

*The provision of water and inequality in the context of HIV/AIDS: is there a correlation between water inequality and HIV/AIDS?<sup>1</sup>*

South Africa is an upper middle income country and yet it is beset with huge inequalities. It has been said that poverty can be linked with hunger, unemployment, exploitation and lack of access to clean water and sanitation among others<sup>2</sup>. There has been a study that showed that poor households lack access to basic services, although there have been remarkable strides in the provision of clean water and adequate sanitation since 1994. According to Ingrid Woolward<sup>3</sup>, 77% of the non-poor have piped water, compared with 47% poor. Yet the Constitution in section 27 provides that ‘everyone has the right to have access to sufficient water’. It continues to provide that ‘the state is obliged to respect, protect, promote and fulfil this right and should thus take reasonable legislative and other measures within its available resources to achieve the progressive realization of this right’.<sup>4</sup> This means that any government policy or conduct that will be incongruent with sentiments embodied in section 27 as a whole will be deemed unconstitutional, as our constitution is the supreme law of the land.<sup>5</sup>

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<sup>1</sup> This article is dedicated to my maternal great aunt, Ms Nokuthela Dorothy Ngcobo (99 years of age) who always encourages me, a great deal, to write about social issues and the fact that she gave me a reason to continue in the pursuit of knowledge through further education.

<sup>2</sup> Human Rights Commission, Report on Water provision on Chapter 9.  
[http://www.sahrc.org.za/old\\_website/chapter\\_eleven.PDF](http://www.sahrc.org.za/old_website/chapter_eleven.PDF) ( Accessed on 3 August 2009)

<sup>3</sup> Woolward (2002), *I An Overview Of Poverty And Inequality In South Africa* , Working Paper Prepared for the DFID  
[http://www.sarprn.org.za/documents/e0000006/Poverty\\_Inequality\\_SA.pdf](http://www.sarprn.org.za/documents/e0000006/Poverty_Inequality_SA.pdf) ( Accessed on 23 July 2009)

<sup>4</sup>Section 27 (1) (b) and section 7 (2) of the Constitution, Act 108 of 1996

<sup>5</sup> Section 2 of the 1996 Constitution

Against this backdrop there is a seemingly formidable challenge of HIV/AIDS<sup>6</sup>. HIV/AIDS is spreading rapidly in Sub-Saharan Africa where 70% of all adults affected by HIV/AIDS are living in the sub-continent<sup>7</sup>. Many seem to know that HIV/AIDS is not a water-borne disease; water and HIV/AIDS seem to bear very little relation to each other, but there is a connection.

Natasha Potgieter<sup>8</sup> conducted a remarkable study where she concluded that the provision of safe and clean water to HIV positive individuals is vital as they live with compromised immune systems and thus are more susceptible to waterborne disease like cholera. She continues to opine that in areas that where HIV/AIDS infected people don't have access to anti-retrovirals; safe drinking water helps them to avoid some opportunistic diseases<sup>9</sup>. Water is crucial because it is needed for bathing, washing soiled linen and clothing. Keeping the home environment clean, taking medicines and preparing food<sup>10</sup>. In the final analysis, it is very important that water supply points and toilets are accessible and close to where they are needed to reduce the burden of a long walk and to maintain the dignity of patients<sup>11</sup>.

It is my contention that dignity is a very important concept in our equality jurisprudence and our courts have come to the rescue of vulnerable individuals.

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<sup>6</sup> The government has acknowledged in its *HIV/AIDS Strategic Framework for 2007-2011* that AIDS is a formidable challenge.

<sup>7</sup> Op cit note 3

<sup>8</sup> Potgieter, N (2003) *Water and AIDS* A study done for the WHO <http://www.hsrc.ac.za/Document-2067.phtml> , (Accessed on 20 July)

<sup>9</sup> op cit note 5

<sup>10</sup> Op cit note 3

<sup>11</sup> Op cit note 5

This paper will attempt to situate the problem of the delivery of clean water against the backdrop of economic realities of South Africa and also establish whether our government's policy and conduct in not marrying the provision of water and sanitation to HIV/AIDS in relation to the delivery of water is in line with the constitutional injunctions. In analyzing case law; the importance of equal distribution of safe and clean water will be emphasised and how this can be of benefit in the fight against this scourge. Comparable studies will be looked at, for example, how the rate of infection was reduced in countries like Uganda so that recommendations made will be pragmatic and in line with the constitutional provisions. It will be shown that the courts favour the approach of equitable distribution of water and that the denial of such a right will impact negatively on the fight against HIV/AIDS.

Municipalities face delivery problems among others; however, the provision of safe and clean water as well as adequate sanitation is the main one. According to Idasa<sup>12</sup> this should be linked up with the socio-economic rights enshrined in our constitution. Potgieter<sup>13</sup> is of the opinion that though in some areas of Limpopo there has been a concerted effort in the provision of safe and clean water, nevertheless, it was found that households did not have always easy access to these water sources nor was the water always available to them.

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<sup>12</sup> Idasa (2006) *HIV/AIDS and Local Government: Newsletter Number 10*  
[http://www.idasa.org.za/index.asp?page=output\\_details.asp%3FRID%3D988%26oplang%3Den%26Pub%3DY%26OTID%3D5](http://www.idasa.org.za/index.asp?page=output_details.asp%3FRID%3D988%26oplang%3Den%26Pub%3DY%26OTID%3D5) ( Accessed on 24 July 2009)

<sup>13</sup> Op cit note 8

She continues to contend that collecting water when the municipal supply was not available was challenging, especially for people who are living with HIV/AIDS, as they have to ‘walk through bushes and uneven terrain to get to remote and often unsafe sources, such as rivers and springs. In her study it was also found that though most households did have some kind of toilet infrastructure, the majority were sub-standard, unsafe or structurally dangerous, and in many cases, these toilet structures bore ample opportunity to cause or transmit disease. As it has been alluded to above, the linkage between HIV/AIDS and the provision of adequate, safe as well as clean water may appear ‘superficial’ however on closer inspection as it has been shown above water plays a crucial role in the fight against HIV/AIDS.

Throughout the world, ‘water-borne disease account for a substantial degree of morbidity and mortality in different age groups<sup>14</sup>. According to Woolard<sup>15</sup>, water supply to communities in South Africa ‘must take into account of the HIV/AIDS epidemic in their design and operations.’ Regrettably, the correlation between HIV/AIDS and water has received only scant regard in South Africa. Yet, as alluded to in the initial paragraph, our constitution in terms of section 27<sup>16</sup> makes provision for everyone to have a right to access to sufficient food and water. However, the state must have sufficient resources to realise such an economic right.

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<sup>14</sup> *Op cit* note 3

<sup>15</sup> *Op cit* note 3

<sup>16</sup> *Op cit* note 4

The constitution in terms of section 24<sup>17</sup> also provides that everyone has a right to an environment that is not harmful to their health and in relation to health care section 27 provides that everyone has the right to have access to health care services<sup>18</sup>. According to Idasa<sup>19</sup>, the Bill of Rights is the foundation of this democracy and contains the basic rights enjoyed by all the people of South Africa. Moreover, Idasa is of the view that in addition to stating the rights of citizens, the Bill of Rights says the state must respect, protect, promote and fulfil these rights. The next question that has to be asked is whether how can the state ensure that there is easy access to safe and clean water? Which states organs are responsible for these basic services?

For Idasa, local government is an appropriate level of the state that is closest to citizens<sup>20</sup>. For instance, local government is responsible for providing municipal health services. They continue to hold the view that these 'include water quality monitoring, food control, waste management, health surveillance of premises, surveillance and prevention of communicable diseases, disposal of the dead, chemical safety, vector control and environmental pollution control.'<sup>21</sup> The health services a municipality is expected to provide are contained in a service agreement plan signed between the district or metropolitan municipality and the provincial government.<sup>22</sup> This exhibits quite clearly that provincial government also has a role to play in the provision of safe and clean water to the poor, especially those communities that are ravaged by the scourge of HIV/AIDS.

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<sup>17</sup> *Of the 1996 Constitution*

<sup>18</sup> *Of 1996 Constitution*

<sup>19</sup> *Op cit* note 12

<sup>20</sup> *Op cit* note 12

<sup>21</sup> *Op cit* note 12

<sup>22</sup> *Op cit* note 12

Idasa also makes an important note by stating that while research is still going on in search of a vaccine for HIV, people living with HIV face have to look well after their health so that their HIV does not progress to AIDS. This translates to eating healthy food and access to clean water and healthy living conditions. It should be clear in the light of what has been said in the preceding paragraphs that many of the people living with HIV come from relatively poor households. According to the study done by the Idasa they often have no means to ensure a healthy diet and often cannot afford the necessary medication to treat opportunistic infections<sup>23</sup>. Poverty and the lack of proper service delivery in the form of safe and clean water makes the challenge of HIV/AIDS more formidable as it is stated in the initial paragraphs.

According to DM Davis<sup>24</sup>, the vision of the Constitution points in the direction of a social democracy in which the state must play an important role. The socio-economic rights and the obligations they impose go to the heart of the developmental role of the state. He continues to inform us that there was a debate whether socio-economic rights had to be included in the constitution and whether those rights were justiciable. He states that, 'the Constitutional Court adopted the view that these rights were, at least to some extent, justiciable.' Moreover, according to Davis it added that '[t]he fact that socio-economic rights will almost inevitably give rise to . . . [budgetary] implications does not seem to us to be a bar to their justiciability<sup>25</sup>.

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<sup>23</sup> *Op cit* note 12

<sup>24</sup> Davis DM, (2006) *Adjudicating Socio-economic Rights In the South African Constitution: Towards a 'Deference Lite?'* (2006) SAJHR 301

<sup>25</sup> *Op cit* note 24

In other words in addition to local, provincial and local governments our courts play a crucial role in ensuring that there should be easy access to safe and clean water so that it will be possible to reduce HIV/AIDS pandemic. There has also been a shift from how the courts have interpreted s26-27 rights and the state's defence has always been lack of resources.

For example, in the case of *Soobramoney v Minister of Health (KwaZulu-Natal)*<sup>26</sup>, the appellant had suffered from a chronic heart disease which made his kidneys fail. He approached a public hospital with a view to receiving dialysis treatment on an ongoing basis since he was not up for the transplant because of his heart problem; the treatment would go on indefinitely. The hospital refused to accord the appellant with this treatment and he approached the court arguing that his s 27(3) of the constitution had been violated. It emerged during course of argument that dialysis treatment will be expensive. The court held that the right did not cover this 'ongoing treatment of chronic illnesses for the purpose of prolonging life'. The court held further that, this case should not be decided in isolation and that the state has also in its priorities programmes that are designed to ameliorate the plight of the poor. The court could not come to the appellant's rescue since within hospital's resources, the institution could not be expected to provide treatment that would match the "appellant's profile."

In the case of *Government of the Republic of South Africa v Grootboom*<sup>27</sup>, the appellant together with other residents of informal settlements have been evicted from their homes

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<sup>26</sup> 1998 (1) SA 765 (CC)

<sup>27</sup> 2001 (1) SA (CC)

which were built on private property. It emerged that quite a number of residents have applied for low cost housing which was to be built on the self-same private land. The residents challenged the eviction on the grounds that it violated their right to have access to housing (s 26) and that because children were involved section 28 was violated and even argue that unlike s26, s 28 accorded children an unqualified right. After canvassing international law and drawing a distinction between rights as they are enshrined in the constitution and the right as they are provided for in the International Convention on the Economic, Social, Social and Cultural rights, the court per Yacoob J acknowledged that the courts could not dictate to the government how a housing programme should be shaped but it gave government two years to design a programme that will suit the poor.

Of significance, the court was no longer looking at the socio-economic rights in a mechanical way but other issues were considered as the learned judge observed that:

The significance of this distinction is that s 26(1) recognises that housing 'entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself'.

Further development of this jurisprudence was to be seen in the *Minister of Health v Treatment Action Campaign (2)*<sup>28</sup>; the TAC had challenged the government's decision in making nevirapine available only at research sites.

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<sup>28</sup> 2002(5) SA 721 (CC)



This meant that a majority of pregnant mothers who were more likely indignant were denied access to health care in terms of s 27 and in terms of s 28(1)(c) the right of the child. The court refused to pronounce on whether the conduct was reasonable because that would in effect be dictating to government how they allocated their resources but held that its policy was inflexible following the central hold of *Grootboom* (supra) that required the court to look at the right holistically. In this regard, the court held that:

that 'the socio-economic rights of the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them . . . All that is possible, and all that can be expected from the State, is that it act reasonably to provide access to the socio-economic rights identified in ss 26 and 27 on a progressive basis'.

It is clear that in *TAC* case that the Court reaffirmed its position that the state should act reasonably.

In *Khosa v Minister for Social Development*<sup>29</sup>, the state had refused to grant permanent residents who were non-citizens social assistants' benefits. The appellant had challenged that law arguing socio-economic rights extended to non-citizens. The state had defended its position by submitting that they did not have adequate resources at their disposal. The court, as per Mokgoro J, held that while the court respects the state's stance in denying these benefits to permanent residents, however in denying this right the state conduct has to "be consistent with the Bill of Rights as a whole. Thus, if the means chosen by the Legislature to give effect to the State's positive obligation under section 27 unreasonably limits other constitutional rights, that too must be taken into account."

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<sup>29</sup> 2004(6) BCLR 569 (CC)

As such the court held that the denial of this right to applicants on the basis of their lack of citizenship alone “does not constitute a reasonable legislative measure as contemplated by section 27(2) of the Constitution.” The majority in this decision were reluctant to conflate section 36 and section 27(2) of the constitution since the main judgment based its decision on the equality clause jurisprudence. In the end, Mokgoro J noted that even if s36 (1)<sup>30</sup>, the states refusal to grant non-citizens social benefits would be an unreasonable legislative measure.

The cumulative effect of these cases is that we have a socio-economic jurisprudence that recognizes that the state legislative conduct should be reasonable. Relying on the defence of unavailable resources will not pass constitutional muster what will be sufficient, however, is that the state has acted reasonably. It is contended that the provision of water and sanitation is one of the basic necessities that the community who ravaged by the scourge of HIV/AIDS needs. It is crucial for South Africa to develop socio-economic rights jurisprudence as it has to realise the rights of poor people especially those are affected and infected by HIV/AIDS.

Furthermore, according to Pieterse<sup>31</sup>, socio-economic rights “enhance participatory democracy by empowering marginalized sectors of society to insist that democratic

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<sup>30</sup> *Of the 1996 Constitution* The limitation clause is not used in respect of socio-economic rights since it has its own ‘internal’ limitations.

<sup>31</sup> Pieterse M (2006) *The Potential Of Socio-economic Rights Litigation For The Achievement Of Social Justice: Considering The Example Of Access To Medical Care In South African Prisons* Journal of African Law Vol. 50 (2 ) pages 118–131 E School of Oriental and African Studies.

institutions pay due attention to their needs”<sup>32</sup>. He believes that, “socio-economic rights may tangibly alleviate hardship by awarding affirmative remedies that satisfy the immediate, vital needs of individuals and groups within society”<sup>33</sup>. He continues to opine that “the consistent pursuit of socioeconomic rights can over time create a space for more meaningful structural transformation by expanding the possible avenues for affirmative relief and by providing leverage for popular mobilization around more structural reforms.”<sup>34</sup> In South Africa we have many social movements and as such litigation and protest over some denial of rights further stimulates debates on many service delivery programmes for the poor. It is through this participation that social movements, who lack space in the media, can mobilise their supporters through such strategies. It is also worth noting that for South Africa to succeed, the executive, together with the judiciary, ought to work hand in hand in ensuring that there is realisation of socio-economic rights. Moreover, the courts should ensure that they interpret any legislation taking into account other rights in the constitution even though section 36 will not be employed. Further, it is submitted that the court should be consistent in their approach so that we may have formidable socio-economic rights jurisprudence in this country. In the light of inadequate provision of water, it would seem that the state is failing in terms of current socio-economic development to provide water and adequate sanitation to its citizens.

One of the African National Congress’ (ANC) five election priorities<sup>35</sup> is to develop rural areas and these have subsequently been confirmed by President Jacob Zuma<sup>36</sup> in his State

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<sup>32</sup> *Op cit* note 31

<sup>33</sup> *Op cit* note 31

<sup>34</sup> *Op cit* note 31

<sup>35</sup> The five priorities are: Creation of decent work and sustainable livelihoods; Education; Health; Crime and Rural Development, including Land Reform, and food production and security.

<sup>36</sup> Zuma J G (2009) *State of the Nation Address* Delivered  
<http://www.info.gov.za/speeches/2009/09060310551001.htm> ( Accessed on 3 August 2009)

of the Nation address after he was elected president of the country. It seems that this has become official government policy and lack of service delivery in the rural areas in terms of the provision of water and adequate sanitation will not only be unconstitutional but it will be against the ANC's avowed policy of developing rural areas. This brings us to case studies of how this scourge was tackled.

It has been mentioned that the correlation between water supply and the reduction of HIV/AIDS prevalence has been given scant attention by academics and people working in the development sector. Even the United Nations has not given sufficient attention to the subject. For Van Wijk<sup>37</sup> neither the UN organisations nor country governments have looked at the implications for the water sector. She continues to hold the view that yet, the need for, and impact on, water supply and sanitation are great. Consequently, according to her over one billion people lack a minimum supply of safe water and 2.4 billion people have no proper sanitation and many of them suffer from HIV/AIDS.

It is now plain that service delivery is, undoubtedly, affected by situations within water and sanitation service organizations, like the local government and by conditions on the

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<sup>37</sup> van Wijk C (2003) *HIV/AIDS and water supply, sanitation and hygiene*  
<http://www.lboro.ac.uk/well/resources/fact-sheets/fact-sheets-htm/hiv-aids.htm> ( Accessed on July 23 2009)

ground, In this regard Samuel Wambua<sup>38</sup> is of the view that "...a scenario may arise when we will have few customers to provide water for, few effective service providers, few to provide labour, few experts to provide management and technical support in the sector" <sup>39</sup> In countries like Uganda, where there was a high prevalence rate of HIV/AIDS, their communities have correctly linked the issue of water provision in the fight against the scourge. For instance, in Uganda they use water tanks<sup>40</sup> to ensure that there is a provision of clean, portable and safe water to be used in the fight against the disease. There is considerable political will on the part of the Ugandan officials to link access to adequate water and the reduction of HIV/AIDS. Permanent Secretary for Ministry of Gender, Labour and Social Development says his government promised to increase basic social services as regards primary education<sup>41</sup>. He further states that an emphasis is also placed on access to safe and clean water by the population as this has shown that it

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<sup>38</sup> He was, at the time, the Executive Director of NETWAS International said at the 13th Regional Water and Sanitation Seminar in Nairobi in September 2001. He was concerned that the government needed to capacitate people on water and sanitation provision and op cit note 37.

<sup>39</sup> Op cit note 37

<sup>40</sup> United States' States Department Report on Uganda, New Water Tank Support Remote Clinic Work

[http://kampala.usembassy.gov/success\\_stories.html](http://kampala.usembassy.gov/success_stories.html) (accessed on 20 July 2009)

<sup>41</sup> Grellier R (2004) The Impact of HIV/AIDS On Fishing Communities in Uganda, <http://www.aidsuganda.org/npdf/Final%20Report%20-%20HIV%20Impact%20on%20Fishing.pdf> (Accessed on 24 July 2009)

Op cit note 42

contributes considerably to the reduction of national prevalence rate for HIV/AIDS as it has decreased from 18.5% to 6%<sup>42</sup>.

Further, it was reported in the *Awareness Wash Report* prepared by the Kamuli and Lwero Districts in Uganda<sup>43</sup>, that advocacy for the provision have assisted a great deal in the reduction HIV/AIDS prevalent rate. What the Ugandan experience teaches us is that, focusing on socio-economic issues like the provision of water help reduce the prevalence rate of HIV/AIDS. What can be discerned from the reading of Ugandan experience is that community participation is crucial and that for every water and sanitation project people are involved. Some municipalities in this country ought to be commended because the eThekweni Municipality Integrated Development Plan<sup>44</sup> makes provision for the water and sanitation project it further states that community participation is crucial. I know of one District Municipality that makes its job to involve the communities in rural areas.<sup>45</sup> I contend that government should really start concentrating on the provision of water,

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<sup>42</sup> See Ntambi K (2008) Speech on Service Delivery  
<http://www.un.org/socialsummit/speeches/296uga.htm> (accessed on 23 July 2009)

<sup>43</sup> Community Leaders of Kamuli and Lwero Districts in Uganda (2008) *Reflection Report on Wash Awareness Nacwola Member*  
[http://www.wsscc.org/fileadmin/files/pdf/For\\_country\\_pages/Uganda/Uganda\\_WASH\\_Awareness\\_Workshop\\_July\\_2008.pdf](http://www.wsscc.org/fileadmin/files/pdf/For_country_pages/Uganda/Uganda_WASH_Awareness_Workshop_July_2008.pdf)  
(accessed on July 31 2009)

<sup>44</sup> eThekweni Municipality (2008) *Integrated Development Plan for 2010 and Beyond*  
<http://www.kzntreasury.gov.za/Portals/0/municipalities/eThekweni%20metro/ethekweniidp20082009.pdf>  
(accessed on 3 August 2009)

<sup>45</sup> The author has done project for Ilembe District Municipality as well as Umzinyathi from May 2008 to June 2009

sanitation and other essential services. The scourge of HIV/AIDS is worsened if such conditions prevail.

If South Africa were to adopt a policy that benefits everyone as well as ensuring that there make good their promise of developing our rural areas in line with the government policy, then there will be progress as far as the provision of social services.

It is quite understandable that the government, at this time of recession, ought to cut on public services but it does not excuse them from neglecting poor people under the guise of following the stringent strictures of Brettenwood Institutions<sup>46</sup>.

The government should rather be frugal in their spending for the politicians and really concentrate on projects and programmes that will be sustainable in a way that will yield positive bearing on the service delivery. The government should ensure that its water and sanitation programmes benefit the poor. It should it, at all times; involve relevant structures of a given community. Any policy that neglects the provision of essential services, like provision of clean water and adequate sanitation will not only be unreasonable legislative conduct but will go against government policy as well as Integrated Development Plan of Municipalities.

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<sup>46</sup> Bond P (2006) *Talk Left, Walk Right* Scottsville University of KwaZulu-Natal Press at page 266

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