



REFERENCE NO: 14/3/6/F4/5/0428/19

Mr Jan Daniel Britz
P.O. Box 4426
MODIMOLE
0510

Tel: (014) 717 1946
Email: daanb@stgafrika.com

Dear Mr Britz

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 CLEARANCE OF VEGETATION ON PORTION 1 OF FARM NO. 305, HOPEFIELD

1. Your appeal lodged against the Administrative Fine decision issued by the Department of Environmental Affairs and Development Planning on 29 August 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 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 **R25,000** (Twenty-five 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: S24G00244
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 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.:	S24G00244

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. However, the payment of the administrative fine in instalments may be arranged with the competent authority. 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. **REASONS FOR THE DECISION:**
The following are reasons for upholding your appeal and vary the original administrative fine issued by the delegated authority:

Introduction

- 8.1. The voluntary application in terms of section 24G of the NEMA is acknowledged but an unlawful activity has been commenced with without an EA prior to its commencement.
- 8.2. 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, in the rectification process of the unlawful activity, to pay an administrative fine which may not exceed R 5 million.
- 8.3. Section 24G(4) of the NEMA does not make provision for exemption from the payment of the administrative fine.

- 8.4. In the Application form, it is confirmed that the commencement of the following listed activity was triggered by the clearing of 10.3 ha of natural Hopefield Sand Fynbos and the applicant planted 750 date palms for a commercial agriculture venture in November 2017:

Government Notice No. R. 983 of 4 December 2014 (as amended by Government Notice No. R. 327 of 7 April 2017):

Activity Number 27:

"The clearance of an area of 1 hectares or more, but less than 20 hectares of indigenous vegetation, except where such clearance of indigenous vegetation is required for—

- i. the undertaking of a linear activity; or*
- ii. maintenance purposes undertaken in accordance with a maintenance management plan."*

Background

- 8.5. It is noted / acknowledged that:

- 8.5.1. The impacts associated with the activities undertaken need to be assessed in the context of the existing rights held over the property and the historical use of the property.
- 8.5.2. The property is zoned for agriculture and is owned by the applicant in his individual capacity and not as a company.
- 8.5.3. The property was purchased on the understanding that the zoning allowed the farm to be cultivated and farmed on the further understanding that the property has previously been cultivated. The applicant was not aware of the fact that after a period of 10 years without cultivation, the previously cultivated farmland is regarded to be undeveloped for the purposes of the NEMA and its EIA Regulations. Evidence of strip farming in the past is still apparent from current and past Google Earth aerial photographs.
- 8.5.4. As part of the applicant's investment in the property and its farming operations, the applicant cleared an area of 10.3 hectares of which 2.4 hectares was ripped to plant 750 date palm trees and a further 1.3 hectares was ripped and planted with feed for the applicant's cattle and sheep.
- 8.5.5. Although the section 24G EIA Report refers to the date palm plantation and its harvest being intended for the "export market", this is entirely overstated as the activity is intended to sustain the applicant and his wife in their retirement. The applicant points out that he has no packaging facility or export contract or an export licence or any European Union or other certification to export. He points out further that 750 date trees will not constitute a viable economic unit for export which would require at least 1000 trees to be viable.
- 8.5.6. The activities were carried out in the bona fide but mistaken belief that the property's zoning permitted the activities without the need for further statutory approvals.
- 8.5.7. Once the applicant became aware that prior EA was required, he immediately consulted Riaan Van der Walt of Advanced Environmental Corporation for advice on how to rectify the clearing activities.

- 8.6. It is concurred with the Department, as detailed in the responding statement, that:

- 8.6.1. Ignorance of law (relating to the appellant not knowing that fallow land in a 10-year period or more triggers a listed activity as per the definition of indigenous vegetation contained in the EIA Regulations' Listing Notices) is a poor argument.

- 8.6.2. The zonation of the farm does not exempt a farmer from obtaining the necessary permits to undertake farming, this not only includes a permit for cultivation in terms of the *Conservation of Agricultural Resources Act, 1983 (Act No. 43 of 1983)* ("CARA"), but also the requirement for EA if such farming activities trigger a listed activity.
- 8.6.3. As an example, a homeowner does not automatically build a residential dwelling without the required approvals just because the Erf is zoned residential.
- 8.6.4. The activities relating to farming that require an EA have been in effect for more than 20 years.
- 8.6.5. The activities relating to the clearance of indigenous vegetation have been in effect since 2006.
- 8.6.6. Any person wishing to undertake a venture should familiarise themselves with the necessary legal requirements to undertake that venture.

The fine decision and grounds of appeal

- 8.7. On 18 December 2013, sub-sections 44 (1) (aC) and (1B) of the *National Environment Laws Second Amendment Act, 2013 (Act No. 13 of 2013)* ("NELSAA") came into effect. Section 44 (1) (aC) of the NELSAA stated that "The Minister may make regulations relating to the procedure and criteria to be followed in the determination of an administrative fine in terms of section 24G".
- 8.8. On 20 July 2017, the Regulations relating to the procedure to be followed and criteria to be considered when determining an appropriate fine in terms of section 24G ("Fine Regulations") were promulgated in terms of section 44(1)(aC) and (b) of the NEMA. Regulation 4(1) of the Fine Regulations states the following:
 - "The fine committee, when determining the proposed quantum of the fine, as well as the competent authority when determining the fine in terms of section 24G(4), must take the following considerations into account-
 - (a) the information submitted by an applicant in terms of section 24G(1)(b)(vii)-(viii);
 - (b) the completed application form, including Section C of Annexure A, Part 1 of which is to be completed by the applicant's environmental assessment practitioner;
 - (c) the impacts or potential impacts, including the cumulative impacts, of the activity or activities namely-
 - (i) the socio-economic impact;
 - (ii) the biodiversity impact;
 - (iii) the impact on sense of place and/or heritage; and
 - (iv) any pollution and/or environmental degradation which has been, is being or may be caused by the activity or activities.
 - (d) any technical or specialist advice or information on local knowledge received pursuant to Regulation 3(3) above.
 - (e) the compliance history of the applicant, namely-
 - (i) whether or not administrative enforcement notices, including pre-notices where appropriate, have previously been issued to the applicant in respect of a contravention of section 24F(1) of the Act and/or section 20(b) of the *National Environmental Management Waste Act*;
 - (ii) whether or not the applicant has previously been convicted in respect of a contravention b of section 24F(1) of the Act and/or section 20(b) of the *National Environmental Management Waste Act*; and

- (iii) whether or not the applicant has previously submitted a section 24G application in respect of an activity or activities which commenced prior to the activity or activities that are the subject of the current application.
- (f) whether the applicant is a firm or a natural person; and
- (g) any other representations made by the applicant in terms of Annexure A Section C in respect of the quantum of the fine."

- 8.9. The EIA Report, as compiled by an independent EAP in terms of section 24G of the NEMA states/found the following:
- 8.9.1. The project involves the clearance of vegetation activity in November 2017 where the following was undertaken:
 - 8.9.1.1. The applicant i.e. Mr Britz cleared 10,3 ha of natural Hopefield Sand Fynbos and planted 750 date palms for a commercial agriculture venture. Water is obtained from two new boreholes on the property.
 - 8.9.1.2. Mr Britz also constructed two storage/packing sheds next to the date orchard. The development is bordered by an existing gravel road that is used to access the site while a new 4x4 road gives access to the new sheds. The two 12 x 30 m storage sheds were constructed to store his agricultural equipment that will be used as part of his farming enterprise on the property.
 - 8.9.2. The 10.3 ha that was unlawfully cleared is next to an existing road that runs through the property. access to the new storage sheds is via a new sandy 4x4 track. Power is supplied by photovoltaic solar panels located on the roof of the new storage shed.
 - 8.9.3. The applicant planted 750 small date palms under drip irrigation on the 10,3 ha that was unlawfully cleared. The water for the drip irrigation comes from a borehole next to the one new storage shed. The applicant has applied for a water use licence in terms of section 40 of the *National Water Act, 1998* (Act No. 36 of 1998).
 - 8.9.4. The vegetation or groundcover, before the commencement of the activity, was Hopefield Sand Fynbos dominated by asteraceous and restioid fynbos, although proteoid species are also present in this vegetation type.
 - 8.9.5. The cleared area was 100% natural although historical satellite photographs indicate strip disturbance throughout the property. Scattered alien trees (Port Jackson willow) are present to the east of the cleared site.
 - 8.9.6. The vegetation on the property, including the site, is dominated by restioid species and the percentage of Proteaceae, (*Leucospermum rodolentum* and *Serruria fucifolia*) and Asteraceae species. Other woody shrubs that are common include *Searsia spp.* In the winter and spring geophytes also emerge.
 - 8.9.7. The natural vegetation (Hopefield Sand Fynbos) was cleared and date palms were planted under drip irrigation in rows. Some natural vegetation has re-sprouted between the rows of date palms and the applicant intend to brush-cut this to keep it from competing with the date palms.
 - 8.9.8. The farm was used for grazing by the previous owner and no cultivation has taken place within the last ten years. The natural vegetation is in a good condition although historical veld management practices (strips) are visible on aerial photographs but not visible on the ground.
 - 8.9.9. The property is zoned for agriculture but authorisation should first be obtained to clear natural vegetation.
 - 8.9.10. The Hopefield area is a moderate agricultural development area in the Provincial Spatial Development Framework ("PDSDF"). The PSDF also gives

the following guidelines on development outside an urban edge: Compatible and sustainable rural activities (i.e. activities that are appropriate in a rural context, generate positive socio-economic returns, and do not compromise the environment or ability of the municipality to deliver on its mandate) and of an appropriate scale and form can be accommodated outside the urban edge (except in bona fide wilderness areas).

- 8.9.11. The activity provides an important social service/ infrastructure to the affected community as the activity will create permanent and temporary employment within a community that suffers from high unemployment rates. Post-commencement of the unlawful activity the project employs 2 persons from Hopefield town and 10 x permanent staff will be employed as soon as date palm trees reach maturity.
 - 8.9.12. The activity permanently transformed/destroyed 10,3 ha of natural Hopefield Sand Fynbos. This vegetation type is formally protected in the neighbouring West Coast National Park and in the neighbouring Hopefield Nature Reserve.
 - 8.9.13. The applicant bought the property with the intension of starting an agricultural venture in the Western Cape. The property did not have any cultivated land so clearing of land was the only option for the planting of date palms but the applicant should have applied for environmental authorisation before he cleared the land.
- 8.10. The following factors were considered when determining an appropriate fine in terms of section 24G of the NEMA and the Fine Regulations:

Socio-economic impact

The EAP stated that:

- 8.10.1. *"The activity will not give rise to any negative socio-economic impacts".*
- 8.10.2. The activity created jobs, considered to be a positive and not a negative impact.

Biodiversity impact

- 8.10.3. *"The activity could give rise to localised biodiversity impacts."*
- 8.10.4. The activity permanently destroyed 10.3 ha of Vulnerable Hopefield Sand fynbos with its associated threatened species.

Sense of place Impact and/or Heritage Impact

- 8.10.5. *"The activity is in keeping with the surrounding environment and/ or does not negatively impact on the affected area's sense of place and/or heritage."*
- 8.10.6. The activity has not impacted on any heritage or cultural aspect. The property is zoned for agriculture and the activity is in line with other farming activities in the area.

Pollution Impact

- 8.10.7. *"The activity will not give rise to any pollution."*
- 8.10.8. The activity has been completed and the cultivation of date palms does not create any pollution.

Compliance history and knowledge of the applicant

- 8.10.9. No administrative action has been undertaken against the applicant in terms of the NEMA and Specific Environmental Management Acts ("SEMA").

Previous convictions in terms of the NEMA and SEMA

8.10.10. The applicant confirmed that he has not been convicted in terms of the NEMA and SEMA.

Applicant's legal persona

8.10.11. The applicant confirmed that he is a natural person and not a firm or company.

Relevant information that the applicant would like to be considered

8.10.12. The applicant unlawfully cleared 10.3 ha of natural veld and planted date palms. The applicant is from Limpopo Province and was not aware that it was unlawful to clear natural veld in the Western Cape Province. When the applicant found out that his actions were unlawful, he immediately contacted an EAP to start with the section 24G application.

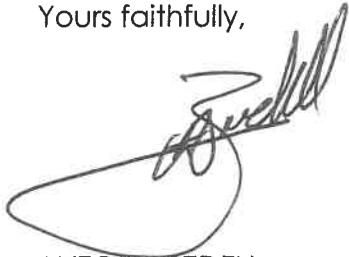
Conclusion

- 8.11. Sub-regulation 4(4) of the Fine Regulations states that *"When calculating the proposed quantum of the fine, or the fine, as the case may be, the fine committee and the competent authority must use the fine calculator approved by the Minister."* Sub-regulation 4(4) of the Fine Regulations states that *"When calculating the proposed quantum of the fine, or the fine, as the case may be, the fine committee and the competent authority must use the fine calculator approved by the Minister."*
- 8.12. I do not consider it appropriate that the applicant was issued an administrative fine of a firm or company i.e. the decision currently subject to this appeal process. Therefore, I consider that an administrative fine of R25,000 is appropriate in terms of section 24G(4) of the NEMA. The reasons to reduce the administrative fine include *inter alia* the following mitigating factors (which have already been alluded to above):
- 8.12.1. The applicant voluntarily applied in terms of section 24G of the NEMA although an unlawful activity has been commenced with without an EA prior to its commencement.
 - 8.12.2. The applicant confirmed that he is a natural person and not a firm or company as issued in the decision which is subject to this appeal process.
 - 8.12.3. Section 24G(4) of the NEMA requires an applicant that has commenced with an activity without an authorisation, in the rectification process of the unlawful activity, to pay an administrative fine which may not exceed R 5 million.
 - 8.12.4. Section 24G(4) of the NEMA does not make provision for exemption from the payment of the administrative fine.
 - 8.12.5. In the Application form, it is confirmed that the commencement of the listed activity was triggered by the clearing of 10.3 ha of natural Hopefield Sand Fynbos, which is considered vulnerable in terms of its conservation status.
- 8.13. Considering the above, an administrative fine of R25,000 (Twenty-five thousand rand) which is an appropriate administrative fine for an individual or natural person must be paid in terms of section 24G(4) of the 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 considered. 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,

A handwritten signature in black ink, appearing to read 'Anton Bredele', written over a large, light-colored oval shape.

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

DATE: 9/12/2019

CC: (1) Mr Johannes Adriaan van der Walt (Advanced Environmental Corporation (Pty) Ltd)

Email: admin@aecorp.co.za

(2) Directorate: Financial Management)

Email: DEADP.Banking@westerncape.gov.za