

**Intergovernmental Response Measures to Address Failing Municipal
Water Supply Services: a Legal Perspective**

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ABSTRACT

As per Schedule 4B of the *Constitution of the Republic of South Africa, 1996* the important government function of delivering water supply to communities rests with municipalities. This function must be executed, however, within a constitutionally designed system of cooperative government, which renders it necessary to understand the role of every sphere of government in giving people sustained access to adequate water supply services. It is also important to understand the dynamics at play and the consequences that would follow if a municipality failed to deliver water supply services. The widespread challenges in South Africa with regards to water and sanitation in local communities serve to underscore the significance of an enquiry into such matters.

The body of constitutional -, local government -, water - and environmental law in South Africa describes the duties of local government in relation to the supply of water to communities. This study unpacks these duties of local government and the role of local government *vis-à-vis* provincial and national government, while it also considers the intergovernmental response measures available to provincial government, specifically to address the issue of the so-called "failing municipal water supply services".

The more obvious intergovernmental response measures in the event of failing municipal water supply services at the disposal of provincial government appear to be particularly intrusive, and may make severe inroads into the autonomy of local government. In this study, following a discussion of failing municipal water supply services, an intergovernmental response measure model is proposed in which the options available to provincial government to act upon a municipality's failure to provide water are presented. The model ranges from the least intrusive measures (such as supervision) to the most intrusive measures (such as intervention and judicial action).

The study concludes with recommendations with respect to the order in which measures should be applied in order to ensure cooperative intergovernmental relations whilst ensuring that municipalities provide sufficient water to their communities in a sustainable manner.

OPSOMMING

Volgens Skedule 4B van die *Grondwet van die Republiek van Suid-Afrika*, 1996 is dit die rol van munisipaliteite om die belangrike regeringsfunksie van watervoorsiening te lewer. Hierdie funksie moet egter uitgevoer word binne die raamwerk van samewerkende regering. Dit is dus belangrik om die rolle van die regeringsfere te verstaan asook die gevolge wanneer 'n munisipaliteit nie volhoubare toegang tot waterdienste kan lewer nie. Die uitdagings in Suid-Afrika in terme van water en sanitasie in gemeenskappe bevestig die belangrikheid van dié studie.

Die Grondwet, plaaslike owerheidsreg, waterwette en omgewingswetgewing in Suid-Afrika bevat die pligte van plaaslike owerhede ten opsigte van watervoorsiening aan gemeenskappe. Hierdie studie pak die genoemde pligte uit, asook die rol van plaaslike teenoor nasionale en provinsiale regering, terwyl dit die inter-regerings maatreëls soos beskikbaar vir provinsiale regering om munisipaliteite aan te spreek wat nie genoegsame watervoorsiening lewer nie, bespreek.

Meer bekende inter-regeringsmaatreëls beskikbaar vir provinsiale regering om 'n munisipaliteit aan te spreek wat nie genoegsame watervoorsiening lewer nie, blyk veral inbreuk te maak op die outonome karakter van plaaslike owerhede. Na 'n bespreking van onvoldoende munisipale watervoorsiening word 'n model voorgestel waarin die beskikbare opsies vir provinsiale regering voorgestel word. Die model reflekteer minder indringende maatreëls soos om toesig te hou asook meer indringende maatreëls soos intervensie of ingryping en regsaksie.

Die studie sluit af met aanbevelings ten opsigte van die voorgestelde volgorde waarin maatreëls toegepas moet word sodat die koöperatiewe inter-regeringskarakter staande kan bly terwyl munisipaliteite voldoende en volhoubare watervoorsieningsdienste aan hul gemeenskappe lewer.

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** *The Legal Aspects of Transboundary Protection of Biodiversity in Southern Africa.*

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ABBREVIATIONS

ADR	Alternative Dispute Resolution
AG	Auditor-General
BCLR	Butterworths Constitutional Law Reports
CJLG	Commonwealth Journal of Local Governance
Constitution	<i>Constitution of the Republic of South Africa, 1996</i>
CSIR	Council for Scientific and Industrial Research
DEA	Department of Environmental Affairs
DEAT	Department of Environmental Affairs and Tourism
DG	Director General
DPLG	Department: Provincial and Local Government
DWA	Department of Water Affairs
DWAF	Department of Water Affairs and Forestry
IDP	Integrated Development Plan
IGRFA	<i>Intergovernmental Relations Framework Act 13 of 2005</i>
ISRDP	Integrated Sustainable Rural Development Programme
LA 21	Local Agenda 21
LED	Local Economic Development
MDG	Millennium Development Goals
MEC	Member of the Provincial Executive Council
MFMA	<i>Local Government: Municipal Finance Management Act 56 of 2003</i>
MIG	Municipal Infrastructure Grant
NCOP	National Council of Provinces
NEMA	<i>National Environmental Management Act 107 of 1998</i>
NEMWA	<i>National Environmental Management: Waste Act 59 of 2008</i>
NWA	<i>National Water Act 36 of 1998</i>
PAIA	<i>Promotion of Access to Information Act 2 of 2000</i>

PAJA	<i>Promotion of Administrative Justice Act 3 of 2000</i>
PER/PELJ	Potchefstroomse Elektroniese Regsblad / Potchefstroom Electronic Law Journal
RECIEL	Review of European Community and International Environmental Law
SADC	Southern Africa Development Community
SAHRC	South African Human Rights Commission
SAJHR	South African Journal of Human Rights
Stell LR	Stellenbosch Law Review
Structures Act	<i>Local Government: Municipal Structures Act 117 of 1998</i>
Systems Act	<i>Local Government: Municipal Systems Act 32 of 2000</i>
UN	United Nations
UNICEF	United Nations International Children's Emergency Fund
VIP	Ventilated Pit Latrine
WHO	World Health Organisation
WRC	Water Research Commission
WSA	Water Services Authority
WS Act	<i>Water Services Act 108 of 1997</i>
WSDP	Water Services Development Plan

Chapter 1: Introduction

1.1 Background

South Africa is a semi-arid country facing the growing effects *inter alia* of climate change, which put water security under serious threat.¹ Yet, it is one of the few countries in the world that enshrines a basic right of access to sufficient water in its supreme law, the *Constitution of the Republic of South Africa, 1996*² (the Constitution). According to the Constitution,³ section 83 of the *Local Government: Municipal Structures Act 117 of 1998*⁴ and section 11 of the *Water Services Act 108 of 1997*,⁵ the responsibility for delivering water services rests with South Africa's municipalities. The responsibility for realising the constitutional water access right is accordingly translated into one of several mandates of local government.⁶

However, as per Schedule 4B of the Constitution, the function of water provision is also an area of concurrent national and provincial *legislative* competence. This suggests that cooperative state action is required in relation to legislating on water provision and governance.⁷ Inter-governmental coordination in implementing such legislation is an auxiliary mandate resting with all three spheres of government in terms of chapter 3 of the Constitution, section 3 of the *Local Government: Municipal Systems Act 32 of 2000*,⁸ and the *Intergovernmental Relations Framework Act 13 of*

1 See Thompson *Water Law* 7. According to Thompson South Africa has 1200 kiloliters of fresh water available for each person per year for a population of around 43 million. Within a few years the growth in the population, the development of the economy and the concomitant urgent need for further water supply will take the country into a situation of 'water stress'.

2 S 27(1)(b) of the Constitution.

3 S 27(1)(b) read with s 7(2) and Schedule 4(B).

4 Hereafter the *Structures Act*.

5 Hereafter referred to as the *WS Act*. The *executive* responsibility for the provision of water and sanitation services limited to potable water supply systems and domestic waste-water and sewerage disposal systems rests with local government.

6 See Bekink *Local Government Law* 41-60 for the general impact of the Constitution on local government. Ss 153(a) and (b) mandate all municipalities to structure and manage their administrations, budgets and planning processes to give priority to the basic needs of their communities and to promote social and economic development. See also Bekink *Local Government Law* 288 and Steytler and De Visser *Local Government Law of South Africa* 5-5 – 5-7.

7 In par 4.2.

8 Hereafter the *Systems Act*.

2005.⁹ Thus, despite the fact that water services provision falls within the constitutionally entrenched *executive* powers of local government, by virtue of other provisions of the Constitution and various laws (e.g. the *Systems Act* and the *WS Act*), a generic responsibility rests upon provincial and national authorities to support and monitor municipalities¹⁰ with respect to the provision of water services, and to develop relevant local capacity. This responsibility is fortified by chapter 5 of the *Municipal Finance Management Act* 56 of 2003,¹¹ which provides for the promotion of cooperative government in the context of fiscal and financial relations.¹²

In addition, in accordance with the so-called principle of subsidiarity,¹³ section 156(4) of the Constitution makes it compulsory for national and provincial authorities to assign the administration of all Schedules 4A or 5A matters to municipalities, provided that such matters would "most effectively be administered locally"¹⁴ and that municipalities have the capacity to administer them. This is of relevance to the fact that the Constitution directs "the state", which comprises of national, provincial and local government, in section 24 to take reasonable legislative and other measures to prevent pollution, to promote conservation, and to secure ecologically sustainable development and the use of natural resources (including water resources). In the water context specifically, section 27(1)(b) of the Constitution leaves "the state" with the duty to take reasonable action to achieve the progressive realisation of the right of access to sufficient water. This suggests that apart from municipalities' constitutional and statutory duty to provide access to water, by virtue of reading the section 24 environmental right with the principle of subsidiarity, municipalities are also indirectly responsible for the protection of water quality. As such, municipalities have the constitutional

9 Hereafter the IGRFA.

10 Chapter 10 of the *Systems Act*.

11 Hereafter the MFMA.

12 See par 4.2 for a discussion on cooperative government.

13 Du Plessis *Constitutional Environmental Right* 141. The principle of subsidiarity implies that any public function that does not necessarily have to be executed by the central authority should be decentralised and entrusted to regional (or provincial) and/or local government. An important component of promoting participation is the delegation of decision making power to the lowest appropriate level in government. However, this requires improved institutional coordination and capacity building. Refer to Pegram *et al* 2006 *Water Research Commission* 115. For a detailed discussion on the principle of subsidiarity, see De Visser 2010 *Stell LR* 90-115.

14 S 156(4)(a) of the Constitution.

duty to provide everyone in South Africa with water of a quality that is not harmful to human health or well-being.¹⁵

This duty seems to be mirrored in the *National Water Act* 36 of 1998¹⁶ as well as in the environmental management principles in the *National Environmental Management Act* 107 of 1998.¹⁷ The NWA bestows upon the state (including local government) the substantive duty to protect water resources.¹⁸ The NWA similarly provides for alternative governance structures to assist in fulfilling the state's duties in relation to water quality. Section 72 and chapter 7 of the NWA provide for the establishment of catchment management agencies¹⁹ to regulate water pollution, for example.

The NEMA principles²⁰ state that policies, legislation and actions relating to the environment should be co-ordinated and harmonised within the spheres of government.²¹ Similarly actual or potential conflicts of interests between organs of state should be resolved through conflict resolution procedures²² and the cost of remedying pollution or the degradation of the environment, including the effects this may have on people's health and well-being, must be paid for by those responsible for harming the environment.²³ Thus national and provincial government are required to ensure that municipalities adhere to the NEMA principles in the preparation of any policy, programme or plan, including the establishment of Integrated Development Plans (IDPs)²⁴ and Water Services Development Plans (WSDPs).²⁵

15 Du Plessis *RECIEL* 319. See also Kok and Langford "The Right to Water", in Brand and Heyns (eds) *Socio-Economic Rights* 207-208 for general guidelines on the use of s 27(1)(b).

16 Hereafter the NWA.

17 Hereafter the NEMA.

18 Chapter 3 of the NWA.

19 CMAs are delegated by the Minister of Water Affairs to take responsibility for resource management in a defined area (a catchment). See also *Draft White Paper on Water Services* 2002 27-28.

20 S 2 of NEMA.

21 S 2(4)(l) of the NEMA.

22 S 2(4)(m) of the NEMA. The national environmental management principles are provided in s 2 of the NEMA.

23 S 2(4)(p) of the NEMA.

24 Chapter 5 of the *Systems Act*.

25 Chapter 3 of the *WS Act*.

1.2 The *status quo* of water services delivery in the local sphere

Despite the constitutional and statutory mandate of local government to provide access to sufficient water of a quality that is not harmful to human health or well-being, water governance at the local level²⁶ appears to be a pressing and continuing challenge.²⁷ The South African government's recent publications, the *Blue Drop Report on South African Drinking Water Quality Management Performance, 2012*²⁸ and the *Green Drop Report on South African Waste Water Quality Management Performance, 2011*²⁹ measure standards such as the adequacy of process control, maintenance and management skills, the efficiency of water quality monitoring, the credibility of drinking water sample analysis, the regular submission of water quality results to the Department of Water Affairs (DWA), and more.³⁰ These reports have indicated continuing challenges with respect to water quality, service delivery and municipal management commitment, for example.³¹ Other reports³² have indicated that municipalities frequently underspend when it comes to infrastructure, assets, repairs, maintenance and waste water management.

Access to sufficient water has significant consequences, amongst other things, for people's social and economic well-being. Water of a poor quality and insufficient access to water are also likely to have a negative impact on the enjoyment of certain constitutional rights e.g. the right to life³³ and human

26 See par 1.3.

27 This is evident from and explained in greater detail in various reports including the Green and Blue Drop Report, reports of the level and quality of water and sanitation services as illustrated in papers published by the Water Research Commission (WRC) (see <http://www.wrc.org.za>), Council for Scientific and Industrial Research (CSIR) (see http://www.csir.co.za/nre/water_resources), other government reports e.g. the DWA *Regulatory Performance Measurement System Municipal Compliance Assessment Report 2008-2009*, which monitors the overall performance of Water Services Authorities (WSAs), and the DEA *National State of the Environment Report*, as well as local newspapers e.g. <http://www.news24.co.za> and <http://www.dailymaverick.co.za>.

28 Hereafter the Blue Drop Report.

29 Hereafter the Green Drop Report.

30 See the summary of the Green Drop Report 4.

31 See the Blue Drop Report 2010 3.

32 Auditor-General 2009-2010 <http://www.agasa.co.za>; CSIR 2007 *Towards a framework for the maintenance of municipal infrastructure: in support of government growth objectives*; Department of Water Affairs 2012 *Water Infrastructure Status and Intervention Plans: 22 Priority District Municipalities*.

33 S 11 of the Constitution.

dignity.³⁴ As Muller³⁵ explains: "it is difficult to maintain minimum standards of dignity in the absence of water required for health and cleanliness".

Section 7(2) of the Constitution requires the state (all spheres of government, including municipalities) to respect, protect, promote and fulfil all applicable constitutional rights. This duty extends in the case of municipalities to informing their developmental role as envisaged by chapter 7 of the Constitution.³⁶ Municipalities' failure to comply with their constitutional and statutory duties with respect to water services provision (as but one of the functions of local government) is of direct relevance for every municipality's constitutional and statutory mandate to be developmental in general.³⁷ The notion of developmental local government suggests that municipalities must, in addition to the provision of basic services, contribute to the development of the community towards an environmentally, socially and economically sustainable future. Stewart and Horsten³⁸ observe in this context that the improvement of access to water is one of the prerequisites for poverty alleviation and sustainable development in South Africa. These authors argue that the proper management of water resources will improve environmental, economic and social goals, which in turn would complement the legal objective of municipalities to be developmental.³⁹ The obverse side of the coin is that non-compliance with the Constitution and statutory law as applicable to municipal water services provision could have a direct negative effect on people's lives and the protection they are entitled to by virtue of a range of rights entrenched in the Bill of Rights.⁴⁰

1.3 Water governance and the provision of water services

1.3.1 Introduction

The term "governance" has been used widely in many contexts; however it may generally be defined as the sum of the elements used to exercise authority. These elements include political leadership, institutional

34 S 12 of the Constitution.

35 Muller as quoted by Makube 2007 <https://editorialexpress.com>.

36 S 153.

37 S 153 of the Constitution and s 23 of the *Systems Act*.

38 Stewart and Horsten 2009 *SAPL* 493.

39 Stewart and Horsten 2009 *SAPL* 493.

40 These effects will be unpacked in chapter 3.

organisation, administration, capacity and skills, oversight and regulation, monitoring and reporting.⁴¹ The term "local governance" encompasses the authority at the local level to enact and enforce legislation and "to take decisions that may affect the rights of other persons".⁴² In the water services context it would be important to understand the meaning of the term "environmental governance" too, which Kotzé defines as "a management process executed by institutions and individuals ... to holistically regulate human activities ... on the total environment".⁴³

Taking into account these definitions, "water governance" may be understood as "the range of political, social, economic and administrative systems that are in place to develop and manage water resources, and the delivery of water services at different levels of society".⁴⁴ Thus perceived, water governance encompasses the actors, resources, mechanisms and processes managing access to water and water services, as well as the assurance of water quality. Viewed in this way, municipalities must by default be understood to form an integral part of the water governance endeavours of the South African government.

1.3.2 Water services

As the focus of this study, water services are part of water governance and may be described as water supply services and sanitation services, and include regional water schemes, local water schemes, on-site sanitation and the collection and treatment of wastewater.⁴⁵ The Constitution provides for all people to have access to sufficient water.⁴⁶ Water should be sufficient both in quantity and quality⁴⁷ and the sustainability of services should be

41 Refer to Du Plessis *Constitutional Environmental Right* 146.

42 For more on governance and water governance see Pegram *et al* 2006 *Water Research Commission* 4-7, 61-64.

43 Kotzé "Environmental Governance" in Paterson and Kotzé (eds) *Environmental Compliance* 107.

44 Rogers and Hall in Anon 2007 <http://www.id21.org>.

45 *Draft White Paper on Water Services* 2002 2.

46 S 27(b) of the Constitution.

47 See par 2.2.2.

ensured.⁴⁸ The standards of service delivery are mostly provided for in national regulations and government guidelines.⁴⁹

1.3.3 Failing delivery of water services

It is argued in this study that when water services do not meet specific requirements this amounts to a failure to deliver water services. The failing delivery of water services is, however, a complex phenomenon which results from various factors.

In this study these factors are understood to include, amongst others, non-compliance with the legislation and the Constitution, the provision of unequal access to sufficient water, the inadequate involvement of and consultation with communities, the lack of political will, insufficient human and financial capacity, inadequate administrative structures in local government, fragmentation and a lack of cooperation amongst role-players, and more.⁵⁰ In this study, the failing delivery of municipal water supply services provides the contextual background for and the rationale behind critically exploring the options in law available to the state when local governments provide services and more specifically water supply services to their communities.

1.3.4 The provision of municipal water services viewed from an intergovernmental perspective

National and provincial government are statutorily obliged to support and monitor municipalities in providing municipal services, including water services.⁵¹ Monitoring and support, together with intervention form the elements of supervision for local government offered by national and provincial government.⁵²

Monitoring has to do with the fact that provinces have the power to regulate, through legislative and executive measures, municipalities' exercise of their

48 See par 2.2.3 for a discussion of the sustainability of services.

49 For the scoping of water services for this study see par 2.2.

50 For an explanation of these factors see Middleton *et al* 2011 *PDG* 21-23.

51 S 155(6) of the Constitution.

52 Refer to chapter 4 for a more detailed analysis of the intergovernmental measures in law to address failing municipal services.

executive authority.⁵³ The *Systems Act* also provides for a broad monitoring framework, mandating provinces to establish a monitoring system with respect to the drafting and aligning of municipal IDPs⁵⁴ and to monitor local governments' exercising of their powers and functions, for example.⁵⁵ Chapter 2 of the MFMA similarly provides for the supervision by the National Treasury and provincial treasuries of local governments' management of money. Provisions dealing with the issues of the monitoring and support of municipalities are also found in sections 154(1), 155(6) and 155(7) of the Constitution, where it is stated that provincial governments must provide monitoring and support of local governments. In chapter 8 the *WS Act* similarly provides for the "monitoring of water services and intervention by the Minister and the different members of the Executive Councils responsible for local government in all the provinces".

In the context described above, the support of local government entails the involvement of national and provincial authorities who are compelled to support municipalities in performing their functions generally.⁵⁶ Section 14 of the *Systems Act*, for example, provides that the Member of the Provincial Executive Council (the MEC) for local government may promulgate standard by-laws (including water services by-laws) to assist municipalities with the making and implementation of their by-laws. The NEMA contains a similar provision to the extent that it provides that the Minister may make model environmental by-laws which may be adopted by a municipality, or a municipality may request the Director-General to assist with the preparation of environmental by-laws.⁵⁷

The *WS Act* further recognises the duty of all three spheres of government to ensure that water services are provided in a manner that is efficient, equitable and sustainable and to strive to provide these services to promote a sustainable economy.⁵⁸

53 S 155(7) of the Constitution.

54 S 31 of the *Systems Act*.

55 S 105 of the *Systems Act*.

56 S of the Constitution.

57 S 46 of the NEMA.

58 S 11 of the *WS Act*. See also par 3.2.10.

Section 139 of the Constitution provides for a province to intervene insofar as a municipality fails to comply with its statutory executive obligations to deliver water services, for example. This section entails in short that a Provincial Executive may intervene upon the failure or non-fulfilment of an executive obligation by a municipality. The steps taken in terms of section 139 should ensure fulfilment of that particular obligation.⁵⁹

Intervention is furthermore provided for in the *Structures Act*⁶⁰ and chapter 13 of the MFMA to the extent that an MEC may dissolve a Municipal Council or act promptly upon the realisation of serious financial problems in a municipality. In addition, section 16(2) and (3) of the NEMA provides for procedures in instances of a failure to comply with environmental management or implementation plans, providing a platform for national or provincial government to intervene in cases where a local municipality does not comply with its WSDP or other developmental and environmental plans.

The intergovernmental support envisaged by the Constitution and legislation as introduced above is laudable in a government that has been entirely transformed since 1996. However, a careful reading of chapter 3 of the Constitution and the IGRFA suggests that, because of the need to foster good intergovernmental relations, national or provincial authorities will not easily be able to use court action, for example, in the event of municipalities failing to comply with the provisions of the Constitution or other laws applicable to the delivery of water services. This makes the ultimate control over municipalities, as governed by water and environmental law, rather difficult and, viewed against the current state of affairs with respect to the provision of water services, poses a significant risk *inter alia* to public health and safety, for the reasons alluded to earlier.⁶¹ This again raises questions about the nature and operation of intergovernmental relations and cooperative government with respect to "the state's" provision of services as essential as water services.

59 See par 4.3.2 on intervention.

60 A 34(3)(b) of the *Structures Act*.

61 Par 1.1 and 1.2.

In the light of the foregoing this study sets out to determine and critically analyse and evaluate the different legal measures available to provincial authorities specifically to address the failing provision of municipal water services in South Africa. An attempt is made to consider the obvious as well as the less obvious (alternative) measures in existing law.

In addressing the problematique underpinning this study, the following are attended to: water supply services as a function of municipalities (chapter 2), the legal framework with respect to the provision of water services in South Africa (chapter 3), intergovernmental measures as provided for in law to address the failing provision of municipal water services, and a model for provincial authorities' intercession in local government (chapter 4).

1.3.5 Research methodology

This research project was conducted by means of a literature review. The review incorporates primary and secondary scholarly and legal texts, including textbooks, journal articles, legislation, case law, government reports, published research reports and other electronic materials relevant to understanding the delivery of water supply services in local government from a constitutional and statutory law and governance perspective. A critical analysis and evaluation was conducted to determine and comment on the legal measures available to provincial authorities to manage the consequences of non-compliance by municipalities with respect to their mandate in South African law to provide water services.

Chapter 2: Water supply services as a function of municipalities

2.1 Introduction

The provision and maintenance of water supply is an essential function of municipalities. Delivering in terms of this mandate is fraught with many challenges, however, especially for smaller or rural municipalities, which have to provide water to their communities whilst facing internal political ructions, financial constraints, lack of capacity and so forth. These problems sometimes give rise to a failure to provide water to their constituents, which sometimes gives rise to service delivery protests in which residents take to the streets in an attempt to force the (local) government to provide the services that are their due, including water.⁶²

The objective of this chapter is to unpack some of the most evident elements facing local government in its obligation to provide sustainable services such as a water supply to its communities. Once the elements and the overall scope of municipal water supply have been determined, the defining indicators of *failing* municipal water supply services will be distilled.

2.2 Water supply: what does it entail?

"Water services" refer to water supply services and sanitation services, and include regional water schemes, local water schemes, on-site sanitation and the collection and treatment of wastewater.⁶³ "Municipal services" is defined in the *Systems Act* as "a municipal service that is necessary to ensure an acceptable and reasonable quality of life".⁶⁴ Municipalities supply water and sanitation to consumers such as households, businesses and industries, and operate wastewater collection and treatment systems. In some instances

62 See Venter 2012 <http://www.zoutnet.co.za>; De Waal 2012 <http://dailymaverick.co.za>; Bhagwan 2012 <http://www.wrc.org.za>.

63 *Draft White Paper on Water Services* 2002 2.

64 S 1 of the *Systems Act*.

municipalities may operate local water resource infrastructure including dams and boreholes and bulk water supply schemes.⁶⁵

A municipality provides a service by exercising its powers and functions related to that specific service in terms of legislation. The service should be for the benefit of the local community and when outsourced, the service remains the municipality's responsibility.⁶⁶ The "local community" consists of the residents, the ratepayers, any civic organisation and non-governmental, private sector or labour organisations or bodies which are involved in local affairs within the municipality, and visitors and other people residing outside of the municipal area but who make use of the services or facilities provided by the municipality,⁶⁷ including the water supply.

2.2.1 The scope of water supply services

In this study only one of the elements of water services, namely *water supply*, is critically unpacked and considered.⁶⁸ "Water supply services" means the following:⁶⁹

The abstraction from a water resource, conveyance, treatment, storage and distribution of potable water, water intended to be converted to potable water and water for industrial or other use, where such water is provided by or on behalf of a water services authority, to consumers or other water services providers.

Water supply services also include the organisational arrangements needed to ensure the provision of water, including health, hygiene and education,

65 *Draft White Paper on Water Services* 2002 1-3.

66 De Visser 2005 *Developmental Local Government* 72. With regards to outsourcing, the Community Law Centre argues that the need to outsource specific services "may lead to the disempowerment of the Council and the community it serves", especially where the legal framework requires highly skilled personnel for the implementation of a particular process, which may include the provision of water or sanitation services. In this regard see Johnson *Outsourcing Municipal Services*.

67 S 1 of the *Systems Act*. See also De Visser 2005 *Developmental Local Government* 72.

68 The definition of water supply services is not restricted to potable water (as in the *WS Act*) but includes all water supplied by or on behalf of a water services authority. *Draft White Paper on Water Services* 2002 6.

69 *Draft White Paper on Water Services* 2002 6.

measurement of consumption and billing as well as the collection of revenue and consumer care.⁷⁰

The *WS Act* provides for the constitutional right to have access to sufficient water⁷¹ and an environment that is not harmful to people's health and well-being.⁷² Section 3(1) of the *WS Act* states that "a person has a right of access to basic water supply and basic sanitation". The *Strategic Framework for Water Services 2003* allows for a more comprehensive definition of water supply services. *Basic* water supply is defined as follows:⁷³

The provision of a basic water supply facility, the sustainable operation of the facility (available for at least 350 days per year and not interrupted for more than 48 consecutive hours per incident) and the communication of good water-use, hygiene and related practices.

This should be read together with the definition of a basic water supply facility.⁷⁴

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

The definitions above seem to emphasise the need for the sustainability of water supply,⁷⁵ the possession of a suitable infrastructure which should

70 See par 3.2.10 for a discussion of financial planning and financial sustainability, which includes billing and consumer care. Par 3.2.19 provides a discussion of environmental education.

71 S 3 of the *WS Act*.

72 S 24(a) of the Constitution. See also Thompson *Water Law* 204-207; S 24(a) of the Constitution. Well-being extends beyond issues of health, which is why s 24(a) refers to health and wellbeing. "People's right to well-being is accordingly not only a moral claim but has its foundation in constitutional law". See Du Plessis 2011 *SAJHR* 296. The NWA is representative of the government's acknowledgement of human life, health and well-being, and its commitment to sustainable development. Stein 2005 *Texas LR* 546.

73 *Strategic Framework for Water Services* 2003 46.

74 *Strategic Framework for Water Services* 2003 46.

75 Sustainable water supply entails the continual supply of water or sanitation services, setting the standard as "at least 350 days per year and not interrupted for more than 48 consecutive hours per incident". *Strategic Framework for Water Services* 2003 46.

deliver and ensure sustainable water supply,⁷⁶ and the accessibility of water supply services.⁷⁷

2.2.2 Sufficient water: quality and quantity

As stated a number of times already, in South Africa everyone has the right to have access to sufficient water.⁷⁸ This right is qualified in section 27(2) of the Constitution, which provides that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.⁷⁹ The *WS Act* furthermore provides the basis for the regulation of water. It sets out the duties of water services authorities (which are mainly municipalities), including the progressive extension of services to all,⁸⁰ the prioritising of basic services,⁸¹ the preparation of a *WSDP*,⁸² and the making of by-laws.⁸³ The *WS Act* also provides the conditions in which services may be limited or discontinued.⁸⁴

An element of water supply is the provision of *potable* water, i.e. "drinkable" or "clean" water. Drinkable water should be of a particular quality to be fit for human consumption.⁸⁵ The section 24 environmental right suggests that "people in South Africa have the right to be protected, *inter alia*, against the

76 Infrastructure should be planned for, constructed, maintained and improved or expanded where needed. De Koker in Gabru 2009 <http://www.engineeringnews.co.za> says that "the lack of maintenance and upgrading is leading to the collapse of existing infrastructure systems." He further states that national government "is aware of these critical issues ..., but lacks the ability to tackle and implement a solution".

77 Basic water supply is defined in s 2 of the *Compulsory National Standards and Measures to Conserve Water Regulations* of 2001 (GN 7079 in GG 22355 of 8 June 2001) as 25 litres per person per day accessible within 200 metres.

78 S 27(1)(b) of the Constitution.

79 For a detailed explanation of the progressive realisation and reasonableness of measures taken by the state see Thompson *Water Law* 147-151. See also Du Plessis 2011 *RECIEL* 321 for an account of progressive realisation in the case of *Lindiwe Mazibuko and Others v The City of Johannesburg and Others* Case No 06/13865 (W).

80 S 11 of the *WS Act*.

81 Ss 3 and 4 of the *WS Act*.

82 S 3(3) of the *WS Act*.

83 S 21 of the *WS Act*.

84 S 4 of the *WS Act*. See also Malzbender *et al* 2009 *Water Research Commission* 42-43. The duty of municipalities to provide sufficient water is further discussed in par 3.2.9.

85 Du Plessis 2011 *RECIEL* 319. Equal access to water and the protection of water resources (including the assurance of good water quality) are some of the government's objectives. See also Turton 2009 *Journal of Transdisciplinary Research in South Africa* 12 for a more scientific discussion on water quality as an issue in South Africa. The World Health Organisation also frequently publishes the World Health Organisation *Guidelines for drinking water quality* <http://www.who.int>.

harmful effects caused by the pollution of drinking water".⁸⁶ Water services authorities are legally required to sample and monitor the quality of drinking water in their area of jurisdiction on a monthly basis.⁸⁷ The *Compulsory National Standards for the Quality of Potable Water 2001*⁸⁸ was introduced by the *WS Act* for the regulation of drinking-water quality. Non-compliance with these national standards is not regarded as a criminal act, but the *WS Act* at least makes it an offence for any person to "fail or refuse to give information" about the quality of water or to provide false and misleading information.⁸⁹

Part of national government's reaction to its duty to control water quality is the investigation into water quality within municipal areas and the annual publication of the Blue Drop Report⁹⁰ and reports by the Water Research Commission.⁹¹ National government has been recognising the challenges facing the provision of potable water of a good quality and stated the following:⁹²

There remain significant challenges in the field of drinking water quality which will require a focused regulatory approach as well as intensified municipal management commitment to ensure improvement. These challenges generally occur in the domain of the management of and operation of treatment technology, due to the lack of adequate process controlling skills in some areas.

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- 86 Du Plessis 2011 *RECIEL* 319. Pollution is defined in s 1 of NEMA as " any change in the environment caused by substances where that change has an adverse effect on human health or well-being or on the composition, resilience and productivity of natural and managed ecosystems or will have such an effect in future".
- 87 S 1 of the *National Health Act* 61 of 2003. Municipal health services include water quality monitoring.
- 88 Published in Government Gazette No 22355 of 8 June 2001.
- 89 S 82 of the *WS Act*.
- 90 Turton in Anon 2010 <http://www.rainharvest.co.za> claims that there is a need for a public acknowledgement that water quality is deteriorating nationally. The issue of skills shortages in many municipalities also negatively affects the outcomes and reliability of the Blue Drop Report. Another factor pointed out is that larger metropolitan areas do not purify their potable water, since large water boards delivery this service. A council member of the SA Institution of Civil Engineering is further of the opinion that "this may skew the results since the more onerous task of purifying the water also rests with many of the smaller municipalities, which have the least capacity to do so".
- 91 Refer to the reports of the South African Water Research Commission available at <http://www.wrc.org.za>.
- 92 Department of Water Affairs 2010 Blue Drop Report.

The national sphere of government hereby seems to blame, *inter alia*, the lack of both management and technical skills for the 'significant challenges' of ensuring the provision of water of good quality.⁹³

2.2.3 The sustainability of services

It is an object of local government to provide services, including water supply services, to communities in a sustainable manner.⁹⁴ Sustainability in this context means that there are adequate resources to operate, maintain, rehabilitate and expand services in future, if necessary.⁹⁵ Thompson⁹⁶ states the following with regards to the sustainability of water services:

For sustainable access to water services in the long term, equipment and technical and management skills are also needed to install, operate, maintain and use the necessary infrastructure to provide the services, and for that, financial resources are needed which are in certain cases the critical element.

When considering the definition of "financially sustainable" as provided for in the definitions to the *Systems Act*, Thompson's postulation on the sustainability of water services seems accurate. The three components assembled to create the definition of sustainability in the *Systems Act*, in short, include initial capital expenditure, operations, and maintenance of the physical assets i.e. the infrastructure necessary to provide a specific service. Thompson adds the elements of the technical and management skills needed to provide water services. These "resources" appear to be critical to the sustainable provision of water services.⁹⁷ Sustainability therefore also entails that there need to be adequate financial resources, human resources and infrastructure to provide continuous water supply to communities.⁹⁸

93 See par 2.2.2.

94 S 152(1)(b) of the Constitution.

95 *Draft White Paper on Water Services* 2002 8.

96 Thompson *Water Law* 693.

97 International and local experience has indicated that technology alone does not contribute to sustainable service delivery and that strong institutions and management contribute significantly to successful programmes. Bhagwan Date Unknown <http://www.wrc.org.za>. Thompson *Water Law* 693 has, however, omitted to mention the issue of natural resources in his definition of the sustainability of water services. S 73(2)(c)-(e) of the *Systems Act* states that the provision of services must be financially and environmentally sustainable and must be regularly reviewed with a view to upgrading, extension and improvement. A failure to provide municipal services in an environmentally sustainable way might result in liability on the part of the municipality.

98 *Draft White Paper on Water Services* 2002 8.

Tariff setting,⁹⁹ cost recovery, proper planning and budgeting are also elements of *financially* sustainable water supply services.¹⁰⁰

The organisational capacity of municipalities also seems to be an important factor in sustainable service provision, especially in specialised fields such as engineering. The prospects of providing sustainable operations are enhanced by performing regular maintenance. It follows that the roles and responsibilities of stakeholders in infrastructure provision and maintenance should be clarified across all spheres of government.¹⁰¹

The provision of sustainable services furthermore requires proper planning. Integrated planning seems to be very important in this context. It involves the alignment of municipal planning with national and provincial objectives, activities, projects and programmes.¹⁰² Integrated planning furthermore takes into account the political, institutional and social dynamics within a municipal area, seeks to promote development, and also attends to on-going operations.¹⁰³

The regulation of services plays an important role in ensuring the effective and efficient delivery of sustainable services.¹⁰⁴ The inability to provide adequate water in a sustainable manner may negatively affect the social contract between the municipality and the people to whom it must provide the service. The result could be, for instance, non-payment by consumers and customer dissatisfaction, which might exacerbate the inability of the municipality to provide sustainable water supply services, and possibly result in the deterioration of infrastructure.

99 It has been stated that a municipal tariff policy should be enforced by improved credit control mechanisms, which include the measuring of consumption and the trustworthy metering of services. Households should, for instance, receive regular accurate bills, and indigent households should receive some free basic services. See DPLG 2007 *Guidelines Sustainable Municipal Infrastructure Provision and Service Delivery* 8.

100 For more information on financial sustainability see par 3.2.10.

101 For more information on infrastructure see par 3.2.13.

102 DPLG 2007 *Guidelines Sustainable Municipal Infrastructure Provision and Service Delivery* 9.

103 *Draft White Paper On Water Services* 2002 48. For more information on municipal planning see par 3.2.18.

104 Regulation should encourage good decision-making, which is to be benefit of the consumer. See DWAF 2008 *National Water Services Regulation Strategy* ii.

2.3 The role of local government *vis-à-vis* national and provincial government

It is important to understand the roles and responsibilities of the different spheres of government, especially when the intergovernmental measures to address failing water supply services are analysed. When "the state" is referred to in legislation, all spheres of government and organs of state¹⁰⁵ are implied. This collective term may, however, lead to some uncertainty with regards to the specific roles and responsibilities of the various role-players.¹⁰⁶

2.3.1 Spheres of government: an introduction

South African government consists of three distinctive, interrelated and interdependent spheres of government.¹⁰⁷ The Constitution provides for spheres of government which are no longer on hierarchical levels and are constitutionally autonomous although dependent on one another. The different spheres are required to liaise with one another in a cooperative manner.¹⁰⁸ Local government is assigned the executive authority and right to administer the functional areas listed in Schedules 4B and 5B, which include *inter alia* water supply services.¹⁰⁹ The legislative competence over this area

105 An organ of state according to s 239 of the Constitution means (a) any department of state or administration in the national, provincial or local sphere of government; or (b) any other functionary or institution- (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation.

106 There appears to be pressure on and tension between local and district municipalities, caused *inter alia* by the number of statutory functions that districts actually perform and the adjustment of functions between local and districts, which has caused uncertainty and instability with regards to roles and responsibilities. This may similarly be the situation in intergovernmental relations and between organs of state. If not resolved, such confusion could undermine intergovernmental planning, budgeting and services delivery. See DPLG 2008 *15 year Review Report on the State of Intergovernmental Relations in South Africa* 63-65.

107 Chapter 3 of the Constitution. See Steytler (ed) *Place and Role of Local Government* 192. The terminology of "spheres" was especially adopted to remove the implications of a hierarchical structure of government, where a lower tier is inferior to a higher one. See Buthelezi and Dollery 2004 *J Stud Econ Econometrics* 92. The interrelatedness of the spheres of government means that each sphere must exercise its autonomy to the common good of the province and the country by cooperating with the others and by avoiding litigation against the others. See DPLG 2003 *A guideline document on provincial-local intergovernmental relations* 5-7; DPLG 2007 *The Implementation of the Intergovernmental Relations Framework Act* 9-10; Malan 2005 *Politeia* 227-228.

108 See paragraph 4.2 for a discussion of cooperative government.

109 Original powers may not be amended or removed by ordinary statutes or provincial acts. See Christmas and De Visser 2009 *CJLG* 111. These functions can furthermore not be changed except by an amendment to the Constitution itself. National and

of service provision is vested concurrently in the national and provincial government. The Constitution furthermore places an obligation on national and provincial government to take legislative and other measures to support and strengthen the capacity of municipalities to manage their own affairs, exercise their powers, and perform their functions.¹¹⁰

The local capacity of municipalities with respect to service delivery is therefore directly affected by the efficacy of the relations among the three spheres of government. When they are "working harmoniously together [they] are more likely to address challenges than if they were acting on their own"¹¹¹ or competing with one another. Local government is therefore an important structure when it comes to water supply services, but is not isolated in its attempts to provide adequate and sustainable services, as the other spheres of government are obliged to support the municipalities.¹¹²

2.3.2 Responsibilities of "the state"

The Constitution obliges the state, (all three spheres of government) to realise the rights entrenched in the Bill of Rights. According to the *Draft White Paper on Water Services*,¹¹³ "water services are the responsibility of all three spheres of government" and they share the obligation to see to the realisation of basic rights to water supply and sanitation.¹¹⁴

National government is, however, identified as the custodian of the country's water resources. This means that national government has the mandate.¹¹⁵

provincial governments' regulatory power over Schedule 4B and Schedule 5B matters is limited. Atkinson 2002 *Centre for Development and Enterprise* 4.

110 Ss 154(1) and 155(7) of the Constitution.

111 Reddy in Davids 2011 *African Journal of Business Management* 3571. Mention is made frequently of the tension or competition between local and district municipalities. See for example Baatjies and Steytler 2006 *Community Law Centre* 25 and Atkinson,, Van der Watt and Fourie 2003 <http://www.hsrc.ac.za> 4-5. This cooperation may also prevent the duplication of initiatives such as programmes to provide water or water infrastructure. See par 4.2.1.

112 See par 4.3.1.3.

113 *Draft White Paper on Water Services* 2002 4.

114 *Draft White Paper on Water Services* 2002 14. The *Water Supply and Sanitation Policy White Paper* 1994 underlines this responsibility of provincial government by stating that "Provincial Governments clearly share the responsibility for assuring service provision, specifically through the promotion of effective local government". See *Water Supply and Sanitation Policy White Paper* 1994 10.

115 Thompson *Water Law* 220-221.

... to ensure that the water resources are protected, used, developed, conserved, managed and controlled in a socially equitable and economically beneficial and sustainable manner.

To this extent, the DWA acts as the public trustee of South Africa's water resources and must in this capacity regulate water resources and services. The NWA confirms in its preamble the role of the DWA as the custodian of all water resources in South Africa, by providing for national government's overall responsibility for and authority over the nation's water resources and their use.¹¹⁶

Provincial government fulfils the role of overseeing the provision of water supply (and other) services by municipalities and is mandated to monitor and support local government in general, as well as to intervene in cases of non-compliance or failure.¹¹⁷

2.3.3 The role of local government

With the introduction of the Constitution, the new system of constitutional supremacy has replaced parliamentary sovereignty. Local government, which is one of the distinctive, interdependent and interrelated spheres of government,¹¹⁸ is invariably the form of government closest to the communities in South Africa.¹¹⁹ Although no universally applicable¹²⁰

116 Ss 139, 154 and 155(6) of the Constitution. National government is designated the public trustee of the nation's resources to "ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate". See s 3(1) of the NWA). The Minister of Water Affairs is given the executive responsibility to ensure that water is allocated equitably and used beneficially in the public interest, and that its environmental values are protected (S 3(2) of the NWA). Equitable access was considered important due to the discriminatory policies of the past (see par 2.3.1 on historic challenges). The concept of public trust gives the responsibility and authority to manage water to the national government, a fact which does not imply that government owns the water resources but that it ensures the management of water to the benefit of all persons. See Thompson *Water Law* 279. See also Tewari 2009 *Water SA* 693-710 on the history and development of water rights.

117 See par 4.3.1 for monitoring and support of municipalities by provincial government.

118 S 40(1) of the Constitution.

119 President Zuma, for example, once stated that "municipalities are the first door that our people knock on when they need assistance from government. When people are frustrated with the slow movement of the wheel of government they engage municipalities before other spheres. Citizens also blame municipalities for functions that they have no direct control over". See Matloho 2009 <http://www.afesis.org.za>.

120 Du Plessis *Constitutional Environmental Right* 141. According to Du Plessis local government cannot be defined without an understanding of the concept of

definition exists, local government is by and large considered as the "service delivery-orientated" sphere of government, insofar as it is involved in the rendering of essential services,¹²¹ while being the "level of government that operates the closest to local residents".¹²² The Constitution recognises every municipality's right "to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution",¹²³ thereby establishing the principle of the autonomy of local government with respect to the allocated powers and functions of municipalities.¹²⁴ Local government's role is also especially important in the socio-economic rights context, as municipalities *inter alia* serve as the "facilitative forum for local community participation in the affairs of government generally".¹²⁵

According to Nel, Du Plessis and Retief,¹²⁶ local government has multiple roles to fulfil. It acts as the *governor* by executing its legislative and executive power, and as being *governed* by the other spheres of government. As the governor, local government is responsible for the regulation of its community by means, for example, of making by-laws and local policies. As the governed, municipalities must comply with the law,

government, which she defines as "a group of people or body governing a country or state – it is responsible for the control or direction of public affairs".

121 Essential services include *inter alia* water, sanitation, electricity, waste disposal.

122 Bekink *Local Government Law* 16. Municipalities should fulfil the role of being the eyes and ears of the South African government in its entirety, according to Nel, Du Plessis and Retief *The Local Government Sustainability Interface* 13-15. This implies that "the impact of the collective efforts of national, provincial and local government in fulfilling their constitutional obligations to citizens must be tangibly seen and felt at the local level". See Christmas and De Visser 2009 *CJLG* 106.

123 S 15(1) of the Constitution. See also s 4(1)(a) of the *Systems Act*.

124 Municipalities must exercise their executive and legislative authority within the constitutional system of cooperative government envisaged in s 41 of the Constitution. The distinctiveness refers to the autonomy of all spheres of government. When a matter falls within its area of competence as provided for by the Constitution, that sphere has the final say on the matter, thereby referring to the legislative and executive autonomy of each sphere. Being interdependent means that the autonomy is supervised by other spheres of government, and national and provincial governments may make a final decision in issues which affect local government, thus emphasising the co-relationship between the spheres. Supervision will be discussed in par 4.3.1 below.

125 Du Plessis *Constitutional Environmental Right* 144. For a discussion on the various goals of public participation and consultation (inform, consult, involve, collaborate, empower) see Jonker *et al* 2010 *WRC Report* 50-51. Bekink *Local Government Law* 63. See Du Plessis *Constitutional Environmental Right* 144-145.

126 Nel, Du Plessis and Retief *The Local Government Sustainability Interface* 4-5.

policies and plans of provincial and national government.¹²⁷ These two roles (which could alternatively be described as the role of a regulated regulator) require a fine balance if municipalities are to operate optimally.¹²⁸ In supplying water, a municipality firstly as a *governor*, should enforce its own policies such as its credit control policies. As being *governed*, these policies should adhere to national legislation. It should be made clear that the duties of local government as the "regulated" also inevitably impact on its own regulatory function, in that these two functions or faces of local government cannot be kept apart altogether.

2.4 Developmental local government, sustainable development, and water supply services

A municipality must be developmental when providing water supply services, amongst others. The notion of developmental local government suggests that municipalities must, in addition to the provision of basic services, contribute to the development of the community towards an environmentally, socially and economically sustainable future.¹²⁹ Municipalities, true to their constitutional mandate, act as "developers" when providing services such as roads and sanitation. These services, when they have an impact on the environment, should be managed in such a way as to ensure that resources are used optimally and not at the expense of the present and future generations. This is essential for development to be sustainable. The World Commission on Environment and Development¹³⁰ states the following in this respect:

127 As a governed entity, municipalities for example need to be able to demonstrate compliance with applicable environmental law. Nel, Du Plessis and Retief *The Local Government Sustainability Interface* 4-5.

128 For more information, refer to Du Plessis *Constitutional Environmental Right* 143-145.

129 See also De Visser 2001 *Local Government Working Paper* 16. "Sustainable service delivery means delivery in such a manner that the consumer can afford them and the supplier can provide them within its own means on an on-going basis." See also Department of Environmental Affairs and Development Planning 2007 *Decision-making for sustainable development: guidelines for municipalities* 12–14 for guidelines for municipalities towards sustainable development, as well as information on cooperative government for sustainable development.

130 United Nations 1987 <http://www.un-documents.net>. Also referred to as the Brundtland Report. Olivier, Van Zyl and Williams 2010 *PER* 103. Also see the definition afforded to "environmentally sustainable" in the definitions of the *Systems Act*. "environmentally sustainable", in relation to the provision of a municipal service, means the provision of a municipal service in a manner aimed at ensuring that (a) the

Sustainable development is development which meets the needs of the present without compromising the ability of future generations to meet their own needs.

Although this is a broad description, it emphasises the key characteristic of "adopting a long-term approach towards improving the quality of life of people now and in the future".¹³¹ Sustainable development in this context is about enhancing human well-being and the quality of life for all time, in particular for those most affected by poverty and inequality,¹³² and is understood to require the balancing of social, economic and environmental factors.¹³³ Of relevance to local government in South Africa would be to provide adequate but affordable water supply services in a sustainable manner.

The objects of local government¹³⁴ include the responsibility of providing democratic and accountable governance to its community, ensuring the provision of sustainable services, promoting a safe and healthy environment, and involving communities and community organisations in its matters. In *Lindiwe Mazibuko and Others Case CCT 39/09 2009 ZA (CC)*,¹³⁵ the Constitutional Court considered the critical need to address socio-economic inequalities, the lack of water services and the unequal access to water resources in the context of the paucity of water resources in South Africa. It recognised that access to water has long been unequal. Section 153 of the Constitution provides specifically for the developmental duties of municipalities in prescribing that municipalities must structure and manage their administration, budgeting and planning processes to give priority to the

risk of harm to the environment and to human health and safety is minimised to the extent reasonably possible under the circumstances; (b) the potential benefits to the environment and to human health and safety are maximised to the extent reasonably possible under the circumstances; and (c) legislation intended to protect the environment and human health and safety is complied with.

131 Urquhart and Atkinson *A Pathway to Sustainability: Local Agenda 21 in South Africa* 16. According to the *Strategic Framework for Water Services* 2003 ii "sustainability requires that services are affordable. Everybody in South Africa has the right to a basic amount of water and a basic sanitation service that is affordable". Equally important is the responsibility to not "abuse the right to free basic services and to pay for services where these are provided over and above a basic service".

132 National Framework for Sustainable Development in South Africa 2008 6.

133 Du Plessis 2011 *SAJHR* 282. See Kotzé 2010 *Journal of Human Rights and the Environment* 156.

134 S 152 of the Constitution.

135 *Lindiwe Mazibuko and Others Case CCT 39/09 2009 ZA (CC)* par 2. Hereafter the *Mazibuko case*.

basic needs of the community, and to promote the social and economic development of the community.

The principle of sustainable development is fundamental to Local Agenda 21 (LA 21), which has been the outcome of a host of international policies and events reflecting the growing importance of sustainable development in the world. LA 21 is the process used to translate Agenda 21¹³⁶ into actions at the local level. There are strong similarities between LA 21 and the constitutional requirements of cooperative government,¹³⁷ as well as the participation of communities¹³⁸ and the promotion of a safe and healthy environment.¹³⁹ The NEMA principles, as stated earlier,¹⁴⁰ are a reflection of South Africa's commitment to the goal of sustainable development.

2.5 The need for and challenge of accessing water: international perspectives

The mandate or function of local government to provide water services cannot be separated from the right of access to sufficient water in South Africa. A right to water is not universally recognised as a fundamental human right. The right to water or basic access to water is usually acknowledged as a general component of existing human rights such as but not limited to the right to a clean environment, dignity, and health.¹⁴¹ However, changing

136 Local Agenda 21 was developed at the 1992 United Nations Conference on Environment and Development, called the Rio Earth Summit. It is a global plan of action to stop environmental degradation and promote equitable development. Urquhart and Atkinson *A Pathway to Sustainability: Local Agenda 21 in South Africa* 13.

137 Chapter 3 of the Constitution.

138 S 152(e) of the Constitution.

139 S 152(d) of the Constitution.

140 See par 1.1.

141 More recently the United Nations developed a *Draft Declaration of Human Rights and the Environment*, which included the principle that "(a)ll persons have the right to a secure, healthy and ecologically sound environment." See Feris 2008 *SAJHR* 46. German law mirrors many aspects of the human right to water. For example, Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights as adopted on December 16, 1966, and in force from January 3, 1976 which contains the right to water, has to be applied by German courts and authorities. Access to water is also listed as one of the elements of social assistance, and the quality of water is protected by a Drinking Water Ordinance (*Trinkwasserverordnung*). In India the constitutional right to access to clean drinking water is inferred from the right to food, the right to a clean environment and the right to health, all of which are protected under the right to life guaranteed under article 21 of the Indian Constitution. *Indian Constitution (Ninety-fourth Amendment) Act*, 2006. See Kothari "The right to water, a constitutional perspective" 8.

environmental, economic and social factors have made access to water as a human right an important development to consider internationally.¹⁴²

The significance of access to water is noticeable in the United Nations (UN) General Assembly's effort to recognise safe and clean drinking water as a human right "essential to the full enjoyment of life and all other human rights".¹⁴³ A 2012 UNICEF and World Health Organisation (WHO) report¹⁴⁴ provides information on access to drinking water worldwide and is compiled every two years. It has been reported *inter alia* that since 1990 more than two billion people worldwide have gained access to improved drinking water sources, but a staggering seven hundred and eighty million people worldwide still do not have access to a satisfactory source of drinking water. It is reported that the sub-Saharan African regions are one of the regions lagging behind in all targets.¹⁴⁵ A Millennium Development Goal (MDG)¹⁴⁶ target for drinking water also calls for halving the proportion of the population without sustainable access to safe drinking water between 1990 and 2015.¹⁴⁷ This target was met in 2010, but it is unlikely that the MDG target for sanitation will be reached by 2015.¹⁴⁸ The relevance of the international context for understanding water services provision in local government in South Africa

142 Kothari "The right to water, a constitutional perspective" 8. The question to ask is what the right of access to water would specifically mean. According to De Visser (as quoted by Kothari) the right of access to water places the following obligations on the state; it must ensure that all people have physical access to water; it must ensure that all people have economic access to water; and where water is provided, consumers should be protected against undue infringement.

143 This was formalised on 28 July 2010. At its 15th session in September 2010 the UN Human Rights Council affirmed the right to water and sanitation, and even connected these rights to the right to the "highest attainable standard of physical and mental health, as well as to the right to human dignity". See UNICEF and World Health Organisation *Progress on Drinking Water and Sanitation 2012* update 36.

144 UNICEF and World Health Organisation *Progress on Drinking Water and Sanitation 2012* Update.

145 UNICEF and World Health Organisation *Progress on Drinking Water and Sanitation 2012* Update 3-5.

146 The international context for development is created *inter alia* by the UN Millennium Development Goals. The United Nations General Assembly unanimously approved the MDGs in 2000. All member states undertook to realise these development goals and to meet their specific targets by 2015. See Olivier, Van Zyl and Williams 2010 *PER*.

147 UNICEF and World Health Organisation *Progress on Drinking Water and Sanitation 2012* update 2.

148 Target 7c of the MDGs requires the reduction by half of the proportion of people without sustainable access to safe drinking water and basic sanitation. For more information see UNICEF and the World Health Organisation *Progress on Drinking Water and Sanitation 2012* update 15. For the other targets or goals, see Olivier, Van Zyl and Williams 2010 *PER*.

lies therein that it emphasises the worldwide focus of authorities on adequate access to water. In other words, it shows exactly how important a role local government has to play.

Standards for the quality of drinking water and the assurance of the safety of drinking water are determined by the WHO. The *Guidelines for Drinking Water Quality 2011*¹⁴⁹ are intended to "support the development and implementation of risk management strategies that will ensure the safety of drinking water supplies".¹⁵⁰ The guidelines describe "reasonable minimum requirements of safe practice to protect the health of consumers". Similarly the founding document establishing the Southern Africa Development Community (SADC), namely the Treaty of the SADC,¹⁵¹ proclaims its objectives as, amongst others, the promotion of "sustainable and equitable growth and socio-economic development" and the achievement of the "sustainable utilisation of natural resources and effective protection of the environment".¹⁵²

Altogether the above serves to show that water supply is an international topic of concern. Progress has been made in terms of international goals set to alleviate backlogs, but the sub-Saharan African region appears to be lagging behind when it comes to the goals set by the MDGs.¹⁵³

2.6 The need for and challenges of accessing water: South African perspectives

South Africa is one of the few countries where the right of access to water is embodied in its constitution.¹⁵⁴ This right was initially included to correct the inequalities brought about by the country's "racially discriminatory past".¹⁵⁵

149 *Guidelines for Drinking-Water Quality 2011*.

150 *Guidelines for Drinking-Water Quality 2011* 2.

151 For information on the treaty, visit <http://www.sadc.int>.

152 See Olivier, Van Zyl and Williams 2010 *PER* 107-108.

153 For more information on international law related to water and water rights, see Kok and Langford "The Right to Water" in Brand and Heyns (eds) *Socio-Economic Rights* 191-197.

154 Kotzé and Paterson *Role of the Judiciary* 51. Gambia, Ethiopia, Zambia and Uganda are some of the countries that also include constitutional provisions ensuring the right to clean water for their citizens See Hardberger 2006 *Texas International Law Journal* 539.

155 Kotzé 2010 *Journal of Human Rights and the Environment* 146. The objective of the inclusion of a human right of access to water is to enable a transformation in the

This context is important to know in order to understand the extended function and role of people's having access to water.

Municipal reform in South Africa commenced in 1994. Prior to this reform the country experienced politically turbulent years in which municipalities were characterised by racial segregation, the unequal allocation of resources and the unequal delivery of basic public services.¹⁵⁶ Access to water resources was dominated by those with access to land and economic power. Hence the progress of the country's wealthy whilst the position of the poor, especially in rural areas, deteriorated.¹⁵⁷ The government engaged in some development of water resources in the black areas of the country – apartheid determined that the country was divided (unequally) on "racial" grounds - but these projects were unevenly distributed, and only twenty-five percent of the existing water schemes in rural areas were operational.¹⁵⁸ Hence the water services infrastructure in many of the rural areas was operated by "fragmented homeland government structures that were almost completely dependent on the South African Government for funding",¹⁵⁹ the consequences of which are still to be seen in rural and less formal areas, where infrastructure is sometimes non-existent or has seriously deteriorated.

Today backlogs remain in service delivery and service infrastructures, especially in historically underdeveloped areas.¹⁶⁰ After the local government elections of December 2000 the newly demarcated municipal areas had to integrate local and rural councils into "single administrations covering far

unjust conditions lingering from the past in order to bring about equity, social justice, and democracy.

156 See Nealer 2009 *The Journal for Transdisciplinary Research in Southern Africa* 76-77. See also the *White Paper on Local Government* 1998 12-14 for a historic review of local government. For a more extensive discussion of the political history, see Magaziner 2008 *North Carolina Journal of International Law and Commercial Regulation* 512-515. Deprivation, inequality and poverty are only a few of the results of the previous historical dispensation which pose a challenge for the state related to the provision of services in different areas. See Du Plessis 2011 *SAJHR* 281-282 for an in-depth discussion on poverty and the environment. Also refer to Du Plessis *RECIEL* 317-318 for a historical background on the constitutional water right.

157 *White Paper on Local Government* 1998 12-14.

158 *Water Supply and Sanitation Policy White Paper* 1994 5. The lack of services may be attributed partly to the fact that there was uncertainty with regards to the roles and responsibilities for water and sanitation services.

159 DWAF 2004 <http://www.wrc.org.za> 4. The previous system did not provide for one dedicated department to take responsibility for water supply and sanitation services.

160 To rectify the situation will require municipal expenditure far in excess of the revenue currently available within the local government system. *Green Paper on Local Government* 1997 par 4.

larger areas",¹⁶¹ whereby additional responsibilities were placed on the newly created municipalities, and different administrative systems were to be integrated.¹⁶² The new mix of different cultures, income groups and expectations became yet another challenge in the new municipal areas.

The purpose of the reform of the water sector within the transformation of local government was the need to redress the inequities of the previous political dispensation, as well as the need to ensure sufficient supplies of water to meet the growing needs of communities stimulated by urbanisation and industrialisation.¹⁶³ The relevance of the complex historical background and its heritage lies in its importance for understanding why local government should do whatever it can to realise people's right of access to water, in order to contribute to justice in South Africa.

2.7 Case law on the provision of water and / or sanitation services

Case law provides a view on the variety of water supply issues communities or individuals have to face. Court rulings furthermore portray people's experiences related to water and disclose the role that municipalities or other spheres of government should fulfil in the water supply context. Some cases dealing with access to water include *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 6 BCLR 625 (W),¹⁶⁴ *Bushula v Ukhahlamba District Municipality* (2200/09) 2012 ZAECHGHC 1,¹⁶⁵ and the *Mazibuko* case.¹⁶⁶

161 Buthelezi and Dollery 2004 *J Stud Econ Econometrics* 101. With the amalgamation of former racially defined municipal areas, there was no overarching paradigm for steering municipal capacity-building, resulting in the development of different styles of functioning and management in different parts of the country. See Atkinson 2002 *Centre for Development and Enterprise* 4.

162 Buthelezi and Dollery 2004 *J Stud Econ Econometrics* 101. Basic issues such as task or job descriptions and different levels of remuneration were problematic, as was the sheer size of municipal areas. Rural municipalities struggled with the problems of post-apartheid amalgamation, resulting in a failure to focus on developmental duties and a tendency to deal in "crisis management".

163 Ashton, Turton and Roux 2006 *Journal of Contemporary Water Research and Education* 28. For an overview of the history and development of water rights, see Pienaar and Van Der Schyff "The Reform of Water Rights in South Africa" 2007 181-183.

164 *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 6 BCLR 625 (W). Hereafter referred to as the *Bon Vista* case.

165 Hereafter the *Bushula* case.

166 For an account of the factual background of the *Mazibuko* case, see Du Plessis 2011 *RECIEL* 321.

In the *Bon Vista* case¹⁶⁷ the High Court found that the disconnection of the water supply would constitute a *prima facie* breach of the state's duty to respect people's right of access to water. In this case the applicants' water supply was disconnected due to non-payment. The court referred to the *WS Act*, which provides for a water services provider to set conditions under which services may be discontinued. However, people who are unable to pay for these services should only have their water supply restricted.

In the *Bushula* case the applicant, Mandla Bushula, wanted to claim his right of access to sufficient water under the Constitution for himself and his community. He requested a court ruling in which a basic water supply to his community would be reinstated after water was disconnected in 2008. It was found, however, that the water problem had been created by the people themselves through illegal connections, thereby affecting the quality and quantity of the water supplied. Whilst a project was underway to upgrade the water supply scheme, the municipality had acted reasonably by providing water through different means, such as tanks.

As was seen in the *Mazibuko* case, people who are denied the right to water are in essence denied the right to lead a dignified life. It is therefore imperative to determine the implications of financial constraints together with water supply limitations and competing demands for government funds on the responsibility of government to provide such access. Unfortunately it is not within all municipalities' capacity to provide adequate water immediately, as they also attempt against the odds to fulfil other social rights provided for in the Constitution.¹⁶⁸ The court stated that local government is "best placed to investigate social conditions in the light of available budgets" and should

167 In the *Bon Vista* case the court gave an order that the plaintiff's water supply be reconnected. Although the decision was based on statutory entitlements, (ss 4(1) and 4(3) of the *WS Act*) the court quoted s 27(1)(b) (a constitutional right to sufficient water), and averred that the disconnection of a water supply is an infringement of this right.

168 These social rights include *inter alia* the right of access to health care, housing, food, education and social security. See chapter 2 of the Constitution. Unfortunately the ruling in *Mazibuko* did not include a discussion on the competing demands for government resources. McCaffrey and Neville 2008-2009 *The Georgetown International Environmental Law Review* 695.

determine what targets it can achieve in relation to social and economic rights.¹⁶⁹

Beja v Premier of the Western Cape 2011 (10) BCLR 1077¹⁷⁰ was heard by the Cape High Court. The South African Human Rights Commission (SAHRC) was requested to investigate the allegations concerning sanitation in the settlement of Khayelitsha. The Cape High Court and the SAHRC found that the sanitation services (or inadequacy thereof) violated the right to human dignity, privacy, and a clean environment, and in both cases, the relevant municipalities were ordered to enclose the existing toilets as a matter of urgency.¹⁷¹ It is possible to generalise from this ruling that access to water *per se* is not enough, but that these services should provide adequate water in a sustainable manner. Although the case reflected on sanitation, it is important in a more general sense, in that it recognises that people's dignity is affected by a lack of the provision of basic services.¹⁷²

In the case of *Federation for Sustainable Environment and Others v Minister of Water Affairs and Others* 35672/12 (2012) ZAGPPHC¹⁷³ the communities turned to court action to force the municipalities to ensure that their right to water was realised. The water supply in the municipal area had been declared unfit for human consumption. The Water Services Authority (WSA) was ordered by the court to supply water to the communities within seventy-two hours. The Constitution and the *WS Act* are explicit when it comes to the duty of government to provide water to people, regardless of who polluted it.¹⁷⁴

It is clear from the above court cases that the courts place a high value on people's access to a satisfactory water supply.

169 See the *Mazibuko* case par 61.

170 Hereafter the *Beja* case.

171 For more on the *Beja* case; see Tempelhof 2012 *Historia* 82-102.

172 For more information on sanitation services, see DWA and the Department of Human Settlements 2012 *Report on the status of sanitation services in South Africa* 2-29.

173 Hereafter referred to as the *Carolina* case.

174 Kings 2012 <http://www.mg.co.za>.

2.8 The benchmark for failing municipal water services provision

The discussion thus far has portrayed how water services provision should be understood in the South African context. Sometimes there is a failure to meet the expectations related to having access to water. Based on a review of the literature, government failure in general can broadly be defined as "the inability of a government agency or agencies to achieve their intended outcomes".¹⁷⁵ Failing water services provision can therefore be described in a nutshell as a municipality's inability to provide water supply services, or the delivery of water supply services that is unacceptable and which cannot ensure a reasonable quality of life.¹⁷⁶ The analysis of the literature in this chapter has suggested the following elements as indicators of failing water services:¹⁷⁷

- a. Insufficient infrastructure to supply at least 25 litres of potable water per person per day;
- b. Water supply which is more than 200 meters from a household;
- c. A minimum flow of 10 litres per minute (communal water point) or 6000 litres per month (formal connection) cannot be supplied;
- d. A large number of people who have never received basic water or sanitation services;
- e. Deterioration of infrastructure providing water supply services beyond the point of regular maintenance requirements;¹⁷⁸
- f. Infrastructure that does not meet the minimum standards;
- g. Unequal access to water;
- h. Access to insufficient water; and
- i. Access to a poor quality of water.

175 Buthelezi and Dollery 2004 *J Stud Econ Econometrics* 92.

176 S 1 of the *Systems Act* in the negative.

177 The negative of some standards found in the Regulations to the *WS Act*.

178 Pirie in Gabru 2009 <http://www.engineeringnews.co.za> is of the opinion that not enough attention is being paid to the maintenance of existing infrastructure. He says "failure to maintain water supply and sewage systems could result in the deterioration of the national health of the population, and needs to be factored into infrastructure programmes". See also Josie 2008 *Community Law Centre* 2, who states that "(i)nadequate municipal infrastructure has negative consequences for the delivery of services and economic growth and development". Unless construction, maintenance and the repairs of basic infrastructure are addressed, sustainable local government may become a mere dream and "the inequalities that characterize our society will be aggravated and exacerbated".

This list is by no means complete. The remaining indicators of failing water supply will be explored in the following chapters.

2.9 Concluding remarks

This chapter focussed on water supply services as an essential function of local government. The scope of the meaning of water supply services was described and analysed. It was seen that water needs to be of a good quality to be drinkable, and the service should be provided in a sustainable manner. The nature of the interaction between the spheres of government is also important to understand, especially when the intergovernmental measures to address failing municipal water supply services are discussed in later chapters. A first attempt was made to benchmark "failing services", also keeping in mind the international emphasis on improved and sustained water supply. In the next chapter the legislative duties of local government related to water supply will be discussed. Non-compliance with the law will then be added to the list of indicators indicative of failing municipal water supply services.

Chapter 3: The legal framework: the duties of municipalities with respect to water supply

3.1 Background

The objective of this chapter is to unpack in more detail the duties of local government with respect to water supply services. As the previous chapter showed, in general a municipal service¹⁷⁹ is a service provided by a municipality that has a direct impact on the quality of the lives of the people in a community. All service delivery functions entail the use *inter alia* of infrastructure, and sound operational and maintenance arrangements, including arrangements for customer relations, all of which contribute to the proper provision of services.¹⁸⁰ The supply of water should ultimately not be regarded as a silo service function of municipalities. The discussion below focuses therefore on all legislation related to local government against the background of related constitutional rights. This chapter therefore focuses on the key legal requirements that municipalities must meet in order to be found to provide adequate access to potable water. Non-compliance to the identified legal requirements will eventually be added to the description in this study of failing water provision.¹⁸¹

It is important to understand from the outset that many of the duties of local government provided in the Constitution are reiterated and broadened or refined in legislation in the fields of water law, environmental law and local government law.

179 People should have access to at least a basic level of services. Municipalities generally supply the following services: water supply, sewerage collection and disposal, refuse removal, electricity and gas supply, municipal health services, municipal roads and storm water drainage, street lighting and municipal parks and recreation. ETU Date Unknown <http://www.etu.org.za>. See also *White Paper on Local Government* 1998 27.

180 Department: Provincial and Local Government 2007 *Guidelines: Sustainable Municipal Infrastructure Provision and Service Delivery* 5. See s 1 of the *Systems Act* for a definition of basic water services and sustainability. See also par 2.2 above.

181 See par 3.3 and 5.4.

3.2 The constitutional, statutory and policy-based duties of local government

A number of duties are discussed below, first and foremost in terms of the Constitution, then along the lines of framework legislation including the NEMA and NWA. Finally, additional duties are unpacked as they emerge from sectoral legislation including the *WS Act*.

3.2.1 General duty

Section 7(2) of the Constitution provides that "the state must respect, protect, promote and fulfil the rights in the Bill of Rights". The Bill of Rights furthermore states that "everyone has the right to have access to sufficient water".¹⁸² The state (all spheres of government) has the duty to respect, protect, promote and fulfil *inter alia* the section 27 constitution right of access to water.

The *duty to respect* means that the right of access to water may not arbitrarily be taken away by the state. A negative duty is implied.¹⁸³ Municipalities may hence not unjustly interfere with people's access to water, and where the limitation or deprivation of the right is unavoidable, a municipality must take steps to mitigate the interference with the water supply, for example.¹⁸⁴ In the *Bon Vista* case¹⁸⁵ the right of access to water was hampered by the municipality's disconnecting the water supply. Such a limitation has to be justified to be legal and constitutional.¹⁸⁶

The *duty to protect* signifies the state's duty to develop legislation and policies which prevent individuals or organisations from violating other people's right of access to water.¹⁸⁷ Courts also have the duty to interpret

182 S 27(b) of the Constitution.

183 See Du Plessis *Constitutional Environmental Right* 98.

184 Brand "Introduction to socio-economic rights in the South African Constitution" in Brand and Heyns (eds) *Socio-Economic Rights* 10.

185 *Bon Vista* case par 20.

186 Water may not be disconnected unreasonably or arbitrarily. However, the right to water will not protect residents whose water supply was disconnected due to the fact that the resident was able to pay but omitted to pay or wrongfully withheld payment. Unknown "A Human Right to Water" 5.

187 See Brand "Introduction to socio-economic rights in the South African Constitution" in Brand and Heyns (eds) *Socio-Economic Rights* 10. Municipalities comply with their

legislation, strengthen existing remedies and develop new remedies to ensure and protect the existing enjoyment of human rights, including the right of access to water.¹⁸⁸ Municipalities specifically must protect their communities against the violation of their right of access to water¹⁸⁹ *inter alia* through the passing of by-laws.

The *duty to promote* compels the state to increase the awareness of¹⁹⁰ and the respect for the right of access to water through methods such as education. The media may be used successfully to inform people of their rights and to raise awareness concerning the remedies available to individuals or organisations upon the infringement of these rights,¹⁹¹ such as municipality's disconnection of water supply.

The *duty to fulfil* imposes a duty on the state to take positive steps¹⁹² to assist people without water to gain access to water. Although the state (and as such, every municipality) is not obliged to provide every person in the country with unlimited free water, it should strive to provide access to water to the majority of people, within its available resources¹⁹³ to ensure that the provision is sustainable, and to improve the level of supply of potable water to households beyond the basic minimum.¹⁹⁴ Sections 26 and 27 of the Constitution acknowledge the fact that the realisation of the right of access to

legislative mandate through the development of by-laws for their particular municipal areas.

188 Brand "Introduction to socio-economic rights in the South African Constitution" in Brand and Heyns (eds) *Socio-Economic Rights* 10.

189 See a discussion of the duty of municipalities to promulgate by-laws in par 3.2.18.

190 See Du Plessis *Constitutional Environmental Right* 98.

191 NEMA prescribes in s 2(4)(h) that such educative initiatives are needed to promote community well-being and empowerment. See par 3.2.20 for a discussion of the duty of the state to provide environmental education.

192 Including the adoption of appropriate legislative, administrative, budgetary, judicial, promotional and other measures. See Brand "Introduction to socio-economic rights in the South African Constitution" in Brand and Heyns (eds) *Socio-Economic Rights* 10. The obligation to fulfil the rights pertaining to water "obliges states to take proactive and affirmative measures to facilitate full enjoyment thereof". These measures may include expenditure and the provision of basic services and infrastructure. See Du Plessis *Constitutional Environmental Right* 98.

193 Should a municipality claim a "lack of resources" when confronted with the non-fulfilment of the right of access to water, its budgetary and financial policies should be investigated so as not to favour privileged groups at the expense of disadvantaged groups.

194 25 litres of water per person per day, within 200 metres from their dwelling. The quality, assurance of supply and extent of flow also prescribed. See the *Water Supply and Sanitation Policy White Paper* 1994 15.

water is a process, and the measures taken should be part of the progressive realisation of the right.¹⁹⁵

As a socio-economic right,¹⁹⁶ access to water is protected as a statutory entitlement in national legislation.¹⁹⁷ The interpretation of this entitlement is informed by the constitutional right of access to sufficient water, while the constitutional right may also support the enforcement of the statutory right.¹⁹⁸ To the extent that national government is required to establish a framework for the "progressive realisation" of the right, local government has the responsibility to ensure the water supply to communities within its area of jurisdiction.¹⁹⁹ However, other spheres of government have a duty to support local government in providing water services,²⁰⁰ with the national government bearing the responsibility in relation to the allocation of national revenue on an equitable basis, for example.²⁰¹

The right of access to sufficient water is subsequently explored in relation to other rights in the Bill of Rights. The objective is to frame the key duties of local government with respect to water supply services against the background of the array of the rights of people.

195 For a detailed explanation of the progressive realisation and reasonableness of measures taken by the state, see Thompson *Water Law* 147-151. See also Du Plessis *RECIEL* 321 for an account of progressive realisation in the *Mazibuko* case. De Visser states that local authorities are obliged, just as much as national and provincial governments, to refrain from interfering with these rights, to guard against their violation by third parties, and to advance the realisation of these rights. This is due to the fact that local government is no longer an administrative function of national and provincial government, but is now elevated to a new order, as affirmed by the Constitutional Court in the case of *Fedsure Life Assurance Ltd v Greater Johannesburg Metropolitan Council* 1999 1 SA 374 (CC). For more information refer to De Visser 2003 *Law, Democracy and Development* 203.

196 For an in-depth discussion of socio-economic rights see Kok and Langford "The right to water" in Brand and Heyns *Socio-Economic Rights* 191-208. See also Liebenberg *Socio-economic Rights*.

197 Such as the *WS Act*.

198 In the *Bon Vista* case the court gave an order that the plaintiff's water supply be reconnected. Although the decision was based on statutory entitlements, (ss 4(1) and 4(3) of the *WS Act*) the court quoted s 27(1)(b) (a constitutional right to sufficient water), as the disconnection of a water supply is an infringement of this right. See also the discussion in paragraph 2.7.

199 Gowlland-Gualtieri 2007 <http://www.ielrc.org>.

200 See par 4.3.1.

201 The *Grootboom* case. See also s 31 of the *Systems Act*, which provides for similar support from provincial government.

3.2.2 *The right to life*

The Constitution states that everyone has the right to life.²⁰² Human survival depends *inter alia* on having access to sufficient water of a quality appropriate to its use. The right to life also translates into both negative and positive duties for the state,²⁰³ the former implying the duty not to take someone's life and the latter placing a duty on the state to protect the lives of its citizens.²⁰⁴ The right to life was confirmed in the case *S v Makwanyane* 1995 3 SA 391 (CC)²⁰⁵ in which any practices or decisions of government that could contribute to the loss of life were rendered unconstitutional.

In relation to water, removing a person's access to water for some time is unlikely to lead to that person's dying of thirst. However, it could force the person to rely on polluted water (for example, water found in watercourses) with the associated health risks involved.²⁰⁶ Water pollution could be seen as an unjustified failure by a municipality to ensure the prevention of the pollution of potable water, with consequent negative effects on human health, while the right to life may "underscore and strengthen" a case against a water polluter, for instance.²⁰⁷

3.2.3 *The right to dignity*

Dignity²⁰⁸ is understood as the "quality of being worthy of respect",²⁰⁹ which relates to the right to an environment that is not detrimental to people's health or well-being.²¹⁰ It has been stated that access to "sufficient environmental infrastructure such as water supply services ... could have a direct bearing on

202 S 11 of the Constitution. For more information on the right to life, see Currie and De Waal *The Bill of Rights Handbook* 280–290.

203 Du Plessis *Constitutional Environmental Right* 56.

204 Currie and De Waal *The Bill of Rights Handbook* 285.

205 Hereafter the *Makwanyane* case.

206 Kidd 2004 SAJHR 133.

207 Du Plessis *Constitutional Environmental Right* 364.

208 S 10 of the Constitution: Everyone has inherent dignity and the right to have their dignity respected and protected.

209 Du Plessis *Constitutional Environmental Right* 365. See also Currie and De Waal *The Bill of Rights Handbook* 272-275.

210 S 24 of the Constitution. The fact that people have the right to an environment not detrimental to their health or well-being must be seen as supporting the interpretation of s 27(1)(b) to mean that everyone has the right of access to water that is safe to drink.

the ability of people to live a dignified life".²¹¹ Furthermore, to quote Yacoob J in the case of *Government of RSA v Grootboom* 2000 (11) BCLR 883 (CC):²¹²

Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the State in all circumstances and with particular regard to human dignity. In short, I emphasise that human beings are required to be treated as human beings.

The intrinsic worth of human beings is the core component of human dignity, and conditions which deny people this value or prevent them from feeling valued should be prevented.²¹³ Ways of ensuring that their dignity is preserved include promoting their human development and guaranteeing that they enjoy their socio-economic rights, such as having access to water.

In the *Beja* case²¹⁴ the dignity of people was seemingly injured when fifty-one unenclosed waterborne toilets were constructed in an informal settlement in the City of Cape Town. According to the municipality an agreement had been reached with the residents that they (the residents) would provide enclosures for the toilets, thereby enabling the municipality to erect more toilets.²¹⁵ The community lodged a complaint with the SAHRC, arguing that their rights to human dignity and privacy had been violated. After an investigation by the SAHRC it was found that the municipality had indeed violated the people's right to human dignity by not providing access to sanitation in a constitutionally sound manner.²¹⁶

211 Du Plessis *Constitutional Environmental Right* 365.

212 *Government of RSA v Grootboom* 2000 (11) BCLR 883 (CC) par 83. Hereafter referred to as the *Grootboom* case.

213 Liebenberg 2005 SAJHR 11.

214 See also par 2.7.

215 The budget which would have been spent on enclosing the toilets could have been used to erect more (unenclosed) toilets.

216 Judge Erasmus found in his judgment that there was a violation in terms of ss 10 (human dignity), 12 (freedom and security of person), 14 (privacy), 24 (environmental right), 26 (housing) and 27 (healthcare). He also found that the provision of unenclosed toilets was inconsistent with Regulation 2 of the Compulsory National Standards promulgated in terms of the *WS Act*. For more information on the *Beja* case, see Tissington *Basic Sanitation in South Africa* 46-48. For more cases dealing with human dignity, see *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 1 SA 765 (CC), *Minister of Home Affairs and Others v Watchenuka and Another* 2004 2 BCLR 120 (SCA), *Minister of Health and Others v Treatment Action Campaign and Others* 2002 5 SA 721 (CC).

3.2.4 The right to equality

The right to equality encompasses the full and equal enjoyment of all rights and freedoms.²¹⁷ This right seems to strengthen the section 24 environmental right, as all legislation must ensure equal protection and benefit to all people.²¹⁸ A good example of the application of the equality clause is found in the case of *Nokotyana and Others v Ekurhuleni Metropolitan Municipality Case CCT 31/09 2009 (ZACC)*,²¹⁹ in which the applicants relied on their right of access to adequate housing²²⁰ to formulate a claim for ventilated pit latrines (VIPs). This was denied by the local municipality as it argued that allowing for VIPs for all would amount to discrimination against similarly situated communities, which would remain with one toilet for ten families. The court agreed, and Bilchitz²²¹ describes the grim situation as follows:

Perhaps one of the most chilling elements of the court's approach is its acceptance of an argument by local government that would entrench "an equality of the graveyard".

The court in effect ensured that the communities involved remained "equally badly off".²²² Under circumstances of inequality or potential inequality a policy should be implemented which would ensure the realisation of the rights of all individuals "to the greatest possible extent"²²³ in line with the principle "'Some for All', rather than 'All for Some'".²²⁴

To realise the constitutional requirements pertaining to equality of access to water, it therefore seems as if the priority in planning and the allocation of public funds should be given to those who are presently inadequately served.

217 S 9 of the Constitution. For an in-depth discussion on equality, see Currie and De Waal *The Bill of Rights Handbook* 229–271.

218 See also Feris "Environment" in Currie and De Waal *Bill of Rights Handbook* 529.

219 Hereafter the *Nokotyana* case.

220 S 26 of the Constitution.

221 Bilchitz 2010 <http://www.businessday.co.za/articles>.

222 Bilchitz 2010 <http://www.businessday.co.za/articles>.

223 Bilchitz 2002 *SALJ* 22.

224 This is a policy principle used in the *Water Supply and Sanitation Policy White Paper* 1994. The slogan is also stated as "Some for All, For Ever" in the *White Paper on a National Water Policy for South Africa 7*, thereby emphasising sustainability.

3.2.5 The pursuance of the constitutional objectives of local government

The Constitution describes the role that local government should play and provides a framework for prioritisation in realising the constitutionally entrenched rights of all people, including the right of access to water. The constitutional objects of local government are:²²⁵

- (a) to provide democratic and accountable government for local communities;
 - (b) to ensure the provision of services to communities in a sustainable manner;
 - (c) to promote social and economic development;
 - (d) to promote a safe and healthy environment; and
 - (e) to encourage the involvement of communities and community organisations in the matters of local government.
- (2) A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1).

These objects of local government are mainly directed at sustainable development and clearly indicate that municipalities should provide sustainable services (including water supply services). The objects above require municipalities *inter alia* to develop policies, systems and programmes to achieve these objects.²²⁶

3.2.6 The environmental right

Section 24 of the Constitution, also known as the environmental right, affords everyone the right to an environment that is not harmful to their health or well-being. People also have the right to have their environment protected and conserved, whilst future generations are also considered. This right provides the basis for environmental governance in South Africa²²⁷ and is the overall safeguard that water is provided in an environmentally sustainable manner.²²⁸ When considering the section 24 environmental right alongside

225 S 152 of the Constitution.

226 See Bekink *Local Government Law* 68. See also the case of *Joseph and Others v City of Johannesburg and Others* 2010 3 BCLR 212 (CC), in which the applicants challenged the validity of the municipality's credit control by-laws.

227 For an in-depth discussion on environmental governance, especially in the local government realm, see Du Plessis *Constitutional Environmental Right* 152-172.

228 Environmental sustainability is defined in s 1 of the *Systems Act* as follows: "environmentally sustainable", in relation to the provision of a municipal service, means the provision of a municipal service in a manner aimed at ensuring that — the risk of harm to the environment and to human health and safety is minimised to the

the section 27 right of access to sufficient water, one may reason that the state has a positive duty to provide drinking water which is free from pollutants and safe to drink. The *WS Act* refines this condition by defining the right to "a prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and *quality* of water".²²⁹ Municipalities therefore have a duty to provide adequate quantities of water that is safe to drink, and should *inter alia* promulgate by-laws to this effect.²³⁰

Water conservation as a tool to ensure environmental sustainability relates to the minimisation of loss or waste, the care and protection of resources, and the efficient and effective use of water.²³¹ In this regard the educational role of local government is crucial. People need to be made aware of the fact that water is a scarce resource in South Africa and that the responsible use thereof is vital for the sustainability of the natural resource.²³² Environmental sustainability includes sustainable development which must not endanger the natural systems that support life on earth.

The duty to conserve the environment and prevent the pollution²³³ of water is provided for in the Constitution.²³⁴ Read with the definition of waste in the *National Environmental Management Waste Act* 59 of 2008,²³⁵ it would seem that the provision of adequate sanitation services (for the disposal and

extent reasonably possible under the circumstances; (c) legislation intended to protect the environment and human health and safety is complied with. For a practical approach and best practice examples on environmentally sustainable services, see Middleton *et al* 2011 *PDG* 21-23.

229 S 1(iii) of the *WS Act*.

230 See the duty to promulgate by-laws in par 3.2.18.

231 Department of Water Affairs and Forestry 2004 <http://www.dwaf.gov.za> 4.

232 Thompson *Water Law* 357. "Significant reductions" in the amount of water use could be achieved by minimising the waste of water and also by increasing the efficient use of water by changing people's behaviour, educating people, and adopting water-saving technologies. This may lead to limiting demand and possibly protecting water resources. *National Water Resource Strategy* 2004 7. See further Thompson *Water Law* 291-308 on the protection of water sources.

233 Pollution is defined in s 1 of NEMA as any change in the environment caused by - (i) substances; (ii) radioactive or other waves; or (iii) noise, odours, dust or heat, emitted from any activity, including the storage or treatment of waste or substances, construction and the provision of services, whether engaged in by any person or an organ of state, where that change has an adverse effect on human health or well-being or on the composition, resilience and productivity of natural or managed ecosystems, or on materials useful to people, or will have such an effect in the future.

234 S 24 as discussed in par 3.2.6.

235 Hereafter NEMWA.

treatment of human waste) is of the utmost importance to conserving the environment and ensuring a safe and healthy environment.²³⁶ Insufficient sanitation services may result in pollutants entering the rivers, causing a health threat to communities living down-stream, and potentially influencing the water supply services of neighbouring municipalities.

3.2.7 Sustainable water supply services

The South African environmental right is firmly based on the concept of sustainability.²³⁷ The sustainability of service delivery²³⁸ in this context differs from sustainable development. Section 152(1) of the Constitution provides that local government should ensure sustainable service delivery. The sustainability of services means delivery in such a manner that it is affordable to the consumer and supplied on a continual basis. The sustainable provision of water is linked to the right of people to be treated in a dignified manner, and to enjoy a standard of living in which they are empowered by the enlargement of their choices.²³⁹ The provision of services in such a manner would go a long way towards improving citizen satisfaction and the quality of life.²⁴⁰

The duty of providing sustainable services is emphasised in the *Systems Act*, the NWA, the MFMA and the *WS Act*. Section 72(2) of the *Systems Act*, provides that municipal services must be provided in a manner that is financially and environmentally sustainable. Section 11(1) of the *WS Act* similarly provides for water services authorities to progressively ensure affordable, economical and sustainable access to water services. The

236 The constitutional objects of local government, s 152 of the Constitution. Government's commitment to protect the environment is emphasised by the significant increases in fines and penalties for contraventions of environmental legislation. NEMA was amended and fines of a maximum of R5 million may be demanded from offenders. See Portfolio Committee on Environmental Affairs and Tourism 2008 <http://www.sabinet.co.za> Also see the WRC report on a case study to introduce incentives to reduce water pollution. Neysmith and Dent 2010 *Water SA* 581-584.

237 Kotzé 2007 *RECIEL* 298.

238 This is known as the "constitutional basis for the service delivery mandate". Rampai J held in the case of *Beck and Others v Kopanong Local Municipality and Others* Case no 3772/2002 unreported (Orange Free State) that local government is the point where services have to be delivered, as municipalities are the point of contact between the governor and the governed. See Ntliziywana *Professionalisation of local government* 10.

239 De Visser 2001 *Local Government Working Paper* 16.

240 Hughes 2011 <http://dplg.gov.za> 4.

NWA²⁴¹ refers to the protection of water resources and the maintenance of the quality of water "to the extent that the water resource may be used in an ecologically sustainable way". The MFMA provides guidelines related to the assets necessary for service delivery as well as the financial sustainability of a municipality, a factor which has a direct impact on the municipality's ability to provide sustainable water supply services.²⁴²

The Council of a municipality should hence strive to ensure that water supply services are provided in a financially and environmentally sustainable manner, having regard to practical considerations and within the financial and administrative capacity of the municipality.²⁴³

3.2.8 Involving people in municipal decision-making

The involvement of communities in local government matters is provided for in the Constitution. One of the objects of local government is "to encourage the involvement of communities and community organisations in the matters of local government".²⁴⁴ This implies that local government has the duty to promote the participation of all interested and affected parties in *environmental* matters²⁴⁵ which would include the provision of water services.

People should accordingly have a say in the planning, implementation, review and execution of water supply services. Communities should be afforded the opportunity to communicate their needs with regards to water and/or sanitation to their local authorities, but should likewise be educated on the potential impacts of these services on the environment and the limits of the natural resource.

241 S 1(xvii).

242 Financial resources are necessary to keep the municipality going. See par 3.2.10 for the duty to prudently manage municipal fiscal relations.

243 S 4(2)(d) of the *Systems Act*.

244 S 152(1)(e). For an in-depth discussion on public participation and its link with the fulfilment of the constitutional environmental right specifically, see Du Plessis 2008 *PER/PELJ* 170-200.

245 See also s 2(4)(h), which states that " (c)ommunity well-being and empowerment must be promoted through environmental education, the raising of environmental awareness, the sharing of knowledge and experience and other appropriate means".

Various acts provide for measures to facilitate municipalities' constitutional duty to encourage the involvement of communities in matters of local government. The principles of section 2 of NEMA, for example, state that:²⁴⁶

(T)he participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured.

This duty in the NEMA expands on mere involvement of the public by stipulating that the 'understanding, skills and capacity' of people should be developed. Specific understanding, skills, and capacity are especially needed for the assessment of a municipality's annual budget, as prescribed in section 23 of the MFMA.²⁴⁷ Chapter 4 of the *Systems Act* establishes the measures to ensure public participation in local government matters and section 19(3) of the *Structures Act* specifies that a Municipal Council must develop mechanisms to consult the community and community organisations in performing its functions and exercising its powers. It may be gleaned from this that an essential part of the provision of water services relates to the communities' involvement in the relevant decisions of municipalities.

3.2.9 Access to sufficient water

Everyone has the right to have access to sufficient water.²⁴⁸ This right is qualified in section 27(2), which provides that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. The right of access to water is furthermore closely linked to the right to dignity and an adequate standard of living, and should therefore include water of sufficient quality.²⁴⁹

As indicated earlier, the right of access to sufficient water does not mean that the state should provide limitless amounts of water to all households. It means at least access to a sustainable provision of a specific level of water supply, and/or a basic minimal quantity of potable water close to all

246 S (2)(4)(f).

247 When the annual budget has been tabled, the Municipal Council must consider any views expressed by the local community. See s 23(1)(a) of the MFMA.

248 S 27(1)(b) of the Constitution.

249 Water quality is discussed in par 2.2.2.

households.²⁵⁰ The means to provide sustainable access to water include sufficient infrastructure, equipment, technical skills, and financial resources.

Water should also be financially accessible, which suggests that a fee structure should take into account the affordability of water services. In the *Bon Vista* case it was held that people's right of access to water should not be denied if they are unable to pay for the services. The Constitutional Court arrived at the conclusion that if a municipality disconnects an existing water supply to consumers, the disconnection might be regarded as a *prima facie* breach of the municipality's constitutional duty to respect the right of access to water.²⁵¹ A *Free Basic Water Policy* was initiated in South Africa during December 2000 to give effect to the section 27 right and as a measure to alleviate poverty. This had implications for public health and equity.²⁵² The policy requires local government to ensure that poor households receive six thousand (6000) litres of clean water every month at no cost. The main objective of this policy is to ensure access to water where citizens are unable to pay for these services.

Like the constitutional duty to provide access to sufficient water, the *WS Act*, *NEMA* and the *Systems Act* provide for the right of access of everyone to a basic water supply.²⁵³ This right is furthered in section 11 of the *WS Act*.

Every water services authority has a duty to all consumers or potential consumers in its area of jurisdiction to progressively ensure efficient, affordable, economical and sustainable access to water services.

NEMA furthermore provides for equity in the access to water in its principles.

Equitable access to environmental resources, benefits and services to meet basic human needs and ensure human well-being must be pursued and special measures may be taken to ensure access thereto by categories of persons disadvantaged by unfair discrimination.

The *Systems Act* furthermore mentions a general duty in terms of service delivery by municipalities, in that "a municipality must give effect to the provisions of the Constitution".²⁵⁴

250 See Thompson *Water Law* 146.

251 For a discussion on the case and municipalities' constitutional duty, see Du Plessis 2011 *RECIEL* 320.

252 Smith and Green 2005 *Water SA* 438.

253 S 3(2) of the *WS Act*.

From the above it seems that the duty of ensuring the realisation of people's right of access to sufficient water is expanded and further unpacked in water law, environmental law, and the legislation regulating municipalities.

3.2.10 Financially sustainable services

Municipal services must be financially sustainable.²⁵⁵ The MFMA²⁵⁶ articulates this as a "primary responsibility to avoid, identify and resolve financial problems in a municipality" and states that this responsibility rests with the municipality itself. There is also no guarantee that national or provincial government will stand in for the bad debts of a local government.²⁵⁷ The MFMA, the *Municipal Property Rates Act* 6 of 2004 guiding the imposition of a new property rates system, and the *Municipal Fiscal Powers and Functions Act* 12 of 2007 and its associated regulations provide a seemingly solid basis for financial management in local government.²⁵⁸

Section 4 of the NWA prescribes that a municipality should *inter alia* set conditions for determining a structure of tariffs, conditions for payments and procedures for limiting and discontinuing water services. Chapter 9 of the *Systems Act* provides for the collection of all money that is due and payable to the municipality,²⁵⁹ and the MFMA prescribes that the municipality should take reasonable steps to ensure that it has an effective revenue collection system.²⁶⁰ The collection of revenue may empower a municipality by enabling it to deliver services and may in addition contribute to financial viability.²⁶¹ It is acknowledged that "improved billing systems and an

254 S 73 of the *Systems Act*.

255 S 73(2)(c) of the *Systems Act*. The definition of financial sustainability in service delivery is as follows, in the definition section to the Act: "financially sustainable, in relation to the provision of a municipal service, means the provision of a municipal service in a manner aimed at ensuring that the financing of that service from internal and external sources, including budgeted income, grants and subsidies for the service, is sufficient to cover the costs of - (a) the initial capital expenditure required for the service; (b) operating the service; and (c) maintaining, repairing and replacing the physical assets used in the provision of the service".

256 S 135(1) of the MFMA.

257 *MEC, Mpumalanga v Imata* 2002 2 SA 76 (SCA). As quoted in Steytler (ed) *Place and Role of Local Government* 200.

258 Department: Provincial and Local Government 2005/6 – 2006/7 *The Implementation of the Intergovernmental Relations Framework Act* 28-29.

259 S 96(a).

260 S 64(a).

261 In the *Bon Vista* case it was held that people's right of access to water should not be denied if they are unable to pay for the services. The Constitutional Court arrived at

enhanced credit control policy are keys to sustainability and stability" in the local sphere.²⁶² Thus in cases of non-payment for water supply services, a municipality may find it more challenging to provide sustainable services and maintain water services infrastructure.²⁶³

3.2.11 Socially sustainable services

Present population growth trends and the concurrent water use behaviour indicate that the country will soon exceed the limits of its economically usable, land-based water resources.²⁶⁴ Municipalities need to take into account population growth trends and distribution when planning and budgeting for the delivery of water services and the possible expansion of infrastructure.²⁶⁵ The social sustainability of water supply services can in effect not be separated from financial sustainability, as social factors frequently affect the financial sustainability of service delivery. Such social

the conclusion that if a municipality disconnects an existing water supply to consumers, this might be regarded as a *prima facie* breach of the municipality's constitutional duty to respect the right of access to water. For a discussion on the case and municipalities' constitutional duty, see Du Plessis *RECIEL* 320. The *Strategic Framework for Water Services* 2003 37, however, grants service providers the right to disconnect water services to domestic consumers, although it should be used only as a last resort. The procedures used to effect a disconnection therefore have to be fair and equitable. See Kidd 2004 *SAJHR* 119-137.

262 Kroukamp 2004 *Journal of Public Administration* 187. Rates and tariffs should be such that most inhabitants are able to afford them, and the level of services being provided by a municipality must justify the payment of rates. Municipalities therefore need to become creative in collecting the revenue which is rightfully owed to them. The example of the Drakenstein Municipality is frequently cited, in which the municipality advertised that all residents who consistently paid their rates and service charges would be entered into a draw, and every six months one of these residents would be the lucky recipient of a car. This was against the MFMA, but the results were so positive that the irregular expenditure on the cars was overlooked. See Community Law Centre "Reviewing the Local Government White Paper" 50-52.

263 See par 3.2.13. The cost of water supply, including capital costs, operating and maintenance costs, should at least be covered by tariffs raised for the services. See *Draft White Paper on Water Services* 2002 37. For findings on financial sustainability at municipalities, see the Auditor-General (AG) report (Auditor-General 2009-2010 <http://www.agasa.co.za>.) Some of the financial issues raised in the AG report include high reliance on grants, own revenue generated being insufficient to cover operating costs, serious challenges being experienced in the recovery of consumer debtors, and current liability exceeding current assets. Auditor-General 2009-2010 <http://www.agasa.co.za> 153.

264 *National Climate Change Response Green Paper* 2010. The population of South Africa is currently estimated at 50.6 million (World Bank 2012 <http://www.google.co.za>).

265 See par 3.2.19 for the duty to plan. The migration of people is caused by economic factors and people seeking "a better life". PWC 2011 <http://www.imfo.co.za> Slide 8. Municipal assets (financial resources and physical infrastructure) are strained even further by the increase in demand. Reliance is then frequently made on external service providers, sometimes at significantly higher costs. PWC 2011 <http://www.imfor.co.za> Slide 9.

factors include *inter alia* population growth, migration, unemployment and poverty.²⁶⁶

Section 4(3)(c) of the *WS Act* provides that a person may not be denied access to basic water services for non-payment where that person proves to the satisfaction of the relevant water services authority that he or she is unable to pay for basic services. In the case of *Mkontwana v Nelson Mandela Metropolitan Municipality and Another*²⁶⁷ Yacoob J stated that municipalities were obliged to provide water and electricity to the residents in the areas "as a matter of public duty".²⁶⁸ O'Regan J placed this duty in context by stating the following in the same case:²⁶⁹

Local government thus bears the important responsibility of providing services in a sustainable manner to their communities. This task is particularly important given the deep divisions in our towns, the scars of spatial apartheid which still exist and the fact that many poor communities are still without access to basic facilities such as water, adequate sewerage systems, refuse collection, electricity and paved roads.

This renders the task of cost recovery difficult for municipalities as the onus rests on them to show that the municipality has legally valid grounds for disconnecting water supply due to non-payment for consumption above the basic free six kilolitres of water.²⁷⁰ Social (and financial) sustainability is closely linked with the duty of local government to be developmental.

266 Poverty is usually coupled with or influenced by unemployment. Some districts in former homeland areas have unemployment levels of more than 60 per cent. For issues on poverty, see Handley *et al* 2009 *ODI Working Papers* and Du Plessis 2011 *SAJHR* 279-307. Unemployment rates are usually an indication of an inability or poor ability to pay for municipal services, therefore suggesting that there will be an increase in debtors and bad debt in the municipality. Policies put in place for cost-recovery of water consumption were accused of impeding the access of the poorer segments of the population to a basic quantity of clean water. Cost-recovery policies imply that the full cost of the operation and maintenance of water utilities should be financed through fees paid by water consumers. When a household's consumption exceeds the free 6 kilolitres, such a household should pay for the additional consumption. Water is usually either restricted or cut off upon non-payment for additional consumption.

267 2005 2 BCLR 150 (CC), hereafter the *Mkontwana* case. In the *Joseph* case, the disconnection of electricity without proper notice was declared unconstitutional.

268 See the *Mkontwana* case at par 38 and 52.

269 See the *Mkontwana* case at par 105.

270 In the case of *Manquele v Durban Transitional Metropolitan Council* 2001 JOL 8956 (D), the Durban High Court made it clear that beyond the free water quota water must be paid for, and once a household is no longer able to pay for the excess it can be cut off completely for non-payment. For the detail of the case, refer to Kothari "The right to water, a constitutional perspective" 9.

3.2.12 Developmental local government

Local government has the developmental mandate to realise the ideal physical environment for its communities.²⁷¹ This means that a municipality has to be committed to find sustainable ways to meet people's different social, economic and material needs and so to improve their quality of life.²⁷² The Constitution obliges municipalities to structure and manage their administration, budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community, whilst participating in national and provincial development programmes.²⁷³ Development in this context is informed by the vision of the *White Paper on Local Government* 1998 of a developmental local government which is "committed to working with citizens and groups within the community to find sustainable ways to meet their social, economic and material needs and improve the quality of their lives".²⁷⁴

The characteristics of developmental local government²⁷⁵ include the exercising of the powers and functions of local government to maximise social and economic development. Municipalities should furthermore integrate and coordinate their strategies and plans with other spheres of government through cooperating with them in the drawing up of integrated development plans. A municipality which supplies adequate water services in a sustainable manner may be regarded as a developmental local government, as the access to water improves the quality of life of the people.²⁷⁶

3.2.13 The provision and maintenance of physical infrastructure

Physical infrastructure is needed to supply water. Properly maintained and managed infrastructure is needed to supply water in a sustainable manner.²⁷⁷

271 Anon 2007 <http://www.ggln.org.za>. See also the *White Paper on Local Government* 1998 23-36.

272 Bekink *Local Government Law* 70.

273 Ss 153(a) and (b).

274 *White Paper on Local Government* 1998 23.

275 See *White Paper on Local Government* 1998 23-25.

276 For more information on developmental local government, see De Visser 2001 *Local Government Working Paper* 1-32.

277 See the requirements in s 73(2) of the *Systems Act*.

The operation, maintenance, repair and replacement of existing and future infrastructure is provided for in the *WS Act*.²⁷⁸ Section 63 of the MFMA provides that the accounting officer²⁷⁹ of a municipality is responsible for the management of the assets of the municipality, "including the safeguarding and the maintenance of those assets",²⁸⁰ which assets include infrastructure to supply water. Water infrastructure includes systems necessary to ensure that water is delivered effectively.²⁸¹ The disruption of the infrastructural life-cycle phases of water supply may cause environmental impacts, for example. These cycles include the design, construction, operation and possible dismantling of the infrastructure. Failures which may have a potential impact on the environment or on the right of people to have access to water include untimely design, inadequate design, insufficient maintenance and care and/or untimely upgrades.²⁸² The sustainability of water supply will not be possible without proper infrastructure accompanied by suitable maintenance and management plans.²⁸³

3.2.14 Duties in public administration

Public administration involves the functions necessary for the management of public affairs²⁸⁴ by government structures and forms part of the execution of executive and legislative powers. Public administration includes policy, decision, general staffing matters, organisation, planning and resources..²⁸⁵

278 S 13(h)(vii) of the *WS Act*.

279 This is the municipal manager, according to s 60 of the MFMA.

280 S 63(1)(a) of the MFMA. See the concerns over the failure of the maintenance of the municipal infrastructure in Gabru 2009 <http://www.engineeringnews.co.za>. See a historic CSIR report on the state of municipal Infrastructure in South Africa, CSIR 2007 *Towards a framework for the maintenance of municipal infrastructure: in support of government growth objectives*. in 2010 an amount of R2.5 billion went into the Municipal Infrastructure Grant "to help municipalities address issues of aging infrastructure and to improve provision of services", again showing government's support and commitment towards service delivery. See Anon 2010 <http://www.southafricainfo.co.za>. Maintenance is necessary to achieving the expected useful life of the asset. Maintenance may be divided into three categories, namely routine, predictive or preventative maintenance. For more information see DPLG 2007 *Guidelines Sustainable Municipal Infrastructure Provision and Service Delivery* 8.

281 Activities include feasibility studies, project planning, and the capacity building of staff. See DPLG 2007 *Guidelines Sustainable Municipal Infrastructure Provision and Service Delivery* 5.

282 Nel, Du Plessis and Retief *The Local Government Sustainability Interface* 53-54.

283 The existence of a sufficient environmental infrastructure, such as the infrastructure necessary to provide water and sanitation services, has a bearing on the ability of people to live a dignified life. Du Plessis 2011 *RECIEL* 323.

284 Du Plessis 2010 *Stell LR* 275.

285 Bekink *Local Government Law* 472.

In section 195 the Constitution entrenches the basic values that should govern the exercise of public administration. Some of these values are as follows:

- (b) Efficient, economic and effective use of resources must be promoted.
- (c) Public administration must be development-oriented.
- (d) Services must be provided impartially, fairly, equitably and without bias.
- (e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.
- (f) Public administration must be accountable.
- (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.

Thus, where municipalities develop policies, projects, by-laws and programmes related to water supply services as part of their public administration duties, these policies should be developed in a transparent manner, involving the public in the development thereof, taking into account local government's duty to be developmental and to provide for the realisation of people's socio-economic rights, including the right of access to water.

The *Systems Act*²⁸⁶ defines a municipality as an organ of state which has a separate legal personality. This legal status allows a municipality to sue or be sued in cases of the non-compliance with statutory or constitutional duties by other natural or legal persons, and ties back to the constitutional values of accountability, responsiveness and openness of government.²⁸⁷ The relationship between a municipality and its communities is meant to be one of mutual trust and support, and municipalities are accountable to the people.²⁸⁸ The failure to adhere to these principles would result in inefficiency and unfairness, and would run counter to the democratic values and principles of

286 S 2 of the *Systems Act*.

287 S 1 of the Constitution.

288 These values were emphasised in the case of *Hardy Ventures CC v Tshwane Metropolitan Municipality* 2004 1 SA 199 (T). For a brief discussion of the facts of the case, see Ntiziwana *Professionalisation of local government* 25. Although this case concerns the application for approval of outdoor advertising, the High Court held that the values and principles of public administration are of high importance and that "professionalism, efficiency, fairness, accountability, transparency and accessibility ... ensure cost effective governance and administration". See *Hardy Ventures CC v Tshwane Metropolitan Municipality* 2004 1 SA 199 (T) par 9.

the Constitution, which should inform any action of local government, including water supply services.

3.2.15 The taking of decisions in line with the principles of just administrative action

People's right to administrative action that is lawful, reasonable and procedurally fair²⁸⁹ is part and parcel of the decision-making processes of public authorities, including municipalities. Should the decisions taken have an environmental connotation, such decisions too should be lawful, reasonable and procedurally fair.²⁹⁰ The right to just administrative action includes *inter alia* the right to the proper management of public funds intended for environmental expenditure, the equal consideration of all people when environmental decisions are made, and the involvement of proper and procedurally fair public participation measures in the decision-making processes.

The duties imposed by the *Promotion of Administrative Justice Act 3 of 2000* (PAJA) are to be read in the context of the constitutional right of people to just administration. Section 3 of the PAJA requires that administrative action which materially and adversely affects the rights or legitimate expectation of any person must be procedurally fair. The disconnection or restriction of a person's water supply may be regarded as an administrative action that could materially and adversely affect a person's right to have access to water.²⁹¹ The action of disconnecting water should therefore be procedurally fair. The PAJA provides for minimum mandatory requirements of procedural fairness.²⁹² A person must be given:

- Adequate notice of the nature and purpose of the proposed administration action.

289 S 33 of the Constitution. For more information on reasonableness and the limitation clause see Rautenbach 2005 *TSAR* 627-654.

290 Du Plessis *Constitutional Environmental Right* 371.

291 Low-income households often have to face desperate situations. They are expected to pay for services on very low incomes, thereby affecting their budget left for essential needs. If unable to pay, these households have to face the "constant uncertainty of disconnection and indignity or illness / death from a reduced or unsafe water supply". See Smith and Green 2005 *Water SA* 436.

292 S 3(2)(b) of the PAJA.

- A reasonable opportunity to make representations.
- A clear statement of the administrative action.
- Adequate notice of any right of review or internal appeal, where applicable.
- Adequate notice of the right to request reasons.

Read together with section 4(3)(b) of the *WS Act*,²⁹³ the PAJA requires a municipality to notify a consumer of its intention to disconnect the consumer's water supply, for example. The consumer must then be allowed to make representations as to why the supply should not be disconnected.²⁹⁴

This right was also illustrated in the *Mazibuko* case, in which the High Court held that the implementation of prepayment meters was unlawful and in violation of the PAJA, as the municipality had not given reasonable notice to affected persons allowing them to make representations before cutting off their water supply.²⁹⁵

3.2.16 The collection and dissemination of environmental information

Collection and dissemination of environmental information are directly related to the constitutional right to information.²⁹⁶ Information is *inter alia* needed to inform people, to enable the exercise of their rights, and to facilitate environmental justice. The Constitution aims to promote a culture of transparency and accountability in public bodies, including local government, and to enable citizens to have access to the information necessary for the protection of their rights, including their right to access a basic water supply. The right of people to have access to information is also closely connected with their right to be involved in the decision-making processes of government.²⁹⁷

293 Procedures for the limitation or discontinuation of water services include the need for a municipality to provide reasonable notice of the intention to limit or discontinue water services and allow for an opportunity for the consumer to make representations.

294 See the *Bon Vista* case, par 26. Such a notice must indicate to whom the consumer may direct representations and the period within which this can be done. See also Kidd 2004 *SAJHR* 128–134 for a discussion on the reasonableness of limiting people's right of access to water.

295 Par 93-95, 112. See also Khalfan and Conteh 2008 *ESR Review* 12-15.

296 S 32 of the Constitution.

297 See par 3.2.9.

The collection and dissemination of environmental information are directly related to the constitutional right to information generally and the protection afforded by the *Promotion of Access to Information Act 2 of 2000 (PAIA)*.²⁹⁸ The DWA and other water authorities, including municipalities, have responsibilities under the PAIA to make water-related information available to the public, particularly in respect of actual or potential disasters and emergency situations.²⁹⁹ The *WS Act* compels a water services provider to give information regarding the provision of water services to any person requesting it, including a consumer or a potential consumer.³⁰⁰ Du Plessis³⁰¹ states that:

Environmental information may further play a crucial role also in holding local government accountable and to enable citizens to take charge of their government by monitoring and reviewing its performance and reacting to underperformance.

This provides for civil society to institute possible judicial or other action against a municipality failing to provide water.³⁰²

3.2.17 The development and promulgation of by-laws

A municipality may make and administer by-laws for the effective administration of "the matters which it has the right to administer".³⁰³ This

298 For more information on access to information, see Du Plessis "Access to Information" in Paterson and Kotzé (eds) *Environmental Compliance* 197-221. The inclusion of the environmental right in chapter 2: Bill of Rights enables citizens to assert the right of access to information, including information related to the environment, at the "'highest' possible constitutional level".

299 *National Water Resource Strategy* 2004 146. S 15 enables the Department to make specific information available automatically without a person having to request access in terms of the PAIA. The right of access to information held by a public body may be limited only to the extent that the limitations are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom as contemplated in s 36 of the Constitution. These could include reports pertaining to water quality, for instance. It is laudable that the DWA promotes transparency and accountability through the annual publication of the Blue Drop and Green Drop reports.

300 S 23 of the *WS Act*. See also ss 141 and 142 of the NWA, prescribing that the Minister may request that information in the form of data, information, documents, samples, or materials be made available to him (s 141), which information must then in turn be made available by the Minister (s 142).

301 Du Plessis 2010 *Stell LR* 292.

302 Although civil action is an important possibility to address failing municipal water services, the focus of this study is on intergovernmental measures and not civil measures.

303 S 156(2) of the Constitution. See also the Department of Environmental Affairs and Development Planning 2007 *Decision-making for sustainable development: guidelines for municipalities* 20-21 for a discussion of a municipality's authority to make by-laws.

includes water supply services. It is therefore not compulsory for municipalities to have by-laws. But the *WS Act*³⁰⁴ forces every water services authority (hence every municipality) to make by-laws which contain conditions for the provision of water services, and which must provide for the standard of the services, quality standards, standards of measurement, verification of meters, procedures for the arbitration of disputes, procedures of limitation or discontinuation, and more. These by-laws should typically regulate tariffs for water services, the disconnection of the water supply in cases of non-payment, and the standards of water quality which will render it fit for human consumption.

The *NEMA*³⁰⁵ allows for the Minister to make model environmental management by-laws for the management of the environmental impacts of any development. These may be adopted by a municipality as municipal by-laws. The municipality may alternatively request the Director General (DG) to assist with the preparation of by-laws on matters affecting the environment, or the DG may choose to institute programmes to assist the municipality with the preparation of by-laws. The *Systems Act* in turn provides for the Minister to draft standard by-laws concerning any matter for which Municipal Councils may make by-laws,³⁰⁶ therefore including by-laws related to service delivery, the environment, tariffs for service delivery³⁰⁷ and by-laws to give effect to the municipality's credit control and debt collection policy, its implementation and enforcement.³⁰⁸

3.2.18 Planning and budgeting for services

In the context of the duty to be developmental, municipal planning is needed to ensure the progressive realisation of people's rights, such as the right to a water supply.³⁰⁹ The planning duties of municipalities are also addressed in

304 S 21(1) of the *WS Act*.

305 S 46 of *NEMA*.

306 S 14 of the *Systems Act*.

307 S 75 of the *Systems Act*.

308 S 98 of the *Systems Act*.

309 S 27(2) of the Constitution. S 153 of the Constitution. See par 3.2.12 for an analysis of the development duty of local government. See the *White Paper on Local Government* 1998 29-36 for more information on the IDP, performance management and the development of action plans and budgets.

the *WS Act* in prescribing the process of establishing the content of a WSDP.³¹⁰

Integrated water resources management should be used to promote the coordinated planning, development and management of water resources. Section 26(d) addresses this key principle in stating that the Council's developmental strategies must be aligned with national or provincial sectoral plans and planning requirements. The *Systems Act*³¹¹ furthermore provides for consultation between district and local municipalities in order to align their IDPs, while the MEC of local government is mandated by section 31 to monitor and/or facilitate this process of drafting and consultation.

3.2.18.1 The Integrated Development Plan

Municipalities must draft an IDP³¹² in order to adhere to the developmental duty of local government³¹³ and the achievement of the objectives of local government as provided for in the Constitution.³¹⁴ Integrated development planning is a process by which municipalities prepare a strategic development plan for a specific number of years.³¹⁵ It is a strategic planning instrument that guides and informs all planning, management, investment, development and implementation decisions and actions in the municipal area. In accordance with section 23(1) of the *Systems Act*, a municipality must undertake developmentally orientated planning to ensure the progressive realisation of the fundamental constitutional rights of citizens, and to give effect to its developmental duties. This would include the section 27 right and duties related to the provision and maintenance of water supply. The IDP should furthermore be aligned with, and complement, the development plans of other municipalities and organs of state.³¹⁶

310 Ss 12-18 of the *WS Act*.

311 S 27 of the *Systems Act*.

312 Chapter 5 of the *Systems Act*.

313 S 153 of the Constitution. See par 3.2.12 for an analysis on the developmental duty of local government.

314 S 152 of the Constitution and s 23 of the *Systems Act*.

315 S 25 of the *Systems Act* prescribes that an IDP be adopted by a Municipal Council and remains in force until an IDP is adopted by the next elected Council.

316 S 24(1) of the *Systems Act*. This is in line with the principles of cooperative government described in s 41 of the Constitution. For an analysis of cooperative government see par 4.2.

The planning function of a municipality is essential in that it forces the Council of a municipality to take into account the needs of people within the communities³¹⁷ and to plan in an integrated fashion for the development of the municipality.³¹⁸ The needs of communities with regards to water supply services should henceforth be considered in the IDP.

3.2.18.2 Planning for water services

The primary instrument of planning in the water services sector is the WSDP. This plan requires the consideration of the physical, social, economic, financial, environmental and institutional aspects of water services provision in a particular water services authority area. The *WS Act*³¹⁹ stipulates that a water services authority must prepare a WSDP which should form part of the IDP, in which the municipality or authority should plan for the provision and expansion of water services.³²⁰ The goals and objectives contained in the plan should be aligned with national or provincial sectoral plans and adhere to the framework for IDPs as provided by the district municipality.

Water demand management should be given adequate attention, especially upon the expansion of networks. In terms of section 26(b) of the *Systems Act* a municipality is required to assess the existing level of services in the municipal area. This may lead to the planning of the expansion of water and/or sanitation networks.³²¹

3.2.18.3 The budget for implementing the IDP and other plans

The MFMA applies to the fiscal management within local government. It is the task of the mayor to coordinate the budget formation process with other main planning instruments,³²² and the IDP (inclusive of the WSDP) must be aligned with realistic future revenue and expenditure projections.³²³ In

317 S 26(b) requires "an assessment of the existing level of development in the municipality, which must include an identification of communities which do not have access to basic municipal services".

318 S 26(a) of the *Systems Act*.

319 S 12 of the *WS Act*.

320 For more information, see the Department of Water Affairs and Forestry 2004 <http://www.wrc.org.za>.

321 S 26(b) of the *Systems Act*.

322 S 21(1)(a).

323 See ss 26(h) and 34 of the *Systems Act* and s 21(2)(b) of the MFMA.

addition, every municipality must prepare an annual report for each financial year.³²⁴ The objective of reporting on the financial performance of the municipality is to measure its performance against the budget³²⁵ and to promote accountability to the local community for the decisions taken and the financial implications thereof.

3.2.19 Education related to water services

Education with regards to water supply addresses the promotion of environmental responsibility³²⁶ and creates an awareness of the effects on the environment of human water use. In line with section 2(h) of the NEMA the state (including local government) should promote community wellbeing and empowerment "through education, the raising of environmental awareness, the sharing of knowledge and experience and other appropriate means". Communities similarly need to be informed of the impact of waste on their health,³²⁷ and a national waste information system should provide information for education, awareness raising, research and development purposes.³²⁸

People should be informed of and trained in how to manage and implement information related to the water supply.³²⁹ Health and hygiene education is important where water and sanitation services are provided, and user education in the nature of any type of sewage system is imperative to ensure that the system is not inadvertently abused.³³⁰

3.3 Concluding remarks

In this chapter the legal framework for water supply services was unpacked in terms of the duties of municipalities. These duties are not isolated and may be found in the Constitution, local government legislation, water laws and environmental legislation. Service delivery is furthermore not possible

324 S 121(1) of the MFMA.

325 Ss 121(2)(a) and (b) of the MFMA.

326 See Du Plessis 2010 *Stell LR* 289.

327 S 2(b) of NEMWA.

328 S 61(c) of NEMWA.

329 Du Plessis 2010 *Stell LR* 289. Du Plessis furthermore states that education programmes should be seen as belonging not only to formal educational facilities such as schools, university or training colleges.

330 Still, Walker and Hazelton 2009 *WRC Report* 96.

without supporting factors such as infrastructure, human resources and finances. While providing services, local government must be developmental, plan for service delivery and provide services in a sustainable manner.

When municipalities fail in any of the duties or a combination of the duties described in chapter 3, this may be regarded as forming part of what may be called "failing municipal water supply services" and should be addressed to ensure that the people's right of access to water is not infringed. The analysis of the legislative duties of local government in relation to the supply of water services above has revealed the following indicators which may now be added to the list of failing municipal water supply services:

- Non-compliance with applicable legal measures;³³¹
- Poor administrative measures within a municipality;³³²
- An inability to gather monies for services delivered, whether due to inadequate human or financial capacity;³³³
- Lack of cooperation between the spheres of government;³³⁴
- An inability to plan and budget for water services, whether due to inadequate human or financial capacity;³³⁵
- Fragmentation in government, as seen in the lack of alignment between water services plans and programmes;³³⁶ and/or
- Corruption and a lack of accountability of municipal employees, as seen in the inability to fulfil the duty of just administration.³³⁷

The elements of failing municipal water supply have a visible impact on people, the environment, political stability and the financial stability of municipalities. Municipalities have a legal duty to provide adequate and

331 See chapter 3 for the broad legal duties of local government pertaining to water supply services.

332 See par 3.2.15 and 3.2.16 for municipalities' duties with respect to public administration and the duty to take decisions in line with principles of just administrative action.

333 See par 3.2.11 on a municipality's duty to provide financially sustainable services.

334 See par 4.2 below for an analysis of cooperative government.

335 See par 3.2.19 on the duty to plan and budget for water supply services.

336 See par 4.2 for an analysis of cooperative government.

337 See par 3.2.15 and 3.2.16 for municipalities' duties with respect to public administration and the duty to take decisions in line with the principles of just administrative action.

sufficient water supply to communities, and the state should ensure compliance with these legal duties. Should municipalities fail to provide water supply services, the other spheres of government have a duty to act. In the next chapter the intergovernmental response measures to address failing municipal water services provision will be critically analysed.

Chapter 4: Intergovernmental response measures

4.1 Introduction

Up to this point, an attempt has been made to describe the parameters and duties of local government underlying the notion of failing municipal water supply services.³³⁸ In chapter 2 the theoretical background was set for the possible reasons for failing municipal services in general and more specifically in relation to water supply services. The *status quo* of local government in general and service delivery by local government specifically were analysed as well as the role of the different spheres of government pertaining to water supply services and intergovernmental relations. Chapter 3 portrayed the constitutional and legislative duties of local government in relation to water supply services. The initial description of "failing water supply services"³³⁹ was subsequently enhanced by adding non-compliance with law and municipalities' non-compliance with their legal duties to the definition.³⁴⁰

The functions of various role-players in relation to water supply services are briefly summarised in this chapter to set the background for an analysis of the "intergovernmental measures" available to address failing water supply services. In this respect it should be noted that the exclusive national government functions related to water supply include, amongst others, water resources management.³⁴¹ Concurrent national and provincial government functions include the management of the environment, nature conservation, and the regulation of the water and sanitation services of local government.³⁴² Local government functions include *inter alia* water and sanitation services limited to potable water supply systems and domestic waste water and sewerage disposal systems.³⁴³ In addition, as was alluded to earlier, the national and provincial spheres have the legislative and

338 See par 3.2.1-3.2.19 and par 3.3.

339 See par 1.3.3 and 2.8.

340 See par 3.3.

341 Department of Water Affairs and Forestry Guidelines on the practical application of the *Intergovernmental Relations Framework Act 13 of 2005* 19.

342 Department of Water Affairs and Forestry Guidelines on the practical application of the *Intergovernmental Relations Framework Act 13 of 2005* 19-20.

343 DWAF *Guidelines on the practical application of the Intergovernmental Relations Framework Act 13 of 2005* 19-20.

executive authority to ensure the effective performance of the functions assigned to municipalities, such as water supply services.³⁴⁴ However, due to the potential conflict³⁴⁵ with respect to the execution of overlapping or related functions that may arise between the spheres of government (for instance a dispute may arise between Municipality A and Province B with regards to the municipality's failure to provide water to communities), the Constitution requires a cooperative government approach in dealing *inter alia* with water matters and service delivery in general. Although both the national and provincial spheres of government are relevant in their relationship with local government with regards to intergovernmental cooperation, the focus in this study is on the role and responsibility of provincial government in cases where municipalities fail to supply water to their communities, in line with the legal framework that has been unpacked in chapter 3. Only upon failure of *provincial* government to intervene in a case of municipal non-compliance will national government intervene.

Various institutions and people could take action when local government fails to deliver in terms of its legal mandate, generally. To this extent, various measures are available to provincial authorities to address or prevent failing municipal water supply services. These "intergovernmental measures" will be critically discussed in this chapter, with the aim of providing provincial authorities with a conceptual model portraying the options of intergovernmental response measures at their disposal in the event of failing municipal water supply services.

4.2 Understanding cooperative government and the intergovernmental context

The Constitution provides in chapter 3 for three spheres of government and sets out the functions of these three distinctive, interdependent and interrelated spheres.³⁴⁶ The principles of cooperative government³⁴⁷

344 DWAF *Guidelines on the practical application of the Intergovernmental Relations Framework Act 13 of 2005* 21-22.

345 It appears that conflict between the spheres of government is equivalent to intergovernmental disputes. See par 4.3.4 on disputes and dispute resolution.

346 See par 2.3.1 on the spheres of government, and par 2.3.3 for the role of local government.

347 S 41 of the Constitution.

generally provide that all actions of the three spheres of government must be conducted in a coordinated and cooperative manner.

4.2.1 Cooperative government: a description

Although the spheres of government are seen as distinctive and interdependent, they are also interrelated.³⁴⁸ Cooperative government therefore requires the spheres to function as a whole³⁴⁹ and provides a set of principles in section 41 to direct the manner in which the spheres of government interact.³⁵⁰ The Constitution prescribes in section 41(2) that an Act of Parliament³⁵¹ must establish or provide for processes, structures and institutions to promote and facilitate intergovernmental relations and provide for appropriate mechanisms and procedures to facilitate the settlement of intergovernmental disputes.

It is furthermore important to note that municipalities, who are the service providers or delivery agents in terms of water supply services, do not exercise their autonomy independently, but they must perform their functions and exercise their powers under the supervision of national and provincial government.³⁵²

The NEMA provides for cooperative government in environmental matters, including water-related matters.³⁵³ It allows at the same time for the development of norms and standards for the implementation of environmental legislation,³⁵⁴ as well as generic monitoring and enforcement provisions e.g. the duty of care and the obligation to remedy pollution in general³⁵⁵ to which local authorities must adhere when planning for water

348 Chapter 3 of the Constitution. See par 2.3 for a discussion of the role of local government *vis-à-vis* national and provincial government.

349 Edwards 2008 *Politeia* 65-66.

350 S 41 of the Constitution encourages the spheres of government to cooperate in mutual trust and good faith, to promote effective intergovernmental relations, ensure effective communication, to respect the constitutional status, institutions, powers and functions, and to avoid taking their disputes to court. See also Malan 2005 *Politeia* 227-228.

351 This refers to the IGRFA.

352 Malzbender *et al* 2009 *Water Research Commission* 38.

353 Chapter 3 of the NEMA.

354 Ss 13 and 14 of NEMA. Norms and standards are relevant as this may give recognition to the different roles and responsibilities of role-players who are involved with water supply services, and well as specifying a standard to which the relevant service must comply.

355 S 28 of NEMA.

services, for example. NEMA furthermore provides in chapter 3 for procedures for cooperative government, which include the drawing up of environmental implementation and management plans, the coordination of environmental policies, plans, programmes and decisions to minimise duplication, promote consistency, enhance cooperative government, prevent unreasonable actions in respect of the environment and enable the Minister to monitor the achievement, promotion and protection of sustainable development.³⁵⁶ This section³⁵⁷ may, for example, prevent the duplication of water provision programmes and instead involve the various spheres of government in planning together in a cooperative and inclusive manner, also ensuring that local government has the required capacity and resources to fulfil its obligations in terms of legislation and programme objectives,³⁵⁸ several of which have been discussed in the water services context in chapter 3.

Additional laws which unpack the roles of the spheres of government generally include the *Municipal Demarcation Act* 27 of 1998, the *Structures Act*, the *Systems Act*³⁵⁹ and the MFMA.³⁶⁰ The role of provincial governments in terms of provincial/local intergovernmental relations is validated by these acts, thereby providing some certainty with regards to the relationship between spheres of government, should provincial government act upon the failure of a municipality to provide sufficient and unpolluted water. The MFMA similarly defines the relationship between the spheres of government in terms of financial management, and establishes the

356 S 12 of NEMA.

357 Chapter 3 of NEMA.

358 In *Uthukele District Municipality and Others v President of the Republic and Others* 2003 1 SA678 (CC) par 13, the court emphasised that an organ of state must fulfil its obligations or exercise its powers in co-operation with the other organs of state. Du Plessis argues that when duplication is prevented more resources may be available to focus on "unattended or deprived geographical and functional areas". See Du Plessis 2010 *Stell LR* 277.

359 S 3 of the *Systems Act* obliges local government to facilitate compliance with the principles of cooperative government and intergovernmental relations as defined in the Constitution.

360 The MFMA modernises the financial management system and ensures the accountability of municipalities. This answers to the constitutional values and principles of "accountability, responsiveness and openness". See s 1(d) of the Constitution.

supervisory and monitoring roles of provincial government *vis-à-vis* local government.³⁶¹

4.2.2 Provincial government's assistance to and support of local government

The principles of cooperative government, and specifically section 41(1)(h) of the Constitution,³⁶² instruct the spheres of government to assist and support one another by consulting one another in matters of common interest and by coordinating actions and legislation.³⁶³ Cooperative government may also result in improved communication not only between the spheres of government, but also horizontally between different municipalities and within different divisions or departments within a municipality, which may lead to better service delivery, including the realisation of people's right of access to sufficient water.³⁶⁴

Cooperative government may be perceived as an integral component of the democratic state,³⁶⁵ as it recognises the complex nature of government in a modern society, especially in so far as litigation is discouraged between and among government departments and spheres of government. However, this renders it difficult for national or provincial governments to take municipalities to task where they fail to deliver water services in line with the duties, mandates and expectations created in law.

361 See chapter 5 of the MFMA.

362 S 41(1)(h) of the Constitution prescribes that all spheres of government and organs of state must cooperate with one another in mutual trust and good faith by (i) fostering friendly relations; (ii) assisting and supporting one another; (iii) informing one another of, and consulting with one another on matters of common interest; (iv) co-ordinating their actions and legislation with one another; (v) adhering to agreed procedures; and (vi) avoiding legal procedures against one another.

363 In the case *In re: Certification of the Constitution of the Republic of South Africa* 1996 10 BCLR 1253 (CC) par 291, it was held that this provision binds all departments and administrators of all spheres of government. Cooperative government entails mutual support and cooperation between the spheres of government. Du Plessis 2010 *Stell LR* 270. See s 41 of the Constitution.

364 See Du Plessis 2010 *Stell LR* 277-278 for the potential disadvantage of applying cooperative government with a political flavour, which may negatively affect effective environmental compliance and enforcement and a system of checks and balances.

365 *White Paper on Local Government* 1998 51.

4.2.3 Intergovernmental relations: a description

A distinction should be drawn between cooperative government and intergovernmental relations. Cooperative government is the key to intergovernmental relations, which in turn are concerned with the political, financial and institutional arrangements regarding interactions between spheres of government.³⁶⁶ The improvement and maintenance of intergovernmental relations are two of the measures³⁶⁷ by which the values of cooperative government are demonstrated. The IGRFA³⁶⁸ provides an institutional framework for national, provincial and local government to facilitate coherent government. It seeks to provide focus, clarity and certainty regarding intergovernmental relations and provide high-level political and technical mechanisms to ensure an integrated approach towards governance generally.³⁶⁹ The Act creates a framework to facilitate the co-ordinated implementation of legislation and policy (including water services law and policy) to ensure the effective delivery of services.³⁷⁰ Against this background, intergovernmental relations should be understood as a system which encompasses the components of administration, fiscal arrangements and cooperative government operating among the spheres of government.³⁷¹

366 Edwards 2008 *Politeia* 67-68. Intergovernmental relations should also promote and facilitate cooperative decision-making processes. See Edwards 2008 *Journal of Public Administration* 90-91. Intergovernmental coordination furthermore requires the alignment of functions and duties among different state organs. See Du Plessis 2010 *Stell LR* 276 and Edwards 2008 *Journal of Public Administration* 93.

367 The other measures include integrated development planning, in which municipalities are supported to develop credible IDPs. Linked to the IDP process is community participation, which may contribute to a cooperative and accountable government. See Edwards 2008 *Journal of Public Administration* 91-92 and par 3.2.8.

368 The IGRFA was introduced largely to guide organs of state on how to effectively relate with one another in pursuit of commonly shared development goals. See DWAF *Guidelines on the practical application of the Intergovernmental Relations Framework Act 13 of 2005* 9.

369 See the preamble of the IGRFA. For more information on the objective of the IGRFA, see the Department of Water Affairs and Forestry *Guidelines on the practical application of the Intergovernmental Relations Framework Act 13 of 2005* 20-41.

370 DPLG Date Unknown <http://www.thedplg.gov.za>.

371 Department of Provincial and Local Government 2008 *15 year Review Report on the State of Intergovernmental Relations in South Africa* 7.

4.3 Intergovernmental measures: the options³⁷²

Various options are available to provincial government to act against or assist a municipality failing to provide access to water for people, or where the service delivered does not adhere to specific legal requirements.³⁷³ The fact that it is people's constitutional right to have access to sufficient water³⁷⁴ in essence translates into a constitutionally entrenched mandate of provincial government, in accordance with the principles of cooperative government, to address or rectify such failure. Furthermore, the fact that the spheres of government should function as one government³⁷⁵ compels the other spheres of government to support and assist local government in re-instituting sufficient water supply when and where a problem occurs. Some of these intergovernmental measures³⁷⁶ may seem reactive in nature, as they are instituted mainly *after* failure to provide adequate access to water.³⁷⁷ The intergovernmental response measures proposed to address failing municipal water supply include improved supervision, the possible conclusion of an environmental partnership or agreement, and alternative dispute resolution (ADR) measures, as will be discussed next.

372 For a discussion of best practice in the area of provincial-local relations, see DPLG 2003 *A guideline document on provincial-local intergovernmental relations* 15-26. The constitutional duty of cooperative government backed up by the IGRFA implies that intergovernmental measures would generally not be punitive. See Malzbender *et al* 2009 *Water Research Commission* vii.

373 See chapter 3.

374 See par 1.1.

375 See par 4.2 above for a discussion of cooperative government.

376 Measures include monitoring, support, regulation, the issuing of a directive, assuming responsibility for the relevant obligation, and the dissolution of the Council. See s 139 of the Constitution and the remainder of this chapter for a discussion of these intergovernmental measures.

377 In some instances the need for a specific measure is easily determined, such as emergency situations or where a municipality does not fulfil an obligation which is regarded as essential and which may have a serious effect on communities when not provided, such as a failure to provide water, or the provision of substandard water. In the *Carolina* case this emergency measure was instituted only after an appeal by the WSA has failed. The Legal Resources Centre and Lawyers for Human Rights have written to the Minister and requested that should the Gert Sibande Municipality fail and/or refuse to fulfil their statutory obligation to provide water, that the Department intervene in terms of ss 73(1)(e) of the *WS Act*, which gives the Minister powers to act as a water service provider and to provide water services in emergency situation. See LRC 2012 <http://www.lrc.org.za>.

4.3.1 Supervision

The spheres of government are interdependent in the sense that local government exercises its autonomy under the supervision of both national and provincial government, who in some instances make final binding decisions affecting local government.³⁷⁸ While it is true that local government has original legislative and executive powers with respect to Schedule 4B and 5B matters, these powers are not exclusive to local government. A municipality's "right to govern on its own initiative the local government affairs of its community" is subject to national and provincial legislation as provided for in the Constitution.³⁷⁹ This is reinforced by the fact that section 155(7) of the Constitution provides that provincial government has the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5.

Supervision seems to be the guidance of local government by national and provincial government. This oversight or supervisory role is performed by regulating municipalities' execution of their executive authority referred to in section 156(1). The Constitution creates a clear duty and power of national and provincial oversight over the exercise of municipal power, including where municipalities provide water supply services to communities.

Different authors define supervision differently. De Visser³⁸⁰ defines supervision as the regulation, intervention and redistribution of municipal powers, with monitoring being linked to intervention, as an integral component of the power to intervene in terms of section 139 of the Constitution, and as a tool to evaluate local government's performance. Other writers add "support" to the list of supervisory measures.³⁸¹ In this study supervision includes the measures of regulation,³⁸² monitoring and reporting,³⁸³ support³⁸⁴ and intervention.³⁸⁵ Due to its complexity, intervention is discussed separately in paragraph 4.3.2 below.³⁸⁶

378 DPLG 2003 *A guideline document on provincial-local intergovernmental relations* 5.

379 S 151(3) of the Constitution.

380 See De Visser *Developmental Local Government* 171-208.

381 See Steytler and De Visser *Local Government Law of South Africa* 15-18.

382 See par 1.1.

383 See par 4.3.1.2.

4.3.1.1 Regulation

Through "regulation" national and provincial government ensure that local government *inter alia* delivers water supply services in accordance with legislation, regulations, norms, standards and national policy.³⁸⁷ Section 155(7) of the Constitution provides for national and provincial government to "regulate" the exercise of municipalities' executive authority.

In the case *In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 (CC),³⁸⁸ "regulation" was interpreted to mean "a broad managing or controlling rather than direct authorisation function".³⁸⁹ The obligation to regulate, according to this understanding of the term, cannot prescribe the details of what a municipality should do, but rather sets the framework within which to operate.³⁹⁰ This somewhat theoretical understanding, however, may render the regulatory role of provincial government a challenge as (according to this understanding) no clear rules or norms exist that should be applied, and potentially many actions by municipalities within the "broad regulatory framework" may be acceptable.³⁹¹

On the other hand regulation may also be regarded as controlling service delivery through either command-and-control based or incentive-based regulatory instrumentation. These possibilities will be discussed briefly.

- Command-and-control regulation

384 See par 4.3.1.3.

385 Steytler and De Visser in *Ntliziywana Professionalisation of local government* 53. See par 4.3.2 for a discussion on intervention.

386 See par 4.3.2.

387 Malzbender *et al* 2009 *Water Research Commission* iv.

388 Hereafter the *First Certification* case.

389 *First Certification* case par 377.

390 *Ntliziywana Professionalisation of local government* 54. DPLG 2003 *A guideline document on provincial-local intergovernmental relations* 5 refers to regulation as a set of frameworks within which local autonomy may be exercised responsibly, thereby not prescribing specific actions that must be taken by municipalities, but more a type of proposal of how they should be acting to ensure effective service delivery such as access to sufficient water. This provision is therefore more concerned with the *way* in which provincial power is exercised, not with whether or not a power exists.

391 This is not correct, as many laws and regulations are in place to regulate the actions of municipalities, including the *Systems Act*, the *Structures Act*, and regulations in terms of the *WS Act*. See chapter 3.

Command-and-control regulation prescribes legal requirements and obligations (e.g. in laws and regulations) and then compels municipalities to comply therewith. Where municipalities do not comply with these legal requirements and obligations, enforcement measures are instituted. Provincial regulation would, however, typically be limited by section 151(4) of the Constitution, which provides that a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.³⁹²

Although this form of regulation seems easy to understand and enforce, it requires "well-resourced and capacitated enforcement authorities" due to the time-consuming and expensive processes involved.³⁹³ Command-and-control regulation furthermore in principle does not allow for municipalities to find creative solutions for their unique issues and challenges.³⁹⁴

- Incentive-based regulation

Another form of regulation is incentive-based regulation, which seeks to encourage compliance with water services legislation, for example, through motivation and reward.³⁹⁵ Examples of incentive-based regulation instituted by the DWA since 2009 are the Blue and Green Drop certification programmes.³⁹⁶ The objective of these programmes is to ensure proper management of water supply (Blue Drop Certification) and wastewater

392 Provincial legislation that deprives local government of the ability to make any policy choices on Schedules 4B and 5B matters, for example, may compromise or impede a municipality's ability or right to exercise its powers or perform its functions. See DPLG 2003 *A guideline document on provincial-local intergovernmental relations* 9. For more information on command-and-control mechanisms, see Craigie, Snijman and Fourie "Dissecting Environmental Compliance and Enforcement" in Paterson and Kotzé (eds) *Environmental Compliance* 51-52 and Paterson "Incentive-based Measures" in Paterson and Kotzé (eds) *Environmental Compliance* 296-297.

393 Craigie, Snijman and Fourie "Dissecting Environmental Compliance and Enforcement" in Paterson and Kotzé (eds) *Environmental Compliance* 51-52.

394 This is especially true for municipalities of different sizes, where the commands to regulate a metropolitan municipality can hardly be applied to a smaller municipality in a rural area. See furthermore Craigie, Snijman and Fourie "Dissecting Environmental Compliance and Enforcement" in Paterson and Kotzé (eds) *Environmental Compliance* 51-53 and Paterson "Incentive-based Measures" in Paterson and Kotzé (eds) *Environmental Compliance* 296-297.

395 Incentive-based measures seek to encourage and reward desired forms of behaviour. For more information see Craigie, Snijman and Fourie "Dissecting Environmental Compliance and Enforcement" in Paterson and Kotzé (eds) *Environmental Compliance* 58-59 and Paterson "Incentive-based Measures" in Paterson and Kotzé (eds) *Environmental Compliance* 296-335.

396 See par 1.2.

(Green Drop Certification). The Blue Drop Certification programme not only focuses on water quality or water supply, but "ventures into the sphere of risk management, operations and asset management".³⁹⁷ The programme furthermore provides the public with transparent reporting on the ability of WSA to manage and sustain drinking water quality and deal with emergency incidents. The certification programme also serves as a motivation for role players in the water sector to "aspire toward targets well beyond the usual minimum requirements",³⁹⁸ therefore focusing not only on mere compliance with the law but also striving towards excellence.³⁹⁹

Regulation, whether as a broad managing or controlling measure or as a direct authorisation function, should be implemented to ensure that local government provides water services in accordance with the law and policies of national and provincial government.

4.3.1.2 *Monitoring and reporting*

A province has the constitutional duty to monitor local government.⁴⁰⁰ General monitoring entails a notice by the MEC responsible for local government to submit information to a specified provincial department or institution, either at regular intervals or within a specific period. The MEC may also request information on an *ad hoc* basis from a municipality, but may do so only after taking into account the reasonableness of the request and the cost and administrative burden on the relevant municipality.⁴⁰¹ Monitoring may furthermore be used to ascertain facts relevant to a section 139 intervention.⁴⁰² This type of monitoring is implemented when an MEC

397 Blue Drop Report 8. The certification programme *inter alia* requires water services institutions to provide information as required by s 62 of the *WS Act*.

398 Blue Drop Report 8.

399 The success of the certification programme is evident in the number of municipalities participating in the programme (107 municipalities in 2009 to 153 in 2012, with a peak of 162 in 2011) and the national Blue Drop score which increased from 51.4 per cent in 2009 to 87.6 per cent in 2012, as well as an increase of 73 Blue Drop awards from 2009 to 2012 (25 to 98).

400 S 155(6)(a) in the Constitution.

401 S 105(2) of the *Systems Act*. See also the Department of Provincial and Local Government 2003 *A guideline document on provincial-local intergovernmental relations* 10.

402 S 106 of the *Systems Act*, which is applied in cases where an MEC has a duty to request information when he or she has reason to believe that a municipality cannot or does not fulfil a statutory obligation. See the Department of Provincial and Local

has reason to believe that a municipality has failed to fulfil an executive obligation, which would typically include the duty to supply potable water to communities.⁴⁰³

In accordance with the *Systems Act*,⁴⁰⁴ various instruments⁴⁰⁵ have been established to monitor municipalities, develop the capacity of local government, and assess the measure of support needed to strengthen weak capacity.⁴⁰⁶ The aim of monitoring and reporting is to identify possible competency gaps in local government and to address it as soon as possible.⁴⁰⁷ Persistent failure to meet competency standards and the associated poor level of service delivery, including with respect to the provision of water services, should essentially lead to action being taken by other spheres of government. Thus, a momentary failure to provide an adequate water supply arguably does not necessitate immediate inter-governmental action, but *persistent* failure should be addressed as a matter of urgency, especially when such a failure is due to a crisis in the municipality's financial affairs.⁴⁰⁸

Various monitoring instruments are contained in the *Systems Act*, read together with the MFMA. Firstly, an annual report must be compiled by the

Government 2003 *A guideline document on provincial-local intergovernmental relations* 10.

403 In terms of s 106 of the *Systems Act*, the MEC may institute an investigation into the relevant failure of a municipality by giving a written notice to the Council to provide specific information, and/or designate a person to investigate the matter and organise a public hearing in which all relevant stakeholders may participate. All of the above is done to establish if intervention by the Provincial Executive is necessary. See De Visser, Steytler and Mettler 2000 *DPLG* 18-19.

404 S 105(1).

405 Including mechanisms, processes and procedures. Provinces need not utilise the same monitoring instrument. They can and must develop, by legislative or other measures, their own scheme of monitoring local government in the province. De Visser, Steytler and Mettler 2000 *DPLG* 18.

406 Capacity in a municipality may be assessed through reports provided by a municipality to the provincial government to enable the province to monitor the municipal execution of functions and roles. For detail on reporting instruments see Malzbender *et al* 2009 *Water Research Commission* 11-18.

407 Ntliziywana *Professionalisation of local government* 31. The result of monitoring informs the extent of support needed by the municipality.

408 S 136(4) of the MFMA states that " (i) if the municipality, as a result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments, or admits that it is unable to meet its obligations or financial commitments, as a result of which the conditions for an intervention in terms of s 139(5) of the Constitution are met, the Provincial Executive must intervene in the municipality in accordance with s 139".

municipality after each financial year.⁴⁰⁹ It should include *inter alia* a performance report, audited financial statements, and a description of the measures taken to improve performance, and should respond to the reporting requirements in terms of other legislation.⁴¹⁰ The MEC must also annually compile a consolidated report on the performance of municipalities in the province, identifying the municipalities that under-performed, whilst suggesting remedial steps. The *WS Act* similarly stipulates that municipalities must, as part of their IDPs, have a WSDP.⁴¹¹ According to section 18(1) of this Act, municipalities should report on the implementation of the WSDP to their relevant provinces.⁴¹² This report would typically allow provincial authorities to pick up on existing or potential failing municipal water supply services.

The MEC may further request information to be provided by municipalities in accordance with section 105(2) of the *Systems Act*. The MEC must, however, first peruse an annual report prior to requesting additional information. The extent of any potential non-compliance with legislation or regulations may be identified and relevant enforcement measures proposed from the information provided. The MEC may request the Municipal Council to provide information or, if necessary, appoint a commission of investigation, if there is reason to believe that a municipality cannot or does not fulfil a statutory obligation e.g. in terms of the *WS Act*, or if the MEC suspects any corruption.⁴¹³ This seems to be a heightened form of monitoring and reporting, and could be potentially useful in cases where a municipality fails to adequately supply water to its communities. Section 1.3.2 of the *White Paper on Local Government* 1998 foresees monitoring as one of the key

409 See s 121 of the MFMA for more detail on the prescribed content of the MFMA. According to s 127(5)(b) of the MFMA this annual report must be submitted to the Auditor-General, the relevant provincial treasury, and the provincial department responsible for local government in the province.

410 S 46(1)(a) of the *Systems Act*.

411 Ss 12-18 of the *WS Act*.

412 De Visser *et al* 2000 *Provincial Supervision* 19. Item 10(3)(i) of the draft Compulsory National Standards in terms of the Act stipulates that municipalities must include their water services audit (introduced by those regulations) in this report. In s 62(1) the Act also compels provinces to monitor the performance of municipalities with regard to the national standards prescribed under the Act. Lastly, the Province can authorise a person to enter property and inspect water services work in terms of s 80(1) of the Act.

413 S 106 of the *Systems Act*. See Ntliziywana *Professionalisation of local government* 48.

measures to be used by provincial government to ensure that high standards of public service and good government are maintained.

4.3.1.3 Support

Support refers to measures of assistance to ensure that another sphere of government is able to perform adequately.⁴¹⁴ The Constitution imposes a duty on provincial government in section 155(6) to "provide for the ... support of local government in the province; and (to) promote the development of local government capacity".⁴¹⁵ The *Systems Act* similarly provides for an MEC to establish mechanisms, processes and procedures to assess the support needed by municipalities to strengthen their capacity to manage their own affairs, exercise their powers and perform their functions.⁴¹⁶ The *Systems Act* therefore adds an additional instrument to the rest, in the form of a provincial government's duty to assess the needs of local government.⁴¹⁷

The duty to support incorporates legislative measures aimed at establishing a monitoring framework⁴¹⁸ in which provincial government may support local government, and to impact on the manner in which local government administers matters related to water supply services.⁴¹⁹ These powers of support by provincial government are significant, as emphasised by the Constitutional Court in the *First Certification* case, in which the court held the following.⁴²⁰

The legislative and executive powers to support (local government) are ... not insubstantial. Such powers can be employed by provincial departments to strengthen existing (local government) structures, powers and functions and to prevent a decline or degeneration of such structures, powers and functions...

414 DPLG 2007-2008 *Practitioner's Guide to the Intergovernmental Relations System in South Africa* 34.

415 This was also referred to in the *First Certification* case par 361. In this case the Constitutional Court had to certify whether or not the provisions of the final Constitution complied with the constitutional principles contained in the Interim Constitution. In par 371 the Court dealt with the provincial government's legislative powers in respect of local government.

416 Ss 31 and 105 of the *Systems Act*. These functions include the provision of water supply services.

417 Mettler 2003 *Law, Democracy and Development* 10.

418 See par 4.3.1.2 above for a discussion of monitoring measures.

419 Community Law Centre "Developmental Local Government" 13.

420 See the *First Certification* case par 371.

Provincial government departments should therefore have the appropriate human and financial capacity⁴²¹ to be able to support local government,⁴²² especially in the realm of water provision services, which have the potential of being highly technical as well as expensive to replace or maintain.⁴²³

4.3.2 Intervention

Intervention is the unilateral interference of one sphere of government in the affairs of another sphere in order to remedy an unacceptable situation.⁴²⁴ Intervention may be necessary if the monitoring measures described above reveal shortcomings which support mechanisms have been unable to remedy.⁴²⁵ In cases of non-compliance and when a municipality "cannot or does not fulfil an executive obligation in terms of the Constitution or legislation", such as providing water to a community, a section 139 intervention may be considered. Section 139 does not require a total collapse of service delivery. Failure in only one functional area, such as water supply, may warrant intervention.⁴²⁶ The yardstick for intervention is failure to provide the minimum standard of service delivery, as prescribed by legislation or policy.

In deciding whether or not to intervene, a provincial government should act according to the principles of cooperative government whilst keeping in mind that intervention may be a "severe inroad in local government's institutional

421 In terms of intergovernmental fiscal relations; national government is compelled to support provincial and local government by means of the transfer of grants to enable these sphere to perform adequately. However, this does not mean that the national or provincial government is liable for the debts of municipalities. See DPLG 2007-2008 *Practitioner's Guide to the Intergovernmental Relations System in South Africa* 36.

422 DPLG 2007 *The Implementation of the Intergovernmental Relations Framework Act: An Inaugural Report 2005/6 – 2006/7* 1. A number of programmes implemented by national and provincial government to support service delivery by local government include, for example, the Municipal Infrastructure Grant (MIG), sustainable human settlements, the Integrated Sustainable Rural Development Programme (ISRDP), the Urban Renewal Programme, Local Economic Development, the IDP and other strategies of sector departments. Department of Provincial and Local Government 2007 *The Implementation of the Intergovernmental Relations Framework Act: An Inaugural Report 2005/6 – 2006/7* 16.

423 See par 3.2.14 for a discussion on infrastructure.

424 DPLG 2007-2008 *Practitioner's Guide to the Intergovernmental Relations System in South Africa* 34.

425 For more information on intervention see DPLG 2007-2008 *Practitioner's Guide to the Intergovernmental Relations System in South Africa* 41-44.

426 This conclusion is made on the basis of the text of 139(1)(b), which refers to the assumption of responsibility "for the relevant obligation". See De Visser, Steytler and Mettler 2000 *DPLG* 19.

integrity" and should be used as a measure of last resort.⁴²⁷ Keeping in mind the autonomy of local government, only after less intrusive measures such as support (as discussed above) and the strengthening of the municipality's capacity in the spirit of cooperative government have failed should intervention by provincial government be considered.

4.3.2.1 Section 139 intervention

Specific steps to be taken are prescribed by section 139 of the Constitution when provincial government decides to intervene in response *inter alia* to failing water supply services. A Provincial Executive⁴²⁸ may issue a directive instructing a municipality to comply with a legislative obligation within a specific timeframe.⁴²⁹ Thus, in cases of a failure to supply water, the Provincial Executive will issue a directive instructing the relevant municipality to re-institute water provision to a community, as required by the *WS Act*. If the municipality fails to implement the directive and continues to fail with regards to providing water to a community, the Provincial Executive may assume responsibility for the relevant obligation,⁴³⁰ but only where it is necessary to meet the established minimum standards for rendering the service. The administrator must assume the responsibility of ensuring that the municipality is in a position to fulfil its obligations.⁴³¹ If the assumption of responsibilities seems unsuccessful and sufficient water supply is not secured, for example, the Municipal Council must be dissolved.⁴³² An administrator must be appointed to ensure the continued functioning of the municipality until the election of a new Council.⁴³³

427 De Visser, Steytler and Mettler 2000 *DPLG* 19-21.

428 The "Provincial Executive" as referred to in s 139 of the Constitution empowers the Premier and the Executive Council to intervene. The Executive Council may furthermore authorise the MEC responsible for local government to intervene. See De Visser, Steytler and Mettler 2000 *DPLG* 7.

429 S 139(a) of the Constitution. See par 4.3.2.4 for a description of a directive.

430 S 139(1)(b) of the Constitution.

431 S 139(1)(b)(i) of the Constitution. See par 4.3.2.5 for a discussion on the assumption of responsibility.

432 S 34(3)(b) of the *Structures Act*. The reason for failure could be resistance from the Council to the dismissal of incompetent officials, or an unwillingness to cooperate with the administrator. See Ntliziywana *Professionalisation of local government* 49. See par 4.3.2.6 below for the dissolution of a Council.

433 S 139(1)(c) read together with s 35(2) of the *Structures Act*. For more information on intervention, see De Visser *Provincial Intervention in a Municipality* 1-59.

4.3.2.2 *Intervention as per other laws*

In addition, section 16(2) and (3) of the NEMA provides for instruments such as a notice to rectify the non-compliance, or conciliation or arbitration,⁴³⁴ in instances of failure to comply with environmental management or implementation plans. These instruments in principle provide a platform for national or provincial government to issue notices in cases where a local municipality does not comply with its WSDP or other developmental and environmental plans of relevance for water services provision.⁴³⁵ If they are unsuccessful, section 16(3)(d)(ii) allows the Director-General (DG) of the Department of Water and Environmental Affairs (DEA and DWA) to request the relevant MEC to intervene in accordance with section 139 of the Constitution.

It is noteworthy that section 63 of the *WS Act* provides that the Minister may request a relevant province to intervene in terms of section 139 of the Constitution in cases where the water services authority has not "effectively performed any function imposed on it" by or under the *WS Act*. If the Province has failed to intervene effectively or at all, the Minister may assume responsibility for that function in order to maintain essential national standards or to meet established minimum standards for providing services. This is one of the few instances where the failure of provincial government to act or intervene may in terms of law activate a reaction by national government.

The variety of instruments and seemingly fragmented nature of legislation pertaining to intervention raise a number of questions, especially with regards to the suitability of the system for addressing failing water supply services in local government. The assumption of power may potentially open the possibility for a total assumption of responsibility by provincial government "through the back door".⁴³⁶ Section 34(3)(b) of the *Structures Act* does not indicate which instrument of intervention should have been instituted prior to dissolving the Council. Where section 139 makes it clear that no intervention

434 Chapter 4 of the NEMA. See par 4.3.4 below for a discussion of alternative dispute resolution measures.

435 By default, this also includes district, provincial or national plans and programmes.

436 De Visser *Developmental Local Government* 32.

may affect the legislative capacity of the Council, the *Structures Act* provides for the dissolution of the entire Council. According to De Visser⁴³⁷ this runs counter to the spirit of the Constitution by the "grave inroad of section 34(3)(b) of the *Structures Act* into the institutional integrity of local government". It therefore appears that more explicit guidance is necessary in terms of the order in which the instruments of intervention should be applied, including in the case of non-compliance with the Constitution and legislation concerning water supply services.

4.3.2.3 *Financial intervention*⁴³⁸

Financial intervention may be necessary upon specific failures with regards to the financial duties of a municipality. The failure to manage municipal finances may hinder the proper delivery of water supply services, for instance. When a budget is not approved, monies allocated to service delivery, or to upgrade or maintain infrastructure will not be available, and the overall control of service delivery will be challenging. Section 139 of the Constitution, which provides for intervention by provincial government in failing municipalities, was significantly amended to enable provinces (and in some instances national government) to intervene in municipalities that are experiencing financial problems.⁴³⁹ The amendments serve as the constitutional basis for the measures provided for in the MFMA regarding municipalities experiencing financial trouble.⁴⁴⁰ Intervention is needed when a municipality's financial problems are still remediable but have resulted in a failure by the municipality to comply with its executive obligations in terms of the Constitution or legislation.⁴⁴¹

The following provisions are listed as situations where provincial government

437 De Visser *Developmental Local Government* 38.

438 Chapter 13 of the MFMA addresses the intervention capability of provincial government in terms of financial issues or non-compliance.

439 A financial problem refers generally to a municipality's inability to meet its financial commitments. See DPLG 2007-2008 *Practitioner's Guide to the Intergovernmental Relations System in South Africa* 45.

440 DPLG 2007-2008 *Practitioner's Guide to the Intergovernmental Relations System in South Africa* 44.

441 According to the *Practitioner's Guide to the Intergovernmental Relations System in South Africa* 45 there must be a causal link between the financial problem and the executive obligation not performed. This will determine the focus of the intervention. See DPLG 2007-2008 *Practitioner's Guide to the Intergovernmental Relations System in South Africa* 45.

is compelled to intervene. The power to intervene in these situations is therefore not discretionary. Should a province fail to intervene, section 139(7) of the Constitution mandates the National Executive to intervene on behalf of the provincial authority.

- When a municipality fails to approve a budget.⁴⁴² The non-approval of a budget will directly influence service delivery, and planning for the new financial year will not be funded without an approved budget.
- When a municipality has an approved budget, but fails to adopt revenue raising measures to give effect to the budget.⁴⁴³ A municipality is obliged to implement tariffs and collect service fees owed,⁴⁴⁴ as these monies should be used to finance service delivery, including the supply of water.
- When a municipality is in serious or persistent breach of its obligation to provide basic services⁴⁴⁵ (for instance water supply services) due to a crisis in its financial affairs.⁴⁴⁶ However, it is uncertain whether the Constitution requires a package of basic services' failure due to financial crisis, or whether the failure of a single service delivery function such as water supply services would suffice for an intervention to be instituted.
- When a municipality admits it is unable to meet its obligations in terms of service delivery or financial commitments. De Visser⁴⁴⁷ argues that this is similar to a "request" for intervention, which does not accord with the

442 S 139(4) of the Constitution. Every Municipal Council must approve an annual budget before the start of the budget year. See s 16(1) MFMA.

443 S 139(4) of the Constitution. This s is not applicable where measures are in place but not enforced.

444 See s 74 of the *Systems Act*, and s 62 of the MFMA.

445 Basic services are not defined clearly in the Constitution. The *Systems Act* in s 1, however, broadly defines a basic municipal service as a municipal service that is necessary to ensure an acceptable and reasonable quality of life and, if not provided, would endanger public health or the safety of the environment. The *White Paper on Local Government* 1998 offers no clarity either and refers to basic services that "enhance the quality of life of citizens, and increase their social and economic opportunities by promoting health and safety, facilitating access (to work, to education, to recreation) and stimulating new productive activities". See the *White Paper on Local Government* 1998 74.

446 S 139(5) of the Constitution. Basic services as defined in s 1 of the *Systems Act* include services necessary to ensure an acceptable quality of life, which would not endanger public health or safety or the environment, thus including water supply services.

447 Steytler and De Visser *Local Government Law of South Africa* 15-29.

principle that intervention is a measure of last resort and to be used in cases of extremity.⁴⁴⁸

In the case of the first two provisions above (failure to approve a budget and/or failure to adopt revenue-raising measures) the Council must be dissolved and an administrator appointed until a new Council is elected.⁴⁴⁹ A temporary budget must be passed or provisional revenue-raising measures adopted.⁴⁵⁰ In the case of the last two options above (serious or persistent breach of obligations and/or an admission that the municipality is unable to meet its obligations) the Provincial Executive must impose a financial recovery plan that is binding on the municipality.⁴⁵¹ With respect to failing water supply services this suggests that the MEC will draft a financial recovery should the municipality due to financial constraints persistently fail to provide water to its communities.

Should the Council not cooperate with the recovery plan, the Council must be dissolved and treated as in the case of the first two options in which an administrator is appointed until a new Council has been elected, with temporary measures put in place. Section 139(5)(c) provides that the Provincial Executive must assume responsibility for the implementation of the recovery plan if the Council is not dissolved. This section obscures the mandate of section 139(5), according to which the Council should be dissolved in a case of lack of cooperation. Yet there are no criteria to decide when the mandatory wording of section 139(5) is applicable.⁴⁵²

Intervention in general may place a burden upon provincial government both in terms of finances and human resources, as a measure which "present[s] itself as an unfunded mandate for provinces".⁴⁵³ According to De Visser,⁴⁵⁴ provinces generally lack the personnel, funds, institutional knowledge and

448 This tends to blur the distinction between support and intervention.

449 S 139(4)(a) of the Constitution.

450 S 139(4)(b) of the Constitution.

451 S 139(5)(a) of the Constitution.

452 De Visser *Developmental Local Government* 194.

453 De Visser *Developmental Local Government* 194. For a discussion of unfunded mandates in intergovernmental relations see Ntenga 2012 *Financial and Fiscal Commission* 261-279.

454 The NCOP is accused of being unable to review interventions, and the NCOP cannot realistically undertake such ambitious, "hands on" oversight functions. De Visser *Developmental Local Government* 200.

expertise to deal with interventions, especially when related to technical services or financial issues. As a rule they also do not budget for interventions, and therefore section 139 of the Constitution has over time manifested itself as a mandate without funds set aside for its implementation.⁴⁵⁵

Another financial intervention instrument is provided for in section 38 of the MFMA, according to which the funding of municipalities may be stopped in cases of serious or persistent breach of the measures designed to ensure transparency and expenditure control, or any terms or conditions by which the allocation is made.⁴⁵⁶ National Treasury may furthermore, in terms of the Constitution and the *Systems Act*, stop funds if a municipality commits a breach of the *Systems Act*.⁴⁵⁷ The stopping of funds may therefore serve as a penalty but would seldom address the underlying issues of non-performance, which require capacity building and support rather than punishment.⁴⁵⁸ If the stopping of funds affects the provision of water supply services, the Provincial Executive must ensure and monitor the continuation of those services.⁴⁵⁹

The process as prescribed by section 139 of the Constitution will be analysed below. While the above section of this chapter has introduced intervention as a measure for addressing failing water supply services in the broad sense, there is detail which needs further discussion. The following section serves to illustrate and discuss the different forms of intervention that exist and that could be employed as intergovernmental response measures in the event of failing municipal water supply services.

455 There seems to be little incentive for provinces to intervene in a failing municipality, due to the fact that provincial governments do not specifically include intervention in their budgets. DPLG 2003 *A guideline document on provincial-local intergovernmental relations* 13.

456 S 38 of the MFMA. Instances of stopping transfers must be reported to Parliament for approval within 30 days. See DPLG 2008 *15 Year Review Report on the State of Intergovernmental Relations in South Africa* 35-39.

457 S 216(1) of the Constitution read together with s 5(2) of the *Systems Act*.

458 Allocations from national to local government are provided for in terms of s 6(3) of the annually published *Division of Revenue Act*. National and provincial departments can also transfer some of their own resources to authorities in other spheres in the form of grants. See also chapter 15 of the MFMA for measures against financial misconduct within municipalities. See DPLG 2007-2008 *Practitioner's Guide to the Intergovernmental Relations System in South Africa* 44-47 for more information on financial interventions into local government.

459 Algottson and Murombo 2009 *LHR Publication Series* 4, 20.

4.3.2.4 Intervention through administrative measures

Administrative measures could be taken in cases of municipal non-compliance.⁴⁶⁰ Where a provincial government becomes aware of a municipality's non-compliance with legislation or failure to provide an adequate water supply, it may undertake an initial assessment.⁴⁶¹ A notice of non-compliance could then be issued against the relevant municipality including the detail of the non-compliance, after which the municipality will be afforded the opportunity to respond or rectify the situation.⁴⁶² This could be seen as a sign of respect for the autonomy of local government.⁴⁶³

After consideration of the representations made by the municipality, the provincial government may issue a directive if it is of the opinion that an intervention is still necessary.⁴⁶⁴ A directive must be issued by the Provincial Executive before it may assume responsibility for any non-compliance with the duties provided for in law, such as a failure to supply water.⁴⁶⁵

The content of the directive is important when the extent of the intervention is

460 Winstanley "Administrative Measures" in Paterson and Kotzé (eds) *Environmental Compliance* 225-226.

461 See the enforcement protocol in the DWAF 2008 *National Water Services Regulation Strategy* 41-42.

462 The content of such notices should consist of at least the following: (i) identification of the executive obligations that are not being fulfilled and their legislative origin; (ii) a description of the extent of non-fulfilment; (iii) identification of the steps that the Provincial Executive will direct the municipality to take; (iv) an invitation to the Council to make written representations; and (v) a reasonable time period for the making of representations. Where extreme circumstances require an instant assumption of responsibility, the Provincial Executive is not necessarily required to first issue a directive or a notice. Responsibility may then be assumed as a first step. See De Visser, Steytler and Mettler 2000 *DPLG* 22-23.

463 This is not directly prescribed by the Constitution, but by best practice. See *DPLG 2007-2008 Practitioner's Guide to the Intergovernmental Relations System in South Africa* 43.

464 S 139(1)(b) of the Constitution. De Visser *Developmental Local Government* 186. This was decided in the *First Certification* case par 124. The Constitutional Court evaluated s 100 of the Constitution, which is equal to the s 139 intervention, but only between national and provincial government.

465 The minimum content of the directive, according to De Visser, Steytler and Mettler 2000 *DPLG* 22-23, should be the following: (i) a statement that the Provincial Executive is acting in terms of s 139(1)(a) of the Constitution; (ii) a consideration of any representations made by the Council; (iii) the identification of the executive obligations that are not being fulfilled; (iv) the identification of the legislative origin of those obligations; (v) an outline of the steps to be taken by the Municipal Council to ensure the fulfilment of the obligations referred to; (vi) the stipulation of a reasonable time period for the Municipal Council to take the steps set out in the directive; (vii) an instruction to the Municipal Council to report to the Provincial Executive on the implementation of the directive; and (viii) a statement that failure to implement the steps could be followed by the assumption of responsibility in terms of s 139(1)(b).

determined. It seems necessary for a provincial authority to determine the extent of the municipality's failure through a thorough investigation.⁴⁶⁶ To ascertain the facts of a failure to supply sufficient water to communities, for example, the Provincial Executive may use its monitoring powers.⁴⁶⁷ After the assumption of responsibility, the steps detailed in the directive lose their binding force and the Provincial Executive becomes the source of authority for the specific executive obligation. A Council is therefore not obliged to continue to attempt to implement the steps set out in the directive.⁴⁶⁸

Note that directives may also be issued to local government in terms of section 28 of the NEMA where a duty of care was breached, or in terms of section 19 of the NWA, but this occurs mainly in cases of pollution or the potential pollution of water resources.

4.3.2.5 Intervention through the assumption of responsibility

If a directive referred to above has not had the desired effect, such as the reinstatement of the water supply, the Provincial Executive may assume responsibility for the relevant obligation.⁴⁶⁹ The relevant provincial government should prove that its assumption of responsibility is necessary to maintain essential national standards or to meet established minimum standards for the rendering of a service by the municipality, such as the

466 The objective facts that come out of the investigation will form the basis on which the Provincial Executive exercises its discretion as to whether or not to intervene, as well as how to intervene. The instruments available for use in conducting an investigation are based on a provincial government's constitutional duty to monitor, as well as the duty to monitor derived from specific legislation. See De Visser, Steytler and Mettler 2000 *DPLG* 18 and par 4.3.1.2 on the duty to monitor.

467 See par 4.3.1.2 above.

468 For more on directives, see the Department of Provincial and Local Government 2007-2008 *Practitioner's Guide to the Intergovernmental Relations System in South Africa* 43.

469 The assumption is made that the issuing of a directive should precede the assumption of responsibility, as the steps of ss 139(1)(a) and 139(1)(b) follow one another in the Constitution. When a directive is issued, the Provincial Executive (or the MEC) must notify the Municipal Council in writing of its intention to assume responsibility in terms of s 139(1)(b) of the Constitution. The Provincial Executive should then first consider any representations made by the Municipal Council and decide whether or not to proceed with the intervention. The Provincial Executive must notify the Municipal Council in writing of its decision to assume responsibility for those executive obligations where the directive has not been complied with. The Provincial Executive should furthermore submit a business plan, which will clearly be informed by the directive and which *inter alia* will set out how the Provincial Executive intends to restore the fulfilment of the relevant obligations and ensure fulfilment in the long term. See De Visser, Steytler and Mettler 2000 *DPLG* 21-29.

supply of water. The province must furthermore prove that the assumption of responsibility will prevent the Municipal Council from taking unreasonable action that is prejudicial to the interests of another municipality or the province as a whole, and that economic unity will be maintained by the provincial government's assuming the responsibilities of a non-compliant municipality.⁴⁷⁰ These conditions are set to protect the autonomy of municipalities. The *necessity* to intervene should be determined prior to actual intervention, while importance or desirability does not amount to necessity.⁴⁷¹ It follows that upon an actual failure to deliver water supply services, a provincial government would be expected to act and intervene. After making a decision to assume the responsibility for the performance of a municipal function, the Provincial Executive must seek approval from the Minister for Provincial and Local Government.⁴⁷² The Provincial Executive must arrange for the tabling in the Provincial Legislature and the NCOP of the notice of the intervention. The NCOP must approve the intervention within thirty days of its first sitting after the intervention began. The thirty day period has the potential of temporarily suspending the process of intervention, while the situation which gave rise to the decision to intervene, such as the lack of water supply, would remain.

4.3.2.6 *Intervention through the dissolution of a Municipal Council*

Section 139(1)(c) provides for the dissolution of a Municipal Council "if exceptional circumstances warrant such a step". This is to prevent a province from interfering with the administration of a municipality on an *ad hoc* basis, as intervention is allowed only in cases of extraordinary non-

470 Ss 139(1)(b)(i), (ii) and (iii).

471 *Ex parte President of the Republic of South Africa In re: Constitutionality of the Liquor Bill 2000* 1 BCLR 1 (CC) par 81, as quoted by De Visser *Developmental Local Government* 188, where the court had to decide on the constitutionality of legislative intervention by central government in the exclusive provincial matter of liquor licences.

472 All copies of notices, directives and representations should be provided by the Provincial Executive, including any relevant information needed for the Minister to take a well-informed decision on the use by the Provincial Executive of its discretion. Examples are: (i) representations or reports submitted to the Provincial Executive by organised local government; (ii) reports on prior attempts made by the province to support the municipality; (iii) any information submitted by the Council on the request of the MEC or any relevant information submitted in terms of specific legislation; (iv) reports of investigations conducted by provincial officials; (v) minutes of public hearings held by the province; and (vi) copies of relevant complaints, letters and petitions that reached the Provincial Executive. See De Visser, Steytler and Mettler 2000 *DPLG* 26-27.

compliance. Section 34(3) of the *Structures Act* was initially intended to provide for the dissolution of a Council.⁴⁷³ Nowadays such a dissolution has a basis in the Constitution.⁴⁷⁴ It is, however, still unclear under which circumstances the MEC can dissolve a Council. Section 34(3)(b) of the *Structures Act* does not indicate which form of section 139 intervention should precede the dissolution of a Council.⁴⁷⁵ It is also not clear whether dissolution is meant to be the final step in the process of intervention, or whether it should be preceded by the assumption of responsibility.⁴⁷⁶ Another undecided factor is the reference to "exceptional circumstances" and the extent of the urgency of the situation necessary to trigger dissolution.

In the case of *Mnquma Local Municipality and Another versus the Premier of the Eastern Cape and Others* 231/2009 ZAECBHC 14⁴⁷⁷ the court however rejected the notion of "successive steps" should provincial government need to take appropriate steps to rectify an inadequacy in a municipality.⁴⁷⁸ In accordance with this approach a provincial government is free to choose whether it wishes to issue a directive, assume responsibility or dissolve a municipal council.

4.3.3 Intergovernmental agreements

There are other less obvious measures available to provincial government to address service delivery challenges in municipalities, and to prevent or rectify, for instance, municipalities' failure to provide sufficient water to its communities. Intergovernmental agreements may, for example, be

473 De Visser *et al* 2000 *Provincial Supervision* 33. S 34(3) of the *Structures Act* provides that the MEC for local government in a province, by notice in the Provincial Gazette, may dissolve a Municipal Council in the province if (b) an intervention in terms of s 139 of the Constitution has not resulted in the Council being able to fulfil its obligations in terms of legislation.

474 S 139 of the Constitution.

475 The most logical interpretation of s 34(3)(b) suggests that the route to dissolution is open only after an unsuccessful s 139(1)(b) intervention, namely the assumption of responsibility by the Provincial Executive. The text of s 34(3)(b) suggests that *any* kind of unsuccessful s 139 intervention opens up the route to dissolution. See De Visser *Provincial Intervention in a Municipality* 31-32.

476 De Visser argues that the insertion of the word "or" between ss 139(1)(b) and (c) suggests a choice between the instruments rather than a succession of steps. See De Visser, Steytler and Mettler 2000 *DPLG* 20.

477 *Mnquma Local Municipality and Another v The Premier of the Eastern Cape and Others* (231/2009) 2009 ZAECBHC 14. Hereafter referred to as the *Mnquma* case. See also Ntlizywana 2010 *Local Government Bulletin* 18.

478 *Mnquma* case 73.

concluded between provincial and local government, although these agreements are not based on a contractual model that creates binding obligations on the parties. The objective of intergovernmental agreements is "to promote political and administrative certainty on common national priorities"⁴⁷⁹ and to concretise cooperative government between provincial and local government in accordance with the principles of chapter 3 of the Constitution.⁴⁸⁰

To assist with the possible use of an intergovernmental agreement, section 35 of the IGRFA allows for the drafting of an "implementation protocol"⁴⁸¹ in the following instance:

Where the implementation of a policy, the exercise of a statutory power, the performance of a statutory function or the provision of a service depends on the participation of organs of state in different governments, those organs of state must coordinate their actions in such a manner as may be appropriate or required in the circumstances.

National and provincial government is forced to consider an implementation protocol if it will materially assist them to "support the local sphere of government or to build capacity in that sphere",⁴⁸² or when the coordination of actions in providing a service in a specific area is required.⁴⁸³

Intergovernmental agreements therefore seem to be a potential measure whereby the provincial and local government may agree on specified roles and responsibilities, including in relation to water supply services.⁴⁸⁴

479 Powell 2010 <http://www.communitylawcentre.org.za> 38.

480 Department of Provincial and Local Government 2003 *A guideline document on provincial-local intergovernmental relations* 21-22. See par 4.2 on cooperative government.

481 An implementation protocol is sometimes also referred to as a memorandum of understanding. DWAF *Guidelines on the practical application of the Intergovernmental Relations Framework Act 13 of 2005* 34. For practical examples of Memoranda of Understanding see the Department of Provincial and Local Government 2003 *A guideline document on provincial-local intergovernmental relations* 21-22.

482 S 35(2)(b) of the IGRFA.

483 S 35(2)(c) of the IGRFA. See s 35(3) for the content and role of an implementation protocol.

484 Intergovernmental agreements provide a measure of certainty, especially where the roles of the different spheres of government interrelate. See Powell 2010 <http://www.communitylawcentre.org.za> 38. For more information on implementation protocols, see Powell 2010 <http://www.communitylawcentre.org.za> 36-37 and DWAF *Guidelines on the practical application of the Intergovernmental Relations Framework Act 13 of 2005* 34-37.

4.3.4 *Dispute resolution measures*

Disputes between organs of state are unavoidable, given the complex relationships between the different spheres of government.⁴⁸⁵ This holds true with respect to water services to the extent that all of the spheres of government are responsible for realising people's right of access to sufficient water. Section 1 of the IGRFA defines an intergovernmental dispute as:

a dispute between different governments or between organs of state from different governments concerning a matter-

(a) arising from –

(i) a statutory power or function assigned to any of the parties; or

(ii) an agreement between the parties regarding the implementation of a statutory power or function; and

(b) which is justiciable in a court of law, and includes any dispute between parties regarding a related matter.

The assumption is made that there is more than one party to an *intergovernmental* dispute, and that these parties should be spheres of government or organs of state that experience differences with regards *inter alia* to powers and functions or agreements.⁴⁸⁶ The duty to provide water is a *statutory function* assigned to local government.⁴⁸⁷ Upon the failure of local government to provide water to communities i.e. in the event of failing municipal water supply services, a dispute is likely to arise between spheres of government. The fact that the interests of communities are furthermore left unprotected whilst their constitutional right of access to sufficient water is infringed could intensify such a dispute and should therefore serve as the motivation urgently to solve the problems related to the failure of the municipality to supply water. Cooperative government requires of organs of state to avoid conflict and to deal with disputes in a constructive manner.⁴⁸⁸

485 Akintan and Christmas 2006 *Intergovernmental Dispute Resolution* 8. Schoeman argues that disputes may arise due to the fragmented nature of legislation as well as the fragmentation within government, among the spheres of government and among the line functionaries within each sphere. See Schoeman *Alternative Dispute Resolution Methods* 7.

486 For a definition of intergovernmental disputes, see the Department of Provincial and Local Government and the Ministry for Provincial and Local Government 1999 <http://www.cogta.gov.za/subwebsites/idpmanual> 125-126.

487 See chapter 3.

488 Ss 41(2)-(4) of the Constitution.

There is furthermore increasing emphasis on the use of alternative dispute resolution (ADR) instruments such as mediation, conciliation, arbitration and other alternative processes, including in cases of intergovernmental disputes. The outcomes of these processes are usually creative, are more effective in terms of time and costs, and provide the chance of saving relationships.⁴⁸⁹ In *National Gambling Board v Premier, KwaZulu-Natal and Others* 2002 2 SA 715 (CC)⁴⁹⁰ the court itself observed that organs of state should settle disputes in a pro-active and creative way by considering "alternative possibilities and compromises [...] with regard to the expert advice the other organs of state have obtained".⁴⁹¹ It follows that alternative dispute resolution could be another appropriate measure to address intergovernmental disputes by providing for mechanisms which resolve disputes at a political level and not through the intervention of the judiciary.⁴⁹² To describe a dispute with reference to a fictitious scenario; Municipality A fails to provide water of a good quality, rendering it unsafe for the community to consume the water. Provincial Government B issues a directive to rectify the situation, thereby already providing grounds for a disagreement or dispute. Municipality A may deny the situation or accuse the Provincial Government B of a failure to provide adequate supervision or funding or of having political motives for intervening, thus creating another ground for dispute.

However, references to ADR measures to address inter-governmental disputes seem to be lacking in most sectoral legislation dealing with local government and water services. The NEMA⁴⁹³ provides for the resolution of inter-governmental disputes, but the application of ADR methods is limited. The NWA⁴⁹⁴ provides for negotiation or mediation, but these are not applicable to inter-governmental disputes. The ADR provisions in the

489 This is especially relevant in cases where the parties to the dispute must work together after the dispute is settled, which is the case where organs of state or spheres of government have declared a dispute. The disadvantages of litigation include delay, costs, the duration of hearings, the limited range of possible outcomes, and the adverse effect on future relations between the parties. See Steytler and Boule *Intergovernmental Dispute Prevention and Settlement* 5.

490 *National Gambling Board v Premier, KwaZulu-Natal and Others* 2002 2 SA 715 (CC) par 36.

491 Akintan and Christmas 2006 *Intergovernmental Dispute Resolution* 6.

492 Schoeman *Alternative Dispute Resolution Methods* 18.

493 Chapter 4 of NEMA.

494 S 150 of the NWA.

*Systems Act*⁴⁹⁵ are aimed at internal relationships within the local sphere of government, and the *Structures Act*⁴⁹⁶ similarly provides for disputes between district and local municipalities.

This lacuna in South African law does not, however, render ADR of less use as an intergovernmental response measures. For this reason, the section below discusses the main categories of ADR. ADR will be discussed against the scenario of Municipality A, which fails to provide water to its communities, and Province B, which acts against the failure:

4.3.4.1 *Voluntary dispute resolution*

Voluntary dispute resolution involves private decision-making by the parties themselves and mainly involves negotiation and mediation. Negotiation is the voluntary exchange of information, for example between a municipality and a provincial government, to resolve a perceived or actual conflict. The parties have total control over procedures, the settlement and its contents. Mediation involves an impartial and neutral third party's assisting Municipality A and Province B to deal with the dispute, for example the issuing of a directive, and to reach agreement on how the non-compliance will be rectified. The mediator controls the procedures and makes suggestions. Municipality A and Province B would typically control the settlement and its content.⁴⁹⁷

In mediation the interests of parties or third parties are more important than the presentation of evidence and arguments. Municipality A and Province B will meet voluntarily. An independent mediator is appointed who will decide upon the process to be followed to ascertain the facts of the dispute.⁴⁹⁸ Mediation is especially appropriate as Municipality A and Province B are likely to be involved in a long-term relationship (which is usually the case between organs of state) and have to find ways to address disagreements which will enable them to continue with the relationship after the dispute has

495 S 109 of the *Systems Act*.

496 S 86 of the *Structures Act*.

497 Pretorius (ed) *Dispute Resolution* 7.

498 For an explanation of the mediation process see Nupen "Mediation" in Pretorius (ed) *Dispute Resolution* 39-72. For more information on ADR and the international use thereof, see Boule 2002 *ADR Bulletin* 27-29 as well as Alder *The use of mediation* 4-6 for a historic view and a description of the benefits of mediation.

been settled.⁴⁹⁹ In the scenario sketched above, a mutually acceptable agreement may (and should be) be reached between Municipality A and Province B, which is free from political influence and which will address the real issue.⁵⁰⁰

Another form of voluntary dispute resolution is conciliation. Conciliation is similar to mediation, with the difference that the conciliator will make a formal recommendation to the parties for the settlement of the dispute.⁵⁰¹ This method of dispute resolution is voluntary and the parties are not mandated to participate. This may, however, delay the resolution of the dispute, as negotiation will first be needed to get the relevant municipality and provincial government to join the voluntary proceedings.⁵⁰²

4.3.4.2 *Mandatory dispute resolution*

When Municipality A and Province B are required by legislation to participate in specific dispute resolution instruments, they are mandated to attempt to resolve the dispute through alternative measures before judicial action is taken. The Constitution requires in section 41(2)(b) that an Act of Parliament must provide appropriate mechanisms and procedures for intergovernmental dispute resolution. Chapter 4 of the IGRFA gives effect to this constitutional requirement. Section 45 prevents the parties to a dispute from resorting to judicial proceedings during the informal stage of the dispute resolution process unless the dispute has been declared a formal intergovernmental dispute in terms of section 41(1) of the Constitution. Sections 41 to 45 of the IGRFA detail the steps that organs of state should follow to settle disputes.⁵⁰³

499 Nupen "Mediation" in Pretorius (ed) *Dispute Resolution* 40.

500 Community members may form part of the mediation process to ensure the protection of their rights and interests.

501 Pretorius (ed) *Dispute Resolution* 4. See also Storm 2011 <http://www.dsclaw.co.za>.

502 For a list of the benefits of various ADR instruments see Brand "The nature of the arbitration process" in Pretorius (ed) *Dispute Resolution* 100-101. See also Brand "Amicable Dispute Resolution in South Africa" in Ingen-Housz (ed) *ADR in Business* 591-599 for a summary of the primary areas of ADR in South Africa.

503 A dispute has to be formally declared as a formal intergovernmental dispute (s 41), setting up a meeting (s 42) appointing a facilitator (s 43) and assistance by the Minister or MEC for Local Government (s 44).

The *Systems Act* provides for an *ad hoc* committee to settle disputes between the MEC and a municipality relating to a municipality's IDP.⁵⁰⁴ The MFMA deals with disputes between organs of state relating to finance.⁵⁰⁵ This section unfortunately fails to identify the specific instrument of dispute resolution that should be used. The NEMA also provides for the resolution of an environmental dispute by means of conciliation, and should conciliation measures fail, the parties may proceed to arbitration.⁵⁰⁶ The DPLG has also published a guide with guidelines on how to prevent or settle intergovernmental disputes.⁵⁰⁷

4.3.4.3 *Private adjudication by third parties*

Arbitration is an example of private adjudication by third parties. Arbitration is defined as "the intervention by a third party into a dispute", whereby the impartial arbitrator will hear the arguments and make a decision with the intention of resolving the dispute.⁵⁰⁸ The decision may be binding on the parties or may be regarded as mere advice. This manner of dispute resolution is voluntary when Municipality A and Province B agree to resolve a dispute through arbitration, or the method may be mandatory if required by law or prior agreement.

The parties to arbitration choose and control or design the procedure, whilst the arbitrator's award binds the parties. No appeal to a higher court is available upon the arbitrator's award. Unfortunately a more influential party

504 S 31(d) of the *Systems Act*. An *ad hoc* committee is convened and acts to resolve the issues.

505 S 44(1) of the MFMA. Whenever a dispute of a financial nature arises between organs of state, the parties concerned must as promptly as possible take all reasonable steps that may be necessary to resolve the matter out of court.

506 Ss 17-19 of the NEMA. Conciliation is possible in disputes concerning the exercise of functions which may significantly affect the environment.

507 DWAF *Guidelines on the practical application of the Intergovernmental Relations Framework Act 13 of 2005* 39-40. In cases of a dispute, parties to the dispute are encouraged to determine the nature of the dispute, negotiate, declare a dispute, convene a meeting, define the dispute and identify an existing dispute resolution mechanism. After appointing a facilitator, the parties should participate in good faith in the dispute resolution process, ask for the assistance of the MEC or Minister if necessary, and implement and monitor the agreement reached, or alternatively go to court.

508 Pretorius (ed) *Dispute Resolution* 5, 94. For detail on arbitration, see Brand "The nature of the arbitration process" in Pretorius (ed) *Dispute Resolution* 93-101 and Brand "How to participate in the arbitration process" in Pretorius (ed) *Dispute Resolution* 102-112.

to an arbitration process may determine or affect the outcome.⁵⁰⁹ The outcome of the arbitration is therefore not necessarily a mutual agreement between the parties, unlike mediation or negotiation, which involves discussions until a win-win situation is reached and the failure related to the municipal water supply, for instance, is rectified.

4.3.4.4 *Judicial action*

One of the most obvious response measures available to provincial government is to take a non-compliant municipality to court. However, in line with the principles of cooperative government, section 41(2)(b) and (3) of the Constitution requires that all mechanisms, remedies and procedures available to address inter-governmental disputes be used and exhausted *before* a dispute may be referred to a court for litigation.⁵¹⁰ All spheres of government and organs of state to which the IGRFA apply must seek to achieve the objectives of the IGRFA and avoid intergovernmental disputes when exercising their powers or performing their functions.⁵¹¹ The IGRFA, however, applies only to intergovernmental disputes if other statutes do not address the dispute or the National or Provincial Executive is not required to intervene in the functions of a municipality.⁵¹²

The constitutional principles of cooperative government discourage the taking of judicial action against organs of state *inter se*, and alternatively allow for

509 Provincial or national government have the potential of appearing more influential when juxtaposed against local government. Unlike judicial action, where extraneous power has little effect on the outcome, it has a major effect on the outcome in mediation. For a useful executive comparison between arbitration, judicial action and mediation, see Brand "The nature of the arbitration process" in Pretorius (ed) *Dispute Resolution* 100-101.

510 Schoeman argues that disputes may arise due to the fragmented nature of legislation as well as fragmentation within government, among the spheres of government, and among the line functionaries within each sphere. See Schoeman *Alternative Dispute Resolution Methods* 7.

511 S 37(1)(a). S 40(2) of IGRFA requires that any formal agreement between two or more organs of state must include clauses providing for dispute-settlement mechanisms or procedures. Such mechanisms or procedures should be appropriate to the nature of the agreement and the matters likely to become the subject of a dispute.

512 The NEMA and NWA similarly provide that conflicts that arise between organs of state must be resolved through conflict resolution procedures. S 2(4)(m) of the NEMA states that " (a)ctual or potential conflicts of interest between organs of state should be resolved through conflict resolution procedures". S 150 of the NWA provides for mediation to take place in cases of dispute. See par 4.3.4 for more detail on ADR generally.

the pursuance of a lengthy process of various steps to address, for example, legal non-compliance by municipalities.⁵¹³ Government structures must first strive for the internal resolution of disputes before external resolution such as a court order is pursued.⁵¹⁴ In *National Gambling Board v Premier, KwaZulu-Natal and Others* 2002 2 SA 715 (CC), the court stated that the organs of state should re-evaluate the need to consider alternative methods to solve disputes and to "do so with regard to the expert advice the other organs of state have obtained", thereby referring to cooperative government.⁵¹⁵

The disadvantages of litigation are ample, such as the cost, the delay, the duration of the hearings, and the harmful consequences for the relationships between the parties to the dispute or the organs of state, including provincial and local government.⁵¹⁶ The principles of cooperative government are based on the belief that government is more responsive to community needs when organs of state act in collaborative ways.⁵¹⁷ It should be made clear that litigation is not excluded as a response measure at the disposal of provinces to address failing municipal water supply, but the disadvantages should serve as an incentive to first resort to alternative methods to address such failure.

4.4 Preliminary observations

An attempt was made in the paragraphs above to investigate the different response measures available to provincial government to address the failure of local government to supply sufficient water to communities. Whilst unpacking the different measures, some observations came to the fore. Briefly, these could be described as the following:

513 The process may involve *inter alia* compliance notices, directives, alternative dispute resolution and intervention.

514 It is clear that the avenues available in terms of cooperative government should be used to resolve any disputes among organs of state. It was held in the case of *Uthukela v President of the Republic of South Africa* 2002 11 BCLR 1220 (CC) par 14. that: "(i)n view of the important requirements of cooperative government, a court... will rarely decide an intergovernmental dispute unless the organs of state involved in the dispute have made every reasonable effort to resolve it at a political level".

515 *National Gambling Board v Premier, KwaZulu-Natal and Others* 2002 2 SA 715 (CC) par 36.

516 Steytler and Boule 2006 *Intergovernmental Dispute Prevention and Settlement* 5.

517 See par 4.3.4 for alternative measures of dispute resolution.

- In cases where Province B monitors Municipality A through various reporting instruments,⁵¹⁸ Province B should act pro-actively where Municipality A fails in terms of water supply services, and address the failure as soon as possible. Province B should consider instituting other monitoring instruments and not wait for the annual report, as water services issues may multiply in a short time.⁵¹⁹
- Where Province B acts as a monitoring "agent" it should attempt to empower Municipality A and not impede its powers and functions to provide water supply services, for example.⁵²⁰
- When national government decides to stop the funding of Municipality A due to its persistent failure to provide water to communities, this may have a negative effect on the municipality's budget and should be used only as a measure of last resort.⁵²¹
- Due to the existence of many uncertainties with regards to the dissolution of a Municipal Council and because it is one of the most intrusive measures and impacts on the autonomy of the municipality, it is a measure which should be instituted in exceptional circumstances only.⁵²²
- In the case of a dispute between Municipality A and Province B, the negative consequences of the dispute on their relationship as well as the possible adverse consequences on the community should be minimised.⁵²³
- The extended process that normally characterises judicial action may have the potential of weakening the judicial system and complicating the enforcement of the response measures provided for in the legislation. The urgent nature of Municipality A's failure to provide water and the subsequent effect on communities' health, well-being, dignity and other

518 See par 4.3.1.2 on reporting instruments.

519 See par 4.3.1.2.

520 *White Paper on Local Government* 1998 40-41.

521 For a recent example of the stopping of funds, see Anonymous 2012 <http://www.treasury.gov.za>, in which National Treasury stopped financial transfers to the Nala Local Municipality in the Free State because of its mismanagement of public funds.

522 For more information on the dissolution of a Council, see DPLG 2007-2008 *Practitioner's Guide to the Intergovernmental Relations System in South Africa* 44.

523 Steytler and Boule *Intergovernmental Dispute Prevention and Settlement* 5. Negative consequences could include the damaging of intergovernmental relations and the destructive actions taken by organs of state, which may be detrimental to the communities.

rights requires that the problem should be solved swiftly. Court proceedings are known to be lengthy and to involve many delays, and should in most instances be resorted to only if unavoidable.⁵²⁴

4.5 A proposed intergovernmental response model in the event of failing municipal water provision

What follows is a proposed model to portray the response measures available to provincial government⁵²⁵ in addressing failing municipal water provision. The objective of the proposed model is to provide provincial government with specific steps in which the elements of intergovernmental response measures are portrayed, in accordance with the relevant legislation discussed above. The intergovernmental response measure model aims to prioritise the options available for provincial government to act upon a municipality's failure to provide adequate and sufficient water. The measures are presented from the least intrusive into the operations of local government to the most intensive. The objective is to provide options for addressing non-compliance with applicable law and some extent of certainty to all of the parties involved with respect to their roles and responsibilities.

4.5.1 Enforcement protocol

The former Department of Water Affairs and Forestry (DWAFF) suggested an enforcement protocol to deal with the general non-compliance of organs of state.⁵²⁶ This protocol is therefore also applicable to failing municipal water supply services. The DWAFF enforcement protocol contains generic responses and specific processes for varying types of situations of non-compliance with applicable law. According to this enforcement protocol, specific steps must be taken before legal enforcement action against the non-compliant municipality may be taken. The first step is to detect and prioritise the non-compliant municipalities, whereafter an investigation into the main causes and possible solutions will follow. The protocol concludes

524 See par 4.3.4.4.

525 National government will step in only upon the failure of the provincial government to successfully intervene.

526 For an illustration of this protocol, see the DWAFF 2008 *National Water Services Regulation Strategy* 41. The protocol may be fast-tracked in cases where, for example, public health and the safety of people are at risk. It is stated that cooperative government is a key feature of the enforcement protocol.

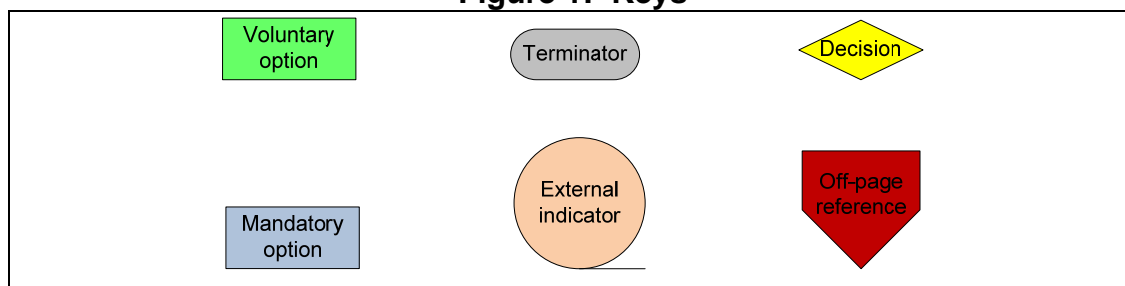
with legal action if none of the prior steps had a positive effect on the compliance of the municipality. This DWAF enforcement protocol is partially included in the proposed model in the next paragraph.

4.5.2 A model for intergovernmental response measures

A model for intergovernmental response measures is proposed in what follows below (see Figure 2). The steps included in the model should not be seen as fixed steps, but merely as a proposal of fluid options available to national and provincial government to address failing municipal water supply services. The options presented are in accordance with legislation and the measures discussed above. Every decision node in the model involves the option of the municipality's rectifying the situation, for instance by re-instating a satisfactory water supply, which will render further action by the provincial government unnecessary. Actions taken against a municipality are instituted by a provincial government. Only upon a provincial government's failure to act will national government intervene.⁵²⁷ The order of the options in this presentation is from the least to most intrusive into the autonomy of local government. Supervision and administrative measures are the least intrusive, whilst intervention in and legal action against a municipality are regarded as invasive measures. The complete model is portrayed in Figure 2, after which a description of sub-sections of the model will follow.

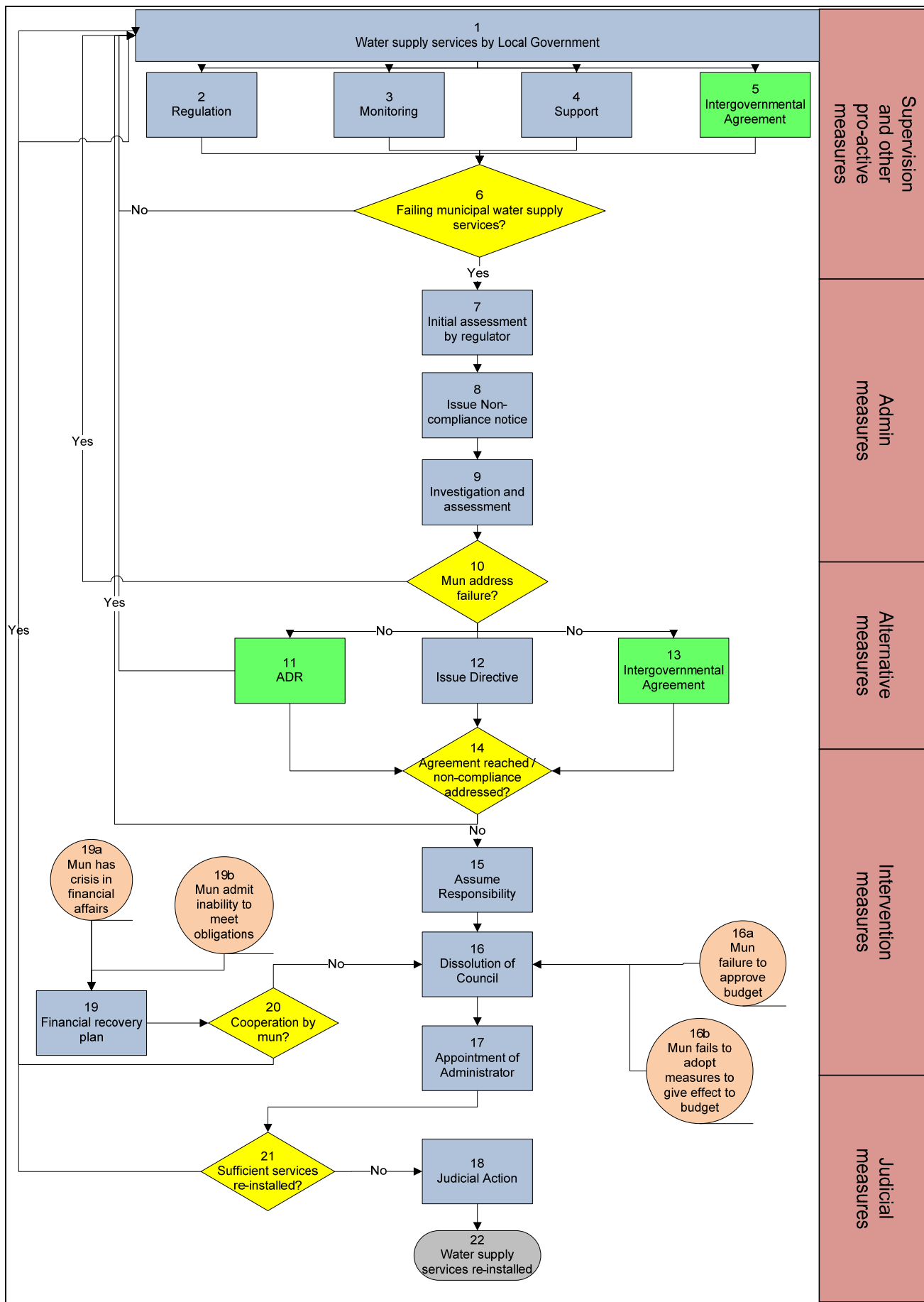
The following keys are used in the model:

Figure 1: Keys



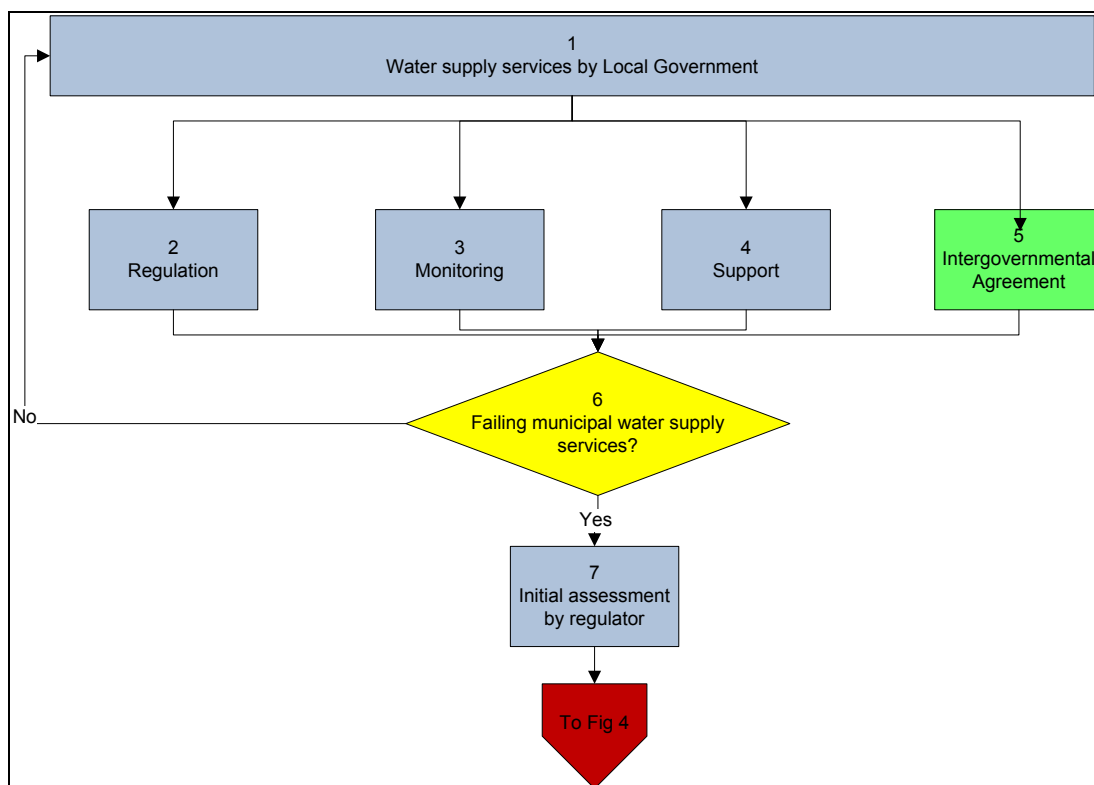
527 S 100 of the Constitution.

Figure 2: A model for intergovernmental response measures



4.5.2.1 Cooperative or preventative and administrative measures

Figure 3: Cooperative / preventative measures and administrative measures



The proposed model for cooperative and administrative measures (see Figure 3) starts off with sufficient water supply by local government and the objective is to maintain the water supply in a sustainable manner. Steps 2 – 4 are the mandatory measures instituted by the Constitution and provide for provincial government to supervise the service delivery of municipalities,⁵²⁸ which includes support, monitoring, and regulation.⁵²⁹ A proactive voluntary measure to improve service delivery may be the conclusion of an intergovernmental agreement (step 5) which stipulates the specific roles and responsibilities of the parties to the service delivery agreement.⁵³⁰ When the municipality fails⁵³¹ to deliver sufficient water regardless of the preventative measures taken by provincial government, steps must be taken to address the situation or risk infringing on people's constitutional right of access to

528 See par 4.4.1 for the measure of supervision.

529 See par 4.3.1 on supervision.

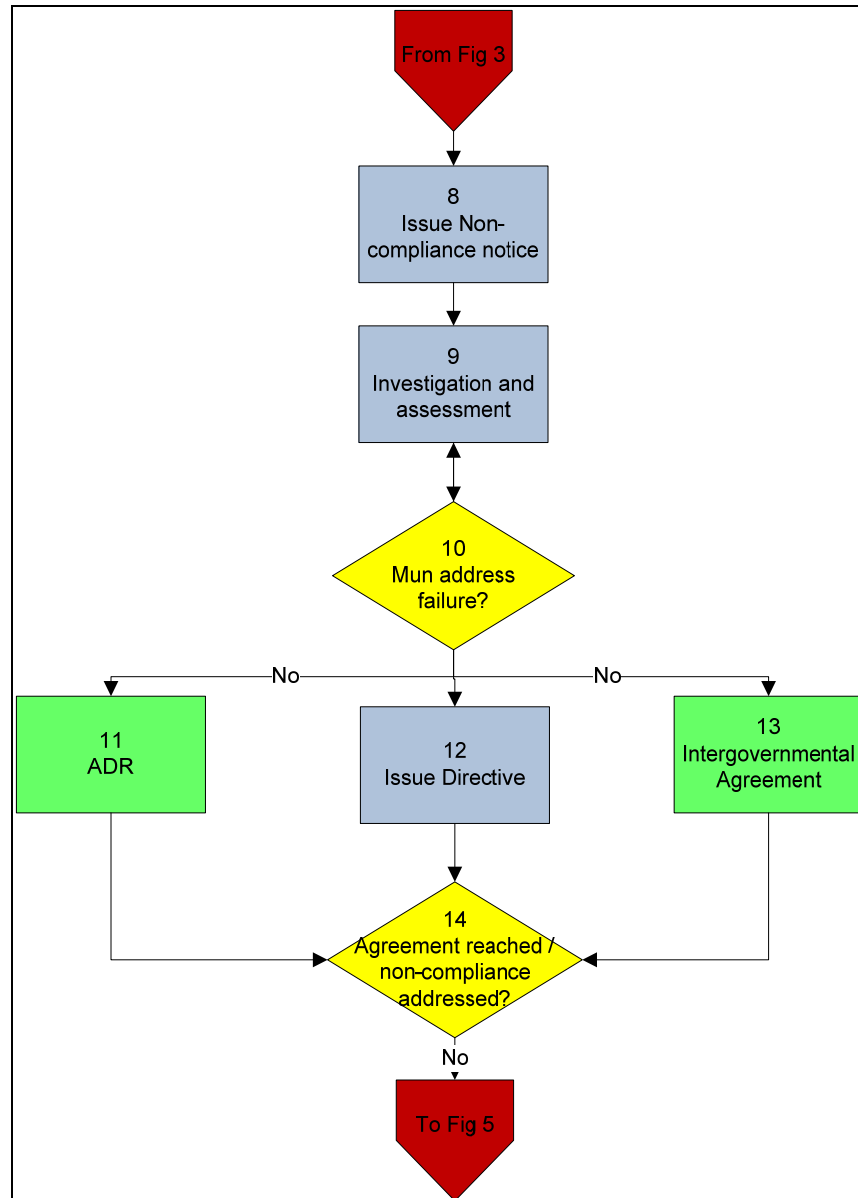
530 See par 4.4.3 for a discussion on environmental agreements.

531 See par 2.8 and 3.3 above for the defining elements of failing water supply services.

sufficient water.⁵³² Also note that supervision by provincial government in support of local government should be a continuous process.⁵³³ Upon any real or perceived failure of a municipality to provide water supply services, the measure of supervision may be heightened and utilised as an investigative instrument into the failure.

4.5.2.2 Directives and alternative measures

Figure 4: Directives and alternative measures



The first step to be taken after a municipality's persistent or serious failure to supply water is to issue an administrative notice such as a non-compliance

532 S 27(1)(b) of the Constitution.

533 See par 4.3.1.3.

notice as an early warning (see Figure 4). The provincial government should undertake an assessment, classify the incident and write a report. The non-compliance notice should include either an action plan or request the water services authority (or municipality) to submit an action plan.⁵³⁴ The municipality may address or amend the situation and report on progress made in implementing the action plan or addressing the non-compliance. Upon compliance, any further action from provincial government is deemed unnecessary.

If the actions taken (above) fail to achieve the desired outcome,⁵³⁵ the Provincial Executive must issue a directive to the non-compliant municipality.⁵³⁶ It may also decide on the relevant measure needed to resolve the issue of non-compliance, including any of the ADR methods,⁵³⁷ or the conclusion of an intergovernmental agreement.⁵³⁸ These measures are voluntary.

If none of these measures are successful and the provincial authority and municipality cannot reach an agreement, the resuming of section 139 intervention is the proposed next step.

534 DWAF 2008 *National Water Services Regulation Strategy* 42.

535 In cases of significant risk arising from non-compliance, the process may start at step 12.

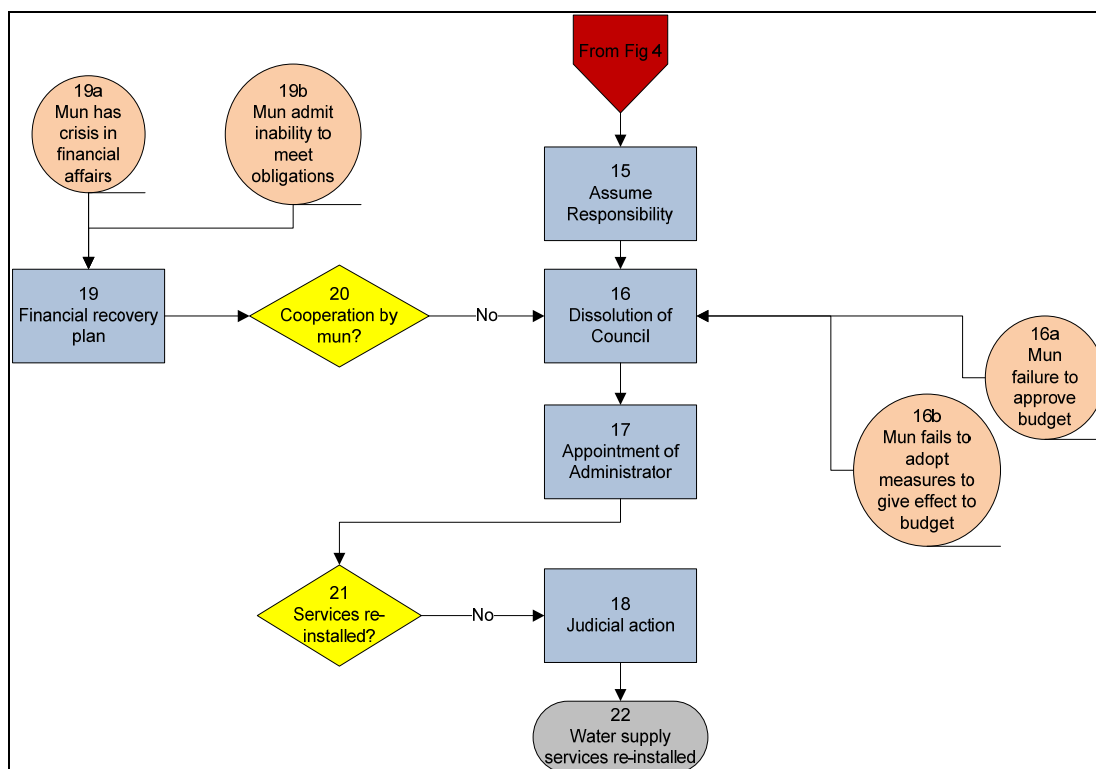
536 See par 4.3.2.4 for detail on directives. The directive must be issued even though intervention may seem unnecessary.

537 Refer to par 4.4.4 on dispute resolution measures.

538 See par 4.4.3 on environmental partnerships. The parties involved may conclude an agreement on the way forward.

4.5.2.3 Intervention

Figure 5: Intervention measures



In accordance with section 139 of the Constitution, the provincial government may assume responsibility for the relevant obligation of the non-compliant municipality, (see Figure 5) and in exceptional circumstances, even dissolve the Council. An administrator may be appointed by the provincial government (step 17), especially in cases where a municipality failed to approve its budget or to adopt measures to give effect to the budget.⁵³⁹ (Steps 16a and 16b)

Should a municipality have a crisis in its financial affairs⁵⁴⁰ or admit its inability to meet the obligations of providing water services (steps 19a and 19b), a financial recovery plan should be devised by the province (step 19), and in the case of unsuccessful implementation thereof by the municipality, the Council may be dissolved and an administrator appointed.⁵⁴¹ As a very

⁵³⁹ See par 4.3.2.3 on financial interventions.

⁵⁴⁰ The specific type and extent of the "financial crisis" is not defined clearly in the Constitution.

⁵⁴¹ See par 4.3.2.6 for the process of dissolution of a Council.

last resort, legal intervention may be instituted, to force the municipality through judicial action to re-institute the water supply.⁵⁴²

It is an unfortunate truth that the steps proposed in the intergovernmental response measures model may be time consuming and have a high demand on human and financial resources. The proposed model is based on what is currently provided for in legislation, but it is suggested that further research be conducted on arriving at a shorter and more economical process of intergovernmental response.

It is an unfortunate turn of events that the court in the *Mnquma* case rejected the process of successive steps when it comes to a section 139 intervention. By this ruling, the court seriously compromises the autonomy of municipalities by offering provincial government the freedom to use any means of resolution of a municipal issue, without first using less intrusive measures.⁵⁴³

4.6 Concluding observations

Both national and provincial government are mandated to support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their duties.⁵⁴⁴ The Constitution furthermore provides for the principles of cooperative government and sound intergovernmental relations.⁵⁴⁵ All spheres of government and all organs of state within each sphere are instructed to "cooperate with one another in mutual trust and good faith by fostering friendly relations and assisting and supporting one another".⁵⁴⁶ The avenues available to provincial government to intervene into or support local government are ample. For example, section 139 of the Constitution provides for instances where a provincial sphere may intervene in a municipality within its jurisdiction.⁵⁴⁷

542 See par 4.3.4.4 for a discussion on judicial action.

543 See Ntlizywana 2010 *Local Government Bulletin* 19.

544 See par 4.3.1.3.

545 See par 4.2.

546 DPLG 2007 *The Implementation of the Intergovernmental Relations Framework Act* 9. S 41(1)(h) of the Constitution.

547 See par 4.3.2.

An intergovernmental response measure model prioritising the options available for provincial government to act upon a municipality's failure to provide water has been proposed in this chapter. Options have been presented from the least intrusive (measures such as supervision) to the most invasive measures (such as intervention and judicial action). The objective is to provide some guidelines to provincial government for addressing municipal non-compliance and a measure of certainty to all of the parties involved.

In the next chapter a final conclusion is drawn.

Chapter 5: Conclusion

Given the numerous deleterious environmental factors the country has to deal with, such as climate change, droughts, and its semi-arid climate, South Africa could be on the brink of facing serious water shortages.⁵⁴⁸ In the face of this potential crisis local government still remains the sphere of government responsible for providing water services to communities.⁵⁴⁹ Water services are defined as water supply services and sanitation services. This study has focused on the former. Despite the constitutional and statutory mandate of local government to provide access to sufficient water of a quality that is not harmful to human health or well-being,⁵⁵⁰ service delivery and in particular water supply services appear to be a pressing and continuing challenge for all spheres of South African government, as is also often the case internationally.⁵⁵¹

5.1 Revisiting the research question

The objective of the research pertains to the intergovernmental response measures available to provincial government to address failing municipal water provision. To determine the scope of legal and intergovernmental measures, an attempt was first made to define "failing municipal water supply services".⁵⁵² In order to define "failing" services the duties pertaining to service delivery, in this case water supply to the communities within a municipal area,⁵⁵³ were unpacked.

5.2 Water supply services by local government

Local government is assigned the executive authority and right to administer the functional areas listed in Schedules 4B and 5B of the Constitution, which includes water supply services.⁵⁵⁴ The legislative competence over this area of service provision is vested concurrently in the national and provincial

548 Par 1.1.
549 Par 1.3.2.
550 Par 2.2.2 and 3.2.6.
551 Par 2.5.
552 Par 2.8 and 3.3.
553 Chapter 3.
554 Par 1.3.2 and 2.2.

government, a fact which suggests the need for cooperative state action in relation to legislating on water provision and governance.⁵⁵⁵

People's right of access to sufficient water as provided for in the Constitution requires (all three spheres of) government to give access to sufficient quantities as well as an adequate quality of water.⁵⁵⁶ The water should be of a sufficient quality to be fit for human consumption. The water supply services should also be sustainable. Sustainability means that there would have to be adequate resources to operate, maintain, rehabilitate and expand services in future, if necessary.⁵⁵⁷

Local government is an autonomous sphere of government. The Constitution recognises a municipality's right "to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution". Local government is also regarded as being the sphere of government closest to the people, and therefore plays a significant role within the overall government structure.⁵⁵⁸

Municipalities are constitutionally obliged to be developmental.⁵⁵⁹ A municipality must give priority to the basic needs of the community and simultaneously promote the development of the community. This means that apart from service delivery a municipality must contribute to the movement of the community towards an environmentally, socially and economically sustainable future, whilst at the same time promoting a safe and healthy environment, and involving communities and community organisations in its governance matters.⁵⁶⁰

5.3 The rights of people and the duties of local government

The state, including municipalities, has the general duty to respect, protect, promote and fulfil people's rights as provided for in the Bill of Rights.⁵⁶¹ One of these rights is the right to have access to sufficient water. The right to

555 Par 4.2.

556 Par 2.2.2 and 3.2.6.

557 Par 3.2.7, 3.2.10 and 3.2.11.

558 Par 2.3.

559 Par 2.4.

560 Par 3.2.8.

561 Par 3.2.1.

water is also linked to other constitutional rights such as the right to life, dignity and equality.⁵⁶² The Constitution states which role local government should play in realising the constitutionally entrenched rights of all people, including the right of access to water. Local government should furthermore give effect to people's environmental right,⁵⁶³ conserve the environment,⁵⁶⁴ provide and maintain physical infrastructure,⁵⁶⁵ give effect to their public administrative duties,⁵⁶⁶ and provide environmental education.⁵⁶⁷ Other duties include the responsibility to promulgate by-laws,⁵⁶⁸ plan and budget for service delivery,⁵⁶⁹ and maintain financial viability through proper credit control procedures.⁵⁷⁰

5.4 Failing water supply services

The benchmarks for failing water supply services have been considered and the following indicators have been found to be apposite:⁵⁷¹ Table 1 reflects the indicators of failing water supply service by municipalities, the legislation in which the indicator is found as well as the paragraph in this document in which the indicator is discussed.

Table 1: Failing water supply services

Indicator	Prescribed in:	Discussion in text (par)
Insufficient infrastructure to supply at least 25 litres of potable water per person per day.	<ul style="list-style-type: none"> Strategic Framework for Water Services 2003 	2.2.1
Water supply which is more than 200 meters per household.	<ul style="list-style-type: none"> Strategic Framework for Water Services 2003 	2.2.1
A minimum flow of 10 litres per minute (at a communal water point) or 6000 litres per month (at a formal connection) cannot be supplied.	<ul style="list-style-type: none"> Strategic Framework for Water Services 2003 	2.2.1
A large number of people who have never	<ul style="list-style-type: none"> S 27 (1)(b) Constitution 	2.2.2

562 Par 3.2.2, 3.2.3 and 3.2.4.

563 Par 3.2.6.

564 Par 3.2.6.

565 Par 3.2.13.

566 Par 3.2.14.

567 Par 3.2.19.

568 Par 3.2.17.

569 Par 3.2.18

570 Par 3.2.10.

571 Par 2.8 and 3.3.3.

Indicator	Prescribed in:	Discussion in text (par)
received basic water or sanitation services.		3.2.10
Deterioration of infrastructure providing water supply services beyond a point of regular maintenance requirements.	<ul style="list-style-type: none"> • <i>Strategic Framework for Water Services 2003</i> • S 73(2) <i>Systems Act</i> • S 13(h)(vii) <i>WS Act</i> • S 63 <i>MFMA</i> 	2.2.1 3.2.14
Infrastructure that does not meet the minimum standards.	<ul style="list-style-type: none"> • <i>Strategic Framework for Water Services 2003</i> • S 73(2) <i>Systems Act</i> • S 13(h)(vii) <i>WS Act</i> • S 63 <i>MFMA</i> 	2.2.1 3.2.14
Unequal access to water.	<ul style="list-style-type: none"> • S 9 <i>Constitution</i> 	
Access to insufficient water.	<ul style="list-style-type: none"> • S 27(2) <i>Constitution</i> • S 11 <i>WS Act</i> • S 2 <i>NEMA</i> • S 73 <i>Systems Act</i> 	3.2.7 3.2.10 3.2.11
Access to poor quality of water.	<ul style="list-style-type: none"> • S 24 <i>Constitution</i> 	2.2.2 3.2.6
Poor administrative measures within a municipality.	<ul style="list-style-type: none"> • S 195 <i>Constitution</i> • S 2 <i>Systems Act</i> 	3.2.15
Inability to gather monies for services delivered, whether due to inadequate human or financial capacity.	<ul style="list-style-type: none"> • Chapter 9 <i>Systems Act</i> • S 4 <i>NWA</i> • S 64(a) <i>MFMA</i> • <i>Draft White Paper on Water Services 2002</i> 	3.2.11
Lack of cooperation among the spheres of government / fragmentation in government as seen in the lack of alignment of between water services plans and programmes.	<ul style="list-style-type: none"> • Chapter 3 <i>Constitution</i> • Chapter 3 <i>NEMA</i> • S 3 <i>Systems Act</i> 	4.2
Inability to plan and budget for water services, whether due to inadequate human or financial capacity.	<ul style="list-style-type: none"> • Ss 12-18 <i>WS Act</i> • Ss 23-27 <i>Systems Act</i> • S 21(1)(a), 121(1) and (2) <i>MFMA</i> • S 34 <i>Systems Act</i> 	3.2.19
Corruption and lack of accountability of municipal employees, as seen in the inability to fulfil the duty of just administration.	<ul style="list-style-type: none"> • S 33 <i>Constitution</i> • S 3 <i>PAJA</i> • S 4(3)(b) <i>WS Act</i> 	3.2.16

Indicator	Prescribed in:	Discussion in text (par)
Unsustainable water supply	<ul style="list-style-type: none"> • S 152 (1) Constitution • S 72(2) <i>Systems Act</i> • S 11(1) NWA • S 63 MFMA 	<p>3.2.7</p> <p>3.2.11</p>
Unaffordable water services	<ul style="list-style-type: none"> • S 73(2)(c) <i>Systems Act</i> • S 135(1) MFMA • S 4 NWA 	<p>3.2.11</p>

This table of indicators is not complete, however. Non-compliance with legislative duties was added to the list after a comprehensive analysis of the duties of local government in general; for instance, the duty to respect, protect, promote and fulfil the rights of people as listed in the Bill of Rights,⁵⁷² and the involvement of communities in municipal decision-making,⁵⁷³ as well as the duties pertaining to water supply services.

5.5 The intergovernmental context

National and provincial government are statutorily obliged to support municipalities in providing municipal services,⁵⁷⁴ which means that they are required to address failing water supply services within a municipality when this is perceived to be the case. Various measures are available to provincial government to address such a failure by local government.⁵⁷⁵ It is assumed that intergovernmental disputes⁵⁷⁶ may arise upon municipal failure to provide water. Provincial government should act upon failing water supply services in accordance with the principles of cooperative government.⁵⁷⁷ While respecting the autonomy of local government, the least intrusive measures should be applied first.⁵⁷⁸

572 See par 3.2.1 to par 3.2.4.

573 See par 3.2.9.

574 Par 4.3.1.3.

575 Chapter 4.

576 Par 4.3.4.

577 Par 4.2.

578 Par 4.5.2.

The duties of provincial government towards local government include the duty to supervise local government.⁵⁷⁹ Supervision in turn entails regulation, through which provincial government ensures that local government *inter alia* delivers water supply services in accordance with the relevant legislation, regulations, norms, standards and national policy. Other instruments of supervision are monitoring, reporting and supporting.⁵⁸⁰

Supervision may take place in a two ways: firstly as a general measure to assist and support municipalities in their day-to-day activities and their management of water supply services, or secondly more rigorously when a real or perceived failure of water supply services is perceived to be imminent.⁵⁸¹

Other less obvious measures for provincial government to address failing municipal water supply services include the conclusion of an intergovernmental agreement⁵⁸² or the utilising of ADR methods.⁵⁸³ Upon the failure of these less intrusive measures provincial government may intervene⁵⁸⁴ in a municipality, assume the responsibilities of the Council,⁵⁸⁵ or ultimately dissolve the Council.⁵⁸⁶

5.6 The intergovernmental response measures model

A model for intergovernmental response measures has been proposed.⁵⁸⁷ The options presented in the model are in accordance with legislation and the measures discussed in previous paragraphs. Every step within the model takes cognisance of the possibility of a municipality itself rectifying the situation, which will render further action by the provincial government unnecessary, as it will be assumed that water supply has been re-instated. The order of the presentation of the options in the proposed model is from the least to the most intrusive. Supervision and administrative measures are the least intrusive, whilst intervention in and legal action against a

579 Par 4.3.1.

580 Par 4.3.1.

581 Par 2.8 and 3.3.

582 Par 4.3.3.

583 Par 4.3.4.

584 Par 4.3.2.

585 Par 4.3.2.5.

586 Par 4.3.2.6.

587 Par 4.5.2.

municipality are regarded as an invasive measure. It is an unfortunate truth that the steps proposed in the intergovernmental response measures model may be time consuming and make a high demand on human and financial resources. It is suggested therefore that further research be conducted on a shorter and more economical process of intergovernmental response.

5.7 Recommendations

On the basis of the discussion and findings in this study, the following recommendations are made:

- In cases where provincial government supervises local government, provincial government should choose to act proactively to prevent municipal non-compliance or failure in terms of water supply services.
- Provincial government should empower local government and not impede its powers and functions to provide water supply services, for example.
- The dissolution of a Municipal Council by a provincial government should be contemplated only in exceptional circumstances.
- Intergovernmental disputes should be solved as swiftly as possible, while considering the long-term relationship of the parties involved.
- More frequent use of ADR measures should be investigated to solve intergovernmental disputes.
- Court proceedings should, in most instances, be only a measure of last resort.
- It is suggested that further research be conducted on a shorter and more economical process of intergovernmental response.

The implementation of intergovernmental response measures to address failing municipal water supply services should take place in accordance with the principles of cooperative government to ensure the provision of a sufficient water supply to communities in a sustainable manner, keeping in mind both the value of municipal autonomy and the developmental role of local government in our still developing South Africa. This is not only owed to the original constitutional drafters and their vision for a cooperative new South African government, but also to the millions of South Africans who

have the right to an environment not detrimental to their health or well-being and the right of access to sufficient water.

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