



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 777/2022

In the matter between:

FORESTRY SOUTH AFRICA

APPELLANT

and

**MINISTER OF HUMAN SETTLEMENTS,
WATER AND SANITATION**

FIRST RESPONDENT

**THE DIRECTOR-GENERAL:
DEPARTMENT OF WATER
AND SANITATION**

SECOND RESPONDENT

**INKOMATHI-USUTHU CATCHMENT
MANAGEMENT AGENCY**

THIRD RESPONDENT

**BREEDE-GOURITZ CATCHMENT
MANAGEMENT AGENCY**

FOURTH RESPONDENT

**THE CHAIRMAN OF THE
WATER TRIBUNAL**

FIFTH RESPONDENT

AND

Case no: 824/2022

In the matter between:

**THE MINISTER OF HUMAN SETTLEMENTS,
WATER AND SANITATION**

FIRST APPELLANT

**THE DIRECTOR-GENERAL:
DEPARTMENT OF WATER
AND SANITATION**

SECOND APPELLANT

**INKOMATHI-USUTHU CATCHMENT
MANAGEMENT AGENCY**

THIRD APPELLANT

**BREEDE-GOURITZ CATCHMENT
MANAGEMENT AGENCY**

FOURTH APPELLANT

**THE CHAIRMAN OF THE
WATER TRIBUNAL**

FIFTH APPELLANT

and

FORESTRY SOUTH AFRICA

RESPONDENT

Neutral citation: *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)*

Coram: MOCUMIE, MOTHLE and WEINER JJA and WINDELL and UNTERHALTER AJJA

Heard: 24 August 2023

Delivered: 15 November 2023

Summary: **Statutory Interpretation – Interpretation of s 32 of the National Water Act 36 of 1998 read with ss 4, 21, 22, 33, 34, 35 and 26 –** whether lawfulness is a requirement for the verification of an existing lawful use contemplated in s 32(1)(a)(ii) read with s 36(1) of the 19 National Water Act – correct interpretation of the concept ‘existing lawful water use’ in relation to a ‘stream flow reduction activity’ as defined and referred to in s 32 of the National Water Act.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Hockey AJ, sitting as court of first instance):

1 In the appeal under SCA case no 777/22:

1.1 The appeal succeeds.

1.2 The first to fifth respondents are ordered to pay the appellant's costs of appeal, such cost to include (a) the cost of the application for leave to appeal and (b) the costs of two counsel, where so employed.

1.3 Paragraph 1 of the order of the high court is set aside and replaced with the following:

'It is declared that:

- (a) An existing lawful water use in respect of a stream flow reduction activity referred to in section 32(1)(a)(ii) of the National Water Act, 36 of 1998 ('the Act'), in respect of the use of land for afforestation which had been or was being established for commercial purposes as contemplated in s 36 of the Act, is not subject to the requirement of authorisation 'by or under any law which was in force immediately before the date of commencement of this Act', as provided for in s 32(1)(a)(i) of the Act;
- (b) The obligations and conditions referred to in s 34(1)(a) of the National Water Act 36 of 1998 (the Act) do not limit existing lawful water use of stream flow reduction activities for commercial afforestation in respect of the planting of specific species or genera of trees, save in so far as such restriction attached to the rights to undertake these activities by reason of conditions or obligations arising from law of application at the commencement of the Act.'

2 In the appeal under SCA case no 824/22:

2.1 The appeal is upheld in part and dismissed in part.

2.2 The appellants are ordered to pay the respondent's costs of appeal, such costs to include (a) the cost of the application for leave to appeal and (b) the cost of two counsel, where so employed.

2.3 The orders of the high court made in paragraphs 2.5.1 b) and 2.5. 4 are set aside, and paragraph 2.5.1 b) is replaced with the following order:

‘The genus or species of trees utilised for commercial afforestation, which afforestation had been established prior to the commencement of the qualifying period or was in the process of being established at any time during the qualifying period, cannot be taken into consideration by the responsible authority to verify the lawfulness or extent of an existing flow activity, save that in determining lawfulness in terms of s 35 of the National Water Act, a responsible authority may consider whether the activity was subject to any conditions or restrictions as to the genus or species of trees that may be planted, deriving from law that was of application at the commencement of the National Water Act and attached to the right to use land for afforestation, as provided for in s 36(1)(a).’

JUDGMENT

Unterhalter AJA (Weiner JA and Windell AJA concurring):

Introduction

[1] We have two appeals before us. They have been consolidated, and were heard together. The first appeal is that of Forestry South Africa (Forestry SA). Forestry SA is a voluntary association, registered as a non-profit organisation. It

represents the interests of timber growers in South Africa. Forestry SA brought an application before the Western Cape Division of the High Court, Cape Town (the high court), in which it sought declaratory relief. That relief was to secure a definitive interpretation of certain provisions of the National Water Act 36 of 1998 (the Act). Forestry SA cited the Minister of Human Settlements, Water & Sanitation (the Minister), the Department of Water and Sanitation (the Department), together with catchment agencies to which powers have been assigned under the Act, and the Water Tribunal, the body to which appeals lie in terms of s 148 of the Act. These parties enjoy powers under the Act, and I refer to them collectively as the Statutory Authorities.

[2] The Statutory Authorities opposed the declaratory relief sought by Forestry SA, and sought its dismissal. In doing so, the Statutory Authorities raised a number of preliminary points that they contended were dispositive of the application. The Statutory Authorities also filed affidavits on the merits.

[3] The high court (*per* Hockey AJ) dismissed the preliminary points; it granted certain of the declaratory relief sought by Forestry SA; dismissed other declaratory relief; and made an order for costs against the Statutory Authorities.

[4] Forestry SA sought leave to appeal the declaratory relief that was dismissed by the high court. The Statutory Authorities sought leave to appeal the preliminary points rejected by the high court, and the declaratory relief that was granted by the high court in favour of Forestry SA. The high court gave leave to appeal to this Court. The appeals proceeded as separate appeals, but, as indicated, were consolidated and heard together. I shall refer to the appeals as the Forestry SA appeal and the appeal of the Statutory Authorities.

[5] The Forestry SA appeal raises two principal issues. Both issues require us to interpret provisions of the Act that bear upon the rights of members of Forestry SA to grow and harvest timber. The first issue arises from Part 3 of the Act. Part 3 defines and regulates existing lawful water uses. Among those uses is stream flow reduction activity (flow activity). Flow activity is defined in s 36 of the Act. It is ‘the use of land for afforestation which has been or is being established for commercial purposes’ and an activity that has been declared as such by the Minister under s 36(2) of the Act.

[6] Flow activity is a concept introduced into our law by the Act. Prior to the Act, as we shall observe, the statutory regime under which commercial forestry was regulated may fairly be described as light-touch regulation. The Act, however, recognises that commercial forestry is an activity that uses water. It may affect stream flow, and this might warrant regulatory intervention. This conceptual innovation is of a piece with the larger purposes and design of the Act. The use of water is not simply an incident of private ownership. The Act proceeds from the following foundational principles: the government is the public trustee of the nation’s water resources; the Minister must ensure that water resources are protected and used in a sustainable and equitable manner in the public interest; and, to this end, the Minister has the power to regulate the use, flow and control of all water in the Republic.¹ The Act contains detailed provisions that demarcate the Minister’s regulatory remit.

[7] Forestry SA’s appeal concerns, in the first place, the recognition given by the Act, at its commencement, to the rights of its members to existing water use

¹ Section 3 of the Act.

and the continuation of that use. More specifically, 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. I shall refer to this as the recognition issue.

[8] The high court declined to make this order. It held that the water use recognised in s 32(1)(a)(ii), being flow activity, must be lawful water use, and not merely use which took place in the qualifying period, stipulated in s 32 to be two years immediately before the commencement of the Act. The high court also refused the declaratory order sought by Forestry SA in the exercise of its discretion.

[9] The second issue in Forestry SA's appeal arises in this way. Forestry SA framed its notice of motion on the basis that if it was entitled to a declarator in respect of the recognition issue, it also sought further declaratory relief. Section 34 of the Act provides that a person may continue with an existing lawful water use, subject to any existing conditions or obligations attaching to that use. Forestry SA contended that in respect of flow use, the conditions and obligations referenced in s 34 do not limit the planting of specific species (or genera) of trees. It sought a declarator to this effect. I shall refer to this as the species issue.

[10] The high court, having refused to grant a declarator in respect of the recognition issue, found that it was not called upon to decide the relief sought on the species issue. That reading of Forestry SA's notice of motion was correct. On appeal, however, Forestry SA seeks both declaratory orders. Counsel for Forestry SA recognised, however, that the species issue in Forestry SA's appeal is closely bound up with the merits of appeal brought by the Statutory Authorities. It will be

convenient to deal with the species issue when I deal with the appeal of the Statutory Authorities.

[11] The appeal of the Statutory Authorities comprises two parts. In the first part, the Statutory Authorities press a number of preliminary points which, they contend, were incorrectly dismissed by the high court. If any one of these preliminary points is sustained on appeal, then, it was contended, Forestry SA's appeal must fail and the appeal of the Statutory Authorities must be upheld. But, if these preliminary points are not sustained, then the merits of their appeal must be decided. This is the second part of the Statutory Authorities' appeal.

[12] The high court granted Forestry SA a number of declaratory orders. The Statutory Authorities do not persist in appealing all of these orders. However, they do appeal those declaratory orders granted by the high court that concern the species of trees utilised for commercial afforestation by those who enjoy existing lawful water uses on the basis of flow activity. Section 35 of the Act provides for the verification of existing water uses. The responsible authority may verify the lawfulness and extent of an existing water use. The orders made by the high court and appealed are as follows:

- '(a) that the species of trees utilised for commercial afforestation in respect of use by way of flow activity cannot be taken into consideration in determining the lawfulness and extent of existing lawful water uses;
- (b) when species of trees used for commercial afforestation are changed, verification in terms of s 35 does not permit the responsible authority to require that the area of land authorised for afforestation be reduced in extent; and
- (c) the exchange of species does not constitute a water use in terms of s 21 of the Act, and species exchange may take place for the purposes of commercial afforestation without authorisation in terms of the Act.'

[13] These orders are based upon the interpretation given by the high court to provisions of the Act that permit of verification. The Statutory Authorities contend that the responsible authority enjoys the power, under the process of verification, to limit the species of trees used for commercial afforestation. Moreover, different species use different quantities of water. Hence, which species are planted, and over what area, are important matters, over which the Act confers regulatory competence. The high court held otherwise. Hence the appeal of the Statutory Authorities, which I will call the regulatory competence appeal.

[14] I proceed in the following way. First, I consider the preliminary points raised, and still pursued, by the Statutory Authorities, and whether any one of these points disposes of both appeals. If I do not so hold, I will proceed to the recognition issue that forms part of the appeal of Forestry SA. I will then engage the regulatory competence appeal of the Statutory Authorities, and the species issue that forms the other appeal of Forestry SA.

The preliminary points

[15] The Statutory Authorities press a number of preliminary points before us. They contend that these issues are determinative of the appeals, and so I commence with them. They were rejected by the high court. The Statutory Authorities submit they should not have been.

Standing

[16] The Statutory Authorities challenged the standing of Forestry SA to have sought declaratory relief. The Statutory Authorities contend that Forestry SA has failed to establish its standing, whether in its own interest, in the public interest, or

in the interests of its members. In essence, the Statutory Authorities sought to persuade us that the members of Forestry SA could and should have appealed, in terms of s 148 of the Act to the Water Tribunal, against specific decisions that have been taken that bear upon the interests of its members. Forestry SA lacked standing to seek declaratory relief on behalf of its members, when those members could have sought relief directly before the Water Tribunal. Furthermore, not all members of Forestry SA are affected in the same way by the declaratory relief that is sought, and some may not be affected at all.

[17] This objection merges two separate issues. The first is whether Forestry SA has standing to seek declaratory relief on behalf of its members. The second is whether that relief is appropriate relief, given other statutory remedies available under the Act.

[18] Forestry SA explained in its founding affidavit that it was seeking declaratory relief on behalf of its members because an authoritative interpretation of certain provisions of the Act bears upon their constitutional rights, including the right to property and the equal protection of the law.

[19] Forestry SA represents timber growers in South Africa. Its application was not only brought in its own interests, but on behalf of its members. Section 38 of the Constitution has considerably extended the common law's recognition of standing. Section 38(e) of the Constitution permits an association, acting in the interests of its members, to approach a competent court to seek appropriate relief, including a declaration of rights, on the basis that members' rights in the Bill of Rights are threatened. Forestry SA and the Statutory Authorities have opposed interpretations of provisions of the Act that bear upon the rights of members,

including their existing use rights to water. These rights fall within the ambit of property rights protected by s 25 of the Constitution. In my view, Forestry SA has standing, on behalf of its members, to approach a court to seek an authoritative declaration as to the correct interpretation of the Act, and thereby determine the scope of the property rights of its members. That is precisely what s 38(e) recognises. There is no constitutional challenge made to the Act. But I can see no reason why, in a case of this kind, which seeks an authoritative interpretation of legislation that affects important rights, an association such as Forestry SA should not enjoy standing on behalf of its members. It is a warranted extension of the standing recognised in s 38(e) of the Constitution

[20] The application of Forestry SA has much utility. It avoids a plethora of applications by timber growers that would be costly, take up much court time, and may give rise to inconsistent interpretations. What Forestry SA has sought to do is to have one authoritative interpretation that will bind its members and the Statutory Authorities. There is no want of standing on the part of Forestry SA to secure such an outcome on behalf of its members. It is also difficult to understand how certain members of Forestry SA are not affected by the declaratory relief that is sought. All the members of Forestry SA fall within the regulatory remit of the Act, and the provisions of the Act that give rise to contested interpretations have application to these members.

[21] Whether members of Forestry SA enjoy other remedies before an administrative tribunal, such as an appeal to the Water Tribunal, does not decide the standing of Forestry SA to seek declaratory relief on behalf of its members. The question of remedies may have a bearing upon whether declaratory relief should be granted by a court, when other remedies are available. But that is not an

issue of standing, but, rather, whether the particular relief that is sought should be granted. And that is a matter to which I will come.

[22] However, the objection based on standing was correctly rejected by the high court. Forestry SA was entitled to approach the high court on behalf of its members.

A declaratory order is not an appropriate remedy

[23] The Statutory Authorities contend that the high court should not have granted declaratory relief because it is not appropriate relief in this case. And it would seem that this criticism is also levelled against the declaratory relief that the high court dismissed, that is now on appeal before us. The objection comes to this. The declaratory relief amounts to the review of permits and licences that permitted the planting of certain species of trees. Yet no review has been brought. The discretion to grant declaratory relief was thus not properly exercised by the high court because declaratory relief cannot undo the permits and licences that are already in place, nor the notices given under the Act. If there is to be a challenge to these permits, licences or notices, they must be reviewed and set aside. Until that is done, declaratory relief should not (and cannot) be granted.

[24] Forestry SA's notice of motion was framed in a somewhat confusing fashion. It sought an order, the introductory words of which are as follows:

'Review of the administrative actions which underpin the decision to which the following declaratory orders relate, by declaring that'

While the founding affidavit goes on to identify the process of validation and verification of water use undertaken by certain of the Statutory Authorities, and notices issued, no administrative actions are sought to be set aside by way of

review. Rather, the actions of the Statutory Authorities are referenced in order to explain the disputed issues of legal interpretation concerning the Act, in respect of which Forestry SA seeks declaratory relief. Hence, the objection of the Statutory Authorities that declarators cannot issue until identified administrative action has been taken on review, and has been set aside.

[25] The Statutory Authorities are correct that, in substance, no review was brought by Forestry SA to set aside identified administrative action. But, in my view, that did not prevent Forestry SA from seeking declaratory relief. There is a live dispute between the members of Forestry SA and the Statutory Authorities as to how specific provisions of the Act bear upon the regulatory remit of the Statutory Authorities. The resolution of that dispute does not depend upon particular administrative action taken by the Statutory Authorities. The dispute concerns the powers enjoyed by the Statutory Authorities derived from the Act. True enough, any declaratory relief that is granted will not of itself cause any administrative action that has been taken to be set aside. Such actions will survive the grant of declaratory relief. But this does not mean that such declaratory relief cannot be granted. It can. Such relief decides what powers the Act confers upon the Statutory Authorities. If, as a result, the legality of certain administrative actions are called into question, then review proceedings may have to issue to have them set aside. This does not prevent the grant of declaratory relief. At best, the consequences of such grant for the validity of administrative actions may be taken into account when the court exercises its discretion as to whether to grant declaratory relief. In this case, rather than inundate the courts or the Water Tribunal with challenges to particular administrative actions, it seems sensible to have the issues of statutory interpretation resolved in a single, binding adjudication.

The absence of review proceedings

[26] Closely connected to the objection just considered, the Statutory Authorities complain that the members of Forestry SA were required to bring review proceedings to set aside those administrative actions to which they were made subject. For the reasons given, I do not consider review to have been a necessary first step. Many decisions may have been taken that affect members of Forestry SA. Neither by reason of principle or practicality must reviews have issued and been decided before declaratory relief was sought to determine the disputed questions of legal interpretation. Such a requirement would be burdensome. More importantly, as I have explained, once an authoritative interpretation is given by the courts, many reviews, if they must be brought at all, would be decided with little difficulty, and, if reason prevails, without opposition. This objection must also fail.

The collateral challenge is inappropriate

[27] The Statutory Authorities cast this objection in two ways. First, that Forestry SA should not have been permitted to make a collateral challenge to the actions of the Statutory Authorities. Second, that the members of Forestry SA were required to exhaust their internal remedies in terms of s 7(2) of the Promotion to Administrative Justice Act (PAJA),² since verification of a water use under s 35 of the Act (one of the issues raised on the merits) is subject to a statutory appeal before the Water Tribunal in terms of s 148 of the Act.

[28] As to the first point, Forestry SA did not bring a collateral challenge. It did not raise a defence to a coercive action taken or threatened against its members by

² Promotion of Administrative Justice Act 3 of 2000.

the Statutory Authorities. Rather, Forestry SA sought declaratory relief to resolve disputed questions of interpretation. That is not a collateral challenge.

[29] As to the second point, s 7(2) of PAJA is only of application when a court is moved to review an administrative action in terms of PAJA. As I have already made plain, while Forestry SA does reference a review in its notice of motion, in substance it does not seek to review any particular administrative action. Hence, s 7(2) is not of application. But even if, in some broader sense, the declaratory relief sought by Forestry SA is considered to be some species of review, there would be no point to insist that the matter first go to the Water Tribunal. In terms of s 149 of the Act, appeals on points of law from the Water Tribunal lie to the high court. To require that disputes on questions of law must first be determined by the Water Tribunal is, at least in this case, an exercise of cumbersome redundancy. This objection also fails.

Disputes of fact

[30] The final preliminary point pressed by the Statutory Authorities is this. Among the issues raised by this case is the question of genus exchange. That is, the exchange by growers of one species of tree for another. The Statutory Authorities contend that such exchange affects the use of water, and the extent of flow reduction. There are disputes on the papers between experts as to the impact of genus exchange (for example the planting of eucalyptus in place of pine) upon flow reduction. The Statutory Authorities complain that the high court should have declined to decide the case, given the disputed evidence on the papers, or, at least, referred the matter to the hearing of oral evidence.

[31] There are two answers to this point. The first is whether the declaratory relief turned on the need for the high court to make findings on the disputed evidence. In my view, as I will explain, it did not. Second, in so far as the high court was willing to proceed to decide the matter, even in the face of disputed evidence, it could do so, applying the principles in (*Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd* (Plascon Evans)).³ And so can we, should it be necessary. This objection does not prevent an adjudication of the merits, and thus falls to be rejected.

The recognition issue

[32] As I have outlined, the Act brought about a fundamental change to the way in which water is to be regulated as a resource over which the national government must discharge the duties of a public trustee. The regulatory remit of the Act must necessarily proceed by affording an answer to the following issue: what rights of existing water use that derive from the law that was of application before the commencement of the Act are recognised under the Act and on what basis should such use continue? The provisions of the Act that determine this issue have occasioned differences of interpretation, more especially in respect of flow activity. Put simply, while the Act subjects recognised types of existing lawful water use to regulation under the Act, what is the contents of the right to flow activity, as one type of existing lawful water use recognised by the Act? I turn to consider this question.

[33] Section 32 of the Act defines two classes of existing lawful water use. The first is a water use which has taken place at any time during a period of two years

³ *Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd* [1984] 2 All SA 366 (A); 1984 (3) SA 623; 1984 (3) SA 620.

immediately before the date of commencement of the Act. I shall refer to such water use as pre-commencement water use. Pre-commencement water use recognises three types of use (set out in s 32(1)(a)(i)(ii)(iii)). The second class of existing lawful water use is one which has been declared an existing lawful water use under s 33 of the Act. Section 33 permits a person to apply to a responsible authority (as defined in the Act) to have a water use that is not a pre-commencement water use declared to be an existing lawful water use. And a responsible authority may also make such a declaration on its own initiative. In other words, to the extent that there are existing lawful water uses not captured by the definitions of pre-commencement water use, s 33 allows for additional declarations of such use.

[34] Section 32(1)(a) recognises three types of pre-commencement water use. First, there is water use that ‘was authorised by or under any law which was in force immediately before the date of commencement of this Act’ (s 32(1)(a)(i)). I shall refer to this water use as authorised water use. Second, there is water use that ‘is a stream flow reduction activity contemplated in section 36(1)’ (s 32(1)(a)(ii)). I have referred to this as flow activity. Lastly, there is water use that is a controlled activity as contemplated in s 37(1). Section 37(1), in turn, defines five sub-categories of controlled activity. I shall refer to these, collectively, as controlled activity.

[35] Forestry SA sought the following declarator:

‘6.1 An existing lawful water use in respect of 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);’

[36] This declarator is concerned to clarify what constitutes flow activity. Flow activity are those activities contemplated in s 36(1). Section 36(1), in turn, contemplates two activities. The first is ‘the use of land for afforestation which has been or is being established for commercial purposes’ (s 36(1)(a)). I will refer to this activity as commercial afforestation. The second is ‘an activity which has been declared as such under subsection (2). Section 36(2) confers the power on the Minister to declare any activity a flow activity. The Minister may do so in respect of the cultivation of a particular crop or other vegetation. But these activities do not exhaust the use of this power.

[37] The point of Forestry SA’s declarator will now be apparent. Forestry SA’s members engage in commercial forestry. One existing lawful water use recognised by the Act is flow activity that constitutes commercial afforestation (s 32(1)(a) (ii) read with s 36(1)(a)). Is the recognition of commercial afforestation as an existing lawful water use under the Act subject to the requirement that such use was authorised by or under any law in force immediately before the commencement of the Act?

[38] Forestry SA contended that there is no such requirement. The Statutory Authorities interpret the Act to mean that the recognition of flow activity, as an existing lawful water use, requires that the flow activity must have been lawful in terms of the laws that were of application during the qualifying period of two years specified in s 32(1)(a). If the flow activity was not lawful in that period, they submit, it is not made so in terms of the Act. The high court held that the types of

pre-commencement water use, in terms of s 32(1)(a), are distinct, but such water use must be lawful. Pre-commencement water use is subject to lawfulness, the high court held, and on this basis declined to grant the declarator sought by Forestry SA.

[39] The interpretative exercise must commence with the three types of pre-commencement water use that s 32(1)(a) of the Act recognises: authorised use, flow activity, and controlled activity. They are distinct because each type of activity derives from a different legislative basis, and hence is a distinct legal category of use. A controlled activity is an activity described under one of the categories set out in s 37. A flow activity is one contemplated in s 36(1). An authorised activity is, in terms of s 32(1)(a)(i), authorised by, or under, any law which was in force immediately before the date of commencement of the Act (which I shall refer to as old order law).

[40] The legislature defined three types of pre-commencement water use, and thereby gave recognition to each as an existing lawful water use. A water use qualifies as a lawful water use if it falls within any one of the defined types. Coherent interpretation requires that a separate definitional content is attributable to each of the types. That is to say, one type of pre-commencement water use is not defined by recourse to another type of use. It follows that the definition of flow activity does not import the requirements of authorised use. A water use may be recognised as flow activity without that activity being one that was authorised by or under old order law. Logically, the typology of s 32(1)(a) allows that water use may qualify 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 may be a flow activity or a controlled activity. The importation of the requirement for authorised use into flow activity or controlled activity cannot be sustained because

it would muddle the three types of pre-commencement water use that the Act has been so careful to delineate.

[41] This interpretation appears to raise a conundrum with which the high court wrestled. If an existing lawful water use recognises types of use that are not authorised use, surely use as flow activity must nevertheless have been lawful in order to qualify as an existing lawful water use? The high court considered this to be so, and found support for this interpretation in s 4(2) read with s 34(1). Section 4(2) provides that a person may continue with an existing lawful water use, in accordance with s 34. And s 34(1), in turn, provides that a person, or that a person's successor in title, may continue with an existing lawful water use, subject to any existing conditions or obligations attaching to the use or any other limitation or prohibition by or under the Act. That existing lawful water use cannot escape the requirements of legality led the high court to refuse Forestry SA's declaratory relief that was directed to the recognition issue.

[42] While 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, though seemingly self-evident, gives rise to redundancy in the interpretation of s 32(1)(a).

[43] To see why this is so, I revisit what is meant by authorised use. Conceptually, and ordinarily, authorisation is a permission to do something, given by an authority that enjoys the power to authorise the doing of that thing. Sometimes, absent authorisation, the authority has prohibited all activity of a particular kind. But that is not always how authorisation takes place. An authority may require that permission is given to engage one aspect of an activity, whereas

other aspects of that activity require no authorisation, and hence are subject neither to prohibition nor authorisation.

[44] The legislation which was of application to commercial forestry prior to the commencement of the Act, which formed part of old order law, was rather modestly concerned with the regulation of commercial forestry, and even less concerned with the effects of commercial forestry upon water use. Commercial forestry was one type of land use, and, subject to legislation enacted from time to time, was an exercise of common law rights to property. It is unnecessary to trace the entire development of this legislation. However, relevant to the scope of authorisation under old order law, the Forest Act No 72 of 1968 was amended by the Forest Amendment Act 46 of 1972. This amendment introduced the following provision:

‘4A. (1)(a) Without the prior written approval of the Secretary, no land which has not previously been afforested, may be utilized for the planting of trees, save fruit or fodder trees, with a view to producing forest produce for commercial or industrial purposes.’

The Forest Act 72 of 1968, as amended, was repealed by the Forest Act 122 of 1984. The Forest Act of 1984 contained s 7(1) and s 8 which read as follows:

‘7. (1) Without the prior written approval of the director-general no land, including land in the possession of the State –

(a) which has not been used previously for the establishment and management of a commercial timber plantation; or

(b) which for a period of five years after the removal, harvesting or destruction of a commercial timber crop, has not been used, may be used for the planting of trees to produce timber for commercial or industrial purposes.

...

8. (1) The Minister may in respect of land which in terms of this Act is being or may be used for the planting of trees to produce timber, by notice served on the owner of that land or by notice in the *Gazette*, prohibit the planting of trees within an area defined in the notice of the

reafforestation of such an area after the harvesting or destruction of a timber crop or prohibit any other act or direct the owner to take any other steps which in the opinion of the Minister are necessary for the protection of any natural water source.

(2) An owner of land shall not permit the regeneration of a commercial timber plantation on any part of his land in respect of which a notice in terms of subsection (1) applies, after an existing timber crop has been harvested or destroyed.’

The Forest Act, 1984 was in force immediately prior to the commencement of the Act, and was repealed by the Act.

[45] Section 7(1) of the Forest Act of 1984 was a provision that required the approval of the director general for the planting of trees to produce timber for commercial or industrial purposes in two circumstances: on land not previously used for the establishment and management of a commercial timber plantation, and where land was not so used, for a period of more than five years, after the removal, harvesting or destruction of a commercial timber crop.

[46] The important feature of s 7(1) was that land use for commercial afforestation was prohibited in respect of two defined types of land use, absent authorisation. But, outside these defined land uses, commercial afforestation required neither authorisation, nor was it subject to prohibition in terms of the Forest Act of 1984. Section 8 stipulated the powers of Minister to prohibit the planting of trees to produce timber in defined areas to protect natural water resources.

[47] Under old order law, prior to the commencement of the Act, commercial forestry thus fell into one of three categories. First, certain land was prohibited from being used for commercial forestry. Second, land subject to prohibition in terms of s 7 of the Forest Act of 1984 could be used to plant trees for commercial

or industrial purposes, only if written approval was given. Third, there was land that was not subject to any prohibition of commercial forestry in terms of the Forest Act of 1984, and such land was used for commercial afforestation as an exercise of private property rights.

[48] This brief exposition of old order law clarifies the derivation of the types of pre-commencement water use defined by the Act. An authorised use in respect of commercial forestry is a use enjoyed by reason of the approval given to plant trees for commercial purposes by the relevant authority under the old order law. Section 7 of the Forest Act is a clear instance of such authorised use. Flow use, by contrast, references the use of land for afforestation established for commercial purposes (within the meaning of s 36 of the Act) that was not subject to prohibition nor authorisation under old order law, and was so used as an exercise of existing property rights.

[49] 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. A farmer who planted timber in an area that prohibited such land use under old order law, enjoyed no right to do so, and acquired no right to do so under the Act. However, as I have endeavoured to explain, the regime of old order law did not divide into 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 is thus the use of land for commercial afforestation which immediately before the commencement of the Act rested upon the exercise of existing property rights.

[50] What s 4(2) read with s 34(1) of the Act does is to permit a person (or that person's successor in title) to continue with an existing lawful water use that is recognised in terms of s 32. Although not framed in the language of rights, s 34(1) is premised on the requirement that persons who may continue 'with an existing lawful water use' are those who at the commencement of the Act have rights to such use. Hence the description of the class of persons who may continue to use extends to successors in title. The title to which they succeed is the right of the person to the lawful water use recognised in terms of s 32.

[51] Section 34 also makes plain that those who may continue to enjoy the rights of lawful use recognised by the Act do so subject to a number of stipulations set out in s 34(1). First, continued use is subject to any existing conditions or obligations attaching to that use. This is a status quo provision. It provides that persons who may continue an existing lawful water use enjoy their right to do so under whatever conditions or obligations attach to such right. These conditions or obligations may derive from private law obligations or public law conditions. The Act does not absolve the person who holds that right from their duties to observe these obligations or conditions, to the extent that they remain binding. Second, and this is the central object of the Act, the rights of continued use recognised under the Act are made subject to the extensive regulatory powers to be found in the Act that may be exercised to fulfil the expansive objects of the Act.

[52] The interpretation of the Act that I favour has the following attributes. First, it holds separate the clear distinction that the Act crafts between authorised use and flow activity. Second, it does not make the definition of flow activity subject to some vague and undefined concept of lawfulness. Rather, flow activity is a distinct use right that rests upon the exercise of existing property rights under old order

law. Third, it clarifies that the definition and recognition of existing lawful use does not absolve a person who would continue to exercise their rights of existing lawful use to do so subject to the conditions and obligations that attached to those rights. Fourth, it makes plain that the rights of lawful water use that are recognised and may continue to be used become subject to the exercise of the considerable regulatory powers of the Act. The Act's recognition of existing water use rights does not immunize these rights from the regulatory remit of the Act. And lastly, it demonstrates that the conundrum that so troubled the high court is not a puzzle at all. Once existing lawful water use is framed under the discipline of rights, the problem of lawfulness evaporates.

[53] It follows therefore that Forestry SA should have been granted the declarator that it sought in paragraph 6.1 of its notice of motion. That order is framed on the simple premise that flow use 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 Act. On the interpretation I have given to the Act that premise is correct. The high court was in error to refuse the grant of this declarator. It declined to do so because its interpretation of the Act was incorrect. That being so, there was also no warrant to refuse the declarator as an exercise of discretion. The issue that has arisen as to the interpretation of the Act is most usefully resolved by way of declaratory relief. And Forestry SA's appeal is upheld on this aspect of the appeal before us.

The species issue

[54] It will be recalled that the species issue engages relief that was sought by Forestry SA, but declined by the high court. The species issue also concerns orders

that were made by the high court, and are appealed before us by the Statutory Authorities.

[55] Forestry SA’s notice of motion was framed on the basis that if an order was granted as to flow activity and authorisation, then it sought a further declarator. This declarator reads as follows :

‘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.’

Since the high court refused Forestry SA’s order as to flow activity and authorisation, it was not called upon to decide whether to grant this further relief. I have found that Forestry SA is entitled to the declarator it sought as to flow activity and authorisation, and hence the further declaratory relief falls for our consideration.

[56] The Statutory Authorities confirmed that they no longer appealed all the relief granted by the high court in favour of Forestry SA, but the following orders remain subject to challenge on appeal:

‘2.5 In respect of genus of species of trees on land use 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 N[ational] W[ater] A[ct];

....

b) the genus of species of trees utilised for commercial afforestation, which afforestation had been established prior to the commencement of the qualifying period, cannot be taken into consideration.

....

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 N[ational] W[ater] A[ct] and genera, species, and clones of trees used for commercial afforestation may be exchanged without the need for authorisation in terms of the N[ational] W[ater] A[ct].’

[57] These orders raise issues as to the powers under the Act to regulate the species of tree planted and the exchange of species in the planting of trees. I have observed that the structure of the Act is organised in the following way. First, to define existing lawful water use and provide for its continuation. Second, to confer powers under the Act to regulate such recognised use. The species issue concerns the powers conferred in terms of the Act to regulate what species are planted by persons who enjoy the right to continued existing lawful water use.

[58] I commence with the declaration that was declined by the high court, set out in paragraph 57 above. I will refer to this declarator as the s 34 species declarator. This relief seeks to make clear that the entitlement to continue with existing lawful water use, though subject to any existing conditions or obligations attaching to such use, does not limit flow activity to the planting of specific species of trees.

[59] Section 32, as I have observed, defines those categories of existing lawful water use that are recognised under the Act. Among the categories recognised is flow use. Section 34 determines that an existing lawful water use may continue, subject to demarcated authority. That authority is of three kinds. The first is ‘any existing conditions or obligations’ attaching to the existing lawful water use. The

second is the replacement of such use with a licence required or granted under the Act. That regime of licences is to be found in Part 7 of the Act, and makes wide-ranging provision for licensing, including compulsory licensing if that is considered desirable. Third, s 34 renders existing lawful water use subject to other limitations or prohibitions by or under the Act.

[60] There is an important distinction between the first kind of authority (s 34(1)(a)), and the two further kinds of authority (s 34(1)(b) and (c)). The first concerns the status quo. That is, existing lawful water use recognised as such as at the commencement of the Act. It is in this sense that the language of the Act refers to use that is existing lawful water use. Section 32(1)(a) frames such use by recourse to its definitions and the fact that it took place within the qualifying period. Flow activity is one type of lawful water use, recognised as at the commencement of the Act, on the basis of use during the qualifying period.

[61] This is of importance so as to understand the meaning of the authority to which flow activity is made subject under s 34(1)(a). This provision makes flow use subject to ‘any existing conditions or obligations attaching to that use’. Existing can only mean, given the nature of flow activity, existing as at the commencement of the Act. This is so as a matter of logic. Flow activity is a lawful water use that is recognised as such at the commencement of the Act. The conditions and obligations attaching to flow activity must similarly exist at that time. Framed in the language of rights, the right to flow activity is made subject to the conditions and obligations that limit those rights. The existing conditions or obligations that attach to the rights must do so at the time that such rights qualify for recognition under the Act. That is, at the commencement of the Act.

[62] Sections 34(1)(b) and (c) reference other ways in which the continued use of existing lawful water use are made subject to regulatory authority. But these provisions source that regulatory authority in the powers conferred under the Act to license water use or other limitations introduced by the Act. There is thus an important distinction in s 34 between backward looking restrictions upon an existing water use that attach to the recognition of rights at the commencement of the Act, and forward looking restrictions that come about through the exercise of regulatory competence conferred by the Act or restrictions that the Act itself imposes upon existing lawful water use.

[63] The s 34 species declarator would declare that the conditions and obligations attaching to flow activity, as provided in s 34(1)(a), do not limit commercial afforestation to the planting of specific species (or genera) of trees. That is too widely framed. If the conditions and obligations attaching to the rights of flow use limited the species of trees that may be planted, then the rights to flow activity, recognised as such under the Act, would be subject to such limitation. I have set out above my understanding of the statutory provisions that were to be found in the Forest Act of 1984. In addition, there was like legislation that was of application in the 'States' that were the incarnation of apartheid infamy. As I have explained, flow activity does not rest upon authorisation under old order law, and in particular the Forest Act of 1984. But that does not exclude the possibility that old order law may contain obligations or conditions that qualify the right to flow activity. These obligations or conditions, whether arising from private law obligations or statutory provisions that qualify private law rights to flow activity, fall within the meaning of s 34(1)(a). In so far as old order law imposed such obligations as to species limitation and remained of force and effect at the commencement of the Act, these

obligations attach to the authority to continued flow activity. Hence the s 34 species declarator is too broad.

[64] There was some debate before us as to whether there was old order law that ever imposed obligations or conditions as to species limitations. I am far from confident that we were given a sufficiently comprehensive account of that large body of law, much less all the administrative actions taken under it, to arrive at any safe conclusion on this score. More prudent would be to fashion the s 34 species declarator with this known-unknown in mind.

[65] However, the s 34 species declarator is principally directed at the proper demarcation of the conditions and obligations that are to be found in s 34(1)(a) as they pertain to flow activity. For the reasons I have given, the conditions and obligations in s 34(1)(a) are those that attach to the rights of flow activity that are recognised by the Act at its commencement. These conditions and obligations do not come about as a result of the exercise of regulatory competences that the Act brought into being; nor by reason of the imposition of other limitations imposed by the Act. Those are the categories of authority provided for in s 34(1)(b) and (c). Nor do the conditions and obligations referred to in s 34(1)(a) constitute authorisation of the kind set out in s 32(1)(a)(i).

[66] Forestry SA should have been granted declaratory relief, in a modified form, by the high court to reflect this position, and its appeal succeeds on this score. The declarator I propose to make is as follows:

‘The obligations and conditions referred to in section 34(1)(a) of the National Water Act 36 of 1998 (the Act) do not limit existing lawful water use of stream flow reduction activities for commercial afforestation in respect of the planting of specific species or genera of trees, save in

so far as such restriction attached to the rights to undertake these activities by reason of conditions or obligations arising from law of application at the commencement of the Act ’

The regulatory competence appeal

[67] I turn to the appeal of the Statutory Authorities: the regulatory competence appeal. The high court granted the following relief:

‘2.5 In respect of genus or 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 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 N[ational] W[ater] A[ct] and genera, species, and clones of trees used for commercial afforestation may be exchanged without the need for authorisation in terms of the N[ational] W[ater] A[ct].

2.5.5 The order in 2.5.4 above will not affect licenses 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 licenses or permits.’

[68] The Statutory Authorities appeal the orders in paragraphs 2.5.1 (b), 2.5.3, and 2.5.4. The appeal of the Statutory Authorities engages the proper interpretation of s 35 of the Act. Section 35 concerns the verification of existing water uses. Its place in the scheme of Part 3 of the Act is as follows. Section 32 defines existing lawful water use. Section 34 constitutes the authority to continue such use. Section 35 confers a power upon the responsible authority to verify existing lawful water use. There is ample regulatory justification to require persons who claim to have an entitlement to an existing lawful water use to be subject to a process of verification. And that is what s 35 does.

[69] Section 35 commences as follows, ‘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 verification of that use’ The process to be followed is then set out. It culminates in the following provision in s 35(4):

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

[70] A person may claim to enjoy an existing lawful water use. But whether that claim is good is made subject to verification. The power of verification, in terms of s 35, permits the responsible authority to verify two dimension of water use. First, is the claimed water use a lawful existing water use? Such use is defined in s 32, as

I have explained. The question of lawfulness is determined by applying the definitions of s 32 to the facts that support the claim that is made. Lawfulness is confined to the definitions in s 32. They demarcate what makes an existing water use a lawful use. This must be so because Part 3 of the Act is not concerned with wider questions of legality that may arise from the exercise of the expansive regulatory powers elsewhere conferred by the Act. Rather, verification as to lawfulness in terms of s 35 is confined to the important question as to whether a claimed existing water use is a lawful use in conformity with s 32. And the decision of the responsible authority on this score is binary. The use is either lawful or it is not, depending upon whether it meets the statutory definitions of s 32.

[71] The second dimension of verification under s 35 concerns the extent of the existing water use. It is this dimension of verification that has occasioned contestation between the parties in relation to flow activity and the planting of species of trees. More particularly, the Statutory Authorities contend that verification in terms of s 35 may take account of what is referred to as ‘genus exchange’ in verifying the extent of an existing water use. Genus exchange is the planting of one species in a place of another. There is a dispute of fact on the papers as to the extent to which different species planted over an area use different quantities of water and how to measure such use. It is unnecessary to resolve this dispute because the issue before us is one of law. It is this: does the extent of an existing water use, being a flow activity, refer to how much water is used or does it refer to the extent of land that is used? The Statutory Authorities contend for the first meaning, and Forestry SA for the second meaning.

[72] This difference is of no small moment. If the Statutory Authorities are correct, then the responsible authority, under s 35, may verify how much water is used by a particular flow activity, recognised under s 32. If more water is being used, by reason, for example, of genus exchange, than the amount permitted by a particular flow activity, then, in terms of s 35(4), a responsible authority may limit the extent of water use. For example, the authority may, in terms of s 35(4), decide that, if eucalyptus uses more water than pine, then the area of permitted planting must be reduced so as to bring water use within the quantitative limit of lawful use, and hence the extent of water use attributable to that flow activity.

[73] Forestry SA interprets verification of flow activity, as to extent, entirely differently. Forestry SA contends that the extent of an existing water use is not concerned with the quantity of water used, but rather, the extent of the land over which the flow use takes place. On this interpretation, species exchange is irrelevant to the exercise of verification in terms of s 35. What is verified is the extent of land use for planting trees for commercial purposes, and not which species of trees are planted. Hence, if a responsible authority seeks to use the power of verification to limit the extent of land that may be planted with a particular species because it determines that a greater volume of water is thereby used, that would be an *ultra vires* exercise of power.

[74] Verification in terms of s 35 is of application to existing water use. As we have seen, s 32 sets out types of existing lawful water use. One type of existing water use is flow activity. The others are authorised use, controlled use, and those declared to be an existing use. When s 35(1) refers to the verification of the 'extent of an existing water use', does it refer to those types of water use defined in s 32

and only to such use? And if it does, how does that cast light on the meaning to be given to ‘the extent of an existing water use’?

[75] Section 35(1) frames the power to verify in the following language: ‘to verify the lawfulness or extent of an existing water use’. The language is carefully chosen. Section 32 defines existing lawful water use. One of the two kinds of verification is to determine whether an existing water use is lawful. That is an enquiry specifically directed to the subject matter of s 32 which defines and recognises a particular class of water use as existing lawful water use. That is not the only water use recognised under the Act. Section 21 provides that, for the purposes of the Act, water use includes a list of stated uses. Section 22 stipulates that a person may only use water under three classes: under stated conditions without a licence, with a licence, and if the responsible authority has dispensed with a licence requirement.

[76] There was some debate before us as to whether s 21 is a closed list of water use. That issue need not be resolved because what is plain from ss 21 and 22 is that in the universe of permissible water use allowed under the Act, existing lawful use is one particular class of use. It is a distinctive use and its definitional content is to be found in s 32. Once that is so, it is clear that the language of verification in s 35 does not reference every water use that is permissible under the Act, but the class of use defined as existing lawful use in s 32. Verification determines that such use is lawful. And it follows that verification as to extent must also be concerned to determine the extent of existing lawful water use of the types identified in s 32 to which any person claims an entitlement. If verification as to lawfulness concerns water use in s 32, the extent of use does not reference use outside of s 32? To hold

otherwise would introduce an incoherence into the interpretation of the scope of s 35 that is unwarranted.

[77] Accepting, then, as I find, that s 35 verification verifies existing lawful water use as defined in s 32, what is meant by the extent of such use? Section 32, as I have explained above, comprises different types of use. The extent of use in s 35 does not, in my view, have a singular application. All depends on the type of existing lawful water use to which verification as to extent is of application. So, for example, a controlled activity includes the intentional recharging of an aquifer with any water containing waste (s 32(1)(a)(iii) read with s 37(1)(d)). The extent of this water use may well require an assessment of the volume of waste water that has been introduced into an aquifer. The measurement of the extent of an activity aimed at the modification of atmospheric precipitation (s 37(1)(b)) would no doubt require some ingenuity, and it would be incautious to determine by way of legal interpretation what might be required to engage this exercise.

[78] We are in this case, however, concerned with flow activity. Flow activity, as we have seen, is defined in s 36. The definition relevant for this case is to be found in s 36(1)(a): ‘the use of land for afforestation which has long been or is being established for commercial purposes’. The plain language of this provision concerns land use. It does not define flow activity by reference to the volume of water that is used for commercial afforestation. Once that is so, to measure the extent of flow activity is to measure in a metric appropriate to the use of land. That measurement is most obviously done by determining how much land has been or is being used for commercial afforestation. That is congruent with the definition of flow activity. It is also consistent with the development of old order law. Though s 8 of the Forest Act did allow for the protection of natural water sources, the central

feature of old order law was to recognise the use of land for commercial forestry by reason of property rights or to regulate land use in specific circumstances. With this legacy of old order law, it is unsurprising that s 36 defines flow activity by reference to land use.

[79] For these reasons, I find that the verification of the extent of flow activity is measured by reference to land use and not by reference to the amount of water consumed by an existing flow activity. It follows that if a person is entitled to an existing lawful water use as a flow activity, the verification of the extent of such use is measured by reference to the land used, and not the amount of water consumed. Such verification cannot consider the impact of species exchange upon water consumption as an incident of determining the extent of flow activity.

The relief claimed

[80] With these issues of interpretation determined, what then is to be made of the regulatory authority appeal of the Statutory Authorities? That appeal must, in substance, fail. It is premised on the proposition that s 35 affords a responsible authority the power, in undertaking verification, to regulate species exchange in respect of flow activity. I have found, for the reasons given, that this premise is incorrect.

[81] However, the interpretation of s 35 that I have determined does not permit of the relief granted by the high court to stand unamended. The wording of this relief is set out in paragraph [68] above. The declaratory order made by the high court in paragraph 2.5.1 b) holds good for verification as to the extent of existing lawful water use in respect of flow activity, but it is too widely cast as to the verification of lawfulness. That is so because Forestry SA has not established that flow use,

recognised in terms of s 32(1)(a)(ii) read with s 36(1), does not include any entitlement to such use, deriving from old order law, that specified for the genus or species of trees that may be planted. This order thus requires modification as follows:

‘The genus or species of trees utilised for commercial afforestation, which afforestation had been established prior to the commencement of the qualifying period or was in the process of being established at any time during the qualifying period, cannot be taken into consideration by the responsible authority to verify the lawfulness or extent of an existing flow activity, save that in determining lawfulness in terms of s 35 of the National Water Act, a responsible authority may consider whether the activity was subject to any conditions or restrictions as to the genus or species of trees that may be planted, deriving from law that was of application at the commencement of the National Water Act and attached to the right to use land for afforestation, as provided for in s 36(1)(a).’

[82] The order made by the high court in paragraph 2.5.3 accords with the interpretation I have given to s 35, and requires no amendment. As to the order made in paragraph 2.5.4, this order is widely cast. Section 21 lists eleven types of water use. The water use for the purposes of the Act is stated in s 21 to include the eleven types of water use. As I have explained, the parties were at odds as to whether the eleven uses are exhaustive of water use for the purposes of the Act. I have not found it necessary to resolve this difference, and for this reason. Although species exchange is not, in terms, a listed use, one of the listed uses is a controlled activity declared to be so under s 38(1) of the Act. A controlled activity is not defined in s 1 of the Act. The scope of this power is broad. It is an activity in respect of which the Minister must be satisfied that it is likely to impact detrimentally on a water resource (s 38(2)). Whether this power may only be exercised in respect of the lawful existing water uses defined in s 32(1)(a)(iii) by reason of the reference to such activity in s 37(1)(e) is not an issue I need to

resolve. Even if this is the case, Forestry SA has not made out the case that such power could not be exercised in respect of the detrimental impact of species exchange on a water resource. Once that is so, species exchange may be declared a controlled activity in terms of s 38(1). That is one of the listed water uses in s 21. Hence, the declaratory order in paragraph 2.5.4 should not have been made by the high court.

Conclusion

[83] The following conclusions follow from these findings. Forestry SA's appeal has prevailed in respect of the recognition issue, and substantially so in respect of the species issue. Forestry SA is accordingly entitled to the relief it sought in paragraph 6.1 and 6.1A of its notice of motion. The Statutory Authorities have failed in their appeal in respect of the regulatory competence issue, save only that the order of the high court granted under paragraph 2.5.4 cannot be sustained and the order in paragraph 2.5.1 b) requires some modification. However, Forestry SA has been substantially successful.

[84] As to the costs of these appeals, they must follow the result. In the appeal of Forestry SA (case no. 777/22) and the appeal of the Statutory Authorities (case no. 824/22), Forestry SA has succeeded, or substantially so, and is entitled to their costs, including the costs of two counsel.

[85] In the result, the following order is made:

1 In the appeal under SCA case no 777/22:

1.1 The appeal succeeds.

1.2 The first to fifth respondents are ordered to pay the appellant's costs of appeal, such cost to include (a) the cost of the application for leave to appeal and (b) the costs of two counsel, where so employed.

1.3 Paragraph 1 of the order of the court below is set aside and replaced with the following:

'It is declared that:

(a) An existing lawful water use in respect of a stream flow reduction activity referred to in section 32(1)(a)(ii) of the National Water Act, 36 of 1998 ('the Act'), in respect of the use of land for afforestation which had been or was being established for commercial purposes as contemplated in s 36 of the Act, is not subject to the requirement of authorisation 'by or under any law which was in force immediately before the date of commencement of this Act', as provided for in s 32(1)(a)(i) of the Act;

(b) The obligations and conditions referred to in s 34(1)(a) of the National Water Act 36 of 1998 (the Act) do not limit existing lawful water use of stream flow reduction activities for commercial afforestation in respect of the planting of specific species or genera of trees, save in so far as such restriction attached to the rights to undertake these activities by reason of conditions or obligations arising from law of application at the commencement of the Act.'

2 In the appeal under SCA case no 824/22:

2.1 The appeal is upheld in part and dismissed in part.

2.2 The appellants are ordered to pay the respondent's costs of appeal, such costs to include (a) the cost of the application for leave to appeal and (b) the cost of two counsel, where so employed.

2.3 The orders of the high court made in paragraphs 2.5.1 b) and 2.5. 4 are set aside, and paragraph 2.5.1 b) is replaced with the following order:

‘The genus or species of trees utilised for commercial afforestation, which afforestation had been established prior to the commencement of the qualifying period or was in the process of being established at any time during the qualifying period, cannot be taken into consideration by the responsible authority to verify the lawfulness or extent of an existing flow activity, save that in determining lawfulness in terms of s 35 of the National Water Act, a responsible authority may consider whether the activity was subject to any conditions or restrictions as to the genus or species of trees that may be planted, deriving from law that was of application at the commencement of the National Water Act and attached to the right to use land for afforestation, as provided for in s 36(1)(a).’

D N UNTERHALTER
ACTING JUDGE OF APPEAL

Mothle JA dissenting (Mocumie JA concurring)

[86] I have read the judgment of Unterhalter AJA (the first judgment), which deals with two appeals that were heard together, concerning the same parties that litigated in the high court. I will refer to the parties as identified in the first judgment. The one appeal was lodged by Forestry SA, and the other by the

Statutory Authorities as described and referred to collectively in the first judgment. I agree with the background set of facts in the first judgment. I however, do not agree with the order of the first judgment as regards the appeal by the Statutory Authorities. I would uphold, in part, the appeal of the Statutory Authorities.

[87] The Statutory Authorities were the respondents in the high court, opposing the declaratory relief sought by Forestry SA, concerning certain provisions of the Act. The high court rejected, in part, the opposition by the Statutory Authorities but upheld some of the relief that they sought. Forestry SA was also successful in part, and unsuccessful on other relief they sought. The high court granted leave to both parties to this Court, separately, on the issues where they were not successful. Apart from the points in *limine* which were conceded in this Court, the essence of the appeal by the Statutory Authorities centers on the exercise of the power in s 35 of the Act. The section provides that the responsible authority may conduct verification of existing lawful water use.

[88] The Statutory Authorities contend that this verification may be conducted in instances where there is a change in the species of trees planted in a forest (the genus exchange). Furthermore, that the ‘genus exchange’ in species of trees or vegetation contemplated in s 32(1)(a) of the Act, may, in some instances, result in an increase in the extent of the existing lawful water use, contrary to the permissible existing lawful water use. Forestry SA argues that the power of verification cannot be used in instances where, as provided in s 32(1)(a)(ii), there is a stream flow reduction activity as defined in s 36(1)(a). Section 36(1)(a) of the Act defines the concept thus: ‘[T]he use of land for afforestation which has been or is being established for commercial purposes. . . .’ It is contended by Forestry SA, that s 36(1)(a) refers to the use of land and not water use. Therefore, the argument

continues, the exercise of the power of verification refers to the existing lawful water use, and not land use in terms of s 36(1)(a) of the Act. It will be *ultra vires* s 35 of the Act. (Emphasis added.)

[89] The first judgment accepts the Forestry SA's contention and dismisses the appeal by the Statutory Authorities. The order proposed in the first judgment reads thus:

'The orders of the high court made in paragraphs 2.5.1 b) and 2.5.4 are set aside, and paragraph 2.5.1 b) is replaced with the following order:

"The genus or species of trees utilised for commercial afforestation, which afforestation had been established prior to the commencement of the qualifying period or was in the process of being established at any time during the qualifying period, cannot be taken into consideration by the responsible authority to verify the lawfulness or extent of an existing flow activity, save that in determining lawfulness in terms of s 35 of the National Water Act, a responsible authority may consider whether the activity was subject to any conditions or restrictions as to the genus or species of trees that may be planted, deriving from law that was of application at the commencement of the National Water Act and attached to the right to use land for afforestation, as provided for in s 36(1)(a)."(Emphasis added.)

For reasons that follow, I disagree.

[90] Chapter 2 of the Constitution of the Republic of South Africa, 1996 (the Constitution), contains the Bill of Rights. Section 24(b) of the Constitution guarantees everyone the right 'to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecological sustainable development and use of natural resources while promoting justifiable economic and social development'. Section 27(1)(b) of the Constitution provides that everyone has the right to have access to sufficient food and water. Section 39(2) of the Constitution enjoins all courts to ensure that

‘when interpreting any legislation . . . courts must promote the spirit, purport and objects of the Bills of Rights.’

[91] The Act is thus legislation enacted to give effect to the Bill of Rights. Section 1(3) of the Act states as follows:

‘When interpreting a provision of this Act, any reasonable interpretation which is consistent with the *purpose of this Act as stated in section 2*, must be preferred over any alternative interpretation which is inconsistent with that purpose.’ (Emphasis added.)

Section 2 of the Act states that ‘[t]he purpose of this Act is to ensure that the nation’s *water resources* are *protected, used, developed, conserved, managed and controlled*’ in ways which take into account other factors listed in s 2(a) to (k) of the Act, and to achieve this purpose, to establish suitable institutions and to ensure that they have appropriate community, racial and gender representation. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*,⁴ it was held that in interpreting legislation, the court needs to look at the context, which in turn clarifies the scope and purpose of the legislation.

[92] The starting point, in my view, is s 21 of the Act which defines the concept ‘water use’. Forestry SA correctly submits, that not every use of water is water use. The concept of ‘water use’ refers to a category of uses listed in s 21 of the Act. In particular, s 21(d) includes a stream flow reduction activity, referred to in s 36, as water use. In addition, there is a specific category of water use which is defined in s 32 of the Act. The water use in s 32 is that which took place at any time during the period of two years immediately before the date of commencement of the Act. This category of water use is referred to as the *existing lawful water use*. (Emphasis added.)

⁴ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 89-90.

[93] Section 32(1) defines an ‘existing lawful water’ use as follows:

‘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 authorized 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 contemplated in section 37(1); or
- (b) which has been declared an existing lawful water use under section 33.’

[94] Of the three kinds of existing lawful water uses listed in s 32(1), the stream flow reduction activity listed under ss 32(1)(a)(ii) is the source of contestation. Forestry SA submits that the stream flow reduction activity does not have to be lawful, which is contrary to ss 32(1)(a)(i) and that, in s 36(1), the stream flow reduction activity implies ‘the use of land’. The case for the Statutory Authorities is that a stream flow reduction activity is not only a water use, but also qualifies as an existing lawful water use in terms of s 32(1)(a)(ii) and thus, falls within the purview of s 35 of the Act.

[95] Section 35 of the Act, which is the subject of disagreement as to its interpretation, deals with verification of existing lawful water uses. In that regard, it authorises the responsible authority to verify the *lawfulness or the extent of an existing water use*, by written notice, requiring any person claiming entitlement to that water use, to apply for a verification of that use. Section 35(3) provides that a responsible authority may require other information, in addition to that provided in the application, or may conduct an investigation into the veracity and the lawfulness of the water use in question. Section 35(4) empowers a responsible authority to 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 water use contemplated in s 32(1)*. (Emphasis Added.)

[96] The definition of the stream flow reduction activity is referenced as an existing lawful water use in s 32(1)(a)(ii). Forestry SA, isolated the words ‘the use of land’ in s 36(1), to contend that a stream flow reduction refers to ‘use of land’ and not a water use, and therefore does not fall within the scope of s 35 of the Act. This contention offends the provisions of s 21(d) of the Act, which provides that:

‘For the purposes of this Act, water use includes –

...

(d) engaging in a stream flow reduction activity contemplated in s 36.’

Reference to ‘*use of land*’ in s 36(1) (a), is made in the context of defining the purpose for which the land is used, namely, afforestation, which has been or is being established for commercial purposes.

[97] The unambiguous language of s 35 of the Act authorises verification of a stream flow activity stated in s 32(1)(a)(ii), as defined in s 36(1). There is no express or implied language of exclusions or exemptions in either s 32(1) or s 36(1), or any qualification that would mean or, for that matter, imply that the exercise of powers in s 35 would be *ultra vires*. Therefore, the verification process is not excluded in its application by any activity to change the genus or species of trees that may be planted in the use of the land for afforestation, which has been or is being established for commercial purposes, as provided for in s 36(1)(a). To state otherwise, as the first judgment does, is to narrowly construe the powers in s 35 of the Act, such that they impede the achievement of the purpose as stated in s 2 of the Act. That construction strains the language of the Act. In *Bertie Van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others*,⁵ the

⁵ *Bertie Van Zyl (Pty) Ltd and Another v Minister of Safety and Security and Others* [2009] ZACC 11; 2010 (2) SA 181 (CC); 2009 (10) BCLR 978 (CC) para 22.

Constitutional Court warned that the interpretation must not unduly strain the legislation. This Court is enjoined to adopt an approach to the interpretation of s 35 which is consistent with the purpose in s 2 of the Act.

[98] Section 35 of the Act provides for verification of existing lawful water use in s 32(1)(a). These are the lawfulness or extent of the existing water use. Therefore, the stream flow on land used for afforestation for commercial purposes, as envisaged in s 32(1)(a)(ii), read with s 36(1)(a) of the Act, or genus exchange, is an activity that may impact on the reduction of water. In that regard, a determination may be necessary in terms of s 35(4), as to the extent of the existing water use in that area.

[99] Undoubtedly, there are, and there will be, in my view, multiple scenarios of genera exchanges which may arise, creating activities which may result in a negative impact on water use. It will be better in such instances, to allow the in-built dispute resolution mechanism of the Water Tribunal, in chapter 15 of the Act, to determine the limits of the exercise of powers in s 35 of the Act on a case-by-case basis. More so, that there are differences of opinion on the scientific methods of determining the accurate measurement of the extent of the impact of genus exchange on water use, as demonstrated by the facts of this case. It will be imprudent to burden the Act with an interpretation which excludes the exercise of power delineated in s 35 of the Act, on a matter on which the courts are yet to express a view as to which scientific method provides a legally acceptable measurement for a reduction activity, once all the stakeholders have agreed on a common meaning and one or two of the stakeholders including those who are not members of Forestry SA may not be happy with the meaning envisaged.

[100] The order in the first judgment unduly limits the scope of s 35 of the Act. It supports an interpretation which will tie the hands of the Statutory Authorities from developing and managing water as a resource to be shared, as envisaged by the Act. It will scupper the work of the experts which the Statutory Authorities and Forestry SA, as well as other stake holders have put in place. In the worst-case scenario, it will stultify any progress achieved thus far. Furthermore, other stakeholders directly or indirectly involved with the environment, may be adversely affected by the stream flow reduction activities, without recourse.

[101] I would therefore uphold with costs, this part of the appeal by the Statutory Authorities under case no 824/2022, and grant the order as follows:

1 It is declared that:

1.1 In the process of verifying existing water use as provided for in section 35 of the National Water Act 36 of 1998 (the Act), the interpretation of ‘use of land for afforestation which has been or is being established for commercial purposes’ is restricted to trees on the ground during the qualifying period.

1.2 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 1996 to September 1998.

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

1.3.1 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 Act:

(a) On a proper interpretation of the Forest Act 122 of 1984 and the Forest Act 72 of 1968 as amended and of the planting permit issued in terms thereof, any reference to genera or species of trees in the planting permits, limits such existing lawful water use for such genera or species;

- (b) reference to genera or species in the planting permits constitutes conditions subject to which such permits have been issued;
- (c) the imposition of such conditions is of force and effect and remains valid until reviewed and set aside by a court of competent jurisdiction;
- (d) the appellants are entitled to take into consideration the genera 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;
- (e) the exchange of genera or species of trees constitutes water use envisaged in section 21 of the Act and genera and species and clones of trees used for commercial forestation may not be exchanged without authorisation in terms of the Act; and
- (f) whenever genera or species of trees used for commercial afforestation changes, the responsible authority is entitled to insist, during the verification process, that the trees authorised for commercial afforestation be reduced in extent in so far as such a species or genera of trees uses more water than the species or genera sought to be replaced.

2 The respondents are ordered to pay the costs of the application, such costs to include the costs of two counsel.

SP MOTHLE
JUDGE OF APPEAL

Appearances

For the appellants: W H Van Staden SC and A De V L Grange SC
Instructed by: Hannes Pretorius Bock & Bryant, Somerset West

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For the respondents:

M Mphaga SC and P Loselo

Instructed by:

The State Attorney, Cape Town

The State Attorney, Bloemfontein