

Monitoring and Evaluating the Progressive Realisation of the Right to Water and Sanitation in South Africa

September 2016

Matshidiso Motsoeneng



The Socio-Economic Rights Monitoring Tool

Monitoring and Evaluating the Progressive Realisation of the Right to Water and Sanitation in South Africa

The Socio-Economic Rights Monitoring Tool

September 2016

By Matshidiso Motsoeneng



*Building up knowledge
to break down Poverty*

Project made possible with funding from the



Recommended citation: Matshidiso Motsoeneng 'Monitoring and Evaluating the Progressive Realisation of the Right to Water and Sanitation in South Africa' (2016) Studies in Poverty and Inequality Institute, Working Paper 12.

Contact the author: matshidiso@spii.org.za

ISBN: 978-0-620-72998-7

Other publications by the Socio-Economic Rights Monitoring Tool

(available at www.spii.org.za):

Zukiswa Kota 'Realising the right to a healthy environment: an analysis of the policy efforts, budgeting and enjoyment of the right to a healthy environment in South Africa' (2016) Studies in Poverty and Inequality Institute, Working Paper 13.

McLaren, D, Moyo, B and Jeffery, J 'The right to food in South Africa: An analysis of the content, policy effort, resource allocation and enjoyment of the constitutional right to food' (2015) Studies in Poverty and Inequality Institute, Working Paper 11.

Franklin, S and McLaren, D 'Realising the Right to Basic Education: An analysis of the content, policy effort, resource allocation and enjoyment of the constitutional right to a basic education (2015) Studies in Poverty and Inequality Institute, Working Paper 10.

Hannah Dawson & Daniel McLaren 'A Framework for Monitoring and Evaluating the Progressive Realisation of Socio-Economic Rights in South Africa' (2015) Studies in Poverty and Inequality Institute.

Hannah Dawson 'Public participation and citizen-based monitoring in realising socio-economic rights' (2014) Studies in Poverty and Inequality Institute, Policy Brief 7.

Hannah Dawson & Daniel McLaren 'Monitoring the right of access to adequate housing in South Africa' (2014) Studies in Poverty and Inequality Institute, Working Paper 8.

Khetho Lomahoza 'Monitoring the right to health care in South Africa' (2013) Studies in Poverty and Inequality Institute, Policy Brief 2.

Hannah Dawson 'Monitoring the right to social security in South Africa' (2013) Studies in Poverty and Inequality Institute, Policy Brief 1.

Hannah Dawson, Khetho Lomahoza & Tshego Monnana 'The right to social security and primary health care in Zandspruit informal settlement South Africa' (2013) Studies in Poverty and Inequality Institute.

Stephanie Brockerhoff 'A Review of the Development of Social Security Policy in South Africa' (2013) Studies in Poverty and Inequality Institute, Working Paper 6.

Contents

Foreword by Axolile Notywala, Social Justice Coalition	1
Acronyms	2
Preface and acknowledgements	3
1. Introducing the Socio-Economic Rights Monitoring Tool	5
1.1. Introduction	5
1.2. Objectives of the tool and end users	7
1.3. Bridging the gap- Community-Base Monitoring	7
1.4. The Right to Water and Sanitation: paper overview.....	8
2. Establishing the content of the right to water and sanitation and the obligations on the state	9
2.1. The Right to Water and Sanitation: Definitions.....	9
2.1.1. Elements of the Full Realisation of the Right to Water	9
2.1.2. International human rights law	14
2.1.3. The Right to Water and Sanitation in African Regional Human Rights Law	16
2.1.3.1 The African (Banjul) Charter on Human and Peoples' Rights (ACHPR) (1986)	16
2.1.4. The Right to Water and Sanitation as a Derivative Right	17
2.1.4.1 Article 16: Right to Health	17
2.1.4.2 Article 5: Right to Dignity and Right against All Forms of Exploitation and Degradation of Man	17
2.1.4.3 Procedural Rights Can Protect the Right to Water and Sanitation	18
3. Assessing the Legislative and Policy Framework for the Right to Water and Sanitation .	20
3.1. Water and Sanitation Policy under the democratic dispensation	20
3.1.1. The right to water and sanitation in the Constitution of South Africa.....	20
3.1.2. Jurisprudence on the right to water and sanitation in South Africa.....	23
3.1.3. White Paper on Water Supply and Sanitation Policy (1994)	29
3.2. Review of legislation and Regulations on the right to water and sanitation	31
3.2.1. Conclusion and recommendations.....	32
3.3. Access to water and sanitation in South Africa: role of national, provincial government and local government.....	33
3.3.1. National Government.....	34
3.3.2. Provincial government.....	34
3.3.3. Local government	34
3.3.4. Conclusion and recommendations	35

3.4.	Affordability: the role of costs on the right to water and sanitation in South Africa	35
3.4.1.	User fees	35
3.4.2.	Free Basic Water	36
3.4.3.	Funding mechanisms.....	37
3.5.	The Right to water and sanitation in informal settlements.....	37
3.6.	Case Study: Mshengu Toilet Social Audit.....	39
3.7.	Key factors hampering the realisation of the right to water and sanitation in South Africa	40
3.8.	Conclusion and key recommendations	40

4. Budget Analysis: Resource Allocations and Expenditures- Department of Water and Sanitation Affairs 42

4.1.	Introduction	42
4.2.	Human Rights Framework for budget analysis	42
4.3.	Budgeting Frameworks for the right to water and sanitation in South Africa	47
4.3.1.	Sources used and availability of the data	49
4.3.2.	Inflation adjusted	49
4.3.3.	Overview of the budget analysis.....	50
4.4.	Total budget allocations for water and sanitation.....	50
4.5.	Spending patterns of national Departments tasked with provision of the right to water and sanitation.....	53
4.5.1.	Allocation and spending patterns of the Regional Implementation and Support programme (Programme 4).....	63
4.5.2.	Spending and allocation patterns of grants transferred to Municipalities	70
4.5.3.	Water Service Subsidy Operating Grant.....	72
4.5.4.	Municipal Water Infrastructure Grant.....	73
4.5.5.	Rural Household Infrastructure Grant	74
4.5.6.	Bucket Eradication Grant.....	76
4.5.7.	Municipal Infrastructure Grant.....	77
4.5.8.	Local Government Equitable Share	81
4.5.9.	Spending challenges at the municipal level.....	84
4.6.	Budget Analysis – key findings and assessment.....	85

5. Indicators for the right to water and sanitation in South Africa..... 88

5.1.	The process of developing indicators	89
5.1.1.	Unpack the normative content of the right	89
5.1.2.	Key Reporting formats used.....	89
5.1.3.	Conceptual Indicators and sectoral meetings.....	89
5.1.4.	Data Sources and analysing information	90
5.1.5.	Indicator “Wish List”	90
5.2.	Presentation and analysis of the indicators.....	91

6. Conclusion and Recommendations..... 106

Bibliography (all online sources checked 12 September 2016).....	108
--	-----

FOREWORD

by Axolile Notywala, Social Justice Coalition

The right to water and sanitation in South Africa is a constitutional right. The right to sanitation might not be as explicit as the right to water is in the constitution but it is provided for in the Bill of Rights under the right to housing, as interpreted by the Constitutional Court in *Government of the Republic of South Africa v Grootboom*. However, 22 years into democracy, many still do not enjoy these rights.

For many of those living in the country's rural areas and informal settlements that do not have access to water and sanitation services, the rights to life, human dignity, safety, privacy and many other rights contained in the Bill of Rights are severely undermined. The tragic story of Sinxolo Mafevuka, a young girl who was raped and murdered in a communal toilet that was a few hundred metres away from her home in Khayelitsha's SST informal settlement in Cape Town, is solid testimony to this. There are many such tragic stories in South Africa. The risks associated with accessing water and sanitation services in poor communities are widespread. Women and children are most at risk. This is a legacy of apartheid that cannot be allowed to continue.

Important strides have been made in addressing some of the legacies left by the apartheid government but a lot more remains to be done. This is confirmed by South Africa's ratification of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The Introduction of the Draft National Sanitation Policy by the Department of Water and Sanitation in February 2016 is a step in the right direction in dealing with some of the gaps in existing policies and legislation that have been identified in this paper. But policy alone will not address these water and sanitation challenges. There is an important role to be played by governments at all levels for the progressive realisation of the right to water and sanitation, especially by local government, which is constitutionally responsible for the provision of these services.

But no real progress can be made without the involvement and participation of the communities affected by these challenges. Communities are the key stakeholders in monitoring and contributing to the progressive realisation of socio-economic rights, including water and sanitation. Decisions made with regards to what Integrated Development Plans and budgets look like without real participation and input from affected communities will yield little or no positive results.

This paper and the Socio-Economic Rights Monitoring Tool by SPII is not only important for those advocating for the progressive realisation of water and sanitation rights in South Africa, it is even more important for government's own reflection on the steps and methods taken so far in this regard and to improve on working towards achieving these rights.

“

Many of those living in the country's rural areas and informal settlements do not have access to water and sanitation services

”



ACRONYMS

ACHPR	African Charter on Human and Peoples' Rights
BEG	Bucket Eradication Grant
CEDAW	Convention on the Elimination of Discrimination Against Women
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
COGTA	Department of Cooperative Governance and Traditional Affairs
DHS	Department of Human Settlements
DoRA	Division of Revenue Act
DWA	Department of Water Affairs
DWS	Department of Water and Sanitation
DPME	Department of Planning, Monitoring and Evaluation
ESCR	Economic, Social and Cultural Rights
GLASS	Global Analysis and Assessment of Sanitation and Drinking-Water
GHS	General Household Survey
HSDG	Human Settlements Development Grant
ICESCR	International Covenant on Economic, Social and Cultural Rights
IES	Income and Expenditure Survey
IDP	Integrated Development Plans
JICA	Japan International Cooperation Agency
LGES	Local Government Equitable Share
MIG	Municipal Infrastructure Grant
MTEF	Medium-Term Expenditure Framework
ODA	Official Development Assistance
OECD	Organisation for Economic Co-operation and Development
OSD	Occupational Specific Dispensation
RBIG	Regional Bulk Infrastructure Grant
RHIG	Rural Household Infrastructure Grant
SAHRC	South African Human Rights Commission
StatsSA	Statistics South Africa
SDGs	Sustainable Development Goals
UNCESCR	United Nations Committee on Economic, Social and Cultural Rights
UNHRC	United Nations Human Rights Council
WASH	Water, Sanitation and Hygiene
WHO	World Health Organisation
WMIG	Water Municipalities Infrastructure Grants
WSC	Water Support Services
WSOSG	Water Service Operating Subsidy Grant
VIPs	Ventilated Improved Pit latrines

Preface and acknowledgements

Studies in Poverty and Inequality Institute (SPII) is an independent research think-tank that focuses on generating new knowledge, information and analysis in the field of poverty and inequality studies.

This working paper has been undertaken as part of the Socio-Economic Rights Monitoring Tool project conducted by SPII with the support of Ford Foundation, Foundation for Human Rights and in partnership with the South African Human Rights Commission (SAHRC). The objective of this project, through the combination of policy and budget analysis and statistical indicators, is to provide a comprehensive framework and set of tools to monitor and guide the progressive realisation of socio-economic rights. This includes investigating the manner in which policy making to expand access to socio-economic rights in fact aligns with Constitutional obligations and jurisprudential guidance handed down by the Constitutional Court. This analysis of policy is complemented by an assessment of the resources directed towards the fulfilment of rights and the evaluation of indicators designed to assess realisation of rights over time. The project aims to provide useful tools for policy makers, those that exercise oversight over the executive, including Parliament, the DPME and Chapter Nine institutions (notably the SAHRC), public interest litigants, and broader civil society.

I would like to express special thanks to SPII Senior Researcher Daniel McLaren for his guidance and constructive comments throughout the drafting of this paper. To Allan Tumbo, thank you for the foundation that you set for the background of this paper, your immense hard work is greatly appreciated. Gratitude is also due to Lily Liu and Suzanna Sone for their contributions to reviewing relevant jurisprudence on the right to water and sanitation, both international, regional and domestic. I also wish to acknowledge the contribution of Dr Khulekani Moyo for reviewing and helping to shape this paper. The process of developing indicators on the right to water and sanitation was made possible with the great assistance of Mr Jay Bhagwan (Water Research Commission), Mr Elroy Paulus (Black Sash), Axolile Notywala (Social Justice Coalition), Ms Pertunia Ramunenyiwa (Department of Water and Sanitation), Mr Mthokozisi Ncube (Johannesburg Water) and Dr Khulekani Moyo as well as civil society organisations who assisted in pointing us to available data sets (SERI and Section 27).

This work is funded by the Ford Foundation and the Foundation for Human Rights¹, whose funding contribution to this research is gratefully acknowledged.



¹ Funding is facilitated by the Foundation for Human Rights which is funded by the Department of Justice and Constitutional Development and the European Union under the Sector Budget Support Programme – Access to Justice and the Promotion of Constitutional Rights





Introducing the Socio-Economic Rights Monitoring Tool

1.1 Introduction

The ratification of the International Covenant on Economic, Social and Cultural Rights (ICESCR) by the South African government with effect from April 2015 affirmed the country's commitment to redress the past injustices of the apartheid regime that left a lasting legacy of poverty and inequality. Both the ICESCR and the South African Constitution (Constitution) speak to the progressive realisation of socio-economic rights such as water and sanitation, housing, food, health care and education. Progressive realisation denotes an acknowledgement that the attainment of socio-economic rights has a progressive vision of achievement and thus cannot be immediate. The right of access to sufficient water as discussed in this paper denotes the right of access to adequate and quality drinking water and water sufficient for the fulfilment of personal hygiene and general household living in South Africa and this is why it is the view of this paper to bring to the fore the relation water has towards the realisation of adequate, quality access to sanitation. This paper discusses the right to water and sanitation as rights that are related with specific distinctions to them. In terms of the South African Constitution, the right to sanitation can be interpreted in terms of Section 26 in the right to housing, which guarantees *"everyone the right to have access to adequate housing"* as confirmed in the *Grootboom* case. In this case the Constitutional Court confirmed that a house was more than just bricks and mortar and stated that adequate housing means;

available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, and there must be a dwelling. Access to land for the purpose of housing is therefore included in the right of access to adequate housing in section 26.2

The status of the right to sanitation in international law has been well defined in key instruments such as the ICESCR and the Committee on Economic, Social and Cultural Rights (CESCR) statement on the right to sanitation³. The CESCR statement on the right to sanitation deals with the question of lumping together water and sanitation in Article 7 and states that *"the right to sanitation is also integrally related among other Covenant rights, to the right to health, as set forth in Article 12, to the right to housing (Article 11), as well as the right to water, which the Committee recognised in its General Comment No. 15."*⁴ This paper seeks to interrogate the extent to which there is constitutional compliance to the right to water and sanitation in South Africa by unpacking the content of the right to water and sanitation and the extent to which the state has fulfilled its obligations to extend enjoyment and access to the right, according to the following methodology.

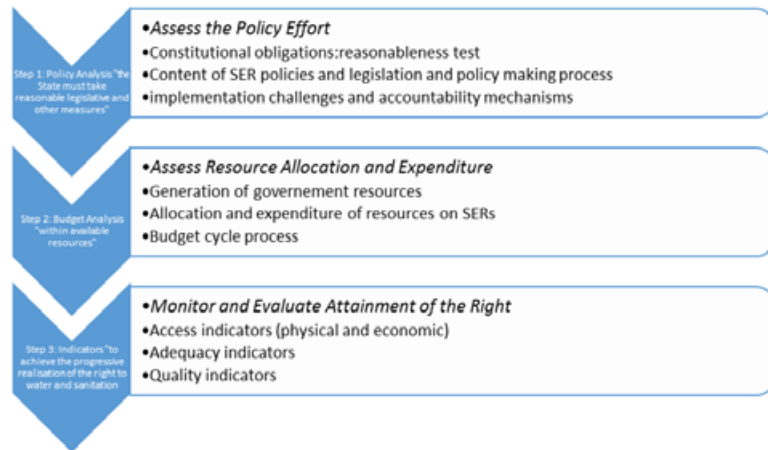
The Socio-Economic Rights Monitoring Tool

SPII's methodology for the SER Monitoring Tool is based on three distinct but interrelated steps. These steps involve an extensive analysis of the policy effort (Step 1); the allocation of resources for expenditure on specific socio-economic rights (Step 2); the analysis of budget expenditure is complemented with the development of statistical indicators to assist monitoring and evaluating obligations of result by measuring the attainment of rights by people on the ground (Step 3).

The purpose of the SER Monitoring Tool goes beyond building a framework for the assessment of constitutional and human rights compliance

² Government of Republic of South Africa and Others v Grootboom and Others 2001 (11) BCLR 1169 (CC), para 35
³ CESCR Statement on the Right to Sanitation- 19 November 2010, www.ihlrc.org/content/e1013.pdf
⁴ CESCR Statement on the Right to Sanitation, Article 12

SER Monitoring Tool: 3 Step methodology



Step 1: Analyse the policy effort

This step entails taking a closer look at the underlying policies and legislation guiding the fulfilment of the right to water and sanitation in South Africa. The reason for this analysis is to measure the progress made by the state in meeting its obligations of conduct. This step essentially provides an assessment of whether the actual content of social and economic policies adequately reflects the Constitution and international treaty obligations that South Africa has ratified. The second part of this step is to evaluate the content and implementation of existing legislation, policy and government programmes to assess what gaps exist. In conducting the assessment on policy gaps, this step adopts a human rights framework of non-discrimination, gender sensitivity and racial sensitivity as well as the right to human dignity, participation, transparency and progressive realisation.

Step 2: Assess Resource Allocation and Expenditure

The second step aims to measure the extent to which budgetary priorities are aligned to the obligations identified in Step 1. This step seeks to measure the effective and reasonable use of available resources towards the progressive realisation of the right to water and sanitation by the government.

Firstly, there needs to be an analysis of the generation of government revenue followed by an analysis of the allocation and expenditure of this revenue to reduce disparities, prioritise the needs of the most vulnerable and disadvantaged groups, and progressively realise the right to water and sanitation. This step uses various budget analysis techniques to monitor planned (budget allocations) and actual resource expenditures at both national and provincial levels and assesses the delivery and implementation of government spending plans as they relate to the realisation of rights. The following are considerations for different levels of analysis and budget tools that can be applied:

- **Adequacy:** Are resource allocations transferred to departments sufficient given the objectives of the programme, likely demand and the costs of intervention, and are they increasing in real terms over time? Are there any regressive spending patterns?
- **Equity and priority of allocations:** Are resources being utilised to prioritise the needs of the most vulnerable and disadvantaged, to reduce disparities in line with the constitutional goal of substantive equality? Is the spread of resources across departments, spheres of government and geographic localities equitable and justified? Are funds available to cover emergency situations?
- **Efficiency:** Is the overall expenditure of the programme efficient given the costs of the intervention? Are institutions capable to spend the funds allocated to them efficiently? Are funds being accounted for and spent on their intended purpose? Are there any under or over-expenditure patterns? Can their cause and impact be identified?
- **Effectiveness:** Is the money being spent on the right things and having the desired results and impact? Is it bringing about tangible improvements in access to the right to water and sanitation? Are targets being met? Is sufficient data available to assess this and is adequate monitoring taking place?

The second step aims to measure the extent to which budgetary priorities are aligned to the obligations identified

Lastly in this step there is an analysis of the budget cycle process from a human rights perspective, focusing on the principles of participation, non-discrimination, transparency and accountability. An assessment of resource availability cannot be separated from an analysis of institutional arrangements, human resources and local capacity which are necessary for the efficient and effective management and spending of budgets.

Step 3: Monitor and Evaluate Attainment of the Right

This last step focuses on measuring the enjoyment of the right to water and sanitation and monitors and evaluates the state's obligation to fulfil the realisation of the right. Here, there is a main focus on the obligations of result rather than conduct placed on the state. It evaluates the state's performance *via* the development of statistical indicators which provide a clearer and more specific illustration of the practical realisation of the right to water and sanitation over time. These outcome indicators make reference to the three dimensions of access (physical and economic), adequacy and quality over time. This requires that quantifiable and replicable indicators (proxies for the different dimensions of SERs) be developed along with agreed benchmarks and targets.

The indicators are aligned to data that is freely and easily available in annual surveys and data sets, and must be capable of being disaggregated by region, race, gender and age, wherever possible and useful. This allows disparities between different population groups or geographical regions to be identified and an assessment of the extent to which progress has been made over time. This data also allows for international comparative analysis to take place.

1.2 Objectives of the tool and end users

The purpose of the SER Monitoring Tool goes beyond building a framework for the assessment of constitutional and human rights compliance, and aims to achieve specific objectives. These include, first, to clarify and unpack the content of SERs and the concomitant obligations they place on the state, and in so doing, to move the country towards greater consensus on what progressive realisation of socio-economic rights means and requires in South Africa. Second, to develop an efficient and useful method for monitoring and evaluating progress made in realising SERs to date and in the future, to create an evidence-base for socio-economic policy-making, advocacy initiatives and legal interventions.

Third, to determine the extent to which organs of the state have respected, protected, promoted and fulfilled their obligations to rights-holders. This involves identifying achievements, deprivations, disparities, and regression to illuminate both causation and accountability in terms of policies, resources spent, implementation and institutional capacity. Lastly, the Tool seeks to make recommendations to broaden and accelerate the progressive – and ultimately universal – enjoyment of all SERs. As the importance placed on stakeholder engagement in the process of developing indicators testifies, the Tool aims to support and be of practical use to a variety of actors, including: civil society, government and policy-makers, advisory and oversight bodies such as the South African Human Rights Commission (SAHRC) and the Department of Planning, Monitoring and Evaluation (DPME).

1.3 Bridging the gap- Community-Base Monitoring

The SER Monitoring Tool places emphasis on the importance of respecting and promoting human rights principles at all stages of the country's development process. However, moving all actors towards thinking about how to develop roadmaps and timeframes for how and by when to achieve universal access to social goods for all citizens can only go so far without inputs from the most vulnerable and marginalised within society. Thus far, the SER Monitoring Tool has emphasised quantitative measures that are well suited to mapping trends and patterns over time, with less focus on qualitative measures to strengthen it. SPII has recognised the need to include citizen-based monitoring (CBM) and other mechanisms for public participation as a way of verifying the actual enjoyment of the socio-economic rights in practice. SPII is currently considering how to incorporate and operationalize a CBM dimension to the SER Monitoring Tool by undertaking a pilot project based in Evaton, Johannesburg (the results of which will be published in February 2017). This is because, in addition to the reasons above, a bottom-

up approach to monitoring the progressive realisation of SERs would provide a very effective mechanism for determining the relationship between individuals and groups with valid claims (right-holders) and the state and non-state actors with correlative obligations (duty-bearers). One of the main causes preventing the realisation of human rights is the failure of duty-bearers to fulfil their obligations combined with a lack of capacity among rights-holders to claim and exercise their rights effectively. Developing these capacities and improving the relationship between these two groups is a cross-cutting and crucial element of the human rights-based approach to development. The pilot project is an 8 months community mapping of human rights challenges using participatory action research in Evaton. Titled 'Voices from the Ground: Community Mapping of Human Rights Challenges in Evaton', the project seeks to bring to the fore the qualitative measures that rights holders use to monitor the states obligation to fulfil human rights.

1.4 The Right to Water and Sanitation: paper overview

This paper provides a comprehensive analysis of the progressive realisation of the right to water and sanitation since the dawn of democracy (since 1994) in South Africa by applying the 3 step methodology (above). The paper begins by exploring the content of the right to water and sanitation and the obligations the right places on specific organs of the state, including international and regional instruments that bind the state to the fulfilment of the right. This is followed by an analysis of existing policy frameworks and legislation that regulates the right to water and sanitation in South Africa.

Secondly, the paper looks at how the South African government has allocated resources towards the attainment of the right to water and sanitation. Looking at the Department of Water and Sanitation's expenditure patterns and budget allocations to water and sanitation at the local level, the paper will establish the level of resource commitment from government towards the progressive realisation of this right.

Thirdly, the paper discusses the process of developing performance indicators for the right to water and sanitation that can be tracked and assessed over time. This will allow for an illustration of the level of enjoyment or the lack thereof of the right to water and sanitation, using evidence to evaluate the state against its constitutional obligations.

The paper concludes with recommendations for accelerating and broadening the progressive realisation of the right to water and sanitation in South Africa.



CHAPTER 2

Establishing the content of the right to water and sanitation and the obligations on the state

Safe, clean drinking water as well as safe and hygienic sanitation is essential to human life. The right to access water and sanitation services has been enshrined in many international and regional treaties and human rights conventions.⁵ The rights to water and sanitation are inextricably linked as the absence of water may hinder the functionality of many sanitation facilities and people will struggle to maintain acceptable hygiene standards without access to water.⁶ The right to water and sanitation contains components central to other human rights such as health, environment, food and nutrition, as well as quality education and housing.⁷ This is in essence a recognition of the right to water and sanitation as a derivative right. In keeping with international and regional human rights norms and jurisprudence, this paper will consider the content of the right to water and sanitation in their specific components. Section 27(1) (b) of the Constitution guarantees the right of access to sufficient water in South Africa along with other socio-economic rights. There are South African policies and legislation that have been established in terms of the right to water and sanitation as well as jurisprudence relating to progressive realisation of the right to water and sanitation. Issues relating to progressive realisation are analysed in this section and this involves availability of resources and minimum core obligations discussed under the rubric of jurisprudential analysis.

The international recognition of the right to water and sanitation is confirmed in the United Nations (UN) and the World Health Organisation (WHO), as well as the Committee on Economic, Social and Cultural Rights (CESCR) in General Comment No. 15. The latter provides guidelines for states on the interpretation of the right to water specifically under Article 11 and Article 12⁸. At a local level, the South African Constitution provides for a right to water along with many legislative and policy frameworks that also recognise the right to sanitation. The purpose of this chapter is to establish the content of the right to water and sanitation by looking at the normative content of the right, as well as the constitutional obligations on the state.

2.1 The Right to Water and Sanitation: Definitions

2.1.1 Elements of the Full Realisation of the Right to Water

With the world's growing scarcity of natural resources such as water, it is imperative for governments to be cognisant of the scarcity factor, and distribute resources efficiently and adequately to residents. In its twenty year review of the state of water in South Africa, the Presidency reported that, "South Africa is a water-scarce country, with very limited availability of raw water..."⁹ This has subsequently led to stress on economic growth. 2015/16 brought the worst drought experienced by South Africa since 1992, which has put a lot of strain on the country's already diminished water resources.¹⁰ The full realisation of the human right to water and sanitation in South Africa requires considerations regarding sufficiency, physical accessibility, safe and quality, as well as dignity of water and sanitation services. These dimensions have been referred to in General Comment 15 of the Committee on Economic, Social and Cultural Rights in determining the normative content of the right to water and sanitation.

“Safe, clean drinking water as well as safe and hygienic sanitation is essential to human life”

⁵ World Health Organisation (WHO) www.who.int/topics/sanitation/en/ (accessed 18 December 2016)

⁶ *Water Supply and Sanitation in South Africa Environmental Rights and Municipal Accountability*, (2009) Lawyers for Human Rights, LHR Publication Series, No. 1

⁷ Langford, M and Kok, A (2005), *The right to water*, in Brand D and Heyns C (eds), *Socio-economic rights in South Africa*, Pretoria University Law Press, p. 192

⁸ Committee on Economic, Social and Cultural Rights General Comment No.15 (2002), *The right to water* (art. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights) UN Document: E/C. 12/2002/11

⁹ *The Twenty Year Review South Africa 1994-2014*, The Presidency Republic of South Africa, pg. 110

¹⁰ *ibid*

Sufficiency

The right to water and sanitation is a substantiated right in that it guarantees sufficient access to the right in the Constitution. The Free Basic Water Policy (which is discussed further in section 2) provides that a basic water supply must have “the prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene.”¹¹ The right to water is expressed in section 27 of the Bill of Rights in the Constitution¹² which also provides for the rights to food, water, health care and social security.

Constitution of the Republic of South Africa, Section 27(1)(b) and (2)

1) Everyone has the right to have access to –

(b) sufficient food and water.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.¹³

The Constitution does not give a description of what constitutes sufficient water, nor does it prescribe specific quantities for sufficient access to water by individuals. Langford & Kok (2005) argue that because section 27(1) (b) refers to ‘everyone’ having the right of access to sufficient water, this “should be interpreted in a universalist fashion. . . .”¹⁴, which means that the right of access to an adequate amount of water is applicable to all people. The National Development Plan (NDP) interprets the right to water in this fashion by aiming to “ensure that all people have access to clean, potable water and that there is enough water for agriculture and industry, recognising the trade-offs in the use of water.”¹⁵ The Committee on Economic Social and Cultural Rights (CESCR) reviews the right to water in light of sufficiency and states:

The water supply for each person must be sufficient and continuous for personal and domestic uses. These uses ordinarily include drinking, personal sanitation, washing of clothes, food preparation, personal and household hygiene.¹⁶

According to the World Health Organisation (WHO), between 50 and 100 litres of water per person per day are needed to ensure that basic needs are met and few health concerns and threats to human life arise.¹⁷ Sufficient provision of water and sanitation must therefore ensure full access to services, as supported through quality infrastructure. In South Africa, legislation establishes a minimum water provision of 25 litres per person per day or 6 kilolitres per household per month¹⁸. This provision is a minimum recommendation and does not indicate it that will provide for an adequate supply for a full and productive life beyond minimal consumption and hygiene requirements. The water source must be situated within 200 metres of a household and is provided for free of charge to indigent households.¹⁹ This is regulated under the Free Basic Services policy and households who are registered on the Municipal Indigent Register qualify for this provision. Sufficiency thus means that the water and the sanitation service provided to people must be able to meet their minimum sanitary and water consumption needs to ensure an acceptable standard of living. The human right to water and sanitation is therefore closely linked to the right to health.

In addition to being sufficient, access to water and sanitation must also be physically and economically accessible and take account of cultural needs and physical vulnerabilities such as disabilities.

Accessibility

The right to water and sanitation means that the services and facilities that provide this right must be accessible in the physical and economic sense. Physical accessibility of water and

“

The Constitution does not give a description of what constitutes sufficient water, nor does it prescribe specific quantities for sufficient access to water by individuals

”

¹¹ The Free Basic Water Policy
¹² The Constitution of the Republic of South Africa, 1996

¹³ Ibid

¹⁴ Langford & Kok (2005), p.198

¹⁵ The National Development Plan: Our Future, Make it Work: Vision 2030, p.154, www.gov.za/sites (accessed 06 January 2016)

¹⁶ Langford M & Kok A (2005), p.198

¹⁷ The Right to Water: Fact Sheet No.35 United Nations Human Rights, 2010. www.ohchr.org/Documents/Publications/FactSheet35en.pdf

¹⁸ The Water Supply and Sanitation Policy of 1994

¹⁹ National Water Policy Review

sanitation services points to the provision of infrastructure that is within an accessible vicinity and reasonable reach by members of households. Physical accessibility also refers to the distance that an individual has to travel to gain access to a water service. The right to water and sanitation considers the supply chain of the right to the end user. Access and use of the water and sanitation services provided must not hinder the health or physical safety of the end user, and any provisions created in the realization of the right must not exclude anyone on the basis of costs, disability, or gender.²⁰ Facilities meant for the provision of water and sanitation must be within easy proximity and distance and the route to the facility must be safe, with no hindrances to accessibility.

The design of the infrastructure that facilitates the rights to water and sanitation should also take into consideration the needs of the elderly, persons with disabilities, children and women. South African legislation provides that “....The minister may prescribe national standards (including norms and standards for tariffs) relating to the provision of water services....”²¹ Facilities must in effect comply with the national standards as set out in legislation such as the Water Services Act.²² General Comment No.15 provides that “facilities and services must be within safe physical reach for all sections of the population.”²³ This means that people’s ability to use a water and sanitation facility must not be threatened by any form of physical insecurity.

Affordability

The right to water and sanitation is essential to human life and economic incapacity should not prevent people from enjoying the right. Economic accessibility of water and sanitation facilities or services means that the price of enjoying this right is reasonable.²⁴ The charge associated with the use of a water and sanitation facility must not exclude people from enjoying the right to water and sanitation. The notion of accessibility is linked to affordability in terms of the right to water and sanitation. For example, the CESCR in General Comment No. 15 clearly states that economic affordability is an impotent component of accessibility. It provides in paragraph 27:

“States parties must adopt the necessary measures that may include, inter alia: (a) use of a range of appropriate low-cost techniques and technologies; (b) appropriate pricing policies such as free or low-cost water; and (c) income supplements. Any payment for water services has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with water expenses as compared to richer households.”²⁵

The South African government recognising the legacies of economic inequalities that have been left by the apartheid government dealt with the question of affordability in respect to those who fail to make the payments in the Water Services Act of 1997. This provides that the “service provider is obliged to ensure that any procedures for the limitation or discontinuation of water must be fair and equitable.”²⁶ This essentially means that in light of economic conditions, those who cannot afford to meet the economic cost of accessing water must not be unfairly discriminated against by being disconnected unfairly without reasonable measures that take into account issues of equitability.

Safety and Quality

The World Health Organisation guides that “safe drinking water is... water that does not represent any significant risk to health over a lifetime of consumption and that is free of



The right to water and sanitation is essential to human life and economic incapacity should not prevent people from enjoying the right



²⁰ United Nations High Commission, 2007, Report of the UN High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments, Annual Report

²¹ Algotsson E & Murombo T (2009), Water Supply and Sanitation in South Africa: Environmental Rights and Municipal Accountability, LHR Publication Series, p.14

²² See Chapter 11 of the Water Services Act of 1997.

²³ United Nations, Committee on Economic Social and Cultural Rights, General Comment 15, Article 12, pg. 17

²⁴ ibid

²⁵ CESCR General Comment No 15 (2002) para 27

²⁶ Moyo, 2013, Water as a human right under international human rights law: Implications for the privatisation of water services, Stellenbosch University <http://scholar.sun.ac.za>, pg. 408

microbial pathogens, chemical and radiological substances.”²⁷ The supply chain of the right to water and sanitation to the end user ensures that access and use of the water and sanitation services provided does not hinder the health or physical safety of the end user. In the Strategic Framework for Water Services, a basic sanitation service includes a sanitation facility that is accessible, sustainable and safe maintenance of the facility to the users. It states that:

A basic sanitation facility is safe, reliable, private, protected from the weather and ventilated, keeps smells to the minimum, is easy to keep clean, minimises the risk of the spread of sanitation-related diseases by facilitating the appropriate control of disease carrying flies and pests, and enables safe and appropriate treatment and/or removal of human waste and wastewater in an environmentally sound manner.²⁸

The provision of water and sanitation must also not have a negative impact on the environment. The Water Services Act of 1997 defines basic sanitation as:

the prescribed minimum standard of services necessary for the safe, hygienic and adequate collection, removal, disposal or purification of human excreta, domestic waste-water and sewage from households, including informal households.²⁹

Water must be safe for drinking and for personal and domestic uses relating to hygiene practices. “It must be free from microorganisms, chemical substances and radiological hazards that constitute a threat to a person’s health.”³⁰

Dignity and privacy

The right to water and sanitation is necessary for the enjoyment of the rights to life, health, dignity and privacy. The realisation of the right to water and sanitation requires adequate access, which means that water can be safely consumed, distributed and available 24 hours a day, and sanitation services have, at least, a ventilated-pit latrine that is safe to use and easy to clean with hygienic services close by.³¹ As the right to sanitation impacts the right to dignity, a human being’s right to access water is a right that deals not only with fulfilling the basic human function of having drinking water, but also extends its function to fulfilling the dignity of persons. General comment No.15 of the CESCR states that:

The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realisation of other human rights.³²

The right to human dignity and privacy is recognised in the Bill of Rights in section 10 (Human dignity) and section 14 (Privacy) as inherent and essential to the right to life.

Section 10: everyone has inherent dignity and the right to have their dignity respected and protected.

Section 14: everyone has the right to privacy, which includes the right not to have-

- (a) Their person or home searched;
- (b) Their property searched;
- (c) Their possessions seized; or
- (d) The privacy of their communications infringed.

The Constitutional Court of South Africa has found that the rights to dignity and privacy had been violated in the case of *Beja and Others v Premier of the Western Cape and Others* when the City of Cape Town implemented a plan of unenclosed toilets that were referred to as “loos with

²⁷ World Health Organisation WHO, Guidelines for Drinking Water-Quality, 2nd Ed, Vol 3, www.who.int/water_sanitation_health/dwq/2edvol3a.pdf?ua=1 (accessed 11 January 2016)

²⁸ Strategic Framework for Water Services, (2003), Water is life, Sanitation is dignity, www.sswm.info/sites/default/files/reference_attachments/KASRIL5%202003%20Strategic%20Framework%20for%20Water%20Services.pdf

²⁹ Water Services Act, sec 3

³⁰ The content of the rights and principles www.righttowater.info/why-the-right-to-water-and-sanitation/the-right-to-water-a-legal-obligation/the-content-of-the-rights-explained/ (accessed 12 January 2016)

³¹ UNICEF, www.unicef.org/was/files/WASH_Annual_Report_Final_7_2_Low_Res.pdf (accessed 18 December 2015)

³² Committee on Economic, Social and Cultural Rights, General Comment No.15 on the right to water, E/C.12/2002/11, adopted January 2003, Article 1

a view". The toilets were close to the road side, in unusable conditions and required people to cover themselves with blankets while they were used, ultimately limiting people's privacy and the right to human dignity. The Beja case is discussed in Chapter 3 of this paper.

Principles of Non-discrimination and Particular Attention to Vulnerable Groups

In addition to the "sufficiency, physical accessibility, affordability, safety, quality, dignity and privacy" requirements in assessing the right to water and sanitation, the African Commission on Human and Peoples' Rights (ACHPR) has posited that governments must abide by the principle of non-discrimination, and pay particular attention to vulnerable groups when making decisions about water and sanitation services.³³

The ACHPR provides a section to address "Vulnerable Groups, Equality and Non-discrimination" when discussing the right to water and sanitation in Article 7 of its 300: Resolution on the Right to Water Obligations.³⁴ The ACHPR emphasizes that vulnerable groups may have particular needs, and that member states must make their facilities and services flexible and appropriate to those needs.³⁵ Further, the ACHPR enumerates a list of vulnerable groups; particular attention must be paid to the needs of people living in rural and deprived urban areas, women and children, indigenous communities and populations, and imprisoned and detained persons.³⁶ In its 2015 *Resolution on the Right to Water Obligations*, the ACHPR added persons with disabilities, elderly persons, and refugees to the list of vulnerable persons.³⁷ In addition, since the ACHPR draws upon the Committee on Economic, Social, and Cultural Rights' (CESCR) General Comment No. 15 when assessing the right to water and sanitation, it is important to note that the CESCR also includes nomadic and traveller communities, and expands the "refugee" category to include asylum seekers, internally displaced peoples, and returnees.³⁸

The South African Constitution embodies similar ideals of non-discrimination under section 9 (the right to substantive equality) in the Bill of Rights.

Attention to vulnerable groups is exemplified in South African jurisprudence in the *Beja* case discussed in section 2 of this paper. The Court held that the city's plan to provide residents with unenclosed toilets was unconstitutional as they did not consider the inability of the poor, the disabled or the elderly to enclose toilets themselves. Further, the Court found that the city did not consider the disparate impact of the unenclosed toilets on women due to gender based violence.

2.2 The right to water and sanitation in international and regional human rights law

The right to water and sanitation has found expression in key international and regional human rights instruments that have been widely ratified by States. The following section looks at defining the content of the right to water and sanitation using key international human rights instruments, including the ICESCR, General comment 15 of the UN Committee on Economic Social and Cultural Rights, and the Convention on the Elimination of Discrimination Against Women (CEDAW). Other key international instruments include the Convention on the Rights of the Child (CRC), International Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Rights of Persons with Disabilities as well as The United Nations Human Rights Council Resolutions on the right to water and sanitation.

³³ Resolution on the Right to Water Obligations - ACHPR/Res.300 (EXT.OS/XVII) 20

³⁴ 300: Resolution on the Right to Water Obligations, ACHPR/Res.300 (EXT.OS/XVII), www.achpr.org/sessions/17th-eo/resolutions/300.

³⁵ Principles and guidelines, par. 92(p)-92(q).

³⁶ Id. at par 92(s)-92(v).

³⁷ 300: Resolution on the Right to Water Obligations, par. 7.

³⁸ CESCR's General Comment No. 15, par 16.

2.2.1 International human rights law

2.2.1.1 The International Covenant on Economic, Social and Cultural Rights (ICESCR) and General Comment No.15 of the CESCR on the Right to Water

General Comment No.15 of the Committee on Economic, Social and Cultural Rights provides the normative content of the right to water by pronouncing the distinct elements of the right. South Africa ratified the ICESCR in April 2015 which commits the State to a number of human rights obligations including the right to water and sanitation. Article 11 of the Covenant expresses:

The States Parties to the present Covenant recognize 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 States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.³⁹

The Committee on Economic, Social and Cultural Rights (CESCR) establishes criteria for the content of the rights contained in the Covenant and speaks about availability, quality, acceptability and accessibility in relation to the right to water.⁴⁰ The CESCR monitors the implementation and state compliance with the ICESCR. In clarifying the normative content of the right to water, the CESCR emphasises that the right contains elements of freedoms and entitlements.⁴¹ It recognises that water should be treated as a social and cultural good, and not primarily as an economic good. This means that states must ensure that people are not excluded from accessing the right to water on the basis of cost. It is important to note that the right to water and sanitation are not explicitly mentioned in the ICESCR, but the CESCR commented that State Parties to the ICESCR must “recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”.⁴² Accordingly, the right to water and sanitation is recognised as extremely important due to its links to other socio-economic rights and the overall enjoyment and fulfilment of life.

Governments that have ratified the ICESCR must recognise their role in making sure that all economic, social and cultural rights are realised. This is expressed in Article 2:

(1) Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.⁴³

Addressing the issue of access to the right to water and sanitation gives a basis to which adequacy and quality of water and sanitation services can be addressed. Murthy (2013) states that the CESCR determined that “the right to water is contained within the right to an adequate standard of living”. Access to clean drinking water and clean, safe sanitation is essential to the realisation of all human rights and the restoration of human dignity.

2.1.2.2 The Universal Declaration of Human Rights (1948)

The Universal Declaration of Human Rights (UDHR) represents the first global expression of human rights on a universal scale. It does not however explicitly mention the rights to water and sanitation. Adopted in 1948, it declared the right to an acceptable standard of living in Article 25 (1) by stating that:

1. Everyone 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

³⁹ ICESCR, Article 11 (1),

⁴⁰ Ibid, CESCR

⁴¹ Article 10 of general comment, CESCR

⁴² General Comment No. 15 (2002) para 3.

⁴³ ICESCR

and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.⁴⁴

The UDHR is not binding on State parties and the guiding principles of the declaration are less restrictive on state parties' sovereignty. Other international instruments have since been developed which impose legally binding obligations on states.

The right to water is given further expression in the following international and regional human rights treaties.

2.1.2.3 Convention on the Elimination of Discrimination Against Women (CEDAW) (1981)

This convention notes the role that States parties must play in ensuring that discrimination against women is eliminated. Through Article 14 (2) it also guarantees women the right to an adequate standard of living and states that women are entitled:

(h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.⁴⁵

The convention also recognises rural women to which it obliges state parties to ensure access to the rights to water and sanitation. Disadvantaged groups such as children, women, the elderly and persons with disabilities have been expressly recognised in international human rights treaties including the following.

2.1.2.4 The Convention on the Rights of the Child (CRC) (1990)

The Convention of the Rights of the Child deals with state parties' obligations to protect and uphold the rights of children. Article 24 of the convention obliges state parties to implement children's rights to health by taking appropriate steps to combat disease and malnutrition within the framework of primary health care. It commits state parties to use readily available technology and provide adequate food and clean drinking water, taking into consideration the dangers and risks of environmental pollution.⁴⁶ South Africa ratified the Covenant in June 1995 before the South African Constitution came into effect in 1996. The Constitution subsequently recognised the rights of children in Section 28 and provides for rights relating to an adequate standard of living but does not overtly state the right to sanitation.

2.1.2.5 Convention on the Rights of Persons with Disabilities (CRPD) (2006)

Under general obligations the UN Convention on the Rights of Persons with Disabilities recognises that State parties must do what they can within their available resources to fulfil the realisation of economic, social and cultural rights of all people including those with disabilities.

Article 4 states:

(2)With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and where needed, within the framework of international cooperation with a view of achieving progressively the full realisation of these rights.⁴⁷

Article 28 states:

States Parties recognise the right of persons with disabilities to social protection and to the enjoyment of that without discrimination on the basis of disability and shall take appropriate steps to safeguard and promote the realisation of this right, including measures to ensure equal access by persons with disabilities to clean water services and to ensure access to appropriate and affordable services, devices and other assistance for disabilities.⁴⁸

⁴⁴ Universal Declaration of Human Rights (UDHR), Article 25 (1) www.claiminghumanrights.org/udhr_article_25.html

⁴⁵ Ibid

⁴⁶ Convention of the Rights of the Child, Article 24, www.ohchr.org/en/professionalinterest/pages/crc.aspx

⁴⁷ United Nations Convention on the Rights of Persons with Disabilities, p. 5

⁴⁸ Ibid,

2.1.2.6 Sustainable Development Goals (SDGs) on water supply and sanitation

At the conclusion of the Millennium Development Goals (MDGs) in 2015, the United Nations General Assembly adopted the 2030 Agenda for Sustainable Development (Resolution A/res/70/1), which announced the Sustainable Development Goals (SDGs). Goal 6 deals with the right to water and sanitation for all.

Goal 6: Ensure availability and sustainable management of water and sanitation for all

6.1 By 2030, achieve universal and equitable access to safe and affordable drinking water for all

6.2 By 2030, achieve access to adequate and equitable sanitation and hygiene for all and end open defecation, paying special attention to the needs of women and girls and those in vulnerable situations.

The rights to water and sanitation are inextricably linked and interrelated as good sanitation practices not only mean having a ventilated pit latrine or a flush toilet, but also means having access to a source of clean water to wash your hands, and it means the ability for women to be able to practice good hygiene during menstruation. The United Nations Human Rights Council (UNHRC) reports that “water and sanitation diseases remain among the major causes of death in children under five as more than 800 children die every day from diarrhoeal diseases linked to poor hygiene.”⁴⁹

United Nations Human Rights Council (UNHRC) Resolution 7/22 (2008) states that “international human rights law instruments, including the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities entail obligations for States parties in relation to access to safe drinking water”⁵⁰. South Africa recognises all the international law instruments contained in this discussion.

The right to water and sanitation has also found expression in some regional instruments. This section is followed by a discussion on regional instruments that deal with the right to water and sanitation on the African continent.

2.1.3 The Right to Water and Sanitation in African Regional Human Rights Law

2.1.3.1 The African (Banjul) Charter on Human and Peoples’ Rights (ACHPR) (1986)

Article 16(2) of the African Charter on Human and Peoples’ Rights proclaims that state parties must take the required measures to protect the health of their people. Access to water is not explicitly mentioned, but the obligation to protect the health and environment would imply that a state party must ensure that its citizens enjoy basic water and sanitation. As the right to water and sanitation is inextricably linked to human health, the Charter stresses the importance of protecting human health and the environment.

2.1.3.2 The African Charter on the Rights and Welfare of the Child (1999)

In 1990, the Organisation for African Unity (OAU), now called the African Union (AU), adopted the African Charter on the Rights and Welfare of the Child, in which they recognised the need for every child to enjoy the provision of safe drinking water.⁵¹ The Charter states that:

Every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health. This includes the provision of nutritious food and safe drinking water as well as adequate health care.⁵²

⁴⁹ UN Human Rights Council, Resolution 15/9 (2010), www.un.org/sustainabledevelopment/wp-content/uploads/2016/08/6_Why-it-Matters-Sanitation_2p.pdf

⁵⁰ Moyo, 2013, Water as a human right under international human rights law: Implications for the privatisation of water services, Stellenbosch University <http://scholar.sun.ac.za>, pg. 75

⁵¹ Article 14, The African Charter on the Rights and Welfare of the Child, www.unicef.org/esaro/African_Charter_articles_in_full.pdf

⁵² Ibid,

It also stipulates that state parties to the Charter, must “.....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.”⁵³

2.1.3.3 Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (2005)

This protocol requires that “state parties shall take appropriate measures to provide women with access to clean drinking water.....”⁵⁴ For women to be able to reach their maximum capacities and participate in functions of society, they need to have this right fully provided for with full access. The Charter states that State parties shall further ensure that women have the right to nutritious and adequate food.

2.1.3.4 Regional Jurisprudence: African Commission on Human and People’s Rights

2.1.4 The Right to Water and Sanitation as a Derivative Right

From a regional perspective, the African Commission on Human and Peoples’ Rights (ACHPR) has interpreted the right to water and sanitation as a derivative right. Rather than commenting on the right to water and sanitation as a right in itself, the ACHPR has found violations of other rights under the African Charter on Human and Peoples’ Rights when member states fail to meet water and sanitation standards. This is in no way different from the CESCR approach, which recognises the right to water and sanitation within the right to an adequate standard of living as contained in the ICESCR.

2.1.4.1 Article 16: Right to Health

The ACHPR most frequently links the right to water and sanitation with the right to health provided under Article 16 of the African Charter on Human and People’s Rights. The ACHPR first explicitly made this link in *Free Legal Assistance Group & Others v. Zaire*, in 2000. Among allegations of arbitrary arrests, arbitrary detentions, torture, and other procedural breaches, the Free Legal Assistance Group also claimed that the then government of Zaire’s failure to provide basic services was degrading.⁵⁵ While the ACHPR ultimately found that the failure to provide basic services such as safe drinking water constituted a violation of article 16, it did not provide a rationale behind this judgment. Similarly, in *Social and Economic Rights Action Centre (SERAC) and Another v. Nigeria*, in 2001, the ACHPR found that the Nigerian military government’s contamination of water sources through the disposal of toxic wastes into local waterways violated the right to health. The ACHPR’s choice not to provide a reasoning for the decision behind these two particular findings could indicate the assumption that the link between water and sanitation on the one hand, and physical and mental health on the other, is so obvious that it does not warrant an explanation. The right to health under the African Charter on Human and Peoples Rights may correspond to the right to health care under Article 27 of the South African Constitution, or the right to an environment that is not harmful to their health or well-being, under article 24 of the South African Constitution.

2.1.4.2 Article 5: Right to Dignity and Right against All Forms of Exploitation and Degradation of Man

The ACHPR has also linked the right to water and sanitation with the right to dignity and the right against all forms of exploitation and degradation of man—article 5 of the African Charter on Human and People’s Rights. Assessments of article 5 allegations appear to entail an analysis of the totality of the circumstances; that is, a consideration of all the circumstances pertaining to the alleged violation, rather than just limited aspects of the situation. It is unclear from existing jurisprudence whether deprivation of water and sanitation alone would constitute a violation of the right to dignity.

⁵³ Article 14 (1)

⁵⁴ The Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa, www.achpr.org/files/instruments/women-protocol/achpr_inst_proto_women_eng.pdf

⁵⁵ *Free Legal Assistance Group & Others v. Zaire*, par 1-4.

In *Institute for Human Rights and Development in Africa v. Angola*, the complainants alleged that the Angolan government breached article 5 when it held detainees in overcrowded and unsanitary centres. The detention centres had formerly housed animals and retained animal residue. One centre provided only two buckets of water for the 500 detainees for the use of sanitation practices when utilising toilets.⁵⁶ In finding that Angola breached the right to dignity under article 5, the African Commission cited the overcrowded and unsanitary facilities, as well as the denial of food and medical attention within the centres. It also cited a previous Commission case noting that article 5 should be interpreted broadly to “extend to the widest possible protection against abuses,” including overcrowded detention conditions.⁵⁷ The Commission does not make explicit whether deprivation of water and unsanitary conditions alone would constitute a violation of the right to dignity, or whether the deprivation of water and unsanitary conditions only constitute a violation of the right to dignity when coupled with other actions, such as the deprivation of food and medical services.

The ACHPR employs a clearer totality of the circumstances test in *Sudan Human Rights Organisation and Another v. Sudan*. The complainant in this case alleged multiple violations under the African Charter on Human and People’s Rights, based on the Sudanese government’s large scale killings, forced displacement, and destruction of public facilities, properties, and disruption of life of indigenous black African tribes in the Darfur region⁵⁸. The ACHPR found that the destruction of properties, water wells, food crops, and livestock constituted cruel, inhuman, and degrading treatment, which is cited as an example of “exploitation and degradation of man” under Article 5. Although the African Commission focused on the destruction of homes when finding an article 5 violation, it nevertheless explicitly cited the destruction of water wells as part of the violation.⁵⁹ Thus, the deprivation of water can contribute to cruel, inhuman and degrading treatment.

The right to dignity under the African Charter on Human and People’s Rights corresponds to the right to human dignity under article 10 of the South African Constitution.

2.1.4.3 Procedural Rights Can Protect the Right to Water and Sanitation

Upholding certain procedural rights can help protect the right to water and sanitation. Procedural rights allow affected individuals and communities to voice their concern regarding particular issues and risks. Protecting procedural rights may help to highlight deprivation of water or sanitation so that authorities can prevent or remedy those situations.

The ACHPR recognizes the protection of procedural rights and their relation to the right to water and sanitation. In its *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and People’s Rights (Principles and Guidelines)*, the African Commission enumerates obligations for national plans, policies, and systems regarding the right to water and sanitation.⁶⁰ Among these recommendations is the obligation to “promote proactive (sic) citizen involvement in defining water and sanitation policies at the local level in a democratic and inclusive manner.”⁶¹ This is equivalent to the right to public participation, embodied under article 13 of the African Charter on Human and People’s Rights. The African Commission also notes that the disconnection of water and sanitation services must entail “timely and full disclosure of information and include legal recourse and remedies as well as legal assistance.”⁶² This is equivalent to the right to receive information under Article 9, and the right to a fair trial under Article 7 in the African Charter on Human and People’s Rights. The ACHPR reiterates the importance of procedural guarantees in its 2015 *Resolution on the Right to Water Obligations*, emphasizing the need to establish participation mechanisms for affected individuals and communities, as well as to protect the justiciability of the right to water.⁶³

⁵⁶ *Institute for Human Rights and Development in Africa v. Angola*, par. 50.

⁵⁷ *Id.* at par 52, citing 224/1998 Media Rights Agenda v. Federal Republic of Nigeria.

⁵⁸ 279/03-296/05 Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) / Sudan, www.achpr.org/communications/decision/279.03-296.05/ *Id.* at par 2.

⁵⁹ Sudan Human Rights Organisation and Another v. Sudan, par. 157.

⁶⁰ *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and People’s Rights*, par. 92.

⁶¹ *Id.* at par 92(i).

⁶² *Id.* at par 92(k).

⁶³ 300: Resolution on the Right to Water Obligations –ACHPR/Res.300 (EXT.OS/XVII), points 4 and 5.

The South African Constitution embodies similar procedural rights through article 19 (political rights), article 32 (access to information), article 33 (just administrative action), and article 34 (access to courts).



Assessing the Legislative and Policy Framework for the Right to Water and Sanitation

Since the dawn of democracy, the South African government has had to deal with a massive backlog of limited access to housing, health care and water and sanitation amongst other socio-economic rights. The legal discriminatory policies implemented by the apartheid government fostered socio-economic inequalities and thus left many people with a huge lack of access to water, sanitation, housing and other socio-economic rights. Policies and legislative mechanisms have been introduced to address the backlog of access to these rights since the dawn of democracy in 1994. The National Development Plan (NDP), an economic and social policy framework that aims to address poverty and reduce inequality is the adopted blueprint of government for development in South Africa. The right to water and sanitation is recognised as a crucial part of this blueprint.

This chapter will look at the development of policy around water and sanitation in South Africa as well as programmes to ensure the progressive realisation of this right. South Africa's policy around water and sanitation has been shaped by four main policy outcomes, namely, the White Paper on Water Supply and Sanitation (1994), the National Sanitation Policy (1996), the White Paper on Basic Household Sanitation (2001) and the Strategic Framework for Water Services (2003), which will be discussed at length. This chapter subsequently goes further to look at key legislation in existence for the governing of water and sanitation. The Water Services Act of 1997, Housing Act of 1997, National Water Act of 1998, Local Government: Municipal Structures Act of 1998, Municipal Systems Act of 2000, National Health Act of 2003, Water Services Amendment Act of 2004 amongst others will be discussed as part of the legislative framework on water and sanitation. Policy, regulation and legislation are key instruments to ensure the realisation of the right to water and sanitation in South Africa. This analysis of the existing legislation and policy will assess the gaps both in principle and in practice that may exist in terms of interpretation of the normative content of the right to water and sanitation.



Since the dawn of democracy, the South African government has had to deal with a massive backlog of limited access to housing, health care and water and sanitation



3.1 Water and Sanitation Policy under the democratic dispensation

3.1.1 The right to water and sanitation in the Constitution of South Africa

The South African Constitution is premised on upholding the rule of law and universal suffrage. Based on this, it seeks to redress the errors of the past through its Bill of Rights. Section 27 of the Constitution recognises the right to water and requires the state to progressively realise this right using its available resources. The relative nature of the right to water and sanitation as it relates to other rights in the Constitution is seen in a number of provisions. Although Section 27 addresses the right to water, it does not explicitly provide for the right to sanitation. The right to sanitation can however be derived from other sections in the Constitution such as environment, housing and health. These Sections are mentioned in the Constitution as:

Section 27: the rights to food, water, health care and social assistance

- (1) Everyone has the right to have access to-
 - (a) Health care services, including reproductive health care;
 - (b) sufficient food and water; and
 - (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

Section 24: Environment

“It has been stated in this report that the all-encompassing commitment of the state is to progressively realise and fulfil socio-economic rights”

Everyone has the right to:

- A. an environment that is not harmful to their health or well-being;
- B. The environment protected for present and future generations.

I. Prevent pollution and ecological degradation

Although the right to a healthy environment has not been fully developed in reference to the right to water and sanitation, it can be argued that access to water and sanitation services would contribute to a healthier environment.

In the *Beja* case, the right of access to the environment was found to be violated when unenclosed toilets were in unsanitary conditions, not suitable for human use and presented a hazard to all people as they had burst pipes overflowing with faeces. The judge found that the rights to environment and health were violated but did not delineate exactly how each one had been violated.

Sections 26(1) and (2): Housing

This section states that “everyone has the right to have access to adequate housing” and that “the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right”. In the landmark *Grootboom* case, the Constitutional Court interpreted the right to housing to include sanitation:

The right of ‘access to adequate housing’...recognises that housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, services, dwelling.⁶⁴

Section 10: Human dignity

This section highlights the importance of human dignity, providing that “everyone has inherent dignity and the right to have their dignity respected and protected”. The South African Human Rights Commission in their 2014 report on the right to water and sanitation notes that if people do not enjoy the right to proper sanitation, they are in essence experiencing a violation of their dignity.⁶⁵ This is essentially based on the notion that it is dehumanising to have to relieve yourself in an open field on the side of the road, or using a toilet with no door or enclosure.

Section 12: Freedom and security of the person

(1)(e) States that “everyone has the right to freedom and security of the person, which includes the right, not to be treated or punished in a cruel, inhuman or degrading way.” This link to sanitation is especially pertinent for women, who may be exposed to attack if toilet facilities are far from their homes. Section 12(2) states that “everyone has the right to bodily and psychological integrity” which includes the right to security and control over their body.

The next section looks at what progressive realisation means for the right to water and sanitation. Moving forward the implication of ‘using available resources’ is analysed and what this means in line with the contentious issue of minimum core.

Progressive realisation and reasonable legislative and other measures

It has been stated in this report that the all-encompassing commitment of the state is to progressively realise and fulfil socio-economic rights as shown in Sections 26 (2) and 27 (2) of the South African Constitution and Article 2 of the ICESCR. The state is required to take reasonable legislative and policy measures “within its available resources” in realising human rights. Similarly, according to the ICESCR, States parties are required to progressively realise rights. This means that, using its available resources, states must work towards realising fully the human rights to water and sanitation as efficiently and speedily as possible.

The state’s obligation to fulfil socio-economic rights has been given content with the adjudication of various cases dealing with such rights in the Constitutional Court. As stated in the Preamble

⁶⁴ Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC) Para 35 (Grootboom).
⁶⁵ South African Human Rights Commission, 2014, Report on the Right to Access Sufficient Water and Decent Sanitation in South Africa, [www.sahrc.org.za/home/21/files/FINAL%204th%20Proof%204%20March%20-%20Water%20and%20Sanitation%20low%20res%20\(2\).pdf](http://www.sahrc.org.za/home/21/files/FINAL%204th%20Proof%204%20March%20-%20Water%20and%20Sanitation%20low%20res%20(2).pdf)

of the Constitution, the overarching goal of the Constitution is to “improve the quality of life of all citizens and free the potential of each person...”.⁶⁶ This is shown in the *Grootboom* case which dealt with Section 26 of the Constitution in terms of the right to adequate housing. Below is a summary of the *Grootboom* case as it appears in McLaren et.al (2015)

*The Court found that the state's housing policy was unconstitutional because it failed to make adequate provision for those in desperate need. However, it declined to indicate precisely how the state should remedy the unconstitutionality of its policies. The Court, which drew upon the guidance and provisions of the ICESCR in parts of its judgement, affirmed the principle of progressive realisation and emphasised that it implied a recognition that the full realisation of SERs will generally not be achieved immediately or even within a short period of time.*⁶⁷

The interpretation of “within its available resources” is such that the State cannot go over and beyond the capacity of its resources to fulfil a right. This means that “both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources.”⁶⁸

The obligation to fulfil mandates government to facilitate the access to the right to water and sanitation according to a number of criteria as it appears in General Comment No.15; these include the issues of availability, accessibility, affordability, quality and acceptability. States must strive to fulfil their obligation to socio-economic rights through progressive realisation while taking cognisance of available resources.

Available resources and the minimum core debate

The Constitutional Court has said that the availability of resources is a determining factor in what can be justified as reasonable action by the state to progressively realise socio-economic rights. The ICESCR holds that State Parties must apply the maximum of their available resources to realise the socio-economic rights of their citizens. In South Africa, the Constitutional Court in *Grootboom* avoided the issue of providing direction or criteria on the obligation to take measures using available resources. The Court stated that “it is essential that a reasonable part of the national housing budget be devoted to this, but the precise allocation is for national government to decide in the first instance.”⁶⁹

The minimum core of the right to water and sanitation

Water and sanitation must be available for each household, educational institution and workplace or its immediate vicinity, in sufficient quantity and on a continuous basis, for personal and domestic use.⁷⁰ This includes drinking, personal sanitation, washing of clothes, food preparation and personal and household hygiene. The World Health Organisation (WHO), provides that between 50 and 100 litres of water per person per day is needed to meet individual basic needs for health concerns.⁷¹ However, States do not have an obligation to provide the prescribed content of 50 litres per person in their countries. The minimum core debate relates to the content of socio-economic rights and the fulfilment of each right while considering resource constraints of countries.

General Comment 3: The Nature of States Parties’ Obligations of the CESCR deals with the legal content of socio-economic rights and provides that States have:

The obligation to ensure the satisfaction of, at the very least, minimum essential levels of the rights.⁷²

The Water Services Act (WSA) provides that the minimum essential levels for access to water in South Africa, as between 25 litres per day within an acceptable standard distance that is within

⁶⁶ Constitution of the Republic of South Africa, Act 108 of 1996

⁶⁷ McLaren D, Moyo B & Jeffery J, (2015), The Right to Food in South Africa: An analysis of the content, policy effort, resource allocation and enjoyment of the constitutional right to food, Working Paper 11, p.20, (available at www.spil.org.za)

⁶⁸ Chenwi, L., (2013), Unpacking progressive realisation, its relation to resources, minimum core and reasonableness and some methodological considerations for assessing compliance, De Jure Law Journal, www.saflii.org/za/journals/DEJURE/2013/39.html

⁶⁹ McLaren et.al (2015), p.22

⁷⁰ Ibid?

⁷¹ The Right to Water Fact Sheet No.35

⁷² CESCR, General Comment No.3

200 metres of a household.⁷³ South Africa does not have an agreed minimum core of socio-economic rights but through legislation such as the Free Basic Water Services Policy 2007, individuals are entitled to a prescribed level of enjoyment of the right to water and sanitation.⁷⁴

While it is very difficult to quantify a minimum standard for sanitation, it can be regarded as “safe, clean, hygienic and reliable toilet facility e.g. ventilated improved pit (VIP) latrine or waterborne sanitation.”⁷⁵ Murthy contends that “there are degrees of fulfilment of a right that a certain minimum level of fulfilment takes priority over a more extensive realisation of the right.”⁷⁶ This means that different countries can decide the standards of fulfilment as according to the needs of its citizens in line with its available resources as was the case in Colombia.

The Courts in Colombia dealing with the minimum core question, adopted “a doctrine of a vital minimum, under which each citizen has a constitutional right to enjoy the necessary means for a basic level of subsistence.”⁷⁷ The Constitutional Court in Colombia enforced the constitutional right to water and the obligation on the state to ensure a minimum amount of water per person on a daily basis. The Court held that “the right to water can be drawn from its connection to the right to life and to the principle of human dignity.”⁷⁸ The minimum core approach obliges States to commit to fulfilling a certain standard or level of a right to water, using its available resources. As shown in the *Mazibuko* case, the Constitutional Court held that it was “institutionally inappropriate for a court to determine precisely what the achievement of a particular social and economic right entails.”⁷⁹

3.1.2 Jurisprudence on the right to water and sanitation in South Africa

The South African Human Rights Commission reports that in 2014, “approximately 1.4 million of households (formal and informal) still have to be provided with sanitation services.”⁸⁰ This is after over 20 years since the first democratic elections took place in the country and a new constitution came into force. The right to water is a guaranteed human right as enshrined in the South African Constitution of 1996. Although the right to water enjoys a substantial amount of legislative tools, the right to sanitation has not been expressively dealt with to same extent. Murthy (2013) contends to this and states, “while the human right to safe drinking water is arguably recognised in international law, the legal status of an independent right to sanitation is less clear...”⁸¹ It is important to look at the South African jurisprudence when analysing the content of the right and this chapter looks closely at some of the cases that shaped the way in which socio-economic rights are looked at in the country.

Johnson Matotoba Nokotyana and Others v Ekurhuleni Municipality and Others (2009)

In *Johnson Matotoba Nokotyana and Others v Ekurhuleni Municipality and Others*⁸², the court dismissed an appeal against the decision of the high court to not grant an order to provide ventilated pit-latrines (VIPs) to the residents of an informal settlement. The applicants who were residents of the Harry Gwala Informal Settlement located in the Ekurhuleni Metropolitan Municipality sought for the municipality to provide one temporary ventilated-pit latrine (VIP) per household, communal water taps, mast-lighting and refuse removal facilities. The High Court granted the provision of communal water taps and refused removal services but refused the mast-lighting and the requested ventilated pit latrine sanitation services. The case was then taken to the Constitutional Court for an appeal on the decision of the South Gauteng High Court.

In bringing their claim to the Constitutional Court, the applicants relied on Chapters 12 and 13 of the National Housing Code as well as the right of access to adequate housing guaranteed by section 26 of the Constitution. They argued that section 26 must be interpreted to include basic

⁷³ Water Services Act

⁷⁴ Free Basic Water: Implementation Strategy: Consolidating and Maintaining, (2007), www.apps.who.int/iris/bitstream/10665/177752/1/9789241569145_eng.pdf (accessed 26 November 2015)

⁷⁵ Ibid

⁷⁶ Murthy (2005), p.4

⁷⁷ Alam S, Atapattu S, Gonzalez C & Razzaque J, (2015), *International Environmental Law and the Global South*, Cambridge University Press, p. 280

⁷⁸ Ibid, p.286

⁷⁹ Ibid, p. 287

⁸⁰ Report on the Right to Access Sufficient Water and Decent Sanitation in South Africa: 2014, South African Human Rights Commission, [www.sahrc.org.za/home/21/files/FINAL%204th%20Proof%204%20March%20-%20Water%20%20Sanitation%20low%20res%20\(2\).pdf](http://www.sahrc.org.za/home/21/files/FINAL%204th%20Proof%204%20March%20-%20Water%20%20Sanitation%20low%20res%20(2).pdf)

⁸¹ Murthy, (2005), p.12

⁸² *Johnson Matotoba Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* (2009), ZACC 33, www.saflii.org/za/cases/ZACC/2009/33.html

sanitation and electricity, and insisted that one VIP latrine per household, or alternatively, two VIP latrines per household, and high mast lighting constituted basic sanitation and electricity. They further argued that the High Court failed to find that the Housing Act, National Housing Code, and Water Services Act imposes mandatory minimum core content as far as free basic sanitation is concerned.

In response to the applicants' concerns, the Court addressed the following five issues:

1. Whether the municipality is obliged by chapter 12 of the National Housing Code to provide the services applicants seek

The Court held that the applicants could not rely on chapter 12 for their claim. Chapter 12 was the result of Grootboom in order to address housing for emergency circumstances. Although the applicants' counsel argued that the living conditions constituted a state of emergency that required application of chapter 12, a state of emergency that invokes application of chapter 12 can only be determined to exist by the MEC, which is not the case here.

2. Whether the municipality is obliged by chapter 13 of the National Housing Code to provide the services applicants seek

The Court held that the applicants could not rely on chapter 13 for their claim. Chapter 13 is based on a principle that capital-based services will not be provided until a decision is made to upgrade a settlement. Only after the layout of the township has been established can infrastructure and engineering services be provided. This is further reinforced by the provisions of the Municipal Finance Management Act which prohibits "fruitless and wasteful expenditure". Here, the decision of the MEC to upgrade the settlement was pending. The applicants therefore could not rely on Chapter 13.

Furthermore, the Court stated that the applicant's insistence of one VIP latrine per household was not justifiable. The applicants asked for temporary sanitation facilities and high-mast lighting in key areas in the High Court but changed their demands to one VIP latrine per household (or per two households) with immediate effect before this court. Their submission could not be considered as it would be inappropriate for the court to adjudicate on this new claim raised on appeal.

3. If municipality is not obliged under chapter 12 or 13, whether they are violating section 26 of the Constitution

The Court held that it would be inappropriate to determine whether the city's policies comply with the Constitution. The applicants contended that section 26 includes the right to basic sanitation and electricity, and urged the court to find that previous decisions interpreting section 26 were incorrect in that they did not give content to the right of access to adequate housing. The Court found that chapters 12 and 13 were created to give effect to section 26 and do not purport to establish minimum standards, but rather regulate the provision of services to a settlement pending an upgrade. Where there is legislation that gives effect to a right, applicants must rely on the legislation or challenge it as being inconsistent with the Constitution. As applicants had recognized this and failed on their challenges to chapters 12 and 13, they could not be permitted to rely directly on the Constitution. It would therefore be inappropriate for this court to consider whether the municipalities' policies comply with the constitution.

4. The relevance of the municipality's new policy

The Court noted the policy and indicated its intention to act speedily in implementing it. Though there were resources available to provide immediate relief to the applicants, there were thousands more in the province and country in similar circumstances. It would be inequitable and unjust only to provide relief to those "who approached a court and caused sufficient embarrassment to provincial and national authorities to motivate them to make a once-off offer of this kind."

5. The delay in approval of the upgrade plan

The Court found that a delay of 3 years was unjustified and unacceptable, violating sections 237 and 26(2) of the Constitution. It ordered the MEC to reach a decision within 14 months.

Comments on *Johnson Matotoba Nokotyana*

This case is a prime example of how the lack of a minimum core has given way to procedural grounds that inhibit the realization of human rights. Here, the Court admits that a delay of three years is unreasonable, and yet gives the City 14 more months to remedy their wrong. The Court acknowledges the injustice of the situation and yet goes on to sentence the people affected by the injustice to endure their suffering for another year and offers no remedy for what they have already undergone. The court further declined to make a ruling on the ratio of toilets per household or the type of sanitation that would be adequate for the Harry Gwala informal settlement. The Court, by limiting the scope of their power to merely assessing the reasonableness of policies that attempt to bring constitutional rights to fruition, allows legal procedural rules to take precedence over constitutionally mandated rights.

Beja and Others v The Premier of the Western Cape and Others (2011)

The right to dignity has played an important role in the Constitutional Court's adjudication of cases relating to the right to water. In *Beja* the right to sanitation was interpreted along with the founding Constitutional provision of human dignity (article 10). The case revolves around 51 unenclosed waterborne toilets that were constructed at Makhaza in Khayelitsha, City of Cape Town, as part of the Silvertown Housing Project (UISP). The city stated that the Housing Code governed this project and therefore relied on the ratio of 1 toilet for every 5 families (1:5) that the Housing Code prescribes as the minimum standard regarding toilets for housing projects. The City referred to these toilets as "loos with a view", and argued that an agreement with the residents had been reached, in which the City would provide a toilet to each household and residents would provide an enclosure for each toilet.⁸³ After a complaint was lodged with the South African Human Rights Commission regarding the right to privacy and dignity, the Commission found that the City had violated the resident's rights to human dignity.

This case brought to light the issue of acceptability and quality for the provision of water and sanitation as well the link to human dignity in the provision of services. In addressing this case Judge Erasmus focused on the following four issues:

1. Whether there was an agreement and if it is enforceable

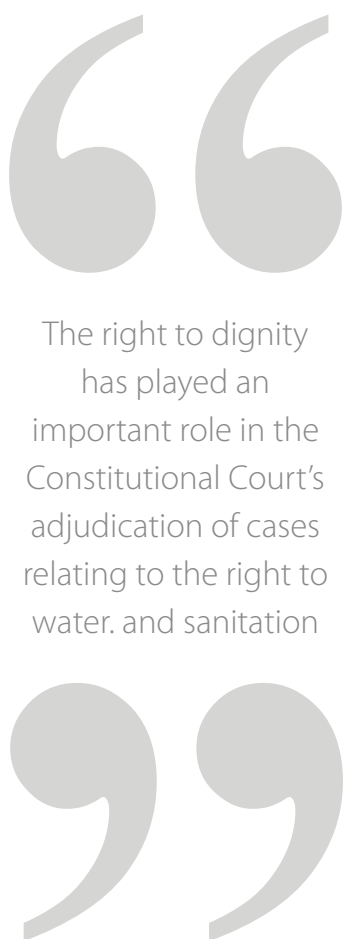
The Court found that if there was an agreement, it was not enforceable. The city alleged that the unenclosed toilets were provided pursuant to an agreement that the community would enclose the toilets themselves and at their own expense. Their evidence of the agreement ("happy letters" with only one negative comment) was insufficient to make the inference that the community agreed simply because they did not object.

The Court held that there are four minimum requirements that must be met for an agreement to be enforceable. The agreement (i) must be concluded with duly authorised representatives of the community; (ii) must be concluded at meetings held with adequate notice for those representatives to get a proper mandate from their constituencies, (iii) must be properly recorded for minutes and publicised; (iv) must be preceded by some process of information sharing and where necessary technical support so that the community is properly assisted in concluding such an agreement.

None of these requirements were met in this matter. Even if these conditions were satisfied, an agreement would not be enforceable if it violates the fundamental rights of minorities within that community.

UISP is premised on engagement with the community, which is interpreted in *Occupiers of 51 Olivia Road 18* as being a meaningful discussion that goes two-ways in order to ensure the city addresses the concerns of the poor, vulnerable, and illiterate. Though the city alleged that 60 people represented the community at their alleged meeting, there was no proof of who was present or what their representative capacity was. Furthermore, even if 60 people were there on behalf of 6000, that was less than 1% and there is no representative status. The meetings were not minuted, and there was no evidence of consideration as to the cost of enclosing the toilets and whether the community could afford to do so. The city violated section 26(2) which requires that a housing programme takes into account of the needs of the most vulnerable

⁸³ *Beja and Others v The Premier of the Western Cape and Others*, (21332/10) [2011] ZAWCHC 97; [2011] 3 All SA 401 (WCC); 2011 (10) BCLR 1077 (WCC) (29 April 2011)



The right to dignity has played an important role in the Constitutional Court's adjudication of cases relating to the right to water. and sanitation

and desperate. Furthermore, the city did not consider the gender impact on women and their vulnerability to gender based violence.

The Court argued that it is uncontested that an agreement must reflect proper consensus achieved with representatives and legitimate community leaders. However, here, the mayor of the city said the unenclosed toilets were an ad hoc decision between community and officials. The agreement was never conveyed to her as mayor, and she agreed that unenclosed toilets would be an affront to human dignity.

2. 1:5 ratio

The Court held that the city's interpretation is inconsistent with the programme itself in terms of how it sought to "cross-pollinate" with the emergency housing programme which was adopted for a different purpose. The city could not rely on the 1:5 ratio to justify the installation of unenclosed toilets as the ratio was identified by the Housing Code as a minimum for emergency housing projects aimed to provide immediate provisions of housing needs. Standards for emergency housing are lower than for projects of a longer duration, such as in this case with the Silvertown UISP. Section 9(2)(a) of the Housing Act states that the participation of a local authority in a national housing programme is to be in accordance with the rules applicable to that particular programme. Here, UISP explicitly states that national norms and standards do not apply to UISP but could serve as a guideline, providing for a toilet and shower. Furthermore, there is no indication of any meaningful community engagement (an essential component of the programme) in implementing the 1:5 ratio.

3. Constitutional issues

After some investigation and testimony regarding the conditions of the toilets, the Court found that there was a violation of rights in terms of sections 10 (human dignity), 12 (freedom and security of persons), 14 (privacy), 24 (environment), 26 (housing) and 27 (healthcare) of the Constitution. It was further deemed inconsistent with Regulation 2 of the Compulsory National Standards promulgated in terms of the Water Services Act for the City to have provided unenclosed toilets to the residents of Makhaza.⁸⁴ The Court decided that the city did not account for the needs for the poorest people's dignity, and any housing development that does not provide for the safety and privacy of its users is inconsistent with section 26 of the Constitution. Additionally, the city had a duty to provide a minimum level of basic municipal services under Section 73(1)(c) of the Local Government: Municipal Systems Act 32 of 2000, and are obligated under the Constitution "to ensure the provision of services to communities in a sustainable manner"³⁶ and "to promote a safe and healthy environment"⁸⁵. The city's decision to install unenclosed toilets lacked reasonableness and fairness, violating constitutional rights. Furthermore, the city violated section 152(1)(e) of the Constitution by not having engaged with the community in implementing these policies.

4. Counter application

The city contended that if they acted unlawfully, their actions were the result of the defects in the housing code. The Court explained that it is not their place to determine what the best policy framework is. The Court is not positioned to determine whether the code is vague, whether it could have been better drafted, whether there are loopholes or could be less rigid, unless any of these infringe on the threshold requirement of reasonableness in the code. In regard to the city's claim that the agreement they entered into was unlawful because it was a defect of the unconstitutionality of the code, the Court held that it had already found the agreement to be unlawful because of the city's failure to comply with the requirements of the code.

Comments on Beja

This case is an interesting example of the role that procedure plays in the realization of constitutionally mandated rights. Though constitutional violations were committed by the city, this case hinges on the city's failure to follow the procedures delineated in the legislation enacted to realize a constitutional right. Had there been a situation where constitutional rights had been violated, but the city complied with legislatively mandated procedures, the case could quite reasonably have come out in favour of the city.

⁸⁴ Beja para 149-150

⁸⁵ Municipal Systems Act 32 of 2000,

City of Johannesburg and Others v Mazibuko and Others 2009

Mazibuko addresses the issue of sufficient access, as dealt with in Section 27 of the Constitution, and as confirmed in the *Grootboom* case. The case posits that there is no positive obligation on the state to immediately deliver sufficient water.⁸⁶

The interpretation of sections 27(1) (b) and 27(2)

The Court stated that the primary question in this case, which was the extent of the state's positive obligations as imposed by sections 27(1)(b) and 27(2), had already been addressed by *Grootboom* and *Treatment Action Campaign No. 2*.

The Court applied this reading to 27(1)(b), stating that 27(1)(b) coupled with 27(2) makes it clear that the scope of the right is not to require "the state upon demand to provide every person with sufficient water without more". The extent of the state's obligation under this right is rather to take "reasonable legislative and other measures progressively to realize the achievement of the right of access to water, within available resources."

The Court held that the "minimum core" argument presented by the applicants that the court should quantify sufficient water for dignified life as being 50 litres a day fails for two reasons:

1. It follows from the reasoning in both *Grootboom* and *TAC no. 2* that section 27(1) and (2) should be read together. This results in a requirement of the state to take "reasonable legislative and other measures progressively to achieve the right of access to sufficient water within available resources", not in the expectation that the state would furnish citizens with sufficient water immediately.

2. It would be inappropriate for courts to make policy decisions. The Court in *Grootboom* held that the threshold for the progressive realization of rights is dependent on varying factors. The court in *TAC No.2* further rationalized that they are ill suited to adjudicate on policy issues, as the Constitution dictates a restrained role for the courts. The Court noted that legislators are better suited to account for varying social factors when implementing programmes. It further argued that fixing a quantified content might, in a rigid and counter-productive manner, prevent an analysis of context. The Court limits its role in policy to assessing context in order to determine whether a government programme is indeed reasonable. Here, the right of access to sufficient water varies depending on circumstance which is not to be determined by the courts.⁸⁷ The Free Basic Water policy provides for acceptable standards and levels of access to the right to water, which means that the Constitutional right to water can only occur if the municipality has failed to provide the free basic access to water up to the level of 25 litres per person or 6 kilolitres per household per month as regulated by the Water Services Act.

Reasonableness:

The Court found that the city's policy was reasonable. The City argued that it was too difficult to figure out which households are deserving of free water and to establish how many people are living on one stand at a given time. Given the continual movement of people within the city, a daily allowance per person would pose an "enormous administrative burden". Further, the Court asserted that there is no constitutional basis for providing a *particular* amount of free water.

The Court argued that raising the free basic water allowance for all (so that it would be sufficient to cover those stands with many residents) would be expensive and inequitable, as it would disproportionately benefit stands with fewer residents. The Court conceded that the unevenness in establishing a fixed amount of water per stand is an inevitable consequence

⁸⁶ *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995), para 58

⁸⁷ *Water Supply and Sanitation in South Africa* Environmental Rights and Municipal Accountability, Lawyers for Human Rights, LHR Publication Series, No. 1, 2009

of universal allocation as those stands with fewer inhabitants have more water per person than those with more individuals per stand. The Court agreed with the City that the current water allowance is generous given the size of the average household in Johannesburg, and establishing a universal allowance per person would be burdensome and costly, if possible at all.

Comments on *Mazibuko*

The Court's rationale in not raising the free basic water allowance in order to prevent inequitable distribution of water (paragraph 88), comes into direct conflict with its concession (89) that uneven distribution of water is an inevitable consequence of establishing a universal water allocation. The Court recognizes that many households in poor areas such as Phiri that are larger than average or have multiple households per stand, are receiving less water per person than the standard supply is meant to allocate per individual, yet decides to keep the water allocation as it is. By this decision, the Court effectively allows households with fewer inhabitants to disproportionately benefit from the universal water allocation on the same basis that it denies households with more inhabitants their right to an adequate amount of water- the prevention of inequitable distribution. While the Court recognizes that inequitable distribution is inevitable, it makes its decision based on the premise that it is preventing inequitable distribution. Accordingly, the Court supports the policy that disproportionately and negatively affects those households in poorer areas, rationalizing that it is not fair to give more to those with sufficient water, at the expense of the poor not having enough water.

In addressing the applicants' concern that it is unreasonable to allocate the same amount of free water for both the rich and poor, the Court says the allocation is reasonable for two reasons. 1. The block tariff structure results in those who use more water paying for the additional water and 2. The City claims it is difficult to determine which households deserve free water. The court fails to recognize that they have not addressed the applicants' concern at all. In fact, that wealthier consumer's pay for their extra water goes to support the applicants' contention that they do not have the means to access the additional water they need and should therefore be given a larger allocation of free water.

The Court further explains that the policy is not unreasonable and inflexible because the city has progressively sought to increase access to water for larger households who are prejudiced by the 6 kilolitre limit. Evidence of this is the City revising its policy in 2007 to allow registered indigent households an extra 4 kilolitres. From this the Court concludes that that the City has continued to review its policy regularly and "undertaken sophisticated research to seek to ensure that it meets the needs of the poor within the city". No evidence is offered to explain what this research is, whether the research adequately targeted relevant issues, and how this research has impacted the changes the government has implemented. Further, there is no explanation of why the resources for this "sophisticated research" could not have been re-allocated to simply counting how many individuals access a particular water stand. Accordingly, it could always be the case that so long as the city implements arbitrary changes (such as re-naming a policy in response to the difficulties with it (92)), the quality of which the court does not even assess, people will have no basis on which to challenge violations of human rights.

There is no transparency in this rationale and it represents the larger problem of a lack of accountability. Earlier in this case, the Court stated that government should be "accountable, responsive, and open" (70), that the standards the government sets allows citizens to hold them accountable through legal challenge if standards are unreasonable, and that a reasonableness challenge "requires government to explain the choices it has made" (71). As exemplified above, the conclusions the Court makes in supporting the reasonableness of the government's policy here are made without sufficient explanation. They are surface level conclusions that do not hold the government accountable for the policies they have chosen to implement and revise.

It is evident that a lack of a minimum core subjects constitutionally awarded human rights to a reasonableness standard that is not rigorous or transparent enough for these rights to bear any real weight. The Court in this case stated that "social and economic rights entrenched in [the] Constitution... contribute to the deepening of democracy. They enable citizens to hold government accountable... through litigation" (71). The outcome of this case however, has rendered social and economic rights meaningless. It is a far cry from the way that even

this Court believes the relationship between the Constitution and the legal system should be characterized.

3.1.3 White Paper on Water Supply and Sanitation Policy (1994)

The 1994 White Paper recognised the role of water supply and sanitation to the process of development in South Africa. Considering the past imbalances of apartheid, the White Paper sought to provide a “framework for ensuring equitable access to water supply and sanitation services.”⁸⁸ It sought to fill the gap for the lack of comprehensible policy in water and sanitation since the apartheid government’s 1956 Water Act.⁸⁹ The explicit inclusion of sanitation in the policy signified the need to see the important link between water and sanitation which speaks to the ‘one right with two components’ formulation discussed in chapter 2 of this paper. The function of the White Paper was also to provide standard outlines for the delivery of services at the local level. Based on the Reconstruction and Development Programme (RDP), the white paper seeks to implement a comprehensive development strategy.⁹⁰ The White Paper also sets out the role of national government, provincial and local government, with national government functioning through the Department of Water Affairs and Forestry (now called the Department of Water and Sanitation). The national government acts as overall manager of the “nation’s water resources in the public interest” to ensure “that all citizens have access to adequate water and sanitation services.”⁹¹

The principles of the policy are premised on the assumption of “universal human rights and the equality of all persons regardless of race, gender, creed or culture.”⁹² The principles are set out as:

1. Looking at basic services as human rights to enable access to a healthy environment while respecting the rights of others.
2. There should be a priority to plan and allocate public expenditure to the most marginalised.
3. Taking into account the issue of limited resources, there should be equitable distribution in the country as according to population requirements.
4. Recognising that the provision of water and sanitation services requires economic capacity to effect sustainability and economic growth.
5. A central principle to payment of usage or ‘user pays’, to facilitate development and sustainable maintenance of water and sanitation services.
6. The development of water and sanitation services cannot occur in isolation with other sectors and thus coordination and collaboration is imperative to find benefits for the development process.
7. Development of water and sanitation should not compromise environmental integrity.

National Sanitation Policy 1996

The National Sanitation Policy of 1996 (hereafter referred to as the Sanitation Policy), came as a result of the 1994 White Paper and deals with the issues of developing a effective, healthy sanitation systems for all in South Africa. The Sanitation Policy dealt with the definition of sanitation and states that it includes, “physical infrastructure, hygiene-related behaviour, disposal of waste water and other solid waste in the context of household institutional activities.”⁹³ The Sanitation Policy also provided a link between sanitation and the right to health. Sanitation services as provided by the state must be cognisant of the impact of sanitation service on the health of the people. The Sanitation Policy also deals with the issue of user fees and recognises that there are members of the society that may not be able to afford the fees. To deal with this the Policy states that “service providers can set-up tariffs and provide a low-cost lifeline for poor households.”⁹⁴

The 1994 White Paper recognised the role of water supply and sanitation to the process of development in South Africa

⁸⁸ Department of Water Affairs and Forestry, Water Supply and Sanitation Policy, White Paper: Water – an indivisible national asset, 1994, www.dwa.gov.za/Documents/Policies/WSSP.pdf accessed 07/01/2016

⁸⁹ Ibid, pg. 3

⁹⁰ Ibid, pg. 6

⁹¹ Ibid, pg. 8

⁹² Ibid, pg. 7

⁹³ Department of Water Affairs and Forestry, National Sanitation Policy, The National Sanitation Task Team, 1996, www.dwa.gov.za/Documents/Policies/National%20Sanitation%20Policy.pdf accessed on 07/01/2016

⁹⁴ Ibid National Sanitation Policy

The Sanitation Policy dealt with the issue of involving people on the ground in planning processes in the development process and not excluding them by taking decisions solely on their behalf. The Policy stresses the importance of good hygiene practices and the building up of knowledge and awareness around the practice of good hygiene with communities. It also notes the importance of building up community behaviour that does not have a negative impact on the environment.⁹⁵ The provision of sanitation services should be cognisant of human health impacts and not have negative effects on the environment.

White Paper on Basic Household Sanitation 2001

Taking into account the gaps of adequate sanitation provision in South Africa, government introduced the White Paper on Basic Household Sanitation in 2001, with the aim of addressing the “.....impact of poor sanitation on health, living conditions and the environment.”⁹⁶ The paper explicitly singles out sanitation of households in rural areas and informal settlements, as these are areas found to be most marginalised in the South African landscape. It is important to note the basic sanitation white paper of 2001 also notes the need to move from the one dimensional view of just the provision of a toilet, but rather as “.....just one element in a range of factors that make up good sanitation.”⁹⁷ This policy paper provides a focus on sanitation strictly on the issue of health and hygiene and the need for improved sanitation to not hinder the health of those that use the sanitation service.

The health problems that are associated with poor sanitation facilities have been outlined as “diarrhoea and dysentery typhoid, bilharzia, malaria, cholera, eye infections and skin diseases...”⁹⁸ amongst others. The provision of improved quality sanitation services has to go hand in hand with hygiene education to create awareness of the health impacts of poor sanitation practices. Poor sanitation not only affects the health of people through bad hygienic practices but the environmental impact of poor sanitation is equally a player in the health compromise. The White paper sets out that there is can be a strong correlation between human activity in terms of disposing of waste and waste water and the environment. Pollution in the water can compromise the quality of the water and cause deterioration.⁹⁹

The Strategic Framework for Water Services 2003

South Africa is a naturally water scarce country which makes it imperative to have a water services strategy. The Strategic Framework for Water Services is an over-arching framework for the implementation of the Water policies. It sets out the role of water services providers and it “addresses the full spectrum of water supply and sanitation services and all relevant institutions.”¹⁰⁰ The Strategic Framework seeks to replace the 1994 White Paper on Water Supply and Sanitation and set out the government’s strategy in terms of the regulation and management of national water resources. The Department of Water Affairs and Forestry (now the Department of Water and Sanitation), is stated as the sole custodian of the national water service which includes sanitation. The purpose of the Department is thus to provide institutional support so as to facilitate the development of “sustainable access” to basic water supply and sanitation through, among others, subsidies to the maintenance and operation costs.¹⁰¹ Using both policy and legislation, government commits to ensure the realisation of the rights to water and sanitation in South Africa. The following section looks at the role of legislation in the realisation of the right to water and sanitation in the South African context.



⁹⁵ Ibid National Sanitation Policy

⁹⁶ Department of Water Affairs and Forestry, White Paper on Basic Household Sanitation, 2001, pg. 5 www.dwa.gov.za/Documents/Policies/SanitationReviewPolicy.pdf Accessed on 07/01/2016

⁹⁷ Ibid White Paper on Basic Household, pg. 5

⁹⁸ Ibid pg. 7

⁹⁹ Ibid pg. 8

¹⁰⁰ Strategic Framework for Water Services: Water is life, sanitation is dignity, September 2003, www.us-cdn.creamermedia.co.za/assets/articles/attachments/00782_waterstrat.pdf

¹⁰¹ Strategic Framework for Water Services, 2003, pg.

3.2 Review of legislation and Regulations on the right to water and sanitation

Much of South Africa's legislation in terms of the right to water and sanitation notes the fact that South Africa is a water scarce country with much of its water resources exhausted amongst the population as well as by industry. The following section looks at some legislative tools in respect to the right to water and sanitation in the democratic South Africa. With respect to enacted laws, the Acts that deal with the provision, regulation and the framework of the right to water sanitation in South Africa are discussed.

The Water Services Act (No.108 of 1997)

The Water Services Act is “the primary legal instrument relating to the accessibility and provision of water services (which include drinking water and sanitation services).¹⁰² According to the Act, it is the responsibility of water services authorities (through water services providers) to ensure access to both water supply services and sanitation services. The objectives of the Water Services Act are set as the provision for:

- (a) *The right of access to basic water supply and the right to basic sanitation necessary to secure sufficient water and an environment not harmful to human health or wellbeing.*
- (b) *The setting of national standards and norms and standards for tariffs in respect of water services.*¹⁰³

The Act defines basic sanitation as the prescribed minimum standard of services necessary for the safe, hygienic and adequate collection, removal, disposal or purification of human excreta, domestic waste water and sewage from households, including informal households. Section 3 of the Act states that:¹⁰⁴

- (1) *Everyone has a right of access to basic water supply and basic sanitation.*
- (2) *Every water services institution must take reasonable measures to realise these rights.*
- (3) *Every water services authority must, in its water services development plan, provide for measures to realise these rights.*
- (4) *The rights mentioned in this section are subject to the limitations contained in this Act.*

National Water Act (No. 36 of 1998)

The National Water Act was enacted to set out the role of government in terms of managing water resources for public benefit. The State's role as the custodian of the national water resources is to “.....ensure that water is protected, used and developed, conserved, managed and controlled in a sustainable and equitable manner.....”¹⁰⁵ The Act also mandates government to develop in consultation with relevant stakeholders a water resource strategy in line with the framework of the Act and its purpose. The National Water Act of 1998 must be read with the Water Services Act, which is primarily concerned with the issue of access to water services by individuals in line with constitutional obligations.¹⁰⁶

Section 3 of the National Water Act reaffirms the role of government as the public trustee of South Africa's water resources and provides a legal framework for the management of water resources, which includes the allocation of water for beneficial use and the redistribution of water.¹⁰⁷

Municipal Systems Act (No. 32 of 2000)

Governance in South Africa is founded on a cooperative model between national, provincial and local spheres of government, each of which has responsibilities under the Constitution and legislation for the protection and fulfilment of rights. Section 151 (1) of the South African Constitution recognises the objects and functions of a municipality and states:

¹⁰² Centre for Applied Legal Studies submission to the South African Human Rights Commission (SAHRC), 18

¹⁰³ Water Services Act 108 of 1997, pg. 8

¹⁰⁴ Water Services Act 108 of 1997

¹⁰⁵ National Water Act 36 of 1998, Section 3

¹⁰⁶ Ibid

¹⁰⁷ Water Supply and Sanitation in South Africa Environmental Rights and Municipal Accountability, Lawyers for Human Rights, LHR Publication Series, No. 1, 2009.

- (c) *The objects of local government are to ensure the provision of services to communities in a sustainable manner.*

The Municipal Systems Act recognises the establishment and status of municipalities in South Africa and notes that municipalities must ensure that they, “review the needs of the community, its priorities to meet these needs, processes for involving the community, organisational and delivery mechanisms for meeting the needs and its overall performance in achieving the objectives.”¹⁰⁸ Adopting a developmental approach to municipal planning, the Municipal Systems Act provides for the use of the Integrated Development Planning (IDP) process so as to effect community involvement and participation in planning and decision making processes that municipalities engage in the provision of essential services in communities.¹⁰⁹

Municipal Finance Management Act (No.56 of 2003)

The Municipal Finance Management Act provides for the fiscal management and budget management of municipalities, as approved and guided by the National Treasury. In terms of this Act, a municipality can only acquire public spending according to an approved budget.¹¹⁰ In line with the Integrated Development Plan (IDP), a municipality must take reasonable steps to have realistic revenue and expenditure projections.¹¹¹

3.2.1 Conclusion and recommendations

The legislation and policy measures in relation to water and sanitation discussed in this section is not exhaustive: government has put in place a number of laws and other policy frameworks not discussed here. Legislation provides the duties and responsibilities for water service providers in dealing with the right to water and sanitation, and policy provides the framework to which the right to water and sanitation is realised in the country. Municipalities bear the duty to deliver basic essential services to communities they serve and it is important to adopt an inclusive approach with the community in the delivery of basic services such as water and sanitation. Integrated Development Plans (IDPs) provide guidelines which municipalities must follow to ensure community participation in the planning, monitoring and evaluation processes of municipalities. The enacted laws can assist communities, interested lobby groups to advocate for the realisation of the right to water and sanitation in respect to the Constitution of the Republic of South Africa.

In the judgement of *Mazibuko*, it is argued that there is “no constitutional core minimum right to water”, rather it is the role of the courts to help the state in the progressive realisation of the right to water. Reasonable access is not the prerogative of the Courts, but is rather the duty of the legislature and executive to advance the provision of services up to the level and standard that will guarantee sufficiency and accessibility to citizens. Government’s obligation to the right to water is the obligation to respect this right by making sure that access is not prohibited on the basis of affordability or any prevention of access. It also has the obligation to fulfil the right to water and sanitation by ensuring that through legislation and other measures, there is a provision of standard and sustainable access to water and sanitation facilities. The obligation to fulfil also deals with the issue of the minimum core approach, which is exemplified in the *Mazibuko* case where Courts decided to relieve themselves of the responsibility to determine the minimum core of the right to water in South Africa.

This Chapter has discussed the normative content of the right to water and sanitation, dealing with the rights in its two component nature by not separating the rights. This lies in the fact that water is essential to the realisation of the right to sanitation.

In general, the full realisation of the right to water and sanitation requires active consideration and fulfilment of the principles of sufficiency, accessibility, safety and quality, and dignity and privacy. Furthermore, the right to water and sanitation can function as a derivative right to the rights of physical and mental health, and dignity. It is also important to remember that

¹⁰⁸ Algotsson E & Murombo T, (2009), Water Supply and Sanitation in South Africa: Environmental Rights and Municipal Accountability, LHR Publication Series

¹⁰⁹ Local Government: Municipal Systems Act (No.32 of 2000), Chapter 5

¹¹⁰ Algotsson E & Murombo T, (2009), Water Supply and Sanitation in South Africa: Environmental Rights and Municipal Accountability, LHR Publication Series

¹¹¹ Ibid

certain procedural rights may help protect the right to water and sanitation by promoting participation of affected individuals and communities.

International, regional, and domestic instruments and jurisprudence all support to some extent state obligation to protect the right to water and sanitation. However, especially in the context of South African jurisprudence, it appears the “minimum core” or baseline that a state must provide varies based on state context and capabilities.

Beja, Johnson, and Mazibuko are examples of how the reasonableness standard and procedural concerns have taken precedent over, and at times hinder, the progressive realization of constitutionally mandated human rights. It is clear from these cases that there is much left to be desired in the realization of and access to human rights. Human rights should have a sufficient basis to stand alone, and a substantive right should not give way to a procedural concern. The lack of a minimum core however, prevents citizens from effectively challenging the government when their rights have been violated, acquiescing to evaluations of reasonableness and procedure.

3.3 Access to water and sanitation in South Africa: role of national, provincial government and local government

South Africa’s governance system consists of national, provincial and local spheres of government, which are interrelated and interdependent to each other.¹¹² The three spheres fulfil their own constitutional mandate in accordance to policy and legislative authority set out by the executive and parliament. Looking at the principles of co-operative government and intergovernmental relations, Section 41 of the Constitution states:

- (1) All spheres of government and all organs of state within each sphere must-
 - (a) Preserve the peace, national unity and the indivisibility of the Republic;
 - (b) Secure the well-being of the people of the Republic;
 - (c) Provide effective, transparent, accountable and coherent government for the Republic as a whole;
 - (d) Respect the constitutional status, institutions, powers and functions of government in the other spheres;

In respect of water and sanitation, the Department of Water and Sanitation has the sole mandate of being South Africa’s “...national agency responsible for formulating and implementing water policy.”¹¹³ This section looks at the right to access to water and sanitation and the role that government plays in the provision in terms of the three spheres of government.

The 2003 Strategic Framework for Water Services provides the institutional framework for water service provision in South Africa. This section provides an overview of the role of the three spheres of government, which are namely, national government, which acts as the national agency for water resources and sanitation in the country, the provincial government, which oversees how local government functions, and the local government through municipalities, which are responsible for the provision of the water and sanitation services to communities.

3.3.1 National Government

The Department of Water and Sanitation is the executive arm of government, and it plays a key role in implementing policy and legislation on water and sanitation in accordance with the Constitution in South Africa. The Minister is the national custodian of the nation’s water resources and must “...ensure the availability and supply of water at national level, facilitate equitable and sustainable social and economic development and ensure the universal and efficient supply of water services at local government.”¹¹⁴ The areas in which the national legislature has competence are listed in terms of Schedule 4 of the Constitution. Water does

¹¹² Chapter 3, Constitution of the Republic of South Africa, 1996

¹¹³ Gowland-Gualteir, A., (2007), South Africa’s Water Law and Policy Framework; Implications for the Right to Water, IELRC Working Paper

¹¹⁴ Issa, L. O., et.al, (2014), Role of the Three Tiers of Government in the Provision of Sustainable Agricultural Extension Service in Nigeria

not hold an explicit mention in Schedule 4 or schedule 5, which means that it falls under the legislative authority of national government. As it currently stands, “any matter that is not listed in both schedules and that has not been assigned to the provinces remains an area of national legislative competence.”¹¹⁵

The National Water Act (NWA) specifies the legal framework for the management of water resources, which lies at the competency of national government.¹¹⁶ The Act¹¹⁷ specifies the powers of the Minister as the custodian of water resources through the national department and the powers of the director general. It also provides a framework in terms of powers relating to catchment management agencies, which are “statutory bodies established to manage water resources and coordinates functions of other institutions involved in water related matters within water management areas.”¹¹⁸ These catchment management agencies oversee the process of water related matters with other institutions that have the same and similar functions under water resource.

3.3.2 Provincial government

The competence of the provincial government is provided for in the Constitution under Section 104 and it is read with Schedule 4 and 5. Section 104 (1) (b) states:

- (1) The legislative authority of a province is vested in its provincial legislature, and confers on the provincial legislature the power-
- (b) to pass legislation for its province with regard to-
 - (i) any matter within a functional area listed in Schedule 4;
 - (ii) any matter within a functional area listed in Schedule 5;
 - (iii) any matter outside of those functional areas, and that is expressly assigned to the province by national legislation;

Provincial legislative authority has the power “...to legislate on any Schedule 4 and 5 matters...”¹¹⁹ These matters, as implemented by local government municipalities are legislated under the authority of the provincial government. Provincial government does not have a direct role in the provision of water and sanitation but has authority to legislate for municipalities who are responsible for the provision of water and sanitation in communities.

Every province has its own legislature, elected in terms of proportional representation and can enact provincial laws that municipalities should adhere to.¹²⁰ The provincial government plays a role of oversight and regulation for the conduct of municipalities in provinces. The provincial government also has legislative and executive powers parallel with the national government over matters such as agriculture, cultural affairs, education, environment, human settlements, regional planning and development, urban and rural development, welfare services, etc. These matters are concurrent with Schedule 4 and 5 where the province has legislative competence over matters related to water and sanitation services¹²¹ such as environment and housing.

3.3.3 Local government

The Constitution gives national and provincial government authority to regulate local government. Local government in South Africa is tasked with the function of being the administrator of services to the community. Guided by Part B of Schedule 4, local government has “to administer water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems.”¹²² The function of local government is carried out by constitutionally established municipalities which are regulated under Chapter 7 of the Constitution. Section 152 specifies the objects of local government and states:

- (1) The objects of local government are-

¹¹⁵ Algotsson E & Murombo T, (2009), Water Supply and Sanitation in South Africa: Environmental Rights and Municipal Accountability, LHR Publication Series, p. 13

¹¹⁶ Ibid, p.14

¹¹⁷ The National Water Act, 36 of 1998

¹¹⁸ Water Catchment Agencies, Department of Water Affairs, www.dwa.gov.za/CM/cma.htm accessed on 1 April 2016

¹¹⁹ Ibid, p.13

¹²⁰ Provincial Government, www.gov.za/about-government/government-system/provincial-government

¹²¹ Schedule 4-Functional Areas of Concurrent National and Provincial Legislative Competence, Part A and Part B www.nelsonmandela.org/omalley/index.php/site/q/03lv02167/04lv02184/05lv02193/06lv02210/07lv02214.htm Accessed 11 April 2016

¹²² Algotsson E & Murombo T, (2009), Water Supply and Sanitation in South Africa: Environmental Rights and Municipal Accountability, LHR Publication Series, p. 13

- (a) To provide democratic and accountable government for local communities
- (b) To ensure the provision of services to communities in a sustainable manner;
- (c) To promote social and economic development;
- (d) To promote a safe and healthy environment; and
- (e) To encourage the involvement of communities and community organisations in the matters of local government.

The Constitution goes further to obligate the municipality to use its available resources to achieve the above objects. This obligation was highlighted in the *Mazibuko* case, where the court held that a municipality, "...has executive authority in respect of, and has the right to administer, among others, water and sanitation services (Section 156 (1)) and may make by-laws for the effective administration of these services (Section 156 (2))".¹²³ Municipalities can employ some of the available funding mechanisms afforded for local government such as the Municipal Infrastructure Grant, which is a "conditional grant for capital investment provided by national government".¹²⁴ This grant is intended for municipalities to use for infrastructure that will support poor households. Other mechanisms such as the equitable share and the local authority revenue also seek to serve the function of lifting the cost burden of basic services from the poor.

3.3.4 Conclusion and recommendations

The three spheres of government must fulfil their roles and responsibilities to ensure quality and adequate access to water and sanitation in South Africa. As guided by the Constitution, both provincial and local government carry the responsibility of ultimately providing clean, safe access to quality water and dignified sanitation to communities including informal settlements. This provision must not be detrimental to the environment or the health of those that utilise the services. People must also not be denied access to water and sanitation services if they are too poor to afford the provision of the service. Government has to address and find ways to integrate different government departments as well as the spheres of government together so that there can be an effective delivery and access to basic services such as water and sanitation. The role of affordability is discussed in the next section in terms of its relation to the right of access to water and sanitation in South Africa.

3.4 Affordability: the role of costs on the right to water and sanitation in South Africa

The provision of water and sanitation services comes with the installation of very expensive infrastructure and it is required that users must pay for the consumption of water to the municipalities. Taking into account the disempowered poor majority, who do not have the sufficient capacity to pay for water services, the South African government in 2000 introduced the Free Basic Services policy as part of the poverty alleviation strategy. The idea behind the Free Basic Water policy is to ensure that no one may be excluded from accessing water on the basis of affordability and that everyone must access 6000 litres (or 6 kilolitres) per month free of charge per household.¹²⁵ The right to access to water and sanitation is not an absolute right, as it is subject to government using its available resources to progressively realise these rights. The Department of Water and Sanitation acts as a national economic regulator in terms of reviewing of investment decisions of water service providers and tariffs. This section provides an analysis in the regulation of costs as they impact on the right to access water and sanitation in South Africa.

3.4.1 User fees

The free basic water services does not override the custom of user pay fees. Excess consumption is liable for payment to municipalities, while those that cannot afford to pay are not excluded

¹²³ Ibid, p.13

¹²⁴ Water and Sanitation, City of Cape Town, Preliminary Draft, March 2008, www.nepadwatercoe.org/wp-content/uploads/Water-and-Sanitation-Service-Standards.pdf, p.6, Accessed on 11 March 2016

¹²⁵ Free Basic Water Implementation Strategy of 2007

from accessing the bare amount of quantity to sustain their lives. Although the Free Basic Water policy guarantees 6 kilolitres of free water by a household per month, anything consumed beyond this is subject to payment as according to the tariffs set by water service authorities.¹²⁶ The free basic water policy provides steps to implementation that must be taken to achieve the objectives of free basic water and sanitation and these are named as:

1. Understand consumers and consumption
2. Assess technical options
3. Assess links to sanitation
4. Establish the institutional framework
5. Understand costs
6. Review income sources
7. Select poverty relief option
8. Complete pricing policy
9. Establish financial arrangements with water service providers (WSPs)
10. Set up management arrangements

The Strategic Framework of 2003 was introduced to provide a governance framework for water and sanitation service provision in South Africa. It stipulates tariff principles and how they should be implemented in light of the free basic water and sanitation policy. It also takes into consideration the economic landscape in communities and it states that “tariffs paid should be pro-poor in their orientation and should seek to ensure that a minimum basic level of water supply and sanitation service is affordable”.¹²⁷

The National Water Act of 1998, sets out a framework for which the minister may set tariffs for water use to consumers. It states that “...the minister may from time to time, after public consultation establish a pricing strategy which may differentiate among geographical areas, categories of water users or individual water users”. User charges as set according to the water pricing strategy are used to discourage waste and incentivise effective use of water resources.¹²⁸ User fees are also used as a way for local municipalities to generate financial revenue, so as to maintain water infrastructure and continue provision of basic services. User fees apply to all consumers who consume water and sanitation services as provided by local government. Indigent people are covered for under the Municipal Indigent System and the Free Basic Services Policy.

3.4.2 Free Basic Water

The provision of basic services rests as a level function of local government through municipalities. The municipalities perform this function based on the Municipal Systems Act 32 of 2000 to ensure that there is a minimum level of basic municipal services to the local community, including ensuring access to those that cannot afford to meet the basic tariffs of these services as set by municipalities.¹²⁹ The legal outline for the application of Free Basic Water is that of tariff setting which is guided by the Constitution, The Municipal Systems Act of 2000 and the Water Services Act of 1997 which all provides a framework for setting tariffs. It seeks to provide priority access to basic water and sanitation services to poor households in South Africa.

The Free Basic Water policy, aims to ensure that affordability is not a barrier to access to safe water. One of the main aims of the policy is “the right of access to basic water supply and the right to basic sanitation necessary to secure sufficient water and an environment not harmful to human health or well-being.”¹³⁰ The Water Services Act prescribes the role of water service authorities and states:¹³¹

¹²⁶ Ibid, p. 33

¹²⁷ Strategic Framework for Water and sanitation policy, 2003

¹²⁸ Chapter 5, Financial Provisions, The National Water Act, 36 of 1998

¹²⁹ Socio-Economic Rights Institute, 2013, Targeting the poor? An analysis of Free Basic Services (FBS) and Municipal Indigent Policies in South Africa, p.15

¹³⁰ Section 2 (a) of the Water Services Act, in SERI, 2013, Targeting the poor? An analysis of Free Basic Services and Municipal Indigent Policies in South Africa, p.16

¹³¹ Water Services Act, 108 of 1997

- (1) Every water services authority has a duty to all consumers or potential consumers in its area of jurisdiction to progressively ensure efficient, affordable, economical and sustainable access to water services.
- (2) This duty is subject to:
 - (a) Availability of resources
- (3) In ensuring access to water services, a water services authority must take into account
 - (e) The need for low costs

According to the Water Services Act,¹³² "... everyone has a right of access to basic sanitation..." which is the approved minimum standard of services required for safe and hygienic collection, removal, discarding of human excreta, domestic waste water and sewage from households including informal households.¹³³ The Free Basic Sanitation Implementation Strategy is aimed at providing free basic sanitation to all citizens by 2014.¹³⁴

3.4.3 Funding mechanisms

The Free Basic Water 2007 Implementation Strategy sets out the framework for financing water services in South Africa. The Implementation Strategy outlines three basic forms of funding for the provision of adequate basic water supply and sanitation services to all and these are named as (1) funds for capital investment in infrastructure to extend basic services to those without adequate service, (2) funds to ensure that the ongoing provision of basic water services is affordable to the poor, and (3) funds to develop the capacity of water services institutions.¹³⁵

National government through the Department of Water and Sanitation subsidises operating costs to local government to support the provision of affordable basic water and sanitation to poor households. The Free Basic Water Implementation Strategy gives guidance in terms of water service provision to communities by local government, stating that:

Subsidies should be targeted to poor households, in the first instance for the provision of basic services where these are inadequate (capital subsidies), and in the second instance in support of the affordability of the ongoing provision of basic services (operating subsidies).

Local government also has funding mechanisms that are available for the provision of water and sanitation in South African communities. The local government municipality acting as water service authorities have access to the Municipal Infrastructure Grant (MIG), which is a conditional grant that is preserved for capital investment from the national government. It is intended to provide capital finance for infrastructure in municipalities for poor households. Another funding mechanism that can be used by municipalities is through the equitable share which is used for subsidising operating costs as well as locally generated revenue which municipalities can use to cross subsidise poor households. The delivery of services in communities rests as a function of municipalities as described in Section 152 of the Constitution and municipalities as a function of local government must use these funding mechanisms to ensure that there is access to basic services in communities.¹³⁶

3.5 The Right to water and sanitation in informal settlements

In October 2014, the national Minister of Human Settlements, Lindiwe Sisulu announced that a new policy stance towards the provision of housing to South Africans. She was quoted saying:

Anybody below the age of 40 will need to understand that they are not our priority unless they are special needs or are heads of child-headed households.

¹³² Ibid

¹³³ SERI, 2013, Targeting the Poor? An analysis of Free Basic Services and Municipal Indigent Policies in South Africa, p.18

¹³⁴ Ibid, p.19

¹³⁵ Free Basic Water Implementation Strategy of 2007, p. 30

¹³⁶ Water and Sanitation Service Standard, Preliminary Draft, 2008, City of Cape Town, www.nepadwatercoe.org/wp-content/uploads/water-and-sanitation-service-standards.pdf

Our intention in giving free houses was to right the wrongs of the past and make sure that we can give our people dignity. And that group of people is not the people below the age of 40.¹³⁷

The above statements, considering the long history of violent land dispossession in South Africa and continuing inequality, have serious ramifications to the constitutional obligations to the state in terms of addressing socio-economic rights in South Africa. Section 26 of the Constitution guarantees everyone the right to housing:

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

The right to access housing holds a direct link to the right to access water and sanitation. This essentially means that those who do not have access to formal functional housing whether private or public, face a threat to their right to access water and sanitation. Such are those that reside in the non-formal settlements or those known as informal settlements. The Housing Development Agency¹³⁸ has a mandate to assist the state with the improvement of informal settlements. Statistics South Africa defines informal settlements as “unplanned settlements on land which has not been surveyed or proclaimed as residential, consisting mainly of informal dwellings.”¹³⁹ The provision of water and sanitation in informal settlements remains a challenge for municipalities due to the fact that these settlements are often seen as temporary and illegal. Many of these settlements have been in existence for many years and are still receiving temporary or emergency water and sanitation services due to slow delivery processes from municipalities. It is important to look at what legislation is available in terms of informal settlements in South Africa.

The National Housing Code: Upgrading of Informal Settlements

The South Africa Human Rights Commission states that “*water is life and sanitation is dignity*”¹⁴⁰, this means that for every lack of access to these for people living in informal settlements, their right to life and dignity is violated. The upgrading of informal settlements is dealt with as a function of the Department of Human Settlements under the National Housing Code, which provides a national framework for the national housing policy, it establishes a housing vision that advocates for socially and economically integrated communities located in areas of efficient access to economic, social, educational and cultural amenities.¹⁴¹ The framework has a vision concerned with the “... establishment of viable, socially and economically integrated communities...”¹⁴²

Emergency Housing

Part 3 of the National Housing Code¹⁴³, recognises 3 categories that form part of emergency housing assistance by government. The first category is on-site assistance, where the settlement is not located on land that is privately owned thus has no legal hindrances or not suitable for habitation. This means that this settlement can be upgraded over time and formalised through proper formal housing programmes.¹⁴⁴ This essentially means that in this type of settlement, there may be a need for relocation but this does not mean that assistance from government is prohibited. The second category is for settlements where relocation is required for households to be “...resettled in the future when a permanent solution becomes available.”¹⁴⁵ Residents of informal settlements can access basic services such as water and sanitation under Part 3 of the National Housing Code as part of a category of emergency housing. The above mentioned two categories deal with the provision of assistance in terms of housing and services for informal

¹³⁷ The Citizen, 21 October 2014, No Free Housing for u40s- Lindiwe Sisulu, www.citizen.co.za/261672/free-housing-u40s-lindiwe-sisulu Accessed on 29/03/2016

¹³⁸ The Housing Development Agency was established in 2009, to act as an agency that provides well located land and buildings available for the development of housing and human settlements.

¹³⁹ Statistics South Africa, General Household Survey, 2014, www.statssa.gov.za/publications/P0318/P03182014.pdf Accessed 29/03/2016

¹⁴⁰ South African Human Rights Commission, 2014, Report on the right to access sufficient water and decent sanitation in South Africa: 2014

¹⁴¹ National Housing Code of 2009

¹⁴² Ibid

¹⁴³ Ibid,

¹⁴⁴ Housing Development Agency (HAD), 2012, Implementation of Emergency Housing, Guidelines for the Implementation of the Emergency Housing Programme, www.thehda.co.za/uploads/files/HDA_Implementing_Emergency_Housing_Guidelines.pdf . p.

¹⁴⁵ Ibid, p.10

settlements and category three only applied to formal settlements that require assistance in terms of repairs or rebuilding of formal housing areas.

3.6 Case Study: Mshengu Toilet Social Audit

The Social Justice Coalition has played a prominent role in exposing the failure of the City of Cape Town to provide adequate, quality and accessible sanitation for people living in informal settlements in Cape Town. Through the use of community-based approaches and participatory research methods, the Social Justice Coalition worked with the community of Khayelitsha to conduct a community social audit on the state of sanitation in the Khayelitsha Informal settlements in Cape Town. The provision of sanitation in informal settlements is a function of municipalities and it is the prerogative of the municipality to decide on the type of sanitation services that will be provided. This has been the case in terms of the Mshengu Toilets in Khayelitsha. This section looks at what the SJC calls the Mshengu Toilet Social Audit, undertaken in 2013 in Khayelitsha.

The Mshengu toilet is a portable toilet provided by the City of Cape Town through a service provider called 'The Mshengu Toilet Hire', which focuses on providing sanitation services and products in the Western Cape Province. The company signed a contract with the City of Cape Town in June 2010 to provide around 5000 chemical toilets to informal settlements across the city.¹⁴⁶ The chemical toilets that Mshengu Toilet Hire was contracted for, is one that is classified as the 'basic range'. This is a type of chemical toilet that is "...ideally suited for use in informal settlements and construction sites" and it is a single toilet used in conjunction with chemical agents, that is supposed to serviced regularly for waste removal and cleaned regularly too.¹⁴⁷

The social audit was conducted by residents of the RR section, Green Point, Taiwan and Emsindweni informal settlements in Khayelitsha. It was found that the City of Cape Town has paid R126 million to the company to provide the temporary chemical toilets to informal settlements. The audit also found that 54% of the toilets in these informal settlements were unusable and there was a lack of frequent servicing of the toilets taking place.¹⁴⁸ The contract between the City and Mshengu indicated that the installation of the toilets must be done in a very safe manner to avoid toppling of the toilet due to wind or other causes, but the social audit found that none of the chemical toilets supplied had been installed and secured to the ground.¹⁴⁹ This essentially means that residents faced the risk of having the toilet toppling while children were using them, and thus coming in contact with the harmful chemicals used in the toilet.

According to the Mshengu Toilet Hire website, chemical toilets "...are serviced on a regular basis which includes the cleaning of the toilet, waste removal from the tank and restoring the supplies as needed."¹⁵⁰ The SJC social audit found that "...significant amounts of waste were unaccounted for", which shows a contradiction to what Mshengu claims to provide as part of their product and what was happening on the ground. Municipalities, when procuring services are supposed to ensure that there is proper maintenance and servicing of sanitation facilities. It appears this was not the case with the Mshengu chemical toilets as the maintenance lies as the responsibility of the service provider without any checks from the municipality.

The Social Justice Coalition has embarked on various advocacy campaigns to highlight the poor adherence to the obligation that the City of Cape Town has to provide sanitation in informal settlements in the city. This advocacy, through the inclusion of community members has led to successful social audits on the state of sanitation and has also worked on producing a substantive report on this with the South African Human Rights Commission.

It is important to note that community involvement and consultation has been the driving factor behind the success of the social audits on the state of sanitation in Khayelitsha. The City of Cape Town has been providing these 'alternative temporary technologies' in

¹⁴⁶ Social Justice Coalition, 2013, Report of the Khayelitsha 'Mshengu' Toilet Social Audit, p.8

¹⁴⁷ Mshengu Toilet Hire, <http://mshengutoilethire.co.za/basic-range/>

¹⁴⁸ Social Justice Coalition, 2013, Report of the Khayelitsha 'Mshengu' Toilet Social Audit, p.4

¹⁴⁹ Ibid, p.20

¹⁵⁰ <http://mshengutoilethire.co.za/basic-range/>

Khayelitsha, with very little consultation with the residents as well as giving indications of when upgrades would happen. Speaking to Axolile who is the head of the local government programme for the Social Justice Coalition in Khayelitsha, he states “the current continuous provision of portable toilets, chemical toilets and other alternative technologies hampers the progressive realisation of the right to water and sanitation in Khayelitsha.”

3.7 Key factors hampering the realisation of the right to water and sanitation in South Africa

The South African Constitution places water and sanitation as a direct function of local government, articulated in Section 151 and Section 152 which states:

Status of municipalities

151. (1) The local sphere of government consists of municipalities, which must be established for the whole of the territory of the Republic.

(2) The executive and legislative authority of a municipality is vested in its Municipal Council.

Objects of local government

152. (1) The objects of local government are-

- (a) to provide democratic and accountable government for local communities;
- (b) to ensure the provision of services to communities in a sustainable manner;
- (c) to promote social and economic development;
- (d) to promote a safe and healthy environment;

To provide water in the community, a municipality may establish a water service authority under the Water Services Act 1997. A Water Service Authority according to the Department of Water and Sanitation is defined as:

“any municipality responsible for ensuring access to water service, may perform the functions of a water services provider and may also form a joint venture with another water services institution to provide water services.”

Municipalities as Water Service Authorities can appoint a water service provider that provides the services related to water supply and sanitation on behalf of the municipality¹⁵¹. As the provision of the service of water supply comes at a cost, municipalities have to set up rates for the services to households in the community, and many municipalities have been struggling to collect revenue efficiently. The South African Human Rights Commission report on water and sanitation¹⁵² reports the following as key challenges to sufficient universal access to water and sanitation:

1. Upgrading and expansion of bulk infrastructure capacity ensuring quality of sanitation facilities built
2. Maintenance of reticulation and onsite infrastructure
3. Revenue collection to fund ongoing provision of services
4. Effective oversight
5. Regulation and management of sanitation services at all levels of government
6. On-going growth of formal and informal settlements due to rural and urban migration, population growth and the influx of foreign nationals.
7. Lack of clarity and coordination between the key actors in the various sanitation service provision is a major factor affecting the right.

¹⁵¹ Water Services Act 108 of 1997

¹⁵² SAHRC, Report on the Right to Access Sufficient Water and Decent Sanitation in South Africa, (2014)

3.8 Conclusion and key recommendations

The National Development Plan states that “water is a strategic resource critical for social and economic development and there is a growing concern about the potential impact of water related risks.” The right to water and sanitation is an integral part of human life and sufficient adequate access to it should not be hindered. The analysis of the normative content of policy and legislation around socio-economic rights provides a comprehensive overview into the monitoring of socio-economic rights. This analysis of existing international instruments, local jurisprudence and legislation allows for proper advocacy and the promotion of progressive realisation of the right to water and sanitation. As shown in this section, the right to water is inextricably linked to the right to sanitation, taking into account the implications of health and quality in terms of sanitation. Water as a natural resource that is imperative to the fulfilment of life should not be treated as a commodity but rather as a community good. It is imperative to note that the Constitution and the judiciary do not provide comprehensive answers at all times, as we have seen with the minimum core debate in *Mazibuko case*. The next step is thus to promote legislation and policy for progressive realisation of the right to water and sanitation. In this, people affected by the Policy must be meaningfully consulted.

The 2016 Draft Sanitation Policy, which the Studies in Poverty and Inequality Institute (SPII) made a submission to in February provides that “sanitation is a public good...with environmental and health protection accruing well beyond the household boundary.”¹⁵³ The policy in this fashion does not explicitly bring to the right the human right element and this needs to be addressed. A human rights approach, ceases to see residents only as consumers of public goods, but as part of an overall developmental and futuristic vision. A human rights approach is thus a pro-poor approach that recognises the broader social ills that trap people into conditions of vulnerability and in need of assistance.

The state should take the primary responsibility to fulfil the right to water and sanitation in South Africa. As the provision of these is a primary function of the local government, the state should capacitate municipalities to effectively work with communities to provide basic services. Local government needs to thoroughly consult with the community when dealing with the provision of sanitation facilities especially in informal settlements as we have seen in the Beja Case. Water Service authorities mandated with making these decisions have to actively seek the contribution of the public and not just provide any sanitation technology they feel is appropriate. There is a need for integrated and inclusive solutions to the geo-physical, economic, legal and socio-political challenges of informal settlements. The process of choosing the provision of specific appropriate technologies must be open and inclusive of the local communities. This will ensure that the type of sanitation facility is culturally appropriate, takes into account needs of vulnerable groups such as people with disabilities, children and women. In many cases, the type of technologies provided, especially in shared facilities, do not come with or have provision for the disposal of feminine hygiene products and are also not disability friendly.

153 Draft National Sanitation Policy, p.1



Budget Analysis: Resource Allocations and Expenditures- Department of Water and Sanitation

By Dr. Anita Ramsak

4.1 Introduction

The right to water and sanitation is part of existing international and regional human rights law.¹⁵⁴ This places obligations on states to work towards¹⁵⁵ universal access to water and sanitation, including through developing financing strategies and budgets guided by the standards and principles enshrined in the right to water and sanitation.

In the first part of this chapter the obligations of states in relation to financing of the right to water and sanitation will be highlighted, with a focus on the obligation to take steps to progressively achieve the realisation of economic, social and cultural rights (ESCR), using the maximum available resources in a non-discriminatory manner. This chapter provides the framework that will guide the human rights budget analysis of the right to water and sanitation in South Africa (SA).

This will be followed by the presentation of the budgeting framework for water and sanitation in South Africa, highlighting responsibilities for the provision of water and sanitation on all levels, explaining budgetary processes as well as financing and resource allocation mechanisms for the provision of the right to water and sanitation.

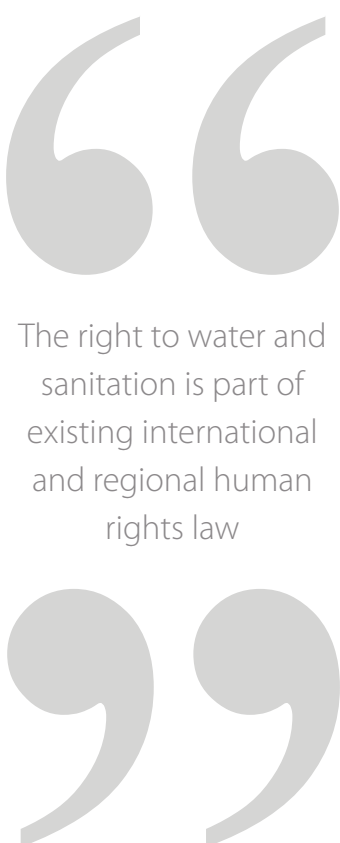
The human rights budget analysis will then look into the actual allocation and spending patterns at the national and local government level, with more detailed analysis of the budget of key responsible department the Department of Water and Sanitation (DWS). Key governance and budgeting challenges undermining the provision of the right to water and sanitation in South Africa will be highlighted. The paper concludes with an assessment of the compliance of the Government of SA with its human rights obligations in relation to budgeting and financing for the right to water and sanitation and key findings.

4.2 Human Rights Framework for budget analysis

The international human rights framework provides for several principles and standards which should guide national budgetary processes, including in relation to the budgeting and financing for the right to water and sanitation:

Maximum available resources

International and regional human rights law¹⁵⁶ as well as the Constitution of South Africa¹⁵⁷ acknowledges that the lack of resources might hinder the state's ability to fully implement economic, social and cultural rights. States can therefore move progressively (over time) towards the full realisation of ESC rights, including of the right to water and sanitation, while using (maximum) available resources¹⁵⁸ in a non-discriminatory manner. In this regard, the Article 2 of the ICESCR demands that states "take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized



The right to water and sanitation is part of existing international and regional human rights law

¹⁵⁴ In September 2010 Human Rights Council adopted Resolution, in which it reaffirmed that the right to water and sanitation is part of existing international law and confirms that these rights are legally binding upon states, Human Rights Council Resolution A/HRC/RES/18/1

¹⁵⁵ General Comment No. 15, para. 18

¹⁵⁶ Article 2 of the ICESCR

¹⁵⁷ In Section 27(1) (b) with the conjunction with Section 27 (2),

¹⁵⁸ The Constitution of South Africa in the Article 27, requires the state "to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation," of socio-economic rights, including of the right to water and sanitation.

in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”¹⁵⁹ These obligations have a direct bearing on the budget of the Republic of South Africa since the ICESCR was ratified by the government in 2015.

International law does not explicitly define what constitutes the *maximum available resources*, beyond elaborating that it encompasses resources existing within the state and those available from the international community through international cooperation and assistance.¹⁶⁰ However, according to the interpretative guidance of the United Nations Committee on Economic, Social and Cultural right (CESCR), the obligation of maximum available resources demands that the state do everything it can to mobilize resources to have sufficient funds available to progressively realize ESC rights. This includes mobilizing resources that are available and existing within the state, which could include setting the human rights responsive fiscal policies, such as progressive and socially equitable taxation policies.^{161 162} Furthermore, in terms of financing for the right to water and sanitation, users’ contributions, including tariffs and other charges for water and sanitation services, are considered one of the means to secure maximum available resources for the right to water and sanitation.¹⁶³

Affordable and financially accessible water and sanitation

The CESCR is clear that any connection charges and tariffs must be set carefully not to interfere with states obligations to fulfil and protect the human right to water and sanitation, including ensuring that the water is affordable and economically accessible for everyone. Any payments and direct and indirect costs and charges associated with securing services have to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups.¹ Furthermore, the state needs to ensure that poorer households are not disproportionately burdened with water expenses as compared to richer households.

To ensure affordability, states are required to take measures, including appropriate water and sanitation pricing policies, which would ensure that the households contributions are set within a reasonable proportion of their monthly disposable income and that that direct or indirect costs do not compromise or threaten the realization of other ICESCR rights.² Furthermore, in line with the state party’s obligation to protect, which requires states to prevent third parties from interfering in any way with the enjoyment of the right to water, the CESCR demands that in situations “where water services (such as piped water networks, water tankers, access to rivers and wells) are operated or controlled by third parties, State parties must prevent them from compromising equal, affordable and physical access to sufficient, safe and acceptable water.”³ The CESCR also recognizes that discriminatory and unaffordable increases in the price of water presents an interference with the right, and might constitute a violation of the right.⁴

Furthermore, in the case of scarce and insufficient resources available within the country, the state has to take necessary steps to seek and receive resources *available from the international community*, including through international cooperation and development assistance.

Furthermore, the obligation to maximum available resources also demands from the state to optimise the resources that are already available or allocated to the sector, by using them as efficiently and effectively as possible.¹⁶⁴ The CESCR has stated that a failure to spend funds efficiently may amount to a failure to comply with the principle of maximum available resources while effective spending would imply that the expenditures have the effect of enhancing people’s enjoyment of their rights, i.e. contribute to increased people’s enjoyment of their rights.¹⁶⁵

¹⁵⁹ Article 2 of the ICESCR

¹⁶⁰ General Comment No. 3, para 3

¹⁶¹ The obligation on the State to institute an effective and fair taxation system and a budgeting process is also implied by the duty of the individual to pay taxes imposed by the African Charter on Human and People’s Rights For (ACHPR, para 15).

¹⁶² For example, in Concluding Observations for Kenya, E/C.12/CAN/CO/6

¹⁶³ UN Special Rapporteur on the human right to safe drinking water and sanitation, 2014, p. 6

¹⁶⁴ Statement by the Special Rapporteur on the right to access to safe drinking water and sanitation at the 66th Session of the General Assembly, 2011.

¹⁶⁵ For more see International Budget Partnership, The Article 2 Project.

South African Constitution and “within its available resources.”

While the ICESCR demands from states to take “appropriate measures”, in accordance with its “maximum available resources”,¹⁶⁵ the Constitution of South Africa in Article 27(2), requires the state to “take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation” of socio-economic rights, including the right to water and sanitation.¹⁶⁶

In the judgement of the Constitutional Court of South Africa (the Court) *Grootboom*,¹⁶⁷ the Court applied a *reasonableness approach* when deciding whether the state has been infringing rights, i.e. whether the taken measures were reasonable, taking into account the available resources of the state. The Court stressed that the availability of resources is an important factor in determining what is reasonable, however acknowledging that measures must be calculated to attain the goals expeditiously and effectively. In its judgement, the Court concluded that the obligation does not require the state to do more than its available resources permit, stating that “that both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources.” Section 26 of the Constitution does not expect more of the state than is achievable within its available resources.

Similarly, Chaskalson P said in *Soobramoney*:¹⁶⁸

“What is apparent from these provisions is that the obligations imposed on the State by ss 26 and 27 in regard to access to housing, healthcare, food, water, and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled.”

The reasonableness approach derived from the *Grootboom* case has been employed in the Optional Protocol to the ICESCR, which SA has not yet ratified. The CESCR has stated that in assessing state’s compliance with the obligations under the ICESCR, it will assess the reasonableness of steps taken, taking into account a number of factors, including decisions not to allocate resources in accordance with international human rights standards.¹⁶⁹

Priority allocation of the ESC rights

In terms of allocating available resources, the human rights framework provides certain parameters regarding the prioritisation of public expenditure within the overall economy, including demanding that states give a priority to the ESC rights in the use of their resources. For the state’s budget, this means that allocations and expenditures should be directed to ESC rights-related areas as a matter of priority. However, international law does not provide an exact percentage of the budget that should be devoted to water and sanitation, leaving states to make their own decisions about how to allocate resources among interdependent and interlinked human rights. However, the CESCR and Special Rapporteur on the Right to Water and Sanitation Ms Catarina de Albuquerque suggest that while allocating resources, states should compare the share for water and sanitation across similarly situated countries, and consider the national and international commitments they have undertaken to realise these human rights.¹⁶⁶ For example, the 2008 eThekweni Declaration commits more than 30 African governments to establish specific public sector budget allocations for sanitation and hygiene programs and to allocate a minimum of 0.5% of GDP for sanitation and hygiene.¹⁶⁷ However, the 2006 UNDP Human Development Report recommended that governments should aim to spend a minimum of 1% of their GDP only on water and sanitation.¹⁶⁸

¹⁶⁶ UN Special Rapporteur on the human right to safe drinking water and sanitation, 2014, p. 6

¹⁶⁷ The eThekweni Declaration and African Action Plan, 2011

¹⁶⁸ Ibidn.

Obligations of an immediate effect

While the ICESCR provides for progressive realization and acknowledges the constraints in available resources, it also imposes obligations on the state towards the fulfilment of the right to water and sanitation, which are of immediate effect.¹⁶⁹ Therefore, in developing their budgets, states must take cognisance of these immediate obligations imposed by the human rights to water and sanitation. For example, State parties have an immediate *obligation to take steps*, which include “all appropriate means, including particularly the adoption of legislative measures.”¹⁷⁰ In terms of the right to water and sanitation, this would also imply that necessary funds are allocated also for aligning legislation, policies and programming with the human rights to water and sanitation as well as for capacity building and the monitoring of service levels and service.¹⁷¹

Furthermore, the State should ensure that the right to water and sanitation is exercised *without discrimination of any kind*.¹⁷² This obligation calls for prioritisation of access to water and sanitation services for disadvantaged individuals and groups, including through allocation of resources,¹⁷³ in order to eliminate disparities and facilitate access to water and sanitation for all members of the society. Furthermore, the CESCR also highlights that inappropriate resource allocation can lead to discrimination that may not be overt. For example, investments should not disproportionately favour expensive water supply services and facilities that are often accessible only to a small, privileged fraction of the population, rather than investing in services and facilities that benefit a far larger part of the population.¹⁷⁴ Therefore, sufficient resources should be made available to ensure that legislation, policies and planning are not discriminatory in their execution and that sufficient funds are allocated for capacity building as well as monitoring of service levels and service provision.¹⁷⁵

Minimum Core Obligations

Equally, the CESCR, when discussing the nature of the state's obligations under the Article 2, recommends that the State establish minimum essential, immediately enforceable, levels of each of the rights recognised in the ICESCR.¹⁷⁶ The state should take into account these immediate obligations, when allocating the resources to the right to water and sanitation, ensuring that the minimum level of the right is accessible to everyone. In a case where the state is failing to provide for minimum core obligations, the state must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.¹⁷⁷ In this regard, states have an obligation to immediately realise a minimum level of provision of a right and then to improve the level of provision beyond the minimum on a progressive basis.¹⁷⁸

The obligation to fulfil the minimum core obligation of the right to water and sanitation, although limited in scope, is also recognized by the African Charter on Human and People's Rights (ACHPR).¹⁷⁹ However, the Constitutional Court of South Africa has failed to confirm the concept of minimum core obligations in two key judgements, *Mazibuko* and the *Grootboom*, stating that the Court is not equipped to determine what the minimum core standards should be, while also recognizing that it might not be possible to give everyone access to core services immediately. However, it has reinforced that the state must ensure, at the very least, that significant number of individuals have access. Furthermore, the Court has acknowledged that “there may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the State are reasonable.”¹⁸⁰

¹⁶⁹ General Comment No. 3, para 1

¹⁷⁰ Article 2 of the ICESCR

¹⁷¹ UN Special Rapporteur on the human right to safe drinking water and sanitation, 2014, p. 6

¹⁷² General Comment No. 15, para 17,18,19

¹⁷³ General Comment No. 15, para 17,18,19

¹⁷⁴ General Comment No. 15, para. 14

¹⁷⁵ UN Special Rapporteur on the human right to safe drinking water and sanitation, 2014, p. 6

¹⁷⁶ General Comment No. 15, para 13

¹⁷⁷ General Comment No. 3, para 10

¹⁷⁸ For more see Bilchitz, 2003

¹⁷⁹ ACHPR, para 92 (a)(b)(c)

¹⁸⁰ Government of the Republic of South Africa and Others v Grootboom and Others (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000)

Progressive realisation and the prohibition on regression

Regressive steps relating to the right to water and sanitation are in contradiction to the progressive realization principle enshrined in the ICESCR and are prohibited. Regressive steps include all of those acts of omission or of commission on the part of the state, which deprive people of rights that they used to enjoy. This could include reducing spending on the right to water, cutting the subsidies as well as failure on the side of the state, when budgeting to the right to water and sanitation, to take into account the full costs of progressively realising the right. The Special Rapporteur on the Right to Water and Sanitation, for example, argued that the failure to commit adequate resources to operation and maintenance can lead to infrastructure breakdown and the degradation of existing water and sanitation services, resulting in retrogression in people's enjoyment of their human rights to water and sanitation.¹⁸¹ The CESCR has stated that regressive measures taken in relation to the right to water are prohibited under the ICESCR and constitute a violation of these rights, unless they "have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the State party's maximum available resources".¹⁸²

In terms of budgeting, the Special Rapporteur on the Right to Water and Sanitation suggests that, in order to comply with the obligation of progressive realisation and to avoid retrogressions, the state must also achieve a balance among water and sanitation budget allocations directed to infrastructure construction, operation and maintenance, training and capacity building and awareness-raising activities.¹⁸³

Accountability, participation, access to information and non-discrimination

Human rights law also demands that states develop an overall financing strategy to achieve universal access to water and sanitation, incorporating human rights principles of accountability, participation, access to information and non-discrimination into financing mechanisms.¹⁸⁴ These so-called "procedural rights" and guarantees exist to ensure that thorough and accountable processes are followed, and are, therefore, also considered as important elements of increasing effectiveness and efficiency of resource allocations and spending, contributing to the fulfilment of the state's obligation of the maximum available resources for the right to water and sanitation.

Human Rights Budget Analysis Framework

Following from the above discussion, the following questions will guide the human rights budget analysis:

- Adequacy: Are resource allocations transferred to departments sufficient given the objectives of the programme, likely demand and the costs of intervention, and are they increasing in real terms over time? Are there any regressive spending patterns?
- Equity and priority of allocations: Are resources being utilised to prioritise the needs of the most vulnerable and disadvantaged, to reduce disparities in line with the constitutional goal of substantive equality? Is the spread of resources across departments, spheres of government and geographic localities equitable and justified?
- Efficiency: Is the overall expenditure of the programme efficient given the costs of the intervention? Are institutions capable of spending the funds allocated to them efficiently? Are funds being accounted for and spent on their intended purpose? Are there any under or over-expenditure patterns? Can their cause and impact be identified?
- Effectiveness: Is the money being spent on the right things and having the desired results and impact? Is it bringing about tangible improvements in access to the right to water and sanitation? Are targets being met? Is sufficient data available to assess this and is adequate monitoring taking place?

¹⁸¹ UN Special Rapporteur on the human right to safe drinking water and sanitation, 2014, p. 8

¹⁸² General Comment No. 15, para 19

¹⁸³ UN Special Rapporteur on the human right to safe drinking water and sanitation, 2014, p. 8

¹⁸⁴ UN Special Rapporteur on the human right to safe drinking water and sanitation, 2014, p. 17

4.3 Budgeting Frameworks for the right to water and sanitation in South Africa

The provision of the right to water and sanitation is “a concurrent function” of national, provincial and local government, with the following divisions of responsibility:

The national government is, through relevant national Departments, responsible for setting national policy frameworks, standards and regulations, as well as monitoring and support functions, including targeted support to municipalities. In 2014, the Department of Water and Sanitation (DWS) took over the water-related mandate of the Department of Water Affairs (DWA) and parts of the sanitation function from the Department of Human Settlements (DHS).

Additionally, the Department of Cooperative Governance and Traditional Affairs (CoGTA) plays an oversight role in terms of municipal service delivery performance, including in municipal planning, budgeting and monitoring and supports municipalities through capacity-building. It also provides and oversees the Municipal Infrastructure Grant (MIG).

The provincial governments have the responsibility to monitor and support municipalities in fulfilling their responsibility to deliver the right to water and sanitation, including intervening under certain circumstances where municipalities fail to deliver the services.

However, local government is, through the municipalities,¹⁸⁵ responsible for providing basic services, such as water and sanitation, electricity, refuse removal, municipal transport, roads and community services. This includes the provision of free or subsidised basic services to poor households. Municipalities receive budget support from the national government for provision of the water and sanitation. However, they have also the possibility to raise the revenues through user charges and property rates within their own tax base¹⁸⁶ to co-finance the services.

Government’s obligation to fulfil the right to water and sanitation requires adequate, efficient, equitable and effective budgeting at the national and local level. Each year a Division of Revenue Act (DoRA) is passed by parliament after receiving inputs from various sectors of government and the public. The DoRA sets out the division of nationally-raised revenue for the year ahead. The resources for the right to water and sanitation are predominately shared between the national sphere, particularly Department of Water and Sanitation, and local municipalities. A share of nationally raised revenues is transferred to municipalities for basic services, including water and sanitation, through a municipal grant system that municipalities can employ to provide water and sanitation. These include:

■ The Local Government Equitable Share (LGES)

LGES is a lump-sum of nationally raised revenues directed towards municipalities to deliver basic services, including a free basic water policy and sanitation to poor households. It also subsidises the cost of administration and other core services for those municipalities that have the least potential to cover these costs from their own revenues. Revenue that municipalities can raise themselves (including property rates and service charges) supplement the LGES. The size of equitable share is determined by formulas that take into account demographic and developmental factors. Municipalities have considerable discretion over spending and allocation of the equitable share funds. However, this transfer usually comes with recommendations, including that at least 57% of the grant should be used for the provision of water (31%) and sanitation (26%).¹⁸⁷

■ Conditional grants

In addition, National Treasury makes extensive use of conditional grants. These are transfers to municipalities from national or provincial departments in order to achieve specific goals, including for the provision of water and

¹⁸⁵ The provision of water and sanitation services is a municipal competence. However, not all municipalities are authorised to provide this function. The two-tiered local government system requires that powers and functions be divided among different categories of the municipalities to avoid duplication and coordination problems: All category A (metros) municipalities are authorised, but the category B (local) and category (C) municipalities are authorised in certain instances.

¹⁸⁶ National Treasury, 2015 Budget Review, p. 77

¹⁸⁷ National Treasury, Explanatory memorandum to the division of revenue 2014/15, p. 39

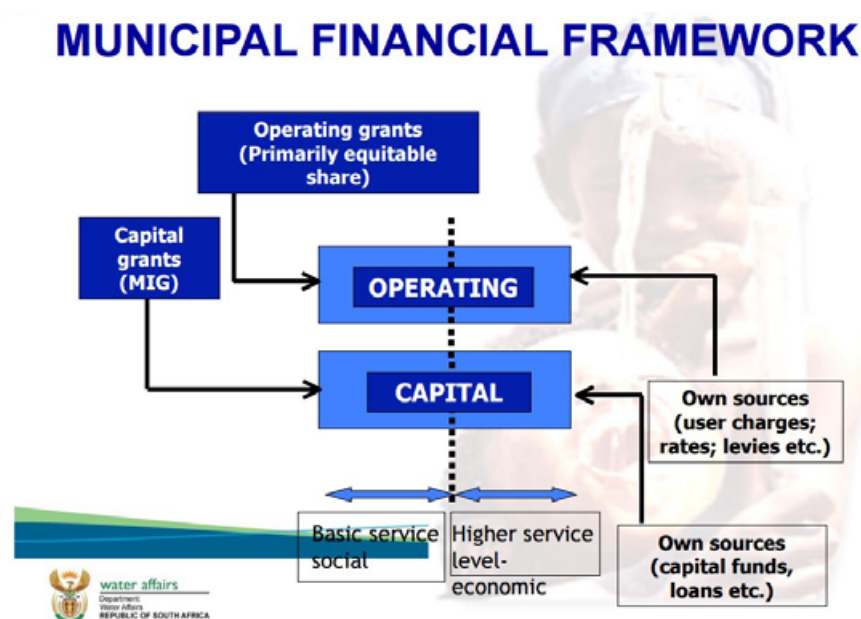
sanitation services. The provinces and municipalities must meet specific criteria to receive grants and fulfil conditions when spending them.¹⁸⁸ The main conditional grant to municipalities is the Municipal Infrastructure Grant (MIG), which provides total amounts which come close to half of the total conditional grants to municipalities. The MIG aims to facilitate the eradication of basic services backlogs and cover the capital costs of infrastructure rollout to predominantly poor households and is calculated through a formula with horizontal (among sectors) and vertical dimensions takes account of poverty, backlogs, and municipal powers and functions in allocating funds to municipalities. In 2014/15 54% of the MIG transferred to the municipalities was intended for water and sanitation.¹⁸⁹

Apart from the MIG, municipalities also receive conditional grants specifically intended for the provision of water and sanitation services administrated through the DWS.¹⁹⁰ These include Water Municipalities Infrastructure Grants (WMIG), which was introduced in 2013/14 to accelerate the delivery of clean water to communities that do not have access to basic water services, the Rural Household Infrastructure Grant (RHIG) for the provision of on-site solutions for sanitation services for rural households where piped infrastructure is not feasible, the Regional Bulk Infrastructure Grant (RBIG) and the Bucket Eradication Grant (BEG).

However, following an intergovernmental review of the local government infrastructure grant system in 2015/16, a number of water and sanitation grants will be merged into two: the Regional Bulk Infrastructure Grant to fund large bulk water and sanitation projects, and the Water Services Infrastructure Grant to fund construction and refurbishment of reticulation schemes and on-site services in rural municipalities.¹⁹¹

Municipalities are also expected to fund a proportion of the costs of providing water and sanitation services with revenues they can raise through user charges, property rates and other taxes collected from their tax base. However, revenue collection, as described in more in detail below, presents a challenge for many municipalities, particularly for rural and poorer municipalities. Those municipalities rely more heavily on national transfers.¹⁹²

Figure 1: Municipal Financial Framework



Source: Department of Water Affairs

¹⁸⁸ National Treasury 2015 Budget Review, p. 76-77

¹⁸⁹ National Treasury, Explanatory memorandum to the division of revenue 2014/15, p. 39-40

¹⁹⁰ Before establishment of the DWS in 2014/15, they were administrated by the DWA (water related grants) and DHS (sanitation related grants).

¹⁹¹ National Treasury, 2015 Budget Review, p. 77

¹⁹² National Treasury, 2015 Budget Review, p. 77, 80

Combining national budget transfers, such as the MIG (conditional capital grant) and the LGES with their own resources, municipal budgets distinguish between water operating revenue and expenditure, and water capital revenue and expenditure, with their water operating budgets going to bulk water purchase costs, repairs and maintenance and personnel costs, and their capital budgets for water infrastructure extension aimed at addressing historical backlogs and infrastructure extension aimed at facilitating economic development.¹⁹³

4.3.1 Sources used and availability of the data

Unless otherwise stated, the data source for all figures and tables are mostly provided by relevant Governmental departments responsible for water and sanitation, including:

- Department of Water and Sanitation Annual Report (2014/15)
- Department of Water Affairs (2009/10 - 2013/14)
- Department of Human Settlements (2009/10- 2013/14)
- Estimates of National Expenditure on Water and Sanitation (2013/14 - 2015/16)
- Budget Reviews (2009/10 – 2014/15)
- Division of Revenue Act and its Explanatory Memorandum

The data provided in these documents were supplemented with the information and reports presented or submitted to the Parliamentary Portfolio Committee on Water and Sanitation and other relevant accountability bodies.

Although South Africa has been rated as having one of the most transparent budgets in the world, there were challenges in relation to the availability of disaggregated data, particularly on actual allocation and spending on water and sanitation at the local level (especially through the MIG and LGES) as well as tracking the sanitation budget at the national level, which posed some limitations on the comprehensiveness of the assessment of the budgets allocated and spent on the water and sanitation. Due to these challenges, this human rights analysis is mostly focusing on the data available at the national level.

4.3.2 Inflation adjusted

Inflation is an economic term referring to an increase in the general price of goods and services over time in the economy. Inflation erodes the value of money and results in an increase of the prices, meaning that what can you buy today with R10, is slightly more than what you will be able to buy next month due to increased inflation. In the same line, as it erodes individuals and household earnings, it also erodes the buying power of governments.

The National Treasury documents and Department's annual reports, including the Department of Water and Sanitation and the Department of Human Settlements, tend to provide only nominal accounts of the allocated budget, which are unadjusted for the effects of inflation. Although this number shows us how much money has been allocated for specific services, they don't provide us with the assessment of the value of the money (e.g. what you can buy with allocated money), which is changing over the time. This also makes comparing spending patterns over time difficult as the value of the money in previous years is changing.

For these reasons, when conducting a budget analysis, we have converted the nominal amounts to real amounts where possible in order to equalise the value of money over time. Using real amounts will allow us to compare allocations and expenditure more accurately over the years and assess whether the budgets have increased at a rate below, in line with or above inflation.

In this paper, we have used the most widely used measurement of general inflation the Consumer Price Index (CPI) tracked by Statistics South Africa (StatsSA). Adjusting the nominal amounts provided in the DWS and other governmental reports to real amounts requires us to make a calculation using "inflaters", which are based on the annual CPI inflation rate provided by StatsSA.

¹⁹³ Water Aid, 2015, p. 5

In the table below you can see the CPI inflation rate and inflators used in the analysis to convert nominal amounts to real amounts. 2014/2015 has been used as the base year, meaning that all amounts have been adjusted to the prices in that year.

	2009/10	2010/11	2011/12	2012/13	2013/14	2014/15	2015/16	2016/17	2017/18
CPI inflation	6,5%	3,8%	5,6%	5,6%	5,8%	5,6%	5,9%	5,6%	5,6%
Inflator	0,77	0,82	0,85	0,90	0,95	1,00	1,05	1,06	1,06

4.3.3 Overview of the budget analysis

With the aim to provide a relatively comprehensive overview of the allocations and spending for the water and sanitation, the budget analysis aims to track the water and sanitation budget at the national level and, to the extent possible, at the local level.

At the national level, the analysis of the budget allocation and spending patterns of the Department of Water and Sanitation (previous Department of Water Affairs) and, when necessary for tracking the budget for sanitation, the budget of Department of Human Settlements, was undertaken. The period of analysis is in most instances 2009/2010 – 2014/2015, mainly due to the availability of disaggregated data and similar structure of the Department's Annual Reports. The DWS's programme Regional Implementation and Support programme and its sub programmes, which received the greatest share of the Department's budget, is looked at in more detail in this chapter.

Since the municipalities have constitutional obligations to provide the right to water and sanitation, selected grants transferred to municipalities will be scrutinised more in detail. This includes conditional grants administrated through the DWS, as well as, to a lesser extent, the MIG and the LGES. The latter two are transferred to municipalities for the provision of several basic services, not only water and sanitation, and the lack of disaggregated data, particularly on the spending of these funds for water and sanitation, does not allow for more in-depth analysis and expenditure assessment.

The paper concludes with a presentation the key findings of the analysis and preliminary answers to the questions above and what these mean for actual access to the right to water and sanitation in South Africa.

4.4 Total budget allocations for water and sanitation

Government budget and expenditure trends are indicators of priority in national policy and action. The current budgetary framework for the provision of the right to water and sanitation does not allow for comprehensive and completely accurate tracking of the total funds allocated for water and sanitation in the years under review.

However, using the indicative data provided by the National Treasury and DWS, we were able to make an assessment of the intended allocation for water and sanitation for the year 2014/15¹⁹⁴ combining the following budget allocations:

- Annual Budget allocated for the Department of Water and Sanitation, which includes several grants transferred to municipalities;
- 54% of the total MIG allocations to municipalities;
- 57% of the LGES allocation to municipalities.¹⁹⁵

Table 1: Total allocation of budget for water and sanitation in 2014/15 by DoRA

¹⁹⁴ Percentage of allocated MIG and LGES recommendations tend not to be available for other years under review.

¹⁹⁵ We used the recommendation for the percentage of the local level allocation of the LGES that should be used for water and sanitation serviced provided by the national government at the time of transfers of the LGES. See, National Treasury, Explanatory Memorandum to the Division of Revenue 2014/15, p. 39. The source for the MIG allocation was taken from the Report of the Select Committee on Appropriations on the Roll-over of Municipal Infrastructure Grant Funds for the 2010-2015 Financial Years, 2016.

	Allocation by DoRA 2015/14 R billion	% of the total allocation
Total DWS Budget	13.647	23,4%
LGES (57% of total allocation)	36.616	62,9%
MIG allocation (56% of total allocation)	7.973	13,7%
TOTAL	58.236	100%

According to the estimates provided in table 1, R58.236m was allocated to water and sanitation in 2014/15 from national raised revenues (real allocations), which presents 5,1% of all the total of the national revenues available in that year (R1.142.562m). Figures in table 1 also highlight that the great share of services for water and sanitation are intended to be covered through the Local Government Equitable Share, which consisted of 63% of the total intended allocation for provision of water and sanitation services. This was followed by budget allocated for Department of Water and Sanitation (23,4%) and Municipal Infrastructure Grant (13,7%).

However, caution needs to be taken in any interpretation of this figure, particularly because the calculated figure is based on the recommendations by the national government of how the LGES *should* be used. However, in reality, municipalities spend their equitable share within the framework of their local democratic processes. As elaborated in more depth in the pages below, there are several indications and concerns that in reality municipalities allocate a much lower percentage of the LGES to water and sanitation services than recommended; meaning that the total allocation to water and sanitation might be much lower than that provided in table 1.

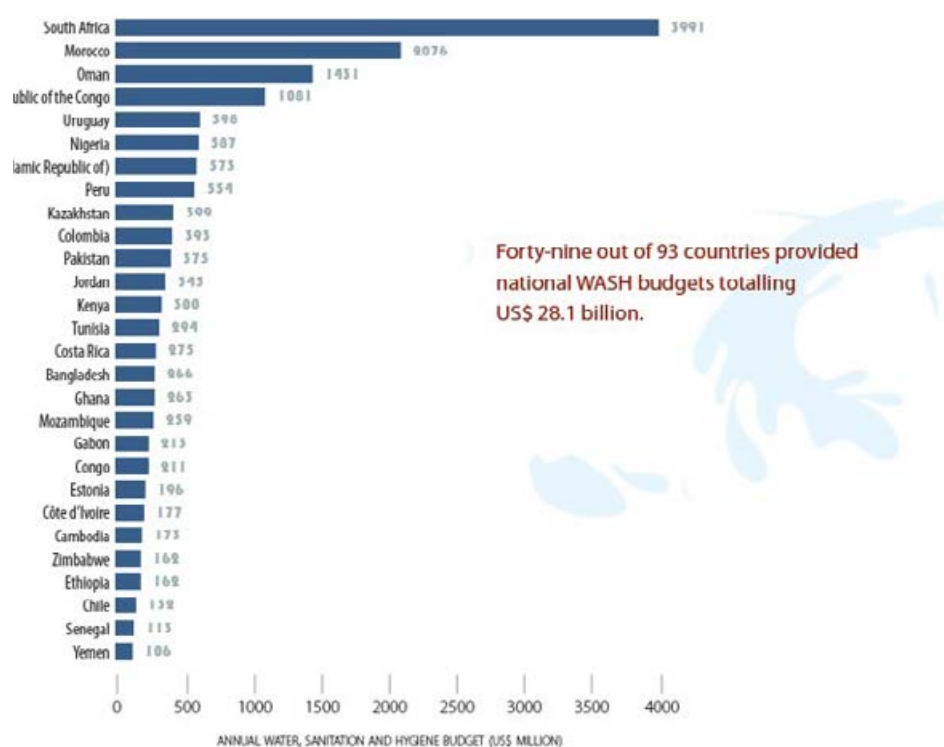
Furthermore, our analysis reveals that the under-spending of allocated budgets for water and sanitation is very high in some instances, meaning that the actual budget spent on water and sanitation is in reality much lower than planned or suggested by DoRA and other expenditure frameworks.

However, for comparison, South Africa, as one of the UN-Water Global Analysis and Assessment of Sanitation and Drinking-Water (GLASS) reporting countries, in 2014 reported a WASH budget for water, sanitation and hygiene equivalent to US\$ 4.0 billion. Out of these funds, 50% was allocated for the operation and maintenance of water and sanitation schemes and also to subsidize free basic water and sanitation services for the poor, as mandated by law.¹⁹⁶



196 UN Water, Water GLAAS 2014 Report, 2014, p. 29

Figure 2: Annual water and sanitation budgets reported by 49 countries for the UN Water-GLASS 2014 report



Source: UN Water-GLAAS 2014 Report, 2014

However, due to the challenges with the tracking of the budgets, even the authors of the report acknowledge that the provided number might not correspond to the reality, and might even be underreported. Furthermore, the nominal number provided unfortunately does not allow for any relevant global comparison in this field.

Regardless of the accuracy of the total allocations, it is clear that South Africa has mobilized extensive resources, mainly national resources, to provide for basic water and sanitation. The budget allocations for water and sanitation have been increasing in real terms in all the years of analysis, while the increases are also expected in the next three-year medium-term financial framework. However, growth will be slower as a result of a reprioritisation to fund new spending needs and to return budget deficit growth to a sustainable path,¹⁹⁷ also reflecting the relatively difficult fiscal environment that South Africa is currently in.

Concerning sources of funding for water and sanitation, it is estimated that over 95% of sector funding has been direct government funding and loan financing, combined with revenues received for tariffs and service provision.¹⁹⁸ As a middle-income country, South Africa compared to other countries in the region, receives very little donor support for the provision of water and sanitation.

¹⁹⁷ Water Aid, 2015, p. 4

¹⁹⁸ An AMCOW Country Status Overview, 2011, p. 16

Donor funding for the water and sanitation sector

According to the reports of the DWS and DWA, in 2013/14 and 2014/15 Departments did not receive any donor funds. In the previous years, a great share of the donor support has been allocated to a sector-wide program Masibambane - Let's work together¹⁰ which was funded since 2007 mainly by the European Union.¹¹ In the last years, the donor funds were also allocated for municipality district infrastructure projects from the Government of the Netherlands and for capacity building of the officials in the water sector from Japan International Cooperation Agency (JICA). The South African government, through its implementing agencies, was also implementing water sector related projects in Congo and Lesotho, funded through the regional initiative African Renaissance donor funds.¹²

However, South Africa receives additional donor funding for the sector through Official Development Assistance (ODA) private and multilateral channels, aimed mainly at non-governmental organisations and civil society. These funds, which are not running through the government, are not systematically tracked and reported. Nonetheless, as seen in table 2, the Organisation for Economic Co-operation and Development (OECD) database on aid flows from member countries provides some indication of the scope and purpose of such flows.

Table 2: ODA to water supply and sanitation in South Africa, US\$ millions

2005	2006	2007	2008	2009	2010	2011	2012	2013
20,35	71,39	167,31	7,59	7,7	2,86	147,84	9,68	3,58

Source: OECD Creditor Reporting System (in Water Aid, 2015)

The OECD data also shows that the funding for the sector has been steadily decreasing since 2007 and was the lowest in 2013, where the total allocation was \$3.85m. The OECD database for 2013 suggests that typically ODA funding to the sector is in the form of smaller, "project-based" grants and technical assistance, with the average grant size for the year 2013 around \$167000. However, three larger grants (two of about \$1,3m and one of \$1.1m) accounted for the big share of ODA flows to the sector.¹³

Serious concerns have also been raised over the sustainability of current financing model, particularly in relation to the general inadequate cost recovery in the water services sector.¹⁹⁹ There also seems to be a high level of inability and challenges at the municipality level to raise the necessary revenues locally. This challenge is elaborated further below.

However, it also needs to be noted that according to the DWS Annual Reports, the current pricing strategy for water is under review, with the key aim to improve the sustainability of the water sector.²⁰⁰ Furthermore, the new funding models are currently being explored, aiming also to find resources to support the infrastructure funding and financing and explore off-budget financing mechanisms.²⁰¹ Furthermore, the programmes and measures to facilitate harvesting of local revenues are being supported and encouraged by the national government.

4.5 Spending patterns of national Departments tasked with provision of the right to water and sanitation

The allocation for water and sanitation between the years 2009/10 - 2014/15 will be tracked through three different Departments that were responsible for the water and sanitation related functions in the period under review: Department of Water and Sanitation (2014/15), Department of Water Affairs²⁰² (2009/10 - 2014/15) and Department of Human Settlements (2010/11 - 2013/14).

¹⁹⁹ Report of the Portfolio Committee on Water and Sanitation, 2014, p. 18

²⁰⁰ DWA Annual Report, 2011/12, p. 86

²⁰¹ DWS Annual Report, 2014/15, p. 22

²⁰² Before 2009/10 Department of Water and Forestry

The mandate of the Department of Water and Sanitation is set out in the National Water Act (1998) and the Water Services Act (1997). The Department seeks to ensure that the country's water resources are protected, managed, used, developed, conserved and controlled through regulating and supporting the delivery of effective water supply and sanitation.²⁰³

In 2014/15, which is our base year, the DWS was running six core programmes financed from its budget. These are listed below along with the programme purpose as articulated in the 2014/15 DWS Annual Report:²⁰⁴

1. Administration with the purpose to provide policy leadership, advice and core support services, including finance, human resources, legal, information and management services, communication and corporate planning.
2. Water Sector Management with the purpose to preserve the sustainability of water resources for the benefit of people and environment by developing and implementing effective policies and integrated planning strategies and developing a knowledge base and procedures.
3. Water Infrastructure Management purpose is to ensure a reliable supply of water from bulk raw water resources infrastructure to meet sustainable demand objectives for South Africa within acceptable risk parameters, as well as to solicit and source funding to implement, operate and maintain bulk raw water resources infrastructure in an efficient and effective manner by strategically managing risks and assets.
4. Regional Management and Support purpose is to coordinate the effective implementation of the department's strategic goal and objectives at the regional level, including the establishment of water resource management institutions, it also accelerates communities' access to water infrastructure, including through the provision of conditional grants to municipalities.
5. Water Sector Regulation purpose is to ensure the development, implementation, monitoring and review of regulation across the water value chain in accordance with the provisions of the National Water Act (1998) and the Water Services Act (1997).
6. International Water Cooperation purpose is to strategically develop, promote and manage international relations on water resources between countries through bilateral and multilateral cooperation instruments and organisations in line with provisions of the National Water Act (1998). Its aim is also to pursue national interests at both, African and global multilateral organisations and forums.

This analysis will look more in-depth above mentioned six programmes. However, it needs to be noted that during 2014/15 the DWS went through additional reprogramming, through which it has categorised its work into the following five programmes: Administration, Water Planning and Information Management, Water Infrastructure Development, Water and Sanitation Services and Water Sector Regulation.²⁰⁵

The budget allocations for the right to sanitation

The sanitation function has been recently transferred between different national Departments. Initially, it was part of the mandate of the Ministry of Water and Forestry and was, in 2009, transferred to the Department of Human Settlements.¹⁴ However, in 2014 it was moved back to the newly established Department of Water and Sanitation.¹⁵ The sanitation function of the DHS consisted of the following functional outputs:

- Implementation of RHIG
- Implementation of bucket eradication programme
- Supporting municipalities on the implementation of sanitation programmes funded by the MIG
- Supporting municipalities on health and hygiene advocacy
- Mainstreaming of sanitation in Integrated Development Plans (IDPs) including councillors' induction.¹⁶

²⁰³ National Treasury, Estimates of National Expenditure 2015, p.1

²⁰⁴ DWS Annual Report, 2014/15

²⁰⁵ Report of the Portfolio Committee on Water and Sanitation, 2016, p.3

With the transfer of the function, the principle of resources to follow a function was applied, and the budget of R1.104b was shifted to the DWS. Together with the 99 posts and equipment that was transferred straight to the new DWS, this included:

- R91.4m for the function's operational expenditure;
- R47.6m for the Rural Households Infrastructure Grant (Direct);
- R65.5m for the Rural Households Infrastructure Grant (Indirect);
- R899.1 m for the Human Settlements Development Grant (Indirect Grant for Bucket Eradication).¹⁷

In order to provide for a more comprehensive overview of allocation and spending patterns for water and sanitation, to the extent possible, the budget for sanitation services for the years 2010/11 - 2013/14 was also tracked within the DHS annual reports.

The sanitation service, when administrated by the DHS appeared to be included within the two main DHS's programmes:

- *Sanitation Services with a goal to promote universal access to sanitation services by managing and administering the sanitation programme (sub programme of the Housing Planning and Delivery Support Programme)*
- *Rural Households Infrastructure Development*, which was a subprogramme of the Programme Housing Development Finance
- *Bucket Eradication Grant* introduced in 2013/14 as a sub programme of the Human Settlements Development Grant (HSDG) aiming at upgrading urban informal settlements in metropolitan municipalities. However, the budget allocated for sanitation services, including bucket eradication that was part of the general HSDG before it was introduced as a separate stream of the HSDG was not possible to track for previous years and is excluded from this analysis, meaning that our calculations of the allocations and spending for the sanitation services are not inclusive.

Table 3: Allocations for the sanitation services within the Department of Human Settlements real allocations, annual % change and under-expenditure, 2010/11 – 2013/14

Programme/Grant	Total (real) allocations, annual % change, actual expenditure and under-expenditure as % of total budget	Allocations and Expenditure R million			
		2010.11	2011.12	2012.13	2013.14
Bucket Eradication Grant	Total nominal allocation				190.453
	Nominal amount spent				190.380
	Total real allocation				201.499
	Real allocation annual % change				
	Real amount spent				201.422
	Real under expenditure				77
	Real under-expenditure as % of total real allocation				0,0%
Rural Household Infrastructure Grant	Total nominal allocation	100.000	257.508	340.625	240.370
	Nominal amount spent	61.614	205.566	205.566	215.310
	Total real allocation	121.843	302.270	378.632	254.311
	Real allocation annual % change		148,1%	25,3%	-32,8%
	Real amount spent	75.073	241.299	228.503	227.798
	Real under expenditure	46.771	60.971	150.129	26.513
	Real under-expenditure as % of total real allocation	38,4%	20,2%	39,7%	10,4%

Sanitation Services	Total nominal allocation	119.117	103.288	66.098	
	Nominal amount spent	85.253	98.648	60.822	
	Total real allocation	145.136	121.242	73.473	
	Real allocation annual % change		-16,5%	-39,4%	
	Real amount spent	103.875	115.796	67.608	
	Real under expenditure	41.261	5.447	5.865	
	Real under-expenditure as % of total real allocation	28,4%	4,5%	8,0%	
Total allocation and expenditure	Total nominal allocation	219.117	360.796	406.723	430.823
	Nominal amount spent	146.867	304.214	266.388	215.310
	Total real allocation	266.979	423.512	452.105	455.811
	Real allocation annual % change		58,6%	6,8%	0,8%
	Real amount spent	178.948	357.095	296.111	227.798
	Real under expenditure	88.032	66.418	155.993	228.013
	Real under-expenditure as % of total real allocation	33,0%	15,7%	34,5%	50,0%
	CPI inflation	3,8%	5,6%	5,6%	5,8%
	Deflator	0,82	0,85	0,90	0,95

Figure 3: Total DWS and DWA budget: real allocations (adjusted for roll-overs, funds withheld and other adjustments), annual % change and under-expenditure, 2009/10 – 2014/15

Figure 3 displays the total budget allocated to DWS (real appropriation) over the six-year period under review, the real annual percentage change, and total departmental under-expenditure, as well as future forecasts of the allocations for the Department.²⁰⁶

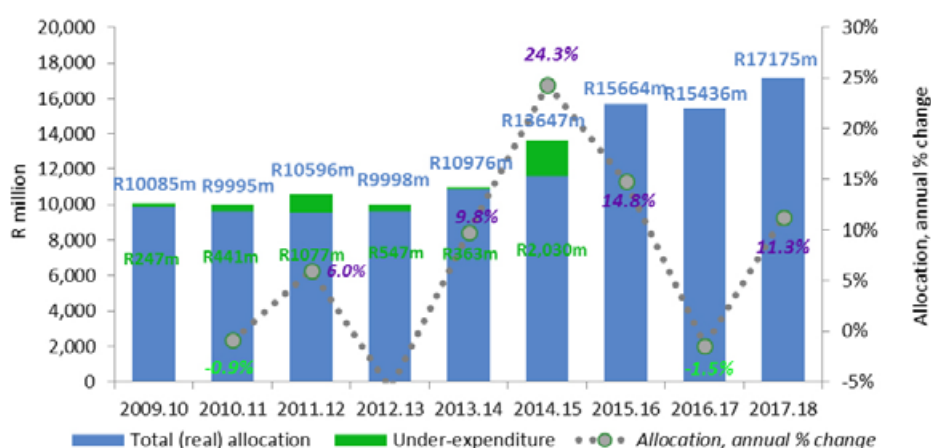


Figure 2 above and table 4 below show that DWS and DWA received relatively steady allocations between 2009/10 and 2013/14 ranging between R9995m and R10976m, with a steep increase of 24,3% in 2014/15. The increase in 2014/15 can be to a minor extent contributed to the transfer of sanitation function from the DHS to the DWS, but mainly to the increase in allocations for the regional bulk infrastructure development.

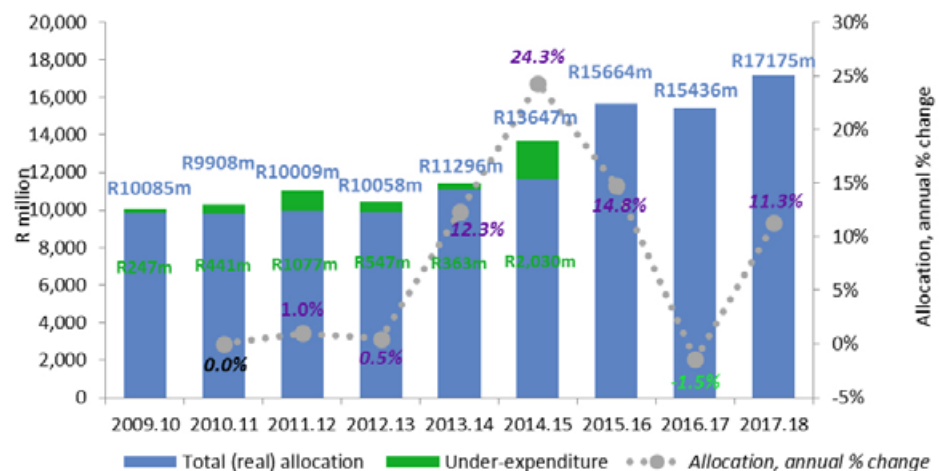
Future estimates indicate that the budget for the DWS will continue to increase in the next three-year medium-term expenditure framework (MTEF), with an expected 15% of the increase (real allocation) in the year 2015/16 and additional 11,3% increase in 2017/18. The 1,6% decrease in 2016/17 will be mainly due to spending on the compensation of employees and various items of expenditure on goods and services, which are not expected to have a negative impact on service delivery.²⁰⁷ The expected increase can be mainly contributed to the continuous increase in financing of infrastructure projects.

²⁰⁶ Since the Departments Annual Reports do not provide the future estimates and allocations, these are taken from the 2015 Estimates of National Expenditure (National Treasury, 2015 Estimates of National Expenditure).

²⁰⁷ Portfolio Committee on Water and Sanitation, 2014, p. 4

Unfortunately, the Department has not been able to fully absorb the increasing allocations, with consistent under-expenditure evident. Under-expenditure by the Department was highest in 2011/12 (9,5%) and 2014/15 when a total of 14,9% of the allocated budget remained unspent. The bulk of under-expenditure in 2014/15 is occurring within the Regional Implementation and Support Programme, largely due to delays and challenges with implementation of water and sanitation infrastructure programmes and grants transferred directly to the municipalities, particularly the regional bulk infrastructure grant.²⁰⁸ Through all the years, unfulfilled vacancies, including for Occupational Specific Dispensation (OSD) posts, through all the Department's programmes also contributed to its under-expenditure.²⁰⁹ The best spending performance has been recorded within the programme Water Infrastructure Management, which under-spending was below 2% of the allocated budget in all years that are subject to this review.

Figure 4: Total DWS, DWA budgets + DHS sanitation budget: real allocations (adjusted for roll-overs, funds withheld and other adjustments), annual % change and under-expenditure, 2009/10 – 2014/15



With the aim to get more realistic (however, not absolutely complete) picture of the allocations and spending, particularly allocation patterns and under-spending, the sanitation budget, administrated in the years 2010/11-2013/14 by the DHS, was added to the DWS and DWA budget. As seen from figure 4, with added sanitation function, the real under-expenditure in all years increased, indicating challenges and shortcomings in the implementation of the sanitation programmes and grants. These are analysed more in details in the following chapters.



²⁰⁸ National Treasury, Estimates of national Expenditure 2015, p. 2
²⁰⁹ DWS and DWA Annual Reports, 2009/10-2014/15

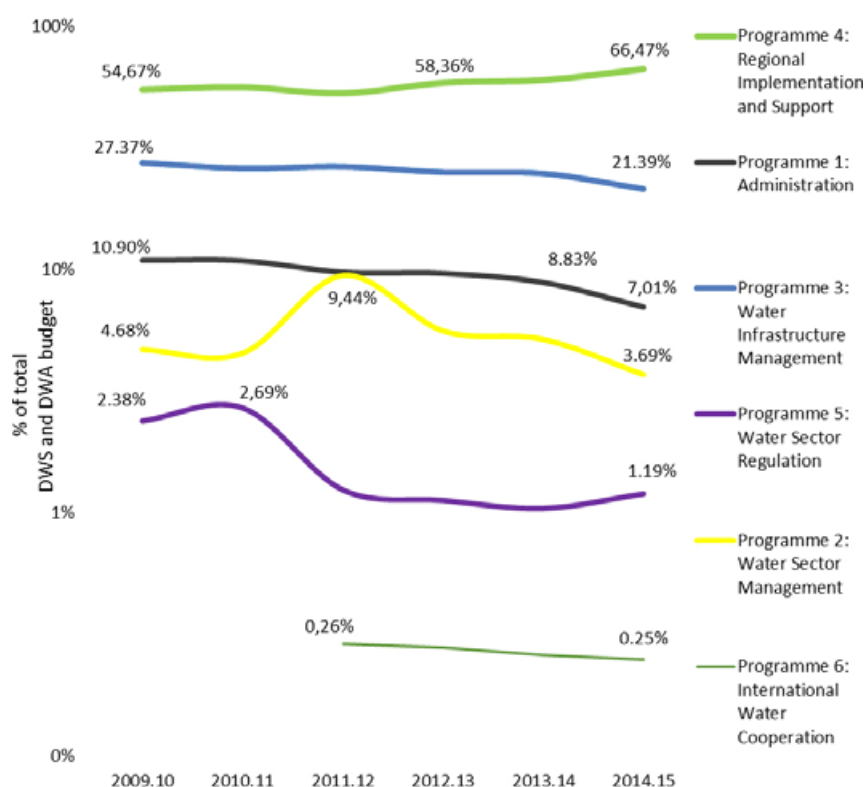
Table 4: DWS and DWA budget (without sanitation function): real allocations and expenditures, annual % change, and under expenditure as % of total budget, five programmes, 2009/10 – 2014/15

Programme	Nominal and real allocations and expenditures, annual % change and under-expenditure as % of total budget	Allocations and Expenditure R million					
		2009/10	2010/11	2011/12	2012/13	2013/14	2014/15
1. Administration	Total nominal allocation*	847	890	878	865	916	956
	Nominal amount spent*	843	842	782	843	907	888
	Total real allocation	1.099	1.084	1.031	962	969	956
	Real allocation, annual % change		-1,3%	-5,0%	-6,7%	0,8%	-1,4%
	Real amount spent	1.094	1.026	918	937	960	888
	Real under expenditure	5	58	113	24	10	68
	Under-expenditure as % of total real allocation	0,5%	5,4%	10,9%	2,5%	1,0%	7,1%
2. Water Sector Management	Total nominal allocation	364	371	852	502	535	504
	Nominal amount spent	348	341	512	501	531	469
	Total real allocation	472	452	1.000	558	566	504
	Real allocation, annual % change		-4,3%	121,2%	-44,2%	1,4%	-11,0%
	Real amount spent	452	415	601	557	562	469
	Real under expenditure	21	37	399	1	4	35
	Under-expenditure as % of total real allocation	4,4%	8,1%	39,9%	0,2%	0,7%	6,9%
3. Water Infrastructure Management	Total nominal allocation	2.127	2132	2385	2252	2565	2919
	Nominal amount spent	2.103	2.132	2.384	2.252	2.559	2919
	Total real allocation	2.760	2.598	2.800	2.503	2.714	2.919
	Real allocation, annual % change		-5,9%	7,8%	-10,6%	8,4%	7,6%
	Real amount spent	2.729	2.598	2.798	2.503	2.707	2.919
	Real under expenditure	31	0	1	0	6	0
	Under-expenditure as % of total real allocation	1,1%	0,0%	0,0%	0,0%	0,2%	0,0%
4. Regional Implementation and Support	Total nominal allocation	4.249	4.589	4.774	5.249	6.223	9071
	Nominal amount spent	4.103	4.389	4.376	4.936	6.130	7178
	Total real allocation	5.514	5.591	5.604	5.835	6.584	9.071
	Real allocation, annual % change		1,4%	0,2%	4,1%	12,8%	37,8%
	Real amount spent	5.324	5.348	5.137	5.487	6.486	7.178
	Real under expenditure	189	244	467	348	98	1.893
	Under-expenditure as % of total real allocation	3,4%	4,4%	8,3%	6,0%	1,5%	20,9%
5. Water Sector Regulation	Total nominal allocation	185	221	112	101	108	163
	Nominal amount spent	185	209	91	87	92	130
	Total real allocation	240	269	131	112	114	163
	Real allocation, annual % change		12,2%	-51,2%	-14,6%	1,8%	42,7%
	Real amount spent	240	255	107	97	97	130
	Real under expenditure	0	15	25	16	17	33
	Under-expenditure as % of total real allocation	0,0%	5,4%	18,8%	13,9%	14,8%	20,2%
6. International Water Cooperation	Total nominal allocation			26	25	27	34
	Nominal amount spent			21	23	27	33
	Total real allocation			31	28	29	34
	Real allocation, annual % change				-8,9%	2,8%	19,0%
	Real amount spent			25	26	29	33
	Real under expenditure			6	2	0	1
	Under-expenditure as % of total real allocation			19,2%	8,0%	0,0%	2,9%

	Nominal and real allocations and expenditures, annual % change and under-expenditure as % of total budget	Allocations and Expenditure R million					
		2009/10	2010/11	2011/12	2012/13	2013/14	2014/15
Total DHS allocations, under-expenditure, and allocation annual % change	Total nominal allocation	7.772	8.203	9.027	8.994	10.374	13.647
	Nominal amount spent	7.582	7.913	8.166	8.642	10.246	11.617
	Total real allocation	10.085	9.995	10.596	9.998	10.976	13.647
	Real allocation, annual % change		-0,9%	6,0%	-5,6%	9,8%	24,3%
	Real amount spent	9.839	9.641	9.585	9.606	10.840	11.617
	Real under expenditure	247	353	1.011	391	135	2.030
	Under-expenditure as % of total real allocation	2,4%	3,5%	9,5%	3,9%	1,2%	14,9%
	CPI inflation	6,5%	3,8%	5,6%	5,6%	5,8%	5,6%
	Deflator	0,77	0,82	0,85	0,90	0,95	1,00

Table 4 above is displaying the allocations broken down by different programmes of the DWS and DWA (without sanitation function managed by DHS), indicating that allocations for the programmes Administrations and Water Infrastructure Management have been decreasing since 2010/11, while the allocations for the Water Sector Management has been fluctuating, with a steep increase in the year 2011/12. The programme Regional Implementation and Support, which alone encompasses more than 50% of the Department's resources, has been steadily increasing, from R5514m in 2009/10 to R9071m in 2014/15, which presents the total increase of 39% in real terms. This also indicates that there is an increase of resources for water and sanitation that are transferred to the municipalities.

Figure 5: Real programme allocations as % of total DWS and DWA budget 2009/10 – 2014/15



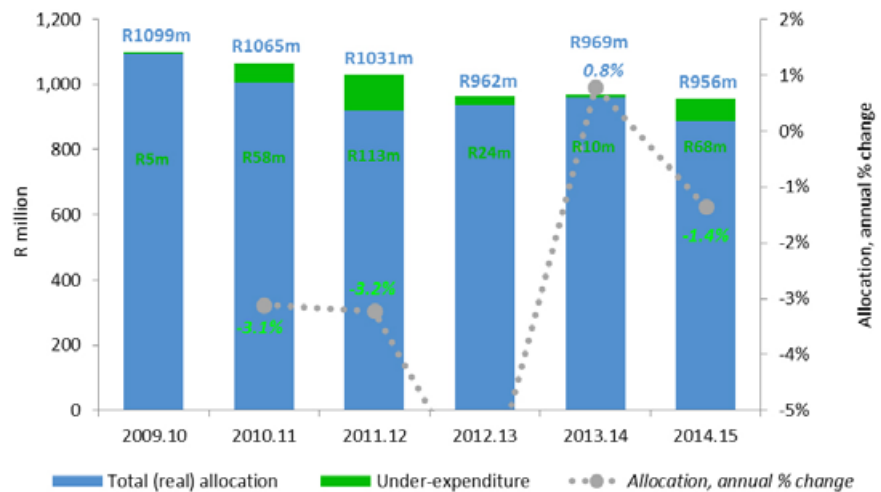
The steady increase of allocations for the Programme Regional Implementation and Support can also be seen from figure 5. This programme has consistently received by far the largest proportion of the water budget since 2009/10, rising to 66,47% in 2014/15; this is followed by the Water Infrastructure Management, which in 2014/15 received 21,39% of the budget (however, its share of the total Department's budget decreased from 27,37% in 2009/2010). The Regional Implementation and Support is also the only programme which share of the total Department's budget was constantly increasing, while the budget shares of other programmes

were decreasing. Despite increase in total budget allocated to the programme, Administration has been decreasing, and in 2014/15 represented 7% of the total share of the Department's budget.

The smallest share of the budget has been allocated to the Programme International Water Corporation, which was established as a separate programme in 2011/12 responsible for international relations over the water resources.

In figures 6 and figure 9 specific programmes will be looked into in more details, outlining allocation and spending patterns for each of the programme. The spending patterns of the Programme 4: Regional Implementation and Support will be looked into details in a separate chapter (3.3.1).

Figure 6: Programme 1: Administration – real allocations, annual % change and under expenditure, 2009/10 – 2014/15



The purpose of this programme is to provide policy leadership, advice and core support services, including finance, human resources, legal, information and management services, communication, and corporate planning, with one of the strategic objective of department being to *“Improve and increase the skills pool and build competencies in the Department and within the sector.”*

The administrative burden is steadily decreasing, in real terms as well as a share of total Department's budget (from 10,9% in 2009/10 to 7% in 2014/15). The decrease can be contributed to the efficiency savings as well as restructuring within the Department, including moving sub programme International Water Cooperation to a separate programme International Water Cooperation, which was established as a separate programme in 2011/12.²¹⁰

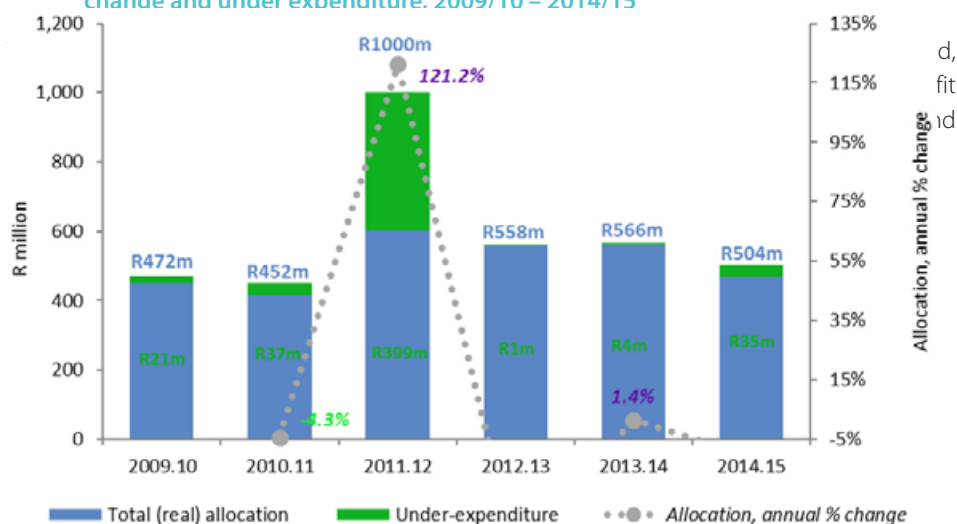
The under-expenditure was high in 2010/11, 2014/15 and in 2011/12 when more than R113m or 10.9% of the total real allocated budget remained unspent. According to DWS and DWA Annual Reports, the under-expenditure has been occurring due to a combination of factors, with the most commonly reported:²¹¹

- Unfulfilled vacant positions through all the Department's programmes, resulting in delays or underspending for the goods and services and other costs associated with the human resources activities (all years);
- Late appointments of service provider or delays with the invoicing related to the Data Storage Infrastructure in the years 2014/15 and 2013/14;
- Delays of invoices or purchasing of office accommodation and municipal services (2014/15);
- Other incidences, such as late appointment of the of Business Process Review in 2011/12 or Transfer payment budgeted for skills levy to Public Sector Education and Training Authority in the year 2013/14.

²¹⁰ Portfolio Committee on Water and Sanitation, 2014, p.4

²¹¹ DWS Annual Reports, 2009/10-2014/15

Figure 7: Programme 2: Water Sector Management – real allocations, annual % change and under expenditure. 2009/10 – 2014/15



This programme has been receiving budget allocations ranging between R427m and R566m, except for the year 2011/12 when there was a steep 121,2% increase (to R1000m). The reasons for this increase include increased allocation for the Acid Mine Drainage and for Financial Assistance to Poor Resource Farmers sub programmes as well as internal restructuring through which the sub programme Catchment Management Areas was transferred to this programme from Water Sector Management programme. However, as seen from figure 7, the programme was facing challenges with absorbing newly allocated resources, resulting in 40% under-expenditure of the available budget in 2011/12. The under-spending occurred due to delays in the design of infrastructure of the building an Acid Mine Drainage as well as due to unfilled vacant posts, including Occupational Specific Dispensation posts.²¹³ The 6,9% under expenditure in 2014/15 was mainly a result of delays in purchasing the laboratory analyses instruments for national surface water quality programme and surveys.²¹⁴

This programme resources will also increase over the medium-term, with estimates of allocation of R589m for 2015/16 and R651m for 2016/17 (in real terms).²¹⁵

Figure 8: Programme 3: Water Infrastructure Management – real allocations, annual % change and under expenditure, 2009/10 – 2014/15

The purposes of programme Water Infrastructure Management programme is to ensure a reliable supply of water from bulk raw water resources infrastructure, including to solicit and source funding to implement, operate and maintain bulk raw water resources infrastructure. This programme, mainly through the Infrastructure Development and Rehabilitation sub-programmes, allocates finances for the water trading entity's implementation of existing and new infrastructure projects.²¹⁶

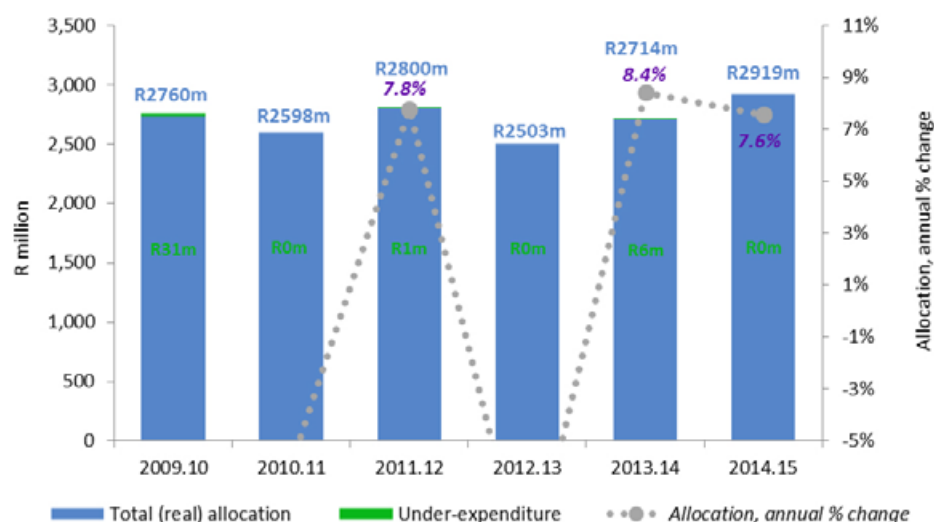
²¹² DWS Annual Report 2014/15, p. 36

²¹³ DWA Annual Report 2012/13, p. 143

²¹⁴ DWS Annual Report 2014/15, p. 259

²¹⁵ Report of the Portfolio Committee on Water and Sanitation, 2016, p. 7

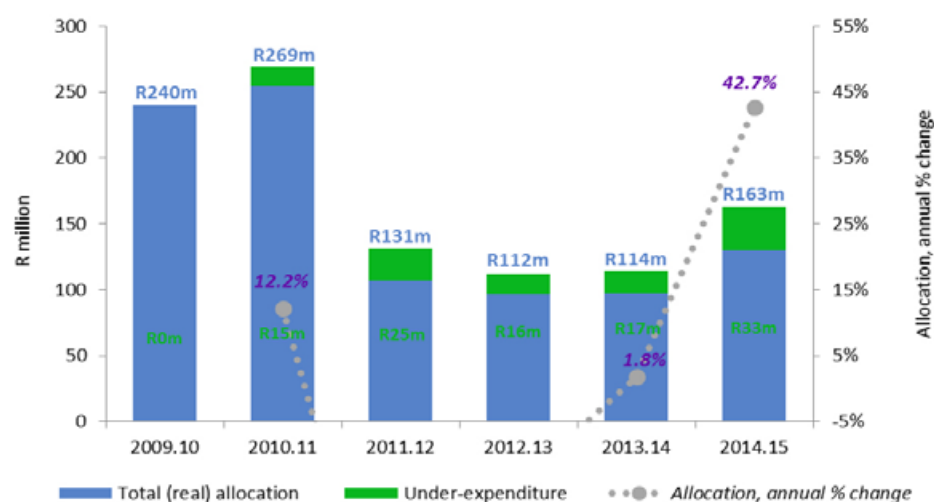
²¹⁶ Report of the Portfolio Committee on Water and Sanitation, 2016, p. 8



This programme receives the second highest allocation of the Department's budget. Although the real allocation for this programme was the highest in 2014/15 and was increasing since 2012/13, its share as total Department's budget was steadily decreasing from 27,37% in 2009/10 to 21,39% in 2014/15. This is also a programme with the best spending performance – in none of the years under review, the underspending did not exceed 2% of the programme allocation, with the underspending being the highest in 2009/10 (1,1% of the budget, amounting to R31m).

Figure 9: Programme 5: Water Sector Regulation – real allocations, annual % change and under-expenditure, 2009/10 – 2014/15

The programme Water Sector Regulation seeks to ensure the development, implementation, monitoring and review of regulations across the water value chain.²¹⁷ The administration of the Blue/Green Drop project aimed at improving drinking water quality and wastewater management form part of this programme.



The amount allocated to this programme abruptly decreased in 2011 by 51,2% from R269m to R131m, mostly due to reorganisation within the Department (the sub-programmes Catchment Management Areas and Financial Assistance to Poor Resource Farmers were moved to Water Sector Regulation programme). After the steep decrease, the programme budget again increased for 42,7% in 2014/15.

However, in the same year, the programme also faced the challenges with the absorption of the funds (with 20,2% of funds unspent). The under-expenditure was relatively high through all the years (ranging from 5,4% to 18% in 2011/12), except 2009/10 when there was perfect spending performance.

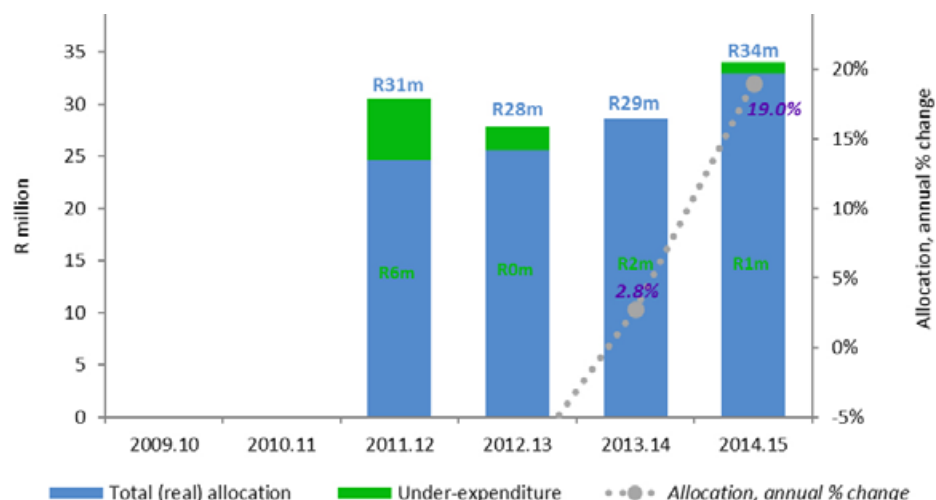
²¹⁷ Report of the Portfolio Committee on Water and Sanitation, 2016, p. 6

The reasons for underspending were, as presented in the Department's Annual Reports, the following:

- Challenges with delays of appointment (2012/13), expiry of contracts (2014/15) or late submission of invoices (2010/11-2013/14) by service providers;
- Unfilled vacant posts, including OSD posts (in all years except 2010/11);
- Other reasons, such as postponing of the conference on African Forum for Utility Regulators Conference (2014/15).

Figure 10: Programme 6: International Water Co-operation – real allocations, annual % change and under-expenditure, 2009/10 – 2014/15

The International Water Co-operation programme, which was established as a separate programme in 2011/12, seeks to strategically develop, promote and manage international relations on water resources between countries.²¹⁸



As seen in figure 10 above, the allocation for the programme has been the highest in 2014/15, when it rose for 19% to R43m. The under-expenditure was the highest, R6m or 19,2 % of the total (real) allocation, in the first year when the programme was established (2011/12). The under-expenditure mainly occurred because planned international engagements did not taking place due to political dynamics and postponements in other countries.²¹⁹

4.5.1 Allocation and spending patterns of the Regional Implementation and Support programme (Programme 4)

The Regional Implementation and Support programme takes up the biggest share of the DWA and DWS budgets, well over 50% through all the years of the analysis. Therefore, its allocation and spending patterns are looked more in-depth in this chapter.

The main goal of this programme is to coordinate implementation of the Department's strategic goals and objectives at the regional (provincial) level,²²⁰ including by establishing of water resource management institutions and accelerate communities' access to water infrastructure.²²¹ Through this programme, conditional grants, such as WMIG and RBIG are administrated to the municipalities. This is also the programme that absorbed the bulk of the sanitation finances transferred from the DHS to the DWS. The programme's work is organised in several sub programmes, which are analysed in details later on.

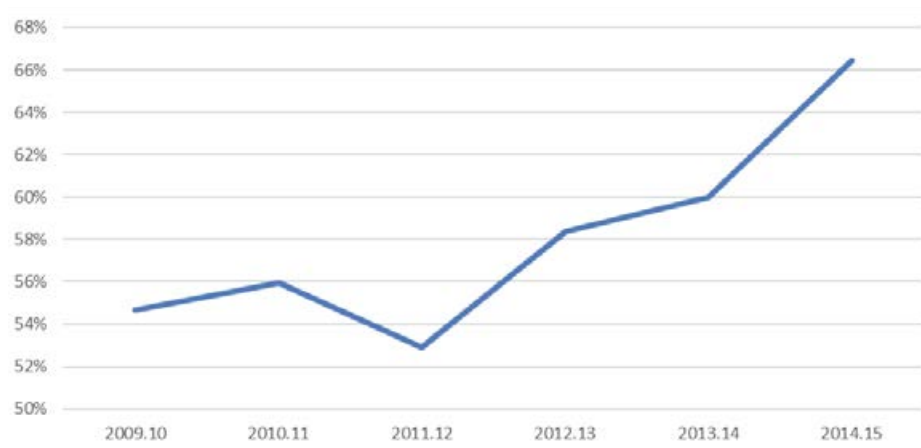
²¹⁸ Report of the Portfolio Committee on Water and Sanitation, 2016, p. 10

²¹⁹ DWS Annual Report 2014/15, p. 143

²²⁰ DWA Annual Report 2013/14

²²¹ DWS Annual Report 2014/15

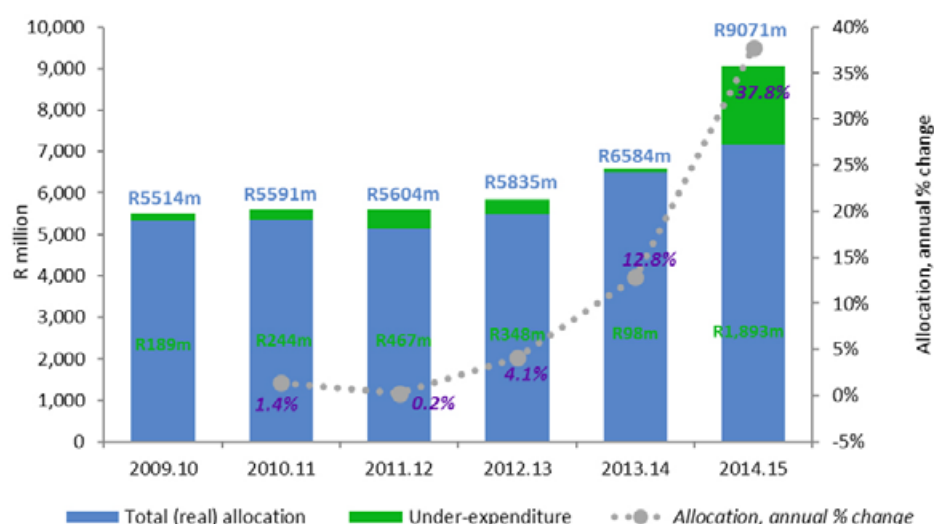
Figure 11: Programme Regional Implementation and Support as % of total real DWA budget Programme



As we can see from figure 9 above, the programme budget allocation has been steadily increasing, except for the year 2011/12, when there was a slight 4% decrease. The allocations for the programme will continue to increase in the next years (R965m in 2015/16 and R10065m in 2016/17²²² in the real terms), in order to continue to pursue programme's objectives, which are:²²³

- To ensure the availability of water supply for domestic and agricultural use;
- To ensure the provision of local government institutional support through the refurbishment of prioritised schemes for municipalities, from 59 in 2012/13 to 100 by 2016/17;
- To support the local government water sector over the medium term;
- To improve the protection of water resources and safeguard their sustainability;
- To improve water use efficiency to previously disadvantaged communities by processing 100% of water use licence applications received and increasing the volume of water allocated to historically disadvantaged individuals from 28 million cubic metres in 2012/13 to 42 million cubic metres of water by 2016/17.

Figure 12: Programme 4: Regional Implementation and Support – real allocations, annual % change and under-expenditure, 2009/10 – 2014/15



As it can be seen from figure 12 above and table 5 below, the under-expenditure of the programme has been the highest in 2014/15, when it was 20,9% of the allocated budget, followed by 2011/12 (8.3%) and 2012/13 (6%).

²²² Report of the Portfolio Committee on Water and Sanitation, 2016, p. 8

²²³ Report of the Portfolio Committee on Water and Sanitation, 2016, p. 8

Table 5: Regional Implementation and Support – real allocations, annual % change and under-expenditure, 2009/10 – 2014/15

Programme	Nominal and real allocations and expenditures, annual % change and under-expenditure as % of total budget	Allocations and Expenditure R million					
		2009/10	2010/11	2011/12	2012/13	2013/14	2014/15
4. Regional Implementation and Support	Total nominal allocation	4.249	4589	4774	5249	6223	9071
	Nominal amount spent	4.103	4.389	4.376	4.936	6.130	7.178
	Total real allocation	5.514	5.591	5.604	5.835	6.584	9.071
	Real allocation, annual % change		1,4%	0,2%	4,1%	12,8%	37,8%
	Real amount spent	5.324	5.348	5.137	5.487	6.486	7.178
	Real under expenditure	189	244	467	348	98	1.893
	Under-expenditure as % of total real allocation	3,4%	4,4%	8,3%	6,0%	1,5%	20,9%
	CPI inflation	6,5%	3,8%	5,6%	5,6%	5,8%	5,6%
	Deflator	0,77	0,82	0,85	0,90	0,95	1,00

The high under-expenditure in 2014/15, according to the DWS Annual Report, can be attributed mainly to the challenges with the implementation of various grants directed for the provision of water and sanitation to the local municipalities, including:²²⁴

- Municipal Water Infrastructure Grant (prolonged signing of service level agreements and the delayed in delivery of materials by suppliers);
- Bucket Eradication Programme (cash flow challenges experienced by the implementing agents and severe hard rock and adverse geotechnical soil conditions delaying the excavation process);
- Rural Household Infrastructure Grant (late appointments of implementing agents, late transfer to implementing agents by DHS and the late submission of business plans for the Grant);
- Regional Bulk Infrastructure Grant, which consist the biggest grant (late appointment of implementing agents, etc.).

Additionally, the under-expenditure in previous years also occurred due to:²²⁵

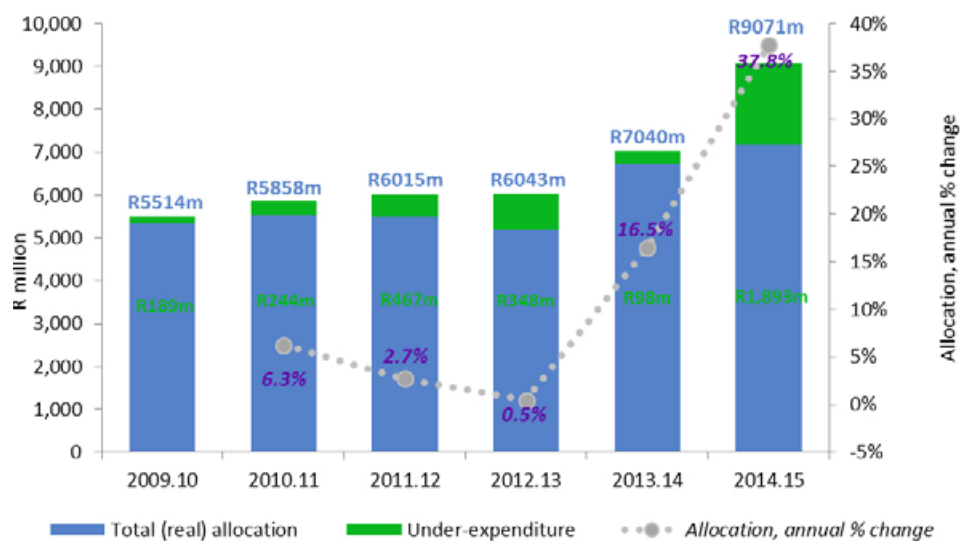
- Non-filling of vacant, but funded positions;
- Failure to transfer the Water Services Operating Subsidy Grant;
- Delays in approving Accelerated Community Infrastructure projects, signing of the funding agreements and delays in the procurement systems within the municipalities;
- Late submission of invoices by the service providers.



²²⁴ DWS Annual Report, 2014/15

²²⁵ DWA and DWS Annual Reports, 2009/10-2014/15

Figure 13: Programme 4: Regional Implementation and Support + DHS sanitation service programmes – real allocations, annual % change and under-expenditure, 2009/10 – 2014/15



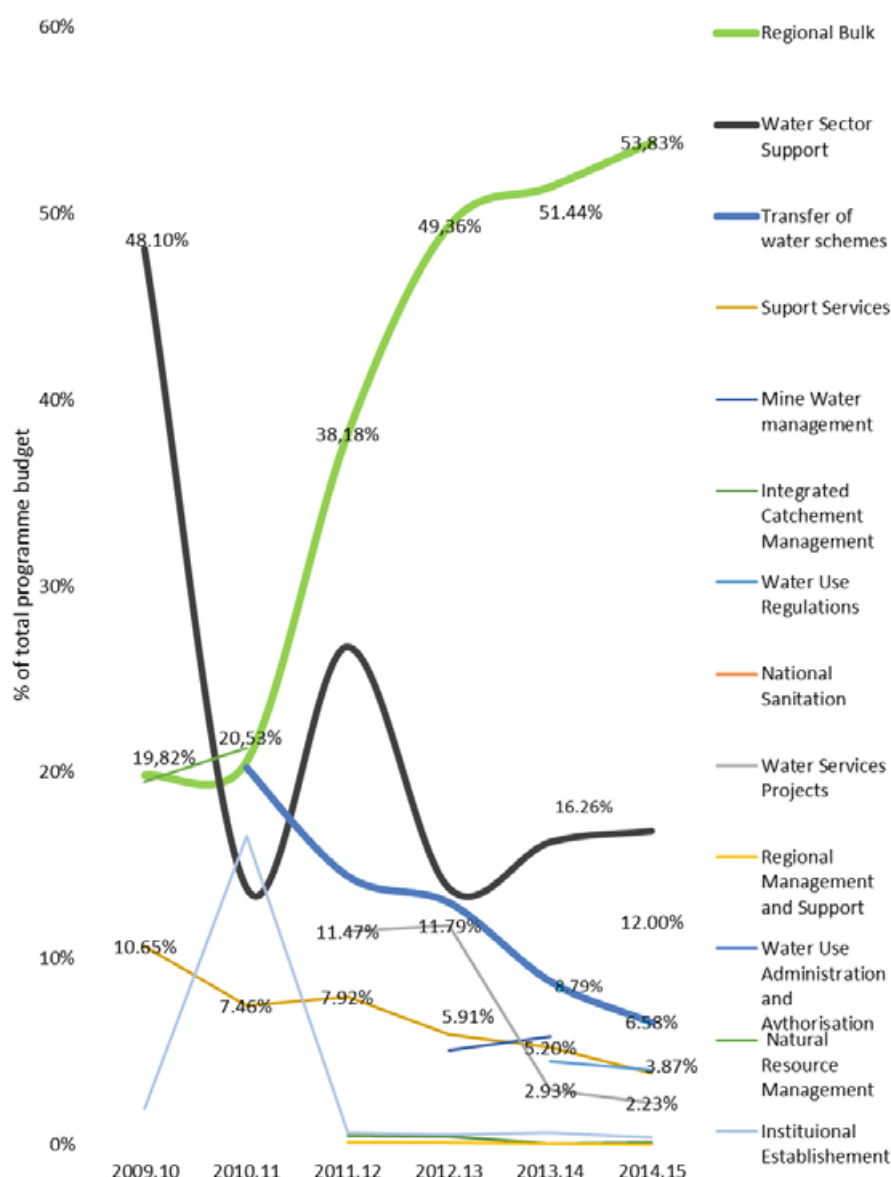
The programme Regional Implementation and Support absorbed the bulk of the sanitation services budget from DHS. As we can see from figure 13 above, when we add the DHS's budget for the sanitation, the under expenditure increases for all the years.

The increases in the under-expenditure are indicators of significant challenges in the provision of sanitation, which is also retreated by the UN Water-Glass 2014 report also showing that defined financing plan and budget for rural and urban sanitation remain not sufficiently implemented in South Africa.²²⁶



²²⁶ UN Water, UN Water - GLAAS 2014 Report, 2014, p. 58

Figure 14: Real sub-programme allocations as % of total Regional Implementation and Support programme budget (logarithmic scale) 2009/10 – 2014/15



As can be seen from figure 14 in the period of review, the programme ran several sub-programmes. Their budget allocations are as follows:²²⁷

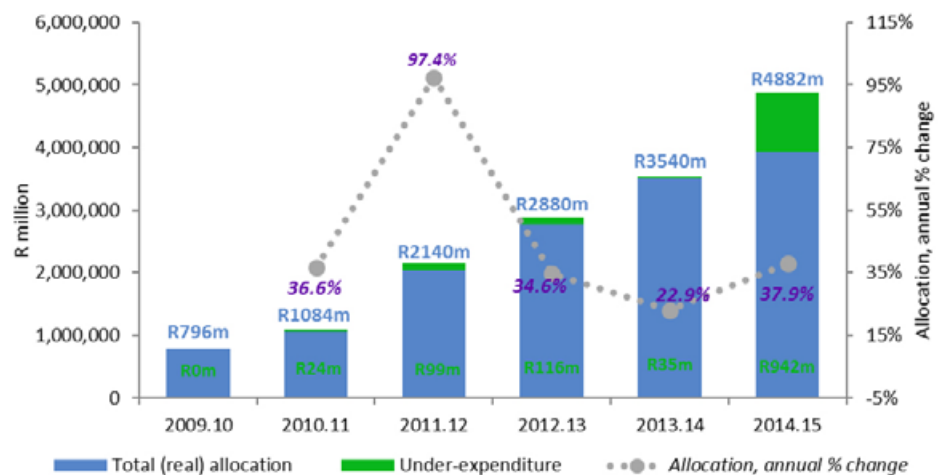
- The greatest share of programme budget was received by the Regional Bulk sub programme, which develops regional bulk infrastructure for water supply and water treatment works and supplements regional bulk sanitation collector systems as well as regional waste water treatment works. This sub programme was also the only sub programme with a steady increase of allocated budget, while the budget allocations for all other programmes were fluctuating or decreasing. In the year 2014/15, 53.8% of the total programme's budget was allocated to this sub programme. According to the mid-term financial framework, the resources allocated to this sub programme will even increase.
- Sub programme National Sanitation Services has been transferred from the DSH in 2014/15, when it composed of 12,8% of the budget. Its goal is to support the development of infrastructure for sanitation services for improved quality of life. The two sanitation related grants, RHIG and BEG, form part of this sub programme.
- This is followed by the Water Sector Support, which coordinates sector collaboration and intergovernmental relations at the national, provincial and local level and provides hands-on support to local government through the rapid response unit and

²²⁷ DWA and DWS Annual Reports, 2009/10-2014/15

accelerated community infrastructure programme to ensure the effective, efficient, economic and sustainable provision of water. However, despite the repeated calls for improving the coordination among different governmental departments and implementing actors on all levels, the allocations for this sub programme has been decreasing since 2010/11 in comparison with the total budget of the Department and has in 2014/15 presented only 7.2% of the Department's budget. However, as seen below, the allocation in real terms has been slightly increasing.

- Followed by the Transfer of Water Schemes sub programme, which guides the transfer of the operation and maintenance functions of water services schemes to water services institutions to ensure effective, efficient and sustainable service delivery by all water services authorities. However, the share of allocation for this programme has been also steadily decreasing in the last years.
- Equally, Support Services sub-programme, which provides human resources, financial management and general administration to the programme, has constantly been receiving a smaller share of the total programmes budget, consisting of 4,2% in 2014/15.
- Other sub-programmes, such as Regional Management and Support (strategic support for and oversees management of the programme), Institutional Establishment (establishment of effective water management institutions), Integrated Catchment Management (protection, development, use and management of resources at the water management area level), Mine Water Management (coordination and oversight of the management of mine water with specific emphasis on acid mine management) and Water Use Authorisation and Administration (authorises all water use activities in South Africa through the use of regulatory instruments such as licensing and water allocation reform) has been receiving smaller share of the programme and will not be analysed in details.

Figure 15: Sub-programme: Regional Bulk – real allocations, annual % change and under-expenditure, 2009/10 – 2014/15



The regional bulk infrastructure is considered as playing an important role in ensuring that there is a sustainable and holistic value chain of water supply and sanitation infrastructure.²²⁸ The sub-programme regional bulk receives the biggest share of the programmes allocations, which were increasing through all the years. The programme allocation multiplied by more than six times since 2009/10, reaching R4882m in 2014/15, indicating that increase in investments in the regional bulk infrastructure can be accounted for a big share of the general increase of the programme allocations. Furthermore, the allocations for this sub programme will continue to increase. The increases include R333m in 2015/16 and R472 million in 2016/17 (in real terms), which will be re-directed from the MIG, allowing more resources to be invested in the bulk water and sanitation infrastructure needed for future household connections.²²⁹

²²⁸ Report of the Portfolio Committee on Water and Sanitation, 2016, p. 5

²²⁹ National Treasury, Explanatory memorandum to the division of revenue 2014/15, p. 40

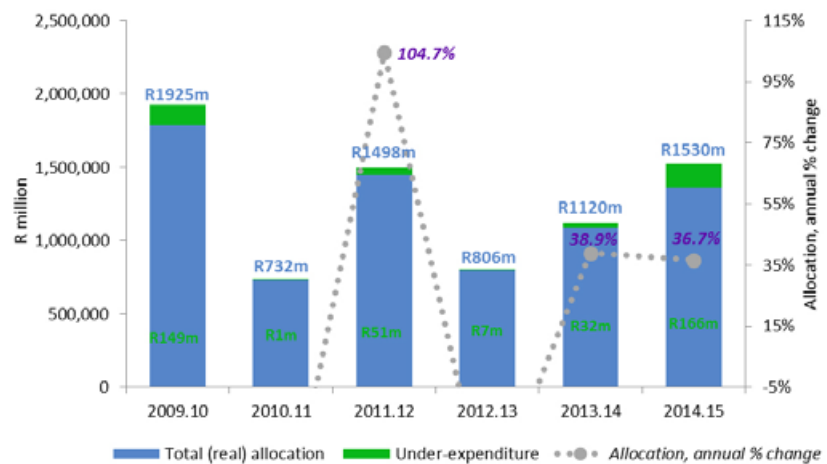
Table 6: Sub-programme: Regional Bulk – real allocations, annual % change and under-expenditure, 2009/10 – 2014/15

Sub-Programme	Nominal and real allocations and expenditures, annual % change and under-expenditure as % of total budget	Allocations and Expenditure R million					
		2009/10	2010/11	2011/12	2012/13	2013/14	2014/15
Regional Bulk	Total nominal allocation	612	890	1823	2591	3346	4883
	Nominal amount spent	612	870	1.739	2.487	3.313	3.94
	Total real allocation	796	1.084	2.140	2.880	3.540	4.883
	Real allocation, annual % change		36,6%	97,4%	34,6%	22,9%	37,9%
	Real amount spent	794	1.060	2.041	2.764	3.506	3.941
	Real under expenditure	0	24	99	116	34	942
	Under-expenditure as % of total real allocation	0,0%	2,2%	4,6%	4,0%	1,0%	19,3%
	CPI inflation	6,5%	3,8%	5,6%	5,6%	5,8%	5,6%
	Deflator	0,77	0,82	0,85	0,90	0,95	1,00

Underspending, as can be seen from table 6, has been fluctuating between 2009/10 and 2013/14 between 0% to 4,6%, with a steep increase in 2014/15, when 19,3% of the allocated budget or R945m, remained unspent.

The bulk of under-expenditure is derived from the failure to implement the Regional Bulk Infrastructure Grant, which is administrated through this programme. The delays were mainly attributed to the finalisation of the implementation plan by the newly appointed implementing agent and the delays in delivery of ordered material needed for implementation of various bulk regional projects.²³⁰ The RBIG targets projects cut across several municipalities or large bulk projects within one municipality, including it funds infrastructure needed to provide reticulated water and sanitation services to individual households. The RBIG can also be used to appoint service providers to carry out feasibility studies, related planning or management studies for infrastructure projects.²³¹ Due to the challenges in the first year of the establishment of the grant, particularly inadequate capacity of municipalities to implement the grant (in 2007), the DWA took a greater/direct control for implementing RBIG projects. However, a portion of the grant has been converted to a direct grant to municipalities again in 2015/16, which should allow well-functioning municipalities to take full responsibility for their infrastructure projects. This will also free the Department to use the indirect component of the grant to complete infrastructure projects on behalf of low-capacity municipalities.²³²

Figure 16: Sub programme Water Support Sector – real allocations, annual % change and under-expenditure, 2009/10 – 2014/15



²³⁰ DWS Annual Report, 2014/15

²³¹ National Treasury, Explanatory Memorandum to the Division of Revenue 2014/15, p. 42

²³² National Treasury, Estimates of National Expenditure, Vote 36: Water and Sanitation 2015, p. 2-3

“Municipalities have the constitutional obligation to provide basic services to communities, including water and sanitation.”

The second biggest sub programme Water Sector Support is responsible for coordination and collaboration and intergovernmental relations at the national, provincial and local level and provides hands-on support to local government through the rapid response unit. As can be seen from figure 16, the allocation for this sub programme has been fluctuating and has been, since decrease for almost 42,% in 2012/13, gradually increasing to R1530m in 2014/15. Out of this budget, 10,8% (or R166m) remained unspent in 2014/15, showing that there is underutilised potential for much-needed improvements in coordination on all levels.

4.5.2 Spending and allocation patterns of grants transferred to Municipalities

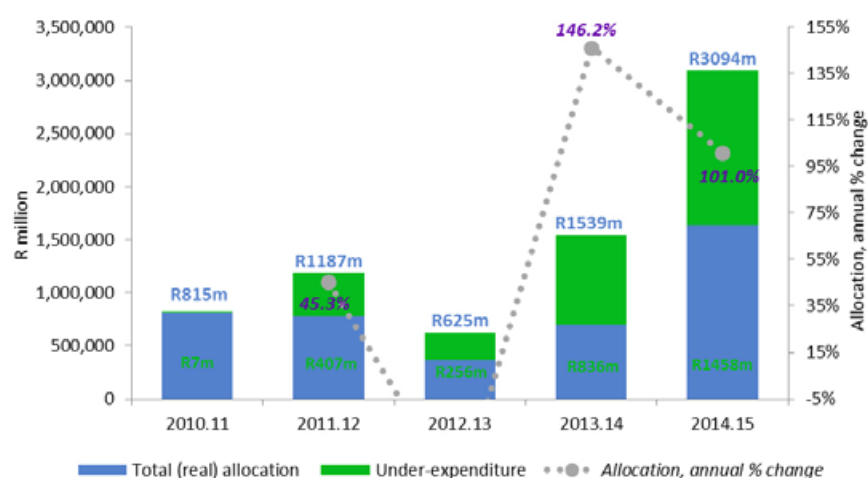
Municipalities have the constitutional obligation to provide basic services to communities, including water and sanitation. For this they receive a share of nationally-raised revenues as well as conditional grants:

- Conditional grants administrated through the DWS (primarily MWIG and WSOSG for water services and RHIG and BEG for sanitation) and CoGTA (MIG). However, in 2016/17 MWIG, WSOSG and RHIG will be merged into a single grant, the Water Services Infrastructure Grant, which will be used for reticulation and on-site solutions in municipalities with low capacity.²³³
- Local Government Equitable Share.

Some of the grants, such as MWIG, have direct and indirect component. Direct grants are directly transferred to the municipalities that have capacities and skills to take full responsibility for their infrastructure projects, while in the case of indirect grants, the DWS completes the infrastructure projects on behalf of municipalities with lower capacities.²³⁴

The Regional Bulk Infrastructure Grant, although transferred to municipalities, has been already dealt in the previous pages, and is excluded from this analysis.

Figure 17: Conditional grants combined (MWIG + RHIG + BEG + WSOG) – real allocations, annual % change and under-expenditure, 2009/10 – 2014/15



Excluding the Regional Bulk Infrastructure Grant, figure 17 shows the combined figure of all four grants.²³⁵ The fluctuation in the total allocation is in mainly linked to the fact that the grants were established and run in different years.

However, figure 17 clearly displays the challenges with the under-expenditure that is a clear feature of all the grants administrated by the DWS. In 2014/15, 41,7% of the allocated grants remained unspent, while in the 2013/14 the under-expenditure was even higher (53,4%).²³⁶ The reason for poor spending will be examined for each grant separately in the pages below.²³⁷

The high level of under-expenditure clearly indicates that the challenge in the provision of water and sanitation does not lie so much in resources available or allocated, but mostly in

²³³ National Treasury, Estimates of National Expenditure 2015, p. 2

²³⁴ National Treasury, Estimates of National Expenditure, Vote 36: Water and Sanitation 2015, p. 2-3

²³⁵ Including RHIG and BEG administrated by the DHS in the years 2010/11 – 2013/14.

²³⁶ However, it needs to be acknowledged that the implementation and spending of some of the grants is aligned to the municipal financial year which is not aligned to the national financial year, for which reason the under-expenditure for the year 2014/15 might be slightly lower than reported in the DWS Annual Report 2014/15 published before the end of the municipality budget year cycle.

²³⁷ DWS Annual Report, 2014/15.

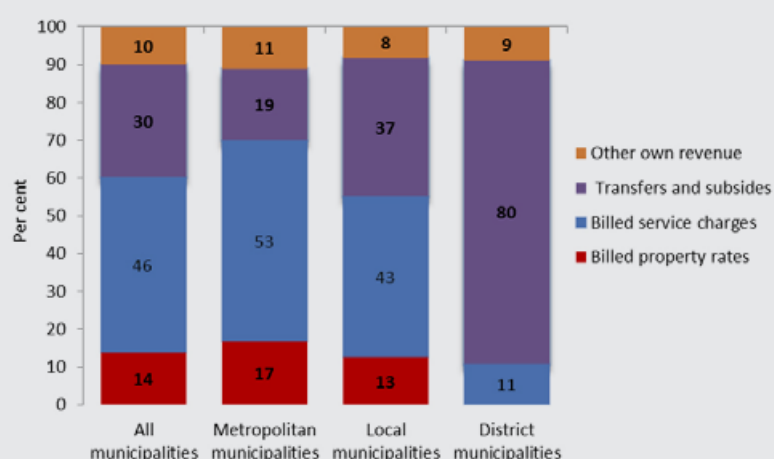
their poor utilisation and in inefficient use. As also pointed out by the South African Human Rights Commission (SAHRC), a critical consideration in this regard is whether there is sufficient monitoring of these substantial funds allocated to local government,²³⁸ as well as to what extent citizens are given an opportunity to participate in planning and oversight of these grants.

Sustainability of the revenues raised for financing for water and sanitation at the local level

As described above, the municipalities are receiving a smaller share of the nationally raised revenues compared to provincial governments. This is partly because they can raise revenues from their tax base to supplement their funding for basic services and operations. For the water and sanitation services, the revenues primarily come from the water tariffs and users charges.²³⁹

However, the possibility and capacity to raise the local revenues vary greatly across the different municipalities. For example, as it can be seen figure 18 below, in the year 2015/16, metropolitan municipalities derived only 19 % of their revenue from national transfers, while district municipalities, which provide services to rural areas, derive 80 % of their funding from transfers. Those municipalities thus remain heavily reliant on subsidies and grant transfers.²⁴⁰

re 18: Budget sources of municipal revenues, 2015/16



Source: National Treasury 2015 Budget Review

In this regard, several concerns have been raised over the insufficient provision of own revenues for operational services beyond the LGES and capital expansion beyond addressing backlogs in historically underserved areas through the MIG and the MWIG.²⁴¹ The municipalities, particularly rural ones, are experiencing several challenges with collecting their own revenues for financing water and sanitation services, with the generally poor billing and cost recovery and some areas that are, in essence, not being billed at all.²⁴² As a consequence, municipalities with large rural populations receive almost no revenue from households living in rural areas, even where the level of service provided may be a yard connection or the households don't fulfil the requirements of the free water service policy. Some commentators have argued that free basic water and sanitation policy might contribute to an expectation on the part of households to receive free water, even if they do not fall within the category of indigent households, while others also suggested that availability of grants might contributed to lower willingness of households to invest in water supply and sanitation improvements,²⁴³ as well as discouraged the local government to acquire loans and seek for other resources to co-finance the services.

The existing cost model has been assessed as not catering adequately for the budget allocations needed to finance daily operations and especially longer term maintenance

²³⁸ South African Human Rights Commission, 2014, p. 67

²³⁹ An AMCOW Country Status Overview, 2011, p. 15-16

²⁴⁰ National Treasury 2015 Budget Review. Chapter 6: Provincial and Local Government, p. 80

²⁴¹ Water Aid, 2015, p. 5-6

²⁴² Report of the Portfolio Committee on Water and Sanitation, 2014, p. 18

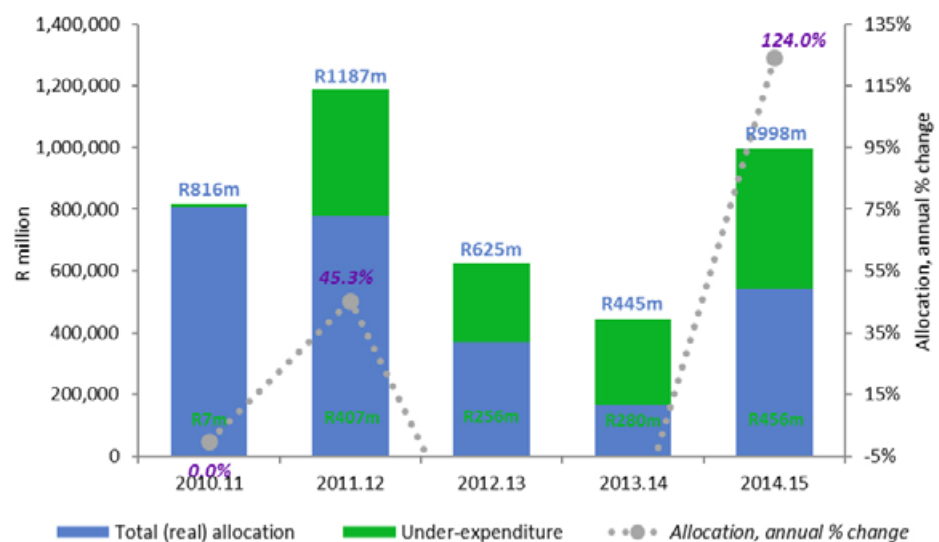
²⁴³ An AMCOW Country Status Overview, 2011, p. 16

of infrastructure,²⁴⁴ even less for the finances needed for the regional bulk infrastructure required for providing bulk water services to the remaining remote rural households and the high cost of urban sanitation. This shows that, within the current fiscal environment, when the growth in transfers are slowing, and the costs of providing services are increasing, there will be additional pressure on local governments to improve their own revenue collection, increase efficiency, and obtain greater value for the money they spend.²⁴⁵

However, in line with the human rights obligations of the Government of South Africa, any billing of the water and sanitation must be done in a way ensuring that water and sanitation remain accessible and affordable to everyone, and that costs recovery does not have an impact on poorer municipalities unable to collect revenue from indigent households. In this regard, any readjustment of the strategy and needed improvements in the revenue collections at the local level should go hand in hand with the access to reliable information on the profile of water users and what they pay for it, including by developing, as highlighted by the UN Water - Glass 2014 report, tracking and monitoring system on affordability of water services.²⁴⁶ Equally, it is important that water and sanitation must be seen and reconfirmed, through all the processes, including the development of a new pricing strategy, as a basic human right and not a commodity.

4.5.3 Water Service Subsidy Operating Grant

Figure 19: Water Service Operating Grant – real allocations, annual % change and under-expenditure, 2010/11 – 2014/15



As can be seen from figure 19 above and table 7 below, the allocation for the Water Service Operating Subsidy Grant has been fluctuating in the years between 2010/11 and 2014/15, with the highest amount allocated in the year 2011/12 (R1187m). This was followed by a steep decrease in 2012/12 and 2013/14 and again increase for 124% in 2014/15.

The fluctuation of allocated resources can be attributed to high levels of under-spending, which has been a constant feature of this programme. With the exception of 2010/11, under-expenditure has been fluctuating between 40,9% and 63% of the total budget. In total, between 2010/11 and 2014/15 the under-expenditure of this grant was R2.666m out of R4.071m of total allocation (34,5%).

²⁴⁴ Report of the Portfolio Committee on Water and Sanitation, 2014, p. 18

²⁴⁵ Water Aid, 2015, p. 4

²⁴⁶ UN Water, UN Water GLAAS 2014 Report, 2014, p. 75

Table 7: Water Service Operating Subsidy Grant – real allocations, annual % change and under-expenditure, 2009/10 – 2014/15

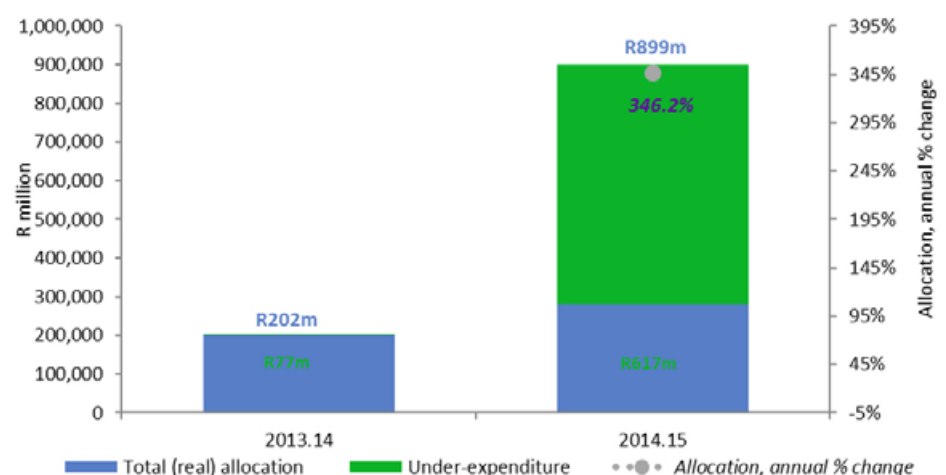
Grant	Nominal and real allocations and expenditures, annual % change and under-expenditure as % of total budget					
		2009/10	2010/11	2011/12	2012/13	2013/14
Water Operating Subsidy Grant	Total nominal allocation	670.102	1.010.794	562.434	420.945	997.684
	Nominal amount spent	664.273	664.273	332.369	155.945	541.997
	Total real allocation	816.474	1.186.498	625.190	445.360	997.684
	Real allocation, annual % change		45,3%	-47,3%	-28,8%	124,0%
	Real amount spent	809.372	779.742	369.454	164.990	541.997
	Real under expenditure	7.102	406.756	255.735	280.370	455.687
	Under-expenditure as % of total real allocation	0,9%	34,3%	40,9%	63,0%	45,7%
	CPI inflation	3,8%	5,6%	5,6%	5,8%	5,6%
	Deflator	0,82	0,85	0,90	0,95	1,00

Disaggregated data on allocation and spending of the grant at the municipal level is available only in the DWA annual reports for the years 2011/12 and 2012/13, when the under-expenditure of the grant was 34,4% and 40,9% respectively.

4.5.4 Municipal Water Infrastructure Grant

The Municipal Water Infrastructure Grant (MWIG) was introduced in 2013/14 to accelerate the delivery of clean water to communities that do not have access to basic water services. The grant provides funding for various projects, including the construction of new infrastructure and the refurbishment and extension of existing water schemes. In areas where municipalities have the capacity to implement projects themselves, funds are transferred through a direct grant. In other areas, the national Department implements projects on behalf of municipalities through an indirect grant.²⁴⁷ This grant and the MIG are the two main grants municipalities can use as part of the capital budget for water and sanitation services.

Figure 20: Municipal Water Infrastructure Grant – real allocations, annual % change and under-expenditure, 2013/14 – 2014/15



The budget allocated to this grant has, despite the high under-expenditure in 2013/14, increased for 69,9% in 2014/15 (from R638m to R1084m). The grant is expected to increase in the next years to R3 billion (in real terms) in 2016/17, which is almost a four-time increase compared to 2014/15. The grant is earmarked for specific projects to eradicate backlogs in water and sanitation infrastructure, particularly within the 24 priority district municipalities identified through Census 2011's enumeration of backlogs per poor household per municipality.²⁴⁸

²⁴⁷ National Treasury, Explanatory memorandum to the division of revenue 2014/15, p. 39

²⁴⁸ Report of the Portfolio Committee on Water and Sanitation, 2016, p. 5

“

Rural Households Infrastructure Grant was introduced in 2010/11 to provide specific capital funding for the reduction of rural sanitation backlogs

”

As it can be seen from Figure 20, the MWIG performance is weak, with 82,9% under-expenditure in 2013/14. The expenditure significantly improved in 2014/15 but was still 27,1% of the allocated budget. According to the DWS Annual Report 2014/15 the allocated budget for “various water supply projects Municipal Water Infrastructure Grant which include construction of pipelines, steel and concrete reservoirs, drilling of boreholes, connection of bulk water supply system /.../ could not be spent due to prolonged signing of service level agreements and the delayed delivery of materials by suppliers».²⁴⁹

The challenges experienced by the WMIG in its first year of the operation can be additionally explained by the briefing to the Standing Committee on Public Accounts by National Treasury and the DWA in the first year of the grant implementation: “As of January 2014, in relation to MWIG, the Department had transferred funding in two quarters to the municipalities. The Department entered into an agreement with municipalities to submit monthly progress reports as well as a business plan. However, DWA was currently experiencing challenges in terms of the MWIG allocation transfers, because of late submission of project plans from the municipalities, and late submission also of the reports /.../another reason for withholding the transfers was that, in the case of the 49% transfers made to the municipalities, only 18% had been spent, and it was a risky exercise to continuously transfer funds where there was no capacity to spend. The Department had projects that needed to be fast-tracked to ensure that water would reach communities. It was thus engaging with the municipalities and encouraging them to review their business plans. DWA recognised that withholding of money did not get the projects done, so it was critically important to reach a stage where it could transfer the money to the projects that needed to progress.”²⁵⁰

Table 8: Municipal Water Infrastructure Grant – real allocations, annual % change and under-expenditure, 2013/14 – 2014/15

Programme	Nominal and real allocations and expenditures, annual % change and under-expenditure as % of total budget		
		2013/14	2014/15
Municipal Water Infrastructure Grant	Total nominal allocation	602.965	1.083.734
	Nominal amount spent	103.098	789.515
	Total real allocation	637.937	1.083.734
	Real allocation, annual % change		69,9%
	Real amount spent	109.078	789.515
	Real under expenditure	528.859	294.219
	Under-expenditure as % of total real allocation	82,9%	27,1%
	CPI inflation	5,8%	5,6%
	Deflator	0,95	1,00

Conversely, the MWIG's expenditure clearly suggests ongoing challenges, with both large transfers being withheld, as in the case of the Free State, KwaZulu-Natal and Mpumalanga, and underspending on funds actually transferred (Free State and North West).²⁵¹

4.5.5 Rural Household Infrastructure Grant

Rural Households Infrastructure Grant was introduced in 2010/11 to provide specific capital funding for the reduction of rural sanitation backlogs and to target existing households where bulk-dependant services are not available. The grant was between 2010/11 – and 2014/15 run by the DHS, and was, in 2014/15 transferred to the DWS. The key objectives of the RHIP, at the time of its establishment, were:

- To support municipalities to address rural basic sanitation (and water supply) backlogs;
- To improve the quality of life in rural communities;
- To contribute to the rural development priority of government;
- To contribute to job creation and local economic development;

²⁴⁹ DWS Annual Report, 2014/15, p. 260

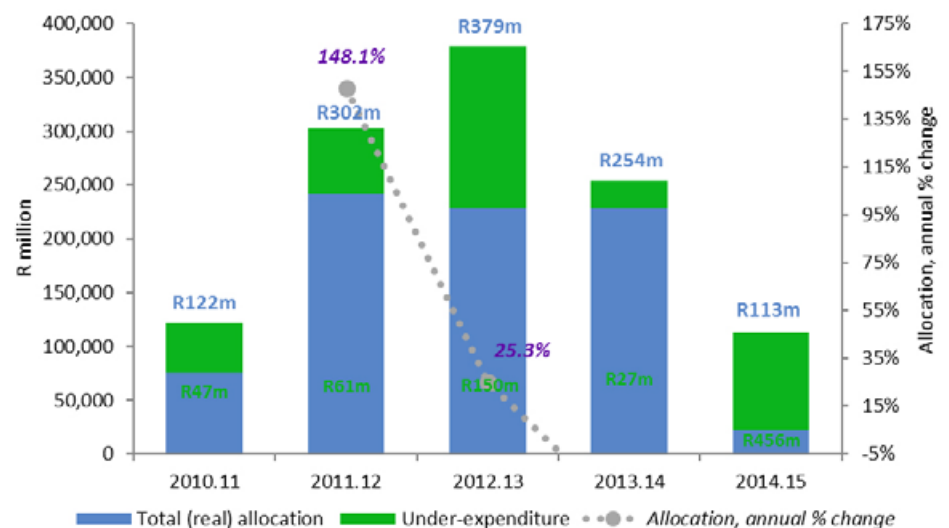
²⁵⁰ In Water Aid, 2015, p. 11

²⁵¹ In Water Aid, 2015, p. 12

- To contribute towards meeting the sanitation (and water supply) Millennium Development Goals targets of South Africa;
- To accelerate delivery of sanitation (and water supply) to meet the 2014 target.²⁵²

The RHIG at the beginning was managed by the national Department, which is responsible for the identifying mechanisms of implementation being used by implementing agents, which could include non-governmental organisations, community-based organisations, public entities or managing contractors. However, national Department needs to agree with municipalities on the scope of the work to be done as well as on issues of operation and maintenance of the infrastructure that includes identification of specific areas of operation up to the ward level.²⁵³ In 2012/13, the RHIG was converted into a direct grant to rural municipalities to support the local government turnaround strategy to strengthen municipalities' ability to deliver and their accountability in the delivery of basic water and sanitation services to households.²⁵⁴ However, in 2014/15 it had been transformed in the grant with both, direct and indirect component allowing the national Department to implementing projects on behalf of municipalities that does not have sufficient skills or capacities.²⁵⁵

Figure 21: Rural Households Infrastructure Grant – real allocations, annual % change and under-expenditure, 2010/11 – 2014/15



As shown in figure 21, the grant allocation fluctuated significantly since its establishment: from R122m in 2010/11 the allocation has sharply increased to R379m in 2012/13, when it started to decrease back to R113m in 2014/15. The fluctuation in allocations is heavily linked to the poor performance and underspending of the programme, which has been the grant's feature since its inception.

The average under expenditure of the grant through all the years was 32%, with the lowest under expenditure of 10,4% in 2013/14 and the highest in 2014/15, when the under-expenditure was as high as 80% of the total allocation of the grant. In real terms, the under-expenditure was the highest in 2012/13, when it was R150m or 39,7% of the grant. It is clear that continuous underspending of the budget prevents responsible Departments from achieving their objectives in respect of providing sanitation services to rural communities.²⁵⁶ Among a range of issues self-reported by DHS and DWS, the RHIG has under-spent and under-delivered due to delays in the appointment of service providers, problems with sourcing, delayed delivery of materials by suppliers, difficult ground conditions, etc.²⁵⁷

²⁵² Progress Report on the Rural Household Infrastructure Programme (RHIP) to the Portfolio Committee on the Water and Sanitation, 2012

²⁵³ Progress Report on the Rural Household Infrastructure Programme (RHIP) to the Portfolio Committee on the Water and Sanitation, 2012

²⁵⁴ National Treasury, Estimates of national Expenditure 2015 Vote 31: Human Settlements, p. 18

²⁵⁵ National Treasury, Explanatory memorandum to the division of revenue 2014/15, p. 41

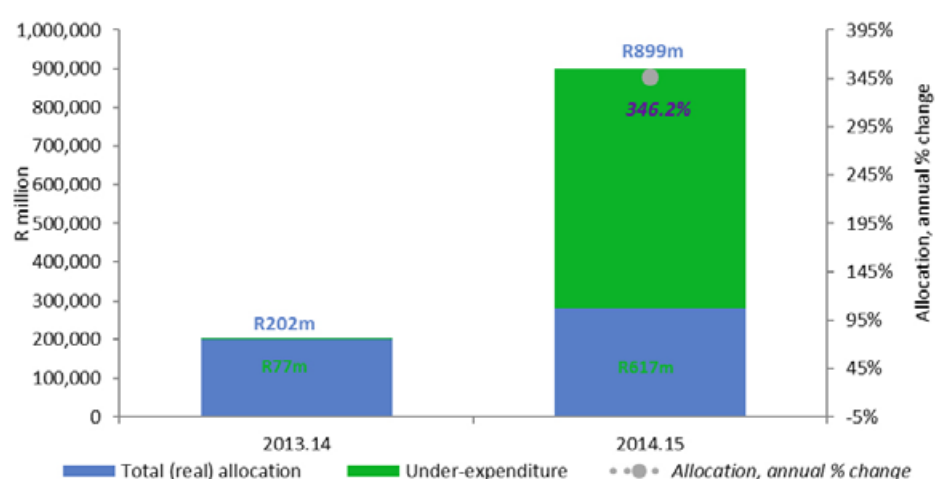
²⁵⁶ DHS and DWS Annual Reports, 2009/10 – 2014/15.

²⁵⁷ Progress Report on the Rural Household Infrastructure Programme (RHIP) to the Portfolio Committee on the Water and Sanitation, 2012

4.5.6 Bucket Eradication Grant

The Bucket Eradication Grant is an allocation for the replacement of bucket toilets with full waterborne sanitation (flushing toilets) with a water and sewer connection to a reticulation network. In 2013/14 it has been established as conditional sub-grant as part of the Human Settlements Development Grant (HSDG) aimed at upgrading urban informal settlements in the eight metropolitan municipalities. To accelerate the eradication of bucket sanitation backlogs, conditions were added to HSDG to require metropolitan municipalities to prioritise this commitment. If municipalities fail to make this a priority or are unable to implement projects, funds could be converted to an indirect grant for the national government to provide infrastructure on behalf of the municipality.²⁵⁸

Figure 22: Bucket Eradication Grant – real allocations, annual % change and under-expenditure, 2013/14 – 2014/15



With only R202m allocated in the year 2013/14, the grant allocation steeply increased for 346,2% in 2014/15, when R899m was allocated for the eradication of bucket system. However, implementation of the grant proved to be challenging, resulting in 68,7% under-expenditure. The under-expenditure is attributed to insufficient support for the programme by the targeted municipalities, cash flow challenges experienced by the implementing agents, including due to a late transfer of funds by DHS and severe hard rock and adverse geotechnical soil conditions which delayed the excavation process. Furthermore, challenges in implementation recognized by the Portfolio Committee on Water and Sanitation, due to which the high number of households in informal settlements continue to utilise the bucket system, include lack of capacity of the municipalities, including to take in contractors, challenges such as urban migration, availability of bulk infrastructure to service projects, as well as decreasing funding that continue to put extra burden on the delivery of services.²⁵⁹

In order to reach the bucket eradication goals, including for an estimated 140 000 households in informal settlements that are still utilising this system, the Portfolio Committee on Water and Sanitation called for an integrated governmental approach that would improve working relationship of DWS with other government departments, such as the Department of Human Settlements, Rural Development and Land Reform, Cooperative Governance and Traditional Affairs, Education and the National Treasury, with the aim to find workable solutions to these challenges.²⁶⁰

The RHIG and the BEG are two grants aimed directly to improve the sanitation services in South Africa. However, as seen from the data provided above, both grants were faced with continuous under-spending of the budget, which prevents achievement of the objectives related to providing sanitation services to rural as well as to urban communities, including relatively high number of users of bucket toilets in informal settlements.

²⁵⁸ National Treasury, Explanatory Memorandum to the Division of Revenue 2014/15, p.- 40-41

²⁵⁹ The Portfolio Committee on Water and Sanitation. Media statement on progress with bucket eradication, 2015

²⁶⁰ Ibid.

“The Bucket Eradication Grant is an allocation for the replacement of bucket toilets with full waterborne sanitation”

4.5.7 Municipal Infrastructure Grant

The Municipal Infrastructure Grant (MIG) is the largest conditional grant to municipalities, and amounts close to half of total conditional grants to municipalities. The MIG supports the government's aim to expand service delivery and alleviate poverty. It funds the provision of infrastructure for basic services, roads and social infrastructure for poor households in all non-metropolitan municipalities. The MIG funds may also be used to upgrade and build new infrastructure and rehabilitate existing infrastructure to a basic level services.²⁶¹

The MIG is administered through the Department of Cooperative Governance and Traditional Affairs, which coordinates its activities in collaboration with other stakeholders through various structures. As recognized by the Portfolio Committee on Water and Sanitation, a collaborative approach to monitoring and supporting municipalities is necessary to ensure the fulfilment of the MIG's objectives and effective spending of the grant.²⁶²

The MIG is allocated through a formula with a vertical and horizontal division. The vertical division allocates resources between sectors and the horizontal division takes account of poverty, backlogs, and municipal powers and functions in allocating funds to municipalities. There is a minimum allocation of R5m.²⁶³ The MIG allocations are biased towards provinces with the least access to basic services and is linked to backlogs in water and sanitation.²⁶⁴ The MIG is supplemented with the WMIG grant, administered by the DWS.

Figure 23: Municipal Infrastructure Grant – real allocations, annual % change, roll-overs and under-expenditure 2010/11 – 2014/15

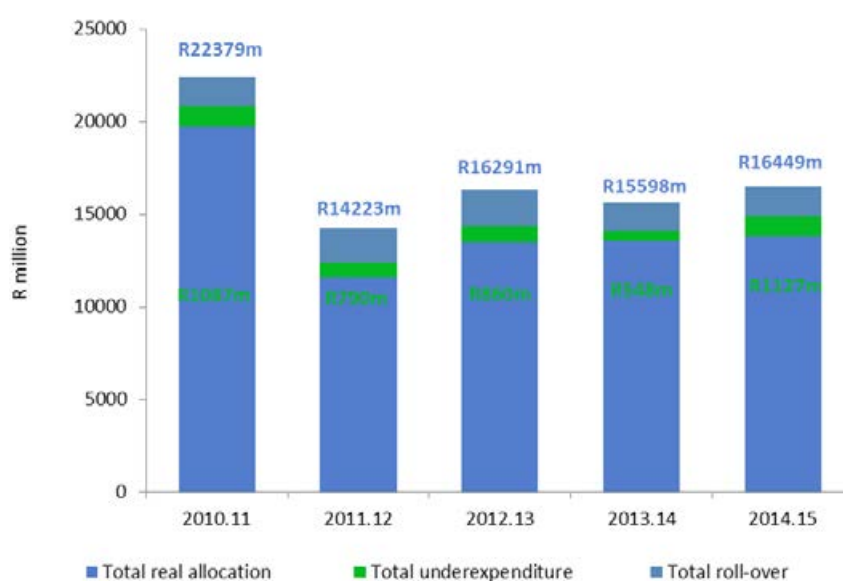


Figure 23 above and table 9 below show the allocation of the MIG in 2010/11-2014/15, as reported by the National Treasury Committee of Appropriations to the Portfolio Committee on Water and Sanitation²⁶⁵, adjusted for inflation (allocations in real terms). The MIG transfer to the provinces was the highest in 2010/11, when it was R21.292m, followed by the decrease for 36,9% in 2011/12 and 14,9% increase in 2011/12. Since then, the grant's budget has been fluctuating between R12422m and R15431m.

However, one should note that not all MIG budget is allocated and subsequently spent on water and sanitation. For example, in 2014/15, according to the DORA explanation, only 54% of the MIG transferred to the municipalities was intended for the water and sanitation.²⁶⁶ Meaning that in 2014/15 out of R14.764m allocated through DORA, R7973m was intended for water and sanitation.

²⁶¹ Basic water supply facility has been defined as the infrastructure necessary to supply 25 litres of potable water per person per day supplied within 200 metres of a household and with a minimum flow of 10 litres per minute (in the case of communal water points) or 6 000 litres of potable water supplied per formal connection per month (in the case of yard or house connections).

²⁶² Report of the Portfolio Committee on Water and Sanitation, 2014

²⁶³ National Treasury, Explanatory Memorandum to the Division of Revenue 2014/15, p. 39

²⁶⁴ Report of the selected Committee on Appropriations to the Portfolio Committee on Water and Sanitation, 2016, p. 3-6

²⁶⁵ Report of the Select Committee on Appropriations on the Roll-over of Municipal Infrastructure Grant Funds for the 2010-2015 Financial Years, 2016

²⁶⁶ National Treasury, Explanatory Memorandum to the Division of Revenue 2014/15, p. 39-40

Table 9: Municipal Infrastructure Grant – real allocations, annual % change, roll-overs and under-expenditure 2010/11 – 2014/15

MIG	Nominal and real allocations, actual expenditure, roll-over and under-expenditure as % of total allocation	Allocations and Expenditure R				
		2009/10	2010/11	2011/12	2012/13	2013/14
Eastern Cape (EC)	Total real MIG allocation	2.672.564	2.823.907	3.243.910	3.124.175	3.079.289
	Real amount received, annual % change		5,7%	14,9%	-3,7%	-1,4%
	Real MIG Roll Over	182.180	91.242	381.378	120.225	99.265
	Real Roll Over as % of total budget	6,8%	3,2%	11,8%	3,8%	3,2%
	Real MIG unspent	72.454	100.158	14	7.984	73.898
	Real under/over-expenditure as % of total budget	2,7%	3,5%	0,0%	0,3%	2,4%
Free State (FS)	Total real MIG allocation	1.058.905	987.318	1.134.158	1.024.866	829.794
	Real amount received, annual % change		-6,8%	14,9%	-9,6%	-19,0%
	Real MIG Roll Over	158.031	57.926	0	0	21.063
	Real Roll Over as % of total budget	14,9%	5,9%	0,0%	0,0%	2,5%
	Real MIG unspent	5.779	32.611	54.854	50.882	14.195
	Real under/over-expenditure as % of total budget	0,5%	3,3%	4,8%	5,0%	1,7%
Gauteng (GP)	Total real MIG allocation	404.754	468.980	538.732	482.936	445.427
	Real amount received, annual % change		15,9%	14,9%	-10,4%	-7,8%
	Real MIG Roll Over	23.435	18.170	36.489	17.371	3.486
	Real Roll Over as % of total budget	5,8%	3,9%	6,8%	3,6%	0,8%
	Real MIG unspent	3.441	18.807	7.475	3.495	1.533
	Real under/over-expenditure as % of total budget	0,9%	4,0%	1,4%	0,7%	0,3%
KwaZulu-Natal (KZN)	Total real MIG allocation	2.632.904	3.050.701	3.504.437	3.378.468	3.270.390
	Real amount received, annual % change		15,9%	14,9%	-3,6%	-3,2%
	Real MIG Roll Over	237.224	204.457	228.884	194.341	53.566
	Real Roll Over as % of total budget	9,0%	6,7%	6,5%	5,8%	1,6%
	Real MIG unspent	67.826	24.087	50.863	43.638	47.258
	Real under/over-expenditure as % of total budget	2,6%	0,8%	1,5%	1,3%	1,4%
Limpopo (LP)	Total real MIG allocation	5.766.516	2.383.224	2.737.689	2.804.619	2.748.406
	Real amount received, annual % change		-58,7%	14,9%	2,4%	-2,0%
	Real MIG Roll Over	143.645	556.852	656.509	606.060	316.317
	Real Roll Over as % of total budget	2,5%	23,4%	24,0%	21,6%	11,5%
	Real MIG unspent	39.636	20.070	395.916	81.063	550.855
	Real under/over-expenditure as % of total budget	0,7%	0,8%	14,5%	2,9%	20,0%

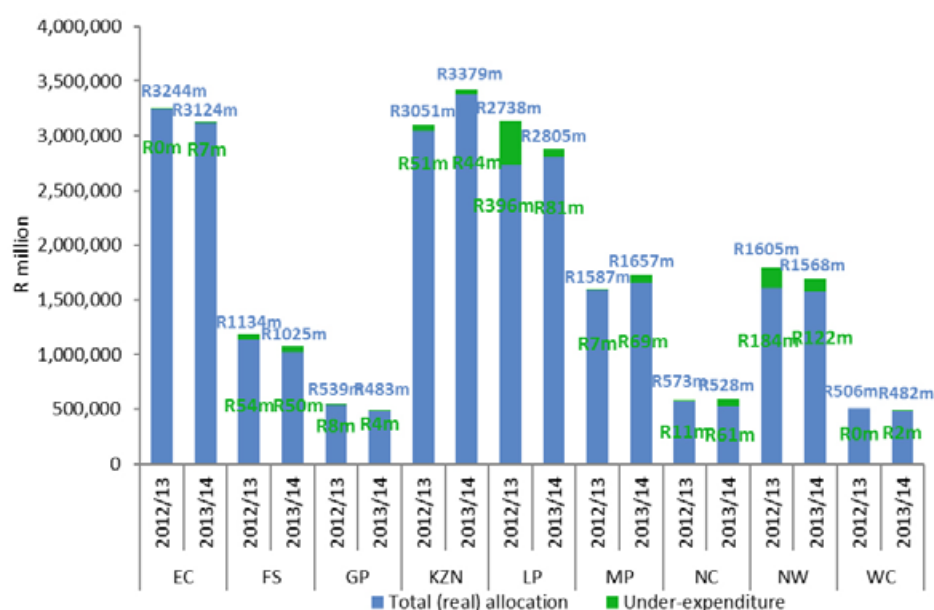
Mpumalanga (MP)	Total real MIG allocation	4.190.707	1.381.688	1.587.195	1.656.528	1.717.515
	Real amount received, annual % change		-67,0%	14,9%	4,4%	3,7%
	Real MIG Roll Over	468.397	449.496	156.232	169.752	112.158
	Real Roll Over as % of total budget	11,2%	32,5%	9,8%	10,2%	6,5%
	Real MIG unspent	10.012	38.780	7.141	68.972	27.127
	Real under/over-expenditure as % of total budget	0,2%	2,8%	0,4%	4,2%	1,6%
Northern Cape (NC)	Total real MIG allocation	430.455	498.764	572.940	528.072	462.944
	Real amount received, annual % change		15,9%	14,9%	-7,8%	-12,3%
	Real MIG Roll Over	48.128	86.067	138.683	64.227	12.275
	Real Roll Over as % of total budget	11,2%	17,3%	24,2%	12,2%	2,7%
	Real MIG unspent	70.943	31.854	10.483	61.376	40.751
	Real under/over-expenditure as % of total budget	16,5%	6,4%	1,8%	11,6%	8,8%
North West	Total real MIG allocation	1.206.106	1.397.494	1.605.346	1.567.684	1.725.708
	Real amount received, annual % change		15,9%	14,9%	-2,3%	10,1%
	Real MIG Roll Over	194.306	357.277	357.277	357.277	357.277
	Real Roll Over as % of total budget	16,1%	25,6%	26,6%	13,1%	1,9%
	Real MIG unspent	276.038	108.269	183.994	122.440	282.833
	Real under/over-expenditure as % of total budget	22,9%	7,7%	11,5%	7,8%	16,4%
Western Cape (WC)	Total real MIG allocation	2.928.649	440.605	506.124	482.118	484.576
	Real amount received, annual % change		-85,0%	14,9%	-4,7%	0,5%
	Real MIG Roll Over	82.595	4.972	121	7.688	3.426
	Real Roll Over as % of total budget	2,8%	1,1%	0,0%	1,6%	0,7%
	Real MIG unspent	5.895	0	0	2.778	1.799
	Real under/over-expenditure as % of total budget	0,2%	0,0%	0,0%	0,6%	0,4%
Total	Total real MIG allocation	21.291.560	13.432.682	15.430.531	15.049.465	14.764.049
	Real amount received, annual % change		-36,9%	14,9%	-2,5%	-1,9%
	Real MIG Roll Over	1.537.941	1.826.459	1.955.573	1.536.941	978.833
	Real Roll Over as % of total budget		13,6%	13,1%	9,2%	4,4%
	Real MIG unspent	1.087.110	790.325	859.953	548.318	1.126.907
	Real under/over-expenditure as % of total budget	5,1%	5,9%	5,6%	3,6%	7,6%
	CPI inflation	3,8%	5,6%	5,6%	5,8%	5,6%
	Deflator	0,82	0,85	0,90	0,95	1,00

Table 9 above also shows that municipalities are regularly employing the institution of roll-overs²⁶⁷ to manage and improve the absorption of the MIG funds. In the period under review, the municipalities on average rolled-over 9,2% of annual MIG budget, with the highest roll-over in 2010/11 (13,6%). According to the assessment of the National Treasury applying for approval of roll-overs have improved the grant spending from 77% to 95% and have also translated into improved reporting by municipalities. MIG rollovers have increased over time but are showing a

²⁶⁷ Section 22 of the Division of Revenue Act (DoRA) provides that all unspent conditional grants has to be revert to the National Revenue Fund, unless permission is granted by National Treasury to roll over the unspent funds into the next financial year.

decline in 2014/15, with the highest use of roll-overs, by Limpopo's and North West. Mbombela municipality has contributed to the high rollover due to the 2010 construction of a Stadium.²⁶⁸

Figure 24: Municipal Infrastructure Grant – real allocations, annual % change and under-expenditure by province 2012/13 – 2013/14



From figure 24 and table 9 above, we can see that the KwaZulu-Natal (KZN), Limpopo (LP) and Eastern Cape (EC) receive the highest MIG allocations, while Gauteng (GP), Northern Cape (NC) and Western Cape (WC) receive the lowest. North West leads with an average of 13,3% unspent MIG, followed by Northern Cape for 9% and Limpopo, with an average of 7,5% unspent MIG over the five-year period, including for the years 2012/13 and 2013/14 which are displayed above in figure 24. Therefore, despite the use of roll-overs, when looking at the under-expenditure, we can see that the MIG performance has not improved over the years, with under expenditure increasing from 5,1% in 2010/11 to 7,6% in 2014/15 (in real terms).

Compared to unconditional grants administered by the DWS, the MIG seems to perform better, but its performance vary significantly among different municipalities. In this regard, concerns have been raised that municipalities, particularly those with high levels of under-spending, are not sufficiently capacitated to plan innovatively and effectively around the MIG process. Consequently, poor planning results in service delivery targets not being met and the MIG funding not being spent efficiently or at all.²⁶⁹ In addition, the concerns have been raised that if a municipality does not spend its allocated grant in a year, there is a great possibility that the funding will be reduced in the following year. In this way, often municipalities that most need the funds are least able to spend them.²⁷⁰ Furthermore, many municipalities struggle to attract and retain the necessary managerial and technical skills and experience to manage water services operations adequately.²⁷¹ There have been reports on consistent challenges with the appointments with the contractors and procurement processes.

Only looking at the reporting procedures for the roll-overs, the Committee on Appropriations also indicated several challenges that municipalities are facing with financial tracking and administration of the grant. These include providing credible information when requesting roll-overs, lack of proper disclosure of the grants in the financial statements, failure to follow the National Treasury's instructions concerning the unspent grant funds, use of MIG allocations for other purposes and other budgetary and fiscal challenges. Furthermore, one of the biggest challenges is that National Treasury is unable to verify the expenditure against approved projects on the ground. The Committee also expressed concern that there seems to be a lack of considering and treating such actions as a financial misconduct.²⁷² Furthermore, the Auditor General also highlighted that, when auditing MIG projects in 2014/15, the targets of

²⁶⁸ Report of the selected Committee on Appropriations to the Portfolio Committee on Water and Sanitation, 2016, p. 3-6

²⁶⁹ An AMCOW Country Status Overview, 2011, p. 15

²⁷⁰ South African Human Rights Commission, 2014, p. 67

²⁷¹ An AMCOW Country Status Overview, 2011, p. 15

²⁷² Report of the selected Committee on Appropriations to the Portfolio Committee on Water and Sanitation, 2016, p. 3-6

52% of the audited projects were either not achieved, or the municipalities had not assessed their performance against targets.²⁷³ The SACHR further signalled their awareness of various allegations of corruption and maladministration by municipalities when it comes to the spending of the MIG funds.²⁷⁴

4.5.8 Local Government Equitable Share

Local Government Equitable Share (LGES) is provided to municipalities to provide free basic services, including a free basic water policy and sanitation, to poor households and to cover basic municipal administration costs. Municipalities can spend LGES as they choose, however, the transfers can be accompanied by recommendations, such as that at least 57% of the grant should be used for the provision of water and sanitation; out of this 31% for water and 26% for sanitation.²⁷⁵

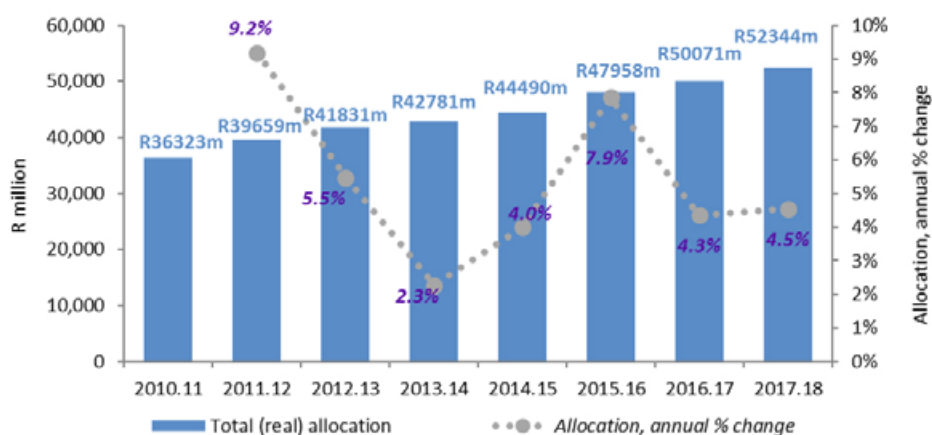
Local Government Share Equitable Formula

Local government raises revenues in the form of charges and taxes, and as a result, less than 30% of their spending is financed through the DoRA. There are, however, significant disparities in municipal tax bases, and national transfers are particularly important for poor and rural municipalities. The share of the revenue that each municipality receives is calculated according to the Local Government Equitable Share Formula, which is developed in a way to particularly support municipalities with lower revenue-raising potential.²⁶

The size of LGES is decided through the national budget process, and divided among the country's 278 municipalities. This is done through a formula that uses objective data so that the split cannot be arbitrarily manipulated to benefit an individual municipality. The LGES formula was reviewed in 2012 to take into account the data from the latest 2011 Census.²⁷

The basic services component of the LGES provided a subsidy of R293 per month in 2014/15 for the cost of providing basic services, including free basic water, energy, sanitation and refuse, to 59 % of households with a monthly income below R2300 (based on the 2011 Census). The equitable share also provides funds for administration and community services in municipalities that are unable to fund these from their own revenues.²⁸ The amount of subsidy increased in 2016/17 to R336 (adjusted for inflation R317), to address the rising prices of the provision of basic services.²⁹

Figure 25: Local Government Equitable Share - Allocation by DoRA in real terms – 2010/11 – 2017/18



As can be seen from figure 25 above, the transfers of LGES to the local governments have grown significantly in recent years, from R36.322m to R47.985m in real terms in 2014/15, providing municipalities with greater resources to deliver basic services. The allocation will also increase

²⁷³ Auditor-General South Africa. Press Release, 2016, p. 8

²⁷⁴ SA Human Rights Commission, 2014, p. 67

²⁷⁵ National Treasury, Explanatory Memorandum to the Division of Revenue 2014/15, p. 39

in the medium term financial framework, particularly in 2017/18, with the aim of offsetting the rising costs of basic services.²⁷⁶

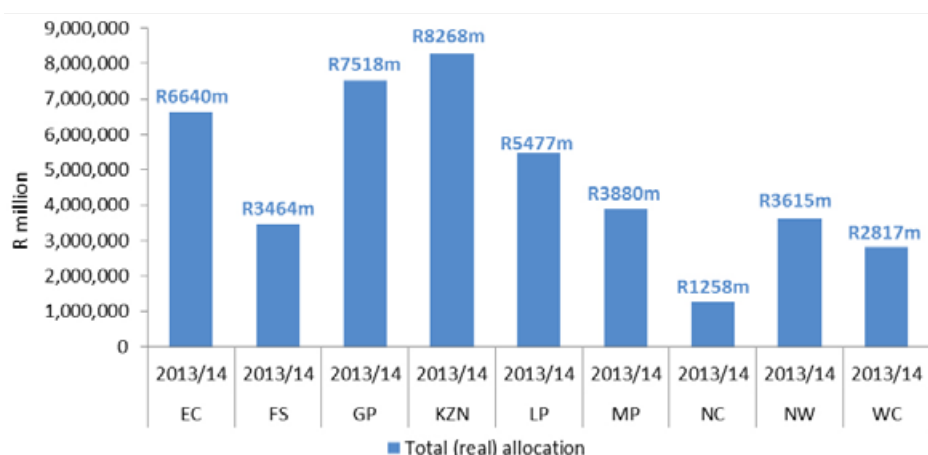
Table 10: Local Government Equitable Share - nominal and real allocations by province, annual % change as % of total budget 2010/11 – 2017/18

LGES	Nominal and real allocations, actual expenditure and under-expenditure as % of total allocation	Allocations and Expenditure R million						2016.17	2017.18
		2010.11	2011.12	2012.13	2013.14	2014.15	2015.16		
Eastern Cape (EC)	Total DORA allocation	4.450.185	5.243.046	5.859.038	6.276.236	6.858.777	7.737.038	7.911.368	8.055.302
	Total real DORA allocation	5.422.251	6.154.431	6.512.783	6.640.258	6.858.777	7.368.608	7.463.555	7.599.342
	Real amount received, annual % change		13,5%	5,8%	2,0%	3,3%	7,4%	1,3%	1,8%
Free State (FS)	Total DORA allocation	2.805.978	2.926.447	3.240.669	3.273.602	3.324.604	3.384.373	3.318.241	3.287.577
	Total real DORA allocation	3.418.896	3.435.144	3.602.259	3.463.471	3.324.604	3.223.212	3.130.416	3.101.488
	Real amount received, annual % change		0,5%	4,9%	-3,9%	-4,0%	-3,0%	-2,9%	-0,9%
Gauteng (GP)	Total DORA allocation	5.445.197	6.012.123	6.680.240	7.105.486	7.734.333	8526797	9350381	10.311.981
	Total real DORA allocation	6.634.607	7.057.195	7.425.614	7.517.604	7.734.333	8.120.759	8.821.114	9.728.284
	Real amount received, annual % change		6,4%	5,2%	1,2%	2,9%	5,0%	8,6%	10,3%
KwaZulu-Natal (KZN)	Total DORA allocation	5.533.344	6.476.001	7.210.513	7.815.039	8.653.044	9.905.062	10.439.951	10.944.033
	Total real DORA allocation	6.742.008	7.601.707	8.015.054	8.268.311	8.653.044	9.433.392	9.849.010	10.324.559
	Real amount received, annual % change		12,8%	5,4%	3,2%	4,7%	9,0%	4,4%	4,8%
Limpopo (LP)	Total DORA allocation	3.666.434	4.253.303	4.732.732	5.176.753	5.843.601	6.953.299	7.298.403	7.561.713
	Total real DORA allocation	4.467.303	4.992.643	5.260.805	5.477.005	5.843.601	6.622.190	6.885.286	7.133.692
	Real amount received, annual % change		11,8%	5,4%	4,1%	6,7%	13,3%	4,0%	3,6%
Mpumalanga (MP)	Total DORA allocation	2.803.310	3.132.492	3.439.424	3.667.113	3.995.937	4.484.577	4.706.556	4.920.898
	Total real DORA allocation	3.415.645	3.677.005	3.823.191	3.879.806	3.995.937	4.271.026	4.440.147	4.642.357
	Real amount received, annual % change		7,7%	4,0%	1,5%	3,0%	6,9%	4,0%	4,6%
Northern Cape (NC)	Total DORA allocation	909.198	1.013.059	1.133.850	1.188.612	1.266.168	1.368.301	1.398.303	1.430.527
	Total real DORA allocation	1.107.797	1.189.156	1.260.364	1.257.551	1.266.168	1.303.144	1.319.154	1.349.554
	Real amount received, annual % change		7,3%	6,0%	-0,2%	0,7%	2,9%	1,2%	2,3%
North West	Total DORA allocation	2.563.886	2.876.410	3.173.310	3.416.522	3.751.372	4.313.714	4.535.438	4.735.681
	Total real DORA allocation	3.123.923	3.376.409	3.527.385	3.614.680	3.751.372	4.108.299	4.278.715	4.467.624
	Real amount received, annual % change		8,1%	4,5%	2,5%	3,8%	9,5%	4,1%	4,4%
Western Cape (WC)	Total DORA allocation	1.990.175	2.175.019	2.403.620	2.662.424	3.062.309	3.534.537	3.883.750	4.236.937
	Total real DORA allocation	2.424.895	2.553.097	2.671.813	2.816.845	3.062.309	3.366.226	3.663.915	3.997.110
	Real amount received, annual % change		5,3%	4,6%	5,4%	8,7%	9,9%	8,8%	9,1%
Total	Total DORA allocation	30.167.707	34.107.900	37.873.396	40.581.787	44.490.145	50.207.698	52.842.391	55.484.649
	Total real DORA allocation	36.322.604	39.658.709	41.831.076	42.781.110	44.490.145	47.985.167	50.071.147	52.344.008
	Real amount received, annual % change		9,2%	5,5%	2,3%	4,0%	7,9%	4,3%	4,5%
	CPI inflation	3,8%	5,6%	5,6%	5,8%		5,9%	5,6%	5,6%
	Deflator	0,82	0,85	0,90	0,95	1,00	1,050	1,060	1,060

As can be seen from table 10 above and figure 26, in terms of allocations by provinces, between 2010/11 and 2014/15 the biggest share of LGES, was allocated to the Kwa-Zulu Natal (19,2%) province, following Gauteng (17,7%) and Eastern Cape province (15,4%). The

least share of the LGES was received by the Northern Cape province (3%) followed by the Western Cape province (6,6%).

Figure 26: Local Government Equitable Share - real allocations by province 2013/14



However, as stated above, the LGES is transferred to local municipalities to subsidise provision of basic services, which besides free basic water (6 kilolitres per poor household per month) and sanitation, also includes refuse (based on service levels defined by national policy) and energy (50 kilowatt-hours per month). Although Municipalities have a high level of discretion over how they will spend their LGES, the DoRA transfers are accompanied with recommendations. For example, in 2014/15 in the explanatory memorandum to the DoRA it was stated that at least 57% of the grant should be used for provision of water (31%) and sanitation (26%).²⁷⁷

If this recommendation were strictly applied by the local governments, in the years 2010/11, the real amount indicated in table 11 below would allocated for the provision of water and sanitation in South Africa through the LGES.²⁷⁸

Table 11: Local Governmental Equitable Share for water and sanitation - nominal and real allocations as % of total LGES

LGES		Allocations R million						Estimates	
		2010.11	2011.12	2012.13	2013.14	2014.15	2015.16	2016.17	2017.18
Total	Total nominal DORA allocation	30.168	34.108	37.873	40.582	44.490	50.208	52.842	55.485
	Total real DORA allocation	36.322	39.659	41.831	42.781	44.490	47.985	50.071	52.344
	Real amount received, annual % change		9,2%	5,5%	2,3%	4,0%	7,9%	4,3%	4,5%
	Total real DORA allocation for water (31%)	11.260	12.294	12.968	13.262	13.792	14.875	15.522	16.227
	Total real DORA allocation for sanitation (27%)	9.444	10.311	10.876	11.123	11.567	12.476	13.018	13.609
	Total real DORA allocation for water and sanitation (57%)	20.704	22.606	23.844	24.385	25.359	27.351	28.540	29.836
	CPI inflation	3,8%	5,6%	5,6%	5,8%		5,9%	5,6%	5,6%
	Deflator	0,82	0,85	0,90	0,95	1,00	1,050	1,060	1,060

²⁷⁷ National Treasury, Explanatory memorandum to the division of revenue 2014/15, p. 39

²⁷⁸ This is also the calculation that has been used in the Chapter 3.2 to provide for a general assessment of allocated budgets for the water and sanitation at the local and national level.

However, this estimate provides a very generous assessment of what resources are available and have been allocated or intended for the provision of these services, as the LGES allows municipalities to make their own decision on how much of the LGES they actually allocate and spent within their municipal budget.

The calculations on how much each municipality actually allocates to the water and sanitation are beyond the scope of this study. However, there are real indications and concerns that the LGES has not been spent on the provision of basic services as intended and calculated for. The shortfall in provision of basic services and misuse of the transferred budget has been also highlighted by the National Treasury, pointing out that LGES for 2016/17 has been calculated for 9.2 million poor households – a figure based on the 2011 Census and adjusted for annual population growth. However, Municipalities have reported that only 5.3 million households have been receiving such services.²⁷⁹ This means that 3.9 million households deemed to receive services have not been reached, bringing into question the intended spending of the LGES.

Equally, there is considerable evidence indicating that an even smaller proportion of the equitable share is actually spent on water services.²⁸⁰ For example, a 2014 report indicates that “discretionary spending of the Equitable Share grant means funding assumed under the National Plan to be allocated to the WASH sector can often be funnelled into other municipal priorities such as housing.”²⁸¹ Equally, the Minister of Finance raised concerns that “[n]ational government is concerned that the substantial resources allocated through the Division of Revenue are not being used optimally and that the pace of service delivery rollout suffers as a result.”²⁸²

Analysis conducted for WASH based on the 2015 allocation data indicates that the average nominal allocation for water of the LGES is 26% (range 10-56%) and for sanitation 21% (range 8-45%). Additionally, analysis of the published budgets from Ugu District Municipality in Kwa-Zulu Natal (population about 720,000), showed that the municipality received the LGES grant of R264m for the year 2015/16, of which about R142m (54%) has been allocated to water and only about R5m (2%) to sanitation. Within the R142m for water, about 13% is allocated to the “cost of supplying free basic metered water”, about 25% to “free basic water – standpipes”, about 42% to “water tariff subsidisation”, and the remaining grant to other water-related budget lines. As pointed out by WASH, this suggests that more is being used for the blanket water tariff subsidy than for free basic water.²⁸³

4.5.9 Spending challenges at the municipal level

Allocation and spending patterns, including poor performance and allocation of the funds intended for the provision of the right to water and sanitation are linked to some of the systemic failures in budgeting and governance, mapped out through this analysis.

There seems to be insufficient capacity in the water and sanitation sector, including with implementing agencies facing challenges with attracting and retaining personnel with necessary managerial and technical skills.²⁸⁴ This is a problem on a broader level, as indicated through, for example, assessment of the civil engineering capacity (expressed as civil engineering professionals per 100,000 people), which has weakened significantly in recent years; namely from 20 engineers per 100,000 people in 1994 to three per 100,000 people, a ratio that is “clearly indicative of a crisis.”²⁸⁵ This is also highlighted by the UN Water - GLASS 2014 report, which found that the capacity constraints in the water and sanitation sector in South Africa are only moderately linked to insufficient financial resources available for staff, but more to the lack of skilled graduates and the unwillingness of skilled workers to live/work in rural areas.²⁸⁶

Although under-spending due to difficulties to fill available vacancies was a constant feature of the DWS and DWA Annual Reports, the capacity challenges seem to be even more pressing for many local municipalities which have the mandate to provide water and sanitation services

²⁷⁹ National Treasury 2015 Budget Review. Chapter 6: Provincial and Local Government, p. 81, also see Statistics South Africa’s 2013 Non-Financial Census of Municipalities.

²⁸⁰ Report of the Portfolio Committee on Water and Sanitation, 2014, p. 18

²⁸¹ In Public Finances for WASH, 2015.

²⁸² In South African Human Rights Commission, 2014, p. 67

²⁸³ In Public Finances for WASH, 2015.

²⁸⁴ An AMCOW Country Status Overview, 2011, p. 15

²⁸⁵ Water Aid, 2015, p. 5

²⁸⁶ UN Water, Water GLAAS 2014 Report, 2014, p. 79

on the ground. Additional challenges at this level are also exacerbated by the governance failures in some of the municipalities, often leading to inappropriate appointments of staff and interference in the day-to-day operations of the service, which disrupt overall functioning and sustainability.²⁸⁷

Linked to general capacity constraints, financial management also appears to be weak. Concerns have been raised that municipalities are often not sufficiently capacitated to plan around the conditional grant process resulting in the underspending and failure to meet the service delivery targets. This is particularly the case with the poorer and weaker municipalities, which need the grants the most, but are often failing to sustain them.²⁸⁸

Furthermore, municipalities are also often failing to provide for planning and budgeting that would take into account the full and realistic costs of progressively realising human rights. For example, it has been observed that the amounts of internally-generated funds budgeted for capital expenditure tend to be planned unrealistically (e.g. revenue projections are set unrealistically, operating expenditures, are too high, resulting in overly ambitious capital budgets).²⁸⁹ This leads to a situation in which internal funds are not sufficient to complement transfers, contributing to the non-completion of the projects and the high level of under-expenditure.

There are also several accounts of financial mismanagement, as also reported by the Auditor General. Although local government audit results have been improving in recent years, in 2014/15 financially unqualified audit opinions with no findings (known as “clean audits”) had been found for only 54 out of 278 municipalities. The highest proportion of municipalities with clean audit opinions in 2014/15 were in the Western Cape (73%), Gauteng (33%) and KwaZulu-Natal (30%) provinces, while the outcomes of municipalities in Limpopo, North West and the Northern Cape have been described as “disappointing at best”.²⁹⁰ Some of these municipalities are also municipalities that are facing the highest challenge with an absorption of the capital grants, such as the MIG.

Furthermore, the differences between well-performing municipalities, where leadership seems to play a key role, compared to low performers (where weak leadership is identified as an issue) has been observed.²⁹¹ For the later, there is a need to improve the leadership and capacity to strengthen the sound financial management of public funds and increase the quality of spending.

Furthermore, the procurement practices, including lack of monitoring and disclosure of the information on the awarded contracts as well as on the implementation progress seems to be a challenge in several instances, contributing to delays in the implementation of the water and sanitation projects and services. Lack of effective monitoring is leading to underperformance or violation of conditions of contracts with no follow-up or recourse. This includes provincial and national government Departments failing to adequately monitor the implementation of contracts with the private sector to ensure that the contracted company provides all services stipulated in the agreement and that service delivery is responsive to community needs and of a high quality.²⁹²

4.6 Budget Analysis – key findings and assessment

The provision of water and sanitation is a “concurrent function” between the national, provincial and local governments, with national and local government receiving the great share of the resources. The budget analysis has uncovered an uneven spending performance for water and sanitation since 2009/10, highlighting some of the systematic failures in governance and budgeting that is negatively affecting the provision of the right to water and sanitation in South Africa.

²⁸⁷ An AMCOW Country Status Overview, 2011, p. 2

²⁸⁸ South African Human Rights Commission, 2014, p. 67

²⁸⁹ Water Aid, 2015, p. 5, 6, 15

²⁹⁰ Auditor-General South Africa. Press Release, 2016, p. 2

²⁹¹ Water Aid, 2015, p. 4

²⁹² Water Aid, 2015, p. 7

Adequacy of resource allocations

In general the analysis displays that the government has been significantly mobilising available resources for provision of water and sanitation. This is also revealed in the continuous increases in the budget allocation, including the budget of DWS (previously DWA) as well as of budgets of the two key transfers to municipalities, The Municipal Infrastructure Grant and Local Government Equitable Share, are playing a key role in actual delivery of water and sanitation services at the local level. The budget for water and sanitation will, although slower for the MIG and LGES, continue to increase also into the current medium-term financial framework.

Despite the increasing budget allocations, the challenging fiscal environment and current mode of delivery are posing the question of whether the current increases are sufficient to progressively achieve universal and full access to water and sanitation, as required by the Constitution and ICESCR. The adequacy of the resources should also be examined in the light of the increasing need to maintain and refurbish old and broken infrastructure, which is often neglected in favour of extension of the services in the recent years. Concerns are also raised regarding the sustainability of newly built infrastructure. Furthermore, the current priorities of providing bulk water services through regional schemes to the remaining rural households and urban sanitation in informal settlements, are financially demanding. These existing needs also need to be analysed in the light of the assessment that the costs of provinces and municipalities of providing public services are expected to grow faster than transfers from national government. Furthermore, the increasing demand also raises serious concerns over the stability of the current financial framework, particularly around the ability to recover the costs of provision of services as well as challenges at municipality level to collect sufficient revenues necessary for the provision of the necessary funds for water and sanitation services.

Government priorities in recent years have tended to be strongly focused on the provision of finances for regional bulk and other infrastructure projects, while fewer funds have been allocated for maintenance of existing infrastructure as well as capacity building to address the constant shortage of staff with necessary skills and expertise.

Equity and priority

With the end of apartheid, the democratically elected government prioritised the expansion of basic services to the majority of the population. In this regard, it has achieved great progress in the delivery of the water and sanitation services, including through the “free basic water” and “free basic sanitation” policies, which are mostly financed through transfers to the municipalities, such as the MIG and LGES.

However, despite the encouraging free basic policy aiming at targeted provision of basic services to poor households, there seem to be serious concerns about the actual budget allocation and spending of funds intended for these services, particularly through the LGES. This concern can be supported with information from National Treasury, stating that only 5,3 million households have received basic services, out of 9,2 million for which the LGES grants were transferred to local municipalities, raising serious concerns over the current model of governance and misuse and misdirection of the finances. The challenges in this sphere include redirecting funds intended for water and sanitation through LGES to other services, such as housing services, as well as using the funds intended to target poor households for provision of the services to households not fulfilling such criteria.

Furthermore, there seems to be a lack of capacity in financial management particularly within the poorer and weaker municipalities, resulting in challenges with adequate planning and absorption of funds and, consequently, a failure to provide water and sanitation services to the poorer communities and households.

Efficiency of expenditure for water and sanitation

However, more than the allocation of sufficient finances, there is a strong indication, particularly through relatively high under-expenditure patterns, that the government is failing to use available resources in an efficient way. The budget analysis has revealed several challenges with under-expenditure occurring in all water and sanitation programmes, particularly grants, transferred from DWS to municipalities.



Some of the highlighted challenges linked with poor spending performance include weak monitoring of the delivery of services, constraints in the capacity of local governments to effectively and innovatively plan to translate policy into effective programmes, the presence of financial mismanagement, lack of personnel with necessary managerial and technical skills within all implementing agents, coupled with a lack of leadership in many spheres. These challenges are linked with accountability failures on all levels, ranging from financial mismanagement, hiring practices, and, specifically monitoring under-performance or violation of conditions of contracts of service providers with no follow-up or recourse. Furthermore, public participation in the planning and oversight of public funds as one of the mechanisms to address the mismanagement and misuse of available funds is often severely lacking.

Although the government is taking steps, including by continually increasing the budget for the right to water and sanitation, the high level of under-spending in certain fields, particularly for the conditional grants transferred to municipalities, raises concerns over whether the government is fulfilling its human rights obligation to provide the maximum available resources to achieve the progressive realisation of the right to water and sanitation to every South Africa.

To achieve sustainability of the sector and provide for universal access to the right to water and sanitation, it is necessary, at all levels, but particularly at the municipal level, to strengthen the efforts to work more efficiently and to improve the allocation and spending performance of all actors within the field. Closely related to this is the need to increase the transparency and access to the budget for the general public, including at the planning stage, allowing for public participation and monitoring in budget allocations and spending. There is also a need to improve fiscal sustainability of water and sanitation services, including by increasing funding from municipalities own revenue, while ensuring that any revenue collection strategies are not violating the principles and standards of human rights, including that of affordability.





Indicators for the right to water and sanitation in South Africa

The status of the right to water and sanitation: what indicators tell us

The Studies in Poverty and Inequality Institute's monitoring of socio-economic rights combines analysis of the content and implementation of government policies and budgets with an assessment of their outcomes on the ground. This involves the development of performance and impact indicators relevant to the right to water and sanitation that can be tracked and monitored over time.

Figure 1: The process of developing indicators

Summary of the process of developing indicators

1. Literature review to unpack the normative content of the right- this entails looking at South Africa and international jurisprudence as well as academic and other literature which deals with the content of the right in question.
2. Identify and analyse key reporting formats and indicators that exist for the right- this step aims to draw upon existing reporting formats and indicators that may have been developed by government, international bodies or civil society for evaluating performance and/or the attainment of rights.
3. Develop a list of conceptual indicators for the right- this is the ideal list of indicators that we would like to measure for the right to water and sanitation.
4. Host initial meetings with sectoral content and rights-specific experts and civil society partners, including relevant committees of the SAHRC where appropriate- this step aims to incorporate the perspectives and experiences of as wide a range of stakeholders as possible, both to draw upon their knowledge and to ensure the indicators are accessible and relevant to their needs.
5. Identification of potential indicators- at this stage the conceptual indicators identified in step 3 have been refined based on the feedback and insights received from stakeholders.
6. Verification of the existence of reliable data sets for each indicator- indicators must be populated with data that is reliable and freely available, ideally on an annual basis, and from a baseline of at least 2002, so that trends can be analysed over time. Data should also be capable of being disaggregated by region, race, gender, age, and other sub-sets, where necessary or useful.
7. Hosting of subsequent meeting with initial group of sectoral experts to present verified indicators- this allows for further feedback to be incorporated before the indicators are finalized.
8. Final set of indicators developed and populated with data

5.1 The process of developing indicators

5.1.1 Unpack the normative content of the right

This process was initiated with the inception of a policy review process looking specifically at both international and local perspectives and jurisprudence on the content of the right to water and sanitation. This policy review is undertaken in Chapter 2 of this paper. As mentioned in the policy review, this paper looked at the right to water and sanitation as one right with two components. The reason that these rights were not separated pertains to the fact that the right to access adequate and quality sanitation is inherently linked to access to water. For example, can we say that one has access to quality and adequate sanitation if they do not have access to water to wash their hands after using a sanitation facility?

5.1.2 Key Reporting formats used

Locally, the South African government has made serious commitment to monitor government's provision to access water and sanitation. Statistics South Africa (through household surveys) and the Department of Planning, Monitoring and Evaluation (DPME) (through administrative data) monitor the realization of the right to water and sanitation. Outside of national monitoring, other aspects of the right to water and sanitation are monitored by different international bodies such as the United Nation's Office of the High Commissioner for Human Rights which has defined indicators for various social and economic rights. The Danish Institute for Human Rights continues to work on development of human rights indicators aimed at monitoring socio-economic rights such as water and sanitation. The Millennium Development Goals, which through target 10 have measured the proportion of people without sustainable access to safe drinking water, came to a conclusion in 2015 and have since been succeeded by the Sustainable Development Goals which will continue monitoring and measuring of the world's commitment to different socio-economic rights, of which water and sanitation is an intricate part.

5.1.3 Conceptual Indicators and sectoral meetings

Consultation meetings with a range of stakeholders who are experts in the field, different interested parties such civil society organizations as well as relevant government stakeholders both at national and local level were held. This was to fulfil the second stage of developing indicators. The consultations broadened the focus of the study on concept definition and what the right to access to adequate and quality water and sanitation meant for all citizens in South Africa, especially those who stand at the margins of the economy. This broadened scope of focus led us to interrogate more profoundly what is meant by access to water and sanitation? In this we found that access can mean different things to different people and it is essentially about making sure there is no marginalization of any group of people in the definitive process to access. SPII through these consultations found that the focus on access reflects the difficulty of the task to address the inherited legacy of inequality and deliberate discrimination to access to water and sanitation to different racial groups in South Africa. As a result it is imperative to bring forward comprehensive solutions that not only speak to the provision of access but also take into account the exclusion that is brought forth by inequality. These indicators cover different areas in terms of addressing the issue of access to water and sanitation in South Africa for different people. Government, through the Department of Water and Sanitation bears the responsibility of ensuring access to clean, adequate and quality water and sanitation.

Subsequent to the desktop research and meetings with stakeholders involved in water and sanitation, a set of conceptual indicators were adopted. To reflect precisely the attainment of progressive realization of socio-economic rights, these indicators focus on three key dimensions of the right to water and sanitation: access, adequacy and quality.

Access

Monitoring the right to water and sanitation requires looking at both physical access and economic access to the right. The right to access water and sanitation through physical access includes looking at the general water supply to households, general physical availability of sanitation facilities as well as the proximity to water and sanitation facilities and sources. The second part of access requires looking at economic access, which essentially considers the extent to which the lack of economic power disables access to water and sanitation in South Africa. This is done by way of looking at who pays for access to water and sanitation as well as looking at the proportion of household income that is spent on accessing water.

Adequacy

Over and above physical access, the right to water and sanitation entails looking at the extent to which water and sanitation that is accessed is adequate. Adequacy indicators look at availability, which includes the level of distribution to households and the extent to which there is a reliable, continued supply of water and sanitation. This is to take into account any disruptions in the supply of water or the number of times a shared sanitation facility is serviced and waste removed regularly.

Quality

Another dimension of the indicators looks at quality. Quality indicators help to measure the level of standard or type of quality given to households. Quality indicators are inherently linked to both access and adequacy indicators as they highlight the gaps and the impact of the type of service given to households. Quality indicators look at acceptability by looking at household perceptions on the water they consume or the level of satisfaction they have with the sanitation service they have. Another set of quality indicators look at maintenance and upkeep of both water sources and sanitation facilities. For example, the number of days it takes for the municipality to respond to a blocked toilet provides a picture of the impact on people's access to hygienic sanitation facilities.

SPH acknowledges the contributions and inputs from experts who were generous enough to allow us to have sectoral meetings while developing the indicators. The experts were made up of civil society activists in the field of the right to water and sanitation and general socio-economic rights, local government officials and national government officials as well as independent experts in the field.

5.1.4 Data Sources and analysing information

Once the conceptual indicators were decided upon, the next process was to populate them, and different data sources were scoped. To determine the final list of indicators, there was a need to think critically about the availability of reliable data that can be decomposed and disaggregated according to different categories such as geography, race and gender. The data also had to be freely available and released annually as well as be of interest and easy to understand by the general public while meeting the internationally recognized Specific, Measurable, Attainable, Relevant and Time-Framed (SMART) standard.

As is the case with many socio-economic rights, there tends to be general disagreements and perspectives that get pulled in and discovered especially in terms of socio-economic rights indicators that speak to issues of adequacy, reliability, affordability, access etc. The stakeholder engagements that were held with various experts exposed these nuances and it became explicit that we needed to find reliable data sources that would point us in the right direction in terms of measuring the progressive realization to the right to water and sanitation in South Africa. The final set of indicators include all these different dimensions and perspectives to establish whether people's right to water and sanitation is being met.

5.1.5 Indicator “Wish List”

As noted before in this paper, the indicators as developed by SPII rely on reliable national data sets that are ideally updated annually for consistency. As every data set boasts of its very own methodological approaches, and each have their own inherent strengths and weaknesses. We had many indicators that we wished to measure but could not due to lack of reliable data on the subject. The indicators presented here can always be improved for further understanding and analysis on the right to water and sanitation in South Africa and are therefore not cast in stone.

5.2 Presentation and analysis of the indicators

Access	Adequacy	Quality Indicators
Economic Access <ul style="list-style-type: none"> ■ Affordability <ul style="list-style-type: none"> ■ Amount spent on water by lowest income decile vs highest income decile group ■ Number of households accessing free basic water and free basic sanitation Physical Access <ul style="list-style-type: none"> ■ Water Supply <ul style="list-style-type: none"> ■ Number of households with water supply infrastructure of RDP standard ■ Access to free basic water ■ Access to free basic sanitation ■ Number of households with no sanitation ■ Type of toilet 	Availability <ul style="list-style-type: none"> ■ Distribution <ul style="list-style-type: none"> ■ Alternative drinking water sources ■ Usability of sanitation facilities ■ Reliability <ul style="list-style-type: none"> ■ Number of water disconnections ■ Length of disconnections ■ Disruption in service ■ Removal of waste from shared bucket toilet 	Infrastructure <ul style="list-style-type: none"> ■ Maintenance <ul style="list-style-type: none"> ■ Service standard. ■ Frequency of disruption in sanitation facilities. ■ Hygiene <ul style="list-style-type: none"> ■ Acceptability ■ Number of complaints about odour and taste ■ Type of sanitation facility

Access Indicator

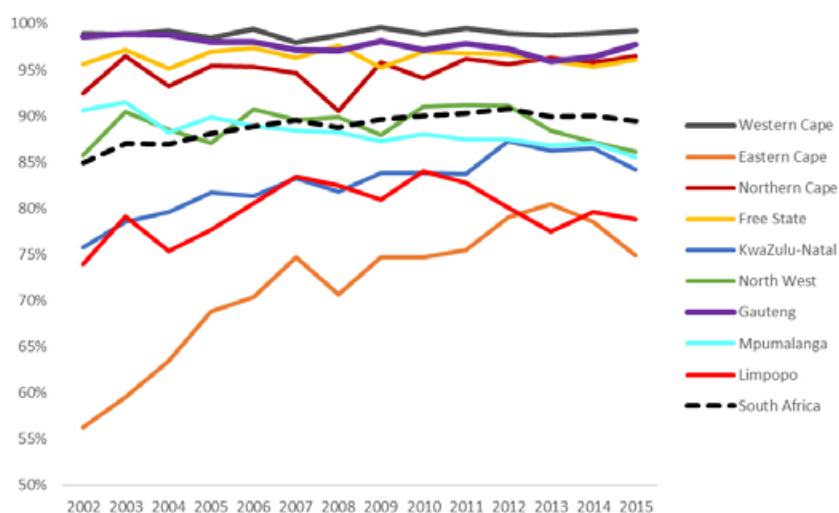
Physical Access

Indicator 1a: Percentage of households with access to RDP standard piped water

Data Source: General Household Survey (GHS) (StatsSA) 2002-2015

Description: This indicator seeks to understand how many households have access to piped water as per the prescribed RDP standard. According to the GHS, RDP standard or higher refers to piped water in dwelling or in yard. Water from a neighbour’s tap or public/communal tap is also included provided that the distance to the water source does not exceed 200 meters.

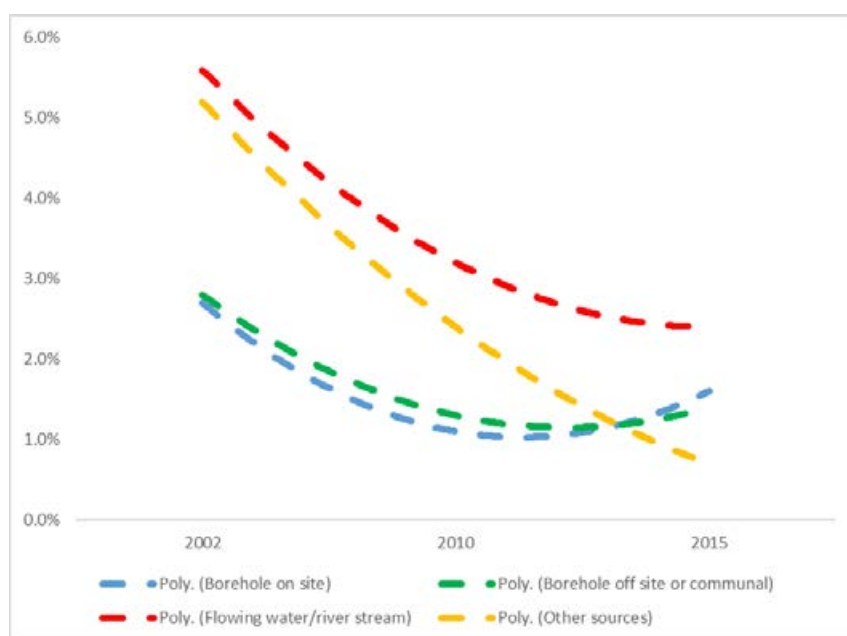




Indicator 1b: Percentage of households accessing drinking water through other main sources

Data Source: General Household Survey 2002-2015

Description: This indicator shows the proportion of households whose main source of drinking water is through other sources such as boreholes on and off-site, rain water tanks, rivers and streams and not through piped running water.



“
increases in the
percentage of
households accessing
piped water
”

South Africa achieved the MDG target to halve by 2015 the proportion of people without sustainable access to safe drinking water and sanitation. Indicator 1a shows that the proportion of people with access to piped water in South Africa has increased from under 85% in 2002 to 90% in 2010, while falling slightly back to 89% in 2015. The Eastern Cape continues to be the province with the lowest proportion of household access to piped water, although there has also been a significant rise in the proportion of households accessing piped water here, from 56.3% in 2002 to 74.9% in 2015. Limpopo saw a decline in 2015, dropping from 84% in 2010 to a 78.8%, while both Gauteng and Western Cape remained in at over 90% access across the years. This highlights the unevenness of service delivery across provinces. Provinces which are more urbanised and economically developed such as Gauteng and the Western Cape show a higher proportion of access of piped water compared to provinces such as Eastern Cape and Mpumalanga which are more rural provinces.

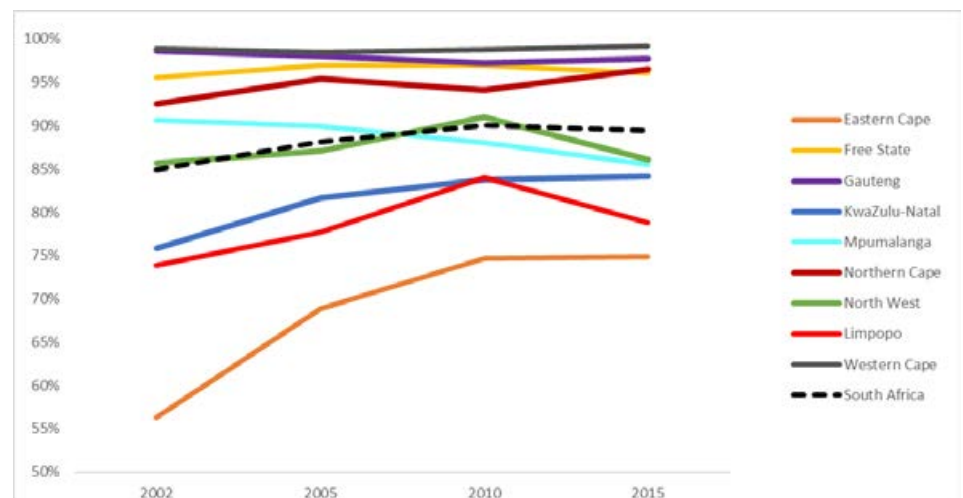
Against the backdrop of increases in the percentage of households accessing piped water, Indicator 1b shows that there are still many people whose access to drinking water does not come from a piped tap. This indicator shows that people who have no access to piped water continue to access drinking water from rivers, rather than much safer alternative water

sources such as boreholes. This is alarming considering the level of pollution that exists in rivers, which therefore pose a health risk to those using the water for drinking. Furthermore the higher percentages of households having flowing water or river streams as their main source of drinking water indicate that government is yet to meet its obligations in terms of policy and constitutional obligations. For example the NDP states that “water is strategic resource critical for social and economic development and there is a growing concern about the potential impact of water-related risks”. Indicator 1b shows that in 2015, the number of people who had flowing water or river streams as their main sources of drinking water was still higher in comparison to other sources such as on site boreholes which stood at 1.6% while flowing water/river streams was at 2.4%. Other sources that served as household’s main source of drinking water are made up of rain water tanks, wells, springs as well as stagnant water sources such as dams. Households accessing drinking water through these other source shows a steep decline in terms of percentages of households main source of drinking water recording 0.7% in 2015 compared to the 2002 5.2%.

Indicator 2: Percentage of households with access to RDP standard sanitation facilities.

Data Source: General Household Survey (StatsSA) 2002-2015

Description: This indicator shows the percentage of households who had access to RDP standard sanitation facilities. According to Statistics South Africa General Household Survey, a RDP standard sanitation facility refers to a flush toilet that is connected to a public sewage system or a septic tank and a pit toilet with a ventilation pipe.



“

Sanitation is inextricably linked to dignity, hygiene and ultimately, health.

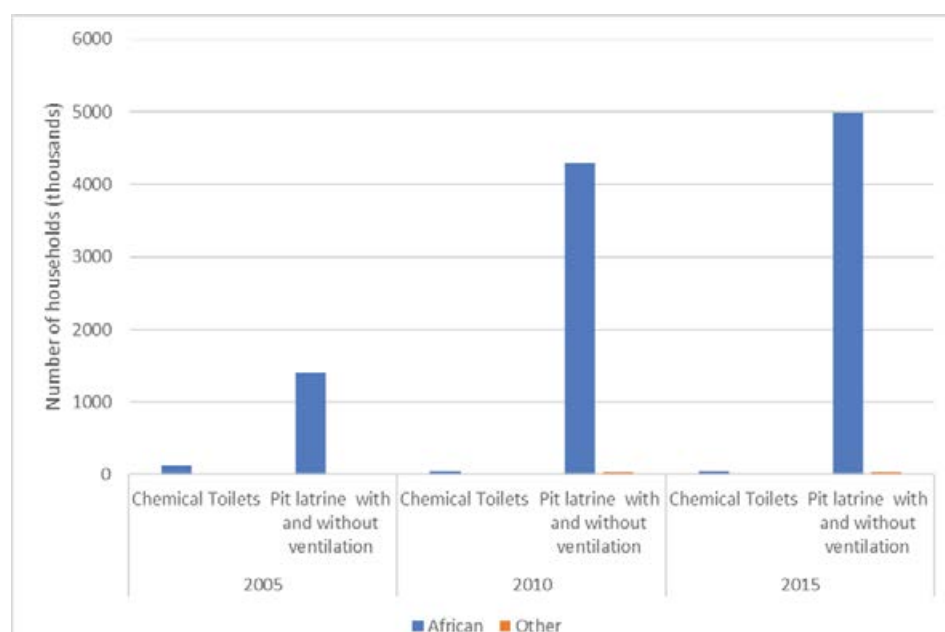
”

Sanitation is inextricably linked to dignity, hygiene and ultimately, health. The above indicator shows household access to sanitation in the country by different provinces, and the national average. The country met its MDG target to halve the proportion of people without sustainable access to sanitation with the national figure reaching 79.9 % in 2015. The Western Cape records the highest access to improved sanitation followed by Gauteng while Limpopo comes last despite an increase from 27.0% in 2002 to 53.8% in 2015. The national averages show that there has been a sustained improvement in access to RDP standard sanitation in South Africa since 2002. However, it is important to note that the number of people who are sharing facilities is under-captured in annual surveys such as the General Household Survey or the Non-financial Census of Municipalities, making it difficult to assess the exact level of access of households. The following indicator looks more closely at the kinds of sanitation used by the 20.1% of households who do not have access to improved sanitation.

Indicator 3: Household access to other sanitation facilities by population group of the household head

Data Source: General Household Survey 2005-2015

Description: This indicator, disaggregated by race population groups, shows the use of alternative sanitation facilities available to households in the absence of an RDP standard sanitation facility as according to the population group of the head of the household in thousands.



This indicator shows that there has been an upward trend in the number of black South African households using pit latrines for sanitation. Of this, a significant number use pit latrines with no ventilation, posing a serious threat to their health. Ventilated Pit latrines are the most improved form of emergency sanitation technology and have less odour. The number of Black African people whose primary access to sanitation was a pit latrine was higher in 2015 than in any other year. Access to improved sanitation is also linked to the type of dwelling or housing conditions that people live in.

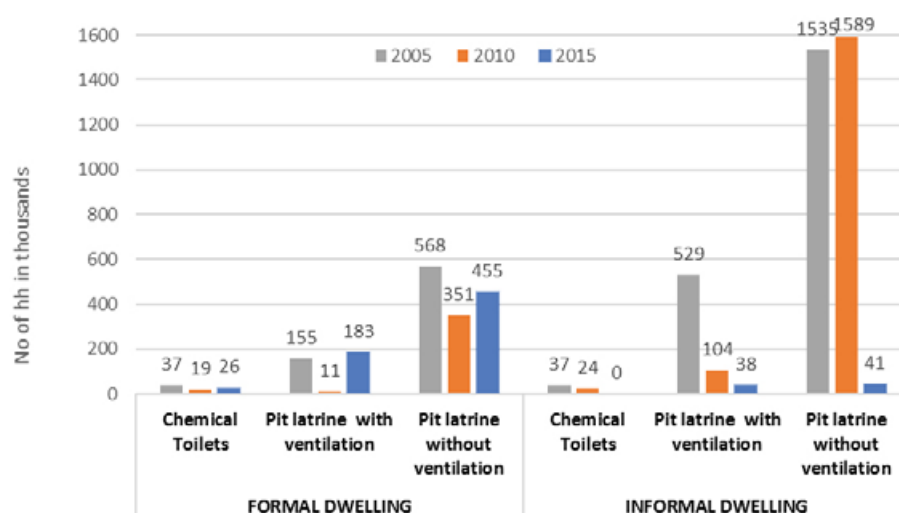
These figures demonstrate the legacy of extreme inequality left by apartheid, as Black people were subjected to extreme living conditions in spaces that received very little infrastructure investment from the government. In the new democratic dispensation, the government has made significant strides in addressing the issue of access to sanitation, but as seen in the above indicator, Black people are still worse off compared to other racial groups in the country in terms of socio-economic rights such as sanitation.

The following indicator shows people's access to sanitation by the type dwelling that they live in.

Indicator 4: Number of households (in thousands) who live in informal and formal dwellings using pit latrines and chemical toilets

Data Source: General Household Survey, 2002-2015

Description: This indicator shows how the type of dwelling usually determines the type of sanitation that households have access to or utilise.



This indicator seeks to show the correlation between the types of dwelling that people have in terms of their access to different types of sanitation facilities. For people living in informal dwellings, the type of sanitation that one is mostly likely to have access to a pit latrine. A pit

“
increasing burdens on
the level of demand
for housing, water and
sanitation
”

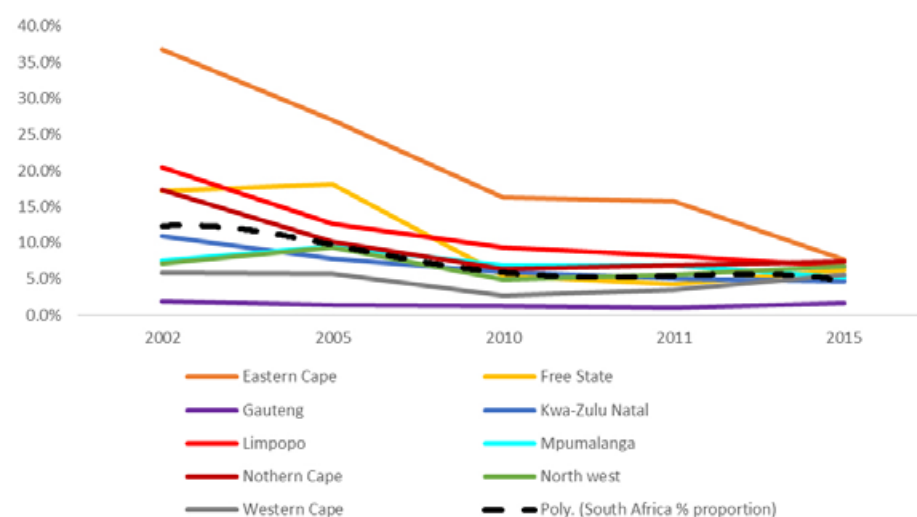
latrine according to the World Health Organisation (WHO)²⁹³ is a form of improved sanitation that can be either waterborne or dry. It is mainly recognised through a corrugated iron structure with a hole in the ground where human excreta is released into. A safe pit latrine is one that has ventilation to control odour and flies, as well as a proper safe seat and a hygienic cover slab. As the indicator shows, the number of households who were still using pit latrines without ventilation in living in formal household dwellings stood at 455 000 in 2015, a slight decline from the 568 000 seen in 2005. This essentially means that there is still a considerable percentage of households that do not have access to adequate or quality access to sanitation as a pit latrine without ventilation is not an improved form of sanitation. For those living in informal dwelling households, pit latrines without ventilation also triumphed over ventilated pit latrines (VIP). For example, in 2005, households who had VIPs stood at only 529 000 while households that had pit latrines without ventilation stood much higher than that.

Due to urbanisation and great internal and external economic migration, high numbers of people are moving to areas of economic concentration, placing increasing burdens on the level of demand for housing, water and sanitation. For many people, this migration to cities means that they find themselves located in informal settlements and slums located near the city that lack basic services such as water and sanitation. Motivated by high inequality and unemployment, many people are unable to afford private housing opportunities and thus have to rely on government provided housing, yet many government housing projects are located outside of city centres and thus far away from places of economic opportunities. This is a big factor in the rise and increase of informal settlements located nearer to cities with very limited access to improved sanitation. SPII's 2014 report on *the Right of access to adequate housing in South Africa* found that in 2014 there was a general decline in the proportion of households that were living in traditional structures. This decline can be attributed to the continuation of the historical trend of economic migration in South Africa. This means that people of working age move from rural, traditional households to urban city centres, to take up occupancy in informal settlements to be closer to places of work.²⁹⁴

Indicator 5: Percentage of households with **no access** to improved sanitation or who use bucket toilets.

Data Source: General Household Survey, 2002-2015

Description: A bucket toilet is a basic form of a dry toilet which is portable. The bucket is located inside a dwelling, or in a nearby small structure or on a camping or other place that lacks waste disposal plumbing. The waste is usually collected through a municipal waste collection system or there is a private waste collector designated to collect waste from bucket toilets in communities. Bucket toilets in formal areas were implemented before 1994 by the apartheid government, and since then government has enacted different policies to eradicate this legacy of bad and unhygienic sanitation in formal areas. Other forms of bucket toilets can be found in informal areas not provided by the government.



²⁹³ World Health Organisation (WHO) Fact Sheet, Water and Sanitation emergencies, http://www.who.int/water_sanitation_health/hygiene/emergencies/fs3_4.pdf

²⁹⁴ The report can be accessed on www.spii.org.za under the Socio-Economic Rights Monitoring Tool project

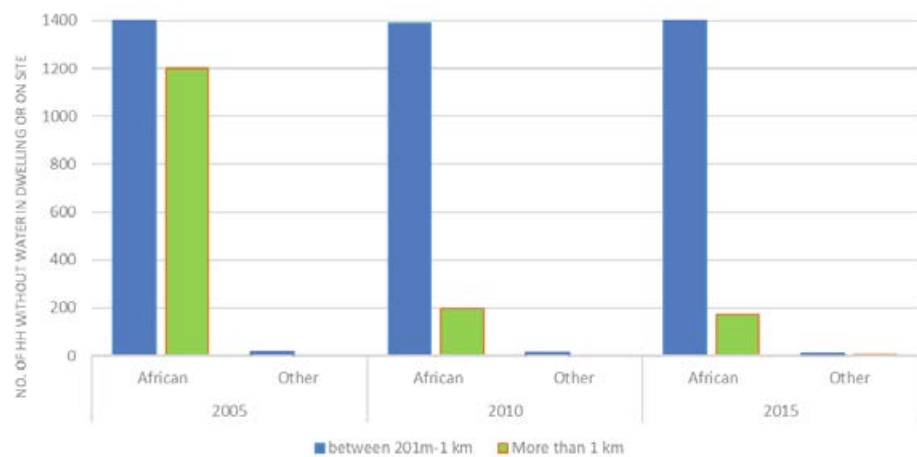
The South African government committed itself to providing access to improved sanitation for all people in communities by 2014. However, by 2011, around 16 percent of households in the Eastern Cape Province had no access to sanitation or were using bucket toilets. This number has since gone down with 2015 figures with only around 7 percent of the residents still affected by no access to sanitation or the use of bucket toilets. This number is slightly higher than the national average figures which sit at 4.7 percent in 2015. Government still lags behind its 2005 targets that were made through the then Department of Water Affairs and Forestry (DWAF), now Department of Water and Sanitation (DWS) to eradicate all bucket toilets in formal areas by December 2007.²⁹⁵ As of 2011, a proportion of 5.4 percent of South African households still had no access to sanitation or were using bucket toilets as their form of sanitation.

The 2005 National Sanitation Bucket Replacement Programme became one of government's biggest and most promising policies in terms of addressing the discriminatory apartheid policy of unhygienic bucket toilets in largely poor black communities. The Programme became one of government's biggest budget allocations for a single government infrastructure programmes in South Africa with a staggering R1.8 billion given to the department to eradicate bucket toilets.²⁹⁶ The Programme was implemented in seven of the nine provinces, excluding Limpopo province and the Kwa-Zulu Natal province because "...they had already replaced their bucket toilets"²⁹⁷. This came as a surprise as the General Household Survey of 2015 as shown in this indicator, reports that in 2005, Limpopo had around 12.6% of its households using bucket toilet sanitation and Kwa-Zulu Natal had around 7.8% of its households using bucket toilets. Other provinces such as the Western Cape and Gauteng had much lower percentages of their households using bucket toilets but were still included in the National Sanitation Bucket Replacement Programme of 2005.

Indicator 6: Distance to water source by race

Data Source: General Household Survey, 2005-2015

Description: This indicator captures the average distances that households from different race groups travel to access a water source.



This indicator reveals that Black African households live further away from their water points than other race groups, and are therefore the most likely to not have access piped water inside their dwellings or within 200 metres of their household premises. This has remained the case since 2005, with around 1400 (thousand) Black African households not living within 200 meters of a water source. The number of Black African households (in thousands) travelling more than 1 kilometre to access a water source has however declined from 1199 in 2005 to 172 in 2015. In other racial groups, the numbers have remained from low to zero from 2005 to 2015. The burden of housework such as fetching water lies significantly with women and young girls in the household. With many African households accessing water through a water source that is located further than 200 metres, the burden of work for women continues to be high. Women often carry the burden of house work such as cleaning and cooking, making them the

²⁹⁵ Department of Water Affairs and Forestry (DWAF), "The National Sanitation Bucket Replacement Programme: Lessons learnt", March 2008, in Tissington, K., 2011, Basic Sanitation in South Africa: A Guide to Legislation, Policy and Practice, SERI, p.5

²⁹⁶ Department of Water Affairs and Forestry (DWAF), 2008, The National Sanitation Bucket Replacement Programme: Lessons learnt, p.ii, http://www.personal.leeds.ac.uk/~cen6ddm/WatSan/DWAF_bucketlatrines.pdf

²⁹⁷ Ibid, p.2

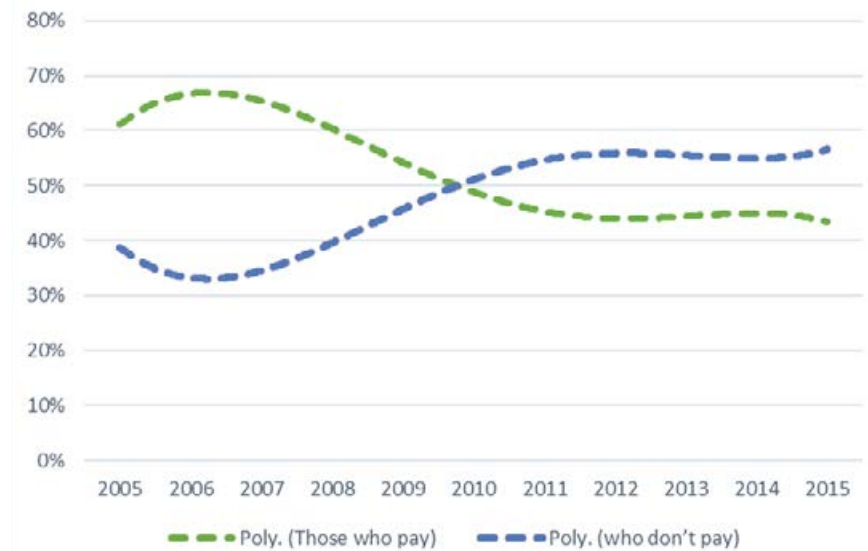
main bearers of the responsibility to fetch water for the household. They also share the load of fetching water with girl children and young boy children.

Economic Access

Indicator 7a: Percentage of households that pay for water and those that do not pay water

Data Source: General Household Survey, 2005-2015

Description: This indicator shows the percentage of households who pay to get access to municipal water against those who do not pay for access.



The Income and Expenditure Survey (IES) provides an account of total household income that is spent on water, and miscellaneous fees related to the dwelling. This classification does not show clearly how much is spent by household's exclusively on water alone, making it difficult to assess exactly how much of household incomes is spent on water and sanitation. This indicator shows a decrease in the percentage of households that pay for municipal water. Reasons for this vary, from bad municipal billing, to lack of proper follow-up and debt recovery by the municipality as well as the implementation of the Free Basic services policy and the municipal indigent system which essentially recognises the inability of some households to pay for water and sanitation amongst other basic services.

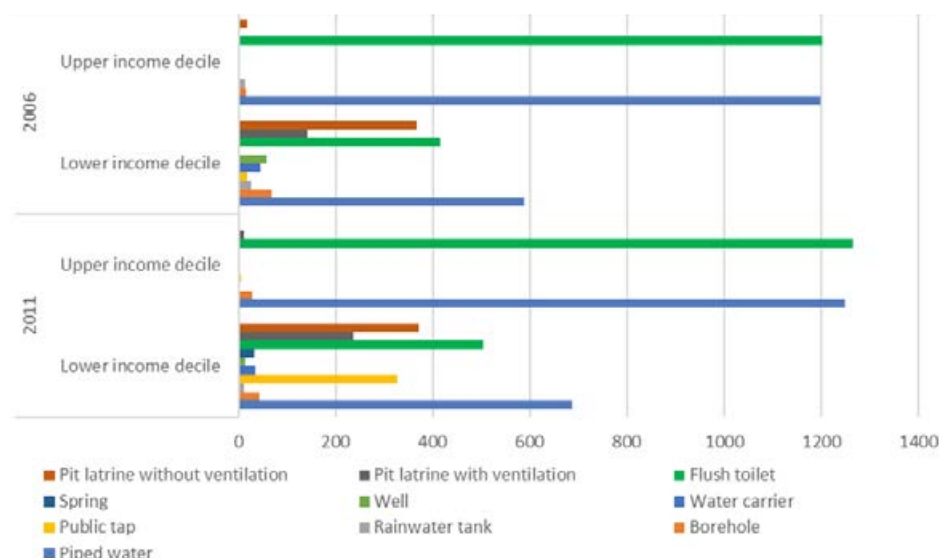
Indicator 7b: Water source and sanitation facility access by income deciles, 2006-2011

Data Source: Income and Expenditure Survey, 2006-2011

Description: This indicator demonstrates the relationship between household income levels and the type of water and sanitation source households have access to.



“
decrease in the
percentage of
households that pay for
municipal water
”

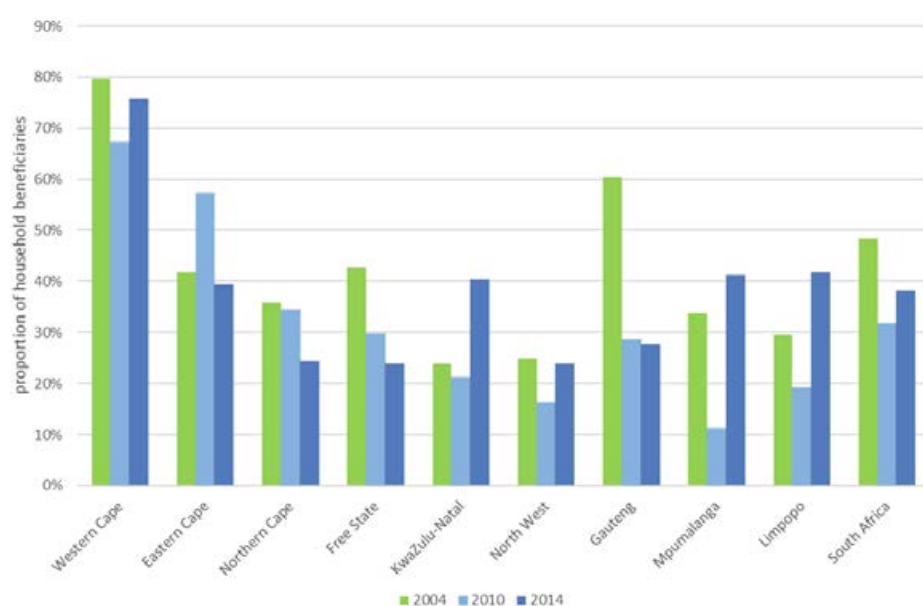


Indicator 7b shows that high income inequality has a negative impact on the realisation of socio-economic rights such as housing, water and sanitation. This graph shows that households in the lowest income decile lack access to improved sanitation facilities and have a high number of their households accessing water through other sources such as wells and boreholes. This indicator also shows that households in the lowest income decile were more likely to use shared facilities such as public taps compared to households in the upper income decile. Access to improved water and sanitation is linked to the type of housing that people occupy. This indicator shows that those who have high income deciles are more likely to have improved sanitation as well as flush toilets as they are more likely to be living in formal housing structures compared to those with very low income deciles. **Indicator 4** demonstrated how households who lived in informal dwellings were more prone to using unimproved sanitation facilities such as pit latrines with no ventilation compared to those that lived in formal dwellings.

Indicator 8: Proportion of households accessing free basic water by province, 2004-2014

Data Source: Non-financial Census of Municipalities, 2004-2014

Description: This indicator represents the proportion of consumer units (households) that receive free basic water from the municipality. Free basic water is accessed under the Free Basic Services Policy. Free basic water policy is based on the standards set in the national Water Act and it grants every household access to 6000 litres of water per month for free, and only water used in addition to this is payable.



The Free Basic Services policy guarantees indigent households the right to access a basic level of water and sanitation. This policy is administered by local government through

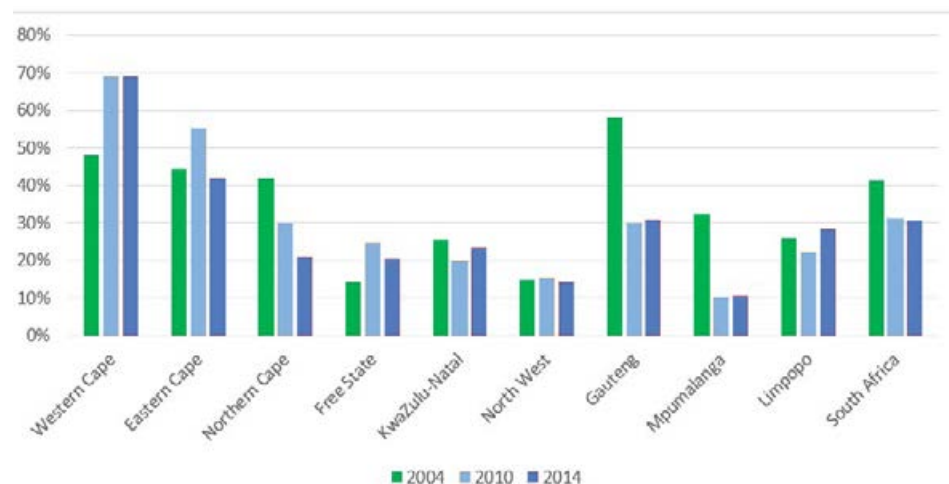
“Access to improved water and sanitation is linked to the type of housing that people occupy”

municipalities. Indicator 8 shows the number of households who are supplied with free basic water and sanitation per province from 2004 to 2014. Nationally, the percentage of households that accessed free basic water and sanitation since 2004 has been declining, from 48.3% for water and 41.2% for sanitation in 2004 to 38.2% for water. The Western Cape records the highest proportion of households who are receiving free basic water reaching an impressive 75.7% in 2014. The North West province records the lowest percentages in terms of access to free basic water since 2004. Only 23.9% of their households had access to free basic water in 2014.

Indicator 9: Proportion of households benefiting from free basic sanitation 2004-2014

Data Source: Non-financial Census of Municipalities, 2004-2014

Description: Basic sanitation is regarded as safe, clean, hygienic and reliable toilet facility such as a ventilated improved pit-latrine (VIP) or water borne sanitation. Free basic sanitation refers to the provision of a basic sanitation facility, including the safe removal of human waste and waste water from the premises where this is appropriate and necessary and the communication of good sanitation, hygiene and related practices.



The Department of Water Affairs (now Department of water and sanitation) in 2008, through the Free Basic Sanitation Implementation Strategy set a target to have all people have access to a functioning basic sanitation facility by 2014. This target has still not been met as seen in the indicator that in 2014, only 31% of South African households had access to free basic sanitation. The Water Services Act 1997 defines basic sanitation as “infrastructure necessary to provide appropriate sanitation facility which considers natural (water, land, topography) resource constraints, is safe including for children, reliable, private and socially acceptable”. This means that what is contained as basic in terms of sanitation must be made accessible to South African households, particularly poor households.²⁹⁸

In terms of this indicator, Mpumalanga is the province with the lowest percentage of households accessing free basic sanitation at only 11% in 2014. The North West province follows with just 14% of their households accessing the free basic sanitation in 2014. The low percentages recorded in these two provinces represents quite a contradiction in terms of the aim of the Free Basic Services Policy as it is aimed as lifting the economic burden of poor households. Municipalities deal with the free basic sanitation policy quite differently, for example, in the Western Cape it is shown in the indicator that about 69% of its households had access to free basic sanitation in 2014 compared to the 31% that Gauteng recorded. The Western Cape also records as the only province that increased the percentage of households accessing free basic sanitation as all the other eight provinces all decreased their household percentages including Gauteng.

“

In terms of this indicator, Mpumalanga is the province with the lowest percentage of households accessing free basic sanitation

”

²⁹⁸ Free Basic Sanitation Implementation Strategy, 2008, p. 6 www.ielrc.org/content/e0826.pdf.

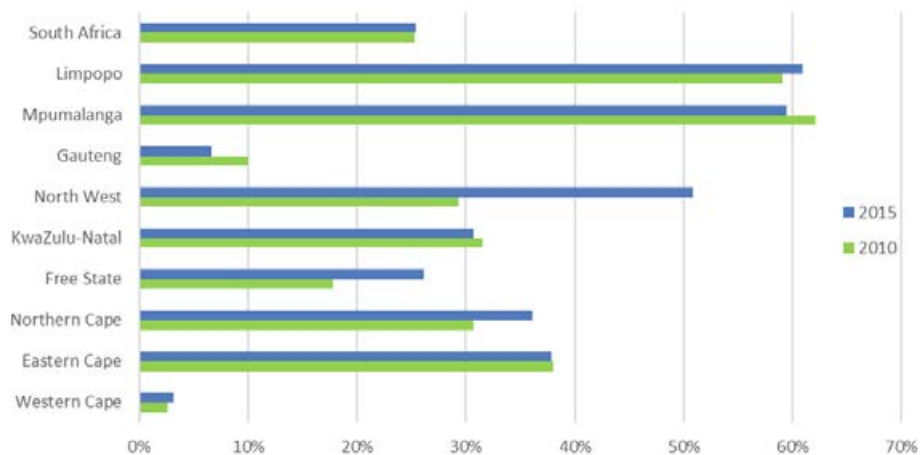
Adequacy Indicators

Availability

Indicator 10: Number of water supply interruptions experienced by households in each province, 2010-2015

Data Source: General Household Survey 2010-2015

Description: This indicator shows the percentage of households who reported water supply interruptions that lasted longer than 2 days



This indicator shows the level of water supply interruptions experienced by households in 2010 and 2015. The proportion of households that experienced water supply interruptions was highest in Mpumalanga and Limpopo during this period. Western Cape had the lowest proportion of households reporting water supply interruptions, followed by Gauteng. This indicator shows that more rural provinces are more likely to experience the worse water and sanitation services. Nationally, over 25% of households reported to have experienced water supply interruptions that lasted longer than 2 days. This figure remained consistent between 2010 and 2015. It is to be noted that before 2010, the General Household Survey did not ask questions related to water supply interruptions experienced by households.

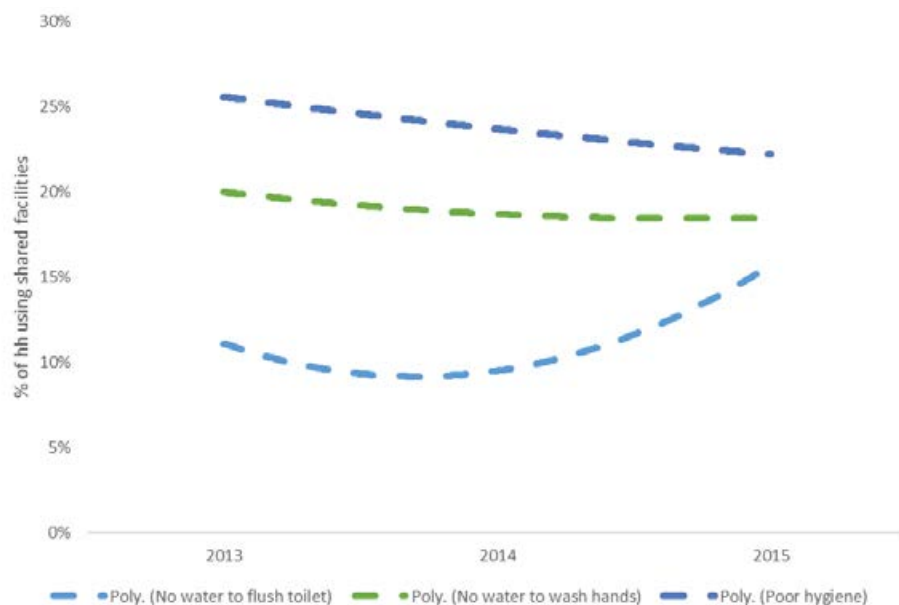
Municipalities do not record the number of water supply interruptions that occur, making it hard to understand the number of times these interruptions take place and what impact this has on the people's access to water. It is also not clear whether people are given enough time to find alternative water for consumption on the days that interruptions take place as municipalities also do not provide records of this information. In order to monitor and evaluate and ultimately decrease the number and duration of interruptions, municipalities should immediately begin keeping records of the number of supply interruptions, their length and the reason behind them.

Hygiene

Indicator 11: Percentage of households using shared sanitation facilities who reported hygiene related issues, 2013-2015.

Data Source: General Household Survey, 2013-2015

Description: The World Health Organization (WHO) defines a shared sanitation facility as "sanitation of an otherwise acceptable type shared between two or more households."



Water borne sanitation (flush toilet) is dependent on a reliable supply of clean water to ensure hygiene and good practices. It is vital that shared facilities are hygienic in order to minimise people's chances of contracting disease and being exposed to unsafe and unhygienic facilities. The number of people per sanitation facility is equally imperative for reliability to ensure adequate access for users.

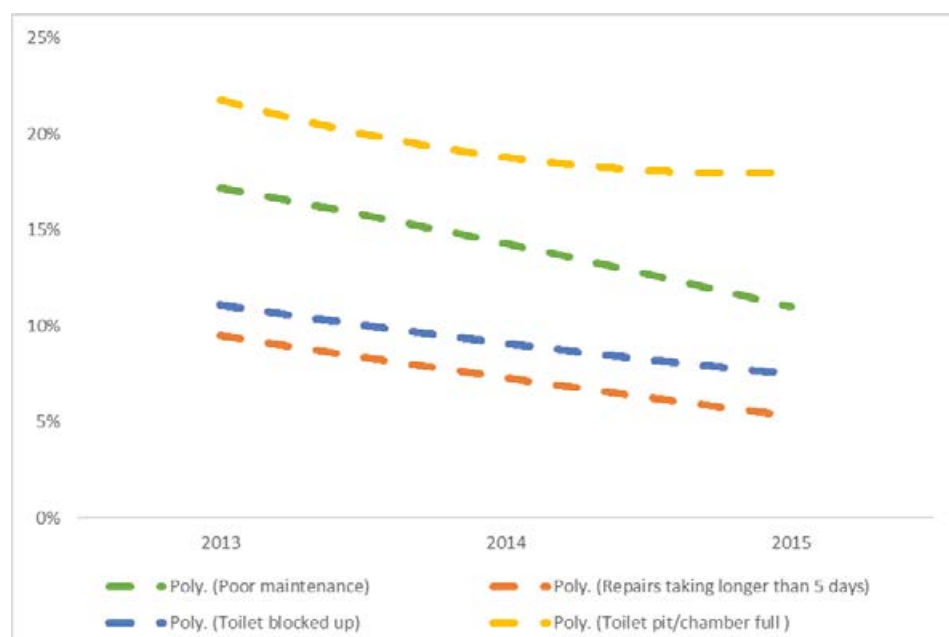
The proportion of households who use shared facilities who reported that they did not have water to wash their hands after using the sanitation facility stood at 18.5% in 2015, while 22.2% of users reported that their shared sanitation facilities were unhygienic. The percentage of households who reported to have no water to flush a shared toilet after using it increased from 11.1% in 2013 to 15.7% in 2015. This lack of water to wash hands after using toilet facilities pose a serious threat to good hygiene practices as well as the risk of contracting diseases caused by bad hygiene practices.

Quality Indicators

Maintenance

Indicator 12: Percentage of households who reported poor maintenance of their shared sanitation facilities, 2013-2015

Data Source: General Household Survey, 2013-2015



Households that use shared water and sanitation facilities are faced with many challenges that ultimately restrict their right to access adequate and quality sanitation. The above chart indicates that many people that used shared facilities found the toilet chamber full, inhibiting them from using the toilet. Chambers that are not emptied frequently make the toilet vulnerable to disease, as well as releasing bad smells which also affect the well-being of users. Other personal hygiene problems experienced by users include 11% of households stating that there is a general level of poor maintenance of shared sanitation services by government. Poor maintenance affects the overall state of the sanitation facility in terms of cleanliness and the removal of waste from sanitation facilities that are not water based and includes the time period it takes for the municipality to fix the facilities when they are broken.

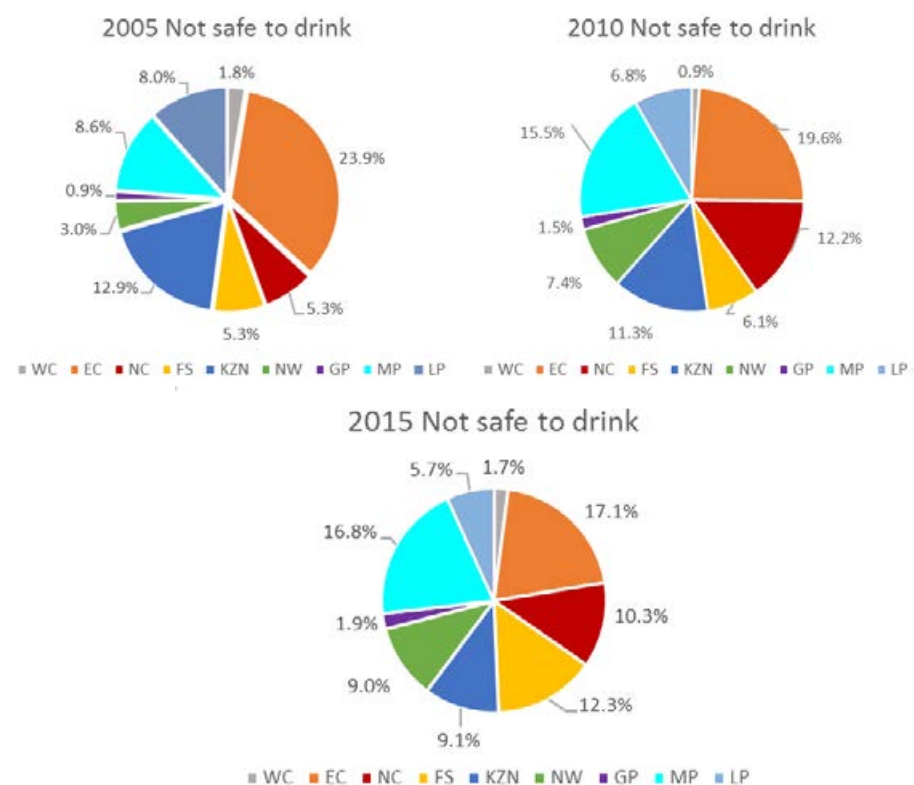
The GHS further reports that there are many challenges related to using shared sanitation facilities related to infrastructure such as lack of an enclosure for the facilities, as well as their distance from household dwellings. Many people also reported that they fear for their personal safety when using shared sanitation facilities especially at night in spaces that do not have adequate lighting. Shared sanitation facilities also do not always come with proper disposal of feminine hygiene products or taps nearby posing a threat to the personal hygiene of users especially women and children. Sanitation technologies have to be sensitive to gender, physical safety in terms of health and hygiene as well as cultural preference.

Acceptability

Indicator 13: Percentage of households who report that they think their water is not safe to drink, 2005-2015

Data Source: General Household Survey, 2005-2015

Description: This indicator shows people's perceptions and the level of acceptance of the quality of the water supply they receive for general consumption. This indicators specifically looks at the households that reported that the water that they drink is not safe.



“Chambers that are not emptied frequently make the toilet vulnerable to disease”

The GHS looks at how people perceive the quality of the water that they drink. This indicator looks at those perceptions in relation to people's acceptability of the quality of the service they get in terms of water. In 2005 23.9% of households in the Eastern Cape expressed that they felt their water was not safe to drink. In 2015, the Eastern Cape still had the most people who felt that it was not safe to drink their water, although this percentage had dropped significantly to 17.1%. Other provinces such as Mpumalanga saw an increase in the percentage of households who rate their drinking water as not safe to drink. While it stood at 8.6% in 2005, Mpumalanga

saw a drastic increase in 2015 with a total of 16.8 % of households reporting that their water is not safe to drink.

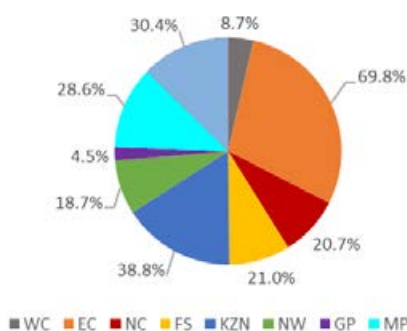
Nationally, in 2015, 7.5% of households felt that their water was not safe to drink. More urban provinces like Gauteng and Western Cape had less complaints from households who felt that their water was not safe to drink. In Gauteng, less than 2% of households perceived their water not safe to drink in 2010, and the number remained unchanged in 2015. Municipalities run annual customer satisfaction surveys, which look at the level of acceptance of the services provided by the local government. This information is however very difficult to access, with many local government municipalities only publishing summaries of the survey and not detailed descriptions of the survey.

Indicator 14: Percentage of households who report that they think that their drinking water was either not clear, not free from bad smells or not good in taste.

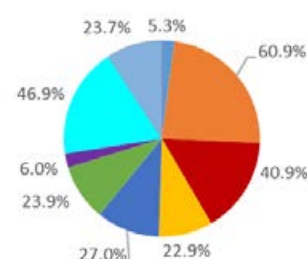
Data Source: General Household Survey, 2005-2015

Description: This indicator reveals household perceptions on the appearance and taste of the water they drink in different provinces.

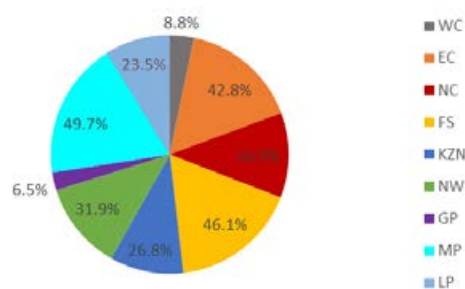
2005 Not free from bad smells/
not in good taste/ Not clear



2010 Not free from bad
smells/not in good taste/Not
clear



2015 Not free from bad smells/ not in
good taste/ Not clear



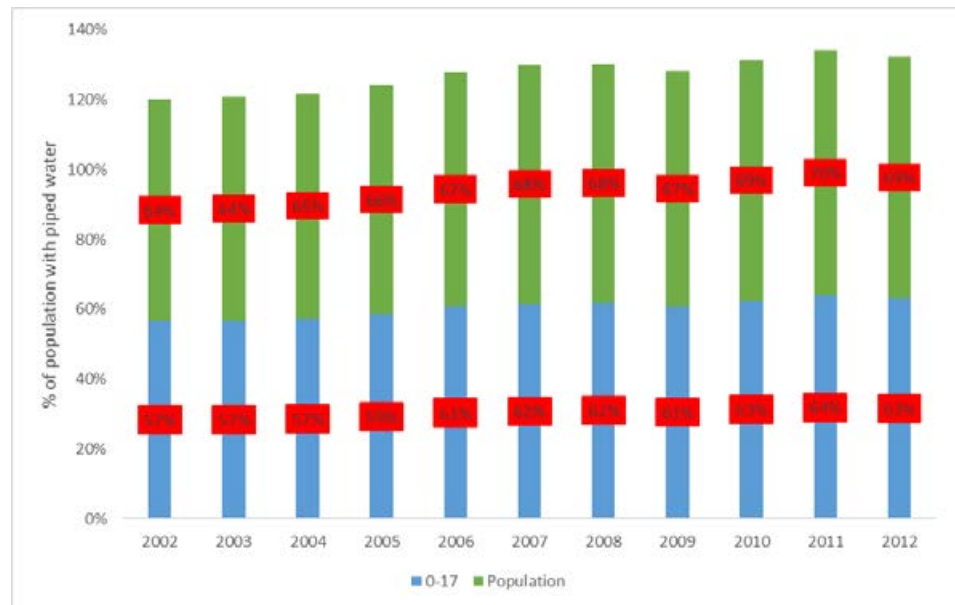
“
Nationally, in 2015, 7.5%
of households felt that
their water was not safe
to drink
”

In 2005, almost 70% of households in the Eastern Cape perceived their drinking water quality as not free from bad smells, not clear and / or not good in taste, compared to 2015 where the percentage was reduced to 42.8%. Eastern Cape however still remains the province with the most negative percentages as it still records higher than most provinces in the two years except in 2015. Mpumalanga, recorded higher percentages compared to Eastern Cape in 2015, even though Eastern Cape was lagging behind with only 6.9% below the 49.7% of Mpumalanga households who felt that their water was not free from bad smells, not clear and / or not in good taste. Free State comes in at 46.1 % in 2015, an increase from 2010 where only 22.9% of its households reported the water was not free from bad smells, not clear and not and / or good in taste.

Indicator 15: Percentage of children (0-17 years) with access to piped water in dwelling or yard.

Data Source: Social Profile of vulnerable groups (StatsSA) 2002-2012

Description: This indicator shows the percentages of children (0-17) who have access to piped water either through connection into the dwelling or inside the yard. This is indicated by referring to the percentage of children living in dwellings with piped water in house or yard. This percentage of children is then compared against the general population.

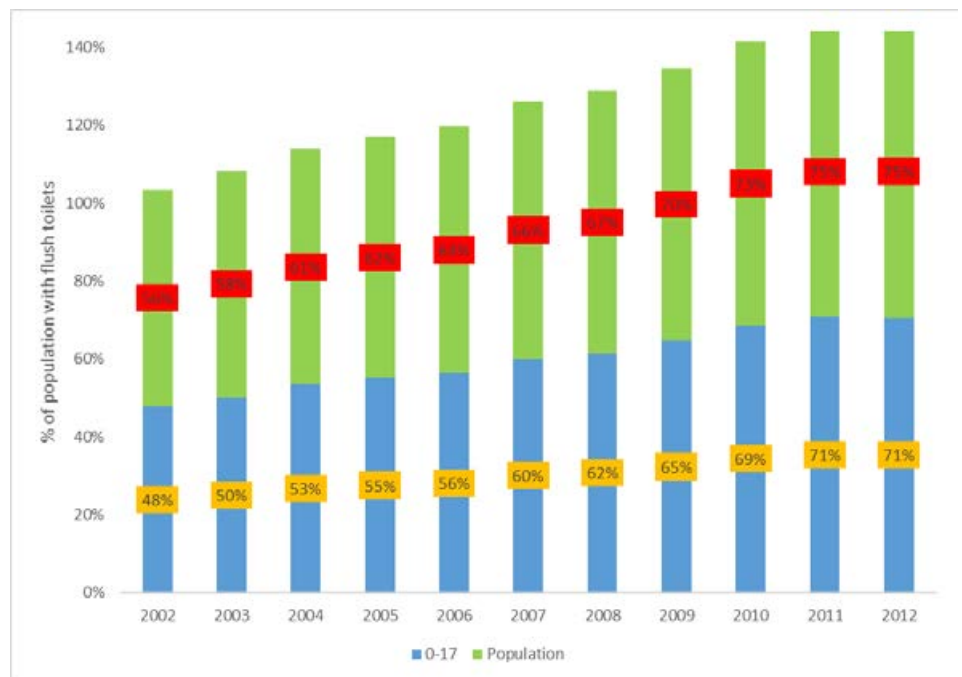


This indicator shows the level of access that children (0-17 years) have to piped water in South Africa since the year 2002 where the level of access for children was below that of the general population. This indicator essentially shows that children are more likely to not have access to piped water in dwelling or inside the yard than adults. For example, in 2002, the percentage of adults who had access to piped water in dwelling or in yard was 64% while children only stood at 57 % until 2005/06. This indicator shows alarming percentages in terms of children's access to piped water in South Africa. This is further alarming considering that the percentage of children with access to piped water in 2012 only stood at 63% while the adult population was reaching 70% in 2011 and 69% in 2012. This essentially means that the living conditions of children in South Africa still needs to be improved especially in terms of such vital goods such as safe and clean drinkable water. Children spend a lot of their time in schools and it is also important they get access to clean and safe drinkable water in schools too. In February 2016, the then Minister of Finance, Nhlanhla Nene recognised the need to improve infrastructure in schools for children to have improved access to basic services such as water and sanitation. The Minister then allocated R29.6 billion to the Educational Infrastructure Grant over a period of 3 years to ensure that minimum standards, while a further 7.4 billion was set aside to address the backlog of infrastructure through the Schools Infrastructure Delivery Initiative (ASIDI).²⁹⁹

Indicator 16: Percentage of children (0-17 years) with access to flush toilets with on or off site disposal.

Data Source: Social Profile of vulnerable groups (StatsSA) 2002-2012

Description: This indicator shows the percentages of children (0-17) who have access to flush toilets with on or off site disposal in dwellings they live in. This percentage of children is then compared against the general population.



This indicator shows the level of access that children in South Africa had from the periods of 2002-2012. Sanitation remains a massive challenge for South Africa as many vulnerable groups, such as children still have relatively low access to flush toilets when compared to adult population who had 75% access to flush toilet when children lagged slightly behind with 71%. The percentage of children's access to flush toilets shows a gradual increase over the years since 2002, where access stood at only 48%.

Vulnerable groups such as women, children and people with disabilities have their right of access to adequate quality sanitation violated as their needs are not taken into account. For example, there are no gender segregated toilets in informal settlements or communities where communities have to use shared sanitation facilities. The situation escalates in the case of minors and children, who require child friendly sanitation facilities to minimise the risk of unhygienic sanitation practices by children.



CHAPTER 6

Conclusion and Recommendations

This paper has undertaken the complex process of unpacking the state of the right to water and sanitation in South Africa, through an extensive analysis of the normative content of the right to water and sanitation in South African legal instruments as well as international key instruments in international law. The paper further provided an evaluation of the resources that have been allocated towards the state's provision of the right to water and sanitation in South Africa since 1994. Our look at the budget allocations from government to the right to water and sanitation found that government has made considerable strides in terms of increasing budget allocations towards basic services, especially through the Municipal Infrastructure Grant. Lastly, this paper developed indicators to monitor progress in terms of the realisation to the right to water and sanitation in South Africa. The indicators provide a snapshot of the progress that has been made in terms of the provision of adequate and quality access to water and sanitation in South Africa.

Government continues to promote efforts to meet the demand for water in communities despite immense pressure amid the drought that has led to widespread water shortages. It is important to note also that government in its many policies around sanitation recognises the link between water and sanitation even in its efforts to explore other non-water dependent sanitation technologies. These indicators provide us with a clear picture in terms of where government still needs to fill gaps and where it has performed well. A number of households still live in conditions where the natural process of relieving oneself is a daily struggle. Women still get raped and murdered in shared community sanitation facilities.

South African water quality standards generally meet international standards and are in compliance with the World Health Organisation's (WHO) requirements, even though some rural and local municipalities are still struggling with compliance and this has been observed in many Department of Water and Sanitation (DWS) reports. Safe and clean drinkable water is a Constitutional right and it should be well treated so that it is free of any contamination so as to not put the lives of those who drink it in jeopardy. As an integral part of human life, water needs to be of an acceptable standard for the people who consume it, meaning it must be free from odour, not be of bad taste, it must be clear and be of a reliable supply. Therefore access as defined as just water coming out of a tap is not sufficient as set out in General Comment No. 15 of the Committee on Economic Social and Cultural Rights (CESCR). What qualifies access as sufficient includes the proximity of each tap and toilet to the end user; the number of times the user experiences water shortages or cuts; the number of people he/she shares the tap with, how much money do they pay to get the water and can they afford it? These are amongst the questions and gaps highlighted in this paper using statistical indicators to measure how far the South African government has come in progressively realising the right to water and sanitation.

People must be aware of their right to water and sanitation

The legal basis for incorporating the right to sanitation together with the right to water is established in this paper based on the interpretation of the right to housing under Section 26 which guarantees the right to access to adequate housing. It was established in the *Grootboom* case that a person's right to adequate housing is beyond just the provision of bricks and mortar, but also involves (amongst others) available land, water and sewerage removal. This provides a basis to bring to the fore the importance of the right to sanitation by putting it on a par with the right to water. Sanitation is as much a right as water and these two are inextricably linked. The right to water and sanitation is also a derivative right in that it is linked to dignity, environment, housing and health. People living in informal settlements are the most affected by a lack of adequate, quality access to sanitation in South Africa. Through indicators and use of a case study, this paper has shown how the right to housing is also inextricably linked to the right to water and sanitation. People that live in informal dwellings or settlements are more likely to have shared sanitation facilities that are of different technologies to the RDP standard (piped water and flush toilets) or inadequate sanitation such as unventilated pit latrines.

Axolile Notywala of the Social Justice Coalition in Khayelitsha states that "the current continuous provision of portable chemical toilets and container toilets hampers the progressive realisation

“

Government continues to promote efforts to meet the demand for water in communities

”

of the right to water and sanitation in Khayelitsha". Having visited Khayelitsha and seeing toppled chemical toilets and toilets located on the main road pavements, we unfortunately share the same sentiments. There is no dignity in using a bucket toilet behind a curtain in a shack because shared toilets are breeding grounds for germs and the scenes of crimes, including especially gender-based violence. These sites constitute a violation of the right to access adequate and quality sanitation as the provision of temporary or emergency sanitation in informal settlements does not take into account the aspect of safety such as high mass lighting, as was an issue raised in the *Nokotyana* case. This paper recommends that government must take reasonable steps to actively include and involve communities in deciding appropriate technologies for the provision of sanitation in informal settlements. Government's top-down approach in terms of the provision of sanitation technologies to informal settlements has been detrimental to the effective use of government resources as is the case in Khayelitsha where government spent a lot of money for the Mshengu chemical toilet service but the facilities are not being cleaned or maintained as per the service contract that the City has with the service provider. Resource allocations for water and sanitation such as this must be strictly monitored and the general public must be included in monitoring and evaluation processes.

Resource allocations for water and sanitation must be strictly monitored

The paper also noted that the equitable share allocation in municipalities is not used equitably as many municipalities allocate a much lower percentage of the LGES to water and sanitation services than recommended. This means that resources towards water and sanitation are already depleted and thus places constraints on the realisation of the right to water and sanitation. This paper thus recommends that the use and allocation of resources towards the right to water and sanitation must reflect the needs of the people on the ground, using the municipal Integrated Development Planning (IDP) process to include the voice of the community from the planning to the implementation and evaluation stages.

Government coordination and integration is imperative

The problem of water and sanitation should be looked as part of a larger framework which includes the right to housing as these rights are intimately linked, as recognised in the ICESCR and General Comment No. 15 of the CESCR. This will involve a more integrated government approach in terms of the delivery of basic services. The various departments which have water and sanitation as cross-cutting functions in their mandate, such as the Department of Human Settlements, need to work together with the Department of Water and Sanitation to ensure the speedy provision of housing, water and sanitation in informal settlements.

Local government also needs to be capacitated to be able to administer effective pro-poor policies towards water and sanitation such as the Free Basic Services policy as well as the Municipal Indigent policy. Due to poor planning processes, municipalities end up not implementing properly the share of resources in terms of allocations to basic services, especially around water and sanitation. The DPME reports that a total amount of around R31.25 billion is needed to upgrade and maintain the current sanitation infrastructure. Catching up to this and finding the necessary resources will be difficult as municipalities continue to mismanage funds and perpetually find themselves facing a backlog of services.

Water and sanitation are rights enshrined in the Constitution and ICESCR that the State cannot choose to ignore. People are making sure of this as seen in the widespread and daily protests that take place under the banner of service delivery. The South African population is mired in socio-economic challenges which the state is obliged to address. The Department of Water and Sanitation must align its programmes with the needs of the people on the ground, especially around upgrading and the maintenance of the current water and sanitation infrastructure. In dealing with upgrading informal settlements, the state must provide adequate, and quality water and sanitation facilities that are culturally sensitive to the needs of women, children and people with disabilities. SPII's monitoring tool seeks to not only monitor State actions towards SERs, but also to facilitate dialogue, collective action as well as comprehensive advocacy towards the universal access of all SERs in South Africa.

“

The problem of water and sanitation should be looked as part of a larger framework which includes the right to housing

”

BIBLIOGRAPHY

(all online sources checked 12 September 2016)

African Commission on Human and People's Rights (ACHPR), Resolution on the Right to Water Obligations –ACHPR/Res.300 (EXT.OS/XVII), <http://www.achpr.org/communications/> Accessed 08/09/2016

Alam S, Atapattu S, Gonzalea C & Razzaque J, (2015), International Environmental Law and the Global South, Cambridge University Press

Algotsson E & Murombo T (2009), Water Supply and Sanitation in South Africa: Environmental Rights and Municipal Accountability, LHR Publication Series,

African Charter of People's and Human Rights, Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986

An AMCOW Country Status Overview, (2011) Water Supply and Sanitation in South Africa Turning Finance into Services for 2015 and Beyond. Available at: <https://wsp.org/sites/wsp.org/files/publications/CSO-SouthAfrica.pdf>

Auditor-General South Africa. Press Release, (2016) Auditor-general reports an overall, encouraging five-year improvement in local government audit results, available at: [https://www.agsa.co.za/Portals/0/MFMA%202014-15/Section%201-9%20MFMA%202014-2015/FINAL%20MEDIA%20RELEASE%20\(MFMA%202016\)%20FN.pdf](https://www.agsa.co.za/Portals/0/MFMA%202014-15/Section%201-9%20MFMA%202014-2015/FINAL%20MEDIA%20RELEASE%20(MFMA%202016)%20FN.pdf)

Algotsson E & Murombo T (2009), Water Supply and Sanitation in South Africa: Environmental Rights and Municipal Accountability, LHR Publication Series, p.14

Centre for Applied Legal Studies submission to the South African Human Rights Commission, CESCR Statement on the Right to Sanitation- 19 November 2010, <http://www.ielrc.org/content/e1013.pdf>

Committee on Economic, Social and Cultural Rights, Concluding Observations for Kenya, E/C.12/CAN/CO/6

Committee on Economic, Social and Cultural Rights General Comment No.15 (2002) , The right to water (art. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights) UN Document: E/C. 12/2002/11

Committee on Economic, Social and Cultural Rights General Comment No.15 (2002) , The right to water (art. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights) UN Document: E/C. 12/2002/11

Committee on Economic, Social and Cultural Rights, General Comment 3, The nature of States parties obligations, (Art. 2, para. 1 of the Covenant), E/1991/23

Commission, and Catchment Management Agencies, 2016, Available at: <https://pmg.org.za/committee/111/>

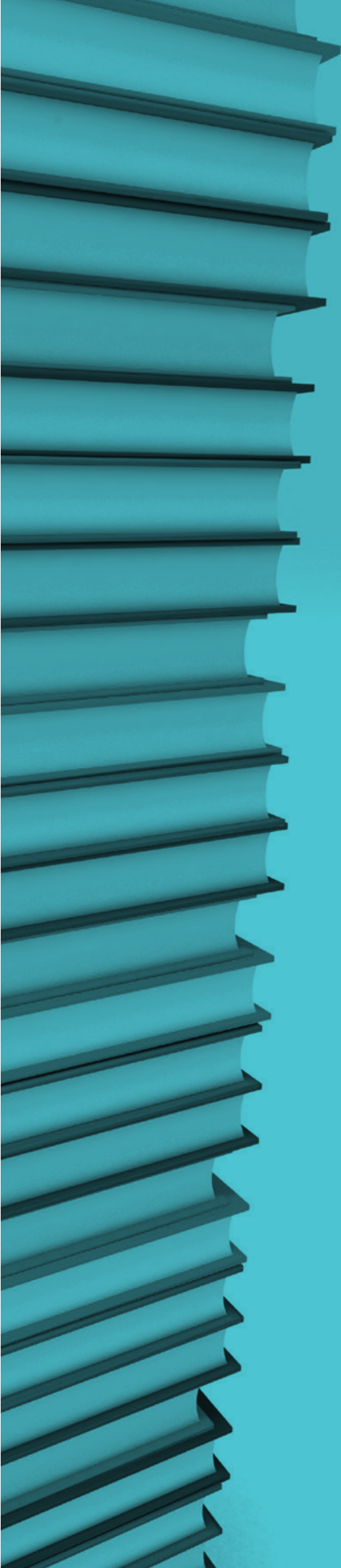
Committee on Economic, Social and Cultural Rights. An evaluation of the obligation to take steps to the "maximum of available resources" under an Optional Protocol to the Covenant, E/C.12/2007/1

Constitution of the Republic of South Africa, 1996

Chenwi, L., (2013), Unpacking progressive realisation, its relation to resources, minimum core and reasonableness and some methodological considerations for assessing compliance, De Jure Law Journal, <http://www.saflii.org/za/journals/DEJURE/2013/39.html>

Department of Human Settlements, Annual Reports 2009/10 – 2013/14. Available at: <https://www.dhs.gov.za/content/annual-reports>

Department of Water Affairs, Annual Reports 2009/10 – 2013/14. Available at: <https://www.dwa.gov.za/Documents/RSP.aspx>



Department of Water and Sanitation Settlements, Annual Report 2014/15. Available at: <https://www.dwa.gov.za/Documents/RSP.aspx>

Department of Water Affairs and Forestry, Water Supply and Sanitation Policy, White Paper: Water –an indivisible national asset, 1994, www.dwa.gov.za/Documents/Policies/WSSP.pdf accessed 07/01/2016

Free Basic Water: Implementation Strategy: Consolidating and Maintaining, (2007), www.apps.who.int/iris/bitstream/10665/177752/1/9789241569145_eng.pdf accessed 26 November 2015

International Budget Partnership. The Use of Maximum Available Resources. Article 2 Governments' Budgets, Available at: <http://www.internationalbudget.org/publications/escrarticle2/>

Issa, L. O., et.al, (2014), Role of the Three Tiers of Government in the Provision of Sustainable Agricultural Extension Service in Nigeria

Gowland-Gualteir, A., (2007), South Africa's Water Law and Policy Framework; Implications for the Right to Water, IELRC Working Paper

Langford, M and Kok, A (2005), The right to water, in Brand D and Heyns C (eds), Socio-economic rights in South Africa, Pretoria University law Press,

Lawyers for Human Rights, 2009, Water Supply and Sanitation in South Africa Environmental Rights and Municipal Accountability, Lawyers for Human Rights, Publication Series, No. 1,

McLaren D, Moyo B & Jeffery J, (2015), The Right to Food in South Africa: An analysis of the content, policy effort, resource allocation and enjoyment of the constitutional right to food, Working Paper 11, p.20, (available at www.spui.org.za)

Mshengu Toilet Hire, <http://mshengutoilethire.co.za/basic-range/> Accessed 29/03/2016

Moyo, 2013, Water as a human right under international human rights law: Implications for the privatisation of water services, Stellenbosch University <http://scholar.sun.ac.za>

National Treasury, 2014 Budget Review, Chapter 7: Provincial and Local Government Available at: <http://www.treasury.gov.za/documents/national%20budget/default.aspx>

National Treasury, 2015 Budget Review, Chapter 6: Provincial and Local Government, Available at: <http://www.treasury.gov.za/documents/national%20budget/default.aspx>

National Treasury, Estimates of national Expenditure 2012. Vote 31: Human Settlements, Available at: <http://www.treasury.gov.za/documents/national%20budget/default.aspx>

National Treasury, Estimates of National Expenditure 2015. Available at: <http://www.treasury.gov.za/documents/national%20budget/default.aspx>

National Treasury, Estimates of national Expenditure, Vote 36: Water and Sanitation 2015. Available at: <http://www.treasury.gov.za/documents/national%20budget/default.aspx>

National Treasury, Explanatory memorandum to the Division of Revenue 2014/15, Available at: <http://www.treasury.gov.za/documents/national%20budget/default.aspx>

Ndifuna Ukwazi and Social Justice Coalitions, 2012, Engaging with Government Budgets. An Activist's Guide to South African Government Budgets at Local, Provincial and National Level. Available at: <http://nu.org.za/wp-content/uploads/2014/06/Budget-Book-1.pdf>

Public Finances for WASH, 2015. South Africa's Equitable Share Formula: A useful model for wash financing? Available at: http://www.publicfinanceforwash.com/sites/default/files/uploads/Finance_Brief_5_-_South_Africa_Equitable_Share_model.pdf

Report of the Department of Human Settlements to the Portfolio Committee on Water and Sanitation, Progress Report on the Rural Household Infrastructure Programme (RHIP), 2012, Available at: <https://pmg.org.za/committee/111/>

Report of the Portfolio Committee on Water and Sanitation on the consideration of the 2014-2015 strategic plans, annual performance plans and budget allocation of the Department

of Water Affairs, Vote 38 and the entities, namely Trans-Caledon Tunnel Authority, The Water Research Commission, and Catchment Management Agencies, Water Boards and Komati River Basin Water Authority, 2014, Available at: <https://pmg.org.za/committee-meeting/20480/>

Report of the Portfolio Committee on Water and Sanitation: Consideration of the 2016-2017 strategic plans, annual performance plans and budget allocation of the Department of Water and Sanitation, Vote 36 and the entities, namely Trans-Caledon Tunnel Authority, The Water Research

Report of the Select Committee on Appropriations on the Roll-over of Municipal Infrastructure Grant Funds for the 2010-2015 Financial Years, Dated 24 May 2016, Available at: http://pmg-assets.s3-website-eu-west-1.amazonaws.com/160517NT_briefing.pdf

Report on the Eradication of bucket system progress: Department of Water & Sanitation, in presence of Deputy Minister to the Portfolio Committee on Water and Sanitation. Available at: <https://pmg.org.za/committee/111/>

Report to the Portfolio Committee on the Water and Sanitation, Eradication of bucket system progress: Department of Water and Sanitation, 2015. Available at: <https://pmg.org.za/committee/111/>

Report on the Right to Access Sufficient Water and Decent Sanitation in South Africa: 2014, South African Human Rights Commission, [www.sahrc.org.za/home/21/files/FINAL%204th%20Proof%204%20March%20-%20Water%20%20Sanitation%20low%20res%20/\(2\).pdf](http://www.sahrc.org.za/home/21/files/FINAL%204th%20Proof%204%20March%20-%20Water%20%20Sanitation%20low%20res%20/(2).pdf)

Resolution adopted by the Human Rights Council, 18/1 The human right to safe drinking water and sanitation, A/HRC/RES/18/1

SALGA, National Treasury, DCG, 2012, Local Government Equitable Share Formula Review: Discussion Paper 2: Analysis of the Current Local Government Equitable Share Formula. Available at: [file:///C:/Users/Anita%20Ramsak/Downloads/LGES_Discussion_Paper_2-Analysis_of_the_Current_Formula%20\(1\).pdf](file:///C:/Users/Anita%20Ramsak/Downloads/LGES_Discussion_Paper_2-Analysis_of_the_Current_Formula%20(1).pdf)

Statistics South Africa, General Household Survey, 2014, www.statssa.gov.za/publications/P0318/P03182014.pdf Accessed 29/03/2016

Social Justice Coalition, 2013, Report of the Khayelitsha 'Mshengu' Toilet Social Audit, p.8

Soobramoney v Minister of Health (Kwazulu-Natal) (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997)

South African Human Rights Commission, 2014, Report on the Right to Access Sufficient Water and Decent Sanitation in South Africa, Available at: [http://www.sahrc.org.za/home/21/files/FINAL%204th%20Proof%204%20March%20-%20Water%20%20Sanitation%20low%20res%20\(2\).pdf](http://www.sahrc.org.za/home/21/files/FINAL%204th%20Proof%204%20March%20-%20Water%20%20Sanitation%20low%20res%20(2).pdf)

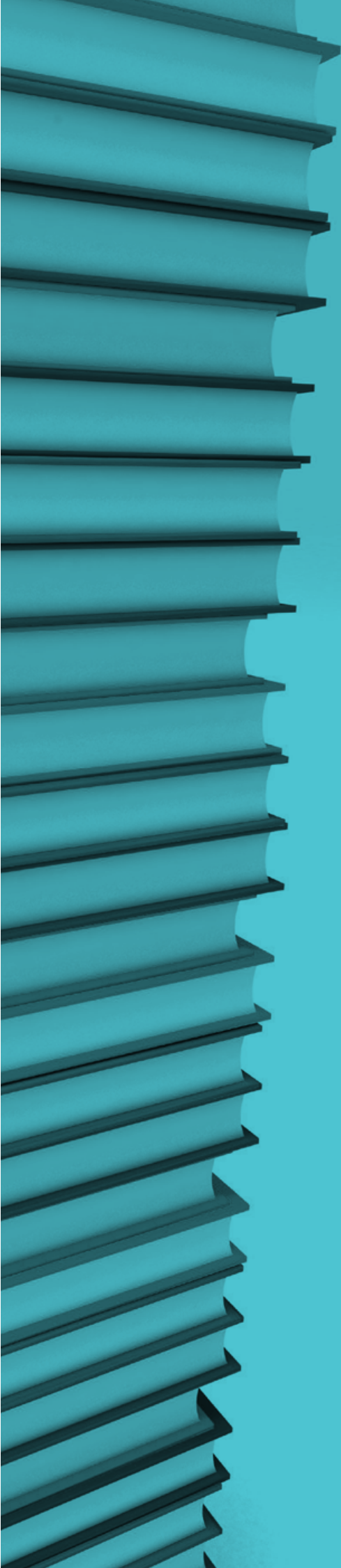
Statement by the Special Rapporteur on the right to access to safe drinking water and sanitation at the 66th Session of the General Assembly, available at: http://sr-watersanitation.ohchr.org/en/statement_66_session.html

Strategic Framework for Water Services, (2003), Water is life, Sanitation is dignity, www.sswm.info/sites/default/files/reference_attachments/KASRILS%202003%20Strategic%20Framework%20for%20Water%20Services.pdf

South African Human Rights Commission, 2014, Report on the Right to Access Sufficient Water and Decent Sanitation in South Africa, [http://www.sahrc.org.za/home/21/files/FINAL%204th%20Proof%204%20March%20-%20Water%20%20Sanitation%20low%20res%20\(2\).pdf](http://www.sahrc.org.za/home/21/files/FINAL%204th%20Proof%204%20March%20-%20Water%20%20Sanitation%20low%20res%20(2).pdf)

Strategic Framework for Water Services: Water is life, sanitation is dignity, September 2003, www.us-cdn.creamermedia.co.za/assets/articles/attachments/00782_waterstrat.pdf

Socio-Economic Rights Institute, 2013, Targeting the poor? An analysis of Free Basic Services (FBS) and Municipal Indigent Policies in South Africa



The eThekweni Declaration and African Action Plan, AfricaSan+5 Conference on Sanitation and Hygiene, February 2008, Available at: <http://www.wsp.org/sites/wsp.org/files/publications/eThekweniAfricaSan.pdf>

The National Development Plan: Our Future, Make it Work: Vision 2030, p.154, www.gov.za/sites

The Right to Water: Fact Sheet No.35 United Nations Human Rights, 2010. www.ohchr.org/Documents/Publications/FactSheet35en.pdf

The Portfolio Committee on Water and Sanitation. Address by the Minister of Water and Sanitation, Ms. Nomvula Mokonyane, National Council of Provinces budget review – Parliament, 10 Jun 2015, Available at: <http://www.gov.za/speeches/minister-nomvula-mokonyane-water-and-sanitation-budget-vote-ncop-201516-10-jun-2015-0000>

The content of the rights and principles www.righttowater.info/why-the-right-to-water-and-sanitation/the-right-to-water-a-legal-obligation/the-content-of-the-rights-explained/

The National Development Plan: Our Future, Make it Work: Vision 2030, p.154, www.gov.za/sites

The Right to Water: Fact Sheet No.35 United Nations Human Rights, 2010. www.ohchr.org/Documents/Publications/FactSheet35en.pdf

The Water Supply and Sanitation Policy of 1994

The Citizen, 21 October 2014, No Free Housing for u40s- Lindiwe Sisulu, www.citizen.co.za/261672/free-housing-u40s-lindiwe-sisulu

The Portfolio Committee on Water and Sanitation. Media Statement, 2015, Parliament Welcomes Progress on Bucket Eradication Programme, 11 Mar 2015, Available at: <http://www.gov.za/speeches/committee-welcomes-progress-bucket-eradication-programme-11-mar-2015-0000>

United Nations Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, 2014. Realising the human rights to water and sanitation: A handbook by the UN Special Rapporteur Catarina de Albuquerque. Financing, budgeting and budget tracking for the realisation of the human rights to water and sanitation. Available at: <http://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/Handbook.aspx>

UN Water, 2014, Investing in Water and Sanitation: Increasing Access, Reducing Inequalities. Special Report for the Sanitation and Water for All (SWA) High-Level Meeting (HLM), 2014. Available at: <http://www.wateraid.org/uk/what-we-do/policy-practice-and-advocacy/research-and-publications/view-publication?id=1982a81b-1dc1-4e63-b2f2-00cb791a7210>

UN Water, 2014, Water GLAAS 2014 Report, Investing in Water and Sanitation: Increasing Access, Reducing Inequalities. UN-Water Global Analysis and Assessment of Sanitation and Drinking-Water GLAAS 2014 Report, Available at: <http://www.unwater.org/publications/glaas/en/>

UNICEF, World Health Organisation (WHO), (2015), Progress on Sanitation and Drinking Water:2015 Update and MDG Assessment www.unicef.org/publications/files/progress_on_Sanitation_and_Drinking_Water_Update_Water_2015_Update.pdf

UNICEF, www.unicef.org/was/files/WASH_Annual_Report_Final_7_2_Low_Res.pdf (accessed 18 December 2015)

Water Aid, 2015, Financial Absorption in the Water, Sanitation and Hygiene Sector: South Africa. Available at: <http://www.wateraid.org/news/blogs/2015/december/releasing-the-flow-addressing-barriers-to-financial-absorption-in-wash-in-africa>

World Health Organisation WHO, Guidelines for Drinking Water-Quality, 2nd Ed, Vol 3, www.who.int/water_sanitation_health/dwq/2edvol3a.pdf?ua=1 (accessed 11 January 2016)

World Health Organisation (WHO) www.who.int/topics/sanitation/en/ (accessed 18 December 2016)

Water Supply and Sanitation in south Africa Environmental Rights and Municipal Accountability, (2009) Lawyers for Human Rights, LHR Publication Series, No. 1

The Twenty Year Review South Africa 1994-2014, The Presidency Republic of South Africa, pg. 110

United Nations, Committee on Economic Social and Cultural Rights, General Comment 15,

United Nations High Commission, 2007, Report of the UN High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments, Annual Report

World Health Organisation WHO, Guidelines for Drinking Water-Quality, 2nd Ed, Vol 3, www.who.int/water_sanitation_health/dwq/2edvol3a.pdf?ua=1 accessed 11 January 2016

Strategic Framework for Water Services, (2003), Water is life, Sanitation is dignity, www.sswm.info/sites/default/files/reference_attachments/KASRILS%202003%20Strategic%20Framework%20for%20Water%20Services.pdf

UNICEF, www.unicef.org/was/files/WASH_Annual_Report_Final_7_2_Low_Res.pdf accessed 18 December 2015

Committee on Economic, Social and Cultural Rights, General Comment No.15 on the right to water, E/C.12/2002/11, adopted January 2003, Article 1

Universal Declaration of Human Rights (UDHR), Article 25 (1) www.claiminghumanrights.org/udhr_article_25.html

The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, www.achpr.org/files/instruments/women-protocol/achpr_inst_proto_women_eng.pdf

Water and Sanitation Service Standard, Preliminary Draft, 2008, City of Cape Town, www.nepadwatercoe.org/wp-content/uploads/water-and-sanitation-service-standards.pdf

South African Cases

Beja and Others v The Premier of the Western Cape and Others, (21332/10) [2011] ZAWCHC 97; [2011] 3 All SA 401 (WCC); 2011 (10) BCLR 1077 (WCC) (29 April 2011)

Johnson Matotoba Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others (2009), ZACC 33, www.saflii.org/za/cases/ZACC/2009/33.html

Mazibuko and Others v City of Johannesburg and Others (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC) (8 October 2009),

Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC)

S v Makwanyane and Another (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995),

Regional Cases

Institute for Human Rights and Development in Africa v. Angola, <http://www.achpr.org/communications/decision/279.03-296.05/>

Media Rights Agenda v. Federal Republic of Nigeria, 224/1998, <http://www.achpr.org/communications/decision/279.03-296.05/>

279/03-296/05 Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) / Sudan, <http://www.achpr.org/communications/decision/279.03-296.05/>

Sudan Human Rights Organisation and Another v. Sudan, <http://www.achpr.org/communications/decision/279.03-296.05/>

Free Legal Assistance Group & Others v. Zaire <http://www.achpr.org/communications/decision/279.03-296.05/>



**STUDIES IN POVERTY AND
INEQUALITY INSTITUTE**

*Building up knowledge
to break down Poverty*

Studies in Poverty and Inequality Institute (SPII)

31 Quinn Street, Newtown
Johannesburg
South Africa
2000

Phone: + 27 11 833 0161
Fax: + 27 11 832 3085
www.spii.org.za

For a complete list of SPII's partners, please visit www.spii.org.za

Design & layout: SUN MeDIA Bloemfontein | admin@sunbloem.co.za