

Progress in implementation of the prohibition on disturbing natural forest on privately owned land in the Eastern Cape Province, South Africa

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Abstract

Section 7 of the National Forests Act No 84 of 1998 prohibits the cutting, disturbing, damaging or destruction of any indigenous tree in a natural forest. The Act provides for the appointment and empowerment of forest officers for law enforcement purposes, and specifies penalties for contravention of the prohibition. Despite this contraventions are commonplace on private land in the Eastern Cape, and invariably reflect perceived entitlement on the part of owners to do as they see fit on their property, coupled with low or absent regard for the Act as a deterrence factor.

Various cases of transgression of the prohibition are examined, with accounts being offered of the circumstances in which they have occurred; the response of the Department of Agriculture, Forestry & Fisheries, which is responsible for enforcing the Act; the efforts of interested and affected parties to ensure outcomes in line with the Act's precepts, and the performance of the criminal justice system in expediting the prosecution of offenders.

It is shown that the Department has consistently failed to mobilise in accordance with the legal responsibilities conferred on it by the prohibition, and seventeen years into the Act's lifespan, remains seriously under-equipped to impose itself in the face of ongoing flouting of this key provision. The concurrent failure of the justice system to pursue criminal action initiated by the Department is also highlighted. Observations are made about the implications of the *status quo* for future enforcement efforts, while interventions are proposed for raising the profile of the prohibition and the capacity of the Department to uphold it.

Key words: prohibition, contravention, capacity

Introduction

The Department of Agriculture, Forestry and Fisheries (DAFF) has indicated that 55,6% of indigenous forest in South Africa is located on privately-owned land,ⁱ and that 36,5% of this amount falls within the Eastern Cape Province. This means that effectively more than 20% of the country's indigenous forest vests in private hands in the Province. The bulk of this forest occurs in the Province's western portion,ⁱⁱ with much of it being situated within 50 km of the coastline (see Figure 1), in accordance with the prevalence there of aeolian-derived land forms, with associated dune forest cover. There are substantial forest elements within the immediate vicinity of the cities of Port Elizabeth (see Figure 2) and East London, as well as in and around the numerous resort towns and villages which are interspersed along the coast. Although ground observation and aerial imagery reveals that much forest has been eradicated from the agricultural land which predominates beyond these settlements, significant tracts still persist in places.



Figure 1: Map depicting privately-owned natural forest in the Eastern Cape Province, South Africa.¹



Figure 2: Typical coastal dune forest on the outskirts of Port Elizabeth.

¹ Derived from *National Forest Index (NFI) Indigenous Forest Map, June 2009*, Department: Agriculture, Forestry and Fisheries, Republic of South Africa.

Historical backdrop

Prior to the promulgation of the National Forests Act (Act 84 of 1998) (NFA), indigenous forest *per se* was not afforded legal protection in South Africa. A limited number of forest tree species could only be disturbed under cover of a licence, but in effect, indigenous forest could legally be destroyed as long as protected specimens were spared. Within this context land owners tended to clear forest virtually at will, and formerly forested landscapes which now exhibit only isolated specimens of protected trees are commonplace.

Promulgation of National Forests Act

The promulgation of the NFA fundamentally changed the complexion of South African forest law. Crucially, the Act gives recognition to what is termed *natural forest*, which includes any *group of indigenous trees whose crowns are largely contiguous*.ⁱⁱⁱ Complementing this, the Act further stipulates that *no person may cut disturb, damage or destroy any indigenous living tree in a natural forest.....except in terms of a licence issued under pertinent provisions of the statute*.^{iv} Any person who contravenes the prohibition *may be sentenced on a first conviction.....to a fine or imprisonment for a period of up to two years, or to both a fine and such imprisonment*.^v

Key question and scope of paper

The key question arising from the promulgation of the prohibition relates to the efficacy with which it has been implemented. This question is considered on the basis of the writer's interaction with the implementation of the Act whilst serving first as an environmental manager in the State sector, and latterly while monitoring the performance of DAFF as a member of the Public Service Accountability Monitor. Substantiation of the situations and events outlined in the paper can be located within both State and PSAM records of routine operations and strategic engagement.

Incidental rollout of the prohibition on natural forest disturbance

It is important to note there was no active rollout *per se* of the prohibition in the Eastern Cape when it came into legal effect in 2000,² and moreover, that the Forestry component of DAFF³ had virtually no presence in the western portion of the Eastern Cape, where forest abounds on private land. Part of this area fell under the auspices of the Department's office in Knysna, which lies some 300 km west of Port Elizabeth and is located in the Western Cape Province, while the area's eastern reaches resided under DAFF's King Williams Town office, in the vicinity of East London. On the one hand, the Knysna office had had little operational involvement in the Province because the provincial nature conservation authority had, by assignment, administered the preceding species-focused legislative dispensation on DAFF's behalf. On the other, given the historical alignment between the King Williams Town office and the nominally independent former Ciskei state, that office's preponderance was for forest protection on State and communal land, and it had no visible presence in the western regions of its jurisdiction.

At the same time, Port Elizabeth-based members of the provincial Department of Economic Development, Environmental Affairs and Tourism (DEDEAT) had, since the promulgation of the country's first set of environmental impact assessment regulations in 1997, been working to eliminate the indiscriminate subdivision of forested land for property development purposes, and since this initiative dovetailed with the prohibition, after the latter came into effect DEDEAT actively pursued a cooperative approach to forest-related governance with Knysna, which drew that office increasingly into

² Although the NFA was promulgated in 1998 the prohibition only came into effect in 2000.

³ For correctness it must be pointed out that at the time the forestry function fell within the Department of Water Affairs and Forestry, and DAFF as such did not exist. However for practical reasons the Department is consistently referred to as DAFF in this paper.

the Province's domain. Indeed, the DEDEAT-DAFF partnership rapidly extended beyond the realm of property development to include compliance monitoring and stakeholder interaction, and led to the profile of both DAFF and the prohibition being consistently raised in the western part of the Province.

Absence of law enforcement capacity

In the aftermath of the prohibition coming into effect Eastern Cape DAFF personnel were trained with a view to their being appointed as *forest officers*, who in terms of the NFA have *in respect of any offence all the powers vested by law in a police official, and may enter and search premises without a warrant if they have reason to believe that an offence has been or is being committed there, seize material believed to be associated with an offence, and arrest any person whom he or she reasonably suspects to have committed an offence.*^{vi} In 2001 DEDEAT staff were additionally trained by DAFF in order to supplement the NFA enforcement capacity in the Province.

Staggeringly, however, and in a grave indictment of DAFF leadership, some seventeen years since the NFA was promulgated the Department has yet to translate the delivery of training into the accreditation of personnel as forest officers, with not a single Eastern Cape DAFF or DEDEAT staff member who was trained having subsequently been legally empowered to enforce the NFA. In the Province therefore the prohibition has to be implemented by officials who are not equipped with the most elementary powers to do so.

Ongoing cooperative governance

Notwithstanding DAFF's failure to appoint forest officers, the Knysna-DEDEAT partnership foiled numerous schemes which would have resulted in significant destruction of natural forest. In one notable instance early intervention halted the illegal clearing of forest in apparent defiance of DEDEAT notification that authorization would not be granted for a proposed estate, and a concerted effort was subsequently mounted by the developers to obtain political support for their intentions. Eventually the proposal was formally rejected, but in keeping with other such cases opened in that period, criminal charges instituted for the transgression did not culminate in prosecution.

A positive spinoff of the plethora of property development proposals appraised by DAFF in that period was that they honed the Department's outlook, and led to its publication in 2009 of a seminal policy framework, entitled *Policy Principles and Guidelines for the Control of Development Affecting Natural Forest (PP&G)*, which established clear bounds of permissibility for activities with the potential to impinge on natural forest. Crucially, the framework provided clear direction on the NFA principle that *natural forests must not be destroyed save in exceptional circumstances where, in the opinion of the Minister, a proposed new land use is preferable in terms of its economic, social or environmental benefits,*^{vii} specifying that "exceptional circumstances" pertained to *capital projects of national and provincial strategic importance, and excluded residential development and agriculture.*^{viii}

Jurisdictional shift repercussions

But for the Department's failure to appoint forest officers, implementation of the NFA remained on track in the western part of the Eastern Cape up until the mid-2000's, although as a result of key personnel changes in DEDEAT, its role had begun to diminish, and the impetus for ensuring that the Act was upheld was increasingly being generated from within civil society. However in 2008 the King Williams Town office's jurisdiction was extended to the Province's western boundary, which had the effect of summarily excluding Knysna from involvement in the Eastern Cape, thereby seriously threatening to undermine the gains which had been made since 2000. This jurisdictional shift was purportedly counter-balanced by the appointment of an official in Port Elizabeth to take charge of NFA implementation, but the incumbent had previously been associated with the Ciskei administration, and by their own admission (to their enduring credit) staff with this operational background were literally not prepared for the rigors of upholding the prohibition on private land.

That the officials who took charge of the area were patently out of their depth was rapidly demonstrated by an estate development scheme outside Port Elizabeth in 2009. In a situation not dissimilar from the one previously described, forest was illegally eradicated in an effort to preempt a preferred development layout, for which an associated rezoning and subdivision application was simultaneously lodged with the local authority. Local stakeholders duly approached DAFF to intervene, in response to which the Department undertook to institute criminal proceedings against the developer, and to convey to the local authority that the PP&G precluded the issuing of licences for the project. At DAFF's request a group of stakeholders accompanied officials to initialize criminal proceedings at the local police station, where the officials' incapability was cruelly exposed when they were unable to formulate the necessary charges, and the stakeholders had to do it on their behalf. Over and above this, when the disputed scheme was later approved by the local authority despite the ostensibly watertight nature of the prohibition, it emerged that in the interim DAFF had abjectly failed to engage the authority in accordance with its undertaking.

From that point until the present DAFF has inevitably been on the defensive in this matter, not only as a result of its own omission, but also because of the subsequent emergence of clear resistance to the strictures of the NFA on the part of both the local authority and the provincial authority to whom the matter was referred on appeal. The local authority had approved the scheme despite stakeholders having provided it with comprehensive submissions relating to the PP&G, which were later backed up by an appeal tabled by DAFF. However the appeal was blithely brushed aside, the Department's standing indubitably having been diminished by the fact that it had failed to interact effectively with the project at its inception stage. On the back of this the developer has unsurprisingly refused to accede to DAFF and the NFA, and engaged in further unlawful site deforestation. The officials who were thrust into this case simply lacked the capacity and confidence to intervene as required. Brinkmanship and outright defiance are recurring themes in the ongoing effort to ensure that the NFA is rightfully imposed on proceedings relating to forested private land in the Eastern Cape, and DAFF under King Williams Town's jurisdiction was woefully unprepared for countering these dynamics.

Ongoing challenges and civil-State cooperation

The synergy which developed between DAFF and stakeholders during the estate development saga described above provided a template for future cooperation, which is now embodied in the *Natural Forest Coordinating Committee*, a joint State-civil structure which seeks to facilitate the administration of the NFA. The need for this entity is constantly affirmed, with a relentless array of illegal deforestation incidents and property development proposals with significant forest destruction implications requiring the ongoing attention of all role-players who can contribute to upholding the Act.

The situation is not helped by the fact that in some twenty instances, criminal charges have not resulted in prosecutions. Indeed, in the fifteen years since the Act came into effect, there has only been one single NFA prosecution in the Eastern Cape. In that case, which involved the unlawful felling of trees for high-value timber in 2001 (and was initiated by players from outside of DAFF), convictions were eventually handed down in 2008, but the accused were granted leave to appeal, and the appeal hearing is yet to take place. Suffice it to say that the criminal justice system is clearly not geared for pursuing NFA-related crimes, and that extensive effort is required to raise their profile within the prosecutorial sector. In the interim, fatigue and logistical constraints have resulted in charges not being laid in more than forty known other cases of illegal deforestation.

Within this context a culture of impunity flourishes, and intimidation, harassment and the ostracizing of whistle-blowers and objectors are not unusual occurrences. A recent extreme instance involved a stakeholder being subjected to a damages claim of R1 million for reacting on a social media platform to an unlawful deforestation incident. At the same time, active resistance to, or, at best, disregard for the NFA by other organs of state continues unabated. Unfazed by being called out for its role in the controversial estate development, the Port Elizabeth local authority persists in supporting schemes which do not pass muster under the Act, while another local authority is pursuing the development of a marina on forested public open space.

On the other hand there has been progress in so far as DAFF's role in criminal action is concerned. Once laid, the charges in the Port Elizabeth estate development imbroglio were not pursued by the Department, and were simply left to the police to handle, with predictable results – no meaningful investigation occurred, and neither did prosecution. More recently, however, specialist DAFF Head Office personnel have been deployed to compile sophisticated, scientifically sound affidavits, and in a recent landmark event one such submission was finally interrogated in detail by a prosecutor, notwithstanding that prosecution did not ensue because of an administrative bungle by the local DAFF case officer which created reasonable grounds for the offender to claim that the Department had by default pre-condoned his illegal action.

And thus proceeds the effort to impose the NFA, generally against the odds and with ongoing setbacks, but also with inexorable progress, although at great cost to those involved. In 2013 the effort was brought to a head when DAFF declined to issue a licence for another contentious coastal estate development proposal, and the developers prevailed on the High Court to review the Department's action. Proceedings remain in the preparatory phase in the matter, and stakeholders look forward in the hope that the Court will uphold DAFF's points of departure. But in the interim, similar litigation has been entered into by the owners of a further property unit, in a different coastal location, where DAFF has also declined to issue a deforestation licence.

Fifteen years into the operational lifespan of the NFA DAFF is flexing its muscles, and the holders of vested interests which do not accord with the scope of the Act are fighting back. Based on the Department's track record to date these opponents have grounds to believe that they are dealing with an organisation which does not have the wherewithal to withstand resistance, but the conviction of dedicated operational officials, fuelled as it is by cooperation with elements of civil society, should not be underestimated.

Conclusion

DAFF leadership has manifestly failed to spearhead the implementation the NFA prohibition on disturbing natural forest on private land in the Eastern Cape, and to equip the Department's operational arm to meet the challenges associated with this aspect of its mandate head-on. However despite this, significant progress has been achieved in rolling out the prohibition, through a collective effort on the part of committed individuals within the Department, civil society and DEDEAT. Substantial challenges remain, but a solid foundation exists for consolidating and building upon gains achieved thus far.

Recommendation

Top Departmental leaders are urged to take note of the lessons which have been learned through the Eastern Cape experience, and to internalize them within the Department's strategic and operational frameworks.

Acknowledgements

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References

ⁱ Department: Agriculture, Forestry and Fisheries, Republic of South Africa. *National Forest Index (NFI) Indigenous Forest Map, June 2009.*

ⁱⁱ *Ibid.*

ⁱⁱⁱ *National Forests Act, 1998 (Act No. 84 of 1998) as Amended, section 2.*

^{iv} *Ibid*, section 7.

^v *Ibid*, sections 58 and 62.

^{vi} *Ibid*, sections 67 - 69.

^{vii} *Ibid*, section 3.

^{viii} Department: Agriculture, Forestry and Fisheries, Republic of South Africa. *Policy Principles and Guidelines for Control of Development Affecting Natural Forests September 2009, p. 8.*