

The right to sanitation in South Africa

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Sanitation is more important than [political] independence.

– MAHATMA GANDHI

(1925)

Introduction

In early June 2013, the residents of Khayelitsha informal settlement in Cape Town made the news when, as part of a sustained protest against inadequate sanitation in the informal settlement which had included two men dumping human waste on the steps of the Western Cape legislature, community members threw faeces at the bus that was carrying Western Cape premier, Helen Zille. Responding to these actions, a community member was quoted in the media as saying that this was ‘a warning’ of things to come, and ‘we will return with thousands of these bucket toilets next week and empty them around the legislature building’ – ‘we are ready to be arrested and will die for this.’¹

This event, as analysed in an opinion piece entitled ‘The Politics of Shit and Why it Should Be Part of public protest’,² highlights the anguish and anger of people without decent sanitation and underscores the mundane reality that improving access to sanitation is not always as prioritised as it should be. Indeed, despite the critical importance of sanitation to poverty alleviation, health care and human development (not to mention dignity) internationally, sanitation has traditionally been viewed as a lesser developmental priority and is somewhat the ugly step-sister to other rights or services. This is not only because in many places sanitation is a taboo subject, but also because there are difficulties with defining what sanitation is and who bears the responsibility for providing it (the state, individuals or communities).

Although perhaps not quite as much of a taboo as in other countries, in South Africa, too, sanitation has been relatively neglected in comparison with other rights and services. Thus, despite a raft of legislative and policy frameworks for basic sanitation services, including legislated basic standards for sanitation and a free basic sanitation policy, while approximately 95 per cent of households have basic access to water, almost twenty years

after the advent of democracy, approximately 21 per cent of households still have inadequate access to basic sanitation.³

One of the reasons for the backlog is the apartheid legacy: in 1994, 52 per cent of households did not have access to adequate sanitation.⁴ Another reason is that, in its subsequent attempts to tackle this legacy, the post-apartheid government has seemingly struggled to decide on which forms of sanitation services should be adopted, especially for publicly-provided basic sanitation (usually communal toilets).⁵ It has only been in the past few years that the government has signalled a shift away from waterborne sanitation, indicating that waterborne sanitation will be pursued only in urban areas. This shift resulted, in May 2009, in sanitation services being moved from the Department of Water Affairs (DWA) to the Department of Human Settlements (DHS) (itself previously called the Department of Housing). However, as set out in this paper, this move has not been successful and has resulted in substantial fragmentation of the sanitation approach in South Africa. In addition, there is still a significant lack of clarity on what kind of sanitation services, if any, should be provided for the approximately four million people who live in informal settlements around the country,⁶ and it is also unclear the extent to which the government will subsidise rural on-site systems. In a context where little has changed in terms of residential geography, the fact that the kind and level of sanitation services are wholly dependent on the kind of housing settlement means that, on the whole, poor people cannot expect much more than to achieve the basic regulated standards of sanitation (and water) services, effectively providing a structural constraint on any progressive realisation of access to sanitation services especially for people living in informal settlements.

Moreover, the implementation of sanitation-related laws and policies is patchy and, for the most part, left up to individual municipalities without national enforcement or regulation. Thus, despite making commendable inroads into eradicating the sanitation backlog, in 2010 the government acknowledged in its Millennium Development Goal Country Report that its erstwhile target of eliminating the full sanitation backlog by 2014 was ‘too ambitious’.⁷

Inadequate sanitation, heightened by a growing impatience on the part of poor communities in the face of rising socio-economic inequality, has in recent years given rise to discrete litigation and escalating community protest, including the throwing of shit at politicians as occurred in Cape Town in June 2013. But, even prior to this, it was clear that in the most recent local government elections, in May 2011, sanitation was one of the key issues and a pivotal electioneering point used by both major political parties against each other. This is largely because of the pre-elections coverage in the media of two ‘open toilet’ scandals – one in Khayelitsha in Cape Town, which gave rise to the *Beja* litigation described below, and one in Moqhaka Local Municipality in the Free State province – both relating to the roll-out in poor communities by the respective local governments of communal toilets without any walls, doors or any form of screens.

This paper examines the situation pertaining to basic sanitation services in South Africa, first reviewing the legal, policy and functional frameworks, before undertaking a rights-based fault-line analysis of the systemic problems.

Framework section

International and regional law

The main international convention governing socio-economic rights, the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966) does not contain an explicit reference to the right to sanitation. Historically, it has been most closely linked to the right to water but, until recently, the right to water itself was a tenuous right, linked to the right to an adequate standard of living in Article 11(1) of the ICESCR. However, the right to sanitation has always been explicitly recognised in relation to membership of a vulnerable identity group including children,⁸ rural women⁹ and prisoners of war.¹⁰

In 2010, the absence of an explicit self-standing right to sanitation was remedied when – guided by the United Nations Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation (this mandate was created in September

2008 and in March 2011 the mandate was reconstituted as the Special Rapporteur on the human right to safe drinking water and sanitation)¹¹ – on 28 July 2010, the United Nations General Assembly adopted a resolution recognising ‘the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human beings’.¹² Celebrating the move, Amnesty International notes that the resolution:

Effectively re-affirms that the rights to water and sanitation are implicitly contained in several human rights treaties, including the International Covenant on Economic, Social and Cultural Rights ... to which 160 States are party, and the UN Convention on the Rights of the Child ..., which has reached nearly universal ratification, and are therefore legally binding rights.

Further consolidating this move, on 15 September 2010, the United Nations Human Rights Council adopted a resolution affirming that the right to water and sanitation are part of international human rights law and are therefore legally binding.¹³ Yet some degree of confusion persists as to whether this right is a single right to water and sanitation or whether it is two rights (one to water and a self-standing separate right to sanitation).¹⁴ Weighing into this debate on the side of there being two rights rather than one right,¹⁵ the Statement on the Human Right to Sanitation of the United Nations (UN) Committee on Economic, Social and Cultural Rights (CESCR, the body that interprets the ICESCR and clarifies related obligations) at the time of the UN Human Rights Council resolution declared:

The Committee reaffirms that, since sanitation is fundamental for human survival and for leading a life in dignity, the right to sanitation is an essential component of the right to an adequate standard of living, enshrined in Article 11 of the International Covenant on Economic, Social and Cultural Rights. The right to sanitation is also integrally related, among other Covenant rights, to the right to health, ... the right to housing, ... as well as the right to water, which the Committee

recognized in its General Comment No. 15. It is significant, however, that sanitation has distinct features which warrant its separate treatment from water in some respects. Although much of the world relies on waterborne sanitation, increasingly sanitation solutions which do not use water are being promoted and encouraged.¹⁶

Fuelling debates about the nature of the right to sanitation is the issue of whether sanitation is a collective or individual right. As pointed out by Malcolm Langford et al, although 'international human rights treaty law is largely structured in individual terms and each right is usually premised on a direct connection with human dignity', tilting the scale in terms of sanitation also being regarded as a collective right are three public aspects with implied obligations on the state: first the need to provide collective education in respect of sanitation and hygiene; second the environmental component, particularly the role of the state regarding developing systems to deal with collective waste of human excreta; and third the public health care/developmental link by virtue that 'human excreta is the leading cause of water pollution and a major cause of preventable illnesses that lead to death'.¹⁷ As highlighted by Langford et al, it is not entirely clear internationally whether this implies that we are all 'primarily concerned not with a personal right to sanitation but rather a right for *all* people to have sanitation, in order that *everyone* will be protected'.¹⁸ One way of reconciling the individual and collective components of the right to sanitation is to 'downplay the theoretical difficulties of recognising a human right with inherent individual and collective characteristics and acknowledge that a right with individual and collective dimensions is acceptable', as with other rights such as the right to form trade unions.¹⁹ Arguably, this fluid approach has been pursued both at the international level through the recognition of the right to sanitation, and also in South Africa, where (as outlined below), section 2 of the Water Services Act frames the right as the right to basic sanitation necessary to secure an environment not harmful to human health or well being.

Regarding the content of the right (however ambiguously framed), the CESCR has yet to develop a General

Comment on the right to sanitation, meaning that the parameters of the right remain decidedly fuzzy.²⁰ However, the CESCR did recognise in General Comment 4 on the right to adequate housing that 'beneficiaries of the right to adequate housing should have sustainable access to ... sanitation and washing facilities ...',²¹ and in General Comment 15 on the right to water, the CESCR expressly included sanitation in the scope of the right to water and stressed that:

Ensuring that everyone has access to adequate sanitation is not only fundamental for human dignity and privacy, but is one of the principal mechanisms for protecting the quality of the drinking water supplies and resources. In accordance with the rights to health and adequate housing States parties have an obligation to progressively extend safe sanitation services, particularly to rural and deprived urban areas, taking into account the needs of women and children.²²

Further, General Comment 19 of the CESCR on the right to social security stipulates that child benefits should be sufficient to provide for sanitation, among other rights.²³ Finally, the recent General Comment 20 of the CESCR on non-discrimination in economic, social and cultural rights emphasises the importance of ensuring access to sanitation to all groups, noting that 'ensuring that all individuals have equal access to housing, water and sanitation will help overcome discrimination against women and girl children and persons living in informal settlements and rural areas'.²⁴

As with all international socio-economic rights, the international right to sanitation entails an obligation to immediately satisfy essential levels of the right (minimum core content), as well as a parallel and ongoing obligation to use the maximum available resources to achieving progressively the full realisation of the right.²⁵ However, with no General Comment on sanitation, it is unclear what the minimum core content of the international right to sanitation is.

South Africa has not [yet, in 2014] ratified the ICESCR. However, as a signatory, it is bound to not undermine its provisions.²⁶ Moreover, in its 1995 judgment on

the death penalty, the South African Constitutional Court clarified that, in the context of interpreting the South African Bill of Rights, section 39(1) of the South African Constitution Act 108 of 1996 (Constitution) requires the courts to consider non-binding as well as binding international law.²⁷ Nonetheless, given the non-ratification of the ICESCR, the South African Constitutional Court has taken the view that the South African Government is not obliged to pursue a minimum core content approach to socio-economic rights but rather that it must have a reasonable programme to progressively realise each right within available resources.²⁸ It should be noted, in light of the government's (as yet not acted on) announcement in October 2012 that it would ratify the ICESCR, that if the ICESCR is ratified, South Africa will be bound to pursue the minimum core approach to socio-economic rights.

South Africa has ratified the African Charter on Human and People's Rights (ACHPR, 1981). While this Charter contains no explicit right to sanitation (or water), Article 16 on the right to enjoy the best attainable state of health could be seen to encapsulate a right to sanitation. Notwithstanding the persuasiveness of, and any international law obligations related to, international and regional human rights instruments, in South Africa the enforcement of the right to sanitation (as with all socio-economic rights) occurs largely within domestic legal and policy frameworks.

South African law

In recognition of the apartheid legacy of inadequate access to sanitation, post-apartheid legal (and policy) documents have sought to create a framework for the equitable provision of basic sanitation. These frameworks adopt a human rights approach to access to sanitation, establishing various state obligations in respect of the provision of basic sanitation to poor communities.

Although there is no explicit right to sanitation in the Constitution of the Republic of South Africa Act 108 of 1996 (Constitution), it can be inferred from the right of access to housing in section 26 and the right to a healthy environment in section 24 of the Constitution. In relation to waterborne sanitation, the right of access to sufficient water is guaranteed in section 27(1)(b) of the Con-

stitution. Other relevant constitutional rights are: section 10's right to human dignity, section 14's right to privacy, section 12(1)(e)'s right to freedom and security of the person, and section 9's equality clause, which requires that there be no unfair discrimination in the provision of services. Finally, Part B of Schedule 4 of the Constitution mandates local government as responsible for sanitation services, defined as 'domestic waste-water and sewage disposal', and section 153(a) of the Constitution provides that local government must 'structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community and to promote the social and economic development of the community'.

Beyond the Constitution, the Water Services Act 108 of 1997 (Water Services Act) is the primary national law relating to water and sanitation services. The linking of sanitation services to water is a hangover from when sanitation was located in DWAF and the Water Services Act, along with the National Water Act 36 of 1998 (which deals with the management and protection of water resources), is currently under review.²⁹

One of the main objects of the Water Services Act, as set out in section 2(a), is to provide for 'the right of access to basic water supply and the right to basic sanitation necessary to secure sufficient water and an environment not harmful to human health or well-being'. The Act defines basic sanitation as: 'the prescribed minimum standards of services necessary for the safe, hygienic and adequate collection, removal, disposal or purification of human excreta, domestic waste water and sewage from households, including informal households'. It acknowledges that, although municipalities have the responsibility to administer sanitation services, all spheres of government have a duty towards the goal of ensuring universal access to basic sanitation services. Section 3(2) of the Water Services Act establishes that 'every water services institution must take reasonable measures to realise these rights'. Section 5 of the Water Services Act stipulates that if the water services provider is unable to meet the requirements of all its existing consumers, 'it must give preference to the provision of basic water supply and basic sanitation'.

To further concretise the definition of basic sanitation, on 8 June 2011 the Regulations Relating to Compulsory National Standards and Measures to Conserve Water (Compulsory National Standards) were published in terms of section 9 of the Water Services Act. Regulation 2 provides that the minimum standard for basic sanitation is:

- a) The provision of appropriate education; and
- b) A toilet which is safe, reliable, environmentally sound, easy to keep clean, provides privacy and protection against the weather, well-ventilated, keeps smells to a minimum and prevents the entry and exit of flies and other disease-carrying pests.

And, on 11 June 2011, the Norms and Standards in Respect of Tariffs for Water Services (Norms and Standards) were published in terms of section 10(1) of the Water Services Act. The Norms and Standards require water services institutions to differentiate between sanitation services to households and discharge of industrial effluent to a sewage treatment plant (section 4(1)); and to consider the right of access to basic sanitation when determining which water services tariffs are to be subsidised (section 3(2)).

The Local Government: Municipal Systems Act 32 of 2000 (Municipal Systems Act) governs the provision of water services at the local government level and reinforces the emphasis on equitable access to water-related services. Section 4(2)(f) stipulates that municipalities must 'give members of the local community equitable access to the municipal services to which they are entitled'. Section 73 states inter alia that a municipality must ensure that 'all members of the local community have access to at least the minimum level of basic municipal services'.³⁰ In relation to tariffs, section 74(2)(c) establishes that 'poor households must have access to at least basic services' through 'special' or 'lifeline' tariffs for 'low levels of use or consumption of services or for basic levels of service' and/or any other direct or indirect method of subsidisation of tariffs for poor households'. In the *Joseph* case, the Constitutional Court used section 73 of

the Constitution's right to basic services to found a claim for a right to basic electricity services, despite electricity not being an explicitly recognised right,³¹ suggesting that a right to basic sanitation services might also be implied in section 73 of the Municipal Systems Act.

The protection of the right of access to sanitation is strengthened by section 33 of the Constitution, which provides for just administrative action that is lawful, reasonable and procedurally fair. The Promotion of Administrative Justice Act 3 of 2000 (PAJA), which was promulgated to give effect to section 33 of the Constitution, further strengthens the right. These administrative protections are important because water services (including waterborne sanitation), whether publicly or privately undertaken, are public services, falling within the definition of administrative action. This means that water services must comply with administrative justice requirements, and if anyone's rights are adversely affected by an administrative action, such action can be brought under review.

There is one further piece of relevant legislation – especially given the institutional move at the national level of sanitation away from DWAF to DHS, as well as the thorny issue of sanitation services in informal settlements – the Housing Act 107 of 1997. The Housing Act inter alia lays the basis for financing national housing projects to low-income groups, which includes the roll-out of sanitation infrastructure through the National Housing Subsidy Scheme. This scheme provides subsidies to developers to build low-income housing, which must meet minimum standards regarding sanitation, for which the minimum level is in turn a ventilated improved pit latrine (VIP) or alternative system agreed to between the community, municipality and provincial government. Regarding informal settlements, the in situ upgrading of informal settlements is provided for in the Upgrading of Informal Settlements Programme (UISP), instituted in terms of section 3(4)(g) of the Housing Act and is contained in Part 3 Volume 4 of the National Housing Code.³²

According to the UISP, where interim municipal engineering services are to be provided, they should 'as far as possible be undertaken on the basis that such interim services constitute the first phase of permanent

services'.³³ Finally, the Emergency Housing Programme (EHP), which is also located in Part 3 Volume 4 of the National Housing Code, establishes a framework for assistance for people who find themselves in emergency housing situations because of floods, landslides, evictions etc. It extends financial assistance, in the form of rapid grants, to municipalities to enable them to provide shelter and basic services (including sanitation) to households on a temporary basis. In respect of emergency basic sanitation, the EHP stipulates that, where possible, VIP toilets must be provided on the basis of one VIP per five families.³⁴ Such legal frameworks are supported by a range of sanitation-related policies.

South African policy³⁵

In November 1994, the newly created Department of Water Affairs and Forestry (DWAF), which was subsequently re-named DWA, formulated a White Paper on Water Supply and Sanitation Policy, which set out the institutional framework for water and sanitation services, later legislated in the Water Services Act. The 1994 White Paper was supplemented in October 1996 by a National Sanitation Policy, which defined sanitation as 'the principles and practices relating to the collection, removal or disposal of human excreta, refuse and waste water, as they impact upon users, operators and the environment'.³⁶ It also listed as inadequate methods of sanitation such as traditional unimproved pits and bucket toilets, and commented that chemical toilets are inappropriate except in emergency situations due to the high running costs involved.³⁷

In September 2001, DWAF published a White Paper on Basic Household Sanitation, which focused on the provision of basic sanitation to communities in low-density rural areas and in informal settlements, which it identified as the areas with the greatest need;³⁸ and it established a National Sanitation Programme Unit within DWAF to co-ordinate government's efforts to advance access to basic sanitation. In August 2005, DWAF published a National Sanitation Strategy, which emphasised that 'informal settlements must not be treated as emergency situations for the purpose of this strategy but should be provided with viable and sustainable solutions. Solutions such as communal facilities and

chemical toilets should not be used where the system is expected to have a duration of more than one month'.³⁹ In March 2011, the National Sanitation Programme Unit (now located in the DHS) published a draft conceptual framework for a new national sanitation policy, which proposed to revise the 2001 White Paper on Basic Household Sanitation. In this document, the Unit acknowledged implementation failures and proposed that 'municipalities need considerably more guidance and government needs a sanitation policy framework which allows for more effective regulation of the national interest'.⁴⁰ At the time of writing, this draft conceptual framework had not been finalised.

Finally, in March 2009, DWA published a Free Basic Sanitation Implementation Strategy (FBSan). This policy acknowledges that there is 'a right of access to a basic level of sanitation service', and that municipalities have an obligation to ensure that poor households are not denied access to basic services due to their inability to pay for such services.⁴¹ The FBSan policy is, however, deliberately vague, stating that free basic sanitation is a controversial issue over which there is no universal agreement and therefore it affords maximum discretion to municipalities in terms of deciding how and even whether to implement the strategy. Thus, beyond mentioning that sanitation is very context-specific and that a basic standard could mean a VIP or (usually in urban and well-established areas) waterborne sanitation, the strategy provides very little in the way of concrete recommendations, and it skirts the issues of appropriate forms of basic sanitation for informal settlements, as well as any attempt to quantify the maximum number of people to share communal sanitation facilities.

The strategy does, however, recommend that, in cases of waterborne sanitation, an additional amount of free basic water (between three and four additional kilolitres per household per month or 15 additional litres per person per day) should be allocated to poor households above the usual FBW amount (the nationally prescribed FBW standard is six kilolitres of water to be provided to poor households per month, which amounts to 25 litres per person per day in a household of eight), with an additional amount for households living with HIV and AIDs. And it clarifies that in so far as basic sanitation for poor

households is concerned, the capital costs of sanitation infrastructure or rehabilitation of infrastructure will be provided by the state, but that households are responsible for the operating costs of the on-site component of the sanitation service (e.g. the toilet itself) – although exceptions may be made for sludge and compost handling and the emptying of VIPs.⁴²

Functional and financial arrangements

As mandated by Part B of Schedule 4 of the Constitution, along with the Water Services Act and the Municipal Systems Act, the primary responsibility for providing sanitation (and water) services lies with local government, which, when acting in terms of authority to undertake water services, is referred to as a Water Services Authority (WSA).⁴³ The Water Services Act requires that every WSA must draft a Water Services Development Plan (WSDP) for its area of jurisdiction and part of this plan is to secure Water Services Providers (WSPs) to assume operational responsibility for providing water services to end users. A WSA may perform the function of a WSP directly or may enter into a contract with a WSP (often a municipal entity such as Johannesburg Water (Pty) Ltd in Johannesburg). A WSA may only enter into a contract with a private sector WSP after considering all public sector WSPs that are willing and able to perform the relevant functions in that area.⁴⁴

Provincial government, together with national government, has the constitutional responsibility to support and strengthen the capacity of local government in the fulfilment of its functions. It is also meant to regulate local government to ensure effective performance. Provincial government departments, such as Public Works, can undertake or oversee the construction of water and sanitation infrastructure, and provincial departments of health care and education are involved in setting design standards for water and sanitation facilities at schools, hospitals and clinics. Provincial housing departments have until recently been largely responsible for developing housing projects, but this role is increasingly being taken on by municipalities if accredited to undertake a direct housing function and administer National Housing Programmes in terms of section 10 of the Housing Act.

The DWA – formerly the DWAF – is the water and sanitation sector leader in South Africa. DWA is the custodian of South Africa’s water resources (via the National Water Act) and water services (via the Water Services Act). Until 2009, DWAF was responsible for co-ordinating the involvement of national government in the sanitation sector, and the National Sanitation Programme Unit was situated within the department. This function has since been moved to the DHS, along with the concomitant officials and funds.

Notwithstanding this move – which as detailed below has not been very successful – the machinery and laws for regulating sanitation services (including the Water Services Act and its Norms and Standards and Regulations) remain largely in DWA. Thus, according to section 155(7) of the Constitution and section 62(1) of the Water Services Act, DWA has the mandate to monitor the performance of all water services institutions, including municipalities that perform the function of WSAs. This disjuncture between legal and functional realms, along with the disruption of moving human and financial resources to a new department, has significantly undermined efforts to ensure full access to sanitation.

Currently, it appears that the DHS is responsible for household sanitation infrastructure, while the DWA is responsible for bulk reticulation and all water and water-borne sanitation services regulation. Since January 2010, in terms of the National Water Services Regulation Strategy (NWSRS), the DWA is also responsible for being the national water services regulator. Prior to this, there was no national water services regulator.⁴⁵ Although it was a welcome move to have a national water services regulator, civil society had hoped for an independent regulator, and there are ongoing concerns about DWA’s willingness to regulate, especially given that it is both the main ‘player’ and only ‘referee’ in the water services sector. Regarding sanitation services, the NWSRS defines various DWA regulatory functions including the monitoring of applications for sanitation-related Municipal Infrastructure Grants (MIG – see below) and the status of operations and maintenance of sanitation-related infrastructure as well as the maintenance of on-site sanitation. However, DWA admits that it has not been able to effectively carry out all its monitoring and regulation func-

tions.⁴⁶ In addition, some of its regulatory powers are circumscribed (for example, while DWA can reject MIG applications that do not comply with policy requirements, it has no power of sanction if project execution is flawed), further undermining its regulatory potential.⁴⁷

The DHS is the custodian of the national Housing Act and the National Housing Programmes contained in the National Housing Code. In May 2009, the sanitation line function (along with the National Sanitation Programme Unit) was moved from DWA to DHS, and the DHS now has the mandate to deliver on the National Sanitation Programme. DHS also oversees the new Rural Household Infrastructure Grant (RHIG – see below), as well as the new Urban Settlements Development Grant (USDG). A recent report by the national Department of Planning, Monitoring and Evaluation (DPME), DWA and DHS, which found the migration of the National Sanitation Programme Unit and sanitation functions from DWA to DHS to have seriously compromised progress on eradicating sanitation backlogs, recommended that sanitation be returned as a DWA function.⁴⁸ In contrast, however, the Ministerial Sanitation Task Team appointed by the Minister of Human Settlements in September 2011 recommended that all sanitation functions and legislation be consolidated under DHS.⁴⁹ For the moment, therefore, the unsatisfactorily fragmented approach between DWA and DHS persists. There are two further national departments with some direct involvement in sanitation functions – the Department of Co-operative Governance and Traditional Affairs (CoGTA), which is the custodian of the Municipal Systems Act and is responsible for ensuring the maximal functioning of municipalities, and the Department of Health, which has a role in developing educational material and programmes in relation to hygiene and sanitation.

Previously, there were three main sources for the provision of basic sanitation in South Africa: the MIG for capital costs of infrastructure development,⁵⁰ the Equitable Share (ES) for operations and maintenance-related costs,⁵¹ as well as internal revenue generated by municipalities through services charges and rates. Recently the National Treasury announced two new grants to be administered through the DHS – the Urban Settlements Development Grant (USDG), which has replaced the

MIG grant in metropolitan municipalities, and the RHIG. The USDG is aimed at assisting metropolitan municipalities (cities) to plan in a more integrated way with regard to the provision of bulk water and sanitation services to low-cost housing developments in well-located areas near social and economic facilities and opportunities. As it was only introduced in March 2011, it is too soon to assess the efficacy of this grant in alleviating sanitation access-related problems, however, MIG funds have historically been under- and/or misspent by most municipalities.⁵² The RHIG, also introduced in March 2011, aims to address backlogs in water supply and sanitation in rural areas by providing funding for the provision of on-site sanitation and water facilities. There have been initial problems around allocating this grant due to the ongoing confusion caused by sanitation's move from DWA to DHS.⁵³

Regarding the ES, there are debates as to whether it is sufficient to cover the costs of free basic service provision (including waterborne sanitation), particularly in poor municipalities that are not able to recoup much revenue through charging for services.⁵⁴ Beyond this, the ES is an unconditional grant, meaning that municipalities have full autonomy to spend these funds as they see fit – and there is mounting evidence that municipalities do not spend ES grants as they should, on basic services including sanitation.⁵⁵

This highly complex machinery relates in part to the fact that sanitation is a difficult functional area, overlapping with so many other rights and government functions including water, housing, health care and education. It is also the socio-economic right that most clearly falls between public and private responsibility since toilets tend to be regarded as a private matter (unless they are communal and/or located on contested terrains such as informal settlements), but infrastructure especially for waterborne sanitation is a public matter. In between lies a grey area where issues of maintenance for chemical toilets, pit latrines and septic tanks are less clearly defined. The complexity of sanitation provision (exacerbated by the transfer of functions from DWA to DHS in 2009) has undoubtedly contributed to the human rights-related fault lines examined below.

South African jurisprudence

In South Africa, socio-economic rights are explicitly justiciable, and to date 20 socio-economic rights-related cases have been decided by the Constitutional Court since its establishment in 1996. These include judgments on the rights of access to housing, water, social security and electricity. And, on 19 November 2009, the South African Constitutional Court handed down judgment in its first and only sanitation-related case to date in the matter of *Johnson Matotoba Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others (Nokotyana)*.⁵⁶

The *Nokotyana* case was an application by the residents of Harry Gwala informal settlement in Ekurhuleni Municipality (close to Johannesburg) for an order against the municipality to install inter alia temporary basic sanitation facilities pending a decision by the local government on whether the settlement would be upgraded to a formal township.⁵⁷ Many of the residents had been living in the settlement since 1993 and had been attempting since then to get the municipality to pursue an in situ upgrading of the settlement. In the meantime, they were living in squalid conditions with only six communal taps for the entire settlement of approximately 1500 households, no electric lighting or refuse collection, and only rudimentary communal pit latrines without adequate privacy built by the residents.

In August 2006, following years of fraught engagement with the municipality, including the municipality's attempt to evict the residents unlawfully without a court order, the Ekurhuleni Municipality had finally submitted a proposal on upgrading to the relevant provincial government official, the Member of the Executive Council (MEC) for Local Government and Housing, Gauteng. However, three years later no decision had been taken, prompting the residents to take the matter to court.

In the Constitutional Court, the applicants based their claim for sanitation services primarily on section 26 of the Constitution's right of access to adequate housing (arguing that sanitation was a component of the right to adequate housing), the constitutional right to human dignity,⁵⁸ and the EHP and UISP of the National Housing Code. In April 2009, in the run-up to the Constitutional Court hearing, the municipality adopted a policy in

terms of which it offered the residents of Harry Gwala informal settlement one chemical toilet per ten families. The residents rejected this offer, arguing for one VIP per household. Ultimately – despite ordering the MEC to take a final decision on Ekurhuleni Municipality's application in terms of chapter 13 of the National Housing Code to upgrade the status of Harry Gwala settlement within fourteen months of the Court order – the Court dismissed the appeal, rejecting the applicants' request for temporary sanitation (and lighting) on the grounds that neither the EHP nor UISP applied to informal settlements where no decision on upgrading had been taken, meaning that the residents were living in limbo until a decision on upgrading was taken and therefore were effectively excluded from access to basic sanitation.⁵⁹

The *Nokotyana* judgment has been criticised for being overly formalistic and deferential to the government, and for not giving due weight to the multiple violations of rights (including dignity) entailed in living for years on end in an informal settlement without adequate service, as well as for failing to develop the normative right of access to housing to include a right to sanitation.⁶⁰ It has also been criticised for misinterpreting the National Housing Code – particularly the UISP – so as to exclude an obligation to provide interim services in informal settlements where no decision has yet been taken regarding upgrading.⁶¹ The Constitutional Court's approach and order in *Nokotyana* stands in sharp contrast with a subsequent case on access to basic sanitation services in an informal settlement heard by the Cape High Court – *Ntombentsha Beja and Others v Premier of the Western Cape and Others (Beja)*⁶² – which deserves to be highlighted for its sensitive approach to the issue of sanitation and for its recognition of the link between adequate sanitation and especially the right to dignity.

In April 2011, the Western Cape High Court delivered its decision in the *Beja* case, which was an application by the residents of Makhaza informal settlement in Khayelitsha, Cape Town, to declare unconstitutional the 1316 *unenclosed* waterborne toilets that the municipality had constructed as part of an upgrading project undertaken in terms of Chapter 13 of the National Housing Code (now the UISP). The municipality referred to these toilets as 'loos with a view' and argued that the toilets

had been constructed pursuant to an agreement with the community in terms of which the municipality would provide one toilet per household and residents would provide an enclosure for each toilet, rather than the ratio the municipality argued it was obliged to provide, of one toilet per five households. The community (supported by the local African National Congress Youth League branch⁶³) complained about the toilets to the South African Human Rights Commission, which investigated the complaint and released a report in June 2010, finding that the municipality had violated the residents' right to human dignity.⁶⁴ On the basis of this finding, the residents went to court, filing an application in the Western Cape High Court in September 2010.

On 29 November 2010, following an inspection of the site, Judge Erasmus made an interim order for the municipality to enclose the toilets. Final judgment was handed down on 29 April 2011, finding in favour of the applicants and providing detailed commentary regarding the level of agreement/consultation with the community regarding providing unenclosed toilets, the veracity of the municipality's argument that it was only obliged to provide toilets in the ratio of one toilet per five households, and whether or not the provision of unenclosed toilets violated constitutional rights.

Regarding the so-called consultation with the community, the Court found that the municipality could not prove that any agreement existed and that, more generally, the consultation process was highly flawed. For example, the sanitation situation was only discussed at one meeting, for which the municipality provided four days notice and the circulated agenda contained no item on sanitation.⁶⁵ Moreover, the minutes of the meeting record that only 60 people out of a community of approximately 6000 people attended the meeting and, as it turned out, the toilets were only constructed two years after the meeting.⁶⁶

More substantively, the judgment found that the municipality had failed to take into account people with disabilities, as well as the safety and security of vulnerable members of the community, including women, who were exposed to the potential risk of gender-based violence. Pointing out that, in arguing that it had an obligation to provide only one toilet per five households, the

municipality had wrongly conflated the EHP with non-emergency housing as provided by the municipality in the UISP project in Makhaza, the judge denounced the toilets as not meeting the required standards and noted that, in any event, none of the toilets was in working order. For these reasons, the judge ruled that there was a violation in terms of sections 10 (human dignity), 12 (freedom and security of the person), 14 (privacy), 24 (environment), 26 (housing) and 27 (health care) of the Constitution.⁶⁷ He further held that the provision of unenclosed toilets is inconsistent with Regulation 2 of the Compulsory National Standards.⁶⁸ He therefore declared the municipality's conduct to be in violation of the residents' constitutional rights and ordered the municipality to enclose all 1316 toilets.

South Africa follows a system of judicial hierarchy and precedent in terms of which all lower courts are bound by the rulings of all higher courts. But because the Constitutional Court essentially opted to avoid any specific pronouncements on sanitation-related rights in the *Nkotyana* case, until another sanitation-related case comes before the Constitutional Court *Beja* stands as the strongest legal authority on local government human rights-related obligations in respect of sanitation.

Systemic human-rights related problems in sanitation

Undoubtedly, great advances have been made in line with the rights-based frameworks set out above to extend basic sanitation services to poor households in rural and informal settlement areas. However, a number of systemic problems remain that compromise the enjoyment of the right to basic sanitation. This next section examines the problems across human rights-related axes, and the following section provides a tentative analysis of the underlying determinants of those problems.

Availability of sanitation

Historically, sanitation services (along with all other services) were skewed in favour of the white minority, meaning that waterborne sanitation was provided to the middle and upper class white suburbs of cities and towns

while the bucket system predominated in black townships and black rural areas. On coming to power in 1994, the new government acknowledged the lack of basic sanitation as a key indicator of the underdevelopment of the black population. It sought to remedy this and particularly to eradicate the bucket system, as an unacceptable and degrading form of sanitation.⁶⁹ To this end, in 1994, the government adopted the Water Supply and Sanitation White Paper and thereafter began to develop the raft of policies and laws outlined in section 2 and, subsequently, it has been able to halve the number of households living without sanitation services (although it has had to several times push back the target year for universal access to sanitation, with the latest postponement – from 2014 to 2016 – being announced in October 2013).

Notwithstanding the statistical advances regarding the roll-out of sanitation services since 1994, there are still significant backlogs in basic sanitation service delivery. According to a March 2012 inter-governmental report on the status of sanitation services in South Africa, approximately eleven per cent of households in South Africa still have to be provided with sanitation services and 26 per cent (or 3.2 million households) are ‘at risk of service failure and/or are experiencing service delivery breakdowns’.⁷⁰ According to the 2011 Census, 57 per cent of households have access to a flush toilet connected to a sewerage system; 3.1 per cent have access to a flush toilet connected to a septic tank; 8.8 per cent have access to a VIP; 19 per cent have access to a pit latrine without any ventilation or improvement; 2.5 per cent have access to a chemical toilet; 2.1 per cent use a bucket; 2.1 per cent use ‘other’ forms of toilets; and 5.2 per cent have no access to any formal form of sanitation.⁷¹

While rural areas remain an ongoing concern – with many households still using rudimentary bucket systems or practicing open defecation⁷² – underscoring the need for clear policy and practice regarding rural sanitation options, one of the greatest challenges facing South Africa is the provision of basic sanitation to informal settlements where in many cases authorities do not want to provide bulk infrastructure because they would like to relocate the residents. However, as highlighted in the *Nokotyana* litigation described above, such proposed relocations are often contested by the informal settle-

ment communities and can take many years to be resolved. As acknowledged by the government, 64 per cent of informal settlement households (584 378 households, representing approximately two million people) are having to make do with interim services that are ‘at risk of service failure and/or are experiencing service delivery breakdowns’, indicating that the ‘provision of adequate services to dwellings in (transient) informal settlements requires a strategy that takes into consideration permanency and land use objectives together with other considerations of topography, geo-hydrology, proximity to bulk services, etc.’.⁷³ Of particular concern is the fact that there is not a clear regulated standard for the number of households that must share government-provided communal toilet facilities in informal settlements.

Beyond informal settlements, aggregated statistics on the roll-out of sanitation across the country obscure both the quality of the services (as discussed below), as well as the problem of geographic areas with unusually low access to basic sanitation such as the former homeland areas. Thus, the March 2012 DPME, DWA and DHS report on sanitation found that the majority of households without adequate sanitation services are in KwaZulu-Natal, North West and the Eastern Cape.⁷⁴ A 2009 submission to the South African Human Rights Commission on access to water and sanitation highlighted that (based on 2001 census data) the 30 worst performing municipalities in terms of inadequate access to sanitation (and water) were in KwaZulu-Natal and the Eastern Cape and that, if you look at the 60 worst performing municipalities, these are all also in KwaZulu-Natal and the Eastern Cape, plus Limpopo.⁷⁵ The submission noted the striking coincidence between the worst performing municipalities and the geographic areas of the former independent homelands (especially the Transkei), indicating the continuation of apartheid-inherited patterns of underdevelopment.⁷⁶

Another dimension of the (in) availability of sanitation facilities that is sometimes overlooked in the general statistics is the issue of toilet facilities at schools, which is dealt with in the FHR paper on education by F Veriava. The chronic under-provision of adequate toilet facilities at schools – currently being addressed through the litigation mounted by the campaigning NGO Equal Educa-

tion that in November 2013 secured a commitment by the national Department of Education to finally adopt Minimum Norms and Standards for school facilities including toilets⁷⁷ – is a serious issue. It fundamentally compromises the rights of children, particularly disabled persons who are less able to make alternative arrangements, and girl-children, many of whom are forced by the unavailability of toilets to drop out of school or stay at home, especially during their menstrual cycles.

In respect of households with waterborne sanitation services, there have not been any studies examining the sufficiency of the recommended FBSan allocation (15 litres per person per day over and above the FBW allocation) or the extent to which municipalities are pursuing this allocation, which is not considered to be a legal requirement. This impacts economic access because, obviously, where the FBSan amount is insufficient, e.g. in multi-dwelling households, households have to use some of the FBW allocation for waterborne sanitation and/or pay for additional water, according to the rising block tariffs in the relevant municipality, which may or may not be appropriately pro-poor.⁷⁸

One further specific problem impeding access to waterborne sanitation services by many of the poorest households is the common practice by municipalities of targeting Free Basic Services (including FBSan) through the municipal indigency policy.⁷⁹ Again, there are generalised problems related to municipal indigency policies, which serve to exclude the most vulnerable and poor households from any potential benefits including FBSan. Chief among these problems are an ad hoc definition of poverty for the purposes of qualifying for benefits – e.g. some municipalities use a level of income equivalent to or just less than two state pensions, while others use property/land value to determine whether a household qualifies. Still others use seemingly random income thresholds; and the process around registering for benefits is typically very onerous, requiring numerous documents, and is perceived by potential recipients as stigmatising.⁸⁰ This means that FBSan is not being accessed by those in most need, a fact highlighted in a recent report, which found that: ‘FBSan services were benefiting the “haves” while the “have-nots” continued to live in squalid

conditions with poor or no access to adequate sanitation services’.⁸¹

Physical and economic access to sanitation; gender and disability dimensions

Physical access to sanitation facilities remains a problem both in rural and informal settlement areas where people often have to walk long distances to relieve themselves. Inadequate physical access has both a gender and disability dimension as having to walk distances to sanitation facilities exposes women to safety concerns, making them vulnerable to attack by wild animals and people. Disabled persons also suffer when sanitation facilities are not conveniently located or are in other ways physically inaccessible to disabled persons. Critically, unlike with water services where minimum basic standards include being located within 200 metres of a water supply, there are no standards for the proximity of sanitation facilities (nor for the number of households that have to share communal sanitation facilities) and no reliable figures for people’s physical access to sanitation.

Economic access is equally difficult to assess. This is because there are no in-depth studies on what poor households spend on sanitation services. In part, this is because many poor households rely on government-provided sanitation services for which there is no household cost, or households dig latrines which represent a once-off cost in terms mainly of household labour. What is apparent from litigation such as *Nokotyana* is that where informal settlements have to rely on chemical toilets (which are at best meant to be temporary measures but often are left as semi-permanent facilities), the chemicals are relatively expensive and unaffordable for the majority of households.

Quality, sustainability and acceptability including participation and information dimensions

Over the past decade, there has been an almost slavish focus in South Africa on constructing toilets and meeting the political and Millennium Development Goal-driven imperative to meet targets, regardless of the acceptability, quality, suitability or outcomes of the projects. Moreover, the target-driven approach has meant that the roll-

out of basic sanitation has often occurred with insufficient or no community participation, as evident in the sanitation projects around the country that have resulted in unenclosed toilets (such as in Makhaza) that no one can use. More research is necessary to understand how sanitation projects could be more genuinely participatory but in the meantime it is clear that, as acknowledged by the government, ‘the continuous chasing of targets (however noble)’ has come at ‘a price of a lack of focus on the far more challenging requirements of the ongoing sustainable operation and maintenance of services.’⁸²

These unintended negative consequences have been confirmed by numerous reports. According to the 2009 Water Dialogues-South Africa report, the preoccupation with numbers and targets has meant that there is insufficient focus on the quality, maintenance and sustainability of the services.⁸³ The South African Institution of Civil Engineering (SAICE) notes that users are ‘often not receiving the full benefit because of high failure rates.’⁸⁴ A 2004/2005 DWAF sanitation sustainability audit commissioned to assess the quality and sustainability of sanitation infrastructure found that 28 per cent of toilets that had been rolled out by government were ‘already dysfunctional or had a high sustainability risk indicating a high probability of failure within the short to medium term.’⁸⁵ And a 2007 report by the Council for Scientific and Industrial Research (CSIR) (commissioned by DWAF), which involved an audit of 2410 sanitation projects in the MIG database that had moved beyond the planning phase, found the following:

- Up to 25 per cent of on-site toilets were inadequately designed for ventilation;
- Up to 68 per cent of on-site top structures were constructed such that they could not be moved when the pits are full;
- Up to 28 per cent of the facilities had doors that could not close or lock;
- Some flush toilets did not have cisterns (23 per cent) or pedestals (18 per cent);
- Up to 61 per cent had no hand-washing facility near the toilet; and
- On 60 per cent of the facilities, municipalities were only doing reactive maintenance and no proactive maintenance; while 40 per cent of municipalities

were found not to have adequate maintenance capacity.⁸⁶

An equally damning 2009 Water Research Commission⁸⁷ report by Still and others on basic sanitation services highlighted that across South Africa ‘there is no single type of sanitation that fared uniformly well.’⁸⁸ Common problems cited by the report include:

- Generally, sanitation facilities are not compliant with appropriate technical design standards and are built in a manner susceptible to quick failure and extreme maintenance difficulties;⁸⁹
- Insufficient attention to safety and access-related issues results in facilities not being used;⁹⁰ and
- Municipalities are not paying sufficient attention to the maintenance of existing infrastructure, which is becoming degraded.⁹¹

Regarding maintenance specifically, during the 2012 survey of sanitation services undertaken by the Ministerial Sanitation Task Team, members noted that around the country municipalities were not emptying VIPs, resulting in unhealthy and unhygienic conditions for the users.⁹² In some rural areas the failure to empty pits relates to municipalities chasing targets through funds that are specifically for the construction of new toilets but not for the emptying of them, resulting in many poor households that have several toilet structures on their properties, including ones with full pits that need to be emptied.⁹³ Additional problems occur wherever there is waterborne sanitation, in that almost all waste water treatment infrastructure, especially municipal treatment plants, has been poorly maintained and is in ‘urgent need of maintenance and replacement’, with much verging on being dysfunctional.⁹⁴ According to DWA’s Green Drop assessment report on the performance of waste water treatment and management, of the 821 systems assessed in 2011, only 40 received Green Drop certification⁹⁵ from DWA, and 317 waste water treatment plants required urgent attention, with a further 143 being categorised as having a high risk of failure.⁹⁶

The target-driven approach to sanitation also blinds implementers to relevant social issues and human rights-related determinants of sanitation, such as access for

people with disabilities, people living with HIV and AIDs, women, girls attending school, and cultural and religious practices etc. It also results in unsustainable and/or unsuitable systems being rolled out. For example, in the Free State province, the government's push to eradicate the bucket system throughout the province was 'remedied' through the installation of waterborne systems, even in relatively isolated and marginalised communities that had no or limited bulk sewer networks or waste water treatment works. This resulted in 'the provision of sanitation infrastructure that, in some cases, was not the optimal technical solution' and meant extreme pressure on existing waste water treatment works and negative consequences 'in respect of long-term service affordability, functionality and sustainability'.⁹⁷ Elsewhere across the country municipalities have provided flush toilets 'where there were inadequate water supplies for flushing'.⁹⁸

Finally, the focus on targets has resulted in poor consultation with local communities over sanitation options. This oversight has been compounded by a widespread failure to provide appropriate hygiene- and sanitation-related education and readily available information, including on cleaning and emptying facilities. This has resulted in widespread misuse and neglect of facilities by communities,⁹⁹ which undermines the quality and long-term sustainability of services. The top-down approach has also led to unacceptable options being foisted on communities. This is apparent, for example, in the outcry over unenclosed toilets in Cape Town and the Free State, and the unpopularity of dry sanitation systems¹⁰⁰ in some provinces, including the Free State.¹⁰¹ It is also apparent from the rejection by poor communities in Cape Town of the 'porta-flush toilet', a portable hand-worked toilet that has a seat, a container for waste and a chemical flushing system. Households do not like these toilets as they often leak, are not emptied regularly enough by the municipality and smell bad,¹⁰² effectively making them function as 'little more than fancy bucket toilets'.¹⁰³ As recognised by the Ministerial Sanitation Task Team, to ensure the quality, acceptability and sustainability of sanitation services, it is necessary for households and communities to be centrally involved in sanitation planning and implementation.¹⁰⁴

Underlying determinants of these systemic problems

In South Africa, which is classified by the World Bank as an upper middle-income country, it is hard to say that the problems¹⁰⁵ identified above relate primarily to inadequate finances – as evidenced by the fact that most municipalities regularly are unable to spend their budgets.¹⁰⁶ Indeed, according to the March 2012 status report on sanitation undertaken by the DPME, DWA and DHS, it is estimated that (according to 2011 prices) the cost of satisfactorily addressing sanitation-related deficits is R50 306 billion and that, if municipalities spent a substantial proportion of the R90.8 billion they received in conditional grants (MIG, USDG and RHIG)¹⁰⁷ for the 2011/2012, 2012/2013 and 2013/2014 financial years, 'with the right institutional mechanism to drive planning and implementation, the water and sanitation backlog could potentially be wiped out over this period'.¹⁰⁸ This leads the authors of the report to conclude that 'while resource limits is a valid proposition, it is our contention that given the existing funding envelope it is within the means of the state to meet everyone's needs with respect to water and sanitation. However, this funding prioritisation will have to go hand in hand with a nationwide effort to put in place appropriate organisational infrastructure to manage the implementation of the programme'.¹⁰⁹ In a similar vein, several reports by the Auditor-General and Fiscal and Financial Commission have found that the failure to eradicate sanitation backlogs is largely due to poor planning and under-spending.¹¹⁰

This is not to suggest that financing is not an issue, but rather to point to the institutional and political problems that overlay any financial issues. While more research is necessary to examine the financial aspect, it is clear that a major underlying determinant of the problems in the sanitation sector relates to institutional challenges, as acknowledged in the reference above from the March 2012 DPME, DWA and DHS Report on the Status of Sanitation Services in South Africa.

One of the reasons for the focus on targets, as opposed to sustainable and life-improving outcomes, is that the institutional structure for sanitation services is fractured. Whereas in many countries sanitation is viewed as a health care-related issue, in South Africa it

was initially housed in the DWA and was then moved in 2009 to the DHS. This shift indicates an institutional discomfort about where to locate sanitation services, which has clearly undermined the coherence of the National Sanitation Programme. This means that there is practically no regulation of sanitation at the national level, not least because the regulatory legislation including the Water Services Act are located in the DWA. As a consequence, it remains unclear which functions DWA retains and how the two national departments co-ordinate their sanitation programmes.¹¹¹ For the most part, the departments have sought to avoid taking responsibility for the National Sanitation Programme.

Such problems have been acknowledged by the DHS, which, in August 2010, reported a lack of personnel, office space and budget in relation to sanitation. It commented that ‘the movement [from DWA to DHS] posed serious challenges to the functioning of the National Sanitation Programme as neither the Department of Water Affairs nor Department of Human Settlements was willing to accept responsibility for the National Sanitation Programme ...’¹¹² DHS also warned that it was difficult for the DHS, as a policy-oriented department, to take responsibility for the National Sanitation Programme, which is an implementation programme; and that the programme’s implementation had been seriously ‘slowed down.’¹¹³ Similarly, in August 2011, the National Sanitation Programme Unit identified ‘ineffective collaboration at all government levels’ as a serious problem.¹¹⁴ Compounding these problems, in recent years the roll-out of sanitation has been institutionally and financially linked (via complex housing subsidy arrangements) to the national housing delivery programme, which itself is beset by problems and delays.¹¹⁵

Further exacerbating the institutional turmoil is a chronic capacity problem at all functional levels, but particularly at the local level, where there is a serious under-capacity to be ‘able to plan, implement and manage infrastructure effectively.’¹¹⁶ It is clear that local government, which is responsible for the delivery of basic services including sanitation, suffers from a myriad problems that impact negatively on the delivery of sanitation services. These include the failure of many municipalities to implement national FBW and FBSan policies;¹¹⁷ lack of

strong leadership and management, as well as a shortage of critical skills and competencies in most municipalities (particularly rural municipalities); and the deterioration of financial viability due to poor revenue collection and management coupled with the inability of households living in poverty to pay for services.¹¹⁸ Such management and governance-related problems have recently resulted in the Auditor General giving clean audit reports to only seven out of 237 municipalities across the country.¹¹⁹ These problems have also led to chronic under-spending by municipalities on sanitation-related budgets – e.g. collectively municipalities were only able to spend approximately 30 per cent of their 2011/2012 capital budget from National Treasury as at 31 December 2011.¹²⁰

As recognised by the National Planning Commission (NPC) in the National Development Plan (NDP), this systemic municipal under-spending has in effect meant that South Africa has ‘missed a generation of capital investment’ in sanitation (along with other municipal services such as water).¹²¹ The serious issue of municipal under-spending requires urgent attention and further study to determine the extent to which this relates to lack of capacity, including requisite staffing (many municipal positions remain unfilled) and the extent to which it relates to poor performance more generally, as well as how to remedy this problem. A related issue that requires further research is the role of the Treasury in ensuring proper spending of allocated budgets, as well as the efficacy (or not) and consequences of placing municipalities under provincial or national administration.

One of the consequences of the institutional weaknesses outlined above is that there is widespread confusion over, and inadequate regulation of, standards and priorities by various government agencies.¹²² As identified in the March 2012 DPME, DWA and DHS report, ‘historically, government has tended to predominantly only monitor financial spending and other quantitative outputs, which generally disregard the qualitative, outcome measures. Questions have never been asked to ascertain simultaneously what services have been completed and to what service standard (quality).’¹²³ Furthermore, the report notes that the inability of the current systems to flag and/or redress the issues that prompted the SAHRC sanitation investigation into unenclosed toi-

lets in Cape Town and the Free State is indicative of inadequate monitoring and regulation.¹²⁴ The role and efficacy of various national departments including DWA, DHS, CoGTA and the DPME in monitoring and regulating sanitation services at the municipal level should be comprehensively evaluated.

The lack of functional coherence within institutions of policy oversight and delivery, along with serious governance and management-related deficits, has also undermined the capacity of government (at all levels) to pursue appropriate technology choices and integrated and sustainable infrastructural programmes for, as well as to ensure a coherent strategy for the roll-out of, basic sanitation services. Collectively, these problems significantly undermine access to satisfactory sanitation services. This is particularly the case for rural areas, where it is still unclear what form of sanitation should be utilised (and how the state should subsidise this). It is also the case regarding informal settlements, which have been left in limbo often without even rudimentary sanitation services. Where basic sanitation has been provided, the failure of a comprehensive policy and plan regarding informal settlements means that residents are left with only the most basic level of access without any prospect for progressive realisation of their sanitation-related rights. There is an urgent need for government to resolve rural and informal settlement-related sanitation issues and to prioritise the roll-out of appropriate basic sanitation to all such households.

Conclusion and recommendations

As recognised by the Court in the *Beja* case, sanitation is intimately connected with a range of other rights such as privacy, dignity, freedom and security of the person, environment, health care and housing. Moreover, access to adequate sanitation is fundamental to any efforts to reduce poverty, eradicate gender inequality and to promote economic and human development, as well as environmental sustainability.

Responding to the desire to improve their lives and living conditions, protests such as the one in Khayelitsha involving the throwing of faeces at politicians, along with

highly publicised court cases such as *Beja*, have drawn attention to the enduring problem of inadequate toilets and lack of basic sanitation across the country. This has not only had an empowering and mobilising impact vis-à-vis disadvantaged communities, as evidenced by communities becoming increasingly vocal and assertive in their demands for basic sanitation, but it has also begun to have an effect on government. In July 2011, the DHS announced that rising dissatisfaction with sanitation provision represents 'a renewed community interest and participation in the politics of development as opposed to the politics of politics', requiring 'a comprehensive solution'.¹²⁵

It must be regarded as a shameful fact that, by all accounts, resources are not the root cause of the failure to come up with a comprehensive solution but that, rather, it is failures of co-ordination, planning and capacity that explain South Africa's continued sanitation backlogs. Yet, as shameful as this might seem, it does offer a glimmer of hope that, with political will, a comprehensive solution may be designed and implemented to ensure that everyone has access to adequate sanitation. Any such solution will need to take into account the failures of the previous approaches, particularly the pitfalls of chasing targets and of not pursuing genuinely participatory approaches that take into consideration the needs of vulnerable groups such as women, school-girls and disabled persons.

This paper recommends further investigation into the following aspects regarding sanitation *policy*:

- The full extent of the gender dimension of sanitation, including how to best ensure that accessing sanitation does not expose women and girl-children to additional vulnerabilities and rights-related violations.
- Best practice and appropriate forms of sanitation for rural and informal settlement areas.

This paper recommends further investigation into the following aspects regarding sanitation *practice*:

- The extent to which all households are able to access adequate sanitation, bearing in mind especially gender, disability and religious/cultural parameters.
- Best practice regarding the institutional home for sanitation. This should include the pros and cons of various models, bearing in mind the problem of fragmentation on the one hand (where, as in South Africa, sanitation is assigned to one specific department thereby severing its relationship with other related departments and services), but also the need to ensure on the other hand that sanitation is not so 'integrated' into multiple departments that it falls through the cracks, becoming no department's responsibility.
- Best practice in terms of the maximum number of households to share communal toilet facilities, what kinds of toilets work best in shared arrangements and what roles such models imply for government.
- A thorough audit of whether each municipality has sufficient funding, and that it's properly allocated and spent, for the sanitation-related needs of its households.
- Ways of improving financial monitoring and regulation, including the role of Treasury regarding budgets and the impact of placing errant municipalities under national/provincial administration, as well as looking at how to ensure that the ES is allocated to basic services such as sanitation.
- The role and efficacy of monitoring and regulation by DWA (particularly in its role as National Water Services Regulator), DHS, CoGTA and DPME.
- Ways of improving community participation in sanitation-related projects, including budgeting.

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CASE NAME	SALR
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<i>Johnson Matotoba Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others</i>	2010 (4) BCLR 312 (CC)
<i>Joseph and Others v City of Johannesburg and Others</i>	2010 (4) SA 55 (CC)
<i>Minister of Health and Others v Treatment Action Campaign and Others (2)</i>	2002 (5) SA721 (CC)
<i>Ntombentsha Beja and Others v Premier of the Western Cape and Others</i>	2011 (10) BCLR 1077 (WCC)
<i>S v Makwanyane and Another</i>	1995 (3) SA 391 (CC)

Glossary

ACCESS	Alliance for Children’s Entitlement to Social Security
ACHPR	African Charter on Human and Peoples’ Rights
ADSL	asymmetric digital subscriber line
ANC	African National Congress
ARV	Anti-retroviral
ASIDI	Accelerated schools infrastructure delivery initiative
BCCSA	Broadcasting Complaints Commission of South Africa
BNG	Breaking New Ground
CALS	Centre for Applied Legal Studies

CCC	Complaints and Compliance Committee
CCL	Centre for Child Law
CDE	Centre for Development and Enterprise
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
CESCR	(United Nations) Committee on Economic, Social and Cultural Rights
CFO	chief financial officer
CoGTA	Department of Co-operative Governance and Traditional Affairs (previously DPLG)
Comtask	Communications Task Group
COO	chief operating officer
COSATU	Congress of South African Trade Unions
CRC	Convention on the Rights of the Child
CSIR	Council for Scientific and Industrial Research
CSSR	Centre for Social Science Research
DA	Democratic Alliance
DBE	National Department of Basic Education
DHS	Department of Human Settlements (previously National Department of Housing or NDoH)
DMA	Disaster Management Act 57 of 2002
DMMA	Digital Media and Marketing Association
DORA	Division of Revenue Act (renewed annually)
DPLG	Department of Provincial and Local Government (now CoGTA)
DPME	Department of Planning, Monitoring and Evaluation
DWA	Department of Water Affairs (previously DWAF)
DWAF	Department of Water Affairs and Forestry (now DWA)
ECA	Electronic Communications Act
ECDoE	Eastern Cape Department of Education

ECS	electronic communications service	IRDP	Integrated Residential Development Programme
ECT	electronic communications and transactions	ISP	Internet service provider
EEA	Employment of Educators Act 76 of 1998	ISPA	Internet Service Providers' Association
EFF	Economic Freedom Fighters	LDoE	Limpopo Department of Education
EHP	Emergency Housing Programme	LRC	Legal Resources Centre
ES	equitable share	LSM	Living Standards Measurement
ESTA	Extension of Security of Tenure Act 62 of 1997	LTSM	Learning and Teaching Support Materials
FBSan	free basic sanitation	MAT	Media Appeals Tribunal
FBW	free basic water	MDDA	Media Development and Diversity Agency
FICA	Financial Intelligence Centre Act 38 of 2001	MEC	Member of the Executive Council (provincial 'cabinet minister')
FHR	Foundation for Human Rights	MIG	Municipal Infrastructure Grant
FLISP	Finance Linked Individual Subsidy Programme	NDoH	National Department of Housing (now called Department of Human Settlements or DHS)
FXI	Freedom of Expression Institute	NDP	National Development Plan
GCEO	group chief executive officer	NERSA	National Energy Regulator of South Africa
GCIS	Government Communication and Information System	NGO	non-governmental organisation
GDE	Gauteng Department of Education	NHFC	National Housing Finance Corporation
GEC	General Education Certificate	NHSDB	National Housing Subsidy Database
GG	Government Gazette	NHSS	National Housing Subsidy Scheme
HDA	Housing Development Agency	NIA	National Intelligence Agency
HOD	head of department	NPC	National Planning Commission
HSDG	Human Settlements Development Grant	NSC	National Senior Certificate
IBA	Independent Broadcasting Authority	Nurcha	National Urban Reconstruction and Housing Agency
ICASA	Independent Communications Authority of South Africa	NUSP	National Upgrading Support Programme
ICCPR	International Covenant on Civil and Political Rights	NWSRS	National Water Services Regulation Strategy
ICERD	International Convention on the Elimination of all forms of Racial Discrimination	OBE	Outcomes Based Education
ICESCR	International Covenant on Economic, Social and Cultural Rights	OECD	Organisation for Economic Co-operation and Development
ICTs	information and communications technologies	PAJA	Promotion of Administrative Justice Act 3 of 2000
IDP	Integrated Development Plan	PCSA	Press Council of South Africa
IEC	Independent Electoral Commission	PDMSA	Print and Digital Media South Africa
IP	Internet protocol	PDMTTT	Print and Digital Media Transformation Task Team
IPTV	Internet protocol television		

PED	Provincial Education Department	SERI	Socio-Economic Rights Institute of South Africa
PIE	Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998	SERs	social and economic rights
PMSA	Print Media South Africa	SGB	school governing body
POCDATARA	Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004	SHF	Social Housing Foundation
R2K	Right to Know Campaign	SHI	Social Housing Institution
RDP	Reconstruction and Development Programme	SHP	Social Housing Programme
RGA	Regulation of Gatherings Act 205 of 1993	SHRA	Social Housing Regulatory Authority
RHIG	Rural Household Infrastructure Grant	SIU	Special Investigating Unit
RHLF	Rural Housing Loan Fund	SSA	State Security Agency
RICA	Regulation of Interception of Communications and Provision of Communications Related Information Act	TIMSS	Trends in International Mathematics and Science Study
SA	South Africa	TRU	temporary residential unit
Saarf	South African Advertising Research Foundation	TV	television
SABC	South African Broadcasting Corporation	UISP	Upgrading of Informal Settlements Programme
SACMEQ	Southern and Eastern Africa Consortium for Monitoring Educational Quality	UKZN	University of KwaZulu-Natal
SADF	South African Defence Force	UN	United Nations
SADTU	South African Democratic Teachers' Union	UPM	Unemployed Peoples' Movement
SAHRC	South African Human Rights Commission	UPR	Universal Periodic Review
SAICE	South African Institution of Civil Engineering	USAASA	Universal Service and Access Agency of South Africa
SANDU	South African National Defence Union	USDG	Urban Settlements Development Grant
Sanef	South African National Editors' Forum	VIP	ventilated improved pit latrine
SAPS	South African Police Service	Waspa	Wireless Applications Service Providers' Association
SASA	South African Schools Act 84 of 1996	WSA	water services authority
SATRA	South African Telecommunications Regulatory Authority	WSDP	water services development plan
SCA	Supreme Court of Appeal	WSP	water services provider
SCOPA	Standing Committee on Public Accounts		

Notes

1. Sapa 'Faeces thrown at Helen Zille's bus' (4 June 2013) *City Press*: www.citypress.co.za/politics/faeces-thrown-at-helen-zilles-bus/ (accessed on 4 September 2013).
2. S Schutte 'The Politics of Shit and Why It Should Be Part of Public Protest' (12 June 2013) *The South African Civil Society Information Service*: sacsis.org.za/site/article/1691.
3. Government of the Republic of South Africa 'Millennium Development Goals: Country Report 2010' (2010) 94: www.info.gov.za/view/DownloadFileAction?id=132022.

4. Government of the Republic of South Africa 'Millennium Development Goals: Country Report 2010' (2010) 94: www.info.gov.za/view/DownloadFileAction?id=132022.
5. In South Africa, as in many other countries, sanitation has a public and a private component. In South Africa this is exacerbated by the apartheid legacy of non-provision of sanitation services to the largely rural African population, meaning that there is a significant backlog in rural areas, as well as the mushrooming informal settlements around urban centres. In urban areas, household toilets (usually waterborne systems) are typically private, while bulk waste water reticulation and treatment of sewage is public. In rural and informal areas, toilets are often communal – sometimes provided by the state (in the form of either chemical toilets or ventilated improved pit latrines) but are often constructed by the community (crude 'bucket' systems or rudimentary pit latrines) – or there are no toilets at all and people practice open defecation, although this is not very common.
6. South Africa's total population is around 50 million people.
7. Government of the Republic of South Africa 'Millennium Development Goals: Country Report 2010' (2010) 94: www.info.gov.za/view/DownloadFileAction?id=132022.
8. Article 24(2)(e) of the Convention on the Rights of the Child (CRC, 1989) obliges States parties to take appropriate measures to ensure that 'all segments of society, in particular parents and children ... [are supported in respect of] the advantages of ... hygiene and environmental sanitation ...'.
9. Article 14(2)(h) of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW, 1979) provides that all states parties must take all the appropriate measures to eliminate discrimination against women in rural areas including to allow them 'to enjoy adequate living conditions, particularly in relation to housing, sanitation, ...'.
10. Articles 29 and 85 of the Geneva Convention III of 1949 stipulate that prisoners of war and other detainees must be provided with shower and bath facilities and water, soap and other facilities for their daily personal toilet and washing requirements: www.icrc.org/eng/assets/files/publications/icrc-002-0173.pdf.
11. For further information on the mandate see: www.ohchr.org/EN/Issues/WaterAndSanitation/SRWa-ter/Pages/Overview.aspx.
12. United Nations General Resolution GA/RES/64/292 on the human right to water and sanitation (3 August 2010): daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/479/35/PDF/N0947935.pdf.
13. United Nations Human Rights Council Resolution HRC/RES/15/9 on human rights and access to safe drinking water and sanitation (6 October 2010): daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/166/33/PDF/G1016633.pdf.
14. As explored in this paper, the question of whether sanitation forms a distinct right or whether it is attached primarily to the right to water has dogged the South African context, too. Whereas there seems to be an emerging self-standing right to sanitation in litigation, the relevant legislation is still located in the Water Services Act 108 of 1997 (Water Services Act), which draws no distinction between water and sanitation supply, and there is confusion at the institutional level about whether sanitation should be dealt with by the DWA (as primarily water-related) or the Department of Human Settlements (as primarily housing-related).
15. It should be noted, in line with the CESCR's pronouncement that the right to sanitation should be viewed as a self-standing right not least due to the fact that many households use dry forms of sanitation, that some environmentalists have expressed concern over too close a link between water and sanitation as promoting an environmentally unsustainable focus on waterborne sanitation (for more on this debate, including the environmental rights angle see, for example, M Langford, R Stacey and D Chirwa 'Water' in S Woolman et al (eds) *Constitutional Law of South Africa Volume 4 2nd edition, revision service 5* (2013) 56B-i, 56B-69).
16. CESCR Statement on the Human Right to Sanitation, U.N. Doc E/C.12/45/CRP.1 (12 November 2010): www.water-lex.org/attachments/File/statement_CESCR.pdf.
17. M Langford, R Stacey and D Chirwa 'Water' in S Woolman et al (eds) *Constitutional Law of South Africa Volume 4 2nd edition, revision service 5* (2013) 56B-i, 56B-70.
18. M Langford, R Stacey and D Chirwa 'Water' in S Woolman et al (eds) *Constitutional Law of South Africa Volume 4 2nd edition, revision service 5* (2013) 56B-i, 56B-70.

19. M Langford, R Stacey and D Chirwa 'Water' in S Woolman et al (eds) *Constitutional Law of South Africa Volume 4 2nd edition, revision service 5* (2013) 56B-i, 56B-71.
20. Although not law per se, in terms of persuasive international frameworks it is worth noting that among the objectives of Millennium Development Goal 7 (to ensure environmental sustainability) is improved access to water sources and sanitation facilities. Internationally the progress in terms of improved access to sanitation facilities has been slow and certainly in the South African context has generated criticism regarding how the focus on chasing quantitative targets has often been to the detriment of other more qualitative content-related aspects of the right.
21. United Nations CESCR General Comment 4 on the right to adequate housing (1991) para. 8(b): www.unhchr.ch/tbs/doc.nsf/o/469f4d91a9378221c12563edo053547e.
22. United Nations Committee on Economic Social and Cultural Rights General Comment 15 on the right to water (2002) para. 29: daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/402/29/PDF/G0340229.pdf.
23. United Nations CESCR General Comment 19 on the right to social security (2008) para. 18: www.refworld.org/docid/47b17b5b39c.html.
24. United Nations CESCR General Comment 20 on non-discrimination in economic, social and cultural rights (2009) para. 8: tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f20&Lang=en.
25. United Nations CESCR General Comment 3 on the nature of States parties obligations (1990): www.unhchr.ch/tbs/doc.nsf/o/94bdbaf59b43a424c12563edo052b664 (accessed on 25 October 2013).
26. In October 2012, the South African Government publicly announced it was going to ratify the ICESCR. However, as of October 2013, such ratification had not yet occurred. [It did occur in 2015, entering into force on 12 April 2015.]
27. *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para. 35.
28. For the Constitutional Court's reasoning behind the apparent rejection of the minimum core obligations see *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) paras 31–33; and *Minister of Health and Others v Treatment Action Campaign and Others* (2) 2002 (5) SA721 (CC) paras 26–29.
29. In September 2013, the Minister of Water Affairs announced that there were plans to merge the Water Services Act and the National Water Act.
30. Section 73(1)(c) of the Municipal Systems Act.
31. *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC) para. 38.
32. National Department of Housing 'National Housing Code' (2000 revised in 2009): www.nwpg.gov.za/HumanSettlements/HousingCode.asp.
33. DHS 'Upgrading of Informal Settlements Programme' (2009a) 4(3) National Housing Code 37: www.nwpg.gov.za/HumanSettlements/HousingCode.asp.
34. DHS 'Emergency Housing Programme' (2009b) 4(3) of the National Housing Code 38: www.nwpg.gov.za/HumanSettlements/HousingCode.asp.
35. For a comprehensive analysis of all sanitation-related policies, see K Tissington 'Basic Sanitation in South Africa: A Guide to Legislation, Policy and Practice' (July 2011) Socio-Economic Rights Institute of South Africa (SERI) Resource Guide: www.seri-sa.org/images/stories/SERI_Guide_to_Basic_Sanitation_Jul11.pdf.
36. DWAF 'National Sanitation Policy' (October 1996) 3: www.dwaf.gov.za/Documents/Policies/National%20Sanitation%20Policy.pdf.
37. DWAF 'National Sanitation Policy' (October 1996) 3: www.dwaf.gov.za/Documents/Policies/National%20Sanitation%20Policy.pdf.
38. DWAF 'White Paper on Basic Household Sanitation' (September 2001) 5: www.dwaf.gov.za/Documents/Policies/SanitationReviewPolicy.pdf.
39. DWAF 'National Sanitation Strategy' (August 2005) 56: africanation.softpagecms.com/files/802976930/library/National_SANPOLICY_Aug2005.pdf.
40. DHS 'Revision of the 2001 White Paper on Basic Household Sanitation, 2001: National Sanitation Policy Conceptual Framework, Draft Version' (March 2011) 3: www.wisa.org.za/Show_document.aspx?Docid=146 (accessed on 4 September 2013).
41. DWAF 'Free Basic Sanitation Implementation Strategy' (April 2009) i: www.dwaf.gov.za/dir_ws/wspd/policy-info.aspx?file=556.
42. DWAF 'Free Basic Sanitation Implementation Strategy' (April 2009) ii: www.dwaf.gov.za/dir_ws/wspd/policy-info.aspx?file=556.

43. There are 169 WSAs in South Africa including metropolitan, district and local municipalities, as well as water boards and municipal companies.
44. Thus, although in many areas water is delivered by corporatised municipal entities such as Johannesburg Water (Pty) Ltd, which is a 100 per cent state-owned company, there is little to no outright water privatisation in South Africa. It should also be noted, however, that even private water companies, because of rendering a public service, would be bound to comply with the same administrative justice-related obligations to provide fair and just services as a public entity would be.
45. DWA 'National Water Services Regulation Strategy' (January 2010) 89: www.dwa.gov.za/dir_ws/dwqr/Default.asp?Pageid=6&SearchString=Strategy Document.
46. DWA 'National Water Services Regulation Strategy' (January 2010) 89: www.dwa.gov.za/dir_ws/dwqr/Default.asp?Pageid=6&SearchString=Strategy Document.
47. K Tissington 'Basic Sanitation in South Africa: A Guide to Legislation, Policy and Practice' (July 2011) Socio-Economic Rights Institute of South Africa (SERI) Resource Guide 59: www.seri-sa.org/images/stories/SERI_Guide_to_Basic_Sanitation_Jul11.pdf.
48. DPME, DWA and DHS 'Sanitation Services – Quality of Sanitation in South Africa: Report on the Status of Sanitation Services in South Africa' (March 2012): www.info.gov.za/view/DownloadFileAction?id=178724.
49. DHS Ministerial Sanitation Task Team Report (July 2012): www.dhs.gov.za/uploads/reports/Sanitation_Task_Team_Report_July2012.pdf.
50. The MIG grant was first introduced in the 2005/2006 financial year, and each year the Division of Revenue Act sets out the allocation of MIG funds from the National Treasury per municipality. For the formula used to calculate the MIG, see D Still, N Walker and D Hazelton 'Basic Sanitation Services in South Africa – Learning from the past, planning for the future' (2009) Water Research Commission Research Report: www.wrc.org.za/Pages/DisplayItem.aspx?ItemID=8632&FromURL=%2FPages%2FAllKH.aspx%3F.
51. For the formula used to allocate National Treasury ES funds to municipalities, see *ibid* (Still et al) 112.
52. DPME, DWA and DHS 'Sanitation Services – Quality of Sanitation in South Africa: Report on the Status of Sanitation Services in South Africa' (March 2012): www.info.gov.za/view/DownloadFileAction?id=178724.
53. K Tissington 'Basic Sanitation in South Africa: A Guide to Legislation, Policy and Practice' (July 2011) Socio-Economic Rights Institute of South Africa (SERI) Resource Guide 58: www.seri-sa.org/images/stories/SERI_Guide_to_Basic_Sanitation_Jul11.pdf.
54. DPME, DWA and DHS 'Sanitation Services – Quality of Sanitation in South Africa: Report on the Status of Sanitation Services in South Africa' (March 2012) 20: www.info.gov.za/view/DownloadFileAction?id=178724.
55. DPME, DWA and DHS 'Sanitation Services – Quality of Sanitation in South Africa: Report on the Status of Sanitation Services in South Africa' (March 2012) 20: www.info.gov.za/view/DownloadFileAction?id=178724.
56. 2010 (4) BCLR 312 (CC).
57. The Constitutional Court hearing was an appeal against a judgment of the South Gauteng High Court, which dismissed the application for the government to provide temporary sanitation services and high-mast lighting but did order the provision of refuse collection and communal taps for the settlement.
58. Section 10 of the Constitution provides that everyone has the right to have their dignity respected and protected.
59. The Court also rejected the applicants' attempt to rely on the rights to housing and dignity in the Constitution.
60. D Bilchitz 'Is the Constitutional Court Wasting Away the Rights of the Poor? *Nokotyana v Ekurhuleni Metropolitan Municipality*' (2010) 127(3) *South African Law Journal* 597–615.
61. M Huchzermeyer 'A challenge to the state's avoidance to upgrade the Harry Gwala informal settlement' in *Cities with Slums: From Informal Settlement Eradication to a Right to the City* (2011) Cape Town: Juta/UCT Press: chapter 9.
62. 2011 (10) BCLR 1077 (WCC).
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66. *Beja* paras 81 and 83.

67. *Beja* para. 149.
68. *Beja* para. 150.
69. DPME, DWA and DHS 'Sanitation Services – Quality of Sanitation in South Africa: Report on the Status of Sanitation Services in South Africa' (March 2012) 7: www.info.gov.za/view/DownloadFileAction?id=178724.
70. DPME, DWA and DHS 'Sanitation Services – Quality of Sanitation in South Africa: Report on the Status of Sanitation Services in South Africa' (March 2012) 2: www.info.gov.za/view/DownloadFileAction?id=178724.
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72. DHS Ministerial Sanitation Task Team Report (July 2012) 10: www.dhs.gov.za/uploads/reports/Sanitation_Task_Team_Report_July2012.pdf.
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75. K Tissington et al 'Submission on Access to Water and Sanitation in South Africa' (9 February 2009) Centre for Applied Legal Studies (CALs) 5–6.
76. K Tissington et al 'Submission on Access to Water and Sanitation in South Africa' (9 February 2009) Centre for Applied Legal Studies (CALs) 6.
77. For further details on the campaign see Equal Education link: www.equaleducation.org.za/campaigns/minimum-norms-and-standards.
78. See, in this series, the paper on water by J Dugard for a discussion of water tariffs.
79. In order to satisfy the legislative and policy imperatives to provide access to basic services for poor communities, most municipalities in South Africa pursue targeted indigency policies with varying qualifying criteria and free basic services-related benefits. A few of the bigger metropolitan municipalities pursue universal access to basic levels of free basic services alongside a targeted programme for additional benefits for qualifying poorer households. Indigency policy targeting has been criticised for differing vastly and irrationally across municipalities and in general for being very onerous, and discouraging registration especially by the poorest and most vulnerable households, including child-headed households. See, for example, Centre for Applied Legal Studies, Centre on Housing Rights and Evictions and Norwegian Centre for Human Rights 'Water Services Fault Lines: An Assessment of South Africa's Water and Sanitation Provision across 15 Municipalities' (2008) CALS, COHRE & NCHR 34–40: www.wits.ac.za/files/resfd5179ffe9b24ecfa4110e1ee24cbb20.pdf (accessed on 30 September 2011); and K Tissington 'Targeting the Poor': An Analysis of Free Basic Services (FBS) and Municipal Indigent Policies in South Africa' (November 2013) Socio-Economic Rights Institute of South Africa (SERI): www.seri-sa.org/images/Targeting_the_Poor_Nov13.pdf. The issue of indigency policies is pursued in further detail in the paper in this series on water by J Dugard.
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