

# WATER LEGISLATION

## Reflecting on 25 years of the National Water Act of – what has been achieved?

*The renowned National Water Act of 1998 quietly celebrated its 25<sup>th</sup> anniversary this year. Long after the optimism of a new democratic South Africa faded, experts say realising its aspirations now lie in grinding, and persistently committed hard work. Article by Petro Kotzé.*



The National Water Act of 1998 was promulgated 25 years ago, in that time of tremendous optimism and possibility of democratic South Africa. The changes were swift and the challenges were monumental. The 1997 Water Services Act and the National Water Act of 1998 were some of the first sectoral translations into law of the spirit of the new Constitution, expected to reverse the vast inequalities of more than three centuries of colonisation and apartheid.

Until then, water and land were tools to enforce privilege to the descendants of white settlers. Under colonial and apartheid regimes, whoever owned the land, owned the water, and, as a range of laws systematically dispossessed black people of their land over centuries, by the dawn of democracy, 1,2% of the population controlled 95% of the water used in rural areas, and the economic benefits that came with using it.

The new Acts had to undo all of that, and fast, to extend the benefits to all citizens of the land.

There have been great successes. Under the Water Services Act, the government has provided a minimum level of access to water supply infrastructure to 88% of households in South Africa, and at least basic sanitation services to 79% of the population (2019 figures).

The National Water Act is celebrated as one of the most progressive and visionary pieces of water legislation worldwide. Established on the principles of equity, sustainability and efficiency, it placed ownership of water in the hands of the people, held in trust by the state. The Reserve was established to set aside water to maintain the ecosystem and meet basic human needs, with other uses for economic development to be authorised through licensing. Water resources management

would be decentralised to Catchment Management Agencies to improve participation, transparency, and accountability.

However, 25 years later, key aspects of the National Water Act remain unrealised. In general, water resources have generally degraded since the Act's promulgation and, partly as a result, the Reserve has been criticised as too complex, costly, and challenging to implement. Arguably more contentious is the progress with the reallocation of water for economic activities. Water use rights are still overwhelmingly vested with white, large-scale commercial water users, and Water Allocation Reform Strategy targets of 45% water allocated to black people by 2019 and 60% by 2024 remain woefully out of reach. Only two out of the six, planned CMAs are up and running.

"The fundamental issues remain," says John Dini, WRC Research Manager for Water Governance and as such, he adds, questioning the competence of the Act is pertinent. Yet, experts caution that changing the law will not fix all the problems.

#### How the Act came to be

It was never going to be easy, says aquatic ecologist Dr Tally Palmer, a co-editor and author of the Act. "There may have been things that could have been fine-tuned better, but, never underestimate the magnitude of the job itself."

While the Water Services Act was relatively uncontested, water use was, and remains, hugely controversial. Speaking at the 20-year anniversary of the National Water Act, civil engineer Len Abrams, a Special Advisor to then-Minister Kader Asmal, recalls that when they started to work on water access and ownership, the VIP protection services of the police visited them in the parliamentary offices in Cape Town. "The water services policy development process was fine – nobody was going to object to everybody getting drinking water but as soon as we started to mess with who owned water and who did not, as soon as we started to talk of breaking the sacred bond between land and water, there was the possibility that someone might get so incensed that they may attempt to harm the ministry."

"Land ownership was one of the most fundamental and contentious instruments of apartheid," Palmer says. At the time, lawmakers deemed it "too risky" to wait for land reform to affect water reform. Their other alternative was to take the administration of water away from land ownership through licensing. Both, she says, were hard alternatives, but the latter was at least possible to imagine.

The Act also recognised Existing Lawful Use, seen as a temporary measure at the time. ELU honours entitlement to water allocated before 1998, under the old, apartheid water law. These users could register their entitlement, instead of applying for a license, until compulsory licensing in a catchment would be introduced. It was envisaged as a reasonable mechanism that would incrementally be changed over a reasonable time, Palmer says.

The set of legal instruments appeared to provide the necessary enablers for the desired outcomes expressed in policy to be realised, but the reality played out very differently. "Hindsight tells us that the administrative load across government of shifting to equity from servicing a very few to servicing everyone was

more than the administrative capacity of the country," Palmer says. "When you add that to the political requirements of transformation, it stretched capacity even further."

The licensing process proved to be complex, time-consuming, and expensive, resulting in significant backlogs of applications. As one consequence, the new users and those without existing permits in 1998 who had to formally apply for licenses, could not get them. The new Act thus gave, again, legal status to the unequal distribution of water rights enforced under the previous regime. Furthermore, in many catchments, all the water had already been fully allocated to existing users, with little left for allocation to new ones. As the delayed process to verify the extent and lawfulness of existing water use is still underway, ELU registrations continue to be made today, 25 years since it was created as a transitional measure.

*"It is the actions at the individual level that need to change so that we change society. The hope is that there are enough people of vision and courage to keep walking."*

Criticism of the Act has been that the roots of the continued inequality in the allocation of water were built into the law. But, says Palmer, "that was not the intention." Instead, she says, it was the shift from land ownership to administration that created the opportunity for unintended privilege. "Greedy people took advantage of the gap unfairly."



GuyStubs/Independent photographers/African pictures

*Since 1994, the government has provided a minimum level of access to water supply infrastructure to at least 88% of households in South Africa, and at least basic sanitation services to 79% of the population (2019 figures).*

## Water legislation

Others ask that the impact of the Act be analysed from a broader perspective. For one, though water and land rights have been legally split, in practice you cannot apply for water for productive use without access to land to use it on. Failure of water reallocation goes in hand with failures to redistribute land in South Africa. In fact, the persistence of the colonial and apartheid legacy in water use is reflected in the same persistence across all facets of South African society.

It has also been pointed out that legislation, regardless of its values, is not enough to ensure that fairness, equity and the restoration of rights and benefits are achieved. "I naively thought that people would see the logic of fairness," Palmer says, "and that they would comply voluntarily towards a healthier environment and looking after vulnerable people."

Abrams also asked for non-technical drivers, constraints,

motivations, and incentives to be considered. These could include corruption and rent-seeking, political influences, hidden agendas, power relationships and historical legacies.

Others point to the fact that 25 years is a very short time period for change, in comparison to the centuries of distorted development that need to be corrected. "We underestimated how difficult it would be to bring about some of the changes that need to happen," Dini says but he adds that we certainly could have been further than we are now. State capture and the undermining and systematic hollowing-out of institutions to achieve certain objectives all rippled throughout South Africa, including the implementation of the National Water Act. Even more factors that have contributed include indecision, and high turnover rates in the political and administrative leadership of the department, among others.

GuySubbs/Independent photographers/African pictures



*Twenty-five years down the line much still needs to be done to transform land and water rights.*

### Over 25 years of hindsight

Asked how they would, if they could review the Act, Dini points to opportunities to develop specific mechanisms for authorising water use by small-scale users that, for little cost to the user and administrative effort by the regulator, could enable the progressive realisation of access to water for productive purposes.

The Act is currently undergoing its first major overhaul since it came into effect. The South African [National Water Policy Review](#) process aims to address oversight and gaps in the current water policy, with specific emphasis on addressing water equity and redress (also refer to the sidebar, *The National Water Act goes to court*).

While there is no doubt that the current Act is not perfect and there are amendments needed, we must also be cautious of assuming that changing it will on its own bring about the changes we want to see in society, Dini says. Various reports have also cautioned against the temptation to rewrite the law to solve problems that arise from shortcomings in how it is implemented. Recognising first, the differences between the need to amend the Act and the challenges to its implementation and, second, accepting that elements of both are likely to be present simultaneously, will be key, he adds.

Instead, we need the same things that have long been called for, Palmer says, namely capacity and capability. Institutions must start working, individual sewage treatment works must meet Green Drop requirements and municipal infrastructure must be repaired and maintained. Working CMAs need to be established. She also calls for the big sectors to be held accountable. They are agriculture and forestry for water quantity; mining for water quality; and, the government for managing sewage works.

Palmer adds that, if she could do one thing, it would be to support and strengthen the pathways of governance between local government and catchment management agencies. "Practical hard engineering in municipalities must be linked to the way in which the catchment works."

### A question of ethics

The Act asks for an ethical commitment to the principles of equity and sustainability, Palmer says. "It's a work in progress." On the ground, however, it needs the hard work necessary towards participatory governance and a healthy environment. "It's the determination to do the hard work that will change small things." Dini points to the DWS as an example, where current Minister, Senzo Mchunu, and Director General, Dr Sean Phillips, have been able to bring about stability and goal-orientated actions in the department. Their approach is perhaps what is necessary to realise the changes that the Water Act called for, he says. "It needs a level of ruthlessness."

There are too many stories of people for whom individual wealth is more important than that of society, Palmer says but for her, the Act still carries the aspiration of an equitable, sustainable, and efficient approach to water use. "It is the actions at the individual level that need to change so that we change society. The hope is that there are enough people of vision and courage to keep walking."

### THE WATER ACT OF 1998 GOES TO COURT

Until 2018, the DWS allowed for the trading of a water use entitlement obtained in terms of the National Water Act to a third party. When it issued a circular that water use trading could not be transferred, litigation followed. In November 2021, the Constitutional Court ruled in favour of Lötter, Wiid and the South African Association for Water User Associations (SAAFWUA), and ruled that the circular contradicted the provisions of Section 25 of the National Water Act and that parties may indeed charge fees for transferring the rights. Then, in March 2023, the Supreme Court of Appeal dismissed with costs the subsequent appeal by the DWS.

In his ruling, Justice Mbuyiseli Madlanga sympathised with the intent of DWS and the Act to bring about transformation in water use but noted that the current letter of the law did not permit the department to ban the transfer of water use rights even if this undermined the desired transformation objectives.

The judge stated: "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."

This is a really good example of where the Act does need amendment in order to be able to do what it aims to do, and is precisely what DWS has done in the draft amendment currently working its way through the system.