

LEGISLATIVE AND POLICY FRAMEWORKS FOR BASIC SERVICES: A SOUTH AFRICAN COMPARATIVE STUDY

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Abstract

It is common course that equitable access to water and sanitation must be accordingly and primarily regarded as criteria for the realization of other several human rights, such as the right to life, dignity, health, food, adequate standard of living and education. Access to safe drinking water and sanitation is essential to the enjoyment of safety and environment that is not hazardous to human health. The lack of water and sanitation does not only hinder access to other available rights, but also magnifies the vulnerability of women, girls and people with disabilities. Water and sanitation services are of utmost important to the health and wellbeing of all people. South Africa is operating under one of the most outstanding legislative and policy frameworks for basic services in the world, including the Constitutional right of access to sufficient water and right to basic sanitation.

Keywords: Constitution, Basic Services, Rights, Human Rights, South Africa, Municipalities

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1 Introduction

Water is life sanitation is dignity, without it, nothing organic grows. Human beings cannot survive without water to drink, to cook, to wash and to ultimately grow food. Without water living organisms will all die. It is for these reasons that the Constitution of South Africa entrenches the right of access to water. The term basic water supply implies the prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quality of water to households, including informal households, to support life and personal hygiene. Sanitation on the other hand is dignity. Using proper toilets and hand washing equipment prevents the likelihood spread of bacteria, viruses and parasites found in human excreta, which would otherwise contaminate water resources, soil and food.

The infection is a critical cause of diarrhea which is said to be the second biggest killer of children in the developing countries, and ultimately leading to other major disease such as cholera.

The term sanitation means the collection, removal, disposal or purification of human excreta, domestic waste water, sewage and effluent resulting from the use of water for commercial purposes. However improving access to sanitation is a fundamental step in attempt to reduce the impact of these diseases. The measures to improve access to sanitation also help to create physical environment that enhances safety, dignity and self-esteem. In

South Africa the Water Service Act⁴ is the fundamental legal instrument that articulates accessibility and the provision of water services. This legal instrument also covers drinking water and sanitation services, to households and other municipal water users by local government⁵. Provincial government has the responsibility to assist municipalities in fulfilling their functions. The Constitution specifically in section 139 confers the provincial government with responsibility to intervene where municipalities fail to deliver on services, as mandated by both Constitutional and legal instruments. The White Paper⁶ states that provinces are entrusted with fundamental role to play in supporting municipalities in achieving their objectives.

2 South Africa's Obligations on Water and Sanitation

In the case of South Africa, section 27 (1) (b) of the Constitution⁷ provides that "everyone has the right to have access to sufficient food and water". This obligation however, extended in section 27 (2), according to which "the state must take reasonable legislative and other measures, within its available

⁴ 108 of 1997

⁵ Tissington, Deffman, Langford, Dugard and Coteh. 2008. Water services faultlines: and assessment of South Africa's water and sanitation provision across 15 municipalities.

⁶ White Paper on Basic Household Sanitation 2001

⁷ The Constitution of the Republic of South Africa, Act 108 of 1996

resources, to achieve the progressive realization of these rights”⁸ the right to sufficient water intersects with environmental rights and is enabling rights for the enjoyment of other rights such as the right to health, the right to education and the right to safety. The right to water is a shared competency of National, Provincial and Local government. The National Government, through the Department of Water Affairs is primarily responsible for setting national policy frameworks and standard for service delivery of water services.

Hence, the National Water Act⁹ creates comprehensive legal framework for the management of water resources in South Africa, which amongst others remains the prime responsibility of National Government. It is stated in the preamble of National Water Act that “acknowledging the national government’s overall responsibility for and authority over the nation’s water resources and their use, including the equitable allocation of water for beneficial use, the redistribution of water and international water matters”. The Provincial Government is imposed with the duty to oversee and support Local Government, since the Local Government is entrusted with the responsibility to deliver water and sanitation services.

The Constitutional protection for the human right to water is the explicit example of how human right can be successfully connected directly to national laws as well as to the public policy. Water is the essence of life, while safe drinking and sanitation are indispensable to sustain life, health and fundamental to the dignity of all. The national water rights entrenched in the Constitutional law offers hope for a systemic approach to working towards equal and sustainable access to water. The South African Constitution clearly contains the right to access water. The imposed duties to promote and protect these rights are both negative and positive in nature. However on the other hand, the state must refrain from unjustifiable interfering with the enjoyment of the right, including:

- Any practice or activity that denies or limits equal access to adequate water,
- Unlawful polluting of water
- Limiting access to, or destroying, water services and infrastructures as a punitive measures
- Arbitrary or unjustified disconnection or exclusion from water services or facilities
- Discriminatory or unaffordable increase in the price of water, or
- Polluting and diminution of water resources affecting human health.

On the other hand the rights are positive in the sense that there are imposed duties on the state to protect and fulfill these rights. The duties requires state to take reasonable legislative and other measures,

within its available resources, to achieve the progressive realization of the rights in section 27 (2) of the Constitution¹⁰. The recognition of the right in turn imposes certain duties on both state and non-state actors that can be enforced by courts. The relevant reference can be drawn from the case of *Government of South Africa v Grootboom*¹¹, where the Constitutional Court held that positive social and economic rights obligations are justiciable.

The Court explained that in challenging the failure of the state to take sufficient positive measures, the real question will be whether the legislative and other measures taken by the state are reasonable.

3 The International Obligations on Water and Sanitation

The state parties to the International Covenant on Economic, Social and Cultural Rights recognize in Article 11 “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, housing and to the continuation improvement of living conditions”. This right has long been interpreted as including water, an interpretation recently confirmed by the United Nations body responsible for monitoring compliance with the treaty.

It is without doubt that the right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, water is one of the fundamental elements for survival. Moreover the Committee on Economic, Social and Cultural Rights¹² has previously recognized that water is a human right and it is contained in Articles 11(1). The right to water is also inextricably related to the right to the highest attainable standard of health and the right to adequate housing and adequate food. The international human rights treaties provides for the right to water. Article 14 (2) of the Convention on the Elimination of all forms of Discrimination Against Women mandates the states to eliminate discrimination against women in rural areas and ensure to such women the “right to enjoy adequate living conditions, electricity and water supply, transport and communication”¹³. The number of other regional treaties that provides for the right to water and sanitation includes:

- The African Charter on Human and people’s Right¹⁴
- The African Charter on the Rights and Welfare of the Child¹⁵

¹⁰ The Constitution of the Republic of South Africa, Act 108 of 1996

¹¹ *Government of the Republic of South Africa v Grootboom* 2000 (3) BCLR 277 (CC)

¹² Water aid and rights and humanity. The right to water: a legal obligation, <http://www.righttowater.info/ways-to-influence/legal-approaches>

¹³ Report on the right to access sufficient water and decent sanitation in South Africa; 2014

¹⁴ 1981

⁸ *Government of the Republic of South Africa v Grootboom* 2000 (3) BCLR 277 (CC)

⁹ 36 of 1998

- The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (protocol of San Salvador)¹⁶ and

- The Arab Charter on Human rights¹⁷

The UN Human Rights Council responsible for mainstreaming human rights within the UN system adopted by consensus a resolution affirming that the right to water and sanitation are human rights¹⁸. The resolution adopted by the Human Rights Council took an important further step in affirming that:

The human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity. This means that for the UN, the right to water and sanitation is contained in existing human rights treaties and is therefore legally binding. The right to water and sanitation is a human right, equal to all other human rights, which implies that it is justiciable and enforceable.

4 The Human Right to Water

In a nutshell the use of water in South Africa has a long history in the context of which water was conceived as a private property subject to private ownership. The coming into existence of democracy in 1994 ushered a great deal in terms of making access to water a socio-economic right for enjoyment by everyone. According to Judge O' Regan¹⁹ access to water has long been grossly unequal in South Africa despite the fact that rain falls everywhere. The Judge further held that despite the significant improvement in the fifteen years of democratic government, deep inequality remains and for many the task of obtaining sufficient water for their families remains a tiring daily burden. In order to give effect to the right to sufficient water for all, the South African Constitution bestows the responsibility of carefully and effectively managing this scarce resource to the local municipality sphere of government. In pursuit of giving effect to the right of access to sufficient water for all South Africans, the Supreme Court of Appeal upheld the human right to water and invested more focus on how to ultimately find a "sufficient" amount as set forth in the Constitution in its landmark decision drawn from the case of *Mazibuko v City of Johannesburg*²⁰.

In this case it was held that the Johannesburg water company has estimated that each particular household would consume around twenty kiloliters of

water per month and charged the township residents with a flat rate of about nine dollars. In principle each water meter was using sixty seven kiloliters, and consequently the majority of residents had developed a notion of not paying the fees assessment at all. It was for this reason that the water company arrived at changing the policies that would seemingly suit the township situation, and prepaid water meters were installed in the township of Phiri in Soweto as a way to effectively reduce this significant economic loss. The plaintiff (*Mazibuko and others*) challenged the decision of the water company based on the Constitutional protection for human right to water. It was held in lower courts that twenty five Liters amount of water was not sufficient for each person per day.

As a result the Supreme Court consulted a South African water expert and who established that the amount per day of water needed per person in order to realize the human right to water, the expert came to the conclusion that the amount of water needed was forty two liters per day. South Africa is guided and protected by one of the most greatest and progressive Constitutions in the world, one which seeks to explicitly acknowledge and make justiciable not simply civil and political rights but social and economic rights as well. In South Africa, a large range of economic and social rights have been recognized in both the Constitution and Bill of Rights.

The Bill of Rights which is incorporated in the 1996 Constitution as a cornerstone of democracy, the Bill of Rights recognizes that every person in South Africa has the right to sufficient food and water subject to availability of resources that the governments could provide. The Constitution requires the state to respect, protect and fulfill all the rights in the Bill of Rights, including socio-economic rights. South African courts affirmed the justiciability and legal enforcement of economic and social rights in the case of *Grootboom*²¹ which is the landmark in South Africa as far enforcement of socio-economic rights is concerned. The Constitutional Court addressed the justiciability of socio-economic rights in the context of eviction, the right to housing and water. The Constitutional Court affirmed that the victims of socio-economic rights violation can resort to courts for appropriate legal relief. In the case of *Residents of Bon Vista Mansions*²² the High Court held that the disconnection of water supply was a justiciable issue and represented a *prima facie* breach of state's Constitutional duty to respect and promote the right to access to water.

The plaintiff (Residents of a block of a flat) in *Bon Vista Mansions* had their municipal water supply disconnected by the defendants (Southern Metropolitan Local Council) for non-payment, and

¹⁵ 1990

¹⁶ 1988

¹⁷ 2008

¹⁸ 30 September 2010

¹⁹ Catherine O' Regan, former Constitutional Court judge in the case of *Mazibuko and Others v City of Johannesburg*

²⁰ (CCT 39/09) (2009) ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC) (8) October 2009

²¹ Government of the Republic of South Africa v *Grootboom* 2000 (3) BCLR 277 (CC)

²² *Bon Vista Mansions v Southern Metropolitan Local Council* BCLR 2002 (6) 625 (W)

Residents sought to have their water access restored. After three days of unsuccessful attempts to convince the manager of the premises to restore services, the Residents petitioned for the relief from the courts on the ground that their inability to pay the water fees made the water shut off unlawful. The Court held that section 27 (1) (a) of the Constitution mandated that everyone have the right to access to water and that the local council, as an organ of state, had the responsibility as detailed in section 27 (2) of the Constitution, to take reasonable legislative and other measures within its available resources to achieve the progressive realization of this right. The Court further held that the disconnection procedures must be fair and equitable for non-payment where the person proves, to the satisfaction of the water services authority, that he/she is unable to pay for the basic services. The Court ordered the defendants to reinstate the water supply to the Residents.

5 Judicial Enforcement of the Right to Water and Sanitation by South African Local Governments.

The Constitution provides for the three spheres of government being: Nation, Provincial and Local. The adequate delivery of clean water may fall within the competence and jurisdiction of all spheres of government, depending on whether one is referring to water as potable water supply system. The legislative competence of national parliament is provided for in the Constitution in section 43 and 44 read with schedule 4 and 5. Similarly the legislative competence of provincial governments is provided for in section 104 read with the same schedules. In terms of section 44 (1) (a) (iii), the national legislative has powers: “to pass legislation with regard to any matter, including a matter within a functional area listed in schedule 5”.

On the other hand, provincial legislatures have powers to legislate on any schedule 4 and 5 matters and any matters that are not listed in either schedule that have been expressly assigned by national parliament to provincial legislature. Any matter that is not listed in both schedule and that has not been assigned to the provinces remains an area of national legislative competence. Schedule 4 of the Constitution lists the area of respect which both the national parliament and the provincial legislature have exclusive legislative competence. Neither schedule 4 nor 5 specifically list water, its supply, management or development of water resources as an area of competence. These functions are both regarded as being within the exclusive competency of national government and reside within the Draft White Paper on water services, it reflects the national importance of water resources in a water scarce country, like South Africa.

The central body for water resources is the National Department of Water and Environmental Affairs, which is in the provincial departments. Part B

of schedule 4 provides for local governments, that is, municipalities, to have exclusive authority to administer water and sanitation services limited to potable water supply systems and domestic wastewater and services disposal system. The Constitution states that the objects of the local government are to ensure the provision of the services to the communities in a sustainable manner, to promote social and economic development and to promote safety and healthy environment. Municipalities must strive, within their financial and administrative capacity, to achieve these objects. It was confirmed in the *Mazibuko* case that:

In terms of the Constitution, one of the objects of the local government is to ensure the provision of services to communities in sustainable manner (section 152 (1) (b)). Like the other objects of the local government, a municipal must strive within its financial and administrative capacity, to achieve the objects (section 152 (2)). It has executive authority in respect of, and has the right to administer, among others, water and sanitation services, (section 156 (1)), and may make by-laws for the effective administration of these services 156 (2)).

The responsibility of ensuring access to water services lies, in terms of the Water Service Act²³ with water service authorities, defined by the Acts as municipalities including districts or rural council. Section 4 of the Water Service Act provides for the conditions of the provision of water services, which must be provided in terms of the conditions set by the water services provider. If the water service provide by the water service institution are unable to meet the requirements of its existing customers, it must give preference to the provision of basic water supply and basic sanitation.

In case of emergency, basic water supply and emergency must be provided, even at the expense of the water service authority. The procedure for limitation or disconnection of water must be a “fair and equitable” and provide for reasonable notice of intention to limit or discontinue water services and for an opportunity to make representations. The Water Services Act acknowledges the Constitutional right of access to basic water supply and sanitation and also provides that every service institution must take reasonable measure to realize these rights. Every water service authority must, in its water service development plan, provide for measures to realize these rights.

6 Reasonable Failure to Provide Access to Water Services

Water services authorities may upon several reasons fail to deliver water service. The provisions of water services requires money, and while municipalities can rely for part of the financial on combination of subsidies from national government and transfer from

²³ Act 2 of 2013

other municipal account, the rest of the financial is intended to come from the tariffs. In certain areas, however municipalities have faced shortfalls in collecting tariffs. Hence, it is questionable, whether a failure by a local authority to provide access to water service as a result of inefficient administration or inadequate allocation of funds is reasonable, the meaning and interpretation of “reasonable” is relevant in this case. A water service may impose reasonable limitations to the use of water services in order to regulate beneficial use, the abuse of the service and pollution.

However, unless the municipality has the financial and technical assistance and qualified human resources to comply with the national water policy and standards, their ability to deliver is severely compromised, and it gives rise to inequitable delivery of services, depending on the resources of the municipality in question.

7 Conclusion

The paper draws an explicit conclusion that as long as water and sanitation issues falls within the bounds of reasonableness and are not in conflict with either section 27 of the Constitution or with national legislation regulating water and sanitation services, the local government with the powers and duties vested in it must adequately take the responsibility to deliver water and sanitation services. Water is the essence of life, while safe drinking water and sanitation are purely indispensable to sustain life, health and fundamental to the dignity of all. The imposed duty to

promote and protect the rights to water and sanitation are both negative and positive in nature, requiring an organ of state to take reasonable legislative and other measures within its available resources to achieve the progressive realization of the right. The highlight of the paper is that the state must also refrain from unjustifiable interfering with the enjoyment of the right to water and sanitation services.

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