IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG PROVINCIAL DIVISION, PRETORIA

CASE NO: 15437/15

In the matter between:

CONCERNED RESIDENTS OF FLAG BOSHIELO WEST	First applicant
SMAKELENG JACOB BALOYI	Second Applicant
KLAAS BAPELA	Third Applicant
SELLO FREDDIE PHEFADI	Fourth Applicant
MARIA MOKOMANE	Fifth Applicant
ELSIE LETAGENG	Sixth Applicant

and

SEKHUKHUNE DISTRICT MUNICIPALITY	First Respondent
EPHRAIM MOGALE LOCAL MUNICIPALITY	Second Respondent
MEC, DEPARTMENT OF WATER AFFAIRS, LIMPOPO	Third Respondent
MINISTER OF WATER AND SANITATION	Fourth Respondent
MINISTER OF BASIC EDUCATION	Fifth Respondent
MINISTER OF HEALTH	Sixth Respondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Seventh Respondent

APPLICANTS' HEADS OF ARGUMENT

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Introduction

1. At issue in this application is the realisation of the rights of poor communities to access an adequate supply of water. In ***Mazibuko***, the Constitutional Court noted the importance of water to our lives and livelihoods. It held: "*Water is life. Without it, nothing organic grows. Human beings need water to drink, to cook, to wash and to grow their food. Without it, we will die. It is not surprising then that our Constitution entrenches the right of access to water.*"[1]

2. The Court also described the scourge of unequal access to water supply in the following terms: "*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 15 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.*"[2]

[1] Mazibuko v City of Jhb 2010 (4) SA 1 (CC) at para 1
[2] Para 2

3. The applicants in this matter belong to the disadvantaged group described by the Constitutional Court. They comprise five communities[3] who have been unlawfully denied access to water by the first respondent, the Sekhukhene District Municipality ("the municipality"). It is common cause that the first respondent is the applicants' water service provider. It is also common cause that the applicants "*are dependent on the Flag Boshielo purification plant for provision of basic water services*".[4]

4. The applicants took occupation of the villages in 1986. From 1986 to 2004 they had access to an uninterrupted supply of water from the Elandskraal water plant.[5] In 2004 the Flag Boshielo plant was constructed and the applicants were told by the municipality that they would henceforth receive water from Flag Boshielo, not Elandskraal.[6] In 2004 Elandskraal was demolished and the applicants' water pipes connected to Flag Boshielo.[7] Later, from 2009, the municipality deprived the applicants of access to sufficient water by distributing water once a week, and on occasion not at all for a period of three to four weeks at a time.[8] At present this state of affairs prevails.

5. Purporting to rely on statistics from Lepelle Northern Water, the municipality contends that the applicants are being provided with water in excess of the prescribed statutory minimum.[9] If this is found to not be the case then the municipality contends that the applicants' right to water is not absolute and limited to its available resources in terms of section 27(2) of the Constitution.[10] Further the policy legislating provision of water below the statutory minimum is a justifiable limitation in terms of section 36 of the

[3] The applicants hail from the villages of Elandskraal, Morarela, Mbuzini,Tsansabela and Dichoeung. The composition of the communities and their socio-economic profile is at pages 20-23 paras 30 to 46
[4] Answering Affidavit Page 454 para 35
[5] Founding Affidavit Page 24 para 47
[6] Id at para 48
[7] Id
[8] Id at para 49
[9] Answering Affidavit Page 458 para 49 and Page 459 para 52
[10] Id Page 460 paras 56 and 57 and Page 461 para 61

Constitution. [11] Lastly, if the applicants are successful the municipality seeks a suspended declaration of invalidity for 36 months "*to devise a plan……for the supply of basic water*". [12]

Structure of heads

6. These heads commence with a discussion on the legal framework governing access to water and then proceed to address the municipality's opposition that:

   6.1. it has supplied the applicants with sufficient water;

   6.2. to the extent that it has not, the applicants' right to water is not absolute; and

   6.3. that it has justifiably limited the applicants' right to water in terms of section 36 of the Constitution.

Legal Framework on access to water

7. Section 27(1)(b) of the Constitution guarantees to everyone the right of access to sufficient food and water. Section 27(2) obliges the state to *"take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation"* of this and other entrenched socio-economic rights.

8. Section 3 of the WSA gives effect to section 27(1)(b). It provides that:

[11] Id
[12] Id Page 467 para 86

"(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."

9. In addition, the preamble to the WSA records that it was promulgated to provide for amongst others the right of access to a basic water supply, necessary to ensure sufficient water and an environment not harmful to health or well-being. The preamble acknowledges also the duty of all spheres of government to ensure that water supply services are provided in a manner that is efficient, equitable and sustainable.

10. Section 1, the definition section to the WSA defines a basic water supply 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;*

11. A basic supply is thus a minimum standard of sufficient quantity and quality to support life and personal hygiene. Anything below this standard of provision is unlawful.

12. Section 2 of the WSA records two of its main objects as being to facilitate the rights of access to a basic water supply, as defined and to set national standards and norms in respect of water services. The Minister, acting in terms of section 9[13] of the WSA has promulgated the *Regulations relating to compulsory national standards and measures to conserve water*[14] ("hereinafter the National Water Services Regulations") which prescribe the "**compulsory national standards**" for the provision of water services. Regulation 3 of which governs the minimum standard for the supply of water. It provides that:

> *"**The minimum standard for basic water supply services is**–*
>
> *(a) ….*
>
> *(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."*

13. Regulation 3(b) thus defines the content of a "basic water supply" as contemplated in the WSA.

14. The WSA also prescribes in section 4 conditions for the provision of water services, including the circumstances for the limitation or discontinuation of such services. It

[13] Section 9 of the WSA 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".
[14] *Government Gazette,* Gazette No 22355, Notice R509 of 2001 (8 June 2001)

requires that water services provided in terms of conditions set by water services providers must, among others, accord with the provision of water services contained in by-laws made by the relevant water services authority. [15] Those conditions must provide for the circumstances under which water services may be limited or discontinued and the procedures for limiting or discontinuing water services.[16] Section 4(3) goes on to require that procedures for the limitation or discontinuation of water services be fair and equitable[17] and, make provision for reasonable notice of intention to limit or discontinue water services as well as for an opportunity to make representations unless, other consumers would be prejudiced, there is an emergency situation, or the consumer has interfered with a limited or discontinued service.[18]

15. In summary, the first respondent must take reasonable measures to progressively realise the applicants' right to adequate water. Within this right, the state has statutorily determined the quantity of basic water supply that each person is entitled to. This has been determined by the Minister in Regulation 3(b). In terms of Regulation 3(b) the municipality is obliged to supply each person with 25 litres of potable water per day at a flow rate of not less than 10 litres per minute and this supply cannot be discontinued for more than seven days in any given year. The municipality must also in its development plan provide for measures to achieve this supply so as not to violate the right of access to a basic supply of water. Any limitation or discontinuation of the applicants' basic water supply must be on reasonable notice and be fair and equitable.

The municipality has denied the applicants access to water

[15] Section 4(2)(b)
[16] Section 4(2)(c)(iv) and (v)
[17] Section 4(3)(a)
[18] Section 4(3)(b)(i) – (iii)

16. The founding affidavit is replete with instances where the municipality violates the applicants' rights to access basic water. On close inspection, one material fact underpins this application namely that the municipality unlawfully denies the applicants access to water. The applicants' history of engagement with the municipality is comprehensively set out in the founding affidavit.[19]

17. Notwithstanding this engagement the applicants, on the occasions that they receive water, are supplied once a week or in some instances not at all. Water is supplied from the Flag Boshielo Plant[20] administered on behalf of the municipality by Lepelle Northern Water. Water is meant to be distributed in accordance with a rotation plan adopted by the municipality and implemented by the Lepelle Northern Water Board.[21] The rotation plan operates in accordance with the February 2013 Free Basic Water Policy ("FBWP"), which this application seeks to impugn.[22]

18. In terms of the plan residents of Morarela and Dichoeung are meant to be supplied three days a week, namely, Tuesday, Wednesday and Friday. Tsansabela is meant to be supplied twice on a Friday. Elandskraal once only and on a Friday and finally Mbuzini is meant to be supplied once on a Tuesday and twice on a Friday.[23] The distribution schedule, as these heads demonstrate is in the first instance unlawful and second, not complied with by the municipality.

[19] Founding Affidavit Pages 26 to 33 paras 51 to 77
[20] Page 215
[21] Page 208
[22] Pages 42 to 44 paras 119 to 121
[23] Page 208

19. The residents of Morarela for example, receive water once week and in some cases are not supplied for weeks on end.[24] In yet other instances some of the applicants share water sources with livestock,[25] and have little option but to pay for the delivery[26] and supply of water. Yet others, such as the residents of Dichoeung, collect water from rivers and springs with the aid of wheelbarrows.[27] In the high lying areas it is quite prevalent for many of the applicants making up these communities to have no access to water. In these cases, they resort to purchasing water.

20. The municipality has not placed on record any substantive response to these allegations. It contends baldly, with no facts to substantiate its averments that the applicants are being supplied with quality and quantity of water prescribed by law. As the founding and replying papers show, this is not the case. On the Plascon Evans[28] test, the municipality has failed to adduce sufficient evidence to raise a bona fide dispute of fact. This court can accordingly decide the application based on the applicants' version of events.

21. In this regards, the well-known test in relation to disputes of fact was laid down by the Appellate Division where the following was held:

"*It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact*

[24] Page 72 para 5
[25] Page 114 para 7
[26] Id
[27] Page 128 para 11
[28] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)

alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard Room Hire Co (Pty) Ltd v. Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1163 - 5; Da Mata v. Otto NO 1972 (3) SA 858 (A) at 882D - H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court (cf Petersen v. Cuthbert & Co Ltd 1945 AD 420 at 428; Room Hire case supra at 1164) and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg Rikhoto v. East Rand Administration Board and Another 1983 (4) SA 278 (W) at 283E - H)."

22. In Wightman t/a JW Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 (SCA), the SCA held that:

"*[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of*

circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter."

The limitations argument

23. At the core of this review lies two issues, first that the *de facto* supply of water to the applicants is below the mandated statutory minimum and unlawful. This was discussed in the previous section.

24. The second issue is that the FBWP and the rotation plan adopted by the municipality is unlawful. In relation to the legality of its policy the first respondent contends that, if it is lacking, the applicants'' right to water under section 27(1) is in any event restricted by section 27(2) read with section 3(1) of the WSA.[29] It contends further that even if its FBWP limits the applicants right of access to water in terms of section 27(1), such limitation is justifiable in terms of section 36 of the Constitution.[30]

[29] Page 460 para 56
[30] Id para 57

25. In *Mazibuko and Others v City of Johannesburg and Others*[31] the Constitutional Court held that in determining the content of 27(1)(b) of the Constitution as read with section 27(2) the first question to be answered was the nature of the obligation imposed on the state by the Constitution in guaranteeing to all a right of access to sufficient water.[32] In ruling on the ambit of the right, the Court found that section 27 imposed an obligation on the state to refrain from interfering with the right of access to water. It held that:

> *"[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, 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****.*

26. Insofar as the relationship between section 27(1)(b) and 27(2) was concerned the court held that:

> *[48] …..This issue has been addressed by this court in at least two previous decisions: Grootboom and Treatment Action Campaign (No 2). In Grootboom the court had to consider whether s 26 (the right to housing) entitles citizens to approach a court to claim a house from the State. Such an interpretation of s 26 would imply a directly enforceable obligation upon the State to provide every citizen with a house immediately.*

[31] 2010 (4) SA (1) CC
[32] Id at para 46

[49] This court concluded that s 26 does not impose such an obligation. Instead, the court held that the scope of the positive obligation imposed upon the State by s 26 is carefully delineated by s 26(2). 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) this court repeated this in the context of s 27(1)(a), the right of access to health care services:

'We therefore conclude that s 27(1) of the Constitution does not give rise to a self-standing and independent positive right enforceable irrespective of the considerations mentioned in s 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.'

[50] Applying this approach to s 27(1)(b), the right of access to sufficient water, coupled with s 27(2), 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.

27. Thus, there is, in the first place, a duty on the first respondent not to interfere with the applicants' right to access water: the negative aspect of the applicants' right. In *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others*[33], this was found to entail an obligation not to prevent or impair access, which extends not only to the state but also to

[33] 2005 (2) SA 140 (CC) paras 31 to 34

private parties. Whilst the court in *Jaftha* did not delineate when a measure would constitute a violation of a negative obligation, it did find that a violation would be proven where the measure in question permits of deprivation of access to an existing right.

28. Thus, the first respondent was constitutionally bound not to interfere with the applicants' right to water. It breached this obligation when in 2009 it deprived the applicants of access to a stable and continuous water supply by changing their water source from Elandskraal to Flag Boshielo, without explanation. The infringement arose when in moving the water supply from one plant to another, the first respondent deprived the applicants of access to an existing supply of water. Apart from the deprivation, which was unlawful in itself, any supply of water which was less than what was supplied prior to 2009 constituted a retrogressive measure which violated the negative obligation to respect the right of access to adequate water.[34]

29. What this court must thus be alive to on the question of negative violation, is that, before the applicants were deprived of access to water, they had sufficient access in terms of the legislated minimum when their water source was the Elandskraal plant. They were unceremoniously and without notice disconnected from the services of this plant and informed that going forward they would be supplied by Flag Boshielo.

Limitation of the right of access to water

30. Insofar as the alleged limitation is concerned, it is not the applicants' case that they have a self-standing and independent right to access water, divorced from the state's ability to progressively achieve the right within its available resources. It is the applicants' case that

[34] Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others 2005 (2) SA 140 (CC) para 34

the Minister has legislated the extent of the state's resources on this question in Regulation 3(b) and the first respondent flouts this standard by legislating for a lower level of supply in its FBWP and by factually supplying water in contravention of the WSA and Regulation 3(b).

31. The first respondent raises the following on the limitation of the right of access to water:

31.1. First, it contends that section 27(2) read with section 3(1) of the Water Services Act constitute laws of general application restricting the applicants right to water.[35]

31.2. Second, it contends that even if its FBWP limited the applicants' right to water, "*the policy would still survive the constitutional scrutiny because it amounts to a reasonable and justifiable limitation of the right in terms of section 36*".[36]

32. The correlation between section 27(1)(b) and section 27(2) are discussed above.

33. Section 36 of the Constitution relates to the limitation of rights. It provides that:

> *"(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including— (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation*

[35] Answering Affidavit Pages 45-60 paras 55, 56 and 107.3
[36] Answering Affidavit Page 465 para 81 and see also Page 438 at para 12

between the limitation and its purpose; and (e) less restrictive means to achieve the purpose."

34. A precondition to the applicability of section 36 is that the limitation of a right must occur by a law of general application.[37] In *Hugo* Mokgoro J found that a law of general application is one which is accessible and precise and applies generally rather than target specific individuals.[38]

35. The applicants concede that the Water Services Act and the Regulations thereto are laws of general application and that the rights accorded to theme thereunder are capable of being limited, provided that the requirements set out in section 36 have been complied with. However, there is no merit to the contention that the WSA and its Regulations justifiably limit the applicants' right to water. Rather, as the statute giving effect to the right of access to water, the applicants rely on its provisions for the enforcement of their rights.

36. There is no dispute on the papers relating to the provisions of the WSA and access to water rights it accords the applicants. The first respondent also does not seek an order that the WSA is unconstitutional. In the absence of a dispute, the parties must be taken to be *ad idem* on the WSA's provisions, particularly section 3(1) which guarantees to everyone the right of access to a basic water supply. That supply is as prescribed in Regulation 3(b) of the compulsory national standards. The first respondent has conceded that its supply is below the legislated norm,[39] which norm it does not challenge. In this regard the first respondent says that in terms of its policy the applicants are supplied with water twice a week. Inexplicably, this statement is made notwithstanding the requirement

[37] *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 para 96
[38] Id at para 102
[39] Answering Affidavit Page 457 para 47

in Regulation 3(b) that no consumer is left without a supply of water for than seven days in any year.

37. The first respondent does not challenge the constitutionality of the WSA and its Regulations on access to water. Thus, they have to comply with the obligations imposed therein. Their contention that the WSA and its Regulations form the basis of limiting the applicants' rights. Is plainly a nonsensical argument. The applicants' case is that the municipality has failed to comply with the WSA and the Regulations. While the municipality self-evidently fails to comply, they have failed to put up a coherent and reasonable explanation as to why this is so.

38. It is the applicants' case that on the facts, the first respondent has failed to comply with the WSA and the Regulations thereto in two material respects. First, the provisions of the FBWP are unlawful insofar as it makes provision for the supply of water to the applicants twice a week and, second, on the facts the applicants are not being supplied with water twice a week. To this case, the first respondent has raised no defence.

39. To the extent that the first respondent argues that its FBWP and/or its rotation plan would survive constitutional muster under section 36 of the Constitution, this argument too must fail. First, as discussed above, a lawful limitation of any fundamental right can take place only in terms of a law of general application. Neither the FBWP nor the rotation plan constitute laws of general application. They are both disparate policies applying only to the applicants and unfairly discriminating between them and the rest of the country on the question of access to water.

40. Even if the FBWP and/or the rotation plan were found to be laws of general application, it would still not meet the test under the limitations analysis for the following reasons:

40.1. ***The nature of the right***

40.1.1. The right of the applicants to their access to water will endeavor to ensure that their rights to equality, dignity and freedom are achieved.

40.2. ***The importance of the purpose of the limitation***

40.2.1. The municipality has failed to illustrate that they had a purpose to limit the applicants' rights to water supply. They have cut off water supply without any temporary measures put in place.

40.3. ***The nature and extent of the limitation***

40.3.1. The limiting of section 27 has further infringed the applicants' rights to health, education, adequate sanitation, freedom and security, privacy and dignity. The rights of women are adversely impacted through the limitation in that women are subject to violence when collecting water; women are the primary care-givers of their families and are required to wake up earlier to do so. Children have been subject to crocodile attacks. The pass rates of children have been affected due to lack of concentration.

40.4. ***The relation between the limitation and its purpose***

40.4.1. The municipality has failed to establish a plausible reason for the lack of water supply.

40.5. ***Less restrictive means to achieve the purpose***

40.5.1. The municipality's unlawful distribution policies and the *de facto* wholly insufficient distribution, both as driven by the rotation plan and the Free Basic Water Policy are at the heart of this application.

The appropriate relief

41. The first respondent seeks a suspended declaration of invalidity for three years if this court is minded to set aside its FBWP and rotation plan as unconstitutional.

42. However, section 172(1)(a) requires that law or conduct inconsistent with the Constitution be declared invalid.[40] Whilst the principle of legality requires that invalid administrative (or executive) action, is declared invalid, a court is nevertheless empowered in the exercise of its discretion to suspend such a declaration where it is just and equitable to do so.[41]

43. The discretion of a just and equitable remedy follows upon a finding of unlawfulness and does not precede it. This approach enables a consideration of whether relief which does not give full effect to the finding of invalidity, is justified.[42] Thus, the rigour of declaring conduct in conflict with the Constitution unlawful, is ameliorated by the provision of a just and equitable remedy, in recognition of the fact that an unlawful act can produce legally effective consequences.[43]There are no hard and fast rules in determining a just and equitable remedy. However, the rule of law must not be relinquished. The circumstances of each case must be examined and the approach depends on the kind of challenge, the interests involved, and the extent and materiality of the breach of the constitutional right.[44]

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[40] *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) 81
[41] Ibid at para 83
[42] Ibid
[43] Ibid at para 85
[44] Ibid

44. It is not just and equitable for the first respondent's FBWP and rotation plan to be of continued application. It is also not just and equitable for the applicants to be deprived of access to water for any longer. The continued infringement of their basic rights makes serious inroads into their constitutional rights. It is the very antithesis of what justice and equity demands.

45. What is more, the first respondent has provided no explanation or evidence on the papers why it should be entitled to breach the applicants' rights by court order for three years. The first respondent has given no facts on its immediate, short and long term plans to facilitate the applicants right of access to a sufficient supply of water. No facts are also provided on the mechanisms in place to address the current water crisis. Instead, the facts show only the first respondent's persistence in defending an indefensible policy and failing to demonstrate at all the measures it will adopt to rectify the dire want of access to water.

46. When regard is had to the nature of the right sought to be enforced and the materiality of its breach, there is just no reasonable basis for this court to sanction a continued rights infringement in the absence of any credible explanation as to what the first respondent has done to address the prevailing deplorable state of affairs amongst the applicant communities.

Conclusion

47. For these reasons the applicants have made a case for the relief sought in the notice of motion and seek an order in terms thereof.

KAMESHNI PILLAY SC

REGHANA TULK

CHAMBERS

13 DECEMBER 2016

LIST OF AUTHORITIES

1. *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) 81
2. Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others 2005 (2) SA 140 (CC)
3. Mazibuko v City of Jhb 2010 (4) SA 1 (CC)
4. Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)
5. *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1
6. Wightman t/a JW Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 (SCA)