

IN THE WATER TRIBUNAL

HELD AT PRETORIA

CASE NO: WT12/10/2009

In the appeal between:-

PUKKA CHUKKA FARMS CC

APPELLANT

and

**THE DEPARTMENT OF WATER AFFAIRS
AND FORESTRY**

RESPONDENT

APPEAL DECISION: 2010-05-17

APPEARANCES

Coram : L.J Lekale (Mr) - Chairman
Dr. W Singo – Deputy Chairperson
Mr. H Thompson – Member
Mr. A.S Makhanya – Member

For the Appellant : Mr. P C Klusener

For the respondent : Mr. Linda Qwabe from its legal services
directorates in Pretoria

DETAILS OF HEARING AND REPRESENTATION:

- [1] The appeal hearing was held at Pretoria on the 7th May 2010.
- [2] The appellant was represented by its managing member **Mr. PC Klusener** while the respondent, on its part, was represented by **Mr. L Qwabe** from its Legal Services Directorate.
- [3] The proceedings were recorded mechanically on 2 (two) audio tapes.

ISSUE TO BE DECIDED:

- [4] The question raised by the appeal is whether or not the appellant is entitled to a Stream Flow Reduction Activity (SFRA) licence in respect of an afforestation which it wishes to establish for commercial purposes with specific reference to the following salient questions:
 - [4.1] whether or not the respondent applied its decision that **“there should be no further development for commercial afforestation in the Matikulu River catchment due to unavailability of water”** consistently and / or equally regard being had to the fact that the appellant’s neighbour was granted the relevant licence in September 2009 and after the appellant’s application was refused on 21st April 2009 on the ground of the said decision; and
 - [4.2] whether or not the establishment of the relevant afforestation by the appellant would have any impact on the Matikulu River catchment area.

BACKGROUND TO THE ISSUE:

- [5] The appellant applied for an afforestation licence viz. SFRA licence on the 25th March 2008 which was refused in terms of a letter dated the 21st April 2009.
- [6] In refusing the said application the respondent gave the reason therefor as being:
- “It has been decided that there should be no further development for commercial afforestation in the Matikulu River catchment due to unavailability of water”.**
- [7] The appellant felt aggrieved by the said decision and lodged an appeal against the same on the 13th April 2009.
- [8] No reasons for and / or documents relating to the decision were forwarded to the Registrar of the Water Tribunal as required by the National Water Act (NWA).
- [9] The matter was, eventually, scheduled for a hearing on the 7th May 2010. At the commencement of the proceedings Mr. Qwabe, for the respondent, pointed out that the reasons were set out in the letter communicating the decision to the appellant viz. letter of 21st April 2009 and that the appellant was satisfied therewith because he did not request any further reasons.
- [10] The Tribunal, however, pointed out to Mr. Qwabe in no uncertain terms that the respondent, as a responsible authority, is obliged to furnish such reasons and / or documents to the Registrar as a matter of law once an appeal has been lodged. The submissions of the said reasons or documents are not

triggered by any request from the appellant as contemplated by section 42(b) of NWA or the Promotion of Administration Justice Act No. 3 of 2000 (PAJA).

(see generally item 5(3) of Schedule 6 to NWA)

SURVEY OF EVIDENCE AND ARGUMENT:

[11] The respondent party submitted a copy of a letter dated the 10th September 2008 and addressed to the appellant as Exhibit "A" in addition to the bundle of documents made available to the Tribunal by the Registrar.

[12] The parties adduced oral evidence and made submissions as follows:

[12.1] **The appellant's case:**

Mr. Peter Charles Klusener testified under oath to, inter alia, the following effect:

- (a) the quality of the soil on the relevant farm is such that it is economically not sound to plant sugar cane thereon and the same applies to his neighbour;
- (b) the relevant farm is situated along the coast and, although there is tribal land between it and the sea, no significant impact would be done on the water resources in the area if the relevant licence is issued;

- (c) he does not dispute or question the relevant decision taken by the respondent on the development of afforestation in the area as set out in the letter refusing the application;
- (d) his neighbour, who operates under the same conditions as the appellant, was granted an afforestation licence in September 2009 and after such a decision had already been taken;
- (e) he concedes that a study was conducted by the respondent and does not dispute that it was completed in April 2008 and the report was made available in July 2008.

[12.2] **The respondent's contentions:**

Mr. Jacobus Christoffel Davel testified under oath to the following effect, among others:

- (a) he is a technician in the Durban region of the respondent responsible for, inter alia, commercial forestry licences and he assesses new applications;
- (b) the application of the appellant's neighbour was received on the 17th May 2004 while that of the appellant was made on the 25th March 2008;

- (c) the appellant's application was lodged at the time when the relevant study had already commenced;
- (d) the neighbour's application had already been recommended at the time of the study and was awaiting a decision from the respondent's head office;
- (e) those who conducted the study assumed, on the basis of the fact that such an application had been recommended, that it had been granted and made their findings and report on that basis;
- (f) the granting of a licence to the appellant's neighbour did not, as such, affect the report and the findings;
- (g) the available water is reserved for the Historically Disadvantaged Individuals (HDI);
- (h) reservations are also made for ecological use as well as the lagoon that is in the region viz. between the appellant's farm and the sea.

ANALYSIS OF EVIDENCE AND ARGUMENT:

[13] A hearing before the Tribunal takes the form of a re-hearing of the application and the Tribunal is, as such, as bound to take the respondent's policy and / or operational decisions, among


others, into account when it considers an appeal as the respondent was when it decided the application.

- [14] The reason underlying the decision refusing the application herein as reflected in the letter dated the 21st April 2009 is, as such, binding on the Tribunal and the appellant did not question the same.
- [15] The explanation furnished by the respondent for not applying the said decision on the application of the appellant's neighbour is, in the Tribunal's view, both plausible and acceptable insofar as it distinguishes the said application from the appellant's application on the basis of the dates on which they were respectively lodged. The said explanation is, in the view of the Tribunal, neither capricious nor subjective but it is based on sound principles of legality and fairness insofar as the relevant operational decision was, *inter alia*, made after the fact of the lodging and recommendation of the neighbour's application and did not apply retrospectively.
- [16] The explanation proffered with regard to the impact the granting of the relevant licence to the appellant would have on ecological reserves and reserves made for HDI's is, equally, plausible and acceptable insofar as it is in line with the provisions of section 27(1) (b) of NWA, among others, which provide for transformation factors on the basis of race and gender.

DECISION:

- [17] In the result the appeal fails and the file shall be closed.

DATED AT PRETORIA ON THIS 21st DAY OF MAY 2010.



L.J LEKALE
(Chairperson)