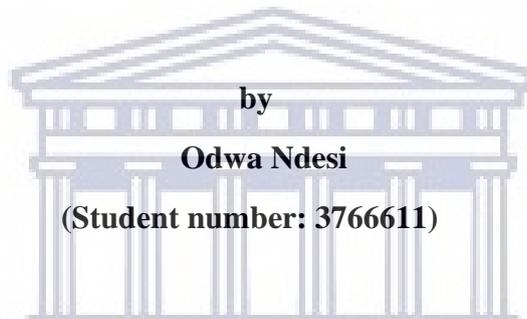


**UNIVERSITY OF THE WESTERN CAPE  
FACULTY OF LAW**

**MEETING OBLIGATIONS BUT FAILING HOPES? AN INVESTIGATION INTO  
SOUTH AFRICA'S OBLIGATION TO REALISE THE HUMAN RIGHT TO  
SANITATION IN RURAL SCHOOLS**



by

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**Research paper submitted in partial fulfilment of the requirements for the LLM degree**

**UNIVERSITY of the  
WESTERN CAPE**

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**Date: 15 November 2019**

## DECLARATION

Research Paper submitted in partial fulfilment of the requirements for the LL.M degree in Environmental Law in the Faculty of Law of the University of the Western Cape. The remainder of the requirements for this qualification require the completion of a programme of courses.

I hereby declare that this Research Paper is my own work, that it has not been submitted for any degree or examination at any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Signature: Odwa Ndesi

Date: 15 November 2019



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Mother: I will thank you in person for all your prayers.



## **KEY WORDS**

- 1) Constitutional Obligations**
- 2) Education**
- 3) Environment**
- 4) Human Rights**
- 5) Inequalities in Schools**
- 6) International Obligations**
- 7) Progressive and Immediate Realisation**
- 8) Sanitation**
- 9) South Africa**
- 10) South African Jurisprudence**



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## ABSTRACT

In South Africa, notwithstanding 25 years into democracy, the constitutional commitment to socio-economic transformation of post-apartheid South Africa remains unfulfilled and unrealized by the vast majority of its people.

The quality of education and access to adequate sanitation in South Africa are issues not exempt from the injustices of apartheid and its consequences of entrenched inequalities and differentiated access to socio-economic rights and privileges. Rural schools or townships have been characterized by unreliable access to water and unsafe pit latrines, or children practising open defecation. And tragically, there have been a series of loss of life due to children drowning in open pit toilets on school property.

The ratification of the International Covenant on Economic, Social and Cultural Rights by the South African government indicates the commitment of our government to be bound by, and to act in accordance with, international laws and principles by guaranteeing, at the very least, minimum essential levels of each of the basic human rights.

Yet, almost five years post-ratification, neither the courts nor the human rights defenders have seized this opportunity in respect of the right to sanitation – a critical, essential core of the right to basic education.

This research paper aims to investigate the nature of South Africa's constitutional obligation in respect of the right to sanitation in schools and makes recommendations on how to restore hope and effectively vindicate the rights of all learners, especially those in rural areas.

## **ABBREVIATIONS**

ACRWC - African Charter on the Rights and Welfare of the Child

CEDAW – Convention on the Elimination of All Forms of Discrimination against Women

CESCR – Committee for Economic, Social and Cultural Rights

CRC – Convention on the Rights of the Child

DWA – Department of Water Affairs

DWAF – Department of Water Affairs and Forestry

DWS – Department of Water and Sanitation

FBSAN – Free Basic Sanitation Implementation Strategy

UNGA – United Nations General Assembly

HRC – Human Rights Council

ICESCR – International Covenant on Economic, Social and Cultural Rights 1966

MDG – Millennium Development Goals

NDP – National Development Plan

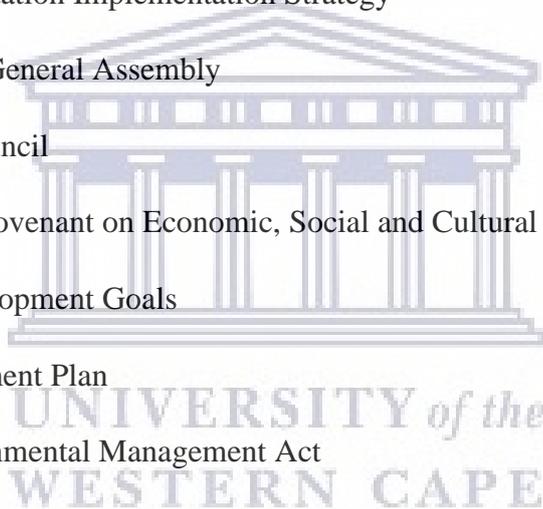
NEMA – National Environmental Management Act

SDGs - Sustainable Development Goals

TAC – Treatment Action Campaign

UN – United Nations

WHO – World Health Organisation



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## CHAPTER1: INTRODUCTION

### 1.1 Background

Sanitation refers to the provision of adequate sanitation infrastructure and services in order to safely manage human excreta from the toilet to storage and treatment facilities.<sup>1</sup> The crisis of inadequate water supply and sanitation is not a feature that is common to or equally experienced by the global population. Rather, it is more pronounced in particular regions, developing countries, or rural communities and schools. By 2017, only 38 percent of the global population had access to managed water services, 673 million still practiced open defecation, and ten of the countries with the highest ratings in rural areas were all in sub-Saharan Africa.<sup>2</sup>

With regard to schools, as of 2016 about 570 million children relied on unprotected dug wells or surface water, 620 million children globally were lacking basic sanitation and relying on unimproved facilities or bucket toilets, and one-third of the schools having no sanitation service were in sub-Saharan Africa.<sup>3</sup>

The global commitment to ensure inclusive and equitable quality education at all levels and ensuring accessibility and sustainable water and sanitation management for all by 2030 was well articulated in the United Nations Sustainable Development Agenda.<sup>4</sup> With about ten years left, however, it would seem that for millions of children, particularly those in schools who had dreams of improving their lives beyond the poverty line, these ambitious goals will be unrealized.

At a national level, South Africa ranks poorly at 142/180 countries based on 24 performance indicators across ten issue categories covering environmental health and ecosystem vitality, of which sanitation is one of those issues<sup>5</sup>. Furthermore, as at January 2018, there were over 8 702 schools which still use pit latrines.<sup>6</sup>

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<sup>1</sup> World Health Organisation (WHO) *Sanitation* (2019) [www.who.int/topics/sanitation/en/](http://www.who.int/topics/sanitation/en/).

<sup>2</sup> World Health Organisation (WHO) *Progress on Household Drinking Water, Sanitation and Hygiene 2000-2017: Special Focus on Inequalities* (2019) 7 and 44.

<sup>3</sup> World Health Organisation (WHO) *Drinking Water, Sanitation and Hygiene in Schools: Global Baseline Report* (2018) 16.

<sup>4</sup> *Transforming Our World: the 2030 Agenda for Sustainable Development*, 2015 United Nations General Assembly Resolution 70/1 (2015).

<sup>5</sup> Wendling ZA. *et al.* (2018). *2018 Environmental Performance Index*. New Haven, CT: Yale Center for Environmental Law & Policy. <https://epi.yale.edu/>

<sup>6</sup> Department of Basic Education *The National Education Infrastructure Management System (NEIMS) Report* (2018) 1.

On 20 January 2014, four-year-old Michael Komape died an untimely, unnecessary and undignified death due to drowning in an unsafe pit toilet situated on school premises<sup>7</sup>. This loss of a child's life is but one of similar tragic stories that happen across the country<sup>8</sup>, and highlights the national crisis and neglect by the national government to protect and promote the rights of its people as mandated by the supreme law of the land – the Constitution.<sup>9</sup>

## 1.2 Problem Statement

The Constitution affirms that everyone has inherent dignity<sup>10</sup> and the right to have their dignity protected as well as their right to life.<sup>11</sup> Over and above these foundational rights, there are socio-economic rights enshrined in the Bill of Rights that must be respected, protected, promoted and fulfilled by the State.<sup>12</sup> As the demographics above show regarding the lack of water supply and poor sanitation facilities, school children are exposed to severe degrading circumstances and in some cases there has been loss of life. This raises questions about the level of compliance by the State with its obligations to protect and fulfil socio-economic rights in general.

The primary sources of socio-economic rights both at an international and national level, namely, the ICESCR and the Bill of Rights respectively, have no explicit reference to a right to sanitation within their provisions. As a result, the right to sanitation must be recognised through the interpretation of other socio-economic rights which include the right to water and basic education, for example.

However, except for the right to basic education, the textual formulation of other socio-economic rights, and more specifically the right to water, are characterized by internal limitation clauses such as 'progressive realisation', 'available resources' and 'legislative and other measures'. This difference in textual formulation gives rise to difficulties in ascertaining

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<sup>7</sup> *Komape and others v Minister of Basic Education* (1416/2015) [2018] ZALMPPHC 18 (23 April 2018) para.2 ( "Komape" ).

<sup>8</sup> See Open Letter By Section 27 to President Cyril Rhamaphosa, dated 07 September 2018, Annexure B of the Report compiled by Section 27: *Towards Safe and Decent School Sanitation in Limpopo: The Most Fundamental of Dignities*, highlighting injuries or deaths of young children as a result of unsafe sanitation facilities.

<sup>9</sup> *Constitution of the Republic of South Africa*, Act 108 of 1996. (hereinafter cited as the Constitution)

<sup>10</sup> Section 10 of the *Constitution*.

<sup>11</sup> Section 11 of the *Constitution*.

<sup>12</sup> Section 7 of the *Constitution*.

the exact nature of the content of positive obligations imposed on the State to realise the right to sanitation.

This research paper endeavors to investigate the nature of the national government's legal obligation to provide sanitation in schools, and provides clarity on how the difference in textual formulation of the right to water versus the right to basic education impacts on the realisation of the right to sanitation.

### **1.3 Research Objectives**

The study aims to:

- Investigate the nature and content of the legal obligations of the South African government in relation to providing sanitation in schools;
- Identify the factors and indicators that have resulted in the inequitable access to sanitation in general and more specifically in rural schools, in South Africa;
- Establish the legal basis for the right to sanitation within the international, regional and domestic human rights frameworks;
- Establish the nature of the relationship between sanitation and other socio-economic rights;
- Determine how the textual formulation of the right to water versus the right to basic education impacts on the core obligation to realise the right to sanitation; and
- Establish whether a minimum core obligation applies to the right to basic education

### **1.4 Research Questions**

The main question of this study will be:

What is the nature of the core legal obligation for the South African government to provide sanitation in schools? From the main research question, the following subsidiary research questions are formulated:

1. Is there a legal basis for the recognition of a right to sanitation within the international, regional and domestic human rights frameworks?
2. What is the nature of the relationship between the right to sanitation and other socio-economic rights, especially the right to water?
3. What is the nature of the core obligations arising from the right to water and the right to basic education?

4. More specifically, what impact does the implicit recognition of the right to sanitation when interpreted in terms of the right to water versus the right to basic education have on the core obligations to provide sanitation in schools?

### **1.5 Scope of the Study**

The research paper merely focuses on the right to sanitation and South Africa's obligation to ensure the realisation of this right in relation to basic education.

### **1.6 Research Methodology**

This research paper is a desktop study of international, regional and national legal framework documents in order to determine South Africa's legal obligation to ensure the realisation of the right to sanitation in schools. It also comprises a review of academic scholarship and South African jurisprudence on the legal obligations to promote, protect and realise the right to sanitation.

### **1.7 Literature Review**

The lack of access to adequate sanitation in rural communities and adequate sanitation infrastructure in rural schools reflects the entrenched legacy of apartheid. Simbo<sup>13</sup> correctly identifies that racial inequalities exist in the education system which is unequal at both the social and economic levels where blacks are mostly subjected to inferior learning environments and inferior Bantu Education through the lack of adequate infrastructure or qualified teachers. The lack of development in rural communities is a feature that characterized the apartheid town planning schemes which resulted in former white areas benefitting from, inter alia, household sanitation systems and rural communities having to resort to mud pit toilets or undignified open defecation. Ndida<sup>14</sup> et al analysed the distribution of sanitation in South Africa by race and province with a view to examining the equality of access to sanitation. Their findings show that the apartheid legacy remains deeply entrenched in the spatial design of cities and towns with formerly white-only areas having the best infrastructure and formerly black areas having the least and poorest services. They argue that such factors and indicators need to be taken into account in designing interventions to address sanitation. Further factors that entrench this

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<sup>13</sup> Simbo C 'The Right to Basic Education, The South African Constitution and the Juma Masjid case: An Unqualified Human Right and a Minimum Core Standard' (2013) 17 (1) *Law Democracy and Development* 477.

<sup>14</sup> Ndida et al. 'Equality of access to sanitation in South Africa' (2013) *Africanus* 43(1) 96.

legacy are economic inequality where households or schools cannot afford to install adequate sanitation infrastructure or do not have the skills or the technical knowledge to do so. Phaswana-Mafuya<sup>15</sup> acknowledged that rural sanitation is a complex challenge, and in her qualitative study investigating sanitation problems that beset rural communities, she identified that these challenges included structural, economic, educational, social and technical issues that needed to be factored in when devising solutions.

The socio-economic disparities in access to sanitation and education between the urban and rural households and schools are not reflective of the constitutional values and the right to equality that ensure that everyone is equal before the law and which entail the full and equal enjoyment of all socio-economic rights.<sup>16</sup>

Michelman and Liebenberg suggest that in understanding socio-economic rights, justice has a major role to play. They see the value of equality as the ability of people to participate as equals in all spheres of South African political and economic life. In this way, they believe, equality has a role to play in improving social policy and socio-economic jurisprudence in a more egalitarian direction.<sup>17</sup> In other words, when people participate meaningfully, on an equal basis, in the country's political decision-making and law-making processes, the distribution of socio-economic benefits for all—including the disadvantaged—will be strengthened. It will be argued that with significant levels of poverty and with high-quality education among the rich, it is pretty naive to expect fair participation. As Phaswana-Mafuya noted, the problem is more complex and structural.

In a rural community which is characterized by culturally defined roles for men and women, regard must be had to a concept of equality that recognises the challenges faced by women and young girls. For example, it is generally the role of women to collect water, perform household chores and remain away from school during menstruation cycles – an undignified compromise of her right to education. Fredman<sup>18</sup> claims that in this respect fair treatment of women and men will not achieve significant equality. Instead, there should be an engendering of socio-economic rights by which they are infused with substantial gender equality in order to attain a

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<sup>15</sup> Phaswana-Mafuya N 'An Investigation into the perceived sanitation challenges in the Eastern Cape rural communities' (2006) 11(1) *Health SA Gesondheid* 18.

<sup>16</sup> Sections 9(1) and (2) of the *Constitution*.

<sup>17</sup> Michelman F & Liebenberg S 'Toward an Equality-Promoting Interpretation of Socio-Economic Rights in South Africa: Insights from the Egalitarian Liberal Tradition' (2015) 132 *The South African Law Journal* 437.

<sup>18</sup> Fredman S 'Engendering socio-economic rights' (2009) 25 *South African Journal on Human Rights* 419.

richer and more effective way of achieving equality and socio-economic rights. Skelton adds further that in the case of young girls, special attention must be given in such a way that they are not excluded from the class of girls.<sup>19</sup>

Therefore, the challenge is not whether to provide access to sanitation equally, or even in a gender-specific way. Rather, it is understanding the legal basis of sanitation, its relationship to other human rights, such as, a clean environment and water, and thereafter establishing the positive obligations of government to do so in the absence of an explicit right to sanitation in the Constitution.

Sanitation has commonly been associated with the right to water, but there has been growing authority that sanitation has distinct water characteristics that dispel some concerns about its legitimacy as a single basic right or its constitutional protection. In this regard, Obani and Gupta recognized this fact of distinct characteristics, and noted that while sanitation is equally crucial to water quality and that it may make sense from an environmental point of view to combine the two, there is a fundamental social, economic and technological difference between access to water and access to sanitation.<sup>20</sup>

Kamga<sup>21</sup> argued that the right to basic sanitation is in need of constitutional guarantee in Africa to ensure its respect, protection, promotion and fulfilment. This argument is not entirely correct. Equal protection of a right can be achieved by its implicit recognition through other interrelated human rights.

Kidd<sup>22</sup> argues that the section 24 meaning of the right to an environment that is not harmful to health or well-being has a wider meaning that 'would not unacceptably limit the right.' Therefore, sanitation can receive equal, albeit implicit, protection in section 24 of the Constitution.

Feris<sup>23</sup> agrees that a correct interpretation of this right to a clean environment will encapsulate the recognition of the right to water and sanitation as components of a clean environment that

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<sup>19</sup> Skelton A 'Girl's Socio-Economic Rights in South Africa' (2010) 26 *South African Journal on Human Rights* 441 163.

<sup>20</sup> Obani P and Gupta J 'The Evolution of the Right to Water and Sanitation: Differentiating the Implications' (2015) 24(1) *Review of the European Community & International Environmental Law* 38.

<sup>21</sup> Kamga SD 'The Human Right to Basic Sanitation: A Human Right in Need of Constitutional Guarantee in Africa' (2013) 29 *South African Journal of Human Rights* 615.

<sup>22</sup> Kidd M 'Environment' in Currie I and De Waal J *The Bill of Rights Handbook* 6th ed (2017) 519.

<sup>23</sup> Feris L 'Constitutional Environmental Law: An Under-Utilized Right' (2008) 24 *South African Journal of Human Rights* 28.

is not harmful to health or well-being. In addition, Feris and Ellis<sup>24</sup> highlight that the right to sanitation is a right distinct from the right to water, and should be recognized separately in the human rights framework.

Pertaining to the obligation to fulfil the human right to sanitation, recognition must be given to the fact that some of the socio-economic rights are of immediate application whereas others are progressively realised within the State's available resources. In this regard, Liebenberg<sup>25</sup> correctly explains that the South African Bill of Rights follow a threefold drafting style: first, being a set of qualified rights (housing, health care services, food and water, and social security). These qualified rights are characterized by a duty on the State to 'take reasonable legislative and other measures', 'within available resources', 'to achieve progressive realisation'. Secondly, sections 26 (right to housing) and 27 (right to water) contain a further formulation that has language that prohibits certain conduct or legislation. Thirdly, those rights that impose an unqualified duty on the State.

One such example of an unqualified obligation is section 29(1) (a) which gives everyone the right to basic education, including adult basic education. This means that the State must fulfil this right immediately subject only to the limitation clause found in section 36 of the Constitution.

Simbo has previously contended that by virtue of the Constitutional Court's<sup>26</sup> recognition of the unqualified nature of section 29(1) (a), this right should impose a minimum core obligation.<sup>27</sup> However, Simbo's analysis was made prior to the ratification of the *ICESCR*; therefore an argument advanced by this research paper seeks to provide a post-ratification analysis and contends that the positive obligations under section 29(1) (a) gives rise to immediate obligations, and further that basic education is a minimum core of the right to education. It bears mention that the Constitutional Court did not outrightly reject the minimum core but held that where sufficient information exists, it shall be considered. Therefore, it is contended that the ratification of the *ICESCR* and the promulgation of the *Minimum Norms and Standards* indicate that the right to basic education is capable of being articulated with

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<sup>24</sup> Feris L and Ellis K 'The Right to Sanitation: Time to Delink from the Right to Water' (2014) 36(3) *Human Rights Quarterly* 607.

<sup>25</sup> Liebenberg S 'Judicially Enforceable Socio-Economic Rights in South Africa: Between Light and Shadow' (2014) 37 *Dublin University Law Journal* 145.

<sup>26</sup> *Juma Masjid Primary School and others v Essay NO and others* 2011 (8) BCLR 761 (CC).

<sup>27</sup> Simbo C 'The Right to Basic Education, The South African Constitution and the Juma Masjid case: An Unqualified Human Right and a Minimum Core Standard' (2013) 17(1) *Law Democracy and Development* 478.

sufficient clarity in terms of its minimum essential features. It can also be advanced that the jurisprudence at that time was still resistant to apply a minimum core.

### **1.8 Significance of the Study**

To date the highest court of the land has not adjudicated on the normative content of the right to basic education and has consistently applied the reasonableness standard when interpreting the positive obligations of the State in respect of socio-economic rights. This study will guide future litigants who want to pursue the right to sanitation in schools to avoid using the right to water - which is a qualified right - but rather to use the right to basic education, and argues that the recent ratification of the *ICESCR* and the *Minimum Norms and Standards* provides a sufficient basis for an immediate obligation to apply the minimum core to the right to basic education. Therefore, the study contributes to the reform of the current jurisprudence of the right to basic education to conform to the international obligations.

### **1.9 Chapter Outline**

In addition to this chapter there are a further five chapters.

**Chapter 2** provides an overview of the socio-economic inequalities, especially the lack of adequate sanitation facilities in schools. It also aims to explain the contributing factors that have caused or enabled such inequalities, such as, apartheid spatial planning, racial discrimination and geographical marginalisation.

**Chapter 3** provides the framework section that considers the legal basis of the right to sanitation. It broadly traces the emergence of sanitation through an analysis of international and regional framework documents, such as treaties, declarations and general comments, as well as South African domestic law and policies. The chapter also discusses the relationship between sanitation and other human rights and its ultimate evolution to being recognised as a basic human right.

**Chapter 4** considers South Africa's international and national obligations for the realisation of the right to sanitation. The chapter further aims to critically analyse how the textual formulation of the provisions for socio-economic rights impact on the positive obligations of the State and the applicability of the minimum core content obligation in respect of the right to basic education. South African jurisprudence is used to facilitate and contextualise the discussion.

**Chapter 5** considers the impact of interpreting the implicit right to sanitation under the qualified right to water versus the unqualified right to basic education. The aim is to juxtapose the difference in positive obligations that will ensure the realisation of the right to sanitation in the most expedient manner especially where it is needed the most – in rural schools.

**Chapter 6** concludes the study by showing that sanitation has a legal basis within the human rights framework, and is interrelated with, but distinct from, other socio-economic rights. It further concludes that the South African government has an obligation to provide sanitation, and that this can be achieved either under the right to water or the right to basic education. It recommends that public interest agents or human right institutions investigate the impact of the ICESCR ratification when adjudicating the right to basic education with a view to reforming the jurisprudence on government's legal obligations.



## CHAPTER 2: SANITATION: AN OVERVIEW

### 2.1 Introduction: Sanitation Inequalities and South African Rural Schools

It is widely accepted that some of the major injustices of apartheid are evident in the systemic disparities between racial groups combined with unequal access to socio-economic rights and privileges in the South African context. The lack of quality education and infrastructure with limited or no access to adequate sanitation facilities in rural areas or townships as opposed to developed urban areas are some notable remnants of this system.

Any observing person may note this difference and conclude in particular that the provision of education and sanitation services in South Africa is both ethnically and provincially unjust.

Ndida<sup>28</sup> *et al* came to a similar conclusion when they investigated the disparities of race and province regarding access to sanitation in South Africa. Their findings indicate that the legacy of segregation remains deeply embedded in the spatial layout of cities and towns with formerly white-only areas with the best infrastructure and formerly black areas with the least and worst services, and more importantly that rural areas struggle the most as regards sanitation equality. This group exclusion from access to sanitation reflects systemic and structured patterns of discrimination and marginalization under apartheid, according to Winkler.<sup>29</sup>

However, the demographics outlined in the above chapter show that rural communities and schools are still underdeveloped with significant populations having no reliable access to water and sanitation.

In the South African context, Phaswana-Mafuya's empirical study exploring sanitation issues affecting Eastern Cape rural communities identified some of the structural impediments to the development of sanitation, including insufficient water supplies, poor water and other domestic waste disposal facilities, inadequate toilet facilities and hand-washing facilities which are the most challenging to deal with, let alone overcome, as they require the availability of resources.<sup>30</sup>

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<sup>28</sup> Ndida *et al*. 'Equality of access to sanitation in South Africa' (2013) 43(1) *Africanus* 98.

<sup>29</sup> Winkler IT 'The Human Right to Sanitation' (2016) 37(4) *U.Pa. Journal of International law* 1340.

<sup>30</sup> Phaswana-Mafuya N 'An Investigation into the perceived sanitation challenges in the Eastern Cape rural communities' (2006) 11(1) *Health SA Gesondheid* 19.

South Africa has adopted the *NDP*, the national long-term strategy for socio-economic development, in its efforts to prevent socio-economic inequalities.<sup>31</sup>

The *NDP's* 2030 vision is focused on providing a minimum standard of living that can be gradually realized through collaborative support from all social partners, such as, individuals' civic organizations, private industry, and government. Even though the *NDP* does not provide a description of what a universal standard of living implies, it is expected to provide a framework for civil society adoption. In this context, the factors of decent living standards include: a cleaner environment; water; sanitation; and, amongst other things, quality education.<sup>32</sup>

Furthermore, the Department of Basic Education claims to have replaced 50 obsolete and dangerous schools with newly-built schools for the financial year 2018/2019 and to have provided 325 schools with water and 286 schools with sanitation.<sup>33</sup>

Government initiatives have proven inadequate to resolve the harsh conditions in rural schools where children lose their lives by falling into pit toilets, and when young girls are subjected to sexual abuse every time they are compelled to go out into the fields just to relieve themselves.

The primary objective of this research is to investigate the precise nature of the responsibilities arising from the right to sanitation by critically examining and addressing the following key question: What is the meaning of the South African government's core legal obligation to provide sanitation in schools?

The secondary issues that will promote the debate are: Is there a legal basis under the international and domestic human rights systems for the right to sanitation? If it is the latter, is this right, particularly the right to water, different from other human rights? What are the material differences in the nature of the obligations arising from the interpretation of the right to water sanitation as opposed to the right to basic education? Is there a minimum core obligation resulting from the right to basic education?

With the section on the legal framework, the next chapter is intended to establish the legal basis for the right to sanitation.

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<sup>31</sup> Department of The Presidency *Our Future -Make it Work, National Development Plan 2030*, Executive Summary (2012).

<sup>32</sup> Department of The Presidency *Our Future -Make it Work, National Development Plan 2030*, Executive Summary (2012) 28.

<sup>33</sup> Department of Basic Education: *Annual Performance Plan 2018/2019* 20-21.



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## CHAPTER 3: LEGAL FRAMEWORK: THE LEGAL BASIS OF THE RIGHT TO SANITATION

### 3.1 Introduction: Is Sanitation an Inter-related or Distinct Human Right?

This section of the chapter will primarily highlight the importance of sanitation and focus on its relationship to the human right to water and basic education more specifically, by examining the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*<sup>34</sup>, *Convention on the Rights of the Child (CRC)*<sup>35</sup>; *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*<sup>36</sup>; and the *African Charter on the Rights and Welfare of the Child (ACRWC)*<sup>37</sup>. Relevant international water law and international environmental law (soft law) instruments (Declarations, Resolutions, General Comments and Reports) will be used to facilitate the discussion.

### 3.2 International and Regional Law

#### 3.2.1 Relationship between Sanitation and Water

The systematic advancement of the right to water and sanitation can be identified in several legally binding human rights international instruments and non-binding (soft law) international environmental law reports.

At the international level, the primary source of socio-economic rights is the *ICESCR* and as such is legally binding on signing and ratifying countries. Article 11(1) of the *ICESCR* guarantees the right of everyone to sufficient living standards for themselves and their families, including adequate food, clothing and accommodation, and the continuous improvement of living conditions.

The *ICESCR* does not include a specific right to water and the *CESCR* read in the right to water as an element of the right to an adequate standard of living by virtue of the *ICESCR*'s interpretative mandate on socio-economic rights. In establishing the normative quality of this

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<sup>34</sup> International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) (1966). (hereinafter referenced as *ICESCR*).

<sup>35</sup> Convention on the Rights of the Child, 1989 General Assembly Resolution 44/25 (1989). (hereinafter referenced as *CRC*).

<sup>36</sup> Convention on the Elimination against All Forms of Discrimination against Women, 1979 United Nations General Assembly Resolution 34/180 (1979) (hereinafter referenced as *CEDAW*).

<sup>37</sup> Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child* CAB/LEG/24.9/49 (1990) (hereinafter referenced as *ACRWC*).

right, the *CESCR* acknowledged personal hygiene and sanitation as variables determining the adequacy of water supply.<sup>38</sup> Nelson and Murray acknowledged that in improving living conditions, sanitation plays a critical role. The authors concluded that a full sanitation system, in addition to protecting human health and the environment, can help meet the objectives of economic development, water and food security.<sup>39</sup>

With regard to women's perceptions of lack of water and sanitation, Michelman and Liebenberg concluded that this burden is exacerbated if public services such as water supply are insufficient, as it is women who have to walk long distances to collect water and try to clean, cook and maintain hygiene.<sup>40</sup>

Against the backdrop of discrimination against women, *CEDAW*, ratified by South Africa in 1995, was adopted to reform these conventional, discriminatory practices and to put greater emphasis on gender equality.

Article 14(2) (h) states that the State shall take all appropriate measures to eradicate discrimination against rural women and shall ensure that these women have the right to enjoy adequate living conditions, in particular with regard to accommodation, sanitation, electricity and water supply. This provision is significant for these reasons: it seeks primarily to improve the living conditions of women free from all forms of discrimination; provides for gender equality as a means of achieving substantive equality between men and women; and furthermore, acknowledges that water and sanitation are components of the right to an acceptable standard of living.

According to Freeman, in order to achieve real change, socio-economic rights and equality need to function synergistically, meaning that the rights themselves need to be restructured taking into account the importance of the voice and agency of women, and the value of dignity, in particular the prevention of violence, stigma and harassment.<sup>41</sup> Rombo et al, on the other hand, introduce a holistic approach to addressing water and sanitation inequality in order to achieve the same goal for women's equality. The authors' central argument is that a gender-neutral language of human rights can explicitly miss key issues faced by women and girls

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<sup>38</sup> *UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant) (2003) E/C.12/2002/11* par.12.

<sup>39</sup> Nelson KL & Murray A 'Sanitation for unserved populations: technologies, implementation challenges, and opportunities' (2008) 33 *Annual Review of Environment and Resources* 121.

<sup>40</sup> Michelman F & Liebenberg S 'Toward an equality-promoting interpretation of socio-economic rights in South Africa: insights from the egalitarian liberal tradition' (2015) 132(2) *South African Law Journal* 432.

<sup>41</sup> Fredman S 'Engendering Socio-Economic Rights' (2009) 25 *South African Journal on Human Rights* 426.

especially where they are exposed to health risks and gender-based violence without clean water.<sup>42</sup> *CEDAW* is therefore a fitting example of attempts toward achieving substantive gender equality.

The *CRC* grants the right to clean drinking water as part of the right of the child to an adequate living standard. Water has other critical uses, however, such as, for sanitation and for personal hygiene during menstrual cycles in the case of girls.

Hall et al, for its limited reference to water, also criticized the *CRC*. They claimed that while the *CRC* does not apply to a specific geographical environment, if the rights are regarded in a rural and peri-urban sense, there is strong case for the right to water operationalization by providing water to grow crops and vegetables, raise poultry and livestock, etc.<sup>43</sup>

The ACRWC does not have a right to water on its own. Article 14(2)(c) follows a wording similar to that of the *CRC* as it recognizes water only for drinking purposes, the only difference being that it falls within the right to adequate health. Nonetheless, poor sanitation and poor quality drinking water have been reported to have an impact on health among those who come into contact with polluted sources.<sup>44</sup>

Reference to water in international water law and international environmental (soft law) documents can also be found outside the human rights framework.

Following four groundbreaking international conference resolutions and statements, the global water and sanitation discourse began to change dramatically. These were relevant for the following reasons: the *Mar del Plata Action Plan* stipulated that everyone was entitled to a sufficient quantity and quality of drinking water<sup>45</sup>; Principle 4 of the *Dublin Declaration* stipulates that it is important, first of all, to accept the fundamental right of all human beings to access clean water and sanitation at an affordable price<sup>46</sup>; Principle 4 of the *Rio Declaration on Environment and Development* stipulates that the protection of the environment is an integral part of the sustainable development process;

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<sup>42</sup> Rombo OD *et al.* 'Water and Sanitation in East Africa: Perspectives from Africana Feminism' (2017) 10(5) *Africology: The Journal of pan African Studies* 195.

<sup>43</sup> Hall RP *et al.* 'The Human Right to Water: The Importance of domestic and productive water rights' (2014) 20 *Science Engineering Ethics* 853.

<sup>44</sup> Bain *et al.* 'Global assessment of exposure to faecal contamination through drinking water based on a systematic review' (2014) 19(8) *Tropical Medicine and International Health* 922.

<sup>45</sup> United Nations Water Conference *Community Water Supply*, Mar del Plata Conference held in Argentina (UN Doc. E/CONF.70/29).

<sup>46</sup> World Meteorological Organization *International conference on water and the environment: development issues for the 21st century* (26-31 January 1992, Dublin, Ireland) 26-3.

and Principle 2 of *Program of Action* that recognised water and sanitation as rights as components of an adequate standard of living.<sup>47</sup>

Furthermore, Bulto argued that the greatest handicap of declarations, values, laws, and action plans is the fact that they remain policy statements, and do not immediately lead to the beneficiaries' contractual entitlements or State duties that are justifiable.<sup>48</sup>

*General Comment No.15*<sup>49</sup> both the draft and the final versions, was criticized for not providing much-needed guidance on sanitation. The former Special Rapporteur, M. Kathari, postulated that without reference to clean water and sanitation, the gradual improvement of living cannot be achieved.<sup>50</sup>

According to Cahill's analysis, sanitation has not been adequately addressed and there have been inconsistencies between the core content of the right to water in that it does not include sanitation, yet the core responsibilities actually refer to sanitation. The author argued in this regard that, notably, the context and quality of the right to water remains unclear and needs clarification. She specifically claims that sanitation is central to the right to water, a basic component without which in fact the right to water cannot be fully implemented.<sup>51</sup> Cahill suggested a clear and specific codification of the right to water and sanitation, alternatively drawing up and implementing a separate general comment to clarify the right to adequate sanitation.<sup>52</sup>

Nevertheless, Winkler took a rather objective view and noted that although it only addresses the issue of sanitation to a very limited extent, it has proved to give a strong impetus to further discussions on sanitation as a human right.<sup>53</sup>

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<sup>47</sup> UN Population Fund (UNFPA) *Report of the International Conference on Population and Development* (5-13 September 1994, Cairo).

<sup>48</sup> Bulto TS 'The emergence of the human right to water in international human rights law: Invention or Discovery' (2011) 12 (11) *Melbourne Journal of International Law* 310.

<sup>49</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)* (2003) E/C.12/2002/11 par.3.

<sup>50</sup> Special Rapporteur, M. Kathari, on the Right to Housing, *Day of General Discussion on the Draft General Comment on the Right to Water*, UN ESCR 29<sup>th</sup> Session, 22 Nov. Geneva.

<sup>51</sup> Cahill A 'The human right to water—a right of unique status': The legal status and normative content of the right to water' (2005) 9(3) *International Journal of Human Rights* 405.

<sup>52</sup> Cahill A 'The human right to water—a right of unique status': The legal status and normative content of the right to water' (2005) 9(3) *International Journal of Human Rights* 403.

<sup>53</sup> Winkler IT 'The Human Right to Sanitation' (2016) 37(4) *U.Pa. Journal of International law* 1355.

Further soft law developments following *General Comment No.15* include the report by Catarina de Albuquerque to the Human Rights Council which contain the following concluding remarks and recommendations.

International human rights legislation requires States to ensure access to sanitation that is clean, hygienic, accessible, affordable, socially and culturally acceptable, provides confidentiality and protects dignity in a non-discriminatory manner. Even so, only looking at sanitation through the prism of other human rights does not do justice to its special nature and value in living a dignified life.<sup>54</sup>

In the absence of a separate General Comment on sanitation, this document was the first to express thoroughly and accurately the characteristics and differentiation of the State's obligation to provide sanitation, and ancillary obligations under international law.

The UN General Assembly Resolution adopted in 2010 formally declared that the right to safe and clean water and sanitation should be recognised as a human right that is necessary for the full enjoyment of life and all human rights.<sup>55</sup>

In reaffirming this landmark Resolution, the Human Rights Council adopted its own Resolution defining the legal basis for sanitation as a distinct human right with legally binding force against State Parties under international law. This resolution explained the fundamental elements of both water and sanitation rights in accordance with the principles of human rights, and that the right to safe drinking water entitle everyone to be provided with appropriate, and reasonable, physically accessible water for personal and domestic use without discrimination. And that the human right to sanitation entitles everyone to access sanitation in all spheres of life, without prejudice, physically and affordably.<sup>56</sup>

Although resolutions may be non-binding proclamations of a State's political commitments, the fact that these two have been adopted by the two highest international bodies implies the unanimous acknowledgement of the appreciation and affirmation of a global opinion on an agreed definition of the nature of the right to water and sanitation.

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<sup>54</sup> United Nations Human Rights Council Report *of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation* A/HRC/12/24, par.81.

<sup>55</sup> United Nations General Assembly *The Human Right to Water and Sanitation* A/RES/64/292 (2010) par.1.

<sup>56</sup>United Nations Human Rights Council *Human rights and access to safe drinking water and sanitation* HRC/RES/15/9.

In this regard, Bulto concurs that these statements and resolutions undergo a cycle of hardening and developing into binding laws, and even play a catalytic role in the development of international law, which is binding ergo omnes.<sup>57</sup>

Cavallo argued that UN resolutions represent the very life of an international rule's *opinio juris* and may shape foreign beliefs or at least be proof of a new customary rule in nascent status. He explained that *UNGA64/292* is a good example of a resolution conveying a wide-ranging legal conviction in regard to an individual's right to water and sanitation access.<sup>58</sup>

Subsequently, the *CESCR* adopted the Declaration on the *Right to Sanitation*, reaffirming that sanitation has distinct characteristics that warrant its treatment separately from water, and extending the right to sanitation requires full recognition by State Parties in accordance with the principles of human rights.<sup>59</sup>

Furthermore, the General Assembly adopted the *2030 Agenda for Sustainable Development* and successfully converted the achievement of the right to adequate water supply and sufficient sanitation into one of the 17 Millennium Development Goals for *Sustainable Development-Goals 6*, ensuring that water and sanitation are accessible and sustainable for all.<sup>60</sup>

### **3.2.2 Relationship between Sanitation and Basic Education**

The right to education is clearly outlined in the normative framework documents, with a pledge to protect, promote and fulfil this right, both at international and regional levels. Moreover, the figures from the (*WHO / UNICEF, 2018*) Report paint a dire picture of children's plight in schools facing extreme levels of insufficient water supply, sanitation and menstrual hygiene.

Articles 13(1) and (2) of the *ICESCR* provide for the right of all to education, at all levels and in all its forms, in order to develop full personality and dignity, and to reinforce human rights and freedom. In general, Article 13(2) (a) specifies that primary education is compulsory and free for all.

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<sup>57</sup> Bulto TS 'The emergence of the human right to water in international human rights law: Invention or Discovery' (2011) 12 (11) *Melbourne Journal of International Law* 310.

<sup>58</sup> Cavallo AG 'The Human Right to Water and Sanitation: From Political Commitments to Customary Rule?' (2012) (3)5 *Pace International Law Review Online Companion* 190.

<sup>59</sup> United Nations Committee on Economic, Social and Cultural Rights, *Statement on the Right to Sanitation*, E/C.12/2010/1 pp.7-8.

<sup>60</sup> United Nations General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1 (2015) pp.14.

The *CRC* further specifically states in Article 28(1) (a) that primary education shall be made compulsory and free for everyone. With regard to women's rights, Article 10 of *CEDAW* acknowledges the socio-economic rights inequities faced by women and focuses on reducing discrimination against women and ensuring equal rights with men in education.

In a regional sense, especially Africa, which is largely characterized by underdevelopment and extreme poverty in most rural areas, *ACRWC* Article 11(2) (g-h) provides for the right to education for every child, including education in respect of the environment and primary health care.

Even though the right to education is granted, these resources do not disclose its normative content. The *CESCR* released *General Comment No. 13* on the normative nature of this right, to provide opinions and interpretation. According to Kalantry et al, General Comments are valuable and relevant as they serve a significant jurisprudential function in relation to the meaning of rights and duties in the *ICESCR* or any other instrument or treaty, and provide guidance and explicit language for effective implementation of and compliance with treaty standards.<sup>61</sup> The *CESCR* recognized sanitation facilities as one of the components of the four essential elements of the right to education common to all forms of education (availability, accessibility acceptability, and adaptability).<sup>62</sup>

There are two important, non-binding international agreements promoting the protection and fulfilment of the right to education. The first are Sustainable Development Goals 4 and 6 (SDG4 & SDG6 respectively) establishing interrelated and indivisible global goals and objectives for achieving sustainable development by 2030.

**Goal 4a:** seeks to build and upgrade child disability and gender sensitive educational facilities and provide safe, non-violent, inclusive and productive learning environments for all.

**Goal 6:** seek to achieve sufficient and equal sanitation for all and end open defecation.<sup>63</sup>

The second is the *Action Plan for Education 2030* which strives to incorporate *SDG4*, and *SDG4a* in particular. The framework indicates that the absence of private toilets, lack of access

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<sup>61</sup> Sital K *et al.* 'Enhancing Enforcement of Economic, Social, and Cultural Rights Using Indicators: Focus on the Right to Education in the *ICESCR*' (2010) 32(2) *Human Rights Quarterly* 267.

<sup>62</sup> UN Committee on Economic, Social and Cultural Rights (*CESCR*) *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)* (1999) E/C.12/1999/10 par.6.

<sup>63</sup> United Nations General Assembly *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1(2015) pp.14.

to sanitary pads, and the hygiene-related stigma when girls start menstruating, can harm their education, increase their level of absenteeism, and reduce their educational performance.<sup>64</sup>

Coinciding with these effects on children, Adams et al argued that boys and girls are likely to be affected by insufficient food, sanitation and hygiene conditions in schools in different ways because the absence of sanitary facilities ensures that girls cannot attend school during menstruation.<sup>65</sup>

To effectively implement these treaty rights and international obligations, States will be bound by them. South Africa has ratified all of the above treaties and has established a legal framework to protect the right to education.

### **3.3 South African Law**

#### **3.3.1 Introduction**

The Constitution is commonly known and accepted as the country's highest rule of law. The Bill of Rights collectively comprises a set of civil and political rights as well as socio-economic rights. It has been said that the language of socio-economic rights within the Bill of Rights represents the interdependence and indivisibility of these rights with other rights on an equal level.<sup>66</sup>

The Bill of Rights enshrines the right of all people in our country and affirms the democratic values of human dignity, equality and freedom, but there is no explicit provision for the right to sanitation. Nevertheless, the Constitution, numerous authorities and decisions of the Court have established clauses that explicitly relate to the right to basic sanitation.

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<sup>64</sup> UNESCO SDG4-Education 2030 *Incheon Declaration (ID) and Framework for Action*. For the Implementation of Sustainable Development Goal 4, Ensure Inclusive and Equitable Quality Education and Promote Lifelong Learning Opportunities for All, (2015) ED-2016/WS/28.

<sup>65</sup> Adams J *et al*. *Water, Sanitation and Hygiene Standards for Schools in Low-cost Settings* (2016) 5.

<sup>66</sup> Heyns C & Brand D 'Introduction to Socio-Economic Rights in the South African Constitution' (1998) 2(2) *Law Democracy and Development* 157.

### 3.3.2 Relationship between Sanitation and Water

The Department of Education aims at replacing 50 schools with unsafe buildings, providing water supply in 325 schools and installing sanitation in 286 for the financial year 2018/2019<sup>67</sup>

In the domestic legal and policy system, the right to water and sanitation has been implemented. Section 27(1) (b) of the Constitution provides for the right of access to adequate water for everyone. To give effect to this right in addition to the right to water, the Water Services Act<sup>68</sup> is the only statute specifically providing for a right to basic sanitation. Section 3(1) of this Act states that everyone shall have the right to access a basic water supply and basic sanitation.

The *National Water Act*<sup>69</sup> clearly states that it does not provide expressly for the right to sanitation, but its main objective is to ensure that water resources are preserved in order to meet human needs and to encourage the effective, safe and beneficial use of water by the public. Tissington contends that access to adequate sanitation is vital for personal dignity and security, social and psychological well-being, public health, gender equality, and environmental sustainability.<sup>70</sup>

Pollution of water sources and environmental degradation is one of the associated effects of lack of water and sanitation. According to Anderson and Minoia, inadequate sanitation is associated with the spread of diseases that are harmful to health, and effects social and environmental degradation.<sup>71</sup>

The interrelationship between the right to a clean environment and the right to sanitation was also expressed by Feris. The author points out the interrelationship between the right to sanitation and other socio-economic rights.

For example, in *Beja v Premier*, Erasmus J decided a case where the local government had provided toilets that were open to the public and freeway in full view. After Mrs Beja was attacked and stabbed at these toilets, the matter was brought to court. The Court held that the

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<sup>67</sup> Department of Basic Education *Annual Performance Plan* (2018) 66.

<sup>68</sup> Section 1 of the *Water Services Act*, No. 108 of 1997 defines 'basic sanitation' as "the prescribed minimum standard of services necessary for the safe, hygienic, and adequate collection, removal, disposal or purification of human excreta, domestic waste-water and sewage from households, including informal households."

<sup>69</sup> Sections 2(a) and (d) of the *National Water Act* 36 of 1998.

<sup>70</sup> Tissington K 2011 *Basic Sanitation in South Africa: A Guide to Legislation, Policy and Practice*. *Socio-Economic Rights Institute of South Africa*, pp.13.

<sup>71</sup> Andersson M & Minoia P 'Ecological sanitation: a sustainable goal with local choices. A case study from Taita Hills, Kenya' (2017) 36(2) *African Geographical Review* 183.

provision of toilets without enclosure infringed the rights to dignity, the security environment, the right to water and the right to life.<sup>72</sup>

The *NEMA*<sup>73</sup>, as amended, affirms the right of everyone to an environment that is not harmful to health or well-being<sup>74</sup> and puts measures in place for the protection of the environment from pollution and ecological degradation.

Section 1 of *NEMA* defines “pollution” to include “any change in the environment caused by any substance odours emitted from any activity including the treatment of waste”.

National government is currently developing a Water and Sanitation Bill – a merging of the Water Services Act and the National Water Act - planned for the 2018/19 medium term to be submitted to Cabinet for approval and introduced in Parliament for enactment and developing regulations.<sup>75</sup>

Sanitation has also been recognised extensively at a policy level. These include the *White Paper on Water Supply and Sanitation*<sup>76</sup>, the *White Paper on a National Water Policy of South Africa*<sup>77</sup>, the *White Paper on Basic Household Sanitation*.<sup>78</sup> The *Strategic Framework for Water Services*<sup>79</sup> was adopted to facilitate and guide the implementation of these policies.

A critical argument against the provision of municipal sanitation has been raised. The central point of the argument was that there is confusion about access to sanitation services at the municipal level, and the current policy does not provide guidance on interpreting sanitation as a human right.

Special attention was paid to the *Free Basic Sanitation Strategy*. Tissington expressed concern that it is troubling that the most disadvantaged and oppressed in society are not enjoying access

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<sup>72</sup> *Beja and Others v Premier of Western Cape* at par.192.

<sup>73</sup> National Environmental Management Act 107 of 1998.

<sup>74</sup> Section 24(a) of the Constitution provides that “everyone has the right to an environment that is not harmful to their health or well-being...” and (b)(i) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation.”

<sup>75</sup> Department of Water and Sanitation: *Annual Report Water is Life-Sanitation is Dignity* (2017) 41.

<sup>76</sup> Department of Water Affairs and Forestry *White Paper on National Water Policy of South Africa* (1997).

<sup>77</sup> Department of Water Affairs and Forestry *White Paper on National Water Policy of South Africa* (1997).

<sup>78</sup> Department of Water Affairs and Forestry *White Paper on Basic Household Sanitation* (2001).

<sup>79</sup> Department of Water Affairs and Forestry *Strategic Framework for Water Services Water is Life, Sanitation is Dignity* (2003)

to basic sanitation services as a human right, as free basic sanitation services only support households already linked to the sewer networks.<sup>80</sup>

The implementation of the *National Sanitation Policy 2016* was aimed at resolving differences and problems with the policies listed above. The policy went so far as to affirm that the right to sanitation is implied in the right to dignity and the right to a clean environment and that the right to access basic sanitation is based on the provision of sanitation services in the country.<sup>81</sup> Its further goal was to align sanitation delivery with the criteria of international development, including the *Sustainable Development Goals*.

### 3.3.3 Relationship between Sanitation and Basic Education

Sanitation (or the lack thereof) has been a critical feature that characterized South African rural schools during the apartheid years and sadly remains as such today.

Section 29(1) (a) of the Constitution provides for a right for everyone to basic education, which includes adult basic education. The insertion of this right reflects the promise of redress to these past injustices.

The importance of this right and the reason behind the inadequate school facilities was outlined by Nkabinde J:

“[The] inadequacy of schooling facilities, particularly for many blacks, was entrenched by the formal institution of apartheid...[t]oday the lasting effects...are discernable in the systemic problems of inadequate facilities and the discrepancy in the level of basic education for a majority of learners.” He added that “basic education is an important socio-economic right directed, amongst other things, at promoting and developing a child’s personality, talents, mental and physical abilities to his or her full potential...”<sup>82</sup>

In the separate but related *Equal Education* case to compel the Minister of Education to enact school infrastructure regulations as envisaged in section 5A of the South African Schools Act, Msizi AJ confirmed that the provision of basic school infrastructure is an

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<sup>80</sup> Tissington, K. 2011. Basic Sanitation in South Africa: A Guide to Legislation, Policy and Practice. *Socio-Economic Rights Institute of South Africa*.

<sup>81</sup> Department of Water and Sanitation National Sanitation Policy *Water is Life, Sanitation is Dignity* (2016) 3-7.

<sup>82</sup> *Juma Musjid*, 42-43.

integral part of the right to basic education and reiterated that this right has been placed in the highest hierarchy.<sup>83</sup>

Embarrassingly, the Court recorded that it was the claim of the Minister of Education that although she acknowledged that a large number of schools still lacked basic services (water, sanitation and electricity), this was not a matter of the right to basic education but rather about infrastructure at black schools.<sup>84</sup>

These two judgments indicate some important elements of the content of the right to basic education. In the light of the Ministry of Education's indifference and poor knowledge of human rights, Mubungazi highlights the need for human rights education. As the primary duty bearer to give effect to human rights education, it would be expected that the most senior government officials know and uphold human rights.<sup>85</sup>

In this regard, Hlalele has described the lack of basic facilities, such as, water and sanitation, as having an impact on the quality of education, and is justified in lamenting that one of the obstacles to rural education, perhaps the biggest obstacle, is the willing ignorance on the part of the government of the conditions in rural areas and the environment.<sup>86</sup>

Apart from government responsibilities (or failures), the right to basic education entails a holistic school environment that promotes health, development, safety and overall quality of life<sup>87</sup> and well-being.

Concerning the environment, Feris calls for a wider understanding of the definition of "environment" in section 24 of the Constitution<sup>88</sup> to explicitly include human-to-human and human -to-environment interrelationships. According to Kidd, a wider interpretation is correct. He claims that the scope of section 24 of the right to an environment that is not harmful to health or well-being is wider, including the built environment and the working environment.<sup>89</sup>

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<sup>83</sup> *Equal Education and another V Minister of Basic Education and Others 2019 (1) SA 421 (ECB)* par.47.

<sup>84</sup> *Equal Education*, par. 48.

<sup>85</sup> Mubungazi JC 'Human Rights Education in South Africa: Whose Responsibility is it anyway?' (2015) 15 *African Human Rights Law Journal* 504.

<sup>86</sup> Hlalele D 'Social Justice and Rural Education in South Africa' (2012) 30(1) *Perspectives in Education* 115.

<sup>87</sup> Serfontein EM 'The Nexus between the Right to Life and to Basic Education in South Africa' (2015) (18) 6 *Potchefstroom Electronic Law Journal* 2283.

<sup>88</sup> Section 24(a) of the Constitution provides that "everyone has the right to an environment that is not harmful to their health or well-being..." and (b)(i) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures.

<sup>89</sup> Kidd, M. 2017. Environment. In *The Bill of Rights Handbook* 6<sup>th</sup> eds. Edited by I Currie & J De Waal. Juta. pp.518-519.

In amplification, Prinsloo's analysis of the connection between basic education and the school environment includes features which contribute to an atmosphere conducive to education and the environment, including a place that is physically and psychologically secure, and property safety, well-maintained facilities, school furniture, clean toilets, water, and a green environment that is free from harassment of school children.<sup>90</sup>

The right to basic education is therefore interrelated with other socio-economic rights, including sanitation, and the right to a healthy, harm-free environment, as well as the learners' health.

Nonetheless, the tacit existence of this right and how it can influence its enforceability have been discussed. For example, in constitutional framework documents, Kamga<sup>91</sup> argues for an express codification of a right to sanitation. In his opinion, in Africa as a whole, the non-performance of this right is based on the fact that most African Constitutions do not include sanitation in express provisions.

Feris disagreed and argued that its legal obligation is not restricted by the Constitution's tacit approval and argued that its constitutional guarantee is not limited by implied recognition in the Constitution.<sup>92</sup> Rather, she suggests that a correct interpretation of this right encapsulates the acceptance of the right to water and sanitation as components of a clean environment that is not harmful to health or well-being.

Indeed, because it is not explicitly stipulated in the Constitution, a right is not necessarily weakened. Under other socio-economic rights, it can receive equal recognition and protection.

Nevertheless, in the light of the above discussion, a school environment can be seen as a social environment in which humans interact with each other and at the same time with the environment by providing adequate water and sanitation facilities for environmental hygiene.

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<sup>90</sup> Prinsloo IJ 'How Safe Are South African Schools?' (2005) 25(1) *South African Journal of Education* 5.

<sup>91</sup> Kamga SD 'The Human Right to Basic Sanitation: A Human Right in Need of Constitutional Guarantee in Africa' (2013) 29 *South African Journal of Human Rights* 615.

<sup>92</sup> Feris L 'Constitutional Environmental Law: An Under-Utilized Right' (2008) 24 *South African Journal of Human Rights* 28.

### 3.4 Conclusion

At an international and regional level, the emergence of sanitation as a global priority and its progressive evolution is reflected within a vast body of international and regional human rights and domestic legal framework documents that either recognise sanitation expressly or implicitly within the provisions of human rights instruments.

These framework documents include binding treaties and non-binding soft law declarations and resolutions that have contributed to the development of the customary international law right to water and sanitation.

The right to sanitation is a component of the right to an adequate standard of living and is interrelated with the right to water and education. After the 2010 United Nation General Assembly Resolution that affirmed this right, sanitation is recognised as a legally binding, distinct right with unique features that give rise to obligations upon States.

At the domestic level, the right to sanitation is implicitly recognised in the Constitution, also as a distinct but interrelated right with the right to water, and the right to a clean environment that is not harmful to health or well-being and free from pollution and environmental degradation. And furthermore, sanitation is an essential component of the right to basic education.

Notwithstanding the interrelatedness between these rights, the fact that sanitation has not been realised in many rural schools reflects the paradox of human rights as identified by Christie: that 'statements of rights do not deliver what they promise.'<sup>93</sup>

Ultimately, to give meaning to the promises of the Constitution and effectively realise the right to sanitation in rural schools there must be a critical analysis of the positive obligations imposed on the State as the primary duty-bearer.

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<sup>93</sup> Christie P 'The Complexity of Human Rights in Global Times: The Case of the Right to Education in South Africa' (2010) 30(1) *International Journal of Education Development* 8.

## **CHAPTER 4: THE CORE OBLIGATIONS TO REALISE THE RIGHT TO SANITATION IN SOUTH AFRICA**

### **4.1 Introduction: A Difference in Textual Formulation**

This chapter examines the core content of the South African government's legal obligations to recognize the right to sanitation in schools as defined under the right to water and the right to basic education. It briefly explains the disparity in language of both categories of rights in order to contextualize the debate, then objectively discusses the nature of the legal obligations resulting from these two rights. The overall goal is to investigate the effect of such disparity on core school sanitation obligations.

Ancillary but critical to this discussion, it is contended that the South African government and the courts have sufficient grounds to apply a minimum core obligation with respect to sanitation as an essential component of the right to basic education.

### **4.2 Socio-economic Rights: A Fundamental Difference in Textual Formulation**

Section 27(1) (a) read with subsection 2(b) of the Constitution stipulates a “right for everyone to access to sufficient water and the State must take reasonable legislative and other measures, within its available resource, to achieve the progressive realisation of the right to water”, whereas section 29(1) (a) provides for everyone “the right to basic education, including adult basic education”.

As articulated by Liebenberg<sup>94</sup>, the Bill of Rights in the Constitution follows a ‘three-fold’ drafting style:

“Firstly, there is a set of qualified rights which include housing, healthcare, food and water and social security. These rights are generally characterised by a peremptory obligation imposed on the State to “take reasonable legislative and other measures”, “within its available resources”, and “to achieve progressive realisation”. Secondly, s26 (right to housing) and s27 (right to water) contain a further formulation that has

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<sup>94</sup>Liebenberg S ‘Judicially Enforceable Socio-Economic Rights in South Africa: Between Light and Shadow’ (2014) 37 *Dublin University Law Journal* 145.

language that prohibits a certain conduct or legislation. Thirdly, those rights that impose an unqualified duty on the State. One such example of an unqualified obligation is Section 29(1) (a) which provides for everyone “the right to basic education, including adult basic education.”

Accordingly, these categories of rights can be classified as qualified socio-economic rights and unqualified socio-economic rights, respectively.

### **4.3 The Qualified Right to Water: A Reasonable Review?**

The concepts of “progressive realisation”, “reasonable legislative and other measures” and “within available resources” are critical to understanding the content of the right to water and therefore warrant clarification.

The ratification of the ICESCR (which is effectively binding on South Africa)<sup>95</sup> and the Constitution make it peremptory, when interpreting any right in the Bill of Rights, to consider international law.<sup>96</sup> The purpose is “to respect the careful way in which the Constitution itself creates concordance and unity between the Republic’s external obligations under international law, and their domestic legal impact.”<sup>97</sup>

#### **4.3.1 Progressive realisation**

As regards the right to water, Article 11 of the *ICESCR* is defined in the Constitution by the same principles as sections 27 (1) and (2). As far as general obligations are concerned, the *CESCR* explained that the concept of 'progressive realization' was indicative of the awareness that the full realization of all socio-economic over a short period of time may not always be practically possible. However, the Committee stressed that this fact should not be misinterpreted as depriving all meaningful content of its obligation, but imposes an obligation to move towards that goal as quickly and effectively as possible.<sup>98</sup>

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<sup>95</sup> Section 231 of the Constitution.

<sup>96</sup> Section 39(1)(b) of the Constitution provides: When interpreting the Bill of Rights, a court, tribunal or forum— (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law;

<sup>97</sup> *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) par. 201.

<sup>98</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)* E/1991/23 (1990) par.9.

In *General Comment No. 15*, State Parties have specific obligations to adopt legislative measures and other measures which include national water strategies and action plans to give effect to the right to water.<sup>99</sup> It is significant to add that within this obligation, the *CESCR* included the obligation “to progressively extend safe sanitation services, especially for rural areas taking into consideration the needs of women and children”.<sup>100</sup>

Finally, a minimum core of the right to water was recognized as placing an immediate requirement on States to ensure access to a minimum necessary quantity of water that is adequate and safe for personal and domestic use to prevent disease.<sup>101</sup>

At the domestic level, socio-economic rights jurisprudence reflects a somewhat different approach. *Government of the Republic of South Africa and Others v Grootboom and Others (Grootboom)*<sup>102</sup> was the first case to introduce the concept of the reasonable standard as a measurement of the State’s compliance with its positive obligations.

Yacoob J defined the concept as meaning that the right could not be immediately realized and that accessibility should be gradually facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, reduced over time.<sup>103</sup> Indeed, what the Court meant was that the right should be made accessible to a greater number of people as time progressed.

According to Moyo, this concept illustrates the difficulty of access to socio-economic rights given the economy's entrenched systemic trends and disadvantages.<sup>104</sup>

In a different matter, *Minister of Health and Others v Treatment Action Campaign and Others (TAC)*,<sup>105</sup> the Court, relying on the ruling in *Grootboom*, found that ‘[s]imilar language is used

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<sup>99</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)* (2003) E/C.12/2002/11 par.26.

<sup>100</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)* (2003) E/C.12/2002/11 par.29.

<sup>101</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)* (2003) E/C.12/2002/11 par.26.

<sup>101</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)* (2003) E/C.12/2002/11 par.37 (a).

<sup>102</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC). (hereafter referenced as *Grootboom*).

<sup>103</sup> *Grootboom*, par.45.

<sup>104</sup> Moyo K ‘The Jurisprudence of the South African Constitutional Court on Socio-Economic Rights’ in *Socio-Economic Rights: Progressive Realisation?* (2017) 58.

<sup>105</sup> *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 (CC) par.30. (hereafter referenced as *TAC*).

in section 27...[and]...the rights requiring progressive realisation are those referred to in sections 27(10(a), (b) and (c)'.

In *Mazibuko and Others v City of Johannesburg and Others (Mazibuko)* the matter dealt specifically with water in relation to the *Free Basic Water Policy* and the installation of prepaid meters. The Court reasoned as follows:

“Not only must government show that the policy it has selected is reasonable, it must show that the policy is being reconsidered consistent with the obligation to “progressively realise” social and economic rights in mind. A policy that is set in stone and never revisited is unlikely to be a policy that will result in the progressive realisation of rights consistently with the obligations imposed by the social and economic rights in our Constitution.”<sup>106</sup>

Dugard challenged the Court for failing to provide meaningful content to the right to water, in that the decision offers virtually nothing to go on in terms of information on the scope and understanding of the right. The little clarification that can be drawn related to the rationale of the reasonableness of the law.<sup>107</sup>

Instead, government must consider a wide range of measures over a period of time in order to realize the right to water. Nevertheless, as Ferriera has pointed out, this principle does not change the State's responsibilities to take the steps within its remit.<sup>108</sup>

#### **4.3.2 Reasonable and legislative and other measures**

According to *Grootboom* , when making a determination of what amounts to reasonable legislative and other measures, the three spheres of government must be factored in. Therefore, “a reasonable programme must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available ...and these programmes must be reasonable both in their conception and implementation.”<sup>109</sup>

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<sup>106</sup> *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) (hereafter referenced as *Mazibuko*) par.162.

<sup>107</sup> Dugard J ‘The Right to Water in South Africa’ in *Socio-Economic Rights: Progressive Realisation?* (2017) Foundation for Human Rights 333.

<sup>108</sup> Ferriera J ‘Socio-Economic Rights: Housing, Healthcare, Food, Water and Social Security’ in Currie I and De Waal J *The Bill of Rights Handbook* 6th ed (2017) 580.

<sup>109</sup> *Grootboom*, par.39-42.

Admittedly, the task of creating policy and allocating resources is outside the Court's jurisdiction. Nevertheless, it can be argued equally that the task of deciding the normative substance of the right cannot be left to the policy makers to attach substantive elements to that right. Rather, it is for the Court to determine the normative content so that the other government spheres can be guided in the execution of their mandate and give effect to the right in question.

The presumption of reasonableness does not seem to underestimate this fact and essentially abrogates this responsibility to the policy maker. What if such policy makers are unclear about a legal concept and this manifests in the policies they make? Should it not be up to the Court to pronounce on the substantive nature of a constitutional right?

Identifying Grootboom's flexibility approach, Liebenberg advised that the disadvantage was that such flexibility might trigger or contribute to a normative deficiency: the courts may fail to understand the normative intent and meaning of the rights, which could leave the exact nature of their entitlements and the responsibilities of the State uncertain to both government and civil society.<sup>110</sup>

In the *TAC* case the Constitutional Court was required to pronounce on the reasonableness of government policy and its implementation. Very briefly the facts of this case are: the South African government had adopted a policy for the provision of nevirapine – a drug that reduces the chances of mother-to-child transmission of HIV – to selected pilot areas. The rationale of implementing the program in such a way was to monitor and evaluate the safety and effectiveness of the drug before a comprehensive roll-out of the program at a national level was implemented.

Having considered the merits of the argument, the Court found that the policy excluded a significant part of the population who were in dire need, and effectively delayed the roll out of nevirapine for protracted periods of time. On such grounds the policy was unreasonable and in breach of section 27(2) read with section 27(1)(a).

Therefore, in both *Grootboom* and *TAC*, the Constitutional Court developed a comprehensive criterion for assessing reasonableness that goes beyond merely promulgating legislation, policy and programs. The Court held that these measures must cater for “the appropriate provision for the short, medium and long terms needs without excluding a significant group, ‘most in peril’

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<sup>110</sup> Liebenberg S ‘Judicially Enforceable Socio-Economic Rights in South Africa: Between Light and Shadow’ (2014) 37 *Dublin University Law Journal* 167-169.

in society without access. Furthermore, anything short of this, the Courts held, cannot be said to be reasonable”.<sup>111</sup>

In *Mazibuko*, the Court was confronted with the argument that the Free Basic Water policy impacted ‘harshly on the poorest residents’. The Court reasoned that the City’s decision to revise its policy and introduce an indigent registration policy to target the poor indicated that it was in line with its duty to take progressive steps in meeting its obligations.

Ultimately, the Court found in favour of the City and held that the Free Basic Water policy and the installation of the pre-paid meters were not unreasonable and therefore did not constitute a breach of section 27.

According to Humby and Grandbois, this decision “has undermined the enforcement of the human right to water in South Africa and without the so-called ‘test-cases’ the promise of s27 (1) (b) will remain unfulfilled”.<sup>112</sup> The Court clearly lost sight of the prescripts of *Grootboom* and *TAC* relating to those most in critical need and the value of human dignity and the right to life – to which water is indispensably related.

Indeed, as the only Court to adjudicate on the right to water, it failed dismally to take heed of the vast number of vulnerable persons who are impacted by a lack of adequate water supply.

#### **4.3.3 Maximum Available Resources**

Under international law, the *CESCR* declared that States Parties are still under an obligation to endeavour, under the prevailing circumstances, to ensure the widest possible enjoyment of the applicable rights, even if the resources are inadequate and insufficient.

With regard to the minimum core required, resource scarcity does not exclude States from their obligations. *Grootboom*, however, deviated from that position.

It was found in *Grootboom* that nothing compels the State to go beyond its resources. Simply put, the availability of resources will govern both the content of the obligations in relation to

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<sup>111</sup> *Grootboom*, par. 43 and *Treatment Action Campaign*, par. 78.

<sup>112</sup> Humby T & Grandbois M ‘The Human Right to Water in South Africa and the Mazibuko Decisions’ (2010) 51(3) *Les Cahiers de Troit* 540.

the rate at which it is achieved, and the reasonableness of the measures used to achieve the outcome.<sup>113</sup>

Although the Court noted the possibility that the minimum core obligations could determine the reasonableness of the measures taken by the State, and could be taken into consideration, it held that neither section 26 nor section 28 entitles the respondent to claim shelter or housing immediately upon request.<sup>114</sup> Therefore, it can be inferred that there are no positive obligations under these two rights and they do not give rise to immediately enforceable rights.

Overall, the Court found that if it can be determined that the State's actions are fair in view of these internal requirements, the State will have met its core obligations successfully.

In *Soobramoney v The Minister of Health (KwaZulu-Natal)*<sup>115</sup>, Mr. Soobramoney sought to challenge the government's public health refusal to provide him with dialysis treatment. The reasons for the refusal, as advanced by the department, was that there were limited resources and if it were to allocate such resources it would have significant budgetary implications. Accordingly, the Court was called upon to determine the positive obligations under section 27.

Finding in favour of the department the Court referred to the wording of both section 26 and section 27 and held that what is evident from these provisions which depend on the available resources is that an unqualified duty to meet such needs would not be able to be met at present.<sup>116</sup>

Moyo argues that claims with major budgetary consequences merit a measure of respect by the judiciary for other government branches resource allocation decisions. The courts may not have the facts before them to determine the effect of such a decision on other needs and goals.<sup>117</sup>

Nevertheless, it is unclear why this critical point was ignored by the Court. If the problem still turns on the lack of evidence, nothing prevents the Court at any stage during a trial from asking for such budgetary evidence. It seems that the Court takes the issue at face value, without calling for such evidence. Yet, the claimants seeking to vindicate their rights are called upon

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<sup>113</sup> *Grootboom*, par. 46.

<sup>114</sup> *Grootboom*, par.95.

<sup>115</sup> *Soobramoney v The Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC).(hereafter referenced as Soobramoney)

<sup>116</sup> Soobramoney, par.11.

<sup>117</sup> Moyo K 'The Jurisprudence of the South African Constitutional Court on Socio-Economic Rights' in *Socio-Economic Rights: Progressive Realisation?* (2017) 60.

to discharge a very onerous duty of proving a *prima facie* case of infringement of a particular right – a rigidity not shown to government.

In support of this contention, Wilson and Dugard lamented the findings in *Mazibuko*:

“the uncontested contextual evidence of the urgent and intense distress caused by the claimants lack of access to sufficient water was virtually ignored.... [yet the Court] ...did not ask whether the City had a reasonable programme that “was capable of facilitating the realisation of the right in the context of its implementation, [n]or did it examine the evidence put by the applicants that the City has the resources to provide additional [Free Basic Water].”<sup>118</sup>

As it stands, the positive obligations that flow from the right to water will be measured against the standard of reasonableness. The discussion turns to consider the right to basic education.

#### **4.4 The Unqualified Right to Basic Education: An Immediate Obligation or Minimum Core?**

This section examines the positive obligations that emanate from the right to basic education (section 29(1) (a) of the Constitution) and further seeks to establish if a minimum core obligation is applicable thereto. Existing jurisprudence has not fully adjudicated on the content of this right, and scholarship on the subject matter largely provides a limited analysis of *Grootboom* and was drafted prior to the ratification of the ICESCR. This study revisits the *Grootboom* decision and contends that a broader analysis, coupled with the ratification of the ICESCR, reveals that a minimum core of this right is incumbent upon the Republic.

To interpret the positive obligations flowing from this “unqualified’ right to basic education, international law must be considered.<sup>119</sup>

The CESCR *General Comment No.13* provides meaningful guidance on the obligation of State Parties with regard to the right to education. First, State Parties have the obligations to respect, protect and fulfil each of the essential features of the right to education. In the previous chapter it was established that sanitation facilities are an essential component of a functioning

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<sup>118</sup> Wilson S and Dugard, J ‘Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights’ (2011) 20(3) *Stellenbosch Law Review* 667 and 676.

<sup>119</sup> Section 39(1) of the *Constitution*.

education system. Accordingly, the positive duties of the State would be to provide the availability of sanitation facilities by taking positive action to build such infrastructure.<sup>120</sup>

Furthermore, the CESCR pronounced that due to the wording of Article 13(2), the obligation to provide primary education is immediate. It must be noted that the textual formulation of the right to primary education resembles section 29(1) (a) of the Constitution - right to basic education- in that it also does not have any internal qualifications.

As with all socio-economic rights under the ICESCR, a minimum core obligation is applicable. In the context of the right to education, the CESCR stipulated that the minimum core entails access to public schools on a non-discriminatory basis, respect for dignity and full development of human personality, free and compulsory education, adoption of a national education strategy and conformity with adopted minimum educational standards.<sup>121</sup>

According to Kilanry *et al.* the Committee seems to accept that the obligation of States to have compulsory and free education is subject to a more rigorous criterion than incremental realization.<sup>122</sup> Arendse claims that a minimum core approach to socio-economic rights prioritizes some needs over others. In the field of education, such a strategy would require the State to commit all the resources at its disposal to first fulfil its minimum core obligations in respect of poor learners before investing money on the relatively privileged classes.<sup>123</sup>

The South African jurisprudence have confirmed that the right to basic education is not subject to progressive realisation or any of the other internal qualifications discussed above.

In *Juma Masjid*, Nkabinde J claimed that it is important to understand the essence of the right to basic education under section 29(1) (a) for the purposes of this judgment. Unlike some of the other socio-economic rights, this right can be realized immediately. There is no internal constraint that allows the right to be slowly realized within the resources available, subject to appropriate legislative measures.<sup>124</sup>

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<sup>120</sup> Committee on Economic, Social and Cultural Rights (CESCR) *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)* (1999) E/C.12/1999/10 par.50.

<sup>121</sup> Committee on Economic, Social and Cultural Rights (CESCR) *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)* (1999) E/C.12/1999/10 par.57.

<sup>122</sup> Sital K *et al.* 'Enhancing Enforcement of Economic, Social, and Cultural Rights Using Indicators: Focus on the Right to Education in the ICESCR' (2010) 32(2) *Human Rights Quarterly* 269.

<sup>123</sup> Arendse L 'The Obligation to Provide Free Basic Education in South Africa: An International Law Perspective' (2011) 14(6) *Potchefstroom Electronic Law Journal* 110.

<sup>124</sup> *Juma Masjid*, par.37.

Having analysed the ruling in *Juma Masjid*, Simbo provides an elaborate and persuasive argument that suggests that section 29(1) (a) is a minimum core obligation of the right to education.

He bolsters his assumption as a point of departure by quoting Young<sup>125</sup> who defines the meaning of a minimum core as a non-derogable obligation and a strict liability obligation. In other words, this is synonymous with the characteristic of the minimum core obligation due to the fact that the right to basic education gives rise to an immediate obligation.

He then goes on to argue that the acceptance by the Constitutional Court that section 29(1) (a) is an unqualified socio-economic right must mean that it will not determine the obligations imposed by section 29(1) (a) in the same way as qualified socio-economic rights were interpreted. Although the Court agreed that section 29(1) (a) imposes immediate obligations on the government, it should consider basic education as a minimum core requirement of the right to education, as explained in this article. He further indicates that the Basic Education Minister should enact the standards and see them as an opportunity to define basic education and unpack its scope and content.<sup>126</sup>

Simbo is absolutely right in reaffirming that an immediate obligation is attracted by the wording. Immediacy alone or Young's non-derogable duty, however, do not mean that the right's meaning is clear. The question will be asked: precisely what should not automatically be derogated or enforced by the government? Rather, it is only after the content has been established that the wording guides the way in which such content is implemented. However, the next question that will arise once those facts are established is the basis of the obligation to apply such a minimum core. In other words, the state may ask why the minimum core should be applied immediately.

The challenge faced by Simbo and Young was therefore that their studies were restricted to the textual formulation of the right to basic education, and which were undertaken prior to the promulgation of the *Minimum Norms and Standards* and the ratification of the *ICESCR*.

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<sup>125</sup> Young C 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33, *Yale Journal of International Law* 115.

<sup>126</sup> Young C 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33 *Yale Journal of International Law* 115.

An evaluation of the *Grootboom* decision shows that there are about four preconditions for a court to rule in favour of a minimum core.

Yacoob J did not close the door to the minimum core obligation, but instead argued that where it is appropriate to do so, it cannot be done unless there is sufficient information before a court to enable it to determine the minimum core in any given context.<sup>127</sup>

Therefore, the first pre-condition can be said to be the need for relevant information to determine the essential elements of the right to basic education, which, the argument contends, can now be met without the court having to encroach on the powers of the executive arm of government.

As an outcome of *Centre for Child Law and Seven Others v Government of the Eastern Cape Province and Others*<sup>128</sup> – generally known as the *Mud School case* – a matter dealing with various schools that required urgent and major infrastructural upgrades to their school buildings and supply of water and sanitation, the much anticipated Regulations on *Minimum Uniform Norms and Standards for Public Schools Infrastructure* were finalised.

The main objectives of the Regulations are to create minimum uniform standards and requirements for new and existing school facilities within specified time frames and enforcement criteria with a specific focus on and prioritization of all schools built entirely out of mud, and all those schools that do not have access to any form of electricity, water supply or sanitation.<sup>129</sup>

Furthermore, the second precondition is the wording of the right concerned. *Grootboom* is generally concerned with the right to housing rather than basic education. The discussion on the difference will not be repeated except for referring to the Court's discussion on the right of access and internal qualifications, when Yacoob J found it not necessary to decide on the appropriateness of establishing a minimum core with regard to the right to housing.<sup>130</sup>

The third precondition are the consequences of ratification of an international agreement like the *ICESCR*. The Court held that here the relevant international law rule binds South Africa,

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<sup>127</sup> *Grootboom*, par.33.

<sup>128</sup> *Centre for Child Law and Seven Others v Government of the Eastern Cape Province and Others*, Case No. 504/10.

<sup>129</sup> Section 2(b) of South African Schools Act: Regulations relating to minimum uniform norms and standards for public school in GN 37081 of 29 November 2013.

<sup>130</sup> *Grootboom*, par.33-38.

and it can be applied directly. About 2015, 15 years after Grootboom, *ISCECR* was signed and ratified by the Republic and it would conclude that its principles are now binding law, according to the Court's reasoning.

The fourth precondition is the reliance on the State' positive duties imposed under a ratified treaty instrument. At the time of this decision, the *CRC* was already ratified by the South Africa. However, the applicants' argument relied on the parent's duty to provide shelter and the question of the State's obligations was not in question.

For example, the Court held that it was not contested that, apart from their parents, the children should be provided with shelter if they are not in state care, in any alternative care, or abandoned. Thus, in the circumstances of this case, the State was not obligated to provide shelter in terms of section 28(10) (a).<sup>131</sup>

However, with regard to basic education, the State is responsible for ensuring the right of children to basic education, not parents. Consequently, it follows that, under these circumstances, the ratification of the *CRC* and section 28(1)(a) would have been considered by the Court to be binding.

Consequently, to reiterate Yacoob J's words, there may be instances where it is necessary and reasonable to take into account the minimum core, and it is therefore argued that the right to basic education does not provide a better example of such possibility and suitability.

#### **4.5 Conclusion**

The right to sanitation is implicitly recognised both under the right to water and the right to basic education. However, these rights differ in their textual formulation. The positive obligations arising from the qualified right to water are measured according to the reasonableness standard, whereas the unqualified right to basic education gives rise to an immediate obligation. The ratification of the *ICESCR* and adoption of the *Minimum Norms and Standards* provide a normative content to the right to basic education, arguably meeting all the essential elements of the international minimum core.

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<sup>131</sup> *Grootboom*, par.79.

## CHAPTER 5: THE IMPACT OF RECOGNISING THE IMPLICIT RIGHT TO SANITATION – WATER VERSUS BASIC EDUCATION

### 5.1 Introduction

In as much as the right to sanitation is a distinct human right, it remains interrelated to both the qualified right to water and the unqualified right to basic education. This chapter will analyse the impact of realising the right to sanitation in terms of these two categories of rights.

### 5.2 Obligations to Realise the Right to Sanitation under Section 29(1) (a)

The provision of sanitation facilities at the basic education level, especially in primary schools, has been globally and generally recognised as a subject of extreme relevance and importance for the child's best interest, development, health, and overall well-being.

The Independent Expert's Report on the human rights obligation to relating to safe drinking water and sanitation<sup>132</sup> outlined a framework that identified five factors that define the nature and content of obligations, namely: availability, quality, physical accessibility, affordability and acceptability.

A summary of the essence of the framework will be provided without discussing these factors ad seriatim and extensively. At heart, the quality of the State's responsibilities includes the provision of sanitation facilities either at, or in the immediate vicinity of, educational facilities, among other items. Such facilities must be of adequate quality to ensure adequate hygiene for children (including menstrual hygiene). They must also be physically accessible in a way that does not pose harm or risk to the disabled, women and young children in particular. The use of these sanitary facilities must be affordable and built and used in a manner that respects the diversity of culture, privacy and dignity of both men and women.<sup>133</sup>

Catarina correctly noted and emphasized that sanitation related human rights responsibilities are inextricably linked to, and essential for the protection of many other human rights. Thus, the right to education is no exception.

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<sup>132</sup> Human Rights Council *Report of the Independent Expert on the Issue of Human Rights Obligations related to Access to Safe Drinking Water and Sanitation* A/HRC/12/24 (2009) (hereafter referenced as *Expert Report on Sanitation*).

<sup>133</sup> *Expert Report on Sanitation*, par.70-80.

In the same year, Katarina, the Special Rapporteur on Education, finalized her preliminary Report with the Commission outlining four key factors to be recognized for primary schools, namely, availability, accessibility, acceptability and adaptability.

She specified in this document what the State's responsibilities entail. In fact, States must first ensure that all children have access to primary schools. Secondly, they must ensure that girls in particular have access to public schools. Thirdly, with regard to the obligation to ensure acceptability in primary schools without violating the rights of the child, Katarina recognized that the enormity of the challenge expressed in this vision is in conflict with the reality of schools that may struggle with a lack of running water and sanitation.<sup>134</sup> And finally, States are obliged to ensure that educational systems are adaptable with the child's best interest in mind.

The State cannot effectively ensure the realisation of the any of these rights if it fails to recognise these interlinkages.

In the light of these interrelated obligations on State Parties, which are binding in a South African context, the essential features of the right to basic education have been extensively defined in the *Uniform Norms and Standards* and include provision of sanitation facilities and the eradication of pit latrines and bucket toilets. Given that the *South African Schools Act* makes primary education compulsory, this means that these norms and standards must be given effect and implemented also at all primary schools.

Furthermore, in accordance with the jurisprudence of *Juma Musjid* discussed above, it would appear that the defence of resource availability or of progressive realisation, finds no application.

Consequently, the argument for the eradication of pit latrines and bucket toilets and the provision of safe, adequate sanitation facilities, of sufficient quantity, quality and acceptability, amongst other essential elements outlined in the basic norms and standards, being an immediate obligation, to be implemented without delay - is plausible and arguably sustainable.

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<sup>134</sup> See Preliminary Report to the Commission on Human Rights, the Special Rapporteur on the right to education sets out “four essential features that primary schools should exhibit, namely availability, accessibility, acceptability and adaptability”, (E/CN.4/1999/49, para. 50-60).

### 5.3 Obligations to Realise the Right to Sanitation under Section 27(1) (b)

In terms of the jurisprudence established in *Grootboom*, the positive obligation to realise sanitation under the right to water includes the promulgation of legislation, policies and strategic programs.

The test of reasonableness will establish, first, whether the State has promulgated sanitation legislation, policy and strategic programs, and secondly, whether it has reasonably taken steps to implement them. If both answers are in the affirmative, then the State will have discharged its positive obligations. At no stage does the enquiry seek to determine if such policy was preferred or ideal.

Examples include the *Water Service Act*, (there is now a *draft Bill on Water and Sanitation* mentioned below), and a *National Sanitation Policy* that makes provision for free basic sanitation targeted for those most in need, in a sustainable and equitable manner. It also makes provision for sanitation facilities in public schools.

The Department of Education is implementing its *Accelerated School Infrastructure Development Initiative (ASIDI)*, a strategic implementation plan for infrastructural development at schools, such as water supply and adequate sanitation facilities.

Although the Department of Education has been criticised in that it failed to meet its own targets under ASIDI, especially in the rural Eastern Cape where it is needed most, such fact does not make the ASIDI or its implementation necessarily unreasonable. This is so because although the courts have not adjudicated on the allocation of budgets therefore, the fact that through ASIDI 1257 schools have been supplied with water and 868 schools with sanitation, may well refute an argument of unreasonableness.

Future efforts include measures, such as, the *Water and Sanitation Bill* and the *Rural Education Draft Policy*<sup>135</sup>, both aimed to address water and sanitation challenges in general and at the rural education level, in particular.

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<sup>135</sup> Department of Education *Rural Education Draft Policy* (2017).

With all these legislative and policy developments for the provision of sanitation in schools, current jurisprudence has shown that as long as these measures seek to cater for the most vulnerable groups and steps are taken to develop and/or implement them in a reasonable manner, the State will have passed the reasonable review standard.

In the context of progressive realisation, the provision of sanitation under section 27(1)(b) will not be an immediate one. Rather, the State need only act expeditiously and effectively to ensure the realisation of this right.

The availability of sanitation will be subject to the resources available to the State. Though the State must strive to ensure the maximum enjoyment of the right to sanitation in higher education, it is not obliged to go beyond the limits of its resources. Further, accessibility is not an individual claim for the provision of sanitation facilities. Rather, the State must ensure that learners have reasonable access to sanitation facilities.

#### **5.4 Conclusion**

Realising the right to sanitation as an essential component of the right to basic education will impose an immediate obligation on the State to make sanitation facilities available in schools, especially at the primary education level. If the same right to sanitation is realised as a component of the right to water, the provision of sanitation facilities in schools will be subjected to progressive and reasonable steps taken by the State, bearing in mind the resource constraints.

Ultimately, the difference in textual formulation of these two critically important basic rights results in two separate outcomes, one more urgent and the other in typical government fashion – uncertain and protracted

## CHAPTER 6: CONCLUSION

### 6.1 Concluding Remarks

The provision of access to sanitation in South Africa remains inequitable and disproportionate, with the rural areas and informal settlements receiving little or inadequate infrastructure compared to the more developed towns and cities. Although apartheid may be the proximate cause of this conspicuous disparity, the dire, and often fatal, situation calls for an immediate investigation into the constitutional obligations of government to realise the right to sanitation and heal the injustices of the past.

Historically, the legal basis for the recognition of sanitation as a right was an elusive concept and only recognised as a global political imperative rather than a basic human right. One of the reasons for this view is attributable to the lack of an explicit reference in the *ICESCR* which is the primary source of socio-economic rights within the international legal framework.

However, after two decades of treaty development, such as, *CEDAW*, *CRC* and others, the adoption of declarations, and authoritative general comments adopted by United Nations treaty bodies, sanitation has progressively emerged not only as a right interrelated to other human rights but as a distinct human right. The significance of this watershed development was that sanitation would no longer be interpreted under its “twin-right” – the right to water. For the first time in the history of human rights, water and sanitation are now recognised as integrally related but yet distinct, each with its own unique features which give rise to general and special obligations under international law.

Unfortunately, and notwithstanding that South Africa has finally ratified the *ICESCR* which effectively binds the State, the government is currently adopting a different approach.

Under South African law, there is no express reference to a right to sanitation in the Constitution. As a result, it is only through the interpretation of other rights within the Bill of Rights that sanitation has received recognition within the domestic legal framework. However, this implicit recognition significantly impacts on the adjudication of the right to sanitation.

Both under international law and South Africa’s Constitution, socio-economic rights are characterised by textual elements such as “access”, “legislative and other measures”, “limited resources” and “progressive realisation”, with the exception of the right to basic education. These two groups are commonly referred to as “qualified” and “unqualified” socio-economic rights.

Qualified socio-economic rights give rise to positive obligations to act expeditiously and effectively toward the realisation of each particular right. The enormity of the socio-economic needs around the world, and the varying disparities in the means or limited resources to address those needs, make it unrealistic to impose an immediate obligation on States or governments.

This textual formulation of these socio-economic rights impacts on the core content of obligations. Contrary to the international law position, South African jurisprudence has not applied the minimum core obligation that ensures that at a very minimum each right must be realised by the State. Instead, a reasonableness standard is used to determine whether the State has met its positive obligations.

For instance, when interpreting the right to sanitation under the right to water - a qualified right – the positive obligations are subject to the internal qualifiers which only obligate the State to act progressively, within its available resources.

The State need only show that it has taken reasonable legislative and policy measures to give effect to the right to sanitation. Further in this regard, the State need only show that it has adopted reasonable measures to implement these policies and programs. In the case of sanitation, the government has promulgated a wealth of sanitation legislation, policies and programs and can arguably justify that it has taken reasonable and progressive steps to implement these measures.

Accordingly, under the reasonableness standard, the State may successfully prove that it has discharged its obligations to realise the right to sanitation.

On the other hand, the textual formulation of an unqualified right, namely, the right to basic education, impacts on the content of obligations when realizing the same right to sanitation.

Due to the fact that the right to basic education has no internal qualifications, jurisprudence has interpreted this to mean that the State has an immediate obligation, subject only to the general limitation clause of the Constitution. Furthermore, it has already been stated that sanitation is an essential component of the right to basic education. As such, when determining the positive obligations to realise the right to sanitation, the State cannot justify its failure to do so on the basis of limited resources or the fact that it has made progress since it took over the new government.

It is evident therefore that the content of the obligation to realise the right to sanitation depends on the socio-economic right under which it is interpreted. In the case of providing sanitation in schools, it would appear that the obligation is an immediate one.

Furthermore, since the *ICESCR* has been ratified an argument can be made that the minimum core obligation therefore applies and is binding on South Africa's domestic law. To date, no court has adjudicated on the content of the right to basic education. The current case law on the subject have been resolved by way of settlement.

However, the fact that the Department of Education has adopted a *Minimum Norms and Standards* on school infrastructure, which includes sanitation facilities as an essential component, further supports the argument that a minimum core is already established or plausible. With the recent ratification of the *ICESCR* and the adoption of the *Minimum Norms and Standards*, it would be very interesting to see how the Constitutional Court would avoid acknowledging that the South African government not only has an immediate obligation to provide sanitation in schools but that a minimum core obligation applies in respect of sanitation under the right to basic education.

## **6.2 Recommendations and Future Research**

In the *Komape* matter, the Court was satisfied that the evidence placed before it proved a case of multiple human rights violations, including the right to basic education and the right to life. However, the relief granted by the Court reveals some shortcomings in that the right to basic education was not only dealt with very briefly, and the positive obligations appear to have been incorrectly applied and/or understood.

The Court's shortcomings are manifested in the manner in which it decided to order a structural interdict obliging the State to instal sanitation infrastructure as part of its remedial actions. In this regard the Court reasoned as follows:

“this court is ever mindful that an order that the state replace the pit toilets at rural schools will place an additional burden on the resources of the state. Information as to the time it will take and the program to be developed to achieve that goal in the shortest period of time must be

placed before the court to enable this court to play a supervisory role in the execution of the order.”<sup>136</sup>

The nature of the request for a sanitation program to be developed, within prescribed time frames, resembles the Court’s jurisprudence on the concept of ‘reasonable measures’ under the standard of the reasonable test. In other words, the Court is effectively subjecting the fulfilment of the right to sanitation, a component of the unqualified right to basic education, to qualifications of resource constraints and reasonable programs to be implemented in a reasonable manner. An element that further supports this contention is the Court’s election to play a supervisory role, presumably to ensure the reasonable implementation of such program.

As this study has shown, this reasoning is in stark contrast to the findings in *Juma Masjid* – that the right to basic education gives rise to an immediate obligation and is not subject to the internal qualifications evident in respect of other socio-economic rights. In any event, even if the issue turned on the availability – which is argued that it does not – the Court had already established that government did in fact have budget resources allocated but wilfully neglected to utilise these funds for their intended purpose, and found it to indicate a lack of understanding of human rights, and ultimately reprehensible.<sup>137</sup>

Accordingly, the burden on State resources and the development of a comprehensive program by sanitation experts finds no application. To do otherwise, is tantamount to an incorrect interpretation of the right to basic education and effectively delays the vindication of the rights of learners who are constitutionally entitled to an immediate fulfilment of their rights.

On this ground alone, the structural interdict ordered by the Court appears to be constitutionally flawed and therefore appealable.

The matter was indeed taken on appeal (heard on 2 September 2019) albeit seeking relief for the initial claim: for damages for emotional shock, development of the common law to found a claim for grief, and for the Court to grant a declaratory order.

This study recommends alternative grounds and other approaches that could have been used or could still be used if the matter is taken to the Constitutional Court.

First, that the structural interdict be declared invalid and replaced with a structural interdict compelling the government to utilise the budget that was allocated for the sanitation

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<sup>136</sup> *Komape*, par.71.

<sup>137</sup> *Komape*, par.65.

infrastructure, immediately begin with installation of sanitation, and further that the government submit a report on progress annually to the Court. To formulate a structural order in this manner indicates the correct interpretation of the positive obligations that arise from the right to basic education.

Secondly, not only in this matter but also for future matters, the Court and/or litigants need to take into consideration the pre-conditions discussed above that seek to invoke the minimum core, of which sanitation is a core component of the right to basic education, as the sole cause of action when adjudicating on the right to basic education.

The fact that the matter went on appeal and that the applicants/appellants only sought a declaratory order indicates that the applicants/litigants have still not grasped the full nature of the relief they sought. As the Court indicated in the judgement, to merely declare that a right has been infringed will do nothing more to advance or vindicate the rights that have been breached.

It is neither a question of future research that is required nor the lack of understanding whether a right has been breached (a matter which is almost always obvious even to the untrained legal mind); Rather, there is an urgent need to properly adjudicate the right to basic education with a view to create new jurisprudence by seeking effective and substantive relief that will truly restore the past injustices and correctly define and appropriately impose the positive duties incumbent upon the State to provide sanitation in schools.

Therefore, the research paper can guide well-meaning litigants and the courts to see *Komape* and future cases on the provision of sanitation in schools as an opportunity ripe for introducing a minimum core. Furthermore, to follow this approach will ensure restorative justice for all school learners in South Africa, especially those most in need and who, as a last resort, depend on the courts to bring meaning and life to the freedoms and entitlements under the Constitution.

To neglect this approach, is to ultimately fail the hopes of many South Africans and entrench the legacy of apartheid once more.

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