

SOUTH AFRICA / JUDGMENT

Rabe KHH (Estate) v Director-General, Department of Water Affairs and Forestry (WT8/R1) [2011] ZAWT 8 (1 January 2011)

[2011] ZAWT 8

COURT

Water Tribunal

BEFORE

E. Davey

CASE / FILE NUMBER

WT8/R1

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IN THE WATER TRIBUNAL

CASE NO.: WT8/R1

IN THE APPEAL OF:

RABE K H H (ESTATE)APPELLANT

AND

THE DIRECTOR-GENERAL

DEPARTMENT WATER AFFAIRS AND FORESTRYRESPONDENT

DECISION

1. The Appellant submitted an application for a stream flow reduction activity licence for afforestation purposes on Portion 1 and 2 of the farm Mahamba No. 7 HU.

The Respondent refused to grant a licence to the Appellant on the grounds that the Appellants property is situated in a critical catchment area where licences for afforestation can no longer be issued.

The matter came before this tribunal by way of appeal against the decision of the Respondent. The main ground of the appeal is failure by the Respondent to apply his mind on the matter before taking a decision or failure by the Respondent to exercise his discretion properly.

2. The application made for a stream flow reduction activity licence for 173.8 ha Eucalyptus afforestation purposes served before the Stream Flow Reduction Activity Licence Assessment Advisory Committee (SFRALAAC) on the 7th December 2000 in the offices of the Department of Water Affairs and Forestry (DWAF).

No objection was made:

The SFRALAAC resolved to recommend the application to DWAF Head Office subject to the following condition:

- (1) Only disturbed soils with regards to old agricultural patches may be planted.
- (2) No areas may be planted within 30 m from the edge of the temporary wetland, including areas, which has been disturbed. The delineation of the wetland must be verified by an authorised official of DWAF and DACE before any establishment of any plantation may take place, as various forms of agriculture had taken place in the wetland in the past.
- (3) Awaiting finalisation of the Reserve with regards to the water balance model, before a final recommendation can be made to DWAF Head Office.

On the 22nd February 2001 the Regional Director for Mpumalanga addressed a letter to the Director-General: Department of Water Affairs and Forestry (Pretoria) wherein the Regional Director conveyed to the Director-General the recommendations of SFRALAAC as follows:

During the SFRALAAC meeting held on the 7th December 2000, it was decided to recommend the application for the afforestation of 50 ha on the mentioned property of the farm Mahamba 7 HU in the quaternary catchment W42K.

The favourable consideration for the issuing of a licence for the afforestation of 50 ha on MAHAMBAMBA 7 HU for a valid period of 40 (forty) years is recommended provided that water is available in the quaternary catchment for development (with regard to the water balance model).

In the letter dated 2nd April 2001 the Chief Director: Water Use and Conservation disapproved of the application. The Chief Director's decision was based on the information received from the Director: Water Utilization.

The information is 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 afforestation licences can no longer be issued. A letter to the applicant to this effect is supplied herewith for your signature, if you concur.

3. The issue is whether or not the Chief Director exercised his discretion properly.
4. Firstly, discretion is understood to mean a choice between alternative course of action and that such choice should not be made arbitrarily, wantonly, or carelessly, but in accordance with the requirements of the situation (See Baxter, 1984: Administrative Law at 88).

Secondly, only the authority to which it is committed to. That authority must genuinely address itself to the matter before it and must exercise discretion. It must not act under the dictate of another body or person and must have regard to the relevant situation (See De Smith, 1980

Judicial Review of Administrative Action at 285) over the above. Section 41(2) of the National Water Act, 1998 (Act No. 36 of 1998) provides that a responsible authority must afford the applicant an opportunity to make representation on any aspect of the application. The intention of this is to ensure that the responsible authority apply its mind to the matter before it taking into account all relevant information submitted for consideration.

5. From the evidence on record, the Chief Director disapproved of the application on the basis of the information, which he received from the office of the Director: Water Utilization. There is no evidence from the record suggesting that the Chief Director considered the recommendation of the SFRALAAC when taking the decision not to approve of the said application. The last paragraph of the letter dated 2001-04-12, which was addressed to the Chief Director reads as follows:

"A letter to the applicant to this effect is supplied herewith for your signature, if you concur"

We understand this letter to be the one informing the applicant of unsuccessful application. The Chief Director was asked to sign the letter, if he concurs. This we understand to imply that the Chief Director was asked to sign the letter if he concurs with the decision already taken. Moreover it is stated in the said letter that the SFRALAAC recommended that licence be refused whereas there is no such evidence on record.

Minutes of the meeting held on the 7th December 2000, point 7.1.8, page 6 read as follows: An application was made for 173.8 ha Eucalyptus sp. No objection was made. The application will be recommended to DWAF Head Office subject to the following conditions.

- (2) No areas may be planted within 30 m from the water edge of the temporary wetland, including areas, which has been disturbed. The delineation of the wetland must be verified by an authorised official of DWAF and DACE before any establishment of any plantation may take place, as various forms of agriculture had taken place in the wetland in the past.

Contrary to the reason given in the letter of refusal, the minute state clearly the recommendation will be made subject to the conditions, as above mentioned.

The Department of Water Affairs and Forestry's legal representative (Mr H. Kavin) on the 19th July 2002 informed the Water Tribunal, according to their knowledge the finalisation of the Reserve has not been determined. No date is given as to when the finalisation will be completed.

The Regional Director Mpumalanga

However, it is on record the Regional Director (letter dated 22nd February

- 2001) Mpumalanga made recommendation of the issuing of a licence was for 50 ha (fifty) on Mahamba 7 HU for a valid period of 40 (forty) years. Provided that the water is available in this quaternary catchment for development (with regards to the Water Balance Model.

Industrial Technician: SFRA Control Mpumalanga Report

The Appellant's property is situated in the Usutu/Mhlantuze Water Management Area. This forms part of the Mozana stream, which flows to the Pongola River, then flows into the Jozini Dam and is situated in the quaternary catchment W42K.

There is no mention of whether the existing approximately 16 ha of Eucalyptus species presently on the property is included in the recommendation regarding the 50 ha (fifty) licence. There has been no mention of the 16 ha in the recommendation for the 50 ha licence, we therefore conclude that the recommendation does not include the existing 16 ha.

The preliminary hydrological assessment or low-flow determination made indicated this development would reduce the catchment's low-flow by 0.11058%.

No preliminary reserve determination has been done for the catchment. The D: WRP decided not to provide the information of a Water Balance Model for the catchment until its verification process is complete (no date as to when this process will be complete).

In view of the above the Industrial Technician (Naomi Fourie) still recommended that a water use licence for 50 ha (fifty) be issued if the Reserve determines that water is available.

The Director-General, acting on behalf of the Department of Water Affairs and Forestry, issued a letter dated 18/04/2001 to the appellant informing him of his unsuccessful application.

It is clear from all the evidence on record that the Director-General signed the letter, which, was already prepared for him. From the above, it is clear that both Chief-Director and Director-General failed to comply with the principles governing discretionary power in that they failed to consider all the facts surrounding the application.

6. (a) The Responsible Authority, being the Chief Director: Water Use and

Conservation, did not apply its mind to all the factors surrounding the licence application, and did not do administrative justice;

The refusal of the licence was not in line with the recommendations of the technical adviser, who did a thorough investigation of all relevant factors, and who recommended the issue of the licence if the final factors, and who recommended the issue of the licence if the final Reserve determined that water is available for this development;

The refusal of new licences on the basis of a regional prescription that all licence applications be refused, negates the very purpose of section 17 which provides for the determination of a preliminary reserve to facilitate the licensing process pending the final Reserve Determination;

The issuance of a licence on condition that such licence is revised on a five-year basis, would have promoted economical development while reserving environmental interests, and would allow for the licence to be amended in the event that the eventual final Reserve

determination

so prescribes.

7. (1) The decision of the Chief Director: Water Use and Conservation

F21/1/1/4/700 dated 12 April 2001, is withdrawn.

(2) The Department of Water Affairs and Forestry is ordered to issues a licence to the appellant for the afforestation of 50 ha.

(a) Eucalyptus species 50 ha (fifty)

(b) Pinus species 0 ha (zero)

Revisable after 5 years, and on the other conditions regarded necessary in view of the recommendations made for purpose of the application.

E. DAVEY

(Other members concur)

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