IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
BLOEMFONTEIN

SCA Case No.: 824/2022
ZAWCHC Case No.: 19684/2019 /11684/2019

In the matter between:

MINISTER OF HUMAN SETTLEMENTS, WATER & SANITATION First Appellant

DEPARTMENT OF HUMAN SETTLEMENTS, WATER & SANITATION Second Appellant

INKOMATHI-USUTHU CATCHMENT MANAGEMENT AGENCY Third Appellant

BREEDE-GOURITZ CATCHMENT MANAGEMENT AGENCY Fourth Appellant

CHAIRMAN OF THE WATER TRIBUNAL Fifth Appellant

and

FORESTRY SOUTH AFRICA Respondent

MEMORANDUM REGARDING THE JUDGMENT IN THE SCA APPEAL

<u>THE RELIEF CLAIMED BY FSA</u>

1. The members of Forestry South Africa ('*FSA*') were confronted by severely prejudicial interpretations of the National Water Act 36 of 1998 ('*the NWA*') by some of the abovementioned respondents ('*the Statutory Authorities*'). Therefore in 2019 FSA lodged an application in the High Court, Cape Town, asking for certain declaratory orders. The pleadings were at a later stage supplemented to also include relief aimed at addressing the avowed approach of the Statutory Authorities in relation to genus exchange. Ultimately FSA applied for orders declaring that:

1.1. Existing lawful water use in respect of streamflow reduction activity, referred to in section 32(1)(a)(ii) of the NWA, which had been or was being established for commercial purposes as contemplated in section 36(1)(a) of the NWA, is not subject to the requirement of authorisation, as provided for in section 32(1)(a)(i) of the NWA (prayer 6.1 of the notice of motion).

1.2 The obligations and conditions referred to in section 34(1)(a) of the NWA do not limit existing lawful water uses in respect of streamflow reduction activities for commercial afforestation to the planting of specific genera of trees (prayer 6.1A).

1.3 In the process of verifying existing lawful water use as provided for in section 35 of the NWA:

1.3.1 The current water use cannot be utilised to reduce the existing lawful water use which had taken place during the qualifying period (prayer 6.2);

1.3.2 the *'Use-it or Lose-it'* policy cannot be utilised in order to reduce the existing law water use which had taken place during the qualifying period (prayers 6.3).

1.4 In the process of verifying existing lawful water use as provided for in section 35 of the NWA, the interpretation of *'use of land for afforestation which has been or is being established for commercial purposes'* is not restricted to *'trees in the ground'* during the qualifying period (prayer 6.4).

1.5 In the process of verifying existing lawful water use in respect of streamflow reduction activity, the qualifying period is 1 October 1997 to 30 September 1999 and not 1 October 1996 to 30 September 1998 (prayer 6.5).

1.6 On a proper interpretation of the previous forestry legislation and the planting permits issued in terms thereof, any reference to genera or species of trees in the planting permits does not limit such existing lawful water use to such genera or species (prayer 6.6.2A(a)).

1.7 For the purposes of determining the lawfulness and extent of streamflow activities, the genera or species of trees, utilised for commercial afforestation established prior to the commencement of the qualifying period, cannot be taken into consideration (prayer 6.6.2A(b)).

1.8 The order set out in prayer 6.1.2A(a) and (b) will not affect specific permits containing provisions expressly therein described as conditions prohibiting genus exchange without written approval from the relevant authority and shall not be regarded as a review of any such permits (prayer 6.6.2B).

1.9 The Statutory Authorities are not entitled to insist during the verification process that the area of land authorised for commercial afforestation must be reduced in extent, whenever genera or species of trees are changed (prayer 6.6.4).

1.10 The exchange of genera or species of trees does not constitute a water use as envisaged in section 21 of the NWA (prayer 6.6.5).

THE JUDGMENT OF THE HIGH COURT, CAPE TOWN

2. The Cape High Court:

2.1. Dismissed all of the substantial number of *in limine* objections raised by the Statutory Authorities.

2.2. Although agreeing that streamflow reduction activity in respect of commercial afforestation is not subject to the authorisation requirement of section 32(1)(a)(i), refused the declaratory relief claimed in prayers 6.1 and 6.1A concerning the interpretation of sections 32 and 34 of the NWA.

2.3. Granted prayers 6.2 to 6.4 [High Court Order ('*H.C. Order*') 2.1 to 2.3], referred to in paragraphs 1.2 to 1.4 above.

2.4. Refused prayer 6.5 dealing with the timeframe of the qualifying period [H.C. Order 2.4]. (It is important to note that FSA made it clear in its heads of argument and in the court that the Statutory Authorities were inconsistent in their application of the NWA and that it was in the public interest that the precise timeframe of qualifying period be judicially determined).

2.5. Granted the prayers dealing with the genus exchange dispute, being prayers 6.6.2A(a) [H.C. Order 2.5.1(a)], 6.6.2A(b) [H.C. Order 2.5.1(b)], 6.6.2B [H.C. Order 2.5.2], 6.6.4 [H.C. Order 2.5.3] and 6.6.5 [H.C. Order 2.5.4 and 2.5.5] referred to in paragraphs 1.6 to 1.8, above.

2.6. Awarded FSA the costs of the application for declaratory relief.

THE APPEALS TO THE SCA

3. FSA lodged an appeal to the SCA against the decision of the High Court to refuse the declaratory relief claimed in prayers 6.1 and 6.1A ('*FSA Appeal*').

4. The Statutory Authorities also lodged an appeal against the following findings by the High Court, ('*Statutory Authorities Appeal*'), which findings are embodied in the paragraphs of the H.C. Order), (hereinafter identified by the use of square brackets):

   4.1. The dismissal of the *in limine* points raised by the Statutory Authorities.

   4.2. The granting of prayer 6.3 and 6.4 (referred to in paragraphs 1.3 and 1.4, above) [H.C. Order 2.2 and 2.3].

   4.3. The order in respect of prayer 6.5 (dealing with the timeframe of the qualifying period) [H.C. Order 2.5] – despite the fact that the order contended for by the Statutory Authorities was in fact granted by the High Court.

   4.4. The granting of the relief claimed in prayers 6.6.2A(a), 6.6.2A(b), 6.6.4 and 6.6.5 (referred to in paragraphs 1.6 to 1.9, above) [H.C. Order 2.5.1(a), 2.5.1(b), 2.5.3 and 2.5.4].

   4.5. The awarding of costs to FSA [H.C. Order 3].

5. In their notice of appeal, the Statutory Authorities requested the SCA to grant them wide-ranging declaratory relief – in the form of orders that are the converse of the orders granted by the High Court, an order confirming the correctness of the High Court's order relating to the timeframe of the qualifying period and further orders which reflect their own views concerning the effect of planting permits that had been issued pursuant to defunct forestry legislation

THE SCA JUDGMENT

6. The FSA's appeal to the SCA in respect of the interpretation of section 32 and section 34 was successful (SCA Order 1.3(a) and 1.3(b) pursuant to prayers 6.1 and 6.1A), subject to a qualification that was added to prayer 6.1A, as follows:

> 'Save insofar as such restriction attached to the rights to undertake these activities by reason of conditions or obligations arising from law of application at the commencement of the Act'.

The orders made in relation to FSA's appeal were unanimous decisions of all five SCA judges. FSA was awarded costs in respect of both its appeal as well as in respect of the appeal of the respondents.

7. In respect of the Statutory Authorities' Appeal:

7.1. All the *in limine* technical objections were rejected.

7.2. Prayer 6.6.2A(b) (referred to in paragraph 1.7 above) [H.C. Order 2.5.1(b)] was qualified in SCA Order 2.3 by the adding of the following:

> 'Save that in determining lawfulness in terms of s 35 of the National Water Act, a responsible authority may consider whether the activity was subject to any conditions or restrictions as to the genus or species of trees that may be planted, deriving from law that was of application at the commencement of the National Water Act and attached to the right to use land for afforestation, as provided for in s 36(1)(a).'

7.3. The Order in respect of prayer 6.6.5 dealing with the so-called close list of water uses envisaged in section 21 of the NWA [H.C. Order 2.5.4] was set aside on appeal in terms of SCA Order 2.3.

8. As will also be explained below, a minority of two judges, however, proposed a different outcome in respect of the genus exchange issue and the appeal of the Statutory Authorities.

THE UNANIMOUS JUDGMENT IN RESPECT OF THE FSA APPEAL

9. It is important to note that:

9.1. There was no appeal against H.C. Order 2.5.2 (Prayer 6.6.2B).

9.2. At the hearing of the appeal in the SCA, counsel for the Statutory Authorities conceded that their clients were not entitled to the declaratory relief set forth in their notice of appeal (as discussed in paragraph 5 above) and specifically indicated that the appeal in respect of H.C. Order 2.5.1(a) (Prayer 6.6.2(a)) was abandoned.

9.3. In paragraph 56 of the SCA judgment, it was therefore correctly recorded that the Statutory Authorities confirmed at the hearing that they were no longer appealing all the relief granted by the High Court as per their notice of appeal. The only remaining aspects, apart from the *in limine* objections and the costs issue, that the Statutory Authorities persisted with at the SCA hearing, were the following:

9.3.1. H.C. Order 2.5.1(b) (not 2.5.1(a)) (in relation to prayer 6.6.2A(b) only), to the effect that for the purposes of determining the lawfulness and extent of streamflow activities, the genera of species of trees utilised for commercial afforestation established prior to the commencement of the qualifying period cannot be taken into consideration.

9.3.2. H.C. Order 2.5.3 (in relation to prayer 6.6.4), to the effect that the Statutory Authorities are not entitled to insist during the verification process that the area of land authorised for commercial afforestation must be reduced in extent, whenever genera or species of trees are changed.

9.3.3. H.C. Order 2.5.4 (in relation to prayer 6.6.5) stipulating that the exchange of genera or species of trees does not constitute a water use as envisaged in section 21.

10. In paragraphs 24 and 25 of the unanimous judgment, it was stated that FSA's notice of motion was framed in *'a somewhat confusing fashion and that in substance no review was brought to set aside identified administrative action'*. Although this does not in any way impact on the outcome of the appeal, we do not agree with this contention for the following reasons:

10.1. In section 1(d) of the Promotion of Administrative Justice Act 3 of 2000 (*'PAJA'*), *'administrative action'* is defined widely as *'any decision taken by an organ state'* and a *'decision'* as *'any decision of an administrative nature made, proposed to be made or required to be made as the case may be under the empowering provision including a decision relating to imposing a condition or restriction'.*

10.2. FSA's notice of motion was drafted in line with the latest regulations under PAJA, using the template for the notice of motion contained in the regulations and it was specifically stated that <u>all the decisions</u> underpinning the declaratory relief applied for, were the subject matter of the proposed review.

10.3. Section 8(1)(d) of PAJA, furthermore, specifically provides for a court to grant an order declaring the rights of the parties in respect of any matter to which the administrative action relates. That is exactly what FSA did. Section 8 of PAJA does not contain a qualification to the effect that a declaration of rights can only be granted pursuant to the setting aside of the administrative action in question.

11. The fact that the SCA did not agree with these arguments on behalf of FSA is of little import, since it was found that the declaratory relief applied for could in any event be granted. The Statutory Authorities may, however, attempt to bolster an application for leave to appeal to the Constitutional Court based on this finding in the SCA judgment.

12. As stated, FSA was successful in respect of the refusal of the High Court to grant prayer 6.1 of the notice of motion, dealing with the interpretation of section 32 (SCA Order 1.3(a)). The SCA agreed with FSA's contention that streamflow reduction activity referred to in section 32(1)(a)(i) is a separate category of water use and is not subject to the authorisation requirement referred to in section 32(1)(a)(i) of the NWA.

13. FSA's appeal in respect of prayer 6.1A, providing that the obligations and conditions referred to in section 34(1)(a) of the NWA do not limit existing lawful water uses in respect of stream flow reduction activities to the planting of specific genera of trees, was also successful. The SCA, however, added the qualification referred to in paragraph 7.2 above (SCA Order 1.3(b)).

14. FSA's argument that the conditions referred to in section 34(1)(a) are only applicable to existing lawful water uses as provided for in section 32(1)(a)(i) (where authorisation is a requirement) and not to streamflow reduction activities as provided for in section 32(1)(a)(ii), was rejected.

15. The SCA, in our view, correctly pointed out that section 34(1)(a)(i) is a *'status quo provision'*. Section 34(1)(a) is therefore concerned with conditions/restrictions that were placed on activities prior to the NWA coming into effect, which activities are regarded as existing lawful water uses under the Act, while sections 34(1)(b) and (c) reference prospective restrictions – in other words, any conditions or limitations placed on an existing lawful water use in terms of the NWA (paragraphs 60 to 66 of the SCA judgment).

THE STATUTORY AUTHORITIES' APPEAL

16. As indicated above, the Statutory Authorities confirmed at the hearing in the SCA that they were no longer appealing all the relief granted by the High Court as per their notice of appeal. The only remaining appeals that the Statutory Authorities persisted with at the hearing, apart from the *in limine* objections and the question of costs, were against the orders referred to in paragraph 9 above.

17. Apart from prayer 6.6.1A(a) and prayer 6.6.2B, which was not under appeal, the SCA:

    17.1. Granted prayer 6.6.1A(b) as qualified (SCA Order 2.3, paragraph 7.2 above).

    17.2. Confirmed the High Court's granting of prayer 6.4.

    17.3. Allowed the Statutory Authorities appeal in respect of prayer 6.5 [H.C. Order 2.5.4] and set aside that order (SCA Order 2.3).

18. The orders proposed by the minority (as formulated in paragraph 101 of the judgment), make no sense at all, more particularly, for the following reasons:

18.1. The majority pointed out in paragraphs 78 and 79 of the judgment, that section 36(1)(a) streamflow reduction activity concerns land use and not the volume of water that is used for commercial afforestation. The verification of the extent of stream flow reduction activity is therefore measured by reference to land use and not by reference to the volume of water consumed by a stream flow reduction activity. On our reading of the judgment, the minority did not appear to dispute the findings of the majority, including the finding alluded to above.

18.2. In addition, the minority proposes the granting of relief that was abandoned by the Statutory Authorities. The minority simply regurgitated the orders proposed by the Statutory Authorities in their notice of appeal - which were, in the first instance, not supported by an application to Court and which, in the second instance, they abandoned at the SCA hearing.

18.3. It is reiterated that the abandonment occurred when Unterhalter AJA, who wrote the majority judgment, confronted counsel acting for the Statutory Authorities with the fact that they never applied for the declaratory relief in question (by bringing a counter-application) and on that basis, could never have been granted orders other than orders dismissing FSA's claims.

18.4. The order proposed by the minority in paragraph 1.1 (page 48 of the judgment), for example, is the converse of prayer 6.4 of the notice of motion/ H.C. Order 2.3 - which was not appealed by the Statutory Authorities.

18.5. Paragraph 1.2 of the order proposed by the minority (page 48 of the judgment) deals with the qualifying period and repeats an order which was granted by the High Court, but in relation to which no appeal was persisted

with by the Statutory Authority.

18.6. The relief framed in paragraph 1.3 (page 48 of the judgment) of the orders proposed by the minority was not requested by the Statutory Authorities and in any event is the converse of the order granted by the High Court in paragraph 2.5.1(a) (prayer 6.6.2A(a)) in relation to which an appeal was not persisted with by the Statutory Authorities. As the appeal against the order set forth in H.C. Order 2.5.1(a) was expressly abandoned at the hearing before the SCA, the order made in that court still stands. This order specifically provides that on a proper interpretation of previous forestry legislation and the planting permits issued in terms thereof, any reference to genera or species of trees in the planting permits does not limit such existing lawful water use to such genera or species.

18.7. The orders proposed by the minority in paragraphs 1.3(b) and (c) are literally copied from the Statutory Authorities' notice of appeal and do not relate to any of the H.C. Orders, did not form the subject-matter of an application to court by the Statutory Authorities and in reality represented nothing more than unwarranted and bald statements that appear in a notice of appeal (which the counsel for the Statutory Authorities in open court conceded they were precluded from relying upon). It should be borne in mind that it is trite law that it is for the parties to identify their disputes and for a court to determine those disputes and those disputes alone.

THE POSSIBILITY OF AN APPLICATION FOR LEAVE TO APPEAL TO THE CONSTITUTIONAL COURT

19. In terms of rules of the Constitutional Court an aggrieved party is afforded 15 court days to apply for leave to appeal to that court. On our reckoning the time so allowed expired on 7 December 2023. Bearing in mind the appalling history of non-compliance of statutory time-limits by the Statutory Authorities, it will be safe to assume that should they decide to take the matter further, they will yet again try and remedy being remiss by applying for condonation.

20. Should the Statutory Authorities consider asking for leave to appeal to the Constitutional Court, they will probably rely on the following arguments:

    20.1. The fact that there was a minority judgment by two of the SCA judges;

    20.2. That the majority disagreed with FSA's argument that section 34(1)(a) of the NWA is not applicable to stream flow reduction activities;

    20.3. The orders that FSA requested were granted but were qualified.

21. Assuming that the necessary condonation would be obtained, it is not possible to say for certain whether the Statutory Authorities will be granted leave to appeal to the Constitutional Court should they so apply. In light of the recent proposed amendments to the NWA, they may consider it more expedient to propose further amendments thereto.

PRACTICAL IMPLICATIONS OF THE SCA JUDGMENT FOR FSA MEMBERS

22. One cannot discount the possibility that the Statutory Authorities will rely, in the verification process in terms of section 35 of the NWA, on the SCA qualifications referred to above, and the rejection of our argument in respect of section 34(1)(a), to contend that references in forestry legislation permits to genus are relevant conditions or obligations, as suggested in the minority judgment. The members of FSA may be confronted by the Statutory Authorities with interpretations that cannot be sustained and will unfortunately have to consider carefully whether they are not negatively impacted by future decisions of the Statutory Authorities that are not in line with the majority judgment of the SCA.

23. The majority, however, made it clear that:

    23.1. Legislation that was applicable to commercial forestry prior to the commencement of the NWA *'was rather modestly concerned with the regulation of commercial forestry and even less concerned with the effects of commercial forestry upon water use'* (paragraph 44 of the judgment).

    23.2. Section 36 of the NWA defines a stream flow reduction activity with reference to land use and not the volume of water that is used (paragraphs 78 and 79 of the judgment).

    23.3. Under the regime of the old order forestry legislation, stream flow reduction activity was the use of land for commercial afforestation which constitutes an exercise of existing property rights (paragraphs 44, 78 and 79 of the judgment).

23.4. H.C. Order 2.5.1(b) was qualified in SCA Order 2.3 because the extent of existing lawful water use in respect of stream flow reduction activity was cast too widely. The stated reason for this qualification is: *'That is so because* [FSA] *has not established that stream flow reduction activity does not include any entitlement to such use deriving from old order law, that specified for the genus or species of trees that may be planted'* (paragraph 81 of the judgment).

24. Further relevant considerations are the following:

24.1. As stated above, H.C. Order 2.5.1(a) (Prayer 6.6.2A(a)) was not proceeded with by the Statutory Authorities and H.C. Order 2.5.2 (Prayer 6.6.2B) was not under appeal.

24.2. It was not disputed that more than 70% of commercial afforestation in South Africa was established prior to 1972 when planting permits were introduced for the first time. In respect of all those plantations, there is no question of any obligations or conditions attaching to the use as contemplated in section 34(1)(a) of the NWA.

24.3. The refusal of the SCA to grant prayer 6.5 [H.C. Order 2.5.4 and 2.5.5] is of little consequence. The order declaring that section 21 of the NWA is a closed list of water uses may have assisted the members of FSA in arguing the extent of lawfulness during the verification process, but this refusal will not seriously impact FSA members.

25. The only reasonable interpretation of the effective SCA and H.C. Orders is that the Statutory Authorities are not entitled to regard the mere reference to genera and species of trees in permits as conditions relevant for verifying lawfulness under section 35 of the NWA, or to require a new application for a licence when the genus or species of trees are changed. This reasonable inference is based on the following considerations:

25.1. The allegations in paragraph 23 and 24 above.

25.2. The wording of the effective court orders, SCA Order 1.3 (dealing with section 34 of the NWA) and qualifying prayer 6.1A.

25.3. SCA order 2.3 qualifying H.C. Order 2.5.1(b).

25.4. H.C. Orders 2.5.1(a) (prayer 6.6.2A(a)) and 2.5.2 (prayer 6.6.2B), which were not under appeal.

25.5. The interaction between the effective orders referred to in sub-paragraphs 25.2 to 25.4.

26. Despite FSA's success in obtaining the orders as explained above in the SCA, this does not have the effect that verification in terms of section 35 of the NWA is no longer necessary. The purpose thereof will be to verify that land was being *'used'* for afforestation during the qualifying period (1 October 1996 to 30 September 1998) and what the extent of the being used land was. However, this does not mean that trees needed to be physically in the ground, but the land must have been actively managed as a plantation, whether preparation, cultivating or harvesting. As explained above in paragraph 3, the Statutory Authorities cannot question the lawfulness in respect of a streamflow reduction activity based on reference to genus or species in old order

permits.

27. Information provided by FSA members and reflected in their water use registration certificates could be of assistance in this regard, bearing in mind that if the certificate only indicates land where trees were planted as at the date that the information was submitted to the relevant authority, additional information may be requested regarding the extent of the land used during the qualifying period (not at the time when members were requested to provide information to register their water use).

28. If it appears that some of the land was not being used for plantation forestry during the qualifying period, then the existing lawful water use may be limited to the extent of the land that was managed as a plantation during the qualifying period and as such, any FSA member using more land after the qualifying period than during the qualifying period will not have such additional land verified as an existing lawful water use.

29. In so far as genus exchange is concerned for plantations established pursuant to a water use licence issued under the NWA, it does not require the written approval of the relevant authority unless FSA members have a water use licence containing a condition that specifically requires written approval for genus exchange.

30. It is important to note that while the SCA made a specific finding that authorisation is not required to be proven in order to claim a stream flow reduction activity as an existing lawful water use, the Statutory Authorities are still empowered to determine the lawfulness of the existing lawful water use that is being claimed.

31. We submit that the correct approach in order to verify the lawfulness of an existing lawful water use in terms of section 35 of the NWA, is the following:

    31.1. Commercial forests established prior to 1968 (which accounts for more than

70% of commercial afforestation) are not subject to any conditions or obligations arising from law of application at the commencement of the NWA in respect of the planting of specific species or genera of trees. There are therefore no such conditions or obligations that can be taken into account by the Statutory Authorities when undertaking the verification process in terms of section 35 of the NWA.

31.2. From 1972 to 1 October 1998, references in planting permits issued under the 1968 Forest Act, (as amended in 1972) and the 1984 Forest Act to species or genera of trees, without clear indications that these references establish conditions or obligations with which commercial foresters must comply, can also not be taken into consideration when undertaking verification in terms of section 35 of the NWA.

31.3. Where express conditions or obligations regulating the species or genera of trees which may be planted, have been imposed in planting permits issued under the 1984 Forest Act, commercial foresters must comply with such conditions, except if the Statutory Authorities consented in writing to the change of genera or species.

31.4. We, however, believe and there are indications in the SCA judgment that the SCA supports FSA's position that the imposition of such conditions was not authorised by the old order forestry acts. Such conditions can therefore be taken on review or can be collaterally challenged by a refusal to comply therewith. With reference to paragraph 28 of the judgment, we define collateral challenge as follows: To raise a defence and refuse to comply with a coercive action taken or threatened against members of FSA by the Statutory Authorities, for example, relying on the invalidity of a condition

specifying that genera may not be exchanged without written approval, even though the condition has not been set aside by a court.

31.5. There may be other legislation that was in operation at the commencement of NWA, for example the Soil Conservation Act 16 of 1969, the Conservation of Agricultural Resources Act 43 of 1983 and the Environment Conservation Act 73 of 1989, in terms of which conditions or obligations relating to the planting of specific species or genera of trees were imposed.

31.6. FSA members should seek legal advice if confronted by the Statutory Authorities with an interpretation that is not in line with the above.

32. Please find a summary below for FSA members of the effective orders of the SCA and the High Court, and the implications of such orders.

SCA AND HIGH COURT ORDERS THAT ARE EFFECTIVE	IMPLICATIONS FOR PLANTATION OWNERS/MANAGERS
• **SCA Order 1.3(a) in relation to prayer 6.1 as amended on appeal.** 1(a) *An existing lawful water use in respect of a stream flow reduction activity referred to in section 32(1)(a)(ii) of the National Water Act, 36 of 1998 ('the Act'), in respect of the use of land for afforestation which had been or was being established for commercial purposes as contemplated in s 36 of the Act, is not subject to the requirement of authorisation 'by or under any law which was in force immediately before the date of commencement of this Act', as provided for in s 32(1)(a)(i) of the Act.*	• During the verification process (a process where the DWS/CMA verify whether plantations are existing lawful water uses, they only need to determine the extent of the existing plantations and area (hectares) of such plantations. This would be based on the National Registration Certificate completed by owners around 2000/2001) but the DWS/CMA may require additional information. They may request you to provide proof that the plantations were authorised, for example, by requesting permits or aerial photos to show that plantations existed prior to 1972.

• **SCA Order 1.3(b) in relation to prayer 6.1A as qualified by the SCA.** 1(b) *The obligations and conditions referred to in section 34(1)(a) of the National Water Act 36 of 1998 (the Act) do not limit existing lawful water use of stream flow reduction activities for commercial afforestation in respect of the planting of specific species or genera of trees, save in so far as such restriction attached to the rights to undertake these activities by reason of conditions or obligations arising from law of application at the commencement of the Act.*	• Genera referred to in planting permits do not limit the existing lawful water use to such genera. However, if a planting permit specifically contains a condition (on page 2 of the permit under the heading *"Conditions"*) stating that the genera cannot be exchanged without the approval of the relevant authority, then FSA members are advised to obtain legal advice, since they may challenge these conditions on review or by way of collateral challenge. **See paragraph 31 above.**
H.C. Order 2.1 (prayer 6.2): Order appealed by Statutory Authorities, but appeal abandoned at the SCA hearing. • *In the process of verifying existing lawful water use, the current water use cannot be utilised to reduce the "existing lawful water use" which had taken place during the qualifying period.*	• In the process of verifying existing lawful water use, the current water use (hectares of land under a commercial forest plantation) cannot be utilised to reduce the *"existing lawful water use"* which had taken place during the qualifying period. • 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.
H.C. Order 2.2 (prayer 6.3): Order appealed by Statutory Authorities, but appeal abandoned at hearing. • *In the process of verifying existing lawful water use, the application of the "Use-it-or*	• If less land is being used now than was being used during the qualifying period, the extent of land cannot be reduced to that which is being used at the time that the relevant authority verifies the existing lawful water use.

Lose-it" policy is ultra vires and cannot be utilised to reduce the "existing lawful water use" which had taken place during the qualifying period.	
H.C. Order 2.3 (prayer 6.4): Order appealed by Statutory Authorities, but appeal abandoned at hearing. • *In the process of verifying existing water use, the interpretation of "use of land for afforestation" which has been or is being established for commercial purposes, is not restricted to "trees in the ground" during the qualifying period.*	Any land that was being actively managed as a plantation during the period 1 October 1996 and 30 September 1998 is considered an existing lawful water use, whether planted to trees or not.
H.C. Order 2.4 (prayer 6.5): Order appealed by Statutory Authorities, but appeal abandoned at hearing. • *In the process of verifying existing lawful water use in respect of stream flow reduction activities the Qualifying Period for a stream flow reduction activity is 1 October 1996 to 30 September 1998.*	• The Qualifying Period for a stream flow reduction activity is 1 October 1996 to 30 September 1998 and <u>not 1 October 1997 to 30 September 1999.</u>
H.C. Order 2.5.1(a) (prayer 6.6.2(a)): Order appealed by Statutory Authorities, but appeal abandoned at hearing. • *For the purposes of determining the lawfulness and extent of existing lawful water uses I respect of stream flow reduction activities in terms of the provisions of the NWA* *(b) (a) On a proper interpretation of the 1984 Forest Act, alternatively the 1984 Forest Act and the 1968 Forest Act as amended in 1972 and of the planting permits*	• Any permit issued between 1972 and 1998 (valid for the planting of trees for a period of 5 years) for a particular genus does not limit the permit holder to planting only that genus – genera may be freely exchanged. • However, where permits contain specific conditions on page 2 under the heading *"Conditions"*, that genus exchange requires the written approval of the relevant authority, then FSA members are advised to obtain legal advice, since they may

issued in terms thereof, any reference to genera or species of trees in the planting permits does not limit such existing lawful water use to such genera or species.	challenge these conditions on review or by way of collateral challenge. **See paragraph 31 above.**
(b) **H.C. Order 2.5.1(b) (prayer 6.6.2(b) as qualified by the SCA) (as amended on appeal)** • *For the purposes of determining the lawfulness and extent of existing lawful water uses I respect of stream flow reduction activities in terms of the provisions of the NWA* (c) *The genus or species of trees utilised for commercial afforestation, which afforestation had been established prior to the commencement of the qualifying period or was in the process of being established at any time during the qualifying period, cannot be taken into consideration by the responsible authority to verify the lawfulness or extent of an existing flow activity, save that in determining lawfulness in terms of s 35 of the National Water Act, a responsible authority may consider whether the activity was subject to any conditions or restrictions as to the genus or species of trees that may be planted, deriving from law that was of application at the commencement of the National Water Act and attached to the right to use land for afforestation, as provided for in s 36(1)(a).*	• The verification of a stream flow reduction activity as an existing lawful water use relates to the use of land for afforestation and not the species of trees planted during the qualifying period. • As explained above, the conditions or restrictions as to genus or species of trees referred to in the amended order must relate to law that applied at the commencement of the NWA. As explained above, the references to genus or species in old order permits not specifically identified as conditions, is not relevant. If confronted by the Statutory Authorities with conditions or obligations rigidly falling under this order, , then FSA members are advised to obtain legal advice, since they may challenge these conditions on review or by way of collateral challenge. **See paragraph 31 above.**

H.C. Order 2.5.2 (prayer 6.6.2B) **Order appealed by Statutory Authorities, but appeal abandoned at hearing.** • *The orders set out in 2.5.1 above shall not affect specific permits containing provisions expressly therein described as conditions prohibiting genus exchange without written approval from the relevant authority and shall not be regarded as a review of these permits.*	• Where permits contain specific conditions on page 2 under the heading *"Conditions"*, that genus exchange requires the written approval of the relevant authority, and this order cannot be regarded as a review and setting aside of such permit. • Apparently a limited number of such permits were issued during about 1997. • If written approval was refused for the exchange of genera, this does not necessarily preclude an affected member from reviewing or collaterally challenging the imposition of such condition and the refusal to grant written approval. • The DWS/CMA are not entitled to insist during the verification process that the area of land used/managed as a plantation during the qualifying period be reduced in extent. **See paragraph 31 above.**
H.C. Order 2.5.3 (prayer 6.6.4): As confirmed on appeal – following dismissing of the appeal of Statutory Authorities there against. • *Whenever genera or species of trees used for commercial afforestation are changed, the respondents are not entitled to insist, during the verification process, that the area of land authorised for commercial afforestation be reduced in extent.*	• Whenever genera or species of trees used for commercial afforestation are exchanged, the Statutory Authorities are not entitled to insist during the verification process, that the area of land authorised for commercial afforestation be reduced in extent. **See paragraph 31 above.**

The Costs Orders: • H.C. Order 3: The Statutory Authorities are ordered to pay FSA's costs on a party and party scale, save for the cost associated with the two interlocutory applications heard on Friday 6 February and on 25 March 2020 respectively, which costs shall be paid by the second and third respondents on an attorney and client scale. All costs shall include the costs of two counsel where so used. • SCA Order 1.2 and 2.2: The Statutory Authorities are ordered to pay FSA's costs of appeal (n its own appeal as well as the appeal lodged by the Statutory Authorities) such costs to include (a) the cost of the applications for leave to appeal and (b) the costs of two counsel, where so employed**.**	• The Statutory Authorities have been ordered to pay substantial costs in respect of the litigation which commenced in 2019.

WH van Staden SC

A de V la Grange SC

Clarissa Molteno

Cape Town

19 December 2023