Water Supply and Sanitation in South Africa

Environmental Rights and Municipal Accountability

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Chapter 1 Synthesis report

1 Summary: legislative framework

South Africa's status as a water-scarce country is reflected in the formulation of our legislative framework pertaining to water. This legislation has placed emphasis on water scarcity and the effective management of national resources coupled with the need to rectify historical inequities and promote justice and equality in the availability and use of water resources.[1] The three principal sources of national water legislation are the Constitution of the Republic of South Africa Act 108 of 1996, the National Water Act 36 of 1998 and the Water Services Act 108 of 1997.

The executive power to deliver water and sanitation services falls, in terms of the Constitution, on local government.[2] The statutory legislative framework for effective management of local government consists of the Local Government: Municipal Structures Act 117 of 1998, the Local Government: Municipal Systems Act 32 of 2000 and the Local Government: Municipal Finance Management Act 56 of 2003. Relevant for this report is also the Public Finance Management Act 1 of 1999.

For legislation that regulates the available legal gateways for effective delivery of water services this report also analyses the National Environmental Management Act 107 of 1998, the Promotion of Access to Information Act 2 of 2000, and the customary law principles of various legal reviews and interdicts.

1.1 Constitutional rights

The founding provisions of the Constitution open with the values on which the state is founded and list the first of these as "human dignity, the achievement of equality and the advancement of human rights and freedoms"[3]. The founding provisions further establish the supremacy of the Constitution over all other South African legislation and require that "the state must respect, protect, promote and fulfil the rights in the Bill of Rights"[4].

Sections 24 and 27 of the Bill of Rights in the Constitution grant specific rights to access to sufficient water, an environment not harmful to health and well-being and the protection of the environment from degradation. The right to basic sanitation is not an explicit constitutional right. However, the right to sanitation could be derived from the right to a clean environment read together with the right of access to clean water.

Many other constitutional rights in the Bill of Rights overlap with and support rights to water and sanitation. These include the right to equality[5], the right to dignity[6] and rights of access to information and just administrative action[7].

The Constitution provides for three spheres of government and sets out the functions of these three distinctive, interdependent and interrelated spheres. The principles of cooperative governance provide that all interactions between the three spheres of government must play out in a coordinated and cooperative manner.

1.2 The National Water Act

The National Water Act (NWA) reaffirms the role of the state by confirming in Section 3 that "as the public trustee of the nation's water resources the National Government, acting through the Minister, must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate." The NWA provides the legal framework for the management of water resources, which includes the allocation of water for beneficial use and the redistribution of water.

1.3 The Water Services Act

The NWA is required to be read with the Water Services Act (WSA), which is "the primary legal instrument relating to the accessibility and provision of water services (which include drinking water and sanitation services)"[8]. In terms of the WSA, the responsibility for ensuring access to water services lies with water services authorities (municipalities). It is the responsibility of water services authorities (through water services providers) to ensure access to both water supply services and sanitation services.

1.4 The Local Government: Municipal Structures Act

The Local Government: Municipal Structures Act (Structures Act) provides for the establishment of municipalities and the divisions of functions and powers between categories of municipalities. Categorised into metropolitan, local or district, each municipality is required to review the needs of the community, its priorities to meet these needs, processes for involving the community, organisational and delivery mechanisms for meeting the needs and its overall performance in achieving the objectives.

1.5 The Local Government: Municipal Systems Act

The Local Government: Municipal Systems Act (Systems Act) provides for the core principles, framework and procedures to enable municipalities to uplift their communities socially and economically and guarantee affordable universal access to basic services. The Systems Act refers to the provision of basic municipal services, which mean municipal service that is necessary to ensure an acceptable and reasonable quality of life and without which public health or environmental safety would be at risk.

1.6 The Local Government: Municipal Finance Management Act

The Local Government: Municipal Finance Management Act provides for municipalities' sound and sustainable fiscal management.

1.7 The Public Finance Management Act

The Public Finance Management Act provides the framework for fiscal management for all government departments and public enterprises.

1.8 The National Environmental Management Act

The National Environmental Management Act (Nema) provides an overarching framework for the regulation and sustainable use of natural resources in South Africa. The Nema is crucial in terms of implementing the constitutional provisions on cooperative governance in environmental matters. It creates the institutional set-up for the development of norms and standards for the implementation of the environmental legislation and provides for generic monitoring and enforcement provisions. Among these are the duty of care provisions and obligations to control and remedy pollution generally. In conjunction with the NWA, the Nema provides an avenue to regulate and control water pollution and promote the fulfilment of the right to an environment not harmful to health or well-being. Importantly, it also creates a specialised enforcement unit of environmental management inspectors charged specifically with the enforcement of environmental management legislation.

1.9 The utility of common law remedies

While legislation might dictate the duties and responsibilities of water services providers, they also remain obliged to observe ordinary common law duties, such as the common law principle of duty of care. Common law remains highly relevant in modern-day South Africa with its impressive array of environmental statutes; common law is especially relevant in terms of providing gateways for enforcement and obtaining remedies where legislation is unhelpful. Civil society and local communities in particular can benefit from enforcing common law based remedies such as the interdict and damage claim; the latter can be instituted where harm has been suffered as a result of failure to deliver a water service or exposure to poor sanitation. Similarly, regulatory agencies can use the common law to control pollution and enforce statutory requirements. Common law remedies have the potential to achieve grassroots impact relative to higher level constitutional impact litigation that often yields programmatic relief but does not immediately result in a change of the livelihoods of the applicants.

2 Strategic interventions for improved water services delivery

This legal review looks at strategic interventions for upholding the constitutional rights to water and sanitation and a better use of the law in improving the delivery of water services. When properly used, the law enables poor and marginalised communities to achieve impact and success where other efforts have failed. This section provides an analysis of available legal interventions and a strategic analysis of how these interventions can have the greatest possible impact on the delivery of water services.

The first call would be to directly challenge (or perhaps rather to clarify) the constitutional right to water. Recent constitutional case law, as evidenced in the recent *Mazibuko* case, however, suggests that the role of the court in interpreting social and economic rights is not to determine precisely what the achievements of any particular right entail and what steps government shall take to ensure the progressive realisation of the right. Rather, the court has adopted a less user friendly approach, which entails an obligation of the state to respond to the basic social and economic needs of the people by adopting reasonable legislation. The court refers to democratic accountability to ensure adequate implementation of the legislation for the fulfilment of social and economic rights.

Alternatively, an administrative law approach focuses on the implementation of the statutory framework for water services. Some of the concerns with failed service delivery can be resolved through improved cooperative governance. Others might have to be resolved through litigation and other types of pressure on the democratic arms of government to account for their actions to fulfil the constitutional and statutory rights to water. An important tool is the principle of public participation, which ensures public involvement and public accountability in decision-making.

Effective participation in decision-making means that all parties are informed about a particular planned activity, that the decision-makers provide opportunities for the public to comment on planned activities and that comments and input from the public are taken into consideration in the decision-making process. Perfected and adequately implemented, public participation can be the cornerstone in which government officials, participants and users of water services all take responsibility to ensure that the decisions that are made by local governments are sound, workable and abided by. Poor public participation, on the other hand, can be disastrous, resulting in false expectations, miscommunication and increased community frustration.[9]

Litigation by civil society may take the form of civil court actions for interdicts seeking to correct or revert specific actions (or failures to take action) by a responsible sphere of government. The defendant in such civil litigation could be a municipality or an external services provider that fails to deliver water services. It could also be the national or a provincial government that fails to support or intervene in a failing municipality. Civil society can also pursue criminal charges against all of the above.

In addition, civil society can lobby for policy and legislative changes, specifically where the statutory framework fails to adequately provide a coherent policy and institutional framework for service delivery. A call for legislative change could be relevant in circumstances where there is disjuncture between what the statutory framework aims to achieve and what is practically workable on the ground.[10] What is perhaps required is greater flexibility within the statutory framework to allow for local level solutions to improve water services. There might also be a need to identify and resolve a number of legislative conflicts.

2.1 Three types of interventions

This legal review provides analysis of three different interventions that address the lack of water services from a strategic point of view.

- The first is **a constitutional challenge** of the right to water. The recent *Mazibuko* judgment, however, has limited such interventions to focus on the "reasonableness" and the "progressive realisation" in Section 27(2) of the Constitution and not on the meaning of the right to access to sufficient water, which might have been a more desirable outcome.[11]
- The second intervention, which we call "monitor the monitors", is a systematic **scrutiny of the regulatory functions of national and provincial government**. Both the Constitution and the statutory framework put an obligation on national and provincial government to monitor and assist local government in the delivery of adequate water services. Civil society can play an important role by monitoring these government obligations.
- The third type of intervention is a system that, through legal interventions, addresses the key steps in the chain of delivering water services. This type of intervention recognises that there is not one one-size-fits-all approach to improving water services. Rather, legal interventions work best when developed on the basis of local assessments of the key challenges to service delivery.[12] What we are proposing is a system that **identifies the specific point in the delivery chain where municipalities fail**. Consolidated legal effort should be aimed at particular delivery obligations rather than at the end product of water services.

2.2 The constitutional right to water – reasonableness of the measures taken to ensure the right

Section 27(1)(b) of the Constitution provides that "everyone has the right to have access to … sufficient … water". However, the Constitutional Court in *Mazibuko*[13] confirmed (what has already been argued in both *Grootboom*[14] and *Treatment Action Campaign*[15]) that there is no positive obligation on the state to immediately deliver sufficient water but rather that "the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of … these rights"[16]. In her judgment, Judge Kate O'Regan argued that "It is clear that the right does not require the state upon demand to provide every person without sufficient water with more; rather, it requires the state to take reasonable legislative and other measures progressively to realise the achievement of the right of access to sufficient water, within available resources."[17]

The court thus rejected both the argument that there is a constitutional core minimum right to water and the argument that the court is in the position to adjudicate the steps government should take to ensure the realisation of the right to sufficient water. In this judgment, it became clear that the role of the court should rather be to require the state to take measures to meet its constitutional obligations and to scrutinise the reasonableness of the measures it has already adopted and plans to adopt.

The following questions should be considered before challenging the constitutionality of government delivery of water services:

- Is government taking progressive steps to realise the right to water?
- Are government's adopted measures reasonable?
- Does government's adopted policy have unreasonable limitations or exclusions?
- Does government's adopted policy progressively realise the right to water?[18]

The remedy that can be requested is for the court to require government to review its adopted measures to realise the right to water. Where legislation has been enacted to give effect to the right to water, a possible legal challenge should rely on that legislation in order to either give effect to that legislation or alternatively challenge the legislation as inconsistent with the Constitution.

Given the substantial legislative framework on water services, the court in the *Mazibuko* case decided that government, in fact, had been taking major steps to realise the constitutional right to water. The court then went on to scrutinise whether the legislative framework was reasonable. It here relied on the *Grootboom* judgment, which considered a measure unreasonable if it makes no provision for those who are desperately in need. It also considered the *Treatment Action Campaign* case, which showed that if government adopts a policy with unreasonable limitation or exclusion, the court may order that those are removed.

The court found that in the *Mazibuko* case, the city's free basic water policy provided reasonable minimum standards for basic water supply. A breach of the constitutional right to water would occur if a municipality provided below-basic levels of water services or if municipalities implemented the free basic water policy differently.[19] The aim should be to provide universal free basic water rather than to target urban and more accessible areas. Although such targeting provides for progressive realisation of the right, it discriminates against poor and rural areas where access to water services is low and the implementation of water services often difficult.

Two interesting questions that arise from the *Mazibuko* case are:

- By complying with a national minimum standard, does a municipality automatically act reasonably?
- Would a municipality with greater available resources than the national average be considered to act unreasonably if it applies only the national minimum standards for service delivery?

It could be argued that such municipalities would be expected to go beyond the national minimum standards.

Another interesting aspect is whether violations of the constitutional right to water will occur if the state fails to prioritise the use of its resources so as to meet its constitutional obligations. This would occur if a municipality fails to adequately budget for

its obligation to deliver water services in favour of other municipal (and perhaps not constitutionally mandated) activities.

In the interpretation of the *Mazibuko* judgment, the most significant constitutional breach of the right to water, however, would occur if government fails to adequately implement its own statutory framework for water services. What is therefore needed is an administrative law approach that fulfils the constitutional right to water by focusing on the constitutional rights of procedural fairness, public participation and access to information.

2.3 Monitor the monitors

The Constitution provides for three spheres of government. The delivery of water services (potable water supply and domestic waste-water and sewage disposal systems) falls within the competence and jurisdiction of local government.[20] This is confirmed in the statutory framework, which allocates the responsibility for ensuring access to water to water services authorities, i.e. municipalities.[21] Where there is a backlog in the delivery of water services, and where municipalities are unable to meet their constitutional and statutory obligations, local government is also most likely to be held legally accountable.[22] However, national or provincial governments should also take responsibility for the failure to perform local government functions or performing them inadequately.

2.3.1 The role of national and provincial government

The Constitution prescribes that national and provincial governments have the legislative and executive authority to see to municipalities' effective execution of their functions.[23]

First, one has to consider Section 154 of the Constitution, which compels national and provincial governments, through legislative and other measures, to support and strengthen the capacity of municipalities to manage their own affairs, exercise powers and perform their functions efficiently.

Second, one has to consider Section 139 of the Constitution, which stipulates the duty of provincial and national government to monitor the performance of local government.[24] This includes measures where the member of the executive council (MEC) for Local Government may require municipalities to submit information about a specific municipal function. When the MEC has reason to suspect that a municipality fails to fulfil a function (which is an executive obligation), he or she can request more information, investigate the matter or even organise a public hearing into the matter. The MEC can also choose to assume the responsibility of the municipality and in the process take over the relevant obligations of the municipality.[25] In other words, where a municipality fails to deliver water services, the provincial MEC for Local Government can assume the responsibility for the delivery of water services.

The WSA likewise recognises that it is the duty of all spheres of government:

- to ensure that water services are provided in a manner that is efficient, equitable and sustainable; and
- to strive to provide such services for subsistence and sustainable economic activity.

It states that although municipalities have the authority to administer water services, all spheres of government have a duty, within the limits of physical and financial feasibility, to work towards this objective.

In terms of the Nema, provincial governments are obliged to ensure that municipalities exercise their functions in line with national and provincial environmental implementation and management plans.[26] Both these plans have specific reporting obligations in terms of compliance with policies, plans and programmes; national norms and standards and the Nema principles.[27] Failure by a local government to comply with such plans may result in a notice to rectify the non-compliance.[28] Failure to comply with such a notice may result in provincial supervision in terms of Section 139 of the Constitution.[29]

The monitoring functions of national and provincial government are, in terms of the WSA, enforceable obligations. Specific obligations by national and provincial government in relation to water services include:

- **Cooperation:** The Municipal Structures Act[30] provides for cooperation between district and local municipalities through mutual assistance and support in financial, technical and administrative sectors.
- **Funding and capacity building:** The Municipal Structures Act[31] provides that the MEC for local government in a province must assist a district municipality to provide support services to a local municipality. Section 93(3) of the Municipal Systems Act has similar provisions in that a cabinet member, deputy minister or MEC initiating national or provincial legislation in terms of which a function or power is assigned to a municipality must take appropriate steps to ensure sufficient funding and capacity building initiatives as may be needed. The Municipal Infrastructure Grant[32] is a consolidated conditional grant to municipalities. It is designed to facilitate the eradication of basic services backlogs and cover the capital costs of infrastructure rollout to predominantly poor households.[33] The Local Government Equitable Share is an unconditional grant from national government to local government that serves as the main subsidy for operational and maintenance costs. In terms of the Local Government Municipal Finance Management Act[34], national and provincial governments must further assist municipalities in building their capacity for efficient, effective and transparent financial management. National and provincial governments must support the efforts of municipalities to identify, avert and resolve their financial problems. Special provision is made in terms of the WSA[35] for the provision of management services, training and other support to water services institutions through water boards. Although these are corporate bodies, water boards are established and monitored by the national Department of Water Affairs. The minister of that department can instruct a water board to undertake specific activities to capacitate municipalities.
- **Monitoring:** The Municipal Systems Act[36] makes provision for the MEC for local government in a province to: establish mechanisms, processes and procedures to monitor municipalities in the province as they manage their own affairs, exercise their powers and perform their functions; monitor the development of local government capacity in the province; and assess the support needed by municipalities to strengthen their capacity to manage their own affairs, exercise their powers and perform their functions.
- **Withdrawal of funding:** The National Treasury may, in terms of the Local Government: Municipal Finance Management Act[37], stop funding to a municipality if the municipality commits a serious or persistent breach of the Constitution or fails to comply with any conditions subject to which the allocation is made. When the National Treasury considers the stopping of funds, it must take into account compliance by the municipality in terms of the Act and the municipality's cooperation with other municipalities on fiscal and financial matters.
- **Relief of duties:** In terms of the Health Act[38], whenever a municipality is unable, owing to lack of resources, to perform its duties (in this case to purify water or to maintain reasonable hygiene), the minister of Health may temporarily relieve the municipality of its duties and instruct its director-general to take of the function of the municipality.
- **Supervision of local government financial management:** The National Treasury may in terms of the Constitution and the Municipal Systems Act[39] take appropriate steps (including supervision over the local government and stopping of funds) if a municipality commits a breach of the Municipal Systems Act.
- **Other interventions:** The Local Government: Municipal Finance Management Act[40] provides for discretionary provincial intervention for serious financial problems in a municipality; mandatory intervention for serious or persistent material breach of its obligations to provide basic services or to meet its obligations or financial commitments; and national intervention if the provincial executive council cannot or does not adequately exercise the powers or perform the aforementioned functions. National government then effectively steps into the shoes of provincial government.[41] At this level the provincial government could also use common law remedies to attain its objectives, especially where the legislation proves ineffective in stopping unreasonable conduct by a local authority.

2.3.2 Discretion to intervene

National and provincial government have discretion whether or not to take any of the above measures. Interventions such as the withdrawal of funding and the relief of duties must only be resorted to when the monitoring and support of the municipality fail to empower a municipality to fulfil its functions. However, when intervening, the aim should be to achieve minimum standards for service delivery coupled with good governance. Important to note is also the fact that the aim of such interventions is not merely the once-off fulfilment of a municipal obligation but the assurance that this obligation will be adequately fulfilled in the future.[42]

The cooperative government framework prescribing interventions by national and provincial governments should play out in a coordinated and cooperative manner. In

terms of the Constitution, all spheres of government and all organs of state within each sphere must, among other things, exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere[43]; must inform one another of, and consult one another on, matters of common interest;[44] co-coordinate their actions and legislation with one another, adhering to agreed procedures;[45] and avoid legal proceedings against one another.[46] The Nema, echoing the Constitution, states that all organs of state must cooperate with, consult and support one another in relation to environmental matters. The Act provides for cooperative governance through defining principles and fair decision-making, institutions that will promote cooperative governance and procedures for co-ordinating environmental functions. Actual or potential conflicts of interest between organs of state should, in terms of the WSA, be resolved though conflict resolution procedures.[47]

In view of recent service delivery demonstrations, it is also important to highlight that the Constitution expressly cautions that the "national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions"[48]. Although these legal provisions are invaluable gateways through which the national and provincial governments can support local authorities to fulfil their obligations pertaining to the provision of water services and sanitation, they can also impede effective intervention by national and provincial governments' supervision of municipality functions. A turnaround strategy for failing municipalities, with improved national oversight of municipalities, might therefore be in conflict with the principles of cooperative governance.

At the same time, it is important to recognise, as was highlighted in the recent National State of Local Government Assessment, that performance failure by local government is partly to be blamed on the lack of support from national and provincial governments. What is needed is an application of intergovernmental checks and balances that include the necessary oversight and review processes of national and provincial governments.[49] While the country is seeking to increase cooperation between the different spheres of government, there is equally a need for a system that can strengthen oversight in municipalities.[50] Undoubtedly, the obligation to monitor, if effectively exercised, could lead to an improvement in the delivery of water and sanitation services. A persistent worry, however, is whether in practice the national and provincial governments exercise this monitoring function at all or in good faith.

2.3.3 The role of civil society

Civil society can through oversight of national and provincial decision-making, for example, put pressure on national and provincial governments to exercise their functions. Civil society and residents can also use the *mandamus* procedure (obtain a court order compelling an administrative agency to act in terms of a power created by statute where it is reluctant or failing to act).

There is also an opportunity to enhance public participation in decision-making processes and to encourage statutory bodies such as the South African Human Rights Commission[51] and the Water Tribunal[52] to play watchdog functions. The principles of public participation and the accountability of local government to its citizens stem from Section 152 of the Constitution, which states that local government is to "provide democratic and accountable government" and to "encourage the involvement of communities and community organisations in matters of local government".

Litigation against municipal failure can extend to national and provincial government for their failure to ensure adequate municipal performance.

The aim for any such actions should be to integrate the works of national, provincial and local government, with improved coordination within provinces as a key decentralisation point.

2.4 Intervening in the delivery chain

The delivery of adequate water services relies on a delivery chain of activities and conditions that varies from service point to service point. Only by closely studying each one of them can one determine where the fault lies. Understanding the key steps in the delivery chain and intervening at the right point will not only improve delivery but ensure the efficient use of financial resources.[53]

One caution that has to be raised against this type of intervention is that it focuses on non-compliance with the statutory framework and not directly on the lack of service delivery. It is therefore important to highlight that compliance with the statutory framework does not automatically lead to better delivery. However, when looking at non-compliance, one has to focus attention on those issues that, if corrected, can improve service delivery.

2.4.1 Statutory right to water – the question of basic services

The WSA prescribes the right to basic water supply and basic sanitation, which imply the minimum supply of services in both instances. Chapter II of the Act, read together with the *Strategic Framework for Water Services*, prescribes the standards for such services. It was pointed out in the *Mazibuko* Constitutional Court judgment that the framework is reasonable. However, these standards may apply differently in different areas and for different purposes. The aim of intervening at the key steps in the delivery chain is to ensure that water services throughout the country confirm to the *Strategic Framework for Water Services*.

It is an obligation of every water services authority to progressively, and subject to affordability, ensure access to water services. A water services authority may not unreasonably refuse or fail to deliver access to water services. Where there is a backlog in the delivery of such services, and where water provided by a water services institution is unable to meet the requirements of all its existing consumers, the following measures can be taken in terms of the WSA:

- the water services authority may impose reasonable limitations on the use of water services;[54]
- preference must be given to the provision of basic water supply and basic sanitation;[55]
- the Water Board may step in and provide water services;[56] and
- the minister may establish a water services committee to provide water services.[57]

The second point would imply that a municipality could be requested to reduce water services in one part of its service area (with service levels above the specified basic standards) if this would lead to increased and basic delivery in another.

Where there is non-compliance with the standards for services, the WSA provides no sanctions. Failure to provide further water services is not a criminal offence and cannot be prosecuted. There are the following exemptions.

- The Health Act makes it a criminal offence to contravene or fail to comply with any provisions of the Act.[58] In terms of the Health Act, a municipality is obliged to purify water intended for the use of its residents.[59] A municipality that fails to purify water intended for human consumption can therefore be criminally prosecuted. Residents can report such municipalities to the SAPS.

- The Local Government: Municipal Finance Management Act[60] renders a political office bearer or accounting officer who incurs unauthorised, irregular, fruitless or wasteful expenditure liable for such expenditure.

2.4.2 Legal gateways for improving service delivery

The ineffectiveness of criminal sanctions for failed service delivery does not mean that there are no other legal routes to follow to improve water services. A number of remedies for poor water services delivery can be found within administrative structures and practices.

Typically, administrative sanctions are used as primary means of securing compliance before authorities resort to any criminal sanctions provided for in legislation or seek the intervention of the court. If not used, these sanctions may provide room for civil society and the community to then approach the courts and seek to compel the relevant authority to act in terms of these sanctions. Administrative sanctions also give the errant service provider or municipality the opportunity to rectify the violation and improve its water-resources management systems.

In terms of procedural fairness, the Promotion of Administrative Justice Act (Paja) provides a framework to seek administrative review of decisions made by public authorities. A review of administrative decisions in terms of the Paja, read together with Section 33 of the Constitution, can be used to rectify institutional and structural deficiencies in the delivery of water services.

Judicial review

Judicial review can ensure that local authorities actually do commit to and implement their constitutional and statutory obligations. This is not limited to the obligation to deliver water services but can also extend to the development or preparation of statutory planning and monitoring instruments, assurance that these instruments have been developed through a participatory process and that the plans are, in fact, implemented. Residents are within their rights to seek a review of any of these instruments if they believe they limit the capacity of a municipality to deliver or are thought to be unreasonable or not suitably tailored to achieve the municipality's statutory obligations. If a municipality fails altogether to develop plans required by legislation, there is room for the use of the common law *mandamus* procedure to compel it to comply with the law and execute its functions in terms of the water legislation. Judicial review includes the following actions:

- **Municipal reporting:** A legal review of municipal reporting mechanisms (for example reporting in terms of *The Strategic Framework for Water Services* or the mandatory Key Performance Indicator Reports) may be used to reveal failure by a municipality to provide quality water services. Possible legal remedy would be a structural interdict to compel a water services authority to perform its constitutional obligations and to report its progress to the court.
- **National and provincial monitoring:** A legal review of the national and provincial performance monitoring of a water services institution (as prescribed by the WSA[61]) may reveal failure of a municipality to perform as well as failure of national or provincial governments to monitor performance. Possible legal remedy would be a structural interdict to compel a province to intervene in terms of Section 139 of the Constitution for provincial supervision of the municipality. If the province fails to do so, the minister of the Department of Water Affairs will assume the responsibility for water services (or part of them) in the municipality. On the approach of civic society organisations, communities or the municipality concerned, the court can also request the minister to provide financial assistance to the water services institution as required by statute.
- **Water services intermediaries:** Failure by water services intermediaries to deliver quality water services may result in the water services authority instructing the water services intermediary to rectify the failure or taking over the functions of the water services intermediary. A legal review may reveal whether the water services authority has monitored the performance of the water services intermediary. A possible remedy would be for the court, at the insistence of residents or civic organisations, to instruct the water services authority to either instruct the water services intermediary to rectify the failure or to take over its functions.
- **External service providers:** Failure by external service providers to deliver quality water services must, in terms of the WSA, be dealt with internally by the department according to contract. Although there is not any requirement to make the contract with an external services provider available to the public, a water services provider must provide the public with such information concerning the provision of water services as may reasonably be called for.[62] Failure to access such information may lead to a Promotion of Access to Information Act (Paia) to establish whether the external service provider complies with the conditions of the contract and whether the water services authority adequately monitors the performance of the external service provider. A Paia test case may even provide access to the process of negotiating or approving these contracts. A legal review of the contract may reveal whether a contract has been entered into under unlawful circumstances. Possible legal remedy would be for a court to declare the contract invalid. Additionally, if the failure to perform by the service provider is threatening the life and health of residents, the residents can directly sue the service provider, not on the basis of the contract, but on the basis of the common law duty of care, created as a result of the service provider undertaking to provide a service to the residents on behalf of the municipality.

Access to information

The importance of accessing information cannot be overemphasised. All the above potential avenues to improve water services delivery rely on the availability of reliable, easily understood and accessible information. Invariably, local communities need information from local authorities, and this information in some cases must be decoded into a language that residents can understand. Information is necessary not only for effective participation in municipal policy development and decision-making, but also, more importantly, to hold the municipality accountable, be it through litigation or other gateways. It is also necessary to be in possession of information before it can be challenged.

The right of access to information is a right in terms of Section 32 of the Constitution and the Paia as well as Section 31 of the Nema. This means that access to information can be requested from public bodies, as well as from a natural or juristic person.

The WSA states that an external water services provider must provide such information concerning the provisions of water services as may reasonably be called for by the water services authority, the relevant province, the minister or a consumer or potential consumer.[63]

Administrative remedies

In terms of framework and media specific legislation – including the NWA, WSA and the Nema – there are further provisions that provide grounds and procedures for seeking administrative remedies against public officials.

- **Prevention of environmental harm:** The enforcement provisions in the Nema, such as Sections 28 to 32, create duties to prevent significant harm to the environment and require responsible persons to take reasonable measures to remedy such harm. These provisions also outline the handling of emergency incidences. Section 28(12) is invaluable to remedy the failure to deliver water services as a result of sewage spilling into municipal water sources.
- **Enforcement:** The Nema also creates a framework for environmental management inspectors to enforce any environmental management law, including the NWA and the WSA. If there is political will, these inspectors (functions described in Sections 31G to 31H) may be useful in enforcing the NWA and WSA against non-complying municipalities. Environmental management inspectors also have the power to do routine searches to monitor compliance with environmental laws without warrants. This could be useful in terms of ensuring that municipalities govern the delivery of water services, failing which the inspectors should enforce the law.[64]

Furthermore, public authorities have statutory powers to use administrative measures or sanctions to promote the implementation of legislation under their mandate and to enforce legislation where there are violations; they don't need to approach the courts or use the litigation process to exercise these powers. Administrative sanctions are imposed and implemented by public authority where there is or has been failure to comply with legislation of administrative directives. These are sanctions imposed without the need for the public authorities to approach a court of law.[65] These include suspension or cancellation of licences or permits or registrations. Section 54 of the NWA gives the regulatory authority powers to suspend or withdraw licences to use water in the event of, among other things, a failure to abide by permit conditions or in the event of violations of the Act. In terms of Section 54(3), such a suspension or withdrawal may be effected where the permit holder has failed to comply with a directive issued by the authority. Also, Section 74 gives the minister powers to issue directives against water management institutions such as a municipality as a result of the execution of its functions or performance and also to issue administrative fines (different from criminal fines).

Public participation

The Nema and the WSA mandate community participation in the formulation of policies and by-laws. Communities and civil society can make effective use of participation at early stages of policy development to ensure that most delivery problems are detected and avoided at the policy and law formulation stage.

Litigation

At the grassroots level, especially to obtain immediate remedies, litigation can be quite effective in improving water services delivery; this could include litigation to enforce duties of municipalities in terms of the WSA and by-laws in force. Besides higher level constitutional litigation, there is need for enhanced lower level litigation. This level of litigation could be aimed at ensuring that municipalities execute their functions, that they develop plans required by law and that they act against people and corporations who hamper their functions. Such litigation could be aided by the use of common law remedies such as prohibitory and mandatory (structural) interdicts. The interdict is useful in the sense that it goes beyond a mere declaration of rights to compelling immediate action on the part of the culprit's municipality. The outcome is to have action on the ground that makes a difference in the livelihoods of residents. Participation can also be enhanced through the interdict – for instance stopping municipal meetings and processes that are not inclusive until they have been planned in an inclusive and procedurally just manner. Furthermore, where harm has already been suffered, claims for damages should come in handy both to obtain relief as well as to deter future retrogressive conduct.

Interesting, failure by national and provincial government in terms of the requirements of the Local Government: Municipal Finance Management Act to assist municipalities in building the capacity does not affect the responsibility of the municipality to comply with the Act.[66] This means that failing local governments cannot claim in their own defence that they have not received any assistance from national and provincial government.

2.4.3 Statutory obligation to plan for quality water services

The chain of activities and conditions for adequate water services to actually be delivered can also be addressed. This includes the obligation of municipalities to plan for the delivery of quality water services as recapped below:

- **Water services development plans:** Every water services authority has a duty to prepare a water services development plan.[67] Such development plans must be developed in consultation with consumers who have a right to comment, and to have their comments considered, before the plan is adopted. The adopted plan, together with a report on the implementation thereof must be made available to the public.[68] A legal review of the water services development plan may reveal whether comments from the public have been adequately addressed in the adopted plan. Possible legal remedy would be to ask the court to set aside the plan based on the fact that, for example, adequate public participation was not sought. A water services authority must report on its implementation of the water services plan. A summary of the report must be publicised. A court can compel a water services authority who fails to do so to publicise the report.
- **By-laws:** Every water services authority must draft by-laws for the provision of water services.[69] A legal review of these by-laws could reveal whether the by-laws were drafted in terms of the legal requirements and whether they contain the relevant provisions. Possible legal remedy would be to ask the court to set aside the by-laws based on the fact that adequate procedures have not been fulfilled.

An analysis of municipal plans has to assess whether these plans adequately identify and grapple with the problems of water services and whether the public was involved in the drafting of plans. This is to ensure that the interests of the community are addressed, that public comment and input is relevant and effective, and that the plans are drafted based on accurate and updated information. The plans should not only focus on delivery but also provide for compliance of adequate services as well as maintenance of assets. Failure to adequately address the needs of the community may cause the court to find them invalid.

- Community participation is provided for in the Municipal Structures Act, which requires municipalities to develop mechanisms to consult with the community and community organisations in the performance of its functions and in exercising its powers.[70]
- The Municipal Systems Act states that “a municipality must establish appropriate mechanisms, processes and procedures to enable a local community to participate in the affairs of the municipality”[71]. The Act further emphasises the rights and duties in relation to municipal functions, which include informing the municipality of all council decisions.[72] At local government level, this has been interpreted into the development of ward committees. These play an important role in linking and informing municipalities about the needs, aspirations, potentials and problems of the communities. They also play a critical role in actively taking part in determining core municipal businesses such as integrated development planning, budgeting and municipal performance management.[73]

2.4.4 Statutory obligation to effectively manage the functions of the municipality

Chapter 5 of the Municipal Structures Act sets out the functions and powers of municipalities. This includes ensuring that all members of the local community have access to at least the minimum basic municipal services. The Municipal Systems Act further prescribes access to municipal services that are equitable among the members of the community; municipal services must also give priority to basic needs and ensure that all members of the community have access to at least the minimum of basic municipal services. A municipality is obliged to draw up a financial plan and assess the cost of providing and the municipality’s capacity to provide basic municipal services.

Adequate budgetary planning: A legal review of a municipality’s financial plan will reveal whether basic municipal services are prioritised. Failure to do so can result in a court, at the insistence of residents, instructing a municipality to revise its financial plan to, for example, reduce municipal services in one part of its service area (with service levels above the specified basic standards) if this leads to increased and basic delivery in another. It would also imply that a municipality can be instructed by a court to revise its financial plan and prioritise the delivery of its constitutional and statutory obligations (which include water services) over for example building roads, which is a national functional responsibility.

In order to fulfil its service delivery obligations, a municipality is obliged to manage its functions effectively. There are several stepping stones for effective municipal services management.

- **Consultation on municipal services:** In terms of the Municipal Systems Act, a municipal council has a duty to consult with the community about the level, quality, range and impact of municipal services and to give members of the community full and accurate information about the level and standard of municipal services.[74] A court can, at the insistence of residents, compel a municipality to do so.
- **Integrated development plan:** The Municipal Systems Act prescribes the drafting and adoption of integrated development plans that bind municipalities in exercising their executive functions.[75] A legal review of such a plan may reveal whether the municipality has drafted and developed the plan according to its mandate and whether the plan adequately addresses the functions of the municipality. A court can compel a municipality to redraft the plan so as to fulfil the mandate of the municipality to provide municipal services. Municipal planning, in terms of the Municipal Systems Act, must provide the right to water as provided for in Section 27 of the Constitution.[76] Failure to do so makes provision for rights-based litigation as highlighted above.

There are also several internal remedies for municipalities that fail to execute their functions:

- **Allocation of functions to a neighbouring municipality:** The MEC for local government may allocate the functions of a municipality that has collapsed or is likely to collapse to a neighbouring municipality.[77] The MEC is also obliged to provide necessary support services to the municipality through, for example, financial assistance. A court may be asked to instruct the MEC to take such actions if deemed necessary to restore or maintain the basic services in a municipality.
- **Monitoring and assessment:** The Municipal Systems Act makes provision for the provincial Local Government MEC to monitor the development of municipal capacity to deliver basic services and to assess the support needed by municipalities to strengthen their capacity.[78] The MEC has the power to request, by written notice, information from the municipality and to investigate its conduct. A legal review of the MEC’s monitoring functions may reveal whether such monitoring has taken place, the result of such monitoring and the actions that have been taken by the MEC against the failing municipality. A court can instruct the MEC to take any of these actions to restore or maintain the basic services in a municipality.

Civil society organisations can provide critical oversight of how municipal budgets are allocated to ensure the municipality takes responsibility for delivering water services as included in these budgets.

2.4.5 Statutory obligation to effectively manage the finances of the municipality

The Local Government: Municipal Finance Act provides for sound and sustainable fiscal management of municipalities. A municipality may only incur expenditure in terms of an approved budget.[79] When preparing a budget the municipality must take into account the municipality’s integrated development plan and take all reasonable steps to ensure that the municipality revises this plan taking into account realistic revenue and expenditure projections for future years.[80]

Fiscal oversight: The National Treasury monitors budgets and municipalities’ implementation of budgets in terms of the Local Government: Municipal Management Act. It may also take appropriate steps if a municipality commits a breach of the Act. The National Treasury has several remedies to improve the financial management of a municipality; these include capacity building, monitoring, cessation of funding and direct interventions. A court may be asked to instruct the National Treasury to take any of these actions.

Chapter 2 Legal review

1 Scope of research

This legal review employs a human rights approach to adequate delivery of water and sanitation services. It looks at the state's obligation to deliver available statutory reliefs for improved delivery as well as at alternative legal gateways for enforcing delivery. The legal review arises from a failure in effective delivery of water and sanitation services and an imminent need for clarity around the constitutional and statutory requirements for such service delivery. The aim is to identify the legal obstacles for effective provision of water services and to develop a strategy that can assist government and civil society in ensuring a better use of the law in upholding the constitutional rights to water and sanitation.

First, the legal review looks at the constitutional and statutory rights to water and sanitation services. This includes an analysis of the right to access to sufficient water and the right to an environment not harmful to health or well-being and an analysis of the constitutional reliefs for upholding these rights.

Second, the legal review looks at government's responsibility to deliver in terms of water and sanitation related legislation. This includes an analysis of the NWA[1] and the South African WSA[2] and the institutional arrangements for the implementation of water services. The review looks at the constitutional devolution of responsibility for water services provisions to local government and the linkages of these responsibilities to national and regional tiers of government. The review further looks at the cooperative governance provisions in terms of the Constitution and Nema, and the duties and powers of national government to hold municipalities responsible for the implementation of water services. This includes an analysis of national and provincial governments' responsibility to investigate municipalities for service delivery failure. The review also analyses the Public Finance Management Act[3] and the Municipal Finance Management Act[4] and how they hold municipalities responsible for adequate fiscal spending.

Third, the legal review looks at government's responsibility to ensure proper implementation of environmental legislation. In cases where government, and in particular local government, fails to fulfil its duties, the review looks at options of rights based litigation and regulatory/judicial review to ensure that adequate actions are taken.

The legal review proposes three strategic interventions for improved water services delivery. These include a constitutional clarification of the right to water, a systematic scrutiny of the regulatory functions of national and provincial government and an analysis of available legal intervention in the water services delivery chain.

In order to provide a clear focus, water and sanitation services affected by mining activities have been excluded from the scope of this review. At this stage this review does also not deal with the allocation of water resources (in terms of the NWA).

2 Factual background

In seeking to use judicial means to achieve real and focused practical results, it is important to take full cognisance of all the issues surrounding water and sanitation related concerns in South Africa.

Access to safe water is crucial to sustain human life. If a country's water supply and sanitation is not sufficient or is of poor quality, diseases such as cholera and diarrhoea will be common. The causes of infant and child deaths provide a good indication of whether water supply and sanitation is adequate and sufficient.[5]

Due to the importance of water and sanitation to the survival, quality of life, health and development of children, one of the Millennium Development Goals is to halve, by 2015, the proportion of people without sustainable access to safe water and basic sanitation.[6]

The *South Africa: Millennium Development Goals Country Report* indicates that South Africa is well on track to meet these goals and targets, with the proportion of households having access to clean water increasing from 60% in 1995 to 85% in 2003. Between 1994 and 2004, 10 million people gained access to basic clean water supply. Access to sanitation increased from 49% of households in 1994 to 63% in 2003.[7]

In South Africa, the 1994 *White Paper on Water Supply and Sanitation* provides definitions for basic water supply and states that water "should be in accordance with currently accepted minimum standards with respect to health-related chemical and microbial contaminants. It should be acceptable to consumers in terms of its taste, odour and appearance." A basic sanitation facility is defined, in the *Strategic Framework for Water Services,* as "the infrastructure necessary to provide a sanitation facility which is safe, reliable, private, protected from the weather and ventilated, keeps smells to a minimum, is easy to keep clean, minimises the risk of the spread of sanitation related diseases by facilitating the appropriate control of disease carrying flies and pests, and enables safe and appropriate treatment and/or removal of human waste and wastewater in an environmentally sound manner".[8]

The *National Water Resource Strategy* ensures the provision of water services – safe drinking water and sanitation – to all people, especially the poor and previously disadvantaged.[9] Yet, as pointed put in the *Mazibuko* judgment, despite significant improvement in the access to water services, deep inequality remains. Particularly worrying is the lack of water services in rural and informal settlements.[10] There are, according to the *State of the Environment Report*, serious lags in the delivery of sanitation facilities. In terms of the report, little or no treatment of waste water takes place in some circumstances, such as in informal settlements. Where treatment is available, sewer reticulation is often inadequate or poorly maintained, resulting in uncontrolled releases such as leakage and overflow.[11] Statistics from the Department of Water Affairs (DWAF) and Forestry (now the Department of Water and Environmental Affairs) indicate that approximately 14% of residents in South Africa do not have access to water that complies with the department's water quality management standard.[12]

The children's rights organisation Children Count, which looks, amongst other things, at children's access to safe and reliable drinking water, argues that only 63% of children have access to adequate water.[13] The organisation finds that there are striking provincial differences in the provision of water and that children living in formal areas are more likely than those living in informal or traditional dwellings to have access to water.[14] However, due to increasing populations, particularly in towns and cities, even the most capacitated municipalities are struggling to deliver water services to all its inhabitants, while at the same time continuing to provide good quality services and maintenance of existing infrastructure.[15]

The state's goal was to provide adequate sanitation to all and eradicate the bucket system by 2007. The proportion of people without adequate toilet facilities, however, remains worryingly high. Children Count has found that nearly 8 million children still use unventilated pit latrines, buckets or open land.

The Centre for Applied Legal Studies[16] recently made a submission to the South African Human Rights Commission on the access to water and sanitation in South Africa.[17] In this submission, the centre identified six challenges in realising access to water and sanitation:

- eradicating backlogs by extending water services to those with none and improving levels of service by providing increasingly better levels of service to those with rudimentary access;
- supplying free basic services (free basic water and free basic sanitation) across all municipalities according to national standards;
- substituting the use of the indigent policy as a mechanism for targeting free basic services with the recommended mechanism of universal allocation;
- setting tariffs in a way that allows for national standardisation while ensuring local appropriateness;
- developing a principled approach to water disconnection and restriction, emphasising equity and human rights consideration while finding ways of avoiding water debt in the first place; and
- resolving problems with water quality including systemic change such as improved interaction between the health and water departments, DWAF's role in monitoring and enforcing water quality standards and problems with water quality monitoring at the local level. [18]

Media reports on the failure of municipalities to fulfil their obligations to deliver adequate water and sanitation services are on the increase. These reports include allegations of the serious pollution of our rivers by human waste and children dying from polluted drinking water.

Many of the problems with water services are attributed to the failure of local government to properly maintain and operate sewage treatment infrastructure; it is argued that infrastructure is strained and aging water services provision capacity limited.

There have also been recent media reports on municipal sewage works operating without the necessary permits. Other reports have documented the country's failure to maintain bulk water infrastructure, which poses a serious threat to the country's future access to water.[19] It has been argued that targets for delivering new infrastructure have been prioritised over systems to operate and sustain existing systems. With a growing scarcity in management, engineering and technical skills and municipalities struggling to obtain adequate finances, there are serious concerns about the ability of municipalities to fulfil their obligations to deliver water services.[20]

Subsequently South Africa, despite its progress in delivering water services, also faces serious backlogs in delivering services, particularly in rural areas and informal settlements. Affected communities have reacted against poorly managed municipalities through service delivery strikes. These communities blame service failure on municipal mismanagement and corruption.

Where resources are available, civic organisations such as ratepayers' associations have taken legal actions against failing municipalities. Through structural interdicts, these organisations are trying to force municipalities to deliver where they are not. National and provincial governments are likewise looking for legal remedies to compel local governments to deliver.

This legal review looks at available legal remedies such as court interdicts, but also looks comprehensively at the problem of service delivery and proposes interventions that use the statutory framework for water services to compel all three spheres of government to better coordinate their actions for improved water services.

Chapter 3 Legal and policy framework

1 Constitutional rights

Several substantive rights in the Constitution's Bill of Rights are of relevance to water and sanitation. These rights fall under the heading of so-called "socio-economic" or "second generation" rights.

1.1 Justiciability of socio-economic rights

The difficulty that is typically identified in attempting to enforce socio-economic rights is the fact that their application requires the courts to direct the way in which the g overnment distributes the state's resources, and this is not normally considered to be an appropriate judicial function.[1]

In international law, it is generally recognised that the positive component of socio-economic rights requires two forms of action from the state. First, the state must create a legal framework that grants individuals the legal status, rights and privileges that will enable them to pursue their rights. Secondly, the state is required to implement measures and programmes designed to assist individuals in realising their rights.[2]

The inclusion of these rights in our Constitution was specifically debated by the Constitutional Court[3] and further commented on in *Government of South Africa v Grootboom*.[4] Although the *Grootboom* case concerned the constitutional provisions contained in Section 26 and 28 of the Bill of Rights, the remarks of the court regarding the justiciability of socio-economic rights are general in their application:[5]

> "Socio-economic rights are expressly included in the Bill of Rights; they cannot be said to exist on paper only. Section 7(2) of the Constitution requires the state 'to respect, protect, promote and fulfil the rights in the Bill of Rights' and the courts are constitutionally bound to ensure that they are protected and fulfilled. The question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case. This is a very difficult issue which must be carefully explored on a case-by-case basis."

These Constitutional Court comments have been accepted and quoted with approval in other judgments concerned with the interpretation of the provisions of the Bill of Rights.[6] The socio-economic rights' positive dimension is qualified by the use of the phrase "employed" in Section 26(2) and Section 27(2), obliging the state to take only those steps "within its available resources to achieve this progressive realisation of the right".[7]

Therefore the positive dimension of socio-economic rights is "realised" or fulfilled through state action "progressively" or over a period of time. However, this realisation is limited by the qualification that the rights are only available to the extent that state resources permit. In the absence of available state resources, the failure of the state to address socio-economic rights is, therefore, not a violation of the right. However, should resources become available, it would be difficult for the state to justify its failure to devote those resources to the fulfilme nt of the rights. It can therefore be argued that this indicates that the positive dimension of the socio-economic rights can be described as a right to have the state justify its use of its resources to its citizens.[8]

1.2 Use of international instruments in interpreting the Constitution

The foundation for the interpretation of the Bill of Rights is Section 39 of the Constitution, which reads as follows:

> "(1) When interpreting the Bill of Rights, a court, tribunal or forum
> Must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
> Must consider international law; and
> May consider foreign law.
> (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
> (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."

It is therefore peremptory for courts to consider international law and optional to consider foreign law. In *S v Makwanyane*, the court held that both binding and non-binding public international law may be used as tools of interpretation and broadened the scope to the use of, in appropriate cases, the reports of specialised agencies for providing guidance as to the correct interpretation of particular provisions.[9] In reaching this conclusion, the court referred to the work of John Dugard[10], who proposed that a court could also rely on international conventions, international custom and general principles of law recognised by civilised nations as well as judicial decisions and teachings of highly qualified publicists of various nations.

In *Grootboom,*[11] the Constitutional Court referred to Section 39 of the Constitution and to the decision in *Makwanyane* regarding the impact of international law and commented that "[t]he relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary". The court acknowledged the provisions of the *International Covenant on Economic, Social and Cultural Rights* (in that case those provisions applicable to Section 26 or the right to adequate housing) but ultimately concluded that "the real question in terms of our Constitution is whether the measures taken by the state to realise the right... are reasonable."[12]

In *Residents of Bon Vista Mansions v Southern Metropolitan Local Council*[13], in which the applicants relied on the provisions of Section 27(1)(b), Judge Budlender concluded that "(t)he General Comments have authoritative status under international law" although this was used in circumstances "where the Constitution uses language which is similar to that which has been used in international instruments".

The most important international document in which the right to water or the right to have access to water is mentioned by name is the *General Comment on the Right to Water* issued by the United Nations Committee on Economic, Social and Cultural Rights.[14] The *General Comment* is issued based on an interpretation of the provisions of Articles 11 and 12 of the *International Covenant on Economic, Social and Cultural Rights* (or the *Covenant*), which provide for the right to an adequate standard of living and the right to the highest attainable state of health.

The content and effect of *General Comment 15* has been summarised as follows, with own emphasis:[15] The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses ... *The right is divided into three categories: availability, quality, and accessibility, each of which creates separate requirements for compliance.* Availability includes quantities for continuous personal and domestic uses ... *The quality condition attempts to ensure the water is free of disease-causing contaminants.* The accessibility prong is the most developed, including the subcategories of physical accessibility, economic accessibility and non-discrimination. The basic premise is that water should be physically available to all people and free of economic encumbrances.

The right is also expressly recognised in international human rights instruments including the *Convention on the Elimination of All Forms of Discrimination Against Women of 1979* (Article 14) and the *United Nations Convention on the Rights of the Child of 1989* (Article 24). The *International Covenant on Economic, Social and Cultural Rights* does not expressly include the right to water. The right to health in the *Covenant* has, however, been interpreted to include an obligation on the state to ensure access to an adequate supply of safe and potable water.

1.3 Core minimum obligations

The Committee on Economic, Social and Cultural Rights in *General Comment 3* in 1990 confirmed that states have certain core obligations to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the *Covenant*. In relation to safe water, *General Comment 15* identifies a number of obligations that are of immediate effect, namely the obligation:[16]

- to ensure access to the minimum essential amount of water that is sufficient and safe for personal and domestic uses to prevent diseases;
- to ensure physical access to water facilities or services that provide sufficient, safe and regular water; that have a sufficient number of water outlets to avoid prohibitive waiting times and that are at a reasonable distance from the household; and
- to take measures to prevent, treat and control diseases linked to water, particularly ensuring access to adequate sanitation.

These core obligations apply unless the state can show that its resources are "demonstrably inadequate" to allow it to fulfil its duties.[17] Violations of socio-economic rights will occur when the state fails to satisfy obligations to ensure the satisfaction of minimum essential levels of each of the rights or fails to prioritise its use of its resources so as to meet its core minimum obligations.[18]

In *Grootboom,*[19] the Constitutional Court declined to set a core minimum obligation guideline for the right to housing, examining instead whether the standard of reasonableness had been complied with. The court raised the problem that determination of a core minimum obligation would require a great deal of evidence and information not ordinarily available to a court hearing a claim of violation of individual rights.[20] The court thus ruled out a holding that certain positive obligations in terms of the socio-economic rights must be immediately complied with and are immediately enforceable.[21]

According to Currie and De Waal, this means that even if a minimum core obligation was established in respect of one of the socio-economic rights, this would be relevant to the assessment of reasonableness and would not confer an immediately enforceable self-standing right.[22] This approach of the Constitutional Court was criticised as it is argued that it is the role of the court, as the upper guardian of the Bill of Rights, to set general standards that must be met in order for the state to comply with its minimum core obligations.[23] Bilchitz argues that the state has an obligation to meet people's basic needs and that the notion of the minimum core obligation involves recognising the centrality and importance that the provision of certain basic goods has for the quality of people's lives and requires correspondingly urgent action.[24]

In the high court decision in the *Mazibuko* case, Judge Tsoka held that he did not regard *Grootboom* as a rejection of the minimum core concept in our law but that it simply pointed out that in relation to the right to housing it presented difficulties.[25] He distinguished the right to housing from the right to water on the basis of the diversity of needs in the two rights. In this regard he referred to the definition of "basic water supply" in the WSA and concluded that the right to water did not have the same diversity of need as the right to housing, presumably as a prescribed minimum standard had been set in the WSA and its regulations.[26]

In the Constitutional Court judgment, however, the court rejected the argument that it should adopt a quantified standard to determine the content of the right to water and thus rejected not only the minimum core argument but also questioned the right to claim "sufficient water" from the state immediately. The reason for rejecting the minimum core is twofold. First the court referred to the relationship between Section 27(1) and (2) and the obligation of the state to take reasonable legislative and other means progressively to achieve the right to access to sufficient water with available resources. The Constitution, however, does not confer a right to claim sufficient water from the state immediately. The concept of reasonableness places an obligation on the court to determine whether a government programme is indeed reasonable and if it progressively realises the particular right. Second, the court held that it was inappropriate for a court to determine precisely what the achievement of a particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. The court thus envisaged that legislative measures are the primary instrument for the achievement of social and economic rights. The court's role is to intervene where no such measures are taken.[27]

The concept of minimum core obligations has not yet been addressed by our courts in the context of sanitation. In the recent high court case of *Nokotyana and Others v Ekurhuleni Metropolitan Municipality,*[28] the inhabitants of the Harry Gwala Informal Settlement applied for an order against the municipality enforcing their right to high mast lighting and temporary sanitation facilities.[29] On appeal to the Constitutional Court, the appellants rely *inter alia* on the constitutional principles of equality and dignity and the "minimum core approach" in enforcing the provisions of the WSA and their right to a minimum level of service as prescribed by the *2001 White Paper on Basic Household Sanitation*.[30] In contrast to this claim, the respondents' heads of argument show that the respondent considered the following sufficient in its budget allocation for the provision of interim sanitation to informal settlements:[31]

> "until the need ceases to exist 'for the provision o f interim sanitation to informal settlements in the form of chemical toilets, provided at one toilet per 10 families … in areas where health problems are associated with community based pit latrines'."

The matter was set down on the court roll for 5 November 2009.

1.4 Constitutional relief

Section 38 of the Constitution provides for the enforcement of rights contained in the Bill of Rights and provides that:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights."

The concept of appropriate relief has been referred to in a number of Constitutional Court decisions and most appositely by the Supreme Court of Appeal in the recent *Mazibuko* case:[32]

> "Referring to Section 38 of the Constitution, which provides that a court may grant appropriate relief in respect of an infringement of a right in the Bill of Rights ... [the respondents] submitted that only effective relief would constitute appropriate relief. In *Fose v Minister of Safety and Security 1997 (3) SA 786 (CC)* at para 69 Ackermann J said: '[A]n appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced.'"

In the *Mazibuko* case, the applicants' need for effective relief was held to outweigh the defence that reasonable measures had been taken in terms of Section 27(2) by the formulation of the city's present water policy.[33] The need for appropriate relief has been held to outweigh the traditional separation of the judiciary and the executive, allowing the Constitutional Court to grant relief in the form of directing the amendment or reformulation of policy.[34]

It has also been noted that structural interdicts, which require of public bodies to perform constitutional obligations and report to the courts on their progress in doing so from time to time, are likely to prove particularly useful in the environmental context, especially in relation to Section 24(b).[35]

1.5 Section 27 of the Constitution

Section 27 provides that "everyone has the right to have access to … sufficient … water" and that "the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of … these rights."[36]

In *Grootboom*, the Constitutional Court considered the distinction between the right to adequate housing and the right of access to adequate housing and appeared to give the latter right a broader ambit that encapsulated the former right.[37] Extending this reasoning to the similar language of Section 27, it could be argued that the wording of the Constitution reflects the legislature's desire to redress past socio-economic inequities rather than its intention to enforce only a portion of the content of the human right to water. (As noted above, the provisions of *General Comment 15* include the requirements of quality, quantity and accessibility in the content of the right to water.)

The interpretation of "access" is further elaborated on by Kok and Langford, where they comment that "[t]he state's duty towards those individuals who have the ability to pay for water services entails that the state must create the conditions and opportunity to ensure that those individuals have access to water" and that this obligation has been described by the Constitutional Court as having to unlock the system by *inter alia* providing a legislative framework.[38]

The Constitution also "does not provide explicit guidance as to the meaning of sufficient water and in particular does not prescribe the quantity and quality of water each individual is entitled to access."[39]

However, in *Mazibuko*,[40] the Supreme Court of Appeal had occasion to address the meaning of the word "sufficient" in the context of the provisions of Section 27(1)(b):

> "In interpreting the right to sufficient water a purposive approach should be followed. In determining the purpose of the right, one should have regard to the history and background to the adoption of the Constitution and the other provisions of the Constitution, in particular the other rights with which it is associated in the Bill of Rights."

The argument on "sufficient water" was rejected in the Constitutional Court judgment where the court held that the state is not under any constitutional obligation to provide any particular amount of free water.[41]

The Supreme Court proceeded to quote the case of *Soobramoney v Minister of Health*[42] on the poor socio-economic conditions that the Constitution's Bill of Rights aims to address and commented further (own emphasis)[43]:

> "A commitment to address a lack of access to clean water and to transform our society into one in which there will be human dignity and equality, lying at the heart of our Constitution, it follows that a right of access to sufficient water cannot be anything less than a right of access to that quantity of water that is required for dignified human existence. Support for this conclusion is to be found in the 2002 *General Comment 15* ... 'The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival ... The right should also be seen in conjunction with other rights enshrined in the International Bill of Human Rights, foremost amongst them the right to life and human dignity.' For this reason 'the elements of the right to water must be adequate for human dignity, life and health.'"

The municipality raised two defences that have a bearing on the interpretation of Section 27(1)(b) and 27(2). Their first defence raised the rule of direct reliance, stating that "where national legislation had been enacted to give effect to a constitutional right, it was impermissible for a litigant to rely directly on the constitutional right concerned."[44] However, the court accepted the respondents' contention that previous decisions concerning the application of the direct reliance rule to provisions of the Constitution did not apply to Section 27(2) on the basis that the section "was ... not intended to cover the field and to deprive anyone of its right to rely on the provisions of Section 27(1). On the contrary it simply recognises that it may, in certain circumstances, not be possible for the state to give immediate effect to the provisions of Section 27(1) and requires the state to take reasonable legislative and other measures to encourage the progressive realisation of the right of access to sufficient water."[45]

The second defence was that the requirement of Section 27(2) that reasonable measures be taken to fulfil the right had been complied with under the city's present water policy. The court conceded that in formulating this water policy, a reasonable balance would have to be struck between available resources and many competing interests and that it would be irresponsible of a court to usurp the function of the city in revising the free water policy.[46] However, weighed against this was the need to provide the respondents with effective relief[47], and this required an interim order pending the implementation of a revised water policy.

In light of the decision of the Supreme Court of Appeal, the implications of the constitutional right to water for prospective litigants are as follows:

- Section 27(1)(b) includes the right to potable or clean water. This is further supported by the provisions of the Water Services Act, which gives effect to the constitutional right.
- It could be argued that the state's failure to ensure water of a suitable quality for human consumption, particularly in relation to a delineated area receiving such water from a single source of supply, is tantamount to a failure to create the conditions and opportunity to ensure that those individuals have access to water. (This view is supported by Kok and Langford, who include "ensuring that drinking water is unpolluted" as an example of one of the conditions for "physical" access to water that could be required to be created by the state.)[48]
- The Supreme Court of Appeal has confirmed that the content of the right encompasses the supply of a minimum quantity of water of a quality sufficient for basic human needs, including sanitation. On the evidence before it, this minimum quantity has been determined by the court to be 42 litres per person per day.
- In addition, several aspects of the *Mazibuko* case deal with areas of interpretation that can be extended to the provisions of Section 24 of the Constitution. An example of this is the further development of the concept begun in other Constitutional Court cases of fashioning the remedy in terms that grant the right holders "appropriate relief" as allowed for by Section 38 of the Constitution.
- However, the specific wording of the provision does create areas of interpretative uncertainty that remain unresolved, and the current judicial interpretation of its application is very narrow. However, it is of direct application to those whose right to a "basic water supply" under the WSA has not been adequately fulfilled, such as the many communities living without proper infrastructure for domestic water supply.

The applicants in the *Mazibuko* case appealed to the Constitutional Court, where they sought an order to further amend the city's free water policy to extend "free basic water of 50 litres per person per day to all the residents of Phiri". The appellants also requested that the court impose a time limit on the city's obligation to reformulate its free water policy in terms of the order.[49] Both applications were rejected by the court.

1.6 Section 24 of the Constitution

In including a right to the environment[50] in the Bill of Rights, "South Africa has followed global trends and the example of many other countries, including African states such as Malawi and Mozambique ... The South African environmental right must be viewed against a history of concern with the link between environmental degradation, socio-economic injustice and a dearth of legal gateways for public participation in environmental policy-making."[51]

In relation to Section 24, the Supreme Court of Appeal has held that: [52]

> "Our Constitution, by including environmental rights as fundamental justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the administrative process in our country."

Several of the individual elements of Section 24 have not yet been informed by the courts with specific meaning. However, the following areas of interpretation must be considered:

- The definition of the term "environment" as it is used in the section clearly encompasses a natural element of the environment such as water, regardless of its intended use.[53]
- Section 24 is divided into two subsections, each of which could function independently of each other. Thus, Section 24(a) deals with the interests of the right holder only and is expressed in unqualified terms while Section 24(b) covers the wider interests of non-right holders and grants only qualified entitlements.[54]
- The wording of Section 24(a) is that of a right to an environment of a certain quality. One possible implication of this wording is that "epidemiological and toxicological evidence which establishes that the environment has been rendered detrimental to health or well-being is sufficient to establish an infringement of Section 24, even in the absence of any proof that a particular act or decision has injured any individual."[55]
- The reference to well-being by the court in the case of *Hichange Investments*[56] has been construed to imply that the term's meaning is to be subjectively determined with regard for the right holder's circumstances.[57]
- In *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [58] the high court quotes Glazewski's comments on the potential wide meaning of the term "well-being" with approval and further supports his and another commentator's view that "[i]n its ordinary meaning Section 24(b) consequently does no less than give constitutional force ... to the principle of 'sustainable development'."[59] The court commented further that:[60]

  > "The scope of the right is therefore extensive. It does not confine itself to protection against conduct harmful to health but seeks also by, *inter alia*, the promotion of conservation and ecologically sustainable development, to ensure an environment beneficial to our 'well-being'. …The attainment of this (constitutional) objective or imperative confers upon the authorities a stewardship, whereby the present generation is constituted as the custodian or trustee of the environment for future generations."

- Further as to the meaning of well-being, "[i]n a multicultural country such as South Africa it is equally vital to recognise that the 'well-being' of many communities depends on the maintenance of a way of life that is integrated with a particular environmental status quo."[61] This would have particular application in the case of South African subsistence farmers, who are affected by natural water resources of an insufficient quality for watering livestock.[62]
- With regard to "reasonable legislative and other measures" and its implication for Section 24(b), the views of the court on the reasonable measures required for the effective content of other socio-economic rights in the Constitution are relevant for interpretation. The principle expressed in the *Mazibuko* case suggests that the court will have regard for the relief sought and the circumstances of the applicants in considering whether or not reasonable measures have been taken.[63]
- The broadening of the *locus standi* provisions in Section 38 of the Constitution makes the use of Section 24 attractive to those who wish to litigate in the public

interest on broader environmental concerns. However, the limitations of the court as to the remedies that they can offer and the extent to which they will be prepared to supplant legislative and administrative functions must be taken into consideration.[64]

- A further warning is sounded in connection with the presence of a large body of legislation that gives effect to the environmental right. "Direct reliance on the constitutional right would be rare due to the principle of avoidance, which requires that remedies should be located in common law or legislation (more likely in the environmental law sense) before resorting to constitutional remedies."[65]
- Given the difference in wording between the provisions of Section 27(2) and Section 24(b), it is debatable whether the reasoning for the inapplicability of the direct reliance rule by the Supreme Court in *Mazibuko* will also be applied to the latter provision.[66] It is possible that a stricter view will be applied in the case of Section 24(b) as in this provision the taking of legislative and other measures forms a more integral part of the right to protection of the environment. A more appropriate test in this case would perhaps be to apply the standards imposed by Paragraphs (i) to (iii), thus using the effectiveness of the legislative and other measures in achieving the stated goals as a test for reasonableness.

To summarise, the right to the environment in the Constitution coupled with broad constitutional provisions allowing standing to sue and access to official information facilitate litigation across the spectrum of interests in water quality. The environmental right is of particular use in public interest litigation, which seeks to protect water as a national natural resource. Clean and clear water links closely with an environment that is not harmful and the need to prevent pollution.[67]

1.7 Right to sanitation

The right to basic sanitation is not mentioned explicitly in the South African Bill of Rights. The right to an amount of water for sanitation purposes is included in the right to water as discussed above. This is confirmed by the provisions of the WSA, which give effect to the constitutional rights in Section 27(1)(b) and specifically extend the right of access to water to include the right to basic sanitation.[68] Moreover, a right to sanitation could be derived from Section 24(a) (the right to a clean environment) read with the right of access to adequate water.[69]

Although sanitation is not named as a right in the South African Constitution, in international law and national policy and law, water and sanitation are closely linked. Without water, many sanitation facilities cannot function and people struggle to maintain dignity and the hygiene standards essential to preventing ill health and the spread of diseases.

The right to sanitation in international law has been grouped with the right to housing and health, although the role of sanitation as one of the principal mechanisms for protecting the quality of drinking water supplies and resources is recognised.[70]

This extension of the right of access to water opens up the possibility of the judicial enforcement of the right to basic sanitation in terms of Section 27(1)(b) of the Constitution, read with the provisions of the WSA.[71]

In the *Nokotyana* case,[72] the applicants relied on Sections 26 and 27 of the Constitution as well as the provisions of the WSA and the high court decision in *Mazibuko* to enforce their right to basic sanitation against the municipality. The high court considered that the relevant provisions of the National Housing Code carried greater weight and concluded that "there is no suggestion … that the municipality is not carrying out its obligations to take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to ensure that services are provided in a manner that is economically efficient." In reaching this decision, Judge Epstein considered the provisions of Section 26(2) of the Constitution, which provides that obligations are to be performed within available resources, and an earlier decision of the Supreme Court regarding the division of power in the context of Section 26 of the Constitution.[73] However, it should be noted that the decision of the Supreme Court of Appeal in the *Mazibuko* case was handed down the day after the high court delivered judgment in Nokotyana. As discussed under Section 1.3, the date for the Nokotyana applicants' appeal in the Constitutional Court was set for 5 November 2009.

Finally, the view has been expressed that a failure to comply with subsidiary legislation enacted or administrative procedures prescribed to give effect to constitutional rights could be regarded by the courts as an infringement of the constitutional right.[74]

On the basis of the arguments above and depending on the interpretation given to the provisions of the WSA, the *Nokotyana* case could potentially result in the Constitutional Court giving specific content, with reference to existing policies and policy documents, to free basic sanitation.

2 Institutional arrangements for water services

2.1. The constitutional devolution of responsibility of water services to local government

The Constitution provides for three spheres of government. Adequate delivery of clean water may fall within the competence and jurisdiction of all three spheres of government, depending on whether one is referring to water resources in general or to potable water supply systems.

The legislative competence of the national parliament is provided for in the Constitution in Sections 43 and 44 read with Schedules 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)(ii), the national legislature has powers:

> "to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, but excluding … 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 legislation to provincial legislatures (Section 104(1)(b)).

Any matter that is not listed in either schedule and that has not been assigned to the provinces remains an area of national legislative competence (the so-called residual area of competence).[75]

Schedule 4 of the Constitution lists the areas in respect of which both the national and the provincial legislatures have legislative competence. Schedule 5 lists areas in which the provincial legislatures have exclusive legislative competence. Neither Schedule 4 nor Schedule 5 specifically list water, its supply, management or the development of water resources as an area of legislative competence. These functions are therefore regarded as being within the exclusive competency of national government and reside with the DWEA, formerly the DWAF.[76] This reflects the national importance of water resources in a water scarce country.[77] The control body for water resources is the national DWEA, which has provincial departments.

Part B of Schedule 4 provides for local government, i.e. municipalities, to have executive authority and to administer water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems. The Constitution states that the objects of local government are to ensure the provision of services to communities in a sustainable manner,[78] to promote social and economic development and [79] to promote a safe and healthy environment. [80] Municipalities must strive, within their financial and administrative capacity, to achieve these objects.[81]

This was recently confirmed in the Mazibuko case. The court held as follows:

> "In terms of the Constitution one of the objects of local government is to ensure the provision of services to communities in a sustainable manner (Section 152(1)(b)). Like the other objects of local government, a municipality must strive, within its financial and administrative capacity, to achieve that object (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 (Section 156(2))".[82]

The municipality must structure and manage its administration and budgeting and planning processes to give priority to the community's basic needs and to promote its social and economic development.[83]

2.2 Statutory legislative framework for the provision of water services

The differentiation between water resources in general and water services systems is replicated in the statutory legislative framework. The NWA provides the legal framework for the management of water resources, which remains a competency of national government and is binding on all organs of state.[84] This includes the allocation of water for beneficial use as well as the redistribution of water.

The responsibility for ensuring access to water services lies, in terms of the WSA[85], with water services authorities, defined by the Act as municipalities including districts or rural councils.[86] Access to water services must be through a water services provider nominated by the water services authority in the area.[87] A water services authority may contract a water services provider or enter into a joint venture with another water services institution.[88] These institutional arrangements are confirmed by the *Strategic Framework for Water Services* (2003).[89]

The responsibility of water services authorities is to ensure access to both water supply services and sanitation services. Section 4 provides for conditions for the provision of water services, which must be provided in terms of conditions set by the water services provider.[90] Importantly, if the water services provided by a water services institution are unable to meet the requirements of all its existing consumers, it must give preference to the provision of basic water supply and basic sanitation.[91] In case of an emergency, basic water supply and sanitation services must be provided, even at the cost of the water services authority.[92] The procedures for the limitation or 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".[93]

2.3 Acknowledging the right to water services

The WSA acknowledges the constitutional right of access to basic water supply and sanitation[94] and provides that every water services institution[95] must take reasonable measures to realise these rights.[96] In addition, every water services authority must, in its water services development plan, provide for measures to realise these rights.[97]

Basic water supply means "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".[98] Basic sanitation means "the prescribed minimum standard of services necessary for the safe, hygienic and adequate collection, removal, disposal or purification of human excreta, domestic waste water and sewage from households, including informal households".[99] Sanitation services imply "the collection, removal, disposal or purification of human excreta, domestic waste water, sewage and effluent resulting from the use of water for commercial purposes".

2.3.1 *The Strategic Framework for Water Services* (2003)

The Strategic Framework for Water Services regards the provision of at least a basic water and sanitation service to all people living in South Africa, referred to as a "universal service obligation", as an important policy priority and commits government to making adequate funds available to make this possible. The following definitions are set out for water supply and sanitation services:[100]

- **Basic water supply facility:** The infrastructure necessary to supply 25 litres of potable water per person per day within 200 metres of a household and with a minimum flow of 10 litres per minute (in the case of communal water points) or 6 000 litres of potable water supplied per formal connection per month (in the case of yard or house connections).
- **Basic water supply service:** The provision of a basic water supply facility, the sustainable operation of the facility (available for at least 350 days per year and not interrupted for more than 48 consecutive hours per incident) and the communication of good water use, hygiene and related practices.
- **Basic sanitation facility:** The infrastructure necessary to provide a sanitation facility that is safe, reliable, private, protected from the weather and ventilated; keeps smells to a minimum; is easy to keep clean; minimises the spread of sanitation-related diseases by facilitating appropriate control of disease carrying flies and pests; and enables safe and appropriate treatment and/or removal of human waste and waste water in an environmentally sound manner.
- **Basic sanitation service:** The provision of a basic sanitation facility that is easily accessible to a household; the sustainable operation of the facility, including the safe removal of human waste and waste water from the premises where this is appropriate and necessary; and the communication of good sanitation, hygiene and related practices.

Potable water must be of a quality consistent with SABS 21 (specifications for drinking water).

The targets set for the provision of services are as follows:

- Basic water supply to all South Africans – 2008
- Functioning basic sanitation facilities – 2010
- Adequate and safe water and sanitation to all schools – 2005
- Adequate and safe water supply and sanitation to all clinics – 2007
- Eradication of all bucket toilets – 2006
- Free Basic Water policy in WSA – 2005
- Free Basic Sanitation policy in WSA – 2010

2.3.2 Policy for Free Basic Water[101]

The Policy for Free Basic Water promotes sustainable access to a basic water supply by subsidising the ongoing operating and maintenance costs of a basic water supply service. It is envisaged that the minimum quantity of free basic water of 25 litres per person per day should over time be increased to 50 litres per person per day. Free Basic Water is financed from the Local Government Equitable Share and through cross-subsidisation.

Although the Free Basic Water policy is not legislated per se, it is based on sections of the WSA as already set out and the Compulsory National Standards (Regulation 3(b)). According to the Centre for Applied Legal Studies, it is clear from the Constitutional Court adjudication that government policies pursued to give meaning to constitutional rights incur the same kinds of obligations as rights and, consequently, may be challenged.[102]

2.3.3 Policy for Free Basic Sanitation

The policy for Free Basic Sanitation promotes affordable access by poor households to at least a basic level of sanitation service. In order to provide this service, water services authorities must ensure that the costs of providing the service are covered by the Local Government Equitable Share and/or through cross-subsidies within the water services authority area. The funds must be paid to the water services provider who operates the service or directly to the households.[103]

The policy has been developed but has not yet been approved or implemented, and the DWAF is meant to be developing a Free Basic Sanitation strategy together with a set of guidelines to assist the implementation of the Free Basic Sanitation policy.[104]

2.4 National standards for the provision of water services

Chapter II of the WSA provides that the minister may prescribe national standards (including norms and standards for tariffs) relating to the provision of water services including the water quality; effective and sustainable use of water resources; the nature, operation, sustainability, operational efficiency and economic viability of water services; and the construction and functioning of water services works and consumer installations.[105] Every water services institution is compelled to comply with the prescribed standard.[106] There are no sanctions in the WSA for non-compliance.

When prescribing norms and standards for tariffs (which must be in consultation with the minister of Finance), the minister may place limitations on the use of income generated by the recovery of charges.[107] This enables the minister to regulate the way in which local authority income is used and could be a tool to ensure that it is earmarked for capital expenditure and maintenance of infrastructure relating to water and sanitation services.

2.5 Obligations of water services authorities to provide access to water services

An obligation is imposed on every water services authority to progressively ensure efficient, affordable, economical and sustainable access to water services for all consumers or potential consumers, subject to considerations of availability, equity, reasonable cost recovery, conservation of water resources, the land in question and the right to limit or discontinue the provision of water services upon failure to comply with any reasonable conditions imposed for the provision of the services.[108]

In ensuring access to water services, it is mandatory for the water services authority to consider certain factors such as alternative ways of providing access, the need for regional efficiency, benefit of scale, low cost, equity and availability. A water services authority may not unreasonably refuse or fail to give access to water services to a consumer or potential consumer in its area of jurisdiction.[109]

Section 20(1)(c) of the Health Act[110] further stipulates that: "Every local authority shall take lawful, necessary and reasonable measures to prevent the pollution of any water intended for the use of the inhabitants of its district, irrespective of whether such water is obtained from sources within or outside its district, or to purify such water which has become so. It is also the obligation of the local authority to 'maintain its district at all times in a hygienic and clean condition' and to 'prevent the occurrence within its district of any nuisance, unhygienic condition, offence condition or any other condition which will or could be harmful or dangerous to the health of any person.'"

Section 9(1)(a)(iii) of the Housing Act states that "Every municipality must, as part of the municipality's process of integrated development planning, take the reasonable and necessary steps to ensure that services in respect of sanitation and storm drainage are provided in a manner which is economically efficient."

2.6 Failure by water services authorities to provide access to water services

2.6.1 Reasonable failure to provide water services

There are several reasons for water services authorities' failure to deliver water services. The provision of water services requires money, and while municipalities can rely for part of this financing on a combination of subsidies from national government and transfers from other municipal account, the rest of the financing is intended to come from local tariffs. In certain areas, however, municipalities have faced shortfalls in collecting tariffs.[111]

Clearly, the meaning and interpretation of "reasonableness" is relevant here. It is questionable whether a failure by a local authority to give access to water services as a result of inefficient administration or inadequate allocation of funds is reasonable. A water services authority may, however, impose reasonable limitations on the use of water services in order to regulate beneficial use, the abuse of the service and pollution. However, unless municipalities have the financial and technical assistance and qualified human resources to comply with national water policy and standards, their ability to deliver is severely compromised, and this gives rise to inequitable delivery of services, depending on the resources of the municipality and its geographic location.

2.6.2 Key performance indicators[112]

The Strategic Framework for Water Services provides that where quality standards are set by a water services authority, the authority must demonstrate what actions it is taking to improve the quality of services and must show reasonable annual improvements in the quality of service provided so as to meet the quality standards within a period of five years.

Where free basic water supply and sanitation services are not provided in terms of the policies in the *Strategic Framework,* the water services authority must demonstrate what actions it is taking to extend free basic water supply and sanitation services and must show reasonable annual expansion in the provision of free basic services so as to meet the benchmark as soon as is practically feasible.

Where financial performance, use of resources and environmental benchmarks are not met, the water services authority must demonstrate what actions it is taking to meet these benchmarks and must show reasonable annual improvements so as to meet these benchmarks within a period of five years.

2.6.3 Water boards

A water services institution may request the water board within its service area to provide water services. A water board may only refuse such a request if, for sound technical or financial reasons, it would not be viable to provide those water services.[113] The water boards may also provide management services, training and other support services to water services institutions, in order to promote cooperation in the provision of water services.[114] In the spirit of cooperative governance the water board must promote the efficiency of water services authorities and take into account national and provincial policies, objects and developments.[115]

The board is required to publish a policy statement, which must be revised at least every five years. The minister may direct the board to revise its policy statement if it is not in the best interests of the general population within its service area or does not meet the parameters of its functions. It is also required to publish a business plan every five years with similar provisions allowing the minister to direct an amendment of the business plan. Importantly, the minister may issue a directive against the board, and the board is obliged to comply therewith, to undertake specific activities or to desist from specific activities. A water board must annually prepare a report containing sufficient information, *inter alia,* to enable the minister, the province, the relevant water services institutions and the public to assess the performance of the board. Any papers seeking a court order or judgment served on the water board must also be served on the minister. Provinces have no executive or legislative power over water boards.

2.6.4 Water services committees

The minister may establish water services committees with the function of providing water services to a community. In setting up these committees, the minister needs to consult with the inhabitants of the proposed service area, the water services authority and the minister for Provincial Affairs and Constitutional Development in the province.[116] The function of a water services committee is to provide water services to consumers within its service areas.

2.6.5 Monitoring and intervention

Both the minister and any relevant province must monitor the performance of every water services institution to ensure compliance with prescribed national standards and norms and compliance with every applicable development plan, policy statement or business plan adopted.[117] If a water services authority has not effectively performed any function imposed on it, the minister, after consultation with the minister for Provincial Affairs and Constitutional Development, may request the relevant province to intervene in terms of Section 139 of the Constitution.[118] Section 139 makes provision for provincial supervision of local government.[119] If the province fails to intervene or effectively intervene, the minister may assume responsibility for the function, subject to notice to the National Council of Provinces and its approval. The minister could appoint a water services institution to perform the function, and he or she may utilise all financial and other resources available to the suspended water services authority relating to that function.

Section 63(8) provides that any expenses incurred or losses suffered by the minister in taking over any function of a water services authority may be recovered from that water services authority. The question arises what happens if the relevant water services authority does not have financial or other resources available to enable to minister to adequately perform the function.

In taking the decision to intervene, the minister must consider the reasons for non-compliance, the attempts made to achieve compliance, the effect of non-compliance and any other relevant matters.[120]

2.6.6 Financial assistance

Chapter 6 of the WSA provides for financial assistance by means of grants, loans or subsidies to given by the minister, after consultation with the relevant province, to a water services institution.[121] In approving an application for financial assistance, the minister must consider, *inter alia*, the requirements of equity and transparency, the

purpose of the loan or subsidy, the main objects of the Act and the financial position of the applicant.

The minister may also, in terms of Section 56 of the NWA, establish a pricing strategy for charges for any water use within the framework of existing relevant government policy by setting water use charges for funding water resource management, water resource development and use of waterworks. A distinction may be drawn in the pricing strategy between geographic areas and different types of water uses and water discharges.

It appears from a report by the Water Services Fault Lines that national government since 2000 has steadily decreased financial and technical support.[122] Related to this is the issue of poor monitoring at national level in terms of the implementation of policies such as the Free Basic Water Policy. Conflict of interest is evident as municipalities are on the one hand expected to provide Free Basic Water or at least affordable water that ensures sustainability and on the other are obliged to fund the provision of services and related infrastructure from revenue generated through the sale of water services. There is no Free Basic Sanitation policy, and there is an urgent need for the DWAF to formulate, monitor and enforce the same.

2.6.7 Ministerial powers

The minister has wide powers pertaining to acquiring water services, constructing, operating, repairing, contracting and issuing of guidelines and model conditions for provision of services; and performing the function of a water services authority or board.[123] The minister may delegate powers, excepting for those set out in Section 74(4)(2), which include the issuing of directives under Section 41 and intervening under Section 63. Provinces, on the other hand, may delegate any power given to them under the Act.

In terms of the Health Act, whenever a municipality is unable, owing to lack of resources, to perform its duties (in this case to purify water or to maintain reasonable hygiene), the minister of Health may temporarily relieve the municipality of its duties and instruct its director-general to take over the functions of the municipality.[124]

2.6.8 Criminal prosecution

Although it is an obligation of a water services authorities to provide water services, failure to do so it not a criminal offence.

The offences set out in the Act include wasteful use of water; interference with water services; and utilising water services, using water or disposing of effluent in contravention of Sections 6 and 7. Section 7(2) refers to the industrial use of water and provides that "No person may dispose of industrial effluent in any manner other than as approved by the water services provider nominated by the water services."

Furthermore Section (4) provides that no approval given by a water services authority under this section relieves anyone from complying with any other law relating to the use and conservation of water and water resources or the disposal of effluent.

"Industrial use" means the use of water for mining, manufacturing, generating electricity, land-based transport, construction or any related purpose.

One would have to consider whether the disposal of effluent by a water services authority falls within the ambit of this section and could thus be prosecuted under this section. With regard to a water services provider, it would act in terms of a licence granted by the water services authority, and again one would have to consider whether sewage pumped into rivers by a water services provider falls within the definition of industrial use. The penalty for an offence is a fine or imprisonment or both. Vicarious liability for both employers and employees is provided for.[125] One would also have to consider that it sometimes would be the same legal entity (the water services provider and the water services authority) that sets up the standards for industrial effluent in terms of the Act.

Section 151(i) of the NWA further makes it is an offence to "unlawfully and intentionally or negligently commit any act or omission that pollutes or is likely to pollute a water resource".

The Health Act makes it a criminal offence to contravene or fail to comply with any provisions of the Act. This includes the obligation by municipalities to purify water intended for the use of their inhabitants.[126]

2.7 Obligatory planning by water services authorities

Every water services authority has a duty to prepare a draft water services development plan, and the contents of the plan are set out in the Act.[127] The plan must include an implementation structure for five years, details of the proposed infrastructure, the estimated capital and operating costs, financial arrangements for funding, the number and locations of persons to whom water services cannot be provided within the five-year period, the reasons therefore and a delivery timeframe. A copy of the draft plan must be made available for public comment and thereafter must be submitted to the minister, the relevant province and all neighbouring water services authorities.[128] The adopted plan must be submitted to the minister, the minister for Provincial Affairs and Constitutional Development, the relevant province and all neighbouring water services authorities.[129]

2.8 Mandatory by-laws

It is mandatory for every water services authority to draft by-laws regulating the conditions for the provision of water services. These must make provision for the standard of services, the technical conditions of supply, the installation alteration, operation protection and inspection, operation and protection of water services works and consumer installations, tariffs, collection of charges, circumstances under which services may be discontinued or limited, prevention of unlawful connections to water services works and the unlawful or wasteful use of water. [130]

2.9 Special obligations for external water services providers

A water services authority may, as mentioned before, contract with a water services provider or enter into a joint venture with another water services institution for the provision of water services.[131] However, as water services providers become privatised, concerns have been raised about addressing human rights in the delivery of water and sanitation services.[132] It is therefore important that mechanisms are in place to ensure adequate provisions of water services.

The minister may prescribe matters that must be regulated by contract with the water services provider. Water services providers are, however, not bound by statutory obligations, and any failure of a water services provider to deliver water services is to be dealt with contractually. Any failure of water services providers to deliver services is to be dealt with contractually.

When a water services authority has contracted the services of an external water services provider, the authority must monitor the performance of the service provider to ensure contractual and other compliance with conditions.[133] The service provider must give information concerning the provision of water services as may be reasonably called for by the authority, the relevant province, the minister or a consumer or potential consumer.[134]

2.10 Special obligations for water services intermediaries[135]

A water services intermediary means any person who is obliged to provide water services to another in terms of a contract where the obligation to provide water services is incidental to the main object of that contract. A water services authority may require an intermediary to register with the water services authority and may regulate water services provided by means of by-laws. Intermediaries have a duty to meet any minimum standards prescribed by the minister and any additional minimum standards set by the authority in terms of the quality, quantity and sustainability of water services provided. Failure by an intermediary to do so will entitle a water services authority to direct the intermediary to rectify the failure and to set out how and when it will be rectified. Failing compliance therewith, the water services authority may take over the functions of the intermediary. The authority must monitor the performance of the intermediary to ensure compliance.

According to the *Strategic Framework on Water Services*, farmers are employers and are responsible for the housing and related services of the employees living on their farms. They therefore are intermediaries and are as such responsible for the provision of at least basic water services to farm workers and their families. Water services

authorities have to ensure that the responsibilities of farmers are set out in by-laws and that these are enforced.[136]

2.11 Conclusions and recommendations

2.11.1 Devolution of water services to local government

The argument for the constitutional and statutory devolution of water services to local government is that local governments are in the best position to make accountable decisions related to how services should be provided, taking into account the social and environmental aspects of water services. Local governments are in the best position to make flexible decisions with regards to the scale and the type of service provision.[137]

A criticism levied at this arrangement is that the provision of water services is fundamentally de-linked from other critical services such as health and housing, as these are functional areas of provincial and national legislative competence, while water services are local government matters. This has resulted in fragmentation of functions and services that should be integrated. This fragmentation has adversely affected municipalities' extension of services to the poor.[138] Environmental and pollution control, health services, housing, urban and rural development (which are arguably all in one way or another linked to or affected by the provision of water services) are areas of concurrent national and provincial legislative competence,[139] and these departments could be compelled to cooperate with and provide assistance to local authorities and monitor the provision of water services.

2.11.2 Pollution by water services authorities

Another concern with the current constitutional and statutory arrangement is the differentiation between water resources in general and water services and how this relates to pollution by water services authorities. One of the main contributing factors for pollution of water resources is human waste, often in the form of sewage effluent, which in many cases enters water systems from so-called non-point sources. For example, rivers that run through communal areas where people have no sanitation and broken sewage systems will invariably be polluted by faeces contamination. This can only be addressed by the provision of sanitation, which is a local government responsibility.[140] However, it is a national responsibility to prevent pollution of water resources.

Section 19 of the NWA provides that the owner of land, a person in control of land or a person who occupies or uses land on which any activity or process is or was performed or undertaken that causes, has caused or is likely to cause pollution of a water resource, must take all reasonable measures to prevent any such pollution from occurring, continuing or recurring. An obligation exists on water services authorities (local government) to ensure that national water services legislation is complied with and that water resources pollution is prevented. Failure to comply with the NWA provisions can result in measures being taken by the catchment management authority, including issuing a compliance notice, to ensure compliance as well as recovery of remediation costs.[141]

On conviction, a court may enquire without pleadings into the harm, loss or damage and determine the extent thereof and thereafter award damages, order the accused to pay for the cost of remediation and order such remediation either by the accused or the relevant management institution.[142] The Act makes provision for vicarious liability in Section 154 and provides for interdicts to be granted by the high court on application by the minister or a water management institution; these interdicts could include an order to discontinue any activity constituting a contravention and to remedy the adverse effects of the contravention.

2.11.3 Obligations of water services authorities

Although water services authorities are obliged to provide water services development plans, unless these are carefully and consistently monitored by all interested and affected parties, but in particular provincial and national government, the plans may prove to be ineffective as a means of delivering water services in compliance with national policy and constitutional obligations. It appears from recent studies that actual monitoring at both local and national level is problematic.[143] There are no further specific sanctions for failure to comply with development plans or failure to submit development plans or reports. The legislator here relies on the principle of cooperative governance to compel municipalities to carry out their statutory obligations. Cooperative governance has, as is demonstrated later, its own limitations and cannot be relied upon as the sole instrument to solve issues around failed service delivery. The lack of sanctions further makes it difficult for civil society to put pressure on water services authorities to comply with statutory requirements.

There are no further sanctions for municipalities that fail to make compulsory by-laws for water services.

2.11.4 External water services providers

The only mechanism for the regulation of external water services providers is by contract. It is envisaged that contractual disputes should be resolved through arbitration mechanisms.[144] The failure to prescribe statutory obligations on external water services providers limits the power of water services authorities (and other spheres of government) to ensure that water services providers provide adequate water services. The reliance on contracts makes it difficult for interested and affected parties outside of these contractual arrangements to put pressure on external water services providers to provide adequate services and limits the human rights to public participation and other Constitutional rights. The obligation of government in the context of privatisation is to subscribe a normative framework with which privatisation measures, like other public measures, must comply to be acceptable. Significantly, since the local governments are contracting external water services providers to provide water services (which is the constitutional obligation of local government), they are principally responsible for their implementation.[145] Legal and administrative measures must be taken to guarantee democratic accountability. This includes the right to public participation.

2.11.5 The National Water Services Regulation Strategy (Draft April 2008)

A Centre for Applied Legal Studies report[146] states that Section 155(7) of the Constitution, as well as Section 62(1) of the WSA, mandate national government to monitor the performance of the water sector and specifically grant the DWAF (now DWEA) the mandate to monitor the performance of all water services institutions. This DWAF mandate did not encompass a role as national water services regulator. The National Water Services Regulatory Strategy aims to establish the DWAF as the national regulator of the water services sector and shifts the DWAF's role from water services provider to that of regulator. In the meantime, in the absence of this regulatory function, there is still very little national regulation of local water services provision, except for the monitoring of water quality. This has resulted in water regulation being left largely to individual municipalities, with the effect of vastly differing tariffs, standards and restrictions, which in many cases compromise access to water for poor and marginalised communities.

The National Water Services Regulatory Strategy envisages that water services authorities will have to report according to a number of key performance indicators, which will assist the DWAF to make performance assessments. The DWAF will have powers of intervention for gross failure of delivery on the part of a water services authority and legal recourse for non-compliance by water services authorities as well as the ability to hand over water services functions to different departments or spheres of government.

3 Institutional arrangements for local government

3.1. Constitutional responsibilities of local government

The overarching municipal legislative provision for local government is found in Section 152(1) of the Constitution, which states that the objects of local government are, amongst others:

- to ensure the provision of services to communities in a sustainable manner;
- to promote a safe and healthy environment; and
- to encourage the involvement of communities and community organisations in the matters of local government.

In terms of Section 152(2) of the Constitution, a municipality must strive, within its financial and administrative capacity, to achieve the objects set out in Sub-section (1). Section 153 of the Constitution, which deals with the developmental duties of municipalities, determines that every municipality is obliged:

- to structure and manage its administration, and the 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; and
- to participate in national and provincial development programmes.

Section 156 of the Constitution sets out the powers and functions of municipalities. These include the functions listed in Schedule 4, Part B, *inter alia*, water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems. Section 156(2) provides room for municipalities to make and administer by-laws. These by-laws must be in line with national and provincial legislation.

Section 227 provides that local governments are entitled to an equitable share of revenue raised nationally to enable them to provide basic services and perform the functions allocated to them. Section 229 of the Constitution gives municipalities powers to impose surcharges on fees for services provided by or on behalf of the municipality.

3.2 Statutory legislative framework for the effective management of municipalities

3.2.1 Local Government: Municipal Structures Act 117 of 1998

The Local Government: Municipal Structures Act provides for the establishment of municipalities and the divisions of functions and powers between categories of municipality. Municipalities are categorised as metropolitan, local or district municipalities. A municipality is required to annually review the needs of the community, its priorities to meet these needs, its processes for involving the community, its organisational and delivery mechanisms for meeting the needs and its overall performance in achieving the objectives.

3.2.2 Local Government: Municipal Systems Act 32 of 2000

The Local Government: Municipal Systems Act provides for the core principles, framework and procedures to enable municipalities to uplift their communities socially and economically and guarantee affordable universal access to basic services. The Act refers to the provision of basic municipal services, which mean municipal service that is necessary to ensure an acceptable and reasonable quality of life and, if not provided, would endanger public health or safety or the environment.[147]

The municipality exercises its legislative or executive authority by the provision of services, whether directly or through service providers; monitoring and regulating same; imposing and recovering rates and taxes etc; monitoring the impact and effectiveness of services, policies, programmes or plans; and promoting a safe and healthy environment.[148]

3.3 Functions of municipalities

3.3.1 Local Government: Municipal Structures Act

Chapter 5 of the Municipal Structures Act sets out the functions and powers of municipalities, which include those assigned in Sections 156 and 229 of the Constitution. This includes the functions listed in Schedule 4, Part B, *inter alia,* water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems.

Section 23 of the Municipal Systems Act provides that a municipality must undertake developmentally oriented planning so as to ensure that it:

- strives to achieve the objects of local government set out in Section 152 of the Constitution;
- gives effect to its developmental duties as required by Section 153 of the Constitution; and
- together with other organs of state contributes to the progressive realisation of the fundamental rights contained in Sections 24, 25, 26, 27 and 29 of the Constitution.

Section 73(1) of the Municipal Systems Act states that municipalities must give effect to the provisions of the Constitution and ensure that all members of the local community have access to at least the minimum level of basic municipal services.

It is the function of a district municipality (which means a Category C municipality, being a municipality that has municipal executive and legislative authority in an area that includes more than one municipality) to supply bulk water, bulk electricity, bulk sewage purification works and main sewage disposal that affect a significant proportion of municipalities in the district.[149] District municipalities are also authorised to impose and collect taxes, levies and duties related to their functions. Local municipalities have the functions prescribed in Section 83(1) of the Act, excluding the functions ascribed to district municipalities in Section 84(1), which include water services. However, local municipalities are not prevented from performing those functions.

3.3.2 Local Government: Municipal Systems Act

The duties of a municipal council and/or administration are, in relation to water services:
- to strive to ensure that municipal services are provided to the local community in a financially and environmentally sustainable manner.[150] Environmentally sustainable means: ensuring that the risk of harm to the environment and to human health and safety is minimised to the extent reasonably possible under the circumstances; the potential benefits to the environment and to human health and safety are maximised to the extent reasonably possible under the circumstances; and legislation intended to protect the environment and human health and safety is complied with.[151]
- to give the local community equitable access to municipal services to which they are entitled.[152]
- to consult with the local community about the level, quality, range and impact of municipal services, provided directly or indirectly by the municipality, and the available options for service delivery.[153]
- to promote and undertake development in the municipality.[154]
- to promote a safe and healthy environment in the municipality.[155]
- to contribute, together with other organs of state, to the progressive realisation of the fundamental rights contained in Sections 24, 25, 26, 27 and 29 of the Constitution.[156]
- to be responsive to the needs of the local community.[157]
- to give members of the local community full and accurate information about the level and standard of municipal services they are entitled to receive.[158]

The community has a right to access to municipal services provided its members promptly pay service fees, rates, taxes etc subject to Section 97(1)(c), which deals with indigent debtors.[159]

3.4 Integrated development plans

Chapter 5 of the Municipal Systems Act requires municipalities to draft and adopt integrated development plans that must *inter alia* include certain core elements relating to the provision of services including identification, priorities, objectives and strategies relating to same. The integrated development plan is the principal strategic planning instrument that must guide and inform all planning and development and decisions concerning this.[160] They bind the municipality in the exercise of its executive authority, and municipalities must give effect to their integrated development plans and conduct their affairs in a manner that is consistent with the plan.[161]

Working hand in hand with this function is performance management, which requires the establishment, development, monitoring, review, auditing and reporting of such a system.[162]

The MEC for local government may, in terms of Section 31, monitor the process of drafting integrated development plans and assist, coordinate or take any appropriate steps to ensure the planning, drafting, adoption or review of such plans.

3.5 Financial planning

Chapter 8 of the Municipal Systems Act states that municipal services must give priority to basic needs and ensure that all members of the local community have access to at least the minimum level of basic municipal services (which have been defined and described before.) Municipal services must be:
- equitable and accessible;
- provided in a manner that is conducive to the prudent, economic, efficient and effective use of available resources and the improvement of standards of quality over time;
- financially sustainable;
- environmentally sustainable; and
- regularly reviewed with a view to upgrade, extension and improvement.[163]

In terms of Section 74, service tariffs must reflect the costs of the service, yet provide that poor households must have access to at least basic services through:

- tariffs that cover only operating and maintenance costs,
- special tariffs or life line tariffs for low levels of use or consumption of services or for basic levels of services or
- any other direct or indirect method of subsidisation of tariffs for poor households.

Tariff policies may differentiate between categories of users, services, service standards, geographical areas and other matters as long as the differentiation does not amount to unfair discrimination.[164]

3.6 Assessment

Section 78 of the Municipal Systems Act requires municipalities, before providing municipal services, to assess the cost of the project and to assess the municipality's capacity to provide the service.

3.7 Failure by municipalities to execute functions

3.7.1 Division of functions and powers

Section 85 of the Municipal Structures Act authorises the MEC for Local Government in a province to adjust the division of function and powers between a district and local municipality if the municipality in which the function or power is vested lacks the capacity to perform that function or exercise that power. Section 87(1) provides that if the provision of basic services by a district or local municipality collapses or is likely to collapse because of that municipality's lack of capacity or for any other reason, the MEC for Local Government in the province may, after written notice and with immediate effect, allocate any functions and powers necessary to restore or maintain those basic services, to a local municipality that falls within that district municipality or to the district municipality in whose area that local municipality falls.

3.7.2 Cooperation

Section 88 of the Municipal Structures Act provides for cooperation between district and local municipalities, by assisting and supporting each other financially, technically and administratively.

3.7.3 Funding and capacity building

Section 88(3) of the Municipal Structures Act provides that the MEC for local government in a province must assist a district municipality to provide support services to a local municipality.

Section 93(3) of the Municipal Systems Act similarly provides that a cabinet member, deputy minister or MEC initiating national or provincial legislation in terms of which a function or power is assigned to a municipality must take appropriate steps to ensure sufficient funding and capacity building initiatives as may be needed, for the performance of the function or power, if it imposes a duty on the municipality or if the duty falls outside the functional areas of Part B of Schedule 4 or Part B of Schedule 5 of the Constitution or if the performance of the duty has financial implications for the municipalities concerned. Similar provisions apply to assignment by the executive to specific municipalities.[165]

The Municipal Infrastructure Grant[166]: This grant is a consolidated conditional grant to municipalities designed to facilitate the eradication of basic services backlogs and cover the capital costs of infrastructure rollout, predominantly to poor households.[167] It is an interim measure officially in place until 2013 or until municipalities are able to adequately raise internal revenue to cover all costs themselves. No grant funding can be spent apart from that within the pre-existing integrated development plan and approved budget. The departments of Provincial and Local Government, Water Affairs and Forestry and Public Works and the National Treasury are each responsible for different aspects of the allocation and monitoring of the Municipal Infrastructure Grant.

Local Government: Equitable Share: This is an unconditional grant from national government to local government that serves as the main subsidy for operational and maintenance costs. Municipalities do not have to report on how they allocate or spend it. The amount allocated to each municipality is determined by assessing fiscal capacity, fiscal efficiency, developmental needs, poverty and backlogs. The grant is calculated in terms of a formula.[168] A criticism levied at the calculation of the Equitable Share is that one of the factors on which the formula is based is the definition of "household" according to Statistics SA, which is based on the Census 2001 figures. This definition does not correlate predictably with the actual units to which municipalities supply services, resulting in the grant allocation being based on inaccurate and outdated figures; this translates into negative financial implications for many municipalities. The allocation of the grant between departments is also unregulated, which means that the amount allocated to water services in each municipality is left solely to the discretion of the municipality itself. This often translates in very little of the grant's funding actually being allocated to the delivery of water services.

3.7.4 Monitoring

The Municipal Systems Act makes provision for the MEC for local government in a province to:

- establish mechanisms, processes and procedures to monitor municipalities in the province in managing their own affairs, exercising their powers and performing their functions;
- monitor the development of local government capacity in the province; and
- assess the support needed by municipalities to strengthen their capacity to manage their own affairs, exercise their powers and perform their functions.[169]

If an MEC has reason to believe that a municipality cannot or does not fulfil a statutory obligation or that maladministration, fraud, corruption or any other serious malpractice has occurred, then the MEC must, by written notice, request information and if necessary appoint someone to investigate. A written statement to the National Council of Provinces must be submitted motivating the action.[170] The minister may also require municipalities to submit prescribed information to a national organ of state concerning their affairs.[171] The minister may also establish essential national and minimum standards for any municipal services, taking into account the capacity of municipalities to comply therewith and differentiating between different kinds of municipalities according to their respective capacities.[172]

3.8 Special provisions in terms of the Local Government: Municipal Finance Management Act 56 of 2003

The Local Government: Municipal Finance Act provides for sound and sustainable fiscal management of municipalities.

3.8.1 Supervision over local government financial management

National Treasury must monitor budgets and promote good budget and fiscal management, which includes the monitoring of the implementation of budgets of municipalities. It may also take appropriate steps if a municipality commits a breach of the Act, including the stopping of funds in terms of Section 216(2) of the Constitution or Section 5(2) of the Act. Provincial treasuries must assist the National Treasury in enforcing compliance with Section 216(1) of the Constitution[173] and monitor compliance with the Act, budget preparation, monthly outcome of budgets and reporting and may take appropriate steps if a municipality commits a breach of the Act.[174]

3.8.2 Budgets

A municipality may only incur expenditure in terms of an approved budget, which must be approved annually.[175] When preparing a budget the municipality must take into account the municipality's integrated development plan (which, as we have seen in terms of the WSA, must in turn take into account the obligations of a water services authority to deliver water services) and take all reasonable steps to ensure that the municipality revises its integrated development plan while taking into account realistic revenue and expenditure projections for future years.[176] The mayor must also provide, on request, any information relating to the budget, to, amongst others, national departments responsible for water, sanitation, electricity and any other service.[177]

An annual budget must be approved before the start of a budget year. The mayor must report failure to do so to the provincial MEC for Local Government; an appropriate

intervention may also be suggested to the MEC.[178] In any event, if at the start of a budget year, no budget has been approved, the provincial executive of the relevant province must intervene, in terms of Section 139(4) of the Constitution, by taking any appropriate steps to ensure that the budget is approved, including dissolving the council and:

- appointing an administrator until a newly elected council has been declared elected and
- approving a temporary budget.

Section 34(3) and (4) and Section 35 apply when a municipal council is dissolved. When entering into a contract with future budgetary implications, the municipal manager must solicit the views and recommendations of, *inter alia*, the responsible national department if the contract involves the provision of water, sanitation or electricity services.[179]

In implementing the budget, the accounting officer must annually submit to the mayor a draft service delivery and budget implementation plan for the year[180] and must send monthly reports on any material variances on the service delivery and budget implementation plan.[181] The mayor is also required to report on the service delivery performance and the service delivery targets[182] and performance indicators during the mid-year budget, as well as on any failure by a municipality to adopt or implement a budget related policy or non-compliance with such a policy.[183]

3.8.3 Public-private partnerships

If a municipality intends entering into a public-private partnership agreement for the provision of a municipal services, Chapter 8 of the Municipal Systems Act must be complied with.[184] In addition, a feasibility study must be conducted, local community must be consulted and the views and recommendations of the responsible national government must be solicited.[185]

3.9 Remedies in terms of the Local Government: Municipal Finance Management Act 56 of 2003

3.9.1 Capacity building

The national and provincial governments must in terms of the Local Government: Municipal Finance Management Act assist municipalities in building their capacity for efficient, effective and transparent financial management, and national and provincial governments must support the efforts of municipalities to identify, avert and resolve their financial problems.[186] Non-compliance by the national or provincial government[187], however, does not affect the responsibility of the municipality to comply with the Act.

National and provincial institutions must also meet their financial commitments towards municipalities, promote cooperative government in their fiscal and financial relations and provide timely information and assistance to municipalities to enable them to plan properly; this assistance should include the development and revision of their integrated development plans and the preparation of their budgets.[188]

3.9.2 Monitoring

The National Treasury must monitor the pricing structure of state organs for the supply of electricity, water or any other bulk resources, to municipalities for the provision of municipal services. The state organ must also send monthly reports to National Treasury detailing the amount paid by the municipality for such bulk resources for that month and for the financial year up to the end of that month and any arrears and actions to recover the arrears from the municipality.[189] Any proposed increase by a state organ supplying a bulk resource of water or electricity to a municipality for the provision of municipal service must first be submitted for approval to its executive authority and any regulatory agency after having requested submissions from National Treasury and organised local government. An amendment must be tabled before parliament or the relevant provincial legislature for approval.[190]

3.9.3 Stopping of funding by national or provincial government

National Treasury may stop funding of the Local Government Equitable Share due to a municipality in terms of Section 214(1)(a) and Section 214(1)(c), only if the municipality commits a serious or persistent breach of Section 216(1) or Section 214(1)(c) of the Constitution, commits a funding breach or fails to comply with any conditions subject to which the allocation is made.[191] When considering the stopping of funds, the National Treasury must take into account compliance by the municipality in terms of the Act and the municipality's cooperation with other municipalities on fiscal and financial matters.[192]

If the stopping of funds affects the provision of basic municipal services in the municipality, the provincial executive must monitor the continuation of those services. Section 139 of the Constitution applies if the municipality cannot or does not fulfil its obligations with regard to the provision of those services. (i.e. provincial supervision of local government). Disputes of a financial nature involving organs of state, one of which is a municipality, should if possible be kept out of court and are dealt with in terms of Section 44.

3.9.4 Provincial or national government interventions

Discretionary intervention: Chapter 13, Part 2 deals with provincial intervention in the event of a serious financial problem in a municipality. When the MEC for local government becomes aware that there is a serious financial problem in a municipality, he or she must promptly consult the mayor, assess the seriousness of the situation and determine if the situation justifies intervention in terms of Section 139 of the Constitution. Section 136(4) provides that if a municipality, as a result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments or admits that it is unable to meet its obligations or financial commitments, as a result of which the conditions for an intervention in terms of Section 139(5) of the Constitution are met, then the provincial executive must intervene in the municipality. An assessment by the MEC for intervention plans must be submitted to the municipality and to Cabinet.

Mandatory intervention: Section 139 provides that if a municipality, as a result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to meet its obligations or financial commitments, the provincial executive must request the municipal financial recovery service to submit a recovery plan and implement the scheme in consultation with the mayor.

National intervention: If conditions for provincial intervention are met and the provincial executive council cannot or does not adequately exercise the powers or perform the functions referred to in Section 139, the national executive must, following consultation with provincial executive, act or intervene.[193] National government then effectively steps into the shoes of provincial government.

3.9.5 Unauthorised, irregular, fruitless or wasteful expenditure

Section 32 makes a political office bearer – or accounting officer who incurs unauthorised, irregular, fruitless or wasteful expenditure – liable for such expenditure unless it is subsequently on investigation certified by the council as irrecoverable and written off by the council. An accounting officer who becomes aware that a decision that, if implemented, is likely to result in unauthorised, irregular, fruitless or wasteful expenditure must inform the council, mayor or executive committee in writing. If he or she fails to do so, he or she will be liable for any such ensuing expenditure.[194] He or she must also inform the mayor, the MEC for Local Government in the province and the auditor-general of any such municipal expenditure, and this correspondence must include certain provisions such as whether any person is responsible or under investigation and what steps have been taken to recover, rectify and prevent a recurrence.[195]

3.10 Public Finance Management Act 1 of 1999

The Public Finance Management Act provides the framework within which departments and public entities are to manage their finances, and their line function responsibilities. It makes explicit the responsibilities of the accounting officer (head of department) in this regard,[196] which include ensuring the effective, efficient, economical and transparent use of resources of a department or constitutional institution and the prevention of unauthorised, irregular and fruitless and wasteful expenditure. It details the consequences of failure to implement the Act or financial misconduct, including criminal proceedings.[197]

Section 26 requires parliament and provincial legislatures to appropriate money for each financial year for the requirements of the state and the province respectively. Chapter 4 regulates the drafting and adoption of the national and provincial budgets.

3.11 Conclusions

3.11.1 Duties of municipalities

The statutory requirements of municipalities for planning and assessing their services are numerous. These include mechanisms for financial planning under integrated development plans and assessment of the municipality's capacity to render the specific service. There are, however, no mechanisms in place to compel municipalities to perform these functions in terms of sanctions for failing municipalities. Despite a push from national government for municipalities to complete the Section 78 assessment processes, the Centre for Applied Legal Studies has found that many municipalities have not yet done so, often due to incapacity.[198]

3.11.2 Financial assistance with conditions

Financial assistance to municipalities for the provisions of municipal services is available in terms of municipal infrastructure grants. However, such grants come with conditions such as the existence of an integrated development plan for the municipality's proposed activities. A major problem with the municipal infrastructure grant is the lack of capacity within municipalities to plan effectively around it, resulting in the grant funds not being spent efficiently or at all. Thus, it often happens that municipalities that need the funds most are the least able to spend them. The outcome remains poor communities without adequate access to water services infrastructure.[199]

3.11.3 Integrated development plans

Municipalities are obliged to draft and adopt integrated development plans, but unless these are carefully and consistently monitored by all interested and affected parties – provincial and national government in particular – the plans may prove to be ineffective as a means to deliver water services in compliance with national policy and constitutional obligations. There are no specific sanctions for failure to comply with or failure to draft and adopt such plans. The legislator here relies on the principle of cooperative governance and the MEC for local government to take necessary steps to ensure that such plans are rated and adopted. Cooperative governance has, as is demonstrated forthwith, its own limitations and cannot be relied upon as the sole instrument to solve issues around failed service delivery. The lack of sanctions makes it difficult for civil society to put pressure on water services authorities to comply with statutory requirements.

3.11.4 Remedies for municipal mismanagement

The Municipal Finance Management Act provides for several useful remedies in terms of mismanagement of municipalities. These include stopping of funding, and provincial and national intervention. These remedies are, however, limited to financial mismanagement of a municipality. With regards to personal liability for accounting officers who incur unauthorised, irregular, fruitless or wasteful expenditure, Section 32 is interesting since it opens up possibilities for challenging accounting officers who have authorised activities that are not line functions of municipalities (in terms of their constitutional and statutory obligations) while neglecting to budget for water services activities.

4 Legal gateways for improved delivery of water services

The analysis of the institutional architecture for water services delivery and local government gives rise to a number of concerns that call for appropriate legal and extra legal gateways to be addressed. In order to position the legal gateways section of the report in its proper context, it is important to understand the constitutional mandate of local governments in South Africa and how they functionally relate to the other two spheres of government. In addition to the Constitution, there are other more specific statutes that delimit the constitution, duties and powers of local government; these include the Municipal Demarcation Act 27 of 1998, the Local Government: Municipal Structures Act 117 of 1998 and the Local Government: Municipal Systems Act 32 of 2000. As Currie and de Waal rightly conclude, these three pieces of legislation almost exhaustively govern local government. They conclude, however, that these three statutes leave a few, but for the purposes of this study, very critical issues "relating to financial management such as budgeting, borrowing and treasury control and property rating and taxation reforms for future legislation"[200].

4.1 Framework for cooperative governance

Section 155 of the Constitution provides, as explained above, for the legal constitution of local government as a sphere of government. Sections 151 to 154 provide for the powers, functions,[201] objectives[202] and legal status of local government in any form. Section 156(4) adds that functions that can effectively be implemented at the municipal government level should be assigned to municipal governments that have the capacity. Municipalities also have residual power to effectively execute their functions (Section 156 (5)). Failure or inadequate performance of these functions can open the way for the provincial government to intervene or take over the concerned function.[203]

Legislatively, municipalities use by-laws to effectively exercise their functions, and in case of conflict between municipal by-laws and national or provincial legislation as well as executive conflicts with the other spheres of government in terms of ineffective delivery of water and sanitation services, the principles of cooperative governance set out in the Constitution[204] and other legislation, such as the Nema, apply.

4.1.1 The Constitution

Chapter 3 of the Constitution sets out the three spheres of government as being distinctive, interdependent and interrelated. In terms of the Constitution, the principles of cooperative governance provide that all spheres of government and all organs of state within each sphere must, among other things:

- secure the well-being of the people of the Republic;[205]
- provide effective, transparent, accountable and coherent government for the Republic as a whole;[206] and
- not assume any power or function except those conferred on them in terms of the Constitution.[207]

More importantly for the purposes of this study, all spheres of government and all organs of state within each sphere must:

- exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere;[208]
- inform one another of, and consult one another on, matters of common interest;[209]
- co-coordinate their actions and legislation with one another, adhering to agreed procedures ;[210] and
- avoid legal proceedings against one another.[211]

There is a legal obligation on both national and provincial government, through legislative and other measures, to support and strengthen the capacity of municipalities to manage their own affairs, to exercise the powers and to perform the above functions effectively.[212] In view of recent service delivery demonstrations, it is important to highlight that the Constitution also expressly cautions that the "national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions."[213] Although these legal provisions are invaluable gateways through which the national and provincial governments can support local authorities to fulfil their obligations pertaining to the provision of water services and sanitation, they can also impede effective intervention by national and provincial governments' supervision of municipality functions.

National and provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5.[214] In addition, Section 155(6) of the Constitution compels each provincial government, by legislative and other means, to provide for the monitoring and support of local government in the province and more importantly to promote the development of local government capacity to enable municipalities to perform their functions and manage their affairs. This is amplified by Section 105 of the Municipal Services Act. Undoubtedly, the obligation to monitor, if effectively exercised, could lead to an improvement in the delivery of water and sanitation services. A persistent worry raised in Chapter 3 of this report is whether in practice the

provincial governments exercise this monitoring function at all or in good faith where it is done.

Cooperative governance between municipalities and the other spheres of government is also further augmented by provisions in other legislation relevant to local government and the delivery of water and sanitation services. A brief overview of these statutes follows below.

4.1.2 The National Environmental Management Act

The Nema[215] provides for cooperative governance by defining principles for fair decision-making, institutions that will promote cooperative governance and procedures for coordinating environmental functions exercised by organs of state and by providing for the enforcement and administration of environmental law, and matters connected therewith. It echoes the constitutional principles of cooperative governance in its preamble, which states that all organs or state must cooperate with, consult and support one another in relation to environmental matters. The principles of environmental management set out in Chapter 1 apply throughout the republic to the actions of all organs of state that may significantly affect the environment. This means that these principles must guide local authorities in the provision of water and sanitation services. Inter-governmental coordination and harmonisation of policies, legislation and actions relating to the environment is required.[216]

Chapter 3 refers specifically to the principles of cooperative governance. The procedures for cooperative governance include the submission of environmental implementation and management plans. This applies to every national department exercising functions that may affect the environment and to every province. The purpose of these plans is to:

- coordinate and harmonise environmental policies, plans, programmes and decisions of (a) the various national departments exercising functions that may affect the environment or are entrusted with powers and duties aimed at the achievement, promotion, and protection of a sustainable environment, and (b) of provincial and local spheres of government. Of relevance here is that the purpose *inter alia* is to promote consistency in the exercising of functions that may affect the environment;
- give effect to the principles of cooperative government in Chapter 3 of the Constitution;
- secure the protection of the environment across the country;
- prevent unreasonable actions by provinces in respect of the environment that are prejudicial to the economic or health interests of other provinces or the country as a whole; and
- enable the minister to monitor the achievement, promotion and protection of a sustainable environment.[217]

Both the environmental implementation and management plans have specific reporting obligations on compliance with policies, plans and programmes, national norms and standards, the Nema principles, compliance priorities and the extent of compliance with policies.[218] Every organ of state must exercise every function it has and which may significantly affect the protection of the environment, substantially in accordance with the environmental implementation or management plans. Any substantial deviation from it must be reported.

Procedures have been laid down for a failure to comply and may include a notice to rectify the non-compliance.[219] With reference to conciliation or arbitration, Chapter 4 of the Nema sets out the steps to remedy a failure of compliance with any such notice. If conciliation fails to resolve the matter, and the organ of state belongs to the local sphere of government, the director-general of the Department of Environmental Affairs and Tourism is to request the MEC (to whom the premier has assigned responsibility for environmental affairs) to intervene in accordance with Section 139 of the Constitution.[220] It is the function of the provincial government to ensure that municipalities comply with the provincial environmental and management plans and the Nema principles in the preparation of any policy, programme or plan.[221]

4.1.3 The Water Services Act

The WSA places cooperative governance firmly within the ambit of the provision of water services and recognises that all spheres of government, in striving to provide water services, must observe and adhere to the principles of cooperative government. It acknowledges that it is the duty of all spheres of government:

- to ensure that water services are provided in a manner that is efficient, equitable and sustainable and
- to strive to provide such services for subsistence and sustainable economic activity.

It states that although municipalities have the authority to administer water services, all spheres of government have a duty, within the limits of physical and financial feasibility, to work towards this object. It recognises that the provision of water services must be consistent with the broader goals of water resource management. Lastly it recognises that such services must promote the interests of consumers and the broader goals of public policy. Actual or potential conflicts of interest between organs of state should be resolved though conflict resolution procedures.[222] This would not extend to actual pollution caused, for example, by untreated sewerage effluent being pumped into a water course by a local authority, as this is a statutory offence. Such pollution, however, should provide a forum for possible resolution of the problem.

While municipalities can outsource water services to water services providers, the responsibility remains there to ensure that they meet their obligations in terms of this Act. Municipalities must be held accountable for the performance of third parties to avoid the situation of poor privatisation of water services referred to above.[223]

4.1.4 The Local Government: Municipal Structure Act

Section 88 of the Local Government: Municipal Structures Act provides for cooperation between district and local municipalities by assisting and supporting each other with financial, technical and administrative support. The provincial MEC for local government must assist a district municipality to provide support services to a local municipality. To what extent is this being implemented as a gateway to improve the delivery of water and sanitation services?

4.1.5 The Local Government: Municipal Systems Act

Section 3 of the Municipal Systems Act provides that municipalities must exercise their executive and legislative authority within the constitutional system and as envisaged in Section 41 of the Constitution (as already discussed above). National and provincial spheres of government must exercise their executive and legislative authority in a manner that does not compromise or impede a municipality's ability or right to exercise its executive and legislative authority.[224] For effective cooperative government, local government must seek to:

- develop common approaches for local government;
- enhance cooperation, mutual assistance and sharing of resources among municipalities;
- find solutions for problems relating to local government generally; and
- facilitate compliance with the principles of cooperative government and intergovernmental relations.[225]

Section 24 of the Act requires municipalities to align their planning with and complement the development plans and strategies of other affected municipalities and other organs of state so as to give effect to Section 41's constitutional principles of cooperative government. Municipalities must participate in national and provincial development programmes as required in Section 153(b) of the Constitution. Municipalities must comply with planning requirements in terms of national or provincial legislation.[226] This requires the responsible organ of state to align the implementation of legislation with the provisions of Chapter 5 of the Act dealing with integrated development planning. When implementing legislation, the relevant organ of state must consult with the affected municipality and take reasonable steps to assist the municipality to meet any time limits set and requirements of its integrated development plan. An organ of state sponsoring national or provincial legislation requiring municipalities to comply with planning requirements must consult with organised local government before the legislation is introduced in parliament or provincial legislature.

As mentioned before, the MEC for Local Government must establish monitoring mechanisms to ensure municipalities properly manage their affairs, including the provision of water and sanitation services. Whether there is adequate monitoring is an open question given the increasing failure by a number of municipalities to fulfil their functions. This failure implicates the whole framework for cooperative governance.

4.2 National government's statutory obligations: water services

4.2.1 The National Environmental Management Act

The Nema was founded on Section 24 of the Constitution and the principles of environmental management provided in Chapter 1 of the Nema. Among these principles are key concepts that underpin the environmental liability of any person including national and provincial governments. One such principle is the "polluter pays principle", which underlies the general duty of care in Section 28 of the Nema.[227] Section 28(1) provides for a duty of care on persons who cause[228] significant pollution or degradation of the environment to take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring.[229]

In the event of non-compliance with the provisions of Section 28(1), Subsection (4) authorises the director-general or a provincial head of department to direct an assessment process (which is a stand-alone process distinct from the environmental assessment impact required for prior authorisation)[230] and also to direct the responsible person to undertake and continue "specific reasonable measures". Subsection (7) provides that the director-general or provincial head of government may take reasonable measures to remedy the situation where a person fails to comply or complies inadequately. Any clean-up costs may then be recovered from the person responsible for the damage, the owner or person in control of the land at the time of the pollution and proportionately from any other person who benefited from the measures.

In determining the application of the section, the definition of "environment" in the Nema includes all water resources.[231] "Degradation" is open to interpretation and is defined by Soltau as the "general reduction in the quality of the environment".[232] "Pollution" is defined as "… any change in the environment caused by substances… where that change has an adverse effect on human health or well-being or on the composition, resilience and productivity of natural and managed ecosystems … or will have such an effect in future."[233] In the context of water pollution, the determination of such an adverse effect would be a largely scientific enquiry, but reference may also be made to the water quality guidelines[234] issued by the then DWAF. It is argued that these guidelines give content to the meaning of the term "water quality" as it is used in national water legislation (notably the NWA and the WSA).

As Glazewski notes, "The significance of the section lies in its generality"[235], and any pollution or degradation of the environment that affect the quality of water resources, regardless of their intended purpose or use, would be encompassed by its operation. However, the opinion has been expressed that practical concerns relating to the apportionment of costs (amongst others several liability, establishing causation, and budgetary constraints on the part of the authorities) may make the provisions of this section difficult to enforce.[236]

For purposes of this study, the following issues are relevant to the practical application of the section:

It only applies to significant degradation or pollution: In *Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd t/a as Pelts Products and others*, the court assessed the meaning of "significant pollution" and stated that "the assessment of what is significant involves … a considerable measure of subjective import … [and] … that the threshold level of significance will not be particularly high."[237] This statement accords with the view that "significant pollution must be considered in light of the constitutional right to an environment conducive to health and well-being."[238]

It is not certain whether or not the section imposes strict liability: In the context of Section 28, strict liability would be required to avoid the defence of the lack of intention or negligence being raised. It has been argued that the Section 28 duty is not an absolute duty as it is qualified by the requirement of reasonableness. Thus courts are likely to apply the common law negligence test to establish reasonableness, namely whether harm was foreseeable and whether the defendant took the necessary steps to avoid it.[239] Others are of the view that the section imposes an absolute duty only with regard to the taking of reasonable measures (thus permitting this defence against the apportionment of costs).[240] The better view, however, is that Section 28 creates a statutory standard that was not intended to import the common law rules relating to delictual liability; it is possible for a responsible person to have acted without negligence but still be regarded as having failed to take the necessary reasonable measures.[241] In the *Gencor* case, the court expressed the view that in some instances Sections 28(1) and (2) may even exclude the element of unlawfulness and impose absolute liability.[242] This is now beyond question in view of the new subsection (1A), which imposes liability to clean up historical contamination that may have been caused as result of a lawful activity.

Section 28 (12) gives any person the right to request a court order: compelling specified environmental authorities to take action under Section 28(7)".[243]

Although the remedy offered in terms of Section 28 is primarily one for environmental officials seeking to enforce its specific provisions, **the true importance of the section lies in the broad scope of the duty of care that it imposes:** In the *Hichange Investments* case[244], the applicant relied on the provisions of Section 28 together with Section 32 of Nema and requested "appropriate relief" in respect of the other respondents. The court noted that while it would have preferred for the cause of action for such relief to be more clearly delineated in the affidavits, the relief could be granted if supported by the facts, which would have to include proof as to the level and severity of the offending pollution.[245] Such relief was not "constitutional relief" as no argument had been presented for the extension of common law remedies.[246] The orders sought by the applicant were ultimately not granted by the court on the basis that they constituted a usurpation of the relevant officials' powers and function; this the court would only do if the applicant had shown that they had not exercised the power vested in them by the legislature reasonably and properly.[247] It may also be possible to argue that in the context of a proper interpretation of the Constitution and the principles of Nema, Section 28 should offer individuals the possibility of compelling the state to take action against any person who fails to take the required remedial measures.[248]

Particularly relevant provisions of the Nema are those that relate to the enforcement of environmental laws. These provisions not only provide legal gateways for remedies against municipalities but also for municipalities against provincial and national government, although cooperative governance discourages litigation among the different spheres of government.

Section 17 of the Nema provides that all spheres of government, including municipalities, must make use of alternative dispute resolution mechanisms before resorting to litigation to resolve differences or disagreements arising out of the exercise of any "functions which may significantly affect the environment". The provision of water services and sanitation may indeed significantly affect the environment as broadly defined in Section 1 of the Nema.

If municipalities fail to meet their obligations to deliver water and sanitation services, or the intervention by the provincial or national government does not remedy the situation, the environmental management inspectors appointed in terms of the Nema can enforce legislation relating to water pollution and anything that threatens the community's right to an environment not harmful to health and well-being.[249] For instance, in terms of Section 31(L), an environmental management inspector can issue a compliance notice to any person responsible for causing water pollution. The enforcement by inspectors can take place even before national or provincial government intervention as long as there is a violation of an environmental management law.

4.2.2 The National Water Act

The principal objectives of the NWA include promoting the efficient, sustainable and beneficial use of water in the public interest and the reduction and prevention of pollution and degradation of water resources.[250]

Apart from the enforcement provisions discussed below, a key provision of the NWA is the mandate placed on the minister to establish a national water resource strategy, which must set out the framework for sustainable use of our water resources. However, an apparent gap in the NWA is that it does not provide for a national approach at a general strategic level with regard to regulatory matters to provide nationally uniform norms and standards and ensure that regardless of municipality, people receive service of comparable standards and necessarily differentiated but realistic tariffs. Section 10 of the WSA does provide for the minister to set national norms and standards in consultation with the minister in charge of finance,[251] but there appears to be no concerted efforts to ensure that municipality and water services providers adhere to the spirit of these norms and standards.[252]

In order to reduce water pollution, the NWA, in Section 19, seeks to achieve that objective and "in particular the situation where pollution of a water resource occurs or might occur as a result of activities on land". It has correctly been contended

that this section clearly creates huge scope of liability for polluters.[253] If the responsible persons fail to take the reasonable measures envisaged in Section 19(2), the catchment management agency may intervene and recover costs incurred from the responsible person(s).[254]

Section 19, therefore, applies to an owner of land, a person in control of land or a person who uses or occupies the land that has caused or is likely to cause pollution of a water resource.[255] "Water resource" is broadly defined to include "a watercourse, surface water, estuary or aquifer". With the exception of surface water, all these terms are, in turn, widely defined for purposes of the Act.[256]

The following issues are relevant to the practical implementation of the section:

- The responsible person is required to take "reasonable measures" to prevent pollution from occurring, continuing or recurring. This has been interpreted as laying down a flexible test that varies with the context and circumstances of each situation (*Harmony Gold Mining Co Ltd v Regional Director: Free State, Department Water Affairs and Forestry*).[257] The Supreme Court held that it was a reasonable anti-pollution measure to require Harmony Gold Mining to take steps to prevent groundwater pollution from defunct and active mines given the problems of de-watering defunct mines. The court further expressed the view with regard to both Section 28 of Nema and Section 19 of the NWA that "the focus of their first two subsections is on preventive measures."[258]
- The *Harmony* case also dealt with the issue of the nature of the measures that could be required of the polluter. The applicant alleged that: (e) the measures referred to in Section 19(2) comprise a closed list and none involves the payment of money; (f) the appellant can only be required to pay money if a catchment management agency has acted in terms of Section 19(4) and seeks recovery of its costs under Section 19(5).[259] In response to this contention, it was held that the wording "may include" unquestionably signifies that the list in Section 19(2) is not exclusive and that "reasonable measures" could therefore require the payment of money.
- Regarding the nature of the liability created, Glazewski suggests that strict liability is imposed in respect of the stipulated persons' duty to take reasonable measures, i.e. no intent or negligence is required to be shown on the part of such persons.[260]
- As with Section 28 of the Nema, it is suggested the words "has caused" in Section 19(1) allow for the provisions of the section to have retrospective effect. The decision of the court in *Gencor* should be noted, however.[261]
- The apportionment of costs is also allowed for in the section should the catchment management agency be required to take remedial measures itself, and such costs may also be recovered from any person who, in its opinion, benefited from the measures undertaken to the extent of such benefit. Benefit is taken to mean a financial benefit or the generation of profit.[262]
- A note of caution is sounded in *Kebble v Minister of Water Affairs*[263] for officials (or others) seeking to enforce a directive made in terms of Section 19(3). The minister's attempt to hold the directors of a mining company that had not complied with a directive in terms of Section 19(3) in contempt failed, because the court agreed with the directors' contention that the order of the lower court (which was directly based on the provisions of the directive) was so lacking in clarity that it was incapable of being enforced.
- As is the case with Section 28, the section offers various remedies for the officials charged with enforcing the provisions of the Act, in this case the catchment management agency. However, any breach of the provisions of Section 19(1) also constitutes a breach of a "statutory provision concerned with the protection of the environment or the use of natural resources" in terms of Section 32(1) of Nema. Based on the provisions of the section and the decision of the court in the *Hichange* case, applicants should be able to seek appropriate relief in respect of a breach or threatened breach of Section 19 from the courts, whether they act in their own private or in the public interest. The nature of this relief will depend on the facts of the case, and the decision in *Hichange* makes it clear that the court will not usurp the relevant officials' function unless it can be shown that their authority has been exercised unreasonably. However, this decision also specifically mentions the possibility of so-called "constitutional relief", based on an extension of the common law, which broadens the range of prospective remedies considerably.

4.3 Administrative measures

In addition to the environment specific legislation, a number of remedies and gateways to secure redress for poor water services delivery can be found within administrative structures and practices. In particular, the Promotion of Administrative Justice Act (Paja) is the central tool that provides for a framework to seeking administrative review of decisions made by public authorities. Within media specific legislation – e.g. the NWA, WSA and the Nema – one may also find provisions that provide grounds and procedures for seeking administrative remedies against public officials. While the regulated public have access to these remedies, public authorities are sometimes given statutory powers to use administrative measures or sanctions to promote the implementation of legislation under their mandate and to enforce legislation where there are violations without approaching the courts or using the litigation process.

Administrative sanctions are imposed and implemented by public authorities where there is or has been failure to comply with legislation of administrative directives. These are sanctions imposed without the need for the public authorities having to approach a court of law.[264] These include suspension or cancellation of licences or permits or registrations (Section 54 of the NWA gives the regulatory authority powers to suspend or withdraw licences to use water in the event of, among other things, failure to abide with permit conditions or violations of the Act. In terms of Section 54(3), such a suspension or withdrawal may be effected where the permit holder has failed to comply with a directive issued by the authority. Also, Section 74 gives the minister powers to issue directives against water management institutions, e.g. a municipality, with regard to the execution of the proper exercise of its functions or its performance); and imposition of administrative fines (different from criminal fines). The power of the minister in Section 74 is important in this study as we have witnessed a number of municipalities who are water management institutions failing to perform or to efficiently execute their statutory functions.

Typical administrative sanctions include Section 53 of the NWA; and Sections 28 and 31(L) of the Nema, which were used successfully by the environmental affairs department in *Khabisi NO and Another v Aquarella Investment 83 (Pty) Ltd and Ors 2008(4) SA 195(T)*; Section 31(A) of the Environmental Conservation Act (*HTF Developers* case); and Section 19(4) and (5) of the NWA discussed above and used in the *Stilfontein, Harmony Gold Mining* and *Kebble* cases. Often these measures are used as primary means of securing compliance before authorities resort to any criminal sanctions provided for in legislation or seek the intervention of the court. If not used, these sanctions may provide room for civil society and community to then approach the courts and seek to compel that the relevant authority act in terms of these sections (e.g. Hichange Investments case). It is important to ensure that good working relationships are maintained between government departments, municipalities and water services providers as there is a continuing relationship.

Administrative sanctions also give the errant service providers or municipalities, as the case maybe, the opportunity to rectify the violation and improve their water resources management systems. This is crucial in the context of this study as the key objective is to work towards improved water services delivery and not to punish municipalities or water services providers who are not complying with water laws or contracts they have entered into. Section 148 of the NWA provides for appeals to the Water Tribunal against decisions made in terms of the Act. However the use of administrative measures including participation in formal decision-making is heavily hampered by lack of access to information, prolonged procedures, lack of real accountability to the community, and finally simply irrational decision-making that disregards the contribution of the community and civic society.[265]

4.4 Criminal sanctions

Criminal sanctions involve the imposition of criminal fines or terms of imprisonment on authorities or other persons who are found to have violated provisions of legislation or to have committed common law offences. In the context of this study, if a person vandalises water infrastructure, the person could be arrested and be charged with malicious injury to property. Similarly, if a person dumps hazardous waste into a water resource with the result that water users are adversely affected, such a person could be criminally charged with assault or attempted homicide, all of which are common law criminal offences. In terms of water resources, most of these have been codified into Section 151 of the NWA and other statutory offences. There is an urgent need to sensitise communities and civic society organisations to monitor local authorities and for both the water authorities and the public to report criminal offences to the South African Police Service. The deterrent effect of a few impact prosecutions could potentially improve water services delivery. It has already been noted that the Health Act criminalises failure by a local authority to provide clean drinkable water.[266]

However, in order to secure effective implementation of water laws, the relevant legislation sometimes provides for offences that are punishable if committed by certain officials or individuals. For instance in terms of Section 151 of the NWA, it is an offence for any person to intentionally pollute a water resource or fail to comply with a Section 19, 20 or 53 directive. Any violations attract a jail term of five years and/or a fine. Repeated violations attract a jail terms of ten years and/or a fine (Section 151(2)). It important to note that while criminal sanctions are generally regarded as ineffective if not coupled with stiff fines, the approach in the NWA for instance links the criminal sanction to a civil order that requires the accused to also pay the actual cost of remedying the environment (e.g. fund the clean-up of a water resource or pay for infrastructure repairs – Section 153). Criminal sanctions are also used in Section 82 of the WSA to penalise non-compliance with that Act, particularly to discourage wasteful use of water resources.

4.5 Non-legal gateways

The common law provides tried remedies that can be resorted to in the event of failure of statutory remedies. These remedies are based mostly on common duties imposed on the general public and include regulatory agencies such as water services authorities and water services providers. Important among these duties is the general duty of care. This duty is relevant especially where there is no defined contractual relationship between for instance a water services provider and a water user/consumer. While privacy of contract may prevent an ordinary resident from enforcing a water services provision contract, the resident could, where harm has been suffered or threatened, rely on the common law duty of care. This duty can be enforced through a number of remedies depending on the extent of breach.

Firstly the interdict also provided for in Section 155 of the NWA (see the *Woodcard* case, which indicates that the minister of water management institution can use common law remedies to enforce legislation) can be very useful for grassroots public-interest litigation to secure immediate relief in critical situations. This remedy can be used to stop the release of raw sewage and other polluting substances into a water resource or to compel local authorities to deliver a service (mandatory interdicts). Procedurally the interdict is a court order that a court grants upon an application by the affected person. The nature of this remedy was defined by the court in *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw 2008 (5) SA 339 (SCA)*, where the court stated that:

> "An interdict is not a remedy for past invasion of rights but is concerned with present or future infringements. It is appropriate only when future injury is feared. Where a wrongful act giving rise to the injury has already occurred, it must be of a continuing nature, or there must be a reasonable apprehension that it will be repeated." (footnotes omitted)[267]

In order to obtain this court order the persons approaching the court (applicants) must show the following:

- that they have a clearly established or a *prima facie* right that may be open to some doubt;
- if the right is *prima facie* and open to some doubt, they must show that there is a real possibility (well-grounded apprehension) that the threatened action that they seek to stop will cause them to suffer irreparable harm (such as dying from contaminated water or being exposed to terminal illness, e.g. water contaminated with radioactivity);
- that the balance of convenience favours the them, i.e. that it is better for the court to stop the action being opposed relative to allowing the applicants to suffer the threatened harm.
- that there is no other satisfactory remedy available to them.[268]

While proving all this looks intimidating to a lay person, it is a good remedy in most situations where delivery of water services have failed and the residents are threatened with unsanitary conditions that may lead to sickness and death. It may also be argued that the standing requirements in the Nema (Section 32) may be applicable if the applicants can sustain the argument that in seeking the interdict they are enforcing their environmental rights, i.e. as in preventing a threatened violation of that right and other provisions such as the NWA or the Nema. Nevertheless, there are potential pitfalls in using common law remedies; these could be overcome by the intervention of public-interest lawyers such as LHR and others.

Where children have suffered illnesses or where a person has passed on as consequence of a failure by a water services authority to deliver a water service, the common law may be an avenue to follow to claim damages suffered (e.g. medical costs; loss of support where the affected person was the breadwinner). This remedy is far more difficult to use given the challenge of proving the causal connection between the pollution of water and the illness or death. This is also made difficult due to other intervening factors such as lack of access to health services for treatment.

From an implementation perspective the regulatory agencies (water services authorities) may also use the common law to control water pollution and wasteful use of water as a way of maintaining an efficient water delivery service. National and provincial governments may also use common law avenues to compel local authorities to efficiently execute their functions where their statutory powers are limited.[269]

The above common law remedies clearly depend heavily on effective monitoring, data collection and access to information that can be used to support the litigation. The right of access to information is therefore invaluable and crucial to the effective use of the other gateways to improve water services delivery.

If all else fails, one is bound to also suggest that civic action (peaceful lobbying and advocacy) be taken and be followed, if necessary, by peaceful demonstrations to remove incompetent but entrenched officers. Current upheavals in various municipalities, while they have been attributed to different causes, may sometimes yield practical results in improving service delivery. Many office bearers have been replaced, and one hopes that any remaining incompetent and corrupt officials will be replaced by people with the necessary expertise to manage municipal service delivery and a commitment to service excellence. From its own review of cooperative governance and service delivery, government has acknowledged that there is a need to review the institutional set-up with regard to the functions and role of municipalities in terms of provision of service.[270]

Section 80(e) of the NWA advises the promotion of community "participation in the protection, use, development, conservation, management and control of the water resources in its water management area". Local communities can participate through their local catchment management agencies, but it remains unclear if they do.

4.6 Administrative procedural guarantees

The obligation of municipalities and the role of provincial and national government would be quite ineffective without procedural legal guarantees that ensure effective access to information and administrative justice. In issues concerning water services and other environmental issues, the ordinary person more often than not lacks the kind of access to information required to show non-compliance with laws and regulations. If the legal gateways discussed above are to be effective, persons must be allowed access to information and be guaranteed administrative justice. This has been provided for in Sections 32 and 33 of the Constitution and legislation giving effect to these provisions, namely the Promotion of Access to Information Act 2 of 2000 (Paia) and the Promotion of Administrative Justice Act 3 of 2000 (Paja). A detailed discussion of the provisions of these Acts falls outside the scope of this analysis, but their importance in water governance and environmental litigation must be noted.

For example, when a water services authority contract with a water services provider or enter into a joint venture with another water services institution for the provision of water services in terms of Section 19 of the WSA, any legal action contemplated would entail a scrutiny of such contracts to establish the terms of the agreement and whether they are being complied with. It is therefore important that such contracts are made available to the public. There are no express provisions in the relevant Acts, which means that access must be enforced through the Paia. The Act does not provide for these contracts to be made available to the public, but access to same could be enforced through the Paia.[271]

The provisions of the Paia are often critical in establishing a cause of action prior to a decision to seek redress including by litigating.[272] By contrast, the provisions of the Paja, by giving effect to Section 33 of the Constitution, provide a basis for litigation by allowing the judicial review of administrative action.[273] The most likely application of the provisions of the Paja in litigating on water and sanitation related concerns is the enforcement of statutory duties on government and water services authorities (municipalities). It has been noted that courts have historically been reluctant to enforce public duties in the absence of proof of a special interest on the part of the applicant but that this should be subject to change in view of the provisions of the Bill of Rights

(in particular Section 24) and the provisions of Section 6(2)(g), which equate failure to take a decision with administrative action.[274]

As regards other constitutional rights, an obvious link exists between adequate food or nutrition, a clean and healthy environment, water conservation and water. The sections in the Constitution dealing with these rights, therefore, also have direct relevance to the discussion of access to water.[275]

The right to dignity and equality are also acknowledged to be mutually reinforcing to rights to water and basic sanitation, and this view has been strongly promoted in the applicants' submissions to the Constitutional Court in both the *Mazibuko* case, which is currently being heard by the court, and the *Nokotyana* case.

4.7 Conclusions

It is clear that the legal framework for cooperative governance in the provision of water services provides for key gateways towards ensuring that there is sustainable use of water resources and that there is efficiency in the delivery of water services. What is undoubtedly equally apparent is that when it comes to practical implementation, there is no obvious cooperation between the different spheres of government, especially the national government and municipalities in those areas where the former must set norms and standards that must underpin and guide water services delivery. The *National Water Resource Strategy* and norms and standards set at the national level, if properly implemented and used as guidelines by municipalities and water services providers, have the potential to lead to improved service delivery. However, in order for this to happen, there must be incentives for municipalities to execute their statutory responsibilities with vigour. Apart from positive incentives, of which there are quite few; legislation can put in place enforcement mechanisms to ensure that regulatory infractions are dealt with effectively.

The principles of cooperative government discourage litigation between and among government departments and spheres of government, with the repercussion that neither national nor provincial governments have the political will to take municipalities to task where they fail to deliver water services. Even the environmental management inspectors appointed in terms of the Nema may find it difficult to enforce water and environmental legislation against municipalities. This is so especially in light of the fact that some officers of a municipality can be appointed as inspectors. This therefore requires an active civil society that can vindicate the rights of the communities served by municipalities. These rights include those based on legislation and also common law rights that can be useful at grassroots level.

Appendix A Summary of media reports

Business Day, 3 July 2008
The Democratic Alliance (DA) is using the Promotion of Access to Information Act in an attempt to establish whether the death of 140 children in Ukhahlamba in the Eastern Cape was directly related to contaminated water supplies. The DA's request for information from the Water Affairs Department followed the deaths, which took place earlier in 2008, as well as numerous reports indicating that water quality in some municipalities was increasingly below standard.

The Cape Times, 22 July 2008
Tulbagh residents threatened to withhold rates payments unless something was done about water pollution in the town. Sewage from a blocked pipe was polluting the Klip River, which feeds into the Voëlvlei Dam, which provides the City of Cape Town with drinking water.

Die Beeld, 9 September 2008
The Mafube Municipality (Frankfort and Villiers) had to cough up more than R300 000 in legal costs after losing a civil suit about sewage disposal in the Wilge River. Andries Swart took the municipality to court to stop it from pumping sewage into the river. This followed a 2004 court order against the municipality to fix the pumps used at the local sewage farm.

The Star, 16 September 2008
Small water treatment plants across the country were being badly run to such an extent that the Water Research Commission had drawn up a manual to teach operators how to make their water safer. The commission drew up the guidelines after surveying 181 small water treatment plants, mostly in rural areas, during 2005/6.

The Sunday Independent, 19 October 2008
Raw industrial effluent, including human excrement, had been flowing on and off for more than two years from a municipal sewerage pipe in Mogale City straight into the Blaauwbankspruit, where it runs through the Cradle of Humankind – a World Heritage Site. The untreated effluent periodically erupts from a blocked manhole just a few hundred metres above the overburdened Percy Stewart Water Care Works from a pipe leading from Delporton industrial area. As a result of the spillage, the effluent bypasses the sewage works and runs directly into the river network.

The Sunday Times, 19 October 2008
Unresolved sewage problems sparked litigation in Nature's Valley in the Southern Cape. The area was being plagued by a troublesome sewage disposal system, and engineering consultants recommended the building of a sewage plant on two plots that had been earmarked for basic services. Residents of the village saw red when the municipality advertised the two plots for sale, effectively dashing plans to build the sewage plant. The Nature's Valley Ratepayers' Association applied for an urgent court interdict to stop the sale of the plots.

News24.com, 22 October 2008
The head of the Department of Water Works and Forestry's Blue Scorpions said the municipal manager of the Emfuleni Municipality (Vanderbijlpark) will be held responsible in his personal capacity for the rehabilitation of the Bedworth Lake in the area. The lake was contaminated with petrol, sewage, manganese and fertiliser that led to the mass deaths of fish in the lake. He said the department would take legal action if future tests didn't show an improvement in the water quality.

Daily Dispatch, 2 February 2009
The Grahamstown High Court extended an interdict to prevent the Ndlambe Municipality from allowing raw sewage to leak into the Bushman's River from its conservancy tanks. Judge Johan Froneman also ordered the municipality to properly maintain and regularly clear their conservancy tank to ensure that no further overflow of spillage occurred.

The Citizen, 4 February 2009
It was reported that Madibeng Municipality in Brits, North West, could be prosecuted over untreated sewage being pumped into the Crocodile River. "The situation is extremely bad," said Leonardo Manus, the Water Affairs Department's manager for waste-water regulation. "Unless the municipality, assisted by the provincial government, comes up with an immediate solution, prosecution is inevitable."

The Beeld, 12 April 2009
The Emfuleni Municipality was given a four month extension by the Johannesburg High Court to ensure that two of its biggest sewage treatment plants function properly. The NGO Save the Vaal Environment took the municipality to court four times since November 2008 over sewage pollution through the Rietspruit and into the Vaal River.

The Times, 7 June 2009
Five people died at Mfeko village, Mthatha, after drinking polluted water, the Eastern Cape Health Department announced. Villagers claimed they became sick when they drank water from a nearby river when their taps ran dry in September. It was not clear why the village ran out of water.

Legalbrief Today, 23 July 2009 (Webber Wentzel news release 22 July 2009)
An upcoming Constitutional Court hearing in August 2009 could force local councils countrywide to provide sanitation for informal settlements, having a far reaching impact on the health of millions and reducing the mortality rate of children. The action was being brought against the Ekurhuleni Council, and the outcome could set a nationwide precedent about the right of those living in informal settlements to basic sanitation.

Daily Dispatch, 22 July 2009
Ndlambe Municipality appealed to a Sunshine Coast ratepayers' group to give them more time to sort out serious township sewerage problems in Port Alfred. The municipal plea came after the Ndlambe Ratepayers' Forum (NRF) decided to take the local authority to the high court to legally force them to act in Nelson Mandela Township. The ratepayers previously gave the authority a 30-day deadline to fix the problems, but after a follow-up visit they were unhappy with progress made by the municipality. So they chose to "go the legal route", said NRF legal adviser George Poole. With a legal challenge estimated to cost R100 000, Poole appealed to residents to help raise the outstanding R50 000 needed.

Legalbrief Environmental, 28 July 2009 (*The Times*, 25 July 2009)
South Africa's rivers were in a parlous state, according to a report on river pollution in the Kruger Park and Eastern Cape made public by Buyelwa Sonjica, Minister of Water and Environmental Affairs. All the major rivers flowing through the Kruger National Park were heavily polluted with human faeces, affecting the health of the park's wildlife, says the report. *The Times* quotes Sonjica, who said several municipalities were to blame for sewage spills that cause human waste to be flushed downstream towards the park. She revealed the extent of the pollution in a written reply to questions in the National Assembly. Once pristine rivers – including the Crocodile, Olifants and Sabie – all showed dangerously high levels of human waste contamination, prompting water authorities to act against municipalities in Mpumalanga. Eight Mpumalanga municipalities had been served notices in terms of the Water Act after sewerage spills. They included Delmas, Bushbuckridge, Govan Mbeki, Mbombela, Nkomazi, Emakhazeni, Kungwini and Greater Sekhukhune, as well as the Vhembe and Greater Tzaneen municipalities in Limpopo.

Legalbrief Environmental, 28 July 2009 (*The Times*, 23 July 2009)
Dangerously high levels of E. coli had been recorded in many of the Eastern Cape's rivers. A report in *The Times* said that the Nahoon, Kubusie, Buffalo, Keiskamma, Yellowwoods, Komani, Klipplaat, Thorn and Hex rivers in the province's East London area were all in the same situation. According to figures tabled by Minister of Water and Environmetal Affairs Buyelwa Sonjica, E. coli levels of 2 400 colony forming units (CFU) per 100ml of water and higher had been found at sampling points along their banks. The Department of Water Affairs' Provincial Director for Water Regulation and Use, Andrew Lucas, said that CFU counts higher than 2 000 were dangerous. The report quotes him as saying that the faecal pollution came from two sources: broken down infrastructure at sewage treatment plants and human settlements along the banks of the rivers.

Le galbrief Environmental, 28 July 2009 (*The Herald*, 5 August 2009)
Fourteen waste water treatment works in the Eastern Cape were exceeding their capacity to treat raw sewage. *The Herald* report noted that Local Government MEC, Sicelo Gqobana, told the Bisho legislature the department had not set aside funds to assist local authorities to upgrade treatment works, but the municipal infrastructure grant available from national government could be used for this purpose. He said his department, together with the DWEA was carrying out a study on the status of waste

water treatment works in the Eastern Cape, monitoring their design capacity and that of municipalities to operate the plants in line with DWEA requirements.

Legalbrief Today, 19 August 2009 (*Die Volksblad*, 19 August 2009)

Eight former municipal managers and acting managers of the Matjhabeng Municipality appeared in the Welkom Magistrate's Court to answer charges relating to the Water Act. The case followed an investigation by the Green Scorpions of water contamination allegedly caused by the municipality's dysfunctional sewerage plants. Matjhabeng Mayor Mathabo Leeto, who attended the proceedings, said outside court the sewerage plants outside Welkom could not be maintained due to financial difficulties. She said an action plan had been drafted in March to address the problem. She said services such as sewerage treatment could only be sustained if residents paid their rates and taxes. DA member of parliament Peter Frewen said sewage had been running into the Sand River at Virginia for more than a year, which prompted charges to be laid. The case was postponed until the end of September 2009.

Legalbrief Today, 6 October 2009 (*Cape Argus*)

A number of municipal and other sewerage works were operating without the necessary permits, the government said. This is because managers of the plants had not applied for the renewal of their permits, even though they had been issued with directives to do so by the Water Affairs Department. In other cases, it was because they did not have the staff to complete the required paperwork. However, the government did not say how many sewerage plants were being operated illegally nor whether discharges from these plants were being monitored for water quality standards. The admissions about the sewerage works came from the DWEA in response to parliamentary questions by the DA's Annette Lovemore. Minister of Water and Environmental Affairs Buyelwa Sonjica said in her answers to Lovemore that the department had issued notices, pre-directives and directives in respect of the non-compliances in terms of the NWA but did not say what the outcomes were.

Legalbrief Today, 6 October 2009 (*Mail & Guardian Online*)

SA needs more than R70 billion to improve its bulk water infrastructure, Water and Environmental Affairs Minister Buyelwa Sonjica said. Sonjica, who spoke at the launch of the Maquassi Hills bulk water supply project in the North West, said "Bulk infrastructure is a critical element of water services infrastructure and an integrated part of water services management." The R158 million Maquassi Hills project was one of the first large projects completed through the regional bulk infrastructure programme. Sonjica said another 23 projects were in the construction phase, 11 were in tender and design phase and 47 feasibility studies had been undertaken.

The Sunday Independent, *Cape Argus*

Experts warned that South Africa's water crisis could be worse than the electricity emergency. The *Independent* report notes that the warning comes on the heels of a new Water Research Commission report, which found that South Africa had 4% less surface water than previously thought. "We are always going to be a water-scarce country. Unless we keep our act together in terms of development, the water crisis is going to be worse than electricity. All it needs is a few bad years," Brian Middleton, project director of the study, was quoted as saying. He added that the results of the integrated assessment of surface and underground water resources and water quality had been sobering. The *Argus* report notes that the situation is particularly bad in the Southern Cape, which is in the grip of the worst drought in 100 years, with farmers battling to survive and towns such as George and Mossel Bay close to running dry. The Eden District Municipality – which includes Knysna, George and Mossel Bay – has appealed for emergency drought relief funding.

Appendix B Recent case law

Other than the Constitutional Court cases discussed, water pollution caused by the discharge of untreated effluent into rivers has been the primary subject of recent litigation in the area of water and sanitation. Most of these cases have involved an approach to the high court for an interdict effectively requiring the cessation of the pollution.

Mafube Municipality

In a decision of the Free State High Court, *Agritrans CC and Another v Mafube Municipality and Another,*[1] the applicant sought to hold the local authority and the municipal manager in contempt of an earlier court order to maintain certain municipal sewerage pumps. In the alternative, the appellant asked for a final order, which required the municipality to, among other things, repair and make operational various sewerage pumps that operated near and on the applicant's property.

The court noted that the fact that raw sewage was being discharged into the Wilge River as a result of certain sewage pumps being out of order was not disputed by the respondent and further stated that:

"The *gravamen* of the applicant's case is that the respondent is not maintaining the sewerage system as it is obliged to in terms of the contract between them, *inter alia*:
(a) to prevent sewage from spilling into the Wilge River, which is the main feeder of the Vaal River. Section 152 of the Constitution of South Africa, Act 108 of 1996 ("the Constitution"), requires the state through its relevant organs to ensure the provision of basic services in the communities in a sustainable manner and to promote a safe and healthy environment to them; and
(b) to prevent nuisance or unhygienic conditions from occurring. Section 20(1) of the Health Act, No 63 of 1977 ("the Health Act")."

Sadly the court felt no need to comment on any of the legal grounds of the application despite the fact that one of these grounds, as noted by the respondent, raised constitutional issues.[2] In responding to the defendant's contention that the constitutional grounds had not been properly noted in the application, the court commented as follows:

> "Although the case raises some constitutional issues, amongst others the right to a healthy environment and adequate and proper service delivery, the matter can be disposed of without resort thereto. It would also be unfair and inequitable to deny the applicant its immediate right of access to courts as envisaged in Section 34 of the Constitution."

The applicant's attempt to hold the respondent in contempt in respect of an earlier order failed on the basis of an absence of *mala fides*, but the application for an order requiring the respondent to repair and maintain the sewage pumps was granted. The court appears to have accepted the applicant's clear right to the interdict on the basis of the facts rather than considering any enforceable legal rights (although a contract between the parties is referred to but not discussed).

Emfuleni Municipality

In the Witwatersrand local division, an NGO by the name of Save the Vaal Environment was successful in obtaining an interdict against the Emfuleni Local Municipality to prevent the further discharge of untreated effluent into the Vaal River and a further mandamus compelling the proper maintenance of certain pump stations adjacent to other water resources.[3] The matter was unopposed. In the founding affidavit, the applicant based the claim on a contravention of the provisions of Section 19(1) of the NWA and Section 28 of the Nema. The urgency of the matter was based on the continuing breach of the applicant's rights and continuing nuisance.

Ndlambe Municipality

In the Eastern Cape local division, the Bushman's River Mouth Ratepayers' Association obtained an interdict against the Ndlambe Local Municipality to prevent the discharge of raw sewage into the Bushman's River from its sewage conservancy tank and also a *mandamus* requiring this tank to be routinely cleared and maintained.[4] This matter was also unopposed, and the founding affidavit similarly based its claim on the provisions of Section 19(1) of the NWA and Section 28 of the Nema. The grounds advanced for urgency not only included a breach of rights and nuisance but also a continuing criminal offence although no statutory basis was advanced for the latter ground.

Appendix C List of key legislation, regulations and policy documents[6]

Legislation and regulations

Constitution of the Republic of South Africa Act 108 of 1996 (Constitution)
Local Government: Municipal Structures Act 117 of 1998 (Municipal Structures Act)
Local Government: Municipal Systems Act 32 of 2000 (Municipal Systems Act)
The National Water Act 36 of 1998
The National Environmental Management Act 107 of 1998
Norms and Standards in Respect of Tariffs for Water Services (20 July 2001) (Norms and Standards)
Promotion of Administrative Justice Act 3 of 2000 (Paja)
Regulations relating to Compulsory National Standards and Measures to Conserve Water (8 June 2001) (Compulsory National Standards)
Water Services Act 108 of 1997 (Water Services Act)
Local Government: Municipal Finance Management Act 56 of 2003
Public Finance Management Act 1 of 1999

Key policy documents

Department of Local Government (DPLG), *Framework for a Municipal Indigent Policy*, draft document, September 2005
DPLG, *Guidelines for the Implementation of the National Indigent Policy by Municipalities*, draft document, 1 November 2005 (Guidelines)
DPLG, *Policy Framework for the Implementation of the Municipal Infrastructure Grant (MIG),* 5 February 2004 (Policy Framework)
DWAF, *Draft White Paper on Water Services*, October 2002
DWAF, *Free Basic Water Implementation Strategy*, August 2002 (FBW Implementation Strategy)
DWAF, *National Water Services Regulation Strategy*, penultimate draft, April 2008 (National Water Services Regulation Strategy)
DWAF, *Strategic Framework for Water Services: Water is life, sanitation is dignity*, September 2003 (Strategic Framework)
DWAF, *Water Supply and Sanitation Policy White Paper*, November 1994
DWAF, *White Paper on a National Water Policy for South Africa*, April 1997
DWAF, *White Paper on Basic Household Sanitation*, September 2001

Appendix D Water quality guidelines

The Water Quality Guidelines[5] have been formulated by the DWAF and define "the physico-chemical requirements of some users ... including domestic, irrigation, live-stock watering, recreation and aquatic ecosystems".

This implies that the actual determination of whether or not the properties of water are "less fit for any purpose for which it may reasonably expected to be used" for purposes of the NWA is made by administrative action and not in terms of a statutorily defined right.

However, the provisions of Section 19 of the Act could be employed in asserting a justiciable right to water of a particular quality if the water quality guidelines are accepted by the court as giving adequate content to the right in the specific circumstances. (Alternatively, a litigant could also lead independent scientific evidence as to the required quality but may be faced with meeting a further requirement of "reasonableness", which may well be avoided if the state's own quality guidelines are used.)

In the WSA, the definition of "basic water supply" does include a reference to "the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene"[6]. The meaning of the word "quality" in the context of this definition is given content by Regulation 3 in Government Notice R509[7] by providing that the minimum standard for basic water supply services is a minimum quantity of "potable water" of 25 litres per person per day or six kilolitres per household per month. Regulation 5 of the same notice provides specific standards for the quality of potable water.[8] These standards are defined by actual physical and chemical characteristics that are set out in *SABS 241: Specifications for Drinking Water, or the South African Water Quality Guidelines* published by the DWAF.[9] On this analysis, the WSA does provide for a right to a specific standard of water for human consumption. However, it is likely that this standard can only be held to apply to the stipulated "minimum quantity" of water per household.

Endnotes

Chapter 1

1 The White Paper On A National Water Policy For South Africa states that: "The need for the review of South African water law and for a fundamental change in our approach to water management is underpinned by the Constitution, both in relation to the creation of a more just and equitable society and in relation to the broad need for more appropriate and sustainable use of our scarce natural resources, driven by the duty to achieve the right of access to sufficient water." The White Paper was the outcome of an extensive public participation programme and formulated the principles and objectives that are the basis of the National Water Act.
2 Part B, Schedule 4
3 Section 1(a)
4 Section 2 and Section 7(2)
5 Section 9
6 Section 10
7 Sections 33 and 34
8 Centre for Applied Legal Studies submission to the South African Human Rights Commission (SAHRC), 18
9 Galvin, M. (2009). "Straight Talk To Strengthen Delivery In The Water Services Sector". The Water Dialogues South Africa Synthesis Report. Page 14
10 Galvin, M. (2009). "Straight Talk To Strengthen Delivery In The Water Services Sector". The Water Dialogues South Africa Synthesis Report. Page 6.
11 Liebenberg, S. (2009). "Water rights reduced to a trickle". Mail & Guardian, 16 October. Page 27.
12 Galvin, M. (2009). "Straight Talk To Strengthen Delivery In The Water Services Sector". The Water Dialogues South Africa Synthesis Report. Page 4.
13 City of Johannesburg and Others v Mazibuko and Others [2009] ZACC 28
14 Government of the Republic of South Africa and Others v Grootboom and Others [2000] ZACC 19
15 Minster of Health and Others v Treatment Action Campaign and Others [2002] ZACC 15
16 The court thus referred to a joint reading of Sections 27(1)(b) and 27(2) of the Constitution.
17 Paragraph 50
18 Paragraph 67
19 The Water Dialogues South Africa found that the ambiguity in the statutory framework (except for perhaps in the Strategic Framework for Water Services) of the definition of the term "basic" services has allowed municipalities to provide below-basic level services without intervention by the Department of Water Affairs as the national regulator.
20 Sections 43 and 44 of the Constitution read together with Part B of Schedule 4
21 Water Services Act (WSA), Section 11
22 See Section 2.4 in this chapter.
23 Section 155(7)
24 Section 155(6) and (9)(c)
25 For more on the process of provincial supervision see De Visser, J et al. (2000). Provincial Supervision: Manual Of The Application Of Section 139 Of The Constitution, www.thedplg.gov.za/subwebsites/annualreport/reports/igrmanual.pdf
26 Section 16(4)
27 Section 13 and 14 of the National Environmental Management Act (Nema)
28 Section 16(2) and (3) of the Nema
29 Section 16(3)(d)(ii) of the Nema
30 Section 88
31 Section 88(3)
32 Op cit note 11 and 18
33 Department of Provincial and Local Government. The Policy Framework for the Implementation of the Municipal Infrastructure Grant. www.dplg.gov.za/subwebsites/mig/docs/2.pdf.
34 Section 34
35 Sections 28-41
36 Section 105
37 Section 39
38 Section 20(5)(a)
39 Section 216(1) of the Constitution states that "National legislation must establish a national treasury and prescribe measures to ensure both transparency and expenditure control in each sphere of government, by introducing (a) generally recognised accounting practice; (b) uniform expenditure classifications; and (c) uniform treasury norms and standards." Read together with Section 5(2) of the Municipal Systems Act.
40 Chapter 13
41 Section 150 of Act 56 of 2003
42 De Visser, J et al. (2000). Provincial Supervision: Manual Of The Application Of Section 139 Of The Constitution. www.thedplg.gov.za/subwebsites/annualreport/reports/igrmanual.pdf
43 Section 41(1)(g)
44 Section 41(1)(h)(iii)
45 Section 41(1)(h)(iv) and (v)
46 Section 41(1)(h)(vi)
47 Section 2(4)(m) of the WSA
48 Section 154(4)
49 Department of Cooperative Government & Traditional Affairs. (2009). National State Of Local Government In South Africa: Overview Report. Working document. Page 34.
50 Opening address by President Jacob Zuma to the presidential meeting with executive mayors and mayors to discuss improving service delivery in municipalities, Khayelitsha, Cape Town, 20 October 2009
51 The SAHRC (www.sahrc.org.za) is a statutory institution with the mandate of Chapter 9 of the South African Constitution. It addresses human rights violations, seeks effective redress for such violations and monitors and assesses the observance of human rights.
52 The Water Tribunal is an independent body that has jurisdiction in all the provinces and consists of a chairperson, a deputy chairperson and additional members. It has jurisdiction over water disputes. Members of the Water Tribunal must have knowledge of law, engineering, water resource management or related fields. They are appointed by the minister on the recommendation of the Judicial Service Commission, the body that elects judges. The Water Tribunal replaced the Water Court in 1998. Contact the Water Tribunal through the high court. www.capegateway.gov.za/afr/pubs/public_info/C/32303/E#9
53 Questions And Answers On The Release Of The Green Paper On Performance, Monitoring and Evaluation. www.info.gov.za/speeches/2009/09090709451001.htm
54 Section 11
55 Section 5
56 Section 32(c)
57 Sections 51-61
58 Section 57
59 Section 20(1)(c)
60 Section 32
61 Section 62 prescribes that the minister and any relevant province is obliged to monitor the performance of every water services institution to ensure compliance with prescribed national standards for water services.
62 Section 23(d)
63 Section 23
64 This the environmental management inspectors can do in terms of a number of the Nema provisions. For instance, they can issue compliance notices under Section 31L. The SAPS can also be relied on to use their powers under Section 31O.
65 See Kidd, M. Environmental Law, page 219.
66 Section 34(4) of Act 56 of 2003
67 Section 82(3)(a) and (b)
68 Sections 14-15
69 Section 21
70 Section 19
71 Section 17(2)
72 Section 5
73 Mpho, P. (2006). The Role Of Ward Committees In Enhancing Public Participation In Rustenburg Municipality. IDASA (www.idasa.org.za/gbOutputFiles.asp?WriteContent=Y&RID)
74 Section 4(2)(e)
75 Chapter 5
76 Section 4(2)(i)
77 Section 87(1) of the Municipal Structures Act
78 Section 105
79 Section 15 and 16 of Act 56 of 2003
80 Section 21(2) of Act 56 of 2003

Chapter 2

1 Act 36 of 1998
2 Act 108 of 1997
3 Act 1 of 1999
4 Act 56 of 2003
5 www.childrencount.ci.org.za/content.asp?PageID=8
6 www.un.org/millenniumgoals/(2004)
7 www.sarpn.org.za/documents/d0001538/RSA_MDG_report2005.pdf
8 Department of Water Affairs and Forestry (DWAF). 2003:12
9 DWAF. (2004). National Water Resource Strategy Pretoria.
10 2009 (39) ZACC 28 (CC)
11 Department of Environmental Affairs and Tourism. (2006). South Africa Environmental Outlook: A Report On The State Of The Environment. Pretoria. Page 37.
12 www.dwaf.gov.za/dir_ws/fbw/
13 The organisation defines adequate water as access to a safe and reliable supply of drinking water at children's homes. Either inside the dwelling or on site is the best proxy for access to adequate water. All other water sources – including public taps, water tankers, dams and rivers – are considered inadequate because of their distance from the dwelling or the possibility that water is of poor quality. See www.childrencount.ci.org.za/content.asp?PageID=8
14 See Children Count (Abantwana Babalulekile) website at www.childrencount.ci.org.za/content.asp?PageID=8
15 Galvin, M. (2009). "Straight Talk To Strengthen Delivery In The Water Services Sector", The Water Dialogues South Africa Synthesis Report. Page 2.
16 A human rights research advocacy and public litigation organisation based in the School of Law at the University of Witwatersrand
17 Submission on access to water and sanitation in South Africa (Millennium Development Goals And The Realisation of Economic And Social Rights In South Africa: A Review, South African Human Rights Commission), Centre for Applied Legal Studies (CALS), University of the Witwatersrand, 9 February 2009. This submission is based on a research report entitled Water Services Fault Lines: An Assessment Of South Africa's Waste And Sanitation Provision Across 15 Municipalities

published in October 2008 by CALS, the Centre on Housing Rights and Evictions and the Norwegian Centre for Human Rights.

18 Ibid, 7

19 See Addendum A for brief excerpts from relevant media reports.

20 Galvin, M. (2009). "Straight Talk To Strengthen Delivery In The Water Services Sector." The Water Dialogues South Africa Synthesis Report. Page 2.

Chapter 3

1 Gabru, N. (2005). "Some Comments On Water Rights In South Africa" PER (1); De Waal, J, Currie, I and Erasmus, G. (2001). Bill Of Rights Handbook. Fourth edition. Pages 432 and 433.

2 De Vos, P. (1997). "Pious Wishes Or Directly Enforceable Human Rights? Social And Economic Rights In South Africa's 1996 Constitution." South African Journal on Human Rights (13). Pages 83-86.

3 In Re Certification of the Constitution of the Republic of South Africa 1996 (10) BCLR 1253 (CC)

4 2000 (3) BCLR 277 (CC) paragrapg 20, where Judge Yacoob stated: "While the justifiability of socio-economic rights has been the subject of considerable jurisprudential and political debate, the issue of whether socio-economic rights are justifiable at all in South Africa has been put beyond question by the text of our Constitution as construed in the Certification judgment. During the certification proceedings before this Court, it was contended that they were not justifiable and should therefore not have been included in the text of the new Constitution. In response to this argument, this Court held: '[T]hose rights are, at least to some extent, justifiable. As we have stated in the previous paragraph, many of the civil and political rights entrenched in the [constitutional text before this Court for certification in that case] will give rise to similar budgetary implications without compromising their justifiability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justifiability. At the very minimum, socio-economic rights can be negatively protected from improper invasion.'"

5 Ibid

6 See also Minister of Health v Treatment Action Campaign 2002 (5)SA 721 (CC) and Rail Commuter Action Group and Transnet Ltd t/a Metrorail and others (No1) and (No2) 2003 (5) SA 518(C)

7 Gabru (note 1 above). The meaning of this qualification has been interpreted as follows by the Constitutional Court (in Soobramoney v Minister of Health (KwaZulu-Natal) 1998 (1) SA 765 (CC)): "What is apparent from these provisions is that the obligations imposed on the state by section 26 and section 27 in regard to access of housing, health care, food, water, and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled."

8 Note 1 above, quoting as reference De Waal, Currie and Erasmus, page 423.

9 Currie, I and De Waal, J. (2005). The Bill of Rights Handbook. Fifth edition. Page 159; and quoting from S v Makwanyane 1995 (3) SA 391 CC, paragraph 55.

10 Chapter 1, note 35, page 160 and Chapter 1, note 57

11 Chapter 1, note 30, page 26

12 Ibid, page 33

13 2002 (6) BCLR 625 (W), pages 15-17.

14 Committee on Economic Social and Cultural Rights. (2002). General Comment 15: The Right To Water (articles 11 and 12 of the Covenant).

15 Hardberger, A. (2005). "Life, Liberty And The Pursuit Of Water: Evaluating Water As A Human Right And The Duties And Obligations It Creates. Northwestern Journal of International Human Rights, Volume 4 Issue 2. Pages 57-60. (own emphasis added)

16 Chapter 1, note 40, page 37

17 Chapter 1, note 35, page 576 and comments on General Comment 3

18 Ibid, page 576 referring to General Comment 3 paragraph 10 and the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (January 22-26, 1997) paragraph 9. www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html

19 Chapter 1, note 30

20 Ibid

21 Chapter 1, note 35, page 584

22 Ibid, page 585

23 Bilchitz, D.(2002). "Giving Socio-Economic Rights Teeth: The Minimum Core And Its Importance." SALJ, volume 119(3). Pages 484 and 488.

24 Ibid, page 501. This point is emphasised in the appellant's submission to the Constitutional Court in the Nokotyana case, where the rights of the appellant to basic sanitation are characterised as "survival rights".

25 L Mazibuko and Others v City of Johannesburg & Others (A1246/2006) [2008] ZAGPHC 106 (18 April 2008), parts 129-133

26 Ibid, part 134, where the definition of "basic water supply" in the WSA is quoted as follows: "the prescribed minimum standard of water supply services necessary for the reliable supply of sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene". The court held that 25 litres per person per day prescribed in legislation was in fact insufficient to meet the daily needs of Phiri residents and, having assessed the available resources of the City of Johannesburg, ordered the local authority to provide 50 litres of free water per person per day to the residents.

27 L Mazibuko and Others v City of Johannesburg & Others 2009 (39)SA 28 (CC), parts 50-67

28 Case no 08/17815 in the Gauteng High Court, 24 March 2009. The municipality opposed the application on several grounds and specifically considered the existing sanitation facilities (which consisted of stand related pit latrines dug by the occupiers and housed in informal structures) to be adequate and not "hazardous".

29 Ibid, paragraphs 5-14. The municipality opposed the application on several grounds and specifically considered the existing sanitation facilities (which consisted of stand related pit latrines dug by the occupiers and housed in informal structures) to be adequate and not "hazardous".

30 Constitutional Court Case no CCT31/09, appellant's heads of argument, 8 June 2009, paragraphs 1, 2 and 10.18-10.20 (www.constitutionalcourt.org.za/uhtbin/cgisirsi/f8QkqeHEhT/MAIN/0/57/518/0/H-CCT31-09) Paragraph 10.19 of the appellant's heads of argument states that "[t]he White Paper on Basic Household Sanitation stipulates that 'the minimum level of service prescribed for sanitation is a V(entilated) I(mproved) P(it Latrine) per household (erf)'..."

31 Constitutional Court Case No CCT31/09, respondent's heads of argument, 17 June 2009, paragraph 6.9 (www.constitutionalcourt.org.za/uhtbin/cgisirsi/f8QkqeHEhT/MAIN/0/57/518/0/H-CCT31-09)

32 Chapter 1, note 53, page 44

33 This was later rejected in the Constitutional Court judgment

34 In Minister of Health and Others v Treatment Action Campaign and Others (No 2) 2002 (5) SA 721 (CC), the court stated that:
"South African Courts have a wide range of powers at their disposal to ensure that the Constitution is upheld. How they should exercise those powers depends on the circumstances of each particular case. Here due regard m ust be paid to the roles of the legislature and the Executive in a democracy. What must be made clear, however, is that when it is appropriate to do so, Courts may – and, if need be, must – use their wide powers to make orders that affect policy as well as legislation."

35 Du Bois, FG and Glazewski, JI.(2004). "The Environment And The Bill Of Rights" in Butterworths' Professional Editors Bill Of Rights Compendium, paragraph 2B4.4 where Authorities of Pretoria City Council v Walker 1998 2 SA 363, 1998 3 BCLR 257, paragraph 96; Minister of Health and Others v Treatment Action Campaign and Others (no 2), paragraph 104; and S v Z and 23 similar cases 2004 4 BCLR 410 (E) are quoted.

36 Section 27(1)(b) and Section 27(2) of the Constitution.

37 Chapter 1, note 30, page 35 where the court states: "The right delineated in section 26(1) is a right of 'access to adequate housing' as distinct from the right to adequate housing encapsulated in the Covenant. This difference is significant. It recognises that housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met …"

38 Kok, A and Langford, M. (2005). "The Right To Water" in D Brand et al (eds). Socio-economic Rights In South Africa. Page 200. This obligation ties in with the duty of the state in Section 7(2) of the Constitution to respect the rights in the Bill of Rights, which would also require that the state refrain from denying or obstructing the right of access to sufficient water.

39 Kok and Langford (note 38), page 198

40 Chapter 1, note 53, paragraph 16

41 Part 85

42 Soobramoney v Minister of Health (KwaZulu-Natal) 1998 (1) SA 765 (CC) 8: "There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring."

43 Chapter 1, note 53, page 17 (emphasis added)

44 Ibid, page 10

45 Ibid, pages 11-13

46 Ibid, page 42, where the case of Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC) 45 was quoted as follows: "The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution."

47 Ibid, page 44. Referring to Section 38 of the Constitution, which provides that a court may grant appropriate relief in respect of an infringement of a right in the Bill of Rights ... (the respondents) submitted that only effective relief would constitute appropriate relief. In Fose v Minister of Safety and Security 1997 (3) SA 786 (CC) at paragraph 69, Ackermann, J said: "[A]n appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced."

48 Chapter 1, note 64, page 201

49 Constitutional Court Case No CCT39/09, applicants' submissions, 27 July 2009, paragraph 416, www.constitutionalcourt.org.za/uhtbin/cgisirsi/f8QkqeHEhT/MAIN/0/57/518/0/H-CCT39-09

50 Section 24 provides that: "Everyone has the right- (a) to an environment that is not harmful to their health or well-being; and
(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that- (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

51 Du Bois and Glazewski (this chapter, note 35), 2B2.

52 Director: Mineral Development, Gauteng Region and Sasol Mining (Pty) Ltd v Save the Vaal Environment and Others 1999 (2) SA 709 (SCA)

53 This is supported by the definition of "environment" in the Nema, which also acknowledges in its preamble the environmental right in Section 24 of the Constitution.

54 Du Bois and Glazewski (note 35), 2B4

55 Du Bois and Glazewski (note 35), 2B4.1: "The practical effect hereof can be illustrated by reference to Natal Fresh Produce Growers' Association v Agroserve (Pty) Ltd 1990 4 SA 749 (N) where the applicant failed to obtain an interdict prohibiting the manufacture and distribution of hormonal herbicides because the Court was not prepared to accept that any use of hormonal herbicides anywhere in South Africa could result in damage to the plaintiff's crops. Provided that a plaintiff or applicant is able to convince a court that the environment has been rendered harmful to health or well-being, it ought no longer to be necessary to prove that other legally recognised interests

have been harmed. This places South African environmental law on a road already embarked on by developed and developing countries alike."

56 Hichange Investments (Pty) Ltd V Cape Produce Co (Pty) Ltd T/A Pelts Products, And Others 2004 (2) SA 393 (E)

57 Glazewski, J. (2005). Environmental Law in South Africa. Second edition. Page 77.

58 2006 (5) SA 512 (T), pages 16-19.

59 Ibid, Glazewski (note 57), page 86 and Du Bois & Glazewski (note 35), 2B4.3.

60 Ibid, pages 18-19.

61 Du Bois and Glazewski (note 35), 2B4.1

62 This issue has already attracted litigation from a company seeking to protect its commercial interest in watering livestock (see "Water company in court", The Citizen 9 November 2007). A commercial beef producer took the local water institution to court to interdict further pollution of the Blesbokspruit River by untreated sewage that was allegedly posing a serious health risk to its livestock.

63 This view is supported in BP[zRPz] Southern Africa (Pty) Ltd V MEC For Agriculture, Conservation, Environment And Land Affairs 2004 (5) SA 124 (W): "However, the precise contours and content of the measures to be adopted are primarily a J matter for the Legislature and the Executive. They must, however, ensure that the measures they adopt are reasonable. It A is the Court's duty to subject the reasonableness of these measures to evaluation while constantly keeping in mind that courts are generally 'ill-suited to adjudicate upon issues where Court orders could have multiple social and economic consequences for the community'."

64 Ibid. See also Du Bois and Glazewski (note 35), 2B4.3, where the willingness of the high court to order a government minister to enforce environmental legislation was noted as was the caution expressed in another case where the court felt unable to interfere unless the officials concerned had been shown not to have exercised their discretion reasonably or properly.

65 Kidd, M. (2008). Environmental Law. First edition. Page 23.

66 See discussion under part 1.5

67 Kok and Langford (note 38), page 207

68 Section 3 of the WSA defines "basic sanitation" as "the prescribed minimum standard of services necessary for the safe, hygienic and adequate collection, removal, disposal or purification of human excreta, domestic waste water and sewage from households, including informal households". As noted by Kok and Langford, it thus explicitly recognises every South African inhabitant's right of access to basic water supply and basic sanitation.

69 Kok and Langford (note 38), page 208

70 Kok and Langford (note 38), page 323: "Failure to control sanitary excreta disposal is one of the major causes of environmental pollution and water diseases. The WHO guidelines prescribe 'sanitary excreta disposal' to be the isolation and control of faeces from both adults and children so that they do not come into contact with water sources, food or people." Also: "The Committee on ESCR has noted the importance of sanitation for the right to water and considers it an element of the rights of housing and health …" See paragraph 29 of General Comment Number 15…: "Ensuring that everyone has access to adequate sanitation is not only fundamental for human dignity and privacy, but is one of the principal mechanisms for protecting the quality of drinking water supplies and resources. In accordance with the rights to adequate housing and health…" State parties have an obligation to progressively extend safe sanitation services, particularly to rural and deprived urban areas, taking into account the needs of women and children.

71 In paragraph 17 of Mazibuko (note 25), the SCA made it clear that "the elements of the right to water must be adequate for human dignity, life and health." It is submitted that the link between health and dignity and proper sanitation is self-evident.

72 Chapter 1, note 55

73 The court quoted City of Johannesburg v Rand Properties (Pty) Ltd & Others 2007(6) SA 417 SCA as follows: "A related problem is that the High Court had insufficient regard to the division of power. It is for the democratically elected government of the city to determine what its vision of the inner city is. Courts are not equipped or entitled to second guess this type of policy decision. The Court also failed to have regard to the constitutional limitation on the right of access to housing. In particular it took no account of the uncontradicted evidence of the city that it did not have the means to provide the respondents with inner city accommodation. …" There is no suggestion that the city has failed in its general obligations in this regard considering that its duty is to provide housing progressively within its means. One can easily disagree with the allocation of resources by organs of state, and one may justifiably debate priorities, but thus far the Constitutional Court has not sanctioned the re-allocation of public funds by courts.

74 Du Bois and Glazewski (note 35), 2B4.3: the view is further expressed that "dicta in Director: Mineral Development, Gauteng Region and Sasol Mining (Pty) Ltd v Save the Vaal Environment and Others indicate that South African law may already be embarking along … (this) path."

75 [zRPz] Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill 2000 (1) SA 732 (CC) – the CC discussed at length this constitutional sharing of legislative competence between the national government and the provinces, although the case did not concern an environmental issue. It is one of the few cases to deal with this issue exhaustively. See also Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development and Another; Executive Council, KZN v President of the Republic of South C Africa and Another 2000 (1) SA 661 (CC); and Ex parte Speaker of the KZN Provincial Legislature: In re KZN Amakhosi and Iziphakanyiswa Amendment Bill of 1995 1996 (4) SA 653 (CC) (1996 (7) BCLR 903

76 Glazewski, J. (2005). Environmental Law in South Africa. Second Edition. Chapter 14, pages 425 and 441. Lexis Nexis Butterworths: Pietermaritzburg.

77 Kidd, M. (2008). Environmental Law. Page 68. Juta: Pietermaritzburg.

78 Section 152(b)

79 Section 152(c)

80 Section 152(d)

81 Section 152(2)

82 City of Johannesburg v L Mazibuko (489/08) [2009] ZASCA 20 (25 March 2009), paragraph 3

83 Section 153 of the Constitution

84 NWA, Section 156

85 108 of 1997 (as amended by the Water Services Amendment Act 30 of 2004), Section 11

86 As defined in the Local Government Transition Act, 1993

87 Section 6(1)

88 Section 19

89 Page 9

90 A water services provider means any person who provides water services to consumers or to another water services institution but does not include a water services intermediary

91 Section 5

92 Section 5

93 Section 4(3)

94 Section 3(1)

95 A water services institution means a water services authority, a water services provider, a water board or a water services committee

96 Section 3(2)

97 Section 3(3)

98 Section 1(iii)

99 Section 1(ii)

100 Strategic Framework For Water Services, Annexure 3, page 66

101 Strategic Framework For Water Services, 4.4, page 28. See also Department of Provincial and Local Government: Guidelines for the Implementation of the National Indigent Policy by Municipalities

102 CALS, Water Services Fault Lines, page 19

103 This is quite an interesting provision – i.e. that the funds must be paid directly to the households. However, it is unclear how this would work.

104 CALS, Water Services Fault Lines, page 21

105 Section 9

106 Section 9(4)

107 Section 10(3)

108 Section 11

109 Section 11(4)

110 No 63 of 1977

111 Kidd, M. (2008). Environmental Law. Juta: Pietermaritzburg, page 86

112 Strategic Framework for Water Services, Annexure 2, page 64

113 Section 32(c)

114 Section 33(2)(a)

115 Section 34(1)(d) and (f)

116 Sections 51-61

117 Section 62

118 Section 63(1)

119 The provincial executive would issue a directive to the municipal council, describing the extent of the failure to fulfil its obligations and stating the steps required to meet its obligations. The provincial executive could also assume the responsibility of the municipality for the relevant obligation. Such intervention must be approved by the Cabinet member responsible for local government affairs and, unless approved by council, must end. Notice of the intervention must be tabled with the provincial legislature and the National Council of Provinces.

120 Section 63(10)

121 Section 64(1)

122 CALS, Water Services Fault Lines, page 3

123 Section 73(1)

124 Section 20(5)(a)

125 Sections 82(3)(a) and (b)

126 Section 57

127 Section 12 and 13

128 Section 14

129 Section 17

130 Section 21

131 Section 19

132 Kidd, M. (2008). Environmental Law. Juta: Pietermaritzburg, page 68.

133 Section 28

134 Section 23

135 Chapter 5 of the WSA, sections 24-27

136 Page 19

137 Strategic Framework For Water Services. (2003). Page 10

138 CALS. Water Services Fault Lines, pages 16-17

139 Schedule 4 Part A

140 Kidd, M. (2008). Environmental Law. Juta: Pietermaritzburg, page 87

141 Section 53

142 NWA Sections 151 and 152

143 CALS. Water Services Fault Lines, page 3

144 Strategic Framework for Water Services. (2003), Paragraph 7.1

145 Danwood, MC. "Privatisation Of Water In Southern Africa: A Human Rights Perspective." African Human Rights Law Journal, page 232

146 Op cit Chapter 1, note 11, page 15

147 Chapter 1(1)

148 Section 11(3) of Act 32 of 2000

149 Section 84(1)

150 Section 4(2)(d) of Act 32 of 2000

151 Section 1 of Act 32 of 2000

152 Section 4(2)(f) of Act 32 of 2000

153 Section 4(2)(e) of Act 32 of 2000

154 Section 4(2)(g) of Act 32 of 2000

155 Section 4(2)(i) of Act 32 of 2000
156 Section 4(2)(j) of Act 32 of 2000
157 Section 6(2)(a) of Act 32 of 2000
158 Section 6(2)(e) of Act 32 of 2000
159 Section 5(1)(g) and 5(2)(b) of Act 32 of 2000
160 Section 35(1) of Act 32 of 2000
161 Section 36 of Act 32 of 2000
162 Chapter 6 of Act 32 of 2000
163 Section 73 of Act 32 of 2000
164 Section 74(3) of Act 32 of 2000
165 Section 10 of Act 32 of 2000
166 Op cit Chapter 1, note 11, page 18
167 Department of Provincial and Local Government, The Policy Framework For The Implementation Of The Municipal Infrastructure Grant. www.dplg.gov.za/subwebsites/mig/docs/2.pdf.
168 Op cit Chapter 1, note 11, page 19 for the formula
169 Section 105 of Act 32 of 2000
170 Section 106 of Act 32 of 2000
171 Section 107 of Act 32 of 2000
172 Section 108 of Act 32 of 2000
173 Section 216(1) of the Constitution reads: "national legislation must establish a national treasury and pre scribe measures to ensure both transparency and expenditure control in each sphere of government, by introducing (a) generally recognised accounting practice; (b) uniform expenditure classifications; and (c) uniform treasury norms and standards."
174 Section 5(4)
175 Section 15 and 16 of Act 56 of 2003
176 Section 21(2) of Act 56 of 2003
177 Section 21(2)(e)(ii)(aa) of Act 56 of 2003
178 Section 25 read with Section 55 of Act 56 of 2003
179 Section 33 (1)(a)(ii)(cc) of Act 56 of 2003
180 Section 69(3) of Act 56 of 2003
181 Section 71(1)(g)(iii) of Act 56 of 2003
182 Section 72(1)(ii) of Act 56 of 2003
183 Section 73 of Act 56 of 2003
184 Section 120(3) of Act 56 of 2003
185 Section 120(6) of Act 56 of 2003
186 Section 34 of Act 56 of 2003
187 Section 34(4) of Act 56 of 2003
188 Section 35 of Act 56 of 2003
189 Section 41(1) of Act 56 of 2003
190 Section 42 of Act 56 of 2003
191 Section 39(1) of Act 56 of 2003
192 Section 38(4) of Act 56 of 2003
193 Section 150 of Act 56 of 2003
194 Section 32(3) of Act 56 of 2003
195 Section 32(4) of Act 56 of 2003
196 Section 38 of Act 1 of 1999
197 Chapter 10 of Act 1 of 1999
198 Op cit Chapter 1, note 62, page 18
199 CALS assessment
200 Currie, I et al. (2001). The New Constitutional And Administrative Law, Volume 1. Page p262. Juta.
201 Further provided for in Chapter 5 of the Municipal Structures Act analysed below.
202 Section 152(1) provides that "the objects of local government are- (a) to provide democratic and accountable government for local communities; (b) to ensure the provision of services to communities in a sustainable manner; (c) to promote social and economic development; (d) to promote a safe and healthy environment; and (e) to encourage the involvement of communities and community organisations in the matters of local government.(see also S154 (2) for legislative procedures meant to promote public participation in local government matters). (2) A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1)." (emphasis added)
203 Currie et al submit that the basis for provincial government intervention is similar but narrower to the grounds for national government intervention or takeover of the functions of an underperforming provincial government. Read also Section 139 with Sections 146 and 119-120 of the Municipal Systems Act.
204 Sections 146 and 156(3)
205 Section 41(1)(b)
206 Section 41(1)(c)
207 Section 41(1)(f)
208 Section 41 (1)(g). See also Ex Parte President-re Liquor License
209 Section 41 (1)(h) and (iii)
210 Section 41(1)(h),(iv) and (v)
211 Section 41(1)(h)(vi)
212 Section 154
213 Section 154(4)
214 Section 155(7)
215 No 107 of 1998, as amended
216 Section 2(4)(l)
217 Sections 12 of the Nema
218 Sections 13 and 14 of the Nema
219 Sections 16(2) and (3) of the Nema
220 Section 16(3)(d)(ii) of the Nema
221 Section 16(4)
222 Section 2(4)(m) of the WSA
223 See sections above
224 Section 241(3)(2) of Act 32 of 2000
225 Section 241(3)(3) of Act 32 of 2000
226 Section 241(3)
227 Soltau (note 61 above) 33-41
228 Causation now expressly includes historical, current and future polluting activities. The anomaly ensuing from the wrongly decided case of Bareki NO and Another v Gencor Ltd and Others where this section was held not to be retrospective, has been rectified through the National Environmental Management Amendment Act 62 of 2009 and specifically subsection (1A), which expressly provides for liability for historical pollution.
229 This duty extends not only to the originator but also to the owner of land or premises, a person in control of land or premises or a person who has the right to use the land or premises on which or in any activity or process is or was performed or undertaken or any other situation exists, which causes, has caused or is likely to cause significant pollution or degradation of the environment.
230 Glazewski (note 57), page 151, citing Hichange Investments (note 56) in support of this contention.
231 The term "environment" is defined in the Nema to consist of the: surroundings within which humans exist and that are made up of (i) the land, water and atmosphere of the earth; (ii) microorganisms, plant and animal life; (iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and (iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and wellbeing.
232 Soltau (note 61 above) 44
233 Section 1(xxiv) of the Nema
234 Chapter 1, note 18
235 Glazewski (note 57), page 149
236 Kidd (note 65), page 136, and Glazewski (note 57), page 152
237 Chapter 1, note 70 and also Glazewski (note 57), page 150, and Kidd (note 65), page 137
238 Glazewski (note 57), page 150
239 Soltau (note 61 above) 45
240 Soltau (note 61 above) 48-49 and Feris (note 120 above) 20
241 Glazewski (note 57), page 152; see also Section 28(3), which prescribes what these reasonable measures may entail.
242 Note 19, page 25
243 See Hichange Investments v Cape Pelts and Products (note 56)
244 Chapter 1, note 70
245 Ibid, page 408
246 Ibid, page 411
247 Ibid, page 142
248 Glinksi, C. (1999). "Public Interest Environmental Litigation in South Africa". Southern Africa Environment Project (SAEP) 18. www.saep.org/Volunteers/VolunteertProjects/intpro99/Glinski/Gliinski%20Paper.doc
249 Section 31C(1)(a) of the Nema
250 Chapter 1 of the Act, Section 2
251 Norms and standards were set in 2001 through GNR.652 of 20 July 2001: Norms and standards in respect of tariffs for water services in terms of Section 10(1) of the WSA (Act No 108 of 1997)
252 In 2002, the Minister of Water Affairs together with the Minister of Local Government promulgated regulation governing the contract to be entered into by municipalities and service providers (see GNR.980 of 19 July 2002: Water Services Provider Contract Regulations). While Regulation 4 of these regulations places the duty of monitoring the performance of a water services provider on the relevant water services authority, a critical issue remains the need to monitor the performance of water services authorities. Merely contracting a service provider does not divest water services authorities of the responsibility to ensure efficient service delivery.
253 Glazewski (note 57), page 625
254 Section 19(4) and (5) of the NWA
255 Section 19(1) and Section 1 defines "pollution" as: "the direct or indirect alteration of the physical, chemical or biological properties of a water resource so as to make it (a) less fit for any beneficial purpose for which it may reasonably be expected to be used; or (b) harmful or potentially harmful (aa) to the welfare, health or safety of human beings; (bb) to any aquatic or nonaquatic organisms; (cc) to the resource quality; or (dd) to property."
256 See Section 1 of the NWA
257 2006 SCA 65 (RSA)
258 Ibid, page 31
259 Ibid, page 28. Section 19(2) provides that: the measures referred to in subsection (1) may include measures to (a) cease, modify or control any act or process causing the pollution; (b) comply with any prescribed waste standard or management practice; (c) contain or prevent the movement of pollutants; (d) eliminate any source of the pollution; (e) remedy the effects of the pollution; and (f) remedy the effects of any disturbance to the bed and banks of a watercourse.
260 Glazewski (note 57), page 624
261 Notes 19 and 20
262 Glazewski (note 57), page 624. Subsections 5 to 8 deal with costs incurred as follows:
(5) Subject to subsection (6), a catchment management agency may recover all costs incurred as a result of it acting under subsection (4) jointly and severally from the following persons: (a) Any person who is or was responsible for, or who directly or indirectly contributed to, the pollution or the potential pollution; (b) the owner of the land at the time when the pollution or the potential for pollution occurred, or that owner's successor in title; (c) the person in control of the land or any person who has a right to use the land at the time when -
(i) the activity or the process is or was performed or undertaken; or

(ii) the situation came about; or
(d) any person who negligently failed to prevent -
(i) the activity or the process being performed or undertaken; or
(ii) the situation from coming about.
(6) The catchment management agency may in respect of the recovery of costs under subsection (5), claim from any other person who, in the opinion of the catchment management agency, benefited from the measures undertaken under subsection (4), to the extent of such benefit. (7) The costs claimed under subsection (5) must be reasonable and may include, without being limited to, labour, administrative and overhead costs. (8) If more than one person is liable in terms of subsection (5), the catchment management agency must, at the request of any of those persons, and after giving the others an opportunity to be heard, apportion the liability, but such apportionment does not relieve any of them of their joint and several liability for the full amount of the costs.

263 2007 SCA 111 (RSA)

264 See generally Kidd, M. (2008). Environmental Law, page 219

265 See generally,Harding, A (ed). (2008). Access To Environmental Justice: A Comparative Study. Martinus Nijhoff Publisers. Pages 8-9.

266 See note 110

267 National Council of Societies for the Prevention of Cruelty to Animals v Openshaw 2008 (5) SA 339 (SCA), paragraph 20; see also Port Nolloth Municipality v Xhalisa and Others; Luwalala and Others v Port Nolloth Municipality 1991 (3) SA 98 (C) (the use of interdict to prevent a local authority from en masse eviction of residents from a "shantytown" the authority had set up as temporary accommodation)

268 Ibid

269 In Minister of Health v Woodarb, the minister used an interdict to stop a company from causing air pollution by burning saw dust in breach of an air pollution permit. This can be done in instances where sewage treatment works are being operated without licences or in violation of licence conditions, where municipalities permit licence violations by service providers etc

270 Department of Cooperative Government & Traditional Affairs. (2009). National State Of Local Government In South Africa: Overview Report. Working document. Aavailable at: www.info.gov.za/view/DownloadFileAction?id=110100

271 Note, however, that every water services provider must develop a charter to be published to consumers among other stakeholders. Regulation 13 of the Water Services Provider Contract Regulations (GNR.980 of 19 July 2002) states that, "Where the contract provides for the water services provider to provide services directly to consumers, a contract must—
(a) require a water services provider to prepare and publish a consumer charter that at least—
(i) fulfils the requirements for conditions for provision of water services as contemplated in section 4 of the Act; (ii) provides a system for dealing with consumers' complaints; (iii) sets out a consumer's right to redress; and
(b) provide for procedures to enable consumers in the contract area to participate in the preparation of the consumer charter, and must for that purpose provide for—
(i) public meetings and hearings that take into account the language preferences and usage in the contract area; and
(ii) the receipt, processing and consideration of comments and other inputs on the proposed charter by consumers."

272 For example, a recent news article ("DA turns to law to get water reports", Business Day 3 July 2008) reports that the Democratic Alliance used the provisions of the Paia to apply to the DWAF for information in an attempt "to establish whether the death of 140 children in Ukhahlamba in the Eastern Cape was directly related to contaminated water supplies". However, the provisions of the Paia cannot be regarded by prospective litigants seeking to found a case as an invitation to conduct a "fishing expedition". For a critical commentary on a recent public litigation case using the provisions of the Paia see "The Impact Of The Biowatch Judgment On Public-interest Litigation" written be D Jordaan and available from: www.sangonet.org.za/portal/index.php?option=com_content&task=view&id=8343&Itemid=314

273 Section 33 provides that (emphasis added):
(1) Everyone has the right to administrative action that is lawful, reasonable, and procedurally fair.
(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
(3) National legislation must be enacted to give effect to these rights . . . [and]
(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
(c) promote an efficient administration.

274 For a full discussion of this issue, see Glazewski and Du Bois (see note 35), paragraphs 2B7 and 2B8

275 Kok and Langford (see note 38)

Appendices

1 [2008] ZAFSHC 102

2 The applicant had made prior applications to the court in 2004 and 2005 for similar orders and it was in respect of an order granted in response to the 2004 application that it sought to hold the respondent in contempt. In 2008, the pumps failed again, which resulted in raw sewage being pumped into the Wilge River and the neighbouring Namahadi settlement. The applicant approached the court for the interdict set out above. This third application was defended on the following grounds:
that it could not be entertained by the court as it is based on the same cause of action, between the same parties and on the same matter as proceedings that were still pending between the parties. This was based on the second interdict application made in 2005;
that the matter was res iudicata;
that the applicant did not prove the requirements of a final interdict, namely that it did not prove that it had a clear right; and
that the application raised constitutional issues and that no notice was filed by the applicant to that effect.
All of these defences were dismissed by the court.

3 Case no 08/40064 (WLD), November 2008, Case no 40/2009 (ECD), January 2009

4 This is an extract from a CALS, Water Services Fault Lines,

5 DWAF. (1996). South African Water Quality Guidelines Volumes 1 – 6

6 Section 1 of the Act

7 Government Gazette 22355 dated 8 June 2001. Note that in Manqele v Durban Transitional Metropolitan Council 2002 (6) SA 409 (D&CLD) the court held that the applicant could not rely on the provisions of Section 3 of the WSA as the regulation had not been promulgated yet. The section was therefore held to have no exigible content.

8 Regulation 5 of Government Notice 509

9 Regulation 5(3) of Government Notice 509; the appropriate standard is also referred to as SANS 241 or SABS 241:2001 in scientific literature

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