



REFERENCE: 14/3/6/B5/17/0396/19

Mr Jacques Beukes
Beukes Broers Trust
P.O. Box 292
DE DOORNS
6875

Tel: (023) 354 8740
Fax: (023) 354 8863
Email: jbeukes@modderdrif.co.za

Dear Mr Beukes

APPEAL LODGED IN TERMS OF SECTION 43(2) OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT, 1998 (ACT NO. 107 OF 1998) ("NEMA") AGAINST THE ADMINISTRATIVE FINE DECISION ISSUED FOR THE UNLAWFUL CONSTRUCTION OF THE BRANDWAGT UPPER DAM ON THE REMAINDER OF PORTION 77 OF FARM BRANDWAGT NO. 187, WORCESTER

1. Your appeal lodged against the Administrative Fine decision issued by the Department of Environmental Affairs and Development Planning on 11 February 2019 and the additional information dated 24 June 2019, refer.
2. After considering all relevant facts and supportive documents, I wish to advise that, in terms of section 43(6) of the National Environmental Management Act, 1998 (Act No. 107 of 1998) ("NEMA"), I have decided to partially uphold your appeal and vary the abovementioned decision of the delegated officer.
3. In terms of section 24G (4) of the NEMA you are hereby informed that for the competent authority to process your application further, an administrative fine of **R50,000** (Fifty Thousand Rand) must be paid.
4. **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, 1st floor Utilitas Building, 1 Dorp Street, Cape Town from Mondays to Fridays between 8h00 and 12h30. The following allocations must be given to the cashier when making the payment:

Reference No: S24G00226
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.:	S24G00226

5. 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 Mr Ziyaad Allie (Tel: (021) 483 2991 and Email: Ziyaad.Allie@westerncape.gov.za) and quote the abovementioned reference number to ensure that the case officer can acknowledge the payment of the administrative fine.
6. The administrative fine must be paid within **30 days** from the date of this letter. If no payment of the administrative fine is received and/or no extended period arrangement of the fine payment is made with the competent authority within the abovementioned timeframe, the competent authority will proceed with the law enforcement action.
7. Please take note that the administrative fine is not an authorisation of the unlawful commencement of the listed activities according to the NEMA. However, your voluntary submission of the section 24G of the NEMA application is acknowledged. Consideration of your application will only commence upon the payment of the administrative fine.
8. You are kindly requested to provide all the Interested and Affected Parties with a copy of my Appeal decision within 14 days of the date of this letter.
9. **REASONS FOR THE DECISION:**
The following are reasons for partially upholding your appeal and varying the original administrative fine issued by the delegated authority:

Introduction

- 9.1. The NEMA principles that apply to the actions of all organs of state that may significantly affect the environment specifically require *inter alia* that:
 - 9.1.1. Environmental management must place people and their needs at the forefront of its concern and serve their physical, psychological, developmental, cultural and social interests equitably;
 - 9.1.2. Development must be socially, environmentally and economically sustainable;
 - 9.1.3. That the disturbance of ecosystems and loss of biological diversity are avoided, or where they cannot be altogether avoided, are minimised and remedied;
 - 9.1.4. That a risk-averse and cautious approach is applied, which considers the limits of current knowledge about the consequences of decisions and actions; and

- 9.1.5. The social, economic and environmental impacts of activities, including disadvantages and benefits, must be considered, assessed and evaluated, and decisions must be appropriate in the light of such consideration and assessment.
- 9.2. In January 2010, the unlawful expansion (expansion of an existing dam basin) of the Brandwagt Upper Dam on the remainder of Portion 77 of Farm Brandwagt No. 187, Worcester was commenced with in contravention of section 24F(1)(a) of the NEMA. A previous land owner only commenced with Phase 1 of the intended dam capacity. Therefore, the dam, although currently functional with a storage capacity of 94,272 m³, is not completed to its ultimately intended capacity. The current land owner purchased the land in 2015, and was unaware at the time of the purchase, that the Upper Brandwagt Dam was constructed unlawfully. The current land owner seeks to legalise the dam via the section 24G of the NEMA process and if so authorised, to enlarge the current dam of 94,272 m³ to the originally intended capacity of approximately 292,040 m³ (i.e. a continuation of the original activity).
- 9.3. On 28 July 2016, an Application form was submitted by the applicant i.e. Beukes Broers Trust in terms of section 24G of the NEMA to obtain a retrospective EA for the abovementioned unlawful construction of the Brandwagt Upper Dam on the remainder of Portion 77 of Farm Brandwagt No. 187, Worcester.
- 9.4. On 11 February 2019, an administrative fine of R 250,000 (Two hundred and fifty thousand rand) was issued to the applicant as required in terms of section 24G(4) of the NEMA, it should be noted that this was a deviation of the recommended fine of R625,000.
- 9.5. The competent authority was correct in imposing an administrative fine as section 24G(4) of the NEMA requires an applicant that has commenced with an activity without an authorisation to, in the rectification process of the unlawful activity, pay an administrative fine which may not exceed R5 million rand. Section 24G(4) of the NEMA does not make provision for exemption from the payment of the administrative fine.
- 9.6. On 20 June 2014, the National Department of Environmental Affairs developed the Section 24G Standard Operating Procedure ("SOP") for the determination of section 24G(4) Administrative fines. This section 24G SOP (which was made available for the applicant's consideration) included a calculator for the determination of the administrative fines.
- 9.7. The calculator is based on the following indexes which must be informed by the impacts that have resulted from the unlawful activities:
- 9.7.1. Social Benefit Index (e.g. intended only for Municipal Infrastructure);
 - 9.7.2. Socio-Economic Impact Index;
 - 9.7.3. Biodiversity Impact Index;
 - 9.7.4. Sense of Place &/ or Heritage Impact Index; and
 - 9.7.5. Pollution Impact Index.
- 9.8. The abovementioned SOP states that the section 24G Calculator serves as a guideline for the determination of the quantum of the fine to be imposed and should therefore not be rigidly applied.

- 9.9. The section 24G calculator distinguishes between the following two categories of offenders:
- 9.9.1. Category 1 offenders are companies, parastatals and government departments.
 - 9.9.2. Category 2 offenders are individual persons.
- 9.10. The calculation of the administrative fine is based on the fact that the appellant in this matter is Category 1 offender. I agree with the competent authority that it is appropriate to regard the appellant in this matter as a Category 1 offender.

Written representations from the appellant on the section 24G Standard Operating Procedure for the determination of Administrative fines

- 9.11. During this appeal process written representations were requested from the applicant on various aspects in terms of the section 24G SOP including the section 24G Administrative fine calculator to determine whether there are reasons to deviate from the quantum of the fine calculated. These aspects include the following:
- 9.11.1. Aggravating circumstances.
 - 9.11.2. Mitigating circumstances.
 - 9.11.3. Profile of Company.
 - 9.11.4. Previous offences
 - 9.11.5. Any other EIA application by Company.
 - 9.11.6. Consistency of the fine with the fines imposed on applicants for similar contraventions.
 - 9.11.7. The weighting allocated on each of the Impact Indexes of the calculator.
 - 9.11.8. Representations as to why an administrative fine of a category 1 or category 2 should not be issued by the appeal authority.
- 9.12. The following written representations were received from the applicant:
- 9.12.1. The impact index calculation method in the 24G SOP is very mechanistic and used for the calculation of the fine based on the facts of the application within the index calculator. The appeal authority is tasked with considering all the relevant factors and to apply his mind to all the information in front of him to make a decision.
 - 9.12.2. It can be seen that the 24G SOP is a guideline and must be applied flexibly rather than rigidly; and second, that a deviation from the fine as initially calculated by using the impact index calculator is permissible, with reference to all relevant considerations.
 - 9.12.3. It is pointed out, for the sake of completeness, that this appeal is not the appropriate forum to challenge the efficacy and/or rationality of the use of the impact index calculator and the decision by the Ministerial Technical Advisory Body ("MinTech") to implement it as part of the section 24G SOP. In this instance, the appellant's submissions do not go to the validity of MinTech's decision to approve the section 24G SOP per se, but relate instead to the exercise of ministerial discretion on the amount of the fine payable, on a proper consideration of the full conspectus of relevant facts in this matter.
 - 9.12.4. Without derogating from the relevance of all the material issues raised on appeal in support of the appellant's prayer for a significantly reduced fine on appeal, the appellant was not responsible for undertaking the unlawful construction of the dam in question. Furthermore, and when the appellant became aware of the unlawful commencement of the listed activities pertaining to the dam by a predecessor-in-title, the appellant voluntarily submitted to the section 24G process. These aspects are traversed.

respectively at paragraphs 28 to 32 of the appeal delivered on 1 March 2019 and at paragraphs 33 to 34 of the appeal.

- 9.12.5. On a proper consideration of all the relevant facts, the appeal authority should reduce the quantum of the administrative penalty as imposed in the first instance by the Department.
- 9.12.6. In their respectful submission and based on the facts of the matter, the fine should be set on appeal by the appeal authority at the minimum provided for in the section 24G SOP for category 1 offenders (that is, at R50,000).

Submissions regarding the relationship between the Trans-Hex Housing Project and the activities that are currently the subject of the section 24G application

- 9.12.7. The primary submission on behalf of the appellant in respect of this issue is that several of the appellant's employees (some 124 in total) are among the intended beneficiaries of the Trans-Hex Housing Project. As such, and to ensure that those recipients can fully achieve the benefits inherent in-home ownership, the economic opportunities presented by job creation in the housing project are paramount. The list of the appellant's employees who have been identified as beneficiaries of the Trans-Hex Housing Project was submitted with the additional information dated 24 June 2019.
- 9.12.8. Most of the employees are currently employed by the appellant's other farming operations near De Doorns, which is some distance from the Worcester area, which is where the Trans-Hex Housing Project is proposed. If the appellant is authorised in due course to undertake the activities detailed in the section 24G of the NEMA application, this would provide the appellant with the opportunity to employ the beneficiaries of the housing project at a location much closer to their new place of residence. It is submitted that this would be a significant benefit to those employees.
- 9.12.9. Further to the submissions directly above, in the event of the abovementioned employees being employed on Remainder of Portion 77 of Farm Brandwagt No. 187, this would also create 124 vacancies within the appellant's current farming operations near De Doorns, which is a community where such employment opportunities are urgently required.
- 9.12.10. If the appellant is authorised in due course to undertake the activities detailed in the section 24G application. It will be able to create further employment opportunities in the Worcester area (currently projected to be 150 permanent positions and 450 – 500 seasonal work opportunities), which will have a further positive impact on the sustainability of the Trans-Hex Housing Project by the beneficiaries of that housing being able to take up employment opportunities if they qualify for those opportunities.

Procedural stipulations pertaining to the proper delivery of this appeal

- 9.13. It is concurred that the appeal was submitted in compliance with the applicable 2014 National Appeal Regulations.

Social and socio-economic benefits

- 9.14. The section 24G EIA Report which complies with section 24G of the NEMA stated that the **Social Benefit Index** should be weighted on the administrative fine calculator that: "*The activity provides no social service / infrastructure to the affected community*". The motivation provided for this weighting states that:
 - 9.14.1. The activities undertaken do not provide any social service or infrastructure to the community. This is not to say that no socio-economic benefits would be realised as a result of the proposed activities.

- 9.14.2. The dam enlargement will require workers during the construction of the dam, and the operation of the vineyards as a result of the enlarged dam would require additional permanent and seasonal workers, i.e. there would be local job creation with the resultant upliftment of the community.
 - 9.14.3. The project is situated in an area which has a strong agricultural base to its economy, and where agriculture is the greatest employer.
 - 9.14.4. The Integrated Development Plan and Spatial Development Framework both acknowledge the importance of agriculture in the region and the need to support it to assist in reducing unemployment and alleviate poverty, amongst other prerogatives.
- 9.15. It is concurred with the appeal that the Department should have considered a further reduction of the administrative fine due to:
- 9.15.1. South Africa's current economic situation, in conjunction with the significant consequences of the drought that was recently experienced in the Western Cape, which act as a significant impediment to job security, particularly in farming communities. It is submitted that this is significant considering the current economic climate in South Africa.
 - 9.15.2. The socio-economic impacts are positive, in that they will increase the economic viability of the agricultural activities on the subject-property through increased water storage capacity.
 - 9.15.3. The use of the dam will have a positive impact on freshwater resources.
 - 9.15.4. The appellant employs approximately 500 employees on the subject-property on a seasonal basis, one-third of whom (approximately 150 employees) are in fact permanent employees of the farm.
 - 9.15.5. Earnings from exports of table grapes (that would be realised due to the enlarged dam) are a significant driver of the local economy and result in trickle down effects to the local economy.
- 9.16. It must be noted that, although there is a further reduction of the administrative fine, the need for sustainable management of water scarce resource and the role water plays in eradicating poverty and under-development in South Africa should not be undermined. The importance of protecting and restoring ecological infrastructure and diversifying water supply options must take the centre stage of water management and planning but the applicable legislation must be enforced where there is non-compliance with the legislation.

Biodiversity-related aspects

- 9.17. The section 24G EIA Report which complies with section 24G of the NEMA stated that the **Biodiversity Impact Index** should be weighted on the administrative fine calculator that: "*The activity could give rise to localised biodiversity impacts*". The motivation provided for this weighting states that:
- 9.17.1. According to the botanical specialist, the unauthorised construction of the Upper Brandwagt Dam resulted in the loss of approximately 1.5 ha of Breede Alluvium Fynbos. The impact of the dam is rated as "*High Negative*" at a local scale. The proposed expansion of the dam would result in a further loss of approximately 3.7ha of Breede Alluvium Fynbos, a portion of which is intact vegetation and a portion of which is extremely disturbed. The anticipated impact of the expansion of the dam would result in a "*Medium Negative*" impact at a local scale.
 - 9.17.2. The cumulative impact of the construction of the Upper Brandwagt Dam and its future expansion is rated as "*Low Negative*" since in terms of the overall extent of the vegetation type this project would have marginal negative implications.

9.18. It is concurred with the appeal that *"The initial assessment identified the dam sites as Breede Alluvium Fynbos and thus a biodiversity offset was pursued. However, upon assessment of the site it was determined that the vegetation occurring at the dam sites is Least Threatened Breede Shale Renosterveld and not Breede Alluvium Fynbos as previously stated"*.

9.19. At the same time, it is also concurred with the Department's responding statement that the localised impacts on the receiving environment that resulted from the activities undertaken on site cannot be ignored.

Appellant not responsible for undertaking the unlawful construction of the dam

9.20. The abovementioned section 24G Standard Operating Procedure for the determination of administrative fines further states that a decision-maker may deviate from the administrative fine calculated with the administrative fine calculator based on the following reasons, *inter alia*:

- 9.20.1. Aggravating circumstances such as blameworthiness (was the activity committed in flagrant disregard of the law), non-compliance history (repeat or habitual offender), risk of environmental harm and ignoring previous advice from the Department.
- 9.20.2. Mitigating circumstances, preventative measures, cooperation with the Department, self-reporting, immediate voluntary remediation and personal circumstances of the offender.

9.21. The following mitigating factors outlined in the appeal are noted:

- 9.21.1. The appellant was not responsible for undertaking the primary listed activity that is the subject of the section 24G of the NEMA application.
- 9.21.2. The unlawful construction of the so-called Brandwagt Upper Dam was not undertaken by or at the behest of the appellant. That activity was undertaken by some previous land owner some five years before the appellant acquired the subject-property.
- 9.21.3. The fact that the activity was undertaken by a previous land owner was highlighted in the section 24G EIA Report in the completed sections pertaining to section J thereof, where it is set out that: *"Having regard to the factors listed above, you are hereby afforded an opportunity to make representations in respect of the calculation of the quantum of the administrative fine and as to why the competent authority should not issue a maximum fine of R5 million."*
- 9.21.4. It was under the previous land owner's auspices that the construction of the dam was undertaken in or about January 2010. The listed activity of constructing the dam is the primary subject of the section 24G of the NEMA application.

9.22. It is concurred that considering the above, the administrative fine of R625,000 calculated with the administrative fine calculator must be deviated from and the reduced administrative fine must be issued to meet the requirements of section 24G(4) of the NEMA.

Appellant's voluntary submission to the section 24G of the NEMA process

9.23. It is acknowledged that:

- 9.23.1. The appellant voluntarily submitted a section 24G of the NEMA application.
- 9.23.2. The appellant co-operated both with the competent authority in respect of the EA and with other organs of state with an interest in the matter.

9.24. It is concurred that the above should mitigate in favour of a further reduction to the administrative fine as currently quantified by the Department.

Other centrally relevant factors in favour of the reduction of the administrative fine on appeal

9.25. It is noted that:

- 9.25.1. The section 24G EIA Report recommended *inter alia* that, if the listed activities are authorised, all the mitigation measures contained in the Environmental Management Programme ("EMPr") must be implemented and complied with. These mitigation measures contained in the EMPr include, amongst others:
 - 9.25.1.1. Employment of a suitable person to rehabilitate areas (outside of the authorised agricultural expansion area) damaged by construction activities during the project.
 - 9.25.1.2. All disturbed areas related to the development will be maintained and kept clear of invasive alien vegetation species.
 - 9.25.1.3. Annual follow-up clearing shall continue until the affected areas are observed to be clear of alien species.
- 9.25.2. The appellant will, in all reasonable likelihood, undertake removal of invasive alien vegetation and rehabilitation of indigenous vegetation, in certain areas of the farm.
- 9.25.3. If the quantum of the administrative fine is not reduced on appeal, that will limit the appellant's ability to ensure the appropriate capital expenditure on botanical rehabilitation and/or clearing of invasive alien plants on the property.
- 9.25.4. The appellant has incurred significant additional expenses to date, including fees raised by the EAP and the specialist consultants retained by the appellant in terms of this section 24G of the NEMA application.
- 9.25.5. Other significant expenses incurred by the appellant in relation to the regularisation of the current situation include the retention of consultants to pursue the relevant application for a water use licence as obliged in terms of the relevant provisions of the *National Water Act, 1998 (Act No. 36 of 1998)*.
- 9.25.6. The appellant also commissioned a dam safety evaluation report which included an assessment in respect of the dam.
- 9.25.7. The appellant delivered a Notice of Intention to Develop to the provincial heritage resources authority i.e. Heritage Western Cape.
- 9.25.8. A further reduction in the administrative fine will have significant positive benefits for the farming operations on the appellant's property as any benefit derived by the appellant from the proposed reduction of the administrative fine on appeal will be utilised to further the appellant's sustainability initiatives which include the creation of additional employment opportunities and ensuring compliance generally with the EMPr which is aimed at facilitating appropriate environmental input during all further phases of the project (if the project is authorised).
- 9.25.9. The quantum of the administrative fine is not reduced on appeal, that will limit the appellant's ability to ensure the appropriate capital expenditure on botanical rehabilitation and/or clearing of invasive alien plants on the property.
- 9.25.10. Considering the above, it is concurred that the above factors mitigate in favour of a further reduction to the administrative fine.

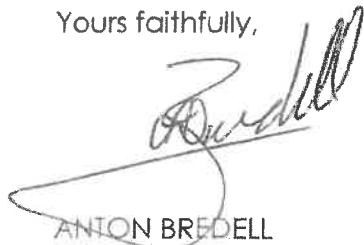
Concluding comments: relief sought on appeal

9.26. 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 environmental authorisation by appellants with similar circumstances as in this case.

9.27. After considering all the above factors and relevant documentation, I am of the view that a deviated fine of R50,000 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 NEMA.

The National Environmental Management Principles (set out in section 2 of the NEMA) which apply to the actions of all organs of state, serve as guidelines by reference to which any organ of state must exercise any function when taking any decision, and which must guide the interpretation, administration and implementation of any other law concerned with the protection or management of the environment. In terms of the NEMA Principles, the effects of decisions on all aspects of the environment are to be taken into account. As such, the consideration, assessment and evaluation of the social, economic and ecological impacts of activities (disadvantages and benefits) must be undertaken, and decisions are to be appropriate in the light of such consideration and assessment.

Yours faithfully,



ANTON BREDELE

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

DATE: 7/2/9/2019

Copied to:

- (1) Mr Ross Holland (Eco Route Environmental Consultancy)
- (2) Mrs Zaidah Toefy (Sub-directorate: Rectification)
- (3) Mr Tashreeq Bennett (Sub-directorate: Financial Accounting)
- (4) Mr Nicholas Smith (Nicholas Smith Attorneys)
- (5) Ms Alana Duffel-Canham (CapeNature)

Fax: 086 402 9562

Email: info@hollandassociates.net

Email: Zaidah.Toefy@westerncape.gov.za

Email: Tashreeq.Bennett@westerncape.gov.za

Email: nicks@nsmithlaw.co.za

Email: aduffel-canham@capenature.co.za



REFERENCE: 14/3/6/B5/17/0396/19

Adv. Charmaine Maré
Directorate: Environmental Governance
Western Cape Department of Environmental Affairs
and Development Planning
Private Bag X9086
CAPE TOWN
8000

Tel: (021) 483 0502

Email: Charmaine.Maré@westerncape.gov.za

Dear Adv. Maré

APPEAL LODGED IN TERMS OF SECTION 43(2) OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT, 1998 (ACT NO. 107 OF 1998) AGAINST THE ADMINISTRATIVE FINE DECISION ISSUED FOR THE UNLAWFUL CONSTRUCTION OF THE BRANDWAGT UPPER DAM ON THE REMAINDER OF PORTION 77 OF FARM BRANDWAGT NO. 187, WORCESTER

Your responding statement lodged with regards to the appeal lodged against the section 24G Administrative Fine decision issued on 11 February 2019, refers.

Please find attached the Appeal decision regarding this matter as issued to Beukes Broers Trust, i.e. the applicant in terms of section 24G of the *National Environmental Management Act, 1998 (Act No. 107 of 1998)* ("NEMA").

Your interest in the future of our environment is greatly appreciated.

Yours faithfully,

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

DATE: 12/9/2019

Copied to:
Ms Zaidah Toefy (Sub-directorate: Rectification)

Email: Zaidah.Toefy@westerncape.gov.za