

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER: 56628/2010

DATE:19/08/2011

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In the matter between:

GOEDE WELLINGTON BOERDERY (PTY) LTD

Applicant

and

ATWELL SIBUSISO MAKHANYA N.O.

First Respondent

**THE MINISTER OF WATER AND
ENVIROMENTAL AFFAIRS**

Second Respondent

JUDGMENT

GOODEY AJ:

[1] INTRODUCTION:

1.1) This application concerns the interpretation and application of the National Water Act 36 of 1998 (“the Act”).

1.2) In **essence** the Applicant is seeking an order in terms of sections 6 and 8 of the Promotion of Administrative Justice Act 3 of 2000 reviewing and setting aside the decision taken on 5 May 2010 by the First Respondent, dismissing the Applicant's appeal against the refusal by the Chief Director: Water Use in the Department of Water Affairs and Forestry of the Applicant's application for a licence to use water from the Berg River.

1.3) The notice of motion reads as follows:

- "1. An order in terms of sections 6 and 8 of the Promotion of Administrative Justice Act 3 of 2000 reviewing and setting aside the decision taken on 5 May 2010 by the First Respondent, in his capacity as an additional member of the Water Tribunal, dismissing the Applicant's appeal against the refusal on 11 April 2008 by the Chief Director: Water Use in the Department of Water Affairs and Forestry of the Applicant's application for a licence to use water from the Berg River to which ECPA Boerdery (Pty) Ltd is currently entitled;*
- 2. An order substituting for the decision of the First Respondent described in paragraph 1 above the following decision:*

- “1. The appeal by Goede Wellington Boerdery (Pty) Ltd against the refusal on 11 April 2008 by the Chief Director: Water Use in the Department of Water Affairs and Forestry of the Applicant’s application for a licence to use water from the Berg River to which ECPA Boerdery (Pty) Ltd is currently entitled, is upheld.*
- 2. The said licence is granted to Goede Wellington Boerdery (Pty) Ltd.”;*
- 3. In the alternative to paragraph 2, an order referring the appeal described in paragraph 1 above back to the Water Tribunal for reconsideration;*
- 4. In the alternative to paragraphs 1, 2 and 3:*

 - 4.1 an order extending to the date of service or issuing of this application, whichever is the later, the period of 21 days in section 149(2) of the National Water Act 36 of 1998;*

- 4.2 *an order that this application be deemed to be an appeal in terms of section 149 of the Act against the decision taken on 5 May 2010 by the First Respondent described in paragraph 1 above on the ground that the First Respondent erred and misdirected himself and did not comply with section 27(1) of the Act, read with Item 6(3) of Schedule 6 thereto, by determining the appeal with reference solely to the factor in section 27(1)(b) of the Act and evidence in relation to that factor, alternatively with inadequate regard to the other factors in section 27(1) of the Act and the evidence in relation to those factors;*
- 4.3 *an order that the appeal described in paragraph 4.2 above be heard and determined together with the application for the relief described in paragraphs 1 and above; and*
- 4.4 *an order upholding the appeal described in paragraph 4.2 above and substituting for the decision of the First Respondent described in paragraph 1 above the following decision:*

- “1. The appeal by Goede Wellington Boerdery (Pty) Ltd against the refusal on 11 April 2008 by the Chief Director: Water Use in the Department of Water Affairs and Forestry of the Applicant’s application for a licence to use water from the Berg River to which ECPA Boerdery (Pty) Ltd is currently entitled, is upheld.*
- 2. The said licence is granted to Goede Wellington Boerdery (Pty) Ltd.”*
- 5. An order directing the First Respondent to pay the Applicant’s costs, including the costs of two counsel, alternatively and in the event of the Second Respondent opposing this application, an order directing the Respondents to pay the Applicant’s costs, including the costs of two counsel, jointly and severally, the one paying the other to be absolved; and*

6. *An order granting the Applicant such further and/or alternative relief as this Honourable Court may deem fit.”*

[2] **IS A JUDICIAL REVIEW POSSIBLE?**

- 2.1) The question which arises is whether or not reviewing and setting aside the decision taken on 5 May 2010 by the First Respondent, in his capacity as an additional member of the Water Tribunal, dismissing the Applicant’s appeal against the refusal on 11 April 2008 by the Chief Director: Water Use in the Department of Water Affairs and Forestry of the Applicant’s application for a licence are possible?
- 2.2) It is common cause that the “ACT” does not provide for any review procedure. The “ACT” is **silent** in this regard.
- 2.3) The further question which arises is whether such procedure should not be allowed in appropriate cases, especially where the First Respondent (*in casu*):

2.3.1 Does not oppose the application:

2.3.1.1 The First Respondent says *inter alia*
the following in paragraphs 3 and 9 of
his affidavit:

a) Paragraph
3 thereof:

“The Applicant has brought a review, alternatively
an appeal against the decision of the Water
Tribunal wherein I was sitting in my capacity as a
member of the Water Tribunal. In addition to the
relief explained herein, the Applicant seeks a cost
order against me in my official capacity for
presumably the judgment that was granted
against the Applicant by myself. ***It is this cost
order that is being opposed***”.

(My emphasis)

b) Paragraph
9 thereof:

"I have consulted with the other members of the Tribunal on this application. In general, the Tribunal does not oppose this application, save for the costs order. We are of the view that the appeals of reviews properly made in terms of the applicable legislations or rules should be ventilated in this Court. We will therefore ***not oppose such applications, appeals or reviews. We will therefore abide the decision of this Court. The only issue that is being opposed is the cost order sought against me, alternatively, against the Tribunal***". (My emphasis)

AND

2.3.1.2 **Concedes** (as counsel on behalf for the First Respondent did during argument) that there might have been incompetency on the part of the First Respondent but the First Respondent (Tribunal) should not be blamed as it has **"no legal expert on board"**.

- 2.4) The Second Respondent in essence argues that since the “ACT” is silent as to a review procedure, it should not be allowed.

2.5) Fact of the matter is:

2.5.1 In terms of section 33 of the Constitution, everyone has the right to reasonable and procedurally fair administrative action. Section 33 of the Constitution reads as follows:

“33. *Just administrative action* –

1) *Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.*

2) *Everyone whose rights have been adversely affected by administrative action has the right to be given*

to be written reasons.

3) *National legislation must be enacted to give effect to these rights, and must –*

a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

*b) impose a duty on
the state to give
effect to the
rights in
subsections (1)
and (2); and*

*c) promote an
efficient
administration.”*

2.5.2 Ostensibly the Second Respondent has complied with section 33(3)(a) by creating an independent tribunal being the First Respondent, the rulings of which a **High Court** will not easily interfere with.

BUT

(a) If the Tribunal (First Respondent) clearly interpreted
the law incorrectly;

and

(b) concedes of having been incompetent;

and

(c) in effect concedes not being an expert body for not having a legal expert on board;

THEN

The High Court can and should interfere.

SEE:

(a) Paragraaf 2.3.2 above;

(b) ***Bato Star Fishing (Pty) Ltd v Minister of
Environmental Affairs and Tourism and Others
2004(4) SA 490 (CC)***

i) The headnote *inter*

alia reads as follows:

“Constitutional law - Separation of powers - Whether judiciary infringing on powers of Executive - Decision of agencies - *D* Court to recognise proper constitutional role of Executive by **treating decisions of administrative agencies with E appropriate respect** - To be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of Government - To give due weight to findings of fact and policy decisions made by those with special expertise and experience in particular field - Extent of such weight to depend on character of decision itself as well as on identity of *F* decision-maker - Court to respect decisions by persons with specific expertise which require equilibrium to be struck between range of competing interests or considerations - To respect route selected to achieve goal - This not meaning that where decision one which would not reasonably result in achievement of goal, or which was not reasonably supported on facts or not reasonable in light of reasons given for it, Court might not review that decision - **Court not to rubber-stamp unreasonable G decision simply because of complexity of decision or identity of decision-maker.**”

Constitutional law - Review - Of administrative action - Allocations of in terms of Marine Living Resources Act 18 of

1998 - Promotion of Administrative Justice Act 3 of 2000 applicable - As PAJA H gives effect to s 33 of Constitution of the Republic of South Africa Act 108 of 1996, matters relating to interpretation and application of PAJA constitutional matters - Applicant not relying on PAJA in notice of motion or founding affidavit - SCA and High Court erring in not considering claims made by applicant in context of PAJA - Permissible to refer thereto only in argument, but it must be clear from facts alleged that section relevant I and operative - Power of Court to intervene in decisions of Executive discussed."
(My emphasis)

- ii) Paragraphs [24] and
[25] read *inter alia* as
follows:

"[24] Section 6 of PAJA identifies the circumstances in which the review of administrative action may take place. PAJA itself provides a definition of 'administrative action' in s 1, but the scope of that definition does not concern us in this case as it is, quite rightly, F common cause that the decision of the Chief Director at issue constitutes administrative action as contemplated by PAJA. Section 6 provides that:

'(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an

administrative action. G

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

(a) the administrator who took it -

(i) was not authorised to do so by the empowering provision;

(ii) acted under a delegation of power which was not authorised by the empowering provision; or H

(iii) was biased or reasonably suspected of bias.

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

(c) the action was procedurally unfair;

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

(e) the action was taken -

(i) for a reason not authorised by the empowering provision; B

(ii) for an ulterior purpose or motive;

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;

(iv) because of the unauthorised or unwarranted dictates of another person or body;

(v) in bad faith; or C

(vi) arbitrarily or capriciously;

(f) the action itself -

(i) contravenes a law or is not authorised by the empowering provision; or

(ii) is not rationally connected to -

(aa) the purpose for which it was taken;

(bb) the purpose of the empowering provision;

(cc) the information before the administrator; or

(dd) the reasons given for it by the administrator; D

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

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

(i) the action is otherwise unconstitutional or unlawful.

(3) If any person relies on the ground of review referred to in ss (2)(g), he or she may in respect of a failure to take a decision, where -

- (a) (i) *an administrator has a duty to take a decision; F*
- (ii) *there is no law that prescribes a period within which the administrator is required to take that decision; and*
- (iii) *the administrator has failed to take that decision, institute proceedings in a court or tribunal for judicial review of the failure to take the decision on the ground that there has been unreasonable delay in taking the decision; or G*
- (b) (i) *an administrator has a duty to take a decision;*
- (ii) *a law prescribes a period within which the administrator is required to take that decision; and*
- (iii) *the administrator has failed to take that decision before the expiration of that period, H institute proceedings in a court or tribunal for judicial review of the failure to take the decision within that period on the ground that the administrator has a duty to take the decision notwithstanding the expiration of that period."*

[25] The provisions of s 6 divulge a clear purpose to codify the grounds of judicial review of administrative action as defined in PAJA. I The cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past. And the authority of PAJA to ground such causes of action rests squarely on the Constitution. It is not necessary to consider here causes of action for judicial review of administrative action that do not fall within the scope J of PAJA. As PAJA gives effect

to s 33 of the Constitution, matters relating to the interpretation and application of A PAJA will of course be constitutional matters.”

(My emphasis)

iii) Paragraph [46] *inter*

alia reads as

follows:

“[46] In the SCA Schutz JA held that this was a case which calls for judicial deference [2003(6) SA 40 SCA]. In explaining deference, he cited with approval Professor Hoexter's account as follows: E

*'(A) judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under F which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. **It ought to be shaped not by an unwillingness to scrutinise administrative action, but by a careful weighing up of the need for - and the consequences of -***

judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; G not to cross over from review to appeal. C Hoexter 'The Future of Judicial Review in South African Administrative Law (2000) 117 SALJ 484 at 501-2"
(My emphasis)

- (c) The headnote of ***Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004(7) BCLR 687 (CC)***

"Administrative justice – review – grounds – entrenchment of the constitutional right to administrative justice – relationship between the common law grounds and constitutional grounds – under new constitutional order control of public power always a constitutional matter – only one system of law regulating administrative action grounded in the Constitution – courts' power to review administrative action no longer flowing directly from the common law but from the Promotion of Administrative Justice Act 3 of 2000 and the Constitution – common law informing the provisions of the Promotion of Administrative Justice Act and the Constitution, and deriving its force from the latter – extent to which the common law remaining relevant to administrative review to be developed on a case-by-case basis as courts interpret and apply the provisions of the Promotion of Administrative Justice Act and the Constitution."

2.5.3 In view thereof that the First Respondent admitted in competence with the explanation of not having a legal expert on board (paragraaf 2.3.2 above) it is doubtful that there was compliance with section 33(3) (a). The reasons being:

2.5.3.1 There is no provision for a review procedure, the Act **is silent**;

2.5.3.2 The First Respondent (Tribunal) must, apart from being independent and impartial, also be an expert or at least competent. The only conclusion is that there was no Tribunal at all. The result is that on this basis alone a review should be allowed;

2.5.4 However, if I am not correct as to paragraph 2.5.3 above, then, in any event, the authorities referred to

above, clearly allow a review in appropriate
circumstances;

2.5.5 I am therefore of the opinion that a review in appropriate circumstances and especially in this matter should be allowed.

[3] **THE PROCEDURE WHICH WAS FOLLOWED / SEQUENCE OF EVENTS:**

- 3.1) On **7 March 2006** the **Regional Director: Western Cape of the Department** recommended the approval of the licence application, saying the water will be used more effectively and better on Goede Hoop (Applicant's farm).
- 3.2) On **11 April 2008** the **Chief Director: Water Use in the Department** refused Goede Wellington's application on the ground that it *"does not fulfil the requirements in terms of section 27(1)(b) as it does not promote the redress of past racial and gender discrimination."* (See annexure "ECM8", p.110 of the papers).

- 3.3) On **13 August 2008 Goede Wellington** appealed against the Department's decision to the Water Tribunal established by section 146 ("the Tribunal") [See annexure "ECM10", p.113 of the papers].
- 3.4) On **5 May 2010** the First Respondent ("**Mr Makhanya**"), in his capacity as an additional member of the Tribunal dismissed the appeal by Goede Wellington against the Department's decision.
- 3.5) On **1 October 2010 Goede Wellington** applied for judicial review of the Tribunal's decision under section 6 and 8 of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").

[4] **BACKGROUND (not in dispute):**

- 4.1) The background is as briefly set out hereinafter.
- 4.2) The **Applicant** ("Goede Wellington") is the owner of the farm Goede Hoop on the banks of the Berg River

in the Western Cape Province. It is currently entitled to irrigate 102.8 hectares of Goede Hoop using water from the Berg River. Its entitlement is 5 000 cubic metres per hectare per annum.

- 4.3) **ECPABoerdery (Pty) Ltd** (“ECPABoerdery”), the owner of a nearby farm, is currently entitled to irrigate 87.3 hectares from the Berg River on the same basis.
- 4.4) During **July 2005** ECPABoerdery and the Applicant agreed that ECPABoerdery would surrender to the Applicant its entitlement to irrigate **7 hectares** of its property, on condition that the Applicant obtained a licence under the Act to use the water on Goede Hoop. The water is surplus to EPCA’s farming requirements following *inter alia* its changeover from sprinkler irrigation to drip irrigation.
- 4.5) The Applicant needs the water to irrigate a new citrus orchard aimed at producing fruit for export.
- 4.6) The aforesaid agreement was subject to **section 25** of the ACT in that the Applicant had to apply for a

licence to use the water surrendered by ECPABoerdery and the surrender/usage only becomes effective upon the licence being granted.

4.7) On **25 November 2005** the Applicant applied to what was then the Department of Water Affairs and Forestry ("the Department") for a licence under section 41, to irrigate 7 hectares of its land with the equivalent part of ECPABoerdery's entitlement, i.e. for the transfer of 7 hectares of ECPABoerdery's entitlement under section 25.

4.8) In a nutshell, the application was motivated as follows as per paragraphs 5.1 to 5.4 of the Applicant's heads:

"1.1 The citrus orchard will be established on undeveloped, good-quality ground, which would otherwise be underutilised.

1.2 *After the planting of the citrus orchard, additional employees will be appointed and trained to work year-round and in addition seasonal workers will be appointed annually in the early winter (a time when there is little employment for them) to assist with the harvest.*

- 1.3 *The irrigation water will enable the production of high-quality citrus for the export market, with the concomitant benefits of advancing economic growth and earning foreign exchange.*

1.4 *As the trees will bear fruit for 30+ years, the socio-economic benefits of the orchard will be realised for a long period into the future.”*

4.9) As I have pointed out in paragraph [3] above, the Second Respondent refused the application and the First Respondent dismissed the appeal.

[5] **THE LEGISLATIVE FRAMEWORK:**

(5.1) As I have indicated above, this is an application in terms of section 41 of the ACT (the granting of the licence being the first application which was lodged for the Second Respondent to consider).

(5.2) Sections 40 and 41 provide for the form and contents of licence application and the procedures for making and determining licence applications.

(5.3) The considerations that must be taken into account are set out in **section 27** which reads as follows:

“27 Considerations for issue of general authorisations and licences:

- (1) *In issuing a general authorisation or licence a responsible authority must take into account all relevant factors, **including-***
 - (a) *existing lawful water uses;*
 - (b) *the need to redress the results of past racial and gender discrimination;*
 - (c) *efficient and beneficial use of water in the public interest;*
 - (d) *the socio-economic impact-*
 - (i) *of the water use or uses if authorised; or*
 - (ii) *of the failure to authorise the water use or uses;*
 - (e) *any catchment management strategy applicable to the relevant water resource;*
 - (f) *the likely effect of the water use to be authorised on the water resource and on other water users;*
 - (g) *the class and the resource quality objectives of the water resource;*
 - (h) *investments already made and to be made by the water user in respect of the water use in question;*
 - (i) *the strategic importance of the water use to be authorised;*
 - (j) *the quality of water in the water resource which may be required for the Reserve and for meeting international obligations; and*
 - (k) *the probable duration of any undertaking for which a water use is to be authorised.”*

(My emphasis)

- (5.4) **The purpose** of the ACT is set out in section 2 which reads as follows:

“2 Purpose of Act

*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;*
- (b) promoting equitable access to water;*
- (c) redressing the results of past racial and gender discrimination;*
- (d) promoting the efficient, sustainable and beneficial use of water in the public interest;*
- (e) facilitating social and economic development;*
- (f) providing for growing demand for water use;*
 - (g) protecting aquatic and associated ecosystems and their biological diversity;*
- (h) reducing and preventing pollution and degradation of water resources;*
 - (i) meeting international obligations;*
- (j) promoting dam safety;*
- (k) managing floods and droughts,*
and for achieving this purpose, to establish suitable institutions and to ensure that they have appropriate community, racial and gender representation.”

(My emphasis)

- (5.5) It is clear that the **considerations** in **section 27** are designed to give effect as to the **purpose** of the ACT, referred to in **section 2**.
- (5.6) **Section 7** of the Act provides that “[t]he Minister, the Director-General, an organ of state and a water management institution must give effect to the national water resource strategy when exercising any power or performing any duty in terms of this Act.”
- (5.7) In **Chapter 3** of the NWRS (National Water Resource Strategy) it is stated that “[a]ll licence applications... must be evaluated against the factors specified in section 27 of the Act. The responsible authority must carefully consider **all of these factors** to determine the extent to which a proposed water use satisfies the Act’s requirements for equity, sustainability and efficiency.” (My emphasis).
- (5.8) It should also be pointed out that one of the relevant considerations is that it should be taken into account the “social benefits of the water use, such as the

*extent to which people **depend on water use for employment***" (My emphasis).

(5.9) **Section 148(1)(f)** of the Act provides for an appeal to the Tribunal against a decision of a responsible authority on a water licence application under **section 41**.

(5.10) **Item 6(1) of Schedule 6** of the Act provides that an appeal to the Tribunal must be heard by one or more members, as the chairperson may determine, and **item 6(3)** adds that an appeal takes "***the form of a rehearing***" and that the Tribunal may receive evidence.

[6] **APPLICANT'S (GOEDE) COMPLAINTS/SUBMISSIONS:**

(6.1) The Applicant points out (correctly so to my mind) that section 6(2)(d) of PAJA provides that a Court may review administrative action if it was materially influenced by an error of law.

(6.2) The Applicant submits that the tribunal (First Respondent) is guilty of having committed a

mistaken interpretation and application of section 27(1) of the Act.

(6.3) The Applicant says the following in paragraph 34 and 35 of its heads:

“1. Goede Wellington contends that the Tribunal adjudicated the appeal as if the factor provided for in section 27(1)(b) of the Act is a prerequisite for the granting of a water licence, and that it accordingly **did not consider all relevant factors as required by section 27(1) of the Act.**

2. This was **also the approach of the Department** when deciding the original licence application. The Department now denies this in its affidavit. However, its explanation in its affidavit of the substance of its reasoning in respect of Goede Wellington’s application for a licence (and its concomitant defence of the Tribunal’s decision) makes it clear that it does indeed regard compliance with section 27(1)(b) as a prerequisite, **and that it does not balance all the factors listed in section 27(1).**”

(My emphasis)

(6.4) The further argument of the Applicant is that the tribunal failed to consider all relevant considerations and made a material mistake of fact.

6.4.1 In this regard reference is made to ***Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae) 2006(2) SA 311 (CC) para 530*** where Ngcobo J (as he then was) held as follows:

“The Pricing Committee and the Minister must apply their mind to all relevant and material information placed before them. They must properly evaluate such information and attach such weight to it as the degree of its importance requires. They should not pay lip-service to this obligation.”

6.4.2 In paragraphs 47 and 48 the Applicant submit as follows:

“47. The Tribunal did not consider ten of the eleven factors listed in section 27(1) of the Act because it mistakenly thought the real dispute between the parties was **“whether or not the need to redress the results of past racial and gender discrimination was in favour of the granting of the licence in question”**. That mistake was material because the primary dispute between the parties was whether or not “compliance” with the factor listed in section 27(1)(b) of the Act was a prerequisite for the granting of a licence application (the Department’s approach), or whether that factor was, instead, one of eleven to be considered by the Tribunal (Goede Wellington’s contention).

(My emphasis)

48. By confining its deliberations to whether the licence application complied with section 27(1) (b) of the Act, apparently because the Chief Director had **“advanced no reason in opposition of the appeal other than the transformation factors as set out in its letter**

of decision” the Tribunal failed to determine the licence application, as it was required to do, by taking into account all the relevant factors and the extensive evidence in relation to those factors, including the evidence provided by Goede Wellington and in the Regional Director’s report.”

- (6.5) The Applicant further submits that **the Tribunal failed to comply with a mandatory and material procedure or condition.** The argument in this regard in essence boils down to the following:

6.5.1 **PAJA** (Section 6(2)(b)) provides that a Court may review and set aside in administrative action on the grounds that “*a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;*”

6.5.2 The decision-maker (including the Tribunal) is required as per section 27(1) of the **ACT** to take into account “*all relevant factors*” when deciding whether

to grant an application for a water licence, and lists **eleven** such relevant factors which must be considered. That requirement is a prescribed precondition for the exercise of the discretionary power. *[See: Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Others (no 1) 2008 (3) SA 91 (E) para 67].*

(6.6) It is also submitted that the Tribunal's decision was materially influenced by an error of law.

6.6.1 In a nutshell, the argument in this regard is that the **TRIBUNAL** believed that all eleven factors to be taken into account as per section 27(1) of the ACT, were all **embedded** in one overriding consideration, namely that the past racial and gender discrimination must/should be addressed [Section 27(1)(b)] and thereby disregarding the other ten factors referred to in Section 27(1) of the ACT.

6.6.2 The aforesaid (so the argument goes) is clearly an

error of law which influenced the decision of the Respondents.

(6.7) The Applicant further argues that **the Tribunal failed to apply its mind to the matter properly.**

6.7.1 In believing that all the factors in Section 27(1) are embedded in redressing past discrimination [paragraph (6.6) above] (so the argument goes) was not only an error of law but also confirmation that the Respondents had not apply their minds properly to the matter.

6.7.2 The aforesaid is further enhanced by the fact that it appears that several of the Tribunal's statements in the appeal decision have been copies from an earlier decision by the Tribunal on a similar appeal.

[7] **FIRST RESPONDENT'S ARGUMENT:**

(7.1) I have already pointed to the fact that the First Respondent does not oppose this application (except the cost order) – see **paragraph 2.3.1.1 above**;

(7.2) Further the First Respondent conceded that it may have been incompetent as it had no legal expert on board – see **paragraph 2.3.1.2 above**.

[8] **SECOND RESPONDENT'S ARGUMENT:**

(8.1) The Second Respondent submits in paragraph 3 of its heads:

“3. *The quantity of the water transferred is immaterial. The issue here is that once transferred and authorised in terms of section 41, the water changes its legal status from existing water use to licence use. An existing water use has no legal protection because at any time the department can subject it to*

compulsory licensing and it may be allocated to another user.”

- (8.2) I do not quite follow the argument in that the water to be transferred is already “**licenced use water**” as it is currently under “**licence**” of **ECPABoerdery**. I can only deduct that what is meant is that ECPA is using the water (to be transferred under licence to the Applicant) under **entitlement** and this would then (in the hands of the Applicant) become usage under a **licence**.
- (8.3) The Second Respondent further in essence argues that since the “ACT” is **silent** as to a review procedure, it should not be allowed.
- (8.4) It also submits the only dispute between the Applicant and the Second Respondent which the Tribunal was required to decide, was whether the Applicant satisfied the provisions of section 27(1)(b) of the Act.
- (8.5) Lastly, it persist that no review is possible in terms of

PAJA.

[9] **DISCUSSION:**

(9.1) I have already stated (paragraph [2]) above that I am of the opinion that a review in appropriate circumstances and especially in this matter should be allowed (paragraph 2.5.5 above).

(9.2) I am convinced that I could not and should not come to any other conclusion than that the First Respondent mistakenly misinterpreted Section 27(1) of the ACT and in so doing committed an error of law which further led to its decision being materially influenced by it. In this regard it is clear from the papers that the Tribunal adjudicated the appeal as if the factor provided for in Section 274(1)(b) of the ACT is a prerequisite for the granting of a water licence, and that it accordingly did not consider all relevant factors as required by Section 27(1) of the ACT.

(9.3) I also agree with the Applicant that it was also the approach of the Department when deciding the

original licence application.

(9.4) I cannot find anything to the contrary, other than that the First Respondent, in believing that all the factors in Section 27(1) are embedded in redressing past discrimination [paragraph (6.6) above] was not only an error of law but also confirmation that the Respondents had not applied their minds properly to the matter.

(9.5) The extent to which the First Respondent has applied his mind is also questionable in view thereof that it appears that several of the Tribunal's statements in the appeal decision have been copies from an earlier decision by the Tribunal on a similar appeal.

(9.6) In view of the aforesaid, I am of the opinion that the decision taken on the 5th May 2010 should be set aside.

(9.7) What now has to be considered is whether I should

give an order, substituting the Tribunal's decision. In this regard Section 8(1) of PAJA provides that a Court, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders setting aside the administrative action and remitting the matter for reconsideration by the administrator [s8(1)(c)(i)] and in **exceptional cases** substituting the administrative action [s8(1)(c)(ii)(aa)].

(9.8) *In casu* there were not serious arguments against substitution from the Respondents.

(9.9) The Applicant, on the other hand, submits as follows in paragraph 71 of its heads:

"71 The exceptional circumstances in this case are the following:

71.1 The primary issue raised by the appeal to the Tribunal, namely whether or not "compliance" with the factor listed in section 27(1)(b) of the Act is a prerequisite for the granting of a licence

application, is a question of law, which the Court is at least as well qualified as the Tribunal to decide.

71.2 *If all the prescribed factors and the evidence in relation to them are taken into account, the only reasonable decision that can be reached is that Goede Wellington's licence application should be granted. As the Tribunal recorded in its decision, the only reasons for opposing the appeal advanced by the Department were the transformation factors set out in letter of decision. It will consequently be a waste of time to send the appeal back to the Tribunal for reconsideration.*

71.3 *Further delay will cause unjustifiable prejudice to Goede Wellington. The trees in the citrus orchard were planted four and six years ago and they require the additional water as soon as possible in order to develop and produce to their full potential.*

71.4 *All in all, the decisions of the Chief Director and the Tribunal in this matter display an alarming degree of ineptitude, a lack of appreciation of*

what is required and a lack of judgment, rationality and common sense. The Tribunal in particular has shown serious incompetence.”

(9.10) I find myself in agreement with the aforesaid argument.

(9.11) Costs

9.11.1 It is trite law that costs are in my discretion;

9.11.2 The argument in this regard is ably summarised by the Applicant in paragraphs 77 and 78 of its heads which read as follows:

“77. As stated earlier, Mr Makhanya abides the decision of this Court save that he opposes the costs order sought against him in his official capacity. Where a tribunal has acted in a quasi-judicial capacity, although the general rule is not to award costs against it if it has acted bona fide but incorrectly in purportedly

discharging its duty, the Court retains a discretion on the issue of costs. For the reasons given above in relation to the substitution of this Court's decision for the decision of the Tribunal, it is submitted that a costs order against Mr Makhanya, in his official capacity not his personal capacity, should be made. In this regard we point out that as the expenditure of the Tribunal must be defrayed out of money appropriated for that purpose by Parliament or from any other source, in terms of section 147(3) of the Act, like the costs order Goede Wellington seeks against the Minister, the costs order it seeks against Mr Makhanya will be met by State funds.

78. *The Minister opposes the substantive relief sought, and in addition argues that there is no basis for a costs order against her "merely on the basis of opposition to this application". However, as explained above, despite its protestations to the contrary, the Department has persisted with its initial view that in order for the licence application to be granted, Goede Wellington had to satisfy the provisions of*

section 27(1)(b) of the Act. That was the basis of the original decision and of the Department's evidence before the Tribunal, and that is the basis of the Minister's opposition to this application now. If the grounds of review or appeal are upheld, Goede Wellington will have been put to the trouble and expense of instituting the present High Court proceedings and dealing with the Department's opposition. There is no good reason why Goede Wellington should not be entitled to recover its costs from the Department, if it is successful in these proceedings."

9.11.3I also do not lose sight of the following:

9.11.3.1 Expertise (or at the very least competency) can be expected from an independent **TRIBUNAL**;

9.11.3.2 The correct interpretation of the law can

be expected from such **TRIBUNAL**;

9.11.3.3 It can be expected from such **TRIBUNAL** that it will properly apply its mind to matters it adjudicates on;

9.11.3.4 It can be expected of such **TRIBUNAL** that if it realises that it needs a legal expert on board that it would obtain such expertise;

9.11.3.5 The First Respondent did not comply with any of the aforesaid and over and above conceded incompetency;

9.11.3.6 The Second Respondent persists in opposing the application.

9.11.4 In view of the aforesaid, it would be unjust that costs not be awarded to the Applicant.

[10] **THEREFORE, I MAKE THE FOLLOWING ORDER:**

1. The decision taken on 5 May 2010 by the First Respondent, dismissing the Applicant's appeal against the refusal by the Chief Director: Water Use in the Department of Water Affairs and Forestry of the Applicant's application for a licence to use water from the Berg River is reviewed and set aside.

2. The said decision is substituted with the following:

- "1. The appeal by Goede Wellington Boerdery (Pty) Ltd against the refusal on 11 April 2008 by the Chief Director: Water Use in the Department of Water Affairs and Forestry of the Applicant's application for a licence to use water from the Berg River to which ECPA Boerdery (Pty) Ltd is currently entitled, is upheld.*
- 2. The said licence is granted to Goede Wellington Boerdery (Pty) Ltd."*

3. The Respondents are to pay the Applicant's costs, including the costs of two counsel, jointly and severally, the one paying the other to be

absolved.

GOODEY AJ

Date heard: 06/08/2011

Date of Judgment: 19/08/2011

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