IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION : MAKHANDA

CASE NO. : CA 160/2022

In the matter between:

THE TRUSTEES FOR THE

TIME BEING OF THE CNJ TRUST **Appellants**

and

THE GREAT FISH RIVER WATER

USERS'ASSOCIATION **1st Respondent**

THE MANAGEMENT COMMITTEE

OF THE KLIPFONTEIN SUB AREA

OF THE GREAT FISH RIVER WATER

USERS' ASSOCIATION **2nd Respondent**

MINISTER OF THE DEPARTMENT:

WATER AND SANITATION

LINDIWE NONCEBA SISULU N.O. **3rd Respondent**

THE DEPARTMENT OF WATER AND SANITATION, PROVINCE OF THE EASTERN CAPE **4th Respondent**

FULL BENCH APPEAL JUDGMENT

GRIFFITHS, J.:

[1] The central issues in this appeal are whether the rules of the first respondent allow the first respondent to abstract more than 125% of its ministerially allocated water into the irrigation sub-canal known as "Klip 1", and whether it is entitled to deduct such surplus abstraction from the individual water use allocations of the farmers using that canal on what is referred to as a "rolling average" basis.

[2] It is common cause that the appellant's crops are irrigated with water abstracted from the Fish River using a series of canals. These canals furrow the water to the various farms situated alongside the canals which in turn take water therefrom for irrigation in accordance with their water use allocations as defined in the National Water Act[1]. In terms of the Act, the

[1] No. 36 of 1968.

appellant is permitted to use 687 500 m³ water per annum based on 55 ha under irrigation at 12,500 m³ per hectare.

[3] A dispute arose between the appellant[2] and the first and second respondents relating to the issues as set out in paragraph one above and, in particular, regarding the deductions made from the appellant's water use allocation based on a rolling average during the course of the water year. Because Prudhon felt aggrieved and believed such grievance was not being addressed, he approached the court on an urgent basis for relief against the first and second respondents. Certain parts of this relief have since been abandoned but, essentially, the appellant sought a mandamus which was intended to force those respondents to abstract no more water than the aggregate of the volumes of water ordered for delivery by the relevant water users drawing from Klip 1, plus a ministerial allowance of 25% surplus. It also sought an interdict restraining such respondents from abstracting the surplus water, and costs. Had such relief been granted, it would have had the effect of containing such surplus abstraction which in turn would have forced an end to the deductions from the appellant's water allocation, a matter of concern to the appellant.

[4] Various agreements were entered into which were designed to take the sting out of the alleged urgency when the matter served before Kruger AJ sitting in the Makhanda High Court. Apart from dealing with various other issues which are no longer relevant, she, in effect, found that the rules allow for the abstraction of such surplus, and for this to be deducted from the water allocations of the various farmers using the canal. She thus

[2] In the form of one Prudhon who, duly authorized by the appellant, represented it in these proceedings.

dismissed the relief sought with costs. It is this order which the appellant has appealed against.

[5] It is common cause that the canal in question is largely an open, unlined earth canal. It is 21 km long and only the first 1.7 km thereof is lined with concrete. Eight water users, including the appellant, receive their irrigation water via this canal.

[6] According to the expert engineers whose evidence the first respondent placed before the court by way of affidavit, the abstraction of water for distribution to users results in losses over and above the aggregate volume of water ordered by the eight farmers in any given week. This is so because of the nature of the canal which has been in existence for many years. Being an open earth canal, it suffers losses from seepage into the earth (particularly after a weekend when the canal has not been used and has dried), from evaporation, evapotranspiration (loss of water from soil and plants by transpiration), leaking of old sluices, over abstraction based on inaccurate or defective measuring devices, intentional over abstraction, leaks and management and execution of the water demand and supply. According to them, the losses are high in unlined earth canals such as this one. Weather and seasonal changes also have an effect. There are furthermore no balancing dams to manage variations and the rate of flow in such canals.

[7] Because of this continual loss of water, the Department of Water Affairs recognized that special circumstances exist in the Fish River Scheme. It thus became necessary to allow an increased allocation per

annum to account for conveyancing losses. This figure was pegged at 25% which was a compromise between the department and the various irrigation boards forming part of the scheme at the time. This percentage was not scientifically determined.

[8] A civil engineering technician and irrigation specialist, one Mulder, attested on behalf of the first respondent that he was then currently assisting the first respondent with the capturing and administering of the water use data of all the sub-areas falling within the management area of the first respondent. He developed an irrigation water administration computer program called "*iWate*" for the capturing and processing of data relating to water orders and sub-canal water abstraction volumes. He explained that the 25% allowance referred to earlier is the extra volume of water which the first respondent may release during a water year in addition to the total annual volume of water entitlements of the irrigators on a particular sub canal.

[9] He further explained that he had introduced the concept of "surplus losses" (being those conveyance losses referred to earlier) to balance water use throughout the water year whilst not exceeding the annual quota. To facilitate an equitable distribution of water to all water users, the surplus losses in a particular canal were shared amongst all irrigators based on a rolling average. This concept was officially recognized and approved by a board resolution of the first respondent on 5 May 2017 and has been applied ever since as it has been generally accepted as the only practical solution, and is fair and equitable.

[10] The water orders of the irrigators on the canal are placed weekly and such orders are then processed through the *iWate* programme. In accordance therewith the required amount of water is requested from the relevant authorities in terms of the Act. The water is ultimately abstracted into the canal in accordance with these orders together with the 25% allowance. To make up for the increased conveyance losses as detailed earlier, the surplus water is also released. This surplus is thereafter determined through the *iWate* system and the irrigators are given periodic reports as to how this has been calculated, and how it has been allocated to each irrigator.

[11] It is of importance to note that the *iWate* system incorporates the concept of surplus losses, determines such surplus losses and thereafter allocates them in accordance with each irrigator's water use allocation. It is this very system, including this means of allocating the surplus losses to each irrigator, which was accepted by the first respondent in its resolution of 5 May 2017. It is common cause that the rules of the first respondent were approved on 24 November 2017.

[12] It is as against this background that the appellant has argued that the high court's judgment in finding that the rules allow for such surplus losses and their allocation to the irrigators is incorrect. It has argued that the rules, per se, do not mention or deal with such surplus losses or means of allocating them and, accordingly, the first respondent has been acting unlawfully or *ultra vires* its own rules in so doing. It has further been argued that because the *iWate* system was introduced to by way of a resolution which predated the coming into being of these rules, the first

respondent is precluded from relying on it. In presenting this argument, the appellant has urged this court to find that the only relevant rule is rule 6(d) which neither mentions such surplus losses or such means of allocation. Kruger AJ thus, in the appellant's submission, was wrong in her finding in this regard because her interpretation, in effect, created a new contract for the parties (and all the members of the first respondent) and was in conflict with the express wording of rule 6(d).

[13] On the other hand, the first respondent has argued that it is not bound simply by rule 6(d) but that on a conspectus of all the rules as read in context, and in particular as against the background of the development and acceptance of the *iWate* system, the rules must be read to have incorporated the earlier described system of allowing surplus losses and their distribution amongst the water users. Furthermore, the first respondent has contended that the appellant's recital of rule 6(5)(d) in its heads of argument is incomplete and has conveniently ignored the first sentence thereof which directly refers to and permits the use of the *iWate* system.

[14] Both parties have accepted that in order to interpret the rules the court must have regard to *Endumeni*[3]. In *Endumeni* Wallis JA laid to rest the continuing tension which then existed in the various rules of interpretation relating to written documents, such as legislation or other statutory instruments, as set forth in previous cases. He said:

> "The present state of the law can be expressed as follows:

[3] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA)

> Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."[4]

[15] It is also important to note that Wallis JA made it clear that where a court finds that the language of a particular provision is clear and admits of little ambiguity, this cannot be entirely correct. He said in this regard:

> "However, that too is a misnomer. It is a product of a time when language was viewed differently and regarded as likely to have a fixed and definite meaning; a view that the experience of lawyers down the years, as well as the study of linguistics, has shown to be mistaken. Most words can bear several different meanings or shades of meaning and to try to ascertain their meaning in the abstract, divorced from the broad context of their use, is an unhelpful exercise. The expression can mean no more than that, when the provision is read in context, that is the appropriate meaning to give to the language used."[5]

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[4] *Endumeni* at paragraphs 18 - 19
[5] *Endumeni* at paragraph 25

[16] As foreshadowed earlier in this judgment, the appellant has submitted that rule 6(d) is definitive of the issue between the parties and that its clear right to a mandamus and/or an interdict lies within the terms of this rule, as properly interpreted. This sub-rule reads as follows:

> "Any irrigator is entitled to only the scheduled net annual quota of water as in #4 supra. At main canals where water gets distributed to multiple points of abstraction, up to a maximum allowance of 25% may be made at the weir in the case of unlined (earth) canals, and up to a maximum of 15% in the case of lined canals, to allow for canal distribution losses (natural – and operating losses), but no individual on such canals is rightfully entitled to any such extra water in the canal. The allowance for losses strictly belongs to the canal/sub-area.
>
> Sub-areas/groups must strive not to abstract the full maximum allowance for losses because they are so allowed, but must manage and operate their water distribution up front in such a way as to minimize the abstraction of additional water at the weir.
>
> Individuals directly abstracting from the river or the state concrete canals are not entitled to any such allowance for losses, but only to their net quotas. No individual anywhere on the whole system therefor (sic) has any entitlement to more than his net quota, regardless of the position, status or method of abstraction."

[17] It is because of the surplus losses occurring in the unlined canal as dealt with earlier that the first respondent introduced to the *iWate* system by way of a resolution which it deemed to be fair and equitable. Mulder's evidence, as summarised earlier, explained this as follows:

> "9. It is commonly known that conveyance losses in these mostly unlined earth canals in the First Respondent's management area, are substantial. Currently, the 3rd Respondent compensates irrigators for these losses with an allowance of 25% on the annual water quotas. The 25% allowance is the extra

> volume of water the First Respondent may release during a water year in addition to the total annual volume of water entitlements of the irrigators on a particular sub-canal.
>
> 10. During 2017 I introduced to the concept of "surplus losses" which are those conveyance losses in excess of the departmentally allowed 25% annual loss allowance. In order to balance water use throughout the water year whilst not exceeding the annual quota and to facilitate an equitable distribution of water to all water users, the surplus losses in a particular canal are shared amongst all irrigators on the basis of the rolling average. This concept was officially recognized and approved by a board resolution of the First Respondent on 5 May 2017. It has been applied ever since and has been generally accepted as the only practical solution, which is fair and equitable."

[18] It is apparent from this that the *iWate* system effectively reduces the volume of water which the irrigators are entitled to in accordance with their annual water entitlements to ensure that the abstraction of water remains within the annual allowance. The question which arises in the circumstances is as to whether clause 6(d) allows for this system, or prohibits it.

[19] In accordance with *Endumeni*, the provisions of the rule must be read in light of the document (the rules) as a whole and the circumstances attendant upon its coming into existence. Consideration must be given to the language used in the light of the ordinary rules of grammar and syntax, the context in which the provision appears and the apparent purpose to which it is directed, and the material known to those responsible for its production.

[20] There is little doubt that the *iWate* system was in existence for some time before the launching of this application, although there has been some dispute in that regard. As pointed out by the appellant, it was introduced (by way of resolution) some months before the passing of the rules in their present form, including rule 6(d). It is clear therefore that the framers of the rule were fully alive to the complex set of problems that the first respondent and the various irrigators concerned experienced regarding unlined canals. They had, at that point in time, devised a scheme known as the *iWate* system, in order to deal with this. It was not a system that had simply arisen overnight as it were, but a system which had evolved and developed as a consequence of the situation on the ground. Hence, being satisfied that this system was the most practical way of dealing with the problem, the first respondent adopted it by way of resolution.

[21] It must therefore be accepted that as at the time when the rules were passed in the present form, this was done in the knowledge that the *iWate* system was up and running, and, of importance, that it incorporated a means of dealing with surplus losses so as to maintain the level of abstraction within the annual quota allowed. Why, as against this background, would they pass a rule which, in and of itself, simply discarded all that had gone before?

[22] Additionally, under the heading "WATER USE MANAGEMENT AND ADMIN" at clause 10 c) of the rules, the *iWate* system is specifically referred to, incorporated, and made compulsory for all users. Several directives are given in the sub-rule relating to the administration of the system and under the sub-heading "*Water Demand Budgets*" an example of

a seasonal water budget is given. Therein is to be found the clear wording: "*Redistribution of surplus losses (m3)"*. It seems clear, in my view, that these words were incorporated because the system was largely devised to deal with this very problem.

[23] In my view, in applying *Endumeni* and viewing clause 6(d) in context and through the prism of the framers of the rules who were alive to all these facts and circumstances, the only appropriate interpretation thereof is that it does not prohibit the use of the *iWate* system and its method of catering for the surplus losses as described by Mulder. To hold otherwise, would lead to the conclusion that the framers intended to apply an exact science to an inexact one which, in my view would lead to an absurdity.

[24] Indeed, in my view the wording of that sub-rule does not exclude this system. It is foreshadowed in the first sentence with the words "*Any irrigator is entitled to only the scheduled net annual quota of water as in #4 above*". Surely the remainder of the wording is governed by this. It is the net annual quota which, as I understand it, the system seeks to ensure is not exceeded. The sub-rule must be read in context with all the other rules which specifically cater for the *iWate* system.

[25] It seems that this is the conclusion which Kruger AJ came to in her judgment when she said:

> "87. It is evident that there is no explicit rule in the first respondent's rules that permits it to allocate surplus losses to

> water users. It is also evident that no amendment was made to the rule to regulate the allocation of surplus losses specifically.
>
> 88. But, the first respondent's rules do not stand on their own. The first respondent is tasked with management and scheduling of water distribution. It does so through the iWate system which the rules incorporate by reference. As such, the system and its allocation of surplus losses on a rolling average basis, based on the explicit earlier approval thereof by the management committee of the first respondent in May 2017, form part of the overall water management system and rules of the first respondent as implemented in the sub-areas."

[26] In the circumstances, I can find no fault with this conclusion and, in my view, the appeal cannot therefore succeed.

[27] The following order will issue:

The appeal is dismissed with costs.

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R E GRIFFITHS

JUDGE OF THE HIGH COURT

MJALI, J. : I agree

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G N Z MJALI

JUDGE OF THE HIGH COURT

NTSEPE, A. J. : I agree

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N NTSEPE

ACTING JUDGE OF THE HIGH COURT

COUNSEL FOR APPELLANT	**:**	**Mr De La Harpe SC with**
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INSTRUCTED BY	**:**	**Nolte Smith Attorneys**
HEARD ON	**:**	**29 MAY 2023**
DELIVERED ON	**:**	**25 JULY 2023**