



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

**Reportable
Case No. 725/2020**

In the matter between:

CASPER JACOBUS LÖTTER N O **FIRST APPELLANT**

JACOBUS ANDREAS DU PLESSIS N O **SECOND APPELLANT**

JOHANNES CORNELIUS HEUNIS N O **THIRD APPELLANT**

and

MINISTER OF WATER AND SANITATION **FIRST RESPONDENT**

MINISTER OF ENVIRONMENTAL AFFAIRS **SECOND RESPONDENT**

**DIRECTOR-GENERAL: DEPARTMENT OF WATER
AND SANITATION** **THIRD RESPONDENT**

BRITZKRAAL (PTY) LTD **FOURTH RESPONDENT**

and in the matter between:

FRANCOIS GERHARDUS JOHANNES WIID **FIRST APPELLANT**

TORQHOFF BOERDERY (PTY) LTD **SECOND APPELLANT**

FRANCOIS GERHARDUS JOHANNES WIID N O **THIRD APPELLANT**

REINETTE JEPPE WIID N O **FOURTH APPELLANT**

CAREL JACOBUS VAN PLETZEN N O **FIFTH APPELLANT**

and

MINISTER OF WATER AND SANITATION **FIRST RESPONDENT**

MINISTER OF ENVIRONMENTAL AFFAIRS **SECOND RESPONDENT**

**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 **SIXTH RESPONDENT**

and in the matter between:

**SOUTH AFRICAN ASSOCIATION
FOR WATER USER ASSOCIATIONS** **FIRST APPELLANT**

EAGLE NEST INVESTMENTS 3 CC **SECOND APPELLANT**

THUSANO EMPOWERMENT FARM (PTY) LTD **THIRD APPELLANT**

and

MINISTER OF WATER AND SANITATION **FIRST RESPONDENT**

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

SECOND RESPONDENT

SIFISO MKHIZE N O

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

Neutral citation: *Lötter N O and Others v Minister of Water and Sanitation and Others* (725/2020) [2021] ZASCA 159 (8 November 2021)

Coram: Makgoka, Plasket, Gorven and Hughes JJA and Kgoele AJA

Heard: 20 August 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. It has also been published on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 09h45 on 8 November 2021.

Summary: National Water Act 36 of 1998– interpretation of s 25 thereof – whether s 25 permits transfers of water use entitlements, with the approval of the regulatory authority, from the holder thereof to a third party – such transfers contemplated by s 25 – trading in water use entitlements – such not prohibited in the Act, and therefore, not unlawful.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mavundla, Ranchod and Mothle JJ sitting as court of first instance)

1. The appeal in each case is upheld with costs, including the costs of two counsel, to be paid by the Minister of Water and Sanitation and the Director-General of the Department of Water and Sanitation.

2. The order of the full bench in respect of each case is set aside and replaced with the following order.

‘1. It is declared that, in terms of s 25(1) of the National Water Act 36 of 1998 (the NWA), a water management institution is empowered, at the request of a person authorized in terms of the NWA to use water for irrigation:

(a) to allow that person on a temporary basis, and on such conditions as the water management institution determines, to use some or all of that water for a different purpose; or

(b) to allow that person to allow a third party the use of some or all of that water on another property in the same vicinity, for the same or a similar purpose.

2. It is declared that, in terms of s 25(2) of the NWA, a person holding an entitlement to use water from a water resource in respect of any land may surrender that entitlement in whole or in part:

(a) in order to facilitate a licence application by the holder of the entitlement or of a third party in terms of s 41 of the NWA for the use of that water in respect of other land owned or controlled either by the holder of the entitlement or the third party;

(b) that the surrender of the entitlement by the holder of the entitlement only becomes effective in the event of the licence application, in terms of s 41 of the NWA, of the holder of the entitlement or of the third party being approved by the responsible authority;

(c) an agreement between the holder of an entitlement to use water and a third party, in respect of the surrender of the entitlement by the former to facilitate an application

for a licence in respect thereof by the latter, in return for payment of compensation, is not prohibited.

3. In the *Lötter* and *Wiid* cases:

(a) the applicants are exempted, in terms of s 7(2)(c) of the Promotion of Administrative Justice Act 3 of 2000 from having to exhaust their internal remedies; and

(b) the decisions taken by the Director-General, Department of Water and Sanitation to refuse the applications of the applicants for licences in terms of s 41 of the NWA are reviewed and set aside.

4. The Minister of Water and Sanitation and the Director-General of the Department of Water and Sanitation are ordered to pay the costs of the applicants, including the costs of two counsel.'

JUDGMENT

Plasket JA (Gorven and Hughes JJA and Kgoele AJA concurring)

[1] This appeal concerns three cases, heard together by a full bench of the Gauteng Division of the High Court, Pretoria, in which the same issues were dealt with. They are whether water use entitlements in terms of the National Water Act 36 of 1998 (the NWA) may be transferred temporarily or permanently from an entitlement-holder to another person, and whether trading in water use entitlements is permitted.¹ These issues involve the interpretation of s 25 of the NWA within the broader context of the statute.

[2] Section 25 of the NWA is headed 'Transfer of water user authorisations'. It reads:

'(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

¹ An entitlement is defined in s 1 of the NWA as 'a right to use water in terms of any provision of this Act or in terms of an instrument issued under this Act'.

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.

(3) The annual report of a water management institution or a responsible authority, as the case may be, must, in addition to any other information required under this Act, contain details in respect of every permission granted under subsection (1) or every application granted under subsection (2).’

[3] In what follows, I shall first set out the facts of each of the three cases. I will then consider the judgment of the full bench and its reasoning. Thereafter I will discuss the terms of the NWA in general. When that has been done, I will turn to the core issues that arise in this appeal: I will interpret s 25(1) and s 25(2) of the NWA and answer the question whether trading in water use entitlements is prohibited. Finally, I will make the orders that flow from my findings on the issues that I have identified.

The cases

[4] In the *Lötter* matter, the Doornkraal Business Trust (Doornkraal), the owner of farms in the Somerset East district of the Eastern Cape, had concluded an agreement with Britzkraal Properties (Pty) Ltd (Britzkraal) in terms of which Doornkraal purchased 30 hectares of Britzkraal’s water use entitlement for a price of R1 950 000. The parties declared in their agreement that they were aware that the approval of the regulatory authority was necessary and made that approval a suspensive condition.

[5] Pursuant to the agreement, and in terms of s 25(2) of the NWA, Britzkraal surrendered its water use entitlement and Doornkraal applied for a licence in respect of that water use entitlement in terms of s 41 of the NWA. To this end, Doornkraal furnished a detailed motivation that dealt with each of the relevant considerations for the grant of a licence listed in s 27(1) of the NWA.

[6] The motivation explained that while the property concerned had existing water use entitlements, Doornkraal required more water because it wished to expand its dairy farming operation. It stated that its proposed water use would thus form part of its 'integrated farming concern'. In respect of the likely effect of the water use on the water resource and other water users, Doornkraal said that no other authorized water user would be affected if the licence was granted.

[7] The Director-General of the Department of Water and Sanitation – the responsible authority for purposes of s 41 – refused Doornkraal's application. He did so, according to his letter to Doornkraal of 16 January 2018, for the following reason: 'Kindly note that Section 25(2) of the National Water Act (Act 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.'

[8] Doornkraal's trustees then launched an application in the Gauteng Division of the High Court, Pretoria for a declarator as to the meaning and effect of s 25(2) of the NWA and for the review and setting aside of the Director-General's decision to refuse the licence application.

[9] The *Wiid* matter was similar. It concerned three agreements between Mr Wiid, Torqhoff Boerdery (Pty) Ltd and the trustees of the De Kalk Trust, on the one hand, and the GP Viljoen Trust, on the other. In terms of these agreements, the GP Viljoen Trust undertook to surrender its water use entitlements so that the other contracting parties could apply for licences in respect of those entitlements. The purpose of the transfer was to enhance the combined crop farming operation of Mr Wiid, Torqhoff Boerdery and the De Kalk Trust in the Hopetown District of the Northern Cape.

[10] In the first agreement, the GP Viljoen Trust agreed to surrender its entitlement to 888 999m³ of water use to Mr Wiid for a consideration of R5 920 000; in the second, it agreed to surrender its entitlement to 2 312 000m³ of water use to Torqhoff Boerdery for a consideration of R15 413 333; and in the third, it agreed to surrender its

entitlement to 222 000m³ of water use to the De Kalk Trust for a consideration of R2 666 667.

[11] Pursuant to these agreements, the GP Viljoen Trust surrendered its water use entitlements in terms of s 25(2) of the NWA and Mr Wiid, Torqhoff Boerdery and the De Kalk Trust applied for licences in respect of those entitlements in terms of s 41 of the NWA. They furnished a detailed motivation that dealt with each of the relevant considerations for the grant of a licence in terms of s 27(1) of the NWA.

[12] In his founding affidavit, Mr Wiid explained that the three applicants had previously leased the water use for which they had applied for licences. As with the *Lötter* matter, the motivation stated that the granting of the licence applications would have no effect on other authorized water users.

[13] As with the *Lötter* matter, the Director-General refused all three applications. He did so for the same reason: s 25(2) of the NWA did not allow for the transfer of water use entitlements from one person to another, and that trading in water rights was not permitted. As a result, Mr Wiid, in his personal capacity, Torqhoff Boerdery and the trustees of De Kalk Trust applied to the Gauteng Division of the High Court, Pretoria for a declarator in respect of the meaning and effect of s 25(2) and for the review and setting aside of the decisions to refuse the licence applications.

[14] The third case – the *South African Association for Water User Associations* matter (the *SAAWUA* matter) – differs to an extent from *Lötter* and *Wiid*. SAAWUA, a voluntary association of 77 Water User Associations and Irrigation Boards, as well as Eagle's Nest Investments 3 CC and Thusano Empowerment Farm (Pty) Ltd, applied to the Gauteng Division of the High Court, Pretoria, for a declarator in respect of the meaning and effect of both s 25(1) and s 25(2) of the NWA. SAAWUA applied for this relief in its own interest, on behalf of its members and in the public interest. Eagle's Nest and Thusano did so after applications that they had made for transfers of water use entitlements had been refused on the same basis as in *Lötter* and *Wiid*.

[15] In its founding affidavit, SAAWUA explained the background to, and the purpose of, the case, and that of the other two applicants, as follows:

'16 The purpose of this application is to bring clarity and certainty, by way of declaratory orders, with regard to the proper scope, ambit, meaning and interpretation of section 25(1) and of section 25(2) of the NWA.

17 In a nutshell the legal issue between the Applicants and the State Respondents is simply whether the provisions of section 25 of the NWA can be used by a person already holding a water use entitlement under or in terms of the NWA for a transfer of that water use entitlement only to him- or herself but not to another person or a third party. (Underlining in the original text.)

18 Before 19 January 2016 there was no dispute or question concerning the scope and ambit of section 25 of the NWA and the permissibility of a transfer of water use entitlement . . . to another person or a third party in terms of the provisions thereof, and section 25 of the NWA was regularly and constantly used and implemented in practice over the period from 1 October 1998 (the date of commencement of the NWA) up to 19 January 2018 (the date of issue of the Legal Services Circular No 1 of 2017 . . .) to effect such transfers of water use entitlements.

19 However, on 19 January 2018 and by way of the issue of the Legal Services Circular No 1 of 2017 . . . the State Respondents adopted the stance that, upon their interpretation, section 25 of the NWA does not make provision for the transfer of a water use entitlement from one person to another and that the NWA does not contemplate a “*trading of water*” between private parties or the transfer of water use entitlements between private individuals.’

[16] The full bench dismissed all three applications but granted leave to appeal to this court. It is to the judgment of the full bench that I now turn.

The judgment of the court below

[17] The full bench identified the issues for decision as being the interpretation of s 25 of the NWA, particularly whether it permitted transfers of water use entitlements from a holder to a third party, and whether ‘the Act permits the sale of, or trade in the water use entitlement, through the transfer or surrender thereof to a third party’.

[18] It held that while s 25 made no express mention of a third party to whom a water use entitlement could be transferred, the section was capable of either a wide or a narrow meaning: either that it permitted transfers of water use entitlements from one person to another; or that it limited transfers to the transfer of water use entitlements

from one property owned or controlled by a holder of a water use entitlement to another property owned or controlled by the same person.

[19] This debate, the full bench held, was in truth of ‘no moment’ because the real issue in dispute between the parties was ‘the question of water trading’. The dispute concerning the interpretation of s 25 was ‘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 or sell it, as previously authorised by Circular no 18 of 2001’.²

[20] The full bench proceeded to say that the contention advanced by the appellants concerning the meaning of s 25 was ‘intended to justify water trading’ but ‘water trading is no longer permissible, for a variety of reasons based on the purposes outlined in section 2 of the Act’. It then proceeded to set out three reasons why it came to that conclusion.

[21] The first reason given for why the transfer of water use entitlements was no longer permitted was that their transfer would enable holders of water use entitlements to ‘continue to identify and choose who the recipients of the transferred or surrendered entitlement should be’. The NWA does not make provision for that but instead it ‘empowers the water institutions to receive the request for transfers and surrender of the water use entitlements’.

[22] The second reason given was that ‘there is no authority in the Act, permitting holders of the entitlements to sell their entitlements’. Allowing that to take place would result in the ‘privatisation of a national resource to which all persons must have access’. With reference to the Minister’s obligations in terms of s 3 of the NWA to ensure that ‘water is allocated equitably and used beneficially in the public (*not private*)

² Circular no. 18 of 2001, issued by the Director-General of the Department contained his interpretation of s 25 at the time. That interpretation in respect of s 25(2) was to the effect that water use rights could 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’. The full bench was not correct when it said that the circular authorised trading in water use entitlements. It is no more than the Director-General’s understanding, at the time, of what s 25 meant. As explained above in the *SAAWUA* matter, the Director-General now takes the view, expressed in Circular No 1 of 2017, that s 25 means something else.

interest', the full bench said that the courts 'cannot accept a construction of s 25 of the Act which impedes the Minister from discharging this obligation'.

[23] The third reason given was that the 'sale of water use entitlements by the holders thereof in private agreements, discriminates against those who cannot afford the prices of compensation unilaterally determined by the holder'. Such a system maintains a 'monopoly of access to water resources only to established farmers who are financially well resourced'; and the sale of water use entitlements would 'frustrate equal access and keep historically disadvantaged persons out of the agricultural industry'.

[24] The full bench concluded:

'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 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.'

[25] In the result, the full bench dismissed the appellants' applications for declarators as to the meaning of s 25 of the NWA, without even interpreting it, because the objective of the applications was, it held, 'to justify water trade'. The applications to review and set aside the decisions to refuse transfers of water use entitlements in *Lötter* and *Wiid* were also dismissed.

The NWA

[26] Given South Africa's generally arid nature and susceptibility to droughts, it is not surprising that from prior to Union in 1910, successive governments have recognised the public interest in the proper and efficient use of water, and have regulated its use. The NWA repealed and replaced the Water Act 54 of 1956. In so doing, Leach JA observed in *S v Mostert and Another*,³ it 'fundamentally reformed South African water law'. It did so by abolishing the common-law distinction between public and private water as a basis for use entitlements. Instead, the national

³ *S v Mostert and Another* [2009] ZASCA 171; 2010 (2) SA 586 (SCA) para 10.

government 'was granted the overall responsibility for and authority over the country's water resources and their use'. In this framework, the Minister of Water and Sanitation acts on behalf of the national government as the 'public trustee of the nation's water resources'.

[27] The long title of the NWA gives notice of its transformatory aims. It provides that the NWA is to 'provide for fundamental reform of the law relating to water resources; to repeal certain laws; and to provide for matters connected therewith'.

[28] The preamble recognizes a number of fundamentals. They are that: water is a 'scarce and unevenly distributed national resource' occurring in 'many different forms which are all part of a unitary, inter-dependent cycle'; while the resource 'belongs to all people, the discriminatory laws and practices of the past have prevented equal access to water, and use of water resources'; the aim of managing this resource 'is to achieve the sustainable use of water for the benefit of all users'; the protection of the quality of this resource is 'necessary to ensure sustainability of the nation's water resources in the interests of all water users'; and the need for 'the integrated management of all aspects of water resources'. The preamble acknowledges that the national government should have 'overall responsibility for and 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'.

[29] Section 2 sets out the purposes of the NWA. It provides:

'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.'

[30] Section 3 creates the public trusteeship of water resources. It does so in the following terms:

'(1) As the public trustee of the nation's water resources the National Government, acting through the Minister, must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate.

(2) Without limiting subsection (1), the Minister is ultimately responsible to ensure that water is allocated equitably and used beneficially in the public interest, while promoting environmental values.

(3) The National Government, acting through the Minister, has the power to regulate the use, flow and control of all water in the Republic.'

[31] Section 4 is headed 'Entitlement to water use'. It provides:

'(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.'

[32] The NWA contemplates lawful water use either with or without a licence. A licence is not necessary if the use is for a purpose set out in Schedule 1,⁴ if the user enjoys an existing lawful water use in terms of s 34,⁵ if a general authorization is issued in terms of s 39⁶ or if the responsible authority has otherwise dispensed with a licence requirement.⁷ In any other instance, a person who wishes to use water must have a licence to do so in terms of the NWA.⁸

[33] Section 26 grants to the Minister the power to make regulations on a wide range of topics such as, for example, 'limiting or restricting the purpose, manner or extent of water use'⁹ and 'requiring that the use of water from a water resource be monitored, measured and recorded'.¹⁰ Section 26(1)(l) empowers the Minister to make regulations:

'relating to transactions in respect of authorisations to use water, including but not limited to –

- (i) the circumstances under which a transaction may be permitted;
- (ii) the conditions subject to which a transaction may take place; and
- (iii) the procedure to deal with a transaction.'

[34] Section 27(1) sets out factors that are relevant when considering general authorisations under s 39 and licences under s 40. The section provides:

'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

⁴ Schedule 1 allows, for instance, for reasonable domestic use of water in a person's household, for small gardening not for commercial purposes and in cases of emergency, either for human consumption or fire-fighting.

⁵ Section 32 defines an existing lawful water use as a water use that had been in existence for at least two years before the NWA came into operation and which, inter alia, was authorized by a law in force immediately before the commencement of the NWA.

⁶ Section 39 allows for the issuing of a general authorisation for a specific geographical area either generally, in relation to a specific water resource or within a specified area.

⁷ It may do so, in terms of s 22(1)(c) read with s 22(3) 'if it is satisfied that the purpose of the Act will be met by the grant of a licence, permit or other authorization under any other law'.

⁸ Section 22(1)(b).

⁹ Section 26(1)(a).

¹⁰ Section 26(1)(b).

- (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.'

[35] The effect of s 27(1) on decision-making in terms of the NWA was discussed by this court in *Makhanya NO and Another v Goede Wellington Boerdery (Pty) Ltd*.¹¹ The court stated:

'The Constitutional Court has previously had occasion to address administrative decision-making where the official is faced with a number of considerations of which racial redress is one. Much like the situation facing the court in *Bato Star*, s 27(1)(b) contains a wide number of objectives and principles. Some of them may be in conflict with one another, as they cannot all be fully achieved simultaneously. There may also be many different ways in which each of the objectives stand to be achieved. The section does not give clear guidance on how the balance an official must strike is to be achieved in doing the counterweighing exercise that is required. As opposed to the legislative scheme before the court in *Bato Star*, there is no indication in the Act that s 27(1)(b) is to be regarded as in any way more important than the other factors.'¹²

[36] Section 28(1) lists the essential requirements that a licence must specify. They are:

- (a) the water use or uses for which it is issued;
- (b) the property or area in respect of which it is issued;

¹¹ *Makhanya NO and Another v Goede Wellington Boerdery (Pty) Ltd* [2012] ZASCA 205; [2012] 1 All SA 526 (SCA). See too *Guguletto Family Trust v Chief Director, Water Use, Department of Water Affairs and Forestry and Another*, North Gauteng, Pretoria (case no. A566/10) 25 October 2011 (unreported) para 22.

¹² Para 33.

- (c) the person to whom it is issued;
- (d) the conditions subject to which it is issued;
- (e) the licence period, which may not exceed forty years; and
- (f) the review periods during which the licence may be reviewed under section 49, which must be at intervals of not more than five years.’

[37] Section 29 allows for conditions to be attached to licences. In terms of s 29(1), these conditions may relate to such matters as: the protection of the water source concerned, the stream flow regime and other existing or potential users;¹³ water management, specifically in respect of management practices and requirements for water use, as well as monitoring, analysis and reporting requirements;¹⁴ and return flow and discharge or disposal of waste.¹⁵ Section 29(2) provides that if ‘a licensee has agreed to pay compensation to another person in terms of any arrangement to use water, the responsible authority may make the obligation to pay compensation a condition of the licence’.

[38] Section 40 concerns applications for water-use licences. Section 40(1) states that a person ‘who is required or wishes to obtain a licence to use water must apply to the relevant responsible authority for a licence’. Section 41 sets out detailed procedures relating to applications for licences. Section 41(1) requires applications to be made on the prescribed form, contain information determined by the responsible authority and be accompanied by the prescribed fee. The remainder of the section deals with the extensive powers granted to the responsible authority to obtain additional information and investigate relevant issues. For instance, s 41(2) provides: ‘A responsible authority –

- (a) may, to the extent that it is reasonable to do so, require the applicant, at the applicant’s expense, to obtain and provide it by a given date with-
 - (i) other information, in addition to the information contained in the application;
 - (ii) an assessment by a competent person of the likely effect of the proposed licence on the resource quality; and

¹³ Section 29(1)(a).

¹⁴ Section 29(1)(b).

¹⁵ Section 29(1)(c).

- (iii) an independent review of the assessment furnished in terms of subparagraph (ii), by a person acceptable to the responsible authority;
- (b) may conduct its own investigation on the likely effect of the proposed licence on the protection, use, development, conservation, management and control of the water resource;
- (c) may invite written comments from any organ of state which or person who has an interest in the matter; and
- (d) must afford the applicant an opportunity to make representations on any aspect of the licence application.'

[39] Section 41(4) ensures that applications for licences are not concluded in secret. It provides:

'A responsible authority may, at any stage of the application process, require the applicant –

- (a) to give suitable notice in newspapers and other media –
 - (i) describing the licence applied for;
 - (ii) stating that written objections may be lodged against the application before a specified date, which must be not less than 60 days after the last publication of the notice;
 - (iii) giving an address where written objections must be lodged; and
 - (iv) containing such other particulars as the responsible authority may require;
- (b) to take such other steps as it may direct to bring the application to the attention of relevant organs of state, interested persons and the general public; and
- (c) to satisfy the responsible authority that the interests of any other person having an interest in the land will not be adversely affected.'

[40] Section 42 places an obligation on a responsible authority who has taken a decision on a licence application to notify the applicant and any objectors of the decision taken and, on the request of either the applicant or an objector, to furnish written reasons for the decision.

[41] I have endeavoured to provide both an outline of the regulatory system that is created by the NWA, as it applies in this case, and an overview of its most important provisions relevant to the issues before us. I turn now to the interpretation of s 25.

The interpretation of s 25 of the NWA

[42] The full bench appears to have dismissed the applications for the declarators on the basis of some or other unexplained abuse of process on the part of the appellants. It ought not to have done so and misdirected itself as a result. More importantly, in so doing, it failed to answer the first question that was before it, namely whether s 25 of the NWA allowed for the transfer of water use entitlements from one person to another. It is only when that question has been answered that the second question can be answered, namely whether, if transfers of water use entitlements are envisaged by the NWA, contractual arrangements may be put in place by parties for the effectual sale or leasing of water use entitlements.

[43] The correct approach to the interpretation of written documents, be they statutes or contracts, was set out authoritatively by this court in *Natal Joint Municipal Pension Fund v Endumeni Municipality*.¹⁶ Essentially, what is required is an objective, unitary exercise that takes into account the language used, the context in which it is used and the purpose of the document concerned. Unterhalter AJA, in *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others*,¹⁷ added the following:¹⁸

'I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined. As *Endumeni* emphasized, citing well-known cases, "[t]he inevitable point of departure is the language of the provision itself".'

[44] I commence with the words used. Section 25(1) envisages two separate situations. The first does not involve a transfer of the entitlement but the second does. In the first part of s 25(1), a water management institution is empowered, at the request

¹⁶ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

¹⁷ *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; [2021] (3) All SA 647 (SCA).

¹⁸ Para 25.

of a person entitled to use water for irrigation, to allow that person to use that water, temporarily, for a different purpose. No third party involvement arises in this instance.

[45] In the second part of s 25(1), however, a water management institution is empowered to allow the entitlement-holder, on a temporary basis, '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'. This contemplates a transfer from the entitlement-holder to a third party. If the intention had been only to allow the entitlement-holder to temporarily use their own water on a second property owned or controlled by them, the section would not have spoken of the water management institution allowing the entitlement-holder to allow that use. The section would simply have said that the water management institution 'may allow a person authorised to use water for irrigation to use some or all of that water on another property in the same vicinity for the same or a similar purpose'.

[46] The first use of the word 'allow' in s 25(1) has reference to who the water management institution may 'allow', or authorise, namely the entitlement-holder. The second use of the word refers to what the entitlement-holder may allow, namely the use of the water on another property in the vicinity of their own property. That second use of the word 'allow' cannot refer to a temporary transfer of water use from one property to another owned or controlled by the entitlement holder. It makes no sense to seek the water management institution's approval for the entitlement-holder to allow themselves to use the water on another of their own properties.

[47] Section 25 deals, according to its heading, with transfers of water use authorisations. If, in s 25(1), the temporary transfer of water use entitlements includes transfers to third parties, I cannot see any basis for the same not applying to the mechanism for permanent transfers created by s 25(2), namely surrender and application. It would be incongruous if the transfer of water use entitlements bore such divergent meanings in s 25(1) and s 25(2), particularly in the light of the assumption that when a word is used in legislation, it bears the same meaning wherever it appears.¹⁹ Section 25(2) creates the mechanism for a permanent transfer of water use

¹⁹ *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* [1999] ZACC 8; 1999 (4) SA 623 (CC); 1999 (7) BCLR 771 (CC) para 47. See too L C Steyn *Die Uitleg van Wette* (5 ed) (1981) at 126.

entitlements. One party – the entitlement-holder – conditionally surrenders their entitlement, while the other party – the prospective entitlement-holder – applies for the licence. And if the licence application is not approved by the responsible authority, the surrender ceases to have effect. The effect of s 25(2) was described thus by Pretorius J in *Trustees for the Time Being of the Lucas Scheepers Trust and Others v MEC for the Department of Water Affairs, Gauteng and Others*:²⁰

‘Although parties can agree that the water entitlement of one user may be used by another farmer on another farm, section 25(2)(b) sets out clearly that where one party surrenders his entitlement for use of water from the same source in respect of other land, it only becomes effective if and when an application is granted. A mere agreement between the parties, as in this instance, does not suffice.’

[48] Section 25 does not stand alone. It must be viewed within the broader context of the statute of which it is part. There are two strong indications, in s 26 and s 29, that support the meaning that I have given above. Section 26(1)(l) empowers the Minister to make regulations ‘relating to transactions in respect of authorisations to use water’, the precise subject-matter of s 25. The *Concise Oxford English Dictionary* defines ‘transaction’ to mean ‘an instance of buying or selling’; ‘the action of conducting business’; ‘an exchange or interaction between people’. Each of these meanings contemplates two parties at least being involved. One does not transact with oneself. (Where the word ‘transfer’ is used in other sections, albeit in different contexts from the transfer of water use entitlements, a transfer from one person to another is clearly contemplated.²¹)

[49] Secondly, s 29 authorises the attaching of conditions to licences. Section 29(2) provides that one such condition may be the payment of compensation, where there has been an agreement to this effect ‘in terms of any arrangements to use water’. The payment of compensation must envisage a quid pro quo payable by one person to another in respect of a water use transaction; and that in turn can only refer to a transaction involving the transfer of water use entitlements pursuant to s 25. In *Ramah*

²⁰ *Trustees for the Time Being of the Lucas Scheepers Trust and Others v MEC for the Department of Water Affairs, Gauteng and Others* [2015] ZAGPPHC 211 para 22.

²¹ See s 89 (transfer of assets and liabilities of catchment management agencies); s 115 (transfer, sale or other disposal of government waterworks); s 135 (transfer by a water management institution of rights held in respect of improvements on land belonging to another person); and s 136 (transfer of personal servitudes held by the Minister or a water management institution).

*Farming v Great Fish River Water Users Association and Others*²² Griffiths J said the following with regard to the effect of s 29(2) on the meaning of s 25(2):

‘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).’

I agree with Griffiths J’s analysis. On its own, s 29(2) is a compellingly strong indication that the transfer of water use entitlements from one person to another is contemplated by s 25(2).

[50] I turn now to consider whether the interpretation that has emerged so far is consistent with the purposes of the NWA. One of the purposes of the NWA set out in s 2 is that of ‘promoting the efficient, sustainable and beneficial use of water in the public interest’;²³ while another is facilitating economic development.²⁴ In terms of s 3(2), the Minister is placed under a duty to ensure that water is used beneficially. And, in terms of s 27(1), when a decision is taken on whether to grant or refuse a licence, the responsible authority must give consideration to ‘the efficient and beneficial use of water in the public interest’. The interpretation of s 25 that allows for transfers of water use entitlements from one person to another is, it seems to me, in harmony with these provisions, speaking to the efficient and beneficial use of water, in particular, and of economic development. When a water use entitlement has been made, the person to whom it was granted should use it optimally. If they cannot or no longer wish to, or have excess water to their needs, rather than that water going to waste, as it were, a transfer to someone else who is going to use it beneficially contributes to the attainment of the purposes of the NWA.

²² *Ramah Farming v Great Fish River Water Users Association* 2021 (2) SA 547 (ECG) para 30.

²³ Section 2(d).

²⁴ Section 2(e).

[51] Two final points need to be made. The first is that the 1997 *White Paper on a National Water Policy* that preceded and informed the content of the NWA had stated that while, in the new legislation, water use allocations would no longer be permanent as in the past,²⁵ provision would be made to ‘enable transfer or trade of these rights between users, with Ministerial consent’. The second point is connected. It is that the transfer of rights similar to water use entitlements, where the regulation of those rights involves the public interest, is common-place and has been for years. Mining rights,²⁶ commercial fishing rights,²⁷ the right to trade in liquor²⁸ and rights to engage in road transportation,²⁹ to name a few, are all transferable from one party to another with the consent of the regulatory authority. There is, in other words, nothing jarring about an interpretation that s 25 of the NWA allows for the transfer of water use entitlements with the approval of the responsible authority. Such an interpretation is consistent with comparable regulatory schemes.

[52] It is evident from the above that both s 25(1) and s 25(2) contemplate and allow for the transfer of water use entitlements, temporarily and permanently respectively, from a holder to a third party. I shall, at the conclusion of this judgment make declaratory orders to this effect. I turn now to the closely related issue of whether the trade in water use entitlements is lawful or not.

May people trade in water?

[53] In considering whether people could trade water use entitlements, the full bench’s starting point was to pose the question whether the NWA ‘permits the sale of, or transfer in the water use entitlements’. It then answered this question by holding that ‘there is no authority in the Act permitting holders of entitlements to sell their entitlements’.

²⁵ See s 28(1)(e) which provides that a licence must specify ‘the licence period, which may not exceed 40 years’.

²⁶ Mineral and Petroleum Resources Development Act 28 of 2002, s 11. Note that the scheme of this legislation is strikingly similar to the NWA in the following senses. First, s 3 vests custodianship of the country’s minerals and petroleum products in the State. Secondly, the transformatory objects of this legislation, also set out in s 2, are similar to those of the NWA.

²⁷ Marine Living Resources Act 18 of 1998, s 52. Once again, s 2 of this Act contains transformatory objects that are similar to those of the NWA.

²⁸ Liquor Act 27 of 1989, s 113; Liquor Act 59 of 2003, s 15.

²⁹ National Land Transport Act 5 of 2009, s 58. For a discussion of the transferability of road transportation permits in terms of previous legislation, the Road Transportation Act 74 of 1977, see Plasket ‘The Proprietary Nature of Road Transportation Permits’ 1985 *De Rebus* 619.

[54] The full bench's approach was erroneous. It asked itself the wrong question and appears to have conflated the way in which the law regulates the conduct of public bodies, on the one hand, and private individuals, on the other. The true distinction was drawn thus by Laws J in *R v Somerset County Council, ex parte Fewings and Others*:³⁰ 'Public bodies and private persons are both subject to the rule of law; nothing could be more elementary. But the principles which govern their relationships with the law are wholly different. For private persons, the rule is that you may do anything you choose which the law does not prohibit. It means that the freedoms of private citizens are not conditional upon some distinct and affirmative justification for which he must burrow in the law books. Such a notion would be anathema to our English legal traditions. But for public bodies the rule is opposite, and so of another character altogether. It is that any action to be taken must be justified by positive law.'

[55] The idea that a private individual may do anything that the law does not forbid fits with another important freedom. It is the freedom of contract, which 'entails a general freedom to choose whether or not to contract, with whom to contract, and on what terms to contract'.³¹ Public policy 'generally favours the utmost freedom of contract'.³²

[56] In *Fick v Woolcott and Ohlsson's Cape Breweries Ltd*,³³ the nature of a liquor licence and its transferability was in issue. Innes J described a liquor licence as a 'privilege granted to a particular person to sell liquor at a particular place'; and that this 'privilege' is personal to the licensee in the sense that 'it involves the exercise by the authorities of a *delectus personae*, so that he would have no power to assign his licence, were there no statutory provision for its transfer'.³⁴ He proceeded to consider

³⁰ *R v Somerset County Council, ex parte Fewings and Others* [1995] 1 All ER 513 (QB) at 524e-g. See too *Clur v Keil and Others* 2012 (3) SA 50 (ECG) para 15; John Dugard *Human Rights and the South African Legal Order* (1978) at 107-108; Lord Lester of Herne Hill QC and Lydia Clapinska 'Human Rights and the British Constitution' in Jeffrey Jowell and Dawn Oliver (eds) *The Changing Constitution* (5 ed) (2004) 62 at 63; Stanley De Smith and Rodney Brazier *Constitutional and Administrative Law* (7 ed) (1994) at 457.

³¹ Francois du Bois (ed) *Wille's Principles of South African Law* (9 ed) (2007) at 737.

³² *Botha (now Griessel) and Another v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A) at 783A.

³³ *Fick v Woolcott and Ohlsson's Cape Breweries Ltd* 1911 AD 214.

³⁴ At 230. It is now accepted that such a licence, and the water use entitlements with which this case is concerned, are regarded by the law as rights, not privileges; and that these types of authorisations are regarded as a form of property, having a commercial value. See generally, C A Reich 'The New Property' (1964) 73 *Yale Law Journal* 733; Plasket (note 29) at 619-620.

the transfer of the licence and the nature of agreement between the licensee and a third party. He held:³⁵

'And the law provides that the transfer of a licence can only be effected by the authority which sanctioned its issue. Contractual undertakings on the part of a holder to transfer his licence to some other person on the happening of certain contingencies are of frequent occurrence. But the expression, though convenient, is inaccurate. No holder can transfer his licence; that is the sole prerogative of the Licensing Court. So that the only way to give any effect to such an undertaking is to treat it as an agreement by the promisor to exercise in favour of the promisee such right to apply for a transfer as the statute gives him, and to do all things necessary on his part to enable the Licensing Court to deal with the application. And that is what, in my opinion, an agreement to transfer a licence amounts to.'

[57] The full bench appears to have decided that *all* agreements in which water use entitlements are transferred are contrary to public policy. I am of the view that it erred in this respect, for the following reasons.

[58] It held that trading in water use entitlements was contrary to s 2 – the purposes of the NWA. Quite what those purposes were that were in conflict with trading in water use entitlements were not specified, and neither was any reference made to any evidence in this regard. It assumed that trading in water use entitlements was discriminatory but did not support this conclusion with any evidence. This assertion appeared to be based on the idea that many people could not afford to pay the commercial value of water use. I do not understand how this economic reality can amount to discrimination.

[59] The full bench ignored the regulatory framework that the NWA put in place to ensure that transfers of water use entitlements did not have such effects. That is precisely why no transfer of a water use entitlement may occur without the approval of the responsible authority, after they have considered and weighed all the considerations relevant to the decision in terms of s 27(1). In this way, the purposes of the NWA are safeguarded and the public interest is furthered. Put otherwise, if a particular application for transfer is indeed offensive to one or more of the purposes of

³⁵ At 230. See too *Aquatour (Pty) Ltd v Sacks* 1989 (1) SA 56 (A) at 64G-65D; *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape and Others* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) paras 67-68.

the NWA, the responsible authority will not grant its approval for the transfer. That, it seems to me, is a complete answer to the full bench's objections to people trading in water use entitlements.

[60] The full bench also appeared to labour under a misapprehension as to the effect of water use transactions. Those transactions do not have the exclusionary effect suggested by it because the water in issue has been allocated in terms of the NWA. The right to use that particular water was granted to the entitlement-holder in terms of the NWA, after the responsible authority applied their mind to the criteria listed in s 27(1). When the entitlement-holder surrenders the entitlement to facilitate a transfer application, the entitlement goes to the transferee, if the transfer is approved by the responsible authority, or remains with the entitlement-holder if the transfer is not approved. At no stage in the process is the water use entitlement available for allocation to anyone else. No water becomes available for re-distribution. As a result, the transaction, whether successful or not, deprives no-one of access to water.

[61] For the above reasons, I conclude that the full bench erred in finding that trading in water use entitlements is unlawful.

Exhaustion of internal remedies

[62] A decision to grant or refuse a licence is an administrative action as defined in the Promotion of Administrative Justice Act 3 of 2000 (the PAJA).³⁶ Section 7(2)(a) of the PAJA requires the exhaustion of any internal remedy that is provided for prior to a person applying to court for the review of an administrative action. In terms of s 7(2)(c), however, a court may exempt a person from the obligation to exhaust an internal remedy in exceptional circumstances in the interest of justice.

[63] Both the *Lötter* and the *Wiid* cases involved applications for the review and setting aside of refusals by the Director-General to grant the transfer of licences, in addition to the declarators that were sought as to the meaning of s 25 of the NWA. In neither case was the internal remedy of an appeal to a Water Tribunal exhausted. In both cases, exemption from that obligation was sought.

³⁶ *Makhanya NO and Another v Goede Wellington Boerdery (Pty) Ltd* (note 11).

[64] The full bench only granted exemption in respect of the applications for declaratory orders, and not in respect of the review and setting aside of the decisions made, on the version of the applicants in *Lötter* and *Wiid*, on the basis of the incorrect interpretation of s 25 of the NWA. The reason for the full bench to draw this distinction is, with respect, opaque.

[65] All of the parties were of the view that the issues involved, being quintessentially legal in nature, and that what was required was a definitive, binding interpretation of s 25 of the NWA by a court. It was equally clear that dealing with these issues in a Water Tribunal would only waste time and would not produce a definitive, binding determination of the meaning of the section. It is evident that when a long-standing, universally accepted interpretation of a statutory provision is suddenly interpreted differently, 20 years into the life of the statute, with far-reaching social and economic consequences for a large number of people throughout the country, exceptional circumstances arise; and the interests of justice require a court to be engaged as soon as reasonably possible to resolve the dispute. In the light of the close connection between the declaratory relief sought and the setting aside of the impugned decisions, the full bench erred in failing to grant unconditional exemptions from the obligation to exhaust internal remedies.

Conclusion

[66] In the result, all three appeals must succeed. The orders made by the full bench will have to be set aside. In their place, a declarator in respect of the meaning of s 25 of the NWA will be made in all three cases, and the decisions made by the Director-General on the basis of his erroneous interpretation of s 25 will be reviewed and set aside as those decisions were materially influenced by an error of law. The full bench's orders granting partial exemptions in terms of s 7(2) of the PAJA will be replaced with orders granting exemptions in unrestricted terms.

[67] With regard to costs, only the Minister of Water and Sanitation and the Director-General of the Department of Water and Sanitation opposed the applications in the high court and this appeal. They should be ordered to pay the appellants' costs in both courts.

[68] In the light of the similarities in the three cases, I shall make a composite order which will refer to specific cases when necessary. I accordingly make the following order:

1. The appeal in each case is upheld with costs, including the costs of two counsel, to be paid by the Minister of Water and Sanitation and the Director-General of the Department of Water and Sanitation.

2. The order of the full bench in respect of each case is set aside and replaced with the following order.

'1. It is declared that, in terms of s 25(1) of the National Water Act 36 of 1998 (the NWA), a water management institution is empowered, at the request of a person authorized in terms of the NWA to use water for irrigation:

(a) to allow that person on a temporary basis, and on such conditions as the water management institution determines, to use some or all of that water for a different purpose; or

(b) to allow that person to allow a third party the use of some or all of that water on another property in the same vicinity, for the same or a similar purpose.

2. It is declared that, in terms of s 25(2) of the NWA, a person holding an entitlement to use water from a water resource in respect of any land may surrender that entitlement in whole or in part:

(a) in order to facilitate a licence application by the holder of the entitlement or of a third party in terms of s 41 of the NWA for the use of that water in respect of other land owned or controlled either by the holder of the entitlement or the third party;

(b) that the surrender of the entitlement by the holder of the entitlement only becomes effective in the event of the licence application, in terms of s 41 of the NWA, of the holder of the entitlement or of the third party being approved by the responsible authority;

(c) an agreement between the holder of an entitlement to use water and a third party, in respect of the surrender of the entitlement by the former to facilitate an application for a licence in respect thereof by the latter, in return for payment of compensation, is not prohibited.

3. In the *Lötter* and *Wiid* cases:

(a) the applicants are exempted, in terms of s 7(2)(c) of the Promotion of Administrative Justice Act 3 of 2000 from having to exhaust their internal remedies; and

(b) the decisions taken by the Director-General, Department of Water and Sanitation to refuse the applications of the applicants for licences in terms of s 41 of the NWA are reviewed and set aside.

4. The Minister of Water and Sanitation and the Director-General of the Department of Water and Sanitation are ordered to pay the costs of the applicants, including the costs of two counsel.'

C PLASKET
JUDGE OF APPEAL

Makgoka JA (dissenting)

[69] I have read the majority judgment prepared by my Colleague Plasket JA, which has set out the essential facts which gave rise to the three appeals before us. For context to this judgment, I summarise them as follows. In the Lötter and Wiid appeals, holders of water use entitlement certificates, Britzkraal (Pty) Ltd (Britzkraal) and GP Viljoen Trust, are the holders of licences to use water, styled water use entitlements in the Act, in accordance with the registration certificates issued by the Department of Water and Sanitation (the department). They concluded sale agreements with the appellants in those appeals, in terms of which the holders of water use entitlements, surrendered their entitlements to the department, represented by a 'responsible authority',³⁷ in return for compensation.

[70] In the Lötter appeal, the purchase price was R1 950 000 (One Million Nine Hundred and Fifty Thousand Rand). In the Wiid matter, there were three agreements

³⁷ The 'responsible authority' is defined in s 1(xx) as follows:

'responsible authority', in relation to a specific power or specific duty in respect of water uses mean-

- (a) if that power or duty has been assigned by the Minister to a catchment management agency, that catchment agency; or
- (b) if that power or duty has not been so assigned, the Minister.'

of sale in terms of which the water use entitlements were sold, respectively for R5 920 000 (Five Million Nine Hundred and Twenty Thousand Rands); R15 413 333 (Fifteen Million Four Hundred and Thirteen Thousand Three Hundred and Thirty-Three Rand); and R2 666 667 (Two Million Six Hundred and Sixty-Six Thousand and Six Hundred and Sixty-Seven Rand). All the applications were rejected by the Director-General on the basis that s 25(2) of the National Water Act 38 of 1998 (the Act) did not 'make provision for the trading or transferring of water use entitlements between two separate legal entities'.

[71] In the SAAFWUA matter the agreements between the holders of water use entitlements, Eagle's Nest Investment 3 CC and Thusano Empowerment Farm (Pty) Ltd, and the third parties to whom they sought to surrender their entitlements, met the same fate. All of the appellants' applications for declaratory orders to the effect that s 25(2) authorises trading in water use entitlements were dismissed by the full bench of the Gauteng Division of the High Court, Pretoria (the full bench), but which subsequently granted leave to this Court.

[72] I agree with the order of the majority judgment, except for paragraphs 2(c) and 3(b) thereof. In terms of paragraph 2(c) of the order, the majority declares that an agreement between the holder of an entitlement to use water and a third party, in respect of the surrender of the entitlement by the former to facilitate an application for a licence in respect thereof by the latter, in return for payment of compensation, is not prohibited by s 25(2) of the Act. In paragraph 3(b) of the order, the decisions taken by the Director-General to refuse the applications of the applicants for licences in terms of s 41 of the Act, are reviewed and set aside.

[73] These paragraphs of the order of the majority judgment rest on an interpretation of s 25(2) of the Act with which I do not agree. I write separately to explain my disagreement. Our difference regarding that subsection is a narrow one. For present purposes, I am prepared to accept an interpretation of s 25 of the Act that allows for the involvement of third parties. That is, s 25(1) permits the holder of a water use entitlement to allow a third party the use of water for a purpose different from that

stated in the water use entitlement, or to use it on another property, for the same or a similar purpose.

[74] Similarly, I am prepared to accept that the surrender of a water use entitlement envisaged in s 25(2) may be made to a third party. This, however, is not the end of the enquiry, and this is where I part ways with the majority. It does not follow, in my view, that a holder of a water use entitlement and a third party are entitled to conclude a private commercial agreement in terms of which they trade in water for compensation, and to have such agreement authorised by a water management institution.

[75] Accordingly, I take the view that the decisions taken by the Director-General to refuse each of the applications in terms of s 41 of the Act in the Lötter and Wiid appeals, were correct and should not be disturbed. I would thus not allow those appeals insofar as these two aspects are concerned.

[76] Shorn of legal technicalities, at the heart of the appeals is whether the Act permits a person holding a water use entitlement from a water resource in respect of any land, to sell such an entitlement. In other words, whether the Act permits trading in water use entitlements. The appellants have identified s 25 of the Act as the empowering provision for that purpose. This involves the interpretation of that section. The principles which should inform that exercise are settled. The provision must be construed by a conventional process of statutory interpretation, which is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. In *Cool Ideas*³⁸ the Constitutional Court put three interrelated riders to this general principle, namely that: (a) statutory provisions should always be interpreted purposively; (b) the relevant statutory provision must be properly contextualised; and (c) all statutes must be construed consistently with the Constitution.³⁹

³⁸ *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC) para 28.

³⁹ Constitution of the Republic of South Africa Act, 1996.

[77] Consideration should also 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 they are directed and the material known to those responsible for enactment of the Act.⁴⁰ Section 39(2) of the Constitution enjoins courts, when interpreting any legislation, to promote the spirit, purport and objects of the Bill of Rights. Where the court is faced with two interpretations, one constitutionally valid and the other not, the court must adopt the constitutionally valid interpretation provided that to do so would not unduly strain the language of the statute.⁴¹ On the other hand, where a provision is reasonably capable of two interpretations, the one that better promotes the spirit, purport and objects of the Bill of Rights should be adopted.⁴² Courts must also adopt a generous and purposive approach.⁴³

[78] The historical context within which a particular provision operated, or in response to which it was enacted, is also an important interpretative tool.⁴⁴ Thus, where applicable, our history may not be ignored in that process. As explained by Moseneke DCJ in *Goedgelegen* '[i]t is helpful, where appropriate, to pay due attention to the social and historical background of the legislation.'⁴⁵ In the present case, it is useful, therefore, to state the obvious point from the onset. Access to water has historically been the privilege of predominantly white people with access to land and to economic power. It seems to be common cause that the appellants in the three appeals fall into that category. The policy considerations underpinning the Act sought to, among others, address the racial imbalances brought about by colonialism and apartheid.

[79] The Act was preceded by a White Paper on a National Water Policy for South Africa (1997) (the White Paper). Outlining the fundamental principles and objectives

⁴⁰*Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262; 2012 (4) SA 593 (SCA) para 18.

⁴¹ *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: in re Hyundai Motor Distributors (Pty) v Smit NO* 2001 (1) SA 545 (CC) paras 23-25.

⁴² *Wary Holdings (Pty) Ltd v Stalwo (Pty) and Another* 2009 (1) SA 337 (CC) paras 46, 84, 107.

⁴³ *Ferreira v Levin NO & others; Vryenhoek & others v Powell NO & others* 1996 (1) SA 984 (CC) para 46.

⁴⁴ *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development; Executive Council, KwaZulu-Natal v President of the Republic of South Africa* [1999] ZACC 13; 2000 (1) SA 661 (CC) para 44.

⁴⁵ *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC) para 53.

for a new water law for South Africa in the White Paper, the then Minister of Water Affairs and Forestry, Professor Kader Asmal, said:

‘South Africa’s water law comes out of a history of conquest and expansion. The colonial lawmakers tried to use the rules of the well-watered colonising countries of Europe in the dry and variable climate of Southern Africa. They harnessed the law, and the water, in the interests of a dominant class and group which had privileged access to land and economic power.’

In para 2.1.4 titled ‘The Right to Equality’ the White Paper points out:

‘[A]partheid was an inefficient racial spoils system under which the distribution of water-use was racially biased, and access to water and the benefits from its use a privilege of those with access to land and political and economic power. In the context of the reform of the water law, the right to equality requires equitable access by all South Africans to, and benefit from the nation’s water resources, and an end to discrimination with regard to access to water on the basis of race, class or gender.’

[80] The Act repealed its predecessor, the Water Act 54 of 1956. Section 2 of the 1956 Act provided:

‘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.’

[81] With this historical context in mind, I turn to the aspirational provisions of the Act. The Act is a progressive piece of legislation. Discernable in it is a clear intention on the part of the Legislature to break with the racist water allocation and use of the colonial and apartheid past. Thus, the policy considerations reflected in the White Paper referred to earlier, later found expression in the Act. For example, the preamble to the Act recognises, among many fundamentals, that water is a ‘scarce and unevenly distributed national resource’, which while it ‘belongs to all people, the discriminatory laws and practices of the past have prevented equal access to water, and use of water resources’.

[82] The purpose of the Act is set out in s 2 as being to 'ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled' in ways which take into account certain factors, among which is to redress the results of past racial and gender discrimination (s 2(c)). To achieve this purpose, the Act envisages the establishment of suitable institutions and to ensure that they have appropriate community, racial and gender representation.

[83] I turn now to s 25, which reads as follows:

'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) 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 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.'

[84] This section concerns only two aspects. First, in subsection (1), the temporary use of irrigation water for a different purpose or on a different land, other than that stated in the licence. Second, in subsection (2), the surrender of a water use entitlement, subject to two provisos, namely that an application in terms thereof must be 'in order to facilitate a particular license application under s 41', and that the surrender 'only becomes effective if and when such application is granted'.

[85] On its plain reading, s 25 does not provide for compensation when a holder of a water use entitlement surrenders such entitlement. Its provisions are clear and unambiguous. However, even if that is so, one must pay due regard to the Act as a whole, especially the other relevant sections, to discern whether compensation is authorised when a water use entitlement is surrendered. Section 25(2) is directly linked

to s 41, which, in turn, sets out the procedure for licence applications. Section 41(1) reads:

‘An application for a licence for water use must—

- (a) be made in the form;
- (b) contain the information; and
- (c) be accompanied by the processing fee, determined by the responsible authority.

[86] Section 41(2) empowers a responsible authority, among others, to call for further information, conduct its own investigations on the likely effect of the proposed licence, invite written comments from any organ of state which, or person who, has an interest in the matter. It is instructive that the selling price in respect of a water use entitlement, or compensation is not specified or foreshadowed in any of the subsections of s 41. Thus, both s 25(2) and s 41, which are expressly interlinked, bear no reference to water trading.

[87] Section 27(1) sets out considerations which a responsible authority must take into account when issuing general authorisations and licences. This section has been quoted in full in the majority judgment, but to recap, the factors which a responsible authority must take into account include the following:

- ‘(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;
 - (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 which a water use is to be authorised.'

[88] Of course, the list is not exhaustive, as the wording of s 27(1) suggests that the responsible authority may take into account other factors. As is clear, compensation for surrender of a water use entitlement is not one of the specified factors, and none of the specified factors in terms of s 27(1) comes even remotely close to it. Being such an important factor, if it was its intention that it be considered, the legislature would certainly have included compensation for surrender of water use entitlements as one of the specified factors in the section.

[89] Two other provisions which, according to the appellants, provide further indication that trading in water use entitlements is authorised in the Act, are subsections 26(l)(i)-(iii) and 29(2). I make this broad observation regarding these two subsections. These sub-sections are of a procedural, rather than a substantive, nature. They do not have a 'life of their own', and do not confer rights in respect of water authorisations, like s 25(2) does. Viewed in this light, the authority to allow for compensation in respect of surrender of water use entitlement must be located within s 25(2) as the empowering provision. It follows that the role of these subsections in the interpretive exercise of s 25(2) should not be overstated. If the appellants are not correct on their interpretation of s 25(2) as an empowering provision, these subsections would not be of any assistance to them. The converse is also true. For this reason, I shall consider them pithily.

[90] Section 26(l)(i)-(iii) empowers the Minister to make regulations relating to 'transactions' in respect of authorisations to use water. These include (a) the circumstances under which a transaction may be permitted; (b) the conditions subject to which a transaction may take place; and (c) the procedure to deal with a transaction. I have no qualm with the conclusion of the majority that the 'transaction' in this subsection refers to the subject matter of s 25(2). But, consistent with the view I take of s 25(2), the subject-matter of that subsection does not include compensation when water use entitlements are surrendered or transferred.

[91] On my interpretation of s 25(2), the word 'transaction' in s 26(1)(i)-(iii) refers to the surrender of water use entitlements between the holders of such entitlements and third parties, but does not include compensation for such surrender. I am therefore unable to agree that the word 'transaction' should be determined by recourse to a dictionary definition. Its meaning should be found in the semantic context in which it is used in the subsection. I have already indicated that this provision is a procedural one, and does not authorise compensation when a water use entitlement is surrendered in s 25(2) read with s 41. Viewed in this light, it could be that, in the absence of an empowering provision in the Act, the Minister could well act ultra vires her powers should she publish the regulations envisaged in this subsection.

[92] The appellants set much store by s 29(2), which provides that if 'a licensee has agreed to pay compensation to another person in terms of any arrangement to use water, the responsible authority may make the obligation to pay compensation a condition of the licence'. The appellants draw a link between this subsection and s 25(2), which construction the majority agrees with. I see it differently. Rather than a confluence between the two subsections, instead, I see a gulf between them, for the following reasons.

[93] The word 'compensation' does not appear in s 25(2) or in any of the other sections dealing with water use authorisations. Section 25(2) concerns the 'surrender' of a water use entitlement, which is a clear and narrow concept. On the other hand, s 29(2) refers to an 'arrangement to use water' which, on a generous construction, could possibly be relevant to s 25(1), rather than s 25(2). I say so because as explained already, s 25(1) allows a holder of a water entitlement, on a temporary basis, to use the allocated water, either for a different purpose, or on a different property for the same or similar purpose. To my mind, that fits neatly into the concept of 'an arrangement', which is essentially what the scheme of s 25(1) is all about, as opposed to a 'surrender', or 'the giving away of an entitlement', which is the subject-matter of s 25(2).

[94] The language of s 25(2) and s 29(2) is so different as to suggest that the Legislature intended them to address totally distinct situations. If it had intended for

the two subsections to dovetail, the Legislature would have used consistent language in both of them. Furthermore, a provision such as this would ordinarily, and in express terms, be linked to an empowering provision elsewhere in a statute, or vice versa, as is the case with s 25(2) and s 41, as alluded to already. In this case, there is no such reference between s 25(2) as the empowering provision, and s 29(2) as a complementary provision.

[95] It was also submitted on behalf of the Lötter appellants that the prohibition against receiving compensation for surrendering water use entitlements, was contrary to the provisions of s 25 of the Constitution, which guarantees property rights and prohibits arbitrary deprivation of property.⁴⁶ This submission is misconceived. The applicants are not being deprived of any property. A holder of a water use entitlement voluntarily surrenders his or her entitlement in terms of the legislative framework of s 25(2). That section does not make provision for him or her to receive compensation for such surrender. There is no attack against the constitutionality of s 25(2).

[96] The fact remains that the holder of such right obtains a statutory personal privilege to use a scarce national resource. This is what distinguishes water use entitlements from other licenses such as liquor and taxi licenses. The holders of those licenses essentially purchase them at a premium, whereas the holder of a water use entitlement obtains it for free, only having to pay a licence fee of R114. Furthermore, the holders of the other licenses do not acquire them in respect of a scarce national resource. All these explain why there is nothing objectionable when the holders of such licences decide to 'sell' them at whatever market related prices they decide on.

[97] As I see it, the insurmountable difficulty for the appellants is that there is no empowering provision in the Act that expressly authorises payment of compensation when water use entitlements are surrendered. To find that there is, one has to imply it. It must be assumed that trading in water use entitlements was upper-most in the minds of those responsible for the drafting of the Act, given that in the repealed 1956

⁴⁶ Section 25(1) provides that:

'No one may be deprived of property except in terms of law of general application, and no law may be permit deprivation of property.'

Act, there was express reference to it. Furthermore, the White Paper noted that provision would be made in the Act to enable transfer or trade of water rights between users, with Ministerial consent. However, when the Bill was finally enacted, express provision was made only for transfer or surrender of water use entitlements in s 25(2), but not for trading in water use entitlements. Had it been the Legislature's intention that such a provision be included, it would expressly have done so, and s 25(2) would have been a good place for it. Given the historical context referred to earlier, and its undoubted prominence, it would be surprising if as important a matter as trade in water rights were to be left to be implied.

[98] What is more, the appellants' interpretation offends one of the key stated purposes of the Act – s 2(c), in that it perpetuates the results of past racial discrimination, contrary to the commitment in that subsection to redress those injustices. Although this is not the only purpose of the Act, considering the Act as a whole, including its historical context, this purpose is of some significant importance. This is acutely demonstrated in the present case, in which the water use entitlements were sold for vast sums of money: in the Lötter matter, R1 950 000; and R5 920 000; R15 413 333; and R2 666 667, respectively, in the Wiid matter. It must be borne in mind that to acquire a water use entitlement, an applicant is required to pay an administration fee of about R114. How that right suddenly becomes capable of being sold for R15 000 000, is neither clear, nor explained.

[99] The appellants take issue with the full bench's reasoning that the sale of water use entitlements in private agreements, results in discrimination. They say there is no evidence of such discrimination. I will explain why there is. Only historically advantaged farmers (overwhelmingly white) would be in a position to afford the unilaterally determined prices, to the exclusion of everyone else. On the facts of these appeals, I agree with the reasoning of the full bench. The trade in water use entitlements would perpetuate colonial and apartheid water allocation enclaves and patterns. That is discrimination, and it is glaring. Given the transformational nature of the Act, this could never have been the intention of the Legislature.

[100] The appellants' interpretation also offends s 3 of the Act. In terms of s 3(1) the National Government, through the Minister, is the nation's public trustee of water resources. The applicants have not shown any provision of the Act which entitles them to privately set prices to sell an entitlement to use a national resource, without the Minister's involvement or consent. Nor have the appellants explained to the responsible authority, who is the Minister's designee, how these purchase prices were arrived at. This certainly emasculates the Minister's role to regulate the use, flow and control of all water in the Republic. It reduces the role of national government, represented by the Minister, to that of a rubber-stamp. Furthermore, in terms of s 3(2) the Minister is responsible to ensure that water is allocated equitably and used beneficially in the public interest. None of the appellants has asserted public interest in respect of their respective applications. These entitlements were sold solely for private farming purposes and for profit.

[101] Section 1(3) provides that when interpreting a provision of this Act, any reasonable interpretation which is consistent with the purpose of this Act as stated in section 2 must be preferred over any alternate interpretation which is inconsistent with this purpose. I find, in the final analysis, that the interpretation propounded by the appellants is totally inimical to the constitutional values and the policy considerations underlying the Act. For all these reasons, I would disallow the appellants' appeal to the extent they sought a declaratory order that s 25(2) allows trading in water use entitlements and for the setting aside of the Director-General's decisions in respect thereof.

T MAKGOKA
JUDGE OF APPEAL

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