The role of courts in promoting water security in South Africa

BB Qumbu

Orcid.org/0000-0002-3816-4903

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Supervisor: Prof ON Fuo

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Student number: 28370333

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> Don't let fear keep you quiet. You have a voice so use it. Speak up. Raise your hands. Shout your answers. Make yourself heard. Whatever it takes, just find your voice, and when you do, fill the damn silence. - Meredith Grey

What a mighty God I serve! Thank You Father!

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ABSTRACT

The right to sufficient water is a basic human right which is central to the realisation of all other human rights. Twenty-five years into South Africa's democracy and twenty-three years after the adoption of the *Constitution of the Republic of South Africa*, 1996, which expressly guarantees a justiciable right to access to sufficient water to everyone, a significant number of citizens remain without access to potable water. This state of affairs is attributed to the legacy of the Apartheid government's inequitable distribution of water resources, the present model of water commercialisation by municipalities, the dismal state of the water services infrastructure in many parts of the country, pollution, the competing demands of industries such as mining, and the effects of climate change, which are manifested through prolonged droughts. These factors suggest that water security remains a major challenge for South Africa. The term "water security" refers to the capacity of South Africa to safeguard the provision of sustainable access to adequate quantities of water of acceptable quality to meet the human needs of the population (in a broad sense) and to preserving the ecosystem. The attainment of water security in South Africa calls for strategic and concerted action from the country's three spheres of government and its organs of state.

This study explores the role which courts could play in promoting water security in South Africa. This research is the first integrated scholarly attempt to interrogate the role that could be played by courts in promoting water security in South Africa. Based on a critical and integrated analysis of primary and secondary sources of law, the study argues that courts could contribute to promoting water security by discharging certain duties: Firstly, the courts must uphold the applicable law by weighing the rights and interests that relate to water, and must then make reasonable, just and equitable findings. Secondly, the courts must solve water-related disputes between parties by interpreting and applying the applicable laws and policies. It is submitted that by executing these two functions the courts contribute to a deeper understanding of the water security discourse through the analysis, interpretation and explanation of water law and policy. Finally, it is argued that through the execution of their traditional function courts contribute to the making of law that has a direct effect on the development of water security. This research argues that

water security will be attained when all South Africans have sustainable access to affordable water resources and when the country's water resources are adequately protected.

Key words: water security, role of courts, right to water, protection of water resources

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LIST OF ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
AHRLR	African Human Rights Law Reports
AJHR	African Journal of Human Rights
AJICL	African Journal of International and Comparative Law
AMCOW	African Ministerial Conference on Water
AU	African Union
DPLG	Department of Provincial and Local Government
DWA	Department of Water Affairs
ESR Review	Economic and Social Rights Review
FBWIS	Free Basic Water Implementation Strategy
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IEA: PLE	International Environmental Agreements: Politics, Law and Economics
IPCC	Intergovernmental Panel on Climate Change
KOSH	Klerksdorp, Orkney, Stilfontein and Hartebeesfontein
MPRDA	Mineral and Petroleum Resources Development Act 28 of 2002
NEMA	National Environmental Management Act 107 of 1998

NEPAD	New Partnership for Africa's Development
NGO	Non-governmental Organisation
NIP	National Indigent Policy
NWA	National Water Act 36 of 1998
NWRS	National Water Resource Strategy
PELJ	Potchefstroom Electronic Law Journal
RECIEL	Review of European Community and International Environmental Law
SADC	Southern African Development Community
SAJELP	South African Journal of Environmental Law and Policy
SAJHR	South African Journal on Human Rights
SDGs	Sustainable Development Goals
SERAC	Social and Economic Rights Action Centre
SERI	Socio-economic Rights Institute
Stell LR	Stellenbosch Law Review
Tilburg Foreign L Rev	Tilburg Foreign Law Review
U. Denv. Water L. Rev	University of Denver Law Review
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme

UNESCR	United Nations Committee on Economic, Social and Cultural Rights
UNFCCC	United Nations Framework Convention on Climate Change
WAR	Water Allocation Reform
WCWDM	Water Conservation and Water Demand Management
WSA	Water Services Act 108 of 1997
YbIEL	Yearbook of International Environmental Law

CHAPTER 1: INTRODUCTION

1.1 Background

South Africa is regarded as the 30th most water scarce country in the world.[1] This situation is further exacerbated by factors such as water pollution, climate change, a growing population, lack of adequate infrastructure and the effects of past discriminatory laws on how people access water.[2] Although there has been a drastic change in service delivery as a result of the constitutional commitment to providing everyone with access to sufficient water,[3] many people still live in deplorable conditions without access to clean drinking water. At the advent of democracy in 1994, it was estimated that approximately 14 million people in South Africa did not have access to clean water for domestic use and over 20 million people did not have sufficient water for sanitation.[4] In 2016 it was estimated that 15,2 million South African households had access to piped water.[5] Despite this progress there is a significant number of households that do not have direct access to potable water and continue to access water from sources within a reasonable distance of their dwelling places or from streams.[6] This predicament was acknowledged by the Constitutional Court in *Mazibuko and Others v City of Johannesburg*[7] (hereafter *Mazibuko*) as follows:

> Although rain falls everywhere, access to water has long been grossly unequal. This inequality is evident in South Africa. While piped water is plentifully available to mines, industries, some large farms and wealthy families, millions of people, especially women, spend hours laboriously collecting their daily supply of water from streams, pools and distant taps … The achievement of equality, one of the founding values of our Constitution, will not be accomplished while water is abundantly available to the wealthy, but not to the poor.

Against the above background, it is evident that realising water security remains a main challenge for South Africa. The term water security has been defined as:

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1 National Water Resource Strategy (2013) 8.
2 Gabru 2005 *PELJ* 2; Honkonen 2017 *PELJ* 2.
3 See s 27 of the *Constitution of the Republic of South Africa*, 1996.
4 Stein 2005 *Texas Law Review* 2169.
5 Statistics South Africa 2016 http://www.statssa.gov.za/publications/P0318/P03182015.pdf.
6 Statistics South Africa 2016 http://www.statssa.gov.za/publications/03-18-07/03-18-072015.pdf.
7 *Mazibuko and Others v City of Johannesburg* 2010 4 SA 1 (CC).

> The capacity of a population to safeguard sustainable access to adequate quantities of acceptable quality water for sustaining livelihoods, human well-being, and socio-economic development, for ensuring protection against water-borne pollution and water-related disasters, and for preserving ecosystems in a climate of peace and political stability.[8]

The above definition seems to suggest three basic elements of water security: the capacity of a population to safeguard sustainable access to sufficient quality and quantities of water; the affordability of such water; and the protection of water resources.[9] The first and second elements of this definition address human needs in the concept of water security while the second element focusses on the protection of water resources. Sadoff and Muller[10] define water security as "the reliable availability of an acceptable quantity and quality of water for health, livelihoods and production, coupled with an acceptable level of water-related risks." It may be deduced from the above definitions that any commitment towards advancing water security should seek to ensure that an acceptable quantity and quality of water is reliably available to the entire population in order to sustain livelihoods, ensure human well-being and promote economic development.[11]

The *Constitution of the Republic of South Africa*, 1996 (hereafter the Constitution) provides the overarching legal framework within which water security concerns should be addressed in South Africa. Section 27(1)(b) of the Constitution guarantees everyone the right to access to sufficient water, thereby addressing the human-related water needs captured in the concept of water security as described above. Sections 27(2) and 7(2) of the Constitution impose duties on the state to respect, protect, promote and fulfil the right to access to water and to adopt and implement reasonable legislative and other measures such as policies that will ensure that South Africans have access to sufficient water. The duties imposed on the state by the constitutional right to access to sufficient water were interpreted by the Constitutional Court in the *Mazibuko* case.[12]

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8 UN-Water 2013 *Water Security* 1.
9 Wouters, Vinogradov and Magsig 2009 *YbIEL* 104-106.
10 Sadoff and Muller *Water Management* 11.
11 The components of water security will be analysed and unpacked in chapter 2 of this study.
12 This matter will be discussed in Chapter 4, part 4.3.2.

In the context of this research, section 27(1)(b) should be read jointly with section 24(b)(iii) of the Constitution, which specifically obliges government to adopt and implement reasonable legislative and other measures that secure the ecologically sustainable development and use of natural resources while promoting justifiable socio-economic development. Section 24 of the Constitution is directly relevant to water security, as it requires the sustainable management of natural resources such as water for the benefit of the present and future generations.[13] In some instances, courts have intervened where the sustainable management of water resources has been compromised by pollution, for example.[14]

The statutory framework that effectively seeks to give effect to the constitutional commitment to ensuring water security for South Africa is comprised of the following statutes: the *Water Services Act* 108 of 1997 (hereafter the WSA), the *National Water Act* 36 of 1998 (hereafter the NWA) and the *National Environmental Management Act* 107 of 1998 (hereafter the NEMA). In compliance with its constitutional duty to adopt and implement policies and programmes to progressively realise the right to access to water,[15] the Department of Water and Sanitation developed the National Water Resource Strategy (hereafter the NWRS) of 2013. The vision of the NWRS is to ensure the sustainable, equitable and secure provision of water for a better life and environment for all.[16] The NWRS further gives effect to the state's obligations to ensure the sustainable management of the country's water resources. The NWRS recognises that courts (amongst other role players) have an important part to play in ensuring that its vision is realised.[17]

1.2 Current issues

Water insecurity is felt mostly by the poorer majority of the country. The inability of government to adequately deliver water services to the poor and harsh environmental

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13 Kotzé 2007 *RECIEL* 300.
14 See *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Limited* 2006 ZAGPHC 47 (15 May 2006).
15 S 27 (2) of the Constitution.
16 NWRS 2013 ii.
17 NWRS 2013 69-71.

conditions are identified as some of the causes of the current state of affairs.[18] South Africa has experienced a drastic change in climatic conditions which has a resulted in the recent droughts. In 2016 most provinces in the country were declared disaster areas because of droughts. At the beginning of 2018 the three Cape provinces were declared disaster areas due to an ongoing drought, as well as certain parts of KwaZulu Natal, the Free State and the North West.[19] Addressing the Province at the Western Cape Water Indaba in 2017, the then Minister of Water and Sanitation, Nomvula Mokonyane, highlighted the fact that it will take a few years for the country's groundwater levels to recover from the rain shortfall, and the effect of the drought has raised serious concern for water security in the country.[20]

In as much as water scarcity can be attributed to climatic conditions,[21] there are man-made factors which tend to regularly influence the quality of the water resources in South Africa. One of these man-made factors is coal mining. The global outcry against the use and construction of coal mines seems not to be clearly heard in South Africa. Two 4800 mega-watt coal-fired stations are expected to be completed in the near future.[22] These power stations, each of which will consume a hefty amount of water, are situated in Limpopo and Mpumalanga respectively.[23] Water is required throughout the process of generating coal-fired electricity, and with the expansion of the energy sector, new pressures are placed on the freshwater resources used.[24] Mining, which is a major industry in South Africa and contributes about 29% to the country's GDP, uses 8 per cent of the country's water, while power generation uses approximately 4 per cent of the total

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18 Couzens 2015 *PELJ* 1181.

19 Department of Water and Sanitation 2018 http://www.dwa.gov.za/Communications/PressReleases/2018/MS%20-%20The%20outcomes%20of%20the%20Inter-Ministerial%20Task%20Team%20meeting%20on%20Drought%20and%20Water%20Scarcity%20held%20on%2030%20January%202018.pdf.

20 South African Government 2017 http://www.gov.za/speeches/address-ms-nomvula-mokonyane-minister-water-and-sanitation-during-western-cape-water-indaba.

21 These climatic influences will be discussed in Chapter 2.

22 See *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* 2017 (65662/16) ZAGPPHC 58. The matter centres on the decision to erect a 1200 mega-watt coal-fired power station in the Limpopo Province, to be in operation until the year 2061, at least, and the environmental authorisations required by *NEMA* before the project could begin.

23 Schneider 2016 http://www.fin24.com/Opinion/drought-pushes-south-africa-to-water-energy-and-food-reckoning-20160124.

24 Spang *et al* 2014 *Environmental Research Letters* 1.

water available.[25] The Water Research Commission conducted an investigation into the use of water resources by power utilities in 2015. It found that most of the power plants are situated in moderately to severely water-strained areas.[26] The Commission noted that although coal will be a dominant factor in electricity generation until locally available resources start to diminish, technologies that utilise water efficiently will have to play a more dominant role in order to preserve national water security.[27]

Apart from mining, agricultural irrigation consumes the bulk of South Africa's available water. About 15% of the country's GDP comes from agriculture, and this sector draws about 60% of the water,[28] while water for domestic use in urban areas draws about 24% of the nation's water.[29] It can be concluded from a consideration of these statistics that water security is bound to become a substantial problem if the issue is not sufficiently addressed and managed.

1.3 Research objectives

The purpose of this research is to examine the role which South African courts could play in promoting water security in the country. This role has not been thoroughly examined from a general point of view in existing scholarship. Analysts have focused their discussion on the implications of the *Mazibuko* case in the realisation of the right to access to sufficient water and the role of courts in addressing the problem of acid mine drainage in South Africa.[30] In the case of *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and*

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25 Department of Water Affairs 2013 http://nepadwatercoe.org/wp-content/uploads/Strategic-Overview-of-the-Water-Sector-in-South-Africa-2013.pdf.

26 Water Research Commission 2015 http://www.wrc.org.za/Knowledge%20Hub%20Documents/Research%20Reports/2383-1-14.pdf.

27 Water Research Commission 2015 http://www.wrc.org.za/Knowledge%20Hub%20Documents/Research%20Reports/2383-1-14.pdf.

28 Department of Water Affairs 2013 http://nepadwatercoe.org/wp-content/uploads/Strategic-Overview-of-the-Water-Sector-in-South-Africa-2013.pdf.

29 Department of Water Affairs 2013 http://nepadwatercoe.org/wp-content/uploads/Strategic-Overview-of-the-Water-Sector-in-South-Africa-2013.pdf.

30 Kotzé 2010 *Journal of Human Rights and the Environment* 156-160; Stewart 2010 *Penn State International Law Review* 487-512; Feris and Kotze 2014 *PELJ* 2105-2151; Dugard and Liebenberg 2009 *Economic and Social Rights Review* 11-17.

Environment, Mpumalanga Province[31] the Constitutional Court affirmed the courts are trustees charged with the responsibility of ensuring that the environment, which is vital for the realisation of other rights, is protected for the benefits of present and future generations.[32] Despite the above developments, the literature shows that little has been written regarding the role which the courts could play in promoting water security in South Africa. This study therefore explores the role which South African courts could play in promoting water security. In other words, the question this study strives to answer is: What role can the courts play in promoting water security in South Africa?

1.4 Research methodology

The research was conducted by means of a critical and integrated literature review. The review incorporates primary and secondary sources of law, including the Constitution, legislation, case law, policies, government notices, research reports, books and scholarly articles. An analysis of the court's role was performed through a dissection of South African case-law pertaining to water security issues. In order to ascertain what role the courts can play in promoting water security, the relevant literature was critically analysed and evaluated in order to determine principles and benchmarks that could be used by the courts in their efforts to promote water security. Due to the limited scope of the study, only four cases were analysed. The researcher analysed two cases concerning sustainable and affordable access to water and two cases which dealt with the protection of water resources.

1.5 Study outline

Chapter 2 of this study explores some global and African regional responses to the need to promote water security. It begins by examining different theoretical perspectives on water security. Chapter 3 analyses the legal and policy framework for promoting water security in South Africa, with a specific focus on the legislation mentioned above. Chapter 4 explores what role the courts could play in promoting and ensuring water security in

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31 *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 10 BCLR 1059 (CC), hereafter the *Fuel Retailers* case.

32 *Fuel Retailers* case para 102.

South Africa taking into account the discussion in chapters 2 and 3. The study concludes in chapter 5 with some recommendations.

CHAPTER 2: INTERNATIONAL AND AFRICAN REGIONAL RESPONSES TO WATER SECURITY

2.1 Introduction

This dissertation explores the role that South African courts could play in promoting water security in the country. The previous chapter painted a picture of the nature of the water-related challenges currently experienced in South Africa and outlined, *inter alia*, the research objective and research methodology. The aim of this chapter is to discuss some of the efforts at the international and African regional levels to promote water security. Part 2.2 of this chapter begins by discussing theoretical perspectives on the notion of water security. Part 2.3 examines international and African regional responses to promote water security. The last part summarises the discussion in the chapter.

2.2 Theoretical perspectives on water security

As already alluded to in Chapter 1, the definition provided by the United Nations Water Security Initiative identifies the various components of water security. In terms of that definition, the components can be listed as the capacity of a population to secure sustainable access to sufficient quality and quantities of water; the affordability of such water; and the protection of water resources.[33] Gerlak and Mukhtarov[34] describe water security as "an extension of sustainable development thinking to water resources with the focus on the quantity and quality of water supply for societal and ecological needs." Jansky, Nakayama and Pachova[35] amplify this description by making the assertion that ensuring water security entails providing adequate protection from water-related disasters and diseases, as well as access to a sufficient quantity and quality of water, at affordable cost, to meet the needs essential for leading a healthy and productive life without compromising the sustainability of vital ecosystems. The UK based organisation

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33 See 1.1 in Chapter 1.
34 Gerlak and Mukhtarov 2015 *Int Environ Agreements* 258.
35 Jansky, Nakayama and Pachova "Introduction: From domestic to international water security" 1.

WaterAid[36] describes water security as having reliable access to water of an adequate quantity and quality for basic human needs, small-scale livelihoods and local ecosystem services, combined with the effective management of the risk of water-related disasters.[37] The definition provided by the UNDP unpacks water security as:

> Ensuring that every person has reliable access to enough safe water at an affordable price to lead a healthy, dignified and productive life, while maintaining the ecological systems that provide water and also depend on water.[38]

In a similar vein, the Ministerial Declaration of the Second World Water Forum, which was adopted in 2000, states that providing water security in the 21st century means:

> Ensuring that freshwater, coastal and related ecosystems are protected and improved; that sustainable development and political stability are promoted, that every person has access to enough safe water at an affordable cost to lead a healthy and productive life and that the vulnerable are protected from the risks of water-related hazards.[39]

Furthermore, the Global Water Partnership states that at any level, water security means that every person has access to sufficient and affordable safe water to lead a clean, healthy and productive life, while ensuring that the natural environment is protected and enhanced.[40] Magsig[41] provides a definition which is similar, by characterising a community as water secure when it has sustainable access to freshwater of a sufficient quantity and quality, and has the ability to minimise water-related risk and its various repercussions to an acceptable level, without compromising the supporting ecosystems.

The various definitions and perspectives on water security given above also suggest what institutions can do in order to attain water security, and emphasise what the focus should be of laws that seek to promote water security. The core components of affordability, sustainable access, and the protection of water resources should be the focus of such regulatory instruments.[42] This researcher argues that these are the main components of

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36 WaterAid is an organisation that was started in the 1980s in response to the global water crisis, and does work globally in the area of providing water and sanitation to the poor and marginalised. See http://www.wateraid.org.

37 WaterAid 2012 www.wateraid.org/~/media/.../water-security-framework.pdf.

38 UNDP 2006 http://hdr.undp.org/sites/default/files/reports/267/hdr06-complete.pdf.

39 *Ministerial Declaration of The Hague on Water Security in the 21st Century* (2000) para 1.

40 Global Water Partnership 2000 http://www.gwp.org/globalassets/global/toolbox/references/towards-water-security.-a-framework-for-action.-mobilising-political-will-to-act-gwp-2000.pdf.

41 Magsig *International Water Law and the Quest for Common Security* 33.

42 Soyapi 2017 *PELJ* 4.

water security and that they are interrelated. For example, sustainable access to water in this context entails that decision-makers take into consideration social, economic and environmental factors, as well as the needs of the present and future generations.[43] According to the United Nations Committee on Economic, Social and Cultural Rights (hereafter UNCESCR) General Comment No 15, there are four overlapping dimensions to accessibility.[44] These aspects are physical accessibility, economic accessibility, information accessibility and non-discrimination. Physical accessibility requires that water facilities, must be within safe reach of all, and easily accessible from households, places of work and educational institutions.[45] Economic accessibility pertains to the affordability of water for domestic use.[46] Theoretically, if physical access to water can be guaranteed, but making use of such access is too expensive, then people will still lack such access.[47] Information accessibility refers to the right to seek, receive and impart information regarding water issues.[48] The element of non-discrimination encompasses accessibility for all, including the most vulnerable and marginalised parts of society, without discrimination on any prohibited grounds.[49] This places emphasis on the need to pay special attention to the water-related needs of the most disadvantaged and marginalised segments of society.[50]

The protection of water resources is an integral part of the notion of water security. Cook and Baker[51] argue that the element of anthropocentrism contained in the stress on access results in a failure to address the inclusion of the ecosystem as an important part of water security. Kotzé and Bates[52] pose a similar argument, that the implementation and outcome of an anthropocentric regime should include ecological considerations.[53] The inclusion of this element places an obligation[54] on the authorities tasked with ensuring

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43 Du Plessis and Nel "An introduction" 3-9.
44 *CESCR General Comment No 15: The Right to Water* UN Doc E/C.12/2002/11 (2003) para 12(c).
45 *CESCR General Comment No 15: The Right to Water* UN Doc E/C.12/2002/11 (2003) para 12(c)(i).
46 *CESCR General Comment No 15: The Right to Water* UN Doc E/C.12/2002/11 (2003) para 12(c)(ii).
47 Jiménez Cisneros *et al* "Freshwater Resources" 54.
48 *CESCR General Comment No 15: The Right to Water* UN Doc E/C.12/2002/11 (2003) para 12(c)(iv).
49 *CESCR General Comment No 15: The Right to Water* UN Doc E/C.12/2002/11 (2003) para 12(c)(iii).
50 Jiménez Cisneros *et al* "Freshwater Resources" 54.
51 Cook and Bakker 2012 *Global Environmental Change* 97.
52 Kotzé and Bates 2012 *U. Denv. Water L. Rev.* 270.
53 Kotzé and Bates 2012 *U. Denv. Water L. Rev.* 270.
54 Fisher "A jurisprudential model for sustainable water resources governance" 141-143.

access to take positive steps to protect water resources for the end goal of ensuring water security. In this regard, Soyapi[55] states that sustainability should inform the use and protection of water, and that sustainability is a core principle of water security.

In contrast, water insecurity exists where one or more of the core components of water security is not present. This means that there is no sustainable access to water resources, or that although there is access to water resources, these resources are not protected, which could therefore lead to a systematic decline in access, which would not be sustainable to start with. Versteeg utilises the term "water scarcity" to identify those situations in which basic human needs might potentially not be fulfilled due to a lack of water.[56] Water security can be said to be attained when all the main components in the various definitions reviewed above are present in a given context.

Climate change has a significant impact on water security and is one of the leading causes of water insecurity, particularly in developing countries such as many African countries. Grey and Garrick[57] summarise society's view with regard to dealing with climate change when they argue that much of the existing discourse on climate change focuses on the need to adapt to future change, whereas the challenge for much of the world's population is to adapt now to the current climate". Climate change is clearly not an uncertain, future event. Water security is inextricably linked to climate change, in that the effects of climate change can be seen through the changes in the water cycle and weather.[58] Water delivers many of the impacts of climate change to society, such as in the case of irregular rainfall and floods.[59] The Intergovernmental Panel on Climate Change (IPCC) projects that climate change will reduce the renewable surface and groundwater resources of the world, especially in rural areas.[60] In urban areas where people are lacking infrastructure, climate change is likely to increase the risks for these people, their economies and the ecosystem, through severe flooding, drought and water scarcity.[61] Developing countries

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55 Soyapi 2017 *PELJ* 4.
56 Versteeg 2006 *Tilburg Foreign L. Rev* 370.
57 Grey and Garrick "Water security, perceptions and politics" 42.
58 Cook *et al Shifting Course* 3.
59 Jiménez Cisneros *et al* "Freshwater Resources" 234.
60 IPCC Climate Change 2014 13.
61 IPCC Climate Change 2014 15.

are thus most affected by the effects of climate change.[62] Water quality is considered poor in these areas as a result of a lack of sanitation, a lack of suitable water treatment methods and generally poor health conditions.[63] It is also predicted that water scarcity is likely to be one of the most important consequences of climate change in developing countries.[64]

Water security is also closely linked to other human rights, in that a lack of water could result in persons affected living in deplorable conditions, which would infringe on their human rights to water, or alternatively, access to water resources, the right to life and dignity.[65] Water security is also thought to be analogous to food security, and therefore the human right to nutrition, which relates to the availability and access to supplies.[66] Furthermore, Mirumachi[67] states that water issues are associated with other developmental problems, such as food production, land development and climate change.

What can be concluded in relation to the different matters referred to above is that water security is attained when three components are present, namely sustainable access to water resources, the affordability of such access, and the protection of water resources. These three components are interrelated, as shown above. If there is access to water resources but such access is not affordable, one cannot argue that water security has been achieved. Similarly, if water resources are not protected, there cannot be sustainable access to water due to there being concerns related to quality. In reviewing these different perspectives on water security, and despite the semantics, it is the view of this researcher that the core components of water security can be described as sustainable access to affordable water and the protection of water resources.

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62 The impact and effects of climate change on developing countries have also been recognised by the *United Nations Framework Convention on Climate Change* (1992) (UNFCCC) in article 3.

63 Bates *et al* "Climate Change and Water" 66.

64 Bates *et al* "Climate Change and Water" 67.

65 De Chazournes, Leb and Tignino are of the view that the protection of access to water is related to the protection of health. See De Chazournes, Leb and Tignino "Introduction" in this regard. General Comment No. 15 is explicit in its assertion that delivery of the human right to water is "indispensable for leading a life in human dignity," and also that this right "is a prerequisite for the realization of other human rights." See *CESCR General Comment No 15: The Right to Water* UN Doc E/C.12/2002/11 (2003) para 1.

66 Mason and Calow *Water Security* 1.

67 Mirumachi *Transboundary Water Security* 2.

Water security is an end-goal which, when attained, can alleviate other socio-economic problems such as poverty, food insecurity and water-borne illnesses. Taking this into consideration, a number of instruments have been adopted at the international and African regional levels to enhance water security.

2.3 International and African regional responses to promoting water security

The discussion that follows looks at how international and African regional instruments give effect to water security, bearing in mind the main issues identified in 2.2 above.

2.3.1 Global responses to promoting water security

2.3.1.1 Agenda 21

Agenda 21 is a voluntary action plan which was adopted along with other conventions at the United Nations Conference on Environment and Development (UNCED) held in Rio de Janeiro, Brazil in 1992.[68] Chapter 18 of the Agenda is aptly titled "Protection of the Quality and Supply of Freshwater Resources", and focusses on global water security problems. Although not specifically termed as such, the Chapter does provide a sketch of the rationale behind the quest for water security as ensuring that the supply of good quality water is maintained for the benefit of the entire population, while preserving the integrity of ecosystems, with due regard to the influence of human activities.[69]

Chapter 18 of UN Agenda 21 illustrates how the problem of water insecurity could be addressed through integrated water resource planning and management.[70] According to the Plan, integrated water resource planning and management must cover all bodies of water and consider both water quality and quantity.[71] In order to promote integrated management, the Plan proposes certain programme areas or activities for the freshwater sector[72] such as water resources assessment,[73] the protection of water resources, water

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68 *Rio Declaration on Environment and Development* (1992) para 1.
69 *Agenda 21: Programme of Action for Sustainable Development* A/Conf.151/26 (1992) paras 18.1-18.5.
70 *Agenda 21: Programme of Action for Sustainable Development* A/Conf.151/26 (1992) para 18.3.
71 *Agenda 21: Programme of Action for Sustainable Development* A/Conf.151/26 (1992) para 18.3.
72 *Agenda 21: Programme of Action for Sustainable Development* A/Conf.151/26 (1992) para 18.5.
73 *Agenda 21: Programme of Action for Sustainable Development* A/Conf.151/26 (1992) para 18.5(b).

quality and aquatic ecosystems,[74] and improving access to drinking-water supplies and sanitation.[75] In addition, countries are called upon to set realistic goals and targets[76] in relation *inter alia* to the provision of access to safe and sufficient water for all on a sustainable basis.[77] Goals and targets with respect to integrated water management should be informed by state capacity and the available resources. The Plan urges Riparian States to consider cooperation amongst one another in achieving integrated water resource planning and management in the case of transboundary water resources.[78]

2.3.1.2 Ministerial Declaration of the Second World Water Forum

The World Water Council was formally established in 1996 in response to the decision of the Ministerial Conference on Drinking Water and Environmental Sanitation held in the Netherlands two years prior.[79] The fragmented nature of the laws governing water resources in the world led to the formation of this unitary body.[80] The Council consists *inter alia* of the founding members, the constituent organisations listed in the by-laws, honorary members and patrons.[81] The main objectives of the Council concerning water security are to bring together stakeholders, to promote the implementation of efficient water-related policies and strategies on a global scale, and to provide advice to institutions and decision-makers on the development and implementation of policies and strategies for sustainable water resources management.[82]

The World Water Council hosts the World Water Forum every three years. In order to promote water security, the First World Water Forum which took place in 1997 made the following recommendations, *inter alia*: recognise basic human needs to have access to

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74 *Agenda 21: Programme of Action for Sustainable Development* A/Conf.151/26 (1992) para 18.5(c).
75 *Agenda 21: Programme of Action for Sustainable Development* A/Conf.151/26 (1992) para 18.5(d).
76 *Agenda 21: Programme of Action for Sustainable Development* A/Conf.151/26 (1992) para 18.50.
77 *Global Consultation on Safe Water and Sanitation for the 1990s* A/C.2/45/3 (1990) 2.
78 *Agenda 21: Programme of Action for Sustainable Development* A/Conf.151/26 (1992) para 18.4. Riparian states are countries that possess land along the path of transboundary water resources such as rivers and lakes.
79 *Ministerial Conference on Drinking Water and Environmental Sanitation (Implementing UNCED Agenda 21)* (1994).
80 *Constitution and By-laws: World Water Counc*il (2013-2015) 6.
81 *Constitution and By-laws: World Water Council* (2013-2015). These members hold different voting powers according to their rank, and may or may not pay annual membership fees to retain membership of the Council.
82 *Constitution and By-laws: World Water Council* (2013-2015) 5.

clean water and sanitation; encourage the efficient use of water; address gender equity issues in water use; establish effective mechanisms for managing shared waters; support and preserve ecosystems; and encourage partnerships between governments and Civil Society. [83] The Forum also recommended that the World Water Council should launch a three-year study that would lead to a "global vision for water, life and the environment in the next century."[84]

The Second World Water Forum which was held in 2000 in The Hague, focused specifically on the future of water, and how meeting certain challenges could change the future of water.[85] The Declaration adopted at the end of the Forum states that its goal is to provide water security in the 21st Century,[86] and recognises that there are certain challenges which hamper the attainment of this ideal. These challenges include meeting basic needs, securing food supplies, the protection of ecosystems, the sharing of watercourses, managing water-related risks, valuing water, and finally, governing water wisely.[87] The actions identified to address these challenges are based on integrated water resource management,[88] which is dependent on collaboration at many levels.[89]

2.3.1.3 UN Resolutions recognising the right to water and General Comment 15

As the discussion in 2.2 above shows, sustainable access to affordable and sufficient water is a core component of the notion of water security. In order to enhance access to water, the UN recognised for the first time in 2010 the right to water and sanitation as an essential human right.[90] This Resolution made it clear that in order to satisfy the

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83 *Declaration of Marrakech* (1997).
84 *Declaration of Marrakech* (1997).
85 *Ministerial Declaration of The Hague on Water Security in the 21st Century* (2000) para 1.
86 *Ministerial Declaration of The Hague on Water Security in the 21st Century* (2000) para 1.
87 *Ministerial Declaration of The Hague on Water Security in the 21st Century* (2000) para 3.
88 *Ministerial Declaration of The Hague on Water Security in the 21st Century* (2000) para 5. Integrated water resources management is also the measure called for in Agenda 21, as discussed in para 2.3.1.1 above.
89 *Ministerial Declaration of The Hague on Water Security in the 21st Century* (2000) para 6. National, regional and international policies are required to achieve integrated water resource management, according to the Declaration.
90 *Human Right to Water and Sanitation* GA Res 64/292, UN Doc A/RES/64/292 (2010). Prior to the adoption of this resolution in 2010, the right to water was implied in other human rights. The General Comment 15 implies this right in the ICESCR in relation to the rights of women to be protected from all forms of discrimination, the right to the highest attainable standard of health and the right to adequate housing. See *CESCR General Comment No. 15: The Right to Water* UN Doc E/C.12/2002/11

minimum requirements of what a dignified and full enjoyment of life is, the right to water is absolutely essential. Further, the Resolution called upon States and international organisations to provide financial resources and support capacity-building and technology transfer especially to developing countries in order to scale up their efforts to provide safe, clean, accessible and affordable drinking water to all.[91]

Although the right to water was formally created only by the UN Resolution of 2010, the scope of the obligation imposed on states had been developed earlier, in 2003, by the Committee on Economic Social and Cultural Rights, in General Comment No. 15, which was based on Articles 11 and 12 of the International Covenant on Economic Social and Cultural Rights (ICESCR) of 1966.[92] The obligations of State parties in relation to the right to water have been extensively discussed by several scholars,[93] so it is sufficient to briefly summarise them (as outlined in the *CESCR General Comment No. 15* of 2003 and the *ACHPR Principles and Guidelines* of 2011[94]) for the purposes of this research. In terms of General Comment 15, State parties' obligations are categorised as general legal obligations, specific legal obligations, international legal obligations and core obligations.[95] In terms of the general obligations, States have an immediate duty to guarantee that the right to water will be exercised without discrimination, and to take steps towards the full realisation of the right.[96] State parties are specifically obliged to respect, protect and fulfil the right to water.[97] The obligation to respect requires State parties to refrain from interfering with the enjoyment of the right, either directly or indirectly.[98] Occurrences of interference include unlawfully diminishing or polluting water, and any activity which

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(2003) paras 2-5 in this regard. It is also contended that the right to water belongs to the group of socio-economic right recognised in the ICESCR. See Belinskij, Kotzé and Fuo 2017 *AJICL* 267.

91 *Human Right to Water and Sanitation* GA Res 64/292, UN Doc A/RES/64/292 (2010) para 2.

92 *CESCR General Comment No. 15: The Right to Water* UN Doc E/C.12/2002/11 (2003), hereafter the *CESCR General Comment No.15* (2003).

93 Belinskij, Kotzé and Fuo 2017 *AJICL* 261-292; Wouters "Dynamic cooperation - The evolution of transboundary water cooperation" 13-65; Fisher "A jurisprudential model for sustainable water resources governance"139-166.

94 *ACHPR: Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights* (2011), hereafter the *ACHPR: Principles and Guidelines* (2011).

95 *CESCR General Comment No. 15* (2003) paras 17-38. Also see Belinskij, Kotzé and Fuo 2017 *AJICL* 266-268.

96 *CESCR General Comment No. 15* (2003) para 17.

97 *CESCR General Comment No. 15* (2003) para 20.

98 *CESCR General Comment No. 15* (2003) para 21.

limits access to adequate water.[99] The obligation to protect entails that State parties prevent third parties from interfering with the enjoyment of the right to water, which includes adopting legislative and other measures to prevent third parties from denying equal access to water as well as preventing pollution of water sources by third parties.[100] The obligation to fulfil requires several actions from State parties. Firstly, State parties must recognise the right to water through legislative implementation.[101] Secondly, they must ensure that water is not only accessible, but affordable for everyone.[102] And finally, they must develop and adopt strategies and programmes which will ensure the sustainability of water resources for present and future generations.[103] There is also an obligation on State parties to engage in international cooperation in order to achieve the full realisation of the right to water.[104] As part of their core obligations, States must take steps to ensure the realisation of the minimum levels of each of the rights recognised by the Covenant.[105]

It is evident that the obligation on States to progressively realise the right to water through legislative and other measures is an important aspect of ensuring water security. Sustainable access to water resources can be secured and the protection of water resources may be realised through respecting this obligation.

2.3.1.4 Sustainable Development Goals

Water security is an important universal ideal, as evidenced by its inclusion in the recently adopted Sustainable Development Goals (SDGs). The SDGs are a collection of 17 global goals and 169 outcomes to be implemented by all countries[106] in an effort to eliminate poverty and build a sustainable global community by the year 2030.[107] SDG 6 aims to

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99 *CESCR General Comment No. 15* (2003) para 21.
100 *CESCR General Comment No. 15* (2003) paras 23.
101 *CESCR General Comment No. 15* (2003) paras 26.
102 *CESCR General Comment No. 15* (2003) para 26.
103 *CESCR General Comment No. 15* (2003) para 28.
104 *CESCR General Comment No. 15* (2003) para 30.
105 *CESCR General Comment No. 15* (2003) paras 37, 45-47. Also see Belinskij, Kotzé and Fuo 2017 *AJICL* 267. The *ACHPR: Principles and Guidelines* (2011) explains what these minimum core obligations are.
106 The SDGs are an initiative of the United Nations (UN) and therefore all member states of the UN are parties to the resolution.
107 *Transforming our world: The 2030 Agenda for Sustainable Development* A/RES/70/1 UN Doc 70/1 (2015), hereafter *Transforming our world: The 2030 Agenda for Sustainable Development* (2015).

ensure the availability and sustainable management of water and sanitation for all.[108] In terms of water security, Goal 6 further states that by the year 2030 States should "achieve universal and equitable access to safe and affordable drinking water for all."[109] Protection of water resources and the sound implementation of integrated water resources management strategies play an important role in the process of achieving this Goal.[110] The goals include the reduction of pollution[111] and a substantial increase of water-use efficiency across all sectors by the year 2030.[112] Integrated water resource management strategies should be implemented at all levels of government.[113] SDG 6 also requires and promotes international cooperation in support of developing countries in water-related programmes, as well as the participation of communities in such programmes.[114] The Agenda recognises the need for a Global Partnership of diverse actors in mobilising resources and implementation in order to ensure that its envisaged outcomes are realized.[115] In addition to promoting this collective approach, the Agenda emphasises the individual obligations resting on each State to realise the envisaged outcomes.

2.3.2 African regional responses to promoting water security

In the African regional context, water security issues are more prevalent, as some of the poorest countries and most water-scarce areas can be found on the African continent.[116] As the discussion below shows, a number of instruments have been adopted at the African regional level which directly address some of the water security issues identified in part 2.2 above.

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108 *Transforming our world: The 2030 Agenda for Sustainable Development* (2015) para 6.
109 *Transforming our world: The 2030 Agenda for Sustainable Development* (2015) para 6.1.
110 *Transforming our world: The 2030 Agenda for Sustainable Development* (2015) paras 6.3-6.5
111 *Transforming our world: The 2030 Agenda for Sustainable Development* (2015) para 6.3.
112 *Transforming our world: The 2030 Agenda for Sustainable Development* (2015) para 6.4.
113 *Transforming our world: The 2030 Agenda for Sustainable Development* (2015) para 6.5
114 *Transforming our world: The 2030 Agenda for Sustainable Development* (2015) paras 6.a-6.b.
115 *Transforming our world: The 2030 Agenda for Sustainable Development* (2015) para 60.
116 UN-Water/Africa 2003 https://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/african%20water%20vision%202025%20to%20be%20sent%20to%20wwf5.pdf.

2.3.2.1 African Charter

The African Charter[117] is a human rights instrument which is aimed at promoting human rights on the African continent.[118] The Charter considers freedom, equality, justice and dignity as essential objectives in the development of the African people.[119] This instrument makes no explicit mention of the right to access to water,[120] but has been implied by the African Commission on Human and Peoples Rights (ACHPR) in a combination of other rights.[121] According to the ACHPR, ensuring access to the minimum essential amount of water that is safe for personal and domestic use is one of the core obligations of African states.[122] State parties must adopt national strategies to realise the right to water, take appropriate measures for the national management of water resources, and ensure the provision of appropriate education concerning the protection of water resources.[123] The Charter further requires States to adopt comprehensive and integrated strategies and programmes to ensure the sustainable use of water.[124] The strategies and programmes proposed by the ACHPR Principles and Guidelines include halting the unsustainable extraction, damming and diversion of water resources, reducing and eliminating the contamination of ecosystems, monitoring water reserves, ensuring that proposed new developments do not interfere with access to adequate water, performing and completing environmental impact assessments, reducing wastage in water distribution processes, developing response mechanisms for emergency situations, and establishing competent institutions to implement these strategies and programmes.[125] Furthermore, States should promote the involvement of citizens in these strategies and programmes at a local level.[126]

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117 *African Charter on Human and Peoples' Rights* OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), hereafter the *African Charter on Human and Peoples' Rights* (1982).

118 The *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights* established the African Court on Human Rights, which enforces compliance with the Charter on states which have ratified the Protocol.

119 *African Charter on Human and Peoples' Rights* (1982).

120 *ACHPR: Principles and Guidelines* (2011) para 87. See also *African Charter on the Rights and Welfare of the Child* CAB/LEG/153/Rev. 2 (1990). Although the right to water is not expressly guaranteed in the *African Charter*, article 14(2)(c) of the *Children's Charter* expressly obliges State parties to provide children with adequate water.

121 *ACHPR: Principles and Guidelines* (2011) para 87.

122 *ACHPR: Principles and Guidelines* (2011) para 92(a).

123 *ACHPR: Principles and Guidelines* (2011) para 92(d)-(f).

124 *ACHPR: Principles and Guidelines* (2011) para 92(g).

125 *ACHPR: Principles and Guidelines* (2011) para 92(g).

126 *ACHPR: Principles and Guidelines* (2011) para 92(i).

In addition, the ACHPR Principles and Guidelines recognise the private ownership of water and require that countries develop and implement an efficient regulatory framework to monitor private water providers in order to ensure that the right to access to water is not violated.[127] Another aspect which a State is obliged to monitor is the reasonable disconnection of water services, and ensuring that when an individual's water supply is disconnected, that person is not denied access to a minimum amount of safe drinking water.[128]

Article 24 of the African Charter contains the environmental right, the formulation of which is that all peoples shall have the right to a general satisfactory environment favourable to their development. This right requires the state to take "reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources."[129] In the *SERAC* case the Commission examined the obligations of the state regarding the fulfilment of Article 24 and noted that:

> (These rights) obligate governments to desist from directly threatening the health and environment of their citizens. The state is under an obligation to respect these rights and this largely entails non-interventionist conduct from the state; for example, to desist from carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual.[130]

The African Commission held that the conduct of the Nigerian government[131] failed to honour the obligations imposed by the African Charter. The Commission also noted that in compliance with Article 24, the state has a duty to conduct environmental and social

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127 *ACHPR: Principles and Guidelines* (2011) para 92(j).

128 *ACHPR: Principles and Guidelines* (2011) para 92(k). *CESCR General Comment No. 15* (2003) make mention of arbitrary disconnections in paragraph 10, but provides no clarity on the principles guiding arbitrary disconnections.

129 *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) (hereafter *SERAC* case) para 52.

130 *SERAC* case para 52.

131 *SERAC* case paras 50, 54 and 58. The Commission noted in the case that, despite the Nigerian government's obligation to protect its people against interferences in the enjoyment of their rights, the government facilitated in the destruction of Ogoniland, by directly participating in the contamination of air, water and soil and thereby harming the health of the Ogoni people. The government also neglected to protect the Ogoni people from the harm caused by the NNPC Shell Consortium, instead using its security forces to facilitate the damages, and failing to advance studies of potential or actual environmental and health risks caused by the oil operations.

impact studies before commencing with industrial activities, as well as allowing sufficient public participation discussions with the communities affected by such activities.[132]

The above paragraphs show that the African Charter compels State Parties to protect water resources and ensure that people have sustainable access to water. It is also incumbent that states honour the duties imposed by instruments to which they are signatories, which in this case, is to provide adequate water and prevent harm to scarce water resources.[133]

2.3.2.2 New Partnership for Africa's Development

The AU's New Partnership for Africa's Development (NEPAD) programme was adopted in July 2001.[134] This Program focuses on the eradication of poverty, and the sustainable growth and development of the African continent.[135] Water plays a vital role in responding to socio-economic crisis facing Africa, and although several instruments have been developed to address this, the success thereof depends on the availability of sustainable water resources.[136] Water is therefore one of the sectors which the NEPAD Framework has given priority to. The objectives of the Framework as it applies to water security are to: ensure sustainable access to an adequate water supply;[137] promote planning and management of water resources as a basis for national and regional cooperation and development; and sustain ecosystems.[138] In order to achieve these objectives, the Framework requires countries to accelerate work on multipurpose water projects,[139] and support the UN Habitat programme on conservation in African cities.[140] However, the NEPAD Programme does not impose any binding obligations on the State parties.

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132 *SERAC* case para 53.
133 *African Charter on Human and Peoples' Rights* (1982).
134 *Declaration on the New Common Initiative* AHG/Decl. 1 (XXXVII). NEPAD was adopted at the 37th session of the Assembly of Heads of State and Government in July 2001 in Lusaka, Zambia.
135 *NEPAD Framework* (2001) 1.
136 Un-Water/Africa 2003 https://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/african%20water%20vision%202025%20to%20be%20sent%20to%20wwf5.pdf.
137 *NEPAD Framework* (2001) para 113.
138 *NEPAD Framework* (2001) para 113.
139 These projects include the SADC Water Secretariat's investigation of the utilisation of the Congo River and the Nile Basin Initiative. See *NEPAD Framework* (2001) para 114.
140 *NEPAD Framework* (2001) para 114.

2.3.2.2.1 African Ministerial Conference on Water

In 2002, African Ministers responsible for water from all over the continent met in Nigeria and adopted the Abuja Ministerial Declaration on Water. This Declaration was dubbed the "key to sustainability" and consequently the African Ministerial Conference on Water (AMCOW) was established.[141] AMCOW addresses the issues raised by the AU in terms of water scarcity in Africa. Some of the issues which the Declaration took cognisance of are the uneven distribution of water resources, unacceptable levels of water pollution, and the high number of people without access to adequate supplies of clean water, which conditions still prevail today. Another problem which the Declaration took notice of is the general misconception by many people on the continent that there is an endless supply of quality water in Africa.[142] The African Ministers Responsible for Water took note of and recognised the fact that "the primary responsibility for ensuring the sustainable and equitable management of water resources in Africa rests with our governments and peoples."[143] This task is one which must be performed in partnership with the private sector.[144] The AMCOW assigned itself an oversight role in relation to the implementation, monitoring, reviewing and assessing of various plans and programmes which seek to manage Africa's water resources.[145]

2.4 Chapter summary

This chapter has explored some international and African regional responses to the need to promote water security. The chapter commenced by unpacking the concept of water security. It was established that the various definitions of water security suggest that it has three main components, namely sustainable access to water, the affordability of water, and the protection of water resources. This researcher argued that the core components of water security are closely intertwined and that, in any state where one of

141 *Abuja Declaration on Water: A Key to Sustainable Development in Africa* (2002) para 1.
142 *Abuja Declaration on Water: A Key to Sustainable Development in Africa* (2002) para 4.
143 *Abuja Declaration on Water: A Key to Sustainable Development in Africa* (2002) para 6(a).
144 *Abuja Declaration on Water: A Key to Sustainable Development in Africa* (2002) para 6(b).
145 *Abuja Declaration on Water: A Key to Sustainable Development in Africa* (2002) para A.

these components is missing, that state can be considered to be suffering from water insecurity.

The discussion has also highlighted the fact that climate change plays a big role in water scarcity, as changing conditions in the climate are first manifested in the hydrological cycle. These effects of climate change are more strenuous on impoverished communities and can be experienced to a harsher extent in developing countries. Water insecurity, which is often exacerbated by climate change, threatens a range of fundamental rights and freedoms of affected individuals and communities.

The discussion in this chapter also shows that several (binding and non-binding) instruments have been adopted both internationally and regionally in order to address and promote water security. On a global level, General Comment No. 15 and regionally, the ACHPR Principles which explain the nature of the duties of governments to give effect to the right to access to sufficient water emphasise the importance of the core components of water security as illustrated above. Apart from these core components, many of the instruments reviewed suggest that to achieve water security, governments must implement integrated water resources management strategies, promote intergovernmental cooperation, and promote cooperation between governments and the private sector, including Civil Society. These instruments also reflect the importance not only of providing access to water resources but also of the role of states in protecting water resources in order to be able to provide such access. A review of the legal instruments that guarantee the right to sufficient water suggests that states can contribute to achieving water security by merely fulfilling their water rights-related duties. The South African legal and policy framework that gives effect to the three core components of water security will be discussed in the next chapter.

CHAPTER 3: LEGAL AND POLICY FRAMEWORK FOR WATER SECURITY IN SOUTH AFRICA

3.1 Introduction

The previous chapter discussed some international and African regional responses to the need to promote water security and also explored in more detail the meaning of the concept of water security. It was argued that the core components of water security are the provision of sustainable access to sufficient water, ensuring the affordability of water, and the protection of water resources. Due to their interrelated nature of these elements, it was argued that sustainable access and affordability can be viewed as one major component of water security. A review of some of the different responses made at the international and African regional levels show that integrated water resource management is of vital importance in achieving water security. It was also argued that if the human right to sufficient water and the environmental right contained in some of the instruments discussed are fully realised by State parties, this will greatly enhance water security at the domestic level.

The purpose of this chapter is to analyse the legal and policy frameworks that seek to address the problem of water security in South Africa. The South African water law regime pre 1994 can best be described as colonial and oppressive. The law was based on racially discriminatory systems which also influenced the distribution of water. Due to the law's regulating the ownership of land, water rights were not equitably distributed.[146] The water sector legislation was overhauled drastically and replaced upon the advent of the new constitutional dispensation, with statutes which reflect the vision and purport expressed in the preamble to the 1996 Constitution:

> [To] heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; Improve the quality of life of all citizens and free the potential of each person.

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146 Stein 2005 *Texas Law Review* 2168.

The NWA promulgated in 1998 replaced about one hundred other acts dealing with water use, allocation and conservation in South Africa.[147] This Act, which should be read with the WSA*,* provides for democracy and inclusiveness in the water sector.[148] It also provides for the management, conservation and protection of water resources.[149] The WSA gives effect to the right to access to sufficient water guaranteed in section 27(1)(b) of the Constitution. Another statute which is relevant to the discussion of water provision and management is the NEMA*.* Section 2(4)(d) of the NEMA requires the state to address past injustices that continue to limit equitable access to water resources. Certain governmental policies and strategies give practical effect to this legislation. The National Indigent Policy (2006) (hereafter the NIP), the Free Basic Water Implementation Strategy (2007)[150] (hereafter FBWIS) and the NWRS form part of the policy framework on the provision and protection of water in South Africa.

Bearing in mind the view adopted by this researcher that the three broad components of water security can be compressed into two, the discussion in this chapter is structured along those lines: Part 3.2 will focus on the legal and policy framework for sustainable and affordable access to water, while part 3.3 will focus on the legal and policy framework for the protection of freshwater resources. Finally, a summary of the chapter will be provided in 3.4.

3.2 Legal and policy framework for sustainable and affordable access to water

As indicated in 1.1 above, the Constitution provides the overarching legal framework for water security in South Africa. The right to water is entrenched in section 27 of the Constitution.[151] The state is obliged to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of the right to access

147 Gabru 2005 *PELJ* 22.

148 The writer hereof contends that while the NWA seeks to protect water resources, the WSA provides for the right to access to a basic water supply. These aims are mirrored in the components of water security, which means that in order to achieve the end goal, these statutes should be read together.

149 S 2 of the NWA*.*

150 Free Basic Water Implementation Strategy 2007.

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

to sufficient water.[152] In terms of the Constitution, local government bears the direct responsibility to provide potable water to communities.[153] A reading of the WSA[154] and the Systems Act reveals that a municipality can provide water services or outsource the provision of water services to another institution.[155] Those bodies responsible for water services include the water services authority, the water services institution, a water services intermediary as well as a water services provider. A water services institution is a water services authority, a water services provider, a water board and a water services committee.[156] The effective provision of water services is also largely dependent on the support of national and provincial government, underpinned by the notion of cooperative governance.[157]

As stated above, the WSA gives effect to the constitutional right to access to water.[158] The WSA repeats the constitutional provision but places the duty on water services institutions to take reasonable measures to realise this right.[159] The provision of a basic water supply should enjoy preference where a water services institution is unable to meet the requirements of all its existing consumers.[160] The district in the case of district municipalities has the responsibility to execute water services functions.[161]

Municipalities are directly responsible for providing water but cannot do so without intergovernmental support. One of the factors which hamper a municipality's functioning is funding. Although the budget which is allocated to municipalities is sourced from the national equitable share allocation[162] and section 229 of the Constitution empowers

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152 S 27(2) of the Constitution.
153 S 156(1)(a) read with Schedule 4B of the Constitution; Fuo 2017 *De Jure* 328-333.
154 S 1 of the WSA.
155 Section 76-81 of the Systems Act empowers municipalities to use external mechanism to provide water services. In terms of section 76 of the Systems Act a municipality may provide a municipal service in its area or a part of its area through external mechanisms, by entering into a service delivery agreement with a municipal entity, another municipality, an organ of state, a community-based organisation or NGO legally competent to enter into such an agreement, or any other person or institution legally competent to operate such activities. This section of the Act therefore provides for the outsourcing of water provision services to private individuals and companies.
156 S 1 of the WSA
157 S 41 of the Constitution.
158 S 27(1)(b) of the Constitution.
159 S 3(2) read with section 11 of the WSA.
160 S 5 of the WSA.
161 S 83(3)(b) of the *Local Government: Municipal Structures Act.*
162 S 64 of the WSA.

municipalities to raise their own money through the imposition of rates and taxes, some municipalities are still dysfunctional and unstable in this regard due to a lack of funds, financial mismanagement and increasing consumer debt.[163] Where a municipality decides to make use of external service providers, measures must be put in place to ensure that the poorest people get access to free basic water.[164] Furthermore, the WSA states that water services must be provided in terms of certain conditions set by water services providers.[165] These conditions must be accessible to the public, and may not contradict any conditions for the provision of water services contained in bylaws made by the water services authority having jurisdiction in an area.[166] These conditions must provide for the circumstances under which water services may be limited or discontinued as well as procedures for limiting or discontinuing water services.[167] In terms of the Act, the term "basic water supply" means,

> The prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene.[168]

This definition does not itself provide the minimum standard against which non-compliance may be measured. The 2001 *Regulations Relating to Compulsory National Standards and Measures to Conserve Water*[169] (hereafter the 2001 Regulations) expands on the content of the right to a basic water supply.[170] The 2001 Regulations describe the

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163 South African Local Government Briefing April 2018 2-4. According to Ratings Afrika's Municipal Financial Stability Index Report for 2016/2017, municipalities' problems start mainly with inadequate budget planning and a lack of fiscal discipline that cause their expenses to exceed their income, resulting in operating losses. These losses, coupled with low revenue collection ratios, cause their current liabilities to exceed their current assets. The result renders them incapable of paying creditors timeously.

164 S 78(3) of the Systems Act. These measures include a feasibility study which must address the needs of the poor and determine the affordability of the services rendered for the municipality and residents.

165 S 4(1) of the WSA.

166 S 4(2)(a) and (b) of the WSA.

167 S 4(2)(c) of the WSA. The Act expressly states that procedures for the limitation or discontinuation of water services must be fair and equitable. See section 4(3) of the WSA in this regard.

168 S 1 of the WSA.

169 GN R509 in GG 22355 of 8 June 2001.

170 Regulation 3 of the 2001 Regulations provides the minimum standard for basic water supply services as a minimum quantity of potable water of 25 litres per person per day, or 6 kilolitres per household per month, while regulation 4 requires a water services institution to take steps to ensure that, where water services usually provided by or on behalf of that water services institution are interrupted for a period of more than 24 hours, for reasons other than those contemplated in section 4 of the WSA, a consumer has access to alternative water services comprising at least 10 litres of potable water per person per day.

content of the right to basic water and quantify the minimum standard for basic water supply services to include the provision of education relevant to effective water use, and a minimum quantity of 25 litres of potable water per person per day, or 6 kilolitres per household per month.[171]

The WSA guarantees a right to access to a basic water supply, and every water services institution must take reasonable measures to realise this right.[172] The NIP was adopted by national government to consolidate a number of basic services policies and provides a framework for the provision of free basic services to impoverished people.[173] The Guidelines for Implementation of Municipal Indigent Policies allow municipalities to customise their policies in order to suit the situations faced within their jurisdiction.[174] Simply put, the NIP further clarifies the commitments envisaged by the WSA and the 2001 Regulations. Should water services be interrupted for a period of more than 24 hours, a water services institution must ensure that a consumer has access to alternative water services comprising at least 10 litres of potable water per person per day.[175] Furthermore, where water services are limited or discontinued, such a limitation or discontinuation must be fair and equitable.[176] The 2001 Regulations further provide for the testing of the quality of water and the measures which should be taken if it is found that the potable water is not of good quality.[177]

A basic water supply is described by the NIP as the provision of a basic water supply facility, the sustainable operation of the facility which is to be available for at least 350

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171 Reg 3 in GN R509 of GG 22355 of 8 June 2001.

172 S 3(1) and (2) of the WSA.

173 National Framework for Municipal Indigent Policies (2006) 2. Section 97(1)(c) of the Systems Act requires a municipality to adopt, maintain and implement a credit control and debt collection policy, which must make provision for indigent debtors that is consistent with its rates and tariff policies and any national policy on indigents.

174 Guidelines for the Implementation of the National Indigent Policy by Municipalities 2.

175 Reg 4 in GN R509 of GG 22355 of 8 June 2001.

176 S 4(3)(a) of the WSA. In *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 6 BCLR 625 (W) para 27 the court held that the effect of section 27(1)(b) of the Constitution, when read with section 4 of the WSA, is that if a municipality disconnects an existing water supply to consumers a *prima facie* breach of a water services provider's constitutional duty takes place, which would then require constitutional justification.

177 Reg 5 in GN R509 of GG 22355 of 8 June 2001. The 2001 Regulations go further to state the points at which the water should be sampled, the standards against which samples will be measured, and precautionary measures to be taken in order to protect consumers should the quality not be of a sufficient standard.

days per year and not interrupted for more than 48 consecutive hours per incident, and the education of good water use, hygiene and related practices.[178] In order to meet the requirements set by the NIP, there are two aspects of water supply which need a municipality's attention, namely a basic water supply facility and a basic water supply. The basic water supply facility relates to the infrastructure necessary to supply the basic quantity of 25 litres of potable water per person per day. Communal water points must be within 200 metres of a household, with a minimum flow of 10 litres per minute, or alternatively, 6 000 litres of portable water supplied per formal connection per month in the case of yard or house connections.[179] Some of the criticism lodged against the NIP relates to the low levels of essential services, which seem to be informed by the misconception that indigent household consume or require fewer basic services than average households.[180] The NIP allows municipalities to target poor households and must ensure that non-indigent households who can afford basic services pay for them, however it has been noted that the profile of an indigent household may be difficult to determine in practice.[181] It has been suggested that the existence and successful implementation of these policies should reduce the vulnerability to resource scarcity threats, and therefore sustain the livelihood of communities.[182]

The NIP was adopted in 2006 to ensure that people living in poverty, without the requisite financial resources to pay for water services, are guaranteed access to a minimum quantity of water that would cater for their daily needs.[183] The Free Basic Water Strategy serves as a sector-specific programme which is intended to complement the implementation of the NIP.[184] The NIP recognises that poverty is multi-dimensional, but

178 National Framework for Municipal Indigent Policies (2006) 21.
179 National Framework for Municipal Indigent Policies (2006) 21.
180 Fuo 2014 *Stell LR* 198. Fuo argues that the NIP fails to address existing inequalities related to access, but further maintains these inequalities.
181 National Framework for Municipal Indigent Policies (2006) 20. Also see *Mazibuko* case para 4.
182 King, Maree and Muir "Freshwater Systems" 441.
183 National Framework for Municipal Indigent Policies (2006) 3.
184 National Framework for Municipal Indigent Policies (2006) 7.

states that in South Africa there is an institutional dimension to poverty which is not being addressed and is relative to the functions of local government.[185]

There is currently no commonly accepted definition of a poor household in South Africa.[186] The Free Basic Water Strategy recognises the various definitions of poverty or impoverished conditions supplied by the NIP, which include the inability to access income, the absence of capital such as land, a lack of access to natural resources, and exclusion from access to basic services.[187] A poor household can be defined as one that does not have enough money to maintain a minimal standard of living, that is, enough to purchase a nutritionally adequate food supply and provide other essential requirements.[188] What can be deduced from this definition is a formulation of a national poverty line, a threshold which determines whether or not a household is poor. Heleba[189] also criticises the perception of the nature of a poor household, stating that many households, due to their non-compliance with the criteria set out in the policies, do not qualify as poor households and end up paying for basic services which ought to be free.

The FBWIS promotes sustainable access to basic water supply by providing a subsidy for the ongoing operating and maintenance cost of a basic water supply service.[190] This subsidy should be financed from the equitable share grant that is allocated annually to local government by national government.[191] In order to ensure cost recovery and financial stability, some municipalities implement a block tariff system where the cost of

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185 National Framework for Municipal Indigent Policies (2006) 8-9. The severity of poverty differs, but it is common cause that the so-called vulnerable groups are most at risk of extreme poverty, and thus lack access to basic services such as the provision of free water services.

186 FBWIS 2007 7. The Mangaung Metropolitan Municipality Indigent Policy uses a targeting approach of household income to identify a household as indigent. According to this strategy, the threshold shall be determined in terms of a socio-economic analysis equalling two state pension grants per indigent household or an amount determined by the Council from time to time. See Mangaung Metropolitan Municipality 2015 http://www.mangaung.co.za/wp-content/uploads/2015/07/Indigent-Policy-June-2015.pdf.

187 National Framework for Municipal Indigent Policies (2006) 8. The Implementation Guidelines state that the total income and consumption levels of a household are not the only determining factors which define an indigent household, and that a combination of criteria such as income, child-headed households, citizenship, housing typology and beneficiaries of social grants should be considered. See SERI 2013 http://www.seri-sa.org/images/Targeting_the_Poor_Nov13.pdf.

188 FBWIS 2007 7-8.

189 Heleba 2009 *ESR Review* 10.

190 Swart and Adams "Water services provision and the protection of water resources" 459.

191 Swart and Adams "Water services provision and the protection of water resources" 460.

water increases with usage, provided that the first 6 kilolitres per household per month is free.[192]

The Free Basic Water Strategy outlines a measures for improving and maintaining access to free basic water supply to poor households. This strategy entails gaining access, which would extend services to the still unserved households, maintaining access through the establishment of efficient operating arrangements to ensure that services are properly managed, and targeting the poor through subsidy allocations.[193] This strategy is focussed on the maintenance of service provision and reaching the unreached in terms of allocation. Dugard[194] criticises the legal framework for the provision of water services in South Africa as being commercialised, which creates barriers to accessing sufficient water at local government level.

The industrial use of water is regulated by section 7 of the WSA. According to this section, anyone obtaining water from the distribution system of a water services provider must gain approval from the water services authority which has jurisdiction before obtaining such water.[195] The effluent discharged as a result of the industrial use of water must be capable of purification and treatment by the sewage treatment plant linked to that sewage system and must comply with the standards prescribed by the NWA.[196] Approval granted by a water services authority in terms of section 7(1) does not exempt anyone from complying with any other laws relating to the use and conservation of water and water resources.[197] The Act also provides for procedures regarding the approval required in terms of the industrial use of water,[198] and appeals to the Minister against any decision

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192 FBWIS 2007 7. The NIP proposes this system as one mechanism of ensuring financial stability, but the method cannot be applied across the board in every municipal indigent policy, as municipalities have the right to decide on which mechanisms to implement according to their particular circumstances. See National Framework for Municipal Indigent Policies (2006) 28-30. The high court found that 25 litres of potable water per person per day is insufficient to meet the basic needs and ordered that an amount of 50 litres would thus be sufficient to meet those needs. This decision was overturned in the superior courts in Mazibuko, where the Court consequently refused to provide for the normative content of the right to water, as this fell outside of the scope of the judiciary. See *Mazibuko and Others v City of Johannesburg and Others* 2008 JOL 21829 (W) para 183.

193 FBWIS 2007 7.

194 Dugard 2008 *SAJHR* 601.

195 S 7(1) of the WSA.

196 Reg 9 in GN R509 of GG 22355 of 8 June 2001.

197 S 7(4)(a) of the WSA.

198 S 8(1)-(3) of the WSA.

by a water services authority in respect of an application,[199] who may confirm, vary or overturn a decision made by a water services authority.[200]

Chapter 6 of the NWRS deals with equitable water allocation. The NWRS states that equity has not received the necessary attention since the promulgation of the NWA, alluding to the current state of inequitable water allocation.[201] Equity in the sphere of the NWRS is three-dimensional and includes equity in access to water services.[202] Investments in water resources infrastructure have enabled the provision of access to water in many urban areas in South Africa, yet rural areas still suffer due to a lack of access to reliable water supply for domestic purposes.[203] The NWRS realises that this is a goal which has not yet been realised as envisaged by legislation.[204] In an effort to address inequitable water allocation, the Department of Water Affairs and Sanitation (hereafter the DWA) developed the Water Allocation Reform (WAR) programme, which addresses inequity in the sphere of water allocation.[205] There have been a few challenges which hamper the progressive realisation of the NWRS's equity goals, such as weak internal coordination, poor external alignment with other reform programmes, legislative impediments and a lack of support for historically disadvantaged users to access water and the productive use of their allocations.[206] Competing demands for water uses also lead to inequitable water distribution.

The Minister acts on behalf of the National Government in owning, taking transfer or disposing of any water services work.[207] The Minister therefore plays a regulatory and

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199 S 8(4) of the WSA.

200 S 8(9) of the WSA. In *Merafong City Local Municipality v Anglogold Ashanti Ltd* [2016] ZACC 35 the Constitutional Court had to decide on the constitutionality of section 8 of the WSA, relating to the appeal procedures to the Minister available to applicants in the event that they are dissatisfied with municipal decisions. The minority judgment in this matter declared the provisions in section 8(9) of the WSA inconsistent with the Constitution. See *Merafong City Local Municipality v Anglogold Ashanti Ltd* [2016] ZACC 35 paras 177-178. Fuo concurs with the minority judgment in this matter, arguing that the Minister's appeal powers go beyond mere regulation and amount to an intrusion into the autonomy of municipalities regarding their duties in respect of the provision of water services. See Fuo 2017 *De Jure* 343.

201 NWRS 2013 45.

202 NWRS 2013 45.

203 NWRS 2013 45.

204 NWRS 2013 45.

205 NWRS 2013 45-46.

206 NWRS 2013 46.

207 S 73(3) of the WSA.

oversight role in the provision of water services. This power must be read with section 3 of the NWA, which confirms the role of National Government as custodian of the nation's water resources. The Minister may also issue regulations in terms of national standards and tariffs of the provision of water services.[208] Standards and tariffs may differentiate between different users of water services and different geographic areas, considering the different socio-economic attributes of different areas.[209] The general powers of the Minister are contained in section 73 of the WSA[210] The NWA goes a step further by providing that over and above water resources being in the public trust, the Minister[211] is responsible for ensuring that water is allocated equitably and used beneficially in the public interest.[212]

3.3 Legal and policy framework for the protection of water resources

Section 24 of the Constitution contains the environmental clause, which guarantees the right to have the environment protected for the benefit of present and future generations through reasonable legislative and other measures.[213] This is the overarching provision for the protection of natural resources, and water resources are constitutionally protected in terms of this provision. The principle of public trusteeship[214] captured in section 2(4)(o) of the *NEMA* and section 3 of the NWA identifies the State, acting through the Minister of Water Affairs, as the public trustee of the country's water resources. The State is obliged to manage the use of water resources for the benefit of the people of South Africa and the Minister, as the public trustee of the nation's water resources, must ensure that these resources, including its freshwater resources, are protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner.[215] However, the competency to protect and conserve natural resources is shared by all spheres of

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208 Section 9(1) and section 10(1) read with section 71 of the WSA, which sets out the procedure for making regulations by the Minister.
209 Section 9(2) and section 10(2) of the WSA.
210 See s 73(1)(a)-(j) of the WSA.
211 "Minister" in this context refers to the Minister responsible for water affairs. See section 1 of the NWA.
212 S 3(2) of the NWA.
213 S 24(b) of the Constitution.
214 See Van der Schyff 2010 *PELJ* 122-160; Stein 2000 *Journal of Energy & Natural Resources Law* 287-293.
215 S 3(1) of the NWA.

government, while national government oversees and regulates water-related activities.[216]

As has already been stated, the NWA provides a framework in which water resources may be protected, conserved, developed and used.[217] There are certain provisions which seek to protect the nation's water resources, of which the most important can be found in Chapter 3 of the Act. Firstly, it requires the Minister to develop a classification system for water resources.[218] Secondly, the Minister is required to use this system to determine the class and resource quality of the water resource.[219] Finally, the Minister is required to determine the Reserve of a water resource.[220] It must again be emphasised that the Reserve is twofold, and applies to both components of water security; the basic human needs Reserve and the ecological Reserve.[221] By including the ecological Reserve as a core component in water management, the NWA attempts to create a balanced hydrological cycle, but also provides for priority water use, which strives to meet basic human needs and protect freshwater resources.[222]

Section 19 of the NWA echoes the polluter pays, preventative and remediation principles contained in the NEMA.[223] This section states that an owner of land, a person in control of land, or a person who occupies or uses the land on which any activity or process is or was performed or undertaken which causes, who has caused or is likely to cause pollution of a water resource must take all reasonable measures to prevent such pollution from occurring, continuing or recurring.[224] The Act also furnishes the measures which may be

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216 See in this regard *Nel v Hessequa Local Municipality* (W) (unreported) case number 12576/2013 of 14 December 2015 at paras 13-14. The Court held in this matter that the fact that national and/or provincial government has functional competence over the rivers under the jurisdiction of a municipality does not exclude the municipality's competence to protect natural resources within its jurisdiction. For similar reasoning see *Le Sueur v Ethekwini Municipality* (9714/11) [2013] ZAKZPHC 6 (30 January 2013) para 20.

217 See 3.1 above.

218 S 12 of the NWA.

219 S 13 of the NWA.

220 S 16 of the NWA.

221 Chapter 3, Part 3 of the NWA. The ecological reserve relates to the water required to protect the aquatic ecosystems of the water resource.

222 Kidd 2011 *International Journal of Rural Law and Policy* 6.

223 A similar sentiment is echoed in section 28 of the NEMA, which contains the principle of the duty of care, and section 30 of the Act, which relates to person responsible for the control of unexpected and/or emergency incidents.

224 S 19(1) of the NWA.

undertaken where the pollution of a water resource occurs.[225] A Catchment Management Agency is empowered to direct any person to take the measures provided, or to take the measures necessary to remedy the situation,[226] and thereafter may recover any costs incurred in taking such remedial measures.[227] Similarly, in the event of an emergency incident, a person responsible for the incident or the substance involved must report that incident to the Department of Water Affairs, the South African Police Services or the relevant fire department or the relevant Catchment Management Agency (CMA), and must take all reasonable steps to minimise the effects of the incident, undertake clean-up procedures, remedy the effect of the incident and undertake any other measure required by the Catchment Management Agency in question within the specified time.[228] The Catchment Management Agency is also empowered to take the steps necessary to remedy the situation and recover the costs thereof from the person responsible.[229] Theoretically, granting catchment management agencies these compliance and enforcement powers should be fairly sufficient to address water pollution. However, there are practical issues which arise. Although the Act envisages the establishment of nine Catchment Management Agencies (CMAs), only two are currently functional, with the remaining seven being referred to as proto-CMAs as they are still in the process of being established.[230] In addition, the Minister must fulfil the role of the CMA in areas where no such agency has been established, or where an agency has been established but is not yet functional.[231]

Chapter 4 of the NWA may be used to manage water use, as it requires licensing unless it is a water use listed in Schedule I of the Act, is an existing lawful use,[232] or is permissible under a general authorisation,[233] or if a responsible authority waives the need for a water

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225 S 19(2) of the NWA.
226 S 19(3) and (4) of the NWA.
227 S 19(5) of the NWA.
228 S 20(4) of the NWA.
229 S 20(6) and (7) of the NWA.
230 Meissner *et al* " The Establishment of Catchment Management Agencies in South Africa with Reference to the *Flussgebietsgemeinschaft Elbe*: Some Practical Considerations" 19.
231 Chapter 7 of the NWA.
232 S 21 of the NWA.
233 S 22(1) of the NWA.

use licence.[234] The Minister is also empowered to make regulations[235] which will in turn manage water usage according to the classification of water resources and geographical areas in which they are found. Section 21 of the NWA provides for the discharge and disposal of waste water as a water use. Any person or entity discharging or disposing of waste or water containing waste as contemplated in section 21 of the NWA must comply with any applicable waste disposal standards and management practices prescribed, may not waste that water and must return any seepage, run-off or water containing waste which emanates from that use to the water resource from which the water was taken, unless provided otherwise by the responsible authority.[236]

The principles contained in section 2 of the NEMA are applicable to the protection of water resources, as they promote sustainability, which is inclusive of conservation and the protection of biodiversity and ecosystems.[237] The principles also promote integrated environmental management.[238] The principle of sustainable development,[239] the polluter pays principle,[240] the remediation principle[241] and the principle of the duty of care[242] are all relevant to protecting and sustainably managing freshwater resources. Chapter 5 of the NEMA contains essential provisions regarding integrated environmental management. According to the general objectives, the purpose of Chapter 5 is to "promote the application of appropriate environmental management tools in order to ensure the integrated environmental management of activities."[243]

The NWRS is the primary policy document for implementing the NWA and essentially the conservation and protection of water resources.[244] The NWRS is binding on all authorities and institutions implementing the NWA.[245] Such protection includes the management of

234 S 22(3) of the NWA.
235 S 26 of the NWA.
236 S 22(2) of the NWA.
237 S 2(4)(a) of NEMA.
238 S 2(4)(b) of NEMA.
239 S 4(a) of NEMA.
240 S 4(p) of NEMA.
241 S 4(p) read with S 28 of NEMA.
242 S 28 of NEMA.
243 S 23(1) of NEMA.
244 S 5 of the NWA. Also see NWRS 2013 1.
245 NWRS 2013 1.

the quantity and quality of surface and groundwater.[246] The Strategy document is adamant that the efficient use of water is important in preserving and protecting water resources, but also recognises the need for an improvement in water conservation and water demand management.[247] A greater demand for water would naturally allude to a greater need for the protection of water resources. Water resource management strategies are important tools for use not only in the protection of resources, but also in the provision of water services. The objective of such mechanisms is to strike a balance between the use of resources for livelihoods and the conservation of resources to sustain its function in the service of both present and future generations.[248]

Chapter 5 of the NWRS unpacks the issue of the protection of water resources. Many existing water resource protection plans and programmes were formulated prior to the enactment of the NWRS, such as the classification system in terms of the NWA, pricing strategies, and the Blue and Green Drop Certification Programme.[249] However, there are still certain challenges to achieving optimal protection by implementing water resource protection programmes. Pressure from growth and development, climate change, water quality issues, the protection of strategic water source areas, a lack of awareness of the value of water resources, and a lack in monitoring to inform management actions are some of the challenges.[250] In order to address these issues, the Strategy provides certain guiding principles which will enable water resource protection.[251] The resource must be protected through the classification of the resource with the Reserve as a prior right, which entails classifying all major rivers, wetlands and aquifers.[252] This requires involvement from all users, planners and policymakers at all levels. Water resource protection must guide setting conditions for water use authorisations and the integrated

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246 NWRS 2013 13.
247 NWRS 2013 13.
248 Thompson *Water Law* 162.
249 NWRS 2013 37. The Blue and Green Drop Certification Programmes were introduced by the DWA in 2008 as a regulatory incentive-based tool which monitors the quality and waste-water quality management practices of a municipality. These programmes are meant to recognise municipalities who maintain the quality and standard of practice while simultaneously encouraging non-compliant municipalities to develop strategies to improve the quality of their potable drinking water and waste water management policies. In this regard see Swart and Adams "Water services provision and the protection of water resources" 125, 473.
250 NWRS 2013 38-42.
251 NWRS 2013 43.
252 NWRS 2013 43.

protection of aquatic ecosystems.[253] Amongst some of the strategic actions which inform this set of principles are strategic investment in strategic resource areas, as well as the maintenance and rehabilitation of water ecosystems, maintaining freshwater ecosystems in good condition, minimising pollution from wastewater treatment processes, and committing to sustainable water resource management.[254] In terms of the NWRS, the institutions established by the policy such as the Catchment Management Agencies and Water Tribunal play an integral role in implementing these conservation and protection measures.[255]

Chapter 7 of the Strategy balances such supply and demand by way of water conservation and water demand management strategies (hereafter WCWDM). "Water conservation" can be defined as "the minimisation of loss or waste, the care and protection of water resources and the efficient and effective use of water,"[256] while "water demand management" can be described as the implementation of a strategy or programme by a water institution or consumer to influence water demand and usage in order to achieve economic efficiency. All WCWDM strategies require the support of and input from various sectors in order to be considered efficient.[257] These sectors are either involved in the supply of water or in the demand therefor.[258] The implementation of the WCWDM strategies is vital in the local government sphere,[259] and this is evident in the alignment of these strategies with the WSA. There are also certain strategic actions in place such as ensuring that relevant, practical interventions are implemented by all sectors, strengthening compliance monitoring and enforcement, setting targets, focussing on leak repairs and developing the institutional capacity within the DWA to manage and regulate WCWDM effectively.[260]

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253 NWRS 2013 43.
254 NWRS 2013 44.
255 Chapter 8 of the NWRS.
256 NWRS 2013 52.
257 NWRS 2013 53.
258 NWRS 2013 53. These sectors include the mining, agriculture and power generation sectors.
259 NWRS 2013 53.
260 NWRS 2013 56-58. An alternative to managing and bridging the gap between water supply and water demand has an economic factor attached to it, as it is characterised by various cost implications. Firstly, supply-side management is the method by which water supply is expanded to meet the ever-increasing demand. This would result in significant increases in the cost of water as less favourable sources further afield have to be developed, and costs would be covered by all water users. Secondly,

Kidd[261] contends that on paper South Africa has a legal system which is sufficient to address the problems surrounding water pollution, and that these problems are not new at all, but rather that they have developed over time, as a result of our political history of inequality. He is of the opinion that political will, together with the implementation of the law, is necessary to achieve integrated water resources management which, he argues, is essential to the achievement of sustainable water use in South Africa.[262]

There are many principles which have been discussed above that guide the protection of water resources. These principles are centred on the sustainable use of water resources. Legislation also aptly provides for the conservation and protection of water resources, as do policies. It is worrying, however, that the problems identified in the NWRS of 2013 with regard to the protection of water resources were not identified as a priority in the first NWRS in 2004.[263] This is an indication of the issues regarding the implementation of conservation and protection programmes promoting water resource protection.

3.4 Chapter summary

This Chapter has analysed the legal and policy framework for water security in South Africa. The objective of the analysis was to ascertain whether the legal and policy framework adequately addresses the three components of water security in South Africa: sustainable access to water services, the affordability of water services, and the protection of water resources. While in section 27 the Constitution guarantees the right to access to sufficient water, it is the enacting and implementation of legislation and policies such as the NWA, the WSA, the NIP and the NWRS which gives effect to this right.

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demand-side measures take on a more managerial approach to water supply. By encouraging all water sectors to use water more efficiently, demand-side management provides a more sustainable solution to the problem of water scarcity than the supply side measures, because it takes into account the value of water thereby treating water resources more like a commodity. See King, Maree and Muir "Freshwater Systems" 448-449.

261 Kidd 2011 *International Journal of Rural Law and Policy* 17.

262 Kidd 2011 *International Journal of Rural Law and Policy* 17.

263 NWRS 2013 2. The achievement of water conservation and water demand management targets was one of the outstanding challenges of the NWRS of 2004. Equity in allocation and addressing the disparities of the previous water regime were given priority status in NWRS1. See NWRS 2004 1.

In looking at the legal and policy framework for sustainable access to safe and affordable water, the discussion commenced with section 27 of the Constitution, which mandates the state to ensure that the right to access to water services is realised. The legislation and policies discussed guarantee the right to access to water and place the duty on the State to implement reasonable measures to realise this right. In terms of the WSA, this mandate to provide sustainable access to a water supply rests with local government, although intergovernmental support is paramount. The duty to provide sustainable access to water sources may also rest with juristic persons who are authorised by a municipality to do so as external contractors.

Furthermore the NIP, which is the policy which municipalities must adopt and alter according to their merits, empowers the municipality to provide free potable water to households which have been identified as indigent households in terms of the policy. This means that marginalised persons will obtain free water supply services from the municipality, which will in turn guarantee access to potable water. The WSA and the 2001 Regulations provide the content to the right to access to water and also identify the conditions in which a water supply may be interrupted and discontinued, ensuring sustainable access to potable water. The Free Basic Water Strategy provides for a subsidy for the ongoing operation and maintenance costs of a basic water supply, and therefore echoes the NIP in the case of indigent households. The NWRS is not to be forgotten as a policy promoting sustainable and affordable access to water, as it provides for a water allocation programme which must ensure that the nation's water resources are allocated equitably and in accordance with the different water uses.

While it is the core duty of local government to provide access to sustainable and affordable water, National Government is still the custodian of the nation's water resources, and therefore the Minister plays both a regulatory and an oversight role in ensuring sustainable and affordable access to potable water.

This discussion of the legal and policy framework for the protection of water resources commenced with an overview of section 24 of the Constitution, which guarantees the right to have the environment protected. The NWA provides the framework in which water resources may be protected, conserved, developed and used. The Act also cites

the State as the public trustee of water resources. It must be kept in mind that although the functional competency of protecting natural resources is attributed to national and provincial government, recent case law has confirmed that local government has the duty to protect the water resources in its jurisdiction.

The Minister plays a prominent role in the protection of water resources, especially in terms of the NWA. His powers relate to the classification system and the determination of the Reserve. What is important to note is that the Reserve consists of two components, namely the basic human needs reserve and the ecological reserve, the latter of which is the object of protection in the water security context.

The NWA provides for pollution prevention measures and procedures through its regulation of water uses, with reference to the discharge and disposal of waste water. This fight against pollution is echoed in the NEMA's principles relating to pollution prevention. In terms of these acts, the Minister or the CMA may direct a person in control of the land on which an emergency incident occurred, or responsible for the incident, to take measures to minimise and/or prevent the pollution.

The NWRS as the main policy document directed at implementing the NWA is binding on all authorities implementing the NWA. Programmes such as the Blue Drop Certification Programme and the Green Drop Certification Programme urge municipalities to maintain a certain quality and standard of practice when it comes to waste water.

In the writer's opinion, the legal and policy framework established adequately address the components of water security in that both components are uniformly covered in all statutes and policies, which confirms that these components are intertwined. Satisfying only one component would not be sufficient to achieve water security, as the definition of water security suggests. The policies are replete with plans to ensure that water resources are protected, but their implementation is inadequate. This can be witnessed in the many instances where the Minister has had to step into the position of a key role player in order to enforce compliance with the standards set by legislation and take steps to remedy pollution. It is this non-compliance which results in institutions failing to meet their constitutional mandate, which is then referred to the Courts for litigation. The decisions made by the Court will be addressed in the next chapter.

CHAPTER 4: COURTS AND WATER SECURITY IN SOUTH AFRICA

4.1 Introduction

Chapter 3 analysed the legal and policy framework for water security in South Africa. It was established that different statutes and policies have been adopted in order to address the different components of water security and that these statutes work in synergy with one another. This chapter will analyse and reflect on the role which South African courts can play in promoting the three main components of water security identified in chapter 2. In a study examining the role of courts in promoting sustainable development in South Africa, Kotze and Du Plessis argued that the role of the courts is four-fold:

> First courts "uphold" the law in practice by weighing rights and interests and then (hopefully) making reasonable, just, lawful and equitable findings; second, courts solve environmental disputes between parties by interpreting and then applying the law and in this sense they give practical effect to one of the most basic functions of law, namely, that of social control and maintaining social order; third, while executing all their functions in terms of the previous two roles, courts simultaneously contribute, through analysis, interpretation and explanation, to a sounder and more useful, or refined, comprehension, and therefore, deepening of the environmental law discourse; and fourth, by doing so, the courts contribute to law-making.[264]

Drawing from the views of Kotze and Du Plessis outlined in the above extract, this researcher argues that South African courts can promote water security by discharging four duties: Firstly, the courts must uphold the law by weighing the rights and interests that relate to water and then making reasonable, just and equitable findings. Secondly, the courts must solve water-related disputes between parties by interpreting and applying the Constitution, water legislation and policies discussed in chapter 3. Just as in the sustainable development context, it is submitted that in executing the first two functions, courts contribute to a deeper understanding of the water security discourse through analysis, interpretation and explanation. Finally, through the execution of their traditional function, courts contribute to law-making that has a direct effect on the development of water security law. Against this background, this chapter uses case-law to show how the jurisprudence of courts has contributed to promoting water security in South Africa.

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[264] Kotzé and Du Plessis 2010 *Journal of Court Innovation* 159-160.

This chapter will commence with a discussion of the structure of courts in South Africa and their powers over constitutional matters in part 4.2. As will become evident from the discussion in 4.2 below, the judicial authority of courts is guaranteed in the Constitution. In addition, the Constitution provides the overarching legal framework for addressing the various components of water security in South Africa. Due to the close relationship that exists between affordability and sustainable access to water, Part 4.3 of this chapter contains a review of selected cases dealing with sustainable access to water. Part 4.4 reviews selected cases that raised questions relating to the protection of the country's water resources. Finally, a summary of the chapter will be provided in part 4.5.

4.2 Structure and constitutional mandate of courts

The Constitution provides for matters connected to the courts and the administration of justice in Chapter 8. In terms of section 165 of the Constitution, the judicial authority of the Republic vests in the courts.[265] The courts are independent, subject only to the Constitution and the law,[266] and no organ of state may interfere with their functioning.[267] Any order issued by a court binds all persons and organs of state to which it applies.[268] This provision emphasises the independence of the courts, the principle of the separation of powers, the supremacy of the Constitution, and the fact that the State and its citizens should submit to the judgments made by the courts.[269]

There is a certain hierarchy of courts, and in terms of this hierarchy, courts are permitted to issue orders on certain matters based on jurisdictional constraints.[270] The Constitutional Court is the highest court in South Africa, and may decide on constitutional matters, as well as any other matter which raises an arguable point of law of general public

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265 S 165(1) of the Constitution.

266 S 165(2) of the Constitution.

267 S 165(3) of the Constitution. The independence of the judiciary and the challenges which this notion poses for judges were discussed by Judge Van Zyl in his 2008 FW De Klerk Lecture. In this regard see Van Zyl 2008 *PELJ* 1-13.

268 S 165(5) of the Constitution.

269 Kotzé and Du Plessis 2010 *Journal of Court Innovation* 160-161. Also see Budlender 2011 *SAJHR* 582-599 for commentary regarding the role of the Constitutional Court in asserting democracy, and specifically on the author's views on the supervisory role of the court in the human rights paradigm.

270 For details on the structure of the judiciary, see Barnard-Naudé "Adjudication, interpretation and dispute resolution" 193-198.

importance.[271] A matter may be brought directly to the Constitutional Court, with the leave of the Court, when it is in the interests of justice to do so.[272] Only the Constitutional Court may decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state.[273] A constitutional matter may include any issue involving the interpretation, protection or enforcement of the Constitution.[274] The Supreme Court of Appeal is the highest court of appeal, save for labour or competition matters to such an extent as may be determined by an Act of Parliament.[275] A High Court of South Africa may decide on any constitutional matter save for those matters assigned directly to the Constitutional Court and those matters assigned to a court of similar status by an Act of Parliament.[276] Courts with a lower status than that of the High Court may not rule on the constitutionality of any legislation or the conduct of the President.[277]

Relevant to this discussion is the power of courts in constitutional matters. Section 172(1)(a) of the Constitution provides that, when deciding a constitutional matter within its power, a court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency. Upon a finding of constitutional invalidity, a court may make any order that is just and equitable, including an order limiting the retrospective effect of a declaration of invalidity,[278] or an order suspending the declaration of invalidity to allow the competent authority time to correct the defect.[279] A court may grant a temporary interdict or other temporary relief to a party in the interim, or may adjourn the proceedings, pending a confirmation of constitutional invalidity from the Constitutional Court.[280] Section 172 grants the Constitutional Court wide discretionary powers, in that any court order concerning the constitutional validity of an Act of Parliament or conduct will not be binding until it is confirmed by the Constitutional Court.

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271 S 167(3)(b) of the Constitution.
272 S 167(6) of the Constitution.
273 S 167(4)(a) of the Constitution.
274 S 167(7) of the Constitution.
275 S 168(3) of the Constitution.
276 S 169(1) of the Constitution.
277 S170 of the Constitution.
278 S 172 (1)(b)(i) of the Constitution.
279 S 172 (1)(b)(ii) of the Constitution.
280 S 172 (2)(b) of the Constitution.

This has considerable ramifications for water security law, as the Constitutional Court may declare invalid conduct based on any of the two components of water security which the writer has identified, and therefore promote water security through judicial processes. In addition, the breadth of the discretionary powers entrusted to courts by the Constitution suggests that, in principle, they can contribute towards promoting water security by executing the roles identified in 4.1 above.

Apart from the provisions dealing with the structure and powers of courts in South Africa, there are many provisions in the Constitution which facilitate access to courts. In section 38 the Constitution makes provision for parties who are competent to approach the court. The section states that the listed parties have the right to approach a competent court where a right in the Bill of Rights has allegedly been violated, and such a competent court may grant appropriate relief, including a declaration of rights.[281] Parties who may approach a court include anyone acting in his or her own interest or on behalf of another person who cannot act in his or her own name, anyone acting as a member of or in the interest of a group of persons, anyone acting in the public interest and an association acting in the interest of its members.[282] The effect of this provision on issues related to water security is that vulnerable persons who usually do not have access to the courts may be represented by an interested party such as an NGO, who may advocate for their rights. It creates a doorway for the enforcement of rights through a party acting in the best interests of the affected group.[283]

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281 S 38 of the Constitution.

282 S 38 of the Constitution.

283 Cote and Van Garderen comment on the usefulness and effectiveness of section 38 to the NGO, Lawyers for Human Rights, who litigate in the sphere of human rights on behalf of very poor, often displaced persons. See Cote and Van Garderen 2011 *SAJHR* 171.

4.3 Review of cases dealing with sustainable and affordable access to water

4.3.1 Federation for Sustainable Environment and Others[284]

4.3.1.1 Facts of the case

The Silobela community lies on the outskirts of Carolina in Mpumalanga.[285] The water supply in the area was contaminated by acid mine water, which made the water unfit for human consumption.[286] In order to alleviate the brunt, in February 2012 water tanks were sourced to supply the residents with water from neighbouring towns. Approximately 20 water tanks were placed around the area of Silobela, Carolina.[287] The applicant alleged that for the period between March and May 2012 the system of providing water to the residents was inadequate as some of the tanks had not been refilled and others had remained completely empty.[288] Due to the fact that the tanks were accessed on a "first come first serve" basis, many residents were forced to walk long distances in order to access tanks elsewhere.[289] The applicant argued that the residents of Carolina had not had a reliable supply of water for an extended period beyond the seven day period, as prescribed by the 2001 Regulations.[290] They argued that this inadequacy constituted a gross infringement of the constitutional right to access to water.[291] The applicants also contended that the respondents should engage with the community in putting measures in place which would address water provision as well as the mitigation and prevention of pollution by the mines.[292] Due to the water supply's being dire at that moment, it was contended that the matter was one of urgency.[293]

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284 *Federation for Sustainable Environment and Others v Minister of Water Affairs* (ZAGPPHC) (unreported) case number 35672/2012 of 10 July 2012. Hereafter, *Federation for Sustainable Environment* case.
285 *Federation for Sustainable Environment* case para 3.
286 *Federation for Sustainable Environment* case para 4
287 *Federation for Sustainable Environment* case para 4.
288 *Federation for Sustainable Environment* case para 5.
289 *Federation for Sustainable Environment* case para 5.
290 *Federation for Sustainable Environment* case para 6.
291 *Federation for Sustainable Environment* case para 6.
292 *Federation for Sustainable Environment* case para 7.
293 *Federation for Sustainable Environment* case para 8.

4.3.1.2 Decision and *ratio decidendi*

The Court acknowledged the duties of the respondents in ensuring water supply, as envisaged by the Constitution and relevant statutes.[294] Responding to the issue of urgency contended by the applicants and opposed by the respondents, the Court referred to the effects of apartheid and the structured racial divide which followed.[295] The Court held that:

> If the legacy of apartheid is ever to be eliminated, it requires that the Courts, must also strive to encourage the national government and all its structures, to boldly and with haste march towards the cherished objective encapsulated in the preamble.[296]

The Court held that the nature of the case therefore required that it be dealt with urgently, as it related to the fundamentally entrenched right to access to water.[297] The Court held that the failure to provide access by way of the water tanks could not be the sole responsibility of the respondents, as it had been submitted that some of the water tanks had been destroyed by the residents of Silobela,[298] rendering positive action by the respondents ineffective. However, the Court emphasised the duty of the municipalities to solve the water crisis and engage with community members in a meaningful manner in developing a progressive plan to achieve this objective.[299] In the light of the urgency of the matter, the Court ordered that the municipalities must provide temporary potable water to the residents of the affected communities in line with the 2001 Regulations.[300] The Court further ordered that the municipalities must engage with the residents regarding the steps to be taken in ensuring that potable water can be supplied through the water supply services, and the intricacies of the temporary water provision, such as the quantity and location of such supply.[301] The municipalities were finally ordered to report back to the Court within a month of the court's order as to the measures which

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294 *Federation for Sustainable Environment* case paras 10-15.
295 *Federation for Sustainable Environment* case para 17.
296 *Federation for Sustainable Environment* case para 17.
297 *Federation for Sustainable Environment* case para 18.
298 *Federation for Sustainable Environment* case para 22.
299 *Federation for Sustainable Environment* case para 24.
300 *Federation for Sustainable Environment* case para 26(1)-(2).
301 *Federation for Sustainable Environment* case para 26(3).

had been taken to ensure that potable water was supplied to the affected communities through the water services institution.[302]

4.3.1.3 A critical reflection on the judgment

As a starting point, it must be noted that the municipalities failed to comply with the court order in that the water tanks were not filled consistently, and eventually this supply was stopped.[303] The water crisis was eventually resolved without an appeal to the Supreme Court of Appeal. In declaring unlawful in terms of the 2001 Regulations the conduct of the municipalities in failing to provide access to effective and reliable potable water,[304] the Court effectively upheld the law, discharging one of its duties as identified in 4.1 above. Further, by ordering a temporary restoration of access to potable water within 24 hours, in line with the 2001 Regulations,[305] and directing the municipalities to actively and meaningfully engage with the communities on the steps which they intended to take to make such access to potable water services permanent,[306] the Court ensured sustainable access to water services - a core component of water security. The Court accepted the matter as one of urgency, which confirms the position of the Court in placing value on the interests of society, especially where it is alleged that a violation of a constitutionally entrenched right has occurred.

The order made by the Court requiring the local authorities to report back within a month of the order's being issued placed the Court in a supervisory role in this regard. Fuo[307] is of the opinion that the use of supervisory interdicts demonstrates the commitment of courts to improving the lives of impoverished, disadvantaged and often marginalised South Africans. The order also held the local authorities responsible and thereby forced them to discharge their socio-economic duties.[308] In considering Fuo's argument on supervisory interdicts, their use in the water security context can be important, as it has

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302 *Federation for Sustainable Environment* case para 26(4).
303 Fuo 2013 *Murdoch University Law Review* 31. In this regard also see Lawyers for Human Rights 2012 http://www.lhr.org.za/news/2012/press-release-carolina-residents-oppose-municipalities-leave-appeal-application.
304 *Federation for Sustainable Environment* case para 2.
305 *Federation for Sustainable Environment* case para 3.
306 *Federation for Sustainable Environment* case para 4.
307 Fuo 2013 *Murdoch University Law Review* 32.
308 Fuo 2013 *Murdoch University Law Review* 33.

been established in chapter 2 that the poor and marginalised are most affected by water insecurity, and that municipalities are failing to deliver this vital service. This failure places the courts in a position to assist indigents through granting supervisory interdicts and ultimately supervising and assisting local authorities to fulfil their service delivery mandate.

4.3.2 Mazibuko and Others v City of Johannesburg and Others[309]

4.3.2.1 Facts of the case

All of the applicants in this matter were residents of one of the poorest areas of the City of Johannesburg (the respondent).[310] Water leakages in the City of Johannesburg had become a problem, and the area in which the applicants resided, Phiri in Soweto, had a large quantity of water which was unaccounted for due to both leakages and the fact that many residents had not paid the consumption charges.[311] A project to curb water leakages and increase rates collection was launched.[312] As part of the project, prepaid water meters were installed in selected households in the area.[313]

The *Mazibuko* case was first heard in the High Court[314] and challenged the legality of installing pre-payment water meters in the light of the constitutional right to sufficient water. The case investigated the obligations of the City of Johannesburg and Johannesburg Water regarding access to water and the supply of free water for residents who cannot afford to pay. It was argued that, since pre-payment water meters require users to pay for water in advance, access to sufficient water is limited if users cannot afford to pay in advance. This was the reality faced by the Phiri residents. It was argued that this was incompatible with the constitutional right to sufficient water.[315]

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309 *Mazibuko and Others v City of Johannesburg and Others* 2010 4 SA 1 (CC), hereafter the *Mazibuko* case.
310 *Mazibuko* case paras 4-5.
311 *Mazibuko* case para 11-12.
312 *Mazibuko* case para 13.
313 *Mazibuko* case para 14.
314 *Mazibuko and Others v City of Johannesburg and Others* 2008 JOL 21829 (W), hereafter the *Mazibuko HC* case.
315 *Mazibuko HC* case para 92.

The High Court held that the installation of prepayment meters was a retrogressive step, in that it not only hampered the applicants' access to water, but also in that they were forcefully installed without the consent of and input from the residents themselves. The installation was therefore unconstitutional and unlawful.[316] Furthermore, the Court held that, given the particular needs of the Phiri community, a volume of 50 litres of water per day would be a more appropriate quantification of sufficient water than the statutory 25 litres per day limit.[317] Satisfied that the respondent could provide this increased amount, the High Court ruled in the applicants' favour.[318] The Court also found that the various policies adopted by the City, especially the policies encouraging and promoting the installation of these prepaid water meters, were irrational and unreasonable.[319]

Dissatisfied with the High Court's judgment, the City of Johannesburg escalated the matter to the Supreme Court of Appeal.[320] The Court had to address two main issues, namely whether the City had a constitutional mandate to provide free water to the residents who could not afford to pay for such water, and whether the City could restrict the Phiri residents access to water by way of prepayment water meters. The Court held, after investigation, that 42 litres of water per person per day would be sufficient.[321] It was found that the City was constitutionally obliged to grant each Phiri resident who could not afford to pay for water 42 litres per day free, insofar as this could reasonably be done, with due consideration to the available resources.[322] The matter was referred back to the City to reformulate its water policy in accord with the ruling.[323]

Unhappy with the Supreme Court's decision to reduce the amount deemed sufficient from 50 litres per day to 42 litres per day, the residents of Phiri appealed to the Constitutional Court. The applicants challenged the constitutionality of the City's decision to supply an amount of 6 kilolitres of free water per month to every account-holder in the City on the

316 *Mazibuko HC* case paras 157-166.
317 *Mazibuko HC* case paras 179-181.
318 *Mazibuko HC* case para 181.
319 *Mazibuko HC* case para 150.
320 *City of Johannesburg v L Mazibuko* (489/08) [2009] ZASCA 20 (25 March 2009), hereafter the *Mazibuko SCA* case.
321 *Mazibuko SCA* case paras 22-24.
322 *Mazibuko SCA* case para 43.
323 *Mazibuko SCA* case para 62.

ground that the policy from which it stemmed was in conflict with section 27(1)(b) of the Constitution.[324] The applicants argued that the court should be able to determine the content of the right in section 27(1)(b) by quantifying the amount of water which could be considered sufficient for a dignified life. They argued that 50 litres per person per day would meet this threshold.[325] The applicants also argued that the City's installation of water meters was unlawful.[326] The questions that arose pertained to the nature of the City's obligations to provide access to sufficient water in terms of the Constitution.

4.3.2.2 Decision and *ratio decidendi*

The Court had to assess the extent of the state's positive obligations in terms of section 27(1)(b) of the Constitution. In doing so, the Court followed the same approach as was followed in the *Government of the Republic of South Africa and Others v Grootboom and Others*[327] and *Minister of Health and Others v Treatment Action Campaign and Others*[328] cases. In these cases the very same Constitutional Court had held that the Constitution provides qualifying provisions for section 26 and 27, which places a direct duty on the state to progressively realise these rights.[329] It was held that section 27(1)(b) of the Constitution does not require the state to provide every person with water on demand, but rather that it requires the state to take reasonable legislative and other measures to progressively realise the right of access to sufficient water, within the state's available resources.[330]

In relation to the argument raised by the applicants that the Court should determine the content of the right contained in section 27(1)(b) of the Constitution, the Court rejected this argument on two grounds. Firstly, the Court stated that section 27(1)(b) and section 27(2) must be read together, in that the Constitution is clear that the right to access to sufficient water cannot be realised on demand but must be realised progressively, taking

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324 *Mazibuko* case para 6.
325 *Mazibuko* case para 51.
326 *Mazibuko* case para 6.
327 *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 1 SA 46 (CC), hereafter the *Grootboom* case.
328 *Minister of Health and Others v Treatment Action Campaign and Others* 2002 5 SA 721 (CC). Hereafter the *Treatment Action Campaign* case.
329 *Mazibuko* case paras 48-49.
330 *Mazibuko* case para 50.

into consideration a number of factors.[331] Furthermore, the content of the right will vary over time and context. Quantifying the right will prevent an analysis of context in future and lead to a situation where no progress in terms of realising the right is made.[332] Secondly, the Court held that it is inappropriate for the judiciary to determine exactly what the achievement of socio-economic rights entails. It must be left to the executive and legislature, working in conjunction with state institutions and in consideration of budget allowance and forecasts.[333] The Court reasoned that the Constitution prescribes that legislative and other measures will be the instrument for the achievement of socio-economic rights. It held that when the state adopts such measures, the rights in the Constitution acquire content, and that content will then be subject to the constitutional standard of reasonableness.[334]

The Court also explained the manner in which the positive obligations that rest upon the state would be enforced by the courts:

> Thus the positive obligations imposed upon government by the social and economic rights in our Constitution will be enforced by courts in at least the following ways. If government takes no steps to realise the rights, the courts will require government to take steps. If government's adopted measures are unreasonable, the courts will similarly require that they be reviewed so as to meet the constitutional standard of reasonableness. From Grootboom, it is clear that a measure will be unreasonable if it makes no provision for those most desperately in need. If government adopts a policy with unreasonable limitations or exclusions, as in Treatment Action Campaign (No 2), the Court may order that those are removed. Finally, the obligation of progressive realisation imposes a duty upon government continually to review its policies to ensure that the achievement of the right is progressively realised.[335]

The Court rejected the arguments made by applicants claiming that the City's Policy was unconstitutional based on the fact that the amount of 6 kilolitres of water was insufficient for large households,[336] and that the policy was inflexible in that it allocated 6 kilolitres of water to both rich and poor households,[337] and finally, that it allocated water per household rather than per person.[338] The Court consequently found that the City's Free

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331 *Mazibuko* case paras 57-58.
332 *Mazibuko* case para 60.
333 *Mazibuko* case para 61.
334 *Mazibuko* case para 66.
335 *Mazibuko* case para 67.
336 *Mazibuko* case paras 86-89.
337 *Mazibuko* case para 83.
338 *Mazibuko* case para 84.

Basic Water Policy fell within the bounds of reasonableness and therefore did not contravene either section 27 of the Constitution or the WSA.[339]

On the issue of the pre-paid water meters, the Court held that the City was authorised to introduce pre-paid meters in terms of national legislation and the City's by-laws.[340] Judge O'Regan stated that the power to install prepaid meters was reasonably incidental to providing services to citizens in a sustainable manner, and was a power that was reasonably incidental to the effective performance and functioning of a municipality.[341] The Court also held that where the water supply ceased, pending the purchase of additional credit, this should be understood as a temporary suspension, and not a discontinuation of services.[342] In effect, the Court held that the installation of prepaid water meters was neither unconstitutional, nor was it in conflict with the WSA, and thus it was lawful.[343] The Court also praised the City for its continuous revision of its policy, which addressed the needs of the poorest residents, and could not find that the policy was unreasonable, as claimed by the applicants.[344]

4.3.2.3 A critical reflection on the judgment

The role of the Court in the Mazibuko case is important to a consideration of socio-economic rights jurisprudence in South Africa. The Case has drawn much criticism from scholars, and will undoubtedly remain the point of reference in the search for water security. In 4.1 above it was indicated that one important role courts play is to balance the competing interests of society and to make judgments which are just and equitable. This case tested that benchmark in its entirety and the criticism which followed proves this. The Constitutional Court was put in the position to weigh up the interests of the poor, marginalised residents of Phiri against the City's desire to rehabilitate the financial system it uses to provide water services. This is an example of the conflict involved in attaining sustainability. The social aspects in this matter could be assumed to outweigh

339 *Mazibuko* case paras 138-143.
340 *Mazibuko* case paras 106-114.
341 *Mazibuko* case para 111.
342 *Mazibuko* case para 120.
343 *Mazibuko* case para 158.
344 *Mazibuko* case para 143.

the economic challenges faced by the City. Kotzé[345] makes the same analogy regarding sustainability and praises the Constitutional Court's judgment. He places intergenerational equity at the heart of the Court's decision, by stating that due to the severe water scarcity issues experienced by South Africa, the Court could not provide every resident of Phiri with access to 50 litres of water per day, considering the state had the resources to do so, while ensuring that the generations to follow would enjoy the same entitlements.[346] In his critique Kotzé also alludes to the Court's role in the interpretation of the law, stating that a "conservative approach to the interpretation of certain socio-economic rights may allow for the possibility of protecting natural resources through the imposition of constraints or limitations on resource use provided by the concept of sustainability."[347] This means that section 27 of the Constitution may be utilised not only to regulate access to water but also as a means of protecting water resources for posterity.[348]

Dugard and Mohlakoana argue that women suffer the most when it comes to access to water. Firstly, access to water is still unaffordable for many women-headed households,[349] and women often bear the brunt of the problems which accompany the installation of prepaid meters, such as disconnections due to the exhaustion of their credit.[350] However, this argument was never raised in the appeals in the Supreme Court and the Constitutional Court.[351] The writer argues that had this aspect of access been argued well before the Court, it might have influenced the outcome to the benefit of the poor women who tirelessly labour in rural areas to fetch water.

According to Dugard, the *Mazibuko* case reveals a clash between a rights-based concept of water as a social good as against to an approach where water is viewed as a commodity.[352] In the matter before the High Court, the applicants had introduced a new model, which was adopted by the High Court.[353] This rights-based approach would satisfy

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345 Kotzé 2010 *Journal of Human Rights and the Environment* 158.
346 Kotzé 2010 *Journal of Human Rights and the Environment* 158.
347 Kotzé 2010 *Journal of Human Rights and the Environment* 159.
348 Kotzé 2010 *Journal of Human Rights and the Environment* 159.
349 Dugard and Maohlakoana 2009 *SAJHR* 550, 561.
350 Dugard and Maohlakoana 2009 *SAJHR* 564-565.
351 Dugard and Maohlakoana 2009 *SAJHR* 557.
352 Dugard 2010 *Review of Radical Political Economics* 177.
353 Dugard 2010 *Review of Radical Political Economics* 177.

the needs of the poor while meeting municipal cost-recovery requirements and eliminating excessive water use, but the reasoning of the High Court was not followed by the Constitutional Court.[354] The Court was very cautious in interfering with the duties of the executive and legislature, in that it refused to make a call on the content of section 27, electing instead to play a role in solving the dispute at hand by interpreting and applying the Constitution as well as the City's Policy regarding the provision of water.[355] In this manner the Constitutional Court addressed sustainable access to water services as a core component of water security in that it praised the efforts of the municipality to continuously revise its Free Basic Water Policy[356] to ensure that residents in bigger households and those with special needs had access to more than 6 kilolitres of water per month. The City's flexible approach ensured that changing circumstances were catered for based on its continuous research in this regard. The City's move to install prepaid water meters was aligned with its policy relating to the provision of access to water services, which is what the Court took cognisance of when interpreting the policy. The City, according to the Court, had upheld its duty in terms of section 27(2) to take reasonable legislative and other steps to progressively realise the right to access to sufficient water as envisioned by section 27(1)(b), by implementing the City's Free Basic Water Policy.

The jurisprudence of the Court in the *Mazibuko* case contributed to a deeper understanding of the water security discourse in South Africa, especially in the light of the Constitution and the duties it imposes on the State to realise socio-economic rights. It was held that the right to access to water cannot be enforced on demand, and that the state needs to develop reasonable legislative and other measures in order to realise this right. In this case, one of the reasonable measures was the implementation of the City's Free Basic Water Policy, which was in a constant state of revision, as the indigent profile

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354 Dugard 2010 *Review of Radical Political Economics* 177.

355 Brand describes this sense of hesitation as a strategy of deference, whereby a court simply defers the issues which require a decision to one of the other branches of government. He further criticises this judicial deference as limiting the political capacity of poor people, and therefore further impoverishing them. This has an effect on their claim to socio-economic rights and their ability to approach the courts for remedy. See Brand 2011 *Stell LR* 619-628.

356 *Mazibuko* case paras 94-97.

of the City changed. Humby and Grandbois[357] criticise the Constitutional Court as having failed in its duty to enforce the human right to water, and ask whether the Court in this matter should have scrutinized the legal, institutional and financial context within which local authorities operate as the water services providers.[358] The writer shares the point of view implicit here. However, the financial and institutional context within which a municipality operates cannot be a matter which the Court alone must consider, as it is closely related to the political climate of South Africa.

In assessing the Court's role to uphold the law by weighing the interest of society and making just an equitable findings, and in considering the critique of the judgment as well as the scope and theme of this research, this researcher is of the opinion that the Court in *Mazibuko* made a just and equitable finding regarding the lawfulness of the installation of prepaid meters. This action from the City was in keeping with its policies and its constitutional mandate to progressively realise the right to access to water, and to take steps to realise that right. This would also ensure sustainable access to water services, which is very important when considering the notion of sustainability, the goals attached to it and the potential impact of climate change. The idea that water may be prepaid does not, in the author's opinion, equate to affordable access to water services. The situation in which the Phiri residents found themselves is testament to that. Whether the residents had access to water through the prepaid meters or through the conventional municipal system, disconnection was inevitable. Residents would then have to go through the process of having the system reconnected, which had its own financial implications. If the conventional system were in operation and the water bill were not paid the water would continue to flow. Although the prepaid method of regulating access was now part of the City's policy, which the Court described as being progressive and constantly evolving, in terms of the law it would also have to be subject to improvements. Irrespective of the fact that the Court discharged its role above, the writer is of the view that the court did not promote water security in this case, based on the fact that the access component of the principle did not receive the judicial attention which it so deserved. When viewed at in isolation, the socio-economic interests of the Phiri

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357 Humby and Grandbois 2010 *Les Cahiers de Droit* 538.
358 Humby and Grandbois 2010 *Les Cahiers de Droit* 540.

community was not sufficiently weighed against the benefits of a policy which at the core was meant to serve the people.

4.4 Review of cases dealing with the protection of water resources

4.4.1 *KOSH* Cases

All of these cases are interrelated and dealt with attempts by the Department of Water Affairs to address the potential pollution of water resources by mines operating in the Klerksdorp, Orkney, Stilfontein and Hartebeesfontein areas (the KOSH area). Due to the sequence of events and the close connection between these cases, it is impossible to present a full description of their import without discussing all the cases. This part of the chapter looks at the facts, decisions and reasoning of the courts in these cases before reflecting on the implications of the jurisprudence of the courts in the water security context.

The following background information is sourced from *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd and Others*,[359] hereafter the *Stilfontein* case. In this matter, which gave rise to the facts of the *KOSH* cases, the applicants sought an order of contempt of court against the respondents. The mining activities of the respondent in the KOSH area had resulted in a situation where at that stage, if the underground water had not been raised to the surface and treated appropriately, it would result in the pollution of the underground water sources.[360] Representatives of the respondents and the applicant had to reach an agreement on how the water could be managed in the interests of all parties concerned, including the public.[361] The parties failed to reach an agreement, and as a result various directives were issued by the applicant in order to address the problem.[362] The directives were issued in terms of section 19 of the NWA and were aimed at ensuring that the risk of water pollution as a result of mining activities in the KOSH area did not materialise.[363] The respondents failed to comply with

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359 *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Limited* 2006 ZAGPHC 47 (15 May 2006).
360 *Stilfontein* case para 2.
361 *Stilfontein* case para 2.
362 *Stilfontein* case para 2.
363 *Stilfontein* case para 13.2

the directives and the applicant consequently obtained a court order compelling the respondents to comply with the directives, which again the respondents ignored and failed to comply with.[364] It must be noted that at the time when the matter was heard, the directors of the first respondent, herein cited as the second to fifth respondents, had resigned, an issue which the judge in this matter dealt with extensively.[365]

4.4.1.1 *Harmony Gold Mining Company Limited v Regional Director: Free State Department of Water Affairs and Forestry and Another*[366]

The Department of Water Affairs and Forestry as the respondent in this matter issued a directive which directed the five mining companies to take anti-pollution measures to prevent the pollution of water resources in the mines which they were operating.[367] The directive compelled the five mining companies to join their financial resources in order to prevent contaminated water from the defunct mines from reaching the active ones.[368] Harmony Gold argued that section 19(1) of the NWA did not require anti-pollution measures to be taken by one land-owner on the land of another owner,[369] and that the Regional Director was not empowered by s 19(3) to issue the directive.[370]

In interpreting section 19(3) the Court firstly explained that the wording of the provision made it plain that the legislature intended to vest the Minister with wide discretionary powers and to leave it to him/her to determine what measures a defaulting landholder must take, and for how long it must continue to do so.[371] Secondly, the Court held that the rationale of section 19(3) was to direct the landholder to address the pollution or risk of pollution, irrespective of how long it might take to do so, and that that rationale did not fall away when the landholder ceased to own, control, occupy or use the land.[372]

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364 *Stilfontein* case para 6.
365 *Stilfontein* case para 1.
366 *Harmony Gold Mining Company Limited v Regional Director: Free State Department of Water Affairs and Forestry and Another* (269/05) [2006] ZASCA 66; [2006] SCA 65 (RSA) (29 May 2006), hereafter *Harmony Gold SCA* case.
367 *Harmony Gold SCA* paras 5-7.
368 *Harmony Gold SCA* paras 8-9.
369 *Harmony Gold SCA* case para 18.
370 *Harmony Gold SCA* case para 18.
371 *Harmony Gold SCA* case para 23.
372 *Harmony Gold SCA* case para 24.

The Court rejected the applicant's argument that the directive ceased to be valid when it became clear that an agreement could not be reached as to how the water pollution would be managed. The Court held that when an agreement could not be reached, the directive would invoke section 150 of the NWA, which would require the dispute to be subjected to mediation and negotiation proceedings.[373]

4.4.1.2 *Harmony Gold Mining Company Ltd v Regional Director: Free State Department of Water Affairs and Others*[374]

In this High Court application, Harmony Gold Mining Company contended that as of February 2008 it was no longer in control of the mine in question due to an unconditional sale of shares, and the directive was no longer applicable to it.[375] The applicant sought that the directive issued against it in terms of section 19(3) of the NWA be withdrawn by the Department of Environment and Water Affairs.[376]

The Court held the directors responsible for their failure to comply with the court order, irrespective of the fact that the shares of the company had been sold. The Court held that this sale of shares by the applicant could never have brought an end to unfulfilled obligations imposed in terms of the directive.[377] The sale of shares by Harmony Gold did not extinguish its responsibilities under the Directive.

4.4.1.3 *Minister of Water Affairs v Stilfontein Gold Company Limited and Others*[378]

These matters concerned an application for contempt of Court by the Stilfontein Gold Mining Company, in that the company failed to comply with the court order which required the implementation of the directives issued by the Department of Water Affairs and Forestry.[379] In the time leading up to the court date, the directors of the mining

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373 *Harmony Gold SCA* case para 30.
374 *Harmony Gold Mining Company Ltd v Regional Director: Free State Department of Water Affairs and Others,* (68161/2008) [2012] ZAGPPHC 127 (29 June 2012), hereafter *Harmony Gold GNP* case.
375 *Harmony Gold GNP* case paras 6-7.
376 *Harmony Gold GNP* case para 8.
377 *Harmony Gold GNP* para 48.
378 *Minister of Water Affairs v Stilfontein Gold Company Limited and Others* (7655/05, 7655/05) [2006] ZAGPHC 47 (15 May 2006), hereafter the *Stilfontein* case.
379 *Stilfontein* case para 6.

company had resigned.[380] The respondents had argued that the directives were vague and therefore could not be complied with.[381]

The High Court held that the directives were in fact intelligible and could be complied with.[382] All the other mines in the KOSH area could understand the content of the directives and could therefore comply with them.[383] Further, it was held that the directors must be held responsible for the companies' failure to comply with the court order, and were therefore jointly held in contempt of court.[384] The court held the directors personally liable for their failure to act in good faith, and ordered each director to pay R15 000, or be committed to prison for a period of 6 months should they fail to pay the fined amount.[385]

4.4.1.4 *Kebble v Minister of Water Affairs*[386]

Dissatisfied with the ruling of the High Court, the directors of the mining company sought an appeal against the order that they were in contempt of court for failing to ensure compliance with an order of the Johannesburg High Court.[387] The applicants argued the point of vagueness of the directives and contended that the application should have failed on those grounds.[388]

The Supreme Court of Appeal ultimately held that the High Court Directives were in fact unintelligible and incapable of implementation.[389] SGM could not have known precisely what steps it should have to take to comply, and the directive to contribute to the costs of pumping water was imprecise.[390] The Directors had drawn the attention of the Department to the vagueness of the Directives before resigning, and had advised the

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380 *Stilfontein* case para 7.
381 *Stilfontein* case para 10.
382 *Stilfontein* case para 13.6.
383 *Stilfontein* case para 13.6.
384 *Stilfontein* case para 16.9.
385 *Stilfontein* case para 22.
386 *Kebble v Minister of Water Affairs* [2007] SCA 111 (RSA), hereafter the *Kebble* case.
387 *Kebble* case para 1.
388 *Kebble* case para 16.
389 *Kebble* case paras 21-23.
390 *Kebble* case para 21.

Department, through their attorneys, that they would not be able to comply.[391] There was not, in these circumstances, any willful failure to comply with the court order.[392]

4.4.1.5 A critical reflection on the *KOSH* judgments

The *KOSH* cases are a good example of the courts executing their core functions as was identified in 4.1 above. The Supreme Court of Appeal in *Harmony Gold SCA* grappled with the interpretation of section 19 of the *National Water Act*, when the applicant challenged the Minister's power to issue certain clauses within the directives. The Court was faced with the burden of interpreting the provision with reference to the discretionary powers of the Minister. In doing so the Court also balanced the diverse interests involved with the provisions of the law, in that the mining companies were held liable for addressing the pollution issues. Had the Court not interpreted the provision containing the Minister's discretionary powers as wide, the interests of those left with managing the pollution would not have been considered, and the finding of the Court could not have been just and equitable. The issue of interpretation was again contentious in *Harmony Gold GP.* The High Court again dealt with the interpretation of section 19 of the NWA. The applicant challenged the interpretation of the provision and contended that the directives could no longer find application as it was no longer in control of the mines as a landholder due to the sale of shares. The Court again fulfilled one of its functions, namely solving water-related disputes, by interpreting the law in this matter. The Court held that the sale of shares did not extinguish the responsibilities of the directors. This judgment relates to the core of sustainable development, as mandated by section 24 of the Constitution. The Court balanced the right of the mining company to sell its shares, thereby contributing to economic growth, with the concept of environmental protection, which is an equally important part of sustainable development.

In the *Stilfontein* case the Court took an important stance against mining companies' reckless and often negligent behaviour. In the context of the four core functions of the courts, the Court in this matter upheld the law by weighing the various interests and making a just and equitable finding, based on the arguments presented. By holding the

391 *Kebble* case para 21.
392 *Kebble* case para 23.

directors responsible for the companies' failure to comply with the directives, the Court also made a valuable statement regarding the duty to protect the environment, which rests not only on the state but may be extended to other parties involved.

The idea that the court in this matter utilised an order for contempt of court in order to enforce environmental obligations shows that any degradation and pollution of water resources jeopardises water security, and that a failure to act on any instance of pollution is a violation of a constitutional right. The directives, as a compliance and enforcement mechanism mandated and supported by law and ultimately enforced by the Court, prevented the directors from shying away from their environmental obligations.[393] The order of contempt of court also served as a way of increasing the effectiveness of the compliance and enforcement mechanism.[394] The fine or prison sentence in the alternate was important, in that it showed the Court's willingness to punish environmental offenders, which further justified the finding of the Court.

Although the High Court in the *Stilfontein* matter made an equitable judgment regarding the accountability of the directors of the mining company, another issue was in contention, namely the vagueness of the directives issued by the Department. The High Court ruled that the directives were intelligible, as all the other mines in the KOSH area could understand their contents and implement them. Upon appeal, the Supreme Court ruled that the directives were unintelligible and incapable of implementation by Stilfontein Gold Mine. The Court also found that there was no wilful failure to comply with the court orders, as the mining company had informed the department of the vagueness of the directives prior to the resignation of the directors. The issues here are based on the different the arguments presented, and the Court did its utmost to fulfil its function of solving a dispute by interpreting and applying the law. Although the Supreme Court overruled the decision of the High Court, the High Court's judgment is still relevant in that the Court successfully discharged its role of weighing the interests of various parties and making a just and equitable decision based on the facts and arguments presented.

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393 Kotzé and Lubbe 2009 *SAJELP* 67.
394 Kotzé and Lubbe 2009 *SAJELP* 68.

4.4.2 S v Blue Platinum Ventures 16 (Pty) Ltd & Matome Samuel Maponya[395]

4.4.2.1 Facts of the case

The facts of this matter are not clear from the court documents, and therefore media reports published during the court proceedings have been used to supplement the facts as they appear from court documents. The accused and his company, Blue Platinum Ventures, had applied to the Department of Mineral Resources, the Department of Water Affairs and the Department of Environmental Affairs and Tourism for the authorisations in order to undertake clay mining near Bathlabine Village.[396] The mining had occurred in close vicinity to a large river.[397] The documentation which the accused had submitted with his application for authorisation had shortcomings, which the experts had informed him of, yet he neglected to rectify the same.[398] When the accused and his company continued with the mining, despite not having received proper authorisation, the community appealed to the Department of Mineral Resources to take action against the company, but with no success.[399] The company also neglected to rehabilitate the area in which it mined. The community then laid criminal charges against the director and the company for causing environmental degradation.[400]

4.4.2.2 Decision and *ratio decidendi*

The accused had pleaded guilty to the charges brought against him in terms of section 112 of the *Criminal Procedure Act* 51 of 1977, so the Court had to determine what sentence should be imposed on the accused and his company.[401] The state prosecutor contended that the accused should be sentenced according to section 24F of the NEMA,

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395 *S v Blue Platinum Ventures 16 (Pty) Ltd & Matome Samuel Maponya* (Sentencing Proceedings: Unreported, Naphuno Regional Magistrates' Court Case No. RN126/13 9 January 2014), hereafter the *Blue Platinum* case.

396 *Blue Platinum* case p 5.

397 *Blue Platinum* case p 7.

398 *Blue Platinum* case p 5.

399 Creamer Media Reporter 2014 http://m.miningweekly.com/article/mining-company-director-receives-five-year-suspended-sentence-for-environmental-offences-a-landmark-victory-for-the-centre-for-environmental-rights-2014-02-07/rep_id:3861.

400 Truter 2014 https://www.werksmans.com/legal-briefs-view/environmental-law-compliance-noose-tightening/.

401 *Blue Platinum* case p 2.

which imposes penalties for the offence committed.[402] In mitigation of sentence, the accused pleaded the following: That his company, Blue Platinum, was no longer functional and therefore also not profitable; that he was married and had children who were financially dependent on him; and finally, that he had offered to rehabilitate the mined area.[403] The accused further stated that he could afford to pay a penalty amounting to R20 000.[404]

The state argued that the offence of which the accused's company had been convicted was very serious. Aggravating factors which the public prosecutor argued included the fact that the mining activities had taken place next to a residential area and a number of houses had been left exposed to the pollution as a result of the conduct of the accused's company; the activity had resulted in serious soil erosion in these areas; the licence which the accused had managed to obtain had already lapsed by the time he had commenced with mining activities; and the accused and his company had benefitted financially from the offence they had committed.[405] The prosecutor also stressed that the accused could not simply start rehabilitation on his own, but that the rehabilitation had to comply with the MPRDA regulations and the Department of Mineral Resources guidelines.[406] The maximum penalty prescribed by the NEMA amounted to R5 million, but the quantum required for the rehabilitation process was to be determined by the Department of Mineral Resources, which was a financial cost separate from the prescribed penalty.[407]

In handing down sentence, the magistrate affirmed that the offence was very serious, and noted the "dire need" for the accused to start the rehabilitation process.[408] The Court considered the fact that a payment of R5 million would benefit only the Department of Justice and the affected residents would continue to suffer from the effects of the offence.[409] An appropriate sentence would be one which promoted deterrence from

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402 *Blue Platinum* case p 7.
403 *Blue Platinum* case p 2-4.
404 *Blue Platinum* case p 14.
405 *Blue Platinum* case p 6-8.
406 *Blue Platinum* case p 6-7.
407 *Blue Platinum* case p 10-11.
408 *Blue Platinum* case p 24.
409 *Blue Platinum* case p 24-25.

committing the same offence, while at the same time benefitting the community.[410] Taking into account these considerations, the court accordingly handed down a prison sentence of 5 years, suspended on the condition that the accused would not be convicted of contravening s 24F of the NEMA during the period of suspension; and that the accused had to rehabilitate all the areas affected by the mining operations within a set time period.[411] The estimated cost of rehabilitating the area amounted to R6.8 million.[412]

The Court also had to determine whether the accused had derived a benefit from the offence that could be subject to confiscation under the *Prevention of Organised Crime Act*.[413] The defendants in this matter acknowledged that he had benefitted from the offence of which he had been convicted, and that the Department of Environmental Affairs had suffered a loss of R200 000 as a result of the offence.[414] The confiscation order of R200 000, payable to the state, was thus handed down.

4.4.2.3 A critical reflection on the judgment

The *Blue Platinum* case has been praised as the landmark case which reflects the direction which environmental enforcement should take in South Africa, and is the first of its kind to hold a director of a company criminally liable within the context of environmental protection. Although the case does not create judicial precedent because of the status of the Magistrates Court, the ruling of the Court did open the doors to finally holding executives of companies personally liable under environmental legislation, and to future prosecutions for environmental offences.

The Court discharged its duty of solving a water-related dispute by interpreting and applying the laws found in legislation and policies through the sentence which was handed down, in accordance with the provisions of the NEMA. In doing so, the court's judgment and sentence had the following effect on environmental litigation: Firstly, the

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410 *Blue Platinum* case p 25.
411 *Blue Platinum* case p 26.
412 Truter 2014 https://www.werksmans.com/legal-briefs-view/environmental-law-compliance-noose-tightening/.
413 *Blue Platinum* case p 17.
414 *NDPP v Blue Platinum Ventures 16 Pty Ltd and Matome Samuel Maponya*: In re *S v Blue Platinum Ventures 16 (Pty) Ltd & Matome Samuel Maponya* (Confiscation order: Unreported, Naphuno Regional Magistrates' Court Case No. RN126/13 21 November 2014).

prosecution of environmental crimes remains at a minimum, so this matter has allowed the court to make a strong statement regarding the seriousness of environmental degradation as a criminal offence, particularly given the sentence which was handed down, as well as the confiscation order. Secondly, the requirements imposed by legislation, that companies should have sound and effective environmental management systems which are monitored and enforced, were highlighted. This speaks to the benchmark in 4.1 stating that Court's should develop the law. Thirdly, communities that are affected by the damage caused by large corporates are, as a result of the outcome of this case, encouraged and empowered to approach the criminal courts, thus facilitating their access to justice. In this way, the interests of the parties can be weighed in order to allow the Court to make just findings. Finally, the court pierced the corporate veil in this matter by holding the executives of a mining company liable for their failure to gain the proper authorisations and rehabilitate the mined areas. This judgment and its effect on environmental litigation highlighted above has deepened our understanding of the water security discourse vis-à-vis the importance of protecting water resources, the threat which mining poses to water security, and the important role which courts can play in executing justice for those parties affected.

4.5 Chapter summary

This chapter has analysed and reflected on the role which courts can play in promoting water security in South Africa. As a starting point, it was argued that courts can execute the following duties in order to promote water security: firstly, they can uphold the law by weighing the interests of society in making reasonable, judgements; secondly, the courts must solve water-related disputes between parties by interpreting and applying the laws found in legislation and policies. In doing so, courts contribute to a deeper understanding of the water security discourse through the analysis, interpretation and explanation of the law. Lastly, the courts contribute to law-making in the area of water security in the discharge of their regular duty.

The constitutional mandate of the courts in promoting water security was then explored. The Constitution, as the highest authority in South Africa, imparts duties upon the courts which allow them to fulfil their mandate in terms of the water security discourse. Chapter

8 of the Constitution sets out the duties and functions of the court and deals with aspects concerning the administration of justice.

A review of various cases was performed in order to establish the role of the courts in fulfilling the four duties set out in 4.1. In reviewing these cases a distinction was made between those addressing sustainable and affordable access to water and those addressing the protection of water resources. With regard to sustainable and affordable access to water, the *Federation for Sustainable Environment* and *Mazibuko* cases were reviewed.

In the *Federation for Sustainable Environment* case, the Court assisted a community which had been without access to water for a long period of time. The matter primarily centered on the duties of the local municipality to provide the community with access to water, which it had failed to do on more than one occasion. The Court relied on supervisory orders to monitor the conduct of the Municipality, and this was found to be an effective means of ensuring that the poor and marginalised received access to water services, and that the local authority was assisted in discharging its constitutional mandate.

The landmark case of *Mazibuko* addressed a number of issues regarding water security and the implementation of policies and legislation. The Court addressed alleged violations of the right to access to water when the City of Johannesburg installed prepaid water meters in poor settlements as part of its mandate to provide residents with access to water. The lawfulness of the installation of these prepaid meters and in effect of the policies authorising the installation was questioned. The Court's duty to uphold the law by balancing various interests and making just and equitable decisions was tested in this matter. Sustainability is an idea which requires the balancing of interests, albeit not human interests directly. In this case, the economic and social aspects of sustainability were weighed against one another, and the declaration of lawfulness relating to the installation of the water meters seemed to balance these two aspects in terms of sustainability. Another conflict which the Court implicitly dealt with was between a rights-based approach and a commercial approach. The Court certainly favoured the approach which viewed water as a commodity, which could potentially mean an end to the financial

woes of the municipality. The Court further refrained from giving meaning to the terms of section 27(1)(b).

In a review of cases relating to the second component of water security, the *KOSH* cases and the criminal matter of *S v Blue Platinum Ventures* were analysed. In the first of the *KOSH* cases (the *Harmony Gold SCA* case), the Court issued an order of contempt of court and held the directors of the mining company liable for the environmental degradation which had occurred as a result of the company's failure to treat polluted water. The Court set the precedent of ascribing personal accountability to directors as an important and often necessary way of enforcing environmental laws. In *Harmony Gold GNP* the Court, through its interpretation and analysis of section 19 of the NWA and by balancing economic and environmental interests, made an equitable and just decision to protect the environment. In this case the Court came face to face with the notion of sustainability yet again. In the *Stilfontein* and *Kebble* cases, the perceived ambiguity of the directives was questioned. Although the Supreme Court of Appeal overturned the decision of the High Court, the Court still had to balance the interests of the parties with the duty to protect water resources.

In the *Blue Platinum* case, the director of the mining company was given a five year suspended jail sentence, after pleading guilty to criminal charges of environmental degradation. The court handed down the sentence without the option of a fine. In this matter, a water-related dispute was solved through the application of the law and the implementation of the sanctions imposed by the NEMA for this offence. In addition to this, the Court also handed down a confiscation order relating to the financial benefit which the company had received, and determined that the Department had suffered a loss of R200 000 in the process. The Court opened the door for future prosecutions of environmental crimes of this nature, and consequently sent a strong message to mining companies relating to the accountability of their executives and their duty to rehabilitate the areas in which they have mined. Failure to do so could lead to criminal prosecution and further financial implications. In handing down a sentence of this nature, the Court also contributed to a deeper understanding of the water security discourse by highlighting the detrimental effect of mining on water resources.

CHAPTER 5: CONCLUSION

5.1 Background

Water scarcity in South Africa has become a bigger problem over the last few years than could have been anticipated. The availability of potable water as well as the protection of water resources is at a critical stage, where concerted visionary intervention is required. Water security has also been recognised on an international and African regional level as needing attention by governments. Against this background, the aim of this study was to determine what role South African courts can play in promoting water security.

Chapter 1 of this study sketched the problem which South Africa faces in providing access to water services while attempting to protect water resources. The recurring and continuous drought in many parts of the country was highlighted and was revealed to be linked to the effects of climate change, mining activities and the inequitable distribution and use of water for mining and agricultural activities. Chapter 1 therefore posed the question, "what is the role which South African courts could play in promoting water security in the country?"

Chapter 2 explored the global and African regional responses to water security. Various regional and international instruments were analysed and dissected in order to ascertain what water security means at a global and African regional level as well as to ascertain the duties of states and government. An important aspect of this chapter was the discussion of the theoretical perspectives on water security, which gave meaning to the term. The result of this analysis was an identification of the components of water security, namely affordability, sustainable access, and the protection of water resources. The researcher argues that affordability and sustainable access to water may be considered as a single component of water security, with the protection of water resources as the other. It was further argued that these component are interrelated.

The focus of Chapter 3 was the legal and policy framework for water security in South Africa. In this chapter the two main components of water security were linked to the provisions in South African legislation and policies to determine the position of the law regarding water security. In terms of the first component, sustainable and affordable

access to water, the Constitution was identified as the overarching instrument, in that the right to access to water is contained therein. The WSA was then discussed as the legal instrument which gives effect to this right, and local authorities as the vessels which must provide, maintain and regulate access to water services. The NIP sketches a framework in which municipalities are to draft their own indigent policies, which should identify categories of persons or indigents who qualify for free basic services based on certain factors and qualifying criteria. In terms of protecting water resources, the NWA is the legislative tool to consult. The NWRS is the policy document which contains guidelines, plans and goals for achieving the protection of water resources. These instruments are informed by the dictates of the constitutional environmental right and the right to access to sufficient water.

Chapter 4 is considered the nucleus of this research as it aims to answer the research question posed. In this chapter, case law was examined to ascertain what role the courts have played thus far in promoting water security. The researcher identified four duties which courts must perform in order to promote water security. Firstly, courts must uphold the law by weighing various rights and interests that relate to water, and then make reasonable, just and equitable findings. Secondly, courts must solve water-related disputes between parties by interpreting and applying the Constitution and water legislation and policies. While executing the first two functions, courts contribute to a deeper understanding of the water security discourse through their analyses, interpretations and explanations. Finally, through the execution of their traditional function, courts contribute to law-making in the water security nexus. A collection of cases was analysed and dissected for the purposes of this chapter. The *Federation for Sustainable Environment* and *Mazibuko* cases were reviewed for the component having to do with affordable and sustainable access to water, while the *KOSH* case and the criminal matter of *Blue Platinum* were reviewed for the protection of water resources component. The main findings of that review and analysis appear below.

5.2 Main findings

After an analysis of the legislation, case law and international and African regional instruments, it could be deduced that water security and the issues related thereto such

as poverty and climate change have a damaging impact on the poor and marginalised. In South Africa the effects of the Apartheid era still linger on, in that many citizens, particularly in rural areas, still do not enjoy access to water services. Although legislation has been promulgated to address these inequities, the constitutional right to access to water has not yet been fully realised. This right is two-fold, and addresses the two components of water security, namely access to sustainable, affordable water, and the protection of water resources. The first element is governed by the WSA and supported by regulations and other policies, while the second element is executed by the NWA and the NWRS.

At the heart of this research is the duty of the courts to promote water security. The cases analysed revealed the position of the South African courts in advancing the elements of water security. In reviewing the cases dealing with access to sustainable and affordable water resources, the mandate of municipalities to provide residents with access to water was the focal point. In the *Federation for Sustainable Environment* case the use of a supervisory interdict by the Court proved to be a mechanism which assisted the local authority to discharge its constitutional mandate and ensure that residents' right to access to water services was realised. The *Mazibuko* case opened up a can of worms regarding the lawfulness of prepaid water meters, the duty of the local authority to provide access to water services, and the content of the right to water. After an analysis of the critique in support of and against the judgment handed down by the Constitutional Court, the researcher finds that sustainability is an important consideration when assessing the conduct of the City of Johannesburg. The action taken by the local authority in this matter proved to be synonymous with the goal of achieving sustainable access to water services, as well as the sustainability of its policies through constant review and revision. The Municipality's approach conforms to the guidelines provided for in section 27 of the Constitution, which is the progressive realisation of the right to access to water. The Court also refrained from giving content to the right to water, which is contrary to the judgment of the court *a quo* and the SCA. This allows for longevity in the policies of the City of Johannesburg, as it enables the City to constantly revise its policy in line with changing circumstances, ensuring that the executive may continue to exercise its constitutional mandate.

The deplorable state in which water resources are left subsequent to mining activities was pivotal in the analysis of cases dealing with the protection of water resources. The *KOSH* cases addressed the powers of the Minister, the interpretation of directives issued by the Department of Water Affairs, and the accountability of mining companies in preventing the pollution of water resources. It was found that the Minister has wide discretionary powers to hold mining companies responsible for their pollution activities. This favours the interests of the environment and the residents exposed to the pollution. The Directives issued had initially been found to be clear and capable of being implemented, but this decision was overturned. The Court found that although the mining companies should be held liable for the damage caused, they had not maliciously intended to commit contempt of court by not implementing the Directives. The Court still held the directors of the mining company personally liable by handing down a sentence of a fine or imprisonment. This judgment displays the Court's desire to hold those guilty of environmental damage liable to the harshest extent. This trend continued in the criminal matter of *Blue Platinum*, where a director of a company was held criminally liable for damage caused. The Court merged the rules regarding the best practices of a company and its directors with environmental provisions in order to hand down a sentence which would speak to the severity of the crime.

5.3 Recommendations

In the light of the findings above and considering the question posed at the beginning of this research, firstly it is proposed that Courts should execute the key roles identified in Chapter 4 of this research. In discharging their duties, the use of supervisory interdicts should be effected where there is a possibility of non-compliance with the law. This would assist local authorities to discharge their socio-economic duties and restore confidence in the citizens affected. The Court would in this instance play the role of guardian. However, the supervisory interdict should be used with caution; otherwise it may lose its force.

Secondly, when courts execute the roles identified in this research, sustainability should be the most important factor to guide their decision-making. Sustainability ensures that access to water is not a temporary luxury, but a right which can be enjoyed by generations to come. It also ensures that the environment is aptly catered for as well as

socio-economic factors. The effects of climate change must also be considered, and the effect which water insecurity has on other human rights. When sustainability is the core aspect of policies regarding water security and access to water, the effects of those policies will not find temporary implementation and application. Courts must therefore make judgments which promote sustainability in the water security context.

Finally, the legislative framework for water security contains provisions which criminalise certain actions. These provisions should be used and where necessary applied to ensure that violators get harsher sentences, specifically in matters involving the pollution of water resources by mining companies that fail to prevent such pollution and to rehabilitate the areas in which they mine.

5.4 Concluding remarks

Water security is a topic which deserves a lot of attention, particularly today, when water is a scarce commodity. The effects of water insecurity are detrimental to the country and have far-reaching effects on the poor and marginalised members of society. This problem is not confined to the borders of South Africa, as there is a global dilemma regarding the availability of freshwater. The difficulty in the South African context arises partly from the historical imbalances still present today. Factors such as climate change and the pressure to realise other human rights simultaneously also contribute to the mounting stress which water resources are under. The complexity of the diverse interests involved in water, and the limitations of the law and policies regulating these interests suggest that courts will continue to play an indispensable role in mediating these interests through the interpretation and enforcement of law and policy.

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