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South African Institute of Race Relations NPC

Submission to the

Portfolio Committee on Water and Sanitation

regarding the

National Water Amendment Bill of 2026 [B1-2026]

30 July 2026

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1 Introduction

The Portfolio Committee on Water and Sanitation (the Committee) has invited interested persons to submit public comments by 30th July 2026 on the National Water Amendment Bill of 2026 [B1-2026] ("the 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*.[1]

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.[2]

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 Committee should have provided a comprehensive evaluation of the Bill and its 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.[3] 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

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

[2] 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.

[3] 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

consultation" is needed, along with "a continual review of the impact assessment as the proposals evolve".[4]

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".[5]

The Bill is likely to generate precisely such "excessive costs" in the form of disinvestment from agriculture and other sectors of the economy as well as increased emigration. Yet no proper SEIA assessment of the Bill has been made available to help the public develop an informed understanding of the likely ramifications of this measure.

2.2 Poor compliance with the National Policy Development Framework

The Committee 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."[6] 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 policy making is a constitutional obligation that government institutions must respect and institutionalise."[7]

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."[8]

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."[9]

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[4] *SEIAS Guidelines* p7
[5] *SEIAS Guidelines*, p11
[6] National Policy Development Framework, 2020, p3
[7] Ibid, p19
[8] Ibid, pp19-20
[9] Ibid, p20

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."[10]

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 regard the Bill.

2.3 A "tick-box" approach already evident

The Bill is likely to have many negative consequences (as further described in this submission), but the Committee 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 this key measure.

Moreover, the Committee has provided a scant six weeks for public comment on a complicated amendment bill, which cannot be understood without also reading the lengthy principal statute it seeks to change. This period is unreasonably short. It further confirms that the Committee is going through the motions on public consultation, rather than properly fulfilling its constitutional obligation, under Section 59(1) of the Constitute, to "facilitate public involvement in the legislative...processes of the Assembly and its committees."

3 The content of the Bill

Given the short time allowed for public comment since 23 June 2026, the IRR has only been able to focus on a limited number of provisions in the Bill. In the analysis which follows, the new provisions to be introduced by the Bill are <u>underlined</u>, while the IRR's comments on the likely ramifications of these changes are set out in *italics*.

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 water flowing through or below their land in rivers or underground streams.[11] In 1998, however, the National Water Act (the 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.[12] This meant that anyone wanting to use water – unless permitted to continue with an "existing lawful water use" – had to apply to the Department of Water and Sanitation (DWS) for a "water-use licence." Under the Water Act, such

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[10] Ibid

[11] 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, pp. 2, 61.

[12] National Water Act, 1998; see also *White Paper on a National Water Policy*, 1997, p. 58.

a licence remains in force for a maximum of 40 years and is subject to review by the state at five-yearly intervals.[13]

In issuing a water-use licence under the 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."[14] However, since the DWS has long aimed to allocate some 70% of licensed water use to black people by 2024,[15] 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 Act, as the Supreme Court of Appeal (SCA) ruled in 2012.[16]

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 Act be amended to "make equity the primary consideration in water allocation."[17] Underpinning this proposed change is the fact that only 5% of water has been reallocated to black farmers since the Act was adopted, which the Master Plan identifies as "a significant failure." The 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.[18]

Water is, of course, important to success in farming, while South Africa undoubtedly needs many more successful commercial farmers of all races – as the IRR has long urged. Unfortunately, however, much of the land that has already been 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, Thozi Gwanya, warned in 2007).[19]

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

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[13] Sections 28(1), 49, National Water Act, 1998; 1999/2000 *South Africa Survey*, p. 156; *The Citizen*, 13, 14 April 2005
[14] 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.
[15] Ibid; *Farmer's Weekly*, 23 February 2018.
[16] *Makhanya* v *Goede Wellington Boerdery* [2012] ZASCA 205, paras. 19, 37 – 40.
[17] National Water and Sanitation Master Plan, Volume 1: Call to Action, v10.1, 31 October 2018 adopted 28 November 2019 p, 54. https://www.gov.za/documents/national-water-and-sanitation-master-plan-28-nov-2019-0000
[18] Master Plan, pp. 2, 61.
[19] John Kane-Berman, "Bad-faith Expropriation Bill not grounded in South Africa's land realities," IRR, Johannesburg, *Fast Facts*, May 2008, p. 7.

3.1.2 Section 27(3): "Race" as the primary consideration

Section 27(1) of the Act currently states that, in issuing a water-use licence, a responsible authority must take into account all relevant factors, including the 11 listed in the statute. These factors include (a) "existing lawful water use," (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."[20]

Under the Bill, section 27(1)(b), with its reference to redress for past racial and gender discrimination, is to be amended so that it reads: "*(b)* <u>whether the applicant is a fit and proper person as contemplated in section 27A</u>." A new section 27A sets out the factors to be taken into account in assessing whether an applicant is indeed a fit and proper person, as further described in *section 3.3.1* of this submission.

In addition, new subsections 27(3) and 27(4) are to be added to the Act. These new subsections provide:

"(3) <u>A responsible authority must, when considering an application for water use authorisation, advance the redress of past racial and gender discrimination when making a decision to issue a licence or general authorisation</u>.

(4) <u>A responsible authority, after taking into account the demographic composition of the water users, in particular a (sic) water management area, may set aside a certain volume of water in each water management area to achieve the redress contemplated in subsection (3).</u>"[21]

<u>Comment:</u> Under these new clauses, 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 Bill provides no clarity as to how "the redress of past 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.[22]

3.1.3 Section 26: Additional regulatory powers

Commercial farmers and other major water users, such as mining companies, could be greatly affected by the Bill's changes to Section 26 of the Act, which deals with "Regulations on the use of water." Under a new Section 26(1)(p), the minister will have the power to make regulations "<u>prescribing the criteria that must be considered when redressing the results of past racial and gender discrimination in relation to water use</u>".[23]

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[20] Section 27(1)(a) to (d) (h)(k), Act.
[21] Clause 13, Bill; Section 27(3), (4), amended Act.
[22] Section 1(c), Constitution.
[23] Clause 12, Bill; Section 26(1)(p), amended Act.

The additional regulatory power to be given to the minister under the new Section 26(1)(p) is not accompanied by any guiding parameters as to what "criteria" may in future be prescribed. This wording is thus too vague to pass constitutional muster. The intention underlying the change does, however, seem clear: to buttress the legality of any future regulations similar to those that were gazetted for public comment in May 2023.[24]

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 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."[25]

The draft regulations put forward in 2023 were ultra vires *the Act and have not been adopted. However, once the Bill has been enacted into law, new regulations along the same lines could 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 with little capacity to pay market value for them.*

Compulsory transfers of this kind would amount to regulatory expropriations, for which the state is obliged to pay "just and equitable" compensation under Section 25 of the Constitution. However, the DWS might seek to avoid this via the Expropriation Act of 2024, which has been signed into law but has yet to take effect. Any such outcome would be extremely damaging to the investment, growth, and jobs the Government of National Unity (GNU) has committed itself to expanding. 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.

3.1.4 Voluntary and compulsory applications for water licences

These new provisions need to be read together with the unchanged provisions of Sections 41 and 43 of the Act. Section 41 sets out the "procedure for licence applications," which involves various steps. Under these rules, applicants must fill in the right forms, pay the prescribed fees, provide required information (including an assessment of the likely impact of the proposed water use on the water resource), and invite objections from state entities as well as the public and all interested people.[26]

The Section 41 application process is a voluntary one, which people may initiate of their own volition. Under Section 43, however, "the responsible authority may issue a notice requiring persons to apply for licences for…water use" of various kinds. This "compulsory" licensing

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[24] Revision of Regulations Regarding the Procedural Requirements for Water Use Licence Applications and Amendments of 2023, *Government Gazette*, 19th May 2023

[25] Clause 12, Table 1, ibid

[26] Section 41, Act.

process can be initiated when, for example, “it is necessary to review prevailing water use to achieve equity in allocations; or to promote beneficial use of water in the public interest.”[27]

Under Section 43, those currently relying on existing lawful water use are effectively obliged to apply for licences under the Act. If they do not apply, their use right is automatically terminated once the period for submitting applications (usually 60 days) has closed. Applications required under Section 43 must generally follow the application procedures set out in Section 41. Under Section 43, however, the responsible authority must also take various steps to alert interested persons to the compulsory licensing process that has been set in motion.[28]

Compulsory licensing may thus result in a host of competing applications. Once these have been received, the responsible authority “must prepare a proposed allocation schedule” which takes account of “the factors contemplated in Section 27” (which the Bill now seeks to amend). This proposed allocation schedule must allocate suitable amounts to the national water reserve; to existing licensees; to other authorised water users, and to “applicants to whom licences ought to be issued in order to redress the results of past racial and gender discrimination.”[29]

The proposed allocation schedule must also be published in the *Gazette*, after which interested persons have the opportunity to object. Thereafter, “the responsible authority must prepare a preliminary allocation schedule,” against which people can appeal to the Water Tribunal under Section 148 of the Act. If an appeal succeeds, the Tribunal must amend the preliminary allocation accordingly.[30] If there is no successful appeal, however, then the preliminary allocation schedule becomes final and is published as such in the *Gazette*.[31] Licences must then be issued in accordance with the final allocation schedule, and automatically “replace any existing lawful water use entitlement” that previously applied.[32]

<u>Comment</u>: *Though these provisions are largely unchanged, the Bill’s amendments to Section 27 increase the likelihood that commercial farmers currently relying on existing lawful water use will in time be obliged to apply 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 significant water volume reductions – many commercial farmers could either be denied water-use licences or have their current water entitlements considerably diminished.*

A major redistribution of water from experienced farmers to new entrants will thus take place. On the surface, this may seem a laudable goal, as water is generally vital to success in farming. However, since the many reasons for the collapse of between 50% and 90% of land reform projects have not yet been resolved, there will be little effective redress from these water transfers.

New farmers are unlikely to experience lasting gains. Instead, the country risks suffering a significant decline in agricultural production. This will end many farming jobs. It will also push up

[27] Section 43(1)(a)(ii), (b), Act.
[28] Section 43(3),(4), Act.
[29] Section 45(1)(c), 2(a)-(d), Act.
[30] Sections 46(1)(b), (2), Act.
[31] Section 47(1),(2), Act.
[32] Section 48(1), Act.

prices, reduce overall food security and make it more difficult for poor people to afford nutritious food. This will harm all South Africans and increase the incidence of malnutrition among the destitute. In addition, many more valuable assets are likely to "die in the hands of the poor," to quote Mr Gwanya once again.

By contrast, what South Africa most needs is a significant increase in the number of successful commercial farmers of all races. All policy interventions should be geared towards this goal, which is vital to increased investment, higher growth, expanding employment and rising prosperity for all. Sadly, the water redistribution proposed in this Bill will make it still harder to achieve all these objectives. This too will result in still greater harm to millions of poor and disadvantaged South Africans.

3.2 Amendments to water use authorisations

3.2.1 Amendments to water use licences

Once many more people have obtained water use licences under the compulsory licensing provisions in Section 43 of the Act, they may also find that the conditions of those licences are changed under other existing clauses in the Act.

Under Section 49, "A responsible authority may review a licence only at the time periods stipulated for that purpose in the licence." However, another clause in the Act requires a review every five years.[33]

On reviewing a licence, a responsible authority "may amend any condition of the licence," (other than its period) if this is "necessary or desirable to prevent deterioration" of water quality; or if "there is insufficient water in the water resource to accommodate all authorised water uses;" or if "it is necessary or desirable to accommodate demands brought about by changes in socioeconomic circumstances, and it is in the public interest to meet those demands."[34] However, an amendment of this kind can be made only if the conditions of other water licences in the area have been similarly amended "in an equitable manner through a general review process." In addition, the affected licensee must be given "an opportunity to be heard" before an amendment is made.[35]

The Act recognises that such amendments to water-use licences could "severely prejudices the economic viability of any undertaking in respect of which the licence was issued." In this situation, the licensee may seek compensation under Section 22 of the Act, as outlined below.

<u>Comment:</u> *Though these provisions of the Act remain unchanged, the enactment of the Bill will give them greater salience. This could result over time in many more amendments that "severely prejudice the economic viability" of farms and other businesses and so merit compensation under Section 22.*

[33] Sections 28(1), Act.
[34] Section 49 (1) – (3), Act.
[35] Section 49(3), read with 49(2), Section 49(5), Act.

3.2.2 Restrictions on "existing lawful water use"

At present, Section 22(1) of the Act 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.[36] 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 Bill has been enacted into law.

The Bill makes no change to Section 34(1) of the Act, under which a person, or his successor-in-title, may "continue with an existing lawful water use." Under this sub-section, 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."[37]

In addition, a new Section 34(1)(aA) is to be introduced under the Bill. This will allow the responsible authority to impose: "*(a*A*)* any new conditions or obligations, necessary to protect the water resources and the environment."[38]

Comment: *The unchanged provisions of Section 22 further confirm that existing lawful use will fall away whenever water-use licences have been granted – most likely under the compulsory licensing provisions set out in Section 43 (see above).*

The new Section 34(1)(aA) to be introduced by the Bill is a broad provision, which seeks to give officials virtually untrammelled discretion to introduce new conditions of many different kinds. This new clause is sure to be interpreted in different ways at different times and is thus in conflict with the doctrine against vagueness of laws.

3.3 Additional barriers to obtaining water use licences

3.3.1 An applicant must be "a fit and proper person"

Under the Bill, as earlier noted, section 27(1)(b), with its reference to redress for past racial and gender discrimination, is to be amended so that it reads: "*(b)* whether the applicant is a fit and proper person as contemplated in section 27A." A new Section 27A is thus inserted, which states:

"(1) In order to determine whether a person is a fit and proper person for the purposes of section 27(1)*(b)*, when issuing a licence or general authorisation, a responsible authority must consider all relevant factors.

(2) The factors contemplated in subsection (1), which disqualify a person from being considered a fit and proper person include whether that person—

(a) has contravened or failed to comply with this Act, any directive issued in terms of this Act, or any legislation applicable to water resources management and water pollution;

[36] Section 22(1)(a)(ii), (b), Act.
[37] Section 34(1), Act.
[38] Clause 18, Bill; Section 34(1)(aA), amended Act.

(b) is or has been a director or senior manager of a company, firm or a juristic person which has been found guilty of contravening or failed to comply with this Act, any directive issued in terms of this Act, or any legislation applicable to water resources management and water pollution; or

(c) has held a water use licence or is entitled to continue with an existing lawful water use in terms of section 34, and that licence or entitlement has been suspended or revoked."[39]

The new Section 27A adds additional grounds under which applications for water-use licences may be refused. In essence, applicants who have failed fully to comply with the Act, a directive, or another relevant requirement will no longer be considered "fit and proper" to obtain water use licences. Effectively, they will be debarred from doing so.

3.3.2 Non-compliance with directives or conditions

Under Section 42 of the Act, once a responsible authority has decided on a licence application, it must "promptly notify the applicant and any person who has objected to the application." At the request of any such person, it must also "give written reasons for its decision."[40]

The Bill then inserts a new Section 42(2), which provides additional grounds on which applications may be refused. According to this clause: "The reasons for refusing to issue an authorisation by the responsible authority, may include, amongst others that— *(a)* an applicant is not a fit and proper person as contemplated in section 27A; *(b)* the applicant, or a director or member of the applicant— (i) has, in the preceding five years, been convicted of an offence, or issued with a directive or other administrative enforcement notice, in terms of this Act; (ii) held any water use or dam safety authorisation that has been suspended or cancelled; or (iii) has not complied with a material condition of a water use authorisation, dam safety license or registration."[41]

Comment: This clause reinforces the importance of an applicant remaining a "fit and proper person", as set out in the new Section 27A. In addition, it allows responsible authorities to refuse to grant a water use licence to an applicant who has merely been issued with a (possibly unwarranted) directive under the Act at any point in the past five years. The list of potential reasons is expressly left open, moreover, so reasons other than those cited could be used to refuse licence applications

3.4 Compensation for the refusal (or limitation) of a water use licence

Section 22(6) of the Act already provides: "Any person who has applied for a licence in terms of section 43 in respect of an existing lawful water use…and whose application has been refused or who has been granted a licence for a lesser use than the existing lawful water use, resulting in severe prejudice to the economic viability of an undertaking in respect of which the water was beneficially used, may…claim compensation for any financial loss suffered in consequence."

However, the amount of compensation is likely to be less than market value and will not extend to consequential losses. According to Section 22(7) (also an existing provision, unchanged by

[39] Clause 13, National Water Amendment Bill of 2026 ("the Bill"); Section 27(1)(b), amended National Water Act of 1998 ("the Act").
[40] Section 42, Act.
[41] Clause 21, Bill; Section 42(2), amended Act.

the Bill): "The amount of any compensation payable must be determined—(*a*) in accordance with section 25 (3) of the Constitution; and (*b*) by disregarding any reduction in the existing lawful water use made in order to—(i) provide for the Reserve; (ii) rectify an overallocation of water use from the resource in question; or (iii) rectify an unfair or disproportionate water use."

Claims for compensation must be lodged within six months with the Water Tribunal. This Tribunal "has jurisdiction to determine liability for compensation and the amount of compensation payable."

Comment: *Section 25(3) of the Constitution lists "market value" as one of five listed factors to be taken into account in determining compensation on expropriation. The four other listed factors are "(a) the current use of the property, (b) the history of the acquisition and use of the property,…(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property, and (e) the purpose of the expropriation." These four factors are difficult to quantify in monetary terms. They create uncertainty as to the amount of compensation that might be paid – which could deviate quite significantly from fair market value and compensation for consequential losses, depending on how these factors are interpreted.*

Section 22(7) of the Act also seeks to exclude water reductions that affect economic viability and need to be taken into account. Under its terms, the Water Tribunal must "disregard" any water use reduction which is made to boost the water reserve, to "rectify an overallocation of water use," or to "rectify an unfair or disproportionate water use."

Again, though these terms of the Act remain unchanged, the enactment of the Bill will give Section 22 greater salience. Once race is made the primary consideration in the granting of water-use licences, many commercial farmers could have their applications for such licences refused. They could also be refused licences under the broad terms of the new Section 42(2), as earlier described. Alternatively, commercial farmers might be granted licences to use less water than before. This reduction could be imposed either in their initial licences or via subsequent amendments. A complete or partial loss of water use could "severely prejudice the viability" of their farming operations, as the Act acknowledged. Yet the compensation paid for what is implicitly recognised as an expropriation will be considerably constricted. Often it will not suffice to make up for losses suffered.

3.5 Limiting reliance on "existing lawful water use"

Section 32(1) of the current Act 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."[42] The Bill deletes both Section 32(1)(b) and the whole of section 33.[43] Once the Bill is enacted, thus, "existing lawful water use" will be confined to that which was already in place in the two years prior to the commencement of the Act in 1998.

Comment: This confirms that the intention behind the Bill is to prevent commercial farmers, in particular, from relying any further on "existing lawful water use". The Memorandum on the Objects of the Bill reinforces this, saying that one of the main aims of the measure is to

[42] Section 32(1), Act.
[43] Clauses 16, 17, Bill; repeal of Sections 32(1)(b) and 33, amended Act.

"strengthen…the ability of the department to phase out previous water entitlements in order to achieve the targets for water allocation reform."[44]

3.6 A prohibition on "trading" in water-use licences

3.6.1 Background

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 Act make provision for the transfer of water-use licenses with the state's consent.[45]

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."[46]

The validity of the DWS prohibition was 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".[47]

The Supreme Court of Appeal (SCA) overturned this ruling. The Pretoria high court, it said, had ignored "the regulatory framework" provided by the Act, which allows transfers to take place provided they have the state's approval.[48] 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."[49]

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."[50]

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[44] Para. 2.4(d), Memorandum on the Objects of the Bill.
[45] *Lötter and others* v *Minister of Water and Sanitation and others* [2021] ZASCA 159 (8 November 2021), paras. 51, 20, 49.
[46] *Business Day* 21 November 2018.
[47] *Lötter and others* v *Minister of Water and Sanitation and others*, [2021] ZASCA 159 (8 November 2021), paras. 23, 24.
[48] Ibid, paras. 53, 59.
[49] Ibid, para. 51.
[50] Ibid, para. 58.

The SCA's decision was upheld by the Constitutional Court in March 2023.[51] 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 Act was to "redress the results of 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.[52]

In its Master Plan for the water sector, the DWS said it planned to amend the Act by prohibiting all "temporary and permanent trading between authorised water users."[53] It also recommended the introduction of a "use-it-or-lose-it" principle, under which any unused water would revert to the state.[54] Both these proposed changes are now reflected in the Bill.

3.6.2 Section 25(1): Transfer of water use authorisations and prohibition of water trading

Under the Bill, a new Section 25(1) states: "A water management institution may, (a) on application in the prescribed manner by a person authorised to use water for irrigation, and having regard to the factors listed in section 27, allow that person to transfer water for a period not exceeding 24 calendar months, to another land which belongs to the same person or a third person as authorised by the water management institution; and (b) on such conditions as the water management institution may determine, allow that person or third person to use some or all of the water transferred for the same or different purpose in the same vicinity".[55]

3.6.3 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 belonging to him or her as contemplated in sub-section (1); and (b) on condition that the surrender only becomes effective if and when such application is granted."[56]

3.6.4 Section 25(2A): Further surrender of entitlement

A new Section 25(2A) is then inserted, which says: "A person who surrenders any entitlement in terms of subsection (2) may not trade in such entitlement and must surrender such entitlement to the Minister."[57]

3.6.5 Reallocation of water by the minister

The Bill inserts a new Section 25A, which states: "(1) The Minister may, in the public interest, reallocate water between water sectors, provinces or catchments. (2) The Minister must make a decision for a reallocation referred to in subsection (1), after consultation with any affected water sector, province or catchment management agency. (3) The Minister in making a decision

[51] *Minister of Water and Sanitation and others* v *Lötter and others* [2023] ZACC 09.
[52] Ibid, para. 39.
[53] Master plan, p. 54.
[54] Master plan, pp. 52, 60.
[55] Clause 10(1)(b), Bill; Section 25(1)(a)(b), amended Act.
[56] Clause 10(c), Bill; Section 25(2), amended Act.
[57] Clause 10(d), Bill; Section 25(2A), amended Act.

to reallocate water must consider all relevant factors relating to the water resource, including those listed in section 27(1)."[58]

3.6.6 New Section 34(A): Curtailment of water and replacement of existing lawful water use

The Bill introduces a new Section 34(A), to be inserted after the existing Section 34(1) of the Act. The new clause states: "(1) A responsible authority may, by written notice to a person holding an entitlement to use water through the existing lawful water use, curtail the volume of water which becomes available as a result of failure by water users to exercise the full existing lawful use volume for any period."[59]

Comment: *These provisions on "the prohibition of water trading" and the surrender or curtailment of water are broadly phrased and sometimes difficult to understand. What is clear, however, 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 productive capacity – and also the market value – of many commercial farms and especially those reliant on irrigation. This too is likely to undermine investment in agriculture and erode South Africa's food security.*

3.7 Appeals to the Water Tribunal

Section 148 of the Act provides for appeals to be lodged with the Water Tribunal established under the statute. According to the existing wording of the Act, appeals may be lodged against various decisions by catchment management agencies and against the "decision of a responsible authority on the verification of a water use." An appeal may also be brought against "a decision of a water management institution on the temporary transfer of a water use authorisation under section 25 (1)." The Bill retains this wording, and adds another sub-clause providing for appeals against "a decision on the surrender of entitlement made under section 25."[60]

In general, the lodging of an appeal with the Tribunal "suspends any other relevant decision, direction, requirement, limitation, prohibition or allocation pending the disposal of the appeal, unless the Minister directs otherwise." However, the Act lists various instances in which such suspension is barred and the Bill seeks to expand this list.

Under an amended Section 148(2)(a), the lodging of an appeal "does not suspend a directive given under section 19(3), 20(4)*(d)* **[or]**, 53(1), 118(3)(b), or 118(3)(c) or 118 (3)(d)."[61] Sections 118(3)(b) to (d) deal with the giving of directions to dam owners to report on, or take steps to improve, the safety of their dams.

Comment: *These changes are relatively minor, compared to the rest of the Bill. The most salient change is that providing for appeals against "the surrender of entitlements" under Section 25.*

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[58] Clause 11, Bill, Section 25A, amended Act.
[59] Clause 19, Bill; Section 34A(1), amended Act.
[60] Sections 148(1)(a)-(d), Act; Clause 32, Bill; Section 148(1)(dA), amended Act.
[61] Section 148(2)(a); Clause 32, Bill; Section 148(2)(a), amended Act.

Under the new wording of this section, as earlier noted, 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.

3.8 New rules for water user associations

3.8.1 Background

Under Section 29(1) of the existing 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."[62] In addition, water user associations may choose various important functions to fulfil from among those listed. For example, they may opt to prevent water being wasted, to protect water resources, to "prevent any unlawful water use," and to "exercise general supervision over water resources." In addition, they may choose to "construct, purchase,…control, operate and maintain waterworks considered…necessary for draining land and supplying water to land for irrigation or other purposes".[63]

Various clauses in the Bill are likely to have significant impact on water user associations.

3*.8.2 Procedure for establishment of water user association*

Under the Bill, Section 92(1) of the Act is to be amended to give the minister two additional powers. These are to "*(c)* consult with the catchment management agency to determine the area of operation of a water user association considering specific public interest and water resource management conditions; or *(d)* determine the criteria for membership of the association."[64]

3.8.3 Section 93: Compulsory compliance with an amended "model" constitution

Under the 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 Act. By contrast, this model constitution need not be followed under the current Act.[65] A water user association's constitution will also have to specify "(*i)* [the] procedure for the annual general meeting; and *(j)* [the] procedure for removing a member of a management committee."[66]

The compulsory model constitution is also to be changed under a new Section 93(2A), which states: "[T]he 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".[67]

Comment*: Earlier proposed amendments – which would have introduced binding new rules on member admissions and voting rights – have been removed from the Bill. So too have other*

[62] Section 29(1)(e)(ix), Act.
[63] Item 4, Schedule 5, Act.
[64] Clause 27, Bill; Section 92(1)(c),(d), amended Act.
[65] Clause 28, Bill; Section 93(1), amended Act.
[66] Clause 28, Bill; Sections 93(1)(i)(j), amended Act.
[67] Clause 28, Bill; Section 93(2A), amended Water Act.

proposed clauses that would have required demographic representivity on management committees and in all other spheres. However, this last objective could still be attained under the proposed new Section 93(2A), which requires "racial and gender representation in all components of the association," including thus its management committee.

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 Bill, however, the minister will have considerable control over these organisations. All will have to comply with the minister's model constitution – which the minister will have the power to amend at any time at his or her discretion. In addition, racial targets are to be imposed on the management committees of these associations and in all their other "components." Given the extent of the skills shortage in South Africa, this could significantly erode the capacity of these associations to discharge their functions efficiently. (This risk, unfortunately, is real. Over close on three decades, the introduction of similar requirements for the public service, municipalities, and state-owned enterprises has significantly damaged their functionality by depriving them of necessary skills, experience and institutional memory.)

3.9 Increased penalties for various offences

Section 151(1) lays down various offences under the existing Act. These range from "us[ing] water otherwise than as permitted under this Act," to "unlawfully…tamper[ing]…with any waterwork" and "unlawfully…commit[ting] any act or omission which pollutes…a water resource."[68]

Section 151(2) adds that: "Any person who contravenes any provision of subsection (1) is guilty of an offence". Applicable penalties on a first conviction are a fine of unspecified amount, or "imprisonment for a period not exceeding five years," or both. For a second or subsequent conviction, penalties include a fine, also of an unspecified amount, or "imprisonment for a period not exceeding ten years," or both.[69]

The Bill seeks to distinguish between different offences and to set out the maximum fines that may be imposed, as well as the maximum prison terms. For the most serious offences, as earlier listed – including the unauthorised use of water and the pollution of water (for which the state is most at fault) – those convicted are "<u>liable to a fine not exceeding R10 million or to imprisonment for a period not exceeding 10 years, or to both such fine or such imprisonment</u>."[70]

For less serious offences, such as "fail[ing] to provide access to any book," or "refusing to give data or information," or "fail[ing] to register an existing lawful water use when required…to do so," potential penalties are also less severe. A first conviction is punishable by "<u>a fine of R1 million and (sic) one year (sic) imprisonment or any other sentence the court consider (sic) appropriate</u>."[71] Penalties for second and subsequent convictions are set at a "<u>fine of maximum R5 million or five years imprisonment</u>" or both, or (again) "<u>any other sentence the court consider (sic) appropriate</u>."

[68] Section 151(1)(a),(e),(i), Act.
[69] Section 151(2), Act.
[70] Clause 33, Bill; Section 151(2), amended Act.
[71] Clause 33, Bill; Section 151(3), amended Act.

Comment: *Both references to "any other sentence the court consider[s] appropriate" should be deleted. Instead, the Bill should make it clear that both the R1 million and the R5 million fines to which it refers are "maximum" fines, which cannot be increased further at the court's discretion. In addition, the penalty for a first conviction must be clearly stated as either a fine* or *imprisonment for up to one year.*

4 Ramifications of the Bill

Once the 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 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 the Constitution. The DWS may seek to avoid paying such compensation under the Expropriation Bill of 2024, but this would also be contrary to what the Constitution requires.

Here, 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. 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. The best solution clearly 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 already shown – will reduce production and bring no tangible gains to intended beneficiaries.

Several key changes in the Bill – particularly Section 27(3) and the racial targets it ushers in – are also inconsistent with the Constitution's emphasis on "non-racialism" as a core founding value.[72] 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 elsewhere, including the private sector. On the contrary, under the *expressio unius est exclusio alterius* principle of statutory interpretation (Latin for "the expression of the one thing excludes the other" from applying), the Constitution makes it clear that "broad representivity" cannot lawfully be pursued outside the two spheres it expressly lists.

The racial redistribution the 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:

[72] Section 1(c), Constitution

- restricting the agricultural exports (worth $15bn or R250bn in 2025)[73] 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 black elite – who will in practice often by the principal beneficiaries of this additional racial redistribution – and the millions of people who are unemployed, destitute, and increasingly malnourished. The 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.[74] As the apex court stressed in this judgment, race-based remedial measures cannot be accepted as valid unless, among other things, they help to "achieve equality" by narrowing – rather than widening – the gap between the small elite and the disadvantaged majority.

5 The way forward

The Bill should be scrapped. It is clearly unconstitutional in some of its key provisions and cannot lawfully be enacted in its current form. It will also do enormous damage to the economy by further undermining property rights. This in turn will further curtail investment, restrict growth, and worsen unemployment and destitution. The harm to the agricultural sector will be particularly severe. The poor will suffer the most, for the farming sector is crucial in sustaining food security, constraining food inflation, and providing jobs (some 960,000 in 2025)[75] 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 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.

South African Institute of Race Relations NPC **30 July 2026**

[73] Sihlobo, W., "South Africa's farming fortunes are positive at the start of 2026," Daily Maverick, 11 June 2026. https://www.dailymaverick.co.za/opinionista/2026-06-11-south-africas-farming-fortunes-are-positive-at-the-start-of-2026.
[74] *Minister of Finance and another* v *Van Heerden*, 2004 (6) SA 121 (CC).
[75] Sihlobo, "South Africa's farming fortunes are positive at the start of 2026," op. cit.