



AUGUST NEWSLETTER 2020

Dear Readers,

We hope that you are safe and looking forward to Spring as we enter level 2 of the nationwide lockdown!



The August edition of our newsletter looks at updates in the water sector, while also focusing on recent legal notices and amendments.

NATIONAL LEGISLATION

❖ **NATIONAL ENVIRONMENTAL MANAGEMENT ACT 107 OF 1998**

Gen Notice 394 in GG 43552 of 27 July 2020 - Eskom Medupi and Matimba Coal-Fired Power Stations - Application for alternative limits in terms of the minimum emission standards – for consultation.

GN 833 in GG 43571 of 31 July 2020 - Generic Environment Programme for the management and mitigation of environmental impacts resulting from the implementation of the working for wetlands projects and the exclusion of these projects from the requirement to obtain an environmental authorisation - for comment.

GN 834 in GG 43571 of 31 July 2020 - Generic Environmental Management Programme relevant to an application for environmental authorisation for the development or expansion of gas transmission pipeline infrastructure - for comment.

GN 835 in GG 43571 of 31 July 2020 - Standard for the development of electricity transmission and distribution infrastructure within identified geographical areas and the exclusion of this infrastructure from the requirement to obtain an environmental authorisation - for comment.

GN 836 in GG 43571 of 31 July 2020 - Identify the procedures to be followed in applying for or deciding on an environment authorisation for the development or expansion of gas transmission pipeline infrastructure when occurring in strategic gas pipeline corridors - for comment.

GN 837 in GG 43571 of 31 July 2020 - Generic Environmental Management Programme for the management and mitigation of environmental impacts resulting from the implementation of working for water projects and the exclusion of these projects from the requirement to obtain an environmental authorisation - for comment.

GN 838 in GG 43571 of 31 July 2020 - Generic Environmental Management Programme for the management and mitigation of environmental impacts resulting from the implementation of the LandCare projects and the exclusion of these projects from the requirements to obtain an environmental authorisation - for comment.

GN 839 in GG 43571 of 31 July 2020 - Generic Environmental Management Programme and mitigation of environmental impacts resulting from the implementation of working for Ecosystems Projects and the exclusion of these projects from the requirement to obtain an environmental authorisation - for comment.

GN 840 in GG 43571 of 31 July 2020 - Procedures to be followed when applying for or deciding on an environmental authorisation for the development of electricity transmission and distribution infrastructure when occurring in renewable energy development zones - for comment.

GN 841 in GG 43571 of 31 July 2020 - Procedures when applying for the Large Scale Wind and Solar Photovoltaic facilities - for comment.

Proposed amendments to regulations relating to plastic carrier bags and plastic flat bags published in GN R625 in GG 24839 of 9 May 2003 published for comment (GN 869 in GG 43601 of 7 August 2020) (p3)

- ❖ **NATIONAL ENVIRONMENTAL MANAGEMENT: PROTECTED AREAS ACT 57 OF 2003**
PN 67 in PG 3091 of 24 July 2020 - Withdrawal of declaration of the Nyl Valley Private Nature Reserve.

PN 68 in PG 3091 of 24 July 2020 - Withdrawal of declaration of the Orabeni and Kasma Nature Reserves.
- ❖ **NATIONAL ENVIRONMENTAL MANAGEMENT: AIR QUALITY ACT 39 OF 2004**
GN 855 in GG 43591 of 7 August 2020 - Proposed declaration of certain printing industry activities as controlled emitters and establishment of their associated emission standards - for comment.

PROVINCIAL LEGISLATION

- ❖ **EASTERN CAPE**

- DISASTER MANAGEMENT ACT 57 OF 2002**

- LAN 131 in PG 4426 of 3 August 2020 - Kouga Local Municipality - Extension of Local State of Disaster due to the prevailing drought conditions for a further month.

- ❖ **WESTERN CAPE**

- Overstrand Local Municipality: Heritage Protection Overlay Zone Regulations, 2020 published (LAN 20366 in PG 8305 of 7 August 2020) (p110)

- Overstrand Local Municipality: Environmental Management Overlay Zone Regulations, 2020 published (LAN 20367 in PG 8305 of 7 August 2020) (p150)

IMPACT OF RECENT CASES & SOME THOUGHTS ON WATER LAW IN SOUTH AFRICA

By Tim van der Merwe, Associate

Introduction

Water law in South Africa is a complex part of our environmental legal regime. Although the National Water Act (“**NWA**”) came into effect in 1998, much uncertainty remains amongst water users, particularly concerning their rights and obligations under the NWA. Water scarcity is becoming more prevalent as natural resources are depleted, also impacting on overall water quality. Effective management of South Africa’s valuable water resources for the benefit of present and future generations, as envisioned in the environmental right in our Constitution, is vital. Therefore, clarity on the NWA and water users’ rights and obligations is paramount for proper water management, with our courts having attempted on numerous occasions to do just that.

However, inconsistent jurisprudence has plagued water users who have approached the courts for relief where the NWA has been unclear. Greater clarity of rights, duties and powers of institutions is required to ensure administrative fairness and water security in South Africa.

Internationally, the importance of conserving water has been recognised for many years, with Principle 1 of the 1992 Dublin Principles (adopted by the United Nations in Dublin, Ireland) reading as follows: *“Fresh water is a finite and vulnerable resource, essential to sustain life, development and the environment.”* This principle is echoed in the NWA and, together with other important principles contained in the NWA, must be given effect to in our courts.

Transfer of Water Use Rights & Section 25 of the NWA

In the case of *“South African Association for Water User Associations and others v Minister of Water and Sanitation and others (71913/2018) [2020]; CJ Lotter N.O. and others v The Minister of Water and Sanitation and others 42072/2018 [2020]; FGJ Wiid and others v The Minister of Water and Sanitation and others (90498/2018 [2020]”* (**“the Water Users Association Case”**), the full bench at the Pretoria High Court heard three separate applications, wherein the applicants each sought a declaratory order contending for a proper interpretation of section 25 of the NWA. The case emanated from an early-2018 decision by the DWS to inform all regional offices to refuse all applications for the transfer of water use entitlements in terms of section 25 of the NWA. This decision appeared to differ materially from the status quo that had prevailed for some time, namely that the ability to transfer water use entitlements was expressly provided for in the NWA and was supported by the DWS.

The DWS justified this decision on the basis that the process provided for in section 25 (namely, the transfer of water use entitlements) has been abused by larger commercial farmers, most often to the exclusion and/or detriment of emerging, smaller-scale farmers. The WUA case thus challenged this decision, as below.

Section 25 of the NWA reads as follows:

“25. Transfer of water use authorisations.

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

Section 25 of the NWA, therefore, deals with the transfer of water use authorisations. The issue for determination was whether the reference to *“property within the vicinity”* or *“other land”* in section 25 of the NWA refers to another person or a third party. Two of the applicants also contended that section 25 permits a holder of water use entitlements to sell or receive compensation from the said person or third party, for the transfer or surrender of that entitlement. The State opposed all three applications, contending that on a proper interpretation of the wording of the NWA, section 25 refers to the property/land *“belonging to”* the holder of the water use entitlement and that there is no reference to any other person or third party.

The Court dismissed all three applications, stating that section 25 of the NWA does not make reference to another person or third party, and does not permit the sale of a water use entitlement. Therefore, water use authorisations/entitlements may not be transferred to another person or third party within the vicinity, and the NWA does not permit the sale of water use entitlement.

The Lucas Scheepers Trust Case

In the case of *The Trustees of the Time Being of the Lucas Scheepers Trust, IT 633/96 v MEC for the Department of Water Affairs, Gauteng 2015 ZAGPPHC 211 (17 April 2015)* (“**the Lucas Scheepers Trust Case**”), application was made for an order declaring that section 25(1) of the NWA was inconsistent with the Constitution (effectively, unconstitutional), as it did not give effect to the Bill of Rights. The applicant, in bringing this case to court, proposed that the word “irrigation” in section 25 of the NWA be replaced with “irrigation or for any purpose”, and that the words “for the same or similar purpose” be replaced by “for such purpose as the water management institution may determine”. Alternatively, the applicant requested that the provisions of section 25(1) be referred to the National Legislature for it to rectify the section, as per the above.

The situation came about as the first applicant had applied to the Department of Water Affairs (“**DWA**”) for the temporary transfer of water use entitlement from the fourth applicant’s property to his farm. The fourth applicant had received permission to use water for industrial purposes (establishing a golf course), while the first applicant was not permitted to use water from the Vaal Dam for irrigation purposes. The DWA declined this application as the NWA does not allow for water being used for industrial purposes to be used for irrigation. The NWA makes only makes provision for the temporary transfer of water use entitlements only. The court stated that section 25(1) “allows a person who has already been authorized to use water for irrigation purposes to use the water at another place for irrigation purposes.” This case, therefore, does not detract from the judgement in the WUA Case and these two cases can be read together to conclude that water use entitlements may not be transferred to another person or third party, and a water use entitlement for industrial purposes cannot be transferred to another person who intends to use that water for irrigation purposes. Only a person who has already been authorized to use water for irrigation purposes may use that water at another place, and also for irrigation purposes.

Implications of the Water Users Association Case Judgement

The Water Users Association case judgement above has far-reaching implications for water users around the country. In particular, the ability of farmers to sell/trade water use entitlements. Farmers have, for many years, been doing so with the cooperation of the DWS. The judgement is likely to be taken on appeal, with the merits of both sides to be scrutinized by either the Supreme Court of Appeal or a Full Bench at the Pretoria High Court.

The judgement does not deal with or mention any impacts on the continued use of existing water use entitlements that are already in place on existing properties, and also does not disallow the sale of farms/properties with existing water use entitlements to future owners or successors in title. The judgement only deals with the transferability of water use entitlements (or part thereof), and the court has made it clear that the sale or trade of water use entitlements is unlawful as it is inconsistent with the spirit, purport and objects of the Bill of Rights. It also leads to a further centralization of power in the hands of DWS, as the NWA

has not functioned as envisaged. CMA's are dysfunctional (or do not exist) and the DWS faces investigations and a special performance audit by the Auditor General. With so much at stake, it is hoped that the DWS will be able to regulate efficiently (or will need to set up enabling structures to help it do so) as water is critical to South Africa's future development.

INTERESTING ENVIRONMENTAL TOPICS

- ❖ **Creecy poised for West Coast wind farm decision**
<https://www.bizcommunity.com/Article/196/604/206836.html>

- ❖ **Water Tribunal says climate change must be considered in water licence applications for coal power plants**
<https://cer.org.za/news/water-tribunal-says-all-new-water-licences-must-take-climate-change-into-consideration>

- ❖ **Municipalities' efforts to procure clean, affordable and reliable electricity dealt a court blow**
<https://cer.org.za/news/municipalities-efforts-to-procure-clean-affordable-and-reliable-electricity-dealt-a-court-blow>

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