

SCA ruling allows for trade of water use entitlements

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In the recent case of *Lotter NO v Minister of Water and Sanitation and Others* (8 November 2021), the Supreme Court of Appeal (SCA) found that section 25 of the National Water Act allows for the transfer of water use entitlements. This decision is important as it is contrary to the position held by the Department of Water and Sanitation (DWS) and may also have significant implications from a deal making perspective.



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Whether the holder of a water use entitlement can alienate and transfer such right lawfully to a third party has been a contentious and important issue in South Africa for some time. DWS in 2013, issued a circular prohibiting such transfer and trading in water use rights. A recent Supreme Court of Appeal (SCA) majority decision has, however, found otherwise. *The central issue in this matter was whether section 25 of the National Water Act 36 of 1998 (NWA) permits the transfer of water use entitlements from one person to another and whether the sale or trade of such entitlements is prohibited.

The majority decision in this matter found that section 25 allows for the transfer of water use entitlements in two circumstances:

- First, a water user association is empowered in terms of section 25(1) to allow a holder of a water use entitlement for irrigation, to use it temporarily for another purpose or to allow it to be used on another property by another person.
- Second, section 25(2) creates a mechanism for permanent transfers of water use entitlements, where such entitlement is surrendered to a third party on condition that a water use licence (WUL) is obtained to exercise such right. The surrender of the entitlement becomes effective, and transfer occurs once the WUL is granted.

This interpretation of section 25 by the SCA is particularly relevant in the agricultural sector where the transfer of water use entitlements is often central to the disposal or acquisition of agricultural land. In this respect, it was found that the transfer of rights similar to water use entitlements (eg. mining rights, commercial fishing rights and the right to trade liquor) whose regulation typically involves public interest, is common-place and these rights are transferable from one party to another. Furthermore, the court found that, the NWA does not prohibit trading in water use entitlements. On the contrary, it held that

the NWA clearly promotes the execution of transactions involving water use entitlements and for the payment of compensation in this respect.

From a mergers and acquisitions (M&A) perspective, this decision lends weight to the argument that WULs are transferable in the context of broader commercial transactions, on application of the 'successor in title' language included under section 51 of the NWA. It is generally accepted that, following the closure of an M&A transaction, water use rights transfer to a successor in title, by operation of law (ie. sections 50 and 51). For instance, in a sale of business transaction, the purchaser will become the successor in title of any lawful water uses associated with the business operation, post-closure of the transaction. This transfer must, however, be formalised in terms of section 51, to reflect the purchaser as the licensee or successor in title of the water use rights, which aligns with the SCA's interpretation of section 25.

This SCA decision is likely to be welcome news to many. It, however, remains to be seen whether the decision will be appealed to the Constitutional Court.

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