

## SELLING RIGHTS TO USE WATER IN AGRICULTURAL SECTOR

**South African Association for Water User Associations and Others v Minister of Water and Sanitation and Others; CJ Lotter N.O. and Others v Minister of Water and Sanitation and Others; FGJ Wiid and Others v Minister of Water and Sanitation and Others (71913/2018; 42072/2018; 90498/2018) [2020] ZAGPPHC 252 (19 June 2020)**

*In the commercial agricultural sector, there existed a longstanding practice in which the holder of water rights who was not utilising the rights, or only using part of the quota, could sell to or trade such rights with a third party. This judgment deals with an application by purchasers of such rights to order the Department of Water and Sanitation to give effect to their purchase and issue the required licence, after the Director General refused to do so following on a new Directive in this regard. Ultimately the Court agreed with the Department, stating that such private sale agreements of water-use entitlements would frustrate equal access to water resources and keep historically disadvantaged persons out of the agriculture sector. The judgment has far-reaching consequence for the commercial agriculture sector and it is expected to be appealed.*

The Judgment can be viewed [here](#).

## FACTS

*(This summary does not give a full rundown of the facts as that is not necessary for illustration of the outcome.)*

The Court heard three separate applications, wherein the applicants in each case sought, amongst other things, a declaratory order regarding the correct interpretation of section 25 of the National Water Act 36 of 1998 ('the Act'). Section 25 reads as follows:

**"25. Transfer of water use authorisations**

*(1) A water management institution may, at the request of a person authorised to use water for irrigation under this Act, allow that person on a temporary basis and on such conditions as the water management institution may determine, to use some or all of that water for a different purpose, or to allow the use of some or all that water on another property in the same vicinity for the same or a similar purpose.*

*(2) The person holding an entitlement to use water from a water resource in respect of any land may surrender that entitlement or part of that entitlement—*

*(a) In order to facilitate a particular license application under section 41 for the use of water from the same resource in respect of other land; and*

*(b) On condition that the surrender only becomes effective if and when such application is granted."*

As a result of a Circular of the Director general issued in February 2001 on the interpretation of section 25, and for a period of approximately 20 years, the holders of water use entitlement were able to trade on these licences. However, in 2017, the then Director General issued a new circular which departed substantially from the existing practice of trade in water use licences in two respects: Firstly, the new Circular dictated that sections 25(1) and (2) of the Act do not authorise the transfer of a water use entitlement from the holder to another person or third party; and secondly, that the transfer and surrender contemplated in sections 25(1) and (2) respectively does not permit the holder to trade in, or sell such entitlement to third parties.

The view expressed by the Director General in Circular 1 of 2017 was the cause of the present litigation. The

applicants had sold water use entitlements to third parties but the latter purchasers' applications for water use entitlements (in terms of section 41 of the Act) were declined by the Department of Water and Sanitation on the ground that transfer to another person or third party does not fall within the scope and ambit of section 25 of the Act and is not permitted by the provisions thereof.

The shared argument made by all applicants in the three matters were that section 25 permits a holder of the water use entitlements **to sell to or receive compensation** for the transfer or surrender of that entitlement. The State opposed these applications, contending that on a proper construction of section 25, it does not permit the sale or trade in water use entitlements. The crisp issue for determination was therefore whether the reference to 'property within the vicinity' or 'other land' in section 25 of the Act refers to another person or a third party; and further whether the Act permits the sale of, or trade in the water use entitlement, through the transfer or surrender thereof to a third party.

### HELD

- Section 25 has to be interpreted in the spirit of the Constitution. In fact, reference to the subject of water is found in Chapter 2 of the Constitution, the Bill of Rights. In particular, issues concerning water are provided for in section 24 under "Environment"; section 25 under "Property" and section 27 under "Health Care, Food, Water and Social Security". The Bill of Rights makes provision for the enactment of legislation to give further expression and protection of the right. In this regard, the preamble to the Water Act provides guidance to understanding the objective of the Act and what it sought to achieve and reads: "Recognising that water is a scarce and unevenly distributed national resource which occurs in many different forms which are all part of a unitary, inter- dependent cycle; Recognising that while water is a natural resource that belongs to all people, the discriminatory laws and practices of the past have prevented equal access to water, and use of water resources; Acknowledging the National Government's overall responsibility for authority over the nation's water resources and their use, including the equitable allocation of water for beneficial use, the redistribution of water, and international water matters; Recognising that the ultimate aim of water resource management is to achieve the sustainable use of water for the benefit of all users...".
- In essence, the present matter was not about an interpretation of section 25 so much as it was a dispute in respect of water trading, i.e. whether or not it is still permissible for a holder of a water use entitlement to trade in it or sell it, as previously authorised by Circular no 18 of 2001.
- The construction of section 25 contended for by the applicants is intended to justify water trading. Such water trading is no longer permissible, for a variety of reasons based on the purposes of the Act. Firstly, if allowed, the holders of water use entitlements would continue to identify and choose who the recipients of the transferred or surrendered entitlement should be. There is no such authority for the holders of entitlements in the Act. The Act empowers the water institutions to receive the request for transfers and surrender of the water use entitlements. Secondly, there is no authority in the Act, permitting the holders of the entitlements to sell such entitlements. Accepting such a construction of section 25 would result in the privatization of a national resource to which all persons must have access. Thirdly, the sale of water use entitlements by the holders thereof in private agreements discriminates against those who cannot afford the prices or compensation unilaterally determined by the holder. Such practice maintains the monopoly of access to water resources only to established farmers who are financially well resourced. The sale of water use entitlements would further frustrate equal access and keep historically disadvantaged persons' out of the agricultural industry. Water is a scarce resource and South Africa, like most countries in the world, has over the years, not escaped the scourge and devastation of the environment as a result of drought. People, animals, crops and vegetation need water to survive.

### CONCLUSION

The application for a declaratory order was accordingly dismissed.