CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 39/09
2009 ZACC 28

In the matter between

LINDIWE MAZIBUKO	First Applicant
GRACE MUNYAI	Second Applicant
JENNIFER MAKOATSANE	Third Applicant
SOPHIA MALEKUTU	Fourth Applicant
VUSIMUZI PAKI	Fifth Applicant

and

CITY OF JOHANNESBURG	First Respondent
JOHANNESBURG WATER (PTY) LTD	Second Respondent
MINISTER FOR WATER AFFAIRS AND FORESTRY	Third Respondent

with

CENTRE ON HOUSING RIGHTS AND EVICTIONS	Amicus Curiae

Heard on : 2 September 2009

Decided on : 8 October 2009

JUDGMENT

O'REGAN J:

Introduction

[1] This application for leave to appeal against a judgment of the Supreme Court of Appeal raises, for the first time in this Court, the proper interpretation of section 27(1)(b) of the Constitution which provides that everyone has the right to have access to sufficient water. Cultures in all parts of the world acknowledge the importance of water. Water is life. Without it, nothing organic grows. Human beings need water to drink, to cook, to wash and to grow our food. Without it, we will die. It is not surprising then that our Constitution entrenches the right of access to water.

[2] 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 (approximately a quarter of the population), did not have adequate access to water. By the end of 2006, this number had shrunk to 8 million, with 3,3 million of that number having no access to a basic water supply at all. 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.

[3] At the same time, ours is a largely arid country, often assailed by drought. Redeeming the constitutional promise of access to sufficient water for all will require careful management of a scarce resource. The need to preserve water is a responsibility that affects all spheres of government. A major piece of legislation adopted only three years after democracy was achieved in 1994, the Water Services Act (the Act or the Water Services Act),[1] highlights the connection between the rights of people to have access to a basic water supply and government's duty to manage water services sustainably.

Parties

[4] The applicants are five residents of Phiri in Soweto. They are poor people living in separate households. The first applicant, Mrs Lindiwe Mazibuko, who has sadly passed away since the litigation commenced,[2] lived in a brick house on her mother's property. There were two informal dwellings in the backyard of her mother's home for which the tenants paid low rentals. Altogether 20 people lived on the stand. The second applicant is Mrs Grace Munyai, who shares a home with her husband, two children and two grandchildren. The third applicant is Mrs Jennifer Makoatsane who shares her home with her mother, brother and six other family

[1] 108 of 1997. The Preamble to the Act states, amongst other things, that the Act is adopted:

> "RECOGNISING 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;
> ACKNOWLEDGING that there is a duty on all spheres of Government to ensure that water supply services and sanitation services are provided in a manner which is efficient, equitable and sustainable;
> ACKNOWLEDGING that all spheres of Government must strive to provide water supply services and sanitation services sufficient for subsistence and sustainable economic activity;
> . . . .
> CONFIRMING the National Government's role as custodian of the nation's water resources".

[2] There was no formal substitution of Mrs Mazibuko as a party in these proceedings, but nothing turns on this.

members. The fourth applicant is Mrs Sophia Malekutu, a pensioner, who shares a home with her nephew and niece. They do not have any tenants. The fifth applicant is Mr Vusimuzi Paki who lives with his brother on a stand which also has three informal dwellings, the occupants of which pay a low rental to him. Altogether eleven people live on the stand.

[5] The first and second respondents are the City of Johannesburg (the City) and Johannesburg Water (Pty) Ltd (Johannesburg Water), a company wholly owned by the City which provides water services to the residents of the city. The third respondent is the national Minister for Water Affairs and Forestry (the Minister). The Centre on Housing Rights and Evictions has been admitted as an amicus curiae.

Issues

[6] The case concerns two major issues: the first is whether the City's policy in relation to the supply of free basic water, and particularly, its decision to supply 6 kilolitres of free water per month to every accountholder in the city (the Free Basic Water policy) is in conflict with section 27 of the Constitution or section 11 of the Water Services Act. The second major issue is whether the installation of pre-paid water meters by the first and second respondents in Phiri was lawful. Each of the issues entails several sub-issues, all of which are considered in this judgment.

[7] The case needs to be understood in the context of the challenges facing Johannesburg as a City. The City is, in terms of population, the second fastest

growing city in the country and according to Census 2001, (the last Census) is home to approximately 3,2 million people living in about a million households. Half of these households are very poor with an income of less than R1 600 per month. Just under a fifth of the households are located in informal settlements. A similar proportion has no access to basic sanitary services, and a tenth of all the households have no access to a tap providing clean water within 200 metres of their home. It can be seen that there is much to be done to "[i]mprove the quality of life of all citizens", an important goal set by the preamble of our Constitution.

[8] This judgment first sets out the background to this case, then the key constitutional and statutory provisions. It proceeds by outlining the history of the litigation in the High Court and the Supreme Court of Appeal and then deals with the preliminary issues. It considers two main issues: the City's Free Basic Water policy and the lawfulness of the installation of pre-paid meters in Phiri. It ends with a brief consideration of the role of litigation in securing social and economic rights in our constitutional democracy.

Summary

[9] After careful consideration of the issues, this judgment finds that the City's Free Basic Water policy falls within the bounds of reasonableness and therefore is not in conflict with either section 27 of the Constitution or with the national legislation regulating water services. The installation of pre-paid meters in Phiri is found to be

lawful. Accordingly, the orders made by the Supreme Court of Appeal and the High Court are set aside.

Background

[10] Apartheid urban planning did not permit black people to live in the same urban areas as white people. Soweto was developed in accordance with this appalling racist policy. It is home to approximately a million people. Phiri, where the applicants live, is one of the oldest areas in Soweto. Most of the houses in Phiri are brick yet generally the people who live in Phiri are poor.

[11] Water piping was initially laid in Soweto in the 1940s and 1950s. Steel piping was used without attention to corrosion protection. By the 1980s, many of these pipes had corroded with resulting water leakages. During this time, households in Phiri had piped water and were charged for water usage on a flat rate basis of R68,40 per month. This amount was calculated on the basis of a deemed monthly consumption of 20 kilolitres of water per household. The deemed consumption system was used as the basis for water charges in all the residential areas in the city that had been set aside under apartheid for black African people.[3] The actual monthly consumption per household in Soweto was far higher than 20 kilolitres, at 67 kilolitres per month. It is not possible to tell, according to the respondents, how much of the excess was consumed by residents and how much lost through leakage.

[3] This deemed consumption system was not limited to Johannesburg. Compare *City Council of Pretoria v Walker* [1998] ZACC 1; 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC) where a "flat rate" was charged to township residents.

[12] Johannesburg Water estimated that between one quarter and one third of all water it purchased was distributed to Soweto, while only one percent of revenue was generated from Soweto. One of the reasons for the shortfall in revenue was the fact that many residents did not pay the deemed consumption charges. Johannesburg Water estimated that 75% of all water pumped into Soweto was unaccounted for. The water losses in Soweto far exceeded the losses in other areas where water was provided on a deemed consumption basis, such as Ivory Park, Alexandra and Orange Farm.

[13] Johannesburg Water thus decided it was necessary to develop a plan to change the pattern of water usage in Soweto. That plan came to be known as Operation Gcin'amanzi (to save water). Its goals were to reduce unaccounted for water, to rehabilitate the water network, to reduce water demand and to improve the rate of payment. Phiri was selected as the area where the project would first be implemented.

[14] Key to the project was the abandonment of the previous system of deemed consumption flat rate charges. Today, the City has three levels of water provision. The lowest level of service, Service Level 1, provides a tap within 200 metres of each dwelling. As noted above, there are still 100 000 households in the City without even this level of water provision. The second level of service, Service Level 2, is the provision of a tap in the yard of a household which has a restricted water flow so that only 6 kilolitres of water are available monthly. The third level of service, Service

Level 3, is a metered connection. Under Operation Gcin'amanzi, residents were required to select between the second level of service provision and a pre-paid meter.[4] The first applicant, Mrs Mazibuko, says that she was not offered a choice between Service Level 2 and a pre-paid meter. This is a matter to which I return later.[5]

[15] The project was approved by the City in May 2003 and implemented in Phiri from February 2004. Twenty community facilitators were appointed by Johannesburg Water to conduct house visits. The task was to explain the project and its implications carefully to each household. By the end of the implementation process in Phiri in February 2005, all but eight of the 1 771 households in the area had opted for either Service Level 2 or a pre-paid meter. Indeed the vast majority selected the latter.

[16] It is clear from the applicants' case that the implementation of Operation Gcin'amanzi in Phiri was not without its problems. The first applicant, Mrs Mazibuko was visited by a community facilitator on 17 March 2004 and informed that the pipes were to be replaced because they were old and rusty. Upon her enquiry, she was told that a pre-paid meter would be installed. She refused to have a pre-paid meter installed and was apparently not informed of the option of a yard tap. The water supply was cut off from the end of March. It was only reconnected in October when she applied for a pre-paid meter to be installed.

[4] The question of whether pre-paid meters fall within Service Level 3 is discussed below at [106]–[114].

[5] See [132] below.

[17] The City states that it cut off the water supply of only those residents who refused either a pre-paid meter or a yard tap. The monthly progress reports on the implementation of Operation Gcin'amanzi show that only a handful of residents refused either a pre-paid meter or a yard tap. In June 2004, for example, there were only 35 outright refusals out of the many hundreds of residents who had the new system installed. Those who did refuse both levels of service were given seven days' notice before their water was cut off.

[18] Moreover, in May and June 2006, a customer satisfaction survey was conducted in Phiri to research attitudes in the community to several matters, including satisfaction with the implementation of the Gcin'amanzi project. The results of this survey showed a customer satisfaction rating of 8,11 out of 10 which was considered "excellent".

Key constitutional and statutory provisions

[19] Section 27 of the Constitution provides 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.
>
> (3) No one may be refused emergency medical treatment."

[20] Parliament has enacted the Water Services Act to regulate the right of access to water and the state's obligations in that regard. Section 3 provides that:

> "(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."

[21] A "water services authority" is defined in the Act as any municipality[6] which would, of course, include the City. A "water services provider" is defined to mean any person who provides water services to consumers.[7] Given that Johannesburg Water is contracted to the City to provide water to residents of the City, it is a "water services provider" within the meaning of the Act. A "water services institution" is defined to include both a water services authority and a water services provider so both the City and Johannesburg Water are water services institutions within the meaning of the Act.

[22] One further definition in section 1 of the Water Services Act is relevant. It is the definition of "basic water supply" which provides that:

> "'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."

[6] See definition in section 1 of the Water Services Act.

[7] Id.

To paraphrase, a basic water supply is the prescribed minimum amount of water necessary for the supply of a sufficient quality of water to support life and personal hygiene.

[23] Section 9 of the Water Services Act provides that the Minister may from time to time prescribe "compulsory national standards" relating, amongst others, to the provision of water services and the "effective and sustainable use of water resources for water services". The Minister has published a set of regulations relating to compulsory national standards and measures to conserve water.[8] Regulation 3 provides that:

> "The minimum standard for basic water supply services is–
>
> (a) the provision of appropriate education in respect of effective water use; and
>
> (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."

It is clear that this regulation defines the content of a "basic water supply" as contemplated in the Act. I shall refer to this regulation as "regulation 3(b)" throughout this judgment.

[8] Regulations relating to compulsory national standards and measures to conserve water, *Government Gazette*, Gazette No 22355, Notice R509 of 2001 (8 June 2001) published in terms of section 9 of the Water Services Act 108 of 1997. Hereafter "National Water Standards Regulations".

[24] In addition, the City has enacted Water Services By-laws to regulate its provision of water services to the residents of the City.[9] I return to these below.[10] Having set out the relevant key constitutional and legislative provisions, I turn now to describe the history of the case now before us.

Proceedings in the High Court

[25] The application was launched in what is now called the South Gauteng High Court in Johannesburg, in July 2006, nearly eighteen months after the completion of Operation Gcin'amanzi in Phiri. As stated above, the applicants identified two key issues: whether the City's policy of supplying 6 kilolitres of water free to every household in the City was in compliance with section 27 of the Constitution; and whether the installation of pre-paid meters was lawful.

[26] The matter was heard in December 2007. In April 2008, the High Court handed down judgment in favour of the applicants.[11] Tsoka J held that–

- the introduction of pre-paid meters constituted administrative action within the meaning of section 33 of the Constitution;[12]
- the City's Water Services By-laws did not provide for the installation of pre-paid meters and that their installation was accordingly unlawful;[13]

[9] City of Johannesburg Metropolitan Municipality Water Services By-laws *Provincial Extraordinary Gazette* (Gauteng), Gazette No 179, Notice 835 of 2004 (21 May 2004) published in terms of section 13(a) of the Local Government: Municipal Systems Act 32 of 2000.

[10] At [78] below.

[11] *Mazibuko and Others v City of Johannesburg and Others (Centre on Housing Rights and Evictions as amicus curiae)* [2008] 4 All SA 471 (W).

[12] Id at paras 63-70.

- because pre-paid meters halt the water supply to a resident once the free basic water supply has been exhausted, until the resident purchases credit, they give rise to the unlawful and unreasonable discontinuation of the supply of water;[14]
- the pre-paid meter system was discriminatory in that residents of Soweto were not given the option of credit meters that are provided by the City to residents in other areas (particularly areas inhabited by white residents);[15]
- the procedure followed by the City to install pre-paid meters was unlawful and unfair;[16]
- regulation 3(b) of the National Water Standards Regulations[17] established a minimum content in relation to water services; he therefore rejected the applicants' argument that regulation 3(b) was inconsistent with the Constitution;[18]
- the City's Free Basic Water policy, coupled with its policy on indigent residents, was irrational and unreasonable;[19] and
- the City should furnish the applicants and all similarly placed residents of Phiri with a free basic water supply of 50 litres per person per day.[20]

[27] As a result, the High Court made the following order:[21]

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[13] Id at para 82.

[14] Id at paras 92-3.

[15] Id at paras 94 and 155.

[16] Id at para 119.

[17] See [23] above.

[18] *Mazibuko* (High Court) above n 11 at para 54.

[19] Id at para 150.

[20] Id at para 183.5.1.

1. The decision of the City of Johannesburg alternatively Johannesburg Water (Pty) Ltd to limit free basic water supply to 25 litres per person per day or 6 kilolitres per household per month is reviewed and set aside.
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.
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.
4. The prepayment water system used in Phiri Township is declared unconstitutional and unlawful.
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–
    5.1 free basic water supply of 50 litres per person per day; and
    5.2 the option of a metered supply installed at the cost of the City of Johannesburg.
6. The respondents are jointly and severally ordered to pay the costs of the application, which costs include costs of three counsel.

Proceedings in the Supreme Court of Appeal

[28] The respondents appealed to the Supreme Court of Appeal.[22] That Court unanimously held that because the City's policy had been formulated on the misconception that it was not obliged to provide the minimum set in regulation 3(b) free of charge to those who could not afford to pay, it was influenced by a material

[21] Id at para 183.

[22] *City of Johannesburg and Others v Mazibuko and Others (Centre on Housing Rights and Evictions as amicus curiae)* 2009 (3) SA 592 (SCA); 2009 (8) BCLR 791 (SCA).

error of law and should be set aside.[23] The Court determined that the quantity of water required for dignified human existence in compliance with section 27 of the Constitution was 42 litres per person per day.[24] It referred the formulation of the water policy back to the City to be revised in the light of this determination.[25] The Supreme Court of Appeal also concluded that the City had no authority in law to install pre-paid meters[26] and that the cut-off in water supply that occurs when the free basic water limit has been exhausted constituted an unlawful discontinuation of the water supply.[27] The Supreme Court of Appeal declared the installation of the pre-paid meters to be unlawful but suspended that order for two years to give the City an opportunity to rectify the situation by amending its By-laws.[28] The Court did not consider the arguments made by the applicants concerning the unlawfulness of the manner in which the pre-paid meters had been installed.

[29] The Supreme Court of Appeal thus made the following order:

> "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:

[23] Id at para 38.

[24] Id at para 24.

[25] Id at para 43.

[26] Id at para 58.

[27] Id at paras 55-7.

[28] Id at paras 58-60.

(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 insofar as it may be possible to do so."[29]

[30] The applicants now seek leave to appeal to this Court in part against the order made by the Supreme Court of Appeal. In a nutshell, they seek the reinstatement of the High Court order. They do not seek to appeal against the order declaring the use of pre-paid water meters unlawful (paragraph 5 of the order), but they do seek to appeal against the suspension of the order of invalidity for two years (paragraph 6). They assert that the Supreme Court of Appeal erred in not considering the arguments relating to the manner in which the pre-paid meters were installed in Phiri and ask this Court to consider those arguments and grant appropriate relief.

[29] Id at para 62. The original order of the Supreme Court of Appeal made no costs award. That order was subsequently amended.

[31] In regard to the Free Basic Water policy, the applicants argue that the Supreme Court of Appeal erred in determining that the sufficient amount of water required by section 27 is 42 litres per person per day, rather than 50 litres per person. They also assert that the Supreme Court of Appeal should have made an order declaring that the City was obliged to provide this amount of water free of charge to all the residents of Phiri who cannot afford to pay for their own water.

[32] The City and Johannesburg Water did not oppose the application for leave to appeal but, in the event that the Court granted it, they applied conditionally for leave to cross appeal. They seek to appeal against the order of the Supreme Court of Appeal that reviewed and set aside the City's Free Basic Water policy as unlawful and the declaration that 42 litres of water per person per day would constitute "sufficient water" within the meaning of section 27(1) of the Constitution. They also seek leave to appeal against paragraphs 3 and 4 of the order to the extent that they were based on paragraphs 1 and 2(a) of the order. The City and Johannesburg Water also ask leave to appeal conditionally against the order that declared the pre-paid meters used in Phiri to be unlawful (paragraph 5 of the order). The City and Johannesburg Water also seek leave to appeal against the costs order made by the Supreme Court of Appeal (which was embodied in an amended order after the judgment had been handed down). That order required the respondents jointly and severally to pay the costs of the application, including the costs of three counsel.

[33] The City and Johannesburg Water also seek leave to tender new evidence on appeal. This evidence relates to changes in their water policy since the papers in this case were finalised. The applicants strenuously oppose this application.

[34] The Minister belatedly also sought leave to appeal against orders 2(a), 2(b) and 4. Her application was lodged 42 days late, and she seeks condonation for the late filing of the application for leave to appeal.

[35] I turn now to identify and consider the preliminary issues in this matter.

Preliminary issues

[36] There are four preliminary issues to be considered before I turn to the main issues in the case. Does the case raise a constitutional matter? Is it in the interests of justice to grant leave to appeal? Should the new evidence tendered by the first and second respondents be admitted? Should the Minister be granted condonation for late filing of the leave to cross-appeal?

[37] Does the case raise a constitutional matter? There can be no doubt that it does. The case concerns, amongst other things, the proper interpretation of section 27(1)(b) of the Constitution, section 27(2) of the Constitution and the proper interpretation of the Water Services Act and some of the regulations promulgated under it, particularly the National Water Standards Regulations.

[38] Is it in the interests of justice to grant leave to appeal? This is the first time that section 27(1)(b) has been considered by this Court. The case is clearly important. All the parties seek leave to appeal or conditional leave to appeal against the judgment of the Supreme Court of Appeal at least in part. The novelty and complexity of the issues make it plain that the interests of justice test is met. Accordingly the applicants' application for leave to appeal should be granted, as should the first and second respondents' conditional application for leave to appeal.

[39] Should the new evidence tendered by the first and second respondents be admitted? And if it should be admitted, on what basis? The applicants are correct when they assert (in opposing the admission of the evidence) that the appeal is concerned with the lawfulness and reasonableness of the City's policy at the time the litigation was instituted. The evidence tendered now cannot on ordinary appellate principles be admitted for the purpose of answering that question.

[40] There are only two qualifications to this conclusion both of which flow from the fact that this case concerns the state's obligations in respect of a social right. The first qualification arises from the character of the obligation imposed upon government by section 27 which is to take measures "to achieve the progressive realisation" of the right.[30] This formulation of the positive obligation applies to most of the social and economic rights entrenched in our Constitution and is consistent with

[30] Section 27(2) of the Constitution, cited above at [19].

the principles of international law.[31] The concept of progressive realisation recognises that policies formulated by the state will need to be reviewed and revised to ensure that the realisation of social and economic rights is progressively achieved. In this case, the evidence tendered by the City and Johannesburg Water shows that the City's water policy, and in particular its policy of providing services to indigent households within the city, has been under constant review and has now been revised. It seems to me that the evidence may be admitted for the purpose of showing that the City accepts an obligation to continue to revise its policy consistently with the obligation to ensure progressive realisation of rights, and that it has done so.

[41] The second qualification is that in many cases concerning social and economic rights, evidence of this sort might be of assistance in determining the appropriate relief to be granted. That is not the case here, but it may often be so in disputes concerned

[31] Article 2(1) of the International Covenant on Economic, Social and Cultural Rights GA Res 2200A (XXI), 21 UN GAOR Supp. (No 16), 1966, U.N. Doc A/6316 is a source of the conception of the progressive realisation of economic, social and cultural rights. It provides that:

> "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

See also General Comment 3, "General Comment 3: The nature of States Parties' obligations (art 2(1))" Fifth Session, 1990, U.N. Doc E/1991/23 at para 9 where the concept of "progressive realisation" is helpfully explained as follows:

> "The concept of progressive realisation constitutes a recognition of the fact that full realisation of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. . . . Nevertheless, the fact that the realisation over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realisation of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d'être, of the Covenant which is to establish clear obligations for States Parties in respect of the full realisation of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources."

with social and economic rights. Given the conclusion to which I have come, however, it is not necessary to consider the application to tender further evidence on appeal.

[42] Should the Minister be granted condonation for late filing of the application for leave to cross-appeal? The main explanation for the delay is the fact that the national general elections were held about a month after the Supreme Court of Appeal handed down its judgment. The Minister notes that after the elections had been held and the new Cabinet appointed, it took some time for her as the new Minister to decide how to proceed in the matter. This explanation bears weight in my view. Moreover, I do not think any party has been materially prejudiced by the delayed application for leave to appeal, and I would therefore grant condonation. The third respondent's application for condonation of the late filing of her application for leave to cross-appeal should also therefore be granted.

[43] I turn now to discuss the two major issues raised. I shall deal first with the issues relating to the Free Basic Water policy and then with those relating to the installation of pre-paid water meters.

The Free Basic Water policy

[44] The applicants raised four arguments as to why the City's Free Basic Water policy should be declared invalid:

(a) The applicants contend that the Court should determine a quantified amount of water as "sufficient water" within the meaning of section 27 of the Constitution and that this amount is 50 litres per person per day. This contention requires the Court to consider the proper relationship between section 27(1)(b) and 27(2).

(b) The applicants contend (and the High Court and the Supreme Court of Appeal held) that the standard set in regulation 3(b) of the National Water Standards Regulations[32] is a minimum standard and that the Court is free to determine a higher amount. The first and second respondents argue, to the contrary, that unless the applicants seek to have regulation 3(b) set aside as unconstitutional, they may not ask the Court to set an amount different to that determined in the regulation.

(c) The applicants contend that the allocation of 6 kilolitres of free water per stand per month by the City is unreasonable within the meaning of section 27 of the Constitution and/or section 11 of the Water Services Act. The applicants point to the following considerations as evidence of unreasonableness: that the amount was based on a misconception; it is insufficient; it is inflexible; it allocates 6 kilolitres per month to both rich and poor; and it allocates per stand rather than per person.

[32] See [23] above for the text of regulation 3(b).

(d) The applicants contend that the City's indigent registration policy (which amongst other things now allows an additional 4 kilolitres per month to indigent households) is unreasonable because it is demeaning or, in effect, under-inclusive.

[45] The respondents contend that the applicants may not challenge the City's Free Basic Water policy without first making application for an exemption in terms of section 118 of the Water Services By-laws.[33] I shall deal with each of these issues separately.

The role of courts in determining the content of social and economic rights: the proper interpretation of section 27(1)(b) and 27(2) of the Constitution

[46] It will be helpful to start by considering the relationship between section 27(1)(b) and section 27(2) of the Constitution. In section 27(1), the Constitution creates a right of access to sufficient water. As with all rights, to understand the nature of the right, we need to understand the nature of the obligations imposed by it.[34] What obligations does it impose and upon whom? This case does not raise the obligations of private individuals or organisations. Johannesburg Water is wholly owned and controlled by the City of Johannesburg and is therefore, for the purposes of

[33] The text of section 118 is set out at n 62 below.

[34] See H Shue *Basic Rights* (Princeton University Press, 1996) who argues that to every basic right three duties attach: the duty to avoid deprivation; the duty to protect from deprivation; and the duty to aid the deprived. This typology corresponds with the notion of the negative duty to protect rights (the duty to avoid deprivation), the positive duty to fulfil rights (the duty to aid the deprived), as well as the intermediate duty to prevent others from interfering with rights. The question whether any particular right in our Constitution contains all three correlative duties as described by Shue is a matter in the first place of constitutional interpretation. See also the helpful discussion in S Fredman *Human Rights Transformed: Positive rights and positive duties* (Oxford University Press, 2008) at 69.

this case, an organ of state. It does raise the question of what obligations the right of access to sufficient water imposes upon the state.

[47] Traditionally, constitutional rights (especially civil and political rights) are understood as imposing an obligation upon the state to refrain from interfering with the exercise of the right by citizens (the so-called negative obligation or the duty to respect). As this Court has held, most notably perhaps in *Jaftha v Schoeman*,[35] social and economic rights are no different. The state bears a duty to refrain from interfering with social and economic rights just as it does with civil and political rights.

[48] The primary question in this case, though, is the extent of the state's positive obligation under section 27(1)(b) and section 27(2). This issue has been addressed by this Court in at least two previous decisions: *Grootboom*[36] and *Treatment Action Campaign No 2*.[37] In *Grootboom*, the Court had to consider whether section 26 (the right to housing)[38] entitles citizens to approach a court to claim a house from the state.

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[35] *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC) at paras 31-4. See also *Minister of Health and Others v Treatment Action Campaign and Others* [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) (henceforth referred to as *Treatment Action Campaign, No 2*) at para 46; *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at para 34 and *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at para 78.

[36] *Grootboom* above n 35.

[37] Cited above n 35.

[38] Section 26 of the Constitution states that:

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

Such an interpretation of section 26 would imply a directly enforceable obligation upon the state to provide every citizen with a house immediately.

[49] This Court concluded that section 26 does not impose such an obligation. Instead, the Court held that the scope of the positive obligation imposed upon the state by section 26 is carefully delineated by section 26(2).[39] Section 26(2) provides explicitly that the state must take reasonable legislative and other measures progressively to realise the right of access to adequate housing within available resources. In *Treatment Action Campaign No 2*,[40] this Court repeated this in the context of section 27(1)(a), the right of access to health care services:

> "We therefore conclude that section 27(1) of the Constitution does not give rise to a self-standing and independent positive right enforceable irrespective of the considerations mentioned in section 27(2). Sections 27(1) and 27(2) must be read together as defining the scope of the positive rights that everyone has and the corresponding obligations on the State to 'respect, protect, promote and fulfil' such rights."[41]

[50] Applying this approach to section 27(1)(b), the right of access to sufficient water, coupled with section 27(2), it is clear that the right does not require the state upon demand to provide every person with sufficient water without more; rather it requires the state to take reasonable legislative and other measures progressively to realise the achievement of the right of access to sufficient water, within available resources.

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[39] *Grootboom* cited above n 35 at para 38.

[40] Cited above n 35.

[41] Id at para 39.

[51] The applicants argued that the Court should determine the content of the right in section 27(1)(b) by quantifying the amount of water sufficient for dignified life, and urged that the appropriate amount is 50 litres per person per day. They further contended that the Court should hold that this is the content of the section 27(1)(b) right which the Court should declare and that the Court should then determine whether the state acted reasonably in seeking to achieve the progressive realisation of this right.

[52] This argument is similar to that advanced in earlier cases in this Court asserting that every social and economic right has a minimum core, a basic content which must be provided by the state. In international law, the concept of "minimum core" originates in General Comment 3 (1990) of the United Nations Committee on Economic, Social and Cultural Rights where the Committee stated that–

> "[it] is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education, is prima facie, failing to discharge its obligations under the Covenant."[42]

[53] In *Grootboom*, this Court rejected the argument that the social and economic rights in our Constitution contain a minimum core which the state is obliged to

[42] General Comment 3 cited above n 31 at para 10.

furnish, the content of which should be determined by the courts. The Court reasoned as follows:

> "It is not possible to determine the minimum threshold for the progressive realisation of the right of access to adequate housing without first identifying the needs and opportunities for the enjoyment of such a right. These will vary according to factors such as income, unemployment, availability of land and poverty. The differences between city and rural communities will also determine the needs and opportunities for the enjoyment of this right. Variations ultimately depend on the economic and social history and circumstances of a country. All this illustrates the complexity of the task of determining a minimum core obligation for the progressive realisation of the right of access to adequate housing without having the requisite information on the needs and the opportunities for the enjoyment of this right."[43]

[54] In *Treatment Action Campaign No 2*, as well, this Court refused to accept that section 27 of the Constitution had a minimum core content. It reasoned:

> "Although Yacoob J indicated that evidence in a particular case may show that there is a minimum core of a particular service that should be taken into account in determining whether measures adopted by the State are reasonable, the socio-economic rights of the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them. *Minimum core was thus treated as possibly being relevant to reasonableness under section 26(2), and not as a self-standing right conferred on everyone under section 26(1).*" (My emphasis) (Footnotes omitted.)[44]

[55] A little further on the Court added:

> "Courts are ill-suited to adjudicate upon issues where Court orders could have multiple social and economic consequences for the community. The Constitution

[43] *Grootboom* cited above n 35 at para 32.

[44] *Treatment Action Campaign No 2* cited above n 35 at para 34.

> contemplates rather a restrained and focused role for the Courts, namely, to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way, the judicial, legislative and executive functions achieve appropriate constitutional balance."[45]

[56] The applicants' argument that this Court should determine a quantity of water which would constitute the content of the section 27(1)(b) right is, in effect, an argument similar to a minimum core argument though it is more extensive because it goes beyond the minimum.[46] The applicants' argument is that the proposed amount (50 litres per person per day) is what is necessary for dignified human life; they expressly reject the notion that it is the minimum core protection required by the right. Their argument is thus that the Court should adopt a quantified standard determining the content of the right not merely its minimum content. The argument must fail for the same reasons that the minimum core argument failed in *Grootboom* and *Treatment Action Campaign No 2.*

[57] Those reasons are essentially twofold. The first reason arises from the text of the Constitution and the second from an understanding of the proper role of courts in our constitutional democracy. As appears from the reasoning in both *Grootboom* and *Treatment Action Campaign No 2*, section 27(1) and (2) of the Constitution must be read together to delineate the scope of the positive obligation to provide access to

[45] Id at para 38.

[46] The Court has declined to adopt a minimum core approach to socio-economic rights, despite the urging of some academic commentators. See, for example, D Bilchitz *Poverty and Fundamental Rights: the justification and enforcement of social and economic rights* (Oxford University Press, 2007).

sufficient water imposed upon the state. That obligation requires the state to take reasonable legislative and other measures progressively to achieve the right of access to sufficient water within available resources. It does not confer a right to claim "sufficient water" from the state immediately.

[58] As counsel for the Minister argued this understanding of the scope of the positive obligation borne by the state in terms of section 27 is affirmed by the duty of progressive realisation. The fact that the state must take steps progressively to realise the right implicitly recognises that the right of access to sufficient water cannot be achieved immediately. That the Constitution should recognise this is not surprising.

[59] At the time the Constitution was adopted, millions of South Africans did not have access to the basic necessities of life, including water. The purpose of the constitutional entrenchment of social and economic rights was thus to ensure that the state continue to take reasonable legislative and other measures progressively to achieve the realisation of the rights to the basic necessities of life. It was not expected, nor could it have been, that the state would be able to furnish citizens immediately with all the basic necessities of life. Social and economic rights empower citizens to demand of the state that it acts reasonably and progressively to ensure that all enjoy the basic necessities of life. In so doing, the social and economic rights enable citizens to hold government to account for the manner in which it seeks to pursue the achievement of social and economic rights.

[60] Moreover, what the right requires will vary over time and context. Fixing a quantified content might, in a rigid and counter-productive manner, prevent an analysis of context. The concept of reasonableness places context at the centre of the enquiry and permits an assessment of context to determine whether a government programme is indeed reasonable.

[61] Secondly, ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subjected to democratic popular choice.

[62] Just as *Grootboom* illustrated that what would be required of the state to achieve the right of access to adequate housing varies depending on context,[47] this case illustrates that the obligation in relation to the right of access to sufficient water

[47] Cited above n 35 at para 37 where the Court reasoned as follows:

> "The State's obligation to provide access to adequate housing depends on context, and may differ from province to province, from city to city, from rural to urban areas and from person to person. Some may need access to land and no more; some may need access to land and building materials; some may need access to finance; some may need access to services such as water, sewage, electricity and roads. What might be appropriate in a rural area where people live together in communities engaging in subsistence farming may not be appropriate in an urban area where people are looking for employment and a place to live."

will vary depending upon circumstance. As emerges from research by the World Health Organisation in 2003 to which two of the experts, Mr McLeod and Mr Palmer, referred, what constitutes sufficient water depends on the manner in which water is supplied and the purposes for which it is used. Water can be supplied in a variety of ways, including through reservoirs, boreholes, water trucks, neighbourhood taps and by piping it into houses. Even where the manner in which and the purpose for which it is supplied are clear – as in this case where we know that in Phiri piped water is generally provided to brick houses with water-borne sanitation – the expert evidence on the record provides numerous different answers to the question of what constitutes "sufficient water". Courts are ill-placed to make these assessments for both institutional and democratic reasons.

[63] In *Grootboom* and *Treatment Action Campaign No 2*, the focus of the Court's reasoning was whether the challenged government policies were reasonable. In both cases the Court identified deficiencies which rendered the policies unreasonable. In determining an appropriate remedy in each case, the Court took care not to draft policies of its own and impose them on government. So, in *Grootboom*, the Court did not order that each applicant be provided with a house, but required government to revise its housing programme to include "reasonable measures . . . to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations."[48]

[48] *Grootboom* cited above n 35 at para 99.

[64] In *Treatment Action Campaign No 2*, the Court did order the government to make Nevirapine available at clinics subject to certain conditions. But it did so because government itself had decided to make Nevirapine available, though on a restricted basis, and the Court found that there was no reasonable ground for that restricted basis. Moreover Nevirapine was, at least for a period, being made freely available to government by its manufacturer. In a sense, then, all the Court did was to render the existing government policy available to all. However, the Court made it expressly clear that government might revise and amend its policies if it needed to do so. Thus, the Court expressly provided that its order did not "preclude government from adapting its policy in a manner consistent with the Constitution if equally appropriate or better methods become available to it for the prevention of mother-to-child transmission of HIV."[49]

[65] The orders made in these two cases illustrate the Court's institutional respect for the policy-making function of the two other arms of government. The Court did not seek to draft policy or to determine its content. Instead, having found that the policy adopted by government did not meet the required constitutional standard of reasonableness, the Court, in *Grootboom*, required government to revise its policy to provide for those most in need and, in *Treatment Action Campaign No 2*, to remove anomalous restrictions.

[66] The Constitution envisages that legislative and other measures will be the primary instrument for the achievement of social and economic rights. Thus it places

[49] *Treatment Action Campaign No 2* cited above n 35 at para 135.

a positive obligation upon the state to respond to the basic social and economic needs of the people by adopting reasonable legislative and other measures. By adopting such measures, the rights set out in the Constitution acquire content, and that content is subject to the constitutional standard of reasonableness.

[67] Thus the positive obligations imposed upon government by the social and economic rights in our Constitution will be enforced by courts in at least the following ways. If government takes no steps to realise the rights, the courts will require government to take steps. If government's adopted measures are unreasonable, the courts will similarly require that they be reviewed so as to meet the constitutional standard of reasonableness. From *Grootboom*, it is clear that a measure will be unreasonable if it makes no provision for those most desperately in need. If government adopts a policy with unreasonable limitations or exclusions, as in *Treatment Action Campaign No* 2, the Court may order that those are removed. Finally, the obligation of progressive realisation imposes a duty upon government continually to review its policies to ensure that the achievement of the right is progressively realised.

[68] These considerations were overlooked by the High Court and the Supreme Court of Appeal which, without first considering the content of the obligation imposed upon the state by section 27(1)(b) and 27(2), found it appropriate to quantify the content of the right, despite the jurisprudence of *Grootboom* and *Treatment Action Campaign No 2*. In my view, they erred in this approach and the applicants' argument

that the Court should set 50 litres per person per day as the content of the section 27(1)(b) right must fail.

The relevance of regulation 3(b) of the National Water Standards Regulations

[69] As mentioned above,[50] section 9 of the Water Services Act empowers the Minister to prescribe compulsory national standards for the provision of water services. "Basic water supply" is defined in section 1 of the Act as "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." In regulation 3(b) of the National Water Standards Regulations,[51] the Minister determined the minimum standard for basic water supply services as 25 litres per person per day or 6 kilolitres per household per month. It is this minimum standard for basic water supply that is the basis of the policy adopted by the City and Johannesburg Water.

[70] National government should set the targets it wishes to achieve in respect of social and economic rights clearly. That is consistent with the founding values of our Constitution: government should be accountable, responsive and open.[52] The

[50] At [23] above.

[51] See full text of regulation 3(b) at [23] above.

[52] Section 1 of the Constitution provides that:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
>
> (b) Non-racialism and non-sexism.
>
> (c) Supremacy of the constitution and the rule of law.

minimum standard set by the Minister informs citizens of what government is seeking to achieve. In so doing, it enables citizens to monitor government's performance and to hold it accountable politically if the standard is not achieved. This also empowers citizens to hold government accountable through legal challenge if the standard set is unreasonable.

[71] A reasonableness challenge requires government to explain the choices it has made. To do so, it must provide the information it has considered and the process it has followed to determine its policy. This case provides an excellent example of government doing just that. Although the applicants complained about the volume of material lodged by the City and Johannesburg Water in particular, which covered all aspects of the formulation of the City's water policy, the disclosure of such information points to the substantial importance of litigation concerning social and economic rights. If the process followed by government is flawed or the information gathered is obviously inadequate or incomplete, appropriate relief may be sought. In this way, the social and economic rights entrenched in our Constitution may contribute to the deepening of democracy. They enable citizens to hold government accountable not only through the ballot box but also, in a different way, through litigation.

(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

[72] Thus, if the applicants contend that the amount determined in regulation 3(b) is unreasonable, they are entitled to challenge the regulation directly. The applicants did at the outset challenge the regulation, but when the High Court (on the basis of a concession by the Minister) held that the regulation constituted a *minimum* standard for basic water supply, they did not persist with their challenge.

[73] Having abandoned the challenge, the question arises whether the applicants are nevertheless entitled to challenge the City's Free Basic Water policy that is self-evidently based on the minimum water standards set by the Minister. The answer to this raises the difficult question of the principle of constitutional subsidiarity.[53] This Court has repeatedly held that where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution.[54]

[74] Does the subsidiarity principle apply here? It may not. The constitutional obligation imposed upon government by section 27(2) is to take reasonable legislative and other measures to achieve the right. If national government legislates for a

[53] For academic commentary on the principle, see AJ van der Walt "Normative pluralism and anarchy: reflections on the 2007 term" (2008) 1 *Constitutional Court Review* 77; Karl Klare "Legal subsidiarity and constitutional rights: a reply to AJ van der Walt" (2008) 1 *Constitutional Court Review* 129. See also, in a somewhat different context, L du Plessis "Subsidiarity: what's in the name for constitutional interpretation and adjudication?" (2006) 17 *Stellenbosch Law Review* 207.

[54] See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at paras 22-6 (in the context of the Promotion of Administrative Justice Act 3 of 2000 which gives effect to the constitutional right to administrative justice in section 33 of the Constitution); *MEC for Education, KwaZulu Natal and Others v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) at para 40 (in the context of section 9 of the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, the Equality Act) and *South African National Defence Union v Minister of Defence and Others* [2007] ZACC 10; 2007 (5) SA 400 (CC); 2007 (8) BCLR 863 (CC) at para 52 (in the context of labour legislation and the labour rights protected in section 23 of the Constitution).

national minimum, do other steps taken by other levels of government escape scrutiny as long as they comply with the national minimum, despite the fact that other spheres of government share the obligation to take reasonable steps? What national government has done is legislated a minimum. Does that mean that a municipality that has, for example, easily within its resources supplied that minimum to all, automatically acted reasonably? I am not sure that it does. However, given the conclusion I reach below, that the City's policy is in any event not unreasonable, it is not necessary to decide this question now. It can stand over for another day.

[75] Neither the High Court nor the Supreme Court of Appeal considered the principle of subsidiarity fully. They held that because regulation 3(b) is a minimum and does not seek to cover the field entirely, a challenge to the reasonableness of the City's conduct was competent.

[76] There can be no doubt that if the High Court and the Supreme Court of Appeal are correct and that a challenge to reasonableness still lies, it will in most circumstances be difficult for an applicant who does not challenge the minimum standard set by the legislature or the executive for the achievement of social and economic rights to establish that a policy based on that prescribed standard is unreasonable. In most circumstances it will be reasonable for municipalities and provinces to strive first to achieve the prescribed (and, in the absence of a challenge, presumptively reasonable) minimum standard, before being required to go beyond that minimum standard for those to whom the minimum is already being supplied. This is

consistent with this Court's jurisprudence in *Grootboom* where the Court held that a government policy may not ignore the needs of the most vulnerable.[55]

[77] I now turn to the question of whether the City's policy is unreasonable.

The reasonableness of the City's Free Basic Water policy

[78] It will be useful here to set out the City's policy at the time of the High Court hearing in December 2007. I have chosen the policy at that date because that is the date upon which its lawfulness and reasonableness was determined by the High Court. It is clear that the policy (particularly in relation to additional benefits afforded to poor households) has been evolving over several years and is no longer the same. It will be helpful to start by setting out section 3 of the City's Water Services By-laws, 2003:

> "(1) The Council may provide the various levels of service set out in subsection (2) to consumers at the fees set out in the schedule of fees, determined by the Council.
>
> (2) The levels of service shall comprise–
>
> (a) Service Level 1,
>
> which must satisfy the minimum standard for basic water supply and sanitation services as required in terms of the Act and its applicable regulations, and must consist of–
>
> (i) a water supply from communal water points; and
>
> (ii) a ventilated improved pit latrine located on each site;
>
> and
>
> (b) Service Level 2,

[55] Cited above n 35 at paras 44 and 63-6. Yacoob J, for a unanimous court, reasoned as follows at para 44:

> "To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right."

which must consist of–

(i) an unmetered water connection to each stand with an individual yard standpipe;

(ii) a water borne connection connected to either a municipal sewer or a shallow communal sewer system; and

(iii) a pour flush toilet which must not be directly connected to the water installation;

which service must be provided to consumer at the fees set out in the schedule of fees determined by the Council, provided that–

(aa) the average water consumption per stand through the unmetered water connection for the zone or group of consumers in the zone does not exceed 6kl over any 30 day period;

(bb) the water standpipe is not connected to any other terminal water fittings on the premises;

(cc) in the case of a communal sewer having been installed, a collective agreement has been signed by the group of consumers accepting responsibility for the maintenance and repair of the communal sewer; and

(dd) the Council may adopt any measures necessary to restrict the water flow to Service Level 2 consumers to 6kl per month.

(c) Service Level 3,

which must consist of–

(i) a metered full pressure water connection to each stand; and

(ii) a conventional water borne drainage installation connected to the Council's sewer.

(3) If a consumer receiving Service Level 2 contravenes subparagraph (aa) or (bb) to subsection (2)(b)–

(a) the Council may install a prepayment meter in the service pipe on the premises; and

(b) the fees for water services must be applied in accordance with section 6.

> (4) The level of service to be provided to a community may be established in accordance with the policy of the Council and subject to the conditions determined by the Council."

[79] From this it can be seen that the City has three different levels of water provision: Service Level 1 provides for communal taps; Service Level 2 for yard standpipes; and Service Level 3 for metered connection services. At Service Level 1, consumers do not pay for water at all. At Service Level 2, consumers pay a fixed fee. At Service Level 3, where consumers are metered for their usage, they pay according to their usage. The City strives, by regulating the water flow, to ensure that yard standpipes provided under Service Level 2 do not deliver more than 6 kilolitres of water per month. Every consumer in the City, whether rich or poor, who has a metered connection services gets the first 6 kilolitres of water free per month and must pay for water used in excess of that amount.

[80] There are two types of meters: credit meters and pre-paid meters. Pre-paid meters are only available in some areas, most notably Soweto, including Phiri, and consumers in those areas do not have a choice of a credit meter (although they do have a choice of yard standpipes). Similarly, as I shall describe in greater detail later, credit-meter consumers do not have the choice to install pre-paid meters. The tariff is determined according to a rising block tariff structure so that the more water used, the higher the per kilolitre tariff. The tariff structure also provides for credit meter users to be charged more than pre-paid meter users. The effect of the tariff structure is that heavy users of water cross-subsidise those who use less water.

[81] In addition to the 6 kilolitres monthly provided free of charge, accountholders whose households have a combined household income of less than twice the highest national government social grant plus R1 (R1 881)[56] are entitled to register on the City's indigent register. To be registered, accountholders must accept the installation of pre-paid electricity and water meters in their homes (where available). The effect of registration is that all arrears owed to the City are written off. From July 2007, those on the register were also entitled to an additional 4 free kilolitres of water monthly (making a total of 10 free kilolitres). However, at the time the answering affidavits were lodged in January 2007 only 118 000 households had registered as indigent households, despite at least 500 000 households apparently being eligible in the light of the income figures captured in Census 2001. All households with pre-paid meters were eligible for a single allocation annually of 4 kilolitres of water for emergency use.

[82] The applicants argue that the policy is unreasonable. They identify the following considerations as supporting this submission: the fact that 6 kilolitres per month is allocated to both rich and poor; the fact that the amount is allocated per stand rather than per person; the fact that the 6 kilolitre free water policy was based on a misconception in that the City did not consider that it was bound to provide any free water to citizens; that the 6 kilolitre amount is insufficient for large households and finally that the 6 kilolitre amount is inflexible.

[56] The amount of a social grant ordinarily increases annually. As of April 2009, social grants for pensioners amounted to R1 010 per month. From April to November 2008, social grants for pensioners amounted to R940 per month from which the calculation of R1 881 on the record appears to have been made.

Rich and Poor

[83] The first question is whether it is unreasonable for the City to provide the 6 kilolitres of free water to rich and poor alike. The City asserts that the fact that the benefit is afforded to all is reasonable for two reasons. First, it asserts that the rising block tariff structure means that wealthier consumers, who tend to use more water, are charged more for their heavier water usage. The effect of this is that the original 6 kilolitres that is provided free is counterweighed by the extent to which heavy water users cross-subsidise the free allocation. Secondly, the City points to the difficulty of establishing a method to target those households who are deserving of free water. This is a matter to which I return in a moment.[57] In my view, these reasons are persuasive and rebut the charge of unreasonableness on this ground.

Per household versus per person allowance

[84] Secondly, the applicants argue that the policy is unreasonable because it is formulated as 6 kilolitres per household (or accountholder) rather than as a per person allowance. Again the City presents cogent evidence that it is difficult to establish how many people are living on one stand at any given time; and that it is therefore unable to base the policy on a per person allocation. This evidence seems indisputable. The continual movement of people within the city means that it would be an enormous administrative burden, if possible at all, for the City to determine the number of

[57] See [98]-[102] below.

people on any given stand sufficiently regularly to supply a per person daily allowance. The applicants' argument on this basis too must fail.

Policy based on a misconception

[85] The third argument, which the Supreme Court of Appeal upheld, is that the policy is unreasonable because the City considered that it was not under an obligation to provide a specified amount of free basic water. What is clear from the discussion above is that the City is not under a constitutional obligation to provide any *particular* amount of free water to citizens per month. It is under a duty to take reasonable measures progressively to realise the achievement of the right. This the City accepts. The City is bound as a water service provider by the provisions of the National Water Standards Regulations[58] and the Tariff Regulations,[59] both promulgated in terms of the Water Services Act but it cannot be said it has acted inconsistently with these regulations. It cannot be said therefore that the policy of the City was based on a misconception as to its constitutional obligations, and I am unable to endorse the reasoning of the Supreme Court of Appeal in this regard. The applicants' argument on this score must also fail.

Insufficient for large households

[86] The fourth argument is that the 6 kilolitres per month per household is not sufficient in that it does not provide 50 litres per person per day across the board.

[58] Cited above n 8.

[59] Norms and standards in respect of tariffs for water services, *Government Gazette*, Gazette No 22472, Notice R652 of 2001 (20 July 2001) published in terms of section 10 of the Water Services Act 108 of 1997.

There is a welter of evidence on the record indicating that household sizes in Johannesburg vary markedly. According to the 2001 Census there are one million households in the City. Of those households, 51% have a household income lower than R1 600 per month. What is clear is that in general the number of people per household is dropping, and the number of households is increasing sharply. The 2001 Census showed a decline in household density from 3,8 people per household in 1996 to 3,2 in 2001.[60] The same period saw a 38,3% increase in the number of households. In addition, in 2001 only 20% of households had more than four people in them and only 2,5% of households more than nine.

[87] The picture is further complicated, however, by the fact that there is often more than one household relying on one water connection. This is especially so in townships where there is still an acute housing shortage, a legacy of apartheid urbanisation policy. Stand-holders permit tenants to erect homes in their backyards, normally against payment of rental. So, for example, the 2001 Census data showed there to be 2,1 houses per stand in Phiri with an average 8,8 people per stand. In some cases, there are far more people per stand. As we have seen, Mrs Mazibuko's household at the time of the launch of the proceedings, for example, comprised three separate households with a total of 20 residents. Two of those households paid Mrs Mazibuko low monthly rentals. On the other hand, there were only three residents on the stand of Mrs Malekutu, the fourth applicant. What emerges from the record, thus,

[60] There is a discrepancy in the evidence provided by the City as to the average household size. According to one deponent, Mr Seedat, it is 3,2 and according to another, Ms Brits, 2,9. Nothing material turns on this, but in applicants' favour, I have opted for the larger figure.

is that although the average household size is quite low, the variation in the number of occupants per water connection is significant. There are many water connections where there is only one resident, but there are some with as many as 20.

[88] Where the household size is average, that is 3,2 people,[61] the free basic water allowance will provide approximately 60 litres per person per day, considerably in excess of the amount the applicants urge us to establish as the sufficient amount of water as contemplated by section 27 of the Constitution. The difficulty is that many households are larger than the average, particularly where there is more than one family or house on a stand as is the case in Phiri and many other poor areas. Yet, to raise the free basic water allowance for all so that it would be sufficient to cover those stands with many residents would be expensive and inequitable, for it would disproportionately benefit stands with fewer residents.

[89] Establishing a fixed amount per stand will inevitably result in unevenness because those stands with more inhabitants will have less water per person than those stands with fewer people. This is an unavoidable result of establishing a universal allocation. Yet it seems clear on the City's evidence that to establish a universal per person allowance would administratively be extremely burdensome and costly, if possible at all. The free basic water allowance established is generous in relation to the average household size in Johannesburg. Indeed, in relation to 80% of households (with four occupants or fewer), the allowance is adequate even on the applicants' case.

[61] See above n 60.

In the light of this evidence, coupled with the fact that the amount provided by the City was based on the prescribed national standard for basic water supply, it cannot be said that the amount established by the City was unreasonable.

Inflexibility of the policy

[90] The final argument raised by the applicants is that the quantity selected by the City was inflexible in that it did not, at least originally, provide for any individualised variation to avoid the hardship that larger households or households with special needs might face in the light of the fixed free basic water allocation.

[91] The City's Free Basic Water policy was introduced in 2001. At the time it was one of only two municipalities in South Africa to have this kind of policy (the other being eThekwini Municipality). In 2002, the City introduced a Special Cases policy which provided relief to poor households in respect of refuse and sanitation charges, but such households had to apply for the relief, and the Special Cases policy did not provide a larger free water allocation. Mr Seedat, the Director of the Central Strategy Unit within the Office of the Executive Mayor of the City, describes the administrative difficulties that arose with the Special Cases policy and points to the fact that by 2004 only 30 000 of an estimated 150 000 eligible households had applied to be registered under it.

[92] In response to the difficulties with the policy, it was revised in October 2005 and renamed the Indigent Persons policy. This revision was seen as a short-term

interim measure until a revised social package policy could be devised. In terms of the Indigent Persons policy, all arrear debt was written off, but registered households had to accept pre-paid electricity and water meters. At the time the answering affidavits were lodged, 118 000 households had registered under the policy.

[93] Initially, indigent households were not afforded a further free water allocation under the new policy although the extension of the free water allocation to 10 kilolitres per month for registered indigent households was under discussion. On 6 December 2006, five months after the applicants launched their challenge, the City Mayoral Committee adopted interim measures to take effect from March 2007. In terms of the measures, registered indigent households would receive an additional 4 kilolitres of free water per month. The applicants acknowledge that those registered as indigent households received the additional 4 kilolitre allocation from July 2007.

[94] The Constitution requires that the state adopt reasonable measures progressively to realise the right of access to sufficient water. Although the free water policy did not contain any provision for flexibility when it was introduced in 2001, the record makes plain that the City was continually reconsidering its policy and investigating ways to ensure that the poorest inhabitants of the City gained access not only to water, but also to other services, such as electricity, sanitation and refuse removal. The extremely informative and candid answering affidavits lodged by the City make it plain that for the City the task was a challenging one, both administratively and financially.

[95] If the City had not continued to review and refine its Free Basic Water policy after it was introduced in 2001, and had taken no steps to ensure that the poorest households were able to obtain an additional allocation, it may well have been concluded that the policy was inflexible and therefore unreasonable. This would have been so, in particular, given the evidence that poorer households are also often larger than average and thus most prejudiced by the 6 kilolitre cap. However, the City has not set its policy in stone. Instead, it has engaged in considerable research and continually refined its policies in the light of the findings of its research.

[96] It may well be, as the applicants urge, that the City's comprehensive and persistent engagement has been spurred by the litigation in this case. If that is so, it is not something to deplore. If one of the key goals of the entrenchment of social and economic rights is to ensure that government is responsive and accountable to citizens through both the ballot box and litigation, then that goal will be served when a government respondent takes steps in response to litigation to ensure that the measures it adopts are reasonable, within the meaning of the Constitution. The litigation will in that event have attained at least some of what it sought to achieve.

[97] What is clear from the conduct of the City is that it has progressively sought to increase access to water for larger households who are prejudiced by the 6 kilolitre limit. It has continued to review its policy regularly and undertaken sophisticated research to seek to ensure that it meets the needs of the poor within the city. It cannot

therefore be said that the policy adopted by the City was inflexible, and the applicants' argument on this score too must fail.

Indigent registration policy

[98] The applicants also challenge the reasonableness of the City's indigent registration policy on two main grounds: the first is that it is demeaning for citizens to have to register as indigents; and the second is that because only approximately one-fifth of the households who are eligible to register are registered, the policy is unreasonable because it is under-inclusive.

[99] Mr Seedat described how the City has grappled with the question as to whether the provision of services should be on a universally available basis or on a means-tested basis. His affidavit neatly captures the advantages and disadvantages of both systems:

> "There are therefore two broad approaches to administering the current social package. One approach – a so-called universalist approach – gives benefits to all households regardless of income. This approach is easy (and therefore cheaper) to administer, but it has the disadvantage of not being targeted only at poor households. Wealthy households that do not really need subsidies also benefit. The second approach – a so-called means testing approach – evaluates whether applicants do or don't have the means to pay for a service. This approach targets the benefit effectively towards poor households, but it also has some disadvantages. One disadvantage is that it asks poor households to present themselves to the City as poor. This is often regarded as undignified, and it results in a situation where many potential beneficiaries prefer not to come forward. Another disadvantage is that means testing is extremely onerous administratively. The system is expensive to run. It is time consuming. It is open to fraud. And it also requires that the City has the ability to check whether the applicants' statement of income is correct or not, and

> keep this information continuously updated. The City must constantly make difficult decisions between systems which while more suitable, are prohibitively expensive to run and those that, while imperfect, are more cost-effective."

[100] This affidavit illustrates the dilemma faced by the City: a universalist approach is administratively simple and therefore cheap but it provides benefits to those who do not need them (something the applicants complain about); the alternative is a means-testing approach which requires citizens to apply and to prove that they are poor. This approach, while beneficial because it targets those most in need, may be under-inclusive because the application procedure is cumbersome or because citizens are unaware of it, or because they are unwilling to identify themselves as poor. The applicants attack both the universalist policy and the means-testing policy for the very reasons given by Mr Seedat. Their attack on the universalist policy has been dealt with above.[62] I now deal with the challenge to the means-testing policy.

[101] Although a means-tested policy requires citizens to apply for benefits and so disclose that they are poor, to hold a means-tested policy to be constitutionally impermissible would deprive government of a key methodology for ensuring that government services target those most in need. Indeed, nearly all social security benefits afforded by the national government are based on means-testing. If means-testing were to be found to be unconstitutional, government would only be permitted to afford social grants on a universal basis. Such a result would be costly and have the result that those who do not need social benefits would receive them. Means-testing

[62] At [83] above.

may not be a perfect methodology because it is under-inclusive, as Mr Seedat acknowledged, and it may be that those who apply for means-tested benefits dislike doing so, but these considerations must yield to the indisputably laudable purpose served by means-testing: it seeks to ensure that those most in need benefit from government services. In their affidavits, the applicants proposed no third way as an alternative to the provision of universal benefits or means-tested benefits. Nor did their counsel propose one in Court.

[102] What is clear is that the City recognises the dilemma posed by both a universalist policy and a means-tested one. The dilemma is not readily solved. The City continues to review and revise its policy in the light of its administrative experience and information gained from research. In so doing, it cannot be said that the policy as formulated at the time this matter was heard by the High Court was unreasonable. The applicants' argument in this regard must fail.

Exemption procedure under section 118 of the City's Water Services By-laws

[103] In the light of the conclusion to which I have come in relation to the challenge to the City's Free Basic Water policy, it is not necessary to consider whether the applicants had to lodge an application for an exemption in terms of section 118 before launching this litigation.[63]

[63] Section 118(1) of the By-laws provides for an exemption procedure in the following terms:

> "The Council may by resolution exempt any person from complying with a provision of these By-laws, subject to any conditions it may impose, if it is of the opinion that the application or operation of that provision would be unreasonable in the circumstances, provided that the Council may not grant an exemption from any section of this section that may result in–
>
> (a) the wastage or excessive consumption of water;

[104] I turn now to the second main issue in the case, the installation of the pre-paid water meters.

Installation of pre-paid water meters

[105] The applicants argue that the installation of the pre-paid water meters was unlawful on the following grounds–

(a) the installation of the pre-paid water meters by the first and second respondents was not authorised by any law;

(b) pre-paid water meters are unlawful because they result in unauthorised cut-offs in terms of section 4(3) of the Water Services Act or sections 9C and 11 of the By-laws; and

(c) the manner in which the pre-paid water meters were introduced was unlawful on one or more of the following grounds–

(i) they were introduced by unlawful threat;

(ii) they were introduced by an unfair process (in this regard we will need to consider whether the introduction of the meters constituted administrative action as contemplated by the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and whether the consultation provisions in the Local Government:

(b) the evasion or avoidance of water restrictions;

(c) significant negative effects on public health, safety or the environment;

(d) non-payment for services;

(e) the installation of pipes and fittings which are not approved in terms of these By-laws; or

(f) non-compliance with the Act or any regulations made in terms thereof."

Municipal Systems Act 32 of 2000 (the Systems Act) take precedence over PAJA's section 4 procedures);

(iii) their introduction violated the duty to "respect" the right of access to water in section 27(1) of the Constitution;

(iv) their introduction violated the duty to take reasonable measures to achieve the right of access to sufficient water (in this regard, we will need to consider whether the introduction constituted a retrogressive measure, or whether it impacted disproportionately on the most desperate);

(v) their introduction violated the right to equality in section 9(1) of the Constitution (i.e. the introduction of water meters results in differentiation that does not have a rational connection to a legitimate government purpose); and

(vi) their introduction violated the prohibition on unfair discrimination in section 9(3) of the Constitution (here too the question arises whether the applicants should have relied on the Equality Act[64] and not directly on the Constitution).

Legal authority to install pre-paid meters

[106] The applicants argued that there was no authority in law for the introduction of pre-paid water meters in Phiri. In answer, the respondents point to the City's Water

[64] Cited above n 54.

Services By-laws. Section 3 of the By-laws is the key provision which provides for different levels of water service.[65]

[107] It is clear, as we have seen above, that section 3(2) establishes three different levels of service provision. Each of the three levels of service provides for a package of water and sanitation services. The first level is the most basic and consists of a communal tap and communal ventilated pit latrines; the second level is a yard standpipe and a sewer connection or shallow communal sewer system with a pour-flush toilet; and the third level is a full metered water connection on each stand and a conventional water-borne sewerage system. Section 3(3) is the only provision that expressly mentions pre-paid meters and does so to provide that in certain circumstances they may be extended to Service Level 2 customers.

[108] The applicants (relying on the reasoning of the Supreme Court of Appeal) contend that because it is only section 3(3) that expressly mentions pre-paid meters, the only circumstances in which a pre-paid meter system may be installed are those mentioned in that section (i.e. where a consumer receiving Service Level 2 services contravenes the prescribed conditions). The respondents argue to the contrary that when section 3(2)(c)(i) refers to a "metered full pressure water connection", it refers to both credit meters and pre-paid meters and that pre-paid meters are therefore authorised by section 3(2)(c)(i).

[65] Section 3 of the Water Services By-laws is set out in full above at [78].

[109] The interpretation proposed by the respondents is textually permissible and is, in my view, fortified by four further considerations. The first is that section 3(3) creates a hybrid service level for Service Level 2 customers who default, by providing that they may have pre-paid meters installed but continue only to receive the level of sanitation contemplated in section 3(2)(b)(ii) and (iii). Section 3(3) therefore is not concerned with section 3(2)(c) at all, but only with the conditions in section 3(2)(b). If it were not for section 3(3), the City might not be permitted to install pre-paid meters for Service Level 2 customers because Service Level 2 is defined in a manner that does not include metering. Understanding section 3(3) in this way makes it plain that it does not have any direct effect at all on the proper interpretation of section 3(2)(c)(i) or the question whether that by-law authorises the installation of pre-paid meters.

[110] A second consideration is that section 95(i) of the Systems Act expressly requires local government to provide accessible pay points for "settling accounts or for making pre-paid for services".[66] The statute thus clearly contemplates that all municipalities shall have the authority to establish pre-paid systems for the provision of services. Given that one of the primary constitutional objects of municipalities is to ensure the provision of services to communities in a sustainable manner[67] and that

[66] Section 95(i) of the Systems Act provides:

> "In relation to the levying of rates and other taxes by a municipality and the charging of fees for municipal services, a municipality must, within its financial and administrative capacity–
> . . . .
> (i) Provide accessible pay points and other mechanisms for settling accounts or for making pre-payments for services."

[67] See section 152(1)(b) of the Constitution. Section 152(1) provides:

> "The objects of local government are–

section 95 of the Systems Act requires local government to provide for pay points for pre-payments, the installation of pre-payment meters to obtain payment against the provision of water services seems implicitly conferred by the Systems Act.

[111] What is more, section 8(2) of the Systems Act stipulates that a "municipality has the right to do anything reasonably necessary for, or incidental to, the effective performance of its functions and the exercise of its powers". This provision echoes the language of section 156(5) of the Constitution which likewise provides that municipalities have the right to exercise any power reasonably necessary for, or incidental to, the effective performance of their functions.[68] Given that the power to install pre-paid meters is one which is reasonably incidental to providing services to citizens in a sustainable manner that permits cost recovery, it is a power that is reasonably incidental to the effective performance of the functions of a municipality. To the extent that the text of section 3 of the City's Water Services By-laws can be read in a manner that results in the City having that power, that interpretation seems constitutionally appropriate in ensuring that the City has the powers that are reasonably necessary for, or incidental to, the performance of its functions.

(a) to provide democratic and accountable government for local communities;

(b) to ensure the provision of services to communities in a sustainable manner;

(c) to promote social and economic development;

(d) to promote a safe and healthy environment; and

(e) to encourage the involvement of communities and community organisations in the matters of local government."

[68] Section 156(5) provides:

> "A municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions."

[112] Thirdly, the installation of pre-paid meters is (so the record makes plain) an expensive and technically complex exercise. It seems improbable that the By-laws are premised on their use only in the relatively narrow circumstances of section 3(3). The fourth consideration that bolsters this approach is also textual. "Meter" is defined in the By-laws as "a water meter" and a "pre-payment meter" is in turn defined as a "meter that can be programmed to limit the flow of water into a water installation to the amount which has been previously purchased". These definitions make plain that when section 3(2)(c)(i) refers to "meter" that, purely definitionally, includes a pre-payment meter.

[113] The Supreme Court of Appeal adopted a different interpretation. In endorsing the applicants' interpretation of section 3(2), the Supreme Court of Appeal relied upon two considerations. The first was section 7 of the City's Water Services By-laws which requires consumers who apply for water services to pay a deposit calculated on the basis of the estimate of the cost of two months' water services. This, the Supreme Court of Appeal reasoned, indicates that the By-laws do not contemplate pre-paid meters at all because it would not be necessary for pre-paid meter users to pay a deposit, and indeed, the City does not require deposits when pre-paid meters are installed.[69] I accept that the By-laws could have been drafted more clearly to provide that deposits are not required from consumers who receive a pre-paid service. It does not follow from the fact that they were not so drafted that the City may not install pre-paid meters at all.

[69] See *Mazibuko* (Supreme Court of Appeal) cited above n 22 at para 53.

[114] Secondly, the Supreme Court of Appeal pointed to the anomaly arising out of the provisions of section 4(3) of the Water Services Act,[70] a matter I turn to in the next section of this judgment. Although I accept that the By-laws could be more clearly drafted, the anomalies identified by the Supreme Court of Appeal are not sufficient to outweigh the considerations I have mentioned in reaching the conclusion I have on the proper interpretation of the By-laws. For these reasons, therefore, the interpretation of section 3(2)(c)(i) of the City's Water Services By-laws proposed by the respondents is to be preferred to that proposed by the applicants and adopted by the Supreme Court of Appeal.

Do pre-paid meters result in unauthorised discontinuation of water supply?

[115] The applicants argued that pre-paid meters result in the unauthorised discontinuation of water supply. They rely on section 4 of the Water Services Act for this contention. Section 4(1) provides that water service providers must set the conditions for the provision of water services and section 4(2)(c)(iv) requires those conditions to provide for the limitation or discontinuation of water services. See Section 21(1)(f) of the Water Services Act contains a similar requirement.[71] Section 4(3) then provides:

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[70] Id at paras 54-6. Section 4(3) of the Water Services Act deals with the discontinuation of water supply.

[71] Section 21(1)(f) of the Water Services Act provides as follows:

> "Every water services authority must make by-laws which contain conditions for the provision of water services, and which must provide for at least–
>
> . . . .
>
> (f) the circumstances under which water services may be limited or discontinued and the procedure for such limitation or discontinuation".

"Procedures for the limitation or discontinuation of water services must–

(a) be fair and equitable;

(b) provide for reasonable notice of intention to limit or discontinue water services and for an opportunity to make representations, unless–

(i) other consumers would be prejudiced;

(ii) there is an emergency situation; or

(iii) the consumer has interfered with a limited or discontinued service; and

(c) not result in a person being denied access to basic water services for non-payment where that person proves to the satisfaction of the relevant water services authority that he or she is unable to pay for basic services."

[116] The City has adopted Water Services By-laws as required by section 4 and section 21 of the Water Services Act. Section 11 of the City's Water Services By-laws deals with the conditions for the limitation or discontinuation of water services.[72]

[72] Section 11 of the City's Water Services By-laws provides as follows:

"(1) Subject to the provisions of sections 9, 9A, 9B, 9C, 9D and 10, the Council may limit or discontinue water services provided in terms of these By-laws–

(a) at the written request of a consumer;

(b) if the agreement for the provision of services has been terminated in terms of section 10 and the Council has not received an application for subsequent services to the premises, within a period of ninety days of such termination;

(c) if the building on the premises to which services were provided has been demolished;

(d) if the consumer has unlawfully interfered with the water installation or service in any way;

(e) in an emergency;

(f) if there has been material abuse of the water services by the consumer or an occupier of the premises; or

(g) if the use of the water services is creating significant environmental damage or water pollution.

(2) The Council will, where a water service has been in terms of subsection (1) discontinued, only be obliged to restore it when the prescribed fees for the discontinuation and reconnection of the water service and any applicable deposit have been paid."

Section 11(1)(b) provides that water services may be limited or discontinued if the agreement for the provision of services has been terminated. The By-laws are quite clearly directed at the circumstances in which an accountholder with a credit meter has failed to pay amounts owing. Section 9C provides for final notice to be given to the customer and an opportunity to make representations, followed by the discontinuation of the water supply.[73] If the customer can establish that he or she is

[73] Section 9C provides:

> "(1) If a consumer fails to pay the amount due and payable on or before the final date for payment, the unpaid amount is in arrears and a final demand notice may be sent and may be hand delivered or posted, per mail, to the most recent recorded address of the consumer.
>
> (2) Failure to deliver or send a final demand notice does not relieve a consumer from paying such arrears.
>
> (3) The final demand notice must contain the following–
>
> (a) the amount in arrears and any interest payable, and the date by which such arrears and interest must be paid;
>
> (b) that the consumer may conclude an agreement with the Council for payment of the arrears amount in instalments within 14 days of the date of final demand notice;
>
> (c) that if no such agreement is entered into within the stated period that the water services will be discontinued or limited and that legal action may be instituted against any consumer for the recovery of any amounts 30 days or more in arrear, without further notice;
>
> (d) that the consumer's name may be made public, and may be listed with a credit bureau or any other equivalent body as a defaulter;
>
> (e) that the account may be handed over to a debt collector or attorney for collection;
>
> (f) proof of registration as an indigent consumer in terms of the Council's indigent policy must be handed in to the Council on or before the date for payment contemplated in paragraph (a); and
>
> (g) that an indigent consumer is only entitled to basic water services and that an indigent consumer will be liable for payment in respect of water services used in excess of the quantity of basic services.
>
> (h) an opportunity for the consumer to make representation in writing, on or before the date of payment contemplated in paragraph (a).
>
> (4) Interest may be levied on all arrears at a rate prescribed by the Council from time to time.
>
> (5) The amount due and payable by a consumer constitutes a consolidated debt, and any payment made by a consumer of an amount less than the total amount due will be allocated in reduction of the consolidated debt in the order determined by the Council.

(6) The Council may, after the expiry of the period allowed for payment in terms of the final demand notice, hand deliver or send, per mail, to the last recorded addr ess of the consumer–

(a) a discontinuation notice informing such consumer that the provision of water services will be, or has been discontinued on the date stated on the discontinuation notice;.

(b) a discontinuation notice must contain information advising the consumer of steps which can be taken to have the service re-connected.

(7) If representations made by a consumer are unsuccessful either wholly or in part, a final demand notice complying with the provisions of subsections (3)(a) to (g) must be given to the consumer in the manner provided for in subsection (1), stipulating that no further representations may be made.

(8) Subject to the provisions of the Act, and subject to the provisions of the Promotion of Administrative Justice Act, 2000 (Act No 3 of 2000), having been observed, save that the Council's reasons for its decision to act must be supplied within seven days after a request therefore; the Council may discontinue water services to a consumer if–

(a) full payment was not received within the period stated in the final demand notices referred to in subsections (3) and (7);

(b) no agreement was entered into for the payment of arrears in instalments;

(c) no proof of registration as an indigent was furnished within the period provided for in the final demand notice contemplated in subsections (3) and (7);

(d) no payment was received in accordance with an agreement for payment of arrears;

(e) no representations as contemplated in paragraph (h) of subsection (3) were made within the period provided for in the final demand notice, contemplated in subsection (3); and

(f) the representations referred to in subsection (7) have not been wholly acceded to by the Council.

(9) Where an account rendered to a consumer remains outstanding for more than 60 days–

(a) the defaulting consumer's name may be made public, and may be listed with a credit bureau or any other equivalent body as a defaulter; and

(b) may be handed over to a debt collector or an attorney for collection.

(10) A consumer will be liable for any administration fees, costs incurred in taking action for the recovery of arrears and any penalties, including the payment of a higher deposit.

(11) Where a body corporate is responsible for the payment of any arrears amount to the Council in respect of a sectional title development the liability of the body corporate shall be extended to the members thereof, jointly in proportion to the participation quota of each sectional title unit.

(12) No action taken in terms of this section due to non-payment will be suspended or withdrawn, unless the arrears, any interest thereon, administration fee, additional charges, costs incurred in taking legal action and any penalty, including the payment of a higher deposit, which are payable, are paid in full.

(13) Subject to the provisions of the Act, an agreement for payment of the arrears amount in instalments, entered into after the water services were discontinued, will not result in the water services being restored until the arrears, any interest thereon,

indigent, the customer will continue to be provided with a basic water supply (6 kilolitres per month) but any water beyond that amount will have to be paid for by the customer.[74] The By-laws dealing with limitation and discontinuation of water supply do not deal with this situation. They provide for the permanent discontinuation or limitation of the water supply to customers with credit meters. They are not concerned with the suspension of water supply when a customer needs to purchase more credit to maintain the water supply through a pre-paid meter.

[117] The applicants argue that the By-laws do not provide for the protections contemplated in section 4(3) of the Water Services Act in circumstances where a water supply is interrupted since a pre-paid meter suspends the provision of water to a customer until that customer purchases additional credit. It is clear that the By-laws do not expressly do so. The applicants argue that the consequence is that the installation of the meters is invalid. I am not sure that this is correct. It may be that if the applicants are correct that the By-laws do not provide protections required by section 4(3) in relation to the suspension of services when credit runs out on a pre-paid meter, this might found a challenge to the By-laws for failing to provide for the protections contemplated in section 4(3). Even if their argument is correct, it is not obvious that the result would be that the installation of pre-paid meters itself is unlawful, particularly given the conclusion above that the City has the power to introduce a pre-paid meter system.

> administration fees, costs incurred in taking legal action and any penalty, including payment of a higher deposit, are paid in full."

[74] Section 9C(3)(g).

[118] Be that as it may, the first question is whether, when section 4(3) speaks of "the limitation or discontinuation of water services", it refers to the suspension of water services that occurs when the free basic water allowance runs out and a customer does not top up the pre-paid meter by purchasing credit.

[119] The respondents argue that the suspension of water supply under a pre-paid credit meter system is not a discontinuation of a water supply within the meaning of section 4(3) of the Water Services Act. To determine what is meant by "discontinuation" in section 4(3), we need first to consider what the word itself means, and then consider that meaning in the light of the purpose of section 4(3).

[120] The ordinary meaning of "discontinuation" is that something is made to cease to exist.[75] The water supply does not cease to exist when a pre-paid meter temporarily stops the supply of water. It is suspended until either the customer purchases further credit or the new month commences with a new monthly basic water supply whereupon the water supply recommences. It is better understood as a temporary suspension in supply, not a discontinuation.

[121] The purpose of section 4(3) of the Water Services Act is to ensure that where a water service is limited or discontinued, that it will be done in a fair and equitable manner, that reasonable notice and an opportunity to be heard will be provided for,

[75] *The Concise Oxford Dictionary of Current English* (Clarendon Press, Oxford 1990) defines "discontinue" as "cease to or cause to cease to exist".

and finally that the discontinuation will not result in an indigent person being denied access to basic water services. The national minimum for basic water services is prescribed as contemplated in the Act by regulation 3(b) of the National Water Standards Regulations, discussed above. That amount is 6 kilolitres per household per month. In Johannesburg, under the City's Free Basic Water policy, the suspension of water services under a pre-paid system never results in indigent customers being denied access to basic water services which are supplied each month regardless of whether a customer topped up the water service during the previous month or not.

[122] Could section 4(3) mean that every time a water supply, provided through a pre-paid meter is about to be suspended because the credit purchased for the water supply is at its end, reasonable notice and an opportunity to be heard must be provided to the relevant customer by the municipality? This would, in my view, have a result that borders on the absurd. It would require the municipality to give advance notice and an opportunity to be heard, possibly several times a month or more to every person who has a pre-paid meter installed. For there is no reason why the reasonable notice should only apply when the suspension of the service arises because the basic water supply has been exhausted. On the applicants' argument it would arise every time the pre-paid water allowance has been consumed and it is time to purchase a further allocation.

[123] A right to be heard is provided for when a person's rights are materially affected. A customer in Johannesburg who has a pre-paid water meter understands

that the water meter will provide a certain quantity of water which may be exhausted; and that, at the latest then, the customer should purchase new credit to recommence the water supply or wait for the beginning of a new month. To require the City to provide notice and an opportunity to be heard each time a pre-paid allowance is about to expire, as the applicants contend, would be administratively unsustainable and in most cases serve no useful purpose. It is an interpretation of section 4(3) that could not have been intended.

[124] Accordingly, I conclude, in the light of the purpose of section 4(3) coupled with the ordinary meaning of "discontinuation", that section 4(3) regulates the circumstances where a water service provider intends to implement a permanent discontinuation or limitation of the water service. It does not apply to a discontinuation or limitation that may be undone by the purchase of pre-payment vouchers or the renewal of the basic water supply at the end of every month. Section 4(3) is thus not directed at the suspension in water services that occurs when either the monthly basic water supply has been exhausted or when the water purchased on credit has been used up.

Was the introduction of pre-paid meters unlawful on other grounds?

(a) Unlawful threat?

[125] When the City abolished the "deemed consumption" system of water service, it offered residents of Phiri a choice of either Service Level 2 (a yard standpipe with a restricted flow) or Service Level 3 with a pre-paid meter. Residents who did not

accept either of these service levels were to be left without any water supply at all. The applicants argue that the City therefore required residents to choose between Service Level 2 or 3 at the same time as unlawfully threatening to terminate their water supply.

[126] Any resident of the City who wishes the City to provide them with a water service is limited to the options the City offers. As long as those options are lawful, it cannot be said that by limiting the options, the City is forcing the resident to make a choice against the background of an unlawful threat. If the options are unlawful, then the resident may challenge them. If they are lawful, the resident cannot complain that they are forced to accept them. The applicants accept that the "deemed consumption" system of water supply was unsustainable and needed to be abolished and replaced by a better system. Their complaint lies in the options offered. If those options are lawful, that complaint has no force. But the options the City provided to the residents of Phiri were lawful. The argument going to unlawful threat cannot therefore be sustained.

(b) Unfair process?

[127] The applicants argue that the City's decision to introduce pre-paid water meters was a decision within the meaning of administrative action as defined in PAJA. Section 4(1) of PAJA stipulates that all administrative decisions which affect the public must be preceded by public participation.[76] Moreover, the applicants point to

[76] Section 4(1) of PAJA provides:

section 4(2)(e) of the Systems Act, which places a duty on the Council to consult the local community about the "level, quality, range and impact of municipal services" and the "available options" for the delivery of services.[77] The applicants argue that because the City did not hold a public enquiry or a notice and comment procedure before implementing the decision to introduce pre-paid meters, it failed to comply with PAJA.

[128] The response of the respondents is fourfold: first they contend that, because in their replying affidavits the applicants expressly foreswore reliance on PAJA, they are not entitled to rely on PAJA in these proceedings. Secondly, the respondents point out that, if the applicants are permitted to rely on PAJA, the application was brought well outside the 180 day time limit for such challenges. The application was launched in July 2006, nearly 18 months after Operation Gcin'amanzi in Phiri was completed and more than three years after the decision to approve Operation Gcin'amanzi was

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> "In cases where an administrative action materially and adversely affects the rights of the public, an administrator, in order to give effect to the right to procedurally fair administrative action, must decide whether–
>
> (*a*) to hold a public inquiry in terms of subsection (2);
>
> (*b*) to follow a notice and comment procedure in terms of subsection (3);
>
> (*c*) to follow the procedures in both subsections (2) and (3);
>
> (*d*) where the administrator is empowered by any empowering provision to follow a procedure which is fair but different, to follow that procedure; or
>
> (*e*) to follow another appropriate procedure which gives effect to section 3."

[77] Section 4(2)(*e*) of Systems Act provides:

> "The council of a municipality, within the municipality's financial and administrative capacity and having regard to practical considerations, has the duty to–. . .
>
> (*e*) consult the local community about—
>
> (i) the level, quality, range and impact of municipal services provided by the municipality, either directly or through another service provider; and
>
> (ii) the available options for service delivery".

taken by the City in May 2003. Thirdly, they argue that the decision to introduce pre-paid meters did not constitute administrative action but properly construed was a policy decision taken by the municipality within its executive powers. And finally, they argue that if the decision did constitute administrative action, the City in any event acted fairly.

[129] As described above,[78] Operation Gcin'amanzi was initiated and designed during 2002 by Johannesburg Water, the water services provider contracted by the City to provide water services to citizens. The project was developed in response to the problems faced with water provision in areas that had formerly been provided with water on a "deemed consumption" basis, and particularly in Soweto, which was responsible for the greatest volumes of unaccounted for water. Mr Still noted that Soweto was responsible for "unacceptably high water losses" and had a "runaway water supply problem". An outline of the proposed project was tabled and considered at meetings of the Johannesburg City Mayoral Committee in September and November 2002. In due course, Operation Gcin'amanzi was incorporated in Johannesburg Water's Business Plan for 2003 to 2005 and approved by the Johannesburg City Council at a meeting held on 28 and 29 May 2003. Johannesburg Water then implemented Operation Gcin'amanzi.

[130] Did the decision by the Johannesburg City Council to approve the implementation of Operation Gcin'amanzi constitute administrative action within the

[78] See [13]-[16] above.

meaning of PAJA? The decision to implement Operation Gcin'amanzi was authorised by a resolution of the City Council after receiving a full proposal from Johannesburg Water. As this Court has held in a series of earlier judgments,[79] in our constitutional order local government is recognised as the third sphere of government, and the Council is a deliberative body which exercises both legislative and executive functions. Where a decision is taken by a municipal council in pursuance of its legislative and executive functions, therefore, that decision will not ordinarily be administrative in character. This principle is recognised in paragraphs (*cc*) and (*dd*) of the definition of "administrative action" contained in section 1 of PAJA which expressly excludes the executive or legislative powers or functions of a municipal council.[80]

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[79] See *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at para 26 where the following was said:

> "Under the interim Constitution (and the 1996 Constitution) a local government is no longer a public body exercising delegated powers. Its council is a deliberative legislative assembly with legislative and executive powers recognised in the Constitution itself."

The Court continued at para 38 as follows:

> "The constitutional status of local government is thus materially different to what it was when Parliament was supreme, when not only the powers but the very existence of local government depended entirely on superior legislatures."

See also, for example, *City of Cape Town and Another v Robertson and Another* [2004] ZACC 21; 2005 (2) SA 323 (CC); 2005 (3) BCLR 199 (CC) at para 58.

[80] Section 1 of PAJA defines "administrative action" as follows:

> " . . . any decision taken, or any failure to take a decision, by–
>
> (*a*) an organ of state, when–
>
> (i) exercising a power in terms of the Constitution or a provincial constitution; or
>
> (ii) exercising a public power or performing a public function in terms of any legislation; or
>
> (*b*) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,
>
> which adversely affects the rights of any person and which has a direct, external legal effect, but does not include–

[131] When the Johannesburg City Council adopted the Business Plan of Johannesburg Water which includes operation Gcin'amanzi, it was exercising executive powers to determine how services should be implemented in the City. The applicants' argument that that decision constituted administrative action cannot therefore be sustained. It is not necessary in the light of this conclusion to consider the other arguments raised by the respondents to counter that contention.

[132] Although the applicants' primary attack is directed at the decision to implement Operation Gcin'amanzi, they also suggested at times that the manner in which the project was implemented was procedurally unfair. In particular, they complain that when Mrs Mazibuko was approached by the community worker regarding the

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(*aa*) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79(1) and (4), 84(2)(*a*), (*b*), (*c*), (*d*), (*f*), (*g*), (*h*), (*i*) and *(k*), 85(2)(*b*), (*c*), (*d*) and (*e*), 91(2), (3), (4) and (5), 92(3), 93, 97, 98, 99 and 100 of the Constitution;

(*bb*) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121(1) and (2), 125(2)(*d*), (*e*) and (*f*), 126, 127(2), 132(2), 133(3)(*b*), 137, 138, 139 and 145(1) of the Constitution;

(*cc*) the executive powers or functions of a municipal council;

(*dd*) the legislative functions of Parliament, a provincial legislature or a municipal council;

(*ee*) the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act No. 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;

(*ff*) a decision to institute or continue a prosecution;

(*gg*) a decision relating to any aspect regarding the nomination, selection, or appointment of a judicial official or any other person, by the Judicial Service Commission in terms of any law;

(*hh*) any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000; or

(*ii*) any decision taken, or failure to take a decision, in terms of section 4(1)".

implementation of the project it was not made clear to her that she had a choice between a pre-paid meter service under Service Level 3 and a standpipe under Service Level 2. In response, the City has lodged evidence outlining in great detail the manner in which the new system was to be implemented.

[133] Mr Rabe, then the project manager of Operation Gcin'amanzi, describes the process in some detail. His evidence is supported by the evidence of several ward councillors and by that of Mr Still, then executive director of Johannesburg Water, and Mr Singh, the current project manager of the Prepayment Business Unit of Johannesburg Water. Mr Rabe states that from July 2002, consultation processes were held through formal structures representing the community, particularly ward committees and meetings held by ward councillors. Meetings and workshops were held with all 43 ward committees in Greater Soweto as well as public meetings. In Phiri itself, there were public meetings hosted by the ward councillor, Mr Kunene, who lodged an affidavit. At one stage, public meetings were called twice monthly in Phiri to explain the project to community members. In addition to public meetings, the project employed 20 community workers from September 2003 to conduct house visits and explain the project to individual householders.

[134] This evidence establishes that the process followed in the implementation of the project was thorough and comprehensive. It reflects compliance with section 4 of the Systems Act. In reaching this conclusion, I accept that it may be that when Mrs Mazibuko was visited by the community worker to inform her of the project, she was

not informed of the choice she had between a pre-paid meter and a standpipe. If that is correct, she was not fully or properly informed. Even if this is accepted, it does not mean that the implementation of the project as a whole was unfair and that the project should for this reason be set aside. The relief that would flow would be directed at Mrs Mazibuko alone. We know that Mrs Mazibuko has, since the launch of this litigation, passed away. Nevertheless, should those residents who now live in what was Mrs Mazibuko's home wish to change their manner of water service provision to a yard standpipe, on the ground that that option was not disclosed to Mrs Mazibuko in 2005, that request would no doubt be considered by the City. For the rest, however, the applicants' arguments in this regard must fail. Having reached this conclusion it is not necessary to deal with the other arguments raised by the City and Johannesburg Water, particularly the question whether the applicants may rely on PAJA in circumstances where they foreswore reliance on PAJA in their replying affidavits.[81]

(c) A violation of the duty to respect the right of access to sufficient water?

[135] The applicants argue that because residents of Phiri were previously provided with water services on the basis of a deemed consumption tariff, the implementation of Operation Gcin'amanzi, with the installation of pre-paid meters, constituted a deprivation of their existing right of access to sufficient water. This result they said was in breach of the City's negative obligation not to impair the right of access to sufficient water. The applicants accept, however, that the system of deemed consumption invoicing was unsustainable and that it had to be changed.

[81] See discussion of the principle of constitutional subsidiarity, above n 53.

[136] Under the system of deemed consumption invoicing, no free basic water allowance was provided to residents. Residents had to pay a flat rate of R68,40 per month for their water supply. The question, therefore, is whether the introduction of a system whereby residents are now furnished with 6 kilolitres of free water monthly, followed by a subsidised tariff for water provision, constitutes an infringement of the negative right against interference with the right of access to sufficient water. In my view, it does not. The new system for the first time provided a free water allowance to all residents. In so doing, it cannot be said that it interfered with the right of access to sufficient water.

[137] Nor could the applicants successfully argue that, because in the past many if not most residents in deemed consumption areas did not in fact pay for their water, the introduction of a system that requires everyone to pay is unfair. The fact that residents did not pay for water in the past in breach of their obligations cannot mean that a new system that provides them with free water for the first time is an infringement of their right of access to sufficient water.

(d) An unreasonable measure in conflict with section 27(2) or section 11(1) of the Water Services Act?

[138] The applicants argue that the shift from the deemed consumption system of water supply to the new water provision policy constituted an unreasonable measure, in particular because it was retrogressive, thereby conflicting with the constitutional

obligation to progressively improve access to social and economic rights. In order to determine whether this argument is correct, it is necessary to compare what the deemed consumption system provided to citizens and what is furnished under the new system.

[139] As indicated above, the deemed consumption system was based on the assumption that consumers used 20 kilolitres of water per household per month. Consumers were charged a flat rate of R68,40 for this amount. In fact, as mentioned above, on average far more water was used, the average for Soweto being 67 kilolitres per household per month. Much of the excess water was not used by consumers but wasted through water leakages given the poor state of repair of the piping and connections in the deemed consumption areas. We also know that most consumers did not pay their water bills. The rate of payment of municipal bills was less than 10%. The high rate of non-payment however cannot be relevant to determining whether the supply of water under the new system is retrogressive or not. The systems must be compared on the assumption that people paid the charges levied for water.

[140] Ms Eales, the programme manager for water in the City's infrastructure department provides the 2006/2007 tariff for combined water and sanitation. According to this tariff, consumers under the pre-paid system (not registered as indigents) will pay R95,80 per month for water and sanitation if they use 20 kilolitres of water. Consumers still charged on the deemed consumption tariff will be charged a

flat rate of R131,25 for water and sanitation, more than 25 percent more than pre-paid meter customers. Pre-paid meter consumers on the Indigent Register will be charged R75,70 for water and sanitation if they use 20 kilolitres of water.

[141] The tariff for pre-paid meters at low levels of usage is well below cost. It costs Johannesburg Water R6,42 excluding VAT to provide a kilolitre of water to consumers. To provide 20 kilolitres of water per month thus costs the City R128,40 but only R95,80 (or R75,70 to indigent consumers) is charged to pre-paid users for both water and sanitation. It should be added that sanitation costs the City R2,50 per kilolitre, excluding VAT. The low tariffs charged to pre-paid meter users under the new system are cross-subsidised by the tariffs charged to heavier water users, and credit meter users are charged a higher tariff across the board.

[142] It cannot be concluded from this comparison that the move from the deemed consumption system to the pre-paid metered system with a free allocation of 6 kilolitres per month constituted a retrogressive step.

[143] The applicants also argue that the policy is unreasonable because it impacts most harshly on the poorest residents of the City. It is not clear from the record that this is so, but assuming that it is, it is clear that it can best be addressed by a policy which targets the poor and ensures that their needs are met. Simply increasing the allocation of free water across the board would benefit wealthier households as well as smaller households at significant cost without necessarily meeting the needs of the

poor. The City has thus chosen to establish an indigent registration policy to alleviate the plight of the poorest which, as I have concluded, passes constitutional muster.[82] This policy has been undergoing continual revision and refinement.[83] In the circumstances, it cannot be said that the policy is unreasonable because it fails to provide for the needs of the poor.

[144] Finally the applicants argue that the policy is unreasonable because it fails to provide for emergencies. The applicants point in particular to the risk of household fires. Mr Paki, the fifth applicant, recounts the tragic events that occurred on his stand in March 2005 when two children were burnt to death in a shack fire. At the time, the water was connected but the flow was not strong enough to put out the fire. The applicants point to the risk of a household fire breaking out while the water supply has been suspended until further pre-payment credits are purchased. Undoubtedly this is a matter of deep concern. The City states that ordinary household water pressure is not sufficient to be used to douse serious household fires. It states that the risk of fire is being addressed by the installation of fire hydrants throughout Soweto with sufficient pressure to combat house fires. The City also notes that in December 2006, as part of its ongoing revision of the indigents'registration policy, it established a 4 kilolitre per household annual emergency allocation which a household may obtain upon application. The City has thus taken reasonable steps to combat the risks of emergencies, steps which it continues to review and revise. The policy cannot be said to be unreasonable on this ground.

[82] See [91] above.

[83] Above at [92]-[97].

(e) An irrational measure in conflict with section 9(1) of the Constitution?

[145] The applicants then contend that the introduction of pre-paid meters is inconsistent with section 9(1) of the Constitution because the differentiation it draws between categories of people is not rationally connected to a legitimate government purpose.[84] It should be noted that the system of pre-paid meters at the time of the launch of this litigation had been introduced only in Soweto, one of the four deemed consumption areas of the City. Deemed consumption areas are townships established by the former apartheid government for black residents. The City chose not to introduce the system in Alexandra, Ivory Park or Orange Farm, other deemed consumption areas, because the unaccounted for water problem was most acute in Soweto.

[146] It is clear that the reason the City chose to introduce Operation Gcin'amanzi in Soweto was because it was there that the problem of unaccounted for water was at its most acute. According to Mr Still, the former executive director of Johannesburg Water, between one third and one quarter of all water purchased by Johannesburg Water, some 110 million kilolitres, was distributed in Soweto. Despite this only one percent of Johannesburg Water's revenue was generated from Soweto.

[84] See *Prinsloo v Van der Linde and Another* [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 25 where the Court reasoned:

> "In regard to mere differentiation the constitutional State is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional State. The purpose of this aspect of equality is, therefore, to ensure that the State is bound to function in a rational manner." (Footnote omitted.)

Unsurprisingly, both the City and Johannesburg Water considered this to be unsustainable.

[147] It cannot be said, therefore, that the introduction of pre-paid meters into Phiri, and Soweto more broadly, was irrational.

(f) Unfair discrimination?

[148] The applicants argue that because pre-paid meters were introduced in Soweto, but not into white suburbs, the system discriminates unfairly between poor, black South Africans and wealthy, white South Africans. A further complaint here relevant is that the new system did not afford residents of Phiri the choice to opt for credit meters. It is not necessary, in the light of the conclusion to which I have come, to consider whether this is a claim that should first have been made under the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.[85]

[149] As mentioned above, it is clear that the system of pre-paid water meters was introduced initially only into Soweto, because Soweto was the area where an enormous quantity of water was being distributed, but for which costs were not being recovered. The system was not introduced into other deemed consumption areas with poor black residents, such as Alexandra, Orange Farm or Ivory Park. It was also not introduced into white suburbs. From this, it is not clear that the applicants have established that the policy impacted more adversely on black and poor customers

[85] See the discussion of the principle of constitutional subsidiarity, above n 53.

given that other deemed consumption areas where poor black customers reside were not targeted.

[150] Even if it was discriminatory in impact, however, if it can be shown that the purpose for which the policy was introduced was not unfair for the purposes of section 9(3), then it will not be in conflict with the Constitution. To determine whether the discrimination was unfair it is necessary to look at the group affected, the purpose of the law and the interests affected.[86] In this case, the group affected are people living in Soweto who have been the target of severe unfair discrimination in the past. The purpose of the law was to eradicate severe water losses in the area of Soweto, a legitimate government purpose. The third issue is the extent to which the new policy was harmful in effect.

[151] The City conceded that, given the deep inequality that exists in South Africa as a result of apartheid policies, any differential treatment of townships or suburbs may have a differential, and arguably adverse impact on the ground of race, and thus constitute indirect discrimination on that ground.[87] On the other hand, given the deep inequality that exists, the City noted, different treatment might often be necessary or desirable. These contentions have merit. Courts need to be cautious when approaching the question of different treatment in these circumstances not to find

[86] See *Harksen v Lane NO and Others* [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) at para 54. See also *City Council of Pretoria v Walker* above n 3 at para 38.

[87] See *City Council of Pretoria v Walker* cited above n 3 where these issues also arose.

legitimate government action to constitute unfair discrimination. These concerns can readily be dealt with in the test for unfairness set by this Court in *Harksen*.[88]

[152] I turn now to the third consideration in the *Harksen* test for unfairness, the extent of the harm. It is not clear that the new water policy is harmful at all, in the sense that it is disadvantageous to those consumers who use it. I have set out above[89] a comparison between the new policy and the previous flat rate policy in deemed consumption areas and indicated that the new policy is not less favourable than the former policy. A similar comparison may also be drawn between the water service under Operation Gcin'amanzi and the service offered to credit-meter customers. Credit-meter customers are charged higher tariffs than pre-paid meter customers. So, pre-paid customers (who receive 6 kilolitres of free water) pay R95,80 per month for water and sanitation if they use 20 kilolitres of water while credit-meter customers pay R131,25 for the same amount.

[153] Secondly, if credit-meter customers fail to pay their water account, there are a range of severe consequences that are not visited upon pre-paid meter users. For example, interest may be charged on arrear amounts and the consumer may have his or her name listed with a credit bureau as a defaulter.[90] For indigent consumers, these are worrying measures which are avoided in a pre-payment system. From this

[88] See *Harksen* cited above n 86.

[89] Above at [138]-[142].

[90] Section 9C(3)(a) and (d) of the City's Water Service By-laws.

analysis, therefore, it is not clear at all that a pre-paid meter system is harmful in the sense that the service it provides is less beneficial than a credit-meter service.

[154] If we now consider the three matters relevant to the determination of fairness, we can see that although the group that is affected by the installation of pre-paid water meters is a vulnerable group, the purpose for which the meters are installed is a laudable, indeed necessary, government objective, clearly tailored to its purpose. Moreover, the difference between the pre-paid meter system and a credit meter system is not disadvantageous to the residents of Phiri. In the circumstances, it cannot be said that the introduction of a pre-paid water meter system in Phiri was unfairly discriminatory.

[155] Finally, the applicants complain that residents of Soweto were not provided with the option of a credit meter system. This, they assert, is evidence of the discriminatory character of the system. But it should be noted that the Implementation Policy for Prepayment Metering for Deemed Consumption Areas tabled before to the Johannesburg City Council in March 2005 makes it clear that credit-meter customers are not to be afforded a choice to move to pre-paid meters, even if they want to benefit from their reduced tariffs, unless certain stringent conditions are met. The City therefore affords effectively little choice to credit-meter users to switch to pre-paid meters just as it affords no choice to pre-paid consumers to switch to credit meters. Part of the reason for this must be the cost of installation of either system which is substantial.

[156] Underlying the preceding consideration of the unfair discrimination argument is the fact that government has the authority to decide how to provide essential services, as long as the mechanism it selects is lawful, reasonable and not unfairly discriminatory. The prohibition on unfair discrimination does not mean that government, in deciding how to provide essential services, must always opt for a uniform system if local circumstances vary. The conception of equality in our Constitution recognises that, at times, differential treatment will not be unfair. Indeed, correcting the deep inequality which characterises our society, as a consequence of apartheid policies, will often require differential treatment.

[157] I conclude that the applicants have not established that the pre-paid meter system is unfairly discriminatory.

[158] In the circumstances, I conclude that the applicants have not established that the introduction of pre-paid meters through Operation Gcin'amanzi was unlawful. Accordingly, the orders made by the Supreme Court of Appeal and the High Court must be set aside.

Litigating social and economic rights

[159] The outcome of the case is that the applicants have not persuaded this Court to specify what quantity of water is "sufficient water" within the meaning of section 27 of the Constitution. Nor have they persuaded the Court that the City's policy is

unreasonable. The applicants submitted during argument that if this were to be the result, litigation in respect of the positive obligations imposed by social and economic rights would be futile. It is necessary to consider this submission.

[160] The purpose of litigation concerning the positive obligations imposed by social and economic rights should be to hold the democratic arms of government to account through litigation. In so doing, litigation of this sort fosters a form of participative democracy that holds government accountable and requires it to account between elections over specific aspects of government policy.

[161] When challenged as to its policies relating to social and economic rights, the government agency must explain why the policy is reasonable. Government must disclose what it has done to formulate the policy: its investigation and research, the alternatives considered, and the reasons why the option underlying the policy was selected. The Constitution does not require government to be held to an impossible standard of perfection. Nor does it require courts to take over the tasks that in a democracy should properly be reserved for the democratic arms of government. Simply put, through the institution of the courts, government can be called upon to account to citizens for its decisions. This understanding of social and economic rights litigation accords with the founding values of our Constitution and, in particular, the principles that government should be responsive, accountable and open.[91]

[91] See section 1 of the Constitution above n 52.

[162] Not only must government show that the policy it has selected is reasonable, it must show that the policy is being reconsidered consistent with the obligation to "progressively realise" social and economic rights in mind. A policy that is set in stone and never revisited is unlikely to be a policy that will result in the progressive realisation of rights consistently with the obligations imposed by the social and economic rights in our Constitution.

[163] This case illustrates how litigation concerning social and economic rights can exact a detailed accounting from government and, in doing so, impact beneficially on the policy-making process. The applicants, in argument, rued the fact that the City had continually amended its policies during the course of the litigation. In fact, that consequence of the litigation (if such it was) was beneficial. Having to explain why the Free Basic Water policy was reasonable shone a bright, cold light on the policy that undoubtedly revealed flaws. The continual revision of the policy in the ensuing years has improved the policy in a manner entirely consistent with an obligation of progressive realisation.

[164] Secondly, the applicants took issue with the sheer quantity of information placed before the courts by the City and Johannesburg Water in particular. It is true that the volume of material was substantial, but none of it was irrelevant.[92] Reading it made plain that this was a government agency that has approached the challenges it

[92] Save for duplication of the United Nations Development Programme Report 2006 which was submitted both by the City and Johannesburg Water, on the one hand, and by the Minister for Water Affairs and Forestry on the other.

faces with an impressive seriousness of purpose and commitment to improving the lives of the residents of the City in a sustainable fashion. Unsurprisingly, given the scale and complexity of the challenge, the policy was not perfect. But that is not the constitutional standard. Indeed the City chose Phiri as a pilot project for Operation Gcin'amanzi so as to learn from it before rolling it out to other areas. That it has done.

[165] It is true that litigation of this sort is expensive and requires great expertise. South Africa is fortunate to have a range of non-governmental organisations working in the legal arena seeking improvement in the lives of poor South Africans. Long may that be so. These organisations have developed an expertise in litigating in the interests of the poor to the great benefit of our society. The approach to costs in constitutional matters means that litigation launched in a serious attempt to further constitutional rights, even if unsuccessful, will not result in an adverse costs order.[93] The challenges posed by social and economic rights litigation are significant, but given the benefits that it can offer, it should be pursued.

Concluding remarks

[166] In summary, this case arose out of the implementation of Operation Gcin'amanzi as a pilot project in Phiri in Soweto by the City of Johannesburg and its water service company, Johannesburg Water. The project was introduced because of

[93] For some of the cases in which public interest groups have played an important role see *Biowatch Trust v Registrar Genetic Resources and Others* [2009] ZACC 14; Case No CCT 80/08, 3 June 2009, as yet unreported. Available at http://www.saflii.org/za/cases/ZACC/2009/14.html, accessed on 6 October

the acute water losses experienced in Soweto coupled with the fact that the City was not recovering payment for water in the area. These problems had three basic causes: the pipes laid during the apartheid era had corroded; the City's deemed consumption tariff system was inaccurate in that far more water was in fact used than the deemed amount stipulated; and finally a culture of non-payment had arisen originally as part of the resistance to apartheid local government. All the parties before us, including the applicants, accepted that the old system of water supply in Soweto was unsustainable and had to be changed.

[167] Operation Gcin'amanzi involved relaying water pipes to improve water supply and reduce water losses and the introduction of a free basic water allowance (6 kilolitres per household per month based on the nationally prescribed basic water supply standard) as well as pre-paid meters for use of water in excess of the free basic water allowance. There was extensive consultation with communities about what the project would entail and how it would be implemented. The initial implementation caused unhappiness amongst some residents. By the time the litigation was launched 18 months after the Phiri pilot had been initiated the vast majority of residents had accepted pre-paid water meters and, according to a survey by the City, were satisfied with the new system. Moreover, the amount of unaccounted for water in Soweto had been successfully curtailed.

[168] The City has provided a detailed account of the project and its genesis. It has also made plain that its Free Basic Water policy has been under constant review since

it was adopted. In particular, the City has sought to ensure that those with the lowest incomes are provided, not only with an additional free water allowance, but also with relief in relation to the charges levied for other services provided by the City such as electricity, refuse removal and sanitation services. The City accepts that it is under an obligation to take measures progressively to achieve the right of access to sufficient water and its conduct so far indicates that it will take further steps to meet this obligation.

[169] I have thus concluded that neither the Free Basic Water policy nor the introduction of pre-paid water meters in Phiri as a result of Operation Gcin'amanzi constitute a breach of section 27 of the Constitution. Accordingly, the respondents' appeals succeed and the order made by the Supreme Court of Appeal should be set aside, as should the High Court order.

Costs

[170] Neither the first nor second respondents seek costs in this Court if they are successful. Nor apparently does the third respondent. In the circumstances, the proper order to be made is no order as to costs. In reaching this conclusion, I note that the respondents did make a contribution to the costs of the preparation of the appeal record in this Court. That was a fitting gesture. In the light of the fact that the cross-appeal has ultimately succeeded, the costs orders made by the High Court and Supreme Court of Appeal should also be set aside and replaced with no order as to costs.

Order

[171] The following order is made:

1. In respect of the applications for leave to appeal:
    (a) the application for leave to appeal by the applicants is granted;
    (b) the conditional application for leave to cross-appeal by the first and second respondents is granted;
    (c) the application for condonation by the third respondent for the late filing of the application for leave to cross-appeal is granted; and
    (d) the application for leave to cross-appeal by the third respondent is granted.
2. In respect of the appeals:
    (a) the applicants’ appeal is dismissed;
    (b) the first, second and third respondents’ cross-appeals are upheld;
    (c) the order made by the Supreme Court of Appeal is set aside; and
    (d) the order made by the High Court is set aside;
3. There is no order as to costs.

Moseneke DCJ, Cameron J, Mokgoro J, Ngcobo J, Nkabinde J, Sachs J, Skweyiya J and Van der Westhuizen J concur in the judgment of O’Regan J.

For the Applicants:	Advocate W Trengove SC and Advocate N Fourie instructed by the Centre for Applied Legal Studies / Wits Law Clinic and the Freedom of Expression Institute Law Clinic.
For the First and Second Respondents:	Advocate G Marcus SC and Advocate A Stein instructed by Bowman Gilfillian Attorneys.
For the Third Respondent:	Advocate PM Mtshaulana SC and Advocate K Pillay instructed by the State Attorney.
For the Amicus Curiae:	Advocate R Moultrie SC and Advocate MS Baloyi instructed by the Legal Resources Centre.