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**Outlining a Right of Access to Sanitation  
in South African Law**

Dissertation for the award of an LL.M degree  
in  
Human Rights Law

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DECLARATION

Research dissertation presented for the approval of senate in partial fulfilment of the requirements for the degree of masters in law in Human Rights Law. The remainder of the requirements for this qualification required the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of a master of laws dissertation, including those relating to length and plagiarism, as contained in the rules of the university, and that this dissertation conforms to those regulations.

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Nicolas van Zyl

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## ABSTRACT

*For many people their ease of access to a private home toilet means that when and where they go to relieve themselves is rarely a deliberation in their minds. In South Africa's rural and peri-urban spaces there are many poor people for whom this is not the case. For these people the inadequacy of their access to sanitation compromises their health, safety and ability to live a dignified life. Without an explicit right included in the Constitution, litigating on access to sanitation poses a formidable legal challenge. However, a critical analysis of South Africa's socio-economic and administrative law jurisprudence reveals that a fundamental right of access to sanitation is not exactly necessary. Outlining South Africa's vast network of service delivery legislation and policy, this thesis submits that there is a principled basis in our law to enforce a right of access to sanitation. It illustrates that this legal basis extends beyond merely protecting a person's existing access to sanitation, but includes positive duties imposed on the state to provide certain services as well.*

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## **GLOSSARY**

ANC – African National Congress

BNG – Breaking New Ground (BNG) policy

CEDAW – Convention on the Elimination of All Forms of Discrimination against Women  
1979

CESCR – Committee for Economic, Social and Cultural Rights

CRC – Convention on the Rights of the Child 1989

CRPD – Convention on the Rights of Persons with Disabilities 2007

DHS – Department of Human Settlements

DPLG – Department of Provincial and Local Government

DWA – Department of Water Affairs

DWAF – Department of Water Affairs and Forestry

DWS – Department of Water and Sanitation

EHP – Emergency Housing Programme

FBsan – Free Basic Sanitation Implementation Strategy

FBS – Free Basic Services Programme

FBW – Free Basic Water Implementation Strategy

GA – United Nations General Assembly

HDA – Housing Development Agency

HRC – Human Rights Council

ICESCR – International Covenant on Economic, Social and Cultural Rights 1966

MEC – Member of the Executive Council

MDG – Millennium Development Goals

NSTT – National Sanitation Task Team

PAJA – Promotion of Administrative Justice Act 3 of 2000

RDP – Reconstruction and Development Programme

SAHRC – South African Human Rights Commission

SALRC – South African Law Reform Commission

SDGs - Sustainable Development Goals

TAC – Treatment Action Campaign

UN – United Nations

UISP – Upgrading of Informal Settlements Programme

VIP – Ventilated Improved Pit latrines

WHO – World Health Organisation

## **Chapter 1: Sanitation - an introduction**

### **1.1.THESIS OBJECTIVES**

Developing upon international legal trends it will be shown that there are immediate human rights concerns over the lack of access to sanitation within South Africa. Unfortunately, South Africa's Bill of Rights does not enshrine a fundamental right of access to sanitation.<sup>1</sup> Such a right would provide a powerful basis, sourced in the country's rich constitutional jurisprudence, from which to challenge the state to provide for the basic needs of the poor. However, despite this not being the case, it is submitted that there is an alternative and principled basis in South African law to fashion a similar right.

It has been over two decades since South Africa has become a constitutional democracy and it has since developed a vast network of legislation, supported by policy, which seeks to facilitate the provision of basic services. These services include not only the provision of housing, electricity and water but sanitation as well. Using this source of law as a departure point, it will be shown that where litigants seek to protect their existing access to sanitation or otherwise intend to compel the state to provide this essential service, they must frame their cause of action with reference to the entitlements that flow from this legislative and policy framework. To do so would give effect to what is broadly referred to as their 'right of access to sanitation'. In short, this thesis is an attempt to outline this right and the ways it could be protected and realised through litigation.

### **1.2. METHODOLOGY**

This thesis was completed using desk based research entirely and studies both primary and secondary sources to the extent that they are relevant to those who seek to enforce a right of access to sanitation. Although international law is briefly discussed, the primary sources relied on are primarily South African case law, legislation and policy whereas the secondary sources used consist of government guidelines, scholarly journal articles and books.

### **1.3.STRUCTURE OF THESIS**

In this Chapter the international status of sanitation will be discussed. Included within this discussion is a brief description of the human rights implications of poor sanitation and what the content of a human right to sanitation is considered to be internationally. Furthermore, international assessments will be used to gauge how South Africa fares globally in providing access to sanitation.

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<sup>1</sup> Constitution of the Republic of South Africa, 1996.

In Chapter 2 South Africa's sanitation service delivery record is scrutinised before outlining the country's sanitation related legislation and policy. It will be shown that a right access to sanitation comprises of a range of entitlements and, depending on the context, a person may enforce access to either basic, interim or a form of adequate sanitation. It is concluded that together, these various forms of access comprise what is referred to more broadly as a right of access to sanitation.

Finally, in Chapter 3 South Africa's first and second wave socio-economic rights jurisprudence is discussed critically. It will be shown how the Constitutional Court's second wave jurisprudence is typified by an increased reliance on the procedural aspects of the rights enforcement process. This trend presents comparable developments to South Africa's administrative law and it is upon this growing symbiosis that this paper will focus before concluding on the judgement of *Joseph*.<sup>2</sup> This judgement presents some unique insight into the increased proceduralisation of socio-economic rights and delivers the legal framework for a so called public law right to sanitation.

#### 1.4. INTERNATIONAL STATUS

'Water is life, sanitation is dignity.'

Above stands the slogan of South Africa's Department of Water and Sanitation (DWS). The quote, although short and simple, is telling. Without water, a human being cannot live. Without sanitation, the quality of a person's life is compromised. However, the provision of access to water and sanitation on a non-discriminatory basis extends to a number of human rights beyond life and dignity including, the rights to health, food, education, housing and an adequate standard of living.<sup>3</sup> What the available evidence suggests is that where the provision of water and sanitation to a community is poor, it is invariably the case that the public health and wellbeing of those who live in such an environment is severely compromised.<sup>4</sup>

Access to clean water is generally necessary for safe hygiene practice and the proper use of sanitary facilities. A lack of access to clean water and safe sanitation often presents significant risks to certain, sometimes vulnerable, groups of people. Women and children in the developing parts of Africa are generally responsible for the provision of their household's water for cooking, cleaning and sanitary purposes. They spend much of their day travelling

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<sup>2</sup> *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC).

<sup>3</sup> South African Human Rights Commission (SAHRC), *Report on the Right to Access Sufficient Water and Decent Sanitation in South Africa* (2014) at 36.

<sup>4</sup> *Ibid.*

great distances through difficult and dangerous terrain to reach the nearest water source.<sup>5</sup> This necessity also means that the collection of water takes precedence over time spent at school or otherwise pursuing work opportunities. These circumstances do not fare any better for those with disabilities where, even should sanitary facilities be readily accessible to the community, these facilities nevertheless fail to structurally accommodate for their particular needs.<sup>6</sup>

Of further concern is the fact that a lack of access to clean water and sanitation places additional burdens on the weakened immune systems of people who are HIV positive and allows for the proliferation of what would otherwise be preventable diseases like diarrhoea and cholera.<sup>7</sup> Global statistics reveal that as many as 3600 children die daily from diarrhoeal diseases due to their relatively weak immune systems and exposure to poor living conditions.<sup>8</sup> In this respect, the substandard management of wastewater treatment facilities contributes greatly to these deplorable living conditions, often allowing their sewage outflows to release wastewater back into the environment where families wash, drink and live.<sup>9</sup>

As has been alluded to, those people who lack access to clean water and sanitation will also generally be society's poorest and most marginalised. It has been shown that poor people living in the informal settlements of developing countries ordinarily have the least affordable access to clean water, often relying primarily on vendor bought bottles for their daily drinking, cooking or hygiene needs.<sup>10</sup> Furthermore, it is almost always these very same people who have limited access to a number of other basic and interrelated services, including access to adequate housing, health and education.<sup>11</sup>

Catarina de Albuquerque, a former United Nations Special Rapporteur on the human right to safe drinking water and sanitation, argues that despite being of fundamental importance to our daily existence, sanitation continues to occupy a space of 'cultural taboo' within most societies. However, the reality is that over a billion people worldwide have little to no access to sanitation at all, often defecating in the open fields and streets of their communities.<sup>12</sup>

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<sup>5</sup> Ibid at 37.

<sup>6</sup> Ibid.

<sup>7</sup> Department of Water Affairs and Forestry (DWA), *Sanitation for a Healthy Nation: Questions and Answers on the White Paper on Basic Household Sanitation* (2002) at 3.

<sup>8</sup> Catarina de Albuquerque, *On the Right Track: Good Practices in Realising the Rights to Water Sanitation* (2012) at 20.

<sup>9</sup> Ibid at 19-20.

<sup>10</sup> Ibid at 20.

<sup>11</sup> Ibid at 21.

<sup>12</sup> Ibid at 19.

In fact, following De Albuquerque's report, a recent joint global assessment released by UNICEF and the World Health Organisation (WHO) revealed that 2.4 billion people worldwide lack access to improved sanitation facilities.<sup>13</sup> Their assessment defines improved sanitation facilities as those which separate human excreta from human contact and are therefore considered 'safe' by international standards.<sup>14</sup> Examples of acceptable facilities include flush/flush pour piped sewer systems or pit latrines, ventilated improved pit (VIP) latrines, pit latrines with a slab, and composting toilets.<sup>15</sup>

In light of growing international pressure, human rights to water and sanitation have received increasing recognition and protection. Several binding international treaties have previously recognised the value and importance of water and sanitation, including the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),<sup>16</sup> the 1989 Convention on the Rights of the Child (CRC)<sup>17</sup> and the Convention on the Rights of Persons with Disabilities (CRPD).<sup>18</sup> The Committee for Economic, Social and Cultural Rights (CESCR) has indicated that access to sanitation is required to realise the rights to both an adequate standard of living and adequate housing.<sup>19</sup> In other words, the right to adequate housing contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR) envisages sustainable access to sanitation<sup>20</sup>

It was only in 2010 that the United Nations General Assembly (GA) passed a resolution of its own, proclaiming 'the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights.'<sup>21</sup> Furthermore, a resolution passed by the UN Human Rights Council (HRC) has since confirmed that the right to water and sanitation is legally binding in terms of international law.<sup>22</sup> The motivation behind these resolutions is to place rights to water and sanitation amongst other international human rights where it is hoped that they will receive the necessary exposure to incentivise states to pass domestic legislation and policy to protect

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<sup>13</sup> UNICEF & WHO, *Progress on Sanitation and Drinking Water – 2015 update and MDG assessment* (2015) at 5.

<sup>14</sup> *Ibid* at 44 & 50.

<sup>15</sup> *Ibid* at 50.

<sup>16</sup> Art. 14(2)(h).

<sup>17</sup> Art. 24 para 2.

<sup>18</sup> Art. 28 para 2(a).

<sup>19</sup> De Albuquerque *op cit* note 8 at 26.

<sup>20</sup> CESCR, *General Comment No. 4: The Right to Adequate Housing (Art. 11(1) of the Covenant)*, 13 December 1991, E/1992/23 para 8(b).

<sup>21</sup> UN General Assembly, *The human right to water and sanitation: resolution adopted by the General Assembly*, 3 August 2010, A/RES/64/292.

<sup>22</sup> UN Human Rights Council, *The human right to safe drinking water and sanitation: resolution adopted by the Human Rights Council*, 2 October 2014, A/HRC/RES/27/7.

them.<sup>23</sup> As with all other human rights, it will also impose duties on state governments to respect, protect and fulfil these rights.<sup>24</sup>

These three core responsibilities require at a minimum that state governments refrain from negatively infringing upon or otherwise preventing people from enjoying the access they already have to water and sanitation without providing an adequate alternative. However, rights to water and sanitation are also socio-economic rights and, like all economic, social and cultural rights, they are subject to the requirement of “progressive realisation”.<sup>25</sup> Specifically, this positive duty imposed in terms of the ICESCR requires that states take “deliberate, concrete, and targeted steps” toward realising their obligations in terms of the Covenant.<sup>26</sup> In other words, although recognising the technical, economic and political constraints facing state parties, the Covenant requires that states do not sit idly by, but take incremental steps towards realising these rights within their “maximum available” resources.<sup>27</sup>

South Africa, who remains a member state of the UN, voted in favour of the above-mentioned GA resolution, committing itself to the position that such a right is deserving of being respected, protected and fulfilled.<sup>28</sup> However, what should be of particular concern to South Africa is the finding by UNICEF and WHO that despite remarkable growth, sub-Saharan Africa has maintained its status of having some of the poorest access to improved sanitation in the world.<sup>29</sup>

South Africa in particular is considered to have made “moderate progress” toward reaching its Millennium Development Goals (MDG). This means that it failed to meet its commitment to halving the portion of its population who do not have sustainable access to basic sanitation.<sup>30</sup> Access to basic sanitation is based on the MDG indicator of who has access to or use of an improved sanitation facility.<sup>31</sup> Therefore, what the figures of UNICEF and WHO’s joint global assessment reveal is that while 51% of the country’s population had access to improved sanitation in 1990, it has only managed to increase this overall percentage

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<sup>23</sup> De Albuquerque op cit note 8 at 22-23 & 29.

<sup>24</sup> Ibid at 22.

<sup>25</sup> Ibid at 23.

<sup>26</sup> CESCR, *General Comment No. 3: The Nature of States Parties’ Obligations (Art. , Para. 1, of the Covenant)*, 14 December 1990, E/1991/23 paras 2 & 9.

<sup>27</sup> Ibid para 9; De Albuquerque op cit note 8 at 23.

<sup>28</sup> Amnesty International, *Recognition of the Human Rights to Water and Sanitation by UN Member States at the International Level* (2014) at 102.

<sup>29</sup> UNICEF & WHO op cit note 13 at 7 & 12.

<sup>30</sup> Ibid at 12.

<sup>31</sup> Ibid at 51.

to 66% by 2015. The remainder of its population relies primarily on unimproved facilities including shared facilities (22%), other unimproved facilities (8%) or otherwise resorts to open defecation (4%).<sup>32</sup>

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<sup>32</sup> Ibid at 72.

## Chapter 2: Access to Sanitation in South Africa

### 2.1. WHAT IS ACCESS TO SANITATION?

Before discussing how a right to sanitation could be enforced domestically, with all the nuances of South Africa's legal and political realities, the following question remains: what exactly is sanitation and why is it important that people have "access" to it?

"Sewage", defined narrowly, often refers to a category of waste water contaminated with human faeces or urine but can also refer to waste water more generally.<sup>33</sup> On the other hand, "sanitation" is primarily concerned with the infrastructure used to safely remove human waste or sewage including, but is not limited to, ventilated improved pit (VIP) latrines or waterborne flush toilets.<sup>34</sup> In developing countries like South Africa, where there are large and concentrated peri-urban and urban populations, sanitation has both a private and public component, particularly in informal settlements which often rely on shared or communal facilities.<sup>35</sup>

In contrast, the term 'access' speaks to a particular perspective on how sanitation should be conceived of. It is submitted that, like water, sanitation should be seen first as a right and not a mere commodity. What this means is that local government and private companies who have been enlisted to provide basic municipal services must understand that it is their duty to ensure that all households are provided with the acceptable minimum level of access to sanitation despite the availability of finances or whether people are able to afford it.<sup>36</sup> An undertaking like this requires a significant capital investment but it is vital that poor people have access to the necessary infrastructure including water supply, sanitation and refuse removal systems.<sup>37</sup>

Access to sanitation also refers to the ability of people to use and continue using the infrastructure or facilities provided to them. Firstly, anything or anyone that impedes this use would undoubtedly infringe on another's ability to access these facilities. Secondly, to have continued access would most certainly include the ongoing services and maintenance required to keep these facilities running and in working order.<sup>38</sup> If a person, company or the state were

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<sup>33</sup> Socio-Economic Rights Institute of South Africa (SERI), *Basic Sanitation in South Africa: A Guide to Legislation, Policy and Practice* (2011) at 10.

<sup>34</sup> *Ibid* at 13.

<sup>35</sup> *Ibid* at 13-14.

<sup>36</sup> SAHRC *op cit* note 3 at 18.

<sup>37</sup> Department of Provincial and Local Government (DPLG), *Guidelines for the Implementation of the National Indigent Policy by Municipalities* Draft Document 1 (November 2005) at 15.

<sup>38</sup> SAHRC *op cit* note 3 at 18.

to hamper another's access this would not only run the risk of violating their rights, but would also affect the ability of people to lead a dignified existence.<sup>39</sup>

A rights based approach to service delivery further requires that those who provide such services act in accordance with the principles of engagement and transparency.<sup>40</sup> These principles envision effective and comprehensive public participation, that attention is given to especially vulnerable groups, that there is sufficient access to information and that grievance mechanisms are put in place to ensure accountability. Furthermore, the principle of non-discrimination is particularly important as it is essential to ensure that there is universal access to services like sanitation and that access is not excluded on the basis of either race, class, gender, sexual orientation, disability or religion.<sup>41</sup>

## 2.2. STATUS OF ACCESS TO SANITATION IN SOUTH AFRICA

At first glance South Africa's overall status in respect to the provision of sanitation does not immediately portray a state of crisis. Statistics South Africa's latest General Household Survey revealed that nationally the percentage of households with access to Reconstruction and Development Programme (RDP) standard toilet facilities has increased from 62,3% in 2002 to approximately 79,9% in 2015.<sup>42</sup> The Western Cape (93,3%) and Gauteng (91%) registered the highest in this respect with the Eastern Cape (81,7%) showing the most dramatic improvement, increasing access to sanitation in the region by 48,2%.<sup>43</sup> Furthermore, the statistics reveal that sanitation service delivery to the country's metropolitans, which hosts the country's most concentrated urban populations, sits well above the overall national average at 89,9%, with the City of Tshwane (82%) and eThekweni (83,5%) registering the lowest in performance.<sup>44</sup>

Once deconstructed however, these statistics portray a rather contrasting narrative. Other parts of the country have registered almost no growth over the last 7 years and, in some cases, have even depreciated. Only half of the population of Limpopo (53%) has access to RDP standard sanitation whereas Mpumalanga (65,8%) and the North West (66,4%) have approximately two-thirds access.<sup>45</sup> Along with the Eastern Cape, these three provinces also

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<sup>39</sup> Ibid at 7.

<sup>40</sup> Ibid at 34.

<sup>41</sup> Ibid.

<sup>42</sup> Statistics South Africa, *General Household Survey 2015* (Issued: 02 June 2016) at 49.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid at 50.

<sup>45</sup> Ibid at 49.

registered the worst figures, at approximately 7%, for households that have never had access to sanitation services at all.<sup>46</sup>

Besides satisfaction surveys, there is little official government discussion of the quality of the sanitation service provided.<sup>47</sup> RDP level services generally speak to the minimum required of government and are often far from desirable. The City of Cape Town, who often proclaims its sanitation service delivery to be the best in the country, is a case in point.<sup>48</sup> Despite the City's claims that its statistics are being misconstrued, there has been enough evidence presented by the Social Justice Coalition, GroundUp and Cornerstone Economic Research to suggest that not only are sanitation budget allocations to informal settlements completely inadequate<sup>49</sup> but further, as the South African Human Rights Commission (SAHRC) reports, the quality of the sanitation service in places like Khayelitsha may in fact constitute human rights violations.<sup>50</sup> The same may be true for the informal settlement of Masiphumelele near Cape Point.<sup>51</sup>

There also appear to be concerning, yet substantiated allegations that the South African government is inflating its figures to portray a higher level of access to sanitation than is the reality.<sup>52</sup> Reports across the country suggest that the norms and standards being applied by the national government are incorrect and that it often considers non-functioning, broken or defective infrastructure in support of its claims that it is providing 'access'.<sup>53</sup> In its findings on the status of sanitation in South Africa, the SAHRC sums up this situation as follows, noting that:

Therefore, national statistics might indicate a higher level of access than is actually enjoyed in reality. If infrastructure for a service is provided, it seems to be considered by government that the right has been realised, despite the fact that there is no access

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<sup>46</sup> Ibid at 50.

<sup>47</sup> Ibid.

<sup>48</sup> Masizole Mngqasela 'Cape Town's sanitation delivery the best in country' *GroundUp* 25 May 2016, available at <http://www.groundup.org.za>, accessed on 30 August 2016.

<sup>49</sup> Albert van Zyl & Jessica Taylor 'Does the SJC understand Cape Town's budget? You be the judge' *GroundUp* 24 May 2016, available at <http://www.groundup.org.za>, accessed 30 August 2016.

<sup>50</sup> Daneel Knoetze 'Human Rights Commission to probe city toilets again' *GroundUp* 5 March 2015, available at <http://www.groundup.org.za>, accessed on 30 August 2016.

<sup>51</sup> Thembela Ntongana 'What it is like to live in Masiphumelele' *GroundUp* 11 June 2015, available at <http://www.groundup.org.za>, accessed on 30 August 2016.

<sup>52</sup> SAHRC op cit note 3 at 53.

<sup>53</sup> Ibid at 53-54.

due to non-functional infrastructure and systems. In addition, evidence shows that some communities are still being charged for services that they do not receive.<sup>54</sup>

The SAHRC has found that of equal concern is the state of water and waste water treatment plants across South Africa which are in a general state of disrepair and ill equipped to meet the needs of a growing population.<sup>55</sup> It has been reported that not only does the quality of this vital service vary across the provinces, but that in some provinces it is almost non-existent. To illustrate this point, a representative of the National Taxpayers Union has previously indicated that there are as little as 33 functional sewerage works across the country and none of them are to be found in the Free State.<sup>56</sup>

What these symptoms appear to illustrate is that, amongst other things, government lacks a sincere commitment to the provision of sanitation and an understanding of what a rights based approach to sanitation entails. Many who have reported to the SAHRC have cited that local government in particular is non-responsive, fails to engage with the community and fails to see the importance in generating awareness on peoples' rights.<sup>57</sup> The result is that government regularly reaches inappropriate decisions and fails to appreciate the effects that these decisions have on the vulnerable and marginalised.<sup>58</sup> What is particularly concerning in the South African context is the high incidence of sexual violence inflicted on women and girls of all ages who fail to find safe access to sanitary facilities and who, often at night, seek out dangerously secluded fields and bushes to relieve themselves.<sup>59</sup>

It is also no coincidence that a lack of access to sanitation to South Africa's highly impoverished communities consists of black people who were historically disadvantaged under apartheid.<sup>60</sup> However, over two decades later, using the spectre of apartheid alone as an excuse for a lack of access to sanitation loses increasing credibility as government fails to act outright on its service delivery mandates. Nevertheless, there are two particularly important and interrelated inferences to be drawn from the statistics and reports provided above. The first is that there is a direct correlation between urban development and the quality of sanitation service delivery within South Africa. The second, and a corollary of the first, is that it is the country's peripheral rural and peri-urban populations, its poorest and most

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<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid at 55.

<sup>57</sup> Ibid at 60.

<sup>58</sup> Ibid at 61.

<sup>59</sup> Ibid at 61-62.

<sup>60</sup> Ibid at 40.

vulnerable, who have little to no access to sanitation and who have largely been ignored by government.

## 2.3. SANITATION RELATED LEGISLATION AND POLICY

### 2.3.1. *Who is responsible for the provision of sanitation?*

Initially, with South Africa's transition into a constitutional democracy, the primary authority tasked with addressing the country's woefully unequal distribution of sanitation services, a legacy of the apartheid regime, fell on the Department of Water Affairs and Forestry (DWA).<sup>61</sup> It launched the National Sanitation Programme in 1996 which aspired to erasing South Africa's sanitation backlog by 2010. Furthermore, in order to better coordinate the relevant governmental departments involved, the National Sanitation Task Team (NSTT) was formed with representatives not only from Department of Water Affairs (DWA) but also the Departments of Health, Education, Housing, Environmental Affairs, Public Works and the National Treasury.<sup>62</sup>

Unfortunately, the NSTT was disbanded and further attempts to coordinate the relevant departments enjoyed relatively little success.<sup>63</sup> This has been exasperated by the numerous departmental and cabinet reshuffles by the national executive in recent years.<sup>64</sup> With the election of President Jacob Zuma in 2009, the provision of sanitation was transferred to the Department of Human Settlements (DHS) and, following the general election in 2014, was transferred back to the DWA. On this occasion it was renamed the Department of Water and Sanitation where it is hoped that the consolidation of sanitation delivery under a single national department will streamline executive decision making.<sup>65</sup>

### 2.3.2. *Constitutional Governance*

Although a variety of socio-economic rights are enshrined in the Constitution's Bill of Rights, the right of access to sanitation is not amongst them. However, there are a number of provisions found elsewhere in the Constitution that could indirectly serve to protect such a right. Perhaps the most relevant of these provisions can be found under Part B of Schedule 4 of the Constitution which provides that local government is primarily responsible for the delivery of water and sanitation services. Its powers and responsibilities in this respect are set

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<sup>61</sup> SERI op cit note 33 at 8.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid.

<sup>64</sup> South African Law Reform Commission (SALRC) Discussion Paper 141 (Project 25), *Statutory Law Revision: Legislation Administered by the Department of Water and Sanitation* (January 2016) at 12-13.

<sup>65</sup> Ibid.

out further under Ch 7 of the Constitution where both s 152 and s 153 lay these out in further detail.

The objects of local government are listed in section 152(1) which provides that local government must be democratic and accountable; deliver services to communities sustainably; promote social and economic development; promote a safe and healthy environment; and encourage community participation. Furthermore, the developmental duties of municipalities are provided in terms of section 153, which requires that they structure their administrative, budgeting and planning processes to give priority to the basic needs of local communities and, like section 152, promote social and economic development.

In other words, the Constitution envisions that it is local government that will administer on the ground access to sanitation. Bearing this in mind, the provisions contained in section 195 of the Constitution set out the basic values and principles governing public administration. Not only must the public administration promote the democratic values and principles contained in the Constitution it must, amongst other things, make efficient, economic and effective use of state resources; provide services equitably; encourage public participation; remain accountable and act transparently.<sup>66</sup>

In order to understand whether these constitutional objectives are being given effect to, it is important to understand the relevant legislative and policy schemes designed to implement them. As already noted, the Constitution indicates that it is primarily a service delivery matter and, in this respect, South Africa has developed one of the most progressive legislative and policy frameworks for basic services in the world.<sup>67</sup>

### 2.3.3. Local Government

The Municipal Systems Act is designed to give effect to sections 152, 153 and 195 of the Constitution.<sup>68</sup> The Preamble to Act requires that local government work progressively toward providing basic services to all people, particularly those that are poor or disadvantaged. To facilitate this requirement local government or municipalities are required to give priority to the basic needs of the local community and ensure that all its members have access to the ‘minimum level of municipal services’.<sup>69</sup>

The Act defines ‘basic municipal services’ as those services that are necessary to ‘ensure an acceptable and reasonable quality of life and, if not provided, would endanger

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<sup>66</sup> Section 195(1) of the Constitution.

<sup>67</sup> SAHRC op cit note 3 at 28.

<sup>68</sup> Section 51 of Act 32 of 2000.

<sup>69</sup> Section 73(1).

public health or safety or the environment.’<sup>70</sup> However, the provision of these basic services to the poor must also be financially sustainable.<sup>71</sup> Therefore, they are subject to municipal tariff policies which may include tariffs that cover operating or maintenance costs, special or life line tariffs, or any other method of subsidisation.<sup>72</sup>

In terms of the Act the Minister may issue regulations for the ‘development and implementation of an indigent policy’.<sup>73</sup> Two policies designed to facilitate this requirement were the Free Basic Services (FBS) programme and the Free Basic Water (FBW) Implementation Strategy, adopted in 2000 and 2001 respectively.<sup>74</sup> In 2005 the South African Department of Local Government, which has since transitioned into the Department of Cooperative Governance and Traditional Affairs, issued Guidelines for the Implementation of the National Indigent Policy by Municipalities.<sup>75</sup>

The guideline provides that ‘due to the level of unemployment and poverty within municipal areas, there are both households and citizens who are unable to access or pay for basic services; this grouping is referred to as the “indigent”’.<sup>76</sup> The guideline defines ‘indigent’ broadly as those persons ‘lacking the necessities of life’ which includes sufficient water, basic sanitation and environmental health.<sup>77</sup> In light of the fact that the Constitution provides that all citizens have a right of access to the basic level of services, municipalities are required to ‘develop and adopt an indigent policy to ensure that the indigent can have access to the package of services included in the FBS programme’.<sup>78</sup>

Because those classified as indigent cannot afford to pay, the guideline provides an outline of essential services and the free basic amount of each service that each person is entitled to. At the very minimum, an indigent person is entitled to a ‘Free Basic Water’ supply of 6 kilolitres per household per month and, in respect to sanitation, is entitled to access either a ventilated improved pit latrine or toilet connected to a septic tank or to water-borne sewerage.<sup>79</sup> However, it is worth noting that the guideline acknowledges that the

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<sup>70</sup> Section 1.

<sup>71</sup> Section 73(1)(c).

<sup>72</sup> Section 74(2)(c).

<sup>73</sup> Section 104(1).

<sup>74</sup> SERI op cit note 33 at 6.

<sup>75</sup> DPLG op cit note 37.

<sup>76</sup> Ibid at 12.

<sup>77</sup> Ibid at 22.

<sup>78</sup> Ibid at 12 & 27.

<sup>79</sup> Ibid at 26.

provision of FBS services alone will not see the standard of living for indigent communities improve without an integrated approach to delivering social services more broadly.<sup>80</sup>

#### 2.3.4. The Department of Water and Sanitation

The DWS is the national custodian of water resources and is responsible for the formulation and implementation of legislation and policy pertaining to the water sector. Included within the scope of its jurisdiction is the provision of sanitation.<sup>81</sup> More specifically, the DWS is required to establish national policy guidelines, national water and sanitation strategies, authorise waste discharge, develop enforcement mechanisms, set minimum standards and monitor the progress of sanitation service delivery.<sup>82</sup> Furthermore, its national and provincial spheres are responsible for exercising oversight over local government in fulfilling these objectives.<sup>83</sup>

The Water Services Act outlines the duties of the DWS and confirms the position that the South African government has indeed committed itself to the provision of sanitation from a rights based perspective.<sup>84</sup> In short, the Act provides that water service institutions and authorities in local government are required to facilitate the ‘right of access to basic sanitation’ which they must take ‘reasonable measures’ to realise.<sup>85</sup> However, read alone, it is not entirely clear what measures the Act envisions.

The Act further falls short of defining the precise content of what could be considered access to basic sanitation. It defines ‘basic sanitation’ as the ‘prescribed minimum standard of services necessary for the safe, hygienic and adequate collection, removal, disposal or purification of human excreta, domestic waste-water and sewage from households, including informal households.’<sup>86</sup> However, the Regulations Relating to Compulsory National Standards and Measures to Conserve Water serves as a guideline to interpreting the Act.<sup>87</sup> It requires that the minimum standard for basic sanitation include the ‘provision of appropriate health and hygiene education’ as well as a toilet which is safe, reliable, environmentally sound, well ventilated and ensures privacy.<sup>88</sup>

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<sup>80</sup> Ibid at 10.

<sup>81</sup> SALRC op cit note 64 at 13.

<sup>82</sup> National Sanitation Policy 2016 at 3.

<sup>83</sup> Ibid.

<sup>84</sup> Act 108 of 1997.

<sup>85</sup> Section 3.

<sup>86</sup> Section 1.

<sup>87</sup> Reg. 2 of Government notice R509 of 8 June 2001.

<sup>88</sup> Section 2.

Of course the general lack of content in terms of the Act may be a result of the fact that it is predominantly water related legislation. However, there has been a growing focus by the DWS and its predecessors on sanitation specific policy in recent times. The 2008 Free Basic Sanitation (FBSan) Implementation Strategy was developed to act as a guide to water service authorities in ‘providing all citizens with free basic sanitation by 2014’.<sup>89</sup> Although the completion of this objective remains outstanding, the Preface to the FBSan Strategy acknowledges that a ‘right of access to a basic level of sanitation service is enshrined in the Constitution’ and reiterates that local government has an obligation to ensure that poor households are not denied access to basic services due to their inability to pay for them.<sup>90</sup>

The FBSan Strategy defines basic sanitation much the same way as the Act but anticipates that the provision of sanitation must be flexible in the face of the inevitable financial challenges that face government. Notwithstanding these constraints, it provides that there is no excuse for people receiving less the minimum basic level of access to sanitation.<sup>91</sup> On a technical level this minimum closely resembles the Guidelines for the Implementation of the National Indigent Policy by Municipalities, namely, it requires anything from VIP latrines to waterborne flush toilets, funded through a variety of tariff or subsidy arrangements.<sup>92</sup>

The DWS’s most recent report on the provision of sanitation is also the Department’s most comprehensive. Last year the DWS released its much anticipated National Sanitation Programme which reviewed the current legislative and policy framework as it relates to sanitation.<sup>93</sup> Its Preamble notes that despite the gains of the White Paper on Water Supply and Sanitation (1994); the White Paper on a National Water Policy of South Africa (1997); the White Paper on Basic Household Sanitation (2001) and the Strategic Framework for Water Services (2003), there is ‘an absence of regulation at all levels of government’ concerning sanitation.<sup>94</sup>

The policy acknowledges that a ‘right to sanitation’ is implicit in the fundamental rights to dignity and access to an environment that is not harmful to a person’s health or wellbeing.<sup>95</sup> Furthermore, it affirms the constitutional responsibility that government must not only ensure that there is ‘universal access to basic sanitation’ but, like the Water Services

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<sup>89</sup> Version 15, 1 October 2008.

<sup>90</sup> Ibid at i.

<sup>91</sup> Ibid at 9.

<sup>92</sup> Ibid at 18, 24-30.

<sup>93</sup> Op cit note 82.

<sup>94</sup> Ibid at 53.

<sup>95</sup> Ibid at 2.

Act, requires that local government ‘must take reasonable measures to realise this right.’<sup>96</sup> However, a noteworthy feature of the policy is its attempt to clearly delineate the concepts of basic sanitation, basic sanitation facilities and basic sanitation services in giving effect to this access.<sup>97</sup>

In contrast to previous legislation and policy, the policy broadens the acceptable minimum level of basic sanitation by placing increased emphasis on the environment and particular vulnerable groups of people.<sup>98</sup> It notes that according to Statistics South Africa, there are only 1.7 million of 3 million recognised indigent households receiving FBSan services.<sup>99</sup> However, where provided, free basic sanitation requires appropriate health and hygiene awareness; the ‘lowest cost’ system that is not only functional but is safe to children, hygienic, easily accessible and does not have a detrimental impact on the environment; houses a toilet with a hand washing facility; ensures a clean living environment both privately and communally; and considers the ‘defecation practices of small children and people with disabilities and special needs.’<sup>100</sup>

On the other hand, basic sanitation facilities or infrastructure should consider the natural topography of the area, be reliable, provide privacy, have the capacity for local operation and maintenance, be well ventilated, maintain control of disease carrying pests, facilitate hand washing, and enable safe and appropriate treatment of human waste.<sup>101</sup> Basic sanitation services refer to the maintenance of basic sanitation facilities to ensure that they are both environmentally and operationally sustainable. This includes the safe removal of human waste or wastewater and the local monitoring of good sanitation and hygiene practices.<sup>102</sup>

A remarkable feature introduced by the policy is the loosely defined ‘polluter pays principle’. The rationale behind the principle flows from the understanding that, first and foremost, ‘sanitation has economic value’.<sup>103</sup> The principle’s purpose is not only to penalise those who pollute but to raise revenue for the provision of water and sanitation.<sup>104</sup> However, the policy provides little guidance on how exactly such a process would be regulated or who

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<sup>96</sup> Ibid at 6.

<sup>97</sup> Ibid at 7-8.

<sup>98</sup> Ibid at 8.

<sup>99</sup> Ibid at 15.

<sup>100</sup> Ibid at 8.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid.

<sup>103</sup> Ibid at 41.

<sup>104</sup> Ibid at 41 & 56.

falls within its scope. Instead, it directs the Minister to issue regulations that will develop and enforce the polluter pays principle.<sup>105</sup>

In terms of South Africa's international obligations, the policy acknowledges that national standards for sanitation will be developed in such a way that corresponds with the international human right to sanitation.<sup>106</sup> It is envisioned that these national standards will reflect international guidelines like those provided by WHO, taking into consideration circumstances unique to South Africa. Furthermore, the objectives of the Sustainable Development Goals (SDGs) will be pursued, including achieving access to adequate and equitable sanitation, substantially increasing water efficiency and strengthening community participation.<sup>107</sup>

#### *2.3.5. The Housing Act*

Given the polycentric nature of service delivery, it is not only the DWS that plays a pivotal role in ensuring that South Africans have access to sanitation. The Department of Human Settlements (DHS) remains the primary authority for the development of South Africa's housing and, therefore, is responsible for much of the infrastructural needs of communities. Therefore, a conversation about sanitation infrastructure is a conversation that cannot be had without reference to the Housing Act<sup>108</sup> which was partly inspired by the 1994 White Paper on Water Supply and Sanitation Policy and which is now South Africa's principal housing legislation.<sup>109</sup>

Its Preamble states that the Act was promulgated to give effect to 'the right to have access to adequate housing' enshrined in s 26 of the Constitution. In terms of s 26(2) the state was required to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.'

The Act explicitly provides for a right of 'access' to 'potable water, adequate sanitary services and domestic energy supply.'<sup>110</sup> Like the Constitution, the Act acknowledges that the provision of adequate housing is a service delivery matter. It requires municipalities to 'take all reasonable and necessary steps' through the applicable housing legislation and policy to realise the right of access to adequate housing. Furthermore, municipalities are required to

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<sup>105</sup> Ibid at 54.

<sup>106</sup> Ibid at 25.

<sup>107</sup> Ibid.

<sup>108</sup> Housing Act 107 of 1997.

<sup>109</sup> SERI op cit note 33 at 27.

<sup>110</sup> Section 1(vi).

ensure that the provision of services, including water, sanitation and electricity, are provided in an economically efficient manner.<sup>111</sup>

Since its proclamation, the Housing Act has been supported further by a comprehensive policy framework. The 2009 National Housing Code sought to introduced technical specifications as to what constitutes a right of access to adequate housing.<sup>112</sup> It provides that in order to facilitate this right South Africans will have access, ‘on a progressive basis’, to potable water and adequate sanitary facilities.<sup>113</sup>

The 1999 National Norms and Standards for the Construction of Stand Alone Residential Dwellings, later revised in terms of the National Norms and Standards in respect of Permanent Residential Structures and which has since been included in the 2009 National Housing Code (the "Code"), Generally speaking, the Code provides that all residential properties developed through national housing programmes are required to meet, at the very least, a minimum level of service. In respect to sanitation this must include communal VIP latrines or an alternative system agreed to with a particular community.<sup>114</sup>

Where sanitary infrastructure is built directly into a single house the Norms and Standards in Respect of Stand Alone Residential Structures (Houses) provide a number of improved specifications that each house is required, at a minimum, to meet. In other words, the standard is higher than would normally be expected of basic services. In respect to providing access to sanitation, this standard includes ‘[a] separate bathroom with a toilet and kitchen with a basin’ that must have a ‘[m]aximum 10 meter connected to municipal water supply and sewer.’<sup>115</sup> Where it is determined that a house requires non-waterborne means of sanitation the Norms and Standards require that a municipality meet the technical requirements of section 7.4 of SABS 0252-2: *Water supply and drainage of buildings; Part 2: Drainage Installations for buildings*.<sup>116</sup>

The Code has been amended further to provide local government with direction in particular or exceptional circumstances where the quality of service delivery may also vary from the basic standard. The Upgrading of Informal Settlements Programme (UISP) is designed to provide funding to municipalities who wish to upgrade informal communities *in situ*. If the request to upgrade the settlement is approved by the MEC for Human Settlements,

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<sup>111</sup> Section 9(1) of Act 107 of 1997.

<sup>112</sup> DHS, ‘Technical and General Guidelines’ Part A of Part 3 Vol. 2 of the National Housing Code (2009).

<sup>113</sup> DHS, ‘The Policy Context’ Part 2 Vol. 1 of the National Housing Code (2009) at 8.

<sup>114</sup> DHS, ‘Technical and General Guidelines’ Part A of Part 3 Vol. 2 of the National Housing Code (2009) at 21.

<sup>115</sup> DHS, ‘Technical and General Guidelines’ Part A of Part 3 Vol. 2 of the National Housing Code (2009) at 27.

<sup>116</sup> *Ibid* at 33.

the Code requires that access to certain interim services, including access to interim sanitation, be provided as part of the first phase of delivering permanent or improved services.<sup>117</sup>

Interim services include the provision of ‘basic water and sanitation services... on an interim basis pending the formalisation of the settlement.’<sup>118</sup> These services are not expected to adhere to the National Norms and Standards at this stage of the project.<sup>119</sup> However, after engaging with the community to ascertain their needs, the provision of permanent sanitary facilities must be of a higher standard of craftsmanship and should adhere to the National Norms and Standards.<sup>120</sup>

A further policy contained in the Code is the Emergency Housing Programme (EHP) which is designed to act as a guide in providing temporary housing in situations of emergency. The EHP requires the provision of interim services in an emergency situation, including the provision of interim sanitation.<sup>121</sup> Similar to the interim services of the UISP, the EHP is not subject to the National Norms and Standards but rather subject to its own. In respect of interim sanitation, the policy provides that at least one ventilated improved pit latrine must be provided per every five households.<sup>122</sup>

Whether the provision of EHP interim sanitation would be held to the minimum standard expected of basic services is still open for debate. However, EHP guidelines published by the Housing Development Agency (HDA) suggest that ‘interim basic municipal services’ may include the provision of basic sanitation and, although not prescriptive, the provision of toilets connected to water borne sewerage in circumstances where authorities decide the minimum to be insufficient.<sup>123</sup>

Recently, the Department of Human Settlements has re-emphasised the integral role that basic sanitation has in realising the right of access to adequate housing in future housing developments.<sup>124</sup> Not only must all new human settlements be fitted with the requisite infrastructure and services that would provide access to basic sanitation, the DHS’s latest White Paper has indicated that the same is expected for existing settlements who must be

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<sup>117</sup> Section 3.13A DHS ‘Upgrading of Informal Settlements Programme’ Part 3 Vol. 4 of the National Housing Code (2009) at 34-37.

<sup>118</sup> *Ibid* at 43.

<sup>119</sup> *Ibid* at 14.

<sup>120</sup> *Ibid* at 37.

<sup>121</sup> Section 2.5 DHS ‘Emergency Housing Programme’ Part 3 Vol. 4 of the National Housing Code 2009.

<sup>122</sup> *Ibid*.

<sup>123</sup> Housing Development Agency (HDA), ‘Implementation of Emergency Housing’ (2012) at 24-25; 47.

<sup>124</sup> DHS, *Towards a Policy Foundation for the Development for the Development of Human Settlements Legislation* (01 Nov 2015) at 27.

provided with ‘basic universal services such as water and sanitation.’<sup>125</sup> In short, the message promoted by the DHS is that government must work collaboratively to ensure that households ‘have access to roads, street lighting, sanitation and water drainage systems.’<sup>126</sup>

### 2.3.6. Concluding remarks

Outlined above is South Africa’s current legislative and policy framework as it applies to sanitation. However, it appears that a distinction can be drawn between providing access to basic sanitation as opposed to interim, adequate or improved sanitation. Clearly these are not all precisely the same things but they do share a significant overlap. Furthermore, collectively, they all form part of a basket of entitlements that facilitate a far wider right of access to sanitation.

We know in light of recent policy that realising a right to basic sanitation refers to a minimum threshold requirement and largely focuses on the needs of the poor. Broadly speaking, the state is required to take reasonable measures to realise this right. In other words, the provision of sanitation will be considered reasonable where access to a toilet is given which, despite being the lowest cost system, takes into consideration the topography of its environment and is considered safe, private, hygienic, well ventilated, reliable, easily accessible and capable of disposing human waste. Furthermore, the design of such a facility must also take into account the use of certain vulnerable groups, including small children and those with special needs or disabilities.

The provision of basic sanitation must also be shown to be environmentally, financially and operationally sustainable. Where a sanitary facility risks the life, health or safety of a community or otherwise threatens harm to the environment, it may be considered unreasonable. Furthermore, it may infringe on certain fundamental rights, particularly the rights to dignity and a healthy environment.

Examples of basic sanitary facilities include, amongst other things, either a VIP pit latrine or toilet connected to a septic tank or water borne sewerage. Furthermore, where an agreement is reached, local government may provide sanitary facilities that are unique to a particular community. However, it is suggested that those facilities would still have to meet the minimum reasonableness threshold applied to standard facilities. In any event, regardless of the facility provided, it must also ensure access to a wash facility.

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<sup>125</sup> Ibid at 27.

<sup>126</sup> Ibid.

In contrast, the provision of interim sanitation is context specific. In terms of the UISP, interim sanitation must, at the very least, reach the minimum threshold expected of basic sanitation. However, as time passes, it is unlikely that the provision basic sanitation alone would be sufficient. Interim sanitation, by its very nature, is considered to be a temporary measure. Once upgraded, a formal settlement is expected have access to a level of service that is not only permanent but adheres to the National Norms and Standards of Stand Alone Residential Structures.

In terms of the Code's EHP it seems that recipients of emergency services may expect the provision of basic services including basic sanitation. Similar to the UISP, the provision of such services should be considered a temporary measure in times of emergency. However, because the cause of an emergency may be unforeseeable and its effects unpredictable, it is arguable that what considered environmentally, financially and operationally sustainable may vary from the basic standard. For Example, the EHP's explicit reference to a ratio of one VIP pit latrine for every five households suggests that access to these interim facilities may be comparatively limited.

It is noteworthy that South Africa's legislation and policy does not explicitly provide for a right of access to 'adequate sanitation'. Nevertheless, there do appear to be a handful of examples where reference is made to acquiring access to adequate sanitary services. Policy maker's reluctance to provide for a specific 'right' of access to adequate sanitation could be a result of their reluctance to elevate a right of access to sanitation to an entitlement resembling a fundamental right. However, following the from the fact that the country's Housing Act is meant to facilitate the right of access to adequate housing, it is conceivable that the Code's National Norms and Standard's provisions on sanitation could amount to a standard considered 'adequate'.

Very little reference is made to 'improved' sanitation let alone explicit reference to it as a standalone right. However, in terms of the UISP especially, it appears to be used interchangeably with its reference to permanent services, services which should adhere to the Code's National Norms and Standards. Therefore, although not conclusive, this could refer to a similar, if not the same, standard expected of adequate sanitary services.

In the international sense the reference to improved sanitation appears to refer to a standard somewhat similar to South Africa's definition of basic sanitation. As was previously mentioned, international authorities like WHO and Unicef refer to 'improved' services as including a variety of broadly defined latrines and toilets. So called 'unimproved sanitation

facilities' which fall short of acceptable standards include pit latrines without a slab, hanging latrines, bucket latrines or 'shared facilities'.<sup>127</sup>

It is suggested that an exclusion of shared facilities should either be revised or treated with some circumspection in respect to its application to developing countries like South Africa. The reason for this is that realising a right of access to sanitation is a nuanced undertaking and, although far from ideal, shared facilities do not necessarily violate a person's access to sanitation.<sup>128</sup> Where facilities are well maintained, safe and hygienic they should be considered acceptable, particularly in the short term.<sup>129</sup>

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<sup>127</sup> UNICEF & WHO op cit note 13 at 52.

<sup>128</sup> De Albuquerque op cit note 8 at 136.

<sup>129</sup> Ibid.

## Chapter 3: Litigating Socio-Economic Rights

### 3.1. INTRODUCTION

The legislative and policy framework regulating sanitation as discussed above demonstrates that a right of access to sanitation does in fact exist in South Africa. This right manifests itself in a variety of forms, be it access to basic, interim, adequate or improved sanitation. All are concerned with service delivery. However, it is possible that there are other forms of sanitation related rights, including the potential for a so called ‘public law right’ to sanitation. The profile for such a right was laid down in the Constitutional Court decision of *Joseph v City of Johannesburg* where litigants were successfully able to show that their ‘public law right to electricity’ was infringed upon.<sup>130</sup>

The decision of *Joseph* falls amongst a larger and more nuanced body of jurisprudence where socio-economic rights and administrative law intersect. It not only provides the basis for so called public law rights, but illustrates the importance of relying on rights and entitlements flowing from legislation and policy to protect access to services. However, before elaborating on the intricacies of this apparent union between two disparate bodies of law it is appropriate to answer a number of preliminary questions.

The first question asks why take a litigious approach to enforcing a right of access to sanitation and what makes this approach advantageous? The second introduces the fundamentals of South Africa’s constitutional and administrative law before a brief yet necessary discussion is had on the principle of legality and whether it may have some use to enforcing a right of access to sanitation. The third explores why justiciable socio-economic rights are controversial and what considerations courts must take into account when pronouncing on them.

#### *3.1.1. The rationale behind formal adjudication*

Although there are a variety of ways to enforce access rights, the perspective adopted by this paper is a litigious one. This is generally considered an unpopular choice because most countries, particularly those in the developing world, consider litigation to be costly, time consuming and therefore inaccessible to those who are most vulnerable.<sup>131</sup> However, it is submitted that, given South Africa’s reality of a public administration widely marred by mismanagement and a general lack of political will, many are left with no alternative but to resort to litigation.

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<sup>130</sup> *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) para 32.

<sup>131</sup> De Albuquerque op cit note 8 at 194.

From this perspective litigation can be used as an effective mechanism to enforce rights, hold government to account, and ensure that communities have appropriate remedies.<sup>132</sup> Furthermore, litigation offers more than just an opportunity for immediate redress and presents the potential for greater legal certainty in future sanitation claims.<sup>133</sup> The importance of this legal certainty extends to both the private and public spheres, compelling states to think critically on how best to draft legislation and policy to address the needs of not only private individuals, but the community at large.<sup>134</sup>

Litigation provides an effective tool for advocacy too. It can serve as the fulcrum around which social mobilisation is organised and provide a powerful platform from which to exert further pressure on policy makers.<sup>135</sup> There are a series of examples contained in this Chapter which illustrate that merely bringing a case before the courtroom persuaded the South African government to amend its policies before the outcome of the case had even been decided.

Finally, in a country where corruption has become so endemic, the importance of an enforceable right to basic services cannot be gainsaid.<sup>136</sup> While the scourge of corruption remains rife, it will be impossible to fully realise any of the fundamental human rights contained in the Constitution, let alone a right of access to sanitation. South Africa's legislation and policy in respect to service delivery seemingly recognises this threat, which is why they, alongside the Constitution, enshrine the concomitant principles of transparency, participation and accountability.<sup>137</sup>

### *3.1.2. The principles of subsidiarity, avoidance and legality*

Before the advent of democracy South Africa was an apartheid state which promulgated racially repressive legislation with effects that span to this day.<sup>138</sup> During this period South Africa was characterised by its oppressive use of administrative power and executive autocracy. Parliamentary sovereignty meant that outside of a limited number of procedural grounds, there was no way to review legislation on a substantive basis. Moreover, it was not

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<sup>132</sup> Ibid.

<sup>133</sup> Ibid at 195.

<sup>134</sup> Ibid at 196.

<sup>135</sup> Ibid at 197.

<sup>136</sup> Ibid at 203.

<sup>137</sup> Ibid.

<sup>138</sup> Currie & De Waal, *The Bill of Rights Handbook* 6<sup>th</sup> ed (2015) at 2-3.

possible to approach a court and challenge the laws of the apartheid state by alleging that they constituted human rights violations.<sup>139</sup>

Following the advent of our constitutional democracy, the Constitution, rather than Parliament, is supreme.<sup>140</sup> Inherent in this development is the principle of constitutionalism which seeks to structure and constrain the exercise of public power.<sup>141</sup> Therefore, while the state is empowered to govern, it can only do so where it acts consistently with the precepts of the law. In other words, the principle of constitutionalism seeks to ensure that although a government may be limited, it cannot exercise arbitrary rule.<sup>142</sup>

Alongside the principles of constitutionalism, democracy and the separation of powers, the Constitution is underpinned by the rule of law sourced in section 1 of the Constitution.<sup>143</sup> Although the doctrine has a long standing history, in South Africa today the rule of law as a standard of judicial review is largely captured in terms of the ‘principle of legality’. This principle prescribes that all law and state conduct must be ‘rationally related to a legitimate government purpose’.<sup>144</sup> This requirement has been most aptly encapsulated by the Constitutional Court in the decision of *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the RSA* where it was held that:<sup>145</sup>

[I]t is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.<sup>146</sup>

Importantly, the Constitutional Court only looked to the principle of legality as a standard of review after declaring that the administrative justice provisions contained in section 33 of the Constitution, which provides that everyone is entitled to 'administrative action that is lawful,

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<sup>139</sup> Ibid at 3.

<sup>140</sup> Section 2 of the Constitution.

<sup>141</sup> Currie & De Waal op cit note 138 at 8.

<sup>142</sup> Ibid.

<sup>143</sup> Ibid at 10.

<sup>144</sup> Ibid at 11.

<sup>145</sup> 2000 (2) SA 674 (CC).

<sup>146</sup> Ibid para 85.

reasonable and procedurally fair', were not applicable. This was because the Court found that the President's conduct did not constitute administrative action.<sup>147</sup>

What the court's reasoning illustrates is the principle of subsidiarity in motion. This, according to Currie & De Waal, is because '[a] norm of such generality and abstraction as the rule of law should not be directly applied until norms of greater specificity have been exhausted.'<sup>148</sup> The norm of greater specificity in this case and at this time would have been the right to administrative justice contained in section 33 if the President's conduct had indeed amounted to administrative action.

Administrative law has evolved somewhat since the decision in *Pharmaceutical Manufacturers*. In terms of section 33(3) of the Constitution the state was required to enact national legislation that would comprehensively give effect to the rights enshrined within it. This took the form of the Promotion of Administrative Justice Act (PAJA).<sup>149</sup> In this context, linked to the principle of subsidiarity is the principle of avoidance which prescribes that litigants should seek out remedies sourced in legislation before they rely directly on constitutional remedies themselves.<sup>150</sup>

In terms of both the principles of subsidiarity and avoidance it should ordinarily be the case that litigants rely on the rights contained in the PAJA first before they rely directly on those contained in section 33. The PAJA contains 'norms of greater specificity' and legislative remedies designed to give effect to the constitutional right. The fundamental right to administrative justice should apply in exceptional circumstances only, namely, when challenging the validity of the PAJA's provisions, to challenge other parliamentary legislation suspected of infringing the right to administrative justice, and when interpreting the provisions of either the PAJA or other legislation.<sup>151</sup>

Unfortunately, the vision that the PAJA would comprehensively regulate and integrate South Africa's administrative law failed to materialise in full. Cora Hoexter describes the PAJA as an opportunity lost and, like the Court in *Grey's Marine v Minister of Public Works*,<sup>152</sup> has criticised the PAJA for its unmanageable definition of 'administrative action'.<sup>153</sup> This is because in order to challenge the exercise of public power in terms of the

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<sup>147</sup> Ibid para 79; Currie & De Waal op cit note 138 at 12.

<sup>148</sup> Currie & De Waal op cit note 138 at 12.

<sup>149</sup> Act 3 of 2000.

<sup>150</sup> Currie & De Waal op cit note 138 at 649-650.

<sup>151</sup> Ibid at 650-651.

<sup>152</sup> 2005 (6) SA 313 (SCA) para 21.

<sup>153</sup> Cora Hoexter, "The Future of Judicial Review in South African Administrative Law" (2000) 117 *SALJ* at 505-506.

PAJA it must first meet the requirements of this definition. However, this definition of administrative action is subject to a ‘palisade of qualifications’ so cumbersome that the Court in *Grey’s Marine* opted instead to use the pre-PAJA definition assigned to section 33 by the Constitutional Court in *President of the RSA v SARFU*.<sup>154</sup>

The result, in part, is that alongside cases concerning administrative action and the application of PAJA there has been a burgeoning of legality review.<sup>155</sup> This flows from the fact that all exercises of public power including administrative action must still be consistent with the principle of legality.<sup>156</sup> As a result of its relative simplicity and flexibility the principle has since proved to be a popular alternative standard for judicial review and has incrementally expanded into areas that were thought to be unique to challenges of administrative action, including lawfulness, rationality and procedural fairness.<sup>157</sup>

These developments have meant that legality review has taken on a form that is similar to both the PAJA and section 33 in content.<sup>158</sup> In the case of *Albutt v Centre for the Study of Violence and Reconciliation* the Constitutional Court relied on legality review intentionally because using the PAJA directly would raise ‘difficult questions’.<sup>159</sup> Although this approach has its advantages it should be noted that it does undermine both the principle of subsidiarity and avoidance by choosing to rely on a more general and abstract constitutional provision over the provisions of the PAJA.<sup>160</sup>

What has been said in relation to the principles of subsidiarity, avoidance and legality is important for two reasons. Firstly, the principles of subsidiarity and avoidance apply to socio-economic rights in the same way that they apply to administrative law. Litigants must frame their cause of action with reference to the entitlements that flow from the legislative and policy framework that was outlined in the previous chapter. This view appears to be supported by the language of the socio-economic rights included in the Constitution which requires that the state ‘take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights.’<sup>161</sup>

Secondly, it should be noted that the cases to be discussed below will almost invariably consider challenges to the exercise of public power. After all, it is the government

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<sup>154</sup> Ibid paras 21-24; *President of the RSA v SARFU* 2000 (1) SA 1 (CC).

<sup>155</sup> Lauren Kohn ‘The burgeoning constitutional requirements of rationality & the separation of powers: Has rationality gone too far’ (2013) 130 *SALJ* 810.

<sup>156</sup> *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) para 49.

<sup>157</sup> Currie & De Waal op cit note 138 at 688-689.

<sup>158</sup> Ibid at 689.

<sup>159</sup> *Albutt* supra note 156 para 80.

<sup>160</sup> Currie & De Waal op cit note 138 at 690.

<sup>161</sup> Sections 26(2) & 27(2) of the Constitution.

that is responsible for the provision of basic services like housing, electricity, water and sanitation. There will be cases where the PAJA is considered and cases where it is not. However, none of these cases, including those relating to sanitation, contemplate a successful challenge using the principle of legality.

Nevertheless, for the sake of completeness a discussion of the principle of legality is necessary. In many of these cases it would appear that the applicants involved did not even consider an application of legality review when it would have been applicable. This is not to say that it would have had any material bearing on the outcomes of these cases or that using legality review was even necessary. However, it should always be borne in mind that the principle of legality provides a flexible yet effective standard of review in difficult cases, particularly where the exercise of a public power does not constitute administrative action.

### *3.1.3. Justiciability of socio-economic rights*

Although it is suggested that litigants should rely directly on sanitation related legislation and policy to enforce their right of access to sanitation this does not mean that fundamental rights should be discarded. Like the right to administrative justice it is submitted that socio-economic rights perform the same interpretive and review functions in respect to the legislation and policy designed to give effect to them. In this respect, there are two socio-economic provisions contained in the Bill of Rights that are of particular importance when outlining a right of access to sanitation. The first provision is the right of access to adequate housing enshrined in terms of section 26 and the second contains the rights of access to health care, food, water and social security enshrined in terms of section 27.

It should not be forgotten that the inclusion of justiciable socio-economic rights in the Constitution is part of its transformative ambition to ensure that all people are capable of enjoying a life of dignity, freedom and equality.<sup>162</sup> The justiciability of these rights like all human rights places negative duties on other parties not to interfere with them and positive duties on the state to realise them.<sup>163</sup> However, it is also the justiciability of socio-economic rights that gives rise to certain institutional concerns and difficulties for the courts.<sup>164</sup>

Many commentators and state officials claim that the judiciary is not well suited to enforcing socio-economic rights. The first of these concerns is the suggestion that a judicial proclamation on the enforcement of socio-economic rights infringes on the separation of

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<sup>162</sup> Currie & De Waal op cit note 138 at 564.

<sup>163</sup> Ibid.

<sup>164</sup> Ibid at 565.

powers principle because it is the executive that is responsible for service delivery.<sup>165</sup> Where a court orders the state to redistribute resources in a way that is different to what was intended, it is the executive, and not the judiciary, that is the democratically elected branch of government and therefore accountable to ordinary South Africans for how these resources are delivered.<sup>166</sup>

Secondly, a concern that causes the judiciary further institutional anxiety is the polycentric effects of their orders in socio-economic rights cases. Many suggest that the judiciary is neither equipped with the personnel nor the resources to fully comprehend the budgetary or infrastructural considerations that sometimes affect the decisions of entire state departments.<sup>167</sup> Not only would a court have to take into account this ‘complex web of mutually interacting resource allocations’, but it would also have to consider the consequences of its decision on the state and society at large.<sup>168</sup>

Although these factors may explain the Constitutional Court’s cautious and deferential approach in many of its socio-economic rights cases of late, they do not reflect on the fact that these rights remain justiciable.<sup>169</sup> As the Court explained in its *First Certification* judgment:<sup>170</sup>

Nevertheless, we are of the view that these rights are, at least to some extent, justiciable. As we have stated in the previous paragraph, many of the civil and political rights entrenched in the New Constitution will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion. In light of these considerations, it is our view that the inclusion of socio-economic rights in the New Constitution does not result in a breach of the... [separation of powers].<sup>171</sup>

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<sup>165</sup> Ibid.

<sup>166</sup> Ibid at 566.

<sup>167</sup> Ibid.

<sup>168</sup> Ibid at 566-567.

<sup>169</sup> Ibid at 568.

<sup>170</sup> *Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa (First Certification judgement)* 1996 (4) SA 744 (CC).

<sup>171</sup> Ibid para 78.

### 3.2. SOCIO-ECONOMIC RIGHTS: THE FIRST WAVE

Socio-economic rights have a dual character. Firstly, as was mentioned above, they are capable of being negatively protected, preventing the state and private persons from interfering with the existing rights of others. Secondly, sections 26(2) and 27(2) of the Constitution require the state to take positive measures toward realising these rights by requiring that it take ‘reasonable legislative and other measures’ to achieve the ‘progressive realisation’ of these rights.

To date there are 23 Constitutional Court cases concerning fundamental socio-economic rights, 15 of them relating to the right of access to adequate housing alone.<sup>172</sup> Looking at this jurisprudence in its entirety, Stuart Wilson and Jackie Dugard suggest that it can be divided into two distinct periods or ‘waves’.<sup>173</sup> They suggest that the more traditional ‘first wave’ ranges between 1998 and 2005. This period is characterised by the South African political context of the period and by the fact that justiciable socio-economic rights were still a relatively novel phenomenon at the time. The Constitutional Court had to inspire confidence in its institutional integrity while also ensuring that the newly elected ANC government maintained its commitment to socio-economic transformation and basic service delivery.<sup>174</sup>

One of the first of the Constitutional Court’s judgements is also one of its most important, illustrating how both the negative and positive facets of a right can be employed. In the case of *Government of the RSA v Grootboom*, a group of people who lived in deplorable conditions decided to illegally occupy private land that was earmarked for low cost housing.<sup>175</sup> After refusing to leave the property a magistrate granted an eviction order against the occupiers. However, not only was the eviction carried out a day early, it was carried out using destructive methods that were reminiscent of the country’s apartheid past.<sup>176</sup> Rendered homeless, the occupiers applied for an order that the state provide them with temporary basic shelter until they received permanent accommodation in terms of the right of access to adequate housing.<sup>177</sup>

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<sup>172</sup> S Wilson, J Dugard & M Clark ‘Conflict management in an era of urbanisation: 20 years of housing rights in the South African Constitutional court’ (2015) *SAJHR* at 472.

<sup>173</sup> S Wilson & J Dugard ‘Constitutional Jurisprudence: The First and Second Waves’ (2011) *Research Gate*, accessed 21 April 2016 at 1.

<sup>174</sup> *Ibid* at 3.

<sup>175</sup> 2001 (1) SA 46 (CC) paras 3-4.

<sup>176</sup> *Ibid* para 88.

<sup>177</sup> *Ibid* para 4.

The Court noted that the question before it was not whether socio-economic rights were justiciable, but rather, to what extent these rights are enforceable in the particular circumstances.<sup>178</sup> It held that in light of the facts of the case the state had, at the very least, violated the negative obligations imposed on it in terms of s 26(1).<sup>179</sup> However, the Court acknowledged that this was not enough and that the Constitution harboured a vision for a society where adequate housing is made accessible to all South Africans.<sup>180</sup>

With the positive obligations contained in s 26(2) in mind, the most important of the Court's pronouncements was its adoption of the flexible "reasonableness test" which it used to investigate the reasonableness of the state's housing policy.<sup>181</sup> Firstly, in defining the notion of 'access' to housing, the Court held:

The State's obligation to provide access to adequate housing depends on the context, and may differ from province to province, from city to city, from rural to urban areas and from person to person. Some may need access to land and no more; some may need access to land and building materials; some may need access to finance; some may need access to services such as water, sewage, electricity and roads.<sup>182</sup>

To facilitate access to housing the Constitution places positive obligations on the state to take legislative and other measures to progressively realise this right. Before underscoring how reasonableness extends both to the formulation of legislation and its implementation, the Court elaborated on the test's parameters:

The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. They must, however, ensure that the measures they adopt are reasonable ... A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations.

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<sup>178</sup> Ibid para 20.

<sup>179</sup> Ibid para 88.

<sup>180</sup> Ibid para 41.

<sup>181</sup> Ibid para 41-43.

<sup>182</sup> Ibid para 37.

Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.<sup>183</sup>

This passage shows that while the state enjoys a significant discretion in designing the legislative measures used to realise the right of access to adequate housing these measures may nevertheless fall prey to the scrutiny of the courts.<sup>184</sup> In this sense the standard of reasonableness is a pragmatic one and it allows the courts to manage their relationship with the political branches of government.<sup>185</sup> However, the adoption of reasonable legislation alone will not be sufficient to meet this standard. The formulation of legislation is merely the first step in meeting the duties imposed in terms of section 26(2) because ‘[a]n otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state’s obligations.’<sup>186</sup> In other words, both the programme itself and the state’s implementation of it must be reasonable.

Furthermore, wary of the pitfalls of an overly formalistic response from state parties and the need for universal access to housing, the Court warned that it would not be enough to satisfy a reasonableness test for the state ‘to show that the measures are capable of achieving a statistical advance in the realisation of the right ... if the measures, though statistically successful, fail to respond to the needs of the most desperate...’<sup>187</sup> Ultimately, the Court found that the state had fallen short of these requirements and had therefore violated the housing rights of Grootboom and others.<sup>188</sup>

Notably, in passing its judgement the Court considered the submissions of the *amici* who suggested that the right to adequate housing, and by extension other similarly drafted socio-economic rights, entailed a minimum core in terms of the ICESCR.<sup>189</sup> They cited para 10 of General Comment 3 of the CESCR which provides that state parties are required to show that every effort has been made, using all available resources, to satisfy a minimum core in respect to the right of access to adequate housing.<sup>190</sup> The Court was unconvinced,

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<sup>183</sup> Ibid para 41.

<sup>184</sup> Currie & De Waal op cit note 138 at 574.

<sup>185</sup> Brian Ray ‘Proceduralisation’s triumph and engagement’s promise in socio-economic rights litigation’ (2011) *SAJHR* at 113.

<sup>186</sup> *Grootboom* supra note 175 para 42.

<sup>187</sup> Ibid para 44.

<sup>188</sup> Ibid para 99.

<sup>189</sup> Ibid para 29.

<sup>190</sup> Ibid.

finding that the duty on the state to progressively realise the right to adequate housing did not place obligations on it to immediately realise the right as the CDESCR would suggest.<sup>191</sup>

The judgement of *Grootboom* remains one of the most far reaching of the Court's socio-economic rights cases which set the tone for its future decisions.<sup>192</sup> However, commentators suggest that the difficulty with the Court's approach is its failure to define what exactly is expected of a reasonable housing policy.<sup>193</sup> This may be true, but it is also in the decision's flexibility that it finds its greatest strength.

What the quotes above illustrate is that the Court's reasonableness test is a variable enquiry and the entitlements available to litigants may be context specific. Importantly, the Court's decision indicates that access to basic services, including sewage, forms part of the right of access to adequate housing. Therefore, it is conceivable that, for argument sake, where a housing policy provides for all the basic amenities required of it but for sewage or sanitation, it is unlikely that adoption of such a policy or its implementation would meet the constitutional reasonableness standard of s 26.

The decision of *Grootboom* was one of a series of socio-economic cases decided by the Court during this first wave period. Other decisions included *Soobramoney v Minister of Health (Kwa-Zulu Natal)*,<sup>194</sup> *Minister of Health v Treatment Action Campaign (TAC)*,<sup>195</sup> *Khosa v Minister of Social Development*<sup>196</sup> and *Jaftha v Schoeman*.<sup>197</sup> In the *TAC* decision the Court used the reasonableness test in the context of access to healthcare where it was successfully employed by the respondents in terms of section 27(2) to challenge government's policy to provide nevirapine, a drug that materially reduced the risk of mother to child transmission of HIV at birth, to a limited number of research and training clinics.<sup>198</sup> Furthermore, the Court reiterated the sentiment expressed in *Grootboom* on minimum core obligations, reiterating that the constitutional standard was one of reasonableness.<sup>199</sup>

In *Port Elizabeth Municipality v Various Occupiers* the Court would ultimately set in motion substantive changes to how the state would have to facilitate community participation in implementing its policies.<sup>200</sup> Community participation requirements are a hallmark feature

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<sup>191</sup> Ibid para 45.

<sup>192</sup> Wilson & Dugard op cit note 173 at 7.

<sup>193</sup> Ibid at 6.

<sup>194</sup> 1998 (1) SA 765 (CC).

<sup>195</sup> 2002 (5) SA 721 (CC).

<sup>196</sup> 2004 (6) SA 505 (CC).

<sup>197</sup> 2005 (2) SA 140 (CC).

<sup>198</sup> *TAC* supra note 195 at 135.

<sup>199</sup> Ibid para 34.

<sup>200</sup> 2005 (1) SA 217 (CC).

of South Africa's basic service delivery policies including those that regulate the provision of sanitation. In this case the Court found in favour of the respondent occupiers who had been evicted and re-settled without receiving security of tenure in respect to their new homes.<sup>201</sup> However, it was Sachs J writing on behalf of the Court who hinted at the possibility of an engagement order in future eviction litigation:

[T]he procedural and substantive aspects of justice and equity cannot always be separated. The managerial roles of the courts may need to find expression in innovative ways. Thus, one potentially dignified and effective mode of achieving sustainable reconciliation of the different interests involved is to encourage and require the parties to engage with each other in a pro-active and honest endeavour to find mutually acceptable solutions. Wherever possible, respectful face-to-face engagement or mediation through a third party should replace arms-length combat by intransigent opponents.<sup>202</sup>

Unfortunately, the Court was of the opinion that it was too late to hand down an engagement order in the circumstances.<sup>203</sup> However, this excerpt appeared to caution future litigants to engage with one another before resorting to litigation. Not only could this be characterised as a procedural duty on parties, but also a remedy where the Court finds that there was a lack of a sincere attempt to engage respectfully in 'face to face' mediation.<sup>204</sup>

It is notable that this procedural requirement in *Port Elizabeth Municipality* bears a striking resemblance to the procedural fairness doctrine found under administrative law.<sup>205</sup> However, Wilson & Dugard suggest that while the Court's first wave jurisprudence seemingly referred to administrative law principles like that of rationality, reasonableness and procedural fairness to evaluate the state's compliance with its positive obligations, it cannot be said that the development of its 'reasonableness test' was a mere adaptation of administrative law norms.<sup>206</sup> That being said, both doctrines ask, in one way or another, whether the means adopted by the state can reasonably achieve a legitimate legislative or constitutional purpose.<sup>207</sup>

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<sup>201</sup> Ibid para 2 & 61.

<sup>202</sup> Ibid para 39.

<sup>203</sup> Ibid para 47.

<sup>204</sup> Shanelle van den Berg, 'Meaningful engagement: Proceduralising socio-economic rights further or infusing administrative law with substance?' (2013) *SAJHR* at 381.

<sup>205</sup> Ibid at 382.

<sup>206</sup> Wilson & Dugard op cit note 173 at 9.

<sup>207</sup> Ibid at 9-10.

What made the application of the reasonableness test particularly difficult during this period was that the comprehensive legislative and policy framework in respect to basic service delivery, like that outlined in Chapter 2, was still in the development process. This is unlike those cases considering the exercise of administrative action where the nature of the power and the interests to be taken into account would often be outlined in relative detail.<sup>208</sup> Because this was not the case in attempts to protect and realise socio-economic rights, it incentivised the courts to adopt a flexible and substantive interpretive approach to the fundamental rights involved.<sup>209</sup>

### 3.3. THE ‘PROCEDURALISATION’ OF SOCIO-ECONOMIC RIGHTS: THE SECOND WAVE

#### 3.3.1. *Introduction*

In contrast, the Court’s second wave period is characterised by an increased reliance on the procedural aspects of socio-economic rights, rather than a deepening of the contextual reasonableness test adopted in *Grootboom*.<sup>210</sup> Furthermore, it is an approach that has been typified by the Court’s direction to government that it implement pre-existing policy and respect the municipal duties it owes to claimants in a particular case.<sup>211</sup>

The case said to mark the beginning of this second wave trend was that of *Occupiers of 51 Olivia Road v City of Johannesburg* where the Court elaborated on the duty of engagement introduced by Sachs J in *Port Elizabeth Municipality*.<sup>212</sup> The applicants in *Olivia Road* were occupiers of inner city buildings located in Johannesburg and were evicted after the City’s authorities determined their buildings unsafe and unhealthy.<sup>213</sup> However, not only had the city authorities refused to provide alternative accommodation to the occupiers, they failed to ascertain either their identities or housing needs and failed to seek representations or consider the consequences of an eviction.<sup>214</sup>

The case led to the Court issuing its first ever engagement order.<sup>215</sup> The Court held that ‘meaningful engagement’ is a component part of reasonableness and a procedural requirement of section 26(2) of the Constitution.<sup>216</sup> However, despite finding that the

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<sup>208</sup> Ibid at 10.

<sup>209</sup> Ibid.

<sup>210</sup> Ibid at 11.

<sup>211</sup> Ibid.

<sup>212</sup> 2008 (3) SA 208 (CC).

<sup>213</sup> Ibid para 1.

<sup>214</sup> Ibid para 1 & 13.

<sup>215</sup> Ibid para 44.

<sup>216</sup> Ibid para 30.

occupier's were entitled to a hearing, little other mention was made to norms of an administrative law nature.<sup>217</sup> Nevertheless, the Court warned that this procedural requirement was not isolated to this case and that it would be expected of organs of state that they engage "individually and collectively" with persons who may be rendered homeless before resorting to an eviction in future.<sup>218</sup>

The decision of *Olivia Road* is cited as a particularly clear example of the increasing 'proceduralisation' of socio-economic rights that would typify the Court's second wave jurisprudence.<sup>219</sup> The decision was considered unique for focusing on the procedural fairness of the state's decision to evict.<sup>220</sup> More specifically, it appears that the Court's engagement order could be characterised as a strong form of the classic administrative law principle of *audi alterem partem*, namely, the duty to allow an affected party a fair hearing before taking a decision that would affect them.<sup>221</sup> However, the decision has been criticised for bypassing the opportunity to further develop the substantive norms surrounding section 26 itself.<sup>222</sup>

The Court's finding in *Olivia Road* would set a strong precedent for future litigation. A similar issue arose in the case of *Residents of the Joe Slovo Community, Western Cape v Thubelisha Homes* concerning the City of Cape Town's N2 Gateway project. The N2 Gateway Project was a policy arrangement developed in terms of the broader Breaking New Ground (BNG) policy and it was designed to provide formal housing for low income families on the site known as the Joe Slovo informal settlement.<sup>223</sup> However, occupiers who lived in Joe Slovo refused to make way for the implementation of the City's policy on the basis that they were not guaranteed permanent housing upon their return.<sup>224</sup> In short, the question before the Court was not just whether the decision to evict was just and equitable, but whether the N2 Gateway project effectively realised the right of access to adequate housing.<sup>225</sup>

The applicants claimed that the City's conduct gave rise to the legitimate expectation that 70% of the houses built in terms of its policy would be assigned to them. This was evidenced through certain "red cards" that were issued by the City, indicating that the holder

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<sup>217</sup> Van den Berg op cit note 204 at 384.

<sup>218</sup> *Olivia Road* supra note 212 para 13 & 30.

<sup>219</sup> Wilson & Dugard op cit note 173 at 13.

<sup>220</sup> Ibid at 12.

<sup>221</sup> Ibid.

<sup>222</sup> Ibid at 13.

<sup>223</sup> 2010 (3) SA 454 (CC) para 28.

<sup>224</sup> Ibid para 14.

<sup>225</sup> Ibid para 6.

had applied for housing with it.<sup>226</sup> The Court held that although there had been little meaningful engagement when drafting the policy, a fact that would ordinarily be fatal in these circumstances, its order directing the government to give effect to the occupier's legitimate expectation would significantly improve the reasonableness of the eviction.<sup>227</sup>

In effect, the Court situated its judgement in the position of requiring the government to implement the best possible version of its policy.<sup>228</sup> The question surrounding the reasonableness of the project was not whether the implementation of the policy was the most appropriate to the community's needs, but whether proper effect was given to the expectations of the community in such a way that was consistent with the established policy and regulatory framework.<sup>229</sup> In respect to the judgment written by Ngcobo J, this included a consideration of both the Housing Act and the Housing Code, the legislative and policy framework designed to give effect to the right of access to adequate housing contained in s 26.<sup>230</sup>

Despite not giving full effect to their agreement, the Court was unanimous in its finding that the City had otherwise acted reasonably in terms of s 26 of the Constitution when implementing the its N2 Gateway Project.<sup>231</sup> It appears as though the Court suggested that provided that 'government policy is found to be sufficiently laudable, it is permissible for the state to ride rough-shod over the requirement of meaningful engagement'.<sup>232</sup> Therefore, although it could be said that meaningful engagement is analogous to the administrative law concept of procedural fairness, it appears as though it is comparatively weaker and seeks to infringe minimally on the jurisdiction of the other branches of government.<sup>233</sup>

What the above-mentioned judgments introduce quite clearly is the growing preoccupation that litigation has with the procedural aspects of the rights and entitlements involved. In both cases, the litigants sought an outcome that would provide them with access, or at least better access, to basic services including housing. However, they relied less on the quality of services they had access to and more on the deficiencies of government conduct to realise that access. In the case of *Joe Slovo* in particular, the entitlements asked for were merely those existing entitlements found in the state's housing legislation and policies.

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<sup>226</sup> Ibid para 33.

<sup>227</sup> Ibid para 5.

<sup>228</sup> Wilson & Dugard op cit note 173 at 16.

<sup>229</sup> Ibid.

<sup>230</sup> *Joe Slovo* supra note 223 paras 199 & 207.

<sup>231</sup> Ibid para 6.

<sup>232</sup> K McLean, 'Meaningful Engagement: One Step Forward or Two Back? Some Thoughts on Joe Slovo' (2010) 3 *CCR* at 237.

<sup>233</sup> Van den Berg op cit note 204 at 385.

What can also be discerned from these cases is that the increased proceduralisation of socio economic rights is a development that is seemingly intertwined with the court's fixation on legislation and policy designed to facilitate access to basic services and, arguably by extension, fundamental rights. With a series of socio-economic rights cases before the courts, they had a number of further opportunities to distil the process, particularly in respect to the provision of essential services like housing, water, electricity and sanitation.

### 3.3.2. *Mazibuko: The swinging pendulum*

A case said to define the Court's second wave period is the unanimous albeit controversial judgment of *Mazibuko v City of Johannesburg*.<sup>234</sup> The case is considered to be an example of how the Court's reasonableness test developed in *Grootboom* could be used to inappropriately defer to the executive policy decisions of government.<sup>235</sup> Be that as it may, a critical analysis of the case is required to accurately understand the expectations of the courts when bringing socio-economic rights claims before them, particularly when litigants seek to enforce the provision of basic services. Although the primary intention is not to criticise the Court's approach, scholarly critiques will be evaluated in so far as they elaborate on the Court's second wave approach.

The applicants in *Mazibuko* were residents of the Phiri settlement in Soweto, home to some of Johannesburg's poorest.<sup>236</sup> Due to the fact that almost three quarters of all water pumped to Soweto was unaccounted for, Johannesburg Water, an organ of state, changed the suburb's water usage policy through Operation Gcin'amanzi to save water.<sup>237</sup> This Free Basic Water (FBW) policy provided that each household was required to choose between a prepayment meter which dispensed 6 kilolitres of free basic water a month or a yard tap connected to a restricted water flow.<sup>238</sup>

The applicants challenged this policy, amongst other grounds, on the basis that it was unreasonable measure in light of the right to have sufficient water in terms section 27 of the Constitution.<sup>239</sup> They also relied on the Water Services Act which provides that everyone 'has a right of access to basic water supply and basic sanitation' and that the state must take 'reasonable measures to realise these rights.'<sup>240</sup> The Minister, in terms of section 9 of the Act

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<sup>234</sup> 2010 (4) SA 1 (CC).

<sup>235</sup> Wilson & Dugard op cit note 173 at 20.

<sup>236</sup> *Mazibuko* supra note 234 para 4.

<sup>237</sup> Ibid para 13.

<sup>238</sup> Ibid paras 6 & 14.

<sup>239</sup> Ibid paras 19 & 44.

<sup>240</sup> Section 3(1) of Act 108 of 1997.

and regulation 3(b) of the National Water Standards Regulations, set the minimum standard of basic water supply at 6 kilolitres per household per month.<sup>241</sup>

It was the submission of the applicants that the regulatory framework above entitled them to ‘sufficient water’ and they asked the Court to determine the amount.<sup>242</sup> Despite their claim that this was not an attempt to argue for a minimum core, the Court remained unconvinced and maintained, in any event, that it should be dismissed for the same reasons.<sup>243</sup> In terms of the positive obligations imposed by section 27, the Court reiterated that like other socio-economic rights the Constitution requires the state to take only reasonable legislative and other measures to progressively realise the right.<sup>244</sup> These positive obligations can be enforced by courts in one of two ways. Firstly, where the government fails to take steps to realise the right the courts will require action. Secondly, if the measures or policies adopted by government are unreasonable then they are open to review in terms of the constitutional standard of reasonableness. The Court noted that its precedent illustrates that such measures will be unreasonable where they fail to accommodate the needs of the most desperate as in *Grootboom*, or where they adopt unreasonable exclusions like in *TAC*.<sup>245</sup>

On the subject of deference the Court reasoned that it was not institutionally appropriate for it to decide on what constitutes sufficient water. This is a matter to be determined by the legislature and executive in light of the available budget. Importantly, Kate O’Regan J writing on behalf of the Court noted: ‘[i]ndeed, it is desirable as matter of democratic accountability that they should do so for it is their programmes and promises that are subject to the democratic popular choice.’ Linked to these comments, O’Regan J continued:

A reasonableness challenge requires government to explain the choices it has made. To do so, it must provide information it has considered and the process it has followed to determine its policy ... If the process followed by government is flawed or the information gathered is obviously inadequate or incomplete, appropriate relief may be sought. In this way, the social and economic rights entrenched in our Constitution may contribute to the deepening of democracy. They enable citizens to hold

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<sup>241</sup> *Mazibuko* supra note 234 paras 23 & 69.

<sup>242</sup> *Ibid* para 44.

<sup>243</sup> *Ibid* para 56.

<sup>244</sup> *Ibid* para 66.

<sup>245</sup> *Ibid* para 67.

government accountable not only through the ballot box but also, in a different way, through litigation.<sup>246</sup>

It would seem from this quote that the focus of the Court is not just on process as a determinative consideration in assessing reasonableness, it also seems to emphasise the participatory elements of South Africa's democracy and the potential of procedural remedies to democratise the rights enforcement process through litigation.<sup>247</sup> Re-emphasising this point toward its conclusion, the Court explained further that the purpose of litigation when positively enforcing socio-economic rights is to hold the democratic arms of government accountable between elections.<sup>248</sup> In other words, litigation fosters a form of participatory democracy which requires the state to justify its policy choices and supports the Constitution's founding values of responsiveness, accountability and openness.<sup>249</sup>

The Court was satisfied that Operation Gcin'amanzi curtailed the water losses recorded by the state, that it was implemented with extensive engagement with the community and that although free basic allowance was only a minimum, the state would take progressive steps to realise the rights contained in section 27.<sup>250</sup> The Court was also of the view that the applicants should take consolation from the fact that during the course of litigation the City had continually reviewed and amended its policy to meet the constitutional standard of reasonableness.<sup>251</sup> In short, the Court was satisfied that both the Free Basic Water policy and the City's policy were not in breach of section 27.<sup>252</sup>

The immediate response from legal scholars criticised the decision of *Mazibuko* as using reasonableness as an over-flexible, abstract and decontextualised standard of governance.<sup>253</sup> This approach allowed the Court to easily conclude that the City's FBW policy fell within the bounds of reasonableness.<sup>254</sup> Specifically, it interpreted the executive powers of the municipality broadly, concluding that the City's decision amounted to executive rather than administrative action which would otherwise have fallen within the more critical purview of the PAJA.<sup>255</sup>

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<sup>246</sup> Ibid para 71.

<sup>247</sup> Ray op cit note 185 at 107.

<sup>248</sup> *Mazibuko* supra note 234 para 160.

<sup>249</sup> Ibid paras 160-161.

<sup>250</sup> Ibid paras 167-169.

<sup>251</sup> Ibid para 163.

<sup>252</sup> Ibid para 169.

<sup>253</sup> Wilson & Dugard op cit note 173 at 22.

<sup>254</sup> Ibid.

<sup>255</sup> *Mazibuko* supra note 234 paras 130-131.

For these reasons the judgment has been cited for its overt displays of deference toward the executive.<sup>256</sup> The approach adopted by the Court concludes that the purpose of the positive enforcement of socio-economic rights is sufficiently served through giving the state the opportunity to justify and revise its policies. Moreover, the case seems to suggest that litigation, and litigation on socio-economic rights in particular, could be construed as a form of political participation in crafting policy.<sup>257</sup>

### *3.3.3. Nokotyana: Access to sanitation before the Constitutional Court*

Following closely after the decisions of *Joe Slovo* and *Mazibuko*, the Court in *Nokotyana v Ekurhuleni Metropolitan Municipality* was asked to pronounce expressly on access to sanitation.<sup>258</sup> In fact, this case serves as a rough blueprint on how and how not to enforce access to basic or interim sanitation through the UISP or a similar policy. Furthermore, like *Joe Slovo*, the case of *Nokotyana* lays bare the importance of focusing on the procedural aspects of rights enforcement.

In *Nokotyana* the applicants consisted of members of the Harry Gwala Informal Settlement who insisted on access to certain basic services owed to them, including ‘temporary sanitation’ and high mast lighting.<sup>259</sup> The facts that gave rise to the issue at hand arose after the municipality governing Harry Gwala applied for a settlement upgrade in terms of the Housing Code’s UISP. However, three years after the proposal had been made, the MEC for Local Government and Housing had still not reached a final decision in respect to this application.<sup>260</sup> The applicants sourced their claim within the relevant legislative and policy framework governing their access to these services.<sup>261</sup> From 2009 onwards this approach was becoming a firmly entrenched trend in socio-economic rights jurisprudence. Introducing the rights involved, Van der Westhuizen J outlined the issues as follows:

This case is about sanitation and lighting. More specifically, it is about the quest of a community in an informal settlement to have toilets. They want one ‘ventilated improved pit latrine’ (somewhat ironically referred to as ‘VIP’ latrines) per household, instead of the one chemical toilet per ten families offered to them by the authorities, in the place of their existing pit latrines. The community also asks for high

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<sup>256</sup> Wilson & Dugard op cit note 173 at 23.

<sup>257</sup> Ibid.

<sup>258</sup> 2010 (4) BCLR 312 (CC).

<sup>259</sup> Ibid para 21.

<sup>260</sup> Ibid para 8.

<sup>261</sup> Ibid para 2-3.

most lighting to enhance safety and access to emergency vehicles. They rely on their right of access to adequate housing, other constitutional rights and certain statutory provisions.<sup>262</sup>

The applicants suggested that the policy adopted by the municipality which provides one VIP pit latrine per household was irrational and unreasonable.<sup>263</sup> Challenging the state to provide the community with access to the minimum threshold requirement of ‘basic sanitation’ the applicants relied not only on the fundamental right of access to adequate housing but also the fundamental right to human dignity.<sup>264</sup> Furthermore, they suggested that when read along with the Housing Code’s UISP and EHP programmes, as well as with the Water Services Act and its supporting policy, the right of access to adequate housing imposed a duty on state to provide ‘a mandatory minimum core as far as free basic sanitation is concerned.’<sup>265</sup>

Unfortunately for the applicants, the Court criticised their case for a lack of accuracy and largely upheld the adverse order of the High Court. The Court found that the emergency provisions of the Housing Code’s EHP were not applicable. It noted that although the living conditions of the settlement were squalid they did not constitute the immediate danger envisioned by the Code.<sup>266</sup> Similarly, the Court dismissed the applicant’s submission in terms of Housing Code’s UISP. It found that until the MEC had reached a final decision on whether to upgrade the settlement the applicants could not make out a case for either interim sanitation or high mast lighting.<sup>267</sup>

On the contention that the constitutional, statutory and policy provisions outlined above provided a minimum core, the Court was even less sympathetic. Not only did it refuse to entertain the argument, it found that the UISP and EHP did not ‘purport to establish minimum standards’.<sup>268</sup> What they purported to do was give effect to the rights contained in s 26 of the Constitution which required the state to take legislative and other measures to realise the right of access to adequate housing.<sup>269</sup> Hinting at the fact that the applicants failed to fully appreciate the subsidiarity principle, van der Westhuizen J remarked:

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<sup>262</sup> Ibid para 2.

<sup>263</sup> Ibid para 22.

<sup>264</sup> Ibid para 21-22.

<sup>265</sup> Ibid para 24.

<sup>266</sup> Ibid para 39.

<sup>267</sup> Ibid para 42.

<sup>268</sup> Ibid para 47.

<sup>269</sup> Ibid para 46-47.

The applicants have not sought to challenge either chapter of the National Housing Code. This Court has repeatedly held that where legislation had been enacted to give effect to a right, a litigant should rely on that legislation or alternatively challenge the legislation as inconsistent with the Constitution.

The applicants recognised this by relying primarily on Chapters 12 and 13 (the EHP and UISP respectively). They also tried to rely directly on the Constitution though. They cannot be permitted to do so...<sup>270</sup>

Fortunately for the applicants they were not entirely without relief. The final issue resolved by the Court was whether the MEC's three year delay was acceptable. The Court found that it was not.<sup>271</sup> It held that this delay not only infringed upon the applicant's rights in terms of s 237 of the Constitution, which requires all constitutional obligations to be carried out diligently and without delay, but that it also fell short of the reasonableness threshold imposed by s 26(2). Without this decision, the applicants could not access the services they sought, including sanitation. As a result the Court ordered the MEC to reach a final decision within 14 months.<sup>272</sup>

The Court's approach on this facet of the case is not unlike a challenge under the PAJA where the 'failure to take a decision' is reviewable.<sup>273</sup> However, in such a case the conduct in question must first be characterised as administrative action. This requires an applicant to show that the impugned decision would constitute the exercise of a public power or public function, taken in terms of an empowering provision and which has a direct, external legal effect on the rights of a person.<sup>274</sup> Regrettably, an administrative law challenge was not pursued by either the litigants involved or the Court.

Furthermore, like *Mazibuko*, the Court's finding is one that is notably deferential. In terms of the municipality's policy it provided the Harry Gwala settlement with access to a level of sanitation well below the basic minimum required. Under ordinary circumstances it would be considered unreasonable. However, on the submission by national government that it could make funds available for the community, the Court held that it would amount to unfair discrimination to provide preferential treatment to the Harry Gwala settlement over the

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<sup>270</sup> Ibid para 48-49.

<sup>271</sup> Ibid para 54-55.

<sup>272</sup> Ibid para 55.

<sup>273</sup> Section 1(b) of Act 3 of 2000.

<sup>274</sup> Ibid.

other informal settlements that fell within the area. In other words, considering their location, their case was neither ‘exceptional or unique’.<sup>275</sup>

The case provides an example of how relief may be sought where the challenged conduct does not stem from a deliberate or direct violation of a fundamental rights but through pure bureaucratic neglect or inertia.<sup>276</sup> However, it is unfortunate that when given an opportunity to do so, the Court again refused to recognise that government policy had infringed upon a fundamental right and said little of the importance of sanitation.<sup>277</sup> Instead, the Court focused again on the procedural aspects of the applicants’ case, citing the MEC’s failure to take a decision as unreasonable in the circumstances.

### 3.4. SOUTH AFRICA’S HIGH COURTS: SANITATION SUCCESS

As South Africa’s apex superior court, the Constitutional Court provides binding precedent that both the Supreme Court of Appeal and High Courts must follow; however, if the discussion on the Court’s second wave jurisprudence reveals anything, it is that there appears to be a disturbing trend whereby it avoids making decisions that expand upon fundamental rights.<sup>278</sup> This was the case for the decisions of *Joe Slovo*, *Mazibuko* and *Nokotyana*. The decision of *Mazibuko* in particular has been criticised for its deferential approach whereas the Court in *Nokotyana* not only criticised the applicant’s case for lacking accuracy but arguably presents a set of facts that were not yet ripe for enforcing a right of access to sanitation directly.

It is with some good fortune then that South Africa’s High Courts have also had the opportunity not only to pronounce on similar issues, but to pronounce on access to sanitation in particular. Unlike the decisions of the Constitutional Court outlined above, the decisions of *Beja v Premier of Western Cape*,<sup>279</sup> *Melani v Johannesburg City*<sup>280</sup> and *Kenton on Sea Ratepayers Association v Ndlambe Local Municipality*<sup>281</sup> all found various fundamental rights to have been infringed upon. Most importantly however, access to sanitation and related sanitation services formed a principle concern in each of these cases. Furthermore, each of these decisions appeared less deferential in both implicating fundamental rights and in providing substantive relief.

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<sup>275</sup> *Nokotyana* supra note 258 para 53.

<sup>276</sup> David Bilchitz, ‘Are socio-economic rights a form of political rights?’ (2015) *SAJHR* at 107.

<sup>277</sup> David Bilchitz ‘Citizenship and community: Exploring the right to receive basic municipal services in Joseph’ (2010) *Sabinet*, accessed 21 April 2016 at 52.

<sup>278</sup> *Ibid* at 51.

<sup>279</sup> 2011 JDR 0412 (WCC).

<sup>280</sup> 2016 (5) SA 67 (GJ).

<sup>281</sup> 2016 JDR 1133 (ECG).

### 3.4.1. *Beja*: A Bill of Rights based approach

The first of the High Court decisions explored is the Western Cape High Court decision of *Beja* and, unlike the Constitutional Court, it did not hesitate to implicate a host of constitutional rights. More specifically, it provides an example of how reference to the legislative and policy commitments of government could be used to positively enforce a right of access to sanitation through implicating a number of fundamental rights. In contrast to *Nokotyana*, it also provides an example of the type of relief that may be sought once concrete entitlements arise from the Housing Code's UISP.

The applicants in this case were residents of Silvertown located in Khayelitsha, an informal settlement that the City of Cape Town decided to upgrade through the UISP.<sup>282</sup> Following negotiations between the City and the community, an agreement was reached in terms of which the City would provide toilets to the community of Silvertown if the community enclosed them.<sup>283</sup> At first glance this would seem consistent with the Housing Code's provisions for such agreements unless the sanitation services and facilities provided failed to meet the Code's minimum requirements. However, after repeated attempts to implement this agreement were frustrated, members of the community sought to challenge this policy through litigation.<sup>284</sup>

It was applicant's submission that the City's Silvertown project, when read according to the provisions of the UISP, the Housing Code and Housing Act, violated their constitutional rights enshrined in section 9 (equality), 10 (human dignity), 12 (freedom and security of person), 14 (privacy), 24 (environment), 26 (housing) and 28 (children) of the Constitution.<sup>285</sup> Furthermore it was their submission that the city authorities must comply with the prescriptions of the Water Services Act and its Regulations Relating to Compulsory National Standards and Measures to Conserve Water (GN R509 in GG 22355 of 8 June 2001) when implementing the Silvertown project.<sup>286</sup>

Firstly, drawing on the Constitutional Court's meaningful engagement jurisprudence, the court noted that as far back as March 2005 the City's authorities had not meaningfully engaged with the community.<sup>287</sup> It found this to be inconsistent with the UISP which, in no

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<sup>282</sup> *Beja* supra note 279 para 11.

<sup>283</sup> *Ibid* para 17.

<sup>284</sup> *Ibid* paras 21-22.

<sup>285</sup> *Ibid* para 7.

<sup>286</sup> *Ibid*.

<sup>287</sup> *Ibid* paras 15 & 94-94.

uncertain terms, is built upon substantial and active community participation.<sup>288</sup> The Housing Code considers such participation to be of vital importance and explicitly seeks ‘to empower communities to take charge of their own settlements’ so as to reach a structured agreement.<sup>289</sup> Applied to the facts before it, the court held that the ‘vague agreement’ entered into between the community and the City fell short of the standards required of the Code and the Constitution.<sup>290</sup>

Turning to the applicant’s submission that the Silvertown project infringed on their right of access to adequate housing and other fundamental rights the court held that there is an unequivocal obligation on the state to take positive measures to meet to meet the needs of the most desperate who are subject to extreme poverty and unacceptable housing conditions.<sup>291</sup> The court found on its own inspection of Silvertown that the woefully inadequate materials used to enclose many of the toilets would not provide its users with either privacy or dignity.<sup>292</sup> The Housing Act makes ‘clear that the requirements of privacy, protection against the elements and adequate sanitary facilities are central features of housing development in South Africa.’<sup>293</sup> A proper interpretation of the Act would not only require that a municipality take reasonable and necessary steps to realise access to adequate housing, but also that it do so on a progressive basis that is consistent with the Bill of Rights.<sup>294</sup>

In terms of the Silvertown project, the City not only entered an agreement with community in terms of the UISP to provide unenclosed toilets, it provided a ratio of one communal toilet for every households. It was the City’s submission that this was consistent with the Housing Code and therefore lawful.<sup>295</sup> However, the court found this submission to misconstrue the provisions of the Code which envisages a variety of different housing programmes.<sup>296</sup> The ratio referred to by the City was the one applicable to emergency housing or the EHP and not UISP programmes aimed at upgrading informal settlements.<sup>297</sup>

The court held that the interim services envisioned by the EHP could be distinguished from those envisioned by the UISP. It found that although the National Norms and Standards

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<sup>288</sup> Ibid paras 60 & 66.

<sup>289</sup> Ibid paras 65-67.

<sup>290</sup> Ibid para 94-94.

<sup>291</sup> Ibid para 39.

<sup>292</sup> Ibid para 29.

<sup>293</sup> Ibid para 52.

<sup>294</sup> Ibid para 57.

<sup>295</sup> Ibid para 107.

<sup>296</sup> Ibid para 111.

<sup>297</sup> Ibid para 114.

did not apply in either case, they could provide some guidance when interpreting the latter.<sup>298</sup> The court distinguished these two programmes on the basis that the interim services envisioned in terms of the UISP are expected to constitute the first phase in providing permanent services and should therefore be of a higher standard.<sup>299</sup> This is in contrast to the Code's EHP that has an entirely different objective in mind.<sup>300</sup>

The court turned its focus to the provision of the unenclosed toilets and found that the appalling conditions that the Silvertown community had to endure in order to use these facilities infringed on their fundamental rights to human dignity, privacy, adequate housing and freedom and security of person amongst other rights.<sup>301</sup> Before reaching its conclusion, the court made reference to the 'the minimum level of basic municipal services' contained in s 73(1)(c) of the Local Government: Municipal Systems Act 32 of 2000. Expanding on the connection between this provision, the delivery of sanitation and fundamental rights, Erasmus J had this to say:

Such minimum level would include the provision of sanitation and toilet services. Irrespective whether it is built individually on separate erven, or communally, it must provide for the safety and privacy of the users and be compliant with the fundamental rights guaranteed in the Constitution. Any housing development which does not provide for toilets with adequate privacy and safety would be inconsistent with s 26 of the Constitution and would be in violation of the constitutional rights to privacy and dignity.<sup>302</sup>

The court was careful to note that when positively promoting socio-economic rights this finding should not be construed as indicating minimum core standards.<sup>303</sup> The Court was of the view that, given the jurisprudence of the Constitutional Court, the polycentric nature of such matters and the principle of the separation of powers, it was simply not institutionally equipped to make such a pronouncement in the circumstances.<sup>304</sup> Nevertheless, the court found the decision to provide unenclosed toilets had fallen foul of the constitutionally

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<sup>298</sup> Ibid para 115.

<sup>299</sup> Ibid paras 114-115.

<sup>300</sup> Ibid para 116.

<sup>301</sup> Ibid paras 125-135 & 150.

<sup>302</sup> Ibid para 143.

<sup>303</sup> Ibid para 183.

<sup>304</sup> Ibid paras 177-184.

required standard of reasonableness and fairness.<sup>305</sup> Therefore, the City was ordered to enclose all 1316 toilets that formed part of the Silvertown Project.<sup>306</sup>

This finding of the court is as notable for its correspondence with the jurisprudence of the Constitutional Court as it is for its departure. It is similar because like the jurisprudence of the Constitutional Court, the court in *Beja* looked to the comprehensive legislation and policy designed to realise fundamental rights as a benchmark from which to determine whether the applicant's rights had been infringed. Part of this enquiry, as shown in *Mazibuko*, involved a consideration of the governance and service delivery obligations imposed on provincial and local government.<sup>307</sup>

Furthermore, the court's decision also interrogated whether the City had complied with its procedural duties and whether it had engaged meaningfully with the community of Silvertown before implementing its policy. The court's finding that the City had failed to do this appeared to fatally compromise the reasonableness of the City's decision and support the view that if the City had better communicated with the community it could have avoided reaching a decision that would ultimately compromise the fundamental rights of the applicants.

However, in contrast to the decisions of *Joe Slovo*, *Nokotyana* and *Mazibuko*, the Western Cape High Court found that the fundamental rights of the applicants had indeed been infringed upon. It also went so far as to treat the rights to dignity, privacy and security of person as interrelated and mutually supporting of section 26 of the Constitution. Moreover, although the court dismissed the notion this it was providing on a minimum core for section 26, it found that in order for sanitation related policy to meet the constitutional reasonableness threshold it must provide for adequate privacy and safety.

The decision of *Beja* also provides an interesting case study in terms of what was not said. With the exception of the court's expansion upon meaningful engagement, neither the applicants nor the court considered the City's decision under the ambit of the right to administrative justice, be it the PAJA or the constitutionally enshrined right or, alternatively, the principle of legality. This is not unusual if it is considered that the issue was framed primarily as the positive enforcement of section 26 of the Constitution.

If the implementation of the City's policy were construed as the exercise of a public power that constituted administrative action it could have been challenged through

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<sup>305</sup> Ibid para 146.

<sup>306</sup> Ibid para 192.

<sup>307</sup> Ibid paras 42 & 49.

administrative law too. In other words, perhaps the City's failure to meaningfully engage, particularly when considering that no people were evicted, should also have been challenged through the procedural fairness requirements of section 3 of the PAJA. This provision requires that those whose rights are affected by conduct amounting to administrative action must receive 'adequate notice' and have a 'reasonable opportunity to make representations'.

Even if this failed and the conduct in question did not amount to administrative action it is likely that it could also have been challenged on the basis of irrationality in terms of the principle of legality. In either event, be it the PAJA or legality review, such an approach to challenging a state policy would raise particularly sensitive institutional concerns for the courts. It would also have a direct impact on the type of relief that could be sought and would place the procedural relief provided for in administrative law and the PAJA over the potentially more substantive relief that could be sought after where fundamental rights have been infringed.

#### *3.4.2. Melani: An administrative law approach*

These institutional concerns appeared to have a significant influence on the South Gauteng High Court decision of *Melani*.<sup>308</sup> Like *Beja*, the case considered the application of the Housing Code's UISP and the decision of the MEC for Human Settlements to upgrade the informal settlement of Slovo Park.<sup>309</sup> However, the case provides a rather unique set of circumstances and serves as an example of how creative litigation through an administrative law perspective, while implicating fundamental rights, may provide more than procedural relief alone.

The applicants in this case constituted approximately 10 000 poor and indigent people who had lived in the community of Slovo Park for 21 years.<sup>310</sup> Similar to the case of *Nokotyana* the applicants approached the court to review and set aside the City of Johannesburg's failure to take a decision and apply to the provincial MEC for Human Settlements for funding so as to upgrade Slovo Park. It was their submission that the City of Johannesburg was obliged to make such a request in terms of the Urban Settlements Development Grant (USDG) and the UISP.<sup>311</sup> Furthermore, they submitted that the Unaville

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<sup>308</sup> *Melani* supra note 280.

<sup>309</sup> *Ibid* para 1.

<sup>310</sup> *Ibid* para 3.

<sup>311</sup> *Ibid* para 1.

plan adopted by the City was at odds with the UISP, which prescribes that the upgrading of an informal settlement must be preferred to relocation where possible.<sup>312</sup>

At the point that the matter reached the court, the only decision that the City had taken was to relocate the community to a site named Unaville, citing sinkholes as a possible risk to the Slovo Park community.<sup>313</sup> Although the applicants submitted that the decision in question amounted to administrative action, the City's position was that their decision to relocate the residents was a policy decision and therefore not subject to judicial review.<sup>314</sup>

At this stage it is worth mentioning that the PAJA explicitly excludes from judicial review 'the executive powers or functions of the National Executive.' A similar position was adopted before the adoption of the PAJA and, as alluded to before, the rationale behind this exclusion rests on the premise that the formulation of policy or the initiation of legislation are political decisions that fall under the prerogative of the Executive and, in certain circumstances, the President.<sup>315</sup> Therefore, expressed differently, it was the City's submission in *Melani* that it was not institutionally appropriate for the court to review its conduct taken in terms of the UISP, doing so otherwise would risk breaching the separation of powers principle.

On its evaluation of the legal precedent the court remained unconvinced in respect to the City's submission. In terms of the Constitutional Court decision of *Permanent Secretary Department of Education and Welfare, Eastern Cape v Edu College PE*<sup>316</sup> the court explained that despite the fact that the formulation of 'broad executive policy' may not constitute administrative action, those decisions which implement policy may constitute administrative action in the narrow sense where they affect the rights or legitimate expectations of a person.<sup>317</sup> Furthermore, where an executive member formulates policy in implementing legislation it may in fact constitute administrative action too.<sup>318</sup> The court noted that even in those cases where policy decisions do not constitute administrative action they may, nevertheless, remain reviewable where the impugned decision breaches constitutional provisions or fundamental rights.<sup>319</sup>

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<sup>312</sup> Ibid para 12.

<sup>313</sup> Ibid paras 11 & 26.

<sup>314</sup> Ibid paras 2 & 20.

<sup>315</sup> Currie & De Waal op cit note 173 at 654.

<sup>316</sup> 2001 (2) SA (1) (CC).

<sup>317</sup> *Melani* supra note 280 para 24.

<sup>318</sup> Ibid para 40.

<sup>319</sup> Ibid para 25.

Having referred to the provisions of the Housing Act and its Code, the court held that the present case was one where the applicants sought the implementation of existing policy, namely the UISP, a typical administrative function that is subject to judicial review.<sup>320</sup> Moreover, the court found that the decision to relocate the applicants and not upgrade Slovo Park *in situ* was taken without due consideration of the relevant legislative and policy framework and was therefore not only unreasonable administrative action but also violated the applicant's right of access to adequate housing and was therefore unlawful.<sup>321</sup>

Finally, the court discovered that the decision to relocate was taken without adequate consultation or engagement with the applicants.<sup>322</sup> It held that the result of such unilateral conduct was found to be inconsistent with the established jurisprudence of the Constitutional Court.<sup>323</sup> Furthermore, not only were the housing rights of the applicants infringed upon, but for almost the entire duration that the applicants had occupied Slovo Park they had been promised that their community would be upgraded and not relocated, a legitimate expectation in the circumstances.<sup>324</sup>

The court held that the City's failure to properly apply the UISP Code was to be reviewed and set aside.<sup>325</sup> Interestingly, the court noted that it was the direction of the Constitutional Court that effective relief be granted in circumstances such as these. Namely, the only suitable effective relief would be to direct the City to upgrade the Slovo Park settlement in terms of the UISP's prescripts.<sup>326</sup>

The decision of *Melani* did not enforce a right to sanitation per se but the provision of interim sanitation would have been incidental to its order. However, its relevance extends beyond this in that it presents similar set of issues to that of *Beja* but resolved them almost entirely within the ambit of administrative law. Although the judgment lacks some precision in elucidating on which administrative law provisions it used and spoke little of the right of access to adequate housing, it was confident in its finding that the decision in question amounted to administrative action and was inconsistent with the legislation and policy framework that government was obliged to rely upon. In other words, it was an unreasonable and therefore unlawful policy decision in the circumstances, a requirement that must be met both in terms of the s 33 of the Constitution and s 6 of the PAJA.

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<sup>320</sup> Ibid para 41.

<sup>321</sup> Ibid para 42.

<sup>322</sup> Ibid para 46.

<sup>323</sup> Ibid para 47.

<sup>324</sup> Ibid para 44-48.

<sup>325</sup> Ibid para 49.

<sup>326</sup> Ibid para 50.

The case is also important because highlights the fact that the implementation of a policy like the UISP is an exercise of public power or otherwise it could not have constituted administrative action. This means that in the alternative, even if it fell into one of the PAJA's exclusions, the implementation of the UISP could be subject to legality review. In either event, the case is strong example of how administrative law can be used to enforce a right of access to sanitation.

### *3.4.3. Kenton on Sea Ratepayers Association: An environmental law approach*

The third and most recent case concerning sanitation related issues was presented with a unique set of facts and issues. The Eastern Cape High Court decision of *Kenton on Sea Ratepayers Association* provides further substance to the notion that a rights surrounding sanitation can be enforced in a variety of ways. Specifically, it entrenches the view that the appropriate means through which to enforce socio-economic rights can be done not only with reference to the relevant legislative and policy frameworks that seemingly inform fundamental rights, but also through implicating the municipal governance functions that underpin these very frameworks themselves. Furthermore, the court's judgment is equally remarkable for its interrogation of the appropriate relief, ordering that the respondents adhere to a detailed structural interdict.<sup>327</sup>

The issues flowing from the case centred around the disastrous effect that the Marselle sewage works and waste dumpsite were having on the Bushman's River estuary.<sup>328</sup> The court noted that the matter sought to address 'the local residents entitlement to basic essential municipal services and the maintenance thereof to a reasonable standard', particularly as they related to the proper running of these facilities in terms of the applicable regulatory standards.<sup>329</sup> It was the applicant's submission that the poor management of these facilities infringed upon their fundamental right to a healthy environment enshrined in s 24 of the Constitution.<sup>330</sup> However, the court did not end its constitutional enquiry there, referring to the obligations placed on local and district government's municipal responsibilities in respect to air pollution, waste water and solid waste in terms of Part B of Schedules 4 and 5 of the Constitution.<sup>331</sup> These are to be read, the court noted, with sections 83 and 84 of the

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<sup>327</sup> *Kenton on Sea Ratepayers* supra note 281 para 115.

<sup>328</sup> Ibid para 1.

<sup>329</sup> Ibid para 2.

<sup>330</sup> Ibid para 16.

<sup>331</sup> Ibid para 17.

Local Government: Municipal Structures Act 117 of 1998 which further specifies which responsibilities are assigned to particular levels of government.<sup>332</sup>

Quoting with approval passages from *Constitutional Law of South Africa*<sup>333</sup> the court noted that the authors suggest that some socio-economic rights not only intersect with certain local government competencies, but that a number of municipal services can be protected or promoted through socio-economic rights.<sup>334</sup> Furthermore, the language of parts of the Constitution appear to work on the premise that there is an obligation on state to provide services, but that these are limited to those services that can be 'labelled as basic.'<sup>335</sup> Expanding on the text further, the following passage is instructive:

The authors point out that the notion of a basic municipal service is a recurrent theme in local government legislation. The conclusion is that both individual claims and communal claims can be made for the provision of basic service provision and that such claims are justifiable. It is finally pointed out that the Municipality's duties in relation to the realisation of socio-economic rights are circumscribed by its defined areas of competence. The question is raised as to whether there is an intersection between socio-economic rights and the particular functional area of the municipality.<sup>336</sup>

The court found that when applied to the present matter the provisions for waste removal and waste management falls within the ambit of Schedules 4B and 5B, the result being that there is a 'direct intersection between socio-economic rights as referred to above and the realisation thereof falling within the Municipality's functional areas.'<sup>337</sup> Such a finding, the court held, would necessarily shape the type of relief that could be granted.<sup>338</sup>

The court noted further that if it found in favour of the applicants it would have to grant appropriate relief in terms of section 38 of the Constitution.<sup>339</sup> The question was whether the structural relief sought was appropriate.<sup>340</sup> Unlike a mandatory interdict which prescribes that a repository of power must act in a certain way or a prohibitory interdict that prohibits certain actions, a structural or supervisory interdict is an order declaring that the

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<sup>332</sup> Ibid para 19.

<sup>333</sup> *Constitutional Law of South Africa 2<sup>nd</sup>* ed JUTA (2008).

<sup>334</sup> *Kenton on Sea Ratepayers* supra note 281 para 25.

<sup>335</sup> Ibid para 26.

<sup>336</sup> Ibid.

<sup>337</sup> Ibid.

<sup>338</sup> Ibid para 28.

<sup>339</sup> Ibid para 18.

<sup>340</sup> Ibid para 94.

violator of a constitutional right must comply with its obligations and report back on the extent to which it has done so.<sup>341</sup>

Elaborating on the suitability of structural interdicts where constitutional challenges against policy are at issue, the court referred to an extract of LAWSA Volume 10(1), which reads that a court:

May grant appropriate relief, including a declaration of rights, when a right in the Bill of Rights has been breached. This relief is typically invoked when government “policy” is inconsistent with the Constitution. Structural interdicts are particularly suited to remedying systemic failures or inadequate compliance with constitutional duties. The purpose of a structural interdict is to compel an organ of state to perform its constitutional duties and to report from time to time on its progress in so doing. This order involves requiring an organ of state to revise its existing policy and to submit the revised policy to the court to enable the court to satisfy itself that the policy is consistent with the Constitution.<sup>342</sup>

The court was satisfied that the applicants had made a good and proper case before it. It ordered a structural interdict which required detailed information from the respondents to be put before it over a timeline.<sup>343</sup> Specifically, it directed the relevant local government authorities to take all reasonable steps to prevent all burning of rubbish, to ensure that solid waste remained within the confines of the Marselle dumpsite and to collect the waste that had dispersed from the dumpsite.<sup>344</sup>

The court held that the local municipality involved had breached its constitutional duties in this regard, that it was required to decommission the dumpsite, and report back to the court on the steps it intended to take so as to accord with its constitutional and statutory obligations. If satisfactory, and after the applicant’s hearing, this report would be made an order of the court, in terms of which, the respondents would be required to report back to the court every 90 days indicating their continued progress in giving effect to the attached order.<sup>345</sup>

Unfortunately, by the time the matter had reached the High Court the aspect of the applicant’s case concerning the sewage flow into the Bushman’s River estuary had been dealt

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<sup>341</sup> Ibid paras 94-95.

<sup>342</sup> Ibid para 99.

<sup>343</sup> Ibid para 115.

<sup>344</sup> Ibid para 113.

<sup>345</sup> Ibid.

with.<sup>346</sup> Due to the action taken by the applicants it seemed as though the respondent municipality had taken steps to remedy the poor maintenance of the sewage reticulation surrounding the area.<sup>347</sup> This would undoubtedly support the views expressed in *Mazibuko* on the democratic value of litigation. Nevertheless, the court's comments on how to litigate on matters where legislative and constitutional provisions intersect provides valuable guidance.

### 3.5. JOSEPH V CITY OF JOHANNESBURG

#### 3.5.1. A public law right

The last of the cases to be discussed is the Constitutional Court decision of *Joseph*. It is a decision that serves as a unique outlier to all the cases discussed above in that it provides the precedent and jurisprudential framework for what it calls a 'public law right.'<sup>348</sup> Although the judgment focused on the negative protection of access to electricity the judgment illustrates how access to services, especially basic services, may be protected more generally. More specifically, it is possible to use the court's approach to fashion a very similar if not analogous public law right to sanitation.

The applicants in *Joseph* were tenants of Ennerdale Mansions, a block of 44 apartments located in the inner city of Johannesburg which were owned by a Mr Thomas Nel.<sup>349</sup> Many of the tenants living in these apartments had little to no income at all.<sup>350</sup> Following a disconnection of the building's electricity supply by the parastatal City Power, the applicants challenged the disconnection before the city council where they discovered that Mr Nel was R400 000 in arrears.<sup>351</sup> This came as a surprise to the applicants who had evidenced their monthly payments. However, upon further investigation it was revealed that Mr Nel had simply failed to forward their payments to the City.<sup>352</sup>

The applicants challenged City Power's decision on the basis that it amounted to administrative action in terms of section 3(2)(b) of the PAJA which required that they first receive notice and an opportunity to make representations before the parastatal disconnected their electricity supply.<sup>353</sup> Furthermore, it was their submission that they should be afforded

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<sup>346</sup> Ibid para 9.

<sup>347</sup> Ibid paras 7-9.

<sup>348</sup> *Joseph* supra note 130 para 47.

<sup>349</sup> Ibid para 3.

<sup>350</sup> Ibid.

<sup>351</sup> Ibid para 7-8.

<sup>352</sup> Ibid para 8.

<sup>353</sup> Ibid para 1.

the procedural fairness protections of the PAJA despite the fact that there was no direct contractual relationship between them and City Power.<sup>354</sup>

In order for the provisions of the PAJA to apply the applicants first had to show that the administrative action in question adversely affected one of their rights or legitimate expectations. They relied on three primary submissions to establish a right, they were: (i) their fundamental right of access to adequate housing under section 26 of the Constitution, (ii) their right to human dignity under section 10, and (iii) their contractual right to electricity in terms of their lease with the building's landlord.<sup>355</sup> Rather remarkably, the Court found that it was 'not necessary' to address any of these contentions in order to establish a suitable right in the circumstances.<sup>356</sup>

Dealing first with the third contention, and in placing substance above form, the Court found that the relationship between the applicants and City Power could be construed as falling outside a formal contractual relationship and within the principles of administrative law.<sup>357</sup> Importantly, the Court was of the view that the affected right flowed not from the common law rights of landowners but from the "special cluster of relationships" that exists between a municipality and citizens.<sup>358</sup> In other words, this was a relationship sourced in the public responsibilities that a municipality owes in terms of the Constitution and the relevant legislation in respect to persons falling under its jurisdiction.<sup>359</sup> On elaborating on the scope of the rights and duties involved in this relationship, Skweyiya J noted that:

The provision of basic municipal services is the cardinal function, if not the most important function, of every municipal government. The central mandate of local government is to develop a service delivery capacity in order to meet the basic needs of all inhabitants of South Africa, irrespective of whether or not they have a contractual relationship with the relevant public service provider. The respondents accepted that the provision of electricity is one of those services that local government is required to provide...<sup>360</sup>

In providing content to the affected right, the Court held that this public law duty flows generally from sections 152(1) and 153 of the Constitution and more specifically from

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<sup>354</sup> Ibid paras 1-2.

<sup>355</sup> Ibid para 12.

<sup>356</sup> Ibid para 32.

<sup>357</sup> Ibid para 24-25.

<sup>358</sup> Ibid.

<sup>359</sup> Ibid.

<sup>360</sup> Ibid para 34.

sections 4(2) and 7 of the Local Government: Municipal Systems Act 32 of 2000 and s 9(1)(a)(iii) of the Housing Act of 1997.<sup>361</sup> The Court found that taken together, these constitutional and statutory provisions should be interpreted so as imposing an obligation on local government to provide basic municipal services.<sup>362</sup> In this respect, Skweyiya J states: '[e]lectricity is one of the most common and important basic municipal services and has become virtually indispensable, particularly in urban society.'<sup>363</sup>

The Court held that in present circumstances the applicants were entitled to the provision of electricity from City Power in terms of this set of reciprocal rights and obligations sourced in public law. This was despite the fact that there is no express right to electricity to be found in the Bill of Rights. Nevertheless, with reference to the abovementioned statutes, the Court held that electricity remained 'an important basic municipal service which local government is ordinarily obliged to provide.'<sup>364</sup>

In considering the application of section 3 of the PAJA, the Court adopted a purposive approach, reiterating that the 'rights' envisaged by the Act extend 'beyond vested, private law rights' but also include 'legal entitlements that have their basis in the constitutional and statutory obligations of government.'<sup>365</sup> Furthermore, it held that the right to administrative justice, which is given effect to through the PAJA, seeks to realise the constitutional values in respect to the government's constitutional commitment to be a responsive and accountable public administration.<sup>366</sup> In this respect the Court placed significant emphasis on the democratic values that procedural fairness promotes, finding that '[c]ompliance by local government with its procedural fairness obligations is crucial, not only for the protection of its citizens' rights, but also to facilitate trust in the public administration and in our participatory democracy.'<sup>367</sup>

It becomes clear that on reading the judgment closely, the Court goes to great lengths to elaborate on how the applicable constitutional and statutory scheme informs the rights owed to the applicants as citizens within the City's jurisdiction. With a basis for an affected right established, the Court held that when the applicants received electricity from City Power they did so by virtue of their "public law right" to receive electricity as a basic municipal

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<sup>361</sup> Ibid paras 35-39.

<sup>362</sup> Ibid para 40.

<sup>363</sup> Ibid para 34.

<sup>364</sup> Ibid para 39.

<sup>365</sup> Ibid para 43.

<sup>366</sup> Ibid para 45.

<sup>367</sup> Ibid para 46.

service.<sup>368</sup> Therefore, the decision to terminate their electricity supply obliged City Power to afford the applicants procedural fairness before taking a decision that would otherwise materially and adversely affect their right.<sup>369</sup>

In determining what procedural fairness would entail in the circumstances, the Court held that requiring City Power to host representations in each and every case would unduly hamper its administrative capacity.<sup>370</sup> However, although there is not an automatic obligation on a public utility to conduct a hearing whenever it decides to disconnect a person's electricity supply, it is nevertheless required to afford notice to affected parties and, where such parties validly challenge the decision to terminate their electricity supply, be prepared to engage in good faith.<sup>371</sup>

### 3.5.2. *Joseph: Reimagining socio-economic rights*

Commentators suggest that the approach adopted by the Court in *Joseph* is notable for several reasons. The judgment adopted an anti-formalist and creative characterisation of the rights and duties involved.<sup>372</sup> The most notable feature of this development was the Court's creation of a new species of 'public law right' based on government's constitutional and statutory duties rather than relying directly on the fundamental socio-economic rights enshrined in the Constitution.<sup>373</sup>

Specifically, the Court relied on sections 152 and 153 of the Constitution to establish the obligations borne by local government in respect to the municipal services owed. In essence these obligations provide that the object of local government is to provide a democratic and accountable administration, to ensure that the provision of services is made sustainably, that it promotes socio-economic and environmental rights, and that it encourages public participation.<sup>374</sup> Furthermore, the Constitution obliges municipalities to prioritise the basic needs of the community while providing equitable access to the municipal services to which they are entitled.<sup>375</sup>

In addition to this, the empowered statute or legislation in respect to these constitutional provisions is the Municipal Systems Act which reiterates much of what is provided above with only minor differences. The only provision relied on by the Court which

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<sup>368</sup> Ibid para 47.

<sup>369</sup> Ibid.

<sup>370</sup> Ibid para 63.

<sup>371</sup> Ibid.

<sup>372</sup> Cora Hoexter, *Administrative Law in South Africa* 2012 at 403.

<sup>373</sup> Ibid at 404.

<sup>374</sup> Section 152(1).

<sup>375</sup> Section 153.

referred explicitly to electricity was section 9(1)(a)(iii) of the Housing Act which provides that every municipality must take all reasonable and necessary steps to ensure that ‘services in respect of water, sanitation, electricity, roads, storm-water drainage and transport’ are provided efficiently.

At its core, the public law right to electricity created in *Joseph* stems from the recognition that public law relationships when looked at through ‘constitutional imperatives of good governance flowing from foundational principles of the rule of law and public administration values in the Constitution’ are worthy of procedural protection.<sup>376</sup> However, the approach adopted by the Court still remains rather perplexing when looked at in its context. Cora Hoexter notes that despite the Court’s finding that there was no need to place any reliance on the fundamental rights contained in the Bill of Rights, the constitutional and statutory provisions that it did rely on are notably vague and general.<sup>377</sup>

Yet there are questions that could be raised as to why the Court found it unnecessary to consider any of the fundamental rights contained in the Bill of Rights in order to establish a public law right. Specifically, the applicants referred to the rights to housing and human dignity contained in sections 26 and 10 of the Constitution respectively. With respect to the former, it was the thrust of the applicant’s case that the disconnection of their electricity supply negatively affected their right of access to adequate housing. It was their submission that the act of terminating their electricity was a retrogressive measure which infringed upon the negative obligation on the City not to interfere with this right.<sup>378</sup>

The fact that the applicants placed so much weight on this contention should not be surprising. Strategically, this approach simply made pragmatic sense considering the rich source of jurisprudence the Court had developed in respect to the right of access to adequate housing. However, in *Joseph*, the Court opted for silence on the matter, with Skweyiya J simply stating that ‘[i]n the view I take of the matter it is not necessary to address this contention.’<sup>379</sup> Similarly, in response to the applicant’s second contention, and perhaps providing some further illumination, she stated that ‘it is not necessary to consider the right to human dignity as a self standing right for the purposes of s 3 of the PAJA.’<sup>380</sup>

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<sup>376</sup> Melanie Murcott ‘The role of administrative law in enforcing socio-economic rights: Revisiting Joseph’ 2013 *SAJHR* at 486.

<sup>377</sup> Hoexter op cit note 372 at 404.

<sup>378</sup> Bilchitz op cit note 277 at 50.

<sup>379</sup> *Joseph* supra note 130 para 32.

<sup>380</sup> *Ibid.*

The Court's caution to pronounce on anything resembling the formation of content in respect socio-economic rights has been well documented. However, it should also be borne in mind that when enforcing rights to electricity or sanitation, the Court's avoidance in implicating fundamental rights may stem from the concern that the Bill of Rights does not explicitly enshrine either. In this sense, it may want to avoid enforcing them directly or it may risk elevating them to a similar level.<sup>381</sup>

Although this approach has attracted significant criticism for nearly a decade, it seems that this is the approach to which the Court has committed itself. With this in mind an intriguing footnote included in *Joseph* may provide some insight into why this is.<sup>382</sup> In it, Skweyiya J refers to the Batho Pele Policy which provides that it may be desirable to conceive of the terms 'citizen' and 'customer' as interchangeable when referring to the service delivery duties imposed on the state.<sup>383</sup> Furthermore, she concludes:

It seems to me that that Batho Pele gives practical expression to the constitutional value of *ubuntu* which embraces the relational nature of rights. Courts must move beyond the common law conception of rights as strict boundaries of individual entitlement.<sup>384</sup>

In other words, the Batho Pele policy appears to call for a transformed public service, where such services are not conceived of as privileges but legitimate expectations.<sup>385</sup> What is required is a focus on creating a framework in terms of which citizens are treated as customers, who are enabled to hold public servants accountable for the services they receive.<sup>386</sup> If South Africa's legislative and policy framework were looked at through the Batho Pele lens it would strengthen the view that people have immediately enforceable entitlements that could protect and promote access to socio-economic rights contained in the Constitution and elsewhere, including a right of access to sanitation.

It is suggested that decision of *Joseph* established a basis from which to fashion additional public law rights in future. Chief amongst these is a public law right to sanitation. Arguably, poor sanitation presents far more of an immediate human rights concern than

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<sup>381</sup> Bilchitz op cit note 277 at 54.

<sup>382</sup> *Joseph* supra note 130 at fn 39.

<sup>383</sup> Bilchitz op cit note 277 at 56.

<sup>384</sup> *Joseph* supra note 130 at fn 39.

<sup>385</sup> White Paper on Transforming Public Service Delivery GG 18340 (1 October 1997)('Batho Pele' policy).

<sup>386</sup> *Ibid* para 1.2.12.

access to electricity does. Where people lack access to sanitation their lives, health and human potential is severely diminished.

What makes the prospect of a public law right to sanitation particularly promising is that, in contrast to the electricity related provisions relied on by the Court in *Joseph*, the legislative and policy framework outlined in Chapter 2 shows that litigants would not have to risk relying on vague or general entitlements to establish such an analogous right. The Court's decision does not necessarily discount the implication of fundamental rights either. In this sense public law rights present a further opportunity for litigants to explore the frontiers of a relatively novel concept in our administrative and socio-economic rights jurisprudence. The question then should not be whether a public law right to sanitation is justiciable, but rather to what extent a public law right to sanitation or similar rights could be realised.

### 3.6. A RIGHT OF ACCESS TO SANITATION: SUMMARY REMARKS

In its seminal judgment of *Grootboom*, the Constitutional Court provided a reasonableness blueprint which continues to present valuable guidance to this day. As was previously mentioned, the question before the Court was not whether socio-economic rights were justifiable, it was the extent and manner of their enforcement that was open to interpretation. However, perhaps wisely recognising that over time the statutory and policy schemes that were to inform these rights would develop significantly, the Court produced a test that would be sensitive to the often context dependant enquiries that surround the positive enforcement of socio-economic rights.

Perhaps not as clear, but it remains explicit nonetheless, the Court recognised that the enforcement of socio-economic rights is primarily a service delivery matter. Namely, it recognised that litigants may want to enforce specific services like electricity or sanitation. It also recognised that the provision of such services could inform fundamental rights like the right of access to adequate housing.<sup>387</sup> The only substantive benchmark for whether the provision of services is constitutionally compliant is that such policies be reasonable.

Although the Court's second wave jurisprudence has been criticised for emphasising the procedural aspects of socio-economic rights rather than their substantive content, a combined analysis of its judgments provides a number of directions. Firstly, it appears that attempts to litigate directly on socio-economic rights have yielded mixed results for parties. The Court appears cautious about defining the interests or goods that could be protected when

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<sup>387</sup> *Grootboom* supra note 175 para 35-37.

relying directly on fundamental rights.<sup>388</sup> In this sense, some commentators suggest that its second wave jurisprudence has developed reasonableness more through assertion than interpretive analysis or substantive engagement with the fundamental rights concerned.<sup>389</sup>

Secondly, commentators point out that this is largely a result of the court's 'proceduralisation' of socio economic rights. As was provided by the Constitutional Court's decision of *Port Elizabeth Municipality*, and later the High Court decisions of *Beja* and *Melani*, a failure to engage at the stage of policy formulation seriously compromises the integrity of the final policy. In other words, where the state falls short of this procedural component it may undermine the reasonableness of the policy itself, particularly where the fundamental rights of the affected persons are later infringed upon.

On the other hand, what the decisions of *Joe Slovo* and *Mazibuko* show is that a failure to properly engage does not necessarily land a fatal blow on the reasonableness of the state's policy. Where state authorities have either since taken steps to remedy this procedural defect or the policy concerned is otherwise sufficiently laudable in the eyes of the Court, it seems that it is willing to exercise a significant measure of deference in respect to the state's case. In this respect, it is also arguable that in these cases the Court's reasonableness test has displaced some of the rights that should have otherwise been available to litigants through administrative law.<sup>390</sup>

Nevertheless, these findings should not detract from the fact that there are still means whereby litigants can resort to litigation to enforce their rights. Where the state engages in conduct that threatens or extinguishes existing rights or entitlements the Court appears comfortable in protecting those rights from infringement.<sup>391</sup> Furthermore, as has been illustrated throughout this Chapter, litigants can and should use the available rights and entitlements that flow from South Africa's comprehensive legislative and policy framework regulating the provision of basic services.<sup>392</sup> As has been directed by the Court, it is to this rich pool of rights and entitlements that litigants should look to when attempting to enforce their socio-economic rights.

The abovementioned decisions also illustrate how a right of access to sanitation may be protected or realised. The decision of *Nokotyana* illustrates how government can be compelled to act positively toward realising particular expectations, namely, the simple act of

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<sup>388</sup> Wilson & Dugard op cit note 173 at 24.

<sup>389</sup> Ibid; Van den Berg op cit note 204 at 387.

<sup>390</sup> Wilson & Dugard op cit note 173 at 24.

<sup>391</sup> Ibid at 25.

<sup>392</sup> Ibid.

committing itself to a decision that could give rise to enforceable entitlements, including incidental entitlements to interim sanitation.

With this in mind the decision of *Beja* is equally notable for providing a deeper understanding of how a right to interim sanitation could be enforced and under what circumstances. It appears in terms of the Housing Code's UISP provisions that where a decision to upgrade an informal settlement has been taken by the MEC for Human Settlements, there arise enforceable rights to certain interim services including sanitation. Although a similar right to interim sanitation is included in the Code's EHP, the decision of *Beja* suggests that the interim services envisioned in the UISP must be of a higher quality and should take guidance from the National Norms and Standards.

Unlike the decisions of the Constitution Court, the litigants in *Beja* were also capable of persuading the court that a number of interrelated fundamental rights were infringed upon, not only through reference to legislation and policy governing the provision of housing and water, but also through reference to the City's municipal responsibilities in terms of the Municipal Systems Act. Importantly, the court held that the government runs the risk of falling foul of its constitutional responsibilities whenever it provides toilets without a permissible level of privacy or safety. We know from the DWS's Water Services Act, the Regulations Relating to Compulsory National Standards and Measures to Conserve Water and its latest sanitation specific policy that these are basic requirements for all sanitation services provided.

From both a factual and legal perspective, the decisions of *Melani* and *Kenton on Sea Ratepayers Association* provide examples of just how multifaceted and nuanced the issues surrounding sanitation can be. In *Melani* we see very similar issues to those in *Beja* but contested successfully through an administrative law approach. It is interesting to note that in considering the appropriate relief that the court was anything but deferential. It directed the City to upgrade Slovo Park *in situ* despite the manifest separation of powers concerns.

In contrast the decision of *Kenton on Sea Ratepayers Association* provides a rather unique set of circumstances where the poor management of waste removal facilities may be challenged. Referring to the relevant constitutional and statutory provisions which oversee local governance, the court provided an elaborate interrogation of the relationship between the provision of municipal services and, where they intersect, their protection or promotion through fundamental socio-economic rights. Unlike any of the other judgments discussed, the applicants here relied primarily on the environmental rights contained in the Bill of Rights.

The court in *Kenton on Sea Ratepayers Association* indicated further that not only would it be advisable to enforce socio-economic rights through the legislative and policy provisions designed to give effect to them, but that these services may be limited to those considered 'basic'. It remains to be seen whether this is indeed the case. The constitutional standard is one of reasonableness and it is foreseeable that the expected standard could vary over time. When times are desperate and resources are scarce it may be appropriate to limit the provision of services to their most basic level. However, if s 26 is indeed amongst the fundamental rights designed to realise access to sanitation, then it is constitutionally required that such access also be adequate and progressively realised. In times of economic prosperity there could be compelling considerations that would require more than the provision of basic services alone.

Perhaps the most inventive of the decisions to have come from the Constitutional Court is the decision of *Joseph*. Here, the Court adopted a purposive approach to the entitlements involved and fashioned an entirely new 'public law right' to electricity sourced in the constitutional and statutory provisions which outlined the state's duty to provide electricity. Through this, the Court also expanded upon the 'special cluster of relationships' that exist between a municipality and citizens, a theme that has become increasingly common in socio-economic rights litigation.

*Joseph* also provides a unique insight into how an analogous public law right to sanitation may be protected. Like electricity, it is one of the most common and important municipal services that can be provided. Perhaps even more so. However, be it the negative protection of the right or its positive promotion, the Court's emphasis on South Africa's democratic values and the requirement that local government comply with its service delivery obligations is crucial to understanding current and future jurisprudential trends. This is a trend that sources the issues within the legislative and policy applicable to the country's public administration and requires that the state meet its service delivery responsibilities.

In this respect the Batho Pele policy referred to in *Joseph* provides some guidance on how the entitlements that flow from the state's service delivery programmes could be re-imagined. Instead of construing the rights involved as sourced directly in the Constitution, it could be imagined that the drafting and implementation of policy in particular gives rise to a basket of legitimate expectations. These would form legitimate expectations not only in the individual sense but the communal sense too. In other words, this characterisation of the entitlements involved could give practical expression to the constitutional value of *ubuntu*.

## CONCLUSION

In conclusion, although there is a great disparity in access to sanitation between the rich and the poor, it should be remembered that all have a right to live a dignified life. Those who live in poverty and with little to no access to sanitation should not have to think of this right as a dream. It is hoped that in outlining the legislative and policy basis for a right of access to sanitation this thesis could make a contribution to a South African future which actively seeks to ensure that the basic needs of the poor are secured. This is primarily the responsibility of government and where litigation is necessary it must be held to account. After all, South Africa's Constitution is premised on the basis that ours is a society committed to democracy, constitutionalism and the fulfilment of fundamental human rights.

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