# THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

**JUDGMENT**

**Reportable**

Case No: 20563/2014

In the matter between:

**MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS** **APPELLANT**

**and**

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

**Neutral citation:** *Minister of Water and Environmental Affairs v Karan Beef Feedlot* (20563/2014) [2015] ZASCA 157 (9 October 2015).

**Coram:** Navsa, Theron, Petse and Saldulker JJA and Van der Merwe AJA

**Heard:** **11 September 2015**

**Delivered:** **9 October 2015**

**Summary:** Water — interpretation of permit issued in terms of s 62(2I)*(a)*(i) of the Water Act 54 of 1956 — meaning of permit clear from words used and context — contrary result sought by respondent could only be achieved by variation of the permit on review — respondent elected not to pursue review — liability of respondent for payment of levies in respect of water supplied by the Trans-Caledon Tunnel Authority not established.

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**ORDER**

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**On appeal from:** Gauteng Division of the High Court, Pretoria (De Klerk AJ sitting as court of first instance):

1 The appeal succeeds to the extent set out in the varied order, with costs, including the costs of two counsel.

2 The order of the court a quo is varied by deleting paragraph 1 thereof.

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**JUDGMENT**

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**Van der Merwe AJA (Navsa, Theron, Petse and Saldulker JJA concurring):**

[1] The respondent, Mr I M Karan t/a Karan Beef Feedlot, is the owner of land riparian to the Suikerbosrand River, in the district of Heidelberg. That land is utilised for purposes of irrigation and a feedlot, requiring vast quantities of water. The water is abstracted from the Suikerbosrand River in terms of rights granted to the respondent under the now repealed Water Act 54 of 1956 (Water Act).

[2] On 28 September 1993 permit number B2/2/16(3062) (the permit) was issued to the respondent. The permit was issued on the authority of the Minister of Water Affairs and Forestry (Minister), the legal predecessor of the appellant, the Minister of Water and Environmental Affairs. I deem it necessary to reproduce the permit in full:

'PERMIT : B2/2/16(3062)

PERMIT HOLDER : MESSRS KARAN ESTATES

PROPERTY : PORTION 5 (PORTION OF PORTION 2) OF THE FARM ELANDSFONTEIN 412 IR; SIZE 985,7855 HECTARES: HEIDELBERG DISTRICT, TRANSVAAL

SUIKERBOSRAND RIVER STATE WATER CONTROL AREA: PERMIT IN TERMS OF SECTION 62(2I)(a)(i) OF THE WATER ACT, 1956 (ACT 54 OF 1956)

Under the powers vested in me by Government notice 966 of 19 Mar 1989, I, Claus Triebel, in my capacity as Manager, Water Sources, in the Department of Water Affairs and Forestry, herewith issue a permit in terms of Section 62(2I)(a)(i) of the Water Act, 1956 to the above permit holder to extract a maximum quantity of 657 000m³ (six hundred and fifty-seven thousand cubic metres) of water per year from the Suikerbosrand River *for industrial purposes (feedlot)* on the above property, subject to the following conditions:

1. The availability of the allocated quantities of water and the quality thereof for any specific purpose is not guaranteed.
2. No new waterworks may be erected or no changes made to existing water works without prior job authorization in terms of Section 62(2H) of the Water Act, 1956, having been obtained.
3. This permit is of a temporary nature and in no way represents a permanent water allocation. The right is reserved to review or to cancel the permit after reasonable prior notice.
4. Authorized officers of the Department of Water Affairs and Forestry shall have free access to the specific water works at all reasonable times, for purposes of monitoring and control over the extraction of water.
5. All possible precautions must be taken to the satisfaction of the Department of Water Affairs and Forestry not to pollute the specific river in any way.
6. *A tariff of 28,4 cents per cubic metre water* and that can be adjusted from time-to-time *shall be charged* for the actual quantity of water used.
7. This permit does not absolve the permit holder from complying with the provisions of the Water Act, 1956.
8. This permit replaces Permit B2/2/16(3062) dated 21 October 1986.' (Emphasis added.)

The conditions of the permit reflect the department's appreciation of water being a scarce natural resource.

[3] During 1986 the Trans-Caledon Tunnel Authority (TCTA) was established in terms of the Treaty on the Lesotho Highlands Water Project entered into between the governments of the Republic of South Africa and the Kingdom of Lesotho. Its main object is the implementation, operation and maintenance of that part of the Lesotho Highlands Water Project situated in

the Republic of South Africa. The TCTA supplies water to the Vaal Dam via the Lesotho Highlands Water Project.

[4] The respondent contended that, as a matter of interpretation, the permit related only to water used for irrigation purposes. He further contended that he is in any event not liable for payment of levies in respect of water supplied by the TCTA. The appellant disputed both contentions.

[5] Upon application by the respondent, the court a quo (De Klerk AJ in the Gauteng Division of the High Court, Pretoria) made the following declaratory order:

'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.'

The appellant appeals against this order, with the leave of the court a quo.

**The meaning and effect of the permit**

[6] In my view the permit should be interpreted against the following statutory and factual background. Section 62 of the Water Act dealt with control and use of public water in a government water control area. As stated in the permit, the respondent's land fell within such water control area. Section 62 provided that the right to the use and the control of public water in a government water control area shall vest in the Minister. It accordingly provided that no person shall use public water on land inside or outside a government water control area, except by virtue of a provisional right in terms of s 62(2A), a permission under s 62(2B) or 62(2I), or an allocation specified in a notice in the Government Gazette under s 62(2F).

[7] Allocations in terms of s 62(2F) were published by the Minister in the Government Gazette, after following the detailed procedure set out in s 62(2C) to s 62(2E). The s 62(2F) allocations determined the quantity of

public water permitted for irrigation of specified areas of land in hectares. Sections 62(2A) and 62(2B) provided for interim rights of use of water, pending the determination of the allocations in terms of s 62(2F). For present purposes it is not necessary to refer to the provisions of s 62(2B). However, s 62(2A), in essence, provided that a landowner with existing irrigation development in a government water control area 'shall be provisionally entitled' to continue with the existing use of water for irrigation purposes on that land, from the date of declaration of the particular area as a government water control area until a notice is published in terms of s 62(2F) in respect of that area.

[8] Section 62(2I), in effect, provided for an extraordinary concession for use of surplus water. Inter alia, it provided:

'*(a)* If the Minister is convinced that sufficient public water is available in a Government water control area due to the occurrence of floods or seepage, the construction of a Government water work, the fact that rights to, or permissions or allocations for, the use of public water conferred by or granted or made under this section are not fully exercised, or any other reason, he may ─

(i) whether before or after the publication of a notice referred to in subsection (2F)*(a)*, grant, on such conditions as he may determine, permission to any person to abstract, impound or store in that Government water control area a quantity of public water and to use it on a piece of land *in that Government water control area for a purpose specified in the permission*, or to use it on a piece of land *outside that Government water control area for urban or industrial purposes*.' (Emphasis added.)

[9] As early as 21 October 1986 (some seven years before the issue of the permit), the respondent was the holder of two separate rights in terms of s 62 to abstract water from the Suikerbosrand River for use on the land. In terms of s 62(2A) he was provisionally entitled to the use of 514 600m$^3$ of water per annum for irrigation purposes. On 21 October 1986 he was granted a permit (number 1026N), which authorised the use of 230 000m$^3$ of water per annum for industrial purposes consisting of a feedlot. That permit was issued in terms of the then s 12(1) of the Water Act. Simply put, in terms of this permit the respondent was the holder of a right to abstract water for industrial purposes

(feedlot) over and above the right to use water for irrigation purposes, as indicated at the beginning of this paragraph.

[10] By way of two separate letters dated 22 May 1992, the respondent applied for the increase of the quantity of the s 62(2A) right as well as for abstracting an increased quantity of water in terms of the permit for industrial use. He requested that he be permitted to use 809 714m³ of water per annum for irrigation purposes as opposed to the 514 600m³ referred to in the previous paragraph. The basis of this request was that the limit of 514 600m³ of water per annum had been calculated on an incorrect measurement of the area of land under irrigation. In respect of the permit for industrial use, he asked for an increase of the quantity of water to 657 000m³ per annum, as opposed to the 230 000m³ mentioned above. This was based on the increased capacity of the feedlot to approximately 30 000 head of cattle per day.

[11] The relevant officials of the Department of Water Affairs refused both applications. The respondent thereafter sought and obtained an interview with the Deputy Minister of Water Affairs and Forestry. They met on 5 November 1992. On 20 January 1993 the Deputy Minister wrote to the respondent in the following terms:

'As stated to you during our discussions, the position concerning the prevalence of water in the Blesbok Spruit and the Suikerbosrand River has improved over the past few years due to the spillage of purified sewage into it. Consequently, the streams have a steady flow which, if not intercepted, will eventually end up in the Vaal Dam from where it will be available for re-use. In light hereof, I declared myself willing to permit Karan Estates (Pty) Ltd in terms of Section 62(2I) of the Water Act, 1956 (Act 54 of 1956) to extract the requested 657 000m³ of water per year from the Suikerbosrand River, which is now required for the operation of the feedlot, on condition, inter alia, that the actual quantity of water extracted shall be paid for at the current tariff for untreated water from the Vaal Dam. Such a concession would result in your company's water allocation for agricultural usage, i.e. 822 988 cubic metres per year being fully available for utilization for such purposes.'

[12] It was thus made clear that the permission ('vergunning') for increased use of water for the feedlot would be given in terms of s 62(2I) ─ surplus water ─ and that a specified tariff would be payable for such use. No tariff or fee was payable in respect of the use of water in terms of s 62(2A). This was concisely summarised in a letter by the Department of Water Affairs to the respondent dated 1 April 1993, which stated:

'Consequent to your visit to the Minister, the following allocations shall apply:

Feedlot: 657 000m³ per year @ 28.4c/m³ (For industrial purposes)

Agriculture: 823 000m³ per year, free (Preliminary agricultural allocation)

In order to exercise control over the above-mentioned allocations, the authorizations will include a requirement that two separate water meters, which must be installed at your own cost, must be kept in a satisfactory and working condition.'

[13] With regard to the envisaged condition that two separate water meters be installed, the respondent replied as follows on 14 April 1993:

'In light of the above, we request that the current water meter and existing installation be left as they are, that the preliminary agricultural allocation in terms of s 62(2A) be applied for both irrigation and feedlot, as in the past, until the allocation, ie 823 000m³ has been consumed, and that subsequently the new allocation in terms of s 62(2I) for industrial purposes, be used for both irrigation and feedlot, on condition that the allocation of 657 000m³ not be exceeded and a remuneration of 28,4c/m³ be payable for the latter.' (My translation.)

Whether the absence in the permit of a condition in respect of two water meters indicates that the respondent's request had been acceded to, is not necessary to decide.

[14] The statement of the respondent in the founding affidavit that 'it has always been my contention that I have since 1993 only been liable for payment of water use charges at the rate for irrigation water use and not for water use charges at the rate for industrial water use', is therefore disingenuous. On his own version he had paid industrial charges in terms of the permit for some 14 years without demur.

[15] In my judgment the background that I have set out confirms that the understanding of the parties at all relevant times was in accordance with the

clear wording of the permit, namely that the permission to use water for the feedlot had been granted as a concession in terms of s 62(2I) for industrial purposes and against payment of the specified tariff of 28,4c/m³ of water. An interpretation that the permit authorised use of water for irrigation purposes in respect of which an unspecified tariff was payable, is in my respectful view not tenable.

[16] In his founding affidavit the respondent pointed out that the definition of 'use for agricultural purposes' in the Water Act had with effect from 1 July 1993 been amended to include use for or in connection with an intensive animal feeding system, ie a feedlot. The respondent's case in the founding affidavit was therefore that the appellant '. . . was bound by the amended definition and could therefore not issue the permit to me for industrial purposes' and that the permit '. . . erroneously referred to industrial use (feedlot) instead of agricultural use'.

[17] But this is the language of review, not of interpretation of the permit. The respondent can only achieve what he seeks by variation of the terms of the permit. However, the respondent deliberately elected not to bring proceedings for variation of the permit on review. Until such time as the permit is varied on review, it remains as a fact and has legal effect in accordance with its terms.[1]

[18] It must be understood that the Legislature in enacting the National Water Act 36 of 1998 and its predecessor (the Water Act) was keenly aware

[1] See *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 [2004] ZASCA 48 (SCA) para 26, and *MEC for Health, Eastern Cape & another v Kirkland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 [2014] ZACC 6 (CC) para 103.

that water was a scarce and unevenly distributed national resource.[2] It is clear, from the terms of the permit itself, that the Minister allowed the use of surplus water to the respondent in an increased volume conditional upon payment being made. Payment in itself would bring about a discipline in the use of water. The problem with using an interpretive exercise, for sidestepping a review of the permit and resulting in the declaratory order, is that it discounts these very important factors.

[19] It is of course open to the respondent to apply afresh for a licence to abstract water for a particular purpose in terms of the National Water Act. In relation thereto a discretion would be exercised by the responsible authority, both in respect of volume and purpose, taking into account current levels of available water and the legislative and constitutional responsibility[3] to conserve water as a resource. If the respondent is aggrieved by such a decision he would be free to take such legal steps as are available to him.

**Trans-Caledon Tunnel Authority levies**

[20] The permit did not mention TCTA levies at all. The appellant accepted that he bore the onus to prove that the respondent was liable to pay the TCTA levies. At the hearing of this matter, counsel for the appellant referred the court to s 138F of the Water Act, the relevant portion of which reads:

'(1) Notwithstanding anything to the contrary contained in any law but subject to the provisions of subsection (2), the Minister may with the concurrence of the Minister of

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[2] In this regard see the preamble to the National Water Act 36 of 1998 which reads as follows:
'RECOGNISING that water is a scarce and unevenly distributed national resource which occurs in many different forms which are all part of a unitary, inter-dependent cycle;
RECOGNISING that while water is a natural resource that belongs to all people, the discriminatory laws and practices of the past have prevented equal access to water, and use of water resources;
ACKNOWLEDGING the National Government's overall responsibility for and authority over the nation's water resources and their use, including the equitable allocation of water for beneficial use, the redistribution of water, and international water matters;
RECOGNISING that the ultimate aim of water resource management is to achieve the sustainable use of water for the benefit of all users;
RECOGNISING that the protection of the quality of water resources is necessary to ensure sustainability of the nation's water resources in the interest of all water users; and
RECOGNISING the need for the integrated management of all aspects of water resources and, where appropriate, the delegation of management functions to a regional or catchment level so as to enable everyone to participate; . . . .' See also s 27(1) of the National Water Act.

[3] See s 24*(b)*(ii) and (iii) of the Constitution.

Finance, by notice in the *Gazette* levy a charge on water which is supplied for use for any purpose by the State, an irrigation board, a water board, a local authority, the Rand Water Board or any other supplier in an area for the benefit of which a water work referred to in section 138A in the opinion of the Minister, has been, is being or will be constructed.

(2)(*a*) No charge shall be levied under subsection (1) unless the Minister not less than 60 days prior to the date on which he intends to publish the relevant notice in the *Gazette*, has tabled in Parliament a report containing the particulars required in paragraph (*b*).

(i) …

(ii) the water work concerned and *the benefit it entails for the users of water who will be liable for the payment of the proposed charges*.' (Emphasis added.)

[21] The respondent has maintained that he derives no benefit from the Lesotho Highlands Water Project. The appellant was requested to furnish the court with the notice referred to in s 138F(2)(*a*) setting out the benefit enjoyed by the respondent from the Lesotho Highlands Water Project. Counsel for the appellant conceded, and rightly so, that if the notice did not identify the respondent as a user who derived benefit from the project, the respondent would not be liable to pay TCTA levies.

[22] Subsequent to the hearing of this appeal, the court was furnished with various notices published in the Government Gazette by the appellant during the period 1988 until 1997, in terms of s 138F(1) of the Water Act.[4] In terms of these notices, the appellant levied a charge on 'water supplied or made available by the Government from or by means of any Government water work in the Vaal River from and including the Grootdraai Dam to the confluence of the Vaal and Orange Rivers to any person or body for eventual use for urban or industrial purposes'.

[23] It is common cause that the respondent abstracts water from the Suikerbosrand River. The Suikerbosrand River is a tributary of the Vaal River.

[4] Section 138F of the Water Act was repealed on 1 October 1998 and thus no notices in terms of this section would be issued after this date.

The respondent's land is situated upstream of the confluence of the Suikerbosrand River and the Vaal River. The confluence of the Suikerbosrand and Vaal Rivers is at Three Rivers near Vereeniging, downstream of the Vaal Dam. It is a fact, therefore, that water is not supplied or made available to the respondent by means of any government water work in the Vaal River. For this reason the respondent is clearly not liable for payment of TCTA levies in terms of the government notices relied upon and it is not necessary to pursue the matter further.

[24] In the result I would make the following order:

1 The appeal succeeds to the extent set out in the varied order, with costs, including the costs of two counsel.

2 The order of the court a quo is varied by deleting paragraph 1 thereof.

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C H G VAN DER MERWE
ACTING JUDGE OF APPEAL

APPEARANCES:

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| For Appellant: | N Cassim SC (with her M Manala) |
| | Instructed by: |
| | State Attorney, Pretoria |
| | State Attorney, Bloemfontein |
| For Respondent: | A B Rossouw SC (with him J H A Saunders) |
| | Instructed by: |
| | Jaco Roos Attorney, Pretoria |
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