The Right of Access to Sufficient Water in South Africa: Comments on *Federation for Sustainable Environment and Others v Minister of Water Affairs* [2012] ZAGPPHC 128

Oliver Njuh Fuo*

It is common knowledge that although the Constitution entrenches the right of everyone to access sufficient water, there are several challenges that continue to impede the full realisation of this right. Recently, environmental pollution by mining companies, a violation of the constitutional environmental right, has emerged as a major impediment to realising the constitutional right of access to sufficient water. The challenge posed by environmental pollution to the enjoyment of the right of access to sufficient water is highlighted in *Federation for Sustainable Environment and Others v Minister of Water Affairs* [2012] ZAGPPHC 128. The purpose of this article is twofold. Firstly, to comment on the judgment of the North Gauteng High Court in *Federation for Sustainable Environment and Others v Minister of Water Affairs*; and secondly, to comment on the litigation strategy employed by the applicants in this case. This article argues that, to promote the realisation of the right of access to sufficient water, communities and civil society organisations should also direct litigation at mining companies responsible for water pollution in order to compel them to at least refrain from violating the enjoyment of socio-economic rights, including the right of access to clean water. It is suggested that this strategy is consistent with the obligation imposed on non-state actors to at least refrain from violating socio-economic rights and the now established 'polluter-pays principle' in environmental law.

1. Introduction

For those familiar with constitutional developments in post-apartheid South Africa, it is common knowledge that s 27(1)(b) of the Constitution of the Republic of South Africa, 1996[1] guarantees everyone a justiciable right of access to sufficient water. This constitutional right has previously been the subject of litigation and subsequent academic discussion in the famous *Mazibuko Case*.[2]

* LLD Fellow at Faculty of Law, North West University (Potchefsroom Campus), South Africa, 20999410@nwu.ac.za.

[1] Constitution of the Republic of South Africa, 1996. Hereafter, the Constitution.

[2] The judgments of the High Court, Supreme Court of Appeal and the Constitutional Court are respectively cited as *Mazibuko v The City of Johannesburg* Case No 13865/06; *City of Johannesburg and Others v Lindiwe Mazibuko and Others* Case No 489/08 [2009] ZA SCA 20; and *Mazibuko and Others v City of Johannesburg and Others* 2010 (3) BCLR 239 (CC) (O'Regan J) ('*Mazibuko*'). For a discussion of the various court judgment, see for example: Linda Stewart (Jansen van Rensburg), 'The Right of Access to Adequate Water [discussion of *Mazibuko v The City of Johannesburg* Case No 13865/06] (2008) 19(3) *Stellenbosch Law Review* 415, 415-435; Jackie Dugard and Sandra Liebenberg, 'Muddying the Waters: The Supreme Court of Appeal's Judgment in the *Mazibuko Case*' (2009) 10(2) *Economic and Social Rights Review* 11, 11-17; Louis Kotze, 'Phiri, the Plight of the Poor and the Perils of Climate Change: Time to Rethink Environmental and Socio-economic Rights in South Africa? 1(2) 2010 *Journal of Human Rights and the Environment* 135, 156-160; Linda Stewart, 'Adjudicating Socio-Economic Rights Under a Transformative Constitution' 2010 28(3) *Penn State International Law Review* 487, 487-512.

The purpose of this article is to comment on the recent judgment of the North Gauteng High Court in *Federation for Sustainable Environment and Others v Minister of Water Affairs*[3] and on the litigation strategy employed by applicants in this case. Interest in this case is motivated by the fact that it is the first in South Africa concerning the violation of the right of access to sufficient water caused by mine pollution and the failure of the government and the implicated mining companies to promptly and adequately address the resultant water crisis.

This article is divided into three main parts. The first part provides an overview of the constitutional and legislative framework of the right of access to sufficient water in South Africa with reference to the obligations imposed on the government. The intention of this section is to contextualize the facts and subsequent comments on *Federation for Sustainable Environment and Others.* The second part provides a summary of the facts of the case and the judgment. The third part comments on the judgment and the litigation strategy employed by the applicants in this case. This article argues that, to promote the realisation of the right of access to sufficient water in cases involving water pollution by mines, communities and civil society organisations should also direct litigation towards implicated mining companies, in order to compel them to refrain from violating the enjoyment of the right of access to water. It is suggested that this strategy which directs litigation towards mining companies responsible for water pollution, is consistent with the obligation imposed on non-state actors to refrain from violating socio-economic rights and the now established 'polluter-pays' principle in environmental law.

2. Legal Framework on the Right of Access to Sufficient Water

This section provides an overview of the constitutional and legislative framework of the right of access to sufficient water and makes reference to the legal obligations of the government in relation to this right.

2.1 The Constitutional Framework

S 27(1)(b) of the Constitution guarantees everyone the right to have access to "sufficient" water subject to the qualifiers of s 27(2).[4] However, the Constitution does not provide content as to what qualifies as sufficient quantity or quality of water.[5] In *Mazibuko,*[6] the

[3] See *Federation for Sustainable Environment and Others v Minister of Water Affairs* [2012] ZAGPPHC 128 (10 July 2012) (Mavundla J) (*Federation for Sustainable Environment and Others*). However, this article takes into consideration corrections of typing errors in this judgment by same court in *Federation for Sustainable Development and Others v Minister of Water Affairs and Others* (2012) North Gauteng High Court, Pretoria, Case No: 35672/12 (3 August 2012) <http://www.saflii.org/za/cases/ZAGPPHC/2012/145.html>. The full reasons for the judgment of 3 August 2012 were outlined in another judgment on the 15 of August 2012. For details of the judgment of 15 August, see: of *Federation for Sustainable Development and Others v Minister of Water Affairs and Others* (2012) North Gauteng High Court, Pretoria, Case No: 35672/12 (15 August 2012), <http://www.saflii.org/za/cases/ZAGPPHC/2012/170.html>.

[4] S 27(2) of the Constitution provides that: 'The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights'

[5] Anton Kok and Malcolm Langford, 'The Right to Water' in D Brand and C Heyns (eds), *Socio-Economic Rights in South Africa* (Pretoria University Law Press, 2005) 191, 197; Anel du Plessis, 'A Government in Deep Water? Some Thoughts on the State's Duties in Relation to Water Arising from South Africa's Bill of Rights' (2010) 19(3) *Review of European, Comparative and International Environmental Law* 316, 319.

[6] *Mazibuko* 2010 (3) BCLR 239 (CC).

Constitutional Court was given an opportunity to properly interpret s 27(1)(b) of the Constitution. One of the issues raised by the applicants was that the Court should determine the content of the right by quantifying the amount of water sufficient for a dignified life.[7] They argued that the Court should hold the approximate amount of 50 litres of water per person per day as the content of the right in s 27(1)(b) and as the quantity of water required per person per day to live a dignified life.[8] This was contrary to the 25 litres per person per day or 6 kilolitres per household per month that was provided under the City of Johannesburg's Free Basic Water Policy.[9] The applicants urged that the Court should use 50 litres of water per person per day to determine whether the state acted reasonably in seeking to progressively realise the right of access to *sufficient* water.[10] The Court rejected this argument for being similar to those for a minimum core for water that it has consistently rejected[11] and argued that courts are ill-placed to make these assessments for both institutional and democratic reasons.[12] However, the Court noted that although the argument raised was similar to those for a minimum core, it is more extensive because it transcends the minimum core argument for water and hinges on the amount of water required for dignified human life.[13] The Court departed from the findings of the High Court and the Supreme Court of Appeal, which had respectively ordered the City of Johannesburg to supply 50 and 42 litres of water per person per day to Phiri residents.[14] It held that the City's Free Basic Water Policy was reasonable because its efforts were consistent with its obligation to progressively realise the right of access to water and therefore set aside the decisions of the High Court and Supreme Court of Appeal.[15] The position of the Court implies that the normative content of the right to water remains elusive in South Africa.[16]

The decision of the Court in the *Mazibuko* case has been criticised by academics for a number of reasons. Firstly, writers have expressed disappointment with the fact that, although the Court recognised the importance of water to the realisation of other rights in the Bill of Rights, it failed to give normative content to the right of access to sufficient water in South

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[7] Ibid 51.

[8] In *Mazibuko v The City of Johannesburg* Case No 13865/06, the High Court held that the quantity of water adequate for purposes of s 27(1)(b) of the Constitution is 50 litres per person per day. For an appraisal of the High Court judgment, see Stewart (Jansen van Rensburg), above n 2, 415-435. To the contrary, the Supreme Court of Appeal determined in *City of Johannesburg and Others v Lindiwe Mazibuko and Others* Case No 489/08 [2009] ZA SCA 20 (25 March 2009), that 42 litres of water per person per day was the adequate content of the constitutional right of access to sufficient water. For a critical discussion of the SCA decision, see Dugard and Liebenberg, above n 2, 11-17.

[9] It should be noted that according to World Health Organization (WHO) standards, 25 litres of water per person per day is the lowest level to maintain life over the short term. See Stewart (Jansen van Rensburg), above n 2, 420.

[10] See *Mazibuko* 2010 (3) BCLR 239 (CC), 51.

[11] See *Mazibuko* 2010 (3) BCLR 239 (CC), 52-58 and 66-68 for considerations used by the Court to avoid prescribing a minimum core. The argument for the minimum core is usually based on the fact that s 39 (1)(b) of the Constitution provides that, when interpreting the Bill of Rights, courts "must consider international law". In *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC) (Chaskalson J) (*'Makwanyane'*) the Constitutional Court held that this provision requires that both binding and non-binding international law should serve as interpretative tools to courts. See *Makwanyane*, 35,37 and 39.

[12] See *Mazibuko* 2010 (3) BCLR 239 (CC), 62, 65-68.

[13] Ibid 56.

[14] Ibid 25-27 and 28-34 respectively for a summary of the High Court and Supreme Court of Appeal rulings.

[15] See *Mazibuko* 2010 (3) BCLR 239 (CC), 69-97 and 171.

[16] Du Plessis, above n 5, 320.

Africa.[17] Secondly, the Court has also been criticised for focusing on the meaning of the right to access and quantity of water sufficient for purposes of s 27(1)(b) of the Constitution, without sufficient attention to the quality of water.[18] Thirdly, it has been argued that the Court diluted the standard of reasonableness established in its earlier socio-economic rights jurisprudence.[19] In addition, the Court has been criticised for failing to take into consideration the historical context of water challenges in South Africa and the fact that the country is semi-arid and suffering from water scarcity.[20] Moreover, its analysis failed to integrate environmental considerations and the implications thereof for access to water in South Africa.[21] In addition to criticisms directed at the Court, concerns have been raised about the general indifference towards the plight of the poor, who suffer from the privatization and commercialization of water services.[22]

Informed by s 39(1)(b) of the Constitution, it is possible to understand the normative content of the right to water by examining the reports of the UN Committee on Economic, Social and Cultural Rights (the UN Committee)[23] on the right to water. At the international level, although the right to water is recognised in a wide range of human rights instruments,[24] the UN Committee has implied the right in article 11 and 12 of the *ICESCR*, which respectively guarantee everyone the right to an adequate standard of living and the right to the highest attainable standard of health.[25] In addition, the UN Committee notes that the right to water is inextricably linked to the rights to adequate housing and adequate food.[26]

The right to water has two main components:[27] The first component is that the quantity and quality of water should be sufficient and adequate for domestic purposes,[28] the right to health

[17] Ibid 321; Sandra Liebenberg, *Socio-Economic Rights: Adjudicating under a Transformative Constitution* (Juta & Co, 2010) 466-480; Siyambonga Heleba, 'The Right of Access to Sufficient Water in South Africa: How Far Have we Come? (2011) 15 *Law, Democracy and Development* 1, 27.

[18] Du Plessis, above n 5, 322.

[19] Liebenberg, *Socio-Economic Rights* (2010) 467-469 and 470-471.

[20] Du Plessis, above no 5, 317-318 and 325; Stewart, above n 2, 502.

[21] Stewart, above n 2, 502-503; Du Plessis, n 5 above 342. Despite this view, Kotze is inclined to believe that the Constitutional Court was likely influenced by environmental considerations such as the long term impact of climate change in making its decisions. See Kotze, above n 2, 156-160.

[22] See Jackie Dugard, 'Can Human Rights Transcend the Commercialization of Water in South Africa? Soweto's Legal Fight for an Equitable Water Policy (2010) 42(2) *Review of Radical Political Economics* 175, 175-194; Jackie Dugard, 'Civic Action and Legal Mobilisation: The Phiri Water Meters Case' in Jeff Handmaker and Remko Berkhout, *Mobilising Social Justice in South Africa: Perspectives from Researchers and Practitioners* (Pretoria University Law Press, 2010) 71, 71-99.

[23] This is an independent body of experts which monitors the implementation of the International Covenant Economic, Social and Cultural Rights (*ICESCR*) by its state parties. See <http://www2.ohchr.org/english/bodies/cescr/>.

[24] See for example, article 14, para 2(h) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), adopted in 1979; Article 24, para 2 of the Convention on the Rights of the Child (CRC), adopted in 1989; Paras 18.47-18.64 of UN Agenda 21 (Report of the United Nations Conference on the Environment and Development), adopted in Rio de Janeiro in June 1992.

[25] UN General Comment No.15 (Contained in Document E.C/12/2002/11): The Right to Water (2002), para 3.

[26] Ibid para 3; UN General Comment 4 (Contained in Document E/1991/23): The Right to Adequate Housing (1991), para 8(b); A J Bradbrook and J G Gardam, 'Placing Access to Energy Services Within a Human Rights Framework' (2006) 28(2) *Human Rights Quarterly* 389, 408.

[27] General Comment No.15, above n 25, para 2.

[28] According to the Committee, the adequacy of water required for the right to water will vary from one context to the other as informed by different conditions. See Ibid, , para 12; Du Plessis, above n 5, 319

(including environmental hygiene/sanitation), human dignity and life. In addition, the manner adopted for realising the right must ensure intergenerational sustainability.[29] The second component requires that water must be physically and economically accessible to all, without any discrimination, on a continuous basis. [30] This implies the right to maintain access to existing water supplies necessary for the right to water; and freedom from interference, including freedom from arbitrary disconnections of water supply.[31] In addition, information relating to the right to water should be equally accessible to all so as to ensure that people can ask, receive and impart information concerning water issues.[32] A corollary of both components is the entitlement to the right to a system of water supply and management that provides equal opportunities for people to enjoy the right to water.[33] It should be noted that the UN Committee includes indigents, women, children and indigenous people in a list of vulnerable individuals and groups who should receive special attention in the state parties' realisation of the right to water.[34]

The right to water is not expressly guaranteed in the *African Charter on Human and Peoples' Rights*.[35] However, the African Commission on Human and Peoples' Rights (ACHPR)[36] has indicated that this right can be implied *inter alia* in the rights to life, human dignity, health, a satisfactory environment, and socio-economic and cultural development.[37] According to the African Commission:

> The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal, domestic, and agricultural uses. Water should be treated as a social and cultural good, and not primarily as an economic good.
>
> Sufficient water means an adequate and continuous water supply for each person's personal and domestic use. This normally includes drinking, personal sanitation, washing clothes, food preparation and personal and household hygiene. A sufficient amount of water is necessary to prevent death from dehydration.
>
> Safe water is water that, in particular, is free from hazardous substances …that could endanger human health, and whose colour, odour and taste are acceptable to users.[38]

This extract reflects the various components of the right to water and sanitation, as elaborated in General Comment 15 on the right to water. In broad terms, the obligations (including core obligations) imposed on state parties to realise the right to water under the *African Charter*

[29] See General Comment No.15, above, n 25, paras 10, 11 and 12.
[30] Ibid para 12 (c)(i)-(iii); Du Plessis, above n 5, 319.
[31] See General Comment No.15, above n 25, para 10.
[32] Ibid para 12 (iv).
[33] Ibid para 10.
[34] Ibid paras 15-6; Du Plessis, above n 5, 319.
[35] The African Charter on Human and Peoples Rights (the *African Charter*) was adopted by the Organization on African Unity (now the African Union) on 27 June 1981 and entered into force on 21 October 1986.
[36] This is the main body tasked with the interpreting, promoting and ensuring the protection of human rights on the African Continent. See article 30 of the *African Charter* and <http://www.achpr.org/about/>.
[37] ACHPR *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and People's Rights* (2010), para 87. These rights are respectively guaranteed in articles 4, 5, 16, 24 and 22 of the *African Charter*.
[38] Ibid paras 88-91. It should also be noted that article 14(2)(c) of the African Charter on the Rights and Welfare of the Child (adopted in 1990) obliges State parties to take measures to fully realise the right of children to safe drinking water.

are similar to those outlined in UN General Comment 15.[39] However, some African peculiarities are equally stressed. For example, interpretations of the *African Charter* by the ACHPR impose a minimum core obligation on State parties to refrain from using access to water as a political tool.[40]

It is important to note that the Constitution imposes negative and positive obligations on the government to respect, promote, protect and fulfill the rights in the Bill of Rights, progressively through reasonable legislative and other measures, within available resources.[41] The duties created by s 27(1)(b) to ensure realisation of the right of access to sufficient water broadly viewed and when read with s 7(2), become the common and shared mandate of all three spheres of the government and all relevant organs of state.[42] This mandate is executed within the broad framework of cooperative government.[43] The joint obligation of all spheres of government to contribute towards realising the right of access to sufficient water is confirmed by ss 4(2)(j) and 23(1)(c) of the *Local Government: Municipal Systems Act*[44], which compels municipalities to contribute, together with other organs of state, to the progressive realisation of the fundamental rights contained *inter alia* in ss 24, 26, 27 and 29 of the Constitution.[45] The direct implication of these provisions is that, municipalities are bound by the constitutional obligations to realise socio-economic rights that fall within shared or exclusive areas of competence.[46]

However, it should be noted that despite these constitutional and legislative pronouncements, the legislative and executive authority of municipalities over these socio-economic rights must be read in conjunction with s 156 of the Constitution.[47] It flows from ss 156(1) and (2)

[39] See ACHPR *Principles and Guidelines* (2010), para 92(i)-xxii and paras 17-38 of General Comment No.15 (2002).

[40] ACHPR *Principles and Guidelines* (2010), para 92(iii).

[41] See ss 7(2), 26(2) and 27(2) of the Constitution. For a detailed discussion of these duties, see: Sandra Liebenberg, *Socio-Economic Rights: Adjudicating Under a Transformative Constitution* (Juta & Co, 2010) 82, 82-87; Danie Brand, *Courts, Socio-economic Rights and Transformative Politics* (LLD Thesis, University of Stellenbosch, 2009) 94, 94-131.

[42] See: Danie Brand, 'Introduction to Socio-economic Rights in the South African Constitution' in D Brand and C Heyns (eds), *Socio-Economic Rights in South Africa* (2005) 1,- 9-12.

[43] Ss 40 and 41 of the Constitution; Willemien du Plessis, 'Legal Mechanism for Cooperative Governance in South Africa: Successes and Failures' (2008) 23(1) *South African Public Law* 87, 90-92; Timothy Layman, *Intergovernmental Relations and Service Delivery in South Africa: A Ten Year Review* (Report Commissioned by the Presidency of South Africa, 2003) 8; Jaap de Visser, *Institutional Subsidiarity in the Constitution: Slapstick Asymmetry or a 'Rights-based' Approach to Powers?* (Report Published by University of Western Cape, 2008) 2-3 and 11-12; Bertus De Villiers and Jabu Sindane, *Cooperative Government: The Oil in the Engine* (Konrad-Adenauer-Stiftung, 2011); Jaap de Visser, *Developmental Local Government: A Case Study of South Africa* (Intersentia, 2005) 209-254.

[44] *Local Government: Municipal Systems Act 32 of 2000*.

[45] These sections respectively deal with rights related to the environment; property; housing; health care, water, food and social security; children; and education.

[46] See J De Visser, 'A Perspective on Local Government's Role in Realising the Right of Access to Housing and the Answer of the Grootboom Judgment' 2003 7(2) *Law, Democracy and Development* 201-215; Oliver Fuo, *Local Government's Role in the Pursuit of the Transformative Constitutional Mandate of Social Justice in South Africa* (LLD Thesis, North West University, 2014) 116-117; Oliver Fuo, 'Constitutional Basis for the Enforcement of 'Executive' Policies that give Effect to Socio-Economic Rights in South Africa' 2013 16(4) *Potchefstroom Electronic Law Journal* 1, 8-9 and 14-15.

[47] S 156 of the Constitution provides that: (1) A municipality has executive authority in respect of, and has the right to administer – (a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5;

of the Constitution that municipalities have executive and legislative competence over matters listed in Part B of Schedule 4 and Part B of Schedule 5 of the Constitution. The matters listed in Part B of Schedule 4 include the provision of water and sanitation services, limited to potable water supply. Therefore, in terms of the s 27(1)(b) right of access to sufficient water, the executive and legislative responsibility of local government is limited to the provision of potable water supply. The water-related responsibilities of local government become clear when one looks at the legislative framework on the right of access to sufficient water.

2.2 Legislative and Policy Framework

The constitutional right of access to sufficient water is given legislative effect by the *Water Services Act*.[48] According to s 3(1) of the Water Services Act, everyone has the right to have access to a basic water supply, which is defined as the prescribed minimum of water supply services needed for the reliable supply of a sufficient quantity and quality of water to both formal and informal households, to support life and personal hygiene.[49] However, this definition does not indicate the specific content of the right to basic water supply. This content is developed in the *Regulations Relating to Compulsory National Standards and Measures to Conserve Water*.[50] According to Regulation 3 of the *Water Regulations*, the minimum standard for basic water supply services is:

> (a) the provision of appropriate education with respect to effective water use; and
>
> (b) a minimum quantity of portable water of 25 litres per person per day or 6 kilolitres per household per month -
>
> (a) at a minimum flow rate of not less than 10 litres per minute;
>
> (ii) within 200 metres of a household; and
>
> (iii) with an effectiveness such that no consumer is without a supply for more than seven full days in any year.

The 25 litres of water per person per day guaranteed by Regulation 3(b) of the Water Regulations as the quantity of basic water supply is consistent with the lowest level of water needed to support life in the short term per person per day as suggested by the WHO.[51] However, it must be understood as forming the basic floor and not necessarily the sufficient quantity of water required for purposes of the right to water as entrenched in international and

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and (b) any other matter assigned to it by national or provincial legislation (2) A municipality may make and administer by-laws for the effective administration for the effective administration of the matters which it has the right to administer. (3)… (4) The national government and provincial governments must assign to a municipality, by agreement and subject to any conditions, the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relate to local government, if – (a) that matter would most effectively be administered locally; and (b) the municipality has the capacity to administer it.

[48] *Water Services Act 108 of 1997*.

[49] S. 1(iii) of *Water Services Act*.

[50] *Regulations Relating to Compulsory National Standards and Measures to Conserve Water* (2001) GN R509 of GG No.22355 of 8 June 2001. Hereafter, *Water Regulations*.

[51] See WHO 'Minimum water quantity needed for domestic uses' at 2 <http://ec.europa.eu/echo/files/evaluation/watsan2005/annex_files/WHO/WHO5%20%20Minimum%20water%20quantity%20needed%20for%20domestic%20use.pdf>; Stewart (Jansen van Rensburg), above n 2, 420.

regional human rights instruments.[52] As suggested by expert evidence and as confirmed by the High Court and Supreme Court of Appeal, the sufficient amount of water for purposes of s 27(1)(b) should vary between 42 and 50 litres of water per person per day.[53] The government's *Strategic Framework for Water Services*[54] is aware that 25 litres of water per person per day is a bare minimum, insufficient for domestic use and therefore expresses the government's commitment to continuously and progressively revise the quantity of basic water supply.[55] Unfortunately, it seems the basic national standards giving effect to the constitutional right of access to sufficient water has not been revised to date.[56]

Regulation 4 of the *Water Regulations* deals with interruptions in the provision of water services. It requires a water services institution to take steps to ensure that, where water services usually provided by or on behalf of that water services institution are interrupted for a period of more than 24 hours, for reasons other than those contemplated in s 4 of the *Water Services Act*,[57] 'a consumer has access to alternative water services comprising at least 10 litres of potable water per person per day; and sanitation services sufficient to protect health.'

In relation to quality of potable water, Regulation 5 now requires water services authorities to include a suitable programme for sampling the quality of potable water provided by it to consumers in a Water Services Development Plan. The sampling programme must specify the points at which potable water provided to consumers will be sampled, the frequency of sampling, and for which substances and determinants the water will be tested. Furthermore, the results obtained from tested samples must be consistent with the South African Bureau of Standards (SABS) 241: Specifications for Drinking Water or relevant drinking water guidelines published by the Department of Water Affairs and Forestry.[58] If sampling indicates that the quality of water poses health risks, the water services institutions must follow the prescribed procedure to protect consumers.[59]

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[52] Stewart (Jansen van Rensburg), above n 2, 420-422.

[53] Linda Stewart and Debra Horsten, 'The Role of Sustainability in the Adjudication of the Right of Access to Adequate Water' (2009) 24(2) *South African Public Law* 487, 459; Stewart (Jansen van Rensburg), above n 2, 417.

[54] Department of Water Affairs (DWAF) *Strategic Framework for Water Services: Water is Life, Sanitation is Dignity* (2003).

[55] Ibid 45-47; Heleba, above n 17, 15.

[56] Heleba, above n 17, 15.

[57] S 4 of the *Water Services Act* provides that: '4(1) Water services must be provided in terms of the conditions set by the water services provider. (2) These conditions must – (a) be accessible to the public; (b) accord with conditions for the provision of water services contained in bylaws made by the water services authority having jurisdiction in the area in question; and (c) provide for – (i) the technical conditions of existing or proposed extensions of supply; (ii) the determination and structure of tariffs; (iii) the conditions of payment; (iv) the circumstances under which water services may be limited or discontinued; (v) procedures for limiting or discontinuing water services; (vi) measures to promote water conservation and demand management; (3) Procedures for the limitation or discontinuation of water services must - (a) be fair and equitable; (b) provide for reasonable notice of intention to limit or discontinue water services and for an opportunity to make representations unless – (i) other consumers would be prejudiced; (ii) there is an emergency situation; (iii) or the consumer has interfered with a limited or discontinued service; and (c) not result in a person being denied access to basic water services for nonpayment, where that person proves, to the satisfaction of the relevant authority that he or she is unable to pay for basic services…'

[58] DWAF, above n 54, 46.

[59] See Regulation 5(4) and 6 of the Water Regulations.

From the above paragraphs, it is evident that the vague, constitutionally guaranteed right of access to sufficient water is given concrete content by the *Water Services Act* and the *Water Regulations*. The *Water Regulations* also clearly set out the responsibilities of local government in relation to water. However, it must be reiterated that in accordance with South Africa's constitutional system of cooperative governance, municipalities (constituting the local government sphere) are expected to receive support from the provincial and national governments in discharging constitutional and legislative obligations.[60]

3. Facts and Decision of the Carolina Case

This section outlines the facts and the decision of the North Gauteng High Court.

3.1. Facts of the Case

Silobela is a residential area which constitutes part of the Carolina mining and farming community in the Albert Luthuli Local Municipality area in the Mpumalanga Province of South Africa. The Carolina community suffers from 'acid mine water' contamination.[61] Leakages from mines contaminated the water resources of this area, depriving about seventeen thousand community residents of regular water supply since the middle of January 2012. The government estimates that it will cost about R200.000.000.00 (Two Hundred Million Rands) to solve this problem.[62]

In order to alleviate the suffering of community residents in affected areas, water tanks were deployed to supply water to residents of Silobela and Carolina at the beginning of February 2012. The applicants indicated that from March 2012 until the beginning of May 2012, the system of providing potable water through water tanks proved inadequate. According to the applicants, often some of the tanks were not refilled while others remained empty. In general, they argued that not only was the water supply inadequate, residents had to walk long distances to access potable water from the tanks.[63]

Using the broad constitutional provision on *locus standi*,[64] the applicants (Federation for Sustainable Environment[65] and the Silobela Concerned Community)[66] brought an urgent application before the North Gauteng High Court against *inter alia*, the Minister of Water Affairs, the Sibanda District Municipality and the Luthuli Local Municipality, arguing that the court should *inter alia* declare unlawful the failure of the respondents to provide residents

[60] See s 41(h)(ii) of the Constitution.
[61] *Federation for Sustainable Environment and Others* [2012] ZAGPPHC 128, 4.
[62] See <http://www.lhr.org.za/news/2012/carolina%E2%80%99s-polluted-water-highlights-growing-problem-sa-business-day>.
[63] *Federation for Sustainable Environment and Others* [2012] ZAGPPHC 128, 4-5.
[64] S 38 of the Constitution provides that: "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are – (a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members.
[65] Federation for Sustainable Environment *is a registered* Non Governmental Organization.
[66] Silobela Concerned Community is a voluntary association of about 150 Silobela community residents. See *Federation for Sustainable Environment and Others*, par 3.

of the Carolina Community reliable supply of fresh drinking water for an extended period beyond the prescribed seven days period in terms of Regulation 3(b) of the *Water Regulations*.[67] They further argued that, the lack of daily access by residents to an effective and reliable supply of potable water, constituted a fundamental violation of their constitutional right to have access to sufficient water.[68] Moreover, the applicants argued that the respondents should consult with residents and other interested and affected parties that would ensure that potable water is provided to the residents as well as mitigate and prevent water pollution by the mines in the area.[69]

3.2. Decision of the Court

The Court acknowledged the duty of the respondents to provide water to residents of the Carolina Community based on the requirements of Regulation 3 of the *Water Regulations*[70], and the constitutional and legislative duties jointly imposed on the respondents.[71] The Court dismissed the claim of the (Fifth to the Ninth) respondents that the water crisis was not urgent and highlighted that this problem probably started before February 2012.[72] The Court asserted that:

> If the legacy of apartheid is ever to be eliminated, it requires that the Courts must also strive to encourage the national government and all its structures, to boldly and with haste march towards the cherished objective encapsulated in the preamble [of the Constitution].[73]

The Judge held that the matter was intrinsically urgent due to the violation or failure to restore to normality the enjoyment of the fundamental constitutional right of access to water.[74]

In relation to the request by applicants that the Court should declare unlawful the failure of the respondents to provide access to reliable potable water for more than seven full days as required by Regulation 3(b) of the *Water Regulations*,[75] the Court held that the respondents could not bear this responsibility alone due to the fact that the applicants had, through the burning of water tanks, constrained the respondents' response to the water crisis.[76]

Based on the constitutional and legislative duties imposed on the respondents, the Court held that:

> … the municipality must strive to resolve as speedily as possible the water problem in Silobela and Carolina. It must equally have a progressive plan to achieve this objective and must engage and inform the community of the steps and progress of doing so. It is in this context that I understand the reason for the applicants to seek prayers 3 to 6. These respondents are

[67] Ibid 6.
[68] Ibid.
[69] Ibid 7.
[70] Ibid10.
[71] Ibid 10-15.
[72] Ibid 16.
[73] Ibid 17.
[74] Ibid 18.
[75] Ibid 2.
[76] Ibid 22.

> accountable to the communities. In my view, the orders sought are reasonable and should therefore be granted, notwithstanding their fierce objection to these reliefs being granted.[77]

Informed by the above finding, the Court ordered *inter alia* that the sixth and the seventh respondents (respectively, the Acting Executive Mayor and Municipal Manager of the Gert Sibanda District Municipality) should:[78] provide temporary potable water to residents of the Carolina Community within 72 hours of the Court's order in line with Regulation 3(b) of the *Water Regulations*; engage actively and meaningfully[79] with applicants regarding the measures being taken to ensure that potable water can be resupplied through the water supply services in the Carolina Community (Silobela, Caropark and Carolina Town) and 'where, when, what volume, and how regularly temporary water will be made available in the interim'; and to report to the Court within one month of its order on the measures that have been taken.[80] The Court granted the respondents leave of appeal against its decision without suspending the execution of it orders.[81] However, it should be noted that although the respondents failed to comply with the timeframes set out in the Court orders, the water crisis was eventually resolved without an appeal to a higher court.

4. Comments on the Judgment and Litigation Strategy

4.1 Comments on the Judgment

The reporting order of Mavundla J in *Federation for Sustainable Environment and Others* obliging the respondents to report to the Court within one month of its order on the measures taken to ensure that potable water supply is reconnected to the Carolina Community[82], is commendable for a number of reasons.[83] Firstly, as Liebenberg points out, a reporting order seeks to ensure that the government complies with the terms of a court order and enables the court to exercise supervisory jurisdiction in ensuring that violations of constitutional rights are effectively remedied.[84] Although Brand argues that the use of supervisory orders or structural interdicts have the potential to erode the legitimacy of courts by directly placing

[77] Ibid 24.
[78] Ibid 26.
[79] The concept of meaningful engagement was developed by the Constitutional Court in a series of cases to describe the nature of the constitutional obligation that is imposed on the government to facilitate public participation in public governance. See: *Residents of Joe Slovo Community, Western Cape v Thebelisha Homes and Others* 2009 (9) BCLR 847 (CC), 236-245; *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (12) BCLR 1399, 123-125, 129-134; *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008(5) BCLR 475 (CC), (Yacoob J) ('*Occupiers of 51 Olivia Road*'), 14-15. For a detailed discussion on this subject, see: Lilian Chenwi, 'Meaningful Engagement' in the Realisation of Socio-economic Rights: The South African Experience' (2011) 26(1) *South African Public Law* 128-156; Gustav Muller, 'Conceptualising 'Meaningful Engagement' as a Deliberative Democratic Partnership (2011) 3 *Stellenbosch Law Review* 742, 742-758; Liebenberg, above n 41, 153-154.
[80] See *Federation for Sustainable Environment and Others* [2012] ZAGPPHC 128, 26.
[81] Ibid 23- 24 and 27.
[82] Ibid 26.
[83] For the views of some South African experts on the use of supervisory orders by courts to ensure that government complies with its socio-economic rights obligations, see: Liebenberg, above no 41, 424-438; Brand, above n 41, 135-136.
[84] Liebenberg, above n 41, 424-434.

courts in confrontation with the executive branch of government,[85] their use also demonstrates the commitment of courts in contributing to improving the lives of especially impoverished, disadvantaged and often marginalised South Africans as required by the Constitution. The reporting order probably takes into consideration the negative attitude of the government in trivializing serious problems of poverty and its failure to comply with constitutional obligations in realizing the fundamental rights of impoverished communities.[86] The reporting order in *Federation for Sustainable Environment and Others* also demonstrates the boldness of the courts in exercising their oversight role, given the generally negative attitude of the government in relation to reporting orders and structural interdicts. For example, shortly after the ruling of the same court in *Section 27 and Others v Minister of Basic Education and Others,*[87] the Department of Basic Education issued a press release to the effect that:

> The department has noted today's ruling by the Gauteng North High Court regarding the matter between Section 27 (applicant) and the Minister of Basic Education along with the MEC for Education in Limpopo.
>
> After lengthy behind-the-scenes discussions with the applicants, we jointly agreed on the delivery date of the 31 May to 15 June 2012 as well as the catch-up academic programme to support learners who didn't get textbooks on time. The department is committed to implementing this part of judgment without further delay.
>
> We are however considering putting under review the decision by the judge to provide monthly reports to Section 27. This part may compromise the functioning of government and may set a wrong precedent. The department will study all other matters contained in the ruling and make an announcement in due course. [88]

Moreover, the reporting order probably takes into consideration the tendency of the government to fail to comply with court deadlines/timeframes. For example, the Department of Basic Education failed to comply with the court deadline in *Section 27 and Others v Minister of Basic Education*.[89] In addition, despite the Court's order in *Federation for Sustainable Environment and Others,* the government failed to provide temporary potable water to all residents of the Carolina Community within 72 hours and the concerned municipalities lodged an appeal to suspend the operation of the orders relating to the supply of water the residents.[90] *Lawyers for Human Rights (LHR),*[91] one of the legal representatives

[85] See Brand, n 41 above, 136.
[86] See *Federation for Sustainable Environment and Others* [2012] ZAGPPHC 128, 16.
[87] *Section 27 and Others v Minister of Basic Education and Others* (2012) Case No 24565/12.
[88] See 'Media Statement on the Court Ruling: Section 27 vs Minister of Basic Education and MEC for Education in Limpopo, 17 May 2012" <http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=27550&tid=68768>.
[89] See: 'Only 15% of Limpopo Textbooks Delivered by Court Deadline – report' <http://www.citypress.co.za/SouthAfrica/News/Only-15-of-Limpopo-textbooks-delivered-by-court-deadline-report-20120716>.
[90] See 'Press Release – Carolina Residents to Oppose Municipalities Leave to Appeal Application' < http://www.lhr.org.za/news/2012/press-release-carolina-residents-oppose-municipalities-leave-appeal-application>.
[91] Lawyers for Human Rights (LHR) is an independent human rights organization with 30 years experience in human rights activism and public interests litigation in South Africa. See <http://www.lhr.org.za/>.

of the respondents in the *Federation for Sustainable Environment and Others* in a press release argued that:

> The decision by the two municipalities to appeal the high court judgment is indicative of the two municipalities' consistent refusal to accept their responsibility to provide even the most basic water supply to the residents. We fear that it is an attempt to prolong the court process and hope that by opposing the application, we will find a rapid solution to the shortage of clean drinking water in Carolina and its surroundings.[92]

The above extract indicates the tendency of the government to trivialize issues relating to the realisation of socio-economic rights that are intended to meet the basic needs of the most impoverished segments of society. It is alarming that instead of using state funds in discharging constitutionally mandated responsibilities, these municipalities prefer wasting them on expensive litigation.

It is also worth noting that the Court's order, that relevant municipal authorities should engage meaningfully with the respondents, initiated and facilitated a process of engagement between the parties on the appropriate measures that could be put in place to give effect to the Court judgment.[93] This approach required municipal authorities to meaningfully engage with residents of the Carolina Community. It is also commendable given that local government authorities frequently overlook the need for effective public participation in discharging their socio-economic rights and obligations.[94] In one instance, the City of Johannesburg shamefully argued that occupiers of unsafe and unhealthy buildings had been given a hearing before the City's decision to evict them, simply because occupiers had an opportunity to file affidavits in the High Court in opposition to the ejectment application.[95] This forms a very impoverished conception of the right and process of public participation at the local government level and displays disrespect for the 'voices' and the dignity of impoverished and marginalised persons.[96]

In *Occupiers of 51 Olivia Road*, the Court defined meaningful engagement as a two-way process in which the City and those about to become homeless would talk to each other meaningfully in order to achieve certain objectives.[97] It held that meaningful engagement has the potential to contribute towards the resolution of disputes and to 'increased understanding and sympathetic care' if both sides are willing to participate in the process. The Court noted that people may be so vulnerable that they may not be able to understand the importance of engagement and may refuse to take part in the process. According to the Court, if this happens, a municipality cannot merely walk away but must make reasonable efforts to engage with such vulnerable people. If these reasonable efforts fail, a municipality may proceed without appropriate engagement. The Court stated that because the engagement process

[92] See 'Press Release', above n 4.
[93] This is one of the advantages of a structural interdict. See Liebenberg, above n 41, 434.
[94] See *Occupiers of 51 Olivia Road* 2008(5) BCLR 475(CC), 9; Stuart Wilson 'Planning for Inclusion in South Africa: The State's Duty to Prevent Homelessness and the Potential of 'Meaningful Engagement' (2011) 22 *Urban Forum* 265, 265-282; *Ntombentsha Beja and Others v Premier of the Western Cape* 2011 (10) BCLR 1077 (WCC), 146.
[95] *Occupiers of 51 Olivia Road* 2008(5) BCLR 475 (CC), 9.
[96] Ibid 10; Holness 2011 *SAPL* 9-10; Wilson 2011 *Urban Forum* 274.
[97] *Occupiers of 51 Olivia Road* 2008(5) BCLR 475 (CC), 14.

precisely seeks to ensure that a city is able to engage meaningfully with poor, vulnerable or illiterate people, that careful and sensitive people should preferably manage the process.[98] It held that the failure of the City to engage with the occupiers was contrary to the spirit and purpose of the Constitution, and violated the right to human dignity, as well as other socio-economic rights and obligations imposed by the Constitution.[99] Yacoob J held that where a municipality's strategy, policy or plan is expected to affect a large number of people, there is a greater need for 'structured, consistent and careful engagement'.[100] The Court further observed that the process of meaningful engagement could only work if both sides act reasonably and in good faith.[101] The Court cautioned that community residents who approach the engagement process with an intransigent attitude or with unreasonable and non-negotiable demands may stall the engagement process. On the other hand, municipalities must not perceive vulnerable groups and individuals as a 'disempowered mass' but rather encourage them to be pro-active rather than being purely defensive. The Court expressed the view that civil society organisations that champion the cause of social justice should preferably facilitate the engagement process in every possible way.[102] Lastly, the Court indicated that secrecy is inimical to the constitutional value of openness and counter-productive to the process of meaningful engagement.[103] This requires that, in negotiating a policy or programme affecting the rights of communities, municipalities must furnish complete and accurate information that will enable affected communities to reach reasonable decisions.[104] It has been suggested that, if approached in good faith, the engagement process can enable parties to relate to each other in pragmatic and sensible ways, building up prospects for harmonious relations for the future.[105] Meaningful engagement gives marginalised and impoverished communities the opportunity to promote social change by directly influencing the content of policies, programmes and plans that seek to give effect to socio-economic right.[106]

4.2 Comments on the Litigation Strategy

Litigation serves as a tool that can be used by individuals and NGOs to hold the government accountable about gaps in policies and laws that give effect to constitutional socio-economic rights, or the poor implementation of laws and policies or the lack thereof.[107] The strategy used in litigation largely informs its process and outcome. In this regard, there are a variety of institutional and political factors that determine whether courts can play an effective role in social transformation.[108] Gloppen has identified four distinct but interrelated stages of litigation in relation to the right to health (which can be extended to socio-economic rights cases generally) and the variety of factors that must be taken into consideration at each

[98] Ibid 15.
[99] Ibid 16.
[100] Ibid 19.
[101] Ibid 20.
[102] Ibid.
[103] Ibid 21.
[104] Ibid.
[105] *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC), 43.
[106] Chenwi, above n 79, 130; Wilson, above n 94 282.
[107] Siri Gloppen 'Litigation as a Strategy to Hold Governments Accountable for Implementing the Right to Health' 2008 10(2) *Health and Human Rights* 21, 24. See Liebenberg, n 41 above 37-38.
[108] See Liebenberg, n 41 above 38.

stage.[109] The stage relevant for current purposes is what Gloppen refers to as the 'claims formulation stage'.[110] During the claims formulation stage, several factors must be taken into consideration. The first factor is: Who litigates? This looks at whether the litigants are lay individuals, Non-governmental organizations or public interest lawyers.[111] The second factor to be considered is the motives for what actually motivates the litigation. Here the focus is on whether the litigation is informed by health concerns, the lack of services, or the expected gains of the litigation.[112] The third factor to be considered is the opportunity structure of the litigants. This looks at the feasibility of alternative avenues for in remedying the problem, including accessibility, cost, and effectiveness.[113] The fourth factor to be considered is the resources that the litigant(s) command. This looks at issues such as rights awareness, legal support structures, organisational resources and mobilization.[114] The fifth factor to be considered is what the litigant(s) seek. This looks at whether the applicants seek to access services or a basic determination of rights.[115] The sixth factor to be considered is the legal basis of the applicants' claim.[116] Lastly, there must be factual argumentation.[117]

Evidence suggests that *Lawyers for Human Rights (LHR)*, the *Legal Resource Centre (LRC)*,[118] lawyers for the respondents in *Federation for Sustainable Environment and Others* took into account almost all of the above factors in preparing a watertight case against the government.[119] For example, the legal representatives of the applicants seem to have been largely influenced by the second, fifth, sixth and seventh factors highlighted above. This explains why the applicants excluded the mines responsible for the pollution of water resources in the Carolina area. This exclusion led the Minister of Water and Environmental Affairs to form the impression that civil society organizations were waging 'a war against the state'.[120] It is suggested that this was a strategy in litigation intended to solicit immediate response to the desperate needs of poor South Africans. This strategic move is confirmed by the extract below:

> No Minister, there is no war against the state. Where the state fails to provide even the most basic services to citizens due to incompetence, laziness, arrogance, corruption or nepotism and in complete disregard of the basic needs of citizens, those citizens have a right and a duty to approach a court to try and get the relevant municipality to do what it is legally required to do. When the citizens do this and when the court then orders the municipality to do what it is legally required to do, it is not at war with the state but is in fact correcting the most basic breach of the social contract between the state and its citizens, saving the state from complete collapse.

[109] For details, see Gloppen, above n 107, 25-26.
[110] Ibid 25.
[111] Ibid 26.
[112] Ibid.
[113] Ibid.
[114] Ibid.
[115] Ibid.
[116] Ibid.
[117] Ibid.
[118] The Legal Resource Centre is a human rights organization in South Africa which engages in social justice litigation. See <http://www.lrc.org.za/about-us>.
[119] See 'Nasty, Brutish and Short – Commentary by Pierre de Vos' <http://www.lhr.org.za/news/2012/nasty-brutish-short-commentary-pierre-de-vos>.
[120] Ibid.

> Besides, as LRC attorney Naseema Fakir explained, although the LRC and the LHR had considered adding the mines to the action, it was felt that it was important to get water to Carolina's residents as soon as possible. If the mines had been added as respondents, the application for an urgent court order would not have been granted. This is because the mines are not the ones who are constitutionally and legally obliged to provide citizens with clean water.
>
> The Minister's attitude is strange and troubling indeed. Instead of apologising to the citizens of Carolina for the criminal negligence of the municipality, she acts as if it is treasonous for citizens to have their most basic rights enforced through the courts. Her comments suggest that she believes that it is not legitimate for the state to be held accountable and to be ordered to take the most basic steps to provide citizens with clean water, without which life itself is not possible.[121]

Indeed, as correctly pointed out in the extract above, and in the constitutional and legal framework on the right of access to sufficient water, it is the legal obligation of the government to supply potable water to community residents. However, the above extract may also suggest what is already established in socio-economic rights law that, at the very least, a negative obligation is placed on 'the State and all other entities and persons to desist from preventing or impairing the right of access' to socio-economic rights.[122] From this point of view, pollution of water resources and drinking water by mines does not only violate the constitutional environmental right[123], but also negatively violates the constitutional right of access to sufficient water. A close reading of *SERAC and Another v Nigeria*[124] also suggests that the primary responsibility rests on the government to protect the environment.[125] Despite this, the point stressed here is that, although mines are not responsible for the provision of water supply, they have a constitutional duty to refrain from acts or omissions that can lead to the contamination of drinking water.

From a purely strategic point of view, it is understandable why public interest lawyers such as *Lawyers for Human Rights (LHR)* and the *Legal Resource Centre (LRC)*, with presumably sufficient resources, excluded mines responsible for polluting water resources in the Carolina area as respondents in *Federation for Sustainable Environment and Others.* Their logic is straightforward: ensure a swift reconnection of water supply to poor residents of the Carolina community.

Apart from joining mining companies responsible for water pollution in the Carolina area in as co-respondents, the applicants and their legal representatives also had the option of instituting a separate law suit to compel mining companies involved in the pollution of water resources in the Carolina area to take pro-active measures that will at least prevent further

[121] Ibid.
[122] *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169, 34; Liebenberg, above n 41, 214.
[123] S 24 of the Constitution provides that: Everyone has the right – (a) to an environment that is not harmful to their health or well- being; and (b) to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.
[124] *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR) (*SERAC and Another*).
[125] *SERAC and Another* (2001) AHRLR 60, 50-58.

pollution of water resources, or compel them to clean up the pollution of affected water resources. These options are consistent with the now established polluter-pays principle in environmental law.[126] Two elements of the polluter-pays principle are relevant in this context. The first element of this principle holds that the polluter must bear the cost of pollution on behalf of society and the environment. The second element is that, the principle requires the polluter to implement corrective measures and restore an affected environmental asset to its initial condition.[127] However, it must be acknowledged that there are a number of constraints to this alternative litigation strategy. For example, it would have required applicants to gather and submit evidence of mines that are responsible for polluting affected water resources. This can be time consuming and may require additional resources. Furthermore, this strategy may not necessarily lead to the speedy reconnection of water supply to the affected communities. Despite these weaknesses, it is believed that instituting a separate law suit to compel mining companies involved in the pollution of water resources in the Carolina community would have sent a strong signal to mining companies and other industries, that their growing negligence and increasing pollution of scarce water resources in South Africa[128] will not be taken lightly by affected citizens and civil society at large.

5. Conclusion

The purpose of this article was to comment on the recent judgment of the North Gauteng High Court in *Federation for Sustainable Environment and Others* and on the litigation strategy employed by applicants in this case. This article notes that the reporting order issued by the Court is laudable from a theoretical point of view, in that it has the potential of ensuring through the Court's supervisory jurisdiction that the government complies with its constitutional obligations. However, in practice, evidence suggests that government officials dislike reporting orders and have a tendency to appeal against such orders. In addition, it was argued that the Court order obliging the parties to meaningfully engage with each other gives poor people an opportunity to direct social transformation at the local level. In terms of the litigation strategy of the applicants, this article observes that it was informed by logic and the need to expediently reconnect water supplies to affected Carolina community residents. However, it is suggested that civil society organisations and public interest litigation lawyers should also direct litigation against mining companies that pollute water resources, in accordance with the polluter-pays principle, in order to compel them, at least, to refrain from violating the enjoyment of the right of access to water or restore the initial quality of polluted water resources. It is believed that instituting public interest litigation against mining companies involved in polluting water resources can promote the realisation of the constitutional right of access to sufficient water.

[126] See Principle 16 of the Rio Declaration. The pollute and pay principle is now incorporated in s 2(4)(p) of the *National Environmental Management Act* (NEMA) *107 of 1998* which provides that: 'The cost of remedying pollution, environmental degradation and consequent health effects must be paid for by those responsible for harming the environment'.

[127] See Oversea Nabileyo, *The Polluter Pays Principle and Environmental Liability In South Africa* (LLM Dissertation, North West University, 2009), 9-12.

[128] See Sue Blaine, 'Carolina's Polluted Water Highlights Growing Problem in SA'<http://www.businessday.co.za/articles/Content.aspx?id=167142>; <http://www.environment.co.za/acid-mine-drainage-amd/acid-mine-drainage-water-threat-mounts.html>.