EASTERN CAPE HIGH COURT DISSENTS FROM NORTH GAUTENG HIGH COURT AND RECOGNISES THE RIGHT TO TRADE WATER USE ENTITLEMENTS.

Recently, in the judgement of ***Ramah Farming v. Great Fish River Water Users Association & Others***, the Eastern Cape High Court dissented from an earlier judgement of a full bench of the North Gauteng High court (in the *SAAWUA* case[1]) , when Judge Robert Griffiths held that, on a proper interpretation of the National Water Act 36 of 1998 (the "Act"), the trade in water use entitlements is indeed countenanced by the Act.

On 19 January 2018, in a complete about-face, the Department of Water and Sanitation ("DWS") issued a circular in which it concluded that:

- Section 25(1) of the Act does not allow the transfer of a water use authorisation (on a temporary basis) to a third party; and
- Section 25(2) of the Act does not permit the transfer of a water use authorisation (on a permanent basis) to a third party.

In October 2019, a full bench of the North Gauteng High Court heard three separate applications in which each of the applicants sought declaratory relief which had the interpretation of Section 25 of the Act at its core. The applicants were the South African Association for Water Users' Associations (SAAWUA), the Doornkraal Besigheidstrust and the De Kalk Beigheidstrust. The applicants were seeking an order to support the continuation of a practice in which the holder of water use entitlements could sell such rights to a nominated third party. The litigation followed after the director general of the DWS in pursuance of its new interpretation of Section 25, refused applications to this effect by both Doornkraal and De Kalk. In the court's determination concerning Section 25, it concluded the sale of water use entitlements discriminated against those who could not afford prices determined by the holder. It further held that "the sale of water-use entitlements would frustrate equal access and keep historically disadvantaged persons out of the agriculture sector". The court placed much reliance on, what it categorized as a course changing "intervention" in the form of the Second National Water Resource Strategy (2013), wherein it was stated that there was a need to review the water policy to do away with water trading which had been part of Departmental policy for more than 20 years. The court concluded that a second "intervention" that changed

[1] South African Association for Water User Associations and Others v Minister of Water and Sanitation and Others; 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 (71913/2018; 42072/2018; 90498/2018) [2020] ZAGPPHC 252 (19 June 2020)

course, occurred in the form of the Director General's Circular 1 of 2017, which abolished water trading and repealed the Circular 18 of 2001 which had allowed water trading.

The court in *SAAWUA* ostensibly disregarded an earlier ruling in ***Makhanya NO v De Goede Wellington Boerdery (Pty) Ltd*** [2] in which the Supreme Court of Appeal recognised the right of a transferor to nominate a third party of its choice to apply for the transfer of a water use entitlement pursuant to the provisions of Section 25(2) of the Act.

It is in any event quite clear that for two decades up to January 2018 the DWS and all those concerned (including our courts) have interpreted Section 25 to acknowledge the practice of the sale and transfer of water use authorisations to a transferee nominated by the authorised holder thereof. In fact, the DWS itself authorised many of these transactions provided that they could be facilitated within the purview and in compliance with the prescripts of the Act.

In ***Ramah Farming*** Judge Griffiths expressly dissented from the conclusions in *SAAWUA* and held that there are a number of provisions of the Act which "underscores, not inhibit, the practice of trading in water use entitlements".

The court's emphasis that the Act has restricted the ambit of such trading and that if the intended transaction does not pass muster under the Act, the court will refuse to enforce such transaction, should serve as a caveat to prospective water traders and legal practitioners who seek to facilitate these transactions.

Needless to say, this is not going to be the last word on water trading and the proper interpretation of Section 25. As the demand for access to water in agriculture surges and the commercial value of water entitlements rises, the debate whether or not private law transactions in respect of water use entitlements should be permitted, will almost certainly intensify and so will litigation over access to water.

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[2] Makhanya v Goede Wellington Boerdery (Pty) Ltd (230/12) [2012] ZASCA 205 (30 November 2012)