IN THE WATER TRIBUNAL OF SOUTH AFRICA CASE NO. WT19/05/2011

HELD AT PRETORIA

ON THE 21ST OF SEPTEMBER 2017

In the Appeal between:

IBHUBESI ORE EXPLORATION (PTY) LIMITED Appellant

And

THE DEPARTMENT OF WATER AND SANITATION Respondent

APPEAL DECISION

APPEARANCES:

Coram	**:**	**Mr. F Zondagh**	**Member (Panel Chair)**
	:	**Prof. T Murombo**	**Additional Member**

FOR THE APPELLANT: **Mr. D.S. Goosen**

Daniel S Goosen Attorneys

FOR THE RESPONDENTS: **Advocate M. Mojapelo**

Assisted by Advocate T.E. Netshiozwi instructed by the State Attorney

INTRODUCTION AND BACKGROUND

1. This is an Appeal before the Water Tribunal (the Tribunal) brought in terms of Section 148(1) (f) of the National Water Act 1998 (Act No.36 of 1998) (NWA) against a decision of the Responsible Authority made on 23rd March 2011 in which it refused a Water Use Licence on application by the Appellant in terms of Section 41 of the NWA in respect of Portions 6, 8, 17 and 20 of the farm Middelpunt 320 JT.

2. The Tribunal finds itself in the invidious position of having to pronounce on the decision of the Responsible Authority in respect of an application for a Water Use licence lodged with the DWS as far back as 17 November 2009.

3. The Appeal noted timeously by the Appellant on 21st April 2011 has been dogged by a series of alleged failures on the part of the Responsible Authority particularly its failure to promptly deliver formal reasons for its decision, notwithstanding repeated requests by the Appellant.

4. On the last appearance before the Tribunal held on 29th day of March 2012, the Parties entered into a written agreement in terms of which the Responsible Authority undertook to deliver its reasons together with all other relevant documentation by 16th April 2012. The Appellant would submit its response 10 (ten) days after receipt thereof. It was further agreed that failing to submit its reasons by the agreed date, the matter would be set down for hearing on the 16th April 2012. To the date of this hearing, no reasons were submitted as agreed. On the agreed date for hearing no functional Tribunal existed and a subsequent invitation to mediate the dispute in terms of Section 150(1) of the Act also failed.

5. The current Tribunal was reconstituted on 11th June 2015 and to bring this matter to its conclusion, the Chairperson of the Tribunal issued a Directive on 8th August 2017 issued the following Directive: -

> *[3.2] The respondent is directed to file and serve its response on the merits of the appeal on or before 22 August 2017.*
> *[3.3] The appellant, should it wish, or be advised to do so, is directed to file and serve its replying submissions on or before 29 August 2017.*
> *[3.4] The parties are directed to file their heads of argument on or before 05 September 2017.*

[3.5] The appellant is directed to submit a Consolidated Index of all documents filed to the Registrar of the Water Tribunal on or before 06 September 2017.
[3.6] The Appeal will be heard on 8th September 2017.

6. In compliance with the directive the Parties presented the following documents.
   6.1 The Respondent filed in response, its "Submissions" on the merits of the Appeal[1] whilst the Appellant filed a Replying Affidavit on 29th August 2017.[2]
   6.2 The Appellant filed Heads of Argument on 6th September 2017 and amplified its grounds for Appeal in terms of Rule 3(2) of the Tribunal Rules on 14th September 2017.
   6.3 On the day of the hearing the Appellant provided the Tribunal with the consolidated index of all documents referred to in paragraph 3.5 of the directive consisting of four (4) volumes.[3]
   6.4 The Respondent at the commencement of the hearing filed documents referred to as "the Respondent's Bundle."[4] These documents were not included in the consolidated Index of all documentation and consisted inter alia of the following documents:-
      - An unsigned copy of the Respondent's "Record of Recommendation". (ROR).[5]
      - A letter addressed to the Registrar of the Water Tribunal dated the19th September 2017 purporting to be the long awaited reasons for declining the Water Use Licence in 2011.
      - A letter from the Chief Director Legal Services dated 2nd August 2013 addressed to the Appellant.
      - The Respondent's reply thereto dated 20th August 2013.
      - Two (2) inter departmental memorandums dated respectively 9th December 2009 and 23rd April 2010.
      - Correspondence from the Office of the State Attorney in which written objections from the Mpumalanga Tourism and Park Agency, Middelpunt Wetland Trust and Dullstroom Trout Farm (Pty) Limited and from the attorney acting on behalf of the Appellant dated 7th September 2017 were included.

[1] Record Page 178 – 186.
[2] Record Page 187-252.
[3] Record Pages 1 – 643.
[4] Pages 1 – 61.
[5] Respondent's Bundle Page 1 – 23.

- A directive issued to the Appellant in terms of Section 19(3) and 53(1) dated 19th January 2015 was attached.[6]

6.5 The Respondent's Heads of Argument were filed on 21st September 2017.

6.6 At the adjournment of the mater the Tribunal requested the parties to file supplementary Heads of Argument to address the following:-

- The alleged inadequacy of the mitigation measures proposed by the Appellant's in the Integrated Water Resource Management Plan (IWRMP);
- The applicability of the provisions of Regulation 704 of June 1999 with regard to the Appellant's activities; and
- Proposals regarding a preferred solution that would address the relief sought by both the Appellant and the Respondent.

Both parties filed Supplementary Heads of Argument, the Appellant on 26th September 2017 and the Respondent in an undated Notice.

6.7 The IWRMP as part of the Water Use Licence Application (WULA), not included in the consolidated index of documentation was by agreement made available in electronic form at the conclusion of the hearing.

6.8 The hearing commenced at the office of the Department of Water and Sanitation, Pretoria on 8th September 2017, was postponed to 20th and 21st September and concluded on the last-mentioned date. The proceedings were electronically recorded.

THE RESPONDENT'S SUBMISSION

7. The Respondent's written submissions on the merits of the Appeal filed pursuant to the directive, set out the facts on which it would rely to conclude that the Appellant's Licence application had correctly been refused.

8. The Respondent's confirms that subsequent to the successful application to the Department of Mineral Resources (DMR) (then DME) and the Respondent's comments thereon, the Appellant's prospecting activities commenced during 2006.

[6] Respondent's Bundle Pages 1 – 62.

9. Prospecting continued for a period of two (2) years until 2008 at which stage the Respondent, in answer to an application for the renewal of the prospecting right, concluded that the Appellant had conducted unlawful water use activities instructed the Appellant to cease its activities and to submit a WULA properly supported by specialist studies.

10. The Respondent alleged that the specific water uses applied for in terms of Section 21(1) (a-c), 21(1) (g) and 21(1) (i-j) of the NWA, constituted water use activities that would impact two hundred and thirty four metres (234) metres along the length of a Hill Slope Seepage wetland associated with the upper reaches of the Lakensvlei Spruit located in the Steelpoort Sub-management area of the Olifants Water Management Area within the B41 quaternary catchment.

11. The Respondent submits that the Appellant's activities had negatively impacted the water resource in that it had modified or altered areas in the Wetland, seriously affected eighteen (18) dams and compromised the integrity of the Wetland and natural flow of the streams.

12. The Respondent further noted that a "Box Cut" pit in the prospecting area contained high concentrations of aluminium that required treatment prior to it being discharged or disposed of and stipulated that precautionary measures were required to prevent pollution of the water course during rehabilitation.[7]

13. The Respondent formally refused the Water Use Licence (WUL) on 23rd March 2011 after having taken the following factors into consideration: -

    - The activities of the Appellant have gone beyond that of mere prospecting and are more in the nature of mining;
    - The Appellant had exercised water use activities unlawfully with resultant negative impacts on the water source;
    - The area is highly sensitive due to the Lakensvlei Wetland having been classified as being "irreplaceable";
    - The current ecological status of the area in terms of water quality was evaluated to be at Class C (moderately impacted) while the recommended Class is set at B (predominantly natural) and it is not foreseen that the continuation of these mining activities would lead to

[7] Record Page 184 paragraphs 10.1 and 10.2.

improved water resource conditions unless the ecological or management Class is downgraded to Class D.

- The activities were conducted without an environmental risk assessment or authorisation by the Respondent and the Appellant only submitted a WULA on 17th November 2009 after intervention by the Respondent.
- Interested and Affected Parties raised genuine issues of concern and objections and that there are legal constraints that could prohibit the issuing of a licence.
- The Licence application does not address the requirements of Section 27(1) of the NWA in that the granting of the licence will not help to address the result of past racial and gender discrimination provided for in Section 27(1) (b) and that the socio-economic impact in granting a licence, would be insignificant given the proposed number of job opportunities and the limited period of the prospecting activities.

Having considered these factors, the Respondent concludes in its submission that, "The mitigation measures proposed by the Appellant are not adequate". On this basis it is alleged the licence was refused and similarly so it contends, should the Appeal.[8]

APPELLANT'S EVIDENCE

14. The Appellant, pursuant to the directive and the Respondent's submissions filed a replying affidavit attested to by its director, Mr Martiens van der Merwe. It drew the Tribunal's attention to the facts leading up to its Appeal in 2011. The affidavit formed the basis of the Appellant's *viva voce* evidence and was amplified by way of a Power Point presentation that highlighted pictorially, the chain of events leading to the Appeal. It included a historical overview of the Appellant's prospecting activities and methods, the geographical layout of the prospecting area on the farm Middelpunt in relation to the Lakensvlei area, environmental concerns, rehabilitation successes, mitigation measures and the administrative process.

15. Mr van der Merwe, called in evidence, dealt with the historic exploration activities previously conducted over time. This history is important as it refers to previous

[8] Record Page 186 paragraph 12.

ecological disturbance of the area having undergone prospecting and mining activities related to open pit coal and diamond mining. Although diamond mining, initially conducted by De Beers in 1975, subsequently continued by Dullstroom Diamond Mines (Pty) Limited in conjunction with Binex (Pty) Limited in 1986 and other private operators, exposed a diamond fissure on the farm Middelpunt, prospecting was discontinued having been found to be sub-economic. These disturbed areas remained mostly unrehabilitated.

16. The area was and still is subject to various agricultural activities that include crop cultivation, livestock farming and the establishment of plantations. The Lakensvlei area, in close proximity to the farm Middelpunt, is also a popular tourist attraction for birders, trout fishermen and the like. All the above activities and related infrastructure contributed to the general ecological state of the area.

17. In 2004 the Appellant acquired the mineral rights, purchased the property and applied for the Right to prospect for diamonds on various Portions of the farm Middelpunt. The Appellant's application was accepted by DMR on 26th June 2005. In terms of the then applicable inter-departmental procedure, a Standard Environmental Management Plan (SEMP) supporting the prospecting right application was provided to Department of Water Affairs and Forestry (DWS) *(as it then was, since replaced by Department of Water and Sanitation (DWS)* for comment.

18. On 31st August 2005, the Respondent addressed a letter to the DMR in reply, requesting that the concerns raised therein be addressed before any recommendation in relation thereto could be made. This letter inter alia drew attention to section 21(b) of the NWA in relation to the storage of water in a dam and in particular the footnote confirmed the obligation of the Mine Manager to –

> "at all times to adhere to the requirements of the regulations on the use of water for mining and related activities aimed at the protection of water resources promulgated under the Government Notice 704 and published in Government Gazette No. 20119 of June 1999".[9]

19. The concerns raised by the Respondent were fully addressed by the Appellant in a written response on the 30th September 2005. No reply to this letter was received from the Respondent and on the 16th January 2006 the DMR issued a Prospecting Right No.

[9] Record Pages 1 – 2; referring to *Regulations on use of water for mining and related activities aimed at the protection of water resources.*

MP30/5/1/1/2/219PR to Ibuhubesi Ore Exploration (Pty) Limited, the Appellant, having satisfactorily complied with all the statutory and regulatory requirements provided for this purpose.

20. The prospecting right, valid for a period of two (2) years, authorised the Appellant to prospect for diamonds on Portions 6, 8, 17 and 20 of the farm Middelpunt 320 J.T. Mpumalanga in accordance with its Prospecting Works Programme. The Prospecting Works Programme proposed planned drilling to determine the depth and extent of the kimberlite dykes, authorised inter alia the collection of bulk samples to assess the feasibility of the project of at least 100,000 tons to be placed on an area not exceeding 1,5 hectares and in addition provided for the treatment and analysis thereof.[10]

21. The Appellant for its part was firmly under the impression that the correspondence between the relevant Departments and the lack of any response or directive from the Respondent constituted an authority to continue their prospecting activities in terms of the Regulations referred to. The Appellant thus commenced with the prospecting activities as they were entitled to do.[11]

22. The Appellant continued undisturbed with its prospecting activities from October 2006 until it ceased its prospecting activities on 30th August 2008. During this time it conducted an extensive and successful rehabilitation programme in respect of the historically disturbed prospecting area referred to as "Pit 1". The Appellant emphatically denies that it conducted any mining activities during the authorised prospecting period.

23. At no stage during this initial period (2006-2008) were any negative comments, concerns or directives made or issued to the Appellant by the DMR or the DWS and Environmental Affairs in relation to its prospecting activities or rehabilitation efforts. No documented complaints or objections were recorded by any Interested or Affected Parties during this phase.

24. An application for the renewal of the prospecting right was submitted by the Appellant to DME on the 8th of January 2008 and on 2nd April 2008 the Appellant submitted a report on its prospecting activities to the DMR and DWS. This submission triggered a meeting between the relevant Departments and other Stakeholders that included

[10] Record Pages 262 - 265
[11] Transcript Pages 10 lines 15 - 25.

various Interested and Affected Parties. During this meeting held on 31st of July 2008 concerns were raised against the prospecting activities and in the main related to:-

- The lack of authority to conduct "Bulk Sampling";
- Water sampling results showed signs of elevated aluminium contamination that could impact the sustainability of aquatic life in the rivers downstream of the prospecting operation; and
- Requested the monitoring of the aquatic life in the river system below the prospecting operation and as well as the water quality in the stream.

25. Photographic images were produced showing some of the machinery used during the prospecting, the extent of the excavations and the equipment intended to wash and screen the "blue" ground. These images created the impression that the prospecting activities were exercised in a manner more indicative of a "mining" operation.

26. The rehabilitation of the western "mining" area (Pit 1) was shown and although considered generally as being successful, was criticised by the Respondent pointing out that the use of wattle branches to reduce soil erosion may lead to the propagation of unwanted wattle.[12]

27. On the 5th November 2008 a further meeting was held at the request of the Appellant to review the current situation, resolve those matters relating to the environmental authorisations prescribed by DWS and to determine a way forward. The DWS raised the concern that the Appellant's activities that included "Bulk Sampling" *constituted a mining activity* as opposed to the prospecting activities authorised in terms of the Right and clarification of this was required.

28. The minutes of this meeting further revealed that the Respondent endorsed an Environmental Risk based approach in which the mining risk was determined by taking into consideration the sensitivity of the water resource based on its ecological importance as well as the present and future ecological state thereof. Although prospecting (all minerals) as well as diamond and precious stone mining are classified as primary hazard risk Class C the Respondent, given the sensitivity of the environment in the present case, concluded that the mining risk must be adapted to risk Class B or even risk Class A. In the light of this conclusion information contained in the approved Standard Environmental Management Plan (SEMP) of 24th October 2006, was

[12] Record Pages 7 – 8.

adjudged to be inadequate, required a major revision for adequacy and objectives in order to meet regulatory requirements. This finding according to the witness contradicted the Respondent's own published licensing guidelines applicable at the time.[13]

29. The Respondent referred to the Appellant's obligation to comply with all other relevant legislative requirements provided for in terms of Section 17(6) of the Mineral and Petroleum Resources Development Act (Act No. 28 of 2002) (MPRDA), and as its intended activities related to several water uses contemplated in Section 21 of the NWA, prospecting could only be authorised subject to the successful application for a WUL supported by a IWRMP. Thus, the application for a WULA became inevitable.
30. To achieve this, the Respondent's officials specified a host of studies to be included in an Integrated Water Resource Management Plan in support of the WULA and detailed the following: -
    - Wetland specialist investigation to quantify impact caused by mining;
    - Rehabilitation plan for disturbed areas ensuring long term sustainability;
    - Geohydrological investigation with hydro census in order to quantify impact of mining on base flow feeding wetlands and ground water users;
    - Financial provisioning (closure costing) in terms of rehabilitation;
    - Compliance with section 27 of the NWA;
    - Clarification on surface right issues as environmental liability remains with the surface owner;
    - Water quality monitoring plan for both surface and ground water; and
    - Stakeholder participation with Interested and Affected Parties.[14]

31. Notwithstanding its view that it is not an industry norm to apply for a WUL in respect of prospecting and that such activities are conducted in accordance with the MPRDA and in accordance with the approved SEMP, the Appellant however, as a responsible prospector bearing the environment and the community in mind, agreed to apply for a WUL when instructed to do so by the Respondent.

32. On the day following this meeting, Mr Nkuna, on behalf of the Respondent, addressed a letter to the Appellant instructing the Appellant to stop conducting any unlawful water use activities on the prospecting property. It instructed the Appellant to compile and

[13] Record Page 12.
[14] Record Page 14.

submit a WULA supported by the required specialist studies as agreed and drew attention to Section 19(1) of the NWA that provides as follows:-

> 'Section 19 (1) an owner of land, a person in control of land or a person who occupies or uses the land on which –
> (a) any activity or process is or was performed or undertaken; or
> (b) any other situation exists,
>
> which causes, has caused or is likely to cause pollution of a water resource, must take all reasonable measures to prevent any such pollution from occurring, continuing or recurring.'

The letter clearly prohibited any rehabilitation other than in consultation with DWS and threatened that failure to comply with these instructions will result in further action being taken by DWS.[15]

33. On 18th August 2009 MENCO, the consultants of the Appellant whilst in the process of preparing the WULA, filed a formal application on behalf of the Appellant in which it proposed and motivated a request for the emergency rehabilitation of Prospecting Pit 2 in terms of Section 19 of the NWA. This application was occasioned by heavy rainfall in the area that resulted in the current Prospecting Pit (Pit 2) filling up with water. The proposed Rehabilitation Plan followed that employed in respect of the successful rehabilitation of Pit 1. It is common cause that notwithstanding the successful rehabilitation of Pit No. 1, no reply or authority to commence with the rehabilitation of Pit 2 as envisaged was received.[16]

34. A scheduled meeting of Interested and Affected Parties was held on 4th September 2009, the main aim of which was to establish and discuss the status of the licence application particularly for prospecting purposes as opposed to a WUL for purposes of mining.

35. The minutes reveal an explanation in regard to the location of the kimberlite dyke intended to be prospected and confirm the Appellant's prospecting activities in the areas previous explored by De Beers by way of open cast bulk sampling techniques.

36. The witness traversed details of the prospecting methods indicative of the difference between mining and prospecting and Mr J M Marè a consultant engaged by the Respondent in the framing of the guidelines of the Integrated Water Use Licence (IWUL) process (2007). They confirmed that the WULA currently relates to prospecting

[15] Record Pages 16 – 17.
[16] Record pages 21 – 23.

only but should the Appellant's prospecting activities result in a decision to proceed with mining, a Mining Right would be required and the Water Use Licence conditions would be reviewed.[17]

37. Discussions during this meeting addressed the geohydrological and wetland investigations and the draft IWRMP was presented for comment thus giving all the parties an opportunity of traversing and commenting on its contents. Several concerns were raised and in general the replies received addressed the concerns. The parties were invited to provide comment on the draft prior to 1st October 2009 in order that such comment may be addressed and included in the final document.[18]

38. The Licence application prepared in accordance with statutory and regulatory requirements including a comprehensive IWRMP with all the specialist studies as required by the DWS was lodged by the Appellant on 17th November 2009. The Respondent confirmed receipt of the documentation on 20th November 2009.[19]

39. A request by the Respondent for additional documentation that included a copy of the Title Deed, completed forms DW 781/768 and DW 763, were complied with on 5th February 2010. The Appellant confirmed a subsequent request from Mr Nkuna for the Appellant company's registration number and date of establishment on the same day being the 30th of June 2010.

40. Evidence provided by Mr van der Merwe refers to a meeting held between the representatives of the Respondent and the Appellant on the 23rd of June 2010 in regard to the WULA and the Appellant's application to rehabilitate the prospecting area on portions of the farm Middelpunt. It appears that during this meeting, officials of the Respondent accused the Appellant of repairing a dam wall without consent, conducting illegal water use activities and polluting the natural water resource with aluminium.

41. On 15th November 2010 a notice of the Respondent's intention to issue a Directive in terms of Section 19(3) and 53(1) of the NWA for failure to take reasonable measures to control pollution and undertaking a water use activity without authorisation was issued to the Appellant. This notice, incorrectly addressed to Petro Erasmus, a representative of the Appellant consultant MENCO, disregards the cessation of the Appellant's prospecting activities and all alleged water uses as far back as 30th August 2008 and

[17] Record Page 25 – 27.
[18] Record pages 25 – 28, and IWRMP Appendix F4.
[19] Record Page 30.

fails to explain its silence on the Appellant's request for approval to commence with emergency Rehabilitation in terms of Section 19 of the NWA Act as far back as the 18th August 2009.[20]

42. On 23rd November 2010 the Appellant responded comprehensively in answer to accusations made by the Respondent during the course of the meeting on the 23rd June 2010. The letter points out that the accusation relating to the dam repair contradicts the official Departmental policy and legal requirements regarding to various classes of dams, as the dam in question is a Category 1 dam and as such the repair did not require the consent or approval of the Respondent.

43. The accusation relating to the elevated levels of aluminium allegedly polluting the natural water course with aluminium, was according to Mr van der Merwe, nothing more than an unsubstantiated allegation by Departmental officials unsupported by the ground water analysis reports obtained by Mr Brett during April 2008 and April 2009, those taken by Ms Hanli Bezuidenhout on 9th September 2009, at the request of the meeting held on 4th of September 2009 as well as the samples taken by Labserve at the request of the Appellant during July 2010.

44. The results of the ground water quality samples as well as its accompanying report prepared by Bezuidenhout included in the IWRMP were attached to the Appellant's reply. From this report the following conclusions were drawn: -

- The presence of Aluminium is a natural occurrence in surface soils.
- Almost all the Aluminium in the water samples taken is in the suspended form to the extent of Al observed in formal drinking water.
- It was found that the increased aluminium is a natural degradation process of the Clay found in the area and that the process will gradually downscale until the clay has settled completely.
- The amount of clay disturbed during Phase 1 of the Prospecting Work Program (The taking of the opencast sample) would be the highest, due to the m2 (square meterage) of surface area disturbed.
- The amount of clay to be disturbed during Phase 2 of the Prospecting Work Program (The taking of the vertical shaft sample) would be very low due to the fact that only 4m2 of the surface soil would be disturbed.
- Richmond will employ a soil specialist after closure to monitor the true impact and time of recovery of these areas. (The Department should have requested this once they have reviewed the documentation).

[20] Record Pages 61-63.

- As the Aluminium is in colloidal form it is easily removable without excessive additional cost. Thus, should it be found that the Al increase drastically before equilibrium is reached the planned mine should incorporate a filtering system into the release water system. This should mitigate any possible Al pollution from spreading into the surrounding area until the natural degradation process is completed.

Please remember this is only prospecting and these points can now be monitored, proved or disproved.[21]

45. The letter includes an analysis of the aluminium measurements and refers the Respondent to the factual findings relating to the occurrence and effect of aluminium, fully dealt with in the Geohydrological Report, included in the IWRMP.

46. Although the Respondent, during a site visit and the meeting of 23rd June 2010 alleged that specialists appointed by the DWS disagreed with the findings contained in the IWRMP in this regard, no such report notwithstanding the Appellant's request for it to be produced, was provided. This letter, as with all the others addressed to the Responsible Authority, elicited no response and a closing invitation to discuss any matter raised in their letter under reply, was ignored.[22]

47. In closing the Appellant draws attention to and bemoans the fact that since lodgement of the WULA and the August 2009 MENCO application in terms of Section 19, it had not received any correspondence from the Respondent and expressed the following opinion: -

> "It should also be noted that at no time since the water use license or the emergency rehabilitation has been submitted to the Department did Richmond Mining and Exploration receive any correspondence from the Department requesting that sampling of the water in the pit to continue. In addition, no further information or studies was requested by the Department.
>
> We are thus of the opinion that the Department are not able to assess the license application to its full capability if there are issues that they feel are not adequately addressed or investigated. The responsibility lies with the Department to provide feedback on ALL applications to the applicant should they require additional information. The affected area could have been closed and rehabilitated a long time ago".

[21] Record Page 52.
[22] Record Page 49 – 55.

48. On 6th December 2010 and again on 2nd February 2011 the Appellant dealt comprehensively with the Respondent's notice of its intention to issue a directive in terms of Section 19(3) and 53(1) of the NWA.

The following was pointed out: -

- The Appellant had ceased all alleged water use activities as required by the Respondent and that it had responded to the instructions to apply for a WUL.
- It noted the rehabilitation requirements proposed by the Respondent and assumed that the notice constitutes an approval of the Rehabilitation Plan previously proposed. It agreed to provide the required monitoring report reflecting progress made towards the wetland rehabilitation and management by June 2011.
- Corrected the allegation that the prospecting area is located within the Lakensvlei Wetland area classified as being "irreplaceable" by confirming that in actual fact the prospecting area is located on Portion 8 and 20 of the farm Middelpunt which is outside the Lakensvlei Wetland area.
- It cannot be accepted that the area is classified as being "irreplaceable" given the cumulative impacts of extensive agricultural, mining and other known activities that contributed significantly to the loss of biodiversity in the area. The characterisation of the area "as irreplaceable" emanates from the Mpumalanga Conservation Plan and is not site specific but is rather a general illustration used for guidance.
- The statement that the Resource Class Objectives has already been degraded from Class B (i.e. natural) to the current Class C (i.e. good) cannot be solely attributed to the Appellant's prospecting activities given the varied historical and current land uses on the property. The Appellant's long-term management objective was in any event directed towards maintaining the current ecological class C by using an Integrated Water Management Plan as a management tool to effect and regulate this management objective.
- Noted the reference to the alleged high concentration of aluminium in the "Box Cut" and the instruction for it to be treated before being disposed of or discharged together with a request that precautionary measures should be taken to prevent pollution of the watercourse during rehabilitation.
- The Appellant had in its application for the emergency rehabilitation of the "Box Cut" set out its rehabilitation plan and committed itself to provide

appropriate water treatment practices for pit water prior to any dewatering disposal or discharge activities.[23]

The Respondent once again failed to reply or comment on the contents of the Appellant's responses.

49. On 23rd March 2011 the Respondent, represented by the Project Manager, Letsema notified the Appellant that the WULA had been processed and confirmed that the application for a WUL was unsuccessful. The reasons for the refusal were stated as follows:-
    - "It has come to the notice of the Department that you engaged in mining activities and water use without water use authorisation. This resulted in severe negative impacts in the water resources".
    - "The proposed mitigation measures as contained in your document will not adequately address the negative impacts".[24]

50. The Appellant formally noted an Appeal against this decision in terms of Section 148(1)(f) of the NWA on 21st April 2011. This document sets out the grounds for the Appeal formulated as follows:-
    - The failure by the Respondent to fulfil the required consultative process in assessing the WULA.
    - The failure to respond to correspondence and requests or to provide comment on the recommendations of the specialists.
    - The confusion of Regulatory Authorities in their approach to Environmental legislation applicable to prospecting activities in the Belfast/Dullstroom area.
    - The conclusion that the Appellant's alleged mining activities resulted in severe negative impacts on the water resource that cannot be adequately mitigated by the measures proposed in the WULA.
    - That the negative impacts relate to the pollution of the watercourse in the form of elevated levels of aluminium occasioned by the prospecting activities.
    - The allegation that the prospecting activities are conducted within the Lakensvlei when in fact these activities occurred more than one kilometre away from the Wetland.

[23] Record pages 65 – 66 and 77– 80.
[24] Record Page 82.

51. The grounds of Appeal were formally amplified on 14th September 2017 by way of notice in terms of Rule 3(2) in which the Appellant contends that the Respondent erred in concluding that it had engaged in mining activities and water use without water use authorisation resulting in the pollution of the water resource. Similarly it erred in finding that the proposed measures to mitigate the alleged negative impact of its activities on the water resource, were inadequate.[25]

52. The Appellant's submissions, statements and evidence supported by the facts and underpinned by the specialists reports were fully traversed in cross-examination. The witness reiterated that no WUL was required at the time, that the prospecting activities of the Appellant was carried out lawfully in accordance with the SEMP approved by the Respondent and that the allegations relating to its prospecting methods in the area were fully described in the Prospecting Works Programme while the alleged aluminium pollution of the water resource was comprehensively dealt with in the correspondence and satisfactorily explained therein as well as in the specialist's report included in the IWRMP.

53. The Respondent's cross examination in the main addressed the contents of the correspondence between the Appellant and the Respondent and voiced criticism in respect of the information contained in the WULA documents and that attested to in the Appellant's Affidavit. No empirical evidence in contradiction or disagreement with that presented by the Appellant in its WULA or in the correspondence in relation to its activities, in particular the alleged pollution or the inadequacy of its mitigation methods, was put to or traversed with the witness during cross examination neither did the Respondent take issue with the chain of events as presented by the witness.

EVIDENCE FOR THE RESPONDENT

54. The Respondent presented and relied on the evidence of Mr Sidney Nkuna, who at the time acted as the case officer that facilitated the administrative processes associated with assessing and evaluating WULA'S. He confirmed that he had received and dealt with the Appellant's application.

55. He testified that in order to address the challenges presented by the licensing process, a project referred to as Letsema had been created. Licence applications were

[25] Record Pages 548 – 555.

therefore dealt with in terms of this project and the Chief Director Water Use was authorised to make decisions in respect of the WULA.

56. Asked to confirm that the decision to refuse the licence was based on the reasons set out in the letter of refusal, Mr Nkuna responded that he was not the relevant person to confirm the reasons. He proceeded to say that other aspects not captured in the letter of refusal may have been considered by the relevant official in addition to the recommendations he put forward.

57. He stated that he was not able to conclusively state that the reasons provided in the letter of refusal were exhaustive in view of the absence of a number of aspects (reasons) that he had highlighted in the Record of Recommendation (ROR). The relevant official may have "used his or her discretion to decide which reason carried weight or not".[26]

58. Mr Nkuna was required to confirm whether to his knowledge, the decision maker actually read and applied his or her mind to its contents, the evaluation, conclusion and recommendations made in support of the decision relayed in the letter. Mr Nkuna replied that he trusted his superiors and therefore accepted that they had read and considered the issues in addition to "other things", before coming to a decision.

59. Mr Nkuna testified that a WULA consisted of two phases, the first being administrative compliance and thereafter the recommendation phase followed. Asked whether he at any stage approached the Appellant's with a request to provide more studies and analysis in respect of areas of concern emanating from the application, Mr Nkuna replied that based on the inputs that were obtained, it was unnecessary to engage the Appellant as the application was according to their specialists "fatally flawed". This "fatal flaw" was ostensibly identified by them having concluded that prospecting activities could not be conducted "on top of a wetland".[27]

60. This conclusion according to Mr Nkuna's evidence was based on information obtained from the "in-house specialist" of DWS and underpinned the recommendation that he put forward to the committee. He confirmed that no external experts were engaged to substantiate it.[28]

[26] Transcript 20/09/2017 page 58.
[27] Transcript 20/09/2017 Pages 60 line 5 – 10.
[28] Transcript 20/09/2017 Page 60 Lines 5 - 10.

61. When asked why he did not apply the provisions of Section 41(2) (d) of the NWA which stipulated that the Responsible Authority, "Must afford the Appellant *an opportunity to make representations on any aspect of the licence application*".

    He replied that it would have been done had the application not been "fatally flawed". In this instance any further engagement would merely have extended the process.

62. He testified that as the case officer, he exercised his discretion when addressing the objections of Interested and Affected Parties and if found that the objections were not adequately addressed by the Appellant, he was always at liberty to apply the provisions of Section 41(4) (c) which in this particular case, he did not.

63. On being required to respond as to whether he had taken into account the requirements set out in Section 27(1) (a)-(h) and whether he could make recommendations relating to its requirements, he replied that there are two issues to be considered, firstly the environmental objections and thereafter the social and economic aspects. Both these aspects he testified were dealt with in the ROR.

64. Having had the benefit of all the information contained in the WULA and apparently with support from the Respondent's "in house specialists", Mr Nkuna found that the possible environmental impacts emanating from the Appellant's "prospecting/mining" of kimberlite, poses

    > "A huge risk on the highly sensitive water resource and water quality impacts have already been observed due to the significantly high levels of aluminium (AL) detected as surface water. This will also lead to the impact on the ground water and the aquatic organisms".[29]

65. Mr Nkuna, the author of the ROR, although not required to explain or defend the contents thereof during his evidence in chief, apparently relied on the aspects referred to in the Respondent's Submission to conclude and recommend the following: -

    > CONCLUSION
    >
    > "The risks associated with the prospecting/mining activity are too high to be adequately mitigated by the measure proposed in the water use licence application documentation and also considering the anticipated two (2) year lifespan of the activity. Furthermore there are genuine issues of concern and objections that have been raised by the Interested and Affected Parties

[29] Respondent's Bundle Page 13.

(I&AP) around the area due to the highly sensitive water resource and the need to preserve the current ecological state of the area".
"Therefore the granting of the water use licence to Ibhubesi is not recommended as it is not beneficial use in the public interest. Furthermore, it is recommended that a directive in terms of Section 19 of the NWA be issued to Ibhubesi for the rehabilitation of the disturbed areas including the wetlands."

RECOMMENDATIONS AND DECISIONS

The granting of a water use licence to Ibhubezi Ore Exploration (Pty) Ltd is not recommended.[30]

66. His recommendation prepared on 7th June 2010 commented that
"the application is not beneficial in the public interest and hence should be declined."
This recommendation occurred nine (9) months prior to the date of the letter in which the Appellant was informed that the application for a Water use Licence had been refused.

ORAL SUBMISSIONS BY THE APPELLANT

67. The Appellant submits that the failure of the Respondent to promptly furnish reasons for its decision as it is statutorily obliged to do in terms of Section 42(b) of the NWA, require an application for Condonation giving a proper and comprehensive explanation for its failure to do so. In the absence thereof, the Tribunal should decide this matter as if it were unopposed. The Appellant contends that this flagrant abuse of the process by the Respondent constitutes *mala fides* and therefore it approached the Tribunal with *"unclean hands"*. On this basis alone, the Tribunal is entitled to *"show the litigant the door"*. In support of this contention the Tribunal was referred to the cases of *Volkskas Beperk versus Barclays Bank (DC&O)* 1952 (3) SA 343 (A) and *Van Wyk versus Unitas Hospital & Another* 2008 (2) SA 472(CC).

68. Although the rules of the Water Tribunal provide for hearing applications for Condonation, it does so only in circumstances where an Appellant fails to file an Appeal or application timeously. The Respondent must comply with its statutory duty set out in Section 42(a) and (b) of the NWA that stipulates as follows: -

"After a Responsible Authority has reached a decision on a licence application, it must promptly:-

[30] Respondent's Bundle Page 22.

(a) Notify the Applicant and any persons who has objected to the application; and
(b) At the request of any persons contemplated in paragraph (a), give written reasons for its decision".

And in addition, must adhere to the provisions of Item 5(3) of Part 2 of Schedule 6 of the NWA that reads:

> "A responsible authority or a catchment management agency against whose decision or offer an appeal or application is lodged must, within a reasonable time –
> -send to the Tribunal all documents relating to the matter, together with the reasons for its decision; and
> -allow the appellant or applicant and every party opposing the appeal or application to make copies of the documents and reasons."

The notion that the Respondent should have applied for condonation is misplaced as the Respondent certainly cannot apply or appeal to the Tribunal to condone a statutory failure.

69. The Appellant accepts that the reasons advanced for refusing it a water use licence as envisaged in the WULA, are those succinctly set out in the Respondent's letter of 23rd March 2011 to the Appellant having:-
    - Engaged in mining activities and water use without water use authorisation; that
    - Resulted in severe negative impacts on the water resources in respect of which
    - The proposed mitigation measures as contained in the Application would not adequately address the negative impacts.

    These reasons form the basis of the Appellant's amplified grounds of Appeal.

70. The Appellant contends that it lawfully exercised its rights to prospect on the property in terms of a valid Prospecting Right No. 30/5/1/1/2/2199PR preceded by an approved SEMP and an accepted Prospecting Work Permit. The prospecting methods, the prospecting area and the approval for the collection of bulk samples are defined and authorised therein. Although the prospecting activities may have created the impression of a mine in operation, its activities were limited to those provided for in the Prospecting right.

71. The Appellant relies on the lawfulness of its prospecting activities as being authorised in terms of the *Regulations on Use for Mining and Related activities aimed at the*

Protection of Water Resources in *Government Notice* No.704 on 4th June 1999 and for support of its contention that prospecting activities did not require to be subjected to a WULA. These Regulations the Appellant argues, provide the parameters within which its prospecting activities could lawfully be conducted.

72. The Appellant confirms the authorised collection of a bulk sample (+-100,000 tons) in an area not exceeding 1.5 hectares by way of two vertical shafts measuring 2.4m x 1.8m x 45m. This, the Respondent argues is in line with industry norms and although "bulk sampling" may present as being an open cast mining activity, it is not. The evidence produced during the hearing supports the Appellant's contention that its activities were carried out in accordance with an approved Prospecting Right supported by a SEMP, presented to and approved of by the Respondent prior to the commencement of its activities in 2006.

73. The Appellant denies the allegation that its activities resulted in severe negative impacts of the water resource. This allegation it contends is a generalisation and is not supported by any specialised research conducted by or on behalf of the Respondent. In support hereof the Appellant refers to the letter addressed to the Respondent on 23rd November 2010 wherein the accusation that the natural watercourse was being polluted with aluminium is comprehensively dealt with. The analysis of the water samples obtained during April in 2008/2009 by M T Brett, those referred to in the report conducted by Ground Water Geology and Environmental Services and the samples taken by Labserve during July 2010 confirms this now. summarises the facts emanating from the Geohydrological Report included in the IWRMP.[31]

74. The proposed mitigation measures alleged by the Respondent to be inadequate are comprehensively dealt with in the IWRMP. The Appellant relies on the scientific evaluation of the impacts and their significance identified and dealt with in the IWRMP. It details the manner in which the mitigation of all the identified impacts will be achieved by following a Water Use Management Plan set out in the IWRMP. The proposed mitigation measures are underpinned by a monitoring system that provides for surface water, ground water and bio-monitoring.[32]

75. Having established the significance of possible impacts relating to ground water levels and quality, the alteration of drainage patterns, waste management facilities as well as

[31] Record pages 49 – 60 and 77 – 80; IWRMP Appendix E and B1.
[32] IWRMP pages 4 – 7 to 4 -22; 6 – 1 to 6 – 7; 7 – 1 to 7 – 4.

surface water levels and quality, all dealt with in the IWRMP, the Appellant submits that the mitigation measures are adequately provided for.

76. The Tribunal is referred to an "Assessment of Wetlands on the Farm Middelpunt previously explored" by Golder Associates Research Laboratory conducted in 2009 prior to and in support of the WULA. This assessment concludes with the following statement: -

> "In general the wetland ecosystems associated with the Richmond Exploration Areas can be considered as ecologically important and sensitive. Wetland 1 is still in a state of relatively high integrity (after exploration) while Wetland 2 is degraded due to the recent exploration activities. Wetland Ecosystem Services assessment show that some wetland functions are still intact in Wetland 2, suggesting that adequate rehabilitation measures such as ecologging, bioengineering, management of grazing in the area, etc could accelerate the recovery of this wetland.
>
> It is therefore recommended that the above mentioned rehabilitation methods should be implemented to ensure recovery of both wetlands."
>
> Any development that takes place in the area should endeavour to avoid impacting on wetlands. It is also important to note that the wetland catchments are to be considered when planning any development.[33]

77. The Appellant submits that the rehabilitation of Pit 1 confirms the Appellant's ability to successfully rehabilitate the prospecting area in accordance with the Rehabilitation Plan provided in the IWRMP and supported by the Wetlands Assessment conducted by Golder Associates Research Laboratory.

78. The Appellant contends that the specialists' reports supporting the IWRMP remain uncontested, provides ample proof that any alleged pollution can be successfully mitigated in accordance with the methods provided in the IWRMP and thus no valid reasons have been advanced for declining the WULA applied for and its Appeal must be upheld.

ORAL SUBMISSION BY THE RESPONDENT

79. The Respondent contends that the Appellant, for a period of two (2) years prior to the WULA unlawfully and without authorisation conducted water use activities associated with prospecting in a sensitive area surrounded by wetlands.

[33] IWRMP Appendix B2.

80. These activities it contends negatively impacted on the wetland and the effect of granting a WUL would only perpetuate the negative impact on this sensitive area. In view hereof, the issue to be decided, is whether the Appellant is entitled to a WUL considering all the factors contained in the WULA and subsequent evidence and documents.

81. The allegation that the prospecting activity and attendant water use would impact 234 metres along the length of a hill slope seepage wetland associated with the upper reaches of the Lakensvleispruit is repeated. This allegation ignores the uncontested evidence of Mr van der Merwe that this impact relating to the specific water use applied for in terms of Section 21(c) and (i) had already been reduced to only 19 metres following the successful rehabilitation of Pit 1.[34]

82. The Respondent's attempt to progress the argument that the Appellant during 2008 was mining and removing bulk samples from inside a Wetland (Heads of Argument Page 11 paragraph 30) failed to reveal that prospecting activities took place in a previously disturbed footprint prospected by Messrs De Beers (Pit 1) that was subsequently successfully rehabilitated and the prospecting activities were moved to another previously historically disturbed footprint outside of the Wetland.[35]

83. The Respondent's persistent view that the area has been classified as "irreplaceable" is contrary to the evidence of the Appellant that this classification is merely a statement contained in the province-wide Mpumalanga Conservation plan which is used as a guideline for development. As such that classification may not always reflect site-specific peculiarities for purposes of water use licensing.

84. The Respondent's reliance on the subsequent proclamation of the Greater Lakensvlei area in terms of the National Environmental Management: Protected Areas Act (Act No. 57 of 2003), as a "protected area", fails to record that all the sub-divisions of the farm Middelpunt referred to in the prospecting right are excluded therefrom.

85. The Respondent submitted that the Appellant conducted mining activities based on the opinion of Mr M T Brett, a mining Engineer who expressed this opinion during a meeting that preceded the WULA. He concluded that as the prospecting right allegedly

[34] Record Page 201.
[35] Record volume III Page 398.

did not authorise the collection of bulk samples it lent credence to his contention that the Appellant was "Mining". Mr Brett was not called in evidence and the allegation was denied based on the Prospecting Works Programme in which the prospecting activity including of "Bulk Sampling" is fully described and authorised.

86. Although the Respondent admits having commented on the Appellant's application for a prospecting right to the DMR on 31st August 2005, it persists with its submission that the Appellant's prospecting activities, having commenced without a water use authorisation, were unlawful. These activities it alleges severely impacted the wetlands and as the significance thereof was rated as being "Medium to High" no mitigation was possible other than to purposefully recharge the ground water, which could be very expensive. These reasons appear to be the major considerations leading to the refusal to grant the WUL.

87. The Respondent submits that the factors considered by the Responsible Authority correctly concluded that the mitigation measures proposed by the Appellant were inadequate.

88. The Respondent contends that the information currently before the Tribunal is out-dated and environmental changes in the biodiversity of the area that may have occurred as a result of the effluxion of time, must be re-assessed and therefore would require a new or supplemented WULA to be made.

89. For these reasons the Respondent submits that the Appeal should be refused and the Appellant should it so wish, formalise and file a new licence application.

SUPPLEMENTARY HEADS OF ARGUMENT

90. The Supplementary Heads of Argument filed by both parties in essence repeated the views and arguments advanced in the *viva voca* evidence and their oral submissions.

91. The Appellant for its part relied on the information it provided in the WULA and insisted that it conducted its prospecting activities lawfully in terms of the relevant Regulations and the prospecting right which the IWRMP deals adequately with identified impacts, their significance, the required management objectives and mitigation measures.

92. The Appellant argues that its Appeal should succeed and the Responsible Authority be ordered to issue a WUL subject to those reasonable and practical Resource Quality Objectives (RQO) parameters presented in the IWRMP in relation to ground water and surface water, alternatively to allow the Appellant to continue its prospecting activities within the parameters contained in the Regulations contained in Government Gazette 704 of 1999 subject to similar RQO'S.

93. The Respondent submits that although the DWS supports the concept of Co-operative Governance it does not support the permit granted to the Appellant by DMR. It points out that the prospecting right issued in terms of the MPRDA is subject to compliance with all other relevant legislation and as such the reliance of the Appellant for the lawfulness of its activities on the regulations, is misplaced.

94. The activities of the Appellant relate to several water uses contemplated in Section 21 of the NWA and can only be lawful if authorised in terms of a WUL. The instructions to the Appellant by Mr Nkuna on 6th November 2008 to cease any unlawful water use activities and apply for a WUL was allegedly done following an agreement reached by the parties and any alleged lack of delegated authority to do so is irrelevant.

95. The Respondent's submission in respect of the alleged inadequate mitigation measures concluded with the statement that, "We are unable to comment on the adequacy of the mitigation factors in the IWRMP as we have not received the documents as promised by the Appellant".

THE RESPONDENT'S BUNDLE

96. The Record of Recommendation (ROR) included in the Respondent's Bundle represents a summary of the information contained in the WULA and all its supporting documents. Randomly summarised, it purports to portray accurately the Case Officer's evaluation of the facts in support of his conclusions and recommendations.

97. The process provides for an oversight mechanism as it appears in the ROR and requires consideration and adjudication by the following senior officials prior to final approval: -
    - Director: Institutional Establishment Mpumalanga.
    - Regional Head Mpumalanga

These officials are required to indicate whether in their judgement the application should be supported or not. Thereafter the process provides for a recommendation to be made by the Chairperson of the Water Use Authorisation Assessment and Advisory Committee (WUAAAC) and subsequently a decision on the issuance of the Licence must be made by the Project Manager of Letsema. Only then, a letter under the hand of the Deputy Director is despatched to the Regional Head confirming the approval or declination of the water use licence.[36]

98. The process provides a robust, thorough and comprehensive interrogation of the application as a whole that once properly evaluated by the designated officials, will ensure that the decision of the Responsible Authority emanating from the process may prove to be lawful, reasonable and procedurally fair.

99. None of the officials authorised to do so, appended their signatures to the document that was prepared on 7th June 2010. The formal letter of refusal prepared on 23rd March 2011 and subsequently presented to the Appellant, was signed by the Project Manager: Letsema under the reference of the Case Officer Mr Nkuna.

100. This failure represents a serious procedural flaw and raises the question whether the ROR was properly placed before the Responsible Authority for purposes of evaluation, consideration and approval. In electing not to traverse this issue with Mr Nkuna in evidence, the absence of this administrative formality remains unexplained.

LEGISLATIVE FRAMEWORK

101. Section 33(1) and 33(2) of the Constitution of the Republic of South Africa 1996 provide that everyone has the right to administrative action that is lawful, reasonable and procedurally fair and that everyone whose rights have been adversely affected by administrative action has the right to be given reasons.

102. The Promotion of Administrative Justice Act 2 of 2000 (PAJA) gives effect to those rights and the provisions in Section 6 thereof for the judicial review of an administrative action by a Court or a Tribunal provides as follows: -

> "6(1) Any person may institute proceedings in a court or tribunal for the judicial review of an administrative action.

[36] Respondent's Bundle Pages 22 – 23.

6(2) A court or tribunal has the power to judicially review an administrative action if-

(a) The administrator who took it-
  (i) Was not authorised to do so by the empowering provision;
  (ii) Acted under a delegation of power which was not authorised by the empowering provision; or
  (iii) Was biased or reasonably suspected of bias/

(b) A mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) The action was procedurally unfair;

(d) The action was materially influenced by an error of law;

(e) The action was taken-
  (i) For a reason not authorised by the empowering provision;
  (ii) For an ulterior purpose or motive;
  (iii) Because irrelevant considerations were taken into account or relevant considerations were not considered;
  (iv) Because of the unauthorised or unwarranted dictates of another person or body;
  (v) In bad faith; or
  (vi) Arbitrarily or capriciously;

(f) The action itself-
  (i) Contravenes a law or is not authorised by the empowering provision; or
  (ii) Is not rationally connected to-
    (aa) the purpose for which it was taken;
    (bb) the purpose of the empowering provision;
    (cc) the information before the administrator; or
    (dd) the reasons given for it by the administrator;

(g) The action concerned consists of a failure to take a decision;

(h) The exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable persons could have so exercised the power or performed the function; or

(i) The action is otherwise unconstitutional or unlawful."

103. Section 7(2)(a) of PAJA stipulates that

"subject to paragraph (c) no Court or Tribunal shall review an administrative action in terms of the Act unless any internal remedy provided for in any other Law has first been exhausted."

104. The National Water Act 1995 (Act 36 of 1998) provides for such a remedy in the establishment of the Water Tribunal in terms of Chapter 15 Section 146 as an independent body to hear Appeals in terms of Section 148(1) (a- m).

105. The matter under consideration is brought in terms of Section 148(1)(f) reads as follows: -

> "against a decision of a Responsible Authority on an application for a licence under Section 41 or any other application in which Section 41 applies by the Applicant or by any other person who has timeously lodged a written objection against the application."

106. A water use activity is defined in section 21 of the NWA. Based on the information before us there is no doubt that the Appellants undertook water use activities prior to 2009 in the process of prospecting. However, entitlement to use water can only be grounded in section 4, 22, 34, 39 read with 40-41 of the NWA. The Appellants did not have any one of such authorisations. This is bearing in mind that the *Regulations on use of water for mining and related activities aimed at the protection of water resources* provides of a framework for the use of water for mining activities, without purporting to authorise the use of water without a WUL.

107. Applications for a Water use Licence are made in terms of Section 40 of the NWA while Section 41 of the NWA prescribes the procedure for licence applications. It reads as follows: -

> "41(1) An application for a Licence for Water Use must –
> (a) Be made in the form.
> (b) Contain the information.
> (c) Be accompanied by the prescribed fee by the Responsible Authority.
> 41(2) A responsible authority-
> (a) may, to the extent that it is reasonable to do so, require the applicant, at the applicant's expense, to obtain and provide it by a given date with-
> (i) other information, in addition to the information contained in the application;
> (ii) an assessment by competent persons of the likely effect of the proposed licence on the resource quality; and
> (iii) an independent review of the assessment furnished in terms of subparagraph (ii), by a person acceptable to the responsible authority;
> (b) 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;
> (c) may invite written comments from any organ of state which or person has an interest in the matter; and
> (d) must afford the applicant an opportunity to make representations on any aspect of the licence application."

108. Section 42 of the NWA provides that once the Responsible Authority has reached a

decision it must promptly: -

> "42(a) notify the applicant and any persons who has objected to the application and
> 42(b) at the request of any person contemplated in paragraph (a) give written reasons for its decision."

109. Item 5(3) of Part 2 of Schedule 6 of the NWA provides for the delivery to the Tribunal within reasonable time all documents relating to the matter, the reasons for its decision and allow the Appellant/Applicant and every party opposing the Appeal or application and opportunity to make copies of the documents and reasons while Items 6(3) of Part 2 confirms the nature of Appeals and applications before the Tribunal as a rehearing.

110. The remedies this Tribunal may grant are provided for in Section 8 of PAJA providing for the following: -

> 8(1) The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders-
> (a) directing the administrator-
> (i) to give reasons; or
> (ii) to act in the manner the court or tribunal requires;
> (b) prohibiting the administrator from acting in a particular manner;
> (c) setting aside the administrative action and-
> (i) remitting the matter for reconsideration by the administrator, with or without directions; or
> (ii) in exceptional cases-
> (aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or
> (bb) directing the administrator or any other party to the proceedings to pay compensation;
> (d) declaring the rights of the parties in respect of any matter to which the administrative action relates;
> (e) granting a temporary interdict or other relief; or
> (f) as to costs.

111. Of course section 8 of the PAJA must be read with *Item 6 (3) of the 6th Schedule* to the NWA and *Rule 7* of the Water Tribunal Rules which both provide that the Tribunal exercises jurisdiction *de novo* and is at liberty to substitute its own decision for that of the Responsible Authority. The power to substitute its decision by the Tribunal assumes availability of current evidence and information on the basis of which section 2 and 27 of the NWA can properly be applied. Unfortunately, that is not the case in this appeal. The bureaucratic bungling by the Respondent led to delays that have inevitably made available information out-dated.

CONCLUSION

112. In the matter at hand no new facts on the merits of the application were submitted by either of the parties. The Appellant relied on the documentation and evidence as it appears in the WULA attested to by the witness Mr van der Merwe. No expert evidence in confirmation of the various specialist report that form part of the WULA was presented.

113. For its part the Respondent's Counsel in cross examination, merely took issue with the facts presented in the WULA, without the support of any evidence, expert or otherwise that could justify the decision of the Responsible Authority and the reasons advanced in reaching it.

114. It is an accepted principle that the Water Tribunal as an independent body has wide procedural and decisional powers as we noted above (para 111). The Tribunal is not confined to the consideration of the merits of the matter only, but is entitled to interrogate the nature of the administrative action to ensure that it is conducted in a manner that gives effect to the right to administrative action that is lawful, reasonable and procedurally fair.

115. To establish whether the Appellant is justified to have the administrative action taken by the Responsible Authority judicially reviewed, regard must be had to the manner in which the Responsible Authority in the present case adhered or failed to adhere to the principles set out in Section 6(2)(a) (I) to (iii) (b) – (i) of PAJA and in this respect I raise the following: -

115.1. Section 53(1) of the NWA provides authority for the rectification of contravention and for convenience the relevant Sections are repeated hereunder: -

> 53(1) A responsible authority may, by notice in writing to a person who contravenes-
>
> *(a)* Any provision of this Chapter;
>
> *(b)* A requirement set or directive given by the responsible authority under this Chapter; or
>
> *(c)* A condition which applies to any authority to use water.
>
> Direct that person, or the owner of the property in relation to which the contravention occurs, to take any action specified in

the notice to rectify the contravention, within the time (being not less than two working days) specified in the notice or any other longer time allowed by the responsible authority.

(2) If the action is not taken within the time specified in the notice, or any longer time allowed, the responsible authority may-

(a) carry out any works and take any other action necessary to rectify the contravention and recover its reasonable costs from the person on which the notice was served; or

(b) apply to a competent court for appropriate relief."[37]

This is a delegation of powers to the Responsible Authority and the administrative action taken by Mr Nkuna instructing the Appellant to cease its alleged unlawful water use, could not have been lawfully exercised by him neither could it be legitimised by agreement with the Appellant as alleged.

115.2. The Respondent did not attempt to explain its failure to comply with its statutory obligation to promptly furnish the reasons for its decision in terms of Section 42(b) of the NWA, neither did it comply with the provision of Item 5(3) Part 2 of Schedule 6 of the NWA. This is a deplorable abdication of its responsibilities by the Respondent leading to a serious administrative injustice contrary to both the PAJA and the objects of the NWA outlined in section 2. Up until the hearing of this appeal on 8 September 2017, the Respondent had not provided reasons for its decisions despite undertaking to do so in March 2012. Needlessly, the hearing had to be postponed to 20 September 2017 to enable the Tribunal and the Appellants to traverse voluminous documents brought to the hearing by the Respondents. This lackadaisical approach by the Respondent to its statutory duties does not augur well for the efficient management of the nation's water resources envisioned in section 2 of the NWA.

115.3. Section 41 of the NWA is an empowering section that cloaks the Responsible Authority with wide-ranging powers to investigate all the circumstances of the application prior to reaching a decision and although the relevant sections are discretionary, there is a necessary implication that an investigation

[37] This should be read with section 19 of the NWA, which imposes a legal duty on a landowner or occupier to take reasonable measures to remedy water pollution.

considerable scope is needed before a decision relating to an entitlement is taken.

115.4. By invoking the provision of Section 41 the Responsible Authority would have been placed in a position to make an informed decision rather than accepting that: -

115.4.1 The activities of the Appellant were that of mining as opposed to prospecting and was the direct cause of the alleged pollution of the water resource without taking into consideration historic and current environmental disturbances and activities that may have and still contribute to it.

115.4.2 The application was “fatally flawed” based on the opinion of undisclosed internal specialists having concluded that the activities of the Appellant were conducted “on top of a wetland” and any enquiry in terms of Section 41 of the NWA would have merely extended the process.

115.4.3 The concerns and objections raised by Interested and Affected Parties created as yet undisclosed legal constraints that would prohibit the granting of a WUL.

115.4.4 The relevant factors set out in Section 27(1)(a) to (k) of the NWA should be considered on the basis that the activity conducted by the Appellant was that of ‘mining’ as opposed to ‘prospecting.’ Contrary to this, there was no evidence that beyond the four reasons provided, the Respondent exhaustively applied its mind to section 27 (1) of the NWA. Rather, it was preoccupied with its perception that the Appellants had used water illegally and contaminated a sensitive wetland through a mining process masquerading as prospecting.

116. Departmental guidelines applicable at the time provides for the preparation of a Record of Recommendation (ROR) that includes an oversight mechanism to ensure the legitimacy of the process and the decision. The absence of approval by the relevant officials or an acceptable explanation that would justify it, renders the decision taken by the Responsible Authority unlawful.

117. For the reasons advanced above the decision of the Responsible Authority set out in the letter of 6th March 2011 declining the WUL, is entirely set aside.

THE RELIEF SOUGHT

118. The Appellant in its amplified grounds for Appeal filed in terms of Rule 3(2) on 5th September 2017 seeks an order for the Appeal to be upheld while the Supplementary Heads of Argument defines the relief it seeks as follows: -

118.1. The Responsible Authority be directed to issue a Water Use Licence as envisaged in the WULA subject to reasonable and practical Resource Quality Objectives (RQO's) detailed in the IWRMP without any further unpractical and unreasonable restrictions valid until a prospecting closure certificate is obtained.

118.2. Failing the issuance of a WUL as envisaged the Responsible Authority be instructed to abandon its insistence on the requirement of a WULA and allow the Appellant to continue its prospecting activities in terms of the Regulations provided for in Government Notice 704 of 1999 subject to the same conditions applicable to the WUL described above.

119. The Respondent required the Appeal to be dismissed.

DECISION

120. Given the information at hand the Tribunal is required to decide whether or not it is in a position to issue a WUL or to instruct the Responsible Authority to issue it alternatively to refer the matter back to the decision maker for the WULA to be reconsidered with full current information and a decision made thereafter.

121. Presently, the provisions of Section 8(1)(c) of PAJA and Rule 7 of the Tribunal Rules, limit the remedies available to the Tribunal to an order remitting the matter for reconsideration to the Responsible Authority with or without directions, or in exceptional cases, substituting or varying the administrative action to correct a defect emanating therefrom.

122. Substituting the decision of the Responsible Authority in the present circumstances

requires consideration whether the Tribunal has been placed in a position to grant a WUL particularly having regard to the constraint provided in Section 8(1)(c) (ii) (aa) of the PAJA and what we stated in para 111 above.

123. The Constitutional Court in the matter of *Trencor Construction v Industrial Development Corporation of South Africa* 2015 (5) S.A. 245(CC) considered the exceptional circumstances that would justify a substitution and found that these are: -

- Whether the Court would be in a good position as a decision maker to make the decision;
- Whether the decision was a foregone conclusion;
- The delay; and
- Bias or incompetence on behalf of the decision maker.

124. In a recent decision of this Tribunal, in the Appeal of *Oosgrens Landgoed (Pty) Ltd v the Director General of Water and Sanitation* Case No. WT05/10/2010, the following comments of relevance to the decision in this matter was ventilated. I quote therefrom the following paragraphs:

> "[60] A view that treats the Water Tribunal strictly like an internal appeal structure potentially creates legal confusion and disarms the Tribunal of its authority to deal with appeals as an independent tribunal. Although it can subpoena any witnesses, the Water Tribunal does not necessarily have access to resources to make polycentric decisions that responsible authorities have at their disposal. The pool of national and regional experts that submit expert reports and prepare recommendations for the Minister or delegated responsible authority are not at the command of the Water Tribunal. It can therefore be seen that the Water Tribunal is different from the authorities at issue in most of the cases where the courts have ruled that the tribunals had wide appeal powers to conduct fresh hearings and consider matters afresh with new evidence to come to an original decision.
>
> If the Water Tribunal conducts a hearing de novo, it still cannot properly make a fresh determination on a water use licence especially the precise terms and conditions at the same level as a responsible authority seized daily with making such decisions.
>
> [61] Indeed, section 146(4) of the NWA provides that "Members of the Tribunal must have knowledge in law, engineering, water resource management or related fields of knowledge." Nevertheless, these special skills cannot substitute for the knowledge and day-to-day experience of bureaucratic decision makers who are the responsible authorities.
>
> Therefore in any one matter before the Tribunal it could be that the matter must be referred back to the responsible authority for reconsideration. In some matters, depending on the nature of the issues, the Tribunal may be

able to hear the matter afresh and come to a new decision that replaces the decision of the responsible authority."

125. The absence of any *viva voce* or updated evidence on the merits of the application, particularly those issues referred to by specialists in the IWRMP leaves the Tribunal with information that was gathered nearly a decade ago and denies the Tribunal the ability to consider the matter afresh and come to an original decision consonant with section 2 and 27 of the NWA.

126. None of the powers afforded by Section 41 of the NWA were invoked and therefore the depth of investigation envisaged by the NWA was not undertaken leaving unanswered a host of issues that, if properly dealt with, may have placed the Tribunal in a good position as the decision maker to substitute the decision by granting a WUL.

127. The process leading to the issuance of a WUL is arduous, complicated and exact, more so when having to exercise a discretion regarding the impact of prospecting activities on a water resource in what is admittedly a sensitive environmental area. A decision of this nature can therefore never be considered as being a foregone conclusion.

128. Having considered the authorities and bearing in mind the complexities and particularities of a WUL in the present circumstances, the Tribunal is not in a position to substitute the decision of the Responsible Authority by issuing a WUL.

129. Given the effluxion of time and the total lack of contemporaneous evidence, the Tribunal cannot accept that the environmental circumstances of the area remained constant and the conclusions and recommendations recorded in the specialists reports at the time, are still valid. For this reason, the Responsible Authority is also at a disadvantage to reconsider the WULA in its present form to enable properly defined parameters within which a WUL could be issued.

ORDER

130. In the circumstances the Tribunal decides as follows: -

130.1. The WULA is to be remitted to the Responsible Authority to assess the application under the following directions: -

(a) To follow the procedures laid down in the departmental guidelines for Water Use Authorisations (2007) applicable at the time in particular the procedural guidelines as it relates to the mining sector.

(b) To review existing information contained in the WULA and such additional information as may reasonably be necessary to satisfy the requirement of the guidelines and the provisions of the NWA.

(c) The relevant factors referred to in Section 27(1)(a) to (k) must be considered given the exploratory nature of the activity that is limited in scope and duration in terms of the prospecting right.

(d) To finalise and communicate its decision within 120 days from the date hereof or such extended period as what the Responsible Authority and the Appellant may agree upon.

HANDED DOWN AT PRETORIA ON THE 26th DAY OF SEPTEMBER 2018.

F. ZONDAGH
Additional Member (Panel Chair)

I agree, and it is so ordered:

T. MUROMBO
Additional Member