

The right of access to sufficient water

Christopher Mbazira

This article analyses the report of the South African Human Rights Commission (the Commission) on the realisation of the right of access to sufficient water in South Africa presented in chapter eight of its *Sixth economic and social rights report 2003-2006* (the sixth report).

While the report provides valuable information on a number of positive developments in the provision of water services, it is deficient in a number of respects.

The most visible deficiency is its lack of comprehensiveness and its failure to verify most of the information it relies on both to credit and discredit the government. It is argued that these deficiencies can be attributed to the sixth protocol on the right to water (the water protocol), which fails in some important respects to elicit information in ways that would allow a deeper analysis of the state's performance.

Normative protection of the right to water in South Africa

As with all other socio-economic rights, access to water in South Africa has historically been linked to race. Previously access to water was linked to private ownership of land: those who did not own land, mainly black South Africans, had very limited access to water (Kok and Langford 2006: 56B-1). It is against this context of deprivation that the 1996 South African Constitution guarantees everyone the right of access to sufficient water (section 27[1][b]). The state is obliged to realise this right progressively through reasonable leg-

islative and other measures within its available resources [section 27(2)].

The obligations that attach to this right are fleshed out in the Water Services Act (No. 108 of 1997). It is notable that, while the Constitution uses the phrase "the right to ... sufficient ... water", the Act refers to the right of access to a "basic water supply" and basic sanitation (section 3[1]).

The Act defines "basic water supply" to mean "[t]he prescribed minimum standard of water ... necessary for the reliable supply of a sufficient quality of water to households, including informal households, to support life and personal hygiene" (section

1(iii)). Regulations to the Act have defined this water to be a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month (Regulations Relating to Compulsory National Standards and Measures to Conserve Water 2001, Reg. 3).

One eye-catching provision of the Water Services Act is section 4(3)(c), which provides that procedures for the limitation or disconnection of water services must not result in a person being denied access to basic water services for non-payment, where that person proves that he or she is unable to pay for the basic service.

The government's commitment to realise the right to water is evident in its policy and practices. South Africa is, for instance, one of the very few African countries to commit a higher percentage of its Gross Domestic Product (GDP) to water and sanitation than to military expenditure: approximately 2% and 1.8% respectively (UNDP 2006: 62). While the government should be commended in this regard, it does not mean that the right of access to sufficient water has been realised for all South Africans. There are still many gaps that need to be filled, some of which are outlined in the sixth report.

An analysis of the chapter on water

Policies and programmes adopted by government

The chapter on water in the sixth report (the chapter) demonstrates that the state has adopted policies that are intended to advance the right of

access to sufficient water. The first policy is the Strategic Framework for Water Services, 2003 (SFWS) of the Department of Water Affairs and Forestry (DWAf). The second is the Department of Provincial and Local Government's Municipal Infrastructure Grant Framework (MIGF). These two policies, according to the Commission, have been used to develop

institutional and regulatory strategies to guide the water services sector.

The chapter reports that the National Department of Provincial and Local Government has been implementing the MIGF to help municipalities achieve

their obligation of providing services and speeding up the provision of water and sanitation. This programme, together with the Consolidated Municipal Infrastructure Programme (CMIP), has helped reduce the backlog of people without access to water beyond the targets set by DWAf. The following achievements by the government are highlighted:

- the reduction of water backlogs;
- the allocation of funds to provinces to reduce sanitation backlogs;
- the restriction of water with a view to promoting water conservation;
- the transfer of water between basins to address the effects of drought;
- building the capacity of municipal staff with regard to the institutionalisation of the municipal infrastructure grant; and
- the reduction of rates charged for water in many rural areas.

Other positive developments include

the commitment made by the Northern Cape and Mpumalanga to eradicate the use of bucket toilets. The Mpumalanga government set aside R35 million for this purpose and the Northern Cape government was to rid the province of 22 000 bucket toilets by October 2006.

In spite of this, the chapter does not discuss some recent policies such as the National Water Resources Strategy (NWRS) 2004. The NWRS is a very important policy because it obliges the government, among other things, "[t]o ensure that potable water and safe sanitation are accessible to all" and to subsidise previously disadvantaged water users. Information on the extent to which measures have been put in place to implement this policy would have been useful, since at the time of writing the sixth report the policy was two years old.

The chapter also does not adequately assess whether the policies it refers to have been implemented effectively. Although it uses some case studies to show the extent to which the policies have been implemented, the information provided is scanty. There is also no evidence to suggest that such information, most of which comes from DWAf, was verified independently by the Commission.

One believes that a monitoring process should look beyond paper policy and target implementation. From the report it is not clear whether the policies mentioned have achieved their objectives, and if not, why they have failed to do so. In addition, no mention is made of any solutions that might have been proposed to overcome the challenges. It is the duty of the Commission to look behind the statistics and synchronise them with the realities on the ground.

The chapter demonstrates that

From the report it is not clear whether the policies have achieved their objectives and if not, why they have failed to do so.

there has been a decline in DWAF's expenditure over the three years under review by approximately R2,27 and R1,53 million per year. While the figures appear negligible, the Commission associates the decline with a reduction in water resources and water quality, with water and sanitation services backlogs, and with inflation. No further elucidation is provided to explain the link, which raises the presumption that it is merely speculative. Such a conclusion is inevitable considering the skeletal nature of the 11-page chapter.

Weaknesses in the water protocol

The failure to monitor the implementation of the policies effectively could, among other things, be the result of gaps in the protocol. While the protocol elicits information on the policies that have been adopted to realise the right of access to sufficient water, it is deficient in eliciting the kind of information that is necessary to assess their implementation. Under the heading "Progress in implementing key programmes, sub-programmes and projects", the protocol places emphasis on the size of the budgetary allocations to implement the relevant programmes. One could argue that while budgetary allocations are an invaluable indicator for the purposes of determining implementation, without other forms of qualitative and quantitative indicators they are inconclusive. The funds allocated could have been spent on items not connected to the services being provided, or they could have been mismanaged, misappropriated or squandered through corruption.

Under the heading "Indicators for the 2003/2004 Fiscal Year" the protocol makes a commendable effort to elicit quantitative information on

access to water. The questions under this heading may elicit invaluable information on the implementation of any programme or policy. For instance, they require information on the number of households with access to piped water in the house, the number of households with communal piped water, the number of household with flush toilets, the size of the population receiving free basic water, and the size of the population receiving less than 25 kilolitres of free basic water per month.

However, despite these quantitative questions the sixth report does not provide adequate statistics to establish the level of access to water services and no explanation is offered for this. While it gives some statistics, these are based mainly on the 2003/2004 financial year and there is nothing on 2004/2005 and beyond. This information could have been used by the Commission to assess whether, in quantitative terms, the right of access to sufficient water is being realised on a progressive basis. Evidence of retrogression would have been condemned, as was done with the declining budgetary allocation trends.

When one compares the water chapter with its predecessor in the fifth report (2002/2003), the differences in the information provided are glaring. The previous report gave statistical information on such aspects as the water infrastructure backlogs, the sanitation infrastructure backlogs, the number of poor households with free basic water, the municipalities offering free basic water, and the average municipal retail tariffs per province. While the current chapter gives statistics on basic water, these are based on a case-study of one district municipality, which can hardly represent the overall situation in the country.

Updated information on the number of poor households accessing free basic water countrywide, and the backlogs in this regard, would have been worthwhile. Such information would have helped not only to establish how many have access but also how many who qualify for free basic water do not yet have it. This is particularly relevant given that the policy on free basic water has not been implemented effectively in all provinces (Mbazira 2006: 77). This problem is mainly associated with financial deficits facing poor rural municipalities.

The chapter quotes DWAF as saying that the backlog in rolling out the free basic water policy is decreasing. DWAF says that in the 2003/2004 financial year the provision of free basic water had increased by 17.5%, resulting in an increase of 42% to poor households. The report unfortunately denies readers statistical or other evidence to verify this, yet the case-study in the chapter presents an opposing picture, showing that, instead of providing the statutorily prescribed 6,000 litres of water per month, only 3,000 litres were being provided. DWAF could, therefore, be basing its conclusion on statistics in terms of the number of households accessing this water, yet the amount falls below the prescribed standard.

Section 7[2] of the water protocol ("Assessment of outcomes in relation to constitutional obligations") may have provided the opportunity to elicit the qualitative information referred to above. However, this protocol is very broad and does not offer precise guidance on what information ought to be provided.

The respondents are required to provide an overall assessment of how they have met the obligations to respect, protect, promote and fulfill

the rights as outlined in section 7(2) of the Constitution. Apart from sketchy definitions of these duties in a footnote, there is no assessment of the state's compliance with these obligations. The Commission should therefore elicit information that enables it to determine, using the expertise at its disposal, whether the obligations in section 7(2) have been discharged.

The Commission needs to use the principles emanating from the jurisprudence of the courts on the nature of the state's obligations in relation to socio-economic rights. The reasonableness approach is an indispensable guide in this regard. The Commission should seek information that enables it to assess whether the measures undertaken by the government are "comprehensive, coherent, coordinated, flexible, reasonably formulated and implemented, and pay attention to the needs of those in desperate circumstances, transparent and allows for participation of relevant stakeholders" (see *Government of the Republic of South Africa and others v Grootboom and others* 2000 (11) BCLR 1169 (CC) and *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC)).

Problem of prepaid meters

The chapter also fails to assess the human rights implications of using pre-paid water meters by some municipalities as a means of ensuring that water bills are paid. Some studies have revealed the negative implications of using these meters in poor communities (Deedat and Cottle, 2002; and Ruiters, 2002; Mbazira, 2006). The meters allow for disconnection from the service without the user being given the requisite legislative notice of disconnection. Comparative jurisprudence from the United Kingdom (UK) suggests that

these meters may be illegal (*R v Director General of Water Services ex parte Lancashire County Council and ors* EWHC, Admin 213 (20 Feb 1998) [UK]). It is also on this basis that a challenge has been launched in the High Court of South Africa against these meters (*Lindiwe Mazibuko & Others v The City of Johannesburg & Others* No 06/13865, High Court of South Africa, Witwatersrand Local Division [pending]).

Assessing the country's international commitments

In spite of the critical place occupied by access to water and sanitation in the Millennium Development Goals, there is evidence that the world, and particularly the developing world, will not meet the target of reducing by half the proportion of people without access to water and sanitation (United Nations, 2006: 18). The Southern African Regional Poverty Network (SARPN) in 2005 published a report indicating that South Africa was well on course to meeting the MDGs and had by 2004 extended water to 78% of its population (SARPN 2005: 49).

Notwithstanding this positive development, the SARPN report shows a discrepancy in access between rural and urban populations and does not make a qualitative assessment of the statistics beyond these variables. There is no way of determining, for instance, the quality of the water and sanitation services being provided. The Commission is well suited to making such assessments and determining on both a statistical and qualita-

tive basis South Africa's commitment to the MDGs.

The chapter demonstrates that DWAF has undertaken steps to ensure that water is safe and of good quality. DWAF has developed a monitoring programme that focuses on monitoring the quality of water in terms of microbials and toxicity. The only problem noted by the Commission is that the programme focuses on what have been described as "hot spots

and high-risk areas". As a result, the Commission states that cases of unsafe water because of faecal content leading to such diseases as typhoid have been reported at some water points. DWAF is, however, planning to extend its quality monitoring to all points. The chapter also notes that

The Commission needs to use the principles emanating from the jurisprudence on the nature of the state's obligations in respect of socio-economic rights.

effective monitoring is being hampered by capacity problems not only in DWAF but at the water boards as well.

Recommendations of the Commission

The chapter makes a number of recommendations. These include:

- the need for the state to provide capacity building at the municipal level;
- the need for the DWAF to focus on the effect of climate change and drought;
- the need for local government to provide information on infrastructure developments when reporting to the Commission;
- the need for local government to support municipalities through adequate budgetary allocations to enable them to provide free basic water; and

- the need for the state to create educational and promotional activities on water conservation, hygienic use of water and protection of water resources.

One of the weaknesses of the Commission, however, has been the failure to follow up on its recommendations (Thipanyane 2007: 14). There is, for instance, no information on whether the Commission has followed up on the recommendations it made in its previous report. Unless there is such follow-up it will remain difficult to determine whether or not the reporting process is achieving its purposes.

Conclusion

The water chapter provides useful information on the extent to which the government has realised the right of access to sufficient water. It details some of the policies that the government has adopted to realise this right. The Commission also makes a number of recommendations on what in its opinion ought to be done to realise the right effectively.

However, the chapter suffers from deficiencies: it is scanty and fails to provide vital information and statistics. Some of these deficiencies arise from the water protocol, which fails adequately to elicit all the relevant quantitative and qualitative informa-

tion. To improve its monitoring of the right of access to adequate water, the Commission therefore needs to:

- revise its water protocol to ensure it elicits all relevant information for effective monitoring of the right to water;
- produce more comprehensive reports that properly analyse the information obtained from the state by assessing it both qualitatively and quantitatively; and
- follow-up on its recommendations made in previous reports.

Christopher Mbazira is a Researcher in the Socio-Economic Rights Project.

References

- Bartram, J and Howard, G 2002. *Domestic water quantity, service level and health: What should be the goal for water and health sectors?* Research for World Health Organisation.
- Booyesen, S 2004. *The effect of privatisation and commercialisation of water services on the right to water: Grassroots experiences in Lukhanji and Amahlati.* Research report, Community Law Centre.
- Deedat, H and Cottle, E 2002. Cost-recovery and prepaid meters and the cholera outbreak in Kwazulu-Natal: A case-study in Madlebe. In D MacDonald and J Pape (eds), *Cost recovery and the crisis of service delivery in South Africa.* Human Sciences Research Council.
- Department of Provincial and Local Government, 2006. Municipal Infrastructure Grant Framework.
- Department of Water Affairs and Forestry 2003. Strategic Framework for Water Services.
- Kok, A 2005. Privatisation and the right of access to water. In D Koen and F Gomez (eds) *Privatisation and human rights in the age of globalisation.* Intersentia.
- Kok, A and Langford, M 2006. Water. In S Woolman et al. (eds) *Constitutional law of South Africa.* Juta & Co.
- Mbazira, C 2006. Privatisation and the right of access to sufficient water in South Africa: The case of Lukhanji and Amahlati. In J de Visser and C Mbazira (eds), *Water delivery: Public or private?* Community Law Centre and the Institute of Constitutional and Administrative Law, Utrecht University.
- Ruiters, G 2002. Debt, disconnection and privatisation: The case of Fort Beaufort, Queenstown and Stutterheim: A case-study in Madlebe. In D MacDonald and J Pape (eds), *Cost recovery and the crisis of service delivery in South Africa.* Human Sciences Research Council.
- Southern African Regional Poverty Network (SARPN). 2005. *South Africa: Millennium Development Goals country report.* Available at <http://www.sarpn.org.za/documents/d0001538/index.php> [accessed 12 July 2007].
- Thipanyane, T 2007. The monitoring of socio-economic rights by the South African Human Rights Commission in the second decade of the Bill of Rights: Methodological issues. *ESR Review* 8(1).
- United Nations 2006. *The Millennium Development Goals report.*
- United Nations Committee on Economic, Social and Cultural Rights *General Comment No. 15 2002. The right to water (articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights).* UN Doc. E/C.12/2002/11.
- United Nations Development Programme (UNDP) 2006. *Human development report 2006: Beyond scarcity: Power, poverty and the global water crisis.*