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Regulations published on the procedural requirements for water license applications

On the 24th of March the Department of Water and Sanitation promulgated regulations laying out the procedure that will need to be followed by an applicant seeking a water use license in terms of the National Water Act. Draft regulations were published for public comment just over two years ago and hence the regulations published in March now have binding legal effect. Although there is no formal opportunity to pass comments at this stage, Business Unity South Africa, supported by Agbiz, is attempting to secure a meeting with the Department to engage on the new regulations.

Although the regulations are procedural in nature, it can have a significant impact on the agro-food value chain. Many primary producers have existing lawful use rights however the Act makes provision for the surrender of such a right in favour of a water use license, furthermore, all new irrigation ventures and expansions will require a license and consequently will need to follow the procedure in these regulations. The primary producers' ability to comply with the procedure and obtain a water license is paramount to agribusinesses as it directly affects the demand for inputs and availability of primary agricultural products for beneficiation. Furthermore, the land's productive potential is greatly influenced by the availability and accessibility of water, which in turn affects the collateral value of the land. It is therefore in the best interests of Agribusinesses that procedural regulations are enabling in nature and do not impose requirements that will be beyond most producer's ability to comply with.

The regulations make liberal provision for public participation in whole process, which one can hardly be faulted as it is important to follow a procedurally fair process and allow all parties affected by the proposed water use to have their say. It is however a bit concerning that the regulations place the obligation to facilitate this consultation process squarely on the shoulders of the applicant. The procedure closely mirrors the relevant provisions in the Minerals and Petroleum Resources Development Act in so far as mining or prospecting applicants are required to facilitate the public consultation process themselves and present the relevant authority with a complete list in the end. This is a very onerous obligation to impose on water users who are often small or medium enterprises that are financially constrained and simply may not have the resources or expertise to carry out this task. Although one cannot ignore the need for public consultation, one can argue that the Department, as the public trustee of nation's water resources, should not be permitted to simply distance itself and delegate the task to the applicant.

It is also worth noting that the regulations do not take parallel processes into consideration. Where a new water license is required to expand agricultural activities, an environmental authorisation is often

also required. Many of the concerns which these regulations seek to address may be dealt with during the environmental impact assessment process, as such it would make logical sense to integrate the processes instead of creating a duplication. The draft regulations published two years ago contained an enabling provision which gave recognition to previous processes in line with the 'one environmental system' approach, however this provision for some reason does not appear in the final version of the regulations.

Finally, the regulations include a form which can be used in the event that the Department requires an applicant to furnish security for rehabilitation in order to protect the water resource. Section 30 of the Act does make provision for security to be furnished in the form of a letter of credit from a bank, a surety or bank guarantee, a bond, insurance policy or any other form of security which the Department deems appropriate. Crucially, the Act gives the Department a very wide discretion to impose this requirement. One would have hoped that the regulations, apart from including a form, will elaborate on this requirement by clarifying the circumstances under which it is imposed or providing criteria to the Department on how they should exercise their discretion. Unfortunately, the regulations do not help in this regard and one still does not know whether only certain industries will be required to provide security or if it will be required on a case by case basis irrespective of the industry or intended water. This omission could be particularly relevant to financial institutions as their clients would likely need to approach them for security in the event that the Department exercises its discretion to impose this requirement on primary producers.

Agbiz, acting through BUSA, will attempt to liaise with the Department to address the concerns raised above. Be that as it may, one should also note that there are also enabling provisions in the regulations which should be commended. For example, the regulations impose strict timelines on the Department to ensure that the whole process is concluded within 300 days of the application being submitted, this essentially legislates the performance targets set for the Department which creates the possibility of recourse for applicants who do not receive the necessary standard of service.

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