

IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

CASE NO: 06/13865

In the matter between:

LINDIWE MAZIBUKO

GRACE MUNYAI

JENNIFER MAKOATSANE

SOPHIA MALEKUTU

VUSIMUZI PAKI

and

THE CITY OF JOHANNESBURG

JOHANNESBURG WATER (PTY) LTD

THE MINISTER OF WATER AFFAIRS
AND FORESTRY

and

THE CENTRE ON HOUSING RIGHTS AND EVICTIONS

DELETE WHICH IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	<input checked="" type="checkbox"/>
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
30 APRIL 2008	<i>J. Sauer</i>
DATE	SIGNATURE

First Applicant

Second Applicant

Third Applicant

Fourth Applicant

Fifth Applicant

First Respondent

Second Respondent

Third Respondent

Amicus Curiae

J U D G M E N T

TSOKA, J:

[1] "Water is life, sanitation is dignity" so says the Department of Water Affairs in its September 2003 Strategic Framework for Water Services.

[2] This case is about the fundamental right to have access to sufficient water and the right to human dignity. The applicants challenge the third respondent's Regulations Relating to Compulsory National Standards and Measures to Conserve Water (GN R509 of 8 June 2001) (*the National Standard Regulations*) and the water policies of the first and second respondents. The applicants seek to prove that the National Standard Regulations and the water policies do not accord with the declaration of "*Water is life, sanitation is dignity*".

[3] Prior to 2001 all the residents of the City of Johannesburg ("the City"), except the residents of the township of Phiri (Phiri), were entitled to unlimited water supply on credit. The residents of Phiri were only entitled to an unlimited water supply at a flat rate. Phiri is one of the townships forming the larger area of Soweto that falls within the area of the City of Johannesburg. In 2001 the City and Johannesburg Water (Pty) Ltd (*Johannesburg Water*) agreed to provide every household within the City with 6 kilolitres free water per month per household/account holder. However, the residents of Phiri's 6 kilolitres free water per month was to be dispensed by a prepayment meter system. The prepayment meters were only implemented in 2004. In terms of that system once the 6 kilolitres have been consumed, the water supply to the stand is automatically cut off. The affected account holder must then purchase water credits to be entitled to the supply of water until he/she becomes entitled to the next month's 6 kilolitres free water.

[4] Phiri, being one of the oldest townships of Soweto had neglected, old and poor water piping infrastructure. Its worn out and ageing water piping system was losing water for the City. As a measure to renovate the infrastructure and save the unaccounted water usage, in 2004 the City introduced prepayment meters in Phiri. This was through an operation called Operation Gcinámanzi (OGM). Each prepayment meter dispenses 6 kilolitres free water per stand per month.

[5] The four applicants are all residents of Phiri. The residents of that township are mainly poor, uneducated, unemployed and are ravaged by HIV/AIDS. Each account holder in the township has more than one household in his/her stand. Those who are employed earn about R1 100,00 per household per month. The majority of the residents depend on either the government old age pension, or child grant. The first applicant has since left Phiri although she still pursues the application on behalf of her household.

[6] The first respondent is the City of Johannesburg, a municipality established as such in terms of section 12(1) of the Local Government: Municipal Structures Act 117 of 1998 ("*Structures Act*"). It is a water service authority as contemplated in the Water Services Act, 108 of 1997 ("*Water Services Act*"). The second respondent is Johannesburg Water (Proprietary) Limited, an incorporated company. Its sole shareholder is the City. The City delegated to the second respondent its authority to act as water service provider as contemplated in the Water Services Act.

[7] The third respondent is the Minister of Water Affairs and Forestry ("*the Minister*") who in terms of the Water Services Act is empowered to set the national standards in the provision of the basic water supply.

[8] For the sake of convenience the City and Johannesburg Water shall be referred to as the respondents unless the context in which the term is used suggests otherwise.

[9] The applicants challenged the following policies of the respondents as being both unconstitutional and unlawful –

9.1 the disconnection of their unlimited water supply at a fixed rate and the installation of the prepayment meters;

9.2 the introduction and continued use of prepayment water meters;

9.3 the amount of free water of 25 litres per person per month or 6 kilolitres per household per month.

[10] They further seek to review and set aside the decision of the respondents setting the amount of free water at 6 kilolitres per month per stand and the introduction of prepayment meters in Phiri.

[11] They further seek declaratory order that –

11.1 Regulation 3(b) of the National Standard Regulations that sets a minimum water supply at 25 litres per person per day or 6 kilolitres per household per month is unconstitutional and invalid;

11.2 each of the applicants and any other similar resident of Phiri is entitled to 50 litres per person per day and that an option of a metered supply be installed at the cost of the City.

[12] All the three respondents oppose the application. They further contended that the application to review the decision setting the minimum free basic water at 6 kilolitres per month per household and the introduction of the prepayment meters had been brought out of time. In response the applicants launched an application for condonation. The respondents do not oppose this application. On the evidence before me, I find that there is no unreasonable delay in bringing the application. The application for condonation is granted.

[13] The Centre on Housing Rights and Evictions ("*COHRE*") has been admitted as *amicus curiae* in the present proceedings to address the legal right to water in the context of international and comparative law. COHRE is an international non-governmental organization. Its economic, social and cultural rights litigation programme works to promote and protect economic, social and cultural rights, including the right to water.

[14] The third respondent raised two preliminary points. The first is that the applicants have no *locus standi* to bring the application on behalf of all the residents of Phiri. The second is that the National Treasury has not been joined despite the fact that any increase in the amount of free basic water, would of necessity increase the equitable share allocated to the Water Services Authorities by the National Treasury under the Division of Revenue Act 1 of 2007 ("*Division of Revenue Act*").

[15] I proceed to deal with the preliminary points.

Locus Standi

[16] In *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 (4) SA 1184 (SCA), the Supreme Court of Appeal defined the feature of a class action as an action where other members of the class, although not formally and individually joined, benefit from and are bound by the outcome of the litigation, unless they invoke prescribed procedures to opt out of it.

[17] Section 38 of the Constitution of the Republic of South Africa Act 108 of 1996 ("*the Constitution*") permits anyone who alleges that a right in the Bill of Rights has been infringed or threatened, to institute proceedings on behalf of others who cannot act in their own name, or on behalf of or in the name of

a group or a class of persons or in the public interest. The section provides a basis for class action in South Africa.

[18] In the present matter, the applicants act on behalf of members of their households who are either old or young. Each of the applicants has furnished a list of names of the persons living in their households. This evidence is unchallenged. The applicants are therefore entitled to act on behalf of these persons.

[19] From the evidence it appears that only a few households have not applied for prepayment meters. However, the introduction of prepayment meters in Phiri must be looked at in its proper context. The prepayment meters were introduced as a credit control measure. Many account holders were in arrears with their water accounts despite the provision of unlimited water supply at a flat rate. To curb the wastage of water and to minimize the accumulation of arrears, on 28 January 2004, the residents of Phiri were by notice, advised to opt for prepayment meters. The benefit that was dangled was that the accumulated arrears would be written off. Each household was advised of the provision of 25 litres per person per day or 6 kilolitres per household per month. It was however pointed out that anyone who did not opt for prepayment meters would be without water. It is in this context that the first applicant initially refused to have a prepayment meter installed with the result that for a period of seven months she had no water. She resorted to obtaining water from a water reservoir in Chiawelo, a 3 km walk from Phiri. This source of water was then closed for her. As she had no alternative, she succumbed

to the installation of a prepayment meter. In this context, it is probable that a number of other households also had no other option but to accept the prepayment meters. It is common cause that the residents of Phiri are not only poor but are also uneducated. The result is that they are not aware of their legal rights, how to enforce them and how to access professional advice. The bulk of them are neither aware of nor capable of enforcing their rights.

[20] In my view, the applicants are therefore entitled to act on behalf of a class of persons in similar positions to themselves. In any event the catch-all phrase of public interest entitles the applicants to act not only on behalf of members of their household but for all the other residents of Phiri that are affected by the water policies of the respondents. The first point *in limine* is therefore without substance

Non-Joinder

[21] The third respondent's contention is that the National Treasury, all the Water Services Authorities and all the residents of Phiri have not been joined. I briefly examine each of the contentions.

[22] With regard to the position of the National Treasury, the submission is that as the financing of the Free Basic Water policy is not only financed from local government sources but also from equitable share distribution effected under the Division of Revenue Act, any increase in the free basic water, would of necessity have financial implications to the equitable share distribution. In

the present matter there is no evidence that the respondents utilise the equitable share to provide free basic water. Neither is there evidence suggesting that the first respondent cannot, from its municipal tax base, afford to provide free basic water. The applicants' evidence is that the relief sought can be funded by cross-subsidization of water tariffs. In this context I am unpersuaded that the National Treasury has a material or substantial interest in the orders sought by the applicants. In any event the applicants' case is not based on the Division of Revenue Act.

[23] As far as all other Water Services Authorities and all the residents of Phiri go, it is an undeniable fact that the Constitution, and in particular the Bill of Rights is of universal application. It is therefore a given that a Court's pronouncement of constitutional validity of a statutory provision will affect all the people. To expect all the people to be joined is not only cumbersome but also impractical. Rule 10A of the Uniform Rules of Court was made to obviate these difficulties by giving the member of the executive tasked with the implementation of the legislation under review, the right to be joined and the opportunity to put before the Court all the evidence relevant to the enquiry. The second preliminary point is thus also without merit.

[24] In the result, I find that the two preliminary points raised by the third respondents are unfounded. They are rejected.

[25] The applicants seek an order declaring Regulation 3(b) of the National Standard Regulations unconstitutional and invalid. It is convenient at this

stage to deal with the challenge of Regulation 3(b) by the applicants. A finding that the Regulation is unconstitutional and invalid will dispose of the entire application as the respondents' water policy flows from the Regulation.

[26] In terms of section 9(1) (a) of the Water Services Act, the Minister is empowered to prescribe the compulsory national standards on the provision of water services. Regulation 3(b) was promulgated for this purpose. It defines "*Basic Water Supply*" as follows:

"The minimum standard for basic water supply service is –

- (a) the provision of appropriate education in respect of effective water use, and*
- (b) a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month –*
 - (i) at a minimum flow rate of not less than 10 litres per minute;*
 - (ii) within 200 metres of a household; and*
 - (iii) with an effectiveness such that no consumer is without a supply for more than seven full days in any year."*

[27] The applicants challenged the validity of the Regulation on seven grounds, namely that:

27.1 the Regulation is based on misconception;

27.2 it falls short of providing "*sufficient water*" as provided for in section 27(1) of the Constitution;

27.3 it was irrationally determined;

27.4 it is irrationally related to the needs of the poorest people;

27.5 it is arbitrary, inefficient and inequitable;

27.6 it irrationally fails to distinguish between those with waterborne sanitation and those without;

27.7 it is inflexible.

[28] I proceed to deal with the alleged grounds of invalidity.

[29] I deal first with the submission that that the Regulation is based on misconception

[30] The respondents contend that they are not obliged to provide free basic water to the poor. They contend that their obligation is to provide basic water at a fee as stipulated in the Standards for Water Services Tariff promulgated in terms of section 10 of the Water Services Act.

[31] However, section 27(1) of the Constitution guarantees everyone the right to have access to sufficient water. In terms of section 39(1) (b) of the Constitution, the Courts in interpreting the Bill of Rights must consider

international law. In terms of section 233 of the Constitution a reasonable interpretation of any legislation which is consistent with international law, must be preferred.

[32] In *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2006 (6) BCLR 625 (W), Budlender AJ, regarding the status of international law and other instruments in the context of our constitutional jurisprudence, in paragraphs 14 and 15 states –

“[14] A court is obliged, when interpreting the Bill of Rights, to consider international law. As has been explained by Chaskalson P

‘In the context of s 35(1) [of the interim Constitution], public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which chap 3 can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the European Commission on Human Rights, and the European Court of Human Rights and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions ...’

“[15] International law is particularly helpful in interpreting the Bill of Rights where the Constitution uses language which is similar to that which has been used in international instruments. The jurisprudence of the International Covenant on Economic, Social and Cultural Rights, which is plainly the model for parts of our Bill of Rights, is an example of this. It assists in understanding the nature of the duties placed on the State (including the Council) by section 7 of the Constitution.”

[33] In *The Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) Mr Justice Jacobo at page 63 said:

"The relevant international law can be a guide to interpretation but weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable."

[34] It is therefore imperative and instructive to consider the international law regarding the right to have access to water.

[35] Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights ("*CESCR*") implicitly recognise the right to adequate standard of living and the continued improvement thereof as well as the right to the enjoyment of the highest attainable standard of both physical and mental health.

[36] General Comment No. 15 (2002) of the United Nations Committee on Economic, Social and Cultural Rights' Twenty-ninth Session, Geneva 11-29 November 2002 ("*General Comment No. 15*") emphasises, amongst others, the following aspects to the right to water: availability and accessibility. Availability means that the water supply must not only be sufficient for each person for personal and domestic use but must also be continuous. Accessibility means both physical and economic accessibility on a non-discriminatory basis. The effect is that the right to water must be accessible equally to the rich as well as to the poor and to the most vulnerable members of the population. It is in this context, that the State is under an obligation to

provide the poor with the necessary water and water facilities on a non-discriminatory basis.

[37] In terms of paragraph 18 of General Comment No. 15 the State has a constant and continuing duty to the progressive realization of the right to water. Retrogressive measures taken by the State with regard to the right to water are prohibited. If such retrogressive measures are taken, the *onus* is on the State to prove that such retrogressive measures are justified with reference to the totality of the rights provided for in the Covenant. The State is obliged to respect, protect and fulfil the right to water.

[38] Article 24 of The Convention on the Rights of the Child ("CRC") contains an obligation on the State to fully implement the right of children to attain the highest possible standard of health and to combat disease through the provision of adequate food and drinking water. Article 14 of the African Convention on the Rights of the Child ("ACRC") also has an identical obligation on the State.

[39] Article 16 of the African Charter on Human and Peoples' Rights guarantees the right to enjoy the best attainable standard of both physical and mental health. Failure by the State to supply basic services, such as safe drinking water and electricity, has been found by the African Commission to be violation of the article.

[40] Seen against the background of international law, decisions of the various international institutions and the similar language used in the Bill of Rights as that used in the various international instruments, the State is obliged to provide free basic water to the poor.

[41] Against this background, I am unable to appreciate the contention of the respondents that they are under no obligation to provide basic water to the poor. Their obligation is to ensure that every person has both physical and economic access to water. Their contention to the contrary is incongruent with their actions. The third respondent's promulgation of the Water Services Act and its Regulations as well as the respondents' water policies and its various adaptations, all point in the direction of compliance with the provisions of section 27(2) of the Constitution: the progressive realization of the right of access to sufficient water as well as compliance with the provisions of section 7(2) of the Constitution: the obligation not only to respect, protect but to promote and fulfil the rights contained in the Bill of Rights.

[42] In the circumstances, I find that the third respondent's denial of its obligation to provide free basic water to the poor is unhelpful. The third respondent's actions in promulgating the Water Services Act and its Regulations, in particular the national minimum basic water of 25 litres per person per day or 6 kilolitres per household per month are in appreciation of its constitutional obligations.

[43] I proceed to deal with the balance of the submissions which are to the effect that the Regulation falls short of providing sufficient water as provided for in section 27(1) of the Constitution. I will deal with the challenge of irrationality, inefficiency, inequity and inflexibility of Regulation 3(b) at the same time as those challenges go towards the determination of the reasonableness of the Regulation.

[44] Again to determine whether the Regulation falls short in providing sufficient water, it is instructive to determine what the international law regards as sufficient water.

[45] Under international law there is no express right to water. Article 25 of the Universal Declaration of Human Rights provides that everyone has the right to a standard of living adequate for health and well-being. In terms of CESCR, the right to water falls within the category of guarantees essential for securing an adequate standard of living. According to CESCR, the quantity of water available to each person must correspond with the World Health Organisation ("*WHO*") guidelines.

[46] WHO guidelines quantifies basic access to water as 25 litres per person per day. This is regarded as the lowest level to maintain life over the short term. This basic access assures consumptions while hygiene, being for hand washing and basic food hygiene, is not assured. There is a possibility that hygiene may be assured. However, laundry and bathing is difficult to assure unless water is carried out of source. According to the Human

Development Report 2006 published by the United Nations Development Programme 20 litres per day is sufficient water per person.

[47] Regulation 3(b) provides for a **minimum** (my emphasis) quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month. The Regulation clearly stipulates the minimum quantity of water per person per day.

[48] Taking into account that South Africa is a water scarce resource country, that it sources its water outside its borders, it is emerging out of decades of inequality guaranteed by the system of apartheid, that it faces various challenges in the provision of basic socio-economic rights, such as housing, health and education and the fact that the demands vary from community to community, it becomes understandable why the third respondent set the minimum standard at 25 litres per person per day.

[49] The rationale of the quantification at minimum of 25 litres per person per day is to ensure that every Water Services Authority is able to assure basic provision of water. In this context, each Water Services Authority, depending on its resources and its residents' needs, may increase the minimum. In other words, the Water Services Authorities, as organs of the State, are also obliged to progressively realize the right to access to water as provided for in section 27(1) of the Constitution. In this context, those Water Services Authorities which have sufficient recourses will, moving from the

minimum, progressively adopt reasonable measures in compliance with the provisions of section 27(1) of the Constitution.

[50] In confirmation that the 25 litres per person per day is the minimum, it is noteworthy that the local authority of Volksrust in KwaZulu-Natal, because of its residents' needs and its available resources, departed from the minimum as set out in Regulation 3(b) and defined free basic water, taking into account waterborne sanitation, as 9 kilolitres per household per month.

[51] It is further noteworthy that Mogale City, which was used by the respondents as a model, is providing 10 kilolitres per household per month, which is more than the minimum of 6 kilolitres per household per month.

[52] It is in this context, as I understand the situation, that the United Nations Development Programme lauds South Africa's water programme, in particular its subsidy of water tariffs to ensure that water services reach the poor.

[53] In the circumstances, I agree with the submissions by Ms Moroka for the third respondent, that the standard set by her client must be viewed "*as a floor and not as a ceiling*".

[54] In the result I find that the applicants have failed to make out a case for the reviewing and setting aside of Regulation 3(b).

[55] I now turn to the respondents' policy of introducing prepayment meters in the provision of sufficient water.

[56] The respondents contend further that the introduction of prepayment meters is an executive action which in terms of PAJA is not reviewable. If the contention is correct, *cadit questio*. If, however, the introduction of the prepayment meters is not an executive action but an administrative action, the decision to introduce them is reviewable. A determination, therefore, as to whether the introduction of the prepayment meters is an executive or administrative action, is crucial.

[57] An administrative action is defined by PAJA as meaning:

"any decision taken or any failure to take a decision by (a) an organ of the State, when –

(i) exercising a power in terms of the Constitution or a provincial Constitution or

(ii) exercising a public power or performing a public function in terms of any legislation or

...

which adversely affects the rights of any person and which has a direct, external legal effect, but does not include –

(aa) ...

(bb) ...

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

..."

[58] J R de Villiers in *"Judicial Review of Administrative Action in South Africa"* at page 59 explains administrative action as being *"concerned primarily with the implementation of legislation whereas executive action relates to the development or formulation of policy and the initiation of legislation"*.

[59] Cora Hoexter in her book *"Administrative Law in South Africa"* points out that *"the executive powers or functions of a municipal council"* on *"an extreme and probably unconstitutional interpretation"* renders all municipal actions as executive and not administrative. She suggests that a widely held view is that *"executive"* should be read in context with the section 1(aa) and (bb) exclusions, resulting in the exclusion of political decisions and inclusion of administrative actions such as the implementation of legislation.

[60] In *Minister of Health v New Clicks SA (Pty) Ltd and Others* 2006 (2) SA 311 (CC) Mr Justice Ngcobo, regarding the meaning of administrative action, in paragraphs 447, 448 and 449 of his judgment says –

"[447] The meaning of administrative action within the meaning of the Constitution was first considered by this Court, in Fedsure Life Assurance v Greater Johannesburg TMC. There the Court held:

"In addressing this question it is important to distinguish between the different processes by which laws are made. Laws are frequently made by functionaries in whom the power to do so has been vested by a competent Legislature. Although the result of the action taken in such circumstances may be "legislation", the process by which the legislation is made is in substance "administrative". The process by which such legislation is made is different in character to the process by which laws are made by deliberative legislative bodies such as

elected municipal councils. Laws made by functionaries may well be classified as administrative; laws made by deliberative legislative bodies can seldom be so described.'

[448] *And in President of the Republic of South Africa v South African Rugby Football Union (SARFU 3) this Court articulated the test for determining whether conduct constitutes administrative action as follows:*

'In s 33 the adjective "administrative" not "executive" is used to qualify "action". This suggests that the test for determining whether conduct constitutes "administrative action" is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. It may well be, as contemplated in Fedsure, that some acts of a Legislature may constitute "administrative action". Similarly, judicial officers may, from time to time, carry out administrative tasks. The focus of the enquiry as to whether conduct is "administrative action" is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising.'

(Footnotes omitted.) The Court went on and said:

'As we have seen, one of the constitutional responsibilities of the President and Cabinet Members in the national sphere (and premiers and members of executive councils in the provincial sphere) is to ensure the implementation of legislation. This responsibility is an administrative one, which is justiciable, and will ordinarily constitute "administrative action" within the meaning of s 33. Cabinet Members have other constitutional responsibilities as well. In particular, they have constitutional responsibilities to develop policy and to initiate legislation. Action taken in carrying out these responsibilities cannot be construed as being administrative action for the purposes of s 33. It follows that some acts of members of the executive, in both the national and provincial spheres of government will constitute "administrative action" as contemplated by s 33, but not all acts by such members will do so.'

(Footnotes omitted.)

[449] *It is clear from the last-mentioned passage that the implementation of legislation is 'an administrative [responsibility],*

which is justiciable, and will ordinarily constitute "administrative action" within the meaning of s[ection] 33'. In SARFU 3 the Court noted that it is not always easy to determine whether the exercise of executive power amounts to formulation of policy or implementation of legislation. However, it held that the question whether the exercise of executive power amounts to implementation of legislation depends primarily upon the nature of the power. The source of the power and its subject-matter, are also relevant in deciding whether the action concerned amounts to administrative action. In this regard it held:

'Determining whether an action should be characterised as the implementation of legislation or the formulation of policy may be difficult. It will, as we have said above, depend primarily upon the nature of the power. A series of considerations may be relevant to deciding on which side of the line a particular action falls. The source of the power, though not necessarily decisive, is a relevant factor. So, too, is the nature of the power, its subject-matter, whether it involves the exercise of a public duty and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is. While the subject-matter of a power is not relevant to determine whether constitutional review is appropriate, it is relevant to determine whether the exercise of the power constitutes administrative action for the purposes of s 33. Difficult boundaries may have to be drawn in deciding what should and what should not be characterised as administrative action for the purposes of s 33. These will need to be drawn carefully in the light of the provisions of the Constitution and the overall constitutional purpose of an efficient, equitable and ethical public administration. This can best be done on a case by case basis.'

(Footnotes omitted.)"

[61] Mr Justice Ngcobo, with regard to the exclusions of executive powers of both the National Executive, Provincial Executive as well as the Municipal Council executive, in paragraph 453 of his judgment states –

"[453] Subparagraphs (aa), (bb) and (cc) exclude from the scope of PAJA executive powers and functions of the National Executive,

Provincial Executives and Municipal Councils. However, subparas (aa) and (bb) proceed to list specific executive powers and functions that are excluded. These subparagraphs introduce this list by using the phrase 'including the powers or functions referred to' and proceed to refer to specific provisions of the Constitution which are then listed in the subparagraphs. The provisions of the Constitution that deal with the implementation of legislation at both national and provincial levels are omitted from the list."

[62] In paragraph 461 of his judgment, Ngcobo J further states –

"[461] The conclusion that the deliberate exclusion of implementing legislation from the list of executive powers or functions that do not fall within the ambit of PAJA was intended to bring the exercise of those powers or functions within the ambit of PAJA is irresistible. Indeed, it would have been an easy matter for the Legislature to have excluded expressly implementation of legislation from the scope of PAJA. I agree with the observation by the Chief Justice that in doing so the Legislature would have excluded from the scope of PAJA the very core of administrative action which is implementation of legislation. I also agree with the observation of the SCA that it is unlikely that PAJA, which was enacted to give effect to s 33 of the Constitution and to codify the principles of administrative justice would have 'reduced the level of administrative justice'. There are further considerations which fortify this conclusion."

[63] In the present matter the applicants challenge the introduction of prepayment meters and their continued use in Phiri. The challenge is not directed at the political decision taken to introduce the prepayment meters. On the authority of *New Clicks*, I find that the introduction of prepayment meters amounts to administrative action within the provisions of section 33 of the Constitution. It is thus reviewable.

[64] Subsequent to the hearing of this matter, I received two unreported judgments from the City and Johannesburg Water's attorneys of record. The judgments were furnished to me with the consent of applicants' counsel.

[65] The first judgment is *Ferndale Crossroads, Ferndale Investments Share Block (Pty) Limited and Urban Real Estate (Pty) Limited (as applicants) v City of Johannesburg Metropolitan Municipality and 4 Others (as respondents)*, Case No. 3879/07 (WLD). It is the judgment of Fevrier AJ.

[66] The judgment was, ostensibly, furnished to me in support of respondents' contention that the introduction of prepayment meters in Phiri is not an administrative action but executive action which is not reviewable in terms of section 33 of the Constitution read with the provisions of PAJA.

[67] The facts in *Ferndale Crossroads* are distinguishable to the facts in the present matter. In *Ferndale Crossroads* the applicants were seeking an interdict pending review proceedings to be instituted to set aside a resolution. The question in that matter was whether the passing of the resolution was an administrative or an executive action. The Court, on the facts of that case, found that the passing of the resolution was an executive action which was not reviewable. In the present matter the decision to introduce prepayment meters in Phiri is not assailed, but the introduction thereof. The facts of the present matter indicate that the introduction of prepayment meters was an administrative action. The residents of Phiri were, ostensibly, given notices for the introduction of prepayment meters and to make an election as to level of

service chosen. They were requested to intimate their election within seven days. Councillors and other employees of the respondents were ostensibly engaged in explaining the workings of the prepayment meters and to gauge the level of acceptance of the meters. The residents were consulted precisely to obtain their views regarding the introduction of the prepayment meters. As I understand the case law, the residents' participation was to influence, one way or the other, the introduction of the prepayment meters. The participation of the residents of Phiri, in my view, is indicative that the introduction of prepayment meters was an administrative action, not an executive action.

[68] In the second judgment, *Millennium Waste Management (Pty) Ltd v The Chairperson of the Tender Board: Limpopo Province and 2 Others*, Case No. 31/2007, delivered on 29 November 2007, the Supreme Court of Appeal dealt with two issues. The first issue is whether the disqualification of the appellant's tender violated its right to procedural fairness. The second related to the appropriate remedy in the event of the first issue being decided in the appellant's favour. See paragraph 13 of the judgment.

[69] The Supreme Court of Appeal proceeded to resolve the two issues after having decided that the decision to award a tender constitutes an administrative action to which the provisions of PAJA were applicable. This decision is unresponsive of the respondents' contention.

[70] In the present matter the introduction of the prepayment meters constitute an administrative action in terms of section 33 of the Constitution.

This administrative action is not excluded in the definition of an administrative action in PAJA. It is therefore reviewable.

[71] The applicants challenge the introduction of the prepayment meters on the grounds that it violates the principle of legality; the State's duty to respect in terms of section 7(2) of the Constitution; the State's duty to take reasonable measures; the right to equality; prohibition of discrimination and furthermore that the introduction was procedurally unfair.

[72] I deal with the grounds raised by the applicants.

The violation of the principle of legality

[73] In terms of section 1(c) of the Constitution all State actions must be lawful. In *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* 2007 (1) SA 343 (CC) the Constitutional Court held that public power can be exercised only if it is clearly sourced in law. In terms of section 33(1) of the Constitution all State administrative actions are required to be lawful. If the actions are not, they are, in terms of section 6(2)(f)(i) of Promotion of Administrative Justice Act 3 of 2000 (PAJA), reviewable.

[74] The Water Services Act does not empower a water services authority/provider such as the first and second respondents to cut off water at all. However, the respondents may only limit or discontinue the supply of

water if such limitation or discontinuation, and the procedure thereof is authorized by its by-laws.

[75] In terms of section 21 of the Water Services Act, every water services authority, such as the City must make by-laws which contain conditions for the provision of water services. The City made such by-laws. They are called the City of Johannesburg Metropolitan Municipality Water Services By-Laws. They are published in Provincial Gazette Extraordinary No. 179, 21 May 2004, Notice No. 835.

[76] It is therefore crucial to examine the City's by-laws to determine whether they authorize the respondents to either limit, discontinue or cut off the supply of water to the applicants.

[77] In terms of By-law 3, the first respondent is authorized to supply water services on three levels. This by-law provides:

"Levels of Service

3. (1) *The Council may provide the various levels of service set out in subsection (2) to consumers at the fees set out in the schedule of fees, determined by the Council.*

(2) *The levels of service shall comprise –*

(a) *Service Level 1,*

which must satisfy the minimum standard for basic water supply and sanitation services as required in terms of the Act and its applicable regulations, and must consist of –

- (i) a water supply from communal water points; and
 - (ii) a ventilated improved pit latrine located on each site; and
- (b) Service Level 2,

which must consist of –

- (i) an unmetered water connection to each stand with an individual yard standpipe;
- (ii) a water borne connection connected to either a municipal sewer or a shallow communal sewer system; and
- (iii) a pour flush toilet which must not be directly connected to the water installation;

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

- (aa) the average water consumption per stand through the unmetered water connection for the zone or group of consumers in the zone does not exceed 6 kl over any 30 day period;
- (bb) the water standpipe is not connected to any other terminal water fittings on the premises;
- (cc) in the case of a communal sewer having been installed, a collective agreement has been signed by the group of consumers accepting responsibility for the maintenance and repair of the communal sewer; and
- (dd) the Council may adopt any measures necessary to restrict the water flow to Service Level 2 consumers to 6 kl per month.

- (c) Service Level 3,

which must consist of –

- (i) *a metered full pressure water connection to each stand; and*
 - (ii) *a conventional water borne drainage installation connected to the Council's sewer.*
- (3) *If a consumer receiving Service Level 2 contravenes subparagraph (aa) or (bb) to subsection (2)(b) –*
 - (a) *the Council may install a prepayment meter in the service pipe on the premises; and*
 - (b) *the fees for water services must be applied in accordance with section 6.*
- (4) *The level of service to be provided to a community may be established in accordance with the policy of the Council and subject to the conditions determined by the Council."*

[78] By-law 9, 9A-9D deals mainly with accounts. Of particular importance is by-law 9C. It regulates the procedure to be followed by the City to discontinue or limit the supply of water in the event of non-payment and arrears for the water services rendered by the respondents. In terms of this by-law, various steps, procedures and time periods are granted to a consumer who is in arrears before the limitation or discontinuation of water supply. A consumer is encouraged, if owing and in arrears with his/her water charges, to make representations to avoid limitation or discontinuation. The overall objective of the by-law is to avoid limitation or discontinuation of supply of water services by encouraging payment of accounts and settlement of arrears. In the present case, the applicants are neither in arrears nor do they owe water charges.

[79] By-law 11 prescribes the grounds upon which the respondents may discontinue or limit the supply of water. Most of these grounds are however not relevant in the present proceedings.

[80] In terms of by-law 3(3), a consumer who receives Service Level 2 and whose

- average water consumption per stand through water connections for the zone or group of consumers in the zone exceeds 6 kilolitres over any 30 day period or
- water standpipe is connected to any other terminal water fittings on the premises,

may have a prepayment meter with its attended costs installed in the service pipe on the premises by the City.

[81] By-law 8A regulates refunds in the event of a consumer, for example, leaves his residence while still having credit in the prepayment meter. This, in my view, refers where the prepayment meter was introduced for contravention of Service Level 2 as set out in paragraph [80] above.

[82] In my view, any reference to prepayment meters in the by-laws, is a reference to the installation of the prepayment meters as provided for in by-law 3(3). The respondents may only install prepayment meters as a penalty

for contravention of the conditions for the supply of water services. The by-laws, other than as a penalty, do not authorize the installation of prepayment meters. The prepayment meters have no source in law. They are unconstitutional and unlawful.

[83] Mr Marcus for the respondents argued that the limitation or discontinuation of the water supply by the prepayment meters is authorized by the provisions of section 21(1) of the Water Services Act, which requires that a Water Service Authority make by-laws setting out the conditions for the provision of water. He argued further that one of the conditions imposed by the by-laws is that the provision of free basic water is limited to 6 kilolitres per household per month and further that once this limit is reached, the limitation kicks in and any provision of water above this limit must be paid for. In this context, the argument goes, the limitation does not amount to cut off as the water supply is available to the particular consumer at a fee alternatively until the next available free 6 kiloliters.

[84] The prepayment meters are designed to supply the free basic water supply of 25 litres per person per month or 6 kilolitres per household per month. Once the allocation is reached, the meters automatically shut off the supply of water unless the consumer uses prepaid tags to obtain further water credits. After the cut off, the consumer cannot get water unless the water is paid for in advance. This automatic shut off is nothing but limitation, discontinuation or cut off, of the water supply. The limitation or discontinuation results in the applicants not having access to water for about

two weeks prior to the release of the next available free 6 kilolitres per household per month. The limitation is not authorized by the by-laws. It is also against Regulation 3(b) that defines basic water supply "*with an effectiveness that no consumer is without a supply of water for more than seven full days in any year*". It is uncontested that the first applicant's 6 kilolitres of water carries her and her household for 15 days of the month. For the last 15 days of the month she is without water.

[85] In terms of section 39(1) (c) a court, when interpreting the Bill of Rights, may consider foreign law. It is therefore informative to consider foreign law on the question of discontinuation or limitation of water supply.

[86] In Brazil, the highest Court in the State of Paraná found that the disconnection of needed water supply constitutes a violation of human rights – even if it is the result of non-payment. See *Bill of Review 0208625-3* Special Jurisdiction Appellate Court, Paraná (Brazil) August 2002.

[87] In the matter of *Users and Consumers in Defence v Aguas del Gran Buenos Aires SA* (2002) referred to in J M Picolotti "*The Right to Water in Argentina*" Rights and Humanity, 2003, the Argentinian Court held that a water company was not entitled to interrupt the supply of water as it found that access to fresh water is a human right which must be assured to all the inhabitants of the country irrespective of whether they have the capacity to pay for the provisions of the service or not. In *Quevedo Miquel Angel y otros c/ Aguas Cordobesas SA Amparo, Cordoba City, Juez Sustituta de Primera*

Instancia 51 Nominacion en lo Civil y Comercial de la Gudad de Cordoba (Civil and Commercial First Instance Court) April 8 2002 reported in Centre on Housing Rights and Evictions, Legal Resources for the Right to Water; International and National Standards (2004), the Argentinian Court again held that disconnection of water supply to a group of low income and indigent families due to non-payment was unlawful.

[88] The preamble to the French Constitution enjoins the State to the achievement of material security. The State must develop water production and distribution to ensure that all citizens inclusive of the poorest enjoy effective access. Where the State charges the full price for water, it is expected to make special arrangements and exceptions for the poorest citizens to ensure that they have sufficient drinking water and sanitation. This is codified in the law of civil enforcement procedures. According to this law gas, electricity and water supplies may be cut off on the grounds of non-payment, in the case of dwellings, but then, only in the event that the creditor obtained an execution warrant.

[89] In March 1996, the Regional Court of Roanne in France convicted a distribution company of unlawful interruption of water supply, on the grounds that a supplier who has not been paid must apply to the Court for a warrant of execution to ensure payment of the sums owed. There must be an express authorization from the Court before the supplier may cut off water supply as this is a service upon which adequate living conditions of families depend. See *TAI Roanne, 11 Mars 1996, Revue CLCV, No 97, Javier 1997: as*

referred to in Commission of Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, fifty fourth session, UN-DOC E/CN.4/Sub.2/2002/10, 25 June 2002: Relationship between the enjoyment of economic, social and cultural rights and the promotion of the realization of the right to drinking water supply and sanitation, Preliminary report submitted by Mr E L Hadji Guisé.

[90] In the United Kingdom in the matter of *R v Director of General Water Services* (1999) Env L.R. 114 (QBD 1998), the Queen's Bench Division held that prepayment meters with automatic shutoff valves violate the procedural requirements in terms of the 1991 UK Water Services Act and are illegal as they offer no notice or opportunity for a hearing prior to the cut off.

[91] It is apparent that in the established democracies, prepayment meters are illegal as they violate the procedural requirement of fairness by cutting off or discontinuing the supply of water without notice and representation. Our Constitution enjoins the Courts to consider foreign law to interpret the Bill of Rights. The Constitution further enjoins the Courts in interpreting any provision of any statutory enactment to prefer an interpretation that is reasonable and consistent with the Bill of Rights.

[92] In the present matter, the prepayment meters were introduced by the respondents through a project known as Operation Gcinámanzi (OGM). The project's aim was to address water losses due to bad municipal infrastructure and the pattern of non-payment of services such as water consumed on

private properties in the deemed consumption areas of the City. The aim and object of the project was intended to rehabilitate the water piping system that was old, broken and dysfunctional. However, the implementation of the prepayment meters with automatic shut off mechanism is both unlawful and unreasonable. The prepayment meters violate the provisions of section 33 of the Constitution read with the provisions of PAJA. In terms of the Constitution and PAJA, everyone has a right to a lawful, reasonable and procedurally fair administrative action. In the present matter, once the allocated basic free water of 25 litres per person per day or 6 kilolitres per household per month is exhausted, the prepayment meter automatically shuts off, until the consumer activates it with the purchased tags for the supply of additional water. If the consumer has no money, he/she will have no water until the next allocation. In the case of the present applicants, the 6 kilolitres per household per month cannot sustain them for a month. The 6 kilolitres lasts until about the 15th of each month. For the remainder of the month, they survive without water as they are unable to purchase more water credits for additional water as they are unemployed and have no other source of income other than the State pension or grant which they receive monthly.

[93] The prepayment meters cut off the supply of water without reasonable notice to enable the applicants to make representations or if able to, to purchase water credits. If the applicants are unable to purchase water credits because of lack of money, they are unable to explain their financial difficulties to the respondents. Although the prepayment meters may admittedly emit a signal warning that there are no sufficient credits for the supply of water, the

warning given is artificial and unhelpful. The purpose of the warning should be to make representation in the event of inability to pay, not to purchase further credits.

[94] The prepayment meters discriminate between the applicants and other residents within the municipality of the City. While other residents of the City for example Sandton, get water on credit from the respondents, the applicants do not. If the residents of Sandton, a wealthy and formerly white area, served by the respondents, fell in arrears with their water bills, they are entitled to notices in terms of By-law 9 before their water supply is cut off. Moreover, they are given an opportunity to make arrangements with the respondents to settle their arrears. Before their supply is cut off, they are not only afforded reasonable opportunity to settle the arrears, but are afforded a reasonable opportunity to make representations concerning the arrears and settlement thereof. The applicants, the residents of Phiri, a poor and predominantly a Black area, are denied this right. This is not only unreasonable, unfair and inequitable, it is also discriminatory solely on the basis of colour. In *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) Langa DP as he then was, alluding to the fact that differentiation based on geographical areas may amount to racial differentiation, in paragraph [33] of his judgment, said –

"[33] I have had the opportunity of reading the judgment of Sachs J in which the view is expressed that the differentiation in the present case was based on 'objectively determinable characteristics of different geographical areas, and not on race'. I cannot subscribe to this view or to the proposition that this is a case in which, because of our history, a non-discriminatory policy has impacted fortuitously on one section of our community rather than another. There may be such cases, but

in my view this is not one of them. The impact of the policy that was adopted by the council officials was to require the (white) residents of old Pretoria to comply with the legal tariff and to pay the charges made in terms of that tariff on pain of having their services suspended or legal action taken against them, whilst the (black) residents of Atteridgeville and Mamelodi were not held to the tariff, were called upon to pay only a flat rate which was lower than the tariff, and were not subjected to having their services suspended or legal action taken against them. To ignore the racial impact of the differentiation is to place form above substance."

[95] I respectfully agree with those sentiments. In the circumstances, I find that the introduction of the prepayment meters and their continued use violate both the Constitution and PAJA.

[96] The applicants contend further that the respondents' conduct of March 2004 of disconnecting their unlimited access to water at a flat rate and the unfair procedure followed by the respondents in the introduction of the prepayment meters, violated the provisions of section 7(2) of the Constitution.

[97] The contention is that in terms of section 7(2) of the Constitution the State has both the negative and positive obligation towards the applicants' right to access to water. In the negative sense, the State is obliged to respect the applicants' existing unlimited access to water and not to interfere with this right. Any interference will be unlawful unless it can be justified in terms of the provisions of section 36 of the Constitution.

[98] In the positive sense, the State is obliged in terms of section 27(2) of the Constitution and the Water Services Act to take reasonable legislative and other measures within its available resources to achieve the progressive realization of everyone's right to access to sufficient water.

[99] The applicants further contend that the respondents' provision of water is an administrative action and as an administrative action, it must be lawful, reasonable and procedurally fair as provided for in both sections 33 of the Constitution and PAJA.

[100] Section 7(2) of the Constitution provides that the State must respect, protect, promote and fulfil the rights in the Bill of Rights. The applicants' contention, therefore, is that the respondents, as organs of the State, are obliged to respect and protect their right to access to pressurized unlimited water at a flat rate rather than disconnecting the water supply and substituting it with prepayment meters. The interference and the disconnection, so the applicants contend, is unjustified in terms of section 36 of the Constitution and therefore unlawful.

[101] The respondents challenge these contentions. According to the respondents, access to pressurized unlimited water at a flat rate, the deemed consumption, was unsustainable. As a result of the deemed consumption, the respondents were unable to account for about 75% of all water pumped into Soweto. Although the deemed consumption was set at 20 kilolitres per household per month, the actual water consumed including wastage and

leaks amounted to 67 kilolitres per household per month. As a result of the non-payment of services including the non-payment of water services during the 1980's boycotts, even the 20 kilolitres per household per month were not paid for. The respondents were not only losing income from wastages and leaks but also from non-payment of water services. At the introduction of the prepayment meters, the applicants were substantially indebted to the respondents and in fact were substantially in arrears.

[102] In the face of these difficulties, and the constitutional obligation on the respondents to progressively realized, within their available resources, access to right to sufficient water, it is understandable why the respondents had to interfere with the applicants' deemed consumption.

[103] In my view, if the deemed consumption was indeed a right that the respondents were obliged to respect and protect, such right was subject to the limitation in terms of the provisions of section 36 of the Constitution. It is unconscionable to expect the respondents, faced with the scarcity of water and the huge water losses, and the huge, continuous unrecoverable financial losses and the unfulfilled constitutional task of meeting the vast and varied social needs of its residents, to perpetuate the deemed consumption practice which is unsustainable.

[104] However, the manner in which the respondents dealt with the deemed consumption is worrisome. The respondents' actions are administrative. In terms of section 33 of the Constitution and PAJA the applicants are entitled to

an administrative action that is lawful, reasonable and procedurally fair. To determine whether the respondents' actions pass this test, it is crucial to examine the manner in which the deemed consumption was dealt with by the respondents.

[105] As pointed out earlier, the introduction of the prepayment meters has no source in law, in other words it is *ultra vires* and therefore unlawful. In the unlikely event that I am wrong in that finding, it becomes of great importance to determine whether the introduction of the prepayment meters was procedurally fair.

[106] The respondents recognised that the community should broadly be consulted before the introduction of the prepayment meters. The prepayment meters would not be enforced on customers until such time as the respondents had consulted with the applicants and other customers affected thereby. Despite this awareness, the first applicant was given wrong information regarding the prepayment meters. She was informed that the purpose of the laying of water pipes was to enable her to get water into her yard. She was not aware of the introduction of the prepayment meters until 7 months after their introduction. There was thus no consultation with her. No proper notice was given to her. She was not advised of her rights to object to the introduction as well as the remedies available should she wish to challenge the introduction. She was also not informed that she has the right to request for reasons for the decision and that she has a right to either review or appeal the decision.

[107] The respondents filed supplementary affidavits to prove that there were consultations and that the purpose and aim of OGM was explained to the residents of Phiri. However, the identity of the deponents reveal more than the content of the affidavits. The majority of them are either employees or councillors of the City. They are the beneficiaries of the City. To expect them to be objective and act contrary to their interests would be foolhardy. Their evidence regarding the notice given to Phiri residents, the nature and purpose OGA and the purported choice the residents had in either accepting or refusing the introduction of prepayment meters is unhelpful.

[108] The notice given to the residents, in particular the first applicant, introducing OGM is both informative and instructive. It is dated 28 January 2004. It is headed "*Notice: Individual house connection finalization*". It is addressed to "*Dear Valued Water Consumer*". It reads –

"As you know, Johannesburg Water (JW) has recently launched Operation Gcinámanzi to promote the conservation of water and improve the level of service delivery to you, our customer.

Operation Gcinámanzi involves, amongst other activities, network upgrading, network leak repairs and repair of leaks through defective plumbing inside private properties.

At present the City of Johannesburg provides three levels of water and sanitation services, namely Level of Service 1, 2 and 3, of which detailed information is attached. The Water Services Act (1997) of South Africa requires the metering of water supplied above the free basic water allocation of 6 000 litres. To comply with the Act, the intention, inter alia, of Operation Gcinámanzi is to provide you with a Level of Service 3, which requires the installation of individual meters to each property.

In this respect JW gives you notice that you will be provided with a Level of Service 3 as described above. Should you refuse to be metered JW will be obliged to provide you wish a Level of Service 2 consisting of an unmetered water connection pipe with a flow restriction device linked to a yard standpipe with a fair-flush toilet. Furthermore, for a Level of Service 2 no plumbing fixtures on the property shall be connected to the water connection pipe or yard standpipe by JW and any such connections by you shall be deemed illegal.

Should you choose to change to a Level of Service 3 at a later stage, after installation of a Level of Service 2 yard standpipe, a connection charge of R650,00 will be later payable by you to JW.

Should JW not hear from you within seven (7) calendar days of receipt of this notice, JW will assume that you have opted to a Level Service 3.

In the event that you wish to present your view to JW regarding this notice, please direct all such correspondence in writing and within the notice period to:-

*Mr O Machado
Johannesburg Water (Pty) Ltd
448
Senoane, Administration Office
Main Hall*

JW undertakes to respond to such correspondence received on this matter from affected customers.

Service Agreements must be completed for both Levels of Service 2 and 3 in compliance with the City of Johannesburg's by-laws. JW Community Facilitators will therefore visit you shortly in this regard and provide you with any further detailed information that you require.

JW would like to emphasize its full dedication to the work that is being done to improve the water services in the community and wish to assure you of our ongoing commitment to provide cost effective, affordable and sustainable water and sanitation services.

*Sincerely
Johannesburg Water"*

[109] The notice is misleading in suggesting to the applicants that the Water Services Act requires the provision of water on three levels and in the same breath suggesting that the only Level of Service suitable to the applicants is

Level of Service 3 as if the applicants had no election to choose any other level of service.

[110] The tone of the notice is both intimidatory and presumptive. Johannesburg Water's subtle attempt to persuade the applicants to accept Level Service 3 and prepayment meters is glaring. It is unreasonable of Johannesburg Water to assume that the applicants would have received the notice within a period of seven days. It is grossly unfair and unreasonable for Johannesburg Water to impose an election on the applicants on the basis of failure to react to the notice.

[111] The purpose of the visitation by Johannesburg Water's community facilitators, in view of the fact that the applicants must make an election within seven days, is unclear. If no election is made, Johannesburg Water will presume that election in favour of Level of Service 3 has been made. It is further incomprehensible what the value of the information provided will be used for after the event. This appears to be a vain attempt on the part of Johannesburg Water to make the process appear reasonable and fair. The attempt falls short of the requirements of section 33 of the Constitution and PAJA.

[112] All subsequent notices, indicate to the applicants that the only choice available to them is Level Service 3. It is common cause that there is no evidence that the subsequent notices have been received by the applicants. However, the first applicant, in particular, states that she received no such

notices. The notices emphasize the fact that the applicants can only choose Level Service 3 at the time of the notices and should they be switched to Level Service 2 they cannot revert to Level Service 3 unless they pay a penalty of R650,00 or disconnection which would result in the applicants having no water for a considerable time. These notices are unreasonable. The procedure followed by Johannesburg Water in introducing the prepayment system is unfair. The notices offend both the letter and spirit of the Constitution and the provisions of PAJA, that is, the applicants' entitlement to an administrative action that is reasonable and procedurally fair.

[113] On 1 October 2004 as a result of the hardships of living without water for extended period, and the closure of the Chiawelo Water reservoir which is 3 kilometres from her yard, the first applicant applied for installation of prepayment meter. The application is accompanied by General Terms and Conditions of Supply. Clause 3 of the Terms and Conditions state that the first applicant acknowledged and accepted the supply of water by Johannesburg Water through mechanism of prepayment water meter. Clause 8 of the Terms and Conditions go further to state that the first applicant "*irrevocably accepts that, after the free basic water allocation is fully utilized per month, the supply of water to the property shall forthwith be terminated upon their (sic) being no valid credits amounts reflected on the display unit of the meter*".

[114] The Terms and Conditions are not signed by Ms Mazibuko. There is no evidence that the Terms and Conditions, in particular clause 8, were explained to the first applicant and that she indeed irrevocably accepted the

prepayment arrangement well knowing that in the event of the credits being used up, her supply of water shall forthwith be terminated. The unchallenged evidence is that the Terms and Conditions were not given to the first applicant.

[115] In terms of section 4 of the Water Services Act, the respondents are authorized to set terms and conditions as well as the procedure for provision of water services. If there is provision for the limitation or discontinuation of water services, the limitation or discontinuation must, however, comply with the provisions of subsection 3.

[116] Subsection 3 provides that –

“(3) Procedures for the limitation or discontinuation of water services must –

- (a) be fair and equitable*
- (b) provide for reasonable notice of intention to limit or discontinue water services and for an opportunity to make representations, unless –*
 - (i) other consumers would be prejudiced;*
 - (ii) there is an emergency situation or*
 - (iii) the consumer has interfered with a limited or discontinued service; and*
- (c) not result in a person being denied access to basic water services for non-payment; where that person proves, to the satisfaction of the relevant water services authority, that he or she is unable to pay for services.”*

[117] The City derived its authority to set conditions for the provision of water through its by-laws. What is undisputed is that the conditions set by the by-laws must be fair and equitable. A consumer must be given a reasonable notice of the provider's intention to limit or discontinue water services. Furthermore, no consumer is to be denied access to basic water services for non-payment where such a person proves to the relevant water services authority that he/she is unable to pay for the services. It is therefore of crucial importance to scrutinize the terms and conditions to limit or discontinue the water supplies to determine whether the terms and conditions comply with the provisions of section 4 and in particular subsection 3. If the terms and conditions do not comply, they lack legality and they have no source in law.

[118] The Water Services By-Laws published in terms of section 13(a) of the Systems Act do not authorise limitation or discontinuation of water services for non-payment.

[119] The Terms and Conditions which purportedly were part of the application by the first applicant to be provided with prepayment meter, have no source in law. The purported irrevocable acceptance by the first applicant of termination forthwith of water services for non-payment, is illegal. Furthermore the conditions are unfair in that no reasonable notice is to be given to the first applicant for termination of her water services. Should she be unable to pay for water services, again, she is unable to prove to the satisfaction of the respondents that her non-payment is as a result of her

inability to pay for the services. Resultantly, the Terms and Conditions are contrary to the provisions of Section 4(3) of the Water Services Act.

[120] The respondents contend that the prepayment measuring systems were widely accepted by the people of Phiri including the applicants. On this basis, the contention is that applicants have no cause of complaint.

[121] The applicants state that the introduction of the pre-payment measuring systems were introduced in Phiri by false pretences. The first applicant in particular, states that at first she refused to accept the prepayment meter. She chose to travel 3 kilometers to the Chiawalo reservoir to fetch water. However, the reservoir was closed for her. For a period of 7 months she had no access to water. She had no choice but to accept the prepayment meter.

[122] From the contents of the various notices sent to the residents of Phiri, including the applicants, it is obvious that the prepayment measuring systems were approved for and not by the residents of Phiri. The terms of the notices do convey the prepayment measuring systems as a *fait accompli*. The purpose of the notices was merely to sell an accomplished fact to the residents of Phiri. It is on this basis that, I understand Mr Trengove's argument that the actions of the respondents, were not consultative but a publicity drive for the prepayment measuring systems.

[123] In *Residents of Bon Vista Mansions* above, Budlender AJ was confronted with an urgent application to restore the water services to residents of a block of flats. In dealing with the provisions of section 4(3) of the Water Services Act, he says the following –

"[28] That is a demanding set of requirements. One would assume that the Constitution-makers and Parliament imposed such demanding requirements because of the potentially serious human and health consequences of terminating water services."

[124] I agree with the sentiments expressed by the learned Acting Judge. Water is life. Life without water is not life. One cannot speak of a dignified human existence if one is denied access to water. The right to water is the bedrock of most of the rights contained in the Bill of Rights. In its General Comment No. 15 (2002) the United Nations' Committee on Economic, Social and Cultural Rights, commenting on the right to water in Chapter 1, paragraph 3 regarding the interdependence of most rights to the right of water, says the following:

"Article 11 paragraph 1, of the Covenant specifies a number of rights emanating from, and indispensable for, the realization of the right to an adequate standard of living 'including adequate food, clothing and housing'. The use of the word 'including' indicates that this catalogue of rights was not intended to be exhaustive. The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is core of the most fundamental conditions of survival. Moreover, the Committee has previously recognised that water is a human right contained in article 11 paragraph 1C. See General Comment No. 6 (1995). The right to water is also inextricably related to the right to the highest attainable standard of health (art. 12, para. 1) and the rights to adequate housing and adequate food (art 11, para. 1). The right should also be seen in conjunction with other rights enshrined in the International Bill of

Human Rights, foremost amongst them the right to life and human dignity.”

[125] The applicants further challenge the respondents' policy of determining sufficient basic water as 25 litres per person per day or 6 kilolitres per household per month.

[126] As pointed out above, the 25 litres per person per month or 6 kilolitres per household per month is the minimum quantity of water set by Regulation 3(b) of the National Standards Regulations. The respondents are, in terms of section 27(2), obliged to provide more than the minimum if its residents' needs so demand and they are able, within their available resources, to do so.

[127] Mr Moultrie, for the *amicus curiae*, argued that the respondents are obliged in terms of international law, to provide the core minimum water supply to the applicants and that the core minimum requirement, on the proper reading of the Court judgments, has become part of over constitutional jurisprudence. Mr Marcus, however, argued to the contrary. His argument is that the Constitutional Court has rejected the core minimum requirement.

[128] In General Comment No. 15 (2002) the United Nations' Committee on Economic, Social and Cultural Rights in paragraph 37, regarding minimum essential levels in relation to the right to water, says the following –

- “37. In General Comment No. 3 (1990) the Committee confirms that States parties have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the Covenant. In the Committee’s view, at least a number of core obligations in relation to the right to water can be identified, which are of immediate effect:
- (a) To ensure access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease;
 - (b) To ensure the right of access to water and water facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalized groups;
 - (c) To ensure physical access to water facilities or services that provide sufficient, safe and regular water; that have a sufficient number of water outlets to avoid prohibitive waiting times; and that are at a reasonable distance from the household;
 - (d) To ensure personal security is not threatened when having to physically access water;
 - (e).....(i)

[129] In *The Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) Mr Justice Jacob, addressing the core minimum requirement of the right to housing, at paragraph 33 says –

“[33] The determination of a minimum core in the context of ‘the right to have access to adequate housing’ presents difficult questions. This is so because the needs in the context of access to adequate housing are diverse: there are those who need land; others need both land and houses; yet others need financial assistance. There are difficult questions relating to the definition of minimum core in the context of a right to have access to adequate housing, in particular whether the minimum core obligation should be defined generally or with regard to specific groups of people. As will appear from the discussion below, the real question in terms of our Constitution is whether the measures taken by the state to realise the right afforded by section 26 are reasonable. There may be cases where it may be possible and appropriate to have regard to the content of a

minimum core obligation to determine whether the measures taken by the state are reasonable. However, even if it were appropriate to do so, it could not be done unless sufficient information is placed before a court to enable it to determine the minimum core access to water; ...

(i) ...”

[130] It was argued on behalf of the respondents that the learned Judge in *Grootboom* disavowed the core minimum as far as socio-economic rights are concerned, in particular the right to housing.

[131] I do not agree that the learned Judge disavowed the core minimum principle. I understand the learned Judge to be saying the core minimum in the context of the right to have access to adequate housing present difficult questions. The difficulties are as illustrated in the above-quoted paragraph. Furthermore the learned Judge went further to point out that it may be possible to determine the core minimum if sufficient information is placed before a Court. The difficulties presented by the determination of the core minimum do not amount to rejection of that principle. The learned Judge did not reject the core minimum as part of our law.

[132] In *Minister of Health and Others v Treatment Action Campaign 2002* (5) SA 721 (CC) in paragraphs 34 and 35 of the judgment, the Constitutional Court said –

“[34] *Although Yacoob J indicated that evidence in a particular case may show that there is a minimum core of a particular service that should be taken into account in determining whether*

measures adopted by the State are reasonable, the socio-economic rights of the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them. Minimum core was thus treated as possibly being relevant to reasonableness under s 26(2), and not as a self-standing right conferred on everyone under s 26(1).

[35] *A purposive reading of ss 26 and 27 does not lead to any other conclusion. It is impossible to give everyone access even to a 'core' service immediately. All that is possible, and all that can be expected of the State, is that it act reasonably to provide access to the socio-economic rights identified in ss 26 and 27 on a progressive basis. In Grootboom the relevant context in which socio-economic rights need to be interpreted was said to be that*

'(m)illions of people are living in deplorable conditions and in great poverty.

There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted. . . ."

[133] Again, I do not understand the Constitutional Court to be rejecting the core minimum as part of our law. In any event all the attempts to determine the core minimum within the context of this case boils down to one thing: an attempt to determine the basic water supply, within the State's maximum available resources in compliance with the provisions of section 27 of the Constitution.

[134] The diverse needs presented by the right to adequate housing do not, in my view, arise in the context of the right to access to water. The definition of "Basic Water Supply" in Water Services Act means "*the prescribed minimum standard of water supply services necessary for the reliable supply of sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene*". In this context, it seems to

me that the right to access to water is different to the diverse needs contained in the right to access to adequate housing as pointed out by Mr Justice Jacobo in Grootboom.

The State's duty to take reasonable measures

[135] The respondents contend that the provision of free basic water of 25 litres per person per month or 6 kilolitres per household per month must be looked at in conjunction with its evolving social policies. In this context, the contention is that the provision of 25 litres per person per day or 6 kilolitres per household per month is not unreasonable.

[136] In terms of section 27(2) of the Constitution, the State is obliged to take measures to progressively realize the right to access to sufficient water.

[137] The respondents contend that since June 2002 they have taken reasonable measures to progressively move from allocating 25 litres per person per day or 6 kilolitres per household per month. The measures resulted in the introduction of Special Cases Policy on 14 June 2002. This policy has evolved into various policies. The respondents contend that these policies are reasonable as the applicants are entitled to more water than the 25 litres per person per day or 6 kilolitres per household per month.

[138] I turn to evaluate the respondents' evolving social policies.

The special case policy of 14 June 2002

[139] The policy was introduced on 14 June 2002. The targeted groups for the policy were pensioners, disabled persons, unemployed persons, persons with full-time, temporary, casual, contract and seasonal employment with low income and HIV/AIDS patients and/or their orphans.

[140] Any resident who wished to benefit from the policy must first register as indigent. Out of 150 000 eligible indigent households, only 30 000 were registered. On 28 October 2004 the indigent policy was amended. The objective of the amended policy was to encourage more indigent households to register. The incentive for registration was the writing off of accrued arrears. The accrued arrears, however, could only be written off provided the account holder agreed to the installation of a prepayment meter.

[141] On 20 June 2005, once again, the policy was amended. It increased the income threshold for qualification as indigent. The account holder, whose arrears had been written off, would have his/her arrears reinstated should he/she prevent the installation of a prepayment meter or if the prepayment meter was already installed, if he/she interfered or tampered with it.

The indigent persons policy of October 2005

[142] On 31 October 2005, the Special Cases Policy was renamed Indigent

Persons Policy. Its features however remained the same.

The social package proposal of June 2006

[143] On 8 June 2006 the City's consultants proposed an entirely new Social Package. This has neither been discussed nor accepted by the City. It remains a proposal with no legal status.

The Mayoral Committee decision of 6 December 2006

[144] The City, in its Mayoral Committee decision of 6 December 2006, envisaged a new Social Package with its implementation target date as July 2008. In the interim, the City's Mayoral Committee adopted measures which were due to be implemented in March 2007. As at the hearing of this matter in December 2007, the interim measures had not been implemented. Parallel with this decision, the Mayoral Committee introduced a process in terms of which residents with special needs may make representation for additional allocation of water.

[145] The effect of all these policies is that all account holders who register as indigent have their arrears written off. Since July 2007 they qualify for additional allocation of free basic water of 4 kilolitres per month. This result in the account holder getting 10 kilolitres free basic water per month. In addition, for emergencies, an account holder registered as an indigent, is

entitled to 4 kilolitres of water per annum. Only 48 249, out of a total of 90 400 eligible account holders, have received this benefit.

[146] There are difficulties with the indigent policy schemes. These difficulties are acknowledged by the City. People are reluctant to register as indigent for fear of social stigma. The additional benefits accrue per stand resulting in the exclusion of multiple householders per stand such as in Phiri. The scheme is inflexible in that account holders with prepayment meters, who run out of water, are unable to make representations for further allocations of free water.

[147] The special representation mechanism that runs parallel with the Mayoral Committee decision of 6 December 2006, has not been implemented. The report on the mechanism ought to have been submitted to the Committee in February 2007. It was only submitted for approval on 18 October 2007. The approval was made solely to justify the introduction of prepayment meters system as both reasonable and rational. The report reads –

“Five residents of Phiri Soweto, with the assistance of Centre for Applied Legal Studies at the University of the Witwatersrand, instituted Legal action against the City Of Johannesburg wherein they requested the Court to review and set aside the decision of the City Of Johannesburg to limit free basic water to 6 kiloliter per household per month, discontinue the full pressure and unmetered uncontrolled volume water supply for which a fixed charge was levied and to install prepaid water meters in the area of Phiri Soweto.

The City Of Johannesburg opposed the action and on 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 to address particular problems with the delivery of water services to what was previously a deemed

consumption area and that it could be implemented in a manner that safe guards the rights of residents.

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.

The in-principle appeals mechanism and broad outline implementation strategy (which demonstrates current strategic thinking on the application of water subsidies) will be one of the central components of the City's argument as contained in our answering affidavit. The matter is placed on the roll to be heard in December 2007. The City need to highlight this mechanism in its further affidavit wherein progress to date is put to court, and hence these key documents are presented to the mayoral committee for in-principle approval."

[148] The various policies adopted to alleviate the plight of the applicants and all other residents of Phiri appear irrational, particularly if the Court has regard to the reasons for the Mayoral Committee in-principle approval of 18 October 2007. The policies are unreasonable as they are inflexible. Although they appear attractive, they are less attractive if subjected to closer scrutiny. On face value the policies sound reasonable, however their reasonableness can only be tested in the implementation thereof. Pending the envisaged implementation of the revised Social Package in July 2008, the residents of Phiri are not in a better position that they were on 14 June 2002 when the Special Cases Policy was first introduced.

[149] The underlying objective of the policies is to encourage the installation of prepayment meters. The incentive being dangled to the residents of Phiri is to have their accrued arrears written off should they elect to have prepayment

meters installed. The prepayment meters having been installed, no resident should interfere or tamper with it. Should there be interference or tampering, the arrears that were written off, will be reinstated. As pointed earlier in this judgment, the prepayment meters have no source in law and therefore are unlawful. The respondents' actions in promoting the installation and continued use of the prepayment meters are unlawful.

[150] In the result I find the various social policies adopted by the respondents as being both irrational and unreasonable.

The equality and discrimination challenge

[151] The Constitution guarantees equality. It is therefore inexplicable why some residents of the City are entitled to water on credit plus free allocation of 25 litres per person per day or 6 kilolitres per household per month yet the people of Phiri, such as the applicants, are denied water on credit. In spite of the fact that they are poor, they are expected to pay water before usage. Their counterparts, who are affluent and mainly in rich and white areas, irrespective of how much water they use, are entitled to water on credit. The differentiation, in my view, contravenes the right to equality.

[152] It was argued on behalf of the respondents that as a result of the Introduction of the National Credit Act 34 of 2005 the applicants will not qualify for water on credit.

[153] To argue, as the respondents do, that the applicants will not be able to afford water on credit and therefore it is "good" for applicants to go on prepayment meters is patronising. That patronization sustained apartheid: its foundational basis was discrimination based on colour and decisions taken on behalf of the majority of the people of the country as "*big brother felt it was good for them*". This is subtle discrimination solely on the basis of colour. Discrimination based on colour is impermissible in the terms of the Constitution. It is outlawed. It is unlawful.

[154] The underlying basis for the introduction of the prepayment meters seems to me, to be credit control. If this is true, I am unable to understand why this credit control measure is only suitable in the historically poor black areas and not the historically rich white areas. Bad payers cannot be described in terms of colour or geographical areas. There may be as many bad customers in the historically rich white areas as they are in the historically poor black areas. Bad debt is a human problem not a racial problem.

[155] The differentiation goes further. It discriminates between the residents of the City on the basis of geography. Although colour appears not to be the basis of the discrimination, the Court in *Pretoria City Council v Walker* pointed out geography may reveal the true basis of discrimination as colour. Phiri Township is historically a black area and generally poor. The affluent suburbs of the City are historically white and rich. It is therefore inescapable that the introduction of the prepayment meters discriminates on the basis of colour.

Discrimination on the basis of colour is unconstitutional and therefore unlawful.

[156] The Bill of Rights enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom. It is these rights that the State and all organs of the State, are obliged to respect, protect, promote and fulfil.

Overview of prepayment meters

[157] The right to water must be interpreted within the context of the Bill of Rights as contained in the Constitution. Such interpretation suggests that it cannot be a restrictive interpretation. The right to water is a common denominator to most rights in the Bill of Rights. It is interconnected and interrelated with all the other socio-economic rights such as the right to access to adequate housing.

[158] It is in this context that the introduction of the prepayment meters and its reasonableness thereof should be viewed.

[159] South Africa is a patriarchal society. Many domestic chores are performed by women. Many households in poor black areas are headed by women. Phiri Township is no exception. It is understandable therefore that the first applicant travelled 3 kilometers to access water on behalf of her household. In this context it seems to me that the prepayment meters

discriminate against women unfairly because of their sex. Discrimination on the basis of sex is outlawed. It is unconstitutional and unlawful.

[160] To deny the applicants the right to water is to deny them the right to lead dignified human existence, to live a South African dream: To live in a democratic, open, caring, responsive and equal society that affirms the values of human dignity, equality and freedom. The denial would perpetuate the decades long poverty, deprivation, want and undignified existence of the recent past. The Bill of Rights guaranteed in the Constitution would, as a result of the denial, remain a distant mirage of unfulfilled dream. The denial is unconstitutional and therefore unlawful.

[161] It was further argued by Mr Marcus, that the applicants' challenge of respondents' water policies as offending the provisions of the Constitution is not suited, as the applicants, on the authority of *Sandu v Minister of Defence and Others* 2007 (8) BCLR 863 (CC) are obliged to challenge the Water Services Act and not the Constitution.

[162] In *Sandu v Minister of Defence and Others* 2007 (8) BCLR 863 (CC) O'Regan, J in paragraph 51 of her judgment says –

"Section 23(5) expressly provides that legislation may be enacted to regulate collective bargaining. The question that arises is whether a litigant may bypass any legislation so enacted and rely directly on the Constitution. In NAPTOSA and Others v Minister of Education, Western Cape, and Others, the Cape High Court held that a litigant may not bypass the provisions of the Labour Relations Act, 66 of 1995, and rely directly on the Constitution without challenging the provisions of the Labour Relations Act on constitutional grounds. The question of

whether this approach is correct has since been left open by this Court on two subsequent occasions. Then, in Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae), Ngcobo J writing a separate judgment held that there was considerable force in the approach taken in NAPTOSA. He noted that if it were not to be followed, the result might well be the creation of dual systems of jurisprudence under the Constitution and under legislation. In my view, this approach is correct: where legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard."

[163] In the present matter the applicants challenge the introduction and continued operation of prepayment meters in Phiri. The right to access to sufficient water in terms of section 27(1) is mirrored in section 3 of the Water Services Act. It is common cause that the Water Services Act was promulgated pursuant to the provisions of section 27(3) of the Constitution. The Water Services Act does not authorise the use of prepayment meters. The Water Services Act authorises the Water Services Authorities to set conditions and procedures for the supply and discontinuation or limitation of water services. The City, as a water service authority, derives its authority to set conditions and procedures from its by-laws. The by-laws also do not authorise the use of prepayment meters although the City may introduce the prepayment meters as a penalty for contravening the conditions set for the supply of water services.

[164] In the present matter, there is no enabling legislation to be challenged. The introduction and implementation of the prepayment meters have no source in law. In this context I fail to appreciate the context in which it was argued that the application offends the dual system of jurisprudence that the

Constitutional Court frowns upon as set out in paragraph [162] above. The facts of this matter, in my view, entitle the applicants to rely directly on the Constitution, as the supreme law, to challenge the introduction and the continued operation of the prepayment meters.

[165] It was further argued on behalf of the respondents that the applicants are a tiny minority, in the scheme of things, that cannot frustrate the implementation of the City's water policies which are beneficial to the majority of the residents of the City. The applicants were characterised as "*Jammergevalle*". As I understand the argument, the applicants are said to be the unfortunate ones that need not complain of the City's water policies as long as the water policies benefit the majority. As his authority, Mr Marcus referred me to *Van Heerden v Minister of Finance* 2004 (6) SA 121 (CC).

[166] This argument loses sight of the following. Each case must be decided on its peculiar facts: The facts in *Van Heerden* differ from the facts in the present matter. Section 27(1) of the Constitution guarantees everyone the right to access to sufficient water, so does the Water Services Act. Taking into account that the average household in Phiri consists of about 16 persons; that there are over 100 000 indigent households in Phiri and that the number of household per stand far outnumber the number of account holders, it cannot be said that the applicants fall in the category of "*jammergevalle*". The recent past history of inequality, want, poverty, indignity, uncaring and unresponsive State are still too fresh in peoples' mind to treat the applicants as "*jammergevalle*". In my view, the applicants and all those residents of Phiri

who found themselves in the same situation as the applicants, cannot be "*jammedgevalle*". They are entitled to enforce the right to water that is guaranteed to **everyone** (emphasis added) in terms of section 27(1) of the Constitution.

[167] The applicants further seek a declaratory order that each of them is entitled to 50 litres per person per day.

[168] It is common cause that the 25 litres per person per day is based on a household of 8 persons which equals to 200 litres per day per household. The respondents set the monthly water requirement at 6 kilolitres per household per month. It is further also common cause that Phiri residents have more persons per household, which is equated to an account holder, than the average 8 persons household. It is also common cause that an account holder or household represents a yard. In Phiri the number of residents per yard far outnumber members of a household. This is because there are more informal settlers in a yard than members of a household. This too is common cause. This means therefore that many residents of a yard are excluded in the determination of the 25 litre per person per day or 6 kilolitres per household per month. These people fall outside the 25 litres per person per day or 6 kilolitres per household per month. They have no access to water at all.

[169] It is further common cause that in the present matter, the average household consists of minimum persons of 16. It is further common cause that it takes 10-12 litres to flush a toilet in waterborne sanitation areas. It is also

common cause that the residents of Phiri Township are mainly poor, uneducated, elderly, sickly and ravaged by HIV/AIDS. Many of them survive on State pension or grants. In these circumstances, it is obvious that the 25 litres per person per day is insufficient for the residents of Phiri.

[170] In his affidavit, Peter Henry Gleick (Gleick), the President of the Pacific Institute for Studies in Development, Environment and Security regarding sufficient water states –

- “17. *The amount of free basic water provided to the residents of Phiri (i.e., 6 kilolitres per household per month, or an average of 25 liters per person per day based on a household of 8 persons), will be insufficient to meet some basic needs because (a) some households will have more than 8 persons; and (b) even 25 liters per person per day will be insufficient for some basic needs defined by international standards (as noted above in Paragraph 12.3).*
18. *Certainly, the right to water cannot imply a right to an unlimited amount of water, nor must water be provided free unless for reasons of poverty or national policy. Under no circumstances should anyone be deprived of the BWR because of inability to pay. Specifically in the context of the state's obligations to ensure access to water to economically and other disadvantaged groups, the right to water must relate to a sufficient amount of water to meet Basic Water Requirements. Based on substantial international comparative research I argue that the Basic Water Requirement (BWR) for human needs is 50 liters per person per day (1pcd). This amount is appropriate for cleaning, hygiene, drinking, cooking, and basic sanitation.”*

[171] Regarding Phiri, Gleick goes further and state –

- “20. *On the facts presented in this case, Phiri is a poor urban area, with large households and high unemployment, meaning high domestic water requirements to meet basic needs.*

21. *Under the circumstances, the 6 kiloliters per household per month provided for free is insufficient to meet some Phiri residents' basic needs, not least because basing the amount provided on household units rather than on a per-capita daily calculation automatically disadvantages any household of more than 8 people. In any Phiri household with more than 8 people, the 6 kiloliter amount would be inadequate to satisfy the stated intention of providing 25 lpcd. Even in a household of 8 people, the amount of 6 kiloliters is insufficient to meet basic water needs of 50 lpcd.*
22. *A more appropriate and fair calculation should be based on the BWR on a per person per day basis. The BWR standard of 50 lpcd is appropriate in Phiri to maintain the health of residents, as follows:*
- 22.1 *In the hot, dry, climate of Soweto, a 70-kilogram human will lose (in basic bodily functions) between four and six liters per day, meaning a minimum drinking water requirement of approximately 5 lpcd.*
- 22.2 *A basic requirement for sanitation of 20 lpcd would be the minimum to ensure healthy living conditions in a densely populated area like Phiri. If the houses are connected with inefficient conventional sewerage systems such as is common in South African townships, the minimum water requirement for sanitation increases to more than 75 lpcd.*
- 22.3 *Living in an urban area, Phiri residents cannot rely on rivers for bathing, meaning a basic requirement for bathing of 15 lpcd.*
- 22.4 *Given that much of residents' food is likely to be bought from lower quality outlets, thorough washing and cooking of food is essential to ensure healthy eating. I suggest a basic requirement for food preparation and cooking of 10 lpcd."*

[172] In his supporting affidavit, Desmond James Martin (Martin) the President of the Southern African HIV Clinicians Society states –

- "9. *Universally, PLWHA require more water on a daily basis than non-HIV infected individuals to ensure their health, standard of living and dignity, for the following reasons:*

- 9.1 *Extra care is necessary in the preparation of food, particularly vegetables and fruit, to minimize the risk of infection by gastro-intestinal pathogens to which HIV-infected individuals are more susceptible, and to prevent the development of nutritional deficiencies in the early stages of infection.*
- 9.2 *Enhanced hygiene is required by all PLWHA and care-givers to minimize the risk of transmission of a variety of infections.*
- 9.3 *Frequent bathing is necessary for PLWHA because they are susceptible to a variety of skin infections.*
- 9.4 *Because PLWHA are susceptible to frequent bouts of diarrhoea, associated with the HIV-infection itself or with gastro-intestinal pathogens, infected individuals require additional drinking water so as not to become dehydrated.*
- 9.5 *Additional drinking water is necessary to taking medicines and for making food easier to eat for patients suffering from mouth ulcers or thrush.*
- 9.6 *In addition, because of the 33% chance of HIV-infected mothers transmitting HIV to their babies through breast-feeding, many mothers choose to bottle-feed babies using formula. UNICEF suggests that baby formula is an option only if a mother has access to sufficient clean drinking water (and can afford enough baby formula) for at least six months.*
- 9.7 *When PLWHA are approaching or at a terminal stage they often need to use the toilet more frequently than non-infected individuals, necessitating frequent flushing.*
- 9.8 *In advanced stages of AIDS, soiling of clothing or bedding is common, requiring regular and frequent laundry of contaminated clothing/bedding.*
- 9.9 *People who are weakened by AIDS can still be involved in growing vegetables in kitchen gardens, provided they have sufficient and easily accessible water. By providing a cheap and ready source of vegetables, kitchen gardens can contribute to the kind of healthy diet that is critical for the health and standard of living of PLWHA.*
10. *In HIV-affected households, access to additional water is not only important for infected individuals, but also for care-givers and for the whole household in order to lessen the burden of*

caring for an HIV-infected household member and to ensure that other members of the household do not have to forgo their basic water requirements in order to care for those infected with HIV."

[173] In contextualising his views about the insufficiency of 6 kilolitres per month per household, with regard to Phiri, Martin goes further to state –

- “11. *In specific terms, I am advised that Phiri is a poor urban locale with large households and high unemployment. This suggests at least average, but probably above average, HIV-infection rate per household.*
12. *Whatever the water requirement for non-infected individuals, households containing PLWHA in Phiri require additional water, not only to meet the needs of PLWHA, as outlined in section B above, but also to lessen the burden on care-givers.*
13. *In respect of the specific amount of water required by PLWHA, I notice that a June 2004 report on ‘HIV/AIDS’ prepared by Professor Richard Tomlinson for the Corporate Planning Unit in the Office of the City Manager of the City of Johannesburg, states in section 6.8: ‘Water is problematical because it is uncertain that 6kl suffices for family consumption, and especially so when there are AIDS patients in the house. Doubts regarding 6kl are most pronounced in formal townships and in RDP houses and serviced sites ...’. The report goes on to acknowledge that the ‘extremely “tight” nature’ of the 6kl per household per month calculation ‘certainly excludes’ households with PLWHA.*
14. *In general terms in South Africa women carry a disproportionate HIV-related burden. This is because women are more susceptible to HIV-infection, more vulnerable to sexual pressure and they are often the primary care-givers to PLWHA. Five of the seven applicants in this case are women representing female-headed households. One of these women, Grace Munyai, was a care-giver to her HIV-infected niece. As testified in Mrs Munyai’s affidavit, the additional water required to take care of her HIV-infected niece, Sizile, necessitated a 3km walk to fetch water as the free basic amount was insufficient to ensure hygienic conditions and adequate drinking water. Given the gendered nature of the HIV-pandemic it is particularly important for women’s health, standard of living, equality and dignity to have access to sufficient water.”*

[174] The respondents' expert evidence contend to the contrary. In addition, Mr Marcus argued that Gleick is not an expert. Mr Marcus further argued that the fact that Gleick signed his affidavit more than 9 months prior to the launching of the application and the fact that it relates to seven applicants, two more applicants than the present number of applicants, is problematic.

[175] He further argued that there is a dispute of fact amongst the experts regarding sufficiency of water, which dispute cannot be resolved in motion proceedings.

[176] Gleick's qualifications suggest that he is an expert. The information he gives about himself suggest this. The United Nations Committee on Economic, Social and Cultural Rights and various other international institutions and other writers use Gleick's opinion on the right to water. In the context of this case, he is an expert.

[177] The applicants are entitled to investigate and gather evidence with a view to launch the application. They were entitled to obtain the evidence of Gleick before the launching of the application. It may be so that prior to the launching of the application, there were more applicants than they are at present. The other applicants may, for one reason or the other, have decided not to pursue the application. Nothing turns on this issue.

[178] An opinion remains an opinion. It only serves as a tool by a Court to enable it to come to a decision. An opinion is not binding on a Court but only persuasive. If a Court finds an opinion unhelpful, it may ignore such an opinion. In this context, an opinion cannot create a dispute of fact. In my view, therefore, I find no dispute of fact. The alleged dispute of fact is no more than a difference of opinion by different experts.

[179] To expect the applicants to restrict their water usage to compromise their health by limiting the number of toilet flushes in order to save water, is to deny them the right to health and to lead a dignified lifestyle. It is common cause that the people suffering from HIV/AIDS need more water than those not afflicted by the illness. Such persons require water regularly to wash themselves, drink, wash their clothes, and cook. Their caregivers are also constantly expected to wash their hands. In this context waterborne sanitation is a matter of life and death. In this context the 25 kilolitres per person per day is woefully insufficient.

[180] The question that arises is whether the respondents have the resources to afford increasing the 25 litres per person per day to 50 litres per person per day.

[181] 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 25 litres per person per day supplied for free to household 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 realization of the provision of water, has not been utilized. 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 25 litres per person per day. It is undeniable that the applicants need more water than the 25 litres per person per day and that the respondents are able, within their available resources to meet this need. The respondents' provision of 25 litres per person per day is unreasonable. It appears that the respondents are able to provide 50 litres per person per day without restraining its capacity on water and its financial resources.

[182] The parties agreed that any award of costs should include the costs of three counsel. They however, do not agree from which date the costs order should run. The application was launched in 2006. There is therefore no factual basis for an order for costs to commence earlier than 2006.

[183] In the result I make the following order:

183.1 The decision of the City of Johannesburg alternatively Johannesburg Water (Pty) Ltd to limit free basic water supply to 25 litres per person per day or 6 kilolitres per household per month is reviewed and set aside.

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

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

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

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

183.5.1 free basic water supply of 50 litres per person per day and

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

[184] The respondents are jointly and severally ordered to pay the costs of the application, which costs include costs of three counsel.



M P TSOKA
JUDGE OF THE HIGH COURT

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INSTRUCTED BY	Legal Resources Centre
DATE OF HEARING	3 – 5 December 2007
DATE OF JUDGMENT	30 April 2008