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The WRC operates in terms of the Water Research Act (Act 34 of 1971) and its mandate is to support water research and development as well as the building of a sustainable water research capacity in South Africa.

TECHNICAL BRIEF

Water legislation

Water Law of South Africa (1912-1998)

For the first time the South African water sector's legal history is captured in one comprehensive document.

Documenting South Africa's past water law

Despite the transformation that is underway, much of South Africa's water management landscape as it still exists today was shaped during an era of previous water legislation. With passage of time, the ease of access to past water law diminishes rapidly. This applies not only to the formal Acts of Parliament, but also to the cases and judgements that reflect the application, interpretation and evolution of water law.

A remedy has, however, been found through the compilation of a comprehensive work that brings together all facets of water law during the greater part of the 20th century up until the promulgation of the latest and still current National Water Act (NWA) of 1998.

Why compile such a document?

Such comprehensive documentation of past water law was necessary for several valid and compelling reasons. These include:

- **To maintain full awareness of history** and to learn from it, in order to rectify the wrongs and injustices of the past and to give emphasis to the importance of remaining true to the spirit and principles of the still relatively new NWA throughout the process of its implementation. The NWA represents a radical departure from older water legislation, which was based on Roman-Dutch Law with its strong leaning towards the principle of riparian rights to water. The preamble to the NWA makes it clear that the new legal order would have to recognise and address the discriminatory laws and practices of the past that prevented equal access to water and use of water resources, despite water being a natural resource belonging to all people.
- **To understand the evolution of water law of the previous dispensation**, thereby facilitating, where

desirable, continuity of water use and water resource development and management. Water Courts were established by colonial legislation, consolidated in the Irrigation and Conservation of Water Act of 1912, retained by the Water Act of 1956 and finally abolished by the NWA in 1998. It is interesting to note that the majority of Water Court cases were decided before 1956, when water users relied heavily on the courts to establish and declare their water rights, mainly because the water law of the time (Irrigation Act of 1912) was a statutory system. After the passing of the Water Act of 1956, the minister assumed greater control over water sources by the declaration of government water control areas. In these areas, water rights were not statutorily but administratively allocated, which had a huge effect on the role of the Water Court in determining water rights.

- **To meet the need for a legal source for use in implementing the NWA**, especially with regard to the determination of existing lawful water uses for purposes of establishing water use entitlements under the current Act. The process of finalising the registration process under Section 34 of the NWA, as well as the verification process, is currently underway. In order to verify existing lawful water uses, heavy reliance is placed on established rights, proof of existence of which requires access to relevant legal sources. The verification process will be followed by the even more onerous task of compulsory licensing, also relying heavily on proof of historical water rights. An authoritative case register and a published compilation of judgements would constitute an important legal source for informing both processes, thus helping to make equitable distribution of water entitlements in the quest for redress in South Africa a reality.

Form of publication

The complete work on the Water Law of South Africa, pertaining to the period 1912-1998, has been compiled in three parts:



Part 1: Water Law Cases

This compendium comprises a complete source of data and information pertaining to all water cases, not only the so-called 'reportable' cases. Prior to 1970, it was common to restrict publications of court judgements to reportable cases (i.e. cases of special importance in contributing to the content of water law and for use by the judiciary in the interpretation of the water law).

Besides the fact that many of these publications are out of print, the process of selective publication has had the effect of previously published data being inadequate for use in the various phases and processes of implementation of the new Act.

In compiling the compendium, Water Court case reports and other cases on water law (water law being concerned with persons' rights to water and the concomitant duties of others) scattered over many law reports were accessed. The result has been the reproduction of 386 cases dealing with South African water law that could be found, including the texts of the reasoned judgements that were handed down. In these cases, the judges sat either as 'Water Courts' under the 1912 Irrigation Act and the 1956 Water Act, or as ordinary Supreme Courts. All cases dealing with the general water Acts and the common law current in the period 1912-1998 are therefore included.

Part 2: Water Legislation

Reproduced in full are also the original texts of the two general water Acts which were current during the period, namely the Irrigation and Conservation of Water Act of 1912 and the Water Act of 1956, together with tests of subsequent Acts that amended these 1912 and 1956 Acts, and also the texts of the main regulations issued under these Acts. This provides a comprehensive picture of water legislation in force at any particular date within the period under consideration.

Part 3: Water Law Literature

Not for many decades has there been any publication devoted exclusively to South African water law. Water law literature tends to be found only in general publications or as articles on selected topics in law journals. Hence a list is provided of all South African water law works published from 1912 to 1998, as well as of water law works noted in the above-mentioned compendium of water law cases.

Water law cases: material selection, preparation and presentation

As indicated, a serious attempt was made to include in the compendium of water law cases every judgement in the period 1912-1998 that qualified as a judgement in a 'water law case'. Not every case dealing with water necessarily qualified, because,

at times, water was merely an incidental subject that could have been substituted by an alternative subject without materially impacting on the case. Cases wholly regulated by special laws such as the Rand Water Board Act, the different Irrigation Settlements Acts, and the Provincial Acts (Ordinances) concerning the distribution of water by local authorities were also excluded.

Parts of judgements dealing with matters not directly concerned with water law are omitted. Also omitted are detailed evidence analyses and apportionments of water or for damages, if the issues and the water law principles involved can be grasped without such details.

The tests of the Water Law Cases (WLC) are presented in chronological order according to their judgement dates. They are numbered consecutively from the first judgement in 1912 to the last judgement in 1998, namely WLC 1 to WLC 386.

Notes on each case are presented according to a standard format comprising the following items: identity of plaintiff and defendant WLC number; judgement date; court; identity of judge(s); any alternative references to the case that might exist; a cryptic 'quick-note' that captures the essence of the case; a summary of the judgement handed down; and sources noted in the support of the judgement.

What next?

Two important parts of South African water law are not included in this work. The first is the law prior to 1912. Its importance arises from the fact that during the 1912-1998 period the courts extensively referred (and in fact still do refer) to pre-1912 cases, legislation and literature (including the common law). Even though the pre-1912 sources are even more difficult to access than those produced after 1912, their systematic collection and reproduction is much to be desired.

The second part of South African water law which is not included in this work, is the even more important, post-1998 water law based on legislation currently in force, namely the NWA and the Water Services Act (Act 108 of 1997).

From a water law point of view, the greatest value would be obtained if the compilation pertaining to 1912-1998 could be expanded to incorporate all other sources of South African water law, from the earliest time to the present.

Further reading:

To obtain the report, *Water Law of South Africa 1912-1998 (Report No: KV 203/08)*, contact Publications at Tel: (012) 330-0340; Fax: (012) 331-2565; E-mail: orders@wrc.org.za; or Visit: www.wrc.org.za