



Municipal Service Partnerships as a legal mechanism for realising the right to have access to sufficient water in South Africa

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ABSTRACT

Water is life. The United Nations General Assembly (UNGA) Resolution A/RES/64/292, 2010, recognises the right to water as a fundamental right that is essential to the realisation of all human rights. Section 27 of the *Constitution of the Republic of South Africa*, 1996, clearly guarantees everyone a justifiable right of access to adequate water. Although all spheres of government are co-responsible for realising this right, local government, constituted by about 257 municipalities, has direct responsibility for providing water services. In compliance with the obligations imposed on the State by the right of access in the Constitution to adequate water, the national government adopted legislation and policies prescribing minimum standards that must be met by municipalities in water services. The *Local Government: Municipal Systems Act* (MSA) No. 32 of 2000 makes it possible for municipalities to provide services, including water services, either through internal mechanisms or external mechanisms. The provision by external service mechanisms include Municipal Service Partnerships (MSPs). The legal framework for MSPs is set out in the MSA and the *Local Government: Municipal Finance Management Act* 56 of 2003 (MFMA). These legislation are complemented by the White Paper on Municipal Service Partnerships (2004), which seeks to ensure that the use of external service providers does not detract from government's commitment to providing universal access to basic municipal services that are affordable and in line with defined service standards.

Despite the existence of legislation and regulations that give effect to the constitutional right of access to sufficient water, recent statistics show that about 1,7 million households in South Africa do not have access to piped water while 10 percent of households still rely on water from unsafe sources, such as rivers, streams, wells or springs. This state of affairs is attributed to diverse reasons, including lack of sufficient bulk infrastructure, poor delivery of municipal service, poor maintenance of existing infrastructure and the inability of poor households to pay for the cost of water supplies.

This study focuses on how the law and policy framework for MSPs can be used to contribute towards realising the right of access to sufficient water in South Africa. Based on critical and systematic review of primary and secondary law sources, it is argued in the study that despite criticisms on the use of public-private partnerships (PPPs), valuable lessons can be learned from theory to improve the usefulness of MSPs in the provision of water services in South Africa. Benchmarks from a general discussion on the use of PPPs are distilled in this study as a mechanism for providing water services and used in analysing the legal and policy framework for MSPs in South Africa. Based on alignments between distilled benchmarks and the regulatory framework for MSPs in South Africa, the research reveals that the legal and policy framework for MSPs can be successfully used to contribute towards the realisation of the right to have access to sufficient water in South Africa.

Key words: Municipal service partnerships, right to water, public-private partnerships, municipalities, South Africa

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LIST OF ABBREVIATIONS AND ACRONYMS

ACHPR	African Commission on Human and Peoples' Rights
AHRLJ	African Human Rights Law Journal
AJICL	African Journal of International and Comparative Law
AMCOW	African Ministerial Conference on Water
AU	African Union
CBO	Community-Based Organisations
CESCR	Committee on Economic, Social and Cultural Rights
DBSA	Development Bank of Southern Africa
DPLG	Department of Provincial and Local Government
DWA	Department of Water Affairs
ESCR	Economic, Social and Cultural Rights
FBW	Free Basic Water
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILGM	Institute for Local Government Management
IMF	International Monetary Fund
IUCN	International Union for Conservation of Nature
MIIU	Municipal Infrastructure Investment Unit
MNCs	Multinational Corporations
MSA	Municipal Systems Act 32 of 2000
MSPs	Municipal Service Partnerships
NEMA	National Environmental Management Act 107 of 1998
NEPAD	New Partnership for Africa's Development
NGOs	Non-Governmental Organisations
NIP	National Indigent Policy
NWA	National Water Act 36 of 1998
NWRS	National Water Resource Strategy
OAU	Organisation for African Unity
PELJ	Potchefstroom Electronic Law Journal

PPPs	Public-Private Partnerships
PSIRU	Public Services International Research Unit
PULP	Pretoria University Law Press
RDP	Reconstruction and Development Programme
RECIEL	Review of European Community and International Environmental Law
SAJHR	South African Journal on Human Rights
SALGA	South African Local Government Association
SDGs	Sustainable Development Goals
Stell LR	Stellenbosch Law Review
UDWLR	University of Denver Water 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
WHO	World Health Organisation
WSA	Water Services Act 108 of 1997

CHAPTER 1: INTRODUCTION

1.1 Background

Generally, water is life, and sufficient quantity and quality of water play an important role in people's well-being. It is for this reason that the right to water is deeply rooted in a host of international human rights instruments and declarations.¹ Prior to 2010, the right to sufficient water was implied in several international and regional instruments, such as the International Covenant on Economic Social and Cultural Rights (ICESCR) of 1966 and the African Charter on Human and Peoples' Rights (African Charter) of 1981. In terms of the ICESCR, the right to water was implied in articles 11 and 12, which guarantee the right to an adequate standard of living and the right to the highest attainable standards of health.² On the other hand, the African Commission on Human and Peoples' Rights (ACHPR)³ state that the right to water is implied in a number of rights guaranteed in the African Charter, such as the rights to life, dignity, food, health as well as economic, social and cultural development.⁴ International and African regional human rights law also recognises the role played by private actors in contributing towards realising the right of access to sufficient water and that they incur human rights responsibilities.⁵ Despite this wide recognition, the right to water only became expressly recognised as a human right following the adoption of Resolution A/RES/64/292 by the United Nations

1 See Art 14(2)(h) of the *Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW) 1979; Art 24(2)(c) of the *Convention on the Rights of the Child* (CRC) 1989; Art 28 of the *Convention on the Rights of Persons with Disabilities* (CRPD) 2006; General Comment No. 15: The Right to Water adopted by the UN Committee on Economic, Social and Cultural Rights (2003); ACHPR Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the *African Charter on Human and People's Rights* (2010) paras 88-91; and Art 14(2)(c) of the African Charter on the Rights and Welfare of the Child 1990.

2 General Comment No. 15: The Right to Water (2002) para 3.

3 This is the main body established within the *African Union* (AU) to monitor compliance with human rights obligations - emanating from the *African Charter on Human and Peoples' Rights* (African Charter) was adopted by the *Organisation for African Unity* (OAU) (now the *African Union*, AU) in 1981 and entered into force in 1986. See Art 30 to 60 of the African Charter.

4 ACHPR *Principles and Guidelines* (2010), para 87-91.

5 See the UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights (2003); UN Guiding Principles on Business and Human Rights (2011); General Comment No. 15 on the Right to Water, (2002); Kotzé and Fuo 2016 *Journal of Energy & Natural Resources Law* 296-300.

General Assembly (UNGA) in 2010.⁶ This Resolution recognises water and sanitation as a fundamental right essential for the realisation of all human rights.⁷ It calls on States to provide financial support, capacity building, and technology transfer through international assistance and cooperation, in particular to developing countries, to scale up efforts to provide safe, clean, accessible and affordable drinking water and sanitation for all. Resolution A/RES/64/292 cemented the entrenchment of the right to water in international human rights law.⁸ There is, therefore, a binding obligation on countries to ensure that this right is realised.

In addition to the international and African regional instruments highlighted above, the right to water received prominent attention in the 2015 UN Sustainable Development Goals (SDGs).⁹ UN SDG Goal 6 is dedicated to water and sanitation and seeks to ensure availability and sustainable management of water for all. The vision in Target 6.1 is to achieve universal and equitable access to safe and affordable drinking water for all by 2030. There is emphasis on the need to promote effective public-private partnerships to realise the vision of the SDGs.¹⁰

Aligned with the above international instruments, section 27(1)(b) of the *Constitution of the Republic of South Africa*, 1996 (the Constitution) guarantees everyone the right to sufficient water. Section 27(2) of the Constitution imposes a legal obligation on the State, within its available means, to take appropriate legislative and other steps to achieve the progressive realisation of this right. In addition, Section 7(2) of the Constitution obliges the state to respect, protect, promote and fulfil the right of access to sufficient water. The obligations imposed on the state by Sections 7(2) and 27(2) of the Constitution in realising the right of access to sufficient water is shared by all three spheres of government.¹¹ In terms of the Constitution and legislation, however, the local government (consisting of

6 UNGA Res 64/292, UN Doc A/RES/64/292 28 July 2010.

7 UN Doc A/RES/64/292 28 July 2010 para 2.

8 Belinski, Kotzé and Fuo 2017 25 *AJICL* 264.

9 United Nations (UN) Sustainable Development Goals: Agenda 2030 (2015).

10 Target 6.1 and par 67 of UN Sustainable Development Goals: Agenda 2030.

11 Section 40(1) of the *Constitution* provides that "in the Republic, the government is constituted as national, provincial and local spheres of government, which are distinctive, interdependent and interrelated."

about 257 municipalities) is solely responsible for the provision of water services, limited to the provision of potable water.¹²

In line with the obligations imposed on the state, the national government has adopted legislation and policies to give effect to this right.¹³ The constitutional right of access to sufficient water is given legislative effect by the Water Services Act (WSA). According to Section 3(1) of the WSA, everyone has the right to access basic water supply. Basic water supply is defined as the prescribed minimum standard of water supply services needed for the reliable supply of sufficient quantity and quality of water to formal and informal households, to support life and personal hygiene.¹⁴ The WSA does not, however, specify the particular content of the right to basic water supply. This content is developed in Regulations Relating to Compulsory National Standards and Measures to Conserve Water.¹⁵ According to Regulation 3 of these regulations, municipalities are under an obligation to provide a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month.

The MSA makes it possible for municipalities to provide services, including water services, either through internal mechanisms or through external mechanisms.¹⁶ Internal mechanisms can be a department or another administrative unit within its administration or any business unit designed by the municipality or any other component of its administration.¹⁷ The use of external service mechanisms for the provision of services is also referred to as outsourcing or Municipal Service Partnerships (MSP). External mechanisms can be a private entity, or person, municipal entity, a state organ, another municipality, community-based

12 Section 156(1)(a) and Schedule 4B of the *Constitution*, read together with ss 3 and 11 of the *Water Service Act* (WSA) 108 of 1997. See Fuo 2017 *De Jure* 325; Fuo (2013) *Murdoch University Law Review* 25-26.

13 The *Water Services Act* 108 of 1997 (WSA); *Local Government: Municipal Systems Act* 32 of 2000 (MSA); White Paper on Municipal Service Partnerships (MSP) (2004) Department of Provincial and Local Governments (now Cooperative Governance and Traditional Affairs (CoGTA)).

14 Section 1(iii) *WSA*.

15 Regulations Relating to Compulsory National Standards and Measures to Conserve Water (2001) GN R509 of GG No.22355 of 8 June 2001.

16 Section 76 *MSA*.

17 Section 76(a) *MSA*.

organisations (CBO) or non-governmental organisations (NGO), other institutions.¹⁸ The White Paper on Municipal Service Partnerships (2004) defines an MSP as contractual agreements between a municipality and another entity (an “external mechanism”) to deliver municipal services.¹⁹ Some municipalities, such as Merafong City Local Municipality, rely on MSPs with Rand Water for providing water to communities under their jurisdiction.²⁰ It should be noted that Schedule 4B of the Constitution, which must be read with Section 156, municipalities are responsible for “water services limited to potable water supply systems”. This Schedule shows that municipalities are responsible for managing systems required for the delivery of water services (water supply networks) such as underground pipes, water storage facilities, such as reservoirs or tanks, pumping stations, connections to sewers and the actual provision of the water itself. This has important implications because municipalities can use MSPs not only to provide water services but also to upgrade their water systems, including replacing old leaking pipes like the City of Johannesburg did in the case of *Mazibuko and Others v City of Johannesburg and Others*.²¹ This implies that it is not only the direct provision of water services that can be outsourced but management of some of the systems required for delivery as well. The framework set out by MSA is complemented by the White Paper on Municipal Service Partnerships (2004), which seeks to ensure that the use of external service providers does not detract from government's commitment to providing universal access to basic municipal services that are affordable and in line with defined service standards.²² With regard to the law and policy, MSPs constitute one of the mechanisms that can be used by municipalities to realise the right to access sufficient water.

18 Section 76(b) MSA.

19 The White Paper on MSPs (2004) 5.

20 See Fuo 2017 *De Jure* 336-339.

21 *Mazibuko and Others v City of Johannesburg and Others* 2010 (3) BCLR 239 (CC) (hereafter *Mazibuko*).

22 The White Paper on MSPs (2004) 2-3.

1.2 Problem statement

Despite the existence of legislation and regulations that give effect to the constitutional right of access to sufficient water, recent statistics show that about 10 percent of households in South Africa do not have access to piped water and some households still rely on water from unsafe sources, such as rivers, streams, wells or springs.²³ The South African Human Rights Commission (SAHRC) observed in a 2018 report that people living in rural areas and informal settlements are the most adversely affected by lack of access to sufficient water.²⁴ This situation is assigned to diverse reasons, including lack of adequate bulk infrastructure, poor municipal service delivery, poor maintenance of existing infrastructure and the inability of poor households to pay for water services.²⁵ Even though MSPs is provided for in law and policy as a mechanism that can be used to contribute towards the realisation of the right of access to drinking water and other municipal services,²⁶ this route has been overlooked and underdeveloped in pursuit of the section 27 constitutional right of access to sufficient water. This mechanism could be utilised to develop new or augment existing water services infrastructure, for example.

Some of the challenges faced by poor households in accessing potable water in South Africa are well illustrated in the landmark case of *Mazibuko*. Although the details of the *Mazibuko* case are discussed in Chapter 3 of this study, it is worth noting that the judgment spells out some of the obligations placed on the state with respect to the section 27 right of everyone to have access to sufficient water. The Court held that the right is qualified by internal limitations in 27 which oblige the state to progressively realise the right.²⁷ The Court established that section 27(1)(b) of the *Constitution* did not oblige the government to provide water on request to

23 CoGTA, 2018/2019 Annual Report (2019) 28.

24 SAHRC Water and Sanitation Research Brief: Monitoring the Implementation of the Commission's Recommendations from its 2014 Report on Access to Water and Sanitation (2018) 31.

25 Statistics South Africa The state of basic service delivery in South Africa (2016) 13.

26 The White Paper on MSPs 2004 1.

27 *Mazibuko* paras 48-49, see also the cases *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 1 SA 46 (CC) and *Minister of Health and Others v Treatment Action Campaign and Others* 2002 5 SA 721 (CC).

every citizen, but rather to take reasonable legislative and other measures to progressively realise the right to access to sufficient water within the resources available to the state.²⁸ However, what is important to note in the current context is that the Constitutional Court judgment has received severe criticisms from scholars for failing to address the plight of poor residents of Phiri in Soweto and that the approach adopted in the *Mazibuko* case seems to encourage the commodification of the provision of water services, a model akin to water services privatisation.²⁹ Dugard argues that the present water distribution paradigm is too commercially-driven and fails to be fully aligned with human rights commitments in the Constitution.³⁰ Commenting on the Constitutional Court judgment, De Vos³¹ observes that, compared to its previous decisions, this judgment represents a regressive step in terms of human rights obligations imposed on the state.

Despite the above criticisms, the existence of a legal framework which promotes MSPs in service delivery, the provision of water services is not privatised in South Africa. Globally, there is a strong resistance against the privatisation³² of water and over the past decade, there is significant "remunicipalisation" of water services.³³ This means that, for diverse reasons, municipalities in Europe and Latin America are increasingly taking back the function of providing water services, which was privatised in the past.³⁴ However, public-private partnerships arrangements regulated by municipalities (local governments) is a feasible option for the provision of potable water. Hence this study explores how the legal and policy framework for MSPs in South Africa can be implemented to contribute towards the realisation of the right to have access sufficient water in South Africa, as enshrined in section 27 of the Constitution. Access to water is particularly fundamental in light of the

28 *Mazibuko* para 50.

29 Dugard 2010 *Review of Radical Political Economics* 175-194; Wilson and Dugard 2011 *Stellenbosch Law Review* 664-682.

30 Dugard 2010 *Review of Radical Political Economics* 177 and 188-189 for details.

31 De Vos "Water is life (but life is cheap)" 2009 Constitutionally Speaking Blog, at <http://constitutionallyspeaking.co.za/water-is-life-but-life-is-cheap>.

32 Kotzé and Fuo 2016 *Journal of Energy and Natural Resources Law* 308-309.

33 Lobina *et al* 2014 Here to Stay: Water Remunicipalisation as a Global Trend 1-14.

34 Lobina *et al* 2014 Here to Stay: Water Remunicipalisation as a Global Trend 4.

ongoing coronavirus (COVID-19) pandemic which has necessitated increased emphasis on hygiene measures such as regular hand-washing.

1.3 Objectives of the study

The aim of this work is to examine how the law and policy framework for MSPs can be used to contribute towards realising the right to access to sufficient water in accordance with Section 27(1)(b) of the *Constitution of the Republic of South Africa*, 1996. In other words, to examine if the law and policy framework provide sufficient safeguards to ensure that its use in the provision of water services does not unduly limit the right of South Africans to access sufficient water.

1.4 Research methodology

This study is based mainly on a coherent and analytical review of primary (international and African regional human rights law instruments; the *Constitution of the Republic of South Africa*, 1996; legislation; and case law) and secondary sources of law (books, policies, regulations, journal articles, specialised and general reports) as they relate to local government's authority to provide water services and to use Municipal Service Partnerships. A review of these sources allowed the researcher to distil best practices from scholarship on public-private partnerships (PPPs) that can be used to guide the use of MSPs in the provision of water services in a manner consistent with human rights ethos of the Constitution. Thus, the study focused on PPPs and not all forms of MSPs due to limitations with regard to the scope and the emphasis on PPPs in local government law and policy for water services.

1.5 Outline of the research work

The research work is made up of five chapters as follows: Chapter 1 is the introduction. Chapter 2 focuses on international and African regional human rights law, with emphasis on two aspects as follows: the obligation of state parties; and the extent to which duties are imposed on private parties to contribute towards realising the right to sufficient water. Chapter 3 is an analysis of the legal and policy framework on the right to sufficient water in South Africa. Chapter 4 focuses on the

legal and policy framework for Municipal Service Partnerships in South Africa, with emphasis on benchmarks for scholarship used to evaluate the potential of legal and policy framework for MSPs in realising the right of access to sufficient water in South Africa. Chapter 5 is the conclusion.

CHAPTER 2: INTERNATIONAL AND AFRICAN REGIONAL HUMAN RIGHTS LAW

2.1 Introduction

As indicated in Chapter 1, this study focuses on the role of Municipal Service Partnerships as a legal mechanism for realising the right to have access to sufficient water in South Africa. As noted in Chapter 1, South Africa ratified the ICESCR and the African Charter on Human and Peoples' Rights, which have been interpreted to include the right to sufficient water. Besides the implicit recognition of the right to sufficient water in these human rights instruments, UN General Assembly Resolution A/RES/64/292 expressly recognise the right to sufficient water.

The main objective of this chapter is to discuss the extent to which international and African regional human rights laws impose duties on private parties to contribute towards realising the right to sufficient water. However, this is preceded by a discussion on the nature of obligations imposed on State parties to create an enabling legal and policy framework for the realisation of the right to water. This is followed by a discussion of obligations of non-state actors and a summary of the chapter.

2.2 Nature of obligations of state parties

The discussion in this section of the chapter begins by tracing the evolution of the right to water under international law before unpacking the nature of State Party obligations as developed by CESCR. This is followed by an exposition of the position under the African regional human rights law system.

2.2.1 International human rights law

2.2.1.1 Emergence of a right to water

The United Nations Water Conference Action Plan recognised, for the first time, a right to water and declared that all people, regardless of their stages of development and social and economic conditions, have the right to access to drinking water in a

quantity and quality that corresponds to their basic needs.³⁵ According to the Mar Del Plata action plan, water is a human right the exercise to which must be equal to the basic needs of all people in quantity and quality.³⁶ The outcome of this meeting was the inauguration of the International Drinking Water Supply and Sanitation Decade (1980-1990), with the expression "Water and Sanitation for All".

The *Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW) explicitly refers to the right to water and states as follows:

State Parties shall take all appropriate measures to eliminate discrimination against women in rural areas to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right: ... (h) To enjoy adequate living conditions, particularly concerning housing, sanitation, electricity and water.³⁷

The CEDAW, therefore, guarantees the right to water and addresses the need for women, a population most susceptible to inequality of rights.

The CEDAW was closely followed by the *Convention on the Rights of the Child* (CRC), 1989. The CRC obliges States to take appropriate measures to tackle diseases and malnutrition, including measures to ensure the provision of sufficient clean drinking water.³⁸

In its guiding principles, Principle 4 of the 1992 Dublin Conference on Water and Sustainable Development reaffirmed the human right to water. This Principle recognises the fundamental right of all human beings to access clean water and sanitation at an affordable price and that failure to recognise the economic value of water has resulted in resource uses that have been inefficient and damaging to the environment.

Principle 1 of the Rio Declaration on the Environment and Development, 1992,³⁹ provides that people are the subject of sustainable development. In harmony with

35 United Nations Water Conference Mar Del Plata Action Plan of 1977.

36 Preamble, United Nations, 1977. Report of the United Nations Water Conference, Mar Del Plata. March 14-25, 1997. No E77 11 A 12, *United Nations Publication*, New York.

37 Art 14(2)(h) of the CEDAW.

38 Art 24(2)(c) of the *Convention on the Rights of the Child* 1989.

39 The Rio Declaration on the Environment and Development of 1992.

nature, they have the right to a healthy and productive life (water being an essential element of healthy wellbeing). Besides, Chapter 18 of Agenda 21 of the Rio Declaration on the Environment and Development accepted the Mar del Plata Water Conference Resolution on the right of all people to access drinking water and referred to it as "the commonly agreed premise".⁴⁰ Chapter 18 considers the right to water as involving three elements, which include access, quality and quantity, emphasising that elements of sustainable development are equally important. It also considers water as a natural resource, a social and economic good, whose quality and quantity determines the scope of its utilisation.⁴¹

In addition, the Action Plan of the United Nations Conference on Population and Development affirms that all persons have the right to adequate living standards, including water for themselves and their families.⁴² As part of the right to healthy living environments, the Habitat Agenda, adopted in 1996 by the UN Conference on Human Settlement (Habitat II), also recognised the provision of adequate quantities of safe water.⁴³ In 1999, the UN General Assembly Resolution A/Res/54/175, "The Right to Development", affirmed that in the full realisation of the right to development, among other things, access to clean water is a fundamental human right and its protection is a moral imperative for both national governments and the international community.⁴⁴

In November 2002, the Committee on Economic, Social and Cultural Rights (CESCR) adopted General Comment No. 15 on the right to water and defined it as the right of all to adequate, safe, acceptable and physically accessible and affordable water for personal and domestic use.⁴⁵ General Comment 15 implies the right to two articles of ICESCR of 1966: the right to adequate standards of living⁴⁶ and the right

40 Report of the United Nations Conference on Environment and Development: Agenda 21, 1992.

41 Agenda 21, Paras 18.2, 18.47 and 18.18.

42 UN International Conference on Population and Development of 1994.

43 UN Conference on Human Settlement (Habitat II) 1996, A/CONF. 165/14, Annex 1 para 10.

44 Art 12(a) of the UN General Assembly Resolution A/Res/54/175 'The Right to Development' 1999.

45 Para 2 General Comment 15 (2002).

46 Art 11 of the ICESCR; see also para 3 of General Comment 15 (2002).

to the highest attainable standards of health.⁴⁷ General Comment 15 clearly outlines obligations of State Parties to the right to water and defines what actions would constitute a violation. This is discussed below under obligations of State Parties in 2.2.1.2. Also, in December 2006, the *Convention on the Right of Persons with Disabilities* was adopted, including the right to water. Article 28 obliges State parties to recognise the right to clean drinking water to persons with disabilities.

Despite the wide recognition described above, it was only in July 2010 that the UN General Assembly, under Resolution A/RES/64/292, for the first time, formally recognised the right to water and sanitation and acknowledged that clean drinking water and sanitation were essential to the realisation of all human rights. Resolution A/RES/64/292 called on states and international organisations to provide economic resources to help build capacity and transfer technology to assist, especially developing countries, to provide secured, clean, accessible and affordable drinking water and sanitation for all. As highlighted in Chapter 1, although the resolution of the UN General Assembly on the right to water was not adopted by consensus, and the vote included 41 abstentions,⁴⁸ Resolution A/RES/64/292 cemented the entrenchment of the right to water in international human rights law.⁴⁹ Consummately, therefore, a binding obligation on countries to assure that this right is realised. Besides, in September 2010, the Human Rights Council, under Resolution A/HRC/RES/15/9, following the Resolution of the UN General Assembly, affirmed that the right to water is part of existing international law and that this right is legally binding on states. The Human Rights Council resolution calls on states to create suitable instruments and mechanisms to gradually attain complete fulfilment of the right to safe drinking water, especially for presently unserved and underserved regions.

47 Art 12 of the ICESCR. In General Comment 15, the Committee strongly emphasized the right to water, since it was not explicitly referred to in the ICESCR.

48 UNGA Department of Public Information 2010 <https://www.un.org/press/en> accessed 7 July 2019.

49 Belinski, Kotzé and Fuo 2017 25 *AJICL* 264.

In addition to the above international instruments, the need to increase access to water is equally addressed in the Sustainable Development Goals of 2015.⁵⁰ UN SDGs Goal 6 is dedicated to water and sanitation and seeks to ensure availability and sustainable management of water for all. The vision in Target 6.1 is to achieve universal and equitable access to safe and affordable drinking water for all by 2030. Also, to realise the vision of the SDGs, emphasis is placed on the need to promote effective public-private partnerships.⁵¹

2.2.1.2 Obligations of State Parties under international law

Despite recognising the right to water in UN General Assembly Resolution A/RES/64/292 of 2010, the nature of obligations imposed on States is fully developed in CESCR General Comment 15, which also sheds light on the normative content of the right to water. In developing the nature of State party obligations, the Committee on ESCR draws from the rights guaranteed in articles 2-5 of the ICESCR.⁵² Generally, the nature of the legal obligations to realise this right, the ICESCR invites every State Party to this Covenant firstly, to take steps to the best of its available resources, individually and through international assistance and cooperation, in particular, economic and technological, to progressively achieve the full realisation of the rights recognised in this Covenant by all appropriate means, including the adoption of legislative measures.⁵³ The importance of this provision lies in the fact that it specifically sets out three important elements of the responsibility of State Parties to uphold the right to water as follows: the substantive commitment to (a) take steps, including the implementation of legislative measures; (b) use the maximum available resources; and (c) the gradual realisation of the right. Moreover, in the enjoyment of the right to water provided by the state, it may be subjected to limitations only by law and only where the nature of the right is compatible to promote wellbeing in a democratic society.⁵⁴ Secondly, States are

50 UNGA Resolution 70/1, Transforming our World: the 2030 agenda for Sustainable Development, UN Doc. A/RES/70/1 (2015).

51 Target 17.6 and par 67 of UN Sustainable Development Goals: Agenda 2030.

52 See General Comment 15 (2002) para 17.

53 Art 2(1) of the ICESCR 1966.

54 Art 4 of the ICESCR 1966.

required not to "engage in any activity or perform any act aimed at the destruction of the right to water" and no "derogation from any of the fundamental human rights recognised..." on the pretext of being recognised to a lesser extent by this Convention.⁵⁵ General Comment 15 provides an overview of these duties at national level, needed for the implementation of the right to water. It provides in paragraph 46 that:

Existing legislation, strategies and policies should be reviewed to ensure that they are compatible with obligations arising from the right to water, and should be repealed, amended or changed if inconsistent with Covenant requirements.

Thirdly, as per the Committee, even though the accomplishment of the right to water in the ICESCR is subject to continuous fulfilment in the scope that can be allowed by the full use of available resources, the Covenant also imposes some duties that must be immediately fulfilled. A clear example of an immediate legal duty is the undertaking to ensure that the right in the ICESCR is exercised without discrimination of any sort as to race, colour, sex, language, faith, political or other opinions, national or social origin, property birth or another status and the enjoyment of the ESCR.⁵⁶ For example, in the context of the right to water, the Committee stated that measures taken "must be deliberate, practical and aimed at the full realisation of the right to water".⁵⁷ According to the Committee, measures to be used to "take steps" as stated in Article 2(1), include the enactment of "legislative measures" and, therefore, legislation remains the most essential step in the realisation of the right to water.

In addition to the general obligations discussed above, in General Comment 15, the Committee sets out specific water-related obligations in the realisation of: The right to lead lives in compliance with human decency and other basic rights.⁵⁸ This means that adequate amounts of water should not be defined narrowly, merely by reference to volumetric quantities and technologies. Water should be viewed as a

⁵⁵ Art 5 of the ICESCR 1966.

⁵⁶ Art 2(2) and 3 of the ICESCR 1966; For other details on State duties on discrimination to the right to water, see art 14(2) of CEDAW1979; art 24(2)(c) of the CRC 1989; General Comment 15 (2002) paras 13 to 17.

⁵⁷ General Comment 15 (2002) para 17.

⁵⁸ General Comment 15 (2002) paras 1 and 11.

social and cultural good and not as an economic good in the first place. Also, the right to seek, receive and impart information concerning water issues,⁵⁹ individuals and groups should be granted full and fair access to information kept by public bodies or third parties about water, water resources and the environment. According to the Committee, responsibilities with regard to water rights, place an immediate responsibility on State Parties. The right to water is non-derogable, and its non-compliance with core obligations cannot be justified by State Parties.

General Comment 15 requires States to respect, protect and fulfil the right to water and outline how this can be done. The duty to respect⁶⁰ allows the State to refrain from intervening directly or indirectly with the enjoyment of the right to water. It requires governments to ensure that a person's access to water is not interfered with by the actions of their institutions and officials. The obligation to protect requires State Parties to put in place measures that ensure that third parties do not interfere with the enjoyment of the right to water in any way.⁶¹ Third parties include individuals, associations, companies and other agencies as well as others under their authority acting as agents. Lastly, the obligation to fulfil is mainly focused on three issues, the state's obligation to facilitate, promote and provide. The obligation to facilitate requires States to take effective legislative, administrative, financial, promotional and other measures to ensure the full realisation of the right to water. It also requires the establishment of judicial redress mechanisms capable of dealing with violations of the right to water. On the other hand, the duty to promote requires State Parties to focus on developing and implementing policies and initiatives that will educate their citizens and raise awareness, particularly for those in remote areas, of their right to water and of programmes established to give effect to such a right.⁶² Lastly, the duty to provide requires States to assure that water is available and take steps, including the use of suitable low-cost methods, technology and

59 General Comment 15 (2002) para 12(c)(iv).

60 General Comment 15 (2002) Paras 21-22.

61 General Comment 15 (2002) para 23. Recognising that this right extends to private relationships, the CESCR clarified that "Preventing third parties" must involve individuals, corporations and other agencies and agents operating under their control from intervening in any way with the exercise of the right to water.

62 General Comment 15 (2002) para 25.

adequate pricing. Payments for water services, whether privately or publicly provided, should be based on the principle of equity in equivalence to their level of affordability.⁶³ Local authorities should take responsibility for providing safe drinking water. General Comment 15 also sheds light on the normative content of the right to water.

The substantive content of the right to water is defined as the right of acceptable quality and appropriate quantities of water sufficient to meet basic human needs.⁶⁴ As such, to meet the quality and appropriate quantities when conceiving water as a human right, certain requirements must be met as follows: Accessibility - water must be (reachable for all, affordable for all and legally accessible for all); Adequate quality (safe water for personal and domestic use); and Quantity (there must be sufficient and continuous water supply for all uses). With regard to accessibility, General Comment 15 makes provision for four primary dimensions from which everybody must have access to water and water services, such as physical accessibility, economic accessibility, non-discrimination and information accessibility.⁶⁵ The quality of water needed for each personal or domestic use must be healthy thus, free of micro-organisms, chemical substances and radiological hazards that pose a threat to the health of an individual.⁶⁶ The quantity of water for personal and domestic uses for each person, must be adequate and continuous. Usually, these uses include drinking water, personal hygiene, laundry, food preparation, personal and household hygiene.⁶⁷ This quantity of water should correspond to the guidelines of the World Health Organisation (WHO), which recommend a minimum of 20 litres per person per day and up to 100 litres of water per person per day to ensure that consumption and hygiene requirements are met.⁶⁸ The WHO recommendation is in line with General Comment 15, which provides that

63 General Comment 15 (2002) paras 26-27.

64 Scanlon *et al*/"Water as a human right" 51.

65 General Comment 15 (2002) para 12(c).

66 General Comment 15 (2002) para 12(b).

67 General Comment 15 (200) para 12(a).

68 Howard and Bartram 2003 *Domestic Water Quantity, Service Level and Health* 23

"Access to the minimum essential amount of water"⁶⁹ is an important element with regard to the normative content provided.

Gleick⁷⁰ argues for an overall basic water requirement of 50 litres per person per day in the assessment of four constituent uses, survival drinking water, human hygiene water, sanitation water and moderate food preparation needs in households. Howard and Bartram are of the view that norms applicable to water quantity should include more access to water rather than quantity. They believe that the quantity issue is not related to the volume of water available but to the level of service offered since it will only be possible to achieve improvements in the quantities of water used by increasing the level of service.⁷¹ They agree that no question ensuring at least a basic level of service remains a key international target, but propose that where at least basic access is already guaranteed for all, the focus should be to increase the number of households entering the intermediate level of access.⁷² According to these authors, a minimum of 20 litres per day per person would reduce the level of health risk from very high to medium while, at least, 50 litres will reduce the health risk to a realistically acceptable level. Meanwhile, the distance will determine the quantity of water to be fetched depending on the access to fetch if it takes 5 to 30 minutes.⁷³ However, these documents reflect a state's ongoing obligation, which starts with the 20 litres provision and meets the global minimum law requirement when a 50 litres level is reached.

While the ICESCR provides for progressive realisation with the limited available resources of the rights inferred to water, General Comment 15 obliges immediate obligations to the right to water by State Parties and to guarantee its exercise without any kind of discrimination. The obligation to take measures under article 2(1)(2) of the ICESCR towards the full realisation of articles 11 and 12 of the ICESCR, are targeted to fulfil the implied right to water. This article does not, however, outline procedures on how states are expected to meet this duty. General

69 General Comment 15 (2002) Para 37(a).

70 Gleick 1996 *Water International* 88-89.

71 Howard and Bartram 2003 *Domestic Water Quantity, Service Level and Health* 23.

72 Howard and Bartram 2003 *Domestic Water Quantity, Service Level and Health* 25-26.

73 Howard and Bartram 2003 *Domestic Water Quantity, Service Level and Health* 27.

Comment 15 stresses that States must, at least, demonstrate that they are making every effort to better protect and promote this right within the resources available within a State and those that can be obtained through international cooperation. This responsibility helps governments to ensure that the actions of their agencies and officials do not interfere with a person's access to water.

Importantly, as indicated above, in General Comment 15, the UN Committee sets out legal obligations to respect, protect and fulfil the right to water. The State's duty to protect third-party activities by controlling them becomes even more relevant in areas where water supplies are operated by private actors. Third-party interference may include water sources contamination, denial of access to water, unfair price increases by private service providers for water services, or sacrificing fair, accessible, and physical access to sufficient, safe and acceptable water. States, therefore, have a duty to take the required legislative and other steps to prevent such interference.⁷⁴ The primary responsibility to promote and protect the right to water lies with the national government, which is responsible for monitoring the performance of sub-national governments and enabling them to carry out their duties by providing adequate powers and resources to them.⁷⁵

2.2.2 African regional human rights law

The African Charter, also referred to as the Banjul Charter, is an African regional instrument with the mandate to promote and uphold fundamental human rights and freedoms in the African continent. Although the African Charter contains no explicit provision of the right to water, the right could be inferred from other rights inextricably linked to water, including the rights to life, dignity, food, health as well as economic, social and cultural development.⁷⁶ These implied rights are expressly recognised by the African Commission on Human and Peoples' Rights. According to the African Charter, one of the African States' core responsibilities is to ensure that

⁷⁴ General Comment 15 (2002) para 24.

⁷⁵ International Council on Human Rights Policy, *Local Government and Human Rights: Doing Good Service* (2005), 11 and 20.

⁷⁶ ACHPR *Principles and Guidelines* (2010) para 87. These rights are respectively guaranteed in Articles 4, 5, 16, 24 and 22 of the African Charter.

they acquire the minimum quantity of drinkable water for private and home use, which is important.⁷⁷ Member States must follow regional policies to recognise the right to water, take adequate national management steps and assure adequate education in the safeguarding of water resources.⁷⁸ Therefore, the African Charter allows Member States to adopt systematic and coordinated policies and initiatives, to ensure safe use of water.⁷⁹ Besides, Member States should encourage participation of citizens at local level in the formulation of these policies and programmes.⁸⁰

Also, the Principles and Guidelines of ACHPR provide for personal ownership of water and allow countries to develop and enforce an appropriate regulatory framework to regulate private water providers in order not to breach the right to access water.⁸¹ In 2015, the African Commission mandated its working group on Economic, Social and Cultural Rights, through its resolution 300, on the right to water commitments, to create values and rules on the right to water to help states in fulfilling their commitments. In alignment with this, there are several other African instruments with commitments to the right of access to water.⁸²

Notwithstanding, the African Charter imposes specific obligations on Member States to respect and recognise the right to water. The African Commission equally stresses on the positive and negative responsibilities placed on Member States in general, to respect,⁸³ protect,⁸⁴ promote⁸⁵ and fulfill⁸⁶ water rights. However, it should be noted that the various components of the right to water by the African Charter above, reflects what is discussed in General Comment 15 and in section 2.2.2 of this study.

77 ACHPR *Principles and Guidelines* (2010) para 92(a).

78 ACHPR *Principles and Guidelines* (2010) para 92(d)(f).

79 ACHPR *Principles and Guidelines* (2010) para 92(g).

80 ACHPR *Principles and Guidelines* (2010) para 92(i).

81 ACHPR *Principles and Guidelines* (2010) para 92(j).

82 See for example, Art 14(2)(c) of the *African Charter on the Rights and Welfare of the Child* (1990) obliges Member States to take measures to fully realise the right of children to safe drinking water. For details, see also the Abuja Declaration on Water: A Key to Sustainable Development in Africa (2002); the Protocol to the African Charter on the Rights of Women in Africa (2003), which includes commitments in connection with access to safe drinking water.

83 ACHPR *Principles and Guidelines* (2010) paras 5-6.

84 See para 7 in ACHPR *Principles and Guidelines* (2010).

85 See paras 8 and 9 in ACHPR *Principles and Guidelines* (2010).

86 See paras 10-12 in ACHPR *Principles and Guidelines* (2010).

In general terms, the responsibilities placed on Member States (including core responsibilities) to recognise the right to water under the African Charter, are identical to those identified in UN General Comment 15 on the right to water.⁸⁷ Nevertheless, several other African peculiarities are emphasised equally. The African Charter, for instance, imposes a minimum core requirement on Member States to refrain "from using access to water as a political tool".⁸⁸

International and African regional human rights law instruments discussed above acknowledge the potential role of private actors in contributing towards realising the right of access to sufficient water.⁸⁹ The discussion that follows focuses on how international and African regional human rights law regulates the role of private actors in realising the right of access to sufficient water.

2.3 Nature of obligations of non-state actors

By the end of the twentieth century, the UN became worried about the effect of globalisation and Multinational Corporations (MNCs) on human rights, the then UN Secretary-General, Kofi Annan, proposed the Global Compact to re-engage with non-state actors and advocate a 'public-private' relationship to make globalisation more inclusive and equal.⁹⁰ Following this initiative, a number of international human rights instruments were subsequently adopted to regulate the activities of non-state actors not to infringe on the rights of citizens.

Although General Comment 15 recognises that State Parties to the ICESCR can use private actors to realise the right to sufficient water,⁹¹ it does not provide any information on the duties of these private actors. This gap in international human rights law received a lot of attention within the UN from 2000 to 2011. In 2000, the Global Compact was launched by the UN under a working group established by the Sub-Commission on the Promotion and Protection of Human Rights based on

87 See para 92(i)-xxii of ACHPR *Principles and Guidelines* (2010); paras 17-38 of General Comment 15 (2002).

88 Para 92(iii) of ACHPR *Principles and Guidelines* (2010).

89 See General Comment 15 (2002) para 60.

90 Deva and Bilchitz 2018 *The Human Rights Obligations of Business* 6-7.

91 General Comment 15 (2002) para 60.

operating practices and operations of Transnational Corporations.⁹² It was structured to allow companies to contribute to meeting global challenges, including assisting governments in achieving the Millennium Development Goals.⁹³ Across this Forum, responsible businesses operating worldwide, committed to adopting and implementing ten guiding principles in the field of human rights to non-state actors. These principles included the following: supporting and respecting the protection of internationally recognised human rights; avoiding being implicated in human rights abuses; undertaking measures to foster greater responsibility for the environment; and working against all forms of corruption.⁹⁴

Despite criticisms from human rights scholars for being too ambiguous and for allowing businesses with no more than voluntary moral guidance,⁹⁵ the Working Group drew up comprehensive substantive guidelines on MNCs and human rights obligations of other business organisations and also introduced procedures for enforcing these responsibilities.⁹⁶ The Global Compact has a clear Water Mandate that seeks to involve businesses in reducing three water-related risks: physical risk (related to emissions and water quality and quantity); reputational risk (related to a corporation's public image); and regulatory risk (related to government capacity to handle water efficiently and sustainably).⁹⁷ By implementing into policies, processes and procedures the Ten Principles of the UN Global Compact and building a culture of integrity, corporations uphold their fundamental responsibilities to society and the environment and pave the way for long-term success.

Consequently, the ideologies of the Global Compact made a step ahead in 2003 when the UN adopted the Norms on the Responsibilities of Transnational

92 Sub-Commission, *The Relationship between the Enjoyment of Economic, Social and Cultural Rights and the Right to Development, and the Working Methods and Activities of Transnational Corporations*, UN Doc. E/CN.4/Sub.2/ RES/1998/8, see also Weissbrodt and Kruger 2003 *American Journal of international Law* 904.

93 UN Millennium Development Goals 2000.

94 See the Ten Principles of the UN Global Compact 2014 <https://www.unglobalcompact> accessed 10 April 2020.

95 Deva 2006 *Syracuse Journal of International Law and Commerce* 107.

96 Weissbrodt and Kruger 2003 *American Journal of International Law* 903-904.

97 *UN Global Compact, 'Water and Sanitation'* 2015 <https://www.unglobalcompact.org> accessed 10 April 2020; see also Kotzé and Fuo 2016 *Journal of Energy & Natural Resources Law* 298.

Corporations and Other Businesses Enterprises with regard to Human Rights (2003 norms) developed by the UN Sub-Commission on the Promotion and Protection of Human Rights.⁹⁸ The 2003 norms proposed a revolutionary approach as it seems to provide greater possibility for realising the human right to water, which never went so far. The norms and commentaries provide for: the right to equal employment and treatment; transparency and prevention of corruption; respect for the right to health; and economic, social and cultural rights.⁹⁹ These 2003 norms suggest that States have the obligation to ensure that transnational companies and other businesses (private companies) have an obligation to respect human rights.¹⁰⁰ The norms, referred to as 'General Obligations' for states, are in no way intended to reduce governments' responsibilities to encourage, implement, respect, safeguard or protect human rights.¹⁰¹ The 2003 norms also provide basic procedures for implementation and it is expected that other methods will eventually be introduced. Firstly, the norms state that businesses are subject to independent and open periodic monitoring and include relevant stakeholders.¹⁰² Secondly, the norms require companies to adopt and implement their own internal operating rules for the protection laid down in the instrument.¹⁰³ Weissbrodt and Kruger allege that although not voluntary, the norms are not a treaty and the legal authority of the norms derive primarily from its origins in treaties and customary international law as a reaffirmation of international legal standards applicable to businesses.¹⁰⁴

Nevertheless, the 2003 norms were dropped in favour of the 2008 UN Protect, Respect and Remedy Framework (PRRF),¹⁰⁵ which was eventually developed into

98 See the UN Sub-Commissions Resolution 2003/16 of August 13, 2003.

99 See Sub-Commission on the Promotion and Protection of Human Rights, Norms on the Responsibility of Transnational Corporations and other Business Enterprises with Regard to Human Rights, Commentary on the Norms on the Responsibilities of transnational corporations and other business enterprises with regard to human rights, UN Doc. E./CN.4/Sub.2/2003/38/Rev.2 (Aug. 26, 2003); David Weissbrodt and Kruger 2003 *American Journal of International Law* 901.

100 2003 Norms para 1.

101 2003 Norms para 1.

102 2003 Norms para 16.

103 2003 Norms para 15.

104 Weissbrodt and Kruger, 2003 *American Journal of International Law* 913.

105 United Nations, Protect, Respect and Remedy: A Framework for Business and Human Rights (UN 2008). This report was developed by Professor John Ruggie, Special Representative of the

the Guiding Principles on Business and Human Rights of 2011¹⁰⁶ by the Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises (SRSG). The Guiding Principles are now regarded as the most authoritative instrument setting out the human rights responsibilities of business adopted by the UN, applicable to all States and all transnational and other business enterprises, regardless of location, size, ownership, sector, and structure. According to paragraph 2 of the Guiding Principles (GPs), business enterprises as specialised entities performing specialised functions shall comply with all applicable laws and respect human rights. It requires that they stop violating other people's human rights and discuss their adverse impacts on human rights.¹⁰⁷ These Guiding Principles are based on three pillars: State responsibilities to protect human rights; corporate responsibility for respecting human rights; and recourse to remedies.¹⁰⁸ The Framework and the first pillar of the UN GPs, brings back emphasis on the role of states in protecting individuals from violations of human rights by non-state actors . The obligation of States to 'protect' is to ensure that corporations do not commit abuses of human rights. The UN GPs explain in depth, a range of measures that an organisation can take to mitigate human rights-related risks. It also emphasises that corporations should practise continuous due diligence not only about its activities but also concerning activities "which may be directly linked by its business relationships to its operations, products or services".¹⁰⁹ In terms of Principle 12, obligations resulting from the Guiding Principles include all human rights guaranteed in instruments of international law, which include: UDHR 1948; ICCPR 1966; and ICESCR 1966 (referred to as International Bill of Human Rights). All these instruments are among those that were recalled by the UN General Assembly in 2010 when it adopted a resolution recognising the right to safe and clean drinking water as a human right. Considering the fact that the right to safe

UN Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises.

106 UN Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, New York and Geneva, (2011).

107 UN Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, New York and Geneva, (2011).

108 UN Guiding Principles on Business and Human Rights (2011) 2; SRSG '2008 Framework' para 54.

109 UN Guiding Principles, Principles 13b and 15 (2011).

drinking water has been thoroughly acknowledged in international law,¹¹⁰ as indicated in the synopsis above, human rights obligations for the state and companies, as set down by default in the Guiding Principles, now also include the right of access to water. Besides, the GPs also provide that States should set out the presumption that all corporations domiciled in their territory and/or jurisdiction must respect human rights during their operations.¹¹¹

Part III of the UN GPs relates the recourse to redress for victims of corporate human rights violations. Access to various remedies depends on states to take appropriate legal, administrative, legislative or other measures to ensure access to an effective remedy. Principle 31 stipulates that states have the obligation to ensure their effectiveness, that both State-based and non-State-based non-judicial grievance mechanisms be legitimate, accessible, predictable, equitable, transparent, and rights-compatible and a source of continuous learning through engagement and dialogue.

With regard to the perspective of African regional human rights law to obligations of non-state actors, it is important to note that the UN GPs are global norms and standards that also apply to non-state actors operating in Africa since there are no specific instruments for African states. Therefore, since the UN GPs are universal norms, MNCs and businesses operating in Africa must comply with them.

Taking into cognisance the above obligations of non-state actors, it has been observed that, given the fact that the UN GPs enjoins States to protect third parties, including corporations, from abuses of human rights within their territories and/or jurisdiction, which includes adequate action to prevent, prosecute, punish, and redress such violation by effective policies, rules, legislation, and adjudication,¹¹² responsibility of human rights abuses by a third party cannot be shifted to the state. Such liability shall be attributed only if the State fails to take effective steps to deter, prosecute, punish and resolve the violation by private actors of human rights. It

110 The UN General Assembly Resolution A/RES/64/292 of July 2010.

111 UN Guiding Principles on Business and Human Rights (2011), Principle 2.

112 UN Guiding Principles, Principle on Business and Human Rights (2011) 1.

should be remembered, however, that the socio-economic and legal contexts of the global North vary significantly from Africa in terms of the community, character, capacity and organisation of the state and its long-established ties with people. In Africa, the post-independence crisis of African States in terms of poor institutions, insecurity, and the failure to forge a shared national identity, ideals, and ethos, warranted an objective basis for assurances of human rights, other than the voluntary contribution of its social bodies. The law has been the most effective reason to do so to date.¹¹³ To preserve the reputation of the state and ensure predictability by delivering coherent and consistent messages, States must clearly state the prospects that companies abroad will respect human rights, particularly where the State itself is involved in or supports these companies.¹¹⁴ This can be done through effective regulatory systems for third parties operating within the territory.

Despite all the proposals of the SRSG on corporate responsibilities for respecting human rights, Deva and Bilchitz acknowledge that the SRSG also distinguishes the terminology used about corporations, that businesses have no legal obligations; they simply have responsibilities and corporate responsibility is expressed as merely "respecting" human rights, described by the SRSG as preventing the violation of such rights.¹¹⁵ The authors argue that this policy has reduced business expectations and has certainly played a role in encouraging the work of the SRSG and believe, however, that the scope of corporate human rights responsibilities is unreasonably restricted. The authors further believe that businesses should take a political pledge to fulfil their responsibility to respect human rights, perform due diligence inquiries to recognise, deter, mitigate and account for how they handle their human rights impacts and have processes in place to resolve any adverse human rights impacts that they cause or contribute to. Generally, the state has a positive and negative duty to respect, protect and fulfill human rights but Principle 11 of the GPs stipulates

113 Okoloise "Contextualising the corporate human rights responsibility in Africa: a social expectation or a legal obligation" 200.

114 UN Guiding Principles, Principle on Business and Human Rights (2011) 1.

115 Deva and Bilchitz 2018 *The Human Rights Obligations of Business* 15.

that companies have a duty regardless of where they operate, only to respect.¹¹⁶ Kotzé and Fuo argue that accordingly, the duty of companies is, therefore, negatively framed since they derive no clear constructive duties from the values to fulfill obligations of rights as states do, including those relating to water supply.¹¹⁷ However, considering the issues in context, Principle 23 stipulates that:

In all contexts, business enterprises should: (a) Comply with all applicable laws and respect internationally recognised human rights, wherever they operate; (b) Seek ways to honour the principles of internationally recognised human rights when faced with conflicting requirements; and (c) Treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate.

This Principle, therefore, supports states' panoply of negative and positive obligations concerning human rights as well as business.

In summary, what protects human rights is that violators are responsible for any violation based on laid down rules, rather than a principle or ethics or voluntarism. Voluntary corporate commitments to respect human rights are positive innovations on their own, but their absence does not, at the very least, mitigate corporate responsibility for respecting human rights. In addition to this moral duty and the modern democratic culture that acknowledges the increased role of private corporations in regulation, there is little in terms of binding international human rights law that legally obliges businesses to recognise the right of access to water in a positive way. In this respect, the Guiding Principles are closest to providing non-binding standards and positive and negative obligation.¹¹⁸ Despite the highly criticised weak language and approach of the SRSG to corporations in the framework and the UN GPs,¹¹⁹ there is a message to corporate bodies concerning their human rights obligations (a more deliberate move) and also gives states the power to regulate the activities of these corporations where there are human rights abuses.

116 UN Guiding Principles on Business and Human Rights (2011) 13.

117 Kotzé and Fuo 2016 *Journal of Energy & Natural Resources Law* 299.

118 Kotzé and Fuo 2016 *Journal of Energy & Natural Resources Law* 300.

119 Deva "Treating human rights lightly: a critique of the consensus rhetoric and the language employed by the Guiding Principles" in S Deva & D Bilchitz (eds) *Human Rights Obligations of Business* 91.

Companies are responsible for upholding the values of human rights accepted by domestic and international law in their operations.¹²⁰

2.4 Summary of chapter

This chapter has analysed the nature of obligations of state and non-state actors in international and African regional human rights law instruments relating to the right to sufficient water. The issue of the emergence of a right to water in international law was discussed in the opening section of the chapter. The discussion in this chapter revealed that access to safe drinking water is an internationally recognised human right, which is essential in the realisation of all human rights. Resolution A/RES/64/292 of July 2010 cemented the entrenchment of the right to water in international human rights law. Prior to its adoption by the UNGA, several binding and non-binding instruments had been adopted at the international and African regional level to guarantee the right to water as a fundamental human right.

This chapter also provided an analysis of obligations of State Parties under international and African regional human rights law concerning the right to water. It was observed that States have a primary duty to protect, promote and fulfill this right. In addition, they are obligated to prohibit public bodies and third parties from intervening in any way with the enjoyment of the right to water under their authority.

The responsibilities of non-state actors with regard to human rights were also analysed in this chapter, such as the UNs deduced frameworks and GPs for corporate human rights obligations, to engage non-state actors on human rights abuses. Both the Framework and the GPs are based on the three foundations of the SRSG as follows: obligations of States to protect human rights; corporate responsibility to respect human rights; and access to remedies. The analysis revealed that the UN GPs of 2011 form the first authoritative initiative regarding

120 Ruggie J UN Guiding Principles on Business and Human Rights: Implementation of the United Nations Framework for Protection, Respect and Remedy ' UN Doc A / HRC/17/31 (2011) Principle 12. See also, Part 6 of African Commission on Human and Peoples Rights, Guidelines on the Right to Water in Africa on Private actors (2015).

corporate human rights responsibilities to be approved by the UN to reduce corporate-related human rights violations. However, it was argued that there is little or no direct binding instrument for legal human rights obligations. Nevertheless, the UN guiding principles are part of measures that inform and give States the powers to control abuse of human rights by corporations. Businesses must respect the values of human rights accepted by domestic and international law in their activities. This directly links to the focus of this study, which is the contribution of public-private partnerships in realising the right to access sufficient water.

In sum, the obligation imposed on State Parties to adopt and implement legislation and other measures are very important since this is how government can regulate the right to water and protect it from improper invasion by third parties. This implies that the government can put laws in place to ensure that where private actors are involved in providing water, they still conform to certain norms and standards, including respecting the rights of people. It also means that the government must put in place redress mechanisms where the right is violated. The next chapter focuses on South Africa's legal and policy framework on the right to access sufficient water.

CHAPTER 3: LEGAL AND POLICY FRAMEWORK ON THE RIGHT OF ACCESS TO SUFFICIENT WATER IN SOUTH AFRICA

3.1 Introduction

This study focuses on how the legal and policy framework for MSPs can be used to contribute towards realising the right to have access to sufficient water guaranteed by the Constitution. The previous chapter focused on the obligations of both State and non-state actors in relation to the right to water as contained in relevant international and African regional human rights instruments. It was established that these actors have divergent human rights obligations to realise the right to water. While states have the obligation to put in place measures to protect and ensure the full realisation of the right to water, the obligation on non-state actors is limited to respecting people's right to access to water.

This chapter provides an analysis of the legal and policy framework on the right to access sufficient water in South Africa in order to illustrate the nature of obligations imposed on governments and non-state actors. To achieve this objective, the remainder of the chapter is divided into four parts as follows: The first part focuses on the legal and policy framework on the right of access to sufficient water in South Africa; the second part makes use of case-law to show how and the extent to which South African courts have been able to uphold and implement the obligation imposed on the government; the third part is a discussion on the obligations of non-state actors in terms of the Constitution; and the fourth part is a summary of the chapter.

3.2 Legal and policy framework on the right to access sufficient water

3.2.1 Constitutional framework

The South African Constitution is, undoubtedly, one of the best constitutions in the world. The 1996 transformative constitutional dispensation in South Africa ushered a new era for the protection of fundamental human rights and freedoms meant to

address historical injustices.¹²¹ The Constitution, as the supreme statute, is the foundation of an overall legal structure for the protection of human rights to the extent that non-adherence to constitutional values and rights constitutes a violation of people's rights and freedoms. Chapter 2 of the Constitution entitled the Bill of Rights, for which an obligation reposes on the government, to respect, Protect, promote and fulfill the rights. One of such rights is the right to access to sufficient water. As far as the Constitution is concerned, the Bill of Rights binds all state organs and natural or juristic persons, which means that, for example, all state organs and natural or juristic persons are obliged to uphold and protect the right of access to sufficient water.

Section 27(1)(b) explicitly guarantees everyone the right to access to sufficient water, while Section 27(2) provides that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right to water.¹²²

Besides, the duty to implement and execute regulatory and other measures, the Constitution also obliges the State to respect, protect, promote and fulfill the right of access to sufficient water.¹²³ As intimated in Chapter 1, since government is constituted of three spheres (national, provincial and local spheres), which are distinctive, interdependent, and interrelated, the obligations imposed on the state by Section 7(2) of the Constitution, in realising the right of access to sufficient water, is shared by all three spheres of government. Though the obligation to realise the right of access to sufficient water is shared by all three spheres of government,¹²⁴ direct responsibility for the provision of water services rests with local government.¹²⁵ It is important to note in this context that although the courts are yet to elaborate on the meaning of obligations to respect, protect, promote and

¹²¹ The Preamble of the *Constitution*.

¹²² Section 27(2) of the *Constitution*.

¹²³ Section 7(2) of the *Constitution*.

¹²⁴ Section 40(1) of the *Constitution* provides that "in the Republic, the government is constituted as national, provincial and local spheres of government, which are distinctive, interdependent and interrelated".

¹²⁵ Section 156(1)(a) and Schedule 4B of the *Constitution* read together with ss 3 and 11 of the *WSA*; See Fuo 2017 *De Jure* 325; Fuo 2013 *Murdoch University Law Review* 25-26.

fulfill socio-economic rights in the Constitution generally, these have been explained by legal scholars.¹²⁶ In brief, the meaning assigned to these obligations is similar to those discussed in Chapter 2. However, the obligation imposed on local government to provide basic services to residents was clearly defined in the case of *Joseph and Others v The City of Johannesburg and Others*¹²⁷ where Skweyiya J held that in performing the constitutional and legislative duties of local government, the City Power supply of electricity to Ennerdale Mansions, was the constitutional right to provide basic public services to all persons living in the City.¹²⁸ The applicants were supplied with electricity based on their right to access this basic municipal service in accordance with the Constitution.¹²⁹ In *Residents of Bon Vista Mansion v Southern Metropolitan Local Council*,¹³⁰ the court held that the municipality violated the obligation to respect the right of access to water when it disconnected water services to residents of a block of flats in Hillbrow for non-payment of arrears without reasonable notice.¹³¹ The *Bon Vista* judgment substantiates the idea that the disconnection of water without compliance with procedural requirements of fairness is a violation of the right of access to water.

In line with the obligation imposed on the state to adopt and implement appropriate regulatory and other measures for the realisation of the right of access to sufficient water, the national government has adopted legislation and policies to give effect to this right.

3.2.2 Legislative and policy framework

3.2.2.1 Water Service Act and Regulations

The constitutional right to have access to sufficient water is given legislative effect by the WSA. The WSA aims to provide for: the right of access to the basic water

126 De Visser *et al.* 2009 *Law, Democracy and Development* 45; De Vos "Water is life (but life is cheap)" (2009) Constitutionally Speaking Blog, at <http://constitutionallyspeaking.co.za/water-is-life-but-life-is-cheap>.

127 *Joseph and Others v The City of Johannesburg and Others* 2010 (3) BCLR 212 (CC).

128 *Joseph and Others v The City of Johannesburg and Others* paras 33-39

129 *Joseph and Others v The City of Johannesburg and Others* para 40.

130 *Residents of Bon Vista Mansion v Southern Metropolitan Local Council* 2002 (6) BCLR 625 (W).

131 *Residents of Bon Vista Mansion v Southern Metropolitan Local Council* paras 20, 27 and 34.

supply required to ensure sufficient water and an environment that is not harmful to human health or well-being;¹³² national water services tariff levels and requirements; a regulatory system for water services institutions;¹³³ the control of water services and intervention by the Minister or the province concerned;¹³⁴ and funding of the water service institutions.¹³⁵

Section 3(1) of the WSA guarantees everyone the right to a basic supply of water, defined as the specified minimum standard of water supply services, required for the reliable supply of sufficient quantity and quality of water to formal and informal households, as well as for the promotion of life and personal hygiene.¹³⁶ To realise this right in accordance with Section 3(2) and (3), reasonable measures must be taken by water service authorities, and such measures must also be included in their Water Service Development Plans. However, preference to basic water supply over other uses of water is provided in Section 5 of the WSA, which states as follows:

If the water services provided by a water services institution are unable to meet the requirements of all its existing consumers, it must give preference to the provision of basic water supply and basic sanitation to them.

However, the WSA does not specify the content of the right to basic water supply but Sections 9 and 10 of the Act authorises the Minister to prescribe compulsory national standards relating to the provision of water services. The WSA also gives the minister powers to set norms and standards concerning tariffs for water services and, in prescribing the norms and standards, he/she must, among other factors, consider social equity and financial sustainability within the geographic area in question.¹³⁷ To this effect, the Ministerial 'Regulations Relating to Compulsory National Standards and Measures to Conserve Water' were adopted in 2001.¹³⁸ The content of the right to basic water supply is developed from the 2001 Regulations. According to Regulation 3 of the 2001 Regulations, municipalities are under an

132 Section 2(a) *WSA*.

133 Section 2(b)(d) *WSA*.

134 Section 2(f) *WSA*.

135 Section 2(g)(i) *WSA*.

136 Section 1(iii) *WSA*.

137 Section 10 *WSA*.

138 GNR 509 in GG 22355 of 8 June 2001.

obligation to provide an appropriate education in respect of effective use of water and a minimum quantity of potable water of 25 litres per day per person or 6 kilolitres per household per month not less than a flow of 10 litres per minute within a distance of 200 metres from households and assure effective supply for no consumer to go without water supply for more than seven days in any year.¹³⁹

In addition to the 2001 Regulations, the government adopted norms and standards for domestic water and sanitation in 2017.¹⁴⁰ These norms and standards are to allow for the provision of water services through a ladder-type system where people move from the most basic level of services to the top of the ladder, which is considered to be 'full services' by municipalities. They provide for acceptable level of services beginning from intermittent, basic-basic, basic plus, intermediate to upper and full services.¹⁴¹

Additionally, the WSA provides that provision of water services must be in line with conditions put in place by service providers;¹⁴² it must be accessible to the public and following bylaws put in place by water authorities within their jurisdictions.¹⁴³ Accordingly, before water is either limited or disconnected, the WSA provides for processes that have to be followed.¹⁴⁴ The WSA provides that limiting or discontinuing "water services must be fair and equitable". In addition to the reasonable notice of intention to discontinue or limit water services, an opportunity to make representations must be given unless where: prejudice will be caused to other consumers; there is an emergency; and consumers have interfered with a limited or discontinued service.¹⁴⁵ Also, the limitation or disconnection must not result in the denial of any person to access basic water services for non-payment

139 Reg 3 of GNR 509 in GG 22355 of 8 June 2001.

140 GN 982 in GG41100 (8 September 2017). This falls under the NWA.

141 Kidd "Realisation of the right to water: Lessons from South Africa" in Cullet P (ed), *Research Handbook on Law, Environment and the Global South* 355.

142 Section 4(1) WSA.

143 Section 4(2)(a)(b) WSA.

144 Section 4(3) WSA.

145 Section 4(3)(b) WSA.

when there is clear proof that the person in question is unable to pay for such services.¹⁴⁶

Furthermore, the Act requires water service authorities to either perform the functions of a water service provider or enter into a contract or joint venture with another water service institution and if the contract is with a private sector water service provider, consideration for all public water service providers must have been exhausted and must publicly disclose its intention to do so.¹⁴⁷ The WSA makes a distinction between a water service authority considered as any municipality, including a district or rural council responsible for ensuring access to water services, and a water service provider refers to any person or entity that provides water services to individuals or other water service authorities.¹⁴⁸

The WSA provides the national government with the legislative and executive authority to oversee the successful implementation of municipalities in their capacity as bodies responsible for water services.¹⁴⁹ Similarly, the Act imposes a duty on all authorities in the field of water services to ensure reliable, efficient, equitable and reliable access to water services for all water users.¹⁵⁰ This duty is correlated by Section 11(4)(5), which provides that a water services authority may not unreasonably refuse or fail to give access to water services to a consumer or potential consumer in its area of jurisdiction, and that in emergencies, reasonable measures must be taken to supply water within their jurisdictions.

3.2.2.2 National Framework for Municipal Indigent Policies (NIP)(2006)

As a primary obligation, the Constitution requires municipalities, as part of the extended developmental mandate of local government, to prioritise and meet the needs of, especially poor community residents.¹⁵¹ In 2006, as required by the Constitution, the national government approved the National Framework for

146 Section 4(3)(c) *WSA*.

147 See section 19 *WSA*.

148 Section 1 *WSA*.

149 Section 63 *WSA*.

150 Section 11(1) *WSA*.

151 See ss 152 and 153 of the *Constitution*.

Municipal Indigent Policies¹⁵² program to help local governments meet the basic needs of disadvantaged community residents to ensure rapid improvement to access to basic services such as water. This policy provides a basis for indigents to access free basic services, including water. It replaces the previous free basic services policies in order to meet the basic needs of indigent households that suit their local context. It acknowledges the necessity for inter-governmental cooperation in dealing with indigents, but places special focus on the municipal sphere, acknowledging the essential role of local government in addressing the concerns of indigent households effectively.¹⁵³ The Framework also provides a basis for measures that the national government will take in respect of obligations provided by the Constitution to municipalities to ensure that everyone in this category has adequate access to basic services.¹⁵⁴ The Indigent Policy defines "indigent" as meaning "lacking the necessities of life". An indigent is considered to include someone who does not have access to basic necessities, such as adequate water, basic sanitation, refuse removal in denser settlements, basic energy, health care, accommodation, food and clothing, as understood in the South African context.¹⁵⁵

The Indigent Policy requires each municipality to provide each indigent household with water supply.¹⁵⁶ It is expected that 25 litres of drinking water per person per day, supplied within 200 meters of the household and with a minimum flow of 10 litres per minute (in the case of community areas) or 6000 litres of drinking water supplied per formal connection per month (in the case of household connections) will provide the basic service level for basic water supply facilities. Also, the basic service level for a basic water supply service requires that the sustainable operation of the facility should be available, at least, 350 days a year and not disrupted per

152 DPLG (now CoGTA) National Framework for Municipal Indigent Policies (2006).

153 DPLG (now CoGTA) National Framework for Municipal Indigent Policies (2006) 6.

154 DPLG (now CoGTA) National Framework for Municipal Indigent Policies (2006) 6.

155 DPLG (now CoGTA) National Framework for Municipal Indigent Policies (2006) 13.

156 DPLG (now CoGTA) National Framework for Municipal Indigent Policies (2006) 21-22.

incident for more than continuous 48 hours and communicating proper water usage, hygiene and related processes.¹⁵⁷

Furthermore, the Policy requires a municipality or its external service providers, even where cost is attributed to a basic service, to be made available to the indigent consumer free of charge. A subsidy is, therefore, needed to ensure that costs necessary for delivering the service can continue to be funded from a source other than the consumer of the service.¹⁵⁸ However, it is envisaged that the free basic water allocation guaranteed in the NIP is sponsored through cross-subsidisation and the national equitable share grant.¹⁵⁹ Accordingly, and in relation to revenue management issues, the Policy contends that a sound indigent policy mechanism is needed for the identification of consumer units and billing those that use the service above the free basic level, ensuring control payment systems. As such, when this is not achieved, there is a propensity that subsidisation has been accessed by those who are not indigent.¹⁶⁰ This Policy has been criticised in relation to low levels of essential services due to the misconception that fewer water services are consumed or required by indigent households than average households.¹⁶¹

3.3 The nature of obligations of the state through case-law

The constitutional mandate of the right of access to sufficient water has been unpacked by South African courts, particularly the Constitutional Court, in the landmark *Mazibuko case*. Although the right to have access to water was subsequently the subject of litigation in *Federation for Sustainable Environment and Others*,¹⁶² *Mazibuko* cemented the criteria for determining compliance by the state in relation to the right to water.

157 DPLG (now CoGTA) National Framework for Municipal Indigent Policies (2006) 21.

158 DPLG (now CoGTA) National Framework for Municipal Indigent Policies (2006) 26.

159 DPLG (now CoGTA) National Framework for Municipal Indigent Policies (2006) 30.

160 DPLG (now CoGTA) National Framework for Municipal Indigent Policies (2006) 30.

161 Fuo 2014 *Stell LR* 198.

162 *Federation for Sustainable Environment and Others v Minister of Water Affairs* (ZAGPPHC) case no. 35672/2012 10 July 2012. (Hereafter *Federation for Sustainable Environment*).

3.3.1 *Mazibuko and Others v The City of Johannesburg and Others*¹⁶³

3.3.1.1 Facts and issues in dispute

The applicants, in this case, were residents in Phiri, a township of Soweto, near Johannesburg.¹⁶⁴ Phiri is one of the neighbourhoods that make up the greater part of Soweto, which is part of Johannesburg City and is largely populated by impoverished and uneducated inhabitants. As one of the oldest townships in Soweto, Phiri is characterised with gross inequality in terms of service delivery. The township has been neglected to the extent that water infrastructure has become obsolete, with poor piping resulting in water losses that cannot be accounted for. In 2004 prepaid meters were introduced in Phiri by the City of Johannesburg (Local Government). This was through an operation referred to as "Operation Gcinamanzi". This policy effort had a double objective: (a) the recovery of outstanding debts from residents of Phiri for unpaid water services; and (b) save water by improving the infrastructure for the provision of services, prevent wasteful water activities and reduce demand. The applicants argued that the City of Johannesburg violated the constitutional right of access to sufficient water by providing 25 litres of water per person per day and by introducing prepaid meters to regulate consumption of water in Soweto.¹⁶⁵ After exhausting the quantity of free water allocated, water supply was automatically disconnected by the pre-payment water meter until further water credit was purchased. As a consequence, to survive, poor households that did not have money for extra water were forced to borrow either money or water from neighbours. To choose between bathing or cleaning their soiled sheets or flushing the toilets, residents had to make undignified hygiene and health choices.

The case involved two major issues in the application as follows: (a) whether the City's Free Basic Water Policy and, in particular, its decision to supply 25 litres per

163 The High Court, Supreme Court of Appeal and Constitutional Court judgments are cited respectively as *Mazibuko v The City of Johannesburg* Case No 13865/06 [2008]; the *City of Johannesburg and Others v Lindiwe Mazibuko and Others* Case No 489/08 [2009] ZA SCA 20; and *Mazibuko and Others v City of Johannesburg and Others* 2010 (3) BCLR 239 (CC) (hereafter *Mazibuko*). The focus here is on the Constitutional Court Judgment.

164 For more on Phiri see Bond and Dugard 2008 *Law Democracy and Development* 9.

165 *Mazibuko* para 6.

person per day or 6 kilolitres of free water per household per month complied with Section 27 of the Constitution; and (b) whether the installation of the pre-payment water meters was lawful.¹⁶⁶

On 30 April 2008, the High Court handed down judgment in favour of the applicants.¹⁶⁷ It ruled, *inter alia*, that the City's by-laws did not provide for the installation of the pre-paid meters and that the installation was, therefore, unlawful;¹⁶⁸ that because the meter stopped water supply after 6 kilolitres had been used, the meter resulted in unconstitutional and unreasonable discontinuation of water supply;¹⁶⁹ the procedure was unlawful and unfair to install the meters and the Free Basic Water Policy implemented by the City was irrational and unreasonable.¹⁷⁰ Significantly, the Court ruled that the City should provide a free basic water supply of 50 litres per person per day for the applicants and all similar residents of Phiri.¹⁷¹ This judgment was appealed by the City of Johannesburg to the Supreme Court of Appeal.¹⁷²

The Supreme Court of Appeal (SCA) unanimously held that since the City's policy was formulated on the presumption that it was not required to grant those who are unable to pay the amount set out in Regulation 3(b) free of charge, it was affected by a substantive error in law and should be set aside.¹⁷³ Besides, the Court determined that the amount of water needed for a dignified human life was 42 litres per person per day, following Section 27(1) of the Constitution.¹⁷⁴ It referred the formulation of the water policy back to the City to be updated in light of the decision. The Court also ruled that installation of the pre-paid meters and the automatic shut off of water supply, when the free cap had been exhausted, constituted unlawful discontinuation of water supply. The Supreme Court, however, suspended the order

166 See Bond and Dugard 2008, *Law Democracy and Development* 9.

167 *Mazibuko* para 26.

168 *Mazibuko* para 26.

169 *Mazibuko* para 26.

170 *Mazibuko* para 26.

171 *Mazibuko* para 27.

172 *Mazibuko* para 28.

173 *Mazibuko* para 28.

174 *Mazibuko* para 28.

for two years to allow the City time to amend its by-laws.¹⁷⁵ The Court set aside the decision of the first and second respondents to limit water supply to 25 litres per day and 6 kilolitres per household per month.¹⁷⁶

Residents of Phiri were dissatisfied with these terms, and sought leave to appeal to reinstitute the High Court's order granting 50 litres per person per day. Though the applicants admitted the Supreme Court order that the pre-paid meters were unconstitutional, they disagreed with the Court's suspension of the order for two years to allow the City to rectify its statutes.¹⁷⁷ They argued that the SCA erred in determining 42 litres per person per day to be sufficient in terms of Section 27.¹⁷⁸ The respondents did not oppose the leave to appeal, but sought permission to cross-appeal if the applicant's appeal was granted.¹⁷⁹ On 8 October 2009, an appeal against the SCA was brought before the South African Constitutional Court.

3.3.1.2 Decision and reasoning of the Constitutional Court

The Constitutional Court found that the Free Basic Water Policy of the City falls within the limits of reasonableness and thus did not interfere with either Section 27 of the Constitution or the national water supply legislation. The setting up of pre-paid meters in Phiri was deemed lawful. Accordingly, the Court set aside the SCA and the High Court's orders.

The Constitutional Court interpreted the nature of the obligation imposed by Section 27(1) and (2) of the Constitution on the state. The Court concluded that the City was working towards the progressive realisation of the right to access to sufficient water, but that proper access would take time for everyone to be served. In terms of Section 27(1)(b) of the Constitution, the Court had to determine the degree of positive obligations of the State. By doing so, the Court adopted the same view in both the *Government of the Republic of South Africa and Others v Grootboom and*

175 *Mazibuko* para 28.

176 *Mazibuko* para 29.

177 *Mazibuko* para 30.

178 *Mazibuko* para 31.

179 *Mazibuko* paras 32-33.

*Others*¹⁸⁰ and *Minister of Health and Others v Treatment Action Campaign and Others*.¹⁸¹ The Constitutional Court had held in these cases that the Constitution contains qualified provisions for Sections 26 and 27, which impose a strong obligation on the state to progressively recognise these rights.¹⁸² The Court established that Section 27(1)(b) of the Constitution did not necessitate the government to provide water on request to every citizen, but allows government to take appropriate legislative and other measures to progressively realise the right to access to sufficient water within the resources available to the state.¹⁸³

The applicants argued that by quantifying the amount of water required for a dignified life, the Court should determine the content of the right in Section 27(1)(b), and urged that the correct amount should be 50 litres per person per day.¹⁸⁴ However, the Court reasoned that the minimum core can only be determined by first identifying the needs and possibilities of obtaining such right;¹⁸⁵ and that the show of minimum core evidence in a particular case to determine reasonableness of the state and Constitutional rights should not be viewed as entitling everyone to request to have the minimum core;¹⁸⁶ and, as such, the argument must fail for reasons similar to those used by the Court to reject the minimum core argument in earlier cases (*Grootboom* and *Treatment Action Campaign*).¹⁸⁷ The claim was dismissed by the Court on two grounds. First, the Court claimed that it was appropriate to read together Section 27(1)(b) and Section 27(2) and that it is clear from the Constitution that the right to have access to sufficient water cannot be realised immediately but must be progressively realised,¹⁸⁸ taking into account several factors: the content of the right varies with time and context; that quantifying the content rigidly would prevent analysis of the

180 *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 1 SA 46 (CC), hereafter *Grootboom*.

181 *Minister of Health and Others v Treatment Action Campaign and Others* 2002 5 SA 721 (CC) hereafter *Treatment Action Campaign*.

182 *Mazibuko* paras 48-49.

183 *Mazibuko* para 50.

184 *Mazibuko* para 51.

185 *Mazibuko* para 53.

186 *Mazibuko* para 54.

187 *Mazibuko* para 56.

188 *Mazibuko* para 57-58.

context; and that the concept of reasonableness places the context at the centre of inquiry and allows context assessment to determine whether a government's programme is reasonable.¹⁸⁹ Second, the Court also found that quantifying a reasonable quantity of water is not a proper matter for a court to deal with. This must be left to the executive and legislature, to deal with government departments and to take account of the availability of funds. The Court reasoned that the Constitution prescribes that the instrument for achieving socio-economic justice should be the promise of the legislative and executive for democratic accountability matters.¹⁹⁰

In line with the above issues, the Court clarified how courts should assess the positive obligations of the state in relation to the right to access sufficient water, depending on the circumstances. The Court referred to experts of the World Health Organisation and concluded that the notion of sufficient water should be considered in terms of its manner and purpose; water can be supplied through boreholes, reservoirs, water trucks, neighbourhood taps, and piping into houses and that piped water was supplied to Phiri generally into brick houses. The Court held that it was ill-placed to assess as to what constituted "sufficient water".¹⁹¹ If the government does not take steps to give effect to rights, the government may be forced to act by the courts. If policies introduced by government are unreasonable, the courts would then demand that they be revised to satisfy the requirement of reasonableness in the Constitution.¹⁹² The Court proceeded that it was obvious from *Grootboom* that a measure was unreasonable if no provisions were made for those in dire need. If, as in *Treatment Action Campaign*, the government adopts a policy with arbitrary restrictions or exemptions, the Court will require that they be removed. The Court concluded that the duty of progressive realisation places on government, the responsibility to constantly revise its policies to ensure the progressive realisation of the right.¹⁹³ The Court also emphasised the principle of

189 *Mazibuko* para 60.

190 *Mazibuko* para 61.

191 *Mazibuko* para 62.

192 *Mazibuko* Para 67.

193 *Mazibuko* para 67.

constitutional subsidiarity, as the applicant's failure to challenge the quantity set in regulation 3(b) presumptively showed that the minimum standards were being applied.¹⁹⁴ The Court confirmed that the quantity of water guaranteed in the City's Free Basic Water Policy was in line with the minimum levels prescribed in national regulations (Regulation 3 of National Water Standards Regulations) and was reasonable with obligations imposed by the Constitution.¹⁹⁵

The Court denied the arguments of the plaintiffs that the policy of the City was unconstitutional because the policy was uncompromising in that it allocated 6 kilolitres of water to both rich and poor households,¹⁹⁶ and eventually allocated water per household rather than per person,¹⁹⁷ and that the amount of 6 kilolitres of water for large households was insufficient.¹⁹⁸ The Court held that the allocation of 25 litres of water per person per day was based on a misconception that must fail because no one is entitled to a specific quantity of water per day according to the right in Section 27(1)(b) and (2).¹⁹⁹ It cannot be assumed also that it is unreasonable in terms of quantity, based on the fact that the City's policy was consistent with national legislation and policy.²⁰⁰

With regard to the applicant's arguments on the flexibility of the City's policies, the Court held that the City's policy was flexible because it was continuously revised to suit local conditions and, eventually, making conditions for those with special needs to apply for relief.²⁰¹

Regarding pre-paid water meters, the Court held that the national legislation and the City's by-laws gave the City legal authority to introduce pre-paid water meters²⁰² and that the installation of pre-paid meters was neither unfair nor discriminatory.²⁰³ The Court also held that this should have been perceived, when the flow of water

194 *Mazibuko* paras 72-74 and 76.

195 *Mazibuko* paras 78-79.

196 *Mazibuko* para 83.

197 *Mazibuko* para 84.

198 *Mazibuko* paras 86-89.

199 *Mazibuko* para 85.

200 *Mazibuko* para 89.

201 *Mazibuko* paras 91, 93-95.

202 *Mazibuko* paras 109-112.

203 *Mazibuko* paras 148-157.

stopped, as a temporary interruption, not the discontinuation of services, pending the availability of additional credit.²⁰⁴ The Court, in turn, held that the installation of pre-paid water meters was not, nor was it in dispute with the WSA, unconstitutional and, therefore, legal.²⁰⁵

3.3.1.3 Observations regarding water-related duties of the state from the judgment

From the above analysis and interpretation of the Court, it could be observed that although everyone is guaranteed the right of access to sufficient water, it is a right of access and the state is not under pressure to provide water to everyone on request. The most important duty of the state is to create an enabling environment for people to access the right and the state should only actually provide for those who cannot provide for themselves

Many scholars have heavily criticised the judgment of the Constitutional Court for failing to address the plight of poor residents in Phiri (Soweto) and that the Court's policy seems to promote the commodification of water services, an approach similar to the privatisation of water services.²⁰⁶ Dugard also argues that the rights-based solution would have addressed the needs of the poor while fulfilling urban cost-recovery criteria and reducing wasteful use of water, but the Constitutional Court did not assess these criteria.²⁰⁷

Chapter 1 provides a vivid summary of these criticisms, highlighting the issue of strong resistance against privatisation of water and that over the past decade, there has been significant 'remunicipalisation' of water services. Chapter 1 also indicates that despite these criticisms and the existence of a legal framework, which promotes MSPs in service delivery, the provision of water services is not privatised in South Africa.

204 *Mazibuko* para 120.

205 *Mazibuko* para 158.

206 See Dugard 2010 *Review of Radical Political Economics* 175-177; Stuart and Dugard 2011 *Stellenbosch Law Review* 664-682; De Vos 2009 "Water is life (but life is cheap)" <http://constitutionallyspeaking> accessed 13 July 2019.

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

In terms of the Constitution, under its minimum core responsibilities, the State has a responsibility to provide, at least, 25 litres of water per day to all individuals with minimal facilities. This can be achieved by using all possible means to build and maintain infrastructure, and by applying the Free Basic Water policy to everyone. However, in South Africa, implementing this key approach does not seem realistic since a considerable number of people still do not have access to sufficient water. A moderate study of rights limitations tends to focus on the incorrect implementation of the legislation: good ideas suffer from limited resources or improper application of the rules. Limits on the use of rights to legitimise socio-economic adjustments lie in the manner in which rights (internationally recognised human rights or constitutional rights) give moral claims legal substance. The moral case is undermined in doing so, turning it into a technical legal issue and diverting the responsibility to fulfill the claim on which the right is based.²⁰⁸ When viewed as a legal claim, considerations such as progressive realisation, reasonableness and available resources become valid reasons for unsatisfied claims. The limitation clause of the South African Constitution immediately undermines the legal argument that everyone should have a right of access to the quantity of water needed for dignified life since it provides that the state can restrict rights if it does so reasonably.²⁰⁹ However, the Court's jurisprudence in *Mazibuko* has led to a deeper understanding of South Africa's water provision debate; especially in line with the Constitution and duties it imposes on the State to recognise the right to water. It was held that, upon individual request, the right of access to adequate water could not be enforced and that, in order to recognise this right, the State needed to take necessary legislative measures.

208 Bond 2011 *South Africa's 'rights culture' of water consumption* 12.

209 Section 36 of the *Constitution*.

3.3.2 Federation for Sustainable Environment and Others

3.3.2.1 Facts and issues of the case

The applicants, in this case, an NGO and residents of Silobela, situated in the outskirts of Carolina Mpumalanga Province,²¹⁰ complained of contaminated "acid mine water" that was not fit for consumption. In an attempt to relieve the plight of the population in the affected communities, in February 2012, some 20 water tanks were brought from the neighbouring towns of Breyten and Chrissiesmeer to supply water to Carolina, Silobela and surrounding areas.²¹¹ The applicants argued that the water supplied to residents was insufficient between March and May 2012, as some tanks were not refilled, and others remained completely dry. Because on a "first come first serve" basis, the tanks were reached, many residents were required to walk long distances to get water from other tanks.²¹² The applicants also argued that, as required by the 2001 Regulations (Regulation 3(b)), Carolina residents did not have a reliable water supply beyond the seven-day limit. They claimed that this insufficiency represented a gross violation of the right to water.²¹³ Besides, the applicants proposed that respondents should work with residents and other interested and affected parties to ensure that residents are supplied with potable water, as well as reduce and prevent the mines in the area from contaminating the water.²¹⁴

3.3.2.2 Reasoning and decision of the Court

After reviewing obligations imposed by the Constitution on respondents (ensuring water supply), the urgency of the matter as it concerned primarily the embedded right of access to water,²¹⁵ referring to the legacy of apartheid²¹⁶ and rejecting the failure not only on respondents as it was alleged residents destroyed some of the

210 *Federation for Sustainable Environment* paras 2 and 3.

211 *Federation for Sustainable Environment* para 4.

212 *Federation for Sustainable Environment* para 5.

213 *Federation for Sustainable Environment* para 6.

214 *Federation for Sustainable Environment* para 7.

215 *Federation for Sustainable Environment* para 18.

216 *Federation for Sustainable Environment* para 9.

tanks,²¹⁷ the Court affirmed that, in order to address the water crisis in a realistic manner, the Municipality must work with citizens to establish a concrete strategy to achieve this objective.²¹⁸ The Court ordered the municipalities to provide residents of the affected communities with emergency potable water in compliance with the Regulations of 2001 within 72 hours.²¹⁹ Finally, the Municipalities were requested to report back in a months' time of the Court's order as to actions taken to provide portable water to the affected communities in Mpumalanga.

3.3.2.3 Observations related to duties of the state from the judgment

Summarily, it should be noted that by requiring an ephemeral reinstatement of access to drinking water within 72 hours, in compliance with the 2001 Regulations,²²⁰ and by guiding municipalities to engage with residents efficiently and sufficiently on measures to be taken to make such access to drinking water services sustainable,²²¹ the Court ensured reliable access to the right to water.

The *Federation for Sustainable Environment* confirms that, even in crises, the minimum obligations imposed by the WSA and its ancillary regulations, as well as the National Indigent Policy on municipalities, must be fulfilled. Although valid questions can be raised about the adequacy of the level of water services provided, there is, no doubt, that the minimum obligations imposed on municipalities to provide basic water services are strict. The discussion that follows focuses on the role envisaged for non-state actors in realising the constitutional right to sufficient water.

3.4 Obligations of non-state actors

The South African Constitution does not only focus on the public sphere; it also obliges a horizontal application of the Bill of Rights to non-state actors. The Constitution states that the Bill of Rights applies to all laws and binds the

217 *Federation for Sustainable Environment* para 22.

218 *Federation for Sustainable Environment* para 24.

219 *Federation for Sustainable Environment* para 26(2).

220 *Federation for Sustainable Environment* para 26(2).

221 *Federation for Sustainable Environment* para 26(3).

legislature, executive, judiciary and all state organs²²² and binds, where applicable, a natural or Juristic person, taking into account, the essence of the right and the nature of any obligation imposed by the right.²²³ Hence, this provision binds both natural and Juristic persons, including those in the private sphere. Some scholars believe Section 8(2) sets out circumstances for which actions of private persons may be sued for violating the Bill of Rights.²²⁴

Notwithstanding the above constitutional requirement, however, some scholars claim that the right to access sufficient water does not impose positive obligations on private entities.²²⁵ In their extensive horizontal analysis, Currie and De Waal argue that "the horizontal application of the Bill of Rights cannot be determined *a priori* and in the abstract" as a general rule and that since its application is context-specific, it will depend on the circumstances of the private conduct.²²⁶ The authors also argue that natural or legal persons should not be held liable to paying the bill for the execution of broader social duties due to their limited interests, which are typically the prerogative of government: since the actions of private persons must be funded from their own pockets, the same responsibilities cannot be imposed on them as can be imposed on a state agency that relies on state funds.²²⁷ However, Kotzé and Fuo argue that if the above interpretative construct on horizontality is sought to be applied to the right of access to water, consideration must be given to the fact that the right of access to water is predominantly overshadowed by issues relating to inequality, poverty, basic needs, lack of capital, limited state capability and disproportionate advancement of industrial concerns, often to the detriment of such concerns and that this context was carefully looked at by the Constitutional Court in *Mazibuko's* opening paragraphs.²²⁸ In this light, considering the arguments against the horizontal application of the Constitution to the private

222 Section 8(1) of the *Constitution*, 1996.

223 Section 8(2) of the *Constitution*, 1996.

224 Currie I and De Waal *The Bill of Rights Handbook* 41.

225 Currie I and De Waal *The Bill of Rights Handbook* 49; Kotzé and Fuo 2016 *Journal of Energy and Natural Resources Law* 304.

226 Currie I and De Waal *The Bill of Rights Handbook* 49.

227 Currie I and De Waal *The Bill of Rights Handbook* 49-50.

228 *Mazibuko* para 2; Kotzé and Fuo 2016 *Journal of Energy and Natural Resources Law* 304.

sector would make certain clauses of the Constitution superfluous. The growing number of private actors who supply water and other basic resources would be free to ignore without penalty, the rights recognised under the Constitution.²²⁹ The objective of the right to access water also seems to justify its horizontal application, and the responsibilities of the right might probably be extended to non-state actors, which would be obliged to assist the state in supplying water.²³⁰ This is because it is not an exclusive state prerogative to provide water and non-state actors are not prohibited from contributing to the provision of water to people.

Outsourcing of water is now becoming progressively widespread across South Africa, and the case against the horizontal application to private entities compromises the basic principles underlying the South African Bill of Rights and international law. In the *Grootboom* case, the Court ruled that private companies have an obligation to respect socio-economic rights. The horizontal application of the right to housing was affirmed by the Constitutional Court (which is interpreted as encompassing the right to have access to water) when it held that:

....at the very least, a negative obligation upon the state and all other entities and persons to desist from preventing or impairing the right to access to adequate housing. The Court also stated, 'it is not only the State that is responsible for the provision of the houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing'.²³¹

This, therefore, indicates that where a private entity is contracted by the state to provide water services, it will be expected to meet the same duties that the Constitution places on the state in respect of the human right to water. This will mean respecting, protecting, promoting and fulfilling the right to water.²³² It can, therefore, be deduced that there is no positive duty on non-state actors to realise the right to have access to water where there is no agreement on the contract to

229 Welch 2005 *Sustainable Development Law & Policy* 63.

230 Kotzé and Fuo 2016 *Journal of Energy and Natural Resources Law* 304.

231 *Grootboom* paras 34-35.

232 Welch 2005 *Sustainable Development Law & Policy* 63.

do so. Thus, by virtue of the right to have access to water referred to in Section 27, no person might assert a right from a non-state actor; the primary positive responsibility remains with the state and non-state actors cannot be obliged to fulfill the obligations of their rights.

This narrow approach against the positive duties to fulfill specific socio-economic rights by non-state actors was upheld in *Juma Musjid*,²³³ a case wherein, the context of the right to access basic education, the Constitutional Court indicated that there is no primary positive obligation on the Trust (private persons) to provide learners with basic education or to contribute to the realisation of Section 29(1) of the Constitution. The Court further held that primary positive commitment rests on the MEC (government).²³⁴ Section 8(2) of the Constitution does not constitute a threat to private autonomy or to the protection imposed on the State by the Bill of Rights. The object of Section 8(2) of the Constitution, according to the Court, is to oblige private persons not to interfere with the exercise of a right or to infringe the exercise of that right, but to comply with their negative obligations.²³⁵

The High Court in *City of Cape Town v Khaya Projects*²³⁶ recently restated this position in the context of the right of access to housing. The Court held that where a contract between a State entity and a private company expressly specifies that it undertakes to fulfill constitutional obligations, it is assumed that the private company will perform effective constitutional duties and to effect the same obligations imposed on the state and vice versa.²³⁷

From the above analysis, it is observed that the horizontal application of the Bill of Rights is envisaged but is context-specific depending on the circumstances. In terms of the Constitution, non-state actors only have a negative obligation to respect the right of access to water. Non-state actors only bare the full range of responsibilities when contracted to provide water on behalf of the government. Thus, the

233 *Governing Body of the Juma Musjid Primary School & Others v Essay and Others* [2011] ZACC 13 (hereafter *Juma Musjid*).

234 *Juma Musjid* para 57.

235 *Juma Musjid* para 58.

236 *City of Cape Town v Khaya Projects (Pty) Ltd* [2015] 1 All SA 81 (WCC)

237 *City of Cape Town v Khaya Projects (Pty) Ltd* [2015] 1 All SA 81 (WCC) para 39.

government eventually remains responsible for ensuring the right to water, as private water entities engaged in the provision of water services have only negative obligations. The government, therefore, must enforce legislation to ensure that the most vulnerable in South Africa have access to water, if not, then the Constitution would be a paper promise without the execution of these obligations to non-state actors involved in the provision of water.

3.5 Summary of chapter

This chapter has provided an analysis of the legal and policy framework on the right to have access to sufficient water in South Africa. The objective of the analysis was to show the nature of obligations imposed on the State and non-state actors.

It was observed that while the Constitution guarantees everyone the right to have access to sufficient water, this is complemented by the enactment and implementation of legislation and policies, such as the WSA, the 2001 water Regulations and the National Framework for Municipal Indigent Policy of 2006, which further give effect to this right. As per the Constitution, the obligation of realising the right of access to sufficient water is shared by all three spheres of government, even though it is the crux of local government, however, the national government remains the custodian of the nation's water resources and, therefore, plays the regulatory role. Section 27(2), as discussed, requires the state to use its available resources to implement reasonable measures to realise this right. Accordingly, a municipality under the WSA, is mandated to the right to a basic water supply necessary to ensure sufficient water for human well-being. The WSA and the 2001 Regulations provide the content of the right to access to water and lays down conditions through which water supply may be limited or disconnected in order to ensure sustainable access to water. The 2006 National Indigent Policy prioritises the needs of poor and vulnerable community residents to water. These policies require local government to provide free water services to households identified as indigent in terms of the policy.

The discussion on the legal and policy framework with regard to access to sufficient water was proceeded by the nature of obligations of the state through case-law.

This duty was unpacked by the Constitutional Court judgment in the landmark case of *Mazibuko*, which cemented the nature of obligations imposed on the State. In *Mazibuko*, the Court reiterated that Sections 26 and 27 of the Constitution imposes a strong obligation on the state to progressively realise the right to water. The Court also established that Section 27(1)(b) of the Constitution does not require the government to provide water on request to every citizen but allows government to take appropriate legislative and other measures to progressively realise the right to access to sufficient water within the resources available to the state. Even though the judgment in *Mazibuko* was criticised as mentioned above, the contributions of the judiciary in the litigation of the right to access to water and identifying that the legislative and executive should provide normative content to the right to access sufficient water in the Constitution is notable.

This chapter ended with an analysis of obligations of non-state actors. It was observed that the Constitution extends the horizontal application of the Bill of Rights to non-state actors, which binds, where applicable, either natural or juristic persons, including the private sphere. However, despite the criticisms by scholars as highlighted above and counter-arguments, it is a fact that out-sourcing of water services is becoming widespread across South Africa, and that the case against horizontal application will compromise the basic principles of the South African Bill of Rights and international human rights law. The Constitutional Court in the *Grootboom* case ruled that private companies have an obligation to respect socio-economic rights, such as the right to access sufficient water. Nevertheless, in the proceeding cases of *Juma Musjid* and *Khaya Projects Ltd*, the courts held that non-state actors, in terms of the Constitution, only have a negative obligation to respect the right of access to water and that non-state actors only bare the full range of responsibilities when contracted to provide water services on behalf of government. This means that in MSPs, private actors bear some human rights duties. The next chapter focuses on an analysis of the legal and policy framework for MSPs.

CHAPTER 4: LEGAL AND POLICY FRAMEWORK FOR MUNICIPAL SERVICE PARTNERSHIPS IN SOUTH AFRICA

4.1 Introduction

As intimated in Chapter 1, over the past decades, there has been an increase drive towards the 'remunicipalisation' of the provision of water services in Europe and South Africa. This is borne by the desire to curb excesses of privatisation of water. It was established in the previous chapter that despite the constitutional and statutory guarantees of the right of access to sufficient water in South Africa, more than 10% of households in the country do not have access to piped water.²³⁸ This is attributed to diverse reasons indicated in chapters 1 and 3.²³⁹ This chapter aims to analyse the legal and policy framework for Municipal Service Partnerships (MSPs) in South Africa in order to understand the extent to which it can be used by municipalities to contribute towards realising the right of access to sufficient water. As indicated in the research methodology of this study, the analysis focuses solely on the use of Public-Private Partnerships (PPPs), which is an aspect of MSPs.

This Chapter begins with a general discussion on PPPs to determine its validity as a mechanism to ensure the provision of water services. This approach serves to identify benchmarks used in analysing the relevance and potential of the legal and policy framework for MSPs in contributing towards realising the right to access to sufficient water in South Africa. The second part offers a review of the legal and policy framework in South Africa for MSPs. The third part is an appraisal of the relevance and potential of the legal framework for MSPs in contributing towards realising the right of access to sufficient water in South Africa against the benchmarks identified in part 1. The chapter ends with a summary.

238 CoGTA 2018/2019 Annual Report (2019) 28.

239 SAHRC Water and Sanitation Research Brief (2018) 31.

4.2 Public-Private Partnerships as a mechanism for providing water services

4.2.1 Contextual background

Globally, PPPs are used as a mechanism to provide services, including water.²⁴⁰ The involvement of the private sector in infrastructure related to water supply has become particularly widespread.²⁴¹ The relevance of this partnership is premised on the fact that public authorities are always in need of the private sector to boost infrastructural networks and help increase the quality of services rendered to citizens. The hope is generally that this model of group financing, in which the state shares risk and liability with private companies but still maintains ownership of assets, would boost the provision of services. Historically, governments have always relied on their revenue to fund the growth of public infrastructure and the provision of services. However, the prevalence of rapidly increasing urbanisation has introduced a major challenge to adequate provision of social services, including water to many developing countries,²⁴² including South Africa. Consequently, direct service delivery by the public sector is gradually being replaced by more market-based strategies, using competition to reduce costs and offering new services, in order to improve quality and meet service gaps.²⁴³ Thus, private investors are usually invited to form partnerships with governments through a process to provide funds and sustain public services. Nonetheless, it is important to understand what PPPs entail and what are the benefits, success factors and potential limits for using it for the delivery of social services, especially in the context of provision of water. The sections that follow focus on these issues.

240 Grimsey and Lewis 2000 *International Journal of Project Management* 107; Reeves 2011 *The Economic and Social Review* 97.

241 Seppälä *et al* 2001 *Public Works Management & Policy* 56.

242 UN Habitat World Cities Report 2016 14; Jamaili 2004 *International Journal of Public Sector Management* 415.

243 Jamaili 2004 *International Journal of Public Sector Management* 414 416.

4.2.2 Definition of PPPs

There is no consensus among scholars as to a generally accepted meaning of PPPs. According to Forrer *et al.*, PPPs are contractual arrangements between governments and private sector entities in which private firms take part in the decision-making and development of a public product or service previously provided by the public service and for which the private sector shares the liability of the development.²⁴⁴ Specifically, Forrer *et al.* point to three key conditions in their conception of PPPs: Long-term relationships, involving public and private sector organisations; the involvement of the private sector in decision-making; and agreed risk sharing between the two sectors. In doing so, they differentiate between PPPs and other agreements, such as privatisation, outsourcing, and service contracting, highlighting the relevance of this kind of partnership.²⁴⁵

Grimsey and Lewis state that depending on the country concern, PPPs cover a wide range of activities through which the private sector is empowered to operate a service, which is usually the sole responsibility of the public sector for some time, alternating from comparatively short-term management agreements (with little or no capital spending), to concession arrangements (which can include the development and design of significant capital resources, the provision of a variety of services and the funding of the overall development and production), to joint ventures where the public and private sectors share possession.²⁴⁶ The foregoing demonstrates the different practices and relationships of PPPs inherent between the public and private sectors. The scholars assert that generally, PPPs cover a vacuum between historically supplied public programmes and full privatisation.

For Fourie and Burger, there might be some confusion in the concept of PPPs, such that it has been misconstrued with privatisation or subsidisation, and that a PPP is identified as an administrative and contractual partnership agreement between the

244 Forrer *et al* 2010 *Public Administration Review* 476.

245 Forrer *et al* 2010 *Public Administration Review* 476.

246 Grimsey and Lewis 2005 *Accounting Forum* 346; See also other definitions by Jamaili 2004 *International Journal of Public Sector Management* 416; see also Jomo *et al* in UN DESA Working Paper No. 148 2016.

state and a private provider to provide a product or service to the public with identifiable features of real partnership relations and the private provider being transferred adequate amount of risk.²⁴⁷

Consistent with the views of Grimsey and Lewis, that PPPs depend largely on a country's concern, the South African National Treasury has developed a manual of standardised guidelines for PPPs based on experience gathered for nearly a decade.²⁴⁸ The Manual is supposed to guide all PPP ventures in the country.²⁴⁹ The Manual defines a PPP as:

A contract between a public sector institution and a private party which the private party assumes substantial financial, technical and operational risk in the design, financing, building and operation of a project.²⁵⁰

The above definition is similar to the one provided by Fourie and Burger above. The PPP Manual points to two different forms of PPPs: where private entities execute a role that is normally performed by government, such as supplying water or repairing water infrastructure; or where the private entity obtains the use of government property for its business purposes and payment may entail the institution providing payment to the private party; or the private party receiving fees or payments from the consumers of the service; or a mixture of all.²⁵¹

It is obvious that despite different definitions in existing literature, the definition from the National Treasury demonstrates how PPPs must be understood in the South African context. Flowing from the above definition, and taking into consideration the focus of this study, it should be emphasised that the provision of water is not privatised in South Africa as municipalities remain responsible for the provision of water services and the Minister of Human Settlement, Water and Sanitation, is the guardian of the country's water resources.²⁵² Even where the

247 Fourie and Burger 2000 *South African Journal of Economics* 1.

248 National Treasury PPP Manual Module 1: South African Regulations for PPPs, 2 at <https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf> accessed 11-05-2020.

249 National Treasury PPP Manual Module 1, 1.

250 National Treasury PPP Practice Note 02 of 2004, Module 1, 4; see also Local Government: Municipal Finance Management Act 2003 Municipal Public-Private Partnership Regulations 10.

251 National Treasury PPP Practice Note 02 of 2004, Module 1, 4.

252 Section 3(1) *NWA*.

provision of water is privatised, the government can regulate private actors, for example, specifying the quality of safe water that must be provided. For example, in the sense of the provision of social services, PPPs will play a major and critical role in improving the realisation of the constitutional right of access to adequate water.

4.2.3 Benefits of PPPs

In developing economies, the current expansion of PPPs has been credited to many clearly stated factors to enhance public sector efficiency in the provision of public services, which cannot be privatised for political or financial motives, specifically essential public infrastructure services, where it is considered unacceptable to privatise or lose command. Firstly, PPPs theoretically introduce corporate flexibility in the delivery of public services and avoid politically divisive aspects of absolute privatisation, increase prices, corruption and unemployment. PPPs enable governments to retain ownership when contracting with the private sector to execute a particular role like constructing, maintaining and running infrastructure, such as water supply.²⁵³ The private sector can often do the job more effectively, lowering costs and boosting service delivery.

Secondly, given the complexity of statistical analysis on the rate of interest on borrowing between the public and private sectors, nevertheless, risk transfer remains a core aspect to justify Value for Money (VFM) in favour of PPPs, as the risk transferred can be best handled by the private sector and thus, the cost of doing so would be reduced than if the risk remained in the hands of the public sector. Consequently, the transition of risk includes VFM. Therefore, PPPs can be used as an efficient way to provide Value for Money in public facilities or services, particularly over long periods.²⁵⁴

253 Farlam 2005 *Nepad Policy Focus Report* No 2, SAIIA, 4.

254 Yescombe 2011 *Public-Private Partnerships* 18; for other details, see also, Chigwata and Ziwas 2018 *Hague J Rule Law* 310; Grimsey and Lewis 2005 *Accounting Forum* 346; Minister of Economy and Finance, Public-Private Partnerships, Partnerships Kosovo 9.

Thirdly, a PPP system helps the public sector to break away from short-term restrictions on public capital spending imposed by inadequate tax revenue and borrowing limits of the public-sector.²⁵⁵ For instance, exposure to private funding helps the public sector to distribute expenses of major projects over a prolonged period, rather than allowing them to be paid against the public budget immediately and the cost is paid by consumers instead of being paid from taxes.²⁵⁶ Yescombe E asserts that because the original investment or PPP falls beyond public expenditure, this allows government to create or increase infrastructure projects that could not have been feasible.

Fourthly, PPP has a proven track record of enhancing quality and rates of services using performance-based rewards. Private specialist service providers provide enhanced skills while competition in the private sector promotes the delivery of quality services. Besides, since the public sector is divesting itself from day-to-day service delivery, it will serve as a more efficient regulator, concentrating more on guaranteeing that the private sector provides the required level of customer service.²⁵⁷ Some countries with well-developed systems, such as the United Kingdom, South Africa, Australia and Chile have made efforts at the national level to implement more open management and reporting standards for PPPs.²⁵⁸

With regard to the potential benefits of PPPs as a mechanism for providing water services and infrastructure, the literature suggests that certain core requirements should be met to optimise their potentials in delivering water services.

4.2.4 Requirements for the success of PPPs

Although PPPs may provide a framework for mutually beneficial leveraging of the competitive advantages of both the public and private sectors, national and local authorities are supposed to determine statutory provisions for PPPs. Firstly, political

255 Yescombe 2011 *Public-Private Partnerships* 17.

256 Yescombe 2011 *Public-Private Partnerships* 17; see also Meidute and Paliulis 2011 *International Journal of Strategic Property Management* 259; see also Minister of Economy and Finance, Public-Private Partnerships, Partnerships Kosovo 9.

257 Minister of Economy and Finance, Public-Private Partnerships, Partnerships Kosovo 9.

258 Jomo *et al*/in UN DESA Working Paper 148 2016 19.

will and support by way of public policy is very important in PPP projects. The fact that PPPs, which are considered as public policy has a direct link with the political inference of the country concerned, it suggests that when there is political will and support, approval for public expenditures is granted for public projects, which enhances the development and success of PPP.²⁵⁹ This approval attracts investors to that particular economy.

Secondly, the adoption of a clear and adequate regulatory framework as a prerequisite for the involvement of PPPs is very important, especially in developing countries. A well-defined legal and regulatory structure would provide private investors with sufficient protections and improve public benefits by ensuring that the contract works efficiently and leveraging the scarce available resources in line with broader public objectives.²⁶⁰ The regulatory framework should provide safeguards against confiscation, facilitate the resolution of trade disputes, ensure compliance with contractual agreements and the legal recovery of expenses and income proportionate to the risk. The social, developmental and environmental significance of the water sector highlight the importance of continuous public regulation. Governments cannot shy away from their obligations with regard to the provision of water services.

Thirdly, transparent and competitive procurement is another critical requirement when considering a PPP agreement. Transparency must be applied to the tendering and competitive bidding process for water services to ensure Value for Money (VFM), and this should be applied throughout the delivery of the project with clear information and reports made available to the public.²⁶¹ Consequently, governments

259 Ameyaw and Chan 2016 *Journal of Facilities Management* 149; Osei-Kyei and Chan 2015 *International Journal of Project Management* 8; Dulaini *et al* 2010 *Construction Management and Economics* 397-398; Lewis and Miller 1987 *Public-Private partnership in water supply* 78.

260 Pongsiri 2002 *The International Journal of Public Sector Management*; UN-Habitat International Guidelines on Decentralisation 2009 21; Grimsey and Lewis 2005 *Accounting Forum* 349-351; Ameyaw and Chan 2016 *Journal of Facilities Management* 147; Hukka and Katko 2003 *Natural Resources Forum* 27, 153; Seppälä *et al* 2001 *Public Works Management & Policy* 2001 47; Osei-Kyei *et al* *The International Journal* 2017 2105.

261 Ameyaw and Chan 2016 *Journal of Facilities Management* 149; Osei-Kyei and Chan 2015 *International Journal of Project Management* 8, 9; UN-Habitat International Guidelines on Decentralisation (2009) 21; Tang *et al* 2013 *Journal of Management in Engineering* 14.

should adopt competitive tendering procedures that are supported by substantial and transparent procurement systems and institutions to ensure a smooth passage of the briefing phase and provide no avenue for collusion.

Fourthly, a comprehensive analysis is an integral part of any PPP contract in order to ensure appropriateness and/or feasibility.²⁶² To ensure effective implementation of PPPs, it is important to define a problem that needs to be addressed; set the correlation coefficients; measure the possible costs accurately; and decide if the outcomes set can be accomplished by adopting a PPP.²⁶³ The feasibility study should regularly cover all phases of PPP projects.

Fifth, in accordance with the UN-Habitat International Guidelines on Decentralisation and Access to Basic Services for All, governments must maintain its involvement, as a partner and regulator of PPP agreements. The public sector, in particular, should try to set guidelines to ensure water safety, effectiveness and develop processes whereby people have appropriate access to the water services they deserve with a consistent monitoring of projects. Put differently, PPPs do not mean "less administration" but a different role of government.²⁶⁴ States should engage in the monitoring of procurement, setting of tariffs and implementation of statutory provisions put in place for PPPs.²⁶⁵

Sixth, before engaging in a PPP, there is need for a clear description of the desired outcomes that provide for a payment mechanism tailored to the project's goals, a proportional shift of risk to the private party dependent on " allocation of fair risk and sound contractual structure".²⁶⁶ Risk transfer includes an entire life-costing viewpoint that can be pursued so that incentives for improved overall results should create "value for money", private parties should be encouraged to ensure better

262 Meidute and Paliulis 2011 *International Journal of Strategic Property Management* 265.

263 Meidute and Paliulis 2011 *International Journal of Strategic Property Management* 264; Dulaini et al 2010 *Construction Management and Economics* 397-398.

264 Jamali 2004 *International Journal of Public Sector Management* 419; Osei-Kyei et al 2017 *The International Journal* 2104.

265 UN-Habitat International Guidelines on Decentralisation and Access to Basic Services for All (2009) 19.

266 Reeves 2011 *The Economic and Social Review* 96.

quality and customer satisfaction.²⁶⁷ Considering risk transfer in PPP agreements needs to start as early as possible with identification of important risks involved.

To ensure a successful implementation of a PPP project, six requirements have been identified that should be met for enhancing the provision of services. The requirements identified above are benchmarks used to analyse the relevance of the legal and policy framework for MSPs in contributing to the right to have access to sufficient water in South Africa.

4.2.5 Possible limits of PPPs in the provision of water services

Despite the favourable support for PPPs in many countries, there is significant resistance to and criticisms of PPPs by some academics and civil society organisations. Given the potentials of PPPs agreements to finance and develop water infrastructure projects in transition or emerging economies, its use has been sluggish and minimal.²⁶⁸ As earlier mentioned in Chapter 1, PPPs are less likely to achieve productivity improvements in water infrastructure and facilities due to concerns such as weak performance of the private sector, challenges in controlling private providers, underinvestment, conflicts over running costs and price hikes, cuts in labour and poor quality, lack of financial accountability and exorbitant increase in water bills.²⁶⁹ For example, in the Dolphin Coast, located in the ILembe District Municipality in South Africa, the use of a private provider for a water supply project led to an increase in tariffs by 119 percent for some consumers.²⁷⁰ These factors form the basis of water 'remunicipalisation' in many cities across the world.²⁷¹ In addition, large government negotiations are always complex and

267 Grimsey and Lewis 2005 *Accounting Forum* 346-347; for other details, see Reeves 2011 *The Economic and Social Review* 96; Ameyaw and Chan 2016 *Journal of Facilities Management* 147; Tati 2005 *Development in Practice* 323; Tang *et al* 2013 *Journal of Management in Engineering* 15.

268 Yang *et al* 2013 *Public Administration Review*.

269 Lobina *et al* 2014 *Here to Stay: Water Remunicipalisation as a Global Trend* 7-10.

270 Farlam 2005 *Nepad Policy Focus Report* No 2, SAIIA, 22-23.

271 See for example, Grenoble and Paris-France due to corruption and weak private sector performance; Berlin-Germany due to underinvestment; Atlanta and Indianapolis-USA due to cuts in labour, poor water quality and tariffs increase; Mozambique due to increase tariffs.

challenging, and highly susceptible to bribery and corruption, unless regulated by extremely open structured processes.²⁷²

Besides, the issue of risk transfer is a typical aspect that makes PPPs lose their credibility. The underlying question is whether risk transfer is real? It should be noted that if private partners get it wrong, they will lose their investment but are under no obligation to continue to rescue the project.²⁷³ Bearing in mind that the key concern of the public sector is to ensure adequate delivery of the contractual service, if the private industry fails to perform as planned with respect to a PPP agreement, the public sector will absorb increased costs to sustain the service to the public and, thereby, failing to transfer risk.²⁷⁴ At this point, the public sector assumes liability for risks originally allocated to the private sector thus, negating the expected risk transfer benefit of PPPs. It is suggested that if this situation is considered, then risk transfer is limited.²⁷⁵

Furthermore, PPPs add more burdens to the public sector by imposing extra liability for them to be prepared to serve as competent partners and supervisors. It may involve a particular set of government skills, for example, managers who are experienced in contracts, negotiation of agreements and risk assessments.²⁷⁶

4.3 A review of the legal and policy framework for MSPs in South Africa

As per the Constitution, all citizens have a right to access to sufficient water, and these services are expected to be delivered by the local government within the scope of their resources (Chapter 3). The inability of municipalities to provide water supply infrastructure to some communities, requires the state to objectively evaluate other legal options through which municipalities can use to provide basic services. It was further argued in Chapter 3 that because of its complex nature, municipalities cannot win the battle alone, cooperation with different role-players

272 Farlam 2005 *Nepad Policy Focus Report No 2*, SAIIA, 38-40.

273 Yescombe 2011 *Public-Private Partnerships* 20.

274 Yescombe 2011 *Public-Private Partnerships* 20.

275 Yescombe 2011 *Public-Private Partnerships* 20.

276 See Minister of Economy and Finance, *Public-Private Partnerships, Partnerships Kosovo* 10.

is, therefore, needed to mitigate difficult situations and MSPs, which includes PPPs, is an alternative.

Problems that arise in the area of public service delivery can be directly linked to the historical past of South Africa.²⁷⁷ The magnitude of the backlog in municipal services and infrastructure was "conservatively" estimated for a basic level of service at R38.5 billion for the total cumulative backlog.²⁷⁸ Projections have revealed that if this backlog is to be addressed using only public sector assets, then many areas will only receive adequate services in 2065. There was, therefore, a need for alternative means aimed at improving service delivery and the use of private-sector skills and resources was considered a desirable option.

As indicated in Chapters 1, "Out-Sourcing or Municipal Service Partnerships (MSP)" is an arrangement in which a non-municipal service provider assumes responsibility for the execution of functions at a fixed price and for the provision of services by an external service provider in compliance with predefined performance criteria under an ongoing service contract.²⁷⁹ Accordingly, partnerships between municipalities and the private sector are a vital alternative that municipalities can explore in their efforts to redress disparities and inequalities in infrastructure.²⁸⁰

In South Africa, the use of MSPs, as a service delivery mechanism, in particular, the comprehensive use of public-private partnerships (PPP), is not quite recent. This section provides an overview of the legal and policy framework to guide the use of MSPs in South Africa.

4.3.1 Legal framework for MSPs

The *Local Government: Municipal Systems Act* (MSA) is a framework legislation that guides how municipalities can use MSPs in providing municipal services, including water services. The MSA was adopted with a view to defining the core values, frameworks and processes required to encourage municipalities to gradually step

277 See paras 1-3 DPLG White Paper on Local Government (1998).

278 See White Paper on MSPs 1.

279 White Paper on MSPs (2004) 2-3.

280 White Paper on MSPs (2004) Foreword.

towards local communities' social and economic growth and ensure universal access to critical services that are available to all.

The MSA makes it possible for municipalities to provide water services or build/maintain infrastructure related to water services through private actors. In terms of Section 76 of the MSA, a municipality may either use internal or external (including private actors²⁸¹) mechanisms for the provision of services. Where municipalities decide to use external mechanisms, such as a private actor for service delivery, which includes the provision of water services, certain core requirements must be met. In this light, after undertaking a review of its delivery mechanism under Section 77 of the MSA, a municipality must first determine whether it is able and can provide the service through an internal mechanism and if it thinks it cannot do so, it may decide to explore the delivery of that service through an external mechanism.²⁸² If a municipality decides to provide a service through an external mechanism, it must: notify the local community of its intention to pursue municipal service delivery through an external mechanism;²⁸³ assess the direct and indirect costs benefits associated with the project and the effects on environment and health, the capacity of the skills and expertise to be furnished by the service provider and the available resources for provision of that service;²⁸⁴ and assess the views of the local community and the likely impact on job creation, development and the views of organised labour.²⁸⁵ A municipality must carry out a feasibility study clearly defining the municipal service for which the intended external mechanism is to be considered, indicating the number of years for which the external mechanism should be considered and the estimated production that could be expected to be generated by the external mechanism;²⁸⁶ an assessment must be conducted to determine the extent to which the provision of services through an external mechanism will provide value for money, address the needs of the poor, be affordable to all, transfer

281 Section 76(b)(v) *MSA*.

282 Section 76(a) *MSA*.

283 Section 78(3)(a) *MSA*.

284 Section 78(3)(b)(i)(ii) *MSA*.

285 Section 78(3)(b)(iii)(iv)(v) *MSA*.

286 Section 78(3)(c)(i)(ii)(iii) *MSA*.

appropriate technical, operational and financial risk;²⁸⁷ and lastly, the feasibility analysis should take into account the expected effect on the workers, properties, liabilities, Integrated Development Plans (IDPs) and budget of the municipality for the duration for which an external mechanism may be used.²⁸⁸ In applying these requirements, a municipality must comply with any applicable legislation or any additional requirements in relation to the appointment of a service provider, which may be prescribed by regulation other than the municipality.²⁸⁹ Municipalities may also be assisted by the national government or relevant provincial government departments in accordance with an agreement, in carrying out a feasibility study or in preparing service delivery agreements.²⁹⁰ In line with this, should a municipality decide to use the external mechanism for the provision of water or for management or repair of any aspect of its water supply system, it must comply with these requirements.

It is important to note that in terms of the above requirements, municipalities must ensure that the use of external mechanisms to provide a service does not negatively impact on the ability of the poor to access basic services. This is in line with the core service delivery obligation of municipalities in Sections 73 and 75 of the MSA. Municipalities have a responsibility during service delivery arrangements, to ensure development and provide, at least, access to a minimum of basic level of municipal services to all members of the local community.²⁹¹ Water is one of the basic services which must be provided. A municipality must consider equity and accessibility in providing services and ensure regular upgrading and extension to the poor.²⁹² As long as it does not amount to unfair discrimination, this can vary between different user groups.²⁹³ The duties of municipalities to give local community members equitable access to municipal services that they are entitled to,²⁹⁴ ensures compliance with the obligation to provide free basic water services in the National

287 Section 78(3)(c)(iv) *MSA*.

288 Section 78(3)(c)(v-vii) *MSA*.

289 Section 78(5) *MSA*.

290 Section 78(6) *MSA*.

291 Section 73(1) *MSA*.

292 Section 73(2) *MSA*.

293 Section 75 *MSA*.

294 Section 4(2)(f) *MSA*.

Indigent Policy (2006) discussed in Chapter 3 of this study. However, municipalities are not obliged to provide water for free to everyone, they can charge rates and tariffs by adopting and implementing a tariff policy where users are treated equitably and payment for services should be proportionate to their use. In terms of the MSA, municipalities must also ensure that the poorest of the poor have free access to basic levels of water provision thereby, ensuring that, where possible, they pay only operating and maintenance costs.²⁹⁵ In this light, should a municipality decide to use the external mechanism for the provision of water or for management or repair of any aspect of its water supply system, it must comply with these requirements. In case a private service provider is used, a municipality must commit to a competitive bidding procedure for all service providers, which do not fall within the scope of a municipal entity, another municipality, national or provincial organ of state.²⁹⁶

Where a municipality decides to use an external mechanism, in accordance with the requirements of its performance management scheme, it must control the provision of the service.²⁹⁷ The execution of the service agreement, including the service provider's performance, must be controlled and measured. Despite outsourcing the provision of a service, a municipality must continue to perform its core integrated planning functions as required by Chapter 5 of the MSA, in particular, if the municipal service is within the development goals set out in the IDP.²⁹⁸ The vital nature of the provision of water services dictates that a municipality should continue to prioritise in its IDP and performance management review, even when components thereof are to be delivered through an external mechanism. Even when an external mechanism is used, a municipality must also determine the tariff policy in terms of Section 74 of the MSA, controlling the setting and adjustment of tariffs for the service provider and also ensure that water delivery is in the best interest of the local community and uninterrupted.²⁹⁹ After determining the tariff policy, the

295 Section 74(2)(a)(b)(c) *MSA*.

296 Section 80(1)(b) *MSA*.

297 Section 81(1)(a) *MSA*. For details on the requirements of municipal performance management systems, see ss 40-41 *MSA*. See also s 83 *MSA*.

298 Section 81(1)(a-c) *MSA*.

299 Section 81(1)(d)(e) *MSA*.

municipality may allow the collection of service fees by the service provider from service users taking into account credit control measures established in terms of Chapter 9 of the MSA.³⁰⁰ In a situation where a municipality provides funds to subsidise services to the poor, it may pass on to the service provider through a transparent system that must be subject to performance monitoring and audit.³⁰¹ As such, a dispute-resolution mechanism must be part of a service level agreement to resolve disputes between municipalities and service providers.³⁰² Accordingly, for effective provision of services to citizens, a municipality must ensure continuity of water services if the service provider is liquidated or unable to continue with its functions in terms of the delivery agreement, and must take over the service delivery if the agreement expires or is terminated.³⁰³ Even though a municipal council is mandated to set, adjust and or review tariffs within the tariff policy, the external service provider may get the authority to adjust tariffs, but within the parameters laid down by the council.³⁰⁴

It is worth noting that in terms of Section 81(4) of the MSA, a service delivery agreement between the parties may be amended by consensus, except where a contract has been reached through a competitive bidding process. In that case, an amendment can only be made after fair notice has been given to the local community of the intention to modify the agreement and the reasons for the proposed revision. And, in terms of a service delivery arrangement, no councillor or municipal staff member can share in any revenue or unfairly gain any benefits from a service provider that offers a municipal service.³⁰⁵

Where a municipality decides to use an external mechanism for the provision of a service, it must select the service provider in a competitive bidding process that complies with the requirements of Chapter 11 of the *Local Government: Municipal Finance Management Act 56 of 2003* (MFMA).³⁰⁶ Therefore, each municipality must

300 Section 81(2)(a)(vi) MSA.

301 Section 81(2)(b) MSA.

302 Section 81(2)(bA) MSA.

303 Section 81(2)(d)(e) MSA.

304 Section 81(3) MSA.

305 Section 81(5) MSA.

306 Section 83(1)(a) MSA.

adhere to its Supply Chain Management Policy as determined in Sections 111 and 112 of the MFMA.³⁰⁷ Generally, the bidding selection processes must: allow for fair and simultaneous access to information relevant to the bidding process to all prospective service providers; minimise possible corruption and fraud; make the municipality accountable to the local community about progress in the selection of a service provider and the reasons for any decision in this regard; and take into consideration, the need to promote emerging and small enterprises.³⁰⁸ In terms of Section 83(3) of the MSA, the selection process must be fair, transparent, equitable, competitive and cost effective in line with the provisions of Section 217 of the Constitution.

It should also be noted that Section 117 of the MFMA reiterates that no councillor of any municipality may be a member of, or participate as an observer in, a municipal bid committee or any other committee which reviews or accepts tenders, quotes, contracts or other proposals. In addition, Section 118 of the MFMA provides that no one may interfere with a municipality or municipal entity's supply chain management system; change or influence any tenders, quotes, contracts or bids after they are submitted. Moreover, in terms of competency level of municipal officials involved in the supply chain management policy, Section 119 of the MFMA provides that the accounting officer and all other officials of a municipality or municipal entity must meet the required standards of competency. Municipalities must provide support or training programmes for the officials referred to in order to reach the standard of competency prescribed.

After a prospective service provider has been selected through the competitive bidding process, a municipality is expected to negotiate the final terms and conditions of the service delivery agreement with the chosen service provider. This must be based on the bidding documents, considering any clarifications, modifications or variations thereto, that were given to all bidders. If the conditions

307 Section 111 *MFMA* requires each municipality to adopt its own supply chain management policy (SCMP), which should be used for procuring goods and services. In terms of s 112 *MFMA*, the SCMPA must reflect the principles of s 217 of the Constitution. For details, see s 112(1)(2) *MFMA*.

308 Section 83(1) *MSA*.

of the service agreement are successful, an agreement is made on the contractual terms defined in the bidding documents as amended in the negotiations, given that such changes do not adversely affect the bid in a manner that violates the credibility of the bidding process.³⁰⁹ Besides, when the service delivery agreement is signed, the municipality must make copies available to its office; give notice in the media of the services to be provided; the name of the service provider; time and location where agreement is accessible for inspection.³¹⁰

It is worthy to note that Section 120 of the MFMA complements the requirements of Sections 78 and 80 of the Systems Act described above by outlining certain conditions that must be met and the process that must be followed when municipalities enter into PPPs. Section 120(1) provides that a municipality may conclude a PPP agreement, only if the municipality can prove that it will provide value for money to the municipality; be affordable for the municipality and appropriate risks transferred to the private party. In addition, Section 120(2) provides that a PPP agreement must comply with any prescribed regulatory framework for PPPs. It is apposite that Chapter 8 of the MSA must be complied with if the PPP involves the provision of a municipal service.³¹¹ Section 120(4) complements the requirement for a feasibility study outlined in Section 78 of the MSA. The study would address concerns such as strategic and organisational advantages, how the agreement can offer value for money, how it will be sustainable, how it can shift sufficient risk and how it will affect current and future budgets and revenue flows.³¹² The study must describe, in specific terms, the significance of the role of a private party in the PPP and the extent to which the private party can both legally and by nature, exercise this role.³¹³ Lastly, the municipality must take into account, all relevant information and explain its capacity to effectively monitor, manage and enforce the contract.³¹⁴ The municipality must submit the study to the council for a "decision in principle" on whether to continue

309 Section 84(1) *MSA*.

310 Section 84 (3) *MSA*.

311 Section 120(3) *MFMA*.

312 Section 120(4)(a)(b)(iii) *MFMA*.

313 Section 120(4)(b)(i)(ii) *MFMA*.

314 Section 120(4)(c)(d) *MFMA*.

with a PPP after the feasibility study has been concluded.³¹⁵ Then follows another process of public participation that involves soliciting comments from the public, National Treasury, the Department of Cooperative Governance and Traditional Affairs and the responsible national sectoral department (where water, sanitation, or electricity services are provided).³¹⁶

The MFMA also requires the Minister of Finance, acting together with the Cabinet Member responsible for local government, to make regulations applicable to municipalities and municipal entities regarding a framework for municipal tariff-fixing powers and financial commitments in considering PPP arrangements.³¹⁷ To this effect, in April 2005, the Minister adopted the Local Government: Municipal Finance Management Act 2003: Municipal Public-Private Partnership Regulations.³¹⁸ Regulation 2 provides that the National Treasury must be notified before a feasibility study is initiated by the accounting officer of a municipality, and the National Treasury may request the appointment of a person with adequate skills and experience as the transaction adviser to aid in the preparation and procurement of the PPP agreement or an external mechanism.

All notwithstanding, the challenge to MSPs is that municipal councils, through collaboration agreements with the private sector, can strengthen, extend and increase service delivery. Recent attempts by local councils to use MSPs, however, have identified a range of major gaps and limitations in the current policy and legislative framework with overlapping and duplications. Such gaps and restrictions generate confusion and place both municipal councils and MSP service providers at risk. Weak governance and corruption plague the policy sectors in South Africa.³¹⁹ Local government councils are poorly equipped for the delivery of water service.³²⁰ They have insufficient budgets, lack technical knowledge and serious shortage of

315 Section 120(6)(a) *MFMA*.

316 Section 120(6)(b)(c) *MFMA*.

317 Section 168(1)(c)(d) *MFMA*.

318 Local Government: Municipal Finance Management Act 2003: Municipal Public-Private Partnership Regulations No 47231, April 2005.

319 See SAHRC Water and Sanitation Brief (2018) 14.

320 See Organization for Economic Co-operation and Development (OECD), OECD ECONOMIC SURVEYS: SOUTH AFRICA 18 (2013).

water engineers, inadequate supervision of private contractors authorised to supply water or install water systems.³²¹ However, by addressing the constraints and restrictions that currently impede the use of MSPs, the MSP policy and legislative framework would create a much more favourable environment for agreements with MSPs. It will make MSPs a viable and effective option for service delivery and thereby help communities plan, finance and accelerate the delivery of municipal services. Municipalities will also be encouraged to set up systems to track service providers' performance to ensure that they deliver as planned, and to report to their communities on this.³²²

However, it is important to note that the Minister of Finance has published a Draft Public Procurement Bill (Draft Bill) for comments until 30 June 2020, which proposes a single regulatory framework for procurement applicable to all three spheres of government, including both state and private entities. Once it becomes law, it will eliminate fragmentation in laws that deal with public sector procurement and reduce overlapping and duplication in the legislation. This Draft Bill also includes the use of Public-Private Partnerships in its Chapter 5 Part 4 with a similar definition of PPPs³²³ to that of the National Treasury Manual of Standardised Guidelines for PPPs as in 4.2.2 above. The Draft Bill simply reiterates some of the provisions in legislation, such as those in Chapter 8 of the MSA while repealing Section 83(1)(a) of this Act and repeals Chapter 11 of the MFMA, which includes PPPs for all procurement processes. Section 46 of the Draft Bill is in line with Section 78 of the MSA and Sections 120 of the MFMA, which stresses on feasibility studies in a PPP project and explains its strategic and operational benefit for the institution. The Draft Bill makes it mandatory for approval of the feasibility study by the relevant Treasury, which may either reject or approve with reasons to that effect.³²⁴

Besides Section 47(1)(2) of the Draft Bill 2020, procurement documentation and draft agreement of any PPP project must be submitted to the relevant Treasury,

321 See SAHRC Water and Sanitation Brief (2018) 14-16.

322 White Paper on MSPs (2004) 2.

323 Section 44(2) Draft Public Procurement Bill, 2020 (hereafter Draft Bill 2020).

324 Section 46(2)(3) Draft Bill (2020).

which may either approve or reject with reasons referring the documentation to the Institution and request further information, amendments or clarification. It is worth noting that the Draft Bill 2020 lays a lot of emphasis on approval by the relevant Treasury from inception of the project, feasibility studies, procurement and conclusion of a PPP agreement. Everything being equal, as the other legislation, it also requires state authorities to ensure proper implementation of PPP agreements, management, enforcement, monitoring and maintain such mechanisms as approved by the relevant Treasury.³²⁵

4.3.2 Policy Framework

As indicated in Chapter 1, the framework set out by the MSA is complemented by the White Paper on Municipal Service Partnerships (2004), which seeks to ensure that the use of external service providers does not detract from government's commitment to providing universal access to basic municipal services that are affordable and in line with defined service standards.³²⁶

The Municipal Service Partnerships Policy Framework (2004) was adopted to guide municipalities on how to ensure accountability and public participation, both in the process of evaluation of methods of service delivery and in selecting basic service providers. It also involves a significant change in accessibility to service, standards of service, efficiency and reliability.³²⁷ This Policy simply reiterates some of the provisions in legislation, such as the WSA, Chapter 8 of the MSA and Section 120 of the MFMA.

The policy also envisages the use of the Municipal Infrastructure Investment Unit (MIIU), which aids local councils in planning, acquiring funds, sufficient experience for municipalities in bidding and streamlining MSP deals and negotiating contracts. It is important to make the wide range of knowledge and experience generated by

325 Section 49 Draft Bill (2020).

326 White Paper on MSPs (2004)2-3.

327 White Paper on MSPs (2004) 1.

the MIIU more open to public and policy-making bodies as well as regulatory bodies, such as SALGA, Provinces and the Local Department.³²⁸

The Department of Cooperative Governance and Traditional Affairs (CoGTA) has the primary function and duty to monitor the performance of local councils and explicitly monitor the implementation of MSP legislation, in collaboration with provincial governments. CoGTA will continue to work closely with other national departments, provincial governments and agencies such as SALGA and ILGM in discharging this role.³²⁹

4.4 Appraisal of the legal and policy framework for MSPs in providing water

For the past 10 years, there has been an ongoing debate about the desirability of using public-private partnerships in the provision of public services.³³⁰ This debate was extended to the water sector, especially following failed attempts at privatisation of water in several countries across the globe. Despite valid concerns raised about the risks of privatisation, several scholars suggest that if certain prerequisites are put in place by government, PPPs can be effectively used to address service delivery backlogs.³³¹ As already shown in this study, PPPs are different from privatisation. While privatisation includes the complete transfer to the private sector of some operations and properties previously controlled by the public sector through a sale, concession or other arrangement to eradicate direct government control and ownership of functions and services, PPPs entail a relationship between a public entity and a private party in the South African context and the government still retains ownership of assets and functioning. PPPs stand

328 White Paper on MSPs (2004) 32.

329 White Paper on MSPs (2004) 34.

³³⁰ Grimsey and Lewis 2005 *Accounting Forum* 346-347; for other details, see Reeves 2011 *The Economic and Social Review* 96; Ameyaw and Chan 2016 *Journal of Facilities Management* 147; Tati 2005 *Development in Practice* 323; Tang *et al* 2013 *Journal of Management in Engineering* 15; Yang *et al* 2013 *Public Administration Review*; Farlam 2005 *Nepad Policy Focus Report* No 2, SAIIA, 38-40.

³³¹ Farlam 2005 *Nepad Policy Focus Report* No 2, SAIIA, 4; Yescombe E 2011 *Public-Private Partnerships* 18; for other details, see also, Chigwata and Ziwes 2018 *Hague J Rule Law* 310; Grimsey and Lewis 2005 *Accounting Forum* 346; Meidute and Paliulis 2011 *International Journal of Strategic Property Management* 259.

out as a form of MSPs in South Africa. A juxtaposition of the benchmarks for PPPs in Section 4.2 above against the legal and policy framework for MSPs in section 4.3 suggests that, if effectively implemented, the legal framework can be used by municipalities to contribute towards providing water services. This view is supported by several factors outlined below.

Firstly, it emerged from the benchmarks in 4.2 that, for PPP to be successful, there must be political will and support by way of public policy. This factor seems to be well catered for in the South African context because of the pressing need for structural changes to the delivery of municipal services. Political will and support is evident from the fact that the executive branch of government has adopted the 2004 Policy pending adoption of the 2020 Draft Public Procurement Bill published for comments and if it becomes law strongly encouraging the use of PPPs. This political will resonates with the approval already given by the legislature through legislation that makes elaborate provision for its use in South Africa.

Secondly, as indicated in 4.2 above, adoption of a clear and adequate regulatory framework is a prerequisite for the involvement of the private sector in the delivery of water services. South African law and policy regulate the use of PPPs for the delivery of water services by putting in place legislation to this effect. Municipalities should be able to set guidelines and track water safety, effectiveness, and develop processes whereby people have appropriate access to the water services they deserve. This ensures precautions and safety built into the law to ensure that there is value for money and poor people should not end up without access to a basic source of water. MSA and MFMA have provided that regulatory framework for MSPs in the provision of water services.

Thirdly, transparent and competitive procurement is an important benchmark identified for PPP contracts. State authorities should engage in ensuring transparent procurement, competitive bidding process, in the implementation of PPP agreements.³³² The WSA and 2001 regulations, together with the MSA, MFMA and case law, provide minimum standards to ensure that this is realised. There has been

332 UN-Habitat International Guidelines on Decentralisation (2009) 19.

much discussion in recent years about the capacity for MSPs, particularly the involvement of the private sector in the provision of water services within municipalities. As indicated in chapters 1 and 3, the Constitutional Court judgment in the *Mazibuko* case was heavily criticised by scholars for failing to meet the plight of poor Phiri residents and that the approach adopted by the Court, in this case, seemed to encourage the commodification of provision of water services, and that it is a model similar to privatisation of water services. Together with this, some critics, even at the local level, argue that using MSPs, which involves the private sector (See 4.1 above), will result in price hikes, drop in efficiency, loss of jobs, inability to serve the poor and excessive profits through monopoly, which can go unchecked because of bribery and corruption.

However, the growing need for structural changes to municipal service delivery systems in South Africa, is widely acknowledged. Section 83(3) of the MSA and Section 120 of the MFMA have both provided an enabling framework for such transparent procurement through a competitive bidding process to be conducted for all service providers, particularly PPPs.³³³ The procurement process must be "equitable, transparent, open, cost-effective and efficient"³³⁴ and "the risk of fraud and corruption must be minimised."³³⁵ It, therefore, enhances public sector efficiency by strengthening competition and easing budgetary restrictions of government's access to private capital for infrastructure investment. Though Public sector preference, as a service provider is still widespread, some municipalities cannot find a workable solution with the public sector, the most important reason being the need to raise corporate sector financing through private sector involvement.³³⁶

Fourthly, in considering PPPs, as identified above, local authorities should establish a comprehensive feasibility study to precede PPP agreements, which will ensure effective implementation methods, define a problem that needs to be addressed

333 Section 80(1b) *MSA*.

334 Section 83(3) *MSA*.

335 Section 83(1)(c) *MSA*.

336 Jackson and Hlahla 1999 *Development Southern Africa*.

and decide if the outcomes can be accomplished by adopting a PPP. In line with this, the MSA and MFMA strengthen the contracting processes, including extensive and thorough guidelines on feasibility studies. According to Section 78(3) of the MSA, after considering Section 76(b), a municipality is obligated to perform a comprehensive "feasibility study" and the findings of this analysis "must" be taken into consideration when a municipality considers an MSPs for the delivery water services. In terms of Section 78 of the MSA and Section 120(4) of the MFMA, the feasibility study should include the following issues: a clear description of the service in issue; the period that the service is expected to be delegated, estimated results; evaluation of how outsourcing will provide value for money; how it will meet the plight of the poor; its sustainability; how it will shift reasonable technological, functional and financial risk; and an impact assessment on employees, facilities, IDPs and budgets.³³⁷ It is clear that the aim of a feasibility study, as provided for by the MSA and the MFMA, is to deter a municipality from rashly deciding to pursue outsourcing without taking into account the potential consequences of the decision, particularly in the context of the needs of the poor, value for money and adequate risk transfer.

Fifth, one of the benchmarks identified in 4.2 is consistent project monitoring to ensure successful PPPs. Public authorities must have the capacity and develop consistent monitoring of procurement and implementation measures for PPP activities.³³⁸ Accordingly, the MSA requires that a municipality remains responsible for monitoring the delivery of services, monitoring the efficiency of the service provider, including the service in its preparation and regulating the setting of tariffs.³³⁹ If the service provider fails to deliver, a municipality must ensure continuity of operation and must take over the service.³⁴⁰ This means that if a municipality had used a MSPs in the provision of water services, it must set key performance

337 Details can be seen above in 4.2.4 with the requirements necessary for PPPs implementation as asserted by Jamali, Grimsey and Lewis.

338 Jamali 2004 *International Journal of Public Sector Management* 419; Osei-Kyei *et al* 2017 *The International Journal* 2104; See UN-Habitat International Guidelines on Decentralisation (2009) 19.

339 Section 81(1) *MSA*; see also S 120(4)(c)(d) *MFMA*.

340 Section 81(2)(d)(e) *MSA*; see also Yescombe 2011 *Public-Private Partnerships* 20.

indicators (KPIs) to assess the performance with regard to its development goals and IDP objectives.³⁴¹

Sixth, the benchmarks in 4.2 above also identify the need for a proportional shift of risk to the private party as a core requirement for successful PPPs. This requirement is catered for in Sections 78 of the MSA and Sections 120 of the MFMA, which requires authorities to prescribe how it will shift reasonable technological, functional and financial risk to the private party. This risk transfer should be able to create value for money.

A close observation of the legal and policy framework for MSPs shows that the framework aligns and creates an overly friendly mechanism for the use of PPPs in providing water services. The cumbersome procedure of the legal and policy framework reveals that there is, and as per the benchmarks for implementation of PPPs discussed in 4.2.4 above, concerted effort to develop a robust regulatory framework with strong support structures to implement MSPs in South Africa. The degree of regulatory oversight over MSPs is breath-taking. This is possibly due to a well-intentioned effort to ensure full consistency in the process and to ensure that municipalities carry out a comprehensive review before outsourcing thereby, preventing any possible pitfalls. In line with the above, an overview of the legal and policy framework for MSPs points to some of the fundamental ideas that make MSPs one of the options that can be used in contributing to realising the right of access to sufficient water in South Africa. With this in mind, it is inferred and convincingly that if the legal and policy framework for MSPs is strictly followed, then it will enhance and contribute to the right to access to sufficient water in South Africa. In brief, the benefits assigned to MSPs are similar to those discussed above on the benefits to PPPs (see 4.2.3 of this chapter).

South Africa has had many municipal-level PPPs in the provision of water services. Werner Zybrands, a Municipal Service Partnerships' consultant in South Africa, states that while South Africa's early schemes had 'few shortcomings and pitfalls', such as lack of reliability assurances and absence of an anti-poor strategy, have

341 See Details under Section 41 *MSA*.

increased the quality of services.³⁴² Zybrands posits that MSPs are 'qualified successes' in the Eastern Cape, KwaZulu-Natal, Limpopo and other provinces and that the positive partnerships focused on mutual comprehension between parties involved and a positive mindset to solve what was sometimes seen as enormous problems. Recently, to curb the spread of COVID 19, Minister Lindiwe Sisulu³⁴³ used PPPs for water infrastructure by providing water to high-risk communities, providing water tanks to drought-stricken areas and using NGOs with support materials for those in need of water supply.³⁴⁴ This is indicative that the use of MSPs, coupled with its legal and policy framework, can contribute to the realisation of the right to access to sufficient water in South Africa. The monitoring provision is key for municipalities during outsourcing, and capable of making a significant improvement. Given the effect that inadequate monitoring can have on some outsourcing targets, there is need for municipalities to get such dimension right.

4.5 Summary of chapter

This chapter has provided an analysis and appraisal of how the legal and policy framework for MSPs can be used by municipalities to contribute towards realising the right to have access to sufficient water in South Africa. As a starting point, since MSPs includes PPPs, a general discussion and reflection on PPPs, as a mechanism for the provision of water services, was examined and it was established by scholars that despite the benefits of PPPs, public authorities are required to meet certain core requirements in considering the use of PPPs for the delivery of services, which include: States political support, adoption of a clear and adequate regulatory framework; ensuring transparent and competitive procurement that should create value for money; conducting a comprehensive feasibility studies with a clear description of desired outcomes, together with efficiency; ensuring consistent project monitoring; and ensuring proportional shift of risk to the private party.

342 Zybrands "Municipal Service Partnerships: A Review of Selected Local Experiences" (2004). Paper presented at an IDEAS workshop on 'PPP Evaluation' at the DBSA, 18 October 2004.

343 Minister of Human Settlement, Water and Sanitation, South Africa, in a SABC Television State briefing on measures to curb COVID 19 on the 28-03-2020.

344 Gift of the Givers (an NGO) was contracted to drill water boreholes in some communities.

As a mechanism for providing water services, a review was presented of the legal and policy framework for MSPs. The commitment of the state to set out obligations and strategies through which municipalities can use to curb service delivery backlogs through PPPs, using the MSA was established. Specifically, Chapter 8 was reviewed since it is a framework of local government legislation in municipalities that focus on the use of alternative service delivery mechanisms. The review revealed the core values, structures, and processes needed to allow municipalities to gradually step towards local communities' social and economic growth and ensure universal access to quality water resources for all. Even though the MSA requires municipalities to adopt tariffs setting policies, it creates uncertainty and allows another sphere of government to set limits on tariff increase. The MFMA was also reviewed, which seeks to ensure sound and viable management of municipal finance by setting standards and norms and other requirements to ensure accountability, adequate lines of responsibility and transparency in financial matters. The White Paper on MSPs was also reviewed, which seeks to ensure accountability and public participation, both in the process of evaluation of service delivery methods and in selecting basic service providers, together with the quality and reliability and restructuring of value for money in public facilities, an outlet for citizen redress, improved flows of information and, above all, courtesy in service delivery.

An appraisal of the legal and policy framework for MSPs in providing water revealed that the benchmarks distilled from PPPs are suited in the South African context, considering the constitutional obligations and the legal and policy framework put in place for this purpose. The MSA, WSA and MFMA provide an enabling framework for MSPs operations. The White Paper on MSPs also culminated in providing the various processes for the provision of water services.

In sum, MSPs, including PPPs, are core components of the national government's strategy for delivering municipal water services. The financial sustainability of a municipality, as a separate and interdependent government sphere, can depend on its ability to access private-sector financing through MSPs. The local experience gained in this regard will also serve as a framework for related national and provincial activities. The next chapter is a general conclusion of the study.

CHAPTER 5: CONCLUSION

5.1 Background

The right of access to water is guaranteed in international and African regional human rights instruments as a fundamental right essential to the realisation of all human rights. In line with international and African regional human rights law, the right to have access to sufficient water is also guaranteed in the *Constitution of the Republic of South Africa*, 1996. Despite this, many municipalities in the country struggle to provide adequate water services, especially to people living in rural areas and informal settlements. In view of provisions provided in the law and policy, it seems concerted effort is required from municipalities and the private sector to work together through partnership arrangements to fully realise the right of everyone to have access to sufficient water. Against this background, the aim of the study was thus, to investigate how the legal and policy framework for MSPs can be used to contribute towards realising the right to have access to sufficient water in South Africa.

Chapter 1 of this study highlighted problems faced by South African citizens in accessing sufficient water. A number of reasons have been attributed to this condition, including the lack of sufficient bulk facilities, inadequate provision of municipal services, poor maintenance of existing infrastructure and the inability of poor people to pay for the cost of water services. Against this backdrop, Chapter 1 provided the objective of this study, which essentially focused on how the legal and policy frameworks on Municipal Service Partnerships should be used to contribute towards realising the right to have access to sufficient water in South Africa. Through a review of primary and secondary sources of law, the researcher distilled best practices from scholarship on public-private partnerships (PPPs) that can be used to guide the use of MSPs in the provision of water services in a manner consistent with the human rights ethos of the Constitution.

Chapter 2 focused on the nature of obligations of states and non-state actors concerning the right to water in international and African regional human rights law. An analysis of various regional and international human rights instruments revealed

that the UNGA Resolution A/RES/64/292 of July 2010 cemented the entrenchment of the right to water in international human rights law. It was also established in Chapter 2 that both states and non-state actors have human rights obligations relating to the right to water. The discussion in Chapter 2 revealed that while states must take appropriate legal, administrative, financial, and educational steps to protect and ensure the full realisation of the right to water, non-state actors, such as companies, have only the duty to respect the human right to water. This means that without governments imposing additional duties in terms of domestic law, the obligation of non-state actors is to respect the right to water. It was further established in the Chapter that international human rights law recognises the possibility of states partnering with the private sector to work towards realising the right to water.

Chapter 3 provided an analysis of the legal and policy framework on the right to access sufficient water in South Africa. It was observed that the *Constitution of the Republic of South Africa*, 1996, case law, legislation, policies, and regulations guarantee the right of everyone to access sufficient water and provide minimum standards for basic water supply in South Africa. A review of the constitutional obligations of the State to realise the right to access sufficient water, through case-law, was done. Although the right to have access to water was subsequently the subject of litigation in *Federation for Sustainable Environment and Others, Mazibuko* cemented the criteria for determining compliance by the state in relation to the right to water. The WSA and the 2001 Water Regulations, as the legislative instruments that give effect to the right to have access to water were discussed, indicating the quantity and quality of water which municipalities are obliged to provide. The NIP was explored as it aims to help local governments meet the basic needs of poor community residents as mandated by the Constitution to ensure rapid improvement to access to basic services, such as water. This Policy provides a basis for indigents to have access to free basic services, including water. This Chapter proceeded by providing an explanation that non-state actors only have a negative obligation in contributing to the realisation of the right to have access to sufficient water in South Africa. This was acknowledged in the *Juma Masjid* and *Khaya Projects* cases, where

it was held that non-state actors only bare the full range of responsibilities when they are contracted to provide basic services on behalf of government. It was argued that despite the existence of legislation, policies, and regulations that give effect to the constitutional right of access to sufficient water, more than 10 percent³⁴⁵ of households in South Africa do not have access to piped water as some citizens rely on water from unsafe sources, such as rivers, streams, wells or springs.

Chapter 4 provided an assessment of the potentials of the legal and policy framework for MSPs in contributing towards realising the right to access sufficient water in South Africa. In order to achieve this objective, a general discussion on PPPs as a mechanism for providing water services served as a prerequisite, where benchmarks were distilled and used in analysing the legal and policy framework for MSPs. Six benchmarks were identified as core requirements for PPPs that public authorities should consider in order to enhance the use of private partners for the provision of water services. These core requirements include the following: political will and support by government, adoption of a clear and adequate regulatory framework; use of transparent and competitive procurement processes; use of comprehensive feasibility studies to assess potential projects; consistent project monitoring; and a proportional shift of risk to the private party. These benchmarks, as discussed in 4.2.4, were juxtaposed with the legal and policy framework for MSPs in South Africa in 4.3 above.

5.2 Findings

After examining international and African regional human rights instruments, it was established that the right to water is guaranteed in international and African regional human rights law. The obligations of states are set out in detail in ESCR General Comment 15. States are obligated to enact and enforce legislative and other measures to ensure that sufficient water is available to citizens. They must also establish mechanisms that should be used to address violations of the right.³⁴⁶ The

345 CoGTA 2018/2019 Annual Report (2019) 28.

346 General Comment 15 (2002) Para 23. Recognising that this right is applicable in private relations, the CESCR declared that "Preventing third parties" must include persons, companies,

obligation of non-state actors is limited to respecting the right to water. States can use private partners to help them realise their obligations. The UN Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, New York and Geneva (2011), provide in Principle 12 that private actors are responsible for upholding the values of human rights accepted by domestic and international law in their operations.

The analysis of the legislation, case law, regulations, and policies, helped in establishing that the right to have access to water is explicitly recognised in South Africa and the State must respect, protect, promote and fulfill the right in line with Sections 27(1)(2) of the Constitution. Even though the Constitution provides for the horizontal application of the Bill of Rights to non-state actors, it was established by the Constitutional Court in the case of *Juma Musjid* and the High Court judgment in *Khaya Projects Ltd* that non-state actors in terms of the Constitution only have negative obligations to respect the right to have access to water and that they only bear the full range of responsibilities when contracted to provide water on behalf of government.

In South Africa, the inability of municipalities to provide water impacts the poor and marginalised as many individuals, especially in rural areas, do not still have access to piped water services. This provided the basis for objectively evaluating the legal options open to the State when local governments provide their communities with services and, more importantly, with water supply. Cooperation with different role-players with unique and different capabilities was, therefore, needed. Thus, a legal and policy framework for alternative service delivery partnerships was developed through MSPs, to mitigate the difficult situations in municipalities, especially concerning water supply.

At the heart of this research, it was established that the benchmarks distilled from core requirements of PPPs, clearly suited the South African context, considering the analysis of the legal and policy framework for MSPs. This served in evaluating the

and other agencies and agents operating under their authority from interfering in any way with the enjoyment of the right to water.

potentials of the legal and policy framework for MSPs in South Africa for the provision of water services. These benchmarks, as summarised include: firstly, there must be political support for the use of PPPs. It was established that political support is evident from the fact that the executive branch of government has adopted the 2004 Policy on MSPs, strongly encouraging the use of PPPs and approval already given by the legislature through legislation that makes elaborate provision for its use in South Africa. Section 76(b) of the MSA makes it possible for municipalities to provide services through external mechanisms while Section 120 of the MFMA also provides for public-private partnerships.

Secondly, states must adopt a clear and adequate regulatory framework for the use of PPPs to ensure private security and boost public benefits. The MSA and MFMA provide this regulatory framework for MSPs in the provision of water services.

Thirdly, states must ensure a transparent and competitive procurement process for PPP projects. Section 83(3) of the MSA and Section 120 of the MFMA both provide an enabling framework for such transparent and competitive procurement processes. Section 80 of the MSA requires a municipality to commit to competitive bidding procedures for all service providers and must regulate the provision of the service in line with the provisions of its performance management systems. Transparent and competitive procurement through a competitive bidding process must ensure value for money and applied throughout the delivery of the project with clear information and reports made available to the public.

Fourthly, states must conduct a comprehensive feasibility study to define a problem that needs to be addressed, measure possible accurate cost, and decide if the outcome set can be accomplished through PPPs. It was established that Section 78(3) of the MSA and Section 120(4) of the MFMA strengthens the contracting processes, including extensive and thorough guidelines on feasibility studies. Section 78(6) of the MSA goes further in terms of conducting feasibility studies for national and provincial spheres of government to assist municipalities that lack the capacity following an agreement in carrying out feasibility studies or preparing service delivery agreements.

Fifthly, state authorities must ensure consistent monitoring of projects. This is provided in Section 81 of the MSA and Section 120(4)(c) and (d) of the MFMA that requires municipalities to remain responsible for monitoring the delivery of services. Municipalities must monitor and assess the implementation of the service agreement and must ensure continuity of water services if the service provider is liquidated or unable to continue with its functions in terms of the delivery agreement.

Lastly, states must ensure a proportional shift of risk to the private actor, depending on "fair allocation of risk and a sound contractual structure" to ensure quality and consumer satisfaction. Sections 78 of MSA and Section 120 of MFMA ensure how a reasonable technological, functional and financial risk should be shifted to the private party. After a review of the legal and policy framework for MSPs (comprising the MSA, MFMA, and the White Paper on MSPs), the general benchmarks distilled as core requirements for PPPs above, were seen to be aligned with the framework for MSPs in South Africa. All these procedures are in accordance with the benchmarks identified, as requirements for the successful implementation of PPPs.

Consistently, this cumbersome procedure of the legal and policy framework for MSPs reveals that there is concerted effort to develop a robust regulatory framework with strong support structures to implement MSPs, which includes PPPs. It is a well-intentioned effort to ensure full consistency in the process and to ensure that municipalities carry out a comprehensive review before outsourcing thereby, preventing any possible pitfalls. The researcher found that the protection guaranteed by the legislative framework, such as extensive monitoring provisions showing the need to prevent lack of accountability, can ensure proper implementation. The various provisions on public involvement illustrates the need to guarantee public buy-in thereby, securing against the hope of escalating prices after award of a contract. Moreover, the framework contains provisions on avoiding stripping of properties.³⁴⁷ It further demonstrates the need to protect and preserve municipal assets with a specific obligation to protect assets in the water sector.³⁴⁸

347 Section 14 *MFMA* prohibits the disposal of capital assets used to provide basic services.

348 Reg 11 *WSA Water Services Provider Contract Regulations* (2002).

The prevention of financial risk through numerous and detailed provisions on feasibility studies and evaluations, ensures value for money. Lastly, it ensures affordability with provisions on tariff policies showing concern for the poor and their needs. This, therefore, transcends to the benefits to be enjoyed by local governments and the local communities where MSPs are used. With this in mind, it is, therefore, certain and convincing that the legal and policy framework for MSPs can be used to ensure that private actors provide water to communities without fears traditionally linked to the privatisation of water services, especially for poor people. Therefore, taking into cognisance the above findings, the legal and policy framework for MSPs can be used to contribute towards the realisation of the right to access sufficient water in South Africa.

5.3 Recommendations

Taking into consideration the findings above and considering the objective of this study, the following recommendations are made: Firstly, it is recommended that state authorities must implement the benchmarks distilled in Chapter 4 as key success factors for using MSPs, which includes the private sector in providing water services in South Africa, as catered for by the law. Given the fact that the use of the private sector can enhance capital investment, create value for money, greater efficiency, skills transfer, and risk transfer, implementation of the current legal and policy framework can assist local governments in discharging their duties of providing sufficient water to affected citizens and restore confidence.

Secondly, in order not to scare private investors away from involvement in the provision of water services, there should be certainty on setting tariffs. The MSA does not reflect on this aspect, as it allows another sphere of government to set limits on tariff increase, which introduces an element of uncertainty, especially where the private actor relies on tariff income to fund and extend bulk infrastructure water projects to water-scarce communities.

Finally, it is strongly recommended that the regulatory provisions for MSPs, including PPPs, be contained in a single piece of legislation, as this will go a long way to benefit municipalities and partners through the compilation of a single manual.

There has been a lot of overlap and duplications in the legislative framework (the MSA and the MFMA) and this makes it cumbersome and difficult for one to choose which to follow. There is need for the framework of these Acts to correlate comprehensively. Certainly, with the hope that the Public Procurement Bill (2020) becomes law, some of these issues will be addressed as it will bring changes and repeal procurement provisions in the MSA and MFMA thereby, serving as the only legislation on public procurement.

5.4 Concluding remarks

The right to access sufficient quantity of quality water is very important to the well-being of all citizens of a nation since “water is life”. The advent of COVID 19 has clearly shown that the right to sufficient water is necessary to sustain life as the use of water for washing hands plays an important role in curbing the spread of COVID 19. Therefore, no matter the circumstances, water services should be provided to all citizens. The legal and policy framework for MSPs in South Africa is and has convincingly proved that if well implemented, will contribute towards the realisation of the right to access sufficient water in South Africa, as enshrined in Section 27 of the Constitution.

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