THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT39/09

In the matter between:

LINDIWE MAZIBUKO	First Applicant
GRACE MUNYAI	Second Applicant
JENNIFER MAKOATSANE	Third Applicant
SOPHIA MALEKUTU	Fourth Applicant
VUSIMUZI PAKI	Fifth Applicant
and	
THE CITY OF JOHANNESBURG	First Respondent
JOHANNESBURG WATER (PTY) LTD	Second Respondent
THE MINISTER OF WATER AFFAIRS AND FORESTRY	Third Respondent

APPLICANTS' SUBMISSIONS

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INTRODUCTION

1. Phiri, Soweto is one of the poorest suburbs in Johannesburg. Its people live in abject poverty. They are unemployed, largely uneducated, and are ravaged by HIV/AIDS. The applicants earn about R1 100 per household per month. It has to sustain households of up to 20 people.

2. The people of Phiri cannot pay for basic services and water. The City of Johannesburg and Johannesburg Water – the company responsible for the City's water and waterborne sanitation services – decided in 2001 that they would provide 6 kilolitres free water per month to every household in Johannesburg, rich and poor alike. This is not enough for the residents of Phiri. Particularly those with large households and those living with HIV/AIDS cannot survive on the 6 kilolitres alone.

3. Until 2003, the residents of Phiri were given unlimited water in their homes. They were charged on a "*deemed consumption*" basis for 20 kilolitres of water at R68 per month. The City did not practise any credit control in Phiri at the time.

4. In 2003 and 2004, the City launched and implemented a pilot project, Operation Gcin'amanzi – Operation Conserve Water – in Phiri. As part of this drive, each household in Phiri was given one of three choices:
   - a prepaid water meter;
   - a yard tap with a trickle device which limits the water supply to a trickle; or
   - no water at all.

5. They were not offered the usual option of unlimited water on credit which is offered as a matter of course to other people across the City.

6. The pre-paid water meters were introduced because there had historically been significant water losses in the area, partly because of bad infrastructure and partly because of a pattern of non-payment. The meters themselves did nothing to solve the infrastructural problems. They made it easier for Johannesburg Water to avoid bad debt. From their point of view, the plan worked. When the meters were introduced, the residents used much less water. For the poor people of Phiri however, the policy had a devastating effect.

7. The pre-paid water meters dispense 6 kilolitres free water per stand per month, but after that the water supply cuts off automatically unless the resident purchases more water credits. Residents with pre-paid water meters, unlike the rest of Johannesburg, get no water on credit. In the months they cannot afford to pay for water over and above the free amount, they must live without water – sometimes for weeks on end.

8. Johannesburg Water exerted much pressure on the Phiri residents to accept pre-paid water meters. It was the only option that provided them with water in their homes. The yard tap, with its slow trickle device, that provided water outside the house, was a harsh alternative. The notices Johannesburg Water gave to the residents also created the impression that the installation of pre-paid water meters was required by the Water Services Act 108 of 1997. In the face of this pressure, they were all but forced to accept pre-paid water meters.

9. Some held out, despite having their water cut off completely, some agreed to a yard tap. Eventually, however, almost all the residents of Phiri succumbed. They accepted the pre-paid water meters, if only to have water in their homes.

10. The impact of the pre-paid meters has been devastating for the applicants and others like them. Ms Mazibuko, before her death in May 2008, left Phiri under the pressure of the new system after suffering many months without water at all. Ms Munyai settled for a yard tap, with all the hardships that it entails. Ms Makoatsane suffered the indignities of caring for her dying father without regular access to water. Ms Malekutu, a pensioner, still faces the distress of water cuts for part of every month. Mr Paki recounts the horror of his backyard shack burning down with children inside, and being helpless without running water because there were only pre-paid water meters in the area.

11. The 6 kilolitres of free water provided by the City through the mechanism of the pre-paid water meter is not enough for the poor people of Phiri. This is so for a number of reasons.

12. The minimum of 6 kilolitres is based on a free basic water minimum standard determined by national government. In calculating the minimum, the government relied on an estimated average household size of four in urban areas and five in rural areas. It meant that the 6 kilolitres per month would give each person free basic water of 40 to 50 litres a day. The government recognised in setting this minimum, that 40 to 50 litres per person per day might not be enough and that it would have to be supplemented, particularly in the case of multiple dwelling stands.

13. In poor areas like Phiri, multiple dwelling stands are common.

13.1. On the City's version, 50% of stands in poor areas have multiple dwellings on them, and 28.5% of stands have more than 8 occupants. Almost a third of the people in poor areas, on this version, accordingly get less than 25 litres per person per day.

13.2. The City says that where there are multiple dwellings per stand, the average occupancy is 10. In these households, the occupants would on average only get 20 litres per person per day.

13.3. The experience of the households that fall outside the average is of course even more desperate. Ms Mazibuko, for example, describes a household of 20 of whom each receives only 10 litres per person per day.

14. In summary, the situation in Phiri and other poor areas in the City is the following:

14.1. Very few people get the national average of 50 litres per day.

14.2. About a third gets less than 25 litres per person per day.

14.3. Some get only 10 litres or less.

15. In poor households, the free basic water runs out before the end of the month. According to the City, the free water in Phiri lasts an average of 20 days per month. In Ms Mazibuko's household, it lasted between 12 and 15 days.

16. The poor in Phiri can frequently not afford to buy water over and above the free amount. It means that they suffer inevitable hardship when the free amount runs out. This is particularly true of those households with special needs – such as families with persons living with HIV/AIDS or other illness. In emergency situations, such as a household fire, the lack of water can be devastating.

17. We shall submit that two features of the City's water policy in Phiri are unlawful:

    17.1. The pre-paid water meters are unlawful on two grounds:

        17.1.1. Their use is in itself unlawful.

        17.1.2. The manner in which the City introduced them in Phiri was unlawful even if they could have been lawfully used.

    17.2. The City's free basic water policy is unlawful because it does not provide poor people with access to sufficient water in terms of s 27 of the Constitution of the Republic of South Africa, 1996 and s 11 of the Water Services Act 108 of 1997. Poor people who cannot afford to pay for their own water, receive too little free water and its supply via pre-paid water meters is too inflexible.

18. Before we address the applicants' causes of action, we deal with the following matters by way of background:

    18.1. We identify and briefly describe the rules of law that govern the right to water.

18.2. We give a chronological account of the facts of this case.

18.3. We describe the City's water policy in Phiri at the time of the hearing in the High Court in December 2007.

18.4. We address the City's belated attempt to introduce new evidence in this court.

19. We emphasize at the outset that the applicants' attacks are directed, not at the City's policy in the abstract, in the sense of its mere plans and decisions to provide free basic water to poor people. Their attacks are directed instead, at the City's policy as it was implemented, that is, at the scheme for the provision of free basic water to poor people as it actually existed on the ground in Phiri.

20. The applicants' attacks were initially directed at the scheme as it existed when this application was launched in July 2006. The City thereafter made various improvements to the scheme, some of them in direct response to this application. The target of the application accordingly moved to the scheme as it existed at the time of the High Court hearing in December 2007.

21. It became clear at about the time of the High Court hearing however, that the City misunderstood or misconstrued the target of the attack in this application. They adopted a range of interim measures by Mayoral Committee resolution in December 2006 and again in October 2007 to bolster their case in the upcoming hearing in the High Court in December 2007. By the time of the hearing, only some of the measures of December 2006 had been implemented. None of the measures of October 2007 had been implemented. Although most of these

measures were no more than future plans, the City nonetheless relied on them before the High Court as improvements in its policy under attack. But that was a misconception. The policy under attack was the actual scheme as it existed on the ground in Phiri at the time, and not the City's plans, designs and ambitions for the future.

22. In the run-up to the hearing in this court, the City has done the same thing again. It has again adopted a range of measures to bolster its case in this court and now applies for leave to adduce evidence of them. Its application to do so is flawed. We will later elaborate on its flaws. But the new evidence in any event again fails to distinguish between the City's free basic water scheme as it actually exists on the ground on the one hand and as it has been designed to work on the other. Their mere decisions, plans, designs and ambitions are irrelevant and must be ignored.

THE RIGHT TO WATER

International law

23. The Centre on Housing Rights and Evictions has been admitted as *amicus curiae* to address the international law aspects of this case. We shall accordingly not traverse this issue at any length.

24. The international law on the right to water is important to this case. The International Covenant on Economic, Social and Cultural Rights and its interpretation and explanation by the UN Committee on Economic, Social and Cultural Rights in their General Comments are particularly significant in the interpretation of the socio-economic rights in ss 26 and 27 of the Constitution for the following three reasons:

    24.1. Whenever a court interprets the Bill of Rights it must consider international law in terms of s 39(1)(b).

    24.2. Whenever a court interprets any legislation it must in terms of s 233 of the Constitution prefer any reasonable interpretation which is consistent with international law over any other interpretation which is inconsistent with it.

24.3. It is clear from the language of ss 26 and 27 of the Constitution that the formulation of these provisions has to a large measure been based on the Covenant and the General Comments.[1]

25. The Covenant right is a significant interpretative tool because it assists in understanding four aspects of the constitutional right to water:

25.1. First, it emphasises the link between water and quality of life, which in turn is central to other human rights;

25.2. Second, it mirrors the "*positive*" and "*negative*" aspects of the constitutional right to water;

25.3. Third, it elucidates the concepts of availability and accessibility of water as central to giving meaning to the right; and

25.4. Fourth, it explains what the state's duties are arising out of the right to water.

Quality of life and the importance for other human rights

26. The Covenant recognises the right to water as implicit in,

- the right to an adequate standard of living and to the continuous improvement of living conditions in article 11; and

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[1] Residents of Bon Vista Mansions v Southern Metropolitan Local Council 2002 (6) BCLR 625 (W) paras 14 to 17

- the right to the enjoyment of the highest attainable standard of physical and mental health in article 12.

27. General Comment 15[2] says that the right to water is implicit in articles 11 and 12 of the Covenant (para 3) and has been recognised in a wide range of international treaties, declarations and other standards (para 4). It highlights that the human right to water is indispensable for a life of human dignity. It is a pre-requisite for the realisation of other human rights (para 1).

Positive and negative rights

28. The General Comment explains that the right to water includes both "*freedoms"* (or what we would call '*negative rights"* or "*defensive rights"*) and "*entitlements"* (or what we would call "*positive rights"*) (para 10).

29. The negative or defensive rights include a right to maintain access to existing water supplies and the right to be free from interference, such as arbitrary disconnections (para 10).

30. The positive rights include the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water (para 10).

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[2] UN Committee on Economic, Social and Cultural Rights, General Comment 15 "*The Right to Water*" (articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights) (2002) vol 67 (Bundle C) p 188 to vol 68 p 205

Availability and accessibility under the Covenant

31. There are at least four aspects to the right to water – availability, quality, accessibility and information accessibility (para 12). Availability and accessibility are of particular importance to this application.

32. The requirement of availability means that the water supply for each person must be sufficient and continuous for personal and domestic uses (para 12(a)).

33. The requirement of accessibility has three dimensions (para 12(c)). They are physical accessibility, economic accessibility and non-discrimination (para 12(c)(i), (ii) and (iii)).

34. The requirement of economic accessibility means that water and water facilities and services must be affordable for all (para 12(c)(ii)). The requirement of non-discrimination means that water and water facilities and services must be accessible to all, including the most vulnerable or marginalised sections of the population, in law and in fact, without discrimination on any of the prohibited grounds (para 12(c)(iii)). The state has 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 (para 15).

Understanding the state's duty

35. The state has a constant and continuing duty to move as expeditiously and effectively as possible towards the full realisation of the right to water (para 18).

36. There is a strong presumption that retrogressive measures taken in relation to the right to water are prohibited under the Covenant (para 19). If any deliberately retrogressive measures are taken, the state has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of rights provided for in the Covenant in the context of the full use of the state's maximum available resources (para 19).

37. The state is obliged to respect, protect and fulfil the right to water (para 20).

37.1. The duty to "*respect*" the right to water requires that the state refrains from interfering directly or indirectly with the enjoyment of the right to water (para 21). It may not engage in any practice or activity that denies or limits equal access to adequate water (para 21). It may also not interfere with the right to water for instance by arbitrary or unjustified disconnection or exclusion from water services or facilities or by discriminatory or unaffordable increases in the price of water (para 44(a)).

37.2. The duty to "*fulfil*" requires the state to adopt the necessary measures directed towards the full realisation of the right to water (para 26). The

state violates this obligation whenever it fails to take all necessary steps to ensure the realisation of the right to water (para 44(c)).

The Constitution

38. There are four rights in the Constitution that are relevant to this case – the right to water, the right to administrative justice, the right to equality and non-discrimination and the right to dignity.

Right of access to water

39. Section 27(1)(b) affords everyone the right to have access to "*sufficient … water*". This section gives rise to both an individual right and a corresponding duty on the state.

40. This state duty has both a negative and a positive component.

    40.1. The negative component arises from s 7(2). It obliges the state to "*respect*" everyone's right of access to sufficient water. It means that the state may not interfere with anyone's existing access to water. Any interference with such access is a limitation of the right which is unlawful unless it can be justified in terms of s 36(1) of the Constitution.[3]

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[3] Jaftha v Schoeman 2005 (2) SA 140 (CC) paras 31 to 34

40.2. The positive component arises from s 27(2). It obliges the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of everyone's right of access to sufficient water.

Right to administrative justice

41. This case concerns the provision of water by local government. It is also subject to s 33(1). This section entitles everyone to administrative action that is lawful, reasonable and procedurally fair. PAJA gives effect to this right. Its provisions accordingly also govern the City's conduct in its provision of water to the applicants.

Right to equality and non-discrimination

42. Section 9 of the Constitution is also important for purposes of this case. Section 9(1) provides that everyone is equal before the law and has the right to equal protection and benefit of the law. Section 9(3) provides that the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, ethnic or social origin, colour or disability.

The right to dignity

43. Section 10 provides that everyone has inherent dignity and the right to have their dignity respected and protected. The state is also obliged in terms of s 7(2) to respect, protect, promote and fulfil this right.

The Water Services Act 108 of 1997

44. This Act regulates the provision of water and sanitation services to the public by local government in accordance with ss 27(1)(b) and 33(1) of the Constitution. The scheme of the Act mirrors the structure of s 27 of the Constitution.

45. In the first instance it provides for an individual *right* of access to "*sufficient water"*. Section 3(1) guarantees everyone a right of access to "*basic water supply"* and a right to "*basic sanitation"*.

45.1. Section 1 defines "*basic water supply"* as the prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene. This minimum standard has been particularised by regulation 3 of the Standards Regulations.[4] Regulation 3(b) quantifies the minimum basic water requirement as 25 litres per person per day or 6 kilolitres per household per month.

45.2. Section 1 defines "*basic sanitation"* as the prescribed minimum standard of services necessary for the safe, hygienic and adequate collection, removal, disposal or purification of human excreta, domestic waste-water and sewage from households, including informal households. This

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4 Regulations relating to compulsory national standards and measures to conserve water Government Notice 509 Gazette No 22355 of 8 June 2001

minimum standard has also been particularised by regulation 2 of the Standards Regulations.

46. In the second instance, the Act places a *duty* on the State to provide access to water. As is the case with the constitutional right, the Act too provides for both a positive and a negative duty.

46.1. The negative duty is found in s 4 of the Act. Sections 4(2)(c)(iv) and (v) and 4(3) regulate the circumstances and manner in which local government may limit or discontinue a person's existing water supply. Sections 4(2)(c)(iv) and (v) provide that the conditions in terms of which a water services provider provides water services, must provide for the circumstances in which and procedures by which water services may be limited or discontinued. In terms of s 4(3) those procedures,

- must be fair and equitable;
- must provide for reasonable notice of intention to limit or discontinue water services and for an opportunity to make representations unless there is good reason to dispense with it; and
- may not result in a denial of access to basic water services for non-payment where the consumer is unable to pay for them.

46.2. The positive duty is in the first place imposed by ss 3 and 9 read with the definition of "*basic water supply*" in s 1. These provisions create a "*floor*" of the basic minimum water that water services institutions must supply to everyone. The core minimum requirement is that everyone must have access to the prescribed minimum basic water supply which has been

quantified by regulation 3(b) of the Standard Regulations as 25 litres per person per day or 6 kilolitres per household per month.

46.3. The positive duty is in the second place extended by s 11 beyond the minimum floor. It imposes an additional open-ended duty on water services authorities "*to progressively ensure effluent, affordable, economical and sustainable access to water services*" to all consumers.

The Johannesburg Water By-Laws

47. Section 21 of the Water Services Act empowers local government to make by-laws on a variety of matters relating to the provision of water services. The City of Johannesburg has done so by way of its Water Services By-laws.[5]

48. By-law 3 defines the three levels of water service the City may provide to the public.

48.1. Service level one is the unmetered supply of water from a communal water point.[6]

48.2. Service level two is the unmetered supply of water to each stand by a yard tap. The tap may not be connected to any other water fittings on the premises. Consumption may not exceed 6 kilolitres per month. The City

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5 City of Johannesburg Metropolitan Municipality Water Services By-Laws Published in Provincial Gazette Extraordinary No 179, 21 May 2004, Notice no 835

6 By-law 3(2)(a)

may install a trickle device which restricts water flow to this limit. If the consumer contravenes these rules, the City may install a pre-paid meter in the yard tap.[7]

48.3. Service level three is the supply of water by a metered water connection to each stand.[8]

49. By-laws 9C and 11 give effect to sections 4(2)(c)(iv) and (v) and 4(3) of the Water Services Act by prescribing the circumstances in, and procedures by which, the City may limit or discontinue water services.

50. By-law 9C prescribes the procedure the City must follow whenever it cuts off any water supply for non-payment. By-law 11 prescribes the other grounds upon which the City may cut off or limit any supply of water.

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7 By-laws 3(2)(b) and 3(3)

8 By-law 3(2)(c)

CHRONOLOGY

The RDP promise of 1994

51. The Reconstruction and Development Programme (RDP) published in 1994 promised that each person would have a basic water supply of 20-30 litres per person per day in the short-term and 50 to 60 litres per person per day in the medium-term.[9] In addition, it provided for adequate sanitation in the short-term, and improved on-site sanitation in the medium-term.[10]

52. The RDP anticipated the problem of affordability by references to "*a lifeline tariff to ensure that all South Africans are able to afford water services sufficient for health and hygiene requirements*".[11] This concept subsequently evolved into the Free Basic Water policy.

The Constitution of 1996

53. The Constitution of the Republic of South Africa, 1996 provides in s 27 that everyone has the right of access to sufficient water. It also provides in s 33(1) that every person has the right to administrative action that is lawful, reasonable and procedurally fair.

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9 RDP (1994) vol 1 p 57 paras 2.6.6 to 2.6.7

10 RDP (1994) vol 1 p 57 paras 2.6.6 to 2.6.7

11 RDP (1994) vol 1 p 58 para 2.6.10.1

54. Schedule 4 Part B of the Constitution lists water and sanitation services as local government matters.

The Water Services Act of 1997

55. The Water Services Act was enacted in 1997 to give effect to the constitutional right of access to sufficient water. It came into effect on 19 December 1997.

The City's Indigent Management Policy of 1998

56. The City initiated its first social package in 1998. The first manifestation of the social package, the Indigent Management Policy of 1998, was a poverty reduction strategy aimed at creating a safety net for the poorest and the elderly by subsidising the supply of water below 10 kilolitres per month to households with a "*total monthly income of less than R800, or not more than two state pensions in the case of pensioners with the cut off of R1 080 per month*".[12] The policy experienced "*administrative and process problems that made it difficult to implement*".[13]

[12] Seedat Answering affidavit vol 10 p 942 paras 26.1 to 26.2

[13] Seedat Answering affidavit vol 10 p 942 para 26.3

The establishment of Johannesburg Water in December 2000

57. Johannesburg Water (Pty) Ltd was established in December 2000 to discharge the City's water service delivery functions.[14] It is a publicly-owned corporation with the City as its only shareholder. It is bound to discharge all the City's constitutional and legislative duties including the City's obligations regarding the poor.

58. On 30 January 2001, the City's predecessor and Johannesburg Water entered into a Sale of Business Agreement in terms of which the City contracted with Johannesburg Water for the provision of water services for a period of 30 years.[15]

59. Johannesburg Water undertook in clause 12 of the Service Delivery Agreement to provide water services to individuals or communities unable to pay the normal tariff rate for water services.

The Free Basic Water Strategy of May 2001

60. Having made several public and political announcements on the subject of Free Basic Water, the Chief Directorate: Water Services of the Department of Water Affairs and Forestry issued Version 1 of its "*Free Basic Water*" Implementation Strategy Document. According to the Strategy "*the primary intended recipients of*

[14] Still Answering affidavit vol 31 p 3026 paras 5 and 8

[15] Sale of Business Agreement (30 January 2001) vol 1 p 64; Service Delivery Agreement (30 January 2001) vol 1 p 65

free basic water are poor households … for whom free basic services represent a significant poverty alleviation measure".[16] It established the national standard of a free basic level of water supply at "*25 litres per person per day*" in paragraph 3.3. It however added that,

> "*Again it needs to be recognised that local authorities should still have some discretion over this amount … In some areas where poor households have waterborne sanitation the total amount of water seen as a 'basic supply' may need to be adjusted upwards (if financially feasible) to take into account water used for flushing. Some local authorities (for example, Volksrust), where affordable, have already defined free basic water as 9 000 litres per month to take into account waterborne sanitation*".[17]

61. The policy document noted in paragraph 6.3 that metropolitan areas are in broad terms economically strong areas with adequate capacity to cross-subsidise poor consumers.

62. It indicated in paragraph 10.1 that the implementation date for the Free Basic Water policy would be 1 July 2001.

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16 Free Basic Water Implementation Strategy Document 1 (May 2001) vol 57 (Bundle B) p 143 para 3.2

17 Free Basic Water Implementation Strategy Document 1 (May 2001) vol 57 (Bundle B) p 144 para 3.3

The Standards Regulations of 8 June 2001

63. On 8 June 2001 the Minister's Regulations Relating to Compulsory National Standards and Measures to Conserve Water set the minimum standard for basic water supply services.

64. Regulation 3(b) of the Standards Regulation provides that the minimum standard is "*a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres perhousehold per month*".

65. Ms Schreiner explains how this minimum standard was set.[18] The government had regard to the fact that the average household size was estimated at four in urban areas and five in rural areas. It meant that 6 kilolitres per household per month would on average provide every person with 50 litres per day in urban areas and 40 litres per day in rural areas.[19] The members of larger than average households would get less but 93% of households comprised no more than 8 people, which would give each of them at least 25 litres per day.[20] It means that the purpose of the prescribed minimum of 6 kilolitres per household per month was to provide the average household with free basic water of 50 litres per person per day in urban areas and 40 litres per person per day in rural areas.

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[18] Schreiner Answering affidavit vol 41 p 4003 paras 113 to 125

[19] Schreiner Answering affidavit vol 41 p 4004 para 116

[20] Schreiner Answering affidavit vol 41 p 4004 paras 117 to 119

The introduction of 6 kilolitres free basic water for all in June 2001

66. At a meeting on 28 June 2001[21], the City approved Johannesburg Water's interim Business Plan for 2001/02 dated 10 June 2001, which made provision "*to introduce free essential water, set at 6 kl/month/household, to all households*".[22]

67. In July 2001 the 2001-2002 Business Plan was approved by Johannesburg Water's Board and the City[23]. From then on, free basic water was allocated to all households with conventional meters in Johannesburg, including those in wealthy suburbs. However, it was only after 2003 that free basic water was implemented in the poor suburbs of Soweto. They had until then an un-metered, flat-rate water supply.

The beginnings of Operation Gcin'amanzi[24] in 2001

68. In "*mid-late 2001*" Anthony Still, former Executive Director and Acting Managing Director of Johannesburg Water, appointed a specific project team within Johannesburg Water to begin focusing on the problems in deemed consumption areas. This project was called *Operation Gcin'amanzi*[25]. It was "*a multifaceted intervention project*" aimed at "*addressing issues surrounding municipal*

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21 City of Johannesburg Council Minutes (28 June 2001) vol 56 (Bundle B) p 1

22 Johannesburg Water Business Plan (10 June 2001) vol 56 (Bundle B) p 24 para 2.5

23 Still Answering affidavit vol 31 p 3030 para 12.4

24 To save/conserve water in *isiZulu*

25 Still Answering affidavit vol 31 p 3032 para 20

infrastructure rehabilitation and water consumption on private properties in the 'deemed consumption' areas of Johannesburg".[26]

69. The initial Operation Gcin'amanzi Report acknowledges that "*as prepayment represents a major paradigm shift from conventional metering and enforces payment for services electronically, prepayment should* _not_ *be enforced on customers until such time as majority acceptance (critical mass) has been obtained, i.e. installation of a prepayment meter on any property should be by choice of the customer … Violation of this principle would in all likelihood lead to confrontation and vandalism of installed meters*".[27]

The Soweto Discussion Document of August 2001

70. In August 2001 Johannesburg Water produced a "*Soweto Discussion Document*" on deemed consumption areas, with a focus on unaccounted for water in Soweto. It highlighted the "*unacceptably high water losses in Soweto*".[28]

71. The discussion document did not explain why the installation of pre-paid water meters (rather than upgrading the pipes and installing conventional meters) was a necessary measure to address Soweto's high water losses, unaccounted for water and ageing infrastructure. Similar problems had in 1995 to 1997 been

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[26] Undated *Operation Gcin'amanzi* Report vol 60 (Bundle B) p 439, referred to in Still Answering affidavit vol 31 p 3032 para 20

[27] Undated *Operation Gcin'Amanzi* Report vol 60 (Bundle B) pp 460 to 461

[28] Johannesburg Water Soweto Discussion Document (August 2001) vol 31 p 3050 para 1, Still Answering affidavit vol 31 p 3031 para 16

successfully remedied by the City of eThekwini by upgrading infrastructure and installing conventional meters in former deemed consumption areas. This resulted in significantly lower wastage of water in the area.[29]

The Special Cases Policy of 14 June 2002

72. On 14 June 2002 the City introduced a Special Cases Policy to provide "*further relief to poor households in respect of refuse and sanitation charges*"[30]. Whereas all households in Johannesburg, rich and poor (except the households in Soweto and other deemed consumption areas), were receiving 6 kilolitres free basic water by this time, the Special Cases Policy of 2002 provided "*further relief*" to qualifying poor households "*in respect of refuse and sanitation charges*".[31]

73. The introduction of the Special Cases Policy was the first of seven steps prior to the hearing in the High Court in the development of the City's indigency policy for the supply of additional free basic water to poor people.

74. It was "*different in that it targeted qualifying poor households who had to provide proof that they needed the benefit because they could not afford to pay"*.[32] The City concedes that this requirement that poor households "*present themselves to the City as poor"*, is "*often regarded as undignified, and it results in a situation*

[29] Macleod Answering affidavit vol 36 p 3543 paras 40 to 42

[30] Seedat Answering affidavit vol 10 p 943 para 28.1

[31] Seedat Answering affidavit vol 10 p 943 para 28.1

[32] Seedat Answering affidavit vol 10 p 944 para 28.2

where many potential beneficiaries prefer not to come forward". The means test is also "*extremely onerous administratively – expensive to run – time consuming – (and) – open to fraud"*.[33] The requirement has however remained in place since its introduction in June 2002.

Phiri selected for a pilot project in July 2002

75. In July 2002 Phiri was selected for the Operation Gcin'amanzi pilot project.[34]

The Councillor Mobilisation Programme commenced in October 2002

76. The City started a councillor mobilisation programme in October 2002. It comprised six workshops to acquaint councillors with Operation Gcin'amanzi.[35]

Operation Gcin'amanzi public meetings in Phiri from November 2002

77. The City held public meetings about Operation Gcin'amanzi in Phiri from November 2002.[36] The applicants were unaware of the public meetings.[37]

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33 Seedat Answering affidavit vol 10 p 944 para 28.3

34 Dumas Answering affidavit vol 25 p 2425 para 21; Still Answering affidavit vol 31 p 3036 paras 31 and 32

35 Rabe Answering affidavit vol 35 p 3477 para 10

36 Brits Answering affidavit vol 7 pp 661 to 664 paras 30.49.1 to 30.49.7; Kunene Answering affidavit vol 39 pp 3842 to 3843 paras 7 to 8; Rabe Answering affidavit vol 35 pp 3477 to 3478 para 10.1; Singh Answering affidavit vol 31 pp 3089 to 3093 paras 33 to 38

Launch of the Phiri pilot project on 26 July 2003

78. The Phiri "*Prototype*" project was formally launched at a public meeting in Phiri on 26 July 2003.[38]

Construction in Phiri commences on 11 August 2003

79. On 11 August 2003 construction work on the "*bulk infrastructure*" for the installation of pre-paid water meters in Phiri commenced.[39]

The Strategic Framework of September 2003

80. In September 2003 DWAF published its "*Strategic Framework for Water Services: Water is life, sanitation is dignity*". The Strategic Framework committed itself to "*progressively improving levels of service over time in line with the original aims of the Reconstruction and Development Programme in 1994*". It also contains a commitment to reviewing basic levels of service by considering "*increasing the basic level from 25 to 50 litres per person*".[40]

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[37] Makoatsane Replying affidavit vol 46 p 4599 paras 804 to 805

[38] Rabe Answering affidavit vol 35 p 3478 para 10.1 lines: 32 to 33

[39] Brits Answering affidavit vol 7 p 664 para 30.49.8; Singh Answering affidavit vol 31 p 3089 para 33

[40] Strategic Framework (September 2003) vol 2 p 124 preface: 3

81. According to the Strategic Framework,

> *"Where sustainable, water services authorities should give consideration to increasing the basic quantity of water provided free of charge (25 litres per person per day) aiming for the free provision of at least 50 litres per person per day to poor households."*[41]

82. It is moreover apparent that the provision of basic sanitation services is separate from, and in addition to, the recommended provision of free basic water services.[42]

The community liaison process from September 2003

83. According to the City "*the community liaison phase of OGA for the household connections commenced in Phiri*" in September 2003. Twenty community facilitators were appointed to conduct house visits and grassroots communication as a means of "*consultation*" about the Operation Gcin'Amanzi process.[43]

84. These public participation processes took place only after the decision to introduce the meters had already been taken. They did not constitute "*true consultation*".[44] Residents were never given any genuine choice about the

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[41] Strategic Framework (September 2003) vol 2 p 155 lines 33 to 36

[42] Strategic Framework (September 2003) vol 2 p 155 lines 33 to 36

[43] Brits Answering affidavit vol 7 p 664 para 30.49.8

[44] Makoatsane Replying affidavit vol 45 pp 4436 to 4437 para 296

available water supply options. In particular, regardless of whether they had any arrears, no Phiri residents were ever given the option of a conventional metered supply[45] such as is available in the richer suburbs of Johannesburg. Meetings and visits were designed to "*inform residents of a decision*" that had already been taken by the City between 2001 and 2002 "*to change the water supply in Phiri to prepayment meters*".[46]

The first phase of the implementation in Phiri from February 2004

85. The first phase of "*commissioning and decommissioning*" for the Operation Gcin'amanzi pilot project in Phiri started in Phiri Block B in February 2004.[47]

86. The City maintains that sometime "*thereafter*" (although no date is provided), a process was pursued whereby "*specially trained community facilitators*" would "*go to each person's house*" to explain Operation Gcin'amanzi and to provide them, over time, with various notices and consent forms regarding the Operation Gcin'amanzi implementation and the related changes to their water supply.[48]

87. Despite the City's claims of "*consultation*" with the people of Phiri, it is apparent that no real consultation took place. The City unilaterally decided what it wanted

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[45] Mazibuko Founding affidavit vol 1 pp 38 to 39 para 95; Makoatsane Replying affidavit vol 45 p 4437 para 298

[46] Makoatsane Replying affidavit vol 45 p 4437 para 296

[47] Singh Answering affidavit vol 31 p 3094 para 39.5

[48] Brits Answering affidavit vol 7 pp 664 to 666 paras 30.49.10 to 30.49.11; Singh Answering affidavit vol 31 pp 3093 to 3094 paras 39.2 to 39.4

to do, and thereafter launched a publicity drive to inform the community of what it had decided. It was a sales drive to promote and implement a decision already taken and not consultation in the process of taking the decision.

88. The City admits that "*it is possible that in the very first phase of implementation of OGA in Phiri in Block B in February 2004, the precise system for communicating with customers was not as well developed as it is today, and it is difficult at this stage, a couple of years on, to compile a collection of exactly which letters were sent to each resident and the order in which they were sent*".[49]

Ms Mazibuko learns of Gcin'amanzi on 17 March 2004

89. On 17 March 2004 the first applicant, Lindiwe Mazibuko, first became aware of Operation Gcin'amanzi when a community facilitator came to her house in Phiri Block B and told her that her water supply system was "*old and rusty*" and that he was going to replace the old pipes with new ones[50]. He gave Ms Mazibuko a letter dated 24 February 2004 entitled "*Decommissioning of the old secondary mid-block water supply system*", which did not say anything about installing pre-paid water meters.[51]

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[49] Brits Answering affidavit vol 7 p 666 para 30.49.13; Singh Answering affidavit vol 31 p 3094 para 39.6

[50] Mazibuko Founding affidavit vol 1 pp 34 to 35 paras 79 to 80

[51] "Notice: Decommissioning of the old secondary mid-block water supply system" (24 February 2004) vol 3 p 237

90. Later that day, Johannesburg Water workers started digging trenches in the pavement outside her house. When Ms Mazibuko asked the workers what they were doing, they told her that they were digging trenches to install pre-paid water meters. She explained that she would never accept a pre-paid water meter because she had heard bad stories about them from people in Orange Farm.[52]

Ms Mazibuko's water is disconnected in March 2004

91. At the end of March 2004, without any notification or warning, Ms Mazibuko's water supply was abruptly disconnected. Although she knew of others in Phiri who were offered the option of a yard tap before their water supply was terminated, Ms Mazibuko was not given the option of a yard tap before her water was disconnected[53]. Her extended household of twenty people received no water at all between March and October 2004. She nonetheless continued to receive monthly water bills.[54]

92. At or around the same time many other Phiri residents experienced water cuts[55]. Like Ms Mazibuko, they had no water supply at all between March and October 2004.

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[52] Mazibuko Founding affidavit vol 1 p 36(a) para 83

[53] Mazibuko Founding affidavit vol 1 p 36(a) para 84 to p 37 para 88

[54] Mazibuko Founding affidavit vol 1 p 38 para 93

[55] Mazibuko Founding affidavit vol 1 p 36(a) para 85

93. Around this time many Phiri residents received standard letters which made it clear that if residents did not consent to the installation of a pre-paid water meter or standpipe, their water would be cut off. [56]

The Water Services By-Laws of 21 May 2004

94. The City's Water Services By-Laws were promulgated on 21 May 2004.[57]

Ms Mazibuko accepts a pre-paid water meter in October 2004

95. By October 2004 Ms Mazibuko could no longer bear not to have water at home. She applied for a pre-paid water meter. It was installed on 11 October 2004.[58]

96. By this time, the other applicants had also either acquiesced in the installation of pre-paid water meters or, in the case of Ms Munyai, the installation of the yard tap.

Amendment of the Special Cases Policy on 28 October 2004

97. By 2004 only about 30 000 special cases had been registered out of an estimated 150 000 eligible account holders[59]. Among the reasons identified by

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[56] Standard letters to Phiri residents (28 September 2004; 24 October 2004; 8 November 2004 and 18 November 2004) vol 3 pp 239 to 247

[57] Provincial Gazette Extraordinary No 179 (21 May 2004) vol 64 (Bundle B) pp 857 to 900

[58] Mazibuko Founding affidavit vol 1 p 38 para 94

the City for this low take-up of the Special Cases Policy benefits, was the fact that "*if an applicant applied during the financial year, registration was approved only until the end of that year … This meant that many applicants received benefits for less than 12 months before having to apply again*".[60] A further "*key constraint*" was that the arrears on the account of the applicant had to be below "*a specified limit*". It meant that many "*heavily indebted households consequently did not qualify to receive the benefit*".[61]

98. The Special Cases Policy was amended to provide further incentives to register. One of these incentives was "*the writing off of accrued arrears … provided that those registering as Special Cases qualified for the installation of free pre-paid electricity and water meters*".[62] This was the second step in the development of the City's indigency policy.

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[59] Seedat Answering affidavit vol 10 p 945 para 28.7.1

[60] Seedat Answering affidavit vol 10 p 946 para 28.7.4

[61] Seedat Answering affidavit vol 10 p 946 para 28.7.5

[62] Seedat Answering affidavit vol 10 pp 946 to 947 para 29.2

Applicants' experiences after October 2004

99. Ms Mazibuko's free 6 kilolitres water per month never lasted the entire month. It usually finished between the 12th and the 15th day of each month. Her household could often not afford to purchase additional water, which meant that they went without water for days and even weeks at a time.[63]

100. With a pre-paid water meter the water supply automatically disconnected when the free basic water supply ran out. According to the applicants, the only warning was an intermittent supply a few litres before the end, after which the supply cut off without notice. There was no opportunity to make representations about the household's circumstances or their inability to pay for water before the disconnection.[64]

101. Ms Makoatsane, the third applicant, with nine people on her property, reported similar experiences. Between November 2004 and January 2005, she bought water twice after the free basic water allocation had run out.[65] In February 2005 she bought water for R10 and then another amount of R60 for her father's funeral.[66] In December 2004 and January 2005 she went without water for two and three days respectively.[67] As a water-saving measure the household cut

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[63] Mazibuko Founding affidavit vol 1 p 40 para 101

[64] Makoatsane Replying affidavit vol 44 p 4384 para 144, with reference to research detailed in Ngwenya vol 48 pp 4793 to 4796

[65] Makoatsane Confirmatory affidavit vol 4 p 350 paras 6 and 10; vol 4 p 351 paras 12, 13 and 15

[66] Makoatsane Confirmatory affidavit vol 4 p 351 para 16

[67] Makoatsane Confirmatory affidavit vol 4 p 350 paras 10 to 11, vol 4 p 351 para 13

down on water-based chores like cleaning floors, doing laundry once a week and no longer on daily basis; reducing the number of times the household flushed the toilet and using dish- and bathwater to do so.[68] Ms Makoatsane also reports the difficulties she has had with dealing with her father's illness on the small amount of water she could afford.[69]

102. Ms Makoatsane admits that the water she received was subsidised and below cost, but she says that she was nevertheless unable to afford the current price.[70] Even 10 kilolitres per month was not sufficient for her basic needs.[71]

103. Ms Malekutu, the fourth applicant, is a pensioner who receives only R780 a month and has three people on her property. She bought water five times from November 2004 to January 2005, amounting to a total of R90. By 5 February 2005 the water she had bought late in January 2005 as well as the 6 free kilolitres for February had run out. She did not have any water until 28 February 2005 and had to live on handouts from neighbours. Sometimes R10 of additional water credit lasted for only one day.[72] Ms Malekutu's pre-paid water meter worked irregularly since its installation.[73]

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68 Makoatsane Confirmatory affidavit vol 4 p 350 paras 6 to 9

69 Makoatsane Confirmatory affidavit vol 4 p 351 paras 14 to 16

70 Makoatsane Replying affidavit vol 45 p 4460 para 388

71 Makoatsane Replying affidavit vol 45 pp 4460 to 4461 para 389

72 Malekutu Confirmatory affidavit vol 4 p 355 paras 9 to 11

73 Malekutu Confirmatory affidavit vol 4 pp 354 to 355 paras 6 to 8

104. Grace Munyai, the second applicant, had a household of six people. They opted for a yard tap rather than a pre-paid water meter because they could not afford to buy water on a regular basis and they did not want to suffer automatic disconnections as a result of their inability to pay for water.[74]

105. The experience of Vusimuzi Paki, the fifth applicant, illustrates the difficulties of dealing with emergencies under the current water supply regime. Mr Paki had eleven people on his property. On 27 March 2005 a fire broke out in one of the shacks. The tap water extinguished only about 60% of the fire, as a result of insufficient water pressure and insufficient water supply. Although neighbours tried to use ditch water to put out the fire, [75] two young children who were in the shack were killed in the fire.

The roll-out of pre-paid water meters completed in February 2005

106. The roll out of Operation Gcin'amanzi pre-paid water meters in Phiri was completed by February 2005. The City began to roll out pre-paid water meters elsewhere in Soweto.

Amendments of the Special Cases Policy on 20 June 2005

107. On 20 June 2005, the City made further amendments to the Special Cases Policy in terms of which the income threshold on which access to additional benefits

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[74] Munyai Confirmatory affidavit vol 4 pp 340 to 341 para 5; p 341 para 12; p 342 para 18

[75] Paki Confirmatory affidavit vol 4 pp 358 to 360 paras 4 to 13

[76] This was the third step in the development of the City's indigency policy.

The Indigent Persons Policy of 31 October 2005

108. On 31 October 2005 the City renamed its Special Cases Policy, calling it the "*Indigent Persons Policy*". It was the fourth step in the development of the City's indigency policy. It was renamed but otherwise merely carried forward the water features of the Special Cases Policy.[77]

109. As with the Special Cases Policy, the Indigent Persons Policy made the installation of pre-paid water and electricity meters compulsory when households applied to register as indigents. If an indigent consumer did not agree to the installation of a pre-paid water meter "*the arrear debt that had been written off would be reinstated*".[78] The policy still did not "*resolve the problem of non-accountholders not yet accessing the social package*".[79]

The launch of this application on 5 July 2006

110. On 5 July 2006, the applicants launched this application in the High Court.

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[76] Seedat Answering affidavit vol 10 p 947 para 29.3

[77] Seedat Answering affidavit vol 10 p 951 para 31.4.1

[78] Seedat Answering affidavit vol 10 p 952 para 31.4.4

[79] Seedat Answering affidavit vol 10 p 953 para 31.5.3

The Social Package of mid-2006

111. In mid-2006 the City again amended its policy. This was the fifth step in the development of the City's indigency policy. In contrast to previous alterations, which left the free basic water allocation unchanged, the City's new Social Package Policy aimed to increase the free basic water allocation to poor people from 6 kilolitres to 10 kilolitres per month to targeted beneficiaries.[80] This formula was based on the recognition that there were more than eight persons in many poor households. A 10 kilolitres allocation provided a household of up to thirteen people with 25 litres per person per day free basic water.[81]

112. The Social Package Policy aimed ultimately, to remove the universal allocation of free basic water and to target only qualifying beneficiaries. They will be identified on the basis of a new property register, which it was thought at the outset would be finalised in July 2007, which was subsequently revised to July 2008.[82]

113. The Social Package was not implemented prior to the hearing in the High Court. Some of its features were however implemented by way of interim measures approved while this application was pending in the High Court, in December 2006 and in October 2007 on the eve of the High Court hearing in December 2007.

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80 Brits Answering affidavit vol 7 p 611 para 26.10.2 (misnumbered in supplementary affidavit, should be para 25.10.2)

81 Brits Answering affidavit vol 7 p 615 para 25.20

82 Brits Answering affidavit vol 7 p 612 para 25.11 and p 613 para 25.16

The interim measures approved on 6 December 2006

114. The Mayoral Committee decided on 6 December 2006 to introduce interim measures "*in the first quarter of 2007*", which will remain in place "*until the revised social package comes into effect*".[83] The interim measures were shown to be necessary by social research undertaken by the City between July and November 2006. It highlighted the need "*to introduce some flexibility into the approach which it takes to the free allocation*".[84]

115. The interim measures included,

115.1. an increase in free basic water from 6 kilolitres to 10 kilolitres per household per month for registered indigent accountholders; and

115.2. a process of representation for "*poor and vulnerable households, who are not registered as indigent but whose circumstances warrant an additional allocation*", and

115.3. an annual allocation of 4 kilolitres for emergencies for accountholders with pre-paid water meters.[85]

116. The interim measures were to be implemented from March 2007[86]. But they were not, as subsequent events made clear.

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[83] Seedat Answering affidavit vol 10 p 966 para 38

[84] Brits Answering affidavit vol 7 p 614 para 25.19

[85] Mayoral Committee Meeting (6 December 2006) vol 40 p 3922 para 5

[86] Mayoral Committee Meeting (6 December 2006) vol 40 p 3923 para 6

The implementation of the interim measures from July 2007

117. During July 2007 Jennifer Makoatsane and others in Phiri began to receive 10 kilolitres free basic water per month by means of a voucher for the extra 4 kilolitres per month allocation.[87] At that stage, the residents of Phiri were not aware of the annual emergency allocation of 4 kilolitres.

118. During September 2007 Johannesburg Water began replacing the old pre-paid water meters with new, above-ground meters, which had the capacity to automatically dispense 10 kilolitres free basic water each month. Jennifer Makoatsane's pre-paid water meter was not replaced as she refused to accept the new meter. Others in Phiri have received the new meters.[88]

The representation mechanism approved on 18 October 2007

119. On 18 October 2007, the City's Mayoral Committee gave in principle approval to the introduction of a representation mechanism for poor people with special needs. It was the seventh and last step in the development of the City's indigency policy before the hearing in the High Court in December 2007. The minute of the Mayoral Committee meeting makes it clear that the approval in

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[87] Makoatsane Supplementary replying affidavit vol 53 p 5246 para 8

[88] Makoatsane Supplementary replying affidavit vol 53 p 5247 paras 11 to 12

principle was given in haste only to bolster the City's case in the High Court hearing:

> "*The City of Johannesburg opposed the action and on the advice of our legal team the City needed to take certain steps to ensure that the use of the prepaid water meter system can be defended as a reasonable and rational policy decision ....*
>
> *One of the needs identified was a representation mechanism.*
>
> *The City of Johannesburg has committed itself through a resolution of the Mayoral Committee on 12 December 2006 to establish a representation mechanism for additional free water based on special needs. This has become an urgent question since such a mechanism has become material to the rights-management issues raised by the applicants in legal action on behalf of pre-paid metre customers.*"[89]

120. This "*special needs water application mechanism*" included the following proposals:

    120.1. A process whereby People Living With HIV/AIDS or "*persons with another chronic illness in respect of which a doctor has indicated that additional water is necessary"* are entitled to apply for and receive an additional two kilolitres per month per HIV-positive or chronically ill person in the dwelling.[90]

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89 Mayoral Committee resolution (18 October 2007) vol 52 p 5199; Brits Supplementary affidavit vol 52 p 5162 para 10

90 Brits Supplementary affidavit vol 52 p 5163 para 10.5.1

120.2. A process for "*an additional allocation of emergency water where this has already been used can be applied for provided the earlier use is justified … 1 kilolitre can be given in the month of the temporary emergency*".[91]

120.3. A process whereby "*multiple permanent households qualifying for Indigency Register on one stand with single water point*" can apply for "*any additional KL per month required to extend water provision to 25 l per person per day, provided that the number of persons counted is not more than the permitted maximum number of legal occupants per square meter and up to a ceiling*".[92]

120.4. Finally, where a "*head of household believes that special circumstances not described by any of the above categories entitle that household to a special needs allocation of water, he or she may request this from the designated social worker at the regional customer service centre*".[93]

121. The decision makes is clear that this mechanism was being introduced only to be in time for the hearing in the High Court. It says that "*the City need to highlight this mechanism in its further affidavit where in progress to date is put to court, hence these key documents are presented to the Mayoral Committee for in-principle approval*".[94]

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[91] Brits Supplementary affidavit vol 52 p 5163 para 10.5.2

[92] Brits Supplementary affidavit vol 52 p 5163 para 10.5.3

[93] Brits Supplementary affidavit vol 52 p 5163 para 10.5.4

[94] Mayoral Committee resolution (18 October 2007) vol 52 p 5199

The City's late affidavits in October and November 2007

122. On 23 October 2007, on the eve of the hearing in the High Court, the City filed supplementary affidavits to explain the delay in implementing the interim measures approved in December 2006 between March and July to September 2007. It claimed it had experienced difficulties updating the prepayment software to increase the free basic water allocation from 6 kilolitres to 10 kilolitres and difficulties in reconciling the indigency register records against Johannesburg Water's prepayment customer records.[95]

123. As foreshadowed in the Mayoral Committee minutes of 18 October 2007, the supplementary affidavit also brought to the attention of the court the "*in principle approval*" of the special needs water application mechanism.[96]

124. The applicants replied in November 2007 with fundamental criticisms of a number of the City's proposals.[97] As the evidence at that stage was that the City had give "*in principle approval*" for a proposed special representation mechanism, it was, however, impossible to assess whether and how they would be implemented.

125. This supplementary evidence filed by both sides, made it clear that the interim measures approved on 6 December 2006 were only partially implemented and

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[95] Singh Supplementary affidavit vol 52 p 5175 to 5177 paras 3 to 7

[96] Brits Supplementary affidavit vol 52 p 5162 para 10.2

[97] Makoatsane Supplementary replying affidavit vol 53 p 5244 to 5265

the interim measures approved on 18 October 2007 were not implemented at all by the time of the High Court hearing in December 2007.

The High Court hearing on 3 to 5 December 2007

126. The application was heard in the High Court from 3 to 5 December 2007.

The High Court judgment on 30 April 2008

127. On 30 April 2008, Tsoka J handed down judgment.[98] The High Court upheld the challenge[99] and

127.1. set aside the City and Johannesburg Water's decisions;

127.2. declared unconstitutional and unlawful

127.2.1. the forced installation of pre-paid water meters,

127.2.2. the choice given to residents of Phiri between only a pre-paid water meter and a standpipe, and

127.2.3. the pre-paid water meter system in Phiri Township;

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98 High Court Judgment vol 54 p 5291

99 High Court Judgment vol 54 p 5361 para 183

127.3. ordered the City and Johannesburg Water to provide each of the applicants and other similarly placed residents in Phiri with a free basic water supply of 50 litres per person per day and the option of a metered supply.

The application for leave to appeal on 22 May 2008

128. On 22 May 2008, the respondents applied for leave to appeal the judgment of Tsoka J.[100]

The correspondence of July and August 2008

129. In the run-up to the hearing of the City's application for leave to appeal, the applicants submitted to court a chronological account of the correspondence between the parties regarding interim relief pending the resolution of the matter on appeal.[101] In response, the City filed additional correspondence which it said had also been exchanged between the parties.

130. The correspondence to which they referred was a letter dated 31 July 2008 from the City's attorney Ms Tucker to Ms Dugard of the Centre for Applied Legal Studies who acts for the applicants.[102] This was the first time the applicants became aware of this letter. Ms Dugard said then that she had never received it.

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[100] HC leave to appeal vol 55 p 5364 and p 5385

[101] Dugard affidavit vol 55 p 5390 paras 5 to 6, correspondence annexed vol 55 pp 5392 to 5414, incorporating Tucker affidavit at pages 5403 to 5406

[102] Letter (31 July 2008) vol 55 p 5407

Ms Tucker investigated the matter and realised that Ms Dugard was correct. She admitted in a subsequent affidavit "*that we did not transmit the fax to the correct number*" due to "*a genuine and most regrettable oversight*" for which she apologised.[103]

131. In this letter, the City invited the applicants to bring to the City's attention any difficulties experienced with the interim indigency measures. Not having received the letter, the applicants' representatives obviously did not reply to it. What was clear, however, from the correspondence *preceding* the letter, is that the City was informed that the applicants

> "*continue to suffer without water for days at a time. Your clients have taken no steps to alleviate the conditions of suffering set out in the application before the High Court – conditions which Tsoka J held to be violations of their constitutional rights.*
>
> *. . .*
>
> *In light of the likely period before this dispute is finally resolved, we accordingly request that your clients introduce immediate interim measures to relieve the suffering of our clients and other similarly placed residents of Phiri*"[104]

132. The applicants were not at that stage aware of the implementation of further interim measures.

103 Tucker affidavit vol 55 p 5404 paras 3.1 to 3.10

104 Letter (31 July 2008) vol 55 pp 5401 to 5402 paras 6 to 7

The application for leave to appeal on 9 September 2008

133. On 9 September 2008 the High Court heard the City's application for leave to appeal. It granted the application.

The hearing of the SCA appeal on 23 to 25 February 2009

134. The City appealed the whole of the High Court judgment to the SCA. The appeal was heard in February 2009. The City did not apply to introduce any new evidence in that hearing.

135. The SCA judgment was handed down on 25 March 2009. The SCA upheld the City's appeal, and ordered that the following order replace that of the High Court:[105]

> *1. The decision of the first respondent and/or the second respondent to limit the free basic water supply to the residents of Phiri to 25 litres per person per day or 6 kl per household per month is reviewed and set aside.*
>
> *2. It is declared:*
>
> *(a) That 42 litres water per Phiri resident per day would constitute sufficient water in terms of s 27(1) of the Constitution.*

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105 SCA Judgment vol 70 (Bundle D) pp 35 to 36 para 62

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

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

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

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

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

136. Subsequently, on 26 March 2009, the SCA in clarification of its order, also issued the following additional order to replace that of the High Court:[106]

"7. The respondents are jointly and severally ordered to pay the costs of the application, which costs are to include the costs of three counsel"

The application to this court on 17 April 2009

[106] Amendment of SCA order vol 70 pp 38 to 39 para 1

137. On 17 April 2009, the applicants filed their application for leave to appeal to this court against the decision of the SCA.

138. On 20 May 2009, the City applied for leave to cross-appeal, and for leave to admit new evidence to this court.

139. On 17 July 2009 the Minister applied for leave to cross-appeal.

THE CITY'S POLICY AT THE TIME OF THE HIGH COURT HEARING

The basic policy

140. The City's allocation of free basic water is made to all residents, rich and poor alike.[107] It is an allocation per accountholder, that is, per stand.[108] It means that everybody who lives on the same stand share a single allocation. The result is that rich people get more free water than poor people. That is because the average number of people per stand is significantly lower in affluent areas than in poor areas.[109] It varies widely from as few as one to as many as 20 per stand.[110] It means that some (mostly rich) people get as much as 200 litres per person per day while other (mostly poor) people get as little as 10 litres per person per day.

141. Most of the rich people who benefit from this one-size-fits-all approach are white while most of the poor people who suffer from it are black.

The interim measures

142. In terms of the interim measures approved on 6 December 2006, poor people also receive the following benefits, but only if they register as indigents.

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[107] Mazibuko Founding affidavit vol 1 p 48 para 128

[108] Brits Answering affidavit vol 7 p 614 para 25.20; Eales Answering affidavit vol 16 p 1560 para 62

[109] Eales Answering affidavit vol 16 p 1548 para 52.2.3

[110] Eales Answering affidavit vol 16 p 1549 figure 2

142.1. Subject to the conditions set out below, their arrears are written off.[111]

142.2. They qualify for an additional allocation of free basic water of 4 kilolitres per accountholder per month. It brings their free basic water to 10 kilolitres per accountholder per month.[112] The residents of Phiri received this benefit from July 2007.[113]

143. The people who qualify for the additional benefits by registration as indigents are,

143.1. poor people whose combined household income does not exceed the value of two social grants paid by national government;[114]

143.2. pensioners and disabled people whose total household income does not exceed the value of two old age or disability pensions paid by national government,[115] and

143.3. accountholders who have "*full blown AIDS"* and AIDS orphans.[116]

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111 Indigent Persons Policy (31 October 2005) vol 14 p 1321 para 7.2

112 Singh Supplementary affidavit vol 52 p 5177 para 9

113 Makoatsane Supplementary replying affidavit vol 53 p 5246 para 8; Singh Supplementary affidavit vol 52 p 5177 para 9.1

114 Indigent Persons Policy (31 October 2005) vol 14 p 1322 para 8.2.1

115 Indigent Persons Policy (31 October 2005) vol 14 p 1322 para 8.1

116 Indigent Persons Policy (31 October 2005) vol 14 p 1322 para 8.2.2

144. Applicants for registration as indigents must agree to the installation of pre-paid water meters to qualify for the additional benefits. If they refuse, obstruct the installation of their pre-paid water meters or tamper with them, they are disqualified, forfeit the additional benefits and again become liable for their arrears.[117]

145. Those with pre-paid water meters also qualify for a single annual allocation of 4 kilolitres of water for emergencies.[118] The applicants had not been told about this benefit at the time of the High Court hearing.[119] The City confirmed that only 53% of eligible households had by that stage received this benefit.[120]

The flaws in the policy

146. Quite apart from the debate about the quantum of the benefits provided to poor people, the scheme is inherently flawed. Its main flaws are the following:

146.1. The free basic water of 6 kilolitres per month is given to rich and poor alike. There is no justification for the allocation of free water to people who can afford to pay for it. The cost of doing so could be spent instead on the enhancement of the benefits to poor people.[121]

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[117] Indigent Persons Policy (31 October 2005) vol 14 p 1321 para 7.2

[118] Singh Supplementary affidavit vol 52 p 5179 paras 10 to 11

[119] Makoatsane Supplementary replying affidavit vol 53 p 5246 paras 8 to 10

[120] Singh Supplementary affidavit vol 52 p 5180 para 11.2

[121] Seedat Answering affidavit vol 10 p 959 para 32.16

146.2. Poor people can only get access to the additional 4 kilolitres per month – which bring their total free water to 10 kilolitres – by registering as indigents. The City has long recognised this to be a serious flaw. The advice of the City's own experts has been that registration is a "*demeaning process*".[122] The City knows that the most vulnerable often do not respond to calls to register.[123] As a result, only a small proportion of the poor people who qualify for the additional benefits in fact receive them.

146.3. The poor who are excluded from receiving the benefits are not merely a few hard luck cases. The City's own evidence in this regard is significant:

- The City says that in 2001, there were approximately 1 million households, 51% of whom earned less than R 1 600 per month. [124] This means at least half million households are in fact indigent.
- The City says that only 150 000 households qualify for the indigent register.[125] This means that 350 000 earn less than R1 600 per month, but do not qualify for the additional indigency benefits. Assuming a conservative figure of 7 people per household, this translates to 2.5 million people who are excluded from the outset.
- On 31 May 2005 only 118 000 households were registered. This means that 32 000 households who qualify, are not registered.

122 Social Package Policy Base Document (8 June 2006) vol 14 p 1350 para 9.1

123 Brits Answering affidavit vol 7 p 686 para 30.75

124 Brits Answering affidavit vol 6 p 599 para 21.1 to p 600 para 21.2

125 Seedat Answering affidavit vol 10 p 945 para 28.7.1

This translates (again at a conservative 7 person per household estimate) to an additional 224 000 poor people who are excluded from the additional benefits.

- There are accordingly millions of poor people who do not qualify for the increase to 10 kilolitres, and who will still only receive 6 kilolitres per household per month, regardless of household size.

146.4. Both the free basic water and the additional 4 kilolitres are allocated per accountholder, that is, per stand. They do not cater for multiple households per stand. This is a serious problem in low income suburbs like Phiri where more than half the stands are occupied by multiple households.[126] The City submitted to the SCA that this should not concern us, however, as the "*law is always concerned with generalities and not with those falling on the extreme of a spectrum".* It is apparent from the City's own evidence, however, that this flaw affects a significant proportion of the City's poor:

- The City acknowledges that the fact that the quota is calculated per stand, means that it fails to provide for large households and that this is "*problematic*" and a "*serious issue"* for which it is *"yet to find a comprehensive solution"*.[127]
- The City's own expert says that 10 kilolitres is only enough for about 7 or 8 people.[128]

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126 Eales Answering Affidavit vol 16 p 1560 para 62.1

127 Seedat Answering affidavit vol 10 p 923 paras 17.10 and 17.12

128 Palmer Answering affidavit vol 38 pp 3792 to 3793 paras 8.14.6 to 8.14.7

– The City's evidence is that 28.5% of stands in Phiri have more than 8 people on each stand.[129] This means that almost one third of the City's poor do not get enough water even if they register for the additional water under the interim mechanism. It is apparent that this fundamental flaw does not only affect a few "*extreme*" cases at the end of a spectrum.

146.5. The Scheme is insufficiently flexible. It does not allow residents with pre-paid water meters who run out of water, to make representations for further allocations of free water to cater for special circumstances.

The special representations mechanism

147. The Mayoral Committee decision of 6 December 2006 recognised that it was "*possible that a number of poor and vulnerable households, who are not registered as indigent but whose circumstances warrant an additional allocation",* were excluded from the additional interim benefits.[130] It accordingly approved a "*parallel process to allow representations on the basis of special need"*.[131]

[129] Eales Answering affidavit vol 16 p 1550 para 52.4.5

[130] Mayoral Committee Decision (6 December 2006) vol 40 p 3922 para 5

[131] Mayoral Committee Decision (6 December 2006) vol 40 p 3922 para 5

148. The decision called for a report on the mechanism to be presented to the Mayoral Committee in February 2007 with a view to its implementation from 1 April 2007.[132]

149. The report which was to have been submitted to the Mayoral Committee in February 2007, was in fact only submitted to it for approval on 18 October 2007.[133] The report made it clear that it was being done only to be in time for the hearing in the High Court. It referred to this litigation and the upcoming hearing and said that,

- "*On advice of our legal team the City needed to take certain steps to ensure that the use of the pre-paid water meter system can be defended as a reasonable and rational policy decision … and that it could be implemented in a manner that safeguards the rights of residents*";
- the mechanism "*has become material to the rights-management issues raised by the applicants*" and
- "*the City need to highlight this mechanism in its further affidavit where in progress to date is put to court, hence these key documents are presented to the Mayoral Committee for in-principle approval*".[134]

150. The report proposed that residents be allowed to make representations to a social worker for the following special allocations of additional free water:

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[132] Mayoral Committee Decision (6 December 2006) vol 40 p 3925 para 5

[133] Brits Supplementary affidavit vol 52 p 5162 para 10.2; Mayoral Committee resolution (18 October 2007) vol 52 p 5199

[134] Mayoral Committee resolution (18 October 2007) vol 52 p 5199

150.1. Registered indigents on stands with multiple households, would qualify for so much additional free water as is necessary to give each person 25 litres per day.[135] This benefit would however, be subject to two limitations. The first is that the number of residents per stand for whom additional water is allocated, may not exceed the number of legal occupants per square metre. The second is an absolute ceiling of 12 kilolitres.[136]

150.2. Where accountholders have exhausted their annual emergency allocation of 4 kilolitres, they could apply for an additional 1 kilolitre emergency water.[137]

150.3. HIV infected people and those who suffer other serious chronic illnesses, qualify for an additional allocation of 2 kilolitres per month.[138]

150.4. A head of household who believes that any other special personal circumstances warrant additional water, may apply for additional free water. It may be granted to him only if his special circumstances "*are of a temporary and/or transitory nature*".[139]

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135 Brits Supplementary affidavit vol 52 p 5163 para 10.5.3

136 Brits Supplementary affidavit vol 52 p 5163 para 10.5.3; Report (October 2007) vol 52 p 5199 at p 5205

137 Brits Supplementary affidavit vol 52 p 5163 para 10.5.2

138 Brits Supplementary affidavit vol 52 p 5163 para 10.5.1

139 Mayoral Committee resolution (18 October 2007) vol 52 p 5199 at p 5205 para (c), as referred to in Brits Supplementary affidavit vol 52 p 5163 para 10.5.4

151. The Mayoral Committee approved the report on 18 October 2007.[140] Both the report[141] and the City's supplementary answer of 23 October 2007[142], envisaged that implementation would only commence from 21 November 2007 and would be done in stages extending into the second half of 2008.

152. At the time of the High Court hearing, the mechanism had accordingly not been implemented. One did not know whether, when or how implementation would take place or how effective it would be.

153. The City's supplementary answer of 23 October 2007 makes it clear that the infrastructure for the implementation of the representation mechanism still had to be created:

> "*The mechanism requires the establishment of a full human development unit. Two dedicated full-time social workers will be attached to each administrative region to provide assessment and verification capacity for this procedure. The unit will comprise a team of 14 social workers who report to a head of unit who will oversee operations city-wide and also manage an administrative support post responsible for co-ordinating unit logistics. This unit is in the process of being established.*"[143]

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[140] Brits Supplementary affidavit vol 52 p 5162 para 10.2

[141] Mayoral Committee resolution (18 October 2007) vol 52 p 5199 at vol 53 p 5207 para 3(b)

[142] Brits Supplementary affidavit vol 52 p 5164 para 10.7

[143] Brits Supplementary affidavit vol 52 pp 5162 to 5163 para 10.4

The City's future plans

154. The Mayoral Committee Decision of 6 December 2006 called for a plan to be submitted in February 2007 for the implementation of a new Social Package for implementation from July 2008.[144] The City's supplementary answers of 23 October 2007 did not report any progress on the new Social Package.[145]

155. The only evidence of groundwork that had at that time been done towards the formulation of a new Social Package, was the Social Package Policy Base Document of 8 June 2006 prepared by the City's consultants.[146] The City however made it clear that this was no more than a "*set of consultant's recommendations*" which had "*not been discussed at any decision-making level of the City*" and that the City indeed disagrees with some of the recommendations.[147] At the time of the High Court hearing, one accordingly had no idea what might come of it.

156. One of the consultant's recommendations was that the free basic water of 6 kilolitres per month be limited to poor people. The Mayoral Committee Decision of 6 December 2006 approved this recommendation in principle with a view to its implementation from July 2008.[148]

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[144] Mayoral Committee Decision (6 December 2006) vol 40 p 3925 paras 1 and 2

[145] Brits Supplementary affidavit vol 52 p 5159; Singh Supplementary affidavit vol 52 p 5174

[146] Social Package Policy Base Document (8 June 2006) vol 14 p 1335

[147] Seedat Answering affidavit vol 10 p 954 para 32.5

[148] Mayoral Committee Decision 6 December 2006 vol 40 p 3925 para 7

157. In its evidence before the High Court the City conceded that this will be "*a dramatic change"* and that one of its consequences will be that "*the revenue gained from not providing wealthier households with a subsidy they do not need will be re-applied to give poor households more of a subsidy"*.[149] The City did not explain why this was not done long ago. It meant however that the City could in this way release very substantial resources to provide greater benefits to poor people.

[149] Seedat Answering affidavit vol 10 p 959 para 32.16

THE NEW EVIDENCE

The City's application

158. On 20 May 2009, the City applied for leave to adduce new evidence to this court.

159. The City's attempt to present more evidence must be seen against the backdrop of a record that, by the time the parties reached this court, ran to some 7 500 pages. By far the bulk of this evidence had been produced by the respondents. It has been an extraordinary burden for the applicants, who have no resources available for litigation, to litigate against the state which amassed this volume of evidence at taxpayer's expense. Yet, on the eve of the hearing, the City applied to present yet more evidence, most of which is irrelevant or at the very least superfluous.

160. At the time we prepared these submissions, the City had already filed 354 pages of evidence in the application for leave to appeal to this court.[150] On Friday 17 July 2009, the City filed further evidence in reply of some 168 pages. They did so,

- without the leave of this court to file a reply at all;
- more than 6 weeks after the applicants had filed their answer on 3 June 2009;
- two days after the record of this case had been filed with this court on 15 July 2009; and

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[150] CC leave to appeal vol 71 (Bundle D) p 147 to vol 74 (Bundle D) p 500

- only a week before the deadline for these submissions on Friday 24 July 2009.

161. We have not been able to read, absorb and address this latest salvo of new evidence within the limits of our pre-determined programme for the preparation of these submissions. We apologise to this court for our inability to do so. We accordingly address the City's application to adduce further evidence without regard to its evidence in reply.

162. We submit for the reasons that follow, that the application to admit new evidence should be dismissed.

Requirements for the admission of new evidence

163. The general rule in our law is that a court of appeal,

> "*determines whether the judgment appealed from is right or wrong according to the facts in existence at the time it was given and not according to new circumstances which came into existence afterwards. In principle, therefore, evidence of events subsequent to the judgment under appeal should not be admitted in order to decide the appeal, although there may possibly be exceptions to this rule.*"[151]

[151] McDonald's Corporation v Joburgers Drive-inn Restaurant 1997 (1) SA 1 (A) 14A to B. Also see Weber-Stephen Products Co v Alrite Engineering 1992 (2) SA 489 (A) 507 C to E; Attorney-General, Free State v Ramokhosi 1999 (3) SA 588 (SCA) para 8; Rail Commuters Action Group v Transnet 2005 (2) SA 359 (CC) paras 41 to 43

164. When the appellate court is the Constitutional Court, further considerations militate against the admission of new evidence:[152]

164.1. It is not ordinarily in the interests of justice for a court to sit as a court of first and last instance over matters of law or fact where there is no possibility of appealing against its decision.[153]

164.2. It is also not in the interests of justice for eleven judges of the highest court in constitutional matters to hear matters at first instance which could conveniently have been dealt with by a single judge of a High Court or by the SCA.[154]

165. Evidence on appeal will accordingly only be admitted in this court in very rare circumstances.[155]

166. There are two kinds of application to adduce new evidence on appeal. One does not require a departure from the general rule that appeals are determined on the facts at the time of the High Court hearing, and the other does.

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152 Omar v Government of the Republic of South Africa (Commission for Gender Equality, Amicus Curiae) 2006 (2) SA 289 (CC) para 33

153 Bruce v Fleecytex Johannesburg CC 1998 (2) SA 1143 (CC) para 7 to 8, most recently confirmed in Aparty v Minister of Home Affairs; Moloko v Minister of Home Affairs 2009 (3) SA 649 (CC) para 56; Women's Legal Centre Trust v President of the Republic of South Africa [2009] ZACC 20 paras 28 to 29

154 Dormehl v Minister of Justice and Others 2000 (2) SA 987 (CC) para 5.2

155 President of the Republic of South Africa v Quagliani and Two Similar Cases 2009 (2) SA 466 (CC) para 70

166.1. The first kind is an application to admit new evidence of facts that existed at the time of the High Court hearing, which was for some reason not adduced in the High Court proceedings. If such evidence is admitted, the appeal is still determined on the basis of the facts as they (truly) existed at the time of the High Court hearing. In order to succeed, the applicant must meet the ordinary requirements for the admission of new evidence on appeal.

166.2. The second kind is an application to adduce new evidence of subsequent events, that is, of facts which did not exist at the time of the High Court hearing. This kind of application involves a departure from the general rule that appeals are decided on the facts at the time of the High Court hearing. To succeed, the applicant must overcome two hurdles. First, it must persuade the court to determine the case on the basis of subsequent events and not on the facts as they existed at the time of the High Court hearing, as is the general rule. Second, it must also meet the ordinary requirements for the admission of new evidence on appeal.

167. This case is of the second kind. The City wants to adduce new evidence, not only of the facts as they existed at the time of the High Court hearing, but also of subsequent events over the period of some 18 months since then. It wants to do so, to persuade this court to overturn the High Court's judgment, not on the basis of the evidence before that court or even on the basis of the facts as they existed at the time of its judgment but on the basis of the subsequent events since then. It must accordingly overcome two hurdles. It must in the first place meet the stringent requirements for the admission of new evidence on appeal. It must secondly persuade this court to depart from the general rule that appeals are

decided on the basis of the facts as they existed at the time of the hearing at first instance.

168. The ordinary requirements for the admission of new evidence on appeal to this court, are to be found in rule 31 of the rules of this court and s 22 of the Supreme Court Act 59 of 1959.[156]

Rule 31

169. Rule 31 provides that documents may be lodged "*to canvass factual material that is relevant to the determination of the issues before the Court*" provided that the facts are common cause or incontrovertible, or are of "*an official, scientific, technical or statistical nature capable of easy verification.*"

170. This court has repeatedly held that this rule cannot be used where the evidence is "*either put in issue*", or "*irrelevant*". [157]

171. It also held in Prophet that a litigant who wishes to make an application under rule 31, has to provide an explanation for the late tender of the evidence, particularly where the evidence could have been obtained at an earlier stage.[158]

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156 Section 22 of the Supreme Court Act is made applicable to proceedings before the Constitutional Court by Rule 30 of the rules of this Court.

157 S v Lawrence 1997 (4) SA 1176 (CC) para 23; Prince v President, Cape Law Society 2002 (2) SA 794 (CC) para 10; Rail Commuters Action Group v Transnet 2005 (2) SA 359 (CC) paras 36 to 38; S v Shaik 2008 (2) SA 208 (CC) para 19

158 Prophet v National Director of Public Prosecutions 2007 (6) SA 169 (CC) para 38

Section 22

172. Section 22 empowers a court on appeal to receive further evidence.[159] This power must however be used sparingly.[160]

173. This court[161] and the SCA[162] have both held that the requirements for the admission of new evidence are as follows:

173.1. A reasonably sufficient explanation must be provided why the new evidence was not led earlier in the proceedings.

173.2. There must be a *prima facie* likelihood of the truth of the evidence.

173.3. The evidence must be weighty and materially relevant to the outcome of the matter. In Colman[163] it was said that the evidence must be "*practically conclusive*" and not "*still leave the issue in doubt*".

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[159] Section 22(a) states that:
'The Appellate Division or a Provincial Division, or a Local Division having appeal jurisdiction, shall have power -

> *(a) on the hearing of an appeal to receive further evidence, either orally or by deposition before a person appointed by such division, or to remit the case to the court of first instance, or the court whose judgment is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as to the division concerned seems necessary". '*

[160] Rail Commuters Action Group v Transnet Ltd t/a Metrorail 2005 (2) SA 359 (CC) para 43

[161] President of the Republic of South Africa v Quagliani and Two Similar Cases 2009 (2) SA 466 (CC) para 70

[162] Botha v NDPP [2009] ZASCA 42 (31 March 2009) para 13

[163] Colman v Dunbar 1933 AD 141 at 161-3, approved in Knox D'Arcy Ltd v Jamieson 1996 (4) SA 348 (A) at 378B.

173.4. There must be a reasonable explanation for its late filing.

173.5. There must be no substantial dispute of fact in relation to evidence.

174. An appeal court in an administrative review, should be particularly loath to admit evidence of the kind the City seeks to introduce, to the effect that its administrative decision under review has evolved and been overtaken by changes made to it since the High Court judgment:

174.1. An applicant for the review of an administrative decision enjoys considerable procedural protection. PAJA entitles her to a fair procedure which usually includes a hearing before the decision is taken[164] and reasons for the decision after it has been taken.[165] Rules 53(1), (3) and (4) of the High Court rules also entitle her to access to the record of the proceedings under review and an opportunity to supplement her application in the light of it.

174.2. If the High Court reviews and overturns the administrative decision, it would be unfair and unjust to allow the public body responsible for the decision, to panelbeat it after the High Court judgment and to adduce evidence of its rejuvenation on appeal in order to argue that the High Court judgment should be overturned because the defects in the administrative decision have been cured. The effect of doing so would be to shift the subject of the review from the administrative decision as it

164 Sections 3 and 4

165 Section 5

stood before the High Court, to another, newly rejuvenated, decision before the court of appeal.

174.3. Such a shift from the original decision on review in the High Court to the newly rejuvenated decision on review in the court of appeal, would force the applicant for review to conduct the appeal with one, or perhaps both arms tied behind her back. That is in the first place because the new decision is now judged on appeal in light of the applicant's old causes of action, designed for and aimed at the respondent's old decision, and not the new one. If any of them still hold good, it is only because the respondent's panelbeating of the old decision has been deficient. The applicant is secondly required to justify her attacks on the new decision without the benefit to which she is entitled in terms of rule 53(1), (3) and (4), of access to the record of the new decision and an opportunity to supplement her causes of action in the light of it.

The new evidence should not be admitted

175. The City does not begin to explain why this appeal should depart from the general rule that an appeal must be determined on the facts as they existed at the time of the High Court hearing. It has clearly gone out of its way in the last few months, to panelbeat its free basic water policy in an attempt to rid it of the defects which the High Court held to be fatal to it. It does not explain why this court should overturn the High Court's judgment, not because it was wrong, not because the High Court was wrong in its finding that the City's policy before it was unlawful, but because the City has now devised a new policy.

176. The evidence which the City wishes to present in any event does not comply with the requirements of either rule 31 or s 22. The facts are disputed, as appears from the three sets of affidavits filed about them. For this reason alone, they cannot be entertained in this court under either provision.

177. The evidence is not of the kind that rule 31 has in mind. It is not scientific, technical or statistical. Even those pieces of evidence that involve some use of statistics, were produced by the City itself and are not objectively ascertainable or capable of easy verification. The evidence also does not determine the issues one way or another.[166]

178. Section 22 also does not assist. Much of the evidence is irrelevant. It is neither weighty, nor will it materially determine the outcome of the matter. No explanation for the late filing of the evidence is provided, even though much of it was available at the time of the SCA hearing, or earlier.

179. This also means that this court will be forced to adjudicate on the disputed evidence as court of first and last instance, despite the fact that the SCA's views on it could easily have been obtained.[167]

180. In any event, neither rule 31 nor s 22 allows a litigant to present evidence on appeal simply in order to "*strengthen the case*" made in the courts below.[168] It is

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166 See Rail Commuters Action Group v Transnet t/a Metrorail 2005 (2) SA 359 (CC) para 45

167 Women's Legal Centre Trust v President of the Republic of South Africa [2009] ZACC 20 paras 28 to 29

168 Shein v Excess Insurance Company Ltd 1912 AD 418, 429

clear that that is what the City is trying to do, to bolster the weaknesses in its case exposed in High Court and the SCA. It tries to do so in two ways. The first and most obvious way is that it seeks to introduce new evidence on the issues on which it now realises that its case before the High Court was deficient. The second and perhaps less obvious way is that it seeks to move the target of the review from its free basic water policy in place at the time of the High Court hearing to a new policy which it contends has cured the deficiencies of the one in place at the time of the High Court hearing. This is not permissible in law.

181. On a closer analysis of the new evidence, it is clear that it falls short of the requirements of both rule 31 and s 22.

An analysis of the new evidence

The evidence of Mr Mudau

182. The City seeks to submit an affidavit of Enoc Ndishavhelafhi Mudau.[169] This evidence deals with certain issues regarding the implementation of the interim measures, and the roll-out of pre-paid water meters.

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169 The evidence of Mr Mudau is also referred to at a number of places in Brits CC Affidavit vol 71 (Bundle D) p 147 ff

183. *The new evidence regarding the further roll-out of pre-paid water meters outside Phiri.*[170]

183.1. This evidence regarding the further roll-out of pre-paid water meters in Johannesburg is dated April 2008. The evidence regarding the use of pre-paid water meters outside Johannesburg is undated. No explanation is provided why this evidence was not presented at an earlier stage. It should be rejected for this reason alone.

183.2. Substantively, the evidence does not fall within the ambit of rule 31. It is not in the nature of statistical, scientific or technical evidence. It is simply the City's own report of what it has done in implementing its own programmes.

183.3. It also does not comply with the requirements of s 22 in that it is not relevant and not weighty or determinative of any issue before this court.

183.4. What the evidence regarding the roll-out in Johannesburg tends to show is that after the hearing in the High Court challenging the lawfulness of the pre-paid water meters, the City continued to roll out the meters for four months in other areas in Soweto. It also shows the City saved substantial amounts of money by limiting the rights of access to water of

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170 Mudau CC Affidavit vol 72 (Bundle D) pp 207 to 208 paras 3 to 5, p 214 paras 29 to 31; Strategic Business Support New Services Development Division Monthly Report (April 2008) vol 72 (Bundle D) pp 220 to 229

the applicants and others like them.[171] Although it is revealing in this sense, this does not determine the issues before the Court either way.

183.5. What the evidence does *not* show is that the City has rolled out the water meters in any area that is predominantly white or affluent.

183.6. The evidence regarding the use of pre-paid water meters by 20 other municipalities in the country is simply not relevant to any issue before this court.[172] The use of the meters are either lawful or not. Their use elsewhere does nothing to change this.

184. *New evidence regarding the roll-out of the 10 kilolitres*[173]

184.1. The City seeks to admit new evidence of the roll-out of the additional 4 kilolitres of water to those on the indigency register, bringing the total free basic water allowance to 10 kilolitres per accountholder. It first describes the changes which were made in October 2007 (which already forms part of the record and can therefore be ignored)[174] and then seeks to introduce evidence of the permanent changes which the City has sought to make to the pre-paid water meters to increase the amount of free water for those on the register.

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171 Mosikili CC Affidavit vol 75 (Bundle D) p 583 para 185

172 Mosikili CC Affidavit vol 75 (Bundle D) p 586 para 194

173 Mudau CC Affidavit vol 72 (Bundle D) pp 208 to 211 paras 6 to 9, 11, and 17 to 19

174 Mudau CC Affidavit vol 72 (Bundle D) p 208 paras 6 to 9

184.2. The evidence does not fall within the ambit of rule 31 as it is simply the City's own report of what it has done to implement its own programmes. The applicants cannot easily verify whether it is true.

184.3. It also should not be admitted under s 22, because it is not material to any issue before the court. The applicants take note of the roll-out of the additional 4 kilolitres. The applicants have, however, always contended that this additional allocation simply serves to ensure that more people get the intended 25 litre per person per day allocation. It does nothing to improve the basic premise of the City's policy under attack. Even in this the additional 4 kilolitre allocation fails, because it only ensures 25 litres per person per day for those accountholders on the register. We deal with the inherent flaws with the register elsewhere. Whether or not, or how well, the City rolled out this allocation accordingly does not resolve any of the issues before the court.

184.4. The evidence relating to the roll-out of the additional amount outside of Phiri[175] is not relevant to the dispute.

184.5. What the evidence does tend to show, however, is that a low number of people in Phiri are on the indigency register – only 683 households.[176] It also appears that this is the same number of people that were on the register in October 2007, which means that the City has not been able to attract more registration of indigents in Phiri since the High Court

[175] Mudau CC Affidavit vol 72 (Bundle D) pp 209 to 210 paras 17 and 18

[176] Mudau CC Affidavit vol 72 (Bundle D) p 209 para 17

hearing.[177] Of this number, 41 household who have registered are still not receiving the 10 kilolitres[178] – almost two and a half years after the decision of the Mayoral Committee on 12 December 2006.

185. *New evidence regarding the response to the High Court order and so-called "disinformation* [179]

185.1. The so-called "*evidence*" is dated May[180] and June 2008[181]. No explanation is provided why this is presented only now.

185.2. It is in any event irrelevant. None of the alleged "*disinformation*" is imputed to the applicants. It is also not suggested that the applicants have removed their water meters or by-passed them. It is not determinative of any issues before the court.[182]

185.3. In any event, what the evidence does tend to establish is a level of dissatisfaction with the pre-paid water meters that contradicts the City's own evidence of "*community buy-in*".

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177 Mudau CC Affidavit vol 72 (Bundle D) p 208 para 7

178 Mudau CC Affidavit vol 72 (Bundle D) pp 209 to 211 paras 17 and 19

179 Mudau CC Affidavit vol 72 (Bundle D) p 209 paras 12 to 15

180 "Phiri Concerned Residents – Coalition against Water Privatisation Community Public Meeting" (8 May 2008) vol 72 (Bundle D) p 230

181 "Jubilation as water meters removed" (14 June 2008) vol 72 p 231; See also Mudau CC Affidavit vol 72 (Bundle D) p 209 para 16

182 Mosikili CC Affidavit vol 75 (Bundle D) p 5 para 11.2, pp 584 to 585 paras 188 to 190

186. *New evidence regarding the implementation of the emergency measures.*[183]

186.1. The City's evidence on how it loads the emergency measures onto pre-paid water meters relates to the situation as at 1 July 2007[184], September 2007[185], January 2008[186], June 2008[187] and 1 July 2008[188] variously. No explanation is provided why this evidence had not been produced earlier.

186.2. In any event, the evidence is not of the kind contemplated in rule 31, and does not comply with s 22.

186.3. The evidence is inconclusive, as the City admits that it does not know how many customers do not have access to the emergency allocation.[189] It is also disputed[190], as the respondents now claim that this allocation was rolled out in September 2007, but the applicants claimed (in their affidavits in the High Court) that they had not yet heard of this allocation as late as 9 November 2007.[191]

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183 Mudau CC Affidavit vol 72 (Bundle D) p 208 para 10, pp 212 to 213 paras 23 to 25.8

184 Mudau CC Affidavit vol 72 (Bundle D) p 212 para 25.3

185 Mudau CC Affidavit vol 72 (Bundle D) p 212 para 25.1

186 Mudau CC Affidavit vol 72 (Bundle D) p 213 para 25.5

187 Mudau CC Affidavit vol 72 (Bundle D) p 213 para 25.7

188 Mudau CC Affidavit vol 72 (Bundle D) p 212 para 25.2

189 Mudau CC Affidavit vol 72 (Bundle D) p 213 para 25.8

190 Mosikili CC Affidavit vol 75 (Bundle D) p 585 para 192

191 Makoatsane Supplementary replying affidavit vol 53 p 5246 paras 8 to 10; p 5251 paras 23 to 24

186.4. In any event, however, the evidence does not take the matter any further. The fundamental criticisms which the applicants have levelled at the emergency allocation since it was introduced on the eve of the High Court hearing, which we deal with below, are still not addressed in this affidavit. It can only be assumed that the City has no answer to these criticisms. Exactly how well, or badly, the City has implemented this fundamentally flawed mechanism, is accordingly neither here, nor there.

186.5. Similarly, the City now produces evidence regarding the installation of fire hydrants in Phiri. The vulnerability of the people of Phiri to fires and other emergencies due to the absence of running water not restricted by pre-paid water meters was raised by the applicants in its first affidavits filed in July 2006. It is not explained why this issue is addressed in evidence now. The City now argues that there are a number of fire hydrants in the area and that domestic water supply can in any event not be used for "*fire fighting*".[192] It is true that a fire burning down a house or shack cannot be extinguished by the water from a kitchen sink. But it misses the point, however, that in the absence of running water, the smallest household accident may result in the need for "*fire fighting*", which otherwise may have been avoided. There can be no doubt that those without running water are more vulnerable to various emergencies and less able to respond to them. This new evidence accordingly fails to take the real issues in dispute any further.

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[192] Mudau CC Affidavit vol 72 (Bundle D) p 213 para 26

186.6. It is surprising indeed that the City presents, in this context, new evidence relating to the response time of the fire services in Soweto. Not only is there again no explanation why the evidence dated January to October 2008[193] is only presented now, but the City also fails to make out a case for relevance. What it establishes, however, is a shocking picture. Even though the fire station is based only 2 km outside Phiri, response times as long as 1 h 47 minutes are recorded. It is little wonder that only five call outs were made from Phiri in a period of a year. It is also entirely consistent with the applicants' evidence in November 2007 that they had never seen a fire engine in Phiri and that "*the fire services will never come, or never come on time, to help us*".[194]

187. *New evidence regarding water tariffs*

187.1. The City now seeks to present evidence regarding what it calls its "*sophisticated*" rising-block tariff. This is a tariff the City, like all municipalities, is required to implement in terms of s 6(2)(a) of the Norms and Standards in Respect of Tariffs for Water Services in terms of s 10 (1) of the Water Services Act. It simply provides for cross-subsidisation of the costs of water.

187.2. The tariffs were published in July 2008. No explanation is provided why this evidence is only presented now. The cost of free basic water, and the affordability of an increase for the City, was hotly debated in the SCA.

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[193] Mudau CC Affidavit vol 72 (Bundle D) p 214 para 27

[194] Makoatsane Supplementary replying affidavit vol 53 p 5252 paras 26 to 27

The only inference that can be drawn is that the City now attempts to improve the case that it made in the SCA. This is not permissible.

187.3. The evidence is not "*uncontrovertible*" evidence as contemplated in rule 31. The analysis of these tariffs is disputed by the applicants' witness.[195] To the extent that the evidence involves a comparison of deemed consumption, pre-paid water meter and credit meter tariffs, the evidence that there are still customers with deemed consumption rates is apparently contradicted by the City's arguments in the SCA that deemed consumption is no longer permissible as it is unlawful.

187.4. To the extent that the evidence is simply presented to establish that the City uses cross-subsidisation to subsidise the poor, this is already established on the record. The question remains why such subsidisation cannot be provided for the poor without resort to pre-paid water meters, or for an amount of free basic water that would be sufficient for their needs. The evidence of Berkowitz shows that the City could, like other peer municipalities, not only do more by way of cross-subsidisation,[196] but also utilise the equitable share in order to achieve this.[197]

187.5. In any event, the applicants have never propagated a return to deemed consumption. That aspect of the comparison done by Mr Mudau is accordingly redundant.

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[195] Berkowitz CC Affidavit vol 76 (Bundle D) pp 609 to 611 paras 19 to 22

[196] Berkowitz CC Affidavit vol 76 (Bundle D) p 609 paras 17 to 18

[197] Berkowitz CC Affidavit vol 76 (Bundle D) pp 603 to 608 paras 8 to 16

187.6. The evidence accordingly does not resolve any of the issues before the court.

188. *New evidence regarding the applicants' consent to their service*[198]

188.1. The City wishes to submit in evidence the agreement which the City concluded with each of the applicants' households regarding the installation of either their pre-paid water meter or their standpipe.

188.2. The agreements are all dated in 2004. The only explanation offered for their late filing is that it was "*initially difficult to extract from Johannesburg Water's system in time for the filing of answering affidavit*", but that they have "*since been located'*. It is not said when they were located, or why they had not been filed either in October 2007 when the City presented supplementary affidavits to the High Court, or subsequently when the matter was appealed to the SCA.

188.3. In any event, it is not clear what purpose this evidence serves, and it is not tendered with an explanation in this regard. It appears to be irrelevant, and that it does not resolve any of the disputes before this court.

188.4. The only explanation that is given by Mr Mudau is that it is presented "*in so far as there has ever been any doubt . . . that each of the Applicants*

198 Mudau CC Affidavit vol 72 (Bundle D) pp 218 to 219 para 46

has consented to the installation of a Prepayment Meter or a Standpipe." In so far as there has been "*doubt*" about the applicants' consent, this is because the unlawful threat underlying the applicants' "*choice*" between pre-paid water meters or no water (or in the case of some residents, between pre-paid water meters, a standpipe or no water) nullified any suggestion of "*consent*". The copy of the form that was signed when the applicants' households finally capitulated to the pressure on them does nothing to resolve this dispute. In any event, to the extent that the forms were not all completed by the applicants but by some other member of their households, it is difficult to see how their individual "*consent*" can be established in this way.

188.5. The evidence accordingly does nothing to resolve this dispute, and should not be admitted.

189. There is accordingly nothing in the affidavit of Mr Mudau that meets the test in either rule 31 or s 22. The application to admit this affidavit should be refused.

The evidence of Mr Koseff

190. The City seeks to submit evidence in the form of an affidavit of Justin Koseff[199] which is also referred to at a number of places in the affidavit of Karen Brits.

191. The evidence of Mr Koseff essentially traverses two issues – the implementation of the so-called "*interim measures*" introduced in December 2006 and the

[199] Koseff CC Affidavit vol 72 (Bundle D) pp 254 to 300

planned implementation of the "*Expanded Social Package*" from July 2009 onwards. In broad terms, before dealing with the detail of the evidence, the first category of evidence all pre-dates the hearing in the SCA and the City provides no explanation for the delay in presenting it. The second category all deals with future plans for free basic water, which is speculative in that it may or may not be successfully implemented by the City. Both sets of evidence should accordingly be refused.

192. *New evidence regarding how the Social Package will work in future*[200]

192.1. Mr Koseff gives evidence regarding the manner in which the City has designed the Social Package, and in particular, how the City will in future target indigents. All of the evidence on which he relies in this regard – regarding the modelling process[201], the problems involved in using a system based on property values[202] and the development of the proposed Poverty Index[203] – pre-dates both the High Court and SCA hearings. Even the decisions approving the Poverty Index and its

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200 Koseff CC Affidavit vol 72 (Bundle D) p 256 paras 8 to 9

201 Koseff CC Affidavit vol 72 (Bundle D) p 256 para 8.1.3, COJ: Human Development Mayoral Sub-Commitee "Process Plan for a Revised City Social Package Policy" (1 February 2007) vol 72 (Bundle D) pp 270 to 278

202 Koseff CC Affidavit vol 72 (Bundle D) p 257 para 8.1.4; COJ Mayoral Committee "Expanded Social Package Development and Delivery Framework" (7 June 2007) vol 72 (Bundle D) p 279 to vol 73 (Bundle D) p 307

203 Koseff CC Affidavit vol 72 (Bundle D) pp 259 to 260 paras 8.1.5 to 8.1.7; COJ Mayoral Committee "Expanded Social Package Development and Delivery Framework" (7 June 2007) vol 72 (Bundle D) p 279 to vol 73 (Bundle D) p 307

components pre-date the SCA hearing.[204] No explanation is provided for why this is presented only now.

192.2. The evidence regarding the policy which the City plans to implement from July 2009 is not of the kind contemplated in rule 31. It is at best speculative and can therefore not be "*weighty*" or "*material*" in the sense contemplated in s 22. The applicants do not know how the implementation will be done or, more fundamentally, whether it will work and what its impact on the poor will be. We do not yet know what the flaws or weaknesses in the implementation of the new policy will be. It is certainly not evidence that can resolve any of the issues regarding the validity of the City's current approach to providing water to the poor in any conclusive way.

193. *New evidence regarding the implementation of additional benefits to registered indigents*

193.1. Mr Koseff also presents evidence regarding the implementation of the special representation mechanism, introduced on the eve of the High Court hearing in October 2007.

193.2. The evidence – a protocol for the special representation mechanism which is tendered to show where and how the mechanism were to be

[204] Koseff CC Affidavit vol 72 (Bundle D) pp 260 to 261 para 8.2 COJ Mayoral Committee "Expanded Social Package Development and Development (15 May 2008) vol 73 (Bundle D) p 308 ff; COJ Mayoral Committee "Interim Poverty Index for the City of Johannesburg (Individual Eligibility Component of Final Poverty Index) (9 October 2008) vol 73 (Bundle D) p 352 ff

implemented – is dated August 2008, in other words before the hearing in the SCA.[205] It is not explained why this evidence was not presented earlier.

193.3. The only "*new*" evidence – in the sense that it post-dates the hearing in the SCA – is a report of the Social Assistance Directorate on the implementation of the representation mechanism since August 2008.[206]The evidence is, however, not the kind of evidence contemplated in rule 31. It is controverted – even by the City's own earlier evidence.

193.4. The City contended before the SCA that the special representation mechanism had been implemented by 31 July 2008.[207] The applicants disputed this. It now appears from Mr Koseff's evidence that the first manual trial of the special needs water application mechanism occurred at Jabulani Civic Centre only in August 2008, that registration occurred at this trial only in September 2008, and that the system was only launched as a fully automated trial at this Centre on 27 October 2008.[208]

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[205] "Interim Protocol and Procedures for Special Needs Water Application Mechanism" (August 2008) vol 74 (Bundle D) p 406

[206] COJ Human Development Mayoral Sub-Committee "Expanded Social Package Implementation Progress Report Initial Roll-Out and Related Developments" (30 April 2009) vol 74 (Bundle D) p 427

[207] This was the date of the mis-faxed letter from Bowman Gilfillan to CALS. This issue is discussed in greater detail below.

[208] COJ Human Development Mayoral Sub-Committee "Expanded Social Package Implementation Progress Report Initial Roll-out and Related Developments" (30 April 2009) vol 74 (Bundle D) p 427

193.5. Furthermore, the applicants dispute the success of the implementation and present evidence that shows the unsuccessful attempts of residents of Phiri to access the special needs mechanisms.[209] The City's own evidence seems to suggest very low success rates – namely that approximately 40 applications had been receive for the whole of Soweto since August 2008 – "*likely due to the low level of benefit awareness*".[210]

193.6. The evidence is in any event not material to determine any issue in dispute between the parties. This is because the special mechanism, whatever successes it may or may not have in future, has two essential limitations in its own terms. The first is that it only serves to ensure that every person who would otherwise not get the basic minimum individual allowance – in particular those who live in bigger than average households or who have more than usual water needs – receives a free basic water allowance of 25 litres per person per day. It does not aim to give them more than this, even if they may need more. The second limitation is that it is a slow and unresponsive mechanism that does not cure the weaknesses in the pre-paid water meter system. It specifically does not provide an effective mechanism to avoid cut-offs when a meter is about to run out of water. For this reason the evidence does not, in any event, conclusively determine the real issues in dispute between the parties.

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209 Mosikili CC Affidavit vol 75 (Bundle D) p 591 paras 207 to 211; Dugard CC Affidavit vol 76 (Bundle D) pp 645 to 662

210 COJ Human Development Mayoral Sub-Committee "Expanded Social Package Implementation Progress Report Initial Roll-out and Related Developments"(30 April 2009) vol 74 p 430 para 3.1.4

193.7. The evidence is inadmissible under both rule 31 and s 22. It should not be allowed.

194. There is accordingly nothing in the affidavit of Mr Koseff that meets the test in either rule 31 or s 22. The application to admit this affidavit should be refused.

The evidence of Mr Tau

195. The question whether the City can afford to pay for more free basic water is an important one in this case. The City in its answering affidavit had not disputed that it could pay for a bigger allocation of free basic water for the people of Phiri. Instead, it simply argued that it had many claims on its resources and that it had to balance many interests in determining how best to spend them.[211] The applicants accordingly argued in both the High Court and the SCA, based on the record of evidence, that the City has not made out a case that it does not have the resources to pay for an increase in free basic water.

196. The City now wants to improve its case. It tries to do so by saying now, for the first time since the case was launched in 2006, that *"it cannot afford to pay for any additional free basic water provision without reducing its budgeting for some existing service*".[212] It tries to do so through the affidavit of Mpho Franklyn Tau. Neither rule 31, nor s 22 allows for evidence to be presented on appeal for this reason.

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[211] Seedat Answering affidavit vol 10 pp 934 to 935 paras 19.5 to 19.8

[212] Tau CC Affidavit vol 74 (Bundle D) p 446 para 11

197. *New evidence regarding the "unaffordability" of additional free basic water*

197.1. The evidence presented by Mr Tau purports to "*update*" the court on the circumstances presently facing the City.[213] The evidence attached, however, is the mayor's budget speech dated 21 May 2008. There is no explanation given why this evidence had not been presented at an earlier stage, or why it is still relevant as an indication of the City's ability to provide sufficient water if ordered to do so.

197.2. In any event, the evidence appears to be admitted not to show that the City cannot afford the additional allocation, but to show that it cannot spend more on free water without spending less on something else. This seems to be an uncontroversial statement that is generally true and does not require evidence. It does not, however, take the matter any further. Unless the City says that it cannot re-direct the necessary funds from somewhere else, the implication is still that it can afford to pay for the increased free basic water. As it stands, however, the evidence is accordingly neither relevant, nor "*weighty and material*". Its admission must accordingly be refused.

198. There is nothing in the affidavit of Mr Tau that meets the test in either rule 31 or s 22. The application to admit this affidavit should be refused.

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[213] Tau CC Affidavit vol 74 (Bundle D) p 444 para 3

Referral to oral evidence

199. If this court, however, were minded to admit the new evidence, then the applicants ask that the matter be referred to oral evidence on the following disputed issues.

199.1. The first is whether the City's new representation mechanism effectively meets the objection that pre-paid meters do not allow a fair opportunity to make representations and avoid the water being cut off before they automatically do so.

199.2. The second is whether the City has, as it now says, implemented the Social Package.

199.3. The third is whether the City has the resources reasonably to require it to provide the free basic water the applicants claim.

200. Such a referral would be necessary, firstly, because these issues are hotly in dispute. Secondly, the applicants have not had any opportunity to investigate the new evidence, in particular the allegations regarding the implementation of the Social Package from 1 July 2009. They are entitled to gather and adduce evidence in rebuttal if the court is minded to consider it at all.

Current policy and future plans

201. If the evidence is admitted, despite these fundamental objections to their admission and without referral to oral evidence to resolve the disputes of fact, the

court will even on the new evidence have to make a distinction between the policy which is currently in place, and the new Social Package which – so the City says – has only been implemented from 1 July 2009. Only the policy which is currently in place on the new evidence can form a proper basis on which to assess the application before this court. This is for two reasons.

202. First, the court cannot decide the lawfulness of the City's policy on free basic water on the evidence of the City's plans for, and expectations of, the Social Package. That would involve nothing more than prediction at this stage. Even if the new Social Package creates mechanisms through which poor people could theoretically get more water from 1 July 2009, one does not know whether the applicants and others like them will get more water, or how responsive the mechanisms will be to the needs of the poor. The plan's effectiveness in securing access to water cannot be assessed.

203. Second, the City has presented evidence throughout this litigation in a way that suggests its new evidence of future plans is designed for litigation purposes rather than with service delivery to the poor in mind.

203.1. On the eve of the hearing in the High Court in 2007, the City presented new evidence about the plans the City had to improve free basic water policies in the future. At that stage the applicants argued, and the court accepted, that the application could not be determined on the basis of this speculative evidence.

203.2. It was clear that this late evidence was presented as a litigation strategy to strengthen the City's case. This is what the evidence said, in so many words.[214] Subsequent events have also reaffirmed that this was case.

203.3. Again, on the eve of the hearing in this court, a new round of last-minute evidence is presented. The City's new evidence now shows that the City only implemented the special representation mechanism a year after it was revealed to the High Court -- between August and October 2008. Similarly the interim measures were also implemented long after the court was told of them. There are, for instance, on the City's new evidence, still some who do not receive the extra 4 kilolitres of free water. The "*emergency allocation*" remains a mystery in its operation.

203.4. What is most revealing, however, is that the policy which was presented to the High Court as the City's "*future policy*" – the Social Package as set out in the Base Document – still has not been implemented. A new and improved "*future policy*" is now presented to this court. Again it is suggested that this court should decide the appeal on the basis of this policy. But it is clear from this history of this litigation that this cannot reliably be done until the measures have been implemented and put to the test.

204. There is of course nothing wrong in the City continually improving its water services policies – even if the synchronicity between the timing of the

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214 Mayoral Committee resolution (18 October 2007) vol 52 p 5199; Brits Supplementary affidavit vol 52 p 5162 para 10

improvements and the timing of the preparation of legal arguments in defence of them may seem cynical. But the court cannot determine the applicants' rights with reference to a shifting target which may or may not realise in the way the City says – or hopes – it will. Only what has been tried and tested can be relied upon.

205. With this distinction in mind, we set out our understanding of what the new evidence says about the status of the City's policy, in case it should be held that the evidence may be admitted.

The City's basic policy

206. The new evidence on the City's basic policy, insofar as it has been tried and tested, appears to be essentially the same as the evidence that was before the High Court.

207. On the new evidence, free basic water is currently still given to all residents, rich and poor alike. It is still allocated per accountholder. It is still in general an allocation of 6 kilolitres per stand.

208. The City still uses pre-paid water meters to distribute water to the poor. It has, on the new evidence, rolled out pre-paid water meters elsewhere in Johannesburg, but not in rich, white areas. It also says that 20 other municipalities use them.

The interim measures

209. The new evidence on the "*interim measures*" still shows that the 4 additional kilolitres per month, are only available to those on the indigency register. These registered indigents have their arrears written off only if they accept pre-paid water meters.

210. What is now clear is that the 4 additional kilolitres per month, have been rolled out to most on the indigency register, but not to all. On the new evidence, there are 683 households in Phiri on the indigency register[215], of which some 41 have not yet received their additional 4 kilolitres of free water.[216]

211. On the new evidence the City seems less sure of the facts on the allocation of the 4 kilolitre emergency allowance to pre-paid customers per year, than they were at the time of the High Court hearing. It now appears that the evidence is inconclusive, as the City admits that it does not know how many customers do not have access to the emergency allocation.[217] The respondents now claim that this allocation was rolled out in September 2007[218], but the applicants testified in their affidavits filed in the High Court in November 2007, that they had not yet heard of this allocation as late as 9 November 2007.[219] The new evidence does not seem to resolve this dispute.

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215 Mudau CC Affidavit vol 72 (Bundle D) pp 209 to 210 para 17

216 Mudau CC Affidavit vol 72 (Bundle D) p 211 para 19

217 Mudau CC Affidavit vol 72 (Bundle D) p 213 para 25.8

218 Mudau CC Affidavit vol 72 (Bundle D) p 212 para 25.3

219 Makoatsane Supplementary replying affidavit vol 53 p 5246 para 8

212. On the provision for responsiveness to emergencies, the new evidence suggests that free basic water dispensed through pre-paid water meters do not allow for fire-fighting, but that there are fire hydrants in Phiri and a fire services 2 km away. The fire service has a low call-out rate and a generally bad response time.[220]

Special representations

213. The crucial piece of evidence now presented to court is that the special representation mechanism was, according to the City, only fully implemented in October 2008[221] – a year after the High Court was informed of it. This is even later than what was suggested by the City and its legal team in their submissions to the SCA. In that court, the City argued that the applicants' failure to answer the faxed letter dated 31 July 2008[222] (which they never received), showed that the special representations mechanism had been implemented by that time. It now appears that the applicants were right in resisting this argument.

214. The applicants have, however, attempted to obtain more water in terms of this new mechanism, and have in the process established that it is not an effective way to get access to more water, or to avoid disconnection. The applicants' evidence in response to the new evidence of the City, is essentially that implementation has not been effective. This may explain why, on the City's own

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[220] Mudau CC Affidavit vol 72 (Bundle D) p 214 para 27

[221] COJ Human Development Mayoral Sub-Committee "Expanded Social Package Implementation Progress Report Initial Roll-out and Related Developments" (30 April 2009) vol 74 (Bundle D) p 427 para 3.1

[222] Letter (31 July 2008) vol 55 p 5407

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The flaws in the policy

215. The new evidence does not add much on the policy as it stood before the High Court. For this reason, it also does not address at all the fundamental criticisms against the current policy. The policy is still flawed in the following ways:

215.1. Free basic water is still given to rich and poor alike.

215.2. The additional 4 kilolitres per month under the "*interim measures*" are still only available to those on the indigency register. This is still a flawed and significantly under-representative mechanism that excludes millions from qualification for this benefit.

215.3. The allocation is still made by accountholder, or by stand.

215.4. The scheme is still insufficiently flexible. The special representation mechanism, even though it has finally officially been implemented, does not appear to be effective, and is accordingly underutilised by poor people.

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[223] COJ Human Development Mayoral Sub-Committee "Expanded Social Package Implementation Progress Report Initial Roll-out and related Developments"(30 April 2009) vol 74 p 430 para 3.1.4

216. The new evidence accordingly does nothing to address the applicants' fundamental criticism of the current policy.

The City's future plans

217. Again, the City presents future plans of how it intends to manage these benefits in future.

218. If and when the policy is implemented as the City says it will, it will operate as follows:

218.1. It will be available not only to accountholders, but to all individuals who qualify.

218.2. A new register will be compiled.

218.3. Each person who registers, will get a poverty index score which determines the level of assistance (poverty bands) for which they qualify and thus how much subsidy they get. The poverty index assigns a 100 point scale to assess this: **70 points** are based on the individual circumstances (based primarily on income but also number of dependants, disability and/or pensioner status) while **30 points** are linked to how deprived the area you live in is compared to other wards and value of property on the valuation roll.

218.4. Once the poverty index score is calculated, it will place an individual in one of three poverty bands:

- Band 1 (vulnerability range) - is the lowest level of subsidy. It is aimed at helping those on the borderline of poverty, with an income less than R3 366
- Band 2 (survival range) - is the middle level of subsidy, aimed at those who earn some formal income but whose earnings fall below the survival level defined by the poverty index. It is aimed at those with income less than R 2 244.
- Band 3 (no formal income) - is the highest level of subsidy, aimed at those with no formal income living in the most deprived circumstance. It is aimed at those with an income less than R593.

218.5. The allocation of additional free water per person per day will be calculated per band:

- Band 1 = 25 litres
- Band 2 = 35 litres
- Band 3 = 50 litres

218.6. There is a cap on how much free basic water will be allocated a household per month, depending on the band in which the household falls. For Band 1 the cap per month will be 10 kilolitres; for Band 2 it will be 12 kilolitres and for Band 3 it will be 15 kilolitres.

218.7. The Special Cases Representation Mechanism will remain in place and will entitle its beneficiaries to additional allocations in three scenarios:

- 2 kilolitres of free water per month per person living with HIV/AIDS or a chronic illness (to be proven by way of a medical certificate);
- 1 kilolitre per household extra per month for an emergency (over and above the 4 kilolitres per year emergency amount allocated via the pre-paid water meter system) which requires an affidavit explaining the emergency and supported by a ward councilor or regional manager for Human Development's Office; and
- an amount up to 4 kilolitres per month (in any given six-month period) for special personal circumstances.

218.8. All three scenarios require representation at any of the ten regional customer care centres. The latter case requires a social worker to ascertain special circumstances.

218.9. The free basic water will still be dispensed through the mechanism of a pre-paid water meter.

219. The City says that the new policy has been implemented from 1 July 2009.[224] But it is apparent from the description of the proposed new system that the new policy depends entirely on a new register for indigents.[225] To qualify for the new benefits, determined in terms of the eligibility criteria in the new Poverty Index, those who want to access the Social Package will have to apply to be included

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224 Brits Replying affidavit in the application to update the evidence (un-indexed) para 9.1

225 Koseff CC Affidavit vol 72 (Bundle D) p 262 para 8.8

on the new register.[226] The City does not say that the applicants or others like them have been included on the new register and that they are therefore entitled to the new benefits based on the Poverty Index. The applicants have not had the opportunity to establish independently the status of this process.

220. If, however, it is true that the Social Package has been implemented, then on the City's own evidence the new system suffers from even lower registrations than the old system, and the vast majority of poor households have not received the benefits intended for them. According to an entry entitled "Registrations to date" in an Implementation Report of 13 July 2009 (annexed as "KB12" to the City's affidavit of 17 July 2009), there are only approximately 8 000 registered beneficiaries on the new register.[227] This is a worryingly low number. The low registration for the new system is apparently why the City has decided that for an unspecified period the old system - based on the December 2006 eligibility criteria and the indigency register - will remain in place and will only be "*phased out progressively as the Expanded Social Package is introduced*".[228] However, according to educational material from the City, anyone who had not re-registered on the new system before 1 July 2009 would have "*their benefits withdrawn*" until they register on the new system.[229]

[226] Koseff CC Affidavit vol 72 (Bundle D) p 262 para 8.8

[227] Implementation Report, City of Johannesburg Poverty Index Project "KB12" para 2.3, annexed to Brits Replying affidavit in the application to update the evidence (un-indexed)

[228] Brits CC affidavit vol 71 (Bundle D) p 165 para 32; p 185 para 58

[229] Siyasizana "We help you help yourself". Expanded Social Package: City of Johannesburg vol 74 (Bundle D) p 422 para 10

221. It is accordingly clear from the City's new evidence that, despite its assertion that everything changed on 1 July 2009, the parties in fact find themselves in exactly the same position they were at the time of the High Court hearing – in an interim period pending the implementation of the new Social Package.

222. What the evidence regarding the planned expansion of the Social Package does, however, establish is that the City has acknowledged that a free basic water policy should not be based on the flawed and under-inclusive indigency register, that it should not only operate on the basis of accountholder eligibility and that it should not be so inflexible so as to provide no reprieve for the most desperate. The criticisms that the applicants have levelled against the policy in this regard since 2006 were accordingly clearly well-founded.

223. The new evidence also usefully illustrates that the City has finally come around to the conclusion that the poorest residents should be given 50 litres of free water per person per day, in compliance with WHO standards.[230] If this evidence were to be admitted, it supports the relief the applicants seek and belies the suggestion that the court would be unduly interfering with the City's own policy making processes if it ordered the City to provide the poor of Phiri who cannot pay for water, with 50 litres of free water per person per day.

224. Whether or not the new system will work, will have to be assessed over time.[231] A prediction of its likely success one way or another cannot determine this

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[230] Koseff CC Affidavit vol 72 (Bundle D) pp 263 to 266 paras 9.2 to 9.10

[231] Even the applicants' enquiries outside the litigation context have shed no light on how the policy may be evaluated. See in this regard Tissington CC Affidavit vol 76 (Bundle D) pp 634 to 638

application. What we do know, however, is that the City's record on implementation is dismal. The fact, for example, that the Base Document on which the Social Package is based was produced in June 2006, and the Social Package only finally approved in July 2009, speaks for itself.

THE USE OF PRE-PAID WATER METERS

The SCA's decision

225. The SCA declared that the use of pre-paid water meters in Phiri was unlawful.[232] It did so on two grounds – first, that the City's by-laws do not authorise the use of pre-paid meters and second, that the pre-paid meters cause unlawful cut-offs. We submit with respect that it was correct on both.

The by-laws do not authorise the use of pre-paid water meters

226. Sections 4(1) and 4(2)(c)(i) of the Water Services Act require that water services be provided "*in terms of conditions set by the water services provider*" which provide among other things for "*the technical conditions of ... supply*". Section 21(1) provides that every water services authority must make by-laws which "*contain conditions for the provision of water services*" and provide *inter alia* for "*the standard of the services*" and "*the technical conditions of supply*".

227. The City's Water Services By-laws comply with these requirements. By-law 3(1) provides that the City "*may provide the various levels of service*" set out in by-law 3(2). The latter goes on to provide for three levels of service. They are a communal tap (service level 1), a yard tap subject to certain restrictions (service level 2) and "*a metered full pressure water connection*" (service level 3).

232 SCA judgment vol 70 (Bundle D) p 35 para 62.5

228. By-law 3(3) provides for the use of pre-paid water meters but only as a punitive measure if a consumer with a yard tap fails to adhere to the restrictions on its use.

229. The SCA concluded[233] that, on a proper interpretation of these by-laws, they do not permit the use of pre-paid water meters in the ordinary course. We submit with respect that it was correct in its conclusion.

230. The City argues that pre-paid water meters have three other sources in law – the Municipal Systems Act, other references in the by-laws which imply the authority to use pre-paid water meters, and the Constitution.[234] Two courts have rejected this argument. None of these "*sources of law*" authorises the use of pre-paid water meters in Phiri as a standard water service. At best, they refer to pre-paid metering on the premise that they may sometimes be used. This is not surprising because pre-paid metering systems have lawful purposes other than those for which the City employ them in Phiri.[235]

231. None of these "*sources of law*" can in any event bring pre-paid water meters like those used in Phiri, within the ambit of section 4 of the Water Services Act, which requires that the particular service conditions on which water services are provided, the standards of water services so provided, and the technical

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233 SCA judgment vol 70 (Bundle D) pp 28 to 30 paras 49 to 53

234 Brits CC Affidavit vol 71 (Bundle D) pp 198 to 199 para 76

235 Mosikili CC Affidavit vol 75 (Bundle D) p 538 para 75

conditions of such a supply, be prescribed by by-law. The City's by-laws do not authorise the use of pre-paid water meters in the ordinary course.[236]

232. The use of pre-paid water meters for the provision of water services in Phiri in the ordinary course, is accordingly unauthorised.

The pre-paid water meters cause unauthorised cut-offs

233. Even if the City succeeds in persuading the court that its by-laws or the other "*sources of law*" authorise the use of pre-paid water meters, they cannot ultimately succeed in this defence, as the meters in any event cause unauthorised cut-offs of water:[237]

233.1. Sections 4(2)(c)(iv) and (v) of the Water Services Act provide that the conditions for the provision of water services, must provide for "*the circumstances under which water services may be limited or discontinued"* and for "*procedures for limiting or discontinuing water services"*. Section 4(3) goes on to say that the procedures for the limitation or discontinuation of water services must be fair and reasonable and comply with certain ancillary requirements. They are echoed in ss 21(1)(f) and 21(2)(b) of the Water Services Act.

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236 Mosikili CC Affidavit vol 75 (Bundle D) p 539 paras 76 to 77

237 SCA judgment vol 70 (Bundle D) pp 30 to 34 paras 54 to 58

233.2. These provisions make it clear that water services may only be limited or discontinued under the circumstances and in accordance with the procedures prescribed by the City's by-laws.

233.3. The by-laws comply with these requirements in that they provide in by-law 9C and 11 for the circumstances in which water services may be limited or discontinued and the procedures by which it must be done.

233.4. None of them, however, provides for the limitation or discontinuation which occurs when a pre-paid water meter runs out of credit and cuts off the supply of water to a consumer. The SCA accordingly concluded[238] that pre-paid meters cause unauthorised cut-offs of water. The applicants submit with respect that it was correct in this conclusion.

234. The SCA did not say so explicitly, but the cut-offs also do not comply with s 4(3) of the Water Services Act.[239] They are not fair and equitable, they do not provide for reasonable notice of the disconnection, and no opportunity is given to make representations to avoid the discontinuation.

235. The City says that the meters do give "*warnings*" and that there is a "*special needs representation mechanism*". This means, it contends, that there is an opportunity to make representations about the household's "*circumstances or their inability to pay*".[240] This is not correct.

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238 SCA judgment vol 70 (Bundle D) pp 30 to 34 paras 54 to 58

239 SCA judgment vol 70 (Bundle D) pp 30 to 31 para 54

240 Brits CC Affidavit vol 71 (Bundle D) p 175 para 45

236. Even if the pre-paid water meters give warnings of impending cuts (which the City claims and the applicants dispute), this does not amount to "*reasonable notice*" as contemplated in s 4(3).[241] There is also no opportunity to make representations to avoid the discontinuation as is required by s 4(3). The City says the "*special needs application mechanism*" which it proposed in October 2007,[242] and apparently implemented between August and October 2008,[243] gives an opportunity for such representations. This mechanism is not the kind of opportunity which s 4(3) has in mind for the following reasons:

236.1. Section 4(3) has in mind that everybody should have the opportunity to make representations to avoid disconnection. It does not limit the categories of person, or the representations that may be made. The special needs representation mechanism on the other hand, is meant only for people with "*special needs*". It strictly limits who can apply for it, and on what basis.

236.2. In particular, it does not, as the City suggests, provide for the opportunity to make representation simply because a household cannot immediately pay for pre-paid water.

[241] Mosikili CC Affidavit vol 75 (Bundle D) pp 563 to 564 para 136

[242] Mayoral Committee resolution (18 October 2007) vol 52 p 5199

[243] COJ Human Development Mayoral Sub-Committee "Expanded Social Package Implementation Progress Report Initial Roll-out and Related Developments" (30 April 2009) vol 74 (Bundle D) p 427 para 3.1

236.3. The special needs representation mechanism is not designed to avoid a particular disconnection – it is designed to assess whether a household should get more free basic water in general. It is not quick and responsive. It will not give consumers the protection that s 4(3) has in mind in this regard. It will not enable them to avoid disconnection, however worthy their cause might be.

237. The SCA declared the use of pre-paid water meters unlawful,[244] but suspended the declaration for two years[245] without affording the applicants any interim relief. The applicants do not appeal against the declaration but do appeal against the suspension and the SCA's failure to afford them any interim relief.

238. We later deal with this appeal in a separate chapter on the pre-paid water meters remedy.

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244 SCA judgment vol 70 (Bundle D) p 35 para 62.5

245 SCA judgment Vol 70 (Bundle D) p 36 para 62.6

THE INTRODUCTION OF PRE-PAID WATER METERS

The SCA's decision

239. The applicants contend that the manner in which the City introduced pre-paid water meters in Phiri was unlawful in six respects (over and above the fact that their use was unlawful in itself).

240. The High Court[246] upheld the applicants' attacks on the introduction of pre-paid meters in Phiri and declared it to have been unlawful.

241. The SCA was however under the impression that, because it had already held the use of pre-paid water meters to be unlawful, it was unnecessary to consider whether they had also been unlawfully introduced[247]:

> "*If the pre-payment water system used in Phiri in respect of the level 3 service is unlawful as I have found it to be, it follows that the installation thereof and the choice given to the residents of Phiri ... was unlawful. There was therefore no need for the orders in paragraphs 183.2 and 183.3 (of the High Court judgment)"*

242. The applicants submit with respect that the SCA erred in this regard for the following reasons:

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[246] High Court judgment vol 54 p 5362 paras 183.2 to 183.3

[247] SCA judgment vol 70 (Bundle D) pp 33 to 34 para 58

242.1. Because the SCA did not consider or take account of the unlawful manner in which the City forced pre-paid water meters onto the residents of Phiri, it also did not grant them any relief for the City's violation of their rights in this way.

242.2. The High Court, on the other hand, ordered the City[248] to provide the residents of Phiri with "*the option of a metered supply installed at the cost of the City of Johannesburg"*. It afforded them this relief *inter alia* in recognition of the unlawful way in which they had been forced to accept pre-paid water meters.

242.3. The SCA should have done the same, but failed to do so because it was mistakenly under the impression that it was unnecessary to consider the applicants' attacks on the manner in which the City introduced pre-paid water meters in Phiri.

243. We submit that it is important to have regard to the applicants' attacks on the manner in which the City introduced pre-paid water meters in Phiri. We will deal with each of them in turn. We will deal with the question of remedy for the unlawful introduction of pre-paid water meters in Phiri in the next chapter.

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[248] High Court judgment vol 54 p 5362 para 183.5.2

The facts

244. Before Operation Gcin'amanzi was introduced in Phiri, the applicants had unlimited water inside their homes.[249] Once the operation was under way, the people of Phiri were given the choice only between pre-paid water meters and yard taps. Their choice, unattractive as it was, was enforced by the City's threat that their water would be cut completely if they did not accept one or the other. Some, like Ms Mazibuko, stood up to the threat. Her water was disconnected, and she was left without any water until she capitulated.[250]

245. Ms Mazibuko's water supply was discontinued without notice.[251] The only communication she received before her water was cut off, was a visit from a "*facilitator*" from Johannesburg Water who informed her that her old, rusty pipes would be replaced.[252] She was told that the decommissioning of the old system would not affect consumers.[253] She was, however, affected. Her water supply was disconnected.

246. Ms Mazibuko was without water for about 7 months from March until 11 October 2004 when she accepted the installation of a pre-paid water meter against her will only so that she would receive water again.[254]

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[249] Mazibuko Founding affidavit vol 1 p 34 para 78

[250] Mazibuko Founding affidavit vol 1 p 35 para 82 to p 40 para 101

[251] The notices from the City regarding the customers' "choice" of service level options followed only in October and November 2004 – months after the residents' metered water supply had already been discontinued.

[252] Mazibuko Founding affidavit vol 1 pp 34 to 35 paras 79 to 80

[253] Letter from Johannesburg Water (24 February 2004) vol 3 p 237

[254] Mazibuko Founding affidavit vol 1 p 38 paras 92 to 94

247. The City does not dispute what had happened to Ms Mazibuko.[255] They admit that, when they first rolled out pre-paid water meters in February 2004, the "*precise system for communicating with customers was not as well developed as it is today*".[256]

248. Ms Mazibuko's water supply was not disconnected because she had not paid her account or because she had failed to choose a service level. She was not given an opportunity to choose the kind of water supply she wished to have before her water was disconnected.[257] Her water was disconnected to compel Ms Mazibuko, along with the other residents of Phiri, to sign up for pre-paid water meters, rather than the credit meters to which they were entitled under the normal service options given to other residents.

249. Discontinuing the supply of any water – including the free basic water supply to which every resident of Johannesburg is entitled – of those poor households in Phiri in order to implement an unpopular municipal policy, is an unlawful disconnection.

250. The only explanation given to Ms Mazibuko for the disconnection was that the implementation of Operation Gcin'amanzi required the upgrading of old

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[255] Makoatsane Replying affidavit vol 46 p 4567 para 722

[256] Singh Answering affidavit vol 31 pp 3094 to 3095 para 39.6

[257] Makoatsane Replying affidavit vol 46 p 4568 para 725

infrastructure and a switch to the new system.[258] The notice made no reference to the installation of pre-paid water meters or the disconnection of her water supply. In fact, it reassured her that the "*decommissioning*" of the old water supply system "*should not affect you as your new house connection pipe is now supplied from the newly installed roadside secondary water supply system*".

251. The need to upgrade old infrastructure did not, however, explain the disconnection of the water supply. Indeed, there is no explanation on the City's papers why it could not have continued the water supply to the residents after the replacement of the new infrastructure. The supply of water is not dependent on a metering system. Even assuming that a new metering system had to be installed, this could have been done without pre-paid water meters, by way of the standard credit meters that are offered all other residents of Johannesburg. Not only would this have afforded the residents of Phiri the same service options without discrimination, but it would also have avoided the interruption of water services to the applicants and others in their position.

They were introduced by unlawful threat

252. The principle of legality is an element of the rule of law entrenched in s 1(c) of the Constitution. It requires all state action to be lawful. State action is lawful only if it is authorised by empowering legislation. This court held in AAA Investments

[258] Brits Answering affidavit vol 7 p 666 para 30.49.13; "Notice: Decommissioning of the old secondary mid-block water supply system (24 February 2004) vol 3 p 237; "Notice: individual house connection finalisation" (24 October 2004) vol 3 p 240

[259]

253. Section 33(1) of the Constitution gives effect to this principle. It requires all administrative action to be "*lawful*". PAJA renders administrative action reviewable in terms of s 6(2)(f)(i) if it is not authorised by an empowering provision.

254. The introduction of pre-paid water meters, and the discontinuation of the existing water supply, were not authorised by law. The threat to discontinue the existing water supply if the customer did not accept pre-paid water meters or a yard tap, was accordingly also unlawful.

255. Discontinuing the water supply of the people of Phiri by introducing pre-paid water meters was unlawful for two reasons:

255.1. First, the discontinuation fell outside the limitations or discontinuations of water supply permitted by the Water Services Act.

255.2. Second, the City was not authorised to introduce pre-paid water meters in terms of by-laws 9C and 11.

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[259] AAA Investments (Pty) Ltd v Micro Finance Regulatory Council 2007 (1) SA 343 (CC) para 68; See also Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1999 (1) SA 374 (CC) para 58; Affordable Medicines Trust v Minister of Health 2006 (3) SA 247 (CC) paras 49 to 50; Minister of Public Works v Kyalami Ridge Environmental Association (Mukhwevho Intervening) 2001 (3) SA 1151 (CC) paras 33 to 35

It was not authorised by the Water Services Act

256. The Water Services Act does not empower a water services provider to cut off water at all. It leaves that to be done under the service provider's by-laws.

256.1. Sections 4(2)(c)(iv) and (v) require that water service providers' conditions to provide for the circumstances under which water services may be limited or discontinued and the procedures for doing so.

256.2. Section 21(1)(f) provides that a service provider must make by-laws which provide for "*the circumstances under which water services may be limited or discontinued and the procedure for such limitation or discontinuation".*

It was not authorised by the by-laws

257. The only cut-offs allowed under the Johannesburg Water Services By-Laws are in terms of by-laws 9C and 11.

258. By-law 9C allows for water services to be cut off for non-payment. It did not, however, justify the cut-offs in Phiri, firstly because they were not done for non-payment and secondly because they did not follow the procedure required by by-law 9C.

259. By-law 11 allows a service provider to limit or discontinue water services on other specified grounds. None of them were applicable in this case.

260. The cut-offs were accordingly not authorised by the empowering provisions and violated the principle of legality.

261. It is common cause that in introducing pre-paid water meters to Phiri, the City told residents that it would discontinue their water supply altogether if they did not accept pre-paid water meters or a yard tap. The use of threats to procure "*agreement*" to one of these two options does not only undo any suggestion of consent on the part of the people of Phiri, but the introduction of the water meters by way of such threats were also unlawful and *ultra vires*. The City did not have the power to achieve the introduction of pre-paid water meters in this way. This threat was unlawful.

262. The City counters the arguments about its unlawful threat in three ways.

262.1. First, it says that there is a high level of satisfaction in the community.[260] They rely on the evidence of City Councillors (who do not have pre-paid water meters in their homes) and residents of Phiri, most of whom are employed by the City.[261] This evidence is contradicted by the City's own (new) evidence of community resistance to the meters.[262]

262.2. Second, it now says (in its new evidence, the admission of which the applicants oppose) that the applicants all signed application forms for

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[260] Brits CC Affidavit vol 71 (Bundle D) p 173 para 41

[261] Affidavits of people with pre-paid water meters from Cynthia Buthelezi through Thabang Makhetha (but excluding Siphiwe Zulu who is a councillor) vol 39 pp 3848 to 3884

[262] Mudau CC Affidavit vol 72 (Bundle D) p 209 paras 12 to 15

their pre-paid water meters (or in the case of Ms Munyai, for her standpipe).[263] This submission clearly misses the point. The applicants admit that they finally succumbed and applied for either the pre-paid water meters, or the standpipe. But they say that they did so because they had no real choice. Their signatures on these forms (or those of the representatives of their households) accordingly do not take the matter any further. [264]

262.3. Third, the City says that the choice of a yard tap was not a bad alternative, and not a harsh one.[265] This is an extraordinary submission. The choice of a yard tap replaces someone's running water inside their house with a tap in their yard which is fitted with a trickle device.[266] As a yard tap user is not allowed to connect the pipe to any plumbing fixture, it also means not having any running water to connect to the flush toilet which the residents of Phiri have in their homes. In any event, although the parties are in agreement that the residents of Phiri were generally provided the option of a yard tap, the evidence of Ms Mazibuko that she was never offered this option is undisputed.[267]

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[263] Mudau CC Affidavit vol 72 (Bundle D) pp 218 to 219 para 46

[264] Mosikili CC Affidavit vol 75 (Bundle D) p 587 para 198

[265] Brits CC Affidavit vol 71 (Bundle D) p 171 paras 39.1 to 39.3 and p 174 para 42.2

[266] The City says that this is not correct. But it is clear from the City's own evidence that when exercising the choice for a standpipe, the consumer has to agree that "Johannesburg Water shall fit a flow-limiting device to the water connection pipe, to ensure that the average household consumption per month does not exceed the free basic water allocation". Domestic Potable Water Agreement (17 November 2004) vol 72 (Bundle D) p 252 para 1.3

[267] Mazibuko Founding affidavit vol 1 p 37 para 88

They were introduced by an unfair process

263. Section 4(1) of PAJA stipulates that all administrative decisions which affect the public must be preceded by public participation. Section 4(2)(e) of the Systems Act places the "*duty*" on the council of a municipality to consult the local community about "*the level, quality, range and impact of municipal services"* and the "*available options*" for delivery of that service. The City itself recognised, when it made the decision to introduce pre-paid water meters, that there was a need for communication and broad-based consultation with the community.[268]

264. The decision materially and adversely affected the rights of the public, particularly those members of the public who are poor and rely on the free basic water supply as their only source of water. The City and Johannesburg Water failed to comply with the provisions of s 4 of PAJA in that,

264.1. they did not hold any public inquiry on whether the existing regime ought to be discontinued and pre-paid water meters introduced; and

264.2. they did not follow any notice and comment procedure in which the affected members of the public could participate.

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[268] Minutes and Resolution Board of Directors (8 May 2003) vol 60 (Bundle B) p 494; Johannesburg Water Business Plans (2003-5) vol 61 (Bundle B) p 527, p 581 and p 597; See also Johannesburg Water Business Plan (January 2002) vol 59 (Bundle B) pp 343 to 344

265. The City says that it "*pursued extensive consultation*" on a "*political, community and individual level*" prior to the introduction of the City's water policy.[269] This is not correct. The City first made the decision to introduce pre-paid water meters without any input from the community that would be affected by the decision.[270] Only thereafter did it embark upon a sales drive to inform the public of the decision it had already taken and to sell it to them. This is not proper consultation.

266. Consultation in this context means that the council must invite, receive and consider the views of the public in the decision-making process. This is not what the City did. The decision was accordingly procedurally unfair, and the SCA should have set it aside on this basis.

Their introduction violated the duty to "*respect*"

267. Section 27(1)(b) read with s 7(2) of the Constitution,[271] required the City to "*respect*" the existing access to water enjoyed by the residents of Phiri. Section 4(3) of the Systems Act echoes this duty.[272]

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[269] Brits CC Affidavit vol 71 (Bundle D) p 174 para 43

[270] Mosikili CC Affidavit vol 70 (Bundle D) p 95 para 132

[271] Section 27(1)(c) provides that "*everyone has the right to have access to sufficient . . .water*. Section 7(2) provides that the state must "*respect, protect, promote and fulfil*" the rights in the Bill of Rights.

[272] Section 4(3) provides that a municipality must in the exercise of its authority "*respect the rights of citizens and those of other persons protected by the Bill of Rights*".

268. The SCA correctly found in paragraphs 4 and 47 of its judgment that, before the disconnections in March 2004, the residents of Phiri had unlimited access to water at a flat rate.[273] They enjoyed such access in the exercise of their right of access to water in terms of s 27(1)(b). The City was obliged to respect their existing access to water by not interfering with it without justification.

269. This court held in Jaftha[274] that the deprivation of existing access (in that case, to adequate housing) amounts to a violation of the right. Such a violation is unlawful unless it is justified under s 36 of the Constitution. The High Court similarly held in Bon Vista[275] that disconnecting an existing water supply is *prima facie* in breach of the constitutional duty to respect the right of access to water. Such a finding places a burden on the state to justify the breach.

270. The City acted in breach of this duty when it cut off the existing unlimited supply of water to the residents of Phiri and forced them to take pre-paid water meters instead. The *prima facie* breach by the City was not justified in terms of section 36. There is no law that empowered the City either to cut off the existing supply to the residents of Phiri or to force them to accept pre-paid water meters. The violation was accordingly not in terms of a *"law of general application*" and was therefore not justified in terms of section 36 of the Constitution.

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273 Mazibuko Founding affidavit vol 1 p 34 para 78

274 Jaftha v Schoeman 2005 (2) SA 140 (CC) paragraphs 33 to 34

275 Residents of Bon Vista Mansions v Southern Metropolitan Local Council 2002 (6) BCLR 625 (W) para 20

Their introduction violated the duty to take reasonable measures

The duty to take reasonable measures

271. The City's policy also breached its positive obligations under s 27(2) of the Constitution, s 11(1) of the Water Services Act and s 4(2) of the Systems Act to take reasonable measures to achieve the progressive realisation of the right of the residents of Phiri to have access to sufficient water.

272. Section 27(2) read with s 11(1) of the Water Services Act provide that the state must take reasonable legislative and other measures within its available resources to achieve the progressive realisation of the right of access to sufficient water.

273. This court held in Grootboom[276] that, while a margin of discretion is given to the state in deciding how to go about fulfilling socio-economic rights, the reasonableness of the measures it adopts is subject to judicial review. This was echoed in TAC where the court held that the positive obligations arising out of socio-economic rights meant that courts must "r*equire the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation*."[277]

274. While it is not the role of the court to second-guess the City on the manner in which it discharges these duties to poor people, it is the court's constitutional duty

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276 Government of the Republic of South Africa v Grootboom 2001 (2) SA 46 (CC) para 41

277 Minister of Health and Others v Treatment Action Campaign 2002 (5) SA 721 (CC) para 38

to test whether the method they have chosen is reasonable to ensure the progressive realisation of the right.

275. A reasonableness test is a higher threshold than mere rationality.[278] In Currie and De Waal, the standard of reasonableness is explained as follows:

> *"While there can be considerable disagreement about the best way to achieve those [developmental] goals, the state has an obligation to justify its choice of means to the public. Put another way, the standard of reasonableness requires, in the first place, reason-giving. But the courts' role does not end with requiring an explanation. The explanation can be evaluated for its reasonableness, its ability to convince a reasonable person of its coherence."*[279]

276. The state policies and programmes to achieve the realisation of socio-economic rights must be reasonable both in their conception and their implementation.[280] It is not sufficient to simply formulate a reasonable programme. The programme must also be reasonably implemented.

277. Factors taken into account by courts in assessing the reasonableness of measures realising socio-economic rights, have included whether it was comprehensive, flexible and characterised by care and concern, whether it provided for urgent need and emergencies, and whether it was in violation of

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[278] Bel Porto School Governing Body and Others v Premier, Western Cape, and Another 2002 (3) SA 265 (CC) para 46

[279] Currie and De Waal *The Bill of Rights Handbook* (5th ed, 2006) p 577

[280] Government of the Republic of South Africa v Grootboom 2001 (2) SA 46 (CC) para 42

other rights in the Bill of Rights.[281] In Grootboom, these factors were described as follows:

> *"Reasonableness must also be understood in the context of the Bill of Rights as a whole. The right of access to adequate housing is entrenched because we value human beings and want to ensure that they are afforded their basic human needs. 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. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test."*

278. Ultimately, the reasonableness of a particular measure must be assessed on a case to case basis.[282]

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[281] Government of the Republic of South Africa v Grootboom 2001 (2) SA 46 (CC) para 44; Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others 2004 (6) SA 505 (CC) para 44

[282] Government of the Republic of South Africa v Grootboom 2001 (2) SA 46 (CC) para 92

279. The use of pre-paid water meters to dispense water to the poor in Phiri, is unreasonable for a number of reasons.

279.1. It is a retrogressive measure which left the poor people of Phiri worse off than before.

279.2. The pre-paid water meters have the most devastating impact on those most desperate by providing them with the least water. The policy is not one characterised by "*care and concern*".

279.3. Pre-paid water meters fail adequately to provide for emergencies.

It is a retrogressive measure

280. The City provides water on three different levels of service described in by-law 3 of the City's Water Services By-laws.[283] The only service level relevant to this application, and the main method by which the City provides water services to most Johannesburg residents, is service level three, which is metered and comprises a house connection and conventional flush toilet.[284]

281. The City and the applicants disagree about service level three:

281.1. The City says that service level speaks merely of "*metered*" connections, which can mean either credit meters or pre-paid water meters.

[283] Mazibuko Founding affidavit vol 1 p 28 para 60

[284] Eales Answering affidavit vol 16 p 1580 para 91

281.2. By-law 3 however makes it clear that pre-paid water meters are not on par with credit meters. Pre-paid water meters are a punitive measure, used when a consumer with a service level two yard tap contravenes the stipulated conditions of that supply.[285] Pre-paid water meters impose additional and unwelcome burdens which the City clearly did not intend to impose on those residents not in violation of any of their service conditions.

281.3. The City's interpretation of by-law 3[286] does not make any sense. In terms of by-law 3, service level three is a superior level of service to service level two. Pre-paid water meters are a punitive measure for non-compliance with the conditions for service level two. The City's claim that pre-paid water meters are simply another service level three measure is accordingly nonsensical.[287]

282. The SCA has resolved this dispute between the parties in favour of the applicants.[288] It held that "*metered*" in the specifications for a level 3 service was not intended to include "*metered by way of a pre-paid water meter*". These meters were a *"major paradigm shift from conventional metering*".

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285 Mazibuko Founding affidavit vol 1 p 29 para 61

286 Brits Answering affidavit vol 7 pp 652 to 655

287 Johannesburg Water's own lawyers, in correspondence written before the litigation in this matter ensued, also appeared to share the view that pre-paid water meters are indeed a separate service option from "metered full pressure water connection". See Webber Wentzel Bowens letter (13 September 2004) vol 5 p 456 and Webber Wentzel Bowens letter (29 September 2004) Vol 5 p 458 and further annexures in vol 5 pp 456 to 494

288 SCA judgment vol 70 (Bundle D) pp 29 to 30 paras 50 to 53

283. The progression from no service to service level one or two and ultimately to service level three, has been referred to as "*the water services ladder*". The City is at pains to point out that it is its priority to provide some service to those with none and to progress those with service level one and two up the ladder to service level three – in other words to ensure progress up the water services ladder for all.[289]

284. In 2004, however, the City chose to introduce a different water supply measure for those living in deemed consumption areas. Deemed consumption areas are areas in which the City did not previously have meters installed. In the case of Soweto including Phiri, this was part of the legacy of apartheid. In these areas, residents had full-pressure, unlimited water supply for which the City charged a flat rate. The SCA correctly found[290] that this unlimited, unmetered water had for decades been given free to the people of Phiri. The residents of Phiri accordingly had the substance of service level three – a house connection and conventional flush toilet – except that they did not have meters and were instead charged on a flat rate calculated by way of a deeming provision.

285. For these residents, living in one of the most historically neglected part of Johannesburg, the introduction of pre-paid water meters meant a downward slide on the water services ladder. From what was in substance a service level three service, they were relegated to a service based on a water restriction device that

[289] Seedat Answering affidavit vol 10 p 920 para 17 ff

[290] SCA judgment vol 70 (Bundle D) p 4 para 4 and p 27 para 47

is, in terms of the City's own by-law, a punitive measure for service level two defaulters.

286. This was a deliberate policy. The City says that its priority is to use its resources to ensure a move up the ladder for those who have service level two and those who have no service. It says that it is more important to focus its attention on those who are even poorer than the people of Phiri. It does not explain however why it cannot do both.

287. It has saved money by imposing water meters on the people of Phiri[291] and can redirect it to its own water services priorities. While it is laudable from a constitutional perspective to provide a step up the water services ladder to others, this cannot be done by taking away the water supplied to the residents of Phiri.

288. Pushing the people of Phiri down the water services ladder is at odds with what the Constitution requires of the state in respect of the right of access to water. In New Clicks, Moseneke J emphasised that the obligation of the state is to "*root out poverty and want*" by accelerating "*reasonable and progressive schemes to ameliorate vast areas of deprivation*".[292] The City's implementation of pre-paid water meters has not ameliorated poverty. It has created greater deprivation instead.

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[291] Eales Answering affidavit vol 16 p 1590 para 110.4

[292] Minister of Health v New Clicks 2006 (2) SA 311 (CC) para 705

It impacts disproportionately on the most desperate

289. The impact of pre-paid water meters is felt most acutely by those who are the poorest and who are in most desperate need of water. This is due to the following combination of factors.

289.1. Pre-paid water meters have only been installed in areas where poor people live.[293]

289.2. Poor people are more likely to live in big households and on multiple-dwelling stands. They must share the per stand allocation of free water between more people.

289.3. Poor households are also more likely to include people who are unemployed, and who are living with HIV/AIDS. Their domestic water requirements are accordingly higher.

289.4. Poor people are less likely to have cash or credit to buy water credits above the basic minimum. They are likely to be limited only to the basic minimum water per month.

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[293] The City challenges this on the basis of new evidence which it seeks to have admitted to show that the meters have now been introduced in new areas. Mudau CC Affidavit vol 72 (Bundle D) pp 207 to 208 paras 3 to 5. Not one of these areas, however, can be described as a "rich" suburb. Mosikili CC Affidavit vol 75 (Bundle D) pp 571 to 573 paras 160 to 165, pp 583 to 584 para 186

289.5. The poor are most likely to be left without access to any water beyond the free minimum on a regular basis due to a pre-payment system. It is the very poor, unemployed people affected by HIV/AIDS who can least afford being subjected to pre-paid water meters. The City has, however, chosen precisely these vulnerable residents of Phiri to pilot the pre-paid water meter project. Its policy is unreasonable for this reason.

290. The City has, as a result of this litigation, now adopted a new policy to ameliorate the devastating consequences for some indigent residents. We deal with this policy in greater detail in the applicants' challenge to the minimum basic water supply. What is, however, clear is that these future plans, and the interim measures introduced in the meantime, do nothing to make the introduction of pre-paid water meters any more reasonable.

290.1. In the first instance, the interim policy is aimed only at those who are registered as indigents. According to the City's latest evidence, only about 26 185[294] out of 90 400 accountholders with pre-paid water meters are registered as indigent customers. [295] This means that 72% of those with pre-paid water meters do not get the benefit of the interim increase from 6 to 10 kilolitres, or the measures introduced to ameliorate some of the other problems inherent in the pre-paid water meters. The City admits that the indigent register is a flawed mechanism for the identification of poor people and that the most vulnerable people often do

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[294] According to the new evidence which the City seeks to have admitted, this number is 26 158. This appears to be an error. Mudau CC Affidavit vol 72 (Bundle D) p 210 para 17

[295] Singh Supplementary affidavit vol 52 pp 5177 to 5178 para 9.2

not respond to calls to register for benefits.[296] The system is administratively cumbersome and non-inclusive and stigmatises those who register under it. The most vulnerable accordingly remain excluded from the system.

290.2. The new policy also does not increase the minimum quantity of water provided per person. It simply makes a new assumption about the size of households in Phiri. It bases its assessment on 13 per household rather than 8, to whom it supplies 25 litres per person per day. This does nothing to cure the fundamental problem that those who are hardest hit by the pre-paid water meters mechanism, are the very poorest. Under the interim provision, the group of poor people left without water on a regular basis is slightly smaller, but even poorer. This does nothing to alter the fundamental shortcomings we have already described.

It fails to provide for emergencies

291. The third inherent flaw which renders the introduction of pre-paid water meters unreasonable is that they fail adequately to provide for emergencies.

292. A pre-paid water meter is an absolute mechanism. It is inflexible and unforgiving. It allows the consumer to use only as much water as he or she can afford in that month. Poor people who cannot afford anything, get the free amount and nothing more. Others who may, in a particular month, be able to afford a few extra kilolitres get so much and nothing more. The system does not allow any leeway.

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[296] Brits Answering affidavit vol 7 p 686 para 30.75

293. The devastation that can arise from this lack of flexibility is clear from the affidavit of Mr Vusimuzi Paki[297] who describes how, after the desperate attempts of residents to extinguish a fire in his backyard shack, the water ran out before the fire could be extinguished. Two children, aged two and nine, died in the fire.

294. If an emergency arises – a household fire, a medical emergency, or a situation in which more water than usual is needed for personal hygiene – those with no or little water do not have any or enough to address the emergency. If they run out of water when they have no more money, then it is an emergency in itself.

295. In December 2006, after this litigation had commenced, the City approved the allocation of a 4 kilolitres "*annual buffe*r" to every indigent accountholder with a pre-paid water meter which, according to the City, "*will cover any emergency requiring additional water*" and will tie over those whose applications for an additional allocation on the basis of special need is being processed. [298] The City decided in December that this emergency allocation will come into effect in March 2007.

296. By 31 May 2007 the "*emergency*" allocation had not yet come into effect as promised. [299] The City's explanation for the delay was wholly unsatisfactory.[300]

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[297] Paki Confirmatory affidavit vol 4 pp 357 to 360

[298] Brits Answering affidavit vol 7 p 637 para 28.13.2

[299] Makoatsane Replying affidavit vol 44 pp 4360 to 4362 para 56

[300] Brits Supplementary affidavit vol 52 p 5162 paras 10.2 to 10.4; Singh Supporting affidavit vol 52 p 5175 para 3 to p 5177 para 7.3

297. By 9 November 2007, the applicants had not received, or been informed of, the emergency allocation.[301]

298. The City now says that the emergency allocation has mostly been rolled out, but that it is not sure how many residents do not have access to the emergency allocation.[302]

299. In any event, even if the emergency allocation has been implemented as promised, it cannot address the real emergency needs of the people of Phiri.

299.1. An emergency is by nature an unexpected and sudden event that must be dealt with immediately. It cannot be dealt with on the basis of an annual amount loaded on a pre-paid water meter along with ordinary credit purchases. There is no mechanism to ensure that the 4 kilolitres remain "*ring fenced*" for emergency purposes until it is needed. [303]

299.2. The proposal of an annual allocation of 4 kilolitres for emergencies does not address the fundamental problem with the plan, namely that it will still be distributed through the mechanism of pre-paid water meters which cut off the supply completely as soon as the free allocation has been used.

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[301] Makoatsane Supplementary replying affidavit vol 53 pp 5246 to 5247 paras 8 to 10

[302] Mudau CC Affidavit vol 72 (Bundle D) p 213 para 25.8

[303] Singh Supplementary affidavit vol 52 pp 5179 to 5180 para 11

299.3. It also does not address the fundamental problem that many indigent people run out of the free basic water every month. They inevitably draw on their annual emergency allocation when their monthly allocation runs out. The token 4 kilolitres per year cannot possibly address this problem. [304]

299.4. The City says that it has been busy with a process of installing fire hydrants "*from 2002*". It said at the time of the High Court hearing, that it had installed 59 hydrants every 220 meters. At November 2007, there was still no source of water that would be available for public use if a fire broke out in Phiri. [305] The City now seeks to submit new evidence that says it has installed 81 fire hydrants. It also seeks to submit shocking new evidence of the response times of the Jabulani Fire Station – located only 2 km outside Phiri – of up to 1 hour and 47 minutes.[306]

300. It is clear from all of these facts that the pre-paid water meter system does not provide for the emergency needs of the indigent. Even the policies devised in response to this litigation, although they seem on the face of it to offer an improvement, do not protect the most vulnerable against the risks inherent in having a mechanism that leaves people without any access to water for any significant periods of time.

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[304] Makoatsane Replying affidavit vol 44 pp 4370 to 4371 paras 75 to 77

[305] Makoatsane Supplementary replying affidavit vol 53 p 5252 para 26

[306] Mudau CC Affidavit vol 72 (Bundle D) p 214 para 27

Their introduction violated the right to equality

301. A measure violates the right to equality in s 9(1) if it differentiates between people or categories of people on a basis which is not rationally connected to a legitimate government purpose.[307]

302. The SCA should have held that the introduction of pre-paid water meters in Phiri differentiated between the poor (mainly black) people of Phiri and the residents of wealthier (mainly white) neighbourhoods, and that the differentiation has no rational connection to a legitimate government purpose.

It differentiates between people

303. The City, in its introduction of pre-paid water meters in Phiri, differentiated between the people of Phiri and the residents of wealthier neighbourhoods:

303.1. The residents of Phiri, who are pre-dominantly poor and black, were not given the option of metered water on credit. [308] This option is given as a standard option to other residents of the City. Even those Phiri residents who have never been in arrears were not given the option of a credit meter. They were not given this option because they live in Phiri, a former deemed consumption area.

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[307] Harksen v Lane NO 1998 (1) SA 300 (CC) para 53

[308] Mazibuko Founding affidavit vol 1 p 38 para 95; Brits Answering affidavit vol 7 p 669 para 30.54

303.2. Pre-paid water meters have been introduced in Phiri, which is one of the poorest suburbs in Johannesburg, as well as in other low-income areas including other parts of Soweto and Orange Farm. [309] These areas are predominantly black. The meters have not been used in affluent suburbs, or those that have a predominantly white population. [310]

303.3. By introducing pre-paid water meters in poor black areas and not in rich, white neighbourhoods, the City differentiates between rich and poor, white and black.

304. The impact of the City's differentiation is significant. It means that rich, white people are given the protection of by-law 9C, while poor, black people are not. The protection offered by this by-law is threefold:

304.1. First, it offers the user water on credit.

304.2. Second, it gives the user a period of grace within which to pay for water it has already used.

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[309] Brits Answering affidavit vol 7 p 640 para 30.4.5; Mazibuko Founding affidavit vol 1 p 35 para 81

[310] Mazibuko Founding affidavit vol 1 p 48 para 128. The City alleges that "*the success*" of Operation Gcin'amanzi and pre-paid water meters has lead it to "*examine the feasibility of rolling Prepayment Meters in a number of other mixed use and low, medium and high income housing developments*." Brits Answering affidavit vol 7 p 623 para 28.7. It does not say what the result of this examination was. In fact, there has been no roll out of prepaid water meters in wealthy suburbs. The new evidence which the City seeks to introduce in this regard also does not take the matter any further. Mudau CC Affidavit vol 72 (Bundle D) pp 207 to 208 paras 3 to 5; Mosikili CC Affidavit vol 75 (Bundle D) pp 571 to 573 paras 160 to 165

304.3. Third, before water is cut off, the user is afforded a fair hearing, that is, a fair opportunity to persuade the City not to do so.

305. Rich, white people are offered this indulgence as a matter of course and whether or not there are special circumstances that justify it. Poor, black people are not afforded any of it. The City has given them access to a very limited appeal mechanism which they can access only if special circumstances exist.

No rational connection to a legitimate government purpose

306. The City has not identified the purpose of the differentiation between rich and poor, white and black.

306.1. In particular, it has not explained why it does not give the option of a credit meter to the residents of Phiri, why it has implemented pre-paid water meters in poor areas, and not in affluent areas, and why it supplies a water service to the poor without the procedural protection afforded to the rich.

306.2. The only explanation the City offers for the use of pre-paid water meters in Phiri, is that it chose to pilot pre-paid water meters in an area where there was a big unaccounted for water problem. But there is no rational connection between this purpose to address unaccounted for water losses, and the differentiation between the rich and the poor in implementing pre-paid water meters.

306.3. The existence of an unaccounted for water problem does not explain why the City chose to subject poor people to a water supply system that provided them with no procedural protection, while affluent residents had the benefit of administratively fair procedures to challenge water disconnections as a matter of course.

306.4. Either way, it is not constitutionally permissible to generalise about people on the basis of the area in which they live.

307. The City also raises the culture of non-payment in former deemed consumption areas apparently in explanation of the introduction of pre-paid water meters. This culture arose from the boycotts against the apartheid government in the 1980s.[311]

307.1. Even if the City meant to use pre-paid water meters as a credit control mechanism in the apartheid townships, which it shies away from acknowledging, there is no rational link between the culture of non-payment as a form of political protest, and the differentiation made by the City in the use of pre-paid water meters in former deemed consumption areas.

307.2. This is so because the City acknowledges that, at the time they decided to address unaccounted for water through the mechanism of pre-paid

[311] Still Answering affidavit vol 31 p 3032 para 19

[312]

307.3. The culture of non-payment cannot explain the City's differentiation between rich and poor, black and white. A credit control mechanism would only be rational if those who were not paying, could do so. But if they genuinely cannot afford the water they use, no credit restriction device could make them pay.

308. The City argued in the SCA that the applicants' challenge against pre-paid water meters is misplaced, because the poor of Phiri are in fact better off with pre-paid water meters than they were under the deemed consumption system.

308.1. They say that the credit system is not as attractive as the applicants think, and that pre-paid water meters are not as bad. In a similar vein, the City says that the poor of Phiri are better off with pre-paid water meters because, if they did not have them, they would be *"accumulating debt"* and be exposed to the harsh debt collecting measures of the City.

308.2. The import of this argument is that the City knows best how to protect poor people against their own spending habits, by limiting them to the water that they can afford.

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[312] Still Answering affidavit vol 31 p 3032 para 19; Brits Answering affidavit vol 7 pp 658 to 659 para 30.47

308.3. It is important to recall that at issue here is not a consumption pattern in relation to household furniture or clothing accounts. The City uses pre-paid water meters to control the spending habits of poor people on water – a necessity of life.

308.4. Furthermore, inequality and discrimination are sometimes borne of paternalism and not malice. The City's policy is based on the assumption that the people of Parktown may be allowed to choose how best to regulate their affairs, while the City will decide what is best for the people of Phiri. This is an invidious form of racism that was common in our colonial and apartheid past that remains offensive even if well-meaning.

308.5. The applicants ask for an order that they be given the choice of a credit meter or a pre-paid water meter. If the City is right that the pre-paid water meter system is such a good solution for poor people, then poor people will no doubt choose it if presented with the option. But it is for them to decide. The City cannot deny Phiri the same choice that it gives Parktown.

309. Finally, the City also argued that it cannot "*extend services on a credit basis*" to the people of Phiri, because they are bad payers and may not qualify for credit under the National Credit Act 34 of 2005.

309.1. In the first instance, the applicants do not ask for an "*extension*" of credit in their favour. They simply ask that they be given the option to have their pre-existing service restored.

309.2. Secondly, bad payers are not limited to Phiri - in fact it is apparent from the City's own evidence that the worst payers are "*government and institutional bodies*".[313] The worst debtors are, nevertheless, given the credit options which the people of Phiri are not.

Their introduction violated the prohibition of discrimination

310. This court held in Harksen[314] that, even if a measure differentiates between people in a rational manner, it might nevertheless amount to discrimination in breach of s 9(3) of the Constitution. To determine whether it does, requires a three-step analysis:

310.1. *"Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner."*

310.2. "*If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground,*

[313] Johannesburg Water Business Plans (2003-5) vol 61 (Bundle B) p 525

[314] Harksen v Lane NO 1998 (1) SA 300 (CC) para 53

unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of s 8(2)."

310.3. "*If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause."*

311. The differentiation made by the City was in the first place made on the grounds of geography. It focused its plan to introduce pre-paid water meters specifically on former deemed consumption areas – in other words on apartheid townships.

312. This court recognised in Walker[315] that the effect of apartheid was that race and geography were inextricably linked, meaning that geographical differentiation, although seemingly neutral, may be racially discriminatory. In this case, the decision to implement pre-paid water meters only in low-income deemed-consumption areas, differentiates in substance between black and white residents. It amounts to indirect discrimination on the ground of race. It also amounts to indirect discrimination on the basis of social origin (or class), which is also a listed ground.

313. The differentiation accordingly amounts to discrimination, and is automatically unfair in line with the *dicta* in Harksen.

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315 City Council of Pretoria v Walker 1998 (2) SA 363 (CC) paras 32 to 35

314. The City's failure to provide any justification for the unfair discrimination[316] means that the policy is unconstitutional and invalid.

Their introduction must be set aside

315. The SCA ought to have found that the decision to discontinue the applicants' existing water supply and to introduce pre-paid water meters in Phiri, must be reviewed and set aside in terms of the following provisions of s 6(2) of PAJA:

315.1. The administrator was not authorised to take the decision in terms of s 6(2)(a)(i), alternatively the decision was not authorised by the empowering provision in terms of s 6(2)(f)(i).

315.2. A mandatory and material procedure prescribed by the empowering provision in the by-law was not complied with in terms of s 6(2)(b).

315.3. The decision was procedurally unfair in terms of s 6(2)(c).

315.4. The decision was materially influenced by an error of law in terms of s 6(2(d).

315.5. The decision was taken for a reason not authorised by the empowering provision in the by-law in terms of s 6(2(e)(i))

[316] Brits Answering affidavit vol 7 p 693 para 30.79.8

315.6. The decision failed to take into account relevant considerations as contemplated in s 6(2)(e)(iii)

315.7. The decision was taken arbitrarily in terms of s 6(2)(e)(vi).

315.8. The decision was not rationally connected to the purpose for which it was taken as contemplated in s 6(2)(f(ii)(aa), or to the reasons given for it by the administrator as contemplated in s 6(2)(f)(ii)(dd).

315.9. The decision was so unreasonable that no reasonable person could have taken it., as is contemplated in s 6(2)(h).

315.10. The decision is otherwise unconstitutional or unlawful in terms of s 6(2(i)).

THE PRE-PAID WATER METER RELIEF

316. The High Court held that the use of pre-paid water meters in itself and the manner of their introduction in Phiri, were both unlawful. It accordingly made declaratory orders to that effect[317] and, in order to remedy the City's breaches, ordered it to provide the residents of Phiri with the option of a metered supply of water on credit.[318]

317. We submit with respect that this was an appropriate remedy for the following reasons:

317.1. It recognised that the use of pre-paid water meters was unlawful in itself.

317.2. It recognised that the pre-paid water meters were also unlawfully thrust upon the residents of Phiri, *inter alia* by failing to provide them with the choice of metered water on credit.

317.3. The option of metered water on credit allows residents to avail themselves of the existing representation mechanism in terms of by-law 9C, if they are unable to pay for the water they consume. It introduces critical flexibility in the terms upon which water is supplied to them because it allows for the accommodation of their individual needs in the

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[317] High Court judgment vol 54 p 5362 paras 183.2 to 183.4

[318] High Court judgment vol 54 p 5362 para 183.5.2

light of their individual ability to pay for the water they need. It accordingly meets the requirements for the limitation or discontinuation of water services laid down by ss 4(2)(c)(iv) and (v), 4(3), 21(1)(f) and 21(2)(b) of the Water Services Act.

318. The SCA on the other hand, merely held that the use of pre-paid water meters was unlawful[319] and mistakenly thought that it was not necessary to consider the applicants' complaints about the manner in which the City introduced pre-paid water meters in Phiri. The only relief it afforded the applicants, was a declaration of invalidity[320] suspended for two years.[321] The implications are as follows:

318.1. The applicants are not afforded any relief for the unlawful way in which they were forced to accept pre-paid water meters.

318.2. The applicants are not afforded any relief for the months they went without any water at all before they succumbed to the City's unlawful pressure to accept pre-paid water meters.

318.3. The applicants are not afforded any relief for the fact that they have since 2004 had to live with the pre-paid water meters which were unlawfully thrust upon them and caused unlawful cut-offs.

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319 SCA judgment vol 70 (Bundle D) p 33 para 58

320 SCA judgment vol 70 (Bundle D) p 35 para 62.5

321 SCA judgment vol 70 (Bundle D) p 36 para 62.6

318.4. The applicants are not afforded any relief for the fact that they will for the next two years have to continue living with the pre-paid water meters which were unlawfully thrust upon them and cause unlawful cut-offs.

318.5. The nature of the relief they might eventually get after two years, is wholly uncertain. The SCA suspended its declaration of invalidity to allow the City "*to legalise the use of pre-payment meters insofar as it may be possible to do so*". It did not say what the City had to do to achieve this objective. Its judgment suggests that it might be enough for the City to amend its by-laws. But it is not as simple as that. It would for instance be very hard if not impossible, to reconcile the use of pre-paid water meters with the procedural requirements for the limitation or discontinuation of water services in terms of s 4(3)(a) and (b) of the Water Services Act.

318.6. At best for the applicants, the relief they will ultimately get in two years' time, for the hardship they suffered as a result of the unlawful introduction and ongoing use of pre-paid water meters for seven years from 2004 until 2011, will be that the City will "*legalise the use of pre-paid meters insofar as it may be possible to do so*". It will only operate prospectively. It will not address or even acknowledge the injustice and hardship the residents of Phiri suffered as a result of the unlawful introduction and ongoing use of pre-paid water meters for seven years. The City will escape scot free without any penalty for the injustice and hardship it unlawfully inflicted on the residents of Phiri. It will not come close to an effective remedy. It will make a mockery of the violations of the constitutional rights of the residents of Phiri.

319. The applicants accordingly submit that the High Court's remedy is the appropriate one in the circumstances. The SCA's remedy does not provide any real relief, and in any event not effective relief of the kind contemplated in Fose[322] and in TAC(2)[323].

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322 Fose v Minister of Safety and Security 1997 (3) SA 786 (CC) paras 19 and 69

323 Minister of Health v Treatment Action Campaign (2) 2002 (5) SA 721 (CC) paras 101 to 106

THE CITY'S FREE BASIC WATER POLICY

The City's policy

320. The City's policy relevant to the determination of this appeal is the one we described in the chapter on "*The City's policy at the time of the High Court hearing*". If this court admits the respondents' new evidence however, the relevant policy is the one we described in the chapter on "*The new evidence"*. In either case, the relevant policy is the City's free basic water scheme as actually implemented without regard to its future plans and promises.

321. The City's free basic water policy, both as it existed at the time of the High Court hearing and on the new evidence, is unlawful because,

- it is based on misconception;
- it provides insufficient free basic water; and
- it is inflexible.

322. We shall later discuss each of these flaws. Before we do so, however, we discuss the elements of the City's duty to provide free basic water to poor people in terms of s 27(2) of the Constitution, ss 3 and 11 of the Water Services Act and ss 4(2)(j) and 23(1)(c) of the Systems Act. We shall in our discussion refer to s 27(2) of the Constitution because its requirements are echoed in the Water Services and Systems Acts.

What does "*sufficient*" mean?

323. Section 27(1)(b) of the Constitution provides for access to "*sufficient*" water without laying down any standard or measure of sufficiency.

324. The SCA held that the 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*".[324]

325. We submit with respect that the SCA was correct in this regard. This is so particularly in the light of this court's repeated emphasis of the close connection and interaction between the socio-economic rights in ss 26 and 27 of the Constitution and the right and value of dignity.[325] It put it as follows in Grootboom:

> "*It is fundamental to an evaluation of the reasonableness of state action that account be taken of the inherent dignity of human beings. The Constitution will be worth infinitely less than its paper if the reasonableness of state action concerned with housing, is determined without regard to the fundamental constitutional value of human dignity. Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the state in all circumstances and with particular regard to human dignity.*"[326]

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[324] SCA judgment Vol 70 (Bundle D) p 11 para 17

[325] Government of the RSA v Grootboom 2001 (1) SA 46 (CC) 83; Jaftha v Schoeman 2005 (2) SA 140 (CC) para 21

[326] Para 83

How much is "*sufficient*"?

326. The High Court examined the evidence on the minimum quantity of water required for dignified human existence.[327] It concluded that 25 litres per person per day was "*woefully insufficient*"[328] and that the City could and should provide a minimum of 50 litres per person per day.[329] It accordingly ordered the City to provide the poor of Phiri with this minimum of free basic water.[330]

327. The SCA disagreed. It analysed the evidence and concluded that the minimum water required for dignified human existence was 42 litres per person per day.[331] It ordered the City to reformulate its free basic water policy in the light of this quantification of "*sufficient*" water.[332]

328. We submit with respect that the High Court's approach to and analysis of the evidence was correct and that the SCA was mistaken for the reasons that follow.

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[327] High Court judgment vol 54 pp 5354 to 5361 paras 167 to 181

[328] High Court judgment vol 54 p 5360 para 179

[329] High Court judgment vol 54 p 5361 para 181

[330] High Court judgment vol 54 p 5362 para 183.5.1

[331] SCA judgment vol 70 (Bundle D) pp 12 to 15 paras 18 to 24

[332] SCA judgment vol 70 (Bundle D) p 35 para 62.2(a) read with para 62.3

The applicants' evidence

329. The applicants' evidence is that when they only have the free basic minimum, it is simply not enough for their basic needs of their households, including drinking, cooking, sanitation, bathing, cleaning the house and laundry.[333] The WHO standard and the expert opinions accord entirely with the personal experience of the applicants regarding what is "*sufficient*".

330. They use as little water as they possibly can. They use little water to bath, they do laundry away from home, they re-use water to flush the toilet or do not flush it at all, and that still they are not able to fulfil their basic necessities with the water they get free.[334]

331. They regularly run out of water before the end of the month and then have to make do without any water if they cannot buy more. The City concedes that the free basic water in Phiri lasts only for 20 days on average.[335] In Mrs Mazibuko's household it only lasted between 12 and 15 days.[336]

The respondents' evidence

332. The minister's evidence is that the minimum of 6 kilolitres per household per month prescribed by the Standards Regulation, was based on an assumption of

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[333] Mazibuko Founding affidavit vol 1 p 43 paras 111 to 114

[334] Mazibuko Founding affidavit vol 1 p 44 paras 115 to 117; Makoatsane Confirmatory affidavit vol 4 p 350 paras 6 to 9

[335] Brits Answering affidavit vol 7 p 671 para 30.55.3

[336] Mazibuko Founding affidavit vol 1 p 40 para 101

4 persons per household in urban areas and 5 in rural areas.[337] The minister accordingly had in mind a minimum of 40 to 50 litres per person per day.

333. The government has always made it clear that its objective was to provide free basic water of 50 litres per person per day, as appears from:

- the RDP policy of 1994, which had a medium-term aim of providing an on-site supply of 50 to 60 litres per person per day.[338]

- the DWAF White Paper of November 1994, which said that 25 litres per person per day, excluding sanitation requirements, was the minimum required only for direct consumption, for food preparation and for personal hygiene. Even with separate provision for adequate sanitation, the 25 litres per person per day was not considered to be "*adequate for a full, healthy and productive life*".[339]

- the Strategic Framework for Water Services of September 2003, stated that "*where sustainable*" *water service authorities should give consideration to increasing the basic quantity of water provided free of charge (25 litres per person per day), aiming for the free provision of at least 50 litres per person per day to poor households*".[340]

334. The City's evidence is that 28.5% of households in the City have more than 8 people,[341] and that the average per household on multiple household stands is

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[337] Schreiner Answering affidavit vol 41 p 4004 para 116

[338] RDP 1994 vol 1 p 57 para 2.6.7

[339] DWAF White Paper (November 1994) vol 1 p 63

[340] Strategic Framework for Water Services (September 2003) vol 2 p 155

[341] Eales Answering affidavit vol 16 pp 1560 to 1561 para 62

10.[342] This must be considered together with the expert evidence of Palmer, which we consider below, that 6 kilolitres is not enough for more than 6 people; and that 10 kilolitres is only enough for 8 people per household.[343]

335. The City's Social Package of 8 June 2006 assumed a household size in the poorer areas of Johannesburg of 7 to 8 people. The package aimed to increase the free basic allocation of water to poor households to 10 kilolitres a month. A consumer unit of 7 people would use 10.5 kilolitres per month if each person used 50 litres per person per day.[344]

336. Johannesburg Water's own "*menu*" of suggested water uses per month includes toilet flushes, body washes, kettles of water, dish-washes, clothes-washes. They acknowledge that sufficiency must be considered with reference to these activities. However, the individual quantities per activity calculated for low-income households were based only the assumption of only seven people per household using 6 kilolitres water.[345]

337. The City's new evidence regarding the development of the Social Package, confirms that it aims to provide those in greatest need with 50 litres per person per day.[346]

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[342] Brits Answering affidavit vol 7 p 685 para 30.71.3

[343] Palmer Answering affidavit vol 38 pp 3791 to 3793 para 8.14

[344] Koseff CC Affidavit vol 72 (Bundle D) p 263 para 9.3

[345] "Johannesburg Water website calculation and menus of water use" vol 4 p 332; "Johannesburg Water brochure of 'Free Essential Water' Menu for Use" vol 4 p 334

[346] Koseff CC Affidavit vol 72 (Bundle D) pp 263 to 267 paras 9 to 13

The expert opinions

338. The City proposes that the evidence of Mr Palmer be adopted in determining how much free basic water is "*sufficient"*.

339. Mr Palmer is a consultant contracted by the City who deposed to an affidavit on behalf of the City.[347] His evidence is to the effect that 42 litres per person per day is sufficient.[348] He, however, used the wrong standard to reach this conclusion. He quantified the minimum water necessary for the "*public benefit*" and did not have regard to the need to provide sufficient water for dignified human existence. He says the following in this regard:

> *"In considering how much water people require, the conventional view, with which I concur, is that one needs to separate out the use of water which has a public benefit from that which has a private benefit. Public benefit can best be identified by asking whether the community as a whole would be negatively affected if an individual did not have the service being considered. So, for example, an individual who is ill through having insufficient or poor quality water will impact on society at large in that others may become infected and in that the state or community will have to bear their health care costs. Private benefit occurs when an individual uses as service for their own convenience.*

[347] Palmer Answering affidavit vol 38 pp 3781 to 3800

[348] Palmer Answering affidavit vol 38 p 3789 para 8.13 to p 3793 para 8.14.7

> *Is it the public benefit argument which has lead to the recommendations, quite correctly, that people require a certain amount of water to remain healthy. Beyond this amount the additional use has either no impact on health or a very small one. So for example, showering rather than washing in a basin may be more convenient and more pleasurable but it does not substantially improve one's health. And flushing a toilet after urinating has no heath benefit and is probably done for aesthetic reasons more than anything else*"[349] (our underlining).

340. Mr Palmer makes it clear that he subscribes to the "*conventional view*". He says that it is the view "*with which I concur*" and describes its recommendations on the minimum water people require, as "*quite correct*".

341. The "*conventional view*" provides only for the minimum needs of people to the extent that it has a public benefit to do so. It asks only "*whether the community as a whole would be negatively affected*" without it. It does not ask whether people require it for dignified human existence, whether or not it has any additional public benefit.

342. But the Constitution requires one to ask the further question. Its concern is not limited to the utilitarian requirements of public health. It also respects and seeks to protect the dignity of every person. It requires every person to have enough water, not merely to avoid disease, but also to live a life with dignity.

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[349] Palmer Answering affidavit vol 38 p 3785 paras 8.3.1 to 8.3.2

343. It means that Mr Palmer's quantification of the minimum water people require, is based on the wrong standard. It provides only for public health and does not allow for dignified human existence as well. It is an underestimation.

344. The difference is very real. The minimum water required for waterborne sanitation is a good illustration. It takes at least 10l of water to flush a toilet. How many flushes should every person be allowed per day? Mr Palmer only allows 1.5 flushes per day because it "*is a reasonable provision from a health point of view*".[350] He makes no allowance for dignity.

345. Prof Gleick, who deposed to an affidavit in support of the applicants' claim, says that the minimum quantity of water required per person per day, is 50 litres. He quantifies it as follows:

- Minimum drinking water – 5 litres
- Basic requirement for sanitation – 20 litres
- Basic requirement for bathing – 15 litres
- Basic requirement for food preparation – 10 litres[351]

346. The biggest single item in Prof Gleick's quantification, is the water required for sanitation. He only allows two flushes of 10 litres each per day. He makes the point however that "*the literature shows that the average person with conventional plumbing uses around 5 flushes per day*"[352] and that they may use

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[350] Palmer Answering affidavit vol 38 p 3791 para 8.13.6

[351] Gleick Supporting affidavit vol 6 pp 505 to 506 para 22

[352] Gleick Supplementary replying affidavit vol 50 p 4972 para 11

15 litres per flush, that is, a total of 75 litres per person per day.[353] He criticizes Mr Palmer's allowance of only 15 litres per person per day:

> "*Palmer comes to his conclusion by applying subjective judgment that is necessary to flush only after defecation and any additional flushes do not improve health. This lends to a substantial underestimate of the minimum water needed for 'sufficient, safe, acceptable' water quantities – the broader definition used by the United Nations.*"[354]

347. Prof Gleick's opinion is not only in line with international standards, it also informs these standards. General Comment 15 of the UN Committee on Economic, Social and Cultural Rights on the right to water, says that water must be sufficient and continuous for personal and domestic use. Under "*personal and domestic use*", it identifies drinking, personal sanitation, washing of clothes, food preparation, household and personal hygiene.[355] It says that the water necessary to meet these needs must accord with WHO guidelines.[356] These guidelines can be found in two sources – first, a study by Drs Bartram and Howard[357] and, second, a study by Prof Gleick.[358]

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353 Gleick Supporting affidavit vol 6 p 505 para 22.2 and Gleick Supplementary replying affidavit vol 50 p 4974 para 19

354 Gleick Supplementary replying affidavit vol 50 pp 4972 to 4973 para 11

355 UN Committee on Economic, Social and Cultural Rights, General Comment 15 "The Right to Water" (Articles 11 and 12 of the Covenant) (2002) vol 67 (Bundle C) p 192 para 12(a)

356 UN Committee on Economic, Social and Cultural Rights, General Comment 15 "The Right to Water" (Articles 11 and 12 of the Covenant) (2002) vol 67 (Bundle C) p 192 para 12(a)

357 J Bartram and G Howard "Domestic water quantity, service level and health: what should be the goal for water and health sectors", WHO (2003) vol 51 p 5073 to vol 52 p 5111

348. The conclusions of Drs Bartram and Howard are consistent with the opinion of Prof Gleick.

348.1. The Bartram and Howard study focuses on the minimum basic water supply necessary to ensure health. It does not quantify the water necessary to ensure effective hygiene. [359] It also does not include a sanitation requirement in its quantification. The study deals with sanitation separately. [360]

348.2. Sufficiency must, according to the General Comment, be determined with reference to the "*highest attainable standard of health*". It is accordingly significant that Drs Bartram and Howard say that "*basic access*" of around 20 litres per person per day carries with it a high level of health concern. Intermediate access, on the other hand, classified as around 50 litres per person per day, carries a low level of health concern. [361]

349. The two reports upon which the General Comment relies as encompassing the "*WHO standards*" – the Bartram and Howard report and that of Prof Gleick – can accordingly be reconciled on the basis that Prof Gleick represents the appropriate

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[358] P.H. Gleick, (1996) "*Basic water requirements for human activities: meeting basic needs*" Water International 21 pp 83 to 92

[359] J Bartram and G Howard "*Domestic water quantity, service level and health: what should be the goal for water and health sectors*", WHO (2002) vol 51 p 5094

[360] J Bartram and G Howard "*Domestic water quantity, service level and health: what should be the goal for water and health sectors*", WHO (2002) vol 51 p 5076

[361] J Bartram and G Howard "*Domestic water quantity, service level and health: what should be the goal for water and health sectors*", WHO (2002) vol 51 p 5075

model for communities where waterborne sanitation is used. His model is also consistent with the conclusion of Bartram and Howard that 50 litres per person per day is necessary to ensure a "*low*" level of health concern. Both reports on which the UN Committee rely accordingly support the applicants' claim that less than 50 litres per person per day is not "*sufficient*".

350. In a more recent WHO study done in 2005 on the minimum water needed for domestic use, it was found that 20 litres per person per day is sufficient only for drinking and cooking, while 50 litres per person per day is required to meet washing and cleaning needs and 70 litres per person per day is required to provide for growing food and waste disposal. Although this study focused on the position of people in emergency situations, there appears to be no reason not to extrapolate uses in the ordinary course. [362]

351. Prof Gleick also confirms that 50 litres per person per day is an entirely appropriate *minimum* standard in a poor, urban context such a Phiri. He emphasises that it is the appropriate *minimum.* His research in areas similar to Phiri across the world, shows that in areas of that kind, actual average domestic consumption is between 150 and 400 litres per person per day. [363] He points out that the factors that result in a higher water usage in places like Phiri are,

- the fact that it is a poor urban area;
- the large households in Phiri;
- the high unemployment, which results in high domestic water requirements;

[362] World Health Organisation "*Minimum water quantity needed for domestic use in emergencies"* (2005) vol 52 pp 5153 to 5156

[363] Gleick Supporting affidavit vol 6 pp 504 to 505 para 19; Gleick Supplementary replying affidavit vol 50 p 4974 para 17

- the hot, dry climate;
- the population density;
- inefficient sewerage systems in Soweto;
- the absence of natural water sources, like rivers; and
- the lower quality of food products used in food preparation. [364]

352. All of these factors reinforce Prof Gleick's general minimum standard, quoted with approval by the UN Committee in its General Comment. It also suggests that, in the case of Phiri and other places like it, the basic minimum should indeed be significantly higher.

353. The SCA analysed the opinions of Prof Gleick and Mr Palmer and accepted that of Mr Palmer.[365] It is, however, apparent that Mr Palmer used the wrong standard in reaching his conclusion. His opposition to Prof Gleick's internationally recognised determination as to what would be "*sufficient*" is also insubstantial. The SCA should have preferred the expert opinion of Prof Gleick.

354. We submit with respect that the SCA also erred by applying unduly fine callipers in making its assessment.[366] The determination of the quantity of water needed for dignified human existence is not an exact science. The allowance for waterborne sanitation alone may, for instance, vary from Mr Palmer's lowly 15 litres per day to the use of the average person of upwards of 75 litres per day.

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[364] Gleick Supporting affidavit vol 6 pp 505 to 506 paras 20 to 22

[365] SCA judgment vol 70 (Bundle D) p 15 para 24

[366] SCA judgment vol 70 (Bundle D) pp 13 to 15 paras 21 to 24

The more robust assessment of the High Court of 50 litres per day, is accordingly more appropriate, particularly because it accords with government's own medium- to long-term vision. Although this assessment, like any other, would always be open to debate, there was no good reason for the SCA to interfere with it.

355. This court should accordingly restore the High Court's conclusion that a minimum of 50 litres per person per day is necessary for dignified human existence.

To whom should it be supplied?

356. Under the City's current free basic water policy, the benefits over and above the 6 kilolitres free basic water provided to all, are provided only to the poor registered on its indigents register. It is common cause however that this mechanism is flawed. We discussed its shortcomings in the chapter on "*The City's policy at the time of the High court hearing"* under the heading of "*The flaws in the policy*". It is in the first place a "*demeaning process"* for poor people to register as indigents as a result of which many of them refrain from doing so. The means test for registration is secondly so low that many poor people who can in fact not afford to pay for their water, do not qualify for registration. As a result of these flaws, millions of poor people who cannot pay for their own water do not receive the additional benefits.

357. The question is who should get the benefit of sufficient free basic water. The issue was not debated in the High Court as a result of which it merely ordered in paragraph 183.5.1 of its judgment, that 50 litres free basic water be provided to "*each applicant and other similarly placed residents of Phiri Township"*. We

accept however that this is not an adequate identification of the poor who qualify for this benefit.

358. We submit that the SCA was correct in its finding implicit in paragraphs 30 to 38 of its judgment and explicit in paragraph 62.2(b) of its order, that the benefit of sufficient free basic water should be provided to "*each Phiri resident who cannot afford to pay for such water*".

359. We accept that a mechanism would have to be devised to identify the people who qualify for the benefit under this standard. It would have to be a mechanism which strikes a balance between the need to be inclusive on the one hand and the need for practical implementation on the other. It is common cause that it is the City's prerogative to devise such a mechanism. It now says it has indeed devised one.

The City's duty to supply sufficient free basic water

360. The applicants contended from the outset, not merely that "*sufficient*" water for purposes of s 27(1)(b) of the Constitution was at least 50 litres per person per day, but also that the City was under a duty in terms of s 27(2) of the Constitution to supply that quantity of free basic water to the poor.

361. The High Court held that the City was under such a duty as it could reasonably provide 50 litres per person per day "*without restraining its capacity on water and its financial resources*".

> "*It is uncontested that the respondents have the financial resources to increase the amount of water required by the applicants per person per day. It is common cause that the respondents have decided to re-*

channel the 25l per person per day supplied for free to households that can afford to pay for water. The equity share that the respondents are allocated by the Treasury, for the purposes of utilising towards the realisation of the provision of water, has not been utilised. The various policies adopted by the respondents such as the Special Cases Policy of June 2002, The Indigent Persons Policy of October 2005, The Social Package Proposals of June 2006, The Mayoral Committee Decision of 6 December 2006, all point to one direction: the ability of the respondents to provide more water than 25l per person per day. It is undeniable that the applicants need more water than the 25l per person per day and that the respondents are able, within their available resources, to meet this need. The respondents' provision of 25l per person per day is unreasonable. It appears that the respondents are able to provide 50l per person per day without restraining its capacity on water and its financial resources."[367]

362. The SCA differed in its conclusion.[368] It did not hold that the City could not reasonably be required to provide the minimum of 42 litres per person per day. It left open the question whether the City had a duty to do so under s 27(2). It accordingly directed the City to formulate a new free basic water policy in light of the provisions of s 27(2) of the Constitution.[369]

363. We submit with respect that the SCA erred and that the High Court's finding and conclusions were correct.

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367 High Court judgment vol 54 pp 5360 to 5361 para 181

368 SCA judgment vol 70 (Bundle D) pp 21 to 25 paras 37 to 42

369 SCA judgment vol 70 (Bundle D) p 35 paras 62.2(b) and 62.3

364. Section 27(2) of the Constitution obliges the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right of access to sufficient water.

365. The City's case in the application has always been that it is not under any duty to provide any free basic water to anybody. It never contended that, if it had such a duty under s 27(2) of the Constitution, it could not reasonably be required to provide sufficient water to the poor free of charge because it lacked the resources to do so.

366. On the contrary, the City always acknowledged that it had the capacity to provide more free basic water to the poor and intended to do so by withdrawing the free basic water provided to the rich and re-allocating the water to provide more free basic water to the poor.

366.1. The City's Social Package of 8 June 2006 recommended that the free basic water be withdrawn from the more affluent who can afford to pay for their own water and that the resultant cost savings be used to increase the free basic water provided to the poor.[370]

366.2. Mr Rashid Seedat, one of the City's deponents, describes this as a "*dramatic change*" and confirms that "*the revenue gained from not providing wealthier households with a subsidy they do not need will be re-applied to give poor households more of a subsidy*".[371]

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[370] Social Package Policy Base Document (8 June 2006) vol 14 pp 1356 to 1358 para 10.4

[371] Seedat Supporting affidavit vol 10 p 959 para 32.16

366.3. Another of the City's deponent, Ms Katherine Eales, also confirms that increasing the free basic water to the poor would be funded by "*redirecting the free basic water benefit away from households who are not poor*".[372]

367. It is common cause that the City has not yet had to draw on this resource available to it. The High Court was accordingly clearly correct in its conclusion that it had spare capacity to provide more free basic water to the poor.

368. This conclusion is also borne out by the fact that the City itself makes the point that, before it introduced pre-paid water meters in Phiri, it in fact supplied a great deal more water to the residents of Phiri at a flat rate paid only by a few who could afford to do so. In other words, it has in fact historically provided much more than 50 litres per person per day free of charge to the poor people of Phiri.[373] It has never suggested that it did not have the resources to do so or that it is no longer able to do so.

369. We accordingly submit that the SCA should, like the High Court, have concluded that the City is obliged in terms of s 27(2) of the Constitution, to provide the minimum sufficient water to the poor of Phiri free of charge.

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[372] Eales Answering affidavit vol 16 p 1558 para 53.12

[373] Still Answering affidavit vol 31 p 3032 para 18

The City's policy is unreasonable and unlawful

370. We have submitted that the City's policy is unlawful for at least three reasons.

370.1. It is based on a misconception.

370.2. It provides insufficient free basic water.

370.3. It is in flexible.

371. We shall now discuss each of these flaws in the light of our discussion of the elements of the City's duty to provide free basic water to the poor.

The City's misconception

372. The City formulated and implemented their free basic water policy under the misapprehension that the law did not require them to provide basic water to the poor free of charge. They were aware of their duty to provide basic water to all but believed that the law did not require them to provide it free of charge to anybody. They supplied some free water to the poor but did so as a matter of discretionary policy and not because they thought they had any duty in law to do so.[374]

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[374] Brits Answering affidavit vol 7 pp 607 to 610 paras 25.1 to 25.8; Schreiner Answering affidavit vol 40 p 3974 lines 22 to 26

373. The City makes this understanding clear in its main answer deposed to by Ms Brits:

> "*The City and Johannesburg Water's provision of an amount of free water to accountholders in Johannesburg arises from central government policy requiring free provision to poor residents rather than from any statutory requirement*".[375]

374. The *"central government policy"* on which the City's policy is based, is described by Ms Schreiner who confirms the City's understanding that the concept of free basic water "*is located in a policy adopted by national government"* and "*is not contained in any statute"*.[376]

375. The SCA held that this is a misconception.[377] The City is obliged in terms of s 27(2) of the Constitution to take reasonable measures within its available resources to provide free basic water to the poor who are unable to afford it. The City's policy is accordingly based on a material error of law. The SCA reviewed the policy, set it aside and referred it back to the City.[378]

376. We submit with respect that the SCA was correct on this score:

376.1. Section 27(1)(b) gives everyone the right "*to have access to"* sufficient water. It includes a right to sufficient "*affordable"* water.[379] Those who

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[375] Brits Answering affidavit vol 7 p 608 para 25.3

[376] Schreiner Answering affidavit vol 40 p 3974 para 25

[377] SCA judgment vol 70 (Bundle D) pp 18 to 23 paras 30 and 38

[378] SCA judgment vol 70 (Bundle D) p 35 paras 62.1 and 62.3

are unable to pay for their own water can only be provided with access to sufficient water, by providing it to them free of charge.

376.2. Section 27(2) obliges the state and thus the City to take reasonable measures within their available resources to achieve the progressive realisation of the right to access to sufficient water. It follows that, insofar as it is reasonable for the City to do so, it must provide free basic water to the poor who are unable to afford it.

376.3. The Water Services Act echoes these duties imposed on the City by s 27 of the Constitution:

376.3.1. Section 3(2) imposes a duty on every water services institution to "*take reasonable measures*" to realise everyone's right of access to basic water.

376.3.2. Section 11(1) obliges every water services authority "*to progressively ensure ... affordable ... access to water services*" of all those within its jurisdiction.

376.4. The City is accordingly indeed under a duty to take reasonable measures within its available resources to provide free basic water to the poor. It means that its policy was founded on a fundamental misconception.

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[379] Minister of Health v New Clicks SA 2006 (2) SA 311 (CC) paras 514 and 704 to 706

The City does not provide sufficient free water

377. The City's policy only provides each accountholder with 25 litres per person per day. Even the improvements in the policy implemented over the three years since this application was launched all aim to provide the members of poor households only with 25 litres per person per day. This is not sufficient for the people of Phiri, for the reasons already discussed.

378. Apart from disputing the applicants' evidence on how much is sufficient on the basis of the expert evidence set out above, the City also defends its policy on the basis that providing 25 litres complies with the Constitution.

379. The City says in its application to cross-appeal that regulation 3(b) of the National Standards Regulations says that 25 litres is sufficient. This regulation, they say, gives effect to the constitutional right and the City is accordingly not required to do any more than this.[380]

380. This argument is bad in law. The quantification in regulation 3(b) is a floor and not a ceiling. This is what both the Minister and the City argued in the High Court. It upheld their interpretation.[381] There has been no appeal against this finding. All the parties are now bound by it because it has become *res iudicata*.

381. Even if this finding had been taken on appeal, it can in any event not be argued that the regulation gives exhaustive effect to s 27 of the Constitution.

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[380] Brits CC Affidavit vol 71 (Bundle D) p 191 para 69.1

[381] High Court judgment vol 54 p 5308 para 53

382. The regulation must be read together with s 3 and the definition of "*basic water supply"* in s 1 of the Water Services Act.

382.1. Section 3(1) provides that everyone has a right to "*basic water supply*". Section 3(2) obliges every municipality to "*take reasonable measures to realise*" this right.

382.2. Section 1 defines the "*basic water supply*" to which everyone is entitled as,

> "*the prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene*".

382.3. This "*prescribed minimum standard*" is the one prescribed by National Standards Regulation 3(b) as follows:

> *"The minimum standard for basic water supply services is ... a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month ...".*

383. It is clear from the language of both the definition of "*basic water supply"* and the regulation, that it provides a minimum standard only. Above the floor set by the minimum, s 11(1) obliges every water services authority *"to progressively ensure . . . affordable . . . access to water services*" of all those within its jurisdiction.

384. The regulation accordingly does not give exhaustive effect to the right to sufficient water. It simply sets the base minimum. Section 11(1) requires progressive realisation of the right over and above that minimum.

385. The City further says that its current minimum of 25 litres per person per day is sufficient because, if you remove from it the amount of water required for waterborne sanitation, it would be "*sufficient*" on anybody's version. They say the applicants and others like them have no right to waterborne sanitation. They were also offered the option of a yard tap that did not provide for waterborne sanitation. They should have chosen this option if the 25 litres were not enough.

386. In making this submission, the City introduces a worrying new approach to what has in this litigation been referred to as the "*water services ladder*". The concept of a "*water services ladder*" is foundational to the national government's water and sanitation policy. DWAF's St*rategic Framework for* Water Services[382] makes it plain that the first step up the water ladder is a basic water and sanitation service to all people living in South Africa. The intermediary step is a tap in the yard. Water services authorities must, however, assist households to take the next step up the ladder to higher level of service, in recognition that this will greatly enhance their lives.

387. Even if the policy did not spell this out, a steady ascent to higher levels of service in realising a life of dignity is in any event what the constitutional principle of "*progressive realisation*" of socio-economic rights requires.

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[382] Strategic Framework for Water Services (September 2003) vol 2 p 153

388. The applicants, although undisputedly among the poorest in the City, live in a neighbourhood where the City has provided more than basic sanitation. They have for decades had access to waterborne sanitation. The free basic water they are provided is not enough, partly because some of it needs to be used for sanitation, whether basic or otherwise.

389. The import of what the City now says is that the applicants could have sufficient water if they only exercised their "*options*" about sanitation differently. The City says that they could have reverted to a lower level of service by opting for a yard tap which may not be connected to any plumbing fixtures on the property. If they "*chose*" this lower level of service, they would have had sufficient water because they would no longer have been able to flush their toilets.

390. This suggestion smacks of cynical opportunism. It does not explain what form of sanitation the residents of Phiri should use. They only have waterborne sanitation. It does not require less water if flushed with water carried from a yard tap. The City does not offer any other form of sanitation.

391. It is in any event astonishing to suggest that Phiri households must *give up their indoor wa*ter supply and waterborne sanitation to make do with the water they get from the City. However interpreted, the constitutional duty to progressively realise the right *of access to sufficient w*ater can never mean putting poor households to this election.

392. The City's new suggestion exposes its approach as being neither pro-poor, nor constitutional. It reinforces our submission that the City's policy must be set aside because it does not provide for sufficient water as is required by s 27.

The policy is inflexible

393. We discussed the inflexibility of the City's policy in the chapter on "*The City's policy at the time of the High Court hearing"* under the heading *"The flaws of the policy".* The policy does not allow residents with pre-paid water meters who run out of water to make representations for further allocations of free water to cater for special circumstances. The new system of representations has been designed to address this problem but there is no evidence of how it will work, whether it will be accessible to the poor, how long it will take between making the special representations and water being available on tap, or how much additional water will be given if the representations are successful.

394. We accordingly submit that the policy is also fatally flawed for this reason.

THE FREE BASIC WATER RELIEF

The SCA's final relief

395. The final relief the SCA granted in relation to the City's free basic water policy, is set out in paragraphs 62.1 to 62.3 of its order. The applicants do not appeal against paragraph 62.1. The applicants submit that the final relief in paragraphs 62.2 and 62.3 is deficient in the following respects.

396. The quantity of free basic water supplied to the poor should be 50 litres per person per day and not 42 litres.

397. The SCA failed to provide any relief for the unacceptable inflexibility in the City's free basic water policy. Paragraph 62.3 of its order merely requires the City to reconsider and reformulate its free basic water policy "*in the light of the preceding paragraphs of this order*". It means that the City is merely required to adapt its policy to take account of the factors mentioned in paragraph 62.2. They do not include the need for greater flexibility. The applicants submit with respect that the SCA erred in failing to take account of and provide for this flaw in the formulation of its final relief.

398. Another serious flaw in the SCA's final relief is that it does not set a deadline by which the City must reconsider and reformulate its policy and implement the changes. This is a serious flaw for the following reasons:

398.1. The absence of a deadline is an incentive for delay. The evidence shows that the City has an extraordinary capacity for foot-dragging. It takes

years to bring about changes to its policy and, even after they have been made, still more years to implement them. In this case, the City will moreover for obvious reasons be a reluctant participant in the process of change. The SCA's order requires it to assume greater burdens than those it bears under its current policy. Its incentive for delay will accordingly be high.

398.2. The applicants and the poor people of Phiri will never know at what point in time they are entitled to measure the City's policy against the requirements of the SCA's order. It will always be an excuse for the City to say that it is still in the process of implementing the order. The applicants and the poor people of Phiri will accordingly never be able to call it to account for any failure on its part to obey the SCA's order.

399. If the SCA had afforded the applicants and the poor people of Phiri sufficient interim relief, these deficiencies would not have mattered because the rights of the Phiri poor would have been protected in the meantime. The deficiencies in the final relief are however exacerbated by the fact that the SCA's interim relief is wholly inadequate. It means that the unlawful hardships suffered by the applicants and the poor people of Phiri will be prolonged and will indeed serve as a further incentive for the City to delay the implementation of the SCA's final relief because it bears such a light burden under the interim order.

The SCA's interim relief

400. The only interim relief the SCA afforded the applicants and the poor people of Phiri in relation to the deficiencies in the City's free basic water policy, is the relief

in paragraph 62.4 of its order. It is limited to the provision of 42 litres of free basic water per person per day to the poor people who are registered on the City's indigents register.

401. This interim relief is wholly inadequate.

401.1. It limits the interim relief to registered indigents. It is common cause that this is a flawed mechanism which denies the additional benefits of the City's free basic water policy to millions of poor people who are in fact unable to pay for their own water.

401.2. The interim order does not provide any relief for the inflexibility in the City's free basic water policy. It does not cater at all for special cases deserving of more than the minimum free basic water or for emergencies when more than the minimum is reasonably required.

402. We have already referred to the SCA's failure to put a time limit to the reforms the City must bring about under the SCA's final relief. The other side of the same coin is that there is no time limit to the period for which the poor people of Phiri will have to endure the hardships inflicted on them by the unlawful features of the City's free basic water policy which have not been addressed at all or in any event not adequately addressed by the SCA's interim relief. The City will also have an incentive to prolong this interim period because it bears such a light burden for its duration.

403. An order modelled on paragraph 183.5 of the High Court's judgment, would best address these problems:

403.1. The City must provide two additional benefits to the poor people of Phiri who cannot afford to pay for their own water. It must in the first place provide them with free basic water of 50 litres per person per day. It must secondly offer them the option of a metered supply on credit.

403.2. The option of metered water on credit would also allow poor people to avail themselves of the existing representation mechanism under by-law 9C. It will immediately introduce greater flexibility. Poor people who are special cases who need more water than the minimum or those who suffer emergencies which require more water on a temporary basis, but who are unable to afford it, will be able to make representations to the City for special dispensation. It will allow the City's policy to accommodate the special needs and special circumstances of individual people who need more than the basis minimum but cannot afford it.

403.3. We accept that a mechanism will have to be devised to identify the poor people of Phiri who qualify for these additional benefits. The City has been working on it for some time and it should accordingly not take it long to do so. The order should provide that, until the City has devised and implemented such a mechanism, it must provide these additional benefits to all the residents of Phiri. It would be far better to provide more water to some who do not qualify for it than to continue to deprive millions of poor people of the free basic water to which they are entitled.

404. The SCA declined to make such an order. It explained in paragraph 46 of its judgment that there is "*no reason why, in the interim, free water should be*

provided to inhabitants of Phiri who can afford to pay for the water". The applicants submit with respect that it was mistaken in this regard:

404.1. Until a new mechanism is developed and implemented for the identification of the poor people of Phiri who are unable to pay for their own water, there are only two options. The first is to provide too little free water – that is, only to some of those who are in fact entitled to it. The second is to provide too much free water – that is, to all the residents of Phiri despite the fact that some of them do not qualify for it. There is no reason to opt for under-provision as the SCA has done, merely because the alternative would result in over-provision. On the contrary, the problem arises from the City's unlawful free basic water policy. The poor people of Phiri have been the victims of its unlawful policy. It should accordingly be the City and not the residents who bear the burden of the imperfections of an interim order.

404.2. The inadequacies of the SCA's order provide an incentive to the City to prolong its search for a long-term solution.

404.3. The other side of the same coin is that the poor people of Phiri will have to continue bearing the brunt of the flaws in the City's current policy which the inadequate interim order fails to address. They will to that extent not receive effective relief. The first priority of the court's interim order should be to give them just that. They should not be made to continue to bear the brunt of the City's unlawful conduct merely to spare the City the cost of over-provision of free water in the interim.

THE MINISTER'S APPLICATION

405. The Minister has made a much belated application to cross-appeal.

406. We submit with respect that the application is out of time, ill-conceived and fatally flawed for the reasons set out in the applicants' answer to it. The applicants ask that it be dismissed with costs.

COSTS

407. The City seeks leave to appeal the amended order for costs issued by the SCA.[383] The amended order[384] clarified that the SCA did not interfere in the costs order granted by the High Court and that the applicants (in this court) remain entitled to their costs in that court.

408. The SCA held that "*there can be no question that in terms of the replaced order the respondents were substantially successful in the court below".* This is with respect correct. The applicants had substantial success in the High Court. There is no reason to deprive them of their costs in that court. Leave to appeal this order should be refused.

409. In addition, in the event that the City's new evidence about its "*improved*" policies on the eve of the hearing in this court is admitted, and to the extent that the City ultimately obtains an order in its favour in this court based substantially on that evidence, the applicants should be entitled to their costs to date of that evidence. There is no reason in law or fairness why the City should not carry the costs incurred by the applicants in litigating against its ever-shifting policy.

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[383] Brits CC Affidavit vol 71 (Bundle D) pp 200 to 201 paras 78 to 81

[384] Amendment of SCA order vol 70 (Bundle D) pp 38 to 39

PRAYERS

410. The applicants ask for orders in the following terms.

411. The applicants' application for leave to appeal is granted and their appeal is upheld. The respondents are ordered jointly and severally to pay the applicants' costs including the costs of two counsel, of both the application for leave to appeal and the appeal itself.

412. The first and second respondents' application for leave to cross-appeal is dismissed. Alternatively, the first and second respondents' application for leave to cross-appeal is granted but their cross-appeal is dismissed. The first and second respondents are ordered jointly and severally to pay the applicants' costs including the costs of two counsel, of both the application for leave to cross-appeal and the cross-appeal itself.

413. The first and second respondents' application to adduce further evidence is dismissed. The first and second respondents are ordered jointly and severally to pay the applicants' costs of the application including the costs of two counsel (even if the application should be granted).

414. The third respondent's application for leave to cross-appeal is dismissed. Alternatively, the third respondent's application for leave to cross-appeal is granted but the cross-appeal is dismissed. The third respondent is ordered to pay the applicants' costs including the costs of two counsel, of both the application for leave to cross-appeal and the cross-appeal itself.

415. The SCA's orders are set aside and replaced with an order in the following terms:

> "*The appeal is dismissed. The appellants are ordered jointly and severally to pay the respondents' costs including the costs of two counsel.*"

416. The orders in paragraphs 183 and 184 of the High Court's judgment which are reinstated by the applicants' successful appeal against the SCA judgment, are amended by replacing the orders in paragraph 185.5 with orders in the following terms:

> "*185.5.1* *The City of Johannesburg and Johannesburg Water (Pty) Ltd are ordered to offer all the residents of Phiri the option of metered water supply installed at the cost of the City of Johannesburg.*
>
> *185.5.2* *The City of Johannesburg and Johannesburg Water (Pty) Ltd are ordered to provide free basic water of 50 litres per person per day to all the residents of Phiri subject to paragraph 185.5.3 below.*
>
> *185.5.3* *The City of Johannesburg and Johannesburg Water (Pty) Ltd may devise and implement a reasonable system to limit the supply of free basic water of 50 litres per person per day, to those residents of Phiri who cannot afford to pay for their own water. Once they have successfully designed and implemented such a system, they may limit their supply of free basic water of 50 litres per person per*

day to the residents of Phiri identified in accordance with the system as those who cannot afford to pay for their own water."

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Wim Trengove SC

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Nadine Fourie

Chambers, Johannesburg
24 July 2009

AUTHORITIES

Case law

AAA Investments (Pty) Ltd v Micro Finance Regulatory Council 2007 (1) SA 343 (CC)

Affordable Medicines Trust v Minister of Health 2006 (3) SA 247 (CC)

Aparty v Minister of Home Affairs; Moloko v Minister of Home Affairs 2009 (3) SA 649 (CC)

Attorney-General, Free State v Ramokhosi 1999 (3) SA 588 (SCA)

Bel Porto School Governing Body and Others v Premier, Western Cape, and Another 2002 (3) SA 265 (CC)

Botha v NDPP [2009] ZASCA 42 (31 March 2009)

Bruce v Fleecytex Johannesburg CC 1998 (2) SA 1143 (CC)

City Council of Pretoria v Walker 1998 (2) SA 363 (CC)

Colman v Dunbar 1933 AD 141

Dormehl v Minister of Justice and Others 2000 (2) SA 987 (CC)

Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1999 (1) SA 374 (CC)

Fose v Minister of Safety and Security 1997 (3) SA 786 (CC)

Government of the Republic of South Africa v Grootboom 2001 (2) SA 46 (CC)

Harksen v Lane NO 1998 (1) SA 300 (CC)

Jaftha v Schoeman 2005 (2) SA 140 (CC)

Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others 2004 (6) SA 505 (CC)

Knox D'Arcy Ltd v Jamieson 1996 (4) SA 348 (A)

McDonald's Corporation v Joburgers Drive-inn Restaurant 1997 (1) SA 1 (A)

Minister of Health and Others v Treatment Action Campaign 2002 (5) SA 721 (CC)

Minister of Health v New Clicks 2006 (2) SA 311 (CC)

Minister of Public Works v Kyalami Ridge Environmental Association (Mukhwevho Intervening) 2001 (3) SA 1151 (CC)

Omar v Government of the Republic of South Africa (Commission for Gender Equality, Amicus Curiae) 2006 (2) SA 289 (CC)

President of the Republic of South Africa v Quagliani and Two Similar Cases 2009 (2) SA 466 (CC)

Prince v President, Cape Law Society 2002 (2) SA 794 (CC)

Prophet v National Director of Public Prosecutions 2007 (6) SA 169 (CC)

Rail Commuters Action Group v Transnet 2005 (2) SA 359 (CC)

Residents of Bon Vista Mansions v Southern Metropolitan Local Council 2002 (6) BCLR 625 (W)

S v Lawrence 1997 (4) SA 1176 (CC)

S v Shaik 2008 (2) SA 208 (CC)

Shein v Excess Insurance Company Ltd 1912 AD 418

Weber-Stephen Products Co v Alrite Engineering 1992 (2) SA 489 (A)

Women's Legal Centre Trust v President of the Republic of South Africa [2009] ZACC 20

Books and articles

Currie and De Waal *The Bill of Rights Handbook* (5th ed, 2006) p 577

P.H. Gleick, (1996) "*Basic water requirements for human activities: meeting basic needs*" Water International 21 pp 83 to 92