



Water legislation for local government

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The National Water Act and Water Services Act

In 1997 the Parliament passed the Water Service Act (WSA)¹, which was guided in particular by Principles 25-28 dealing water services. The following year the National Water Act (NWA) was passed.² Although, the former deals with water services and the latter with water management, the two acts are based on the same fundamental Principles and are so inter-related to the overall goal of realizing the right to water that they must be read in unison.

a. The National Water Act

The NWA provides for protection of the quality of water resources and for the integrated management of water resources. The purposes of the NWA include to meet the basic human needs of present and future generations and to redress the results of past racial and gender discrimination.³ Issues covered by the NWA are as follows:

(i) Ownership of water

The NWA recognizes that water is a natural resource that belongs to all people⁴ and that the national government, through the Minister of Water Affairs and Forestry, is acting as the public trustee for the people. As a trustee the government must “ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefits of all persons and in accordance with its constitutional mandate.”⁵

In this respect, the NWA has elaborated on Principles 2, 3 and 4 of the National Water Policy. Principle 3 states: “There shall be no ownership of water but only a right (for environmental and basic human needs) or an authorization for its use.”⁶ Principle 4 clearly does away with the notion of riparian rights stating: “The location of the water resource in relation to land shall not in itself confer preferential rights to usage. The riparian principle shall not apply.”⁷

(ii) Classification system for water and Setting Class and Resource Quality Objectives

The NWA sets out an elaborate procedure for classifying water resources and setting class and resource quality objectives in relation to a number of aspects. The Minister must prescribe a classification system for water resources. Currently, the draft

¹ Republic of South Africa Water Service Act (WSA) No. 108 of 1997

² Republic of South Africa National Water Act (NWA) No. 36 of 1998.

³ *Ibid.* at sections 2(a) & (b).

⁴ *Ibid.*, Preamble.

⁵ *Ibid.* at section 3

⁶ NWP, Appendix 1, Principle 3.

⁷ *Ibid.* at Principle 4.

national water resource strategy has set out a classification system ranging from (a) being natural or near pristine and (f) irreversibly damaged or severely modified.⁸ Once a classification system is set, the Minister must set out to “determine the class and resource quality objectives of all or part of water resources considered to be significant.”⁹

(iii) Institutional Framework and Water Management Areas

The NWA created a number of institutions, namely the Catchment Management Agency (CMA) charged with administering 19 water management areas (WMA).¹⁰ These institutions will be discussed below in section 4. The Fundamental Principles state that the “responsibility for the development, apportionment and management of water resources shall when appropriate be delegated to catchment or regional level.”¹¹ Furthermore the management of quality and quantity should be integrated in consistence with broader environmental management approaches.¹² The integrated water resource management (IWRM) envisioned by the NWA aims to co-ordinate the planning and management of water with regard to such issues as water sources, water use, quality and environmental and social issues. One of the key outcomes desired by IWRM is to ensure participation in water management.¹³ It is important to note that the WMAs are based on catchment areas, and are not congruent with political boundaries or national, provincial or municipal demarcations.

(iv) The Reserve

The NWA defines the Reserve as:

The quantity and quality of water required (a) to satisfy basic human needs by securing a basic water supply, as prescribed by the Water Services Act..., for people who are now or who will, in the reasonable future, be relying upon; taking water from; or being supplied from, the relevant water resource; and (b) to protect aquatic ecosystems in order to secure ecologically sustainable development and use of the relevant water resource.¹⁴

The Minister, after classification of the resource, is responsible for determining the quantity and quality of the water necessary to meet both aspects of the Reserve, namely the environmental and basic human needs Reserves.¹⁵ According to the NWA, “if a resource has not yet been classified, a preliminary determination of the Reserve may be made and

⁸ Draft NWRS at Section 3.1.2.1.

⁹ NWA at Chapter 3, Part 2 Preamble.

¹⁰ *Ibid.*, Chapter 7. See generally section 4 below.

¹¹ NWP at Appendix 1, Principle 23.

¹² *Ibid.*, Principle 15.

¹³ See NWA, Preamble & NWP, Appendix 1, Principle 23.

¹⁴ NWA at Section 1(xviii).

¹⁵ *Ibid.* at section 16.

later superseded by a new one.”¹⁶ All organs of state and water management institutions must give effect to the Reserve in exercising any power or performing any duty under the NWA.¹⁷ This means that the right to the use of the Reserve must be met before any other authorisation to use water is made. In this sense, the Reserve enjoys priority of water use by right.¹⁸ How the concept of the Reserve fits into a rights framework will be discussed in more detail in section 8.

(v) The national water resource strategy

The national government is also responsible for establishing a national water resource strategy (NWSR). The national water resource strategy must also set out the strategies, objectives, plans etc for the protection, use, development, conservation, management and control of water.¹⁹ Furthermore, it must, at the very least, provide for “the requirements of the Reserve and identify, where appropriate, water resources from which particular requirements must be met; international rights and obligations; actions to be taken to meet projected future water needs; and water use of strategic importance.”²⁰ Finally, the NWSR may be established in a progressive manner which should include a process for participation. The NWSR will be referred to throughout the paper.

(vi) Water Use and Authorisations

The NWA defines use of water broadly. Section 21 sets forth a non-inclusive list of water use, including taking water from a water resource; storing water; impeding or diverting the flow of water in a water course, discharging waste or water containing waste into a water resource; disposing of waste in a manner which may detrimentally impact on a water resource; and altering the bed, banks, course or characteristics so of a water course.

In addition to the priority to use water in the Reserve by right and international obligations, all other use is subject to authorisation. The NWA creates a detailed regime concerning authorization. It is important to highlight this regime in some detail in order to understand how decisions are made and on what grounds to allow the use of water.

Water use can be authorized under three circumstances: water use without a license, water use requiring a license, and situations where the Responsible Authority²¹ has dispensed the license requirement for a period of time. There exist three situations where water use without a license can occur. First, if the water use falls under Schedule 1 annexed to the NWA, no license is required.²² These uses have minimal or insignificant impact on water resources and include taking water from a water source (i.e. rivers, boreholes etc but not from reticulation) to which that person has lawful access for domestic use or to use water for reasonable non-commercial gardening.

Second, the Minister can authorize general authorizations to use water. This is an authorization to use water for a specific purpose and under certain limits and conditions without a licence. According to the NWA: “A general authorisation may be restricted to a

¹⁶ *Ibid.* at Chapter 3, Part 3 Preamble.

¹⁷ *Ibid.* at section 18.

¹⁸ See NWP, Appendix 1, Principle 3.

¹⁹ NWA at section 6(1)(a).

²⁰ *Ibid.* at section 6(1)(b).

²¹ The Responsible Authority is discussed in the section 4 below.

²² NWA at section 22(1)(a)(i) and Schedule 1.

particular water resource, a particular category of persons, a defined geographical area or a period of time, and requires conformity with other relevant laws.”²³ As with the issuance of licenses, discussed below, the Minister or Responsible Authority must consider a number of factors when issuing licenses.²⁴

The third situation where no license is required is under an existing lawful use. If a use of water was authorised between October 1996 and September 1998, that is just before the application of the NWA, it may count as existing lawful uses and may continue without a licence.²⁵ However, the existing lawful uses have to be registered²⁶ as this measure is only a transitional arrangement.

If water users do not meet the above-mentioned criterion, they will have to apply for a license. A licence is a legal entitlement to use water, granted for a maximum of 40 years.²⁷ The Responsible Authority must review the condition of the licence at least every five years and if necessary amended.²⁸ A licence does not imply a guarantee in regard to the quality or the availability of water²⁹ and may be withdrawn, suspended or transferred totally or partially, temporarily or permanently.³⁰ Even if the act is vague on this point, the possibility to transfer a water license opens up for a so called “water right’s market”³¹, but it has to be noted that the only guaranteed right to use water in the NWA, the Reserve, must be determined before any licence can be issued.

When deciding on an application for a license, similar to the granting of general authorizations discussed above, the responsible authority must take into account a number of factors. These include, among other things, the socio economic impact of the decision; the use of the water to the public interest; the need to redress the results of past racial and gender discrimination; the class and resource quality objectives of the water resource; meeting international obligations and the Reserve; and the effect of the water use on the resource and other water users.³²

Finally, the NWA allows the responsible authority to “dispense with the requirement for a licence for water use if it is satisfied that the purpose of this Act will be met by the grant of a licence, permit or other authorisation under any other law.”³³

(vii) Pricing strategy

The NWA empowers the Minister to develop a pricing strategy to fund water resource management, resource development and use of waterworks and for achieving the equitable and efficient allocation of water.³⁴ According to the NWA, “[w]ater use charges are to be used to fund the direct and related costs of water resource management,

²³ *Ibid.* at Chapter 4, Part 6 Preamble; see also section 39.

²⁴ *Ibid.* at section 27.

²⁵ *Ibid.* at section 32.

²⁶ *Ibid.* at section 34(2).

²⁷ *Ibid.* at section 28 (1)(e).

²⁸ *Ibid.* at sections 28 (1)(f) & 49.

²⁹ *Ibid.* at section 31.

³⁰ *Ibid.* at sections 54 & 25.

³¹ See Sylvain R. Perret, “Water policies and smallholding irrigation schemes in South Africa: a history and new institutional challenges”, (2002) 4 Water Policy 283, 295.

³² NWA at section 27.

³³ *Ibid.* at section 22(3).

³⁴ *Ibid.* at section 56 (2).

development and use, and may also be used to achieve an equitable and efficient allocation of water.”³⁵ The pricing strategy can differentiate with regard to a number of factors, including geographic area and type of water user. For example with respect to the different types of water users, the strategy can differentiate with respect to the extent of their water use; their economic circumstances and the statistical probability of the supply of water to them.³⁶ Aspects of the pricing strategy will be discussed throughout this report.

(viii) Pollution Prevention

The NWA puts a responsibility on the person who owns, controls, occupies or uses the land from where the water is polluted to take measures to prevent pollution.³⁷ If he or she does not take these measures the CMA may do what is necessary to remedy the situation and recover the cost from the person that is responsible.³⁸

(ix) Offences and remedies

The NWA lists a number of offences related to non-compliance with directives and requirements of the Act. These include a failure to register water use, unlawfully and intentionally or negligently commit any act or omission which detrimentally affects or is likely to affect a water resource; and failure to provide access to any books, accounts, documents or assets required under the Act.³⁹

A person guilty of an offence is liable to a fine and/or imprisonment not exceeding five years on the first conviction and not exceeding ten years of a second conviction.⁴⁰ The offender may also be liable for damages for the loss or harm suffered by others as well as for remedial measures.⁴¹

(x) Information and monitoring

The Act requires the Minister to establish a national monitoring system for water resources to collect the information needed for water management.⁴² Furthermore the Minister must make information about water resource quality, groundwater, hydrological data and a register of water use authorisations⁴³ available, subject to reasonable charges.⁴⁴ These will be discussed in more detail in the following section under the powers of the Minister.

b. Water Service Act

³⁵ *Ibid.* at Chapter 5, Part 1 Preamble.

³⁶ *Ibid.* at section 56(4).

³⁷ *Ibid.* at section 19.

³⁸ *Ibid.* at section 19(3) & (4).

³⁹ *Ibid.* at section 151.

⁴⁰ *Ibid.* at section 151(2).

⁴¹ *Ibid.* at section 154.

⁴² *Ibid.* at section 137.

⁴³ *Ibid.* at Section 139.

⁴⁴ *Ibid.* at Section 142.

The objectives of the WSA are to, among other things, provide “the right of access to basic water supply and the right to basic sanitation necessary to secure sufficient water and an environment not harmful to human health or well-being”⁴⁵, to “provide a regulatory framework for water services institutions”⁴⁶ and “the monitoring of water services and intervention by the Minister or by the relevant Province.”⁴⁷

(i) Basic water supply

The most important feature of the WSA for a human rights approach to water is that it recognizes the right of everyone to basic water supply and basic sanitation.⁴⁸ The WSA does not, however, define what this means. In a compulsory national standard emanating from section 9(d) of the WSA,⁴⁹ the Minister promulgated a minimum standard for water supply services is set at a minimum quantity of potable water of 25 litres per person per day or 6000 litres per household and month within 200 meters from the household.⁵⁰ This quantity is however subject to future revision and the intention is that the water services shall climb a ladder of an increasing service level for all consumers.⁵¹ The same regulation also sets up requirements in regard to quality; situation where there are interruptions of provision and the requirement of a consumer service to which consumers can report non-compliances with the regulation.⁵² Section 7 will address how the concept of basic water supply fits into a human rights framework.

□ *Free Basic Water Policy*

In relation to the basic water supply, the national government has issued a programme to provide free basic water with the general aim to supply all households with free basic water.⁵³ However as it is not economically feasible to supply all households the Free Basic Water Policy (FBWP) points to “poor households” as its main target⁵⁴ and reminds the local governments that the paramount goal is to make sure that everyone has access to water services before giving out free basic water.⁵⁵ The Free Basic Water Implementation Strategy states that, “the continued extension of adequate water supplies to unserved households must remain at the core of any provision of free basic water.”⁵⁶

FBWP gives discretion to local governments “in defining local poverty indicators and identifying which households fall within the local definition.”⁵⁷ It also allows local

⁴⁵ *Ibid.* at section 2(a).

⁴⁶ *Ibid.* at section 2(d).

⁴⁷ *Ibid.* at section 2(f).

⁴⁸ *Ibid.* at section 3(1).

⁴⁹ Regulation relating to compulsory national standards and measures to conserve water (Gazette 22355, Regulation Gazette 7079) (8 June 2001) [Basic Water Standards].

⁵⁰ *Ibid.* at section 3(b).

⁵¹ DWAF, Strategic Framework for Water Services (September 2003), 27 [SFWS].

⁵² Basic Water Standards at sections 4, 5, & 6.

⁵³ DWAF, “Free Basic Water Implementation Strategy Document”, version 8.3, (May 2001) online: <www.dawf.gov.za/FreeBasicWater/>.

⁵⁴ *Ibid.* at section 3.2.

⁵⁵ *Ibid.* at section 3.1.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.* at section 3.2.

municipalities to choose between various overall approaches to implementing the strategy, such as rising block tariffs or targeting credits⁵⁸ and various technical options, such a yard tap or a manually refillable water tank.⁵⁹ Finally, although FBWP refers to the Basic Water Standards discussed above as a guide to what constitutes the free basic amount, the FBW Implementation strategy gives local government flexibility to define this as a greater or smaller quantity.⁶⁰ The FBWP will also be discussed throughout the report.

(ii) Tariffs

The WSA gives the Minister powers to set norms and standards with regard to tariffs.⁶¹ The Minister may differentiate on an equitable basis between a number of factors, including socio-economic and physical attributes of an area and different users of water services.⁶² In this respect, standards can place limits on cost recovery. In doing so the Minister must consider, among other things, social equity and the recovery of costs associated with the services.⁶³ No water service institutions may use tariffs that are “substantially” different from the prescribed norms.⁶⁴ The Minister has stated in a compulsory national standard pursuant to the WSA that water service institutions have to “ensure that all households have access to basic water supply and basic sanitation” in setting their tariffs.⁶⁵ Furthermore, the same national standard requires that water service institutions differentiate between different levels of service in setting tariffs, the lowest level being a communal water services network.⁶⁶ DWAF in the Strategic Framework for Water Services, discussed below, has also reiterated that tariffs for domestic use should be “pro-poor” in their orientation and that basic water and sanitation services should be *affordable* to all households, especially vulnerable groups such as HIV affected individuals and households headed by women or children.⁶⁷

(iii) Information and monitoring

Similar to the NWA, the WSA puts a duty on the Minister to create a national information system, which can take part of the larger information system envisaged in the NWA.⁶⁸ The Minister and the relevant Province have a duty to monitor the water service institutions in regard of all national standards and all plans and policies under the Act.⁶⁹ These will be discussed in more detail in the sections 4 and 5.

⁵⁸ *Ibid.* at section 8.

⁵⁹ *Ibid.* at section 7.1.

⁶⁰ *Ibid.* at section 3.3.

⁶¹ WSA at section 10.

⁶² *Ibid.* at section 10 (2).

⁶³ *Ibid.* at section 10(3).

⁶⁴ *Ibid.* at section 10.

⁶⁵ Norms and standards in respect of tariffs for water services in terms of section 10(1) of the water services act, 11 June 2001 at section 2(e).

⁶⁶ *Ibid.* at section 4(2).

⁶⁷ SFWS at section 4.5.3.

⁶⁸ WSA at section 67.

⁶⁹ *Ibid.* at section 62(1).

3.5 Strategic Framework for Water Services

The Strategic Framework for Water Services (SFWS) outlines key strategies to implement the WSA. This includes clarifying the institutional framework in the water services sector, outlining the financial framework needed to ensure access to water, including the Free Basic Water Programme, and seeking to elaborate on the Water Service Development Plan procedure.⁷⁰ This report will refer often to the SFWS throughout the various sections.

3.6 Local government

In analysing the water legislation in South Africa, one must also look at laws that deal with local government powers and functioning. Three important laws must be considered: the Constitution, the Municipal Structures Act, and the Municipal Systems Act. Various sections throughout this report will refer to these three laws when evaluating local-government related legislation, such as the WSA.

a. Constitutional provisions

The responsibility to provide water and thus realise the right to water must be understood in relation to the constitutional division of competences between the national, provincial and local spheres of government. According to Schedule 4 (B) of the Constitution “water and sanitation services limited to potable supply systems and domestic waste-water and sewage disposal systems” falls under the duties of local government. However, section 154(1) of the Constitution states that national and provincial government must support and strengthen the capacity of municipalities to perform their functions and the general principal of co-operative government must be taken into account by all spheres of government in solving water problems.⁷¹ The Provincial government must monitor, support and promote the development of local government capacity in order enable municipalities to fulfil their functions.⁷² Furthermore, the national government retains the legislative and executive authority to see to the effective performance of municipalities by regulating the exercise of their executive authority.⁷³

b. The Municipal Structure Act

The framework legislation for the establishment of municipalities is found in the Municipal Structure Act⁷⁴, which pursuant to the Constitution, divides municipalities into three categories, categories A (Metropolitan Municipalities), B (local municipalities) and C (District Municipalities).

⁷⁰ See generally SFWS.

⁷¹ SA Constitution at section 41.

⁷² *Ibid.* at section 155 (6).

⁷³ *Ibid.* at section 155 (7).

⁷⁴ Municipal Structures Act no 117 of 1998.

c. The Municipal Systems Act

The internal system of administration of a municipality is regulated in the Municipal Systems Act (Systems Act).⁷⁵ The Systems Act makes a distinction between the authority and provider function of the municipality, which correspond to the WSA's distinction between water services authority and the water services provider.⁷⁶ In ensuring that services are provided to communities, the Systems Act requires the Municipality to "give effect to the provisions of the Constitution."⁷⁷ In this regard, it must "(a) give priority to the basic needs of the local community; (b) promote the development of the local community; and (c) ensure that all members of the local community have access to at least the minimum level of basic municipal services."⁷⁸ In addition the provision of services must be "environmentally sustainable and be regularly reviewed with a view to upgrading, extension and improvement."⁷⁹

The Systems Act also sets out the requirements for partnerships with others, which have to be fulfilled by, for example, when a WSAU is contracting a Water Service Provider.⁸⁰ This will be discussed in section 4. Furthermore, the Systems Act provides for the legal framework for municipalities setting of tariffs for its services, including water services.⁸¹ Tariff setting must comply with any other legislation⁸² and the Systems Act reiterates much of what has been included in the WSA and its ensuing standards dealing with tariffs and tariff setting.

(i) Integrated Development Plan (and Water Services Development Plan)

Local government must formulate Integrated Development Plans (IDPs), which are to work as a form of strategic planning for municipal and district development. The Local Government Second Amendment Act of 1996 first demanded the creation of IDPs, which was expanded on in the White Paper. Among other things, the White Paper elaborated that the IDPs are meant to "serve as a basis for engagement between local government and the citizenry at the local level, and with various stakeholders and interest groups. Participatory and accountable government only has meaning if it is related to concrete issues, plans and resource allocations."⁸³

The Systems Act lays down the framework for the process and content of the IDP.⁸⁴ The Municipality must, among other things, "together with other organs of state contribute to the progressive realisation of the fundamental rights contained in sections 4,

⁷⁵ Municipal Systems Act No. 32 of 2000 (Systems Act).

⁷⁶ *Ibid.* at sections 11 & 73.

⁷⁷ *Ibid.* at section 73(1).

⁷⁸ *Ibid.*

⁷⁹ *Ibid.* at sections 73(2)(d) & (e).

⁸⁰ *Ibid.* at sections 76(b) & 81.

⁸¹ *Ibid.* at section 74.

⁸² *Ibid.* at section 74(1).

⁸³ South African White Paper on Local Government (1998), section B, 1.3 [White Paper on Local Government]. Other reasons for IDPs include facilitating interaction between all three levels of government, helping to prioritize actions that are most pressing, and help municipalities to develop a holistic approach to development, including focusing on environmental sustainability.

⁸⁴ Systems Act, Chapter 5.

25, 26, 27 and 29 of the Constitution.”⁸⁵ Furthermore, the IDP should set key indicators and performance targets with regard to each of its development priorities and objectives.⁸⁶ The Systems Act requires that these performance targets be reviewed annually.⁸⁷ Participation is integral aspect of the IDP process. This will be discussed in detail below in the section dealing with participation.

With regard to water services, local government must formulate a Water Services Development Plan (WSDP) as part of the IDP, or separately if no IDP exists. Therefore, the key obligations in preparing an IDP apply equally to the development of the WSDP. The WSDP is discussed in more detail in the section 4.

3.7 National Environmental Management Act

As discussed in section 2.2(b), the right to a healthy environment is an important link between the right to water and environmental law. In this connection, the National Environmental Management Act (NEMA)⁸⁸ is applicable to all of the other legislation outlined above, particularly the NWA. Specifically, NEMA will be revisited in the section 9 discussing the Reserve.

NEMA’s chapter 2 sets out a list of important environmental law principles that are applicable to the right to water, both in terms of resource management and water supply. Important principles include sustainable development, precaution, integrated management, basic human needs, participation, transparency and access to information, public trust, and the importance of women and youth in environmental management.⁸⁹

In addition, NEMA requires that certain organs of state and different spheres of government, including DWAF and all provinces, prepare an environmental implementation plan and environmental management plan that must address the above mentioned principles.⁹⁰ These plans must address, among other things, “a description of the policies, plans and programmes of the relevant department that are designed to ensure compliance with its policies by other organs of state and persons; a description of priorities regarding compliance with the relevant departments policies by other organs of state and persons ...” and “a description of the extent of compliance with the relevant departments policies by other organs of state and persons.”⁹¹

⁸⁵ *Ibid.* at section 23(c).

⁸⁶ *Ibid.* at sections 26(i) & 41.

⁸⁷ *Ibid.* at section 46.

⁸⁸ National Environmental Management Act 107 of 1998.

⁸⁹ *Ibid.* at section 2.

⁹⁰ *Ibid.* at sections 15 & 16, and Schedules 1 & 2.

⁹¹ *Ibid.* at sections 14(c), (d) & (e).