South African Institute of Race Relations NPO

Submission to the Minister of Water and Sanitation,
regarding the
Revision of Regulations Regarding the Procedural Requirements
for Water Use Licence Applications and Amendments, 2023
Johannesburg,
18th July 2023

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1 Introduction

The Minister of Water and Sanitation (the Minister) has invited public comment, by 18th July 2023, on the Revision of Regulations Regarding the Procedural Requirements for Water Use Licence Applications and Amendments of 2023 (the draft Regulations). These draft Regulations were published in the *Government Gazette* on 19th May 2023, under the powers conferred on the Minister by the National Water Act of 1998 (the Act).

This submission is made by the South African Institute of Race Relations (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 No SEIA reports made available

Since September 2015 all legislation and regulation in South Africa must be subjected to a 'socio-economic impact assessment' before it is adopted. This must be done in terms of the Guidelines for the Socio-Economic Impact Assessment System (SEIAS), developed by the Department of Planning, Monitoring, and Evaluation in May 2015. The aim of this 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.[1]

[1] SEIAS Guidelines, p3, May 2015

According to the Guidelines, the SEIA system must be applied at various stages in the policy process. Once new regulations (or other rules) have 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'.[2]

A 'final impact assessment' must then be developed that 'provides a detailed evaluation of the likely effects of the [regulation] in terms of implementation and compliance costs as well as the anticipated outcome'. When the regulation is published 'for public comment and consultation with stakeholders', the final assessment must be attached to it.[3]

The Guidelines stress that the SEIA system must be applied not only to legislation, but also to 'significant regulations' and any 'major amendments of existing regulations…that have country coverage with high impacts'. In addition, where 'legislation provides an enabling framework for more detailed regulations', then 'the subordinate regulations should be the main subject of the assessment process'.[4]

However, no SEIA reports on the draft Regulations have been made available, as the Guidelines require. This has undermined necessary public consultation and made it more difficult for the public to know about the issues raised by the draft Regulations or to have an adequate say on the rules that are to govern them.

3 Inadequate public consultation

The Constitutional Court has repeatedly stressed that proper public participation in the law-making process is a vital aspect of South Africa's democracy. Relevant rulings here include *Matatiele Municipality and others* v *President of the Republic of South Africa and others*;[5] *Doctors for Life International* v *Speaker of the National Assembly and others*[6]; and *Land Access Movement of South Africa and others* v *Chairperson of the National Council of Provinces and others*.[7]

In these judgments, the Constitutional Court has elaborated on what is needed for proper public consultation. According to the court, citizens must be given 'a meaningful opportunity to be heard in the making of laws that will govern them'. They must also be given 'a reasonable opportunity to know about the issues and to have an adequate say'.[8]

[2] Guidelines, p7
[3] Guidelines, p7
[4] Guidelines, p8
[5] [2006] ZACC 12
[6] 2006 (6) SA 416 (CC)
[7] [2016] ZACC 22
[8] Ibid; see also *Minister for Health and another* v *New Clicks South Africa (Pty) Ltd and others*, [2005] ZACC 14, para 630

The best way to give citizens a 'reasonable opportunity to know about the issues' is to make available the comprehensive SEIA reports required by the 2015 Guidelines. This is particularly important in the context of the draft Regulations, which are vague and difficult to interpret. In addition, the draft Regulations are likely to undermine South Africa's food security, thereby pushing up food prices, curtailing agricultural exports, and making it more difficult for the country to afford essential food imports, such as wheat.

Given the significant harm the draft Regulations are likely to cause, it is unacceptable that no proper SEIA reports have accompanied them. The absence of these SEIA reports has undermined the public consultation process and placed the Minister in breach of what the Constitution requires.

4 Vague, uncertain, and misleading wording

Clause 1, definitions

The definition of *'black people'* is vague and uncertain. Clause 1 of the draft Regulations states that 'black people' has 'the meaning assigned to it in the Broad-Based Black Economic Empowerment Act of 2003', as amended. However, the definition in this statute is also vague and uncertain, for it provides no information on how black people are to be classified by race. Nor does it explain or lay down any process by which contested racial classifications are to be investigated and decided.

Clause 2: Purpose of the draft Regulations

According to Clause 2, the purpose of the draft Regulations is to '*prescribe the procedures and requirements for water use licence applications*'. This is misleading, as the real purpose of the draft Regulations is to impose additional substantive requirements for water use licence applications, particularly in the form of race-based ownership requirements. This undermines the separation of powers and further breaches the Constitution, as outlined below.

Clause 12: Racial requirements to be imposed via the draft Regulations

Under Clause 12(1), 'the responsible authority shall give preference to applications from black people, followed by women'.

In the absence of legislation defining 'black people' and setting out clear procedures for accurate racial classifications, this clause is vague and uncertain and is sure to be interpreted in different ways at different times by different officials. This contradicts the doctrine against vagueness of laws, as set out by the Constitutional Court in the *Land Access* case[9] and other judgments.

Under Clause 12(2), 'all applications for consumptive water use (Section 21 a, b and d) submitted to the Department [of Water and Sanitation] are expected to satisfactorily address

[9] *Land Access Movement of South Africa and others* v *Chairperson of the National Council of Provinces and others*, [2016] ZACC 22

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'.

This wording is also vague and uncertain, especially in its references to 'satisfactorily' and 'specifically'. The clause further assumes that all applications will be submitted by 'enterprises', which is not defined. However, this term prima facie excludes applications by individuals, trusts, and various other entities. There is also no clear definition of 'black people'.

Table 1: Requirements for compliance to contribute to transformation for applicants
This heading, along with the table itself, is inherently vague. 'Transformation' is not defined, while the box inserted beneath this heading is also uncertain in its meaning. Among other things, it is not clear whether the criteria set out in column 1, headed Section 21 a and b, must be read cumulatively with the criteria set out in column 2, headed Section 21(d).

The meaning of the criteria in both columns is also uncertain. In stating 'up to 250 000 m3' in column 1, do the draft Regulations refer to 'taking' water up to this limit (under Section 21(a) of the Act), or 'storing' water up to this limit (under Section 21(b) of the Act) or both? It is also unclear to what extent the land sizes listed in column 2 of Table 1 (for example, 'up to 100 ha') relate to 'stream flow reduction activities' – such as 'the use of land for afforestation…for commercial purposes' – under Section 36 of the Act.

As for column 3 of Table 1, this lists '% shares to be allocated to blacks', but the meaning of 'blacks' is uncertain. In addition, how relevant shareholdings are to be calculated is unclear, while the legal basis for the stipulated percentages (ranging from 25% to 75%) is uncertain.

5 The draft Regulations are *ultra vires* the Act

Section 27 of the Act requires a responsible authority, in issuing a water use licence, to 'take into account all relevant factors', including the 11 that it lists. These factors include 'existing lawful water uses', along with the need 'to redress past racial and gender discrimination'. Other listed factors include the extent of 'investments already made', the 'socio-economic impact' of allowing or refusing the requested water use, and the importance of ensuring the 'efficient and beneficial use of water in the public interest'.[10] All these factors are equally relevant and all of them must be taken into account.

The responsible authority may not give primacy to the need to redress past racial discrimination and overlook the 10 other factors that are expressly listed. This has been confirmed, moreover, by both the Pretoria high court and Supreme Court of Appeal in the *Goede Wellington Boerdery* (*Goede Wellington*) case.

[10] Section 27, National Water Act, 1998; *Business Day* 28 August 2018

This case began when Goede Wellington's application for the transfer of a water-use right was denied on racial grounds, prompting it to seek judicial review of the tribunal's decision.[11] Handing down his ruling in 2011, Judge James Goodey criticised the Department's application of the Act, which clearly states that all 11 factors must be considered. This means that an applicant's race cannot be the sole consideration in deciding on a water-use licence. The department appealed against this ruling, but the Supreme Court of Appeal upheld it in 2012.[12]

In a 'National Water and Sanitation Master Plan' drawn up in 2018 and approved the following year, the Department said it aimed to amend the 1998 Act to 'make equity the primary consideration in water allocation'.[13] However, no such amendment to the Act has been adopted by Parliament or brought into operation.

Instead, the minister is trying to achieve this result by means of the draft Regulations. This attempt is in breach of the doctrine of the separation of powers, under which legislative powers are reserved for Parliament, while the executive is confined to implementing the rules which Parliament has laid down.

The minister is seemingly trying to circumvent this doctrine by claiming that the draft Regulations deal only with procedural issues. However, this claim is false, as the draft Regulations clearly introduce substantive new rules for the granting of water use licences. Attempting to insert new rules in this way contradicts the separation-of-powers doctrine and is unconstitutional.

In addition, the proposed new rules are *ultra vires* the powers conferred on the minister by the 1998 Act and are unlawful for this reason too. There is nothing in the 1998 Act which allows the minister to decree that the responsible authority must 'give preference to applications from black people, followed by women', as the draft Regulations require in Clause 12(1). Nor is there any legislative authority in the Act for the draft Regulation's demand, in Clause 12(2), that 'the enterprise in respect of the application must allocate shares to black people in the proportions stipulated in Table 1'. These 'stipulated' proportions range from 25% to 75%, yet there is no legislative authority in the Act for their introduction.

The Constitutional Court has recently confirmed, in *Minister of Finance* v *AfriBusiness NPO*, that regulations that are *ultra vires* the powers conferred on a minister by a particular statute are invalid and unconstitutional.[14] The draft Regulations fall clearly within this category. They are therefore unconstitutional and must simply be withdrawn.

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[11] Anthony Turton, 'Sitting on the Horns of a Dilemma: Water as a Strategic Resource in South Africa', *@Liberty*, IRR, Johannesburg, Issue 22, November 2015, p3

[12] Ibid; *Makhanya* v *Goede Wellington Boerdery* [2012] ZASCA 205, paras 19, 37-40

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

[14] *Minister of Finance* v *AfriBusiness NPO* [2022] ZACC 4; https://www.saflii.org/za/cases/ZACC/2022/4.pdf, paras 114-116, 118-119

6 The way forward

The draft Regulations are unconstitutional on procedural grounds, for a failure to facilitate proper public consultation informed by comprehensive SEIA reports. They are also unconstitutional on substantive grounds. In part, their wording is too uncertain to comply with the doctrine against vagueness of laws. This doctrine is an integral part of the rule of law, the 'supremacy' of which is guaranteed by the founding provisions of the Constitution. In addition, many clauses in the draft Regulations are (to cite the words of the Constitutional Court in *Minister of Finance* v *AfriBusiness NPO*) 'invalid for being *ultra vires* the enabling sections' in the Act. The draft Regulations therefore cannot lawfully be adopted and must be withdrawn.

South African Institute of Race Relations NPO **18th July 2023**