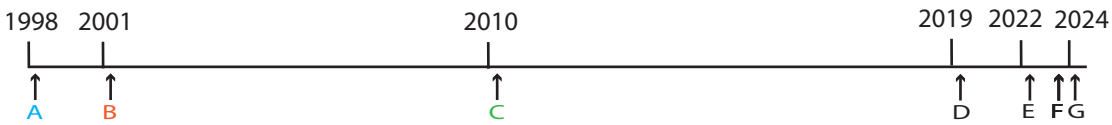


Forestry South Africa vs Department of Water and Sanitation Court Case

Part One: The background

After large numbers of FSA members were confronted by prejudicial interpretations of the National Water Act (NWA) regarding the extent of commercial forestry land on their property being claimed as stream flow reduction activities (SFRAs), FSA initiated a court case to obtain orders to clarify the interpretation of the NWA. In November 2023, the Supreme Court of Appeal (SCA) found in favour of FSA and granted various orders relating to SFRAs and genus exchange. While court proceedings were only initiated in 2019, the court case also dealt with issues that arose when the NWA came into effect in 1998.



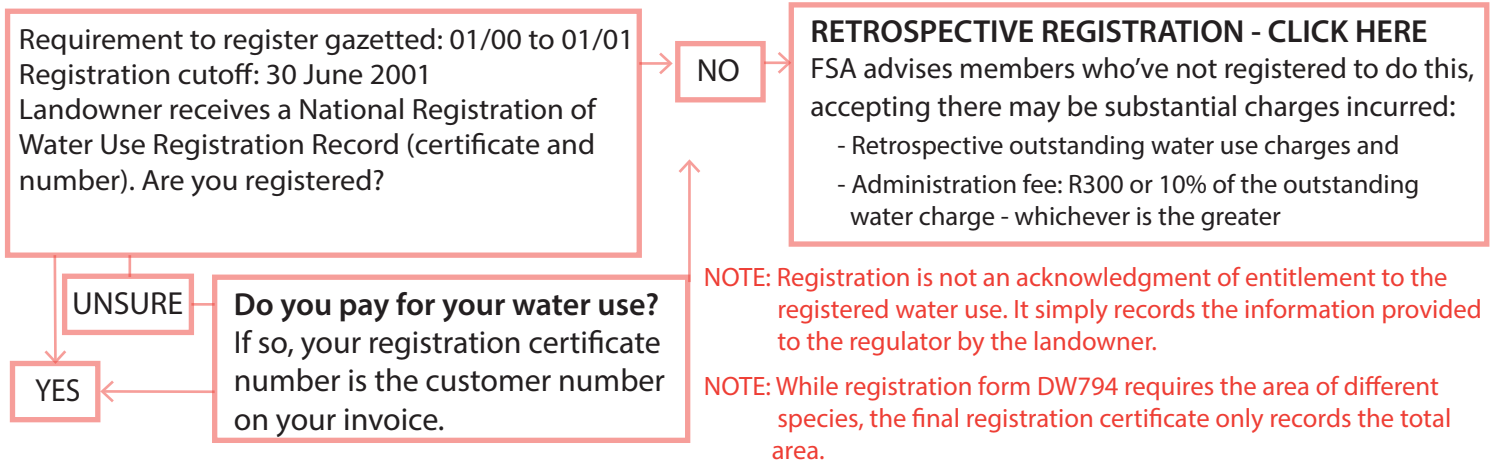
- A - National Water Act comes into force Oct 1998
- B - NWA Registration Period closes 30 June 2001
- C - Verification outcomes initiated by the DWS
- D - FSA lodge a case with the Cape High Court (CHC) Nov 2019
- E - CHC Judgment received May 2022
- F - SCA Judgment received Nov 2023
- G - Constitutional Court ruling Aug 2024

National Water Act (NWA) Act No.36 of 1998

- 1 October 1998 commercial forestry is declared a SFRA: the use of land for afforestation, which has been or is being established for commercial purposes.
- All existing land used for commercial forestry needs to be registered.
- All new afforestation (post 1 October 1998) requires a Water Use License (WUL).

Registration of Existing Water Use

1. Registration allows the Department of Water and Sanitation (DWS) to collect information about the geographical location and extent of commercial forestry, ensuring its lawfulness and effective management and allocation.
2. In terms of section 54 of the NWA, an unregistered water use entitlement may be suspended or withdrawn.



Verification of Existing Lawful Water Use (ELWU) Pre-Oct 1998

ELWU allows those using water prior to the NWA to continue doing so until their water use is verified through the process in terms of sections 35(1-4) of the NWA. Verification is the process of checking the volume of water registered and its lawfulness under previous legislation. In the case of SFRA, it is verifying the extent of lawfulness of commercial land actively managed for commercial forestry that existed during the "qualifying period": 01/10/1996 to 30/09/1998.

Section 35(1) Notice issued: Landowner invited by DWS to apply for verification of water use by completing Table 1: information about the property, water use, area used for commercial forestry and the certificate number. Table 2 and 3: are populated by the DWS using information provided by the landowner, including: the registered SFRA area, the SFRA area established with planting permits and the SFRA area established during the qualifying period.

Section 35(2): Enables further information to be requested by the DWS or added by the landowner.

Section 35(4) Notice issued: Verification of the extent of ELWU (hectares under timber)

Section 35(3) Notice: Penultimate notice before ELWU is confirmed:

1. Allows the DWS to conduct its own investigations into the lawfulness of the water use via WARMS (Water Authorisation Registration Management System).
2. The landowner can provide more information or make representation on any aspect of the application, before signing off on the notice.

Water Tribunal - The landowner can lodge an appeal to dispute the extent (hectares under timber) of the ELWU contained in the Section 35(4) Notice.

Forestry South Africa vs Department of Water and Sanitation Court Case

Part Two: The Findings

Below is a summary of the judgment of the Supreme Court of Appeal (SCA). Note that the Constitutional Court has subsequently held that it is not in the interests of justice to grant the Department of Water and Sanitation (DWS) leave to appeal the judgment of the SCA.

MAIN ARGUMENTS PUT FORWARDS TO THE COURTS

DISPUTE ONE: VERIFICATION OF STREAM FLOW REDUCTION ACTIVITIES (SFRA)

FSA: Sought various declaratory orders, including that commercial forestry need only to have taken place during the qualifying period to be considered an Existing Lawful Water Use (ELWU) and that authorisation (vs lawfulness) is not a requirement for verification.

DWS: Verification of commercial forestry plantations established between 1972 and September 1998 must provide proof that they were authorised by means of a Department of Forestry permit.

DISPUTE TWO: GENUS EXCHANGE

FSA: ELWU SFRA are not limited to the planting of specific genera of trees (Genus Exchange) that were planted during the qualifying period and genus exchange can be done on a 1:1 basis

DWS: Genus Exchange from pine to eucalypt requires authorisation and a 30% reduction in area planted.

JUDGMENTS

Commercial forestry plantations established prior to the 1 Oct 1998 are not subject to the requirement of proving "authorisation" when being verified as ELWUs.

IMPLICATIONS: DWS can only verify the extent and area of the hectares of land used/managed for commercial forestry during the qualifying period.

In the verification of SFRA ELWUs, the current water use – i.e extent of land used for commercial forestry (at the time of verification) cannot be used to reduce the extent of the land used for commercial forestry being claimed as a ELWU that was actually used during the qualifying period.

IMPLICATIONS: The DWS MAY NOT apply the "use-it-or-lose-it principle".

Any land actively being managed for commercial forestry purposes pre-Oct 1998 qualifies as an ELWU, whether the land was planted to trees at the time or not.

IMPLICATIONS: The land need not have been "planted to trees" during the qualifying period – it only needed to be part of an existing plantation that may have, coincidentally, been harvested during the qualifying period but, for whatever reason, had not been replanted.

The qualifying period for a SFRA is 1 October 1996 to 30 September 1998.

IMPLICATIONS: Any land being actively managed as a commercial plantation during the qualifying period and earlier qualifies as a ELWU.

Section 34(1)(a) of the NWA does not limit SFRA ELWUs to species or genera of trees. The court orders do not affect specific permits containing provisions that are expressly described as conditions prohibiting genus exchange without written approval from the relevant authority.

IMPLICATIONS: Genus exchange can happen freely, and without authorisation unless the planting permit issued specifically contains (on page two) specific conditions and limitations on the exchange of genus. Note that plantations established after 1 October 1998 in terms of water use licences may also contain conditions prohibiting genus exchange.

When genera or species of tree are changed, the DWS is NOT entitled to insist during the ELWU verification process that the area of land authorised for commercial afforestation be reduced in extent.

IMPLICATIONS: No reduction in the area commercially planted is required when changing genus for commercial forestry plantations that are SFRA's.

NOTE: FSA advises members with genus exchange conditions and limitations to obtain legal advice in respect of collaterally challenging those conditions, as the judgment found that there is no basis in law nor science for those conditions and limitations to have been inserted into such licences.