



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 15 November 2023

Status: Immediate

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Forestry South Africa v Minister of Human Settlements, Water and Sanitation and Others (777/2022) and Minister of Human Settlements, Water and Sanitation and Others v Forestry South Africa (824/2022) [2023] ZASCA 153 (15 NOVEMBER 2023)

Today, the Supreme Court of Appeal (SCA) delivered judgment in a matter where two appeals were consolidated and heard together under case numbers 777/22 (the Forestry SA appeal) and 824/22 (the statutory authorities' appeal). The court upheld the Forestry SA appeal and upheld the statutory authorities' appeal, in part. Both appeals were from orders of the Western Cape Division of the High Court, Cape Town (the high court).

The appellant (Forestry SA) brought an application before the high court in which it sought declaratory relief pertaining to the interpretation of certain provisions of the National Water Act 36 of 1998 (the Act). This relief was opposed by the respondents (the statutory authorities) who sought its dismissal. However, the high court granted certain aspects of the relief sought, and dismissed other relief.

The appeal revolved around two principal issues, namely, the regulation of existing lawful water use, and the continuation of existing lawful water use. The first issue concerned stream flow reduction activity (flow activity), as defined in the Act, being the use of land for afforestation which has been, or is being established, for commercial purposes. Flow activity was introduced into South African law by the Act, and was founded on the principle that the government is the public trustee of water resources, which must be protected and utilised in a sustainable and equitable manner. Government has the authority to regulate the use, flow and control of all water. Forestry SA sought a declaratory order that water use that is flow activity is not subject to authorisation by or under any law which was in force immediately before the commencement of the Act. The second issue in respect of which Forestry SA sought relief in terms of s 34 of the Act, namely that a person enjoyed the right to continued existing lawful water use and that did not limit the planting of specific species of trees (the specie issue).

The question before the SCA was this: what rights of existing water use were there that derived from the law that was of application before the commencement of the Act, and on what basis could such use continue? The SCA found that s 32 of the Act defined two classes of existing lawful water use, the first being water use two years prior to the commencement of the Act (pre-commencement water use), while the second class concerned existing lawful water uses not captured by the definitions of pre-commencement water use. The former was divided into three types of use: use that was authorised by any law in force immediately before the date of commencement; water as a flow activity, and lastly, water as a controlled activity in terms of s 37(1). Forestry SA sought a declarator specifically with regards to what constituted flow activity in terms of s 36(1) of the Act. This section contemplates two activities, the first being the use of land for afforestation for commercial purposes and the second, any activity determined by the Minister as being a flow activity, with regards to a particular crop or other vegetation.

The declarator brought by Forestry SA was to determine whether its members who engaged in commercial forestry as a flow activity were only recognised as an existing lawful water use under the Act on the basis that such use was authorised by a law in force immediately before the commencement of the Act. Forestry SA contended that there was no such requirement, whereas the statutory authorities contended that the recognition of flow activity, as an existing lawful water use, required that the flow activity must have been lawful in terms of the laws that were of application during the qualifying period of two years. If the flow activity was unlawful, it could not be made lawful in terms of the Act. It was on this basis that the high court declined to grant the declarator.

The SCA approached the interpretative exercise by examining the three kinds of pre-commencement activities embodied by s 32(1). The three activities were authorised use of water, in terms of s 32(1); a flow activity in terms of s 36; and a controlled activity in terms of s 37. The SCA explained that the legislature defined three types of pre-commencement water use and gave recognition to each as an existing lawful water use. Water use qualified as lawful use if it fell within one of the defined types, and a coherent interpretation required that a separate definitional content must be attributed to each type. One type of pre-commencement water use is not defined by recourse to another type of use. The definition of flow activity did not import the requirements of authorised use. A water use could have been recognised as flow activity without that activity being one that was authorised by or under old order law. The typology of s 32(1)(a) allowed that water use could have qualified as an existing lawful water use, even if it was not authorised use in terms of s 32(1)(a)(i). That is so because an existing lawful water use could have been a flow activity or a controlled activity. The high court found that the principle of legality did not allow for this interpretation of the Act.

However, the SCA held that, although the high court correctly observed that authorised use does not exhaust what constitutes an existing lawful water use under s 32(1) of the Act, engrafting lawfulness as a constitutive requirement of flow activity gives rise to redundancy in the interpretation of s 32(1)(a). The reason for this is because the Forest Act 122 of 1984 defined land used for commercial afforestation. Outside these defined land uses, commercial afforestation required no authorisation, nor was it subject to any prohibition. So understood, the pre-commencement water use recognised by the Act was not making lawful what had been unlawful commercial afforestation prior to the commencement of the Act. The regime of old order law did not divide prohibited land use and authorised land use in respect of commercial forestry. Rather, there was prohibited land use, authorised land use, and land use that was neither prohibited nor authorised, but constituted an exercise of existing property rights. Flow use, in this context, was thus the use of land for commercial afforestation which immediately before the commencement of the Act rested upon the exercise of existing property rights. The Court held that, correctly interpreted, the Act permitted the continuation of existing lawful water use to those who had access to existing use prior to the commencement of the Act, subject to any existing conditions or obligations that attached to such use. However, in terms of the Act, existing rights are subject to the extensive regulatory powers found in the Act. In interpreting the provisions in this manner, this Court clarified the meaning of flow activity on the basis that a clear distinction is to be made between authorised use and a flow activity. Flow activity is not made subject to a vague understanding of lawfulness. The SCA emphasised that existing lawful use was not absolved from the regulatory ambit of the Act; it was a continuation of existing rights. The SCA held that, on this basis, the high court ought to have granted the declarator sought.

The species issue concerned the powers conferred by the s 34 of the Act to regulate what species of trees could be planted by persons with the right to continued existing lawful water use. The relief sought was to clarify that the entitlement to continue with existing lawful water use did not limit flow activity to the planting of specific species of trees. Section 34 determined that an existing lawful water use may continue, subject to three kinds of authority, the first concerning any existing conditions or obligations that attached to the existing lawful water use; the second pertains to the replacement of such use with a licence required or granted under the Act; and the third rendered existing lawful water use subject to other limitations or prohibitions under the Act.

The SCA found that there was an important distinction between the first kind of authority and the two others. The first pertains to existing lawful water use. Flow activity was one type of lawful water use, recognised, as at the commencement of the Act, on the basis of use during the qualifying period. This was important as it clarified the meaning of authority to which flow activity was being made subject in terms of s 34(1)(a). This provision made flow use subject to any existing conditions or obligations attached to that use, correctly interpreted. Flow activity was a lawful water use that was recognised at the commencement of the Act and, logically, the conditions and obligations attaching thereto should similarly exist. The other two authorities dealt with matter introduced by the Act. The SCA found that this was relevant as it highlighted how a distinction is to be made between forward- and backward-looking restrictions in terms of the Act. The SCA found that the declarator sought by Forestry SA in the high court was too broad. The high court ought to have granted the declarator, but in a modified form, to reflect that the rights attaching to flow activity prior to the commencement of the Act are recognised by the Act at its commencement.

Lastly, the statutory authorities sought an authoritative interpretation of s 35 of the Act, which concerned the verification of existing water uses. The majority of the court found that the power to verify existing water uses revolved around the question whether the water use was lawful and what the extent of the use. The question was whether the extent of existing water use, as a flow activity, referred to the amount of water used or the extent of land used? The majority found that verification in terms of s 35 of an existing water use, in terms of s 32 and was depended on the type of existing lawful water use to which verification used was of application. Flow activity referenced land use. The majority found that if a person was entitled to an existing lawful water use as a flow activity, the verification of the extent of such use was measured by reference to the land used, and not the amount of water consumed. Such verification could not consider the impact of species exchange upon water consumption as an incident of determining the extent of flow activity. The position taken by the statutory authorities that s 35 afforded the authority to regulated species exchange in relation to flow activity was therefore found to be incorrect.

In the result, the SCA upheld the Forestry SA appeal and declared that existing lawful water use in respect of a stream flow reduction activity in respect of the use of land for afforestation was not subject to authorisation by any law immediately in force before commencement of the Act. The obligations and conditions referred to in the Act did not limit existing lawful water use in stream flow reduction activities with regards to the planting of specific species of trees, except where a restriction emanated from the commencement of the Act. The statutory authorities appeal was upheld in part by the majority and the relevant section was replaced with an order that the species of trees utilised for commercial afforestation, established prior to the commencement of the qualifying period during the qualifying period, cannot be taken into consideration by the responsible authority to verify the lawfulness or extent of an existing flow activity, save that in determining lawfulness in terms of s 35 of the National Water Act, a responsible authority may consider whether the activity was subject to any conditions or restrictions as to the genus or species of trees that may be planted, deriving from law that was of application at the commencement of the National Water Act and attached to the right to use land for afforestation, as provided for in s 36(1)(a).'

In a separate dissent, the minority concurred with the majority in the Forestry SA appeal, but not with the statutory authorities' appeal. The dissent took up the interpretation of s 35. The minority held that s 35 authorises a responsible authority to verify the lawfulness or the extent of an existing water use and empowered the authority to determine the extent and lawfulness of water use pursuant to an application. Such a determination had the effect of limiting the extent of any lawful water use contemplated in s 32. However, Forestry SA's interpretation of s 36, read in conjunction with s 32 offended the provisions of s 21(d) of the Act as it should refer to water used, not the use of land. In effect, the majority narrowly construed the powers in s 35 of the Act, which impeded the purpose of the Act. The order of the majority unduly limited the scope of s 35 as it posited an interpretation that tied the hands of the statutory authorities from developing and managing national water sources.

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