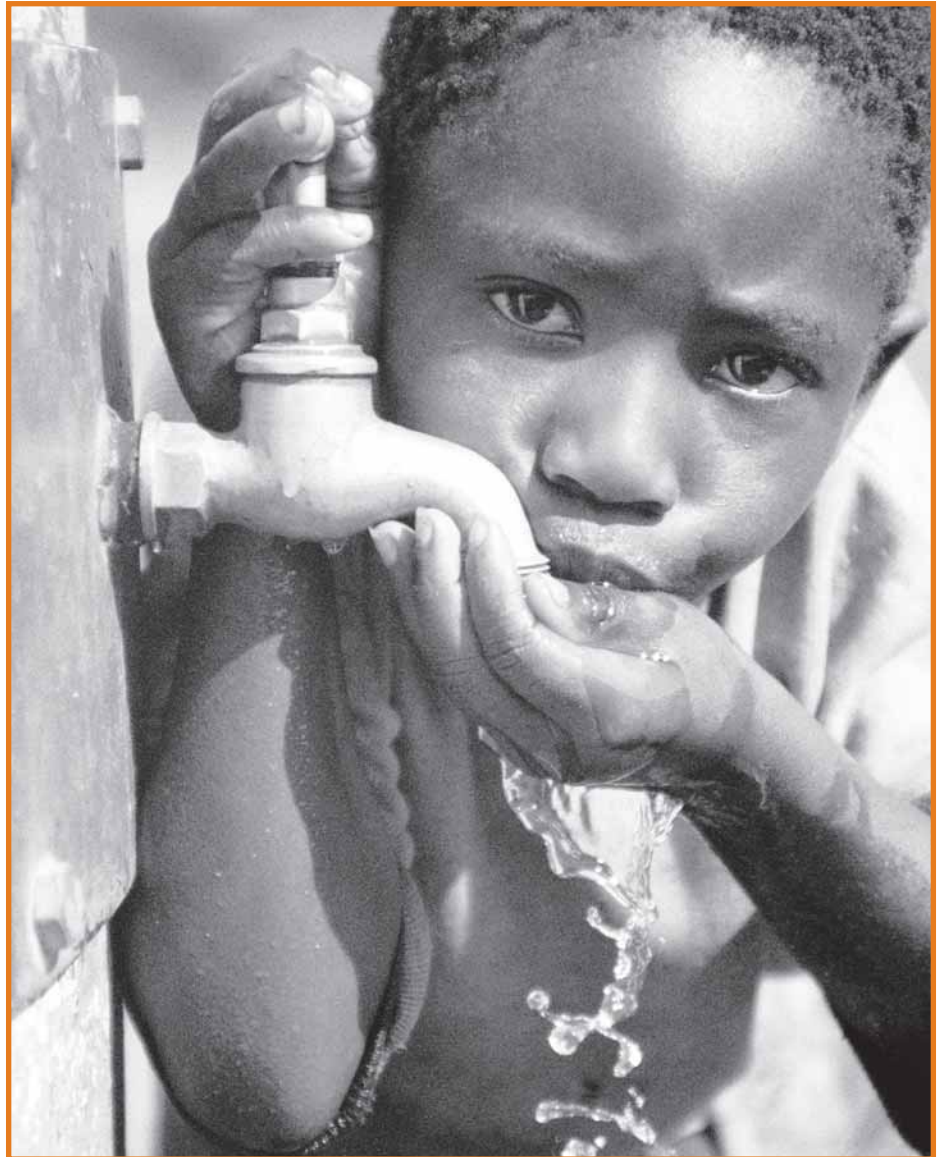

Water rights

CHAPTER 10



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KEY WORDS

Access/Accessible	Ability to get, have or use something, eg access to sufficient water.
Accountability	Being answerable for your actions, eg by reporting.
Arbitrarily	In an unfair and unlawful way.
Breach	Break the law or not respect your rights, eg disconnect your water supply without good reason.
Catchment	Area of land that collects and transfers rainwater into a waterway, river, lake or ocean.
Compliance/Comply	Whether or not you obey duties and procedures set out in law and policy.
Constitutionality	Whether a policy, law or procedure is in line with the Constitution.
Cooperative	The principle that national, provincial and local government government should assist each other, and respect each other's powers and functions.
Corporatisation	When a government department is turned into a public company – the State keeps ownership, control and management, but the new body runs on business principles.
Delegate	Transfer powers and duties to another body.
Ecosystem	The relationship and interaction between plants, animals and the non-living environment.
Equitable/Equity	Fair and reasonable.
Labour tenants	People allowed to live on and develop land in return for their labour.
Lobby	Persuade or influence a person or authority, eg lobbying the Minister of Water Affairs and Forestry on the quantity and quality of water supply services.

Malnutrition	A medical condition caused by not eating enough or proper food, or not having a balanced diet.
Mediation	A process where a neutral person is given the power to help two sides find a solution to a dispute.
Organ of State	Government departments and public bodies carrying out State duties.
Potable water	Drinkable water.
Precedent	A case that sets an example for future cases to follow.
Prescribed	As set out in the law, usually by regulations made under an Act.
Privatisation	A process where private companies are involved in owning and managing State assets to provide a service or to operate a service.
Public trustee	A person who holds, manages and controls something for the benefit and in the interests of the public.
Riparian principle	When access to and use of water is linked to owning land next to rivers and other large water sources.
Sanitation	Maintaining clean and hygienic living conditions, including services for collecting sewerage and garbage.
Spheres of government	National, provincial and local levels of government.
Sustainable	Lasting and staying in a good condition for a long time.
Unfair discrimination	When a policy, law, condition or situation unfairly disadvantages you, eg because you are a woman, black, gay, living with a disability, or living with HIV.
Violate/Violation	Abuse or not respect your rights, eg violate your human dignity.
Water resource	Any source that water comes from, eg a borehole, a river, a lake.

10.1

Why is it important to understand your water rights?

CASE STUDY



THE VALUE OF WATER

Nomonde Mnika, a resident of Masakala community near Matatiele, in the Eastern Cape, knows the value of water. Her daily efforts to get potable water for her family until April 1998 were a time-consuming affair.

She would walk a few kilometres to a dry riverbed and begin digging by hand. Eventually, depending on the weather conditions over the past few weeks, she would strike paydirt – brown, unusable mud. Further digging and withdrawal of the water from the donga, as the holes were known locally, allowed clearer water to filter through and she would fill a few buckets and carry them home. She was one of hundreds of people who relied on the dongas for her water.

John Soderlund, 'Masakala community takes the initiative to replace water dongas', Sunday Independent, 14 February, 1999

The Constitution gives people like Nomonde Mnika a right of access to sufficient water. However, in order to be able to access this right, it is important that communities and individuals know what the right is, and how to protect and advance it.

10.2

History and current context

South Africa faces an increasing demand for water. It is a semi-arid country receiving insufficient and unpredictable amounts of rain every year. Initially, water was needed mainly for domestic agriculture and use. However, the growth of the industrial sector since the last half of the 20th century has increased the demand for water as an important natural resource.

Before 1994, the provision of water supply to the people was not regarded as the duty of the State in South Africa. Rather, access to water was closely linked with land. The old water laws tied access to and use of water to ownership of land along rivers and other large water bodies – this is called the 'riparian principle'. Land owners also had the sole right to use water sources like rain water that fell on their land, a stream that arose on their land and groundwater (eg from a borehole).

The fact that the majority of South Africans were stripped of their land rights and restricted to 13% of the land meant the majority of the people were also deprived of effective control of and access to water. The principles of South African water law helped to ensure that white land owners enjoyed privileged access to and use of the country's water resources.

There is also widespread waste of water, a scarce resource. Large-scale irrigation on commercial farms uses vast quantities of the country's water resources. The previous water laws granted the relevant Minister wide powers to regulate the storage, distribution and use of water.



10.2.1 The impact of lack of access to water

The Government estimates:

- About 7 million people in South Africa do not have access to adequate water services.
- About 18 million people or 3 million households do not have adequate sanitation facilities (*Draft White Paper on Water Services, 2002, 2; White Paper on Basic Household Sanitation, 2001, paragraph A1*).

Water is essential to live a healthy life. A human body cannot function properly without taking sufficient amounts of clean water. Water is also important for preparing our food, washing our clothes and maintaining a clean environment. Lack of access to water causes serious illnesses such as diarrhoea and cholera.

Water also serves many other important functions. For example, it can be used for farming, leisure and cultural purposes.

The *Draft White Paper on Water Services* of 2002 acknowledges:

“Water services are intimately linked with *poverty*. Lack of access to water supply and sanitation constrains opportunities to escape poverty.”

Paragraph 1.1

EXAMPLES



EFFECTS OF LACK OF ACCESS TO WATER

- *Lack of access to water has particularly negative impacts on women and the girl child. Rural women, for example, walk long distances to rivers or community taps to collect water. This task is time-consuming and exhausting. As a result, many rural women cannot take full advantage of economic and development opportunities, and do not participate equally in private and public life.*
- *Children in rural areas, who often accompany their mothers to assist in the collection of water for the household, experience similar hardships. They have little time for recreation and their heavy domestic responsibilities often affect their education.*

10.2.2 Current barriers to accessing water

Many people do not have access to water because of poor implementation of policies (such as the indigent policy and the free basic water policy) and legislation by municipalities. Many poor people are also not informed about their rights, and laws and programmes aimed at enabling them to have access to water. As a result, they have no way of claiming their water rights.

Most rural-based farm workers rely on the permission of farm owners to gain access to water supplies, and this contributes to a relationship of dependence.

Some barriers identified by poor people in gaining access to safe water include:

- Inadequate and unreliable infrastructure and services.
- Affordability of the services.
- Pollution and poor quality of water supplies.
- The special problems experienced by rural women and children.
- The attitudes of some local governments and traditional leaders.
- Privatisation of providing water services.

10.3

Your water rights in the Constitution

10.3.1 The right of access to sufficient water

Section 27(1)(b) of our *Constitution (Act 108 of 1996)* recognises the right of everyone to have “access to sufficient water”.

The State must take reasonable legislative and other steps, within its available resources, to achieve the “progressive realisation” of this right.

Section 28(1)(c) of the Constitution also gives children the right to basic nutrition.

For more on progressive realisation, see Chapter 1 on page 38.

10.3.2 Duties of the State

Section 7(2) of the Constitution sets out the specific duties of the State to “respect, protect, promote and fulfil” the right of access to water.

- *The duty to respect* means that the State must stop companies and people from preventing or impairing a right. For example, disconnecting water supply without a justifiable reason is a breach of this duty.
- *The duty to protect* means that the State must take positive action to protect people from violations of their rights by private actors. For example, the State must regulate a private water service provider.
- *The duty to promote* means that the State must ensure that individuals are informed and aware of how to exercise their rights.
- *The duty to fulfil* means that the State must deliver water services to the people by facilitating or providing it directly, including a duty to provide water to individuals or groups who cannot afford it. The free basic water policy is an example of the duty to fulfil the right to water.

The State also has the duty to take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of this right. For example, if the Municipality of Cape Town developed a policy to privatise water services, this policy could be declared ‘unreasonable’ if poor people cannot afford it. This kind of policy could be set aside because it does not provide for people who are desperate and poor.

For more on the reasonableness test, see page 32.

10.3.3 Duties of different spheres of government

Providing water services falls within the shared mandate of all three spheres of government – national, provincial and local governments. All these have different and overlapping powers and duties around water resources and services.

For example, national government must manage and conserve South Africa’s water resources. The *National Water Act 36 of 1998* is the main law that directs the Government to ensure that the country’s water resources are managed, used, protected and developed in a sustainable way.

Water management is closely related to environmental issues and pollution control that fall within the joint powers of national and provincial government. These issues have to be dealt with in the spirit of cooperative government under the Constitution.

Some of the important functions of local government under the Constitution include the delivery of water supply and sanitation services. Water delivery and sanitation services by local government include domestic wastewater and sewage disposal systems. National and provincial governments must monitor, support and build the capacity of local government to fulfil this important function of providing access to water services. It is also the responsibility of the national Government to set national standards for the delivery of water services. This is mainly done through the *Water Services Act 108 of 1997*.

For more on the National Water Act, see page 363.

For more on the Water Services Act, see page 365.

The Department of Water Affairs and Forestry is the main organ of State responsible for water services. However, water management is also closely related to the activities of other government departments dealing with areas such as housing, land use, industrial development and mines.

10.3.4 Linking water rights to other rights

As water is very central to our lives, access to water can be claimed as a right linked to a broad range of other rights. For example, the rights to food and water are very closely linked. While water is essential for nutrition and to avoid malnutrition, access to water is also essential for food production.

We have seen how water and health are also closely linked. The *White Paper on Water Policy for South Africa* (1997) highlights this link:

“Access to sufficient, affordable, clean water for hygiene purposes should be seen as part of the primary health care service.”

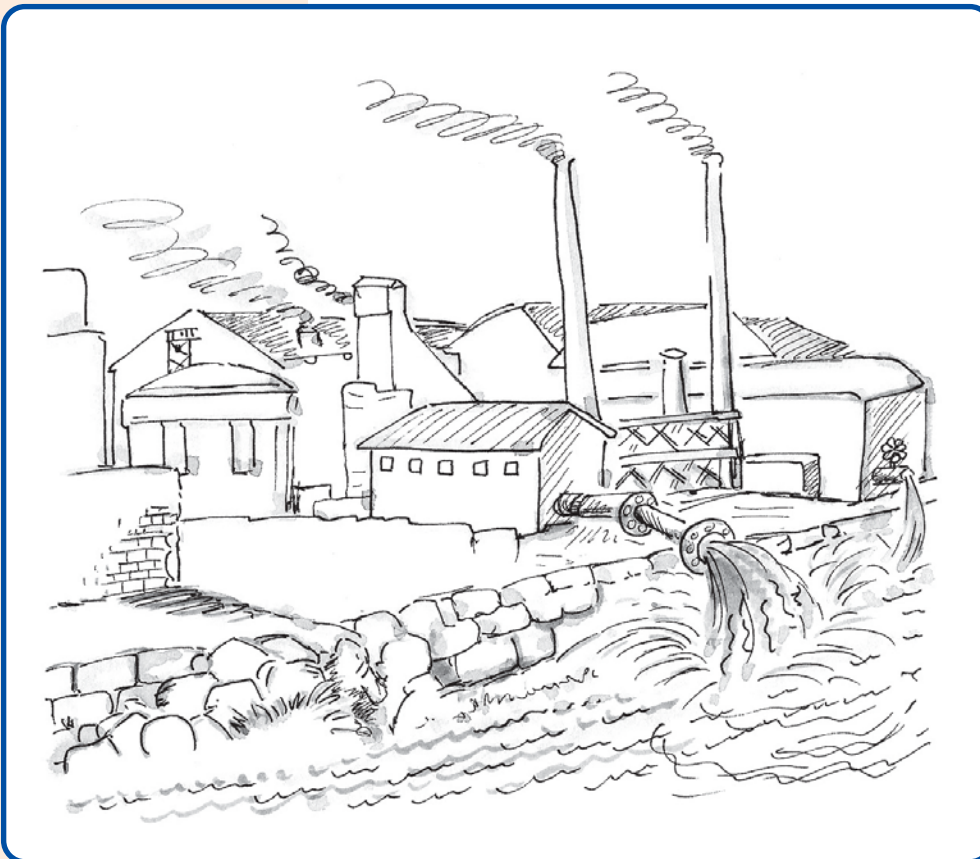
Paragraph 2.1.8

Water is also important for enjoying the right to housing. The Constitutional Court highlighted the close connection between water and housing in the 2000 case of *Government of the Republic of South Africa and Others v Grootboom and Others* (Grootboom case). The Court decided that housing:

“...requires available land, appropriate services such as the provision of water and the removal of sewerage” *Paragraph 35 of judgment*

The environmental rights protected in the Constitution are closely related to the

right of access to sufficient water. The environmental rights place duties on the State to prevent pollution and ensure conservation of South Africa’s scarce water resources.



Land rights

As we have seen, access to our water resources has historically depended on having access to land. The right of equitable access to land is thus also important for accessing water rights.

COURT CASE



A WIDE INTERPRETATION OF EVICTION

In the 1998 case of *Ndhladhla and Others v Erasmus* and the 1999 case of *Van der Walt and Others v Lang and Others*, the Land Claims Court decided:

- Restricting occupation of or use of land may be an “eviction” under section 1 of both the *Land Reform (Labour Tenants) Act 3 of 1996* and the *Extension of Security of Tenure Act 62 of 1997* (ESTA).
- Restricting access to water for domestic use or for cultivating crops and watering livestock may be considered as an eviction that will have to be justified under these Acts.

Equality and human dignity

Other related rights are the rights to equality and human dignity protected as central values in our Constitution. Some of the main goals of the Government’s water policy are to:

- Ensure equitable access by all South Africans to the nation’s water resources.
- End discrimination in access to water on the basis of race, class or gender (*White Paper on National Water Policy for South Africa, 1997, paragraph 2.1.4*).

South Africans in poor communities often suffer a number of indignities arising out of poverty. Wilson Mhana told the National Speak Out on Poverty Hearings in the North West Province:

“People are starving. There is no work and no water. The gardens fail, and people eat rotten vegetables. I teach cooking and nutrition in adult schools. But people are too poor to buy fresh food.”

Poverty and Human Rights, Report, 1998, 12

COURT CASE



UNFAIR DISCRIMINATION AND CHARGES FOR WATER SERVICES

In the 1998 case of *City Council of Pretoria v Walker*, the Constitutional Court permitted a ‘flat rate’ system of levying service charges for water and electricity by a local authority in disadvantaged areas (previously ‘black’ group areas). The Court said that using this system instead of the consumption-based system used in previously ‘white’ areas was not unfair discrimination in the particular circumstances of the case (*Paragraphs 57–68 of judgment*).

10.4

Guides to interpreting your water rights

South African case law and legislation, and guidelines from international law, help us interpret our constitutional water rights.

10.4.1 South African law

a) Case law

COURT CASE



ACCESS TO RIGHTS AND SERVICES

In the Grootboom case, the Constitutional Court decided that the right of access to housing means something more than simply providing shelter. Rather, this right guarantees access to shelter and all services connected to the enjoyment of shelter, such as electricity, sanitation, water and land. Thus, the right of access to water guarantees not only access to water as a physical good, but also access to all services linked to providing water, such as sanitation.

Although there has been an increasing amount of case law on socio-economic rights in South Africa, little of this has focused on the right of access to sufficient water. Thus, in order to understand this right, we must be guided by the existing South African case law relating to other socio-economic rights.

The Grootboom case and the 2002 case of *Minister of Health and Others v Treatment Action Campaign and Others* (TAC case) also help explain the meaning of the terms “progressive realisation” and “availability of resources”.

They also define the ‘reasonableness test’ for measuring the State’s compliance with its duties in relation to socio-economic rights. The meaning of these concepts applies directly to the right to water.

For more on progressive realisation and the availability of resources, see Chapter 1 on pages 38–39.

b) Legislation

Statutory law also provides specific protection of the right to water.

EXAMPLE



WATER SERVICES ACT

The Water Services Act protects the right to basic water supply and basic sanitation. Section 1(iii) of the Act defines “basic water supply” as:

“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 Act says that water service institutions must give preference to providing a basic water supply and basic sanitation to its existing consumers if they are unable to meet the requirements of all those consumers. It also sets out the procedure and conditions for disconnections of water supply.

We can also find out the meaning of the right of access to water through key definitions given in various Acts:

- “Eviction” has been defined in ESTA to include depriving people against their will of residence on land, or the use of land, or access to water that is linked to a right of residence in the Act.
- The Land Reform (Labour Tenants) Act defines “eviction” as including deprivation of a right to occupy or use land. “Use of land” includes access to water for domestic use or for cultivating crops and watering livestock.

Based on this broad definition of eviction, it may be possible for farm workers or tenants to say that they have been unlawfully evicted from land when they are not allowed to water their cattle from a nearby stream, or to draw water from their employer’s borehole.

10.4.2 International law

a) The ICESCR

Although the main international treaty on socio-economic rights, the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), does not directly recognise the right to water, this right is closely linked to other rights.

The UN Committee on Economic, Social and Cultural Rights (CESCR) monitors implementing the ICESCR. The CESCR has stated in *General Comment No. 15 on the Right to Water* that this right is indirectly protected in article 11 of the ICESCR. This is because article 11 recognises the right to an adequate standard of living, including adequate food, clothing and housing, and other rights such as the right to equality, health and human dignity.

General Comment 15 gives a comprehensive definition of the right to water, its meaning and content, and the duties arising from the right to water. It is a very important guide to interpreting our Constitution.

GUIDELINES



GENERAL COMMENT 15

The right of access to water has four elements:

1. *Physical access* – water, water facilities and water services must be within physical reach for all people.
2. *Economic access* – water, water facilities and water services must be affordable for all.
3. *Non-discrimination* – water, water facilities and water services must be accessible to all without discrimination.
4. *Information access* – information on water must be accessible to all.

Water, water facilities and water services must be adequate for human dignity, life and health. *Adequacy* means:

- The water supply for each person must be sufficient and continuous for personal and domestic uses, including drinking, personal sanitation, washing of clothes, food preparation, and personal and household hygiene.
- The quantity of water available for each person must be in line with the World Health Organisation (WHO) guidelines.
- Water for personal and domestic use must be safe and free from impurities, micro-organisms and other kinds of contamination.

b) Other international documents and bodies

International treaties directly recognise the right to water:

- The *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW, 1979) places a duty on States to ensure that women in rural areas have the right “to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications” (*article 14(2)(h)*).
- The *Convention on the Rights of the Child* (CRC, 1989) says States have a duty to implement children’s right to health through “the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution” (*article 24(2)(c)*).
- The *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa* (2003) says that women have a right to nutritious and adequate food. States must therefore take steps to “provide women with access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious foods” (*article 15*).

A range of declarations and other standards also recognise access to water as a right, including:

- The *Mar del Plata Declaration* of the 1977 United Nations Water Conference.
- The *UN Principles for Older Persons*, 1991.
- The *Dublin Statement on Water and Sustainable Development*, 1992.
- The *Programme of Action of the 1994 International Conference on Population and Development*.

Specialised bodies of the United Nations, particularly the WHO and the United Nations Children’s Fund (UNICEF), have established important standards and guidelines that can assist in giving meaning to the right of access to sufficient water.

EXAMPLES



WATER STANDARDS

- The WHO estimates 20 litres a person each day is a minimum to maintain life. This amount can cover consumption, hand washing and food hygiene, but not laundry and bathing.
- To assure all personal and food hygiene, the minimum amount of water needed for domestic use is 50 litres a person each day.
- The water supply must be located “within a reasonable distance from the household”, meaning not more than 200 metres from the household.

WHO: *Domestic Water Quantity, Service Level and Health*, 2003, 25

For more on international law in interpreting our Constitution, see Chapter 3 on page 111.

10.5

Policies, legislation and programmes to implement your water rights

10.5.1 Policies

a) **White Paper on Water Supply and Sanitation**

In 1994, the Government adopted a *White Paper on Water Supply and Sanitation*, focusing on broadening access to water supply and sanitation services.

In November 1996, after a process of wide consultation with interested role players by the Department of Water Affairs and Forestry, the Cabinet approved a set of Fundamental Principles and Objectives for a New Water Law in South Africa. These principles are very different from the approach to water rights in apartheid South Africa.

EXAMPLES



PRINCIPLES FOR A NEW WATER LAW

- *Private ownership of water resources and the 'riparian principle' are done away with.*
- *The national Government will be the 'public trustee' of the nation's water resources. It must thus ensure that water resources are managed in a sustainable and equitable way for the benefit of all people.*
- *The development and supply of water resources must be managed in a way that respects environmental rights.*
- *Apart from the right to use a water resource to meet basic human needs, all other uses of water will have to be authorised by the Government through a system of licensing.*
- *To create greater local participation in water management, the Minister of Water Affairs and Forestry will give this responsibility to a local catchment or regional level where this is possible and suitable.*

b) **White Paper on Water Policy**

In its *White Paper on a National Water Policy* (1997), the Government committed itself to a policy and law-making agenda that would implement these principles.

The goals of the Department of Water Affairs and Forestry are captured in its slogan:

"Some, for all, for ever:
access to a limited resource (some)
on an equitable basis (for all)
in a sustainable manner, now and in the future (for ever)."

This White Paper formed the basis for drafting the Water Services Act.

c) **White Paper on Basic Household Sanitation**

In 2001, the Government adopted the *White Paper on Basic Household Sanitation*. This policy highlights the link between sanitation and water, and clearly shows that water is very critical to maintaining a clean environment and healthy living conditions. Its particular focus is on “the provision of a basic level of household sanitation to mainly rural communities and informal settlements”.

The White Paper defines the principles of providing sanitation:

- Sanitation is a basic human right and all South Africans must have access to sanitation services.
- Water has an economic value, and sanitation improvement is thus a primary responsibility of households.

The sanitation policy identifies strategies for improving sanitation such as:

- Facilitating the participation of communities.
- Promoting health and hygiene awareness and practices.
- Developing and using local resources.

The policy defines the duties of different role players in improving sanitation, such as householders, communities, national, provincial and local governments, the private sector and non-governmental organisations (NGOs).

Under this policy, municipalities must provide access to a free basic level of sanitation to poor households. The amount of the free service must be based on the minimum technical standards, and health and hygiene promotion standards, that will satisfy the elements of the definition of a basic level of service.



d) **National Water Resource Strategy**

In September 2004, the Government adopted the first edition of the *National Water Resource Strategy* (NWRS). This development is in keeping with CESCR's General Comment 15 that requires States to "adopt and implement a national water strategy and plan of action addressing the whole population", and to review it periodically (*paragraph 37(f)*).

The NWRS describes how water in South Africa will be used, managed, conserved and developed. The strategy is reviewed every five years.

Key features of the NWRS are:

- To ensure that "water is used to support equitable and sustainable social and economic transformation and development".
- To ensure that potable water and safe sanitation are accessible by all people, including the poor and previously disadvantaged people.
- To highlight the need for water conservation and protecting the environment.
- To provide for subsidising previously disadvantaged water users.
- To delegate powers and responsibilities of the Department of Water Affairs and Forestry to catchment management agencies and water user associations.

For more on new structures under the National Water Act, see pages 364–365.

e) **Draft White Paper on Water Services**

The Government is currently developing a new policy on water services. In 2002, it issued the Draft White Paper on Water Services for public comment. The new White Paper is being formulated because many changes have taken place since publishing the White Paper on Water Supply and Sanitation in 1994.

The new Draft White Paper covers both water services and sanitation. Thus, it is also meant to support the White Paper on Basic Household Sanitation. It will provide a basis for reviewing the Water Services Act and other legislation relating to water services. At the time of writing, the Draft White Paper had not been finalised.

Key features of the Draft White Paper on Water Services are to:

- Provide for a basic water supply – a minimum of 25 litres of potable water a person each day, or 6 000 litres a household each day, within 200 metres of a household.
- Provide basic sanitation services – appropriate health and hygiene education, and an acceptable, safe and reliable toilet.
- Set out goals and targets for water services, such as:
 - Water and sanitation services should be provided equitably, affordably, effectively, efficiently and sustainably.
 - Water services authorities are accountable, have adequate capacity to make wise choices on water service providers, and are able to effectively regulate water service provision.
 - The price of water and sanitation should reflect the fact that they are social and economic goods.
 - Water and sanitation services are effectively regulated.

- Set out social, economic and institutional principles to govern water services.
- Define the role of all three spheres of government in providing water and sanitation services.
- Set out a framework for monitoring and regulating the provision of water and sanitation services.

f) **Draft Position Paper for Water Allocation Reform**

The Department of Water Affairs and Forestry is currently developing a policy on water allocation. According to the *Draft Position Paper for Water Allocation Reform in South Africa* released in January 2005 (*Towards a Framework for Water Allocation Planning*), the main aim of this policy is to promote beneficial use of water in the best interests of all South Africans. Its aims are to promote equity in accessing water, address poverty, generate economic growth and create jobs.

GUIDELINES



WATER ALLOCATION REFORM

The policy establishes seven guidelines for allocating water:

1. The water allocation process must address past imbalances in water allocation to historically disadvantaged individuals.
2. The water allocation process must be supported by capacity development programmes to improve livelihoods and productive and responsible use of water.
3. The water allocation process must contribute to black empowerment and gender equality.
4. The water allocation process must respond to domestic national planning initiatives (local, provincial and national), and to regional and international initiatives.
5. The water allocation process must be undertaken in a fair, consistent and reasonable manner, and existing users must not be limited arbitrarily.
6. The water allocation process must promote water resources by promoting developmental and environmental objectives.
7. Innovative mechanisms will be developed that reduce the administrative burden of authorising water use, but support productive and responsible use, and effective management.

There is a new process of compulsory licensing. A compulsory licence will give government the power to take control of a water resource where there is more demand for water than is available for allocation. This will ensure that water is distributed fairly and equitably. It will also enable government to redress past imbalances in access to water.

g) Privatisation and corporatisation

Water services in South Africa are provided by State departments, private companies, or jointly by State departments and private companies. Policies and law governing this process are:

- The *White Paper on the Transformation of the Public Service*, 1995.
- The *White Paper on Municipal Partnerships*, 2000.
- The *Strategic Framework for Delivering Public Services through Public-Private Partnerships*, 2000.
- The *Local Government: Municipal Systems Act 32 of 2000* (Municipal Systems Act), as amended in 2003.

The process where private bodies are allowed to play a part in providing water services is called *privatisation*. The Government prefers to use the term 'restructuring', but there is no real difference between the two. Although water services in most municipalities have continued to be provided by State departments, privatisation has taken place in a number of municipalities.

EXAMPLES



PRIVATISATION

- The delivery of water and sanitation services in three municipalities of the Eastern Cape – Queenstown, Stutterheim and Fort Beaufort – were the first basic municipal services to be privatised between 1992–4. *Lyonnaise Water Southern Africa* (restructured in 1996 as *Water and Sanitation Services of South Africa*) was the private company that won the relevant management contracts.
- In 1999, the provision of water services in Nelspruit was contracted out to *Biwater*, a British-based multinational company, for 30 years.
- Also in 1999, the provision of water and sanitation services in Dolphin Coast and Durban was contracted out to the multinational companies *SAUR International* and *Biwater*.
- In 2001, *Water and Sanitation Services of South Africa* won management contracts to provide similar services in Johannesburg.

A new form of privatisation: corporatisation

Another kind of privatisation currently in use in South Africa is *corporatisation*. The cities of Cape Town, Pretoria, Johannesburg and Durban, for example, have adopted this form of providing water. Corporatisation is a process when a government department is turned into a public company with the aim of letting it function as a commercial body. The State keeps ownership, control and management of the assets, but the new body operates according to business principles.

Responses to privatisation

Many civil society organisations and labour groups, including COSATU, the Alternative Information and Development Centre and the Anti-Privatisation Forum, have criticised the privatisation policy. They argue that:

- Privatisation has led to higher prices for water and thus more disconnections, job losses and the creation of private monopolies.
- Privatisation does not lead to more access by poor people to the privatised service, but that the real beneficiaries are the big companies.

Does privatisation violate human rights?

The Constitutional Court in the Grootboom case said that the State has the duty to empower other actors to provide services to realise socio-economic rights. This statement means that privatisation, in itself, does not violate the Constitution, and can be seen as a way of giving effect to socio-economic rights.

However, privatisation does not do away with the human rights duties of the State. The State still has the duty to respect, protect, promote and fulfil the right to water and all other rights involved when it decides to privatise providing water. These duties must be complied with before, during and after the privatisation process.

The role of local communities in the privatisation process

While undertaking privatisation, the State must observe the Constitution and other laws, including the Municipal Systems Act. The Municipal Systems Act sets out the procedure to be followed when privatising municipal services. An amendment to this Act, *Act 44 of 2003*, introduced a detailed procedure for privatisation, including recognising the role of local communities in the privatisation process.

Local communities now have the right to record their views on whether a municipality must privatise a service or not. They also have the right to register their views on the content of the contract between the State and the private service provider, and to demand accountability from the relevant authorities.

Community participation in the privatisation process is important because it can highlight important concerns that need to be addressed before the decision to privatise can be made.

However, the Municipal Systems Act does not create a monitoring procedure, including local communities, once the privatisation process has been completed.

GUIDELINES



COMMUNITY PARTICIPATION IN THE MUNICIPAL SYSTEMS ACT

1. Before a municipality begins to explore whether to provide a service through an external body, it must give notice to the local community of its intention to do this.
2. Once the municipality decides to assess different service delivery options, it must consider the views of the local community and organised labour.
3. Before a municipality enters into a service agreement for a basic municipal service, it must establish a mechanism and programme for community involvement and distributing information on the service delivery agreement.
4. Municipalities have the duty to communicate the contents of the service agreement to the local community through the media.
5. Once the agreement is reached and signed, the municipality must make copies of the agreement available at its offices for public inspection during office hours. It must give notice to the media of:
 - The details of the service that will be provided under the agreement.
 - The name of the service provider.
 - The place where and the period for which the copies will be available for public inspection.

h) **Free basic water policy**

The Government adopted the free basic water policy in June 2001, based on regulations under the Water Services Act. It started implementing this policy in July 2001.

The plan was that, by June 2005, the policy would be implemented in all municipalities in the country. The amount of free basic water is 25 litres a person each day, or 6 000 litres a household each month.

Many writers have criticised this policy arguing that:

- The amount of free water provided is too little.
- The current pricing system means that consumers are charged at a high rate after the free block of water. As a result, the impact of the free water policy is insignificant.

However, this policy can be seen as one significant step towards realising the right to water. The duties of the State on the right to water are continuous, as the State must realise this right progressively. This means that the amount of free basic water should not remain static. The State should increase it over time so that poor people have access to sufficient water as required by the Constitution.

10.5.2 **Legislation**

a) **The National Water Act**

Together with the Water Services Act, the National Water Act implements the new water policies and principles.

The main aims of the National Water Act are to:

- Meet basic human needs of present and future generations.
- Promote equitable access to water.
- Facilitate social and economic development.
- Reduce and prevent pollution of water resources.

The National Water Act establishes the national government as the *public trustee* of the nation's water resources. This means that the Government must ensure that water resources are conserved and used so that the public's water needs will be met now and in the future. The Act says that most water use must be authorised through a system of licensing by the Minister of Water Affairs and Forestry.

Licensing for water use

The National Water Act provides for rules on licensing. A person must apply for a licence to use water. However, some uses of water do not need a licence, for examples, the taking of water for:

- Reasonable domestic use.
- Gardening that is not for commercial purposes.
- The watering of animals that graze on a person's land.

Water for personal or community use may be taken from any water resource that is situated on or forms the boundary of the land owned or occupied by a person if the use is not too much. This right is very important for facilitating access to water by disadvantaged communities, especially in rural areas.

Water pricing

The Minister has power under the National Water Act to establish, after public consultation, a pricing strategy for water use charges:

- These charges are to fund the costs of water resource management, and can also be used to achieve the equitable and efficient allocation of water.
- This pricing policy may vary according to geographic area and water use, depending on socio-economic conditions and circumstances. This will assist in making water more affordable for disadvantaged areas and for groups such as emerging black farmers.

New structures

The National Water Act establishes a number of new structures. These are important to promote community participation in decisions on managing and using water.

Catchment Management Agencies

Catchment Management Agencies (CMAs) are responsible for water resource management. The purpose of establishing these agencies is to delegate water resource management to the regional or catchment level, as well as ensuring that local communities are involved in water management. The Minister, local communities and other interested role players may establish a CMA.

Water User Associations

The Minister may also establish Water User Associations (WUAs). WUAs operate at local level and are cooperative associations of individual water users, who wish to undertake water-related activities for mutual benefit. Thus unlike CMAs, the main function of WUAs is not water management. The WUAs can be a useful vehicle for community members to join together for joint benefit in using or conserving water.

Water Tribunal

The Water Tribunal is an independent body that hears appeals against certain decisions taken by a responsible authority, catchment management agency or water management institution. Tribunals encourage solving disputes by mediation and by negotiation. Thus, you may appeal against decisions of a Water Tribunal to the High Court only on points of law.

b) The Water Services Act

The Water Services Act is the other main law for implementing the constitutional right of everyone to have access to sufficient water. One of the main aims of the Act is to give effect to:

“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.” *Preamble to Act*

Regulation 3 of the *June 2001 Regulations* under this Act provide that the minimum standard for basic water supply is:

“The minimum of potable water of 25 litres per person per day or six kilolitres per household per month at a minimum flow rate of not less than 10 litres per minute; within 200 metres of a household; and with an effectiveness such that no consumer is without a supply for more than seven full days in any year.”

The Government has adopted this minimum amount as the basis for its free water policy. It has also been criticised for being too little.

Development plans

The Act also provides for water service development plans. It imposes a duty on water service authorities to take reasonable measures to realise the right of access to basic water supply and basic sanitation. A *water service authority* is a municipality, including a district or rural council, responsible for ensuring access to water services.

Every water service authority must prepare and report on the implementation of a water service development plan. The plan must set out a five-year implementation programme to improve access to water supply and sanitation. The public must be allowed to comment on this plan.

Disconnections

Many people experience disconnections of water for non-payment of bills. Does the law permit disconnections of water for personal and domestic use because of non-payment? The answer is yes.

See the Mazibuko case challenging the constitutionality of this restriction on page 367.

See similar comments on the free water policy on page 363.



However, the Water Services Act places some restrictions on the right of a service provider to discontinue water services on grounds of non-payment. Section 4(1) of this Act says a service provider must set conditions for providing water services, including the circumstances under which water services may be limited or discontinued, and procedures for limiting or discontinuing water services.

GUIDELINES



LIMITING OR DISCONTINUING WATER

Section 4(3) of this Act says that procedures for limiting or discontinuing a water service must:

- Be fair and equitable.
- Provide for reasonable notice of intention to limit or discontinue water services and for an opportunity to make representations, unless:
 - Other consumers would be prejudiced, or
 - There is an emergency situation, or
 - The consumer has interfered with a limited or discontinued service.
- Not result in a person being denied access to basic water services for non-payment, where that person proves (to the satisfaction of the relevant water service authority) that he/she is unable to pay for basic services.

Section 4(3) thus directs that a water service may not be disconnected without reasonable notice. It may also not be discontinued where a person satisfies the local authority that he/she is unable to pay.

These provisions are important safeguards for people who cannot afford water services. It is therefore important to always check whether you have an unpaid bill or not. If you do, you are supposed to go to the relevant authority to explain that you cannot afford to pay for the bill. The relevant authority should then not discontinue your access to water.

COURT CASE



RESPECTING EXISTING ACCESS TO WATER

In the 2002 case of *Residents of Bon Vista Mansions v Southern Metropolitan Local Council*, the High Court examined the Water Services Act, together with the right to water under the Constitution. The Court decided that, when a local authority disconnects an existing water supply to consumers, this is a breach of its constitutional duty to respect the right of existing access to water.

Prepaid meters

Prepaid meters are used more and more these days by municipalities as a credit control method. These meters have the effect of discontinuing a water supply automatically after the credit for a given quantity of water expires. South African courts have not ruled on the constitutionality of using these meters, especially against poor people.

However, it is clear that prepaid meters effectively get around the procedures for discontinuing a service set out in the Water Services Act. In other words, these meters discontinue water supply without giving notice and without allowing the consumer a chance to show that he/she cannot pay.

COURT CASES



CUTTING WATER SUPPLY

In the 2006 case of *Lindiwe Mazibuko and Others v The City of Johannesburg and Others* (Mazibuko case), the applicants are challenging the decision of the City of Johannesburg to:

- Limit free basic water supply to six kilolitres for each household a month.
- Discontinue in Phiri, Soweto, a full-pressure, unmetered, uncontrolled volume water supply and to install a controlled volume water supply system operated by means of a prepaid water meter.

The applicants are all unemployed and living in poor conditions. They are acting for themselves and on behalf of all residents of Phiri who are similarly affected by the decision. The case was started by the Coalition Against Water Privatisation and is supported by the Centre for Applied Legal Studies.

The Mazibuko case will set a precedent on the legality of prepaid meters against the backdrop of the Water Services Act that sets out procedures to be followed before a disconnection of water supply can take place. Crucially, it will revive the debate about the role of the 'minimum core obligations' concept in implementing socio-economic rights in South Africa.

In a 1999 case in the United Kingdom, *R v Director General of Water Services Ex parte Lancashire CC*, the Water Industry Act of 1991 had similar provisions to South Africa's Water Services Act. A challenge was made in court to make the relevant water supplier remove and not install any further prepaid water devices in domestic premises in each of the applicants' areas.

The Court decided:

- The automatic operation of closing the valve disconnects water supply to the premises within the meaning of the legislation.
- The use of these prepaid devices went against the Act, because they cut water supply without observing the notice requirements or procedural provisions in the Act protecting individuals, who could not afford or who disputed their bills.

For more on 'minimum core obligations', see Chapter 1 on page 39.

National standards

Under the Water Services Act, the Minister of Water Affairs and Forestry may set national standards for the delivery of water services. Everyone must follow these standards.

In setting these standards, the Minister must consider a range of factors, including:

- The need for everyone to have a reasonable quality of life.
- Equitable access to water services.
- Social equity.
- The needs and economic circumstances of different users of water services and different geographical areas.

Water Services Committees

The Minister has power to establish a Water Services Committee (WSC) only when a relevant local authority is unable to supply water services effectively to consumers and potential consumers in a particular area. The WSC must have community representatives as members. Also, the WSC must consult the community before setting conditions for supplying water services.

Water Boards

The main function of Water Boards is to supply water services to other water service institutions within the Water Board's water services area. Some of the Water Board's powers include setting and enforcing general conditions, including tariffs, for providing water services.

Monitoring and information

The Act sets out steps for monitoring water services and intervention by the Minister or the provincial government where there are problems with providing water services. The Act also establishes a national water services information-gathering and information-distribution system.

10.6

Protecting and advancing your water rights

We have focused on the National Water Act and the Water Services Act. These laws create a number of opportunities for groups working in the area of water rights to protect and advance access to sufficient water for all.

10.6.1 Guidelines: Using the National Water Act

GUIDELINES



USING THE NATIONAL WATER ACT

For more on access to information, see Chapter 2 on page 57.

1. Write to the Minister of Water Affairs and Forestry or the relevant CMA when a land owner or industry is polluting a water resource and request them to take action under the Act. For example, they are polluting by discharging harmful waste products into a river.
2. If you are a member of a disadvantaged group (eg a small farmer, a rural woman), you can request that you are given special consideration in the issuing of licences for water use. You can also request financial assistance from the Minister for making a licence application.
3. If you are unhappy with a licensing decision or other water resource decisions under the Act, you can appeal to the Water Tribunal. You can also request mediation for any dispute under the Act.
4. You can make comments on any proposed water use charges that the Minister plans to set. This will ensure that these charges are equitable by considering the economic circumstances of disadvantaged water users.
5. If your organisation wants to monitor the protection of water resources and access to water, you can request access to the information collected by the Government in the national monitoring and information systems that it must set up under this Act.

10.6.2 Guidelines: Using the Water Services Act

GUIDELINES



USING THE WATER SERVICES ACT

1. You can make representations (eg letters, petitions) and lobby the Minister of Water Affairs and Forestry to ensure that the Minister prescribes an adequate quantity and quality of water supply services.
2. When people are too poor to pay for water services, you can assist them to make representations to the relevant local authority, proving that they are unable to pay for water services.
3. If a local authority unreasonably refuses to consider these representations and cuts off or limits their water supplies, you may be able to challenge this decision in court. You can also request the South African Human Rights Commission (SAHRC) to assist the affected people.
4. You can lobby and carry out campaigns for setting national standards on affordable tariffs for water services.
5. Your NGO or community organisation can monitor and make sure that water service providers follow national standards for the delivery of water services and the setting of tariffs.
6. You can comment on the draft water service development plan prepared by your local authority to ensure that it includes effective steps and reasonable timetables for improving access to water services in your area. Your community can monitor the implementation of this plan.
7. You can inform the Minister of Water Affairs and Forestry or the Provincial MEC that a local authority has not performed its duties under the Water Services Act. This may lead to the provincial or national government taking over the functions of the local authority.
8. You or your organisation can request information on the delivery of water services from the monitoring and national information systems.
9. Remember there can also be community participation in some of the bodies set up under the National Water Act and the Water Services Act, eg CMAs and WSCs.

Discussion ideas



TALKING POINTS

Break into small groups to discuss different ways for your NGO or community to deal with these situations:

- 1. A local authority cuts off all water supplies to a community. Many community members cannot afford water tariffs charged by the municipality.*
- 2. A farmer refuses to let his farm workers draw water from a local dam or borehole for domestic use and watering livestock.*
- 3. A person living in a wealthier residential area challenges the reduced water tariffs paid by people in poorer residential areas, arguing that the setting of different tariffs is unfair discrimination.*
- 4. You discover that your local authority plans to enter into a contract with a private company to provide water services. You are concerned that this will make water services too expensive.*
- 5. How can your organisation go about trying to improve the quality and quantity of water services in your area? Who can you approach for assistance?*

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