



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

[REPORTABLE]

Case no: 22969/2023

In the matter between:

IZAK SCHALK WILLEM VAN ZYL N.O

First applicant

JOHANNA GERTRUIDA VAN ZYL N.O

Second applicant

SIMON PETRUS VAN BLERK N.O

Third applicant

(in their capacities as trustees of
the ISW Van Zyl Trust)

HENDRICK GIDEON LOUW

Fourth applicant

and

THE MINISTER OF WATER & SANITATION

First Respondent

THE DEPARTMENT OF WATER & SANITATION

Second Respondent

THE CHIEF DIRECTOR: WATER USE & AUTHORIZATION

MANAGEMENT, DEPARTMENT OF WATER & SANITATION

Third Respondent

CEDERBERG MUNICIPALITY

Fourth Respondent

Coram: Sher J

Summary: Water-National Water Act 36 of 1998- Sections 24, 27 and 41(4)- Application in terms of s 24 for a licence to use water found underground on land not owned by the applicant. May be granted if the owner consents or if there is good reason-Applicant for such a licence required to notify the owner and engage them with a view to obtaining

their consent- A responsible authority may not dispense with a landowner's consent without them being notified of the application and being given a reasonable opportunity to make representations or submissions in respect thereof. On a proper interpretation of ss 24 and 27, read with the preamble to the Act and its purposes, when considering whether to issue a water use licence a responsible authority is required to have regard for all water uses, not only existing lawful registered uses. Although the provisions of s 41(4)(a) and (b) are phrased in permissive terms, they are not purely discretionary and confer a power on the responsible authority to require an applicant for a water use licence to give notice thereof to interested persons, and a duty to exercise such power in appropriate circumstances. *Held* that as the applicants were landowners and, as such, interested persons whose rights might be affected by the grant of the licence in terms of s 24 the responsible authority was under a duty to ensure they were given notice thereof by the fourth respondent municipality.

ORDER

1. The decision by the 3rd respondent on 23 March 2023 to issue a water use licence (number 01/G30G/AB/10089) to the 4th respondent, allowing it to abstract a combined total volume of 567 648 m³ of groundwater per annum from boreholes 'LR1', 'OD514' and 'KKL5' on the applicants' land for a period of 20 years, and the licence itself, are reviewed and set aside.
2. The 4th respondent is granted leave, if so minded, to resubmit an application for a water use licence for the supply of groundwater for Lambert's Bay from boreholes 'LR1', 'OD514' and 'KKL5', to the 3rd respondent for reconsideration, who in doing so shall have due regard for the judgment in this matter and any submissions or representations which may be made by the applicants in respect of such application.

3. The operation of the order in paragraph 1 is suspended for a period of 18 months or until the 3rd respondent has reconsidered and made a decision in respect of the 4th respondent's fresh application for a water licence in terms of paragraph 2, whichever is the earlier.
4. The parties are granted leave to approach the court (on the same papers duly supplemented), to request an extension of the suspension of the order in paragraph 1, and/or for any further or ancillary relief thereto, should that be necessary.
5. The respondents shall be liable jointly and severally (the one paying the other to be absolved), for the applicants' costs, which shall include the costs of two counsel where so employed, one on scale C and one on scale B.

JUDGMENT DELIVERED (VIA EMAIL) ON 9 JULY 2026

SHER J:

1. This is an application to review and set aside a decision which was taken on 23 March 2023 by the Chief Director: Water Use Authorisation Management, of the Department of Water and Sanitation, to grant a water use license to the Cederberg municipality in terms of the National Water Act¹ ('the NWA'), which allows it to abstract groundwater for the town of Lambert's Bay from three boreholes, one of which is situated on land which is owned by the ISW Van Zyl Trust and two on land owned by the 4th applicant. The properties, which adjoin one another as portions 3 and 6 of the farm Klein Klipheuvel, are used for the commercial farming of vegetables and potatoes.

The relevant facts and circumstances

2. Lambert's Bay is a small town on the West Coast which obtains its entire municipal water supply from groundwater, which was initially abstracted from

¹ Act 36 of 1998.

boreholes in a well field in the Wadrif aquifer, an area about 15 km south of the town. Due to the rate of abstraction, over the course of time the water levels in the well field dropped, its yields declined, and the quality of the water which was drawn from it deteriorated.

3. Although high rainfall in 2007 and 2008 replenished the aquifer's water levels, as an adjacent salt pan was inundated the groundwater became increasingly saline, rendering it unfit for human consumption. Because of this, and in the light of an imminent shortage of potable water for Lambert's Bay, in 2008 a 'production' borehole, 'OD514', was installed on 4th applicant's land with his consent, but with the closure of further boreholes in the Wadrif well field it was insufficient to meet the demands of the town's water supply. The 4th applicant then agreed to supplement it with water taken from his own private borehole, 'KKL5', (which had been installed in 2000), which was used as a back-up supply during times of peak demand, largely in the summer months.
4. In 2009 the municipality also entered into an agreement with the previous owner of the adjoining Trust's land for the installation on it of a 'production' borehole, 'LR1', at the municipality's cost. In terms of the agreement the owner was to be paid an agreed rate per kilolitre for water which was abstracted from it. In 2016, after the Trust acquired the property, it entered into a substitute agreement which allowed the municipality to abstract water at an increased rate per kilolitre, for 3 years. In 2019 the agreement was extended to 2021, when it came to an end, as the parties were unable to agree on an increased rate of payment for the continued abstraction of water.
5. Despite both this agreement and the one in respect of OD514 having come to an end by 2021, the municipality continued nonetheless to abstract water from the boreholes. This prompted the Trust to launch an application in July 2021 for an order compelling the municipality to remove the installation at LR1 and rehabilitate its property. On 18 November 2021 the parties agreed to an order directing the municipality to remove its equipment and evicting its employees (who were in possession of the installation), which was suspended for a period of 6 months, until 31 May 2022. The municipality did not comply with the order by

the due date. On 21 June 2022 it was extended, by agreement, till the end of the month.

6. As the municipality had still not removed the borehole installation by 30 June 2022 and continued to take water from it, the Trust launched an application to hold it in contempt. The MEC for Local Government and the Department of Water and Sanitation were joined to the proceedings and requested a stay of execution of the November 2021 order, pending the municipality sourcing an alternative supply of water from the northern Cape.
7. As this did not materialize, in November 2022 the Trust removed the borehole pump from the installation at LR1 and blocked access to it by the municipality. On 2 December 2022 the municipality obtain a spoliation order directing the Trust to restore it in its possession of the facility.
8. In August 2023, shortly before the contempt application was due to be heard, the Trust's attorneys received a letter from the municipality's legal representatives in which they were notified that a water use license had been issued to the municipality some 5 months earlier by the Chief Director: Water Use Authorisation Management, whereby it was granted the right to abstract water from the three boreholes, for a period of 20 years. As a result, the contempt application was rendered moot.
9. From the respondent's affidavits it appears that the application for a water use license was submitted to the Department by the municipality's Manager for Water Services, in April 2019. It was supported by a geo-hydrological report which had been prepared by Geohydrological & Spatial Solutions international (Pty) Ltd ('GEOSS'). In July 2019 the Department conducted a site visit and in October 2019 it requested the municipality to provide further information.
10. On 6 January 2020 a 'DW 902 consent' form, which had been signed by the GEOSS consultants, ostensibly on the authority of the municipality's Manager of Water Services, was submitted to the Department. As the form is one which is to be submitted by a landowner, granting permission for the installation of a water extraction resource on its land,² the Department requested the municipality to

² Pursuant to the provisions of s 24 of the NWA.

submit a DW 902 which was completed and signed by the Trust. In May 2020 the Manager of Water Services advised that the Trust had been unwilling to give access for an 'investigation' i.e. drilling and testing (sic) and any further borehole 'development' on its land, and had demanded an unreasonable tariff of R7 per kilolitre for water which was to be extracted from LR1, after rejecting the municipality's proposal for a tariff of R0.39 cents per kilolitre. Thus, the Manager requested that the Department intervene.

11. Despite this request, from the papers it does not appear that the Department made any attempt to formally contact the Trust and request its consent, as landowner, to the issue of a water use license allowing the municipality to abstract water from borehole LR1. There is similarly no indication on the papers that any attempt was made to obtain the consent of the 4th applicant in relation to the municipality's request for a water use license allowing it to abstract water from boreholes OD514 and KKL5, and no DW 902 form was seemingly submitted by, or in respect of, 4th applicant.
12. The record of the decision is voluminous. For the purposes of the judgment it is not necessary to traverse chapter and verse of it, and a synopsis thereof will do. It sets out the background circumstances which gave rise to the application (including particulars of the water demand and supply required for Lambert's Bay having regard for its population at the time), the location of the boreholes from which water was to be drawn, a summary of the technical information which was contained in the GEOSS report (including water yield and monitoring data for each borehole and specifications as to the Wadrif groundwater reserve), and the water uses applied for with reference to the cubic metres per annum abstraction rates proposed for each borehole and the impacts thereof, and mitigation measures which would be implemented. It also contained a detailed discussion of the relevant factors, in terms of s 27 of the NWA, which were considered. These were said to include (a) existing water uses (b) the need to redress past racial discrimination (c) the need for the efficient and beneficial use of water in the public interest (d) the socio-economic impact of the proposed water use if it

was authorised and if it was not, and (e) the likely impact of the proposed water use on the water resource and on other water users.

13. After having regard for the foregoing information, on 13 March 2020 the Department's Water Use License Application Manager recommended that a licence be granted to the municipality, in terms of ss 40-42 of the NWA, whereby it would be allowed to abstract a combined total of 567 648 m³ of groundwater per annum from the three boreholes for a period of 20 years, which licence would be renewable at 5-year intervals thereafter. Because of the litigation that ensued between the Trust and the respondents between July 2021 and December 2022, the further process required for the consideration and approval of the recommendations was placed on hold pending the outcome thereof. The recommendations were eventually accepted by the Chief Director, who authorised a licence in such terms, on 23 March 2023.

The applicants' challenge

14. The applicants seek to review the grant of the licence on several grounds, both procedural and substantive. In relation to the former they point out that despite having an interest, as landowners, in the grant of the licence, they were never formally given notice of the application which was lodged by the municipality. As a result they were not given an opportunity to object to the application or to provide their input and views in relation to it, and were consequently deprived of their right to appeal the grant of the licence to the Water Tribunal ³ because, in terms of the NWA only objectors to an application for the grant of a water use licence are entitled to lodge an appeal.⁴ As a result they also lost their limited further right, if warranted, to appeal the decision of the Water Tribunal to the high court.⁵

³ The Water Tribunal, which is established in terms of Ch 15 of the NWA, may hear appeals against certain decisions which are taken by a 'responsible authority'.

⁴ Section 148(f), read with s 41(6), provides that only an unsuccessful applicant or any other person who has timeously lodged a written objection to an application for a water use licence may lodge an appeal against a decision pertaining thereto.

⁵ The preamble to Ch 15 notes that a person who is aggrieved by a decision of the Water Tribunal may appeal it to the high court, on a question of law.

15. The applicants contend that the notice provisions which are set out in s 41(4) of the NWA, although framed in permissive terms, should be interpreted and understood as mandatory, and it should be held that the respondents' failure to comply with them renders their decision reviewable in terms of the relevant provisions⁶ of the Promotion of Administrative Justice Act ('PAJA').⁷
16. In addition, they contend that the decision also falls to be set aside on substantive grounds, as it was irrational and failed to have regard for, or take into account, several material factors and considerations.⁸ These include the historical over-abstraction of groundwater from boreholes on the Wadrif aquifer, and the fact that the use of groundwater as a source of water for Lambert's Bay was always intended to be a temporary solution and not a permanent one. Consequently, they submit that for these and other reasons the means which were adopted by the respondents and the process which they followed were not rationally connected to its ends, or to the purpose of the licensing provisions of the NWA.⁹
17. In their response the respondents contend that as the notice provisions of s 41(4) are permissive and discretionary, not mandatory, and as the applicants were not existing lawful water users,¹⁰ they had no rights or lawful interest in the application and were not entitled to receive notice of it. They point out that PAJA only provides¹¹ that administrative action which materially and adversely affects a person's 'rights' must be procedurally fair, and in the seminal decision in *Grey's Marine*¹² the SCA accepted that the term does not 'encompass interests that fall short of that'. They note further that, in terms of regulation 3 of the Water Use Regulations,¹³ any person utilizing water (other than for domestic purposes) is required to register their use, which none of the applicants had done.

⁶ Section 3(2)(b)(i).

⁷ Act 3 of 2000.

⁸ Contra s 6(2)(e)(ii) of PAJA.

⁹ Contra s 6(2)(f)(ii) of PAJA.

¹⁰ Sections 32(1)- (2) define what constitutes an 'existing lawful water use'.

¹¹ Section 3(1).

¹² *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA) para 30.

¹³ Published in GN R1352, GG 20606 of 12 November 1999.

18. Consequently, so the respondents contend, the applicants were not deprived of an opportunity to object to the grant of the licence as they did not enjoy any right to do so and were likewise not deprived of an opportunity to appeal its grant.
19. Finally, the respondents contend that the substantive challenge must fail as the relevant functionaries had due and proper regard for all the relevant considerations that were applicable, including those set out in s 27 of the NWA, and the decision to award the licence was therefore neither arbitrary nor irrational.

The relevant provisions of the NWA

20. In its preamble the NWA recognizes that water is a scarce and 'unevenly distributed' national resource which belongs to all people in SA, and the national government exercises overall responsibility and authority over it. In doing so its functions include the 'equitable allocation' of water for beneficial use and its redistribution.
21. The Act is a lengthy statute, which is structured into 17 chapters, each of which is divided into several parts. Those chapters which are principally applicable to a determination of the issues in this matter are chps. 1 and 4.
22. Chapter 1 sets out how the Act is to be interpreted and its fundamental principles. To this end s 1 sets out certain definitions and principles of interpretation, and s 2 sets out the Act's purposes, which are to ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled in ways which take into account a range of listed factors, including (a) meeting the basic human needs of present and future generations (b) promoting equitable access to water (c) redressing the results of past discrimination (d) promoting the efficient, sustainable and beneficial use of water in the public interest (e) facilitating social and economic development, and (f) providing for the growing demand for water use. 'Protection' of a water resource means maintaining its quality 'to the extent' that it is used in an ecologically sustainable manner and preventing its degradation. Section 4 deals with the entitlement to use water and must be read with the proviso in s 151(1) that no person may use water otherwise than as permitted under the Act. It states that a person may either

- continue with an 'existing lawful water use',¹⁴ or may use water in terms of a 'general authorisation or licence'.¹⁵ Such permitted usage extends to 'reasonable' domestic use, 'domestic' or 'small' gardening (not for commercial purposes), animal 'watering', fire-fighting (in emergency situations) and recreational use'.¹⁶
23. Chapter 4 in turn deals, in detail, with the use of water and its licensing, which can be in the form of either a general authorisation (for a category or group of persons)¹⁷ or an individual license.¹⁸ The chapter is divided into ten parts. Part 1 deals with the general principles applicable to water use. It provides¹⁹ that, in general, a water use must be licensed unless it is listed in Schedule 1, is an existing lawful use, or is permitted under a general authorisation, or the responsible authority waives the need for a licence for it.
24. Part 2 contains provisions which deal with the considerations which must be taken into account (s 27), and the conditions and essential requirements for the issue of general authorisations and licences (ss 28-9), and their essential features.
25. Part 3 deals with 'existing lawful water uses'. In its preamble it states that no licence is required to continue with an existing lawful water use until a responsible authority requires a person who claims such an entitlement, to apply for one. If a licence is issued on such application, it becomes the source of authority for the water use. If it is not the existing use is no longer permissible.
26. Existing lawful water uses are defined in s 32. They are uses which took place at any time during a period of two years immediately prior to the commencement of the NWA (in 1998) and which were authorised by or under any previous law which was in force,²⁰ or those which have been declared to be such in terms of the NWA.²¹

¹⁴ In accordance with s 34.

¹⁵ Sections 4(2)-(3).

¹⁶ Section 4(1) read with Schedule 1 to the Act.

¹⁷ In terms of section 39.

¹⁸ In terms of Ch 4 Part 7, ss 40-41.

¹⁹ In its preamble and ss 22(1)(a)-(c).

²⁰ Section 32(1)(a)(i).

²¹ Section 32(1)(b) read with s 33.

27. Part 6 deals with general authorisations to use water, which may apply to a category of persons, a defined geographical area, or a period of time. Part 7 deals with applications for individual licences (s 40) and the procedure to be followed for them (s 41). Part 8 deals with the procedure which is to be followed for the compulsory licensing of any aspect of water use in respect of resources within a specific geographical area which are under 'water stress' i.e. where the demand for water may exceed the available supply, or where the quality of the water is under threat. Part 9 deals with the review and renewal of licences, and the amendment and substitution of their conditions.
28. The procedure which is to be followed for an application for a licence for a water use is set out in s 41. Section 41(1) provides, in peremptory terms, that the application must be made in the form, and must contain the information determined by, the responsible authority.²²
29. In contrast to this, subsections 41(2)-(4) are largely worded in permissive terms. They provide that when processing an application for a water use licence a responsible authority 'may require' the applicant to do certain things, and it 'may' do certain things.
30. In this regard, to the extent that it is reasonable to do so the authority 'may' require the applicant to obtain and provide it with further information, an assessment by a competent person of the likely effect of the proposed licence on the 'resource quality', and an independent review thereof by a person who is acceptable to it.²³ The responsible authority 'may' conduct its own investigation on the likely effect of the proposed licence on the protection, use, development, conservation, management and control of the water resource in question.²⁴ It 'may' also invite written comments from any organ of state which, or person who, has an interest in the matter.²⁵
31. Similarly, section 41(4) provides that a responsible authority 'may' require the applicant, at any stage of the application process, to take certain steps in relation

²² Sections 41(1)(a)-(b).

²³ Sections 41(2)(a)(i)-(iii).

²⁴ Section 41(2)(b).

²⁵ Section 41(2)(c).

to the application. These include giving 'suitable notice' thereof in newspapers and other media, 'describing' the licence which has been applied for and stating that written objections thereto may be lodged by a date which is no less than 60 days from the date of the publication of the notice.²⁶ In addition, the responsible authority 'may' require the applicant to take 'such other steps' as it 'may' direct to bring the application to the attention of relevant organs of state, interested persons and the general public.²⁷ It 'may' also require the applicant to satisfy it that the 'interests of any other person having an interest in the land' will not be adversely affected by the licence which is sought.²⁸

32. In contrast to this permissive language section 41(2)(d) provides that the responsible authority 'must' afford the applicant an opportunity to make representations to it on any aspect of the licence application.

The principles of interpretation

33. It is trite that when interpreting a provision in a statute a court engages in the unitary exercise of having regard for the text i.e. the language used, in its context, and the purpose of the provision in question.²⁹ In *Capitec Bank*³⁰ the SCA cautioned that this triad of interpretative factors must not be used in a mechanical fashion and it is the relationship between the words used, the concepts expressed by them, and the place of the contested provision within the scheme of the statute as a whole, that constitutes 'the enterprise by recourse to which a coherent and salient interpretation' is arrived at.
34. Insofar as the starting point is the text, words are to be given their ordinary grammatical meaning unless doing so would result in an absurdity. But as meaning depends on and is influenced by context, the text should not be viewed

²⁶ Section 41(4)(a)(i)-(ii).

²⁷ Section 41(4)(b).

²⁸ Section 41(4)(c).

²⁹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

³⁰ *Capitec Bank Holdings Ltd & Ano v Coral Lagoon Investments 194 (Pty) Ltd & Ors* [2021] ZASCA 99; 2022 (1) SA 100 (SCA) para 25.

in isolation, and a construction that promotes the purpose or object which underlies the Act should be preferred above one that does not do so.³¹

35. As to 'ordinary meaning', in *SA Nursing Council*³² the SCA noted that this does not necessarily mean the 'straightforward attribution' of a dictionary meaning of a word to it, as such a meaning may often give rise to further questions, such as for whom this 'ordinary meaning' is intended, as the word may be used in common parlance, and in which community it is used. One must also guard against choosing a dictionary meaning that would best suit a preferred outcome, rather than the meaning that 'best fits' what has been written and the 'larger design' of the instrument which the court is called upon to interpret.³³
36. Statutes must also be construed consistently with the Constitution and, where reasonably possible, should be interpreted in a such a manner as to preserve their constitutional validity.³⁴ In addition, when interpreting any legislation, a court must promote the spirit, purport and objects of the Bill of Rights, where any fundamental rights are implicated therein.³⁵
37. Finally, s 1(3) of the NWA provides that when interpreting any of its provisions a reasonable interpretation which is consistent with its purposes must be preferred over an alternative one which is inconsistent therewith.

An assessment

(a) The use of permissive language

38. Given the provisions of the NWA which have been referred to, it is evident that in order to abstract water lawfully from the three boreholes on the applicants' land the municipality required a licence to do so, for which it applied. In this regard s 24 provides that a licence may be granted to use water which is found underground on the property of another. But this may only occur if the owner of the land consents thereto, or, failing this, if there is 'good reason to do so'.

³¹ *Centaur Mining SA (Pty)Ltd v Moodliar N.O. & Ors* [2026] ZACC 20 para 79, referring to *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC) para 28.

³² *SA Nursing Council v Khanyisa Nursing School (Pty) Ltd* [2023] ZASCA 56; 2024 (1) SA 103 (SCA) para 15.

³³ *Id.*

³⁴ *Centaur* n 31 para 80.

³⁵ Section 39(2) of the Constitution.

39. Given the history of their dealings with the 4th respondent municipality, it is evident that at least the Trust applicants were opposed to it drawing water from their boreholes, unless the Trust was compensated and the rate and quantity of groundwater which was to be abstracted was sustainable, and did not imperil the Trust's farming activities.
40. It is further evident that the 4th respondent did not formally engage any of the applicants in regard to its application for a water use licence. It also never formally requested them to provide their consent, nor did it seemingly ever formally give them notice that if they failed to do so, application would be made to the responsible authority for it to dispense therewith, in terms of s 24.
41. Common sense and fairness dictates that prior to granting a water use licence in terms of s 24 these steps should have been taken. In his answering affidavit the Chief Director said that once it was established that the municipality would not be in contempt of the court if it accessed its infrastructure at the Trust's boreholes in terms of s 80 of the Water Services Act,³⁶ the Trust's consent was 'dispensed' with.
42. The question that requires determination is whether, in the absence of these steps having been taken the responsible authority's grant of the licence was invalid or may otherwise be set aside.
43. In this regard, as previously pointed out the applicants contend that, although the notice provisions of s 41(4) are framed in permissive terms they are not 'purely' discretionary and, in certain circumstances, such as those which feature in this matter, they should be considered to be mandatory, and as such they imposed a duty on the responsible authority to take steps directing the 4th respondent to give them due and proper notice of its application for a licence.
44. The respondents in turn contend that as the applicants were not existing lawful water users, and the provisions of s 41(4) are purely permissive and discretionary, there was no need, or legal obligation or requirement, for them to ensure that the applicants were given notice of the application, or an opportunity to object or provide input in regard thereto.

³⁶ Act 108 of 1997.

45. As to the use of permissive language in statutory provisions, Wade³⁷ has remarked that:
- ‘The hallmark of discretionary power is permissive language using words such as ‘may’ as opposed to obligatory language such as ‘shall’. But, this simple distinction is not always a sure guide, for there have been many decisions in which permissive language has been construed as obligatory. This is not so much that one form of word is interpreted to mean its opposite, as because the power conferred is, in the circumstances prescribed by the Act, coupled with the duty to exercise it in a proper case.’
46. In expanding on this the learned author referred to the comment by Cotton LJ in *Nickalls v Baker*³⁸ that:
- ‘...great misconception is caused by saying that in some cases ‘may’ means ‘must’. It can never mean ‘must’ so long as the English language retains its meaning; but it gives a power, and then it may be a question in what cases, where a judge has a power given him by the word ‘may’, it becomes his duty to exercise it.’
47. As is apparent from the preceding quotes, in its ordinary, literal (dictionary) meaning the word ‘may’ clearly does not equate to ‘must’. How then have courts arrived at interpretations in certain matters that effectively say it does?
48. As Baxter³⁹ further explains, legislation not only empowers administrative authorities but may also place them under a duty to act in certain instances. Whether such a duty exists must be ascertained from the empowering legislation. Whereas the use of the word ‘may’ usually indicates that the administrative authority is merely empowered or enabled to act if, in its discretion, it deems such a course to be desirable, and the use of the injunction ‘must’ or ‘shall’, on the other hand, instead of the permissive ‘may’, could indicate that a positive duty has been introduced, this is not always the case. A proper construction of the legislation may show both that permissive language was employed for enabling purposes and, in addition, that a duty was nonetheless intended.
49. In *Schwartz*⁴⁰ Corbett JA (as he then was) held that while a statutory enactment may therefore be couched in permissive terms, it does not necessarily follow that

³⁷ *Administrative Law* (7th ed) at 265.

³⁸ (1890) 44 Ch D 262.

³⁹ *Administrative Law* (2nd issue) at 410-14.

⁴⁰ *Schwartz v Schwartz* 1984 (4) SA 467 (A) at 473I-474B.

the legislature intended to confer a discretion to exercise it, on a decision-maker. It may have to be construed as making it the duty of the person or authority in whom the power is reposed, to exercise it when 'the conditions prescribed as justifying its exercise' have been satisfied. Whether an enactment is to be so construed depends *inter alia* on the language in which it is couched, the context in which it appears, the general scope and object of the legislation, the nature of the 'thing' (i.e. the act or conduct) which is empowered to be done, and the person(s) for whose benefit the power is to be exercised.

50. In a range of subsequent cases, including decisions of the Transkei High Court in *Vulindlela* (1998)⁴¹ and *Dlisan* (1999),⁴² the SCA in *Groundwork Trust* (2025),⁴³ and the CC in *Van Rooyen* (2002),⁴⁴ *Saidi* (2018),⁴⁵ *Premier, Gauteng* (2021),⁴⁶ *Standard Bank* (2022),⁴⁷ *Zuma* (2025)⁴⁸ and most recently *EFF v The Speaker* (2026),⁴⁹ courts have interpreted the use of the word 'may' in a variety of statutory enactments in line with this approach, holding that on a proper construction it denoted the conferral of a power which was coupled with a duty to exercise it, in appropriate circumstances, rather than a simple discretionary power. In *EFF*⁵⁰ the CC held that as a default 'may' empowers but is 'otherwise neutral on the existence of discretion'.

(b) The proper interpretation of ss 41(4) and 24

51. What the proper construction is which must be placed on the provisions of s 41(4) read with s 24, therefore depends not only on the standard and trite exercise of interpretation set out above, but also on a consideration of the additional factors which were set out in *Schwartz*.

⁴¹ *Vulindlela Furniture Manufacturers (Pty) Ltd v MEC, Department of Education & Culture, Eastern Cape & Ors* 1998 (4) SA 908 (Tk) at 927B-G.

⁴² *Dlisan v Minister of Correctional Services & Ano; Mathwetha v Minister of Safety & Security & Ano* (1999) 20 ILJ 534 (Tk) at 538G-I; 1999 (1) SA 1020 (TkH).

⁴³ *Minister of Environmental Affairs v Trustees, Groundwork Trust & Ors* 2025 (1) SA 98 (SCA) paras 28-30.

⁴⁴ *Van Rooyen v S* [2002] ZACC 8; 2002 (5) SA 246 (CC) paras 178-184.

⁴⁵ *Saidi v Minister of Home Affairs* [2018] ZACC 9; 2018 (4) SA 333 (CC) paras 16-17.

⁴⁶ *Premier, Gauteng v Democratic Alliance* [2021] ZACC 21; 2022 (1) SA 16 (CC) para 59.

⁴⁷ *SAHRC v Standard Bank of SA Ltd* [2022] ZACC 43; 2023 (3) SA 36 (CC) paras 24-29.

⁴⁸ *Zuma v President of the Republic of South Africa* [2025] ZACC 21; 2025 (12) BCLR 1428 (CC) para 30.

⁴⁹ *EFF v The Speaker of the National Assembly & Ors* [2026] ZACC 17 paras 49-52.

⁵⁰ *Id* para 49.

52. As far as context is concerned the following provisions of the NWA are relevant. In the first place, as previously noted, s 24 provides that a licence to abstract water which is found underground on the property of another may be granted if the owner of the land on which the resource is located consents thereto or failing this, if there is 'good reason' to grant it. Given the terms of the section an applicant for such a licence is obviously required to engage the owner first, with a view to obtaining their consent, before proceeding to ask the responsible authority to dispense with it. This is because, if the owner has a valid and sound basis to refuse consent, there may not be 'good reason' for the responsible authority to grant a licence in the absence thereof. In *Endangered Wildlife Trust*⁵¹ the SCA held that a 'good reason' means a 'sound basis', in the light of the purposes of the NWA and the particular facts and circumstances.
53. In my view the terms of s 24 implicitly placed a duty on the 4th respondent municipality to formally notify the applicants of its intentions. Without doing so it was not able to engage them with a view to requesting their consent. On a sensible construction of s 24 the 4th respondent had an implied obligation to notify and then consult with the applicants, with a view to obtaining their possible consent. In the absence of any such engagement with the applicants, by the 4th respondent, the 3rd respondent was not entitled to dispense with their consent summarily. On this ground alone his decision is reviewable.
54. The second obvious point that flows from the language of s 24 is that the obligation to consult exists in respect of the *owner* of the land from which it is sought to abstract groundwater. The section does not stipulate that only owners who are (existing) lawful registered water users (as defined in terms of s 32), need be consulted for their consent. Thus, whether the owner of the land has an existing lawful water use is not relevant. There may well be instances where a licence is sought to extract groundwater which is found on the land of another, when they do not draw or use any water from it.

⁵¹ *Endangered Wildlife Trust & Ano v Acting Director-General, Department of Water & Sanitation* 2025 (5) SA 343 (SCA) para 87.

55. In their founding and replying affidavits the applicants sought to contend that, on the strength of letters which were sent to them by a Control Industrial Technician in the employ of the Western Cape region of the Department of Water and Sanitation, on 14 June 2023, they were recognized as having lawful 'registered' water uses in respect of the boreholes on their properties. However, as the respondents pointed out, on a proper reading of the letters the registration was seemingly only provisional, at best, and did not 'render' a 'final lawful entitlement' to the use of water.
56. In the third place, s 27 provides that in considering whether to issue a licence a responsible authority must take into account 'all relevant factors'. These therefore include not only the factors specifically listed in the section,⁵² but all others that may be relevant for the decision. Amongst those listed are existing lawful water uses,⁵³ the need to redress the results of past racial discrimination,⁵⁴ and the socio-economic impact the water use will have if authorised, as well as the impact it will have if it is not.
57. That the interests of water users other than existing lawful ones must also be considered is evident from s 27(1)(f), which stipulates that in considering whether to issue a licence the responsible authority must also have regard for the 'likely effect' of the proposed water use on the water resource and on 'other water users', and ss 29(1)(a)(i) and (iii), which provide that a responsible authority may attach conditions to a licence relating to the protection of the water resource in question and 'other existing and potential water users' (sic). In like vein, s 41(4)(c) provides that in considering whether to issue a licence the responsible authority may require the applicant to satisfy it that the interests of 'any other person having an interest in the land' will not be adversely affected by it.
58. Given the terms of these provisions, it is evident that when considering whether to grant a licence the responsible authority must therefore have regard for its likely effect on all water users, not just lawful ones. This much is also clear if one has regard for the recognition in the preamble to the Act that the 'ultimate aim' of

⁵² Subsections 27(1)(a)-(k).

⁵³ Section 27(1)(a).

⁵⁴ Section 27(1)(b).

the State's management of the resource is to achieve the sustainable use of water for the 'benefit of all users' (my emphasis), and that the purposes of the Act⁵⁵ include ensuring that water resources are protected, used, conserved, managed and controlled in ways which take into account the basic needs of present and future generations and promote 'equitable access' to water and its 'sustainable and beneficial use in the public interest', and redress the results of past racial discrimination.

59. Given our history of past racial discrimination, in many areas of the country persons using water may not be existing lawful water users, in terms of s 32 of the NWA, as their current water use may not be one that occurred within a period of 2 years before the commencement of the Act in 1998 and/or was not authorised under any law which was in force immediately prior thereto, nor has their use been declared to be lawful, in terms of s 33. An interpretation of ss 27 which would allow a responsible authority to only have consideration for existing lawful water uses (as referred to in s 27(1)(a)) and no regard for any other uses would be at odds with the purposes which the NWA seeks to achieve and could continue to reinforce past patterns of exclusion of water use, based on discrimination. Consequently, a construction of s 41(4) which holds that a responsible authority has an entirely discretionary power to ask an applicant who seeks a licence in terms of s 24, only to give notice to existing lawful water users, would not be correct.
60. Such exclusive interpretations of ss 41, 24 and 27 would be at odds with the constitutional injunction that, when interpreting legislation, a court must have regard for the Bill of Rights, insofar as any fundamental constitutional rights may be implicated. In this regard s 27(1)(b) of the Constitution provides that 'everyone' has the right to have access to 'sufficient water' and s 24(b)(i) and (ii) provides that 'everyone' has the right to have the environment protected for the benefit of present and future generations through reasonable legal and other measures that seek to prevent ecological degradation, and secure the ecologically sustainable development and use of natural resources.

⁵⁵ Sections 2(a)-(d).

61. There are further provisions in the NWA which reflect that it would be anomalous not to require the giving of notice to persons such as the applicants, as landowners. In this regard, as previously pointed out s 41(2)(d) provides that the responsible authority 'must' afford the *applicant* for any licence an opportunity to make representations to it on any aspect of the licence application. There is no logical or fair basis on which the applicant for a licence to extract groundwater from land which belongs to another, in terms of s 24, should be afforded the right to make representations in relation to its application but the landowner should not. In addition, s 50(2)(a) provides that before amending or substituting a licence condition a responsible authority may require the licensee to obtain the written consent of 'any affected person', and s 41(4)(b) provides that when considering an application for a water use licence the responsible authority may require the applicant to 'take such steps as it may direct' to bring the application to the 'attention of interested persons' and the general public. As owners of the land on which the boreholes from which it was sought to extract water in terms of the proposed licence were located, the Trust and 4th applicant were clearly both interested and affected parties.
62. In the circumstances, in my view, in the context of the 4th respondent's application in terms of s 24 of the NWA for a water use licence which would allow it to abstract groundwater from boreholes on the applicants' property, without their consent, the provisions of s 41(4)(b) as to the giving of notice to the applicants as interested parties were not simply discretionary, and not only conferred a power on the responsible authority to issue directions in this regard, but also imposed a duty on it to exercise such power. The responsible authority's failure to do so resulted in it taking a decision without giving the applicants an opportunity to provide their input and representations as to the licence which was sought. It is common cause that the decision constituted administrative action, and consequently the responsible authority's failure to provide the applicants with a reasonable opportunity to make representations constituted a breach of the applicants' rights to procedurally fair administrative action, in terms of the

relevant provisions⁵⁶ of PAJA. On this ground too, the decision to grant the licence cannot stand and must be set aside.

63. In their founding affidavit the applicants pointed out that the historical over-abstraction of groundwater resulted in the failure of three of their boreholes since 2021 and an increase in salination levels with a resultant decrease in water quality which has adversely impacted on their large-scale, commercial farming. That there was a serious over-abstraction by the 4th respondent is evident from the GEOSS report, which noted that at the time some 864 000 m³ of groundwater per annum was being taken from the three boreholes. According to the report the three boreholes could sustain an annual abstraction rate of 522 025 m³ of groundwater, some 45 000 m³ less than was ultimately authorised in terms of the licence. These circumstances, amongst others, were material factors which were relevant to the decision which the 3rd respondent was required to make, and the applicants should have had an opportunity to make representations and submissions pertaining to them, before the decision was made to authorise the issue of the licence. At the very least, these factors could have had an influence on the terms and conditions of the licence which was granted.
64. It is further apparent that, aside from not giving the applicants formal notice of the application for the s 24 licence, the responsible authority did not cause the application to be advertised in any newspapers or other media. From the hydro-census which was performed by GEOSS it appears that there were some 28 boreholes within a radius of 1.5 km of the applicants' properties, which were also drawing groundwater from the Wadrif aquifer or its surrounds. The owners of the properties on which these boreholes were situated were not identified in the GEOSS report. As interested and potentially affected parties they should also have been notified of the 4th respondent's application for a licence to abstract half a million m³ of groundwater annually from the applicants' boreholes, as the quantity and scale/rate of the abstraction could potentially have a material impact on their water uses and any farming or other enterprises which relied on the

⁵⁶ Section 3(2)(b)(i)-(ii) read with s 3(3)(b), which, in order to give effect to the right to procedurally fair administrative action requires an administrator in certain instances to give a person whose rights may be adversely affected by a decision, an opportunity 'to present and dispute information and arguments'.

groundwater they were abstracting. Although the failure of the responsible authority to provide notice of the 4th respondent's application to such other parties was not raised as a separate ground for a review of the 3rd respondent's decision, given the order which I propose making this is an aspect that the 3rd respondent should take into account when considering any fresh application which may be submitted by the 4th respondent.

65. As water is a national resource which in terms of the NWA is to be shared equitably and sustainably amongst and for the benefit of all users, both present and future, it is imperative that when taking any decision to grant a licence for the large-scale abstraction of groundwater from property belonging to a 3rd party, the responsible authority should encourage the participation and input of all affected and interested persons/parties in the process and should provide such parties with a reasonable opportunity to make representations and submissions in regard thereto, in order to ensure that the decision which is arrived at is one which is properly informed by all relevant factors which should be taken into account and is rationally connected to the powers which the responsible authority enjoys in terms of the NWA.
66. The parties were agreed that, in the event that the 3rd respondent's decision were to be set aside on the basis that the applicants had not been given formal notice of the application for a water use licence and an opportunity to make representations and submissions in relation thereto, it would be just and equitable in terms of the applicable provisions of PAJA⁵⁷ to suspend the order (setting aside the decision to issue the licence and the licence), for a period of 18 months, to allow the 4th respondent time to submit a fresh application for a licence in terms of s 24, after giving notice thereof to the applicants, and to ensure that the residents of Lambert's Bay will in the meantime continue to receive potable water drawn from the applicants' boreholes.
67. Finally, as far as costs go, there is no reason why the ordinary principle should not apply i.e. that they should follow the event.

⁵⁷ Section 8(1) of PAJA provides that a court dealing with an application for the review of administrative action may grant any order that is just and equitable.

68. In the result, I make the following order:

1. The decision by the 3rd respondent on 23 March 2023 to issue a water use licence (number 01/G30G/AB/100892) to the 4th respondent, allowing it to abstract a combined total volume of 567 648 m³ of groundwater per annum from boreholes 'LR1', 'OD514' and 'KKL5' on the applicants' land for a period of 20 years, and the licence itself, are reviewed and set aside.
2. The 4th respondent is granted leave, if so minded, to resubmit an application for a water use licence for the supply of groundwater for Lambert's Bay from boreholes 'LR1', 'OD514' and 'KKL5', to the 3rd respondent for reconsideration, who in doing so shall have due regard for the judgment in this matter and any submissions or representations which are made by the applicants in respect of the application.
3. The operation of the order in paragraph 1 is suspended for a period of 18 months or until the 3rd respondent has reconsidered and made a decision in respect of the 4th respondent's fresh application for a water licence in terms of paragraph 2, whichever is the earlier.
4. The parties are granted leave to approach the court (on the same papers duly supplemented), to request an extension of the suspension of the order in paragraph 1, and/or for any further or ancillary relief thereto, should that be necessary.
5. The respondents shall be liable jointly and severally (the one paying the other to be absolved), for the applicants' costs, which shall include the costs of two counsel where so employed, one on scale C and one on scale B.

M SHER
Judge of the High Court

Appearances:

Applicants' counsel: P de B Vivier SC & J Whitaker

Applicants' attorneys: TSP Inc (Cape Town)

First-Third respondents' counsel: J Williams

First-Third respondents' attorneys: State Attorney (Cape Town)

Fourth respondent's counsel: M de Beer

Fourth respondent's attorneys: Van Der Spuy (Cape Town)
