

IN THE WATER TRIBUNAL

HELD AT PRETORIA

CASE NO: WT 21/09/2006

In the appeal between:-

JARRETT PECH TRUST

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
Mr. A.S Hadebe - Member

For the appellant : **Mr. Jarrett Pech**

Telephone / Fax : (033) 343 1767

For the respondent : **Mr. Linda Qwabe** from its Legal Services
Directorate in Pretoria

DETAILS OF HEARING AND REPRESENTATION:

- [1] The appeal hearing was held over 2 (two) days at Richmond and Pretoria on the 20th March 2009 and the 8th December 2009 respectively.
- [2] The appellant was represented by **Mr. J Pech** while the respondent, on its part, was represented by its legal officer, **Mr. Linda Qwabe**.
- [3] The proceedings were recorded mechanically on audio tapes.

ISSUE TO BE DECIDED:

- [4] The question to be determined was whether or not the appellant was engaged in a stream flow reduction activity (SFRA) as defined by section 36 (1) of the National Water Act (the Act) with specific reference to whether or not the appellant is establishing or has established an afforestation.
- [5] In the event of the foregoing question being decided in the negative, the Water Tribunal was requested by the appellant to set aside the directive issued against it in terms of section 53 of the Act.

BACKGROUND TO THE ISSUE:

- [6] The appellant is engaged in an essential oils production operation which entails the planting of, inter alia, Eucalyptus Smithii trees for distillation of oil. The trees in question get pruned or cut every 12 months and their height is not allowed to exceed 4 metres.
- [7] Prior to planting the trees in question the appellant's Jarrett Pech (Pech) engaged the officials of the respondent in an endeavour to ensure that the operation complies with the law and applicable rules.
- [8] On the 25th August 2006 the respondent issued a directive against the appellant in terms of which it, inter alia, identified the trees planted as an unlawful SFRA and directed the appellant to remove the same within a stipulated time period.
- [9] The appellant felt aggrieved by the directive and lodged an appeal against it on the 21st September 2006.

- [10] The appeal hearing was, eventually, commenced in Richmond on the 20th March 2009 but could not be finalised as the parties were afforded an opportunity to secure expert evidence on whether or not the plants in question constitute a forest within the contemplation of section 36(1) of the Act.
- [11] During the said proceedings the parties were directed to address the Tribunal on whether or not it had jurisdiction to enquire into the issue as to whether or not the plants in question are a forest. The respondent left the matter in the hands of the Tribunal while the appellant answered in the positive.
- [12] When the proceedings resumed on the 8th December 2009 it became clear that the appellant's representative and the respondent's officials in Durban met over the issue and agreed on the need for the respondent to withdraw the directive.
- [13] The respondent's representative could, however, not confirm those developments and maintained that he was neither a party to any such discussions nor was he made aware of the same.
- [14] The parties submitted the evidence of their respective experts in an endeavor to assist the Tribunal in determining the appeal.
- [15] On or about the 14th December 2009 the appellant's Mr. Pech directed a communication to the Registrar of the Tribunal enclosing an e-mail from the appellant's expert witness Mr. Michael Howard (Mr. Howard) dated the 11th December 2009 in which the latter effectively advised him that the respondent's expert witness, Ms. Jacolena Fourie (Ms. Fourie) brought the provisions of the National Forests Act No. 84 of 1998 (the NFA) to his attention and that, in terms thereof, he was of the opinion that eucalyptus leaf gardens are in fact a forest plantation and, as such, require a water use licence.
- [16] The said communication was referred to the respondent's representative for comment by the Registrar but no response had been received from the respondent as at the date of preparation hereof.
- [17] The Tribunal was, however, satisfied that it was entitled to have regard to the said information, inter alia, because:
- [17.1] it relates to a legal position which the Tribunal is entitled to consider without permission from either of the parties;

[17.2] it expressed an opinion which is against the appellant as a party producing the same;

[17.3] there existed no possibility of prejudice to the respondent if the information was considered;

[17.4] ex facie the relevant e-mail the information emanated from the respondent's quarter insofar as it was communicated to Mr. Howard by Ms. Fourie.

[18] In the light of the foregoing development it was no longer necessary for the Tribunal to outline the oral evidence adduced for and on behalf of the parties in any significant detail.

SURVEY OF EVIDENCE AND ARGUMENT:

[19] The parties adduced oral evidence in addition to the bundle of documents made available by the Registrar.

[20] In support of the appellant's contention that the plants in question do not constitute a forest, Mr. Howard testified as a forestry expert. Ms. Fourie testified for the respondent to the effect that an inference that the plantation in question is a forest should be made as the most plausible one to draw from the facts that the pattern used to plant the eucalyptus trees is similar to the one used in establishing forests and eucalyptus is one of the genera known and identified by the respondent as using significant amount of water.

[21] Mr. Pech submitted to, inter alia, the effect that it was clear from Mr. Howard's evidence that the leaf garden in question was not a forest.

[22] On behalf of the respondent Mr. Qwabe argued to the effect that the plants in question have a negative impact on stream flow insofar as the genus involved is one of the 3 (three) known and identified as having a stream flow reduction effect.

[23] Mr. Qwabe, further, submitted that a decision to the effect that the plantation in question was not a forest would have a catastrophic effect as it would encourage the establishment of such plantations with adverse impact on scarce water resources. He, furthermore, implored the Tribunal to adopt a purposive approach in the interpretation of the relevant provisions of the Act.

ANALYSIS OF EVIDENCE AND ARGUMENT:

[24] There was no dispute between the parties that, in order for the relevant plants to require a licence in terms of section 22 of the Act, they have to constitute a forest established for commercial purposes.

[25] The dispute between the parties was throughout the hearing limited to the question as to whether or not the appellant was and is using land for afforestation. The appellant maintained that it had developed a leaf garden as opposed to a "forest" while the respondent contended that the relevant plants were in fact a forest.

[26] Following the communication addressed to the Tribunal through the office of the Registrar by Mr. Pech it was clear that the parties were *ad idem* that the appellant has established a plantation which is regarded by the NFA as a forest.

[27] Section 2 (1) (x) of NFA provides that:

" 'forest' includes –

(a) a natural forest, a woodland and a plantation"

[28] Section 2(1) (xxiii) on its part defines "plantation" as "a group of trees cultivated for exploitation of the wood, bark, leaves or essential oils in the trees".

[29] As correctly conceded by the appellant, it is clear that the so-called leaf garden is, in fact, a plantation and, as such, a forest in terms of the NFA.

[30] The foregoing finding signals the end of the enquiry insofar as it is effectively a finding that the appellant is using land for afforestation established or being established for commercial purposes.

[31] In conclusion it needs to be noted that the appellant in its letter directed to the Tribunal after the fact of an appeal hearing, effectively, requests the Tribunal to relax the directive to the extent to which it requires the removal of the leaf gardens.

[32] The issue in question is, however, not properly before the Tribunal insofar as it was not dealt with at all during the hearing and insofar as, according to the

e-mail from Mr. Howard, the farm has changed hands it is possible that the appellant was no longer the relevant water user and, as such, did not have locus standi in the matter as at the 11th December 2009 when Mr. Howard brought the legal position to its attention.

DECISION:

[33] In the premises the appeal fails and the directive prevails.

DATED AT PRETORIA ON THIS 23rd.... DAY OF DECEMBER 2009.



L.J LEKALE
Chairman