

Agbiz prepares comments on regulations on water use license applications

On the 19th of May 2023 the Department of Water and Sanitation published a notice called the revision of regulations regarding the procedural requirements for water use license applications and renewals. The due date for comments is 19 July 2023.

The draft regulations provide, amongst other things, that applicants for water licenses will have to initiate a pre-application engagement with the Department first. During this engagement the applicant will be advised on the need for an authorization, the type of authorization and the requirement and information needed to apply. Also, it will be indicated whether a site visit is required. Thereafter an application for a water use license can be submitted. The so-called responsible authority will assess the application. A non-refundable application fee will have to be paid. There will be an opportunity for interested and affected parties to object to a license application. If the property is subject to a land claim, both the Land claims Commissioner and the land claimants will have to indicate that they do not object to the license application.

Chapter 5 of these draft regulations deal with the promotion of equity and redressing past racial and gender discrimination as contemplated in section 27(1)(b) of the National Water Act of 1998. Section 27 reads as follows: "In issuing a general authorization or licence a responsible authority must take into account all relevant factors, including-

- (a) existing lawful water use.
- (b) the need to redress the results of past racial and gender discrimination.
- (c) efficient and beneficial use of water in the public interest.
- (d) the socio-economic impact—
 - (i) of the water use or uses if authorized.
 - (ii) of the failure to authorize the water use or uses
- (e) any catchment management strategy applicable to the relevant water resource.
- (f) the likely effect of the water use to be authorized on the water resource and on other water users.
- (g) the class and the resource quality objectives of the water resource.
- (h) investments already made and to be made by the water user in respect of the water use in question.
- (i) the strategic importance of the water use to be authorized.
- (j) the quality of water in the water resource which may be required for the Reserve and for meeting international obligations; and
- (k) the probable duration of any undertaking & which a water use is to be authorized.

The Regulations now propose that preference shall be given to applications by black people followed by women. Secondly all applications for consumptive water use in terms of sections 21 (a), (b) and (d) are expected to satisfactorily

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address section 27(1) (b) of the Act. Specifically shares in the enterprise must be allocated to black people according to the table below:

Section 21 a and b	Section 21 (d)	% Shares allocated to blacks
Up to 250 000 m ³	Up to 100 ha	Exempted
250 000 to 500 000 m ³	100 to 500 ha	25 %
500 000 to 1 000 000 m ³	500 to 1 000 ha	50 %
More than 1 000 000 m ³	More than 1 000 ha	75 %

Section 21(a) deals with the taking of water from a water resource, section 21(b) with the storing of water and 21(d) with engaging in a streamflow reduction activity.

The Regulations also provide for compulsory licensing in clause 13 thereof, within a period of 60 days, which is very short notice.

Agbiz is preparing a draft submission that will be sent to members soon. In the submission Agbiz makes the following points:

- Whilst we acknowledge that transformation must play a role in ensuring equitable access, the means provided for in these regulations should be reconsidered.
- This approach to redress is overly simplistic, and we are concerned that it could lead to arbitrary decision-making and litigation.
- Black shareholding cannot be the only or overriding criteria in the awarding of water licenses. This approach runs contrary to the decision of the Supreme Court of Appeal in the Goede Wellington case. The Court confirmed that the transformation imperative must be applied within the context of all requirements contained in section 27 of the Act.
- Equating the percentage of black shareholding to a juristic entity's transformation status undermines the BBBEE Act as it only focusses on one element namely ownership.
- The requirement to get input from both the Land Claims commissioner and land claimants is onerous. Notice to the Land claims Commissioner where a claim has already been gazette should suffice.

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