

High Court dismisses appeal regarding the tradability of water use entitlements

Late in June, the North Gauteng High Court has dismissed an appeal brought by the South African Association for Water Users Associations (SAAWUA) and two other, similar applications regarding the tradability of water use entitlements. The full bench of the North Gauteng High Court, sitting as a court of appeal, reiterated that section 25 of the National Water Act does not permit authorised water users to 'sell' their water use entitlements as this would lead to the privatisation of a national resource and deprive the minister of her statutory obligation to ensure that water is equitably allocated.

Rationale for the court's decision

Section 25(1) of the National Water Act (NWA) permits the holder of a water use entitlement to apply for consent to temporarily use his/her water use entitlement on another property. This is what is commonly known as a temporary transfer. Section 25(2) makes provision for a person holding an entitlement to water to conditionally surrender his or her entitlement to facilitate a licence application under section 41 of the Act. The surrender is 'conditional' as it will only take effect if the licence application is granted. Over time a practice has developed whereby the holders of water use entitlements receive consideration for either allowing their right to be used by another person on another property temporarily (s25(1)), or in exchange for surrendering their entitlement to support another persons' application under s41. This was commonly referred to as selling or trading a water use entitlement and was condoned by the department up until 2017. From a technical point of view, water entitlements are not 'sold' but surrendered in favour of another person's application and the party who surrenders the entitlement received monetary consideration from the applicant, thereby mirroring a 'transaction'.

Section 25 (1) & (2) reads as follows:

"Transfer of water use authorisations

25. (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 of that water on another property in the same vicinity for the same or a similar purpose.

(2) 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."

The court relied on a purposive interpretation of the NWA to hold that these provisions do not permit water rights to be 'sold'. The court interrogated the purpose of the legislation and sought to read the provision to give effect to this purpose. With reference to the preamble and object of the Act, it was reiterated that the NWA does not permit water to be privately owned. Instead, the nations' water resources are common property belonging to the nation as a whole and the use thereof must be allocated to persons on an equitable basis. It is furthermore the responsibility of the minister, as the public trustee, to act on behalf of the

2 July 202

Theo Boshoff

Head: Legal Intelligence

Tel: +27 12 807 6686

Email: theo@agbiz.co.za

www.agbiz.co.za

Disclaimer:

Everything has been done to ensure the accuracy of this information, however, Agbiz takes no responsibility for any loss or damage incurred due to the usage of this information.

nation to ensure water is equitably allocated. When allocating water, the authority must have regard to several considerations, including, but not limited to the need to ensure transformation and water allocation reform.

With these considerations in mind, the court held that an interpretation whereby holders can sell their entitlements to a person of their choosing would lead to the privatisation of a natural resource (which the NWA does not permit) and divest the minister of her function in allocating water equitably. Receiving monetary compensation for surrendering a right would also discriminate against those who cannot afford it but who are never-the-less entitled to use an equitable portion of the nation's water resources. Finally, on a more literal note, the Act permits water management institutions to receive a conditional surrender under s25(2) and consider applications under s41, but it does not permit the person surrendering the entitlement under s25(2) to dictate whether an application under s41 should be granted or refused.

As a court of appeal, the judgement essentially confirmed the position expressed by the same court in 2019. It will however require agricultural water users, as well as those who fund their operations, to adapt, but the implications must be carefully analysed and considered. For instance, the judgement is unlikely to have a substantial impact on the holders of water use entitlements who use these rights to irrigate their own properties. Likewise, it should not have an impact on the value of agricultural properties unless these properties were priced with the intention to sell excess water allocated to the owner. A holder may also still conditionally surrender his entitlement in favour of another application but the latter must be considered by the authority on its own merits. In doing so, the authority will need to consider all the factors listed in section 27 in deciding whether or not to grant an application. The surrender of entitlements will therefore not guarantee that the application is granted but it remains conditional. In other words, if the application is not awarded then the surrender will also not take place.

The biggest impact will likely be on a holder of excess water's ability to profit from unused allocations. Although the judgement was not explicit, the judgement condemned any form of 'sale' which may imply that a holder may not be permitted to receive monetary consideration for a conditional surrender or temporary transfer.