IN THE WATER TRIBUNAL

HELD AT PRETORIA

CASE NO: WT 16/07/2015

In the appeal between:

NET TWEE BOERDERY CC	**APPELLANT**
and	
DEPARTMENT OF WATER AND SANITATION	**RESPONDENT**

DATE HEARD: **11 April 2017**

APPEARANCES:

Coram:	Ms. L. Mbanjwa	– Deputy Chairperson (Chairing)
	Mr. P. Jonas	– Additional Member
	Prof. T. Murombo	– Additional Member

For the Appellants: Adv. T Reinders
instructed by Mr W Spangenberg

For Respondent: Adv. M Lebeloane
instructed by the State Attorney, Pretoria
With Mr. V Blair and C Schrade, Department of Water and Sanitation.

MINORITY JUDGMENT

---

1. This appeal comes to the Water Tribunal in terms of Section 148 (1)(e) of the National Water Act, Act no.36 of 1998 (the National Water Act). As such it is an appeal against a decision of a responsible authority on verification of a water use under section 35 by a person affected thereby.

2. The facts are in the main common cause: The Appellant, Net Twee Boerdery had a lawful water use entitlement derived from the Old Water Act, Act no.54 of 1956(the 1956 Water Act), the immediate predecessor to the National Water Act. That entitlement gave the Appellant the right to irrigate 25.3 hectares of land using a maximum allocated volume of 192 786 cubic metres of water. However during the critical two year period (*the relevance of the two year period will become evident later*) immediately before the commencement of the National Water Act Appellant was only irrigating 10 hectares of land, using 76 200 cubic meters of water per year: -

2.1. Respondent, acting in terms of section 35(4) of the National Water Act issued a determination that reduced Appellant's water use entitlement to 76 200 cubic meters per year, irrigating 10 hectares of land. Appellant is appealing against that determination, and wants its old water use entitlement of 192 786 cubic meters for irrigation of 25.3 hectares restored.

3. Part 3 of the National Water Act is titled '***Existing lawful water uses, (ss 32 - 35)' and*** has the following explanatory preamble: -

‘This part permits the continuation, under certain conditions of an existing water use derived from a law repealed by this Act. An existing lawful water use, with any conditions attached, is recognized, but may continue *only to the extent that it is not limited, prohibited or terminated by this Act*. No licence is required to continue with an existing lawful water use until a responsible authority requires a person claiming such an entitlement to apply for a licence. If a licence is issued, it becomes the source of authority for the water use. If a licence is not granted the use is no longer permissible.’ *(own emphasis)*

3.1 Applying the preamble to the Applicant, its water use entitlement derived from the 1956 Water Act is recognized. Recognition is however not equivalent to confirmation of its water use entitlement, because the preamble also provides expressly for limitation, prohibition or termination of recognised lawful water use under the National Water Act.

3.2 Therefore the National Water Act permits limitation, and or total deprivation of existing water use rights and or entitlements. This observation is reinforced by the following extract from the preamble to the National Water Act.

‘Acknowledging the National Government’s overall responsibility for and authority over the nation’s water resources and their use, including the *equitable allocation of water for beneficial use, the*

redistribution of water, and international water matters.' *(own emphasis)*

3.2.1 Indeed, Appellant has not challenged any of the provisions of the National Water Act insofar as same may be seen as depriving it of its water use entitlement. There is therefore no need to address the constitutionality or otherwise of section 35(4) of the National Water Act.

3.2.2 What Appellant has done in oral argument and in both his main and supplementary heads of argument is to challenge the Respondent's right to invoke section 35 (4) of the National Water Act. Before addressing the challenge mounted by the Appellant it is best to first analyse the provisions of the sections of the National Water Act that provide the context for section 35(4) so as to understand why the Respondent invoked the provisions of section 35(4) in the case of the Appellant. I must state from the onset that I agree with the Respondent.

3.2.3 Firstly, this section is contained in Part 3 of the National Water Act. Part 3 has sections 32, 33, 34 and 35. According to the head note, Part 3 it is aimed at "***permitting the continuation under certain conditions of an existing water use from a law repealed by this Act."*** Now for the component section of Part 3.

3.2.4 Section 32 provides as follows:-

'32(1) An existing lawful water use means a water use:-

(a) which has taken place at any time during a period of two years immediately before the date of commencement of this Act and which:-

(b) was authorized by or under any law which was in force immediately before the date of commencement of this Act.'

The rest of the subsections are not relevant for the purpose of this appeal.

3.2.5 The two subsections give the definition of existing lawful water use only if they are read together, absent one of them then there is no existing lawful Water use.

Appellant's argument in its heads was as follows:-

'The property was allocated a water use rights of 25, 3 hectares (ha) at a quote of 7 6203/ha/annum (192786 cubic meters/annum) under the Old Water Act (Act 54 of 1956). *The lawful water use was therefore 25.3 ha.'* *(*own emphasis*)*

3.2.6. The above statement was of course correct, Appellant's water use entitlement under the 1956 Water Act is common cause. The statement however does not assist the Appellant because it does not take into account section 32 (1)(a) which provides that the water use must have taken place at any time before the commencement of the National Water Act. It was conceded on behalf of the Appellant that as from the time Appellant's then two members acquired ownership rights over it in 1994 till the time of the Appeal, Appellant never irrigated the full 25.3 ha or used the total allocation of 192 786 cubic metres.

Granted the National Water Act came into effect on the 01st October 1999 Appellant therefore never had existing lawful water use as defined in section 32 (1)(a) read with section 32 (1)(a)(i) of the National Water Act.

3.2.7 Due to the concession made by Appellant's counsel concerning non-existence of lawful water use, it is not necessary to enquire if the verification of existing water use done by the Respondent was correct or not.

4. Appellant's counsel, having failed to appreciate the importance of the definition of existing lawful water use mounted his challenge to Respondent's use of section 35(4) by arguing that that the Appellant's water use entitlement derived from the 1956 Water Act was fully operative under the National Water Act and could be verified in terms of section 35(4) only if Appellant was exercising it in an unlawful manner. To address this misconception I now turn to the provisions of section 35.

4.1. Section 35 is titled '***Verification of existing water uses'*** and provides as follows:-

> '(1) The responsible authority may, in order to verify the lawfulness or extent of an existing water use, by written notice require any person claiming an entitlement to that water use to apply for a verification of that use.
>
> (2) A notice under subsection (1) must:-
>
> (a) have a suitable application form annexed to it,

(b) specify a date before which the application must be submitted.

(c) Inform the person concerned that any entitlement to continue with the water use may lapse if an application is not made on or before the specified date, and

(d) be delivered personally or sent by registered mail to the person concerned.

(3) A responsible authority:-

(a) May require the Applicant, at the Applicant's expense to obtain and provide it with other information, in addition to the information contained in the application.

(b) May conduct its own investigation into the veracity and the lawfulness of the water use in question,

(c) May invite written comments from any person who has an interest in the matter.

(d) ***must*** afford the Applicant an opportunity to make representation on any aspect of the application." *(own emphasis)*

(4) A responsible authority may determine ***the extent*** and lawfulness of a water use pursuant to an application under this section, and such

determination limits *the extent* of any existing lawful water use contemplated in section 32(1).' *(own emphasis)*

For purposes of this appeal it is not necessary to reproduce the rest of the subsections.

4.4 Counsel for the Appellant contended as follows in his Heads of Argument:

'The gist of the argument may be summarized as follows:-

During 2013 an investigation was done in terms of section 35(4) of the said Act. The purpose of that section is to verify the water use which are(sic) exercised by users who claim that they have the right to do so, but whose right to do so is in doubt it being illegal and excessive or against authorization.'

4.5 Unfortunately his contention is based on an incorrect understanding of not only section 35 (4), but also the other related sections forming part of Part 3 of the National Water Act referred to earlier.

4.6 Firstly, an investigation by the responsible authority verifying the lawfulness or extent of an existing water use is not done in terms of section 35(4) but is done in terms of section 35(3)(b), refer to the latter provision cited in full above.

4.7 Secondly, section 35(1) of which section 35(4) is a follow up section is couched in very wide terms. The request for verification may be directed to 'any person claiming entitlement to (that) water use.'

4.8 Further, the wording of section 35(4) is clear and unambiguous, consequently there is no basis for departing from the accepted canon of interpretation, namely that in interpreting the provisions of a statute the ordinary meaning of the words used in the provision must be followed. In the circumstances, I understand Section 35 (4) to be available for use by the Respondent in determining the extent and lawfulness of a water use by <u>any</u> person claiming an entitlement to use water, including the Appellant in these proceedings.

4.9 Furthermore, If one keeps in mind that the National Water Act acknowledges in its preamble the National Government's overall responsibility to *inter alia* allocate water equitably, and if need to be (my own insertion) <u>*redistribute it*</u> (own emphasis) the additional purpose of section 35(4) that is linked to the overall purpose of the National Water Act becomes clear. That purpose is to redistribute equitably the use of water within the regulated parameters of the National Water Act.

4.10 It seems that Counsel for the Appellant never adverted to this redistributive function of the National Water Act, hence his submissions are simply incorrect.

5. What however also needs to be addressed is reliance of Appellant's counsel for his submission as to the purpose of section 35(4) on Hubert Thompson, Water Law, *A Practical Approach to Resource Management and the Provision of Services*, and (Juta, 2006). Appellant's Counsel relies specifically on page 414 where there is a paragraph titled ***"Verification of existing water uses."***. Section

35 of the National Water Act has exactly the same heading. That heading is however expanded on in subsection 35(1) which provides as follows:-

> 'The responsible authority may in order to verify the lawfulness or ***extent*** of an existing water use, by written notice require any person claiming entitlement to that water use to apply for a verification of that use.' *(own emphasis)*

5.1. From the above, it is clear is that when the section is invoked the aim is to verify two things concerning exercise of water entitlements namely:-

(i) the lawfulness thereof; and

(ii) the extent of water use. The use of the word or is disjunctive and introduces an alternative see Reader's Digest Oxford, Complete Word Finder, page 1067. This means that even if water use is lawful the responsible authority may still invoke section 35 in order to verify the extent of that lawful use. Thompson in his book at page 414 limits section 35 to only those instances that are tainted with some illegality, be it lack of authority, contravention of the conditions of water use or excessive use.

5.2. What Thompson does not take into account is the fact that for lawful water use to be given recognition as an entitlement in the National Water Act it must also fulfil the definition of existing lawful water use as set out in section 32 of the National Water Act. That definition includes water use which has taken place at any time during a period of two years immediately before the date of commencement of the National Water Act. Although the term water use is not defined in the National

Water Act, entitlement to water use is always given in measurement, i.e. extent. Consequently by verifying the extent of water use the responsible authority facilitates the task of the National Government set out in the preamble to the National Water Act, namely ensuring equitable allocation and redistribution of water where necessary. Indeed section 35(4) speaks directly to this redistribution function when it provides that a responsible authority may determine the extent and lawfulness of a water use, and such determination limits the extent of any existing lawful water use.

5.3. If the interpretation of Thompson as regards the purpose of the verification provisions of the National Water Act were to be accepted, and verification limited as he says, to unlawful and or excessive water use, the reforming nature of the National Water Act would be hampered and its redistribution aim thwarted . This incidentally is clearly illustrated by the Appellant's case because:

5.3.1. It is common cause that Appellant, under the 1956 Water Act had a water use entitlement of 25.8 hectares with a volume of 192 786 cubic meters per annum. It is also common cause that Appellant never used the full volume of the water allocated to it from the time it fell into the hands of its two quarrelling members in 1994 till the time of the Appeal, what Appellant was using was 76 200 cubic meters per annum to irrigate 10 hectares.

5.3.2. In the circumstances the Respondent correctly invoked section 35(4) of the National Water Act in reducing the extent of water use Appellant had under the

1956 Water Act because that volume was not being used, to the actual volume used.

6. Another aspect of the Appellant's argument that needs to be addressed is contained in the heads of argument whereat its Counsel queries how determination of water usage during September 1997 to October 1999 can assist the Respondent in establishing what the position should be in 2013 when the decision/determination was made.

6.1. The simple answer to his query is that water use entitlements derived from the 1956 Water Act had to have been actually and or physically exercised in the two year period immediately preceding the commencement of the National Water (i.e. they had to be exercised between September 1997 and October 1999 in order for them to be valid under the National Water Act), refer to definition of existing lawful water use in section (32)(1).

7. Appellant has therefore failed to make out a case insofar as it claims that its lawful water use in terms of the 1956 Water Act ought not to have been interfered with. However the matter does not end there.

8. Now for the Respondent:-

8.1 It is trite law that the Respondent in making the adverse determination on the water use entitlement of the Appellant was performing an administrative function, therefore the Promotion of Administrative Justice Act, Act No 3 of 2000 (PAJA) applied, see definition of Administrative Action, section 1 PAJA.

8.2 The determination affected the Appellant adversely in that his lawful water use entitlement in terms of the 1956 Water Act was reduced

8.3 However, it needs to be kept in mind that it was conceded on behalf of the Appellant that from 1994 until the time of this appeal, Appellant never utilized its full allocation of 25.3 ha/ 192 786 cubic meters per annum, but was only irrigating 10 ha with 7 620 cubic meters of water.

8.3.1 Therefore Appellant's water use entitlement was not existing lawful water use protected in terms of section 32, National Water Act.

8.3.2 As such, what Appellant had was a legitimate expectation that it would be afforded an opportunity to make representations to the Respondent. The representations would be aimed at persuading the Respondent to recognise its water use entitlement in terms of the 1956 Water Act as existing lawful water use protected in terms of the National Water Act.

9. PAJA protects legitimate expectations by providing that administrative action which materially and adversely affects the rights and legitimate expectations of any person must be procedurally fair. The requirements of that procedural fairness are set out in section 3 (2). Reproduced hereunder are two of those requirements which apply directly in the specific circumstances of this matter:-

2(a) A fair administrative procedure depends on the circumstances of each case.

2(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection 4, must give a person referred to in subsection……(ii)a reasonable opportunity to make representations.

9.1. PAJA apart, section 35(3) of the National Water Act also provides for procedural fairness in that section 35(3)(d) states that a responsible authority must afford the Applicant an opportunity to make representations on any aspects of the application.

9.2. During oral argument counsel for the Respondent was asked specifically if the Appellant was afforded the opportunity make representations as provided for in section 35(3)(d). Her response was that the letters written by the Respondent to the Appellant afforded it the opportunity to make representations. I therefore now turn to the letters as it appeared in the record. The chronology of the letters is contained in a letter sent by the Respondent to the Registrar of the Water Tribunal, page 7, 8 and 9 of the Appeal record.

9.3. The first letter was sent on the 05th February 2013 and is dated 30 January 2013. It requested the Appellant to apply for verification of its water use entitlement in order to confirm the extent and lawfulness thereof. Included in the letter was a table showing the lawful use under the 1956 Water Act and possible existing lawful use which at the end of the day became the determined existing lawful water use. The two last

paragraphs of the letter have a bearing on whether Appellant was afforded an opportunity to make representations.

9.3.1. Commencing from the penultimate paragraph it reads as follows:-

‘’*Upon receipt of your application, the responsible authority may require further investigation in terms of section 35(3) of the Act. You will be informed of this if required.*

You may then make further representations before the responsible authority finally decides on your application in terms of section 35(3) of the Act. A final determination is applicable in terms of the Act’’.

9.4 Appellant’s member responded, albeit late. The handwritten portion of his response pertinent here appears on page 23 of the record. Under the heading ‘Existing Water Rights or Entitlement’ he wrote, *see attached certificate*. He apparently attached the certificate issued in terms of the 1956 Water Act which gave Appellant 25.3ha at a volume of 192 786 cubic meters per annum. Under another block titled ‘remarks/ comments’ he wrote *see letter attached*, said letter is not identifiable from the record. On the same block he further wrote as follows:

I am uncertain what the implication is with the volume (cubic meters/year) indicated as 192 786 at to lawfull (sic) water use of 76 200. I would appreciate an explanation.

Appellant’s application containing the response outlined above was sent on the 08th May 2013. Although it was sent late, Respondent had not yet made the determination. Consequently nothing turns on the lateness.

9.5 Respondent did not reply to the Appellant's application with the notes described above, meaning that the sought for explanation by the Appellant was not given by the Respondent.

9.6 Instead, on the 19th June 2013, the Respondent sent a second letter with the following heading in block letters.

''**APPLICATION FOR VERIFICATION OF EXISTING LAWFUL WATER USE IN TERMS OF THE NATIONAL WATER ACT, 1998 (ACT 36 OF 1998). REQUEST FOR ADDITIONAL INFORMATION IN TERMS OF SECTION 35(3) (a) AND SECTION 35(3)(d)''.**

9.6.1 The heading was of course incorrect because section 35 (3)(d) is not for furnishing additional information, but is the section that obliges the Responsible Authority to afford the Appellant an opportunity to make representations.

9.6.2 The letter went on and stated as follows:-

> *'In terms of section 35(3)(a) and 35(3)(d) of the Act, you are hereby required to obtain and provide other information in addition to what is contained in your application for verification of existing water use... You are also afforded the opportunity to make representations on any aspect of the application.* Then followed the property description after which the letter continued as follows*:-*
>
> '*The following items are examples of the information required, this list is for illustrative purposes only:-*
>
> *(a) any permit, water court decision, servitude, agreement or other legal proof allowing you to store water.*

(b) *any determination in terms of section 33 of the National Water Act, 1998 declaring your water use as existing lawful water use.*

(c) *Evidence or proof of why you should be allowed to irrigate a large (sic) area than the allowable (sic) volume on the property.*

(d) *proof of abstraction or storage of water during the qualifying period as indicated in section 32 of the National Water Act.*

9.6.3 *Please furnish this office with the requested information before or on 01st July 2013. If the time given to meet this requirement is insufficient a written application for the extension of time is required.'* So the letter ended.

9.6.4 It is common cause that Appellant never responded to this second letter and no explanation was given for the failure to respond, both in oral agreement and in the heads of argument.

9.6.5 On the 13th September 2013, Respondent made the determination reducing the water entitlement in terms of the 1956 Act to the volume verified to be existing water use in terms of section 32, National Water Act.

9.6.6 According to the Respondent before making the determination Appellant was afforded an opportunity to make representations concerning the application in terms of section 35(3)(d).

9.6.7 The question then is:- given the wording of the letters reproduced above, can it be accepted as a fact that Appellant was afforded an opportunity to make representations.

9.6.8 The first letter from the Respondent in the two last paragraphs advised the Appellant that after receipt of his application the Respondent may request further investigation in terms of section 35(3). It also further advised that after the further investigations he might then make representations. Things however did not unfold as set out in the first letter. Instead what happened is the following:-

9.6.8.1 The Respondent did not request or do further investigation but requested further information from the Appellant. A reading of the second letter which contained that request shows that the requested information was the same information already furnished by the Appellant in response to the first letter.

9.6.8.2 Further, Appellant was not called upon to make representations after the second letter before the Respondent made the determination. Further also, Appellant's request for explanation of the different volumes mentioned in the letter calling on it to apply for verification went unanswered by the Respondent.

9.6.8.3 Looking at the promised sequence of events and the contents of the two letters from the Respondent to the Appellant I could not find any evidence that the Respondent afforded the Applicant an opportunity to make representations. Further, I need to draw attention to the wording and structure of the

provision of section 35 (3). This Section has four subsections, three of them 35(3)(a), 35(3)(b) and 35(3)(c) commence with ‘’may’’ and refer to the various possible steps a responsible authority may take in verifying entitlement to water use. Subsection 35(3)(d), however commences with must. That in my view strongly indicates that the Respondent ought to have afforded the Appellant a clear unambiguous opportunity to make representation.

9.6.8.4 In point of fact in the covering letter attached to the application for water use verification Appellant wrote as follows to the Respondent:- ‘*I am a little bit in the dark because I received from your office a registration certificate for which I submitted a receipt note. I would appreciate your response on this matter to understand what I need to do to validate the water use yearly*.’ Respondent did not come forward with the requested response.

9.7 The preamble to PAJA states that Act’s purpose as follows:- ‘To give effect to the right to administrative action that is lawful, reasonable and procedurally fair.’

9.8 One would expect a reasonable and fair administrator to respond to the letter and afford the Appellant an opportunity to make proper representation since he confessed that he did not know what to do.

9.9 My conclusion that the Respondent never afforded the Appellant an opportunity to make representation is buttressed by the fact that during appeal it came to light that Appellant has a business plan for crop rotation that would utilize the full water allocation under the 1956 Water Act. That business plan formed part of the appeal record.

9.10 Procedurally the business plan provided a dilemma for us members of the Water Tribunal hearing the appeal because, from the evidence led it became clear that it was never forwarded to the Respondent before the adverse determination was made. Respondent's counsel in her argument ignored it altogether although it was raised and relied on in Appellant's heads of argument. Further Respondent's counsel confirmed that it was coming before the Respondent for the very first time during the appeal. Respondent's counsel did not however object to it being part of the appeal record, and Appellant's counsel did not apply for it to be admitted as further evidence. That aforesaid may be anomalies in a normal court appeal where the rules are strict and formal.

9.11 However, the Water Tribunal does not have the formality and strictness of court proceedings, it is therefore impossible to jettison the Appellant's business report. Further, appeals and applications to the Tribunal take the

form of a rehearing: Rule 7.1 Water Tribunal Rules published in *Government Notice* No.28060, 23 September 2005.

9.12 In the circumstances the Water Tribunal had to take into account the business report.

9.13 Although the Water Tribunal in handling an appeal from a decision of the Respondent is not sitting as a reviewing tribunal there are significant similarities between the Tribunal hearing an appeal from the decision of a responsible authority and a reviewing court. Those similarities are the following:-

9.13.1 (i) Like the courts:- The Water Tribunal is external to the Respondent, its members being appointees of the Minister of Water Affairs on the recommendation of the Judicial Service Commission as contemplated in section 178 of the Constitution, and the Water Research Commission established by section 2 of the Water Research Act, 1971 (Act 34 by of 1971 in accordance with item 3, schedule 6).

9.13.2 (ii) Being external to the Respondent means that the Water Tribunal similar to a reviewing court does not have first-hand knowledge of the appealed matter possessed by a direct functionary like the Respondent, nor the expertise, and investigative machinery that is vital in making the determination..

9.13.3 (iii) Furthermore, in the given circumstances of this matter where the Appellant is requesting that a lawful water use entitlement under the 1956 Water Act which does not qualify as existing water use entitlement in terms of section 32 National Water Act be reinstated the Tribunal would essentially be dealing with a situation provided for in section 33 of the National Water Act.

10 Section 33 is titled ‘**’Declaration of Water Use as existing water use’’**, and has the following provisions:-

> ‘A person may apply to a responsible authority to have water use which is not one contemplated in section 32(i)(a) to be an existing lawful water use.
>
> A responsible authority may on its own initiative, declare a water use which is not one contemplated in section 32 (1)(a) to be an existing lawful water use.
>
> A responsible authority may only make a declaration under subsection (1) and (2) if it is satisfied that the water use:-
>
> took place lawfully more than two years before the date of commencement of the Act and was discontinued for good reason; or
>
> 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 this Act.’

11 *Section 41 applies to an application in terms of this section as if the application has been made in terms of that section.* Section 41 envisages among others the following steps which must be taken before a decision is made:-

11.1 An assessment by a competent person of the likely effects of the proposed license on the resource quality, section 41 (2) (ii).

11.2 An independent review of the furnished report in terms of subparagraph (ii), by a person acceptable to the responsible authority: section 41 (2)(iii).

11.3 Further, the responsible authority:- may conduct its own investigation on the likely effect of the proposed license on the protection, use and development, conservation, management and control of the water resource: section 41(2)(b).

11.4 May invite written comments from any organ of state which or person who has an interest in the matter: section 41(2)(c).

11.5 Clearly during the hearing of the appeal, the Water Tribunal would not have had the benefit of the assessment machinery mentioned in section 41 in order to conclude that the business report filed by the Appellant warrants reinstatement of the water use entitlement Appellant had in terms of the 1956 Water Act.

11.6 Added to the machinery of section 41 are the 10 relevant factors mentioned in section 27 of the National Water Act, section 27(1)(a)-(k) which must be taken into account before a responsible authority issues a water licence. Those ten factors fall within the administrative machinery of the Respondent.

11.7 Having assessed and outlined what consideration of the Business Plan would entail for the Water Tribunal, I am therefore confident that the dictum in *Gauteng Gambling Board v Silverstar Development Ltd and others* 2005 (4) SA 67 (SCA) quoted in *Vodacom (Pty) Ltd and Another v Nelson Mandela Bay Municipality and Others* 2012 (3) SA 240 (ECP) applies, In that judgment Heher JA writing for a unanimous court stated as follows:-

'An administrative functionary that is vested by state with the power to consider and approve, or reject an application is generally best equipped by the variety of composition, by experience, and its access to sources of relevant information and experience to make the right decision. The court typically has none of these advantages and is required to recognize its own limitations. See Minister of Environmental Affairs and Tourism and Others Phambili Fisheries (Pty) Ltd, Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd 2003 (6) SA 407 (SCA) in paras (47)-(50) and Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 CC 2004 (7) BLLR 678 in paras 46-49. That is why remittal is almost always the prudent and proper course.'

12 In the circumstances the following order is made:-

12.1. The determination made by the Respondent on the 13th September 2013 reducing Appellant's water use entitlement is hereby set aside.

12.2. The matter is remitted back to the Respondent for it to afford the Appellant an opportunity to make representations on any aspect of its application for verification of water use entitlement as provided for in section 35(d).

_____

LMBANJWA

Panel Chair

Deputy Chairperson, Water Tribunal

MAJORITY JUDGMENT

INTRODUCTION

13. The issues for determination are clear from the judgment of the Deputy Chairperson. I agree with the summarisation of the facts, statement of the issues as well as the reasoning and decision by the Deputy Chairperson regarding the first issue of whether the Respondent acted correctly in making a determination in terms of section 35 (4) of the National Water Act 36 of 1998 (NWA).

In particular, the following findings are common cause:

a. That the Appellant had a registered water use entitlement under the repealed Water Act 54 of 1956 to the extent of 25,3 hectares (ha) at a volume of 192 786 m^3/year from the Caledon River.
b. That the Appellant never used their full entitlement including up to the time of the hearing of the appeal in April 2017.
c. That the Appellant at all material times including the two-year period preceding the coming into effect of the NWA only used up to 10 hectares (ha) at a volume of 76 200m^3/year.
d. That, by definition, an existing lawful water use refers to the actual physical use of water in the period from 1 October 1997 to 30 September 1999.
e. That the Appellant's properly determined existing lawful water use in terms of section 32 (1) (a) of the NWA was, and remains 10 hectares (ha) at a volume of 76 200 m^3/year. This much the Appellant conceded.
f. That the Appellant's interpretation of section 35 of the NWA in terms of its purpose and when it can be used by the Respondent is incorrect.

14. The above is quite clearly explained in detail from para 1 to 7 of the Deputy Chairperson's judgment. In para 7 the Deputy Chairperson correctly concludes that,

> 'Appellant has therefore failed to substantiate its case insofar as it claims that its lawful water use in terms of the 1956 Water Act ought not to have been interfered with. However, the matter does not end there.'

15. By saying ‘the matter does not end there’ in para 7 the Deputy Chairperson was referring to the second issue which the judgment deals with, namely whether or not the Appellant was afforded a reasonable opportunity to make representations in terms of the promotion of Administrative Justice Act 3 of 2000 (section 3) (PAJA) read with section 35(3)(d) of the NWA.

16. Whilst I agree that action taken by the Respondent in terms of the NWA constitutes administrative action, which is subject to PAJA, in considering this second issue I came to a different conclusion than the Deputy Chairperson. Below, I articulate the reasons why I came to the conclusion that the Respondent afforded the Appellant a reasonable opportunity to make representations which opportunity the Appellant failed and neglected to use.

17. In order to determine whether or not the Appellant was afforded a reasonable opportunity to make representations, two main documents are relevant to the Water Tribunal, namely, the Respondent’s first letter dated 30 January 2013 and the second letter of 3 June 2013. Before unpacking the contents of the letters it is important to explain the legal criteria for compliance with Section 3 (2)(d)(ii) of the Promotion of Administrative Justice Act (PAJA).

WHAT CONSTITUTES A REASONABLE OPPORTUNITY TO MAKE REPRESENTATIONS?

18. In relevant parts Section 3 of PAJA provides that

> ‘(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.
>
> (2)*(a)* A fair administrative procedure depends on the circumstances of each case.
>
> *(b)* In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1) -
>
> (i) adequate notice of the nature and purpose of the proposed administrative action;
>
> (ii*)* *a reasonable opportunity to make representations;*
>
> (iii) a clear statement of the administrative action;
>
> (iv) adequate notice of any right of review or internal appeal, where applicable; and
>
> (v) adequate notice of the right to request reasons in terms of section 5.’

Section 3(2) (b) of PAJA must be read together with Section 35(3)(d) of the NWA which states that a responsible authority ‘must afford the Applicant an opportunity to make representations on any aspects of the application.’ We underscore that, unlike section 33(4) of the NWA, section 41 does not apply to the section 35 process. (see *para 10-11 above*). The *verification of existing use* exercise serves a different purpose and is subject to a different procedure than the *declaration of*

existing water uses, which is subject to the full procedural process of a water use licence application provided for in section 41.[1]

19. The PAJA does not prescribe any particular manner through which a person affected by an administrative action should be given an opportunity to make representations. Depending on the circumstances of each case (section 3 (2) (a) PAJA) such an opportunity could be satisfied by an opportunity to make written comments, while in other cases a hearing may be necessary[2] or even multi-stage participation in the decision-making process. In *De Beer v Health Professions Council of South Africa* the court explained this provision by noting that;

> 'where adequate provision is made for written representation then the Courts have tended to regard that oral representation was excluded There is a general tendency to regard oral representations as unduly over-judicialising the decision-making process. The crucial question is, whether the appellant had a real opportunity to put his side of the case. A person who is entitled to the benefit of the *audi alteram partem* rule need not be afforded an oral hearing, however; written submissions will suffice.'[3] *(references omitted)*

[1] We thus do not agree with the conclusion in para 9.13.3 above that we are dealing with a situation provided for section 33 in this case. The Respondent acted in terms of section 35 of the NWA, and the two sections should be applied separately although they both fall under Part 3 of the NWA.

[2] See *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) para 28; see also Hoexter C Administrative *Law in South Africa* (2012) 371 citing *De Beer v Health Professions Council of South Africa* 2005(1) SA 332 (T) and cases therein cited including *Catholic Bishops Publishing Co v State President and Another* 1990 (1) SA 849 (A) at 871D-E; and *Bam-Mugwanya v Minister of Finance and Provincial Expenditure, Eastern Cape* 2001 (4) SA 120 (C) para 23-24.

[3] *De Beer (above)* para 31.

What is clear is that there is no set criterion of what steps a decision-maker must take in each and every case. Indeed as the court said in *De Beer*, "The crucial question is, whether the appellant had a real opportunity to put his side of the case." Whether this opportunity was presented through a standard form letter, detailed letter, oral hearing or public hearings, does not seem decisive as long as the adjudicator can, on the facts of each case, determine that the affected persons were afforded a reasonable opportunity to make representations.

20. Hoexter, citing Baxter, states it is important that the affected person is 'properly apprised of the information and reasons that underlie the impending decision.'[4] In other words, the affected person must be informed of the material facts and motivations or reasons for the intended decision and the legal consequences of the decision i.e. how the decision will affect the rights of the affected person. Such information or occasion at which an opportunity to participate is presented must be relevant to the decision to be made,[5] and include the legal basis of the administrative action, namely the legislative authority to act, which in this case would be section 35 of the National Water Act 36 of 1998.

21. The real question is whether the two letters by the Respondent, taken together as part of the decision-making process, afforded the Appellant a reasonable opportunity to make representations as contemplated by section 3(2)(b)(ii) of

[4] Hoexter (above) 372, citing Baxter L *Administrative Law* (1984) 546.
[5] [5] *Sokhela v MEC for Agriculture and Environmental Affairs, KwaZulu-Natal* 2010 (5) SA 574 (KZP) para 55.

PAJA and section 35(3)(d) of the NWA? I reiterate that the question is relevant to our decision, although the Appellant did not raise it. In order to answer question we address the two letters that constitute the material communication between the Appellant and the Respondent.

THE RESPONDENT'S FIRST LETTER OF 30 JANUARY 2013

22. The first letter is a '**NOTICE IN TERMS OF SECTION 35 (1) OF THE NATIONAL WATER ACT, 1998 (ACT 35 OF 1998) TO APPLY FOR VERIFICATION OF THE LAWFULNESS AND EXTENT OF EXISTING TAKING AND STORING OF WATER**.' The letter gives details of the Appellant's property. It also explains that the Respondent was undertaking verification, not only on Appellant, but also for the Upper Orange Water Management Area. **(page 50 record).**

23. The letter proceeds to outline the basis and information used by the Respondent in verifying the water uses by the Appellant **(page 51 record).** A table is provided which tabulates the 'Lawful water use in terms of the Water Act, 1956 (Act 54 of 1956)'; 'Water use during the qualifying period' namely two (2) years before commencement of the NWA; the 'Registered water use'; and 'Possible existing lawful water use.' This is the information on the basis of which the Respondent proposed to make a declaration of how much water the Appellant was using two years prior to the commencement of the NWA.

24. In the letter, the Respondent advises the Appellant 'to apply for the verification of your water use in order to confirm the *lawfulness* and *extent* thereof.' *(emphasis added).* This the Appellant was supposed to do by the 13th of March 2013. The letter empathically states that,

> 'Please note that should the application not reach the responsible authority on or before the due date, *you may lose your entitlement to continue with your water use.* Please pay particular attention to Section 35 (5) (a) of the [NWA] Act, which states the following:
> No person who has been required to apply for verification under subsection (1) in respect of an existing lawful water use may exercise that water use –
>
> *(a)* after the closing date specified in the notice, if that person has not applied for verification.' *(emphasis added)*

It is clear that the letter invited the Appellant to dispute the information presented in the table if it was incorrect by applying for verification. **Table 2 (page 51 record)** includes the statement that there was no 'Possible unlawful water use.' Importantly, this first letter advises the Appellant of the legal consequences that follow if the Appellant did not apply and motivate for a different finding of the physical existing water use. Among these consequences was the loss of the remainder of what the Appellant was not physically using two years prior to the commencement of the NWA.

25. The letter explains the next steps in the process once the Appellant submits an

application. In detail, the letter states that once the Appellant submits an application, 'the responsible authority *may* require further investigations in terms of Section 35 (3) of the [NWA]. You will be informed if this is required.' The letter further states that 'you then may make further representations before the responsible authority finally decides on your application in terms of Section 35 (4) of the [NWA].' **(page 51 of record).**

26. It is clear from **para 23 to 24** above that the Respondent's letter, not only *notifies*, but importantly, *explains* to the Appellant the nature of the decision to be taken and the steps which the Appellant should take to participate in the decision-making process. It explains the possible consequences or implications of the Appellant's failure to submit an application or provide further information as requested by the Respondent. **Annexure 1** to the letter **(page 52 of the record)** explains in detail the terms used in the letter, as well as the purpose of the Section 35 process. It explains how the water usage is calculated showing how the physical verified use was arrived at. It explains what is an existing lawful water use and how the 'existing' and 'lawful' concepts are interpreted and implemented. These are all elements of the procedural requirements of a fair administrative action, which are required by the PAJA, and indeed the NWA itself.

27. Not only did the Appellant respond after the 13th of March 2013, but also the

Appellant's response did not address the declaration of extent of water use. The Appellant submitted the completed form and attached a certificate issued under the Water Act 54 of 1956 and in the block labelled 'remarks or comments,' Appellant states that, *"I am uncertain what the implication is with the volume (m^3/year) indicated as 192 786 as to lawful water use of 76 200. I would appreciate an explanation."* It is important to distinguish between the 'meaning' of the letter that is whether the Appellant understood what the letter said; and the 'implications' or 'consequences' of the letter on Appellant's entitlements. The letter clearly explained the implications if the Appellant did not do what was required in the letter. **(page 51 record)**

28. **Annexure 1 (page 52 record)** to the first letter explains in detail the figures in **Table 2** of the letter, namely the implications of the physical use as against the registered use and the fact that the Appellant would only be entitled to use water to the extent of the verified actual use. Therefore apart from being vague, the Appellant's request for explanation begs the question whether Appellant had read Annexure 1 to the letter. It has been argued that '[o]ur courts have tended to emphasise that fairness does not entail a general right to discovery.'[6] The implications of the Section 35 (4) determination are a legal issue on which the Appellant could have sought legal advice if they did not understand, or were ignorant of the law in question. Nevertheless the Respondent send a follow- up letter.

[6] Hoexter (above) 375.

29. Since the Appellant's response did not address or challenge the proposed verified water usage or raise any issues material to the verification of water use, the Respondent requested for further information in their letter dated 3 June 2013. This is dealt with this letter in detail below.

THE RESPONDENT'S SECOND LETTER OF 3 JUNE 2013.

30. The Respondent's second letter to the Appellant is entitled 'UPPER ORANGE

> **WATER MANAGEMENT AREA APPLICATION FOR VERIFICATION OF EXISTING LAWFUL WATER USE IN TERMS OF THE NATIONAL WATER ACT, 1998 (ACT 36 OF 1998): REQUEST FOR ADDITIONAL INFORMATION IN TERMS OF SECTION 35(3)(a) AND SECTION 35 (3)(d).'**

Parts of Section 35 (3) of the NWA referred to provide that,

> '(3) A responsible authority –
>
> *(a)* may require the applicant, at the applicant's expense, to obtain and provide it with other information, in addition to the information contained in the application…
>
> *(d)* *must* afford the applicant an opportunity to make representations on any aspect of the application.'

31. The letter expressly references, as background documents, the Respondent's letter of 30 January 2013 and the Appellant's response to that letter. It proceeds to state that,

'In terms of Sections 35(3)(a) and 35 (3) (d) of the Act, you are hereby required to obtain and provide other information in addition to the information contained in your application for verification of existing water use, on the property shown in Table 1. ***You are also afforded the opportunity to make representations on any aspect of the application***. [Table 1 is inserted] *The following items are examples of the information required, this list is for illustrative purposes only and not exhaustive.*

(a) any permit, water court decision, servitude, agreement or other legal proof allowing you to store water.

(b) any determination in terms of Section 33 of the National Water Act, 1998 declaring your water use as existing lawful water use.

(c) Evidence or proof of why you should be allowed to irrigate a large (sic) area than the allowable (sic) volume on the property.

(d) Proof of abstraction or storage of water during the qualifying period as indicated in Section 32 of the National Water Act.

Please furnish this office with the requested information before or on 1 July 2013. If the time given to meet this request is insufficient, *a written application for the extension of time (specific date) is needed*.' *(emphasis added)*

This letter expressly invited the Appellant to make representations, and provides the Appellant with examples of what such information could be. The Appellant in response to this letter from June 2013 made no representations until September 2013.

32. Furthermore, the Appellant neither responded to the second letter at all, nor did

they apply for an extension of time within which to provide additional information or make any representations. The Appellant acknowledged that they received both letters from the Respondent.

33. Not having heard from the Appellant since June 2013, the Respondent proceeded to make a determination in terms of section 35 (4) of the NWA **(page 17 of record).** This determination informed the Appellant that the extent of physical use and lawfulness of its water use was up to a volume of 76 200 m^3/year (10 ha). The determination provided the Appellant with information regarding the right to appeal, time to appeal, and the authority to which an appeal may be lodged.

34. The appeal was lodged with this Tribunal on 6 October 2014. A Notice of Appeal dated 26 January 2016 **(page 4-5 of record)** stated the grounds of appeal as follows, 'To reinstate the lawful water use to 25,3 ha (192 786 m3/year) for the implementation of the irrigation.' The notice was supplemented with a notice filed by counsel dated 12 April 2016. This supplemental Notice of Appeal did not address the question of why the Appellant's existing lawful use as determined in terms of section 35 (4) should be 25,3 hectares (ha). Rather the whole Notice focused on how ownership wrangles between the proprietors of the Appellant, BJ Swart and HJ van Vuuren, prevented effective use of the water for over 21 years, from 1994 to 2017. The original and the supplemental Notices of Appeal at no point challenged the reasonableness or adequacy of the opportunity that the Appellant was afforded by the Respondent to make representations. At all

material times therefore, the Appellant did not aver that the opportunity to make representations provided by the Respondent was insufficient or not provided at all.

35. During the hearing, the Chairperson was at pains to direct both Counsel to address the PAJA question but Appellant's Counsel did not sufficiently address the issue. The Respondent's Counsel submitted that the two letters and Annexures send to the Appellant constituted more than reasonable invitation and opportunity for the Appellant to make representations before the determination was made. She submitted further that in the absence of responses from the Appellant, the Respondent could not wait forever before making a decision. **(para 11-13 Respondent's Heads of Argument, page 5-6). As the court states in** *Premier, Mpumalanga and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal;*

> 'In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively (a principle well recognised in our common law and that of other countries). As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the Executive to act efficiently and promptly.'[7]

36. The Appellant did not produce any information controverting the finding that two

[7] *Premier, Mpumalanga and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) para 41 followed in *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) para 123.

years prior to the commencement of the NWA they used water to irrigate only 10 hectares. The Appellant provided an explanation of why that was the case, but no information disputing the extent of physical use of water, which is the purpose of section 35.

37. On behalf of the Appellant, Counsel submitted closing heads of argument wherein the argument remained focused on whether it was competent for the Respondent to act in terms of Section 35 of the NWA in the first place where a water use is not unlawful. As indicated above, this interpretation was erroneous to the extent that it limits the purpose of Section 35 of the NWA to unlawful or doubtful water uses. In particular, the final submissions **(para 5.1-5.9 Appellant's Heads of Argument)** on behalf of the Appellant were as follows:

> 'The gist of the argument may be summarized as follows:
>
> 5.1 During 2013 an investigation was done in terms of Section 35(4) of the said Act.
>
> 5.2 The purpose of that section is to verify the water uses, which are exercised by users who claim that they have the right to do so, *but whose right to do so is in doubt being illegal and excessive or against authorization.*
>
> 5.3 It was submitted that this would be typical where a person exercises a water use and a responsible authority doubts the lawfulness of the use in that either no such authority exists or, more water is used than authorized, or *the terms and conditions of the entitlement are contravened.*

5.4 It was submitted that at best the investigation revealed none of the above. In fact, *it became common cause that the Appellant at no stage used more water than was authorized*. *There was therefore no reason for the authority to further determine the extent and lawfulness of the water use and thereafter limits the extent of the existing lawful water use contemplated in Section 32(1).*

5.5 The determination by the Respondent is based on satellite images of what it calls the "qualifying period" which is two (2) years prior to commencement of the National Water Act…

5.8 It is the submission on behalf of the Applicant that *it is not necessary for the Appellant to now prove that it is entitled to the quota of 25.3 hectares which was awarded under the Old Water Act of 1956*.' *(emphasis added)*

The Appellant clearly did not express the view that they had not been afforded an opportunity to make representations. The Appellant's argument is that because its use of water was within its registered lawful use, the Respondent could not trigger Section 35 of the NWA in respect of the Appellant.[8]

38. It is therefore important for the PAJA question, that at no stage did the Appellant

[8] This is distinguishable from *HentiQ 2580 (Pty) Ltd v The Provincial Head: North-West Department of Water and Sanitation and Another* WT001/15/NW, where the water user in fact disputed the verified actual physical use of water during the relevant period. In this case the Appellant is not disputing that it were irrigating only 10 hectares of land.

raise the Section 3 (2) of PAJA as a ground of appeal. Neither did Appellant's counsel address this issue during the hearing, nor did counsel refer to the issue in closing heads of argument that were requested by the panel.

39. However, being cognizant of the fact that the Respondent was taking administrative action and we, the Water Tribunal, in making this decision, are also making an administrative decision. The Tribunal decided to apply its mind to the question whether the Respondent complied with Section 3 (2)(b)(ii) of PAJA.

WAS THE APPELLANT AFFORDED A REASONABLE OPPORTUNITY TO MAKE REPRESENTATIONS?

40. There is no dispute that the Appellant was informed with adequate notice of the nature and purpose of the Section 35 of the NWA invitation to make an application. Equally, the Appellant does not dispute that the determination by the Respondent is clear and provides information on the appeal rights of the Appellant. The Appellant does not argue that it was not afforded a reasonable opportunity make representations (see **Para 7.1-7.5 Appellant's Main Heads of Argument**.) As noted in the first part of this judgment all the parties are agreed that as at the time of the determination the Appellant was using only 76 200 m^3/year to irrigate 10 hectares of land.

41. The second letter by Respondent expressly invited the Appellant to make any

representations relevant to the matter, and it provided the Appellant with examples of what information to submit. This opportunity directly related to the decision to be made.[9] As submitted by the Respondent, the Appellant failed or neglected to use that opportunity, contenting only with challenging the authority of the Respondent to make the determination. The first letter gave the Appellant 30 days to submit the application with representations. The second letter gave the Appellant at least 21 days to make any representations. Beyond that, the determination was made on 13 September 2013 and by then the Appellant did not make any further representations to the Respondent.

42. The Business Plan presented at the appeal was not submitted to the Respondent at any time before the appeal. Indeed, the Appellant used the first opportunity by submitting the registration certificate and letter, which information the Respondent found to be insufficient, hence the second letter. The Appellant completely ignored the second letter and did not give any reasons for the failure to respond whether to the Respondent or at the appeal hearing. The Business Plan which details what the Appellant intends to do on its property in the future post 2013, has no relevance to a Section 35 (4) NWA determination if it does not deal with the actual physical water use during the relevant two-year period as discussed below.

THE RELEVANCE AND PROBATIVE VALUE OF THE BUSINESS PLAN.

[9] *Sokhela v MEC for Agriculture and Environmental Affairs, KwaZulu-Natal* 2010 (5) SA 574 (KZP) para 55.

43. In the period before the hearing the Appellant submitted an undated Business Plan **(page 58-68 record)** purporting to show how the Appellant is planning, in the future, to use the full extent of 25,3 hectares (ha) of the its registered use. The Business Plan was not submitted to the Respondent before the September 2013 determination was made. Indeed, it was never submitted to the Respondent and the Respondent only became aware of it at the appeal hearing. There being no objection to it being part of the record, and the Tribunal exercising first instance jurisdiction we considered the relevance and implications of the Business Plan. Unlike an appeal court, the Water Tribunal is entitled in terms of the Act and its rules to accept new and further evidence during the appeal hearing.

44. However, nothing turns of the Business Plan to the extent that it does not address the question of whether the Respondent correctly determined the extent of the Appellant's physical use of water in the two years preceding the commencement of the NWA. Section 35 of the NWA enables the Respondent to verify and determine what a water user was physically using between 1 October 1997 and 31 September 1999 (for surface water). The determination by the Respondent was made on 13 September 2013. The determination does not and cannot address future use of water by the Appellant. It is in a sense a declaratory determination, which declares what the Appellant physically used at the relevant time. In this case, even at the time of the hearing the Appellant did not dispute

the verified extent of the actual use of water being 10 hectares (ha) at 76 200 m^3/year. If the Appellant intends to motivate for additional water use going forward, which they are entitled to do, the NWA provides for a procedure for the Appellant to apply for a water use licence in terms of section 40- 42. What the Appellant cannot do is to use a Business Plan developed *ex post facto* and was never submitted during the Section 35 process to challenge a Section 35(4) determination relating to what was the extent of water use in 1997 to 1999. The Business Plan therefore does nothing to negate the factual verification by the Respondent of *the physical extent* of the Appellant's existing lawful water use – which is the purpose of Section 35.

45. Based on the communication between the parties, their written and oral submissions, as well as the provisions of the NWA and the PAJA, the Water Tribunal find that the Appellant was afforded a reasonable opportunity to make representations before the Respondent made the determination of 13th September 2013. The Appellant failed and neglected to take advantage of the opportunity afforded by the Respondent. Up until the hearing of the appeal the Appellant had not made any meaningful representations regarding the matter (what amount of water was physically used between 1997 to 1999), except to point out that due to ownership wrangles he, and his then partner could not agree on an expansion of the irrigation on the property **(see letter on page 56 record).** In the said letter the Appellant states that between September 1994 and September 1999 one of the partners developed the irrigation. Then the Appellant

states that ‘during the period **1999 – 2014** it was not possible for BJ Swart as one member to develop the irrigation.’ This letter, and all representations by the Appellant, did not seek to dispute the verified physical extent of water use which was the purpose and objective of the Respondent’s administrative action.

46. The Respondent did not request or do further investigations but requested further and additional information from the Appellant. The representations about ownership disputes were irrelevant, because they did not explain why the Appellant wanted 25,3 hectares (ha)/ 192 786 m^3/year (instead of the verified actual physical use of 10 hectares (ha)/ 76 200 m^3/year.) Any further investigations in terms of Section 35(3) of the NWA depended on what relevant representations the Appellant had made. Since the Appellant ignored the Respondent’s second letter, and made no further representations disputing the proposed finding regarding the extent of the existing lawful water use, the Respondent cannot be expected to have made any further investigations. For example, if the Appellant had submitted a Business Plan **(page 58 of record)**,the Respondent would have been expected to make further investigations as to whether the Business Plan constituted sufficient representation to negate a determination other than the one Respondent made in 13th September 2013. However, as explained above the Business Plan does nothing to explain the extent of the physical existing water use by the Appellant during the relevant statutory period.

47. By its own admission, the failure by the Appellant to use their registered water use from 1994 to 2016 is unsustainable and inefficient that being the basis on which the Business Plan was developed. (see **page 60 record**, and **page 16 of appeal hearing record.**)

48. Among other things, Section 2 of the NWA states that

> 'The purpose of this Act is to ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled in ways which take into account amongst other factors – …
> *(a)* meeting the basic human needs of present and future generations;…
> *(d)* promoting the efficient, sustainable and beneficial use of water in the public interest;
> *(e)* facilitating social and economic development.'

49. Whenever the Appellant has sufficient and adequate information to motivate for an expanded allocation, the Appellant is entitled to use the NWA to apply for a water use licence in terms of section 40 and 41.

50. In the circumstances, I make the following order:-

50.1. The appeal by the Appellant is hereby dismissed.

50.2. The determination made by the Respondent in terms of section 35(4) of the NWA on the 13th September 2013 is hereby confirmed.

_____

TUMAI MUROMBO
Additional Member, Water Tribunal.

PUMEZO JONAS

Additional Member, Water Tribunal.
I agree, and it is so ordered.