

SOUTH AFRICA / JUDGMENT

Ramah Farming v Great Fish River Water Users Association and Others (2614/2019) [2020] ZAECGHC 119; 2021 (2) SA 547 (ECG) (13 October 2020)

[2020] ZAECGHC 119

COURT

Eastern Cape High Court, Grahamstown

BEFORE

R E Griffiths

CASE / FILE NUMBER

2614/2019

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION

: GRAHAMSTOWN

Reportable

Case no: 2614/2019

In

the matter between:

RAMAH
FARMING
Applicant
and
GREAT FISH RIVER WATER
USERS
ASSOCIATION
1st
Respondent
LOMAJASA
BELEGGINGS (PTY) LTD
2nd
Respondent

MINISTER OF THE
DEPARTMENT:

WATER & SANITATION,
LINDIWE
NONCEBA SISULU N.O.
3rd
Respondent
DEPARTMENT OF WATER AND SANITATION
PROVINCE
OF THE EASTERN CAPE
4th
Respondent

JUDGMENT

GRIFFITHS J:

Introduction

[1] This matter has at its heart the correct interpretation of the National Water Act (“the Act”).

[1] In a nutshell, the applicant contends that the retention and sale of certain water use entitlements by a predecessor in title contravened

the provisions of the Act and is unenforceable.

The claim and counterclaim

[2] The applicant has sought a declaratory order relating to certain alleged water use entitlements in respect of its immovable properties. The orders it seeks are couched in the following terms:

1. That the Applicant’s lawful water use entitlement in respect of lot 67 and lot 68 in the Great Fish River Settlement, is declared to be:

1.1 250 000m³ for use on 20 hectares of land in respect of lot 67, Great Fish River Settlement; and

1.2 305 000 m³ for use on 24 hectares of land in respect of lot 68, Great Fish River Settlement;

in accordance with and in terms of the declarations of water use as an existing lawful water use in terms of section 32(2) of the National Water Act No. 36 of 1998 (annexed to the notice of motion and marked ‘A’ and ‘B’ respectively).

2. The First Respondent is ordered to deliver to the Applicant the volumes of water provided for in the declarations (annexed to the notice of motion marked ‘A’ and ‘B’).

3. The First Respondent is ordered to pay the Applicant’s costs of this application jointly and severally, the one paying the other to be absolved, with any other Respondent who should unsuccessfully oppose this application.

[3] The first and second respondents[2] have opposed the application and the second respondent has, by way of a counterclaim, sought an order in the following terms:

1.Declaring that the Applicant in its capacity as owner of lots 67 and 68, Great Fish River Settlement, is possessed of an unencumbered right, title or interest in and to the listed/scheduled water use entitlements in relation to those two properties that is limited to 12 and 2,8 hectares of listed/scheduled water use entitlements respectively, which entitlements accrued to the said properties

pursuant to agreements of sale entered into between the Applicant's predecessors in title and the sale that the applicant had concluded with its immediate successor in title, Mr Henry Norman Stewart Cloete;

2.Declaring that insofar as any additional listed/scheduled water use entitlements that had been conditionally sold and had already been conditionally surrendered (and delivered) to the Second Respondent by a predecessor in title of the Applicant for use on the Remainder of the Farm Juriesbaken 105, Middelburg are still attached to lots 67 and 68, Great Fish River Settlement, the Applicant, as successor in title, took possession of those properties subject to an encumbrance in the form of an obligation, as contemplated in section 25(2) of the Act, to provide its co-operation in respect of and support to the finalisation of the process of effecting the transfer of such balance of the listed/scheduled water use entitlements for use on the Remainder of the Farm Juriesbaken 105, Middelburg under authority of a licence to be issued in terms of section 41 of the Act;

3.Directing the Applicant to sign all documents and do all things necessary to procure the insurance of a licence under section 41 of the Act for the use of the additional listed/scheduled water use entitlements relating to Lots 67 and 68, Great Fish River Settlement (to which the Applicant has in paragraph 1 above been declared not to possess any unencumbered right title or interest) on the Remainder of the Farm Juriesbaken 105, Middleburg;

4.Directing that should the Applicant fail to refuse to sign all the documents or take all the steps referred to in paragraph 3 above within 14 days of the granting of the order, the Sheriff of this Honourable Court be authorised to sign all such documents and take all such steps on behalf of the Applicant.

The background

[4] The facts giving rise to the contrary positions held by the parties are largely common cause. The applicant

is the owner of, inter alia, lots 67 and 68 which are situated in the Great Fish River Settlement. It is also the holder of declarations[3] of a water use entitlement as an existing lawful water use in terms of section 33(2) of the Act. Such water use entitlements are intended to be used for irrigation of the lands situated on such lots. The first respondent controls the water works by which the water is extracted from the Great Fish River.

- [5] When the Act came into effect on 1 October 1998, lots 67 and 68 were owned by Johanna and Johannes Vosloo. Subsequently, and during 2003, Rooiakkers Farming CC (“Rooiakkers”) purchased both lots from the Vosloo family.
- [6] During 2006, Rooiakkers sold the lots to Boompie Onthou CC (“Boompie”), with transfer being effected during 2007. It appears from the relevant deed of sale that Rooiakkers purported to sell 55 ha of the 85 ha of existing water use entitlement for use on all the lots sold, inclusive of lots 67 and 68, whilst retaining 30 ha of the existing water use entitlement for itself. The apparent intention was that Rooiakkers would retain 8 ha of existing water use entitlement in respect of lot 67, and 22 ha of existing water use entitlement in respect of lot 68. It was thus further intended that Boompie would not, by virtue of the deed of sale, receive the equivalent water use entitlement in respect of those lots.
- [7] During 2008, lots 67 and 68 were sold by Boompie to one Sanet Ferreira who, in turn and during 2012, sold them on, together with certain other lots, to Vreys Farming CC.
- [8] On 9 October 2012 Rooiakkers sold to the second respondent 34,7 ha of the existing water use entitlements for irrigation of lots 67 and 68 which it had ostensibly retained after its sale of those lots to Boompie during 2006. The agreement of sale in respect of this transaction recorded that Rooiakkers would remain the owner of the water rights until transfer to the second respondent, but that possession of the water rights was to be given on the date of signature.
- [9] Lots 67 and 68 were subsequently sold by Vreys Farming CC, together with certain other lots, to Mr Cloete (the deponent to the founding affidavit) on 4 April 2014, with transfer being effected on 5 September 2014. Because Cloete believed that more water was available for use on the farms than had been represented to him, he instructed an attorney to make inquiries in this regard. It was as a consequence of these inquiries that he realised that more water had previously been available for use on the lots, but that a portion of the water use entitlements had been sold by a predecessor in title. He was also told that transfer of these water use entitlements was still pending and, in the interim, the water was being delivered elsewhere on a temporary transfer.
- [10] On 5 November 2016, Cloete sold lots 67 and 68 together with the other lots that he had purchased to the applicant, of which he is a director. Before transfer took place, he was approached by a representative of the second respondent with a request that he sign certain documentation for a licence application by the second respondent as contemplated in section 25(2) of the Act. Acting on advice from his attorney, he refused to sign these documents as he had not personally agreed to sell or lease such water use entitlements to the second respondent.

- [11] It furthermore appears that the first respondent initially took the position that the water use entitlements had been lawfully retained and sold to the second respondent and that the second respondent was accordingly entitled to receive the equivalent amount of water for irrigation purposes. When however, it became clear that a dispute was looming, the first respondent indicated by way of correspondence that it would stand back as its attitude was that the dispute had arisen between the applicant and the second respondent, and that it ought to be decided by a court. There remains however a dispute as to whether the first respondent has continued to provide this water to the second respondent, the applicant contending that it has whilst the first and second respondents contend that it has not.
- [12] Because of these disputes the applicant approached the third respondent in this regard and was provided with the written declarations referred to above.
- [13] It is also common cause between the parties that the subject water use entitlements exist lawfully by virtue of the provisions of section 32(1)(a)(i) of the Act in that they are an existing lawful water use which existed within the period of two years immediately before the date of commencement of the Act, and were authorized by the repealed Water Act.

The Act

- [14] The Act came into force on 1 October 1998 and repealed the Water Act[4] which had previously regulated the water dispensation in South Africa. Certain basic principles of the previous dispensation such as the concept of riparian ownership and the distinction between private water and public water were abolished. The effect of the Act has been succinctly summarized by Leach AJA (as he then was) in *S v Mostert & Another*. [5] He said:

‘The 1956 Act was repealed and replaced by the 1998 Act which fundamentally reformed South African water law. The common law distinction between public water and private water was no longer recognised as a basis for entitlement to the use of water. Instead, under s 2 of the 1998 Act, government at national level was granted the overall responsibility for and authority over the country’s

water resources and their use. Section 3 recognises national government, acting through the minister as the public trustee of the

nation’s water resources, as having the power to regulate the use, flow and control of all water in the country. Section 4 goes on to prescribe who is entitled to use water, and the use of water otherwise than as permitted under the Act is both prohibited and criminalised.’[6]

- [15] As there was no right of property in public water under the old dispensation, the “right to water” and the “right to use water” were recognized as synonymous terms.[7] These rights enjoyed legal recognition, were protected by the courts and could be alienated by way of an agreement of sale or lease.[8] This concept was further extended by the courts in their being recognized as “property rights” or rights in property for which the holder of such rights was required to be compensated on expropriation.[9]

[16] Whilst the legal status of water prior to the promulgation of the Act was not entirely clear or precisely defined, there seems to have been little doubt that lawful water users were possessed of vested water use rights which they could trade and alienate, and which were protected by the courts.[10]

[17] The following sections of the Act are relevant to this matter:

“2 Purpose of Act

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 other 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) protecting 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.

...

4 Entitlement to water use

- (1) A person may use water in or from a water resource for purposes such as reasonable domestic use, domestic gardening, animal watering, fire fighting and recreational use, as set out in Schedule 1.
- (2) A person may continue with an existing lawful water use in accordance with section 34.
- (3) A person may use water in terms of a general authorisation or licence under this Act.
- (4) Any entitlement granted to a person by or under this Act replaces any right to use water which that person might otherwise have been able to enjoy or enforce under any other law-

- (a) to take or use water;
- (b) to obstruct or divert a flow of water;
- (c) to affect the quality of any water;
- (d) to receive any particular flow of water;
- (e) to receive a flow of water of any particular quality; or
- (f) to construct, operate or maintain any waterwork.

22 Permissible water use

- (1) A person may only use water-
 - a) without a licence-
 - (i) if that water use is permissible under Schedule 1;
 - (ii) if that water use is permissible as a continuation of an existing lawful use; or
 - (iii) if that water use is permissible in terms of a general authorisation issued under section 39;
 - (b) if the water use is authorised by a licence under this Act; or
 - (c) if the responsible authority has dispensed with a licence requirement under subsection (3).
- (2) A person who uses water as contemplated in subsection (1)-
 - (a) must use the water subject to any condition of the relevant authorisation for that use;
 - (b) is subject to any limitation, restriction or prohibition in terms of this

Act or any other applicable law;

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 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.

27 Considerations for issue of general authorisations and licences

- (1) In issuing a general authorisation or licence a responsible authority must take into account all relevant factors, including-
 - (a) existing lawful water uses;
 - (b) the need to redress the results of past racial and gender discrimination;
 - (c) efficient and beneficial use of water in the public interest;
 - (d) the socio-economic impact-
 - (i) of the water use or uses if authorised; or
 - (ii) of the failure to authorise the water use or uses;
 - (e) any catchment management strategy applicable to the relevant water resource;
 - (f) the likely effect of the water use to be authorised on the water resource and on other water users;
 - (g) the class and the resource quality objectives of the water resource;
 - (h) investments already made and to be made by the water user in respect of the water use in question;
 - (i) the strategic importance of the water use to be authorised;
 - (j) the quality of water in the water resource which may be required for the Reserve and for meeting international obligations; and
 - (k) the probable duration of any undertaking for which a water use is to be authorised.
- (2) A responsible authority may not issue a licence to itself without the written approval of the Minister.

32 Definition of existing lawful water use

- (1) An existing lawful water use means a water use-
 - (a) which has taken place at any time during a period of two years immediately before the date of commencement of this Act and

which-

- (i) was authorised by or under any law which was in force immediately before the date of commencement of this Act;

34 Authority to continue with existing lawful water use

- (1) A person, or that person's successor-in-title, may continue with an existing lawful water use, subject to-

- (a) any existing conditions or obligations attaching to that use;
- (b) its replacement by a licence in terms of this Act; or
- (c) any other limitation or prohibition by or under this Act.

43 Compulsory licence applications

- (1) If it is desirable that water use in respect of one or more water resources within a specific geographic area be licensed-
 - (a) to achieve a fair allocation of water from a water resource in accordance with section 45-
 - (i) which is under water stress; or
 - (ii) when it is necessary to review prevailing water use to achieve equity in allocations;
 - (b) to promote beneficial use of water in the public interest;
 - (c) to facilitate efficient management of the water resource; or
 - (d) to protect water resource quality,

the responsible authority may issue a notice requiring persons to apply for licences for one or more types of water use contemplated in section 21.

55 Surrender of licence

- (1) A licensee may offer to surrender any licence issued to that licensee under this Chapter, whereupon, unless there is good reason not to do so, the responsible authority must accept the surrender and cancel the licence.
- (2) A responsible authority may refund to a licensee any charge or part of any charge paid in respect of a licence surrendered under

subsection (1).

151 Offences

- (1) No person may-
 - (a) use water otherwise than as permitted under this Act;
- ...”

The parties' contentions

- [18] It is convenient to deal initially with the second respondent's contentions. The second respondent contends that the practice of trading in water rights which existed at the commencement of the Act was not abolished by it as there is no express or, it is submitted, implied prohibition against such trading. The Act is not to be interpreted in any event so as to extinguish existing rights and obligations, unless the statute clearly provides otherwise, or its language clearly shows such a meaning.[11] Therefore, Rooiakkers was entitled to

trade in the subject water use entitlements by withholding them from the sale to Boompies and by subsequently selling them to the second respondent. This, so the second respondent submits, does not conflict in any way with the provisions of the Act and is indeed supported by certain of those provisions resulting in a series of lawful transactions. Accordingly, the second respondent submits that the applicant is not entitled to the declaratory orders it seeks but is obliged to do all that may be necessary to ensure that transfer of those water rights to the second respondent takes place. Thus it seeks the orders set out in its counterclaim with costs, and contends that the application falls to be dismissed with costs.

- [19] The applicant on the other hand contends that such trading in water use entitlements has been abolished by the Act. On a proper reading of various sections of the Act, in particular section 25 thereof, it contends that it was the intention of the legislature in framing the Act to do away with the old practice of trading in water rights, now water use entitlements. This being so, the applicant contends that Rooiakkers acted unlawfully in terms of the provisions of the Act by withholding, or purporting to withhold, certain water use entitlements from the sale to Boompies and by subsequently, some six years later, selling or trading those retained water use entitlements to the second respondent. Thus, it contends that these transactions on the part of Rooiakkers and the second respondent fall foul of section 151(1) (a) of the Act and constitute a criminal offence. On this basis, and based further on the earlier mentioned declarations submitted by the third respondent which indicate the extent of the water use entitlements attaching to lots 67 and 68, the applicant contends that it is entitled to the declaratory order it seeks together with the further relief, and that the counterclaim falls to be dismissed with costs[12].

- [20] The applicant further contends that because the first respondent allied itself with the contentions of the second

respondent to the effect that the transactions entered into by Rooiakkers and the second respondent were lawful in terms of the Act and that it was therefore obliged to comply therewith, and because (which is disputed) the applicant maintains that the relevant water use entitlements are still being delivered to the second respondent, the first respondent must be put to the costs of the application jointly and severally together with the second respondent.

- [21] The first respondent disavows any liability for costs maintaining that, although it holds a particular view as set out above relating to the legal position, it has maintained a neutral stance vis-à-vis the dispute between the applicant and the second respondent which culminated in its advising them to have the issue resolved in court.

Interpretation

[22] The modern approach to interpretation of documents encompasses a far broader approach to that which pertained in earlier days which will generally result in a more sensible result. This approach has been endorsed by the highest courts in our land and has been succinctly expressed by Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[13] as follows;

‘The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the

background

to the preparation and production of the document.’[14]

Does the Act permit of trading in water use entitlements?

[23] The applicant’s contentions in this regard find support from the recently decided unreported judgment of *The South African Association for Water User Associations and Others v Minister of Water and Sanitation and Others* and two other matters[15] (“Saawua”). The Full Court of the Gauteng Division, Pretoria, found, inter alia, that:

1. on a proper analysis of section 25 of the Act, the text of the section is couched in terms that may permit of two constructions, that is, a construction in favour of third-party transfer and a construction against a third-party transfer, and that both versions of the keywords (“another property in the vicinity” and “other land”) may, depending on the situation arising, be ascribed either meaning, appropriately;
2. that trade in water, or sale of water use entitlements is unlawful as it offends section 2 of the Act, and is inconsistent with the spirit, purport and objects of the Bill of Rights in the Constitution.

[24] It seems clear therefore, and the parties in casu are in agreement in this regard, that the proper interpretation of section 25 (which provides for the transfer of water use authorizations) is central to this issue. The applicant contends that section 25(1) provides for the temporary use by a person authorized to use the water on another of his or her properties, in the same vicinity, for the same or a similar purpose. It does not allow an authorized user to seek permission from a water management institution to give the water use on a temporary basis to another person for use on his or her property. As regards section 25(2), the applicant contends that it provides for a conditional surrender of the water use entitlement by the authorized user in order to facilitate a licence application for the use of that water elsewhere by another person and, upon the licence being granted, for the final surrender of the entitlement to become effective. Thus, the entitlement is surrendered to the State and the State thereafter licenses another person to use that water. There is thus no transfer of a water use entitlement by or from the authorized user to the licensed user and such a transaction is prohibited by the section.

[25] The second respondent, on the other hand, contends that an underlying trade in the water use entitlements is not prohibited by the section, but it is indeed facilitated by it. Where there has been an agreement between two landowners in the same vicinity in terms of which one landowner trades a portion of his water use entitlement to the other landowner for reward, section 25(1) allows for the temporary transfer thereof pending the outcome of the “particular” licence application (referred to in section 25(2)), under section 41. Although Saawua ultimately decided that such trading was indeed unlawful, it however accepted that the interpretation of section 25 as espoused by the second respondent may well be correct.

[26] To my mind, Saawua is indeed correct in so far as it found that section 25 is unclear and somewhat ambiguous regarding whether a temporary or permanent

transfer may be made to another landowner. However, in my view the finding that trade in water use entitlements is unlawful per se is, with respect, incorrect.

[27] It will be convenient to deal first with the provisions of section 25(2) in this regard. At the outset, it should be noted that the Act has no provision which expressly prohibits the trading, or any transaction, in water use entitlements between private individuals. It is of some significance that subsection 25(2)(a) states that the surrender of a water use entitlement may be effected “in order to facilitate a particular licence application”. The word “particular” is defined in the Oxford Concise Dictionary as “relating to or considered as one thing or person as distinct from others.” That, in my view, is a clear indication that the surrender of the entitlement may only be done where a particular licence application is envisaged which fits hand in glove with an underlying transaction between parties such as the trade of such

entitlement, or even a donation. This interpretation is given further credence by the provisions of subsection 25(2)(b) which provides that the “surrender only becomes effective if and when such application is granted.” “Such”

application can only refer to the “particular” licence application mentioned in the immediately preceding subsection.

[28] This also flies in the face of the submissions made by the applicant in this regard to the effect that when a surrender is made by the holder of the entitlement it becomes incumbent on the State to determine to whom a licence in respect of the surrendered entitlement will be granted. In my view such entitlement may only be surrendered conditionally on the basis that a particular licence application is made by a particular person or entity (in terms of an underlying transaction) and the surrender will only become final if and when such “particular” application is granted.

[29] On a reading of the whole Act it does not seem that any other sections exist to counter this interpretation. On the contrary, section 29(2), which pertains to conditions which may be imposed by the responsible authority when issuing water use licences under the Act, reads as follows:

‘If a licensee has agreed to pay compensation to another in terms of any arrangement to use water, the responsible authority may make the obligation to pay compensation a condition of the licence.’

[30] This subsection appears to acknowledge that it is lawful in terms of the Act to enter into a private law 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. It seems to me that the provisions of subsection 29(2) dovetail with those of subsection 25(2). The “licensee” mentioned in subsection 29(2) can only refer to a party who has been successful in obtaining a licence, who would typically be the applicant in the licence application referred to in subsection 25(2)(a). The “another” referred to in subsection 29(2) can only be the holder of a water use entitlement which qualified to form the basis of an arrangement which entailed that the successful licensee could use the water in return for payment of compensation. Typically, this would be the surrendering party referred to in subsection 25(2).[16]

[31] There are other provisions in the Act which appear to underscore, not inhibit, the practice of trading in water use entitlements, such as section 26(1)(l) which authorizes the Minister to make regulations relating to transactions in respect of authorizations to use water, and section 26(1)(n) which empowers the Minister to prescribe procedures for the allocation of water by means of public tender or auction.

[32] This interpretation also resonates with the principle mentioned earlier to the effect that the Act is not to be interpreted so as to extinguish existing rights and obligations, unless it clearly provides otherwise, or its language clearly shows such a meaning.[17] It is common cause that such rights existed prior to the promulgation of the Act. Indeed, for many years during the existence of the Act the third respondent (as revealed by policy documents issued by it) accepted that such rights existed and continued after the Act was promulgated.[18] The Act does not expressly prohibit such rights and I find no clear language which ineluctably

points to such a meaning.

- [33] It is accordingly my view that the Act does not prohibit such transactions, but any such transaction entered into at private law relating to water use entitlements must comply with the provisions of the Act otherwise it will be unlawful and may constitute an offence under section 151(1)(a).
- [34] Having reached this conclusion, it seems that the conundrum relating to subsection 25(1) may be solved. As indicated earlier, there appears to be some ambiguity in the wording of the subsection as to whether it allows for a temporary transfer of a water use entitlement to another person, or only a temporary transfer by the holder of the entitlement from one property to another. Once it is accepted that trading is permitted by the Act as long as it complies therewith, then, in applying a purposive approach to subsection (1), it can only have been intended to mean that the temporary transfer may be made to “another” person (for the use of some or all of that water on another property in the same vicinity) in order to facilitate the surrender referred to in subsection (2) which is done for the purposes of the licence application to be made by such “another” person.

Saawua

- [35] It will be seen that this conclusion is not in accordance with the Saawua judgment. As already indicated, because of the reasons set forth above I must respectfully disagree with that conclusion. In addition

to the reasons I have set forth, certain other aspects of the reasoning in that judgment appear to me to be flawed.

- [36] The court in Saawua relied for its conclusion on three identifiable bases. Firstly, if trading were to be allowed, the holders of water use entitlements

would continue to identify and choose to whom the entitlements may be transferred. For this proposition, said the court, there is no authority in the Act.[19] Secondly, it found that there is no authority in the Act which permits holders of the entitlements to sell them. If one accepted

such a construction of section 25, it further reasoned, this would result in the “privatization of a national resource to which all persons must have access”.[20] Thirdly, such trade would, if allowed, discriminate “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.”[21]

- [37] In reaching its conclusion in this regard the court did not have regard to a number of judgments concerning section 25 of the Act which appear to conflict with this conclusion. [22] Whilst the precise point does not appear to have been argued in these matters, it does appear that the courts recognized the right to trade in water use entitlements.

[38] In Makhanya the Supreme Court of Appeal recognized the right on the part of a transferee to nominate a third-party of its choice to apply for the transfer of a water use entitlement held by such transferee pursuant to the provisions of section 25(2) of the Act. In Guguletto the court gave effect to and enforced an agreement of sale that related to a water use entitlement which was conditional upon the transfer of such entitlement being successful and a water use licence under the Act being granted to the purchaser (being the party nominated by the transferee/holder of the water use entitlement concerned).

[39] In Lucas Scheepers the court, in concluding that the applicants had failed to exhaust internal remedies, held at paragraph 21 thereof that certain

applicants could have facilitated their application for a licence by requesting one of the respondents to surrender its unused entitlement to them, as envisaged in section 25(2). In doing so, the court not only expressly confirmed that section 25 allows for the transfer of water use entitlements to third parties, but also acknowledged that the mechanism provided for in that section entitles the surrendering party to choose or nominate the person or entity who is supposed to benefit from the process.

[40] Finally in this regard, in Wittewater the court held that, on a proper interpretation of section 25(1) of the Act, the provision allows the temporary transfer of a water use entitlement from the holder thereof to a third party chosen by the transferee.

[41] The court in Saawua appears to have sought “authority” in the Act for the various propositions relating to trade in water use entitlements. As reasoned earlier in this judgment, the Act does not expressly prohibit trading and, for the reasons given, not only facilitates it (subject to the provisions of the Act) but directly countenances it in providing for the payment of compensation. Furthermore, the court in that matter does not appear to have considered the fact that extensive trading in water use rights had occurred for many years prior to the coming into being of the Act and that where the Act does not clearly delegitimize continuation of these rights, it must be seen to have accepted them. In the circumstances, it would not be necessary to seek direct “authority” for the proposition that such trading might be allowed. In any event, it is difficult to understand how the sale of entitlements in accordance with the Act would result in “privatization”. The state still maintains control thereof in terms of the Act and any such transaction must comply with the Act.

[42] As regards the question of discrimination, the court did not appear to refer to evidence in this regard. In my view, a court ought to be hesitant in making such a finding without the existence of clear evidence to support it.

[43] It is for these reasons that I am respectfully of the view that this conclusion in Saawua is incorrect.

Do the transactions giving rise to this case comply with the Act?

- [44] The finding that trade in water use entitlements is countenanced by the Act is not an end to the matter. As I have said before, such trade must be in compliance with the Act which, in my view, has restricted the ambit of such trading.
- [45] The question then is whether the series of transactions between Rooiakkers and Boompies and subsequently as between Rooiakkers and the second respondent pass muster under the Act. In particular, do they comply with section 25?
- [46] In my view they do not. I have been at pains to make it clear that the section requires a surrender of the entitlement for a particular purpose, that being to facilitate a particular licence application under section 41.[23] The transactions under review are not countenanced by section 25. It would stretch the language used in that section too far to say that it allows for transactions of this nature.
- [47] When Rooiakkers withheld a portion of the water use entitlements in its sale to Boompies, and thereafter purported to retain them for some six years before they were sold to the second respondent, it clearly did not “surrender” the entitlements “in order to facilitate a particular licence application under section 41...”. Nowhere in the papers is it suggested that this was indeed so. Likewise, when it purported to sell these rights to the second respondent, this was not done in the form of a surrender to facilitate a licence application. This is exemplified in the fact that a licence application was in the process of being made by the second respondent some twelve years after the initial transaction between Rooiakkers and Boompies took place. That can never have been a contemplated “particular” licence application for the purposes of section
25. It was therefore, in my view, not competent in terms of the Act for Rooiakkers to withhold the water use entitlements from its sale of lots 67 and 68 and to retain such entitlements after it (Rooiakkers) was no longer the owner of lots 67 and 68 without surrendering the water use entitlement in terms of section 25(2), and making application in terms of section 41 for a licence to use that water elsewhere. The subsequent purported sale thereof to the second respondent was therefore also unlawful.

Should the first respondent pay costs?

- [48] In my view it should not. It has retained a neutral stance as mentioned above even though it may have taken the view that the transactions in question were lawful. The only reason why the first respondent opposed the application was to resist the costs order sought against it, albeit that it was sought jointly and severally with the second respondent. This it was entitled to do. In my view therefore the applicant must pay the first respondent’s costs incurred in opposing the application. As regards the question of whether the first respondent has continued to supply the water elsewhere and not to the applicant, this is a dispute of fact and must be resolved in favour of the first respondent.[24]
- [49] In these premises the following order will issue:

1. The applicant's lawful water use entitlement in respect of lot 67 and lot 68 in the Great Fish River Settlement is declared to be:
 - (a) 250 000m³ for use on 20 hectares of land in respect of lot 67, Great Fish River Settlement; and
 - (b) 305 000m³ for use on 24,4 hectares of land in respect of lot 68, Great Fish River Settlement;both in accordance with, and in terms of, the declarations of water use as an existing lawful water use in terms of section 33(2) of the National Water Act No. 36 of 1998, set forth in annexures "A" and "B" to the notice of motion.
2. The first respondent is ordered to deliver to the applicant the volumes of water provided for in the declarations annexed marked "A" and "B" annexed to the notice of motion.
3. The second respondent is ordered to pay the applicant's costs of the application.
4. The applicant is ordered to pay the first respondent's costs of opposing the application.
5. The second respondent's counter application is dismissed with costs.

R E GRIFFITHS

JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT :

Mr De la Harpe SC

INSTRUCTED BY

: Messrs BKG attorneys

COUNSEL FOR 1ST RESPONDENT : Mr Ford SC

INSTRUCTED BY :

Messrs Nolte Smit Inc.

COUNSEL FOR 2ND RESPONDENT : Mr La Grange SC

INSTRUCTED BY

: The State Attorney

HEARD ON

: 30 JULY 2020

HANDED DOWN ON

: 13 OCTOBER 2020

[1] No. 36 of 1998.

- [2] The first respondent is the Great Fish River Water Users Association and the second respondent is Lomajasa Beleggings (Pty) Ltd. The third respondent (Minister of the Department: Water and Sanitation, Lindiwe Nonceba Sisulu N.O.) and the fourth respondent (Department of Water and Sanitation Province of the Eastern Cape) have not opposed. The first respondent has opposed solely as to the question of costs.
- [3] The declarations provide for the use of 250 000 m³ of water per annum for the irrigation of 20 ha on Lot 67 and for the use of 305 000 m³ of water for the irrigation of 24,40 ha on Lot 68.
- [4] No. 54 of 1956.
- [5] 2010 (2) SA 586 (SCA) at paragraphs 8–11.
- [6] Ibid at paragraph 10.
- [7] De Wet v Deetlefs 1928 AD 286.
- [8] Hall C. G. and A. P. Burger Hall on Water Rights in South Africa 4 ed (1974) p 59.
- [9] GJO Boerdery Ondernemings v Bloemfonteinse Munisipaliteit 1988 (4) SA 75 (A).
- [10] E van der Schyff ‘Die Nasionalisering van Waterregte in Suid-Afrika: Ontneming of Onteining?’ PER/PELJ 2003(6)1 p 11.
- [11] Veldman v DPP, WLD 2007 (3) SA 210 (CC) at paragraphs 26 and 27; Pienaar Brothers (Pty) Ltd v Commissioner, South African Revenue Service and Another 2017 (6) SA 435 (GP) at paragraph 40; Curtis v Johannesburg Municipality 1906 TS 308 at 311; Katzenellenbogen LTD v Mullin 1977 (4) SA 855 (A) at 884A.
- [12] The applicant has raised certain sub-issues which will be dealt with later and has raised other issues which it is not necessary to detail.
- [12] The applicant has raised certain sub-issues which will be dealt with later and has raised other issues which it is not necessary to detail.
- [13] 2012 (4) SA 593 (SCA) at paragraph 18.
- [14] See also: Cool Ideas 1186 CC v Hubbard & Another 2014
- (4) SA 474 (CC) at paragraph 28; Kubyana v Standard Bank of South Africa Ltd 2014 (3) SA 56 (CC) at paragraph 18; Democratic Alliance v Speaker, National Assembly & Others 2016 (3) SA 487 (CC) at paragraph 27.
- [15] 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 (GP) unreported case no 71913/2018 of 19 June 2020.
- [16] In Xenopoulos and Another v Standard Bank of South Africa Ltd and Another 2001

- (3) SA 498 (W) at 512E – F: “... [I]t was stated that it is unusual for persons to give up rights or property gratuitously unless there is a reason for their conduct. It would therefore be the rule rather than the exception for someone to receive a quid pro quo for the surrender of a water use entitlement.”

[16] In *Xenopoulos and Another v Standard Bank of South Africa Ltd and Another* 2001

- (3) SA 498 (W) at 512E – F:

“... [I]t was stated that it is unusual for persons to give up rights or property gratuitously unless there is a reason for their conduct. It would therefore be the rule rather than the exception for someone to receive a quid pro quo for the surrender of a water use entitlement.”

[17] See Veldman (note 11 above) at paragraphs 26 – 27.

[18] For a history of the policy and procedural guidelines concerning ‘Temporary water use and a surrendering of water use entitlements’ see Saawua at paragraphs 5 – 10.

[19] Saawua (note 15 above) at paragraph 42.

[20] Ibid at paragraph 43.

[21] Ibid at paragraph 44.

[22] *Makhanya NO and Another v De Goede Wellington Boerdery (Pty) Ltd* [2013] 1 All SA 526 (SCA) (“Makhanya”) at paragraphs 4 – 6; *Guguletto Family Trust v Chief Director Water Use, Department of Water Affairs and Forestry and Another (GNP)* unreported case no A566/10 of 25 October 2011 (“Guguletto”); *Trustees of the Time Being of the Lucas Scheepers Trust, IT 633/96 & Others v MEC for the Department of Water Affairs, Gauteng and Others (GP)* unreported case no 40514/2013 of 17 April 2015 (“Lucas Scheepers”); *Wittewater Boerdery (Pty) Ltd and Another v Minister of Water and Sanitation and others (WCC)* unreported case no 18115/2018 (“Wittewater”).

[23] Hubert Thompson *Water Law* 2 ed (2006) pp470 & 523.

[24] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A).

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