THE

# Right to water

## A MATTER OF DIGNITY

From the COURTS

*Mazibuko and Others v City of Johannesburg and Others* (Centre on Housing Rights and Evictions as Amicus Curiae) (06/13865) [2008] ZAGPHC128 (30 April 2008)

According to the Department of Water Affairs and Forestry, "water is life, sanitation is dignity." Water, as a human right, is essential to sustain life, development and the environment. In *Mazibuko and Others v the City of Johannesburg and Others* the fundamental right to have access to sufficient water and the right to human dignity were tested.

### Facts

Prior to 2001, the residents of the City of Johannesburg (the City), except those resident in Phiri in Soweto, were entitled to unlimited water supply on credit. The residents of Phiri were only entitled to an unlimited water supply at a flat rate. In 2001 the City agreed to provide every household within the City with six kilolitres of free water per month. However, the residents of Phiri were to receive their six kilolitres via a prepayment meter system.

In this system, once the free water has been consumed, the water is automatically cut off. Once cut off, the consumer can only access water by obtaining prepaid tags with further water credits. Phiri, being one of the oldest and poorest townships of Soweto, had old and neglected water piping infrastructure that was losing the City water. As a measure to save water and renovate the infrastructure, the City introduced the prepayment water meters in Phiri in 2004.

### Issues

The applicants challenged the following policies of the City as being both unconstitutional and unlawful:

## key points

- The Court found that the City's consultation process leading up to the installation of prepayment meters was inadequate and "more of a publicity stunt than consultation".
- A consumer must be given reasonable notice of the provider's intention to limit or disconnect a service.
- The City's practice of forcibly installing the prepayment water meters in Phiri, Soweto, was therefore unconstitutional and unlawful.
- The Court also set aside the City's decision to limit the free basic supply of water to 25 litres per person per day and ordered it to provide the residents of Phiri with 50 litres per person per day.

- the disconnection of their unlimited fixed-rate water supply and the installation of the prepayment meters;
- the introduction and continued use of the prepayment water meters;
- the amount of free water allocated, being 25 litres per person or six kilolitres per household per month.

## Judgment

In a groundbreaking judgment, the Johannesburg High Court (the Court) criticised the municipality for its discriminatory approach to the provision of water.

The prepayment meters discriminated between the residents of Phiri and other residents of the City, since the latter were not subject to such meters. If the other residents of the City, for example in Sandton, a wealthy and formerly white area, fell into arrears, they were entitled to notices in terms of the by-law and were given an opportunity to explain and settle their arrears. The residents of Phiri, a poor and predominantly black area, had no such right.

The inherently racist connotation was, according to the Court, inescapable. The Court noted that "the underlying basis for the introduction of 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 area." Discrimination on the basis of geography, in the South African context, is often actually discrimination on the basis of race.

The Court held that the applicable by-laws of the City only authorised the City to install prepayment water meters as a penalty for contravention of the conditions for the supply of water services. The by-laws did not authorise the installation of these meters, and therefore such installation was unconstitutional and unlawful.

The implementation of the prepayment meters also violated section 33 of the Constitution, read with the Promotion of Administrative Justice Act 3 of 2000, which entitles everyone to lawful, reasonable and procedurally fair administrative action. The prepayment meters simply cut off the supply of water without notice.

While the Court was sympathetic to the loss of water and

the unrecoverable financial losses sustained by the City in the townships, it nevertheless felt that the manner in which the City went about curbing water usage was "worrisome".

The Court found that the consultation leading up to the adoption of prepayment meters was inadequate, and stated that the process was "more of a publicity stunt than consultation". No consultations had taken place and the residents of Phiri had been misled into believing that prepayment meters were the best option available.

The terms of the notices conveyed the installation of the prepayment meters as a *fait accompli*, and, in the Court's view, "The tone of the notice is both intimidating and presumptive."

The conclusion that the City's process of consultation and engagement was nothing more than a smokescreen was glaringly obvious. In the result, the procedure used by the City in the installation of the prepayment meter system was grossly unfair and unreasonable. A consumer had to be given a reasonable notice of the provider's intention to limit or disconnect the service. Moreover, no consumer could be denied access to water where he or she proved that he or she was unable to pay for such services.

The Court ruled that the City's practice of forcibly installing prepayment water meters in Phiri, Soweto was unconstitutional.

It also set aside the City's decision to limit its free basic water supply to 25 litres per person per day and ordered it to provide the residents of Phiri with 50 litres per person per day. The Court stated that "25 litres per person day is insufficient for the residents of Phiri", whom it described as "poor, uneducated, elderly, sick, ravaged by HIV / AIDS and reliant on state pensions and grants." The Court stated further that "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 rights to health and to lead a dignified lifestyle."

The Court found that increasing the free basic water supply would not put significant strain on the City's water and financial resources, especially if the free basic water already supplied to rich households was redistributed to the poor. The City was further directed to give the residents of Phiri the option of an ordinary credit metered water supply.

In many instances, the articulation of pro-poor policies, particularly by the bigger cities, appears to be little more than lip service.

## Comment

It is increasingly evident that socio-economic rights have teeth. This judgment shows a careful and sensitive understanding of the law, of the City's obligations and, above all, of the community's needs.

However, this judgment dealt specifically with the situation in Phiri township. It has binding force in the jurisdiction of the Witwatersrand High Court. Pre-paid water meters in other municipalities are thus not automatically unlawful as a result of the judgment unless they are succesfully challenged in the relevant high court. The City of Johannesburg has indicated that it will appeal the decision. If the judgment is confirmed in the Supreme Court of Appeal or the Constitutional Court, it will have application throughout the country.

While this case is likely to go all the way to the Constitutional Court, the judgment nevertheless speaks volumes on the City's approach to the poor and the vulnerable. In many instances, the articulation of pro-poor policies, particularly by the bigger cities, appears to be little more than lip service. It is cause for concern that, at times, municipalities impose their policies on poor and vulnerable communities through subtle coercion masquerading as 'consultation'. The courts are becoming alert to this and are more vigilant and quite willing to enforce the rights of communities.

Municipalities should take more care to ensure that the spirit, as much as the letter, of the values enshrined in the Constitution is adhered to in their policies. As the sites where socio-economic realities are experienced, municipalities must be more sensitive to the needs of their communities, especially the poor and vulnerable. If they are not, they will surely face the wrath of the courts with punitive effect.

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