IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 39/09

In the matter between:

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

and

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

CENTRE ON HOUSING RIGHTS AND EVICTIONS	Amicus Curiae

FILING SHEET

DOCUMENTS FOR FILING: *AMICUS CURIAE'S* HEADS OF ARGUMENT AND BUNDLE OF AUTHORITIES

DATED AT JOHANNESBURG ON THIS THE 19th DAY OF AUGUST 2009.

RP

NOMFUNDO GOBODO

Applicants' Attorney

LEGAL RESOURCES CENTRE

7TH floor, Bram Fischer House,

25 Rissik Street

Johannesburg

Tel: (011) 836 9831

Fax: (011) 836 8680

Email: nomfundo@lrc.org.za

Ref: 1022809J

TO: **REGISTRAR OF THE**
ABOVE HONOURABLE COURT

AND TO : **WITS LAW CLINIC**

Applicant's Attorneys

West Campus

University of the Witwatersrand

1 Jan Smuts Avenue

Braamfontein

Johannesburg

Tel: 011 717 8619

Fax: 011 717 1702

Ref: CALS/J Dugard/Mazibuko

CENTRE FOR APPLIED LEGAL STUDIES
UNIVERSITY OF THE WITWATERSRAND
PRIVATE BAG 3
P O WITS, 2050
REPUBLIC OF SOUTH AFRICA

19/08/09

AND TO: **BOWMAN GILFILLAN ATTORNEYS**

Attorneys' for the 1st and 2nd Respondents

165 West Street

Sandton

Tel: 011 669 9000

Fax: 011 669 9001

E-mail: c.tucker@bowman.co.za

Ref: C Tucker/S Gore 1124154/1124149

BOWMAN GILFILLAN INC.
RECEIVED WITHOUT PREJUDICE.
Signed: .....
Name: .....
Date: 19/8/19 Time: 0928

AND TO: **THE STATE ATTORNEY JOHANNESBURG**

11th Floor, North State Building

Cnr. Market & Kruis Streets

Johannesburg

Tel: 011 330 7600

Fax: 011 337 7180

E-mail: NeGovender@justice.gov.za

Ref: N. Govender

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: CCT39/2009
SCA Case No.: 489/2008

In the appeal 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*

AMICUS CURIAE'S HEADS OF ARGUMENT

Table of Contents

I. INTRODUCTION

COHRE and its role as an amicus curiae

1. The Centre on Housing Rights and Evictions ("COHRE") is an international non-governmental organisation with its head office in Geneva, Switzerland. COHRE has Special Consultative Status with the Economic and Social Council of the United Nations and Observer Status with the African Commission on Human and Peoples' Rights. The COHRE ESC Rights Litigation Programme works to promote and protect economic, social and cultural rights, including the right to water. COHRE also has a Right to Water Programme that has worked with governments and low-income urban communities in Argentina and Kenya on the implementation of the right to water through training, legal research and advocacy. The programme has also carried out training programmes for civil society organisations, legislators, municipal councillors and water and sanitation practitioners, and has published widely on international and national standards for the right to water and sanitation, on indicators, and on the practical measures required to implement the right. The COHRE ESC Rights Litigation Programme and the COHRE Right to Water Programme are working together in this matter.[1]

---

[1] COHRE has been assisted with legal research and analysis for this project by the International Human Rights Clinic (IHRC) of the Center for Human Rights and Global Justice at New York University School of Law. The international and comparative law research that forms

2. COHRE has been admitted as an *amicus curiae* in terms of directions issued by the Chief Justice on 13 July 2009 to address the issues that arise in the appeal in the context of international and comparative law on the right to water.[2]

3. As an international expert in socio-economic rights, COHRE believes that South Africa must take into account its obligations under various international human rights instruments, which together form a distinct right to sufficient, safe, physically accessible and affordable water at international law, and which must be properly taken into account in interpreting and enforcing South Africa's own constitutional obligations.

4. Due to the nature of these submissions, some of the international and foreign materials referred to may be difficult to obtain. Together with these submissions, the attorneys for the *amicus curiae* will therefore deliver a bundle containing a selection of sources, including sworn translations of the four foreign-language judgments that are relied on. Should the Court or any of the parties require access to any of the sources mentioned herein, we will be glad to furnish copies to them.

---

the basis of the arguments set out in these heads of argument was originally undertaken by Bret Thiele, Ashfaq Khalfan and Thorsten Kiefer of COHRE together with members of the New York University International Human Rights Law Clinic. We also acknowledge the considerable contribution of Lena Graber, a student at the George Washington University Law School while working as an intern at the Legal Resources Centre, Johannesburg during May – July 2007.

[2] Directions, 13 July 2009, vol. 77, 715. COHRE was admitted as an *amicus curiae* on a similar basis in both the High Court and the SCA.

The importance of water

5. The importance of access to sufficient water cannot be overestimated. In *Grootboom*, the Constitutional Court held that "[a] society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality".[3] These foundational values of South African society are denied not only to those who have no food, clothing, shelter and healthcare but also to those who lack sufficient water to meet the basic needs of daily life including drinking, cooking and flushing toilets. In a report to the United Nations Commission on Human Rights, access to water has been recognised as being critical to the realisation of human dignity.[4]

6. In practical terms, the importance of access to water is demonstrated by the facts of this case. The applicants have suffered indignities and extreme hardships because their access to sufficient water has been

---

[3] See *Government of the RSA v Grootboom and Others* 2001 (1) SA 46 (CC) ("*Grootboom*") para 44. See also *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC) ("*Soobramoney*") para 8.

[4] Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, fifty-sixth session, U.N.-Doc. E/CN.4/Sub.2/2004/20, 14 July 2004: "Report of Mr Guissé on the guidelines for the realization of the right to drinking water supply and sanitation", preamble, para 3: "Considering that all persons have the right to sufficient supplies of water to meet their essential needs and to have access to acceptable sanitation facilities that take account of the requirements of hygiene, human dignity, public health and environmental protection." See also: Committee on Economic, Social and Cultural Rights, Twenty-ninth session, 2002, U.N.-Doc. E/C.12/2002/11: General Comment 15, The Right to Water ("General Comment 15") para 1. This document is contained in the record at vol. 67, 188.

curtailed and, due to their extreme poverty,[5] they are unable to pay for more. They have been denied the most fundamental amenities necessary for a healthy, dignified life – flushing the toilet regularly, bathing on a routine basis, and having clean water for washing food, dishes, and clothes.[6]

7. Lack of water has meant that children are forced to go to school without baths or clean clothes.[7] Menstruating women endure indignities from being unable to wash, bathe, and flush the toilet while living in large households.[8] Important social and cultural activities, such as funerals,[9] have been disrupted.

8. Most importantly, lack of access to sufficient water has had severe health implications. Vital nutrition sources have been compromised because the applicants do not have sufficient water to grow their food

---

[5] For example, the total monthly income of the first applicant's household of 20 people was R1,300 and she alleged that after her free allocation of water ran out, they did not always have money to pay for more: Mazibuko FA, paras 73 & 103, vol. 1, 33 & 40.

51% of households in Johannesburg have an income of less than R1,600 per month and 18.75% have no income at all: Seedat AA, para 18.4, vol. 10, 927.

40% of Hansen's applicants in Phiri had monthly incomes between R5 and R1,000 and 23% have incomes lower than R200: Hansen "A case study of the socio-economic impacts of a corporatised water and sanitation service delivery regime in Phiri and Stretford Extension 4" paper submitted in partial fulfilment of the requirements for a Masters degree in International Environmental Science, Lund University, Sweden, 2005, JM2, vol. 48, 4764.

[6] Munyai FA, para 17, vol. 4, 342.

[7] Mazibuko FA, para 115, vol. 1, 44; Makoatsane FA, paras 7 – 8, vol. 4, 350.

[8] Makoatsane FA, para 18, vol. 4, 352.

[9] Makoatsane FA, para 17, vol. 4, 351.

gardens.[10] Some households have sometimes not had enough water to drink[11] and have been forced to make difficult choices between water and food. Vital nutrition sources have been compromised because the applicants do not have sufficient water to grow their food gardens.[12]

9. Many of the applicants and members of their households have chronic medical conditions.[13] Individuals lack water to clean infections and have suffered gangrene and even death.[14] According to Ian Palmer, the respondents' own expert, the average water needs of a person living with HIV/Aids are approximately twice that of a healthy person[15] and those who are sick with serious illnesses and who cannot control their bodily functions have been forced to lie in their own filth because of insufficient water.[16] The need to travel 3 kilometres per day or more to obtain additional water in wheelbarrows[17] has detracted from the ability of care-givers to look after sick members of their households, as well as to participate in activities outside the home.

---

[10] Mazibuko FA, para 117, vol. 1, 44.

[11] Mazibuko FA, para 116, vol. 1, 44.

[12] Mazibuko FA, para 117, vol. 1, 44.

[13] Ms Mazibuko had arthritis and high blood pressure; her mother suffers from diabetes, high blood pressure, and heart trouble; her sister moved in with her four children after a stroke: Mazibuko FA, para 69, vol. 1, 32. Ms Munyai's niece passed away as a result of an HIV-related illness in April 2004: Munyai FA, para 5, vol. 4, 340 - 341.

[14] Ms Makoatsane's father suffered a stroke and a gangrene infection in his foot until he died on 14 February 2005: Makoatsane FA, paras 4 & 14 – 16, vol. 4, 349 & 351.

[15] Palmer AA, para 8.17.2, vol. 38, 3796.

[16] Munyai FA, para 15, vol. 4, 342.

[17] Mazibuko FA, para 91, vol. 1, 31; Munyai FA, para 14, vol. 4, 342.

10. In one case, water being supplied through a pre-payment meter ran out while the residents were trying to fight a fire. Two children burnt to death.[18]

Summary of COHRE's submissions

11. COHRE submits that section 27 of the Bill of Rights, which specifically establishes the right to have access to sufficient water, must be read in the context of the substantive right to water at international law. This right must be respected, protected and fulfilled by the State in order to protect the fundamental values of dignity, equality and freedom. In particular, it is submitted that the installation of prepaid meters and the limitation on free water available to the residents of Phiri contravenes the respondents' constitutional and international law obligations.

12. In section II of these heads of argument, we examine the principles that should be applied by this Court in considering the international and comparative law that COHRE wishes to bring to the Court's attention.

13. We then introduce (in section III) the right to water at international law, which is enshrined in the International Covenant on Economic, Social and Cultural Rights as interpreted and defined by the 2002 General

[18] Paki FA, paras 10 - 14, vol. 4, 359 – 360.

Comment 15 of the United Nations Committee on Economic, Social and Cultural Rights entitled "the Right to Water" ("General Comment 15"), as well as the more recent adoption by the U.N. Sub-Commission on Human Rights (Sub-commission on the Promotion and Protection of Human Rights) of its "Guidelines for the realisation of the right to drinking water supply and sanitation" ("the UN Sub-Commission Guidelines").

14. Section IV deals with the positive aspect of the right to water, namely the obligation on the State to progressively realise that right. 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. It is argued that although the South African courts have rejected the notion of an immediately justiciable minimum core obligation, the recognition, in international law, of a minimum core content of the right to water is a relevant consideration and a useful indicator in determining what might be regarded as reasonable conduct by the State. In particular, it is argued that failure to provide the basic minimum amount of water that is required for survival with dignity should be regarded as presumptively unreasonable in the absence of a high threshold of justification by the respondents. Any such justification should incorporate a stringent assessment of available resources and a proportionality examination. It

is further argued that the State's obligation to act reasonably in progressively realising the right to water means that its responsibilities go further than ensuring access to the "dignity standard" where resources permit this.

15. Apart from the positive obligations of the State, the right to water encompasses a negative component. Interference with existing access to water constitutes an infringement of the right of access to water, and is only justifiable in terms of the stringent requirements of the general limitations clause contained in section 36 of the Constitution.[19] In Section V, it is submitted that this negative aspect of the right is repeatedly infringed by the operation of pre-payment meters, which cut off water supplies when consumers are no longer able to pay for water over and above the amount provided free of charge. In addition, it is submitted that the decision to implement pre-payment meters constituted an impermissible retrogressive measure under international law. It is noted that the obligation placed on the respondents to justify these infringements resonates with international and foreign law.

16. Finally, COHRE will draw the attention of the court to international law jurisprudence and comparative law that is relevant to the applicants' contentions that the implementation and operation of prepayment

---

[19] *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 paras 31 – 34.

meters is procedurally unfair (dealt with in section VI) and is discriminatory (section VII).

The relevant facts

17. At this stage, the factual matrix upon which this court will base its decision is not clear. The respondents claim that over the course of the litigation, their free basic water policy has undergone considerable change and development. Subsequent to the judgment of the Supreme Court of Appeal, the respondents have applied for leave to adduce additional material regarding the content and operation of their free basic water policy, in particular the amount of water that is provided without charge to those who cannot afford it. This application is opposed by the applicants.

18. The attitude of this Court to the reception of the new material will have important consequences for the determination of the applicants' various causes of action, some of which (for example those founded on the Promotion of Administrative Justice Act and the doctrine of legality) do not, and cannot, fall within the purview of these submissions on international and foreign law, and upon which the *amicus curiae* takes no position. In the circumstances, we have attempted as far as possible to present the international and foreign material in a manner that will be of assistance to the Court irrespective of the conclusions that may be

reached about which facts are applicable to the determination of the appeal.

II. THE DUTY TO CONSIDER INTERNATIONAL AND FOREIGN LAW

19. Under the South African Constitution, courts "must prefer any reasonable interpretation of ... legislation that is consistent with international law over any alternative interpretation which is inconsistent with international law"[20] and, specifically in the context of interpreting the rights in the Bill of Rights, courts are obliged to "consider international law".[21]

20. As recognised by Tsoka J in the High Court,[22] these provisions oblige South African courts, in considering constitutional rights violations such as those alleged in this case, to refer to, consider and apply a variety of international legal sources insofar as they have a bearing on the right to water.

---

[20] Constitution, s 233.

[21] Constitution, s 39(1)(b).

[22] High Court Judgment, para 31, vol. 54, 5301 – 5302. The Supreme Court of Appeal also relied on international law in the course of its judgment: SCA Judgment, paras 17 and 28, vol. 70, 12 and 17.

Customary international law

21. In the first place, section 232 of the Constitution stipulates that customary international law "is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament". As will be seen below, the international right to water is underpinned by customary international law provisions such as article 25 of the Universal Declaration of Human Rights ("the UDHR").[23]

Binding and persuasive international treaties

22. Secondly, the Constitution provides that signed and ratified treaties (i.e. treaties that have been approved by Parliament in terms of section 231(2)) become domestic law once enacted by national legislation.[24] In such circumstances, the treaty in question is directly binding on the State, and conduct in violation of it is unlawful and justiciable in a South African court.

23. Thirdly, where a treaty has been signed and ratified, but not enacted into law in terms of section 231(4), it is binding and directly enforceable

---

[23] Universal Declaration of Human Rights, GA-Res. 217 (III), 3 UN-GAOR, 71, UN-Doc. A/810 (1948). Although there is debate around the question of the ascertainment and proof of international customary law, the Courts have consistently recognised that the provisions of the UDHR do in fact comply with the requirements of *usus* and *opinio juris* for it to be regarded as binding customary law in South Africa – see Dugard International Law: A South African Perspective 3 ed (Juta, Cape Town, 2005) 314 - 316.

[24] Constitution, s 231(4)

against the State on the international plane in terms of section 231(2) of the Constitution.[25] In *Grootboom*, however, this Court held that "where the relevant principle of international law binds South Africa, it may be directly applicable."[26] The Court has also held that section 39(1)(b) requires that even international treaties that have not been signed, ratified or enacted into South African law are persuasive sources of law in the interpretation of the provisions of the Bill of Rights, by virtue of the operation of section 39(1)(b) of the Constitution. In *Grootboom*, the Court quoted and applied the earlier *dictum* of Chaskalson P in *S v Makwanyane*[27] dealing with section 35(1) of the interim Constitution:

> *"[P]ublic international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which Chapter Three can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and in appropriate cases, reports of specialised agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular*

---

[25] Dugard (*supra*) 62.

[26] *Grootboom* (*supra*), para 26.

[27] *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) ("*Makwanyane*")

provisions of Chapter Three."[28]

24. Furthermore, it is submitted that customary international law, as codified in Article 18 of the Vienna Convention on the Law of Treaties ("the VCLT"), obliges South Africa "to refrain from acts which would defeat the object and purpose" of treaties that have been signed but not ratified in accordance with the principle of good faith.[29] While States are not obligated to incorporate treaty provisions into their domestic legal system or take affirmative measures to implement treaties that they have yet to ratify, intentionally and unjustified retrogressive measures defeat the object and purpose of a treaty and thus place a State in violation of its treaty obligations as a signatory. The object and purpose of a treaty may be derived from its preamble.[30]

25. The South African courts have been receptive to applying the VCLT in the past[31] and this Court has previously accepted, without deciding, that

---

[28] *Makwanyane* (*supra*) para 35. *Dugard* (*supra*) 65 refers to this passage in noting that his initial "fears" raised regarding the scope of the section 35 (and subsequently 39) in J Dugard "The Role of International Law in Interpreting the Bill of Rights" (1994) 10 SAJHR 208 have proved unfounded.

[29] Vienna Convention on the Law of Treaties, 1946 UNTS 3, UN Doc. A/Conf.39/27 (1969). See also Aust Modern Treaty Law and Practice (Cambridge, CUP, 2000) 93 and Cheng General Principles of Law as Applied by International Courts and Tribunals (Cambridge, CUP,1953) at 111.

[30] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 ICJ 23 (Adv. Op.); Rights of Nationals of the United States in Morocco (Fr. v. U.S.), 1952 ICJ 196s (Judgm.); Klabbers "Some problems regarding the object and purpose of treaties" 8 *Finnish Yearbook of International Law* 155 (1997); Buffard & Zemanek "The 'Object and Purpose' of a Treaty: An Enigma?" 3 *Austrian Review of International and European Law* 332 (1998).

[31] The VCLT was referred to with apparent approval in *Makwanyane* (*supra*) per Chaskalson P

the principles contained in the treaty reflect international customary law and are therefore binding in terms of section 232 of the Constitution.[32]

26. The VCLT is generally recognized as customary international law by the International Court of Justice[33] and academic writers have pointed out that no court has ever held that a provision of the VCLT does not constitute customary international law.[34] Moreover, Article 18 specifically constitutes a codification of customary international law. An interim obligation to avoid defeating the objectives of a treaty was recognized by tribunals as early as 1928 and was discussed by scholars throughout the twentieth century.[35] During the negotiation of the VCLT, governmental delegates thought that the possible extension of the obligation to the negotiating stage reflected a departure from customary international law, but there were no such strong objections to Article 18

---

at para 16, fn 23 and in *S v Mhlungu* 1995 (3) SA 867 (CC) per Sachs J at para 119, fn 30.

[32] *Harksen v President of the RSA* 2000 (2) SA 825 (CC) para 26 per Goldstone J.

[33] The International Court of Justice held that the analysis under the VCLT should apply to the determination of when treaties begin and end, even when neither party had ratified the VCLT at the time of the breach. *Case Concerning the Gabcikovo-Nagymaros Project (Hungary / Slovakia)*, 1997 I.C.J. 7, 36-39.

[34] Aust (*supra*) 11 (citing M Mendelson in Lowe and Fitzmaurice (eds.), *Fifty Years of the International Court of Justice* (1996)). Aust also states that "[t]o attempt to determine whether a particular provision of the Convention represents customary international law is now usually a rather futile task... the modern law of treaties is now authoritatively set out in the Convention".

[35] In 1928, the Greco-Turkish Mixed Arbitral Tribunal held that "a Turkish seizure of Greek Property was invalid, since if the treaty had then been in force it would have been a material breach": Aust (*supra*) 95. The Draft Convention on the Law of Treaties, prepared in 1935, also proposed that "the State shall, for a reasonable time after signature, refrain from taking action which would render performance by any party of the obligations stipulated impossible or more difficult". Harvard Draft Convention on the Law of Treaties, 29 Am. J. Int'l L. 657, 658 (1935) (Draft Article 9). J Mervyn Jones, a well-respected scholar who compiled a study of full powers and ratification, wrote that a State "ought not to do anything between signature and ratification which would frustrate the purpose of the treaty". J M Jones Full Powers and Ratification: A Study in the Development of Treaty-Making Procedure (1949) 89.

in its current form.[36]

Declarations and non-binding pronouncements

27. Fourthly, as is apparent from the *Makwanyane dictum* quoted above, relevant persuasive sources of international law are not limited to treaties. This was confirmed by the judgment in *Grootboom*, which referred to a General Comment of the CESCR as being:

> *"helpful in plumbing the meaning of 'progressive realisation' in the context of our Constitution. The meaning ascribed to the phrase is in harmony with the context in which the phrase is used in our Constitution and there is no reason not to accept that it bears the same meaning in the Constitution as in the document from which it was so clearly derived"*[37]

28. This extract shows that the phrase "international law" as used in section 39(1) is not confined to international treaties ratified by South Africa and applicable customary international law, but refers to the whole body of directly applicable and persuasive sources of international law, including the General Comments and jurisprudence of U.N. human rights

---

[36] Sir Humphrey Waldock, *Fourth Report on the Law of Treaties*, [1965] 2. Y.B. Int'l L. Comm'n 3, 43-45, U.N. Doc. A/CN.4/SER.A/1965/Add.1 (cited in Jan Klabbers, *How to Defeat a Treaty's Object and Purpose Pending Entry into Force: Towards Manifest Intent*, 34 Vand. J. Transnat'l L. 283, 310 (2001)).

[37] *Grootboom* (*supra*) para 45.

committees.[38] In a case dealing specifically with the right to water, Budlender AJ quoted the above *dictum* from *Makwanyane* and held that:

> *"International law is particularly helpful in interpreting the Bill of Rights where the Constitution uses language which is similar to that which has been used in international instruments. The jurisprudence of the International Covenant on Economic, Social and Cultural Rights, which is plainly the model for parts of our Bill of Rights, is an example of this".*[39]

29. The court in *Bon Vista* went on to recognise that the General Comments of the Committee on Economic, Social and Cultural Rights ("CESCR"), in particular, "have authoritative status under international law".[40]

Local municipal entities are bound by international law

30. Finally, before proceeding to identify and analyse the specific international law instruments which give guidance in relation to the right to water, it is necessary briefly to emphasise that under international law, the conduct of an organ of a territorial governmental entity within a State – such as the City of Johannesburg – is considered to be an act of

---

[38] *Grootboom* (*supra*) para 26. See also the express recognition that "guidance may be sought" from the jurisprudence of the Committee on Economic Social and Cultural Rights in *Jaftha* (*supra*) para 23 and also *Carmichele v Minister of Safety & Security (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 para 73 and *City of Cape Town v Rudolph* 2004 (5) SA 39 (C) at 75.

[39] *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 (6) BCLR 625 (W) ("*Bon Vista*") para 15.

[40] *Bon Vista* (*supra*) para 17, relying on *Grootboom* (*supra*) and Craven The International Covenant on Economic, Social and Cultural Rights (Clarendon, Oxford, 1995) at 91 – 92.

that State.[41]

31. In addition, article 28 of the International Covenant on Economic, Social and Cultural Rights ("ICESCR")[42] (which is referred to in detail below) requires that "the provisions [of the ICESCR] shall extend to all parts of federal States without any limitations or exceptions." This issue arose in the CESCR's consideration of Canada's report in 1998, in which the Committee urged Canada to "to take concrete steps to ensure that the provinces and territories are made aware of their legal obligations under the Covenant and that the Covenant rights are enforceable within the provinces and territories through legislation or policy measures and the establishment of ... independent and appropriate monitoring and adjudication mechanisms."[43]

32. State-run entities which are not part of the State itself are also liable for violations of international law. The conduct of an entity which is not an organ of the State but which is empowered by the law of that State to exercise elements of the governmental authority (such as Johannesburg Water) is considered an act of the State under international law,

---

[41] International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, 2001, Annex to GA-Res. 56/83, Article 4.

The court in *Bon Vista* (*supra*) implicitly accepted that international law was applicable to a municipality when exercising its powers in relation to the provision of water.

[42] International Covenant on Economic, Social, and Cultural Rights, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966) (signed by South Africa on 3 October 1994) ("the ICESCR").

[43] Committee on Economic, Social and Cultural Rights, 4 December 1998, U.N.-Doc. E/C.12/1/Add.3: Concluding Observations: Canada, para 52.

provided it is acting in that capacity in the particular instance.[44]

33. In the light of the above, it is clear that South Africa will be legally accountable under international law if the City of Johannesburg and Johannesburg Water do not comply with the State's human rights obligations.

The persuasive value of foreign law

34. According to section 39(1)(c) of the Constitution, courts may consider foreign law when interpreting the Bill of Rights.

35. The courts have elaborated and commented on the value of foreign law in a number of cases.[45] In *Makwanyane* (*supra*), Chaskalson P (as he then was) considered that it is important "to have regard" to foreign law but cautioned that foreign law is in no way binding on a South African court's decision or ruling.

36. In *Sanderson*,[46] before considering Canadian and American jurisprudence, Kriegler J reiterated the non-binding nature of foreign law, but stated that it may be of particular value when dealing with issues that

---

[44] International Law Commission Draft Articles on the Responsibility of States (*supra*), Article 5.

[45] See: Iain Currie, Johan de Waal, The Bill of Rights Handbook 5 ed (Juta, Kenwyn, 2005) 161.

[46] *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) (1998 (1) SACR 227; 1997 (12) BCLR 1675).

are new to South African jurisprudence but well developed in other jurisdictions.

III. THE RIGHT TO WATER IN INTERNATIONAL LAW

An express right to water

37. COHRE's key submission in these proceedings is that there is an express and justiciable international law right to water. It is respectfully submitted that the third respondent's attempt[47] to rely on Tsoka J's statement that "under international law there is no express right to water"[48] is not tenable.

38. This international right to water is implicitly enshrined in the International Covenant on Economic, Social and Cultural Rights as authoritatively interpreted and defined by the 2002 General Comment 15 of the United Nations Committee on Economic, Social and Cultural Rights entitled "the Right to Water" ("General Comment 15").[49] This document recognises a specific international law "human right to water" that "entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water

---

[47] Third respondent's heads of argument, para 58.1, p. 20.

[48] High Court judgment, para 45, vol. 54, 5306.

[49] General Comment 15 (*supra*).

for personal and domestic uses", which include drinking, personal sanitation, food preparation, washing of clothes, and personal and household hygiene. General Comment 15 constitutes an authoritative interpretation of the provisions of the International Covenant on Economic, Social and Cultural Rights by the body responsible for overseeing it."[50]

39. General Comment 15 emphasises that access to water must be "adequate for human dignity, life and health".[51] Although "the adequacy of water required for the right to water may vary according to different conditions", the question of adequacy can "in all circumstances" be measured in relation to four factors, namely "availability",[52] "quality", "accessibility"[53] and "information accessibility".[54]

40. In 2006, General Comment 15 was supplemented by the U.N. Sub-commission on the Promotion and Protection of Human Rights "guidelines for the realization of the right to drinking water supply and

---

[50] The Committee on Economic, Social and Cultural Rights sought the authorisation of the United Nations Economic and Social Council to develop General Comments, and received encouragement from the Council to "continue using that mechanism to develop a fuller appreciation of the obligations of State Parties under the Covenant." Economic and Social Council, Resolution 1990/45, UN Doc. E/RES/1990/45 (1990), para 10.

[51] General Comment 15, article 11.

[52] "The water supply for each person must be sufficient and continuous for personal and domestic uses".

[53] Accessibility is defined as referring to "physical accessibility", "economic accessibility" (affordability) and "non-discrimination".

[54] This relates to procedural issues associated with the provision of water.

sanitation" ("the U.N. Sub-Commission Guidelines").[55] These guidelines "highlight the main and most urgent components of the right to water and sanitation"[56] as being the following:

> *"1.1 Everyone has the right to a sufficient quantity of clean water for personal and domestic uses.*
>
> *1.2 Everyone has the right to have access to adequate and safe sanitation that is conducive to the protection of public health and the environment.*
>
> *1.3 Everyone has the right to a water and sanitation service that is:*
>
> *(a) Physically accessible within, or in the immediate vicinity of the household, educational institution, workplace or health institution;*
>
> *(b) Of sufficient and culturally acceptable quality;*
>
> *(c) In a location where physical security can be guaranteed;*
>
> *(d) Supplied at a price that everyone can afford without compromising their ability to acquire other basic goods and services."*

41. The recognition of the right to water in General Comment 15 and the U.N. Sub-Commission Guidelines is a major development in international law that has been hailed all over the world, including in

---

[55] Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Fifty-seventh session, U.N.-Doc. E/CN.4/Sub.2/2005/25, 11 July 2005: "Draft guidelines for the realization of the right to drinking water supply and sanitation" ("the U.N. Sub-Commission Guidelines"). The guidelines were formally adopted by means of: Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Fifty-eighth session, U.N.-Doc. A/HRC/Sub.1/58/L.25, 21 August 2006: "Adoption of guidelines for the realization of the right to drinking water and sanitation", para 4

[56] U.N. Sub-Commission Guidelines, para 3.

South Africa, where the South African Human Rights Commission has described General Comment 15 as "particularly useful" as a source of international law that should be taken into account by the Government in developing a position paper for water allocation reform in South Africa.[57] It is submitted that this is correct for two reasons. Firstly, because there are striking similarities between the architecture of the ICESCR rights and the socio-economic rights in the South African Constitution, particularly in relation to the positive obligation to "progressively realise" such rights;[58] and secondly, because (as will appear from the discussion below) the international jurisprudence on the right to water is significantly more developed and detailed than current South African law on the subject. It is respectfully submitted that international law must be seriously considered by this Court in deciding this appeal.

Other relevant International Law instruments

42. A number of other international human rights treaties and legal sources guide the interpretation of the right to water as set out in the Constitution.

---

[57] South African Human Rights Commission, Response to Call for Comments by the Department of Water Affairs and Forestry, Directorate: Water Allocation on a Draft Position Paper for Water Allocation Reform in South Africa, May 2005, available at: http://www.sahrc.org.za/sahrc_cms/downloads/Water%20Allocation_May.doc

[58] See *Grootboom* (*supra*) para 45, in which it is recognized that the phrase "progressively realise" is in fact taken from article 2 of the ICESCR. See also *Bon Vista* (*supra*) para 15.

The International Covenant on Economic, Social, and Cultural Rights

43. The ICESCR[59] and, in particular, articles 11[60] and 12[61] thereof is the primary source of General Comment 15 as an express codification of the international right to water. These provisions guarantee everyone the right to an adequate standard of living including adequate food, clothing and housing, as well as to the enjoyment of the highest attainable standard of physical and mental health.[62] The General Comments of the CESCR, in particular General Comments 12 and 14 have also significantly clarified the scope and substance of the right to water and other socio-economic rights.[63]

44. Although South Africa has signed (but has yet to ratify) the ICESCR, it is

---

[59] International Covenant on Economic, Social, and Cultural Rights, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966) (signed by South Africa on 3 October 1994) ("the ICESCR").

[60] Article 11(1) of the ICESCR provides that: "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent."

[61] Article 12(1) provides that: "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."

[62] In General Comment 15, the CESCR notes that the use of the word "including" in Article 11(1) in the ICESCR indicates that this catalogue of rights was not intended to be exhaustive. See also CESCR, twenty-second session, 2000, U.N.-Doc. E/C.12/2000/4: General Comment 14: The right to the highest attainable standard of health paras 11, 12 (a), (b) and (d), 15, 34, 36, 40, 43 and 51, as well as CESCR, sixth session, 1991, U.N.-Doc. E/1992/23, General Comment No. 4: The right to adequate housing (art. 11(1)), para 8 (b). The CESCR had previously identified article 11(1) as implying the existence of a human right of access to adequate water: see Committee on Economic, Social and Cultural Rights, Thirteenth session, 1995, U.N.-Doc. E/1996/22: General Comment 6, The Economic Social and Cultural rights of Older Persons, paras 5 & 32.

[63] CESCR, twentieth session, 1999, U.N.-Doc. E/C.12/1999/5: General Comment 12: The right to adequate food (art. 11); CESCR General Comment 14 (*supra*).

submitted that (at least) its objects and purpose are binding on South Africa by virtue of customary international law and Article 18 of the VCLT.[64] The preamble of the ICESCR acknowledges that the "ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby all persons may enjoy their economic, social and cultural rights" in addition to their civil and political rights.[65] In the context of the drafting history of the ICESCR, it is submitted that the treaty's object and purpose involve securing and promoting economic, social and cultural rights.[66] Thus, even in the absence of ratification, South Africa has by its signature committed itself to refrain from acts contravening the right to water, which is a pre-requisite for the achievement of so many of the other rights that it contains.

The Universal Declaration of Human Rights

45. Article 25(1) of the Universal Declaration of Human Rights ("UDHR") stipulates that everyone has the right to a standard of living adequate for

---

[64] See the discussion of this issue above. The ICESCR has regularly been referred to in South African courts as if it was fully binding on South Africa: see, for example: *Jaftha (supra)* para 24; *NUMSA v Bader Bop (Pty) Ltd* 2003 (3) SA 513 (CC); 2003 (2) BCLR 182 para 33; *Chairperson of the Constitutional Assembly, Ex p: In re Certification of the Amended Text of the Constitution of the RSA*, 1996 1997 (2) SA 97 (CC); 1997 (1) BCLR 1 para 19.

[65] ICESCR, preamble, para 4.

[66] See Craven (*supra*) 22ff. As pointed out above, in *Grootboom*, the Constitutional Court itself has recognised that the structure of the socio economic rights in the Constitution was "clearly derived" from the provisions of the ICESCR (para 45). This is confirmed by Liebenberg in her discussion of the *travaux preparatoires* of these sections: Liebenberg, S "The Interpretation of Socio-Economic Rights" in Woolman *et al* Constitutional Law of South Africa 2 ed, OS (Juta, Kenwyn, 2006) 33-4

the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services.[67]

The Convention on the Elimination of Discrimination Against Women

46. Conditions that impose a disproportionate burden on women may violate substantive equality and constitute indirect discrimination under international law. As noted by Langa DCJ (as he then was) in the *Bhe* case, South Africa is a party to numerous international instruments that "underscore the need to protect the rights of women".[68] In particular, it is a full state party to the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW"),[69] article 14(2)(h) of which provides that the State must:

> *"take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right ... to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and*

---

[67] Article 25(1) of the UDHR prescribes that: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."

[68] *Bhe and Others v Magistrate, Khayelitsha, and Others; Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC) ("*Bhe*") para 51.

[69] Convention on the Elimination of all forms of Discrimination Against Women, GA res. 34/180, 34 UN GAOR Supp. (No. 46) at 193, UN Doc. A/34/46 (ratified on 15 December 1995).

communications."

47. The Committee on the Elimination of Discrimination Against Women has stated that CEDAW'S provisions demand substantive equality and equality of results.[70] The Convention requires states to protect women from both direct and indirect discrimination and to "improve the *de facto* position of women through concrete and effective policies and programmes."[71] States also are obliged to address gender-based differences that affect women in law and in legal and societal structures and institutions.[72] Thus, states are obliged to address any policies that, despite being facially neutral, nonetheless affect the situation of women as a result of pre-existing social structures. Ngcobo J affirmed this view in *Bhe,* stating that CEDAW "requires South Africa to ensure, amongst other things, the practical realisation of the principle of equality between men and women and to take all appropriate measures to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against women."[73]

48. Article 1(1) of CEDAW characterizes as discriminatory any distinction,

---

[70] Committee on the Elimination of all Forms of Discrimination Against Women, thirtieth session, 2004, U.N.-Doc A/59/38: General Recommendation No. 25: Temporary special measures (art. 4(1)) ("CEDAW General Recommendation 25") para 8.

[71] CEDAW General Recommendation 25 (*supra*) para 7. See also Human Rights Committee, thirty-seventh session, U.N.-Doc. A/45/40, 10 November 1989 General Comment No. 18: Non-discrimination, para 7.

[72] CEDAW General Recommendation 25 (*supra*), para 7.

[73] *Bhe (supra)*, para 209.

exclusion, or restriction that has the "effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women" of their human rights on an equal basis with men. Similarly, according to the Committee on the Elimination of Racial Discrimination, an action that has "an unjustifiable disparate impact upon a group" is discriminatory in effect.[74]

49. It is submitted that limits on access to water generally create equality concerns because of their disproportionate effects on women, who are commonly in charge of providing water for the household. Women shoulder the responsibility for care-giving, washing, cooking, and cleaning, all tasks that require water.

50. The installation of pre-payment meters, though not directly targeting women, has such an unjustifiably disparate impact because the effects of this policy are borne largely by women and prevent them from enjoying their human rights on an equal basis with men. It is clear from the record in this case that when the free water supply runs out, the burden falls on women to secure other sources, often through great physical exertion. Women may forego their own water needs to meet the needs of the household. For these reasons, the use of pre-payment

---

[74] Committee on the Elimination of Racial Discrimination, forty-second session, 22 March 1993, U.N.-Doc. A/48/18: General Recommendation No. 14: Definition of discrimination (art. 1(1)) para 2.

meters creates significant hardships for women.[75]

51. Moreover, the lack of sufficient water disproportionately interferes with the ability of women to enjoy other human rights, including the rights to health, dignity, and access to food. As a result, it implicates the guarantees in CEDAW, which target "discriminatory dimensions of past and current societal and cultural contexts which impede women's enjoyment of their human rights and fundamental freedoms."[76]

Convention on the Rights of the Child ("CRC") and the African CRC

52. Article 24 of the Convention on the Rights of the Child ("the CRC"),[77] one of the most widely ratified international conventions, contains an express obligation to fully implement the right of children to "the highest possible standard of health" and to "combat disease ... through the provision of adequate food *and drinking water*".[78] An almost identical requirement is found in article 14 of the African Charter on the Rights

---

[75] This issue is discussed in Liebenberg, S & Goldblatt, B "The interrelationship between equality and socio-economic rights under South Africa's transformative constitution" (2007) 23 *SAJHR* 335: "one cannot appreciate the nature and extent of gender inequality in South Africa without an understanding of how poverty and a lack of access to basic social services, such as potable water and health care, entrench and exacerbate such inequality ... it would be remiss of a court to fail to consider the disproportionate gendered impact of the lack of these services on women as a group" (at 339 - 340).

[76] CEDAW General Recommendation 25 (*supra*) para 14.

[77] Convention on the Rights of the Child, GA Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) 167, U.N. Doc. A/44/49 (1989) (ratified on 16 June 1995) ("the CRC").

[78] CRC, Article 24 [emphasis supplied].

and Welfare of the Child ("the African CRC").[79] It is submitted that without adequate provision of water, food, and housing, children are effectively denied their right to life.

African Charter on Human and Peoples' Rights

53. The African Charter on Human and Peoples' Rights ("the Banjul Charter")[80] guarantees, in article 16, "the right to enjoy the best attainable standard of physical and mental health". The African Commission has found a failure to supply basic services, including safe drinking water and electricity, to be a violation of this article:

> *"Article 16 of the ... Charter states that every individual shall have the right to enjoy the best attainable state of physical and mental health, and that States Parties should take the necessary measures to protect the health of their people. The failure of the Government to provide basic services such as safe drinking water and electricity and the shortage of medicine as alleged in communication 100/93 constitutes a violation of Article 16".*[81]

---

[79] African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990) (ratified on 7 January 2000) ("the African CRC"): "Every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health. State Parties ... shall undertake to pursue the full implementation of this right and in particular shall take measures ... to ensure the provision of adequate nutrition and safe drinking water".

[80] African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5 (1982) (ratified on 9 July 1996) ("the Banjul Charter").

[81] *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah v. Zaire (Democratic Republic of the Congo)*, Communication Nos. 25/89, 47/90, 56/91, 100/93 (Joined), 18th Session, October 1995, 47.

54. Furthermore, Article 18 of the Banjul Charter requires that women and children must be protected "as stipulated in international declarations and conventions", thus incorporating the explicit obligations of CEDAW and CRC to ensure adequate water, sanitation, food, and shelter.

55. In *SERAC v Nigeria*, the African Commission ruled that the rights to shelter and food are implied from a range of provisions in the Banjul Charter, including the rights to health, dignity, life and political participation. It is submitted that, by analogy, the same arguments must apply in relation to access to water, which cannot be contemplated separately from the right to food and nutrition.[82]

56. Article 15(a) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa[83] refers to the obligation of States Parties to "ensure that women have the right to nutritious and adequate food. In this regard they shall take appropriate measures to ... [p]rovide women with access to clean drinking water, sources of domestic fuel, land and means of producing nutritious food..."

---

[82] SERAC v Nigeria, Communication 155/96 of the African Commission on Human and Peoples' Rights, 27 May, 2002, http://www1.umn.edu/humanrts/africa/comcases/155-96.html, at paras 64 - 65

[83] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003. Available at http://www.achpr.org/english/_info/women_en.html.

Relationship between water & other rights, particularly health & dignity

57. The Vienna Declaration and Programme of Action, adopted by the international community at the conclusion of the World Conference on Human Rights in 1993, states that, "[a]ll human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis."[84] The right to water clearly highlights this indivisibility of human rights and shows how human rights are interrelated. The legal implication of this indivisibility is that deprivation of a basic right like water affects not only the right to water, but a plethora of other basic rights.[85]

58. Of all the rights that are impacted by the question of access to water, the right to health is the most important. In General Comment 15, the CESCR states that water is "inextricably related" to the right to health contained in Article 12(1) of the Covenant.[86] In General Comment 14, "access to safe and potable water and adequate sanitation" was identified as one of the underlying determinants of the right to health.[87]

---

[84] Vienna Declaration and Plan of Action, UN Doc. A/CONF.157/23 (adopted by the World Conference on Human Rights, 12 July 1993) Article I(5).

[85] General Comment 15 of the CESCR states that the right to water is a "*prerequisite* for the realization of other human rights" [emphasis supplied].

[86] CESCR General Comment 15 (*supra*) para 3.

[87] CESCR General Comment 14 (*supra*), para 11.

59. Lack of access to water contributes to poor health and disease, including scabies and malnutrition.[88] The sick, including those who are HIV positive, require sufficient water for their treatment and for taking medications. Water shortages specifically associated with pre-payment meters have also been linked to cholera outbreaks.[89]

60. On the other hand, as pointed out by the applicants, increasing water would have health, gender equity and economic benefits.[90] In particular, improved access to water and sanitation reduces risk of water-borne diseases and strengthens overall health. According to the Disease Control Priorities Project, the quantity of and access to water can be even more important than quality in reducing disease and improving public health: "[m]ost water-related disease, including skin and eye infections, and diarrhea, is transmitted person-to-person because of a lack of water for personal hygiene. The more water available and the more convenient it is to collect, the more people will use for hand-washing and other hygienic practices."[91]

61. Furthermore, it is submitted that providing ample water and sanitation to

---

[88] The Coalition Against Water Privatization, the Anti-Privatisation Forum, and Public Citizen, "Nothing for Mahala," Centre for Civil Society Research Report No. 16, April 2004.

[89] Edward Cottle and Hameda Deedat, The Cholera Outbreak: A 2000-2002 Case Study of the Source of the Outbreak in the Madlebe Tribal Authority Areas, uThungulu Region, KwaZulu-Natal; See also Jeter, *South Africa's Driest Season*, in: Mother Jones, November/December 2002, http://www.motherjones.com/news/feature/2002/11/ma_145_01.html.

[90] Bond RA, para 10, vol. 49, 4829

[91] Disease Control Priorities Project "Water, Sanitation, and Hygiene: Simple Effective Solutions Save Lives" p. 2.

poor communities significantly improves public health, and thus can reduce the costs to the health care system of caring for the poor. In this regard, it is noteworthy that economists Guy Hutton and Lawrence Haller have found that, for each additional $1 invested in water supply, there is a $5 - $8 gain in health-related costs.[92] The 2006 United Nations Development Programme report relied upon by the respondents also extensively discusses the relationship between clean water provision and healthcare costs. For example, "[d]iseases and productivity losses linked to water and sanitation in developing countries amount to 2% of GDP, rising to 5% in sub-Saharan Africa – more than the region gets in aid".[93] In addition, diseases related to a lack of water "fill half the hospital beds in developing countries. They probably account for an even greater share of the patients treated in primary health clinics, especially in slums and poor rural areas. Measured by conventional global health indicators, the burden of disease linked to water and sanitation is enormous: according to the WHO, it accounts for 60 million disability-adjusted life years lost each year, or 4% of the global total."[94] If the water and sanitation target of the millennium development goals were met in Sub-Saharan Africa, the UNDP reports that the equivalent of approximately

---

[92] Guy Hutton and Lawrence Haller Evaluation of the Costs and Benefits of Water and Sanitation Improvements at the Global Level (Geneva: World Health Organization, 2004). See also The Case for Water and Sanitation (The Water and Sanitation Program, 2004), estimating an $11 gain for every $1 spent. The Water and Sanitation Programme is an international partnership established by the World Bank and the United Nations Development Programme.

[93] UNDP report, 2006, vol. 36, 3596 (a clearer copy of this page is found at vol. 41, p. 4096).

[94] UNDP report, 2006, vol. 37, p. 3619.

12% of public health spending would be saved.[95]

62. Apart from the right to health, access to clean water is closely related to the rights to life,[96] food,[97] housing,[98] and the environment,[99] as well as the overarching concept of human dignity. Without potable water, people cannot live, nor can they grow or cook staple foods, clean their homes or enjoy adequate sanitation, bathe or properly care for their children, or

---

[95] UNDP report, 2006, vol. 37, p. 3616.

[96] International Covenant on Civil and Political Rights, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966) (ratified on 10 December 1998) ("ICCPR"). According to the United Nations Human Rights Committee ("HRC"), the right to life should be interpreted expansively to include measures such as reducing infant mortality and increasing life expectancy, and in particular to require measures to eliminate malnutrition and epidemics: Human Rights Committee, Sixteenth session, 1982, U.N.-Doc. HRI/GEN/1/Rev.6 at 127, General Comment No. 6: The Right to Life.

[97] Commission on Human Rights, Sixty-second session, U.N.-Doc. E/CN.4/2006/44, 16 March 2006: "Report of the Special Rapporteur on the right to food, Jean Ziegler", para 12. See also Mazibuko FA; para 117, vol. 1, 44 and "Nothing for Mahala" (*supra*) 22-23. According to paragraph 7 of General Comment 15, the right to water is fundamentally linked to the right to food in two ways: the right to consume water has been construed as part of the right to food, and without water, households are unable to produce food through agriculture. The right to food and the right to water are inseparable rights, linked to the right to life and the right to health, because depriving people of the right to food and water would automatically affect health and life. The CESCR has also acknowledged the "importance of ensuring sustainable access to water resources for agriculture to realize the right to adequate food".

[98] The United Nations Special Rapporteur on the Right to Adequate Housing has noted that the right to adequate housing is dependent on water and sanitation, without which housing delivery cannot be regarded as successful: "[T]he success of housing delivery cannot be measured only by quantity but needs to take into consideration the location of housing, the quality of the housing and accessibility to water, sanitation, electricity as well as schools, hospitals and other civic services. This is essential to ensure the implementation and the indivisibility of a human rights approach." The Special Rapporteur also urged a more comprehensive program for meeting the requirements of socio-economic rights, including water: "The Rapporteur recommends improved coordination amongst all government departments including housing, water, health, social services to ensure an approach to housing that recognises that housing will only be adequate where there is proper access to water, health services, employment and education opportunities and other civic and support services." Preliminary observations as of 24 April 2007 by the United Nations Special Rapporteur on adequate housing, Mr Miloon Kothari in light of his mission to South Africa (12 April – 24 April 2007) available at http://abahlali.org/files/preliminary%20obs%20rev.pdf

[99] Johannesburg Plan of Implementation of the World Summit on Sustainable Development, in *Report of the World Summit on Sustainable Development*, Johannesburg, South Africa, August 26 to Sept. 4, 2002, UN Doc. A/CONF.199/L.1, available at: http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf paras 8 and 26(b).

function on a normal level. Thus, a deprivation of water simultaneously reduces the realisation of other socio-economic rights.

63. Furthermore, the deprivation of the right to water significantly impacts upon civil and political rights. Since individuals and families without adequate access to water have to worry about procuring water and often travel miles to fetch water, the violation of the right to water has an opportunity cost. Time that people could otherwise use for participation in their local communities and political processes is instead spent procuring the basic requirements of survival. This burden falls disproportionately on women, who may be forced to walk several kilometres just to acquire water.

IV. THE POSITIVE RIGHT TO WATER: FREE BASIC WATER

Introduction

64. The Constitutional Court has recognised that "a society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality".[100] Because human dignity, freedom and equality are denied to those who lack these basic rights, "the State is obliged to take positive action to meet the

[100] *Grootboom* (*supra*) para 44.

needs of those living in extreme conditions of poverty, homelessness or intolerable housing."[101] Sections 26 and 27 of the Constitution impose positive obligations on the State to act reasonably in seeking to progressively realise the full content of the socio-economic rights they encompass.

65. The positive right of access to sufficient water contained in section 27 of the South African Constitution is by no means unique in the world. Many constitutions guarantee the human right to water[102] and most national laws address the issue of affordability of water by regulating water service pricing policy and offering subsidies. In France, there is a clear legal framework for achieving what paragraph 11 of the preamble of the Constitution calls "material security." The State must develop water production and distribution to ensure that all citizens, including the poorest, enjoy effective access. Even if the State opts to finance this by charging the full price for water, there must be special arrangements and

---

[101] *Grootboom* (*supra*) para 24

[102] See for instance Constitution of Zambia, 1996, Article 112(d): "the State shall endeavour to provide clean and safe water, adequate medical and health facilities and decent shelter for all persons, and take measures to constantly improve such facilities and amenities..."

Constitution of the Republic of Ecuador, 2008, Article 12: "The human right to water is fundamental and unrenounceable. Water constitutes a national strategic heritage of public use, inalienable, not subject to prescription or seizure, and essential for life."

Constitution of Panama, 2004, Article 110(4), sets out the State's "primary" obligation in relation to health by "combating of contagious diseases through environmental health, development of potable water availability, and adopting methods of immunization, prophylaxis, and treatment to be provided collectively and individually to all the population ..."

The preamble of the Constitution of Uganda, 1995, XIV,(ii) commits the State to ensure that "all Ugandans enjoy rights and opportunities and access to education, health services, clean and safe water ...".

exceptions to ensure that the poorest citizens have sufficient drinking water and sanitation.[103]

The reasonableness standard in South African law

66. In *Grootboom*, this Court held that the primary issue that courts must consider in deliberating a claim that the positive element of socio-economic rights under the South African Constitution has been infringed is the question whether the measures that have been adopted are reasonable.[104]

67. It is submitted by the *amicus curiae* that a relevant consideration in determining the reasonableness of any measures undertaken in relation to the progressive realisation of the right to have access to sufficient water in section 27(1)(b) is whether or not the measures in question are in compliance with international law.

The positive right to water in international law

68. In defining the right to water, General Comment 15 states that water is to be treated "as a social and cultural good, and not primarily as an

---

[103] Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, fifty-fourth session, U.N.-Doc. E/CN.4/Sub.2/2002/10, 25 June 2002: "Relationship between the enjoyment of economic, social and cultural rights and the promotion of the realization of the right to drinking water supply and sanitation, Preliminary report submitted by Mr El Hadji Guissé", para 28.

[104] *Grootboom* (*supra*) para 41.

economic good"[105] and that:

> *"An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements"*[106]

69. States have a "special obligation to provide those who do not have sufficient means with the necessary water"[107] and they "are also obliged to fulfil (provide) the right when individuals or a group are unable, for reasons beyond their control, to realise that right themselves by the means at their disposal".[108]

70. In addition, necessary measures must be adopted to ensure that water is affordable, including "appropriate pricing policies such as free or low-cost water and ... [a]ny payment for water services has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with water expenses as compared to richer households."[109]

---

[105] General Comment 15, para 11.

[106] General Comment 15, para 2.

[107] General Comment 15, para 15.

[108] General Comment 15, para 25.

[109] General comment 15, para 27.

71. The U.N. Sub-Commission Guidelines also recognise a positive obligation on states to ensure that everyone receives "a sufficient quantity of clean water for personal and domestic uses" and that is "supplied at a price that everyone can afford without compromising their ability to acquire other basic goods and services".[110]

72. Summarising the international right to water, the U.N. Special Rapporteur on the Right of Access of Everyone to Drinking Water Supply and Sanitation Services has stated that "[t]he essence of the right to water resides in the implementation of the principle that no person may be deprived of enough water to satisfy basic needs."[111]

The relevance of the minimum core concept

73. An important element of the jurisprudence of the CESCR is the concept of the "minimum core" content of the positive obligations of the Covenant. The concept of the minimum core was introduced in paragraph 10 of General Comment 3[112] and echoed paragraph 8 of the 1987 Limburg Principles, which stated that: "[a]lthough the full realization

---

[110] UN Sub-Commission Guidelines (*supra*), para 1.3.

[111] Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, fifty-fourth session, U.N.-Doc. E/CN.4/Sub.2/2002/10, 25 June 2002: "Relationship between the enjoyment of economic, social and cultural rights and the promotion of the realization of the right to drinking water supply and sanitation, Preliminary report submitted by Mr El Hadji Guissé".

[112] CESCR, General Comment No. 3 (supra) para 10.

of the rights recognized in the Covenant is to be attained progressively, the application of some rights can be made justiciable immediately while other rights can become justiciable over time."[113]

74. The implication of paragraph 10 of General Comment 3 is that a State can be required at international law to immediately realise the "minimum essential level" of the right in question. This is known as the "minimum core" obligation, and was described in *Grootboom* as follows:

> *"The concept of minimum core obligation was developed by the committee to describe the minimum expected of a State in order to comply with its obligation under the Covenant. It is the floor beneath which the conduct of the State must not drop if there is to be compliance with the obligation. Each right has a 'minimum essential level' that must be satisfied by the State parties. ... Minimum core obligation is determined generally by having regard to the needs of the most vulnerable group that is entitled to the protection of the right in question. ...."*[114]

75. Although it is beyond doubt that the idea of an immediately justiciable minimum core of socio-economic rights has been rejected by the Court in favour of an obligation on the State to act reasonably, it is submitted that this does not mean that the concept of a minimum core (or more accurately, a "minimum essential level") could never be relevant to the

---

[113] International Commission of Jurists, *Limburg* Principles, para 8. The Limburg principles were the result of a detailed analysis of the ICESCR undertaken by the International Commission of Jurists.

[114] *Grootboom* (*supra*) para 33.

adjudication of socio-economic rights under the South African Constitution. In fact, the opposite is true: In *Grootboom*, this Court stated that:

> *".... the real question in terms of our Constitution is whether the measures taken by the State to realise the right afforded by s 26 are reasonable. There may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the State are reasonable. However, even if it were appropriate to do so, it could not be done unless sufficient information is placed before a Court to enable it to determine the minimum core in any given context."*[115]

76. In *Treatment Action Campaign*[116] the Court confirmed that *Grootboom* does not contain any impediment to a party showing in an appropriate case "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."[117] This makes it clear that the concept of a minimum core may in a given case form an important element of the "reasonableness" test. This is what actually transpired in *Jaftha*, where

---

[115] *Grootboom* (*supra*), para 33.

[116] *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC) ("*TAC*").

[117] *TAC* (*supra*) para 34: "Although ... 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 [is] thus treated as possibly being relevant to reasonableness ..., and not as a self-standing right conferred on everyone ...".

the Court noted that:

> *"Although the concept of adequate housing was briefly discussed in [Grootboom] this Court has yet to consider it in any detail. This subject has however been dealt with by the United Nations Committee on Economic, Social and Cultural Rights (the Committee) in the context of the International Covenant on Economic, Social and Cultural Rights, 1966 (the Covenant). In terms of s 39(1)(b) of the Constitution, this Court must consider international law when interpreting the Bill of Rights. Therefore, guidance may be sought from international instruments that have considered the meaning of adequate housing."*[118]

77. In a similar vein, it is submitted that General Comment 15, read with the guidelines of the World Health Organisation and the opinions of various respected experts in relation to the minimum essential level of the international right to water is relevant and useful as a guideline against which the reasonableness of the respondents' efforts to progressively realise the right to water can be measured.

78. It is submitted that this approach not only faithfully applies the jurisprudence of the Constitutional Court, but it is also consistent with the requirements of international law, and, as such, in terms of section 233, it must be preferred to other approaches that are not.[119]

---

[118] *Jaftha* (*supra*), para 23.

[119] It should be noted that this has always been COHRE's position in this litigation. The statement in paragraph 127 of the judgment of the court below that COHRE submitted that the

79. In the context of water, the "minimum core" approach of the CESCR is evident in the express reference in General Comment 15 to "a core obligation" on each State "to ensure access to the minimum essential amount of water that is sufficient and safe for personal and domestic uses to prevent disease" with "immediate effect".[120]

80. Personal and domestic uses "ordinarily include drinking, personal sanitation, washing of clothes, food preparation, personal and household hygiene".[121] Footnote 13 specifically indicates that "[w]ater is necessary for personal sanitation where water-based [sanitation] means are adopted."[122]

Express international standards

81. Although General Comment 15 does not itself expressly stipulate the amount of water to be supplied, paragraph 12(a) indicates that "the quantity of water available for each person should correspond to World Health Organisations (WHO) guidelines". In this regard, the document refers to two publications, those of Gleick (one of the applicants' expert

---

minimum core approach has been accepted by the South African courts, is incorrect.

[120] General Comment 15, para 37(a).

[121] General Comment 15, para 12(a).

[122] General Comment 15, footnote 13.

witnesses) and of Howard & Bartram.[123]

82. Gleick[124] identifies 50 litres per person per day as the minimum necessary for a healthy life that allows basic hygiene and consumption needs to be met, excluding gardening and special needs such as illness. According to Gleick, "failure to provide this basic need is a major human tragedy. Preventing that tragedy should be a major priority for local, national, and international groups". The amount of 50 litres is broken down as follows: drinking: 5 litres; sanitation: 20 litres; bathing: 15 litres and food preparation: 10 litres. Importantly, Gleick undertakes a detailed discussion of the amount of water required for sanitation, even though he appears to allow for only a comparatively small amount in this regard, in comparison to the 75 litres that is usually required per person per day when using flush toilets.

83. On the other hand, Howard and Bartram[125] identify 20 litres per person per day within 100 and 1,000 metres (or 5 – 30 minutes collection time) as constituting "basic access" to water. According to these authors, this level of access carries with it a "high" level of health concern, whereas an intermediate level of 50 litres is associated with a "low" level of

---

[123] General Comment 15, para 12(a), fn 14.

[124] Gleick, "Basic water requirements for human activities: meeting basic needs" Water International 21 (1996) 83 – 92 (copy in *amicus* bundle); see also Gleick FA, Annexure LM42, vol. 5, 498ff and Gleick RA, vol. 50, 4969ff.

[125] Bartram & Howard Domestic Water Quantity, Service Level and Health (Geneva: World Health Organization, 2003), p. 2, JM15, vol. 51, 5075.

concern. Importantly, these authors do not include sanitation in their "basic access" calculation. In the discussion of the "three types of use" associated with domestic water supply (consumption, hygiene and amenity use), there is no mention of sanitation requirements. Since Phiri has a water-borne sewerage system (and since the respondents do not suggest that additional water would be provided to each household in Phiri for the purposes of sanitation), it is submitted that this is a serious deficiency in the utility of the study for current purposes.

84. Howard and Bartram also make no allowance in the "basic access" category for laundry and bathing. In table S1, the report states that laundry and bathing would be "difficult to assure unless carried out at source".[126] It is, however, clear from Table 6 of the report that the amount of 20 litres per person per day does not include any amount for laundry and/or bathing because these "may occur at water source with additional volumes of water".[127] According to Howard and Bartram, where the amount of 50 litres per person per day is available, "most basic hygiene and consumption needs" can be met.

85. It would appear that the United Nations Development Programme report of 2006 (which is also relied upon by the respondents for the standard of

---

[126] Howard and Bartram, p. 2, vol. 51, 5075. The Respondents' heads of argument (para 75.10.4, p. 185) incorrectly quote the study as stating that, at an access level of 20 litres per person per day within 1 kilometre, "hygiene, including laundry and bathing with be difficult to assess unless investigations are carried out at source".

[127] Howard and Bartram, p. 27, vol. 51, 5100.

20 litres of clean water per person per day within 1 kilometre)[128] recognises the limitations of the Howard and Bartram study, and specifically states that this standard "is only sufficient for drinking and basic personal hygiene ... Factoring in bathing and laundry needs would raise the personal threshold to about 50 litres a day."[129] Furthermore, the level of 20 litres per person per day is still regarded by the authors of the UNDP report as constituting "deprivation".[130]

86. It is noteworthy that the record also contains a reference to a more recent WHO report regarding minimum quantity of water needed for domestic use in emergencies.[131] Figure 1 on page 2 of this document suggests that an amount of 30 litres per person per day is only sufficient for "short term" survival (drinking and cooking), whereas 50 litres is required to include washing and household cleaning. An amount of 70 litres is regarded as being essential in the medium term, in the sense that standards of living can be maintained.

87. In the circumstances, it is submitted that stating, as the respondents

---

[128] Respondents' heads of argument, para 75.10.2, p. 184; para 75.14, p. 187; Third respondent's heads of argument, para 58.4, p. 20.

[129] UNDP report, 2006, p. 34, vol. 37, 3608. The standard of 20 litres within 1 kilometre appears to have been set for the purposes of international reporting purposes – see UNDP report, 2006, pp. 80 – 81, vol. 37, 3654 – 3655.

[130] UNDP report, 2006, p. 35, vol. 37, 3609.

[131] RA, Makoatsane, para 1113 – 1114, vol. 47, 4685 – 4687, referring to World Health Organisation, "Minimum water quantity needed for domestic use in emergencies", vol. 52, 5153.

repeatedly do in their heads of argument,[132] that the standard of 20 litres per person per day within 1 kilometre constitutes the relevant "WHO guideline" only tells half of the story. The respondents make no reference to the fact that the Gleick article is also cited in footnote 14 of General Comment 15 despite the fact that it is clearly more appropriate for circumstances where water-borne sanitation must be taken into account.

88. In the light of the above discussion, it is submitted that, for the purposes of evaluating the reasonableness of the respondents' efforts to provide sufficient water, it would be appropriate to accept that no less than 50 litres per person per day is the minimum essential amount that would be required to be provided under international law as set out in General Comment 15.

The "dignity standard"

89. In his judgment on behalf of the Supreme Court of Appeal, Streicher JA found that "[a] right of access to sufficient water cannot be anything less than a right of access to that quantity of water that is required for dignified human existence."[133]

---

[132] Respondents' heads of argument, para 31.2, p. 87; para 75.25, p. 193; para 90.7, p. 226; Third Respondent's heads of argument, para 58.3, p. 20.

[133] SCA judgment, para 17, vol. 70, 11.

90. It is submitted that the SCA's reference to a standard based on the right to dignity is not only consistent with the jurisprudence of this Court[134] but also with applicable international and foreign law, which is replete with references to water as being a critical component of the right to dignity.

91. According to General Comment 15, "[t]he human right to water is indispensable for leading a life in human dignity";[135] "[t]he right [to water] should ... be seen in conjunction with other rights enshrined in the International Bill of Human Rights, foremost amongst them the right to life and human dignity";[136] and "the elements of the right to water must be adequate for human dignity, life and health".[137] All of these provisions were referred to by the SCA in its decision.

92. Dignity is also referred to in the preamble to the UN Sub-Commission Guidelines which recognises that "... all persons have the right to sufficient supplies of water to meet their essential needs and to have access to acceptable sanitation facilities that take account of the requirements of hygiene, human dignity, public health and environmental protection";[138]

---

[134] See, for example *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others* 2004 (6) SA 505 (CC) (2004 (6) BCLR 569) para 80.

[135] General Comment 15 (*supra*), para 1.

[136] General Comment 15 (*supra*), para 3.

[137] General Comment 15 (*supra*), para 11.

[138] UN Guidelines (*supra*), preamble.

93. The African Commission has held that the right to food is "inseparably linked" to the right to dignity.[139] It is submitted that similar reasoning applies to water.

94. The implication of all these statements is that when this Court applies the standard of reasonableness in examining the alleged infringement of the right to water in this case (and indeed in all cases where socio-economic rights are alleged to have been infringed), special attention must be paid to the extent to which human dignity will be negatively impacted if the right is not fulfilled.

95. It is submitted that the quantity of water required for the residents of Phiri to live a dignified existence is inextricably linked with the fact that they utilise a water-borne sanitation system. As the SCA held, "nobody has suggested, or could on the evidence suggest, that 6kl per household per month or 25 litres per person per day constituted sufficient water for leading a life in human dignity where use had to be made of flush toilets, as is the case in Phiri."[140] The SCA went on to hold that in this context, it would be unreasonable for the respondents to provide less than 42 litres per person per day.[141]

---

[139] *SERAC* (*supra*), para 65.

[140] SCA judgment, para 18, vol. 70, 12.

[141] SCA order, para 2(a) vol. 70, 2.

96. Although the central role afforded by the SCA to the concept of dignity in determining the reasonableness of the amount of water provided without charge to the residents of Phiri is to be supported, the *amicus curiae* supports the applicant's submission that the SCA's finding regarding the amount of water that is required in order to live with dignity in Phiri is incorrect. In particular, it is submitted that it would be unreasonable to conclude that an average of 1.5 toilet flushes per day[142] would be consistent with a dignified life in the face of Gleick's evidence that "the average person with conventional plumbing uses around 5 flushes per day".[143]

97. It is also noteworthy that, in their introduction to the report of the proceedings of the symposium "Water, poverty and productive uses of water at the household level", held in Johannesburg between 21 & 23 January 2003, Moriarty, Butterworth & Van Koppen state that 25 litres per person per day is an "extremely low survival norm" and that it "severely" constrains "opportunities to engage in productive activities". These authors identify "a norm in the range of 50 – 200 lpcd as identified by those present at the Johannesburg symposium, as being both adequate and sustainable from a water resources point of view".[144]

---

[142] SCA judgment, para 22, vol. 70, 14.

[143] Gleick RA, para 11, vol. 50, 2972.

[144] Moriarty, Patrick; Butterworth, John & van Koppen, Barbara "Introduction" in Beyond

98. It is submitted that approving a mere "survival" norm would not accord due recognition to the central place of human dignity in the reasonableness enquiry that this Court is required to undertake.

99. In the circumstances, it is submitted that at least 50 litres of water per person per day is required to ensure that the residents of Phiri can live a dignified life, and that this must be taken into account when determining the reasonableness of the respondents' free basic water policy.[145]

Progressive realisation – beyond dignity

100. While, as stated above, the *amicus curiae* supports the central role afforded by the SCA to the concept of dignity, it must be recognised that the issue of ensuring the dignity of citizens is only one aspect to be considered in applying the reasonableness analysis required by section 27(2) in this case. It is thus submitted that, even in the event that it might be determined by this Court that the SCA was correct in its determination that a dignified life in Phiri requires only 42 litres of water per person per day, that would not necessarily be the end of the enquiry.

Domestic: Case Studies on Poverty and Productive Uses of water at the Household Level (2004, Delft, IRC International Water and Sanitation Centre), Technical Paper Series; no. 41, 39 – 41.

[145] Liebenberg argues that where the values of equality and dignity are threatened by human beings not having their basic needs met, the standard of review should be strengthened, including by the imposition of a presumption of unreasonableness: see Liebenberg, S "The value of human dignity in interpreting socio-economic rights" (2005) 21 SAJHR 1 at 21ff.

101. The ultimate enquiry in this matter is whether, in all the circumstances of the case (including the evidence in relation to the amount of water required for a dignified existence in Phiri), it is reasonable for the respondents to provide anything less than what the applicants claim, namely 50 litres per day "to all residents of Phiri who cannot pay for their own water".[146] In the words of the applicants, the question is whether the provision of this amount is "a reasonable measure which the City and Johannesburg Water must take to achieve the progressive realisation of the rights of the people of Phiri."[147]

102. The requirement to act reasonably arises from the obligation on the State under section 27(2) to "take reasonable legislative and other measures within [its] available resources to achieve the progressive realisation" of the right of access to sufficient water. In considering the meaning of the phrase "progressive realisation", this Court has approved of the following statement of the CESCR:

> *"The concept of progressive realisation constitutes a recognition of the fact that full realisation of economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this sense the obligation differs significantly from that contained in Article 2 of the International Covenant on Civil and*

---

[146] Leave to appeal, FA, para 35.2, vol. 70, 57.

[147] Leave to appeal, FA, para 36.2.2, vol. 70, 58.

Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights. Nevertheless the fact that the realization 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 realization 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 realization 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."*[148]

103. Specifically in the context of the international right to water, paragraph 18 of General Comment 15 imposes a "constant and continuing duty ... to move as expeditiously and effectively as possible towards the full realisation of the right to water".[149] The duty of progressive realisation is described in the U.N. Guidelines as follows:

"Each level of government in a State, including the national Government, regional governments and the local authorities, has

---

[148] CESCR, fifth session, 1990, U.N.-Doc. E/1991/23, General Comment No. 3: The nature of States Parties obligations (art. 2(1)) para 9. [emphasis supplied]

[149] General comment 15, para 18.

a responsibility to move progressively and as expeditiously as possible towards the full realization of the right to water and sanitation for everyone, using practical and targeted measures and drawing, to the maximum extent possible, on all available resources."[150]

104. Although the full content of the right in question need not be achieved immediately and is not necessarily immediately justiciable, the phrase "progressive realisation" is to be understood as imposing an "obligation"[151] on the State to take reasonable measures to realise the right to the maximum of its available resources. If the State fails to realise the right to the extent that it is reasonably capable, it will have committed a justiciable breach of the right that entitles the applicants to an appropriate remedy.

105. It is submitted that, in considering whether reasonableness requires the provision of 50 litres of free water to each resident of Phiri who cannot afford to pay for their own, the court is required to weigh *inter alia* the following factors:

105.1 Firstly, the critical importance of the right of access to water, and the degree and extent of its denial, taking into account the amount of water that, according to expert opinion, is objectively

---

[150] *U.N. Guidelines* (*supra*), para 2.1.

[151] *Grootboom* (*supra*) para 46.

required by a person each day for their various needs, as well as the amount of water that is recognised as comprising the minimum essential level of the right of access to water in international law.[152] In this regard, COHRE submits that provision of less than 50 litres of water per person per day without charge to those who cannot afford it would be less than is required by international law;

105.2 Secondly, whether there is anything in the personal or general circumstances of the applicants that suggests that this amount should be increased. It is submitted that the need to use water for water-borne sanitation is such a circumstance in this case. The unreasonableness of the respondents' stance that water-borne sanitation should not be taken into account for the purposes of the free water allocation is highlighted by the fact that they have been aware form the earliest times that free water provision and water-borne sanitation are inextricably linked.[153] n addition, Schreiner recognises that communities where water-borne

---

[152] *Grootboom* (*supra*), 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".

[153] DWAF Implementation Strategy: "Free Basic Water", Vol. 57, para 3.4, 144: "... in certain situations there may be difficulties in reconciling current sanitation policies with a free basic water strategy ... for example if poor households have waterborne sanitation some proportion of their free water allocation will be used for flushing ..."

sanitation had previously been provided posed "specific challenges".[154]

105.3 Thirdly, the Court should consider the extent to which the record shows that limitations on access to water have resulted in infringements of other rights, particularly the right to dignity. In *Khosa*[155] this Court held that:

> *"When the rights to life, dignity and equality are implicated in cases dealing with socio-economic rights, they have to be taken into account along with the availability of human and financial resources in determining whether the State has complied with the constitutional standard of reasonableness. This is, however, not a closed list and all relevant factors have to be taken into account in this exercise. What is relevant may vary from case to case depending on the particular facts and circumstances. ... In dealing with the issue of reasonableness, context is all-important. ... It is also necessary to have regard to the [the conduct complained of] that this has on other intersecting rights."*

105.4 Fourthly, it is submitted that the consequences of providing a less than sufficient amount of water must be shown to be

---

[154] Schreiner AA, paras 126 - 127, vol. 41, 4007.

[155] *Khosa* (*supra*) at para 44.

proportionate in the light of the resource implications for the State.[156]

106. The final consideration is the question of the resource constraints faced by the State, which must be carefully, if not critically, analysed. The onus to show lack of resources falls on the respondents: this Court has stated that resource constraints ...

> *"... will require careful consideration when raised. In particular, an organ of State will not be held to have reasonably performed a duty simply on the bald assertion of resource constraints. Details of the precise character of the resource constraints, whether human or financial, in the context of the overall resources of the organ of State will need to be provided."*[157]

107. It is submitted that there is little scope for the respondents in the current matter to successfully raise resource constraints as a basis for the refusal of the relief sought by the applicants. Not only was this issue not pertinently raised in the High Court, it is also evident from the information most recently supplied to the Court that the respondents not only have the resources to comply with the relief sought by the

---

[156] Liebenberg, S "The Interpretation of Socio-Economic Rights" in Woolman *et al* Constitutional Law of South Africa 2 ed, OS (Juta, Kenwyn, 2006) 33-32. In *Jaftha* (*supra*), para 56, the Constitutional Court held that one of the guiding factors relevant to the exercise of the required judicial oversight of sales in execution would be whether such a sale would be "grossly disproportionate", which would be the case "if the interests of the judgment creditor in obtaining payment are significantly less than the interests of the judgment debtor in security of tenure in his or her home, particularly if the sale of the home is likely to render the judgment debtor and his or her family completely homeless."

[157] *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC) (2005 (4) BCLR 301) para 88.

applicants but that it is actually their intention to do so.[158]

V. THE NEGATIVE RIGHT TO WATER: PRE-PAYMENT METERS

108. In *Grootboom*, this Court considered the extent of the State's obligations with respect to socio-economic rights and held that, "there is, at the very least, a negative obligation placed upon the State and all other entities and persons to desist from preventing or impairing the right of access."[159] The negative aspect of socio-economic rights was confirmed in *Jaftha*, in which the Court held that cutting off existing access to such rights constitutes a *prima facie* violation (limitation) of the right in question, and can only be justified in terms of a law of general application under the stringent requirements of the general limitations clause.[160]

---

[158] Leave to appeal, AA, Brits, paras 32 and 47.6, vol. 71, p. 165 and 178; Leave to appeal, AA, Koseff, paras 9.4 - 9.7, vol. 72, p. 263 – 265; Leave to appeal, AA, Koseff, annexure JK3, vol. 73, p. 309; Leave to appeal, further affidavit of Brits, annexure KB13, vol. 79, p. 836.

[159] *Grootboom (supra)* paras 34 and 38. The court relied for this proposition on *In re: Certification of the Constitution of the Republic South Africa, 1996* 1996 (10) BCLR 1253 (CC), paras 78. See also *City of Johannesburg v Rand Properties* (Pty) Ltd 2007 (6) SA 417 (SCA), para 38. Although the Court in these cases was considering the section 26 right to access to adequate housing, the structure of that section is identical to the section 27 right of access to sufficient water.

[160] *Jaftha (supra)* paras 29 and 31 - 33

Pre-payment meter cut-offs

109. In the *Bon Vista* case, it was held that section 7(2) of the Constitution, which obliges the State to "respect" rights, imposes a negative duty on it to "refrain from action which would serve to deprive individuals of their rights" to water. Relying in part on international law, the court held that any act that deprives the applicants of existing access to water constitutes a limitation of the Constitutional duty to respect the right of access to water and requires those responsible to justify the breach in accordance with the Constitution.[161] The court granted an interim interdict in terms of which the City Council was required to restore the applicants' water supply.

110. This approach is consistent with international law. General Comment 15 requires that water supply must not only be *sufficient* but also *continuous* for personal and domestic uses including drinking, sanitation, washing of clothes, food preparation, personal and household hygiene. "Continuous" is stated to mean "that the regularity of the water supply is sufficient for personal and domestic uses".[162]

111. General Comment 15 also stipulates that where any interference with the right to water is based on a person's failure to pay, their capacity to

---

[161] *Bon Vista* (*supra*) paras 15, 18, 20 & 27.

[162] General comment 15, para 12.

pay must be taken into account.[163] Similarly, according to the UN Sub-Commission Guidelines, where a person's access to water and sanitation services is reduced owing to non-payment, account must be taken of that person's ability to pay and "no-one should be deprived of the minimum essential amount of water or access to basic sanitation facilities".[164] The same applies even where cut-offs are legal:

> *"No one whose access to water and sanitation may be legally curtailed after the appropriate procedures have been followed should be deprived of the minimum essential amount of water or of minimum access to basic sanitation services"*[165]

112. It is submitted that the Supreme Court of Appeal was correct in holding that there is very little practical difference between an "ordinary" water cut-off such as the one in issue in the *Bon Vista* judgment, and the automatic (though possibly temporary) cut-offs that inevitably occur as a result of the operation of pre-payment meters.[166] In this regard, it is noteworthy that, after investigating the situation in Phiri in 2007, the United Nations Special Rapporteur on Housing expressed his concerns as follows:

> *"The Special Rapporteur is of the view that the provision of water*

---

[163] General comment 15, para 56.

[164] U.N. Sub-Commission Guidelines, para 6.4.

[165] U.N. Sub-Commission Guidelines, para 2.3(d).

[166] SCA judgment, para 55, vol. 70, 31. A similar conclusion was reached by the Queens Bench Division in *R v Director General of Water Services* [1999] Env. L.R. 114 (Q.B.D. 1998).

prepayment meters for water seriously compromises numerous human rights and may be contrary to the Constitution's provision on the right to housing and the right to water. The Government should reconsider this policy."[167]

113. The limitation of the negative aspect of the right to water by means of the operation of the pre-payment meters will be unlawful unless it can be justified by the respondents.

The introduction of pre-payment meters is a retrogressive measure

114. Craven states that the "dominant characteristic" of the obligations imposed on states arising out of the ICESCR is their "progressive" nature. Referring to General Comment 3, and the "obligation to move as expeditiously and effectively as possible towards" the goal of fulfilment, Craven states that:

"The obligation ...would appear to require a continuous improvement of conditions over time without backward movement of any kind – in what may be described as a form of "ratchet" effect."[168]

115. This is known as the principle of non-retrogression, which was described in the Maastricht Guidelines prepared in 1998 by a panel of experts

---

[167] U.N. Special Rapporteur on Adequate Housing (*supra*).

[168] Craven (supra) 129 – 131.

invited by the International Commission of Jurists as follows:

> *"Like civil and political rights, economic, social and cultural rights impose three different types of obligations on States: the obligations to respect, protect and fulfil. Failure to perform any one of these three obligations constitutes a violation of such rights. The obligation to respect requires States to refrain from interfering with the enjoyment of economic, social and cultural rights. Thus, the right to housing is violated if the State engages in arbitrary forced evictions. ... Violations of economic, social and cultural rights can occur through the direct action of States or other entities insufficiently regulated by States. Examples of such violations include: ... (e) The adoption of any deliberately retrogressive measure that reduces the extent to which any such right is guaranteed."*[169]

116. The Committee on Elimination of Racial Discrimination has ruled that a decision of the Dobšiná Municipal Council (Slovakia) to cancel a previous resolution in which it had approved a plan to construct low-cost housing for Roma inhabitants living in very poor conditions was a breach, *inter alia*, of article 11 of the ICESCR because it involved the revocation of an important practical and policy step towards realisation of the right to adequate housing and its replacement with a weaker measure. The committee ruled that Slovakia should, *inter alia*, take measures to ensure that the complainants were given the benefit of the

---

[169] Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1998), paras 6 and 14(e).

initial resolution.[170]

117. In *Grootboom*, this Court endorsed the applicability of the principle of non-retrogression in South African law.[171]

118. Until the pre-payment meters were installed, the applicants in this case and other residents of Phiri had access to a post-paid, continuous and unlimited water supply. They paid for water after its consumption and were also afforded the opportunity to make representations before their access to water was discontinued (although the evidence suggests that this seldom or never actually happened).[172]

119. Since the installation of pre-payment meters, however the applicants have had to pay for water in excess of the amount provided for free in advance. If they are unable to pay, their water supply is cut off without any opportunity to make representations or demonstrate inability to pay. It has increased the financial burden on the economically vulnerable population of Phiri. Now, unlike previously, the residents of Phiri who cannot pay are denied access to water once they have used their initial supply, even in situations where there may be a dire need of water for health, sanitation or safety reasons. As a result, their existing access to

---

[170] *Ms L.R. et al v Slovakia*, Communication No. 31/2003, CERD/C66/D/31/2003.

[171] *Grootboom* (*supra*), para 45.

[172] Makoatsane RA, para 96, vol. 44, 4378.

water has been severely compromised and replaced with a much more limited form of access simply because of their inability to pay.

120. In addition, studies have found that the installation of pre-payment meters has had a negative effect on public health. According to one study, there was a "significant difference in the proportion of household carers ... who never washed their hands with flowing tap water", with 77% doing so in "deemed consumption" areas, and only 43% doing so where pre-payment meters were installed. According to the authors of the study, "we did find evidence that those who were being asked to prepay for their water were practising poorer hygiene behaviours than their neighbours who were still in deemed consumption."[173]

121. Water shortages specifically associated with pre-payment meters have also been linked to cholera outbreaks. For example, according to Cottle and Deedat, in 2000 the government funded the Madlebe project in KwaZulu-Natal, in which pre-payment water meters were attached to what had previously been free communal taps. Many households could not pay for additional water and began fetching water from a nearby stream that contained cholera, resulting in the deaths of hundreds of people.[174]

---

[173] Municipal Services Project report on "The Problem of Handwashing and Paying for Water in South Africa", March 2007, JM13, vol. 51, 5024 & 5029.

[174] Cottle & Deedat (*supra*).

122. It is submitted that the conversion from the "deemed consumption" water access system to a pre-payment system is retrogressive in effect and violates the obligation to respect access to water while working towards progressive realisation.

Justification of the negative infringements

123. In the light of the above discussion, it is submitted that the applicants have demonstrated that the respondents' use of pre-payment meters results in two clear infringements of the negative aspect of the right to water as guaranteed in section 27(1)(b) of the South African Constitution. Not only does the operation of such meters virtually guarantee extensive and repeated limitations of consumers' rights against interference of their access water, it is also clear that the decision to adopt pre-payment meters in the first place constituted a retrogressive measure.

124. According to *Jaftha*, the negative duties imposed by the socio economic rights provisions in the Constitution (e.g. section 27(1)) are not subject to the qualifications in the subsections relating to reasonableness, resource constraints and progressive realisation (e.g. section 27(2)). Deprivation of this nature constitutes a rights limitation, and the onus thus fall on the respondents to justify such a limitation in terms of section

36 of the Constitution.[175]

125. Justification of the negative infringement of a socio-economic right involves the application of a stringent test: in *Jaftha*, the Court rejected the arguments advanced by the state "that debt recovery is an important government purpose. ... The procedure put in place to allow for execution in order to recover money owed is reasonable and, without it, the administration of justice would be severely hampered ... [and] that it is not possible for every execution order to be overseen by a magistrate".[176] These arguments were rejected primarily because of the nature and importance of the right that had been limited. It is submitted that the limitations of the negative right of access to water in this case should be treated similarly, and that the respondents' submissions in relation to the "vital role" that pre-payment maters play "in the delivery of free basic water"[177] should not merely be accepted at face value.

126. Of further relevance is that the remedy provided by the court in *Jaftha* was to protect the procedural rights of the complainants. This demonstrates the important linkages between the negative infringement of the right to water and the procedural complaints raised by the applicants.

---

[175] *Jaftha* (*supra*), paras 31 – 34.

[176] *Jaftha* (*supra*), para 37

[177] Respondents' heads of argument, para 82.4, p. 202.

127. The close scrutiny applied to the justificatory arguments and the proportionality assessment in *Jaftha* resonates with the approach of the European Court of Human Rights in the case of *Connors v United Kingdom*.[178] The eviction of a gypsy family by a local authority was challenged as a violation of the right in the European Convention on Human Rights to respect for family life, which the court found "concerns rights of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community."[179] The seriousness of the impact of the eviction accordingly "required particularly weighty reasons of public interest by way of justification and the margin of appreciation to be afforded to the national authorities must be regarded as correspondingly narrowed."[180]

128. In addition it is relevant that established practice in other countries is to disallow water cut-offs except under the most circumscribed conditions. For example:

---

[178] *Connors v United Kingdom* (2005) 40 EHRR 9.

[179] *Connors (supra)*, para 82.

[180] *Connors (supra)*, para 86. In this case, where the evictions were allowed by law, even the fact that the proceedings were open to judicial review was regarded as being an insufficient safeguard against abusive or oppressive conduct: see para 92.

128.1 In 1995, a District Court in France 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".[181]

128.2 In a subsequent case, in March 1996, the Regional Court of Roanne found that a service provider had unlawfully interrupted the water supply on the grounds that a supplier who has not been paid must apply to the court for a warrant of execution to ensure payment of the sums owed. Without express authorization from the court, the supplier may not cut off water supply, because it is a service upon which adequate living conditions of families depend.[182]

128.3 This approach, which is very similar to that adopted in the *Jaftha* case, was also followed in the Brazilian case of *Ademar Manoel Pereira*. The court found that the water supplier was "obliged to provide water to the population in an adequate, efficient, safe and continuous manner, and in case a user falls back with the

---

[181] 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) (English translation provided in the *amicus* bundle) French version at: http://www.cace.fr/jurisprudence/rets/eaupression/tgi12051995.html.

[182] TGI Roanne, 11 Mars 1996, Revue CLCV, n°97, Janvier 1997 (France). Referred to in Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, fifty-fourth session, U.N.-Doc. E/CN.4/Sub.2/2002/10, 25 June 2002: "Relationship between the enjoyment of economic, social and cultural rights and the promotion of the realization of the right to drinking water supply and sanitation, Preliminary report submitted by Mr El Hadji Guissé", para 28.

payments it cannot interrupt the service". The court stated that the interruption of supply could not be used as a coercive measure against users who are unable to pay. The court found that the water supplier was obliged to use the legal procedures available to recover unpaid debts. According to the court, interruption of the water supply service constituted a reprehensible, inhuman and unlawful act.[183]

128.4 A further example of similar reasoning may be found in *Rajah Ramachandran v. Perbadanan Bekaln Air Pulau Pinang Sdn Bhd,* in which the High Court of Malaysia found that the water supplier was obliged to avoid cutting off the water of those who had not paid their bills after querying the amounts and to take less drastic measures that would cause less inconvenience to the consumer, for example instituting a civil action to recover the amount owed, acting "as a reasonable man would".[184]

128.5 The highest court in the Brazilian State of Paraná has determined that the disconnection of needed water supplies constitutes a

---

[183] *Ademar Manoel Pereira v Catarinense Company of Water and Sanitation (CASAN),* First Chamber of the Brazilian Court of Appeals (STJ), Special Appeal n.201.112/SC,20 April 1999 (Brazil) (English translation provided in the *amicus* bundle).

[184] *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 (copy provided in the *amicus* bundle)

violation of human rights, even if it is the result of non-payment.[185] Taking into account the vulnerability of one of the residents of the house, who was sick, the court ordered the re-establishment of the water supply. Even in the event of payment default, it was held that the supplier must use other means to collect delayed payment as there was a risk that irreversible damage could result from discontinuing the water supply.

129. In relation to the issue of retrogressive measures, this court should take into account that, at international law, deliberately retrogressive measures such as those taken by the respondents in this case "demand very careful analysis" and must be "fully justified by reference to the totality of the rights provided for in [the ICESCR] and in the context of the full use of the maximum available resources" of the State:

> *"[t]here is a strong presumption that retrogressive measures taken in relation to the right to water are prohibited ... If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified ... in the context of the full use of the State party's maximum available resources".*[186]

---

[185] *Bill of Review 0208625-3*, Special Jurisdiction Appellate Court, Paraná (Brazil), August 2002 (Brazil) (English translation provided in the *amicus* bundle).

[186] General Comment 15, para 19. See also: Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1998), paras 6 and 14(e); and Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, fifty-sixth session, U.N.-Doc. E/CN.4/Sub.2/2004/20, 14 July 2004: "Report of Mr Guissé on the guidelines for the realization

VI. THE PROCEDURAL CHALLENGE TO PRE-PAYMENT METERS

130. A key element of the international right to water and the comparative foreign law discussed above relates to the procedural protections that must be afforded to water consumers. These protections include the right to participate in decision-making in relation to water supply systems and mechanisms and, importantly, the rights to be warned before water supplies are disconnected and to make representations before this happens. The participation of affected parties is essential to the procedural aspects of the right to water, without which there can be no legal guarantee to the protection of the right.

131. Although those protections are available under applicable South African law to those who are supplied with credit-based water meters,[187] they have been denied to the residents of Phiri, who were not given choices relating to the water supply system, and who were coerced into accepting pre-payment meters after their water supply was entirely cut off. The lack of choice, the failure to ensure proper participation in water development, and the non-existence of notice procedures or opportunity to object when the water runs out all contravene the requirements of

---

of the right to drinking water supply and sanitation", para 47.

[187] Basic Water Regulations, 2001, vol. 64, 878. See also *Bon Vista* (*supra*) paras 26 – 27.

international law.

Procedural protections under international law

132. General Comment 15 recognises that an important aspect of the international right to water is the factor of "information accessibility", which relates to procedural issues associated with water availability.[188]

133. Various procedural protections are therefore recognised as part of the right to water. Not only do individuals and groups have a right to participate in decision-making processes regarding "any policy, programme or strategy concerning water" that may affect their exercise of the right to water,[189] but the "duty to respect"[190] the right requires State authorities, at a minimum, to consult with the affected persons and to provide them with legal recourse and remedies against any decision interfering with their right to water.[191]

134. With regard to procedural protections, the UN Sub-Commission Guidelines state that:

---

[188] General Comment 15, para 12.

[189] General comment 15, para 48.

[190] cf. Section 7(2) of the Constitution.

[191] General comment 15, para 56.

"Everyone has the right to participate in decision-making processes that affect their right to water and sanitation. Special efforts must be made to ensure the equitable representation in decision-making of vulnerable groups and sections of the population that have traditionally been marginalized, in particular women."[192]

Procedural protections in other jurisdictions

135. In the United Kingdom, the Queen's Bench Division has held that pre-payment meters with automatic shutoff valves violate the procedural requirements in the 1991 UK Water Services Act and are illegal because they offer no notice or opportunity for a hearing before the supply was discontinued.[193] The challenge had been brought by a number of local authorities against a decision of a regulator not to outlaw pre-payment meters installed by private water companies on the basis that they posed a public health risk. The implication of the judgment is that the cutting off of water supplies by means of a pre-payment meter is no different in effect from the discontinuation of an ordinary post-paid metered supply, contrary to the submissions of the respondents in this appeal.[194] The manner in which pre-payment meters operate, even where they are installed by consent of the consumer, constitutes a breach of basic procedural fairness rights. In light of this judgment, it is

---

[192] U.N. Sub-Commission Guidelines, para 8.1.

[193] *R v Director General of Water Services* (*supra*).

[194] Brits AA, para 28.10.9, vol. 7, 627; Makoatsane RA, para 13.4.1, vol. 44, 4344.

submitted that the installation of pre-payment meters gives rise unjustifiable limitations on consumers' rights to fair administrative action.

136. It is submitted that a number of the cases referred to above, including the 1996 French case,[195] and the Indian,[196] and Malaysian[197] cases, provide an appropriate model for the protection of the water rights of the poor. Where a water consumer has failed to pay for services, the provider must seek repayment of the debt by means other than disconnection, or obtain approval from the court before terminating water supply. This ensures the individual's right to proper notice and a hearing before their fundamental rights are limited. As indicated above, there are noteworthy similarities between this approach and that followed in the *Jaftha* case.

VII. THE EQUALITY CHALLENGE

137. The principles of equality and non-discrimination are central to the system of human rights protection in international law.[198] Under the ICESCR, states parties undertake to guarantee that the rights contained

---

[195] *Roanne* case (*supra*).

[196] *Delhi Water Supply & Sewage Disposal Undertaking and Another v. State of Haryana and Others*, Supreme Court of India, 29 February 1996, (1996) SCC (2) 572.

[197] *Rajah Ramachandran v. Perbadanan Bekalan Air Pulau Pinang Sdn Bhd* (*supra*).

[198] CCPR Non-discrimination: 10/11/89 General Comment 18, para 1.

in the Covenant will be exercised without discrimination.[199]

138. According to General Comment 15, the guarantee of non-discrimination is a minimum core obligation that applies to the right to water with immediate effect.[200] General Comment 15 also stipulates that the entitlements that attach to the right to water "include the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water"[201] and obliges states to ensure that the allocation of water resources facilitate access to water. It further recognises that an inappropriate allocation of resources can lead to discrimination that may not be overt.[202] States have a special obligation to provide those who do not have sufficient means with the necessary water and water facilities and to prevent any discrimination on internationally prohibited grounds in the provision of water and water services.[203]

139. The UN Sub-Commission Guidelines require states to ensure that "no persons or public or private organizations engage in discriminatory practices which limit access to water and sanitation on the grounds of sex, age, ethnic origin, language, religion, political or other opinion,

---

[199] ICESCR (*supra*), Article 2, para 2.

[200] General Comment 15 (*supra*), para13.

[201] General Comment 15 (*supra*), para 10.

[202] General Comment 15 (*supra*), para14.

[203] General Comment 15 (*supra*), para 15.

national or social origin, disability, health status or other status". They also require that particular attention should be given to the needs of vulnerable groups.[204] The Guidelines also stipulate that "States should ensure that they have appropriate water and sanitation pricing policies, including through flexible payment schemes and cross-subsidies from high-income users to low-income users."[205]

The provision of free basic water to all households

140. It is submitted that international law requires the respondents' policies to take into account the differences between those who can pay for water over and above the basic minimum amount of water required for dignified human existence and those who cannot. A policy that denies access to water above the minimum amount without taking these differences into account is unreasonable.[206]

141. Although the respondents themselves admit that wealthy households should not get free basic water,[207] they also state that the cost of the free water provided to the wealthy "will be clawed back from wealthier

---

[204] UN Sub-Commission Guidelines (*supra*), paras 3.1 and 3.2.

[205] UN Sub-Commission Guidelines (*supra*), para 6.1.

[206] *Grootboom*, (*supra*) paras 35–37; *TAC* (*supra*) para 70.

[207] Brits AA, para 25.10.2, vol. 7, 611. In her answering affidavit in the leave to appeal application, Brits states that it would be possible "to remove the 6 kilolitre free basic water allocation to certain households" once the special targeting mechanism associated with the expanded social package was implemented (see Leave to appeal, AA, Brits, para 49.2, vol. 71, 179). There does not appear to be any indication on the papers whether this has been done or not.

households through the rising block tariff" and that "wealthier households do ultimately pay for this water".[208] This reasoning is fallacious: under such a system, poor and wealthy households are treated exactly the same if they use the same amount of water, with the result that if poor households do use water over and above the free basic amount, they will ultimately pay for the water that they had been given "free". Furthermore, the respondents supply the same amount of free water irrespective of the size of the household. The consequence is that households with fewer members have more access to water per person than larger households.

142. Since it is common cause that households in predominantly poor and black townships are on average larger than households in predominantly rich and white areas, the effect of these practises is that poor and black residents of Johannesburg receive less free water per person than white residents. It is submitted that this offends the international law prohibition of discrimination on the grounds of race and economic status.

Discrimination and pre-payment meters

143. It is submitted that the High Court correctly found that the applicants' rights to equality and non-discrimination have been infringed by the decision to install pre-payment meters in their area and not in other,

[208] Leave to appeal, AA, Brits, para 49.3, vol. 71, 180.

more wealthy areas.

144. This decision is discriminatory because it targets on its face the most economically disadvantaged members of society for pre-payment – the very population most likely to be unable to pay in advance – resulting in manifestly unequal access to water. According to General Comment 15, where any interference with the right to water is based on a person's failure to pay, their capacity to pay must be taken into account.[209] Pre-payment meters, however, unfairly burden those who need the greatest protection of their rights due to the structural disadvantage that they have suffered in the past. They require available money in order to access the most basic requirement of life: water. If there is no money on hand in the house (which is commonly the case in poorer households), the household simply goes without water. In circumstances where households only realise that they are unable to afford water at the time that they need to purchase it, it is doubtful whether the respondents' special representation mechanism complies with this injunction.

145. Because of concerns over possible non-payment, the residents of Phiri and similar areas are also not afforded the usual protections against cut-offs that accompany metered water provision, particularly by-law 9C. These protections are therefore denied the residents of Phiri because of their economic status, in contravention of Article 7 of the Universal

[209] General Comment 15, para 56.

Declaration of Human Rights and Article 26 of the International Covenant on Civil and Political Rights.

146. Policies that disproportionately burden the poor violate the guarantee of equality as guaranteed by international and domestic law. Geographic distinctions that establish differences in treatment between low-income areas that were historically black (and where the residents are still predominantly black), and wealthier areas that were historically white, also violate the equality guarantee.[210] The pre-payment water meters at issue in this matter have only been installed in poor black neighbourhoods. The applicants claim that pre-payment meters are generally not installed in rich, predominantly white areas, even taking account of the new evidence that the respondents seek to introduce.

147. It is therefore submitted that the City's pre-payment meter policy places a disproportionate burden on women, the economically disadvantaged, and those living in historically black areas. By forcing these groups to spend time tending to their need for water which could have been spent participating in the political or economic life of the community, it reduces their equality of opportunity.

---

[210] Pretoria City Council v Walker 1998 (2) SA 363 (CC).

VIII. CONCLUSION

148. In conclusion, it is submitted that the provision of less than 50 litres of water per person per day and the use of pre-payment meters in Phiri constitute unreasonable, retrogressive, unprocedural and discriminatory measures in violation of the respondents' constitutional and international obligations.

Richard Moultrie

M S Baloyi

Counsel for the *Amicus Curiae*

19 August 2009

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: CCT39/2009
SCA Case No.: 489/2008

In the appeal 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*

COHRE'S LIST OF AUTHORITIES

	South African Cases
1.	*Bhe and Others v Magistrate, Khayelitsha, and Others; Shibil v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC)
2.	*Carmichele v Minister of Safety & Security (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995
3.	*Chairperson of the Constitutional Assembly, Ex p: In re Certification of the Amended Text of the Constitution of the RSA*, 1996 1997 (2) SA 97 (CC); 1997 (1) BCLR 1
4.	*City of Cape Town v Rudolph* 2004 (5) SA 39 (C)
5.	*City of Johannesburg v Rand Properties* (Pty) Ltd 2007 (6) SA 417 (SCA)
6.	*Government of the RSA v Grootboom and Others* 2001 (1) SA 46 (CC)
7.	*Harksen v President of the RSA* 2000 (2) SA 825 (CC)
8.	*In re: Certification of the Constitution of the Republic South Africa, 1996* 1996 (10) BCLR 1253 (CC)
9.	*Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC); 2005 (1) BCLR 78
10.	*Khosa v Minister of Social Development* 2004 (6) SA 505 (CC)
11.	*Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC)
12.	*Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others* 2005 (3) SA 280 (CC) (2004 (5) BCLR 445)
13.	*NUMSA v Bader Bop (Pty) Ltd* 2003 (3) SA 513 (CC); 2003 (2) BCLR 182
14.	*Pretoria City Council v Walker* 1998 (2) SA 363 (CC)
15.	*Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC) (2005 (4) BCLR 301)
16.	*Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 (6) BCLR 625 (W)

17.	*S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC)
18.	*S v Mhlungu* 1995 (3) SA 867 (CC)
19.	*Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) (1998 (1) SACR 227; 1997 (12) BCLR 1675)
20.	*Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC)

	Foreign Cases
1.	*Ademar Manoel Pereira v Catarinense Company of Water and Sanitation (CASAN),* First Chamber of the Brazilian Court of Appeals (STJ), Special Appeal n.201.112/SC,20 April 1999 (Brazil) (English translation in *amicus* bundle)
2.	*Bill of Review 0208625-3,* Special Jurisdiction Appellate Court, Paraná (Brazil), August 2002 (Brazil). (English translation in *amicus* bundle)
3.	*Flor Enid Jiménez de Correa v Empresas Públicas de Medellín*, Constitutional Court, 17 April 2007, Decision n. T-270/07, File n. T-1426818. (Colombia) (English translation in *amicus* bundle) Full Spanish decision available at: http://basedoc.superservicios.gov.co/basedoc/corte_constitucional.shtml?x=64842
4.	*Delhi Water Supply & Sewage Disposal Undertaking and Another v. State of Haryana and Others*, Supreme Court of India, 29 February 1996. (1996) SCC (2) 572 (India). Available at: http://www.ielrc.org/content/e9603.pdf
5.	*R v Director General of Water Services* [1999] Env. L.R. 114 (Q.B.D. 1998) (UK)
6.	*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
7.	TGI Roanne, 11 Mars 1996, Revue CLCV, n°97, Janvier 1997 (France). Referred to in Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, fifty-fourth session, U.N.-Doc. E/CN.4/Sub.2/2002/10, 25 June 2002: "Relationship between the enjoyment of economic, social and cultural rights and the promotion of the realization of the right to drinking water supply and sanitation, Preliminary report submitted by Mr El Hadji Guissé"
8.	*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) (English translation in *amicus* bundle)

	Foreign Legislation
1.	Constitution of Ecuador, 2008.
2.	Constitution of Panama, 2004 in Baustein, AP & Flanz, GH Constitutions of the Countries of the World. (Originally published in paper as a 20 volume set) Online Access: 15 November 2007
3.	Constitution of Uganda, 1995 in Baustein, AP & Flanz, GH Constitutions of the Countries of the World. (Originally published in paper as a 20 volume set) Online Access: 15 November 2007
4.	Constitution of Zambia, 1996 in Baustein, AP & Flanz, GH Constitutions of the Countries of the World. (Originally published in paper as a 20 volume set) Online Access: 15 November 2007
	International cases
1.	*Case Concerning the Gabcikovo-Nagymaros Project (Hungary / Slovakia)* 1997 I.C.J. 7, 36-39
2.	*Connors v United Kingdom* (2005) 40 EHRR 9
3.	*Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah v. Zaire (Democratic Republic of the Congo)*, Communication Nos. 25/89, 47/90, 56/91, 100/93 (Joined), 18th Session, October 1995 1995 available at: http://www1.umn.edu/humanrts/africa/comcases/25-89_47-90_56-91_100-93.html
4.	*Ms L.R. et al v Slovakia*, Communication No. 31/2003, CERD/C66/D/31/2003
5.	*Rights of Nationals of the United States in Morocco (Fr. v. U.S.)*, 1952 ICJ 196s (Judgm.)
6.	*SERAC v Nigeria*, Communication 155/96 of the African Commission on Human and Peoples' Rights, 27 May, 2002, available at: http://www1.umn.edu/humanrts/africa/comcases/155-96.html

	International Treaties and Conventions
1.	African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5 (1982)
2.	African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990)

3.	Convention on the Elimination of all forms of Discrimination Against Women, GA res. 34/180, 34 UN GAOR Supp. (No. 46) at 193, UN Doc. A/34/46
4.	Convention on the Rights of the Child, GA Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) 167, U.N. Doc. A/44/49 (1989)
5.	Harvard Draft Convention on the Law of Treaties, 29 Am. J. Int'l L. 657, 658 (1935)
6.	International Covenant on Economic, Social, and Cultural Rights, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966)
7.	International Covenant on Civil and Political Rights, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966)
8.	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003. At http://www.achpr.org/english/_info/women_en.html
9.	Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 ICJ 23 (Adv. Op.)
10.	Universal Declaration of Human Rights, GA-Res. 217 (III), 3 UN-GAOR, 71, UN-Doc. A/810 (1948)
11.	Vienna Convention on the Law of Treaties, 1946 UNTS 3, UN Doc. A/Conf.39/27 (1969)
12.	Vienna Declaration and Plan of Action, UN Doc. A/CONF.157/23 (adopted by the World Conference on Human Rights, 12 July 1993)
	Commission on Human Rights
1.	Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, fifty-fourth session, U.N.-Doc. E/CN.4/Sub.2/2002/10, 25 June 2002: "Relationship between the enjoyment of economic, social and cultural rights and the promotion of the realization of the right to drinking water supply and sanitation, Preliminary report submitted by Mr El Hadji Guissé".
2.	Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, fifty-sixth session, U.N.-Doc. E/CN.4/Sub.2/2004/20, 14 July 2004: "Report of Mr Guissé on the guidelines for the realization of the right to drinking water supply and sanitation"
3.	Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Fifty-seventh session, U.N.-Doc. E/CN.4/Sub.2/2005/25, 11 July 2005: "Draft guidelines for the realization of the

	right to drinking water supply and sanitation"
4.	Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Fifty-eighth session, U.N.-Doc. A/HRC/Sub.1/58/L.25, 21 August 2006: "Adoption of guidelines for the realization of the right to drinking water and sanitation"
5.	Commission on Human Rights, Sixty-second session, U.N.-Doc. E/CN.4/2006/44, 16 March 2006: "Report of the Special Rapporteur on the right to food, Jean Ziegler"
	Committee on Economic, Social and Cultural Rights
1.	Economic and Social Council, Resolution 1990/45, UN Doc. E/RES/1990/45 (1990)
2.	Committee on Economic, Social and Cultural Rights, Fifth session, 1990, U.N.-Doc. E/1991/23, General Comment No. 3: The nature of States Parties obligations (art. 2(1))
3.	Committee on Economic, Social and Cultural Rights, Sixth session, 1991, U.N.-Doc. E/1992/23, General Comment No. 4: The right to adequate housing (art. 11(1))
4.	Committee on Economic, Social and Cultural Rights, Thirteenth session, 1995, U.N.-Doc. E/1996/22: General Comment 6, The Economic Social and Cultural rights of Older Persons
5.	Committee on Economic, Social and Cultural Rights, 4 December 1998, U.N.-Doc. E/C.12/1/Add.3: Concluding Observations: Canada
6.	Committee on Economic, Social and Cultural Rights, Twentieth session, 1999, U.N.-Doc. E/C.12/1999/5: General Comment 12: The right to adequate food (art. 11)
7.	Committee on Economic, Social and Cultural Rights, Twenty-second session, 2000, U.N.-Doc. E/C.12/2000/4: General Comment 14: The right to the highest attainable standard of health (art. 12)
8.	Committee on Economic, Social and Cultural Rights, Twenty-ninth session, 2002, U.N.-Doc. E/C.12/2002/11: General Comment 15, The Right to Water
	CEDAW Committee
1.	Committee on the Elimination of all Forms of Discrimination Against Women, thirtieth session, 2004, U.N.-Doc A/59/38: General Recommendation No. 25:

	Temporary special measures (art. 4(1))
	CERD Committee
1.	Committee on the Elimination of Racial Discrimination, forty-second session, 22 March 1993, U.N.-Doc. A/48/18: General Recommendation No. 14: Definition of discrimination (art. 1(1))
	Human Rights Committee
1.	Human Rights Committee, Sixteenth session, 1982, U.N.-Doc. HRI/GEN/1/Rev.6 at 127, General Comment No. 6: The Right to Life
2.	Human Rights Committee, Thirty-seventh session, U.N.-Doc. A/45/40, 10 November 1989 General Comment No. 18: Non-discrimination
	Other International Law materials
1.	International Commission of Jurists, Limburg Principles (1987)
2.	International Commission of Jurists, Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1998)
3.	International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, 2001, Annex to GA-Res. 56/83
4.	Johannesburg Plan of Implementation of the World Summit on Sustainable Development, in Report of the World Summit on Sustainable Development, Johannesburg, South Africa, August 26 to Sept. 4, 2002, UN Doc. A/CONF.199/L.1, available at: http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf
5.	Preliminary observations as of 24 April 2007 by the United Nations Special Rapporteur on adequate housing, Mr Miloon Kothari in light of his mission to South Africa (12 April – 24 April 2007) available at http://abahlali.org/files/preliminary%20obs%20rev.pdf
6.	South African Human Rights Commission, Response to Call for Comments by the Department of Water Affairs and Forestry, Directorate: Water Allocation on a Draft Position Paper for Water Allocation Reform in South Africa, May 2005, available at: http://www.sahrc.org.za/sahrc_cms/downloads/Water%20Allocation_May.doc

	Books and Articles
1.	Aust Modern Treaty Law and Practice (Cambridge, CUP, 2000)
2.	Bartram & Howard Domestic Water Quantity, Service Level and Health (Geneva: World Health Organization, 2003)
3.	Buffard & Zemanek "The 'Object and Purpose' of a Treaty: An Enigma?" 3 *Austrian Review of International and European Law* 332 (1998)
4.	Cheng General Principles of Law as Applied by International Courts and Tribunals (Cambridge, CUP,1953)
5.	Cottle, E & Deedat, H The Cholera Outbreak: A 2000-2002 Case Study of the Source of the Outbreak in the Madlebe Tribal Authority Areas, uThungulu Region, KwaZulu-Natal; See also Jeter, South Africa's Driest Season, in: Mother Jones, November/December 2002, http://www.motherjones.com/news/feature/2002/11/ma_145_01.html
6.	Craven The International Covenant on Economic, Social and Cultural Rights (Clarendon, Oxford, 1995)
7.	Currie, I & de Waal J The Bill of Rights Handbook 5 ed (Juta, Kenwyn, 2005)
8.	Disease Control Priorities Project "Water, Sanitation, and Hygiene: Simple Effective Solutions Save Lives" Occasional paper, May 2007
9.	Dugard J "The Role of International Law in Interpreting the Bill of Rights" (1994) 10 SAJHR 208
10.	Dugard J International Law: A South African Perspective 3 ed (Juta, Cape Town, 2005)
11.	Gleick, "Basic water requirements for human activities: meeting basic needs" Water International 21 (1996)
12.	Hutton, G & Haller, L Evaluation of the Costs and Benefits of Water and Sanitation Improvements at the Global Level (Geneva: World Health Organization, 2004)
13.	Jeter, *South Africa's Driest Season*, in: Mother Jones, November/December 2002, http://www.motherjones.com/news/feature/2002/11/ma_145_01.html
14.	Jones JM Full Powers and Ratification: A Study in the Development of Treaty-Making Procedure (1949)
15.	Kidd, M "Not a drop to drink: Disconnection of Water Services for non-payment

	and the right of access to water" 20 *SAJHR* (2004) 127
16.	Klabbers J "How to Defeat a Treaty's Object and Purpose Pending Entry into Force: Towards Manifest Intent" 34 *Vand. J. Transnat'l L.* 283, 310 (2001)
17.	Klabbers J "Some problems regarding the object and purpose of treaties" 8 *Finnish Yearbook of International Law* 155 (1997)
18.	Liebenberg, S "The value of human dignity in interpreting socio-economic rights" (2005) 21 *SAJHR* 1
19.	Liebenberg, S "The Interpretation of Socio-Economic Rights" in Woolman *et al* Constitutional Law of South Africa 2 ed, OS (Juta, Kenwyn, 2006)
20.	Liebenberg, S & Goldblatt, B "The interrelationship between equality and socio-economic rights under South Africa's transformative constitution" (2007) 23 *SAJHR* 335
21.	Moriarty, Patrick; Butterworth, John & van Koppen, Barbara "Introduction" in Beyond Domestic: Case Studies on Poverty and Productive Uses of water at the Household Level (2004, Delft, IRC International Water and Sanitation Centre), Technical Paper Series; no. 41
22.	Municipal Services Project report on "The Problem of Handwashing and Paying for Water in South Africa", March 2007
23.	The Case for Water and Sanitation (The Water and Sanitation Program, 2004)
24.	The Coalition Against Water Privatization, the Anti-Privatisation Forum, and Public Citizen, "Nothing for Mahala," Centre for Civil Society Research Report No. 16, April 2004