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TRIBUTE TO AKHO NTANJANA

Why should young and promising eagles suddenly perish and be taken away from us forever? I am gutted and unable to understand why.

Akho Ntanjana was on a meteoric rise – he was excelling in his career and slowly transforming into a trailblazer in his own unique way. He was a quiet, focused, forward looking young man and destined to reach great heights.

Akho worked tirelessly on the accreditation of this journal by the Department of Higher Education and Training – a long and arduous process. The receipt of the accreditation letter made him smile – he was relieved and fulfilled when he achieved his objective. He reminded us all that the real work was about to begin to maintain the accreditation.

Akho will be sorely missed by his SAJEI colleagues, the SAJEI Editorial Board members, the authors, the JUTA team and, more specifically, by his mother, wife, and siblings. May his soul rest in peace and rise in glory.

DR GOMOLEMO MOSHOEU

Production editor

Well done, Akho!

You have run your race; now, it is for us to take the baton and continue on your well-defined route.

Thank you for being our guiding light.

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Enhancing Judicial Excellence

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The *South African Judicial Education Journal* is published by the South African Judicial Education Institute (SAJEI), Office of the Chief Justice. The mandate of SAJEI is to provide judicial education to aspiring and serving Judicial Officers in order to enhance judicial accountability and transformation of the Judiciary.

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REINFORCING WATER GOVERNANCE THROUGH PURPOSIVE INTERPRETATION: A COMMENTARY ON *MINISTER OF WATER AND SANITATION AND OTHERS v LOTTER NO AND OTHERS; MINISTER OF WATER AND SANITATION AND OTHERS v WIID AND OTHERS; MINISTER OF WATER AND SANITATION v SOUTH AFRICAN ASSOCIATION FOR WATER USERS' ASSOCIATIONS* (CCT 387/21) [2023] ZACC 9; 2023 (6) BCLR 763 (CC); 2023 (4) SA 434 (CC) (15 MARCH 2023)

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I INTRODUCTION

While it is axiomatic that water is an essential requirement for preserving life, among other vital usages, the recognition of access to this essential resource as an integral part of the economic, social and cultural rights corpus has not been without interpretational controversy. For one, the International Covenant on Economic, Social and Cultural Rights ('ICESCR'), 1966, did not expressly create a right of access to water. However, the UN Committee on Economic, Social and Cultural Rights ('Committee on ESCR') has affirmed in its General Comment 15 that the right to water is implicitly included in the contents of article 11(1) of the ICESCR, which relates to the right to an adequate standard of living and that the right to the highest attainable standard of health requires water for drinking and sanitation (CESCR General Comment 15, para 29. The UN General Assembly in its Resolution 64/292 of 28 July 2010 explicitly recognised the right to water as a distinct human right. See UN 'The human right to water and sanitation' https://www.un.org/waterforlifedecade/human_right_to_water.shtml). This aligns with the underpinning notion that human rights are indivisible, interdependent and mutually supporting (P Neves-Silva, GI Martins & L Heller 'Human rights' interdependence and indivisibility: A glance over the

human rights to water and sanitation' (2019) 19 BMC *International Health and Human Rights* at 1–8; B Porter 'Interdependence of human rights' in J Dugard, B Porter, D Ikawa & L Chenwi (eds) *Research Handbook on Economic, Social and Cultural Rights as Human Rights* (2020) at 301–326).

Another source of tension on water rights is often seen in countries with limited water resources and those with stringent controls over their water distribution systems for domestic consumption and agricultural purposes (Special Rapporteur Report on the Human Rights to Safe Drinking Water and Sanitation, UN Doc A/66/255 (3 August 2011) paras 9–12). Navigating the contours of water rights thus necessarily compels national governments and judiciaries to adopt inventive approaches in defining the substance of these entitlements.

Although South Africa has a justiciable right to water among the litany of entitlements in her Bill of Rights (section 27(1)*(b)* of the Constitution of the Republic of South Africa, 1996 (the Final Constitution) says: 'Everyone has the right to have access to – sufficient food and water….') the country further reinforced the constitutional right to water through the National Water Act 36 of 1998 (Water Act), among other enactments, with elaborate normative and institutional interventions to secure usage and governance matters for her citizens (other notable statutes on the subject include the Water Services Act 108 of 1998 (WSA); the National Environmental Management Act 107 of 1998; and the Water Services Amendment Act of 2018). Section 2 of the Water Act enunciates the purpose of the Act this way:

> *to ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled in ways which take into account amongst other factors… redressing the results of past racial and gender discrimination.*

The apex court in South Africa has been in the vanguard of securing the intendments of the constitutional drafters through its notable pronouncements in this sphere (generally decisions like *Lindiwe Mazibuko and Others v City of Johannesburg* CCT 39/09, 8 October 2009 [2009] ZACC 28 and *Minister of Water and Sanitation v Sembcorp Size Water (Pty) Ltd and Another* CCT300/19, 23 July 2021 [2021] ZACC 20).

Beyond its noble reputation of guiding the scope and content of the corpus of socio-economic rights in general and water rights in particular, the recent judgment of the Constitutional Court in the triple cases of *Minister of Water and Sanitation and Others v Lotter NO and Others; Minister of Water and Sanitation and Others v Wiid and Others; Minister of Water and Sanitation v South African Association for Water Users Associations* (*Lotter, Wiid and SAAWUA 2023*, case CCT 387/21, 15 March 2023 [2023] ZACC 09, per Madlanga J, delivering the unanimous judgment) marks another epoch in global trends of

judicial protection of water as a resource, the rights of its end-users and the entire apparatchik of its governance.

This comment analyses the judgment of the Constitutional Court in the tripartite decision and accentuates its jurisprudential value in the evolution of water rights ethos in contemporary South Africa. The comment also highlights the implications of this landmark decision for the regional and global ramifications of the right to water and water governance.

II BRIEF FACTS OF THE CASE

Following the enactment of the Water Act in 1998, the Department of Water and Sanitation ('DWS'), which is the principal agency in charge of South Africa's water resources management as well as the implementation of all policies governing the water sector, permitted private arrangements through which one party would facilitate another party's application for a licence for water use entitlement under sections 25(2) and 41 of the Water Act. This kind of capital-intensive commercial transaction continued for two decades under the watch of the DWS (*Lotter, Wiid and SAAWUA 2023* para 5).

Somewhere along the line, three categories of natural and juristic persons contracted for water use entitlements but the Director-General of the DWS declined to approve their applications, claiming that such deals in water use entitlements contravened the provisions of section 2 of the Water Act and that the transfer of water use entitlements was unknown under section 25(2) of the Water Act.

The aggrieved parties approached the High Court for declaratory reliefs that were dismissed on the grounds that trading in water use entitlements was unallowable under the Water Act.

On appeal, a majority of four court judges of the Supreme Court of Appeal (SCA) upheld the case of the aggrieved parties while one judge of the appellate court agreed with the decision of the High Court dismissing the application. The majority reasoned that the combined reading of sections 25(1) and 25(2) of the Water Act allows the temporary or permanent transfer of water use entitlements from one holder to a third party for a fee. The matter proceeded to the Constitutional Court on appeal.

The Constitutional Court received submissions from all the parties to the three cases before the High Court of the Gauteng Province and decided to consolidate all three cases since they related to the same core issue, namely, the interpretation of section 25(1) and 25(2) of the Water Act (*Lotter, Wiid and SAAWUA 2023* para 1).

III ISSUES FOR DETERMINATION BEFORE THE CONSTITUTIONAL COURT

For clarity purposes, it is crucial to reproduce the provisions of the Water Act which formed the fulcrum of the issues for determination in this case. Section 25 of the Water Act contained the following provisions:

> *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 of that water on another property in the same vicinity for the same or a similar purpose.*
>
> *(2) A 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 licence 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.*
>
> *(3) The annual report of a water management institution or a responsible authority, as the case may be, must, in addition to any other information required under this Act, contain details in respect of every permission granted under subsection (1) or every application granted under subsection (2).*

Among the contentions of the applicants for leave to appeal (Minister of Water and Sanitation and other officials of the State; *Lotter, Wiid and SAAWUA 2023* para 6) was that by an ordinary textual meaning of section 25, the transfer of water use entitlements to another person is not covered by the provision. According to them, the second part of the same section 25 must be construed to mean that the temporary use of water is for the same or similar purpose on another property in the locality by the holder, not by a third party.

A similar contention was made regarding section 25(2), where the applicants submitted that the section also does not expressly mention another person.

The applicants further submitted that 'wealthy farmers, who are largely white, have created an enclave within which a scarce national resource is traded, thus perpetuating the imbalances of the past' (*Lotter, Wiid and SAAWUA 2023* para 14) a situation that would amount to an infringement of the right to equality. In the reckoning of the applicants, such a situation would contravene section 2 of the Water Act, which states that the purpose of the Water Act is to redress the results of past racial and gender discrimination. Finally, the applicants submitted that the Water Act 54 of 1956, which was the predecessor to the Water Act, made specific provisions

for the trading in water use. Therefore, the applicants submitted that because no similar provision is found anywhere in the Water Act, trading in water use is not permissible (*Lotter, Wiid and SAAWUA 2023* para 14). Delivering the unanimous judgment of the apex court, Judge Madlanga set down three questions for the determination of the court, namely:

(i) whether section 25(1) of the Water Act permits the use of water by a person other than the holder of a water licence;

(ii) whether the application for licence envisaged by section 25(2) is an application for licence by the holder of a water use entitlement; and

(iii) whether the Water Act prohibits the charging of a fee in respect of transactions concluded regarding water use entitlement.

In determining these three key questions, the Constitutional Court (per Madlanga J) relied broadly on its applicable jurisprudence, the rationale for the laws as well as the ensconced stance of the court towards purposive interpretation in constitutional matters (*Lotter, Wiid and SAAWUA 2023*, paras 16–17. Some notable scholarly works on the growing importance of purposive interpretation in South Africa's contemporary approaches to legal hermeneutics include but are not limited to: FJ Van Heerden & AC Crosby *Butterworths Key to Knowledge – Interpretation of Statutes* (1996) at 6–7; JR De Ville *Constitutional and Statutory Interpretation* (2000) at 34–38; PA Swanepoel *An Analysis of the Purposive Approach to the Interpretation of South African Fiscal Legislation* unpublished LLD dissertation, University of Pretoria, 2012 at 67–70; W le Roux 'Editorial: Special edition – Legal interpretation after Endumeni: Clarification, contestation, application' (2019) *Potchefstroom Electronic Law Journal* at 2–9; K Perumalsamy 'The life and times of textualism in South Africa' (2019) *Potchefstroom Electronic Law Journal* at 65).

(a) Resolving issue one: permission of the use of water by a person other than the holder of a water licence

Steadfastly following and adopting the Constitutional Court's interpretive approach in previous decisions the court echoed its earlier decisions in *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16 (CC); 2014 (8) BCLR 869 (CC) para 28; *Chisuse v Director-General, Department of Home Affairs* [2020] ZACC 20 (CC) para 47. The court summarily rejected the applicant's interpretation of section 25(1) of the Water Act for lacking grammatical sense and being founded on a flawed premise (*Lotter, Wiid and SAAWUA 2023* paras 23–25). Madlanga J summed up the absurdity of the applicants' arguments in the following words:

> *If the interpretation contended for by the applicants had been intended, it could simply have been rendered thus:*
>
> *'A water management institution may, at the request of a person authorised to use water for irrigation under [the Water] 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 on the same property or on another property in the same vicinity for the same or similar purpose.'*

In sum, section 25(1) is incapable of the interpretation contended for by the applicants (*Lotter, Wiid and SAAWUA 2023* paras 23–24).

(b) Resolving issue two: envisaged application for a licence

Regarding the purport of section 25(2), the Constitutional Court decided that just as the provision does not specifically mention another person, so does it not specifically exclude another person. The Court remarked that it would not be possible to 'trade' in water use entitlements in the conventional sense, meaning that in the context of section 25(2), the holder of an entitlement can, at most, surrender their right to facilitate a particular application by another person but trading, that is, entering into a private, corresponding transaction, is not barred by any provision in the Water Act (*Lotter, Wiid and SAAWUA 2023* paras 29–30). Although not expressly stated in the judgment, that the reasoning of the apex court was based on purposive interpretation is decipherable from the following words of Madlanga J:

> *This insertion entails a limiting qualifier to the otherwise plainly broad language of the section. The breadth of the language of section 25(2) is magnified by the breadth of the language of section 41 in terms of which an application for a licence may basically be made by anybody. Of course, the fate of each application will depend on its merits. I can think of no interpretative tool that justifies this departure from the plain language of the section and dictates the insertion suggested by the applicants' interpretation. Our courts – including this Court – have consistently held that words cannot be read into a statute by implication unless the implication is necessary in the sense that without it effect cannot be given to the statute as it stands and that without the implication the ostensible object of the legislation cannot be realised. In this instance, nothing makes the implication necessary. Thus, the application for a licence envisaged in section 25(2) may be made by a third party. (Lotter, Wiid and SAAWUA 2023 para 30, underlined for own emphasis.)*

(c) Resolving issue three: charging of fees for water use entitlements

From a procedural viewpoint, according to Madlanga J, sections 26(1)*(l)* and 29(2) of the Water Act refer to 'transactions' and 'compensation', which translates into the lawfulness of trading in water use entitlements even where

there is exchange of money for such trade (*Lotter, Wiid and SAAWUA 2023* paras 34–36). In the words of Madlanga J:

> *In sum, I see no impediment to a fee being charged for water use under the second part of section 25(1) or in respect of a surrender of a water use entitlement in terms of section 25(2) in order to facilitate a section 41 licence application by a third party. (Lotter, Wiid and SAAWUA 2023 para 37.)*

It follows, therefore, that there is no prohibition of the charging of a fee or other compensation for water use entitlements under the Water Act to constitute any impediment to another person applying for a licence under section 41 of the statute.

In the final analysis, the appeal was dismissed with costs to the applicants.

IV SIGNIFICANCE OF THE DECISION FOR WATER RIGHTS AND WATER GOVERNANCE

It is important to note that this decision of the Constitutional Court is coming in the aftermath of the Committee on the ESCR's admonition to governments worldwide to take cognisance of indigenous groups and other traditionally marginalised communities and work towards ameliorating their exclusion from enjoying their water rights (Creamer Media Reporter 'Water 2021: Reform urgently needed' *Creamer Media* 23 August 2021 https://www.engineeringnews.co.za/print-version/water-2021-reform-urgently-needed-2021-08-23).

The wording and spirit of the supreme constitution of South Africa provided the basis for the approach adopted in resolving the disputes arising in *Lotter, Wiid and SAAWUA 2023*. Under section 39(1)*(b)* of the Constitution, South African courts have the obligation to consider the principles of international law. Without expressly saying so in any part of the *Lotter, Wiid and SAAWUA 2023* judgment, the enunciation by the UN Committee on ESCR and the global trends in the field would have weighed favourably in the mind of the Constitutional Court in arriving at its seminal decision through purposive interpretation.

Purposive interpretation is a legal method in which courts interpret statutes or constitutional provisions by focusing on the text's literal meaning and the purpose or objective the law aims to achieve. This approach recognises that legal texts often cannot cover every specific circumstance and that the broader intention behind the law should guide its application. In the context of South African case law, purposive interpretation is deeply rooted in the country's constitutional framework, particularly the Constitution of 1996, which enshrines the values of human dignity, equality, and freedom.

These aspirational principles require active judicial interpretation reflecting the transformative nature of South African society post-apartheid.

The theoretical underpinnings of purposive interpretation can be traced to the broader jurisprudential debate between legal positivism and natural law. Legal positivism, which focuses on the literal and formal application of law, is seen as insufficient for addressing a society's complex, dynamic needs in transition. In contrast, purposive interpretation aligns more closely with natural law theories, emphasising the law's moral and ethical foundations. In South Africa, courts have often turned to purposive interpretation to give effect to the transformative spirit of the Constitution, which mandates that the law must promote a democratic, inclusive society.

The concept of a 'living constitution' further bolsters purposive interpretation. This view holds that constitutional provisions are not fixed or static but should evolve in response to changing societal values and circumstances. In the seminal case of *S v Zuma* CCT 5/94 [1995] ZACC 1 (5 April 1995) the South African Constitutional Court emphasised the importance of interpreting the Constitution in light of its underlying values and the societal goals it seeks to achieve. This case exemplified a purposive approach, where the Court did not limit itself to rigid textualism but looked at the broader context to ensure that the law served its intended purpose.

One of the key cases that illustrate purposive interpretation is *S v Makwanyane* CCT 3/94 [1995] ZACC 3 (6 June 1995). In its landmark decision on the death penalty, the Constitutional Court emphasised the need for judicial interpretations that align with the spirit of the Constitution. The Court argued that the death penalty violated the Constitution's commitment to the right to life and human dignity, highlighting the importance of interpreting laws in a way that supports constitutional values.

Another significant example is the *Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another* CCT28/01 [2002] ZACC 6; 2002 (4) SA 613; 2002 (7) BCLR 663 (21 May 2002), where the Court applied a purposive approach to interpreting the definition of 'deprivation of liberty' in the context of unlawful detention, the Court emphasised that statutory provisions should not be read in a vacuum but in a way that serves the public interest and advances fundamental rights.

Moreover, in *National Coalition for Gay and Lesbian Equality v Minister of Justice* CCT10/99 [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 (2 December 1999), the Constitutional Court struck down laws criminalising consensual same-sex relations, applying a purposive interpretation to the Constitution's equality clause. The judgment reflected a deep commitment to social transformation and the protection of human rights.

Furthermore, in cases like *Government of the Republic of South Africa v Grootboom* CCT38/00 [2000] ZACC 14 (21 September 2000), the Court

adopted a purposive approach to interpret the right to housing in the context of the socio-economic realities many South Africans face. The Court interpreted the Constitution legally and as a tool to address historical injustices and current socio-economic challenges. This interpretative approach is vital for promoting human rights and socio-economic equality, where textualist interpretation could fall short.

From a jurisprudential perspective, the application of purposive interpretation in South Africa represents a commitment to an evolving understanding of justice that moves beyond rigid legal doctrines to embrace a dynamic conception of rights and social goals. It reflects the recognition that law is not merely a system of rules but a framework for achieving societal transformation. South African case law, particularly in constitutional matters, showcases the judiciary's engagement with this theory to promote the spirit and purpose of the Constitution.

In sum, purposive interpretation ensures that legal norms are applied in ways that best fulfil their intended societal functions enshrined in the Constitution, especially in a country with a history of deep-seated inequalities and a commitment to overcoming them and facilitating the evolution of a just legal system. The purposive interpretation adopted by the Constitutional Court, in this case, is significant for its alignment with the global environmental, social and governance ('ESG') principles which corporate entities are expected to infuse with their operational impacts on the water rights of local communities.

ESG considerations have become ever more crucial for corporate enterprises. The considerations serve as valuable yardsticks for assessing a company's long-term feasibility and environmental influences. Therefore, businesses are often expected to factor ESG considerations in their business schemes as a precaution against ESG-related lawsuits and to safeguard their business repute (M Kennedy & T Serongoane 'Redressing mine closure liability through the ESG lens: Emerging ESG risks' *Webber Wentzel News* 14 Jul 2022 https://www.webberwentzel.com/News/Pages/redressing-mine-closure-liability-through-the-esg-lens-emerging-esg-risks.aspx).

Under the auspices of the United Nations ('UN'), several initiatives have, for more than a decade, emphasised the requirement for corporate and financial stakeholders involved in water usage for mining, extractive or other industrial purposes to conduct their businesses with the observance of social responsibility, alignment with the sustainable development goals and the avoidance of harm to the environment and communities. Among these are the UN's Environmental Programme's Finance Initiative ('UNEPFI') of 1992; the UN's Global Compact ('UNGC') of 2000; the UN's Equator Principles ('UN-EP') of 2003; the UN Principles for Responsible Investment ('UNPRI') of 2005; the UN Environmental Programme's Finance Initiative's Principles for Sustainable Insurance ('UNEP-PSI') of 2012; and the UN's

Sustainable Development Goals (particularly Goals 6 and 17) of 2015 (N James 'Climate change, ESG obligations will make water issues more challenging for miners', *Creamer Media's Engineering News* 12 March 2021 https://www.engineeringnews.co.za/article/climate-change-esg-obligations-will-make-water-issues-more-challenging-for-miners-2021-03-12). All of these initiatives aim to ramp up universal consciousness for water sustainability and resilient responses to the threats of climate change and global warming, culminating in the collaborative platform known as the Water Action Hub (CEO Water Mandate 'Water Action Hub – About Us' https://wateractionhub.org).

Ban Ki-moon, former UN Secretary-General, had in June 2012, at the launch of the UNEP-PSI initiative, summed up the overall global policy outlook on this subject in the following words:

> *a global roadmap to develop and expand the innovative risk management and insurance solutions that we need to promote renewable energy, clean water, food security, sustainable cities and disaster-resilient communities. (UNEP 'Principles for Sustainable Insurance initiative hits 200 members' 6 December 2021 https://www.unepfi.org/industries/insurance/200-members-are-now-part-of-the-principles-for-sustainable-insurance-initiative/)*

Following these initiatives, several states have amplified their recognition of rights to natural resources, created normative and institutional frameworks to regulate the limits of water allocation rights and numerous lawsuits have been recorded from non-compliance with these emerging norms (James 'Climate change, ESG obligations will make water issues more challenging for miners'; F Joubert 'A South African perspective on water rights' *Lexology* at 31 October 2023 https://www.lexology.com/library/detail.aspx?g=47471c78-9072-4219-a815-523ee37a7037).

It is notable that as a leading voice in the global agenda setting for these concerns, the South African Department of National Treasury had in May 2021 published a technical document titled 'Financing a Sustainable Economy Technical Paper 2021' (https://www.treasury.gov.za/comm_media/press/2021/2021101501%20Financing%20a%20Sustainable%20Economy.pdf), the first of its kind in the country contained guidelines on how corporate entities should observe national best practices and minimum standards in tackling ESG risks occasioned by climate change, fossil fuel resource depletion and water pollution. This technical paper gave birth to the voluntary code of conduct, the South African Code for Responsible Investing ('CRISA'), adopted in 2011 and has gained broad national and subregional endorsements. (For analysis of this instrument and developments relating to it, see S Viviers & G Els 'Responsible investing in South Africa: Past, present and future' (2017) 9(1) *African Review of Economics and Finance* at 122–155; N Locke 'International best practice and a revised Code for Responsible Investing in

South Africa' (2023) at 140 *South African Law Journal* 550–578). This Code stipulates obligations that financial institutions and corporate investors must observe in their operations involving ESG risks.

As a landmark judgment, the *Lotter, Wiid and SAAWUA 2023* decision accentuates the intersectionality of human rights, statutory interpretation and public policy. It illustrates that courts can play a vital role in the protection of human rights and in holding the state accountable for its obligations under the supreme Constitution in accordance with the wording and purpose of section 7 of the Constitution:

> *(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.*
>
> *(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.*
>
> *(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.*

This decision enlarges the scope of the constitutional and statutory water rights for the enjoyment of all South Africans and shields them from the arbitrariness of the government and its officials. South Africans whose livelihoods depend on the irrigation-reliant agricultural sector will now be able to draw legitimate benefits from their water resources and their agricultural activities with an assurance of a stable water supply and without undue government interference. Beyond polemics, Madlanga J settled the purposive interpretation adopted in this decision in the following words:

> *The conclusion that I have reached is not dismissive of the state's concerns that water, a scarce national resource, is largely in the hands of advantaged white farmers. On the contrary, I understand why the state may now be seeking to redress the injustice brought about by this disproportionate enjoyment of water use entitlements. Indeed, one of the factors to be considered to ensure the achievement of the purpose of the Water Act is 'redressing the results of past racial and gender discrimination'. This attests to the reality of the racially skewed enjoyment of water use entitlements. Unfortunately, the existing legislative instrument does not admit of the redress; at least not in the manner contended for by the applicants in this matter. (Lotter, Wiid and SAAWUA 2023, para 39.)*

The purposive interpretation given to the vital provisions of the Water Act by the Constitutional Court implicates business operations and financing in the agrow-allied and extractive industries that unavoidably engage with water usage and the steady transfer of water use entitlements which invariably affect employment opportunities, job security and sustainable access to food and water in South Africa. To put this in a clearer perspective, if the Constitutional Court had failed to rule that the moratorium on the transfer of water rights

imposed by the DWS by fiat was indefensible and illogical, the result would have been perilous for the national economy.

With this judgment, policymakers and corporate entities involved in water usage and management are most likely to be influenced to take seriously the views and participation of communities in the protection of their lands, natural resources, and water rights. The court's pronouncements should also prompt policy reforms targeting improvements in the efficiency of service delivery in the water sector.

While there have been some concerns about the appropriateness of economic, social and cultural rights for judicial determination (S Liebenberg *Socio-Economic Rights: Adjudication under A Transformative Constitution* (2010) at 34–36), the apex court, in the *Lotter, Wiid and SAAWUA 2023* case, was careful not to overly impinge on the roles of the legislature and the executive but to only remind the State of its obligation to justify restrictions on water rights and to point the government to the need for policies to secure the protection of the rights of the marginalised.

This judgment also exemplifies another cogent way through which the judiciary can shape public policy and ensure that human rights are given effective protection through judicial oversight functions and purposive interpretation.

V CONCLUSION

The global situation in water use litigation is ongoing in its various forms. Business entities should be mindful of the possibility of facing legal action, rigorous regulatory scrutiny, citizen-led actions or other challenges directed at them or their leadership. Yet, governments and authorities should also recognise the risks associated with the increasing number of claims challenging their objectives, goals, or implementation of climate considerations in decision-making in the sphere of water rights.

Although the decision of the Constitutional Court was located within the exclusive confines of the South African law and legal system, its significance for regional and global discourses on water rights and water governance cannot be overemphasised. South Africa has witnessed a general election and some changes in the outlook of government since the judgment of the Constitutional Court in this case, and one can expect some effects of this on the country's attitude towards its water use entitlements policy and, indeed, the country's entire water governance system. It is logical to anticipate a more encompassing approach to the issues brought to the fore by this case once the government's position becomes clear.