IN THE WATER TRIBUNAL

HELD AT PRETORIA

CASE NO: WT 28/08/2006

In the appeal between:-

CHAMPAGNE FALLS (PTY) LIMITED **APPELLANT**

and

DEPARTMENT OF WATER AFFAIRS AND FORESTRY **RESPONDENT**

APPEAL DECISION

APPEARANCES

Coram	:	L.J Lekale (Mr) Chairperson Mr. H Thompson – Member Mr. A.S Makhanya – Member
For the appellant	:	**Adv. JHA Saunders** instructed by Mr. Snyders of Blake Bester Inc. Private Bag x 44 Wilro Park 1731 Tel: (011) 764 4643 Fax: (011) 764 3622
For the respondent	:	**Mr. T.M Sedibe** from its Legal Directorate in Pretoria

DETAILS OF HEARING AND REPRESENTATION:

[1] This is a majority decision in the appeal hearing held at Pretoria on the 5th October 2009.

[2] The appellant was represented by **Adv. Saunders** instructed by Messrs. Blake Bester Inc. Attorneys while the respondent, on its part, was represented by **Mr. Sedibe** from its Legal Directorate in Pretoria.

ISSUE TO BE DECIDED:

[3] The first question to be determined was whether or not the appellant was and still is undertaking a water use as defined by section 21 (d) read with section 36(1)(a) of National Water Act (the Act) in the sense that it uses land for an afforestation which has been or is being established for commercial purposes.

[4] In the event of the aforegoing question being decided in the affirmative, the next enquiry was whether or not the said water use was an existing lawful water use within the contemplation of section 32 of the Act.

[5] In the further event of either a negative answer to the question in [3] above or a positive answer to the question in [4] above, the Water Tribunal was requested to set aside the directive issued in terms of section 53 of the Act by the respondent against the appellant.

BACKGROUND TO THE ISSUE:

[6] On the 15th June 2006 the respondent issued a directive against the appellant in terms of section 53 of the Act in terms of which it held, inter alia, that the afforestation on the appellant's property was in contravention of section 22 of the Act and, further, required it to remove the planted trees by no later than a specified date.

[7] The appellant felt aggrieved by the directive and appealed against the same in terms of applicable law with condonation for the late appeal effectively being granted on the 25th August 2006.

[8] The matter was, eventually, scheduled for a hearing on the 13th March 2009 but could not be proceeded with because a preliminary issue relating to whether or not condonation had been granted was raised and had to be determined ante omnia.

[9] Condonation was, eventually, confirmed on the 8th April 2009, whereafter, the matter was rescheduled for continuation of the appeal hearing.

SURVEY OF EVIDENCE AND ARGUMENT:

[10] No oral evidence was adduced. The parties made submissions with the appellant, further, submitting written argument while the respondent, on its part, handed in a bundle of photographs for the sake of convenience and ease of reference as Exhibit A.

[11] The appellant relied, in support of the appeal, on, inter alia, an affidavit of its director submitted in reply to the reasons furnished for the directive by the respondent. The respondent, on the other hand, referred to Exhibit A and reports submitted by the appellant in support of its contentions.

ANALYSIS OF EVIDENCE AND ARGUMENT:

[12] It was effectively common cause between the parties that the appellant planted trees on its property and that such a plantation could be regarded as a forest.

[13] The parties were, however, in dispute over whether or not the said afforestation was established for commercial purposes. The appellant maintained that the trees were planted in order to prevent landslide problems and to stabilise the topsoil of its property while the respondent, effectively, contended that, having regard to the vast area covered by the plantation as well as the geotechnical reports submitted by the appellant, the reason cited by the appellant for the establishment of the afforestation in question is not acceptable as the plantation enhances the value of the property and, further, consumes a lot of water.

[14] The respondent conceded that there was no direct evidence to prove that the appellant established the plantation for commercial purposes but contended that it was against the purpose of the Act insofar as it consumes a lot of water when it was not even being used for commercial purposes. In this regard Mr. Sedibe, for the respondent, invited the Water Tribunal to supply the lacuna or apparent omission in the Act by having regard to the purpose and objectives of the Act. He conceded that the Act and the proclamations made thereunder, as they presently stand, do not target the activities in which the appellant is engaged as a defined stream flow reduction activity.

[15] Mr. Sedibe, furthermore, referred to section 22(2)(b) of the Act in his submissions that not only the Act should be considered in the determination of the appeal but also any other applicable law such as by-laws which the appellant was contravening by planting the Pinus Patula trees should be taken into account. The tribunal must, however, hasten to point out that, as correctly and effectively conceded by Mr. Sedibe, section 22 of the Act only deals with water uses which are permitted.

[16] In order for the provisions of section 22 of the Act as referred to in the directive to be applicable to the appellant, the appellant should be undertaking a water use as defined in section 21 of the Act. In other words, the undertaking of a water use as defined by section 21 is a jurisdictional fact for a person in the position of the appellant to require a licence or authority to make such a water use.

[17] The starting point was, thus, whether or not the appellant was undertaking a water use as defined. The tribunal was divided on the issue as to whether or not it had jurisdiction to determine the issue in question. The minority felt that the determination of such a question involves the application of the law to determine the lawfulness of the directive issued which task, in its view, is judicial and not administrative in nature and, as such, falls beyond the jurisdiction of the Water Tribunal. The majority, on the other hand, felt that the issue resided within the appeal jurisdiction of the Tribunal because the appeal takes the form of a re-hearing and that in determining the issue the Water Tribunal is not simply called upon to enquire into whether or not the respondent complied with the law but is effectively required, in the exercise of its original powers, to look at the evidential material properly before it and to determine therefrom whether or not the appellant is undertaking a water use within the contemplation of section 21 of the Act.

[18] The members of the Tribunal were, however, in unison in their view that, if the Water Tribunal had the requisite jurisdiction then and only in that event, what had to be determined as a factual issue was whether or not the afforestation was established for commercial purposes and that if the answer was in the negative, then that would signify the end of the enquiry.

[19] The Tribunal was, further, united in its view that there was no direct evidence before it to prove that the plantation in question was established for commercial purposes. The aforegoing was, furthermore, effectively conceded by Mr. Sedibe who, save for referring to the large area covered by the plantation, could not take the matter any further. The Tribunal could not draw the inference that the plantation was or is being established for commercial purposes merely from its size. The aforegoing prevailed because such an inference was not the most plausible that could be drawn from the size of the plantation as this fact was equally consistent with, inter alia, the need to stabilize the topsoil of the property. (see generally **AA Assuransie – Assosiasie Bpk v De Beer 1982(2) SA 603 (A)** on circumstantial evidence).

[20] It was, thus, clear to the Tribunal that for an afforestation to be a stream flow reduction activity for the purposes of section 36 read with section 21 of the Act it should have been or be in the process of being established for commercial purposes.

[21] Where an afforestation has not been or is not being established for commercial purposes it followed, in the Tribunal's view, that such afforestation is not a water use as defined by section 21 of the Act and, as such, does not require authorisation in terms of section 22 of the Act.

[22] In conclusion it may be mentioned by way of parting shots that:-

[22.1] as a creature of statute the Tribunal is only entitled to do that which it is permitted to do by its enabling legislation;

[22.2] the supply or filling of casus omissus in the Act falls beyond the powers of the Tribunal;

[22.3] section 36 (2) of the Act confers the power to declare **"any activity (including the cultivation of any particular crop or other vegetation) to be a stream flow reduction activity [if] that activity is likely to reduce the availability [of] water"** on the Minister;

[22.4] the respondent did not refer the Tribunal to and the Tribunal was not aware of any declaration by the Minister which makes the appellant's activity a stream flow reduction activity;

[22.5] it follows from the provisions of section 36(2) of the Act that the respondent is not without a relief where it feels that the plantation in question is likely to reduce the availability of water.

DECISION:

[23] In the result the appeal succeeds and the relevant directive is hereby set aside.

[24] The file shall, therefore, be closed.

DATED AT PRETORIA ON THIS ..17th..... DAY OF NOVEMBER 2009.

L.J LEKALE
Chairman