

**South African Institute of Race Relations NPC**  
**Submission to the**  
**Department of Water and Sanitation**  
**and the Minister of Water and Sanitation**  
**regarding the draft**  
**National Water Amendment Bill of 2023**  
**and the**  
**Water Services Amendment Bill of 2023**  
**Johannesburg**  
**16<sup>th</sup> January 2024**

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## 1 Introduction

The Department of Water and Sanitation (DWS) and the minister of water and sanitation (the minister) have invited interested persons to submit public comments by 16<sup>th</sup> January 2024 on the draft National Water Amendment Bill of 2023 ('the Water Bill') and the Water Services Amendment Bill ('the Services Bill').

This submission is made by the South African Institute of Race Relations NPC (IRR), a non-profit organisation formed in 1929 to oppose racial discrimination and promote racial goodwill. Its current objects are to promote democracy, human rights, development, and reconciliation between the peoples of South Africa.

## 2 Inadequate public participation

Public participation in the legislative process is a vital aspect of South Africa's democracy, as the Constitutional Court has repeatedly reaffirmed in judgments spanning a decade or more. These include *Matatiele Municipality and others v President of the Republic of South Africa and others*, *Doctors for Life International v Speaker of the National Assembly and others*, *Land Access Movement of South Africa and others v Chairperson of the National Council of Provinces and others*, and *Mogale and others v Speaker of the National Assembly and others*.<sup>1</sup>

In the *New Clicks* case in the Constitutional Court, Mr Justice Albie Sachs noted that there were many ways in which public participation could be facilitated. He added: 'What matters is that... a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say'. This passage was quoted with approval in *Doctors for Life*, the *Land Access* case, and in the recent *Mogale* judgment striking down the Traditional and Khoi-San Leadership Act of 2019.<sup>2</sup>

### 2.1 No socio-economic impact report

To help the public 'know about the issues', as the *New Clicks* ruling and other judgments require, the DWS should have provided a comprehensive evaluation of both bills and their

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<sup>1</sup> (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC); 2006 (6) SA 416 (CC); 2016]ZACC 22; [2023] ZACC 14

<sup>2</sup> Section 59(1), Constitution of the Republic of South Africa, 1996; *Minister for Health and another v New Clicks South Africa (Pty) Ltd and others*, [2005] ZACC 14, at para 630, emphasis supplied by the IRR; *Doctors for Life*, at para 145; *Land Access* judgment, at para 59; *Mogale* judgment, at para 34

likely socio-economic impact. A report of this kind is also what is needed under the government's own *Guidelines for the Socio-Economic Impact Assessment System (SEIAS)*.

The *Guidelines* were developed by the Department of Planning, Monitoring, and Evaluation in May 2015 and took effect in September that year. The aim of the SEIA system is to ensure that 'the full costs of regulations and especially the impact on the economy' are fully understood before new rules are introduced.<sup>3</sup> According to the *Guidelines*, the SEIA system must be applied at various stages in the policy process. Once new legislation has been proposed, 'an initial assessment' must be conducted to identify different 'options for addressing the problem' and making 'a rough evaluation' of their respective costs and benefits. Thereafter, 'appropriate consultation' is needed, along with 'a continual review of the impact assessment as the proposals evolve'.<sup>4</sup>

A 'final impact assessment' must then be developed that 'provides a detailed evaluation of the likely effects of the [proposed law] in terms of implementation and compliance costs as well as the anticipated outcome'. When a bill is published 'for public comment and consultation with stakeholders', this final assessment must be attached to it. A particularly important need is to 'identify when the burdens of change loom so large that they could lead to excessive costs to society, for instance through disinvestment by business or a loss of skills to emigration'.<sup>5</sup>

The bills now under consideration – particularly the Water Bill – are likely to generate precisely such 'excessive costs' in the form of both emigration and disinvestment from agriculture and other sectors of the economy. Yet no proper SEIA assessment of either the Water Bill or the Services Bill has been made available to help the public develop an informed understanding of the likely ramifications of these measures.

## **2.2 *Inadequate compliance with the National Policy Development Framework, 2020***

The DWS is also expected to comply with the *National Policy Development Framework* (the *Framework*), which was approved by the Cabinet in December 2020 and is intended to help give effect to the *National Development Plan: Vision 2030*.

The *Framework* seeks to improve policy development by 'ensuring meaningful participation' and 'inculcating a culture of evidence-based policy making'.<sup>6</sup> In a section dedicated to 'Stakeholder Engagement in Policy Making', the *Framework* states: 'Chapter 10 of the Constitution prescribes that people's needs must be responded to, and the public must be encouraged to participate in policy making. Therefore, the involvement of the public in

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<sup>3</sup> Department of Planning, Monitoring and Evaluation, 'Socio-Economic Impact Assessment System (SEIAS), Revised Impact Assessment: National Health Insurance Bill', 26 June 2019 (2019 SEIAS Assessment); *SEIAS Guidelines*, p3, May 2015

<sup>4</sup> *SEIAS Guidelines* p7

<sup>5</sup> *SEIAS Guidelines*, p11

<sup>6</sup> National Policy Development Framework, 2020, p3

policy making is a constitutional obligation that government institutions must respect and institutionalise.’<sup>7</sup>

The *Framework* goes on to list some of the key requirements for proper public participation. ‘Consultation with stakeholders should commence as early as possible’, it says. All relevant stakeholders should be identified, including ‘those who will benefit when [existing] problems are addressed’ and ‘those who will bear the cost of implementation of the proposed intervention’. Policy makers must also identify and counter all ‘barriers to active participation’ and ensure that ‘consultation is infused in all aspects of the policy making cycle’.<sup>8</sup>

According to the *Framework*, adequate thought must be given to ‘which policy solutions would best achieve the public policy objective’ and ‘how best’ the proposed policy solution can be implemented. Policy makers must ‘inform and engage stakeholders’ on ‘the nature and magnitude of a policy issue’, along with its likely ‘impacts and risks’. These assessments must be ‘informed by the best available evidence, data, and knowledge’.<sup>9</sup>

In addition, policy makers must be willing to adjust their proposals in the light of the feedback provided. ‘Policy makers must not impose their preconceived ideas...and pre-empt the outcome of the policy consultation process. They need to be willing to be persuaded and acknowledge the input of stakeholders with a view to creating a win-win policy outcome’. They must also avoid any impression that ‘the consultation process is staged, managed, cosmetic, token, and a mere compliance issue’. Instead, they must ‘strive to produce an outcome based on bargaining, negotiation, and compromise’.<sup>10</sup>

The *Framework*, with its emphasis on negotiation and compromise in the best interests of the country, is also being ignored. Instead, what the *Framework* expressly rejects – a tick-box approach to consultation – is already evident as regards both bills.

### ***2.3 A tick-box approach already evident***

Both the Water Bill and the Services Bill are likely to have many negative consequences (as further described in this submission) but the Department has nevertheless adopted a tick-box approach to public consultation. This has denied South Africans the comprehensive information and evaluation they require to ‘know about’ the relevant issues and to have ‘an adequate say’ on both of these key measures.

Moreover, the DWS has provided a scant eight weeks for public comment on two complicated amendment bills – neither of which can be understood without reading the lengthy principal statute it seeks to change. In addition, much of the eight-week period

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<sup>7</sup> Ibid, p19

<sup>8</sup> Ibid, pp19-20

<sup>9</sup> Ibid, p20

<sup>10</sup> Ibid

allowed for comment has been taken up by school holidays and by the festive season, when most South Africans are focused on family and friends and not on policy issues.

### **3 The content of the Water Bill**

Given the short time allowed for public comment, the IRR has been able to focus only on a limited number of provisions in the Water Bill.

#### **3.1 Racial criteria in the issuing of water-use licences**

##### **3.1.1 Background**

Under the common-law rules that applied in South Africa for many years, landowners had riparian and other rights to the water in rivers flowing through their land or located beneath it in underground streams.<sup>11</sup> In 1998, however, the National Water Act (the Water Act) made the government the ‘public trustee’ or ‘custodian’ of all the country’s water resources. In the government’s view, the statute thereby overrode all common-law water rights.<sup>12</sup> This meant that anyone wanting to use water – unless permitted to continue with an ‘existing lawful water use’ – had to apply to the DWS for a ‘water-use licence’. Under the Water Act, such a licence remains in force for a maximum of 40 years and is subject to review by the state at five-yearly intervals.<sup>13</sup>

In issuing a water-use licence under the Water Act, the state must take account of all relevant factors, including the 11 listed in the statute. The need ‘to redress past racial and gender discrimination’ is one listed factor, but the ten others listed are equally important – and include, for example, the extent of ‘investments already made’.<sup>14</sup> However, since the DWS has long aimed to allocate some 70% of licensed water use to black people by 2024,<sup>15</sup> both DWS officials and the Water Tribunal (which is responsible for reviewing disputed decisions) have often focused largely on race. This approach is in conflict with the Water Act, as the Supreme Court of Appeal ruled in 2012.<sup>16</sup>

Partly to circumvent this judgment, the ‘National Water and Sanitation Master Plan’ (drawn up by the DWS in 2018 and approved the following year) recommends that the Water Act be amended to ‘make equity the primary consideration in water allocation’.<sup>17</sup> Underpinning this proposed change is the fact that only 5% of water has been reallocated to black farmers since the Water Act was adopted, which the Master Plan identifies as ‘a significant failure’. The

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<sup>11</sup> National Water and Sanitation Master Plan, Volume 1: Call to Action, v10.1, 31 October 2018, adopted 28 November 2019 p54: <https://www.gov.za/documents/national-water-and-sanitation-master-plan-28-nov-2019-0000>, pp2, 61

<sup>12</sup> National Water Act, 1998; see also *White Paper on a National Water Policy*, 1997, p58

<sup>13</sup> Sections 28(1), 49, National Water Act, 1998; 1999/2000 *South Africa Survey*, p156; *The Citizen*, 13, 14 April 2005

<sup>14</sup> Section 27(1), 45(2)(e), National Water Act, 1998; 1999/2000 *South Africa Survey*, p156; *The Citizen*, 13, 14 April 2005, *Business Day* 28 August 2018

<sup>15</sup> *Ibid*; *Farmer’s Weekly*, 23 February 2018

<sup>16</sup> *Makhanya v Goede Wellington Boerdery* [2012] ZASCA 205, paras 19, 37-40

<sup>17</sup> National Water and Sanitation Master Plan, Volume 1: Call to Action, v10.1, 31 October 2018 adopted 28 November 2019 p54: <https://www.gov.za/documents/national-water-and-sanitation-master-plan-28-nov-2019-0000>

reallocation of water (along with the redistribution of land) thus remains ‘a major challenge facing the country, and one that must be addressed’, the Master Plan adds.<sup>18</sup>

South Africa undoubtedly needs many more successful commercial farmers of all races, as the IRR has long urged. Since 1994, however, much of the land transferred to emergent farmers – between 50% and 90% of it – has either fallen out of production or now yields only at subsistence levels. Intended land reform beneficiaries have thus reaped little or no benefit, while thousands of farming jobs have been lost.

Land reform has failed in this way because success in commercial farming depends not only on access to land and water but also on a host of other factors. These range from individual ownership and working capital to know-how, experience, entrepreneurship, labour, electricity, infrastructure, and markets. Unless all relevant needs are met, the transfer of water and lands to emergent farmers is sure to result in yet more assets ‘dying in the hands of the poor’ (as a former director general of land, Thozzi Ngwanya, warned in 2007).<sup>19</sup>

In practice, however, little has been done to fulfil these important requirements. The Water Bill ignores this major shortcoming in seeking to make racial (and gender) identity the predominant factors in the issuing of water-use licences.

### *3.1.2 Section 27(3): ‘Race’ as the primary consideration*

Section 27(1) of the Water Act currently states that, in issuing a water-use licence, a responsible authority must take into account all relevant factors, including the 11 that are listed in the statute. These factors include (a) ‘existing lawful water uses’, (b) ‘the need to redress the results of past racial and gender discrimination’, (c) the ‘efficient and beneficial use of water in the public interest’, and (d) the ‘socio-economic impact’ of the water use if authorised or refused. Also relevant, among other things, are ‘investments already made by the water user’, and ‘the probable duration of any undertaking for which a water use is to be authorised’.<sup>20</sup>

Under the Water Bill, section 27(1)(b), with its reference to redress for past racial and gender discrimination, is to be deleted. However, a new subsection 27(3) will be added, which says: ‘A responsible authority must prioritise the redress of past racial and gender discrimination when issuing a licence or general authorisation and set aside a certain volume of water in each water management area to achieve this redress.’<sup>21</sup>

Under this new clause, racial identity and the need for redress will no longer count as one factor out of 11 equally important ones. Instead, racial identity will trump all other considerations. In addition, the Water Bill provides no clarity as to how ‘the redress of past

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<sup>18</sup> Master Plan, pp2, 61

<sup>19</sup> John Kane-Berman, ‘Bad-faith Expropriation Bill not grounded in South Africa’s land realities’, IRR, Johannesburg, *Fast Facts*, May 2008, p7

<sup>20</sup> Section 27(1)(a) to (d) (h)(k), Water Act

<sup>21</sup> Clause 12, National Water Amendment Bill of 2023 (the Bill)

racial...discrimination' is to be secured. Nor does it provide any guidance as to what volume of water may be set aside in each water management area to help achieve redress. The Bill's provisions are thus so vague that they are sure to be interpreted in different ways at different times by different officials. This puts them in breach of what the rule of law requires. It also puts them in conflict with the Constitution's founding provisions, which recognise 'the supremacy of the rule of law' as a core value of South Africa's open and accountable democracy.<sup>22</sup>

### *3.1.3 Sections 32 and 33: The curtailment of 'existing lawful water use'*

At present, Section 22(1) of the Water Act generally allows water to be used either as 'a continuation of an existing lawful water use' or 'if the water use is authorised by' a water-use licence.<sup>23</sup> In the agricultural sector, the process of rolling out water-use licences has been slow and most farmers have continued to rely on 'existing lawful water use'. That seems set to change, however, once the Water Bill has been enacted into law.

The Water Bill makes no change to Section 34(1) of the Water Act, under which a person, or his successor-in-title, may 'continue with an existing lawful water use'. However, this permission is 'subject to' (a) 'any existing conditions...attaching to that use'; (b) 'its replacement by a licence' under the Act, or (c) 'any other limitation or prohibition by or under this Act'.<sup>24</sup>

Also relevant is Section 32(1) of the current Water Act, which defines an 'existing lawful water use' as one which (a) 'has taken place at any time within the two years immediately before the date of commencement of this Act', or a water use which (b) 'has been declared lawful under section 33'.<sup>25</sup> The Water Bill deletes both this (b) option and the whole of section 33. 'Existing lawful water use' will thus in future be confined to that which was already in place in the two years prior to the commencement of the Water Act in 1998.

The repeal of section 33, coupled with the existing wording of Section 34(1) of the Water Act, increases the likelihood that commercial farmers currently relying on existing lawful water use will in time be obliged to apply instead for water-use licences under the new Section 27(3). Under this provision – which gives priority to racial identity and is likely to result in major water volume reductions – many commercial farmers could either be denied water-use licences or have their current water entitlements significantly diminished.

A major redistribution of water from experienced farmers to new entrants will thus take place. However, since the many reasons for the collapse of most land reform projects have not been resolved, there will be little effective redress in this process. Instead, the country risks suffering a significant decline in agricultural production and food security – to the great detriment of all South Africans – while new farmers will experience few lasting gains.

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<sup>22</sup> Section 1(c), Constitution

<sup>23</sup> Section 22(1)(a)(ii), (b), Water Act

<sup>24</sup> Section 34(1), Act

<sup>25</sup> Section 32(1), current Act

### 3.1.4 Section 26: Additional regulatory powers

Farmers who retain or gain water-use licences could be greatly affected by the Water Bill's changes to Section 26 of the Water Act, which deals with 'Regulations on the use of water'. Under the new wording of this section, the minister will have the power to make regulations 'prescribing the criteria that must be considered when redressing the results of past racial and gender discrimination in relation to water use'.<sup>26</sup>

This regulatory power is not accompanied by any guiding parameters and is too vague and broad to pass constitutional muster. The intention underlying the change does, however, seem clear: to buttress the legality of any future regulations similar to those gazetted for public comment in May 2023.<sup>27</sup>

The 2023 draft regulations stated that 'the responsible authority shall give preference to applications from black people, followed by women'. In addition, all applications for consumptive water use were expected to 'satisfactorily address Section 27(1)(b) of the Act. Specifically, the enterprise in respect of the application must allocate shares to black people in the proportions stipulated in Table 1'. Effectively, the draft regulations thus required that water users should 'allocate shares to black people in the proportions stipulated' by the state. These proportions ranged from 25% for relatively small water users to 75% for those taking or storing 'up to 250 000 cubic metres'.<sup>28</sup>

The draft regulations put forward in 2023 were *ultra vires* the Water Act and have not been adopted. However, once the Water Bill has been enacted into law, new regulations along the same lines could well be introduced. This could compel farming, mining or other enterprises that are major water users to allocate 75% of their assets or shareholdings to black people for little or no return.

Compulsory transfers of this kind would amount to regulatory expropriations, for which the state would be obliged to pay 'just and equitable' compensation under Section 25 of the Constitution. However, the DWS might seek to avoid this via the Expropriation Bill of 2020, which may soon be adopted by Parliament. Any such outcome would be extremely damaging to investment, growth, and jobs. In addition, a 75% black ownership requirement would be inconsistent with other black economic empowerment (BEE) rules, which generally require 25% ownership deals. This inconsistency would increase uncertainty, further deter investment, and cause still greater economic damage to all South Africans – and especially to the poor.

## 3.2 'Trading' in water-use licences

### 3.2.1 Background

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<sup>26</sup> Clause 11, Water Bill, Section 26(1)(p), amended Water Act

<sup>27</sup> Revision of Regulations Regarding the Procedural Requirements for Water Use Licence Applications and Amendments of 2023, *Government Gazette*, 19<sup>th</sup> May 2023

<sup>28</sup> Clause 12, Table 1, *ibid*

In January 2018 the DWS issued a notice prohibiting those holding water-use licences from transferring them to third parties. This dismayed the farming sector, as both the 1997 *White Paper on a National Water Policy* and Section 25 of the Water Act make provision for the transfer of water-use licenses with the state's consent.<sup>29</sup>

According to Janse Rabie, head of natural resources at Agri SA: 'The ability to transfer water-use entitlements is frequently vital to farmers... Large areas of cultivated land can often be saved through the temporary transfer of...water allocations between farmers,...while this also allows for thousands of seasonal jobs to be saved in times of drought.'<sup>30</sup>

The validity of the DWS prohibition was soon challenged, but the Pretoria high court upheld the ban. The high court found that the 'sale of water-use entitlements...in private agreements discriminated against those who could not afford the prices of compensation' and 'kept historically disadvantaged persons out of the agricultural industry'. The trading of water-use licences was thus contrary to the purpose of the Act and 'inconsistent with the spirit, purport, and objects of the Bill of Rights'.<sup>31</sup>

The Supreme Court of Appeal (SCA) overturned this ruling. The Pretoria high court, it said, had ignored 'the regulatory framework' provided by the Water Act, which allows transfers to take place provided they have the state's approval.<sup>32</sup> Allowing transfers on this basis was not contrary to the purposes of the statute, which aimed at ensuring the 'efficient, sustainable and beneficial use of water in the public interest'. If the holder of a water-use licence could not use it optimally, or 'had excess water to his needs', then 'a transfer to someone else who was going to use it beneficially contributed to the purposes of the Act, ...rather than have that water going to waste'.<sup>33</sup>

According to the appeal court, the high court had also 'assumed that trading in water-use entitlements was discriminatory'. However, it had not 'supported this conclusion with any evidence'. Said the SCA: 'This assertion appears to be based on the idea that many people cannot afford to pay the commercial value of water use. [We] do not understand how this economic reality can amount to discrimination.'<sup>34</sup>

The SCA's decision was upheld by the Constitutional Court in March 2023.<sup>35</sup> However, in an *Epilogue* to its analysis, the apex court said it was 'not dismissive of the state's concerns that water, a scarce national resource, was largely in the hands of advantaged white farmers'. It was also well aware that one of the purposes of the Water Act was to 'redress the results of

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<sup>29</sup> *Lötter and others v Minister of Water and Sanitation and others* [2021] ZASCA 159 (8 November 2021), paras 51, 20, 49

<sup>30</sup> *Business Day* 21 November 2018

<sup>31</sup> *Lötter and others v Minister of Water and Sanitation and others* [2021] ZASCA 159 (8 November 2021), paras 23, 24

<sup>32</sup> *Ibid*, paras 53, 59

<sup>33</sup> *Ibid*, para 51

<sup>34</sup> *Ibid*, para 58

<sup>35</sup> *Minister of Water and Sanitation and others v Lotter and others* [2023] ZACC 09]

past racial and gender discrimination’. However, the court went on, its hands were ‘unfortunately’ tied by the wording of the statute, which ‘did not admit of the redress’ which the DWS was seeking.<sup>36</sup>

In its Master Plan for the water sector, the DWS said it planned to amend the Water Act by prohibiting all ‘temporary and permanent trading between authorised water users’.<sup>37</sup> It also recommended the introduction of a ‘use-it-or-lose-it’ principle, under which any unused water would revert to the state.<sup>38</sup> Both these proposed changes are now reflected in the Water Bill.

### 3.2.2 *Section 25(1): Transfer of water use authorisations and prohibition of water trading*

Under the Water Bill, a new Section 25(1) states: ‘A water management institution may, at the request of a person authorised to use water for irrigation, allow that person, on application under the Act, to transfer water for a period not exceeding 24 calendar months to another land belongs (sic) to the same person so authorised on such conditions as the water management institution may determine, [to] use of some or all of the water transferred for the same or different purpose in the same vicinity’.<sup>39</sup>

### 3.2.3 *Section 25(2): Surrender of entitlement*

A new Section 25(2) adds: ‘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 his or her own licence application under section 41 for the use of water from the same resource in respect of other land belongs (sic) to him or her in terms of subsection (1); and (b) on condition that the surrender only becomes effective if and when such application is granted.’<sup>40</sup>

### 3.2.4 *Section 25(2A): Surrender of water*

A new Section 25(2A) is then inserted, which says: ‘The water use connected with surrender of entitlement is prohibited from trading in any form of (sic) nature, and such water must be surrendered to the national Government, acting through the Minister, unless the Minister decides otherwise.’<sup>41</sup>

### 3.2.5 *Section 34(2A): Curtailment of water*

In another related change – listed under the heading ‘Authority to continue with existing lawful water use’ – the Water Bill introduces a new Section 34(2A), which states: ‘A responsible authority may curtail a volume of water which becomes available as a result of

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<sup>36</sup> Ibid, para 39

<sup>37</sup> Master plan, p54

<sup>38</sup> Master plan, pp52, 60,

<sup>39</sup> Clause 9, Bill

<sup>40</sup> Ibid

<sup>41</sup> Ibid

failure by water users to exercise the full existing lawful use volume for any period specified by the Minister’.<sup>42</sup>

These provisions on ‘the prohibition of water trading’ and the surrender or curtailment of water are so badly phrased as to be largely unintelligible. However, what is clear is that farmers are to be deprived of a capacity to trade that many regard as vital in coping with droughts, as Agri SA has stressed. The surrender and curtailment clauses will also undermine the security of water use rights. Under these amendments, commercial farmers could find themselves deprived of water allocations they have failed to use in full at any given time (perhaps because of heavy rainfall in a particular year), but which they nevertheless need when rainfall decreases. These clauses could thus reduce the market value of many commercial farms and especially those reliant on irrigation. This too will undermine investment in agriculture and reduce South Africa’s food security.

### **3.3 *New rules for water user associations***

#### **3.3.1 *Background***

Under Section 29(1) of the existing Water Act, ‘a responsible authority may attach conditions to every general authorisation or licence’. One possible condition, as regards ‘the...taking or storage of water’, is that the licensee must ‘become a member of a water user association before water may be taken’.<sup>43</sup> In addition, water user associations have various important functions to fulfil, for they must prevent water being wasted, protect water resources, ‘prevent any unlawful water use’, and ‘exercise general supervision over water resources’. In addition, they must ‘construct, purchase,...control, operate and maintain waterworks considered...necessary for draining land and supplying water to land for irrigation or other purposes’.<sup>44</sup>

Various clauses in the Water Bill are now likely to have significant impact on water user associations. Among other things, the amendments will introduce binding new rules on member admissions and voting rights. They will also require demographic representivity on management committees and in all other spheres. If the new Section 27(3) earlier described generates an influx of relatively inexperienced new members into water user associations, these changes could make it more difficult for many of these organisations to discharge their vital functions in an efficient, lawful, and cost-effective way.

#### **3.3.2 *Section 93(1): Compulsory compliance with a ‘model’ constitution***

Under the Water Bill, all water user associations will be obliged – the word ‘must’ is to be introduced – to comply in full with the model constitution set out in Schedule 5 of the Water Act. At present, by contrast, this model constitution is not compulsory and need not be followed in full.<sup>45</sup>

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<sup>42</sup> Clause 16, Bill

<sup>43</sup> Section 29(1)(e)(ix), Water Act

<sup>44</sup> Item 4, Schedule 5, Water Act

<sup>45</sup> Clause 23, Water Bill; Section 29(1) amended Water Act

### 3.3.3 Sections 93(5) and (2A), Schedule 5: Mandatory changes to this model constitution

Under the Water Bill, the minister will be empowered to ‘revise’ this model constitution ‘by notice in the Gazette’.<sup>46</sup> In addition to the broad power of amendment thus given to the minister, the model constitution is to be changed in three specified ways.

First, under a new Section 93(2A), ‘the constitution of a water user association must detail a strategy to achieve transformation in regard to racial and gender representation in all components of the association’.<sup>47</sup> Second, the model constitution must provide that ‘all persons’ with ‘an authorisation to use water...from a water source...under the control of [an] association, must be...deemed a member of the association’.<sup>48</sup> Third, all members of an association must be limited to ‘one vote per entitlement to water use’. (This amendment will exclude the other options which currently apply and which allow, for example, a member to have ‘one vote for every five hectares (or part of five hectares) of land that can be irrigated in terms of [that] member’s entitlement’.)<sup>49</sup>

What will this mean in practice? A water user association might in time find that its obligation to achieve demographic representivity in every sphere has resulted in its having many relatively inexperienced members on its management committee. If it then fails to ‘protect water resources’, ‘prevent any unlawful water use’, or ‘maintain’ any waterworks needed to ‘supply water...for irrigation or other purposes’<sup>50</sup>, as required of it under the Water Act, the minister will be able to intervene in various ways. After giving the association an opportunity to rectify any such failures, the minister will be able temporarily to take over the functions which the association is failing adequately to fulfil. He will also be entitled to recover from the association ‘all reasonable costs’ incurred in rectifying the problem.<sup>51</sup>

Also potentially relevant are the punitive provisions in the Water Act. Under these sections, no ‘person’ (defined as including an ‘association’)<sup>52</sup> may ‘unlawfully and intentionally or negligently commit any act or omission which detrimentally affects or is likely to affect a water resource’. If a water user association under new and inexperienced leadership were to commit such an offence, it might have to pay a substantial fine on conviction.<sup>53</sup> Once convicted, a water user association might also be ordered to pay damages for any loss or harm suffered by another person ‘as a result of the act or omission constituting the offence’.<sup>54</sup>

Water user associations are supposed to be voluntary bodies whose members work together to help manage the water resources they are entitled to use to optimum effect. Under the Water Bill, however, the minister will have great control over these organisations via a

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<sup>46</sup> Clause 23, Water Bill; Section 93(5), amended Water Act

<sup>47</sup> Clause 23, Water Bill; Section 93(2A) amended Water Act

<sup>48</sup> Clause 30, Water Bill; Item 7(1), Schedule 5, Amended Water Act

<sup>49</sup> Clause 30, Water Bill; Option (d), item 15(3), Schedule 5, Water Act

<sup>50</sup> Item 4, Schedule 5, Water Act

<sup>51</sup> Section 95(6), Water Act

<sup>52</sup> Section 1, Water Act

<sup>53</sup> Section 151(1)(j), (2), Water Act

<sup>54</sup> Sections 152, 153, Water Act

revised model constitution which will be binding on them and their members – and which he can always further amend at his discretion. In addition, unrealistic racial targets (quotas in all but name) are to be imposed on the management committees of these associations and in all other spheres. This could greatly erode their capacity, just as similar requirements in state departments, municipalities, and state-owned enterprises have robbed many of these institutions of their functionality.

#### **4 Ramifications of the Water Bill**

Once the Water Bill is enacted into law, the DWS and relevant water authorities are likely to put an end to the ‘existing lawful water use’ on which most commercial farmers currently rely. Farmers in this situation will have to apply for water-use licences. However, many are likely to be denied these licences under the new Section 27(3), with its emphasis on racial identity as the primary consideration. This will have many negative consequences for agricultural production, food security, inflation, employment, and the wider economy, as earlier outlined.

What the Water Bill envisages is also often unconstitutional. Farmers whose existing lawful water use rights are terminated will suffer regulatory expropriations for which ‘just and equitable’ compensation must be paid under sub-sections 25(2) and (3) of the Constitution. The DWS may seek to avoid paying such compensation under the Expropriation Bill of 2020, but this would also be contrary to what the Constitution requires.

In addition, Sub-section 25(8) of the Constitution will not assist the DWS, as it stipulates that any limitation of the rights guaranteed by Section 25 must comply with Section 36 of the Constitution. However, the proportionality test in Section 36 cannot be met so long as ‘less restrictive’ means of redressing past racial discrimination are available. In addition, ‘less restrictive’ means of providing redress for past injustices can easily be found, for the best solution lies in expanding the number of successful commercial farmers of all races. This would boost investment, growth, jobs, and food security, while increasing production and agricultural exports to the great benefit of both the farmers concerned and the wider society. By contrast, there will be no effective ‘redress’ through the forced redistribution of land and water rights which (as a host of failed land reform projects have shown) will reduce production and bring no tangible gains to intended beneficiaries.

Key changes in the Water Bill – particularly Section 27(3) and the racial targets it will usher in – are also inconsistent with the Constitution’s emphasis on ‘non-racialism’ as a core founding value.<sup>55</sup> Moreover, though the Constitution provides some scope for ‘broad representivity’ in the public service and the judiciary, it does not authorise the use of racial targets in the private sector. On the contrary, under the *expressio unius est exclusio alterius* principle of statutory interpretation, the Constitution makes it clear that ‘broad representivity’ cannot lawfully be pursued outside the two spheres it expressly lists.

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<sup>55</sup> Section 1(c), Constitution

The racial redistribution the Water Bill seeks to enforce will also bring great harm to the great majority of disadvantaged South Africans. It is sure to reduce investment, agricultural production, and food security, while:

- restricting the agricultural exports (worth \$12.8bn or R225bn in 2022)<sup>56</sup> that are needed to pay for oil and other essential imports;
- pushing up food prices and consumer inflation in general; and
- worsening already high levels of joblessness, poverty, and hunger.

Section 27(3) will thus widen the gap between a small and often politically connected elite and the millions of people who are unemployed, destitute, and increasingly malnourished. The Water Bill's forced racial redistribution thus fails the tests for the validity of race-based remedial measures, as laid down by the Constitutional Court in the *Van Heerden* case in 2004.<sup>57</sup> As the apex court stressed in this judgment, race-based remedial measures cannot be accepted as valid unless they help to 'achieve equality' by narrowing – rather than widening – the gap between the small elite and the disadvantaged majority.

## **5 The content of the Services Bill**

Given the short time allowed for public comment, the IRR has again been compelled to focus solely on the most important provisions in the Water Services Bill (the Services Bill). Most of these clauses deal with two key changes to the Water Services Act (the Services Act): the compulsory licensing of water services providers, and the enforcement powers given to the minister of water and sanitation (the minister).

### **5.1 The compulsory licensing of water services providers**

#### **5.1.1 The need for operating licences**

The main objective of the Services Act is to give effect to 'the right of access to basic water supply and the right to basic sanitation'.<sup>58</sup> Towards this end, the statute seeks to improve the efficiency of every 'water services provider', which it defines as 'any person who provides water services to any consumer'.<sup>59</sup> The Services Bill now expands the statute's aims to include 'the licensing of water services providers in certain circumstances'.<sup>60</sup>

Since the Services Act was adopted in 1997, all water services providers have had to be approved by 'water service authorities' – defined as 'any municipality, including a district or rural council,...responsible for ensuring access to water services'.<sup>61</sup> Under the Services Bill, water services providers still require that approval, but must also obtain 'operating licences'.

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<sup>56</sup> <https://www.dailymaverick.co.za/opinionista/2024-01-14-thirty-years-into-democracy-how-has-sas-agricultural-sector-performed/>

<sup>57</sup> *Minister of Finance and another v Van Heerden*, 2004 (6) SA 121 (CC)

<sup>58</sup> Section 2(1), Water Services Act of 1997 (Services Act)

<sup>59</sup> Section 1, Services Act

<sup>60</sup> Clause 2, Water Services Amendment Bill (Services Bill); Section 2, amended Services Act

<sup>61</sup> Section 1, Services Act

Under a new Section 22A: ‘No person may operate as a water services provider without being granted an operating licence.’ Moreover, ‘a water services authority may only approve a water services provider...to operate in its area of jurisdiction if the water services provider is licensed to do so in terms of this Act’.<sup>62</sup>

### *5.1.2 Regulations on the granting of operating licences*

According to the Services Bill, the necessary operating licence will have to be obtained from the DWS under regulations to be drawn up by the minister within 12 months of the enactment of these provisions. Within this 12-month period, as the Services Bill states, the minister must ‘publish a notice prescribing procedures, requirements, exemptions, and conditions for licensing, the application process, and [the] granting or refusal, enforcement and revoking of operating licences’.<sup>63</sup>

These regulations must ‘call on all water service providers to apply for licensing within 12 months’ of their gazetting. The regulations must also be ‘reviewed and updated’ by the minister within five years of their initial publication. Thereafter, they must be further reviewed ‘at an interval of at least every ten years’.<sup>64</sup>

The regulations must ‘set criteria for the water service provider’s application, including institutional and governance arrangements, financial sustainability, managerial capability, and technical competence to provide water services’. They must also ‘distinguish between different categories of water services providers’, based on such issues as ‘the scope of the services to be provided and the size and complexity of the [water] works’.<sup>65</sup>

### *5.1.3 The content of operating licences*

An operating licence must give details, among other things, of the water services authority in whose area the water services provider is to act, the functions for which it is accountable, the duration of its licence (subject to a maximum of 30 years), and ‘the review period of the licence, to ensure progressive improvement during the period of the licence’. The licence must also require ‘full financial transparency’ and the disclosure of ‘all funding due to and from the water services function’. In addition, the licence must require the water services provider to be ‘responsible and accountable’, to ‘report as required by the regulations and licence conditions’, and to ‘comply with the Act’.<sup>66</sup>

### *5.1.4 Rules regarding contravention and rectification*

A water services provider that ‘fails to meet the conditions of an operating licence’ must be directed to ‘comply with set conditions, or to rectify the failure within a reasonable time frame’. Persistent failure to comply or rectify the failure may result in its licence being revoked. If revocation occurs, the relevant water services authority must ‘proceed to approve

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<sup>62</sup> Clause 7, Services Bill; Section 22A, amended Services Act

<sup>63</sup> Clause 7, Services Bill; Section 22B, amended Services Act

<sup>64</sup> Ibid

<sup>65</sup> Ibid

<sup>66</sup> Clause 7, Services Bill; Section 22C, amended Services Act

another licensed water services provider'. In the interim, it must put 'interim water services delivery arrangements' in place, so as to 'ensure continuity of services delivery'.<sup>67</sup>

## 5.2 *Monitoring, enforcement, and intervention*

The Services Bill inserts a new Section 62A, which deals with the enforcement by the minister of the obligations of various water services institutions. These institutions include water services authorities, water service providers, and water boards (which are provided for in the Services Act and are responsible for bulk water infrastructure and provision).

Under the new Section 62A, the minister or a person delegated by him may 'issue a directive and require the water services institution to rectify its conduct or omission' if it has not 'effectively performed any function imposed on it' by the Act. The directive must state 'the nature and extent' of the non-compliance, its duration, its 'effect and impact on consumers or [water] works', and other relevant matters. The directive must also 'require the water services institution to comply with the directive within a time frame considered reasonable in the circumstances' and then 'diligently continue with those measures'.<sup>68</sup>

If there is 'continued non-compliance with the Act' – due to 'persistent failure of the water services institution to comply with the directive' – the minister may 'exercise all the powers and carry out all the duties' related to particular functions on behalf of the water services institution. He may thus take charge of 'operations and maintenance, infrastructure maintenance, refurbishment and expansion, billing and revenue management, procurement and supply chain management, human resource management, and any other functions...associated with that water services...function and/or...set out in the directive'.<sup>69</sup>

While the minister is busy 'rectifying the non-compliance', the governing body of the relevant water services institution may not 'exercise any of its powers or carry out any of its duties' relating to the functions in issue. Instead, the minister may 'utilise all financial and other resources available to that...governing body' as regards those functions. He may also appoint any other water services institution to take on those functions or any part of them 'during the period of rectification'.<sup>70</sup>

The minister's actions must end 'when there is sustainable compliance with the directive'. Once the rectification process has ended, 'the water services institution must continue to exercise its functions and powers in accordance with the Act and not do anything to jeopardise the sustainability of the function'.<sup>71</sup> In addition, 'any expenses incurred or losses suffered...in implementing the directive...may be recovered from the governing body of that water services institution'.<sup>72</sup>

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<sup>67</sup> Clause 7, Services Bill; Section 22D, amended Services Act

<sup>68</sup> Clause 21, Services Bill; Section 62A(1) to (3), amended Services Act

<sup>69</sup> Clause 21, Services Bill; Section 62A(4)(a), amended Services Act

<sup>70</sup> Clause 21, Services Bill; Section 62A(4)(b) to (d), amended Services Act

<sup>71</sup> Clause 21, Services Bill; Section 62A(4)(e), (5), amended Services Act

<sup>72</sup> Clause 21, Services Bill; Section 62A(6), amended Services Act

## 6 Ramifications of the Services Bill

According to water and sanitation minister Senzo Mchunu, the Services Bill will ‘result in more professionally managed, capable, efficient, and financially viable water services institutions’.<sup>73</sup> However, adding further layers of regulation and bureaucracy will do little to address the underlying reasons for a sharp decline in the quality of the government’s water management over many years.

Water treatment has two facets: the treatment of effluent to acceptable standards so that it can be discharged safely into rivers, dams, and oceans; and the conversion of what is often dirty water to potable standards. Since the state took custodianship of the country’s water resources, standards of treatment in both spheres have declined precipitously.

Performance has deteriorated for various reasons. The complex infrastructure involved in the capture, storage, transfer, treatment, and distribution of water needs constant and expert maintenance. This has faltered badly, however, as skilled engineers and technical staff have been pushed aside to make way for the ruling party’s deployed cadres and other employment equity appointees.

A marked deterioration in the maintenance of all water infrastructure is increasingly evident. In 2022 an ‘Infrastructure Report Card’ compiled by the South African Institution of Civil Engineering (Saice) gave the country’s bulk water resources a grade of D- (indicating a risk of failure), largely because of insufficient maintenance.<sup>74</sup> Sanitation, including wastewater treatment, received a C- (satisfactory for now) in major urban areas but an alarming E- (unfit for purpose) in all other areas.<sup>75</sup> Commented SAICE: ‘Over the last decade there has been a major loss of senior engineering personnel from the DWS, mainly due to the retirement of staff – currently more than 100 senior level engineering posts are vacant.’ This exodus had cost the department much of its ‘institutional knowledge and strong technical skills base’ and put its capacity under ‘extreme pressure’.<sup>76</sup>

In 2021 the Department of Planning, Monitoring and Evaluation in the Presidency cautioned that only three out of the country’s nine water boards – the entities responsible for bulk water supply to metros and municipalities – were still technically efficient. In addition, ‘at least a third of the 144 municipalities that were water service authorities were regarded as dysfunctional and more than half had no, or very limited, technical staff.’ Moreover, ‘out of 278 municipalities in South Africa, 202 were without civil engineers’. This assessment seems too optimistic, however, for the 2022 SAICE report indicates that almost all municipalities

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<sup>73</sup> <https://www.businesslive.co.za/bd/national/2023-12-05-senzo-mchunu-outlines-plans-to-fix-water-distribution-and-waste-management/>

<sup>74</sup> SAICE, 2022 Infrastructure Report Card, pp6, 8: <https://saice.org.za/downloads/SAICE-2022-Infrastructure-Report-Card.pdf>

<sup>75</sup> Ibid, pp6, 8

<sup>76</sup> Ibid, p23

currently lack engineers and hence can no longer draw on their crucial ‘problem-solving skills and depth of knowledge’.<sup>77</sup>

By 2015 more than 3.6 billion litres of untreated or partially treated sewage were being returned to rivers and dams every day. This total has since gone up to some 5bn litres a day, says independent water expert Anthony Turton, as wastewater treatment has deteriorated further.<sup>78</sup> The state, for all its claims to be safeguarding the nation’s resources for the benefit of all, has thus become the single largest polluter of water in the country.<sup>79</sup>

The daily discharge of untreated sewage is driving the eutrophication of all major dams and promoting the growth, as Turton warns, of a dangerous form of blue-green algae known as cyanobacteria.<sup>80</sup> One of the most common species of cyanobacteria produces a potent toxin, called microcystin, which has long reached levels ‘amongst the highest ever measured in the world’. Adds Turton: ‘Microcystin toxin levels become a concern in developed countries at three orders of magnitude *below* the levels commonly found in South Africa.’<sup>81</sup>

Limited revenue is also a major constraint. The 2019 Master Plan estimates that R90bn a year is needed over the next decade to overcome the maintenance backlog and start meeting other needs.<sup>82</sup> But, as Turton points out, annual budgetary allocations are generally well below this sum, while many municipalities and other state entities either under-spend their budgets or fritter much of the money away, often through rampant tender corruption.<sup>83</sup>

Water consumption in South Africa averages 237 litres per person per day, which is almost 40% higher than the global average of 173 litres. A key part of the problem is that almost half of the water supplied by water service institutions is ‘non-revenue’ water. Such water is either lost to leaks – generally from poorly maintained control valves, transfer pipelines, reservoirs, and reticulation systems – or is never billed or paid for because of meter manipulation or other forms of water theft.<sup>84</sup>

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<sup>77</sup> <https://www.businesslive.co.za/bd/national/2021-03-25-presidency-supports-calls-for-independent-water-regulator/>; SAICE, 202 Infrastructure Report Card, pp17, 18

<sup>78</sup> Turton, ‘Sitting on the horns’, p11; <https://www.dailymaverick.co.za/article/2023-02-02-when-crises-collide-water-is-south-africas-next-perfect-storm/>

<sup>79</sup> Turton, Water Pollution, pp6-8

<sup>80</sup> *Farmer’s Weekly* 31 August 2018

<sup>81</sup> Turton, ‘Sitting on the horns’, p14; Turton, ‘Water pollution’, pp7-8

<sup>82</sup> Master Plan, p48; <https://www.businesslive.co.za/bd/opinion/2022-03-03-mike-muller-there-are-no-water-supply-backlogs-just-difficult-decisions/?ut>;

<sup>83</sup> Turton, ‘Sitting on the Horns’, p19

<sup>84</sup> Master Plan, pp10, 60; <https://www.moneyweb.co.za/news/south-africa/gautengs-biggest-cities-are-out-of-water-while-the-dams-are-full/>; <https://www.engineeringnews.co.za/article/you-think-load-shedding-is-bad-water-shedding-is-far-worse-2022-03-17/r>; <https://www.biznews.com/interviews/2023/12/06/sa-could-have-no-safe-drinking-water-in-5-years>

In December 2023 the DWS released its latest ‘Blue’, ‘Green’, and ‘No’ Drop reports dealing respectively with drinking, waste, and non-revenue water. As the *Financial Mail* reports, these assessments show that:<sup>85</sup>

- ‘47% of drinking water systems are in a poor or critical state of performance’;
- ‘66% of wastewater treatment works are in the high or critical risk category’; and
- ‘almost half [46%] of the country's treated water is considered non-revenue water’.

The World Bank has recently identified water as one of the three biggest risks for doing business in South Africa. As the Democratic Alliance adds: ‘The escalating water and sanitation crisis (as illustrated by the latest Blue, Green [and No] Drop reports) is the direct result of poor governance, financial mismanagement, and widespread corruption brought about by the ANC's policy of cadre deployment applied in every [state] structure or entity.... While the government acknowledges these failures, it remains impotent in solving them.’<sup>86</sup>

The Services Bill cannot address any of the underlying reasons for the growing water crisis. Poorly performing water services institutions which have been stripped of engineering, technical, financial, and other skills cannot magically improve their performance when issued with ministerial directives to do so. The revenue needed for essential water services – often already whittled away by wasteful spending, corruption, and the diversion of money from infrastructure to salaries – will not expand under the Services Bill. On the contrary, much of this revenue will instead be allocated to the salaries and benefits of the thousands of additional cadres who will be needed to administer the new licensing and enforcement systems.

In addition, corruption in the water sphere will not be curbed by the Service Bill’s new licensing rules and non-compliance directives. Instead, many of the new cadres appointed will start milking the system for their own benefit, often through inflated prices in procurement contracts. As the South African Human Rights Commission reported back in 2013, ‘[water] tenders are often awarded to the family members of friends of officials, who are then unable to complete their job promptly or adequately’.<sup>87</sup> The Services Bill will further encourage this trend, not help bring it to an end.

## **7 The way forward**

Both the Water Bill and the Services Bill should be scrapped. The Water Bill is clearly unconstitutional and cannot lawfully be enacted in its current form. It will also do enormous damage to the economy by further undermining property rights, curtailing investment, restricting growth, and adding to unemployment. The harm to the agricultural sector will be particularly severe. The poor will suffer the most, for the farming sector is crucial in

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<sup>85</sup> <https://www.businesslive.co.za/fm/opinion/on-my-mind/2023-12-14-shirley-de-villiers-frightening-future-as-safe-water-dries-up>

<sup>86</sup> <https://www.politicsweb.co.za/politics/sas-water-and-sanitation-crisis-is-a-crime-against>

<sup>87</sup> *Mail & Guardian* 21 July 2017

sustaining food security, constraining food inflation, and providing some 956 000 jobs in 2023<sup>88</sup> to people with often limited skills.

In addition, successful land reform cannot be achieved through the forced redistribution of land and water to people generally lacking the many ingredients vital to success in farming. The government should thus jettison the Water Bill and focus instead on expanding the number of successful commercial farmers of all races. All these farmers need secure property rights to both land and water. It is only with this foundation in place that the various other factors vital to successful farming can be addressed in innovative and constructive ways. At the same time, no one should be encouraged to believe that farming is an easy option, for agriculture is an exceptionally high-risk sector – and all the more so in a water-stressed country such as South Africa.

The Services Bill cannot address the underlying reasons for deteriorating water services. If anything, it will make existing problems worse by wasting scarce revenue on the deployment of thousands more cadres, while failing to overcome the skills shortage and increasing the scope for waste and corruption. This Bill must thus be abandoned. Instead, the vital water services the government is increasingly failing to provide should be outsourced to the private sector via public-private partnerships. These must be concluded through open and competitive tender processes and provide substantial value for money.

**South African Institute of Race Relations NPC**

**16<sup>th</sup> January 2024**

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<sup>88</sup> <https://www.dailymaverick.co.za/opinionista/2024-01-14-thirty-years-into-democracy-how-has-sas-agricultural-sector-performed/>