Muddying the waters

The Supreme Court of Appeal's judgment in the *Mazibuko* case

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City of Johannesburg and Others v Lindiwe Mazibuko and Others Case No 489/08 [2009] ZA SCA 20 (25 March 2009)

On 25 March 2009, the Supreme Court of Appeal (SCA) handed down judgment in the *Mazibuko* case. The case was an appeal against the judgment of the Johannesburg High Court (now the South Gauteng High Court) of 30 April 2008, concerning the sufficiency of the City of Johannesburg's free basic water (FBW) policy and the lawfulness of prepayment water meters (PPMs).

Background

In 2000, the City of Johannesburg (the City) experienced a fiscal crisis. From the City's perspective, it became increasingly important to minimise inefficiencies and revenue losses in water and electricity supplies. One of the main areas of such identified inefficiencies and losses was Soweto, which (like most former township areas) did not have meters for water supply for each household. Rather, it had a 'deemed consumption system', which meant that each household (or property) was charged for 20 kilolitres of water each month, regardless of actual consumption. A consequence of the system was that most households could not afford the monthly charge and, by 2000, Soweto households owed the City millions of rands for water-related services. In addition, Soweto's apartheid-inherited water infrastructure was in a state of collapse, with inferior piping and numerous water leakages.

In 2002, the City devised a plan to repair the water infrastructure in Soweto. It was also obliged, in terms of the National Free Basic Water Policy and the Water Services Act 108 of 1997 (section 3 as read with section 9(1)(a) and Regulation 3(b) of the Regulations relating to Compulsory National Standards and Measures to Conserve Water, published in *Government Gazette* 22355, Notice R509, 8 June 2001 (National Standards Regulations)), to provide a minimum quantity of potable water of 25 litres per person per day or six kiloliters per household per month. However, it was not possible to allocate the FBW under the deemed consumption system as individual household water supply was not metered. This is one of the reasons which compelled the City to review the deemed consumption supply system in Soweto.

While other municipalities, such as eThekwini, replaced the deemed consumption system with conventional metering, the City chose to install PPMs throughout Soweto and other townships. Conventional meters supply water on credit. Prepayment meters, however, have an automatic disconnection function that physically restricts water consumption in poor households to the obligatory FBW allocation, unless the household purchases additional water in the form of water credit vouchers. Calling the programme Operation *Gcin'amanzi,* meaning 'conserve water' in isiZulu, the City chose the poorest suburb of Soweto, Phiri, as the pilot project for the roll-out of prepayment meters.

The City's water services provider, Johannesburg Water (Pty) Ltd, began the bulk infrastructure construction work for the installation of PPMs in Phiri on 11 August 2003, and individual household prepayment meters were installed starting in February 2004. Initially, the only choice given to households was between a prepayment meter and total water disconnection. Households that rejected the prepayment meters had to suffer for months without any on-site access to water until they capitulated and accepted prepayment meters. Later on, households that refused prepayment meters were given an outside tap (standpipe), with explicit instructions not to connect a hose to the tap (the punishment for violating these terms being compulsory PPM installation). For these households, a standpipe represented a major regressive measure as, for example, they now had to collect water in a bucket to flush the toilet and wash the dishes.

For the households with prepayment meters, access to water was similarly restricted. With an average of 13 or more people living on each property, the standard FBW allocation (of six kilolitres per household per month, providing each person in a household of eight with 25 litres per day) was grossly insufficient to meet everyone's basic sanitary needs. For those who exhausted their FBW supply before the end of the month, failure to purchase additional water credit resulted in an automatic and immediate disconnection of water supply. This meant no water for those who could not afford additional water until the next month's FBW allocation.

The High Court case and judgment

Responding to the hardships and infringements of basic rights associated with the imposition of PPMs, in mid-2004, the residents of Phiri decided to build a legal case against the City. With the support of social movements – the Anti-Privatisation Forum and the Coalition Against Water Privatisation – and the assistance of the Freedom of Expression Institute (FXI) and the Centre for Applied Legal Studies (CALS), the application was launched in the Johannesburg High Court on 12 July 2006. (The two years it took to initiate the litigation testifies to how difficult it is to mount socio-economic rights cases.)

The application was brought by five residents of Phiri, on behalf of themselves, all similarly positioned residents of Phiri and everyone in the public interest. The applicants were initially represented by FXI, but CALS took over as their attorneys from March 2007. The respondents were the City of Johannesburg, Johannesburg Water and the Minister of Water Affairs and Forestry. The Centre on Housing Rights and Evictions (COHRE), a Geneva-based international organisation focusing on housing and water rights, intervened as *amicus curiae* to raise relevant issues of international and comparative law.

The applicants challenged the sufficiency of the City's FBW policy, arguing that this policy was inconsistent with section 27(1)(b) of the Constitution of South Africa (Constitution), which recognises the right of everyone to sufficient water. They also challenged the legality of PPMs in terms of the City's water services by-laws and the Water Services

Act 108 of 1997. In addition, they argued that by targeting poor residents (who also happened to be black) for the rollout of PPMs, the City had violated section 9(3) of the Constitution, which prohibits unfair discrimination. The applicants asked the City to provide them and all similarly positioned residents of Phiri with 50 litres of FBW per person per day and the option of the conventional meters provided to the wealthier, mostly white, residents of Johannesburg.

The application was heard in the High Court (3–5 December 2007) and judgment was handed down on 30 April 2008. In a landmark judgment (discussed by Khalfan and Conteh, 2008: 12–15), Judge Moroa Tsoka ruled in favour of the applicants, holding that the City's imposition of PPMs was unlawful and unconstitutional. He ordered the City to provide the applicants and all similarly positioned residents of Phiri with 50 litres of free water per person per day and the option of a conventional metered water supply at the City's cost. The court accepted the expert evidence of Peter Gleick, a highly regarded international expert on water rights, that 50 litres per person was the minimum quantum of water needed by Phiri residents to meet their basic needs, to avoid threats to their health and to live in dignity. It further held that it was 'uncontested that the respondents [had] the financial resources' to increase the FBW allocation. In these circumstances, it was unreasonable for the City to limit its FBW allocation to 25 litres per person per day when it was capable of providing 50 litres per person 'without straining its capacity on water and its financial resources' (para 181).

The High Court accepted expert evidence that 50 litres per person per day was the basic needed to meet basic needs, to avoid threats to health and to live in dignity.

The rollout of PPMs only in predominantly black residential areas was also found to contravene the constitutional right to equality. As Judge Tsoka observed:

> 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 ... 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 representation concerning the arrears and the 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 (para 94).

The Court also held that the introduction of PPMs exclusively in an impoverished historically black area and not in historically rich white areas was based on an invidious stereotype that poor, black consumers were generally defaulters while rich consumers were reliable debtors. As the Judge observed, 'Bad debt is a human problem, not a racial problem.' The targeting of historically black geographical areas for the introduction of PPMs also constituted indirect racial discrimination (paras 154–155). Finally, the Judge held that PPMs had the effect of arbitrarily limiting access to water by the applicants. It also placed a disproportionate burden on poor black women who, in a patriarchal society such as ours, bore the brunt of household chores and care-giving responsibilities (para 179).

The Supreme Court of Appeal judgment

Unsurprisingly, the City, Johannesburg Water and the Minister of Water Affairs and Forestry appealed against the entire High Court judgment. The appeal was heard before five judges of the SCA on 23–25 February 2009. On 25 March 2009, Judge Piet Streicher handed down a unanimous judgment of the SCA. In the main, the judgment upheld the appeal, but it made a number of orders which affirmed some aspects of the residents' case.

Despite the fact that the appeal was allowed, the SCA found in favour of the respondents (the residents of Phiri) in relation to the free water policy by the City and the introduction of PPMs.

The 'direct reliance' rule

The SCA dismissed the appellants' argument that the residents of Phiri could not rely directly on their water rights as protected in section 27 of the Constitution, which guarantees everyone the right of access to sufficient water (the 'direct reliance' rule). Rather, the

SCA found that the residents of Phiri were not obliged to ground their claim exclusively in terms of the Water Services Act and the National Standards Regulations promulgated in terms of the Act.

The SCA ruled that such measures, taken to give effect to section 27, were not intended 'to cover the field and to deprive anyone of [their] right to rely on the provisions of s 27(1)' (para 13).

We are of the view that the SCA's approach is sound, as section 27(2) clearly envisages that both legislative and 'other measures' must be taken to achieve the realisation of the various rights in section 27(1). Thus, challenges to water policies cannot be based on existing legislation, as this would place a constitutional straitjacket on litigants seeking to challenge the adequacy of existing legal and policy measures which impact on the realisation of socio-economic rights. In any event, it is clear that the Act and the regulations were intended to provide a minimum national standard of 25 litres per person per day. It was therefore important to answer the critical question of whether the decision of the City of Johannesburg to provide no more than this national minimum was consistent with its constitutional obligations to take reasonable measures to ensure that everyone has access to 'sufficient water' (section 27(1)(b) read with (2)).

The critical question was whether the City's decision to provide no more than the national minimum was consistent with its constitutional obligations to take reasonable measures to ensure that everyone has access to sufficient water.

The FBW water policy

The SCA considered section 3 of the Water Services Act along with regulation 3(b) of the National Standards Regulations as measures to give effect to the constitutional right of everyone to have access to 'sufficient' water. It held that the 25 litres per person per day provided for in regulation 3(b) constituted 'the minimum that may constitute sufficient water' (para 14). However, as the circumstances of different communities differed, with some having access to waterborne sanitation and others only to pit latrines, it was incumbent on the City and other local authorities to consider what would constitute a sufficient supply in the light of such differing particular contexts.

In evaluating what would constitute a sufficient water supply, the Court endorsed three interrelated standards concerning life, health and dignity (para 17). It found support for these standards in international law, particularly the influential General Comment 15 adopted in 2002 by the UN Committee on Economic, Social and Cultural Rights (CESCR) (UN doc E/C.12/2002/11). The Court further held that assessing the quantity of water needed for a dignified existence required a context-sensitive evaluation that took into account, for example, whether people needed additional water because they relied on flush toilets (such as the Phiri residents). It found that the 25 litres standard could not have taken into account the water needs of communities relying on waterborne sanitation (para 18).

The Court proceeded to consider the quantity of water which would meet the abovementioned standards of sufficiency in respect of the Phiri residents. It did so by referring to the evidence of two experts, Peter Gleick and Ian Palmer, on behalf of the residents and the City, respectively. Where there was a discrepancy in the evidence of the experts, it tended to rely on the evidence of Palmer for the respondents. Taking into account the quantity of water required for various household needs such as drinking, food preparation, bathing and toilet flushing, the Court held that 42 litres of water per person per day would constitute sufficient water for the Phiri residents in terms of section 27(1) of the Constitution (para 24).

The next major issue considered by the Court was whether the City was obliged to provide 42 litres (or a lesser quantity of water) free of charge. The City contended that there was nothing in the Water Services Act or regulations that obliged them to provide 'free' water. In interpreting the phrase, 'access to', in section 27(1)(b), the Court endorsed the CESCR's stipulation that 'access to water entails both physical and financial access' (General Comment 15, para 12(c)). In other words, water should be affordable for all 'and must be accessible to all including the most vulnerable or marginalized sections of the population,

in law and in fact' (para 28). The contention that the City was not obliged to provide at least some quantity of water free of charge was rejected on the basis of the Court's interpretation of the Act, the FBW policy of the government and the City, and the obligation to ensure that water was economically accessible in terms of section 27(1) of the Constitution. In determining the extent of the obligation to provide water free to people living in poverty, the SCA stated that the key criterion was what would be reasonable, taking into account the City's available resources and other competing claims.

The Court considered the fact that the City had various other claims on its budget. It concluded, however, that the City's decision to provide only six kilolitres of water per household (or 25 litres per person per day) was 'materially influenced by an error of law' and fell to be set aside on that basis (para 38). Essentially, the City had failed to appreciate that it had both statutory and constitutional obligations to provide a sufficient amount of water, including, reasonable provision of free water for those who could not afford to pay for it.

Having set aside the City's FBW policy, the Court ordered the City to formulate a revised water policy 'in the light of the finding that it is constitutionally obliged to grant each Phiri resident who cannot afford to pay for water access to 42 litres of water per day free in so far as it can reasonably be done having regard to its available resources and other relevant considerations' (para 43). As an incentive to the City to adopt a revised free water policy as soon as possible, and to cater for those in dire need of water, the City was required to provide each account holder in Phiri who is registered with it as an indigent with 42 litres of free water per day per household member.

There are certain positive features of the Court's reasoning in relation to this aspect. These include its willingness to engage with the substantive interests and values that affect water as a human right, and to articulate normative standards against which the sufficiency of the water supply to an impoverished community must be measured. The Court was also unambiguous in affirming that the right of 'access to' water was not equivalent to access through exclusively commercial mechanisms. It included a constitutional obligation to ensure that water is economically accessible to the poor, including an obligation to supply free water to meet basic needs. The serious consideration which the Court gave to leading international law standards on water rights in interpreting section 27 of the Constitution and its engagement with expert evidence on the water needs of the Phiri community are also positive features of the judgment.

More problematic is the reduction of 50 litres of water to 42 litres on the basis of preferring Palmer's evidence in cases where his figures diverged from those of Gleick. A generous and substantive interpretation of the evidence regarding the relevant water needs would have been preferable in the light of the vital interests protected by the right to water – particularly in an impoverished community such as Phiri, with a high HIV/AIDS prevalence.

Furthermore, there are difficulties with the Court's construction of section 27 of the Constitution read as a whole. Section 27(1)(b) defines the full scope of the right to which 'everyone' is entitled. Section 27(2) describes the nature of the state's obligations in achieving the realisation of this right. The state must take 'reasonable legislative and other measures, within its available resource, to achieve the progressive realisation' of this right. An approach that implies that 42 litres of water per person per day represents the full extent of the right guaranteed in section 27(1)(b) (ie a ceiling), would be unduly limiting of the scope of the right and would also fail to take into account the diversity of water needs of differently placed groups and communities.

A better interpretation is that 50 litres (or 42 litres, if the SCA's assessment is accepted) of water per person per day is what currently constitutes a reasonable measure in terms of section 27(2). However, relevant organs of state remain under an obligation to take reasonable measures towards the full realisation of the right as defined in section 27(1)(b). The assessment of the reasonableness of the measures adopted by the state at a particular juncture should take into account the lived realities of poor communities and the impact of a lack of water on their lives, and the implications of a lack of water for women and the ability of poor communities to participate fully in the activities of society. Moreover, this assessment cannot occur without a prior normative understanding being developed of the right to sufficient water and the

interaction between the right to equality and the need for ecologically sustainable development and use of natural resources. It is only against this normative and contextual background that a proper judgment can be made on whether a reliance by organs of state on resource constraints can be deemed reasonable.

The lawfulness of the PPMs

Regarding PPMs, the SCA held that the City's Water Services By-Laws of 21 May 2004 did not authorise the installation of a PPM other than as a penalty for breaching the conditions of service of a standpipe. Consequently, the installation of PPMs in Phiri was found to be *ultra vires* and unlawful (paras 57 and 58).

The SCA rejected the City's argument that the cutting off of water services by a prepayment meter when the credit ran out did not constitute a discontinuation of services (para 55). It further held that

> procedures for the limitation or discontinuation of water services must be fair and equitable, provide for reasonable notice of intention to limit or discontinue the services and for an opportunity to make representations. They may 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 basic services (para 54).

In their arguments in the SCA, the residents highlighted the unlawfulness of both the installation of PPMs and the functioning of PPMs. Although the SCA correctly ruled that the PPM installation was unlawful, the judgment failed to deal meaningfully with the issue of the inherent unlawfulness of PPMs, such as their automatic disconnection without satisfying the procedural requirements of reasonable notice and opportunity to make representation prior to disconnection.

While the judgment briefly mentioned the legal requirements for fair and equitable procedures for the discontinuation of water supply (located in section 4(3) of the Water Services Act), the SCA did not go on to decide whether PPM functioning violated these requirements. Nor did the SCA base its order on any finding in this regard. The neglect of this critical component of the case against PPMs contributed to the ineffective remedy on the issue of PPMs, which we discuss next.

Moreover, in contrast with the High Court judgment, the SCA's judgment was also notable for not dealing at all with the argument that the imposition and continued application of PPMs in impoverished black communities and the credit supply option offered to communities in historically white areas constituted a breach of equality rights.

The remedy

The SCA starts off promisingly by reinforcing the principle laid down by the Constitutional Court in *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) that 'an appropriate remedy must mean an effective remedy', and that where an 'infringement of an entrenched right has occurred, it must be effectively vindicated' (paras 69 and 44). However, in fact, the SCA provides neither an effective remedy nor a vindication of the infringed rights.

On the issue of FBW, the SCA's interim order is exclusionary, restricting the allocation of the 42 litre amount to Phiri residents on the City's indigency register, despite having found a long-standing violation of the right to water. In addition, the evidence presented by the residents to the SCA was that the indigency register was woefully under-representative of the number of formally qualifying indigent households. Moreover, as highlighted in the record, the City's indigency register captures only each account holder, and not the number of people living in a household or on a property. This means that there is no way for the interim order to achieve the objective of providing 'each account holder in Phiri who is registered ... as an indigent with 42 litres of free water per day per member of his or her household' (para 62(4)).

The SCA's order in respect of PPMs is even less effective and more problematic. Having found that the installation of PPMs in Phiri was unlawful, the SCA ruled that obliging the City to remove them was an inappropriate remedy, and that a better remedy, which would safeguard residents who genuinely preferred PPMs, was to suspend the order of invalidity for a period of two years to enable the City to legalise the use of PPMs. Here, the judgment is not only wrong in its inference that the High Court ordered the removal of PPMs (it did not), but it is also wrong in its legal logic. Having found that the City had acted unlawfully in installing PPMs in Phiri, the SCA ought to have upheld the High Court order, which obliged the City to provide residents of Phiri with the option of a conventional water meter at the City's cost. This remedy would have provided effective

relief to residents opposed to PPMs, while allowing residents who preferred PPMs to retain them.

Finally, possibly because the SCA did not deal with the arguments about the inherently unlawful functioning of PPMs, the order is lamentably weak in its prescriptions of the 'steps' the City should take to legalise the use of prepayment meters In the context of the Water Services Act's procedural requirements, it is doubtful that any simple amendment of the City's by-laws to allow for the installation of PPMs in the first instance would render PPMs lawful, as these by-laws would not operate retrospectively. As things stand, even if the City were to merely amend the by-laws as advised by the SCA, it would still be open to Phiri residents to raise the issue of the inherent unlawfulness of PPMs.

Conclusion

Despite promising aspects, the SCA's judgment ultimately fails to provide normative clarity in interpreting the right of access to sufficient water and the nature of the obligations it imposes on water services providers. It also falls short of its stated intention to provide an effective remedy for the constitutional infringements caused by FBW supply and the use of PPMs.

At the time of writing, the applicants had applied for leave to appeal to the Constitutional Court against the SCA judgment. The appeal raises some of the shortcomings in the SCA decision discussed above.

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The background section draws from Jackie Dugard's paper 'Rights, regulation and resistance: The Phiri water campaign' (2008) 24(3) *SAJHR* **588-606.**

Reference

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