

Realising the right of access to water: Pipe dream or watershed?

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The most basic and compelling human need is clean water and sanitation. The World Health Organisation (WHO) links about four million deaths each year and almost five billion sickness incidents to the lack of adequate sanitation and drinking water.¹ In South Africa, unequal access to this basic human need is part of the unjust division of resources bequeathed on the majority of South Africans by the policies of the past. Landowners were also the owners of the water on their land.² Hence, access to water is integrally linked to land ownership and millions of South Africans are condemned to a life of poverty, insecurity and continuous exposure to diseases that would otherwise be avoidable. At nationwide public hearings on poverty in 1998,³ the restriction of access water was continuously cited as one of many obstacles in the development of many impoverished communities. Statistics indicate that only 27% percent of African households have running tap water inside their households and only 34% have access to flush toilets.⁴ While households generally consume almost 12% of South Africa's water, black households consume less than one tenth of that.⁵ The demand to rectify these historical imbalances has shaped the fundamental human rights entrenched in the 1996 Constitution.⁶ The Constitution provides under section 27(1)(b) that everyone has the right to have access to sufficient water.⁷

In assessing the impact of the *Grootboom* judgment on the right of access to water, this paper follows a three-pronged approach: First, it discusses the responsibilities of the various spheres of government from an intergovernmental relations perspective. Second, the policy and legislative efforts of government are discussed, as well as some aspects related to judicial adjudication in the field of water service delivery. In reviewing the

1 Hemson 1999: 1.

2 Liebenberg 1998: 3.

3 "Poverty and Human Rights: National 'Speak Out on Poverty' Hearings", March to June 1998 convened jointly by the Commission for Gender Equality, the South African Non-Governmental Organisations Coalition (SANGOCO) and the South African Human Rights Commission (SAHRC).

4 RDSN 1999: 1.

5 RDSN 1999: 1.

6 Constitution of the Republic of South Africa Act 108 of 1996.

7 Section 27(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.

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

legislative and policy framework, this paper provides an overview of some of the major policy initiatives and pieces of legislation and assesses whether or not the two requirements of the state's responsibility have been met. In addition, the judicial adjudication in respect of government's responsibility to refrain from interfering with the enjoyment of such a right is assessed against the backdrop of the *Grootboom* judgment. Third, the paper gives an overall assessment of government's policies in the field of water delivery against the principles pronounced in the *Grootboom* judgment.

1 THE RIGHT OF ACCESS TO WATER: RESPONSIBILITIES OF THE DIFFERENT SPHERES OF GOVERNMENT

No sphere of government can escape the general responsibility for realising socio-economic rights. However, the Constitution contains an intricate 'division of responsibilities' between the three spheres of government. In assessing government's performance in realising access to water, it is therefore important to pause at the question: who does what? What are the responsibilities of the various spheres of government in providing access to water? There are certain fundamental rights, such as, for example, the right to basic education,⁸ wherein the local sphere does not have significant power to take legislative, administrative or budgetary measures to achieve their realisation. That, of course, does not mean that local authorities do not play any role in realising these rights. The question therefore becomes: what influence, if any, does the intergovernmental division of powers in the Constitution have on the responsibilities of national, provincial and local government respectively?

Section 7(2) of the Constitution imposes four different types of obligations on the state when it comes to fundamental rights, as entrenched in the Bill of Rights: the obligations to *respect*, *protect*, *promote* and *fulfil*. These obligations exist with regard to rights both of a civil or political nature, and of an economic, social and cultural nature.

The obligation to *respect* these rights means that the state must refrain from interfering with their enjoyment.⁹

The obligation to *protect* means that the state must prevent violations by third parties.¹⁰

The obligation to *promote* fundamental rights means that the state must encourage and advance the realisation of these rights, which includes ensuring public awareness.

The obligation to *fulfil* fundamental rights means that the state must take appropriate legislative, administrative, budgetary, judicial and other measures towards realisation.¹¹

The question is whether all three spheres of government, which make up 'the state', are jointly responsible for all of these four obligations, or

8 Section 29(1)(a).

9 Van Boven et al 1998: 4.

10 Van Boven et al 1998: 4; see also De Vos 1997: 87-91 and Liebenberg 1997: 169-179.

11 See Van Boven et al 1998: 4.

whether distinctions can be made. It is clear that national government can devolve powers and decentralise the effort to realise economic, social and cultural rights, but it remains fully accountable to its citizens for realising these rights. Do provincial and local governments bear the same unqualified burden with regard to realising economic, social and cultural rights?

It has been argued that a qualification must be made along the lines of the four types of obligations on the state, referred to above. This assertion is based on the premise that, when it comes to *fulfilling* an economic, social or cultural right in terms of taking legislative, administrative, budgetary, and judicial or other similar measures, local government's hands might be tied by its constitutional mandate. Local government's aggregate budget consists of own revenue, supplemented by intergovernmental grants and payments for the performance of agency functions.¹² Local authorities raise revenue and receive grants, *based on their powers and functions as determined by the Constitution*.¹³

Linking section 7(2) with the constitutional division of competencies between the three spheres of government could lead to the conclusion that a local authority is only responsible for the *fulfilment* of economic, social and cultural rights in terms of taking legislative, administrative or budgetary measures if the subject matter falls within the competencies set out in Schedules 4B and 5B of the Constitution, or if it has been assigned to local government by national or provincial legislation. The other responsibilities to *respect, protect and promote* would then exist irrespective of the division of responsibilities.

1.1 Local government's responsibilities in providing access water

The existence of a functional, competent local government is key to sustainable water and sanitation development. Schedule 4 Part B of the Constitution tasks local government with providing "water and sanitation services, limited to potable water supply systems and domestic waste-water and sewage disposal systems". In line with the argument set out above, local government would be responsible for the *full spectrum* of responsibilities to implement the right of access to water. The role of local government is, however, performed in partnership with the other spheres of government. Section 154(1) of the Constitution states that national and provincial government must support and strengthen the capacity of municipalities to perform their functions. This would include – but is not limited to – the provision of access to water and sanitation services. National government is also responsible for establishing national standards for the delivery of services.¹⁴ Section 63 of the Water Services Act¹⁵ appears to provide the national Minister with a legal instrument to intervene if a municipality fails to meet these standards. The Minister can intervene "by assuming responsibility for that function" if the relevant provincial government has failed to do so

¹² Mastenbroek & Steytler 1997: 247.

¹³ Mastenbroek & Steytler 1997: 247.

¹⁴ The basic norms and standards are set out in the National Water Act 36 of 1998 and the Water Services Act 108 of 1997.

¹⁵ Water Services Act 108 of 1997.

effectively. However, the constitutional validity of these sections can be called into question. The institutional integrity of municipalities and the provincial prerogative to intervene in local government militate against national intervention in local government.¹⁶ When asked what the Minister can do to prevent municipalities from cutting water below the free allocation (see below), the Minister responded, “My hands are tied because I do not have the powers to enforce that, given the constitutional provisions on the role of local government”.¹⁷

1.2 The approach in *Grootboom*

In *Grootboom*, the Constitutional Court stated that, in order for a government policy to pass the constitutional muster dictated by the inclusion of socio-economic rights, those whose needs are most urgent couldn't be ignored. A policy aimed at providing access to a right cannot be aimed at long-term statistical progress only.¹⁸

In respect of the responsibilities of the various spheres the Court stated that *all spheres* bear a responsibility towards realising socio-economic rights:

All levels of government must ensure that the housing programme is reasonably and appropriately implemented...Every step at every level of government must be consistent with the constitutional obligation to take reasonable measures to provide adequate housing.¹⁹

The Court avoided delineating the responsibilities of the various spheres of government. Instead, it placed the emphasis on the cooperative effort for which Chapters Two and Three of the Constitution stand. This meant that, in the context of the housing debate, local government could not escape its responsibility by pointing to the constitutional division of powers.

However, the other side of the coin is that the Court also emphasised the central responsibility of the national government:

Each sphere of government must accept responsibility for the implementation of particular parts of the programme but the national sphere of government must assume responsibility for ensuring that laws, policies, programmes and strategies are adequate to meet the state's section 26 obligations. In particular, the national framework, if there is one, must be designed so that these obligations can be met. It should be emphasised that national government bears an important responsibility in relation to the allocation of national revenue to the provinces and local government on an equitable basis.²⁰

This means that the right of access to water places a distinct

16 See De Visser, Steytler & Mettler 1999: 6; Steytler, Mettler & De Visser 1999: 11; In 2001, government introduced proposals to amend the Constitution – see De Visser & Steytler 2001: 1. These proposed amendments permitted national intervention. However, they were not passed by Parliament and new proposals that were submitted in 2002 do not include national intervention in local government – see Smith & Steytler 2002: 1.

17 *Sunday Times* 2002.

18 De Visser 2001: 15.

19 *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) (hereafter *Grootboom*), para. 82.

20 *Ibid.* para 40.

responsibility on national government to ensure that its water delivery strategy enables local governments to deliver potable water and sanitation services. This requirement can be broken down in two aspects:

First, the *policies, legislation, macro-economic strategies and service delivery programmes related to water delivery* must facilitate and promote access to basic water services for the poor.

Second, the *institutional framework for local government* must be structured to facilitate access to basic water services for the poor.

2 ASSESSING WATER POLICIES AND LEGISLATION

2.1 International framework

The 1996 Constitution states that international law can be used to interpret fundamental human rights, including water rights.²¹ Only two international human rights treaties refer explicitly to water rights, namely the Convention on the Elimination of All Forms of Discrimination Against Women of 1979 (CEDAW) and the Convention on the Rights of the Child of 1989 (CRC). CEDAW places a duty on member states to protect the right of rural women to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.²² The CRC places a duty on member states to implement children's right to health with "the provision of adequate nutrition foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution".²³ These two important treaties target two of the most vulnerable sectors in our society, namely rural women and children. The interdependence and indivisibility of these rights is demonstrated in the UN Committee on Economic, Social and Cultural Rights' (CESCR's) General Comment relating to the right to health. The Committee confirmed that the obligation on states in respect of the right to health includes the obligation "to ensure access to basic shelter, housing and sanitation, *and an adequate supply of safe and potable water*".²⁴

The WHO and the United Nations Children's Fund (UNICEF) have enhanced the right to water with the principles that every person must have a minimum water supply of 20 to 40 litres of safe drinking water per day and proper sanitation facilities. The water supply must also be located within a reasonable distance – approximately 200 metres – from the household.²⁵

In contrast to the number of international treaties referring explicitly to the right to food, there have generally been few *explicitly* providing for the right of access to water as a fundamental human right.²⁶ The right to water has often been inferred from the right to food. The primary link between water

21 s 233.

22 Article 14(2)(h).

23 Article 24(2)(c).

24 General Comment No. 14 (Twenty-second session, 2000) *The right to the highest attainable standard of health (art 12 of the Covenant)* UN doc. E/C.12/2000/4, para 43(c).

25 WHO 1996 "Fact sheet no. 112: Water and sanitation" <www.who.int/inf-fs/en/fact112.html>

26 Article 25 of the Universal Declaration of Human Rights (1948), the International Covenant on Economic, Social and Cultural Rights (ICESCR)(1966), the Convention on the Rights of the Child (1989).

and nutrition is inseparable in food preparation, for consumption, hygiene and farming, to name but a few. It is clearly established that basic health care and hygiene are indivisible from access to clean water. The 1996 Constitution protects the right of access to sufficient food.²⁷ It also recognises the fundamental human right of children to basic nutrition²⁸ and a detained person's right to adequate nutrition,²⁹ respectively.

2.2 The constitutional framework

Section 10 of the Constitution affords everyone "inherent dignity and the right to have their dignity respected and protected". Section 24 lays down the right to a safe and healthy environment, free from pollution and ecological degradation. Section 27(1)(b) entrenches the right of everyone to have access to water. It falls within a cluster of socio-economic rights providing for, among other things, health care services, including reproductive health care (section 27(1)(a)), sufficient food and water (section 27(1)(b)) and social security and social assistance (section 27(1)(c)).

In terms of the phrase "the right of access", a duty is placed on the state to provide the beneficiary with an *opening* to the right.³⁰ The right is not automatically or immediately enforceable. The beneficiary is also under an obligation to use his or her own resources to fulfil this right. The state must provide an opportunity for the beneficiary to realise the right. The phrase presents a bridge between the obligation of the state to respect, protect, promote and fulfil³¹ and the complementary duty of the beneficiary to be an active participant in the provision, use and protection of the right. Section 27(2) states that the state must take "reasonable legislative or other measures, within its available resources, to achieve progressive realisation of this right". Although water cannot be provided to everyone immediately, the duty is on the state to begin immediately to take steps towards the full realisation of the rights contained in Chapter Two of the Constitution. The CESCR has stated that the state must take deliberate, concrete and targeted steps towards meeting its obligations,³² including:

- enacting legislation and policies with the objective of making water accessible to everyone;
- creating structures to assist people to gain access to water; and
- making water affordable to everyone and ensuring that existing water access is not eliminated.

In its General Comments on the rights to food and adequate health care, the CESCR made an important distinction between the economic and physical accessibility of these rights, which should guide a discussion of the reasonableness of government's efforts to provide access to water.

"Physical accessibility" means that facilities that give access to the right must be "within safe physical reach" of all sections of the population, especially vulnerable or marginalised groups.

27 Section 27(1)(b).

28 Section 28(1)(c).

29 Section 28(2)(e).

30 Eksteen 1999: 3.

31 Section 7(2).

32 General Comment No. 3 (Fifth session, 1990) *The nature of States parties obligations (art 2(1) of the Covenant)* UN doc. E/1991/23, par.1.

On the right to health, the CESCR remarked that economic accessibility also implies that medical services and underlying determinants of health, such as safe and potable water and adequate sanitation facilities, are within safe physical reach, including in rural areas.

“Economic accessibility” implies that costs of accessing the right should be at a level such that the attainment and satisfaction of other basic needs are not threatened or compromised. Again, on the right to health, the CESCR remarked that the costs of services related to the underlying determinants of health 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.

The CESCR calls for special attention for socially vulnerable groups such as landless persons, victims of natural disasters, people living in disaster-prone areas, persons with disabilities, children, elderly people, and persons with HIV/AIDS. This obligation is particularly relevant in light of South Africa's large rural population that does not even have adequate ‘physical’ access to water, and in light of the large number of people affected by HIV/AIDS.

2.3 Legislative measures

The basic legislative measures that embody the national standards for water and sanitation services are the Water Services Act³³ and the National Water Act.³⁴ National government must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons. This is a key shift in policy. Historically, people could claim exclusive rights to water falling on private land, water pumped from boreholes etc., or they could claim so-called riparian rights to water from a public stream adjacent to their land. The National Water Act did away with private ownership of water and the riparian principle. Instead, by subjecting water use to authorisation through a system of licensing, it is recognised as a national resource that should be used for the benefit of all.³⁵

The Water Services Act provides under section 3(1) that everyone has the right of access to basic water supply and basic sanitation. Section 3(2) goes on to state that every water services institution must take reasonable measures to realise these rights. “Basic water supply” is “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”. The term “prescribed” indicates that regulations made under the Act must give further content to the term “basic water supply”.³⁶ The Act also contains a framework for the procedures for limiting or disconnecting water supply.³⁷

The Minister has prescribed the above standard for basic water supply in regulations.³⁸ Regulation Three describes the minimum standard for basic

33 Water Services Act 108 of 1997.

34 National Water Act 36 of 1998.

35 Liebenberg 1998: 4.

36 Section 1.

37 See below under Judicial adjudication.

38 Regulations relating to compulsory national standards and measures to conserve water (Gazette 22355, *Regulation Gazette* 7079), 8 June 2001 (c).

water supply services as:

- (a) the provision of appropriate education in respect of effective water use; and
- (b) a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month:
 - (i) at a minimum flow rate of not less than 10 litres per minute;
 - (ii) within 200 metres of a household; and
 - (iii) with an effectiveness such that no consumer is without a supply for more than seven full days in any year.

Prima facie, the prescribed minimum standard appears to meet the minimum set by WHO and UNICEF.³⁹

2.4 Policy measures

In *Grootboom* the Court made it clear that legislative measures are not likely to constitute constitutional compliance by themselves. They have to be supported by appropriate, well-directed policies and programmes that are also implemented reasonably.⁴⁰

The *Water Supply and Sanitation Policy White Paper* (hereafter the *White Paper on Water*) defined basic water supply as a quantity of 25 litres per person per day.⁴¹ This minimum is required for direct consumption, for food preparation and for personal hygiene. It is not considered adequate for a full, healthy and productive life. In contrast, the 1994 Reconstruction and Development Programme (RDP) provided for a short-term target of a safe water supply of 20–30 litres per capita per day within 200 metres, an adequate/safe sanitation facility per site, and a refuse removal system to all urban households. The RDP went on to define a medium-term strategy of providing an on-site supply of 50–60 litres of clean water, improved on-site sanitation, and an appropriate household refuse collection system. The *White Paper on Water* is a clear departure from the standard set in the RDP. The sad truth is that neither of these benchmarks has been met: millions of people are still without water and others are receiving an inadequate supply to sustain a full, healthy and productive life.

3 INSTITUTIONAL FRAMEWORK FOR LOCAL GOVERNMENT

The recently promulgated local government legislation complements the policy and legislative framework for water delivery.

3.1 Local government transition

Historically, local government is viewed as the lowest hierarchical level, deriving its powers – although they are severely limited – from two superior tiers, namely provincial and national government. After the 1996 Constitution, local government has become an active sphere of government, strengthened by the same constitutional principles as national and provincial government.

³⁹ Twenty to 40 litres per day within 200 metres of the household (see above).

⁴⁰ At para 42.

⁴¹ Department of Water Affairs and Forestry (DWAF) 1994 “Water Supply and Sanitation Policy White Paper” < www.gov.za/whitepaper/index.html > November: 15.

Before the December 2000 elections there were 843 municipalities. Municipalities have varying resources and client bases; some contain both rural and urban communities. Some municipalities have large numbers of mass consumers of services, such as industrial consumers, while others have a predominantly impoverished consumer base. After the December 2000 elections the number of municipalities was reduced to 284, of which six are metropolitan municipalities, 231 are local municipalities and 47 are district municipalities. Larger and inclusive tax bases are expected to promote redistribution of resources and prevent duplication. This is supposed to free up more money for service delivery. Local subsidisation would occur where larger industrial users can subsidise smaller impoverished communities. A bigger tax base would provide more money for infrastructural development and maintenance. In this scenario, the assumption is that local government can benefit from its substantial revenue generating power: more than 90% of local government budgets are derived from own revenue. However, while it is true that the legal power to raise revenue is real and entrenched in the Constitution,⁴² it can be a hollow power. Rural local government can be characterised as having a 'flimsy' and sometimes even non-existent tax base, rendering the legal authority to raise revenue an empty shell.⁴³ Inasmuch as an improved tax base was the overarching objective of the demarcation exercise, in many rural areas the inadequate tax base that existed prior to the elections could not be improved in any significant manner.

3.2 Developmental local government

Local government's constitutional mandate has been captured in sections 152 and 153 of the Constitution. Section 152(1)(b) instructs local government to ensure sustainable service delivery: *sustainable* service delivery means delivery in such a manner that the consumer can afford it and the supplier can provide it within its own means on an ongoing basis.⁴⁴ A continued, sustainable and improving delivery of services such as water, sanitation, electricity, refuse removal and municipal health is a vital component of local government's developmental mandate. In speaking of the promotion of social and economic development, section 152(1)(c) recognises that improving the standard of living through delivery of government services and through self-empowerment (employment, social upliftment) is dependent on a productive local economy and improved social conditions. In the same vein, section 153(a) stipulates that the objects of local government translate into a duty on municipalities to promote their social and economic development. Further, section 153(a) instructs municipalities to prioritise their communities' basic needs. Section 152(1)(d) requires the promotion of a safe and healthy environment, which connotes the provision of basic sanitation and water delivery.

3.3 Service delivery in terms of the Systems Act

The service delivery responsibilities of local governments have now been regulated in Chapter Eight of the Local Government: Municipal Systems Act

42 Section 229.

43 *Business Day* 2001d.

44 See Steytler et al 2000: 26.

(the Systems Act).⁴⁵ This chapter provides a broad normative framework for municipal service delivery.

In section 73(1)(c) the Systems Act instructs municipalities to ensure that “all members of the local community have access to at least the minimum level of basic municipal services”. Section 74 prescribes the principles that must be reflected a municipality’s tariff policy. These include a water tariff policy. Two elements are stressed throughout the list of principles, namely:

- *Access to basic services*: for example, section 74(2)(c) provides that poor households must have access to at least basic services through tariffs that cover costs only, special tariffs or other methods of cross-subsidisation.
- *Cost recovery*: section 74(2)(b) stipulates that the amount individual users pay for services should generally be in proportion to their use, and section 74(2)(d) puts it beyond doubt that tariffs must reflect the costs associated with rendering the service. Further, section 74(2)(e) establishes financial sustainability as a principle for tariff policy.

The implementation of the right of access to a basic water supply is further regulated in the Municipal Planning and Performance Management Regulations.⁴⁶ In these regulations, the Minister for Provincial and Local Government has set general key performance indicators for municipalities.⁴⁷ Sub-regulations 10(a) and (b) provide for the following indicators:

- (a) the percentage of households with access to a basic level of water, sanitation, electricity and solid waste removal; and
- (b) the percentage of households earning less than R1 100 per month with access to free basic services.

Municipalities must report on these indicators in terms of their performance management system and the Minister compiles and publishes a report on the performance of municipalities in terms of these indicators.⁴⁸ In essence, it means that municipalities are forced to integrate these indicators into their planning and management and that their performance will be monitored by Members of the Executive Committee and the national Minister.

3.4 Partnerships

National government has placed particular emphasis on the establishment of municipal service partnerships, including public-private, public-public and public-community partnerships. In section 76 of the Systems Act, municipalities are given the choice to deliver services through either internal or external mechanisms.⁴⁹ External mechanisms can take the form of, among other things, companies controlled by a municipality or any other entities that operate business activities.

Local Government: Municipal Systems Act 32 of 2000 (hereafter the Systems Act).

⁴⁶ Local Government: Municipal Planning and Performance Management Regulations, 2001 (*Government Gazette* Vol. 434, No. 22605) promulgated in terms of the Local Government: Municipal Systems Act 32 of 2000.

⁴⁷ Section 43 of the Systems Act empowers the Minister to set these general key performance indicators.

⁴⁸ See also De Visser 2001b: 6-8.

⁴⁹ See Pickering 2002: 3

4 FREE BASIC WATER

An important policy development was President Thabo Mbeki's announcement in September 2000 of a policy to provide free basic water.⁵⁰ The policy intends the provision of free basic water to be funded using a combination of the equitable share of local government revenue and internal cross-subsidies from appropriately structured water tariffs. The Department of Water Affairs and Forestry revealed a four-pronged strategy to deliver free water:

- the promotion and regulation of partnerships;
- pricing and cross-subsidisation;
- the promotion of sustainability by capacity building at local government level; and
- the need to explore inexpensive and easy to maintain projects in the remoter areas.⁵¹

The support programme for local government consists of:

- guidelines for local government;
- dedicated support teams for local government; and
- the establishment of mechanisms to finance and implement the required metering and billing of water supplies.⁵²

4.1 The regulations relating to free basic water

The Water Services Act empowers the Minister to set national norms and standards for setting tariffs in respect of water services.⁵³ These are applicable to all water service institutions (water service authorities, water service providers, water services committees and water boards). The norms and standards were issued in the form of regulations on 10 July 2001 and will come into effect on 1 July 2003.⁵⁴

In regulation two, the Minister instructs water services institutions, when determining their revenue requirements on which tariffs for water services are based, to at least take into account the need to:

- (a) recover the cost of water purchases;
- (b) recover overheads, operational and maintenance costs;
- (c) recover the cost of capital not financed through any grant, subsidy or donation;
- (d) provide for the replacement, refurbishment and extension of water services works; and
- (e) ensure that all households have access to basic water supply and basic sanitation.⁵⁵

⁵⁰ The policy was approved as part of the government's Integrated Rural Development Strategy and Urban Renewal Programme by Cabinet on 14 February 2001.

⁵¹ See DWAF 2000, "Delivery of free water to the poor", press release, www.dwaf.gov.za/Communications/Press%20Releases 13 October.

⁵² DWAF 2001 Media statement by the Minister <www.dwaf.pwv.gov.za/FreeWater>

⁵³ Section 10(1).

⁵⁴ Norms and Standards in respect of Tariffs for Water Services, 2001 (*Government Gazette* Vol. 433, No. 22472) promulgated in terms of s 10(1) of the Water Services Act.

⁵⁵ In the guidelines for implementation of these regulations it is said that the minimum tariff should cover:

- cost of raw water or bulk potable water; plus
- cost of overhead and operational costs; plus

When water is provided through a communal water services work (e.g. standpipes), these regulations provide that the tariff must be set at the lowest amount, including a zero amount, required to ensure the viability and sustainability of the water supply services.⁵⁶

When water is provided through a yard or house connection, the regulations provide that the tariff must be set at a level that supports, among other things, the viability and sustainability of water supply services to the poor.⁵⁷ This requirement is complied with if the municipality adopts a block tariff system whereby fees increase with usage, subject to a number of requirements, including that the first block, with a maximum consumption volume of six kilolitres, is set at the lowest amount (including a zero amount).⁵⁸ Thus, the regulations encourage water services institutions to make every effort to supply the basic water supply quantity of six kilolitres per household per month free of charge.

The regulations encourage the use of available subsidies to support the provision of basic water supply and basic sanitation. As mentioned above, in order to be financially sustainable the water services institution needs to consider the full financial cost of supplying water. The water services institution also has to consider what proportion of this cost needs to be recovered from water users and what proportion, if any, can be funded from other municipal sources, such as the equitable share. Where funds are available to subsidise water supply and sanitation services these funds should be targeted first and foremost at ensuring that all consumers have at least a basic level of service.⁵⁹ The question arises as to how the free basic water delivery programme is to be operationalised if delivery is assigned to privatised water providers. In terms of the Systems Act, the municipality remains responsible for controlling the setting of tariffs.⁶⁰ If outside providers are given the power to adjust tariffs, the municipal council must determine the limitations.⁶¹

5 ASSESSING WATER POLICIES AND PROGRAMMES IN TERMS OF THE GROOTBOOM PRINCIPLES

5.1 Assessing the ‘user pays’ principle

In general, the legislation that covers tariffs calls for a balance between the principles of cost recovery and access to basic services. Municipalities are

-
- cost of capital; plus
 - cost of replacement and refurbishment; and
 - extension; minus
 - subsidies.

See the guidelines for norms and standards for water services tariffs available at www.dwaf.pwv.gov.za/FreeWater 2001.

56 Regulation 5.

57 Regulation 6(1)(a).

58 Regulation 6(2).

59 Regulation 3.

60 Section 81(1).

61 Section 81(3); see also De Visser 2001b: 8.

encouraged to recover costs and at the same time look for opportunities to cross-subsidise from other sources within and outside the municipality. The frameworks for tariff policies in the Systems Act and the Water Services Act emphasise cost recovery as a paramount principle.

This means that a significant component of water tariff policies regarding the right of access to water and sanitation services depend on the ability of consumers to pay.⁶² With the help of two examples, the problems with this principle are highlighted below.

Minister Ronnie Kasrils, having visited Mount Ayliff in the former Transkei, “couldn’t believe it” when a woman was scooping muddy water in a bucket while two hundred meters away her neighbours were queuing at a tap. Many people are going back to traditional methods of accessing water despite the fact that the cost of water may be not more than R10 per household. It has been well documented that in most rural households, pensioners are the breadwinners.⁶³

In 1982 there were 12 822 recorded cases of cholera.⁶⁴ The cholera epidemic, which started in Ngwelezane township in KwaZulu-Natal in August 2000 and spread to other provinces, has claimed the lives of at least 265 people. There have been 120 000 known cases of cholera since then.⁶⁵

The cholera outbreak exposes the lack of delivery in water and sanitation in South Africa. It also exposes the ruthlessness of ‘cost recovery’ methods. The uMhlatuze Water Board cut off the water supply to rural people using eight communal tap stands that were provided free of charge by the apartheid regime after the drought of 1983/4. This area is the source of the cholera outbreak.

It is not unreasonable to expect beneficiaries to pay for water and sanitation services provided to them. However, problems such as high unemployment and dependency on seasonal income sharply influence the ‘reasonableness’ of this principle. The principle of ‘user pays’ has severe implications for many who were marginalised under the previous dispensation. The historical limitations of access to natural and financial resources become more pronounced when greater emphasis is placed on communities’ responsibility for meeting their own developmental needs. Unemployment is one of the biggest obstacles to development.⁶⁶ The macro-economic conditions, with a continued growth rate that is far less than the projected rate, compounds inequality with regard to access based on the ‘user pays’ principle.

5.2 Experience speaks louder than words: Assessing the

62 Hemson 1999: 14-15.

63 In the settlements of Mission, Ezingweni, Nsingweni and Thuthukani in KwaZulu/Natal prices vary between a rate of R10 and R15 per month and up to 80% of those making payments made for water were found to be pensioners. Report on focus group discussion with representatives from rural community projects serviced by Thuthuka, an RDSN affiliate (14/5/2000).

64 *South African Review* 1982: 264.

65 Department of Provincial and Local Government National Disaster Management Centre 2002 “Cholera epidemic” <www.sandmc.pwv.gov.za/ndmc/cholera> 18 April.

66 Statistics SA reveals that unemployment rose from 36.3% in 1999 to 37.3% in 2000. Even the ‘official’ figures, which exclude ‘discouraged job seekers’, show a rise from 23.3% to 26.7%.

macro-economic strategy on water

Key to any assessment of the 'reasonableness' of government's policy and legislative efforts with regard to realising access to water is the Growth Employment and Redistribution (GEAR) strategy. Privatisation of state parastatals and services are central to GEAR, which has been widely critiqued by civil society as a macroeconomic strategy that places free market economy principles above the interests of the poor.

5.2.1 What is privatisation?

Privatisation can be regarded as:

...covering any policies, processes and activities which bring market forces (which encompasses the drive to make a profit and competition), into the public sector or the delivery of public services. It therefore, covers a range of activities, not only the complete or partial sell-off of state enterprises.⁶⁷

As stated above, placing water under public trusteeship has done away with private ownership of water. A licence is needed to use water.⁶⁸ The licence is not only given to the private sector: local authorities also need a licence to be able to extract water from a water resource. The licence is a mechanism for regulating water allocation. However, it can be argued that even the licensing can be a disguised form of privatisation. The criteria themselves spell out who is to benefit most, namely the private sector. Moreover, the fact that water use licences are commodified by the possibility for trading in them on the open market indicates that, under productive use, privatisation can take the form of water use licenses. In the domestic sphere privatisation takes the form of both corporatisation of public utilities, and outright sale, concessioning or management of water services by private companies.

5.2.2 Private water inefficiencies

A recent study on a comparison of state and private enterprises stated:

Overall, public enterprises appear no less efficient than private companies, while being capable of development-oriented consideration of public interests.⁶⁹

In a case study comparing Swedish and English cities of similar size, the public Swedish company had lower costs than the privately owned UK companies.⁷⁰

A similar picture emerges from a comparison between the Build Operate Train and Transfer (BoTT) programme of the South African government, which was launched in 1996, and Mvula Trust. BoTT is a privatised management contract to deliver water projects to rural communities. Mvula Trust is a large NGO. In terms of the Department of Water Affairs' (DWA's) delivery programme both parties are contracted to deliver water. A Rural Development Services Network (RDSN) study of

67 This definition of privatisation was developed by the Municipal Worker's Union (SAMWU) in 1997.

68 Barring a few exceptions in s 22 of the National Water Act, 1998.

69 Lobina & Hall 2000: 35–55.

70 See Annexure I.

projects of similar sizes show that the per capita cost of BoTT is R1 022 compared with Mvula Trust's per capita cost of R380. In assessing cost effectiveness, BoTT is on average 2.7 times more expensive than Mvula Trust projects.⁷¹ Furthermore, DWAF had also paid for the establishment and running costs of offices at provincial and local level, which includes office equipment, staff salaries, travelling costs, allowances for typing and printing and reproduction. In addition, the BoTT consortia of private companies had not made any direct investment into the provision of water supply and had therefore borne no risk. Referring to the BoTT programme, the Minister of Water Affairs and Forestry admitted that it was not clear whether greater private sector involvement has "achieved either efficiency or sustainability".⁷²

5.2.3 Investments

Thames Water in the United Kingdom (UK) cut their capital investments to increase dividends to shareholders, but refused to cut prices to customers. Water multinationals are shareholder-driven and therefore also invest in other sectors. Vivendi is using profits from its 'environment division', which includes water, energy, waste and transport, to invest in its 'communications division', which includes films, television, telecoms etc. Consequently, every customer pays a 4% levy to subsidise films. Development priorities are therefore held to ransom by shareholders.

5.2.4 Prices and affordability

The private sector has been notorious for its price increases. Water prices in Hungary in 1998 increased by 175% above the level of 1994 and in the Czech Republic, by 39.8% in 1999. In the UK water and sewerage bills increased by an average of 67% between 1989/90 and 1994/95, but profit margins in water companies rose from 28.7% to 36.5% in the period between 1989/90 and 1992/3.

5.2.5 Distorted competition

It is consistently argued that competition will bring about lower prices for the consumer. In practice, this is certainly not always the case. Vivendi, Suez-Lyonnaise des Eaux and SAUR/Bouygues control more than 70% of the market and use 'organised competition' through negotiating the market. In UK there is no competition to Thames Water. In many countries multinationals collaborate in joint projects.

5.2.6 Local governments reclaiming services

Issues of this nature have led to the development of an international trend whereby cities are re-claiming privatised services. Between 1994 and 2000 the cities of Debreceni Vizmu (Hungary), Lodz (Poland), Grenoble (France), and in Trinidad (part of the southernmost islands of the Caribbean archipelago) and Cochabamba (Bolivia) returned privatised water delivery to state control for a variety of reasons, including corruption, inflated costs, inflated prices and poor maintenance. Private UK water companies have also

⁷¹ See Annexure II.

⁷² See speech at the Stockholm Water Symposium in August 2000. What is not said, however is that BoTT contract has been renewed.

proposed selling back water systems to the public and have suggested that prices would drop by about 5% as a result.

5.3 Assessing free basic water

Aspiring to free basic services for all will have a hollow ring for many. First, there are vast areas where water infrastructure does not exist and water delivery, let alone free water delivery, is a non-starter. Second, the opportunities for cross-subsidisation in rural areas and small rural towns are extremely limited.

The block or stepped tariff, is, as evidenced by the approach in the free basic water regulations, a key pricing instrument representing an concomitant increase in water price as users consume greater amounts of water, with the first block of water being free. The increase in price for further blocks of water consumed lays the basis for cross-subsidisation, but is a key problem at the same time. Though government appears confident, it seems that it is actually unsure whether free basic water is achievable. It says that *if* local government uses about 30% of the equitable share and *if* "...there is a 70% cost recovery rate, *then* there will be ample funds to subsidise a basic amount of free water". The 2001/2002 budget is even more revealing in decreasing the allocation for water by 2.9% compared with the 2000/2001 budget allocation.⁷³ Instead of focusing attention on the formulation of a less complex national cross-subsidisation model, government has made it very clear that the model is a localised one and that there are no additional funds available to local authorities for the provision of free water.⁷⁴ This creates serious problems for many rural communities and less populous areas, which do not have sufficient high volume users to ensure cross subsidisation.

For most urban working class townships that have been used to a high level of service, the six kilolitres of free water is clearly insufficient. Six thousand litres of free water to the poor will only amounts to two toilet flushes per day for a household of eight people, and is totally inadequate. After the first block of free water has been consumed they will be expected to pay for the next block/s at a higher price. Ultimately, the free water policy results in the working-class cross subsidising the poorest of the poor. Indeed, the free water policy even goes as far as to exclude local businesses from cross subsidisation as it would act as a deterrent to local economic development.⁷⁵ In light of the fact that 78% of water in South Africa is consumed by commercial agriculture and industry and that domestic water consumption accounts for only 12%, this appears unreasonable.⁷⁶ Most of South Africa's water infrastructure, paid for by taxpayers, supports the usage of water by business. Cross-subsidisation from business would ensure that costs are borne by those who make profits from water rather than those who need it to survive.

73 See Fair Share 2000: 6.

74 See DWA 2000, *supra* note 51.

75 Palmer Development Group 2001: 14.

76 Bond et al 1999: 5.

6 JUDICIAL ADJUDICATION

The centrality of the cost recovery principle brings to the fore the discussion on the negative obligation on the state to *respect* the right of access to water. A violation of the duty to respect a right “arises when the state, through legislative or administrative conduct, deprives people of the access they enjoy to socio-economic rights”.⁷⁷ Clearly, one of the most pertinent issues in this context is the disconnection of water by municipalities. Municipalities increasingly resort to disconnecting water as a cost recovery method. The ongoing standoff between the City of Cape Town and the residents of Tafelsig is but one painful example of the potential for conflicts between municipalities and communities around water disconnections.

This part of the paper asks how the courts have interpreted the duty to respect the right of access to basic water in two recent cases and how the *Grootboom* judgment should influence the courts’ jurisprudence relating to implementing this right.

6.1 *Manquele v Durban Transitional Metropolitan Council*

The first case is *Manquele v Durban Transitional Metropolitan Council*.⁷⁸ The Durban Transitional Metropolitan Local Council (DTMC) provides households with the first six kilolitres of water supply free of charge, and between seven and 30 litres at a standard rate. The consumer pays hefty penalty charges for water usage exceeding 30 litres per day.

The applicant, a 35 year-old woman with seven children under her care, failed to pay for water consumed in excess of the free six kilolitres per month. In accordance with its by-law on water supply, the DTMC gave her written notice and allowed for representations to be made, before disconnecting her water supply. The applicant approached the Durban High Court for an order declaring the disconnection illegal.

6.1.1 *The arguments*

The Water Services Act stipulates that procedures for the disconnection of water services must be fair and equitable, contain reasonable notice provisions and an opportunity to make representations. They may not result in a person being denied access to basic water supply where that person proves that he or she is unable to pay.⁷⁹ The applicant argued that the by-law was inconsistent with the Water Services Act in that the discontinuation resulted in her being denied access to basic water services when she was not able to pay for them. The regulations prescribing the content of ‘basic water supply’ (see above) did not exist at the time of the judgment.

6.1.2 *The judgment*

The Court said that, in the absence of a regulated minimum standard of water supply, it could not enforce the right to basic water supply in terms of the Act. According to the judge, the judgment call necessary for interpreting section 3 and 4(3) of the Act without the regulations, concerns “policy matters which fall

77 Liebenberg 1999: 41-28.

78 *Manquele v Durban Transitional Metropolitan Council* (2001) JOL 8956 (D)

79 Section 4(3).

outside the purview of my role and function". Furthermore, the Court was satisfied that the procedures used by DTMC, in accordance with its by-law, did not fall foul of section 4(3)(a) or (b) of the Act. The by-law provided for written notice and for the opportunity to make representations. Another factor considered by the Court was that the applicant permitted tampering with the service during a previous disconnection. With regard to the argument that the disconnection resulted in the applicant and her children being denied access to a basic water supply, the Court further considered that the applicant "chose...not to limit herself to the water supply provided to her free of charge but to consume additional quantities". The service was discontinued because of non-payment for these additional quantities. This, according to the Court, removes her from the ambit of those who can prove they are unable to pay for 'basic services'.

It is regrettable that, because of the arguments placed before it, the Court could not entertain section 27(1)(b) and section 28(1)(c) of the Constitution. These sections enshrine the constitutional right of access to water and the children's right to basic nutrition. Had the applicant based her argument on these provisions, the absence of regulations could not have prevented the Court from considering the scope of 'basic water supply'. The constitutional right of access to basic water exists independently from the existence of regulations in terms of the Water Services Act. The *Grootboom* precedent would have required a more detailed analysis, in which the circumstances of the applicant, such as the fact that she was caring for seven children, should have played an important role in assessing the reasonableness of DTMC's implementation of the right of access to water.

The Court avoided giving content to the term 'basic water supply' without the said regulations, justifying this with an argument based on the separation of powers doctrine, which reserves policy-making for elected governments. It is submitted that, under the same circumstances, the same argument would not hold water any longer in view of the *Grootboom* precedent. The Constitutional Court did not avoid assessing the reasonableness of government's actions in the light of the right of access to a basic minimum level of housing. Even though the Court stopped short of stipulating a right of access to a basic minimum level of housing – saying that government was under an obligation in terms of section 26 to provide immediate relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations – it did not shy away from concluding that the state fell short of its constitutional obligations. This should serve as a clear signal that the courts can, at the very least, assess whether or not a state has fulfilled its obligations to provide a minimum level of access to a right.

6.1.3 Residents of Bon Vista Mansions v Southern Metropolitan Local Council

In *Residents of Bon Vista Mansions v Southern Metropolitan Local Council*,⁸⁰ the Council disconnected the water supply to the residents of a block of flats in Hilbrow because of non-payment of arrears. The residents obtained an

⁸⁰ *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 (6) BCLR 625 (W).

interim order against the municipality to restore their water supply. Budlender D J summarised the effect of the right of access to water, as entrenched in the Constitution and the Water Services Act, as follows:

If a local authority disconnects an existing water supply to consumers, this is *prima facie* a breach of its constitutional duty to respect the right of (existing) access to water, and requires constitutional justification.

The Water Services Act requires that:

the water service provider must set conditions which deal with the

- circumstances under which water services may be discontinued, and the procedures for discontinuing water services.
- those conditions and procedures must meet the requirements of
- section 4(3) of the Act. In particular, the procedures must be 'fair and equitable'. In the context of a case such as this, they must provide for reasonable notice of termination and for an opportunity to make representations. They must not result in a person being denied access to basic water services for non-payment where that person proves, to the satisfaction of the water services authority, that he or she is unable to pay for basic services.

This judgment was handed down after the *Grootboom* judgment. Importantly, the *Bon Vista* judgment confirms the principle that disconnection is a *prima facie* breach of the constitutional right of access to water.⁸¹ The onus is on the state to justify the disconnection. According to Budlender, "having regard to the constitutional and statutory provisions, I hold that there [is] such an onus. This should not be a difficult onus for the Council to discharge, if in fact it acted lawfully".⁸² The High Court further stressed the importance of the opportunity to make representations, as being:

particularly important in the light of the provision that water supply may not be discontinued if it results in a person being denied access to basic water services for non-payment, where that person proves, to the satisfaction of the relevant water services authority, that he or she is unable to pay for basic services.⁸³

The onus is on the municipality to justify the disconnection and the importance of the opportunity to make representation stands in contrast to the *Manquele* judgment, where the High Court focused on the validity of the by-law.

6.2 Dignity and disconnection

The *Grootboom* judgment deals in the main with the positive obligation on the state to achieve the progressive realisation of a right, and not with the negative obligation to refrain from interfering with the right. However, the Court warned government not to ignore crisis situations in devising mechanisms to achieve overall delivery. In addition, the Court consistently

81 Smith 2002: 15.

82 At para. 32.

83 At para. 26.

places human dignity at the centre of the test of whether or not state action is reasonable: “human beings are required to be treated as human beings”.⁸⁴ In the same vein, Budlender explained the stringent conditions to terminating water services in the Constitution and the Water Services Act by referring to “the potentially serious human and health consequences of terminating water services”.⁸⁵

From a comparative point of view, it is interesting to note that the British government recently confirmed that water disconnections to enforce payment go beyond the realm of what is reasonable. An amendment to the British Water Industry Act 1999 removes the water suppliers’ power to disconnect or limit water supply for non-payment from, among other places, private dwelling houses, children’s homes, residential care homes, prisons and detention centres, schools and premises used for children’s day care.⁸⁶

6.3 Free basic water and disconnection

The complexity, added by the free basic water policy, reared its head in the *Manquele* judgment. If the DTMC provides six kilolitres per month for free as standard practice and has the means to do it, is the non-payment of the applicant for excess usage good enough reason to deprive her of even those first six kilolitres? Unfortunately, the Court did not entertain this argument and an opportunity was missed to give further content to the right to basic water supply. However, some comments can be made with reference to *Grootboom*.

It is submitted that the *Manquele* judgment does not stand the test required under *Grootboom*. The Court held that, by using more than the free six kilolitres, Mrs Manquele removed herself from the protection offered by section 4(3)(c) of the Water Services Act for those who can prove that they are unable to pay for ‘basic services’. She could not rely upon her inability to pay for the excess usage for the purposes of enjoying the protection afforded by this section.⁸⁷ To the extent that this means that exceeding the free six kilolitres removes even *the opportunity* to prove inability to pay for the excess usage, this seems particularly harsh, considering the fact that Mrs Manquele was unemployed and had seven children under her care.

When viewed in light of the new regulations, the minimum set in terms of the Water Services Act is 25 litres per person per day. A household of eight persons would therefore be entitled to exactly six kilolitres as a basic minimum. It is submitted that the supply of the free minimum should have continued, or that she should have at least been afforded an opportunity to prove that she could not pay.

Interestingly, the national Minister announced in May 2002 that his department was reviewing sections of the National Water Act to prevent water being cut off by municipalities before communities exhaust the free six kilolitres. In any event, the Minister urged municipalities to respect everyone’s right of access to a basic minimum water supply: “In no way have we ever

84 Para. 83; see also para 1, 23.

85 At para. 28.

86 Section 61(1A). The list also includes caravans, houseboats, houses in multiple occupation and sheltered accommodation, institutions of further and higher education, hospitals, nursing homes, GPs’ and dentists’ surgeries and premises occupied by the emergency services.

87 At page 14 of the judgment.

indicated that [they can cut water supply before the national allocation is used]”.⁸⁸

6.4 Disconnecting water to recover any debt

Interestingly, section 102 of the Systems Act allows a municipality to consolidate a person’s separate municipal accounts and implement debt collection measures in relation to any arrears on any of that person’s accounts. In other words, non-payment for water or property rates arrears can be enforced through the disconnection of electricity. Similarly, payment for electricity or property rates arrears can be enforced through the disconnection of water.

Disconnection of electricity has been accepted as a debt collection mechanism that is indispensable for local government to ensure financial viability. However, it can be argued with persuasion that the deprivation of electricity seriously affects human dignity in terms of access to safe fuel for heating and cooking, light for studying, and creates the dangers to human life that are associated with non-supply of electricity, such as paraffin fires, etc. What is important, though, is that the Constitution provides for a *specific* right of access to water. In addition, the impact of inadequate or no access to water on human dignity in terms of the ability to clean, prevent dehydration, prevent infection, prevent the spread of diseases etc. is certainly without doubt. The deprivation of a basic supply of water removes the inherent dignity of people: it strips an individual of the possibility of living a dignified life and poses serious health risks, as evidenced by the water cut-offs in Ngwelezane. As the Court put it: “There can be no doubt that human dignity... [is] denied those who have no food, clothing or shelter”. It is therefore suggested that the centrality of dignity in the Constitutional Court’s approach to realising socio-economic rights militates against disconnection of water in response to non-payment of other municipal accounts, such as electricity and property rates accounts.

Further, the possibility of cutting water to recover any debt contradicts the free basic water policy. Government appears to be speaking with two tongues by promising a free basic water supply while simultaneously allowing water cuts to recover any municipal debt. It is hard to understand how six kilolitres of water per month can be ‘free’ when it can be taken away if there are arrears on, for example, a rates account. The conclusion must be that section 102 of the Systems Act will not pass constitutional muster in light of *Grootboom*.

7 ASSESSMENT

Key to the Constitutional Court’s approach is the fact that it is not impressed with mere statistical improvement in service delivery.

Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the

⁸⁸ *Sunday Times* 2002.

realisation of the right.⁸⁹

If the ability to achieve statistical advances is anything to go by, the privatisation of water services appears to be a 'reasonable' answer to the almost insurmountable service delivery backlogs that local government faces.⁹⁰ However, the *Grootboom* judgment has made clear that this is not good enough. Experiences with the privatisation of water services indicate that it harbours very real dangers for the most vulnerable sections of society.

This should prompt government to seriously reassess its privatisation of water services strategy. This strategy should ensure that access of the poorest sections of society to basic water services is sufficiently protected against the forces of the free market. The legislation is clear in that municipalities remain responsible for regulatory functions pertaining to water delivery and for the continued provision of services. However, the notion that water users are turned into and treated like 'consumers', whose right of access to basic water supply goes only as far as they can afford, will undoubtedly enter the paradigm along with the privatisation of water services. In addition, the capacity of local governments to properly prepare and manage service delivery partnerships, enter into the right contracts and, most importantly, exercise those responsibilities that remain theirs even after privatisation, can be called into question.⁹¹

In general, government should be commended for its efforts to put in place a comprehensive and progressive institutional framework for local government. It has the potential to equip municipalities with the discretion and constitutional space that is necessary to tap into local resources and rally businesses, civic organisations and communities around a local developmental agenda. The inclusion of 'developmental' key performance indicators that place free basic services in the planning and reporting cycle of local authorities is an example of this.

The free basic water policy is a bold attempt to provide a 'minimum core' of water delivery. However, the implementation hinges on a sound revenue base for local government, coupled with access to an equitable share that can plug the holes left by a lack of own funds. In rural areas, the revenue base is far from sound, if present at all, and the equitable share does not live up to the promise captured in its name. It is therefore submitted that government's free basic water policy ignores a significant section of society, namely the rural poor. An increase of the equitable share to rural

89 At para. 44.

90 The White Paper on Municipal Service Partnerships says that "it has been conservatively estimated that the total cumulative [municipal service] backlog is about R 47 – 53 billion, with an average annual backlog of R 10.6 billion...if these backlogs are addressed through public sector resources alone, many communities will receive adequate services only in the year 2065. Department of Provincial and Local Government 2000 "White Paper on Municipal Service Partnerships" <www.gov.za/whitepaper/index.html> at p 1.

91 The water privatisation in Nkonkobe Municipality is a case in point. The municipality won a court battle to nullify a 6 year-old water privatisation contract. They brought the application after high management fees of R400 000 per month placed an intolerably high burden on their budget. The massive fees charged by the private contractor left the municipality with no money to provide other services. The municipality told the Court it would save R19 million if the contract could be nullified. In *Nkonkobe Municipality v Water Services South Africa (PTY) Ltd and others* Case No. 1277/2001 (unreported), the Court eventually nullified the contract because the municipality did not comply with the necessary consultation and public participation requirements. See De Visser 2002: 13.

municipalities in order to enable the free basic water delivery should be high on government's agenda. At the same time, the efforts that are underway to tinker with one of local governments' major income sources, namely the revenue from electricity reticulation, should be treated with a great deal of suspicion.⁹²

Cost recovery appears to be the driving force behind the new water service delivery paradigm. However, government should guard against driving the poorest sections of society out of the ambit of water provision and forcing them to resort to alternative, hazardous ways of fulfilling this basic need and thereby forfeiting their health and human dignity.

Water disconnections have affected millions of people over the past few years. Nevertheless, litigation around the termination of water services is not exactly flowing thick and fast. The absence of litigation alone could bear testimony to the fact that these measures have hit the poorest of the poor, who cannot easily access the legal remedies they enjoy under the Constitution. For them, realising the right of access to water remains a pipedream. However, what can be gleaned from an assessment of the two cases, against the backdrop of the *Grootboom* judgment, is that the courts cannot shy away from assessing government's performance in providing a basic minimum of water service delivery and that an individual's right to a *dignifying* basic minimum of water delivery cannot be sacrificed at the altar of cost recovery or sustainability.

ANNEXURE I

Table 1: Cost comparison between municipal (public) and private water delivery

Cost per cubic meter delivered, purchasing power parities in US\$
(m = municipal, p = private)

| Water company | Owned by | Cost to consumer | Cost of operation | Capital maintenance | Return on capital |
|-----------------------|-----------------|-------------------------|--------------------------|----------------------------|--------------------------|
| Stockholm | m | .28 | .17 | .03 | .09 |
| Manchester | p | .91 | .40 | .20 | .31 |
| Bristol | m | .83 | .48 | .19 | .15 |
| Gothenburg | m | .38 | .11 | .05 | .21 |
| Kirklees | p | .99 | .52 | .31 | .15 |
| Htlepool | p | .73 | .35 | .08 | .29 |
| Helingborg | m | .42 | .42 | .05 | -0.05 |
| Waverley | p | .82 | .48 | .22 | .12 |
| Wrexham | p | 1.25 | .57 | .35 | .32 |
| Sweden average | | .36 | .23 | .04 | .08 |
| UK average | | .93 | .48 | .20 | .23 |

⁹² *Business Day* 2001a, 2001b, 2001c.

Table by Public Service International Research Unit 2000

ANNEXURE II

Table 2 Cost comparisons of BoTT and Mvula Trust Projects

| | Project | Population | Project budget (Rands) | Per capita cost (Rands) |
|--------------------|-------------|------------|------------------------|-------------------------|
| BoTT | Ndatshana | 8 500 | 13 940 336 | 1640 |
| | Emnambithi | 6 672 | 6 004 387 | 900 |
| | Nqutul | 11 000 | 5 786 404 | 526 |
| Mvula Trust | Drycott | 6 000 | 4 000 000 | 667 |
| | Mkhize | 9 733 | 3 925 960 | 403 |
| | Bhekabezayo | 6 218 | 2 392 777 | 385 |

Source: Bond et al 1999

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