THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 489/08

THE CITY OF JOHANNESBURG	**First Appellant**
JOHANNESBURG WATER (PTY) LTD	**Second Appellant**
THE MINISTER OF WATER AFFAIRS & FORESTRY	**Third Appellant**

and

LINDIWE MAZIBUKO	**First Respondent**
GRACE MUNYAI	**Second Respondent**
JENNIFER MAKOATSANE	**Third Respondent**
SOPHIA MALEKUTU	**Fourth Respondent**
VUSIMUZI PAKI	**Fifth Respondent**
THE CENTRE ON HOUSING RIGHTS AND EVICTIONS	**Amicus Curiae**

Neutral citation: *City of Johannesburg v L Mazibuko* (489/08) [2009] ZASCA 20 (25 March 2009)

Coram: STREICHER, MTHIYANE, JAFTA, MAYA JJA & HURT AJA

Heard: 23, 24 & 25 FEBRUARY 2009

Delivered: 25 MARCH 2009

Summary: Section 27 of Constitution – sufficient water is the quantity of water required for dignified human existence – the Water Services Act 108 of 1997 does not deprive anyone of the right of access to sufficient water in terms of s 27(1) – a person who cannot afford to pay for water has no access to water being charged for – local authority obliged to supply free water to residents who cannot afford to pay for the water if reasonable to expect it to do so – prepayment water meters used by appellants not authorised by bylaws and unlawful.

ORDER

On appeal from: Johannesburg High Court (Tsoka J sitting as court of first instance)

The appeal is upheld and the order by the court below is replaced with the following order:

‘1 The decision of the first respondent and/or the second respondent to limit the free basic water supply to the residents of Phiri to 25 litres per person per day or 6 kl per household per month is reviewed and set aside.

2 It is declared:

(a) That 42 litres water per Phiri resident per day would constitute sufficient water in terms of s 27(1) of the Constitution.

(b) That the first respondent is, to the extent that it is in terms of s 27(1) of the Constitution reasonable to do so, having regard to its available resources and other relevant considerations, obliged to provide 42 litres free water to each Phiri resident who cannot afford to pay for such water.

3 The first and second respondents are ordered to reconsider and reformulate their free water policy in the light of the preceding paragraphs of this order.

4 Pending the reformulation of their free water policy the first and second respondents are ordered to provide each account holder in Phiri who is registered with the first respondent as an indigent with 42 litres of free water per day per member of his or her household.

5 It is declared that the prepayment water meters used in Phiri Township in respect of water service level 3 consumers are unlawful.

6 The order in paragraph 5 is suspended for a period of two years in order to enable the first respondent to legalise the use of prepayment meters in so far as it may be possible to do so.'

JUDGMENT

STREICHER JA (MTHIYANE, JAFTA, MAYA JJA and HURT AJA concurring)

[1] Do the City of Johannesburg ('the City'), the first appellant, and Johannesburg Water (Pty) Limited ('Johannesburg Water'), the second appellant, a company in which the City is the sole shareholder, have a constitutional duty to provide free water to the residents of Phiri (a township in Soweto, Johannesburg), who cannot afford to pay for such water? This question is one of two main issues to be decided in this case. The other one is whether the City and Johannesburg Water (unless the context indicates otherwise, henceforth jointly referred to as the City) could restrict access to water by the Phiri residents by way of prepayment water meters.

[2] Upon application by the five respondents, all of whom are resident in Phiri, the Johannesburg High Court (per Tsoka J) made an order in terms of which it:

(a) Reviewed and set aside the decision of the City alternatively Johannesburg Water to limit free basic water supply to 25 litres per person per day or 6 kilolitres per household per month.

(b) Declared the prepayment water system used in Phiri Township, the 'forced installation' of the system and the choice given by the City alternatively Johannesburg Water to the respondents and other residents of Phiri of either a prepayment water supply or a water supply through standpipes, unconstitutional and unlawful.

(c) Ordered the City alternatively Johannesburg Water to provide each applicant 'and other similarly placed residents of Phiri Township' with a free basic water supply of 50 liters per person per day and the option of a metered supply installed at the cost of the City.

With the leave of the court a quo the City and Johannesburg Water together with the third appellant, the Minister of Water Affairs and Forestry, now appeal to this court.

[3] The City is a municipality in the Province of Gauteng. In terms of the Constitution one of the objects of local government is to ensure the provision of services to communities in a sustainable manner (s 152(1)(b)). Like the other objects of local government a municipality must strive, within its financial and administrative capacity, to achieve that object (s 152(2)). It has executive authority in respect of, and has the right to administer, among others, water and sanitation services (s 156(1)) and may make bylaws for the effective administration of these services (s 156(2)).

[4] The residents of Phiri are very poor, but, for years, until 2004, they, like residents in the rest of Soweto, Alexandra and other townships within the area of jurisdiction of the City, had access to an unlimited supply of water which was not metered and for which they were charged on the basis of a deemed consumption of 20kl per month. In 2004 the deemed

consumption was discontinued by the City and prepayment meters were installed dispensing 6kl water per stand per month free. Additional water had to be pre-paid for. The respondents contended that 6kl water per stand per month was insufficient water for the residents of Phiri and that in terms of s 27 of the Constitution, they had a right of access to sufficient water, which they contended would be 50 litres water per person per day. That quantity of water, so they contended, had to be provided free to each resident in Phiri who could not afford to pay for such water.

[5] Section 27 of the Constitution provides that everyone has the right to have access to sufficient water. The section reads as follows:

'(1) Everyone has the right to have access to –

(a) health care services, including reproductive health care;

(b) sufficient food and water; and

(c) social security, including, if they are unable to support themselves and their dependents, 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.'

[6] Giving effect to its obligation in terms of s 27(2) the state enacted the Water Services Act 108 of 1997. Section 4 of the Act provides that water services must be provided in terms of conditions set by the water services provider which must accord with conditions for the provision of water services contained in bylaws made by the water services authority having jurisdiction in the area in question. The City is a water services authority and Johannesburg Water is a water services provider as defined in the Act.

[7] In the preamble to the Act 'the rights of access to basic water supply and basic sanitation necessary to ensure sufficient water and an

environment not harmful to health or well-being' are recognised. Section 3 provides as follows:

'(1) Everyone has a right of access to basic water supply and basic sanitation.

(2) Every water services institution must take reasonable measures to realise these rights.

(3) Every water services authority must, in its water services development plan, provide for measures to realise these rights.

(4) The rights mentioned in this section are subject to the limitations contained in this Act.'

[8] '"Basic water supply" means the prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene' (s 1). It follows that in terms of s 3(1) everyone has a right of access to 'the prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity of water to households . . . to support life and personal hygiene.'

[9] As envisaged in s 3 read with the definition of 'basic water supply' water services regulations providing for the minimum standard of water supply services were promulgated. Regulation 3 provides:

'3 The minimum standard for basic water supply services is –

(a) . . .

(b) a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month –

(i) at a minimum flow rate of not less than 10 litres per minute;

(ii) within 200 metres of a household; and

(iii) with an effectiveness such that no consumer is without a supply for more than seven full days in any year.'

[10] Section 3 of the Act read with regulation 3(b) therefore provides that everyone has a right of access to a minimum quantity of water of 25 litres per person per day or 6 kilolitres per household per month. The appellants submitted that as a result of this legislation the respondents could no longer base their claim on a right of access to sufficient water in terms of s 27 of the Constitution but had to base their claim on the provisions of the Act. They submitted that where national legislation had been enacted to give effect to a constitutional right, it was impermissible for a litigant to rely directly on the constitutional right concerned. In this regard they relied on *MEC for Education, KwaZulu-Natal, and Others v Pillay* 2008 (1) SA 474 (CC) at para 40 where Langa CJ said:

'This court has held in the context of both administrative and labour law that a litigant cannot circumvent legislation enacted to give effect to a constitutional right by attempting to rely directly on the constitutional right. To do so would be to "fail to recognise the important task conferred upon the legislature by the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights". The same principle applies to the Equality Act. Absent a direct challenge to the Act, courts must assume that the Equality Act is consistent with the Constitution and claims must be decided within its margins.'

[11] The respondents conceded that this rule, ('the direct reliance rule'), is well established. But, they submitted that the rule does not operate whenever legislation gives effect to a constitutional right. It operates only if and when, on a proper interpretation of the legislation read with the constitutional right to which it gives effect, the legislation is intended to be exhaustive of the right, that is, if parliament intended to cover the field. In support of this submission they relied on Chaskalson CJ's reasoning in *Minister of Health and Another v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) in which he held that a review of administrative action can no longer be brought directly under s 33 (1) of

the Constitution and has to be brought under the Promotion of Administrative Justice Act 3 of 2000. Chaskalson CJ said:

'PAJA is the national legislation that was passed to give effect to the rights contained in s 33. It was clearly intended to be, and in substance is, a codification of these rights. It was required to cover the field and purports to do so.

A litigant cannot avoid the provisions of PAJA by going behind it, and seeking to rely on s 33(1) of the Constitution or the common law. That would defeat the purpose of the Constitution in requiring the rights contained in s 33 to be given effect to by means of national legislation.'[1]

[12] However, there is a substantial difference between, on the one hand, the constitutional provisions and legislation that gave rise to the application of the direct reliance rule and, on the other hand, s 27 of the Constitution and the Water Services Act.

(i) Section 9(4) of the Constitution provides that no person may unfairly discriminate against anyone on one or more of the grounds mentioned and then adds that national legislation must be enacted to prevent or prohibit unfair discrimination. The Equality Act was thereupon enacted to give effect to s 9. That is the background to the Constitutional Court's decision in *Pillay* referred to above.

(ii) Section 33(1) of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair and subsection (3) requires national legislation to be enacted to give effect to that right. PAJA was thereupon enacted to give effect to that right. It is on that basis that Chaskalson CJ applied the direct reliance rule in *New Clicks.*

(iii) Section 23(5) of the Constitution provides that every trade union, employers' organisation and employer has the right to engage in collective bargaining and that national legislation may be enacted to

[1] At paras 95-96.

regulate collective bargaining. Regulations in terms of the Defence Act 44 of 1957, which in terms of the Constitution qualify as national legislation, were promulgated to regulate collective bargaining. This led O'Regan J in giving the judgment of the Constitutional Court in *South African National Defence Union v Minister of Defence and Others* 2007 (5) SA 400 (CC) to say in para 52 that 'a litigant who seeks to assert his or her right to engage in collective bargaining under s 23(5) should in the first place base his or her case on any legislation enacted to regulate the right, not on s 23(5).

[13] In all these cases the direct reliance rule was applied in circumstances where the Constitution provided that legislation could be or had to be enacted to give effect to the right in terms of the Constitution and where that had been done. In the present case the Constitution does not provide that legislation could or had to be enacted to give effect to the right of access to sufficient water. It provides that legislative and other measures must be taken to achieve the progressive realisation of each of the rights mentioned in s 27(1). It was in my view realised that there were people who had access to sufficient water and others who did not have such access and could not immediately be given such access. It is for the latter category of people that the Constitution requires the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right of access to sufficient water. Section 27(2) was therefore not intended to cover the field and to deprive anyone of its right to rely on the provisions of s 27(1). On the contrary it simply recognises that it may, in certain circumstances, not be possible for the state to give immediate effect to the provisions of s 27(1) and requires the state to take reasonable legislative and other measures to

encourage the progressive realisation of the right of access to sufficient water.

[14] The Water Services Act together with the regulations promulgated in terms thereof, provide that 6kl water per household per month or 25 litres per person per day, is the minimum quantity of water that would constitute a sufficient quantity of water for households to support life and personal hygiene. In terms of s 3 and subject to the limitations contained in the Act (s 3(4)) everyone has a right of access to that quantity of water (s 3(1)), every water services institution must take reasonable measures to realise these rights (s 3(2)) and every water services authority must, in its water services development plan, provide for measures to realise these rights (s 3(3)). These provisions were not intended to detract from the right of everyone of access to sufficient water in terms of s 27(1) of the Constitution. They were intended, as required by s 27(2), to achieve a progressive realisation of those rights. As a result of these provisions it cannot be contended by a water services institution that a lesser quantity of water would constitute sufficient water to support life and personal hygiene. The quantity stipulated is the minimum that may constitute sufficient water. However, circumstances differ, some people, like the residents of Phiri, may have waterborne sanitation while others have pit latrines which makes a dramatic difference to the water required. By stipulating the minimum that would constitute sufficient water the legislature has not stipulated that that quantity would in all circumstances constitute sufficient water.

[15] It follows that the Water Services Act does not deprive anyone of the right of access to sufficient water in terms of s 27(1). This interpretation gives rise to three questions, namely: (i) What would

constitute sufficient water in terms of s 27(1); (ii) Does the City have to provide residents of Phiri with access to that quantity of water; and (iii) Does the City have to provide such access or access to a lesser quantity of water free. I shall deal with each of these questions in turn.

What would constitute sufficient water in terms of s 27(1)?

[16] In interpreting the right to sufficient water a purposive approach should be followed. In determining the purpose of the right one should have regard to the history and background to the adoption of the Constitution and the other provisions of the Constitution, in particular the other rights with which it is associated in the Bill of Rights.[2] On this approach the following passage in *Soobramoney* is apposite:[3]

'There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.'

[17] A commitment to address a lack of access to clean water and to transform our society into one in which there will be human dignity and equality, lying at the heart of our Constitution, it follows that a right of access to sufficient water cannot be anything less than a right of access to that quantity of water that is required for dignified human existence. Support for this conclusion is to be found in the 2002 General Comment 15 of the United Nations Committee on Economic, Social and Cultural Rights on the International Covenant on Economic, Social and Cultural

[2] *S v Zuma and Others* 1995 (2) SA 642 (CC) para 15; and *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 9 and 10.
[3] *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC) at para 8.

Rights, in which it is stated: 'The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights.'[4] And 'The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival. . . . The right should also be seen in conjunction with other rights enshrined in the International Bill of Human Rights, foremost amongst them the right to life and human dignity.'[5] For this reason 'the elements of the right to water must be *adequate* for human dignity, life and health'.[6]

[18] The quantity of water that is required for dignified human existence would depend on the circumstances of the individual concerned. As stated above the Water Services Act, read with the regulations promulgated in terms thereof, prescribes a basic minimum supply of water of 6kl per household per month or 25 litres per person per day. Being a basic minimum supply of water and bearing in mind that many people who are in desperate need of adequate access to water, do not have waterborne sanitation; the basic minimum supply of water in terms of the Act must have been determined by reference to the needs of households or individuals who can manage without waterborne sanitation. That is so because according to the evidence a flush toilet dispenses approximately 10 litres of water per flush and nobody has suggested, or could on the evidence suggest, that 6kl per household per month or 25 litres per person per day constituted sufficient water for leading a life in human dignity where use had to be made of flush toilets, as is the case in Phiri.

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[4] Para 1.
[5] Para 3.
[6] Para 11.

[19] Confirmation of the aforegoing is to be found in the White Paper issued by the Department of Water Affairs and Forestry in November 1994 entitled 'Water Supply and Sanitation Policy'. In respect of water supply it is said: 'Basic water supply is defined as 25 litres per person per day. This is considered to be the minimum required for direct consumption, for the preparation of food and for personal hygiene. It is not considered to be adequate for a full, healthy and productive life which is why it is considered as a minimum.'

[20] In September 2003 the Department issued a Strategic Framework for Water Services entitled 'Water is Life, Sanitation is Dignity'. According to the Framework, basic levels of service would be 'reviewed in future to consider increasing the basic level from 25 to 50 litres per person'.

[21] As to what quantity of water would constitute sufficient water for the residents of Phiri the respondents relied on and the court below accepted the evidence of P H Gleick the author of an article entitled 'Basic water requirements for human activities: Meeting basic needs' published in Water International, 21 (1996) 83-92. According to the article the water requirements of a resident of Phiri per day are a minimum of (i) three litres by way of fluid replacement under average temperate climate conditions and 5 litres in tropical and subtropical conditions; (ii) 5 to 15 litres for adequate bathing; (iii) 10 litres for food preparation, including dishwashing; and (iv) 20 litres for waterborne sanitation. On this basis he recommended in the article that a minimum of 50 litres per person per day be provided taking the upper limit for drinking water and bathing. No reason for taking the upper limit in respect of bathing is advanced. In an affidavit filed in support of the

respondents' claim Gleick stated that 50 litres per person, made up in the same way, should be viewed as a minimum basic need. The 15 litres per day for bathing he justified on the basis that Phiri residents cannot rely on rivers for bathing. However, the statement in the article that 5 to 15 litres would be adequate for bathing is not qualified in this manner. In the result, reducing the 50 litres minimum by 2 litres in respect of drinking water Gleick's evidence, at best for the respondents, is to the effect that a Phiri resident, who is not living in tropical or subtropical conditions, requires a minimum of 48 litres per day.

[22] The appellants relied on an affidavit by I H Palmer in respect of the water requirements of the residents of Phiri. Palmer is a civil engineer and managing director of Palmer Development Group (Pty) Ltd a consultancy company offering consultancy services in respect of, among others, water supply and sanitation. According to him 3 litres drinking water per person per day is considered reasonable for a Highveld climate, 7 litres per person per day is consistently used in the literature as a minimum for personal washing but 14 litres per day is consistent with research carried out for a low income water use category, 9.2 litres per person is required by a household of four in respect of cooking, washing of dishes, washing of clothes and cleaning of the premises and 15 litres (1.5 toilet flushes) in respect of toilet flushing ie, taking the upper limit in respect of personal washing which is almost the same as the figure suggested by Gleick, a total of 41.2 litres per person per day is required.

[23] The appellants objected to the court a quo's reliance on the evidence of Gleick on the basis, amongst others, that in terms of the *Plascon Evans* rule, the matter having been brought on application, it should be decided on the appellants' (respondents in the court below)

evidence in so far as it differs from that of Gleick. The respondents on the other hand submitted that Palmer's evidence could not be accepted because he applied the wrong standard. According to the submission Palmer's standard was the quantity of water required for the public benefit and not the quantity of water required for dignified human existence. I do not think that this criticism of Palmer's evidence is justified. It is clear from his evidence that he realised that what he had to determine was the quantity of water required for dignified human existence and that that was what he attempted to do. His quantification is specifically done under the heading 'Quantifying the amount of water needed for health (and human dignity).

[24] The only real difference between the evidence of Gleick and Palmer is that Palmer is of the opinion that 15 litres of water would suffice for waterborne sanitation whereas Gleick is of the opinion that 20 litres are required. There is no basis upon which the evidence of Gleick can on the papers be preferred to that of Palmer. The same applies to the minor differences in respect of personal washing and cooking and house cleaning. For these reasons I am of the view, on the evidence presented, that 42 litres water per person per day would constitute sufficient water in terms of s 27(1) of the Constitution.

Does the City have to provide Phiri residents with 42 litres of water per person per day?

[25] In terms of s 11 of the Water Services Act every water services authority has a duty to all consumers in its area of jurisdiction to progressively ensure efficient, affordable, economical and sustainable access to water services (s 11(1)). This duty is subject to, amongst others, the availability of resources; the need for an equitable allocation of

resources to all consumers; the need to regulate access to water services in an equitable way; the duty of consumers to pay reasonable charges; and the right to limit or discontinue the provision of water services if there is a failure to comply with reasonable conditions set for the provision of such services (s 11(2)). In ensuring access to water services, a water services authority must take into account factors such as the need for regional efficiency; the need to achieve benefit of scale; and the requirements of equity (s 11(3)). It may not unreasonably refuse or fail to give access to water services to a consumer or potential consumer in its area of jurisdiction (s 11(4)).

[26] Although s 27(1) provides that everyone has the right to sufficient water everyone does not have a claim for the immediate fulfilment of that right. As was said by Chaskalson CJ in *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC) para 11:

'What is apparent from these provisions is that the obligations imposed on the state by sections 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled.'

[27] A local authority such as the City is required only to act reasonably and to progressively fulfil its obligation to ensure that everyone has access to sufficient water.[7] It is, however, not the City's case that it is unable to provide the residents of Phiri with sufficient water and that it is not obliged to provide them with access to sufficient water, be it 42 litres

[7] *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 (CC) para 35.

or a greater quantity. The City's case is that it does not have to provide free water. Subject to the residents paying for such water they are not restricted to a certain quantity of water.

Does the City have to provide such access or access to a lesser quantity of water free of charge?

[28] In terms of s 27(1) everyone has the right to have access to sufficient water ie every Phiri resident has the right to have access to 42 litres per day. But many of the Phiri residents are poor and at least some of them cannot afford to pay for the water they need. Not being able to pay for the water, they have no access to that water. Compare in this regard 2002 General Comment 15 of the United Nations Committee on Economic, Social and Cultural Rights on the International Covenant on Economic, Social and Cultural Rights[8] in which it is said, under the heading 'Accessibility', that water, and water facilities and services, must be affordable for all and must be accessible to all including the most vulnerable or marginalized sections of the population, in law and in fact.

[29] The City did not contend that a person who cannot afford to pay for water has access to that water. It contended, as stated above, that the respondents could not rely on the Constitution but had to rely on the Water Services Act. In terms thereof, so it submitted, the City was obliged to take reasonable measures to secure access to basic water services as prescribed in the Water Regulations and not to provide such basic services free. I have already rejected the submission that the respondents could not base their claim on s 27(1) of the Constitution and I do not agree that, in terms of the Act, no water is to be provided free. Section 4(3)(c) of the Act expressly provides that 'procedures for the

[8] At para 12(c).

limitation or discontinuation 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'. It is also not the policy of the Department of Water Affairs and Forestry or of the City not to provide free water in any circumstances.

[30] A contention that the state and the City are not obliged to provide water free to people who cannot afford to pay for that water in circumstances where it would be reasonable to expect the state or the City to do so is in my view untenable. Whether it would be reasonable will of course depend on its available resources and other relevant considerations. The state and the City realised that to be so. That much is clear from the free water policy adopted by the state and the City to which I now turn.

[31] In February 2001 the Minister of Water Affairs and Forestry announced that government had resolved to ensure that poor households were given a basic supply of water free of charge. He went on to state that Cabinet had approved a policy to provide 6kl of safe water per household per month. In May 2001 the Chief Directorate: Water Services of the Department of Water Affairs and Forestry issued Version 1 of its 'Free Basic Water' Implementation Strategy Document in which it is said:

'Again it needs to be recognised that local authorities should still have some discretion over this amount. In some areas they may choose to provide a greater amount, while in other areas only a smaller amount may be possible. For example, in some remote areas with scattered settlements, high water costs and water stressed areas it is often not feasible to provide 6000 litres of water. . . . In some areas where poor households have waterborne sanitation the total amount of water seen as a "basic

supply" may need to be adjusted upwards (if financially feasible) to take into account water used for flushing.'

[32] Shortly after the promulgation of the water regulations on 28 June 2001 the City approved Johannesburg Water's business plan in terms of which it was recommended that each household be provided with 6kl free water per month. The provision of 6kl free water per month may have been brought about by the regulations read with s 4(3)(c) of the Water Services Act which provide, as stated above, that procedures for the limitation or discontinuation 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 water services. Initially the decision to provide 6kl free water per month was only implemented in areas other than deemed consumption areas such as Soweto. Later, when prepayment water meters had been installed in Phiri the first 6kl per month per stand was also provided free but for all water required in excess of 6kl prepayment had to be made.

[33] The City from time to time revised its free water policy. In mid-2005 it appointed consultants to undertake, amongst others, the development of a clear set of policy recommendations for how to restructure the City's social package designed to assist the poor, the assessment of past experience of the City in implementing successive versions of the social package and the evaluation of a variety of options for targeting the social package so that it optimally benefits poor households. The work culminated in two documents one of which is titled 'A Social Package Policy Base Document' dated 8 June 2006 ('the Base Document'). The Base Document recommends that 10kl free water per

month per consumer unit be provided to properties valued at less than a certain amount and that no free water be provided to other properties. It adds:

'6kl of water per month is the standard for free basic water per month. The amount of 6kl is based on the RDP standard of 25l per day, and a household size of 8 people. This amount is adequate for households with no reticulation . . ..

Evidence suggests that the average consumer unit size in the poorer areas of Johannesburg is 7 to 8 people . . .. A consumer unit of 7 people using 50l of water per day will use 10.5kl of water per month.

It is recommended that the free basic water allocation to poor households be increased to 10kl a month. This will go a long way to ensuring that larger households in Johannesburg have access to adequate water.'

[34] The recommendations contained in the Base Document have not been adopted by the City. At the time when the answering affidavits were deposed to, namely January 2007, it was envisaged that a new social package policy would be implemented effective July 2008 but that has not happened. The Mayoral Committee of the City however decided, as an interim measure:

(i) That the free basic water allocation to targeted poor households be increased from 6kl to 10kl so as to ensure that up to 13 people on a stand would receive at least 25 litres of water per day.

(ii) That the City's existing Register of Indigents be used as a basis for targeting poor households ie that 10kl of free water be provided to accountholders on the Register of Indigents. (Section 23 of the Credit Control and Debt Collection By-Laws of the City makes provision for registration upon application of a person as an indigent person. As at

January 2007 there were 118 549 accountholders registered on the register.)

(iii) That an additional 4kl free water per annum be allowed to every accountholder with a prepayment meter to cover any emergency requiring additional water.

(iv) That representations be considered for additional water in the case of people whose circumstances warrant an additional allocation of water.

[35] At the time it was envisaged that the interim measures would be introduced as from March 2007. That did not happen but according to the appellants they were fully introduced by the time that the application for leave to appeal was heard. The respondents dispute that a representation mechanism has been established but in the light of the conclusion to which I have arrived there is no need to deal with this dispute.

[36] The City maintains that it has no constitutional obligation to provide more than 25 litres free water per person per day and concedes that what it is trying to achieve by way of the interim measures is to get 25 litres per day to everyone who cannot afford to pay for water. That is with the exception of special cases such as where a person is suffering from AIDS, where a greater quantity of water may be provided. The City concedes that the method adopted to target those that cannot afford to pay for water is not perfect but contends that it is a practical approach and that the cost of a more targeted solution would be prohibitive.

[37] Apart from submitting that the respondents had no right of access to more water than the basic water supply in terms of the Water Services Act read with the water regulations ie 6 kl per household or 25 litres per person, the City, quite correctly, submitted that its obligation extended

only to its capacity within its available resources and that all that could be expected of it was to take reasonable steps within its available resources, aimed at a progressive fulfilment of everyone's right to have access to sufficient water. It submitted that it did not have the resources to provide sufficient free water to those who cannot afford to pay for water. In this regard the City relied on the fact that the City as well as Johannesburg Water had emerged from periods of acute financial crises, the fact that the City operates under budgetary constraints and that it is not allowed to spend more than is brought in on its operating budget and the fact that there are many other demands on its resources. The other demands on the City's resources include primary health care services, emergency services, public transportation, delivery of other essential services such as waste collection and electricity, development and maintenance of roads, storm water and other infrastructure, safety, security and housing. The City is required to balance different delivery and development expenditure priorities and in doing so budgeted to spend R17,8 billion of its projected operating revenue of R17,9 billion in the 2006/2007 financial year. The largest portion of the City's capital budget, namely R726m (or 34% of the budget), is directed to Johannesburg Water infrastructure projects. In addition the City directs R570m to fund its Social Package which includes free water. The City contends that it is unreasonable in these circumstances to require the provision of more free water to those who cannot afford to pay for such water, more so in the light of the fact that there are some 105 000 households in informal settlements within the City who do not have access to even basic water services and also the fact that, under the City's so-called 'stepped' or 'rising block' tariff, water usage by lower income and lower volume users is heavily subsidised by higher income and high volume users.

[38] However, the free water policy of the City was adopted on the basis that it was in terms of the Water Services Act obliged to provide the residents within its area of jurisdiction access to 6kl water per household per month or 25 litres per person per day, that this obligation did not entail that the provision had to be free to those who could not afford to pay and that the obligation superseded the constitutional duty that it may have had before the Act was enacted. For the reasons stated the policy was materially influenced by an error of law and falls to be set aside on that basis.

[39] The court below held that the City's provision of 25 litres of free water per person per day was unreasonable and ordered the City alternatively Johannesburg Water to provide each of the respondents and other similarly placed residents of Phiri with a free basic water supply of 50 litres per person per day. However, the circumstances of the respondents are so dissimilar that it would be impossible to give effect to the order. For example, the fourth respondent lives in a house with two others. They are getting 6kl water per month free ie approximately 60 litres per person per day. Her complaint is against a prepayment meter that had not functioned properly. The fifth respondent lives in a house jointly owned by him and his brother together with nine tenants. No case is made out that they cannot afford to pay for water. His complaint is that the water ran out when one of the shacks on his property caught fire.

[40] The respondents submitted that it would be appropriate in these circumstances to replace the order of the court below with an order that the City provide the quantity of water that is found to constitute sufficient water in terms of s 27(1) free of charge to every resident in Phiri. According to them, the City's case on the papers is not that it cannot

afford to do so and having failed to take action against non-payers the City had in fact, for many years provided an unlimited quantity of water free to the deemed consumption areas such as Phiri. They submitted further that to now, except in special cases, provide only 25 litres per person per day free is a retrogressive step.

[41] The City may of course be able to divert funds budgeted for other expenses and so make funds available to provide sufficient water free to every citizen in Phiri. But it contends that it would be unreasonable to expect it to do so. More so because an order that the City should provide 42 litres of free water to the residents of Phiri who cannot afford to pay for such water will in effect oblige the City to provide that quantity of water free to other residents in the City whose circumstances are similar to those of the Phiri residents.

[42] Having concluded that the City's free water policy falls to be reviewed and set aside a revised free water policy which is reasonable has to be adopted. In formulating that policy regard should be had to the available resources and many competing interests. A reasonable balance will have to be struck between those interests. In addition regard should be had to logistical problems that will have to be overcome in order to target those in need of free water in a practical and cost effective way. Without even knowing what the costs implications to the City would be if the City were to provide 42 litres free water to all of its residents who cannot afford to pay for such water and without the expertise to deal with the logistical problems, it would be irresponsible of a court to usurp the function of the City and to itself revise the City's free water policy. The court is in no position to do so whereas the City should have the knowledge and expertise required to do the exercise. As was said in *Bato*

Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC) at para 45:

'The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.'

[43] For these reasons the matter should be referred back to the City to formulate a revised water policy in the light of the finding that it is constitutionally obliged to grant each Phiri resident who cannot afford to pay for water access to 42 litres of water per day free in so far as it can reasonably be done having regard to its available resources and other relevant considerations.

[44] The respondents submitted that the constitutional rights of the residents of Phiri have been violated and that, as a result, those that cannot afford to pay for water have been forced to live in squalor for years. Referring to s 38 of the Constitution which provides that a court may grant appropriate relief in respect of an infringement of a right in the Bill of Rights they submitted that only effective relief would constitute appropriate relief. In *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at para 69 Ackermann J said:

'[A]n appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if needs be, to achieve this goal.'

[45] Having regard to the fact that the recommendations contained in the Social Package Base Document dated 8 June 2006 are apparently still under consideration while there is a dispute about the extent to which the interim measures adopted by the City in the light of those recommendations have been implemented, the respondents submitted that it would take a long time for the City to adopt a revised policy in the light of the findings of this court. In the meantime the constitutional rights of the residents of Phiri will be violated and they will have to continue living in squalor. To refer the matter back to the City would in these circumstances not constitute effective relief. When asked to formulate an order having regard to the logistical problems that will be encountered in giving effect to an order that a certain quantity of water had to be provided to all Phiri residents who cannot afford to pay for water, the respondents could do no better than suggest that the City should be allowed to identify the people who qualify for free water by any reasonable means. That is to say, at least in respect of the identification of people entitled to free water, they conceded that the matter had to be referred back to the City for them to adopt an appropriate policy. However, they suggested that an interim order should be made that sufficient water must be provided free to all inhabitants of Phiri so as to serve as an incentive to the City to adopt a revised free water policy as soon as possible.

[46] An interim order will indeed be an effective order pending the implementation of a revised water policy. There is however no reason why, in the interim, free water should be provided to inhabitants of Phiri who can afford to pay for the water. The question then is how to identify those than cannot do so. At least as an interim measure there would not seem to be any other practical way than to do what the City has done and

that is to use the City's Register of Indigents as a basis for targeting poor households. There are 118 549 accountholders registered as indigents and provision is made in section 23(1) of the City's Credit Control and Debt Collection By-laws for applications to be registered as an indigent. An order that 42 litres of free water per person per day be provided to those households should not cause undue hardship to the City because in terms of the interim measures adopted by the City, 10kl of free water per month is already provided to these households. As a result households registered on the register of indigents and consisting of 8 or less people are being provided with 42 litres free water per person per day. Such an order would nevertheless ensure that those in dire need of water would not have to go without sufficient water pending the adoption and implementation of a revised free water policy by the City. It would put some pressure on the City to adopt and implement a revised policy as soon as possible.

Prepayment meters

[47] As stated above the City provided an unlimited unmetered quantity of water to the residents of Soweto including Phiri and charged them on the basis of a deemed consumption of 20kl per month. However, the infrastructure was in a lamentable condition. The piping system was chaotic and there were fundamental technical problems in that it was incompatible with pressure systems resulting in fractures and innumerable leaks in primary and secondary water reticulation. As a result of the deemed consumption system coupled with the chaotic water reticulation infrastructure the actual 'consumption', including wastage and leaks of water in Soweto, was in the order of 67kl per household per month. That was not the only problem faced by Johannesburg Water. The payment rate of municipal bills was less than 10%. Non-paying account holders amassed substantial arrears on their accounts. The City ascribes

the non-payment for water services to a culture of non-payment which took root in the 1980's under the apartheid system. In the result, as is stated by Karen Brits in the answering affidavit filed by the City, those consumers were in effect receiving unlimited free water. This situation was considered by the City to be unsustainable. However, the City does recognise that many of the residents are not able to pay for the water provided to them.

[48] The problems with the deemed consumption system and the water reticulation infrastructure led to the appointment in mid-late June 2001 of a project team within Johannesburg Water to devise a strategy to reduce unaccounted for water in the deemed consumption areas. The project was called Operation Gcin'manzi ('OGA'). A report was prepared by the OGA task team in terms of which they recommended that prepayment water meters be installed. The report added: 'As prepayment represents *a major paradigm shift from conventional metering* and enforces payment for services electronically, prepayment should not be enforced on customers until such time as majority acceptance (critical mass) has been obtained, i.e. *installation of a prepayment meter on any property should be by choice of the customer per predefined area*.' The report was adopted and it was decided that a pilot project should first be undertaken in a prototype area. Phiri was selected for the pilot project. Construction of the 'bulk infrastructure' phase of the project started on 11 August 2003 and the installation of prepayment meters in Phiri was completed in February 2005.

[49] The court below, referring to s 21 of the Water Services Act (which provides that every water services authority such as the City must make bylaws which contain conditions for the provision of water services) and

to the bylaws made by the City, held that the bylaws did not authorise the installation of prepayment meters in respect of the water services rendered to the respondents.

[50] In terms of bylaw 3 of the City's Water Services By-Laws the City may provide three levels of service. Service level 1 must consist of a water supply from communal water points and a ventilated improved pit latrine located on each site. Service level 2 must consist of an unmetered water connection to each stand with an individual yard standpipe; a water borne connection connected to either a municipal sewer or a shallow communal sewer system; and a pour flush toilet which must not be directly connected to the water installation. Service level 3 must consist of a metered full pressure water connection to each stand and a conventional water borne drainage installation connected to the City's sewer. The level of service to be provided to a community may be established in accordance with the policy of the City and subject to the conditions determined by the City. The provision of service level 2 is subject to certain conditions and in terms of bylaw 3(3) the City, in the event of a consumer receiving service level 2 contravening certain of those conditions, may install a prepayment meter in the service pipe on the premises.

[51] The City submitted that, in the case of Phiri, service level 3 is provided to consumers and that the use of prepayment meters is authorised because level 3 requires a 'metered full pressure water connection' without specifying the nature of the meter to be used.

[52] In my view 'metered' in the specifications of a level 3 service was not intended to include 'metered' by way of a prepayment meter. If that

was the intention one would have expected that to have been mentioned expressly in the light of the specific authorization to install prepayment meters in respect of the level 2 service by way of a penalty for having breached the conditions upon which that service is being provided. One would also have expected mention being made of the circumstances under which prepayment meters instead of a credit meters may be used. More so in the light of the statement in the OGA report that prepayment in respect of water represents '*a major paradigm shift from conventional metering*'.

[53] There are several other indications that 'metered' was not intended to include metered by way of a prepayment meter. Section 7(1) requires every consumer on application for the provision of water services and before such water services are provided to deposit with the City a sum of money equal to the estimated fees for two average months' water services as determined by the City. If 'metered' was intended to include prepayment it is unlikely that the same deposit would have been required from those applying for the provision of prepaid water services as from those applying for the provision of water services on credit. Not surprisingly we were informed at the hearing that no deposit is required in respect of prepaid water services.

[54] In terms of s 4 of the Water Services Act water services must be provided in terms of conditions set by the water services provider and these conditions must provide for the circumstances under which water services may be limited or discontinued and for procedures for limiting or discontinuing water services. Furthermore, procedures for the limitation or discontinuation of water services must be fair and equitable, provide for reasonable notice of intention to limit or discontinue the services and

for an opportunity to make representations. They may 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.

[55] The City submitted that the cut-off of the water supply by a prepayment meter does not amount to a discontinuation of water services because the water services are still available against payment. On that basis one can argue that water services are not discontinued to a consumer to whom water is provided on credit when the water supply is cut-off due to non-payment. The only difference being that in the case of prepayment meters the customer can himself restore the supply whereas in the case of credit meters the co-operation of the supplier is required. In my view a cut-off of water services by a prepayment meter when the credit runs out clearly amounts to a discontinuation of the services (see *R v Director general of Water Services* [1999] Env. L.R. 114 (QB)).

[56] As stated above, in terms of s 4 of the Water Services Act water services must be provided in terms of conditions set by the water services provider which must accord with conditions for the provision of water services contained in bylaws. The City's Water Services By-Laws provide for the circumstances under which water services may be discontinued and for procedures for doing so (s 9.C). Subsection 6 for example provides for the sending of a discontinuation notice in the event of non-payment which notice must contain information advising the consumer of steps which can be taken to have the service reconnected. Subsection 7 requires a final demand notice in the event of representations having been unsuccessful. Subsection 8 states under what circumstances water services to a consumer may be discontinued. These

provisions provide for cut-offs for non-payment but do not authorise the cut-off by a prepayment meter. The City submitted that the prepayment meters are designed to give a warning signal before the credit is exhausted and that, since the hearing of the case in the court below, representations can be made to the City not to discontinue the service when the credit runs out. The respondents dispute that a special cases representation procedure has been implemented and contend that the prepayment meters in Phiri, in any event, give no warning that would allow sufficient time for representations or for purchasing further water credits so as to avoid the cut-off. However that may be, if 'metered' in bylaw 3 was intended to apply also to metered by way of prepayment meters, the bylaws would have stipulated, as in the case of credit meters, as to what warning had to be given before the water services could be discontinued and would have contained, as in the case of credit meters, comprehensive provisions as to the making of representations.

[57] The City contends that bylaws 31, 8A and 31A(2) make it clear that prepayment meters may be used. These bylaws do refer to prepayment meters but the provisions which refer to prepayment meters are necessitated by the fact that, as stated above, the bylaws do authorise the installation of prepayment meters as a penalty for a breach of conditions imposed in respect of level 2 services. The City also submitted that the use of prepayment meters is envisaged in the Local Government: Municipal Systems Act 32 of 2000. In terms of s 95(i) thereof a municipality must within its financial and administrative capacity provide accessible pay points and other mechanisms for settling accounts or for making pre-payments. That the section envisages prepayments is clear but that is a far cry from authorising prepayment water meters. In addition the City referred to s 156(5) of the Constitution which provides that a

municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions. It submitted that the introduction of prepayment meters in the circumstances prevailing in Phiri, falls within the powers reasonably necessary for, and incidental to, those powers expressly articulated in the Constitution and national legislation. That may be so but the argument loses sight of the fact that the Council of the City in terms of the bylaws decided what water services would be provided to consumers. The question therefore remains whether the bylaws authorise the use of prepayment meters in the case of level 3 water services.

[58] For the reasons mentioned I am of the view that the City's Water Services By-Laws do not authorise the installation of prepayment water meters in respect of its level 3 water services and that such installation was unlawful. Once again the question arises as to what the appropriate remedy would be. The court below made the following order:

'183.2 The forced installation of prepayment water meter system in Phiri Township by the City of Johannesburg alternatively Johannesburg Water (Pty) Ltd without the choice of all available water supply options, is declared unconstitutional and unlawful.

183.3 The choice given by the City of Johannesburg alternatively Johannesburg Water (Pty) Ltd to the applicants and other similarly placed residents of Phiri of either a prepayment water supply or supply through standpipes is declared unconstitutional and unlawful.

183.4 The prepayment water system used in Phiri Township is declared unconstitutional and unlawful.

183.5 The City of Johannesburg alternatively Johannesburg Water (Pty) Ltd is ordered to provide each applicant and other similarly placed residents of Phiri Township with –

183.5.1 . . .

183.5.2 the option of a metered supply installed at the cost of the City of Johannesburg.'

If the prepayment water system used in Phiri in respect of the level 3 service is unlawful as I have found it to be, it follows that the installation thereof and the choice given to the residents of Phiri (that was a choice between a level 3 and a level 2 water service) was unlawful. There was therefore no need for the orders in paragraphs 183.2 and 183.3.

[59] Having been declared unlawful, the City was obliged to remove the prepayment meters. I do not think that was the appropriate remedy in the circumstances. According to the City the residents of Phiri are better off with prepayment meters and many of them prefer to have them; no other mechanism allows a guaranteed monthly delivery of free water; the introduction of prepayment meters involved massive capital expenditure (as of September 2007 a total of 82 591 had been installed); and the implementation of OGA has been effective, resulting in a dramatic reduction in the level of unaccounted for water, enabling the City to plan for the extension of basic water infrastructure to the estimated 105 000 households that do not have access to basic water.

[60] In the circumstances an order having the effect that the prepayment meters that have already been installed should be removed is inappropriate. The City, by amending its bylaws, to at least some extent may alleviate the problems caused by the unauthorized installation of the prepayment meters. By doing so it may be able to retain the prepayment meters at least in respect of consumers who prefer to have them and possibly also in respect of those who cannot pay a deposit or who do not pay their accounts. For these reasons the appropriate order would in my view be to suspend the order of unlawfulness for a period of two years to

enable the City to take such steps as it may be advised to take to legalise the use of prepayment water meters.

[61] The appellants do not ask for a costs order against the respondents and have achieved a sufficient measure of success in this appeal not to be ordered to pay any of the respondents' costs.

[62] For these reasons the following order is made:

The appeal is upheld and the order by the court below is replaced with the following order:

'1 The decision of the first respondent and/or the second respondent to limit the free basic water supply to the residents of Phiri to 25 litres per person per day or 6 kl per household per month is reviewed and set aside.

2 It is declared:

(a) That 42 litres water per Phiri resident per day would constitute sufficient water in terms of s 27(1) of the Constitution.

(b) That the first respondent is, to the extent that it is in terms of s 27(1) of the Constitution reasonable to do so, having regard to its available resources and other relevant considerations, obliged to provide 42 litres free water to each Phiri resident who cannot afford to pay for such water.

3 The first and second respondents are ordered to reconsider and reformulate their free water policy in the light of the preceding paragraphs of this order.

4 Pending the reformulation of their free water policy the first and second respondents are ordered to provide each accountholder in Phiri who is registered with the first respondent as an indigent with 42 litres of free water per day per member of his or her household.

5 It is declared that the prepayment water meters used in Phiri Township in respect of water service level 3 consumers are unlawful.

6 The order in paragraph 5 is suspended for a period of two years in order to enable the first respondent to legalise the use of prepayment meters in so far as it may be possible to do so.'

P E STREICHER
JUDGE OF APPEAL

APPEARANCES:

For 1st appellant:	G Marcus SC A Stein
For 2nd appellant:	K D Moroka SC K Pillay
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