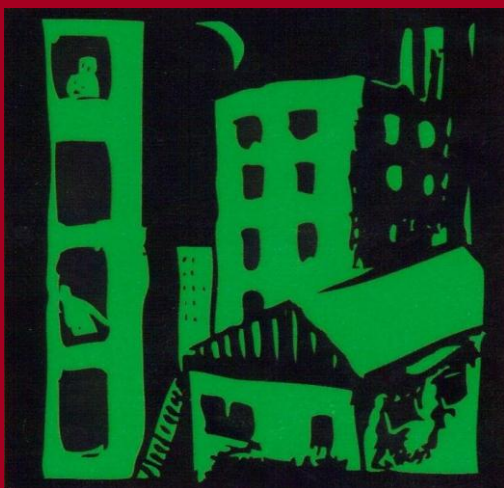
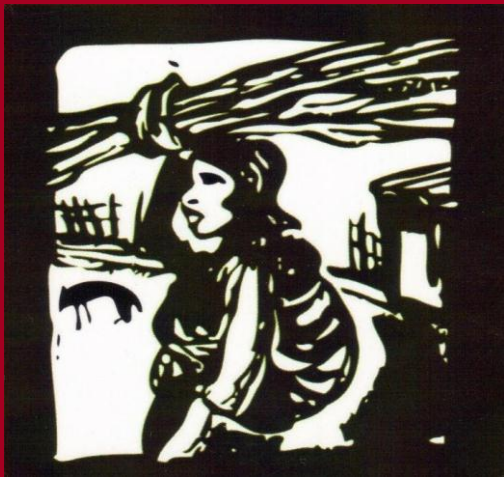


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The right of access to sufficient water in South Africa: How far have we come?*

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1 INTRODUCTION

Water is generally regarded as a scarce resource the world over.¹ It is widely accepted as fact that only ten per cent of the annual world water supply is consumed by humans and that only 15 per cent of people worldwide have an abundance of water.² The World Resource Centre has estimated that

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¹ World Water Assessment Programme (2009); Fitzmaurice (2007) 18 537; Hardberger (2005) 331.

² World Water Assessment Programme (2009). See also Fitzmaurice (2007) 537.

41 per cent of the world's population, or 2.3 billion people, live under "water stress", which means the per capita water supply is less than 1.7m³/year for these people.³ It is further estimated that 1.1 billion people live without safe drinking water and 2.6 billion people do not have access to adequate sanitation, which often leads to health problems.⁴ Over two million people die every year owing to lack of safe water.⁵ Statistics also show that globally almost 6 000 children under the age of five die every day from water-related diseases.⁶

Water needs increase with population growth and demand may double by 2050. The International Water Management Institute identifies two forms of water scarcity: physical and economic. Physical water scarcity occurs when available resources cannot meet demand, including minimum environmental flow requirements.⁷ Economic scarcity occurs "when there is a lack of investment in water or lack of human capacity to respond to growing water demand. Institutions frequently favour the needs of certain groups of people to the detriment of others (such as women). Economic scarcity also includes inequitable water distribution even where infrastructure is in place."⁸

The United Nations Committee on Economic, Social and Cultural Rights⁹ has commented that water is a limited natural resource and a public good fundamental for life and health.¹⁰ Furthermore, the right to water is indispensable for leading a life of human dignity. It also stated that water is a prerequisite for the realisation of other human rights.¹¹ Although South Africa has made great strides in the provision of this important natural resource, many poor and vulnerable South African inhabitants still lack access to sufficient water, and the little water that is available is not always of a quality suitable for drinking or personal hygiene.

This paper examines to what extent the South African government has met its obligation to provide access to sufficient water fit for human consumption. It also looks at recent judicial decisions on the right of access to sufficient water, where courts have not only found that the minimum quantity of water prescribed by national legislation is insufficient but have prescribed what a minimum quantity of water should be. Section 2 looks at United Nations treaty and regional law provisions on the right to or right of access to water and the relevant declarations. Section 3 looks at the South African

³ As quoted by Fitzmaurice (2007) 537. Interestingly the more recent *3rd United Nations World Water Development Report: Water in a Changing World* published by the World Water Assessment Programme, mentioned above, puts the figure of those living in arid and semi-arid parts of the world and who have little or no renewable water resources, slightly lower at just over 1 billion.

⁴ Fitzmaurice (2007) 537.

⁵ Hardberger (2005) 331.

⁶ Fitzmaurice (2007) 537.

⁷ International Water Management Institute (2007) 11-12.

⁸ International Water Management Institute (2007) 7.

⁹ The Committee on ESCR exercises oversight over compliance with the International Covenant on Economic, Social and Cultural Rights of 1966.

¹⁰ General Comment No 15 (2002) para 1.

¹¹ General Comment No 15 (2002) para 1.

constitutional and legislative provisions on right of access to water as well as relevant policies. This section also considers South Africa's obligation to provide access to sufficient water under the Constitution, as interpreted by the courts. Section 4 looks at the progress achieved in expanding access to water to poor citizens as well as the recent pronouncements by South African courts on the right of access to sufficient water in South Africa. Section 5 provides a brief analysis of the *Mazibuko* decisions on the right of access to sufficient water, discussed in section 4. Section 6 deals with challenges faced in providing access to water to poor South Africans, while section 7 provides some concluding remarks and suggests what should be done in South Africa in order to meet its obligation to ensure access to sufficient water for everyone.

2 INTERNATIONAL LAW PROVISIONS ON THE RIGHT OF ACCESS TO WATER

The Constitution of the Republic of South Africa of 1996 mandates reference to international law when interpreting certain parts of the Constitution. In particular, section 39(1)(b) obliges a court, tribunal or forum to consider international law “[w]hen interpreting the Bill of Rights.” In *S v Makwanyane*¹² the Constitutional Court held that, in terms of the above section, “public international law” means both international law that is binding on South Africa and international law that is not binding on South Africa. The Court stressed that our courts are obliged to consider both “hard” and “soft” international law in their interpretation of the Bill of Rights.¹³ The following section looks at treaties which implicitly and/or explicitly mention the right to water both at the international and regional level, as well as international conference pronouncements on the right to water.

2.1 United Nations (UN) instruments (binding)

The right to water is neither widely recognised at an international level nor explicitly provided for in key UN instruments such as the Universal Declaration of Human Rights (UDR),¹⁴ the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁵ or the International Covenant on Civil and Political Rights (ICCPR),¹⁶ together known as the International Bill of Rights.¹⁷ Few reasons have been advanced for what appears at first sight to be a glaring omission on the part of the framers of the International Bill of Rights. According to Hardberger, “early human rights were written in general terms

¹² 1995 3 SA 391 (CC).

¹³ Para 35.

¹⁴ Adopted in 1948.

¹⁵ Adopted in 1966.

¹⁶ Adopted in 1966.

¹⁷ A suggestion that the United Nations General Assembly develop a Bill of Rights came up at the UN Conference on International Organisation held in San Francisco in 1945. For a fuller account of the history of the three instruments, see Gleick (1999) 487-503.

and did not explicitly define all possibly implied rights.”¹⁸ Gleick augments this view, stating that it is highly unlikely that the framers could have consciously excluded the right to water “while rights considered less essential¹⁹ than the right to water have been recognised.”²⁰ For these reasons, and also due to the interdependence and interrelatedness of socio-economic rights, the right to water is regarded as implicitly included by virtue of explicitly recognised rights such as the rights to health, adequate standards of living, life etc.

For instance, article 25 of the Universal Declaration of Human Rights provides that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing....” Similarly, article 11 of the ICESCR stipulates that states parties to the Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The ICESCR further states in article 12 that states parties recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. It further states that the steps to be taken to achieve the full realisation of this right shall include those necessary for the prevention, treatment and control of epidemic, endemic, occupational and other diseases. Article 6 of the ICCPR provides that every human being has the inherent right to life, which shall be protected by law. Importantly, the ICCPR stipulates that no one shall be arbitrarily deprived of his life.

It is by now generally accepted that meeting the standards in article 25 of the UDR, article 11 and 12 of the ICESCR and even article 6 of the ICCPR cannot be achieved without water of sufficient and quality to maintain human health and well-being.²¹ In fact, Gleick remarks that

“[l]ogic also suggest[s] that the framers ... considered water to be implicitly included as one of the ‘component elements [i.e. of the right to food, housing, health care etc] – as fundamental as air’. Moreover, the minimum amount of clean water envisaged by the framers of the above instruments is that which is necessary to ‘prevent death from dehydration, to reduce the risk of water-related diseases, and to provide for basic cooking and hygienic requirements’.”²²

Furthermore, Daniel, Stamatopoulou & Diaz see the exclusion of an explicit right to water in the International Bill of Rights as no stumbling block to the realisation and enforcement of this essential right. They hold the view that

¹⁸ Hardberger (2005) 331. She refers to the right to life and points out that it was “originally read narrowly and did not include basic life necessities, but... has now been read more broadly to include measures that increase life expectancy like personal health and hygiene.”

¹⁹ Such as to work, to protection against unemployment, to form and join trade unions, to rest and to leisure in arts 23 and 24. See Gleick (1999) 491.

²⁰ Gleick (1999) 491.

²¹ Gleick (1999) 491.

²² Gleick (1999) 491.

“[t]here is nothing ill-defined or fuzzy about being deprived of the basic human rights to food and clean water, clothing, housing, medical care, and some hope for security in old age. As for legal toughness, the simple fact is that the 138 governments which have ratified the International Covenant on Economic, Social, and Cultural Rights have a legal obligation to ensure that their citizens enjoy these rights.”²³

The Committee on Economic, Social and Cultural Rights (Committee on ESCR) in its interpretation of article 11(1) appeared to treat the right to water for personal and domestic uses as an independent right. It noted that other listed rights in the article were not intended to be exhaustive by virtue of the use of the word “including”.²⁴ The Committee on ESCR commented that “the right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it was one of the most fundamental for survival.”²⁵

To fortify its interpretation of article 11(1), the Committee on ESCR referred to its previous general comments²⁶ and stated that in the final analysis the right to water “should also be seen in conjunction with other rights enshrined in the International Bill of Human Rights, foremost amongst them the rights to life and human dignity.”²⁷ Furthermore, as can be already seen from the title of its General Comment No. 15, the Committee on ESCR appears to draw inspiration for its position that water should be seen as a right independent from the health provisions of the ICESCR.²⁸ Article 12(1) stipulates that states parties to the ICESCR “recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.” The committee commented that the right to water is also “inextricably related to the right to the highest attainable standard of health.”²⁹ Langford and Kok³⁰ observe that the Committee on ESCR had earlier only stated that the underlying determinants of the right to health include potable water. In General Comment No. 15, however, the Committee on ESCR touched on a number of other aspects of water, beyond those of direct access for personal and domestic needs, under the right to health. Article 12(2)(b) stipulates that states parties to the treaty must aim to improve all aspects of environmental and industrial hygiene.³¹ The Committee on ESCR noted that this duty involves taking steps on a non-discriminatory basis to prevent threats to health from unsafe and toxic water conditions.³²

²³ Danieli, Stamatopoulou & Diaz (1999) 492.

²⁴ General Comment No.15 (2002) par 3. See also Langford & Kok (2005) 191-208.

²⁵ General Comment No. 15 (2002) par 3.

²⁶ General Comment No 4 (1991) par 8(b); General Comment No. 6 (1995) pars 5 and 32, and General Comment No. 14 (2000) pars 11, 12 (a), (b) and (d), 15, 34, 36, 40, 43 and 51.

²⁷ General Comment No. 15 (2002) par 3.

²⁸ For a similar reading of the committee’s approach see Langford and Kok (2005) 193.

²⁹ General Comment No. 15 (2002) para 3.

³⁰ Langford & Kok (2005) 193.

³¹ General Comment No. 15 (2002). See also Langford & Kok (2005) 193.

³² General Comment No. 15 (2002) para 8.

The right of access to water received explicit mention in subsequent international instruments. The UN Convention on the Elimination of Discrimination against Women of 1979 obliges states parties to ensure that rural women enjoy the right to adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.³³ The UN Convention on the Right of the Child of 1989 provides that states parties to the Convention recognise the child's right to enjoyment of the highest attainable standard of health and facilities for the treatment of illness and rehabilitation of health, and shall strive to ensure that no child is deprived of the right of access to such health care services.³⁴ It further obliges states parties to take measures to combat disease and malnutrition, also within the framework of primary health care through, inter alia, the application of readily available technology and the provision of adequate nutritious food and clean drinking-water, taking into consideration the dangers and risks of environmental pollution.³⁵ It is submitted that access to water is central to states parties meeting their obligations under this instrument.

International humanitarian law also makes provision for the right to water during armed conflict. It is stated that sufficient drinking water is to be supplied to prisoners of war and other detainees.³⁶ Prisoners of war and other detainees are to be provided with shower and bath facilities and water, soap and other facilities for their daily personal toilet and washing requirements.³⁷ Furthermore, objects indispensable to the survival of the civilian population, such as food-stuffs, agricultural areas for the production of food, crops, livestock, drinking water installations and supplies and irrigation works are specifically protected.³⁸

Recently access to water was expressly included in the Convention on the Rights of Person9070s with Disabilities as an aspect of an adequate standard of living.³⁹ Article 28(2)(a) in particular obliges states parties "[t]o ensure equal access by persons with disabilities to clean water services, and to ensure access to appropriate and affordable services...." A year after the Convention came into force three departments within the UN jointly prepared and published a handbook on the convention intended for parliamentarians.⁴⁰ The handbook identifies the lack of access to clean water as part of

³³ Art 14(2)(h)

³⁴ Art 24(1).

³⁵ Art 24(2)(c).

³⁶ Arts 21, 25 and 46 Geneva Convention III (1949); art 89 and 127 Geneva Convention IV (1949), and art 5 Additional Protocol II.

³⁷ Arts 29 and 85 Geneva Convention III (1949).

³⁸ See art 54 of Additional Protocol I and art 14 of Additional Protocol II. In General Comment No. 15 the Committee on ESCR urged states parties to give special attention to those individuals and groups who have traditionally faced difficulties in exercising this right, and as part of such individuals and groups, "[p]risoners and detainees...[should be] provided with sufficient and safe water for their daily individual requirements, taking note of the requirements of international humanitarian law and the United Nations Standard Minimum Rules for the Treatment of Prisoners", para 16.

³⁹ Adopted in 2006.

⁴⁰ UN, OHCHR, IPU 2007 *From Exclusion to Equality: Realising the Rights of Persons with Disabilities* 1.

a myriad of social ills associated with disabilities.⁴¹ Furthermore, the office of the UN High Commissioner for Human Rights, as part of the effort to monitor compliance with the convention, has published a guide for human rights monitors at places of work.⁴² In the guide monitors are required, when assessing accessibility at workplaces, to check whether devices such as water coolers and telephones are placed low enough for wheelchair users.⁴³ While it is still early days in the life of this treaty these efforts, if met with political will by states parties, should go a long way in improving the working conditions of those with disabilities.

2.2 Regional law

The African Charter on Human and Peoples' Rights (African Charter)⁴⁴ does not explicitly mention the right to water. It does, however, mention a right that is inter-related with access to water. Article 16(2) obliges states parties to the African Charter to take the necessary measures to protect the health of their people. As with the above instruments, the right to water must be deduced from the express provision of other rights such as health, the realisation of which cannot be achieved without providing water and basic sanitation services. In any event, the African Commission on Human and Peoples' Rights has in the past derived such rights as the right to food and housing from other rights, such as the right to health, in the African Charter.

In *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*⁴⁵ the African Commission held that part of the states' obligations under the African Charter to realise all human rights, and not just the rights in the Charter, "could consist in the direct provision of basic needs such as food or resources that can be used for food (direct food aid or social security)."⁴⁶ The Commission held as follows:

"Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under Article 16 above, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. It is thus noted that the combined effect of Articles 14 [right to property], 16 [right to health] and 18 [right to family] reads into the Charter a right to shelter or housing which the Nigerian Government has apparently violated."⁴⁷

⁴¹ Others being illiteracy, poor nutrition, low rates of immunisation against diseases and unhealthy working conditions: *ibid.*

⁴² OHCHR 2010 *Monitoring the Convention on the Rights of Persons with Disabilities: Guidance for Human Rights Monitors* 52

⁴³ *Ibid.*

⁴⁴ Adopted in 1981.

⁴⁵ Communication 155/96 of 2001.

⁴⁶ Para 47.

⁴⁷ Para 60. For fuller analyses of this decision, see among others Nwobike (2005)29-146 and Chirwa (2002) 19.

More explicitly, the Commission held that failure by the Nigerian government to guard against contamination of air, water and soil of the affected community amounted to violation of articles 16 (right to health) and 24 (right to clean environment).⁴⁸ Furthermore, in *Free Legal Assistance Group v Zaire*,⁴⁹ the African Commission held that “failure of the government to provide basic services such as safe drinking water and electricity and the shortage of medicine as alleged in Communication 100/93 constitutes violation of article 16 [right to health].”⁵⁰

The African Charter on the Rights and Welfare of the Child (Charter on Welfare of the Child) explicitly includes the right to water. First, the Charter on Welfare of the Child provides that every child has the right “to enjoy the best state of physical, mental and spiritual health.”⁵¹ And in even more explicit terms, the Charter declares that

“[s]tates parties to the present Charter shall undertake to pursue the full implementation of this right and in particular shall take measures to ensure the provision of adequate nutrition and safe drinking water.”⁵²

Similarly, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Protocol) expressly mentions the right of access to water. The Protocol stipulates that

“[s]tates parties shall ensure that women have the right to nutritious and adequate food. In this regard, they shall take appropriate measures to: (a) provide women with access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food; (b) establish adequate systems of supply and storage to ensure food security.”

The European Social Charter⁵³ makes no explicit mention of the right to water. Instead, as with the International Bill of Rights, the right to water is implicit in other provisions of the Charter. Article 11 states that contracting parties to the Charter should, either directly or in co-operation with public or private organisations, inter alia remove, as far as possible, the causes of ill-health and prevent, as far as possible, epidemic, endemic and other diseases. It should be obvious that access to water is a prerequisite for meeting these provisions. Similarly, the right to water should be regarded as being included by implication in the Revised European Charter⁵⁴ by virtue of article 31 which obliges states parties to “promote access to housing of an adequate standard” in order to ensure the “effective exercise of the right to housing.”

The necessity of water to enjoy the rights explicitly mentioned in the Revised European Charter is apparent in some of the recommendations of the European

⁴⁸ Paras 50-54.

⁴⁹ (2000) AHRLR 74 (ACHPR 1995), as discussed in Langford and Kok (2005) 196.

⁵⁰ Par 47 of the English version of the decision.

⁵¹ Article 14(1).

⁵² Article 14(2)(c).

⁵³ Adopted in 1961.

⁵⁴ Adopted in 1996.

committee of ministers of member states of the Council of Europe (Committee of Ministers).⁵⁵ The Committee of Ministers stated that

“everyone has the right to a sufficient quantity of water for his or her basic needs. International human rights instruments recognise the fundamental right of all human beings to be free from hunger and to adequate standard of living for themselves and their families. It is quite clear that these requirements include the right to a minimum quantity of water of satisfactory quality from the point of view of health and hygiene. Social measures should be put in place to prevent the supply of water to destitute persons from being cut off.”⁵⁶

The Convention for the Protection of Human Rights and Fundamental Freedoms,⁵⁷ known as the European Convention on Human Rights (ECHR), has also been invoked to protect the right to water as an element of the right to property enjoyment contained in the ECHR. Prominent among these cases is the case of *Zander v Sweden*.⁵⁸ In this case the applicants requested the European Court of Human Rights to declare the Swedish government to be in violation of the ECHR, which entitles an aggrieved person to judicial review,⁵⁹ by failing to grant them access to such review. The case involved a certain waste removal company being granted a renewed license to deliver and treat waste on a dump adjacent to the applicants’ property. In the past it had been found that a number of wells adjacent to the dump, including one on the applicant’s property on which the applicants relied for drinking water, contained impermissible levels of cyanide. The applicants had demanded that the issuing of the license to the waste company be made conditional on the company having to provide free water in case of contamination. The domestic Licensing Board had dismissed the applicants’ case mainly on the ground that there was no likely connection between the wells and activities on the dump, and therefore no risk of water pollution. The applicants appealed to the government against the decision of the Licensing Board. The government dismissed the appeal. The relevant law in Sweden did not permit further appeals. It was for this reason that the applicants approached the European Court of Human Rights.

After an analysis of the relevant domestic law and the requirements of article 6 of the ECHR, the Court found that the applicants were entitled “to protection against the water in their well being polluted as a result of the [waste company’s] activities on the dump.”⁶⁰ The Court further held that

“the applicants’ claim was directly concerned with their ability to use the water in their well for drinking purposes. This ability was one facet of their right as owners of the land on which

⁵⁵ Monitors compliance of the European Social Charter/Revised European Charter by member states.

⁵⁶ Recommendation Rec(2001) 14 on ‘Water Resources’ par 5, as discussed in Langford and Kok (2005) 196.

⁵⁷ Adopted in 1950.

⁵⁸ (1993) 18 EHRR 175.

⁵⁹ In terms of art 6, ECHR.

⁶⁰ *Zander v Sweden* (1993) 18 EHRR 175, para 24.

it was situated. The right of property is clearly a 'civil right' within the meaning article 6, para.1".⁶¹

The Court concluded that there had been a violation of article 6 of the ECHR as Swedish law then did not permit judicial review of a government decision and ordered the Swedish government to pay compensation to the applicants' for expenses they incurred in bringing the case to the European Court of Human Rights.

This case served as one more example of how overstated – and often false – the distinction between economic, social and cultural rights and civil and political rights⁶² can be. At the core of the distinction has been the argument that the former category of rights has budgetary implications for government while the latter merely requires government not to interfere with the enjoyment of these rights. Thus, in the *Zander* case we saw how a civil right can be invoked to protect a social and economic right in the form of the right to water.

In the inter-American human rights system the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Additional Protocol)⁶³, while not expressly providing for the right of access to water, states that "everyone shall have the right to live in a healthy environment and to have access to basic public services."⁶⁴ It is submitted that access to water is a crucial part of such basic services necessary for a healthy environment.

Argentina, a state party⁶⁵ to the Additional Protocol, is arguably a prominent example in the Inter-American Human Rights System where the domestic courts have sought to give effect to the Additional Protocol. In *Menores Comunidad Paynemil s/accion de amparo, Expte. 311-CA-1997. Sala II. Cámara de Apelaciones en lo Civil, Neuquen*⁶⁶ the Court dealt with the issue of water quality. The case arose from pollution of water with heavy metals leading to the contamination of the aquifers utilised by the Paynemil Mapuche Community in Neuquen for their water supply. Together with a university institute, the community complained to the local authorities, presenting studies which showed that, as a result of the pollution, the water was unsuitable for drinking. Health studies ordered by the local authorities, focusing especially on children, showed that many children had high levels of either lead or mercury or both of these heavy and highly toxic metals.

The Children's Public Defender then filed an *accion de amparo* (a special expedited procedure) against the government, contending that the Province had neglected to fulfil its obligation to protect and guarantee the good state of health of the population. The

⁶¹ *Zander v Sweden* (1993) 18 EHRR 175, para 27.

⁶² As contained in the ICCPR. For a more recent work touching on this issue, see McLean (2009) 190.

⁶³ Adopted in 1988.

⁶⁴ Art 11(1).

⁶⁵ Argentina had signed this Additional Protocol in November 1988 but only deposited its instrument of ratification in June 2003.

⁶⁶ 19 May, 1997, as reported by COHRE (2004) 110. See also Winkler (2008) 10.

court *a quo* agreed with the Children's Public Defender's arguments and ordered the Provincial Executive Power to (i) provide 250 litres of drinking water per inhabitant per day; (ii) ensure the provision of drinking water to the affected people by any appropriate means, set up a procedure to determine whether the health of the population had been damaged by the existence of the heavy metals and, in such a case, provide the necessary treatment, and (iv) take steps to protect the environment from pollution.

The government appealed against this decision to the Provincial Court of Appeals. The Court of Appeals effectively upheld the court *a quo*'s decision on the basis that the government had not taken any reasonable measure to tackle the pollution problem, even though it was well informed about the situation. The Court of Appeals further held that, "even though the government had performed some activities as to the pollution situation, in fact there has been a failure in adopting timely measures in accordance with the gravity of the problem."

The case of *Quevedo Miguel Angel y otros c/Agua Cordobesas S.A Amparo, Córdoba City, Juez Sustituta de Primera Instancia y 51 Nominación en lo Civil y Comercial de la Ciudad de Córdoba (Civil and Commercial First Instance Court)*⁶⁷ raised the issue of water disconnection. The water supply of a group of indigent families living in the City of Córdoba had been disconnected by a water service company for non-payment. The families took the water company to court contending that disconnection was illegal, that the company had failed to comply with its regulatory obligation to provide 50 litres of water per day (regardless of payment) and that even 50 litres per day was too low. They requested the court to order the company to provide 200 litres of water per household per day.

While rejecting the applicants' contention that the disconnection was illegal, since it was contractually permissible in this case, the court noted the dire health hazards occasioned by a discontinued water supply. After traversing the regulatory framework governing the provision of water in the City and in Argentina at large, and assessing the regulatory framework against the critical economic and social situation facing the poor in Argentina, the court came to the conclusion that 50 litres per family per day was inadequate and ordered the water service company to provide 200 litres of potable water per family per day. The court left it to the water service company to engage with the government to compensate it for the increased water supply.

In the case of *Marchision José Bautista y Otros Ciudad de Córdoba, Primera Instancia y 8 Nominación en lo Civil y Comercial: Marchision José Bautista y Otros, Acción de Amparo*⁶⁸ the court had to grapple with the issue of water pollution and access to clean water. The case involved poor communities who, because they were not connected to the public water distribution network, relied for their water supply on ground water wells that are often polluted with faecal matter and other contaminants. A treatment

⁶⁷ 8 April, 2002, as reported by COHRE (2004) 112. See also Winkler (2008) 10.

⁶⁸ 19 October 2004, as discussed by Winkler (2008) 10.

plant which had been built closer to the communities servicing Córdoba city could not cope with the size of the city, resulting in daily spillage of untreated sewer-water into the river. As the right to water is not explicitly mentioned in the Argentinean Constitution, the court drew a link between access to clean water and the right to health – which is mentioned in the Constitution – and found that the right to health included the duty to take measures to prevent damage to health by providing access to clean water.⁶⁹ The Court ordered the government to take measures to contain the water contamination and – until a permanent solution to the spillage was found – to provide 200 litres of clean water per household per day.

Suffice it to say that these Argentinean cases have their parallels in South Africa case law, as will be seen below, both on the issue of water disconnection and the issue of the minimum quantity of water necessary to meet daily needs. The basic difference, however, is that in Argentina the right to water has been derived from other rights expressly mentioned in the Argentinean Constitution as well as invoking the general comments by the UN Committee on ESCR. In contrast, in South Africa the right of access to sufficient water is expressly mentioned in the Constitution and further elaborated in subsequent legislation aimed at giving effect to the right.

2.3 International conferences and declarations (non-binding)

There have also been a number of international conferences with the right to water as their subject matter.⁷⁰ In the Mar del Plata Declaration of the 1977 UN Water Conference the convening states resolved that “all peoples, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantities and of a quality equal to their basic needs.”⁷¹

The UN Principles for Older Persons (UN Principles)⁷² also mentions the right to water. The UN Principles are organised into five parts, with the section providing for economic and social rights entitled “Independence”. It states, among other things, that “older persons should have access to adequate food, water, shelter, clothing and health care.” These Principles further state that access should be brought about through the provision of income, family and community support and self-help.

The Dublin Statement on Water and Sustainable Development,⁷³ adopted at the 1992 International Conference on Water and the Environment, acknowledged the “basic right

⁶⁹ In this the Court relied on the relevant provisions of the UDR and the ICESCR which had been incorporated into the Argentinean Constitution.: see Winkler (2008) 9.

⁷⁰ Of course, the declarations and agreements concluded at these conferences do not command the same legal force as Covenants do. However, they “offer strong evidence of international intent and policy that inform the views of States”: see Gleick (1999) 493.

⁷¹ Preamble to the Mar del Plata Declaration.

⁷² Adopted by the General Assembly in terms of Resolution 46/91 of 16 December 1991, entitled “Implementation of the International Plan of Action on Ageing and Related Activities.”

⁷³ The Statement was issued by government-designated experts from 100 countries and representatives of 80 international, intergovernmental and non-governmental organisations.

of all human beings to have access to clean water and sanitation at an affordable price.”⁷⁴ The right to water was also recognised in Agenda 21 of 1992 and the 1994 Programme of Action adopted at the UN International Conference on Population and Development.⁷⁵

In the UN Habitat Agenda states drew a link between human health and quality of life, on the one hand, and sustainable human settlements on the other. They stated that the latter “depend on development of policies and concrete actions to provide access to food and nutrition, safe drinking water, sanitation, and universal access to the widest range of primary health-care services...to eradicate major diseases that take a heavy toll on human lives, particularly childhood diseases”.⁷⁶

The World Health Organisation (WHO) and the UN Children’s Fund (UNICEF) have set standards below which states may not go in their attempts to provide access to water. The WHO and the UNICEF have set the minimum at 20 litres of safe drinking water per person per day, and water sources must be located within a reasonable distance from the household.⁷⁷ The principle of “reasonable distance” has been interpreted to mean a distance no more than 200 meters from the house or a public stand post in an urban environment.⁷⁸ In rural areas the definition is “more flexible and may vary with the topography of the area.”⁷⁹ The World Bank has defined “reasonable access” as “[situated] in the home or a within 15 minutes’ walking distance”.⁸⁰ These definitions have been found less than helpful. For this reason Langford and Kok point to the need for the adoption of

“[a] proper definition ... taking local conditions into account: in urban areas; distance of not more than 200 meters from the house or a public stand post may be considered reasonable access; in rural areas reasonable distance implies that the housewife does not have to spend a disproportionate part of the day fetching water for the family’s needs.”⁸¹

In the Millennium Declaration 2000 states committed themselves to a number of goals, including environmental sustainability. They also set themselves a number of targets

⁷⁴ Principle No 3 of the Dublin Statement.

⁷⁵ See United Nations *Report of the United Nations Conference on Environment and Development* (1992) 21, pars 18 and 47; United Nations *Programme of Action of the United Nations International Conference on Population and Development* (1992) Principle 2.

⁷⁶ Adopted by 171 states at the City Summit in Istanbul, June 1996; most relevant is Chapter II on “Goals and Principles”. South Africa is signatory to the UN-Habitat Agenda.

⁷⁷ WHU/UNICEF *Global water supply and Sanitation Assessment Report* 2000.

⁷⁸ See American Health Organisation and WHO “Mid-decade of evaluation of water supply and sanitation in Latin America and the Caribbean’, conference organised by the Pan – American Health Organisation and WHO” 1997 Washington DC as discussed in Langford & Kok (2005) 195.

⁷⁹ Ibid.

⁸⁰ As discussed in Langford & Kok (2005) 195.

⁸¹ Langford and Kok (2005) 195.

including to “halve, by 2015, the proportion of the population without sustainable access to safe drinking water and basic sanitation.”⁸²

3 SOUTH AFRICAN LAW

3.1 The Constitution

The South African Constitution of 1996 is one of the few national constitutions containing an express provision on the right to water. Section 27(1) states that “[e]veryone has the right to have access to ... sufficient ... water.” Section 27(2) provides that the “state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.”

3.2 Legislation and policies on access to water

Parliament sought to give effect to the above constitutional injunction by enacting the Water Services Act 108 of 1997 (WSA). The preamble to WSA recognises the “rights of access to basic water supply and basic sanitation necessary to ensure sufficient water and an environment not harmful to health or well-being.” This recognition is repeated in section 3(1), which provides that “[e]veryone has a right of access to basic water supply and basic sanitation.” Furthermore, section 3(2) states that “[e]very water service institution must take reasonable measures to realise these rights.”

In terms of section 1 “basic water supply” means a prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households to support life and personal hygiene.

The Act therefore confers on everyone a right of access to “the prescribed minimum standard of water supply necessary for the reliable supply of a sufficient quantity to households...to support life and personal hygiene.”⁸³ The regulations⁸⁴ to the Act prescribe what the basic water quantity and minimum standard of water supply should be. Regulation 3(b) states that the “minimum standard of water supply service” is

“[a] minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month –

- (i) at a minimum flow rate of not less than 10 litres per minute;
- (ii) within 200 metres of a household; and
- (iii) with an effectiveness such that no consumer is without supply for more than seven full days in any year.”

⁸² Goal No. 7 of the nine Millennium Development Goals in the Millennium Declaration. South Africa is a signatory to the Millennium Declaration.

⁸³ For a similar interpretation see *City of Johannesburg v Lindiwe Mazibuko and Others (Centre on Housing Rights and Evictions as amicus curiae)* (2009) 8 BCLR 791 (SCA) par 8.

⁸⁴ *Government Gazette* 22355, 8 June 2001, GN R509, Reg 3.

Thus the Act by way of sections 3 and 1 read with regulation 3(b) confers on everyone a right of access to a minimum quantity of water of 25 litres per person per day or 6 kilolitres per household per month.

There is also the National Water Act 36 of 1998 (NWA), which is the principal Act governing water resources and their management in South Africa. It does not directly provide for the provision of water services, but provides the background and framework within which the WSA is implemented. In this sense it establishes a regulatory regime that informs, complements and supports the realisation of several rights in the Bill of Rights; for example, the environmental right (section 24) and the right to health, food and water (section 27).

The WSA codifies the Department Water Affairs and Forestry's "Water Supply and Sanitation Policy (Water Policy)" of 1994. The Water Policy defined basic water supply as 25 litres per person per day. This is considered to be the minimum required for consumption, for the preparation of food and personal hygiene. It is not considered to be adequate for a full, healthy and productive life, which is why it is considered a minimum.

For this reason the Department in 2003 issued a Strategic Framework for Water Services entitled "Water is Life, Sanitation is Dignity". In terms of this Framework basic levels of service would be reviewed in future to consider raising the basic level from 25 litres per person per day (or six kilolitres per household per month) to 50 litres per person per day. Sadly, this review never happened until the courts were confronted three years later with reviewing the allocated amounts (among other things) in subsequent suits against the government (see Section 6 below).

3.3 Obligations of the state

As a general principle, individuals have to meet their own water needs, and where there is existing access to water, as a minimum, the state may not interfere in the enjoyment thereof. That is to say, the state may not prevent people from using their own available resources to meet their water needs. This duty applies only between the state and individuals but also between individuals themselves. Where one individual threatens or violates another's right of access to water, the state must step in and protect that individual's right of access to water against threat or violation.

The Constitution provides for the progressive realisation of the right of access to water. The phrase "progressive realisation" was clearly inspired by the ICESCR. In terms of this treaty neither retrogression nor inaction is allowed a state party. According to the Committee on ESCR, the phrase should be interpreted as obliging a state to "move as expeditiously and effectively as possible towards a full realisation of a particular right."⁸⁵ The Constitutional Court has held that this interpretation is in consonance with

⁸⁵ General Comment No. 3, para 9.

the demands in the South African Constitution.⁸⁶ For this reason the state is expected to develop clear goals, realistic strategies for the achievement of these goals,⁸⁷ time-related benchmarks to measure progress,⁸⁸ and monitoring and review mechanisms by which progress in the realisation of the right may be measured.⁸⁹

A state will be violating its obligation to provide its citizens with access to water if its water policy leads to a decline in access to water by South African citizens at the hands of the state. The Committee on ESCR has stated that “any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified ... in the context of the full use of the maximum available resource.”⁹⁰

This is significant in the South African context as section 27(2) of the Constitution makes the duty to progressively realise a right of access to water contingent on the availability of resources. Furthermore, the Constitutional Court initially showed deference to the state on budgetary and allocation of resources decisions, limiting its review to the reasonableness of whatever means the state thought appropriate to realise the rights in the Constitution, including that of access to water.⁹¹ The Committee on ESCR, however, has interpreted this qualification as referring to resources existing within a state as well as resources available from the international community through international assistance and co-operation.⁹² This interpretation is further bolstered by the recently adopted Convention on the Rights of Persons with Disabilities. In Article 32(1) the states parties to the treaty recognise the importance of international cooperation and the promotion thereof in assisting poorer states to meet the objectives of the treaty. In particular, states parties pledge to, among other things, “[p]rovide, as appropriate, technical and economic assistance, including by facilitating access to and sharing of accessible and assistive technologies, and through the transfer of technologies” (Article 32(1)(d)).

Subsequent cases, however, reveal that courts will be more interventionist with regard to state budgetary and resource allocation decisions when they deem it justified, provided enough information is placed before them and they feel competent to make that kind of intrusion in the particular circumstances. In this respect a court reviewing the right of access to water may draw inspiration from the Committee on ESCR’s

⁸⁶ See *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC), para 45.

⁸⁷ General Comment No. 1, para 4, speaking of “principled policy-making”.

⁸⁸ General Comment No. 1, para 6. See also Langford and Kok (2005) 202.

⁸⁹ General Comment No. 15, s V.

⁹⁰ In General Comment No. 3, para 9.

⁹¹ In *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC), a first socio-economic right case concerning the right to health care, the Court applied a “rationality test” in assessing whether the state was meeting its obligation to access to health care in term of s 27(1)(a) of the Constitution. The Court held that state decisions must “rational” and taken in “good faith” [para 9]. If these requirements are met, courts will not interfere. The state will not be acting rationally if it allocates grossly inadequate or no resources to the realisation of a particular socio-economic right [para 9]. For a recent work on the issue of constitutional deference, see McLean (2009) 23 – 87.

⁹² General Comment No. 3, para 13.

General Comment No. 15 which signifies a marked shift from earlier comments regarding resource constraints consideration. In this recent comment the Committee on ESCR stated that “with respect to the right to water, States parties have a *special* obligation to provide those who do not have sufficient means with the necessary water and water facilities and to prevent any discrimination on internationally prohibited grounds in the provision of water and water services.”⁹³

The South African Constitution spells out the state’s obligations in respect of the rights in the Constitution. Section 7(2) provides that “[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights”. The duty to respect requires of the state to desist from interfering with the enjoyment of the right of access to sufficient water. The Committee on ESCR has stated that the right to water contains freedoms and entitlements. The freedoms include the “right to maintain access to existing water supplies necessary for the right to water, and the right to be free from interference, such as the right to be free from arbitrary disconnections or contamination of water supplies.”⁹⁴ This would mean that the state must refrain from “arbitrarily depriving people of their right of access to sufficient water, or denying or obstructing the right of access to sufficient water, or unfairly discriminating when allocating water resources.”⁹⁵

The duty to *respect* has come before the courts in a few cases from as early as 2001. In *Manqele v Durban Transitional Metropolitan Council*⁹⁶ the applicant, an unemployed woman who occupied premises with seven children, requested the Court to declare that the discontinuation of water services to the premises was unlawful. Her contention was that the by-laws in terms of which the water service was discontinued exceeded the boundaries of its authority (was *ultra vires*) when viewed against the WSA. She relied on her right to a basic water supply as contained in the Act and did not rely on the Constitution. The Metropolitan Council responded that the right to a “basic water supply” in the Act had no content as no regulations have been passed to give meaning to the right. The Court found in favour of the Metropolitan Council. De Visser pointed out that the decision was “regrettable” in that the Court avoided making a pronouncement on the scope of the right in issue. He argued that, “had constitutional arguments been advanced, the Court would have been confronted with assessing the scope of the right to basic water supply under the Act.”⁹⁷

⁹³ Emphasis mine. The Constitutional Court gave indications of this interventionist approach for the first time in *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC), and then in *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA (CC). Recently in the *Mazibuko* case (fn 83 above), the SCA delivered a decision with budgetary or resource implications for the state when it raised the minimum quantity of water from 25 litres per person per day to 42 litres per person per day.

⁹⁴ General Comment No 15, par 10. By contrast, “entitlements include the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water.”

⁹⁵ Langford and Kok (2005) 203.

⁹⁶ 2002 6 SA 423 (D).

⁹⁷ De Visser (2001) 1.

In *Residents of Bon Vista Mansions v Southern Metropolitan Local Council*⁹⁸ the applicants sought interim relief on an urgent basis for the reconnection of their water supply. Unlike in the *Manqele* case they based their claim on the Constitution. The Court found that the obligation to respect existing access entails that the state may not take any measures that result in the denial of such access. It held that, by disconnecting the water supply, the council had *prima facie* breached the applicants' existing rights. With reference to the WSA, the Court stated that the Act provides that the procedure for discontinuing water services must be (i) fair and equitable; (ii) provide for reasonable notice of intention to discontinue the service, and (iii) provide for an opportunity to make representations. Furthermore, where a person proves to the satisfaction of the relevant water services provider that he or she is unable to pay for basic services, the service may not be discontinued. It held that a *prima facie* violation of a local council's constitutional duty occurs if a local authority disconnects an existing water service and that such disconnection therefore requires a constitutional justification. It is submitted that this decision is in accordance with the standards set out in the general comments by Committee on ESCR.⁹⁹

Furthermore, interference with water supplies may in some situation require a prior court order. This would be the case if the disconnection, denial or limitation of access to water services or supplies amounts to a constructive eviction. A constructive eviction would occur if as a result of the disconnection, denial or limitation a resident is forced to leave his or her own home. It is therefore argued that this should not occur without a court order.¹⁰⁰ Constructive eviction by cutting a water supply would clearly violate section 26(3), which requires that eviction be carried out in terms of a court order obtained after considering all the relevant circumstances. In fact, the Land Claims Court has elsewhere stated that restricting the use of land may amount to an eviction and therefore trigger the application of section 26(3).¹⁰¹

The duty to *protect* the rights in the Bill of Rights, on the other hand, requires the state to prevent violations of the right access to water by third parties. That is to say, if a landlord arbitrarily disconnects the water supply to a lawful tenant, the state must restore water to the tenant. A component of the obligation to protect is a duty to regulate private provision of water services. The Committee on ESCR has stated that

⁹⁸ 2002 6 BCLR 625 (W).

⁹⁹ See General Comment No. 15, para 56, where the Committee on ESCR states that “[b]efore any action that interferes with an individual’s right to water is carried out by the State party, or by any other third party, the relevant authorities must ensure that such actions are performed in a manner warranted by law, compatible with the Covenant, and that comprises: (a) opportunity for genuine consultation with those affected; (b) timely and full disclosure of information on the proposed measures; (c) reasonable notice of proposed actions; (d) legal recourse and remedies for those affected; and (e) legal assistance for obtaining legal remedies.”

¹⁰⁰ Langford and Kok (2005) 204.

¹⁰¹ In *Van der Walt v Lang* 1999 1 SA 189 (LCC) and *Dhladhla v Erasmus* 1999 1 SA 1065 (LCC), as cited in Langford and Kok (2005) 204.

“where water services (such as piped water networks, water tankers, access to rivers and wells) are operated or controlled by third parties, States parties must prevent them from compromising equal, affordable, and physical access to sufficient, safe and acceptable water. To prevent such abuses an effective regulatory system must be established, in conformity with the Covenant and this General Comment, which includes independent monitoring, genuine public participation and imposition of penalties for non-compliance.”¹⁰²

The duty to *promote* the right of access to sufficient water in the Bill of Rights would involve, among other things, the promotion of educational and informational programmes aimed at generating awareness and understanding of the right of access to sufficient water. The Committee on ESCR has commented that the “obligation to promote obliges the State party to take steps to ensure that there is appropriate education concerning the hygienic use of water, protection of water sources and methods to minimise water wastage.”¹⁰³

The obligation to *fulfil* the rights in the Bill of Rights requires of the state to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of the right.¹⁰⁴ Another important component of the duty to fulfil is that the state must facilitate and provide access to sufficient water. According to the Committee on ESCR “[s]tates parties are also obliged to fulfil (provide) the right when individuals or a group are unable, for reasons beyond their control, to realise that right themselves by the means at their disposal.”¹⁰⁵

In the *TAC*¹⁰⁶ case, however, the Constitutional Court made it clear that sections 26(2)¹⁰⁷ and 27(2)¹⁰⁸ qualify the section 7¹⁰⁹ obligations in respect of socio-economic rights.¹¹⁰ The state’s obligation to respect, protect, promote and fulfil the right of access to sufficient water is likewise limited by these qualifiers. It remains unclear, however, to what extent these qualifiers limit the state’s duty to “respect” the right of access to sufficient water. It is submitted here that these qualifiers should not affect the State’s duty to respect as this duty typically calls for very minimal or no resources at all for its implementation.

¹⁰² General Comment No 15, para 24.

¹⁰³ General Comment No. 15, para 25; see also General Comment No. 10 (1998), para 3(a).

¹⁰⁴ Maastricht Guidelines (1998) *Human Rights Quarterly* 691-701, para 6. For a fuller discussion of the guidelines, see Langford and Kok (2005) 204.

¹⁰⁵ General Comment No. 15, para 25.

¹⁰⁶ *Minister of Health v Treatment Action Campaign and Others* (2002) 10 BCLR 1033 (CC).

¹⁰⁷ S 26(2) stipulates: “the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.”

¹⁰⁸ S 27(2) provides: “the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.”

¹⁰⁹ Section 7(2) obliges the state to respect, protect, promote and fulfil the right the rights in the Bill of Rights.

¹¹⁰ *TAC* case, para 39.

3.4 Linking access to water with other rights in the Constitution

From the record of general comments by the Committee on ESCR, the interdependence of access to water and other rights becomes conspicuous. In fact, access to water is often a precondition for the fulfilment and enjoyment of most of the other rights.

Commentators point to the difference in wording of the socio-economic rights. Sections 26 (housing), 27 (health, water, food, social security) are categorised as “access rights”, while sections 28(1)(c) (on “basic nutrition”) and 29(1)(a) (on “basic education”) are basic rights. While water is categorised as an “access” right, it goes without saying that the obligation to provide basic nutrition cannot be fulfilled without access to sufficient water for drinking, food preparation and even food production.¹¹¹ Thus the right to water straddles these two categories. The significance of the wording lies in the fact that the state has to meet this obligation with regard to children immediately, as this right is not qualified. However, the Constitutional Court in *Grootboom*, in the context of access to housing, stated that sections 28(1)(b) and 28(1)(c) must be read together and that the obligations set out in section 28(1)(c) primarily rests on the parents or family of the child and only alternatively on the state; for example, where children are removed from their families.¹¹²

Furthermore, section 35(2)(e) provides that everyone who is detained, including every sentenced prisoner, has a right to “conditions of detention that are consistent with human dignity, including, at least, exercise and the provision, at state expense, of adequate accommodation and nutrition, reading material and medical treatment.” As stated above, water forms an important component of that nutrition which the state must provide at its own expense.

Moreover, section 24 stipulates that everyone has a right to an environment that is not harmful to their health or well-being and to have the environment protected through legislative and other measures that prevent pollution and ecological degradation, and promote conservation and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.¹¹³ With many people still drawing water directly from the source (rivers, dams or wells), often with no alternative, a harmful environment would represent a health hazard. Using untreated water from the source exposes communities to a variety of water and air-borne contaminants with a potential to cause serious health problems.¹¹⁴

¹¹¹ Langford and Kok (2005) 206.

¹¹² Paras 76-79.

¹¹³ See also Langford and Kok (2005) 207.

¹¹⁴ Drawing water directly from the source by poor rural communities is still prevalent in South Africa 17 years into our democracy. See among others *The New Age* (22 June 2011). To deal with this challenge President Zuma in his 2011 state of the nation address stated that “[g]overnment will spend R2,6 billion on water services this year. Among the priority areas are the provinces of Limpopo, KwaZulu-Natal and the Eastern Cape where there are still high numbers of people without safe drinking water, while not neglecting other areas.”

For instance, in the *SERAC* case¹¹⁵ the applicants complained of illnesses associated with their polluted water and soil, including gastrointestinal problems, skin diseases, cancers and respiratory ailments. After detailing the initial steps to be taken by the government to remedy the situation complained of, the Commission stated that a government's obligation in relation to the right to health and healthy environment of its citizens consisted of the following minimum: to take reasonable precautions to avoid contaminating the environment in a manner that threatens the physical, mental and environmental health of its citizens; to ensure that private parties do not systematically threaten peoples' health and environment; and to provide citizens with information regarding environmental health risks and meaningful opportunities to participate in development decisions.¹¹⁶

4 PROGRESS ACHIEVED IN PROVIDING ACCESS TO SUFFICIENT WATER TO POOR SOUTH AFRICANS

Painting a picture of the progress made thus far by the South African government in the provision of water and sanitation in the context of poverty alleviation, the President said in his state of the nation address of 2009 that "access to potable water improved from 62% in 1996 to 88% in 2008 and that access to sanitary facilities improved from 52% in 1996 to 73% in 2007."¹¹⁷ While the 2010 state of the nation address was silent on the advances made by the end of 2009 in expanding access to basic water supply, in his 2011 state of the nation address the President stated that an additional 400 000 people had access to basic water supply by the end of 2010.¹¹⁸

A practical and an effective way of targeting free basic services such as water to those who cannot afford to pay for them has been through the Indigent Register policy adopted by government at municipal level.¹¹⁹ Municipalities identify households that are eligible to receive free basic services. Of the estimated 5,5 million indigent households in the country, over four million (73%) are registered on municipal databases and currently receive free basic water.¹²⁰

The judiciary has also entered the fray in the struggle by poor citizens to have access to sufficient water. In *Mazibuko v City of Johannesburg*¹²¹ the applicants brought a

¹¹⁵ *The Social and Economic Rights Action Center for Economic and Social Rights (SERAC) v. Nigeria*, Communication No. 155/96, African Commission on Human and Peoples' Rights.

¹¹⁶ *SERAC* case, paras 6-7.

¹¹⁷ President Kgalema Motlanthe "State of the nation address of the president of South Africa to the joint sitting of parliament" February 6, 2009, available at <http://www.pmg.org.za/briefing/20090206-state-nation-address>, (accessed 8 July 2011).

¹¹⁸ President Jacob Zuma "State of the Nation Address of the President of South Africa to the joint sitting of parliament" February 10, 2011, available at <http://www.pmg.org.za/node/25075> (accessed 8 July 2011).

¹¹⁹ See *Mazibuko* case above, para 42 and 46.

¹²⁰ *The Presidency Towards anti-poverty strategy for South Africa, a discussion document* (2008), available at <http://www.thepresidency.gov.za/pebble.asp?releid=1090> (accessed 8 July 2011).

¹²¹ 2008 JOL 21829 (W).

complaint against the City's use of prepaid water metres in the township of Phiri in Soweto, Johannesburg. The effect of the prepaid metres was that, when the free basic water allocation of 25 litre per person per day or 6 kilolitres per household per month was exhausted, they were left with no water until the next month's allocation. The Court found that the use of prepaid water metres was unlawful as it was not authorised by City's by-laws.¹²² The Court also held that the use of prepaid metres amounted to unfair discrimination as these were installed only in poor households while residents in upmarket areas received water on credit. There was further discrimination in that the use of prepaid metres did not allow an opportunity to make representations on inability to pay for water, while this opportunity was available to their more affluent counterparts.¹²³ The Court therefore ordered the immediate removal of prepaid metres.¹²⁴

More importantly, the Court also found the amount of 25 litres per person per day or 6 kilolitres per household to be insufficient for the residents' daily needs, such as drinking, cooking, bathing and personal hygiene, and ordered the City to provide a minimum of 50 litres per person per day.¹²⁵

The City of Johannesburg appealed against this decision to the Supreme Court of Appeal (SCA). The SCA upheld the High Court's decision in as far as it related to the lawfulness of the use of prepaid water metres. The SCA also agreed that 25 litres per person per day or 6 kilolitres per household per month was insufficient. With regard to what amount would be sufficient to meet daily needs, the SCA was caught between two pieces of expert evidence. On the one hand, the respondent's evidence showed that a total of 50 litres per person per day was the minimum required to drink, cook, bath, flush the toilet and personal hygiene.¹²⁶ However, the appellant's evidence showed that the same needs could be met with approximately 41.2 litres per person per day.¹²⁷ By way of remedy, and apparently relying on the so-called "*Plascon Evans*" rule,¹²⁸ the SCA preferred the appellant's evidence and ordered the City to immediately provide those

¹²² Para 105.

¹²³ Paras 91 and 92.

¹²⁴ Para 183.

¹²⁵ Para 183.

¹²⁶ Para 21.

¹²⁷ Para 22.

¹²⁸ *Editor's note*: in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) the Appellate Division held as follows: "[W]here in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order ... may be granted if those facts averred in the applicant's affidavits which have been admitted, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact ... If in such a case the respondent has not availed himself of the right to apply for the deponents to be called for cross-examination ... and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact amongst those upon which it determines whether the applicant is entitled to the relief which he seeks ...": at 634E-635C.

on its indigent register with 42 litres per person per day.¹²⁹ Importantly, the SCA did not order immediate removal of prepaid water metres. Instead the SCA gave the City two years to revise its water policy in relation to the respondent.¹³⁰

Unsurprisingly, the City appealed to the Constitutional Court against the decision of the SCA.¹³¹ The Constitutional Court restricted its review to two major issues. The first was whether the City's policy in relation to free basic water, and particularly its decision to supply six kilolitres of free water per month to every accountholder in the City (the free basic water policy), was in conflict with section 27 of the Constitution or section 11 of the WSA 108 of 1997.¹³² The second was whether the installation of prepaid water meters by the first and second respondents (the City of Johannesburg and Johannesburg Water (Pty) Ltd, respectively) in Phiri was lawful.¹³³ What follows is a brief summary of the Constitutional Court decision.

4.1 The judgment

The Constitutional Court held that the City's Free Basic Water policy was reasonable as the City acted consistently with its constitutional obligation in terms of section 27(1)(b) read with section 27(2) of the Constitution. It also held that the use of prepaid water meters in Phiri was lawful. It thus set aside the orders of High Court and SCA respectively requiring the City to provide Phiri residents with 50 and 42 litres of free water per person per day.

4.1.1 *On the issue of free basic water policy*

In respect of the free basic water policy, the Court had to answer four subsidiary questions. The first concerned the proper relationship between section 27(1)(b) (right to sufficient food and water) and 27(2) (obligation to take reasonable measures, within available resources, to progressively realise the right to water). This was necessary in order to determine the content of section 27(1)(b) and ultimately whether the six kilolitres provided by the City of Johannesburg was sufficient or should be replaced with 50 litres per person per day. The Court held that section 27(1)(b), read with section 27(2), "does not require the state upon demand to provide every person with sufficient water without 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."¹³⁴ It stressed that section 27(1)(b) does not "confer a right to 'sufficient water' immediately."¹³⁵

¹²⁹ Para 61.

¹³⁰ Para 62.

¹³¹ *Lindiwe Mazibuko v City of Johannesburg* 2010 (3) BCLR 239 (CC).

¹³² Para 6.

¹³³ Id.

¹³⁴ Para 50.

¹³⁵ Para 57.

The applicants had argued that determining the content of section 27(1)(b) required the Court to quantify an amount of water sufficient for a dignified life, as the High Court and SCA had done. The Court saw this argument as requiring it to determine the minimum core of the right to sufficient water. The Court was unwilling to do so, arguing that “[f]ixing a quantified content might, in a rigid and counter-productive manner, prevent an analysis of context.”¹³⁶ It also argued that it was

“institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights.”¹³⁷

Mainly because of the above reasons the Court criticised the High Court and the SCA for fixing the amount of water in their attempt to give content to sufficient water under section 27(1)(b) read with section 27(2).¹³⁸

The second question was whether the amount of basic water prescribed in terms of the WSA exhausted the state’s obligations to provide sufficient water under section 27(1) of the Constitution. Employing reasoning similar to that outlined above, the Court found that the state is free to set the targets it wishes to achieve in respect of socio-economic rights. Once the government has done so, the role of the court in a legal challenge is confined to assessing the reasonableness of those targets.¹³⁹

The third question concerned the reasonableness of the allocation of six kilolitres of free water per stand per month by the City within the meaning of section 27 of the Constitution and/or section 11 of the WSA. The Court held that the “City is not under a constitutional obligation to provide any *particular* amount of free water to citizens per month.”¹⁴⁰ It is under a duty to take reasonable measures progressively to realise the achievement of the right. Furthermore, the Court concluded that the City had adopted these measures and acted consistently with them. It therefore rejected the argument that the City’s policy was based on a misconception as to its constitutional obligations.¹⁴¹

The Court also rejected the argument that the allocated amount was unreasonable. It held that because of the continuous movement of people in and out of the City and given the varied water and sanitary needs of different household, it would be administratively burdensome, if not practically impossible, for the City to be expected to meet everyone’s

¹³⁶ Para 60.

¹³⁷ Para 61.

¹³⁸ Para 68.

¹³⁹ Para 70.

¹⁴⁰ Para 85.

¹⁴¹ *Ibid.*

needs in such a situation.¹⁴² For the same reasons the Court also rejected the applicants' argument that the allocated amount was unreasonable because it was provided per household and not per person in a household.

Considering the fact that the Indigent Persons policy adopted in 2005 made provision for an extra free four kilolitres of water per month to registered households, it was held that the City's policy was flexible and continually being reconsidered to meet the needs of the poorer households. It could therefore not be said, the Court held, that the City's policy was unreasonable.¹⁴³

The fourth and final question concerned the reasonableness of the Indigent Persons policy. The applicants argued that the requirement of registration rendered the policy unreasonable because it was demeaning and under-inclusive.¹⁴⁴ The Court was, however, persuaded by the City's testimony that of the available options to the City (the other being "universal access"), indigent registration or means-testing was a practically feasible way of targeting the poor. It pointed out that means-testing was also used in other government programmes, such as social security. The Court stated that "to hold a means-tested policy to be constitutionally impermissible would deprive government of a key methodology for ensuring that government services target those most in need".¹⁴⁵

4.1.2 On the issue of pre-paid water meters

With regard to pre-paid water meters, the first question raised before the Court was whether the installation of prepaid meters had a legal basis. The applicants argued that it did not. The Court rejected this argument, holding that the authority to install prepaid water meters emanated from (i) section 3(3) of the City's Water Services By-laws (the By-laws) which creates a hybrid service level for Service Level 2 customers who default by providing that they may have pre-paid meters installed;¹⁴⁶(ii) section 95(i) of the Municipal Systems Act 32 of 2000, which expressly requires local government to provide accessible pay points for settling accounts or for making pre-payments for services,¹⁴⁷ and (iii) section 156(5) of the Constitution, which provides that municipalities have the right to exercise any power reasonably necessary for, or incidental to, the effective performance of their functions.¹⁴⁸

The second question was whether pre-paid meters lead to unauthorised disconnection of water supply. The Court held that the by-laws dealing with limitation or discontinuation of water supply did not apply to pre-paid meters but to credit

¹⁴² Para 84.

¹⁴³ Paras 93-97.

¹⁴⁴ Paras 44 and 98.

¹⁴⁵ Para 101.

¹⁴⁶ Para 109.

¹⁴⁷ Para 110.

¹⁴⁸ Para 111.

meters.¹⁴⁹ According to the Court, when credit runs out of a pre-paid water connection, what results is a “suspension” and not a “disconnection” of water supply.¹⁵⁰ The Court further held that the City could not be expected to provide reasonable notice and an opportunity to be heard to a prepaid water customer each time the customer runs out of credit.¹⁵¹

The final question concerned the manner in which pre-paid water meters were introduced. The applicants argued that pre-paid water meters were introduced by unlawful threats and an unfair process. They also argued that their introduction was inconsistent with the state’s duty to take reasonable measures to achieve the right of access to sufficient water, the right to equality under section 9 of the Constitution which prohibits unfair differentiation or discrimination, and the right to fair administrative action under section 33 of the Constitution.

With regard to unlawful threat, the Court stated that

“[a]ny resident of the City who wishes the City to provide them with a water service is limited to the options the City offers. As long as those options are lawful, it cannot be said that by limiting the options, the City is forcing the resident to make a choice against the background of an unlawful threat. If the options are unlawful, then the resident may challenge them. If they are lawful, the resident cannot complain that they are forced to accept them.”¹⁵²

Regarding the issue of unfairness, the Court held that introducing pre-paid water meters did not constitute administrative action. That decision, in fact, held the Court, fell within the executive and/or legislative function of the municipality.¹⁵³ The Court held that, in any event, evidence before the court showed that the City had carried out adequate public consultation before introducing pre-paid water meters.¹⁵⁴

The Court also rejected the argument that the installation of pre-paid water meters violated the government’s “duty to respect”, holding that “[t]he new system for the first time provided a free water allowance to all residents.” Because of this, it could not be said that government interfered with the right of access to sufficient water.¹⁵⁵

The Court was not persuaded by the applicants’ argument that the introduction of pre-paid water meters constituted an unreasonable measure in conflict with section 27(2) or section 11(1) of the WSA.¹⁵⁶ On the strength of the evidence before it, the Court stated that pre-paid meter customers are charged lower tariffs (well below cost) and “are cross-subsidised by the tariffs charged to heavier water users, and credit meter

¹⁴⁹ Para 116.

¹⁵⁰ Paras 117, 120 and 121.

¹⁵¹ Paras 122, 123 and 124.

¹⁵² Paras 126.

¹⁵³ Paras 30 - 31.

¹⁵⁴ Paras 133 -134.

¹⁵⁵ Paras 136.

¹⁵⁶ Paras 140.

users are charged a higher tariff across the board.”¹⁵⁷ It held that the switch to the pre-paid metered system with a free allocation of six kilolitres per month did not constitute a retrogressive step.¹⁵⁸

The Court further rejected the applicants’ contention that the introduction of pre-paid meters was inconsistent with section 9(1) of the Constitution. The Court held that even if it had discriminatory impact, such discrimination was not unfair as it served a legitimate government purpose (curbing wasted and unaccounted water in the area in question).¹⁵⁹ The Court also held that the introduction of pre-paid meters was not harmful to the residents of Phiri as it in fact treated them more favourably in comparison to credit meter customers (“white suburb” residents) in that, among other things, pre-paid meter users were spared the severe penalties imposed on credit meter customers.¹⁶⁰

5 A BRIEF ANALYSIS OF THE MAZIBUKO JUDGMENTS

The major criticisms of the *Mazibuko* judgments – especially the SCA’s and the Constitutional Court’s decisions – seem to centre around what is seen as the courts’ avoidance of pronouncing on the content of the right of access to sufficient water. Some commentators viewed the Constitutional Court in particular as being too deferential to the executive arm of the state. For ease of reference, the decisions will be referred to as *Mazibuko HC* (High Court decision), *Mazibuko SCA* (Supreme Court of Appeal decision) and *Mazibuko CC* (Constitutional Court decision).

Commenting on *Mazibuko SCA* Dugard and Liebenberg,¹⁶¹ while embracing certain aspects of the judgment, point out that it represents a missed opportunity to “provide normative clarity in interpreting the right of access to sufficient water and the nature of the obligations it imposes on water services providers.”¹⁶² At a remedial level also, they argue, the Court’s order is weak for its failure, inter alia, to direct an immediate ban on prepaid water meters.¹⁶³ They are particularly critical of the Court’s reduction of the 50 litre per person day, ordered by *Mazibuko HC*, to 42 litre per person per day.

Stewart also criticises the *Mazibuko HC* and *Mazibuko SCA* remedies, but for different reasons. She laments particularly the courts’ decision to fix the amount of water to be made available to poor house.¹⁶⁴ She sees a danger in the possibility that “it may be unattainable for government to implement the order made by the Court which will automatically bring the credibility of the Court in the transformation of society into

¹⁵⁷ Paras 141.

¹⁵⁸ Paras 142.

¹⁵⁹ Paras 150 – 151.

¹⁶⁰ Paras 153 -157.

¹⁶¹ Dugard and Liebenberg (2009) 11.

¹⁶² Dugard and Liebenberg (2009) 17.

¹⁶³ Dugard and Liebenberg (2009) 17.

¹⁶⁴ Stewart (2010) 501.

disrepute.”¹⁶⁵ Other points criticism include the sustainability (and therefore accessibility) of providing fixed amounts, failure to recognise water as scarce resource and disregarding the fact that evidence on record showed that the City had revised its Expanded Social Package so that those on the highest band of the City’s Poverty Index receive 50 litres of free basic water per person per day.¹⁶⁶

Commenting on *Mazibuko CC* decision, De Vos¹⁶⁷ observes that, in comparison with the Court’s previous decisions, this judgment represents a regressive step. He argues that

“[t]he Constitutional Court judgment demonstrates a limited (and quite conservative) understanding of its role in enforcing social and economic rights and shows an over eagerness on the part of the Court to endorse the essentially ‘neo-liberalism-with-a-human-face’ pay-as-you-go water provision policies of the Municipality. To some extent the judgment represents a retreat for the Court from its hey-day when (in the *TAC* case) it ordered the state to take steps to make Nevirapine available to all HIV positive pregnant mothers in order to prevent HIV transmission to their babies.”¹⁶⁸

In her recently work published work Liebenberg¹⁶⁹ is sharply critical of each of the findings in *Mazibuko CC*. The excerpts that follow sum up Liebenberg’s take on the decision. Pointing to the standard of review employed by the Court, she observes that

“[t]he Court’s dismissal of the challenge to the sufficiency of the free basic water supply illustrates the shortcomings of reasonableness review unmoored from a substantive analysis of the normative purposes and values underpinning the relevant socio-economic rights. The Court fails to give any independent significance to the right of access to sufficient water in s 27(1)(b). Instead the right is subsumed within the overarching qualification of reasonableness in s 27(2).”¹⁷⁰

Liebenberg further points to the Court’s now predictable rush to embrace the reasonableness review standard without substantively engaging the socio-economic claims in the case, as well as the failure in the present case to adhere to the constitutional injunction to consider international law when interpreting the Bill of Rights. According to her, this

“represents an avoidance of the special responsibility of the courts, particularly the Constitutional Court, to interpret the normative standards underpinning socio-economic rights in the light of the considerations referred to in s 39(1) of the Constitution, and to scrutinise closely whether the State’s conduct or omissions are reasonable as required by ss 26 and 27(2).”¹⁷¹

¹⁶⁵ Ibid.

¹⁶⁶ Stewart (2010) 502.

¹⁶⁷ De Vos (2009) 1.

¹⁶⁸ Ibid.

¹⁶⁹ Liebenberg (2010) 467.

¹⁷⁰ Ibid. (footnotes omitted).

¹⁷¹ Liebenberg (2010) 469.

Overall, Liebenberg feels that the Court showed more respect for the executive than is necessary in the manner it dealt with the issues in the case. She observes that

“the Constitutional Court adopts a highly deferential approach to the policy choices of the City, and gives a particularly narrow reading of its own application of the reasonableness standard in the cases of *Grootboom* and *Treatment Action Campaign*.”¹⁷²

The criticism that the Constitutional Court – as was the case in *Mazibuko CC* – is sometimes eager to jump to the reasonableness standard of review, and thereby avoid pronouncing on the content of the right in question, seems to be a well-placed one. Steward is to be seconded – but for different reasons – in the observation that the court in *Mazibuko HC* and *Mazibuko SCA* perhaps overreached at the remedial level in prescribing the amount of water to be provided by the City.

It is submitted that in a properly functioning democracy with a relatively competent executive both the above courts should at best simply have declared the current 25 litres per person per day in the enabling legislation inadequate and therefore incompatible with section 27(1) of the Constitution, but left it up to parliament to prescribe the minimum quantity deemed appropriate and affordable.¹⁷³ This would on the one hand take care of the credibility concern – the perception that courts are happily encroaching into the executive terrain, and as such avoiding the hostility aroused in the executive by the order of the High Court – while providing partial victory for the residents by declaring current amounts of provided water inadequate.¹⁷⁴ We should bear in mind that, in strategizing for successful socio-economic rights litigation, one is advised to “choos[e] cases in which the State is not required to allocate more than minimal resources, or additional resources”.¹⁷⁵ Thus the Constitutional Court’s conclusion in the *Mazibuko* case came as no surprise to some observers.

6 CHALLENGES IN ACCESSING WATER BY POOR SOUTH AFRICANS

Despite improvements in government services to the poor, there are concerns. Data released by Statistics South Africa in 2007 indicated that it has proven difficult to reach many of the poorest municipal districts as well as informal settlements and farm workers. As a result poor households continue to lag in access to government services. For instance, in 2005, one-half of poor households still had no piped water on site and a

¹⁷² Ibid (footnotes omitted).

¹⁷³ In India, where such overreaching conduct is prevalent, courts have deemed necessary to usurp the function of the executive as they see the executive as incompetent. See Gonsalves (2005) 177.

¹⁷⁴ For instance, the City of Johannesburg mayor, Amos Masondo, was reported to have said in reaction to the High Court order: “Judges are not above the law. We don’t want judges to take the role of Parliament, the role of the National Council of Provinces, the role of the legislature and the role of this council. Judges must limit their role.” See *Business Day* (15 May 2008).

¹⁷⁵ Chenwi (2008) 10.

third had no electricity. According to the state, these shortfalls place a burden on women and girls who continue to undertake most household labour.¹⁷⁶

The data shows that poor households also find it difficult to pay for services. In September 2005, 3,3% of households spending under R800 a month who had access to water said they had been cut off in the last month for failure to pay. In contrast, among better-off households cut-offs for water totalled 2,1%.

The government concedes that households often do not know what programmes are available, and government does not always correctly identify the needs of households and communities. Furthermore, the working poor may find it hard to prove they are indigent and so end up paying for education, health, water and electricity.¹⁷⁷ Moreover, the extension of government services has not always been co-ordinated to ensure they support each other. For instance, plans for new housing settlements do not always include clinics, schools, retail and industrial sites or public transport. Sometimes people who are eligible for social grants cannot get the necessary identification documents.¹⁷⁸

According to the government, this picture “points to some gaps in the existing government services. These include lack of services for unemployed able-bodied people, deficiencies with regard to reach and coverage of some of the services currently provided [as well as] inefficiencies in the provided services.”¹⁷⁹

The quality and maintenance of the infrastructure is also an issue in the provision of basis water supply to citizens. In the beginning of 2010 the government acknowledged that, while the country does not enjoy abundance of water resources, it continues to lose a lot of water through leaking pipes and inadequate infrastructure. The government then committed itself to halving this problem by 2014.¹⁸⁰

7 CONCLUSION AND RECOMMENDATIONS

We have come a long way since the time when many doubted whether the right of access to adequate water was justiciable, pointing to its glaring exclusion from the International Bill of Rights. Today, from the general comments of UN human rights treaty bodies and regional decisions to a number of international conferences and declarations, as well as a growing body of academic literature on the subject, it is clear that the right of access to sufficient water is as legally enforceable as any other right listed in the International Bill of Rights.

The right of access to sufficient water is essential for dignified existence, let alone the fact that it is a source of life, so to speak. In South Africa, from statistics and surveys

¹⁷⁶ Anti-Poverty Strategy (2008) 36.

¹⁷⁷ Anti-Poverty Strategy (2008) 46.

¹⁷⁸ Ibid.

¹⁷⁹ Ibid.

¹⁸⁰ President Jacob Zuma “The state of the nation address to the joint sitting of parliament” February 11, 2010, available at <http://www.thepresidency.gov.za/pebble.asp?relid=211> (accessed 8 July 2011).

released at regular intervals, it is clear that great strides have been made since 1994 in bringing basic services such as water to many poor households. However, statistics also reveal that a great many are still either denied or have insufficient access to water. This is a cause for concern. By government's own admission,

"clean water [and] adequate sanitation [is] critical in overcoming poverty. On the other hand, in the context of persistent inequalities and social divisions, delays in obtaining services, lower levels of service and relatively high levels of disconnection in poor communities generate considerable anger."¹⁸¹

Though heavily criticised by some commentators, the Constitutional Court decision in the *Mazibuko* case has been embraced by others. McKaizer praises the decision for what he regards as the balanced way it dealt with the lawfulness and reasonableness of the City's Free Basic Water policy and the introduction of pre-paid meters. According to him, "O'Regan situated the court comfortably between the rock of passively deferring to government policy processes on the one hand and the hard place of subverting the government's right to make policy on the other. The Constitutional Court's pro-poor credentials remain intact."¹⁸² De Vos, while generally critical of the judgment, points out that the decision

"does add two interesting and welcome innovations to the jurisprudence on social and economic rights. First, it states that the government has a duty continually to review its policies to ensure the progressive realisation of social and economic rights – something the City of Johannesburg was willing to do in this case. Second, the judgment views social and economic rights adjudication as part of a broadening of democracy as it helps to hold the government accountable for its actions."¹⁸³

Indeed, the contribution of the judiciary in the litigation of the right of access to water in recent decisions, particularly the attempts by *Mazibuko HC* and *Mazibuko SCA* to provide normative content to the right of access to sufficient water in the Constitution is notable. These two decisions – while clearly problematic from a separation of powers point of view – have been embraced for their pro-poor attitude which is evident not only in declaring that the current 25 litres per person per day is inadequate, and therefore incompatible with section 27(1) of the Constitution, but also in daring to go so far as prescribing the minimum amount of water to be provided by the City as part of the remedy. However, to preserve and foster cordial and co-operative relations between the judiciary and other arms of the state, it seems appropriate that parliament and the executive, not courts, should determine what the minimum obligations of government are.

¹⁸¹ Anti-Poverty Strategy (2008) 35.

¹⁸² McKaizer (2009) 1.

¹⁸³ De Vos (2009) 1.

Finally, in order for the state to comply with its obligations in terms of the Constitution, and emanating from the international norms referred to above, it is recommended that the state should ensure the following:¹⁸⁴

- (i) Every South African inhabitant should have access to water. The state should prioritise improvement of access to water in those areas where the greatest need exists.
- (ii) Every inhabitant has access to enough water to meet basic needs. Such water should be of adequate quality.
- (iii) Water sources are as close as possible to households.
- (iv) Water is available on a daily basis.
- (v) Water provision services are easily maintainable, effective, reliable and flexible enough to upgrade easily.
- (vi) Water is as affordable as possible, especially to the disadvantaged and vulnerable members of the South African society.
- (vii) Adequate policy is developed and monitored to prevent pollution of water resources and encourage water conservation.
- (viii) Water use is managed and controlled adequately.
- (ix) The state monitors the right to water and provide, as far as possible, effective remedies for violations.
- (x) Finally, the state takes appropriate measures to urgently deal with the reported raising levels of the underground acid mine water in the City of Johannesburg. If not attended to, this poses a huge environmental threat and would violate section 24 of the Constitution.

SELECT BIBLIOGRAPHY

UN Documents

Committee on Economic, Social and Cultural Rights *General Comment No. 4 The right to adequate housing* (1991), 6th session, CESCR 1991/12/13.

¹⁸⁴ See also Langford and Kok (2005) 207-208.

Committee on Economic, Social and Cultural Rights *General Comment No. 6 The economic and cultural rights of older persons* (1995), 13th session, CESCR 1995/12/08.

Committee on Economic, Social and Cultural Rights *General Comment No. 14 The right to the highest attainable standard of health* (2000), 22ND session, CESCR 2000/8/11.

Committee on Economic, Social and Cultural Rights *General Comment No. 15* (2002), 29th session, CESCR 2002/10/11.

World Water Assessment Programme *3rd UN World Water Development Report: Water in a Changing World* (2009), available at [http://www.unesco.org/water/wwap/wwdr/wwdr3/pdf/WWDR3 Water in a Changing World.pdf](http://www.unesco.org/water/wwap/wwdr/wwdr3/pdf/WWDR3%20Water%20in%20a%20Changing%20World.pdf) (accessed 6 July 2011)

UN *Report of the UN Conference on Environment and Development* (1992) 21 UN.

UN *Programme of Action of the UN International Conference on Population and Development* (1992) 2 UN.

UN, OHCHR, IPU (2007) *From Exclusion to Equality: Realising the Rights of Persons with Disabilities* 1, available at <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx> (accessed 12 December 2011).

OHCHR 2010 *Monitoring the Convention on the Rights of Persons with Disabilities: Guidance for Human Rights Monitors* 52, available at <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx> (accessed 12 December 2011).

South African Legislation

Water Services Act 108 of 1997

National Water Act 36 of 1998

Books

Danieli Y, Stamatopoulou E and Diaz C *The Universal Declaration of Human Rights: Fifty Years and Beyond*: Baywood Publishing Company (1999).

Gonsalves C "Reflections on the Indian experience" in Squires J, Langford M and Thiele B *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights*: COHRE (2005).

Langford M and Kok "The right to water" in Brand and Heyns *Socio-Economic Rights in South Africa*: Pretoria University Law Press (2005).

Liebenberg S *Socio-Economic Rights: Adjudication under a transformative constitution*: Juta (2010)

McLean K *Constitutional Deference, Courts and Socio Economic Rights in South Africa*: Pretoria University Law Press (2009).

Journal articles

Chenwi L “Litigating socio-economic rights through amicus briefs: Challenges and strategies” (2008) 10 *ESR Review* 10.

Chirwa D “A Fresh Commitment to Implementing Economic, Social and Cultural Rights in Africa: Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights v. Nigeria” (1999) 3 *ESR Review* 19.

De Visser J (2001) “Disconnection of water supply” (2001) 3 *Local Government Bulletin* 1.

Dugard J and Liebenberg S “Muddying the waters: the supreme court of appeal’s judgment in the *Mazibuko* case” 2009 10 *ESR Review* 11.

Fitzmaurice M “The human right to water” (2007) 18 *Fordham Environmental Law Review* 537.

Gleick P “The human rights to water” 1999 *Water Policy* 1(5) 487.

Hardberger A “Life, liberty and the pursuit of water: Evaluating water as human right and the duties and obligations it creates” (2005) 4 *Northwestern University Journal of Human Rights* 331.

Nwobike J “The African Commission on Human and Peoples’ Rights and the Demystification of Second and Third Generation Rights under the African Charter: *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v Nigeria*” (2005) 1 *African Journal of Legal Studies* 129.

Stewart L “Adjudicating Socio-Economic Rights Under a Transformative Constitution” (2010) 28 *Penn State International Law Review* 487.

Winkler I “Judicial enforcement of the Human Right to Water – Case Law from South Africa, Argentina and India” (2008) 1 *Law, Social Justice and Global Development* 10, available at http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2008_1/winkler/winkler.pdf (accessed 7 July 2011)

Online articles

De Vos P “Water is life (but life is cheap)” (2009) *ConstitutionallySpeaking Blog*, available at <http://constitutionallyspeaking.co.za/water-is-life-but-life-is-cheap> (accessed 7 June 2011).

Editorial “Masondo takes on water judge” *BusinessDay* (15 May 2008)

McKaizer E “Court strikes right balance on water for poor people” 2009 *Business Day* online, available at <http://www.businessday.co.za/articles/Content.aspx?id=83847>, (accessed 7 June 2011).

Newspaper articles

Mashele E “No water for Dwarssloop” *The New Age* June 22, 2011.

Other sources

The Presidency *Towards anti-poverty strategy for South Africa, a discussion document* (2008), available <http://www.thepresidency.gov.za/pebble.asp?reid=1090> (accessed 8 July 2011).

COHRE *Legal Resources for the Right to Water: International and National Standards* Right to Water Programme, Geneva, (2004).

Johannesburg Declaration *World Summit on Sustainable Development* (2002), available at http://www.owrld2002.org/publications/memo_en_with.pdf. (accessed 5 July 2011)

International Water Management Institute *Water for Food, Water for Life: A Comprehensive Assessment of Water Management in Agriculture* 2007, available at <http://www.iwmi.cgiar.org/assessment/> (accessed 14 December 2011).