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SHARE RIVERS INITIATIVE PHASE 2

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***DRAFT Deliverable L2b: A Review of Water Tribunal
Decisions***

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1. Introduction and Objectives of the research:

The Water Tribunal is an independent body that was established under section 146 of the National Water Act 36 of 1998 (NWA) to hear appeals against, among other things, directives or administrative decisions made by a responsible authority regarding water use rights.¹ But despite more than ten year since its inception, there is sparse literature reviewing the Tribunal's decisions, including its effectiveness in carrying out its mandate.²

This deliverable paper reviews and analyses the Tribunal's decisions and seeks to preliminarily address the following objectives:

- Extrapolate emerging themes or categories from the Water Tribunal's jurisprudence.
- Determine whether the Tribunal's mandate or other aspects of the NWA should be amended
- Understand the accessibility of decisions and documents relied upon in evidence to support decisions
- Identify potential lessons for regulators moving forward.
- Identify percentages of cases won by regulator
- Identify future research inquiries.

The following section reviews the research process. Section three discusses some research challenges around accessing decisions and supporting documents. Section four presents various themes that can be extracted from the Tribunal's decisions. Section five present a short discussion of major issues. Finally, in conclusion, we present some future research ideas.

2. The Research Process

Dimakatso Sefatsa, a legal intern at AWARD and law student at Wits University School of Law, undertook much of the research. The decisions are discussed in this paper, and presented in table format, as the table allows for an efficient and easy way to get across vast

¹ National Water Act 36 of 1996 s 148 (The mandate of the Water Tribunal is set forth in Chapter 15 of the NWA.)

² Maritza Uys "South African Water Law Issues" report to the Water Research Commission June 2009

amounts of information in a relatively accessible manner. This table is attached in **Appendix A**. The research is what legal practitioners refer to as traditional legal research. This entails searching for decisions, reviewing and analysing decisions, identifying issues and themes, and discussing the decisions. AWARD reviewed 48 decisions (all the decisions available on the Tribunal's website)³, and presents pertinent cases in the attached table.

It is important to note that this paper and table are not static documents, but must ideally be updated as more decisions are decided and/or discovered (see below discussion). This table can serve as a good foundational document for future research and elaboration. In addition, this research supplements another WRC legal research project undertaken by Maritza Uys in 2009 highlighting various legal issues arising out of the NWA, and referring to select Water Tribunal cases.

The table contains the following columns: **Case Name** (the legal citation for the case); **NWA and other legal provisions at issue** (the provisions of the NWA at issue); **Issues** (the legal issues before the Tribunal); **Facts** (a brief summary of the factual scenario behind the legal issues, including the legal claims raised); **Holding** (the Court's main decision in the case, and relevant other findings); **Comments** (AWARD's comments on the case, and its broader implications to water resource management).

3. Research Challenges

Identifying challenges faced trying to access decisions and supporting documents during the research process is just as important as discussing the substance of the research. Doing so places the research in context, because difficulties accessing decisions and supporting documents is equally as relevant to understanding the functioning of the Tribunal. Moreover, access to public information is essential in light of our Constitutional⁴ dispensation which guarantees one the right to 'accesses information held by the State'.⁵ The following challenges were confronted during the research process:

³ There were 49 decisions on the Tribunal's web site and two Agreements. AWARD did not review the agreements and could not download one of the cases.

⁴ The Constitution of the Republic of South Africa Act 108 of 1996

⁵ *Ibid.* s. 32

3.1. Accessibility of cases: AWARD's effort to find Tribunal decisions highlights potential problems accessing decisions. There are approximately 50 decisions on the Water Tribunal's website. It seemed improbable that on average the Tribunal would hear five cases per year since 2001. The research team contacted Judge Hubert Thompson, a sitting member of the Tribunal and an expert in water law, and asked for his opinion as to whether there were missing cases. After looking at the web site, Judge Thompson replied that there were in fact missing cases, and that the Tribunal has decided on average about 20 cases per year. Consequently, the research team contacted the Tribunal's Registrar to enquire about missing cases. The Registrar, however, informed the research team that in her belief the web site was up-to-date and includes all decisions.

The Registrar instructed AWARD to send her a list of missing cases so that she could inquire into the matter. Unfortunately, this approach presents a huge burden on AWARD or any researcher, because there is no way to know what cases are missing. Luckily, Judge Thompson was kind enough to list cases that he was aware are missing from the Tribunal's web-site, and the research team also found missing cases cited by another WRC project. It then forwarded a list of missing cases to the Registrar. However, AWARD has no idea if there are other missing cases, which there likely is. Since the time of writing this deliverable, it has been over four weeks and the Registrar has not provided AWARD with the missing cases. Upon further inquiry, the Registrar has informed AWARD that it has referred the matter to the Chairperson of the Water Tribunal. Because the cases presently are not all on the Water Tribunal's website, the decisions discussed herein are limited only to the cases that were available.

3.2. Supporting documents: The Water Tribunal's website only included decisions, and did not include supporting documents. The lack of supporting documents makes it difficult to analyse the evidence that the Tribunal relied on in reaching a particular decision, as well as to better understand the types of evidence and arguments typically presented in a Tribunal case.

4. Themes and a Review of Select Decisions

The research identified the following four main themes and sub-themes out of the Water Tribunal decisions:

- Directives
- License Applications
 - Section 27(1)(b)
 - Reserve Determinations
- Jurisdiction
- Condonation
- Declarations

Various cases under each theme are discussed below to better illustrate the emerging themes. However for a full review of the cases under each theme, readers are referred to the Table in Appendix A.

4.1. Directives

A ‘directive’ can be issued to a particular party who has contravened various provisions of the NWA, including Section 19 and 21, and it directs them to perform a specified action.⁶ The issuance of directives must also comply with the Promotion of Administrative Justice Act (PAJA). This category of cases deals with a person or entity challenging the issuance of a directive.

In *Gerhard Neethling v DWAF WT 12/06/2006*, DWAF issued a directive requiring Neethling to reduce the height of a weir on his property back to its original size because he allegedly increased the weir’s height without prior authorisation. Neethling argued that he had done nothing illegal because his aim was to restore the water capacity he was authorised to use, and increasing the weir’s height would accomplish this. DWAF contended that this was nevertheless unauthorised as he was storing additional water, changing the river banks and altering the river banks in question.

⁶ See note 1 above s 53(1)

The Tribunal found that the directive was grounded in valid facts and sound legal reasoning⁷. It found that Neethling's increase of the height of the weir resulted in water uses contemplated in section 21 of the NWA. Accordingly the Tribunal held that Neethling needed authorisation for this action. The Tribunal relied on documents that were before them as well as the submission of the parties in reaching its decision. However, none of these documents are available on the web site.

4.2. License application

These cases involve appeals to the responsible authority's decision to refuse an application for a water use authorisation. There are also two sub-themes discussed below.

The main issue that stands out around license application decisions involves **locus standi** before the Tribunal. Unfortunately, the Tribunal has taken a narrow view of who has standing to bring cases before it. This is because it does not consider a party to be an "objector" unless DWA has specifically invited comments on a license application pursuant to the NWA. If DWA decides not to invite comments, a third party objector's hands are tied when it comes to challenging decisions before the Tribunal.

In *Gideon Anderson T/A Zonnebloem Boerdery v DWEA*⁸ and *Vuna Enterprises (Pty) Ltd WT 24/02/2010*- Vuna Enterprises applied successfully for a water use licence for its mining operation which would be conducted near Anderson's property. Anderson had objected to the granting of the water use licence during the authorisation process to both Respondents even though DWAF had not invited objections under section 41(4) of the NWA. Section 41(4) states, among other things, that a responsible authority **may** require an applicant to give notice in newspaper and other media inviting written objections to the granting of the requested license by the applicant.⁹ Nevertheless, Anderson appealed the water use authorisation pursuant to section 148(1)(f) of the NWA contending that this section conferred to him the right to appeal. That section allows for appeals of water use license decisions by the applicant or by any other person who has timeously lodged a written objection against the application.

⁷ Gerhard Neethling v DWAF WT 12/06/2006 pg 4

⁸ The respondent is listed as the Department of Water and Environmental Affairs (DWEA). It is unclear whether this is an error or not.

⁹ Ibid s 41(4)

DWAF argued that Anderson could not be considered an objector as contemplated by section 148(1)(f) of the NWA because he is not an aggrieved party who had applied for a license and because DWAF had not asked for objections. Vuna Enterprises argued that Anderson lacked **locus standi**, or the ability to bring the case before the Tribunal, for the same reason as articulated by the DWAF.

The Tribunal dismissed the appeal and, agreeing with the Respondents, stated that in order to qualify under section 148(1)(f) of the NWA as a third-party objector, it is necessary for DWAF to invite objections under section 41(4) of the NWA. The Tribunal held that since DWAF did not invite objections in this matter, Anderson could not be considered an objector as contemplated by section 148(1)(f) of the NWA.

In this case the Tribunal relied on the Anderson bundle of documents and head of arguments, the minutes of the Pre-trial conference and the parties' submission to reach its decision, none of which were available on the website or in the case.

Similarly, in *Carolyn Nicola Shear v. DWAF et al. WT 19/02/2009*, a truly low point in the Tribunal's history, the Tribunal refused to recognise the *locus standi* of the Appellant. The Tribunal found that because no written objections were invited pursuant to section 41(4) of the NWA, the appellant did not have standing to appeal the license application before the Tribunal under section 148(1)(f), which extends the right to appeal to any person who is an objector contemplated under section 41. Despite this ruling, the Water Tribunal acknowledged that its holding would amount to a legal absurdity. It stated that:

The plain grammatical meaning of section 148(1)(f) of the NWA leads to an absurdity insofar as it would mean that where no public notice was required by the responsible authority or where such notice was required but was not complied with and enforced, a party who would otherwise have objected to the application could thereby be disenfranchised (para 13.10)

Nevertheless, the Tribunal maintained the appellant lacked *locus standi*. What is particularly troubling about the *Shear* decision, is that DWAF initially required the applicant to invite

public comments under section 41(4) and even issued a directive when the applicant failed to do so. However, because that directive was never enforced and public comment was never officially invited, the Tribunal maintained that the applicant could not be an official objector contemplated under section 141.

a. Section 27(1)(b) of the NWA

Section 27(1) of the NWA requires the responsible authority to take into account all relevant factors when issuing a water use license, including specific factors set out under Section 27(1). A category of decisions involve appeals as to whether the responsible authority properly complied with the requirements of section 27(1), particularly section 27(1)(b), which requires the Responsible Authority to consider the need to redress the results of past racial and gender discrimination when issuing water licenses.

In *Johanna Sweetnam v DWAF WT 23/02/09*, Sweetnam had applied unsuccessfully for the permanent transfer of water use rights in her favour. DWAF cited non-compliance of section 27(1)(b) of the NWA as the reason why they refused to grant the licence application without citing to any other factors listed under section 27(1) of the NWA. Sweetnam argued that DWAF had considered section 27 (1) (b) of the NWA in isolation and it is obliged to take into account all relevant factors including those set out in section 27(1) of the NWA. She contended further that DWAF had applied section 27(1) (b) narrowly as transformation could be achieved through a number of ways, one of which is through the employment of people from previously disadvantaged communities. DWAF argued, however, that it existed the well accepted **AGRIBEE Sector Charter** which applied to the Appellant's farm and which she did not comply with.

The Tribunal dismissed the appeal, stating that it did not matter whether DWAF elaborated on all the factors in its written decision because the appeal process would draw out the reasons behind DWAF's decisions, thus determining whether DWAF acted appropriately. The Tribunal stated that whatever the outcome of DWAF's license application decision, "the Tribunal would still be obliged to take the said factors when it determines the appeal"¹⁰. After reviewing the evidence, the Tribunal found that DWAF did appropriately consider all the

¹⁰ Johanna Sweetnam v DWAF WT 23/02/09 pg 4

factors required under Section 27(1) and also held that the **AGRIBEE Sector Charter** appropriately serves as a yardstick for determining compliance with section 27 (1) (b) of the NWA.

b. Reserve Determination

Another subset of license application decisions includes a case reviewing DWAF's reserve determination. The Reserve is a tool in the NWA that is essential to securing the sustainability of the water resource.

Section 1 (1) (xviii) of the NWA defines the Reserve as:

the quantity and quality of water required - (a) to satisfy basic human needs by securing a basic water supply, as prescribed under the Water Services Act, 1997 (Act No. 108 of 1997), for people who are now or who will, in the reasonably near future, be - (i) relying upon; (ii) taking water from; or iii) being supplied from, the relevant water resource; and b) to protect aquatic ecosystems in order to secure ecologically sustainable development and use of the relevant water resource.

H.H Smith v DWAF WT 14/07/2006, evaluated whether DWAF properly considered the Reserve in evaluating a license application. There, DWAF had refused to grant Smith an afforestation licence because, among other things, it found that there was not enough water in the system to deliver the Reserve. In reaching this conclusion, DWAF relied on a desktop reverse model which set the mean annual runoff (MAR) at 37%. DWAF also rejected the Appellant's application on the basis that the catchment area experience different flows during the year which resulted in "a drop to about 5% of the MAR during winter months and 7% of the MAR at the height of the summer".¹¹ It found that the impact of the Appellant's activity would be severe on the low flow months.

The appellant, however, argued, among other things, that DWAF's calculation was inaccurate and that it should have relied on a hydrological assessment in the relevant catchment area that

¹¹ *H.H Smith v DWAF WT 14/07/2006*, para. 5.3

set the Reserve Quality Requirement at 50% of the MAR.¹² Moreover, the Appellant stated that DWAF did not have the precise data to make its Reserve determination.

The Tribunal dismissed the appeal finding that the determination of the Reserve was a legal requirement set out in section 16 read with section 17 of the NWA. It further found that the difference between the two determinations was because the desktop determination had taken into account the ecological requirements, while the hydrological assessment had not, and that DWAF properly relied on the 37% MAR calculation.¹³ The Tribunal also agreed with DWAF, finding that “the water shortage during the low flow months is inextricably intertwined with the sustainable existence of the ecosystem and the biota”.¹⁴ It further found that DWAF properly relied on information provided in the relevant catchment management strategy to make its reserve determination.¹⁵

In reaching its decision, the Tribunal gave much discretion to DWAF’s expertise and was willing and able to analyse and discuss important technical aspects around setting the Reserve. This is a positive decision because it demonstrates that the Court is willing to entertain relatively complex issues around calculating the Reserve. Moreover, the Tribunal gave credence to the ecological functions of the Reserve, thus recognising the importance of sustainability within the NWA.

4.3. Jurisdiction

This category of cases deals with decisions where the Tribunal has refused to hear the merits of a case because the appeal falls outside its statutory mandate under section 148 of the NWA.

In *Ncandu River Dam v Minister of Water Affairs and Forestry & others WT 18/08/2008*, the two appellants who had applied for water use authorisation brought an appeal to force the Department to reach a decision on their applications. They appealed in terms of section 148(1)(f) of the NWA¹⁶ which states, among other things, that Tribunal will only have jurisdiction ‘**against a decision of**’ the responsible authority. DWAF argued that Tribunal

¹² Para. 8.2

¹³ *Ibid.*

¹⁴ *Ibid.* 8.4

¹⁵ *Ibid.* 8.5

¹⁶ The National Water Act 36 of 1996 s148 (f) which states that there will be an appeal in the Tribunal “against the decision of the responsible authority.....”

lacked the jurisdiction to hear the appeal as there had not been any decision on the said application.

The Tribunal dismissed the appeal finding that because there had been no decision, the Tribunal lacked jurisdiction under section 148(1)(f) of the NWA. The Tribunal recommended that the Appellant approach the High Court to seek relief.

4.4. **Declarations**

Section 33 of the NWA allows the responsible authority, upon its own volition or upon request, to declare a water use which was not an existing water use that occurred within two year period preceding the commencement of the NWA. In making the declaration, the responsible authority must be satisfied that the water use (a) took place more than two years before the date of commencement of this Act and was discontinued for good reason; or (b) had not yet taken place at any time before the date of commencement of this Act but - (i) would have been lawful had it so taken place; and (ii) steps towards effecting the use had been taken in good faith before the date of commencement of the Act.

Quite surprisingly, only one case under this category was on the Tribunal's website. In *Christiaan Johannes Louw v Director-General of DWAF*, WT 12/L2/0, the Appellant, a third-party objector, argued that the declaration granted by DWAS did not comply with the requirements of section 33 of the NWA.

The Applicant for the declaration relied on a water use that was exercised by his predecessors in title but was discontinued because of the construction of a dam, which allegedly intercepted the water flow of the stream from which the previous water use was exercised. DWAF found that the construction of the dam was a good reason (section 33(3)(a) of the NWA) for the Applicant's inability to use its previous water entitlement.

In setting aside the Declaratino, the Tribunal stated that Section 33 of the NWA is part of the transitional system for recognising and managing existing lawful uses. The purpose of section 33 was to extend the category of lawful water users to include those water uses that for some "good reason" were not exercised during the qualifying period. The Tribunal then stated that for the purpose of a section 33 declaration the water use relevant would be the most recently exercised. The dam that allegedly terminated the applicant's ability to use the water was

constructing during the old water regime and took away water rights that were not statutorily guaranteed to the Applicant. Thus, the Tribunal found that most recent water use was the abstraction of water that flowed in the furrow after rain fall, not water impeded by the dam.

On the issue of “good reason”, the Tribunal held that ‘good reason should be measured objectively’. The Tribunal found that the discontinuation of the water use was due to, among other things, “natural disasters (drought, an alleged earthquake), the land use and resulting lack of interest in commercial farming by the successor-in-title, the termination of the agreement to share water between predecessors, and the disintegration of the furrow and other waterworks used for the leading of the water”. The Tribunal held that “the administrator of the estate or the potential beneficiaries of the estate could be expected (objective measure) to have taken steps to protect the assets and (at that time under the old Water Act) the associated entitlements to water use.” Therefore, during the qualifying period there was no objective good reason for non-use.

Condonation

The category of cases involves requests for condonation. Appellants have 30 days¹⁷ to launch an appeal to the Tribunal from an administrative decision under the NWA and if they do not do so within the required time frame, the Appellant may ask for the court to excuse the late appeal. The Tribunal has stated in these cases that the onus will be on the applicant to show the good cause existed for condonation. In evaluating a condonation request, the Tribunal, citing to **Melane v Santam Insurance Co Ltd 1962 (4) SA 531 (A)** set forth the following multi-factored test that must be applied on a case-by-case basis.

- “The degree of lateness”
- “The reasonableness of the explanation given for the delay”
- “The prospect of success of the appeal”
- “Whether there would be prejudice suffered by the other party”

The Tribunal gives each of these factors equal weight.

¹⁷ See note 1 above s148(1) of the NWA read with the provisions of rule 4(1) of the Water Tribunal rules

In only one instance out of ten did the Tribunal refuse to grant condonation. To highlight how the Tribunal applies the above test, we present two cases, one where condonation was granted and one where it was refused.

In the **Norsands Holdings (Pty) Ltd v DWAF and Chief Director WT 26/08/2008** condonation was granted. The Tribunal applied the multi-factor test as follows:

- **Degree of lateness:** The Tribunal stated that Norsands Holdings had been two days late.
- **The reasonableness of the explanation given for the delay:** The Tribunal found that the delay was due to DWAF providing the wrong telephone details in its notice.
- **Prospect of success on the merits:** The Tribunal stated that this factor will be satisfied if there is “a bona fide case which carries a prima facie prospect of success”.¹⁸ Here, the Tribunal held that Norsands Holdings satisfied this test as the Appellant had stated that she complied with the Broad Based Black Economic Empowerment Charter for the Mining Industry.
- **Prejudice to the Respondent:** The Tribunal was satisfied that DWAF would not be prejudiced because DWAF had submitted that it would suffer only minimal prejudice should condonation be granted.

Looking at each of these together, the Tribunal granted condonation.

In contrast, the Tribunal refused condonation in **Gannaput Plase (Pty) Ltd v DWAF WT 09/02/2009**. It applied the multi-factored test as follows:

- **Degree of lateness:** The Tribunal stated that Gannaput Plase was excessively late as the decision was made on 24 July 2008 but the appeal was posted on 23 September 2008
- **The reasonableness of the explanation given for the delay:** the Tribunal held that the explanation given was unreasonable because the Appellant had furnished the wrong address to DWAF, so it was not DWAF’s fault that it sent the notice to an incorrect address. The Tribunal further questioned why Gannaput Plase’s director could not leave his farm to consult his lawyer about the appeal time.

¹⁸ Norsands Holdings (Pty) Ltd v DWAF and the Chief Director WT 26/08/2008 pg 7

- **Prospect of success:** Gannaput Plase argued that there water use was supported by local and regional authorities; however, the Tribunal held that this did not help their prospect of success on the appeal.
- **Prejudice to the Respondent:** The Tribunal elaborated on a test to determine prejudice, which would seek to determine “the ability of a party to present its case fairly and properly at the appeal hearing”¹⁹ despite condonation. On this point the Tribunal held that no prejudice would be suffered by the parties.

After balancing these factors, the Court refused to grant condonation.

5. Discussion

A few notable points can be gleaned from the above five decisions and other cases in the Table attached in Appendix A, including issues around structural defects of the NWA, the mandate of the Tribunal, and also some lessons learned moving ahead for legal practitioners, appellants, and regulators. It must be reiterated, that these themes and issues are based only on what we believe are approximately half of the decisions from the Tribunal to date. As these other “missing” decisions become available, they will inevitably give rise to additional discussion.

Before we discuss issues emanating from the above decisions, Table 1 presents a summary of the number of cases reviewed in each category organised by cases won by DWA or appellants. In terms of local standi, those cases are more difficult to categorise, as a third-party objector is the appellants, while DWA and the applicants are respondents.

Table 1: Summary of Decisions

Category	DWA	Applicant
Directives	4	2
License Applications	9	10

¹⁹ Gannaput Plase (Pty) Ltd & ANO v DWAF WT 09/02/2009 pg 5

License Applications, Section 27(1)(b)	3	1
Condonation	1	9
Jurisdiction	8	
Declaration ²⁰	1	

As the above table demonstrates, 48 cases have been reviewed. DWA has won most of the appeals in the directive category and has won and lost the roughly an even amount of appeals related to license applications. The Court has granted virtually all condonation applications, and has dismissed approximately 15 percent of cases based on lack of jurisdiction.

Misperceptions around DWA’s Track Record

Prior to commencing its research, AWARD found that the NGO community and DWA generally perceived that DWA was losing most of its cases before the Tribunal. In addition, there was a perception that the Tribunal was dismissing many cases on procedural grounds without getting to the merits of the appeal

As the above table demonstrates, this has not been the case. DWA has prevailed on most of the cases where it has issued directives, and has won about half of the cases challenging license applications. A closer review of the cases that DWA has lost shows that it lost due to its own negligence or error, rather than a bias in the Tribunal.

In the *Norsands Holdings (Pty) Ltd* case discussed above, DWAF had provided Norsands Holdings with incorrect telephone numbers which the Tribunal accepted as the cause of why the Appellant was late in lodging her appeal.

In *A.F.C Cloete v Director- General of DWAF WT2/C1*, a case discussed in the Table in Appendix A, the Court found that DWAF did not exercise its discretion properly in considering A.F.C Cloete’s licence application. The Court found that there was no evidence that the Chief

²⁰ Declarations refer to cases where a person applies to a responsible authority to have a water use which is not one contemplated in the NWA to be declared an existing lawful water use (NWA section 33 (1)). This case is discussed in the Table attached in Appendix A.

Director when disapproving the license application had considered recommendations approving the application from an internal assessment committee, the regional director, and the industrial technician's report. Moreover, the record indicated that the Chief Director had not prepared the letter disapproving the license application, but had just signed it as it was sent to him. *See also Du Plooy P.J. v. Director-General DWAF WT/3DI* (similar issue); *Klingenberg O.H. v Director-General DWAF, WT5/KI* (similar issue). It should be noted, however, that the majority of these "negligence" cases occurred early on in the 2000-2001 time period. Thus, it may be reasonable to conclude from the cases we have reviewed, that DWA has learned from its losses and changed its practices moving ahead.

Design defects of the NWA and locus standi

Gideon and *Shear*, discussed above, raised two critical issues around the NWA. First, it highlighted a problem in terms of who can access the Tribunal under section 148. As *Gideon* and *Shear* demonstrated, only a formal objector or person who applied for a license can challenge DWA's decision. However, one can only be an objector at the discretion of DWA, and should the Department decide not to ask for objections related to a particular application, then a third-party objector has no recourse to appeal DWA's decision before the Tribunal. Moreover, as the *Shear* decision acknowledged, even if DWA requires public comment inviting objections, yet fails to enforce against an applicant who refused to do so, an appellant who objects to the application still lacks **locus standi**. This does not conform to the overall objectives of the NWA and the Constitutional norm, both of which promote participation and access to justice, and, as the Tribunal itself acknowledged, leads to a legal absurdity. Moreover, as one expert commented, this issue "negates the Tribunal's efficiency and frustrates its accessibility".²¹ On this point, the NWA should be amended to make it more in line with our Constitutional²² right of just administrative action and to ensure adequate participation in environmental decision-making, a requirement under environmental right enshrined in Section 24 of the Constitution.²³

Decisions interpreting the NWA

²¹ See note 2 above 55

²² The Constitution of the Republic of South Africa Act 108 of 1996

²³ *Ibid* s 33

There are a number of decisions discussed in the Table in Appendix A where the Tribunal has interpreting provisions or specific terms in the NWA. These kinds of decisions are helpful, because the NWA, like other legislation, is subject to interpretation and the Tribunal's decisions here help to crystallise some of these ambiguities.

In *Champagne Falls (Pty) Ltd v DWAF WT 28/08/2006*, DWAF had issued a directive to Champagne Falls to remove an afforestation scheme it had planted allegedly to prevent landslide and erosion problems. DWAF argued that this afforestation should be licensed as it consumed a lot of water and covered a vast area. The Tribunal stated there was no evidence that the afforestation had been established for a commercial purpose and that for it to require a licence under section 36(1)(a) of the NWA it should be established for a commercial purpose. Thus, the Tribunal gave "commercial" a narrow definition.

In *the Jarrett Pech Trust v DWAF WT 21/09/2006*, the Tribunal referred to section 2(1)(x) of the National Forest Act to help define a forest for purposes of the NWA, and found that this definition would include a "plantation". Here, the Tribunal found that the plantation at issue had been established for a commercial purpose and thus required a licence in terms of section 21(d) read with section 36(1)(a) of the NWA. This case also demonstrates that the Tribunal will look to other environmental legislation to help interpret the NWA.

In *J D Barnard v DWAF WT02/04/2007*, DWAF had issued a directive against Barnard that required him to stop drawing water from a canal, including his lawful allocated use, because he had exceeded his allocation. The Tribunal set aside the directive because it found that taking away Barnard's lawful allocation was excessive. The Tribunal stated that a blanket prohibition against the use of the water would be contrary to the spirit of section 53 (1) of the NWA.

Jurisdiction

The Tribunal, as stated above, can only hear appeals set out in section 148 of the NWA. The Tribunal has dismissed around 15% of the cases on jurisdictional grounds and this raises the question as to whether its mandate is too narrow or whether the Tribunal is construing its mandate too narrowly.²⁴ For example, there are a number of cases where the Tribunal

²⁵ See e.g. *G M Weasels v DWAF WT 13/03/2006*.

decided that the failure of DWAF to timeously decide a license application fell outside its appeal jurisdiction.²⁵ But this is precisely the kind of question that the Tribunal, an administrative body charged with hearing disputes under the NWA, should be addressing.

As the Tribunal dismisses more and more cases on jurisdictional grounds, it is likely that many potential appellants will bypass the Tribunal and go straight to the High Court. However, this indirect result does not conform to the intention of having a functional and efficient administrative tribunal in place.

6. Conclusion

There are many outstanding cases and it will be important to review these as they become available. Other themes and issues will inevitably come out. However, this research has pointed the need for additional research around the Water Tribunal. First, it will be helpful to find and review the supporting documents the Tribunal relied on in reaching a particular decision. This can shed light around the level of proof and the kinds of evidence needed to succeed before the Tribunal, and whether the Tribunal's decisions are reasonably grounded in evidence before it. Second, it would be useful to understand appellants' and DWA's perceptions about the functionality of the Tribunal. They have a lot of potential insight from their experiences before the Tribunal and can shed light on whether they believe the Tribunal is serving its intended purpose. Finally, discussing the Water Tribunal with current and former judges can also present critical insights around the functionality of the Tribunal, and also provide recommendations for reform.

²⁵ See e.g. *G M Weasels v DWAF WT 13/03/2006*.