



CONSTITUTIONAL COURT OF SOUTH AFRICA

Lindiwe Mazibuko and Others v City of Johannesburg and Others

Case CCT 39/09
[2009] ZACC 28

Date of Judgment: 8 October 2009

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

Today, the Constitutional Court delivered a judgment in a case concerning the right of access to water entrenched in section 27 of the Constitution, which provides that everyone has the right to “sufficient water”. The case considers the lawfulness of Operation Gcin’amanzi, a project the City of Johannesburg piloted in Phiri in early 2004 to address the severe problem of water losses and non-payment for water services in Soweto. This project involved re-laying water pipes to improve water supply and reduce water losses, and installing pre-paid meters to charge consumers for use of water in excess of the 6 kilolitre per household monthly free basic water allowance.

Mrs Mazibuko and four other residents of Phiri, Soweto (the applicants) challenged, firstly, the City of Johannesburg’s Free Basic Water policy in terms of which 6 kilolitres of water are provided monthly for free to all households in Johannesburg and, secondly, the lawfulness of the installation of pre paid water meters in Phiri. The three respondents are the City of Johannesburg (the City); Johannesburg Water and the national Minister for Water Affairs and Forestry.

The applicants succeeded in the South Gauteng High Court. The Court found that the installation of pre-paid water meters in Phiri was unlawful and unfair. It also held that the City’s Free Basic Water policy was unreasonable and therefore unlawful. It ruled that the

City should provide 50 litres of free basic water daily to the applicants and “similarly placed” residents of Phiri.

On appeal, the Supreme Court of Appeal varied this order. The Supreme Court of Appeal held that 42 litres of water per day would be “sufficient water” within the meaning of the Constitution, and directed the City to reformulate its policy in light of this conclusion. The Supreme Court of Appeal also held that installation of the pre-paid water meters was unlawful on the ground that the City’s By-laws did not make provision for them in these circumstances. The Court gave the City two years to rectify the By-laws. The Supreme Court of Appeal did not consider whether the manner in which the meters were installed was fair.

The applicants applied to this Court for leave to appeal against the judgment of the Supreme Court of Appeal and, in effect, sought reinstatement of the High Court order. All the respondents also sought leave to cross appeal the order of the Supreme Court of Appeal.

All the parties before this Court, including the applicants, accepted that the old system of water supply to Soweto was unsustainable and had to be changed. The applicants however asserted that the City’s policy and the manner in which it was implemented is unlawful, unreasonable, unfair and in breach of their constitutional right to sufficient water.

Once the City had opted for Operation Gcina’manzi, there was extensive consultation with communities about what the project would entail and how it would be implemented. The initial implementation in early 2004 caused unhappiness amongst residents. By the time the applicants brought their challenge in the High Court eighteen months later, the vast majority of residents had accepted pre-paid water meters. According to a survey the City undertook, they were satisfied with the new system. Moreover, the amount of unaccounted for water in Soweto had been successfully curtailed.

The City provided a detailed account of Operation Gcin’amanzi and how it came to be adopted and implemented. It also made plain that its Free Basic Water policy has been under constant review since it was adopted. In particular, the City sought to ensure that those with the lowest incomes are provided not only with an additional free water allowance, but also with assistance regarding the charges levied for other services provided by the City, such as electricity, refuse removal and sanitation. The City accepts that it is under a continuing obligation to take measures progressively to achieve the right of access to sufficient water.

The Constitutional Court held that the obligation placed on government by section 27 is an obligation to take reasonable legislative and other measures to seek the progressive realisation of the right. In relation to the Free Basic Water policy, therefore, the question is whether it is a reasonable policy. The Court notes that it is implicit in the concept of progressive realisation that it will take time before everyone has access to sufficient water.

The Court concluded, in contrast to the High Court and the Supreme Court of Appeal, that it is not appropriate for a court to give a quantified content to what constitutes “sufficient water” because this is a matter best addressed in the first place by the government. The

national government has adopted regulations which stipulate that a basic water supply constitutes 25 litres per person daily; or 6 kilolitres per household monthly (upon which the City's Free Basic Water policy is based).

The Court concluded that it cannot be said that it is unreasonable for the City not to have supplied more, particularly given that, even on the applicants' case, 80% of the households in the City will receive adequate water under the present policy. The Court noted that 100 000 households within Johannesburg still lack access to the most basic water supply, that is a tap within 200m of their household.

On pre-paid water meters, the Court held (contrary to the High Court and the Supreme Court of Appeal) that the national legislation and the City's own by-laws authorise the latter to introduce pre-paid water meters as part of Operation Gcin'amanzi. The Court concluded that the installation of the meters was neither unfair nor discriminatory.

The Court affirmed the democratic value of litigation on social and economic rights. It noted that the applicants' case required the City to account comprehensively for the policies it has adopted and establish that they are reasonable. During the litigation, and perhaps because of it, the City has repeatedly reviewed and revised its policies to ensure that they do promote the progressive achievement of the right of access to sufficient water.

The Court thus upheld the appeal by the City and Johannesburg Water and the Minister. The orders of the High Court and Supreme Court of Appeal were, therefore, set aside.

