

**IN THE WATER TRIBUNAL**

CASE NO: WT14/12/2004

IN THE APPEAL OF:

WESTON AGRICULTURAL COLLEGE

Appellant

and

THE DEPARTMENT OF WATER AFFAIRS & FORESTRY

Respondent

**DECISION**

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"),
2. Pursuant to Section 21 (d) read together with Section 36 of the National Water Act, the Appellant applied to the Respondent for a licence to grant 100 ha of a broad leaf tree group, for commercial purposes, on its property situated in the Mooi River district. The Appellant is a public educational institution providing secondary schooling to approximately 200 pupils. Such schooling includes practical training in a variety of agricultural disciplines.
3. The Appellant wishes to propagate, cultivate and harvest a commercial forest plantation on a 100 ha block situated on its property, in phases, over a period of 5 years, Commercial gain obtained from such commercial afforestation, on the Appellant's submission, would be used to further subsidise the ongoing operation of the Agricultural College,

4. While the Appellant submitted that it had made at least two similar licence applications to the Respondent over the past few years, it is only the most recent licence application (made in 2003) which is a matter for this Appeal.
5. In reaching its decision to disapprove the Appellant's licence application, the Respondent relied on the advice of the KwaZulu-Natal stream Flow Reduction Activity Licensing Assessment Advisory Committee (the Committee). In this regard, the Respondent submitted an extract of minutes of the Committee in support of its decision to refuse the application which state the following

*"S.2.3 Weston Agriculture College: (No EIA No.): 100 ha: Weston Training School: Mooi River Catchment: Quaternary sub-catchment: V20£: Genera: Eucalyptu\$*

*This property is situated East of the town of Mooi River. The reduction in flow will increase to 5.95% in a catchment where the allowable reduction in low flow was 5%. This allowable low*

*flow reduction had been set at 5% because of objections received from the Mooi River Irrigation Board.*

*The Reserve however indicated that there was surplus water. The site was overgrazed and degraded.*

*It was noted that other applications had been turned down in this catchment, The Advisory*

*Committee recommended that this application not proceed, as the reduction in low flow had already been exceeded. "*

6. Taking into account the recommendations of the Committee, the Respondent submitted the following grounds for refusing the Appellant's application:
  - 6.1. objections to the licence application that had been received from the Mooi River Irrigation Board;
  - 6.2. in response to the Appellant's submission that there are a number of other permit holders in the area who had not planted their land in accordance with duly obtained licence approvals,

138 ha could theoretically be licensed to be planted for the reduction in low flow to reach 5%, or 611 ha could be licensed to be planted to revert to a previously recorded reduction in low flow to reach 5.75%. In this regard the Respondent submitted that note should be taken of a number of previous unsuccessful licence applications; that all its decisions are made with the objectives of equity, efficiency and sustainability in mind and that in the event that further water should become available within the relevant sub-catchment, such availability should be advertised to all users and all past unsuccessful applications with priority given to previously disadvantaged communities; *and*

6.3. in the event that the Respondent's submission that the reduction of low flow is considered to be invalid, a number of studies have indicated that the recharge of groundwater within the relevant catchment is limited by afforestation especially in circumstances where Eucalyptus as a species is proposed for planting, given the impact of such species on recharge of underground water.

7. The Respondent submitted a letter written by the Chairperson of the Joint Steering Committee of the Mooi River and Hlatikulu / Little Mooi Irrigation Boards dated 19 September 2005 containing the following extract from the minutes of its meeting dated 16 August 2005 :

*"a) Weston Agricultural College :An application was received previously and was discussed at the meeting held on 6 May 2005. Further motivation information was requested. This matter was opened up for further discussion. It was suggested that the College might be looking to increase their income, but the request was for educational purposes and due to the fact that they could not use that portion of land for any other farming activity. Mr John Armstrong supported their application, It was accepted by all".*

8. On the issue of equity, sustainability and efficiency in decision-making, the Respondent submitted that it had well-qualified employees who would be responsible for managing the afforested portion of its land, that it was an educational and a "not a profit-for-institution" (Le. a Section 21 Company); that measurement equipment on its land indicated that the low flow would not be negatively impacted upon by afforestation" activities (particularly in the low rain fall months) and that water management in the

area (Le. to manage low flow and to control water downstream the Mooi River) would be further enhanced in future by the construction of the Mearns Dam and Weir. Furthermore, it was the

Respondent's submission that its intended afforestation activities were not limited to the planting of Eucalyptus and that it would be amenable to the planting of any other suitable tree species to fulfill its educational objectives, including the objective to achieve some commercial gain to support its operations. In the latter regard, the Appellant further submitted that its intended afforestation activities would also facilitate the clearing of areas of its property on which wattle had been established and that the cleared wood material would be made available for fuel use by communities in the proximity of its property.

9. The Appellants licence application (brought under the provisions of Section 21(d) read together with Section 36 of the National Water Act) is subject to consideration of a number of general provisions governing licensing under the Act. Among those are the provisions of Section 17 and 18 of the National Water Act, requiring the preliminary determination of the Reserve prior to any licence application and the implementation of such preliminary determination in any licensing decision. The preliminary determination of the Reserve was not an issue in this appeal. In addition, Section 23 of the National Water Act provides that, subject to the National Water Resources Strategy, the Minister may determine the quantity of water in respect of which a responsible authority (i.e. the Department of Water Affairs & Forestry) may issue a licence for water resources in a water management area. The determination of the quantity available for allocation within the area the subject matter of this appeal was not disputed or raised. Section 27 of the National Water Act sets out, on a non-exhaustive basis, the considerations that must be taken into account in the issue of any licence which include, among others:

- 9.1. the need to redress the results of past racial and gender discrimination;
- 9.2. efficient and beneficial use of the water in the public interest;
- 9.3. the socio-economic impact -

- 9.3.1. of the water use or uses, if authorised: or

- 9.3.2. of the failure to authorise the water use or uses;
- 9.4. the likely effect of the water use to be authorised and the water resource and on other water users;  
;
- 9.5. investments already made and to be made by the water user in respect of the water use in question:
- 9.6. the probable duration of any undertaking for which a water use is to be authorised.

10. In terms of Schedule 6, item 6(3) of the National Water Act, an appeal to the Tribunal takes the form of a rehearing. Having regard to the evidence received from the Appellant and the Respondent the Tribunal's findings are as follows:

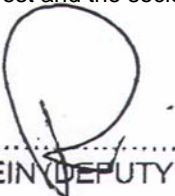
- 10.1. On the issue of objection to the Appellants licence application received from the Mooi River Irrigation Board, the Tribunal has no basis to uphold the Respondent's contention that the Irrigation Board has no objection to the Appellant's licence obligation. Evidence to the contrary was submitted by the Appellants and was not rebutted by the Respondent.
- 10.2. The Appellant initially intended to conduct the afforestation activities utilising the Eucalyptus species. However, during the course of its evidence, the Appellant submitted that it was not unamenable to considering any other appropriate alternative species for planting purposes subject to the requirement that *any* alternative species should be capable of affording some activities commercial gain for subsidising the Appellant's operational activities. The National Water Act accords the responsible authority a wide ranging discretion as far as the attachment of conditions to any licence that it may issue is concerned. In terms of Section 29 (1) of the National Water Act., those conditions may include protection of the stream flow regime (Section 29(1)(ii)) and water management (by specifying management practices and general requirements for any other water use), including water conservation measures(Section 29(1)(b)). Although the Appellant submitted that it would be amenable to the planting of an alternative species

amenable to the planting of an alternative species for afforestation purposes, the Appellant neither specified a particular alternative species or the impact of any other suitable species a particular alternative species or the impact of any other suitable species or the impact on the affected water resource over time.

- 10.3. Insufficient and in somewhat contradictory evidence was presented to the Tribunal regarding the availability of water in relevant sub-catchment under consideration. Although the Respondent made reference to water availability on a theoretical basis, no evidence was submitted to this Tribunal in support of the contention that a particular quantity of water is factually available for allocation purposes. The recommendations of the Committee, submitted in support of the Respondent's decision to refuse the application on the basis of unavailability of water for allocation of purposes, are somewhat contradictory and at the least indicate the presence of some "surplus" water. The Respondent also did not submit any very evidence to support its decision to refuse the licence application on the basis of negative impact on resource availability, particularly in the low flow months. Instead, it submitted that even if water was available, then such water would have to be advertised for allocation to other users in the area, including previous licence applications and, in particular, previously disadvantaged communities. In support of the latter, the Respondent cited Section 45 of the National Water Act which deals with compulsory water licensing applications and went to state that in terms of Section 45(3) of the Act it is and was under no duty to allocate water further in the circumstances. The licence application forming the subject matter of this appeal is not a compulsory licensing application but rather a licence application under Section 21(d) read together with Section 36 of the Act. For this reason the Respondent's contention in regard cannot stand. this

- 10.4. On the point of equity considerations, the Appellant submitted evidence in support of its educational objectives including its desire to extend its educational activities to previously disadvantaged learners as well as to make a contribution to the community within which it operates. No evidence was lead by the Respondent to refute the submission nor to substantiate the equity considerations it would take into account in reaching its decision to refuse the Appellant's licence application.

11. For the reasons stated above, this Tribunal cannot uphold the Respondent's decision to refuse the Appellant's licence application on basis of the evidence heard by and submitted to it. Having said this, insufficient evidence was submitted to this Tribunal by the Appellant to enable it to substitute its own decision for that of the Respondent. Accordingly, it is decided that the Appellant's licence application is remitted to the Respondent for reconsideration subject to the requirement that the provisions of Sections 2, 17, 18, 23 and 27 must be taken into account by the Respondent in any decision-making regarding the Appellant's licence application, in particular having regard to the need to redress the results of past racial and gender discrimination, efficient and beneficial use of water in the public interest and the socio-economic impacts of the water use under consideration.



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R T STEIN (DEPUTY CHAIRPERSON)

(Other members concur)