

**IN THE WATER TRIBUNAL**

CASE NO.: WT2/C1

IN THE APPEAL OF:

A.F.C. CLOETE

APPELLANT

AND

DIRECTOR-GENERAL  
DEPARTMENT OF WATER AFFAIRS AND FORESTRY

RESPONDENT

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**DECISION**

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1. BACKGROUND

The Appellant submitted an application for a stream flow reduction activity licence for afforestation purposes on the farm Mooihoek 168 HT. The Respondent refused to grant a licence to the Appellant on the grounds that the Appellant 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 EVENTS THAT LED TO THE APPEAL

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

**The SFRALAAC resolved to recommend the application for the planting 62 ha *Eucalyptus sp*, 14.4 ha *Pinus sp.* and 12 ha *wattle* to DWAF Head Office subject to the following condition:**

- (1) A minimum distance of 1 000 m is required from the crane nest site during the breeding season. The DACE and MPB shall provide the breeding times. This means no culling; harvesting or other noise related forestry-impacts may occur within 1 000 m of the crane nest site during breeding season.
- (2) Awaiting finalisation of the Reserve with regards to the water balance model, before final recommendation can be made to DWAF Head Office.

On the 22<sup>nd</sup> 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 22 February 2001, it was decided to recommend the application for the afforestation of 40 ha on the mentioned portion of the farm Mooihoek 168 HT in the quaternary catchment W 51 C. DWAF has confirmed (16/7/2002 Mr Kavin) that no other correspondence accompanied the letter of recommendation from the Regional Director.

The minute of the meeting held on the 22<sup>nd</sup> February 2001 reads as follows; Mrs Cloete applied for 62 ha *Eucalyptus sp.* 14,4 ha *Pinus sp.* and 12 *wattle*. The application will be recommended to the DWAF Head Office subject to the following conditions:

A minimum distance or 1 000 m is required from the crane nest site during the breeding season. The DACE and MPB shall provide the breeding times. This means no **culling**; harvesting or other noise related forestry-impacts may occur within 1 000 m of the crane nest site during breeding season.

Must read-thinning

Addition: Breeding times provided by Mpumalanga Parks Board:

Blue Crane (Oct-Feb)

Crowned Crane (Dec-Feb)

Wattle Crane (May-Aug)

In the letter dated 12<sup>th</sup> April 2001 the Chief Director: Water Use and Conservation submitted quoting the National Water Act for the Chief Director's decision.

Reads as follows:

Herewith an application for Stream Flow Reduction Activity Water Use Licence for afforestation in accordance with Chapter 4. Section 21(d) read with section 36(1)(a) of the National Water Act, 1998 (Act No. 36 of 1998) for your approval, if you concur.

STREAM FLOW REDUCTION ACTIVITY LICENCE: A.F.C.

APPROVED AND SIGNED/NOT SIGNED

Director-General's letter dated 19<sup>th</sup> April 2001 the second paragraph reads: We regret to inform you that a permit cannot be granted as the property is situated in a critical catchment area where the maximum permissible area, which may be afforested, has been reached. Any additional demands on the available water will be have a detrimental effect on the present unfavourable situation.

### 3. THE ISSUES TO BE DETERMINED

The issues are whether or not the Chief Director exercised his direction properly.

### 4. POSITION OF THE LAW

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. THE DECISION OF THE DEPARTMENT

From the evidence on record, the Chief Director disapproved/not signed 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 recommendations of the SFRALAAC, (88.4 ha) the Regional Director (40 ha) and the Industrial Technician Report (35 ha) when taking the decision to sign a letter quoting sections of the Water Act to approve of the said application if he concurs. The last six words of the letter dated 2001/04/12, which was addressed to the Chief Director reads as follows:

**“for your approval, if you concur”**

It is also evident that the letter prepared was not read, as the signature is almost directly under the typed words reading **not signed**.

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 no mention in the letter was made of SFRALAAC recommendation.

**Minutes of the meeting held on the 7<sup>th</sup> December 2000, point 7.1.4 page 5.  
State:**

Mrs Cloete applied for 62 ha *Eucalyptus sp.* 14,4 ha *Pinus sp.* and 12 wattle (88,4 ha). **The application will be recommended DWAF Head Office subject to the following conditions:**

- (1) A minimum distance of 1 000 m is required from the crane nest site during the breeding season. The DACE and MPB shall provide the breeding times. This means no **culling**; harvesting or other noise related forestry-impacts may occur within 1 000 m of the crane nest site during breeding season.
- (2) Awaiting finalisation of the Water Reserve with regards to the water balance model, before a final recommendation can be made to the DWAF Head Office.

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

The Regional Director Mpumalanga letter dated 22<sup>nd</sup> February 2001 states:

During the SFRALAAC meeting held on the 22<sup>nd</sup> February 2001, it was decided to recommend the application for the afforestation of **40 ha** on the mentioned portion of the farm Mooihoek 168 HT in quaternary catchment W 51 C.

From the above statement the Regional Director did not read the recommendation made by the SFRALAAC the minute of the meeting held on the 22<sup>nd</sup> February 2001, point 7.1.4 page 4, which reads as follows;

Mrs Cloete applied for 62 ha *Eucalyptus sp.* 14,4 ha *Pinus sp.* and 12 wattle. **The application will be recommended DWAF Head Office subject to the following conditions.**

A minimum distance of 1 000 m is required from the crane nest site during the breeding season. The DACE and MPB shall provide the breeding times. This means no **culling**; harvesting or other noise related forestry-impacts may occur within 1 000 m of the crane nest site during breeding season.

Must read-thinning

Addition: Breeding times provided by Mpumalanga Parks Board:

Blue Crane (Oct-Feb)

Crowned Crane (Dec-Feb)

Wattle Crane (May-Aug)

However, went on to recommend that the application be approved for 40 ha subject to the water balance.

The Industrial Technician (Naomi Fourie) report:

### **Hydrological Assessment**

#### The Low-Flow Determination

A preliminary hydrological assessment or low-flow determination has been made for this catchment. The determination indicated that this development would reduce the catchment's low flow with 0.05097% keeping in mind the low-flow determination, the Industrial Technician (Naomi Fourie) SFRA Control for Mpumalanga made recommendation on the issuing of a licence for 35 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 2001/04/12 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.

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.

The Regional Director failed to make recommendation to the Director-General as per the recommendation of the SFRALAAC meetings held on the 7<sup>th</sup> December 2000 and 22<sup>nd</sup> February 2001.

The purpose of section 17 of the Act, which makes provision for the determination of a preliminary reserve, is to facilitate the licensing process while the process towards the determination of the final Reserve is going on. The effect should be that new water uses may be licensed in spite of the final Reserve not being available yet.

An administrative decision or recommendation that a licence application be refused and the catchment be “closed” until the final Reserve determination has been done, negates the purpose of the provision for the determination of a preliminary reserve. A regional decision to close the catchment pending a final determination of the Reserve is restricting the delegated decision-maker in his or her discretion. What the decision-maker should have done was to weight the preliminary Reserve (VMAR) of - 80,0 mm<sup>3</sup>/a) (which represented the interest of domestic and ecological use) against the impact, which the use would make on this flow, and the economical, social, and other factors and then came to a decision whether or not to allow the use.

Of course, conditions as to the revision of the licence could be placed to accommodate the effect of a final Reserve determination. By refusing the licence because the region made a general decision that the decision-maker may not allow, in his or her discretion, any more licences irrespective of the other factors, which may be relevant, the decision-maker did not promote administrative justice.

## 6. DECISION

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

- (d) 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. ORDER

- (1) The decision of the Chief Director: Water Use and Conservation F21/1/1/4/700 dated 12<sup>th</sup> April 2001, is withdrawn.
- (2) The Department of Water Affairs and Forestry is ordered to issue a licence to the appellant for the afforestation of 35 ha.
  - (a) *Eucalyptus sp* 35 ha (thirty-five)
  - (b) *Pinus sp.* 0 ha (zero)
  - (c) *Wattle* 0 ha (zero)

Revisable after 5 years on the other conditions regarded necessary and shall be subject to the provision of Section 49 of the National Water Act, 1998 and other relevant departments who may impose other reasonable conditions.

.....  
ETHNE DAVEY (ADDITIONAL MEMBER)

(Other members concur)