

**IN THE WATER TRIBUNAL**

CASE NO: WT/B1

IN THE APPEAL OF:

O.T. BENEKE  
REIIEIVO BOERDERY (PTY) LTD

APPELLANT

AND

THE DIRECTOR-GENERAL  
DEPARTMENT WATER AFFAIRS AND FORESTRY

RESPONDENT

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**DECISION**

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1. The Appellants submitted an application for a stream flow reduction activity licence for afforestation purposes on portion 2 of the farm Weeber 147HT. The Respondent refused to grant a licence to the Appellants 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 for a stream flow reduction activity licence for afforestation purposes served before the Stream Flow Reduction Activity Licence Assessment Advisory Committee (SFRALAAC) on 7<sup>th</sup> December 2002 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) All wetlands and watercourse must be delineated prior to the establishment of any plantations.
- (2) Awaiting finalisation of the Reserve with the regard to the water balance model, before a final recommendation can be made to DWAF Head Office.
- (3) If the application is unsuccessful, appropriate action will have to be initiated from DWAF's side, to ensure that the area which is established illegally, is eradicated.

On 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 7<sup>th</sup> December 2000, it was decided to recommend the application for the afforestation of 129 ha on the mentioned portion of the farm Weeber 147 HT in the quaternary catchment W 51 C.

The favourable consideration for the issuing of a licence for the afforestation of 129 ha on Weeber 147 HT 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 2<sup>nd</sup> 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 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, to let administrative justice happen.
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, may make the decision. 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 2001/04/02, 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 7<sup>th</sup> December 2000, point 7.1.10, page 7.

The last sentence dealing with the application states:

**The applicant will be recommended to DWAF Head Office subject to the following conditions:**

1. All wetlands and watercourses must be delineated prior to the establishment of any plantations.
2. Awaiting finalisation of the Reserve with regards to the water balance model, before a final recommendation can be made to DWAF Head Office.
3. If the application is unsuccessful, appropriate action will have to be initiated from the DWAF's side to ensure the area established illegally is eradicated.

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

However, it is on record that both the Regional Director (letter dated 22 February 2001) and Naomi Fourie (letter not dated) Industrial Technician: SFRA Control for Mpumalanga made recommendation on the issuing of a licence was for 129 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.

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 the Reserve is restricting the delegated decision maker in his or her discretion.

What the decision maker should have done was to weigh the preliminary Reserve (VMAR of 80,9 mm<sup>3</sup>/a) (which represents 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. (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 adviser, 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; and
  - (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. (1) The decision of the Chief Director: Water Use and Conservation F21/1/1/4/700 dated 18 April 2001, is withdrawn.
- (2) The Department is ordered to issue a licence to the appellant for the afforestation of 129 ha as follows:
- (a) *Eucalyptus* species 76 ha
  - (b) *Pinus* species 53 ha
- (Which includes the existing 26 ha), revisable after 5 years, and on the other conditions regarded necessary in view of the recommendations made for purposes of the application.

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E. DAVEY (ADDITIONAL MEMBER)

(Other members concur)