

An Analysis of South Africa's Provision of Emergency Water Supply During the Covid-19 Pandemic: Accountability and Expiration

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Abstract

The COVID-19 pandemic has illuminated the widespread lack of access to adequate water and sanitation in South African informal settlements and rural areas. While the full complexities of the relationship between inequality, COVID-19 and water in South Africa are still unfolding, the importance of access to water emerged early on in the pandemic, and catalysed an emergency response from the Department of Water and Sanitation (DWS). This article analyses the impact of the DWS' COVID-19 response in three ways. Firstly, the available data on the provision of tanks and tankers is examined to highlight the importance of a reliable monitoring system. Secondly, the dangers of prioritising short-term action at the expense of long-term sustainability are discussed with reference to the twin challenges of further reduced municipal revenue and redirected funds. Thirdly, the implications of a future cessation of emergency water supply is considered. This analysis provides evidence and perspectives to guide the post-COVID-19 transition from emergency to routine water services provision, and distils lessons which might be applied to the approaching challenge of water services provision in the context of climate change.

Keywords

Right to water; emergency water supply; COVID-19; municipal budgeting; corruption.

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1 Introduction

On 30 January 2020 the World Health Organisation (hereafter the WHO) declared the outbreak of coronavirus disease 2019 (hereafter COVID-19) to be a public health emergency of international concern. This is the WHO's highest level of alarm.¹ Six weeks later, on 15 March 2020, South Africa declared a national state of disaster in terms of section 23(1)(b) of the *Disaster Management Act 57 of 2002*. The importance of access to water emerged early in the pandemic as an integral part of combatting the spread of COVID-19, as frequent handwashing is one of the key preventative measures recommended by both the WHO and the National Institute for Communicable Diseases.²

The COVID-19 pandemic has reminded everyone living in South Africa of the widespread lack of access to adequate water and sanitation, particularly in informal settlements and rural areas,³ and how this disproportionately impacts on poor, predominantly black communities. It catalysed an emergency response from South Africa's Department of Water and Sanitation (hereafter the DWS). This article examines the nature, extent and effectiveness of that response.

By way of background, part two below gives a brief overview of how water services provision is regulated in South Africa while part three highlights the disjunct between the theoretical promise of the legal framework and the lived experience of poor people living in South Africa. Part four describes the key features of the DWS' COVID-19 response to contextualise part five, which examines: a) the need for a reliable monitoring system; b) the future repercussions of the DWS' response with reference to the twin challenges of further reduced municipal revenue and redirected funds; and c) the legal

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¹ WHO 2020 <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/interactive-timeline>.

² The National Institute for Communicable Diseases is a national public health institute of South Africa providing reference microbiology, virology, epidemiology, surveillance and public health research to support the government's response to communicable disease threats – for more information, see National Institute for Communicable Diseases 2020 <https://www.nicd.ac.za/>.

³ Townsend 2020 <https://opiniojuris.org/2020/03/31/covid-19-symposium-covid-19-and-the-human-right-to-water-and-sanitation/>.

implications of a cessation of the emergency water supply down the line. Finally, some concluding remarks are provided in part six.

The article was compiled using desktop analysis of relevant legislation, caselaw and secondary sources. In addition, the authors conducted a quantitative analysis of data contained in a report of the Auditor-General on the financial management of the South African government's COVID-19 initiatives⁴ (hereafter the AG's Report) and in press releases issued by the DWS. The analysis was conducted at a time when the circumstances of the pandemic changed daily, and the relationships between COVID-19, water, inequality and resilience were still emerging.

Nevertheless, its purpose is to contribute to the growing body of knowledge on the effects of COVID-19, and to provide evidence and perspectives to guide a post-COVID-19 transition from emergency to routine water services provision. In addition, COVID-19 will not be the last crisis requiring urgent water provision in difficult conditions. The impacts of climate change (particularly around increased water scarcity) will present challenges to the state's ability to provide water in the future.⁵ By analysing the DWS' response to COVID-19, this article therefore seeks to distil lessons which can be applied to water-provision challenges to come.

2 Overview of the regulatory system for water services provision

Shortly after South Africa's transition to democracy, between 12 and 14 million people living in the country (out of a total population of around 40 million) were without access to a basic water service.⁶ The vast majority of these were black people.⁷ Areas without access to water services were located primarily in the former homelands and in informal settlements, and thus mirrored apartheid spatial injustice.⁸ Achieving equitable and universal access to water was therefore particularly important at the dawn of democracy given the drive to redress deeply rooted historical inequalities,

⁴ AGSA 2020 <https://www.agsa.co.za/Reporting/SpecialAuditReports/COVID-19AuditReport.aspx> (the AG's Report).

⁵ For an analysis of the impacts of climate change on the water sector in South Africa and responses to those impacts, present and future, see Department of Environment, Forestry and Fisheries date unknown https://www.environment.gov.za/sites/default/files/docs/climatechange_impacts_water_resources.pdf. See further Kotzé 2010 *JHRE* 141.

⁶ DWAF *White Paper on a National Water Policy* 55.

⁷ DWAF *White Paper on a National Water Policy* 55.

⁸ SAHRC *Report on the Right to Access Sufficient Water* 14.

and to further the developmental objectives that underpinned post-apartheid socio-economic reconstruction.⁹

To this end, a rigorous framework of laws, policies and programmes has been put in place since 1994.¹⁰ This framework is guided by the *Constitution of the Republic of South Africa*, 1996 (hereafter the Constitution), which is the supreme law in South Africa.¹¹ Section 27(1)(b) of the Constitution provides that everyone has the right to have access to sufficient water,¹² while section 27(2) obliges the state to:

... take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation

of the right of access to sufficient water.

As with all rights in the Bill of Rights, the state must respect, protect, promote and fulfil the right to water.¹³ Although a full discussion of the nature of the right to water is beyond the scope of this article,¹⁴ it is worth noting that the right places both positive and negative duties on the state.¹⁵ This is because the nature of these duties is relevant to the later discussion¹⁶ of the state's obligation to refrain from interfering with any existing right of access to water in the context of a post COVID-19 transition from emergency to routine water supply.

There are two key pieces of legislation designed to give effect to the right to water in South Africa: The *National Water Act* 36 of 1998 (hereafter the NWA) and the *Water Services Act* 108 of 1997 (hereafter the WSA). The

⁹ Rodina 2016 *Geoforum* 58; Centre for Applied Legal Studies *Tale of Six Buildings* 9; Kotzé 2009 *Finnish Environmental Law Review* 7.

¹⁰ This section does not attempt to provide a comprehensive discussion of the regulatory framework applicable to water in South Africa. Rather it gives a brief overview as its purpose is merely to provide background to the analysis in the rest of the article.

¹¹ Section 2 of the *Constitution of the Republic of South Africa*, 1996 (the Constitution) provides that the Constitution "is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

¹² Section 27(1)(b) of the Constitution also enshrines a right of access to sufficient food, but the focus of this article is on the right to water.

¹³ This language appears in s 7(2) of the Constitution and is examined in Liebenberg 2002 *LDD* 181. For a discussion of the implications of s 8(2), which places similar obligations on private actors, see Meyersfeld 2020 *SALJ* 441.

¹⁴ For a discussion of the characteristics of the right to water, see Kotzé 2010 *JHRE* 148.

¹⁵ Du Plessis 2010 *RECIEL* 316.

¹⁶ See Part 5 below.

NWA provides the legal framework for *water resource management*.¹⁷ It provides that national government acts as the custodian of the nation's water resources¹⁸ and must therefore ensure that water is protected, used, conserved and managed in a sustainable and equitable manner.¹⁹ As a complement to the NWA, the WSA facilitates water services delivery. Section 3 of the WSA confirms a right of access to a basic water supply and requires every water services institution²⁰ to take reasonable measures to realise this right.

The Constitution, the NWA and the WSA work together to place a duty on all three spheres of government to collaboratively realise the right to water.²¹ Local government is given the critical task of ensuring that water is provided to the people.²² In doing so, municipalities are required to ensure the provision of services to communities in a sustainable manner and to

¹⁷ The *National Water Act* 36 of 1998 (the NWA) is supplemented by the 2013 DWA *National Water Resource Strategy* (hereafter the NWRS), which was developed in terms of s 5 of the NWA. The NWRS is binding on all authorities and institutions exercising powers or performing duties under the NWA.

¹⁸ For a discussion of the public trust doctrine in South Africa, see Blackmore 2018 *SALJ* 631; Takacs 2016 *Berkeley J Int'l L* 58; Van der Schyff 2013 *SALJ* 375; and Feris 2012 *LEAD* 11.

¹⁹ Section 3(1) of the NWA. The preamble of the NWA states that national government bears overall responsibility for and authority over the nation's water resources and their use, including the equitable allocation of water for beneficial use, the redistribution of water, and international water matters.

²⁰ Section 1(xxi) of the *Water Services Act* 108 of 1997 (the WSA) defines "water services institution" to include a water services authority, a water services provider, a water board and a water services committee.

²¹ This system is reinforced by South Africa's obligations under international law. The United Nations has formally recognised the human right to water and sanitation (*General Resolution on the Human Right to Water and Sanitation* GA Res 64/292, UN Doc A64/PV.108 (2010)). In addition, art 16 of the *African Charter on Human and People's Rights* (1981) enshrines the right to enjoy the best attainable state of health, which has been interpreted by the African Commission on Human and People's Rights to include a right to water (see for example *Centre on Housing Rights and Evictions v Sudan* (Communication No 279/03, 296/05) 2009 ACHPR 100 (27 May 2009)). South Africa has ratified the key international instruments which protect water rights and South Africa's international law obligations also find expression through s 39(1) of the Constitution which requires courts to consider international law when interpreting the Bill of Rights. For a more detailed discussion of the international protection of the right to water, see Dugard *Right to Water in South Africa*.

²² Part B to Schedule 4 of the Constitution, read with s 156, confers executive authority on municipalities for the administration of water and sanitation services, limited to potable water supply systems, domestic waste water and sewage disposal systems. See further De Visser, Cottle and Mettler 2002 *ESR Review* 18.

promote social and economic development.²³ They must also structure and manage their administration, budgeting and planning processes to give priority to the basic needs of the community.²⁴ Further, municipalities must ensure that all members of the local community have access to at least the minimum level of basic municipal services.²⁵

As part of government's attempted poverty-alleviation strategy, the Free Basic Water Policy (hereafter FBWP) was introduced in 2001, together with a set of regulations which set the national minimum standard for basic water supply as follows:

a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month at a minimum flow rate of not less than 10 litres per minute, within 200 metres of a household; and with an effectiveness such that no consumer is without a supply for more than seven full days in any year.²⁶

Whether or not this standard (hereafter Regulation 3(b)) amounts to "sufficient" water in terms of section 27(1)(b) of the Constitution has been the subject of much contestation,²⁷ including in *Mazibuko v City of Johannesburg*,²⁸ where the Constitutional Court upheld the standard.²⁹ Regulation 3(b) has subsequently been enforced by the High Court in cases like *Nokotyana v Ekurhuleni Metropolitan Municipality*³⁰ and *Mtungwa v Ekurhuleni Municipality*.³¹

In September 2017 a new set of National Norms and Standards for Domestic Water and Sanitation Provision was published³² (hereafter the

²³ Section 152 of the Constitution. In the interests of space, the rich scholarship on the service delivery obligations of local government is not discussed here, especially because the focus of this article is primarily on the actions of national government (the DWS specifically) and particularly on the DWS' emergency COVID-19 response, rather than the fulfilment of its more routine obligations.

²⁴ Section 153(a) of the Constitution.

²⁵ Section 73 of the *Local Government: Municipal Systems Act* 32 of 2000 (the *Systems Act*).

²⁶ Regulation 3(b) in GN R509 in GG 22355 of 8 June 2001.

²⁷ Gleick has argued that the minimum standard should be 50 l per person per day (Gleick 1996 *Water International* 83). Also see Bond and Dugard 2008 *Law, Social Justice and Global Development* 8; Mehta "Do Human Rights Make a Difference?" 13.

²⁸ *Mazibuko v City of Johannesburg* 2010 3 BCLR 239 (CC).

²⁹ For critiques of this judgment see Dugard "Urban Basic Services" and Dugard and Langford 2011 *SAJHR* 39.

³⁰ *Nokotyana v Ekurhuleni Metropolitan Municipality* (GSJ) unreported case number 08/17815 of 24 March 2009.

³¹ *Mtungwa v Ekurhuleni Municipality* (GSJ) unreported case number 34426/11 of 6 December 2011.

³² GN 982 in GG 41100 of 8 September 2017.

2017 Norms and Standards). The 2017 National Norms and Standards go further than the 2001 version, for example, by requiring free basic water supply to include a yard connection and by specifying that this infrastructure be maintained by the Water Services Authority.³³

In summary, South Africa's legislative and policy framework for water services includes a constitutional right to water, a network of legislation and a national FBWP designed to give effect to this right. Within this framework water is conceived of as a social good and a vital part of the broader developmental project which continues to respond to systemic inequality.

3 The disjunct between theory and practice

However, despite this regulatory framework, the majority of the population including the poor, unemployed and marginalised (who are typically black), still struggle to access sufficient water.³⁴ In May 2020 the DWS confirmed that 12% of the population do not have access to even a basic water supply.³⁵ It is of great concern that the 2019 National Water and Sanitation Master Plan reports that twenty-six years after South Africa's transition to democracy, the percentage of the population receiving reliable water services is lower than it was in 1994.³⁶ While more homes in total have water now, as a percentage of all homes, fewer homes have water now than at the end of apartheid.³⁷

Many of the challenges associated with water services provision relate to the state of local government, as it is municipalities which serve as the frontline for communities seeking access to water. South African local government is plagued by financial mismanagement and poor governance, resulting in widespread failure to realise socio-economic rights.³⁸ While multiple factors contribute to this, the poor and deteriorating state of municipal finances and financial mismanagement are critical. The reality of systemic municipal failure must be recognised at the outset, as this provides important context for the analysis in part 5.

³³ Section 1(xx) of the WSA states that a "water services authority" is a municipality responsible for ensuring access to water services.

³⁴ Kotzé 2010 *JHRE* 140.

³⁵ DWS "Covid-19: Water and Sanitation Intervention".

³⁶ DWS *National Water and Sanitation Master Plan*.

³⁷ DWS *National Water and Sanitation Master Plan*. See discussion in Kings 2020 <https://mg.co.za/environment/2020-01-31-water-services-worse-than-in-1994/?fbclid=IwAR0S9A05mftHTGPAXS9JjHrrZZdYdGvm1jl1f7XpJ8WBm3PkSgrJlhI8UE>.

³⁸ CoGTA *State of Local Government in South Africa* 5.

In the period 2017-2019 more than thirty municipalities received either a disclaimer or an adverse audit outcome, or failed to submit their financial statements on time - or a combination thereof.³⁹ In a National Treasury briefing to the National Council of Province's Finance Committee in October 2019 it was confirmed that 51% of municipalities had overspent their operating budget and the number of municipalities in financial distress had increased from 95 in 2012/13, to 125 in 2017/18, which amounted to almost half of all municipalities in the country.⁴⁰ The systemic nature of financial mismanagement at local government level is also evident in the increasing numbers of municipalities placed under provincial administration in terms of section 139 of the Constitution.⁴¹

Without sufficient funds and the ability to responsibly manage them, many municipalities are failing to fulfil one or more of their core functions: to deliver services such as water, sanitation and electricity, and thereby to realise the socio-economic rights of the people living under their jurisdiction. Ensuring equitable and sufficient access to water thus remains one of the most crucial challenges in democratic South Africa. The COVID-19 pandemic is taking place in the context of a significant disjunct between the theoretical promise of the legal framework and the lived experience of poor people in South Africa.

4 Overview of the DWS' COVID-19 response

This section describes the key features of the DWS' COVID-19 response. It is deliberately descriptive as opposed to analytical as its purpose is to contextualise the critique of DWS' COVID-19 response which follows in part five.

Following the declaration of a state of disaster, the first set of regulations issued in terms of section 27(2) of the *Disaster Management Act* empowered the Minister of Water and Sanitation to issue directions within her mandate to address, prevent and combat the spread of COVID-19.⁴²

³⁹ Ledger and Rampedi *Mind the Gap* 1.

⁴⁰ PMG 2019 <https://pmg.org.za/committee-meeting/29052/>.

⁴¹ Chamberlain and Masiangoako 2021 *SALJ* 423; De Visser and November 2017 *HJRL* 109.

⁴² Including to disseminate information required for dealing with the national state of disaster; to implement emergency procurement procedures; and to take any other steps that may be necessary to prevent an escalation of the national state of disaster, or to alleviate, contain and minimise the effects of the national state of disaster. Reg 10(8) in GN 318 in GG 43107 of 18 March 2020, as amended by GN R398 in GG 43148 of 25 March 2020, GN R419 in GG 43168 of 26 March 2020, GN R446 in GG 43199 of 2 April 2020 and GN R465 in GG 43258 of 16 April 2020, and consolidated

Exercising this power, Minister Lindiwe Sisulu issued directions on 15 April 2020 (the COVID Water Directions).⁴³

The COVID Water Directions established a National Disaster Water Command Centre (hereafter the Water Command Centre) to assist with the roll-out of an emergency water and sanitation intervention.⁴⁴ The task of the Water Command Centre was to provide water tanks to vulnerable communities, as well as tankers to fill the tanks with water.⁴⁵ Emergency tanks are not a feature of South Africa's routine water supply system because they provide a small amount of water of unreliable quality at great expense at a shared water point. This is a low level of service that is both logistically difficult and expensive to maintain. Nevertheless, emergency tanks have formed the cornerstone of the DWS' COVID-19 response.

The Water Command Centre was based at and coordinated by Rand Water⁴⁶ in return for a management fee.⁴⁷ It was staffed by representatives from various water boards, as well as officials from the DWS and municipalities.⁴⁸ The COVID Water Directions also tasked Rand Water with emergency procurement, which was done through the Water Command Centre.⁴⁹ The regulations thus effectively centralised emergency procurement and water provision.

The DWS, through Rand Water, then proceeded to procure water tanks. These tanks were owned by the Department although it seems that the plan is for ownership of the water infrastructure set up during the pandemic to be

at Minister of Cooperative Governance and Traditional Affairs 2020 <https://sacoronavirus.co.za/wp-content/uploads/2020/04/Consolidated-Regulations-DMA-17-April.pdf>.

⁴³ GN 464 in GG 43231 of 15 April 2020 (the COVID Water Directions).

⁴⁴ Regulation 5 of the COVID Water Regulations.

⁴⁵ Regulation 7(1) of the COVID Water Regulations.

⁴⁶ Rand Water is a water board as envisaged in the WSA. The primary activity of a water board is to provide water services to other water services institutions in its service area (s 29 of the WSA). A water board can perform other functions, which include providing management services to promote co-operation in the provision of water services (s 30(2)(a) of the WSA), acting as a WSP (s 30(2)(d)(iii) of the WSA), and providing water services in a joint venture with Water Services Authorities (s 20(2)(e) of the WSA). Importantly, the Minister may issue reasonable directives to a water board to undertake a specific activity, for which it may be paid (s 41(1) of the WSA). This is presumably the basis on which Rand Water came to play the central role it did in the DWS' emergency water response.

⁴⁷ PMG 2020 <https://pmg.org.za/committee-meeting/30104/>.

⁴⁸ Regulation 5(2) of the COVID Water Directions.

⁴⁹ Regulations 5(3)-(4) of the COVID Water Directions; PMG 2020 <https://pmg.org.za/taled-committee-report/4278>.

transferred to municipalities.⁵⁰ Once tanks had been procured they had to be delivered and installed (which involves building a concrete base and cementing in the tank).⁵¹ The arrangements as to who was responsible for delivery and installation varied from province to province.⁵² For example, Rand Water was responsible for the delivery and installation of tanks in Gauteng and Mpumalanga.⁵³ In other provinces, other water boards and municipalities were responsible for installation.⁵⁴ Municipalities were tasked with ensuring that the tanks were not stolen or vandalised.

To get the tanks filled, the idea was that initially the DWS (again through Rand Water) would be responsible for arranging tankers to fill the tanks. In time this responsibility would be transferred to municipalities. In total, Rand Water appointed 28 different service providers to provide water tankers to fill the tanks.⁵⁵

The process of the delivery and installation of the tanks did not always go smoothly. In some instances, where municipalities were responsible for installation they struggled to access materials from hardware stores which were closed as part of the national lockdown.⁵⁶ Subsequently the Minister of Trade and Industry was requested to declare hardware stores an essential service.⁵⁷ However, considerable delay had already been caused to the rollout of emergency water supply.⁵⁸ Additionally, the infrastructure was vandalised in certain areas. For example, the DWS intervened after allegations of vandalism of water tanks installed in Alfred Nzo Municipality in the Eastern Cape⁵⁹ and two water tanks in Orange Farm, Gauteng were

50 PMG 2020 <https://pmg.org.za/committee-meeting/30104/>.

51 PMG 2020 <https://pmg.org.za/committee-meeting/30104/>.

52 AG's Report.

53 AG's Report.

54 AG's Report.

55 Rand Water 2020 <https://www.randwater.co.za/Rand%20Water%20Documents/Rand%20Water%20Demobilizes%20COVID-19%20Emergency%20Water%20Supply%20Project.pdf>.

56 PMG 2020 <https://pmg.org.za/committee-meeting/30104/>.

57 PMG 2020 <https://pmg.org.za/committee-meeting/30104/>.

58 PMG 2020 <https://pmg.org.za/committee-meeting/30104/>.

59 DWS 2020 <http://www.dwa.gov.za/Communications/PressReleases/2020/MS%20-%20Department%20of%20Water%20and%20Sanitation%20to%20monitor%20installation%20of%20water%20tanks%20in%20Alfred%20Nzo%20District%20Municipality.pdf>.

reportedly set alight.⁶⁰ In addition, water from a tanker was dumped near Pongola in KwaZulu-Natal on 29 July 2020.⁶¹

On 31 August 2020, Rand Water demobilised "its operations as part of the National COVID-19 Emergency Water Supply Project".⁶² Rand Water's press statement announcing this development is opaque as to the reason for it, but seems to suggest that it was too expensive for the DWS to have Rand Water continue in this role.⁶³ The demobilisation of Rand Water's operations meant that water tanker service providers contracted by Rand Water ceased activity on 31 August 2020.⁶⁴ Filling the tanks has now become a municipal responsibility.

DWS' COVID-19 response thus centralised emergency procurement with Rand Water responsible for procuring both water tanks and contractors to fill the tanks using water tankers. Rand Water also delivered and installed tanks in some areas, while in other places this was done by other water boards or municipalities. This splitting of functions, and particularly the fact that in some areas it was municipalities who were responsible for delivery and installation, is significant for the analysis of the monitoring data in part five. With Rand Water's involvement in the emergency water supply ending, responsibility has been placed on municipalities to pick up where Rand Water left off.

5 Analysis of the DWS' COVID-19 response

With this outline of DWS' COVID-19 response in place, this section analyses the effectiveness of that response across three themes. First, the need for an effective monitoring system for the rollout of tanks and tankers is discussed. Second, the repercussions of the DWS' COVID-19 response for future water services provision in South Africa is examined. Third, the legal

⁶⁰ DWS 2020 <http://www.dwa.gov.za/Communications/PressReleases/2020/MS%20-%202%20244%20water%20tanks%20rolled%20out%20in%20Gauteng%20as%20lockdown%20restrictions%20are%20eased.pdf>.

⁶¹ DWS 2020 <http://www.dwa.gov.za/Communications/PressReleases/2020/MS%20-%20DWS%20strongly%20condemns%20the%20dumping%20of%20water%20meant%20for%20communities%20as%20an%20act%20of%20sabotage.pdf>.

⁶² Rand Water 2020 <https://www.randwater.co.za/Rand%20Water%20Documents/Rand%20Water%20Demobilizes%20COVID-19%20Emergency%20Water%20Supply%20Project.pdf>

⁶³ By the end of July 2020, Rand Water had been paid R11,31 million as a management fee to act as the implementing agent AG's Report 154.

⁶⁴ Rand Water 2020 <https://www.randwater.co.za/Rand%20Water%20Documents/Rand%20Water%20Demobilizes%20COVID-19%20Emergency%20Water%20Supply%20Project.pdf>.

implications of a future withdrawal of water provided as part of the DWS' COVID-19 response is considered.

The significance of this analysis lies in the fact that the COVID-19 pandemic can be seen as a precursor to continued challenges in water services provision, which are being catalysed by climate change. Kotze has argued that one of the most significant impacts of climate change in South Africa will be on water resources, and that this:

... will have a very palpable effect on (a) the ecological aspects of the resource, specifically with respect to water quantity and quality; and as a consequence of the latter, (b) the manner in which water will be provided to people, especially with respect to the poor.⁶⁵

The purpose of this section is therefore to distil lessons which might be useful as South Africa hones its plans for water services provision in the context of climate change.

5.1 The need for an effective monitoring system

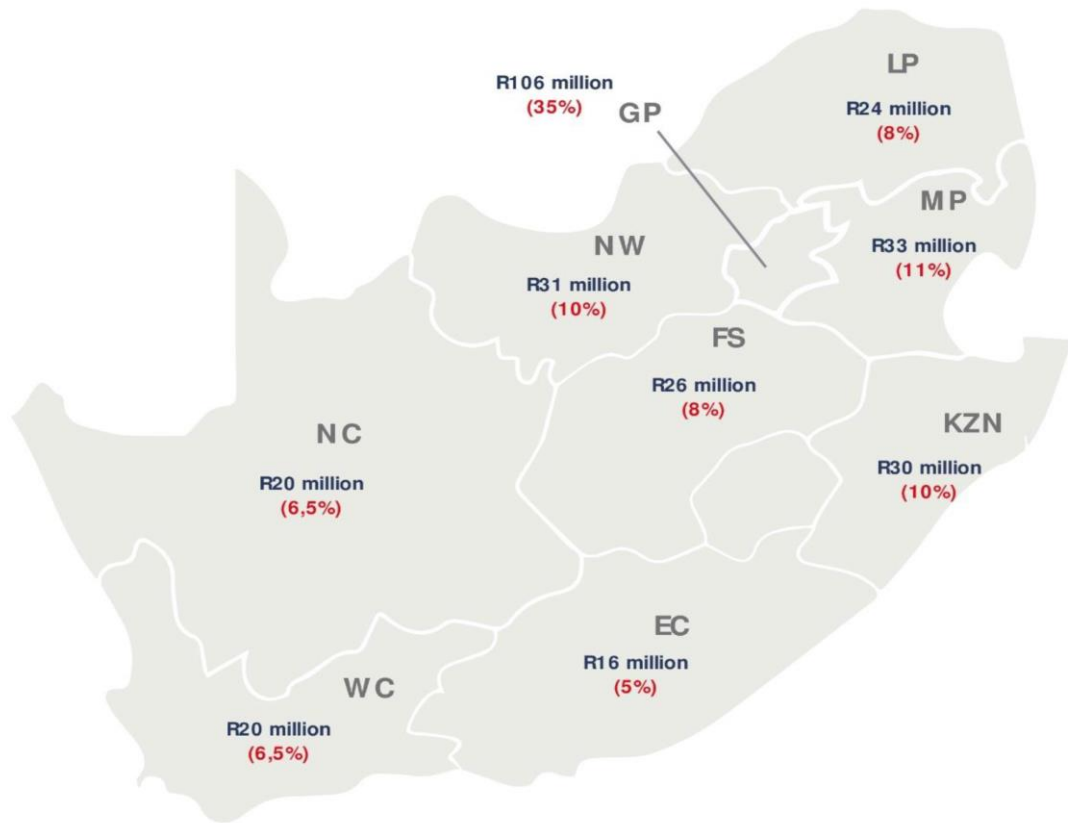
The COVID-19 pandemic required the DWS to design and implement an emergency water provision intervention of significant scale. To better understand questions of scale, this section examines the available data on emergency water provision in the AG's Report, DWS press releases and reports by the DWS to the Parliamentary Portfolio Committee.

According to the AG's Report, by 31 July 2020 the Water Command Centre had spent R237,49 million on emergency water supply.⁶⁶ The map and table which follow⁶⁷ provide insights into both *where* the money was spent, and *what* it was spent on.

⁶⁵ Kotze 2010 *JHRE* 137. Also see Kotze and Du Plessis 2020 *Environmental Law* 615, where the authors discuss the unique nature of the impacts of climate change in Africa. For a discussion of the role of local authorities in the South African government's response to climate change, see Du Plessis and Kotze 2014 *J Afr L* 145.

⁶⁶ AG's Report_153.

⁶⁷ AG's Report_154.

Figure 1: Emergency water supply expenditure per province**Figure 2: Breakdown of funds spent on emergency water supply**

Expenditure item	Budget	Expenditure as at 31 July 2020	Percentage spent
Sanitation packs	R44,14 million	R44,23 million	100%
Water tanks	R94,79 million	R57,8 million	61%
Water tankers	R76,52 million	R100,86 million	132%
Monitoring and evaluation	R28,79 million	R12,87 million	45%
Installation of tanks by other water boards	R43,14 million	R4,59 million	11%
Disbursements	R3,07 million	R5,81 million	190%
Implementing agent fee, including project management fee	R16,08 million	R11,31 million	70%
Total	R306,53 million	R237,49 million	77%

This data shows a concentration of COVID-19 water expenditure in Gauteng (35% of total spending). This is to be expected given that much of Gauteng

is densely populated⁶⁸ and it is the province with the largest population.⁶⁹ Extrapolating from these provincial characteristics, one would have expected the province with the second largest expenditure to be KwaZulu-Natal (which has both the next largest population⁷⁰ and the next highest population density).⁷¹ However, KwaZulu-Natal received only 10% of the total emergency water supply expenditure - less than Mpumalanga and equivalent to the North-West, both of which trail far behind in terms of population size and density.⁷²

It is also important to highlight that the data provided to the Auditor-General by the DWS do not always correlate with either the claims made in the DWS' press releases or in its presentations to Parliament. The table below has been compiled by the authors to compare the data provided by the DWS to the Auditor-General with that contained in the DWS' press releases.

⁶⁸ There was an average of 785 people per km² in Gauteng in 2019 (South Africa Gateway date unknown <https://southafrica-info.com/infographics/infographic-population-density-south-africas-provinces/>).

⁶⁹ The 2011 census conducted by StatsSA records Gauteng's population as 23 700 000 people (StatsSA 2011 http://www.statssa.gov.za/census/census_2011/census_products/Provinces%20at%20a%20glance%2016%20Nov%202012%20corrected.pdf 3).

⁷⁰ The 2011 census conducted by StatsSA records KwaZulu-Natal's population as 19 800 000 people (StatsSA 2011 http://www.statssa.gov.za/census/census_2011/census_products/Provinces%20at%20a%20glance%2016%20Nov%202012%20corrected.pdf 3).

⁷¹ There was an average of 117 people per km² in KwaZulu-Natal in 2019 (South Africa Gateway date unknown <https://southafrica-info.com/infographics/infographic-population-density-south-africas-provinces/>).

⁷² For example, Mpumalanga had a population of 7 800 000 in 2011 (StatsSA 2011 http://www.statssa.gov.za/census/census_2011/census_products/Provinces%20at%20a%20glance%2016%20Nov%202012%20corrected.pdf) and a population density of only 58 people per km² in 2019 (South Africa Gateway date unknown <https://southafrica-info.com/infographics/infographic-population-density-south-africas-provinces/>).

Figure 3: Numbers of tanks and tankers provided

Province	Tanks delivered (AG's Report)	Tanks delivered/allocated (DWS press releases)	Tanks installed (DWS press releases)	Tankers allocated (DWS press releases)
Gauteng ⁷³	1827	2244	1662	20
KwaZulu-Natal ⁷⁴	1000	4200	3026	639
North West ⁷⁵	833	725	?	50
Western Cape ⁷⁶	615	567	?	130
Mpumalanga ⁷⁷	607	500	?	56
Limpopo ⁷⁸	440	677	614	34
Free State ⁷⁹	400	1265	282	152
Northern Cape ⁸⁰	256	884	851	84
Eastern Cape ⁸¹	129	5694	4719	181
TOTAL	6107	16756⁸²	11154	1346

⁷³ The Gauteng press release data comes from press releases dated 28 March 2020, 29 March 2020, 2 April 2020, 7 April 2020, 12 April 2020, 27 April 2020, 2 June 2020, 12 June 2020, 17 June 2020 and 24 June. All the press releases referred to in this analysis were available on the DWS' website at the time of writing - DWS 2020 <https://www.dws.gov.za/Comms/MediaStatements.aspx>.

⁷⁴ The KwaZulu-Natal press release data comes from press releases dated 20 May 2020, 25 May 2020, 22 June 2020 and 29 July 2020.

⁷⁵ The North West press release data comes from press releases dated 3 April 2020 and 28 April 2020.

⁷⁶ The Western Cape press release data comes from press releases dated 1 April 2020 and 4 April 2020.

⁷⁷ The Mpumalanga press release data comes from press releases dated 7 April 2020, 15 April 2020 and 20 April 2020.

⁷⁸ The Limpopo press release data comes from press releases dated 1 April 2020, 2 April 2020, 9 April 2020, 20 April 2020, 28 April 2020 and 31 May 2020.

⁷⁹ The Free State press release data comes from press releases dated 1 April 2020, 6 April 2020 and 21 April 2020. Additional press releases on 5 June 2020, 8 July 2020 and 26 August 2020 refer to additional numbers but these seem to be localised to Maluti-a-Phofung and have been excluded from this analysis.

⁸⁰ The Northern Cape press release data comes from press releases dated 7 April 2020, 11 April 2020, 23 April 2020, 10 May 2020, 3 July 2020, 29 July 2020 and 24 August 2020.

⁸¹ The Eastern Cape press release data comes from press releases dated 3 April 2020, 16 April 2020, 19 April 2020, 26 April 2020, 20 May 2020, 22 May 2020, 28 May 2020, 5 June 2020, 28 September 2020 and 23 October 2020.

⁸² These totals are based on the numbers that appear to refer to the province in general, rather than those that refer only to schools or only to a particular area.

The blocks shaded in orange reflect where the press release claims exceed the figures which the Auditor-General was able to verify on the basis of the information provided to his office by the DWS. The largest of these discrepancies is in the Eastern Cape, where the press release claim is 44 times bigger than the Auditor-General's figure. From the blocks shaded in red it can be seen that in its press releases the DWS claim to have delivered/allocated 16 756 tanks whereas the Auditor-General was able to verify only 6107 tanks as having been delivered.

Note, however, that some DWS press releases make claims about tanks delivered and others about tanks allocated. This may explain at least some of the discrepancies with the AG's Report as that Report focusses on tanks delivered. The higher numbers in the press releases may therefore refer to tanks which had been allocated but not yet delivered. Nevertheless, even if that is the case, it suggests that 10 649 tanks (16 756 – 6 107) had been allocated but not delivered, which raises the question why so many tanks were languishing in a central depot when the need for water was so urgent. It also raises a further set of questions around how urgency was determined – who identified which municipalities needed tanks, how many, and on what basis?⁸³

Of additional concern is that on 20 April 2020, in a report to the Parliamentary Portfolio Committee, the DWS claimed that 18 875 tanks had been allocated, 14 737 had been delivered, and 7698 had been installed.⁸⁴ This means that while the DWS officially claimed to have delivered 14 737 tanks, the Auditor-General was able to verify the delivery of only 6107, leaving 8630 tanks unaccounted for. Furthermore, the parliamentary report was delivered in April 2020⁸⁵ while the AG's Report covers the period up until the end of July 2020⁸⁶ which means that the numbers in the AG's Report should be expected to be larger than those in the earlier report to Parliament.

In addition to these discrepancies, the DWS also failed to meet its own targets. At the beginning of the national lockdown the DWS set its goal as the provision of 41 000 tanks.⁸⁷ On the basis of the Auditor-General's data,

⁸³ This investigation is beyond the scope of this article.

⁸⁴ DWS 2020 https://static.pmg.org.za/200421COVID_19_V7_20_April_2020.pdf.

⁸⁵ DWS 2020 https://static.pmg.org.za/200421COVID_19_V7_20_April_2020.pdf.

⁸⁶ AG's Report.

⁸⁷ Sisulu 2020 https://www.youtube.com/watch?v=HxudKGJnqwl&ab_channel=SABC News at minute 27.

by the end of July 2020 it seems that the DWS had provided about 15% of that target.⁸⁸

At best, these discrepancies suggest that the DWS has not managed to keep a credible, consistent record of what tanks were delivered and where. This is confirmed by the AG's Report, which paints a bleak picture of erratic record-keeping and unreliable data where,

[t]he basic recording and accounting processes implemented at the inception of the initiative which are necessary to maintain a full register of all tanks purchased and delivered, were not implemented.⁸⁹

The AG's Report concludes that:

Due to the outstanding information, we were unable to confirm whether the reporting of the actual number of tanks delivered and installed, was indeed accurate and complete. Therefore, we cannot determine how the [Water Command Centre] ensured an efficient reporting process. This casts significant doubt on how the expenditure incurred was linked to the tanks procured and installed – ultimately raising a risk in terms of whether the services had been delivered.⁹⁰

The state's data was not reliable. Civil society and citizen-based monitoring pointed to significant shortfalls in emergency water provision, particularly in informal settlements. At the beginning of the national lockdown several civil society organisations launched the Asivikelane initiative, which was designed to give voice to informal settlement residents faced with severe shortages of basic services during the COVID-19 crisis.⁹¹ Asivikelane publishes weekly information based on responses it receives from informal residents themselves to a set list of questions regarding access to water, clean toilets and waste removal.⁹² A full analysis of government claims as compared to the information collated by Asivikelane is yet to be done, and at the time of writing, Asivikelane's monitoring information came from settlements in only fourteen municipalities.⁹³

⁸⁸ See the table above. The AG's Report in July 2020 found only 6 107 of the promised 41 000 water tanks.

⁸⁹ AG's Report 159.

⁹⁰ AG's Report 161.

⁹¹ International Budget Partnership 2020 <https://www.internationalbudget.org/covid-monitoring/>.

⁹² International Budget Partnership 2020 <https://www.internationalbudget.org/covid-monitoring/>.

⁹³ International Budget Partnership 2020 <https://www.internationalbudget.org/covid-monitoring/>. These fourteen municipalities are located in six of South Africa's nine provinces. They are the following metropolitan municipalities: Buffalo City, Cape Town, Ekurhuleni, Ethekewini, Johannesburg, Nelson Mandela Bay and Tshwane;

The question is why government has not generated reliable, publicly accessible monitoring data. The lack of a reliable baseline points to weak and inconsistent monitoring of basic services in informal settlements prior to the pandemic. Reliable, accessible monitoring data is a critical component of accountability, including against government's own targets. At the beginning of lockdown, the DWS promised that:

[o]n a daily basis, the Department will update all relevant stakeholders on progress made to ensure that the process is not only inclusive but is transparent.⁹⁴

The Acting Director-General of the DWS also referred to an app that had been developed internally and which was being used to monitor the delivery of tanks and tankers.⁹⁵ Based on the desktop inquiry followed in this article, it seems that neither of these promises has materialised.

It is also not the DWS alone which is implicated here. The DWS would have relied on municipalities to provide it with data, especially in areas where municipalities took responsibility for delivering and installing water tanks. The absence of reliable monitoring data thus also speaks to a failure of inter-governmental cooperation.⁹⁶

The significance of a lack of reliable monitoring data lies further in the fact that the absence of such data makes it difficult for both civil society and other parts of government (such as the Auditor-General or National Treasury) to hold the DWS accountable. Accountable government is a key feature of South Africa's constitutional dispensation.⁹⁷ In relation to water services provision, accountability mechanisms are particularly important because the water sector is currently trying to recover from years of corruption.

and the following district and local municipalities: Emalahleni, Emfuleni, Knysna, Madibeng, Mossel Bay, Msunduzi and Witzenberg.

⁹⁴ DWS 2020 <https://www.randwater.co.za/Press%20Release/2020%20Media%20Release/Jojo%20TanksCovid-19.pdf>.

⁹⁵ PMG 2020 <https://pmg.org.za/committee-meeting/30104/>.

⁹⁶ South Africa has a complex system of co-operative government, a discussion of which is beyond the scope of this article. See ch 3 of the Constitution, the *Intergovernmental Relations Framework Act* 13 of 2005 and the rich analysis of this system, such as Uregu Ile 2010 *Journal of US-China Public Administration* 51.

⁹⁷ See s 195(1)(f) of the Constitution which establishes accountability as one of the basic values and principles governing public administration, and s 92 which entrenches the accountability of Cabinet to the Constitution, the President and to Parliament.

The DWS estimates that in the 10 years from 2010-2020, R31 billion was lost to irregular and wasteful expenditure.⁹⁸ In response Minister Sisulu has instigated a largescale clean-up operation. In her budget speech to Parliament on 23 July 2020 she indicated that 97 officials had already been found guilty of being involved in irregular and wasteful expenditure by internal disciplinary structures.⁹⁹ In addition the Acting Director-General established a Stabilisation Committee which is investigating an additional 166 cases arising from the Auditor-General's reports over the years.¹⁰⁰

Investigations have also been launched into several water boards including Amatola Water, Lepelle Northern Water Board and Sedibeng Water.¹⁰¹ The CEOs of Lepelle and Amatola have been suspended and disciplinary processes against them have been instigated.¹⁰² Both these Water Boards were placed under "caretakership" and executive caretakers were appointed to fulfil the responsibilities of a CEO.¹⁰³ The interim board of Amatola was disbanded in early May 2020.¹⁰⁴ This upheaval at the water boards is important to note because several water boards, including Sedibeng and Amatola, were involved in emergency procurement during COVID-19.¹⁰⁵

The urgency with which communities lacking adequate access to water needed to be provided with water during the COVID-19 pandemic necessitated the use of emergency procurement processes to procure the necessary tanks and tankers quickly. While implementing emergency

⁹⁸ DWS 2020 <http://www.dwa.gov.za/Communications/PressReleases/2020/MS%20-%20Minister%20Sisulu%20acts%20on%20corruption%20in%20her%20department.pdf>.

⁹⁹ Sisulu 2020 <https://www.gov.za/speeches/debate-water-and-sanitation-dept-budget-202021-23-jul-2020-0000>.

¹⁰⁰ DWS 2020 <http://www.dwa.gov.za/Communications/PressReleases/2020/MS%20-%20Minister%20Sisulu%20acts%20on%20corruption%20in%20her%20department.pdf>.

¹⁰¹ Section 45(2) of the WSA allows the Minister to appoint someone to investigate the affairs or financial position of a water board.

¹⁰² DWS 2020 <http://www.dwa.gov.za/Communications/PressReleases/2020/MS%20-%20Minister%20Sisulu%20acts%20on%20corruption%20in%20her%20department.pdf>.

¹⁰³ DWS 2020 <http://www.dwa.gov.za/Communications/PressReleases/2020/MS%20-%20Statement%20by%20Minister%20of%20Human%20Settlements,%20Water%20and%20Sanitation,%20LN%20Sisulu%20MP%20on%20the%20on-going%20challenges%20at%20Amatola%20and%20Lepelle%20Northern%20Water%20Boards.pdf>.

¹⁰⁴ DWS 2020 <http://www.dwa.gov.za/Communications/PressReleases/2020/MS%20-%20Staff%20Brief.pdf>.

¹⁰⁵ Sedibeng, Amatola, Overberg and Magalies Water Boards were all involved in procurement during COVID. PMG 2020 <https://pmg.org.za/committee-meeting/30104/>.

procurement measures was a necessary part of the DWS' COVID-19 response, given the culture of corruption which permeated both the DWS and many water boards, emergency procurement was always going to be risky.

In the words of the Auditor-General's Report:

Emergency responses and quick actions are required to save lives and livelihoods, but the easing of controls and the streamlining of processes and procedures to respond to crises expose the government to the risks of the misuse or abuse of public resources. The multibillion rand relief package was introduced into a compromised control environment. We have been reporting on and warning about poor financial management controls, a disregard for supply chain management legislation, an inability to effectively manage projects and a lack of accountability in many of the government sectors that now need to lead or support government's efforts.¹⁰⁶

From the outset National Treasury issued a series of instructions on how emergency procurement should be managed during the pandemic.¹⁰⁷ It does seem that the DWS attempted to put some safeguards in place. For example, the COVID Water Regulations confirm that emergency procurement is still subject to both the *Public Finance Management Act* 1 of 1999 (PFMA) and the *Local Government: Municipal Finance Management Act* 56 of 2003.¹⁰⁸

This is significant because the PFMA contains several tools with which government officials can be held accountable. For example, section 51(e) provides that Accounting Authorities must take effective and appropriate disciplinary steps against any employee of a public entity who contravenes or fails to comply with the provisions of the PFMA. Furthermore, regulation 5 of Government Notice 464 issued by the DWS on 16 April 2020 requires that a national procurement officer be appointed to preside over all emergency procurement, and that details of these transactions be made public immediately after the end of lockdown.¹⁰⁹

However, the effectiveness of these checks and balances during the COVID-19 pandemic is questioned in the AG's Report. At the time of writing,

¹⁰⁶ AG's Report 5.

¹⁰⁷ See for example National Treasury 2020 http://www.treasury.gov.za/comm_media/press/2020/Instruction%205.pdf.

¹⁰⁸ Regulation 9 in GN 318 in GG 43107 of 18 March 2020, as amended by GN R398 in GG 43148 of 25 March 2020, GN R419 in GG 43168 of 26 March 2020, GN R446 in GG 43199 of 2 April 2020 and GN R465 in GG 43258 of 16 April 2020, and consolidated at Minister of Cooperative Governance and Traditional Affairs 2020 <https://sacoronavirus.co.za/wp-content/uploads/2020/04/Consolidated-Regulations-DMA-17-April.pdf>.

¹⁰⁹ PMG 2020 <https://pmg.org.za/committee-meeting/30104/>.

allegations of the abuse of emergency procurement were already surfacing. For example, in May 2020 City Press reported that an audio recording in which the provision of emergency relief to the Qwa Qwa region was discussed, allegedly captures Thami ka Plaatjie (Chairperson of the Ministerial Water Services Advisory Group) as saying "[w]e can all share the slice because it is a lot."¹¹⁰

Other less stark examples of non-compliance with checks and balances include Rand Water's inconsistent compliance with procurement procedures such as not always making sure that a signed declaration of conflict of interest form was received before appointing a service provider to supply water tanks or tanker services.¹¹¹

Water tanks are far more portable than permanent water infrastructure and therefore easier to lose track of. This concern is noted by the Portfolio Committee, which indicated that the use of water tanks is susceptible to corruption, and is further borne out by the discrepancies highlighted in figure 3 above.¹¹²

The need for emergency procurement during the COVID-19 pandemic was clear. Emergency procurement procedures should be more efficient and streamlined than procurement procedures ordinarily are, but checks and balances are critical, even in a state of disaster. This is particularly important in light of the corrupt practices that have plagued the water sector. Ordinarily a robust monitoring system forms part of this system of checks and balances and serves as a safeguard against corruption. Unfortunately, the DWS' failure to collate reliable monitoring data has made it difficult to conclusively ascertain whether and to what extent there has been corruption in the procurement of emergency water tanks and tankers during the COVID-19 pandemic.

The absence of reliable monitoring data also cripples the ability of any sphere of government to make informed, evidence-led decisions, to respond to early warning signs, and to take corrective action. It is also profoundly damaging to public trust. The need for monitoring data, especially during a time of crisis, is therefore one of the key lessons to be learned as South

¹¹⁰ Stone 2020 <https://www.news24.com/citypress/News/sisulu-adviser-discussed-sharing-contracts-20200531>.

¹¹¹ AG's Report_161.

¹¹² PMG 2020 <https://pmg.org.za/taled-committee-report/4278/>.

Africa readies itself for the challenges of water services provision in the context of climate change.

5.2 Repercussions of the DWS' COVID-19 response for future water services provision

A second aspect of emergency water provision to examine with the climate change context in mind, is the impact of the DWS' COVID-19 response on the state's ability to realise the right to water going forward. In this section these longer-term consequences are discussed with reference to the challenges associated with further reduced municipal revenue and redirected funds.

5.2.1 Further reduced municipal revenue

As discussed in part three above, systemic financial mismanagement and poor governance are significantly undermining local government's ability to fulfil its constitutional and legislative obligations vis-à-vis the right to water. The challenges faced by municipalities when attempting to collect revenue for services, including water, are well documented.¹¹³ While these are not new challenges, they have now been exacerbated by the effects of the COVID-19 pandemic.

The economic impact of the national lockdown in South Africa has been severe. According to the NIDS CRAM survey,¹¹⁴ at least 3 million people have lost their jobs and a 5-10% decrease in GDP was projected. In this context, consumers' ability to pay for services during lockdown became a key concern. Municipalities heeded calls from both the South African Local Government Association (SALGA)¹¹⁵ and civil society organisations¹¹⁶ to

¹¹³ Schreiner and Van Koppen 2003 *Water Policy* 489; Eales "Water Services in South Africa 1994-2009"; De Visser, Cottle and Mettler 2002 *ESR Review* 19.

¹¹⁴ NiDS-CRAM is the National Income Dynamics Study - Coronavirus Rapid Mobile Survey. The survey investigates the socioeconomic impacts of the national lockdown associated with the State of Disaster declared in South Africa in March 2020, and the social and economic consequences of the global Coronavirus pandemic. National Income Dynamics Study - Coronavirus Rapid Mobile Survey 2020 <http://www.nids.uct.ac.za/about/nids-cram/nids-cram>.

¹¹⁵ The role of SALGA is to raise the profile of local government, to represent, promote and protect its interests, and to provide local government with advice and support (SAHRC *Report on the Right to Access Sufficient Water* 28).

¹¹⁶ SERI 2020 http://seri-sa.org/images/STATEMENT_Urgent_Call_for_Immediate_Action_to_Suspend_and_Resolve_Water_and_Electricity_Disconnections_final.pdf ; SERI 2020 <http://www.seri-sa.org/index.php/more-news/1027-advocacy-challenging-evictions-and-service-disconnections-during-lockdown-12-june-2020>.

stop disconnections, but themselves received no relief from Eskom or bulk water services providers (water boards).¹¹⁷

The economic impact of the lockdown has meant that less municipal revenue could be generated from ratepayers who were struggling to pay property rates and service charges. At the same time there is some evidence that demand for, and the usage of, municipal utilities increased due to the lockdown,¹¹⁸ and that numbers of indigent households (who are entitled to receive the free basic water allocation in terms of the FBWP) also increased.¹¹⁹ The overall result has been the compounding of existing municipal financial vulnerabilities.

During a presentation to Parliament's select committee on the 2020/21 Division of Revenue Bill in May 2020, SALGA projected a 5% drop in rates payments which would cost local government an estimated R14 billion.¹²⁰ While National Treasury set aside R20 billion in the Disaster Management Relief Fund to support municipalities, available from July 2020,¹²¹ the extent to which this has helped is unclear. Given the central role played by municipalities as Water Services Authorities in South Africa, further reduced municipal revenue is likely to significantly undermine the ability of local government to fulfil its constitutional and legislative obligations to provide water (and other services) going forward.

5.2.2 *Redirected funds*

An emergency COVID-19 water response had to be funded. To unlock resources to fund the provision of emergency water tanks and tankers, the DWS redirected more than R300 million from the Regional Bulk Infrastructure Grant (RBIG).¹²² The RBIG is a targeted capital grant used for

¹¹⁷ PMG 2020 <https://pmg.org.za/page/RoleoflocalgovernmentincombatingspreadofCOVID19virusSALGA%20briefing>.

¹¹⁸ At a presentation to the CoGTA Portfolio Committee on 28 April 2020, SALGA highlighted that the national lockdown was forcing people to stay at home, which was resulting in higher-than-normal water use. PMG 2020 <https://pmg.org.za/page/RoleoflocalgovernmentincombatingspreadofCOVID19virusSALGA%20briefing>.

¹¹⁹ De Groot and Lemanski 2020 *Environment and Urbanization* 8; City of Johannesburg 2020 https://www.joburg.org.za/media_/Newsroom/Pages/2020%20News%20Articles/May%202020/1-million-households-to-benefit-from-City%E2%80%99s-food-parcel-voucher-scheme.aspx.

¹²⁰ PMG 2020 <https://pmg.org.za/committee-meeting/30105/>.

¹²¹ PMG 2020 <https://pmg.org.za/page/RoleoflocalgovernmentincombatingspreadofCOVID19virusSALGA%20briefing>.

¹²² PMG 2020 <https://pmg.org.za/committee-meeting/30104/>.

regional bulk water supply and sanitation infrastructure.¹²³ This redirection of funds reduced by two thirds the funds available to maintain and refurbish wastewater treatment plants and other essential infrastructure.¹²⁴ The effect of this decision was to delay significantly the upgrades needed to repair and restore water supply in Makhanda in the Eastern Cape and in Giyani in Limpopo, to name but two examples.¹²⁵

As early as in April 2020 SALGA noted municipalities' concerns about the sustainability of the emergency water supply in a presentation to the CoGTA Portfolio Committee. It noted that the DWS' provision of emergency tanks had made an enormous impact on previously unserved communities, but that this had also created expectations in communities which extended beyond COVID-19.

SALGA therefore highlighted that:

Continuing this programme over many months will divert limited funding available from the provision of reliable and sustainable solutions. Given municipal existing constraints, it is likely that once emergency funding has dried up, the tanks will not be serviced and will stand empty. There is an urgent need to move rapidly to exit the current emergency response and move into the next phase of the programme. The focus must shift to sustainable solutions – a programme to support WSAs to provide and sustain water services both technically and financially. As a result, the DWS may have no option but to seek expensive loan finance to refurbish bulk infrastructure, which is concerning given the ways in which loan finance has contributed to policy capture and crippling debt in many countries.¹²⁶

Encouragingly, the DWS refers to phases in its emergency response¹²⁷ and promises that the redirection of these resources will be addressed after the

¹²³ It can be used in situations where the need is to build new infrastructure, or to extend or refurbish existing infrastructure, and can be used to fund the planning, design, procurement and implementation of projects, as well as the setting-up of the necessary institutional arrangements, (funding for operation and maintenance must be sourced elsewhere). DWA *Water Services Regional Bulk Infrastructure Grant*.

¹²⁴ Saba 2020 <https://mg.co.za/article/2020-04-23-sisulus-plan-threatens-water-future/>.

¹²⁵ The DWS has reallocated R22 million of the R66 million annual budget earmarked for the upgrading of the James Kleynhans Water Treatment Works to emergency water provision, thus pushing the possibility of a sustainable water supply to Makhanda even further out of reach (Nowicki 2020 <https://www.groundup.org.za/article/cost-covid-19-response-will-prolong-water-crisis-makhanda/>). See further SERI *Claiming Water Rights in South Africa* 55.

¹²⁶ Potter 2020 http://www.seri-sa.org/images/SERI_comments_PC_DG_DWS_21_April.pdf 6. See also Moyo 2011 *Stell LR* 805. Moyo highlights that the World Bank, the International Monetary Fund and regional development banks pushed vigorously for the privatisation of water supply services in response to the global water crisis.

¹²⁷ Mdekazi 2020 https://www.voices360.com/politics/rejoinder-to-athandiwe-sabas-article-sisulus-plan-threatens-water-future_.

immediate emergency response, through a post-disaster recovery plan (phase two) followed by rehabilitation (phase three). It is critical that this is carried through.

While no-one denies the importance of the need to provide emergency water in response to COVID-19, the ripple effects of this kind of budget reallocation could profoundly restrict the government's ability to realise the right to water in South Africa in the long term. It is therefore essential that the focus on emergency interventions in this period of disaster does not neglect or undermine the institutional, financial, operational and maintenance systems required to provide effective, affordable, sustainable services going forward.

The combination of the pandemic itself, the economic effects of the national lockdown necessarily imposed in response to it, and the way in which the DWS' emergency water response was designed and implemented, has without doubt compounded the existing financial challenges faced by both national and local government. In the process, the resources available to facilitate the resumption of routine, sustainable municipal water services, have been severely depleted.

5.3 The legal implications of withdrawing access to emergency water down the line

The third theme of the analysis presented here concerns the legal implications of withdrawing access to emergency water in the future. While COVID-19 seems to be here to stay, at least for the moment, it is nevertheless important to focus on planning for how the emergency response will transition to routine water services once more.

As outlined in part two above, the state's obligations with respect to the right to water include a negative obligation to respect the right to water. Legally, discontinuing emergency water supply constitutes an interference with existing access to water and may therefore constitute a contravention of this obligation. The courts have in the past found disconnecting a pre-existing water supply to be a breach of section 27(1) of the Constitution, and that while the WSA foresees at least the possibility of disconnection, if the person receiving water is unable to pay, their access to water may not be cut off.

In *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 6 BCLR 625 (W) the High Court held that the obligation to respect entails that the state may not take measures that result in the denial of

access. For this reason disconnecting a pre-existing water supply was found to be a breach of section 27(1). The Court noted that while the WSA allows a water service provider to set conditions under which water supply may be discontinued, the procedure to discontinue must be fair, equitable, provide reasonable notice and an opportunity to make representations. Furthermore, where someone proves to the water service provider that they are unable to pay, their water service may not be cut off.¹²⁸ A similar approach was adopted by the Supreme Court of Appeal in *City of Cape Town v Strümpher* 2012 4 SA 207 (SCA).

Nevertheless, the right to water in section 27 of the Constitution is subject to the qualifier that the state need only take *reasonable measures within its available resources* to *progressively realise* the right.¹²⁹ With this in mind, it may well be considered reasonable for emergency water supply to be suspended after the pandemic, provided of course that ordinary water services can then resume. Any infringement on section 27 can of course also be argued to be reasonable and justifiable in terms of the limitations clause in section 36 of the Constitution.¹³⁰

However, as discussed in sections 5.1 and 5.2 above, the institutional capacity of both municipalities and the DWS to provide water services, already on shaky ground prior to the pandemic, has been severely undermined by COVID-19. Thus, even if the legal arguments for the continuation of emergency water supply post the pandemic succeed, it seems unlikely that the state will in practice be able to continue this service in the context of dwindling municipal revenue.

6 Conclusion

Prior to the COVID-19 pandemic, water services provision in South Africa was characterised by a comprehensive regulatory framework which faltered

¹²⁸ See the discussion of the case in Kok and Langford "Right to Water" 204. See further Kidd 2004 *SAJHR* 119. In addition, if the disconnection amounts to a constructive eviction i.e. the persons are forced to leave their home, a prior court order must also be obtained in terms of s 26(3) of the Constitution and the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998.

¹²⁹ For discussions of these internal limitations, see Bilchitz 2002 *SALJ*; Iles 2004 *SAJHR*; Pieterse 2004 *SAJHR*.

¹³⁰ Section 36 of the Constitution provides that: "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including— (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose."

in its implementation. This was particularly so given the large role given to municipalities, many of whom are struggling to fulfil their constitutional and legislative water services delivery obligations in the face of systemic municipal collapse, driven largely by financial mismanagement and poor governance. Even at national level, the DWS was struggling to recover from many years of corruption in both the national department and various water boards.

As is so often the case, the people who bear the brunt of these government failures are those most in need of government support. Historical inequality in water services provision has unfortunately persisted well into the democratic era, and it is precisely these inequalities which COVID-19 has now deepened. While access to water has been a critical part of protecting against infection, many poor people living in informal settlements and rural areas have not had access to the quantities of water necessary to sustain frequent handwashing. The DWS has implemented an emergency COVID-19 response in an attempt to confront these challenges. This response has taken the form of the provision of water tanks and tankers to fill them, both procured through Rand Water at the Water Command Centre. This provision of emergency water supply no doubt brought welcome relief to the areas which benefitted from it.

Nevertheless, the DWS response can be critiqued in several ways. First, the DWS has failed to collate reliable monitoring data. There are perturbing discrepancies between the claims it has made to the Auditor-General, in its press statements, and in its reports to Parliament. Reliable data is the cornerstone of an effective monitoring system. Its absence has thus undermined the ability of both civil society and the relevant arms of government to hold the DWS to account. Given the importance of accountability, even in the context of emergency procurement, or perhaps particularly in those circumstances, this is an unfortunate failure on the part of the DWS. In addition to hampering accountability measures, an absence of reliable monitoring data also increases vulnerability to corruption and erodes public trust. Furthermore, it undermines the ability of any sphere of government to make informed, evidence-led decisions and to implement corrective action when the data signals a problem.

Secondly, the pandemic has exacerbated existing municipal challenges in collecting revenue. The need to urgently pay for emergency tanks and tankers also forced the DWS to make some hard choices about reallocating budget ring-fenced for the repair and maintenance of infrastructure.

Thirdly, should the state decide down the line to withdraw the emergency water services it has provided as part of the COVID-19 response, it could be argued that this is unconstitutional on the basis that it constitutes a retrogressive measure in the form of the removal of existing access to water. Nevertheless, counterarguments to the effect that such a withdrawal of emergency supply is reasonable (in terms of section 27(2) of the Constitution), or is justifiable (in terms of section 36 of the Constitution) would be available.

With the national rollout of a vaccination programme underway, the end of the COVID-19 pandemic may be in sight for South Africa. This eventuality would require careful planning as the nature of water services provision shifts from emergency back to routine. However, as the effects of climate change intensify, "routine" may well be a thing of the past anyway, even in a post-COVID-19 world.

For these reasons it is prudent to reflect on the DWS' COVID-19 response. The key lessons which can be distilled from an examination of this response are that: a) a reliable monitoring system is a non-negotiable component of water services provision, and particularly in times of crisis; b) while agility in a crisis is important, prioritising short-term action at the expense of long-term sustainability places future water services provision at considerable risk; and c) when rolling out an emergency response in the heat of the moment, attention must be paid to what legal obligations are being created by emergency supply, as this may cause difficulties when the crisis has abated and the state tries to transition from emergency to routine water services provision. As the impacts of climate change intensify, and South Africa moves into increasing water insecurity, these are lessons which the state will do well to heed.

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List Of Abbreviations

AGSA	Auditor-General of South Africa
Berkeley J Int'l L	Berkeley Journal of International Law
CEO	Chief Executive Officer
CoGTA	Department of Cooperative Governance and Traditional Affairs
COVID-19	Coronavirus disease 19
DWA	Department of Water Affairs
DWAF	Department of Water Affairs and Forestry
DWS	Department of Water and Sanitation
ESR Review	Economic and Social Rights in South Africa Review
FBWP	Free Basic Water Policy
HJRL	Hague Journal of the Rule of Law
J Afr L	Journal of African Law
JHRE	Journal of Human Rights and the Environment
LDD	Law, Democracy and Development
LEAD	Law Environment and Development Journal
NWA	National Water Act 36 of 1998
NWRS	National Water Resource Strategy
PFMA	Public Finance Management Act 1 of 1999
PMG	Parliamentary Monitoring Group
RBIG	Regional Bulk Infrastructure Grant

RECIEL	Review of European Community and International Environmental Law
SAHRC	South African Human Rights Commission
SAJHR	South African Journal on Human Rights
SALGA	South African Local Government Association
SALJ	South African Law Journal
SERI	Socio-Economic Rights Institute of South Africa
StatsSA	Statistics South Africa
Stell LR	Stellenbosch Law Review
WHO	World Health Organisation
WSA	Water Services Act 108 of 1997
WSP	Water Services Provider