

Constitutional court pronounces on transfer of water use entitlements

Background

Despite previously permitting water use entitlements to be transferred, the Department sent out a circular in 2018 stating that this practice would no longer be permitted as they did not believe that the Act allowed such a transfer. On the basis of two specific cases where commercial farmers had applied to transfer water use entitlements to third parties and the applications were refused, the Constitutional Court was requested to pronounce itself on the interpretation of section 25(1) and (2) of the National Water Act of 1998.

Three questions before the Court were:

- Whether a water management institution may temporarily allow a person to allow the use of his water use entitlement by a third party on a separate property (i.e. temporarily transfer a water use entitlement);
- Whether a water use entitlement obtained in terms of the Water Act may be conditionally surrendered in favour of a third party's application for an entitlement "i.e. permanently transferred" to a third party and, if so,
- Whether a fee may be charged for the transfer.

Arguments raised by Department of Water and Sanitation

The Department argued the ordinary grammatical meaning of section 25(1) of the Water Act does not include the transfer of water use entitlements to a third party. The legal team of the Department contended that only the temporary use of water for the same or similar purpose on another property in the same vicinity by the holder, not a third party was allowed by the Act. They also argued that "transfer of water use authorisations" in the heading under which section 25 falls means no more than the transfer of a water authorisation from one property to another, "and not from an authorised water user to a third party". The legal team argued that wealthy farmers, who are largely white, have created an enclave within which a scarce national natural resource is traded, thus perpetuating the imbalances of the past and that this infringes the right to equality.

Judgement

The matter had travelled a long way to reach the Constitutional Court for a final determination. Initially, the High Court held that on a proper reading of section 25 of the Water Act, trading in water use entitlements is not allowed. On appeal, the Supreme Court of Appeal, in a majority judgement held that section 25(1) and (2) of the Water Act does permit the temporary or permanent transfer of water use entitlements from a holder to a third party. The SCA's judgement was appealed and the Constitutional Court was now called upon for a final and binding interpretation.

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The Court found that the Department's interpretation grammatically did not make sense. What makes sense is that the section means the water management institution may allow the holder to allow use of some or all of the water on another property by another person, i.e. a third person, on a temporary basis.

The Court also found that the Water Act has no provision which expressly prohibits private individuals to conditionally surrender their entitlement to facilitate third party's application and to receive remuneration for doing so. This has colloquially been termed 'trading'. In the absence of a clear enough proscription of trading in water use entitlements, private persons must surely be perfectly entitled so to trade. Section 29(2) appears to acknowledge that it is lawful in terms of the Water Act to enter into a private transaction relating to the use of water with another person and that, when this is done, it is in order for such an arrangement to include the payment of compensation.

Importantly, the court did acknowledge that when a person conditionally surrenders their entitlement in favour of another person's application, that application must still meet all of the requirements for a water use entitlement. In other words, there is no guarantee that the third party's application will be successful. However if they do meet all of the requirements and the entitlement is awarded, the person who gave up their water rights may receive remuneration from that third party.