

The right to water in South Africa

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*We want the water of this
country to flow out into a*

*network – reaching every
individual – saying: here is*

this water, for you. Take it; cherish it as affirming your human dignity; nourish your humanity...Water – gathered and stored since the beginning of time in layers of granite and rock, in the embrace of dams, the ribbons of rivers – will one day, unheralded, modestly, easily, simply flow out to every South African who turns a tap. That is my dream.

– ANTJIE KROG¹

Introduction

On 13 April 2011, during a protest about inadequate water services in Maqheleng township (Setsoto municipality, Ficksburg, Free State), community leader Andries Tatane was shot dead by police while attempting to shield elderly residents from a police water cannon. Commenting in the aftermath of the protest – which was organised by Maqheleng Concerned Citizens (a local community organisation) – Maqheleng Concerned Citizens' chairperson Sam Motseare poignantly lamented the death of his colleague, as well as the circumstances that led to the tragedy:

Tatane sacrificed his life to free us from the shackles of the Setsoto municipality. If our rights for clean water had been respected, we wouldn't be here. If our rights for a clean environment that is free of stinking sewage had been respected, we wouldn't be here. When will this sub-standard life come to an end, just when? Maybe the day Tatane died marked a turning point in the history of Ficksburg, Maqheleng.²

Although the death of Andries Tatane did not put an end to the water services-related problems of the residents of Maqheleng, it did mark a turning point in raising public awareness about inadequate access to water in South

Africa and the rising levels of frustration at the grass-roots level around this issue. As highlighted in a recent research report, the single most cited concern of local protestors after housing (36.33 per cent), is access to water (18.36 per cent).³ The failure to advance adequate access to water services to all residents – illustrated by rising protest, as well as litigation such as the *Mazibuko* case against prepayment water meters in Phiri, Soweto (outlined below) – is all the more striking given the post-apartheid government's focus on ensuring equitable access to water.

When the African National Congress (ANC)-led government was elected to power by the vast majority of South Africans in April 1994, one of the historical wrongs expected to be addressed was the inequitable distribution of water services. As recognised by then Minister of Water and Forestry Affairs, Kader Asmal, in the introduction to the 1997 White Paper on a National Water Policy for South Africa:

South Africa's water law comes out of a history of conquest and expansion. The colonial law-makers tried to use the rules of the well-watered colonising countries of Europe in the dry and variable climate of Southern Africa. They harnessed the law, and the water, in the interests of a dominant class and group which had privileged access to land and economic power. It is for this reason that the new Government has been confronted with a situation in which not only have the majority of South Africa's people been excluded from the land, but they have been denied either direct access to water for productive use or access to the benefits from the use of the nation's water. The victory of our democracy now demands that national water use policy and the water law be reviewed. Our Constitution demands this review, on the basis of fairness and equity, values which are enshrined as cornerstones of our new society.⁴

In April 1994 an estimated twelve million people or 30 per cent of the population did not have access to piped water.⁵ In many respects the advances made in connect-

ing previously unconnected households to the water supply grid are one of the success stories of South Africa – according to the 2011 national census, approximately 91.3 per cent of households now have access to piped water.⁶ Nevertheless, despite this commendable progress, systemic problems remain in the qualitative aspects of access to water services, particularly by poor households such as those situated in Maqheleng and Phiri. In general terms, the main underlying reason for continuing problems is the absence of an effective and/or independent national water regulator to ensure that the raft of progressive laws and policies outlined below are appropriately complied with by local government.

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

Legal, policy and functional frameworks

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 water. However, historically, the right to water was viewed as an indirect right linked to inter alia the right to an adequate standard of living in Article 11(1) of the ICESCR.⁷ It was also explicitly recognised in relation to membership of vulnerable identity groups including children,⁸ rural women,⁹ people with disabilities¹⁰ and prisoners of war.¹¹ And, in 2002, the United Nations Committee on Economic, Social and Cultural Rights (CESCR – the body that interprets the ICESCR and clarifies related obligations) adopted General Comment 15 on the right to water (General Comment 15), which states:

Water is a limited natural resource and a public good fundamental for life and health. The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realisation of other human rights ... The human right to water entitles everyone to sufficient, safe, accept-

able, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related diseases and to provide for consumption, cooking, personal and domestic hygienic requirements.¹²

While recognising that some of the contours of the right to water are context-dependent, General Comment 15 provides generally applicable parameters of the normative content regarding availability, quality, accessibility (physical, economic, non-discrimination and information dimensions). Possibly the most contentious parameter – particularly in the South African context where the sufficiency of the government's Free Basic Water (FBW) policy was challenged in the Constitutional Court in the *Mazibuko* case (see below) – is that on availability.

According to General Comment 15, the supply for each person should be sufficient and continuous for personal and domestic uses including drinking, personal sanitation, washing of clothes, food preparation and personal and household hygiene. The General Comment does not stipulate a specific amount of water to be provided for these purposes, but it notes that the amount available to every person should correspond with the World Health Organisation (WHO) guidelines. In this respect, two WHO sources are footnoted.¹³ First, a 2002 study by Guy Howard and Jamie Bartram (published in 2003), which establishes that at a service level allowing for between five and twenty litres of water per person per day carries a very high level of health concern, a service level allowing for between twenty and 50 litres of water per person per day carries a high level of health concern, while a service level allowing for 100 litres of water per person per day and above is optimal.¹⁴ Second, a 1996 study by Peter Gleick (who was a deponent in the *Mazibuko* water rights case), which highlights that to meet basic needs and lead a healthy and dignified life, humans require at least 50 litres of water per person per day, broken down into basic functions:

- Drinking water: five litres per person per day;
- Sanitation: twenty litres per person per day;¹⁵

- Bathing: fifteen litres per person per day; and
- Cooking and kitchen: ten litres per person per day.¹⁶

Regarding quality, General Comment 15 states: 'The water required for each personal or domestic use must be safe, therefore free from micro-organisms, chemical substances and radiological hazards that constitute a threat to a person's health' and it should be an acceptable colour, odour and taste.¹⁷ For accessibility, General Comment 15 stresses the obligations to ensure that water services and facilities are within safe *physical* reach of all sections of the population *without discrimination* on any prohibited grounds, are *affordable* for all, and that there is sufficient readily available *information* about all water services.¹⁸

The absence of an explicit self-standing right to sanitation was remedied in 2010 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)¹⁹ – 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'.²⁰ 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.²¹ The CESCR's General Com-

ment 16 on the equal right of men and women to the enjoyment of all economic, social and cultural rights (2005) emphasises the need to address the ways in which gender roles affect access to determinants of health, including water.²² General Comment 19 on the right to social security stresses that all social security schemes, including family and child benefits, should 'ordinarily' enable the recipients to access minimum essential levels of inter alia water.²³ Finally, the recent General Comment 20 on non-discrimination in economic, social and cultural rights emphasises the importance of ensuring access to water to all groups, particularly women and girl-children, 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', and that access to water services should not be made conditional on a person's land tenure status.²⁴

As with all international socio-economic rights, the international right to water 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 In terms of the international right to water, General Comment 15 stipulates that the minimum core content to be immediately achieved by states (or to be justified in terms of insufficient resources) includes an obligation to ensure everyone's equitable and safe physical and economic access, on a non-discrimination basis, to the minimum essential amount of water required for personal and domestic use, and to adopt a national water strategy and plan of action setting out how the right is to be realised and prioritising the most disadvantaged and marginalised groups.²⁶

South Africa has not ratified the ICESCR. However, as a signatory, it is bound to not undermine its provisions.²⁷ 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.²⁸ 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.²⁹ It should be noted, in light of the government's announcement in October 2012 that it would ratify the ICE- SCR, that if the ICESCR is ratified [as it indeed was in 2015], 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 water, Article 16 on the right to enjoy the best attainable state of health could be seen to encapsulate a right to water, as confirmed by the African Commission on Human and People's Rights, which, in the complaint of *Free Legal Assistance Group v Zaire*, held that 'the failure of the [now Democratic Republic of Congo] government to provide basic services such as safe drinking water ... constitutes a violation of Article 16'.³⁰ And in *Centre on Housing Rights and Evictions (COHRE) v Sudan*, the ACHPR found that the failure of the Sudanese government to stop inter alia the poisoning of water sources including wells by the *janjaweed* militia in the Darfur region amounted to a violation of Article 16.³¹

South Africa has also ratified the African Charter on the Rights and Welfare of the Child (1990), which provides in Article 14(2)(c) that States parties have an obligation to ensure the provision to children of 'adequate nutrition and safe drinking water'. In addition, South Africa has ratified the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (2003), which stresses in Article 15(a) states' obligations to provide women with access to clean drinking water.

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 water (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 water, post-apartheid legal (and policy) documents have sought to create a framework for the equitable provision of water. These frameworks establish various state obligations in respect of the provision of basic water supply to poor communities.

Section 27(1)(b) of the Constitution of the Republic of South Africa Act 108 of 1996 (Constitution) guarantees everyone's right of access to sufficient water. Other relevant constitutional rights are: section 9's equality clause, which requires that there be no unfair discrimination in the provision of services, section 10's right to human dignity, section 24's right to an environment that is not harmful to health or wellbeing, section 26's right to housing and section 27's health care-related rights.

Also relevant is section 33 on the right to just administrative action which, along with the Promotion of Administrative Justice Act 3 of 2000 (PAJA), creates the framework for procedural fairness (embracing the rights to reasonable notice of a decision and an opportunity to make representation regarding your circumstances before a decision affecting your rights is taken) in all administrative decisions including those to disconnect water services. 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.

Finally, Part B of Schedule 4 of the Constitution mandates local government as responsible for potable water supply and domestic waste water and sewage disposal services, 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 other

main piece of legislation governing water is the National Water Act 36 of 1998 (National Water Act), which deals with the management and protection of water resources in the country. Although until now water services and water resources have been managed under separate mandates and two different acts, there is currently a government-initiated water sector review underway that seeks to merge the Water Services Act and the National Water Act.³²

One of the main objectives 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 Water Services Act defines basic water services as 'the prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene'.³³ It acknowledges that, although municipalities have the responsibility to administer water services, all spheres of government have a duty towards the goal of ensuring universal access to basic water services.

Section 3(2) of the Water Services Act establishes that 'every water services institution must take reasonable measures to realise these rights'. Echoing the procedural requirements for administrative action under PAJA, Section 4(3) of the Water Services Act states that procedures for the limitation and discontinuation of water must be 'fair and equitable' and 'provide for reasonable notice of intention to limit or discontinue water services and for an opportunity to make representations'. 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 water supply, 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 3 provides that the minimum standard for basic water supply services is:

a) The provision of appropriate education; and

b) A minimum quantity of potable water of 25 litres per person per day or six kilolitres per household per month³⁴ –

(i) At a minimum flow rate of not less than 10 litres per minute;

(ii) Within 200 metres of a household; and

(iii) With an effectiveness such that no consumer is without a supply for more than seven full days in any year.

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, containing a number of important provisions relating to tariffs and cross-subsidies for water services. Section 3(2) of the Norms and Standards requires that water services institutions must consider the right of access to basic water supply when determining which water services tariffs are to be subsidised. Section 6(2) of the Norms and Standards stipulate that all domestic water supply tariffs must have a rising block tariff structure that includes at least three rising blocks with the tariff increasing for higher consumption blocks (i.e. luxury water users pay more per kilolitre than basic users pay) and the first tariff block should be 'set at the lowest amount, including a zero amount'.³⁵

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'.³⁶ 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'.

South African policy³⁷

In November 1994, the newly created Department of Water Affairs and Forestry (DWAF) (which was subsequently renamed Department of Water Affairs or DWA), formulated a 'White Paper on Water Supply and Sanitation Policy'.³⁸ The paper set out the institutional framework for water and sanitation services, which was later legislated in the Water Services Act. The 1994 White Paper was supplemented in 1997 by a 'White Paper on a National Water Policy for South Africa'³⁹ and in 2002 by a 'White Paper on Water Services'.⁴⁰ These policies amplified the equity-driven provisions of the Water Services Act and other water-related legislation, and culminated in the adoption of an FBW policy in 2001, which was concretised in the 'Free Basic Water Implementation Strategy' of August 2002.⁴¹ In terms of the FBW policy, poor households should be allocated a free basic quantity of potable water, with a six kilolitre per household per month minimum threshold, and with encouragement to provide additional free basic water if a municipality can afford it. Although this flexibility is arguably a pragmatic response by national government to the issue of municipal autonomy, as well as the differing levels of financial bases across municipalities, in practice it has resulted in a patchwork approach to the provision of FBW, which has been exacerbated by the fact that the policy also allows maximum flexibility in terms of how municipalities target FBW allocation (see below). FBW is financed through two main sources – the cross-subsidies afforded through municipal rising block water tariffs (whereby the free first block is financed through the higher tariffs at the top end of consumption), and the Equitable Share Allocation to municipalities from National Treasury (see below).

Of direct relevance to FBW provision are the means-tested indigency policies that municipalities use to allocate FBW to beneficiaries. Section 104(1)(a) of the Municipal Systems Act provides that the Minister may make regulations or issue guidelines to provide for or regulate the development and implementation of an indigent policy. To this end, in 2005 the Department of Provincial and Local Government (DPLG) (now called the Department of Co-operative Governance and Traditional Affairs or CoGTA) published a 'National Framework for a Municipal Indigent Policy',⁴² as well as the 'Guidelines for the

Implementation of the National Indigent Policy by Municipalities'.⁴³ Within such frameworks, municipalities must decide how they are going to implement an indigency policy and particularly how they aim to target beneficiaries. This is an under-researched area but recently there is increasing acknowledgment that there are widespread problems with the implementation of indigency policies that result inter alia in very low registration and uptake of benefits by formally-qualifying households.⁴⁴

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 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).⁴⁵ 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,⁴⁶ and private water contracts can be challenged if the terms become too onerous.⁴⁷ These onerous conditions have led experts to conclude that it is unlikely that private water contracts – such as were initially awarded to BiWater and SAUR International in the Dolphin Coast – will be awarded in South Africa in future.⁴⁸

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 Healthcare and Education are involved in

setting design standards for water (and sanitation) facilities as schools, hospitals and clinics.

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). Thus DWA is responsible for bulk reticulation and all water services regulation. Since January 2010, in terms of the National Water Services Regulation Strategy (NWSRS), DWA is also responsible for being the national water services regulator – prior to this there was no national water services regulator. 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. Also, as highlighted below, it is as yet unclear how effective DWA has been in this role, an issue that requires further investigation.

Under the NWSRS, DWA operates a Compliance, Monitoring and Enforcement Directorate, which is mandated to enforce compliance with water-related legislation and regulation. Where there is non-compliance, the Directorate issues pre-directive notices and injunction directives and then can take cases forward in the water tribunal or bring criminal prosecutions in the normal courts. To date, the Directorate has focused mostly on water resources-related issues rather than water services-related issues. In respect of water services, the NWSRS defines various DWA regulatory functions, including the monitoring of applications for water services-related Municipal Infrastructure Grants (MIG – see below) and the status of operations and maintenance of water services-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 functions.⁴⁹ 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.⁵⁰

It is envisaged that DWA has the power to reassign water services functions to other institutions of government if intractable water services problems arise⁵¹ but to date DWA has hardly, if at all, exercised this authority. Rather, where municipalities have become dysfunctional, there is a national government process in terms of section 139 of the Constitution, which allows provincial government to place municipalities under provincial administration.⁵² It is usually the case that where there are serious problems with water services functions, other municipal functions are also in trouble, and the precise delineation between DWA regulation and provincial government regulation in respect of addressing failing water services is not clear. More generally, there is scant information regarding the impact of placing a municipality under administration and whether this improves service delivery or simply results in further disconnections and cutbacks to save money – this is a subject that requires investigation.

Previously there were three main sources for the provision of basic water services in South Africa: the MIG for capital costs of infrastructure development,⁵³ the Equitable Share (ES) for operations and maintenance-related costs,⁵⁴ 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 in metropolitan municipalities) and the Rural Households Infrastructure Grant (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 water services access-related problems. However, MIG funds have historically been under- and/or misspent by most municipalities.⁵⁵ 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 the move in 2009 of sanitation away from DWA and to DHS (see FHR paper on sanitation by J Dugard).⁵⁶

Regarding the ES, there are debates as to whether it is sufficient to cover the costs of free basic service provision, particularly in poor municipalities that are not able to recoup much revenue through charging for services.⁵⁷ Beyond this, the ES is an unconditional grant, meaning that municipalities have full autonomy to spend these funds as they see fit. There is mounting evidence that municipalities do not spend ES grants as they should – on basic services including water services,⁵⁸ prompting suggestions that ways should be found to ensure more accountability regarding ES funds to municipalities.

South African jurisprudence

In South Africa, socio-economic rights are explicitly justiciable and twenty 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, social security, sanitation and electricity. And, on 8 October 2009, the South African Constitutional Court handed down judgment in its first and only water rights case to date in the matter of *City of Johannesburg and Others v Mazibuko and Others (Mazibuko)*,⁵⁹ which concerned two main issues related to the City of Johannesburg's water services policy and provision: the reasonableness and sufficiency of the City's FBW allocation of six kilolitres per household per month, and the lawfulness of the City's imposition of prepayment water meters on poverty-stricken households in Phiri, Soweto.

In 2001, the City of Johannesburg formulated a project to limit unpaid-for water consumption in Soweto by means of the mass installation of prepayment water meters. Called Operation Gcin'amanzi (meaning 'to conserve water' in isiZulu), the project started with a pilot in Phiri, one of the poorest suburbs of Soweto. As an apparent sweetener to the Phiri residents, at the time of installing prepayment water meters the City of Johannesburg also introduced the FBW allocation of six kilolitres per household per month that was already available to most other middle- and upper-income areas of Johannesburg. Indeed, when first introduced, the City referred

to prepayment water meters as Free-pay water meters, referring to the FBW component for the first six kilolitres. However, unlike the conventional meters available throughout Johannesburg's richer suburbs, which provide water on credit with numerous protections against unfair disconnections, prepayment water meters automatically disconnect once the FBW supply is exhausted, unless additional water credit is purchased and loaded, thus leaving poor households without water for days on end each month.

Determined to push for at least 50 litres of FBW per person per day (as per the expert advice of Peter Gleick and according with his recommendations referenced in General Comment 15 of the CESCR) and to not accept prepayment water meters, on 12 July 2006 the residents of Phiri launched a legal challenge in the Johannesburg High Court, where the case was heard between 3 and 5 December 2007. The ruling of 30 April 2008 found in the applicants' favour on all grounds, declaring prepayment water meters unlawful and unconstitutional, declaring the City's FBW policy to be unreasonable and ordering the City to provide the applicants and all similarly-situated residents with 50 litres of FBW per person per day.⁶⁰ However, the judgment was appealed to the Supreme Court of Appeal, where the judgment of 25 March 2009 upheld the appeal but ruled in the applicants' favour on both substantive grounds, again declaring prepayment water meters unlawful and the City's FBW policy unreasonable.

Due to perceived problems with the order of invalidity regarding prepayment water meters, the applicants decided to appeal the decision to the Constitutional Court.⁶¹ The Constitutional Court's judgment of 8 October 2009 took the applicants and many commentators by surprise because it ruled against the applicants on all grounds,⁶² including finding prepayment water meters to be lawful on the grounds inter alia that they 'suspend' the water supply rather than discontinue it and, sidestepping the question of limitation, therefore do not violate the section 4(3) of the Water Services Act protections against unprocedural disconnection.⁶³

Elsewhere I have written about the positive socio-political (and material) consequences of the litigation, notwithstanding the judgment.⁶⁴ However, for the pur-

poses of establishing jurisprudence on the right to water in South Africa and particularly given that this is the first and only water-related case to have been heard by the Constitutional Court to date, the judgment provides almost nothing to go on in terms of informing the content and interpretation of the right.

The little guidance that can be extracted from the judgment relates to the Court's reasoning around the finding that the City's FBW policy was reasonable. Here – following its housing-related analysis of sections 26(1) and 26(2) in *Grootboom*,⁶⁵ and health-related analysis of sections 27(1)(a) and 27(2) in *Treatment Action Campaign*⁶⁶ – the Court pursued its prevailing approach regarding the meaning of the section 27(1)(b) right of everyone to have access to sufficient water as being qualified by the section 27(2) caveat of the state's obligation to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights'. This means that in the Court's view neither the section 27(1)(b) right nor the section 27(2) right exists as a self-standing or stand-alone entitlement. Rather, 'in a somewhat inverted analysis', the content of each right rests on the reasonableness of the state's response to progressively realising that right, i.e. determining the 'content of each right in the first place – that is, working out what the right entitles citizens to – is to proceed on the basis of a determination in the second place of what it would be reasonable for the state to provide, within available resources, in order to realise the right progressively'.⁶⁷

This approach by the Constitutional Court – of requiring the state only 'to take reasonable legislative and other measures progressively to realise the achievement of the right ... within available resources'⁶⁸ – has been criticised for reducing the content of the socio-economic right to being defined by the action that the government takes in advancing access to that good.⁶⁹ Regardless of any criticism, Langford et al point out that this trajectory is consistent with the Court's apparent rejection of the minimum core content approach and its dismissal of the notion that socio-economic rights entail some kind of minimum core content enforceable against the state in all circumstances, thus significantly departing from the approach of the CESR.⁷⁰ However, before turning to the

Court's specific finding in relation to the reasonableness of the City of Johannesburg's FBW policy in *Mazibuko*, it is worth noting that the Regulation 3(b) requirement of a minimum basic water supply of 25 litres per person per day or six kilolitres per household per month is, in effect, a minimum core approach as pursued by the legislature to ensure that all households have a minimum basic level of water.⁷¹ Whether or not this basic 'minimum core' amount is sufficient was part of the *Mazibuko* litigation but has not, to date, been conclusively answered by the Court in the *Mazibuko* or any other context.

In the Constitutional Court, the *Mazibuko* applicants argued that the FBW was unreasonable because it was insufficient to meet basic needs in the context of multi-dwelling households, extreme poverty and waterborne sanitation, which meant that water supplies were exhausted mid-way through each month and households were left without their water connection for days and even weeks at a time. Largely ignoring the common cause fact of households being left without access to water, the Court disagreed with the applicants' contention that the City's FBW policy was unreasonable, holding that the policy 'falls within the bounds of reasonableness and therefore is not in conflict with either section 27 of the Constitution or with the national legislation regulating water services'.⁷² The Court's rationale for finding the policy reasonable has nothing to do with an inquiry into the needs of the applicants or the resources available to the City. Rather, the Court found the policy to be reasonable mainly because it had changed over time in response to the litigation in the sense that when the applicants first went to court, the policy provided a maximum of six kilolitres of FBW per household per month and, by the time the matter was heard in the Constitutional Court, the City had instituted a new policy in terms of which qualifying households could register for substantially more FBW.⁷³

Beyond confirming in *Mazibuko* its previous finding (in *Grootboom* and *Treatment Action Campaign*), that one of the parameters of a reasonable policy is that it must be flexible, the Constitutional Court has to date not provided much clarity on what obligations, if any, the state has regarding the duty to progressively realise the right to water, other than to note that the government's water

policies must be flexible and change over time. We are therefore none the wiser as to how or in what ways the policies should change. Indeed, it is not even clear from the *Mazibuko* decision whether the Court holds there to be an obligation to provide the regulated minimum amounts of water *for free*.⁷⁴ However, two High Court cases appear to have established that, where there are no water connections at all, the government has an obligation to ensure access to the minimum regulated amount and that, where this is in the context of an informal settlement, such connections (which are usually in the form of communal taps) are invariably undertaken at the government's expense. Thus, following the initial hearing in the *Nokotyana* case in the High Court (see FHR position paper on sanitation by J Dugard),⁷⁵ Ekurhuleni Municipality agreed to provide communal taps to the residents of Harry Gwala informal settlement in compliance with Regulation 3(b). And in *Mtungwa*,⁷⁶ the South Gauteng High Court presided over a court-ordered settlement in which Ekurhuleni agreed to provide sufficient communal taps to the residents of Langaville informal settlement in order to satisfy Regulation 3(b).

Regardless of any grey areas around the state's positive obligations to fulfil the right of access to sufficient water, there is a bit more clarity regarding the state's obligation to refrain from interfering with existing access to water (the negative duty to protect), albeit not from the Constitutional Court but rather from the High Court decision of *Bon Vista Mansions*.⁷⁷ In this case, which concerned an interim order in connection with a municipality summarily disconnecting the water supply to a block of flats, the High Court ruled that a disconnection of a pre-existing water supply is a *prima facie* breach of the section 27(1) right of access to sufficient water that must be justified by the municipality in order to be lawful.⁷⁸ Taking into consideration both the Constitutional Court judgment in *Mazibuko* and the other water-related cases outlined above, it seems that, for the moment, legal tactics should focus on litigation to ensure that government minimum standards are met and that there are no non-procedural disconnections of water supply.

An analysis of systemic human rights-related problems

Undoubtedly, great advances have been made in line with the rights-based frameworks set out above to extend basic water services to poor households in South Africa. However, a number of systemic problems remain that compromise the enjoyment of the right of access to sufficient water, which are analysed here across human rights-related axes. The next section examines the problems across human rights-related axes and the following provides a tentative analysis of the underlying determinant of these problems.

Availability of water

There is some debate over the extent to which South Africa is a water-scarce country.⁷⁹ What is clear, however, is that as with many countries in the world, the issue is more about distribution than scarcity *per se*.⁸⁰ Thus, 'South Africa has enough water to meet everyone's needs until 2025 and beyond' and 'present problems and future challenges' are related mainly to financial and institutional capacities as well as political choices.⁸¹ Another factor impacting the availability of water is the water use pattern – in South Africa agriculture uses approximately 52 per cent of all water resources, while domestic water use is estimated at only 10 per cent, meaning that (at least from a water resources perspective) discussions about how much water can be made available to poor households should be contextualised in light of the relatively small amount of water consumed by the domestic sphere and the relatively large amount of water used by the agricultural sector.⁸²

In terms of aggregate numbers, according to the 2011 Census, 73.4 per cent of households have access to piped water in their dwelling or yard; 17.9 per cent have access to piped water outside their yard (this includes those with access to piped water within 200 metres of their dwelling and those whose access is further than 200 metres); and 8.8 per cent of households have no access to piped water.⁸³ However, these otherwise impressive connection figures obscure several problems experienced with access to water services, especially by poor house-

holds. The more qualitative aspects are discussed later, while here the availability-related dynamics are detailed.

First, at a very basic level, the statistics on connections do not take into account households that have been connected to a water infrastructure grid but where the infrastructure does not function to deliver water because of pipes and taps that do not work. Nor do the statistics reflect the degree to which, in respect of each formal connection, there is ever any progress in moving the water connection closer into the home. That is, there is no dedicated monitoring of the obligation to progressively realise the right of access to water by, for example, moving communal taps into yards or yard taps into houses. This touches on the physical access issue outlined below and has particular relevance for women and disabled persons.

Second, such statistics usually do not reflect the scale of the problem of land-use areas with insufficient access – informal settlements and rural areas around the country. Rural areas generally are the worst affected by non-connection to piped water. For example, one study found that in Amatole District Municipality, a deep rural jurisdiction in the Eastern Cape province, approximately 32 per cent of the population still do not have access to piped water.⁸⁴ Regarding informal settlements, houses and shacks typically do not have in-house connections (nor access to hot water even if they have electricity), so most households have to rely on water tankers or communal taps. There are problems with unreliable water tanker services.

Communal taps are often inadequate to supply multitudes of households and/or are not properly maintained. For example, until a settlement was reached in the wake of the *Mtungwa* litigation discussed above, Langaville informal settlement Extension 3, with 184 shacks, was served by one communal tap; Extension 6, with 1016 shacks, was served by only one continually working communal tap (one other communal tap was regularly dysfunctional); and Extension 18, with 108 shacks, had no water taps. In total, approximately 4735 people had to share two communal taps.⁸⁵ As with sanitation services in informal settlements (discussed in the FHR position paper on sanitation by J Dugard), the failure of a comprehensive policy and plan regarding informal settlements

means that residents are often at best left with only the most basic level of access to water (effectively the minimum regulated ‘floor’ becomes a ‘ceiling’), without any prospect of progressive realisation of their water-related rights.

Third, aggregated statistics on the roll-out of water services across the country mask the problem of geographic areas (often encompassing rural areas and informal settlements) with unusually low access to basic water services such as the former homeland areas (the provinces of KwaZulu-Natal and Eastern Cape), which continue to have extremely low levels of access to adequate water provision. As was highlighted in a 2009 submission to the South African Human Rights Commission on access to water and sanitation, the 30 worst performing municipalities in terms of inadequate access to water (and sanitation) were in KwaZulu-Natal and the Eastern Cape. According to the 2011 census, 22.2 per cent of households in KwaZulu-Natal and 14.1 per cent of households in the Eastern Cape do not have access to piped water.⁸⁶ The 60 worst performing municipalities are also all in KwaZulu-Natal and the Eastern Cape, plus Limpopo.⁸⁷ 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.⁸⁸

Fourth, quantitative figures on numbers of households having been connected to water services since 1994 do not capture all the households that have subsequently been disconnected due to being unable to afford water services (the matter of economic access – affordability – per se is examined below). Statistics on disconnections of water services are not readily provided by municipalities, nor are the reasons for non-payment recorded or examined, so the true scale of disconnections is not known and there is no way to ascertain how many disconnections are due to a genuine inability to pay for water.

Despite such difficulties, some authors have managed to track water disconnections for specific periods. For example, a 2006 study of the Cape Town and Tygerberg administrations indicated 159 886 households had their water disconnected due to non-payment between 1999

and 2001, and that most of these households were in poor areas where people struggle to pay water bills.⁸⁹ A 2003 study found that there were approximately 800–1000 water disconnections per day in Durban, affecting about 25 000 people per week.⁹⁰ And, using national household data and data collected in a 2001 national survey, a 2002 survey estimated that between the years 2000 and 2001, 7.5 million people experienced both water and electricity disconnections.⁹¹ These figures were contested by the Minister of Water Affairs and Forestry, who argued that the population disconnected in that time period was much lower. However, the minister's then director general, Mike Muller, subsequently acknowledged that, in 2003 alone, 275,000 households had their water supply disconnected at least once due to inability to pay (amounting to approximately 1.5 million people or more).⁹²

Furthermore, where disconnection has occurred via a prepayment water meter, there is no process of administrative justice governing or recording such disconnections, which are colloquially referred to as 'silent disconnections'.⁹³ The City of Johannesburg was one of the first municipalities to impose prepayment water meters on poor communities, and resistance to this imposition gave rise to the *Mazibuko* litigation outlined above. Following the judicial defeat in *Mazibuko* it seems that prepayment water meters are considered lawful, so this kind of silent disconnection can continue beyond the realm of government administration.

From the perspective of many municipalities, prepayment water meters are a welcome technology that maximise cost recovery and minimise the transaction costs associated with delivering water services to poor households, including the onerous usual notification and disconnections procedures. However, from the perspective of end-users, prepayment meters 'transfer the social and administrative costs to households'.⁹⁴ These costs include the inconvenience of purchasing water credit tokens at outlets that are often far away and not open at night – but the main cost of prepayment meters lies in the automatic disconnection if there is no money to purchase additional credit, or the threat of such disconnection, which forces people to 'live according to how much they can afford, rather than how much they need'.⁹⁵

Typically, the problems associated with prepayment water meters affect women more adversely than they affect men.⁹⁶ A survey in the informal settlement of Stretford Extension 4, Orange Farm, where prepayment water meters were first piloted in Johannesburg, found that in 52 per cent of households surveyed women were responsible for buying the water tokens. Men were responsible in only 27 per cent of households, and in 16 per cent this was a shared responsibility.⁹⁷ Responsibility for purchasing tokens can lead to conflict where money is in short supply, and in households with prepayment water meters, women's attempts to secure the necessary cash for water tokens has led to increased tensions and domestic violence.⁹⁸ Moreover, women have to shoulder most of the burden of managing the threat of silent disconnections, making difficult choices between going for days without water or conserving water in ways that compromise health and dignity, such as mothers forgoing bathing in favour of their children, carers not washing soiled sheets and female members of households not washing their hands or flushing the toilet regularly enough.⁹⁹ In her founding affidavit, Lindiwe Mazibuko, lead applicant in the *Mazibuko* case, outlined the hardships imposed on her multi-dwelling, female-headed household by a prepayment water meter:

We use very little water to bath with. We are now forced to do our laundry at my sister's house in Protea South, approximately 4 kilometres from our house. Sometimes I do not drink sufficient water. This weakens my health. We often do not flush our toilets ... I used to have a small food garden but I abandoned it Now I have to buy vegetables that I used to plant in my garden.¹⁰⁰

The other *Mazibuko* applicants (all women, bar one) suffered similarly under prepayment water meters. Jennifer Makoatsane was not able to properly wash her elderly father's infected leg and he died as a result of septicaemia. In addition, Ms Makoatsane was not able to honour her cultural traditions regarding funerals as there was insufficient water to invite guests to the house to observe the burial ceremony. And Vusimuzi Paki (the only male applicant in the *Mazibuko* case) recounted the tragedy of

how one of the backyard shacks on his property burnt to the ground, killing two small children, because he and his neighbours did not have sufficient water credit to put out the fire – the children were left in the shack overnight while their single mother went to work.¹⁰¹ Further empirical research is required to delve into the extent of imposition and the impact of prepayment water meters on households.¹⁰²

To add insult to injury, at the same time as municipalities are imposing harsh credit control measures on low-income residents, there appears to be a trend to be more lenient in respect of businesses and especially government institutions that fail to pay their municipal accounts.¹⁰³ Investigations of the source of municipal debt have revealed that a major portion of debt owed to municipalities for municipal services derives from non-payment by government departments, yet (understandably given their public function) these are rarely disconnected.¹⁰⁴

Fifth, the quantitative connection figures do not factor in the question of whether the amount of basic water provided through the FBW allocations reaches the intended beneficiaries or is sufficient to meet their needs. This fault line has two dimensions – the low level of registration by formally qualifying households for the FBW (and other) benefits via the municipal indigency register; and the sufficiency of the FBW allocation itself, which is allocated per stand (which might have a number of households living on it with a main household and backyard shacks etc.) rather than per household or individual.

Regarding the issue of uptake of FBW, almost all municipalities target Free Basic Services (including FBW) through the municipal indigency policy.¹⁰⁵ However, there are endemic problems related to municipal indigency policies, which serve to exclude the most vulnerable and poor households from any potential benefits, including FBW. Chief among these problems are an ad hoc definition of poverty for the purposes of qualifying for benefits. For example, 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, and still others use seemingly random income thresholds.¹⁰⁶ The process around registering for benefits is typically very onerous, requir-

ing numerous documents, and is perceived by potential recipients as stigmatising. The most vulnerable societal groupings, including women, child-headed households and the unemployed, are often not aware of the policy or do not register for fear of attracting adverse official attention.¹⁰⁷ The net result is that registration for municipal indigency benefits, including FBW, is relatively low across the country, raising questions about whether indigency policies, with their invariably complex administration and registration systems, are effective means of allocating crucial benefits to households or whether alternative means of assistance should be investigated.

Finally on the FBW point, there are questions about whether the amount of water provided is sufficient to meet basic needs. According to the FBW national policy, as set out in the FBW Implementation Strategy, the target FBW amount is 6000 litres (six kilolitres) per household per month, which converts to 25 litres per person per day in a household of eight persons. However, as noted above, while the policy refers to ‘households’, the allocation is actually per stand, meaning that it sometimes has to be shared by multiple households and individuals. As raised in the *Mazibuko* case, the current formulation is problematic in multi-dwelling contexts such as township areas with backyard shacks, where many more than eight people have to share one FBW allocation. In the case of Lindiwe Mazibuko, twenty people had to share the initial six kilolitre monthly allocation, meaning each person could only use approximately ten litres of water per day in a context where one toilet flush consumes thirteen litres.

Beyond this issue, even if calculated as an individual allocation, international experts, including the CESCR,¹⁰⁸ as well as DWA itself (while DWAF),¹⁰⁹ suggest that this amount is insufficient and have indicated that 50 litres per person per day is the minimum amount of water required to sustain a healthy and dignified life. In its 2003 policy document entitled ‘Strategic Framework for Water Services: Water is life, sanitation is dignity’, DWAF highlighted that:

In time, the definition of what constitutes a basic water service will be revised by national government ... Where sustainable, water services

authorities should give consideration to increasing the basic quantity of water provided free of charge (25 litres per person per day), aiming for the free provision of at least 50 litres per person per day to poor households... The existing norms and standards will be revised and updated to be consistent with the policies in this Strategic Framework.¹¹⁰

Yet, while the policy recommends that municipalities move away from this very minimal amount of water towards a higher allocation as soon as possible, all national funding is still based on achieving only the minimal six kilolitre amount and there has been no revision of the applicable norms and standards to signal the need to move to a higher FBW amount. Some of the bigger metropolitan municipalities have raised the amount of available FBW – e.g. in Cape Town, indigent households qualify for ten kilolitres per household per month and in Johannesburg, following the *Mazibuko* case, indigent households can qualify for up to fifteen kilolitres per household per month. But in the vast majority of municipalities (85 per cent), the FBW amount remains six kilolitres (and some municipalities still have not adopted FBW policies at all).¹¹¹

Physical and economic accessibility, and the influence of gender and disability

Physical access to water services facilities remains a problem both in rural and informal settlement areas where, notwithstanding regulations governing minimum distances from a piped water source, people often have to walk long distances to fetch water (whether from a river or communal tap). Inadequate physical access has both a gender and disability dimension, as having to walk distances to water points exposes women and disabled people to safety concerns, making them vulnerable to attack by wild animals and people. More generally, wherever there is inadequate access to water services, this has a disproportionately negative effect on women. This is because there is a gendered division of labour within most households, meaning that women are 'often singly responsible for child-care, cleaning the house, fetching and heating water, washing and ironing, [grocery] shop-

ping, collecting firewood, cooking and washing dishes'.¹¹² This means that where there is inadequate physical access to water services, women (and girl-children) bear the brunt of walking to and collecting water, compromising their ability to secure paid work and exacerbating their dependence on men within the household.¹¹³ Disabled persons also suffer when taps are not conveniently located or are in other ways physically inaccessible to disabled persons.

Regarding economic access, there are baseline standards that municipalities are meant to comply with regarding the setting of water tariffs, e.g., that there must be at least three rising blocks. However, as autonomous spheres of government, municipalities enjoy a relatively wide discretion to establish water tariffs and the evidence is that 'municipalities tend to use full cost recovery as the overriding yardstick in setting tariffs',¹¹⁴ often functioning as corporatised and/or commercialised water services providers even if not actually privatised. As a consequence, a patchwork of different water tariffs exists across South Africa's municipalities, and not all tariffs are as optimally effective or pro-poor as they could be, resulting in water tariffs remaining too expensive for low-income households (beyond the FBW allocation). In this respect, a 2008 study found that, beyond physically restricting the amount of water poor people can access by means such as prepayment water meters, the way that municipalities achieve full cost recovery is often through setting a high price for the second tariff block (i.e. the block after the zero-rated FBW block) and relatively high prices for the blocks thereafter.¹¹⁵

For example, in 2000 the City of Johannesburg commercialised its water services, establishing a fully state-owned but corporate entity called Johannesburg Water (Pty) Ltd. And, in 2003, the Johannesburg Water (Pty) Ltd. adopted a relatively steep-rising tariff structure for water such that:

... the second tier of the [rising] block tariff (7–10kl/household/month) was raised by 32 per cent, while the third tier (11–15kl/household/month) was lowered by two per cent (during a period of roughly ten per cent inflation, which was the amount by which higher tier tariffs

increased). The dramatic increase in their per-unit charges in the second block meant that there was no meaningful difference to their average monthly bills even after the first free 6000 litres.¹¹⁶

This practice, of having sharply rising blocks in the lower levels of per unit consumption, contradicts the optimal pricing structure for achieving the three objectives of social equity, revenue and water conservation, which is a structure in which there are relatively gradual price increases per unit of consumption at lower consumption levels, with the tariff becoming steeper and steeper at higher consumption levels, until the final block places a very high price on luxury consumption (which serves the twin purposes of promoting water conservation and securing revenue from luxury consumers in order to cross-subsidise the FBW allocation and cheaper priced blocks).¹¹⁷

Thus, while there is scant research on the actual cost burden of water services to low-income households, it is clear that, in the absence of standardised tariff structures, the cost of water services in poor households can differ substantially (and unfairly) depending on which municipality you live in. Typically, low-income households in richer metropolitan municipalities fare the best. For example, an indigent household that uses twelve kilolitres of water per month will get this for free in Cape Town where the FBW policy in effect provides thirteen kilolitres of water. But an indigent household using the same amount of water in Msunduzi Municipality will pay in the region of R54.24 per month.¹¹⁸

As alluded to above, where households cannot afford water services and difficult trade-offs must be made, it is usually women who 'find ways of making the household cope' by going without other essentials such as food or facing the potential of violent household conflict when they fail to secure daily resources, including water.¹¹⁹

Although further research into prices, costs and affordability of domestic water is necessary, it is evident that the structure of water distribution and consumption in South Africa – with agriculture and industry using the bulk of water and often receiving preferential tariffs – together with the fact that water services make up one

of the main sources of revenue for municipalities (along with electricity services), places pressure on municipalities to view water as a revenue stream rather than a public service.

Exacerbating this perverse schema is the fragmentation of the functions and budgets between municipal and provincial government. While one of the major sources of illness in South Africa (as in any developing country) relates to waterborne disease and inadequate access to water, which could be addressed relatively cheaply in health care terms by ensuring adequate access to water, health care is a provincial concern, whereas water services (including sanitation) are a municipal concern. This means that, whereas health departments have the incentive to spend more on water services, they do not have the power to do so, and whereas municipalities have the power to do so, they do not have the incentive to spend more than they have to on water services (in fact they have quite a disincentive as they have to ensure cost recovery and balanced books). Thus the horizontal fragmentation of functions creates a disjuncture between inputs and outputs in developmental terms, suggesting the need to better integrate health care and water services-related functions across the various government spheres and departments.

Water quality, acceptability, participation and information

At various points since around 2008, fears have been publicly expressed about a looming water quality crisis. There have been some outbreaks of cholera and deaths of babies due to waterborne diseases but, for the most part, the quality of South Africa's piped water remains good, although there are some concerns that the Blue Drop certification process (in terms of which municipalities are given certificates according to levels of water quality, including Red Drop status for non-complying municipalities) tends to 'do little more than provide financial reward to those municipalities that are already performing well, quell the fears of rich water consumers, and embarrass those municipalities that are not complying with water quality standards, which could be for a myriad structural reasons'.¹²⁰

In addition, there are inconsistencies around which municipal institutions and departments monitor water quality standards and how regularly. Better-resourced municipalities have their own water quality laboratories with skilled technicians, while other municipalities out-source this function and use private laboratories and consultants to test water quality. There are also differences in the frequency of water quality testing.¹²¹ It is also worth noting that in some countries water quality is managed by health department structures rather than water. In South Africa, there has been a rather unsatisfactory division of responsibility for water quality between health and water departments, evidenced in the fact that whenever there is a cholera or waterborne disease scare, the advice from clinics and hospitals is to boil or wash food and to regularly wash hands, but this is not always possible in contexts of insufficient access to water.

As referenced in the FHR position paper on sanitation by J Dugard, additional problems exist in relation to waterborne sanitation, in that almost all waste water treatment infrastructure, especially municipal treatment plans, have been poorly maintained and are in 'urgent need of maintenance and replacement', with many verging on being dysfunctional.¹²² 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 certification¹²³ from DWA, 317 waste water treatment plants required urgent attention, with a further 143 being categorised as having a high risk of failure.¹²⁴

Arguably of more concern than water quality per se are the more qualitative dimensions of participation and information, as well as the acceptability of water service options provided especially to poor households, which are all adversely impacted by the Millennium Development Goal influenced target-chasing approach of tracking how many households have been connected to water services.¹²⁵ Regarding the acceptability of water services, it is clear from the *Mazibuko* case that poor people are often not consulted about water services options. Indeed, in *Mazibuko*, households were initially not given any choice when the City of Johannesburg took the decision to change their water supply from a deemed consumption system (where households were charged a flat-rate

for water) to a prepayment water meter system. It was only after the commencement of litigation that the City began to provide the alternative option of a yard tap for those households that did not 'choose' a prepayment meter. Although largely glossed over by the Constitutional Court, this autocratic and non-consultative way of operating was highly criticised by the High Court judge, Moroa Tsoka, who lambasted the City of Johannesburg for its failure to consult communities over the decision to install prepayment water meters:

The respondents [the City of Johannesburg, Johannesburg Water and DWAF] recognised that the community should broadly be consulted before the introduction of the prepayment water meters... Despite this awareness, the first applicant [Lindiwe Mazibuko] was given wrong information regarding prepayment meters ... [and there was] no consultation with her. No proper notice was given to her. She was not advised of her rights to object to the introduction as well as the remedies available should she wish to challenge the introduction. She was also not informed that she has the right to request reasons for the decision and that she has a right to either review or appeal the decision.¹²⁶

From the contents of the various notices sent to the residents of Phiri, including the applicants, it is obvious that the prepayment metering systems were approved for and not by the residents of Phiri. The terms of the notices do convey the prepayment metering systems as a *fait accompli*. The purpose of the notices was merely to sell an accomplished fact to the residents of Phiri. It is on this basis that I understand Mr Trengove [counsel for the applicants]'s argument that the actions of the respondents were not consultative but a publicity drive for the prepayment metering systems.¹²⁷

Although an under-researched issue, anecdotal evidence suggests that, in general terms, there is insufficient participation around water services, with municipalities adopting overly technocratic and alienating approaches



Graffiti on a Johannesburg Water (JW) Operation Gcin'amanzi water conservation message in Phiri, Soweto.

to water provision, such as the imposition of water management devices in poor communities. In addition, where households have prepayment water meters, this diminishes their participation in public administration, as all processes are internalised within the home. These kinds of top-down approaches undermine trust and sentiments of 'citizenship' among residents, and give rise to escalating frustration, which has begun to spill out on the streets in the form of protest, as witnessed across the country over the past few years, including in Maqheleng.

Regarding information in the form of education, especially about water conservation, this is usually ad hoc and almost always targeted at poor households rather than the rich households that consume the highest amounts of water and, arguably, should be educated about conserving water. In poor communities, especially those with prepayment water meters and the like, there is commonly quite a lot of information available – including large billboards – about saving water. Understandably, given the absence of such information in rich areas, poor households find this a cynical kind of education, as illustrated by graffiti on a Johannesburg Water (JW) Operation Gcin'amanzi water conservation message in Phiri, Soweto.¹²⁸

Without the deliberate involvement of communities in the planning, provision and distribution of water services, the advances made through providing taps and

connecting households to water grids will continue to be undermined.

Underlying determinant of the systemic problems¹²⁹

A clear problem with the water services sector in South Africa is the ineffective regulation, which means that there is no watchdog to ensure compliance with the minimum standards set out in the laws and policies outlined earlier, let alone to push public authorities to progressively realise the right of access to water, to bring more water closer to more households in increasingly participatory ways. The failure of regulation is evident in the vastly differing approaches and adherence by municipalities around the country to minimum standards such as minimum FBW allocations, requirements regarding maximum distance from a piped water source, policies on disconnection, and the like.

It is tempting to expect that with all the outlined laws and policies in place the debate by now would have shifted to one about how best to progressively realise access to water – yet, despite these being legislated, South Africa has not yet achieved compliance with the basic minimum standards, clearly signalling a serious regulation failure.

Indeed, there are two striking facts regarding water regulation. The first is that, notwithstanding having a national electricity regulator since 2003 (the National Energy Regulator of South Africa, NERSA), there was no national water regulator in South Africa until 2010. The second is that, despite abundant evidence of municipal non-compliance with minimum standards, there has been no in-depth evaluation of water services regulation since the establishment of DWA as national water services regulator.¹³⁰ Such an evaluation is critical to understanding the complexities and obstacles to effective water regulation, as well as to re-ignite debates around whether South Africa should have an independent water regulator.

The issue of national regulation of water services is all the more pressing given the generalised failures of governance and delivery at the municipal level across the country. As set out also in the FHR position paper on sanitation by J Dugard, local government, which is responsible for the delivery of basic services, including water, suffers from a myriad problems that impact negatively on the delivery of water services. These include a 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.¹³¹ 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.¹³²

These problems have also led to a chronic under-spending by municipalities on water-related budgets – for example, collectively municipalities were only able to spend approximately 30 per cent of their 2011/2012 capital budget from National Treasury as at 31 December 2011.¹³³ 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 water services (along with other municipal services such as sanitation).¹³⁴ 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 un-filled), 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 under-performing municipalities under provincial or national administration.

Conclusion

South Africa has made great advances in connecting a large number of previously disadvantaged households to the water grid. However, rising protest over inadequate water services, along with litigation such as the *Mazibuko* case, have highlighted systemic problems. On the whole, the problems outlined in this paper do not relate to policy or legislation but rather to non-compliance with such, in part due to the failure to regulate water services. This suggests an urgent need to examine the performance of national regulation and the reasons for any regulation failures, as well as to evaluate the decentralised model of water services delivery. National government must hold municipalities more accountable, but the full effects of placing under-performing municipalities under administration, as sometimes happens, need to be explored.

Beyond this, there is a need for human rights-oriented research to evaluate the qualitative needs and concerns of households receiving basic levels of piped water or not receiving piped water at all. In particular, the gender dimensions of water supply and access need to be better understood, along with the nature of delivery, including levels of participation and consultation, and the amount of household income poor people have to spend on water services to ensure adequate supply. If South Africa hopes to move away from basic targets for connecting households to taps, to progressively realise adequate and equitable access much more must be done to understand and plan around people’s lived realities

and the role that water plays or could play in improving living conditions and livelihoods.

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

- Whether indigency registers, with all their complexities and high administrative costs on the one hand and the relatively low registration on the other hand, are the best way to assist poor households with their living costs or whether, for example, direct cash transfers might not be a better approach.

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

- Evaluating qualitatively whether water services are meeting needs and human rights obligations, especially in poor households, and taking into account the gender dimension, including the cost to households of accessing water, as well as the impact of any water restriction devices such as prepayment water meters.
- Examining whether each municipality has sufficient funding, and that it's properly allocated and spent, for the water-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 water.
- The role and efficacy of monitoring and regulation by DWA (particularly in its role as National Water Services Regulator), CoGTA and DPME.
- Ways of improving community participation in water-related projects, including budgeting.

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<i>City of Johannesburg and Others v Mazibuko and Others</i>	2010 (4) SA 1 (CC)
<i>City of Johannesburg and Others v Mazibuko and Others</i>	(2008) 4 All SA 471 (Mazibuko South Gauteng High Court Decision)
<i>Minister of Health and Others v Treatment Action Campaign and Others (No 2)</i>	2002 (5) SA721 (CC) (<i>Treatment Action Campaign</i>)
<i>Mtungwa and Others v Ekurhuleni Municipality</i>	unreported South Gauteng High Court case no: 34426/11 (6 December 2011) (<i>Mtungwa</i>): http://www.seri-sa.org/index.php/litigation-9/cases/12-litigation/cases/92-mtungwa-and-others-v-ekurhuleni-metropolitan-municipality-langaville

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<i>Residents of Bon Vista Mansions v Southern Metropolitan Local Council</i>	2002 (6) BCLR 625 (W) (<i>Bon Vista Mansions</i>)

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	FLISP	Finance Linked Individual Subsidy Programme
CRC	Convention on the Rights of the Child	FXI	Freedom of Expression Institute
CSIR	Council for Scientific and Industrial Research	GCEO	group chief executive officer
CSSR	Centre for Social Science Research	GCIS	Government Communication and Information System
DA	Democratic Alliance	GDE	Gauteng Department of Education
DBE	National Department of Basic Education	GEC	General Education Certificate
DHS	Department of Human Settlements (previously National Department of Housing or NDoH)	GG	Government Gazette
DMA	Disaster Management Act 57 of 2002	HDA	Housing Development Agency
DMMA	Digital Media and Marketing Association	HOD	head of department
DORA	Division of Revenue Act (renewed annually)	HSDG	Human Settlements Development Grant
DPLG	Department of Provincial and Local Government (now CoGTA)	IBA	Independent Broadcasting Authority
DPME	Department of Planning, Monitoring and Evaluation	ICASA	Independent Communications Authority of South Africa
DWA	Department of Water Affairs (previously DWAF)	ICCPR	International Covenant on Civil and Political Rights
DWAF	Department of Water Affairs and Forestry (now DWA)	ICERD	International Convention on the Elimination of all forms of Racial Discrimination
ECA	Electronic Communications Act	ICESCR	International Covenant on Economic, Social and Cultural Rights
ECDoE	Eastern Cape Department of Education	ICTs	information and communications technologies
ECS	electronic communications service	IDP	Integrated Development Plan
ECT	electronic communications and transactions	IEC	Independent Electoral Commission
EEA	Employment of Educators Act 76 of 1998	IP	Internet protocol
EFF	Economic Freedom Fighters	IPTV	Internet protocol television
EHP	Emergency Housing Programme	IRDP	Integrated Residential Development Programme
ES	equitable share	ISP	Internet service provider
ESTA	Extension of Security of Tenure Act 62 of 1997	ISPA	Internet Service Providers' Association
FBSan	free basic sanitation	LDoE	Limpopo Department of Education
FBW	free basic water	LRC	Legal Resources Centre
FICA	Financial Intelligence Centre Act 38 of 2001	LSM	Living Standards Measurement
FHR	Foundation for Human Rights	LTSM	Learning and Teaching Support Materials
		MAT	Media Appeals Tribunal
		MDDA	Media Development and Diversity Agency
		MEC	Member of the Executive Council (provincial 'cabinet minister')
		MIG	Municipal Infrastructure Grant

NDoH	National Department of Housing (now called Department of Human Settlements or DHS)	RICA	Regulation of Interception of Communications and Provision of Communications Related Information Act
NDP	National Development Plan		
NERSA	National Energy Regulator of South Africa	SA Saarf	South Africa South African Advertising Research Foundation
NGO	non-governmental organisation		
NHFC	National Housing Finance Corporation	SABC	South African Broadcasting Corporation
NHSDB	National Housing Subsidy Database	SACMEQ	Southern and Eastern Africa Consortium for Monitoring Educational Quality
NHSS	National Housing Subsidy Scheme		
NIA	National Intelligence Agency		
NPC	National Planning Commission	SADF	South African Defence Force
NSC	National Senior Certificate	SADTU	South African Democratic Teachers' Union
Nurcha	National Urban Reconstruction and Housing Agency	SAHRC	South African Human Rights Commission
NUSP	National Upgrading Support Programme	SAICE	South African Institution of Civil Engineering
NWSRS	National Water Services Regulation Strategy	SANDU	South African National Defence Union
OBE	Outcomes Based Education	Sanef	South African National Editors' Forum
OECD	Organisation for Economic Co-operation and Development	SAPS	South African Police Service
PAJA	Promotion of Administrative Justice Act 3 of 2000	SASA	South African Schools Act 84 of 1996
PCSA	Press Council of South Africa	SATRA	South African Telecommunications Regulatory Authority
PCSA	Press Council of South Africa	SCA	Supreme Court of Appeal
PDMSA	Print and Digital Media South Africa	SCOPA	Standing Committee on Public Accounts
PDMTTT	Print and Digital Media Transformation Task Team	SERI	Socio-Economic Rights Institute of South Africa
PED	Provincial Education Department		
PIE	Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998	SERs	social and economic rights
		SGB	school governing body
		SHF	Social Housing Foundation
PMSA	Print Media South Africa	SHI	Social Housing Institution
POCDATARA	Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004	SHP	Social Housing Programme
		SHRA	Social Housing Regulatory Authority
		SIU	Special Investigating Unit
R2K	Right to Know Campaign	SSA	State Security Agency
RDP	Reconstruction and Development Programme	TIMSS	Trends in International Mathematics and Science Study
RGA	Regulation of Gatherings Act 205 of 1993	TRU	temporary residential unit
		TV	television
RHIG	Rural Household Infrastructure Grant	UISP	Upgrading of Informal Settlements Programme
RHLF	Rural Housing Loan Fund		

UKZN	University of KwaZulu-Natal
UN	United Nations
UPM	Unemployed Peoples' Movement
UPR	Universal Periodic Review
USAASA	Universal Service and Access Agency of South Africa
USDG	Urban Settlements Development Grant
VIP	ventilated improved pit latrine
Waspa	Wireless Applications Service Providers' Association
WSA	water services authority
WSDP	water services development plan
WSP	water services provider

Notes

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7. The right to water was also viewed as linked to the right to enjoy the highest attainable standard of health (Article 12 of the ICESCR) and the right to adequate housing and adequate food (Article 11 of the ICESCR).
8. Article 24(2)(c) of the Convention on the Rights of the Child (CRC, 1989) obliges states parties to take appropriate measures to ensure that children receive the 'provision of adequate nutritious foods and clean drinking-water ...'.
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, electricity and water supply...'
10. Article 28 of the International Convention on the Rights of Persons with Disabilities (2007) compels states parties to ensure equal access by persons with disabilities to clean water services.
11. Article 29 of the Geneva Convention III of 1949 stipulates 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
12. United Nations CESCR General Comment 15 on the right to water (2002), paras. 1–2: daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/402/29/PDF/G0340229.pdf.
13. United Nations CESCR General Comment 15 on the right to water (2002), para. 12(a): daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/402/29/PDF/G0340229.pdf
14. G Howard and J Bartram 'Domestic Water Quantity, Service Level and Health' (2003) World Health Organisation, i: http://www.who.int/water_sanitation_health/diseases/WSHo302.pdf
15. The twenty litre amount is acknowledged by the author probably to be insufficient, particularly for waterborne sanitation, which might require up to 75 litres per person per day.
16. P Gleick 'Basic Water Requirements for Human Activities: Meeting Basic Needs' (1996) 21 *Water International* 83, 88: http://www.pacinst.org/wp-content/uploads/2012/10/basic_water_requirements-1996.pdf. Excluded from this calculation is the amount of water needed to grow food, which Gleick stresses is critical but is often socialised, i.e. not used on an individual basis.

17. United Nations CESCR General Comment 15 on the right to water (2002) para. 12(b): daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/402/29/PDF/G0340229.pdf.
18. United Nations CESCR General Comment 15 on the right to water (2002), para. 12(c): daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/402/29/PDF/G0340229.pdf.
19. For further information on the mandate see: <http://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/Overview.aspx>.
20. United Nations General Resolution GA/RES/64/292 on the human right to water and sanitation (3 August 2010): <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/No9/479/35/PDF/No947935.pdf>.
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23. United Nations CESCR General Comment 19 on the right to social security (2008) paras 18 and 59(a): <http://www.refworld.org/docid/47b17b5b39c.html>.
24. United Nations CESCR General Comment 20 on non-discrimination in economic, social and cultural rights (2009) paras 8 and 25: http://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): <http://www.unhcr.ch/tbs/doc.nsf/o/94bdbaf59b43a424c12563edo052b664>.
26. United Nations CESCR General Comment 15 on the right to water (2002) para. 37: daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/402/29/PDF/G0340229.pdf
27. In October 2012, the South African Government publicly announced it was going to ratify the ICESCR, which it did, in January 2015, taking force on 12 April 2015.
28. *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para. 35.
29. 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) (*Grootboom*) paras. 31–33; and *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA721 (CC) (*Treatment Action Campaign*) paras. 26–29.
30. Communication nos 25/89, 47/90, 56/91, 100/93 (ACHPR 1995) para. 47 (English version).
31. Communication no 296/2005 (ACHPR 2009).
32. In September 2013, the Minister of Water Affairs announced that there were plans to merge the Water Services Act and the National Water Act. The proposal is under review and there is much debate about this proposed move. See, for example, the editorial 'New water law won't help much' (5 September 2013), *Business Day*. There have been indications that the review will be concluded in early 2014.
33. Section 1(iii) of the Water Services Act.
34. These legislated minimum amounts coincide precisely with the national Free Basic Water policy (see later discussion), which was announced around the time of the promulgation of the Compulsory National Standards and subsequently concretised in the Free Basic Water Implementation Strategy of August 2002, effectively meaning that there is a legal obligation to provide (to poor households) at least six kilolitres of water each month for free.
35. Most municipalities provide the first block (whether six kilolitres per household per month or more) of water to indigent households for free, with this becoming the Free Basic Water policy and/or part of the municipal indigency policy packing (see later discussion of Free Basic Water policy).
36. Section 73(1)(c) of the Municipal Systems Act.
37. For an analysis of the evolution of water-related policy see, for example, C de Coning and T Sherwill 'An Assessment of the Water Policy Process in South Africa (1994 to 2003)', Water Research Commission Report No. TT232/04 (June 2004): <http://www.wrc.org.za/Other%20Documents/Software/prepublication%20TT232-04%20final.pdf>.
38. DWAF 'White Paper on Water Supply and Sanitation Policy' (November 1994): <http://www.dwaf.gov.za/Documents/Policies/WSSP.pdf>.
39. DWAF 'White Paper on a National Water Policy for South Africa (April 1997): www.dwaf.gov.za/Documents/Policies/nwppw.pdf.

40. DWAF 'White Paper on Water Services' (October 2002): <http://www.dwaf.gov.za/docs/Other/WaterServices/draft%20water%20services%20white%20paper%206.1.pdf>.
41. DWAF 'Free Basic Water Implementation Strategy' (August 2002): <http://www.dwaf.gov.za/Documents/FBW/FBWImplementStrategyAug2002.pdf>.
42. DPLG 'National Framework for a Municipal Indigent Policy' (2005): www.cogta.gov.za/index.php/documents/doc_download/739-municipal-indigent-policy-national-framework-book1.html (accessed on 30 October 2013).
43. DPLG 'Guidelines for the Implementation of the National Indigent Policy by Municipalities' (2005): www.cogta.gov.za/cgta/index.php/documents/doc_download/740-municipal-indigent-policy-national-framework-book-2.html (accessed on 30 October 2013).
44. 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.
45. There are 169 WSAs in South Africa including metropolitan, district and local municipalities, as well as water boards and municipal companies.
46. 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 (see discussion on accessibility in section 3 for a critique of the cost-recovery oriented model of corporatised water service provision). 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 the same fair and just services as a public entity. For a discussion of the corporatised/cost-recovery model of water services, see the section on water tariffs below.
47. In *Nkonkobe Municipality v Water Services South Africa (Pty) Ltd. and others* unreported Eastern Cape Division High Court case No. 177/2001 (14 December 2001), the municipality brought an application to rescind a private water services management contract because it could not afford the high management fees. The Court nullified the contract, albeit on the basis that the municipality had not complied with the public participation requirements. See M Langford, 'Privatisation and the Right to Water' in M Langford and A Russell (eds) *The Right to Water and Sanitation in Theory and Practice: Drawing from a Deeper Well?* (forthcoming 2014).
48. M Langford et al 'Water' in S Woolman et al (eds) *Constitutional Law of South Africa Volume 4 2nd edition, revision service 5* (2013) 56B-55.
49. DWA 'National Water Services Regulation Strategy' (January 2010) 89: http://www.dwa.gov.za/dir_ws/dwqr/Default.asp?Pageid=6&SearchString=Strategy Document.
50. K Tissington 'Basic Sanitation in South Africa: A Guide to Legislation, Policy and Practice', Socio-Economic Rights Institute of South Africa (SERI) Resource Guide (July 2011) 59: http://www.seri-sa.org/images/stories/SERI_Guide_to_Basic_Sanitation_Jul11.pdf.
51. M Langford et al 'Water' in S Woolman et al (eds) *Constitutional Law of South Africa Volume 4 2nd edition, revision service 5* (2013) 56B-44.
52. Section 139(7) of the Constitution provides that if a provincial government is unable to or chooses not to intervene to rectify local government problems then national government has the power to intervene.
53. The MIG was first introduced in the 2005/2006 financial year, and each year the Division of Revenue Act (DORA) sets out the allocation of MIG funds from the National Treasury per municipality. For the formula used to calculate the MIG, see Still et al (2009) 'Basic Sanitation Services in South Africa – Learning from the past, planning for the future', Water Research Commission Research Report, p. 110: <http://www.wrc.org.za/Pages/DisplayItem.aspx?ItemID=8632&FromURL=%2FPages%2FAI-IKH.aspx%3F>.
54. For the formula used to allocate National Treasury ES funds to municipalities, see *ibid*, p. 112. (Still et al).
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. 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: http://www.seri-sa.org/images/stories/SERI_Guide_to_Basic_Sanitation_Jul11.pdf.

57. 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.
58. 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.
59. *City of Johannesburg and Others v Mazibuko and Others* 2010 (4) SA 1 (CC) (*Mazibuko*).
60. *City of Johannesburg and Others v Mazibuko and Others* (2008) 4 All SA 471 (*Mazibuko* South Gauteng High Court decision).
61. The Supreme Court of Appeal suspended the order of invalidity, giving the City of Johannesburg two years in which to remedy the legal defects of prepayment water meters.
62. The *Mazibuko* judgment has been heavily criticised for being overly-deferential and normatively thin, as well as for its characterisation that prepayment water meters do not violate entrenched procedural protections. See, for example, S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 466–480.
63. *City of Johannesburg and Others v Mazibuko and Others* 2010 (4) SA 1 (CC) (*Mazibuko*) paras 118–124.
64. See, for example, J Dugard 'Urban Basic Services: Rights, Reality and Resistance' in M Langford et al (eds) *Socio-Economic Rights in South Africa: Symbols or Substance?* (2013); and, J Dugard and M Langford 'Art or Science: Synthesising Lessons from Public Interest Litigation and the Dangers of Legal Determinism' (2011) 27(3) *South African Journal on Human Rights* 39–64.
65. *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) (*Grootboom*).
66. *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA721 (CC) (*Treatment Action Campaign*).
67. M Langford et al 'Water' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa Volume 4 2nd edition, revision service 5* (2013) 56B-i, 56B-24, 56B-25.
68. *City of Johannesburg and Others v Mazibuko and Others* 2010 (4) SA 1 (CC) para 50.
69. See, for example, D Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007).
70. Langford et al 'Water' in S Woolman et al (eds) *Constitutional Law of South Africa Volume 4 2nd edition, revision service 5* (2013) 56B-25.
71. Langford et al 'Water' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa Volume 4 2nd edition, revision service 5* (2013) 56B-29.
72. *City of Johannesburg and Others v Mazibuko and Others* 2010 (4) SA 1 (CC) para 9.
73. *City of Johannesburg and Others v Mazibuko and Others* 2010 (4) SA 1 (CC) paras 90–97.
74. Langford et al 'Water' in S Woolman et al (eds) *Constitutional Law of South Africa Volume 4 2nd edition, revision service 5* (2013) 56B-60.
75. *Nokotyana and Others v Ekurhuleni Metropolitan Municipality*, unreported South Gauteng High Court case no: o8/17815 (24 March 2009): <http://www.saflii.org/za/cases/ZAGPJHC/2009/14.html>.
76. *Mtungwa and Others v Ekurhuleni Municipality*, unreported South Gauteng High Court case no: 34426/11 (6 December 2011) (*Mtungwa*): <http://www.seri-sa.org/index.php/litigation-9/cases/12-litigation/cases/92-mtungwa-and-others-v-ekurhuleni-metropolitan-municipality-langaville> (accessed on 6 November 2013).
77. *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 (6) BCLR 625 (W) (*Bon Vista Mansions*).
78. *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 (6) BCLR 625 (W) (*Bon Vista Mansions*) para 20.
79. See, for example, M Muller et al 'Water Security in South Africa' (2009) Development Bank of Southern Africa Working Paper Series No. 12: www.dbsa.org/EN/About-Us/Publications/Documents/DPD%20No12.%20Water%20Security%20in%20South%20Africa.pdf.
80. See the 2006 United Nations Human Development Report, entitled 'Beyond Scarcity: Power, Poverty and the Global Water Crisis': <http://hdr.undp.org/en/reports/global/hdr2006/>.
81. M Muller et al 'Water Security in South Africa' (2009) Development Bank of Southern Africa Working Paper Series No. 12, 5: www.dbsa.org/EN/About-Us/Publication

- s/Documents/DPD%20No12.%20Water%20security%20in%20South%20Africa.pdf.
82. This is not to suggest that it is not important to ensure sufficient water to the agricultural sector, but rather to indicate that discussions about water efficiency and savings need also to engage with bulk water users such as agriculture.
 83. Statistics South Africa 'Census 2011: Methodology and Highlights of Key Results' (2011) 12: http://www.statssa.gov.za/Census2011/Products/Census_2011_Methodology_and_Highlights_of_key_results.pdf.
 84. J Dugard, M Langford and E Anderson 'Determining Progress on Access to Water and Sanitation: Law and Political Economy in South Africa' in M Langford and A Russell (eds) *The Right to Water and Sanitation in Theory and Practice: Drawing from a Deeper Well?* (forthcoming 2014) 21.
 85. See documentation related to *Mtungwa and Others v Ekurhuleni Municipality* unreported South Gauteng High Court case no: 34426/11 (6 December 2011) (*Mtungwa*): <http://www.seri-sa.org/index.php/litigation-9/cases/12-litigation/cases/92-mtungwa-and-others-v-ekurhuleni-metropolitan-municipality-langaville>.
 86. Statistics South Africa 'Census 2011: Methodology and Highlights of Key Results' (2011) 12: http://www.statssa.gov.za/Census2011/Products/Census_2011_Methodology_and_Highlights_of_key_results.pdf.
 87. 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.
 88. K Tissington et al 'Submission on Access to Water and Sanitation in South Africa' (9 February 2009) Centre for Applied Legal Studies (CALS) 6.
 89. L Smith 'The Murky Waters of Second Wave Neoliberalism: Corporatisation as a Service Delivery Model in Cape Town' in D McDonald and G Ruiters (eds) *The Age of Commodity: Water Privatization in Southern Africa* (2005) 168, 180.
 90. A Loftus '“Free Water” as Commodity: The Paradox of Durban's Water Service Transformations' in D McDonald and G Ruiters (eds) *The Age of Commodity: Water Privatization in Southern Africa* (2005) 189, 194.
 91. D McDonald 'The Bell Tolls for Thee: Cost Recovery, Cut-offs and the Affordability of Municipal Services in South Africa' in D McDonald and J Pape (eds) *Cost Recovery and the Crisis of Service Delivery in South Africa* (2002) 170.
 92. M Muller 'Turning on the Taps' *Mail & Guardian* (24 June 2004).
 93. Coalition Against Water Privatisation 'The Struggle Against Silent Disconnections: Prepaid Meters and the Struggle for Life in Phiri, Soweto' (July 2004): http://apf.org.za/IMG/pdf/phiri_report.pdf (accessed on 7 November 2013).
 94. J Dugard and N Mohlakoana 'More Work for Women: A Rights-Based Analysis of Women's Access to Basic Services in South Africa' (2009) 25(3) *South African Journal on Human Rights* 546, 564.
 95. Public Citizen, Anti Privatisation Forum and Coalition Against Water Privatisation 'Nothing for Mahala: The Forced Installation of Prepaid Water Meters in Stretford, Extension 4, Orange Farm, Johannesburg, South Africa' (2004) 22: http://apf.org.za/IMG/pdf/nothing_for_mahala.pdf.
 96. J Dugard and N Mohlakoana 'More Work for Women: A Rights-Based Analysis of Women's Access to Basic Services in South Africa' (2009) 25(3) *South African Journal on Human Rights* 546, 564–565.
 97. Orange Farm Water Crisis Committee, Anti Privatisation Forum and Coalition Against Water Privatisation 'Destroy the Meter/Enjoy Free Water' (2004) 27: http://apf.org.za/IMG/pdf/orange_farm_prepaid_booklet.pdf.
 98. Public Citizen, Anti Privatisation Forum and Coalition Against Water Privatisation 'Nothing for Mahala: The Forced Installation of Prepaid Water Meters in Stretford, Extension 4, Orange Farm, Johannesburg, South Africa' (2004) 24: http://apf.org.za/IMG/pdf/nothing_for_mahala.pdf.
 99. J Dugard and N Mohlakoana 'More Work for Women: A Rights-Based Analysis of Women's Access to Basic Services in South Africa' (2009) 25(3) *South African Journal on Human Rights* 546, 564–565.
 100. Lindiwe Mazibuko suffered from severe diabetes, which was exacerbated by insufficient access to water. She died at the age of 41, shortly after the *Mazibuko* High Court victory. Her affidavit is on file with the author.

101. J Dugard and N Mohlakoana 'More Work for Women: A Rights-Based Analysis of Women's Access to Basic Services in South Africa' (2009) 25(3) *South African Journal on Human Rights* 546, 565.
102. In 2013 the Water Research Commission published a study on user perceptions and levels of satisfaction regarding water management devices in Cape Town and Ethekwini (L Thompson, T Masiya and P Tsolekile De Wet 'User Perceptions and Levels of Satisfaction of Water Management Devices in Cape Town and Ethekwini' WRC Report No. 2089/1/13 (October 2013)). This study indicates that, although there was insufficient participation regarding the installation of the meters, on the whole households were satisfied with the service. However Cape Town and eThekweni's water management devices operate differently from the kind of prepayment water meters used by the City of Johannesburg and further research is necessary to investigate the different technologies utilised around the country and how these impact households.
103. K Tissington, P Berkowitz and J Dugard 'Submission on Access to Water and Sanitation in South Africa' (9 February 2009) Centre for Applied Legal Studies (CALs) 13–14.
104. J Wicks 'State still to pay Durban's municipal bills' (11 August 2008) *IOL News*: <http://www.iol.co.za/news/south-africa/state-still-to-pay-durban-s-municipal-bills-1.411904>.
105. 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 (Johannesburg and Cape Town included) 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 (CALs), Centre on Housing Rights and Evictions (COHRE) and Norwegian Centre for Human Rights (NCHR) 'Water Services Fault Lines: An Assessment of South Africa's Water and Sanitation Provision across 15 Municipalities' (2008) CALs, COHRE and NCHR: <http://www.wits.ac.za/files/resfd5179ffe9b24ecfa4110e1ee24cbb20.pdf> (accessed on 30 September 2011) 34–40; 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.
106. H Bhorat, M Oosthuizen and C van der Westhuizen 'Estimating a Poverty Line: An Application to Free Basic Municipal Services in South Africa' (2012) 29(1) *Development Southern Africa* 77, 92: <http://www.tandfonline.com/doi/abs/10.1080/0376835X.2012.645643>.
107. 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, 65: http://www.seri-sa.org/images/stories/SERI_Guide_to_Basic_Sanitation_Jul11.pdf.
108. United Nations CESCR General Comment 15 on the right to water (2002), para. 12(a): daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/402/29/PDF/G0340229.pdf (accessed on 25 October 2013); P Gleick 'Basic Water Requirements for Human Activities: Meeting Basic Needs' (1996) 21 *Water International* 83, 88: http://www.pacinst.org/wp-content/uploads/2012/10/basic_water_requirements-1996.pdf (accessed on 25 October 2013); and G Howard and J Bartram 'Domestic Water Quantity, Service Level and Health' (2003) World Health Organisation, i: http://www.who.int/water_sanitation_health/diseases/WSHo302.pdf.
109. DWAF 'Strategic Framework for Water Services: Water is life, sanitation is dignity' (September 2003): <http://www.info.gov.za/view/DownloadFileAction?id=70217>.
110. DWAF 'Strategic Framework for Water Services: Water is life, sanitation is dignity' (September 2003) 27, 29, 49: <http://www.info.gov.za/view/DownloadFileAction?id=70217>.
111. 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): https://www.academia.edu/13483940/Targeting_the_Poor_An_Analysis_of_Basic_Services_FBS_and_Municipal_Indigent_Policies_in_South_Africa.

112. J May (ed) 'Poverty and Inequality in South Africa', report prepared for the Office of the Executive Deputy President and the Inter-Ministerial Committee for Poverty and Inequality, South Africa (13 May 1998): <http://www.polity.org.za/polity/govdocs/reports/poverty.html>, 6.
113. J Dugard and N Mohlakoana 'More Work for Women: A Rights-Based Analysis of Women's Access to Basic Services in South Africa' (2009) 25(3) *South African Journal on Human Rights* 546, 561–563.
114. M Langford, R Stacey and D Chirwa 'Water' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa Volume 4 2nd edition, revision service 5* (2013) 56B-i, 56B-59; citing E Cottle and H Deedat 'The Cholera Outbreak: A 2000–2002 Case Study of the Source of the Outbreak in the Madlebe Tribal Authority areas, uThungulu Region, KwaZulu-Natal' (2002) 71–72: <http://www.healthlink.org.za/publications/480>.
115. Centre for Applied Legal Studies (CALs), Centre on Housing Rights and Evictions (COHRE) and Norwegian Centre for Human Rights (NCHR) 'Water Services Fault Lines: An Assessment of South Africa's Water and Sanitation Provision across 15 Municipalities' (2008) CALs, COHRE and NCHR, 45–49: <http://www.wits.ac.za/files/resfd5179ffe9b24ecfa4110e1ee24cbb20.pdf>.
116. P Bond and J Dugard 'The Case of Johannesburg Water: What Really Happened at the Prepayment "Parish Pump"' 12(1) *Law, Democracy and Development* 1, 7.
117. For an in-depth analysis of ideal versus actual tariff structures across South African municipalities, see Centre for Applied Legal Studies (CALs), Centre on Housing Rights and Evictions (COHRE) and Norwegian Centre for Human Rights (NCHR) 'Water Services Fault Lines: An Assessment of South Africa's Water and Sanitation Provision across 15 Municipalities' (2008) CALs, COHRE and NCHR, 45–49: <http://www.wits.ac.za/files/resfd5179ffe9b24ecfa4110e1ee24cbb20.pdf>.
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119. Coalition Against Water Privatisation 'The Struggle Against Silent Disconnections: Prepaid Meters and the Struggle for Life in Phiri, Soweto' (July 2004) 23: http://apf.org.za/IMG/pdf/phiri_report.pdf.
120. Centre for Applied Legal Studies (CALs), Centre on Housing Rights and Evictions (COHRE) and Norwegian Centre for Human Rights (NCHR) 'Water Services Fault Lines: An Assessment of South Africa's Water and Sanitation Provision across 15 Municipalities' (2008) CALs, COHRE and NCHR, 62: <http://www.wits.ac.za/files/resfd5179ffe9b24ecfa4110e1ee24cbb20.pdf>.
121. K Tissington, P Berkowitz and J Dugard 'Submission on Access to Water and Sanitation in South Africa' (9 February 2009) Centre for Applied Legal Studies (CALs) 14–15.
122. SAICE 'Infrastructure Report Card for South Africa 2011' (May 2011) *Civil Engineering*, vol. 19(4), 16: http://www.saice.org.za/downloads/monthly_publications/2011/2011-Civil-Engineering-may.pdf.
123. The Green Drop system certifies that waste water systems and processes are operating well: http://www.dwa.gov.za/Dir_WS/GDS/.
124. DWA 'Statement by the Minister of Water and Environmental Affairs Mrs Edna Molewa at the release of the Blue Drop and Green Drop assessment reports' (30 June 2013): <http://www.dwaf.gov.za/Communications/PressReleases/2011/BlueDropGreenDropAssRep.pdf>.
125. Millennium Development Goal 7c, which the South African government has formally fulfilled (albeit with the distribution- and quality-related problems outlined in this paper), is to halve by 2015 the number of households without sustainable access to safe drinking water: <http://www.un.org/millenniumgoals/enviro.shtml>.
126. Paragraph 106, *City of Johannesburg and Others v Mazibuko and Others* (2008) 4 All SA 471 (Mazibuko South Gauteng High Court Decision).
127. Paragraph 122, *City of Johannesburg and Others v Mazibuko and Others* (2008) 4 All SA 471 (Mazibuko South Gauteng High Court Decision).
128. Photo of Phiri graffiti by Antina von Schnitzler (used with permission).

129. Further research is necessary to delve more deeply into the policy- and institutional competency-related questions raised here.
130. My investigations, including enquiries through the water services network Bubbles (subscribed by water activists and government officials) and South Africa's primary water research-related think tank, the Water Research Commission, uncovered only a study from prior to the establishment of the NWSRS and DWA as national water services regulator: D Malzbender, A Earle, H Deedat, B Hollingworth and P Mokorosi 'Review of regulatory aspects of the water services regulator' African Centre for Water Research Water Research Commission Report No. TT 417/09 (November 2009).
131. 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 62: http://www.seri-sa.org/images/stories/SERI_Guide_to_Basic_Sanitation_Jul11.pdf.
132. R Downing '230 municipalities fail clean audit report' (29 June 2011) *Business Day*: <http://www.bdlive.co.za/articles/2011/06/29/230-municipalities-fail-clean-audit-report;jsessionid=06F537993738E4CAB013E09BC943D9FD.present1.bdfm>.
133. DPME, DWA and DHS 'Sanitation Services – Quality of Sanitation in South Africa: Report on the Status of Sanitation Services in South Africa' (March 2012) 26: <http://www.info.gov.za/view/DownloadFileAction?id=178724>.
134. National Planning Commission (NPC) 'National Development Plan: Vision for 2030' (15 August 2013) 13: <http://www.info.gov.za/issues/national-development-plan/>.