



T: 051 401 9111 info@ufs.ac.za www.ufs.ac.za

© Copyright reserved
Kopiereg voorbehou

UNIVERSITY OF THE
FREE STATE
UNIVERSITEIT VAN DIE
VRYSTAAT
YUNIVESITHI YA
FREISTATA



UFS·UV
LAW
REGSGELEERDHEID



Title: Bridging the Public–Private Regulatory Divide: Non–state Actor Involvement in Providing Access to Water in South Africa



Professor Louis J. Kotzé, NWU(Potchefstroom Campus)
and

Dr. Oliver Fuo, (Recently Appointed) Senior Lecturer, University of the
Free State

T: 051 401 9111 info@ufs.ac.za www.ufs.ac.za



Background



- ❑ The transformative agenda of the Constitution of the Republic of South Africa, 1996
- ❑ Transformation as a joint project – concerted action
- ❑ Human rights as a vehicle for social transformation
- ❑ The place and importance of the right of access to *sufficient* water
- ❑ Obligations imposed by s 27(2) of the Constitution
- ❑ Obligations imposed by s 7(2) of the Constitution
- ❑ Government's effort in past 20yrs
 - From less than 60% to approximately 14% (7.2 million) without access to prescribed standards of water supply

T: 051 401 9111 info@ufs.ac.za www.ufs.ac.za



Background cont.



□ Difficulties highlighted by cc in *Mazibuko* case:

Although rain falls everywhere, access to water has long been grossly unequal. This inequality is evident in South Africa. *While piped water is plentifully available to mines, industries, some large farms and wealthy families, millions of people, especially women, spend hours laboriously collecting their daily supply of water from streams, pools and distant taps.* In 1994, it was estimated that 12 million people ... did not have adequate access to water ... *Yet, despite the significant improvement in the first fifteen years of democratic government, deep inequality remains and for many the task of obtaining sufficient water for their families remains a tiring daily burden. The achievement of equality, one of the founding values of our Constitution, will not be accomplished while water is abundantly available to the wealthy, but not to the poor* (Mazibuko, par 2)

T: 051 401 9111 info@ufs.ac.za www.ufs.ac.za



Background cont.



- ❑ **Challenges attributed to:**
 - ▶ Lack of sufficient financial and human resources
 - ▶ High levels of corruption
 - ▶ Limited institutional capacity in some municipalities that act as water services providers;
 - ▶ Growing industrial and domestic demand;
 - ▶ Insufficient water infrastructure;
 - ▶ Increasing water scarcity as a result of climate change and
 - ▶ rampant water pollution by acid-mine drainage (AMD)

- ❑ **Failures in water provision can be attributed to the actions of both government and the private sector**

T: 051 401 9111 info@ufs.ac.za www.ufs.ac.za





Purpose of our paper

- considering their impact on South Africa's water resources and the benefit that they gain from these resources, could corporate actors in especially the extractive industry sector be obliged to contribute to realising the right of access to water, and if so, how should this be facilitated in the country's constitutional democratic order?
- **Central argument:** Yes they are obliged. Can do so through PPP and not Privatisation

T: 051 401 9111 info@ufs.ac.za www.ufs.ac.za



Structure of paper



- ❑ Part 1: highlights the rise of non-state actors as governors alongside the state and the notion of corporate social responsibility (CSR) which imposes a moral duty of industrial corporations
- ❑ Part 2: International human rights law obligation on business entities re access to sufficient water?
- ❑ Part 3: SA Legal and Policy Framework
- ❑ Part 4: Public-Private Partnerships (PPPs) as a potential mechanism

T: 051 401 9111 info@ufs.ac.za www.ufs.ac.za



2: From "government" to "governance": Emergence of non-state actors and the notion of CSR



- ❑ The traditional role of the state in the regulation of collective goals is being continuously altered by the emergence of non-centred government forms of *governance*
- ❑ Diminishing role of the government is attributed to *inter alia*:
 - ▶ forces of globalisation;
 - ▶ significant advances in communication technology and social media that are connecting the world;
 - ▶ systems of free trade;
 - ▶ the creation of regional and international superstructures of governance such as the European Union;

T: 051 401 9111 info@ufs.ac.za www.ufs.ac.za





From "government" to "governance" cont.

- ▶ the emergence of treaty regimes and international norm producing functional organisations such as the World Bank;
 - ▶ the steady growth of multinational corporations that function in an transnational settings; and
 - ▶ the emergence of global regulatory problems such as climate change that affects everyone with little regard to physical borders
- ❑ Changes in the traditional role of the state and lack of a clear distinction between public and private governance – **overlap between public and private governance**

T: 051 401 9111 info@ufs.ac.za www.ufs.ac.za



From "government" to "governance" cont.



□ Ladeur Karl-Heinz:

The past twenty years have witnessed important changes in the ways in which government is exercised ... To capture these processes [of change], the term “governance” was coined ... [It] points to a turn from a normative substantive conception of government exclusively tied to the national state based on constitutional and international law towards a functional characterization of governing activities. It embraces the possibility of a multiplicity of governance agents, who engage in new modes of exercising power (2004) 17

- A contemporary understanding of governance encapsulates, *inter alia*, the collective solving of social problems by a variety of state and non-state actors

T: 051 401 9111 info@ufs.ac.za www.ufs.ac.za



From "government" to "governance" cont.



- ▶ There is a steady realization by non-state governance actors, such as corporations, that they have a crucial altruistic contribution to make to the hitherto state-dominated governance agenda
- ▶ In the water context, a recent statement by business leaders proclaims that:

As leaders of business organisations, we recognise that the private sector has an important stake in helping to address the water challenge faced by the world today. It is increasingly clear that lack of access to clean water and sanitation in many parts of the world causes great suffering in humanitarian, social, environmental and economic terms, and seriously undermines development goals...In order to operate in a sustainable manner, and contribute to the...realisation of the Millennium Development Goals, companies have a responsibility to make water-resources management a **priority** (See The CEO Water Mandate (2011) 3)

T: 051 401 9111 info@ufs.ac.za www.ufs.ac.za



From "government" to "governance" cont.



- ❑ UN Global Compact (26 July 2000) – launched by Kofi Annan
 - ▶ Aim: enable business corporations contribute towards addressing global challenges, e.g. support governments achieve the MDGs
 - ▶ 3000 companies pledged commitment to implement 10 guiding principles in the areas of human rights, environment etc
- ❑ The idea of CSR is not new in SA – Boddenberg and Aletter: the Constitution is a tool that promotes CSR in SA

T: 051 401 9111 info@ufs.ac.za www.ufs.ac.za



3. International law obligation?



- ❑ No legally binding human rights instrument
- ❑ **UN Agenda 21 of 1992**
 - Ch 3 urges gov'ts to work in partnership with international and national actors to establish and implement measures that will directly or indirectly provide people living in poverty with access to water and sanitation
- ❑ UN ***Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*** (2003 – Approved by UN Sub-Commission on the Promotion and Protection of Human Rights on 13 August 2003)
 - Aim: create binding human rights obligations on business
 - Lack of universal support

T: 051 401 9111 info@ufs.ac.za www.ufs.ac.za



International law cont.



❑ *UN Protect, Respect and Remedy Framework (2008)*

- ▶ Report developed by Professor John Ruggie, Special Representative of the UN Secretary General (SRSG) on the issue of human rights and business corporations
- ▶ Approved unanimously by UN Human Rights Council in June 2008
- ▶ Approved Framework further developed by Professor Ruggie into the UN *Guiding Principles on Business and Human Rights* (2011)
- ▶ *Guiding Principles* – considered the most authoritative statement adopted by the UN on the human rights responsibilities of business
- ▶ *Guiding Principles* is grounded on three pillars:
 - ✓ states have an existing obligation to respect, protect and fulfil human rights

T: 051 401 9111 info@ufs.ac.za www.ufs.ac.za



International law cont.



- ✓ as specialised organs of society performing specialised functions, the role of business enterprises requires that they should conform to all applicable laws and respect human rights; and
- ✓ rights and obligations should go hand-in-hand with appropriate and effective remedies when they are breached
- Responsibility of business under *Guiding Principles* is to **respect** all human rights where they operate
- *Respecting* the right of access to water may require that corporations take positive action e.g.:
- ✓ business enterprises are required to take adequate measures to prevent, mitigate, and where necessary, remediate adverse human rights impacts
- **Criticism**

T: 051 401 9111 info@ufs.ac.za www.ufs.ac.za





4: SA Law and Policy

□ The Constitution

- ▶ Consensus on the horizontal application of the Bill of Rights – *Yacoob J in Grootboom* paras 34–35
- ▶ S 8(2) of the Constitution provides that: “A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right”
- ▶ **Dominant view:** the right of access to sufficient water should not impose positive burdens on private agencies: CC in *Governing Body of the Juma Musjid Primary School and Others v Essay No and Others* 2011 BCLR 761 (CC)

T: 051 401 9111 info@ufs.ac.za www.ufs.ac.za



SA Law and Policy cont.



- ▶ Main purpose of s 8(2) is to require private parties not to interfere with or diminish the enjoyment of a right . It does not seek to obstruct private autonomy or impose state duties on a private party
- ▶ Application of s 8(2) also depends on the *"intensity of the constitutional right in question, coupled with the potential invasion of that right which could be occasioned"* by private parties
- ▶ Jurisprudence of CC confirmed by lower courts –see *City of Cape Town v Khaya Projects*
- ▶ *Where a contract between an organ of state and a private company expressly state that the latter undertakes to discharge constitutional obligations, the latter is expected to execute positive constitutional duties*

T: 051 401 9111 info@ufs.ac.za www.ufs.ac.za





- ❑ ***Water Services Act No 108 of 1997***
 - Gives effect to the right of access to sufficient water
 - Does not impose duties on private parties
 - Water services intermediaries or private companies can be used to discharge some aspects of government's water obligations
- ❑ ***Local Government: Municipal Systems Act 32 of 2000***
 - municipalities may engage external mechanisms for the provision of water services through service delivery agreements
 - Act specifies conditions which must be met when private companies are used to provide water services
- ❑ ***National Water Act 36 of 1998***
 - Comply with obligations attached to water-use licenses

T: 051 401 9111 info@ufs.ac.za www.ufs.ac.za



5: Toward PPP in realising the right of access to water



- ❑ SA law and policy promotes the use of PPP as a tool for addressing infrastructure needs and delivering social services to communities
- ❑ **The White Paper on Municipal Service Partnerships (2014) – *without private resources, many communities will only get adequate services (including adequate water supply) by 2065***
- ❑ Advantages of PPP??? – infrastructural development
- ❑ **What is PPP in SA???**

SA government officially defines PPP as:

- ▶ a contract between a public sector institution/municipality and a private party, in which
- ▶ the private party assumes substantial financial, technical and operational risk in the design, financing, building and operation of a project (See:

<http://www.ppp.gov.za/Pages/whatisppp.aspx> [date of use 24 February

2015])

T: 051 401 9111 info@ufs.ac.za www.ufs.ac.za



5: Toward PPP



- ❑ Government recognises **two forms of PPP**:
 - ▶ Where the private party performs an institutional/municipal function; and
 - ▶ where the private party acquires the use of state/municipal property for its own commercial purposes
 - ▶ However, a PPP may also be a hybrid of both types
- ❑ **What is not a PPP??? – National treasury:**
 - ▶ a simple outsourcing of functions where substantial financial, technical and operational risk is retained by the institution;
 - ▶ a donation by a private party for a public good;
 - ▶ the 'commercialisation' of a public function by the creation of a state-owned enterprise

T: 051 401 9111 info@ufs.ac.za www.ufs.ac.za



5: Toward PPP



- ❑ **Mechanism for paying services rendered through PPP**
 - ▶ Institution/municipality pays private party for the delivery of the service; or
 - ▶ the private party collects fees or charges from users of the service; and or
 - ▶ a combination of the above
- ❑ **Conditions for successful PPP – White Paper on Municipal Service Partnerships (2014)**
 - PPP must not compromise access of impoverished people to the basic level of social services

T: 051 401 9111 info@ufs.ac.za www.ufs.ac.za



Concluding remarks:



“Stakeholder management and partnerships with all stakeholders within the water value chain is imperative. Neither government nor businesses alone can solve water issues such as climate change and water scarcity. As a result, government and companies increasingly have to forge new types of partnerships and rethink relationships with stakeholders. Sectors must become strategic partners, commit themselves to effective water resource planning, management and use, and accept accountability for water resource protection and associated actions” (DWAF *National Water Resource Strategy* (2013) 15).

T: 051 401 9111 info@ufs.ac.za www.ufs.ac.za





Thank You Dankie

T: 051 401 9111 info@ufs.ac.za www.ufs.ac.za

© Copyright reserved
Kopiereg voorbehou

UNIVERSITY OF THE
FREE STATE
UNIVERSITEIT VAN DIE
VRYSTAAT
YUNIVESITHI YA
FREISTATA



UFS·UV
LAW
REGSGELEERDHEID