

# Realising socio-economic rights in the South African Constitution:

## The obligations of local government

### A guide for municipalities



By Christopher Mbazira

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The Socio-Economic Rights Project  
serp@uwc.ac.za

Community Law Centre  
University of the Western Cape  
Private Bag X17  
Bellville 7535  
Tel: 021 959 2950  
Fax: 021 959 2411

**Editorial assistance:**

Coel Kirkby and Reuben Baatjies

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Christopher Mbazira  
Researcher, Socio-Economic Rights  
Project, Community Law Centre  
University of the Western Cape



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# Preface

The guide is primarily aimed at municipal officials, councillors and members of the public who seek a general overview of the socio-economic rights obligations of municipalities. While the 1996 Constitution guarantees a number of socio-economic rights, these rights are yet to become a reality for the majority of South Africans. Municipalities are at the centre of realising these rights because they are the sphere of government closest to the people.

This guide is written in a user-friendly manner to simplify legal duties. It is not intended for use as a legal reference work; reference is made to legislation and particular sections of Acts only where it is strictly necessary. Hypothetical examples and the case studies illustrate the obligations in a practical context. At the end of the guide is a checklist that may be used by municipalities to determine whether or not a programme adopted to deliver socio-economic rights is reasonable, not only in conception but in implementation was well.

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**Professor Nico Steytler**  
**Director, Community Law Centre**  
**University of Western Cape**



# Chapter 1: Introduction

## Are socio-economic rights human rights?

Human rights are the fundamental liberties that protect the individual not only against intrusive exercise of state power but also against intrusion from other individuals or corporate entities. They also guarantee some entitlements, which individuals can demand from the state. Human rights have been grouped into two broad categories. The first category comprises the so-called civil and political rights, which guarantee individual civil and political liberties. They include rights such as the right to life, freedom of expression, freedom of association, freedom of assembly, right to vote and freedom of movement, amongst others.

The second category is the economic, social and cultural rights (socio-economic rights). Socio-economic rights are those entitlements and claims that guarantee people's economic and social well-being such as food, shelter, healthcare services, water, education and a clean and healthy environment. The state has a moral and legal duty to ensure that all people have access to these basic goods and services. These obligations are most effectively discharged when transformed into rights that an individual may demand. The South African Constitution enshrines both socio-economic and civil and political rights in the Bill of Rights. The Constitution also imposes a duty on the state and all its organs to respect, protect, promote and fulfil these rights. To a limited extent, private individuals and corporate entities are also bound to respect such rights.

The South African Constitution does away with the traditional distinction between categories of human rights. It recognises the fact that all human rights are interdependent, interconnected and interrelated. The relationship between the different human rights is symbiotic; no right can survive without another. Though this publication concentrates on socio-economic rights, civil and political rights are equally important in enhancing the quality of life.



## Socio-economic rights in the South African Constitution

The South African Constitution protects and guarantees a number of socio-economic rights, including:

### a) Access to land;

#### Section 25(5)

The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

### b) Access to adequate housing;

#### Section 26(1)

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve progressive realisation of this right.
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

### c) Access to health care services, sufficient food and water, and social security and social assistance;

#### Section 27(1)

- (1) Everyone has the right to have access to-
  - a) health care services, including reproductive health care;
  - b) sufficient food and water;
  - c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

**d) Children's rights to basic nutrition, shelter, basic health care services and social services;**

**Section 28(1)(c)**

Every child has the right to basic nutrition, shelter, basic health care services and social services.

**e) Right to education**

**Section 29(1)**

(1) Everyone has the right-

(a) to basic education, including adult basic education; and

(b) to further education, which the state through reasonable measures, must make progressively available and accessible.

(2) Everyone has the right to receive education in the official language or languages of their choice in public institutions where that education is reasonably practicable

(3) Everyone has the right to establish and maintain at their own expense, independent educational institutions ...

**f) Right to an environment not harmful to health and wellbeing**

**Section 24 (a)**

Everyone has the right to an environment that is not harmful to their health or wellbeing.

Apart from the Constitution, these rights are expanded in several pieces of legislation. Legislation has been enacted on the right to water, access to land and protection of tenure, health services, education and protection of the environment.

# Chapter 2: The obligations of government to realise socio-economic rights

## Duty of local governments to respect, protect, promote and fulfil

The Constitution obliges the state to respect, protect, promote and fulfil the rights therein. These duties bind the state and all its organs (which include Parliament, the provincial legislatures and the municipal councils), the executive (which includes the national executive, the provincial executive and the municipal councils), and the judiciary (which comprises all courts). While to a certain extent the rights also bind natural persons and corporate entities, the state bears the primary responsibility. This is especially so with socio-economic rights because they require a great deal of positive action and resources from the state. In the following paragraphs we discuss the duties imposed on local governments to respect, protect, promote and fulfil the rights.

### a) Respect

The duty to respect requires local governments to refrain from interfering with the enjoyment of the rights. This prohibits local governments from taking any action that would jeopardise the enjoyment of existing rights. For instance, the right of access to adequate housing may be violated if people are evicted in order, for example, to build a sports stadium without making adequate alternative accommodation and/or compensation for the people affected.

### b) Protect

This duty requires local governments to protect people from violation of their rights by third parties not linked to the state. The activities of other individuals and, more so, corporate entities, such as companies, may interfere with the enjoyment of human rights. For instance, a mining company may spill dust into the atmosphere, leading to illness in surrounding communities. This violates the right to an environment that is not harmful to health and well-being, and the right to health. The duty on government is to regulate potentially harmful activities of third parties, by adopting and enforcing laws and regulations. Such laws, in addition to prohibiting harmful conduct, should also provide for mechanisms to investigate and punish perpetrators, and for remedies for victims.

### c) Promote

This obligation compels government to promote the rights through educating the people on how best to enjoy them. This can be done through all forms of information dissemination on various aspects of the rights. For example, in order to



promote the right to health care, the government should disseminate information on how best to avoid certain disease and what to do after contracting specific diseases. This applies to all other rights in as much as it applies to the right to health care. One of the most threatening diseases to the future of South Africa is HIV/AIDS; there is a great need for dissemination of information on prevention and management of this disease. The municipalities also have a duty, when they adopt policies to benefit in the indigent, to publicise those policies and to ensure that information reaches all potential beneficiaries.

#### **d) Fulfil**

The duty to fulfil requires the government to take positive steps to ensure the realisation of the rights. In terms of socio-economic rights, this duty requires government to adopt measures that make it possible for those in need to access socio-economic goods and services. This could include the adoption of laws and policies that make it possible for people to access things such as food, health care, water and social security amongst others. The duty to fulfil also requires the state to provide material goods and services whenever the need arises. This could include providing medical services, housing, food and water or creating and effectively implementing programmes that promote these rights. As will be seen in the next chapter, this duty is onerous because it requires far more resources as compared to other duties.

As will be seen below, the duty to fulfil does not oblige the state to provide individual goods and services to everyone on demand. Instead, the state's duty is to undertake reasonable programmes aimed at realising the rights. Such programmes should be inclusive and should not ignore the needs of the most vulnerable members of the community.

### **Realising socio-economic rights and resource obstacles**

With respect to the rights of access to adequate housing, health care services, sufficient food and water, social security and social assistance, the nature of the government's duties are delineated in sections 26(2) and 27(2) of the Constitution. These provisions compel government to take reasonable legislative and other measures, within the limitations of available resources, to progressively realise these rights. It is on the basis of these obligations that the government's performance in realising the socio-economic rights in sections 26(1) and 27(1) will be assessed. It is therefore important that we understand the nature of these obligations. At the international level, the obligations to realise socio-economic rights are defined by the International Covenant on Economic, Social and Cultural Rights (ICESCR) which is the major treaty on this subject. Though South Africa has not ratified this treaty the obligations describes are relevant to South Africa because of the similarity between this treaty and the South African Constitution.

## Taking 'reasonable legislative and other measures'

The Constitutional Court, which is the highest court in constitutional matters, interpreted the duty to take reasonable measures in the case *Government of the Republic of South Africa v Grootboom* (Grootboom case). The case was lodged by a group of residents of Oostenberg municipality in the Cape metropolitan council. The residents who were in illegal occupation of land identified for low cost housing were forcibly evicted by the municipality, their shacks and belongings callously set on fire. With no other place to go, the residents decided to move to a sports field where they erected temporary shelters.

They then lodged an application in the High Court on the basis, amongst others, of the right of access to adequate housing. The Constitutional Court said that the question was whether the state had undertaken reasonable legislative and other measures, within its available resources, to progressively realise the right of access to adequate housing. The Court held that the Constitution requires the state to put in place a reasonable programme to realise the rights, one that must allocate responsibilities between spheres of government, take care of short term needs, allocate the requisite financial and human resource, and be reasonably implemented.

The Court rejected submissions to the effect that the state was under a duty to provide a minimum level of goods and services immediately to everyone. If the Court had accepted this submission it would have transformed socio-economic rights into individual entitlements which individuals could demand. To the Court, undertaking reasonable legislative and other measures to realise the rights progressively was a more realistic duty.

### a) Allocation of responsibilities

The Court in the Grootboom case said that a reasonable programme must clearly allocate responsibilities and tasks between the three spheres of government (national, provincial and local). The Court also underscored the fact that municipalities have an important role in ensuring that services are provided in a sustainable manner to their communities. The programme must be comprehensive and well coordinated, with each sphere of government consulting the other. While each sphere must accept responsibility for implementing particular parts of the programme, national government bears the ultimate responsibility.

### b) Short term needs to be considered

The Court also said that a reasonable programme to realise socio-economic rights must be balanced and flexible. It must make provision for short, medium and long-term needs. A programme that excludes those persons in desperate and immediate need in favour of those with medium and long term needs does not pass

the test of reasonableness. The Court found the government's national housing programme to be unreasonable on this ground. The programme did not respond to the needs of those who had lost housing as a result of evictions or natural disasters. Instead, the government had argued that its long term objective was to provide low-cost housing for many people. The government contended that the applicants should have waited for their turn in the low-cost housing queue. The Court rejected this argument: the applicants were desperate, their shacks and belongings had been set on fire, and they had no place to go. Ignoring their needs on the pretext of satisfying long term goals was unreasonable.

### **c) Allocation of human and financial resources**

A reasonable programme must ensure that appropriate financial and human resources are available. First, the state, at all its levels, must ensure that enough money is allocated to realise socio-economic rights. Programmes must make provision for sufficient human resources possessing the necessary skills. Though the Court found the Cape metro housing programme to be reasonable, it had not been fully implemented because of financial deficits. The Court emphasised that the national government had the duty to ensure appropriate financial and human resources. The concept of resources means more than financial and human resources; it also refers to all things needed to realise socio-economic rights, such as information and development of appropriate technology.

### **d) Reasonable implementation**

A reasonable programme must not only be reasonably conceived but also implemented. An otherwise reasonable programme unreasonably implemented does not pass the test of reasonableness. The state must execute well directed policies and programmes, and ensure sufficient financial, human and other resources. For example, failing to allocate a requisite budget for a programme, thus frustrating its implementation, is an unreasonable state action.

### **e) Programme to be publicised**

In the case *Minister of Health v Treatment Action Campaign (TAC case)*, the Constitutional Court added another element to the test of reasonableness. For a programme to be reasonable, its contents must be made known to the intended beneficiaries. This means that the state is under a duty to publicise its programmes and the pre-requisites of gaining access to them. This is in line with the constitutional values of accountability and openness, discussed below.

## **Checklist for reasonable programme**

At the end of this guide is annexed a checklist that may be used by municipalities to determine whether a programme is reasonable both in conception and implementa-

tion. This checklist is, however, not conclusive as the standard of reasonableness is a changing one. The checklist is deduced from the standards that the courts have set thus far.

## **Acting ‘Within available resources’**

As already mentioned above, the government’s obligations to realise socio-economic rights are subject to the resources at its disposal. The government is not expected to deliver more, in terms of goods and services, than is permitted by its resources. This phrase ‘within available resources’ mirrors that of ICESCR. The ICESCR requires that states realise socio-economic rights to the maximum extent afforded by their available resources.

But while the government can claim scarcity of resources to justify failure to realise these rights, it is also required to devise means of boosting the available resources. The government must therefore show that it has plans to develop more resources, either from external or internal sources. In addition, the obligation also requires the government to maximise the available resources by employing them diligently and putting them where they are required most. Loss of resources because of corruption or inept use amounts to violation of this obligation. The government should be able to demonstrate that it has effectively used the available resources in a manner that best realises the rights.

## **‘Progressive realisation’ of socio-economic rights**

Like the phrase “within available resources”, “progressive realisation” mirrors provisions of the ICESCR. The phrases recognise that it may not be possible for the government to realise the rights immediately, but this does not mean that the state should neglect its obligations. Instead, the government should begin to take steps immediately to realise the rights, followed with measures intended to steadily improve the quality of socio-economic goods and services. Additionally, the number of people supplied with socio-economic goods and services should eventually increase. The government should employ more resources towards realising the rights and health care services, housing, social assistance, food and water should improve in quality and reach more people over time. Progress also has to be tested against reasonableness; unreasonable delays such as those caused by bureaucracy are not a valid excuse for failure to improve access to a right.

# Chapter 3: The place of local government in realising socio-economic rights

The state bears the primary duty to realise socio-economic rights. As mentioned above, the Constitution imposes a duty on the state to respect, protect, promote and fulfil all the rights in the Bill of Rights. The Bill of Rights also binds the legislature, executive, judiciary and all organs of the state. These organs include all spheres of government, national, provincial and local government, and accordingly municipal councils, as part of the local government sphere, are also bound by the Bill of Rights.

The objects of local government are outlined by the Constitution.

## **Constitution, section 152(1) - objectives of local government**

The objects of local government are:

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

The Constitution compels municipalities to strive, within their financial and administrative capacity, to achieve these objectives. Municipalities must also structure and manage their administration, budgeting and planning processes in a manner that gives priority to the basic needs of the community and promotes social and economic development.

Being the sphere closest to the people, local government has a key role in delivering basic services and developing communities. Municipalities are not alone though. As will be seen later, the Constitution also imposes a number of obligations on the national and provincial governments to support municipalities.

## **Constitutional duties (functions) of local government to provide socio-economic goods and services**

The Constitution sets out the different functions of the various spheres of government for provision of social goods and services. Section 156(1) of the Constitution provides

that a municipality has executive authority and the right to administer local government matters listed in Part B of Schedules 4 and 5. These schedules include the following relevant functions.

### **Schedules 4B and 5B**

- a) Electricity and gas reticulation
- b) Municipal health services
- c) Municipal public transport
- d) Municipal public works
- e) Water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems
- f) Municipal roads
- g) Refusal removal, refuse dumps and solid waste disposal

Municipalities must provide the above goods and services; however, the national and provincial governments may by agreement delegate the administration of additional functions to municipalities. This includes services in Part A of Schedule 4 which fall in the concurrent competence of the national and provincial governments. These include: education at all levels except tertiary education, housing, and public transport amongst others. It is the duty of the national and provincial governments to ensure that the municipalities have the capacity to carry out the delegated functions and all requisite human and budgetary allocations have been effected. Failure in this duty can occur when either the national or provincial government delegates functions to local government without ascertaining whether the latter has the capacity to execute the delegated function.

## **Direct and indirect socio-economic rights obligations of local government**

As mentioned above, municipalities may only perform functions listed in Schedules 4B and 5B and those delegated by the provincial or national government. Here, their obligations are direct: municipalities bear the primary responsibility to ensure the discharge of the function. This means that the municipality must consider this obligation in its planning and budgeting processes, and dedicate the requisite financial and human resources as the primary obligation bearer. However, this does not mean that municipalities do not bear any obligations in relation to socio-economic services which are outside their functional or delegated areas. It may still be the duty of local government, for instance, to carry out certain functions in order to ensure that its residents maximally enjoy a service provided by another sphere of government.

To get a better understanding of the direct and indirect obligations, one must first have an understanding of the obligations to respect, protect, promote and fulfil as discussed above. While the first three obligations bind all spheres of government, the obligation to fulfil does not, although this depends on the nature of the service in issue. This is because local governments have direct duties to fulfil the provision of the services that fall within their functional areas in schedules 4B and 5B.

All spheres of government have a direct obligation to respect socio-economic rights. Municipalities may violate this obligation by, for instance, carrying out an unlawful evictions, thereby violating respect for housing rights. They may also directly protect and promote these rights by stopping third parties, in their areas of jurisdiction, from violating the rights. For instance, local governments are required to take action against any individual or corporate entity engaging in activities that may be hazardous to the environment and health without adequate safeguards. Additionally, local governments may involve themselves in activities that promote the enjoyment of the rights such as education and dissemination of information on the rights. Such education may include dissemination of information on the existing services provided by the municipality, with focus, amongst others, on such things as how to access these services, the complaints-making mechanism, and the remedies available to aggrieved members of the community.

The duty to fulfil is unique since it calls for positive action and financial and human resources. Where a right is a listed function of local government in Schedules 4B and 5B, then municipalities have a direct obligation to fulfil that right. For example, it is the duty of the municipality to deploy the financial and human resources at its disposal to provide municipal health services and water and sanitation services. In respect of these services the obligations of local government are direct; it bears the ultimate responsibility of ensuring that these services are fulfilled. However, it should be noted that while the obligations in respect of services that fall outside the competence of local government are imposed on other levels of government, municipalities may still bear certain indirect obligations. In this the municipalities will indirectly be contributing to the realisation of services outside their competence.

One example is electricity and gas reticulation. While this contributes to the enjoyment of the right to housing, it does not in itself amount to housing. On the other hand, municipal health services may directly address some aspects of the right of access to health care services guaranteed by section 27(1) of the Constitution as discussed below. Municipal public transport, public works and roads contribute indirectly to the fulfilment of such rights as education and housing. Refuse collection contributes indirectly to housing and health.

To make this point more clear we shall examine a few rights: access to water, health care service and housing.

## Access to water

Access to sufficient water is guaranteed by section 27(1) of the Constitution. Water and sanitation services fall within the functional area of local government in Schedule 4B. This imposes direct obligations on municipalities to ensure access to water supply systems, and domestic waste-water and sewage disposal systems. The Water Services Act also designates municipalities as 'water services authorities' and creates a direct obligation on water services authorities to ensure that consumers (and potential consumers) have progressive access to efficient, affordable and sustainable water services. Municipalities must take direct responsibility for domestic water purification and delivery. Other spheres still have a duty to support local government in providing water services.

## Health care

Municipalities have a direct duty to provide only a portion of healthcare services described as 'municipal health services' in Schedule 4B. The National Health Act defines 'municipal health services' as follows:

### Section 1 - National Health Act

'Municipal health services' includes -

- (a) water quality monitoring;
- (b) food control;
- (c) waste management;
- (d) health surveillance of premises;
- (e) surveillance and prevention of communicable diseases, excluding immunisations;
- (f) vector control;
- (g) environmental pollution control;
- (h) disposal of the dead; and
- (i) chemical safety, but excludes port health, malaria control and control of hazardous substances.

Municipalities must commit resources to provide these services. Since maintaining a health care system is a complex task, all spheres of government share some responsibility. While all spheres may have direct and specific obligations in respect of health care, they also have an indirect duty to support each other. While paying due regard to their respective functions, all spheres of government should coordinate their activities in delivering healthcare services.



## Access to housing

Access to adequate housing is an example of a right with an indirect obligation of fulfilment for local government. In terms of Schedule 4A of the Constitution, housing is a concurrent competence between national and provincial governments. However, municipalities play an important supporting role. In the Grootboom case, the Constitutional Court stated that housing entails more than bricks and mortar; it includes appropriate services such as water and sewerage removal. These services fall squarely within the sphere of local government. The Court also emphasised that all spheres of government are responsible for implementing particular parts of the housing programme. In terms of the Schedules, municipalities must provide the services mentioned above, thereby ensuring enjoyment of the right to housing. It should be noted, however, that at the moment most municipalities have through delegation from the other spheres of government taken on the duty to fulfil the right of access to housing. In this respect the obligation to provide housing becomes a direct one subject to the terms of the contract of delegation. But this does not mean that the sphere of government making the delegation is exonerated from responsibility as it still bears the obligation to ensure that the service is efficiently delivered.

## Municipal Systems Act

The Municipal Systems Act of 2000 (Systems Act) elaborates the constitutional duties of municipalities. These duties are relevant to socio-economic rights in the Constitution. The Systems Act in section 6(2) also imposes specific duties on municipalities towards their communities.

### Systems Act, section 4

- (2) The council of a municipality, within the municipality's financial and administrative capacity and having regard to practical considerations, has the duty to-
- (a) exercise the municipality's executive and legislative authority and use the resources of the municipality in the best interests of the local community;
  - (b) provide, without favour or prejudice, democratic and accountable government;
  - (c) encourage the involvement of the local community;
  - (d) strive to ensure that municipal services are provided to the local community in a financially and environmentally sustainable manner;
  - (e) consult the local community about-
    - (i) the level, quality, range and impact of municipal services provided by the municipality, either directly or through another service provider; and
    - (ii) the available options for service delivery;

- (f) give members of the local community equitable access to the municipal services to which they are entitled;
  - (g) promote and undertake development in the municipality;
  - (h) promote gender equity in the exercise of the municipality's executive and legislative authority;
  - (i) promote a safe and healthy environment in the municipality; and
  - (j) contribute, together with other organs of state, to the progressive realisation of the fundamental rights contained in sections 24, 25, 26, 27 and 29 of the Constitution.
- (3) A municipality must in the exercise of its executive and legislative authority respect the rights of citizens and those of other persons protected by the Bill of Rights.

### **Systems Act, section 6(2)**

- (2) The administration of a municipality must:
- (a) be responsive to the needs of the local community;
  - (b) facilitate a culture of public service and accountability amongst staff;
  - (c) take measures to prevent corruption;
  - (d) establish clear relationships, and facilitate co-operation and communication, between it and the local community;
  - (e) give members of the local community full and accurate information about the level and standard of municipal services they are entitled to receive; and
  - (f) inform the local community how the municipality is managed, of the costs involved and the persons in charge.

## **Accountability, openness and responsiveness**

All the municipal duties enumerated by the Systems Act have relevance to the realisation of the socio-economic rights protected in the Constitution. For example, the Constitution envisages a government based on accountability, responsiveness and openness. This is important for the realisation of socio-economic rights because it compels the government to make rational decisions. Openness reinforces responsiveness and accountability; it compels public officials to open up public affairs to the members of the community. This transparency will enable the community to access information which they may use to demand that officials justify their actions and be held accountable for shortcomings.

Accountability, openness and responsiveness give the community a role in managing the municipality. It opens up communication between the community and the municipality, thereby averting possible disagreements. Members of the community should be able to make complaints based on actual information obtained from the municipalities to better exercise their rights. They cannot, however, get accurate information unless the municipalities make their decisions in an open and transparent manner. In addition to this, members of the community should be enabled to participate in decision-making processes. In terms of socio-economic goods and services, the community should be able to participate in the decisions relating not only to what services are needed but also how they should be delivered. In the TAC case, for example, the Constitutional Court insisted that for a programme to be reasonable it must be publicised. This means that municipalities have a duty to make their programmes known to the public. They have to spell out to the public in clear terms the criteria of accessing any goods and services provided by the programme.

## **Duties towards the indigent**

The Constitution guarantees socio-economic rights to all without discrimination. All members of the community, especially the indigent, must have access to the services. In the Grootboom case the Court emphasised that government must pay special attention to those in desperate need to meet the standard of reasonableness. The Systems Act requires that a municipality's credit control and debt collection policy make provision for indigent debtors consistent with the national policy on indigents. Measures include free access to the services or subsidisation of rates for the indigent. The credit policy must also make provisions for convenient debt settlement measures for the indigent and must employ discontinuation of the services as a measure of last resort.

The measures taken by the municipality, as referred to above, must ensure that the people's socio-economic rights, as guaranteed in the Constitution and other laws, are respected. For instance, the Water Services Act guarantees the right of access to basic water supply. Section 4 provides that limitation or disconnection of water should not result in a person being denied access to basic water supply if that person proves that he or she is unable to pay for the service.

Some municipalities have already adopted indigent policies, but have not implemented them effectively. The reasons for non-implementation include: financial deficits, ignorance of existence by residents of these policies, absence of clear procedures and mechanisms for determining indigence, and the absence of effective and transparent procedures for access to the benefits of the policies.

Municipalities have an obligation to put in place mechanisms and procedures through which members of the community can exercise their rights. Such procedures must be

open, transparent and free from corruption. Though a policy on indigent people may meet the test of reasonableness on paper, failure to implement it may make such a programme unreasonable in practice.

## **Duties when services are privatised**

Many municipalities have privatised the provision of services such as water purification and delivery, electricity reticulation and distribution, sanitation and refuse collection, and street lighting and cleaning. Privatisation has taken different forms, including outsourcing, leasing out, management contracts, public-private partnerships, and in some cases has taken the form of outright sale of public assets. A number of reasons have been put forward by government to justify privatisation, including the attraction of skills and private capital, efficiency and value for money, and sustainable delivery of public services. While this guide does not discuss the advantages and disadvantages of privatisation, it should be noted that the privatisation of public services may sometimes be detrimental to the poor due to the profit-driven nature of the private sector, and the rigorous debt recovery measures that accompany it.

Under the Systems Act, municipalities have a number of obligations even when public services are privatised. [See Community Law Centre's guide entitled Outsourcing basic municipal services: a practical guide for councillors and communities, 2005]

### **a) State primary bearer of human rights obligations**

Although individuals and private entities have limited duties, the state has the primary responsibility for the human rights obligations in the Constitution. The state's obligations remain even when service provision has been privatised. The Systems Act provides that a municipality remains responsible for ensuring that the service is provided to the local community. This means that a municipality is responsible for failure by a private entity to effectively deliver the outsourced service(s). The Act requires a municipality to regulate the provision of the service and to monitor implementation. The service agreement must therefore make clear provisions that allow a municipality to effectively discharge its obligations. It should be noted that the obligations of local government to monitor apply to all forms of external service delivery, including public-private partnerships and partnerships with community based organisations.

### **b) Obligations before privatisation**

The Systems Act requires a number of things to be done before a decision to privatise services can be made and the service contract concluded. The municipality must assess whether it is viable for the service to be provided internally. Only if the benefits of external provision outweigh those of internal provision, is a decision to externalise justified. Internal service delivery means that the municipality pro-

vides the service by employing its own internal machinery and human resources. The community must be consulted in the process of externalisation, and even after the decision has been made the community should be allowed to comment on the agreement. A municipality must also inform its community, through the media, of its intention to externalise provision of a service or services. The contents of the intended externalisation agreement must also be publicised with an invitation for comments from the community. These requirements promote the values of accountability, responsiveness and openness as discussed above.

### **c) Needs of the indigent**

Privatisation should not compromise the needs of the poor. The municipality should take reasonable measures to protect the poor from exploitation. This can be done through the municipality's tariff policies and by ensuring the implementation of indigent people's policies on free basic services. Special attention should be paid to the debt collection and tariff setting mechanisms in order to avoid those mechanisms that unduly burden the poor.

#### **Hypothetical example – violation of rights**

Mr. Mokwena who is unemployed stays with six members of his family in Bambosi informal settlement in the area of Bugina municipality. Until two years ago the informal settlement did not have running water. Following the signing of an outsourcing contract piped water has been extended to the formal settlement by Water for South Africa, a private water services provider. To ensure that it recovers money for the water supplied and 'to fight the culture of not paying for services', Water for South Africa has decided to introduce pre-paid meters in the informal settlement. But this has made it hard for the unemployed, like Mr. Mokwena and his family to recharge these meters and get access to water. While the free basic water policy is being implemented in the municipality residents still need to recharge their meters with at least R 20 in order to activate the meters every month. For the last two months, Mr. Mokwena has not been able to activate his meter and has therefore not had access to the free basic water. For survival Mr, Mokwena and his family have resorted to using untreated river water, in spite of the several cholera cases in the community associated to water from the river.

As already mentioned above, private service providers are generally profit motivated, which forces them to adopt rigorous debt recovery mechanisms. These mechanisms may, however, make it hard for the poor to access the services on a sustainable basis as is seen from the example of Mr. Mokwena. The right to water as guaranteed by the Constitution has been given effect by the Water Services Act

of 1997. This Act guarantees everyone a right of access to free basic water, which has been defined by the government to mean access to at least 25 litres of water per person per day, or 6 kilolitres of water per household per month. By requiring that Mr. Mokwena and the other residents to recharge their prepaid meters by at least R 20 before accessing the free basic water, a condition not anticipated by the law is being imposed on this right. The disconnection should not result in people being denied access to basic water services for non-payment, where the person proves that he or she is unable to pay for the service. This in effect amounts to violation of the right of access to sufficient water as guaranteed by section 27(1) of the Constitution. Prepaid meters also perpetuate disconnection from the service without being given notice as required by the Water Services Act. The Water Services Act provides that procedures for the disconnection of water must provide reasonable notice and an opportunity to make representations. With prepaid meters there is no such notice and there is no opportunity to make representations as required by the law.

To ensure that residents consuming free basic water do not exceed the allocated amount of 6 kilolitres, some municipalities have introduced gadgets that restrict the amount of water dispensed to a consumer in a given period. But just as with prepaid meters, these gadgets in effect allow for disconnection from the service without being given the requisite statutory notice. Consumers who find the 6 kilolitres inadequate should be allowed to consume excess water and be billed for this amount. Where the consumer fails to pay they should be disconnected from the services in accordance with the provisions of the law which require notice. Rather than install water restrictors, consumers who are unable to pay for excess water should be considered for indigent status.

### **Section 4(3) Water Services Act**

Procedures for the limitation or disconnection 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; or
  - (iii) 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 non-payment, where that person proves, to the satisfaction of the relevant water services authority, that he or she is unable to pay for basic services.

# Chapter 4: Rights and duties of members of the community

To reinforce accountability, openness and responsiveness, the Systems Act creates corresponding rights and duties for the members of the community. Municipalities must ensure that the rights are enjoyed and duties exercised.

## Rights

Section 5(1) of the Systems Act guarantees a number of rights to members of the community.

### Systems Act, section 5(1)

- (1) Members of the local community have the right-
  - (a) through mechanisms and in accordance with processes and procedures provided for in terms of this Act or other applicable legislation to-
    - (i) contribute to the decision-making processes ... and
    - (ii) submit written or oral recommendations, representations and complaints ...  
;
  - (b) to prompt responses to their written or oral communications ... ;
  - (c) to be informed of decisions ... affecting their rights ... ;
  - (d) to regular disclosure of the state of affairs of the municipality, including its finances;
  - (e) to demand that the proceedings of the municipal council and those of its committees must be-
    - (i) open to the public, subject to section 20;
    - (ii) conducted impartially and without prejudice; and
    - (iii) untainted by personal self-interest;
  - (f) to the use and enjoyment of public facilities; and
  - (g) to have access to municipal services which the municipality provides, provided the duties set out in subsection (2) (b) are complied with.

The duties of the members of the community are outlined in section 5(2) of the Systems Act:

### **Section 5(2) Systems Act**

#### **Members of the local community have the duty:**

- (a) when exercising their rights, to observe the mechanisms, processes and procedures of the municipality;
- (b) where applicable, and subject to section 97(1)(c),\* to pay promptly service fees, surcharges on fees, rates on property and other taxes, levies and duties imposed by the municipality;
- (c) to respect the municipal rights of other members of the local community;
- (d) to allow municipal officials reasonable access to their property for the performance of municipal functions; and
- (e) to comply with by-laws of the municipality applicable to them.

\*Section 97(1)(c) requires that the municipality's debt collection policy makes provision for indigent debtors consistent with its rates and tariff policies and any national policy on indigents.

Usually, the enjoyment of rights comes with corresponding duties on the part of beneficiaries of those rights. The above section makes this point clear by emphasising that members of the community also have duties in relation to service delivery. They must pay service fees and rates promptly. This is in addition to respecting the rights of other members of the community and making it convenient for the authorities to effectively deliver the service. However, it should be noted that the municipality has a duty to establish structures that make it possible and convenient for members of the community to discharge their duties. For instance, the municipality must not only bill for the services effectively but also communicate the bills promptly.





# Chapter 5: National and provincial government: Duties toward local government

Both the national and provincial governments have duties to help municipalities protect socio-economic rights. In the Grootboom case, while the Constitutional Court held that all spheres of government bear responsibilities it emphasised that the national government bears ultimate responsibility. The national government must make available the necessary human and financial resources to realise socio-economic rights. Where special expertise is needed, national government must make sure that municipalities have access to such expertise. The provincial governments have similar obligations towards the local governments in their areas of jurisdiction. The Constitution requires both the national government and provincial governments to support and strengthen the capacity of municipalities.

## **Constitution - section 154(1)**

The national government and provincial governments, by legislation and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions.

## **Constitution - section 155(6)**

Each provincial government must ... -

- (a) provide for the monitoring and support of local government in the province; and
- (b) promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs.

The Systems Act provides that whenever either the national or provincial government delegates functions to municipalities, appropriate steps must be taken to ensure sufficient funding, or such capacity-building initiatives as may be needed, to perform the delegated task. If the delegated programme fails because of insufficient financial or human resources, then either the provincial or national government will be in breach of its constitutional duty.

## Section 10A Systems Act - Funding and capacity building

The Cabinet member, MEC or other organ of state initiating an assignment of a function or power to a municipality in terms of section 9 or 10\*, must take appropriate steps to ensure sufficient funding, and such capacity-building initiatives as may be needed, for the performance of the assigned function or power by the municipality if -

- (a) the assignment of the function or power imposes a duty on the municipality;
- (b) that duty falls outside the functional areas listed in Part B of Schedule 4 or Part B of Schedule 5 to the Constitution or is not incidental to any of those functional areas; and
- (c) the performance of that duty has financial implications for the municipality.

\*Sections 9 and 10 make detailed provision for the procedures that have to be followed before a function is assigned to a municipality. A detailed fiscal projection of the assignment has to be made and submitted to the Minister of Provincial and Local Government and to the National Treasury.

At the moment many municipalities are carrying out functions that have been delegated to them. It should be noted, however, that delegation of a function to local government does not relieve the national or local government of its duties to ensure that the function is carried out efficiently. The sphere of government making the delegation must not only provide the requisite financial and human resources but must monitor exercise of the function to ensure efficiency.



# Chapter 6: Case-studies of violation of socio-economic rights: What have the courts said?

This chapter uses examples of court cases to illustrate the nature of the obligations engendered by the socio-economic rights in the Constitution. It is clear from these cases that socio-economic rights are capable of judicial enforcement against all spheres of government as they all bear obligations to respect, protect, promote and fulfil the rights. The Constitution Court has expressly emphasised the important role of local government in the realisation of socio-economic rights because it is the sphere of government closest to the people. In fact most socio-economic rights cases arise either out of municipal service delivery or evictions carried out by, or with the assistance of, municipalities. The cases are therefore important in understanding when local government may become liable for violation of socio-economic rights.

## Case-study 1 - Right of access to adequate housing

### Government of the Republic of South Africa v Grootboom (2000)

This case arose from an eviction carried out by Oostenberg municipality of over 900 occupants who were in illegal occupation of land earmarked for low cost housing. With no place to go to, they occupied a sports field and lived in appalling conditions with no water and sanitation facilities. They approached the High Court and later the Constitutional Court to enforce, amongst others, their right of access to adequate housing. The Constitutional Court held that a reasonable housing programme must take care of the needs of those in desperate need and failure to do so would render the programme unreasonable. The Court found the national housing programme to be unreasonable on this ground. Though the Cape Metropolitan Housing programme was found to have an element that responded to the needs of those in desperate need, it had not been implemented. The Court emphasised that a reasonable programme must not only be reasonable in conception, but in implementation as well.

Though the Court said that all spheres of government had to assume specific responsibilities in implementing the housing programme, it emphasised the importance of local government. This is because local government is the sphere of government closest to the people. The Court also emphasised that housing entails more than bricks and mortar. It includes services such as water and sanitation. However, this means that a municipality still has an indirect duty to facilitate the enjoyment of the right to housing. When municipalities have assumed responsibility for implementation of programmes, like Cape Town had done, they are under a duty to implement those programmes reasonably.

This is an example of a case where the activities of the municipality have the potential of violating respect for the right to housing. This may happen when the municipality carries out an eviction without providing alternative accommodation. The case also highlights the nature of the positive steps that have to be undertaken by government to fulfil not only the right of access to housing but also other socio-economic rights.

## **Case-study 2 - Right of access to sufficient water**

### **Bon Vista Mansions v South Metropolitan Local Council (2002)**

In the Bon Vista case, the municipal council had discontinued the supply of water to a block of flats occupied by the applicants on the ground of non-payment. The applicants contended that the discontinuation was unlawful because it violated their right of access to sufficient water as guaranteed by the Constitution and the Water Services Act. They sought an order from the High Court compelling the council to restore the water supply.

The Court read the right of access to sufficient water in section 27(2) together with the duty to fulfil the right as imposed by section 7 of the Constitution and concluded that the applicants had a right of access to sufficient water. The Court held that the municipality had disconnected the water without giving sufficient notice. Also, the disconnection resulted in the applicants being denied access to basic water supply as guaranteed by the Water Services Act. The Court stressed that notices of disconnection should clearly state that the consumer has a right to bring his or her inability to pay for a service to the attention of the municipality. This would allow indigent people to be considered for indigent policies in order to guarantee such people a service. In this case, other than the standard written notice, no such right was spelt out. On that basis, the municipality was ruled to have acted unlawfully and ordered to restore water to the applicants' residences.

The Court found that the municipality had violated its constitutional obligations to respect the right of access to sufficient water. The applicants had been enjoying access to water until the municipality unjustifiably interfered with this enjoyment.

## **Case-study 3 - Right of access to land and right of access to adequate housing**

### **President of RSA & another v. Modderklip Boerdery (2005)**

This case highlights the obligations of government in instances where the rights of individual property holders and the group's right of access to housing have to be balanced. The government is not only obliged to protect private property rights but is supposed to do it in a manner that respects socio-economic rights. An eviction from private property cannot take place without provision of alternative accommodation. Yet

a private property owner should not suffer the burden of providing adequate housing since this is a burden imposed not on individuals but on government.

This case arose from an illegal occupation by over 40 000 people of privately owned land situated in Ekurhuleni metropolitan municipality. Modderklip Boerdery, the land owner, had obtained an eviction order which could only be executed with the help of the municipality and police. The sheriff had declined to execute the order unless Modderklip deposited R 1.9 million, the cost of the process. Modderklip could not afford this amount of money. Relying on the right to property, Modderklip brought legal action to compel the government to execute the order.

The Constitutional Court held that Modderklip was entitled to the protection of its right to property by the state. But most important, the Court held that the state could not pass over its burden of providing housing for the illegal occupiers to Modderklip. While compelling the state to evict the occupants, the Court stated that the occupants could not be evicted without alternative land being found for them by the state. The Court emphasised that the duty to provide housing was constitutionally imposed on the state and not on private entities. As a remedial measure for Modderklip, the court recommended that the state pays compensation to Modderklip for the use and continued use of the land by the illegal occupiers.

Both Modderklip and the occupants of the land emerged victorious; the latter could not be evicted without alternative accommodation, while the former would claim damages from the state. The state is in the process of complying with this order and alternative accommodation is being arranged for the occupants.

## Conclusion

Since local government is the sphere of government closest to the people, municipalities are the key to successful service delivery. Municipalities are bound by the obligations in the Constitution to respect, protect, promote and fulfil the different socio-economic rights. The nature of the state's obligations includes taking reasonable legislative and other measures within the available resources to achieve progressive realisation of the socio-economic rights. A well-coordinated programme is required, which must clearly stipulate the respective duties of each sphere of government.

The Systems Act outlines the specific duties of municipalities and also confers a number of rights on communities in relation to service delivery. Municipalities must prioritise access to basic services in all their policies, and do so in a manner consistent with the constitutional principle of openness, accountability and responsiveness. Where basic services have been privatised, municipalities must ensure that access to these services is not compromised. The outsourcing process must be transparent and allow for wide public participation, especially from affected communities. Consumers must also be protected from profit-motivated practices of private service providers, which may include debt-recovery mechanisms that oppress the poor.

While the obligations to respect, protect and promote directly bind all spheres of government, including local government, the obligation to fulfil can be either direct or indirect, depending on the nature of a specific socio-economic right and the manner in which it relates with local government competences. Where there is a direct relationship, the municipality's obligation to realise the right will be direct. The clearest example of a direct obligation is access to sufficient water. This is because it falls squarely within the competence of providing water and sanitation services listed in Schedule 4B. Housing is different; it is a concurrent function of national and provincial governments. However, enjoyment of this right must be supported by provision of services such as water, electricity, sanitation, and refuse collection. These are services that local government has an obligation to provide in order to influence the right to housing.

Municipalities must respect the rights of their communities to access public services and must ensure that these services are accessed in a transparent and non-discriminatory manner. The needs of those in desperate need must not be sacrificed in programmes that are aimed at medium and long term benefits. It has, however, been demonstrated in this guide that municipalities are not alone in discharging these functions. The Constitution compels both the provincial and national governments to support the municipalities in their endeavours to deliver the services. These spheres of government must ensure that municipalities have access to the requisite financial and human resources. The different levels of government must also coordinate their

activities in accordance with the spirit of cooperative government as enshrined in the Constitution. This not only avoids unnecessary duplication but also ensures efficient service delivery.

This guide has demonstrated that while the members of the community have rights to access services, they also have duties on their part. They must pay the service fees and rates, and must respect the rights of other members of the community. It is, however, incumbent on the municipalities to put in place proper structures and processes that make it possible for members of the community to discharge these duties. For instance, there should be effective and prompt billing in addition to clear and convenient complaint-making procedures.

# ANNEXURE

## Checklist for what constitutes a reasonable programme

### 1. Allocation of responsibilities

- Does the programme identify, in clear terms, the sphere of government responsible for the identified responsibilities?
- Does the programme identify, at a specific level of government, the department or officials responsible for the tasks specified by the programme?
- If programme is to be executed by different levels of government, does it put in place a clear system of coordination and make provision for a coherent execution of the tasks assigned?

### 2. Identification and consideration of needs

- Does the programme clearly identify short, medium and long term needs with a clear stipulation of how each is to be realised?
- Does the programme pay attention to long and medium terms needs without sacrificing the short-term needs?
- Does the programme recognise the needs of the most vulnerable and make clear provision for attending to them?

### 3. Allocation of resources

- Does the programme make adequate provision for financial resources necessary for the realisation of its objectives?
- Does the programme make adequate provision for the human resources necessary for realisation of its objectives?
- Does the programme identify and make provision for other resources, other than financial and human, needed for the realisation of its objectives? Other resources could include, for instance, information and technology.
- If the programme assigns tasks to different persons or levels of government, does it distribute its resources in a manner commensurate with the magnitude of the tasks assigned?

### 4. Flexibility

- Is the programme flexible enough to respond to unforeseen circumstances?
- In other words, does the programme make provision for adjustments should the need to do so arise?



## **5. Implementation**

- Are there clear guidelines for the implementation of the programme?
- If the programme has already been adopted, is it being implemented reasonably?
- Have the necessary budgetary and other resource requirements been allocated?
- At the implementation level it should be asked whether the programme is on time, and if not on time, have all the obstacles causing delay been identified and attended to? It should also be asked whether adjustments have been made to the programme to accommodate the delays and avoid any further delays.

## **6. Publication**

- Has the programme been publicised adequately, not only after adoption but before adoption with an invitation for public comment?
- Have reasonable steps been undertaken to bring the programme to the attention of all the potential beneficiaries?
- Has the programme been brought to the attention of all the duty-bearers not involved in its adoption, with clear indication of the nature their tasks?

