



ALIENATION OF PRIVATE WATER: A Summary Of The Recent SCA Decision Regarding Transfer and Trading of Water Use Entitlements

1. Introduction

This discussion concerns the case of *Lötter N O and Others v Minister of Water and Sanitation and Others* (725/2020) [2021] ZASCA 159 which was first heard in the North Gauteng High Court (“**High Court**”), and was then appealed to the Supreme Court of Appeal (“**SCA**”). The SCA handed down judgment in this case on 8 November 2021.

The initial application to the High Court concerned the interpretation of section 25 of the National Water Act 36 of 1998 (“**NWA**”), and specifically the legal issue of whether water entitlements may be transferred temporarily or permanently from an entitlement-holder to another person, and whether trading in water use entitlements is permitted. The applicants were unsuccessful in the High Court, and therefore appealed to the SCA to consider the findings by the High Court.

2. Background: North Gauteng High Court Decision

In short, the full bench of the High Court did not really deal with whether the NWA allows water use entitlements to be transferred to a third party, but rather determined that the real issue in dispute between the parties was the ‘question of water trading’. In this respect, it held that the contention advanced by the appellants, concerning the meaning of section 25 of the NWA, was intended to “justify water trading” and that water trading was not permissible in terms of the NWA for the following reasons –

- 2.1. firstly, allowing holders of water use entitlements to transfer their entitlements would “*enable them to continue to identify and choose who the recipients of the transferred or surrendered entitlement would be*”. The High Court further held that the NWA specifically empowers the water institutions to receive the request for transfers and surrender of the water use entitlements;

- 2.2. secondly, that there is no authority in the NWA which permits the holders of the entitlements to sell their entitlements, and allowing holders to do so would result in the “*privatisation of a national resource to which all persons must have access*”; and
- 2.3. finally, the sale of water use entitlements by the holders thereof in terms of private agreements, discriminates against those who cannot afford the prices of compensation unilaterally determined by the holder. Allowing such a system to take place would maintain a monopoly of access to water resources only to established farmers who are financially well resourced, as well as keep historically disadvantaged persons out of the agricultural industry.

The High Court accordingly held that water trade or sale of water use entitlements is unlawful as it offends section 2 of the NWA, and is inconsistent with the spirit, purport and objects of the Bill of Rights in the Constitution. The full bench of the High Court therefore dismissed the applicants’ applications for declaratory orders as to the meaning of section 25 of the NWA to justify water trade.

3. Section 25 of the NWA

Section 25(1) of the NWA provides that: “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 of that water on another property in the same vicinity for the same or similar purpose”.

Section 25(2) of the NWA provides that: “a 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 licence 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.*”

4. SCA Decision: *May Water Use Entitlements Be Transferred?*

The SCA, in considering the decision by the High Court, held that the latter failed to answer the question that was before it, namely whether section 25 of the NWA allowed for the transfer of water use entitlements from one person to another. It highlighted another important question to consider namely whether, if transfers of water use entitlements are envisaged by the NWA, contractual arrangements may be put in place by parties for the effectual sale or leasing of water use entitlements.

The SCA closely considered the wording of section 25(1), and differentiated between the first part of section 25(1) which states that a water management institution may allow an entitlement-holder to use some or all of that water for a different purpose, and the second part of section 25(1) which seems to authorise the entitlement holder to allow someone else to use the water on another property or for a similar purpose.

The SCA further considered section 25(2) which creates a mechanism for the permanent transfer of water use entitlements, and stated that if, in section 25(1) the temporary transfer of water use entitlements includes that transfer to third parties, as highlighted above, then it cannot see any basis for the same not applying to the mechanism for permanent transfers created by section 25(2).

In considering the purposes of the NWA, the SCA held that one of the purposes of the NWA as set out in section 2 is that of 'promoting the efficient, sustainable and beneficial use of water in the public interest' and 'facilitating economic development'. The SCA interpreted section 25, which allows for transfers of water use entitlements from one person to another, to be in harmony with the aforementioned purposes of the NWA. The SCA reasoned that when a water use entitlement has been made, the person to whom it was granted should use it optimally, and if they have no use for it, or have excess water, rather than the water going to waste, a transfer thereof to someone else who could benefit from using it contributes to the attainment of the purposes of the NWA.

5. SCA Decision: *May People Trade In Water?*

The High Court's decision on this aspect was based solely on the interpretation they had that "there is no authority in the NWA permitting holders of entitlements to sell their entitlements". The SCA held that this approach was erroneous, and that the High Court conflated the way in which the law regulates the conduct of public bodies on one hand, and private individuals on the other. It further highlighted the important concept of 'freedom of contract', and the rights that private bodies have to contract with whomever they like insofar as it is permitted by law to do so.

In giving its decision on this issue, the SCA held that the High Court failed to support its assertion that trading in water use entitlements was discriminatory, and that raising the idea that many people could not afford to pay the commercial value of water use was irrelevant as this economic reality does not equate to discrimination. It further stated that the High Court ignored the regulatory framework that the NWA put in place to specifically ensure that transfer of water use entitlements did not have the aforementioned effects. The NWA states that no transfer may occur without the approval of the responsible authority, and in this way the purposes of the NWA are safeguarded and the public interest is furthered. The SCA therefore found that the High Court erred in finding that trading in water use entitlements is unlawful.

6. Conclusion

The SCA held that all three appeals must succeed, and that the orders made by the High Court must be set aside on the basis that the decisions were materially influenced by an error of law.

The SCA accordingly held that –

- 6.1. Section 25 of the NWA permits transfers of water use entitlements, with the approval of the regulatory authority, from the holder thereof to a third party; and
- 6.2. Section 25 of the NWA does not prohibit trading in water use entitlements and accordingly this is not unlawful.