

**AN ANALYSIS OF SANITATION AND WATER SERVICE DELIVERY IN MAHIKENG  
LOCAL MUNICIPALITY**

Mini dissertation submitted in partial fulfilment of the requirements of the degree of  
Master of Laws in the Faculty of Law

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by

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## **Candidate's Declaration**

I, Mutsi Phethedi Mleya, do hereby declare that except for references specifically indicated as such in the text and any other help as I have acknowledged, this dissertation is wholly a product of my own research, opinions and analysis and has not been previously submitted for assessment to any other University or for academic examination towards any other qualification.

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**Declaration by supervisor**

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## **Dedication**

To my mother, Patience Mleya, the woman who loves me unconditionally and with unceasing love, you mean the world to me.

## **Abstract**

This study analyses various statutes and policies on water and sanitation service delivery in Mahikeng. The water and sanitation services delivery system of the Mahikeng Local Municipality is problematic because of the absence of a formal policy that outlines the duties of the municipality as a water service provider. Through a thematic approach, the study concludes that Mahikeng Local Municipality officials are complacent and at times do not exercise their discretion to avoid foreseeable harm in water and sanitation service provision. Accountability and responsiveness manifest themselves through encouraging community participation for collaboration with the Mahikeng community in decision-making. Community participation is not a guarantee to adequate sanitation and water service delivery but an ideal arrangement is envisaged when an experienced private company takes over some of the functions of the Mahikeng Local Municipality through a contract with specific terms of reference that are subject to review after engaging stakeholders in the fashion that Johannesburg has resorted to in order to provide improved water quality.<sup>1</sup>

Keywords: water services, service delivery, accountability, legitimate expectations, community participation, governance and government

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<sup>1</sup> Chirwa 2009 *Law, Democracy and Development* 184.

## **List of Abbreviations**

CALS – Centre for Applied Legal Studies

CHRE – Centre on Human Rights and Evictions

CJLG – Commonwealth Journal of Local Governance

Hum Rts L Rev – Human Rights Law Review

IDP – Integrated Development Plan

IELRC – International Environmental Law Research Centre

Int'l J Const L – International Journal of Constitutional Law

KAS – Konrad Adenauer Stiftung

NCHR – Norwegian Centre for Human Rights

OIDA – Ontario International Development Agency

PER– Potchefstroom Electronic Law Journal

RDP – Reconstruction Development Programme

SALGA – South African Local Government Authority

SSRN – Social Science Research Network

STELL LR – Stellenbosch Law Review

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## CHAPTER 1: INTRODUCTION

### 1.1 Background to the study

Sanitation and water service delivery in Mahikeng local municipality is a hotly contested issue among residents<sup>2</sup> as this service is essential to their daily lives. The central characteristic of all rights is that they hinge on the preservation of life and dignity.<sup>3</sup> The right to water and sanitation is an internationally recognised right,<sup>4</sup> which promotes healthy standards of living and the wellbeing of any society.<sup>5</sup> The right to water and sanitation bears the salient features of being essential to hygienic and healthy life, which, if not respected by some water service providers<sup>6</sup> such as Mahikeng Local Municipality,<sup>7</sup> may result in fatalities.<sup>8</sup> The Mahikeng Local Municipality has a duty to directly enforce water and sanitation rights and avoid infringements of these rights caused by inconsistent service delivery. The expectations of the local community in this regard would be that, among others, septic tanks and ventilated improved latrines must expediently be cleared upon any resident's request. It is expected that the municipality provide for clean water at all times and that access to adequate sanitation facilities is provided to the most vulnerable members of society at the state's expense.<sup>9</sup> These expectations of the residents translate into deliverable services that relate to water and sanitation. These services are crucial to the survival of the citizens and residents of Mahikeng in particular. Mahikeng is situated in a semi-arid region<sup>10</sup> where water is always a problem and it is up to the local municipality to ensure reliable and smooth

<sup>2</sup> Interview of MEC Maine *Youth Today* 7 and Anonymous 2014 [www.sabc.co.za/news](http://www.sabc.co.za/news).

<sup>3</sup> *S v Makwanyane* 1995 (3) SA 391 (CC) para 144.

<sup>4</sup> United Nations "The human right to water and sanitation" 2010 *GA Res 64/292* para 1.

<sup>5</sup> Article 25 of the United Nations *Universal Declaration of Human Rights* (1949).

<sup>6</sup> Is defined as an institution that provides water services to consumers in the *Water Services Act* 108 of 1997.

<sup>7</sup> *Ngaka Modiri Molema District IDP* (2011 - 2016) page 17 provides that the Mahikeng Local Municipality is a water service provider.

<sup>8</sup> The preamble of United Nations "The human right to water and sanitation" 2010 *GA Res 64/292* shows that negligent water and sanitation service delivery may cause water and sanitation related diseases that are potentially fatal and lead to a decline in the productivity of the population.

<sup>9</sup> *Beja and others v Premier of the Western Cape and Others* (hereinafter *Beja*) [2011] 3 All SA 401 (WCC) para 5.

<sup>10</sup> *Ngaka Modiri Molema District IDP* (2011 - 2016) page 19.

water service provision. Sight should not be lost of the fact that the right to water is regarded as important even in international regulatory instruments. The importance of the right to access adequate sanitation facilities and protected water is reflected a number of times either implicitly or explicitly in international human rights instruments. The international instruments that promote water and sanitation rights include but are not limited to this set: the United Nations *Universal Declaration of Human Rights*,<sup>11</sup> the *International Covenant on Economic Social and Cultural Rights*,<sup>12</sup> *Johannesburg Declaration on Sustainable Development*<sup>13</sup> and the *Millennium Declaration*.<sup>14</sup>

During the apartheid era, government authority was centralised, and this meant that local municipalities lacked the capacity to independently deliver sanitation and water service needs without engaging the national government.<sup>15</sup> During that time, the management of water resources was deeply political, influenced by issues of access to power and means of production. The apartheid system curtailed such access through rigid legislation.<sup>16</sup> This bureaucratic system of government gave rise to several service

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<sup>11</sup> United Nations *Universal Declaration of Human Rights* (1949) in article 22 which states that socio-economic rights are indispensable for the upholding of the dignity of an individual and the socialization of the personality of an individual and Article 25 which acknowledges the right to a standard of living that promotes health and wellbeing, which were in 2010 recalled for special consideration with regards to United Nations “The human right to water and sanitation” 2010 *GA Res 64/292*. United Nations “The human right to water and sanitation” 2010 *GA Res 64/292* expressly recognises the right to water and sanitation as a human right and calls upon states and international organisations to collaborate in increasing access to water and sanitation in particular to developing countries.

<sup>12</sup> *International Covenant on Economic Social and Cultural Rights* (1967) further interpreted in the Committee on Economic Social and Cultural Rights substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights “The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)” 2002 *General Comment No. 15* and further promoted in the Human Rights Council “Human rights and access to safe drinking water” 2010 *GA Res A/HRC/15/L.14*.

<sup>13</sup> Adopted at the World Summit on Sustainable Development in Johannesburg, South Africa, 4 September 2002, which states that the socio-economic and environmental rights are indivisible and that their protection is a global concern that requires international capacity building, technology transfer and financial co-operation to banish underdevelopment.

<sup>14</sup> United Nations “Millennium Declaration” 2000: *GA Res 55/2*, which contains a goal to by 2015 to half the proportion of the people unable to access or afford clean drinking water, which proves to be problematic in Mahikeng where most families have resorted to buying water from reputable companies due to a lack of trust in the municipality’s capacity to deliver clean water.

<sup>15</sup> Binns and Nel 2002 *Regional Studies* 932.

<sup>16</sup> The *Group Areas Act* 1950 racially segregated areas in which different racial groups could reside in and had supporting government policy that provided for separate funding of water and sanitation service delivery by race – Department of Co-operative Governance and traditional Affairs and European Commission 2009 [http://sacitiesnetwork.co.za/wp-content/uploads/2014/07/poster\\_of\\_township\\_timeline.pdf](http://sacitiesnetwork.co.za/wp-content/uploads/2014/07/poster_of_township_timeline.pdf).

delivery problems, especially in black communities that were systematically marginalised by apartheid laws.<sup>17</sup> Consequently, several demonstrations and service delivery strikes were rife in black communities.<sup>18</sup> In the current constitutional dispensation, the right of access to adequate water and sanitation services is a constitutionally recognised socio-economic right of all Mahikeng residents.<sup>19</sup> This makes the provision of adequate water and sanitation services to all Mahikeng residents a mandatory constitutional duty<sup>20</sup> promoted and protected<sup>21</sup> by the national, provincial and local arms of government.

The Mahikeng Local Municipality falls under Ngaka Modiri Molema District Municipality in the North-West Province, South Africa. The municipality has a constitutionally mandated primary duty to promote access to adequate water and sanitation facilities to its communities. “Water services refer to water supply and sanitation services...and the collection and treatment of wastewater.”<sup>22</sup> Section 156(1) (a) and Schedule 4 part B of the 1996 Constitution of South Africa provide that municipalities have executive authority over the provision of potable water and sewage disposal systems. The right to access adequate water facilities is integral to the sustenance of human life<sup>23</sup> and must be provided by government to maintain the dignity of residents and not expose them to the indignity of collecting water from unsafe sources<sup>24</sup> or use indecent sanitation facilities.<sup>25</sup> Therefore, Mahikeng Local Municipality has a duty to provide quality water services to all members of its communities in an environmentally friendly and

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<sup>17</sup> Binns and Nel 2002 *Regional Studies* 921.

<sup>18</sup> Monaghan 2008 *International Criminal Justice Review* 84.

<sup>19</sup> Section 27 of the *Constitution of the Republic of South Africa*, 1996 (hereinafter the Constitution) recognizes the right for everyone to receive adequate water and Section 26 of the Constitution recognises the right for everyone to access adequate housing that by extension may include adequate sanitation facilities.

<sup>20</sup> This duty corresponds with the rights contained in sections 26 and 27 of the Constitution.

<sup>21</sup> Section 7(2) of the Constitution.

<sup>22</sup> Eberhard 2003 <http://www.treasury.gov.za/publications/other/epir/water.pdf> page 6.

<sup>23</sup> Human Rights Council “Human Rights and Access to Safe Drinking water and Sanitation” 2010 *GA Res A/HRC/15L.14* in para 2 details the rights to water and sanitation as essential to the full enjoyment of the right to life and water.

<sup>24</sup> Human Rights Council “Human Rights and Access to Safe Drinking water and Sanitation” 2010 *GA Res A/HRC/15L.14* in para 3 details the right to water as essential to mental health, physiological integrity and human dignity.

<sup>25</sup> Article 22 of the United Nations *Universal Declaration of Human Rights* 1948 which states that socio-economic rights are indispensable for the upholding of the dignity of an individual and the socialization of the personality of an individual

economically sustainable manner. Should this not be met, in the current constitutional dispensation,<sup>26</sup> Mahikeng residents, like all residents of various South African municipalities, have the right to picket and present petitions on water and sanitation services.<sup>27</sup>

Therefore, in order to obtain adequate water service delivery infrastructure in Mahikeng, the Local Municipality's development plans should be progressively realised within the resources available to local government.<sup>28</sup> The progressive realisation of adequate water and sanitation services and policies of the Mahikeng Local Municipality should be reviewed by all the relevant stakeholders, including donors and residents.<sup>29</sup>

The 2014/2015 *Integrated Development Plan Review of the Ngaka Modiri Molema District* indicates that the district faces water shortages and may require further infrastructural relief to reconcile the demand of water to the currently available volume of water.<sup>30</sup> This is one of the factors that impacts heavily on the right to access adequate water. There exist discrepancies in basic sanitation services between the actual delivery and the ideal vision for Mahikeng residents.<sup>31</sup> Concerning the issue of disparities, Chaskalson J, Goldstone J and O'regan J, pointed out that:

It is a legitimate aim and function of local government to eliminate the disparities and disadvantages that are a consequence of the policies of the past and to ensure, as rapidly as possible, the upgrading of services in the previously disadvantaged areas so that equal services will be provided to all residents.<sup>32</sup>

Emerging from the apartheid era, government authority was centralised and this meant that local municipalities lacked the capacity to independently provide for service delivery needs without engaging the national government.<sup>33</sup> South Africa has made rapid

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<sup>26</sup> The Republic of South Africa is one sovereign and democratic state founded on the values of transparency, responsiveness and openness among others – Section 1(d) of the Constitution.

<sup>27</sup> Section 17 of the Constitution.

<sup>28</sup> Section 27 of the Constitution.

<sup>29</sup> Odeku and Konanani 2014 *Studies Tribes and Tribals* 164.

<sup>30</sup> 2014/ 2015 *Integrated Development Plan Review of the Ngaka Modiri Molema District* page 53.

<sup>31</sup> Motsapi 2014 <https://www.dwa.gov.za/stories/BucketToiletsSystem.pdf>.

<sup>32</sup> *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 1 SA 374 (CC) para 80.

<sup>33</sup> Binns and Nel 2002 *Regional Studies* 932.

progress in eliminating poverty in the post-apartheid era because local government now plays an active role in the provision of services in previously disadvantaged areas such as Mahikeng.<sup>34</sup> Currently, the provisions of sanitation and water services are governed by both the national and provincial legislations.<sup>35</sup> It is important that this is fulfilled as water is a crucial necessity in the lives of all people.

Water services are essential to the wellbeing of Mahikeng communities and as such, providing these services requires adequate planning on the part of the relevant authorities to optimise delivery. Although municipal councils have executive and administrative authority over potable water service delivery,<sup>36</sup> there are still problems in the management of water purification<sup>37</sup> and cost recovery systems<sup>38</sup> of the Mahikeng Local Municipality. To complete these processes effectively, there must be a money generating plan that ensures timeous delivery of water services. Adequate financial and management structures in any municipality become an imperative foundation for efficient service delivery. Therefore, there are legitimate tariffs charged on the Mahikeng Local Municipality residents which include both operational management and resource development elements that have an impact on operational and projected capital budgets and plans.<sup>39</sup> The failure of the Mahikeng Local Municipality to receive these tariffs usually results in poor sanitation and water service delivery problems in Mahikeng. In 2003, an *Ad hoc Committee on the Intervention in the Mahikeng Local Municipality* reported that poor financial planning, administration and debt collection practices in the municipality impacted negatively on the capacity of municipality to deliver free basic

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<sup>34</sup> Kgoali et-al 2004 <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2004/appendices/04819Mahikeng1.htm>.

<sup>35</sup> Section 156(1)(a) and Schedule 4 part B of the Constitution.

<sup>36</sup> Section 156(1)(a) and Schedule 4 part B of the Constitution.

<sup>37</sup> Anonymous 2012

<http://ewisa.co.za/ewisawaterworks/misc/municipalcontacts/defaultNWNgakaModiriMolema.htm>;

Ruiters in his capacity as Director: Infrastructure Services wrote a letter to Solomon Mathebula at the Botshelo Water, Corporate Centre on 18 September 2013 criticising "Poor Water Quality." The Letter is available at the Mahikeng Local Municipality Tell 0183890382 the information therein was released solely for research purposes and Anonymous 2014 [www.sabc.co.za/news](http://www.sabc.co.za/news).

<sup>38</sup> Poor billing and debt collection systems have led to a large number of outstanding debts from the local community - SALGA "Comments on Botshelo Water's proposed bulk tariff increase for the 2013/2014 financial year" circular dated 30 January 2013 page 7.

<sup>39</sup> Eberhard 2003 <http://www.treasury.gov.za/publications/other/epir/water.pdf> page 15.

services to indigent communities.<sup>40</sup> In 2011, the court also echoed this view in *Beja and others v Premier of the Western Cape and Others*<sup>41</sup> where it found that administrative and financial failures of municipalities happen in environments where the discretionary powers of municipality officials are unchecked and they lose sight of the needs of the most vulnerable and desperate people in society.<sup>42</sup> It is imperative to have a full scope of Mahikeng Local Municipality officials' financial planning responsibilities professionally audited in order to check the legitimacy of their decisions.<sup>43</sup> On the same note, in 2013 Mahikeng Local Municipality residents complained about the billing system of the municipality, alleging that they never see water meter readers or receive letters containing water bills.<sup>44</sup> Without effective billing systems there cannot be enforceable debt collections by the Mahikeng Local Municipality. Therefore, the Mahikeng Local Municipality's debt collection strategies should be systematically and consistently implemented to improve water and sanitation services.

The Mahikeng Local Municipality has a mandate to consistently report its water related problems to the Sedibeng Water Board to enable the Water Board to find possible solutions to such problems.<sup>45</sup> It is also the municipality's duty to explain<sup>46</sup> their inactions whenever standards of sanitation and water service delivery are below expected standards.<sup>47</sup> Between 2009 and 2012 the Mahikeng Local Municipality failed to achieve the blue drop certification on water purification status by large margins.<sup>48</sup> On countless occasions, the municipality has made promises to rectify this anomaly and provide clean water.<sup>49</sup> These seem to be just empty promises which are unlikely to restore

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<sup>40</sup> Kgoali et-al 2004 <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2004/appendices/04819Mahikeng1..htm>.

<sup>41</sup> [2011] 3 All SA 401 (WCC).

<sup>42</sup> *Beja para* 102.

<sup>43</sup> Ursolo N R 2011 *Uppsala faculty of Law Working Paper* 24.

<sup>44</sup> Insession 2014 [www.parliament.gov.za/live/counterpopup.php/Item\\_ID=6714&Category\\_ID](http://www.parliament.gov.za/live/counterpopup.php/Item_ID=6714&Category_ID).

<sup>45</sup> Section 23(a) of the *Water Services Act* 108 of 1997.

<sup>46</sup> Section 23(d) of the *Water Services Act* 108 of 1997.

<sup>47</sup> The standard for good quality water is the attainment of a blue drop certificate from the Department of Water Affairs and the standard of adequate sewage treatment is the attainment of a green drop certificate from the Department of Water Affairs. - Department of Water Affairs 2008 <http://www.dwa.gov.za>.

<sup>48</sup> Anonymous 2012

<http://ewisa.co.za/ewisawaterworks/misc/municipalcontacts/defaultNWNgakaModiriMolema.htm>.

<sup>49</sup> Interview of MEC Maine *Youth Today* 7 and Anonymous 2014 [www.sabc.co.za/news](http://www.sabc.co.za/news).

public confidence in the municipality as Mahikeng residents taste, smell and see<sup>50</sup> the poor quality of water that is sometimes distributed to them by the same municipality.<sup>51</sup> This proves that there is still a lot more to be done to improve the water and sanitation services in Mahikeng.

## 1.2 Statement of the Problem

The right to access adequate sanitation facilities is a major facet of the right to human dignity and wellbeing and a guiding principle in determining if the living conditions of individuals are tolerable or they are “inhuman and degrading.”<sup>52</sup> It can only be said that sanitation facilities are dignified when they are easy to access, clean and used by people who can be held accountable for their cleanliness after use.<sup>53</sup> For this reason, in *Beja and others v Premier of the Western Cape and Others*<sup>54</sup> it was proved that the one toilet per five households strategy failed to provide adequate sanitation. <sup>55</sup> Dignified use of sanitation facilities shows that a person has been socialised in such a way that allows them to participate in community life. When government is required to provide adequate sanitation facilities it is a means of averting greater health risks like outbreaks of water borne diseases.

The state has the duty to protect<sup>56</sup> individual residents from interference in the existing enjoyment of rights, which includes the charging of unreasonable prices for bottled water.<sup>57</sup> According to Cloete,<sup>58</sup> the adoption of adequate sanitation and water policies could enhance service delivery in Mahikeng. For instance, the proper implementation of sanitation and water-related policies and a review of the performance of the Mahikeng

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<sup>50</sup> Committee on Economic Social and Cultural Rights “Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)” 2002 General Comment No. 15 At para 12(b).

<sup>51</sup> Anonymous 2014 *Ngaka Modiri Molema Municipality Assures Residents of Clean Water* [www.sabc.co.za/news](http://www.sabc.co.za/news).

<sup>52</sup> De Vos and Freedman (eds) *South African Constitutional Law in Context* 457.

<sup>53</sup> *Beja* para 135 -136.

<sup>54</sup> [2011] 3 All SA 401 (WCC).

<sup>55</sup> *Beja* para 136.

<sup>56</sup> Section 7(2) of the *Constitution of the Republic of South Africa*.

<sup>57</sup> De Vos and Freedman (eds) *South African Constitutional Law in Context* 672.

<sup>58</sup> Cloete “Service delivery: Conceptual and practical issues and challenges” 93 states that good governance results in effective service delivery.

officials are necessary in order to improve service delivery. Another dimension is submitted, that the Mahikeng Local Municipality should consistently engage the community to participate in its water and sanitation policy formulation and other related programmes. It is reported<sup>59</sup> that residents in the Mahikeng Local Municipality feel disengaged from the planning process and are generally uninformed about how the Mahikeng Local Municipality operates.

There is a dense population in the Mahikeng community but there is palpably slow progress of sanitation upgrades.<sup>60</sup> There is reluctance within the Mahikeng Local Municipality to strategically implement policies<sup>61</sup> aimed at improving access to adequate sanitation facilities and protect the dignity of those who cannot afford to build standard ablution facilities for themselves.

There are notable discrepancies in relation to access to water and sanitation facilities in the Mahikeng Local Municipality. For instance, in 2010, 60% of the houses in the Ngaka Modiri Molema District had no access to adequate and healthy sanitation facilities,<sup>62</sup> 36% of the households had no direct access to water facilities<sup>63</sup> and a further 22% of households had to walk long distances to obtain water facilities.<sup>64</sup> These discrepancies defeat the provisions of the constitution that require that “everyone has the right to access sufficient water.”<sup>65</sup> Some of the Mahikeng Local Municipality officials are incompetent<sup>66</sup> giving rise to maladministration, poor sanitation and water service delivery in Mahikeng. The court in *Beja and others v Premier of the Western Cape and Others*<sup>67</sup> found that the failure of municipalities to deliver basic water and sanitation services happens in environments where they have wide discretionary powers but fail to

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<sup>59</sup> Insession 2014 [www.parliament.gov.za/live/counterpopup.php/Item\\_ID=6714&Category\\_ID](http://www.parliament.gov.za/live/counterpopup.php/Item_ID=6714&Category_ID).

<sup>60</sup> The North-West Province has the third highest number of bucket toilets in South Africa – People’s Assembly 2014 <http://www.pa.org.za/blog/new-department-tasked-with-eradicating-bucket-toilets>.

<sup>61</sup> During the preparation of the integrated development plan the Mahikeng Local Municipality delayed in the submission of project proposals relating mainly to water and sanitation - Ngaka Modiri Molema District Municipality Integrated Development Plan, 2012 – 2016 page 12.

<sup>62</sup> Ngaka Modiri Molema District Municipality Integrated Development Plan, 2012 – 2016 page 22.

<sup>63</sup> Ngaka Modiri Molema District Municipality Integrated Development Plan, 2012 – 2016 page 19.

<sup>64</sup> Ngaka Modiri Molema District Municipality Integrated Development Plan, 2012 – 2016 page 19.

<sup>65</sup> Section 27 of the Constitution.

<sup>66</sup> Ngaka Modiri Molema District Municipality Integrated Development Plan, 2012 – 2016 pages 12 and 72.

<sup>67</sup> [2011] 3 All SA 401 (WCC).

consider the social impact of policy on the most desperate and vulnerable members of society.<sup>68</sup> It is against this backdrop that this study seeks to explore the importance of water service delivery in Mahikeng.

### **1.3 Aims and Objectives**

#### 1.3.1 Aims

The aim of the study is to:

- discuss the responsibility of the Mahikeng Local Municipality in providing water and sanitation services to Mahikeng residents;
- discuss selected factors affecting water and sanitation service delivery in the Mahikeng Local Municipality; and,
- analyse the importance of adequate community participation and debt collection practices in the Mahikeng Local Municipality in promoting access to water and sanitation services to all residents.

#### 1.3.2 General objective

The study seeks to analyse sanitation and water service delivery in Mahikeng Local Municipality.

#### 1.4 Rationale of the Study

- To provide guidance to other local municipalities which are faced with the same predicament;
- To redirect practices on water and sanitation service delivery policy in Mahikeng and beyond, based on legal issues identified in the Mahikeng Local Municipality;

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<sup>68</sup> *Beja* para 102.

- To contribute to the ongoing debates on municipal water and sanitation by providing concrete evidence of the impact of inefficient water and sanitation delivery based on legislation; and,
- To provide insights for researchers and scholars on local municipalities and administration of water and sanitation service delivery in South Africa and beyond.

### 1.5 Limitation of the Study

The study is limited to a desktop research. The study was conducted in the Mahikeng Local Municipality and utilised statistics and circulars obtained from the municipality.

### 1.6 Research Methodology

The qualitative method approach will be adopted. The study was limited to a desktop research. Primary and secondary sources were used. For instance, the study uses primary sources such as legislation and case law in South Africa and elsewhere, to assess sanitation and water service delivery in Mahikeng. Secondary sources such as books, journal articles, conference papers, newspaper articles, government circulars from the Mahikeng Local Municipality, local libraries and internet sources were used. In a nutshell, a qualitative research method was employed throughout the study following a thematic approach. The Potchefstroom Electronic Law Journal standard referencing style was employed in this study.

### 1.7 Study Scope and Outline

Chapter 1 outlines the background of the study and problem statement that highlights the challenges associated with water and sanitation provisioning in Mahikeng. The chapter demonstrates that effective water and sanitation service delivery could be enhanced through community participation in the relevant Mahikeng Local Municipality policies and their ultimate implementation.

Chapter 2 highlights the challenges that affect water and sanitation service delivery in

Mahikeng. This chapter of the study identifies weaknesses in local government systems, structures and implementation mechanisms and may help come to an understanding of how best the Mahikeng Local Municipality has to deal with the risks to its financial and operational capacity to improve service delivery.

Chapter 3 outlines how poor water and sanitation services in Mahikeng communities infringe upon the human rights of this community. The chapter also reveals that effective community participation could improve water and sanitation services in the Mahikeng communities.

Chapter 4 gives conclusions and possible recommendations that could improve sanitation and water service delivery in Mahikeng.

## 1.8 Summary

Mahikeng communities have a constitutional right to adequate clean water and sanitation services.<sup>69</sup> Mahikeng Local Municipality should ensure improvement of sanitation and water service delivery in all its local communities. This could improve the lives of Mahikeng residents and stem maladministration and complacency among Mahikeng Local Municipality authorities.<sup>70</sup>

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<sup>69</sup> See section F of the *White paper on Local government* 1998.

<sup>70</sup> Ashton 2013 <http://www.ddp.org.za/information-material/articles/transforming-the-tragedies-of-local-government-failure-in-south-africa>.

## CHAPTER 2: SELECTED FACTORS AFFECTING WATER SERVICE DELIVERY IN MAHIKENG LOCAL MUNICIPALITY

### 2.1 Introduction

The factors that negatively affect water and sanitation service delivery consist of inherent challenges in policy implementation, poor financial management practices in municipalities and the inability of formal policies to deliver desired results<sup>71</sup> but are not limited to this set. The discretion of municipality managers and councillors who act without clear policy guidelines is a hindrance to effective service delivery as municipality councillors could lack objectivity when delegating tasks. Their caucus and individual decisions may foreclose residents' rights, ultimately traducing implementation for cost efficiency.<sup>72</sup> For service delivery to be successful; efficient and rights-based management of resources is essential. Optimal management of resources is only possible if local government officials conduct their affairs in a diligent and accountable manner.<sup>73</sup>

The three spheres of government in South Africa, the national, the provincial and the local, have authority over water and sanitation service delivery,<sup>74</sup> suggesting the desirability for a bottom-up approach in planning and promoting efficient and effective service delivery programmes.<sup>75</sup> If municipalities adhere to bottom-up planning and engage local communities therein,<sup>76</sup> developmental plans would yield desirable results because the interests of all stakeholders would receive due consideration. Mireku submits that the promotion of good governance by all spheres of government must strengthen national unity and promote the interests of the nation as a whole.<sup>77</sup> It is worthy of note that the planning responsibilities of the Mahikeng Local Municipality when delivering water services emanate from the 1996 *Constitution of the Republic of*

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<sup>71</sup> Fuo 2013 *PER / PELJ* 262.

<sup>72</sup> Ursolo 2011 *Uppsala Faculty of Law Working Paper* 24.

<sup>73</sup> Carythorne *Municipal Administration: the handbook* 6<sup>th</sup> ed 141.

<sup>74</sup> Section 156(1)(a) and Schedule 4 part B of the Constitution.

<sup>75</sup> Baatjies "The evolution and prospects of our intergovernmental approach: A Local Government Perspective" 3.

<sup>76</sup> Section 16(1)(a)(i) of the *Systems Act*.

<sup>77</sup> Mireku 2000 *African Journal of Comparative and International law* 374.

South Africa, Millennium Declaration,<sup>78</sup> Water Services Act,<sup>79</sup> Municipal Systems Act,<sup>80</sup> Municipal Finance Management Act,<sup>81</sup> Municipal Structures Act,<sup>82</sup> Mahikeng Local Municipality Credit Control and Debt Management Policy,<sup>83</sup> Mahikeng Local Municipality Asset Management Policy,<sup>84</sup> Mahikeng Local Municipality Integrated Risk Management Policy,<sup>85</sup> Mahikeng Local Municipality Fraud Prevention Policy<sup>86</sup> and Mahikeng Local Municipality Indigent Policy.<sup>87</sup> This legislative and policy framework provides for both sound financial management and service delivery and if properly implemented would remedy some of the challenges that negatively affect water service delivery in Mahikeng.

## 2.2 Historical Background of Water Service Problems in South Africa

The factors currently affecting water and sanitation service delivery in Mahikeng could be a continuation of the governance challenges of the apartheid past. The level of sanitation and water service delivery in urban and rural areas is caused by socio-economic factors. Nevertheless, it may have been impacted by previous systems of government. Apartheid zoning systems neglected certain areas because of the classification categories into which the areas were put.<sup>88</sup> During the apartheid era,

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<sup>78</sup> United Nations “Millennium Declaration” 2000 GA Res 55/2.

<sup>79</sup> Act 108 of 1997,

<sup>80</sup> Act 32 of 2000.

<sup>81</sup> Act 56 of 2003.

<sup>82</sup> Act 117 of 1998.

<sup>83</sup> *Mahikeng Local Municipality Credit and Debt Collection Policy*, 2014 Available at [http://archive-za.com/page/3974091/2014-05-12/http://www.Mahikeng.gov.za/index.php?option=com\\_docman&task=cat\\_view&gid=75&Itemid=89](http://archive-za.com/page/3974091/2014-05-12/http://www.Mahikeng.gov.za/index.php?option=com_docman&task=cat_view&gid=75&Itemid=89).

<sup>84</sup> *Mahikeng Local Municipality Asset Management Policy*, 2014 Available at [http://archive-za.com/page/3974091/2014-05-12/http://www.Mahikeng.gov.za/index.php?option=com\\_docman&task=cat\\_view&gid=75&Itemid=89](http://archive-za.com/page/3974091/2014-05-12/http://www.Mahikeng.gov.za/index.php?option=com_docman&task=cat_view&gid=75&Itemid=89).

<sup>85</sup> *Mahikeng Local Municipality Integrated Risk Management Policy*, 2012 Available at [http://archive-za.com/page/3974091/2014-05-12/http://www.Mahikeng.gov.za/index.php?option=com\\_docman&task=cat\\_view&gid=75&Itemid=89](http://archive-za.com/page/3974091/2014-05-12/http://www.Mahikeng.gov.za/index.php?option=com_docman&task=cat_view&gid=75&Itemid=89).

<sup>86</sup> *Mahikeng Local Municipality Fraud Prevention Policy*, 2012 Available at [http://archive-za.com/page/3974091/2014-05-12/http://www.Mahikeng.gov.za/index.php?option=com\\_docman&task=cat\\_view&gid=75&Itemid=89](http://archive-za.com/page/3974091/2014-05-12/http://www.Mahikeng.gov.za/index.php?option=com_docman&task=cat_view&gid=75&Itemid=89).

<sup>87</sup> *Mahikeng Local Municipality Indigent Policy*, 2014 Available at [http://archive-za.com/page/3974091/2014-05-12/http://www.Mahikeng.gov.za/index.php?option=com\\_docman&task=cat\\_view&gid=75&Itemid=89](http://archive-za.com/page/3974091/2014-05-12/http://www.Mahikeng.gov.za/index.php?option=com_docman&task=cat_view&gid=75&Itemid=89).

<sup>88</sup> The *Group Areas Act* 1950 racially segregated areas in which different racial groups could reside in and had supporting government policy that provided for separate funding of water and sanitation service delivery by race – Department of Co-operative Governance and traditional Affairs and European Commission 2009 [http://sacitiesnetwork.co.za/wp-content/uploads/2014/07/poster\\_of\\_township\\_timeline.pdf](http://sacitiesnetwork.co.za/wp-content/uploads/2014/07/poster_of_township_timeline.pdf).

there were no enabling provisions that established municipalities as a competent authority<sup>89</sup> that could pass laws to remedy inequality. The common law system of use of water according to demand and riparian rights<sup>90</sup> made the socio-economic right of universal access to water<sup>91</sup> potentially inaccessible. Local government service delivery issues were not always open to the criticism of the courts and civic society as the apartheid era created a doctrine of municipal immunity that gave municipality administrators unlimited decision making powers.<sup>92</sup> The absolute power of the apartheid bureaucracy reduced the state's capacity to deliver relevant services to the populace because local government officials were a law unto themselves. However, this is now a thing of the past and building public confidence in government officials has become a priority. The *Municipal Systems Act*<sup>93</sup> provides that municipalities have a mandatory duty to consult the local community about "the level, quality, range and impact of municipal services provided by the municipality" and furthers the right of the local community to access information about situations that adversely affect their rights.<sup>94</sup> The dormant status of local government that weakened the responsiveness of government during the apartheid era no longer inhibits water services delivery in the current arrangement.<sup>95</sup>

There has been massive progress made by the current government since 1994 in water and sanitation service delivery but a culture of protest where dissatisfaction occurs did not disappear with apartheid. In 1994, it was estimated that about fourteen million people across South Africa lacked adequate water supply services while about twenty one million had inadequate sanitation. South Africa has made great strides towards the ideal of universal access to water and sanitation.<sup>96</sup> The state has transitioned from one

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<sup>89</sup> *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 1 SA 374 (CC) para 38.

<sup>90</sup> This was the concept applicable to water rights prior to the *National Water Act* 36 of 1998, which links water rights to land rights - Gowlland-Gualtieri 2007 *IELRC Working Paper* 6.

<sup>91</sup> Section 27 of the *Constitution of the Republic of South Africa* 1996.

<sup>92</sup> Hoexter and Lyster *The new Constitutional and Administrative Law Volume II Administrative Law* 305 and The doctrine of municipality immunity in *Moulong v Port Elizabeth Municipality* 1958 (2) SA 518 (AD).

<sup>93</sup> Act 32 of 2000.

<sup>94</sup> Section 4(2)(e) of the *Systems Act*.

<sup>95</sup> *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 1 SA 374 (CC) para 38.

<sup>96</sup> Moatshe and Mbecke 2012 *OIDA International Journal of Sustainable Development* 57.

where water use was driven by demand of those with an objective claim to water, to a state where water is now a public resource<sup>97</sup> under the custodianship of the government at the three-tier level.<sup>98</sup>

Municipalities' responsibility over the living conditions of residents in South Africa requires that government officials represent the best interests of residents and avoid conflict of interests with residents when implementing policies.<sup>99</sup> The government has the responsibility to promote substantive equality, empathetic service delivery and socio-economic development.<sup>100</sup> More specifically, municipalities have a duty to provide adequate water and sanitation services to all the people of South Africa.<sup>101</sup> This implies that local government has the responsibility to ameliorate suffering and improve the living conditions of village and township dwellers by increasing access to water and sanitation facilities.<sup>102</sup>

The right of access to water and sanitation services depicts residents' reliance on government for basic services and the supporting infrastructure.<sup>103</sup> However, among other factors that make it difficult to realise definite results from government policy is a feeling that government has already done enough for post-apartheid South Africa. Baatjies<sup>104</sup> writes about government falling victim to its own aspirations, which is a common statement that reveals a lack of willingness within the executive to do anything further for the people. The Mahikeng Local Municipality's ability to increase access to sanitation and water services depends on the availability of measures to hold the municipality accountable and on the availability of adequate resources to provide for progressive realisation of such rights. The level of accountability and responsiveness of a municipality determine the level of residents' satisfaction with services.

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<sup>97</sup> Direct access to water from the environment is regulated through a licensing system that ensures the realisation of socio-economic and environmental rights - Section 27 of the *National Water Act* 36 of 1998-

<sup>98</sup> Department of Water Affairs 2011  
<https://www.dwa.gov.za/io/Docs/CMA/CMAGBTrainingManuals/gbtrainingmanualchapter1.pdf> page 4.

<sup>99</sup> De Visser *et al* "Report on a Roundtable on Law Reform In Planning" 6.

<sup>100</sup> The *United Nations Charter*, 1945 Article 1 para 3.

<sup>101</sup> Section 156(1)(a) and Schedule 4 part B of the Constitution; Sections 27 and 26 of the Constitution.

<sup>102</sup> United Nations "Millennium Declaration" 2000: *GA Res 55/2* para 19.

<sup>103</sup> Section 27 of the Constitution..

<sup>104</sup> Baatjies "The evolution and prospects of our intergovernmental approach: A Local Government Perspective" 4.

The Mahikeng Local Municipality assists in the promotion of universal access to water for both sanitation and consumption purposes. However, access to basic services in Mahikeng villages continues to lag behind the national norm<sup>105</sup> because of a population explosion.<sup>106</sup> Population explosion without proportional increases in sources of income for the municipality impacts negatively on government policy aimed at expansion of water services. Another matter of concern is that previously underdeveloped rural villages still need greater financial input than developed areas yet they do not have a sufficient tax base.<sup>107</sup> In 2003 the Mahikeng Local Municipality was 25% urban and 75% rural but the equitable share did not reflect these demographics.<sup>108</sup> Cross subsidisation<sup>109</sup> was incapable of advancing substantive equality<sup>110</sup> and financing free basic water provision meant that a few property owners were strained by high tariffs.<sup>111</sup> Apart from cross subsidisation, the national government's equitable share scheme currently contributes resources to remedy the present unequal state of water and sanitation facilities in Mahikeng.<sup>112</sup> The financing of free basic services is part of how the government protects the justiciable right<sup>113</sup> to adequate water and sanitation services.

### 2.3 The Constitutional Guarantee for the Right of Access to Adequate Sanitation and Water

The *Constitution of the Republic of South Africa*, 1996 (hereinafter the Constitution)

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<sup>105</sup> Chikulo 2013 *Journal of Social Development in Africa* 48.

<sup>106</sup> A population explosion is when the number of people who were initially targeted to benefit from government policies increases unmanageably. The population explosion in South Africa is caused primarily by it being a safe destination for refugees and asylum seekers - Chikulo 2013 *Journal of Social Development in Africa* 49.

<sup>107</sup> *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC) para 123.

<sup>108</sup> Kgoali *et-al* 2004 <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2004/appendices/04819Mahikeng1..htm>.

<sup>109</sup> Is a system that allows the taxing of wealthier people at a higher rate to allow government to subsidise less fortunate members of society who cannot afford to pay for municipal services.

<sup>110</sup> *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC) para 140.

<sup>111</sup> Kgoali *et-al* 2004 <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2004/appendices/04819Mahikeng1..htm>.

<sup>112</sup> Section 214(1)(a) of the 1996 Constitution of the Republic of South Africa provides for that municipalities are entitled to receive an equitable share of revenue raised nationally.

<sup>113</sup> Section 27 and 26 of the Constitution.

recognises the right for everyone to receive adequate water.<sup>114</sup> It is submitted that the right of access to water also includes water based sanitation facilities. The Constitution recognises the right for everyone to access adequate housing.<sup>115</sup> It is submitted that the right to housing includes adequate sanitation facilities. The provisions of the Constitution are best understood through court judgements,<sup>116</sup> which define the extent to which the rights of access to adequate sanitation and water services are enforceable. The administrators of the Mahikeng Local municipality's sanitation and water facilities may benefit from the practical insights that have emerged from the discussions raised in local Courts. The luminary judgements in the issues of water and sanitation are the *Beja and others v Premier of the Western Cape and Others*,<sup>117</sup> *Mazibuko v City of Johannesburg*,<sup>118</sup> *Federation for Sustainable Environment and Others v Minister of Water Affairs and Others*<sup>119</sup> and *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others*<sup>120</sup> cases.

### 2.3.1 Selected Judicial Precedent on the Right of Access to Water

The Committee on Economic Social and Cultural in *General Comment No. 15* points out that water of acceptable quality standards should be of an acceptable smell, taste and colour to end users.<sup>121</sup> In South Africa access to water is a fundamentally entrenched human right to which any violation be it pollution of water, prolonged breakdowns of water infrastructure or inadequate supplies of water is an emergency.<sup>122</sup> South Africa also has standing regulations on the conservation of water which regulate the basic conditions for water supply to include a

minimum standard for basic water supply services ... a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month- (i) at a minimum flow rate of not less than 10 litres per minute; (ii) within 200 metres of a household; and (iii) with an effectiveness such that no

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<sup>114</sup> Section 27 of the Constitution.

<sup>115</sup> Section 26 of the Constitution.

<sup>116</sup> Section 165(5) of the Constitution.

<sup>117</sup> [2011] 3 All SA 401(WCC).

<sup>118</sup> 2010 (4) SA 1 (CC).

<sup>119</sup> [2012] 35672 ZAGPPHC 128.

<sup>120</sup> 2010 (4) BCLR 312 (CC).

<sup>121</sup> *General Comment No. 15* at para 12(b).

<sup>122</sup> *Federation for Sustainable Environment and Others v Minister of Water Affairs and Others* [2012] 35672 ZAGPPHC 128 para 18.

consumer is without a supply for more than seven full days in any year.<sup>123</sup>

These standards set for water provision in the national regulations may be unreasonable given a particular community's surrounding circumstances. Given, the necessity,<sup>124</sup> demand and supply dynamics in water use for each society these standards require adjustment from time to time. Hence, there needs to be dialogue to determine service standards. The *Local Government: Municipal Systems Act* (hereinafter the *Systems Act*)<sup>125</sup> mandates municipalities to consult communities about the expected impact and method of service provision.<sup>126</sup> The frequency, quantity and method which emergency water services are supplied are subject to municipalities meaningfully engaging with residents for constitutionally appropriate standards of service delivery.<sup>127</sup>

The free basic water allocation is a means to directly assist indigent residents to acquire a sustainable standard of living through a set minimum allocation of portable water per household. The purpose of the free basic water allocation is to progressively realise the socio-economic right of access to water.<sup>128</sup> Free basic water services are subject to means testing, which makes it feasible for a municipality to allocate free basic water to "those most in need."<sup>129</sup> The allocation of free basic services requires further economic determination than the preservation of dignity of the poor, which is principally not a function of the judiciary.<sup>130</sup> The judiciary however has the duty to come up with effective remedies that consider the plight of the poor and hardship on the part of government in all matters.<sup>131</sup>

The court in *Federation for Sustainable Environment and Others v Minister of Water*

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<sup>123</sup> Regulation 3 of the Regulations Relating to Compulsory National Standards and Measures to Conserve Water in terms of GN R509 of 8 June 2001.

<sup>124</sup> Self sustaining small scale farmers may demand more water than urban dwellers and people who use water based sanitation use more water than people who use ventilated pit latrines.

<sup>125</sup> 32 of 2000.

<sup>126</sup> Section 4(2)(e) of the *Systems Act*.

<sup>127</sup> *Federation for Sustainable Environment and Others v Minister of Water Affairs and Others* [2012] 35672 ZAGPPHC 128 para 26(3).

<sup>128</sup> *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) para 97.

<sup>129</sup> *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) para 101.

<sup>130</sup> Williams 2009 *Forum for Development Studies* 8.

<sup>131</sup> Section 165(4) of the Constitution provides for the impartiality, accessibility and effectiveness of the courts.

*Affairs and Others*<sup>132</sup> interpreted the principle of progressive realisation<sup>133</sup> to mean among others the duty of municipalities contained in section 152 of the Constitution,<sup>134</sup> a duty not to retrogress in service delivery and to plan to speedily resolve water problems.<sup>135</sup> Poor access to information and a lack of citizen participation in South Africa often result in the destruction of state property during violent protests.<sup>136</sup> This however should not consist of any grounds to deny relief to innocent residents by frustrated service providers.

### 2.3.2 Selected Judicial Precedent on the Right of Access to Sanitation

“Water, sanitation and hygiene facilities and services must be available at the household level or its immediate vicinity and in all places where people spend significant amounts of time.”<sup>137</sup> If an administrator of a public facility or a municipality that leads a vulnerable community fails to provide access to adequate sanitation facilities, they unduly limit freedom to live in a healthy environment. The national criterion for describing adequate sanitation facilities is

(a) The provision of appropriate health and hygiene education; and (b) A toilet which is safe, reliable, environmentally sound, easy to clean, provides privacy and protection against the weather, well ventilated, keeps smells to a minimum and prevents the entry and exit of flies and other disease-carrying pests.<sup>138</sup>

Apart from these substantive requirements laid out in the legislated minimum-core, the *Systems Act* adds a formal layer of the protection to municipal services, which is the prudent use of available resources through regularly reviewed formal agreements between the community and service providers.<sup>139</sup> Equitable participation in government

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<sup>132</sup> [2012] 35672 ZAGPPHC 128.

<sup>133</sup> Section 26(2) and section 27(2) of the Constitution.

<sup>134</sup> Municipalities have the duty to promote sustainable social and economic development in a safe and healthy environment through involvement of communities and community organisations in the matters of local government planning; within the financial and administrative capacity of municipalities.

<sup>135</sup> *Federation for Sustainable Environment and Others v Minister of Water Affairs and Others* [2012] 35672 ZAGPPHC 128 para 24.

<sup>136</sup> Monaghan 2008 *International Criminal Justice Review* 84.

<sup>137</sup> For example schools, prisons, markets and hospitals - Boussard et-al *The human rights to water and sanitation in courts worldwide a selection of national, regional and international case law* 21.

<sup>138</sup> Regulation 2 of the Regulations Relating to Compulsory National Standards and Measures to Conserve Water in terms of GN R509 of 8 June 2001.

<sup>139</sup> Section 73(2) of the *Systems Act*.

planning makes constitutionally guaranteed rights part of the living law and forces governments to be more responsive.<sup>140</sup> The open access and transfer of information contained in government plans can prompt municipalities to act to avoid unnecessary protests.

The promotion of socio-economic rights is incremental in nature and requires the conclusion of agreements with communities.<sup>141</sup> The conclusion of structured agreements gives communities a claim to only the resolved terms of the agreement, which highlight the level of access to sanitation services residents may expect from the municipality. The needs of particularly vulnerable individuals are more absolute and subject to the states responsibility to protect such individuals.<sup>142</sup> The court in *Beja and others v Premier of the Western Cape and Others*<sup>143</sup> emphasised the fact that reasonable and fair service delivery is only possible when residents status as autonomous and dignified rights holders is respected and further stated that:

The legal obligation to reasonably engage the local community in matters relating to the provision of access to adequate housing which includes reasonable access to toilet facilities in order to treat residents “*with respect and care for their dignity*.”<sup>144</sup>

All human rights relating to are “universal, indivisible and interdependent and interrelated.”<sup>145</sup> It cannot be said that a municipality respects the dignity and equality of all people when it provides unenclosed toilets to indigent and particularly vulnerable residents.

The guarantee of access to adequate sanitation facilities is not limited to legitimate land tenure holders.<sup>146</sup> The Constitution guarantees equality of all people before the law regardless of whether or not they occupy informal settlements.<sup>147</sup> The Constitution

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<sup>140</sup> Fuo 2013 *PER / PELJ* 233.

<sup>141</sup> *Beja* para 98.

<sup>142</sup> *Beja* para 100.

<sup>143</sup> [2011] 3 All SA 401(WCC).

<sup>144</sup> *Beja* para 146.

<sup>145</sup> Vienna Declaration and Programme of Action: Adopted by the World Conference on Human Rights in Vienna on 25 June 1993 Paragraph 5.

<sup>146</sup> Boussard et-al *The human rights to water and sanitation in courts worldwide a selection of national, regional and international case law* 9

<sup>147</sup> Section 9 of the Constitution.

however contains general rights to which individuals cannot lay specific claims that are similar to those that are legislated to apply in formal settlements if they live in informal settlements.<sup>148</sup> Claims to any socio-economic rights are subject to all residents deriving equal from the law within their jurisdiction, whether or not they formally lay a claim before the courts.<sup>149</sup> The administrative and executive arms of government have a greater responsibility in the implementation of socio-economic rights than the courts as these arms of the government are better suited to make substantive decisions of an economic nature.<sup>150</sup>

## 2.4 The Current National and Local Government Responsibilities

Government has the primary responsibility to protect human life from all foreseeable danger and in South Africa, municipalities are the arm of government particularly tasked with providing sanitation and water services. If government does not effectively carry out its duties as is sometimes witnessed in Mahikeng when there are water shortages<sup>151</sup> and dirty water,<sup>152</sup> the people may resort to self-help mechanisms like buying bottled water and attempting to purify visibly contaminated water by boiling it. South African municipalities have the responsibility to protect vulnerable persons through the provision of utilities that support a sanitary environment and provide clean drinking water.<sup>153</sup> These responsibilities are performed in tandem with socio-economic and environmental rights. Socio economic rights include the right to access adequate water<sup>154</sup> and

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<sup>148</sup> *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* 2010 (4) BCLR 312 (CC) page 28.

<sup>149</sup> *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* 2010 (4) BCLR 312 (CC) page 27.

<sup>150</sup> Williams 2009 *Forum for Development Studies* 8.

<sup>151</sup> Mahlakoleng 2013 [http://www.botshelowater.co.za/news/entries/2013/11/27\\_WATER\\_SHORTAGES.html](http://www.botshelowater.co.za/news/entries/2013/11/27_WATER_SHORTAGES.html).

<sup>152</sup> Anonymous 2012

<http://ewisa.co.za/ewisawaterworks/misc/municipalcontacts/defaultNWNgakaModiriMolema.htm>, Ruiters in his capacity as Director: Infrastructure Services wrote a letter to Solomon Mathebula at the Botshelo Water, Corporate Centre on 18 September 2013 criticising "Poor Water Quality." The Letter is available at the Mahikeng Local Municipality Tell 0183890382 the information therein was released solely for research purposes and Anonymous 2014 [www.sabc.co.za/news](http://www.sabc.co.za/news).

<sup>153</sup> Section 156(1)(a) and Schedule 4 part B of the *Constitution* provide that municipalities have executive authority over the provision of potable waste and sewage disposal systems.

<sup>154</sup> Section 27 of the *Constitution*; and Committee on Economic Social and Cultural Rights "Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights. The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and

sanitation facilities,<sup>155</sup> which in turn ensure a productive and healthy populace. Valuing the populace's expectations in municipal planning increases the effectiveness of state plans<sup>156</sup> and protects the dignity of the less privileged in society. Bekink emphasises the importance of community participation in strategic planning to ensure service needs and priorities are correctly identified.<sup>157</sup> The mainstreaming of community participation allows government to be proactive by grasping the needs of the people they lead, which improves their confidence in the state.<sup>158</sup>

The autonomy of municipalities is a good thing to the extent that it equips competent authorities to carry out their mandates but in the absence of a clear mandate, Christmas and De Visser argue that:

Poorly defined powers and functions have been a source of great concern and confusion for municipalities since the creation of the new local government dispensation. This lack of clarity has often resulted in duplication of duties, confusion, inefficiencies and arguably even deterioration in the delivery of services to communities. In worst case scenarios it has led to intense animosity between provincial governments and municipalities, who reach an impasse in respect of which sphere should perform a particular function. This has even led to situations where neither sphere wishes to take responsibility for a contested function.<sup>159</sup>

The same view is aired by Baatjies who holds that a failure to coordinate government financial and administrative functions may lead to duplication of functions, abandonment of other functions and dissatisfaction with the level of service delivery in local municipalities.<sup>160</sup> The provincial and national departments of government cannot be exonerated from the failures in local municipalities as they have a duty to “monitor and

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Cultural Rights)” 2002 *General Comment No. 15* at para 12(b) that points out that water of acceptable quality standards should be of an acceptable smell, taste and colour to end users.

<sup>155</sup> Section 27 of the Constitution; and “The minimum standard for basic sanitation services is (a) The provision of appropriate health and hygiene education; and (b) A toilet which is safe, reliable, environmentally sound, easy to clean, provides privacy and protection against the weather, well ventilated, keeps smells to a minimum and prevents the entry and exit of flies and other disease-carrying pests.”- Regulation 2 of the Regulations Relating to Compulsory National Standards and Measures to Conserve Water in terms of GN R509 of 8 June 2001

<sup>156</sup> Van Donk and Williams 2015 *State of Local Government Publication* 14.

<sup>157</sup> Bekink *Principles of South African Local Government Law* 287.

<sup>158</sup> Van Donk and Williams 2015 *State of Local Government Publication* 13.

<sup>159</sup> Christmas and De Visser 2009 *CJLG* 110.

<sup>160</sup> Baatjies “The evolution and prospects of our intergovernmental approach: A Local Government Perspective” 4.

assist in the implementation of projects.”<sup>161</sup> Moreover, the primary concern of government when assisting communities must be the promotion of access to essential municipality services. Failure to plan with communities in mind produces ineffective government action, such as unenclosed toilets, that may not gain the support of local communities when they are implemented. In *Beja and others v Premier of the Western Cape and Others*<sup>162</sup> members of the Makhaza community were inadequately consulted in a scheme meant to increase access to sanitation services and the city failed to comply with the peremptory human rights objectives of the scheme.<sup>163</sup> There is a similar complacency in the Mahikeng Local Municipality that fails to strategically implement policies<sup>164</sup> by delaying in the submission of project proposals relating mainly to sanitation services. Adequate sanitation facilities are indispensable for the upholding of the dignity of every resident and must be factored in when planning service delivery.<sup>165</sup>

Passive officials may wrongly assume the needs of the community which harms the prospects of success of policies aimed at improving access to sanitation services.<sup>166</sup> Thus, in *Beja and others v Premier of the Western Cape and Others*,<sup>167</sup>

the City argued that the potential violation of dignity ought to be properly considered. They stated that no-one was ever expected or compelled to use the individual unenclosed toilets in Makhaza before they were enclosed. ... The City, in support of their counter application, filed a supporting affidavit by Thembisa Princess Sokabo...I deem it necessary to quote from her affidavit ...Due to the fact that when toilets are communally owned, people do not take responsibility and personal pride in them.<sup>168</sup>

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<sup>161</sup> *Beja* para 148.

<sup>162</sup> [2011] 3 All SA 401 (WCC).

<sup>163</sup> *Beja* para 185 -186.

<sup>164</sup> During the preparation of the integrated development plan the Mahikeng Local Municipality delayed in the submission of project proposals relating mainly to water and sanitation - Ngaka Modiri Molema District Municipality Integrated Development Plan, 2012 – 2016 page 12.

<sup>165</sup> Article 22 of the United Nations *Universal Declaration of Human Rights* 1948 which states that socio-economic rights are indispensable for the upholding of the dignity of an individual and the socialization of the personality of an individual.

<sup>167</sup> [2011] 3 All SA 401 (WCC).

<sup>168</sup> *Beja* para 135 -136.

Diligent water and sanitation service delivery is a means of averting greater health risks like outbreaks of water and water-borne diseases.<sup>169</sup> It is important for the government to protect the dignity<sup>170</sup> of all residents by allowing them to enjoy community life, and to be personally responsible for their health and wellbeing<sup>171</sup> and respect that of others. However when government provides communally owned toilets there is no guarantee that all people will respectfully and responsibly use them.

Water services are not solely under the administration of municipalities but they are functions that inherently belong to other spheres of government.<sup>172</sup> Other spheres of government may hide their failures behind delegating financially unsupported mandates to municipalities.<sup>173</sup> In the same way, government may outsource services to companies as an administrative scapegoat. It is submitted that the desirability for outsourcing tasks and private public partnerships is great where government fails to meet its responsibility to deliver water and sanitation services within its own capacities.<sup>174</sup> The factors that favour a private public partnership system in South Africa are a skills deficit, unaccountable human resource practices and poor organisational design within some municipalities.<sup>175</sup> The factors that may limit the political support for private organisations involvement in aspects of provision of water services are the possibilities of higher service charges to residents<sup>176</sup> and the limitation of necessary political oversight over administrative functions.<sup>177</sup> In the Mahikeng Local Municipality, the outsourcing of some of the functions of a water service provider to companies with a proven track record in water service delivery would limit incidents of poor service delivery. Best practices in government, are broadly referred to as good governance, which is broader than personnel management and legislated government action.

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<sup>169</sup> *Beja* para 75.

<sup>170</sup> Section 10 of the Constitution.

<sup>171</sup> Section 12(2) of the Constitution.

<sup>172</sup> Section 156(1)(a) and Schedule 4 part B of the Constitution.

<sup>173</sup> Atkinson "Taking to the streets: has developmental local government failed in South Africa" 70.

<sup>174</sup> Kotzé and Fuo 2015 <http://www.nwu.ac.za/sites/www.nwu.ac.za/files/files/p-fl/documents/Projekte/WaterSecurityMay2015/OliverandLouis-BridgingthePublic-PrivateRegulatoryDivideNon-stateActorInvolvementinProvidingAccesstoWaterinSouthAfrica.pdf>.

<sup>175</sup> Van Donk and Williams 2015 *State of Local Government Publication* 13

<sup>176</sup> Gowlland-Gualtieri 2007 *IELRC Working Paper* 10.

<sup>177</sup> Ursolo 2011 *Uppsala Faculty of Law Working Paper* 24.

## 2.5 Possible Ways of Promoting Socio-Economic Development

Good governance in the context of water and sanitation service delivery is a means of promoting socio-economic development.<sup>178</sup> Good governance is a concept related to professional and ethical management practices, which aim at maintaining the integrity of an organisation. Effective service delivery is one of the desired aims of good governance.<sup>179</sup> A sense of responsibility over service provision among municipality employees is the starting point for good municipal governance. This is premised on the argument that actions of one municipality employee may taint the reputation of the whole municipality and may appear at face value to be the fault of a municipality manager. Municipality councils must seek credible means of addressing irresponsibility and ineffective conduct by local government officials and thereby reduce service delivery backlogs by promoting accountability.<sup>180</sup>

Global trends point to the emergence of “good governance” as opposed to an overtly political mode of government that fails to account for financial realities and gives administrators inflexible mandates.<sup>181</sup> The term “good governance” gained political currency through “foreign aid donors, development agencies and international financial institutions” that saw that their investment in the poor was worth protecting from maladministration and fraudulent conduct by African governments.<sup>182</sup> The localisation of good governance practices reduces impunity of those in authority and promotes socially responsible service delivery. Good governance, even without foreign aid, increases access to water and sanitation services to the poor and ensures that taxpayers appreciate how their money is spent.<sup>183</sup> For small towns like Mahikeng, good governance in the water sector has the potential of creating stable systems that promote development and investment in the municipality. The principle of good governance in South Africa is legally enforceable in the Mahikeng Local Municipality<sup>184</sup>

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<sup>178</sup> Chikulo 2013 *Journal of Social Development in Africa* 37.

<sup>179</sup> Cloete “Service delivery: Conceptual and practical issues and challenges” 93.

<sup>180</sup> Olowu “Good Governance and Constitutional Validation in Commonwealth Africa” 8.

<sup>181</sup> Ursolo 2011 *Uppsala Faculty of Law Working Paper* 24.

<sup>182</sup> Olowu “Good Governance and Constitutional Validation in Commonwealth Africa” 6.

<sup>183</sup> Olowu “Good Governance and Constitutional Validation in Commonwealth Africa” 6.

<sup>184</sup> Section 195(1)(i) of the *Constitution* is legally binding on all organs of state – including municipalities and provides that “Public administration must be broadly representative of the South African people,

and acts as a means of promoting “democratic values and principles” in public administration with “employment and personnel management practices based on ability, objectivity, fairness,” and realising the need to promote socio-economic development.<sup>185</sup>

Socio-economic rights’ implementation is a benchmark that is used to measure poverty eradication in the *United Nations Millennium Declaration, 2000*.<sup>186</sup> The United Nations and associated donor agencies declared their aspirations “to halve the proportion of people who are unable to reach or to afford safe drinking water”<sup>187</sup> by 2015 thereby realising the right to sufficient water. This aspiration has not yet been fulfilled in Mahikeng, as the number of people that owe the local municipality for services rendered is overwhelming<sup>188</sup> and there are still some households without direct access to treated water in Mahikeng.<sup>189</sup> To fulfil this aspiration, the Mahikeng Local Municipality should, “stop the unsustainable exploitation of water resources by developing water management strategies...which promote both equitable access and adequate supplies.”<sup>190</sup> The unsustainable exploitation of water and water shortages is not only remedied through cost recovery and limiting<sup>191</sup> of services to users who do not pay for services but may also be limited by pre-paid meters and sound financial management practices. Direct access to water from the environment is regulated through a licensing system that ensures the realisation of socio-economic and environmental rights.<sup>192</sup>

Community participation that promotes equitable use of water in conservation schemes and the setting of Water Resource Management Tariffs<sup>193</sup> is the first step toward

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with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.”

<sup>185</sup> Section 50 of the *Systems Act*.

<sup>186</sup> United Nations “Millennium Declaration” 2000 *GA Res 55/2*.

<sup>187</sup> United Nations “Millennium Declaration” 2000 *GA Res 55/2* para 19.

<sup>188</sup> SALGA “Comments on Botshelo Water’s proposed bulk tariff increase for the 2013/2014 financial year” circular dated 30 January 2013 page 7.

<sup>189</sup> Ngaka Modiri Molema District Municipality Integrated Development Plan, 2012 – 2016 page 19.

<sup>190</sup> United Nations “Millennium Declaration” 2000 *GA Res 55/2* para 23.

<sup>191</sup> *Mahikeng Local Municipality Credit and Debt Collection Policy*, 2014 Para 33(1)(b) Available at [http://archive-za.com/page/3974091/2014-05-12/http://www.Mahikeng.gov.za/index.php?option=com\\_docman&task=cat\\_view&gid=75&Itemid=89](http://archive-za.com/page/3974091/2014-05-12/http://www.Mahikeng.gov.za/index.php?option=com_docman&task=cat_view&gid=75&Itemid=89).

<sup>192</sup> Section 27 of the *National Water Act* 36 of 1998.

<sup>193</sup> Eberhard 2003 <http://www.treasury.gov.za/publications/other/epir/water.pdf> page 15.

effectively redirecting the effort of government towards consumer needs.<sup>194</sup> The second step would be extending the indigents register<sup>195</sup> and rearranging the billing schedules to ensure non-indigent citizens have adequate water at costs reasonably associated with rendering such services.<sup>196</sup> The finances needed to subsidise the indigent policy and other operational activities obtainable through the equitable share grant allocation,<sup>197</sup> if the Mahikeng Local Municipality updates the necessary statistics before national budget allocations. The Municipality Infrastructure Grant plays a role in assisting the municipality to explore alternative sources of water and maintaining existing service delivery infrastructure within the municipality.<sup>198</sup> What the municipality may lack is the ability to manage funds and that leads to non-delivery of water services.

Good administrative conduct requires “diligent and competent exercise and implementation of the prescribed procedures by employees”, and ensures a results-driven approach to governance.<sup>199</sup> Diligence and prudence can alleviate risks such as the bursting of raw water supply pipes<sup>200</sup> by assigning designated staff to run scheduled maintenance runs before rupture of pipes occurs.<sup>201</sup> The inability to avoid risks is evidence of recalcitrant management practices and results in their being held either personally liable for the losses they have caused. Section 32(1) of the *Local Government: Municipal Finance Management Act 56 Of 2003* provides that accounting officers and municipal managers who ignore necessary precautions before making any irregular municipality expenditure are personally liable for such expenditure.

The inability to perform according to set performance targets may lead to senior

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<sup>194</sup> Section 74(2)(a) of the *Systems Act*.

<sup>195</sup> Section 74(2)(c) of the *Systems Act*.

<sup>196</sup> Section 74(2)(d) of the *Systems Act*.

<sup>197</sup> Eberhard 2003 <http://www.treasury.gov.za/publications/other/epir/water.pdf> page 9.

<sup>198</sup> Eberhard 2003 <http://www.treasury.gov.za/publications/other/epir/water.pdf> page 9.

<sup>199</sup> *Judd v Nelson Mandela Bay Municipality* (CA149/2010) [2011] ZAECPHC 4 (17 February 2011) para 58.

<sup>200</sup> Mhlakoleng 2014

[http://www.botshelowater.co.za/news/entries/2014/5/29\\_WATER\\_SUPPLY\\_INTERRUPTIONS.html](http://www.botshelowater.co.za/news/entries/2014/5/29_WATER_SUPPLY_INTERRUPTIONS.html).

<sup>201</sup> *Mahikeng Local Municipality Asset Management Policy*, 2014 Para 7 Available at [http://archive-za.com/page/3974091/2014-05-12/http://www.Mahikeng.gov.za/index.php?option=com\\_docman&task=cat\\_view&gid=75&Itemid=89](http://archive-za.com/page/3974091/2014-05-12/http://www.Mahikeng.gov.za/index.php?option=com_docman&task=cat_view&gid=75&Itemid=89)

states that one of the objectives of the policy is, “to establish sound risk-based internal controls supporting all asset management practices within the Municipality.”

municipal managers being dismissed.<sup>202</sup> Performance management and objective recruitment and selection programmes ensure competent asset management in a municipality's infrastructure services division. Planning and implementation of plans without the necessary precaution and skill can lead to missing of performance targets and disappointment of residents.

Fiduciary duties of good governance guarantee that municipal managers protect the interests of their wards and do not erode the trust that the community has bestowed on them.<sup>203</sup> Fiduciary duties are breached if key municipal structures like executive committees and mayoral committees avoid public scrutiny and act in their personal interests which weakens municipal credibility.<sup>204</sup> The Mahikeng Local Municipality Anti-Fraud and Corruption Committee ensures that personal gain does not interfere with municipal processes by investigating possible misconduct in the municipality and recommending possible remedies to the municipal council that may require judicial enforcement.<sup>205</sup>

The importance of fiduciary duties is that they inform all other elements of good governance and that the ultimate beneficiary of services is the customer. Fiduciary duties also depend on special attention required to deliver services to special needs groups like women and the disabled.<sup>206</sup> Embracing community views is essential to the realisation of targets and setting of performance indicators for the institutional security of municipalities.<sup>207</sup>

Cooperative governance is that element of good governance that promotes efficient economic processes by enhancing co-operation in government,<sup>208</sup> through mutual

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<sup>202</sup> *Government: municipal performance regulations for municipal managers and managers directly accountable to municipal managers*, 2006: Reg 23 of GN R805 in GG 29089 of 1 August 2006.

<sup>203</sup> Davis *et al Companies And other Business Structures in South Africa* 105.

<sup>204</sup> Atkinson "Taking to the streets: has developmental local government failed in South Africa" 64.

<sup>205</sup> *Mahikeng Local Municipality Fraud Prevention Policy*, 2012 page 10 Available at [http://archive-za.com/page/3974091/2014-05-12/http://www.Mahikeng.gov.za/index.php?option=com\\_docman&task=cat\\_view&gid=75&Itemid=89](http://archive-za.com/page/3974091/2014-05-12/http://www.Mahikeng.gov.za/index.php?option=com_docman&task=cat_view&gid=75&Itemid=89) .

<sup>206</sup> *The White Paper on Local Government* 1998 Section B para1.3.

<sup>207</sup> Section 42 of the *Systems Act*.

<sup>208</sup> Olowu "Good Governance and Constitutional Validation in Commonwealth Africa" 7.

assistance and sharing of resources within government.<sup>209</sup> Intergovernmental functions require cooperative governance that limits disputes among spheres of government<sup>210</sup> to ensure quality service provision. However, Cloete has observed that:

National and provincial government departments for various reasons find it impossible to fulfil their own mandates. They then use the easy option to delegate or devolve those functions they cannot execute to local government, without the accompanying staff and finances to implement these new mandates effectively. This phenomenon can only be the result of a lack of knowledge about the requirements for successful governance or a cynical bureaucratic strategy at higher governmental levels to maximise their own bureaucratic interests, ignoring the overall national interest.<sup>211</sup>

The lack of clarity of the Department of Water's scheme to eliminate the bucket system and its imposition of a duty on Mahikeng Local Municipality to partly fund the project<sup>212</sup> can lead to another *Beja and others v Premier of the Western Cape and Others*<sup>213</sup> case. In the *Beja and others v Premier of the Western Cape and Others*<sup>214</sup> case the social implications of financing development programmes were not properly factored in by a municipality and provincial government when they authorised installation of unenclosed toilets.<sup>215</sup> This was held by Erasmus J to undermine the dignity and privacy of the most vulnerable and desperate members of society.<sup>216</sup> In a broad sense, the essence of good governance is results-based management and effective risk management that focuses on service delivery. After targets have been set by residents, public officials must make an account of the factors that hinder their performance.<sup>217</sup> Therefore, the practices of the Mahikeng Local Municipality when attempting to provide access to adequate water and sanitation facilities must remain within the confines of the law and be justifiable.

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<sup>209</sup> Section 3(3)(b) of the *Systems Act*.

<sup>210</sup> Section 41 of the *Constitution of the Republic of Africa*. 1996.

<sup>211</sup> Cloete "Service delivery: Conceptual and practical issues and challenges" 101.

<sup>212</sup> Motsapi 2014 <https://www.dwa.gov.za/stories/BucketToiletsSystem.pdf>.

<sup>213</sup> [2011] 3 All SA 401 (WCC).

<sup>214</sup> [2011] 3 All SA 401 (WCC).

<sup>215</sup> *Beja and others v Premier of the Western Cape and Others* [2011] 3 All SA 401 (WCC).

<sup>216</sup> *Beja* paras 101 - 102.

<sup>217</sup> Section 13(i) of the *Water Services Act* 108 of 1997.

## 2.6 Poor implementation of Policies

Policies are part of the instruments that municipalities plan their affairs with and policies embody the attitude of municipalities toward particular issues.<sup>218</sup> Policies are only deliverable if they are practical and if government officials have the capacity to implement them.<sup>219</sup> To be over-ambitious when setting up prospective policies is what causes discontentment among the populace.

The causes of poor water and sanitation service delivery in the Mahikeng Local Municipality are a lack of sense urgency when dealing with emergencies,<sup>220</sup> poor planning for sanitation services,<sup>221</sup> underserviced plant and machinery,<sup>222</sup> poor financial management and debt collection strategies<sup>223</sup> and a lack of meaningful engagement in water conservation.<sup>224</sup> Any slackening in the provision of clean water as was recorded in Mahikeng on 10 September 2013 when residents complained of green tap water<sup>225</sup> would result in potential disease outbreaks that would make people unwell. Not prioritising needs in order of urgency leads to municipalities lacking the ability to respond to emergencies.<sup>226</sup> An inability to source alternative clean water supplies during water shortages<sup>227</sup> or when the tap water is contaminated<sup>228</sup> indicates a lack of capacity

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<sup>218</sup> Collins COBUILD Advanced Learner's English Dictionary. 2003. Fourth ed. Great Britain: Harper Collins Publishers.

<sup>219</sup> Olowu 2014 *Obiter* 218.

<sup>220</sup> Mahlakoleng 2013

[http://www.botshelowater.co.za/news/entries/2013/11/27\\_WATER\\_SHORTAGES.html](http://www.botshelowater.co.za/news/entries/2013/11/27_WATER_SHORTAGES.html).

<sup>221</sup> Motsapi 2014 <https://www.dwa.gov.za/stories/BucketToiletsSystem>.

<sup>222</sup> Mahlakoleng 2014

[http://www.botshelowater.co.za/news/entries/2014/5/29\\_WATER\\_SUPPLY\\_INTERRUPTIONS.html](http://www.botshelowater.co.za/news/entries/2014/5/29_WATER_SUPPLY_INTERRUPTIONS.html).

<sup>223</sup> SALGA "Comments on Botshelo Water's proposed bulk tariff increase for the 2013/2014 financial year" circular dated 30 January 2013 page 7.

<sup>224</sup> SALGA "Comments on Botshelo Water's proposed bulk tariff increase for the 2013/2014 financial year" circular dated 30 January 2013 Page 6 links the water output of water boards to their operational expenses and costing structures, thereby linking the water output to water tariffs

<sup>225</sup> Ruiters in his capacity as Director: Infrastructure Services wrote a letter to Solomon Mathebula at the Botshelo Water, Corporate Centre on 18 September 2013 criticising "Poor Water Quality." The Letter is available at the Mahikeng Local Municipality Tell 0183890382 the information therein was released solely for research purposes.

<sup>226</sup> Tissington *et al* 2008 *Centre for Applied Legal Studies, Centre on Housing Rights and Evictions and Norwegian Centre for Human Rights* 26.

<sup>227</sup> Mahlakoleng 2013

[http://www.botshelowater.co.za/news/entries/2013/11/27\\_WATER\\_SHORTAGES.html](http://www.botshelowater.co.za/news/entries/2013/11/27_WATER_SHORTAGES.html).

<sup>228</sup> Ruiters in his capacity as Director: Infrastructure Services wrote a letter to Solomon Mathebula at the Botshelo Water, Corporate Centre on 18 September 2013 criticising "Poor Water Quality." The Letter is available at the Mahikeng Local Municipality Tell 0183890382 the information therein was released

within Mahikeng to deal with emergencies. Responding to emergencies may at times require a simple gesture like communicating to the public regarding what happened and when it would be resolved. Yacoob J regards an emergency as being a situation when people are faced with intolerable circumstances such as lack of access to adequate water facilities.<sup>229</sup> Intolerable circumstances are desperate circumstances where the victims are vulnerable, powerless and unattended by responsible authorities.<sup>230</sup> The most vulnerable members of society who cannot afford bottled water for drinking and cooking purposes are the worst affected by lax water service delivery.

The Mahikeng Local Municipality and North-West Provincial Government have the authority to budget for communities, select appropriate service-delivery facilitation options and to decide on the appropriate mix of services in the area, given the general financial status of users per target area.<sup>231</sup> Good administration requires that municipal officials make business judgements in good faith. The legitimacy or otherwise of government action depends on the prioritisation of the greater good of society; but there is also need to cater for those with particular needs like the disabled, who would need unique attention.

Clean tap water depends on unpolluted environments around water source points. If development issues are uninformed by environmental issues, sewage effluent management will fall below standard and significant amounts of underground water will be polluted. For instance, in the 2010/2011 period, failure by the Ngaka Modiri Molema District Municipality to avoid environmental hazards in their waste disposal functions<sup>232</sup> led to critically high health risks.<sup>233</sup> Regular audits to ensure effective maintenance of assets by competent staff are necessary to avoid environmental hazards that pollute

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solely for research purposes.

<sup>229</sup> *Beja* para 161.

<sup>230</sup> Women, disabled people and extremely poor people must not be burdened too heavily by a lack of policy or policies that do not consider their circumstances in service delivery.

<sup>231</sup> Baatjies "The evolution and prospects of our intergovernmental approach: A Local Government Perspective" 4.

<sup>232</sup> Section 84(1)(d) of the Local Government Municipal Structures Act 117 of 1998.

<sup>233</sup> Anonymous 2012

<http://ewisa.co.za/ewisawaterworks/misc/municipalcontacts/defaultNWNgakaModiriMolema.htm>.

underground water reserves.<sup>234</sup> It is imperative to note that the Mahikeng Local Municipality has dedicated resources to the formation of a risk management committee to monitor environmental risk and inform the district's operational staff about impending peril as part of the municipalities' integrated governance model.<sup>235</sup>

Municipality officials in Mahikeng must reorient the community to water dynamics.<sup>236</sup> The society at large needs to assist municipalities in curbing wastage. If communities get to understand their responsibility in water conservation and the municipality manages to trace all water leakages<sup>237</sup> that would result in loss of treated water and an undue cost burden on residents. Water conservation is often cited as a justification for steeper water bills.<sup>238</sup> Water conservation must not be an issue readily raised when limiting allocation of water, which is a human rights concern. Fuo argues that the free basic water allocation requires modification to suit the actual needs of the local community and need not be driven by the assumption that poor people use less water.<sup>239</sup> The Mahikeng Local Municipality recognises the nationally regulated minimum of six kilolitres but may upwardly adjust the free basic water allocations based on the council budget.<sup>240</sup> Another argument is that the ability to pay for services should not be the main factor determining allocation of services. However, sight should not be lost of the fact that strict adherence to budgets and plans when carrying out the day-to-day financial management of a municipality is what constitutes responsible financial conduct.<sup>241</sup> It has been noted that in some areas within the same municipality residents use water for

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<sup>234</sup> *White Paper on Local Government*, 1998 Section B para 3.1.1.

<sup>235</sup> *Mahikeng Local Municipality Integrated Risk Management Policy*, 2012 Page 9 Available at [http://archive-za.com/page/3974091/2014-05-12/http://www.Mahikeng.gov.za/index.php?option=com\\_docman&task=cat\\_view&gid=75&Itemid=89](http://archive-za.com/page/3974091/2014-05-12/http://www.Mahikeng.gov.za/index.php?option=com_docman&task=cat_view&gid=75&Itemid=89).

<sup>236</sup> Tissington *et al* 2008 *Centre for Applied Legal Studies, Centre on Housing Rights and Evictions and Norwegian Centre for Human Rights* 57.

<sup>237</sup> 2014/2015 Ngaka Modiri Molema Municipality Integrated Development Plan Review.

<sup>238</sup> SALGA "Comments on Botshelo Water's proposed bulk tariff increase for the 2013/2014 financial year" circular dated 30 January 2013 Page 6; and Odeku and Konanani 2014 *Studies Tribes and Tribals* 165.

<sup>239</sup> Fuo 2014 *STELL LR* 198.

<sup>240</sup> *Mahikeng Local Municipality Indigent policy*. 2014 para 22(2)(b) Available at [http://archive-za.com/page/3974091/2014-05-12/http://www.Mahikeng.gov.za/index.php?option=com\\_docman&task=cat\\_view&gid=75&Itemid=89](http://archive-za.com/page/3974091/2014-05-12/http://www.Mahikeng.gov.za/index.php?option=com_docman&task=cat_view&gid=75&Itemid=89)

<sup>241</sup> Each appropriation in a municipal budget should have a specified source - Section 24 of *Municipal Finance Management Act* 56 of 2003.

recreational purposes like swimming pools simply because they can afford the water.<sup>242</sup> This illustrates the disparities in water allocation on the basis of affordability and non-affordability. Those who can afford to pay take advantage of that and end up abusing water instead of conserving it. Water conservation and reasonable billing of services can be reconciled in the Mahikeng Local Municipality area.

The effectiveness of the *Mahikeng Local Municipality Indigent Policy, 2014*<sup>243</sup> depends on its ability to address particular needs and avoid extreme poverty. The essence of providing free basic services is to cater for those who would otherwise be unable to access them due to financial constraints. Vulnerable and desperate persons' plight should be key priorities in budget processes as they have unique needs and circumstances that they may reasonably expect the State to provide for.<sup>244</sup> If indigents are not recognised as such in Mahikeng for fear of revenue losses, then the socio-economic disparity in Mahikeng would worsen.<sup>245</sup> If an indigence is viewed as a rare case then material realities may prove the contrary for small towns such as Mahikeng. In any event, services are unaffordable to most rural and township dwellers and government must make an effort to mitigate their costs.<sup>246</sup> In those circumstances, the number of people on record for being indebted to the Mahikeng Local Municipality would be high<sup>247</sup> and the likelihood of indigents being part of the bad debts list would increase. The rights to access water and sanitation would be a hollow aspiration, without policies that address particular expectations and give effect to the rights. Policies that aim at the provision of free basic services must take into account the needs of people and purposes served by the rights in a specific context to avoid irrational

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<sup>242</sup> Tissington *et al* 2008 *Centre for Applied Legal Studies, Centre on Housing Rights and Evictions and Norwegian Centre for Human Rights* 66.

<sup>243</sup> *Mahikeng Local Municipality Indigent Policy, 2014* Available at [http://archive-za.com/page/3974091/2014-05-12/http://www.Mahikeng.gov.za/index.php?option=com\\_docman&task=cat\\_view&gid=75&Itemid=89](http://archive-za.com/page/3974091/2014-05-12/http://www.Mahikeng.gov.za/index.php?option=com_docman&task=cat_view&gid=75&Itemid=89).

<sup>244</sup> *Beja* paras 101 - 102.

<sup>245</sup> Tissington *et al* 2008 *Centre for Applied Legal Studies, Centre on Housing Rights and Evictions and Norwegian Centre for Human Rights* 37.

<sup>246</sup> Typically rural areas and small towns have fewer employment prospects due to lower levels of business development and fewer trade opportunities.

<sup>247</sup> SALGA "Comments on Botshelo Water's proposed bulk tariff increase for the 2013/2014 financial year" circular dated 30 January 2013 page 7.

decisions.<sup>248</sup> When reviewing the *Mahikeng Local Municipality Indigent Policy*<sup>249</sup> the municipal council must decide on the necessary steps to avoid inadequate free basic water allocations.<sup>250</sup> Advocate Budlender argues that South Africa has fallen victim to its own aspirations as laws and policies are grossly disconnected from the technical and financial capacity to implement them on the ground.<sup>251</sup> The major weakness of government is assuming that they have done enough for the people in post-apartheid years; hence, a half-hearted approach to policy review and implementation, which results in the systemic failure of government policies and causes financial maladministration in municipalities when services are not delivered. This could be one of the reasons why there is continued use of the bucket system in parts of Mahikeng. This is a very big problem as there is a dense population in the villages but there is palpably slow progress of sanitation upgrades.<sup>252</sup>

## 2.7 Summary

The sacrosanct nature of water and sanitation related rights is not only identified in factoring in the needs of the poor in decision-making, but it is also a matter of maintaining an administratively and technically sound system of government. The huge gaps in development in the different sections of the Mahikeng Local Municipality add the onus onto government to deliver free basic services, to avoid the poor from feeling that they are not equal beneficiaries of the democratic system of government. This chapter of the study identified weaknesses in local government systems, structures and implementation mechanisms; and may help come to an understanding of how best the Mahikeng Local Municipality has to deal with the risks to its financial and operational capacity to improve service delivery. However, laws cannot operate in isolation therefore the municipality's policy implementation strategies should meet current service delivery demands in a progressive manner.

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<sup>248</sup> Wilson and Dugard "Constitutional Jurisprudence: The First and Second Waves" 7.

<sup>249</sup> *Mahikeng Local Municipality Indigent Policy*, 2014.

<sup>250</sup> Fuo 2014 *STELL LR* 198.

<sup>251</sup> De Visser *et al* "Report on a roundtable on law reform in planning" 6.

<sup>252</sup> The North-West Province has the third highest number of bucket toilets in South Africa – People's Assembly 2014 <http://www.pa.org.za/blog/new-department-tasked-with-eradicating-bucket-toilets>.

## CHAPTER 3: ADDRESSING DEMANDS FOR SERVICE DELIVERY

### 3.1 Introduction

The immutable demand for adequate water<sup>253</sup> and sanitation facilities<sup>254</sup> affects the “public purse.”<sup>255</sup> The use of this public purse is not subject to the discretion of the courts, which are restricted from making decisions that have multiple social and economic consequences.<sup>256</sup> As an alternative to litigation, the direct involvement of communities in strategic planning<sup>257</sup> guarantees service delivery by directing the efforts and resources of a municipality to where they would achieve performance targets.<sup>258</sup> Documenting strategic planning processes provides specific guidelines as to what the duties of particular officials are and how mal-performance of those duties attracts rewards or punishment in employment contracts.<sup>259</sup> The municipality is obliged to engage residents to ensure that their demands are kept reasonable and that the municipal by-laws governing such delivery are practicable. Engaging residents during the development planning processes of a municipality facilitates legitimate means for addressing concerns over poor service delivery.<sup>260</sup> However, if the engagement process does not lower bills and the municipal billing process is based on cost recovery it does not make the policy unlawful.<sup>261</sup> Equitable bills and viable service delivery mechanisms are what show that adequate consultations have taken place and avoid unnecessary

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<sup>253</sup> Section 27 of the Constitution; and Committee on Economic Social and Cultural Rights “Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights. The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)” 2002 *General Comment No. 15* at para 12(b) that points out that water of acceptable quality standards should be of an acceptable smell, taste and colour to end users.

<sup>254</sup> Section 27 of the Constitution; and “The minimum standard for basic sanitation services is (a) The provision of appropriate health and hygiene education; and (b) A toilet which is safe, reliable, environmentally sound, easy to clean, provides privacy and protection against the weather, well ventilated, keeps smells to a minimum and prevents the entry and exit of flies and other disease-carrying pests.”- Regulation 2 of the Regulations Relating to Compulsory National Standards and Measures to Conserve Water in terms of GN R509 of 8 June 2001.

<sup>255</sup> *Beja* para 183

<sup>256</sup> *Beja* para 183.

<sup>257</sup> *Government: municipal performance regulations for municipal managers and managers directly accountable to municipal managers* - Reg 23 of GN R805 in GG 29089 of 1 August 2006.

<sup>258</sup> Streib and Poister 2005 *Public Administration Review* 46.

<sup>259</sup> *Government: municipal performance regulations for municipal managers and managers directly accountable to municipal managers* - Reg 23 of GN R805 in GG 29089 of 1 August 2006.

<sup>260</sup> Odeku and Konanani 2014 *Studies Tribes and Triblas* 164.

<sup>261</sup> *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) para 126.

strikes. This chapter analyses strategies that can potentially minimise dissatisfaction in the function of the Mahikeng Local municipality. It demonstrates the advantages of engaging residents of the municipality in development planning to improve service delivery and its suitability for application in debt management.

### 3.2 Legitimate Expectations and Service Delivery

When politicians make promises that create the expectation for change either in the form of lower bills or the extension of the indigent register to accommodate more people they create legitimate expectations.<sup>262</sup> Chikulo and Ashton argue that, “the lives of far too many citizens, especially those in small towns and rural areas, remain fundamentally unchanged” due to false promises by politicians and lack of information among citizens on what makes plans feasible.<sup>263</sup> An example of a false promise is the promise to eradicate the bucket toilet system by 2016,<sup>264</sup> which makes government look materially disconnected to the realities in Mahikeng and betrays the trust of residents who see no possible change in the near future because policies are grossly disconnected to the technical and financial capacity to implement them on the ground.<sup>265</sup> Legitimate expectations constitute demands that have the potential to spark dissatisfaction in the populace if not managed. A way of managing these expectations is clarifying the residents’ duty to promptly pay for water services.<sup>266</sup>

When legitimate expectations are respected the people know what to reasonably expect from the government and when they will get it. Legitimate expectations are an expression of the public’s political interests in the administration of government. The administration of water affairs is largely dependent on the financial input of residents in the form of rates, surcharges and other relevant taxes charged by municipal councils.<sup>267</sup> When laws give effect to legitimate expectations value for money, timely and fair public administration will result. The South African legal order requires that administrators who

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<sup>262</sup> De Vos and Freedman (eds) *South African Constitutional Law in Context* 610.

<sup>263</sup> Ashton 2013 <http://www.ddp.org.za/information-material/articles/transforming-the-tragedies-of-local-government-failure-in-south-africa>; and Chikulo 2013 *Journal of Social Development in Africa* 48.

<sup>264</sup> Motsapi 2014 <https://www.dwa.gov.za/stories/BucketToiletsSystem.pdf>.

<sup>265</sup> De Visser *et al* “Report on a roundtable on law reform in planning” 6.

<sup>266</sup> Section 5(2)(b) of the *Systems Act*.

<sup>267</sup> Section 160(2)(c) of the Constitution.

take decisions that adversely affect the rights or legitimate expectations of the public to be able to justify each decision.<sup>268</sup> As the Constitutional Court rightly pointed out,

Municipalities are, after all, at the forefront of government interaction with citizens. Compliance by local government with its procedural fairness obligations is crucial therefore, not only for the protection of citizens' rights, but also to facilitate trust in the public administration and in our participatory democracy.<sup>269</sup>

This is necessary in order to rationalise the practice of municipal councils conduct in exercising their discretion,<sup>270</sup> thereby ensure the reasonableness of decisions. Breaches of legitimate expectations make government look irresponsible. The courts and internal grievance procedures protect the aspirations of the people by playing both a declaratory role to define government mandates and an assurance role for the people that they have a legitimate claim to services.<sup>271</sup> When giving effect to the legitimate expectations of the particularly disadvantaged, it is essential for the Mahikeng Local Municipality to mobilise national resources to where they benefit society the most. It must not be emphasised though that despite the pressing realities in rural Mahikeng, the populace must not have impossible expectations of government as the planning and budget processes of municipalities aim at progressive realisation of rights.<sup>272</sup> Every municipality service is a direct response to the needs of citizens. The Mahikeng Local Municipality administration unduly separates political issues from financial issues because they have a record for failing to protect consumers from high undue financial burdens.<sup>273</sup>

Sustainable development does not mean immediate realisation of rights and because available resources are naturally limited in supply. Progressive and tangible realisation of rights ensures the responsible use of resources shows and that a local municipality is organised when providing for water and sanitation needs.<sup>274</sup> For an example, the current *Mahikeng Local Municipality Indigent Policy*, 2014 and the prospect of government

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<sup>268</sup> Section 3 of the *Promotion of Administrative Justice Act* 3 of 2000.

<sup>269</sup> *Joseph v City of Johannesburg and others* 2010 (4) SA 55 (CC) para 46.

<sup>270</sup> De Vos and Freedman (eds) *South African Constitutional Law* 619.

<sup>271</sup> Roux 2009 *Int'l J. Const. L* 114.

<sup>272</sup> Vegter *Daily Maverick* 10 December 2013 (no page number added).

<sup>273</sup> SALGA "Comments on Botshelo Water's proposed bulk tariff increase for the 2013/2014 financial year" circular dated 30 January 2013 page 7.

<sup>274</sup> Dugard *International Law a South African Perspective* 331.

eliminating the bucket system by 2016<sup>275</sup> are only viable to the extent they give effect to the Constitution and legitimate expectations placed on them by society.

The Constitution mandates government to take “reasonable legislative and other measures, within its available resources, to achieve progressive realisation of a rights.”<sup>276</sup> Socio-economic rights give substance to policies<sup>277</sup> because they are binding on all organs of State that must promote the bill of rights.<sup>278</sup> Socio-economic rights implementation is a benchmark that can be used to measure if local government has managed to redress the imbalances of the past.<sup>279</sup> In trying to enforce these rights, the courts strive to both avoid infringing on the functions of other branches of government and to provide effective remedies socio-economic problems.<sup>280</sup> This is due to the fact that the extent to which the court can intervene in socio-economic rights can affect the institutional integrity of the government of the day negatively if it is over intensive.<sup>281</sup> Furthermore, all government officials are expected to be equally able to interpret the provisions of the Constitution and give life to its provisions.

### 3.3 Water Demand and Debt Management

At times inappropriate methods of debt management fail to consider other more consumer friendly approaches to promote sustainable access to water and sanitation services than the limitation of services. If individuals in Mahikeng face financial difficulties in paying water bills or any other municipal debt<sup>282</sup> the *Mahikeng Local Municipality Credit and Debt Collection Policy*<sup>283</sup> allows that such people have payments deferred on their accounts.<sup>284</sup> This creates a budget deficit in the municipality

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<sup>275</sup> Motsapi 2014 <https://www.dwa.gov.za/stories/BucketToiletsSystem.pdf>.

<sup>276</sup> Sections 26(2) and 27(2) of the Constitution.

<sup>277</sup> Section 8 of the Constitution.

<sup>278</sup> Section 7(2) of the Constitution.

<sup>279</sup> Section 195(1)(i) of the Constitution.

<sup>280</sup> *Beja* para 132.

<sup>281</sup> Wilson and Dugard “Constitutional Jurisprudence: The First and Second Waves” 7.

<sup>282</sup> Section 102(1)(a) of the *Systems Act* allows all debts owed to the municipality to be consolidated into one account upon enforcement of debts.

<sup>283</sup> *Mahikeng Local Municipality Credit and Debt Collection Policy*, 2014 Available at [http://archive-za.com/page/3974091/2014-05-12/http://www.Mahikeng.gov.za/index.php?option=com\\_docman&task=cat\\_view&gid=75&Itemid=89](http://archive-za.com/page/3974091/2014-05-12/http://www.Mahikeng.gov.za/index.php?option=com_docman&task=cat_view&gid=75&Itemid=89).

<sup>284</sup> *Mahikeng Local Municipality Credit and Debt Collection Policy*, 2014 Para 31 Available at <http://archive-za.com/page/3974091/2014-05->

and obliges the municipality manager to report, any assistance rendered to residence during a particular financial year, during the integrated development planning and budget process.

The municipal manager has the duty to manage the provision of services in a sustainable and equitable way.<sup>285</sup> The limitation of water services suggests that there is a great demand for water that exceeds a municipality's water supply capacity,<sup>286</sup> or an extreme cost recovery drive within a municipality.

The self-regulating duties of municipalities in cost setting can promote the commercialisation of municipalities, with a monopoly of price setting possible. The outstanding amount owed by the Mahikeng local community<sup>287</sup> proves that council yields to commercialisation of services at the expense of consumer protection. The fact that municipalities operate in a business environment does not make them a profit making entity that must recover costs as its primary goal.<sup>288</sup> However, deference of the large number of outstanding debt due from the Mahikeng local community<sup>289</sup> would be imprudent without assessing individual circumstances. The regulatory functions of municipalities include ensuring residents' satisfaction<sup>290</sup> from excessive service charges<sup>291</sup> and cost recovery to ensure sustainable service delivery.<sup>292</sup> Assistance rendered to genuine consumers that are willing to restructure their debts is important because it is not just social expenditure on the part of municipalities but is a major part of their core business in ameliorating suffering.

It is desirable that services remains affordable for domestic and private use.<sup>293</sup> The fact

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12/http://www.Mahikeng.gov.za/index.php?option=com\_docman&task=cat\_view&gid=75&Itemid=89.

<sup>285</sup> Section 55(1)(d) of the *Systems Act*.

<sup>286</sup> Odeku and Konanani 2014 *Studies Tribes and Tribals* 165.

<sup>287</sup> SALGA "Comments on Botshelo Water's proposed bulk tariff increase for the 2013/2014 financial year" circular dated 30 January 2013 page 7.

<sup>288</sup> Chirwa 2009 *Law Democracy and Development* 199.

<sup>289</sup> SALGA "Comments on Botshelo Water's proposed bulk tariff increase for the 2013/2014 financial year" circular dated 30 January 2013 page 7.

<sup>290</sup> Section 55(1)(o) of the *Systems Act* makes "developing and maintaining a system whereby community satisfaction with municipal services is assessed" a duty of the municipal manager.

<sup>291</sup> Section 4(2)(c)(ii) of the *Water Services Act* 108 of 1997.

<sup>292</sup> In some circumstances this means the limitation and disconnection of services in cases where defaulters are reluctant – Section 4(2)(c)(iv) of the *Water Services Act* 108 of 1997.

<sup>293</sup> Chirwa 2009 *Law Democracy and Development* 200.

that the *Constitution* stipulates a right to access sufficient water points to the infinite demand of water but a limited accessibility thereof.<sup>294</sup> Unfortunately, many people misinterpret the right to access water to avoid the corresponding duty<sup>295</sup> to, within their means promptly, pay for service fees.<sup>296</sup> Fuo submits that, the free basic water allocation need not be driven by the assumption that poor people use less water.<sup>297</sup> Odeku and Konanan erroneously assume that the setting of limits on amount of water indigent's use for domestic purposes limits the demand for water.<sup>298</sup>

### 3.4 Meaningful Engagement during Integrated Development Planning

Integrated development plans are the principal strategic planning instrument of a municipality and guide the management, planning and development of aspects of service delivery.<sup>299</sup> Integrated development plans<sup>300</sup> align the use of resources in a municipality to the supply of basic services to local communities.<sup>301</sup> The water services development plan is that part of the IDP that deals with aspects of water resource management and infrastructural planning.<sup>302</sup> As a strategy for economic and social development, the IDP assesses critical development needs and lays down performance targets set to ensure policy implementation. The knowledge of the financial implications of equitable water resource management and consumer protection strategies is important to the effective implementation of IDPs and budgets. The success of an IDP depends not only on the business side of the plan but also extends to the level of trustworthiness and accountability of municipal officials in the fulfilment of plans.<sup>303</sup> Keeping of detailed records of proceedings during the IDP process forces the State to consider the relative cost and benefits of their programs and create an appropriate

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<sup>294</sup> Section 27 of the Constitution of the Republic of South Africa.

<sup>295</sup> Section 5(2)(b) of the *Systems Act*.

<sup>296</sup> See *Rademan v Moqhaka Local Municipality* 2013 (4) SA 225 (CC) para 46.

<sup>297</sup> Fuo 2014 *STELL LR* 198.

<sup>298</sup> Odeku and Konanani 2014 *Studies Tribes and Tribals* 165.

<sup>299</sup> Section 35(1)(a) of the *Systems Act*.

<sup>300</sup> hereinafter referred to as IDPs.

<sup>301</sup> *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* (CCT89/09) [2010] ZACC 11 Para 83.

<sup>302</sup> Section 13 of the *Water Services Act* 108 of 1997.

<sup>303</sup> Muller 2011 *STELL LR* 753.

atmosphere for development.<sup>304</sup> Detailed records of municipality proceedings are the basis upon which the success of a plans<sup>305</sup> or policy may be judicially reviewed if need arises and a means of performance management that avoids complacency in government.<sup>306</sup> It is, however, worthy to note that water policy on water quality and quantity is outside the purview of the functions of the courts and inextricably linked to the availability of resources.<sup>307</sup>

Municipalities' development mandate involves poverty eradication, through giving the poor financial assistance in line with indigent policies. Community participation in development planning is necessary, "as the individual is the best judge of personal welfare."<sup>308</sup> Participation builds on their strength and overcomes their weaknesses and greatly reduces the chance of water wastage. That could reduce the challenges for water policy-makers as the communities would be playing an indispensable role in water use and conservation. Participation of the community stimulates thoughts on ways to manage water and at the same time continues to meet the needs of the consumers. Securing community participation during decision making is an indicator to the reasonableness of plans, it also indicates the possibility of the progressive realisation of plans that promote access to water and sanitation.<sup>309</sup> Communication with all residents is at the core of every effective municipality service delivery strategy, as it aligns potentially conflicting views to common goals. It is submitted that continuous engagement is not a stereotypical popularity act or finger pointing exercise but it is a forum to draw lessons from lived experiences of residents in water service delivery.

The legitimacy of municipality administrative action and substantive performance of municipality in their duties are what constitute of the higher constitutional norm of

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<sup>304</sup> Ray 2010 Hum Rts L Rev 370.

<sup>305</sup> Section 34 of the *Systems Act*; and *Ngaka Modiri Molema District Municipality IDP 2012 – 2016* Page 39 that provide for annual review of the plan.

<sup>306</sup> *Government: municipal performance regulations for municipal managers and managers directly accountable to municipal managers*, 2006 - Reg 23 of GN R805 in GG 29089 of 1 August 2006.

<sup>307</sup> *Manqele v Durban Transitional Metropolitan Council* 2002 SA 423 (D & CLD) and Bekink B *Principles of South African Constitutional Law* 54.

<sup>308</sup> Burrows and Veljanovski *The Economic Approach to Law* 3.

<sup>309</sup> Muller 2011 *STELL LR* 743.

responsiveness.<sup>310</sup> Upholding high performance standards ensures a high level of competency by municipal managers in the implementation of plans.<sup>311</sup> Once an emergency such as a water shortage occurs, and the municipality fails to respond to it, the municipality's risk management strategy requires review that includes simple measures such as informing the community when the water is contaminated. Sometimes, consumer protection requires *ad hoc* action such as the supply of mobile water storage tanks when there are water shortages.<sup>312</sup> How Mahikeng Local Municipality deals with water shortages and is not limited to cost recovery, but extends to the question of how it deals with burst water pipes as witnessed in Molopo,<sup>313</sup> unnecessary use of water such as regularly draining swimming pools<sup>314</sup> and the finding of alternative water reserves. Access to information is the lowest level of proof for meaningful engagement, as information about a decision is not the same as jointly making a decision.<sup>315</sup> The right to access information is violated when a failure to make a disclosure affects the right to adequate and clean water occurs. Municipalities have a duty to consult communities about "the level, quality, range and impact of municipal services provided by the municipality" and furthers the right of the local community to access information about situations that adversely affects their rights.<sup>316</sup> Citizens also need information about the factors that are delaying plans so that when other spheres of government are at fault local government is not blamed for their failures.<sup>317</sup>

Not all residents in the Mahikeng Local Municipality have similar living conditions, what they consider as quality service delivery may differ, and the best way to identify the risks that may occur to a policy implementation is to understand the differing interests which

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<sup>310</sup> Ursolo 2011 Uppsala faculty of Law Working Paper 24.

<sup>311</sup> *Government: municipal performance regulations for municipal managers and managers directly accountable to municipal managers*, 2006 - Reg 23 of GN R805 in GG 29089 of 1 August 2006.

<sup>312</sup> Mahlakoleng 2013

[http://www.botshelower.co.za/news/entries/2013/11/27\\_WATER\\_SHORTAGES.html](http://www.botshelower.co.za/news/entries/2013/11/27_WATER_SHORTAGES.html).

<sup>313</sup> Mahlakoleng 2014

[http://www.botshelower.co.za/news/entries/2014/5/29\\_WATER\\_SUPPLY\\_INTERRUPTIONS.html](http://www.botshelower.co.za/news/entries/2014/5/29_WATER_SUPPLY_INTERRUPTIONS.html).

<sup>314</sup> Dugard 2010 *Review of Radical Political Economics* 186.

<sup>315</sup> Muller 2011 *STELL LR 754*.

<sup>316</sup> Muller 2011 *STELL LR 754*; Section 32 of the *Constitution of the Republic of South Africa* 1996; section 4(2) (e) of the *Systems Act*.

<sup>317</sup> Christmas and De Visser 2009 *CJLG 14* see also Section 13(1) (i) of the *Water Services Act* that states that detailed and honest progress reports and implementation deadlines are a major component of IDPs.

various stakeholders have. A lack of risk identification procedures in municipalities and complex bureaucratic systems hinder the progress of water service development plans.<sup>318</sup> The reconciliation of differing interest through meaningful engagement provides a platform for proactive and honest interaction and risk identification by the Mahikeng Local Municipality.<sup>319</sup> If a policy plan fails to consider those living in intolerable circumstances through meaningful engagement it must be subject to immediate re-evaluation.<sup>320</sup> It has been observed that when planning for services provision the Mahikeng Local Municipality's priority lies with those who wish to access basic services over those who wish to upgrade the standards of service provision.<sup>321</sup>

### 3.5 Summary

The rights to water and sanitation create a constant demand for the related services to the public who expect municipalities to be at the forefront of government action that promotes access to services. Meaningful engagement during policy planning and implementation processes promotes the progressive realisation of rights. It also exposes municipalities to resident's challenges and the probable causes of ineffective service delivery. Although community partnerships like meaningful engagement have been aspired to in legislation and court orders, there has been limited use of such strategies in addressing the plight of residents living in Mahikeng. In Mahikeng, meaningful engagement has been reduced to the right to access information,<sup>322</sup> which is at times totally ignored.<sup>323</sup> Community participation in decision-making simplifies

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<sup>318</sup> *Judd v Nelson Mandela Bay Municipality (CA 149/2010) [2011] ZAECPEHC 4 (17 February 2011)* para 56 see also Ray 2010 Hum Rts L Rev 360 who states that the start of bureaucratic mismanagement is a failure to consult residents.

<sup>319</sup> *Occupiers of 51 Olivia Road and Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) para 12.

<sup>320</sup> *Beja* para 159 – 161.

<sup>321</sup> *Ngaka Modiri Molema District IDP, 2012 – 2016* Page 96 details the water service backlog of the municipality as the number of houses that are below the RDP standard of access to water and sanitation.

<sup>322</sup> Mahikeng citizens allege that the only time they receive communication about their water bills is through debt collectors on the phone. - Insession 2014  
[www.parliament.gov.za/live/counterpopup.php/Item\\_ID=6714&Category\\_ID](http://www.parliament.gov.za/live/counterpopup.php/Item_ID=6714&Category_ID).

<sup>323</sup> Ruiters in his capacity as Director: Infrastructure Services wrote a letter to Solomon Mathebula at the Botshelo Water, Corporate Centre on 18 September 2013 criticising "Poor Water Quality." The Letter is available at the Mahikeng Local Municipality Tell 0183890382 the information therein was released solely for research purposes (and was not reported to the public).

municipal mandates and assigns specific duties to the government that are realistic and reviewable.<sup>324</sup> Meaningful engagement creates a common understanding of the duties of municipality officials within the community. Meaningful engagement is also an extension of the legal duty to consult residents about suitability of billing schedules<sup>325</sup> and creates a platform for innovation to improve service delivery.

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<sup>324</sup> Muller 2011 *STELL LR 754*.

<sup>325</sup> Section 4(2) (e) of the *Systems Act* mandates municipalities to consult communities about the impact of methods of service delivery.

## CHAPTER 4: CONCLUSIONS AND RECOMMENDATIONS

### 4.1 Introduction

The South African Constitution provides for the right of access to adequate water. This study established that there is still need to improve water and sanitation service delivery in Mahikeng Local Municipality. The need for adequate water and sanitation services commonly affects the poor in the Mahikeng Local Municipality as compared to those who are financially stable and can afford alternative water services such as bottled water, together with proper sanitation services. In order to reach an 'above average' standard, the Mahikeng Local Municipality needs to ensure that the vulnerable groups (the poor, women and the disabled) in Mahikeng have access to sufficient water as it is their constitutional right, subject to the availability of such resources. Not only is it detrimental but it impinges on the people's right to dignity when they cannot get access to adequate water and sanitation due to failure by the Mahikeng Local Municipality to render services. A lot has to be done in order to fulfil this constitutional right.

### 4.2 Summary of the Study

The study sought to analyse sanitation and water service delivery and investigated ways to combat sanitation and water service delivery problems in Mahikeng Local Municipality. In spite of the desire to deliver best service in Mahikeng, there is still dirty water,<sup>326</sup> and water supply interruptions in most households.<sup>327</sup> The service delivery system for water and other services in Mahikeng Local Municipality is problematic. The Mahikeng Local Municipality has a legal duty to provide water and sanitation services to

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<sup>326</sup> Anonymous 2012

<http://ewisa.co.za/ewisawaterworks/misc/municipalcontacts/defaultNWNgakaModiriMolema.htm> ; Ruiters in his capacity as Director: Infrastructure Services wrote a letter to Solomon Mathebula at the Botshelo Water, Corporate Centre on 18 September 2013 criticising "Poor Water Quality." The Letter is available at the Mahikeng Local Municipality Tell 0183890382 the information therein was released solely for research purposes; and Anonymous 2014 [www.sabc.co.za/news](http://www.sabc.co.za/news) [Date of use 27 July 2015].

<sup>327</sup> Mahlakoleng 2014

*Interruptions*[http://www.botshelowater.co.za/news/entries/2014/5/29\\_WATER\\_SUPPLY\\_INTERRUPTI](http://www.botshelowater.co.za/news/entries/2014/5/29_WATER_SUPPLY_INTERRUPTI) ONS.html.

the people because it is the municipality's duty to do so, and people depend on these services.

Given the problems highlighted in this dissertation, the Mahikeng Local Municipality should adopt practical policies to adequately combat sanitation challenges that are associated with Mahikeng households and communities. The Municipality should also engage all relevant stakeholders to improve sanitation, water services and the general administration of developmental projects in Mahikeng. In this regard, it is hoped that the recommendations made in this research will be utilised by the relevant stakeholders to curb all the service delivery challenges in respect thereof. The expectations of the local community in this regard would be that, among others, septic tanks and ventilated improved latrines are expediently cleared upon residents' request<sup>328</sup> and that the municipality provides clean water at all times and that access to adequate sanitation facilities is provided to the most vulnerable members of society.

#### 4.3 Major Findings of the study

The Mahikeng Local Municipality does not provide high quality services to the people and as a result, it is unfortunate that vulnerable groups suffer. The inability to provide adequate water and sanitation services is due to, amongst other factors, the fact that Mahikeng Local Municipality is unable to collect debt on water services from its customers;<sup>329</sup> there is deficient communication with community members on matters concerning their basic needs,<sup>330</sup> and there is inability to provide alternative means to the community when the water is contaminated.<sup>331</sup> It is an irrefutable fact that there is a

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<sup>328</sup> Section 23(a) of the *Water Services Act* 108 of 1997.

<sup>329</sup> SALGA "Comments on Botshelo Water's proposed bulk tariff increase for the 2013/2014 financial year" circular dated 30 January 2013 page 7.

<sup>330</sup> Insession 2014 [www.parliament.gov.za/live/counterpopup.php/Item\\_ID=6714&Category\\_ID](http://www.parliament.gov.za/live/counterpopup.php/Item_ID=6714&Category_ID).

<sup>331</sup> Anonymous 2012

<http://ewisa.co.za/ewisawaterworks/misc/municipalcontacts/defaultNWNgakaModiriMolema.htm>, RS Ruiters in his capacity as Director: Infrastructure Services wrote a letter to Solomon Mathebula at the Botshelo Water, Corporate Centre on 18 September 2013 criticising "Poor Water Quality." The Letter is available at the Mahikeng Local Municipality Tell 0183890382 the information therein was released solely for research purposes and Anonymous *Water* [www.sabc.co.za/news](http://www.sabc.co.za/news).

shortage of water in Mahikeng<sup>332</sup> and at times, contaminated water which may be as a result of financial mismanagement in the municipality, and so, the municipality is obliged to inform the people of this problem and come up with ways to address such, or policies which may ensure that people preserve water.

The study has shown that Mahikeng Local Municipality is not transparent in informing the people about water shortages, informing them of their prospective resumption of water supply or even about their intentions to cut supplies for maintenance services and worse still when water is contaminated. It is important to let people know of any of the above to avoid loss of water through hoarding. When water is contaminated people must be informed to avoid unnecessary loss of lives and spread of contagious diseases especially in schools and other public places.

The study has shown that the current operational and financial management system of the Mahikeng Local Municipality is compromised by maladministration and this could have caused poor sanitation and water service delivery in the area of jurisdiction.

People have the right to dignity and clean water. However, throughout the years, the Mahikeng Local Municipality has not quite recognised this right and turned into a reality through efficient service delivery. This is against the Constitution which is the supreme law of the country. Water is a problem and scarce commodity especially in Mahikeng given that it is in the semi-arid region. Still it is the duty of the local municipality to supply waters as sanitation depends on water and without water supply, sanitation suffers as well. This results in people getting avoidable diseases.

Municipal officials have a mandate to fulfil their duties and they have to treat everyone equally. Selective supply is unfair as the poor have no means of paying for those services. Water is a basic need and different rates should be charged according to a means test. This test would determine the amount of income a family receives on a monthly bases and this would then be used to establish whether they could afford to pay for water services or may need alternative arrangements like free basic services or cost rearrangement. Depriving the poor of the water supplies worsens their social status.

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<sup>332</sup> *Ngaka Modiri Molema District IDP (2011 - 2016)* page 19 states that the district is a semi-arid area..

#### 4.4 Recommendations

In order to determine whether the municipality is providing quality services, there should be a mechanism to review the effectiveness of their services. A regular survey and interviews should be conducted annually during the IDP review in order to ascertain whether there is customer satisfaction. If that is done, there is likely to be positive feedback from residents, the officials will take necessary steps to improve on the service delivery. In this regard, it is submitted that Mahikeng Local Municipality should adopt adequate measures to provide judicial and other remedies to all the affected persons. The study suggests that all the residents of Mahikeng Local municipality should be duly consulted by the relevant authorities in order for them to give their input on water and sanitation service delivery policies in the future. This is done to encourage accountability and transparency among all the relevant stakeholders in Mahikeng Local Municipality.

- In order to ensure that people preserve water, prepaid water metres could be introduced such a measure is lawful and subject to the discretion of a municipality.<sup>333</sup> This ensures that people use water responsibly. This system has been introduced in Phiri in the Gauteng Province<sup>334</sup> and it works as a water saver and a deterrent to irresponsible use of water. Although this system is expensive to the people, it leaves them no choice but to adjust and reduce their water consumption. The prepaid water payment system can actually function like that of electricity. So it is a justified measure. However, the poor in the community must not be put under the same bracket as this would mean no water supply to them.
- The Municipality must manage its administration properly and give priority to providing basic needs to the people in an effort to promote their socio-economic rights. The officials must be actively involved in the adoption and implementation of relevant policies aimed at improving access to sanitation services for all the residents in Mahikeng. This could improve the accountability of such officials and

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<sup>333</sup> *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) para 126.

<sup>334</sup> Odeku and Konanani 2014 *Studies Tribes and Tribals* 165.

enhance water service delivery in Mahikeng. When municipality officials are accountable, there would be more transparency and the people would have reasonable expectations from their local municipality. Moreover, it is submitted that strategic planning should be done democratically by asking views from the residents.<sup>335</sup>

- The Municipality needs to be transparent. The Municipal Council of Mahikeng must know the needs of the people in the community and involve the community in matters that may affect their Constitutional rights. This could happen through an annual review with the people within the communities as provided for in terms of the Municipal Systems Act 34 of 2000.<sup>336</sup> Furthermore, it is recommended that the Mahikeng Local Municipality should have a cell-phone message or email platform to increase the general participation of all its residents in water, sanitation and other related services delivery programmes.
- The disclosure of potential hazards in the quality of water delivered by the Mahikeng Local Municipality could improve the general health and welfare of Mahikeng residents. It is submitted that the Mahikeng Local Municipality should provide alternative sources of water when the water is dirty<sup>337</sup> or when there are water shortages to improve the water and sanitation services for all residents in Mahikeng.<sup>338</sup> It is recommended that the *Mahikeng Local Municipality Integrated Risk Management Policy*<sup>339</sup> should be adequately utilised to isolate water and sanitation service-related risks and proffer possible solutions to such risks.<sup>340</sup>

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<sup>335</sup> Section 4(2) (e) of the *Systems Act* mandates municipalities to consult communities about the impact of method of service delivery.

<sup>336</sup> Section 34(a)(ii) of the *Systems Act* provides that municipalities must “review integrated development plans to the extent that changing circumstances demand so.”

<sup>337</sup> Ruiters in his capacity as Director: Infrastructure Services wrote a letter to Solomon Mathebula at the Botshelo Water, Corporate Centre on 18 September 2013 criticising “Poor Water Quality.” The Letter is available at the Mahikeng Local Municipality Tell 0183890382 the information therein was released solely for research purposes.

<sup>338</sup> Mahlakoleng 2013 [http://www.botshelowater.co.za/news/entries/2013/11/27\\_WATER\\_SHORTAGES.html](http://www.botshelowater.co.za/news/entries/2013/11/27_WATER_SHORTAGES.html).

<sup>339</sup> *Mahikeng Local Municipality Integrated Risk Management Policy*, 2012 Available at [http://archive-za.com/page/3974091/2014-05-12/http://www.Mahikeng.gov.za/index.php?option=com\\_docman&task=cat\\_view&gid=75&Itemid=89](http://archive-za.com/page/3974091/2014-05-12/http://www.Mahikeng.gov.za/index.php?option=com_docman&task=cat_view&gid=75&Itemid=89).

<sup>340</sup> *Mahikeng Local Municipality Integrated Risk Management Policy*, 2012 Page 9 creates a risk management committee that gives the municipality guidance on methods of risk management.

- Finance in any municipality is important because proper finance management implies that the needs of the people within the community will be met. In order to ensure that there is no dissatisfaction in the water and sanitation service delivery in Mahikeng, such finances must be transparent and accountable, and the authorities ought to be able to manage their expenditure properly in order to ensure that the people's basic needs are met. The debt collection strategies should be consistently enforced to improve water and sanitation services in Mahikeng. In this regard, the writing off of debts or deference of the large number of outstanding debt<sup>341</sup> due to the Mahikeng Local Municipality without assessing all the circumstances of each case should be discouraged. Furthermore, corruption in the Mahikeng Local municipality should be adequately addressed to enhance water and sanitation services in Mahikeng.<sup>342</sup> In this regard, all the relevant projects and policies of the Mahikeng Local Municipality should be consistently audited to curb corruption.
- It is recommended that the Mahikeng Local Municipality should be adequately financed to improve sanitation and water services delivery in Mahikeng.<sup>343</sup> In light of this, the provision of water-based sanitation services requires the Mahikeng Local Municipality to have the necessary support from the provincial government to enable it to execute its duties effectively.<sup>344</sup> It is further suggested that independent private companies should externally audit the water service delivery programmes of the Mahikeng Local Municipality to combat maladministration and corruption.

The municipality should consider outsourcing relevant water and sanitation service delivery programmes to other relevant private institutions to improve water and sanitation services in Mahikeng.<sup>345</sup>

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<sup>341</sup> SALGA "Comments on Botshelo Water's proposed bulk tariff increase for the 2013/2014 financial year" circular dated 30 January 2013 page 7.

<sup>342</sup> Madonsela "Corruption and Governance: A South African Perspective" 2.

<sup>343</sup> Ursolo 2011 *Uppsala Faculty of Law Working Paper* 24.

<sup>344</sup> Motsapi 2014 <http://www.dwa.gov.za/stories/BucketToiletsSystem.pdf>.

<sup>345</sup> Kotzé and Fuo 2015 <http://www.nwu.ac.za/sites/www.nwu.ac.za/files/files/p-fl/documents/Projekte/WaterSecurityMay2015/OliverandLouis-BridgingthePublic->

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