
60. According to Ms. Mpetle, the Reconciliation Strategy of 2016 was available at the time of the WUL application, and this information should have been relied upon instead of the Respondent solely using the NWRS, 1st edition, 2004 and the ISP 2004. In her view, the NWRS 2004 and ISP 2004 are not reliable sources for determining water availability for the WUL applications in question, as the water studies in these documents are outdated and have been superseded by the Limpopo Water Management Area Reconciliation Strategy of 2016. Additionally, she pointed out that water requirements in some cases are only estimates and are conservative. According to the NWRS 2004, any identified deficit does not mean that actual water use exceeds the available supply, but rather that allowances for implementing the ecological component of the reserve are still indicative and not yet fully implemented. It is, therefore, prudent to include all known and estimated requirements in the NWRS.
61. Ms. Mpetle referred the Tribunal to various excerpts from the ISP 2004 indicating availability of water in the relevant Catchment Management Area. Firstly, she referred to page 8 of ISP Limpopo WMA, version 1, November 2004 in which the reconciliation of water requirements and available water resources indicated that:

"the water requirements and groundwater resources of the water management area as documented are much higher than those given in the NWR. The reason for this is

⁷ NWRS, 1st ed, 2004, pg. 10, para 2: *It must also be emphasised that the purpose of the NWRS is to strategically direct the management of water resources from a national perspective, and the water availability information is therefore relatively coarse. The information is not appropriate, nor is not intended to be used, for planning individual projects. These must be investigated using more detailed information, as well as being the subject of the impact assessments required by environmental legislation.*

that new information became available on the groundwater use through the registration process as well as the GR IP project (DWA, 2004).⁸

62. She went on to refer to the NWRS, 2nd edition, June 2013, which stated that:

"the Lephalale area must optimise the utilisation of local resources, but surplus water in the crocodile River system is available for transfer..."⁹

63. According to NWRS 2 of 2013, long-term water requirements which were expected or accounted for in NWRS 2004 have dropped from 149 million m³/a to 49 Mm³/a
64. She further stated that the draft Limpopo Water Management Area Reconciliation Strategy 2016 is based on hydrological water studies that account for actual water usage and recognize the independence of different catchment areas. The water availability for the quaternary catchment A50A, as reported in the Respondent's ROR, is based on actual water use in the area and demonstrates a surplus of over 16 Mm³ per annum in available water.
65. According to Ms. Mpetle, all reports submitted to the Respondent, as required, were based on the actual local conditions at the time of the WUL applications. These reports demonstrate that there are 16 Mm³ of surface water available for allocation, of which the Appellant requires only 0.67 Mm³.
66. Ms. Mpetle concluded that the Respondent should not have determined that there was insufficient surface water in the catchment area. She noted that the water balance at the quaternary catchment level A50A is in surplus, based on both the water balance provided by the Respondent in the ROR and internal water balance calculations. These calculations were derived from the WR2012 database, which the Respondent relies on.

⁸ Exhibit 3, pg. 8, para 4

⁹ Exhibit 3, pg. 14

67. Additionally, the water balance at the catchment level for Lephalale is in surplus, according to the Limpopo Water Management Area Reconciliation Strategy. Ms. Mpetle referred to Table 5.1 on page 5-1 of the 2016 strategy document, which shows a positive water balance of 2,300,000 m³ per annum for the Lephalale Management Area and 1,400,000 m³ per annum for the total water management area. These positive balances represent a significant improvement compared to the outdated 2000 values relied upon by the Respondent, which indicated a small deficit for Lephalale and a 23 Mm³ per annum deficit for the overall water management area.
68. In relation to the abstraction of surface water, Ms. Mpetle reiterated that the Respondent's rejection of the WUL applications, on the basis that there is insufficient water for obstruction of surface water was also incorrect. This is so because the Respondent had confirmed in its ROR that the water balance at the quaternary catchment level A50A is in surplus although it relied on an outdated water balance in the Lephalale catchment level.
69. Ms. Mpetle further disagreed with the Respondent's reasoning in relation to instream dams because the Respondent had incorrectly referred to the dams as "still to be constructed" when in fact both were constructed and registered in 1987. The Respondent incorrectly regards the catchment as "stressed" when both the quaternary catchment A50A and the catchment Lephalale are in surplus.
70. Ms. Mpetle emphasized under cross examination that the Reconciliation Study of 2016 is more appropriate to use and is no longer a draft. Reference was also made to the impact of Invasive Alien Plants on water resources in the Catchment and the duty of Government to remove them. This was in response to the assertion of the Respondent that the Draft Reconciliation Strategy does consider other water users e.g. Livestock, Invasive Alien Plants (IAP), Afforestation and Ecological water requirements. The totality of the information available in the latest drafts and final strategy documents for the Limpopo Water management Area, since 2013 to date

does indicate that there is sufficient water availability in Lephalale to enable authorisation of the Appellant's WUL applications. She alluded to the fact that the Respondent does acknowledge the presence of unlawful water use in that area but has done nothing about that and now wants to decline the Appellant's water use application, on account of alleged water shortages occasioned by, among others, unlawful use.

Respondent's case

71. The Respondent called, as its first witness: Ms. Takalani Tshiruruvhela ("Ms. Tshiruruvhela"). Environmental Officer who testified that she conducted the initial assessment and prepared the Record of Recommendation (ROR).
72. Ms. Tshiruruvhela testified that she conducted a site visit on the Appellant's two farms in the process of consideration of Appellant's application for WUL and prepared the ROR where she recommended that the application be declined and presented the ROR to the Water Use Authorisations Assessment Advisory Committee (WUAAAC). She stated that during the site inspection she noticed that there were two instream dams constructed on the Appellant's farms respectively, and upon enquiring whether the Appellant had any ELWU, the Appellant could not produce any document or authorisation to prove the ELWU for the historical dams. The Appellant was advised to contact the Respondent's validation and verification section to verify the water users observed in the constructed teams.
73. She indicated that her recommendation for the decline of the applications was based on the fact that the Lephalale Catchment is stressed, and no new licences are being issued from surface water, for irrigation purposes.

74. She stated that the Appellant has submitted all the required reports including the registration certificates of the historical dams indicating the water uses in terms of section 21(a) and (b) of NWA.
75. She confirmed that during the consideration of the WUL the NWRS and ISP, 2004 were consulted and it was noted that according to those documents the Lephalale Catchment Area was stressed. It was further noted that in 2005, the Catchment had a deficit of minus million m³ and that deficit goes on to 2025.
76. Ms. Tshiruruvhela stressed that in a stressed catchment area it means the area is fully allocated to other users and there is no water available for further allocation. If new allocation is allowed to new users, this will affect other users who already have an authorisation.
77. Under cross-examination, Ms. Tshiruruvhela confirmed that she doesn't take decisions relating to WUL applications but rather makes recommendations. She was referred to the Respondent's ROR which reflected the recommendations from instream water use which recommended as follows:

"DWS instream water use recommends a water use license in terms of section 21 (c) and (i) with the proviso that the recommendations are implemented. DWS regional office to verify and validate existing lawful water use for section 21 (a) and (b) water uses."

78. Ms. Tshiruruvhela indicated that the committee overruled the instream water use, recommendations because the recommendation for a WUL under section 21(c) and (i) cannot sustain without an authorisation under section 21(b) (storing of water). This explanation is sound, however when one looks at the further recommendation by Instream Water Use, that the regional office had to verify and validate the Appellant's ELWU, for section 21(a) & (b), this begs a question of

whether Ms Tshiruruvhela's committee ought to have waited for the V&V prior finalising the WUL application?

79. Upon being pressed by the Appellant's counsel, Ms. Tshiruruvhela conceded that she and her committee did not wait for verification by the V&V section. Instead, she asked someone who works on WRMS system to check if there was any ELWU because if there was any, it could have been registered on the system and would be visible. This is unhelpful, because according to the testimony of Mr. Malungani (Chief Director responsible for Validation and Verification ("V&V") of ELWU the Appellant's ELWU has not yet been verified due to the Respondent's capacity challenges in addressing the backlog for the validation and verification of ELUs.
80. Importantly, Mr. Malungani had also confirmed that the verification process had not yet commenced in the catchment area where the Appellant's farms are located. Since the start of the appeal hearing, the Respondent, only then initiated the verification and validation (V&V) process for the Appellant's water uses concerning the storage of water in the already constructed instream dams on its farms and the verification process of the lawfulness of the use is still outstanding.
81. This goes to show that there was nothing preventing the Respondent from awaiting the V&V process to be finalised prior the finalisation of the WUL application. This would have cleared the issue of ELWU and assisted on the volumes thereof.
82. On the contents of the ROR for both applications in respect of Farm 1 and Farm 2, Ms. Tshiruruvhela, was pointed to various inconsistencies on the ROR which pointed to some possible ineptitudes of the Respondent in considering the Appellant's WUL applications. The rejection letter in respect of Dam 2 WUL application (s 21(a), (b), (c) &(i)) reference to the NWRS was left out, whereas NWRS was referred to in the rejection letter in respect of Dam 1.¹⁰

¹⁰ *Appeal Record, Bundle 2, pg. 25// Bundle 1, pg. 25*

83. The ROR's conclusions in respect of dam 2, did not refer to section 21(a), which indicates that the conclusion was copied from the conclusion made in the ROR in respect of dam 1 which did not require authorisation for the taking of water.¹¹
84. The comment made by the committee in the ROR that the Appellant did not address the requirement of section 27 (1) (b) of NWA, as there is no redress, and the discriminated group are still regarded as the employees and the employer, is incoherent with the Appellant's motivation in their applications relating to social economic impact of the WUL if authorised.¹² Ms. Tshiruruvhela, acceded that the committee never investigated any socio-economic impact of the WUL.
85. Furthermore, Ms. Markie's (sustainability manager for United exports which owns and manages Lepalala Berries) evidence¹³ relating to the social economic impact of the WUL was never disputed by the Respondent.
86. Importantly, Ms. Tshiruruvhela indicated in her testimony that she and her committee in considering the Appellant's applications did not commission or conduct further studies in relation to water availability in the catchment area. The committee solidly relied on the NWRS and the ISP of 2004 and nothing else.
87. The picture painted by the overall testimony of Ms. Tshiruruvhela is that the Respondent in dealing with the WUL application simply looked at the NWRS 2004 and the ISP 2004 and did not conduct any further investigation including ensuring that the V&V process has been finalised and has provided the final determination of verification of the Appellant's ELWU. A closer look on the ROR for both applications, it is easily discernible that in most categories the Respondent simply copied information from one ROR into the other ROR, although the water uses were different in some respect.

¹¹ *Appeal Record, Bundle 2, pg. 39*

¹² *Appeal Record, Bundle 2, pg38*

¹³ *Exhibit 8*

88. The Respondent's witness: Mr. D Nethengwe ("Mr. Nethengwe") testified that he was the Chairperson of WUAAAC and he is a specialist Geohydrologist, specialising in both ground and surface water. He indicated that he chaired the WUAAAC, which recommended the decline for the Appellant's WUL applications because the case officer, Ms. Tshiruvhela had presented both RORs in relation to the Appellant's WUL applications and had recommended a decline because the NWRS and ISP of 2004, reflected that the Lephalale Catchment Management Areas were stressed.
89. According to Mr. Nethengwe's evidence, the NWRS 1st edition 2004 and the ISP, 2004 were the applicable and sole source information guides which are considered in all WUL applications for water availability. The strategy documents of 2013, 2015, 2017 and 2023 referred to by Ms. Mpetle, did not repeal the NWRS 2004. They are just built-up information, and further that in 2013 a decision was taken not to reconcile the figures of water availability.
90. According to Mr. Nethengwe, there have not been any other resource strategies published by the Department which have either reconciled the figures contained in the NWRS or repealed the 2004 NWRS. The Reconciliation Strategy of 2016 is but a draft reconciliation strategy and does not have the force and effect of the NWRS, 2004 and specific and limited to the Limpopo North Water Management Area and not the whole nation. Furthermore, the Draft Reconciliation Strategy, 2016 does not factor ecological water requirements, commercial forestry, and invasive alien plants in the figures contained at Table 5.1, which are factored in NWRS Table 4, and does not factor water use by neighbouring countries unlike NWRS. It is based on 2010 development figures which by the logic of the Appellant are also outdated with projections for up until the year 2010. It is an internal tool used by the Department to assess the water resource and is read together with the NWRS.

91. Mr. Nethengwe emphasised that there is limited water available in the Lephalale Catchment and the source documents recommends that no new licence allocation should be made for irrigation purposes. The content of the Reconciliation Strategy 2016 does not bolster the Appellant's application but affirms that there is no additional surface water available and that the water management area is stressed.
92. The aim of the Department is to ideally maintain the balance of a water resource, the quality of a water resource, and the flow availability to all users of the resource in line with enforcing the NWA. The intended dams are located on an instream water course and would result in the reduction of the flow of water to downstream users.
93. Being in a water stressed management area, instream water interruptions are not encouraged for the sake of all water users hence the refusal of the application. The Appellant did not satisfy the considerations contained in section 27(1)(b), (f), (g), (i), and (j) of the NWA. Even if the Appellant satisfied all the considerations in section 27, the application would have been unsuccessful due to the water resource being heavily stressed and there being no additional surface water available.
94. The dams, whether already constructed or to be constructed, are not licenced for water use and would be in contravention of the NWA if they are being utilised in any manner for water use/storage. Even if the dams are not in use, they are situated on an instream watercourse and would cause further stress to an already stressed water resource and therefore, the application was bound to fail.
95. Under cross examination, Mr. Nethengwe stressed that he still stands with the decision that there is no water to allocate to the Appellants. When asked whether the figures used in NWRS 1 of 2004 are still relevant, his answer was yes, even for NWRS 2.

96. When asked by counsel for the Appellants whether one can't use data from one research document and transpose it to another research document and further that Dam 1 ROR was a cut and paste of Dam 2 ROR, he was rather evasive and failed to give a direct clear answer.
97. When the Tribunal asked whether, as a Geo-hydrologist, he had conducted any studies for the Respondent regarding water availability during the assessment of the Appellant's WUL applications, he confirmed that no further studies had been conducted. No recent studies were undertaken, and as the WUAAC, they only referred to NWRS 1, without considering other NWRS, ultimately concluding that no additional water allocations were possible. Such a rigid approach seems precarious, especially considering that by the time the WUL applications were reviewed, the NWRS projections were nearing their 2025 endpoint. Additionally, the evolving environmental conditions were a crucial factor that should have been considered.

ANALYSIS

98. At the outset, we take the view that for an application that was made in 2019 and refused in 2021, the Respondents erred in basing its decision solely on the ISP 2004 and NWRS 1 of 2004, as if environmental conditions do not change for better or worse.
99. It is for a reason that section 5(4)(b) of the NWA states that "A National Water Resource Strategy must be reviewed at intervals of not more than five years".
100. If one looks at NWRS 2 of June 2013,¹⁴ the Vaal River System is linked to all its adjacent WMA's including Lephalale. The upper Vaal with Eskom and Sasol the

¹⁴ Annexure A, *Perspectives Per Water Management Area*,

dominant water user is now in balance. Some of the power stations will ultimately be closed and water used by them should become available.¹⁵

101. Furthermore, the NWRS 2 of June 2013¹⁶ states, under the Crocodile West Catchment that substantial volumes of return flows generated in the urban centres enter the Crocodile River resulting in a surplus of water in the basin. This surplus offers a resource that can be used to support development in the Lephalale area of Waterberg. The Lephalale area must optimise the utilisation of local resources, but surplus water in the Crocodile River system is available for transfer. Significant planning changes have taken place since 2010, and expected long-term water requirements have dropped from 147 Mm³/a to 49 Mm³/a.
102. The projected future increases in domestic return flows, and the reduction in water requirements in the Lephalale area means that there will now be a surplus of water in the Crocodile West System, and it is no longer necessary to have additional effluent transfers into the Crocodile River to make up for the previously anticipated deficit.
103. The recommendation of the Instream Water Committee, a specialised unit of the Respondent whose views should have been taken seriously recommended for a WUL to be granted for section 21(c) and (i) was ignored and not even discussed. The unit further recommended that DWS Regional Office conducts a Validation and Verification exercise for ELWU for section 21 (a) and (b) water uses. Up to date of hearing of the appeal in 2024 this was never done.
104. The 2016 Strategy Document identifies “unlawful water use” of 3 400 000 m³ of surface water and 5 200 000 m³ overall in the Lephalale Catchment and 9 700 000 m³ and 22 600 000 m³ in the Water Management Area. The removal of these unlawful uses is the responsibility of the Respondent, and the outcome would be

¹⁵ See *National Water Resource Strategy Second Edition 2013*

¹⁶ *Annexure A, pg 5*

to increase surplus water already identified in 2016 Strategy Document. No evidence was given by Respondents showing attempts to address this problem.

105. The Respondent erred in stating that instream dams in respect of which licences were applied for had been unlawfully constructed and thus should be demolished. This is at odds with the Respondent's internal Instream Water Use Unit which recommended the water uses in relation to the constructed dams.
106. According to the evidence of Mr. Nethengwe, the Reconciliation Strategy of 2016 is specific and limited to the Limpopo North Management Area, not the whole nation. This is how it should be as is the case in other Water Management Areas and Catchment Management Areas not the whole nation as in National Water Resource Strategies.
107. Further evidence of Mr. Nethengwe that the Reconciliation Strategy of 2016 does not factor in as incorrect by Ms. Mpetle 's evidence which also showed that the Limpopo Water Management Area North Reconciliation Strategy also deals with International Obligations contradicting the evidence of Mr. Nethengwe.

CONCLUSION

108. Based on the exposition of the law and the facts above, the Tribunal concludes that sections 41(2) of the NWA was not properly applied as required, because not only were the Appellant not asked to provide further additional information, but it would also appear that not all of the information which was submitted by the Appellant was considered, particularly in relation to the studies and research findings referred to by Ms. Mpetle in her report.
109. The Respondent did not conduct any studies in relation to the water availability at the relevant Catchment Management Area, considering the studies relied upon were conducted in the years 2000 and covered the period 2000 up to 2025. This

is contrary to section 41(2)(b) of the NWA which provides that a responsible authority may conduct its own investigation on the likely effect of the proposed licence on the protection, use, development, conservation, management and control of the water resource.

110. The Respondents have stated that the Lephalale catchment is not only stressed but is fully allocated and no new licenses should be issued from surface water for irrigation purposes. By doggedly sticking to 2004 projections, they have closed their eyes to changing circumstances reflected in latter publications, namely NWRS 2 of 2013 and ISP 2016 which shows improved water conditions.
111. The tenants of section 27 of NWA set out factors which must be considered by the responsible authority in the issuance of the water use licence or a general authorisation. These include ELWU, the socio-economic impact of the water uses, if authorised, the likely effect of the water used to be authorised on the water resource on other water users, the class and 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 among others.
112. The above factors also require that a responsible authority must consider the availability of water before issuance of a WUL. Moreover, section 41 (2) empowers the responsible authority to take certain steps when considering an application for a water use licence. This includes requiring an applicant to, among others, obtain and provide him with other information, in addition to the information contained in the application, and to subject the information to an assessment by a competent person of the likely effect of the proposed licence on the resource quality and require that the assessment be subjected to an independent review by a person acceptable to the responsible authority. The responsible authority may also conduct its own investigation on the likely effect of the proposed licence on the protection, use, development, conservation, management and control of the water resource.

113. There was no evidence led by the Respondent that the responsible authority required further information from the Appellants, over and above the information which was provided, including Ms. Mpetle's report. There was also no evidence indicating that the Respondent had conducted its own investigation on the likely effect of the proposed licence on the protection, use, development, conservation, management and control of the water resource.
114. No steps have been taken by the Respondent to lead to an improved water availability situation, such as the eradication of unlawful water usage in the Lephalale Management Area and the transfers in the Crocodile West, and dealing with Invasive Alien Plants (IAP). All these actions are within the purview and control of the Respondent.
115. Given the effluxion of time and the total lack of further studies conducted by the Respondent, the Tribunal cannot accept that the environmental circumstances of the area remained constant and the conclusions and recommendations recorded in the NWRS and ISP of 2004, are still valid.
116. The failure by WUAAAC to implement the recommendations of the Instream Water Use Unit to ensure V & V is conducted to verify the Appellant's lawful and extend of water uses under s 21(a) and (b), leaves much to be desired. Up to the last day of hearing of this appeal in 2024, this had still not been done.

Powers of the Tribunal on appeal

117. An appeal before the Tribunal takes the form of a rehearing. The Tribunal may, thus, receive new evidence.¹⁷ In other words, it is an appeal in the wide sense, which is a complete rehearing and redetermination of the merits of a case, with or

¹⁷*Tikly and Others v Johannes, N.O., And Others* 1963 (2) SA 588 (T) at 590G. See also item 6 (3) of Schedule 6 to the Act read with rule 7(1) of the Water Tribunal Rules.

without additional evidence or information.¹⁸ Under this type of appeal, the Tribunal is not confined to the record of the body *a quo*.

118. The Tribunal can, therefore, after having reconsidered the appeal, replace the decision of the responsible authority with that of its own. In doing so, the Tribunal must consider several factors. *First*, it must consider whether it is in as good a position as the responsible authority to make the decision. *Second*, whether the decision of an administrator is a foregone conclusion. *Third*, it must consider other relevant factors, such as the delay, bias, and the incompetence of an administrator. Finally, it must consider whether a substitution order is just and equitable. This involves consideration of fairness to all the implicated parties. In each matter, all the relevant factors must be examined on a case-by-case basis.¹⁹
119. Counsel for the Respondent argued that the Tribunal cannot come to any other conclusion, save to dismiss the Appellant's appeal considering two previous decisions by the Tribunal, where Appellants were denied WUL because of water unavailability and stressed Catchment Management Area. In this regard, counsel for the Respondent referred the Tribunal to the decision in ***Joseph Kloppers v Department of water and sanitation (WT 01/21/GP)*** ("Klopper") and the case of ***Ramaliane Trust v Department of water and sanitation (WT 03 /19 /LMP)*** ("Ramaliane Trust"). In both cases, the Respondent had declined WUL applications based on stressed catchments. On appeal, the Tribunal had dismissed the Appellant's appeals. It must be stated that the cases cited by the Respondent are distinguishable on facts from the current case.
120. In Klopper, the Appellant had an ELWU to store 13 963m³ and required authorisation to construct 7 dams for purposes of storing water as per the ELWU.

¹⁸ *Tikly and Others v Johannes, N.O., And Others* 1963 (2) SA 588 (T) at 590G.

¹⁹ *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* (CCT198/14) [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) (26 June 2015), para 47.

Out of the 7 dams, DWS only approved 5 dams. The 2 dams were declined on the basis that the catchment in the area was already stressed and could not have an unauthorised impoundment. The Respondent had argued that it had adopted declining the WUL application as an avoidance strategy over the mitigation measure strategy.

121. On appeal, the Tribunal dismissed the appeal and in its reasons for judgement, citing the case of **African Realty trust (Pty) Ltd, WT03/20/LMP** stated as follows:

*"The appeal in the African Realty trust case was successful and upheld by the water tribunal due to the reasons advanced by Prof Murombo, which have been coated in great details herein. The difference between the African Realty trust and the current case is that, in the African Realty case the Department of water and sanitation did not provide adequate and sufficient reasons for declining the water use license in respect of the 2 proposed dams which were meant for the storage of water from the Letaba River, whilst in this current case there are a few notable things which present some challenges to the appellant's case ..."*²⁰

122. The Tribunal's decision in the case of **African Realty Trust (Pty) Ltd, WT03/20/LMP** is particularly relevant, as it strongly criticized the Respondent for failing to consider recent reports and instead relying on the outdated 2004 NWRS and ISP strategies. The Tribunal's remarks on this issue were as follows:

"The Record of Recommendations records that the In-Stream internal experts of the Respondent recommended approval of the application subject to certain conditions. However, such conditions were not captured and when we directed the Respondent to provide the recommendations by the In-Stream unit, the Case Officer swore to an explanatory affidavit deposing that this paragraph in the Record of Recommendations was a mistake as it was carried over from a previous template."

[38] What the case officer states bears repeating:

²⁰ Klopper, para 77

"I forgot to remove the statement on paragraph 3.2.1 of the Record of Recommendation bearing subject 'Resource Directed Measures' which stated that 'Based on the comments submitted by In Stream Water Use (IWU) dated 24/06/2019 recommending the approval of this application on the basis of the following conditions."

I did not request specialist inputs from In Stream Water Use as I deemed it unnecessary following the notion that the catchment is under severe water stress."
[39] (our emphasis).

40. What this shows is that the water use application was not subjected to the In-Stream use experts who would have provided the Respondent with expert input on the impacts of the proposed storage dams on the non-perennial streams. Rather the Case Officer and the Supervisor were content using outdated documents to conclude that the area is water stressed, and no more dams of any type will be allowed. It is surprising that the case officer and supervisor thought it wise not to seek In-Stream Use expert input, yet they raise in-stream related impacts as grounds to decline the water use licence. That a water management area is under stress is no rational basis for failing to properly obtain expert assessment of an application.

...

49. The reasons provided by the Respondent to reject the application are irrelevant, immaterial, and unsubstantiated. This is inconsistent with section 2, 3, 27 (1) and 41 of the NWA. The reasons assume that the proposed dams are like new dams being constructed in-stream of perennial streams, that would extensively affect the water balance and resources in the water system. There was no effort to consider the unique nature of the proposed dams as balancing storage dams aimed to store water from the canal. Little is considered by the Respondent regarding Appellant's existing entitlement and that the storage dams will not results in the Appellant using more water than it is entitled to by law...

54. Furthermore, the Respondent failed to consider recent reports that could better inform its decision. Apart from failing to consider the 2013 National Water Strategy, the Respondent and their witness throughout maintained reference to the 2004

documents and ignore the later documents. The National Water Strategy of 2013 emphasises that,

"The NWRS2 is developed within a changing environment and acknowledges that monitoring and collecting relevant data will not only affect the accurate assessment of the status of water resources and the magnitude of water problems but will vastly improve planning and policy formulation processes." [48]

55. The emphasis on "changing environment" and "accurate assessment of the status of water resources" puts paid the decision to rely on a 2004 Strategy by the Respondent simply to find and maintain an argument that the water management area is water stressed and therefore no more dams can be constructed.

56. In addition, the goal of 2013 National Water Strategy is to ensure that "water is efficiently and effectively managed for equitable and sustainable growth and development." [49] Among its objectives we find the following,

"Water supports development and elimination of poverty and inequality. Water contributes to the economy and job creation; and Water is protected, used, developed, conserved, managed and controlled sustainably and equitably."

[50]

...

59. The Respondent ignored the recent Reconciliation Strategy for the Luvuvhu and Letaba Water Supply System (completed in 2015) which has up to date information on the water management area than the 2004 documents.

123. It is important to note a key distinction between this case and the *African Realty Trust* case. In this case, there is no ELWU verification, whereas in *African Realty Trust*, the ELWU had been verified.
124. Having considered the documents submitted, relevant factors, witness testimony, the applicable law and legal arguments by counsel, we find that the Appellant must succeed in their appeal. The Respondent has exhibited ineptitude in the

consideration of the Appellant's WUL application. We are, however, not in a better position to substitute the decision of the Respondent at this stage.

125. In ***Makhanya NO v Goede Wellington Boerdery (Pty) Ltd [2013] 1 All SA 526 (SCA)*** paragraph 41-44, where it was stated that there are factors to be considered in deciding whether to remit for a reconsideration. A court would not remit a matter where:

- (a) the result is a foregone conclusion.
- (b) further delays would cause unjustifiable prejudice to the applicant.
- (c) the functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again; and
- (d) the tribunal is in as good a position to make the decision itself.

126. Regarding the Appellant's ELWU, it cannot be conclusively stated that the Appellant's dams and water storage are unlawful. The technical reports related to the verification and determination of the Appellant's ELWU have not been presented before us. Furthermore, the verification and determination process is highly technical, and the Tribunal is neither in a position nor was it required to adjudicate the dispute concerning the ELWU's determination. In any case, the Respondent has already initiated this process and indicated during the appeal hearing that the only remaining phase is verifying the lawfulness and extent of the ELWU.

127. We find that, regarding the finalization of the verification and determination of the Appellant's ELWU, the Tribunal is not in the same position as the responsible authority in making such a determination. Moreover, the Tribunal has not been tasked with resolving the dispute concerning the ELWU's determination. It can only intervene once the responsible authority has decided, and the Appellant disputes the outcome.

128. For these reasons, we conclude that remitting the matter to the responsible authority is the most appropriate course of action.

ORDER OF THE TRIBUNAL

129. The Tribunal makes the following order:

- a. The appeal is upheld.
- b. The decision of the Respondents to refuse the Appellants' WULA applications for section 21(b), (c), and (i) water uses in Dam 1 within the Lephalale River on the Farm Portion 0 of Farm Vrischgewaagd 172 KR and the WULA for section 21(a), (b), (c) and (i) water uses on Dam 2 on Portion 1 of the Farm Houtboschkloof 309/1 KR within the Limpopo Water Management Area reference numbers 27/2/1/A150/6/1 and 27/2/1/A150/5/1, on 5 January 2021, respectively is set aside.
- c. The Appellant's WULA applications are remitted to the Respondent for reconsideration.
- d. The Respondent is hereby directed, within sixty (60) days of this order, to finalise the determination and verification of the Appellant's ELWU, including the extent thereof, in accordance with section 35 of the NWA and communicate the outcome thereof to the Appellant.
- e. The Appellant is directed to submit any additional information or report to the Respondent in respect of the reconsideration of its WULA, within 30 calendar days of this order, if the Appellant so chooses.
- f. The Respondent is further directed to reconsider the Appellant's WULA within a period of 60 calendar days from the period referred to in paragraph (d) above, subject any appeal under s 148(1)(e) of the NWA in respect of

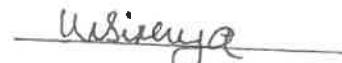
the verification and determination of ELWU referred to in paragraph (d) above.

- g. The instruction for the Appellant to demolish the two dams on the two farms is set aside.

THUS HANDED DOWN AT PRETORIA ON THIS TH 14TH DAY OF FEBRUARY 2025.



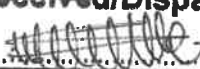
Adv N Lekgetho
Additional Member (Chairing the Hearing)



Mr. M Sirenya
Additional Member

Appearances:

 For the Appellant: Adv Le^ech, SC
For the Respondent: Adv Jozana

<p>The Registrar of the Water Tribunal 191 Francis Baard Street, Waterbron Building Pretoria, 0001</p> <p>2025 -02- 12</p> <p>Received/Dispatched</p> <p>Signature: </p>
