

Is your Company's Borehole Legally Compliant?

By Peggy Schoeman

Associate, Warburton Attorneys

November 2018

In light of the drought in the Western Cape and subsequent water restrictions, many companies in the Western Cape (and elsewhere in South Africa) are exploring options beyond their municipal water supply. In particular, companies are sinking new boreholes, or pumping more groundwater out of their existing boreholes. This article looks at the legal requirements for the commercial abstraction of groundwater from a borehole.

As is the case with minerals, the nation's water is held by the State, acting as a public trustee on behalf of all South Africans. Flowing from this, one must apply to the Department of Water and Sanitation to use water and the Department must grant or refuse your water use request. The National Water Act, 1998 ("**Water Act**") is the governing national legislation in this regard and sets out the authorisation requirements for different water uses, including groundwater abstraction.

As a starting point, there are two general carve-outs to water use licensing for boreholes – Schedule 1 water uses and existing lawful water uses. The former is not applicable in the case of commercial water use as Schedule 1 of the Water Act applies to *domestic* reasonable use, and accordingly rather covers your average household's borehole. The latter may apply to a company if it lawfully abstracted borehole water at some point between October 1996 and October 1998, and on this basis, is entitled to continue to do so. Where no exception applies, the Water Act provides for a General Authorisation, and where a General Authorisation is not applicable, a Water Use Licence (often referred to as a "**WUL**").

With respect to a General Authorisation for groundwater abstraction, National General Authorisation Regulations have been published ("**GA Regulations**") and can be accessed at <https://www.gov.za/af/documents/national-water-act-revision-general-authorisation-taking-and-storing-water-2-sep-2016-0000>. By way of background, a General Authorisation is a blanket *automatic* allowance of an area and property-specific amount of water, the underlying intention being to reduce the administrative burden on the Department (i.e. less processing of water use requests). In this way, *if* your company's water use falls within its property-specific volume threshold, the company is automatically, without undergoing any administrative application process, allowed to abstract this amount of water from its borehole. Appendix B to the GA Regulations sets out the area and property-specific maximum volume thresholds for groundwater

abstraction throughout South Africa and is based on firstly, what 'drainage zone' the borehole falls in (a map with the different zones can be accessed at http://www.dwa.gov.za/SLIM/Digital%20Map%20Library/RSA_DrainageRegions_&_2012WMA_A0.pdf), and secondly the size of the property. By way of example, Fish Hoek in the Western Cape falls within the 'G22A' drainage zone and a one-hectare (commercial) retirement village may abstract a maximum of 400 000 litres per year. In this scenario, if the retirement village abstracts less than this amount, it would fall within the ambit of a General Authorisation and may, without submitting any kind of water use application to the Department, abstract up to a maximum of 400 000 litres per year from its hypothetical borehole. There are two critical points to note *if* a water use falls within the scope of a General Authorisation. Firstly, there are conditions which automatically attach to this water use, including that the water user must apply all reasonable water conservation measures, the water use may not be excessive and where groundwater is abstracted at more than 2 litres per second, a water metering system must be installed. Secondly, in the event that more than 10 000 litres per day (3.65 million litres per year) is abstracted, then the water user must apply to the Department for a registration certificate. This registration process is relatively easy and shouldn't take more than two months.

As mentioned above, a General Authorisation is not always applicable, in which case, a commercial water user must apply to the Department for a Water Use Licence. This application process is complex, requires specialist input and involves a public participation process. In our experience, it generally takes between one to two years to obtain a Water Use Licence. (For more information on this application process, see the Water Use Licence Application Regulations, which can be accessed at <https://www.gov.za/documents/national-water-act-regulations-procedural-requirements-water-use-licence-applications-and>). There are broadly three instances where a Water Use Licence would be required for the commercial abstraction of groundwater from a borehole. Firstly, if the water abstraction exceeds the company's area and property-specific maximum volume threshold for a General Authorisation. Notably, there are some drainage zones where the maximum General Authorisation volume is zero, whether due to water scarcity in that area or otherwise, and in these cases, a Water Use Licence is required for *any* volume of water abstraction. In other words, in these areas, a General Authorisation is simply not applicable; there is no automatic allowance. (As a side note, there are misleading reports in the media that if your company's borehole abstraction is below 10 000 litres per day (the *registration* threshold requirement for a General Authorisation), then there is no licensing required – this is not always the case as it entirely depends on the drainage zone and size of the commercial property as set out in Appendix B to the GA Regulations). Secondly, irrespective of the property-specific General Authorisation maximum volume, if more than 40 million litres per year is abstracted from a borehole

on a property, a Water Use Licence will be required. Thirdly, if any of the exclusions to the GA Regulations apply, a Water Use Licence is required. These include where the borehole is within a certain distance from a wetland, a river or the ocean.

It is a criminal offence to “use water otherwise than as permitted under th[e] [Water Act]”. In our view, this would include *inter alia* the failure to adhere to the conditions imposed on water uses falling within the ambit of a General Authorisation, the failure to apply for a registration certificate where so required under the General Authorisation scheme and of course, the failure to obtain a Water Use Licence where one is required. On conviction of any one of these offences, a criminal court may impose a fine of an unspecified amount, which would be left to the Magistrate's discretion. In this respect, compliance and enforcement action may not only emanate from a dutiful official at the Department's enforcement arm, commonly known as the Blue Scorpions, but may be brought by a civil society organisation concerned about unlicensed water use in the area, or a neighbouring company who suddenly has far less water of its own to abstract.

Over and above national legislation, there is municipal legislation to consider. By-laws often impose various additional requirements *vis-à-vis* boreholes (as opposed to the water use which is a national prerogative), which may include, depending on the municipality, prior permission to drill, borehole registration, water metering, water quality testing, signage requirements and/or compliance with water restrictions. It is important to note that these by-law requirements may apply even if your commercial water use doesn't trigger a Water Use Licence in terms of national legislation.

If your company is considering sinking a new borehole, or has increased its rate of abstraction from its existing borehole, it would be prudent to, as a first step, familiarise yourself with the applicable national and municipal legislation. At the very least, your local by-laws will most likely impose certain obligations on your company. Secondly, ascertain the volumes which are being, or are intended to be, abstracted. In this way, you can determine if your company falls within the ambit of a General Authorisation or if a Water Use Licence is required. Lastly, keep records of your company's abstraction volumes, as these may be needed in the event that any compliance action is taken against your company, which, as noted, may arise from a variety of sources.