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A South African Perspective on Water Rights

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This article provides a general insight into the concept of water rights and their regulation, predominantly from a South African perspective, however, also from a global impact perspective, focusing on the constitutionally guaranteed right to access to water, how water use rights can be acquired and the way in which water rights can and should be protected.

This article also addresses examples of environmental, social and governance (ESG) considerations which a company should take into account when their operations impact on the water rights of a community, emphasising the importance that has been placed on the protection of indigenous communities water rights in case law, both in South Africa and in jurisdictions around the world.

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Right to access to water

According to section 27(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution), the supreme law of South Africa, everyone has the right to have access to 'sufficient' water. As a basic human right, provided for and protected under the Constitution, access to water must be respected, promoted and fulfilled by the state.[2] This right is further enshrined in section 3(1) of the Water Services Act 108 of 1998 (WSA), which provides that everyone has the right to have access to a basic water supply and basic sanitation necessary to ensure sufficient water and an environment not harmful to health or well-being.

The state fulfils its constitutionally mandated duty to provide access to water through the Department of Water and Sanitation (DWS). The DWS is the custodian of South Africa's water resources and is responsible for the formulation and implementation of policy which governs the water sector. The legislative mandate of the DWS is to ensure that the country's water resources are protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner for the benefit of all South Africans. In order to fulfil this mandate, the DWS must support and regulate the delivery of sufficient, reliable and clean water supply and sanitation.[3]

The importance of secure and equitable access to water by all South Africans, and the potential it holds as a catalyst for socioeconomic development, is recognised in Chapter 4 of the National Development Plan and is given expression by the Government of South Africa's 2019–2024 Medium Term Strategic Framework.[4] In addition, the DWS has developed the National Water and Sanitation Master Plan in an attempt to ensure water conservation and security. A number of laws have accordingly been enacted in order to regulate and facilitate the state's constitutionally duty to provide access to water, the most relevant to this article being the National Water Act 36 of 1998 (NWA).

2 Constitution, section 7(2).

3 'Water and sanitation', South African Government, www.gov.za/about-sa/water-affairs, accessed 12 September 2023.

4 ibid.

The National Water Act 36 of 1998

The NWA was enacted in order to provide for fundamental reform of the law relating to water resources. The objectives of the NWA include recognising that South Africa's discriminatory laws and practices of the past prevented equal access to water and that water is an unevenly distributed national resource that belongs to all people of South Africa.[5] The NWA also aims to acknowledge the national government's overall responsibility for and authority over the nation's water resources and their use, including the equitable allocation of water for beneficial use, the redistribution of water, and international water matters.[6]

According to the NWA, as the public trustee of the nation's water resources and in accordance with its constitutional mandate, the national government, acting through the Minister of Water and Sanitation (the Minister), must ensure that all persons benefit from the water resources of the nation, taking into account the need for redress of the past racial and gender discrimination.[7] The Minister therefore has to strike a delicate balance between ensuring that water is allocated equitably and used in the public interest, while at the same time ensuring that the environment is being protected.

Water use rights

The NWA is founded on the principle that national government has overall responsibility for and authority over water resource management, including the equitable allocation and beneficial use of water in the public interest.[8] A person may only be entitled to use water if the use is permissible under the NWA.[9] Chapter 4 of the NWA lays the basis for regulating 'water use' and sets out the various types of licensed and unlicensed entitlements to use water. The NWA broadly defines 'water use' as including:

- taking and storing water;

5 NWA, preamble.
6 ibid.
7 NWA, section 2.
8 NWA, section 3(2).
9 NWA, section 4.

- activities that reduce stream flow;
- waste discharges and disposals;
- controlled activities (activities that impact detrimentally on a water resource);
- altering a watercourse;
- removing water found underground for certain purposes; and
- recreation.[10]

If a person intends to perform any of the water uses listed in the NWA, they must first obtain a water use licence (WUL).[11] Anyone who wishes to obtain a WUL must apply to the DWS in the form determined by the responsible authority and in accordance with section 41 of the NWA, read with the Regulations in respect of Water Use Licence Applications and Appeals[12] published under the NWA. Once the application has been submitted, the relevant authority will attend a site inspection to confirm the water uses, determine information requirements and the need for public participation.[13] The applicant will also have an opportunity to submit a WUL application technical report based on the site visit and discussions with the relevant authority.[14] The responsible authority may invite written comments from any organ of state which or person who has an interest in the matter and must afford the applicant an opportunity to make representations on any aspect of the licence application.[15] After considering all the relevant factors, the responsible authority will reach a decision whether to issue a WUL or not.[16]

In addition to a voluntary application for a WUL, section 43 of the NWA provides that if it is desirable that a water use in respect of one or more water resources within a specific geographical area be licensed in order to achieve a fair allocation of water from a water resource, promote beneficial use of water in the

10 NWA, section 21.
11 NWA, section 40.
12 Water Use Licence Application and Appeals Regulations, 2017, published under Government Notice R267 in Government Gazette 40713 of 24 March 2017.
13 Water Use Licence Application and Appeals Regulations, Regulation 10.
14 ibid, Regulation 11.
15 NWA, section 41(2)(c) and (d).
16 NWA, section 42.

public interest, facilitate efficient management of a water resource or protect water resource quality, then the responsible authority may issue a notice requiring those who want to make use of the water to apply for licences.

A person may only use water without a licence if the water use is permissible under Schedule 1 of the NWA (which includes reasonable domestic and small-scale uses), if the water use is permissible as a continuation of an existing lawful use (any water use which was lawful under the Water Act 54 of 1956 and which took place within two years prior to 1 October 1998) or if the water use is permissible in terms of a General Authorisation issued under section 39 of the NWA.[17] A General Authorisation is an authorisation to use water without a WUL, provided that the water use complies with certain conditions and falls within the relevant thresholds specified in the General Authorisation notice published in the Government Gazette. Although a WUL is not required, the water use must still be registered with the DWS prior to exercising the water use.[18] The General Authorisation may authorise all or any category of persons to use water in general or may only apply to a specific area or water resource.[19]

The responsible authority may attach conditions to every General Authorisation or WUL relating to water management and the protection of the water resource in question, the stream flow regime, and other existing and potential water users.[20]

Right to use water

According to section 3 of the NWA, the national government is regarded as the public trustee of the nation's water resources and accordingly, all potential water users in South Africa may apply for water use rights. This is in line with the principle of equality enshrined in the Constitution, which provides that 'everyone is equal before the law and has the right to equal protection and

17 NWA, section 22(1).
18 NWA, section 29(1)(b)(vi).
19 NWA, section 39(1).
20 NWA, section 29.

benefit of the law.'[21] The fact that all water users may apply for water use rights is also in line with the concept of sharing a common resource. Developing countries like South Africa have been under great scrutiny to implement policies which seek to ensure there is an equitable sharing of the benefits of natural resources, in an attempt to close the gap between the rich and the poor, while the price of commodities continues to increase.[22]

In addition to this, the NWA provides for the acknowledgment of existing water use entitlements. According to section 4(2), a person may continue with an existing lawful water use and this must be done in accordance with section 34. Section 34 provides that a person or that person's successor in title may continue with an existing lawful use, however this is subject to the conditions or obligations that attach to this use, the replacement of the use by a licence in terms of the NWA or any limitation or prohibition set out in the NWA. In addition, an authority may require that the existing lawful water use be registered.[23] Section 22(6) provides that any person who has applied for a WUL in respect of an existing lawful water use and whose application has been refused or has been granted a licence for a lesser use than the existing lawful water use, may claim compensation for financial loss suffered as a consequence of the prejudice to the economic viability of an undertaking in respect of which the water was used. The NWA also provides for the granting of a licence to use water found underground on land that is not owned by the applicant, provided that there is good reason for this and the land owner consents.[24]

Although all South Africans may apply for water use rights, what constitutes 'sufficient' water is not easy to determine and poses various challenges. The Constitution itself does not provide much guidance on what qualifies as a sufficient quantity or quality of water. The WSA defines basic water supply as:

21 Constitution, section 9(1).

22 Bimo Abraham Nkhata, Charles Breen & Alfons Mosimane, 'Engaging common property theory: implications for benefit sharing research in developing countries', *International Journal of the Commons* (Vol. 6, No. 1, February 2012 at page 53).

23 NWA, section 34(2).

24 NWA, section 24.

[The] prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene.[25]

Regulation 3 of the Regulations Relating to Compulsory National Standards and Measures to Conserve Water[26] goes a step further and quantifies the minimum standard of basic water supply as being:

> *[A minimum] quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month (i) at a minimum flow rate of not less than 10 litres per minute; (ii) within 200 metres of a household; and (iii) with an effectiveness such that no consumer is without a supply for more than seven full days in any year.*

As mentioned above, the Minister has to safeguard that a balance is struck between ensuring that the rights of all South Africans to sufficient water are met, while at the same time ensuring that the resources of the country are protected. This will be discussed in further detail below.

Protection of water resources

The NWA emphasises the protection of water resources by seeking to maintain the quality of water resources to the extent that the water resources may be used in an ecologically sustainable way, preventing the degradation of water resources, and rehabilitating water resources.[27] Section 19(1) of the NWA imposes a duty of care on owners of land, people in control of land or those who occupy or use the land on which any activity or process is or was performed or undertaken; or any other situation exists, which causes, has caused or is likely to cause pollution of a water resource and provides that such people must take all reasonable measures to prevent any such pollution from occurring, continuing or recurring.

25 WSA, section 1 'basic water supply'.

26 Regulations Relating to Compulsory National Standards and Measures to Conserve Water, published in Government Notice R509 published in Government Gazette 22355 of 8 June 2001.

27 NWA, section 1 'protection'.

The National Environmental Management Act 107 of 1998 (NEMA) contains a similar duty of care and provides that:

> *[Every] person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment.*[28]

Like the duty of care principle under the NWA, section 28(2) of NEMA provides that the obligation to take reasonable measures is imposed on owners of land or premises, people in control of land or premises or those who have rights to use the land or premises on which or in which any activity or process is or was performed or undertaken, or any other situation exists, which causes, has caused or is likely to cause significant pollution or degradation of the environment.

The duty of care imposed by NEMA and the NWA to prevent, protect and mitigate the impacts of pollution or degradation of water resources is in line with and finds application in the national policies, statutes and guidelines applicable to sensitive water catchment areas. Furthermore, Chapter 2 of the NWA sets out the development of strategies to facilitate the proper management of water resources, which includes the development of a national water resource strategy to provide the framework for the protection, use and conservation of water resources for the country as a whole, as well as the framework within which water will be managed at catchment level. In addition to this, section 8 of the NWA sets out that each catchment management agency must develop a catchment management strategy for the water resources within its management area. Furthermore, the Minister may make regulations which limit or restrict the purpose, manner or extent of water use and regulate or prohibit any activity in order to protect a water resource or habitat.[29] NEMA also expressly highlights the importance of protecting water resources and provides that:

28 NEMA, section 28(1).

29 NWA, section 26(1)(a) and (g).

Sensitive, vulnerable, highly dynamic or stressed ecosystems, such as coastal shores, estuaries, wetlands and similar systems require specific attention in management and planning procedures, especially where they are subject to significant human resource usage and development pressure'.[30]

While it is crucial to protect these water resources in order to ensure that these resources are conserved so that they may meet the basic human needs of present and future generations, it is also important to specifically protect the water resources of communities who find themselves in areas of impact at the expense of their water rights.

Protecting the water rights of communities

Communities located in areas that are subject to mining or other large-scale development activities may experience a negative impact on the surrounding water resources. This poses a significant risk for communities who may already find themselves in a position where adequate water resources are not guaranteed. The Committee on Economic, Social and Cultural Rights, the body established by the United Nations to authoritatively interpret the meaning of the rights set forth in the International Covenant on Economic, Social and Cultural Rights (ICESCR) has stated that the 'human right to water entitles everyone to sufficient, safe, acceptable physically and affordable water for personal and domestic uses'.[31] This right is available to all and cannot be discriminated against. It is thus important that companies whose operations pose a threat to the water resources of a community (eg, mining operations) manage the resources in a proper manner. Mining companies, in particular, must ensure that their principles align with global sustainable development goals, such as, the Initiative for Responsible Mining Assurance (IRMA) (which is a multi-stakeholder initiative between industry and civil society and whose

30 NEMA, section 2(4)(r).

31 Ellen Lutz, 'Indigenous Peoples and Water Rights', *Cultural Survival Quarterly Magazine* (2005), www.culturalsurvival.org/publications/cultural-survival-quarterly/indigenous-peoples-and-water-rights, accessed 12 September 2023.

objective, through the guidance of the IRMA Standard,[32] is to achieve more socially and environmentally responsible mining) and when it comes to human rights and water, extractive industry companies must ensure that they behave in a socially responsible manner, particularly if they seek to meet investor expectations.[33] Projects will be most successful when they are sustainable, involve local involvement and take the ESG factors of their operations into consideration.[34]

In this regard, corporate governance has grown in importance in recent years and has been added to the integrated concept of environmental and social risk management. Sustainable finance is now frequently used as a catalysed for incorporating the various ESG principles, as almost a necessity, for any project requiring funding.

International frameworks, such as the United Nations Global Compact (UNGC),[35] United Nations' Principles for Responsible Investment (UNPRI),[36] United Nations Equator Principles (UN-EP),[37] the United Nations Environmental Programme's Finance Initiative (UNEPFI)[38] and the United Nations Environmental Programme's Finance Initiative's Principles for Sustainable Insurance (UNEP-PSI),[39] to reference only a few, increasingly

32 Initiative for Responsible Mining Assurance (IRMA) (2021), https://responsiblemining.net/what-we-do/standard, accessed 12 September 2023.

33 Nadine James, 'Climate change, ESG obligations will make water issues more challenging for miners', Creamer Media's *Engineering News* (2021), www.engineeringnews.co.za/article/climate-change-esg-obligations-will-make-water-issues-more-challenging-for-miners-2021-03-12, accessed 12 September 2023.

34 'Water 2021: Reform Urgently Needed', Creamer Media's Water Report (2021).

35 United Nations Global Compact, www.unglobalcompact.org, accessed 12 September 2023.

36 United Nations' Principles for Responsible Investment, www.unpri.org/pri/about-the-pri, accessed 12 September 2023.

37 United Nations Equator Principles, https://equator-principles.com/wp-content/uploads/2021/02/The-Equator-Principles-July-2020.pdf, accessed 12 September 2023.

38 United Nations Environmental Programme's Finance Initiative, www.unepfi.org, accessed 12 September 2023.

39 United Nations Environmental Programme: Finance Initiative, Principles for Sustainable Insurance, https://www.unepfi.org/insurance/insurance/, accessed 12 September 2023.

require signatories, mostly financial institutions as lenders to the extractive industry, to integrate ESG considerations in lending decisions to avoid or mitigate financial losses, reputational risk, or harm to the environment and communities.

Today, almost every reputable financiers' ESG lending risk criteria inevitably include specific references to climate change, biodiversity and water related risks, all of which forms part of a transparent, responsible and meaningful lending risk assessment process. For example, the UNGC's mission[40] is to, among other things, assist clients of the signatories, many of which are in the extractive industry, to align their own internal corporate strategies and operations with the United Nations Sustainable Development Goals[41] and specifically the 10 Principles on Human Rights, Labour, Environment and Anti-corruption.[42]

In as far as the protection of water rights are concerned, one of the initiatives that UNGC signatories (developed from goal number 17)[43] can be part of is the Water Action Hub,[44] which is an initiative aimed at raising global awareness about, and catalysing collaboration in respect of, critical lessons on water sustainability and climate resilience.

The UNPRI, an investor initiative in partnership with UNEP Finance Initiative and the UN Global Compact provides that signatories to UNPRI must report on their responsible investment activities annually otherwise they will be delisted. As from 2020 it became compulsory for signatories to report on climate change indicators.

40 United Nations Global Compact Mission, www.unglobalcompact.org/what-is-gc/mission, accessed 12 September 2023.

41 United Nations Sustainable Development Goals, www.un.org/sustainabledevelopment/sustainable-development-goals, accessed 12 September 2023.

42 United Nations Global Compact, www.unglobalcompact.org/what-is-gc/mission/principles, accessed 12 September 2023.

43 United Nations Global Compact, Goal 17: Strengthen the means of implementation and revitalise the global partnership for sustainable development', United Nations Global Compact, www.unglobalcompact.org, accessed 12 September 2023.

44 https://wateractionhub.org, accessed 12 September 2023.

The importance of initiatives such as the UNPRI is illustrated by the following quote:

> *The Principles for Sustainable Insurance provide a global roadmap to develop and expand the innovative risk management and insurance solutions that we need to promote renewable energy, clean water, food security, sustainable cities and disaster-resilient communities.'United Nations Secretary-General (June 2012)*

Likewise, the United Nations Equator Principles represent a risk mitigation framework for the financial industry, applied as part of the credit risk assessment process (such as an assessment of the relevant water usage, water intensity and water source impacts), in order to avoid complicity in human rights abuses and environmental harm through their lending practices, and the associated financial, reputation, and legal risks that can result from questionable projects.

UNEP Version 4 (UNEP4) provides that within the project finance and private equity sector, signatories to the UNEP4, must report annually on the progress in implementing its policies and processes and give statistics on the number of qualifying transactions, project categorisations and project locations.

In line with the above-mentioned global initiatives, the South African National Treasury, on 15 May 2020, published the draft technical paper titled 'Financing a Sustainable Economy' (the Technical Paper).[45] The paper has since seen various ad hoc amendments subsequent to its first publication. In essence, it provides a framework for financial institutions to increase their efficiency in disclosing public information on green practices and investments. The Technical Paper, among other things, outlines draft recommendations on how financial institutions are to account for climate change and other ESG risks in their lending practices and or criteria. It also introduces guidance on the establishment of minimum standards and best practices for financial institutions. It aims to draw the attention of stakeholders, predominantly the fossil

45 South African National Treasury, Financing a Sustainable Economy – The Technical Paper, www.treasury.gov.za/publications/other/Sustainability%20technical%20paper%202020.pdf, 15 May 2020, accessed 12 September 2023.

fuel extractive and industrial manufacturing industries, to the extent of the financial sector's vulnerability to ESG Risks caused by climate change, water and air pollution, degradation and fossil fuel resource depletion.

In addition, signatories to the voluntary South African Code for Responsible Investing (CRISA) initiative[46] must strive to integrate sustainability issues, including ESG, into long-term investment strategies (ie, an institutional investor), by virtue of its direct share ownership in, for instance, a mining entity or even just a partial ringfenced share ownership in a mining project, should use its ability to influence and encourage the relevant mining company to apply sound governance principles and to care for the environment in which it operates, especially in the application of the duty of care principle towards the protection of water resources in general, and more specifically the rights of communities to have access and use to potable water resources.

The CRISA sets out the governance duties of institutional investors in relation to the overall governance system including engagement with companies on ESG issues.

It is thus clear that there is an inevitable link between long-term ESG related risks, especially as same are linked to the extractive industries, and implementing reasonable measures to mitigate the risks associated with these anticipated environmental and social disaster (eg, water contamination, water scarcity, flooding, drought and the destruction of infrastructure). Equitable governance of these risks is of critical importance for both producers, lenders, insurers and consumers.

From a practical ESG implementation perspective, the board of a company is primarily responsible for the management of the affairs of the company, including the incorporation of ESG considerations into all aspects of the

46 The Institute of Directors in Southern Africa, South African Code for Responsible Investing, 2011, https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/79874DB1-8300-49EB-AE0D-993809CAAA6C/CRISA_Code_for_Responsible_Investing_in_South_Africa.pdf, accessed 12 September 2023.

company, and directors need to be able to evaluate the risks that arise from these ESG factors.[47]

While ESG reporting is an important tool in ensuring environmental considerations are taken into account by placing a large emphasis on climate change, the critical importance of water as a resource and its protection is being under-represented and this runs the risk that the environmental and social issues which are associated with water will not be solved.[48]

We all agree that water is a key sustainability challenge in extractive operations, since a mine is dependent on water for its processing activities. The global impact and ever increasing water footprint of mining operations is substantial, however, more often than not, significant risks related to water quantity and quality, occurs on a local scale. Managing the sustainable use of water in mining operations is a vitally important contribution towards achieving the global sustainable development agenda, especially as access to potable water is seen as a basic and fundamental human right. As a result, we have seen an ever-evolving trend in the extractive industry's drive to increase their focus on water related risks as an integral part of their overall business risk or more informally, their licence to operate strategy mainly because of the following key external drivers:

- stricter regulatory regimes governing water access and the way we use water, caused by impacts of climate change (ie, increases in extreme, less predictable weather conditions) which in turn affects the availability of water resources globally;
- a surge in the global demand for 'green' commodities that supports the production of low-carbon technologies, as countries gradually move towards low carbon economies (ie, renewable energy, healthcare and technology industries);

47 Ezra Davids & Ryan Kitcat, 'South Africa: Environmental, Social and Governance Law 2021', ICLG.com (2020), https://iclg.com/practice-areas/environmental-social-and-governance-law/south-africa, accessed 12 September 2023.

48 Will Sarni, 'We need to rethink ESG to ensure access to water and sanitation for all', World Economic Forum (2021), www.weforum.org/agenda/2021/08/rethink-esg-to-ensure-access-to-water-and-sanitation-for-all, accessed 12 September 2023.

- rising demands for responsible sourcing and investment practices, that clearly demonstrates a company's support for demonstrable water stewardship;
- finding the right balance between the mine's water needs and engagement with communities to determine their needs, and trying to find an equitable co-existing model to manage water as a scare but shared resource;
- water is a precious commodity and the quantity and quality available for mining operations often don't match community needs in contrast with the needs of mining and mineral processing; and
- informed and responsible development of the extractive industries is vital to amplify a more sustainable future.

Going forward the extractive industry must consider the ESG risks related to water scarcity and potential contamination risks, such as:

- stricter regulatory regimes establishing mandatory limits to address water scarcity and contamination resultant from abstraction and dewatering or other water usage activities;
- limited access and availability of water in the geographical jurisdictions in which the mine operates (ie, production constraints due to droughts or extreme weather conditions);
- competing for resources with local communities, where mismanagement of water can lead to often violent community conflicts, impact on enterprise value and reputational damage; and
- lack of proper planning and management of mine waste and effluent, which may result in toxic spills, acid mine drainage, red mud contamination, which in turn may lead to severe and costly production constraints and most likely reputational damage.

The mitigation of water-related ESG issues is imperative for the lawful and sustainable continuation of a licence to operate across the entire extractive sector.

Stakeholders (ie, the government, investors, customers, employee and community members) are increasingly interested in how companies perform as stewards of the environment, especially in respect of measurable water stewardship. As such companies are now hard pressed to demonstrate:

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- the kind of water performance indicators that they track and report on, both internally to their boards or externally through public reporting;
- the consideration of actual emerging environmental, especially water-related issues and concerns that may impact their operations, and how these environmental issues and concerns are incorporated in to planning and operational strategies;
- investigating and putting in place practical and implementable mitigation measures to address the physical risks resulting from climate change (eg, flooding and extreme weather events) on the water resources to be impacted by their extractive activities, and as a result, being able to determine the actual or potential impact on the company's operating assets, markets and supply chains;
- how the company's approach to water management and actual water requirements are being impacted by government climate change policy and associated regulatory frameworks (eg, carbon pricing or taxes); and
- the evaluation, improvement and monitoring its human rights performance, especially related to community interaction in respect of water scarcity and mitigation of potential contamination risks.

As mentioned before, the Committee of the ICESCR calls upon governments to give attention to groups who have traditionally faced difficulty in exercising their water rights and to ensure that indigenous peoples access to water resources is protected and controlled.[49]

There are many South African cases which emphasise that basic water rights, such as the right to temporarily or permanently transfer water from one user to another, must be protected.

A recent example of the importance of protecting fundamental constitutional rights relating to the transfer and trading for compensation of water use entitlements in South Africa is the landmark decision delivered by the Constitutional Court of South Africa in *Minister of Water and Sanitation and Others v Lotter N.O. and Others*; *Minister of Water and Sanitation and Others v Wiid and Others*; *Minister of Water and Sanitation v South African Association for Water Users Associations* [2023] ZACC 09.

49 Nadine James op cit note 33.

The interpretation of the Constitutional Court is particularly relevant in the agricultural and mining sectors, which interact on a regular basis and where the common use of water resources and transfer of water use entitlements relevant to such common resource is often pivotal to a mutually beneficial and equitable sharing arrangement, and by direct implication, inter alia, the sustainability of food and employment security in South Africa.

The outcome of this judgment is also significant from a mergers and acquisitions (M&A) perspective, since in many commercial transactions, security of water supply and access to the lawful use of water are crucial considerations. A water use licence is transferable in the context of broader commercial transactions, on application of the 'successor in title' language included under section 51 of the National Water Act.

In the context of the importance of the judgment, it needs to be appreciated that usually, following the closure of an M&A transaction, water use rights transfer to a successor in title, by operation of law. Consequentially, in a sale of business transaction, the purchaser will become the successor in title of any lawful water uses associated with the business operation, post-closure of the transaction.

If the Constitutional Court had not ruled that the unilaterally decided moratorium on the transfer of water rights in South Africa was irrational and unjustifiable, it could have caused catastrophic implications for the South African economy.

In what can only be assumed to be a response to the Constitutional Court judgment, the legislature recently proposed controversial amendments to the Regulations Regarding the Procedural Requirements for Water Use Licence Applications, as provided for in section 26(1)(k) of the National Water Act.

The draft revised regulations introduce proposed thresholds of abstraction volumes of water against the level of black ownership in applications submitted for new water use allocations, in line with the government's objective to ensure that there are changes to water use allocations, to address the disparities in access to water use from the Apartheid.

It is important to note that the proposed revised Regulations will only be relevant to new water use licence applications, which effectively mean that the

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amendments will not impact current water use entitlement holders and only impact an estimated 1.5 per cent of water resources in South Africa that have not already been allocated. The proposed revised Regulations are currently in the public commentary phase.

South African case law also entrenches the protection of indigenous communities' rights to equitable water availability and use, with the seminal case being that of *Mazibuko v City of Johannesburg*,[50] in which the Constitutional Court held that the constitutional protection of water rights stems from the fact that 'water is life'.[51] In the case of *Federation for Sustainable Environment and Others v Minister of Water Affairs*,[52] a mining and farming community in Mpumalanga was affected by acid mine drainage which led to a contamination of water resources.[53] The court held that the Minister has a duty to take progressive steps towards the realisation of communities' rights of access to water and must engage with communities and inform them of the plan to achieve the realisation of this right.[54] More recently in the case of *Baleni and Others v Minister of Mineral Resources and Others*,[55] the High Court in Pretoria heard a matter in which the members of the Umgungundlovu community approached the court for the right to consult and consent to projects occurring on their land. The applicants contended that their ancestral land, which was the proposed site for the mining activities to occur, provided, amongst other things, the water supply on which the members of the community relied.[56] The applicants argued that the community had an intimate cultural connection with the land and that without their free prior consent, they would lose their rights, inclusive of their inherent constitutional right to use water on their land for their own purposes, in the land as well as their way of being.[57] The judge

50 *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC).
51 ibid, para 1.
52 *Federation for Sustainable Environment and Others v Minister of Water Affairs* (2012) (ZAGPPHC).
53 ibid, para 4.
54 ibid, para 24.
55 *Baleni and Others v Minister of Mineral Resources and Others* 2019 (2) SA 453 (GP).
56 ibid, para 11.
57 ibid, para 27.

upheld the community's contentions and ruled that a community must not be deprived of their land without their consent.[58] In this way, the court emphasised the importance of protecting the rights, including the water rights, of indigenous communities, which are often disproportionately affected by projects such as mining projects.[59] This is a step in the right direction as it is a move away from artificial consultation with affected communities which at most results in the offering of a meagre compensation that does not always follow.[60] Communities are now required to provide their fee, prior and informed consent to the mining operations and are able to have a real say in the protection of their land, resources and rights.

South Africa is largely following international statutory paradigms and comparative case law in consideration of prioritising the importance of protecting the essence of water rights (ie, the resources itself). For example in Quebec, Canada, the Magpie River in Côte-Nord was granted legal personhood by the local municipality of Minganie and the Innu Council of Ekuanitshit.[61] What this essentially means is that the river itself has its own rights and the potential ability to protect its own rights.[62] Canada is not the first country to pass a resolution of this kind. In 2008, Ecuador enshrined the legal rights of nature in its constitution, closely followed by Bolivia in 2011 and New Zealand in 2017, which was the first country to grant legal rights to a river. This was followed by Uttarakhand (an Indian state) in 2017 and Bangladesh in 2019.[63] In Colombia, the Atrato River was granted rights in order to protect the rights to life, health and water of the indigenous community, and the government and community representative acted as the legal representatives for the river's rights.[64] Following these developments, many countries have increased recognised

58 ibid, para 79.

59 'South African indigenous community win environmental rights case over mining company', UN Environment Programme (2018), www.unep.org/news-and-stories/story/south-african-indigenous-community-win-environmental-rights-case-over-mining, accessed 12 September 2023.

60 ibid.

61 Nadine James op cit note 33.

62 ibid.

63 ibid.

64 Judgment T-622/16 (the *Atrato River* case), Constitutional Court of Colombia (2016).

rights to natural resources, established frameworks creating limits on water allocation rights and seen a number of lawsuits occurring for non-compliance with these restrictions. There has also been an increase in the amount of case law across the world around the need to protect the water rights of indigenous communities or alternatively negotiate suitable set-offs or compensation. The Human Rights Committee, in terms of the International Covenant on Civil and Political Rights, held in the *Angela Poma Poma v Peru*[65] matter that served before it, that it constituted a violation to culture and religion where the indigenous Aymara peoples free, prior and informed consent was not obtained prior to depriving them of access to water and that the measures implemented must ensure that they do not endanger the survival of the community. In Chile, the First Environmental Court of Antofagasta ruled that Barrick Gold had to stop construction of its large-scale Pascua-Lama gold and silver mine and that the mine was to be definitively and totally closed.[66] The company's activities had detrimentally impacted the glaciers and rivers in the valley, which were the principal source of water for the indigenous communities in this area, thereby not only impacting their right to access to water but also their health.[67] The company was ordered to pay a fine of US$9 million for the destruction of the water resources. Finally, in the state of Arizona the contentious Resolution Copper mine has been further halted by the decision of the US Department of Agriculture to direct the US Forest Service to rescind its decision to transfer land for the construction of the mine.[68]

These decisions indicate how jurisdictions around the world are emphasising the importance of protecting water resources and the water rights of communities.

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65 Human Rights Committee, Communication No. 1457/2006, Doc. CCPR/C/95/D?1457/2006 of 27 March 2009.

66 'Historic Win for Communities in Chile – Barrick Gold's Pascua Lama Project Permanently Put to Rest', *MiningWatch Canada* (2020), https://miningwatch.ca/news/2020/9/18/historic-win-communities-chile-barrick-gold-s-pascua-lama-project-permanently-put, accessed 12 September 2023.

67 ibid.

68 'Resolution Copper Project and Land Exchange Environmental Impact Statement', US Department of Agriculture Tonto National Forest (2021), www.resolutionmineeis.us, accessed 12 September 2023.

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