



Western Cape
Government

Environmental Affairs and
Development Planning

MINISTRY OF LOCAL GOVERNMENT,
ENVIRONMENTAL AFFAIRS AND
DEVELOPMENT PLANNING

M 3/6/5

Mr J Wessels
Kosie van Niekerk Boerdery
P O Box 71
PORTERVILLE
6810

Dear Mr Wessels

APPEAL LODGED IN TERMS OF SECTION 43(2) OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT, 1998 (ACT NO. 107 OF 1998) AGAINST THE ADMINISTRATIVE FINE FOR KOSIE VAN NIEKERK BOERDERY: FARM DE HOEK AND REMAINDER OF FARM VORENTOE, PORTERVILLE

The appeal lodged by van Heerden Attorneys on your behalf against the quantum of the section 24G fine issued by the Department of Environmental Affairs and Development Planning has reference.

After careful consideration of your appeal, as well as supporting documentation received, I have decided to partially uphold your appeal and vary the fine of **R625 000-00 (Six hundred and twenty-five thousand Rand) to R100 000-00 (One hundred thousand Rand)**.

In terms of section 24G(4) of the NEMA you are hereby informed that in order for the competent authority to process your application further, an administrative fine of R100 000-00 (One hundred thousand Rand) must be paid.

Payment may be made by cash, cheque or electronic transfer as follows:

Cash Payment:

The amount may be paid at the cashier's office of the Department of Environmental Affairs and Development Planning, ground floor Utilitas Building, 1 Dorp Street, Cape Town from Mondays

to Fridays between 8h30 and 12h30. The following allocations must be given to the cashier when making the payment:

Reference No: **S24G00190**

Item: section 24G Administrative fine

Company/ Individual Name:

ID No:

Cheque Payment:

The cheque must be crossed and made payable to the Department and may either be deposited at the aforementioned cash office under the allocations mentioned above or deposited directly in the bank account. (See bank details below)

Electronic Transfer

An electronic transfer may be made to the following account:

Name of Bank:	NEDBANK
Name of Account:	Provincial Government of the Western Cape Department of Environmental Affairs and Development Planning
Account Type:	Current Account
Account Number	1452 045 003
Branch Name:	NEDBANK CORPORATE
Branch Code:	145 209
Reference No.:	S24G00190

You are hereby requested to forward a copy of **the proof of payment** (e.g. receipt, deposit slip, electronic transfer confirmation) to the Sub-directorate: Rectification for the attention of Moe'mienna Hoosain (Tel: (021) 483 2755, Fax: (021) 483 4033 and Email: Moe'mina.Hoosain@westerncape.gov.za) and quote the abovementioned reference number to ensure that the case officer can acknowledge the payment of the administrative fine.

The administrative fine must be paid within **30 days** from the date of this letter. If no such payment is received within the abovementioned timeframe, the competent authority will proceed with the law enforcement action.

Please take note that the administrative fine is not an authorisation of the unlawful commencement of the listed activities according to the NEMA. Consideration of your application will only commence upon the payment of the administrative fine.

You are kindly requested to notify all registered interested and affected parties ("I&AP's") in writing, within 14 (fourteen) days of the date of the appeal decision of the outcome of the appeal and the reasons for the appeal decision.

REASONS FOR THE DECISION:

The following are the reasons for partially upholding your appeal and varying the original R625 000-00 quantum of the administrative fine issued by the Delegated Authority to R100 000-00 :-

The section 24G application stems from a Pre-Compliance Notice issued to the appellant on 4 May 2015, which included the dam as authorised on 18 March 2016, as well as the construction of the lapa, hostel and clearing of 37ha of land. The decision to split the application was based upon advice from officials of the Department of Environmental Affairs and Development Planning and by the need to expedite the application required for a Water Use Licence.

The Western Cape experienced a sharp decline in the average winter rainfall and emergency precautions needed to be implemented to ensure viability of the harvest. Once the Environmental application for the dam was approved, the Department of Water Affairs and Sanitation could start processing the Water Use Licence application which was already submitted in 2014 and usually takes quite some time to be issued. The entire table grape development at significant cost was dependent on the enlargement of the dam which could result in significant capital and job losses.

It is evident that the development provides essential services and infrastructure to the community and almost 300 jobs are created. The activities on site have a positive socio-economic benefit in that:

- The increased farming area, hostel and lapa provides additional work for farm workers. Their families also benefit from activities on the farm;
 - 40 permanent jobs and 3 managerial positions were created for the production of table grapes;
 - Approximately 20 children are provided schooling on the farm;
 - 250 seasonal workers (period of 6 months) are locally recruited annually in the Saron area where unemployment is the norm amongst the population;
 - Labour costs incurred are in the amount of R6.2 million per annum;
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- The hostel provides safe accommodation on the farm for temporary workers with electricity and warm water.

The agricultural sector in the Western Cape is currently under severe financial stress due to the intense and extended drought and farmers are starting to go under. Another excessive administrative penalty fine of R625 000-00, will knock the operation of the farm to such an extent, that it will unavoidably lead to downscaling and a loss of jobs.

Due consideration has been given to the fact that with the exception of the clearing of the site where the hostel was constructed, the resultant impacts of the activities undertaken are low and can be addressed by mitigation and a section 24G fine in the amount of R625 000-00 had already been issued for the expansion of the dam.

This fine was determined by the fine calculator, which was developed by the National Department of Environmental Affairs and the decision-maker did not deviate from the calculated fine. Due to the fact that the appellant urgently required a Water Use Licence, for the reasons mentioned above, he was "forced" to pay the fine and could therefore not appeal the fine. The fine could have been reduced on appeal.

Having agreed to, the appellant submitting two separate applications and having issued him with two fines of R625 000-00 each and an authorisation for what could have been dealt with as one application, cannot result in the appellant being assigned the status of a repeat contravener. His conduct was considered and it was noted that he cooperated with the Department from the start.

Application of the fine calculator to this application as a single application rather than a split matter would in all likelihood have resulted in a fine of less than R1 250 000-00 based on previous matters of this nature.

The fine amount as issued in June 2017, is based on the information and findings of the EIR, but does not reflect the majority low to negative impacts or the medium positive impacts. The same findings were used in determining the fine of 23 February 2016 for the unlawful expansion of the dam. The recommended fine by the Appeal Administrator was also determined by the administrative fine calculator without any deviation from the calculator.

As stated in the fine letter of the decision-maker, the S24G fine calculator is a guide that is not rigidly applied and is used in order to reduce the maximum section 24G fine amount of R5 million to an appropriate fine based on applicable impacts resulting from the unlawful commencement activity/ies on the receiving environment. Each section 24G administrative fine is determined on its own merit and is dependent on the information provided in the application, as well as on appeal. The calculator is oversimplified and does not accurately assess impacts or provide correct values to these impacts.

I have taken into account relevant case law, indicating that a decision-maker, informed by policy guidelines, must exercise his discretion with an open mind. Policies should therefore not be elevated into rules that are considered to be binding with the result that no discretion is exercised at all.

I have also taken into account consistency of the administrative fine with other fines on activities without authorisation by appellants with similar circumstances as in this case.

The fine calculator is a predetermined calculator designed by the National Department of Environmental Affairs for use by the competent authority when determining the administrative fine for an application submitted in terms of section 24G of the NEMA. The fine calculator was utilised as a guide in determining the fine amount.

The S24G fine calculator distinguishes between the following two categories of offenders:

- o Category 1 offenders are companies, parastatals and government departments.
- o Category 2 offenders are individual persons.

An amount of R625 000-00 was determined by the fine calculator for Category 1 offenders and R25 000-00 for Category 2 offenders for this application. The calculation of the administrative fine is based on the fact that the appellant in this matter is a Category 1 offender. The fines for individuals are excessively less in comparison with Category 1 offenders for the same offence.

The comment of the following organs of state has been noted and considered:-

- o CapeNature agreed with the Botanical Assessment and noted that an insignificant amount of natural vegetation remains on the site.
- o The Bergriver Municipality did not object to the application.
- o Heritage Western Cape agreed with the findings of the Heritage Consultant that no further studies were required after the initial survey.
- o The Department of Agriculture made recommendations regarding soil preparation and surface run-off.

I have noted that the Directorate Environmental Law Enforcement of the Department did not submit a formal response to the correspondence submitted by Mr Nicholas Smith dated 22 May 2015, however referred to it in their letter dated 11 June 2015. A meeting was, however held between Departmental officials and the appellant and his representative at which time it was confirmed that based on the date of commencement of the activities, the *NEMA Environmental Impact Assessment Regulations 2010* ("*NEMA EIA Regulations, 2010*") were applicable as stated in the correspondence from Mr Smith. It is, however pointed out that irrespective of the regulations quoted in the Pre-

Compliance Notice, the activities were commenced unlawfully as the appellant failed to obtain the requisite Environmental Authorisation prior to commencement.

In the S24G application the EAP cited the listed activities in terms of the *EIA Regulations, 2010* applicable at the time that the unlawful activities commenced, and also included similarly listed activities in terms of the *NEMA EIA Regulations, 2014*, which is a requirement by the Department. The EAP confirmed that the relevant thresholds for the clearance of vegetation were met and the relevant listed activities were applied for.

The specialist reports assessed the impacts of all the activities on the site and the same specialist reports were used to determine the fines as issued to the appellant in both matters.

The botanical specialist determined that the mapping of parts of the 37ha as Critical Biodiversity Area to be erroneous and not based on ground-truth information. The Biodiversity Impact Report stated that no categorical statement can be made as to the condition of the site prior to clearing in 2013 and whether there was any viable Swartland Alluvium Fynbos that may have regenerated after the pine plantation burnt down. The 'transformed land' after the 1985 fire would have supported indigenous vegetation, but not critically endangered Swartland Alluvium Fynbos, because the integrity of that vegetation was destroyed by bulldozing and ploughing in 1960, the pine plantations and the invasion by alien invasive plants.

The direct impact of the clearing of 37ha of land is considered to be Low Negative.

The general vegetation type found at the lapa is Winterhoek Sandstone Fynbos (Least Threatened). The impact of the access road and the lapa has had an overall Moderate Negative impact on the site. With a certain level of restoration and the removal of alien invasive wattles that would allow the fynbos and riparian vegetation to improve and restore, the impact after mitigation would be Low Negative.

The site of the hostel was degraded Swartland Alluvium Fynbos due to the presence of alien invasive trees and other sources of disturbance. Since the site has been completely transformed and no mitigation would be possible to compensate for the loss of vegetation, making the impact Moderate Negative.

The Freshwater Specialist Report indicated that although the Leeu and Twenty Four Rivers Systems are mapped as Critical Biodiversity Areas and Freshwater Ecosystem Priority Areas, considering the existing largely modified ecological state of the rivers within the farm, the significance of the activities on freshwater features is considered Medium-Low. With mitigation the impact is likely to be Very Low.

The actual activities associated with the dam and the hostel as well as clearing for cultivation purposes have not had a significant impact upon freshwater features on Farm Vorentoe as they have largely occurred within already impacted areas adjacent to the river systems.

After considering all the above factors and relevant documentation, I am of the view that a deviated fine of R100 000-00, is an appropriate fine. However, I wish to advise the appellant to approach in future an environmental assessment practitioner and/or the Department of Environmental Affairs and Development Planning for advice prior to commencement of an activity/activities on the farm which may require an environmental authorisation in terms of the National Environmental Management Act, 1998 ("NEMA").

Yours faithfully

A handwritten signature in black ink, appearing to read 'Anton Brebell', written over a horizontal line.

**ANTON BREDELL
WESTERN CAPE MINISTER OF LOCAL GOVERNMENT,
ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING**

DATE: 16/4/2018

Cc Dr F J van Heerden (van Heerden Attorneys)

fjoy@lanfc.net

