

SOUTH AFRICA / JUDGMENT

Filter v Director-General, Department of Water Affairs and Forestry (WT4/F1) [2011] ZAWT 9 (1 January 2011)

[2011] ZAWT 9

COURT

Water Tribunal

BEFORE

M.M. Mabesele

CASE / FILE NUMBER

WT4/F1

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IN THE WATER TRIBUNAL

CASE NO.: WT4/F1

IN THE APPEAL OF:

E.P. FILTER

.....APPELLANT

AND

THE DIRECTOR-GENERAL

DEPARTMENT WATER AFFAIRS AND FORESTRY

.....RESPONDENT

DECISION

1. The Appellants submitted an application for a stream flow reduction activity licence in respect of an area of land, in extent 370 ha, situated on the remaining extent of the farm Witrivier, No. 208, registration division HT. The application was for afforestation with eucalyptus and wattle plantations. The Respondent refused to grant licence to the Appellant on the grounds that the property of the Appellant is within the Pongola River Catchment which is closed and the allowable stream flow reduction already exceeded.

The Appellant has lodged an appeal against the decision of the Respondent to refuse granting licence applied for.

- 1.2. The appeal is lodged on the following grounds:

1.2.1. The Stream Flow Reduction Activity Assessment Advisory Committee has recommended that the application for 75 ha be approved.

1.2.2. There is no legal provision that an afforestation licence cannot be issued if the property is situated within a catchment area which is closed and the allowable stream flow reduction already exceeded.

1.2.3. The Respondent failed to observe rules of natural justice. In other words, the Respondent failed to give the Appellant the opportunity to present his case, which entitled appellant an opportunity to obtain legal representations in complex cases.

1.2.4. The Respondent fettered his discretion to grant the application by concluding that as the KwaZulu-Natal Region had closed the Pongola catchment, he is not at liberty to grant the application.

1.2.5. The Act does not grant the Department or the KwaZulu-Natal Region of the Department the right to close a catchment area and that such power is vested with the Minister.

2. The issues which we are called upon to determine are the following:

2.1. Whether or not the Respondent observed the rules of Natural Justice.

2.2. Whether or not the Respondent has fettered his discretion by refusing to grant the application by holding that Appellant is precluded from granting a licence.

3. The Appellant applied for a water use licence for the afforestation of 370 ha eucalyptus sp. And wattle species on the farm Witrivier 208 HT. The property is situated in catchment W 42 F of the Witrivier which flows to the Pongola River. The application served before the SFRALAAC on 22nd February

2001. The SFRALAAC recommended that the application for the afforestation of 75 ha on the aforementioned portion of the farm Witrivier 208 HT in quaternary catchment W 42 F be approved. The said recommendation was forwarded, through the office of the Regional Director for Mpumalanga, to the office of the Director-General (Water Affairs and Forestry). The application was ultimately forwarded to the Chief-Director (Water Use and Conservation) for his decision. The contents of the application were as follows:

"The applicant has complied with the various directives as laid down by the Department. However the local Stream Flow Reduction

Activity-Licence Assessment Advisory Committee has recommended that the licence be refused as this property is situated in a critical catchment area where no more afforestation licences can be issued.

The Chief-Director (Water Use and Conservation) approved of the application on 19th September 2001 despite the contents of the application. (See annexure "A"). Despite the Chief Director's approval, the Director-General sent a registered mail to the Appellant informing the Appellant about his unsuccessful application.

4. What is clear from annexure "A" is that the Chief Director (Water Use and Conservation) approved of the application for a stream flow reduction activity licence for afforestation purposes on the remaining portion of Witrivier 208 HT.

There is no evidence on record which indicates that the Director-General has ever read the application and recommendations from the SFRALAAC. Furthermore, there is no evidence on record which indicates that the Director-General has ever questioned the Chief Director's authority to approve the application. Neither is the evidence that the decision of the Chief Director has been reviewed by the Director-General. The decision of the Chief Director still stands.

Having considered all the information pertaining to the matter before us, the following order is appropriate.

5. 5.1. The decision of the Director-General is set aside.
- 5.2. The appeal succeeds.
- 5.3. The Director-General is ordered to implement decision of the Chief Director and issue a licence to the Appellant for afforestation of 75 ha Eucalyptus Sp. and wattle species on the farm Witrivier 208 HT in the quaternary catchment W 42 F.
- 5.4. The licence shall be valid for a period of 40 (forty) years.
- 5.5. The licence shall be subject to the provisions of section 49 of the National Water Act, 1998 (Act No. 36 of 1998) and other reasonable conditions as may be imposed by other relevant departments.
- 5.6. No order as to costs.

M.M. MABESELE (ADDITIONAL MEMBER)

(Other Members concur)

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