IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO. CCT 39/09
Supreme Court of Appeal Case No. 489/2008

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

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

and

THE CENTRE ON HOUSING RIGHTS AND EVICTIONS	Amicus Curiae

SERVICE AND FILING SHEET

HEREWITH PRESENTED FOR SERVICE AND FILING:

FIRST AND SECOND RESPONDENTS' RESPONSE TO THE *AMICUS CURIAE* SUBMISSIONS

DATED at JOHANNESBURG this 26th day of August 2009

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In the matter between :-

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FIRST AND SECOND RESPONDENTS' RESPONSE TO THE *AMICUS CURIAE* SUBMISSIONS

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1. The ultimate proposition for which the *amicus curiae* ("COHRE") contends in these proceedings is that the City and Johannesburg Water's failure to provide at least 50 litres of water per person per day to the applicants and other similarly placed residents of Soweto, is an infringement of international law.

> ***Amicus* Heads: p82 para 148.** See also **p49 para 88 and p51 para 105.1**

2. This is reinforced by the following contention by COHRE :

> *"It is submitted that international law and foreign jurisprudence provide useful guidance in relation to the applicants' challenge to the sufficiency of the amount of water supplied to the residents of Phiri without charge and support the order sought by the applicants in this regard."* (emphasis added)

> ***Amicus* Heads: p9 para 14**

3. In other words, it is COHRE's contention that international law and foreign jurisprudence require both:

3.1. the supply of 50 litres free water per person per day; and

3.2. that this is required to be provided immediately.

> ***Amicus* Heads: p42 para 74**

4. These are extraordinary submissions in respect of the content of international law and the law of foreign jurisdictions, made particularly so in view of the fact that as further indicated below neither COHRE (nor the applicants), despite repeated invitations to do so during the course of these proceedings, are able to point to a single case which has made a similar order to that sought or a single jurisdiction that provides more (or even an equivalent amount of) free water, and with the same levels of service and infrastructure, as that afforded to the applicants. The contention is simply unsustainable, for the reasons set out further below. The contention is all the more extraordinary in light of the fact that COHRE:

4.1. recognises in these proceedings that the concept of a justiciable minimum core, as articulated in General Comment 3 of the Committee on Economic, Social and Cultural Rights of the United Nations ("General Comment 3") was explicitly considered by the Constitutional Court in **Grootboom,** with explicit reference to General Comment 3, and rejected;

***Amicus* Heads: p38 para 64;** see also **p9 para 14**

Govt of the RSA v Grootboom 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169: paras 28-33

4.2. further recognises, as it must do, that General Comment 3 insofar as it places any obligation on State Parties, places an obligation at most to take reasonable steps to achieve the progressive realisation of an identified minimum core (it must

be borne in mind in this respect, as set out in the previous sub-paragraph, that our Courts have explicitly rejected a justiciable minimum core);

***Amicus* Heads: p43 para 76**

4.3. concedes that international instruments are conspicuously silent on what amount of water should be considered sufficient (or constitute part of a minimum core);

***Amicus* Heads: p45 para 81**

4.4. further concedes that there are differences even amongst experts as to what may be regarded as a sufficient basic water supply;

***Amicus* Heads: pp45-47 paras 82-83**

4.5. fails to point out that in General Comment 15, which is the most complete articulation of an international right to water, the reference to a "basic water supply" is "*at least 20 litres of safe water per person a day*"; and

General Comment 15: para 1 and fn 1

4.6. Fails to refer to the fact that (as discussed further below) the UNDP Report (2006) prepared around the time when these proceedings were launched, and to which COHRE has

referred repeatedly, expressly records that other than South Africa, very few countries, whether developed or developing countries, provide any free water at all.

UNDP Report: p85

AN INTERNATIONAL RIGHT TO WATER

5. While it may be assumed for the purposes of the present proceedings, it is by no means clear that there is in fact a right to water at international law. The High Court in the proceedings below rejected the contention that there is such a right.

High Court Judgment: vol 54 p5306 para 45

6. The best source of such a right is the International Covenant on Economic, Social and Cultural Rights ("ICESCR"). However, as COHRE correctly recognises, the ICESCR itself does not expressly recognise a right to water.

7. Authority for the existence of the right is therefore generally taken to be General Comment 15 of the Committee on Economic, Social and Cultural Rights of the United Nations ("General Comment 15") which considered the right to water to be implied in the ICESCR and in particular, in Article 11, para1.

ICESCR, in particular Article 11;

General Comment 15

8. Although COHRE asserts that the ICESCR has been "authoritatively interpreted" by General Comment 15 to recognise a right to water in international law, this is also by no means certain. Notably in this regard:

***Amicus* Heads: p21 para 38**

8.1. General Comments are not generally binding on States. They provide guidance as to the interpretation of an instrument specifically intended for State Parties to the instrument. They are, in any event, not primary sources of international law;

8.2. Conspicuously for the purposes of the present proceedings, although South Africa has signed, it has not ratified the ICESCR. The failure to ratify the ICESCR is undoubtedly deliberate in light of the South African Constitution and its express provision for socio-economic rights. At best therefore, from South Africa's perspective, the ICESCR read with General Comment 15, provides an argument for a right to water in customary international law;

9. It is paradoxical, in light of the above, that COHRE can submit that the right to water though not expressly recognised, is more developed in international law and foreign jurisprudence than in South African law.

***Amicus* Heads: p24 para 41**

10. Moreover, without the necessary elements of *usus* and *opinio juris*, the contents of General Comment 15 cannot automatically be regarded as encapsulating international law. *Usus* entails State behaviour that amounts to a constant and continuous practice and that evidences an intention to be bound by a relevant rule. (For the purposes of the *amicus's* submission it would require constant and continuous behaviour by States which overwhelmingly demonstrates an intention to be bound by the obligation immediately to provide 50 litres free water per person per day). This must be seen against the recordal by the UNDP in its 2006 report that very few countries other than South Africa provide any free water to their residents.

See generally: **Brownlie Principles of Public International Law (4th ed) pp4-9**

11. As set out further below, despite repeated invitations to do so, neither the amicus nor the applicants have been able to refer to a single instance of a State, let alone a developing water scarce State, which considers itself obliged to provide this quantity of water free. The two Argentinian cases upon which COHRE relied in the Supreme Court of Appeal and the High Court, one of which the High Court relied upon in its judgment, have apparently been withdrawn by the *amicus*. This was after it was pointed out in the proceedings before the SCA that the cases concerned in fact supported the provision of, at best, much lower quantities of free water; namely 20-25 litres per person per day

or 200 litres (ie 6kl) per household per month. Even though the *amicus* apparently no longer relies on these cases before this Court, it will be necessary to consider them briefly in that they formed part of the judgment in the High Court.

THE CONTENT OF AN INTERNATIONAL RIGHT TO WATER

12. Even on the assumption that there is an international right to water, the content and scope of such a right is by no means clear. What is certain is that the contention that such a right places an obligation upon States immediately to provide 50 litres of free water per person per day is unsustainable.

13. As set out above, the clearest possible source of the international right is General Comment 15. COHRE, however, concedes that neither General Comment 15 nor any other international instrument specifies an amount which should be regarded as sufficient for the purposes of right, let alone specifies a minimum core.

***Amicus* Heads: p45 para 81**

14. In fact, General Comment 15 itself, in the very first paragraph, by way of introduction notes that: "*Over 1 billion persons lack access to a basic water supply.*" In explaining what is meant by a "*basic water supply*" for the purposes of international law, General Comment 15 refers to the Word Health Organisation study which indicates that, "*1.1 billion persons did not have access to an improved water supply*

... able to provide at least 20 litres of safe water per person per day". (emphasis added) More than double that amount at that time lacked access to basic sanitation, defined as excluding waterborne sanitation.

General Comment 15 para 1 and fn 1

15. Plainly, the guiding assumption underlying General Comment 15 was that a "basic water supply" consists of a minimum of 20 litres per person per day. This is understandable since it accords with the Howard and Bartram study (considered further below) which was at that time the authoritative study undertaken specifically for the World Health Organisation.

16. Moreover, as set out above, even the *amicus* is required to concede that:

16.1. there is no consensus amongst experts as to what would constitute a "basic water supply" and hence what may give content to any concept of a "minimum core";

***Amicus* Heads: pp45-47 paras 82-83**

16.2. that the concept of an independent justiciable "minimum core" was considered and specifically rejected by the Constitutional Court in **Grootboom** (this must also be viewed in light of the

fact that South Africa has declined to ratify the ICESCR upon which General Comment is predicated);

***Amicus* Heads: p9 para 14**

Grootboom: paras 28-33

16.3. In **Grootboom** the court specifically noted that *"The differences between the relevant provisions of the Covenant and our Constitution are significant in determining the extent to which the provisions of the Covenant may be a guide to an interpretation of s 26."* If anything, these differences are only more marked in the case of section 27 and particularly the right to sufficient water since, as indicated, the ICESCR makes no express provision for a right to water at all, let alone using the same or similar wording as section 27 of the Constitution.

16.4. Even insofar as a minimum core was recognised in General Comment 3, General Comment 15 is explicit that the obligation upon States is not immediately to provide the basic service to all consumers. Rather, explicitly, under General Comment 15 the immediate obligation is to take steps towards the full realisation of Article 11, paragraph 1 and Article 12. Such steps "*must be deliberate, concrete and targeted towards the full realisation of the right to water*".

General Comment 15: para 17

17. COHRE's contention in light of this that a State may be required under General Comment 3 "*to immediately realise*" the "*minimum core*" is plainly unsustainable.

***Amicus* Heads: p42 para 74**

18. Notably, General Comment 15 requires that State Parties should "*adopt comprehensive and integrated strategies and programs to ensure that there is sufficient and safe water for present and future generations*" and that such strategies and programs may include, amongst other things, "*increasingly efficient use of water by end users ... reducing water wastage in its distribution ... response mechanisms for emergency situations ... and establishing competent institutions and appropriate institutional arrangements to carry out the strategies and programs*".

General Comment 15: para 28

19. Particularly notable is the fact that in defining the core obligations upon States with specific reference to General Comment 3, General Comment 15 (as noted above) refrains from stipulating any minimum basic amount of water but does indicate that amongst a State's core obligations is:

> "...
>
> *(f) to adopt and implement a national water strategy and plan of action addressing the whole population; the strategy and plan of action should be devised and*

periodically reviewed, on the basis of a participatory and transparent process ...;

(g) ...

(h) *to adopt relatively low-cost targeted water programs to protect vulnerable and marginalised groups."* (emphasis added)

20. Significantly, General Comment 15 emphasises that in terms of the ICESCR every State Party has a margin of discretion in assessing which measures are most suitable to meet its specific circumstances and that the obligation to take all appropriate means "*includes particularly the adoption of legislative measures*".

General Comment 15: para 45

21. In view of the above, there is no conceivable way upon which an immediate right to 50 kilolitres of free water per person per day can be derived from General Comment 15 (read with General Comment 3).

General Comment 15: para 37

22. As indicated above, the only reference to a content of sufficient water or a basic supply in General Comment 15 is that of the World Health Organisation Guidelines. These, as indicated in the papers and in the City and Johannesburg Water's heads of argument are premised on a minimum sufficient quantity of 20 litres per person per day within 100 and 1000 metres (or 5 to 30 minutes collection time).

City's Heads: p185 para 75.10.4;

Macleod: vol 36 pp3531-3534 paras 16-17

23. Moreover, in contending that SA is in breach of its international law obligations by failure immediately to provide 50 l/p/d free to the residents of Phiri, COHRE fails to explain, or properly to bring to the attention of the Court in referring to the UNDP Report (2006), the repeated and universal praise that is given to South Africa throughout the UNDP report. In terms of General Comment 15, the UNDP (like the WHO) is explicitly an institution tasked with advising States and monitoring implementation of State obligations under the ICESCR.

General Comment 15: para 60

United Nations Development Programme: Human Development Report (2006) (The UNDP report). The full report is lengthy and available at: http://hdr.undp.org/en/reports/global/hdr2006/

24. The UNDP report is extremely lengthy and thorough, recording states' progress toward securing a sustainable supply of water. The UNDP Report dedicates an entire section to the success of water provision in South Africa entitled "South Africa – acting on the right to water" and records in the opening paragraph "*Since apartheid was brought to an end, a rights-based legislative framework and public policies aimed at extending access to water have empowered local communities and reduced inequalities. The task is not yet complete—but there are important lessons for other countries.*"

UNDP Report: Box 1.6 p64

and states:

> *"The South African experience highlights three crucial policy ingredients for progress: a clear national plan with well defined targets, a strong national regulatory framework with devolution to local authorities and constant monitoring of performance and progress."*

UNDP Report: p64

25. Amongst many other things, the report praises South Africa's cross-subsidisation by means of the rising block tariff, its free water provision (the report by no means assumes that free water is standard and records that in most countries it is not) as well as South Africa's water saving initiatives. It is extremely significant in this regard that the report records that: "*Many countries apply a low tariff for an initial volume of water, though few countries follow South Africa's policy of free water*." (emphasis added) No other countries are named.

UNDP Report: p85

26. Durban (now eThekwini) in particular is identified for praise for providing 25 litres free water per person per day with a progressive increase in cost above this level. As is apparent from the report, this was clearly exceptional at the time when the report was prepared in 2006. This is significant in light of the evidence (considered in detail in the main heads of argument) of Macleod who was responsible for eThekwini's water policy (as well as Anthony Still, the then Managing Director of Johannesburg Water) who indicate that at the time when it was introduced in Durban and Johannesburg there was very little international experience in respect of the provision of free basic water

and who explain that Johannesburg compares very favourably with Durban. Both Durban and Johannesburg are well ahead of most other municipalities in SA let alone in other developing countries and, this was particularly evident at the time when these policies were first implemented. The report also records that South Africa is one of the few countries in the world that spends more on water and sanitation than on military budgets.

See for example:
UNDP Report: p11; p18; p20; p62; p63; p66; p72; p84; p85; p92; p98; p99; p101; p114; p135; p141; p181; p182; p236; p225; p226; p227

27. The UNDP Report records further that while more than 90 countries have the right to water in their constitutions,

> "*For the most part, this has been a matter of profound irrelevance to their citizens. Constitutional provision has not been backed by a coherent strategy for extending access to water. But South Africa has demonstrated how the human right to water can serve as a mechanism for empowerment and a guide to policy.*"

UNDP Report: p63

28. The report reiterates that: "*For international reporting purposes people are classified as enjoying access to water if they have available at least 20 litres a day of clean water from a source less than 1 kilometre from their home.*"

UNDP Report: p80-81

29. Significantly, the UNDP Report notes that mere connection to the water services grid in many developing states is at the cost of the consumer and that this cost is prohibitively high. Numerous examples are considered. In Manila, Philippines, just the cost of connecting to the utility represents about 3 month's income for the poorest 20% of households, rising to 6 months in Nairobi, Kenya. Many other cities simply refuse to connect certain consumers and make no attempt to do so.

UNDP Report, p10

30. The report notes that standpipes in particular are an important mechanism in reaching the poor with targeted water services. However, it criticises the use of standpipes in a number of places (such as Senegal and Manila, in the Philippines) recording that "*Subsidies are provided for constructing public standpipes and for connecting them to the grid. This arrangement has expanded access, but because standpipe users are charged at higher rates, unit costs are still more than three times the lowest domestic tariff.*" (emphasis added) In other words, in many jurisdictions, the poor are not only charged, but charged at higher rates, for services by means of a public standpipe (ie. a standpipe which is not even on their property). This is in stark contrast to the services provided by the City and Johannesburg water.

UNDP Report: Box 2.7 p 100

31. The report notes further that poor people in, for example, Jakarta, Indonesia and Manila, Philippines (neither of which Cities is water scarce compared to Johannesburg) as well as Nairobi, Kenya pay 5-10 times more for water per unit than those in high income areas in the same cities.

32. The report notes in a separate chapter entitled "The vast deficit in sanitation" that approximately 2.6 billion people do not have access to improved sanitation (two-and-a-half times the deficit of access to clean water). The report notes in this regard:

> *"Just reaching the Millennium Development Goal target of halving the global deficit against the 1990 coverage level would require bringing improved sanitation to more than 120 million people every year between now and 2015. And even if that were accomplished, 1.8 billion people would still be without access."*
>
> **UNDP Report: Chapter 3 p111 at p112**

33. "Improved sanitation" is not waterborne sanitation. Rather the report adopts the accepted definitions of improved sanitation as falling along a "*sanitation ladder*" extending "*from very basic pit latrines to improved pit latrines, pour-flush facilities using water and septic tanks, through to conventional sewers.*" Provision of sanitation services by means of improved pit latrines or pour-flush facilities, such as those provided by the City on LOS2 (or even LOS1), are therefore relatively high on the sanitation ladder as defined by the expert community and reflected in the UNDP report.

UNDP Report: Chapter 3 p111 at p113

34. Significantly, the report repeatedly praises South Africa's policies whilst also noting that countries like Kenya, Malawi and South Africa are already below the water-stress threshold.

UNDP Report: p135

35. Against this background (and there are many more examples canvassed in the UNDP report), if SA and the City of Johannesburg are, with the present policy, in breach of their obligations under international law then the bar will be raised so high that most developing countries will be failing by an extremely large margin to meet these obligations. The UNDP report reflects that in 2004, with more than 70% access to basic water services, South Africa falls into an extremely high band amongst all states but particularly developing states and that almost all developing countries fall below South Africa in sanitation provision; notably including China.

See: **UNDP Report: Figure 1.3 p36**

INTERNATIONAL AND FOREIGN CASES

36. As indicated above, COHRE has contended that "*the international jurisprudence on the right to water is significantly more developed and detailed*" than South African law.

***Amicus* Heads: p24 para 41**

37. COHRE seeks to rely upon a number of decisions in international law and foreign jurisdictions for its submissions. None of these decisions comes close to imposing an immediate obligation upon a State to provide 50 litres free water per person per day.

Decisions in international law

38. There is not a single decision referred to by COHRE in international law that purports to provide content to the right to sufficient water let alone asserting that such content must be immediately provided and be provided free.

Foreign domestic cases

39. COHRE submits that a number of the cases it refers to, but particularly "*the 1996 French case, and the Indian, and Malaysian cases provide an appropriate model for the protection of the water rights of the poor.*"

***Amicus* Heads: p 76 para 136**

40. As set out below these cases concern vastly differing circumstances to those at issue in this appeal and are of no assistance in the interpretation of the right to sufficient water under the Constitution.

"**The Indian Case**"

41. The Indian case referred to is the **Delhi Water** case. The case is not reproduced in the Amicus Bundle. (It can be obtained at the Commonwealth Legal Information Institute website www.commonlii.org)

> **Delhi Water Supply & Sewage Disposal Undertaking and Another v State of Haryana and Others (1996) SCC (2) 572 ("Delhi Water")**
> Full reference:
> **http://www.commonlii.org//cgibin/disp.pl/in/cases/INSC/1996/348.html?query=Delhi%20Water%20Supply**
>
> ***Amicus* Heads: p 76 para 136**

42. This case concerned a riparian dispute between two Indian States regarding access to the water in inter-State rivers governed by the Inter-State Water Disputes Act of 1956. The upper riparian State of Haryana was not releasing or maintaining a regular flow of water into the Jamuna river. The consequence was that the lower State of Delhi and particularly the City of Delhi was not receiving enough raw water from the river. The court ordered 2½ times the seasonal allocation from the river to be released from the Tajewala Head so that Delhi would get sufficient raw water during the period of March to June 1995.

43. Besides the fact that this case was concerned specifically with interim relief, it was concerned with a dispute between states concerning release of raw water from a river system and with the proper

interpretation of an Indian statute governing access to water between Indian states. The case simply has no application to the issues in question in this dispute let alone providing a basis upon which to shape the interpretation and application of a person's right to sufficient water under the Constitution.

"**The Malaysian Case**"

44. The Malaysian case referred to is the **Rajah Ramachandran** case.

> **Rajah Ramachandran v Perbadanan Bekalan Air Pulau Pinang Sdn Bhd, High Court of Malaya, Civil Suit No. 22-716-2003, 2 March 2004. (Malaysia) Available at: http://hba.org.my/laws/CourtCases/2004/rajah.htm**
> **(Amicus Bundle p25)**
>
> ***Amicus* Heads: p 76 para 136**

45. This case dealt with a consumer who refused to pay his water bill from the utility because his bi-monthly water bill had never exceeded RM25 and he was suddenly presented with a bill for RM3 047 for the two month period. The consumer was willing to pay his subsequent bills, which had returned to the normal range, but not the disputed bill. This overture was rejected by the utility concerned. The utility's explanation was that the meter on the disputed bill had been incorrectly read by the meter reader who assumed that it was one kind of meter rather than another. The court held that there was no satisfactory explanation as to why the meter had been repeatedly incorrectly read

during the period concerned and therefore ordered the restoration of the water service which the utility had disconnected.

46. The decision was based expressly on the interpretation of the relevant Malaysian legislation and on the specific facts of the case. It was held that the act of cutting off the supply in the particular circumstances was too harsh but the court emphasised that "*Nevertheless, it [the utility] must not hesitate to act appropriately where drastic action is warranted like when a consumer without any rhyme or reason refuses to settle his bill.*"

Rajah Ramachandran: para 13 (Amicus Bundle p26)

47. Conspicuously, as appears from this case, there is plainly no provision in Malaysia for free water supplied to a consumer irrespective of payment. Apart from this, the case self-evidently has no useful application to the issues in the present proceedings.

"The French" Cases

48. A French case relied upon by COHRE is

François X and the Union Fédérale des Consommateurs d'Avignon v Société Avignonnaise des Eaux, Tribunal de Grande Instance (District Court) of Avignon, Order No. 1492/95, 12 May 1995 (France) (Amicus Bundle p28)

***Amicus* Heads: p 70 para 128.1**

49. The judgment, as appears from the translation, is extremely terse however it appears that the case dealt with a married couple who refused to pay the entire amount of their water invoice following an amendment which established a new pricing scheme. The translation of the judgment appears to indicate that they agreed to pay a part of the invoice.

50. The amicus relies on this case for the proposition that that the French courts have found that "disconnecting water amounted to 'the deprivation of an essential element of life ... and constitutes an impediment and health risk which could only be remedied by the immediate reconnection of water supply'."

***Amicus* Heads: p 70 para 128.1**

51. The case apparently rested on the interpretation of the service contract concerned. Once again, it is apparent that in France, notably a developed country that does not experience difficulties of water scarcity, there is no provision for a free monthly allocation of water irrespective of non-payment. When the utility cut off the water, the family concerned was left with no water. This is in stark contrast to the present dispute. Apart from this, the case can offer little guidance as to the interpretation of our constitutional right to sufficient water.

52. The **Roanne case**, upon which COHRE also relies, similarly reflects that in France there is no provision for free water. No translation of this case is provided and COHRE appears to have derived the

reference to it from a single paragraph of a preliminary report from the UN Economic and Social Council (only a few paragraphs of the UN report has been provided and no translation of the case). The case appears to have noted only that, while charging the full price for water, an authority must also make allowance for special arrangements, exceptions and amendments (to the relevant legislation) such as through subsidies or provision for free water *"to ensure that the poorest citizens have access to drinking water and sanitation."*

***Amicus* Heads: p 70 para 128.2**

53. Notably the full preliminary UN Report (which does not form part of COHRE's bundle) makes clear that the context of this case is one in which the Commission notes with concern a growing trend in developed countries where there was an increasing incidence of poor people being cut off from any supply of water because the State in those countries provides no free water or subsidisation. Unlike in the present case, a termination of service in those jurisdictions entails that the consumers affected have no access to water whatsoever. The preliminary report therefore recommends that some subsidisation of water or free water should form part of the right to water without suggesting what the quantity of this free water should be (notably this was 2002 prior to the 2006 UNDP Report referred to above).

> **United Nations Economic and Social Council: Preliminary report submitted by Mr. El Hadji Guissé in pursuance of decision 2002/105 of the Commission on Human Rights and resolution 2001/2 of the Sub-Commission on the**

Promotion and Protection of Human Rights at para 24; paras 22, 33-34 and 41
Available at:
http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2002.10.En?Opendocument

54. Beyond this it is impossible to reflect meaningfully on this case and the City and Johannesburg Water sought the full translation of the case itself from the COHRE. COHRE has indicated that it has only the reference in the UN Document and that they have been unable to find the original judgment. COHRE has now provided the full Preliminary UN Report (2002) which is not included in the Bundle (a reference to this is provided above).

55. In addition both COHRE and the applicants rely on the decision of **R v Director General of Water Services** for the contention that PPMs should be found to be unlawful. This English decision is distinguishable on a number of fundamental grounds.

R v Director General of Water Services [1999] Env LR 114 (QBD 1998)

55.1. As the judgment indicates, budget payment units were not envisaged at all in the relevant legislation in force at the time;

55.2. The decision rested on the particular and close interpretation of the English legislation concerned and the precise nature of the "budget payment units". The English system was based upon the purchase of time and not volume. The court found

that the pre-payment water devices, known as 'budget payment units' ("budget units"), were "*not water meters because they do not measure the volume of water used*" (emphasis added)(p 3 of the decision). This is plainly different from the PPMs at issue in these proceedings.

55.3. The English case was not about free water at all. It is apparent from the decision that in the UK (despite being a developed country that is not comparably water scarce) there is no provision for a free allocation of water irrespective of non-payment. Accordingly, the "budget units" allowed connection to the water grid only for the time period purchased and in the event of non-payment there was no access to any water supply whatsoever. As a speech by a member of Parliament in the House of Commons sponsoring the bill which subsequently lead to the enactment of the UK Water Act 1998 outlawing the use of the budget units (as opposed to volumetric pre-payment meters) noted:

> *"I said at the beginning of my speech that they differed in one significant respect from traditional gas and electricity meters. The difference is that the vast majority of water pre-payment meters are not volumetric. Normally, when the customer charges up his water key or other pre-payment device, that does not involve his buying a certain quantity of water; he is buying a certain amount of time during which he is connected to the water supply."*
>
> **House of Commons 8 May 1996: Column 151 Water Meters quoted in Emanuele Lobina & David Hall "UK Water privatisation – a briefing"**

Public Services International Research Unit, at pp17-18
Available at: http://www.psiru.org/reports/2001-02-W-UK-over.doc

55.4. Thus, while they may operate similarly to the PPMs installed in Phiri in that they interrupt the provision of water supply services to a household upon the exhaustion of previously purchased credit for such services, the "budget units" serve a fundamentally different purpose to the PPMs at issue here. The PPMs are water meters as defined in section 1 of the City's Water Services By-Laws. We refer in this regard to the comprehensive discussion in the City and Johannesburg Water's main heads of argument;

55.5. There is no suggestion emanating from the judgment that the Budget Units provided the same kinds of extensive warnings as PPMs; and

55.6. The case has in any event now been superseded by UK legislation in the form of the Water Act of 1998 that was passed shortly after the decision (which was not appealed) and which prohibits use of these budget units.

Other foreign domestic cases

56. The *amicus* in previous proceedings sought to rely on a number of other cases from foreign jurisdictions in support of its contentions.

The high point of these cases is two decisions of the Argentinean Courts. Although COHRE no longer appears to rely on these cases after it was pointed out that the cases do not support the propositions for which COHRE contended in the High Court and the SCA, it is necessary to consider them briefly in that the High Court accepted COHRE's submissions on these cases and one of the cases is expressly relied upon in the judgment of the High Court.

High Court Judgment: vol 54 p5322-5323 paras 87-88

The Quevedo case

57. This case involved a cut-off of all water services to certain poor residents for non-payment. The applicants applied for an order reinstating their water service even though they were in arrears and had not paid for it.

> **Quevedo Miguel Angel y otros c/ Aguas Cordobesas S.A. Amparo, Cordoba City, Juez Sustituta de Primera Instancia y 51 Nominacion en lo Civil y Comercial de la Ciudad de Cordoba (Civil and Commercial First Instance Court). April 8, 2002**, reported in Centre on Housing Rights and Evictions, Legal Resources for the Right to Water; International and National Standards (2004), available at http://www.cohre.org/view_page.php?page_id=118.

58. The Court, notably upheld the right of the utility (in this case a private entity contracted to provide water services) to cut off or disconnect water services to the applicants for non-payment. The Court, however, "partially allowed" the applicants their relief by requiring that

the utility provide a minimum supply of 200 litres of potable water to each household per day. The evidence was that a household size was "*more or less two to eight people*". In other words, while permitting the disconnection of the services, the Court required the provision of a minimum of 25 litres per person per day.

59. This is the same amount as that provided free by the City and Johannesburg Water prior to the initiation of these proceedings and less significantly than the amount provided to registered indigents or those who make successful representations, or the amount provided under the Expanded Social Package by the City. Moreover, there is no indication in the judgment that any provision was made for representations over an above this amount or that any account was taken of larger households sizes.

60. Significantly, the Court's reasoning was based heavily on Argentinean substantive law and in particular the interpretation of a new Provincial Constitution.

61. Furthermore, the Court specifically emphasised particular contextual factors as providing a basis for its decision, most notably that a state of social emergency had recently been declared as a result of an economic crisis. In this regard the Court emphasised the "*factual and temporary circumstances*" in applying the regulatory framework.

62. The Court recognised that "*both the costs of delivery as well as the necessary investments, within the framework of the delivery of a public service, are rewarded by means of the payment of relevant fees*".

Quevedo: p14

63. Notwithstanding all of these factors, the Court ordered the provision of no more than that which the City has been providing since prior to the launching of these proceedings.

The Bautista case

64. COHRE relied in the High Court upon this Argentinean decision as requiring the provision of at least 200 litres of uncontaminated water per day per person.

Juez de 1era. Instancia y 8a Nominación en lo Civil y Comercial de la ciudad de Córdoba, Marchisio José Bautista y otros s/amparo, sentencia del 19 de Octubre de 2004 (Argentina)

65. COHRE did not provide a full translation of the judgment and when research was conducted it was found that the English summary presented appeared not to be accurate.

66. The critical portion of the decision in fact ordered 200 litres of safe drinking water per household per day (ie 6kl per month), not per person.

> See, for example, Winkler: **"Judicial Enforcement of the Human Right to Water – case law from South Africa, Argentina and India", LDG 2008 (1) at p19, line 58 (available at www.warwick.ac.uk/elg/lgd/2008_1/winkler)**

67. In any event, the facts of this case are critical and informative. The case concerned contamination of the Sukuia River due to the release of untreated sewerage upstream. The affected community was a community that had no access to the city's water services grid at all and were left to obtain their water by their own devices from the contaminated river. The court held that the city was required to provide each household with 200 litres of safe water each day (by tanker service). Furthermore, and most significantly, the Court apparently granted this relief only on an interim basis. It ordered that the city was required to provide the stipulated amount of water only until the contamination of the river had been resolved. By implication, once the contamination had been cleared up, the community would be required to resume collecting water from the river. There was no requirement of permanent connection to the city's water services grid.

68. It is submitted that COHRE is incorrect, in light of the above, to submit that foreign jurisprudence is significantly more developed in respect of the right to water than our own law or that the above cases can provide any useful guidance as to the development of the right under

our Constitution. It is significant that despite the fact that COHRE has searched far and wide there are no decided cases in foreign jurisdictions that are squarely on point in favour of the propositions for which the applicants and COHRE contend. This supports the laudatory findings reflected in the UNDP Report (2006) concerning the supply of water in South Africa as well as the respondents' contention that the applicants have been unable to point to a single jurisdiction, let alone a developing county in water scarce conditions, that does more than is encapsulated in the City's water policy.

COHRE'S RELIANCE ON INCORRECT FACTS

69. The *amicus* relies repeatedly on fundamentally mistaken factual premises. Some of the more important factual errors are the following:

69.1. COHRE repeatedly asserts that the residents of Phiri were given no choice of LOS2. Even the applicants now concede that a choice was given between LOS3 and LOS2 even if one of the applicants was not aware of it at the time;

***Amicus* Heads: p47 para 83; p51 para 95; p73 para131**

69.2. That there was no procedure for representations and not sufficient warning before the free water or water credits run out. We address this comprehensively in the main Heads of Argument.

***Amicus* Heads: p73 para 131**

69.3. That the residents of Phiri are worse off than they were previously under deemed-consumption and that the introduction of PPMs is therefore a retrogressive measure.

***Amicus* Heads: p63-67 para 114 -122**

Again the City and Johannesburg Water address this comprehensively in the Heads of Argument. The residents of Phiri previously had no free water whatsoever and were demonstrably worse off under the deemed-consumption system.

IMPROPER INTRODUCTION AND RELIANCE ON EXPERT SCIENTIFIC AND TECHNICAL EVIDENCE

70. Throughout their Heads of Argument COHRE repeatedly relies upon academic articles and scientific studies. Not only are these articles and studies not properly canvassed in the Heads of Argument, but COHRE has made no attempt to introduce this evidence through the mechanisms specifically provided for this purpose. The respondents, therefore, have had no opportunity to consider the facts and opinions relied upon and to place this evidence before their experts to obtain appropriate and considered comment.

See, for example, ***Amicus'*** **Heads: p66 paras 120-121 fn173-174; p34 para 59 fn89; p35 para 61 fn92; p52 para 97**

71. COHRE's further submissions regarding the procedural fairness of PPM's and the alleged retrogressive measures are dealt with exhaustively in the main heads of argument.

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Chambers
26 August 2009