Water allocation for productive use: policy and implementation. A case study of black emerging farmers in the Breede-Gouritz Water Management Area, Western Cape, South Africa

Report to the

Water Research Commission

by

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WRC Report No. 2530/1/18

ISBN 978-0-6392-0025-5

September 2018

Obtainable from

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Printed in the Republic of South Africa

EXECUTIVE SUMMARY

BACKGROUND AND RATIONALE

South Africa's National Water Act, Act 36 of 1998 (hereinafter the NWA), is lauded internationally as one of the most robust and comprehensive instances of water legislation. Redress for past injustices is an overarching objective and the NWA provides that water allocations are to be granted at the discretion of the relevant authorities, taking into account, *inter alia,* the need to transform and redress the results of past racial and gender discrimination. The discretionary capacity lends itself to subjective interpretation. The major focus of the National Water Resource Strategy 2 (NWRS-2) is equitable and sustainable access and use of water by all South Africans, whilst sustaining the water resource and ensuring that water is made available to previously disadvantaged groups.

However, scholars suggest that the Department of Water and Sanitation (DWS) lacks capacity to implement the provisions of the NWA and specifically to apply and enforce the licensing process, and argue that any prospect of transformation has been diminished due to the legal complexities of water allocation. Water allocation reform targets for historically disadvantaged individuals were set as part of the Water Allocation Reform strategy, but in 2015 these targets had to be redefined as South Africa was not near achieving these. Implementation challenges in allocating water resources to both poor farmers and historically disadvantaged individuals continue to plague South Africa. Almost twenty years after the promulgation of the NWA, previously disadvantaged farmers are still struggling to access water whilst commercial farmers still enjoy hugely greater access to water for productive use and thus sustained social and economic prosperity.

Catchment management agencies (CMAs) and water user associations (WUAs) are meant to be fora where local public and private interests can interact to shape water allocation strategies but South Africa to date is still struggling to establish or transform these institutions. The Breede-Gouritz CMA (BGCMA) that forms part of this research study does not have basic technical information such as knowing what the allocable water is and what local white farmers are using. The CMAs also need to find ways to integrate the needs of the different role players such as communities, industries and farmers to bring about transformation. These constraints do not serve the interests of the emerging farmers well.

The water resource sector has become more intricate; more role players are involved and the political environment has also undergone considerable change. The transformation mandate is driven by the same bureaucracy that was responsible for the implementation of the previous regulatory frameworks that caused the injustices. This, and other factors, have made it more difficult for marginalised communities (inter alia emerging farmers) to access water in an equitable manner and to effectively penetrate the water scene with its administrative complexities. In addition, commercial farmers are better resourced and more experienced in navigating the administrative processes to deal with and obtain water use licences. The NWRS-2 noted the main issues impeding implementation as weak

internal coordination and integration, poor external alignment with other reform programmes, legislative impediments, and lack of support for historically disadvantaged individuals to access water and make productive use of their allocations.

This research was of significant benefit to the BGCMA in that it generated data which supported the CMA in reviewing its water allocation strategy; and could contribute to the national and local debate on the reform of water governance to ensure equitable water allocation. It would also contribute to an approach to effectively and efficiently manage water allocation for productive use for black emerging farmers in Pietercieliesklоof specifically and the BGCMA generally. This research posits that bureaucracy and the complexity of the legislative framework hinders water allocation reform. The research thus contributes to the ongoing endeavour to reform the water landscape to lead to socio-economic advancement of the previously disenfranchised.

OBJECTIVES AND AIMS

The aims of this research were to:

1. Explore the case of black emerging farmers in the Breede-Gouritz Catchment Management Agency in the Western Cape, South Africa, between 2005 and 2015, by identifying and analysing the legal and institutional difficulties experienced by black emerging farmers in accessing water use for productive purposes.
2. Define the role and influence of the bureaucracy, as experienced by black emerging farmers, in accessing water use for productive purposes, and compared to the experience of successful white farmers.
3. Plot and interrogate the role and effect of the intersection of the bureaucracy and the law, impacting access to productive water and reform.
4. Contrast the experience of black emerging farmers with that of commercial white farmers in accessing water use for productive purposes to determine whether the new dispensation has brought about the expected redress.
5. Develop a means to contribute to the development of the status quo as experienced by black emerging farmers.
6. Contribute to the ongoing cycle of review of the national water dispensation.

METHODOLOGY

This research was conducted in a qualitative paradigm and invited subjective understanding and interpretation of phenomena within the environment in which they occurred. Therefore, it was essentially interpretive, as the analysis entailed understanding the participants' experiences within their own contexts. Participants were commercial farmers and black emerging farmers as they attempted to access or retain water use, officials at regional and local institutional level, persons involved with the Groenland WUA (GWUA) in the study area, and experts in the water sector. The case study was located in the Breede-Gouritz water management area and the research sites were

located in the jurisdiction of the GWUA and Pietercieliesklоof. The research entailed that the researcher made sense of participants' experiences and to capture this, the data was derived from, *inter alia,* in-depth interviews and observations supported by relevant documents relating to accessing water for productive purposes. The research also scrutinised the various institutions' decision-making processes by analysing recorded and archived institutional meetings, as well as observing meeting procedures, to understand the process of interpreting and implementing the policies for water allocation. A document analysis is presented, sketching the prevalent content on water resource management for equitable productive water resource allocation. The design strategies yielded rich and diverse data enabling the research to address the research aims.

FINDINGS AND DISCUSSION

The findings and discussion centred on local stakeholders' understanding and experience of the legal and institutional frameworks and the role of the bureaucracy in the process as users endeavoured to access water. Several themes emerged from the data as presented below.

- **Local stakeholders understanding and experience of the legal and institutional frameworks within which they operate to access water for productive use**

Water users had strong views on the transformation agenda, the institutional and legal structures and the ability of the institutions to implement their own policies. Water users realised that some form of authorisation is required for water use but they were not certain when it was needed and which authorisation was needed. They expressed the view that the institutions were not always forthcoming with assistance, and further guidance and advice was needed. This uncertainty contributed to these farmers' frustration, and analysis of the insights of those responsible for implementating the legislation and policy framework endorsed the experiences of these water users. Officials at the CMA and DWS regional office voiced their frustration with the lack of guidance and the uncertainty pertaining to the interpretation and application of the legislation and policy. These officials continue to perform their duties and attempt to carry out the mandate of the NWA in an environment where they very often rely on each other's insights and understanding and where policy seems to change and is not clear.

- **The role of the bureaucracy in the process as users endeavour to access water**

The state is the custodian of the country's water. The DWS is responsible for water use authorisation. This inevitably means that water users or potential water users have to enter the bureaucratic arena to access or retain water use. In the primary research site, this bureaucratic process starts with the BGCMA as no WUA exists. Although the intent is that water use authorisation be devolved to local level, this has not yet happened and water use applications still require approval at national level. Officials and staff at the institutions which are at the frontline of implementation struggle to execute their mandate due to lack of clear guidance and uncertainty. As the farmers accessed the bureaucracy they found the process difficult to understand and the bureaucracy did not necessarily help to elucidate the process. Feedback or further communication after the process had started was non-existent or slow and this added to farmers' frustration.

- **Coordination or fragmentation of institutions and the corresponding influence on transformation**

The empirical data was significant in that many stakeholders first got to know about requirements for water use through a department other than the DWS. Emerging farmers found that they had to provide proof of water use and authorisation thereof when they applied to access funding via the Department of Rural Development and Land Reform (DRDLR) or Department of Agriculture, Forestry and Fisheries (DAFF). This confirms the observation of the NWRS-2 that 'the significant challenges that have hampered the progressive realisation of its equity goals 'are, *inter alia,* the 'weak internal coordination and integration and poor external alignment with other reform programmes'. This had proven to be frustrating for emerging farmers as they have to navigate the various departments to access resources and water. Hence, even though government has acknowledged that coordination, integration and alignment with other reform programmes is crucial to effectively and efficiently allocate and reallocate water it had proven to be difficult to achieve or maintain and this does not bode well for the transformation agenda.

Implementation concerns are evident when one peruses the Department's own statistics on various issues, with transformation, amongst others, being of paramount importance. The following issues point to a discontinuity between the legislative framework and implementation by the Department:

- To date, only two CMAs are operational and this puts a severe strain on the Department's resources, whether it is financial, infrastructural or human resources.
- The first NWRS was only published in 2004, six years after the NWA was promulgated. The Act clearly dictates that reviews of the NWRS should take place within a five-year cycle. The second NWRS was only published nine years after the first NWRS. Clearly, the delay in providing detail and guidance on implementation of the NWA created uncertainty and more importantly frustrated the objective of the NWA. This is an indictment on the trustee of South Africa's water and the trustee, i.e. the government, should be held answerable to South Africa for this state of affairs.
- The Department issues policies and strategies but does not afford time and opportunity to monitor their success or failure. The constant amendment of strategies frustrates the implementation and widens the discontinuity between legislation and implementation.

- **Transformation and allocation and reallocation of water**

The 2008 Water Allocation Reform Strategy is the strategic tie between policy intent and the practical implementation of the provisions of the NWA. By the Department's own admission and supported by the insights and experiences of participants in this study, it is clear that the transformation targets have not been achieved. If the system does not work effectively it opens a space and creates an environment for frustration and non-implementation.

- **Strategies for the local stakeholders to employ to acquire or retain water use**

The frustration experienced with the implementation of the legislative requirements to access or retain

water had actors devise a variety of discursive strategies to counter the impediments. The strategies employed by role players may be an adaptive approach, to collaborate or act for self-preservation or self-development. Officials tasked with implementing the legislative and policy framework equally continue to carry out their duties by relying on each other's experience and insights in the face of uncertainty and lack of institutional guidance. These stakeholders also recognised the value of research institutions and collaborated with these institutions to promote, develop and access further resources.

- **The end result of all these processes impacting on access to water for these stakeholders and specifically the black emerging farmers**

Stakeholders found the process confusing and the bureaucracy did not necessarily help to demystify the process. The ineptness of the bureaucracy in dealing with licence applications does not bode well for the national transformation agenda. Nevertheless, the bureaucratic encounter has the potential to be satisfying if processes work and an effort is made to explain and implement said processes as intended.

Institutional dynamics have great influence on effective and efficient implementation of the legislative framework. Clear institutional roles and responsibilities are delineated in the legislation but in practice this seems to be determined by political mandates. Experts blamed lack of quality leadership, lack of understanding and appreciation of the underlying principles and the intent of the water legislation and political influence for the continued uncertainty and failure to implement legislation and policy. Institutions such as CMAs and WUAs were not established as intended and the previous dispensation's irrigation boards seem to continue to operate unfettered. These collectively contribute to the water use process, and hence transformation, being frustrated.

From the above it is clear that water governance should enjoy urgent attention as institutions and water users alike are finding it challenging to effectively implement the legislative and policy framework. The gaps and challenges experienced by these stakeholders are impacting on effective application of the legislation and policy to bring about the intended transformation. Gaps exist within the institutions and amongst institutions and consequently the process of water allocation suffers and this delays the finalisation of licences. It is crucial that South Africa refine and redefine water governance to suit local needs and challenges and it is imperative that the reality of these stakeholders be considered if South Africa is serious about implementing the intent of her Constitution and the National Water Act.

The research points to gaps and challenges experienced by stakeholders – users and institutions alike – as they navigate the water use system to access or retain water use. Although the stakeholders expressed their frustrations and anger, they accepted that they have to operate within the existing governance structure and devised ways to attempt to overcome the gaps and challenges. It is clear that a concerted improvement strategy is necessary if any progress is to be made in strengthening implementation. A concerted improvement strategy is recommended entailing the following:

i. DWS to invest in, develop and offer appropriate training specifically tailored to empower staff to enable them to effectively implement policy and regulations.
ii. DWS to invest resources in disseminating water user information broadly.
iii. Inputs by officials at lower levels into understanding the strengths and weaknesses of the system are crucial if and when any review of the policy is undertaken.
iv. DWS in collaboration with other relevant stakeholders to conduct a comprehensive review and analysis of the status quo of transformation. This should inform priorities and collectively these priorities should be pursued by investing in and focusing on achieving these identified concerns.
v. A well-devised strategic plan has to guide the transformation agenda and competing interests should be secondary until the objectives are achieved.
vi. Devise and *implement* inter-governmental strategies to improve and streamline processes, enabling users to access resources effortlessly.
vii. The DWS and CMAs should dedicate resources to monitoring water quantity, especially *post* allocation. Authorising institutions should, in collaboration with all stakeholders, devise shared ways to find water or new water for allocation or reallocation.
viii. In collaboration with stakeholders, demystify water use to serve those who are meant to benefit from the promulgation and implementation of the NWA.
ix. Allow the legislation and policy to be implemented rather than amending it prematurely
x. The DWS should devise tools to ensure accountability by *all* in the chain of implementation.
xi. All relevant institutions need to strategise collaboratively to make themselves more accessible and to market themselves, the services they offer and their fit in the whole scheme of things.
xii. Stabilising institutional arrangements for decentralised water resource management is a matter of urgency, and in-depth research and level-headed and rational decision-making is critical.

These recommendations will require a concerted and collective effort by all stakeholders but the DWS has to take initiative, leadership, and ownership, and make resources available to enable implementation thereof.

ACKNOWLEDGEMENTS

The author would like to thank and acknowledge the following persons for their assistance, contributions, constructive discussions and sharing of expertise and insights during the duration of the project:

Name	**Affiliation**
The Reference Group of the WRC Project K5/2530.	
Mr John Dini Research Manager, 2017–2018	Water Research Commission
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The farming community of Pietercieliekloof.	
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ABBREVIATIONS AND ACRONYMS

BOCMA -	Breede-Overberg Catchment Management Agency
BGCMA -	Breede-Gouritz Catchment Management Agency
BWMA -	Breede Water Management Area
CASP -	Comprehensive Agricultural Support Programme
CMA -	Catchment Management Agency
CMS -	Catchment Management Strategy
DAFF -	Department of Agriculture, Forestry and Fisheries
DRDLR -	Department of Rural Development and Land Reform
DWA -	Department of Water Affairs
DWAF -	Department of Water Affairs and Forestry
DWM	Developmental Water Management
DWS -	Department of Water and Sanitation
HDI-	Historically Disadvantaged Individual
IB -	Irrigation Board
GA -	General Authorisation
GWUA -	Groenland Water User Association
NWA	National Water Act 36 of 1998l
NWRS-1-	National Water Resource Strategy-1
NWRS-2-	National Water Resource Strategy-2
WAR -	Water Allocation Reform
WARMS -	Water Use Authorisation Registration and Management System
WSA -	Water Services Act 108 of 1997
WUA-	Water User Association
WULA -	Water Use Licence Application

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SECTION 1: INTRODUCTION

1.1 Background and motivation

South Africa's transition from apartheid to democracy in 1994 prompted a re-engineering of her legislative regime, starting with the promulgation of her Constitution, Act 108 of 1996 (RSA, 1996). The Constitution is the supreme law of the country and all law or conduct has to be consistent with its provisions. The re-engineering involved repealing a barrage of laws and promulgating new ones. The 1997 White Paper on a National Water Policy for South Africa (DWAF, 1997) stated that:

> 'Apartheid was an inefficient racial spoils system under which the distribution of water use was racially biased, and access to water and the benefits from its use a privilege of those with access to land and political and economic power'.(1997: section 2.14).

The National Water Act (NWA, Act 36) was promulgated in 1998 (RSA, 1998) and this completely redefined the way South Africa manages her water resources, from the institutions to the permissible uses of water.

The NWA introduced the public trust doctrine whereby the state is the custodian of the resource and is mandated to regulate water use for the benefit of all South Africans. The only right to water is the 'Reserve', which ensures a reserve of water for ecological and basic human needs. All other water use is permissible as dictated by chapter 4 of the NWA. Thus, water use is a *usufructuary* right limited by the interests of other users (Movik *& de Jong*., 2011). Permissible water use is achieved in one of four ways, namely Schedule one use, existing lawful use, general authorisations and licensing. Thus, South Africa has an administrative water rights system, and permissible water use is either unlicensed use or licensed use.

Access to water for productive purposes implies that potential users, in casu emerging farmers, will most probably have to enter the realms of the bureaucracy to lodge an application for general authorisation or a licence for permissible use. For emerging farmers, general authorisation or licensing will require a formal application to use water for productive purposes to be lodged at a water users association (WUA), catchment management agency (CMA) or the national Department of Water and Sanitation (DWS), depending on where the emerging farmer finds herself, pending the existence of a WUA or CMA within the area of water need. Only two CMAs have been established nationally. One is operational in the research area of this project, namely the Breede-Gouritz Catchment Management Agency (BGCMA). The water users in the primary research site, Pietercieliesksloof, had to approach the BGCMA to access water, whereas the water users in the secondary research site, which is Elgin, have an established WUA, i.e. the Groenland Water User Association (GWUA) to manage water at the localised level in its jurisdiction. This research focused on these two institutions, as well as the DWS in terms of its role in the water use application process.

This research therefore explored the role of the bureaucracy and the law in the implementation of the national water allocation policy for productive use, with the focus on black emerging farmers within the

jurisdiction of the BGCMA in the Western Cape. It further explored legal and institutional difficulties experienced by black emerging farmers in accessing water. It presents a critical analysis of the role of the bureaucracy and the law in water allocation for productive use by black emerging farmers in South Africa. Secondly, it unpacked the knowledge component as most studies continue to insist that the major problem is 'unequal access to information and knowledge' (see Goldin, 2010; Funke & Jacobs, 2011). Thirdly, past research looked at the black farmer and cooperatives in isolation and not sufficiently at the struggles at the intersection of bureaucracy and law. Fourthly, this research explored the challenges of emerging farmers who are individual farm owners and not farming within a communal setting which has been the focus of most research. Lastly, it compared the different constituencies amongst segments of the farming sector.

This research was of significant benefit to BGCMA in that it generated which supported the CMA in reviewing its water allocation strategy; it would contribute to the national and local debate on the reform of water governance to ensure equitable water allocation. It would also contribute to an approach to effectively and efficiently manage water allocation for productive use for black emerging farmers, in Pietercieliesklоof specifically, and in the BGCMA in the Western Cape, and in South Africa generally. The project developed and enhanced the research capacity of the lead researcher, creating the environment to combine and complete her PhD qualification and also to become an established researcher within the discipline of water. It was meant to further provide the research team with an opportunity to develop and enhance new and diverse skills and knowledge whilst working to complete this research project. However, due to the overwhelming and unexpected challenges experienced in the higher education sector nationally over the last two years, it has been impossible to achieve the full development aim. The academic programmes were severely disrupted and students completed their own studies and ventured into the world of work.

Redress for past injustices is an overarching objective of the NWA and so the NWA provides that water is to be allocated taking into account, *inter alia,* the need to transform and redress the results of past racial and gender discrimination. The water allocation reform targets for historically disadvantaged individuals were set at 30% of allocable water by 2014, of which 50% should be allocated to women (DWAF, September 2008: 4-5). However, in 2015, South Africa is not near achieving these targets. This research posits that bureaucracy and the complexity of the legislative framework hinders such reform. The research thus contributes to the ongoing endeavour to reform the water landscape to lead to socio-economic advancement of the previously disenfranchised.

1.2 Aims

The aims of this research were to:

- Explore the case of black emerging farmers in the Breede-Gouritz Catchment Management Agency in the Western Cape, South Africa, between 2005 and 2015, by identifying and analysing the legal and institutional difficulties experienced by black emerging farmers in

accessing water use for productive purposes.

- Define the role and influence of the bureaucracy as experienced by black emerging farmers who apply to access water for productive use, compared to that of successful white farmers.
- Plot and interrogate the role and effect of the intersection of bureaucracy and law, impacting access to productive water and reform.
- Contrast the experience of black emerging farmers with the experience of white commercial farmers in accessing water use for productive purposes, to determine whether the new dispensation has brought about the expected redress.
- Develop a means to contribute to the development of the status quo as experienced by black emerging farmers.
- Contribute to the ongoing cycle of review of the national water dispensation.

SECTION 2: THE RESEARCH CONTEXT

2.1 Breede-Gouritz Catchment Management Agency and its role in water reform for productive use

The research was conducted in the Breede-Gouritz water management area (see figure 1) with specific focus on access to water by farmers in the Breede-Overberg area. The case study areas are in Pietercieliesklоof (see figure 2) and the jurisdiction of Groenland WUA. Pietercieliesklоof is in the jurisdiction of Bredasdorp Municipality, in Bredasdorp (as per map in figure 1), and Groenland WUA is in the Overberg in Elgin. The research specifically analysed the implementation processes of the BGCMA in the allocation of water, with the aim of bringing about reform.

The National Water Resource Strategy (NWRS) of 1994 made provision for 19 water management areas (WMAs), and each was to have its own CMA. Included in these 19 were the Breede-Overberg and Gouritz as two separate WMAs, each with its own CMA. A CMA was established and made operational for the Breede-Overberg WMA but not for the Gouritz WMA. However, by 2011, of the 19 WMAs with their corresponding number of CMAs, only nine had been set up, of which only two were operational. In 2012, the Minister of Water Affairs approved a reduction from 19 WMAs to 9 WMAs, resulting in a reconfiguration of the Breede-Overberg WMA. The merger resulted in the jurisdiction of the BOCMA being increased to cover the Gouritz and its name being changed to BGCMA.

The Centre for Environmental Rights (2011:8) reported in 2011 that only two CMAs, namely the BOCMA1 and the Inkomati CMA, were functional. This implies that in WMAs where CMAs were not yet operational, the DWS2 at regional level was managing the water. Although some decentralisation took place, these regional offices still had to obtain authorisation at national level for water use authorisations and this placed unnecessary further pressure on the Department of Water and Sanitation (DWS)'s already limited resources. This state of affairs defeated the intention of the legislator to devolve authority to regional and local levels, i.e. to CMAs and WUAs.

The BOCMA was established by the Minister of Water Affairs in July 2005, in terms of the NWA (Act 36 of 1998) and it managed all water resources within the Breede-Overberg WMA. The Governing Board of BOCMA was appointed in October 2007 and the CMA became operational with the appointment of the CEO and staff (BOCMA, 2012:7). The agency is situated entirely in the Western

[1] For this research I used the data as provided by BOCMA as it still reflected the current status as relevant to the research even though a new CMA namely the BGCMA was established. This section thus refers to BOCMA and not BGCMA and sourced the data form the BOCMA 2011/2012 annual report.

2 The Department has undergone various name changes over the years and has been known as the Department of Water Affairs and Forestry (DWAF) and The Department of Water Affairs (DWA). For purposes of this research and ease of reference when generally referred to the researcher will refer to it as the Department of Water and Sanitation (DWS,) unless a specific date is attached.

Cape and its name originated from the largest river within its borders, namely the Breede River, and a significant portion of the WMA consisted of the rivers of the Overberg. The report (BOCMA, 2012:17) further states that the population of the Breede-Overberg WMA is estimated to be about half a million people, two thirds of whom live in towns and villages and the region is serviced by seven local municipalities. According to the same report, unemployment is at 19% but high levels of income inequality exist, with many of the rural and peri-urban communities working in farm labour.

The DWA provided the following information pertaining to the BGCMA:

> 'The Breede-Gouritz water management area (WMA) is the result of the amalgamation of the Breede WMA and the Gouritz WMA. The new WMA will be bounded by the Indian Ocean to the south, what will be the Berg-Olifants WMA to west, the Orange WMA to the north and the Mzimvubu-Tsitsikama WMA to the East. It will largely fall within the Western Cape Province, with small portions of the upper catchment of the Olifants River falling in the Eastern Cape Province, and tiny portions of the upper catchments of the Gamka and Groot Rivers falling in the Northern Cape Province. The Breede-Gouritz WMA will include the catchment area of the Gouritz River and its major tributaries (the Gamka, Groot and Olifants Rivers), as well as the catchments of the smaller coastal rivers that lie to the east and west of the Gouritz River mouth, the Breede River and the the catchments of the smaller coastal rivers that lie to the west of the Breede River mouth, i.e. the Palmiet-, Kars-. Sout-, Uylenkraals-, Klein-, Onrus- and Bot-Swart Rivers. here are two large rivers within the WMA, the Breede and Gouritz Rivers. The Breede River, with its main tributary the Riviersonderend River, discharges into the Indian Ocean. The Gouritz has three main tributaries, the Groot, Gamka and Olifants Rivers. (DWA, 2012:8).

It is further reported that 'The largest sector in the Breede-Gouritz WMA is the agriculture and processing sector which contributes 23.2% to the GGP. The region as a whole is quite significantly dependent on the agricultural economy which provides 58% of jobs to the rural poor. Once the associated manufacturing, construction and services are considered, an even larger proportion of the economy appears to be dependent on the agricultural sector. Trade and accommodation is the second largest sector of the economy in the WMA. This is related to the coastal residential retirement and tourism' (DWA, 2012:11).

A central challenge for the then BOCMA was to ensure contribution to economic development (growth) and social redress (equity) in the region. At the Parliamentary Budget Vote Hearings: Department of Water Entities (12 May, 2012) the Chief Executive Officer of the BOCMA reported that it focused on allocating water resources to poor farmers and historically disadvantaged individuals but recognised that this is a complex issue and impacts on implementation. He listed, amongst others, the following risks:

- Failure to make resources available due to current backlog of applications.
- Inconsistent understanding of national policy.
- Lack of integration of land and water reform.

The BOCMA presented its draft catchment management strategy to DWA in 2010 and was awaiting approval during the 2012/13 period for implementation between 2013 and 2017. The strategy was never implemented as a BOCMA strategy due to the tabling of the NWRS-2 for public consultation and the establishment of the new BGCMA on 23 May 2014. These policy changes and uncertainty further contribute to the wider implementation challenges.

2.2 Pietercieliesksloof: The geographic area, the farmers and the realities

The research was conducted as a case study and focused on the Pietercieliesksloof farming community specifically. No WUA or any other local water management institution exists for the area and Pietercieliesksloof was contrasted with the situation of farmers in the catchment area of the Palmiet River under management of the Groenland WUA.

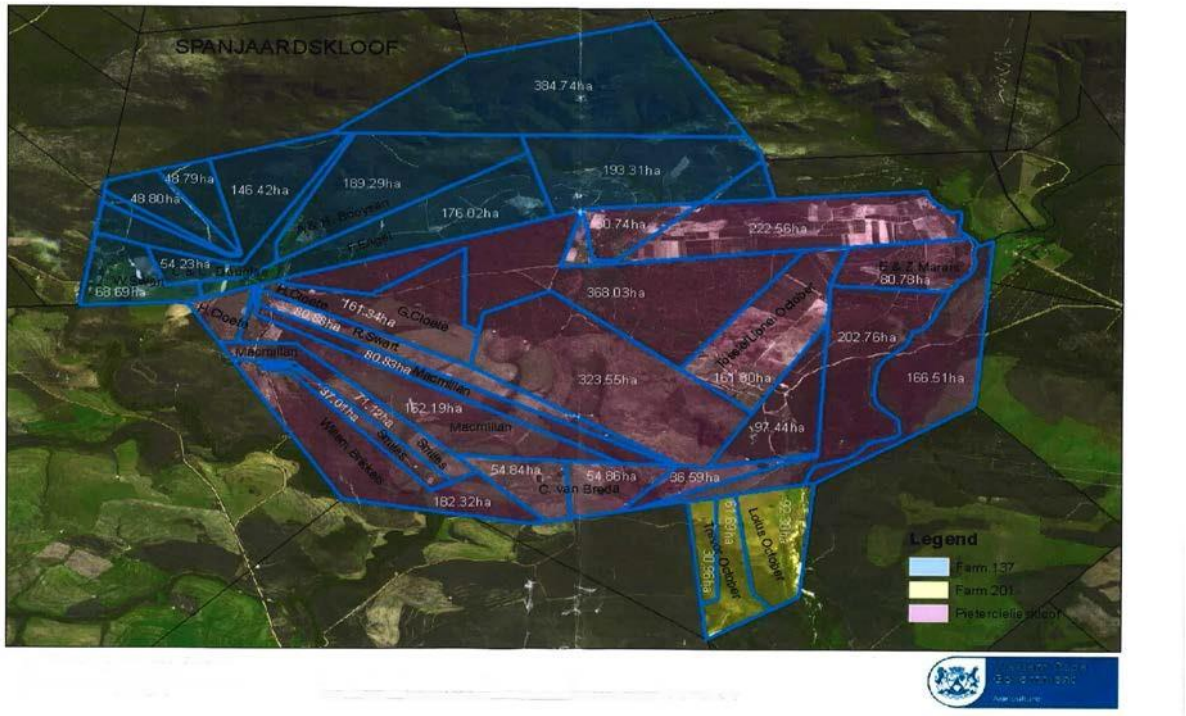

Figure 2: Pietercieliesksloof: the Breede-Overberg Water Management Area (Source: E. Wessels, Bredasdorp GIS, Western Cape Department of Agriculture, 29/08/2012)

The Pietercieliesksloof agricultural area is situated near Bredasdorp (see figure 2 in the Overberg East district, which is the biggest zone in the BOCMA. It falls within the Cape Agulhas municipal area in the Western Cape. The Overberg East zone starts at the mouth of the Ratel River in the west and ends at the mouth of the Breede River in Infanta in the east. Bredasdorp is located approximately 200 km south-east of Cape Town. About 18% of families have been classified as poor, meaning that their income is less than R1 340 per household unit (Mukheibir & Sparks, 2005). The assessed GDP for the Overberg East was R470 million in 2004, of which agriculture contributed 13%. There are no irrigation boards or WUAs in the Overberg East Zone (BOCMA, 2010: 22).

The history of Pietercieliesksloof is not well documented and to begin to write this history the researcher consulted maps, gathered historical data from the librarian at the Elim library in the neighbouring town, and interviewed the farmers in the area and members of the community. What emerged is that Pietercieliesksloof was originally a farm called Pietercieliesksloof Farm 202. This was subdivided into smaller farms and today these farms are occupied and cultivated by sixteen farmers who individually own or lease these farms. Three of the farmers are regarded as commercial farmers, implying that they have penetrated profitable markets to sell their produce and generate income elevating them to commercial status. Two of the commercial farmers are white and one black, with the others being small-to-medium black farmers (also referred to as emerging farmers); only three are female farmers. The main agricultural activities are livestock, grain, wheat, oats, vegetables, fynbos and rooibos tea.

The emerging farmers have strong generational ties to the land and thus land ownership of the farms within this area is mainly through inheritance or purchase from within the family. The majority of the farmers regard themselves as small-to-medium black farmers and have established and registered the Pietercieliesksloof Farming Cooperative which has the objective of offering services supporting different aspects of their farming. Some of these farmers are also members of the Spanjaardskloof civic association. Membership of this association is open to all farmers, i.e. emerging and commercial farmers, and it seeks to provide social and general support to all its members. The fynbos cooperative was established to provide a platform for emerging farmers to market their flowers but it has not been successful as it had not penetrated the market yet. Thus, emerging famers still gain entry to the market via the commercial farmers. They are not necessarily able to negotiate the best possible prices for themselves, they are dependent on the commercial farmer and thus the commercial farmer has the power. How does this contribute to the challenges experienced by the emerging farmer in the process of accessing water?

2.3 Groenland Water User Association and its significance to the study

The research area of Groenland Water User Association (hereinafter the GWUA) is well documented and the data was sourced from the DWA, the BOCMA and the GWUA.

The GWUA existed as an irrigation board under the previous 1956 Water Act. It was established in 1966. DWA approved the transformation to a WUA on 10 June 2005. The GWAU is situated in the Overberg West zone of the BOCMA which covers the geographical area from Pringle Bay in the south west to the mouth of the Ratel River in the east. The boundary to the north is between Sir Lowry's Pass and Theewaterskloof Dam in the west and the start of the Karringmelk River in the east. It also covers portions of two local municipalities in the Overberg District Municipality, specifically Theewaterskloof in the north within which the GWUA falls (BOCMA, 2010:25). The Overberg West zone is a diverse agricultural area with barley, canola, wheat and sheep. In Palmiet sub-catchment, where the GWUA operates, the majority of the Western Cape's apple and pear growing industry is found. The

area also has a series of fruit and beverage manufacturers and a well-known fruit packing industry. In 2004, the GDPR was valued to be about R1 929 billion with 20% contributed by agriculture (BOCMA, 2010:24). The water resources under control of the GWUA fall in the catchment area of the Palmiet River, and include all the tributaries from where they originate in the Hottentots Holland Mountains (north/north-west), the Kogelberg Mountains (west/south-west) and the Groenland Mountains (east up to the confluence with the Krom River and Palmiet River **(**GWUA, 2009). The board consists of 21 representatives from the following constituents:

- Five former irrigation board members
- Four other registered water users
- Two emerging farmers
- Three from local government
- Two individual water users
- One from a national industry, i.e. Eskom
- One from a local industry
- One from a public environmental organisation
- One from an institution which has an interest in water management
- One from the forestry sector (co-opted).

A closer look at the numbers suggests an interesting story about the social make-up and the likely political orientation of the GWUA. The founding members of the GWUA were members of the previous irrigation board, i.e. white commercial farmers, and they were also the first members of the GWUA (GWUA, 2005, Constitution: section 6). They were also the management committee, and new membership was to be decided by this committee. Representation of this single constituent on the board is the largest, i.e. five. Figures from the 2009 management committee indicate that, of the eleven farmers represented on the 21-member committee, nine were white commercial farmers. Thirteen of the total members were white (two females) and thus carried the majority (GWUA, 2009:11). Although the current board composition has changed, it continues to be white- and male-dominated and with the authority that it holds pertaining to water within its jurisdiction, it places white commercial farmers in a powerful position to continue protecting their own interests and being the gatekeeper to any other development or growth. This puts the question of transformation still head-on on the agenda.

The Constitution of the GWUA does not have transformation or redress as a strategic objective or function. The business plan refers to a transformation plan which merely states that it has the intention to increase the historically disadvantaged individuals (42.8%) on the current management committee to 52.4% by June 2010 (GWUA, 2009). It recognises transformation as a challenge within the broader scheme of water management and listed the following impacting issues:

- Under-representation of race and gender
- Specified water to be kept in reserve for allocation to emerging farmers
- Limited resources and finances obstruct the GWUA's ability to assist emerging farmers and

other HDIs. **(**GWUA, 2009:10)

The GWUA business plan specifically states that its key focus is its primary functions of water use and water resource management and it seems as if no tangible plans are evident to address transformation. The business plan simply references its transformation agenda with phrases such as:
'…encourages and support joint ventures, …to develop them as emerging farmers, …avidly aware of responsibilities towards the HDIs, …willing to take whatever steps(within the ambit of their primary duties) as may be necessary to render any required assistance, …in-principle decision to obtain water use entitlements, as and when they become available (GWUA, 2009:13).

As illustrated above, the two sites are very diverse in management and composition. The juxtaposition of these two sites and comparison of the experiences of the commercial farmer and the emerging farmer when accessing water for productive use shed insight into the transformation agenda. This research sought to learn whether and how the farmers', and especially the emerging farmers', access to water use was dictated by their own circumstances or by external factors such as the presence of water management institutions like CMAs and WUAs, bureaucracy and the complexity of law.

SECTION 3: A LITERATURE REVIEW

3.1 Introduction

The National Water Act 36 of 1998 (hereinafter the NWA) provides that water allocations are to be granted at the discretion of the relevant authorities, taking into account inter alia the need to redress the results of past racial and gender discrimination (section 27(1)). The existing and ever-expanding bureaucracy has to fulfil this transformation mandate, but delays in, inter alia, the reallocation and compulsory licensing processes and the processing of water use applications and licences have significantly hindered economic growth and social and economic development for black emerging farmers. Today, almost twenty years later, the question is whether this directive is reasonable and achievable within the current milieu. This research posits that the delayed transformation of South Africa's water reform is due to bureaucratic barriers cemented by the demands of legislation and policy and the shortage of resources and skills to deal with the rigours of policy and legislative implementation. This negatively impacts on black emerging farmers' ability to access water and thus social and economic transformation is retarded.

This section reviews and analyses the literature relevant to access to productive water, with specific focus on black emerging farmers' access to the resource. A literature review is presented, sketching the prevalent content and processes for water resource management for equitable productive water resource allocation in South Africa. It further plots and interrogates the legal and policy framework governing water reform and appraises and examines how the bureaucracy and the legislative framework influence these processes as these dynamics intersect, impacting water reform and implementation.

The section is organised as follows:

- An introduction giving a synopsis of the rationale for the research in the South African water context
- An historical impression of the South African water resources management framework
- The paradigm shift: legal and policy framework
- A view from literature assessing the influence of the legislative framework and bureaucracy generally, and on water reform specifically, determining South Africa's water resource management journey from the previous water regime to the current situation
- Conclusion
-

3.2 Rationale: water allocation in the South African context

The end of apartheid in 1994 heralded a new political framework for South Africa. This led to the shaping and implementation of a number of socio-economic development strategies, with the

Constitution of the Republic of South Africa of 1996 as the legislative imperative.

The Constitution is the supreme law of the country and all law has to be consistent with it. The Constitution entrenches the right of access to water (s27(1)(b)) and therefore the overhauling of the water policy and legislative framework was a constitutional imperative. South Africa's history of apartheid, whereby the black majority of her people was excluded from sharing in the resources of the country, meant that the new water framework necessitated a collective effort from all stakeholders at all levels to bring about this paradigm shift. The promulgation of the Water Services Act 108 of 1997 (hereinafter the WSA) and the NWA were but two instruments in response to this constitutional directive to manage water resources in a sustainable and equitable manner in a democratic South Africa. These Acts completely reformed South Africa's water law, with the intention of redressing inequalities, i.e. racial and gender discrimination with specific reference to access to water (s2 of NWA)3. Redress for past injustices is an overarching objective, and the preamble of the NWA reads that

> '…the discriminatory laws and practices of the past prevented equal access to water, and use of water resources; Acknowledging 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… The preamble further reads '…that the ultimate aim of water resource management is to achieve the sustainable use of water for the benefit of all users'.

Although the new water dispensation was regarded by the international community as groundbreaking, the implementation thereof was slow and the anticipated transformation, coupled with the intent of poverty alleviation, did not take place as envisaged. The National Water Resource Strategy-1 (hereinafter the NWRS-1) delineated 19 water management areas, to be managed by catchment management agencies. Catchment management strategies (hereinafter the CMS) for each CMA were to be developed, anticipating that all CMAs were to be fully functional by 2016 (2004: 119). A parliamentary public hearing to review the implementation of the NWA pointed to wide gaps in the licensing systems, the tardiness in establishing catchment management agencies and the challenges of enforcing the Act (Parliamentary Monitoring Committee, 2008).

The Water Allocation Reform Strategy of 2008 is one of the main pillars of the water reform. National targets were set, to be progressively achieved by the year 2024. According to the targets, 60% of allocable water should be allocated to black people, of which half thereof should be allocated to black women (DWAF, 2008). Several strategic mechanisms and approaches were proposed to achieve the set targets, including, amongst others, compulsory licensing. Sections 43–48 of the NWA provide that compulsory licensing requires all the water use authorisations in an area to be reconsidered in order to, amongst others, achieve a fair water allocation from a resource that is under stress. The DWA was

[3] For the purposes of this research, water specifically refers to productive water, meaning water that is utilised for agricultural, economic and commercial use

planning to use compulsory licensing to address the lack of water available to historically disadvantaged individuals (HDIs) (Parliamentary Monitoring Committee, 2013) but it seemed to be over-ambitious. The pace of water allocation reform remains slow and, almost twenty years later, white commercial farmers still enjoy hugely greater access to water for productive use.

The delays in processing water use licences for historically disadvantaged individuals, thus water reform; significantly hinder economic growth and social and economic development. In 2013 the Department of Water Affairs4 (hereinafter DWA) indicated that the backlog in water licence applications' was 1 142, and that 210 of these applications dated as far back as 2010. It attributed the delays to:

- Not knowing the availability of water resources due to Reserves not having been established
- The difficulties in the determinations.

This state of affairs forced a questioning of the system to determine why it seemed to be failing the most vulnerable. In 2013, the DWA delivered the NWRS-2, the core objectives being that water:

- Supports development and the elimination of poverty and inequality
- Contributes to the economy and job creation
- Is protected, used, developed, conserved, managed and controlled sustainably and equitably.

The NWRS-2 introduced the concept of developmental water management (hereinafter DWM) which supports South Africa's key developmental objectives as informed by the National Development Plan and NWA. It acknowledged that integrated water resource management (IWRM) was still necessary but had to be interpreted to promote the concept of DWM5.

This research proposed that, due to an extensive bureaucracy operating within a very complex legal framework, water reform is not unfolding as was envisioned.

3.3 An historical impression of South Africa's water resource management

South Africa's current water dispensation can only be fully appreciated within her historical context, as legislation generally articulates the history of a country and South Africa is no exception.

In 1860, over 83% of the nearly half-a-million hectares of white-owned land was farmed by African tenants, and during this period, the accumulation of capital and wealth by African farmers caused the Native Affairs Commission to comment that Africans were becoming wealthy, independent and difficult to govern (Adams et al., 1999). However, all this altered when on June19 1913, the notorious Natives

[4] The Department was previously known, at different times, as the Department of Water and Forestry (DWAF) and the Department of Water Affairs (DWA). It is currently called the Department of Water and Sanitation (DWS).

[5] More detail and discussion follow later in this section of the report.

Land Act 27 of 1913 was promulgated, separating black and white persons on a territorial basis and forcibly resettling at least three million black South Africans. About 8% of the country's farm land was designated as reserves which became the only areas that could legally be occupied and farmed by Africans.

The water allocation regime under Dutch rule in South Africa was the dominus fluminus principle which meant that the governing party had complete control of the resource. The state had the right to allocate water without concern for sustainability and equity (Tewari, 2009). The Water Act 54 of 1956 had traces of the dominus fluminus principle but entrenched riparian rights whereby holders were entitled to use water for agricultural purposes and urban use. Riparian water rights were attached to land and afforded landowners the right to share in the water of a spring or river flowing alongside or over their properties (Pienaar & Van der Schyff, 2007). The Act (ss1&5) further distinguished between private and public water. Historically, the 1956 Water Act did not explicitly determine who the owner of private water was, but established that exclusive use rights of private water could be exercised by the owner of the land where it had its source or which the water flowed over. Private ownership of groundwater afforded individual landowners exclusive use of water underlying their property. Although the legislation governing access to water in South Africa was not, in itself, overtly racist, access to water was linked to ownership of land through the concept of riparian rights, and 'private' ownership of groundwater or small tributaries found on or under private land. As riparian water rights were entrenched in South Africa, therefore race-based access to land resulted in race-based access to water (Cleaver, 2000). This implied that this natural resource was dominated by the small, white minority and thus access to water for economic good was also controlled by the small white minority. The dominus fluminus principle applied and rights to public water were regulated by the state. Public water could only be used for industrial purposes if permission was granted by the Minister of Water Affairs, and it also found expression in the Minister's authority to declare types of control areas, where the Minister deemed it necessary, for public or national interest (ss 28, 59, 71, 3).

This regime excluded the majority of South Africans from accessing water rights and with the dawn of South Africa's democracy a significant change in water law dispensation was needed to give effect to the constitutional imperative of every citizen's right to equality, and specifically, access to water (s27(1)(b)).

3.4 The paradigm shift: the policy and legal framework

From the historical perspective above, it is clear that South Africa had to ensure the advancement of human rights, freedom and dignity for all her people so that everyone could equally share in, benefit and develop from all her resources. South Africa had heralded a new democracy in 1994. The Constitution of 1996 is the supreme law of the country and the Bill of Rights (Chapter 2) is the legal imperative enshrining these values. With reference to the right to water, section 27(1)(b) of the Bill of Rights provides that everyone has the right to have access to sufficient food and water. Section

27(2) states that 'The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights' (RSA, 1996). These two fundamental rights form the basis of South African water law and hence the overhauling of her water policy and legislative framework was a constitutional and a political imperative.

3.4.1 The policy and legal framework after 1994

A paradigm shift in the South African water regime was essential and the current legislative framework made a marked shift from previous water laws; it sought to address social inequities and environmental concerns on the one hand and efficiency-related issues on the other. This led to, inter alia, the promulgation of the National Water Act 36 of 1998 with the objective to manage water resources in an efficient, sustainable and equitable manner and this reformed South Africa's water law radically, intending to redress inequalities, i.e. racial and gender discrimination.

The innovative water paradigm in South Africa completely reformed South Africa's water law. It was anticipated that it would contribute to poverty relief and be a means to enhance social justice and redress inequalities, with specific reference to access to water (s2 of NWA). A different approach to water resource management, it focused on demand management, and on delegating water management decisions away from the national authority with the intent of creating a more integrated and participatory decision-making process, as provided in the NWRS (NWA, chapter 2).

Gowlland-Gualtieri (2007:3) argued that, due to the following principles, the NWA had fundamentally changed South Africa's water resource management:

- Integrated water management to achieve environmental sustainability, equity and efficiency and no difference made between surface and groundwater, and as such all water management strategies must reflect this cohesion.
- The public trust doctrine replaces private ownership and the preamble recognises that water belongs to all the people of the country. The NWA assigns the national government as the custodian of the country's water resources and mandates it to exercise its powers as public trustee (s3) to ensure that water is 'protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons'.
- The 'Reserve' (NWA: Chapter 3, Part 3) is the only right to water and it enjoys priority over all other water uses. The Reserve is designed to meet the constitutional right of access to water. It consists of two parts - the basic human needs reserve providing 'for the essential needs of individuals served by the water resource in question and includes water for drinking, for food preparation and for personal hygiene' and an ecological reserve relating 'to the water required to protect the aquatic ecosystems of the water resource.'
- The previous riparian system of water allocation is replaced with a licensing system, thus separating land ownership and water rights. The intent is to achieve equitable access to water, especially for those who do not own or control land.

The NWA is premised on the approach of IWRM to manage South Africa's water resources and

changed the pre-1998 riparian system of water rights to a system of administrative water use licences granted by an institutional authority. All water in South Africa belongs to all her people and is held in trust by the government and the Minister who are the trustees thereof. No one is an owner of water, they can only be granted authority to use the water. The only right to water is the right of the Reserve for human and ecological needs. The application process of licensing was conceived to facilitate allocation and reallocation of water resources to bring about transformation and Chapter 1 of the NWA provides that the fundamental principles of equity and sustainability will be applied in the protection, use, development, conservation, management and control of water resources.

Lewis (2007:1257) remarked that IWRM has been recognised as the water management system for the 21st century but implementation thereof has been difficult. He attributed this to lack of a clear conceptual understanding and this seems to ring true if one scrutinises South Africa's implementation track record since the promulgation of the NWA.

The NWA does not specifically use the words IWRM but the principles are entrenched as supported in the preamble of the NWA, acknowledging the 'need for the integrated management of all aspects of water resources and, where appropriate, the delegation of management functions to regional or catchment level so as to enable everyone to participate.' IWRM is the approach that is widely sanctioned by the international community as a complete approach to water management and planning, and decision-making processes in the water sphere are more and more based on this paradigm (Anderson et al., 2008). A definition of IWRM that is generally used is that of the Global Water Partnership (GWP, 2000:22) which states that it is 'a process which promotes the coordinated development and management of water, land and related resources, in order to maximise the resultant economic and social welfare in an equitable manner without compromising the sustainability of the vital ecosystems.'(DWAF, 2004:13). For the first time the words 'integrated water resources management' were used in an official document in South Africa. Through IWRM, decision-making power is decentralised (in the South African context, to regional level through the CMAs and to local level through the WUAs). Movik (2011:2) pointed out that this had brought water resources progressively into the realm of the state, and, in South Africa, the allocation of water vis-à-vis the issuing of licences was unmistakably a key function of the DWA to be ultimately performed by CMAs. She (2011:2) further noted that IWRM was the dominant international discourse to bring about reform.

Thus, giving effect to IWRM, the NWA made provision for the establishment of CMAs with the purpose of delegating water resource management to regional or catchment level and, consequently, involving communities. CMAs are statutory bodies provided for in terms of Chapter 7 of the NWA. Section 80 assigns CMAs five initial functions, namely (i) investigate and advise on the protection, use, development and control over water in the catchment, (ii) develop a catchment management strategy, (iii) coordinate related activities of water users and institutions, (iv) promote coordination of the implementation of the catchment management strategy with development plans resulting from the Water Services Act, and (v) promote community participation. The Minister may delegate or assign

further functions, powers and duties to CMAs, including the review, authorisation, extension and registration of water licences. In those water management areas where a CMA has not been established, or is not operational, the Minster, through DWS regional offices, will continue to fulfil the functions thereof.

Another water management institution at local level enabling greater stakeholder participation is the WUA (water user association). Under the previous Act, of 1956, the water management institution at local level was the irrigation board (hereinafter IB). IBs consisted predominantly of white commercial farmers, and water management was for their benefit only. Chapter 8 of the NWA provides for the establishment of WUAs as the primary body to facilitate stakeholder participation at a local level. The main function of a WUA is to undertake water-related activities for the mutual benefit of its members, including supervision and regulation of water distribution and construction, and operation of hydraulic infrastructure. The NWA (section 98) requires all IBs to be transformed into WUAs to be more inclusive of all water users. Section 98 (2) provides that an IB is to 'continue to exist until it is declared to be a WUA in terms of subsection 6 or until it is disestablished in terms of the law by or under which it was established'.

However, the decentralisation of management from government to stakeholders at regional and local level through the establishment of CMAs and WUAs has not happened as intended. The NWRS-1 envisaged that 19 CMAs would to be established but, by 2013, only two, namely the Inkomati and Breede-Overberg CMAs, were established. The original 19 WMAs included the Breede-Overberg and Gouritz as two separate WMAs, each intended to have its own CMA. A CMA was established and made operational for the Breede-Overberg WMA but not for the Gouritz WMA. In 2012, the Minister approved the merger of CMAs and establishment of nine CMAs in nine WMAs (Department of Water Affairs 2011). This meant the reduction to 9 WMAs in 2013. Consequently, the Breede-Overberg WMA was reconfigured to become the Breede-Gouritz WMA and this merger resulted in the jurisdiction of the BOCMA being increased to cover the Gouritz and its name being changed to BGCMA (Breede-Gouritz Catchment Management Agency). The reduced number of CMAs is meant to better employ scarce technical skills and diminish the regulatory and oversight duties of the Minister and Department, thus alleviating the management, technical and administrative demands associated with the establishment of CMAs (DWA, 2013)6. However, to date, these institutions are still not established or operational as intended. Still, only two CMAs are operational nationally, namely the Inkomati-Usutu CMA and Breede-Gouritz CMA. Various reasons for this state of affairs have been put forward, inter alia an absence of direction and social and institutional memory in the Department, attributed to the exodus of personnel which led to high institutional indecision (Department of Water Affairs, 2011, Karar et al., 2011). The question remains whether it was the intended interpretation of IWRM that authority were to be devolved to regional and local level to provide the emerging farmer with a voice to influence whether and

[6] At the time of writing, South Africa is contemplating the continued existence of its water governance (National Policy Review: DWA, August 2013) and specifically the institutional arrangements and equity challenges.

how water is accessed. This became apparent as the research explored whether, and in what way, bureaucracy gives expression to this intention, and further, whether and how the legislative framework impacted on the emerging farmer's experience with the process of accessing water for productive use.

The new water dispensation brought about many opportunities for, and challenges in, the reallocation of water. Chapter 4 of the NWA specifically regulates water use rights. S22 provides that permissible water use will be granted under the following circumstances, namely, Schedule 1 authorisations, the continuation of an existing lawful use, general authorisations under s39 and through individual water use licences, in terms of Part 7. Part 7 of the NWA also makes provision for compulsory licensing, requiring a responsible authority to prepare schedules for allocating quantities of water to existing and new users in water-stressed areas. Section 43 of the NWA provides that water may be reallocated from existing use in order to realise fairer allocation of water, to improve efficiency of resource management and to protect water quality. Further, water allocations were to be granted at the discretion of the relevant authorities with the fundamental principles of equity and sustainability being pertinent. Section 27(1) provides specifically that, in the issuing of general licences, the responsible authority must take into account *inter alia* the need to redress the results of past racial and gender discrimination. However, decision-making was often left to the resolve of officials and reform was slow.

The NWA requires the Minister to progressively develop a National Water Resource Strategy (hereinafter the NWRS), and this framework was to set out the principles and guidelines for implementing water management and transformation. The NWRS is the framework for the protection, use, development, conservation, management and control of the country's water resources. It guides legislative and policy implementation through strategies, objectives, plans, guidelines and procedures for water at national, regional and catchment levels. It is a prerequisite for the full implementation of the NWA and is meant to be reviewed at intervals of not more than five years (ch 2, part 1, s5(4)(b)). It sets out the plan of action for, *inter alia,* compulsory licensing and the establishment of CMAs and WUAs. CMAs are obligated to develop catchment management strategies (hereafter the CMS) which must be aligned with the NWRS, and the CMS should include water allocation plans. The key principles of the NWRS (DWAF, 2004) were to achieve:

- Equitable access to water, that is, equitable access to water services, water resources, and associated benefits
- Sustainable use of water, by making progressive adjustments to water use
- A balance between water availability and legitimate water requirements, by implementing measures to protect water resources
- Efficient and effective water use for optimum social and economic benefits.

The NWRS (DWAF, 2004) further provides guidelines for the implementation of the Water Allocation Reform (WAR) programme (DWAF, 2005) and is a means to deal with the imbalances of

previous access to water and ensure the 'efficient and beneficial use of water in the public interest' (NWA, s27(1)(c)). The WAR:2006 is the practical policy guide to implementation and was approved in September, 2006. It provides:

- A connection point between the Constitution, the National Water Policy, the National Water Act and the National Water Resources Strategy within the water allocation process;
- A code of practice to guide water allocation processes both inside and outside of compulsory licensing;
- A commitment to stakeholders regarding the intention and purpose of these processes;
- The basis for developing the water allocation principles that must be included in catchment management strategies (WAR, 2006:6).

Compulsory licensing is a key legal instrument to give effect to the WAR and potentially bring about change to existing water use. Sections 43-48 of the NWA provide that compulsory licensing requires all the water use authorisations in an area to be reconsidered in order to:

- Achieve a fair allocation of water from a resource that is under stress or to achieve equity in allocations;
- Promote beneficial use of water in the public interest;
- Facilitate efficient management of the water resource; or
- Protect water resource quality.

The Water Authorisation Registration and Management System (WARMS), a national register of water users, requires all authorised water use to be registered on WARMS and is the only available national data set of water use. This information feeds into DWA's SAP (Systems, Applications and Products in Data Processing) system and is used for charging water users.
These policies, together with the NWA, establish the state's discretionary powers to determine water use rights.

The concept of the public trust doctrine is new in South Africa's jurisprudence and Pienaar and Van Der Schyff (2007:183) regarded this as the pivot of the new water law dispensation. They noted that accepting this foreign Anglo-American concept into South African jurisprudence had provided the State with a means to integrate the needs of the different role players, such as communities, farmers and industry and thereby achieve transformation (2007:183). Tewari (2009:705) cautioned that this role of government implied that the water allocation process was administratively greater and noted that Kidd and Bronstein had critiqued the legislation as 'unnecessarily interventionist'. They argued that the allocation process should be guided by the market, and Kidd (2009:82) further submitted that the market should be the determining factor and not the use of powers as provided for by the NWA.

Transformation was a key driver of the new dispensation and cognisance should be taken of the

White Paper on a National Water Policy for South Africa (DWAF,1997). It denoted that the government, when allocating resources, 'cannot be bound by past decisions which may be inappropriate in the light of current knowledge or inconsistent with current needs' and should be permitted to reassess previous allocation decisions (DWAF,1997:24).

The Department published the WARS to further give impetus to the NWA's overarching objective of equity, and therein equity targets were expressed as follows:

> 'The strategic objective for WARS is to redress past imbalances in the allocation of water. The WARS stipulates national targets, which are inclusive of black women, and are to be progressively achieved by the year 2024. In terms of these targets, 60% of allocable water should be in the hands of black people, of which half should be in black women's hands. The reasoning behind setting up targets is to ensure that resources are channeled or focused to meeting the objectives of the WAR programme' (DWAF, September, 2008).

Section 2 of the strategy specifically provides for 30% of allocable water to be allocated to previously disadvantaged individuals (i.e. Blacks, Coloureds and Indians) by 2014, and at least 50% of the 30% allocable water should be allocated to women. Thus, the long-term target is to have 60% of water allocated to blacks by 2024 (DWAF, 2008). Setting these targets was to bring South Africa closer to meeting the transformation mandate as per the Constitution, NWA and the NWRS. The WAR strategy made provision for enabling mechanisms and approaches such as:

- Set-asides – In stressed catchments, water is to be made available from water conservation, water demand management and illegal water use recovered during the verification and validation process. Following this, individual licences or general authorisations will be issued.
- General authorisations.
- Strategic alignment with other national initiatives – such as the land reform programme and Special Purpose Vehicle of the Department of Agriculture.
- Compulsory Licensing (NWA: sections 43-48) – all the water use authorisations in an area are reconsidered in order to, amongst others, achieve a fair allocation of water from a resource that is under stress.
- Partnerships and Business enterprises – such as joint venture initiatives and public private partnerships who use water as a productive asset and implemented on a scorecard basis.
- Development support – financial support, funding of infrastructure, grant funding, technical support, voluntary donations, etc.

  (DWAF, 2008:6).

The WAR strategy puts forward a two-pronged strategy for implementation. It requires catchment management strategies to contain water allocation plans and the Department's internal processes and initiatives to be aligned to achieve these targets by 2024. (DWAF, 2008:6).

3.4.2 The institutional authorisation processes

The institutional authorisation processes are dictated to by the legislative and policy framework. This section identifies these processes with specific reference to the NWA, the NWRS-1 and NWRS-2, the WARS and the 2015 draft regulations pertaining to these processes, and interprets said processes in the context of the licence application.

3.4.2.1 The National Water Act 36 of 1998

The process of a review and reform of South Africa's water management began immediately after South Africa became a democracy. The process for a new water dispensation was preceded by 28 newly developed fundamental principles and objectives for water presented for public comment at the beginning of 1996. Central to the new water law proposal was the Reconstruction and Development Programme which focused on meeting basic needs, developing human capacity, growing the economy, and democratising the state. This focus was mirrored in the Growth, Employment and Redistribution Strategy which emphasised land reform, agricultural development and the provision of infrastructure. These principles were further refined after extensive consultations with multiple sectors such as agriculture, mining, industry and environmental groups, and finally approved by Cabinet in 1996. The first four principles were the legal basis of the water law (Tewari, 2009) and principles 1-4 were:

i. The water law must be subjected to and consistent with the Constitution.
ii. All water is a common resource and its use is under national control.
iii. There is no ownership of water but only a right (the Reserve) or use by authorization, not granted permanently but subject to regular review.
iv. The riparian principle is eradicated.

Tewari (2009:702) further noted that the second set of principles (principles 5-6) dealt with the water cycle as a resource, the third set of principles dealt with water management priorities (principle 7), principles 8 and 9 concerned access to water for all and the reserve and principles 10 and 11 were about international obligations. He further mentioned that the fourth set of principles (12-21) spelt out water management approaches, principles 22-24 dealt with the establishment and functioning of water institutions whilst principles 25-28 relate to provision of water services.

The next step was the drafting of a White Paper on Water Policy in 1997, representing the policy of Government. This formed the basis of the water legislation, and after wide consultation the National Water Bill was tabled in parliament in 1997[7]. In 1998, the National Water Act, Act 36 of 1998, was promulgated. The legislative process was finalised within a short period of two years and this may be ascribed to the urgency and need to transform the existing inequitable water framework.

[7] All the information pertaining to the process preceding the promulgation of the NWA in this section was sourced from DWAF (1997), White Paper on a National Water Policy for South Africa. Pretoria: South African Government.

The NWA dictates all considerations, conditions and requirements for permissible water use and provides the principles for water allocation as per Chapter 4 of the Act. However, the NWA leaves wide discretion to the responsible authority. Responsible authorities are the CMAs but if not established, then the responsible authority is the Minister (Chapter4, part 2). Only two CMAs were operationalised in 2004 and 2005, as seemingly the process of establishing these CMAs is very complex. Further, Movik et al. (2016:469) noted that power relations and tensions between the national and regional offices added to the complexity of the process. Hence as the Minister has not yet delegated the licensing authority to the two operationalised CMAs this authority to issue licences still vests with the Minister. By implication, all permissible water use still has to go to national level to be authorised and this further contributes to the licensing backlog. Interestingly, the centralisation issue was not mentioned by DWS as a contributing factor to the backlog and it appears that it was more convenient to apportion blame to the slow pace of Reserve determinations. Hence, almost twenty years after promulgation, South Africa had not fulfilled the intention of the NWA of '…integrated management of all aspects of water resources and… the delegation of management functions to regional and catchment level so as to enable everyone to participate'8 .

The discretion of the responsible authority in granting permissible water use is unmistakable in chapter 4 of the NWA. Part two of the chapter specifically states that 'It guides responsible authorities in the exercise of their discretion9 to issue and to attach conditions to general authorisations and licences. The NWA provides the principles and subsequent policies, such as the NWRS, offer more practical detail for water allocation. Nonetheless, the processing of licences, and ultimately the final decision to issue licences and attach conditions to said licences, falls within the bureaucracy. Any licence application process will travel a heavy bureaucratic route, starting at CMA or regional level and eventually landing on the desk of the national Director General (DG) of Water and Sanitation in Pretoria for final consideration. The Act intends that ultimately CMAs will be the regulators of water use but in the current situation where the power to issue licences has not been delegated to CMAs, the ultimate decision still vests at national level. This whole authorisation process, whether at the level of first enquiry or ultimately at DG level, rests with people who are fallible at most times. The DG is in all probability inundated with all types of portfolio demands and, although the DG receives recommendations from his/her Department, is still required to apply his/her mind to the licence application at hand. This inevitably leaves one to question whether at all times the right decision promoting equity and efficiency will be made.

S41 of the NWA dictates the information the responsible authority may require from the applicant to accompany the application. The information required is very technical in nature and includes inter alia an assessment and review by a competent person of the likely effect of the proposed licence on the

[8] The preamble of the NWA

[9] This is my emphasis to illustrate that the responsible authority exercises discretionary powers when issuing licences.

quality of water and an assessment in terms of section 26 of the Environment Conservation Act (section 41(2), (3)). All this will be time consuming, ignoring the probable urgency of access to water for these farmers to maximise use of their land. Further, this information is to be sourced and submitted at the applicant's costs. Although it is appreciated that water resources be protected and all efforts be made to protect and manage the resource effectively and efficiently, these demands may, by implication, put the emerging farmer on the back foot. This stakeholder is already stressed for resources such as finances, an existing network of expertise, time and human capital and this may defeat the purpose of equity and transformation.

It begs further directives to tighten the procedures for the process of permissible water use thereby instilling confidence in water users that decisions are indeed made with the intent to promote the fundamental principles of the NWA of sustainability and equity.

3.4.2.2 The National Water Resource Strategy 1 and 2

Although the NWA provides the principles for water allocation, it was necessary that clearer practically directed policy was issued, detailing how these principles were to be applied, thus making water allocation tangible. Chapter 2 of the NWA provides for water resource strategies to enable management of the resource, hence the NWRS and catchment management strategies.

The NWRS is a dynamic document which provides a national framework for managing water resources and, amongst others, the key objective of equitable water allocation. In terms of the NWA, the NWRS is binding on all authorities or institutions exercising powers in respect of the NWA. The NWRS 'sets out the strategies, objectives, plans, guidelines and procedures of the Minister and institutional arrangements relating to the protection, use, development, conservation, management and control of water resources within the framework of existing government policy…' (NWA: s6).
The NWRS is a legal instrument for implementing or operationalising the NWA. It is the chief mechanism to manage water across all sectors towards achieving national government's development objectives. It further ensures support for equitable and sustainable social and economic transformation and development.
South Africa's first edition NWRS was published in September 2004, six years after the promulgation of the NWA. This strategy offered a plan of action which included the establishment of CMAs, compulsory licensing, a progressive decentralisation of responsibility and authority to CMAs, establishment of new WUAs at local level and refinement of the licence application process to minimise delays. In 2014, the DWS presented the following overview of the implementation of the NWRS to the Portfolio Committee on Water & Sanitation:

OVERVIEW OF ACHIEVEMENTS AND CHALLENGES OF THE NWRS	
ACHIEVEMENTS	**CHALLENGES**
Sustaining reliable supplies Development of new water resources	Achievement of the Water Conservation and Demand Management targets

infrastructure and investment in improved dam safety of state dams Improved insights into future water demands and supplies A significant proportion of reserve determinations complete and first examples of implemented environmental flows in place Water reconciliation studies done in the major urban areas Incentive based regulation through the blue and green drop assessments Improved sector collaboration and participation Development of a Learning Academy to improve skills and capacity within the sector Two CMAs established and functional Support provided to a number of resource poor farmers Verification of water use well underway Water sharing agreements and institutional arrangements in place in all trans-boundary basins	*Streamlined water allocation reform to redress past racial and gender imbalances in access to water for productive uses and to address poverty and inequality*[10] Implementation of environmental flow monitoring and water resource classification *Establishment of water management institutions and the decentralisation of water resources management* Strengthening of regulation of water resources and compliance monitoring and enforcement Improvement of technical and management skills to implement developmental water management Improvement in the integration of monitoring and information management Reduction in the backlog of infrastructure maintenance

DWS (2014)

Hence, by the DWS's own assessment of its performance on the objectives of the NWRS, it is disquieting that a key objective, i.e. equity, is still, 15 years after the NWA was promulgated, a challenge to be addressed. This refers directly to access to water for the emerging farmer who is also classified as the historically disadvantaged, i.e. the black farmer.

The second edition of the NWRS was only published in 2013, nine years after the publication of the first edition. The core objectives of the NWRS-2 are:

Water supports development and the elimination of poverty and inequality, i.e. equity.

Water contributes to the economy and job creation, and

Water is protected, used, developed, conserved, managed and controlled sustainably and equitably (DWA, 2013).

This research focuses on objective one only, i.e. equity. The NWRS-2 defines equity to mean

'that special attention must be given to the needs of those that were historically denied access to water or to the economic benefits of water. Equity implies a concept of fairness, which allows for different practices in the management of water in response to different social, economic and environmental

[10] My emphasis for purposes of this research project

needs. Equity encompasses fair attention to the needs of future generations (DWA, 2013:12).
Chapter 6 of the NWRS-2 provides the detail for equitable allocation of water. It specifically highlights the disregard of this objective since the NWA was promulgated. The strategy identifies compulsory licensing as a means to achieve equity but recognises that it is resource-intensive, will require expert knowledge and skills and is a 'legally and technically complex process' (DWA, 2013:46). The NWRS-2 principles of equity inform the planned ways to achieve WAR and the envisaged objectives, namely i) Redress race and gender imbalances, ii) Broad-based black economic empowerment, iii)Fair, reasonable and consistent, iv) phased attainment of developmental and environmental objectives, v) Reduction of administrative burden and vi) Capacity development (DWA, 2013:48). The strategy underlines the need to collaborate with other stakeholders to enable success of its WAR.

3.4.2.3 The Water Allocation Reform Strategy

The Water Allocation Reform Strategy (DWAF, 2008) served as the strategic link between policy intent and the practical implementation of the provisions of the NWA. It provided the implementation targets to achieve the objectives of the NWA.
The strategic objective of the WARS was redress in water allocation and for this purpose it had set implementation targets. These targets were:

- By 2014, 30% of allocable water allocated to previously disadvantaged individuals (i.e. Blacks, Coloureds and Indians)
- At least 50% of the 30% allocable water should be allocated to women
- The long-term target is to have 60% of water allocated to blacks by 2024 (DWAF, 2008:4-5).

With these targets the Department anticipated that it could ensure that resources were directed or geared towards meeting the objectives of the WAR programme. A five-year rolling plan was devised to reach these targets (DWAF, 2008:5). However, the NWRS-2 clearly indicated that South Africa had not experienced real transformation and these WARS targets were not reached. In 2013, five years after WARS was published, the focus of the NWRS-2 is still on equity.

Nevertheless, as the NWRS-2 was published, the Department made known its intention to review the existing legislative water regime by publishing a policy review in August, 2013 (DWA, 2013). This policy position proposed radical changes to the existing water landscape and the key policy issues are:

- Developmental water management.
- One whole water value chain – from resource to consumptive and productive use to resource.
- Developing a national water strategy.
- Water for equitable use. This entails the principles of use-it-or-lose-it, water trading between authorised users, prioritising social and economic equity in reallocation of water, multiple water use approach in planning infrastructure, access to basic water supply and free basic water supply to indigent households.
- Institutional arrangements and governance. This involves economic regulation, the establishment and functions of water utilities, the roles and functions of WUAs, appeal functions to be aligned with the National Environmental Management Act, Act 107 of 1998, and other

appeal mechanisms, powers and functions of water service authorities (WSAs) and public water institutions, and appointments of boards and chief executives.

South Africa's water sector is presently uncertain as to what the future holds, following this policy review, as it awaits the next step from the Minister pertaining to how the policy position will find expression in regulatory action.

3.4.2.4 The draft regulations for the procedural requirements for water use licence applications

The backlog of licence applications was of concern to all stakeholders, albeit in the private sector or the public sphere. South Africa was struggling to give access to new applicants. Hence, by implication, the historically disadvantaged, i.e. emerging farmers, were included in this delayed processing of licences and thus the transformation agenda of the state suffered.

The current water use licence application process has no specific timelines attached to it and can take more than two years11 to finalise. Consequently, it created unacceptable backlogs, and all parties, be it applicants or institutions, were frustrated with this state of affairs. In order to address the slow turn-around time, the DWS published draft regulations proposing more detailed guidelines to help make the process more efficient and effective. The draft regulations, for the first time, included time frames for the processing of applications. The proposed 300-day time frame incorporated into the draft regulations could be a general improvement, provided it can be implemented effectively by the responsible authority. The following timeframes were proposed by the DWS:

[11] In some instances, this period is even longer. Schreiner (2013:240) stated that in some instances licence applications had been with the Department for up to eight years without being finalised.

Timeframes for processing of water use licence applications

Stages of water use licence application process	Days	Cumulative days
Inception of application at relevant State department (if so required)	7	7
Applicant to inform responsible authority of the intent to apply	5	12
Responsible authority acknowledges receipt of notice of intent to applicant	5	17
Meetings and site inspection and grant permission to proceed with application	30	47
Compile application/submission	100	147
Reject/accept application	10	157
Final Processing and recommendation	120	277
Decision and communication to applicant	23	300

Government Gazette General Notice 126 of 2015:Notice no 38465

Figure 3: Government Gazette General Notice 126 of 2015: Notice no 38465

Before these regulations were finally adopted, the institutions had adopted the draft processes and were using the draft regulations in the absence of anything else. This illustrates the need by officials and staff for clear guidance to help them to perform the tasks at hand. The process still seems to be overly administrative and technical (see attached Appendix 1). However, the question remains whether these regulations had necessarily improved matters or had merely squeezed the process into a delineated time period and not necessarily made it less administrative and technically intensive.

This section of the report has identified legislation and policy plotting the progression of South Africa's regime for water allocation, from the promulgation of the NWA to the present framework (see attached Appendix 2). As the Minister is putting into motion the policy positions as put forward in 2013, the institutions will continue to endeavour to implement the existing framework under difficult circumstances and in a changing environment. The next part of this report gives an insight into the institutions and how the role players understand and implement their roles in water allocation.

3.4.3 Implementation challenges of the policy and legal framework

The NWRS specified the details to bring about the water reform targets. However, as indicated previously, South Africa floundered in the implementation phase of this changed policy and legal framework. As stated earlier, the NWRS was meant to be reviewed at intervals of not more than five years (ch 2, part 1, s5 (4)(b)). A review, albeit delayed, led to the issuing of the NWRS-2 in 2013. The NWRS-2 introduced the model of developmental water management (DWM) with the intent that it should be interpreted within the context that 'water plays a critical role in

equitable social and economic development' (NWRS-2:14)[12].

In reviewing the literature, the following challenges were suggested as preventing successful implementation:

- 'human capacity constraints
- inadequate acceptance of the IWRM concept in practice
- 'insufficient cooperation between the different sectors and different policies that impact on water' (for example, management of watercourses and management of land within catchments are handled by different government departments)
- public participation in water decision-making is difficult due to capacity constraints particularly in rural areas
- the highly technical nature of the hydrological process in the process of determining the Reserve and water resource quality objectives in the different water management areas' (Kidd, 2011).

Schreiner (2013:242,243) added that further factors contributing to poor implementation were:

- Lack of capacity further exacerbated by leadership challenges at both ministerial and director general level. During the past nine years, the Department has had three directors general and two acting directors general. The Department also had three ministers during this period.
- Striking the right balance between technical or scientific quality and the ability to manage a process enabling implementation.
- The Department attempted to implement all the changes brought about by the NWA at once but this proved to be unsuccessful due to the limited capacity.
- The Department's tardiness to adhere to and swiftly implement decisions contributed to weak implementation. A case in point is the establishment of the CMAs.

Funke and Jacobs (2011:90) were of the opinion that DWA lacked capacity to apply and enforce the licensing process and, due to administrative pressure, seemed to award licences as requested without due consideration. They further stated that any prospect of transformation was diminished due to the legal complexities of water allocation. Kidd (2011:16) further warned that the IWRM approach was intricate and required a thorough understanding of the hydrological cycle for it to be successfully implemented.

In view of the above, the following broad implementation challenges were inferred:

- Institutional lack of capacity.
- Complex legal framework for water allocation.
- Institutional failure to fully understand the complex IWRM approach.
- Weak cooperation between the different government departments which contribute to a successful water use application.

[12] This will be discussed in more detail later in this report.

- The administrative burden of water applications.

For the purposes of this research, and in light of the above challenges, the discussion in the following sections focuses on decentralisation and reallocation/allocation only as they directly impact on the issue at hand.

3.4.3.1 Decentralisation

Giving effect to the IWRM mandate of decentralisation of functions to regional and local levels, the NWA provides for the establishment of CMAs and WUAs. The NWRS had made provision for 19 CMAs to be functional in 2016. However, by 2011, of the 19 WMAs with a corresponding number of CMAs, only nine were set up, of which only two were operational. Various reasons for this state of affairs were put forward, inter alia the absence of direction and social and institutional memory attributed to the exodus of personnel, and this further led to high institutional indecision (DWA, 2011; Karar et al., 2011). In 2012, the Minister approved the merger of CMAs and establishment of nine CMAs in nine WMAs (DWA, 2011). The DWA decided to reduce the number of CMAs as a '…result of a reconsideration of the management model and viability assessments related to water resources management, funding, capacity, skills, and expertise in regulation and oversight, and an effort to improve integrated water systems management' (Meissner et al., 2016) and thus more effective governance. The reduced number of CMAs was intended to better employ scarce technical skills and diminish the regulatory and oversight duties of the Minister and Department, thus alleviating the management, technical and administrative demands associated with the establishment of CMAs (DWA, 2013). However, it implied that the geographical area of operation of these CMAs would increase and, by inference, the bureaucracy would also be bigger, hence increasing the administrative burden on each CMA. This could nullify the benefits associated with the merging of WMAs. However, to date, the mentioned two CMAs are the only CMAs operationalised and one questions whether the reduced number would indeed have achieved the objective of the revised policy decision. However, in December 2017, the Minister signed off yet another policy review, namely the establishment of ONE single CMA. 'Amid growing concern regarding the costs associated with the establishment of multiple institutions and the need to rationalise and align existing institutions as a mechanism to unburden the state of burgeoning service costs. This is in line with the Presidential review of state-owned entities and National Treasury's cost cutting measures (DWS, February 2015).

This is very concerning as economics seem to be the key driver and not the objective of subsidiarity, i.e. having participation at the lowest level at its core. This seems to create another enormous bureaucratic structure which does not address the real challenges experienced by the water user or official at local level as they struggle to access or implement water use. A further concern is how the Department changes direction and creates further uncertainty whilst the previous policy had not been implemented completely and problems or challenges vis-a-vis existing institutions are not fully dealt with and resolved. Since the inception of the NWA, CMAs, and the intended objective of the legislation, have not been given adequate opportunity to come to their fullest potential, due to tardiness at the helm

in establishing and operationalising these institutions. A reduced number of nine CMAs, in the merged WMAs, did not materialise, i.e. the policy was not implemented. The question is, in what way will this new policy of a mega CMA be any different, and how will it be implemented, as South Africa once again introduces a new policy to address unfulfilled previous policy decisions.

It was envisaged that IBs would be transformed to WUAs within six months after promulgation of the NWA, but this time frame was extended by a year. In 2013 the DWA released figures pointing to the slow transformation of the IBs, and thus by implication a continuation of the old discriminatory practices (Portfolio Committee on Water and Environmental Affairs, 2013). The national figures indicated that of the total number of 279 IBs only 59 were transformed to WUAs whereas 79% were still operating as per the Water Act 54 of 1956. At this parliamentary session (DWA, 2013) envisaged that all irrigation boards will be transformed within a year. This has not happened.

3.4.3.2 Reallocation/allocation and equity

Although equity is one of the central guiding principles of the NWA, it seems that access to water, and the related benefits of allocation of water to HDIs, has not received the priority it deserves.

The NWRS-2 (DWA, 2013:45) defines equity to mean 'that special attention must be given to the needs of those that were historically denied access to water or to the economic benefits of water. Equity implies a concept of fairness, which allows for different practices in the management of water in response to different social, economic and environmental needs'. NWRS-2 further emphasises the importance of distinguishing between equity in access to water services, equity in access to water resources and equity in access to benefits from water resource use through economic, social and environmental development and management. Schreiner (2013: 126) observed that the largest users of water were still white commercial farmers and this mirrored the fact that South Africa was still one of the most unequal societies in the world. Between 1998 and 2012, 4 284 water use licences were issued over a period of 14 years. Of these, only 1 518 (35.4%) were issued to HDIs (DWA, 2013). This percentage of water allocations to HDIs was negligible.

Commentators have put forward a number of reasons for the slow implementation of a policy that was regarded by the international community as revolutionary. Van Koppen & Schreiner (2014:9) stated that the equity objective was difficult to achieve and identified the following contributing factors:

- Flaws in IWRM.
- The inability of the DWAF to immediately implement highly technical aspects of the NWA, due to skills scarcity and technical incapacity partly brought about by the exodus of experienced staff into retirement or to the private sector.
- DWAF's failure to retain especially senior staff.

Msibi and Dlamini (2011:59) added the following to the list of constraints of WAR:

- Inadequate human capacity in critical skills.
- The resource-intensive nature of the water use licence application (WULA) process.
- Lack of understanding by key staff of important provisions of the NWA.
- Intricate technical procedures for reserve determinations and validations and verifications.
- 'Exclusive dominant knowledge regime restricting and reproducing top-down of government and cements closed networks and historical patterns of inclusion and exclusion'.

Further challenges adding to the bottleneck in WULA which DWA put forward (Msibi & Dlamini, 2011) were:

- Insufficient guidelines.
- Unwillingness to contribute to redress and equity amongst some stakeholders.
- Delayed inputs from other departments.
- Incomplete documentation from applicants, probably brought about by inadequate assistance to HDIs.

Reallocation could only be achieved if the state was brave enough to face the issue of the 'existing lawful user' head-on. The NWA (s32 (1)) defines existing lawful water use as use

> **'**which has-taken place at any time during a period of two years immediately before the date of commencement of this Act, or which has been declared an existing lawful water use under section 33, which was authorised by or under any law which was in force immediately before the date of commencement of this Act; is identified as a stream flow reduction activity in section 36(I); or is identified as a controlled activity in section 37'.

The concept of existing lawful use seems to be derived from, and influenced by, section 25 of the Constitution which guarantees and protects existing property rights and, by implication, access to water use. However, it also seems to have been a way to allay the fears of commercial farmers and, on the basis of economic sustainability, it was accepted to ease the transition from the old water order into the new dispensation. The first draft WAR policy document read: ''If reallocations occur too quickly, the country will suffer economic and environmental damage as emerging users struggle to establish productive uses of the reallocated water'' This policy position was criticised as it entrenched the status of existing lawful users and linked reallocation of water to HDIs to their potential for commercial efficiency (Movik, 2009). A requirement of classification as an existing lawful user was that the use would have to be validated, i.e. accurately quantified and verified to check whether the use was lawful in terms of the Water Act of 1956. Following this, the Department would then discern the quantity of water availability for reallocation. This required the Department to embark on a technical and highly skilled exercise, and further rely on existing lawful users to offer information. Due to lack of resources consultants were used and it became an extremely costly exercise. Currently, many commercial farmers are still using water based on use rights that existed in terms of the old water regime. This situation is untenable as it implies that reallocation takes a back seat and thus redress is neglected or not enjoying attention. Movik (2011:168) critiqued the notion of 'existing lawful users' and challenged the associated assumptions around efficiency and environmental damage that would result from reallocation. She

maintained that their continued status as the most productive users effectively excluded the emerging black farmer from having a fair and equitable chance to access water use.

The above does not serve the interests of emerging farmers well. It refutes the objective of the NWA of promoting equitable access to water, redressing the results of past racial and gender discrimination and facilitating social and economic development.

3.5 The second wave – 2013 policy review

The NWRS was based on the principles of IWRM and introduced policies, guidelines, strategies, plans and procedures with the intent to implement the management of the country's water in an equitable, sustainable and efficient manner. Almost ten years later, in 2013, the NWRS-2 was issued, introducing the notion of DWM. The strategy cautioned that the principles of IWRM should be interpreted within the context of a developmental state, understanding that 'water plays a critical role in equitable social and economic development' (NWRS-2:14). Van Koppen and Schreiner (2014:1) observed that the NWRS-2 departed from the widely accepted understanding of IWRM in the following three ways:

- Water management is no longer seen as an end in itself. Water management has to be aligned to the goals of the country as a developmental, democratic state with goals of equitable, redistributive and broad-based social and economic development. Water management is thus undeniably political in nature.
- Water infrastructure and service delivery are critical and the directive to role players to get the basics right.
- Equity is operationalised (Van Koppen *et al*: 2014).

Van Koppen and Schreiner (2014:2) argued that the introduction of DWM required the state to be at the forefront of water management and not the corporate sector as promoted by IWRM. Gumede (2009:9) contended that a successful developmental state needed to demonstrate that it possessed the following characteristics:

- A developmental vision needs political will and a long-term vision and resolve. South Africa's national policy directives, i.e. the New Growth Path and the National Development Plan: Vision 2030, foster this vision.
- Prior experience of development and South Africa's history of apartheid development state implies that new ways must be found to achieve equity for all her people.
- An efficient bureaucracy requires the state to be well resourced with efficient and skilled staff. It means that the state must be administratively, technically and politically strong to enable implementation of its policies.
- An efficient coordinating centre to manage development and drive economic transformation.
- The capacity to get the policy mix right with the content of the policies crucial for development to be effective.

- An integrated long-term development plan is central for the identification of the core priorities of a nation.
- A developmental partnership between government, business, labour and civil society with the ultimate goal of transforming the economy in the public interest. The international environment contributes to the success of a developmental state.

The above pointed to the fact that the bureaucracy would have a more prominent role in the allocation of water and it begs the question whether it was sufficiently equipped to deal with this mandate.

However, did this policy change necessarily mean an improved implementation trajectory in a very complex and multi-layered environment? Was this the injection that South Africa needed to improve the constitutional imperative to transform the water landscape and would this bring the social and economic advancement that was so desperately wanted by the vast majority of South Africans?

Suhardiman et al. (2014:453) concluded that reform processes, and thus water reform and implementation, could not be fully understood unless the concepts of bureaucratic interests, institutional trajectory and reform strategy were explored. This study explored whether, and how, the intricate policy and legal framework and the resulting greater bureaucracy influenced the transformation of access to water use for the emerging farmer within the BGCMA. This was undertaken by investigating two sites in the CMA. The one site is organised and managed by a local WUA which acts as an intermediary on behalf of its members, who are 'protected' from interfacing with the bureaucracy, although the WUA ultimately still falls under the jurisdiction of the CMA. The other site relies directly on the CMA and the bureaucracy at regional and national level to gain access to water, which leaves existing and potential water users more vulnerable to the workings of the bureaucracy.

3.6 The legal framework – traversing the minefield

Internationally, the NWA was lauded as one of the most robust and comprehensive examples of water legislation (Merrey, 2008) with water allocation reform as a fundamental concept in the South African legislation. However, this paradigm shift has not translated into transformation and consequently a better life for many South Africans. According to Schreiner (2013:239), implementation of the NWA has fallen short in the key components of reallocation and equity, amongst others, and this was evident in access to water for productive use by HDIs. As stated above, she noted (2013:240) that for white commercial farmers the status quo regarding access to water for productive use remained and the challenges and deferrals in the process of water licensing was impeding economic growth. Woodhouse (2008:3) commented that the new water regime did not just introduce changes in 'process (holistic, decentralised, participatory and economically costed), but also change in social outcomes'.

As illustrated above, water allocations were to be granted at the discretion of the relevant authorities, recognising the fundamental principles of equity and sustainability and taking into account inter alia the need to redress the results of past racial and gender discrimination (section 27(1)). This discretion of

the relevant authorities in allocating water should be exercised according to the constitutional imperative (s33) of just administrative action, with the fundamental principles of equity and sustainability being pertinent. Movik (2011:14) observed that, whereas the old South African water regime required the application of fairly clearly defined legal principles, the new framework required the state's discretion in water allocations. She warned that these processes might be greatly swayed by a 'particular political economy context and the associated discourses that emerge.' The legislation does not deal specifically with how water rights should be allocated and does not indicate how the concepts of 'optimal resource allocation of water resources' and 'beneficial use of water for public good' are interpreted and implemented (Perret, 2002). Roa-García observed that countries were faced with the challenge of harmonising equity, efficiency and sustainability in water allocation. In referring to Adger et al (2005) she stated that 'the relative weight allocated to each criterion is not given but rather emerges from societal processes of consent and action; the balance between them is dynamic as they are promoted or contested by societies' (Roa-Garcia, 2014:298). She noted that, as the concept of equity is vaguely defined, and as efficiency and markets continue to dictate water allocations, those who were economically in a stronger position would be able to demand greater access to water. She argued that this interpretation would certainly influence how users with different levels of power and water requirements access the resource. Zwarteveen and Boelens (2014:145) also questioned the prevailing discourses of efficiency. They argued that IWRM analyses suggest that water users and uses were rated according to exact calculations of efficiency and that those at the top of this efficiency ladder such as large-scale commercial enterprises, agribusiness firms, private drinking-water companies, and mining and hydropower conglomerates were regarded as the model. On the other hand, those using old-style irrigation systems should adapt their ways of water use to enter the fray. Zwarteveen and Boelens (2014:145) reasoned that dissecting the concept of efficiency would provide insight into water injustices and this search would enter the domain of politics and political implications of reforms in water governance and regulation. They were of the opinion that 'prevailing modes of water distribution and water authority, as well as of the discourses, institutions and technologies through which these become articulated' (Zwarteveen and Boelens, 2014) should be interrogated.

Therefore, the researcher's submission is that this disjuncture does not serve the interests of the emerging farmer well as external factors dictate emerging farmers' access to water. Thus, as emerging farmers do not have the preferred economic muscle in its present form the black emerging farmers cannot rely on water reform, i.e. equity, to secure access to water use.

Backeberg (2005:113) noted that in the licence application process the responsible authority should identify especially the marginalised and disadvantaged to enable fair allocation of available water. He further cautioned that many issues were still uncertain, such as expropriation from existing lawful water users, and identification. Thus, more and more layers are added to this already complex process of water allocation and reform.

The key challenge for redistribution was the lack of accurate information on actual water use by the

main existing water use, namely commercial agriculture (Woodhouse: 2008), which is predominantly white. WARMS, being the only available national water use data source, has numerous limitations, and this compounds the challenges with water allocations. Anderson et al. (2008:732) discussed restrictions extensively and contended that a disconnect exists between water allocation and water registration. Not all the water use data has been validated or verified and hence the data could not be seen as reliable. They pointed out that Schedule 1 use (small-scale use such as gardening, feeding of livestock, etcetera) and General Authorisations (GAs) use does not need WARMS registration. Similarly, use through GAs is more than Schedule 1 use and need not go through the administratively burdened licence process and although the NWA requires registration of GAs, it does not always happen. WARMS does not make provision for the different categories of water use and therefore water allocated to municipalities is only defined as to water service providers and does not specify to which specific sector the share of water is allocated by municipalities. Thus, the WARMS does not accurately reflect water use and so monitoring and prioritising of water allocation is a great challenge (Anderson et al., 2008).

Movik (2011:174) further cautioned that, due to the state being burdened with the authority to define the content of these rights, the state's capacity might be overextended and thus the task might even be impossible. This lack of capacity was glaring during the establishment of the Inkomati CMA. Woodhouse (2008:7) noted that the DWAF outsourced important tasks such as the preparation of the CMA 2005-6 business plan, elements of registration and verification of water use in the WMA, and the drafting of the CMA's catchment management strategy in 2007. He further noted that delegation to the local water agency was delayed due to the postponements in establishing the CMA, the technical requirements of the exercise, and the pervasive threat of legal action by the powerful local commercial farming community (2008:8).

As illustrated above, the policy and legislative framework to access water use is multifaceted and multi-layered, and for those who want to apply to use water and for those who have the responsibility of processing the application, the process might be overwhelming. The understanding and interpretation of what is required in the application needs in-depth knowledge, insights, consideration and experience of the issues at hand. Is the DWA or BGCMA sufficiently equipped to do this effectively to bring about reform as intended by policy and how does this impact the emerging farmers' ability to access water for productive use?

3.7 Bureaucracy: concepts, theories and challenges within the South African water context

It cannot be disputed that bureaucracies are responsible for essential and intricate tasks which can only be achieved within an environment of organised administrative ability, pointing to a modern organisation (Parenti, 1988) and many proponents view it as the organisational model that provide greater efficiency and reliability. Drawing on the definition proposed by the organisational and social theorist Watson *et al* (as identified by Beetham, 1996) pointed to the four main features of bureaucracy,

and by implication efficiency, namely:

- Hierarchy, whereby staff or the unit in the structure has delineated roles and is assessed by someone higher in the hierarchy who supervises performance.
- Rules dictate procedures and there is stability within established career structures.
- Service is rendered according to prescribed rules to ensure no randomness or preference.
- Proficiency for the job specifications and suitability for positions to control access to confidential information (2009: 449).

However, this archaic view of a bureaucracy had been critiqued for its inflexibility. Hill (2007:280), referring to and quoting Beetham and Lipsky, highlighted the role of 'street-level' bureaucrats. Beetham argued that this view did not encourage individual bureaucrats to be accountable or resourceful and did not meet the needs of practice (Beetham,1987:19). Beetham further put forward that lower-level employees held power due to the positions they occupied. Lipsky contended that 'public policy is not best understood as made in legislatures or top-floor suites of high-ranking administrators, because in important ways it is actually made in the crowded offices and daily encounters of street-level workers' and 'the decisions of street-level bureaucrats, the routines they establish, and the devices they invent to cope with uncertainties and work pressures (that) effectively *become* the public policies they carry out' (Lipsky 1980, p. xii; original italics). Thus, Lipsky maintained that these lower-level employees 'make policy' as they carry out their daily tasks as they interact with the general public.

Winter (2002:3) defines street-level bureaucrats as 'public field-workers who are interacting directly with citizens in implementing and delivering public policies'. He suggested that these street-level bureaucrats are important cogs in the implementation process as 'A reform is nothing but paper until street-level bureaucrats have delivered the policy to the citizens' (2002:3). He noted that ordinary citizens do not know the intricacies of the legal and policy processes and regard the street-level actions and decisions to be law. Winter (2002:3) further stated that, due to limited and inadequate resources, these street-level employees struggle to meet the demands of their jobs and devise strategies to deal with it. Amongst others, they attempt 'to decrease demand for their services by limiting information about services, letting clients wait, making access difficult, and imposing a variety of other psychological costs on clients'. They also 'ration services by setting priorities amongst tasks by concentrating on a limited number of selected clients, cases, and solutions' (Lipsky, 1980) and 'dominating clients in order to make cases easier to process, gradually developing more cynical perceptions of clients, and modifying programme objectives making them easier to achieve' (Winter: 2002). Staff at DWS and the BGCMA are important role players in the implementation process and their roles and the impact thereof cannot be underestimated.

Rogers et al. (2000:506) stated that bureaucracies, due to their nature and especially when they are established, do not take to change easily and challenges are difficult to deal with. They referred to the

problems experienced in transforming parastatal institutions, regional and national government in South Africa. This might partially explain why it was so difficult for South Africa to establish 19 new CMAs, and why, even after reducing them to nine only, South Africa still had only two CMAs fully operational in 2015. Benson (1995:1) warned that organisations should take cognizance that programmes were implemented by people who were fallible and had their own personal challenges, which might lead to rules, regulations, and programmes not being executed or impacted in the way that the designers of the programmes expected. Watson et al. (2009: 449) also cautioned that bureaucrats claim to be experts and holders of exclusive knowledge, and this places them in a position of power to influence political decision-making while,at the same time, of not being subjected to public inspection and interrogation.

Suhardiman *et al.* (2014:445) observed that irrigation bureaucracy did not feature in all the attempts to advance irrigation performance. They argued that there was an assumption in reform policies that better irrigation system performance was paramount on all the agendas but they failed to consider how change might (or might not) assist the bureaucracy. They further pointed out that within the domain of, specifically, irrigation literature, notions of bureaucracy, bureaucratic reform, and the way the characteristics of irrigation bureaucracy are shaped by power structures, were sketchy. They drew on other disciplines for the conceptualisation of irrigation bureaucracy (2014: 445–447) and wrote as follows:

Within the political science domain the understanding is focused on power struggles specifically based on the relationship between the politician and the bureaucrat. This conceptualisation sees politicians and bureaucrats using their influences to promote their own interests, strategies and accessing resources. They refer to Espeland (2000) who holds that 'government bureaucracy's main interests, and basic mechanisms in shaping its strategy to gain, sustain, and reproduce power' (Espeland, 2000).

From a public administration perspective, economic efficiency is central and therefore change in government bureaucracy consists of privatisation, decentralisation of power, outsourcing, public private ventures, deregulation and so forth.

The organisational sciences view bureaucratic reform in terms of structures, rules, procedures and its instruments and the impact of these on the operation of the bureaucracy. Bureaucratic reform is approached from one of two views: 1) institutional inertia meaning it may be easier to continue on the known path as changing course may be too costly; 2) institutional innovation dictates that the institution develops as new thinking is accepted and implemented.

The literature seems to indicate that South African irrigation bureaucracy has elements of all of the above approaches and begs the question whether this promotes the cause of the emerging farmer in accessing water.

Molle et al. (2009:336) noted that hydraulic bureaucracies came about as nation states reproduced their concerns and objectives. They stated that bureaucratic influence was dependent on the state budget allocation, the staff complement, and, pertaining to water specifically, the heavy equipment needed for

infrastructural interventions. Thus, they argued that it was important for these bureaucracies to continue feeding the planning/construction cycle to ensure the continuation of the power they wielded (2009: 336). In South Africa, this was evident as the country embarked on overhauling the water regime after the dawn of its democracy in 1994, adopting new policies, creating new infrastructures and revising and reinventing as objectives and needs changed and dictated. South Africa had adopted the approach of IWRM. This required a holistic and integrated approach to water management and therefore it necessitated greater bureaucracy and centralisation (Movik, 2011). Wester et al. (2003:809) warned that especially in developing countries the policy development approach usually adopted was almost completely driven by government agencies and this was underwritten 'by a combination of technical and economic concerns and interagency politics'. They argued that this did not allow the disenfranchised to participate and because they were excluded it would not bring about the anticipated transformation and this constituent would continue to be dependent on the state's favour. Wester et al. (2003:810) also observed that the South African approach seemed to include poor rural stakeholders by way of WUAs and if this inclusion succeeds, it could lead to the empowerment of the disenfranchised. This research has, as one of its sites, a fully functional WUA and, in the greater scheme, also investigates whether and how emerging farmers are organised and empowered, with or without a WUA.

Laube (2009:6) observed that water bureaucrats understand water to be produced and managed through technical means whilst people's behaviour in relation to this resource could be controlled by rules and regulations and directed by economic rewards. He stated that they were inclined to de-politicise managing water to justify 'top-down planning and implementation approaches that are said to be driven by physical preconditions and technical necessities often believe in the manageability of water resources through technical as well as social engineering' (2009:6). However, water is a political issue, and more so when it is threatened, adds value and access thereto is unequal, favouring the privileged (Wester et al., 2003). Mollinga (2008:8) supported this view and stated this was not always the generally held view as it was believed that social engineering dictated water resource management. He noted that the introduction of water governance brought politics into the discourse and argued that notions such as accountability, transparency and legitimacy have political dimensions. He argued (2008:10) that water was inherently political due to it being about 'water control'. He stated that any human intrusion which alters the characteristics of the hydrological cycle was a form of control of the resource. This might take the form of influencing 'physical flow and quality of water, the guiding of the human behaviour, and the socio-economic, legal, administrative and other structures in which water management is embedded and that constitute conditions and constraints for management and regulation' (2008:8).

Movik (2009:1) argued that, within South Africa, the state's discretionary power, as played out in a political context, coupled with the 'technocratisation of the policy process, the failure to deal with the local dynamics and the inability to determine the extent of existing users combined with a lack of administrative capacity to handle the water licensing bureaucracy contributed to leading the reform efforts into an impasse'. In 2005, the Chief Executive Officer of the Central Breede River Water Users

Association informed the Water Affairs and Forestry Portfolio Committee that the Association's water allocation reform initiatives were frustrated by bureaucracy.

One of the pillars of an effective bureaucracy is expertise and skills. Von Holdt (2010:9) noted that in South Africa the bureaucracy was faced with a dilemma between bureaucratic skills and procedures which were introduced and driven by Whites and the need to transform this history. South Africa's transformation agenda led to an employment equity approach driven by race, gender and a political plan. The inadvertent result was an exodus of white officials with years of technical experience; many of them ventured into consulting, transfering sought-after skills into the private sector. Ironically, these former employees who managed and administered the previous water system advised the under-resourced DWA to plan and implement the new water regime. Schreiner commented that this left the public water sector dependent on the old order that did not necessary share the new political vision, and illustrates this with the following observation:

> '…in discussing water allocation reform some years ago, one of the old-guard white officials in the Department articulated clearly that taking water away from white commercial farmers to give to small-scale black farmers was inappropriate in a water-scarce country – the transformational requirements of building a racially inclusive economy being seen as secondary to the perceived superior farming capabilities' (2013:127).

Tewari warned that due to the extent of the bureaucracy needed to implement the new legislative framework, transparency and clean governance was vital to ensure that the objective of the framework was realised. He stated that the ultimate objectives were attainable if institutional integrity was sought after and corruption was held at bay (2009:705). Molle *et al.* (2009:339) also observed that water bureaucracies faced further challenges such as the call that environmental degradation should stop, challenges by other state institutions, reduced funding for water infrastructure, decentralisation processes and increased demonstrations by civil society. In the South African context, it seemed as if these observations ring true as South Africans took to protest and legal action, struggled with establishing institutions at regional and local level, the interdepartmental synergy was not working and transformation seemed to be a distant objective as emerging farmers continue to struggle to gain access to water use.

Suhardiman *et al.* (2014:443) noted that it was understood that the introduction of new water management structures such as CMAs and WUAs would bring about bureaucratic change as these structures necessitate that authority, and thus responsibilities, be devolved to water users or their representatives at regional and local levels. They cautioned that national governments very seldom alter in bureaucratic structure, and thus power dynamics, when implementing reforms. In the South African context, this proposition seemed to hold as the new water dispensation did not mean that the existing national Department in charge of water, and thus the bureaucracy, had undergone any fundamental change or reform. The Department has undergone numerous name changes since South Africa became a democracy, but the challenge is whether the Department was effectively equipped

to deal with the new regime, taking the country into a reformed/changed direction. Suhardiman *et al.* (2014:443) further suggested that water reform research showed that reform targets, and not the role of bureaucracy, enjoy priority. Suhardiman *et al.* (2014:445) commented that irrigation bureaucracy as a role player in better irrigation performance was not considered and this was reflected in reform policies. They argued 'that understanding of irrigation bureaucracies' roles and positions, and how they perceive and shape the overall idea of reform, is crucial to increase the actual significance of irrigation reforms' (Suhardiman *et al.,* 2014).

This research explicitly unpacked the role of bureaucracy in the efforts of black South African emerging farmers to access water. Parenti (1988:264) argues that bureaucracies were effective because of the power that its supporters hold and if it serves this interest well criticism about bureaucratic interference will be minimal. He further noted that red tape might be used as a tool to jeopardise programmes which might not be favourable to these interests.

3.8 Conclusion

From the literature above, it is clear that South Africa has struggled to implement a water policy regarded by the international community as ground-breaking. Was this 'the Volkswagen vs. the Rolls Royce issue' (Schreiner: 2013)? Schreiner argued that policy and legislation should be such that it meets the unique needs and resources of a developing country. There seems to be a disjuncture between the policy and legislative framework on the one hand and the ability of the country to implement the provisions thereof, and this disconnect does not bode well for the transformation agenda. Those who were intended to benefit from the objective of redress are not getting the Roll Royce experience and implementation is too slow or not happening at all for many emerging farmers.

This research explored how bureaucracy and the complexity of the changed water legal regime impacted the water reform process. It explored the implications of these factors as they intersected in two study sites where emerging farmers do not ply their trade within a communal farming set-up but as owners or lessors of the farms. The communal farming scenario has been the topic of numerous studies but not enough work has been carried out on emerging farmers who are individual landowners or who are leasing property for personal benefit. This setting unfolds within a new water dispensation that has intent to bring about change and improvement for historically disadvantaged individuals. The research juxtaposed two sites, the main 'unorganised' research site, i.e. no WUA or other institutions except for the CMA for water management, against the Groenland WUA reality of water allocation and access.

SECTION 4: METHODOLOGY

This research was undertaken in a qualitative paradigm and presented the researcher with the prospect of analysing participants' experiences and behaviour. Hennik *et al.* (2011:9) defined qualitative research as an approach that gives the researcher the opportunity to scrutinise participants' experiences and behaviour, placing the researcher in a position to identify issues from the participants' perspective and to make sense of and understand these experiences in a real-life context. Marshall and Rossman (2006:2) stated that this research approach focuses on social occurrences; it is essentially interpretive, employs a number of research methods and situates the research in the natural world.

This research sought to explore why policy and the implementation thereof were at odds. Thus, to gain an in-depth understanding, the researcher had to invite subjective understandings and interpretations of phenomena within the environment where they occurred. The research at hand required actual experiences and understandings of the participants when engaging with access to water as this was crucial to gain a comprehensive understanding and insight into the influence of bureaucracy and how the legal framework underwriting the process affected access to water. This enabled the research to unpack the central research issue which was an exploration of the legal and institutional difficulties experienced by black emerging farmers in accessing water for productive purposes. The research was, therefore, inductive in nature.

This research used a case study approach as it allows an investigation to be undertaken in a real-life context. The research employed multiple collection methods to achieve its research aim. A case study is defined as 'a methodology that is used to explore a single phenomenon in a natural setting using a variety of methods to obtain in-depth knowledge' (Collis and Hussey, 2009). Baxter and Jack (2008:545), referring to Stake and Yin, pointed out that the philosophical foundation of the case study approach is constructivist, i.e. it is based on social construction, placing participants' views, understandings and realities at the centre, enabling the researcher to better understand the research questions. The case study is most appropriate under the following conditions:
(a) the focus of the study is to answer 'how' and 'why' questions; (b) you cannot manipulate the behaviour of those involved in the study; (c) you want to cover contextual conditions because you believe they are relevant to the phenomenon under study; or (d) the boundaries are not clear between the phenomenon and context (Baxter and Jack, 2008, quoting Yin, 2003).

This research did pose 'how' and 'why' questions to allow participants to share their understanding. This placed the researcher in a position to gain better insight into the participants' actions and therefore the research aim. The second condition is not applicable as there was never any desire to manipulate the behaviour of the policy actors. The third condition is essential for understanding policy processes. As policy is translated into policy actions and tangible outcomes, it happens in a specific context and does not occur in a linear and mechanical manner. Thus, the understanding and insight of role players

is important. To this end, the researcher interviewed staff at the BGCMA and the regional office of the DWS in the Western Cape. Unfortunately, due to administrative challenges at higher education institutions nationally at the time of the research, travel funding requests were not being processed and the researcher was not able to conduct interviews with as many respondents as planned. Irrespective of this impediment, rich data was collected from respondents at the DWS and BGCMA, and the researcher was able to draw conclusions from said data. The respondents were all involved with the process of water allocation. Fourthly, in applying an actor-oriented approach to policy processes, it is problematic to distinguish between those who influence the process and those who are seemingly passive recipients of the process or part of the context within which the process is enacted. The understanding and insights of role players was obtained through interviews in the case study areas and these were complemented by relevant documents. A particular phenomenon was investigated with the broader aim of unearthing the mechanisms responsible for the lack of progress in implementing equity in water allocation reform. The research design allowed the research aim to be addressed using a particular informative case and allowed for more general conclusions to be drawn from analysing it.

Consequently, in this study, two research sites, namely Pietercieliesksloof, the primary research site, and the jurisdiction of GWUA in Elgin, the secondary site, were selected, based on the following criteria:

- Both research sites are situated within the jurisdiction of the BGCMA. The legislative intent was to decentralise water management to basin level, and to implement WAR, an implementing agency such as the CMA is required. To date, no further CMAs have been operationalised The Department (Department of Water Affairs, 2011) itself was disturbed by the slow implementation and the negative effects thereof on water security and water quality. One could not help but be curious about the status of water allocation reform as the implementing mechanism was not getting off the ground.

  The primary study site was Pietercieliesksloof where no WUA exists, whereas the secondary study site was the area of jurisdiction of the GWUA, Elgin, and is managed by a very active and well-organised WUA. The policy and legislative aim is to redress imbalances of the past by inclusion and representation of HDIs, i.e. black people[13] at this localised level of WUAs. This contrasting factor between the two research sites allowed the researcher to assess the effect when users have organised themselves into a WUA as opposed to those who do not have a WUA and, without an intermediary, are directly dependent on the CMA or DWS to organise their water.
- A further contrasting aspect is the demographic composition of the farmers. The primary site, Pietercieliesksloof, situated in the Nuwejaars Catchment, consists of predominantly black emerging farmers. At the time when the research was conducted, there were only three

[13] In terms the Employment Equity Act 55 of 1998, chapter1, section 1 defined **black people** as 'a generic term which means Africans, Coloureds and Indians'. In this research context black people refers to Coloureds.

commercial farmers and fifteen black emerging farmers[14] in the area. Three of these farmers are female. Most of these farmers own their farms and these farms have been in the families for generations. The size of these farms ranges from 2 hectares to 430 hectares and the agricultural produce is fynbos, proteas, rooibos tea, vegetables and livestock. Some of the emerging farmers do not have access to ready markets and depend on neighbours to offload their produce. In contrast, the secondary site, area of jurisdiction of GWUA, Elgin, in the Palmiet River Catchment, consists of mostly white commercial farmers. The only black farmer is regarded as a commercial farmer. Elgin has been a successful farming area for a long time, producing apples, pears and grapes for a well-established export market. This type of farming is irrigation intensive.

Baxter and Jack (2008:547) advised that the choice of case study design will be directed by the general study aim. Ultimately, what this research pursued was to uncover the mechanisms underlying the stunted implementation of the equity dimension of water reforms; hence, the type of case study is exploratory. These two case studies helped to identify these mechanisms and placed the researcher in a position to generalise and determine whether and how the bureaucracy and legislative and policy framework influenced the phenomenon of lack of progress in granting water use access to the black emerging farmer.

The central research question is: What are the legal and institutional difficulties experienced by black emerging farmers in accessing water use for productive purposes compared to 'successful' white farmers and how does the bureaucracy further enable or disable access?
For this section of the research project the sub-questions were:

- What are the legal and institutional frameworks within which role players operate to access water for productive use?
- What is the role of the bureaucracy in the process as users endeavour to access water?
- What has been the end result of all these processes impacting on access to water?

Thus, amongst others, the researcher had to understand the legal framework and policies regulating water reform, the processes of water allocation and water allocation decision-making by all relevant stakeholders.

The research questions dictated the qualitative research methods of data collection. Marshall and Rossman (2006:56) claimed that the case study is the most intricate research strategy and requires a combination of methods such as interviews, observations and document analysis. The researcher relied on, *inter alia,* in-depth interviews and observations which were supported by the relevant documents relating to accessing water for productive purposes. This mix of data sources and methods, including

[14] During the field work through interviews conducted with farmers and officials the impression was the label of commercial and emerging famer was given based on being white or black respectively.

content analysis of government policy documents, literature and academic publications, observations at meetings, analysis of minutes of meetings and interviews with actors in the process of access to productive water presented a setting for the researcher to gain a deep understanding and make sense of the research issues.

The interviews were conducted via email, telephone, sms or social media and participants' access to these resources dictated the way of communication. Generally, participants were very responsive and willing to be interviewed. The interview meetings were arranged with participants at places and times convenient to, especially, the participants, as participants and the researcher had personal responsibilities and time constraints which had to be negotiated. The interviews took place when and where participants were available, whether at their private homes on farms or in the city, at restaurants or wherever and whenever it was convenient to conduct interviews. It was important to respect the participants' own constraints as the researcher had to nurture the relationship and retain access to the research space. The interviews were informed by the research questions and an interview guide assisted the process. The interview guide defined only the key issues and allowed for flexibility, providing the researcher with opportunities to probe further matters as they arose during the interview. Hence it presented the researcher with instances to gain insights into the unique experiences of commercial and emerging farmers as different categories but also as individual farmers. The interviews were conducted in both English and Afrikaans, setting the participants at ease and allowing them to answer as authentically as possible. The interviews lasted between thirty minutes and two hours and a voice recorder and rough hand-written notes were used to record the interviews, after which they were transcribed into Microsoft Word documents for analysis. This method of data collection provided meaningful and rich data to suitably satisfy the research aim.

The researcher also used observation as a method to answer the research questions and this complemented the interviews, giving a more comprehensive insight, especially of the sociocultural context within which participants make meaning (Hennik *et al.,* 2011:170). These observations occurred at meetings to which the researcher was invited, or requested permission to attend, within the study sites. The researcher also had the privilege of visiting farmers on their farms and this offered some insight into the working environment. These observations and the interviews with participants sketched a more complete perspective of the research issues.

Purposive sampling was used as the specific settings, persons and events were aimed at the ability to deliver important evidence that would be aligned with the research (Bickman and Rog, 1998:87). In this case*,* the research purpose demanded an in-depth investigation of the research phenomenon (i.e. the slow pace of implementation of the equity element of WAR), within a specific research context; hence, purposive sampling was specifically selected as it fitted the needs of the study. The research participants identified and interviewed were significant to the study as they either influenced, or were impacted by, the implementation of the policy and legislative framework on water allocation within the study sites specifically as they negotiated and navigated the system for gaining access to water. At

various stages of the process, the different participants interacted with the bureaucratic framework and gained insights and experiences which informed and were relevant to the research at hand.

The total number of participants interviewed was determined by the purpose of the study and whether saturation point was reached. Bazeley (2013) explained saturation to mean that no new information would be generated by interviewing more participants who might add to the coding categories. Each study would dictate its own saturation point taking into consideration 'the quality of the data, the scope of the study, the nature of the topic, the amount of useful information obtained from each participant, the number of interviews per participant, the use of shadowed data and the qualitative method and study design' (Bazeley: 2013).

Enabling triangulation, a select group of individuals and gained thoughtful and insightful opinions from these individuals who are regarded as experts in the water sector. These individuals are, or were in the past, involved actively in water or water-related issues for a number of years, either by professional practice, occupation, research or consulting, and some have extensive knowledge of the case study area. Semi-structured in-depth interviews were conducted with the experts with the purpose of gaining their opinions and views on the implementation challenges and whether South Africa should change or adapt the transformation agenda. A comprehensive interview schedule, based on open-ended questions, was prepared. Questions posed were guided by the research topic and further informed by the data solicited from emerging farmers and other related stakeholders. Included were questions related to legislation and policy, inter-governmental relations and its impact, governance, and the individuals' personal background, to contextualise their responses. Some of the questions were water specific or water related, other questions were governance related with the intent to solicit direct responses to the research topic at hand, whilst some had the aim of stimulating further discussion or posed projected scenarios.

The in-depth interviews and observations produced local stakeholders' actual insights and perspectives relating to institutional engagement as they attempted to gain access to productive water. The research prompted, amongst others, the role players' views of how they make meaning of their experiences and their insights into how decisions were made. The in-depth interview allowed the researcher to establish a connection with the participant. The fact that that the interview was only semi-structured created opportunities to explain and adjust questions and also pose follow-up questions; the researcher controlled and structured the interview to yield rich data (Adler and Clark: 256) in an attempt to answer the research questions. The data from expert interviews added another layer and allowed for triangulation of the data. Although the semi-structured interviews were time consuming and costly, they proved to be effective as they yielded the uniqueness of individual experiences and understanding. It was the best way to address the research questions and probe further into the participants' explanations. The data collected was analysed using thematic analysis, creating a way to interpret different facets of the research topic (Braun & Clarke, 2006). This allowed for conclusions to be drawn, findings to be made and finally to propose recommendations. The themes were identified using the research

questions as these had informed the interview schedule and the interview itself.

The fieldwork in Elgin started with the GWUA manager taking the researcher on a comprehensive tour of the area. This provided a unique perspective of the research area through the lens of someone who farmed and lived in the area of the GWUA. It also gave the researcher the opportunity to forge a trust relationship with the manager as this ensured further access to other participants. The researcher conducted in-depth interviews with five commercial farmers and key personnel of the GWUA in the Elgin Valley, in the Palmiet catchment. The primary research site, namely Pietercielieskloof, consists of a smaller geographical area and is situated in the Nuwejaars Catchment. The majority of emerging farmers were participants and most commercial farmers were interviewed as this was the primary research site. The farmers who were not interviewed were not available due to time constraints and/or commitments which made meetings and interviewing them difficult. The researcher requested and was granted permission by the Spanjaardskloof Inwoners Vereniging (SIV) to conduct research in the area. The SIV represents all the farmers in the area and generally deals with matters of common interest to all farmers. The researcher thereafter contacted each participant to arrange individual meetings to conduct interviews.

In the process of gaining a full appreciation of whether and how bureaucracy and the law impact on access to productive water, it was important to scrutinise how the reality was documented. Flick (2009: 259) states that documents should be used to frame information as they denote but a particular account of reality. Institutional documents are tools to record organisational practices and to justify operations. Thus, institutional documents were not used to authenticate interviews but rather these documents, and the analysis thereof, were used as a complementary strategy. These documents do not stand in isolation of each other but, as stated by Silverman, 'reflect and refer to other documents' (2004:67) and thus the range of documents as they impact on access to water was analysed. The main documentary sources for this study consisted of:

- Water legislative and policy documents for the Republic of South Africa, including documents obtained from, amongst others, the government printers, the DWS' official website, BGCMA's official websites and from the BGCMA offices, GWUA's official website and from the officials, and from various participants, as and when these were available. These documents provided a detailed understanding of the objective and intent of the legislative and policy framework and were critical to assess the impact thereof on whether and how the emerging farmers are supported or disadvantaged by the process.
- Minutes of meetings and annual reports relevant to the study – several of these documents of the DWS, BGCMA and GWUA are freely available in the public domain, whereas certain documents were acquired only on the request of the researcher or were volunteered by participants.
- Licence applications – these allowed the researcher to supplement the insights attained during the interviews and to draw independent inferences from these written records.
- Documents recording historical insights into the relevant institutions, *inter alia,* the DWS,

BGCMA and GWUA and to understand how the institutions are governed.

- Central to water allocation and reallocation for irrigation is data on water quantities and this was obtained using the statistics as provided by the DWS, BGCMA, GWUA and other relevant government departments.

These documentary sources were relevant to the study not only for their content, but their context, use and purpose were important to gain a complete representation of the research issues. The approach thereto was from an interpretative standpoint to understand its role in achieving transformation as intended by the legislation and policy.

This mix of data sources and methods complemented by interviews with experts presented a setting for the researcher to gain a holistic understanding of the research issues.

SECTION 5: FINDINGS AND DISCUSSION

5.1 Introduction

As expounded above, the legislative framework underpins allocation of water for productive use. This legislative framework has a rich history and water reform and redress are constitutional imperatives as South Africa works towards changing the unequal distribution of access to water, with the objective of alleviating poverty.

Literature suggests and supports the deficiencies of South African water legislation regarding access to water use, especially by emerging black farmers. Evidence from the DWS itself indicates that South Africa is failing to effectively implement transformation, as put forward in 2014 by DWS when presenting an overview of the implementation of the NWRS to the Portfolio Committee on Water & Sanitation. The DWS highlighted various challenges and, amongst others, indicated that it should 'Streamline water allocation reform to redress past racial and gender imbalances in access to water for productive uses and to address poverty and inequality' (DWS, 2014). Thus, by the DWS' own admission, it is not meeting a key objective, i.e. equity, almost twenty years after the NWA was promulgated. This refers directly to access to water for the emerging farmer who is also classified as the historically disadvantaged, i.e. the black farmer.

This section focuses specifically on the legislative framework and how the bureaucracy and stakeholders interact, engage and navigate the legislative framework to enable access to water use for the black emerging farmer. It presents stakeholders' insights and analysis, profiling local stakeholders' understanding and experiences of the institutional and policy and legislative framework for water allocation and reform and their interaction with the bureaucracy.

Thus, the perspectives of water users will be reported, reflecting their interaction with the legislative framework and the bureaucracy in the process of attempting to acquire authority to use water.
The section further presents the insights of a number of experts, in triangulation of the experience of local stakeholders. The section is structured as follows:

- An overview of the institutional and policy framework for access to productive water
- The stakeholders' experiences, insights and strategies
- The experts' views
- Conclusion

5.2 An institutional analysis of water allocation processes

This section of the report analyses the legislation and policy as it pertains to water use allocation, and stakeholders' experiences and insights in their struggle to retain or access water**.** The legislative

framework and policy instruct and guide all stakeholders concerning the implementation processes to access water use. In this case, water users rely on the BGCMA, the regional office of the DWS in the Western Cape and nationally, and the GWUA to assist, guide, manage, navigate and facilitate the legislative framework and policy as they attempt to gain or retain access to the water resource. Inevitably, these stakeholders have to access the bureaucracy to gain or retain access to water and this research report specifically focused on these local stakeholders as they navigated the processes.

5.2.1 An overview of the institutional and policy framework for access to productive water

A complex legal framework for water regulation exists, premised on the relevant provisions in the Constitution of the Republic of South Africa, 1996, and led to South Africa's water resource management regime being changed drastically, requiring new institutional arrangements with the intent to reform the water sector.

Associated with this water regime change was the legislative intent to establish new water management institutions at regional and local levels which would allow greater stakeholder participation, especially at the lowest levels. The devolution of authority from national level to catchment level, i.e. CMAs, is a key aspect of the NWA and hence this new institutional framework of integrated water resource management is meant to enable South Africa's water resources to be managed in a holistic, efficient and sustainable manner. However, to date, these institutions are still not established or operational as proposed. Only two CMAs are operational nationally, namely the Inkomati-Usutu CMA and the Breede-Gouritz CMA, which implies that stakeholder participation and transformation at local level is not happening as intended by the legislation and policy. Cognisance should further be taken of the fact that even though these two CMAs are operational, the authority to grant water use permission was withdrawn by the DWS almost immediately after it had been delegated in 2015. This hence begs the question as to the impact of this seeming reluctance by the DWS to devolve authority to CMAs. One cannot help but be curious about the status of water allocation reform as a key implementing mechanism is not getting off the ground.

WUAs should represent water users, from commercial farmers to emerging farmers to farm workers and informal water users, representing South Africa's diversity. WUAs were to replace the existing IBs of commercial farmers which were established and continued to exist in terms of the Water Act of 1956. Membership of these IBs was open to white commercial farmers only and thus their water interests at local level were exclusively promoted. The transformation of all IBs to WUAs was intended to be finalised six months after the promulgation of the NWA, but given the non-implementation, the transformation due date was extended for another year (DWA, 2013). The transformation of IBs to WUAs appears to be more easily said than done (see figure 1 below) and to date IBs are still in existence, inclusion of all water users at local level stays elusive and the previously advantaged white water users continue to enjoy seemingly unfettered access.

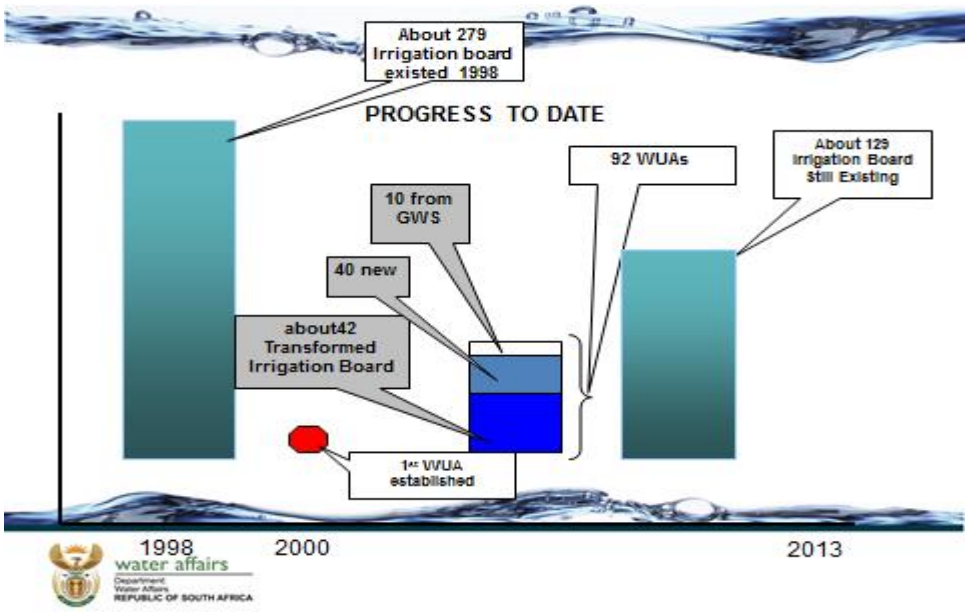

Figure 4: Department of Water Affairs. Status Report on Water User Associations in South Africa Portfolio Committee on Water and Environmental Affairs, 24 April 2013

Ten years after the promulgation of the NWA, and by the Department's own assessment and analysis, it was shown that transformation would fall through the cracks if more stringent dictates were not imposed.

Almost twenty years after the new water dispensation was heralded in South Africa, the country is struggling to effect complete implementation of her water legislative framework and the enactment of the NWA and related policy seems to be evasive. Consequently, the inability to bring about transformation raises concerns about the effect this may have on emerging black farmers and the notion of poverty alleviation.

5.2.2 Findings and discussion

The findings and discussion follow, according to the following identified themes:

- Local stakeholders'[15] understanding and experience of the legal and institutional framework within which they operate to access water for productive use.
- The role of the bureaucracy in the process as these local stakeholders endeavour to access water.
- Strategies the local stakeholders employ to acquire or retain water use.
  The end result of all these processes impacting on access to water for these stakeholders and specifically the black emerging farmers.

[15] The research specifically focused on the black emerging farmer's ability to access water use and therefore, although local stakeholders refer to all water users, the emphasis was on the black emerging farmer.

Each of these is discussed individually in the sections that follow.

5.2.2.1 Local stakeholders' understanding and experience of the legal and institutional framework

This part of the discussion and findings first provides an analysis of the legislative and policy framework and secondly shares an analysis of the local stakeholders' understanding and experiences of said legislative and policy framework.

The legislative and policy framework

South Africa's new constitutional democracy led to the promulgation of a number of laws supporting the fundamental political imperative of transformation. The National Water Act 36 of 1998 (the NWA), lauded by the international water fraternity as progressive and trail blazing, was one of the first pieces of legislation seeking to bring about reform in the water sector. It changed South Africa's water governance, introducing the concept of the South African government being the public trustee of the country's water, responsible for managing the water efficiently, equitably and effectively.

A legal paradigm shift took place from a rights-based to an interest-based approach to water use, i.e. the riparian system was abolished in favour of water use authorisation by the DWS. The NWA, chapter 4, makes provision for access to water use via one of four ways, namely schedule 1 use, general authorisation, existing lawful use and licensing. Water use authorisation is an administrative-laden process of licensing conceived to facilitate allocation and reallocation of water resources to bring about transformation. This administrative process is complex and both the DWS and applicants found the legislation and policy too daunting and encountered various challenges with the implementation thereof. The NWA also introduced new decentralised water institutions at regional and local levels (DWA, 2012a) and this was aligned with the concept of IWRM, facilitating subsidiarity, demanding greater stakeholder participation at the lowest level, i.e. from water users themselves.

As indicated above, the DWS set five-year strategic targets to achieve transformation goals (Water Allocation Reform Strategy: DWAF, 2008) but has struggled to bring about the expected reform in the water sector. Ninety-five percent of South Africa's water still remains in the hands of those who were previously advantaged and a range of factors, *inter alia* the complex licence application process, the lack of expertise and skills to implement the complex legal framework, the vagueness of legislation and policy giving wide discretion to officials to interpret and grant access to water, and the lack of cooperative governance are blamed for the delayed reform. The case of the Goede Wellington Boerdery (Pty) Ltd [16] illustrates this dilemma of the wide discretionary powers afforded to officials in the allocation

[16] An appeal was first lodged by Goede Wellington Boerdery (Pty) Ltd against the decision of the Water Tribunal to the court *a quo,* the North Gauteng High Court; *Goede Wellington Boerdery (Pty) Ltd v Makhanya NO*(56628/2010) 2011 (ZAGPPHC 141)). It was eventually heard by the Supreme

of water.

Goede Wellington Boerdery (Pty) Ltd applied for a water use licence in November 2005, which application was duly recommended for approval in 2006 by the Regional Director of the Western Cape of the Department. This application was supported by, amongst others, the Berg River Irrigation Board and the Department of Agriculture in the Western Cape Provincial Government. However, in 2008, the national director of DWAF rejected the licence application on the basis that it did not meet one of the NWA s27 (1) criteria, namely 'the need to redress the results of past racial and gender discrimination'. Goede Wellington Boerdery (Pty) Ltd appealed to the Water Tribunal but their appeal was dismissed. Goede Wellington Boerdery (Pty) Ltd then applied to the High Court to have the decision of the Water Tribunal overturned. The court a quo found that Makhanya, an additional member of the Water Tribunal, had erred in refusing the water use licence. The Supreme Court of Appeal17 had to pronounce on, inter alia,18 whether all the relevant factors should be considered when allocating water. The Supreme Court of Appeal noted that the Minister had accepted that the Water Tribunal made an error of law in regarding the redress factor as 'essential and decisive, rather than considering all the relevant factors prescribed' (2012:par 22) as per s27 (1) of the NWA. The Court 'observed that the need to redress the results of past racial and gender discrimination is only one factor in a non-exhaustive list of several factors that have to be taken into account when issuing a licence. It clearly does not presuppose a crude approach where a s27(1)(b) sledgehammer should be taken to an otherwise exemplary application' (Makhanya v Goede Wellington Boerdery (Pty) Ltd (230/12) [2012] ZASCA 205, at 37).The Supreme Court of Appeal determined that without legislation dictating that a specific factor enjoyed preference, the only inference to be drawn was that all factors should be weighed together when a decision as to whether to allocate a water use licence is made. The Supreme Court of Appeal dismissed the appeal against the High Court's finding that the Water Tribunal's decision to refuse a water use licence to Goede Wellington Boerdery (Pty) Ltd had been unlawful. Thus, the appeal by Goede Wellington Boerdery (Pty) Ltd against the refusal by the DWAF to grant a water use licence was upheld and the licence was granted.

The empirical data collected from people who want to access water use was significant in that many of these stakeholders related that their first encounter with the legislative requirements for water use was via a department other than the DWS. Emerging farmers found that they had to disclose their water use and authorisation thereof when they applied for funding via the Department of Rural Development and Land Reform (DRDLR) or the Department of Agriculture, Fisheries and Forestry (DAFF). In most

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Court of Appeal, the highest court for civil matters.

[17] Makhanya NO and Minister of Water and Environmental Affairs v Goede Wellington Boerdery (Pty) Ltd ((230/2012) [2012] ZASCA 205).

[18] The other two issues were the right to fair and reasonable administrative action and the role of the Water Tribunal.

instances this prompted the water use process, as illustrated by farmers and officials alike. These stakeholders noted as follows:

> ‘Agriculture a big role player, we must stay in their good books, otherwise we have no door to get in. Department of Agriculture and Fisheries, coming,... How is farming progressing, we ask for funding, now they say we don’t have water… so now we arguing the fact but we have water.’(a black famer)
>
> ‘I applied to Agriculture and they asked about the water use. The process started with Agriculture and they directed us to water. I got into my car and went to Worcester. It was an expensive process. At the beginning it was lengthy and expensive to go there and find out about the processes. I did it on my own. At the time when I spoke to BOCMA there were others who were in the same position. I asked them to address the farmers. We pushed Agriculture to let BOCMA see the seriousness of this. BOCMA came and brought the forms and meet with everyone. They came in fewer than six months in 2012’.

This research focused on access to water use but the interconnectedness between land and water cannot be disputed and requires attention. One participant aptly noted that ‘Water Affairs cannot do transformation. It’s not them. It’s not their sole job. You cannot do water allocation without land education’. Another stated that

> ‘…my feeling is that you cannot do water transformation without land transformation. You cannot do the one before the other. I mean, it cannot work for me. Because you need land to be able to use water’

Attempts were made to bring different government departments together but ostensibly without producing the intended outcome. One such attempt is the Comprehensive Agricultural Support Programme (CASP). The University of Pretoria did an impact appraisal of the CASP to determine whether the CASP was realising its policy aims (The Department of Agriculture, Forestry and Fisheries, 2015).The evaluation found, inter alia, that although the CASP had contributed to capacity building and assisted with agricultural support services, the CASP could have yielded better results if, amongst others, there was better coordination of the programme within DAFF and its provincial departments. It further noted that the CASP was not aligned with other government programmes and that key directorates within DAFF did not take ownership of the CASP. The research recommended that replication and wasted resources may be eliminated if National Treasury facilitated ‘the planning, alignment, coordination and integration of farmer support programmes between DAFF and other related government departments’ (Department of Agriculture, Forestry and Fisheries, 2015: viii). Another effort to enable better coordination was the memorandum of understanding between the DRDLR and DWS (DWS, 2016). It was noted at a Parliamentary Monitoring Committee meeting in November, 2016 (DWS, 2016), that although land reform and allocation of water were on their agendas the different departments prioritised other critical issues. These are but two examples illustrating that government realised that collaboration may be critical for successful implementation of policy but once again raising the question as to why it seems not to be sustained or successful.

Hence, almost twenty years later, the legislative intent to bring about improvement in the lives of those who were legislatively excluded and discriminated against seems to be worth only the paper it was written on.

5.2.2.2 Local stakeholders' understanding and insights

This theme offered an opportunity to gain insight into how stakeholders, and especially those who were meant to benefit from the legislative and policy intent of transforming the water landscape, experienced and understood this objective.

The experience of emerging farmers suggests that transformation may not be a reality for many of them. Frustration was evident as voiced by an emerging farmer:

> 'The law is drawn up. I can't build a dam. Two years to get permission to build a dam. Who is the person in power to say I'm breaking the law? I'm not breaking the law.'

The frustration is deepened by the impression that white farmers seem to be enjoying unfettered access to water.

> '…Do not understand how river is on border of farm but we're not able to use the water. The white farmer further downstream is able to use limitless.' 'Why can we not use the river water? The white farmers further upstream just use and do not bother to do the right thing. We toe the line and apply as we are told. But we suffer.'

Emerging farmers felt the white farmer was placed in a better position to succeed as emerging farmers 'Lack of resources - alien trees clearing costly, done manually…' whilst the 'white farmer has resources, more effective with equipment.' The process to access water is regarded as complicated as experienced by this farmer when he asked: 'Why must it be so difficult? Just to get funding. What does someone know about hydrology report, cash flow prediction?'

However, it should be noted that the complexity of the process cannot be ascribed to stakeholders being ill-informed or uneducated. A well-educated farmer viewed the process to access water as intricate and stated: 'I do not know what we had to fill in. I just thumb suck when they ask about how much water we use. And I have five years post-matric education'.

Farmers seemed to acquire their knowledge of the legislative and policy requirements through word of mouth, but this did not mean that they were sure of what was required of them to use water or access the system. This is illustrated by this farmer when asked how he got to know about the water application:

> 'It is, um, it's the sort of thing that neighbours talk about because I think it became new legislation a few years ago and people were talking about, 'Oh, if you've got water, you should register it', so …'.

This farmer voiced his understanding of water authorisation as follows:

> '…and according to the calculations it showed that it falls within *a schedule 1. So it is a general authorisation then.* So we did not need a water licence or anything to provide water to our animals from the dam nearby.'

Another farmer stated:

'…That is just the first step, nothing on paper yet. They are still busy, I don't know what they must still do, they know we need it now.'

This farmer indicated that the processes were not clear and the impression was that institutions did not explain the processes and the extent thereof to applicants.

> '…Sent from one to another department and understandings of what are required changes–no clarity therefore frustration. Confused - what are rights, what and when is required?'

This study compared the experiences of farmers in two research sites. In the secondary site, the farmers also had challenges but very different from those experienced by farmers in the primary site. The secondary site relies on the WUA to manage the water and farmers turn to the WUA for their local water needs. At the time of the research, the manager of the GWUA was not aware of any black emerging farmers in the jurisdiction of the WUA and his only terms of reference were an empowerment farming scheme and a very successful black farmer. Most, if not all, of the farmers in the jurisdiction of the GWUA are commercial farmers and are existing lawful users. Their water requirements are to a large degree taken care of and thus they do not have to enter the fray of the bureaucracy to farm and continue therewith. Whilst the researcher was on site at various times at the GWUA, farmers seem to have free access to the WUA via telephone or by visiting the offices. During one site visit with the manager of the GWUA, the researcher observed that members phoned intermittently and he dealt with their queries immediately. He and his assistant had arranged shifts and were on call 24/7 to deal immediately with any water-related issues or emergencies. This arrangement ensured that their infrastructure was in impeccable condition and breakdowns were minimal. These members approached the WUA with their immediate water challenges or queries and their water needs were attended to immediately, or relatively soon. As one farmer observed:

'I just communicate with the manager, we agree what we want and if it is within the rules of the scheme, we function'.

From this utterance it is clear that the farmers have an idea that some form of permission is required for water use. However, it is apparent that they are uncertain as to the exact detail and legal requirements and therefore will be reliant on relevant institutions for further guidance and advice to be on the right side of the law. In the secondary site, where a functional and seemingly successful WUA manages the water, farming did not seem to be negatively impacted due to bureaucratic delays. These farmers did not have to deal with any other institution but their local WUA for their water needs as the WUA is an intermediary accessing the bureaucracy on behalf of its members. It appears that subsidiarity can achieve success if the WUA at local level has the capacity to address and meet the needs of local farmers. Where farmers rely directly on the CMA and the DWS for their water needs it appears as if these institutions are not forthcoming in guiding and informing these farmers of the processes to access water and this uncertainty contributes to these farmers' frustrations.

5.2.2.3 The role of the bureaucracy in the process

This theme offered an opportunity to gain insight into how stakeholders, and especially those who were meant to benefit from the legislative and policy intent of transforming the water landscape, viewed and experienced the bureaucracy tasked with the objective of, inter alia, transformation. It also gives an impression of those who are tasked with implementation at the different levels of government.

Farmers located in the primary research site are reliant on the CMA and Department to manage and regulate their water needs and requirements, due to the absence of an established WUA to deal with water-related issues at local level. Thus, any changed or new water-related concerns will inevitably mean that these farmers will find themselves having to enter and interact with the water bureaucracy.

For many farmers, the BGCMA was not initially part of their frame of reference and they discovered the existence and the role of the CMA via other institutions, especially the Department of Agriculture. This was the route for many emerging farmers as they needed funding and applied for funding through the Department of Agriculture. This is the impression of one farmer of the workings of the bureaucracy and of contact with BGCMA:

> '…look the structures work as such: you lodge an application then there is a CPAC who consider the applications. And when they ask, want to know exactly how much water the pigs will use over a period of time in a year…They then referred us to BOCMA to calculate exactly how much water a pig will use per day and we had to calculate it for the year'

Another farmer related that:

> 'I applied to Agriculture and they asked about the water use. The process started with Agriculture and they directed us to water. At the time when I spoke to BOCMA there were others who were in the same position. I asked them to address the farmers. We pushed Agriculture to let BOCMA see the seriousness of this. BOCMA came and brought the forms and meet with everyone. They came in fewer than six months in 2012'.

As these stakeholders accessed the bureaucracy to acquire or to maintain their water use, they found the process confusing and the bureaucracy did not necessarily help to demystify the process. Feedback or further communication after the process had started was non-existent or slow. The impression is that institutions do not explain the processes and the progress and extent thereof to applicants. One farmer accessed the bureaucracy without understanding the process and it seems as if no one explained to him the detail or need for the process. The bureaucracy was not very forthcoming with assistance and merely sent the applicant from one department to another. This applicant also noted that the rules seemed to constantly change and this further added to the frustration and confusion pertaining to the correct water use application processes.

Another farmer stated '…That is just the first step, nothing on paper yet. They are still busy, I don't know

what they must still do, they know we need it now.'

One farmer had a dim view of the ability of the bureaucracy to effectively fulfil its mandate to the emerging farmer, as evidenced by the following statement:

> '..they put the wrong jockeys on the horses, because many of the officials who sit there, sit there only for the salary. They do not care… or they have nothing to do with the emerging farmer on the outside. For example, an emerging farmer will approach them and say but I want to apply for funding with you for a,b,and c, say for 2017/218. And then the process has to start but if you started the process, you write the business plan, get all the financial information, as to how much it will cost to do a,b and c and you hand it in and then from the time you've handed the documents in then they must continue with the process. But if you phone maybe a week or a month later then you find that they still had done nothing or the documents had just gotten lost. So the person who sits there does not necessary have the expertise to help the emerging farmer, no. And they merely say they do not know what had happen with it.'

However, although these farmers experience bureaucratic red tape, some had positive results when the process eventually worked and came to fruition. The following expressions by stakeholders attest to how the bureaucracy may have a positive impact if it works.

This statement by a farmer who had difficulty calculating the quantum of water use illustrates how the bureaucracy can work if enough pressure is put on it to work effectively:

> 'Yes, when we went to what-is-his-name at BOCMA, he helped us to calculate exactly how much water we'll use within a year and in what schedule it will fall. And according to the calculations it showed that it falls in schedule 1. So it was a general authorisation. So we did not need a water licence or anything to provide water to the animals from a dam nearby. It took approximately two days to sort out. We communicated with them via emails. So we did not have to drive to them physically. It was immediately, yes. It was as if pressure was put on them to deal with as soon as possible because the project was already moving back and forth for almost a year due to certain things with which they did not agree.'

Another emerging farmer also shared a positive experience with the bureaucracy and it led to a number of them getting a response from the CMA within a reasonably short time.

> 'At the time when I spoke to BOCMA there were others who were in the same position. I asked them to address the farmers. We pushed Agriculture to let BOCMA see the seriousness of this. BOCMA came and brought the forms and meet with everyone. They came in fewer than six months in 2012'.

However, it seems as if the stakeholders in the secondary site, where water use is managed by the GWUA, regard the CMA as a hindrance and my impression is that these farmers do not have confidence in the CMA to deliver and deliver correctly. An encounter with the CMA and other water management institutions might arise due to a need for an increased water volume and they further had to deal with the bureaucracy during the verification and validation process as was initiated by the CMA in terms of

section 35[19] of the NWA. This means that existing lawful water use has to be registered at the appropriate regional office of the Department to be verified and validated, and this was driven by the CMA. The NWA meant that these farmers had to register or register their water use. One farmer observed that 'it improved how I do business as it brought certainty to how I do business.'

However, the verification and validation process proved to be technically and administratively very complex and cumbersome due to insufficient knowledge and infrastructure and generally frustrated all stakeholders. A farmer noted that that he was able to download the many forms via the internet but had to use a consultant, at an expense, to complete the forms. Another noted that 'truth be told I think that farmers did not want to fill it in. It happened at the same time as the draft policy bill[20] and people were as nervous as hell. It was badly timed.'

The GWUA informed the farmers of the process but, generally, farmers stated that communication of the stages of the process was not well executed. Feedback on the process after submission was lacking, as stated by this farmer:

> 'I did not get any feedback. I do not know whether it is registered. No formal piece of paper to say the water is registered'.

Another expressed his lack of confidence in the bureaucracy to complete the task and noted that:

> 'I gather it is in Worcester in the passage way waiting on someone to work through it. An official just said ja, ja, we'll handle it and I haven't heard anything.'

From the above, it is clear that these stakeholders regard the CMA and the Department as a hindrance and prefer to deal with the CMA via the WUA only. However, this begs the question whether it is really due to the perceived inability of the bureaucracy to manage the water portfolio or whether it is to protect their historical vested interests.

We can garner from the views of these stakeholders that they came to realise that the bureaucracy is crucial to their ability to gain or maintain access to water use. However, their interaction with the bureaucracy left much to be desired. This negative impression was brought about by the behaviour of the bureaucracy. Nevertheless, at the same time, participants expressed the view that the bureaucratic encounter has the potential to be rewarding if processes work and an effort is made to explain and implement said processes.

The next part of this report gives an insight into the institutions and how the role players understand and implement their roles in the water allocation process.

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[19] The verification and validation determines what water is used and how much is being used from the different water resources. Thus an existing water use requires any person claiming an entitlement to that water use to apply for a verification and validation of that use.

[20] This commercial famer was referring to the national policy review process as published by the DWA in December 2013.

5.2.2.4 Implementation at the various institutional levels

The Minister is the responsible authority and via the Department executes the functions of trustee of South Africa's water. The NWRS emphasised the importance of decentralising responsibility and authority for water resource management to the CMAs. The intent was to:

> 'facilitate effective participation in the management of water resources in their areas. It will also enable the Department of Water Affairs and Forestry to move from its present multiple roles as operator, developer and regulator to become the sector leader, policy maker, regulator and monitor. The Department will lead the creation of the new institutions, which will take a number of years, and support and guide them in the execution of their tasks (2004: i).

Almost twenty years after the promulgation of the NWA, it is clear that the intent of the NWA had not been met as only two of the initially projected 19 CMAs are operational, namely Breede-Gouritz CMA and Inkomati-Usuthu CMA. As stated earlier, the Minister has not yet delegated authority to issue licences to these two operationalised CMAs and thus the authority to issue licences still vests with the Minister. Hence all licence applications are forwarded to the Director-General at Head Office in Pretoria for final approval. These licence applications may have originated at CMA level or at regional offices across the country and this inevitably prolongs the licence application process. The technical and resource-intensive nature of the process may cause the licence application to be further delayed should the DG decide to refer the application back for more information. As authority has not been devolved to CMA level the intent of the NWA and NWRS to implement IWRM remains unfulfilled. Yet in 2013 the Minister published a policy review position proposing to amend the institutional and legislative regime. This radical proposed change was published for comment without having the full benefit of implementation of the existing framework. Again, this begs the question as to whether devolution of authority to CMAs would have produced a different outcome from the licence application backlog the country is facing today, and will a brand new institutional and legislative order bring South Africa closer to realising the objective of equity?

5.2.2.5 Insights and understandings from within the bureaucracy

Legislative frameworks and policy are translated into policy actions and tangible outcomes by institutions. In this case, the BGCMA and the regional office of the DWS in the Western Cape are the implementing institutions as they represent the Minister in the execution of her responsibility as trustee of South Africa's water. This translation of policy into action and outcomes happens in a specific context and does not occur in a linear and mechanical manner. Together with the legislative and policy framework as explained above the understandings and insights of institutional role players are important in gaining a complete appreciation of the water allocation process. To this end, the researcher interviewed staff at the BGCMA and the regional office of the DWS in the Western Cape. The staff interviewed were all involved with the process of water allocation. The participants interviewed held a diverse array of positions at different levels within the hierarchy of these institutions. The rich data

gained from the participants at the DWS and BGCMA is presented and from the results the researcher was able to draw conclusions.

Theme 1:

The legal and institutional frameworks within which role players operate to access water for productive use. This theme allowed the researcher to gain insight into how the participants view and navigate the legislation and policy when dealing with the process of water allocation.

Some participants felt that the legislation is in order and has to be applied. One participant, who holds a middle management position, noted that 'Nothing is wrong with the legislation. We only manage the water, see that the water is enough and distribute it, not to the white farmer.' However, it is interesting that those participants who do not have managerial positions and who deal with water licence applications noted that 'the legislation is fine', but they struggled with the interpretation and application thereof and needed assistance in this regard stating that 'we do not get guidance to how it's to be applied'. The experience of having difficulty in implementing the legislation and policy found voice stating that 'Interpretation of legislation and policy create uncertainty. Must find a way of interpreting what's being said'. Participants seemed to be irritated, and one expressed frustration with the legislative framework by mentioning that:

> 'NWA on its own is not easy to understand. Act is not specific. Policy is there but it sometimes depends on individual interpretation. Act is the main instrument. Remember I'm not lawyer, we should be using guidelines, there is room for interpretation and that is how I proceed'.

Another participant articulated the engagement with the legislative framework as follows:

> 'Rules are not clear – they say different things, people have not been trained'.

Participants expressed their hopelessness and mentioned that 'although the regulations[21] are in draft form we try and make sense thereof and use it. There is nothing else to use.' As clear guidance is not readily available, participants rely on their own experience and knowledge and those working with them to resolve matters.

> 'Interpretation of legislation is about litigation. Our interpretation is the reality. If person who deals with the application does not understand then he will ask others in the office. It is about experience. Not a legal person'.
>
> 'I have to use discretion, it's up to me how things go forward'.

The participants had strong views regarding institutions and their role and status.

> 'CMAs have not been established yet, because it is more complicated than they thought it would

[21] The regulations referred to are the licence application process as contained in the draft regulations for the procedural requirements for water use licence applications as published by the Department of Water and Sanitation (Government Gazette 38465 of 12 February 2015). At the time of writing, i.e. 31 January 2017, these draft regulations had not been finally accepted but the responsible authority had started to implement these regulations.

be. At one stage there was a minister every year, all with different ideas. So this time around, she is very positive about CMAs'.

'The difference between CMA and water affairs, same rules but you have the connection with the stakeholders. You know what is going on in the area. No struggles with different people of different departments. Stakeholders know who to call in which area. There is really contact that makes a huge difference'.

'Idea of CMAs is doing the work at local level, but regulated by DWS. Other thing is that the functions that we do has been delegated by the Minister. DWS does their own things. They don't water resource management in this area. Licensing and other delegations. It is only certain functions that we do, we are not taking over what DWS is doing. Just water resource management that we are doing'.

From the above it is clear that staff want to do their job but they seem uncertain in the execution thereof. The uncertainty of the role and status of institutions and the legislative and policy framework proves to be too much in situations where very little or no guidance is in place to instil confidence and ensure that the best decision is made, promoting efficient and equitable access to water.

Theme 2:

The role of the bureaucracy in the process as users endeavour to access water. This theme affords an opportunity to gain an understanding into how the participants interact with the institutional processes when handling the application.

From within the bureaucracy, participants found obstacles impeding the effective performance of their duties. The uncertainty pertaining to the roles of different role players in the process was of great concern, but also conflicting insights which may be ascribed to whether the participant was employed by the CMA or by DWS. The following statements by the participants illustrate:

'We had authorisation to issue licences for 150 days and it was withdrawn. We do not know why, were not consulted and were never told why. Now we must explain why the application will not be ready on date as we've promised. This is frustrating'.

On the same issue, participants stated:

'With authority with CMA the way I see it will be easier'.

'One of the biggest accomplishments is that we have received the delegation to do the licensing. We helped, but we had to send it back for approval to DWS. Now only to board CMA[22]. From institutional/stakeholder side, people understand that we are here, and they accept us. Working together with agriculture and WUAs, struggling: too little people, too much work. Too little money'

'CMA does have a backlog. With new licence 2015 January everything will be done here. We

[22] This participant felt that the delegation of authority to the CMA to issue water use licences would allow for a quicker localised process and allow the CMA to reduce the licence backlog.

will present in November with our committee. We will present to the internal committee. It will be approved here and wait for signature. We might decide we don't need all the comments. Why did I request comments and they say remove it. These comments are from the Department. The board will authorise. The board needs training to authorise licence. They need to know what's happening. In Bellville[23] they are experienced. We'll see how it goes. We think it will be easy'.

Another participant expressed an opposing view and noted that 'No, it's necessary that the authority stays at national level - we cannot trust that the CMAs will ensure transformation'.

The participants referred to shortcomings in their own armoury when dealing with water use authorisations.

'We don't have dedicated staff for licences. It is a matter of prioritising as there are more urgent matters'.

'A case file just lands on your desk and whatever it is you'll have to do it, process it. If you do not know, you ask your colleagues. You just have to rely on them and their knowledge to get the application processed. There is no record keeping. This is frustrating'.

'Who verifies information, person can lie. With others we must see agreement with farm worker. We want to see something written. But with the monitoring part we don't do. Who follows up on the conditions? It's supposed to be someone but no one does. The Department does not follow up. I don't know of follow up. With water use – no one is checking if there is a meter. You must know how much water is used. I must know really this is the amount that is used. They must put things in place to monitor quantity as they do quality. The licence is given and then we walk away and that is not supposed to happen. It is a gap. Some will be honest. With water quality they are very strict. They're doing good work'.

The above insights and experiences of these bureaucrats allude to Lipsky's notion that these street-level bureaucrats have considerable influence. As they deal with the challenges during the implementation process they devise and employ various strategies to enable them to perform their mandates under difficult circumstances. They are important role players in the implementation process and their roles, influence and impact on policy and implementation thereof cannot be underestimated.

This section of the report has identified legislation and policy, plotting the progression of South Africa's regime for water allocation from the promulgation of the NWA to the present framework (see attached Appendix 2). As the Minister is preparing to put into motion the policy position as put forward in 2013, the institutions will continue to endeavour to implement the existing framework under difficult circumstances and in a changing environment.

[23] This refers to the DWS Western Cape Regional Office.

The bureaucracy seems to be fighting with itself and struggling to implement its policy as elucidated by staff dealing with the processes authorising access to water use.

5.2.2.6 Strategies employed by local stakeholders

Water is in the focal point of farming without which the farm cannot endure. To acquire and retain access to water the South African legislative and policy framework demands permission thereto and to do so legitimately the water user has to engage the process and enter the relevant bureaucracy. As illustrated above, for local stakeholders, i.e. farmers and specifically the black emerging farmer, the process to gain or retain access has not been without challenges. However, these farmers had devised discursive strategies to deal with challenges, perceived or real.

One strategy to achieve a desired outcome was to dance to the tune of those who purportedly hold sway over the desired result. Those who hold power may be the bureaucracy or any other person who may be in a position to promote the farming operation. These farmers came to realise that although water is key to farming, the Department of Agriculture provides the funding needed to acquire farming implements and products and, as observed by this stakeholder:

> 'Agriculture a big role player, we must stay in their good books, otherwise we have no door to get in. Department of Agriculture and Fisheries, coming,... How is farming progressing, we ask for funding, now they say we don't have water… so now we arguing the fact but we have water.'

Another stakeholder's approach to access was that:

> 'I just want to say a sensitive thing about these farmers, when you speak to these farmers, have a attitude of oh they are the best, any one that you are going to deal with, and talk. Put them on a pedestal'.

Some stakeholders had the perception that the white farmer held the key to funding and believed that the strategy worked. This stakeholder summed it up as follows:

> '…funding we only got because we have some white farmers who belonged to the association. When we said that they could not still benefit and they left, then everything stopped. Goodbye, you get nothing more. That is about five years ago!'

Another strategy employed was to join forces and find strength in numbers to get the attention of the bureaucracy and to get it effectively. By doing this, within a relatively short period, BGCMA responded to the call for assistance from the collective body of farmers, as emerging farmers in the primary site joined forces to get results. These farmers also understood that the success of the whole process depended on inter-governmental collaboration and used the one department to communicate with the other to ensure that the departments work together for the benefit of all stakeholders. This farmer collaboration brought about inter-departmental collaboration enabling these farmers to have the bureaucracy work for them. Joining forces to enable more effective access also led the community of black emerging farmers to establish the Pietercielieskloof Cooperative. The objective of this cooperative was to facilitate the process of black emerging farmers collectively applying for institutional assistance.

However, some stakeholders were not as diplomatic and were very critical of the bureaucracy. After being disappointed in the service rendered by the bureaucracy this stakeholder decided to rely on himself to ensure that the best results were obtained. This farmer stated that:

> 'Yes, he also helped me with that. And what happened was that there was certain information which he did not bring to my attention. And there was a little of a miscommunication between us. And the product was not according to my specifications. He put in his own specifications and we were at logger heads. And since then I've decided, no, I'm going to fill in my own forms. Since then I fill in my own forms then I know that what is filled in is what I want. And then it is 100% correct'.

Another stakeholder decided to operate strictly according to the rules and chose not to ask for favours during the application process. His impression was '… I applied for funding lots of times and I got rejected because I said I'm not going to be nice.' Although this may be one farmer's view it is concerning as the bureaucracy should never be regarded as accessible due an amenable approach by an applicant.

The commercial farmers in the secondary site have a functional WUA and rely on it to manage and protect their water needs. The WUA is well resourced and staffed with employees who deliver to meet the objectives of the WUA and thereby protect the interest of all stakeholders. These stakeholders are aware of the role that the GWUA plays in their farming and some of them are actively involved in the business of the GWUA. They contribute financially to benefit from the services rendered by the WUA and depend on the WUA to engage with the broader water bureaucracy for their water requirements. Meetings of the GWUA present opportunities to be updated on any developments or changes to the business or operations of the GWUA and create a space to share information affecting the farming community. The WUA is regarded by the CMA and the Department as effective in managing the water and hence interference by these institutions is minimal. These farmers invest in consultants, as required, and are able to challenge or meet legislative requirements to effectively run their farming operations. Within this commercial farming collaboration of water users these farmers are affected minimally or not at all by the bureaucracy and are able to manage the water for their exclusive benefit.

All of the above strategies were used by these farmers, black and white, to find the most effective way to access or retain water. However, this may be regarded as an indictment of the bureaucracy as it begs the question as to why these strategies should be employed when the bureaucracy is mandated to manage the water and bring about transformation.

5.2.2.7 End result of the processes on stakeholders

This section discusses the end results of water use applications through the stakeholders sharing their insights and experiences. For many stakeholders, the process was challenging and some of

them were still caught up in the complex, lengthy bureaucratic process. The obstruction had been brought about by a range of factors and its effect on ability to farm cannot be disputed.

This stakeholder clearly illustrated the effect thereof on farming and the frustration seems to be magnified when the delay is due to negligence by the bureaucracy.

> 'It is very frustrating because it means that you must start the process from the start. And a farmer does not have that time to start every time over and over again. For example, if you have to plant grain. There is a specific time to do a, b and c. Like when you have to plant, if you have to spray and all those things. So you cannot during this time sit with the forms again just because the next person lost the things.'

As previously expounded, targets were set to bring South Africa closer to meeting the transformation mandate as per the Constitution, the NWA and the NWRS. However, the experience on the ground dispels the notion of transformation. A stakeholder had a very strong opinion on the transformation agenda and expressed his anger and claimed that:

> '…so you're talking about water restrictions? It's White oppressing Black. Nothing has changed…. So, access to water. There's corruption. There's politics still very much alive. White people in charge, making decisions for black people. Apartheid put them in the position that they are. They're still reaping the benefits, you know? Yes, they talk about… how long is it going to take to compete? You know, they got farms, they got tractors and stuff worth a million Rand in 19…1990, the ANC was unbanned, so basically, in the late '80s, they were given stuff, two million Rand's tractors. They're selling that tractors now for two hundred thousand. They had farms the size of 10 000 hectares. They subdivided to their children... Why aren't we Drostdy-Hof, 200 years?... Where are we?'

Stakeholders' distrust in the institutions' ability to implement the transformation agenda was manifested in the establishment of the Pietercieliesskloof Cooperative. Membership was exclusively for black emerging farmers with the objective of promoting the collective interests of these black emerging farmers. However, the Cooperative had, to date, not lodged any application for funding as the state had seemingly changed its policy from collective to individual funding applications.

The participants cited various examples of how the processes impacted on access to water and their ability to provide such access.

> 'There were lots of problems with transition. Difference of understanding of DWS officials on what transformation is and what they[24] should look like. In our mind, we don't only consist of white farmers, but must encompass other stakeholders, emerging farmers, community, and

[24] 'They' referred to the interpretation of transformation as it pertains to who the stakeholders should be, to correctly interpret the intent of transformation.

municipality. Government didn't look further, if we have WUA, how are we going to support WUA, to make sure that all new members want to come to meetings and sit in board'

One participant cited an example to illustrate how the interpretation can lead to different results.

'There was this application I received. Water collected in a quarry and they wanted to remove it. The water just collected from the rain but now it is in the quarry. I told them there is no need for authorisation. You are not extracting it. A consultant insisted it is that a licence is needed. In other regions authorisation is given. We are not doing the same thing.

Another one is a septic tank, it is not section 21g. I asked colleagues and they said the same thing we can't authorise. We ask the person to send authorisation for the septic tank and we could not understand how they could authorise a septic tank. It is not 21 g.

Another result of the uncertainty of processes led to possible illegal use of water and was highlighted by participants.

'New application but applicant is already using the water. It's just that now they are caught and put pressure on us to issue a licence'.

'Person is already using water. There is uncertainty as to whether it is illegal. Directive is from the Department and Department deals with illegal water. You present it as someone who is using new water, you lie as the person is already using water'.

Delayed implementation or inability to implement the provisions of the Act impacted the institutions as much as it had an effect on participants.

'The same board[25] is still the board. They were supposed to get another board in two years, but it hasn't happened. The new minister decided to go more into skills based. Finance expert, water issues expert, etc. We are waiting what is going to happen'.

'DWS wanted to see the transformation immediately, so 50% women, 50% black farmers, etc. It is not that easy to have so many changes at once. Instead, capacity building should be taken into account, giving people knowledge, skills to participate in the meetings. Some WUAs had the numbers, but had to wait for years to get a response. Applications were lost, etc'.

The above insights and experiences have shed light on the workings of the implementing authorities and provided a picture of how the bureaucracy interfaces with the legislative framework. But what does all of this mean for access to water for the emerging farmer?

From these insights it is clear that black emerging farmers still regard the transformation objective as ineffective as they struggle to seamlessly access the bureaucratic process for water.

5.3 The insights and analysis of water experts' understandings and experiences

The findings from interviews with emerging farmers and stakeholders suggested that farmers contacted the DWS after they had been directed to it by either DAFF and/or DLDLR. The interconnectedness between water and land cannot not be disputed and, given the long-standing phenomenon of the gap

[25] The participant referred to the composition of the board of the BGCMA.

between policy and implementation, the researcher deemed it appropriate to invite the opinions and insights of experts in water management and water-related disciplines. This unique perspective of experts provided the researcher with a specialist lens on the research issue which could guide and inform management decisions. It further offered an opportunity to triangulate the data collected.

This section profiles and analyses water experts' insights, understanding and experiences of the institutional and policy and legislative framework for water allocation and reform. The intent is to capture the insights and understanding of knowledgeable and experienced individuals enabling a complete overview of the research at hand. These expert insights and opinions were solicited to support, inform and advise managerial decisions related to productive water. Due to these experts' extensive and intimate knowledge of the research topic and its intersection with related disciplines, these experts' opinions were invaluable for fully outlining the policies and processes and their impact pertaining to access to productive water. These experts' experiences and knowledge added great value to the research and enabled a more complete assessment of the research topic.

Experts have unique knowledge and insights, but they are far and few between and so are not easily accessible. The research participants were selected as experts due to the positions they hold, the work they deliver, their consistency, the period they have been applying their knowledge and craft and its relevance to the research (Ericsson *et al.,* 2007:2). These participants are established and knowledgeable individuals from the water and water-related sectors in academia, the public and private sector. It was not merely difficult to locate these experts but also to secure interviews with them. Using an existing network, the researcher made contact via email and requested interviews with these individual experts. Some agreed to be interviewed whilst others ignored the request completely. Some of these experts were in bureaucratic structures where protocol required official permission via a bureaucratic process for the researcher to conduct interviews with them. This process proved to be too long to meet the deadline for this particular research. An analysis of the empirical data follows.

5.3.1 **Analysis of experts' insight and opinions**

The findings are thematically presented. The themes were guided by the research aim and this informed the interview schedule. The insights and opinions of the experts presented an opportunity to triangulate the data collected from water users and officials and the following themes identified were:

- Transformation and allocation and reallocation of water.
- Coordination or fragmentation of institutions and the corresponding influence on transformation.
- Legislative and policy framework and the bureaucracy.

5.3.1.1 Theme 1: Transformation and allocation and reallocation of water

One of the underlying intents of the legislation and policy is to bring about transformation to benefit the

historically disadvantaged through the allocation and reallocation of water. As indicated above, the WARS set national targets to be progressively attained by 2024. However, these targets have not been attained and this begs the question as to why, in light of the legislation and policy supporting said transformation, it remains elusive. One expert reckoned that 'transformation doesn't happen because people have said transformation must happen. People need to get off their butts, roll up their sleeves and do some work for a change'. However it seems to be more complex than just 'rolling up sleeves'.

The data suggest that transformation is not just about water but that the allocation of water is just one component in the bigger South African transformation landscape. Due to her history, it is imperative that land and water be dealt with as inseparable; water cannot be divorced from land and vice versa. The following insight by the research participant suggests that land reform can only be successful if it is accompanied by access to sufficient water use. Thus, successful land reform would automatically address water reform.

> 'Look, if you look at the bigger picture, my feeling is that you cannot do water transformation without land transformation. I mean, to me it just cannot work. Because you need land to use water. So automatically, it can also happen that if you apply successful land transformation, the water will be automatically on the land. Then you do not need water transformation'.

This opinion also found expression in the views of this expert who stated:

> 'Well, if you're talking about transformation in terms of licences for black people, then it's a Department for Land Reform issue. It's about land reform, not water reform. So, if there's land, to give the water there is the easy thing. And then Water Affairs is finished. Because they only give the water. They're not worried about the finances or the support or … there's no support for them from Water Affairs… then it's supposed to come from Agriculture. So Agriculture do have a unit for small farmer whatever. But they also struggle'.

The principle of subsidiarity requires that decisions should take place at the lowest appropriate level with the intent of transformation. The focus shifts from national level to the CMAs and WUAs but, as one expert stated, government does not seem to be interested in whether transformation is indeed happening at local level as legislatively intended.

> 'But now they want to say, if you're not doing it in the very first meeting, then the second meeting there must be reasonable differences, you don't want to transform. Let me tell you that Water Affairs, there's a hundred and ten irrigation boards in the Western Cape. They did not visit two of them in the last fifteen years – I'm talking about the top management…but it's just a group of white farmers. Why must I go? I'm not going to waste my time with them…But even if there's one black person there, you should promote him…
>
> So, transformation is a numbers game for the Department? Definitely. No, definitely. There's no question about that'.

5.3.1.2 Theme 2: Coordination or fragmentation of institutions and the corresponding influence on transformation.

The inter-relatedness between water and land was highlighted through the empirical findings and relevant literature and this research explored whether and how this interconnectedness plays out in the allocation and reallocation of water.

One expert related that as far back as 2002 he brokered the first Water and Agriculture joint meeting emanating from concern that very little emphasis was placed on the role of water in agriculture, notwithstanding agricullture being the biggest user of water. He indicated that:

> 'I've found out very early on, that for example, the land, the Land Commission and the Department of Land Affairs at that time, didn't even talk to one another properly. So, the Land Commission would adjudicate and look at who would be beneficiaries for all who made the Land Reform claims and, when they finished off their investigation, they'd hand it over to Land Affairs. But I told them I need lead time. And then, when they were ready to settle communities, they'd come to me and say we need water. I said why wasn't that brought in right at the outset? Why don't you talk to one another? Now those are the relationship issues we can't just go in and level. That's another domain. So, that's where your bureaucracy comes in'.

This expert noted that collaboration within the Department of Water and Sanitation at various levels facilitated sharing of knowledge and through joint efforts the Department endeavoured to find solutions.

> 'When I was at Water Affairs we at least tried to work better together for licences. There's a clause in the Act that says, if another department gives a licence and it fulfils the criteria of the Water Act, then you don't need to issue a licence. They don't want to do it. So what we ended up with, at least we made sure that all three licence application forms are available with Agriculture and Environmental Affairs and with Water Affairs because then it's an omnibus for dam licences. But that also fell away now. It's not done anymore'.

This absence of cooperation has inadvertently led to confusion for those at a lower level and this might be a contributing factor to the delays in transformation.

> 'Everything fails. There's no coherent approach between regions any more. We had meetings, on a lower level, Deputy Directors, where we came together, all the regions, in the past, discussed, you know? Gave papers. Made formal presentations – you talk about this, you talk about that, interesting things that happened, or how do you solve this problem? Nothing like that anymore. Now the Chief Directors come together every month. They get a speech from somebody for half an hour. They give it to the next one for ten minutes. They give it to the next one for two minutes. The person on the ground doesn't know what's going on'.

In 2013, the NWRS-2 recognised this gap in water management and specified that 'the significant challenges that have hampered the progressive realisation of its equity goals' (DWA, 2013:46) are *inter alia* 'weak internal coordination and integration and poor external alignment with other reform programmes'(DWA, 2013:46).

To fast-track the water sector reform agenda, the policy put forward, *inter alia,* that strategic action be

aligned with key government initiatives such as land reform and the Comprehensive Rural Development Programme. It further recommended that 'the DWA will work with the Departments of Rural Development and Land Reform and Agriculture, Forestry and Fisheries (and provincial departments of agriculture) to achieve a coherent programme of land, water and agrarian reform' (2015:48). It also noted that the water, land and agrarian reform programmes be integrated to improve the implementation of WAR. CASP and a memorandum of understanding between the DRDLR and DWS are two examples of attempting coordination. The data from this research assigns the inability to coordinate to individuals' lack of understanding of different actors' roles pertaining to the allocation of water. This failure to coordinate was also ascribed to operational functions and responsibilities incorrectly demarcated and it was noted that all bureaucracy in the domain should not be influenced by absence of will or finances but rather by the intent to implement the purpose of the legislative framework.

However, even though collaboration is critical to effectively and efficiently allocate and reallocate water, to date South Africa is struggling to maintain coordination within and amongst relevant departments and this hampers transformation. As indicated above, attempts were made to collaborate and coordinate within and amongst departments to impact on reform in the sector. However, it seemingly did not produce the intended outcome. This expert cautioned that the relationship was hampered by individuals and their lack of understanding of their responsibilities pertaining to the allocation of water. He was of the opinion that as soon as water is allocated, the Department of Agriculture has to step in as the water is consequently attached to the land and falls within the mandate of Agriculture.

> 'where water was transferred from the Northern Cape to Eastern Cape and it became a bit of a tussle between the respective provinces, but that water sat there, idle. So the Department of Agriculture and/or Land Affairs or whoever, needs to take that up and develop the infrastructure and that's where it is. Because then you're crossing over mandates and you must be very careful to part … each department has its mandates. So the agricultural extension officers need to build up capacity on the ground for the uptake of that water. Agricultural extensions services need to go in to provide the infrastructure and the means as in tools, seeds, and financial wherewithal for all of that. We had a very powerful empowerment programme developed where we realised there were eight factors that needed to be achieved for the entire successful uptake of water'.

Another expert concurred and noted that the operational functions and responsibilities might be wrongly delineated. Lack of will or finances should not influence the separation of functions but rather appropriateness to effectively implement the legislative and policy framework. He explained that:

> 'Land Reform is more an issue around Department of Agriculture and Department of Land Reform than Water Affairs. Water Affairs plays a supportive role, almost. Yes, maybe initially, to give the water and then supportive afterwards, but, you know, with the new pricing strategy, Water Affairs is taking even another step back. And say no, we're not going to give subsidies anymore. If you want to give subsidies to help support poor farmers, Agriculture you must do it. Agriculture said, we don't have a system like that. We cannot do it. Our support system is in

> place, but it will take three years from now. So, I can see there's a problem coming, temporarily, but you can also argue that that's maybe the correct way to do it. Because they're supposed to look after agriculture um, Water Affairs must look after the soils. But they don't always know what triggers that. Is it that they don't want to be involved, or the budget? The budget is always a problem'.

This expert was of the opinion that 'the bureaucracy always got in the way…, well there was never an effective and an efficient way in which Water and Land and Agriculture came together…Unfortunately, a lot of that depends on individuals and the energy they channel into it'. By implication, cooperative governance can be successful if individuals are prepared to pursue collaborative relationships.

However, this expert was of the view that a solution might be to create a dedicated department for emerging farmers or redefine the operational functions of the different relevant departments and it may sustain the effective and efficient use of water to bring about transformation and poverty alleviation as legislatively intended.

> 'see the whole thing of emerging farmers is a huge aspect in our country. If I was head of the government I would have established a department for emerging farmers...in that department will be the whole mandate to help emerging farmers. I do not think that something that is so important for the country should be fragmented into different departments. I think this is where the problem of the country is'.

5.3.1.3 Theme 3: Legislative and policy framework and the bureaucracy

Transformation through allocation and reallocation of water is a constitutional and legislative imperative and this forced an interrogation of the legislative framework in this research to unpack why South Africa struggles to implement her progressive and trail-blazing legislation and policy. The IWRM approach of South Africa's water framework dictates subsidiarity, devolving authority to the lowest water management authority, namely the CMA or WUA, thus ensuring stakeholder participation at the lowest level. However, almost twenty years after the passing of the NWA provisions of the Act remain unacted upon.

All the experts were in agreement that the legislation does not need amendment. This is how one responded to the idea, saying: 'No, that's the problem, is we change the legislation because we're too bloody lazy or we've never had the wherewithal to implement it. And that's the sad fact…'. However, what became clear was the view that at the helm of the implementation struggle were people who did not understand the legislative provisions, and compounding the challenge was the fact that no clear guidelines existed to interpret the legislation and policy[26].

[26] As indicated above, the regulations promulgated on 24 March 2017 by DWS may be effective in facilitating an improved water use licence application process.

Section 27 of the NWA provides that the following factors be considered for the issuing of general authorisations and licences:

(1) In issuing a general authorisation or licence a responsible authority must take into account all relevant factors, including -

- existing lawful water uses;
- the need to redress the results of past racial and gender discrimination;
- efficient and beneficial use of water in the public interest;
- the socio-economic impact -
    - of the water use or uses if authorised; or
    - of the failure to authorise the water use or uses;
- any catchment management strategy applicable to the relevant water resource;
- the likely effect of the water use to be authorised on the water resource and on other water users;
- the class and the resource quality objectives of the water resource;
- investments already made and to be made by the water user in respect of the water use in question;
- the strategic importance of the water use to be authorised;
- the quality of water in the water resource which may be required for the Reserve and for meeting international obligations; and the probable duration of any undertaking for which a water use is to be authorised.

The NWA stipulates that all of the above factors are to be considered when allocating water. This was confirmed by the Supreme Court of Appeal in the case of Makhanya NO and Minister of Water and Environmental Affairs v Goede Wellington Boerdery (Pty) Ltd ((230/2012) [2012] ZASCA 205, as discussed earlier.

Chapter 6 of the NWRS-2 (DWA, 2013:47) underlined the complexity of water allocation, that when 'weighing up the social and/or economic benefits of competing water uses ...(it) becomes more complex when the ecological costs and benefits must be considered as well. This means that the decision on how best to allocate water between competing uses requires a complex and difficult assessment, which includes the ability to assess social, economic and ecological values arising from various water uses'.

The NWRS-2 specifically addressed competing uses for water and established priorities for allocating water. These priorities are to give effect to the promotion of equity and are in order of importance:

- The Reserve.
- South Africa's international water obligations.
- Poverty eradication, the improvement of livelihoods of the poor and the marginalised and uses contributing to greater racial and gender equity.
- Uses strategically important to the national economy, as described in section 6(1)(b)(iv) of the

NWA to be authorised by the minister.

- Uses for general economic purposes best dictated by prevailing local and regional dynamics and requirements.

Chapter 6 of the NWRS-2 went further and described the objectives to achieve WAR, namely redress race and gender imbalances, broad-based black economic empowerment, fair, reasonable and consistent allocation, phased attainment of developmental and environmental objectives, reduction of administrative burden and capacity development. However, at the time of the research the uncertainty was still apparent. This expert attributed the challenge of implementation to the wide discretion given to officials in the authorisation chain when interpreting s27 of the NWA.

> 'to this important thing, I think that it is necessary that there be less discretion. But remember we are also different types, in the chain, ok, if there is discretion. My discretion is 20%, yours is 30%, yours is 60%. So you do not know what the right answer is, before there is approval or disapproval. Because that makes it very difficult'.

This contributes to the indecision and thereby prolongs the outcome of the water use application. Even though priorities were listed in the NWRS-2 the expert maintained that the skewed weight attached to the redress factor and the lack of guidance exacerbates the lack of implementation, prolongs the authorisation process and by implication delays transformation.

> 'So in terms of the current legislation all those things are equal. But we always interpret it to the side of redress, weigh the heaviest. We do not get legislative support. And then the applicants come to us and say, but what do you understand under redress? Then every offical here in the CMA, Water Affairs Pretoria,...You will get different answers So every one does not have the same answer. So if the legislation can be made more clear, I think the process will be better'.

The principle of subsidiarity implies that decision-taking should be at the lowest appropriate level, to achieve equity and sustainability of water resource management. To this end, Chapter 7 of the NWA provides for the establishment of CMAs to promote decentralised decision-making. These institutions are supposed to enable sector involvement and participatory management at local level, promoting equity through more effective water resources management and better reaction to the needs of marginalised communities. However, complete authority as legislatively intended to fulfil its mandate fully has not been devolved to CMAs. Water use applications currently still require approval at national level. This largely defeats the principle of subsidiarity and frustrates users and officials alike. This expert expressed his opinion on the devolution of authority and the value of the delegation of said authority to CMAs:

> 'the thing is, if you are a traffic person, and you check that people do not park too long or that they park at the right places, then you must walk the street where the cars are parked You cannot walk in the streets of Pretoria to check if someone is correctly parked in *Koekenaap*. So therefore you have institutions, you need people at local level to perform that function. This ensures that that function or whatever you want to do, that it will be more successfully carried out than something you will carry out by remote control from afar. That is just like that. Because there is not just one municipality in the country. You find municipalities all over the country in

every place and there is a reason for that. You get beter service delivery if you put something in the middle of something you want to do...it is better at local level'.

The view that delays in processing water use applications were due to this reluctance to devolve authority to lower levels was echoed by others, and the officials' attitude of lack of responsibility further compounded the slow implementation.

> **'**Not even CMAs. The regional office cannot sign anything anymore. It's all taken up … Licences, which was signed, small licences on the skin level, the Director General had to sign everything. I believe now it's directed to the Deputy Director General. Now, it's maybe wrong, but see, if I write a letter and I know you're going to scratch out a lot of things anywhere because you want your style, then I'm not going to write it a hundred percent, because you're going to change it anyway. That's the culture that's now there. The work is going up and that delays it of course, again, because there's more queries and more queries and more queries and so on. If you tell me I am the responsible person, I will make sure that that letter's going out correctly'.

Therefore if you want to accelerate and improve service delivery of the state, then I shall say that the powers must be brought back to where the function is performed'.

One expert who agreed with devolution of authority to local level, commented that:

> 'My problem is that I worked in the system, so I understand why it's needed for different people to have a say, because we are looking to environmental things, we're looking to socio-economic things, we look to economic things, we look to transformation issues and there's not one division that's an expert on everything.., unless there's a big backlog on my table, I can't understand why it takes some of those people so long to respond. That's one problem. If they give that delegations down, then the regional the regional office, but definitely the CMA, will still have their respective specialists to look to it, but they will have their meeting and they will maybe do it a bit better, because they know that next Tuesday's meeting is now final. There's not a Head Office that's going to look after everything again. It can be better, more effective, even better. Yes, devolving it down will help a lot'.

This expert also attributed the poor implementation to lack of accountability and said that:

> 'the beauty of our legislation allows people rights, but there are responsibilities to go with that. It's very integrated, it's very costly. It's important. That's what we need to do. But now, we need to have, not just DGs coming in, I mean, there's a whole lot of corruption and who's going and who's going to get jobs and all of that. I think that's now clouded this whole performance issue. We need to get to becoming a performance-driven government'.

The NWSR-2 indicated that 'in order to take full ownership of the water value chain, the DWA must provide decisive leadership and ensure that all components of the value chain function efficiently and effectively' (DWA, 2013:62). However, the experts pointed to the lack of quality leadership, the lack of

understanding and appreciation of the underlying principles and intent of the water legislation as well as political influence for the continued uncertainty and paralysis relating to implement legislation and policy. This is how one expert expressed his insight:

> ‘You see what happened is that, when we wrote the Act, everybody was involved. Kader was the Minister and he was a very, very committed person to the principles of the Act. He is a lawyer. But it’s also… the whole subsidiarity approach and everything, he understands it. So, we were on our way to establish these things…Then a new Minister came in, which was not part of the, the policy development and then that minister was fired and another minister came in – no, no, no. Why must we have nineteen? Why must I have? That was the question I was asked – why must I have four hundred institutions reporting to me? How can I do that? How can you expect that from me? But how did it work in the past? Water user associations and irrigation boards theoretically respond to the Minister. They actually respond to the Regional Director in Cape Town. The Regional Director takes up the problems with Head Office’.

The above opinion found expression by the experts in a number of ways:

> ‘People … the Department failed because the top management doesn’t know what‘s going on. Not one of them grew up through the ranks. They don’t understand the principles of the Act. And I say that because I was there. I was Acting Chief Director and I sat in those meetings talking to the Minister and I was ashamed of them not knowing what they do’.

Another expert also observed that ‘You have people in positions of authority that do not have insights into the business. Unfortunately, that’s a reality’ whilst another noted that ‘The CMAs was established, …still the nineteen. So we established the two, we had meetings, discussed all the delegations, it was all written up for publication and then one stupid person said, no, you can’t put that delegation there. I want that delegation. And this and that and that and it was only a third of the delegations was given to the CMA’.

One expert articulated that ‘we often brag about the best water act in the world! What happened? The brains that developed all of that, and I was part of that process, moved and there was none of that skills transfer, knowledge transfer, it was still the legacy of apartheid – and I’ll call it that – and I’ve seen it in the Department – you had a black caucus and you had a white caucus. Amongst the black caucus, there were also different factions and that created it. But, if you had good leadership, it could’ve diluted some of those impacts’.

Added to the above challenges is the impact of the political interference as it shifts priorities, thereby delaying outcomes.

> ‘...because the legislation is actually tied to the politicians...they must decide the priorities of whatever parts of the legislation...so it can be that you go into a certain direction due to a certain politician saying so, but these are now the important things...now you get another person who is now the head, the political head, And this person say for example now...this is now again the most important to implement. And the whole thing of shifting priorities, I think this also make

the whole implementation of the legislation in its totality to be delayed'.

The experts also warned against wanting to implement everything. 'Just go out, pick one thing you need to do and do it…We get too caught up in trying to do everything and you find you do nothing. The trouble with us, we want to do everything perfectly'.

South Africa had been lauded for its ground-breaking legislation but we seem not to be able to bring it to execution. This is how one expert summed it up:

> 'So we're brilliant at formulating policies. So we've got the best policies in the world. We've got the best laws in the world, including our Constitution…You can have the best document written in the world, no matter how simple. You've got lazy people or people who don't want to … nothing happens because you wrote it. It happens because you have to do it after you write it. And in that, it actually tells you what you need to do. So that's what needs to happen and that's what's not happening'.

The opinions expressed by these experts indicate that they clearly viewed political interference and lack of quality leadership as contributing factors to the poor implementation of the legislation, but found that the deficiency in knowledge of those in leadership positions further hindered the execution of the legislative and policy framework, thereby delaying transformation. The experts shed light on the implementation challenges from a unique perspective but also put forward recommendations as to how South Africa might approach her water resource management differently and thereby move closer to realising the objective of transformation.

5.4 Synopsis of the data analysis

The water policy and the promulgation of the NWA were politically driven, due to a transition of power from an apartheid state to a democracy. The Constitution of the Republic of South Africa, the supreme law of the country, provided the primary impetus to bring about a changed dispensation in the management and allocation of water. This determination by the government to shake off the shackles of apartheid brought about a vigour and drive to produce policy documents and pass legislation fairly swiftly to manage South Africa's water differently. The water policy and legislation responded to constitutional imperatives. The process did not just deliver an outcome but one that was lauded by the international community as innovative. In reading the White Paper on a National Policy for South Africa, 1997, one gets a sense of the vision and of the enormity of the task of transforming South Africa's water to be inclusive, sharing the benefits amongst all her people. This process from policy to legislation seems to have been seamless and it delivered what the role players envisaged. This instilled confidence in the legislation and as a participant said, 'there is nothing wrong with the legislation'.

However, the legislation required policy and strategy to give practical detail to guide the implementation process. This task was within the scope of the powers of the Department to devise and carry out. From the exposition above, it is clear that South Africa is struggling to implement the NWA. There is a

discontinuity between the legislation and the implementation thereof. As the Department is the responsible authority for water management it has to be held accountable for the failure to deliver. Thus, in summary, the following:

5.4.1 Local stakeholders' understanding and experience of the legal and institutional frameworks within which they operate to access water for productive use

This theme was insightful as it offered a perspective on the legal and institutional structures as seen by those who have to access these structures, namely the water users. These users had strong views on the transformation agenda, the institutional and legal structures and the ability of the institutions to implement their own policies.

The Water Allocation Reform Strategy (DWAF, 2008) is the strategic tie between policy intent and the practical implementation of some of the transformation provisions of the NWA. Its objective was redress in water allocation and for this purpose, WARS set an implementation target in that 60% of water was to be allocated to blacks by 2024 (DWAF, 2008:4-5), and a five-year rolling plan was to ensure that these targets were achieved (DWAF, 2008:5). However, in 2017, these targets were still not anywhere near being achieved and in 2013, five years after WARS was published, the focus of the NWRS-2 was still on equity. By the Department's own admission and supported by the insights and experiences of relevant stakeholders, it is clear that the transformation targets have not been achieved. The voices of these stakeholders were revealing and informative but at the same time disquieting. It is clear that if the system does not implement effectively it opens a space and creates an environment for frustration. This seems to be the experience of these stakeholders and defeats the objective of transformation. The change, development and improvement that many farmers expected continues to be a struggle and elusive.

The water users realised that some form of authorisation was required for water use but they were not certain when it was needed and which authorisation was needed. They expressed the view that the institutions were not always forthcoming with assistance and further guidance and advice. This uncertainty contributed to these farmers' frustration. The empirical data was significant in that many stakeholders first experienced or got to know about requirements for water use through a department other than the DWS. Emerging farmers found that they had to provide proof of water use and authorisation thereof when they applied to access funding via the DRDLR or DAFF. In most instances, this prompted the water use application process, as illustrated by farmers and officials alike. In 2013, the NWRS-2 highlighted this gap in water management and stated 'the significant challenges that have hampered the progressive realisation of its equity goals' (2013:46) are *inter alia* the 'weak internal coordination and integration and poor external alignment with other reform programmes' (DWA, 2013:46). This has proven to be frustrating for emerging farmers as they have to navigate the various departments to access resources and water. Hence, even though government has acknowledged that coordination, integration and alignment with other reform programmes was crucial to effectively and efficiently allocate and reallocate water, it has proven to be difficult to achieve or maintain and this does

not bode well for the transformation agenda.

If one turns the lens onto those who are responsible for the implementation of the legislation and policy, their description of the institutional challenges endorsed the experiences of the water users. Officials at the CMA and DWS regional offices voiced their frustration with the lack of guidance and the uncertainty pertaining to the interpretation and application of the legislation and policy. These officials continue to perform their duties and attempt to carry out the mandate of the NWA in an environment where they very often rely on each other's insights and understandings and where policy seems to change and is not clear. A case in point is the policy decision to establish one single CMA and the uncertainty and change of gear that this will bring about in an already challenging environment. This state of affairs contributes to questioning of the transformation agenda by local stakeholders as it seems as if government is dragging its feet in the allocation of water to emerging farmers.

5.4.2 The role of the bureaucracy in the process as users endeavour to access water

The state is the custodian of the country's water and the fact that one can only obtain authorization to use water from the DWS inevitably means that water users, or potential water users, have to enter the DWS bureaucratic arena to retain or access water use. In the primary site of this research, this bureaucratic process starts with the BGCMA as no WUA exists. Although the intent was that the water use authority be devolved to local level, it did not happen and water use applications still require approval at national level as South Africa struggles to devolve authority to the lowest level. In 2016, authority was delegated to the BGCMA but withdrawn without any consultation, forewarning or reasons provided. The CMA had to undo all planning and revert to authorisation from the Department at national level. This contributes to the water use authorisation process being frustrated and hence transformation delayed as water users face an administratively heavy application process handled by a bureaucracy far removed from the initial source of the water use application. Officials and staff at the implementing institutions who are at the frontline of implementation struggled to execute their mandate due to lack of clear guidance and uncertainty. As the farmers accessed the bureaucracy, they found the process difficult to understand and the bureaucracy did not necessarily help to elucidate the process. Feedback or further communication after the process had started was non-existent or slow and this added to farmers' frustration.

Additional evidence of implementation concerns can be in the Department's own statistics on various issues including the important issue of transformation. The following issues point to this discontinuity between the legislative framework and implementation by the Department:

- The establishment of institutions such as CMAs. The Department changed its own proposal of 19 CMAs, as initially mooted, to 9 CMAs in 2014. Each CMA had to develop catchment management strategies, anticipating that all CMAs were to be fully functional by 2016 (NWRS, 2004:119). These institutions are crucial if South Africa wants to achieve the goal of subsidiarity, i.e. devolving authority to the lowest level, enabling integrated water resource management. If

all CMAs were to be established and fully functional, it would fulfil the regulatory role for water use authorisation as envisaged by the Act. Accordingly the DWS would be primarily the policymaker and fulfil the role of oversight of institutions. The structural change to CMAs in 2014 meant that the established CMAs had to take on added responsibilities and operate within a broader management area. However, to date, only two CMAs are operational and this puts a severe strain on Departmental resources, whether it is financial, infrastructural or human resources. The CMAs also operated under a cloud of uncertainty. Authority was delegated to these institutions to issue licences but not long thereafter retracted by the minister without warning or explanation.

- The first NWRS was only published in 2004, six years after the NWA was promulgated. Although the Act clearly dictates that reviews of the NWRS should take place within a five year cycle, the second NWRS was only published nine years after the first NWRS. That the DWS did not adhere to the legislative prescription of a review of the NWRS in not more than five years points directly to failure by the DWS. Clearly, delay in providing detail and guidance on implementation of the NWA has created uncertainty and has, more importantly, frustrated the objective of the NWA. It is noteworthy that the NWRS-2 still emphases the need for equity and this implies that the DWS is fully aware that the intent of the NWA and the objective of equity has not been fulfilled almost twenty years after its promulgation. This is an indictment on the trustee of South Africa's water and the trustee, i.e. the government, should be held answerable to South Africa for this state of affairs.

- A parliamentary public hearing to review the implementation of the NWA pointed to wide gaps in the licensing system (Parliamentary Monitoring Committee, 2008). In 2013, the Department indicated that the water licence application backlog was 1142 and that 210 of these applications dated as far back as 2010. Various reasons for this were cited, but this situation directly affects the black water user's access to water for productive use, beyond Schedule One use.

- The Department issues policies and strategies but does not afford itself time and opportunity to monitor its success or failure. The constant amendment of strategies frustrates implementation and widens the discontinuity between legislation and implementation.

5.4.3 Strategies the local stakeholders employ to acquire or retain water use

The frustration experienced with the implementation of the legislative requirements to access or retain water had actors devise a variety of discursive strategies to counter the impediments.

Commercial and emerging farmers employed ways to secure their water and thus their farming operations. These strategies employed by role players may be an adaptive approach, to collaborate or act for self-preservation or self-development. One strategy to acquire a desired outcome was to dance to the tune of those who purportedly hold the power to bring about the desired result, whether it is

another farmer, a government department or acquiring the services of a consultant at great expense. Discursive strategies employed were to collaborate with others who may promote their cause such as other farmers or relevant government departments or institutions. Farmers further recognised opportunities to promote the individual cause pursuing individual water access applications and acquiring assistance from existing and new networks.

Officials tasked with implementing the legislative and policy framework equally continue to carry out their duties by relying on each other's experience and insights in the face of uncertainty and lack of institutional guidance. These stakeholders also recognised the value of research institutions and collaborated with these institutions to promote, develop and access further resources.

5.4.4 The end result of processes impacting access to water for these stakeholders and specifically black emerging farmers

The NWRS-2 specifically addressed competing uses for water and established priorities for allocating water that could guide the DWS or CMAs when processing a licence application. However, at the time of the research, uncertainty as to the implementation was still apparent.

Stakeholders found the process confusing and the bureaucracy did not necessarily help to demystify the process. This may be attributed to the uncertainty and delayed contact within the ranks of the bureaucracy as communication frequently seems to break down between CMAs, the DWS at provincial level and the DWS at national level, as stakeholders await decisive action from the national authority. Feedback or further communication after the process had started was non-existent or slow and stakeholders regarded the bureaucracy as unresponsive, not explaining the processes and the progress and extent thereof to applicants. This inability of the bureaucracy to deal with licence applications and instil confidence in the process does not bode well for the national transformation agenda.

However, although the farmers experienced the negative side, i.e. the red tape of the bureaucracy, they also had positive results when the process eventually worked and came to fruition. Irrespective of these experiences, the farmers understood that the bureaucracy is central to their prospects of gaining or maintaining access to water use, although their interaction and experience with the bureaucracy left much to be desired. Nevertheless, the bureaucratic encounter has the potential to be satisfying if processes work and an effort is made to explain and implement said processes as intended.

SECTION 6: GAPS IDENTIFIED

6.1 Introduction

The above analysis presented the reality of three different constituencies, namely the farmers, the institutions and the experts as they navigated and experienced the process of access to productive water as dictated to by the legislative and policy framework. Commercial and emerging farmers were interviewed as well as a cross-section of staff in various capacities as stakeholders in navigating the process to gain access to water. This section contains a comprehensive account of the analysis pertaining to the gaps and challenges articulated and presented during the different stages of the research. It is organised with specific focus on the gaps and challenges, as perceived by the stakeholders, and thereafter improvement strategies are put forward.

This section of the report analyses the gaps and challenges as perceived by the stakeholders, i.e. the water users and the institutions responsible for implementation. This perception is further analysed against legislative and documentary evidence. The analysis presents the issues as offered:

- In the institutions as experienced by officials as they deal with the process of authorization, interacting with the various users and other institutions.
- By the farmers as experienced amongst themselves and in relation to the implementing institutions.

6.2 Institutional challenges

Institutional dynamics have a great influence on effective and efficient implementation of the legislative framework. Clear institutional roles and responsibilities are delineated in the legislation but in practice this seems to be determined by political mandates. The Minister, as trustee of South Africa's water, has ultimate authority[27] but still has not delegated water use authority to local level as legislatively intended. The seemingly mischievous action by the DWS to grant licensing authority to the CMA in 2015 but then withdraw it without reason or consultation aggravates an already challenging implementing institutional environment and does not instil confidence. The CMA had to adjust processes and put structures in place to accommodate this new delegated authority. However, midway through this process of delegating authority, it had to undo all processes and planning and revert to operating without authority. The DWS constantly changes the goal posts and this state of affairs has impacted on the way staff approach the process of issuing licences; it contributes to users not trusting the process and ultimately delays the finalisation of licences. The NWSR-2 indicated that 'in order to take full ownership of the water value chain, the DWA must provide decisive leadership and ensure that all components of the value chain function efficiently and effectively' (2013:62). However, experts blamed the lack of quality leadership, the lack of understanding and appreciation of the underlying principles and the intent of the

[27] Chapter 7, part 4, gives the Minister the authority to intervene in, disestablish or change a CMA.

water legislation as well as political influence for the continued uncertainty and paralysis affecting legislation and policy implementation.

Institutions such as CMAs and WUAs have not been established as intended and the previous dispensation's irrigation boards seem to continue to operate unfettered. The DWS does not seem to have an interest in the business of the established WUAs and there is no evidence of DWS attending meetings or following up or monitoring their water management. By implication, the DWS does not seem to monitor these institutions and by implication not the water i.e. quantity and this contributes to the water use process and hence transformation being frustrated.

In casu the implementation of the legislative and policy framework had proven to be a challenge to the institutions. The empirical evidence showed that staff are frustrated and without clear direction when faced with understanding and interpreting the provisions of the legislation and policy. Staff were not reluctant to deliver the mandate of the portfolio but they did not have the confidence to do so. This seems to be due to uncertainty about processes and a lack of clear guidelines when dealing with applications for water use. The Supreme Court of Appeal ruling in the Goede Wellington Boerdery (Pty) Ltd matter, as expounded above, further contributed to denting bureaucrats' confidence in performing their mandate. One expert reflected on the impact of the ruling and stated that:
'…the judge granted the licence to the person who appealed. The whole case was about the Department and the processes. The judge asked just one question: but where did you read it in the Act? The BEE prolongs the application…BEE is linked to the politics; it is also linked to the stability of the water environment in the country. So I think it will continue for some time'.
Thus, it seems the ruling increased risk aversion among the bureaucrats, who might fear that other decisions would be legally challenged and found wanting. This fear of being punished in court and the lack of clear processes and guidelines for making decisions may add to implementation challenges.

Staff found themselves faced with demands and responsibilities for which they were not formally trained. Staff relied on their instincts and experience when considering and directing water use applications. Heavy workloads and the absence of dedicated specialists implies that staff 'ration services by setting priorities amongst tasks by concentrating on a limited number of selected clients, cases, and solutions' (Lipsky, 1980) and those applications that seems to be more dominating enjoy preference. One of the pillars of an effective bureaucracy is the expertise and skills required (Watson *et al.*, 2009) and from the exposition above it can be inferred that the bureaucracy is failing the water users. Records of precedents, or written records capturing institutional memory, are not readily available in the institutions and staff are reliant on their own understanding and colleagues' insights to interpret the provisions of the NWA and to proceed with applications for water use. Due to the lack of practical guidelines[28] staff relied on discretion to determine a course of action when dealing with applications for water use. Not all have the same understanding and insight and this adds to the

[28] The promulgation of the regulations may improve the situation but only time will tell.

uncertainty that prevails.

6.3 The water users

Equally, water users experienced the uncertainty, skills gaps and lack of decisive leadership when entering the bureaucracy to access or retain water. Users expressed their frustrations, distrust and anger with the bureaucracy. Water users, and especially the emerging farmer, distrust the water implementing institutions to implement the transformation agenda and seemed to turn to departments other than DWS, such as the Department of Agriculture, to assist them with resources. Black emerging farmers still regard the transformation agenda as unsuccessful as they find it difficult to effortlessly enter the bureaucratic process for water use. On the other hand, the commercial farmers are organised and rely on the WUA to address their water needs. This appears to work well for them as they seem to experience very few challenges with the WUA. However, their interaction with the CMA presents similar frustrations as that experienced by the black farmer, albeit on a different scale, as their needs are different. Commercial farmers who were existing lawful users experienced the verification and validation process[29] initiated by the CMA and found the process to be administratively laden and complex. Although costly they sought the services of consultants to assist them with the intricacies of the process. They found the CMA not very helpful and many questions were left unanswered during the process. This may be ascribed to the fact that the CMA did not carry out the verification and validation process but called on the expertise of consultants to perform the task.

From the above it is clear that governance of water should enjoy urgent attention as the relevant institutions and water users alike are challenged with effective implementation of the legislative and policy framework. These gaps and challenges are overlying and impacting on the effective application of the legislation and policy to bring about the intended transformation. Gaps exist within the institutions and amongst institutions and consequently the process of water allocation suffers and this delays the finalisation of licences. The delayed transformation of South Africa's water reform traverses bureaucratic barriers, shortage of resources and skills and continued unequal power relations. Steady leadership is needed under these difficult conditions but is not forthcoming thereby contributing to delayed transformation.

It is crucial that South Africa refine and redefine water governance to suit local needs and challenges and it is imperative that the reality of these stakeholders be considered if South Africa is serious about implementing the intent of the NWA and her Constitution.

[29] The process is detailed in sections 32-35 of the NWA.

SECTION 7: RECOMMENDATIONS

The above analysis points to gaps and challenges experienced by stakeholders, users and institutions alike, as they navigate the water use system to access or retain water use. Although the stakeholders expressed their frustrations and anger, they realised that the existing governance structure is what they have to operate within and devised ways to attempt to overcome the gaps and challenges. It is clear that a concerted improvement strategy is necessary and the following are suggested:

i. The DWS should accept and appreciate that the water allocation process is complex. Officials are expected to fulfil the transformation mandate dealing with competing water uses and simultaneously establish priorities for allocating water. The promulgation of the Regulations on 24 May 2017 is indeed a step in the right direction, offering detailed procedures to finalise a licence application. These regulations may address the concerns raised against the wide discretion given to officials in the authorisation chain when interpreting s27 of the NWA, which it is argued contributes to indecision and thereby prolongs the outcome of water applications. However, these regulations will only be effective if all stakeholders, officials and users alike, are familiar with the provisions and procedures. Officials should be fully competent to implement the provisions and users should be aware of what is expected to successfully lodge an application for water use. Due to the uncertainty and lack of skills brought about by the uncertainty of clear leadership and guidelines regarding policy, it is recommended that officials be empowered and capacitated to implement policy as intended. To this end, the DWS will have to develop and offer appropriate training specifically tailored to meet the officials' needs, to empower staff to enable them to effectively implement these regulations. .

ii. Likewise, users should be educated regarding the regulations and the DWS should invest resources in disseminating this information broadly. Great work was done to facilitate the dissemination of information and make interaction with the water authorisation system more user friendly, as reported in a WRC report titled: 'Approaches for emerging farmer participation in water resource management: the case of the Breede-Gouritz Catchment Management Agency (BGCMA) Western Cape'. However, the research raised the concern that even though dissemination of information may be achieved, this still would not ensure access to water (Ncube, 2017: 96). Without the actual access to water, transformation will remain a pipedream. Thus, the authorising institutions, *inter alia* BGCMA and DWS, should, in collaboration with all stakeholders, devise shared ways to find water or new water for allocation or reallocation. This suggests that priority should be given to completion of the verification and validation processes, compulsory licensing, and reallocation, as envisaged in the Act. The Act has all the mechanisms in place for this to happen, but nowhere in the country has the process yet been completed. Any strategy adopted has to be devised in collaboration with all stakeholders as these stakeholders at local level have intimate knowledge of the water management area and are best placed to find the most viable way forward to address this challenge.

iii. Lower level staff are central to the execution and implementation of policy. As theorised by Lipsky,

due to their status as ‘street-level’ bureacuracts, they hold power and are really ‘policy makers’ as they go about executing their mandates. This puts them in a unique space as they experience, struggle and use their discretion to implement the legislative and policy framework, and really determine whether and how soon initiatives and processes happen. Their insights and knowledge of the strengths and weaknesses in the system are thus crucial if and when any review of the policy is undertaken. This acknowledgement of their contribution in the policy review process may engender amongst officials and lower level staff a mindset of ‘ownership’ of the water allocation framework to facilitate a more effective implementation process.

iv. The DWS should conduct a comprehensive review and analysis of the status quo of transformation in collaboration with other stakeholders who have an impact on and an interest in agriculture. This will provide insight into and understanding of the strengths and weaknesses in implementation and present an opportunity to strengthen existing practices.

v. The review should inform priorities and collectively these priorities should be pursued. The DWS should prioritise key issues and invest in and focus on achieving these identified concerns. Restraint should be exercised in wanting to implement everything simultaneously at the expense of not achieving anything.

vi. Transformation is a constitutional imperative and is a key NWA objective but has remained elusive in the water sector. If serious about transformation, the DWS should direct its resources to this objective. A well-devised strategic plan, in conjunction with local stakeholders (see ii above), has to guide this, and competing interests should be secondary until the objectives are achieved.

vii. The multiple requirements and needs impacting on successful farming are administered by different government departments at different levels. Various stakeholders have highlighted challenges pertaining to the lack of coordination amongst these departments which impact especially on emerging farmers’ ability to successfully access resources. The broader South African legislative framework provides for inter-governmental coordination and it is necessary that departments which impact on agriculture devise and *implement* inter-governmental strategies to improve and streamline processes enabling farmers to access various resources effortlessly.

viii. The DWS and CMAs should dedicate resources to the monitoring of water quantity. Only if the implementing authorties are certain of the water capacity, will they be able to allocate and reallocate water. However, it is imperative that the authorities continue to monitor water use *after* it has been allocated as this further impacts on existing and future allocations.

ix. Local stakeholders’ understanding and experience of the legal and policy framework undoubtedly shows that the process is complex and stakeholders generally struggle to access the process. It is further evident that stakeholders did not understand what was required to legitimately use water and the uncertainty of processes contributes to non-implementation and its negative consequences. Many stakeholders only discovered on applying for funding at other institutions that their lack of authorised water use negatively affected their funding application. At this stage of their funding application their frustration was further heightened when they had to enter the water bureaucracy and deal with and decipher a complex and lengthy authorisation process. Hence, the recommendation is that the process be demystified and be user friendly to serve those meant to

benefit from its promulgation and implementation. Demystifying the process implies that the institutions should communicate in easily accessible language and in a variety of ways to stakeholders. The institutions should consult with these stakeholders (see ii above), and with their involvement, attempt to simply the processes whilst maintaining authenticity to meet the overall objectives of the legislation and policies.

x. The legislation should be implemented and not amended prematurely. Implementation of the full extent of the legislation has not been undertaken and to this end it is unclear whether or how amendments should be effected.

xi. The DWS should devise tools to ensure accountability by all in the chain of implementation. However, a note of caution – resources should be made available and staff capacitated so that they operate in an environment which enables those responsible for implementation to indeed be able to do so without the impediments as outlined above.

xii. The role of the bureaucracy in the process leaves much to be desired. The voices of stakeholders cannot be ignored and to make the process work requires that institutions are trusted to deliver on their mandates. Therefore the recommendation is that all relevant institutions strategise to become more accessible and market themselves, the services they offer and their fit in the whole scheme of things. It will further instil trust if feedback is provided timeously and on an ongoing basis, placing stakeholders in a better position to do their planning and thus to run their farming operation more effectively. However this will only be effective if all relevant institutions operate collaboratively and stakeholders understand and experience the basket of institutions holistically.

xiii. A major contribution to the lack or slow pace of implementation is the uncertainty pertaining to institutional arrangements. It crucial that the institutional arrangements for water resource management be stabilised as a matter of urgency. South Africa changed its policy relating to institutional arrangements but has not fully implemented the changed policy intent, *inter alia* establishing or operationalising CMAs, or delegating functions so that decision-making can happen at local level. It is necessary to provide clarity and resolve the single CMA proposal and give clear guidance as to what needs to happen in relation to WUAs. Hence, in-depth research has to be conducted and level-headed and rational decision-making is critical.

These strategies and recommendations will require a concerted and collective effort by all stakeholders. Governance capacity needs to be enhanced by adopting a collective and collaborative approach with all stakeholders to develop institutions that are capable of delivering as intended by the legislative and policy framework. However the DWS has to take initiative, leadership, ownership and make resources available to enable implementation thereof.

SECTION 8: CONCLUSION

South Africa has made progress in many ways in the implementation of the NWA but *full implementation eludes.* Almost twenty years after the promulgation of the NWA, those who were meant to benefit from the transformation objective of the Act are still struggling to see real change. The voices of local stakeholders should not go unheard and their understanding, whether perception or reality, must be addressed as it is concerning and does not bode well for the implementation of the legislation and policy framework and, by implication, does not promote the transformation agenda. As stakeholders are wary and suspicious of the water institutions a response from South Africa's water management institutions is desperately needed. The transformation targets are not going to happen automatically but will require the water management institutions to consciously pursue this objective to bring about real and tangible transformation. The end result may be that those who are meant to benefit from the mandate of transformation will indeed experience said transformation and the allocation targets may be attainable.

Implementation and transformation are credible if there is the will to achieve it. As noted by an expert participant, 'Where there's a will, there's a way. I've seen it. It's possible if the attitude is right'.

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