Legal Resources Centre Working Paper Series

19 November 2012

Crisis of the Commode: Recognising a Constitutional Right to Sanitation in South Africa

Joseph Chedrawe
Intern, Legal Resources Centre, Johannesburg Office

Working Paper Series No. A3/2012

Recommended Citation:

Joseph Chedrawe 'Crisis of the Commode: Recognising a Constitutional Right to Sanitation in South Africa' (2012) A3 *Legal Resources Centre Working Paper Series.*

CRISIS OF THE COMMODE: RECOGNISING A CONSTITUTIONAL RIGHT TO SANITATION IN SOUTH AFRICA

JOSEPH CHEDRAWE*

Legal Resources Centre, Johannesburg Office

ABSTRACT

The right to sanitation has received considerable global attention in recent times and yet over 2.6 billion people in the world continue to lack access to adequate sanitation. In South Africa, this crisis of the commode has received some policy attention, but to date there has been no clear pronouncement from the Constitutional Court on the status of the right to sanitation in the socio-economic rights landscape. The absence of its inclusion in the Bill of Rights arguably relegates the status of the right to sanitation to merely a legislative right, particularly since the Constitutional Court omitted to comment on its status in the 2009 Nokotyana case. Nevertheless, the Court's strong socio-economic rights jurisprudence, combined with a recent case from the Western Cape that supports the constitutional status of the right, has given rise to a compelling and persuasive argument for recognising a constitutional right to sanitation.

I INTRODUCTION

The right to sanitation has received considerable global attention in recent times. 2008 was designated as the UN International Year of Sanitation.[1] In July 2010, the UN General Assembly recognised the right to water and sanitation. On 30 September 2010, the UN Human Rights Council (Council) affirmed for the first time that the human right to water and sanitation is legally binding.[2] In

* Intern. Barrister and Solicitor (Canada and Dubai). B.A., LL.B (Dalhousie), BCL, MPhil (Oxford). Canadian Bar Association 2011-2012 Young Lawyers International Program, Legal Resources Centre, Johannesburg. I am thankful to Robert Seals, Law Student, University of Adelaide (Australia) and LRC intern for his early research assistance. The usual caveats apply.

[1] United Nations General Assembly Resolution 61/192 of 20 December 2006 "International Year of Sanitation".

[2] United Nations General Assembly Resolution A/HRC/15/L.14 of 28 July 2010 "The Human Right to Safe Drinking Water and Sanitation". The Resolution declared, 'the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights.' Furthermore, the Council urged countries to 'scale-up

June 2011, UN Secretary-General Ban Ki-moon launched the 'Sustainable Sanitation: Five-Year Drive to 2015' a push to speed up progress on the Millennium Development Goals of improving global sanitation by 2015 and to ensure sanitation for all.[3]

With the pronouncement of these international declarations, one must query why over 2.6 billion people in the world, including over 3 million South Africans, continue to lack access to adequate sanitation facilities.[4] In fact, according to the UN Committee on Economic, Social and Cultural Rights (CESCR) Statement on the Right to Sanitation, sanitation is one of the most off-track targets of the Millennium Development Goals.[5]

David Bilchitz succinctly summarises the importance of adequate sanitation as follows:

> 'The right to have access to adequate sanitation is not expressly provided for in the South African Constitution. In fact, virtually no international human rights instrument provides expressly for this right. This is a strange omission given the fact that individuals, if they are to function normally, have a fundamental bodily need to excrete a certain amount of bodily waste every day (whether in the form of bodily fluids or faeces). Such waste, if not disposed of in a hygienic manner, has the potential to contaminate food and water sources and to create health and environmental hazards for individuals and communities.'[6]

In South Africa, the right to sanitation is expressly founded in legislation, but its availability under the Constitution[7] is less clear. Without a clear articulation on the status of the right to sanitation in South Africa, its realisation will continue to be slow, leaving millions without adequate sanitation and further escalating South Africa's crisis of the commode.

This article is in five parts. Part II outlines South Africa's constitutional, legislative, regulatory, and policy frameworks related to the right to sanitation. Part III briefly reviews the

---

efforts to provide safe, clean, accessible and affordable water and sanitation for all.' After more than 15 years of contentious debate on the issue, 122 countries voted in favour of a compromise, none objecting, and 41 abstentions.

[3] At the 2002 World Summit on Sustainable Development in Johannesburg, a target on sanitation was added to the Millennium Development Goals (MDG) emphasizing that reducing the number of people without access to sanitation is as fundamentally important as the other MDG targets.

[4] The WHO-UNICEF Joint Monitoring Programme (JMP) estimates that 80 percent of the world's urban population has access to adequate sanitation compared to only 39 percent of the rural population.

[5] United Nations Committee on Economic, Social and Cultural Rights' Statement on the Right to Sanitation E/C.12/45/CRP.1 of 19 November 2010 ('UNCESCR Statement').

[6] David Bilchitz 'Is the Constitutional Court Wasting Away the Rights of the Poor? *Nokotyana v Ekurhuleni Metropolitan Municipality*' (2010) 4 SALJ 591 at 591 ('Bilchitz').

[7] The Constitution of the Republic of South Africa, 1996 (the 'Constitution').

Constitutional Court's foundational socio-economic rights judgment. Part IV examines the Constitutional Court's contrary approaches to two basic services, electricity and sanitation. Part V analyses a recent right to sanitation case from the Western Cape High Court. Part VI offers some concluding remarks.

Despite the seemingly adverse ruling relating to the right to sanitation in a 2009 Constitutional Court judgment, this article will suggest that, based on the Court's socio-economic rights jurisprudence, and following a recent 2011 ruling from the Western Cape High Court, the case for recognising a constitutional right to sanitation is stronger than ever.

II CONSTITUTIONAL, LEGISLATION, REGULATION, AND POLICY FRAMEWORKS

(a) Constitution

Although the right to sanitation is not expressly provided for in the Constitution, there are a number of clauses that are related and relevant to this right, including the right to a healthy environment,[8] the right to housing,[9] the right to water,[10] the right to dignity,[11] the right to privacy,[12] freedom and security of the person,[13] and equality rights.[14]

In terms of responsibility, Part B of Schedule 4 of the Constitution in the section on Local Government and Municipal Basic Services mandates local government responsible for 'water and sanitation services limited to potable water supply systems and domestic waste water and sewage disposal.'[15] Section 152(1) lists the objects of local government, including the obligations to: ensure the provision of services to communities in a sustainable manner; promote social and economic development; promote a safe and healthy environment; and encourage the involvement of communities and community organisations in the matters of local government. Section 153(a) lists

[8] Lawyers for Human Rights, 'Environmental Rights and Municipal Accountability: Water Supply and Sanitation in South Africa' *LHR Publication Series* (2009) ('LHR Report') at 2: 'the right to sanitation could be derived from the right to a clean environment read together with the right of access to clean water.'
[9] *Government of the Republic of South Africa and Others v Grootboom and Others*, 2001 (1) SA 46 (CC) ('*Grootboom*') para 35.
[10] LHR Report supra note 8 at 2.
[11] *Beja and Others v Premier of the Western Cape and Others*, [2011] 3 All SA 401 (WCC) ('*Beja*') paras 29-31.
[12] Ibid. at paras 128-143.
[13] Ibid. at paras 137-138.
[14] Ibid. at paras 126-127.
[15] The Constitution, Part B, Schedule 4.

the developmental duties of municipalities, including the duties to: structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community; promote the social and economic development of the community; and participate in national and provincial development programmes.

(b) Legislation and Regulation

The right to sanitation is also supported by at least three pieces of legislation.

The main objectives of the Water Services Act (1997) are *inter alia* to provide for 'the right of access to basic water supply and the right to basic sanitation necessary to secure sufficient water and an environment not harmful to human health or well-being.'[16] Section 3 establishes the following rights and obligations in respect of access to basic water supply and basic sanitation:

i. Everyone has a right of access to basic water supply and basic sanitation.
ii. Every water services institution must take reasonable measures to realise these rights.
iii. Every water services authority must, in its water services development plan, provide for measures to realise these rights.

The Regulations Relating to Compulsory National Standards and Measures to Conserve Water published in terms of the Water Services Act set the minimum standard of basic water supply and basic sanitation.

The Housing Act (1997) is also relevant insofar as the government has linked sanitation rollout to its housing delivery programme through the National Housing Subsidy Scheme. The Housing Act states that, 'all citizens and permanent residents of the Republic will, on a progressive basis, have access to … potable water, adequate sanitary facilities and domestic energy supply.'[17] All residential properties created through national housing programmes must comply with a minimum level of service, as per the National Norms and Standards.[18] For sanitation, the minimum level is 'Ventilated Improved Pit (VIP) or alternative system agreed to between the community, the

[16] Water Services Act 108 of 1997, section 2(a).
[17] Housing Act 107 of 1997, section 1(vii).
[18] As revised on 1 April 2007 and contained in the 2009 National Housing Code.

municipality and the MEC.' The Upgrading of Informal Settlements Programme (UISP), instituted in terms of the Housing Act and contained in the National Housing Code, provides for interim municipal engineering services as a first phase to alleviate immediate/emergency need to access potable water, sanitation services and certain preventative measures. Additionally, the Emergency Housing Programme (EHP) also instituted in terms of the Housing Act exists in order 'to provide for temporary relief to people in urban and rural areas who find themselves in emergencies' and states that 'temporary sanitation must be provided, which may vary on the circumstances. Where possible, VIP toilets must be provided as a first option, with a ratio of 1:5.'[19]

Finally, the Municipal Systems Act (2000) provides in section 4(2)(d) that the council of a municipality, within the municipality's financial and administrative capacity and having regard to practical considerations, has a duty to 'strive to ensure that municipal services are provided to the local community in a financially and environmentally sustainable manner.'

(c) Policy

There is also a volume of strategy and policy that aims to progressively realise the right to sanitation in South Africa:

- The White Paper states that 'basic sanitation is a human right' and that the local government has the constitutional responsibility to support local sanitation services with the support of provincial and national government.
- This White Paper policy was revised by the National Sanitation Programme Unit in March 2011. Among the policy objectives is an emphasis on the need for equity and participation of all demographic and vulnerable groups as well as the establishment of an 'enabling regulatory environment for the provision of sustainable and equitable sanitation services including the mechanisms for intervention and ensuring compliance with national norms and standards.[20]
- The Strategic Framework for Water Services Policy was approved in Cabinet in 2003 as the national umbrella framework for the water services sector and refers to the 'universal service obligation' of all WSAs to ensure provision of at least a basic level of water and sanitation

[19] DHS *Emergency Housing Programme* at 38.
[20] DHS *Revision of the White Paper on Basic Household Sanitation, 2001* National Sanitation Policy: Conceptual Framework, Draft Version (March 2011) 17.

service to all residents within their jurisdiction.[21] The Strategic Framework envisaged that WSAs, supported by DWA and the NSTT, are primarily responsible for delivering on the revised target of all people in South Africa having access to appropriate, safe and affordable basic sanitation by 2014.

- The National Sanitation Strategy has the objective of facilitating the elimination of the sanitation backlog by 2010, and discusses *inter alia* the roles and responsibilities in sanitation delivery, planning for sanitation, and funding sanitation.
- The Free Basic Sanitation Implementation Strategy (2009) was developed to provide 'all citizens with free basic sanitation by 2014' and acknowledges that there is a 'right of access to a basic level of sanitation service' enshrined in the Constitution, and that municipalities have an obligation to ensure that poor households are not denied access to basic services due to their inability to pay for such services.[22]

III THE FOUNDATION FOR SOCIO-ECONOMIC RIGHTS: GROOTBOOM

It is well established that the positive aspect of socio-economic rights entails two forms of state action. First, the state must establish a framework that grants rights to individuals and the ability to pursue those rights. Second, the state must implement measures to further the realisation of those rights.[23] In the seminal *Grootboom* case, the Constitutional Court commented on the inclusion and justiciability of socio-economic rights in the Constitution:

> 'Socio-economic rights are expressly included in the Bill of Rights; they cannot be said to exist on paper only. Section 7(2) of the Constitution requires the state to respect, protect, promote and fulfill the rights in the Bill of Rights and the courts are constitutionally bound to ensure that they are protected and fulfilled. The question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case. This is a very difficult issue which must be carefully explored on a case-by-case basis.'[24]

[21] The Department of Water Affairs and Forestry (DWAF) *Strategic Framework for Water Services* at 42.
[22] DWAF *Free Basic Sanitation Implementation Strategy* (April 2009).
[23] De Vos, P. 'Pious Wishes Or Directly Enforceable Human Rights? Social And Economic Rights In South Africa's 1996 Constitution.' (1997) *SAJHR* 13 at 83-86.
[24] *Grootboom* supra note 9 at para 20.

The Court noted that the Constitution enshrines a 'cluster of socio-economic rights', including the right of access to land, to adequate housing and to health care, food, water and social security as well as the rights of the child and the right to education. The Court commented that

> 'the right of access to adequate housing … 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 these*, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, there must be a dwelling (emphasis added).'[25]

It was thus accepted that the right to housing does not merely entail a roof over one's head and invariably includes services related to housing. The Court also discussed two levels of rights inter-relation:

> 'The right of access to adequate housing cannot be seen in isolation. There is a clear relationship between it and other socio-economic rights. Socio-economic rights must all be read together in the setting of the Constitution as a whole. The state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. Their interconnectedness needs to be taken into account in interpreting the socio-economic rights, and, in particular, in determining whether the state has met its obligations in terms of them.'[26]

In sum, the first level involves the inter-relation between both civil and political rights, on one hand, and social and economic rights, on the other. The second level of inter-relation is at the specific rights level.

[25] Ibid. at para 35.
[26] Ibid. at para 24.

IV CONTRARY APPROACHES TO MUNICIPAL SERVICES RIGHTS: JOSEPH AND NOKOTYANA

In late 2009, the Constitutional Court rendered two decisions in the municipal services context. The *Joseph* case dealt with the right to electricity and was rendered on 9 October 2009.[27] The *Nokotyana* case involved the right to sanitation and was rendered less than 6 weeks later on 19 November 2009.[28]

(a) Joseph v City of Johannesburg

The *Joseph* case concerned the termination of the electricity supply to the applicants' residences following the accumulation by the landlord of substantial arrears in payments owing to the City of Johannesburg's (City) electricity service provider. The applicants relied on three rights to support this claim: (i) their right of access to adequate housing under section 26 of the Constitution; (ii) their right to human dignity under section 10 of the Constitution; and (iii) their contractual right to electricity in terms of their contract of lease with their landlord. The applicants challenged the constitutional validity of the by-law 15 of the Credit Control bylaws inasmuch as it permitted the termination of electricity supply to a building or residence without affording notice and an opportunity to make representations to occupants with whom the service provider has no contractual relationship.

Skweyiya J, writing for a unanimous Court, was of the view that the case was about the 'special cluster of relationships' that exist between a municipality and citizens, which is fundamentally cemented by the public responsibilities that a municipality bears in terms of the Constitution and legislation in respect of the persons living in its jurisdiction.[29]

The Court discussed the importance of the 'right to receive electricity as a basic municipal service' and wrote:

> 'The provision of basic municipal service is a cardinal function, if not the most important function, of every municipal government. The central mandate of local government is to develop a service delivery capacity in order to meet the basic needs of all inhabitants of South

[27] *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC) ('*Joseph*').
[28] *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* 2010 (4) BCLR 312 (CC) ('*Nokotyana*').
[29] *Joseph* supra note 27 at para 25.

> Africa, irrespective of whether or not they have a contractual relationship with the relevant public service provider. The respondents accepted that the provision of electricity is one of those services that local government is required to provide. Indeed they could not have contended otherwise.'[30]

The Court went on to examine the obligations borne by local government to provide basic municipal services as sourced in both the Constitution and legislation noting section 152(1) of the Constitution, which sets out the objects of local government in general terms, and creates an overarching set of constitutional obligations that are to be achieved in accordance with section 152(2). Those sections provide that:

(1) The objects of local government are—

a. To provide democratic and accountable government for local communities;
b. To ensure the provision of services to communities in a sustainable manner;
c. To promote social and economic development;
d. To promote a safe and healthy environment; and
e. To encourage the involvement of communities and community organizations in the matters of local government.

(2) A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1).

The Court also noted section 153 of the Constitution, which specifically entrenches the developmental duties of municipalities and requires municipalities to prioritise the basic needs of the community and to promote the social and economic development of the community.

The Court further noted The Local Government: Municipal Systems Act 32 of 2000, which gives legislative content to the various constitutional duties of local government. Section 4(2) of the Act sets out the duties of municipal councils, in particular paragraph (f) which states that

[30] Ibid. at para 34.

> '(2) the council of a municipality, within the municipality's financial and administrative capacity and having regard to practical considerations, has the duty to -- … (f) to give members of the local community equitable access to the municipal services to which they are entitled.'

The Court also cited the Housing Act 107 of 1997, in particular s 9(1)(a)(iii), which provides for the municipality's duty to

> 'take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to – (a) ensure that -- … (iii) services in respect of water, sanitation, electricity, roads, storm-water drainage and transport are provided in a manner which is economically efficient.'

The critical point of the Court's analysis comes at paragraph 40 where Skewiyaya J wrote:

> 'Taken together, these provisions impose constitutional and statutory obligations on local government to provide basic municipal services, which include electricity. The applicants are entitled to receive these services. These rights and obligations have their basis in public law. Although, in contrast to water, there is no specific provision in respect of electricity in the constitution electricity is an important basic municipal service which local government is ordinarily obliged to provide. The respondents are certainly subject to the duty to provide it.'[31]

The Court held that by-law 14(1) of the Electricity By-law fell to be declared invalid to the extent that pre-termination notice to 'customers' was not mandatory.

Accordingly, sections 152 and 153 of the Constitution, read together with the provisions of the Municipal Systems Act and the Housing Act, were found to create a 'right to basic municipal services', including the right to electricity.[32] This would presumably include the right to sanitation; yet the *Nokotyana* case may indicate otherwise.

[31] Ibid. at para 40.
[32] Ibid. at para 39.

(b) Nokotyana v Ekurhuleni Metropolitan Municipality

Very few court judgments in South Africa have dealt directly with the right to sanitation and the 2009 *Nokotyana* case represents the only Constitutional Court decision to come close to commenting on the right. Residents of the Harry Gwala settlement in the Ekurhuleni Metropolitan Municipality (the Municipality) attempted to upgrade their settlement *in situ* and launched an application for services, including 'temporary sanitation facilities.'

Following the South Gauteng High Court's dismissal of the application, the residents appealed directly to the Constitutional Court. In the interim, the Municipality adopted a revised policy to provide one chemical toilet for every ten informal settlement households, which the residents rejected on the basis that expecting ten households to share one communal toilet compromised their dignity and rather that one VIP toilet per household or two households, as opposed to the chemical toilets, was appropriate.

Their argument relied on the constitutionally entrenched section 26 right to adequate housing, chapters 12 and 13 of the National Housing Code, the Water Services Act, and Regulation 2 of the Compulsory National Standards promulgated pursuant to the Act. The Court cited these provisions, including section 9(1) of the Housing Act, which provides that every municipality, as part of its process of integrated development planning, must take all reasonable and necessary steps to *inter alia* ensure that services in respect of water, sanitation, electricity, roads, storm water drainage and transport are provided. The Court also cited section 3 of the Water Services Act which provides that everyone has a right of access to basic water supply and basic sanitation, and Regulation 2, which describes the minimum standard for basic sanitation services.

The Court's analysis considered first, whether the Municipality was obliged under Chapter 12 of the National Housing Code to provide the services the residents sought, second, whether it was obliged to do so under Chapter 13, and third, whether, if it was not obliged under either of these chapters, the residents were entitled to rely on section 26 of the Constitution. The fourth and fifth issues related to the municipality's new policy and the province's delay in the decision to upgrade.

The Court held that neither Chapter 12 nor Chapter 13 were applicable to the informal settlement because they were 'in limbo' in terms of the settlement's status and accepted the Municipality's argument that Chapter 13 precludes capital intensive service provision until a decision

to upgrade has been taken.[33] The judgment further noted that the applicants' reliance on some of the constitutional provisions was vague and insufficiently specified, and ultimately the Court did not reach a conclusion regarding the status of the right to sanitation in South Africa. The Court went on to repeat its well established subsidiarity principle that where legislation has been enacted to give effect to a right, a litigant should rely on that legislation or alternatively challenge the legislation as inconsistent with the Constitution:

> 'Section 39 of the Constitution requires courts when interpreting the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality and freedom. It is incontestable that access to housing and basic services is important and relates to human dignity. It remains most appropriate though to rely directly on the right of access to adequate housing, rather than on the more general right to human dignity.'

Van der Westhuizen J delivered the judgment on behalf of a unanimous Court dismissing the appeal and holding that only the delay to make a decision around the upgrading was unconstitutional. The Court ordered the MEC for Local Government and Housing to take a final decision within 14 months, the time deemed necessary to commission a new feasibility study. [34]

The Court's decision in *Nokotyana* has been subject to a number of trenchant critiques organised here under four heads:

(i) Implications for Public Impact Litigation

In its judgment, the Court then stated that, 'it would not be just and equitable to make an order that would benefit only those who approached a court and caused sufficient embarrassment to provincial and national authorities to motivate them to make a once-off offer of this kind.'[35] Even if one ignores the adverse impact this kind of statement has to diminish all public impact litigation, which is rarely about the particular applicant before the Court and almost always about similarly situated vulnerable and marginalised South Africans everywhere, the Court's statement is particularly confusing in the light of its earlier statement in the judgment that

[33] *Nokotyana* supra note 28 at para 23.
[34] Ibid. at para 62.
[35] Ibid. at para 54.

> 'these matters have to do with the applicability of certain constitutional and statutory provisions (especially section 26 of the Constitution, which provides for the right of access to adequate housing) as well as what the content of the right is.'[36]

(ii) Subsidiarity

According to the Court, the applicants had failed to make out a case in terms of the existing legislation and thus they could not rely on the Constitution and further had not lodged a constitutional challenge to the provisions of chapters 12 and 13. What is clear from the judgment is that the Constitutional Court chose not to make a finding on the claims in terms of the Constitution preferring to rely instead on, first, chapters 12 and 13, which have the purpose of regulating the provision of services pending a decision to upgrade[37] and, second, the subsidiarity principle whereby the Court 'has repeatedly held that where legislation has been enacted to give effect to a right, a litigant should rely on the legislation, or alternatively challenge the legislation as inconsistent with the Constitution.'[38] Nevertheless, even the Municipality acknowledged that 'the true difference between the parties is the practical implementation of measures to achieve the applicants' constitutional rights, not their entitlement to these rights.'[39] Why then again did the Court shirk away from recognising a constitutional right to sanitation? Instead, the judgment side-steps the opportunity to recognise a constitutional right to sanitation and relies on a narrow legislative scheme and the principle of subsidiarity.

(iii) Form over Substance

While the strategic presentation of the case might be criticised, and indeed the Court did offer such a critique when Van der Westhuizen J described the case by saying that 'it is not easy to describe the applicants' case accurately, because of the way it was presented', the Court chose to prefer form over substance effectively ignoring that marginalised and vulnerable groups often lack access to legal representation. Improper formulation of an argument should not be a bar to the recognition of

[36] Ibid. at para 16.
[37] Ibid. at para 47.
[38] Ibid. at para 48.
[39] Ibid. at para 18.

important rights. That the case was, according to the Court, not 'properly conceived in law' is disappointing.[40] Bilchitz writes:

> 'The court's refusal to engage with the substance of the Constitutional challenge – whether the Constitution in fact requires temporary basic sanitation to be provided – simply on the basis that the claim had not been formulated in the way it desired thus placed form above substance and meant that the court avoided deciding a matter that was squarely before it.
>
> …
>
> the Constitutional Court took an extremely formalistic approach to the issues before it, and avoided making any decision as to whether the normative content of section 26 (of the Constitution) includes basic sanitation. The inescapable conclusion seems to be that for some reason the court was attempting to use all the tools it had to avoid giving definitive content to socio-economic rights.'[41]

The Court's assertion that the proper argument was not made is in itself dubious as the Court noted the applicants' clear argument: 'It was argued on behalf of the applicants that the right of access to adequate housing, recognized in section 26 of the Constitution, must be interpreted to include basic sanitation and electricity.' Thus the argument was clearly that if the existing legislative and policy framework did not provide for temporary basic sanitation, then such an omission of a positive duty violated the Constitution. Yet the Court's response was that it was not necessary to make a finding on these submissions as Chapters 12 and 13 were promulgated to give effect to the rights conferred by section 26 of the Constitution.

(iv) Analytical Path

Bilchitz also points out that in the past the Constitutional Court has made decisions on matters that had not been fully argued before it and notes the *Joseph* case as an example where the Court developed a new legal basis for a constitutional right even where it had not been fully argued before it. Why then was the reasoning in *Joseph* not equally applied in *Nokotyana*? In *Joseph*, the Court relied on the duties in the Constitution to develop a new right to receive basic municipal services, in that case

[40] Ibid. at para 61.
[41] Bilchitz supra note 7 at 597.

electricity. Given that sanitation, like electricity, is a basic municipal service and also listed in the Housing Act, the Court's silence on this point is puzzling to say the least.

There are many analytical paths to the affirmation of a constitutional right. In *Joseph*, the Court founded the basis for the right to electricity in the local government provisions of the Constitution, rather than expanding upon the content of an express right in the Bill of Rights, for example, the right to housing. While the Court in *Joseph* certainly went further than it did in *Nokotyana*, the problem with the *Joseph* approach is that it creates a set of rights that are not founded in the Bill of Rights as part of the content of one of the existing rights. By conceptually focusing on government responsibility rather than on claimant marginalization and vulnerability, the Court diminishes both the right's worth and the plight of rights claimants. The *Nokotyana* Court's order of analysis is itself very telling. Rather than beginning with a Bill of Rights analysis that tested the government's policies, the Court examined the policies and found that the government was in compliance with them. That this approach is derived from a desire to be judicially minimalist so as to avoid allegations of being judicially activist is possible.

The *Grootboom* judgment listed sanitation as an area related to housing thereby building its foundation as a human right read into the South African Bill of Rights. *Nokotyana* seems to have shaken that foundation. The Court's formalistic approach has led to a flawed judgment as well as a contradictory and inconsistent socio-economic rights jurisprudence. Nevertheless, as clearly as *Nokotyana* did not recognise a constitutional right to sanitation, it equally did not deny the existence of the right and it appears that the Constitutional Court has (perhaps intentionally) left the door open for an appropriate case to affirm the right.

V RECOGNISING THE RIGHT TO SANITATION: BEJA V PREMIER OF THE WESTERN CAPE

The dispute in *Beja* began in 2009 when 1,316 open toilets were installed in Makhaza and other informal settlements in the Khayelitsha township as part of the Silvertown housing project. The open toilets were installed on the condition that local residents would build their own enclosures. Most residents built walls around the toilets, but 51 residents said they could not afford to do so. The municipality built corrugated tin structures around the remaining 51 toilets, but these were torn down with demands for real walls. The South African Human Rights Commission lodged a complaint and

released a report, which argued that the rights to human dignity and privacy, among others, had been violated by the open toilets following which the residents made an application to the Western Cape High Court. The Cape Town municipality (the municipality) maintained that it was only required to build communal toilets, but had gone further by providing sanitation services to nearly every household.

In April 2011, Judge Nathan Erasmus of the Western Cape High Court delivered a judgment in which it was ordered that the Municipality had to build enclosures.[42] Judge Erasmus considered four issues:

1. whether a legally enforceable agreement was reached with the affected community;
2. whether a 1:5 ratio was applicable;
3. whether any constitutional rights of the affected community were infringed; and
4. whether the application was competent (not relevant to this article).

With respect to the first issue, Judge Erasmus concluded that, based on a lack of meaningful participation (officials had only spoken to 60 of the 6000 people who would be affected by the toilet scheme), the agreement relied upon by the Municipality was not a valid and enforceable one.[43] Citing a Constitutional Court case, he wrote as follows:

> 'The requirement of engagement flows from the need to treat residents with respect and care for their human dignity… The alleged agreement made no provision for those who were unemployed and poor and could not fund the enclosure of their own toilets.'[44]

He further held that the Municipality was bound by the Constitution and the National Housing Code to ensure community participation noting that the agreement reached between the Municipality and the community failed to uphold the section 26(2) reasonableness requirement of the Constitution as those with disabilities and gender-based violence issues were not taken into account.[45]

[42] *Beja* supra note 11 at para 192(3).
[43] Ibid. at para 106.
[44] Ibid. at para 89.
[45] Ibid. at paras 94 and 102.

Turning to the second issue, he held that the Municipality could not rely on the ratio of one toilet per five families, as per the National Housing Code, to justify the unenclosed toilets.[46] Judge Erasmus noted that the communal toilets were in an unusable condition and that even though the Municipality was pursuing a 'laudable programme', its actions were 'not in line with the provisions of section 26' and that 'no thought was given to the outcome of their decision and how it would affect the lives of the community.'[47] Judge Erasmus also noted that section 73(1)(c) of the Municipal Systems Act requires a municipality to provide 'the minimum level of basic services,' which he found to include the provision of sanitation and toilet services.[48] He further noted the objects of local government in the Constitution 'to ensure the provision of services to communities in a sustainable manner' and 'to promote a safe and healthy environment.'[49] According to Judge Erasmus, regardless of whether the municipality built individual or communal toilets, it was obligated to ensure the safety and privacy of the users and be compliant with the fundamental rights guaranteed in the Constitution.[50]

As for the third issue, he found that providing unenclosed toilets was a violation of several constitutionally entrenched rights, more particularly human dignity, freedom and security, privacy, healthy environment, housing and water.[51] Judge Erasmus wrote that 'any housing development, which does not provide for toilets with adequate privacy and safety would be inconsistent with s 26 of the Constitution and would be in violation of the constitutional rights to privacy and dignity.'[52] He also held that the provision of unenclosed toilets was unlawful as it is inconsistent with Regulation 2 of the Regulations Relating to compulsory National Standards and Measures to Conserve Water promulgated in terms of the Water Services Act.[53]

Judge Erasmus made no mention of the Constitutional Court's decision in *Joseph* although his analytical path parallels the *Joseph* reasoning by emphasizing the link between dignity and the delivery of municipal services. He described the objects of local government in the Constitution, including 'to ensure the provision of services to communities in a sustainable manner' and 'to promote a safe and healthy environment' (s 152(1)(b) and (d)) and confirms that a municipality is

[46] Ibid. at paras 107-118.
[47] Ibid. at paras 144-145.
[48] Ibid. at paras 142-143.
[49] Ibid. at para 142.
[50] Ibid. at para 143.
[51] Ibid. at para 137-144.
[52] Ibid. at para 143.
[53] Ibid. at paras 149-150.

obliged to try to achieve these objectives).[54] He also cited section 73(1)(c) of the Local Government: Municipal Systems Act 32 of 2000, which obliges a municipality to provide all members of communities with 'the minimum level of basic municipal services.'[55] He went on to write:

> 'Such minimum level would include the provision of sanitation and toilet services irrespective whether it is built individually on separate even, or communally, it must provide for the safety and privacy of the users and be compliant with the fundamental rights guaranteed in the Constitution. Any housing development which does not provide for toilets with adequate privacy and safety would be inconsistent with s 26 of the Constitution and would be in violation of the constitutional rights to privacy and dignity.'[56]

While the *Beja* case certainly represents a victory for sanitation rights, it is perhaps only a minor victory given the narrow factual issue before the Court. Judge Erasmus' focus on the inadequacy of 'unenclosed toilets' specifically and further on the related right to privacy, rather than on the right to sanitation and its intersection with many other rights more generally, diminishes the strength of the decision.[57] Despite Judge Erasmus' strong articulation supporting a recognition of the right to sanitation, it is almost certain that local governments will seek to distinguish the case based on the enclosed-unenclosed distinction. Such an argument, however, ignores the importance of sanitation and would support the illogical position that doing nothing (i.e. providing no sanitation facilities) is better than doing something (i.e. providing unenclosed toilets). Judge Erasmus' careful narrowing of the issue may have been to avoid any conflict with the *Nokotyana* decision, which does not even receive a mention in *Beja*. Thus the major breakthrough for sanitation rights in South Africa remains and still requires Constitutional Court comment.

VI CONCLUSIONS

The founding provisions of the Constitution open with the values on which South Africa is founded with the first being 'human dignity, the achievement of equality and the advancement of human rights and freedoms.' Sanitation is a human right essential to the full enjoyment of life and all

[54] Ibid. at para 143.
[55] Ibid. at para 142.
[56] Ibid.
[57] Ibid. at paras 125-128 and 143.

other human rights. Lack of access to sanitation represents an affront to human dignity and undermines the enjoyment of other human rights. South Africa, like all States, must ensure that everyone has access to sanitation, 'in all spheres of life, which is safe, hygienic, secure, socially and culturally acceptable, provides privacy and ensures dignity' in line with human rights principles related to non-discrimination, gender equality, participation and accountability.[58]

One of the stated purposes for the adoption of the Constitution is to 'improve the quality of life of all citizens and free the potential of each person.'[59] Why the drafters of the Bill of Rights did not explicitly include the right to sanitation is not important. How we move forward is critical. Sanitation is certainly not one of the 'glamour' rights like the right to water, health, environment or housing, but it is vital to daily living and millions are currently living without it. Sanitation must not be perceived as a second-rate or after-thought or side-kick or back-burner right. Rights claimants should not have to bring forward sanitation cases under the guise of the rights to housing, health, environment, or water. Legitimate rights claims should not be dressed up.

The lack of recognition by the Constitutional Court that the right to sanitation is one grounded in the Constitution presents a legal obstacle to the full realization of the right and to human dignity. *Nokotyana* should not be perceived as a failure or a definitive ruling on the right to sanitation, but rather as merely a missed opportunity to recognise the right to sanitation under the Constitution. *Beja* represents a step towards that recognition.

None of this should be taken to suggest that sanitation rights claims cannot succeed as the legal landscape currently exists. Nevertheless, Constitutional Court recognition will do two things: first, it will prevent unnecessary litigation in similar cases where the Court has clearly articulated the realization of the right, and second, where there is litigation, rights claimants will have constitutional protection on which to rely in their claims. Recognition by the Constitutional Court will serve to strengthen sanitation rights litigation and provide a greater impetus for the government to not only act, but to act swiftly. As stated by the Constitutional Court in *Mazibuko*:

> '[T]he social and economic rights entrenched in our Constitution may contribute to the deepening of democracy. They enable citizens to hold government accountable not only through the ballot box but also, in a different way, through litigation.'[60]

[58] UNCESCR Statement *supra* note 5.
[59] The Constitution supra note 7 at Preamble.
[60] *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) at para 71.

The recognition of the right to sanitation as a constitutional right in South Africa will have the effect of allowing those denied adequate sanitation the opportunity to hold government to account. As the clock ticks towards the 2014 Millennium Goals target, the need for a strong legal principle from the Constitutional Court affirming the constitutional right to sanitation becomes more pressing.

Of course the right to sanitation, like other socio-economic rights, is only as powerful as its practical application, and governments must dedicate funding, technology and other resources to help in the sanitation effort. Nevertheless, this very practical problem requires a baseline legal solution from South Africa's highest court before we can truly hope for the right's realisation.

BIBLIOGRAPHY

David Bilchitz 'Is the Constitutional Court Wasting Away the Rights of the Poor? Nokotyana v Ekurhuleni Metropolitan Municipality' (2010) 4 SALJ 591.

Pierre De Vos 'Pious Wishes Or Directly Enforceable Human Rights? Social And Economic Rights In South Africa's 1996 Constitution.' (1997) SAJHR 13.

Lawyers for Human Rights, 'Environmental Rights and Municipal Accountability: Water Supply and Sanitation in South Africa' LHR Publication Series (2009).

Socio-Economic Rights Institute of South Africa, 'Basic Sanitation in South Africa: A Guide to Legislation, Policy and Practice' (July 2011).

Anthea van der Burg 'Application of international law in South African case law and the importance of ratification of the ICESCR' (2012) 13:1 ESR Review 7.