

Mandate of the Special Rapporteur on the human rights to safe drinking water and sanitation

Ref.: OL ZAF 1/2022

(Please use this reference in your reply)

13 January 2022

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the human rights to safe drinking water and sanitation, pursuant to Human Rights Council resolution 42/5.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received in relation to the **legislative and policy framework on the prohibition of water disconnections for those who are incapable of paying, in particular, in the context of COVID-19**.

Legal framework

Disconnection of water services because of failure to pay due to lack of means constitutes a violation of the human rights to safe drinking water and sanitation and in order to prohibit such disconnections, it is imperative that the human rights to safe drinking water and sanitation are explicitly recognized in the legal framework. In relation to the legal framework, I note the following information:

- The Constitution of the Republic of South Africa 1996 recognizes that "everyone has the right to have access to sufficient food and water" (section 27.1(b)) and requires the state to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of [the right to have access to sufficient food and water]" (section 27.2). However, the Constitution does not explicitly recognize the right to sanitation.
- In order to give effect to the right to access to water stipulated in section 27.1 of the Constitution, the Water Services Act 1997 (Act No.108 of 1997) was enacted on 19 December 1997 and in its Section 3 of Chapter 1, the right of access to basic water supply and to basic sanitation services is recognized:

"Everyone has a right of access to basic water supply and sanitation services";

"Every water services institution must take reasonable measures to realise these rights"; and

"Every water services authority must, in its water services development plan provide for measures to realise these rights".
- In addition, the Water Services Act 1997 stipulates procedures for the limitation or disconnection of water services. Water services providers must provide for reasonable notice of intention to limit or discontinue water services and for an opportunity to make representations, unless

there are three situations which constitute (i) other consumers would be prejudiced; (ii) there is an emergency situation; or (iii) the consumer has interfered with a limited or discontinued service. The second situation, referring to an "emergency situation" is defined as any situation declared as such in terms of a law and which is likely to cause injury or loss of life. In addition, the procedures for the disconnection of water services must 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 (Section 4 of Chapter 1).

- To implement the Water Services Act 1997, the "Regulations relating to compulsory national standards and measures to conserve water" was published on 8 June 2001 (Regulation Gazette Vol. 432 No. 22355). The Regulations quantifies the minimum standard for basic water supply as a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month 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 (Section 3 of Chapter 1). Furthermore, the Regulations requires that in the event water services are interrupted for a period of more than 24 hours, the water services institution should take steps to ensure that consumers have access to alternative water services comprising at least 10 litres of potable water per person per day and sanitation services, sufficient to protect health (Section 4).

I would like to congratulate the State of South Africa for explicitly recognizing the human right to water in the Constitution and recognizing both the human rights to water and sanitation in the Water Service Act. I wish to reiterate that the human right to water and the human right to sanitation are closely interlinked but they are two distinct rights. The human rights to safe drinking water and sanitation - both the human right to water and the human right to sanitation - as components of the right to an adequate standard of living are essential for the full enjoyment of the right to life and all human rights as stipulated in article 11 of the International Covenant on Economic, Social and Cultural Rights which was ratified by your Excellency's Government in 2015.

In addition, as your Excellency will note, in 2010 the human right to water and sanitation was explicitly recognized by the General Assembly in its resolution 70/169, which "[recognized] that the human right to safe drinking water entitles everyone, without discrimination, to have access to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use, and that the human right to sanitation entitles everyone, without discrimination, to have physical and affordable access to sanitation, in all spheres of life, that is safe, hygienic, secure, socially and culturally acceptable and that provides privacy and ensures dignity, while reaffirming that both rights are components of the right to an adequate standard of living".

Furthermore, I wish to reiterate that disconnection of water and sanitation services due to an inability to pay for the service is a retrogressive measure and constitutes a violation of the human rights to water and sanitation (Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002)

(E/C.12/2002/11), para. 44a). Such retrogressive measures are not only incompatible with the international human rights obligations pertaining to the human rights to water and sanitation but also is incompatible with South Africa's Constitution which explicitly stipulates the progressive realisation of human rights (section 27.2). Also, the African Commission on Human and Peoples' Rights (the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, para. 92.k) recommends that States ensure that procedures take into account the individual's ability to pay and therefore disconnections for non-payment should not result in a person being denied access to a minimum amount of safe drinking water where that person proves that he or she is unable to pay for these basic services.

Policy implemented during the pandemic

The affordability of water and sanitation services and disconnections are inextricably linked, as in many instances the failure to pay for services leads to disconnections, which has come to the fore particularly during times of COVID-19. In this regard, I note the following information relating to the policy implemented during COVID-19:

- On 15 March 2020, the Head of the National Disaster Management Centre declared a national state of disaster by classifying the COVID-19 pandemic as a national disaster in accordance with section 23(1)(b) of the Disaster Management Act, 2002. In response, the Minister of Human Settlements, Water and Sanitation directed the Department of Human Settlements and the Department of Water and Sanitation to ensure that rural areas and informal settlements are provided with water tanks and standpipes, to increase access to water for residents.
- In addition, on 15 April 2020, the Minister of Human Settlements, Water and Sanitation issued "Water and Sanitation Emergency Procurement COVID-19 Disaster Response Directions in accordance with regulation 10(8) of the Regulations issued the Section 27(2) of Disaster Management Act 2002 (Act No 57 of 2002)" (hereinafter referred to as "Directions"). The main purpose of the Directions is to give command control to the National Disaster Water Command Centre to take appropriate measures to prevent the spread of COVID-19 (Section 4(a)), and to provide for the emergency procurement of goods and services required for the provision of water services through the manufacture, supply, delivery and procurement of water tanks, and related goods and services as a response to the coronavirus pandemic (Section 4(c)). The Directions also regulate the administration of the Disaster Water Command Centre to centralise the system for conducting effective, accountable, efficient, and transparent emergency procurement and provision of water and sanitation equipment (Section 4(d) and 4(e)).
- In fulfilling its constitutional obligations of providing access to basic water supply and to basic sanitation, specifically to mitigate the impact of COVID-19 epidemic, the Directions specify the emergency procurement of goods and services such as water, water tanks, water

tankers, installation of water tanks and stands, taps and communal standpipes, sanitation packs, ablution blocks and toilets (Section 7).

- In terms of emergency procurement (Section 8), the Department of Water and Sanitation will first and foremost utilise its own resources and assets for water distribution, and water and sanitation equipment (defined in Section 7) are authorised to provide communities without adequate access to water and sanitation.
- The monitoring system is required for the urgent procurement decisions and efficient distribution of water and sanitation resources (Section 10). The National Disaster Water Command Centre must set up a monitoring system in order to track the emergency water and sanitation procurement and distribution. This helps to indicate where the water and sanitation equipment or tanks must be delivered and provide the precise location for identifying exact delivery points.
- On 29 April 2020, the Minister of Human Settlements, Water and Sanitation announced that a total 17,000 water storage tanks and over 1,200 water tankers were delivered across the country. Specifically, the following areas have benefited:
 - In Eastern Cape, a total of 4,775 water tanks have been delivered to various communities and 3,074 of those have been installed.
 - In Northern Cape, the Department of Water and Sanitation in the Northern Cape has distributed 884 water tanks for water supply to communities in vulnerable situations during COVID-19 lockdown. Of the 884 tanks delivered, 585 are permanently installed, 778 are in use and 193 are temporarily installed in Northern Cape.
 - In KwaZulu-Natal, a total of 4,200 water tanks have been delivered and installed to various parts of the province by the Department of Water and Sanitation. To supplement these, 532 water tankers (trucks) have also been allocated to refill the tanks regularly to ensure reliable water supply.
 - In Free State, 185 water stands and 178 water tanks have been constructed by Bloem Water, a water utility company in South Africa.
- The status of national disaster under COVID-19 has been extended several times. Most recently, on 10 December 2021, the national state of disaster under COVID-19 was extended to 15 January 2022, taking into account the need to continue augmenting the existing legislation and contingency arrangements undertaken by organs of state to address the impact of the disaster (Government Notice R.1598).

I welcome the above-mentioned initiative by the Minister of Human Settlements, Water and Sanitation to provide water tanks and standpipes for people

living in rural and informal areas. Having adequate access to water and sanitation is more challenging for the population who live in rural areas as the settlement locations are remote and it is equally challenging for those living in informal areas as informal settlements often do not have in place proper water and sanitation infrastructures. Further, COVID-19 adds another layer of challenge for those populations to access water and sanitation, which is essential to ensure sanitary recommendations to prevent contamination from COVID-19. While the measure taken to provide water tanks and standpipes to rural and informal areas is recognized, I am concerned that a one-time exercise of delivering water to those areas does not provide a sustainable measure for the population to have access to water and sanitation in the long-term, in particular, with the prolonged COVID-19 situation. In this regard, I would like to emphasise that the human rights to water and sanitation require States to provide drinking water that is continuously available.

I also wish to note the concrete guidelines that Excellency's Government has put in place related to emergency procurement of water and sanitation services in the context of COVID-19. The "Water and Sanitation Emergency Procurement COVID-19 Disaster Response Directions" stipulates several aspects of procurement of water and sanitation services in COVID-19 context, which indeed facilitates the water and sanitation providers to procure relevant goods and services in order for those providers to be able to provide access to water and sanitation. I believe that these guidelines, being essential in a pandemic, should be projected beyond the pandemic as a policy measure that puts people at the center from a human rights-based approach to "Build Back Better".

Finally, I would like to stress that the above-mentioned concerns are heightened by the ongoing COVID-19 pandemic and the need for people, particularly those in vulnerable situations, to have access to water and sanitation in order to comply with the recommendation to wash their hands as a preventive measure against COVID-19. Further, it should be noted that notwithstanding the persistence of COVID-19 pandemic, disconnection of water services due to incapacity to pay constitute human rights violations that all States must avoid at all costs in accordance with their international human rights obligations.

As it is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention, I would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the matters mentioned above.
2. In reference to the "Water and Sanitation Emergency Procurement COVID-19 Disaster Response Directions" published on 15 April 2020, please provide more detailed and up to date information on the quantity of water tanks and water tankers delivered to the public and in which areas; also kindly provide the following:
 - a. The criteria and/or definition on how the Government identified communities in vulnerable situations when implementing the Directions.

- b. Information relating to the communities in vulnerable situations that have been benefited from the water services and sanitation equipment.
 - c. Information on how the monitoring system by the National Disaster Water Command Centre is used to identify the distribution priority of water services.
 - d. Information on whether the quantity of basic standard water supply under Water Services Regulation 2001 is guaranteed to the public since the declaration of the national disaster with COVID-19 on 15 March 2020.
3. Please provide information on legal remedies available to people whose water supply is cut off due to their inability to pay.
 4. Please provide information on legal and policy measures taken to ensure the affordability of water services for those who are unable to pay their bills for reasons beyond their control, including unemployment and poverty, during and after the COVID-19.
 5. Please provide information on how the right of access to basic water supply and sanitation services, stipulated in the Water Services Act are implemented in practice and what measures exist to guarantee the enjoyment of the right in particular for marginalised groups and those in most vulnerable situations.
 6. Please provide information on the situation of communities without adequate access to water and sanitation when the provision of water by means of water tankers are suspended.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting [website](#) after 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of my highest consideration.

Pedro Arrojo Agudo
Special Rapporteur on the human rights to safe drinking water and sanitation