CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 39/09
[2009] ZACC 28

In the matter between

LINDIWE MAZIBUKO	First Applicant
GRACE MUNYAI	Second Applicant
JENNIFER MAKOATSANE	Third Applicant
SOPHIA MALEKUTU	Fourth Applicant
VUSIMUZI PAKI	Fifth Applicant
and	
CITY OF JOHANNESBURG	First Respondent
JOHANNESBURG WATER (PTY) LTD	Second Respondent
MINISTER FOR WATER AFFAIRS AND FORESTRY	Third Respondent
with	
CENTRE ON HOUSING RIGHTS AND EVICTIONS	Amicus Curiae

Heard on : 2 September 2009

Decided on : 8 October 2009

JUDGMENT

O'REGAN J:

Introduction

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

[2] Although rain falls everywhere, access to water has long been grossly unequal. This inequality is evident in South Africa. While piped water is plentifully available to mines, industries, some large farms and wealthy families, millions of people, especially women, spend hours laboriously collecting their daily supply of water from streams, pools and distant taps. In 1994, it was estimated that 12 million people (approximately a quarter of the population), did not have adequate access to water. By the end of 2006, this number had shrunk to 8 million, with 3,3 million of that number having no access to a basic water supply at all. Yet, despite the significant improvement in the first fifteen years of democratic government, deep inequality remains and for many the task of obtaining sufficient water for their families remains a tiring daily burden. The achievement of equality, one of the founding values of our Constitution, will not be accomplished while water is abundantly available to the wealthy, but not to the poor.

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

Parties

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

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

> "RECOGNISING the rights of access to basic water supply and basic sanitation necessary to ensure sufficient water and an environment not harmful to health or well-being;
> ACKNOWLEDGING that there is a duty on all spheres of Government to ensure that water supply services and sanitation services are provided in a manner which is efficient, equitable and sustainable;
> ACKNOWLEDGING that all spheres of Government must strive to provide water supply services and sanitation services sufficient for subsistence and sustainable economic activity;
> . . . .
> CONFIRMING the National Government's role as custodian of the nation's water resources".

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

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

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

Issues

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

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

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

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

Summary

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

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

Background

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

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

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

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

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

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

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

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

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

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

[5] See [132] below.

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

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

Key constitutional and statutory provisions

[19] Section 27 of the Constitution provides as follows:

> "(1) Everyone has the right to have access to—
> (a) health care services, including reproductive health care;
> (b) sufficient food and water; and
> (c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
> (3) No one may be refused emergency medical treatment."

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

> "(1) Everyone has a right of access to basic water supply and basic sanitation.
> (2) Every water services institution must take reasonable measures to realise these rights.
> (3) Every water services authority must, in its water services development plan, provide for measures to realise these rights.
> (4) The rights mentioned in this section are subject to the limitations contained in this Act."

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

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

> "'basic water supply' means the prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene."

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

[7] Id.

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

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

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

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

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

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

Proceedings in the High Court

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

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

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

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

[10] At [78] below.

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

[12] Id at paras 63-70.

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

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

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[13] Id at para 82.

[14] Id at paras 92-3.

[15] Id at paras 94 and 155.

[16] Id at para 119.

[17] See [23] above.

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

[19] Id at para 150.

[20] Id at para 183.5.1.

1. The decision of the City of Johannesburg alternatively Johannesburg Water (Pty) Ltd to limit free basic water supply to 25 litres per person per day or 6 kilolitres per household per month is reviewed and set aside.
2. The forced installation of prepayment water meter system in Phiri Township by the City of Johannesburg alternatively Johannesburg Water (Pty) Ltd without the choice of all available water supply options, is declared unconstitutional and unlawful.
3. The choice given by the City of Johannesburg alternatively Johannesburg Water (Pty) Ltd to the applicants and other similarly placed residents of Phiri of either a prepayment water supply or supply through standpipes is declared unconstitutional and unlawful.
4. The prepayment water system used in Phiri Township is declared unconstitutional and unlawful.
5. The City of Johannesburg alternatively Johannesburg Water (Pty) Ltd is ordered to provide each applicant and other similarly placed residents of Phiri Township with–
   - 5.1 free basic water supply of 50 litres per person per day; and
   - 5.2 the option of a metered supply installed at the cost of the City of Johannesburg.
6. The respondents are jointly and severally ordered to pay the costs of the application, which costs include costs of three counsel.

Proceedings in the Supreme Court of Appeal

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

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[21] Id at para 183.

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

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

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

> "The appeal is upheld and the order by the court below is replaced with the following order:
>
> 1. The decision of the first respondent and/or the second respondent to limit the free basic water supply to the residents of Phiri to 25 litres per person per day or 6 kl per household per month is reviewed and set aside.
> 2. It is declared:

[23] Id at para 38.

[24] Id at para 24.

[25] Id at para 43.

[26] Id at para 58.

[27] Id at paras 55-7.

[28] Id at paras 58-60.

> *(a)* That 42 litres water per Phiri resident per day would constitute sufficient water in terms of s 27(1) of the Constitution.
>
> *(b)* That the first respondent is, to the extent that it is in terms of s 27(1) of the Constitution reasonable to do so, having regard to its available resources and other relevant considerations, obliged to provide 42 litres free water to each Phiri resident who cannot afford to pay for such water.
>
> 3. The first and second respondents are ordered to reconsider and reformulate their free water policy in the light of the preceding paragraphs of this order.
> 4. Pending the reformulation of their free water policy the first and second respondents are ordered to provide each accountholder in Phiri who is registered with the first respondent as an indigent with 42 litres of free water per day per member of his or her household.
> 5. It is declared that the prepayment water meters used in Phiri Township in respect of water service level 3 consumers are unlawful.
> 6. The order in paragraph 5 is suspended for a period of two years in order to enable the first respondent to legalise the use of prepayment meters insofar as it may be possible to do so."[29]

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

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

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

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

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

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

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

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

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

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

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

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

[36] *Grootboom* above n 35.

[37] Cited above n 35.

[38] Section 26 of the Constitution states that:

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

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

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

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

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

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

[40] Cited above n 35.

[41] Id at para 39.

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

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

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

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

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

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

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

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

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

[55] A little further on the Court added:

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

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

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

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

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

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

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[45] Id at para 38.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[50] At [23] above.

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

[52] Section 1 of the Constitution provides that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The reasonableness of the City's Free Basic Water policy

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

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

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

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

which must consist of–

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

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

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

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

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

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

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

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

(c) Service Level 3,

which must consist of–

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

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

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

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

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

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

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

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

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

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

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

Rich and Poor

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

Per household versus per person allowance

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

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

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

Policy based on a misconception

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

Insufficient for large households

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

[58] Cited above n 8.

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

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

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

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

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

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

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

[61] See above n 60.

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

Inflexibility of the policy

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

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

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

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

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

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

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

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

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

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

Indigent registration policy

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

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

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

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

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

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

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[62] At [83] above.

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

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

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

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

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

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