IN THE WATER TRIBUNAL

IN THE APPEAL OF: Case NO: WT 14/07/2006

H. H. SMITH Appellant

and

THE DEPARTMENT OF WATER AFFAIRS AND FORESTRY Respondent

DECISION

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1. This is an appeal against the decision of the Respondent to disapprove the Appellant's application for a licence in terms of Section 21(d) read together with Section 36 of the National Water Act (Act 36 of 1998) ("the National Water Act"). Pursuant to Section 21(d) read together with Section 36 of the National Water Act, the Appellant applied for an afforestation Licence to set-up a commercial Timber (Pine) plantation on Portion 69 of Elandskraal 203 Division of Knysna using 4 hectares.

2. In 2002 the Appellant planted 4 hectors of commercial Timber (Pine) on Portion 69 of the Elandskraal 203 Division of Knysna without proper authorisation in contravention of Section 21 (1) (a) (ii) read together with Section 22 (1) (b) of the National Water Act. On 23 October 2003 the Respondent instructed the Appellant to remove the trees and rehabilitate the area in question within 90 days in terms of Section 53 (1) of the National Water Act.

3. The Appellant applied for condonation for a late appeal. In the letter dated 22 January 2004 the Water Tribunal refused the application for condonation for a late appeal.

4. The Respondent issued the second directive in terms of Section 53(2) of the National Water Act and on 28 and 29 October 2004 proceeded to remove the trees.

5. The Respondent submitted the following grounds for refusing the Appellant's application for a water use licence to engage in a stream flow reduction activity:

5.1. A hydrological assessment was conducted at Karatara catchment area and approved by the Director-General. The assessment set the Reserve Quantity requirement at 50% of the MAR..."with a maintenance low flow of 37% of the MAR at the exit of the K40C quaternary." Although the report indicated that 76% of the Karatara River's flow was still available when the study was being conducted, an assessment conducted through the desktop reserve model indicated that the reserve requirement was 37% of the MAR and not 50% of the MAR as indicated above. The Respondent maintained that the proposed activity would have a detrimental effect on the reserve. The Appellant made a case that the reserve determination was not revealed to him and also questioned the accuracy thereof. In his faxed letter dated 02/ 09/2006, p1 he further indicated that the data was not current and was "conflicting with some of their other reports (such as the Swartvlei Situation Assessment), DWAF [had] no accurate data available to make an informed decision of this nature..." The Appellant asserted that if there was, in deed, a deficit the Respondent would be making an effort to store water for the low flow months. The Respondent maintained that, in terms of Section 11 of the Water Services Act No 10 of 1997, the Water Services Authority was responsible for supplying water services in the area.

5.2. The Respondent disapproved the Appellant's application because the Swartvlei estuary into which the Karatara River flows is of ecological importance and sensitivity. It carries, among others, "the Red Data Species such as the Knysna seahorse, freshwater mullet, and the checked goby." In addition to ranking sixth in conservation significance of South African estuaries, its coastal lakes are of "the rarest types of the estuarine system in South Africa..." The Appellant claimed that his proposed activity would not pose a danger to the Swartvlei estuary ecology as requirements thereof were "...being currently met comfortably..." The Appellant argued that the impact of his activity would be mitigated by the SAFCOL's phasing out of over 600 hectares of pine plantation. The Responded dismissed the latter by pointing out that the Appellant was informed on 24 August 2005 by the Area Manager, Mr. Taylor Geoff, of MTO Forestry (Pty) Ltd that he was no longer certain if phasing out was going to take place. The Appellant further indicated that the impact of his activity would be mitigated by

the fact that he had not replanted 15 hectares which he recently harvested.

5.3. The Respondent also rejected the Appellant's application on the basis that the Karatara catchment area experienced different flows during the year which resulted in a drop to about 5% of the MAR during the winter months and 7% of the MAR at the height of the summer. The Respondent indicated that the importance of maintaining the flow during the low flow months was crucial for maintaining the functions quoted below:

- *Ensuring that open mouth conditions occur within the lake (the virgin conditions of an open mouth for 65% of the time has been reduced to 50-55% open mouth conditions currently). These conditions are necessary to allow for the migration of marine organisms. The reduced flows have resulted in increased freshwater conditions within the estuary as well as increased sedimentation of the estuary.*

- *Ensuring that the current ecological state of the river remains intact – when perennial rivers are dry they [lose] much of the ecologically sensitivity biota that are particular to those systems and only the more tolerant species remain. The black water systems which flow through the fynbos vegetation of the [C]ape south coast and drain the table mountain sandstone group are considered to be unique and of high biodiversity.*

The Respondent submitted that although "... water is still available for abstraction during the high rainfall months, no further Stream Flow Reduction Activity can be allowed as this would further reduce the low in the river during the low flow months." According to the Respondent the impact of the Appellant's activity would be severe on the low flow months. The Appellant contended that the impact would not be much because the area where his activity would be occurring was on a steep slope with hard clay soil that would accelerate water runoff and leave his "pine trees as a poor SFRA..." The Respondent asserted that the disapproval of the application was the right thing to do because the Appellant's activity would not amount to the best way of using water in an already water stressed area.

6. An undated and unsigned letter addressed to the Regional Director – Western Cape DWAF, (inquiries C. J. Visser), indicated that "the applicant was given the opportunity to offer alternatives, but he could not come forth with any viable options." Although the Respondent did

not submit this as one of the grounds for the refusal of the Appellant's application he (the Appellant) presented this issue as his second objection and the basis of his appeal.

Before the application was rejected the Appellant was made aware, in the letter dated 13 April 2006, of an option to find another water user in his area who was keen to give up his/her water use in favour of the Appellant to back his application in terms of Section 25(2) of the National Water Act. "This was done because this catchment (Karatara) is already stressed and a normal licence application could not be recommended (in a letter dated 24/06/2005, p.2)." The Appellant could not find anyone to surrender his/her water use. He offered instead to eradicate the invasive alien plants (IAP's) in the property where he planned to plant the pine in accordance with the Yield Enhancement Guidelines. The Appellant's expression of interest in this option was followed by Mr. Neethling's visit and an inspection of the various alternative sites of IAP's was done. After the inspection the Respondent (Mr. J. C. Visser) wrote a letter dated 24 June 2005 to Mr. Reggie Nkosi saying that "The IAP's are however scattered between dense indigenous vegetation and [that] it will be difficult to monitor follow-up operations in terms of CARA legislation (ACT 43 of 1983)." In the letter dated 02/09/2006 (p.5) the Appellant argued that "On inspection he [Mr. Neethling] assured me that if, for whatever reason, DWAF would require me to clear a bigger area than what I offered him he would contact me to discuss the matter." The Appellant is concerned that a final decision was made without coming back to him because he had "numerous alternative sites of IAP's, which... [he is] prepared to clear with immediate effect." In the letter addressed to the Appellant dated 04 September 2006 the Respondent asserted that according to the CARA legislation, "it is the responsibility of the landowner to ensure that invasive plant species do not spread over his/her property or onto the neighbouring property." Mr. J. C. Visser informed the Regional Director that "the vegetation that the Appellant offered to clear would normally have been his responsibility [to clear] under CARA legislation." The Responded reconfirmed its stance regarding the latter matter during the hearing on 31 May 2007.

7. Pursuant to Section 41(2) (c) of the National Water Act the Respondent invited written comments from persons and organizations interested in this matter. The Respondent received "17 unmitigated objections from affected and interested parties in the Gouritz Catchment." The Appellant did not make any comments on these public objections.

8. After reviewing all the evidence advanced by both the Appellant and the Respondent, the Water Tribunal concludes as follows:

8.1. The Appellant planted commercial Timber (pine) trees without authorisation. He ignored the directive to remove and rehabilitate the planted area on his property in contravention of Section 53(1) of the National Water until they were removed by the Respondent, in terms of Section 53(2) of the National Water Act on 28 and 29 October 2004.

8.2. The determination of the Reserve or Preliminary Reserve in accordance with Sections 16 read together with Section 17 is the legal requirement of the National Water Act, No 36 of 1998. The Reserve Quantity requirement set without taking the ecological and seasonality factors into account is at 50% of the MAR. When these factors were factored in, the reserve requirement became 37%. The Appellant maintained that the Respondent's reserve calculations were not accurate. The Respondent indicated in the letters dated 4 September 2006 and 27 September 2006 and was rehashed during the hearing that 50% of the MAR did not take ecological requirements and seasonality into account while the 37% of the MAR did. The explanation provided by the Respondent appears to make statistical sense because the percentage is bound to increase when two factors are not taken into account and to decrease when they are taken into account. Thus 37% of the MAR is the only official percentage that the Respondent had to base his decision on until another study proofed the figure otherwise.

8.3. The Appellant made a case that he was not shown the reserve determination; that the calculations were not "very accurate", current and were conflicting to serve as a basis for a decision. The reserve determination in question formed a critical part of the Appellant's application refusal on the one hand, and the basis for his first objection on the other. Section 16 (1) read together with Section (3) (a) of the National Water Act informs that, the members of the public have access to the reserve determination. Besides paragraphs 1, 3 & 4 of the Respondent's letter to the Appellant dated 27 June 2006 reference L22095661/1 addressed the issue of the reserve determination. The Appellant had an interest in the matter. As an interested party the Appellant could have taken the initiative to obtain the necessary information relevant to his application.

8.4. The water shortage during the low flow months is inextricably intertwined with the sustainable existence of the ecosystem and the biota. The Appellant was unable to provide a viable means of mitigating the shortage of water during the low flow months on the ecological sensitivity of the biota in particular.

8.5. The Respondent used the hydrological assessment signed by the Director-General and the desktop reserve model to arrive at the conclusion that the water availability during the rainfall months could not be the primary determinant for Stream Flow Reduction Activity licensing. The Respondent insisted that the decision to licence a Stream Flow Reduction Activity should take into account the water availability during the low flow months or dry season which drops to about 7% of the MAR. This decision seemed to have been guided by Section 36 (3) (a) of the National Water Act which maintains that before declaring an activity as a stream flow reduction activity the Minister must consider the extent to which the activity would significantly reduce the water availability in the water course. The Appellant concurred with the Respondent saying, "...I have no doubt that it is quite dry when it is dry and ... [that] ....is nature we cannot control it." The Appellant suspected that his planting of the pine trees on top of the hill would reduce the impact of the flow into the Karatara catchment area. He placed the honours on the Respondent to "calculate what ... the impact would be" if any. While the Appellant's observation might be legitimate it did not provide the Water Tribunal with any scientific basis to draw conclusions from. However, the report used by the Respondent showed that "the impact of abstractions (this includes SFRAs) on the low flow conditions is severe" (DWAF, 1995, Swartvlei Lake Catchment Water Management Strategy. Volume 2; Water Resources. DWAF, Pretoria).

The Appellant inquired that if water availability was a problem as stated by the Respondent, "why ... [were] numerous housing schemes being approved and initiated in the Sedgefield area..now [and] since [his] first application?" However, the Respondent indicated that DWAF was not involved with housing schemes. Items 6 of the letter dated 04 September 2006 addressed to the Appellant appeared to give some insights to the Appellant's question. The letter reads "...In terms of the South Cape Sub-Regional Structural plan (1996), this area is designed for 'Rural Habitation.' The proposal developed is, therefore, regarded not to be compatible with the relevant forward planning document."

8.6. The Appellant's admitted that "... [he had] numerous alternative sites of IAP's, which ... [he was] prepared to clear with immediate effect" to facilitate the approval of his application. The presence of numerous alternative sites of IAP's on his property implied that the Appellant has contravened the CARA legislation (ACT 43 of 1983) which required him to clear the alien vegetation on his property.

8.7. The Appellant admitted in the letter dated 13 April 2005 that he actually failed to find someone in his area prepared to surrender plantation rights in his favour.

8.8. In terms of Section 41(2) (c) of the National Water Act the Appellant received 17 objections from the Interested and Affected Parties (I&APs). In their objections, the I&APs underscored, among others, the detrimental impact of the Appellant's proposed activity on the availability of water, the "ecological biodiversity" and the surrounding "biophysical environment." These objections seem to affirm the Respondent's arguments regarding issues such as water availability, ecological sensitivity and low flows during low months. The evidence before the Water Tribunal did not reflect how the Appellant effectively addressed these objections.

9. On the basis of the reasons stated above the Water Tribunal, therefore, upholds the Respondent's decision to refuse the Appellant's application for the Stream Flow Reduction activity.

10. The Appeal is, therefore, dismissed

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W. E. Singo (Member)

L. S. Steele and O. Mooki concur.