

*development  
dialogues*



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OPEN SOCIETY FOUNDATION FOR SOUTH AFRICA

**'WATERWISE: ADVANCING LIFE, EQUITY  
AND SUSTAINABLE RESOURCE USE'**

**\*monograph 15**

ISANDLA INSTITUTE / OPEN SOCIETY FOUNDATION

**About Development Dialogues**

*Development Dialogues* is a joint initiative of Isandla Institute and the Open Society Foundation for South Africa. The aim of the public dialogue series is to create a space for critical reflection and dialogue among key development stakeholders in South Africa. In doing so, the organisers seek to make a (rather modest) contribution to enhancing the quality of debate in the development sector. Through *Development Dialogues*, Isandla Institute and the Open Society Foundation intend to bring about creative and constructive multi-stakeholder meeting opportunities that push stakeholders to think beyond the confines of their immediate interests and theoretical paradigms.

This monograph captures the speakers' inputs and discussions at the *Development Dialogue* on 'Waterwise: Advancing life, equity and sustainable resource use' which took place on 12 June 2008 at the Centre for the Book in Cape Town.

Published in 2008



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I appreciate the opportunity to participate in this debate, especially because I do not think we have enough debate on the issues that we are going to be discussing today. I hope that this event can instigate more robust discussion around some of the challenges facing the water sector.

When I was invited to speak, there was a perception that the energy sector was in crisis, which led to the question whether this is also the case for the water sector. That question has framed my input. My response to the question is, yes, I do think there is a crisis in the water sector. Let me try to tell you why.

As you all know, the South African state has taken a very strong approach to universal access to services in terms of water and sanitation and has tried to legislate a rights-based approach. Despite the effort of taking a strong pro-poor stance, *vis-à-vis* access to services, the very weak public accountability mechanisms that are in place are unfortunately threatening to undermine the very achievements accomplished over the last decade.

If one looks at the service delivery track record since 1994, there has been a tremendous effort to distribute equity, in terms of trying to eradicate backlogs. Ambitious targets have been set in terms of trying to eradicate water backlogs by 2008 and sanitation backlogs by 2010.

**The South African state has taken a very strong approach to universal access to services like water and sanitation.**

But in the haste to deliver services rapidly and widely, there has been a little bit of neglect of the issue of procedural equity. What I mean by that is the widening of the decision-making processes that involves the public. So what many of us are finding right now is: where are the people when it comes to technology choices and when it comes to the way in which services are delivered?

The problem is a top down, supply-side driven approach to service delivery. This stems from the response by municipalities facing enormous pressure from national government in trying to achieve service delivery targets within ridiculous time frames without necessarily paying attention to whether what is put in the ground is sustainable.

One of the unintended consequences of this approach is that very high levels of services are being put in without regard to maintenance. The use of municipal infrastructure grants to pay for basic services tends to skew municipal investment decisions because it is 'free' money that is coming in. And because the general public is not involved in these delivery processes, public oversight as to whether what was supposed to be delivered actually reaches the intended beneficiaries is sometimes poor.

Let me give you a perfect example. In relation to sanitation delivery, the bucket eradication programme occurred with such a rapid roll-out that in many instances, water borne sanitation was put in place to replace buckets in municipalities that did not have the water supply to insure sewage connections. Such lack of attention to the composite conditions that are necessary to put in higher levels of infrastructure and to be able to maintain it over time, as opposed to just respond



## The problem is a top down, supply-side driven approach to service delivery.

to political expediency, is creating a quagmire at a municipal level.

The current demand from the public is for high levels of services. This is understandable given the sense of exasperation in waiting to climb the service delivery ladder for 15 years. This dwindling of patience is creating very strong political pressure to skip elements of the ladder and to just move into higher levels of service, sooner rather than later. While this may seem pro-poor in the short-term, the lack of attention to the sustainability implications is in the long-term undermines the longevity of this intention.

The challenge is looking at the implications of this approach. Are our households able to pay for it? Is the municipality able to subsidise it if households cannot pay for it? Are there sufficient skills to maintain it? Extending coverage has been prioritised over sound maintenance of both new and existing systems and these factors raise the likelihood of service failure.

We are seeing rising levels of wastewater treatment failure that is threatening the water systems across South Africa, let alone the water security of South Africa. The Delmas outbreak in 2003 and the deaths of 28 babies in Ukhahlamba municipality in April 2008 were not a result of insufficient resources for infrastructure, but of insufficient skills to maintain the infrastructure. It was because of neglect of the maintenance of that infrastructure.

An unintended consequence of this top down approach to putting in high-level services is that the skills to maintain these levels of services are not in place. A national survey of technical capacity of municipalities in 2005 showed that 83 municipalities have no civil engineering staff at all, 43 municipalities employed only technicians or technologists under the age of 35, with the majority of these under the age of 27. The relevance of age is that it generally takes 20 years to gain the experience required to head a water works treatment plant.

The root cause of the poor performance of the majority of non-compliant plants is that the available plant infrastructure and equipment is not well operated or sufficiently maintained. These challenges heighten the need for effective oversight, monitoring and accountability systems, and raise the importance of effective recourse measures for citizens before services falter or fail.

When policy makers drive a state agenda down a trajectory that is unsustainable, what gets lost is the issue of accountability. When the demand for a high level of service emerges without a sense of the trade-offs and consequences of delivering this over time, how does the public then take the moral high ground in assuming a public accountability role for the quality of services delivered? How do politicians hold municipal officials to account for

**These challenges raise the importance of effective recourse measures for citizens before services falter or fail.**





collapsing infrastructure and deteriorating water quality when the officials have responded to the politicians' demands to skip the service delivery ladder in addressing backlogs?

There has been some effort to put accountability mechanisms in place between the national policy makers and municipalities as the main service providers of water and sanitation. While the framework for this is in place, in practice there are weaknesses. For example, the national regulator is not yet in place as the Department of Water Affairs and Forestry (DWAF) makes its transition from historical provider to regulator. Also, the National Water Services Regulation Strategy has not yet been approved, nor are the powers and functions for DWAF to effectively enforce in place. Furthermore, the constitutionally-enshrined interdependence of the three spheres of government makes it very difficult for DWAF to punish non-compliance at the local level.

In addition, the Water Service Authority function, which would operate in a manner similar to municipal councils at the local level with political authority and oversight over delivery, is very weak given the information asymmetries that exist between politicians and officials and the understaffing of water departments to even allocate the human power to take up such a critical function. In the absence of effective Water Service Authority functions being carried out at the local

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level, there is a need for honest conversations between officials and politicians about the implications of delivering various service levels. Getting back to the role of procedural equity, there is a need for public education to support, empower and create a learning environment in order for the public to begin holding local government to account. IDP processes and ward committees have not effectively held service providers to account. Citizens need to get back in the picture and we have got to start with public education and accountability.

On this front, I must take my hat off to Cape Town for starting with the "Raising Citizens Voice in the Regulation of Water Services" initiative in 2006 and turning it into a fully fledged programme that is spreading like wildfire across the townships. This effort has begun to make some inroads in improving council responsiveness to service delivery challenges being raised by communities that have historically been neglected. ■



I am going to talk about the recent water rights case, of which the full name is 'Mazibuko and Others versus the City of Johannesburg and Others'. I have been involved with this case for four years, starting in July 2004 when the Centre for Applied Legal Studies at Wits University became aware of people in Phiri, Soweto whose water supply had been discontinued because Johannesburg Water Pty Ltd had decided they were going to end the former deemed consumption system.

The deemed consumption system is one whereby people are billed flat rates every month regardless of how much water they use. It is obviously a legacy of apartheid, when billing for water was deemed too politically charged and problematic, and the rationale made sense as there was no metre reading.

**It is a legacy of apartheid, when billing for water was deemed too politically charged.**

This changed starting in 2000 when the City of Johannesburg experienced a rising fiscal crisis and deemed consumption was seen as unfair. Also people were not paying their bills and in 2001/02 the City of Johannesburg began to install pre-payment meters.

On 30 April 2008 one of the most progressive socio-economic rights judgments was handed down. The Department of Water Affairs and Forestry and the City of Johannesburg have both indicated that they will appeal the judgment.

The orders of the court as they apply to Phiri requires that the City of Johannesburg provide each

**On 30 April 2008 one of the most progressive socio-economic rights judgments was handed down.**

applicant and all similarly placed residents of Phiri Township with a Free Basic Water supply of 50 litres per person per day and the option of a metred supply installed at the cost of the City of Johannesburg. This is set out in paragraph 183.5 of the judgment.

This is to rectify Johannesburg Water's Gcina'manzi credit control campaign which limited the choice of residents to standpipes or prepaid meters. They had no choice but to have a conventional water meter, and this was sold as a mechanism to provide Free Basic Water.

The judgment handed down by Justice Tsoka also set out a number of generally applicable principles. For one, regarding the obligation to provide free basic water, the state's obligation is to ensure that "every person has both physical and economic access to water" (para 41 of the judgment). Secondly, the National Free Basic Water policy of 6kl per household per month is a 'floor', not a 'ceiling' (paragraph 53). Thirdly, the decision to introduce pre-payment meters amounts to administrative action, reviewable under section 33 of the Constitution and the Promotion Administrative Justice Act (PAJA).

The judgment re-opened the minimum core content approach (paragraph 131). It further noted that pre-payment meters violate the provisions of section 33 of the Constitution read with the provisions of PAJA. In terms of the Constitution and PAJA, "everyone has the right to a lawful,





**The judge noted that the approach amounted to unfair discrimination on the basis of race, in that the households in Phiri were only given choices targeted for credit-control.**

reasonable and procedurally fair administrative action" (paragraph 93) and pre-payment meters "cut off the supply of water without reasonable notice to enable the applicants to make representations, or if able to, to purchase water credits" (paragraph 93).

Aspects of the judgment are only applicable to the City of Johannesburg and to Phiri. With respect to the City of Johannesburg's policies the judge found that there is no legal basis in by-laws (and the Water Services Act is silent in this regard) for pre-payment meters, other than for the contravention of conditions relating to standpipes, and pre-payment meters are therefore unlawful (paragraph 74).

The judge further found that the City had failed to consult on the implementation of pre-payment meters. Rather, what the City did was more of a public relations exercise, described in the judgment as "misleading" (paragraph 109), "intimidatory and presumptive" (paragraph 110), "patronising" (paragraph 153) and "big brother" (paragraph 153).

In addition, the judge noted that the approach amounted to unfair discrimination on the basis of race, in that the households in Phiri were not given all the choices, only those choices targeted for credit-control. This happened despite government

and business being the worst debtors (paragraphs 94, 154 to 159). In the words of the judge: "It is therefore inescapable that the introduction of the pre-payment meters discriminates on the basis of colour" (paragraph 155).

Also, the City's indigency and special cases policies were found to be "unreasonable and inflexible" (paragraph 148).

The judgment has important implications for Johannesburg's Free Basic Water policy. Paragraph 168 of the judgement notes that it is common cause that Phiri households have more than eight people, so each person does not get 25 litres per person per day, and it is also common cause that these residents are poor and cannot afford water. The judgement notes: "it is obvious that the 25 litres per person per day is insufficient for the residents of Phiri" (paragraph 169). In fact, later on the judge refers to the provision of 25 litres per person per day as "unreasonable" (paragraph 181).

The judgment accepted the expert evidence of Peter Gleick, the President of the Pacific Institute for Studies in Development, Environment and Security, whose affidavit argued that members of poor households required 50 litres of water per person per day. The judgment also accepted the affidavit of Desmond Martin on the water requirement of people living with HIV/AIDS (paragraphs 170-179).

**The state's obligation is to ensure that every person has both physical and economic access to water.**



The judgment also stated that “it is uncontested that the respondents have the financial resources to increase the amount of water required by the applicants per person per day” (paragraph 181). It concluded that the City of Johannesburg has not used the equitable share for the poor, noting that “It appears that the respondents are able to provide 50 litres per person per day without restraining its capacity on water and its financial resources” (paragraph 181). ■

**The National Free Basic Water policy is a ‘floor’, not a ‘ceiling’.**



**L**et me start my input by saying that I do not think we have a crisis in the water sector. While there are a number of challenges that face us, I do not think they are insurmountable.

In the City of Cape Town we have completely eradicated water supply backlogs in informal and formal settlements. Yes, we have challenges with regard to basic sanitation in informal settlements. Some informal houses are in unsuitable terrains, such as wetlands. If you put in a toilet there, it will sink or collapse. Informal settlements are also dense and difficult to go in and put in and service a toilet because of the lack of space.

**There may not be enough public accountability and perhaps we should be talking to consumers directly.**

Part of the challenge as well is the need to provide housing, after which water and sanitation provision will be a relatively simple task.

With regard to the skills problem, the City of Cape Town recently advertised a number of posts. While we did not get old, white, male engineers we recruited 25 young civil engineers and we are very happy with them. They may not be experienced, but they are skilled and competent. These youngsters came into the system, rolled up their sleeves, and are up for the challenge.

With regard to compliance with national standards, compliance is improving all the time. In the past we had 65% compliance and now it stands at 80%, so we are making progress. This means that we cannot say that we have a crisis. There is

progress and we are constantly upgrading to ensure compliance. It might not be at 100% yet, but we continue to work, together with other municipalities, to improve compliance.

Regarding issues of public accountability, we acknowledge that there may not be enough public accountability and that perhaps we should be talking to consumers directly. But we cannot say that there is no public accountability. Someone in my position is accountable to the Department of Water Affairs and Forestry (DWAF) if a municipality fails to comply with national standards.

Turning to the events in Delmas, water quality is clearly a challenge in that municipality. Does the country therefore have a problem or a water crisis? No, Delmas has a crisis because it failed in this regard. We do not all have a crisis because the water samples in Delmas failed. In Cape Town people wake up every day and open their taps to drink potable water.

One of the challenges is that we have not been able to upgrade infrastructure at a rate commensurate with growth in the country. Again, this does not mean that there is a crisis in the water sector, but this is clearly one of the challenges we need to address systematically.

We are doing a number of things in the City of Cape Town to ensure equitable access to water for the poor. We are not debating that everyone has a right to free basic water and sanitation here, but there is the Free Basic Water policy. The challenge is when we say this amount of water is sufficient, as one figure does not work for a one-person household versus a 20-person household. The policy is clear that everyone has a right to free basic water and sanitation and the stepped tariff that we have also ensures that the more you use, the more you pay.

But of course, there is no such thing as free water



## We have not been able to upgrade infrastructure at a rate commensurate with growth.

as someone must pay. This can be achieved through cross-subsidies. Even the government grants are not enough to provide free water and sanitation, which means that someone has to pay. As ours is a ring-fenced business unit we rely heavily on our tariffs. One of the objectives of the stepped tariff is that it discourages wastage of water and talks to water conservation.

When we put standpipes and sanitation in informal settlements we first go into the area and talk about the options and choices. We look at the challenges in areas and available technologies, but

we do not force a technology onto people. Our experience is that if you do not have buy-in it will not work.

The City of Cape Town has opted not to use the system of pre-payment meters for water, so this is not an issue that affects us here. Instead we are looking at a range of water conservation, water saving and water management measures. We have a whole host of projects, but because of time I will not be able to go through them. Suffice to say that where we go into communities and informal settlements we try to talk about water conservation. We are emphasising, in our communication with the public, various ways to use water responsibly. ■



### AFTER THE INPUTS THE FLOOR WAS OPEN FOR QUESTIONS AND COMMENTS. ISSUES THAT WERE RAISED INCLUDED:

- What can be done to address the issue of inadequate skills levels and how are we going to tackle this in the long-term?
- Should we regard water as a commodity or a public good?
- Does the national free basic water supply amount now shift upwards as a result of the judgment?
- 50 litres of water per person per day could apply to almost all urban areas as a new basic standard or minimum provision. But there will be a need to look at affordability, including what is affordable for a municipality and what is affordable for the nation.
- The City of Cape Town uses a range of water management devices which are post-payment and are set to what a household can afford. But there seem to be some technical problems regarding these, particularly in the way they are installed.
- Why is there not a greater range of alternative technologies being looked at as a way to provide sustainable sanitation solutions?

### IN RESPONSE THE SPEAKERS MADE SOME CONCLUDING COMMENTS:

#### Sipho Mosai

In responding to whether water is a commodity or public good, we need to understand that water is not free. To put water in a tap costs money and this money has to come from somewhere. It is not good enough to say that everybody must get free water without addressing this issue of money. In fact, it worries me when more and more people are trying to sell the idea of 'free water'. I am a practitioner. On a daily basis I have to pay salaries. On a daily basis I have to buy chemicals. Where should the money to provide free water come from?

As far as the City's water demand management devices are concerned, we will not install the device if you do not want it. A lot of people came to us, saying: 'I am managing my water responsibly and I do not want to get a bill that says I must pay R2,000 because there is an underground leak on my property.' I have the device in my house. I know my household uses up to 18 kilolitres, based on an arrangement between myself and the City. I can always phone the Council to change that within 24 hours and push it up to 20 kilolitres or completely remove the device. If the device cuts the water off it tells me that there is something going on on my property. So on a monthly basis I know that my water bill will not be more than R500. I think as a City you have a responsibility to provide consumers with devices that will help them to use water responsibly. This device is not only for those living in informal settlements. You have it in places like Constantia or Parklands, all across the



city. You can set the device at a level you can afford, a level that will help you determine if you have a leak in your property. That is not pre-payment. Like any other technology that is mechanical, there are challenges, but I can tell you with confidence that my office has not received more than five complaints about the device in the past month or so. We need to acknowledge that we need to save water. And we need to have measures and technologies that will help those that want to use water responsibly. So this is where the device is coming from. Again, it is not forced on anybody.

### **Laila Smith**

A lot of my input was not particularly about Cape Town. I am more concerned with rural water provision. In remote rural areas municipalities have to service settlements that are very far apart, without the personnel to travel six hours to fix a burst pipe. This is where some of the real challenges lie.

In the 1990s, before municipal boundaries were drawn and the powers and functions of municipalities with respect to water provision were clarified, DWAF had this enormous responsibility to address service delivery. At that time, there was openness in rural areas to bring on board community-based organisations to participate in service delivery. There was very strong public accountability, with money going into the bank accounts of the community. Members of the community managed the schemes, the operations and maintenance. It is particularly around the crisis of operations and maintenance that I think one has to look at how one caters for the role of

communities. Because having a top flight engineer in all municipalities is just not going to happen.

When the powers and functions of service provision was given over to municipalities, my sense is that there was a perception that municipalities can do it on their own. Then the legislation changed which has made it exceptionally difficult for there to be any kind of partnerships with alternate service providers, be it on the public side or the private side. It has not been possible for municipalities to partner even private sector providers. I do think that maybe we need to revisit the legislation to facilitate a greater partnership approach and work at skills building in a variety of areas, because my sense is that we have to tap more into local communities to resolve these problems. We cannot just rely on the hard skills of engineers; we need to be much more creative in our approach.

In terms of the question of alternative technologies, I think that is such an important question and it is particularly critical when it comes to sustainable sanitation. I think the top down approach which says 'these are the standards, it must be uniform across the board' is no longer appropriate given the very context specific service delivery challenges that most municipalities have to contend with.

### **Jackie Dugard**

What we can take from Justice Tsoka's judgment more generally are other principles. For example, in an adequately resourced municipality where everybody is getting free basic water and where there are large poor households receiving the amount of six kilolitres, I think you could argue



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persuasively that it is a similar setting to Phiri and therefore that the judgement should apply here as well.

As to the DWAF policy on the national free basic water supply amount, some of us were disappointed that the judge was not more tough or explicit. But for the moment we are just trying to achieve one victory at a time. Yet, there is no

doubt that we believe that 25 kiloliters per person per day is not enough.

I think that part of the problem about affordability is the framework which does not calculate the real cost of non-provision. This is about development, health and well-being, all these things which unfortunately are not costed at local government level. ■







## 'WATERWISE: ADVANCING LIFE, EQUITY AND SUSTAINABLE RESOURCE USE'

12 JUNE 2008

CENTRE FOR THE BOOK, CAPE TOWN

### ABOUT THE PANEL:

**Laila Smith** is the Director of Policy and Advocacy at Mvula Trust. For ten years she has engaged in research and policy work in the water sector. Prior to coming to the Mvula Trust she worked at the Centre for Policy Studies examining alternative service delivery models, the City of Johannesburg regulating water services, and contributed to the development and piloting of a public accountability model called "Raising Citizens Voice in the Regulation of Water Services". Laila has also published on the challenges facing municipalities in trying to find the balance between equity and efficiency in service delivery.

**Jackie Dugard** is a human rights activist and Senior Researcher at the Centre for Applied Legal Studies (CALS) at the University of the Witwatersrand. She works on socio-economic rights, focusing on basic services and access to justice for the poor through research, writing, advocacy and public interest litigation. She has been working on water services in Soweto since 2004.

**Sipho Mosai** is the Director of Water and Sanitation in the City of Cape Town. He has previously worked for Mhlanthuze in KwaZulu/Natal as the Operations Manager. Prior to joining the bulk water service provider he worked for various departments of the national Department of Water Affairs and Forestry (DWAFF).



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