

# SUMMARY OF THE JUDGMENT

## CONSTITUTIONALLY UNFAIR TO DISALLOW TEMPORARY TRANSFER OF IRRIGATION WATER USE?

**Trustees of the Time Being of the Lucas Scheepers Trust, IT 633/96 and Others v MEC for the Department of Water Affairs, Gauteng and Others (40514/2013) [2015] ZAGPPHC 211 (17 April 2015)**

*Does the Water Act allow the MEC to grant a temporary transfer of owner A's right to irrigation water to owner B, for purposes of irrigation, where A and B reached agreement to this effect? And if not, does this infringe owner B's constitutional rights? These were the issues tackled in this judgment.*

### FACTS

The Lucas Scheepers Trust (the Trust) was the owner of a farm, Denver. The farm was not allowed to use any water for irrigation purposes from the Vaal River or Vaal Dam at the time the present matter was heard.

Previously, however, Denver was allowed, in terms of the repealed Water Act of 1956, to use public water drawn from the Vaal River.

Merry Mole Developments (Pty) Ltd (Merry Mole) held a permit to utilize water for industrial purposes as it had an intention to establish a golf course on its property. It never proceeded with this plan.

At some stage, the Trust and Merry Mole entered into an oral agreement and it was agreed that the latter's entitlement to use industrial water would be made available to the Trust for irrigation purposes on the farm Denver.

The Trust, with Merry Mole's assistance, then applied to the Gauteng Department of Water Affairs for the temporary transfer of this water use entitlement to Denver in terms of section 25(1) of the Act.

The application was denied on the basis that section 25 did not make provision for the transfer of industrial water use entitlements, and related only to irrigation entitlements.

Section 25(1) provides:

*“A water management institution may, at the request of a person authorised to use water for irrigation under this Act, allow that person on a temporary basis and on such conditions as the water management institution may determine, to use some or all of that water for a different purpose, or to allow the use of some or all of that water on another property in the same vicinity for the same or similar purpose”*

The Trust approached the Court for an order to declare section 25(1) of the National Water Act 36 of 1998 (“the Act”) to be inconsistent with the provisions of the Constitution.

**HELD:**

*Dismissal of application for temporary transfer*

- The dismissal of the application for a temporary transfer could not be faulted as section 25(1) did not provide for water that was being used for industrial purposes, to be used for irrigation.

*Unconstitutionality?*

- The Trust argued that its constitutional rights had been infringed: section 9(1) dealing with equality before the law and equal protection and benefit of the law; section 24 dealing with the protection of the environment through legislative and other measures; section 27 that provides that “everyone has the right to have access to ... (b) sufficient food and water.”
- It accordingly requested the court to declare section 25(1) of the Act inconsistent with the Constitution, as section 25(1) only relates to water for irrigation purposes and should, according to the Trust, include use for industrial purposes.
- On the facts, it appeared that the Trust followed the verification process which was undertaken after the National Water Act 36 of 1998 came into operation. The Department however found that the farm Denver did not have water rights as provided for in section 3 thereof.
- The Trust however did not appeal this decision to the Water Tribunal and, as such, did not exhaust the available internal remedies before approaching the court. (Our law holds generally that the “duty to exhaust internal remedies was a valuable and necessary requirement in our law as internal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilize its own mechanism, rectifying irregularities first before aggrieved parties resort to litigation”.)

- In addition, the Department indicated that to address the lack of water supply on Denver, the Trust could apply for a licence in terms of section 40 of the Act. This section provides that “a person who is required or wishes to obtain a license to use water must apply to the relevant responsible authority for a license ...”. The Trust however also did not avail itself of this option.
- As the Trust had not exhausted its internal remedies or availed themselves of the option to apply for a water license, a determination that access to resources were unfairly denied, or that other constitutional values were denied, could not be made and accordingly it could not be found that section 25 of the Water Act is inconsistent with the Constitution.

The application was accordingly dismissed

#### CONTACT US

■ CAPE TOWN  
Tel: 021 406 9100

■ SOMERSET MALL  
Tel: 021 850 6400

■ TYGER VALLEY  
Tel: 021 943 3800

■ FOURWAYS  
011 219 6200

■ CLAREMONT  
Tel: 021 673 4700

■ STELLENBOSCH  
Tel: 021 001 1170

■ MENLYN  
Tel: 012 348 1682

■ CENTURION  
Tel: 012 001 1546

■ FISH HOEK  
Tel: 021 784 1580

■ TABLE VIEW  
Tel: 021 521 4000

■ ILLOVO  
Tel: 011 219 6200

■ BEDFORDVIEW  
Tel: 011 453 0577