**IN THE WATER TRIBUNAL**

CASE NO.: WT16/M3

IN THE APPEAL OF:

MODDEX TRUST APPELLANTS

AND

DIRECTOR-GENERAL RESPONDENT
DEPARTMENT OF WATER AFFAIRS AND FORESTRY

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**DECISION**

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1. BACKGROUND

The Appellant has lodged an appeal against the decision of the Respondent refusing to issue a licence to the Appellant for afforestation on the farm De Kraalen 160 HT (Portion 2). The reasons for refusal are as follows:

1. The property of the Appellant is situated in a critical area.

2. The maximum permissible area which may be afforested has been reached.

3. The additional demand for the water will have a detrimental effect on the present unfavourable situation.

The Appellant is contesting the decision of the Respondent on the following grounds:

1. The Appellant was never informed during the decision-making process about the above-mentioned reasons for the refusal of its application for a licence.

2. The Appellant was never given the opportunity to address these new and unmotivated reasons.

2. THE EVENTS WHICH LED TO THE APPEAL

The Appellant initially applied for a licence to establish commercial timber plantations on 901 hectares. The Appellant reduced these hectares to 431,8 to accommodate the requirements set by the officials of the Department of Water Affairs and Forestry.

After the reduction of the area to 431,8 hectares, the Department of Water Affairs and Forestry, Mpumalanga Province, recommended that a licence to establish commercial timber plantations of 431,8 hectares be granted. The recommendation was submitted for consideration by the office of the Director-General.

The said recommendation appears in the letter dated 22 February 2001 as follows:

> "During the SFRALAAC meeting held on the 6th August 2000, it was decided to recommend the application for the afforestation of 431,8 ha on the portion of the farm De Kraalen 160 HT in quaternary catchment W 51 D. The favourable consideration for the issuing of a licence for the afforestation of 431,8 ha on De Kraalen 160 HT for a valid period of 5 (five) years is recommended provided that water is available in the quaternary catchment for the development".

The application and recommendation served before the Chief-Director: Water Use and Conservation and was approved on the 12th April 2001. See annexure "A".

In his letter dated 18th April 2001 the Director-General regrettably informed the Appellant of his unsuccessful application in that the appellant's property is situated in a critical catchment area where the maximum permissible area which may be afforested has been reached and that the additional demand for the available water will have a detrimental effect on the present unfavourable situation.

3. THE ISSUES TO BE DETERMINED

What should be determined here is whether or not the Department of Water Affairs and Forestry, in considering the aforesaid application, complied with section 33(1) of the Constitution of the Republic of South Africa, Act 108 of 1996.

The section makes provision for the following:

"Everyone has the right to administrative action that is lawful, reasonable and procedurally fair."

The Appellant contends that the Department failed to comply with section 33(1) of the Constitution as follows:

1. The officials of the Department of Water Affairs and Forestry did not take all the relevant factors into account and did not apply their minds to the matter when they reached the decision to refuse the application.

2. The action taken by the Department was not procedurally fair because the Appellant was not informed, during the decision making process, as to the three new reasons considered by the said Department on which the refusal was based.

3. The Appellant was not given the opportunity to address those reasons and make the necessary submissions to the Department before the Department reached a final decision.

Elaborating on his contention the Appellant argues that during the entire process of the application the Department has never mentioned to the representatives of the Appellant that the Appellant's property is situated in the so-called "critical catchment area". The first time the Appellant had been informed that the property was situated in a "critical catchment area" was when the Appellant received the letter dated 18 April 2001 from the Department. The Appellant was never given an opportunity to assess for itself whether the catchment area within which its property is situated, was indeed a critical catchment area and the implications thereof. The Appellant argues further that at no stage during the entire process did officials of the Department indicate to the Appellant or its representatives that the maximum permissible area which may be afforested, had been reached. The Appellant was also not informed about the extent of the so-called maximum permissible area and how was that determined. At no stage during the process of the application did the officials ever indicate that the so-called "present unfavourable situation" existed in the catchment area in question. The Appellant does not even understand the meaning of the "present unfavourable situation". The Appellant submits that a study of the "available water" has not been concluded and it would therefore be a misrepresentation on the side of the Department to suggest that conclusive studies have been undertaken to determine the extent of available water.

Appellant submits further that should such scientific studies and data be available, it has not been submitted to the Appellant for his consideration. No scientific data and information was made available to the Appellant to show what detrimental effect the granting of the licence would have on the available water.

4. POSITION OF THE LAW

Section 33(1) of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

In terms of this section the reasonableness of an administrative action includes *inter alia* consideration of all relevant information and that the decision-maker applied his mind to all the facts before him. Moreover, administrative action is procedurally fair if, among others, the decision-maker afforded a party to the case an opportunity to fully state his or her case. Put it differently, the decision-maker should have observed the rules of natural justice, in particular, *audi alteram parterm* rule. In making an order in this case we will be guided by the provision of section 33(1) and in particular, the reasonableness and procedural fairness of administrative action.

5. THE DECISION OF THE DEPARTMENT

The Director-General addressed a letter dated 18/04/2001 to the Appellant wherein Appellant was informed of his unsuccessful application. (The reasons for the decision have already been stated in the background of this case.)

From the evidence on record the reasons stated by the Director-General are known to the Director-General alone. For example the SFRALAAC Naomi Fourie, an Industrial Technician (SFRA Central Mpumalanga) and the Regional-Director for Mpumalanga were involved in this application from its initial process. At no stage during application process did any of them bring to the attention of the Appellant that the Appellant's property is situated in the so called critical catchment area neither did any of them bring to the attention of the Appellant any of the reasons stated by the Director-General. Most importantly, the Regional-Director for Mpumalanga holds a senior position within the Department of Water Affairs and Forestry and I would have expected of him to know that the Appellant's property is situated in a critical catchment area where the maximum permissible area which may be afforested has been reached and that additional demand for the available water will have a detrimental effect on the present unfavourable situation as stated by the Director-General.

Moreover, had the Regional-Director known he must have communicated such information to the Appellant and gave Appellant an opportunity to respond. (Compliance with section 41(2)(d) of the National Water Act, 1998 (Act No. 36 of 1998).

This section provides that a responsible authority must afford the applicant an opportunity to make representations on any aspect of the licence application. During the whole process of this application the Appellant was made to belief that his application may only be considered provided the Appellant reduces the hectares to 431,8.

The question which I should consider now is whether or not the action of the Director-General was reasonable and procedurally fair. On the reasonableness of his action there is no evidence on record which indicate that the Director-General considered all relevant information before taking a decision. There is no evidence also that the Appellant was given an opportunity to fully state his case. Moreover, the Chief-Director: Water Use and Conservation approved of the application. There is no doubt therefore that the Director-General compromised the constitutional rights of the Appellant as provided for in section 33(1) of the Constitution.

6. ORDER

Having considered all the facts before me I made the following order:

1. The decision of the Director-General is set aside.

2. The Appeal succeeds.

3. The Department of Water Affairs and Forestry is ordered to issue a licence to the Appellant for the afforestation of 431,8 ha on De Kraalen 160 HT for a valid period of five years.

4. The licence shall be subject to the provision of section 49 of the National Water Act, 1998 and other reasonable conditions as may be imposed by other relevant departments.

5. No order for costs.

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ETHNE DAVEY

(Other members concur)