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Another Watergate?

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Legal Brief

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Following the electricity crisis in 2008, experts in the water sector are warning that South Africa will soon face a similar catastrophe in the form of a water crisis. Section 24 of the Constitution of the Republic of South Africa, 1996 ("the Constitution") requires the government to bring about equitable access to water resources, which means that every South African has a fundamental right of access to sufficient water. Given the current predictions over the current state of South Africa's water resources, it is necessary to enquire whether or not the government is fulfilling its constitutional mandate.

Background

South Africa is a country with considerable water demands. These pressures include the day-to-day requirements of industry, mining, agriculture and domestic use. With present demands, South Africa is considered to be one of the countries currently experiencing water stress. Whilst South Africa is categorised as a country that is in the midst of a water crisis, there are still between 12 and 14 million South Africans who still do not have access to safe water and over 20 million people are without adequate sanitation.¹ In a few years, once the needs of those who are not currently being supplied with water have been met, coupled with a growing population and economic growth, South Africa will then indeed be in the threshold of a water emergency.

The legislative framework

South Africa's legislative framework, pertaining to water, was previously characterised by a plethora of Acts that made the framework cumbersome and often inefficient. These Acts were repealed when the Constitution and the National Water Act No. 36 of 1998 ("the Water Act") were promulgated. Before the crisis is discussed, South Africa's legal framework, pertaining to water resources, will be discussed.

The Constitution seeks to "heal divisions of the past" and "improve the quality of life of all citizens and grants everyone the right to have access to sufficient water."² The government is tasked with the duty of ensuring the realisation of the right by taking legislative and other measures into account.³ Under the current framework, all households are entitled to six free kiloliters of water per month, which is provided free of charge as a basic service. The Constitution also provides that every person has a right to an environment that is not harmful to his or her health or well being.⁴ Every person also has the constitutional right to have the environment protected for the benefit of present and future generations through legislative and other measures.⁵ One of these measures includes the sustainable use of natural resources while promoting justifiable economic and social development.

The enactment of the Water Act was a response by government to its constitutional responsibility to facilitate the provision of water to every South African. The preamble of the Water Act amplifies this responsibility - it records that water is a natural resource that belongs to all people and that historically discriminatory laws and practices have prevented equal access to water and

¹ White Paper on a National Water Policy for South Africa Department of Water Affairs and Forestry April, 1997

² Section 27(1)(b) of the Constitution.

³ Section 27(2) of the Constitution.

⁴ Section 24(a) of the Constitution.

⁵ Section 24(b) of the Constitution.

the use of water resources. The preamble goes on to state that government is responsible for and has authority over the nation's water resources and their use and that the ultimate aim of water resource management is to achieve the sustainable use of water for the benefit of all users. The purpose of the Water Act is to ensure the nation's water resources are protected, used, developed, conserved, managed and controlled in ways that take into account basic human needs. These needs arguably include those of present and future generations, reducing and preventing pollution and the degradation of water resources and promoting the efficient, sustainable and beneficial use of water in the public interest.

The Water Services Act No. 108 of 1997 ("the Services Act") was enacted in order to give practical effect to the constitutional right to water. The Services Act does this by creating structures for the supply of water and sanitation. One of the objectives of the Services Act is the promotion of effective water conservation.

We can now turn to look at the current situation that faces South Africa.

The current crisis

It appears that despite the legislative mechanisms, detailed above, South Africa finds itself in the face of a looming water crisis. This crisis appears to be due to three areas of concern:

- ▶ the pollution of water sources by industrial and mining activities has long been a concern to environmentalists. Sources of water such as rivers and wetlands, which feed into water storage dams, are becoming increasingly polluted with chemicals that result in fatalities if ingested by animals or humans;
- ▶ there are more concerns over the poor maintenance of dams. The result of the poor maintenance is twofold: the first problem is that many dam structures are weak and are becoming silted with only 54 percent of dams meeting compliance standards, and secondly, the result of poorly maintained dams is increasing costs of purification of drinking water;
- ▶ water and sewage infrastructure is currently old and dilapidated and an insignificant amount of resources are being allocated in order to correct this situation. Municipalities are being placed under tremendous pressure to service previously disadvantaged areas with a result that budgets allocated to infrastructure are used on rolling out new systems and not maintaining old, more inefficient systems.⁶

The Minister of Water Affairs and Forestry ("the Minister"), in her address to Parliament, has denied that there is a water crisis facing South Africa. However, if one considers the problems listed above together with the recent debacle over the publication by Dr A Turton,⁷ the erstwhile natural resource and environment unit fellow at the Council for Scientific and Industrial Research ("the CSIR"), one can not help but ask whether or not the Department of Water and Forestry ("DWAF") has been fulfilling its legislative duty as set out in the Constitution, the Water Act and the Services Act?

The government bears the responsibility of regulating water use for the benefit of all South Africans and to ensure that this scarce resource is beneficially used in the public interest both now and in the future.

Whilst it must be remembered that government does not own South Africa's water, it does have the overall responsibility and authority to ensure that all the water in the country is managed effectively and efficiently. Despite government's responsibility, it appears that the three problems noted above are attributable to government's poor custodianship of water resources and the infrastructure for which it has responsibility:

- ▶ legislation such as the National Environmental Management Act No. 108 of 1998, as amended, and the applicable environmental provisions of the Mineral and Petroleum Resources Development Act No. 28 of 2002 exist together with the principal Acts mentioned earlier in this document, to protect water resources from pollution. It appears, however, that the relevant departments within government are not enforcing the provisions of legislation stringently to avoid problems such as pollution;
- ▶ by the Minister's own admission, during July 2007, of the 294 dams owned and managed by her department, only 54 percent, that is, 160 dams presently comply with the applicable safety standards. In this regard the provisions of the Water Act, specifically those provisions relating to the government's responsibility as a custodian of water resources,⁸ which requires it to ensure that water is protected, used, managed and controlled in a sustainable and equitable manner, are not being met;
- ▶ the Water Act also places responsibilities on the Minister to comply with certain duties to reduce the risk of dam failures. These responsibilities are in addition to the common-law responsibilities to ensure the safety of dams. Given the startling statistics recorded above it appears as though the Minister is not fulfilling her responsibility, both in terms of legislation and the common law;
- ▶ in 2003 the Department of Water Affairs and Forestry warned the country about the consequences of rolling out new water projects without setting aside enough money to maintain existing facilities;
- ▶ water services should be provided in terms of the conditions set by water services providers, which provide for measures to promote water conservation and demand management.⁹ The Minister has the power to direct executive councils, responsible for local government in a province, to intervene where water services authorities are not performing their functions effectively.¹⁰

Conclusion

It, therefore, appears that there is indeed a crisis facing South Africa's already threatened water reserves. This crisis may either lie in the fact that South Africa's water supplies are not currently being used in accordance with the principles of the governing legislation, alternatively, that the Minister is not performing her constitutional responsibility by ensuring that the environment is preserved for the benefit of present and future generations. It appears, therefore, that there is still much that needs to be done in order to for government to fulfil its constitutional responsibility.¹¹

⁶ The statement to Parliament on "Water Crisis" by L B Hendricks, Minister of Water Affairs and Forestry on 11 March 2008.

⁷ Dr Anthony Turton, Three Strategic Water Quality Challenges that Decision Makers Need to Know About and How the CSIR Should Respond, Keynote Address: A Clean South Africa, Presented at the CSIR Conference "Science Real and Relevant", November 2008.

⁸ See section 3 of the Water Act.

⁹ Section 4(2)(c)(vi) of the Services Act.

¹⁰ Section 63(1) of the Services Act.

¹¹ See section 24 and section 27(1)(b) of the Constitution.

These responsibilities include:

- ▶ implementing measures to achieve equitable access to water. These measures include equal access to water services, a just allocation of water resources and an even handed and fair approach to the benefits gained from the use of water resources;
- ▶ making progressive adjustments to water use in order to achieve sustainable use of water with the objective of striking a balance between water availability and legitimate water requirements and by implementing measures to protect water resources; and
- ▶ achieving efficient and effective water use for optimum social and economic benefit pursuant to and in line with the Constitution.

By balancing the responsibilities recorded above together with government's responsibilities in terms of common law and legislation, the crisis may indeed be dealt with in a manner that prevents a debacle similar to the one experienced by our energy sector earlier in 2008.

South Africa's legislation relating to the protection and sustainable use of water resources is world class and built on solid legal principles. If these principles are followed by government, then arguably, not only will the right of every South African to have access to sufficient water be realised but an impending water crisis will possibly be avoided.

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