IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN]

Case No: **19684/2019**

Before the Honourable Mr Acting Justice Hockey
Hearing: 15 – 26 February 2021
Judgment Delivered: 23 August 2021

In the matter between:

FORESTRY SOUTH AFRICA	Applicant
and	
MINISTER OF HUMAN SETTLEMENTS, WATER & SANITATION	First Respondent
DEPARTMENT OF HUMAN SETTLEMENTS, WATER & SANITATION	Second Respondent
INKOMA THI-USUTHU CATCHMENT MANAGEMENT AGENCY	Third Respondent
BREEDE-GOURITS CATCHMENT MANAGEMENT AGENCY	Fourth Respondent
THE CHAIRMAN OF THE WATER TRIBUNAL	Fifth Respondent

JUDGMENT

HOCKEY AJ:

Introduction

[1] Afforestation, in common parlance, is the planting of trees or the establishment of a forest on land which had not previously been forested. Section 36 (1) of the National Water Act No. 36 of 1998 ("the NWA") declared, for the first time, the use of land for afforestation for commercial purposes as a *"stream flow reduction activity".* Section 32 of the NWA, in turn, included a "*stream flow reduction activity"* as an "*existing lawful water use*".

[2] The reason for the above is clear. Afforestation uses soil water and groundwater within a catchment area, thereby reducing the flow of water which would otherwise have run into streams and eventually to other users downstream who are dependent on water from the catchment area.

[3] The essence of this matter revolves around the interpretation of the concept *"existing lawful water use"* in the context of a *"stream flow reduction activity"* in relation to the use of land for commercial

afforestation purposes. These concepts are found in section 32 of the NWA, which warrants being quoted in full:

"32. Definition of existing lawful water use

(1) An existing lawful water use means a water use –

(a) which has taken place at any time during a period of two years immediately before the date of commencement of this Act and which –

(i) was authorised by or under any law which was in force immediately before the date of commencement of this Act;

(ii) is a stream flow reduction activity contemplated in section 36(1); or

(iii) is a controlled activity in section 37(1); or

(b) Which has been declared an existing lawful water use under section 33.

(2) In the case of –

(a) a stream flow reduction activity declared under section 36(1); or

(b) a controlled activity declared under section 38;

existing lawful water use means a water use which has taken place at any time during a period of two years immediately before the date of the declaration."

[4] For present purposes, section 32 must be read with 36 of the NWA which declares the use of land for afforestation which has been, or is being established for commercial purposes is declared to be as a stream flow reduction activity. What is meant by *"stream flow reduction activity"* is revealed in section 36(2) which states:

"The Minister may, by notice in the Gazette, in relation to a particular area specified in that notice, declare any activity (including the cultivation of any particular crop or other vegetation) to be a stream flow reduction activity <u>if that activity is likely to reduce the availability of water in a watercourse to the Reserve, to meet international obligations, or to other water users significantly."</u> (My underlining).

[5] A correct interpretation of section 32 and 36 will determine much of the disputes between the parties and the outcome of the relief sought by the applicant, which is contained in its amended notice of motion as follows:

***"TO TAKE NOTICE THAT** the applicant intends to make application to this Court on **20 NOVEMBER 2019** at 10h00 for the following relief:*

PART A

1. *In respect of both the order for an interim interdict as set out in Part B and the final relief as set out in Part C, an order dispensing with the usual forms and requirements for service and directing that the applications be heard on an urgent basis*

in terms of the provisions of Rule 6(12) of the Uniform Rules of Court.

2. *In the event of Part B and/or Part C of this notice of motion, including the concomitant prayers in respect of Part B and/or C contained in Part A being opposed, an order in terms of which the Honourable Court determines the hearing date(s) of Part B and/or C and the dates for the filing of further affidavits and other steps in respect of the proceedings.*

3. *An order that the costs in respect of the relief sought in Part A, B and C, shall be paid by the respondents jointly and severally.*

4. *Further and/or alternative relief in respect of Part A, B and C.*

PART B

5. *Pending the determination of the final relief sought in Part C of this notice of motion, a temporary interdict prohibiting the respondents from applying a definition of existing lawful water use in respect of stream flow reduction activities contemplated in section 36(1) of National Water Act 36 of 1998, ("the Act"), and section 32(1)(a)(ii) in respect of verification under section 35 and licence applications under section 41 thereof, in conflict with the declaratory orders set out in Part C hereunder.*

PART C

6. Review of the administrative actions which underpin the decisions to which the following declaratory orders relate, by declaring that:

6.1 An existing lawful water use in respect of a stream flow reduction activity referred to in section 32(1)(a)(ii) of the Act, in respect of the use of land for afforestation which had been or was being established for commercial purposes as contemplated in section 36(1)(a) 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 section 32(1)(a)(i) of the Act;

6.1A In the event of the Honourable Court granting the declaratory relief claimed in prayer 6.1:

The obligations and conditions referred to in section 34(1)(a) of the Act do not limit existing lawful water uses in respect of stream flow reduction activities for commercial afforestation to the planting of specific genera of trees.

6.1B In the alternative to prayer 6.1, and in the event of the Court concluding that the Applicant is not entitled to an order in terms of prayer 6.1:

Authorisation under any law as contemplated in section 32(1)(a)(i) in relation to stream flow reduction activities claimed as existing lawful water uses need not be proven

in respect of any other legislation save for the 1984 Forest Act in so far as it is applicable.

6.2 In the process of verifying existing water use as provided for in section 35 of Act, the current water use cannot be utilised to reduce the "existing lawful water use" which had taken place during the qualifying period set out in section 32(2) of the Act;

6.3 In the process of verifying existing water use as provided for in section 35 of Act, the application of the "Use-it or Lose-it" policy position is ultra vires the provisions of the Act, and cannot be utilised to reduce the "existing lawful water use" which had taken place during the qualifying period set out in section 32(2) of the Act;

6.4 In the process of verifying existing water use as provided for in section 35 of the Act, that 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;

6.5 In the process of verifying "existing lawful water use" in respect of stream flow reduction activities as provided for in section 35 of the Act, the qualifying period is 1 October 1997 to 30 September 1999; and

6.6 In respect of genus of species of trees on land used for afforestation:

6.6.1 In the event of an order in terms of prayer 6.1 above, being granted:

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 to determine the extent of existing lawful water uses relating to stream flow reduction activities.

6.6.2 In the event of the Court refusing the relief sought in Prayers 6.1, 6.1A and/or 6.1B:

6.6.2A For the purposes of determining whether the water use was authorised as contemplated by section 32(1)(a)(i) of the Act and the extent of existing lawful water uses in respect of stream flow reduction activities in terms of the provisions of the National Water Act:

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 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;

b) *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.*

6.6.2B The order as set out in prayer 6.6.2A above 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.

6.6.3 Since the promulgation of the Act, in respect of an application for a licence in terms of section 41 of the Act for the water use of engaging in a stream flow reduction activity, contemplated in section 36(1)(a) of the Act, the responsible authority has not been entitled to and is still not entitled to validly impose any condition prohibiting the exchange of

genera, species or clones of trees in the absence of regulations prescribing methods for making a volumetric determination of water to be ascribed to a stream flow reduction activity as provided for in section 26(1)(m) of the Act.

6.6.3A The order set out in prayer 6.6.3 above will not automatically affect existing licences containing conditions prohibiting genus exchange without written approval from the relevant authority and is not to be regarded as a review of such licences.

6.6.4 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.

6.6.5 The exchange of genera or species of trees does not constitute a water use as envisaged in section 21 of the Act and genera, species, and clones of trees used for commercial afforestation may be exchanged without the need for authorisation in terms of the Act.

7. To the extent that it might be held that the Applicant is possessed of a competent internal remedy/appeal, an order directing

and declaring that the Applicant is exempted, under the provisions of section 7(2)(c) of PAJA, from the obligation to first proceed with the internal remedy of an appeal to the Fifth Respondent under section 148(1) of the NWA."

[6] As can be gleaned from the notice of motion, section 35 of the NWA, which provides for the verification of existing water use also requires consideration. In terms of this section, the responsible authority, in order to verify the lawfulness or extent of an existing water use, may require a person claiming entitlement to a water use to apply for verification of that use. The responsible authority, in relation to a specific power or duty in respect of water use is defined in section 1 of the NWA as meaning –

"(a) if that power or duty has been assigned by the Minister to a catchment management agency, that catchment management agency; or

(b) if that power or duty has not been so assigned, the Minister".

The relevant portions of section 35 reads as follows:

"35 ***Verification of existing water uses***

(1) The responsible authority may, in order to verify the lawfulness or extent of an existing water use, by written notice require any person claiming an entitlement to that water use to apply for a verification of that use.

(2) …

(3) A responsible authority –

(a) may require the applicant, at the applicant's expense, to obtain and provide it with other information, in addition to the information contained in the application;

(b) may conduct its own investigation into the veracity and lawfulness of the water use in question;

(c) may invite written comments from any person who has an interest in the matter; and

(d) must afford the applicant an opportunity to make representations on any aspect of the application.

(4) A responsible authority may determine the extent and lawfulness of a water use pursuant to an application under this section, and such determination limits the extent of any existing lawful order use contemplated in section 32(1).

(5) No person who has been required to apply for verification under subsection (1) in respect of an existing lawful water use may exercise that water use –

(a) after the closing date specified in the notice, if that person has not applied for verification; or

(b) after the verification application has been refused, if that person applied for verification."

The parties

[7] The applicant in these proceedings is Forestry South Africa, a voluntary association registered as a non-profit organisation in terms of the Non-Profit Organisation Act No.71 of 1977. The applicant was established on 1 January 2002 as a result of the unification of three bodies which represented timber growers in South Africa. The applicant represents 93% of all planted afforestation in South Africa. Its membership includes corporate forestry companies as well vast numbers of commercial timber farmers and emerging small-scale growers. The applicant represents its members and interacts on behalf of the timber industry through a host of committees and bodies within and outside the timber industry, in order to promote the interests of its members and those of the industry in general.

[8] The first respondent is the Minister of Human Settlement, Water and Sanitation, ("the Minister") who is the Minister responsible for water affairs in terms of the NWA. The duties of the Minister include exercising the powers and duties of the responsible authority in relation to "water uses" as per the NWA, where such power had not been assigned to a catchment management agency. In terms of section 3 of the NWA, the National Government as the public trustee

of the nation's water resources acts through the Minister who must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner for the benefit of all persons and in accordance with its constitutional mandate. The Minister is ultimately responsible to ensure that water is allocated equitably and used beneficially in the public interest, while promoting environmental values. The Minister has the power to regulate the use, flow and control of all water in the Republic in terms of section 3(3) of the NWA.

[9] The second respondent is the Department of Human Settlement, Water and Sanitation ("the Department"), whose officials have delegated powers to act on behalf of the Minister, or the Department whose powers include the verification of existing water uses. Where I refer to "the Department", it includes any department (under a different name) which was previously responsible for the country's water resources.

[10] The third and fourth respondents are responsible authorities as defined in section 1 of the NWA. They have powers or duties assigned

to them by the Minster in terms of section 63 of the NWA, or by the Department under section 75.

[11] The fifth respondent is the chairperson of the Water Tribunal established in terms of section 146 of the NWA whose duties include the hearing of appeals against any decisions of a responsible authority on the verification of a water use under section 35 by a person affected thereby. One of the preliminary points raised by the respondents is that the applicant and/or its members adversely affected by decisions of a responsible authority should have exhausted internal remedies, by referring those decisions to the Water Tribunal chaired by the fifth respondent.

The history of litigation in this matter

[12] This application was launched on 6 November 2019 when the applicant requested temporary relief against the respondents to interdict them from making determinations under section 35(4) of the NWA in respect of the extent and lawfulness of a water use.

[13] The respondents, via the state attorney, filed a notice to oppose the entire application, but on 20 November 2019, when the matter came before Savage J, the parties agreed to an order ("the first court order") in terms of which a temporary interdict as requested in the notice of motion was granted. The matter was postponed to 27 and 28 May 2020 for determination of Part C of the notice of motion.

[14] Thereafter it came to the applicant's notice that the third respondent continued to make determinations and issued notices in terms of section 35(4) of the NWA against some of the applicant's members in contravention of the first court order.

[15] The applicant wrote to the state attorney on more than one occasion requesting the withdrawal of the section 35(4) notices. When no response was received, the applicant launched an interlocutory application ("the first interlocutory application") to enforce compliance with the first court order.

[16] After first interlocutory application was launched, the state attorney proposed that same be withdrawn and indicated that their clients

would undertake to comply with the first court order and write to officials of the Department instructing them to strictly comply with the first court order. This was not agreed to by the applicant and on the proposal of the applicant, and by agreement between the parties, a second court order was granted on 6 February 2020, ("the second court order") in terms of which the first to fourth respondents would withdraw all section 35(4) notices which were issued in contravention of the first court order.

[17] Notwithstanding the second court order and letters from the applicant's attorney requesting compliance therewith, the section 35(4) notices which were issued in contravention of the first court order were not withdrawn. The applicant also became aware that the Department had also made determinations in terms of section 35(4) of the NWA in contravention of both the first and second court orders.

[18] The applicant launched a second interlocutory application on 12 March 2020 ("the second interlocutory application"). The matter was set down for 25 March 2020. On that day the parties agreed to an

order ("the third court order") in terms of which (a) the section 35(4) notices annexed to the second interlocutory application were declared to be invalid and of no force and effect, and (b) all section 35(4) notices in relation to stream flow reduction activities issued subsequent to the first court order (after 20 November 2019) were declared invalid and of no force and effect.

[19] The question of costs in respect of both the first and second interlocutory applications stood over for later determination, as well as the question of contempt in respect of the second interlocutory application. In terms of the third court order, the respondents were to file opposing papers to the question of penalties for contempt which they failed to do and became *ipso facto* barred from doing so.

[20] I must raise at this juncture, that when this matter came before me, both on 27 October 2020, and thereafter, when the matter was argued during February 2021, I discussed the question of contempt with the parties and the applicant agreed not to pursue the question of penalties for contempt, but asked this court to consider the question of costs in respect of the two interlocutory applications,

with a request that costs for these applications should be granted on a punitive scale. I agree with counsel for the applicant that the conduct of the second and third respondents is such that whatever the outcome of this matter, they should be held liable for the costs of the first and second interlocutory applications on a punitive scale.

[21] In terms of the first court order, the respondents were to file answering papers by 21 February 2020, but did so only on 29 April 2020. Due to the late filing of the answering affidavit, the matter was by agreement again postponed on 21 May 2020 for hearing on 27 October 2020.

[22] The order of 21 May 2020 provided for the applicant to serve and file its amended notice of motion and supplementary affidavit for a further declaratory order in respect of genus exchange by 30 June 2020 and for the respondents to file opposing papers by 31 July 2020.

[23] The respondents only filed their opposing papers on 2 September 2020. This became of no relevance when the matter came before me on 27 October 2020, as the respondents have accepted that the

proposed amendments are in order, and the amendments were accordingly effected by the order granted by me on that day.

[24] In terms of the order dated 27 October 2020, the matter was postponed for hearing to 15 February 2021, when the matter was argued over two weeks, from 15 February until 26 February 2021.

[25] A reason why the matter was further postponed on 27 October 2020, is that on the eve of the date of hearing, the applicant brought an application to further amend its notice of motion by the addition of prayer 7, requesting exemption from having to exhaust internal remedies in terms of section 7(2)(c) of PAJA in the event of the court finding that such internal remedy was competent for the applicant.

[26] When the matter came before me on 15 February 2020, there were several matters relating to the pleadings that needed attention. These relate to the two contempt applications, the late filing by the respondents of various affidavits, and their application for leave to file a further answering affidavit to the applicant's replying affidavit

of 17 November 2020. During a discussion with the parties, I indicated that given the importance of this matter, it was important to have a full ventilation of the issues. Agreeing with the sentiment expressed, the parties gave no further attention during argument to any of the condonation applications. The matter was fully ventilated on the basis of the record before me.

[27] It is opportune at this juncture to mention that during the proceeding in February 2021, the applicant further amended its notice of motion, which the respondents agreed to.

Background facts to commercial forestry practices in South Africa

[28] The following background facts relating to commercial afforestation are set out in the founding affidavit and are common cause:

> [11.1] The silviculture (the science of growing and cultivation of trees) system used is that of "*even-aged*" stands, or a clear felling system as a way to achieve unform growth and regeneration of trees and allowing for a uniform harvesting system. The

silvicultural regime can be described as a planned programme implemented during the life of a stand of trees.

[11.2] Growth performance in plantations is influenced by the quality of sites, the species planted and silvicultural management. The management interventions include site species matching, soil preparation, fertilization, weed control, thinning and pruning.

[11.3] The land available for commercial forestry in South Africa is limited. It is therefore important to ensure maximum timber production on available land, thus reducing the need for more land for this purpose.

[11.4] Rotation, i.e. the period in years between the establishment of a stand of timber and harvesting thereof, depend on various factors but is often driven by market demands. Rotation can vary from 6 to 14 years for hardwood, such as eucalyptus trees, whereas the rotation age for softwood such as pine species can vary from 14 to 20 and up to 30 years.

[11.5] Hardwood (eucalyptus) trees may be allowed to coppice (i.e. allowed to regrow after having been cut down to near ground level) and then managed for 12 to 20 years. After coppicing, the plantation is normally replanted and a new rotation process commences. Pine plantations do not coppice and are replanted every 20 to 30 years.

[11.6] After harvesting, there is always some management activity taking place on the land, such as residue management, weed control, soil preparation, pitting and watering. The land lies fallow between harvesting and replanting – this period varies, depending on a number of factors including weather conditions.

[11.7] The above clearly shows that management of timber plantations is an ongoing process. After harvesting and before replanting, it is obvious that there are no “trees in the ground”, although the land is still being used for afforestation.

Genus exchange

[29] An issue to be determined in this matter is whether the imposition of conditions in the permits for the planting of trees for commercial purposes under the various Forest Acts (which are dealt with below) which were applicable at various points in the past, were permissible in the event of a forester wanting to change from one genus of trees to another. To put it another way, this court must determine whether the imposition of conditions or obligations by the responsible authorities before the exchange of genus or species of trees is invalid and of no force or effect. Another issue which is to be determined is whether the genus exchange constitute water use as contemplated under the NWA and whether the responsible authorities may insist on a reduction of the extent of land used for afforestation as a result of genus exchange from a genus with a lower water consumption to a genus with a higher water consumption level.

[30] Genus exchange is a form of crop rotation in the timber industry whereby eucalyptus, pine and wattle trees, which are the main genera of trees used for commercial afforestation, are rotated on the same piece of land.

[31] Genus exchange is done for a number of reasons, including to avoid a decrease in soil fertility, to control pests and diseases, to prevent the spread of alien and invasive species and to meet market requirements. In terms of the Agricultural Pests Act 36 of 1993, the Department of Agriculture may require a farmer to destroy crops to prevent the spread of disease. In the forestry industry, as an example, the Department of Agriculture could require pine trees to be destroyed and replaced with another genus to prevent the spread of the Sirex wasp which has a serious impact on pine trees.

[32] In South Africa, the genus *Eucalyptus* (eucalyptus trees) comprise 43% of the commercial forestry species. There are five main species within the genus as well as multiple other species, hybrids, varieties and clones thereof. They are used for wood chips, pulp and paper, mining poles, transmission poles, building poles, furniture and cellulose (used *inter alia* for textiles, clothing, recycling of paper, tissue paper, personal hygiene products and thickeners in the food industry).

[33] There are three main species of genus *Pinus* (pine trees) as well as multiple other species, hybrids, varieties and clones thereof that are used for commercial forestry. Pine trees comprise 49% of commercial forestry in South Africa, and are used for structural timber, construction, mining poles, veneer, pulp and paper, saw logs, woodchips, furniture, pallets, cellulose and cable drums.

[34] There is only one species of wattle tree in South Africa and it comprises of 7% of the commercial forestry species. Wattle is used for tannin, wood chips, adhesives and tannin extracts.

[35] Internationally, the demand for timber products has been shifting away from paper which is used in magazines and newsprint towards timber-based products like chemical cellulose (pulp) used in the clothing and textile industry, pharmaceuticals, food, bio-plastics, green chemicals and high value and renewable products. This high value pulp and the multitude of products manufactured from it, require as their feedstock, timber from eucalyptus trees (including their various species, hybrids, varieties and clones). As timber growers want to take advantage of the shifting demands in the

market, some of them are systematically converting their plantations from pine trees to eucalyptus trees, and in some instances from eucalyptus to pine trees.

[36] It is not disputed that the conversion from pine trees to eucalyptus trees has a number of important benefits for South Africa. The shorter rotation years of eucalyptus as opposed to that of pine trees means larger and more frequent investments, more employment is created and higher volumes of timber are produced. The high value pulp attained from eucalyptus trees is mostly produced for export which has a positive benefit to South Africa's foreign exchange earnings.

[37] The respondents do not dispute the commercial motivation for the genus exchange from pine trees to eucalyptus trees, but take issue that such genus exchange must take place unregulated. Their concern being that it is to the detriment of ecological sustainability of the water resource and the economic benefit of the genus exchange alone should not override the ecological impacts.

[38] A critical question, therefore, is whether genus exchange was permitted without more under legislation which existed prior to the relevant provisions of the NWA coming into effect and whether this position is retained under the NWA. For this purpose it is necessary to consider the history of legislation governing Forestry in South Africa.

The history of forestry legislation

[39] Because this matter concerns the interpretation of an "*existing water use*" as defined in section 32 of the NWA, where such a water use is referenced to an existing lawful water use which *"was authorised by or under any law which was in force immediately before the date of commencement of [the NWA]"*, it is necessary to have regard to a brief history of forestry legislation in South Africa in addition to whether genus exchange is permissible.

[40] Before 1972, the establishment of commercial timber plantations did not require any authorisation from any government department, and approximately 70% of all commercial timber plantations did not

require any permits or water use licences in order to be established. The Forest Act 72 of 1968 ("the 1968 Act") primarily dealt with the harvesting of timber plantations.

[41] The 1968 Act was amended with effect from 26 May 1972 ("the 1972 amendment") by amongst other, the introduction of what was known as the Afforestation Permit System ("the APS") which required prior written approval to be obtained from the then Secretary for Forestry for the planting of trees (excluding fruit or fodder trees) for commercial or industrial purposes, on land which had not previously been afforested (section 4A of the 1972 amendment). These authorisations were known as "*afforestation permits*" or "*planting permits*" and did not affect then existing timber plantations, which did not require to be registered nor did they require any approval. In terms of subsection 4A(3), the Secretary could withhold or grant approval for the planting of trees, and if granted, he could impose such conditions as he deemed fit.

[42] Regulations under the 1968 Act were promulgated on 8 September 1972 which stipulated the form and procedure for the application for

the planting of trees for commercial or industrial purposes under section 4A. The *pro forma* form contained in the regulations required an applicant to state what species were to be planted as well as the object of the management of the timber plantation.

[43] Annexure "ABS12" attached to the respondents' papers is a typical permit which was issued in terms of section 4A of the 1968 Act as amended. The permit specifically records for the area approved for the plantation to the extent of 320 hectares, and for the coniferous species to be "*Broad-leaved species*". Condition 3 of the permit states that the permit was valid for a period of five years from the date of issue.

[44] The 1968 Act was repealed by Forest Act 122 of 1984 ("the 1984 Act") which came into effect on 27 March 1986. Section 89 of the 1984 Act falls under the heading "Repeal of laws, and savings", and subsection 89(4) provides that *"anything done under a power conferred by or in terms of a provision of a law repealed in subsection (1), is deemed to have been done under a power conferred by or in terms of the corresponding provision of this Act"*. It needs be

mentioned that a similar provision was contained in the 1968 Act, namely in section 34 thereof.

[45] Section 7(1) of the 1984 Act prohibited the use of land (a) which had not previously been used for the establishment and management of a commercial timber plantation; or (b) which had not been used for a period of five years after the removal, harvesting or destruction of a commercial timber crop, for the planting of trees to produce timber for commercial or industrial purposes without the prior written approval of the director general.

[46] The effect of the 1984 Act, therefore, was to allow for the continuation of the APS in that no approval under that Act was required for timber plantation already in existence at the date of its commencement, or for new commercial timber plantations that were being established on land previously used for commercial forestry provided that such land had not lain fallow for more than five years.

[47] The 1984 Act did not apply to a vast area of land currently part of the Republic of South Africa, including the TBVC states where commercial forestry activities were already being undertaken.

[48] Regulations ('the 1984 Regulations") were promulgated in terms of section 73 of the 1984 Act and remained in place, with subsequent amendments, until repealed on 29 April 2009, long after the NWA was promulgated. Importantly, these regulations were in place during the qualifying period referred to in the NWA which I will discuss later.

[49] The 1984 Regulation principally dealt with state forests, but like the 1968 Regulations, provided for the procedure for the application by an owner of land to apply for the establishment of a commercial timber plantation. The application form provided for this purpose is virtually identical to the application form under the 1968 Act.

[50] The only other reference to private commercial timber plantations in the 1984 Regulations is that found in regulation 16 which provided for data requirements to be submitted to the Minister by way of a

return. Such data included data as to the different timber species, the area of the plantation, the quality of the land, etc.

Forestry legislation in the TBVC states and self-governing territories

[51] Due to the policy of apartheid, the TBVC "states" were created in 1976, 1977, 1979 and 1981, respectively. These "states" were the balkanised states of Transkei, Bophuthatswana, Venda and Ciskei which were granted "independence" by the apartheid government. In addition, six "self-governing territories" were created which remained under the political control of the South African government. The TBVC states could and did pass their own legislation. Laws of the Republic of South Africa applied to all the areas and states until amended or repealed by the competent authority, i.e. either the states themselves or the legislative authority of the self-governing territory, depending on whether the latter had jurisdiction over the relevant matters or not.

[52] With the advent of democracy and with the promulgation of the Constitution of the Republic, Act 200 of 1993 ("the interim

Constitution") which came into force during 1994, the TBVC states and homeland system were abolished and all these areas became part of the Republic of South Africa. Section 229 of the interim Constitution provided that all laws which were in force in any area which form part of the national territory continued to be in force in such areas until they were repealed or amended.

[53] Pursuant to section 229 of the interim Constitution, Parliament passed the Forestry Laws Rationalisation and Amendment Act, Act 51 of 1994 ("the Rationalisation Act"). The Rationalisation Act amended or repealed several pieces of legislation which applied in the TBVC states and self-governing territories. The main effect of the amendments was that with effect from 7 December 1994, the 1984 Act became applicable throughout the Republic of South Africa.

[54] The Rationalisation Act amended section 2 of the 1984 Act by deleting subsection (1) thereof which previously provided that that Act did not apply in respect of land contemplated in section 25 of the Black Administration Act, 1927 (Act 38 of 1927) and also section 21(1)

of the Development Trust and Land Act, 1936 (act 18 of 1936) in terms whereof the self-governing areas were created.

[55] As a result of the provisions in the Rationalisation Act, and with effect from 7 December 1994, the provisions of the 1984 Act became applicable throughout the Republic of South Africa. This act was also applicable during the qualifying period, i.e. a period of two years before the commencement of the NWA in terms of section 32 thereof.

[56] The implications of what is set out above are that different pieces of legislation may have to be considered for the determinations of "*existing lawful water use*" as defined in section 32 of the NWA, as the rights in respect of water use were obtained in such various pieces of legislation and carried through under the 1984 Act which became applicable in terms of the Rationalisation Act. In the light of the nature of relief sought in the present matter, it is not necessary to pronounce on the rights carried through from the different pieces of legislation which existed in the TBVC states and the self-governing territories, but these may become important on a case by case basis.

Preliminary Points raised by the respondents.

[57] The respondents raised several points *in limine*. Some of these were abandoned during the course of the hearing. I only deal with those with which the respondents persist and do so not necessarily in the order in which they were raised in the papers.

The first point in limine: Lack of locus standi

[58] In their heads of argument filed on the eve of the hearing originally scheduled for 27 October 2020, the respondents raised that the applicant lacks *locus standi*. This argument is based on the supposition that the applicant is acting in its own interest and is therefore relying solely on section 38(a) of the Constitution of the Republic of South Africa, 1996 ("the Constitution"). Counsel for the respondents place reliance on decisions of the Constitutional Court in **Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others** 2013

(3) BCLR 251 (CC) and **Areva NP Incorporated in France v Eskom Holdings SOC Ltd and Another** 2017 (6) SA 621 (CC). In the **Areva** matter, the court cited with approval the matter of **Giant Concerts**, and held:

> *"[32] This court held in* Giant Concerts *that, 'where a litigant acts solely in his or her own interests, there is no broad or unqualified capacity to litigate against illegalities'. We said that '(t)he own interest litigant must therefore demonstrate that his or her interests or potential interests are directly affected by the unlawfulness sought to be impugned'."*

[59] Further, the respondents' counsel cites the following extract from paragraphs 40 of the **Areva** judgment:

> *"It was said in Giant Concerts that the issue of* locust standi *is separate from the merits and will usually be dispositive of an own-interest litigant's claim. The court went on to say that –*

'an own-interest litigant may be denied standing even though the result could be that an unlawful decision stands. This is not illogical. As the Supreme Court of Appeal pointed out, standing determines solely whether this particular litigant is entitled to mount the challenge: a successful challenge to a public decision can be brought only if "the right remedy is sought by the right person in the right proceedings".'"

[60] Respondents' counsel also relies on the following extract from paragraph 41 of **Giant Concerts**:

"These cases make it plain that constitutional own-interest standing is broader than the traditional common low standing, but that a litigant must nevertheless show that his or her rights or interests are directly affected by the challenged law or conduct. The authorities show:

(a) To establish own-interests standing under the Constitution a litigant need to show the same 'sufficient,

personal and direct interest' that the common law requires, but must also show that a contested law or decision directly affects his or her rights or interests, or potential rights or interests."

[61] It is so that the applicant, in its founding affidavit, asserted that it has the necessary legal standing because the applicant itself has a substantial interest in the proper interpretation of the provisions of the NWA, given its objectives and its responsibilities to assist its members who are holders of water use entitlements under the NWA. This assertion may lead to a conclusion that the applicant is litigating in its own interest. However, the applicant further states in paragraph 21 of its founding affidavit *"that [it] has the necessary standing to bring this application by virtue of section 38 of the Constitution for appropriate relief, including declaratory orders and associated relief regarding the proper interpretation of sections 4, 22, 32, 34 and 35 as read with sections and 21 and 36 of the [NWA], as it is a party:*

21.1 acting in its own interest;

21.2 acting in the interest of a group or class of persons;

21.3 acting in the public interest; and/or

21.4 acting as an association in the interest of its members;

under circumstances where a number of fundamental rights are being infringed or threatened…".

[62] The rights which the applicant alleges are being threatened are noted in the founding affidavit as; (i) the right to just administrative action in terms of section 33 of the Constitution; (ii) the right to property in terms of section 25(1) of the Constitution (with the assertion that a water entitlement under the NWA is property under a legal dispensation which allows for protection under the NWA, and in respect of which holders of such rights may not be arbitrarily and irrationally be deprived of such rights; (iii) the right to equality under section 9(1) of the Constitution; (iv) the right to the environment in terms of section 24(b)(iii) of the Constitution; and (v) the right to choose a trade, occupation or profession freely in terms of section 22 of the Constitution.

[63] Section 38 of the Constitution brought about a completely new dispensation on *locus standi*, far beyond that as was available under the common law. The section provides:

> *"**Enforcement of rights***
>
> ***38** Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—*
>
> *(a) anyone acting in their own interest;*
>
> *(b) anyone acting on behalf of another person who cannot act in their own name;*
>
> *(c) anyone acting as a member of, or in the interest of, a group or class of persons;*

(d) anyone acting in the public interest; and

(e) an association acting in the interest of its members."

[64] The judgments of the Constitutional Court in **Giant Concerts** and **Areva** are clearly cases where the parties, whose standings were challenged, acted in their own interests in terms of section 38(a) of the Constitution and not under any of the other grounds listed in that section. In **Areva**, the court made it clear that WEBSA, the party whose standing was impugned, was the wrong litigant to challenge the impugned decision and it was on that basis that it was held not to have standing (at para 45). The court noted (at para 42):

"In the circumstances I conclude that WEBSA had no locus standi to institute the review proceedings in its own right to have the award of the tender to Areva set aside. <u>It would have been entitled to do so as an agent of Westinghouse USA</u>, but it did not do so. Indeed, it insisted that it instituted those proceedings in its own name because it had submitted the tender in its own right which I have found not to have been the case." (my underlining)

[65] The above is a clear indication that the Constitutional Court recognised that a party may act as an agent of another. More specifically, section 38 of the Constitution permits an association to act on behalf of its members. This was the case in **Polokwane Local and Long Distance Taxi Association v Limpopo Permissions Board and Others** (490)/2016) [2017] ZACSA 44 (30 March 2017), where a taxi association acted on behalf of its members alleging that their members' constitutional rights to freedom of association has been infringed or threatened. The court held that *"[i]n terms of these provisions [i.e. section 38 of the Constitution] an association acting in the interest of its members has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may then grant appropriate relief."*

[66] This is clearly not a case akin to that of **Giant Concerts** where the court held (at para 55):

> *"The inference that Giant was merely toying with process, or seeking to thwart a propitious public development because it had*

been made available to someone else, is therefore one the Court is entitled to draw. The consequence is that Giant lacks standing, since its interests remains incipient and has never become direct or substantial."

In the present matter, in my view, the applicant, as a role player in the forestry industry where it has a substantial membership, not only has a real and substantial interest in its own right, but is also acting in the public interest and in the interest of its members. Sections 38(d) and (e) of the Constitution therefore find application.

[67] There are further reasons raised by the applicant why the respondents' attack on the applicant's standing should fail, but I find it unnecessary to deal with them. The reasons dealt with above sufficiently show that the attack on standing is without merit and falls to be dismissed.

The second point in limine: Failure to exhaust internal remedies.

[68] The relief sought by the applicant is pursuant to section 6(1) of the Promotion of Administrative Justice Act No. 3 of 2000 ("PAJA"), read with sections 8(1)(b), (d) and (e) of that Act, and sections 9, 22, 24(b)(iii), 25(1) and 33 of the Constitution.

[69] In terms of section 6(1) of PAJA, any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action. In terms of section 7(2), however:

> *"(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.*
>
> *(b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.*

(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice."

[70] In **Nichol and Another v Registrar of Pension Funds and Others** 2008 (1) SA 383 (SCA), the court dealt with section 7 of PAJA and held (at para 15):

"Under the common law, the mere existence of an internal remedy was not, by itself, sufficient to defer access to the judicial review until the remedy had been exhausted. Judicial review would in general only be deferred where the relevant statutory or contractual provision, properly construed, required that the internal remedies first be exhausted. However, as is pointed out by Iain Currie and Jonathan Klaaren, 'by imposing a strict duty to exhaust domestic remedies, [PAJA] has considerably reformed the common law'. <u>It is now compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies unless exempted from doing so by way of a successful application under s 7(2)(c).</u>

Moreover, the person seeking exemption must satisfy the court of two matters: first, that there are exceptional circumstances, and second, that it is in the interests of justice that the exemption be given." (Own emphasis)

[71] There is no definition of *"exceptional circumstances"* in PAJA, but it is trite that it must be circumstances which are out of the ordinary. What constitutes exceptional circumstances must be determined on a case by case basis. In **Koyabe & Others V Minister for Home Affairs & Others (Lawyers for Human Rights as Amicus Curiae** 2010 (4) SA 327 (CC), it was held (at para 39):

"What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and/or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile."

[72] In **Koyabe**, the court stressed (at para 35) the importance of the exhaustion of internal remedies and held that "*…[they] are designed to provide immediate and cost- effective relief, giving the executive the opportunity to utilise its own mechanisms, rectifying irregularities first, before aggrieved parties resort to litigation. Although courts play a vital role in providing litigants with access to justice, the importance of more readily available and cost effective internal remedies cannot be gainsaid.*"

[73] The court, however, cautioned against a rigid imposition of the requirement to exhaust internal remedies and had this to say (at para 38):

> *"The duty to exhaust internal remedies is therefore a valuable and necessary requirement in our law. However, that requirement should not be rigidly imposed. Nor should it be used by administrators to frustrate the efforts of any aggrieved person or to shield the administrative process from judicial scrutiny. PAJA recognises this need for flexibility, acknowledging in s 7(2)(c) that exceptional circumstances may require that a court condone non-*

exhaustion of the internal process and proceed with judicial review nonetheless. Under s 7(2) of PAJA, the requirement that an individual exhaust internal remedies is therefore not absolute."

[74] In **Nichol**, the court held (at para 18):

"As 'exceptional circumstances' which might justify an exemption in terms of s 7(2)(c) would exist where the available internal remedy would not be able to provide the applicant with effective redress for his or her complaint, it is necessary to examine more closely the nature of the internal remedy provided for in the FSB Act."

In the present matter, the internal remedy is provided for in section 148 of the NWA. The relevant provision for present purposes is found in section 148(1)(e) which provided for an appeal to the Water Tribunal *"against a decision of a responsible authority on the verification of a water use under section 35 by a person affected thereby".*

[75] A question which arises is whether the applicant is indeed an affected person as referred to in section 148(1)(e). I think not. In this regard, I agree with the conclusion reached by Rogers J in **WWF South Africa v Minister of Agriculture, Forestry and Fisheries and Others** 2019 (2) SA 403 (WCC) where it was held, (at para 69) in relation to the meaning of "*an affected person*" in that case:

> *"In kindred settings this expression is one which has to be taken to connote a proximate rather than a remote adverse effect on the person (Wilson v Zondi 1967 (4) SA 713 (N) at 718A–C; Workmen's Compensation Commissioner v Crawford and Another 1987 (1) SA 296 (A) … at 305 F-I and cases there cited). If WWF were an 'affected person', anyone would be entitled to exercise the right of appeal in s 80 since in a general sense a TAC determination always implicates the environmental rights of the public at large. Such a wide reading, which would render the word 'affected' superfluous, could not have been the lawmaker's intention."*

[76] In the **WWF** matter, the Rogers J, as a result of his finding that WWF was not an "*affected person"*, found it unnecessary to consider the question of exemption under section 7(2) of PAJA, but held

nevertheless that he would probably have granted it in the circumstances of that case.

[77] In the present matter, an application for exemption has been filed, albeit belatedly and only after the issue of the exhaustion of internal remedies was raised as a point *in limine.* Counsel for the applicant raised several reasons why the applicant should not be non-suited on the basis that those of its members that have been affected by section 35(4) notices issued to them should first have exhausted the internal remedies provided for in section 148(1)(e). I do not agree with all the reasons proffered by counsel for the applicant, and mention only those with which I agree;

[34.1] The applicant relied on the provisions of PAJA to bring the application as it has itself a substantial interest in the proper interpretation of provisions of the NWA, which is the central issue to be determined in the matter.

[34.2] The fifth respondent is not a court of law and does not deliver binding precedent. The High Court is better suited to

deal with disputes on the application of law as opposed to the fifth respondent which is well suited to deal with administrative disputes.

[34.3] In any event, any determination by the fifth respondent on a question of law is subject to appeal to the High Court, which is the pre-eminent forum to deal with the interpretation of the NWA. The expedited determination of the key issues of interpretation of the NWA by the High Court is in the public interest and in the interest of justice.

[78] What I also find instructive for the conclusion I reach on this issue, is that the case brought by the applicant is different from a case that would be brought by a single affected party directly affected by a section 35(4) notice issued to it. Should the applicant be non-suited, it would result in a multitude of cases being referred to the Water Tribunal, whereas the outcome of the present matter could possibly avoid such situation. As had been held in **Earthlife Africa (Cape Town) v Director General: Department of Environmental Affairs and Tourism and Another** 2005 (3) SA 156 (C), (para52) where there were

more than 70 appeals pending before the applicable Minister against a decision of the Director General, that should the review before the High Court be allowed to proceed and be successful, the 70 appeals would fall away, because the decision against which they had been directed would have been overturned. The court held:

> *"This case is different from the ordinary one contemplated by s 7(2)(a) of PAJA, where a balance has to be struck between a single applicant's internal remedy, on the one hand, and judicial review, on the other. The balance that has to be struck in this case is between a single applicant's limited review, on the one hand, and more than 70 complicated appeals. It is, in other words, an exceptional case in which the interest of justice dictate that the court should allow the review to proceed."*

[79] For these reasons, I would have granted prayer 7 of the notice of motion exempting the applicant under provision of section 7(2)(c) of PAJA from the obligation to first exhaust internal the remedy of an appeal to the fifth respondent, if it was necessary.

Third point in limine: Whether declaratory relief is appropriate.

[80] A declaratory order has been described in **Rail Commuters' Action Group v Transnet Ltd t/a Metrorail and Others** 2005 (2) SA 359 (CC) as *"a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes of our Constitution and its values."*

[81] It must be noted, also, that declaratory relief is a discretionary remedy. This was confirmed by the Constitutional Court in **JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others** 1997 (3) SA 514 (CC), where it was held (at para 15):

> *"… a declaratory order is a discretionary remedy, in the sense that the claim lodged by an interested party for such an order does not in itself oblige the Court handling the matter to respond to the question which it poses, even when that looks like being capable of a ready answer. A corollary is the judicial policy governing the discretion thus vested in the Courts, a well established and uniformly observed policy which directs them not to exercise it in*

favour of deciding points that are merely abstract, academic or hypothetical ones. I see no reason why this new Court of ours should not adhere in turn to a rule that sounds so sensible. Its provenance lies in the intrinsic character and object of the remedy, after all, rather than some jurisdictional concept peculiar to the work of the Supreme Court or otherwise foreign do that performed here. Perhaps, what is more, a declaratory order on an issue quite unsuitable for one does not even amount to 'appropriate relief', …"(Internal references removed)

[82] Declaratory orders can be granted under section 8(1)(d) of PAJA. Declaration of rights are also referred to in section 38 and 172(1)(a) of the Constitution, and is provided for in section 21(1)(c) of the Superior Courts Act, 2013.

[83] Even though there is no reference to PAJA in the applicant's notice of motion, counsel for the applicants made it clear, both in their heads of argument and during oral submissions that this application is brought in terms of PAJA, with reliance on relief provided for in section 8(1)(d), which provides:

"8 Remedies in proceedings for judicial review

(1) The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just an equitable, including orders-

…

(d) declaring the rights of the parties in respect of any matter to which the administrative action relates;"

[84] The reference to section 6(1) in section 8 of PAJA requires the latter section to be read in conjunction with the former. It provides that *"[a]ny person may institute proceedings in a court or a tribunal for the judicial review of an administrative action."*

[85] PAJA, of course, gives effect to section 33 of the Constitution. Section 172(1) is applicable to judicial review proceedings, whether on the basis of legality or under PAJA. The section provides:

"172(1) When deciding a constitutional matter within its power, a court-

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make an order that is just and equitable, including-

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[86] Section 33 of the Constitution provided that *"[e]veryone has the right to administrative action that is lawful, reasonable and procedurally fair"* and imposes a duty on the State to give effect the rights

mentioned under that section. Such duty was fulfilled by the passing of PAJA.

[87] It is trite that the review of public power is invariably a constitutional matter. This issue was discussed in the constitutional court on various occasions, and it was held in **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others** 2004 (4) SA 490 (CC) thus (at para 22):

> *"In* Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others*, the question of the relationship between common-law grounds of review and the Constitution was considered by this Court. A unanimous Court held that under our new constitutional order the control of public power is always a constitutional matter. There are not two systems of law regulating administrative action - the common law and the Constitution - but only one system of law grounded in the Constitution. The Courts' power to review administrative action no longer flows directly from the common law but from PAJA and the Constitution itself. The groundnorm of*

administrative law is now to be found in the first place not in the doctrine of ultra vires, nor in the doctrine of parliamentary sovereignty, nor in the common law itself, but in the principles of our Constitution. The common law informs the provisions of PAJA and the Constitution, and derives its force from the latter." (Internal references removed).

[88] In Part C of its notice of motion, the applicant asks for a *"[r]eview of the administrative actions which underpin the decisions to which the following declaratory orders relate, by declaring that:…".* The various declaratory relief, some being sought in the alternative follows, spanning some 5 pages.

[89] In **Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources** (Pty) Ltd and Others 2011 (4) SA 113 (CC), the court held:

"[84] It would be conducive to clarity, when making the choice of a just and equitable remedy in terms of PAJA, to emphasise the fundamental constitutional importance of the principle of legality,

which requires invalid administrative action to be declared unlawful. This would make it clear that the discretionary choice of a further just and equitable remedy follows upon that fundamental finding. The discretionary choice may not precede the finding of invalidity. The discipline of this approach will enable courts to consider whether the relief which does not give full effect to the finding of invalidity, is justified in the particular circumstances of the case before it. Normally this would arise in the context of third parties having altered their position on the basis that the administrative action was valid and would suffer prejudice if the administrative action is set aside, but even then the 'desirability of certainty' needs to be justified against the fundamental importance of the principle of legality."

[90] In **MEC for Health, Eastern Cape, and Another v Kirkland Investments (Pty) Ltd t/a Eye Laser Institute** 2014 (3) SA 219 (SCA), it was held:

"[27] In my view Makaula J [the court a quo] had no jurisdiction to set aside the approvals granted by Diliza in the absence of either

an application or counter-application in which that relief was sought. Section 6(1) of PAJA, not surprisingly, postulates proper proceedings having been instituted as a precondition to a court's exercise of its power of judicial review when it states that '(a)ny person may institute proceedings in a court … for the judicial review of an administrative action'. In terms of s 8(1), a court may grant just and equitable relief, including the setting-aside of an administrative action, 'in proceedings for judicial review in terms of s 6(1)'. Taken together, these provisions mean no more than that, before a court may set aside an administrative action, there must have been proceedings for judicial review that were brought for that relief, in exactly the same way that, before a court may grant an award of damages, there must have been a claim instituted in accordance with the proper procedure."

[91] The purpose for the remedies under section 8 of PAJA, in my view, is to correct and/or reverse an unlawful administrative action. The remedy must of course fit the injury, must vindicate the wrong inflicted, and it must be fair, just and equitable. Without knowledge of what the wrong actually complained of is, it is not possible to apply

an appropriate remedy. In **Steenkamp NO v Provincial Tender Board, Eastern Cape** 2007 (3) SA 121 (CC), Moseneke DJP had this to say:

"[29] It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just an equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public-law remedies and not private-law remedies. The purpose of a public law remedy is to pre-empt or correct or reverse an improper administrative function. In some instances the remedy takes the form of an order to make or not to make a particular decision or an order declaring rights or an injunction to furnish reasons for an adverse decision. Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and

effective public administration compelled by constitutional precepts and at the broader level, to entrench the rule of law."

[92] The position explained in the preceding paragraphs implies that the court, in the context of PAJA, cannot consider an appropriate remedy without knowing what the wrong is that the remedy is supposed to correct and/or reverse.

[93] This brings me to the question whether this court should grant the declaratory relief under section 21(1)(c) of the Superior Courts Act. It provides:

"Persons over whom and matters in relation to which Divisions have jurisdiction

21. *(1) A Division has jurisdiction over all persons residing in or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power –*

...

(c) in its discretion, and at the instances of any interested person, to enquire into and determine any existing, future, or contingent right or

obligation, notwithstanding that such person cannot claim any relief consequential upon the determination."

[94] Unlike the situation under PAJA, the existence of a dispute between the parties is not a pre-requisite for the existence of the power of the Court as conferred upon it by section 21(1)(c) to grant declaratory relief. What is required under the subsection, though, is that the party seeking the declaratory relief must satisfy the Court that that he or she is a party interested in an *"existing, future or contingent right or obligation"*.

[95] In **Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd** 2005 (6) SA 205, the court dealt with section 19(1)(iii) of the Supreme Court Act 59 of 1959 which was replaced verbatim by the current section 21(1)(c). The court confirmed the two-staged approach devised by Watermeyer JA in **Durban City Council v Association of Building Societies 1942 AD 27** when deciding whether or not an order should be granted under section 19(1)(iii). The two-staged enquiry was set out as:

"First the Court must be satisfied that the applicant is a person interested in an 'existing, future or contingent right or obligation', and then, if satisfied on that point, the Court must decide whether the case is a proper one for the exercise of the discretion conferred on it."

[96] The question as to whether there should be an existing dispute between the parties for a court to grant declaratory relief was settled in **Ex Part Nell** 1963 (1) SA 754 (A). The position adopted in **Ex Parte Nell** was discussed in **Minister of Finance v Oakbay Investments (Pty) Ltd and Others** 2018 (3) SA 515 (GP), where the full court held:

"[61] Ex Parte Nell *settled the law regarding the existence of a live dispute as a requirement for the granting of a declaratory order by abrogating this requirement. However,* Ex Parte Nell *did not render declaratory orders justified in all cases where there is no live dispute. This dictum on this requirement in* Ex Parte Nell *is not without qualification. There the court went further and stated that '… though the absence of a dispute may, depending on the*

circumstances cause the court to refuse to exercise its jurisdiction in a particular case.'"

[97] Counsel for the respondents argued that since the applicant does not have *locus standi* to have instituted these proceedings in its own interest, the applicant cannot have any "existing, future or contingent right or obligation". I have already dealt with the *locus standi* issue and held that the applicant indeed have standing to act on behalf of its members in terms of section 38(e). This finding, however, only relates to the applicant's capacity to institute proceedings and does not that imply that the applicant would be entitled to the relief sought. The competency of the relief claimed and the applicant's entitlement to the relief are separate issues.

[98] In **Giant Concerts**, the court quoted (at para 32) with approval the following from Hoexter **Administrative Law in South Africa** (2nd ed) (Juta & Co, Cape Town) at 488:

"The issue of standing is divorced from the substance of the case. It is therefore a question to be decided in limine *[at the outset], before the merits are considered."*

[99] In **Giant Concerts**, the court held (at para 35) that "*where a litigant acts solely in his or her own interest, there is no broad or unqualified capacity to litigate against illegalities. Something much more must be shown*." The court held further (at para 55) that the appellant, as an own-interest litigant, lacked standing, *"since its interest remains incipient and has never become direct or substantial."* (at para 55). The court, however, did distinguish between own interest litigants and those that litigate under section 38(b) to (e) of the Constitution, and noted (at para 42):

"It should be noted that the own-interest provision in section 38(a) is not isolated - it stands alongside section 38(b) – (e). These provisions create scope for public interest, surrogate, representative and associational challenge to illegality. The risk that an unlawful decision could stand because an own-interest

litigant cannot establish standing is diminished by the fact that broad categories of other litigants, not acting in their own interest, are entitled to bring a challenge."

[100] Section 38 of the Constitution entitles anyone listed in that section to approach a competent court for relief, including a declaration of rights on an allegation that a right in the Bill of Rights has been infringed or threatened. Furthermore, section 21(1)(c) vests the courts with a discretion to grant a declaration of rights where it would constitute appropriate relief. Before granting such relief, a court must take in consideration all the relevant circumstances, as stated by O'Regan J in paragraph 107 in **Rail Commuters:**

> *"It is quite clear that before it makes a declaratory order a court must consider all the relevant circumstances. A declaratory order is a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and its values. Declaratory orders, of course, may be accompanied by other forms of relief, such as*

mandatory or prohibitory orders, but they may also stand on their own. In considering whether it is desirable to order mandatory or prohibitory relief in addition to the declarator, a court will consider all the relevant circumstances."

[101] In the present matter, the declaratory orders sought by the applicants concerns the ongoing process of interpreting of provisions of the NWA on the part of the respondents and does not relate only to matter of the past. The relief sought has a real and substantial impact on the applicant and its members. The point *in limine* relating to the appropriateness of declaratory relief must fail.

Fourth point in limine: Whether the applicant should have instituted review proceedings in terms of PAJA.

[102] Counsel for the respondent argue that the applicant has clothed a review application in an application for a declaratory order. This argument is based on the assertion that the applicant had conceded that the decision relating to the imposition of conditions and obligations relating to genus exchange under the relevant statutes

constitute administrative action under PAJA. Furthermore the argument is based on the dictum in **Bato Star** that *"the cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past."*

[103] The applicant indeed conceded that the decisions of the respondents constitute administrative action which are reviewable under PAJA, and correctly contend that declaratory relief can be granted if reviewed in terms of section 8(1)(d) of PAJA.

[104] A consideration of the prayers in the Notice of Motion clearly indicate that what the applicant is challenging in the present proceedings is the alleged incorrect interpretation of provisions of the NWA by the respondents, in particular the interpretation of "*streamflow reduction activity*" as defined in section 32 read with sections 21(d) and 36(1) of the NWA.

[105] I agree with counsel for the applicant that this application is a declarator for the correct interpretation of provisions of the NWA as borne out by the prayers set out in the notice of motion. As for the

decisions already made by the first to fourth respondents in relations to permit conditions and genus exchange, I agree that the members of the applicant will have to bring applications for review, if they so wish, with of course, applications for condonations, where required, in the event that the declaratory orders sought are granted.

Fifth point in limine: Collateral challenge is inappropriate

[106] Counsel for the respondents argued that it is clear that the applicant had taken a view that the responsible forestry authorities, by imposing conditions relating to genus exchange, acted ultra vires and that the applicant therefore raises a collateral challenge which is bad in law in the circumstances.

[107] It is a general rule that an administrative act, even if irregular, stands until set aside by a court of law. If, however, a public authority tries to enforce an administrative act, a defence known as "*a collateral challenge*" may be raised challenging the irregular administrative action. A collateral challenge was described in **Oudekraal Estates**

(Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA) as follows (at para 32):

"it is in those cases - where the subject is sought to be coerced by a public authority into compliance with an unlawful administrative act - that the subject may be entitled to ignore the unlawful act with impunity and justify his conduct by raising what has come to be known as a 'defensive' or a 'collateral challenge' to the validity of the administrative act."

Further, (at para 35) it was stated:

"It will generally avail to a person to mount a collateral challenge to the validity of an administrative act where he is threatened by a public authority with coercive action precisely because the legal force of the coercive action will most often depend upon the legal validity of the administrative act in question. A collateral challenge to the validity of the administrative act will be available, in other words, only 'if the right remedy is sought by the right person in the right proceedings'. Whether or not it is the right remedy in any

particular proceedings will be determined by the proper construction of the relevant statutory instrument in the context of principles of the rule of law."

[108] It is argued on behalf of the respondents that this is not a case where the *"right remedy is sought by the right party in the right proceedings".* In the present proceedings, however, it is not so that the forestry authorities are seeking to coerce the applicant or any subject to comply with an unlawful administrative act.

[109] From the prayers sought in the notice of motion, it is clear that the applicant is not reviewing planting permits issued under any of the repealed Forestry Acts, or any license issued in respect of streamflow reduction activities under the NWA. On the contrary, the applicant is challenging an alleged incorrect interpretation of "*existing lawful water use*" in respect of "*streamflow reduction activity*" as defined in section 32(1)(a)(ii) read with section 32(2)(a) and section 36(1) of the NWA. The dispute also concerns the correct interpretation and application of section 34, which deals with the authority to continue with existing lawful water use. The applicant is not seeking to nullify

any administrative decisions already taken, but instead contend that it would be up to individual foresters who hold licences granted in terms of the NWA to review license conditions imposed in respect of genus exchange if they wish to do so.

Sixth point in limine: Dispute of fact

[110] Counsel for the respondents contend that the applicant ought to have made an application *in limine* for the hearing of oral evidence on a material dispute of fact pertaining to the method used to estimate genus exchange ratios which dispute cannot be resolved on affidavit. The gist of this argument is the dispute around the extent of water used by different species of trees, and consequently the effect of the streamflow reduction on the water source cannot be resolved on affidavit.

[111] It is so that the applicant contends that the method used by the respondents to determine the effect of streamflow reduction by genus exchange is fundamentally flawed. The respondents contend that the "*best available information"* should be used to determine the

difference in water used by various species and resultant conditions imposed following genus exchange are reasonable, whereas the applicant contends that such conditions in the circumstances are unreasonable, disproportionate and irrational.

[112] The applicant, however, contends that the disputes of fact are not germane to the interpretation of the NWA which lies at the heart of this matter. What is clear from the evidence on record is that there is indeed a factual dispute about the determination of genus exchange ratios and whether the water use of the natural vegetation (which would have been present before a plantation has been planted) should be discounted. This, the applicant contends, is only relevant, firstly in determining whether it is reasonable, rational and proportional for the Department to impose conditions relating to genus exchange in respect of new licences and secondly whether the impact of genus exchange is significant and whether it should be taken into consideration as an "*other measure*" as referred to in section 27 of the Constitution, which provides for the state to take reasonable legislative and other measures within its available

resources to achieve the progressive realisation of rights pertaining to heath care, food, water and social security.

[113] To the extent that the respondents rely on the fact that the parties rely on different expert opinions which differ, the critical issues in this matter remain issues of legislative interpretation. It is trite that it is the function of the courts to interpret statutory provisions. In **International Business Machines SA (Pty) Ltd v Commissioner for Customs and Excise** 1985 (4) 852 (A) it was held (at 874 A – C):

> *"Under our system, questions of interpretation of documents are matters of law, and belong exclusively to the Court. On such questions the opinions of witnesses, however eminent or highly qualified, are (except in regard to words which have a special or technical meaning) inadmissible. (See Phipson on Evidence, 13th ed., sec 27 – 46). So, subject to the exception mentioned the Courts do not receive opinion evidence, either as for the meaning of statutory provision… or any other document."*

[114] When it comes to the interpretation of legislative provisions, the starting point is the words used by having regard to their language, their context and the purpose to which they are directed. Facts are irrelevant. As held in the Constitutional Court in **President of the Republic of South Africa v Democratic Alliance and Others** 2020 (1) SA 428 (CC) (at para 54), *"[f]acts play no role in an interpretation of a rule or legislation for that matter. If this were to be so, provision in legislation would carry different meanings depending on the facts of specific cases."*

[115] I will deal, to the extent necessary, with the dispute of fact, and remain mindful of the point *in limine* raised. At the outset, however, it is my view that since this matter principally concerns legislative interpretation, it is not necessary to refer any aspect to oral evidence.

Background facts that occurred after the NWA came into operation

[116] Shortly after the NWA came into operation, during November 1999, the Department published a document titled "*Water-Use Licensing:*

The Policy and Procedures for Licensing Stream Flow Reduction Activities". In the introductory and background clause of the document, it is stated:

> *"This document sets out the policy and procedure for the licensing of land use that reduces stream flow. It consolidates current policy and practice while taking account of the requirements of the NWA. The approach adopted is based on the fact that within any one water management area as defined in the Act, SFRAs [stream flow reduction activities] are among several kinds of water use that must be treated fairly in the process of allocating and licensing water use."*

[117] The Department contends that this is not a policy document *per se*, but rather a guide. Whatever the status of the document, counsel for the applicant point out certain relevant statements contained and issues dealt with therein.

[108.1] The document refers to Nänni who first estimated stream flow reduction activities in 1970. It was estimated *"for annual*

flows only, based upon an agreed formula derived from experimental catchment results in South Africa, and with parameters set logically for variations in annual rainfall". These estimations for average water use were based on one species of pine and one species of eucalyptus only and is known as the Nänni curves. The Nänni curves were modified in 1982 by Van der Zel, and again in 1997 by Scott and Smith. According to the applicant, the latter modification, was clearly because the verification process of existing water uses provided for in section 35 of the NWA would commence shortly thereafter.

[108.2] It was stated that the methods for the estimation of stream flow reductions for plantation forestry *"will need to be based upon sound scientific information and established through consultation with stakeholders*".

[108.3] It is stated that *"[t]he Minister will prescribe such methods in terms of Section 26(1)(m) in the NWA. However the methods will be constantly reviewed with the intention of making improvements whenever necessary and possible. Improved methods of*

estimating SFRA impacts may result in changes to the estimates of water use ascribed to SFRAs. How these changes will be administered is an issue that that will need attention."

[108.4] The document records, in clause 1.3 thereof, that *"[t]he Act provides for the Minister to prescribe by regulation the methods of calculating stream flow reduction (section 26(1)(m)). This will require an agreed scientific basis for these methods, through the required consultations."*

[108.5] Plantations managed for local use and local trade such as woodlots, are included in the definition of plantations.

[108.6] Timber plantations smaller than 10 hectares would be dealt with differently.

[118] In addition to the above, it is of interest to note that at page 20 of the document it is recognised, in respect of the new legal regime brought about by the *"new regime for SFRAs"* (under the NWA):

"1. all lawful plantation forests in existence within 24 months prior to the date of commencement of the Act are defined as existing lawful water uses (section 32 of the NWA); this means that all plantation forests will be properly authorised as lawful water uses and [do] not required a licence until the responsible authority, i.e. the Minister or a person or agency to whom authority has been delegated, requires the person entitled to this use of water to apply for a licence

2. forest owners will be required to register their water uses (Section 34(2) of the NWA), subject to appropriate regulations; this will enable DWAF to estimate current levels of water use, and to calculate water use charges

3. applications for new SFRAs will be handled according to the procedures set out in this document, updated from time to time and established in regulations where necessary

4. the Minister will require forest owners to apply for licences (Section 43(1) of the NWA)."

[119] The regulations requiring that a water use be registered, known as the Water Use Registration Regulations were published and came into effect on 12 November 1999. These regulations provided that any

person who uses water in terms of section 21 of the NWA must register such use on a form obtained from the Department and must submit the completed form to the responsible authority when requested to do so. The form required applicants to indicate what species were planted but there was no indication that the species and their extent were in relation to what were planted during the qualifying period.

[120] During 2002, a document titled "*Estimation of Streamflow Reduction Resulting from Commercial Afforestation in South Africa"* referred to as the 2002 Gush Report was published by the Water Research Commission ("the WRC"), an entity of the Department. The document was the result of a project undertaken by a team of forest hydrologists and catchment modellers, including Gush and Jewitt, both of whom are experts in the field of hydrology. The report contains national streamflow reduction tables caused by afforestation at Quaternary Catchment ("QC") scale ("the 2002 Gush Tables"). A catchment area can be described as a drainage basin or a typographically represented area within which surface water flows to a common outlet. Quaternary catchments are fairly large

heterogenous typographical units within which terrain can be very different. A quinary catchment is a smaller typographical unit, but still fairly large.

[121] The Department used the 2002 Gush Report as *"the best available information"* on the water use of different genera at quaternary catchment level for years.

[122] The Department made it clear that it was using the 2002 Gush Tables in email correspondence with Jewitt on 6 September 2011. This despite a new report that was authored by Jewitt, Gush and others published in September 2009 ("the 2009 Jewitt Report"). This report is based on information obtained at a quinary level which Jewitt himself calculated.

[123] Mr Balzer, the Acting Director General at the time advised the applicant in a letter dated 14 August 2013 that the 2002 Gush Report was the best available information on the water use of different genera at quaternary level.

[124] It bears mention that the 2009 Jewitt Report referred to above was a study commissioned by the WRC titled *"Methods and guidelines for the licensing of SFRA's with particular reference to low flows, Jewitt, et.al. (WRC report no 1428/1/09)"*. It is stated in the report that a key component of the project was the improvement of the low-flow and stream flow reduction activities related routines in hydrological modeling systems, to better serve the needs of the Department and the integration of outputs into decision-making processes concerning water allocation and licensing with particular emphasis on stream flow reduction activities and low flows (i.e. during dry seasons).

[125] According to Mr Mbulelo Tshangana, the Director General of the Department who deposed to affidavits on behalf of the respondents, the 2009 Jewitt Report was an improvement on the 2002 Gush Tables. He admits that both reports have information only on water use for one species per *genera*.

[126] Part of the objectives of the 2009 Jewitt Report was to develop a computer program ("the SFRA Assessment Utility") which according

the Mr Tshangana is much more refined and site specific than the 2002 Gush Tables.

[127] The letter from Balzer dated 14 August 2013 was a belated response to a letter sent to the department on behalf of the applicant dated 13 December 2011. In the letter, Dr Scotcher who is the author thereof on behalf of the applicant raises a number of issues, *inter alia* issues that revolve around genus exchange and the application of section 27(1) of the NWA. Scotcher referred to matters that have been debated with officials of the Department, and in particular a legal opinion within the Department that states that *"replanting of, …, a felled pine plantation compartment with eucalyptus trees, is not permitted unless authorised buy an amended water use license. Thus, although a land-user might have a water use licence for, say, 50ha of pine, in order to convert that pine to eucalyptus, the land-user is required to apply for an amendment to the existing water use licence."*

[128] Scotcher argues in his letter that genus exchange does not result in a different form of water use as defined in the NWA. He also raised that the Department *"have taken the view that eucalyptus uses more*

water than pine, but appear not take into account the rotation length of eucalyptus vs pine (i.e. 3 rotations of eucalyptus to rotations of pine over the same period of time), water use efficiency, timber yields, pulp yields, economic benefit, job creation and others. Further, and based on the Department's use of the Gush tables which are used for the assessment of SFRA license applications, DWA is of the opinion that they will need to be a reduction area planted when changing from pine to eucalyptus due to the greater water use attributed to eucalyptus."

[129] Against the background of the many issues raised in the latter, Scotcher requested a meeting with the Department to refresh their respective memories on agreements already reached in previous discussions, and to discuss the path forward.

[130] As already stated, Balzer responded to Scotcher's letter on 14 August 2013. Besides stating that the 2002 Gush Report was the best available information used by the Department, Balzer confirmed that afforestation has been regulated since 1972. He further stated that:

"Authorisations therefore clearly indicate the genus authorised in terms of the permit or licence and it is therefore regarded as a condition of the authorisation, similar to the property where the water use/afforestation may occur and the extent or hectares that may be established. Changing the authorised genus therefore constituted a change in the permit or license conditions."

[131] Balzer made it clear that changing the authorised genus stipulated in the permit or of an existing lawful water use required the replacement of the existing lawful water use by a licence.

[132] When the draft Genus Exchange Regulations ("the draft regulations") were published for comment on 23 October 2015, it proposed that authorisation would be required for genus exchange and that the Department would make use of best available researched information to determine the genus exchange ratio. The draft regulations also provided for a mechanism where the Department would be permitted to amend the authorised genus and hectares of an existing lawful afforestation use without amending the existing lawful water allocation of the use.

[133] Following submissions of comments on the draft regulations, various meetings were held between the Department and various stakeholder and scientists. At a workshop held in February 2016, various scientists and officials from the Department shared an opinion that one cannot use the water estimates of only one specimen of pine tree and one specimen of eucalyptus tree (*Pinus patula* and *Eucalyptus grandis* – which are still the only species used in the hydrological model for which water use estimates are available) and that better information was required. The applicant therefore appointed Gush to provide and expert scientific opinion and independent advice on the draft regulations.

[134] A workshop was held on 15 July 2016 attended by government officials, various experts and scientists, members of the applicant and stakeholders in the forestry industry to discuss the draft regulations. At the meeting, Gush demonstrated that the Department had made a fatal error in their application of his hydrological models contained in the 2002 Gush Tables in that they did not take into account the baseline vegetation data.

[135] Gush made his report ("the 2016 Gush Report") available to the applicant during August 2016. This report was, on request, provided to Department during the same month. The 2016 Gush Report was reviewed by Jewitt who responded thereto in an email dated 3 December 2016. Jewitt utilised data from 7 out of 1946 quaternary catchments in South Africa and concluded that eucalyptus trees use between 23% and 45% more water than pine trees. Counsel for the applicant points out that it appears that Jewitt did not take the water use that should be attributed to baseline vegetation into account when making these calculations.

[136] On 11 August 2016, a notice issued in terms of section 35(1) of the NWA was forwarded to a member of the applicant requiring such member to apply for the verification of its water use to confirm the lawfulness and extent thereof. From this notice it is apparent that the department adopted the position that in claiming an "*existing water use*", you had to prove that the timber plantation was planted prior to 1972 (no specific date was given), but any plantation planted after 1972 required a permit from the relevant authority.

[137] In a letter to the applicant dated 14 December 2016, Mr Singh from the Department confirmed that the genus exchange regulations were put on hold *"pending the review of the CSIR [the Council for Scientific and Industrial Research] report by SFRA [stream flow reductions activities] research specialists."* Mr Singh added that *"in the absence of the regulations, genus exchange may only be done if a specific licence, in its conditions, allows for the exchange"* and *"[f]ailing this the water user wanting to do genus exchange must contact the DWS for a licence (this is relevant for pre-72 and permitted afforestation as per section 34 of the NWA) or the amendment of the existing National Water Act, 1998 (NWA) licenses."*

[138] During 2019 the WRC concluded a further study titled "*Resetting the baseline land cover second against which streamflow reduction activities and hydrological impacts of land use change are assessed, Toucher et.al. 2019 (WRC K5/2437/1)"*. This is referred to as the 2019 Toucher Report.

[139] An overall objective of the 2019 Toucher Report was to produce a refined and parameterized baseline land cover against which the hydrological impacts of various land uses can be assessed. In the executive summary to the report, it is stated:

> "*The need for a relatively accurate second baseline, or reference, land cover became more important what implementation of the [NWA], as the NWA requires reference flows for both the determination of the ecological reserve and the assessment of the impact of specific land uses on (especially) low flows. Currently, the South African Department of Water Affairs (DWA) supports and accepts the use of "natural vegetation" in the form of Acocks'(1998) Veld Types as the reasonable standard or a reference land cover again switch to assess land use impacts (Schulze; Jewitt et al., 2009).*

[140] The 2019 Toucher Report concluded that *"[t]his project has provided an alternative hydrological baseline in the form of the SANBI (2012) clusters for which the vegetation water used parameters have been*

derived using a documented, consistent and repeatable methodology using field based or remotely sensed data where possible."

[141] The authors of the Toucher Report recorded that challenges were encountered throughout the project, but provided a reflection on the water use of natural vegetation as the hydrological baseline against which use change are assessed in Chapter 13 assessment. The authors recommended future research for amongst other, further reflection on the use of natural vegetation as a hydrological baseline against which land use changes are assessed.

[142] Following the 2019 Toucher Report, the Department commissioned further studies, namely the *"K5/2791 – Expansion of knowledge on evapotranspiration and stream flow reduction of different clones/hybrids to improve the water use estimates of SFRA species*", referred to as "*the 2018 – 2021 Toucher Study*".

[143] According to Mr Tshangana, the aims of the project is described as including to expand the knowledge of the estimates of water use of different clones and hybrids of eucalyptus, wattle and pine species,

to expand the knowledge on the water use of different stand densities, and to improve existing tools used for the estimation of the impacts of SFRA through the inclusion of improved soils data and baseline land cover data, as well as the inclusion of the latest process results related to water use (i.e. evapotranspiration) of SFRA clones, hybrids and species.

[144] Mr Tshangana states that he does not place any reliance on the 2018 – 2021 Toucher Study, but refers to it to demonstrate the extent to which his department has gone in seeking to improve scientific knowledge related to afforestation and stream flow reduction activities in general. What this indicates, in my view, is that there is acknowledgment that the current scientific knowledge being utilised to estimate the impact of stream flow reduction activities is inadequate and improved knowledge is necessary for better estimations.

[145] On 20 March 2020, Mr Singh sent a letter to Sappi, a member of the applicant wherein he stated that a water licence application remains a requirement in the case of genus exchange.

[146] In a letter to the applicant dated 25 March 2020, an official of the Department again confirmed that research was being conducted on genus exchange, that the genus exchange regulations have been placed on hold, and that in the absence of such regulations, the NWA regulates genus exchange. It was stated that *"should a water user desire to change a condition (e.g. the genus) of and existing use such genus exchange may only be done by approval of the Department. if the entitlement is a water use license the exchange may occur if it's conditions, allows for the exchange."*

[147] The Department again confirmed its position on genus exchange in a letter to the applicant dated 22 June 2020. In this letter, it was stated that section 34 of the NWA imposes the requirement for existing lawful water users to obtain a licence when implementing genus exchange. The Department acknowledged that the current water use research is based on single species assessment, but added that this *"by no means confirms that there is currently inadequate scientific basis for insisting on a reduction in the planted area where genus exchange is concerned."*

The issues to be determined

[148] As already alluded to, the crux of this matter concerns the correct interpretation of various sections of the NWA, importantly what is meant by an "e*xisting water use*" and a "*stream flow reduction activity*" as referred to in section 32 read with section 36. The application also concerns section 34 dealing with the authority to continue with existing lawful water use, and section 35 dealing with the verification of an existing water use. The qualifying period as referred to in section 32 also falls to be determined.

[149] Also at issue are several disputes relating to genus exchange that the court is asked to determine. These are whether the exchange of genus or species of trees constitute water use as contemplated in section 21 of the NWA and whether the exchange of genus or species and clones of trees can take place without authorisation.

[150] As for the application and issuing of new licences under section 41 of the NWA, the court is asked to determine whether the responsible

authority is permitted in terms of the NWA to impose conditions prohibiting the exchange of genus or species of trees without prior written authorisation of the responsible authority and in the absence of regulations prescribing methods for making a volumetric determination of water to be ascribed to a stream flow reduction activity as provided for in section 26(1)(m) of the NWA.

[151] An issue related to genus exchange is whether the responsible authority is entitled, during the verification process as contemplated in section 35, to insist on the reduction of the extent or area of land used for commercial afforestation.

[152] The applicant also requires this court to disavow the use of policy where the respondents are superimposing such policy into legislation and also where policy is used in relation to decisions or decisions proposed to be made relating to the verification of stream flow reduction activities in respect of lawful water uses, as well as the granting or refusal of applications for new licences and the imposition of conditions.

[153] Counsel for the applicant record the following policies which they say are applied to a lessor or greater extent by the respondents:

"1. Current water use must be taken into consideration when determining existing lawful water use in respect of streamflow reduction activities.

2. The "Use-it or Lose-it" policy.

3. Interpreting section 36(1) as encompassing the consumptive use of water.

4. Interpreting the Qualifying Period as requiring that there must have been "trees in the ground".

5. Applying the 2002 Gush Report (or the 2009 Jewitt report/SFRA Utility) to verify the extent of stream flow reduction activities claimed as existing lawful water uses despite the admitted shortcomings of these reports.

6. Applying the concept of "other measures" referred to in sections 24(b) and section 27(2) of the Constitution to the interpretation of the NWA.

7. Applying the precautionary principle and the concept of "best available information".

8. Applying a policy in respect of genus exchange.

9. Applying a policy that where there is genus exchange from a lower water-using genus to a higher water-using genus that there must be a reduction in planted area.

10. Determining the volumetric water use for the purposes of verification in terms of section 35(4) of the NWA and determining genus exchange ratios at quinary or quaternary catchment level and not at farm or compartment level."

[154] The respondents rely on the argument that the Constitution makes provision for the state to rely on "*other measures*" in sections 24(b)

and 27(2) thereof to protect or to achieve the realisation of constitutional rights contains in these section. The respondents further argue that the measures so adopted are practical and informed by the best available information and are legally permissible.

[155] It is correct, as argued by the respondents, that reasonable measures may be taken in consideration by the state to achieve constitutional rights. The test for such measures is reasonableness, besides it having to be legally permissible. In The **Government of the Republic of South Africa and Others v Grootboom and Others** 2001 (1) SA 46 (CC), it was held (at para 42):

> *"The state is required to take reasonable legislative and other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive. These policies and programmes must be reasonable both in their conception and their*

implementation."

[156] Policy, however, cannot stand if it is in conflict with legislation, and as argued by the applicant, cannot be superimposed upon a statute.

[157] In **Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd** 2001(4) SA 501 (SCA) it was held (at para 7):

> *"I prefer to begin by stating the obvious, namely that laws, regulations and rules are legislative instruments whereas policy determinations are not. As a matter of sound government, in order to bind the public, policy should normally be reflected in such instruments. Policy determinations cannot override, amend or be in conflict with laws (including subordinate legislation). Otherwise the separation between legislature and the executive will disappear."*

[158] I now move on to consider those policies utilised by the respondents that are challenged.

The "Use-it or Lose-it" policy; the qualifying period; and "the trees in the ground" issue.

[159] Both the relief relating to the "*Use-it or Lose-it*" policy and that relating to trees in the ground are related to the qualifying period referred to in section 32(1) of the NWA. It is apt, therefore, to first consider the qualifying period. The importance of a correct determination of the qualifying period is obvious as the determination of an existing awful water use depends on it. In terms of section 32(1)(a);

> *"An existing lawful water use means a water use –*
>
> *(a) which has taken place at any time during a period of two years immediately before the date of commencement of this Act and which -*
>
> *(i) was authorised by or under any law which was in force immediately before the date of commencement of this Act;*

(ii) is a stream flow reduction activity contemplated in section 36(1); …"

[160] The applicant contends that the qualifying period is 1 October 1997 to 30 September 1999, with reliance on the fact that sections 7, 8 and 9 of the 1984 Forest Act were only repealed with effect from 1 October 1999. Also, certain provisions of the NWA only commenced on 1 October 1999. Section 7(1) and (2) of the 1984 Act provided that land which was previously used for commercial timber plantation which for a period of five years after removal, harvesting or destruction of the commercial timber crop, has not been so used, may not use such land for the planting of trees for commercial purposes without the prior written approval of the director-general. Subsection (2) requires an application to be made for the establishment of a commercial forest plantation on such land.

[161] The provisions of section 32 in its current form was brought about by an amendment by Act 45 of 1999 ("the Amendment Act") which came into force on 6 December 1999. What is of importance, is the use of the words "*this Act*" and not "*this section*" in the amendment.

[162] The use of the words "*this Act*" in section 32(1)(a), in my view is determinative of what the period referred to is. It can be correlated with section 164 which states that *"[t]his is the National Water Act, 1998 which takes effect on date fixed by the President by proclamation in the Gazette.*" The two year period referred to in section 32(1)(a), therefore, can only be a reference to when the NWA ("*this Act*"), not a section of the NWA, commenced.

[163] The qualifying period referred to in section 32(1), which is the period for the verification of an existing lawful water use, therefore, is the period between 1 October 1996 and 30 September 1998, as correctly contended for by the respondents.

[164] It must be stated that the qualifying period is not the same period in respect of activities that are declared under the NWA. In terms of section 32(2), where there is a declaration of a streamflow reduction activity under section 36(1), (as opposed to a determination of an existing lawful water use) or of a controlled activity under section 38, for such existing lawful water uses, the qualifying period is the period

of two years immediately before the date of the declaration. This period does not relate to the commencement of the NWA, but rather to the date when the relevant declaration is made.

[165] As for the "*Use-it or Lose-it"* policy, the applicant asks for this court to declare the policy ultra vires of the provisions of the NWA and that it cannot be used to reduce the "*existing lawful water use*" which had taken place during the qualifying period.

[166] On 30 August 2013 the Minister caused the publication of the "*National Water Policy Review ('NWPR') Water Policy Positions*" document, which contains the "*Use-it or Lose-it*" policy position in the Government Gazette for public comment. Mr Tshangana, in his answering affidavit on behalf of the respondents confirms that this policy has been approved by cabinet. He states that the policy is consistent with section 27(2) of the Constitution which obliges the State to take not only legislative measures but other measures to progressively realise the right to access water.

[167] It is trite that policy determinations cannot override, amend or be in conflict with laws.

[168] It should be noted that it is stated in the NWPR document itself that the "*NWA empowers on a discretionary basis that the use-it or lose-it principle be applied to the licensing of an authorised water use*", but states further that "*[t]he current legislation does not contain any mandate for this provision to be applied to Existing Lawful Water Use*."

[169] Mr Tshangana confirmed in his answering affidavit what is stated in the applicant's founding affidavit, namely that Mr Singh of the Department confirmed during the meeting with representatives of the applicant on 2 October 2019 that the "*Use-it or Lose-it*" policy could not be implemented until such time that the NWA is amended.

[170] Nothing further needs be said about the "*Use-it or Lose-it*" policy, save to confirm that, in my view, the use of this policy is beyond what is permissible under the NWA in respect of existing lawful water which taken place during the qualifying period discussed above.

[171] As for the "*trees in the ground*" issue, the relief sought by the applicant is for this court to declare that "*[i]n the process of verifying existing water use as provided for in section 35 of the Act, that 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".*

[172] It is important to note that the meaning of an existing lawful water use in terms of section 32(1) of the NWA includes a stream flow reduction activity, which in terms of section 36(1) includes "*the use of land for afforestation which has been or is being established for commercial purposes*".

[173] The way I understand the respondents' argument is that the absence of trees in the ground does not necessarily indicate that the land in question is not being used for commercial afforestation. Their argument is that the absence of trees in the ground is but one indicator that there was no existing lawful water use during the qualifying period in the form of a stream flow reduction activity. I

agree with this argument, keeping in mind that land may have lain fallow for the duration of the qualifying period, which does not mean that it was not in use for commercial forestation. It may be so that during this period the land may have been under preparation for commercial afforestation or the clear felled area may have been under preparation for the planting of new trees.

[174] On the premise that the determination of an existing lawful water use in the form of a streamflow reduction activity by way of commercial forestry must be determined with reference to the circumstances of each case, the respondents argue that the applicant is not entitled to the relief claimed in prayer 6.4 as it would apply generally whereas the circumstances of each case are different.

[175] I agree with the applicant's argument that the contentions of the respondents are based on an erroneous reading of the relief claimed, namely that the absence of trees in the ground during the qualifying period should not be regarded as conclusive of the absence of the use of land for afforestation which has been or is being established for commercial purposes. I agree with counsel for the applicant, that

the use of the present progressive tense in section 36(1)(a) is significant, describing an action that started in the past and continues in the present. On a proper reading of the section, it is clear that the use of land for commercial afforestation include periods where such land was in the process of being prepared for commercial afforestation or for reforestation. It may be that the period during which the land laid fallow or was being prepared for commercial afforestation could have fallen within the qualifying period.

[176] I am mindful that during the qualifying period, the 1984 Act, as well as the regulations promulgated thereunder were applicable. In terms of the 1984 Forest Act Regulations, "plantation" was defined as "*…land as defined in the Act [the NWA] on which timber species for industrial or commercial purposes are cultivated and which can deliver or is physically capable of delivering usable crops of timber and timber produce and which has been withdrawn from timber utilisation, as well as a plantation which has been clearfelled or burnt down and which will be reafforested in the foreseeable future, …".* (my underlining). This is a clear indication that land was legally

considered a plantation despite that absence of trees in the ground under the circumstances mentioned.

[177] Under the circumstances, I am of the view that the applicant is entitled to the relief claimed in prayer 6.4.

The best available information and the precautionary principle

[178] The respondents rely on the best available information and the precautionary principle in its persistence that genus exchange from pine to eucalyptus trees must be authorised. They furthermore rely on provisions of the National Environmental Management Act, 1998 ("NEMA") to advance the argument that the best available information and the precautionary principle must be taken in consideration;

a. to interpret the NWA, in particular the definition of *"stream flow reduction activity"* premised on the interpretation that such definition involves the consumptive use of water (as

opposed the applicant's argument that it involves the use of land); and

b. when making decisions relating to the verification of existing water uses in respect of stream flow reduction activities in terms of section 35(4), when granting licences and when determining genus exchange ratios.

[179] Section 2(4) of NEMA provides that *"[s]ustainable development requires the consideration of all relevant factors including … (vii) that a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions…".* This is the so-called "*precautionary principle*".

[180] Section 2(1) provides that principles set out in that section (which includes the precautionary principle dealt with in section 2(4)), apply throughout the Republic to actions of all organs of state that may significantly affect the environment, and "*serve as guidelines by reference to which any organ of state must exercise any function*

when taking any decision in terms of [NEMA] or any statutory provision concerning the protection of the environment;" and "*guide the interpretation, administration and implementation of [NEMA], and any other law concerned with the protection or management of the environment."*

[181] As for the verification of an existing water use, the applicant points out that section 35(4) of the NWA involves an investigation as to the factual state of affairs that existed during the qualifying period referred to in section 32(1) and does not entail a discretion to grant or refuse water entitlements. As such, the precautionary principle referred to in section 2 of NEMA is not applicable. I agree with this contention, but this does not imply that the precautionary principle as it was applicable before the coming into effect of NEMA did not apply.

[182] Counsel for the applicant argue that since NEMA came into operation on 25 January 1999, being a date subsequent to the coming into effect of the NWA, the principles in NEMA could not have been applied to interpret the NWA or to determine genus exchange ratios

or the issue of new licences under the NWA. It could also not have been utilised to support the approach that genus exchange necessitates a new licence or authorisation.

[183] The granting of licences, as correctly argued by counsel for the respondents, continue to take place after the coming into effect of the relevant provisions of NEMA. I agree, therefore, that these provisions in NEMA may be relied upon by the respondents in respect of the granting of licences. The same argument applies to the determination of genus exchange ratios, but this is dependent on what I find in respect of genus exchange, which I shall deal with later.

[184] The applicant may be correct in its contention that the precautionary principle as set out in NEMA is not applicable to the verification of an existing water use. Counsel for the respondents, however points out, correctly in my view, that indeed there were no legislation in place specifically giving effect to the precautionary principle before NEMA, and the respondents were therefore not precluded by the principle of constitutional subsidiarity from directly relying on sections 24(b) and 27(2) of the Constitution.

[185] The precautionary approach is also recognised in international law. Principle 15 of the Rio Declaration on Environment and Development states as follows:

> *"In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation."*

Section 233 of the Constitution requires our courts to prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is not.

[186] In the **WWF** matter, Rogers J discussed the application of the precautionary approach in international law and referred to the detailed treatment of the subject in the Australian case of **Telstra Corporation Limited v Hornsby Shire Council,** 228, 228 [2006]

NSWLEC (sic). He summed up aspects of the case as follows (at para 104):

> *"The court said that the principal finds application where two conditions are satisfied, namely, that the proposed activity poses a "threat of serious or irreversible environmental damage" and the "existence of scientific uncertainty as to the environmental damage". If these conditions are met, the principle is activated and there is a "shifting of an evidentiary burden of showing that this threat does not, in fact, exist or is negligible". Furthermore, prudence suggests that "some margin for error should be retained" until all consequences of the activity are known. Potential errors are "weighted in favour of environmental protection", the object being "to safeguard the ecological space or environmental room for manoeuvre".*

[187] The respondents rely on the precautionary principle on the basis that, according to them; (a) the unregulated 1:1 ration exchange from lower water using genus (pine) to a higher water using genus (eucalyptus) would lead to an increased consumption of up to 45% of

water resulting in a devastating effect on the environment and socio-economic conditions as a result of a marked reduction in water availability; and (b) industrial forestry is based on 10% of the land that produces 60% of South Africa's water resources which, which is ranked the 30th driest country in the world.

[188] The respondents contend that the studies relied upon by them are the best available information, in that;

[154.1] The Gush 2002 Report was significantly refined by the 2009 Jewitt Report, which is more site specific and provided a powerful tool for the assessment of stream flow reduction activities;

[154.2] The 2009 Jewitt Report also led to more specific spatially representative information regarding rainfall, soils, potential evaporation and baseline vegetation which are provided, leading to more spatially explicit estimates of water use with less uncertainty than those previously available;

[154.3] The 2009 Jewitt Report's SFRA Assessment Utility also refined the water use estimates to typographical quinary catchment level; and

[154.4] The 2019 Toucher Report, which; (a) addressed the concerns relating to the Acocks baseline vegetation; (b) significantly refined the Acocks baseline classification; and (c) concluded that it has provided an alternative hydrological baseline in the form of the SANBI (2012) clusters for which the vegetation water use parameters have been derived using a documented, consistent and repeatable methodology using field based or remotely sensed data where possible.

[189] The applicant argues that the respondents' reliance on the precautionary principle is misguided for a number of reasons. In furtherance of this argument they state that the modified Gush Tables (as per the 2009 Jewitt Report) have been shown to have a high degree of uncertainty and are at best suitable for broad preliminary national or regional planning and are not appropriate for detailed on-farm decision making at farm or compartment level.

[190] The applicant makes the point that a potentially large range of diverse catchment properties, such as baseline vegetation, soils, altitude, rainfall etc. are represented by average values in "*the best available information*". Each catchment, be it quaternary or quinary is unique. They have different annual rainfalls, each has a variety of soil types, the depth of the soils in which trees are planted varies, the trees are planted on different altitudes and the terrains fluctuate. These factors all affect how much of the rainfall or water the trees use. The estimates in "*best available information*" are based on information obtained on a quaternary catchment level and in the case of the 2009 Jewitt Report, at a quinary level which Jewitt himself calculated, and which calculations, according to the applicant, have never been published.

[191] The applicant maintains that the precautionary principle cannot be utilised to diminish water use entitlements in the process of verifying existing water use in terms of section 35(4) of the NWA, and the definition of "stream flow reduction" activity does not refer to a volume of water, consequently no authorisation is required for genus

exchange. The precautionary principle, as a consequence of this argument, is of no import. A correct interpretation of the relevant provisions of the NWA, in my view, will be determinative of these aspects. I will deal with this later.

[192] In support of the application of the precautionary principle, the respondents contend that eucalyptus trees use 23% to 45% more water than pine trees, and the unregulated genus exchange will result in a significant reduction of water availability for basic human consumption, animals and the ecological system.

[193] In support of the argument, the respondents rely on advice obtained from Jewitt in the email dated 3 December 2016. In this email, Jewitt advised that In the NWA, "water use is defined as impact on 'blue water' i.e. the water in rivers and aquafers. He then states that in order for water use in accordance with the NWA, "*we should perhaps rather estimate forestry water use a volume i.e. blue water. In SA, we do this through estimating impact on blue water i.e. Streamflow generated from an area of natural vegetation (baseline) [less] streamflow generated from the same area of forestry [equals]*

Streamflow reduction". He then provides a table with data from the seven quaternary catchment areas, concluding that eucalyptus trees in those catchment areas have a 23% to 45% higher water use than eucalyptus trees in the same areas.

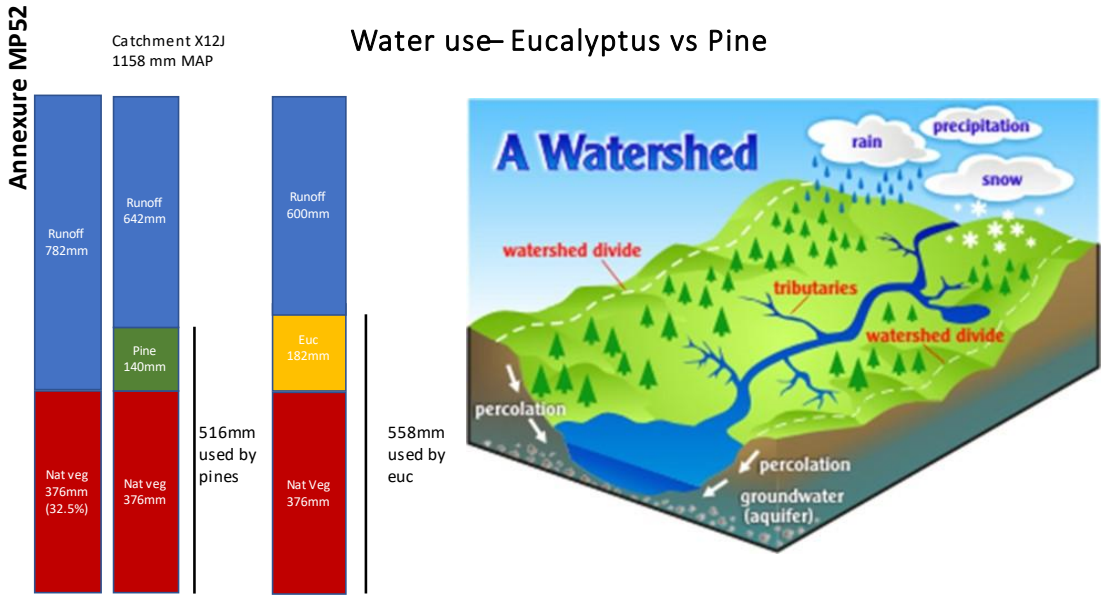
[194] Counsel for the applicant argue that the estimates contained in the email from Jewitt is artificial, illogical and irrational and fails to take into account the water that would have been consumed by whatever natural vegetation there existed before afforestation was established. In response, counsel for the respondents states that the water that would have been consumed by baseline vegetation has already been taken in consideration, but there are no indications of this in Jewitt's email. If such use had been taken in consideration, there are also no indications as to what values were attributed to this.

[195] Counsel for the applicant further argue, correctly in my view, that the total evaporation values (and the relative genus-specific differences) as opposed to the smaller streamflow reduction values (and the relative genus-specific differences) should be taken in consideration

in the utilization of the modified Gush Tables to determine genus exchange ratios and hence also whether the current "*best available information*" can be relied upon. The use of the smaller values to genus exchange ratios, without taking into account the water which baseline vegetation would have consumed, results in greater relative difference between genera.

[196] Counsel for the applicant illustrated the opposing views of the parties with reference to the graph below which is attached as Annexure MP 52 to its papers. The information and data used in the graph is the actual information and data taken from the 2002 Gush Tables in relation to quaternary catchment X12J therein.

Annexure MP52



[197] The graph reflects the following;

[166.1] The mean annual precipitation of the quaternary catchment amounts to 1 158mm;

[166.2] The Acocks baseline vegetation consumes 376mm per annual runoff (32.5% of the total runoff);

[166.3] Pine trees annually consume 140mm more than the 376mm runoff consumed by the Acocks baseline vegetation; and

[166.4] Eucalyptus trees annually consume 182mm more than the 376mm runoff consumed by the Acocks baseline vegetation.

[166.5] The relative increase in the reduction of runoff if pine trees have been replaced by eucalyptus trees is 42mm (based on a consumption ration of 516mm/558mm, which includes the consumption by the genera as well as the Acocks baseline vegetation), or 7.5% expressed as a percentage.

[198] In the presentation the respondents, by using the same data, takes no account of the water which would have been consumed by the natural vegetation which the trees have replaced. Instead, the smaller values used by the respective genera, namely 140mm and 182mm used by pine and eucalyptus trees respectively over and above the water that would have been consumed by natural vegetation (as opposed to 516mm and 558mm if the baseline vegetation water use is taken into consideration), results in estimates

which show the difference in water use between pine and eucalyptus as 23% more water used by eucalyptus over pine.

[199] Counsel for the applicant point out that not more than approximately 10% of each quaternary catchment area is planted with commercial forest plantations. To illustrate the true impact of genus exchange where 10% of a quaternary catchment had been planted with trees, data that relate to quaternary catchment B81C in the 2002 Gush Tables is used in a series of graphs and summarised in the bar graph marked as Annexure MP53.5. The data as reflected in the 2002 Gush Tables in respect of quaternary catchment B81C, is as follows;

[169.1] the catchment is 20 840 hectares in extent;

[169.2] the annual mean precipitation amounts to 890.9mm;

[169.3] the Acocks baseline vegetation on medium depth soils consumes 178mm per annum (calculated with reference to the median annual flow);

[169.4] pine trees on medium depth soils consumes 241.2mm per annum (calculated with reference to the median annual total flow); and

[169.5] eucalyptus trees on medium depth soils consume 261.1mm per annum (calculated with reference to median annual flow).

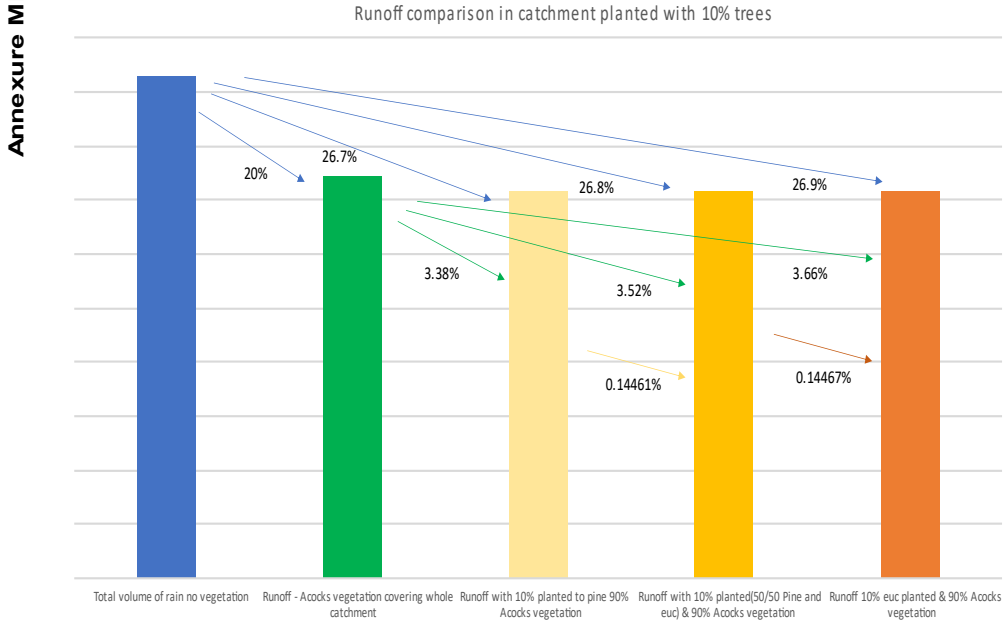
It should be noted that the information in the aforesaid tables is based on the assumption of 100% forest cover in each catchment. The water use and streamflow under the forest cover was then compared with those associated with a baseline land cover equivalent to the dominant Acocks Veld Type within a quaternary catchment. The streamflow reductions were thus assumed to be the difference between the streamflow simulated for the catchment, consisting of the dominant Acocks Veld Type and 100% of the commercial afforestation within the catchment.

[200] In Annexure MP53.5 replicated below, it is assumed that only 10% of the catchment area had been afforested, either with pine or eucalyptus trees, or a combination of the two genera.

[201] Annexure MP53.5 reflects the runoff in different scenarios, with the first bar representing the total volume of rain with no vegetation in the entire catchment, the second bar with Acocks baseline covering the whole catchment, the third bar with 10% of the area planted with pine trees, the fourth bar with 10% of the catchment planted with 50% pine trees and 50% with eucalyptus trees, and the fifth bar with 10% of the area planted with eucalyptus trees. Taking into consideration the water consumed by the Acocks vegetation and the trees planted, if 10% of the catchment is planted with pine trees and the balance covered with natural vegetation the net effect on the runoff for the whole catchment would be a 3.38% reduction from the scenario where the whole area is covered with natural vegetation. If the pine trees are replaced with eucalyptus trees, the net effect would be a 3.66% reduction in runoff. The estimated difference on the effect of the exchange of genera from pine trees to eucalyptus

trees on the streamflow, therefore would be a reduction of 0.28% of the runoff.

Annexure MP53.5



[202] Based on the above, if the assumptions are correct, the effect on the streamflow in the case of genus exchange from pine trees to eucalyptus trees is less dire (an increase of 0.28% in the sketched scenario) than what the respondents make out to be the case.

[203] The applicant argues that the precautionary principle cannot be resorted to by the respondents in the circumstances as sketched. It is further argued by the applicant that the definition of "*streamflow reduction activity*" does not refer to a volume of water, consequently

no authorisation is required for genus exchange and as such the principles contained in section 2 of NEMA, including the precautionary principle, are of no import.

[204] The applicant admits that the principles in section 2 of NEMA are applicable as far as the granting of licences are concerned, but submits that the precautionary principle can only be applied where there is a threat of serious or irreversible environmental damage which is adequately sustained by scientific evidence and asks this court to conclude that it cannot be the case in this matter.

[205] The parties agree that the scientific knowledge relating to water use by different genera and species is inadequate and is inappropriate for a detailed on-farm decision making for afforestation at farm or compartment level, that the modified Gush Tables have a high degree of uncertainty, and that a large range of diverse catchment properties (such as soils, vegetation, altitude, rainfall etc.) are represented by average values. The argument presented by the applicant with reference to Annexures MP52 and MP53.5 is based on the information and data which the applicant itself say are unreliable.

[206] The applicant's argument against the utilisation of the precautionary principle in the issuing of licences under the NWA and the imposition of conditions prohibiting genera exchange when licences are issued is based on the unreliability of the information available. However, case law suggests in favour of the use of the principle where there is scientific uncertainty.

[207] In the **WWF** matter, the court, at paragraph 103, referred to a judgment of the Supreme Court of India, **AP Pollution Control Board v Prof MV Nayudu** AIR 1999 SC 812 where that court reviewed the development of the precautionary principle internationally and identified the inadequacies of science as the real basis that has led to its emergence. It was held that it is "*based on the theory that it is better to err on the side of caution and prevent environmental harm which may become irreversible*".

[208] In **Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture,**

Conservation and Environment, Mpumalanga Province and Others 2007 (6) SA 4 (CC), the Constitutional Court held (at para 81) that *"NEMA requires 'a risk averse and cautious approach' to be applied by decision-makers [section 2(4)(a)(vii) of NEMA]. This approach entails taking into account the limitation on present knowledge about the consequences of an environmental decision."*

[209] The relief sought by the applicant in relation to the imposition of conditions prohibiting genera exchange when issuing licences, and where, by implication, the court is asked to rule that the respondents are not allowed to utilise the precautionary principle, is contained in paragraph 6.6.3 of the notice of motion, and is worth repeating, as follows:

> *"Since the promulgation of the Act, in respect of an application for a licence in terms of section 41 of the Act for the water use of engaging in a stream flow reduction activity, contemplated in section 36(1)(a) of the Act, the responsible authority has not been entitled to and is still not entitled to validly impose any condition prohibiting the exchange of genera, species or clones of trees in*

the absence of regulations prescribing methods for making a volumetric determination of water to be ascribed to a stream flow reduction activity as provided for in section 26(1)(m) of the Act."

[210] I understand that the relief in prayer 6.6.3 of the notice of motion is asked for in the absence of regulations prescribing methods for making volumetric determination of water to be ascribed to a streamflow reduction activity and also the use of water by different genera of trees. The problem with this relief is that section 26(1)(m) of the NWA provides for the making of regulations to be directory, not compulsory. Granting the relief under discussion, therefore, may cause the relief to be in place *ad infinitum*, or for an inordinate amount of time. This would be problematic, especially if new scientific information that may come to hand indicate that certain genera or species of trees use significantly more water than others, and may have a detrimental effect on water use.

[211] A further difficulty I have with the relief sought in prayer 6.6.3 relates to the separation of power and the matter of deference that courts

must show to functionaries or decision makers in branches of government. In **Doctors for Life International v Speaker of the National Assembly and Others** [2006] ZACC 11; 2006 (6) SA 416 (CC) at para 37; 2006 (12) BCLR 1399 (CC) at 1417C-E, it was held:

> *"The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle 'has important consequences for the way in which and the institutions by which power can be exercised'. Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the Judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution."* (Footnotes omitted)

[212] The above paragraph was quoted by the Constitutional Court in **International Trade Administration Commission v SCAW South Africa (Pty) Ltd** (CCT 59/09) [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) (9 March 2010), where the court further held: (at para 95):

> *"Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric*."

[213] I am mindful that in terms of section 29 of the NWA, the responsible authority may attach conditions to every general authorisation or licence. Subsection 1(a) is of a general nature in that it empowers the responsible authority to attach conditions relating to the protection of the water source in question, the streamflow regime and other existing water users. Subsection (1)(f) is specific to a streamflow reduction activity and allows the responsible authority to attach conditions specifying practices to be followed to limit streamflow reduction and other detrimental impacts on the water resource. The relief in prayer 6.6.3, in my view, will interfere with the authority granted to the responsible authority under subsections 29(1)(a) and (f).

[214] In these circumstances, I am of the view that the respondents should not be injuncted from applying the precautionary principle when considering new licences for afforestation and when considering the imposition of conditions prohibiting genera exchange in respect of such licences.

Further issues requiring legislative interpretation

[215] I now move on to deal with the relief sought by the applicant in prayer 6.1 of the notice of motion, which is repeated for ease of reference, as follows;

> "*An existing lawful water use in respect of a stream flow reduction activity referred to in section 32(1)(a)(ii) of the Act [i.e. the NWA], in respect of the use of land for afforestation which had been or was being established for commercial purposes as contemplated in section 36(1)(a) 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 section 32(1)(a)(i) of the Act*".

[216] It is immediately evident that an interpretation of sections 32(1)(a)(i) and (ii) as well as section 36(1)(a) is required. It will also become

apparent that section 32(1)(a) must be read with other provisions of the NWA, specifically section 4(2), 32(2)(a) and 34(1)(a) of the NWA.

[217] The approach to statutory interpretation has been extensively dealt with in **Natal Joint Municipal Pension Fund v Endumeni Municipality** SA 2012 (4) 593 (SCA), where Wallis JA described the process of interpretation as involving a unitary exercise of considering language, context and purpose (at para 18) and concluded (at para 19) that the approach to interpretation which our courts should now follow is that from the outset, one considers the context and the language used together, with neither predominating over the other. In the oft-quoted passage (at para 18), he held:

> *"The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration*

must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute with statutory instrument is to cross the divide between interpretation and legislation; in a contextual context it is to make a contract for the parties other than the one they infect made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.". (Footnotes omitted)

[218] It bears mention that the Constitutional Court has approved the approach adopted in **Endumeni**, first in **KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, Kwazulu-Natal and Others** 2013 (4) SA 262 (CC) (at para 129) and the approach was relied on in many other cases thereafter.

[219] As already mentioned, section 32 of the NWA defines an "*existing lawful water use*" in subsection (1) as meaning a water use which has taken place at any time during the qualifying period, and which –

> *"(i) was authorised by or under any law which was in force immediately before the date of commencement of [the NWA];*
>
> *(ii) is a stream flow production activity contemplated in section 36(1); or*
>
> *(iii) is a controlled activity in section 37(1)"*

[220] The applicant's argument is that section 32(1) provides for three distinct categories of water uses listed under (i), (ii) and (iii) respectively.

[221] The applicant expresses the view that an existing lawful water use in respect of a stream flow reduction activity referred to in section 32(1)(a)(ii) of the NWA, with regards to the use of land for afforestation which had been or was being established for commercial purposes as contemplated in section 36(1)(a) is not subject to the requirement of authorisation "*by or under any law which was in force immediately before the date of commencement of [the NWA]",* as provided for in section 32(1)(a)(i). The applicant finds support for its view in the words of Hubert Thompson in his book, **Water Law** (first ed) 2006, where it is stated (at page 413):

> *"As far as determining the lawfulness of use of land for commercial afforestation and the identified controlled activities which are not authorised by a license or a general authorisation concerned, the current use is only compared with the use that actually took place during the qualifying*

period to determine <u>whether this is lawful or not</u>." (my underlying)

[222] Counsel for the applicant argues that the applicant's interpretation is supported by the structural and grammatical analysis of section 32 of the NWA, viewed in its proper context. In furtherance of this stance, it is argued that the use of the word "*or*" in section 32(1)(a) is instructive in that it separates sub-sections (i), (ii) and (iii) and also separates sub-sections (a) and (b). In both instances, it is argued, its function is to cause the separated portions to be read disjunctively. It is difficult to disagree with the applicant's argument, as sub-section (i) provides for a wide category of water uses, whereas Sub-sections (ii) and (iii) are specific to a stream flow reduction activity and a controlled activity respectively. If one is to read in the word "*and*" between sub-sections (i) and (iii), or accepts that "*or*" means "*and*" between sub-sections (ii) and (iii), it would have the result that no other water uses besides that catered for in sub-sections (ii) and (iii) would qualify as "*existing lawful water uses*".

[223] The respondents contend that the applicant's argument that existing lawful water use in respect of stream flow reduction activities is not subject to section 32(1)(a)(i) of the NWA, namely that it did not need to have been authorised by or under any law which was in force immediately before the commencement of the NWA is absurd. What this means, they argue, is that any person who may have used land for afforestation during the qualifying period and will be entitled to claim an existing lawful use under section 32(1)(a)(ii) of the NWA.

[224] I agree with the applicant that the three uses mentioned in section 32(1)(a) are distinct from each other, but disagree that this implies that a stream flow reduction activity mentioned under sub-section (ii) need not be lawful. In my view, a correct interpretation of section 32(1)(a), and in particular sub-section (ii) thereof will be ascertained if one reads this provision by having regard to other sections of the NWA. Sub-section (ii) refers to a stream flow reduction activity as contemplated in section 36(1) of the NWA. The latter section declares the use of land for afforestation which has been or is being established for commercial purposes as a stream flow reduction activity. The present continuous tense used in section 36(1) is, in my

view, consistent with section 4(2) which provides that a person may continue with an existing lawful water use in accordance with section 34. Importantly, section 34 provides that a "*person or that person's successor-in-title, may continue with an existing lawful water use*", subject to certain conditions.

[225] The use of the words "existing" and "lawful" in section 4(2), 36(1) as well as in section 32 are, in my view, instructive. The water use referred to in section 32(1)(a)(ii), must be lawful. It would be absurd to hold otherwise.

[226] I remain mindful that the 1984 Act was applicable during the qualifying period and in terms of that Act, commercial afforestation had to be permitted or authorised under it. This is in line with the submission made by counsel for the applicant that the 1984 Act (as was the case with the 1972 amendment) concerned itself with the authorisation in respect of new land to be afforested for commercial purposes. The absence of a requirement of lawfulness will have an absurd effect of section 32(1)(ii) legalising the use of land for

afforestation only because the land was so used for some time during the qualifying period.

[227] The relief sought by the applicant in prayer 6.1 is to the effect that the use of land for afforestation, as long as such land was used for such purpose during the qualifying period, is not subject not only to the requirement of authorisation "*by or under any law which was in force immediately before the date of commencement of [the NWA]",* but effectively also not subject to lawfulness. This cannot be sustained. I am fortified by the clear meaning of section 35(1), in terms whereof the responsible authority may, "*in order to verify the lawfulness or extent of an existing water use, by written notice, require any person claiming an entitlement to that water use to apply for a verification of that use."* (My underlining).

[228] In any event, the relief sought in prayer 6.1 is of a declaratory nature which is discretionary. In terms of section 38 of the Constitution, a court "*may*" grant a declaration of rights where it would be appropriate relief.

[229] In the present matter, I am of the view that granting the relief sought in prayer 6.1 would be inapposite and I should exercise my discretion accordingly. It follows that prayer 6.1A should also be refused as the relief sought therein is asked for only in the event of the relief in prayer 6.1 being granted.

[230] The relief sought in prayer 6.1B is in the alternative to the relief in prayer 6.1, and is to the effect that authorisation under any law as contemplated in section 32(1)(i) in relation to stream flow reduction activities claimed as an existing lawful water use, need not be proven in respect of any other legislation save for the 1984 Act in so far as it is applicable.

[231] I have already held that subsections (i), (ii) and (iii) under section 32(1)(a) are distinct from one another. In effect, the requirement pertaining to one cannot be superimposed onto one of the others. I have also concluded that lawfulness remains a requirement for a streamflow reduction activity contemplated in sub-section (ii). For these reasons, I am of the view that the relief under prayer 6.1B

should be refused for similar reasons for the refusal for the relief under prayer 6.1.

[232] The relief sought in prayer 6.2 is:

> "*In the process of verifying existing water use as provided for in section 35 of the Act [the NWA], the current water use cannot be utilised to reduce the "existing lawful water use" which had taken place during the qualifying period set out in section 32(2) of the Act*".

[233] The respondents admitted in their answering affidavit that current use is utilised to determine the existing lawful water use which had taken place during the qualifying period. In their answering affidavit (paragraph 135) the respondents denied that the applicant is entitled to the relief that current use cannot be utilised to reduce the existing lawful water use which had taken place during the qualifying period. The respondents do, however, admit (in paragraph 275 of the answering affidavit) that by interpreting the word "*existing*" in the

phrase "*existing lawful water use*" as meaning "*at the current time*" is incorrect.

[234] Clearly the purpose of section 35 is to verify the existing water use, which is the water use which had taken place during the qualifying period and not the current use, i.e. the use at the time of the verification exercise. As a result, the applicant is entitled to the relief claimed in prayer 6.2.

The relief sought relating to genus exchange

[235] The relief sought in relation to genus exchange is contained in various prayers under prayer 6.6. Prayer 6.6.1 is sought only in the event of an order in term of prayer 6.1 being granted. I held that prayer 6.1 should be refused, and it is therefore not necessary to deal with prayer 6.6.1.

[236] The relief sought under prayer 6.6.2 is sought in the event of the refusal of the relief sought in prayers 6.1, 6.1A and/or 6.1B, and therefore requires consideration.

[237] Prayer 6.6.2 consists of 6.6.2A and 6.6.2B, and reads:

"*6.6.2A For the purposes of determining whether the water use was authorised as contemplated by section 32(1)(a)(i) of the Act and the extent of existing lawful water uses in respect of stream flow reduction activities in terms of the provisions of the National Water Act:*

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 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;*

b) *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.

6.6.2B The order as set out in prayer 6.6.2A above 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."

[238] Before dealing further with prayer 6.6.2, it should be noted that the relief contained therein are sought, based on two premises, firstly, for the purposes of determining whether the water use was authorised as contemplated by section 32(1)(a)(i) of the NWA and secondly, for the purposes of determining the extent of existing lawful water uses in respect of stream flow reduction activities in terms of the provisions of the NWA. I have already held that the stream flow reduction activity referred to in section 32(1)(a)(ii) of the NWA is a distinct water use from that mentioned in section

32(1)(a)(i), and is therefore not subject to the same requirements of the use in sub-section (i) *per se*, but it is still subject to a lawfulness requirement. I will proceed to consider the relief sought in prayer 6.6.2A, therefore, only on the premise for determination the lawfulness and extent of existing lawful water use in respect of a stream flow reduction activity.

[239] The relief sought under prayer 6.6.2A, as well as the relief sought under prayers 6.6.4 and 6.6.5 all relate to the verification of existing water uses. In terms of section 35 of the NWA, the responsible authority (i.e. the Minister) may by written notice, in order to verify the lawfulness or extent of an existing water use, require any person claiming an entitlement to such water use to apply for a verification of that use. In terms of section 35(4) of the NWA, once the Minister has determined the extent or lawfulness of a water use pursuant to the aforesaid application, such determination limits the extent of any lawful water use contemplated in section 32(1).

[240] The relief under discussion sought by the applicant was prompted by the position adopted by the Department relating to the verification of

existing lawful water use and genus exchange in correspondence with the applicant and some of its members. This includes:

[228.1] A letter from the Department to one of the applicant's members, dated 17 May 2012, wherein the latter was informed as follows:

> "*The genus authorised on the permit/licence may not be changed without authorisation from the Department (please see permit/license conditions). If the genus is planted in the 1996 - 1998 qualifying period (see section 32 of the NWA) is not the authorised genus, the existing lawful water use is determined considering the lawful genus i.e. permitted. The unauthorised genus is therefore regarded as unlawful and a genus exchange is required to rectify the situation. In the case of pre-72 afforestation, the genus planted in the 1996-1998 qualifying period is regard as the lawful genius*."

[228.2] The letter from the department to the applicant dated 14 January 2017, wherein the department informed that the draft genus exchange regulations were put on hold pending a review by research specialists, and wherein the applicant was informed as follows:

> "*In the absence of the regulations, genus exchange may only be done if a specific licence, in its conditions, allows for the exchange. Failing this the water user wanting to do genus exchange must contact the [Department] for a licence (this is relevant for pre-72 and permitted afforestation as per section 34 of the NWA) or the amendment of existing National Water Act (NWA)* licences."

The reference to section 34 of the NWA seems to imply that the position adopted by the department also included those uses which were allowed to continue as existing lawful water uses as provided for in section 34.

[228.3] The letter from the Department to SAPPI, one of the applicant's members, dated 20 March 2020 (it should be noted that the relief sought currently under discussion was introduced after this letter), wherein the latter was informed that in the absence of regulations relating to genus exchange, a water use license application remains a requirement in the case of genus exchange.

[228.4] The letter of 25 March 2020 from the Department to the applicant wherein the applicant was informed that in the absence of the draft regulations, the NWA regulates genus exchange, which may only be done with the approval of the department.

[228.5] Lastly, a letter from the Department addressed to the applicant dated 20 June 2020, wherein the applicant was informed that it was not the draft regulation (relating to genus exchange) that impose the requirement for existing lawful water uses to obtain a licence when implementing genus

exchange, but section 34 of the NWA that indicates the requirement in this regard.

[241] For consideration of the relief sought in paragraphs (a) and (b) under prayer 6.6.2 (as well as the relief sought in prayers 6.6.4 and 6.6.5, which I shall deal with hereafter), it is necessary to have regard to the position regarding genera exchange before the NWA came into being.

[242] As already mentioned, the 1972 amendment of the 1968 Act introduced a permit system, the APS, for the planting of trees for commercial forestry (in terms of section 4A(1)(a) of the amendment act).

[243] Section 4A(1) of the amendment Act introduced the need for approval by prior written consent by the then authority for the utilisation of land for afforestation for commercial or industrial purposes. Section 4A(3) provided that the authority may, if he had granted approval, have imposed such conditions as he may have deemed fit.

[244] When the 1984 Act became law, section 89(1) thereof repealed the 1968 Act as amended, and provided in section 89(4) that:

> "*Anything done under a power conferred by or in terms of a provision of a law repealed by subsection (1), is deemed to have been done under a power confirmed by or in terms of the corresponding provision of this Act.*"

[245] The 1984 Act also had a provision (in section 7) requiring the prior written approval from the director-general (who was the then relevant authority) for the establishment and management of a commercial timber plantation.

[246] The 1984 Act was repealed by the NWA, and also made provision to the effect that anything done under the repealed 1984 Act remained valid.

[247] On the basis of the aforegoing, the respondents correctly argue that the rights, obligations and conditions vested or implied under the

1984 Act are, under the NWA, to be dealt with as if the 1984 Act was never repealed.

[248] The applicant's case is that the 1984 Act and the regulations promulgated thereunder did not concern themselves with the issue of genus exchange or genera of trees, except for regulation 16 which makes provision for the collection of data pertaining to plantations and statistical returns. Both the regulations promulgated under the 1968 Act (i.e. regulation 5) and the 1984 Act (regulation 16) makes provision for annual returns to be submitted to the responsible authority in respect of certain information, including information as to the species of trees planted.

[249] The applicant argues, and I agree, that the effect of the 1972 amendment was that as from the date of commencement thereof, existing commercial timber plantations did not require to be registered, nor did they require approval. The only permits that were required in terms of the amendment were permits for afforestation with a view of producing forest produce for commercial or industrial purposes on land not previously afforested for such purposes.

[250] The regulations promulgated under in terms of the 1968 Act after the 1972 amendment, contained a *pro forma* application form in terms of which an applicant was required to state, amongst other, which species were to be planted.

[251] A typical permit issued under section 4A(1) of the 1968 Act is attached to the papers as "*ABS12*", and is headed "*PERMIT TO PLANT TREES FOR COMMERCIAL PURPOSES*". Under the heading "*Particulars of Area Approved for Afforestation – Broad-leaved species*", the permit allows for 320 hectares to be planted. The permit contains a condition that it is valid for a period of five years from the date of issue.

[252] Similarly, a typical permit issued under section 7(2) of the 1984 Act attached to the papers as "MP50.2", is headed "*PERMIT TO PLANT TREES FOR COMMERCIAL PURPOSES*" and provides under the heading ""*Particulars of Area Approved for Afforestation"* for 342 hectares of broad-leaved species. This permit also contains a condition that it is valid for a period of five years from the date of issue.

[253] Another permit attached to the papers as "MP50.3" which was issued under the 1984 Act on 13 October 1998 after the NWA came into operation, but before sections 7, 8 and 9 of the 1098 Act were repealed, states as condition 4 that the planting panting of tree groups specified on the permit "*may not be amended without the written approval of this Department*".

[254] The applicant argues that the permits issued under the 1968 and 1984 Acts (jointly referred to as the "the repealed Acts") were planting permits which expired after the period (mostly five years as indicated on the permits which are part of the record) specified thereon. This is borne out by the fact that both section 4A of the 1968 Act as amended, as well as section 7 of the 1984 Act require the prior written approval of the relevant authority for the "*planting of trees*", "*with a view to producing forest produce for commercial or industrial purposes*" in terms of the 1968 Act, or "*to produce timber for commercial or industrial purposes*" in terms of the 1984 Act.

[255] A consideration of the contents of the permits issued under the repealed Acts is also indicative that these permits were planting permits. In this regard, the heading of the permits are instructive, clearly indicating that they were permits to plant trees for commercial purposes. They all expired after a period specified therein, which is clearly the period within which the permitted trees, to the extent of their permitted hectarage, had to be planted.

[256] The repealed Acts, their regulations and the contents of the permits issued thereunder support the applicant's argument that these Acts, and their regulations did not concern themselves with genus exchange. This raises the question whether conditions such as condition 4 contained in the permit marked as annexure "*MP50.3*" survived the period of validity of the permit or not (it should be noted that the respondents attached further permits to their papers containing similar provisions to condition 4). This, however, is not an issue for this court to determine as the applicant made it clear that it is not reviewing any permits issued under the repealed Acts and their regulations. This issue was raised during argument, whereafter the applicant amended its notice of motion, without any objection from

the respondents, to the effect that in the event of the order sought in prayer 6.6.2A being granted, it would not affect specific permits containing provisions described as conditions prohibiting genus exchange, or where genus exchange were not allowed without the prior written approval of the Department.

[257] The respondents argue that afforestation under the repealed Acts constituted water use, or at least it affected the availability of water, albeit so that it was not regulated under the then applicable water legislation. This, they say, is clear from the provisions of section 4A of the 1968 Act as amended, and section 8 of the 1984 Act. It is indeed so that in terms of section 4A of the 1968 Act as amended, the Minister was empowered to, in the event of any trees impairing the water run-off of land which in his or her opinion was situated within a natural water course, direct the removal of trees in order to improve the run-off. Section 8 of the 1984 Act gave the Minister similar powers for purposes of the protection of any natural water source.

[258] The aforesaid powers of the Minister, however, is not conclusive of the view that afforestation for commercial purposes was considered a water use as opposed to a use of land under the repealed Acts.

[259] Besides sections 4A of the 1968 Act and section 8 of the 1984 Act, both indicating that the legislature was aware that afforestation impaired the water run-off, I cannot find anything in the repealed Acts which indicate that afforestation was not treated as a use of land for commercial afforestation. The repealed Acts were also not concerned about genus exchange in the sense that different genera of trees consumed different volumes of water, or in any sense at all. The only instance where there is a reference to timber species, is Regulation 16 promulgated under the 1984 Act, but the reference is clearly in the context of information to be submitted in an annual return to the Department.

[260] Everything points to the fact the repealed Acts and their regulations treated afforestation as a use of land. One needs to look no further than the contents of the permits issued under the repealed Acts and their regulations, which all dealt with the extent of land in measured

in hectares which were approved for afforestation. Reference to the use of water found no place in these permits.

[261] As for the aspect of "*extent*" which may also fall to be verified under section 35 of the NWA, it is indubitable that "extent" refers to a physical area and not volumetric use of water. Counsel for the respondents seem to agree that it is indeed a physical area, where they discuss (in paragraph 213 of their heads of argument) the approach to the verification process under section 35. Furthermore, they made it clear (in paragraph 76 of their supplementary heads of argument) that it is not the respondents' contention that streamflow reduction activities in the form of commercial forestry constitutes consumptive water use, but rather that streamflow reduction activities affects water in rivers and aquafers, thus reducing water availability to other users.

[262] It follows that in determining the existing lawful water use which occurred during the qualifying period, 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. Neither can the genus or

species of trees utilised for commercial afforestation which 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 be taken in consideration.

[263] The relief sought in prayer 6.6.4 should therefore be granted, namely that "*[w]henever 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 full commercial afforestation be reduced in extent*."

[264] The relief sought in 6.6.5 is to the effect that exchange of genera or species of trees does not constitute a water use as envisaged in section 21 of the NWA, and genus, species and clones of trees used for commercial afforestation may be exchanged without the need for authorisation in terms of the NWA.

[265] Section 21 lists, for purposes of the NWA, "*water uses*" under subsections (a) to (k). The applicant contends that the list is comprehensive and exhaustive despite it being preceded by the word

"*includes*". For this conclusion, the applicant relies of the findings in **R v Debele** 1956 (4) 570 (A) (at 575B – 575H) which was confirmed in **De Reuck v Director of Public Prosecutions, Witwatersrand Local Division and Others** 2004 (1) SA 406 (CC), where it was held (at para18);

> "*The correct sense of "includes" in a statute must be ascertained from the context in which it used.* Debele *provides a useful guideline for this determination. If the primary meaning of the term is well known and not in need of definition and items in the list produced by "includes" go beyond that primary meaning, the purpose of that list is then usually taken to be to add to the primary meaning so that "includes" is non-exhaustive. If, as in this case, the primary meaning already encompasses all the items in the list, then the purpose of the list is to make the definition more precise. In such a case "includes" is used exhaustively. between these two situations there is a third where the drafters have for convenience group together several things in the definition of one term, whose primary meaning - if it is a word in ordinary, non-legal usage - fits some of them better than others. such a list may*

also be intended as exhaustive, if only to avoid what was referred to in Debele (supra*) as ''n moeras van onsekerheid' (a quagmire of uncertainty) in the application of the term*."

[266] It seems to be that the list of water uses in section 21 of the NWA is indeed a *numerus clausus*, but even if it was not so, it is difficult to imagine that genus exchange could fit in as a water use without it having been mentioned in the list of water uses. There is no other indication in the NWA that genus exchange can be a water use.

Some concluding remarks.

[267] The stance adopted by the respondents in respect of the relief claimed, in particular in respect of genus exchange is based on their concern that water is a scarce resource and the belief that genus exchange from pine trees to eucalyptus trees can result in the use of between 23% and 45% more water. A correct approach, illustrated by

graphs MP52 and MP53.5 is that given the areas of afforestation in any particular catchment area (up to 10% only), shows that the impact of genus exchange is far less severe than assumed by the respondents.

[268] The parties agree that the present scientific evidence which can be used to determine the impact of afforestation, and the impact of genus exchange in particular, is inadequate and more research is being undertaken. If it turns out that genus exchange or any other reason causes the water resource to be or become under stress in any particular geographical area, the department will not be without recourse to achieve equity of access to water. The provisions of section 43 of the NWA were specifically promulgated to cater for this and entitles the responsible authority (i.e. the Minister) to review the prevailing water allocation to achieve equity in allocations.

[269] Section 43(1) of the NWA provides:

"*If it is desirable that water use in respect of one or more water resources within a specific graphical area to be licenced –*

(a) to achieve a fair allocation of water from a water resource in accordance with section 45 –

(i) which is under water stress; or

(ii) when it is necessary to review prevailing water use to achieve equity in allocations;

(b) to promote beneficial use of water in the public interest;

(c) to facilitate efficient management of the water resource; or

(d) to protect water resource quality;

the responsible authority may issue a notice requiring persons to apply for licences for one or more types of water use contemplated in section 21."

[270] In terms of section 48 of the NWA, any licence issued pursuant to an application contemplated in section 43(1) replaces any existing lawful water use entitlement to that person in respect of the water use in question. In a case of a stream flow reduction activity, the responsible authority may, in terms of section 29(1)(a)(ii) of the NWA, attach conditions relating to the stream flow regime, and in terms of section 29(1)(f), may impose conditions, in the case of a stream flow reduction activity;

"*(i) specifying practices to be followed to limit stream flow reduction and other determinantal impacts on the water resource; and*

(ii) setting or prescribing a method for determining the extent of the stream flow reduction caused by the authorised activity".

It goes without saying that such conditions may include conditions relating to genus exchange.

[271] It must be stressed that the relief that I believe the applicant is entitled to relating to genus exchange is only applicable to the existing lawful water use which occurred during the qualifying period and exclude those uses which were subject to conditions prohibiting genus exchange without the consent of the department. It does not apply to licences issued in terms of section 41 or 43 of the NWA which are subject to conditions limiting or prohibiting genus exchange.

The issue of costs

[272] The applicant may not have been successful in all respects relating to the relief claimed, but has been more successful than the respondents, and should, therefore be entitled to costs. This matter is complex and without doubt warrants the costs of two counsel. I have already dealt with the costs issue relating to the first and second interlocutory applications.

Order

I make the following order:

1. The relief sought in paragraphs 6.1, 6.1A, 6.1B, 6.6.1 and 6.6.3 of the notice of motion are refused.

2. It is declared that:

2.1. In the process of verifying existing water use as provided for in section 35 of the National Water Act 36 of 1998 ("the NWA") the current water use cannot be utilised to reduce the "existing lawful water use" which had taken place during the qualifying period set out in section 32(2) of the NWA.

2.2. In the process of verifying existing water use as provided for in section 35 of NWA, the application of the "Use-it or Lose-it" policy position is *ultra vires* the provisions of the NWA and cannot be utilised to reduce the "existing lawful water use" which had taken place

during the qualifying period set out in section 32(2) of the NWA.

2.3. In the process of verifying existing water use as provided for in section 35 of the NWA, that 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.

2.4. In the process of verifying “existing lawful water use” in respect of stream flow reduction activities as provided for in section 35 of the NWA, the qualifying period is 1 October 1996 to 30 September 1998 (“the qualifying period”); and

2.5. In respect of genus of species of trees on land used for afforestation:

2.5.1. For the purposes of determining the lawfulness and extent of existing lawful water uses in respect of stream flow reduction activities in terms of the provisions of the NWA:

(a) on a proper interpretation of the Forest Act 122 of 1984 ("the 1984 Forest Act"), alternatively the 1984 Forest Act and the Forest Act 72 of 1969 as amended in 1972 ('the 1968 Forest Act") and of 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;

(b) 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.

2.5.2. The order set out in 2.5.1 above 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.

2.5.3. 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.

2.5.4. The exchange of genera or species of trees does not constitute a water use as envisaged in section 21 of the NWA and genera, species, and clones of trees used for commercial afforestation may be exchanged without the need for authorisation in terms of the NWA.

2.5.5. The order set out in 2.5.4 above will not affect licences or 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 licences or permits.

3. The respondents shall pay the applicant's costs on a party and party scale, save for the costs associated with the two interlocutory applications heard on 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.

Hockey AJ

Appearances:

For the applicant: Adv WH van Staden (SC), and

Adv A la Grange (SC)

Instructed by - Hannes Pretorius Bock & Bryant

For the respondents: Adv M Mphaga (SC), and

Adv P Loselo

Instructed by – the State Attorney, Cape Town