

SOUTH AFRICA / JUDGMENT

Kloppers v Department of Water And Sanitation (WT01/21/GP) [2022] ZAWT 3 (4 July 2022)

[2022] ZAWT 3

COURT

Water Tribunal

BEFORE

Robert Mokgalabone, Unathi Mbeki

CASE / FILE NUMBER

WT01/21/GP

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IN

THE WATER TRIBUNAL (HELD VIRTUALLY)

CASE

NO: WT01/21/GP

In

the appeal of:

JOSEPH
KLOPPERS Appellant
And
DEPARTMENT
OF WATER AND SANITATION Respondent
APPEAL
DECISION
Date
heard: 26th
May 2022
Date
of decision: 4th
July 2022
APPEARANCES
Presiding
Officers: Robert
Mokgalabone
Unathi
Mbeki
For
the Appellant: Adv.
Thompson

For
the Respondent: Adv.
Mgwetyana

INTRODUCTION

1

This is an
appeal brought by the Appellant, in terms of section 148(1)(f) of the
National Water Act of 1998 (hereafter referred
to as the NWA),
against a decision of the Acting Director-General: Department of
Water and Sanitation (the Respondent), which decision
was taken on
the 4th
December 2020.

2

In terms of
the said decision, the Respondent, refused to grant a water use
license to the Appellant, in relation to dams 4 and
5, out of the
seven dams which were the subject of the Appellant's water use
application.

3

The reasons
which were given by the Respondent for the refusal to grant a water

use licence to the
Appellant, were:

3.1.

The area where
the Appellant's properties are situated is a water stressed area.

3.2.

Dams 4 and 5
are situated instream and approving the impoundment of water through
the said dams would have a negative impact on
downstream users.

BACKGROUND

4

The
Appellant's properties are located 20 kilometres, northwest of the
town of Vaalwater, Lephalale Local Municipality, Waterberg
District,
Limpopo Province. The water use extends over one portion of a farm
owned by the Appellant, namely: the remainder of Farm
Doornspruit 215
KQ. The application falls within the A42E quarterly drainage region
(QDR) of the Limpopo Water Management Area
and access to the said
properties is gained through the R517 road.

5

The Appellant
was in the process of verifying existing lawful water volumes (ELU)
allocated to the respective farms by the Respondent
when it was

brought to his attention that, apart from verifying the ELU of the respective properties, the construction of dams for the storage of the ELU would also need environmental authorization in terms of the relevant laws, as well as a new water use license from the Respondent.

6

The Appellant secured the services of Spoor Environmental Services (Pty) Ltd (Spoor) to apply for a water use license for the storage of water in dams. Spoor, then assisted the Appellant with the application for new impounds in the primary in-stream locations of the Sterkstroom River. The dams are outlined in Table 1: Storage Dam Detail, in page 2 of the Appellant's bundle of documents. The said table 1, shows a total of seven dams.

7

The Water Use Licence (WUL)[1], in terms of section 21(b) of the NWA,[2] was issued to the Appellant by the Respondent on 12th December 2020, under reference number: 07/A42E/BCIBCL/10043. The

said licence was issued by the Respondent in respect of the properties, Boschpoort 249 KQ Ptn 3 and Doornspruit 215 KQ Ptn's 0

and 2. The license was issued for a period of twenty (20) years from the date of issue and will be reviewed on intervals of not more than five (5) years. The said licence was issued subject to the conditions stated in Appendix 1,[3] and Appendix 11,[4]. The conditions

specified in Appendix II of the licence are as follows:

7.1

The

Appellant is authorised to store water in the off-channel dams as follows,[5]:

Water

Use(s)

Purpose

Capacity

Property

Description

Dam

1 Boschpoort

Irrigation

75

000 cubic meters
Boschpoort
249
KQ
Ptn 3
Dam2
Doornspruit
Irrigation
45
000 cubic meters
Doornspruit
215 KQ Remainder
(Ptn0)
Dam
3 Interfokus
Irrigation
110
cubic meters
Doornspruit
215- KQ Remainder
(Ptn0)
Dam6
Doornspruit C
Irrigation
50
000 cubic meters
Doornspruit
KQ Remainder (Ptn0)
Dam
7
Irrigation
100
000 cubic meters
Doornspruit
7.2
The Appellant

was given these further
conditions in terms of
Appendix II:

"1.2
The Licensee is not exempted from compliance with any applicable Dam
Safety Regulations.
2.
Monitoring
Requirements
2.1
To
compile a
water
balance to manage the use of water optimally the Licensee shall
monitor the quantity of water transferred into and from each
of the
dams set out in Condition 1.1 of Appendix II on a

daily basis

and submit this to the Provincial Head bi-annually.

2.2

The

Licensee shall provide information on the method on the flow measurement within one year from the date of issuance the licence.

2.3

All

flow gauging devices shall be maintained in a sound state of repair.

2.4

All

flow gauging devices shall be calibrated by a competent person, at intervals not exceeding one year.

2.5

The

installation of flow meters shall comply with the specifications of the manufacturer with regard to distance from obstructions in the pipeline upstream and downstream of the meter to ensure accurate measurements.

2.6

Records

confirming proof of the calibration must be kept and made available to the Provincial Head upon request

...

4.

Site

specific conditions

4.1

Proposed

off channel dam must be constructed outside of 1:100 year flood line or delineated riparian habitat whichever is the greatest;

4.2

Final

master layout plan consist of a relationship between proposed off channel dam and 1:100 year flood line and delineated riparian habitat whichever is the greatest must be submitted to Department before commencement of proposed activity."

8

The

Appellant had applied for the approval of seven dams, however two(2) dams were not approved, namely,[6]:

Darn
ID
Farm
Name
Volume
Status
Dam4
Doornspruit A
Doornspruit
215 KQ Remainder
(Ptn0)
120
000 cubic meters
Existing
(Upgraded)
Dam5
Doornspruit B
Doornspruit
215 KQ Remainder
(Ptn0)
80
000 cubic meters
Existing
9
Out of seven
dams applied for approval by the Appellant, the Respondent only
approved five dams. The combined capacity of the two
dams not
approved by the Respondent is 200 000 cubic meters.
ISSUES
TO BE DECIDED BY THE WATER TRIBUNAL
10
The Water

Tribunal is required to
decide the on the
following issues:

18.1.
Whether the Respondent was correct in declining the application for
water use brought by the Appellant.
THE
APPELLANT'S CASE
The
Appellant's Witness: JC Van Rooyen {Spoor Environmental Services)
11
The witness stated
that he holds a B.SC and M.SC Degrees and has approximately 19 years'
experience as an environmental practitioner.
He stated that Mr.
Joseph Klapper, the Appellant herein, is his client and he is the one
who assisted Mr. Joseph Klapper to apply
for the water use license.
12
The witness

stated that he assisted the Appellant to apply for a water use license for the approval of the construction of seven dams with the purpose of storing water on the basis of the existing water use licence. The said seven dams were supposed to be located in three properties belonging to the Appellant. The three properties already have an existing water use licence.

13

The witness referred the Tribunal Appellant's existing water use licence, showing the quantity of water the Appellant is allowed to draw from the Sterkstroom River, for irrigation purposes. The witness indicated that there is no unlawful water use on the part of the Appellant, as he is complying and respecting all the existing environmental laws.

14

The witness indicated that he compiled the water use licence application on behalf of the Appellant, for the construction of the seven dams, aimed at storing water in line with the existing water use license. The witness indicated that during the initial stages of the construction of the seven dams, dam engineers were involved for the purpose ensuring dam safety. The said application was submitted by the witness to the Respondent, on behalf of the Appellant for consideration and decision.

The
Appellant's Grounds of Appeal

15

The witness stated that currently there are two dams which are without water use licences[7], due to the fact that out of the seven dams for which licence applications were submitted to the Respondent, the Respondent only gave approval and licences for five dams[8].

16

The witness stated that the decision of the Respondent to decline the approval and licencing of the remaining two dams was not a correct decision for the reasons which have been advanced by the Appellant in the notice of appeal. The witness emphasised that during the initial stages of the water use bundle,

the Respondent's decision which is the subject of this appeal proceedings. licence application process, the Respondent's own official recommended that the Appellant may store water in the other dams, but not in the two unlicensed dams[9].

17

The witness

stated that the Respondent, provided as reasons for not approving the water use licenses for the two remaining dams on the basis that the Respondent was concerned that the Appellant would impede or divert water flow on a water course and therefore the Appellant would store additional water, exceeding the amount of water allocated to the Appellant in terms of the existing water use license.

18

The witness

indicated that should there be more rainfall in a particular year, there is a need for additional water storage. The witness stated that the environmental concerns by the Respondent with regard to the environmental degradation, the diverting of water and additional storage of water were unfounded, as the Appellant was prudent enough to seek the services of an environmental specialist. According to the witness, an environmental impact assessment was conducted.

Cross-examination

19

The witness

stated that dams 1 to 6 have already been constructed and are in existence. It is only dam seven which has not yet been constructed.

The witness stated that the dams were built in 2018 by the Appellant, before his appointment, as an environmental specialist.

20

The

witness admitted that the application for the approval and licencing of the dams came after the fact, that is, after the dams,[10] had already been built.

21

The witness

stated that based on the Appellant's existing water use license volumes, the Appellant deserved to be granted the licence to store water even in the two dams which were not approved.

22

The witness stated that, even though he is not a legal expert, he knows that the existing water use licence was issued under the previous legislation[11].

23

The witness stated that the Appellant, under the existing water use licence is allowed to store only 13 963 cubic meters of water.

24

The Respondent put a version to the witness that since the Appellant was only allowed to store 13 963 cubic meters of waters, the Appellant, by building more dams sought to store more volumes of water that allowed by the existing water use license and that would be an unlawful act on the part of the Appellant, thereby curtailing the flow of water and thereby negatively affecting water users downstream. The witness responded by stating that the Appellant proposed certain activities, which would reduce the flow altering of the water course[12].

25

The witness stated that the current appeal is not with regard to the application for Additional water use, however the storage of the volumes allocated by the Respondent, in terms of the existing water use license.

26

The witness conceded that the Appellant is currently breaching the conditions of the existing water use licence by storing more than 13 963 cubic meters of water. The Appellant is storing more water than allowed by the existing water use license.

27

The witness further stated that the Appellant erred by storing more water than permitted in terms of the existing water use license. He further stated that the Appellant was fined by the government, for the breach of the environmental integrity of the area.

28

The witness conceded that the Respondent has a duty to enforce the laws in order to protect other water users downstream.

29

The

Respondent stated to the witness that Mr. Khosa,[13]

will

testify that the conduct of the Appellant in building more storage

dams than permitted has had a negative impact on water users

who are

downstream. The Respondent put to the witness that dams 4 and 5 exist

without the necessary authorisation, to which assertion

the witness

conceded.

30

The witness

conceded that with regard to dams 4 and 5, the Appellant might have

been tempering with a water course without the required

authorisation

from the Respondent.

31

The

witness conceded that five impounding structures (dams) were approved

and two structures were not approved. The letter from

the Respondent

declining the construction of the dams clearly stated that no

additional structures may be constructed,

[14]

32

The witness

conceded that there was no impact assessment which was conducted

before dams 4 and 5 were constructed and further stated

that

recommendations are not necessarily decisions of the Respondent,

however inputs from various officials of the Respondent or

Directorates of the Respondent.

33

The witness

could not respond when asked by the Respondent's legal representative

that the Respondent was correct in declining the

approval of dams 4

and 5, in order to lessen the negative impact on downstream users.

Re-examination

34

The witness

stated that the reason the Appellant approached the Water Tribunal

was with a view to make dams 4 and 5 lawful,

as they were

currently unauthorised.

Clarity

questions from the presiding panel

35

The witness

responded to the clarity question by Ms. Mbeki whether construction

can precede the application and approval processes by stating that the application and the approval process must come before construction of the dams commences.

RESPONDENT'S

CASE

Respondent's

First Witness: Ms. Takalelo Tshiruvhele

36

The witness

stated that she is employed by the Respondent as an Environmental Officer, based in the Department of Water and Sanitation, Regional Office in Limpopo Province. She further stated that she holds a B.SC and Master's Degree in Aquatic Health.

37

The witness

stated that she is aware of the matter currently before the Water Tribunal, as she was involved in the handling of the said application. She indicated that she did a site visit to the properties of the Appellant and one of her observations was that some of the dams, which were the subject matter of the application process had already been built.

38

The witness

stated that out of the seven dams which were part of the application, five dams were approved for licensing, while two dams were declined. She indicated that dams 4 and 5 were the dams which the Respondent declined for licencing.

39

The

witness described "instream", as a water which is located within a water course, whether perennial,[15]

or

non-perennial,[16].

She

stated that the dams which were declined,[17],

were

located on a non-perennial water course.

40

The

witness stated that the catchment in the area is already stressed and could not have an unauthorised impoundment. She further stated that

the construction of the two unauthorised dams by the Appellant was contrary to the National Water Strategy[18].

She

further stated that this government policy[19],

is
a public document which members of the public can access.

41

The witness
stated that the Respondent is correct to refer to the National Water
Strategy of 2004 and not the National Water Strategy
of 2013, as the
latter policy has not repealed the 2004 Strategy.

42

The
witness stated that the Respondent's main aim through the National
Water Strategy of 2004,[20]

is
to preserve water for future generations.

43

The witness
stated that the Appellant's conduct, by constructing two unauthorised
dams, has a negative effect on other water users,
such as the
neighbouring properties and neighbouring countries, such as Botswana.

44

The witness
stated that the recommendation to decline the Appellant's additional
two dams was a correct decision, on the part of
the Respondent, as
the area is a water stressed area.

Cross-Examination

45

The
witness stated that if the two dams,[21]
which
were not approved, were off- channel or off-stream, the
Respondent would have approved the Appellant's water use application
in respect of the said two dams.

46

The witness
stated that in the area in question, no instream impoundments are
authorised, due to the water stressed nature of the
area.

Respondent's

Second witness: Mr. Mulalo David Nethengwe

47

The witness
stated that he is employed by the Respondent and that he is the
manager responsible for water use management,
in the Limpopo
Province, Regional Office of the Respondent. He stated that he holds
a Master's
Degree in Hydrology, specialising in both ground and surface water.
The witness stated that he is the supervisor to Ms. Tshiruvhele
and

further that he chairs the adjudication committee for water use licenses in the Regional Office.

48

The witness

stated that with regard to the current matter before the Water Tribunal, the five dams were approved by the Respondent and two dams

were declined for licensing and the two dams in question are dams 4 and 5.

49

The witness

stated that dams 4 and 5 were not approved for licensing, based on the

National Water Strategy and dams 4 and 5 were declined for approval, as they are situated instream, in line with the said national government policy.

50

The witness

stated that approving dams 4 and 5 would have had a negative impact on the already stressed water area.

51

The

witness disputed the Appellant's contention that the two unapproved dams,[22], were meant to store the already approved water volumes in terms of the existing water use license. He stated that the Respondent approved five dams for the purposes of water storage by the Appellant, as these five approved dams do not have a negative impact on downstream water users. He stated that instream, storage would cause reduced flow on the downstream users.

52

The witness

stated that the river in question, flows into the Limpopo river and any unauthorised tempering with the water flow would have a negative effect on neighbouring states, such as Zimbabwe and Botswana.

53

The witness

stated that the Appellant should have made the application for the two unapproved dams before constructing the said two dams. He stated that the two dams are currently storing water unlawfully.

54

The

witness stated that the Respondent is responsible for enforcing compliance with the National Water Act,[23].

He stated that in cases where there is non-compliance on the part of water users, the Respondent, through its officials would

issue

compliance notices.

55

The witness

stated that the case, which is currently before the Water Tribunal, was referred to the Respondent's Compliance Division.

56

The witness

stated that where the affected party has been issued with a compliance notice and still the said party does not comply, the

Respondent would usually resort to approaching the Court to seek appropriate relief.

57

The

witness stated that the Respondent was well aware that the Appellant's application was not about seeking approval for additional water and referred to the letter declining the Appellant's application for the two dams,[24].

He

stated that the Respondent was fully aware what the Appellant's application was all about.

58

The witness

stated that there are no approvals for impoundments in the area where the two dams were constructed, as they would impound water which is supposed to flow downstream.

59

The witness

stated that the Appellant's current water use licence allows him to store 13 963 cubic meters of water and exceeding the permitted allocation on the part of the Appellant would be unlawful.

60

The witness

stated that he was involved in the adjudication of the Appellant's application, which led to the declining of the construction and

storage of water in dams 4 and 5. The witness stated that adjudication for water use licence applications is conducted at regional level and not at national offices of the Respondent. He stated that the Chairperson of the adjudication committee makes the decision.

61

The

witness stated that Ms. Tshiruvhele prepared the record of recommendations,[25]

62

When asked by

the Appellant's legal representative, as where does the record of recommendations deal with ecological issues, the witness stated that table 4 of the bundle, the National Water Strategy and Internal Strategic Perspectives deal with ecological issues.

Respondent's

third witness:

Mr.Tsunduka

Baldwin

Khosa

63

The witness

stated that he is employed by the Respondent as Director of Water Use Licensing. He stated that he holds a Master's Degree in Agricultural Sciences.

64

The witness

stated that according to the National Water Strategy, water is a scarce resource and therefore it should be preserved for future

generations. The witness stated that half of the water management areas in the country are water stressed, including the area which is

the subject matter of this current appeal before the Water Tribunal.

65

The witness

stated that in water stressed areas, additional dams are not encouraged nor approved in respect of instream water courses, as they

reduce the flow of water to downstream users. He indicated that the Respondent's standpoint is informed by the fact that the cumulative

impact of building dams instream may have a negative impact overall on other water users.

66

The witness

stated that the Appellant's proposed mitigation strategies, would not be sufficient to minimize the negative impact on the downstream water

users. He stated that in water stressed areas, the Respondent has adopted declining, an avoidance strategy, over mitigation measures.

67

The witness

stated that dams 4 and 5 which have been constructed and are being used by the Appellant are unlawful.

68

The witness

stated that the main reason that the approval of dams 4 and 5 was

declined, was due to concerns of the quality of water downstream.

69

The witness

stated that mitigation strategies will not assist in minimizing the negative impact on the downstream water users. He stated that the system must not be tempered with.

70

The witness

stated that currently there are no approved water use licenses for dams 4 and 5. He stated that the location of dams 4 and 5 is not the same as the other approved dams as they are situated instream, while the other approved five dams are not situated instream.

ANALYSIS

OF SUBMISSIONS

71

The Appellant

called and led evidence of a single witness Mr. JC Van Rooyen, whose evidence has been detailed herein above. Van Rooyen is from an environmental company called, Spoor Environmental Services. The Appellant himself did not present evidence during the hearing of this matter.

72

The

Respondent, on the other hand called three witnesses, whose evidence is also detailed herein above.

73

The Appellant

brought a case against the Respondent contending that the Respondent's decision to deny him the approval of the licensing to store water in dams 4 and 5 was incorrect and therefore such decision stands to be appealed and corrected by the Water Tribunal.

Out of the

seven dams that the Appellant sought to get approval for, from the Respondent, only five were approved for licensing by the Respondent and the other two dams were not approved.

74

The

Appellant's main grounds of appeal were that this appeal focuses only on the two unapproved dams, namely dams 4 and 5 and is not concerned with the other five dams which were approved by the Respondent. The Appellant's main contention is that contrary to the reasons advanced

by the Respondent for declining the approval of dams 4 and 5, the two dams have not been built instream, however in a tributary of the Sterkstroom River and further that the catchment of this tributary is very small. The other dams which were approved by the Respondent were built "off-channel", in that no surface water flows into these five dams.

75

The

Appellant, however, does not dispute the Respondent's assertion that the area where the Appellant has his properties, in the Lephalale area, is a water stressed area. The Appellant emphasises in his appeal that the application for a water use licence in respect of the two dams[26]

was

not for the allocation of additional water, but for the storage of water according to the allocated water volumes in terms of the existing water use licence.

76

The Appellant

also stated that the Respondent did not take into account the proposed mitigation strategies, with regard to lessening the negative impact of the two unapproved dams on downstream water users.

56

In

the case of African

Realty Trust (Pty) Ltd,[27]

the

Appellant (the Trust) which operates operating a citrus fruit farming operation draws water from the Letaba River. Due to a combination of

climatic conditions and the abstraction of water from the Letaba River by various other users, the water source has been too

constrained. This water constraints were negatively impacting on the farming activities of the Trust and a decision was taken to construct

two holding dams to

draw

water from the canal during the night,

when

abstraction by other users is at low levels, so that the stored water can be used during weekends or when there is increased demand on the

canal. The proposed dams' carrying capacity were to be within the Trust's existing water use entitlement. In March

2018, the Trust applied for a water use license and upon receipt of the Trust's water use license application, the Department of Water and Sanitation (the Department), acknowledged receipt of the said application and confirmed that the water use license application meets all the requirements. In October 2019, the Department refused to grant the water use license application. The record of recommendation showed that the Department declined to grant the water use license citing the fact that the Letaba water system is under pressure, as a result of small farm dams in the area and further citing the fact that the Trust has enough storage dams for irrigation purposes. The Water Tribunal, through a judgment prepared by Prof. T Murombo, found among

other things that:

"(48)
The storage dams are intended to store water drawn from the Letaba canal in respect of which the Letaba Water Users Association has existing water use rights and the Appellant, being members are entitled to in all to 16 357 988 cubic meters la of water which they are carefully underutilizing because of the storage constraints and the inefficiencies caused by the aging canal infrastructure. The canal is closed during weekends and during some draught periods. There is great demand for water in the morning forcing Appellant to irrigate at night. The storage dams have been proven to be a possible solution to the Appellant's water challenges without adding any additional stress or demand on the Letaba Water Management Area or the Great Letaba River.

(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 water canal. Little is considered by the Respondent regarding Appellant's existing entitlement and that the storage dams will not result in the Appellant

using more water
than it is entitled to by law.

(50)

The

irrelevance of the reasons can be demonstrated by the submission,
which was persisted with to the end that the two proposed
storage

dams are part of farm dams that are affecting the capacity of the
major dams in the Letaba area from being met. The undisputed
evidence

presented by the Appellant was that the Tzaneen,
Ebenezer

and Magoebaskloof
dams

are all upstream Letaba Estates and the proposed storage dams have no
impact on these dams.

(51)

The

Appellant provided an undisputed Hydrological Study which mapped the
footprint of the two storage dams, which is insignificant
in the big

picture of the 61 000 cubic meters Letaba Water System. The study
also confirmed that any impacts of the proposed dams
on the episodic

non-perennial streams was miniscule and insignificant ...

(54)

Furthermore,

the

Respondent failed to consider recent reports that could better inform
its decision. Part 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 process."

(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". 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 equitable." We find that the purposes for which the Appellant requires the two additional storage dams resonates with these national water strategy objectives

...

(58) In addition, reliance was placed on the Groot Letaba River Water Development project (GLEWAP)-volume 2, May 2010. Indeed, it confirms that the Letaba Water Management Area is water stressed. But that is where its relevance end as far as this specific application for a license is concerned. The plans and projects to augment water supply and conservation in the Letaba Water Management Area do not direct that no more dams should be licensed. More specifically nothing in the said plans and documents informs against the construction of balancing storage dams that have insignificant impact on non-perennial streams. These documents have no bearing on an application by an existing holder of water use rights, to recognise its storage infrastructure to maximise and ensure more efficient and beneficial use of allocated water, they would be relevant to a new allocation and new in-stream dams that would directly impact the water resources in the water management area.

(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.

(62) Many of the reasons raised against the water use application were after thoughts that show that the Respondent did not

fully apply
their mind to documents submitted in support of the application.
Despite having extensive powers in terms of the NWA
to request
additional information, direct the undertaking of further specialist
studies or in fact undertaking those
studies or investigation itself-the Respondent chose not to use those
powers

...

(67)

In the end we come to the decision that the Appellant must succeed
and that the Respondent have not provided any meaningful
reasons for
refusing the water use license

..."

77

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
quoted in great detail 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
and the water use license in respect
of the two 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,

including that:

77.1

The Appellant
constructed the dams and commenced the storage of the water before
approaching the Respondent for the necessary authorisation
and
licensing.

77.2

There
is no dispute that the two dams[28],
which were not approved by the Respondent were built instream,
contrary to the National Water Strategy and the Respondent's own
policy that no dams which are built instream within the area in
question will be approved for licensing.

77.3

The Appellant
conceded that it was storing water unlawfully in dams 4 and 5, even
before the Respondent declined the Appellant's
application in
December 2020.

The Appellant was storing water beyond the allocated volumes of 13

963 cubic meters, in terms of the existing water use licence.

77.4

The

Appellant's unlawful water storage in respect of dams 4 and 5 was negatively affecting the downstream water users. The Appellant's proposed mitigation strategy was contrary to the Respondent's policy of avoidance, that is to decline all water use licence application for dams located in stream.

77.5

The two

unapproved dams were built in a non-perennial water course.

77.6

The reasons

which were advanced by the Respondent's officials regarding declining the Appellant's application for the approval and licensing of dams 4

and 5 were based on sound and valid reasons informed by facts. The Respondent's officials conducted site visits and conducted a thorough analysis of the Appellant's application.

77.7

The record of

recommendations which was prepared by the officials of the Respondent was not significantly challenged by the Appellant, except to point

out that the record of recommendations does not allude to any ecological degradation, whilst that was the reason which was advanced

by the Respondent as a reason for declining the approval of dams 4 and 5.

78

The Appellant

in the current case, in contrast to the African Realty Trust, has some difficulties in discharging its onus of proof to show that the

decision of the Respondent in this matter was incorrect. The Water Tribunal is mindful of the fact that the Appellant approaches the

Water Tribunal not with clean hands. The Appellant was already breaking the law by storing more water than permitted in terms of the existing water use license.

FINDINGS

78

According to

the law of evidence the Appellant bears the burden of proof to show that the Respondent's decision to decline the application for a water

use licence, stands to be appealed and set aside. The Appellant stated the reasons which according to them, show that

the decision of
the Respondent is legally not justifiable.

79

Based

on the evidence, which was presented before the Water Tribunal, the
Appellant built dams 4 and 5 before approaching the Respondent
with
an application for a water use license. The Appellant commenced using
the said dams,[29]

by

storing water without the necessary water use license from the
Respondent. There is no dispute that dams 4 and 5 are located
instream and there is no dispute that the area where the dams have
been built is a water stressed area.

80

Based on the

evidence which has been presented in this matter, there is no reason
to conclude that the decision which was taken

by the Respondent in

declining the Appellant's water use licence in respect of dams 4 and
5 is an incorrect decision.

81

The

Appellant's own witness, Mr. JC Van Rooyen conceded to the fact that
the Appellant is currently using dams 4 and 5 unlawfully,
as he

started doing so, before acquiring the necessary licence from the
Respondent.

82

In the light

of the above, the Appellant has failed to discharge his onus of
proving that the decision of the Respondent is incorrect.

RULING

AND ORDER

83 After taking into account all the facts of this case, the submissions made by Counsel for the
Appellant and Counsel for the Respondent, the following ruling and order are hereby made:

83.1 The Appeal is hereby dismissed

83.2 There is no order as to costs

Thus handed down in Pretoria on the 06 July 2022

Mr. Robert Mokgalabone

Chairperson of the Panel

So I agree.

Ms Unathi Mbeki

Panel Member of the Tribunal.

For the Appellant: Mr. H Thompson

Spoor Environmental Services

Pretoria

Instructed by Joseph Klepper

For the Respondent: Adv. Mgwetyana

Briefed by the State Attorney

[1] WUL refers to a Water Use License

[2] National Water Act, 38 of 1998

[3] General Conditions for the License

[4] Specific Conditions for the Licence(Section 21(b) of NWA: Storing of Water)

[5] Appellant's bundle, page 11

[6] Appellant's bundle, page 2

[7] Page 8 of the Appellant's bundle

[8] Page 13 of the Appellant's bundle, the Respondent's decision which is the subject of this appeal proceedings.

[9] Page 36 to 49 of the Appellant's bundle, Recommendations by the Limpopo Department of Water and Sanitation

[10] Dams 1 to 6

[11] The Water Act 54 of 1956

[12] Page 56, paragraph 15 of the Appellant's bundle.

[13] An official of the Department of Water and Sanitation

[14] Page 36 of the Appellant's bundle, Recommendation, Stated that Dams 4 and 5 are not recommended for the storage of water.

[15] Water course which flows throughout the year

[16] Water course which does not flow throughout the year.

[17] Dams 4 and 5

[18] National Water Strategy, 2004

[19] The National Water Strategy, 2004

[20] Page 52 of Appellant's bundle

[21] Dams 4 and 5

[22] Dams 4 and 5.

[23] National Water Act, 1998

[24] Page 16, Appellant's bundle, letter declining the application for the approval of dams 4 and 5. Section 21(b)(c) and (i)

[25] Page 36, Appellant's bundle, Record of Recommendations.

[26] Dams 4 and 5

[27] Dams 4 and 5

[28] Dams 4 and 5

[29] Dams 4 and 5

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