



- (1) REPORTABLE: YES ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES ~~NO~~
(3) REVISED.

19/6/2020

[Signature]

Case No: 71913/2018

In the matter between:

**SOUTH AFRICAN ASSOCIATION
FOR WATER USERS ASSOCIATIONS**

First applicant

EAGLE'S NEST INVESTMENTS 3 CC

Second Applicant

THUSANO EMPOWERMENT FARM (PTY) LTD

Third Applicant

and

MINISTER OF WATER AND SANITATION

First Respondent

**DIRECTOR GENERAL
DEPARTMENT OF WATER AND SANITATION
SIFISO MKHIZE N.O.**

Second Respondent

Third Respondent

**DEPUTY DIRECTOR GENERAL:
WATER SECTOR REGULATION,
DEPARTMENT OF WATER AND SANITATION**

Fourth Respondent

**DEPUTY DIRECTOR GENERAL:
SPECIAL PROJECTS
DEPARTMENT OF WATER AND SANITATION**

Fifth Respondent

Case No: 42072/2018

In the matter between

CASPER JACOBUS LOTTER N.O. First Applicant

JACOBUS ANDREAS DU PLESSIS N.O. Second Applicant

JOHANNES CORNELIUS HEUNIS N.O. Third Applicant
(THE TRUSTEES FOR THE TIME BEING OF THE DOORNKRAAL BESIGHEIDTRUST IT 844/2003 (E))

and

THE MINISTER OF WATER AND SANITATION First Respondent

THE MINISTER OF ENVIRONMENTAL AFFAIRS Second Respondent

DIRECTOR GENERAL: DEPARTMENT OF WATER AND SANITATION Third Respondent

BRITZKRAAL (PTY) LTD Fourth Respondent

Case No: 90498/2018

In the matter between

FRANCOIS GERHARDUS JOHANNES WIID First Applicant

TORQHOFF BOERDERY (PTY) LTD Second Applicant

FRANCOIS GERHARDUS JOHANNES WIID N.O. Third Applicant

REINETTE JEPPE WIID N.O. Fourth Applicant

CAREL JACOBUS VAN PLETZEN N.O. Fifth Applicant
(THE THIRD, FOURTH AND FIFTH APPLICANTS BEING TRUSTEES FOR THE TIME BEING OF DE KALK TRUST IT51/2008/K)

And

THE MINISTER OF WATER AND SANITATION First Respondent

**THE MINISTER OF WATER AND
ENVIRONMENTAL AFFAIRS**

Second Respondent

**THE DIRECTOR GENERAL: DEPARTMENT OF
WATER AND SANITATION**

Third Respondent

GABRIEL PETRUS VILJOEN N.O.

Fourth Respondent

ANTON ANDRE STRYDOM N.O.

Fifth Respondent

**ANTON STEPHANUS VILJOEN N.O.
(THE FOURTH, FIFTH AND SIXTH RESPONDENTS
ARE THE TRUSTEES FOR THE TIME BEING OF
THE GP VILJOEN TRUST IT3917/94**

Sixth Respondent

Neutral Citation: *South African Association for Water User Associations and others v Minister of Water and Sanitation and others* (71913/2018) [2020]; *CJ Lotter N.O. and others v The Minister of Water and Sanitation and others* 42072/2018 [2020]; *FGJ Wiid and others v The Minister of Water and Sanitation and others* (90498/2018 [2020]

Coram: Mavundla J, Ranchod J and Mothle J.

Heard: 30 and 31 October 2019.

Delivered:

Summary: Section 25 of National Water Act 36 of 1998 – Meaning- Declaratory Orders – whether on a proper interpretation reference to property within the vicinity and to other land refers to property or land owned by another person or a third party- whether a holder of a water use entitlement is permitted to sell such entitlement to another person or a third party. - section 25 of National Water Act does not make reference to another person or to a third party and does not permit sale of water use entitlement.

ORDER

On application before the full bench: The High Court of South Africa, Gauteng Division, Pretoria. (Mavundla J, Ranchod and Mothle JJ) sitting as the court of first instance:

South African Association for Water User Associations and others v Minister of Water and Sanitation and others, case no: 71913/2018

1. The application for a declaratory order is dismissed with costs, including the costs of respondents' two counsel.

CJ Lotter N.O. and others v The Minister of Water and Sanitation and others; case no. 42072/2018.

1. The application for a declaratory order is dismissed with costs, including the costs of respondents' two counsel.
2. The application for exemption in terms of section 7 of PAJA is granted, only in so far as it relates to the application for the declaratory order. The respondents are ordered to pay fifty percent (50%) of the cost, including the applicants' costs of two counsel.
3. The application to review and set aside the decision of the Director General in refusing to grant the application for a water use entitlement, in terms of section 41 of the National Water Act is dismissed with costs, including the costs of the respondents' two counsel.

FGJ Wiid and others v The Minister of Water and Sanitation and others; case no. 90498/2018.

1. The application for a declaratory order is dismissed with costs, including the costs of respondents' two counsel.
2. The application for exemption in terms of section 7 of PAJA is granted, only in so far as it relates to the application for the declaratory order. The respondents are ordered to pay fifty percent (50%) of the costs, including the applicants' costs of two counsel.
3. The application to review and set aside the decision of the Director General in refusing to grant the application for a water use

entitlement, in terms of section 41 of the National Water Act is dismissed with costs, including the costs of the respondents' two counsel.

JUDGMENT

Mothle J (Mavundla J and Ranchod J concurring)

Introduction

[1] The Court heard three separate applications, wherein the applicants in each case sought, amongst others, a declaratory order, contending for a proper interpretation of section 25 of the National Water Act 36 of 1998 ("the Act"). The text of section 25 reads:

'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." (my emphasis)

[2] The applicants' contention in essence is that reference to the words 'on another property within the vicinity' in section 25(1) of the Act and 'in respect of other land' in section 25(2) of the Act, should be interpreted to mean 'property

or other land' as belonging to another person or a third party. In the other two applications, the applicants further contend that section 25 of the Act permits a holder of the water use entitlements to sell to or receive compensation from the said person or third party, for the transfer or surrender of that entitlement. In opposing all three applications, the State respondents contend that on a proper construction of the text, section 25 of the Act refers to the property or land 'belonging to' the holder of the water use entitlement and that there is no reference to another person or third party. Further, that neither section 25 nor any other section of the Act, permits the sale or trade in water use entitlements.

[3] Thus, the crisp issue for determination is 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.

Background

[4] The Water Act 54 of 1956 (Act 54 of 1956), which has been repealed, preceded the current Act. Section 6(1) of that Act had provided as follows:

'1. There shall be no right of property in public water and the control and use thereof shall be regulated as provided in this Act.'

In particular, and as it relates to the sale of water use entitlements, section 5(2) of Act 54 of 1956 stated thus:

'2. A person who is, as contemplated in subsection (1), entitled to the use and enjoyment of private water found on any land of which he is the owner, shall not, except under the authority of a permit from the Minister and on such conditions as may be specified in that permit, sell, give or otherwise dispose

of such water to any other person for use on any other land, or convey such water for his own use beyond the boundaries of the land on which such water is found.'

[5] On 19 February 2001, the then Director General addressed a letter to the Regional Directors, in which he dealt with the policy and procedural guidelines concerning 'Temporary water use and surrendering of water use entitlements.' This letter addresses in detail the approach to section 25 of the Act. The letter distinguished section 25(1) from section 25(2). It concluded that the two subsections are different from one another.

[6] As regards to section 25(1), the Director General was of the view that the requests for permission under this paragraph are limited to the use of water for irrigation purposes. The letter further directs that where the request to use water temporarily for a different purpose on the same property, there are no two parties. The same situation arises where the requester intends to use water, temporarily for the same purpose on another property belonging to the requester.

[7] In paragraph 2.5.2, the Director general states that: 'The surrender form should be submitted with the relevant licence application by the applicant.' This statement envisages that there should be a link between the surrender of a water use entitlement and an application for such entitlement in terms of section 41.

[8] A follow-up Circular 18 of 2001, was issued on 29 March 2001. This circular expressly withdrew Circular 59 of 1999 which was then in force. Circular 18

dealt with water charges levied on the holders of water use entitlements. It provided in paragraph 3.3 as follows:

'3.3 ... existing lawful uses (of water) can be traded to a willing buyer on the same scheme or even outside the scheme if such trading can be facilitated in terms of section 25 of the NWA, and the annual charges for such traded uses would be paid for by the buyer.'

[9] For a period of about 20 years, the holders of the water use entitlement were able to trade on these licences. On 19 January 2018, by means of the Legal Services Circular 1 of 2017, the then incumbent Director General, repealed Circular 18 of 2001 and departed substantially from the known practice of trade in water use licences in two respects. Firstly, that sections 25(1) and (2) of the Act does 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.

Paragraph 2.4 of Circular 1 of 2017 reads:

'2.4 The correct interpretation of section 25(2) of the Act, when read with sections 2, 3 and 55 of the Act, should be to discourage trading in water use entitlements between private individuals. I do not believe this to have been the intention of the legislature to allow trading in water use entitlements between private individuals. If this were to have been the intention of the legislature, the legislature would have made an explicit provision in this regard. Section 2 of the Act makes it clear that the Minister must, in accordance with the purpose of the Act, promote equitable access to water and also redress past racial and gender discrimination. If section 25(2) of the Act were to read to mean that the holder of entitlement is permitted to trade

in water use entitlement or to choose in whose favour the entitlement is to be surrendered, then equity and redress would largely be unachievable. The purpose of section 2 of the Act will be defeated and the Minister would also be rendered powerless in relation to achieving the purpose of the Act.'

[10] As it appeared in the applications in this matter, the view expressed by the Director General in Circular 1 of 2017, informed the reasons stated in the letters declining the applications for water use entitlement, which were preceded by agreements of sale. It is the dismissal of these applications that spawned this litigation.

The applications before Court

[11] The three applications were launched separately but heard together. The background facts were generally similar in two of the applications. I nevertheless deal succinctly hereunder, with the facts of each application separately.

Case no: 42072/2018 ("the Doornkraal application")

[12] On 14 January 2014, the applicant, Doornkraal Besigheidstrust ('Doornkraal'), entered into a purchase and sale agreement with the fourth respondent, Britzkraal (Pty) Ltd, the holder of entitlement for water use. The terms of the agreement were that Britzkraal, would sell to Doornkraal its rights, title and interests in a 30 ha water use entitlement on a farm in Somerset East, Western Cape, against payment of an amount of R1 950 000.00, payable in staggered terms. It was a further term of the agreement that Britzkraal would,

in terms of section 25(2), surrender its entitlement for water use, to the Water Institution, in support of Doornkraal's application in terms of section 41 for acquisition of that entitlement for water use.

[13] On 21 October 2016, Doornkraal submitted its application for the water use licence in terms of section 41. On 16 January 2018, the third respondent, the Director General, declined to grant the application of water use entitlements to Doornkraal.

[14] Doornkraal did not appeal the decision of the Director General. In June 2018, they launched this application, wherein they sought relief in the form of a declaratory order, in which they contended that on a proper interpretation of section 25 of the Act, that section contemplates or allows for the transfer of a water use entitlement from the holder thereof to another person or a third party; and that the section permits the trade in or selling of water use entitlement by the holder thereof to another person or a third party.

[15] Further and as an alternative relief, the Doornkraal launched an application for judicial review of the Director General's administrative decision, conditional upon the Court granting the declaratory order in the main application. In support of the review application, Doornkraal delivered the third application in the same papers and in anticipation of a point *in limine* that may be raised by the respondents, that they be exempted under the provisions of section 7(2) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"),

from the obligation to first exhaust internal appeal processes, before launching the review application. Doornkraal also prayed for a cost order against the respondents.

Case No. 90498/2018 (“the De Kalk application”)

[16] There are three applicants in this application; FGJ Wiid in his personal capacity, Torqhoff Boerdery and the De Kalk Trust (of which Mr. Wiid was one of the trustees for the time being). The three applicants were farming jointly as a unit in the Upper Orange Water Management Area, in the Division of Upington. In October 2016, the three applicants entered into three separate agreements with G.P Viljoen Trust, holder of water use entitlements on farms Keboes in Upington.

[17] As part of the terms of each agreement, the GP Viljoen Trust was to surrender its water use entitlements in support of the applicants' applications for water use entitlements in terms of section 41 of the Act. The GP Viljoen Trust was to receive compensation for each of the three surrendered water use entitlements, in the amounts of R5 920 000.00; R15 413 333.00 and R2 666 667.00, all in the total amount of R24 000 000.00.

[18] On 28 August 2017 and pursuant to the conclusion of the agreements, the applicants lodged applications in terms of section 41 of the Act, in order to obtain licences for the surrendered entitlements. The Director General declined the applications on 3 July 2018 for the same reasons as with the Doornkraal

application. On 1 August 2018, the three applicants lodged appeals against the Director General's decisions with the Water Tribunal in terms of section 148 of the Act. With the appeals pending, the applicants launched this application in December 2018. The application is couched in the same terms as those of Doornkraal application and seeking the same relief, namely a declaratory order, in the alternative judicial review of the Director General's decision; exemption of the terms of s7 of PAJA and a cost order against the respondents.

Case No. 71913/2018 ('the Associations' application')

[19] The Associations' case was also launched by three applicants; the Association of Water Users Associations, Eagle's Nest and Thusano Empowerment. Eagle's Nest and Thusano Empowerment were holders of entitlements which they applied to transfer such entitlements to third parties in terms of section 25 of the Act. Their applications were refused 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.

[20] The three applicants launched this application during September 2018. In essence they sought as relief, a declaratory order that on a proper interpretation of section 25 of the Act, a person holding an entitlement for water use may temporarily or in part, transfer such entitlement for water use to another person or third party. The applicants also sought a punitive cost order against the government respondents.

The state respondents' case

[21] The three cases are being opposed by the Minister of Water and Sanitation as the first respondent; the Director General of the Department of Water and Sanitation as the second respondent, Mr Sifiso Mkhize, *Nomino Officio* (N.O.) as the third respondent; including two Deputy Directors General in the same Department as the fourth and fifth respondents respectively. For purposes of this judgment, I will refer to them collectively as the respondents. Where applicable, I will refer to the particular respondent as cited.

[22] There were three teams of counsel appearing in each case on behalf of the respondents. The one team appeared for the respondents in the Associations' application and the other two teams in the Doornkraal and De Kalk applications.

[23] The respondents' counsel to the Associations' application contended in essence, that section 25 of the Act makes no reference to third parties and that the interpretation attached to that text by the applicants is not only incorrect but also 'irrational, unlawful and unconstitutional.' The respondents' counsel in the Doornkraal and the De Kalk applications conceded that on proper interpretation, section 25 of the Act reference to 'other property in the vicinity' and to 'other land' in the text may well refer, in a different context, to property or land owned by third parties. Further, and in response to the declaratory order sought by the Doornkraal and De Kalk applicants, the respondents contend that

s 25 of the Act makes no provision for the holder to trade in, or sell the authorisation for water use.

[24] The respondents in the Associations' application further contend *in limine* that in all three applications, the applicants have failed to exhaust internal remedies as required by section 7 of PAJA read with section 148 of the Act. The respondents also sought a cost order against the applicants.

[25] In both the Doornkraal and the De Kalk applications, there are additional respondents cited. These additional respondents, apart from the inclusion of the Minister of Environmental Affairs, include Britzkraal in the Doornkraal application and GP Viljoen in the De Kalk application. The two entities were holders of the entitlements to water use, which they intended to surrender. The additional respondents were cited in the proceedings as having substantial and direct interest therein. No relief is sought against these additional respondents.

Approach to the construction of section 25

[26] The approach to the literal construction of a statute is no longer considered to be the only legitimate method of construction. In *Thoroughbred Breeders' Association v PriceWaterhouse*¹, the Supreme Court of Appeal expresses the following view:

'... The days are long past when blinkered peering at an isolated provision in a statute was thought to be the only legitimate technique in interpreting it if it seemed on the

¹ *Thoroughbred Breeders' Association v PriceWaterhouse* 2001 (4) SA 551 (SCA) at para 12.

face of it to have a readily discernible meaning. As was said in *University of Cape Town v Cape Bar Council and Another* 1996 (4) SA 903 (A) at 914D_E:

"I am of the opinion that the words of s 3(2)(d) of the Act, clear and unambiguous as they may appear to be on the face thereof, should be read in the light of the subject-matter with which they are concerned, and that it is only when that is done that one can arrive at the true intention of the Legislature. ".²

[27] Thus s 25 of the Act cannot be read and understood in isolation. It is part of legislation that was enacted in 1998, two years after the adoption of the Constitution of the Republic of South Africa, 1996. That the National Water Act effected transformation of the laws relating to water in South Africa, is evidenced by the number of water laws that were repealed in terms of section 163 of the Act and listed under Schedule 7. Thus the genesis of the Act is the Constitution.

[28] Reference to the subject of water is found in Chapter 2 of the Constitution, the Bill of Rights.² In particular, issues concerning water are provided for in

² Constitution of the Republic of South Africa Act, 1996.

section 24 under Environment³; section 25 under Property⁴ and section 27 under Health care, Food, Water and Social Security⁵.

[29] The Bill of Rights makes provision for the enactment of legislation to give further expression and protection of the right. The preamble to the Act provides guidance to understanding the objective of the Act and what it sought to achieve. The first three paragraphs of the Preamble read:

'Preamble-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;

³ "Environment

24. Everyone has the right-

(a) ...

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-

(i) ...

(iii) secure ecologically sustainable development and use of natural resources.

⁴ Property

25. (4) For the purposes of this section-

(a) public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

⁵ Health care, food, water and social security

27. (1) Everyone has the right to have access to-

(a) health care services, including reproductive health care;

(b) sufficient food and water; and ..." my emphasis

Recognising that the ultimate aim of water resource management is to achieve the sustainable use of water for the benefit of all users. . .'

[30] The purpose of the Act is provided for in section 2 of the Act which specifies thus:

'2. The purpose of this Act is to ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled in ways which take into account amongst factors –

- (a) meeting the basic human needs of present and future generations;
 - (b) promoting equitable access to water;
 - (c) redressing the results of past racial and gender discrimination;
 - (d) promoting the efficient, sustainable and beneficial use of water in the public interest;
 - (e) facilitating social and economic development;
 - (f) providing for growing demand for water use;
 - (g) protection aquatic and associated ecosystems and their biological diversity;
 - (h) reducing and preventing pollution and degradation of water resources;
 - (i) meeting international obligations;
 - (j) promoting dam safety;
 - (k) managing floods and droughts,
- and for achieving this purpose, to establish suitable institutions and to ensure that they have appropriate community, racial and gender representation.'

[31] The preamble and section 2 of the Act, sets out the objectives sought to be achieved in transforming water law in South Africa. In attaching a proper construction to the Act in general and section 25 in particular, one has to be guided by the approach stated by the Constitutional Court in *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism and others*,⁶ where the Court in paragraph 91 stated as follows:

'[91] The technique of paying attention to the context in statutory construction is now required by the Constitution, in particular, section 39(2). As pointed out above, that provision introduces a mandatory requirement to construe every piece of legislation in the manner that promotes the "spirit, purport and objects of the Bill of Rights".'

Section 25 of the Act

[32] There is no express reference in section 25 of the Act to 'another person' or a 'third party'. In section 25(2), reference is made to an application in terms of section 41 of the Act, without an indication whether the said application refers to a new one by the holder of the surrendered water use entitlement, or by another person or third party. The words another property or other land are not synonymous with 'another person or a third party'. To link these words to others, there needs to be a specific or express indication in the text. In section 25 of the Act, the only persons referred to are the holder of a water use entitlement, who raises a request to transfer (section 25(1)), and the holder of a water use entitlement who surrenders (section 25(2)).

⁶ *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism and others* 2004 (4) SA 490 (CC)

[33] The applicants contend, on a broad construction of section 25 of the Act, that the words on another property within the vicinity and on other land as used in the text, are wide enough to refer to property or land belonging to third persons. Similarly, the words a particular application in terms of section 41, may refer to an application by someone other than the holder of a water use entitlement who intends to surrender it.

[34] The respondents prefer a narrower construction by which they contend that there is no reference to another person or a third party in section 25 of the Act. The text deals with a transfer and surrender between the holder of the water use entitlement and the water institution which has to consider and either grant or refuse the transfer; or accept surrendered entitlement which may be used to process another application in terms of section 41 by the holder who decides to change the existing one.

[35] On a proper analysis of section 25 of the Act, it seems to me that text of the section is couched in terms that may permit both constructions. A holder of a water use entitlement may request authorisation to transfer the water use temporarily to another property of his, within the vicinity or to another property within the vicinity, belonging to a neighbour. The constructions of section 25 of the Act contended for by the applicants and the respondents are in my view not mutually exclusive. The text is worded such that both versions of construction of the key words "*another property within the vicinity*" and "*other land*" may, depending on the situation arising, be ascribed either meaning, appropriately.

[36] The issue of the construction of section 25 of the Act is of no moment. It seems to me that what really lies at the heart of the dispute between the applicants and the respondents, is the question of water trading. Thus the dispute over the construction of section 25 of the Act is a collateral issue that is merely the means to justify the real dispute, which is 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.

[37] In support of the contention that the holders of water use entitlements may trade therewith, the applicants referred to sources extrinsic to section 25 and the Act. First of these sources is reference to the *White Paper on a National Water Policy for South Africa, 1997*. This White Paper preceded the enactment of the 1998 Act and expressed the following view:

‘Water use allocations will no longer be permanent, but will be given for a reasonable period, and provision will be made to enable the transfer or trade of these rights between users, with Ministerial consent.’

[38] This view in the White Paper was not included in the legislation. There is no provision in the Act that echoes this sentiment. The second source the applicants appeal to for support of their contention is the first National Water Resource Strategy (2004), published under GN 65 of 28 January 2005, Government Gazette 27199 of 28 January 2005, in terms of section 5 of the Act. The Director General and the water management institutions are

obligated by section 7 of the Act to give effect to such strategy, when exercising any power or performing any duties in terms of the Act. The Water Resource strategy dealt essentially with the approach to section 25 of the Act. In regard to section 25(1) and section 25(2) of the Act, it stated thus:

"In section 25 the Act provides for two distinctly different circumstances under which water use authorisations may be transferred... In the latter case (to another property for the same or similar use), the two properties may, but need not necessarily be owned by the same person..."

The second circumstance (s 25(2) refers to permanent transfers, which may be effected by one user offering to surrender all or part of an allocation to facilitate a licence application by another prospective user. Transfers of this nature constitute trade in water use authorisations..."

[39] This Water Resource Strategy of 2004 was preceded by circular 18 of 2001, whereby the then Director General authorised the trade in water use authorisations or entitlements. Two developments followed which changed course and seemingly put paid to the applicants' support for the advocacy of water trading. The first of these was the second National Water Resource Strategy (2013), published under GN 845 of 16 August 2013, in Government Gazette No. 36736 of 16 August 2013, defined water trading as:

"The process of buying and selling of water access or use entitlements, also called water rights. The terms of the trade can be either permanent or temporary, depending on the legal status of the water rights..."

Further, at the end of chapter 6 of the Resource Strategy 2013, it is stated thus:

“In conclusion, the implementation of the provisions of this chapter should lead to a faster realisation of the equity principle described in the National Water Act and the Constitution of South Africa. To achieve this, there is also the need for a review of the water policy to do away with water trading. The rationale for the abolishment of water trading is sufficiently articulated in the Emerging Policy chapter of this document. Flowing from this policy review would be a legislative review meant to reflect the policy decision on water trading and to provide mechanisms for ensuring that unused entitlements are freed for equity purposes and contribution to economic development. These are very much in line with the “use it or lose it” principle.

[40] The second intervention that changed course is the Director General's Circular 1 of 2017, which abolished water trading and repealed the Circular 18 of 2001 which had allowed water trading. Thus the latest sources extrinsic to the Act, do not support the applicants' contentions. Similarly, reference to section 51 of the Act dealing with transfers of water use entitlements to successors-in- title do not make any provision for water trading.

[41] The respondents contend for a construction that would exclude the possibility of any sale of the water use entitlement to a third party, upon either a request for transfer of an entitlement in terms of section 25(1), or surrender of an entitlement in terms of section 25(2) of the Act. The respondents argue that the applicants' construction of section 25 is contrived.

[42] It is thus my view that 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 outlined in section 2 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.

[43] 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. Section 3 of the Act, imposes an obligation on the Minister to "ensure that water is allocated equitably and used beneficially in the public (*not private*) interest,". The courts cannot accept a construction of s 25 of the Act, which impedes the Minister from discharging this obligation.

[44] 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. A person pays approximately R114.00 for an application to acquire a water use entitlement in terms of

section 41 of the Act. In the present applications before this Court, the highest price charged for water use entitlement is R15 000 000.00.

[45] The sale of water use entitlements would frustrate equal access and keep historically disadvantaged persons' out of the agricultural industry.

[46] 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.

[47] For reasons stated above, I find that on a proper construction of section 25 of the Act, the words '*another property in the vicinity*' and '*other land*' could mean either as owned by the holder of the water use entitlement, or by another person or third party. I further find that water trade or sale of the water use entitlements is unlawful as it offends s 2 of the Act, and is inconsistent with the spirit, purport and objects of the Bill of Rights in the Constitution.

[48] There is thus no merit in all the three applications for a declaratory order whose objective is to justify water trade. The applications for declaratory orders in all three cases must therefore fail.

The application for exemption in terms of section 7 of PAJA

[49] Having dealt with the proper interpretation of section 25, it is apposite to deal with the point *in limine* raised by the respondents. The respondents contend that all three applicants are unsuited, in that they have failed to exhaust internal remedies before launching the declaratory order applications. By internal remedies, the respondents refer to the provisions of sections 148 and 149 of the Act.

[50] Section 148 of the Act provides that an appeal against the decision to refuse transfer of an authorisation in terms of section 25 of the Act may, in terms of section 148 of the Act, be lodged with the Water Tribunal, established in terms of section 146 of the Act. A party intending to lodge a further appeal from the decision of the Water Tribunal, may do so to the High Court, only on a point of law, in terms of section 149 of the Act. These appeal procedures are the internal remedies contended for by the respondents.

[51] Section 7(2) of PAJA provides: '(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

(b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.

(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice’.

[52] In *Koyabe and others v Minister of Home Affairs and others*⁷ the Constitutional Court summed the principle as follows:

‘... Thus, unless exceptional circumstances are found to exist by a court on application by the affected person, PAJA, which has a broad scope and applies to a wide range of administrative actions, requires that available internal remedies be exhausted prior to judicial review of an administrative action.’

[53] What constitutes ‘exceptional circumstances’ was considered and determined by the Supreme Court of Appeal in *Nicol and another v The Registrar of Pension Funds and others*⁸. The Court held in paragraph 17 thus: ‘exceptional circumstances upon which reliance is placed . . . should primarily be *facts and circumstances existing before or at the time of the institution of the review proceedings*. . . This does not mean that the court may, in principle, take into consideration events occurring after the launch of such proceedings.’ My emphasis

[54] In particular, in regard to the two applications of Doornkraal and De Kalk, the process envisaged in section 148 and section 149 of the Act is one of appeal and not review. The decision taken by the Director General, which ordinarily would be an administrative action subject to judicial review in terms of PAJA, was in this instance not reviewable but appealable in terms of section 148(1)(f)

⁷ *Koyabe and others v Minister of Home Affairs and others* 2010 (4) SA 327 (CC) at para 34.

⁸ *Nicol and another v The Registrar of Pension Funds and others* 2008 (1) SA 383 (SCA) at para 17.

of the Act. The appeal to the Water Tribunal is a “remedy” as provided in section 7 of PAJA. A further relief from the decision of the Water Tribunal is, in terms of section 149, a form of appeal and not review. The application in terms of section 7 of PAJA should therefore be one of exemption from appeal, not from review.

[55] The Doornkraal’s application for a water use entitlement in terms of section 41 was refused by the Director General. Doornkraal failed to appeal the decision to the Water Tribunal, in terms of section 148. Instead, Doornkraal launched an application in this Court, for a declaratory order. The main reason advanced in the letter by the Director General to declining the section 41 application was based on a legal interpretation of section 25 of the Act. The Director General wrote:

‘Kindly note that Section 25(2) of the National Water Act (Act No. 36 of 1998) does not make provision for the transfer of a water use entitlement from one person to another. A person who holds an entitlement may only surrender part or all of his/her entitlement to facilitate a water use licence application to use of water from the same resource in respect of other land that belongs to that person. The National Water Act therefore does not make provision for the trading or transferring of water use entitlements between two separate legal entities.’

[56] The arrival of Circular 1 of 2017 clearly raised a matter of concern to the applicants and potential applicants in terms of section 41 of the Act. This is evidenced by the participation of the Associations of Water Users in this matter. The issue of interpretation was therefore not only of concern to Doornkraal and

De Kalk. Two of the applicants in the Associations' case, as well as the applicants in the Doornkraal and De Kalk cases had a direct interest in the construction of section 25 of the Act.

[57] Further, the fact that there were different views in the Department concerning the construction of section 25 of the Act, is acknowledged by the Director General in paragraph 2.1 of Circular 1 of 2017. It was therefore in the interests of all parties that the High Court should be seized with the construction of section 25 of the Act. The question of the interpretation of section 25 of the Act is a matter for the courts and it cannot be left to whoever is the Director General at a given time.

[58] From the applicants' point of view, it seems to me that the interpretation of section 25 of the Act, would have been the main, if not the only ground of appeal. Thus, an appeal to the Water Tribunal would have invariably led to a further appeal to the High Court on a point of law, regardless of the outcome.

[59] I am therefore persuaded that this is one of those instances where it would be in the interest of justice to exempt the applicants from the obligation to comply with section 148 and possibly section 149, in so far as the application for a declaratory order is concerned. The applicants may still reserve the right to appeal the decision on other grounds. In which case, such appeal should be lodged with the Water Tribunal.

[60] I therefore find, on consideration of the circumstances outlined in the preceding paragraphs, that the application for exemption in terms of section 7 of PAJA should be granted only in regard to the application for a declaratory order concerning the interpretation of section 25 of the Act.

[61] The application for exemption in terms of section 7 of PAJA, lodged by De Kalk stands slightly on a different footing. At the time of instituting the proceedings in this Court, De Kalk had already lodged an appeal to the Water Tribunal in terms of section 148 against the Director General's decision. Therefore, De Kalk sought exemption from further prosecuting the lodged appeal.

[62] The circumstances outlined in the consideration of the Doornkraal application for exemption, are also applicable to the application of De Kalk. The views I have expressed in that application are similarly applicable to this application and there is thus no reason to repeat same. I also find, on consideration of the same circumstances as stated in the Doornkraal application, that the De Kalk application for exemption only on the application for a declaratory order concerning the interpretation of section 25 of the Act, should be granted.

The review applications

[63] The applications for review of the decision of the Director General on the interpretation of section 25 of the Act, lodged separately by Doornkraal and De Kalk, have been partly dealt with in this judgment. In light of the decision I have

taken in regard to the applications for declaratory orders, I find it unnecessary to deal with that ground of review.

[64] In regard to the other grounds of the review applications of the decision of the Director General, I have not granted Doornkraal and De Kalk applications exemption in terms of section 7 of PAJA. Therefore, to the extent that the applicants may wish to appeal that decision on the other grounds, then such appeal may be lodged with or prosecuted before the Water Tribunal.

[65] The applications for review in both cases are therefore dismissed.

[66] In all applications, the costs must follow the result to the extent of success.

[67] In the result, I make the following order:

South African Association for Water User Associations and others v Minister of Water and Sanitation and others, case no: 71913/2018

1. The application for a declaratory order is dismissed with costs, including the costs of respondents' two counsel.

CJ Lotter N.O. and others v The Minister of Water and Sanitation and others; case no. 42072/2018.

1. The application for a declaratory order is dismissed with costs, including the costs of respondents' two counsel.
2. The application for exemption in terms of section 7 of PAJA is granted, only in so far as it relates to the application for the declaratory order. The respondents are ordered to pay fifty percent (50%) of the cost, including the applicants' costs of two counsel.
3. The application to review and set aside the decision of the Director General in refusing to grant the application for a water use entitlement, in terms of section 41 of the National Water Act is dismissed with costs, including the costs of the respondents' two counsel.

FGJ Wiid and others v The Minister of Water and Sanitation and others; case no. 90498/2018.

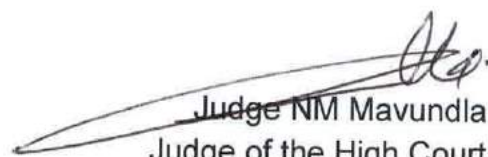
1. The application for a declaratory order is dismissed with costs, including the costs of respondents' two counsel.
2. The application for exemption in terms of section 7 of PAJA is granted, only in so far as it relates to the application for the declaratory order. The respondents are ordered to pay fifty percent (50%) of the costs, including the applicants' costs of two counsel.

3. The application to review and set aside the decision of the Director General in refusing to grant the application for a water use entitlement, in terms of section 41 of the National Water Act is dismissed with costs, including the costs of the respondents' two counsel.



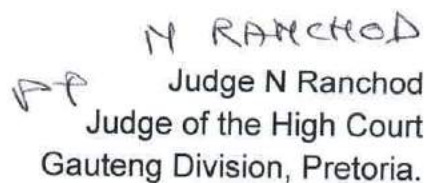
Judge SP Mothle
Judge of the High Court
Gauteng Division, Pretoria.

I Agree



Judge NM Mavundla
Judge of the High Court
Gauteng Division, Pretoria.

I Agree



Judge N Ranchod
Judge of the High Court
Gauteng Division, Pretoria.

Delivered. This judgment was handed down electronically by circulation to the parties' representatives by email and will be released on SAFLII. The date and time for hand down is deemed to be 10h00 19 June 2020.