IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

Case Number: 43448/13

In the matter between:

10/2/2014

I M KARAN t/a KARAN BEEF FEEDLOT **Applicant**

and

THE MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS **Respondent**

JUDGMENT

DE KLERK AJ

[1] The Applicant seeks declaratory orders in the following form:

1. That it be declared that since 28 September 1993 the Respondent's charging to the Applicant for industrial

water use in terms of permit B2/2/16(3062) dated 28 September 1993 has been unlawful and in contravention with the repealed Water Act, 1956 (Act 54 of 1956);

2. That it be declared that since 1 October 1998 the Respondent's charging to the Applicant for industrial water use for his existing lawful water use in terms of permit B2/2/16(3062) dated 28 September 1993 read with the provisions of section 22 (1) (a) (ii) and section 32 of the National Water Act, 1998 (Act 36 of 1998) has been unlawful;

3. That it be declared that upon a proper interpretation of the Applicant's permit B2/2/16(3062) dated 28 September 1993 the Applicant's water use in terms of the repealed Water Act, 1956 (Act 54 of 1956) was agricultural use;

4. That it be declared that upon a proper interpretation of the Applicant's permit B2/2/16 (3062) dated 28 September 1993 read with the provisions of Section 22 (1) (a) (ii) and Section 32 of the National Water Act, 1998 (Act 36 of 1998) is irrigation water use;

5. That it be declared that the Applicant is only liable to pay irrigation water use charges in terms of the raw water charges as amended and approved by the Respondent for the Applicant's existing lawful water use in terms of permit number B2/2/16 (3062) dated 28 September 1993 read with the provisions of Section 22 (1)(a)(ii) and Section 32 of the National Water Act, 1998 (Act 36 of 1998);

6. That it be declared that since 28 September 1993 the Respondent's charging to the Applicant of Trans-Caledon Tunnel Authority charges has been unlawful;

7. That it be declared that the Applicant is not liable to pay Trans-Caledon Tunnel Authority charges for the Applicant's existing lawful water use in terms of permit number B2/2/16 (3062) dated 28 September 1993 read with the provisions of Section 22 (1)(a)(ii) and Section 32 of the National Water Act, 1998 (Act 36 of 1998).

[2] The Applicant further seeks an order directing the Respondent to pay the costs of the application.

[3] The Respondent opposes the application and has raised a point *in limine*.

Introduction:

[4] This case is all about the tariffs at which the Respondent is charging the Applicant for his water use with regard to a feedlot which the Applicant operates on a portion of the Farm Elandsfontein. The reason why the Applicant has now resorted to litigation over this matter is because he and the

Respondent have been at loggerhead with each other over this matter for many years, in particular because the Applicant argues that the Respondent is charging him an industrial instead of agricultural water use tariff. The determination of the applicable tariff to be paid is relevant because there is a marked difference between the two tariffs.

Common cause facts:

[5] The facts are mainly common cause and can be summarised as follows:

1. The Applicant is the owner of a cattle feedlot and he is conducting business as such on Portion 5 (a portion of portion 2) of the Farm Elandsfontein 412, Registration division IR, in the district of Heidelberg (hereinafter referred to as the land).

2. The land is situated at the confluence of the Blesbokspruit and Suikerbosrand River.

3. In terms of a permit granted to the Applicant by the Respondent on 28 September 1993, he was authorised to abstract a maximum of 657 000 m^3 water per annum from the Suikerbosrand River for the specific purpose of a feedlot on the said land.

4. The Applicant was also entitled to abstract an additional 823 000 m^3 water per annum from the Suikersborand River for irrigation purposes.

5. The Respondent charged the Applicant for the water use in respect of the feedlot, an industrial tariff including Trans-Caledon Tunnel Authority charges.

6. The rate charged for irrigation water use has always been lower than the rate charged for industrial use.

The Applicants' contentions are as follows:

[6] The permit wrongfully states that the water use was for industrial purposes.

[7] In terms of the prevailing legislation the water use, when the permit was issued, was for agricultural use.

The Respondents' contentions are as follows:

[8] The 1993 amendment of the definition, as referred to by the Applicant, did not amend the conditions of the said permit as issued.

Legislation:

[9] The permit was issued in terms of the provisions of Section 62 (21) (a) 1 of the repealed Water Act 54 of 1956.

[10] The relevant part of Section 62 (21) (a) 1 reads as follows:

"The Minister may grant on such conditions as he may determine permission to any person to abstract a quantity of public water and to use it for A PURPOSE SPECIFIED in the permission."

[11] The definition of "use for agricultural purposes" as published by Notice 1164 in government gazette dated 7 July 1993 read as follows:

"Use for agricultural purposes means use for irrigation of land and includes use for domestic purposes or for the purpose of water borne sanitation or for the watering of stock or gardens or use for or in connection with an intensive animal feeding system or the breeding or keeping or growing, for commercial purposes, of any aquatic animal or plant or any amphibian."

[12] Section 34 of the new Water Act provides that a person or his successor in title may continue with an existing lawful water use, subject to any existing condition or obligation attaching to that use.

[13] **Applying the law to the facts:**

The permit reads as follows:

VERGUNNING	:	B2/2/16 (3062)
VERGUNNINGHOUER	:	MNRE. KARAN ESTATES (EDMS.) BPK.
EIENDOM	:	GEDEELTE 5 (GEDEELTE VAN GEDEELTE 2) VAN DIE PLAAS ELANDSFONTEIN 412 IR : GROOT 985, 7855 HEKTAAR: DISTRIK HEIDELBERG, TRANSVAAL.

SUIKERBORSRANDRIVIER-STRAATSWATERBEHEERGEBIED:

VERGUNNING KRAGTENS ARTIKEL 62 (2I) (a) (i) VAN DIE WATERWET, 1956 (WET 54 VAN 1956)

Kragtens die bevoegheid aan my gedelegeer by Goewermentskennisgewing 966 van 19 Mei 1989, verleen ek, Claus Triebel, in my hoedanigheid van Bestuurder: Waterbronne in die Departement van Waterwese en Bosbou, hiermee aan die bogenoemde Vergunninghouer 'n maksimum hoeveelheid van 657 000 (seshonderd sewe-en-vyftigduisend) kubieke meter water per jaar uit die Suikerbosrandrivier vir nywerheidsdoeleindes (voerkraal) op bogenoemde eiendom te ontrek, onderwope aan die volgende voorwaardes:

1. Die beskikbaarheid van die toegekende hoeveelheid water en die gehalte daarvan vir enige bepaalde doel word nie gewaarborg nie.

2. Geen nuwe waterwerk mag opgerig of geen verandering mag aan 'n bestaande waterwerk aangebring word nie sonder die voorafverkryging van die nodige werkemagtiging kragtens artikel 63 (2H) (a) van die Waterwet, 1956.

3. Hierdie Vergunning is tydelik van aard en verteenwoordig geen permanente watertoekenning nie. Die reg word voorbehou om die Vergunning te hersien of te kanselleer na redelike voorafkennisgewing.

4. Gevolmagtigde beamptes van die Departement van Waterwese en Bosbou het vir doeleindes van toesig en beheer oor die onttrekking van water ingevolge hierdie Vergunning te alle redelike tye vrye toegang tot die betrokke waterwerke.

5. Alle moontlike voorsorg moet tot tevredenheid van die Departemente van Waterwese en Bosbou getref word om nie die betrokke rivier op enige wyse te besoedel nie.

6. Tarief van 28,4 sent per kubieke meter water en wat van tyd tot tyd aangepas kan word, sal vir die werklike hoeveelheid water wat onttrek word, gehef word.

7. Hierdie Vergunning stel nie die Vergunninghouer vry van voldoening aan die bepalings van artikels 12 en 21 van die Waterwet, 1956 nie.

8. Hierdie Vergunning vervang Vergunning B2/2/16 (3062) gedateer 21 Oktober 1986.

[14] The parties are *ad idem* that the permit was granted to the Applicant for the specific purpose of a feedlot. Same is also clearly evident from the wording of the permit. It is further evident from the permit itself that same was granted to the Applicant subject to certain conditions including the levying of a tariff for the actual water extracted by the Applicant and which could be adjusted from time to time. It is common cause that the tariff had from time to time been adjusted, however, there is no evidence on the papers that any of the conditions had been amended.

[15] It is further common cause that the extraction of water in terms of the permit was in addition to the Applicant's extraction of water for agricultural use.

[16] It is not the Applicant's case that his water use (in terms of the permit) is for agricultural purposes (it is for the specific purpose of a feedlot). It is the Applicants' case that a feedlot was in terms of the prevailing legislation, at the time when the permit was issued, to him classified as "use for agricultural purposes" and not industrial purposes.

[17] The insertion of the word industrial purposes next to the word feedlot on the permit is accordingly contrary to the statutory provision which classified a feedlot as use for agricultural purposes.

[18] In the light of the common cause facts and a proper interpretation of the legislation, I am of the view that the definition of "use for agricultural purposes' at the time when

the permit was issued included use in connection with an intensive animal feeding scheme.

Trans-Caledon Tunnel Authority Charges:

[19] The parties are *ad idem* that the Trans-Caledon Tunnel Authority levy is specifically charged for water for industrial users. I am, in the light of my finding hereinbefore, of the view that the Applicant is not liable to pay Trans-Caledon Tunnel Authority charges for his existing lawful water use in terms of the permit dated 28 September 1993.

Point *in limine*:

[20] The Respondent raised a point *in limine* to wit the Applicant's failure to comply with the provisions of the Promotion of Administrative Justice Act 3 of 2000.

[21] The Respondent's contentions are that:

1. The Applicant is challenging a decision made on 28 September 1993 and the Applicant is in effect asking for a review of that decision. Consequently, the Applicant's challenge falls within the provisions of Section 6 (1) of the Promotion of Administrative Justice Act No. 3 of 2000 and that the Applicant has failed to comply with any of the requirements of the said act.

2. The Applicant's contentions are that he is not challenging the decision / permit. His application so the argument runs, centres around the interpretation of a statutory provision.

[22] In my view the Applicant's contentions are sound.

[23] Consequently the point *in limine* is dismissed.

The order reads as follows:

1. In terms of permit number B2/2/16 (3062) dated 28 September 1993 the Applicant is only liable to pay irrigation water use charges.

2. The Applicant is not liable to pay Trans-Caledon Tunnel Authority charges for the applicant's existing lawful water use in terms of permit number B2/2/16 (3062) dated 28 September 1993;

3. The Respondent is ordered to pay the costs of the application.

Signed at Pretoria on this 28th day of February 2014.

Judge De Klerk AJ
The Honourable Judge of the
High Court of Pretoria