

In the appeal of:

HAASFONTEIN BELEGGINGS (PTY) LTD

APPELLANT

and

THE MINISTER OF WATER & SANITATION

FIRST RESPONDENT

THE PROVINCIAL HEAD: GAUTENG

SECOND RESPONDENT

APPEAL DECISION

PANEL

Murombo. T

Panel Chairperson (Additional Member).

Heard on:

23 February 2021.

Decision:

15 March 2021.

APPEARANCES

Appellant:

Adv. J. Saunders instructed by Röntgen and Röntgen Attorneys (Paul Wani Lado).

1st and 2nd Respondent: Adv. D. Mtsweni instructed by the State Attorney, Pretoria.

INTRODUCTION AND BACKGROUND

1. This is an appeal in terms of section 148(1)(j) of the National Water Act, 36 of 1998 (NWA) against a directive issued to the Appellant by the Second Respondent under powers delegated by the First Respondent. I shall refer to the First and Second Respondent as the Respondents for ease of reference in this decision. The directive was issued on 12 February 2016 directing the Appellant to do the following:

- i. Cease all unlawful water use activities with immediate effect. Proof of cessation must be provided within five (5) working days of the date of receipt of this directive.
- ii. Appoint a suitably qualified environmental consultant to conduct an impact caused by erected walls, compile environmental assessment report and a rehabilitation plan for all the affected areas within 30 days upon receipt of the directive and submit the report to the Department for approval. The rehabilitation plan must entail amongst other things; the nature and extent of the impact that the water use activities have had or may have on the water resource and measures that will be implemented to remediate or mitigate the impacts with clear timeframes and descriptions of how and when each remedial/mitigation action will be implemented.
- iii. Implement all the recommendations contained in the rehabilitation plan and rehabilitate the areas affected by the water use activities within thirty (30) working days of the Departmental approval of the Rehabilitation Plan.¹

2. Prior to issuing the said directive the Respondents had issued a Notice of Intention to issue the directive on 2 January 2016 wherein the Appellant was given two days to make written representation and/or provide proof that the Appellant was authorised to use water in terms of section 21(a), 21 (c), and 21(i) of the NWA. The notice of intention was the sequel to a complaint received by the Respondents from the Appellant's neighbour that the Appellant was allegedly engaging in the use of water without authorisation. The uses concerned consisted in that the Appellant had constructed weirs by erecting three walls on Watervalrivier, Rolspruit and

¹ Record p23-24.

another unnamed stream. The construction of the weir and the 1.2m high walls meet the definition of a water use in terms of section 21 of the NWA. Such structures will constitute a “taking water from a water resource”, in-stream thereby “impeding or diverting the flow of water in a watercourse” and in the process “altering the bed, banks, course or characteristics of a watercourse.”²

3. Having received a complaint from a neighbouring farmer (Springbokdraai Boerdery (Pty) Ltd), the Respondent conducted an site investigation on 12 and 14 January 2021³ at Haasfontein Beleggings (Pty) Ltd located at Leandra in the Waterval Water Management Area (Coordinates *26°26' 12"S; 28°59'21"E*). The Appellant clarified in its papers that the property in question is Broederstroom 351 IR, Portion 4 owned by Quantum Leap Investments 639 (Pty) Ltd and leased by Haasfontein Beleggings (Pty) Ltd.⁴ The Appellant’s ground of appeal revolves around these factual issues, therefore it is important to state what is common cause from the record at the outset. The Directors of Haasfontein Beleggings (Pty) Ltd are listed on the company’s letterhead as JC Bezuidenhout, assisted by JGE Bezuidenhout (Crops) and RC Bezuidenhout (Livestock).⁵ JC Bezuidenhout is the sole director of the property-owning company, Quantum Leap Investments 639 (Pty)Ltd.

4. During the site investigation referred to above, the owner of Springbokdraai Boerdery (Pty)Ltd, Respondents’ officers, and law enforcement officers were present. Then on the 14th of January 2016 it is recorded on the register that JGE

² Section 21 (a), (c) and (i) of the NWA.

³ Report of Site Investigation- Record p3-5.

⁴ Record p34.

⁵ Record p10.

and JC Bezuidenhout were also present during the on-going site investigation.⁶ Some photographs were taken of the structures in the Waterval and Rolspruit river that are at the centre of this appeal.⁷

5. The report of the investigation details that the two walls and a weir on the rivers were observed and that Mr. Bezuidenhout explained that,

the walls were erected to prevent the cattle from getting stuck in mud and to provide sufficient drinking water for them. He consulted with experts before erecting the walls to enquire about the height of the wall and volume of water they may legally store.⁸

“During December 2015, after the erection of the wall, Mr De la Rey requested more water for his crops. As a result of the pressing drought circumstances Mr. Bezuidenhout opened the side of the river to release more water. An installed pump station on the Rolspruit was also observed. The pump station is not yet operational as Eskom only installed the electricity in December.⁹

6. The Environmental Officers who conducted the investigation record their findings that they were not provided with any authorisation for the said waterworks, and that according to their observations of the structures they constituted water uses in terms of section 21 of the NWA. The uses were noted to be unlawful in the absence of authorisations, therefore the Environmental Officers recommended that a Notice of Intention to issue a directive in terms of section 53(1) of the NWA be issued. This resulted in the Notice of Intention issued on 27 January 2016.

7. The Notice of Intention to issue a directive was addressed to “Broederstroom, PO Box 383, Kinroos 2270” and marked to the “Attention: Mr. JGE Bezuidenhout”.¹⁰

⁶ Record p5.

⁷ Record p10.

⁸ Record p3.

⁹ Record p3(a) (Report of Site Investigation p2.)

¹⁰ Record p7.

The Notice was received and acknowledged by JC Bezuidenhout on 28 January 2016.¹¹ On 28 January 2016 written representations in a letter were submitted to the Respondents by JC Bezuidenhout. In these representations the Appellant denied that it was engaged in any unlawful use of water. This was because allegedly all the uses it engaged in including the construction of the weir, and three dam walls were permissible under the General Authorisation in force in the water management area. The representations conclude by stating that, “all activities we engaged in were authorised in terms of a general authorisation issued under section 39 of the National Water Act 36 of 1998.” The representations provide facts to justify the in-stream waterworks, mainly that it was for the Appellant’s livestock water needs. Without the dam walls their cattle were getting stuck in the muddied stream and dying. Each wall is explained, and the Appellant explain that the amount of water stored is within the amount allowed under the General Authorisation.

8. In relation to the weir in Rolspruit, the Appellant explained that the river was in flood and the weir never blocked reduced the stream flow. It states further that “We applied for our water use licence and will only start inhibiting water in the event that our application is successful.”¹² Apart from the explanations, the Appellant also stated that it complied with the National Environmental Management Act 107 of 1998 before constructing the waterworks.

9. Upon receiving the written representations, the Respondents replied on 10 February 2016 and advised the Appellant that its written representations were not

¹¹ Record p9.

¹² Record p16.

satisfactory.¹³ In particular, the Respondents explained that a General Authorisation issued in terms of section 39 of the NWA is subject to conditions included, among others, that the use is subject to regulations made under section 26¹⁴ and any conditions imposed in terms of section 29¹⁵ and 39 of the NWA.

10. The Respondents explained that the water uses undertaken by the Appellant were in contravention of the conditions of the General Authorisation 1199 of 2009 as revised, and further that no documents were submitted with the written representations to support several assumptions of lawfulness in the letter. These include construction dates and legality of the in-stream waterworks. After addressing and rejecting the Appellant's written representations the Second Respondent then proceeded on 12 February 2016 to issue a directive to the Appellant to cease and desist the water uses complained of (within 5 days) and to do an impact assessment together with a rehabilitation plan (within 30 days). The directive also required the Appellant to implement all its recommendations in all areas impacted by the erected walls.

11. On 9 March 2016, the Appellant lodged an appeal to the Water Tribunal against the directive of 12 February 2016 (Ref 16/2/7/C121/B002).

GROUND OF APPEAL

12. The Appellant raised broadly two grounds of appeal. Firstly it submitted that the directive was void for vagueness, and secondly that even if it is found that the Appellant is a water user confronted by a valid directive, that the use of water was

¹³ Record p19.

¹⁴ Regulations on the use of water.

¹⁵ Conditions for issue of general authorisations and licences.

within the terms of the General Authorisation. The Notice of Appeal was amplified on 17 May 2017 to clarify the grounds of appeal on the merit, namely that the Appellant is not “Broederstroom”, does not own the property named “Broederstroom” and it was not a water user. It further added that,

“The functionary erred in issuing the directive as there are no objective evidence that the appellant is storing more water on the property than it is allowed in terms of the General Authorisation as the functionary did not survey the storage dam and weirs that are situated on the property, and the functionary further failed to measure the amount of water that the appellant abstracts for irrigation purposes.”¹⁶

The grounds of appeal are addressed below and evaluated considering the parties' submissions in argument.

That the Directive is Void for Vagueness (In limine)

13. Regarding this ground of appeal the Appellant argued that as administrative action, the issuing of any directive must be constitutionally valid, clear, and intelligible. It was argued that the directive is “not clear and intelligible” because: it was addressed to a non-existing entity being “Broederstroom”; that was not addressed to Haasfontein Beleggings although it purported to mention the company as the water user; that the directive states the property on which the alleged water uses take place as “Broederstroom”; that the directive did not contain specifics about the property as registered in the Deed Office on which the water uses are taking place and finally that the directive did to contain any coordinates for the property.¹⁷ It is important to note that general authorisation, on the basis of which Appellant

¹⁶ Record p51.

¹⁷ Record p25 (Notice of Appeal) as amended on 17 May 2017, see Record p48.

claim entitlement to use water applies to owners or lawful occupiers of the land in respect of which a water use is taking place.

14. In response to this claim of void for vagueness, the Respondent submitted that despite its claim of voidness the Appellant in fact submitted a Rehabilitation Plan as directed in the directive of 12 February 2016 in June 2017. Not only that, but also that the Appellant had taken steps to implement the Rehabilitation Plan. On its own this attempt to comply with the directive is contrary to claims of vagueness and the facts advanced in support of such a claim. Furthermore, the Respondents submitted that this compliance action by the Appellant could suffice to render the appeal moot.

15. However, even if the appeal was not moot, the Respondents submitted that the criteria for determining if an administrative action is vague to the extent of being void was laid down in the *Affordable Medicines* case where the constitutional court held that,

“The doctrine of vagueness is founded on the rule of law, which, as pointed out earlier, is a foundational value of our constitutional democracy. It requires that laws must be written in a clear and accessible manner. *What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws.* The law must indicate with *reasonable certainty* to those who are bound by it what is required of them so that they may regulate their conduct accordingly. The doctrine of vagueness must recognise the role of government to further legitimate social and economic objectives and should not be used unduly to impede or prevent the furtherance of such objectives.”¹⁸ (emphasis).

16. Section 53 of the NWA¹⁹ is clear on what it empowers the Respondents to do and

¹⁸ *Affordable Medicines Trust and others v Minister of Health and others* 2006 (3) SA 247 (CC), para 108.

¹⁹ Section 53 “Rectification of contraventions

(1) A responsible authority may, by notice in writing to a person who contravenes-
(a) any provision of this Chapter;

the reasons for the exercise of that power. The provision is meant to enable the responsible authority to act decisively against non-compliance. The responsible authority can direct a water user to cease and desist or take remedial measures to comply with the NWA, an authorisation, or a condition of a water use licence. While it does not specifically require the responsible authority to give the water user an opportunity to make representations, the Respondents nevertheless gave the Appellant with such an opportunity by way of a Notice of Intention to issue a directive. It was only after submission of written representations that the Respondent then proceeded to issue the directive.

17. There is no doubt on the record that the Appellant, through its directors was aware of a complaint, which was followed by a site investigation in which they fully participated. The investigation was concerned with specific complaints of impediment of the flow of three streams on the property Broederstroom 351 IR, portion 4, owned by Quantum Lead Investments and leased to the Appellant. JC Bezuidenhout is a director of both companies. The Appellant is therefore a lawful occupier in the language of General Authorisations. In specific terms, the directive was marked to the attention of a director of the Appellant, and its reference is stated as,

(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 whom the notice was served; or

(b) apply to a competent court for appropriate relief.”

“DIRECTIVE IN TERMS OF SECTION 53(1) OF THE NATIONAL WATER ACT, ACT NO 36 OF 1998(NWA) (THE “ACT”): ENGAGING IN WATER USE ACTIVITIES WITHOUT AN AUTHORISATION IN HAASFONTEIN BELEGGINGS PTY LTD: BROEDERSTROOM”²⁰

The directive cross-references the site investigation of 12 and 14 January 2016, the Notice of Intention to issue a directive (27 January 2016) and the Appellant’s rejected written representations of 28 January 2016. Therefore, information in those documents constitutes part of the background and context to the directive which was known to the Appellant.

18. Upon receiving the Notice of Intention to issue a directive the Appellant through its director JC Bezuidenhout, wrote an extensive response justifying its water uses and claiming lawfulness under a General Authorisation. At no time did the Appellant directors raise the vagueness of the notice or directive. On the contrary the Appellant’s JC Bezuidenhout concludes the written representation of 28 January 2016 by saying firstly that “We deny contravening any laws as alleged in your notice.” In addition it stated that “We thank you in advance for entertaining and accepting our representations. Furthermore, should you require further information, we warmly invite you for further visits to our property.” Together with the rest of the representations, these cannot possibly be the words of a discombobulated person who has just been confronted with a vague document to which he cannot sensibly respond.

19. The property at issue was identified in the Site Investigation Report with coordinates and the water uses concerned were particularised in that report. The

²⁰ Record p23.

directive was an upshot of an ongoing investigation to which the Appellant were a part and fully aware of. Perhaps the directive would be vague to counsel who was not part of the prior investigation and site visits. Indeed, as argued by the Respondents and with reference to the *Affordable Medicines* case, the directive provided the Appellant with more than reasonable certainty as to what action was required, why it was required, and the legal consequences of failure to comply with the directive. The directive also provided information on what steps the Appellant could take if they wished to appeal the directive, which right they promptly exercised.

20. For the record, at no time did the Respondents in their papers or argument, aver anything relating to the quantity of water stored in the dams or abstracted. The focus of the directive and enforcement action is solely the erection of structures in in the water courses without the requisite licence and/or contrary to the conditions of the General Authorisation. So much was made of the lack of surveys or investigation to quantify the amount of water involved by the Appellant's counsel. In any case in terms of the law it is the obligation of a water user to maintain accurate records, monitor abstraction rates and installed equipment and to report these to the responsible authority. To argue that the Respondent had any duty to investigate quantities abstracted or contained in the dams is clearly misplaced. In any case the Respondent provided this information through its attorneys.²¹

21. Therefore, as far as the argument that the directive was void for vagueness is concerned the Appellant have not made out a case. That ground of appeal fails.

²¹ Record p35.

Water Uses are Allowed under General Authorisation

22. On the merits the Appellant argued that the General Authorisation of 2004 as regularly extended by the Minister²² authorised the water uses complained of. They stated that the amount of water stored in-stream and abstracted was within the terms of the general authorisation. The Respondents argued that reliance on the 2004 General Authorisation was misplaced as it was amended in 2009, which latter was repealed and replaced with a 2016 general authorisation.

23. What is important is that in terms of section 4 of the NWA water may only be used if one has authorisation in terms of Schedule 1 to the NWA, an existing lawful water use, a general authorisation, or a licence. Any water uses not covered by these four situations is unlawful. In an Explanatory Note accompanying the 2016 General Authorisation, the Acting Director-General cautions that “This general authorisation may be withdrawn at short notice. A water user who needs an entitlement with a firm duration may apply for a water use license.” This underpins the purpose of general authorisation detailed in section 39(1) of the NWA. It is not meant to replace the need to apply for a water use licence for those who need firm guarantee of the right to use water. It does not replace existing water use licences in the area in which it applies. In tandem with its general nature and the discretion vested in the responsible authority, a general authorisation cannot authorise the construction of long-term permanent waterworks such as dam walls.

²² GN 399 of 26 March 2004: Revision of General Authorisations in terms of section 39 of the National Water Act, 1998 (Act No. 36 of 1998)

24. Once a General Authorisation lapses, is withdrawn or repealed any use of water premised on such an authorisation must cease or be continued under a savings clause or another form of authorisation as provided in section 4. The 2004 General Authorisation was revised by the 2009 General Authorisation²³ (section 21(c) and 21(i) uses). The 2009 authorisation introduced further conditions aimed at ensuring protection of water resources and equitable access to water resources. By way of a savings clause, it provided that uses exercised under the 2004 authorisation may be continued but subject to the conditions of the 2009 authorisation.²⁴ Clause 7 provided, among many conditions, that,

- 7(2) The water user must ensure that the water use: - does not have a detrimental impact on another person's lawful use or land; and is not detrimental to the health and safety of the public.
- 7(3) Structures or hardened surfaces associated with the water use must not: - be structurally unstable, induce any flooding, ...
- 7(4) The water use must not result in a potential, measurable or cumulative detrimental...Change in the stability of a water course; change in the physical structure of a water course; scouring, erosion, or sedimentation of a watercourse.
- 7(5) The water use must not result in a potential, measurable or cumulative detrimental change in the quantity, velocity, pattern, timing, water level and assurance of flow in a water course.²⁵

The 2009 authorisation was subsequently revised by other general authorisations the last of which (relevant to this appeal) is the 2016 general authorisation. All

²³ Replacement of General Authorisation in terms of Section 39 of the National Water Act, 1998 Act 36 of 1998, Government Gazette No 1199 of 18th December 2009.

²⁴ Clause 5(2) *Revision of General Authorisations in terms of Section 39 of the National Water Act, 1998* (Act No. 36 Of 1998). ("A water user who used water in terms of general authorisation 1 and 2 to the Schedules of *Government Notice 398* published in *Government Gazette* 26187 dated 26 March 2004 may *subject to the provisions of this Notice*, continue with such water use.") (emphasis).

²⁵ *Ibid.*

subsequent general authorisations retain the critical conditions in Clause 7 of the 2009 regulation.²⁶

25. Assuming water use entitlement in terms of the 2004 General Authorisation, the uses claimed by the Appellant listed in Clause 1.7(ii) and 1.7(iii)²⁷ were regulated. Clause 1.7 provides that any of the water uses authorised thereby are subject to the condition that,

the taking or storing of water –

(aA) does not *impact on a water resource or any other person's water use*, property or land;

(aB) is not excessive in relation to the capacity of the water resource and the *needs of other users*; and

(aC) is not detrimental to the health and safety of the public in the vicinity of the activity. (*emphasis*).

26. The Site Investigation Report indicates that “during December 2015, after the erection of the wall” the neighbouring farmer had to request for more water to be released by the Appellant. That construction of the in-stream walls, in or during 2015, is contrary to the conditions of the general authorisations from the 2004, 2009 and 2012 ones to the extent that such conduct was detrimentally impacting the water sources and impeding access to water by other water users.

27. It was also reported that one of the walls was washed away when there was flooding in 2017, indicating that the wall was structurally problematic. Similarly, the construction of a weir or walls on in-stream has potential to change the quantity,

²⁶ See for example Clause 9(1), (2) and (3) of the 2016 Revised general authorisation.

²⁷ Record p35.

velocity, pattern, water levels and assurance of the flow in the concerned water course. While the general authorisation authorised storage of water, it did not and does not, authorise the construction of in-stream walls to impede a watercourse without complying with Chapter 12 of the NWA.²⁸

28. A situation where a user impedes and obstructs the flow of a water course the detriment of downstream users under the guise of a general authorisation is not consistent with the objectives of general authorisations laid out in section 39 of the NWA read with section 2 of the Act. The Appellant admit that the flow of the Waterval river has been reduced, albeit they attribute this to riverbed sand mining by unknown persons.²⁹ Should the Appellant wish to engage in water-intensive commercial agricultural activities they are entitled to apply for a firm water use authorisation. Indeed, the Appellant having realised that pathway to a remedy applied for a water use licence for abstraction of water from the Rolspruit river.³⁰

29. I therefore find that the Respondents properly exercised the powers vest in them by section 53(1) of the NWA in ensuring that the Appellant does not engage further in the use of water under a General Authorisation contrary to the conditions imposed by the General Authorisations and the Act aimed at ensuring that water users have equitable access to water resources particularly under the scheme design by general authorisation.

²⁸ Clause 1.9 (1) *Revision of General Authorisations* in terms of Section 39 of the National Water Act, 1998 (Act No. 36 of 1998). This should be read with *Regulations Regarding the Safety of Dams* in terms of Section 123(1) of the National Water Act, 1998 (Act No. 36 of 1998) *Government Notice R 139* in *Government Gazette* 35062, effective 24 February 2012.

²⁹ Record p16 (para 18 of Letter).

³⁰ Record p16.

ORDER

30. The appeal is hereby dismissed.

31. The directive issued by the Second Respondent on 12 February 2016 is hereby confirmed, subject to amendments in para 32 and 33 below.

32. The Appellant, or any lawful occupier claiming rights through the Appellant, is directed to comply with the directive upon delivery and cease all unlawful water uses on the Waterval river, Rolspruit river, unnamed stream on Broederstroom 351 IR, Portion 4 (Coordinates 26°26' 12"S; 28°59'21"E). Proof of cessation to be provided to the First and Second Respondent within seven (7) working days of this decision.

33. The Appellant is further directed to provide the Respondents with an updated Rehabilitation Plan within fourteen (14) days notification of this decision. Such an update must consider and demonstrate how any further environmental changes since 2016 have been incorporated into the plan for remediation and mitigation of impacts caused by the walls on the Waterval river, the unnamed stream, and the weir on the Rolspruit river.

34. The Respondents may, at their discretion, act in terms of section 53(2) of the NWA in the event the Appellant fails or neglects to comply with the directive read with this order.

**HANDED DOWN AT JOHANNESBURG ON THIS 15TH DAY OF MARCH
2021.**



T. Murombo
Additional Member of the Tribunal
(Panel Chair)