

IN THE WATER TRIBUNAL

CASE NO.: WT/3DI

IN THE APPEAL OF:

DU PLOOY P.J.

APPELLANT

AND

THE DIRECTOR-GENERAL

DEPARTMENT WATER AFFAIRS AND FORESTRY

RESPONDENT

DECISION

1. The Appellant submitted an application for a stream flow reduction activity licence for afforestation purposes on the farm Welgekozen 514 IT. The Respondent refused to grant a licence to the Appellant on the grounds that the Appellant's 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 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).

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

1. Awaiting finalisation of the Reserve with regards to the water balance model, before a final recommendation can be made to DWAF Head Office.
2. All wetlands and watercourse must be delineated prior to the establishment of any plantations.

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 75 ha on the mentioned portion of the farm Welgekozen 514 IT in the quaternary catchment W 51 C.

The favourable consideration for the issuing of a licence for the afforestation of 75 ha on Welgekozen IT 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 12th April 2001 the Chief Director: Water Use and Conservation disap-proved of the application. The Chief Director's decision was based on the information received from the Director: Water Utilisation.

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 Utilisation. 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 7th December 2000, point 7.1.8, page 6.

The last sentence dealing with the application states: **The applicant will be recommended to DWAF Head Office subject to the following conditions:**

1. **Awaiting finalisation of the Reserve with regards to the water balance model, before a final recommendation can be made to DWAF Head Office.**
2. All wetlands and watercourse must be delineated prior to the establishment of any plantations.

Nowhere in the minutes of the said meeting was recommendation made that the licence be refused.

Noted in the recommendation signed by Naomi Fourie were the following concerns:

- The Upper Usutu catchment being more or less in the balance.
- The Usutu is also an international river and further utilisation of the resource may particularly impact on Swaziland.
- The need to identify the impact on the downstream users and the ecological Reserve needs to be assessed in greater detail.

The preliminary hydrological assessment indicates this development would reduce the catchment's low flow by 0,11723%. This is the only reference to the determination of the reserve.

However, it is on record that both the Regional Director (letter dated 22 February 2001) and Naomi Fourie (not dated) Industrial Technician: SFRA Control for Mpumalanga made recommendation on the issuing of a licence was for 75 ha if the Reserve determines that water is available in the catchment.

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.

Having considered all the facts before us, we make the following order.

- (1) The Director-General decision be set aside.
- (2) The appeal succeeds.
- (3) The Department of Water Affairs and Forestry is ordered to issue a licence to the appellant for the afforestation of 75 ha on Welgekozen 514 HT, for a valid period of five years. Eucalyptus species - 50 ha (fifty) Pinus species - 26 ha (twenty-six).
4. The licence shall be subject to provision of section 49 of the National Water Act, 1998 and other relevant departments who may impose other reasonable conditions.
5. No order as to costs.

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E. DAVEY (ADDITIONAL MEMBER)

(Other members concur)