11. Urban Basic Services: Rights, Reality and Resistance

*Jackie Dugard*

About 1,000 residents of Maboloka Township outside Brits, North West Province, took part in a service delivery protest to complain about the poor quality and scarcity of their water. The residents, who live near Hartebeespoort Dam, said they have been without running water since December [2009] and the water which the Madibeng Municipality supplies in trucks is insufficient, dirty, and makes them ill. Jan Motaung, protest organiser and chairman of the Maboloka Community Organisation, said: “We followed protocol. We marched to the Madibeng Municipality on February 9 to hand in our memorandum and nothing has been done; picketing was our plan B”. Residents told *The Times* that Maboloka has 18 sections with 100 residents each. Every three days one truck makes a water delivery. Sikho Sikhosana, a resident, said: “We were told to boil water that we get from the river, but we have no electricity” (Boikanyo and Tlhoele2010).

1. Introduction

From a human rights perspective, South Africa has a commendable legal and policy framework for urban basic services that explicitly recognises socio-economic disadvantage. The Constitution⁠¹ entrenches a right to water, there are national Free Basic Water, Free Basic Electricity and Free Basic Sanitation policies, the Water Services Act 108 of 1997 stipulates basic minimum standards for water and sanitation, and there is a host of rights-friendly legislation, regulations and policies. Yet, at the local level where service delivery occurs, the reality is very different, with widespread failures of basic services delivery leading to rising discontent in many poor urban areas, as well as several test litigation cases.

This divergence between framework and practice is largely related to the limitations of South Africa’s macro-economic model, which has failed to advance inclusive economic and human development. This has had serious ramifications at the local government level, which is conceptualised as the developmental arm of government. In line with the broader neoliberal economic policies pursued since the democratic transition - central government has devolved the responsibility for basic services to the local government sphere and has emphasised a

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cost-recovery driven approach to basic services (McKinley, 2005). In this model, municipalities are under considerable financial pressure to limit services to households that cannot pay for services, as the income derived from water, electricity and sanitation services is the most important source of revenue for local government (Makgetla, 2006). As such, and despite a degree of cross-subsidisation, basic services are viewed more as a commercial revenue stream than a public health or development/poverty eradication related service (Hemson, 2008). The consequential preoccupation with maximising profits from basic services has resulted in inadequate extension of basic services and insufficient maintenance of infrastructure, along with an overly technocratic approach to service delivery. It has also led to widespread limitation and disconnection of existing services in poor urban areas, which has rolled back many of the gains made in connecting poor households to basic services’ grids in the post-apartheid era.

On top of this, there is increasing evidence of corruption, incapacity and incompetence in municipal governance. During 2010, collapses of municipal governance resulted in more than twenty municipalities being placed under administration in terms of section 139 of the Constitution. Such malaise is aided by both the list system of political representation and the party-political dominance of local vehicles for public participation such as ward committees, (Piper and Deacon, 2009) which have the effect of constraining formal participation at the local level. As observed by Laurence Piper and Lubna Nadvi, it is notable that the Non-Governmental (NGO) sector has “tended to disengage from the local state and focus on provincial and national levels” while local communities and social movements “resort to forms of popular protest to become heard by local government” (Piper and Nadvi, 2010: 212-238).

In this political vacuum, growing dissatisfaction with basic services has manifested as escalating protest in many poor urban areas along with a number of cases, which have been articulated by protestors and litigators in social justice terms. Much of the litigation and protest is recent and ongoing, so it is consequently too early to properly assess either strategic

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2 See for example Local Government Briefing (April 2010), pp. 6-7.
3 Peter Alexander argues that one of the underlying determinants of the political crisis of local democracy is the party list system of national and provincial legislatures, meaning that members of parliament and members of provincial assemblies do not have constituencies and are largely absent from the direct political realm (local government) (Alexander, 2010).
4 There are exceptions to the NGO non-involvement pattern. NGOs such as Planact and SERI are heavily involved in local capacity-building and social movement mobilisation, and litigating NGOs such as the Legal Resources Centre and, again, SERI, are engaged in basic services-related litigation against local government.
value or impact. Nevertheless, this chapter provides a preliminary examination of the rising resistance in urban areas to inadequate basic services. The chapter first provides an overview of the socio-economic rights framework (section 2) and the systemic problems associated with urban basic services (section 4), before examining resistance to such problems (section 4) with a focus on the form of both protest (section 5), and a selection of test case litigation: Mazibuko,\(^5\) Joseph\(^6\) and Nokotyana\(^7\) (section 6).

The chapter concludes that the multiple, linked failures of local government and governance - some related to economic and some to political constraints - have fatally undermined the promise of national legislation and policy at the local level, resulting in inadequate services. At the same time, the malfunctioning of local democratic institutions has rendered local government increasingly unaccountable and unresponsive to the needs of poor residents, displacing dissatisfaction onto the streets and into the courtrooms. Yet, to date, it seems that the national realm (and formal politics) has been relatively insulated from the mushrooming crisis at the local government level.

Indeed, in the burgeoning resistance by local communities to inadequate basic services, remote government and deplorable living conditions, the chapter is unable to draw linear connections between specific instances of local activism and positive structural outcomes. However, in advocating for a longer-term frame of analysis, it suggests that currently disparate struggles and actions need to be linked together to contribute to the kind of progressive mass mobilisation that might overcome the current impasse of political and economic governance and result in greater socio-economic equality and genuine democracy. It is possible that rights-based struggles could play a tactical part in such a movement, but unlikely that discreet struggles, whether rights-based or not, will be able to overcome structural inequalities or the political status quo.

2. Socio-Economic Rights Framework

Within South Africa’s legislative and institutional framework, the Municipal Systems Act\(^8\) was enacted to “provide for the core principles, mechanisms and processes that are necessary

\(^{5}\) Mazibuko and Others v City of Johannesburg and Others 2010 (4) SA 1 (CC) (Mazibuko).
\(^{6}\) Leon Joseph and Others v City of Johannesburg and Others 2010 (4) SA 55 (CC) (Joseph).
\(^{7}\) Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others 2010 (4) BCLR 312 (CC) (Nokotyana).
to enable municipalities to move progressively towards the social and economic uplifting of local communities, and ensure universal access to essential services that are affordable to all”.

According to the Act, the concept “basic municipal service” is defined as “a municipal service that is necessary to ensure an acceptable and reasonable quality of life and, if not provided, would endanger public health or safety or the environment”. In municipal practice and policy, as well as national standards, “basic services” most commonly includes water, electricity and sanitation services, which I focus on in this chapter.

2.2 Water Services

In recognition of the importance of water to life, health and dignity, section 27(1)(b) of the Constitution guarantees everyone’s “right to have access to … sufficient water”. And, to provide meaning to the Constitutional right, section 3 of the Water Services Act provides that “everyone has the right of access to basic water supply” and “every water services institution must take reasonable measures to realise” this right. Basic water supply is defined in section 1(iii) 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”. And regulations clarify that the minimum standard for basic water supply is, inter alia, a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month within 200 metres of a household.

Giving further effect to these legal iterations, and in recognition of the fact that greater physical access to water (through bringing water infrastructure closer to people’s households) is meaningless if water remains unaffordable, in 2002 the national Department of Water Affairs and Forestry (DWAF) instituted a Free Basic Water (FBW) policy. The Free Basic Water Implementation Strategy establishes a national policy (to be effected at municipal level) to provide at least 6 kilolitres (6kl) of Free Basic Water per household per month, to be implemented through local municipalities. (DWAF, August 2002). However, calculated at 25 litres per person per day in a household of 8 persons (based on estimates of average

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9 Object of the Municipal Systems Act.
10 Section 1, Municipal Systems Act.
12 In May 2009 the Department of Water Affairs and Forestry became the Department of Water and Environmental Affairs, but it is referred to as DWAF in this chapter.
household occupancy), this amount falls short of the internationally recognised minimum required for a healthy and dignified existence – estimated at a minimum of 50 litres per person per day without waterborne sanitation\(^{13}\) - and is vastly insufficient in the multi-dwelling households often found in poor urban townships. The insufficiency of the FBW allocation to meet the basic needs of poor households in multi-dwelling township areas is expanded on in Section 3, and is also one of the issues that was taken up in the Mazibuko water rights case discussed in Section 6.

### 2.2 Electricity Services

Unlike water, in South Africa there is no explicit right to electricity (nor is there an elucidated right to energy). However, this right might be inferred from, inter alia, the right of access to adequate housing, found in section 26(1) of the Constitution, as is the approach pursued in General Comment 4 on the right to adequate housing of the UN Committee on Economic, Social and Cultural Rights.\(^{14}\) The fact that the right to housing implies more than merely having a roof over your head was discussed by the Constitutional Court in the *Grootboom* judgment.\(^{15}\) According to the Court, the “state’s obligation to provide 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” and while “some may need access to land and no more … some may need access to services such as water, sewage, electricity and roads”\(^{16}\) (emphasis added). This means that, in the Court’s view, one of the factors relevant to a consideration of the right to housing is electricity provision. Recently, however, the Constitutional Court has muddied this interpretation of the right to electricity in its judgment in *Joseph*, summarised in Section 6.

In terms of legislation, since the repeal of the Electricity Act 41 of 1987 by the Electricity Regulation Act of 2006, electricity services have been governed mainly by municipal bylaws. Most electricity bylaws stress equity considerations in electricity service provision. In terms

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\(^{13}\) The international expert on the sufficiency of water, Peter Gleick (President of the Pacific Institute for Studies in Development, Environment and Security in Oakland, California), recommends at least fifty litres of water per person per day (excluding waterborne sanitation) to guarantee human health and dignity (Gleick, 1996). And the World Health Organisation (WHO) warns that access to water below twenty litres per person per day carries “a high level of health concern” and is insufficient to cover “laundry/bathing unless carried out at source” (Bartram and Howard, 2002).


\(^{15}\) *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) (*Grootboom*).

\(^{16}\) Ibid, para 37.
of policy, since 2003, there has been a national Free Basic Electricity (FBE) policy at the national level. Like DWAF’s FBW policy, the Department of Minerals and Energy’s\(^{17}\) FBE policy of 2003 was formulated to assist impoverished households that could not afford electricity services. Informed by the generally low levels of energy consumption in (mostly rural) newly electrified areas, the fifty kiloWatt hours (kWh) to be provided for free per month enables a household to power four electricity lights for four hours per day and play a small radio and black and white television. (Mlambo-Ngcuka, 11 May 2001) Self-evidently, the FBE allocation is not sufficient to meet the basic needs of poor households in urban areas, especially where home industries are being supported. This is elaborated on in section 3.

2.3 Sanitation Services

Despite the critical importance of sanitation to poverty, health and development (not to mention dignity),\(^{18}\) sanitation has traditionally been viewed as a lesser priority – in the area of basic services. One of the reasons for this is that it has not been clear what standard of sanitation the government advocates for households. More recently, there have been indications that waterborne sanitation will only be pursued in urban areas.\(^{19}\) Nevertheless, and notwithstanding basic sanitation services having moved in May 2009 from DWAF (Water) to the Department of Human Settlements (Housing),\(^{20}\) national standards for sanitation are found in the Water Services Act. Section 3 of this law provides that “everyone has the right of access to basic water supply and sanitation” (emphasis added) and that “every water services institution must take reasonable measures to realise” this right. This means that in spite of the Constitution’s silence regarding sanitation, there is a legal basis for a state obligation to provide basic sanitation, which the Water Services Act defines in section 1(ii) as “the prescribed minimum standards of services necessary for the safe, hygienic and adequate collection, removal, disposal or purification of human excreta, domestic waste-water and sewage from households, including informal households”. Further, Regulation 2(b) of the Water Regulations provides that the minimum standard for basic sanitation services is a safe, environmentally sound toilet that is “easy to keep clean, provides privacy and protection

\(^{17}\) Recently split into the Department of Energy and the Department of Mineral Resources.

\(^{18}\) According to Zafar Adeel, chair of UN-Water, a coordinating body for the twenty-seven United Nations agencies that work on water and sanitation, for every US dollar spent on sanitation, the return on investment is between US dollar 3 and 34 realised through reduced poverty and health costs as well as improved productivity (Adeel (15 April 2010).

\(^{19}\) See for example DWAF (October 2008).

\(^{20}\) Prior to May 2009, the Department of Human Settlements was called the Department of Housing.
against the weather, well ventilated, keeps smells to a minimum and prevents the entry and exit of flies and other disease-carrying pests.”

Nevertheless, it was only in October 2008 that a Free Basic Sanitation (FBS) policy was finalised, recommending an ongoing FBS component to be added to waterborne sanitation of 15 litres per person per day, calculated as 3 or 4kl additional FBW per household per month on top of the existing FBW allocation. At the time of writing, very few municipalities had adopted this policy. In any event, even where the additional amount has been incorporated, and if based on the national policy, 15 litres per person per day for waterborne sanitation is insufficient to cover this function (the average toilet flush in inefficient toilets uses 13 litres of water). This means that for the most-part poor households with waterborne sanitation are not adequately subsidised. At the same time, as outlined in section 3, millions of poor households still have inadequate access to sanitation, using the ‘bucket’ system or chemical toilets indefinitely. The insufficient provision of basic sanitation services was one of the issues that prompted the residents of Harry Gwala informal settlement to go to court in the Nokotyana case, discussed in section 6.

2.4 The Principles of Non-discrimination and Just Administration

Regardless of the commercialisation or corporatisation of municipal services entities all policy choices in relation to water, electricity and sanitation provision must comply with section 9 of the Constitution – the right to equality. This means that basic services provision may not unfairly discriminate between groups on the grounds listed in section 9(3).  

Supplementing the framework for equitable services, section 33 of the Constitution provides everyone with the right to just administrative action that is “lawful, reasonable and procedurally fair”. The Promotion of Administrative Justice Act (PAJA) was promulgated to give effect to this right. There are two aspects of PAJA that are particularly relevant to water and electricity services, as public services falling within PAJA’s definition of administrative action. First, section 4(1) of PAJA stipulates that all administrative decisions that materially or adversely affect the public must be preceded by public participation such as public inquiry or commentary processes.

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21 Grounds listed in section 9(3) of the Constitution include race, gender and sexual orientation. The list of grounds in section 9(3) is not exhaustive.
22 Promotion of Administrative Justice Act 3 of 2000 (PAJA).
Second, in terms of existing services, section 3(2)(b) of PAJA sets out the requirements for procedural fairness, including (i) adequate notice of proposed action and (ii) reasonable opportunity to make representations. Principles of administrative justice extend also to other relevant legislation. For example, section 4(3) of the Water Services Act reproduces the requirements for notice and opportunity to make representations prior to the limitation or discontinuation of water services. The Electricity Act provided a similar protection against the unprocedural disconnection of electricity supply. With the repeal of the Electricity Act, most municipal bylaws reinforce the requirements for notice and opportunity to make representation prior to disconnection. These administrative justice requirements are particularly important in the context of disconnections of water and electricity services (for non-payment of pay municipal bills), which must comply with the notification and representation elements of PAJA and other legislation outlined above.

Yet, in reality, municipalities routinely disconnect basic services in unfair and unprocedural ways (that are also non-transformative and anti-developmental). Such disconnections were taken up in two test cases, Mazibuko and Joseph discussed in section 6. More generally, in reality basic services are often not used to the full developmental and transformative potential as directed in the legislative and policy framework.

3. Reality

Despite the rights-based framework for basic services set out above, millions of poor South Africans (and non-South African residents) still do not access adequate basic services. This reality belies the official statistics, which paint a much rosier (although not perfect) picture, and are not included here as they do not capture the lived conditions of basic services, particularly in poor areas. There are four main reasons for the unrealistically rosy picture painted by the available statistics. First, national statistics on household connections to basic

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23 In terms of section 11(b) of the Electricity Act, electricity supply could not be discontinued without written notice of the intention to do so.
24 However, until the Joseph litigation, bylaw 14(1) of the Greater Johannesburg Metropolitan Council: Standardisation of Electricity By-Laws Provincial Gazette (Gauteng), GC 16 GN 1610, 17 March 1999 published in terms of section 101 of the Local Government Ordinance 17 of 1939 (City of Johannesburg’s electricity bylaws) permitted the disconnection of electricity supply without notice. Part IV explains how the Constitutional Court cured this defect in Joseph.
25 Section 3 draws from Dugard and Mohlakoana (2009), as well as a report by Tissington et al (October 2008).
26 According to the South African Institute of Race Relation (SAIRR)’s South Africa Survey 2008/2009, in 2008, 11.9 million households had access to piped water, 11 million households had access to electricity and 8 million households had access to flush or chemical toilets (p 546) out of a total of 13.4 million households (p 543), with an average of 3.6 persons per household for 2008 (p 544).
services derive from municipal data, which in many instances are not properly verified. Second, most data are aggregated, which means that entrenched inequalities in terms of which whole sectors/areas remain under-serviced are not readily highlighted. Third, in most municipalities there is a high rate of disconnection of water and electricity services for non-payment (particularly in poor residential areas), meaning that infrastructure connection does not translate to ongoing access to basic services i.e. statistics on household connection to basic services do not reflect how many households at any specific time are currently disconnected from electricity or water services (and where sanitation is waterborne, by implication of water disconnection, this too). Fourth, the data for infrastructural connections are quantitative and do not incorporate critical qualitative aspects of the services that impact their adequacy, particularly from a human rights perspective. These qualitative aspects include access by women and disabled people (physical access) and affordability (economic access).

Undoubtedly, rural areas are objectively worst affected by non-delivery of basic services, with vast areas having no formal services at all. However, the problems of non/under-delivery also affect poor urban areas, the focus of this chapter, particularly those in urban informal settlements, townships and inner-city areas. In informal settlements, houses typically do not have in-house water and sanitation services, so people must rely on water tankers or communal taps, and woefully inadequate toilets (including bucket toilets, chemical toilets or the bushes). And most informal houses do not have access to a legal electricity connection.

Based on the available data, it is not possible to accurately quantify basic service disconnections and the true scale of disconnections is simply not known. Most municipalities, as well as national government, do not keep data on disconnections or are reluctant to share such information. Furthermore, in those municipalities that have installed prepayment meters in poorer residential areas, any disconnection is ‘outsourced’ as a private disconnection in the person’s own home and not part of the municipality’s administrative record (such disconnections are referred to by community based organisations as ’silent disconnections’). Nevertheless, some authors have managed to track water disconnections for specific periods. For example, using national household data and data collected in a 2001 national survey, David McDonald estimated that in the seven years between 1994 and 2001, up to 7.5 million people experienced both water and electricity disconnections, amounting to up to or over 1 million people per year (McDonald, 2002). There has been some debate about this figure, including contestations by Mike Muller (former Director General of Water Affairs) that McDonald’s figure is too high (see for example, Muller, 2004). However, as pointed out by Bond and Dugard (2008a), Muller’s own complicated reinterpretation of McDonald’s figures (Muller, 2007), seems to validate McDonald’s assertions. Thus, while Muller concedes that in 2003 alone, 275,000 households were disconnected from water services at least once due to inability to pay (Muller, 2004), Bond and Dugard point out that with an average occupancy of around 3 to 4 people per low-income household, 275,000 households represents an average of between 825,000 and 1.1 million people disconnected from water services at least once in that year due to inability to pay (and this figure excludes disconnections by prepayment water meters). David McDonald stands by his figures and has challenged the government to research and provide a more accurate figure (McDonald, 2003). Thus far the government has not taken up this challenge (email, David McDonald, 24 February 2012).
supply, but those that do usually have a low amperage electricity supply (usually 2.5 to 10Amp), which provides only enough electricity for lights, a small television or radio and sometimes an additional small appliance for a limited number of hours.

Turning to formal township areas, these usually have in-house water and electricity connections, as well as water-borne sanitation. However, as with informal settlements, township households, often receive a low amperage electricity supply, albeit higher than informal settlements (usually 20Amp). This supply allows the additional usage of a small heating element for cooking or a fridge, but these can often not be used in combination with other appliances. In addition, in many townships municipalities have installed technical mechanisms to attempt to minimise loss of revenue due to non-payment of basic services. These include water flow-restrictors (a metal disk with a tiny hole in the middle that is inserted snugly inside the diameter of the pipe and only allows a trickle of water through), and water and electricity prepayment meters (where you have to purchase water or electricity credit in advance of using the service and when you run out, the service automatically discontinues). The City of Johannesburg was one of the first municipalities to impose prepayment water meters on poor communities, starting with a pilot project in Phiri, Soweto, at the end of 2003. The rollout of prepayment water meters in Soweto was strongly resisted and resulted in a protracted battle by community organisations and an associated social movement, the Anti-Privatisation Forum (APF), which included the Mazibuko case.

In inner city areas, water and electricity supply is usually in-house (multi-storey apartment), with water-borne sanitation. However, poor tenants’ access to basic services is typically mediated by landlords, which can compromise access in two critical ways. First, where landlords have abandoned buildings (absentee landlords), the occupiers generally are not able to contract directly with the municipality for services, as most municipalities require a letter of permission from the landlord before they will contract directly with tenants for services. This leaves many inner city buildings, particularly those housing unlawful occupiers but also those where tenure security has not been regularised or has been disrupted, without any formal access to basic services. Second, where landlords incorporate charges for basic services as part of rental, as is common practice, complications can arise especially when

28 A similar problem occurs in collapsed sectional title schemes where there is no longer a formal mechanism (body corporate) to effect payments for municipal services, leading to massive debt and disconnection of basic services.
29 For a Johannesburg-based study of such problems, see for example Wafer et al (April 2008).
landlords do not pass on the electricity or water payments to municipal authorities. As demonstrated in the *Joseph* case, relying on landlords to pay the municipality for services can result in the disconnection of tenants’ electricity supply, even where they have been regularly paying their landlord for such services.

Beyond inadequate availability of services, there are endemic problems relating to affordability of services, mainly affecting township and inner city households rather than households in informal settlements (in informal settlements, all formal services are commonly communal and provided for free, and any in-house connections are usually illegal i.e. ‘free’). First, many municipalities simply do not provide any FBW, FBE and FBS (Tissington et al, October 2008) and, where these free basic services are provided, the amounts are almost always woefully inadequate to advance socio-economic development, particularly in urban settings. The insufficiency of the free basic amounts is exacerbated in urban townships, where typically one property contains multiple poor households that must all rely on the one FBW/S and FBE allocation.

Finally, beyond these free basic policies, water and electricity tariffs are often too expensive for low-income households, despite a degree of cross-subsidisation especially in water tariffs (Bond and Dugard, 2008b), meaning they must pay a disproportionate amount of their household income for relatively low levels of consumption or suffer chronic disconnections to services due to non-payment.

The basic services-related realities outlined above are poignantly illustrated in a description of the living conditions in Harry Gwala informal settlement. Detailing the conditions for the applicants in Harry Gwala at the time of launching the *Nokotyana* litigation in the South Gauteng High Court in July 2008, Kristen Kornienko, an architect from Polvadera (USA), described the following:

- There were only six communal taps for the entire informal settlement of 1,500 households;
- None of the taps was situated in the large central area of the informal settlement between Dube Street and the storm water channel;
- The only toilets were pit latrines, which the residents of Harry Gwala had dug and furbished themselves, and for which the residents purchased chemicals to maintain some semblance of hygiene;
There had been no municipal refuse collection since 2005;
There was no household electrification and no public lighting.  

4. Rising Dissatisfaction and Resistance

In urban areas across the country there is evidently growing dissatisfaction with such conditions. While NGOs continue to engage in policy and legislative advocacy at provincial and national levels to ensure optimum frameworks for delivery, this is not the main fault-line as, for the most-part, there are no major problems with the legal and policy frameworks outlined above. Consequently, this chapter does not examine policy/legislative advocacy of civil society formations as a tactic. Rather, the problems lie in municipal implementation (or lack thereof) of the frameworks. Accordingly - and because of the constraints of local political institutions - grassroots discontent over basic services (broadly defined) has been channelled against breakdowns at the local government level, manifesting as protest along with instances of test case litigation. The protests have occurred mainly in urban township or informal settlement areas and comprise marches, gatherings and the handing over of petitions or memoranda (usually aimed at local authorities); road-blockades; and attacks on public property. Test case litigation challenging systemic problems with basic services has occurred over urban water (Mazibuko), electricity (Joseph) and sanitation (Nokotyana) services.

The phenomenon of ‘service delivery’-related protests in post-apartheid South Africa is a relatively recent one, beginning in 2004 and escalating in 2009, when there were an estimated average of 19.8 protests per month (Jain, 2010). Similarly, the three test cases examined in this chapter were all initiated between 2004 and 2008. Undoubtedly, it is

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30 Affidavit of Kristen Kornienko provided by Nokotyana applicants’ lawyer, Moray Hathorn of Webber Wentzel Attorneys, Johannesburg.
31 While there are grounds to trace current protests back to the apartheid era, most commentators on local protests date the contemporary protest phenomenon as beginning in 2004 (see for example Booysen, 2007). It is possible that the onset of the current wave of protests in 2004 relates to the consolidation of the powers of local government and the first round of local government elections in December 2000, and civil society’s growing dissatisfaction over the subsequent months and years with the failures of the local government realm.
32 There is evidence that protests have escalated since the election of President Jacob Zuma in April 2009. According to Municipal IQ, a private research company, there were more ‘service delivery’ protests in the first seven months of the Zuma administration than in the last three years of the Mbeki administration (Municipal IQ (1 December 2010) Explanations for the rise in incidents of protest under President Zuma relate to the raised, and then dashed, expectations of his more presidency (than that of President Thabo Mbeki, considered to be a technocrat and removed from ‘the people’).
33 The same study notes that in 2007 there was an average of 8.73 protests per month and in 2008 this rose modestly to 9.83 protests in an average month. Admittedly, there is some disagreement over the statistics, but the CLC study provides conservative figures. For a discussion of protest statistics and problems with these see for example Alexander (March 2010).
therefore too early to assess the longer-term, more wide-reaching impact of these resistance tactics. It is also particularly difficult to draw causal links between specific protests and demonstrable changes in service delivery, especially in such a short time horizon. And, while more connections can be made between litigation and changes in service delivery, it is still too soon to assess the full impact of litigation.

So, unlike other thematic areas examined in this book where there has been a campaign or a case to change national policy (such as the efforts to lower the age for male pensioners or child support grants), it is not possible to make any definitive claims about the effectiveness of different tactics in relation to basic services.\textsuperscript{34} To date, in general terms and despite indications that service delivery was one of the key campaigning issues in the May 2011 local government elections, local governments have appeared curiously immune to the reality of escalating protest and high-profile litigation. It might simply be too soon for the full effects to take hold. And, as suggested here, the gap between local and national, and sector-specific and structural, might need to be bridged by activists for real resonance to be achieved. Nevertheless, that there is so much resistance does beg the question of what is going on with local democracy, an issue that is not taken up directly here, but which indirectly impacts the analysis of resistance in the remainder of this chapter.

5. Protest\textsuperscript{35}

5.1 Understanding the Phenomenon

Since 2004, South Africa has experienced a movement of local protest amounting to a rebellion of the poor. This has been widespread and intense, reaching insurrectionary proportions in some cases. On the surface, the protests have been about service delivery and against uncaring, self-serving, and corrupt leaders of municipalities. A key feature has been mass participation by a new generation of fighters, especially unemployed youth but also school students. Many issues that underpinned the ascendancy of Jacob

\textsuperscript{34} The one possible exception, not dealt with in this chapter (it occurred almost a decade ago), is the resistance and protests by social movements against the threatened privatisation of public services, which occurred around 2000 and effectively halted further outright privatisations to date. See Bond and Dugard (2008).

\textsuperscript{35} I do not include trade union campaigns and strikes in this analysis. Nor do I cover the extent to which social movements and campaigns, such as examined in the chapter in this volume by Madlingozi, intersect with and possibly assist in organising and coordinating the kinds of local protests examined in this chapter – I could not find any evidence or studies of this intersection.
Zuma also fuel the present action, including a sense of injustice arising from the realities of persistent inequality (Alexander, 2010).

During 2009, in the wake of “the latest round” of locally-organised protests in urban areas, a debate waged in the South African mainstream media about the nature of the grassroots protests (Friedman2009). Commentators such as Steven Friedman cautioned against the crude reduction that the protesters are demanding “service delivery” – for Friedman, protesters in townships such as Diepsloot (on the outskirts of Johannesburg) “are demanding public service, not delivery” (Friedman2009). Friedman notes that the trigger for the Diepsloot protests was the news that some households were to be evicted from their homes in order to make way for planned upgrading of sewage works and that, far from being about slow service delivery, protest was about ‘delivery’ being too quick and overwhelmingly non-consultative (Friedman2009). Similarly, in a recent media release entitled “Serving our Life Sentence in the Shacks”, members of the the shack-dwellers’ social movement Abahlali baseMjondolo write:

Waiting for ‘delivery’ will not liberate us from our life sentence. Sometimes ‘delivery’ does not come. When ‘delivery’ does come it often makes things worse by forcing us into government shacks that are worse than the shacks that we have built ourselves and which are in human dumping grounds far outside of the cities. ‘Delivery’ can be a way of formalising our exclusion from society (Zikode and Nsibande, 2010).

However, while there is clearly a need to utilise a wider lens with which to view the protests, it is inescapable that protesters have framed their actions as relating to service delivery and the protests at least in part relate to inadequate services, even if the protests are only triggered following specific interventions or, more commonly, non-interventions by local authorities. It is also worth noting that protests about evictions - while perhaps directly relating to a negative infringement (too much ‘delivery’) - sometimes obscure underlying problems related to the government’s failure to implement its positive obligations to provide basic services and appropriate housing or to upgrade existing services in a coherent way (too little ‘delivery’). In short, it is likely that the protests are about both poor service delivery and

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36 Evidently, not all of the immediate triggers relate directly to basic services. Specifically, housing, which is examined in a chapter by Langford in this book, is neither formally considered a basic service nor technically part of local government service delivery. However, there is a very close link between basic services and
unresponsive/remote government. As argued by Richard Pithouse, the protests are best understood as being about “the material benefits of full social inclusion … as well as the right to be taken seriously when thinking and speaking through community organisations” (Pithouse, 2007). In the words of Abahlali baseMjondolo:

But we have not only been sentenced to permanent physical exclusion from society and its cities, schools, electricity, refuse removal and sewerage systems. Our life sentence has also removed us from the discussions that take place in society (Zikode and Nsibande, 2010);

In as much as you [the government] need to deliver services, you cannot do that without engagement, or direct engagement … If people were engaged and consulted about development, then people become a vital tool in their own development and such developments will also be owned at a community level, you know.37

Thus when Imraan Buccus writes about the recent burning of schools in the North West (ostensibly because people were unhappy when a gravel road was not tarred), that the protests are “in response to a crisis of local democracy rather than what has often been referred to as a crisis of service delivery” he concedes the point that the two are inextricably linked: “in most instances failed service or misguided delivery is where things begin to go wrong” (Buccus, 2010). Interestingly, a recent study by the Community Law Centre (CLC) of local protests between 2007 and 2010 found that there was a common mix of issues in the articulated concerns of protesters across the country, not all of which relate directly to basic services per se, with access to housing the single most cited concern (36.33%) After housing, the highest expressed concerns of protesters were access to water (18.36%), access to electricity (18.16%), poor service delivery generally (15.62%), sanitation (13%) and corruption generally (11.47%) (Jain, 2010: 29-30).

To some extent, the debate around terminology is a victim of a seemingly contradictory feature of the increasingly endemic phenomenon of ‘service delivery protest’ (hereafter called local protest). This is that, despite such protests becoming such a regular feature as to

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37 Interview with Abahlali baseMjondolo (Western Cape) 10 September 2009 (Dawson, 2010).
prompt speculation that South Africa currently experiences more protests per person than anywhere in the world (Bond, June 2010: 17), there is very little in-depth qualitative research into the triggers, causes, framing and organisation of local protests. As noted by Jane Duncan in March 2010, “images of violent protest action against poor service delivery have dominated the news in the past few weeks, signalling growing frustration with the Jacob Zuma administration’s failure to address the implosion of services in parts of South Africa”, yet:

[All too often, media coverage does not help us to understand the complex forces that gave rise to such protests. Coverage tends to be episodic, focusing on the moment of the protest, which does not explain why a community got to the point where they felt that the only way of communicating their message was to barricade roads, stone the mayor’s house or torch the library … Journalists are not alone in generalising about protest action. Often, researchers have not helped matters either. While some sketchy statistics are available about the number of gatherings taking place in South Africa year on year, too little is understood about the reliability of this data … As there are significant gaps in the research, we do not really know how South Africa measures up to other countries as a protest ‘hotspot’, and whether we do, in fact have the highest rate of protest action in the world (as has been alleged). Given the centrality of protest in our national politics, it is a sad indictment on the priorities of our research institutions, especially our universities, that we know so little about protest action and its underlying processes (Duncan, 2010).

So what, if anything, is known about the local protests? A useful starting point is one of the few examples of a thorough research project, undertaken by researchers at the Centre for Sociological Research at the University of Johannesburg (UJ). This research into the protests in Piet Retief,38 Balfour,39 Thokoza40 and Diepsloot of June to August 2009 confirms that there are three interwoven features in all the protests studied:

38 Thandakukhanya township in Piet Retief (Mpumalanga Province) was one of the first sites to experience a mass service delivery protest following the election of President Jacob Zuma, as part of a much longer struggle by the community to improve local material conditions and to try to instil greater political municipal accountability.
39 Siyathemba township in Balfour (Mpumalanga Province) is a desperately poor township with approximately 40 000 residents, many of whom do not have access to water, electricity and sanitation services.
40 Thokoza, including Mpilisweni informal settlement and KwaMadala hostel is in Johannesburg’s East Rand, and part of Ekurhuleni Metropolitan Municipality (Gauteng Province). Mpilisweni informal settlement has no toilets other than pit latrines built by the residents and no formal electricity connections. KwaMadala hostel has only partial electricity connection and, while a small proportion of the hostel has been converted into family units, it retains the single-sex dormitories inherited from the apartheid past.
• High levels of poverty and unemployment (in the context of a middle income country with stark inequality);
• Inadequate basic services including water, sanitation, electricity, street lighting, paved roads, as well as insufficient or inadequate housing; and
• In all instances, protests only occurred following repeated unsuccessful attempts by community members to engage with local authorities over issues of failed service delivery (Sinwell et al, 2009: 1, 6)

In terms of other factors, in the cases of Balfour and Thokoza, the authors found that a brutal police response to the protests contributed to the violence. And, they found that while there were widespread attitudes of xenophobia, there was no evidence that xenophobia was the prime motivator behind any of these particular protests (Sinwell et al, 2009: 1).

Perhaps the most interesting research finding relates to the relatively modest, albeit persistent, demands expressed in the memoranda presented to relevant municipal officials in each case, and as relating to similar deep-seated problems. In the case of Piet Retief, the memorandum refers to inadequate service delivery, unaffordable tariff increases and unresponsive officials. It demands investigations into various misappropriation and inappropriate usages of funds by the municipality, as well as the allocation of government-provided housing. And the Balfour memorandum’s demands include a training centre to develop skills, a police station, a mini-hospital, clean water, houses, street lights, paved roads and storm water drainage and quarterly reports on development and expenditure from councillors (Sinwell et al, 2009: 9-12). For residents of Thokoza, the demands related to the abysmal living conditions including inadequate access to water, electricity and sanitation, as well as calling for the resignation of the mayor of Ekurhuleni, Ntombi Mekwegwe, due to her failure to respond to the concerns of the community. In Diepsloot, residents wanted to be consulted about the upgrading of sewage works as this was going to impact access to housing and sanitation.

Particularly alarming is the seemingly endemic indifference of government to the multiple concerns of residents. For example, in the case of Piet Retief, following three years of

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41 Diepsloot is a large township/informal settlement to the north of Johannesburg (Gauteng Province). Originally conceived as a site of temporary relocation, it has ballooned in size since 1994 and contains both bond, and RDP, housing, as well as informal shacks. Little upgrading has occurred and it is crowded with inadequate basic services infrastructure.

42 I do not deal with the question of whether the violence against foreigners that erupted across South Africa in May 2008 can accurately be termed xenophobic violence or whether that, too, can be regarded as local / service delivery-related violence. For the interplay and overlaps between these forms of violence see for example Von Holdt et al, July 2011).
attempts to voice grievances over living conditions to the local council, the residents of Thandakukhanya township formed a Concerned Group in April 2009. The Group drew up a memorandum with a list of demands as previously communicated to the municipality, which it submitted to councillors in early-June 2009. On 15 June 2009, community members staged a peaceful protest and marched to the Town Hall to deliver the memorandum. In the hope that provincial government might be more responsive than local government, a copy of the memorandum was sent to Mpumalanga Premier, David Mabuza, who was given seven days to respond. The Premier did undertake to respond in an open meeting the following Sunday. However, he failed to attend the meeting, instead sending the Member of the Executive Council (MEC) for Cooperative Governance and Traditional Affairs, as well as the MEC for Sports and Recreation. Following the Premier’s non-attendance, the community staged a second march. At this march, community leaders struggled to contain the community’s rising antagonism and municipal buildings were burnt and two residents were shot dead allegedly by a traffic police officer and a security guard respectively (Sinwell et al, 2009: 1-2).

From the UJ research it seems that grievances are systemic within municipalities. It is also becoming apparent from the widespread incidences of such protests in poor urban communities all over South Africa, as confirmed by the more quantitative CLC study, that complaints are similar across municipalities. Protestors’ demands represent an attempt to forge a new, more inclusive and expansive deal at the local level, suggesting the potential for linked up protest to challenge the limits of the current political economy (but also the potential for greater state repression against protesters). Indeed, the common underlying determinants of the 2009 protests in Piet Retief, Balfour, Thokosa and Diepsloot led the UJ authors to conclude that “frustrations with government service delivery and the protests which result from this will remain part of the South African political landscape as long as people do not have access to basic services and are unable to find effective channels through which to express their demands” (Sinwell et al, 2009: 1).

5.2 Rights-Based?

But, to what extent can such protests be regarded as rights-based? More empirical research, including discourse analysis, is necessary to conclusively answer this question. However, it does seem that, while not always explicitly expressed as rights-claims by protesters, rights

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43 According to Municipal IQ, by February 2011, protests had “afflicted 40% of local and metropolitan municipalities” (Heese and Allan, 18 February 2011: 13)
often inform the struggles and there is sufficient utilisation of the kind of rights-frame set out in the Introduction of this book - including articulation of demands that coincide with explicitly recognised rights, the conceptualisation of duty-bearing government and rights-bearing residents - to include the protests as a form of rights-based contestation in this chapter’s analysis. One very recent example of a tragic, rights-based, protest for access to water is the 13 April 2011 protest in Ficksburg, Free State, in which community activist, Andries Tatane, was brutally beaten, and allegedly killed, by the police. Commenting in the aftermath of the protest - which was organised by Maqheleng Concerned Citizens (a community organisation) in response to inadequate water and sanitation services in Maqheleng township (Setsoto municipality, Ficksburg) - The Times quoted chairman of Maqheleng Concerned Citizens, Sam Motsare, saying:

Tatane sacrificed his life to free us from the shackles of the Setsoto municipality. If our rights for clean water had been respected, we wouldn’t be here. If our rights for a clean environment that is free of stinking sewage had been respected, we wouldn’t be here. When will this substandard life come to an end, just when? Maybe the day Tatane died marked a turning point in the history of Ficksburg, Maqheleng. (Masondo, 20 April 2011)

As for the impact question, regardless of the degree of rights-framing by protesters, from the UJ research it appears that the causal chain in the build up to protests follows this pattern:

- Inadequate basic services/living conditions give rise to discontent;
- Residents attempt to engage government regarding the problems;
- When such overtures are ignored, protests occur.

5.3 Impact of Local Protests

But how does the chain operate in return? In other words, how do protests affect material conditions or, more instrumentally phrased, what is the link between protest and politics? Interestingly, in terms of the political effect, the UJ researchers found that, while there is some evidence to suggest that protests generally have escalated since Jacob Zuma became president, there is no evidence that protesters’ demands are rooted in a campaign against the

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44 At the time of writing this chapter, six policemen had been charged – four with serious assault and two with murder – following the televised broadcast of footage showing the police attacking Tatane, who collapsed and died with multiple bruises and two rubber bullets in his chest. See for example Mahabane (15 April 2011) and Pithouse (16 April 2011).
Zuma administration, the national policies of the African National Congress (ANC) or even local government electoral support for the ANC. Rather, they were linked to “the failure of the ANC to implement policy at a local government level” (Sinwell et al., 2009: 1). In fact, in Piet Retief, the community activists’ memorandum was at pains to demonstrate support for the ANC, stating:

We also would like to state it clear that the Mkhondo citizen’s concerned group are the members of the ANC … We also want the ANC to win the local elections convincingly. We pledge that the councillors involved in misconduct be recalled to the structure with immediate effect (Sinwell et al., 2009: 11).

What is happening on the ground, it seems, is a critical disjuncture between national and local politics. In this fractured reality, communities cling to the ANC promise and view local problems as arising from corrupt councillors who are betraying the ANC. Thus they continue to remain loyal to and vote for the ANC, while protesting against local officials. As explained by Peter Alexander, given the popular rise of Zuma and regardless of whether local councillors are Mbeki-ites, “opposition to local authorities is possible without it de-stabilising support for Zuma and his administration” (or the provincial governments also elected in April 2009, which are seen as extensions of national politics) (Alexander, 2010: 33). The divide between national and local politics is reinforced when national leaders have visited protest ‘hotspots’ - e.g. in Balfour, where President Jacob Zuma paid an unexpected visit to some of the houses at the entrance of Siyathemba township on 4 August 2009; and Diepsloot, where Minister of Settlements, Tokyo Sexwale, infamously spent the night in a shack on 3 August 2009 following the violent protests there - but local conditions have not substantially improved. Worryingly, the most observable medium-term reaction from the government in Balfour has been a crackdown against Siyathemba community organisations by the South African Police Service (SAPS). Yet, although there is some evidence of a decreasing majority for the ANC at the national level, such is the opaque (and almost mystical) relationship

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45 However, Peter Alexander cautions that it would be simplistic to suggest that all protesters have precisely the same motivations. He notes that any particular protest can contain “both a popular antipathy to corruption and a struggle for patronage” (Alexander, 2010: 34).

46 In February 2011, it was reported in the press that Siyathemba was again “on the brink of exploding as residents’ simmering discontent and impatience with the government’s failure to deliver on its promises balloons” (Masondo, 20 February 2011).

47 The ANC lost seats and had a decline in the percentage share of the vote in 2009, compared with steady increases in the period 1994-2004 in both percentage of vote share and in seats won (email from Ebrahim Fakir,
between national leadership and local politics that communities – at least for the present – are
still hopeful that national politicians will make a difference, as expressed by Balfour youth
leader, Lefu Nhlapo’s comments following President Zuma’s visit to Balfour: “For him to
come here shows us that he cares about his communities” (Sinwell et al, 2009: 5).

Although still early days, certainly in terms of the most recent wave of protests, it is possible
that this artificial but perceived rupture between the national and the local, the ANC party and
the individual ANC councillor, might inhibit any substantive political feedback, perpetuating
local problems of non-delivery and unaccountability. After all, no political party speaks more
directly to the poor than the ANC. Thus, at least in the short-term, a local problem can be
diffused and rising dissatisfaction over poverty and inequality can be moderated through the
removal of specific councillors (although there are only sporadic instances of even this low-
level accountability occurring), while the central political economy stays in-tact and the ANC
remains overwhelmingly popular.

At the same time, however, social tensions are undeniably rising. And with these rising
tensions, the limits of South Africa’s transformative project are becoming increasingly
evident, even if not yet directly politically relevant. While many of the protests remain local
and concern immediate grievances, there are budding signs of linkages between working and
non-working sectors of society, and between inadequate service delivery and structural socio-
economic and political problems. An example of ‘connecting the dots’ was apparent in the
protracted public sector strike of August-September 2010, which reflected solidarity with
poor people’s struggles, and was powerfully articulated in a statement by the National
Education and Health and Allied Workers Union (NEHAWU) responding to the throwing of
food by Stellenbosch University students at striking workers:

The residents of Stellenbosch need to realise that as long as the people of South
Africa are hungry and disillusioned no one in this country need feel secure. When
poor people are hungry they tend to eat the rich and it will be naïve for
Stellenbosch residents to think because they are rich, the working class fight is
not their fight. (NEHAWU, 8 September 2010)

Manager: Governance Institutions and Processes, Electoral Institute for the Sustainability of Democracy in
Africa (EISA, 15 February 2011).
There are also recent signs that the ANC is beginning to worry about the burgeoning protests. And it is evident that service delivery (and particularly the problem of ‘open’ toilets) was a key campaigning issue in the run-up to the May 2011 local government elections, even if there is no clear indication yet of lasting structural improvements for protesters. Ultimately, as with the litigation outlined below, it is in all probability simply too early to assess the efficacy of these tactics at affecting change. This is especially true if the analytical frame is widened to take into account the broader objectives of local protest (and litigation), of forging a more responsive and accountable political sphere and a more egalitarian economic deal.

6. Litigation

To date, three basic services-related test cases have come before the Constitutional Court, Mazibuko, Joseph and Nokotyana. All three relate to common problems poor people experience with basic services I, and all three decisions were handed down in quick succession (Mazibuko on 8 October 2009, Joseph on 9 October 2009 and Nokotyana on 19 November 2009). One of these cases - Joseph - was a narrowly defined case brought by tenants to challenge a negative infringement of their right to electricity. In this case, the applicants were successful and obtained a favourable ruling from the Constitutional Court. The other two cases - Mazibuko and Nokotyana - involved articulations of the state’s positive obligations in respect of socio-economic rights. In both these cases, the Constitutional Court ruled against the applicants and did not order the substantive relief prayed for. Nevertheless, in all three cases there has already been a demonstrable impact, confirming that litigation can (and should) be about much more than simply winning or losing in court. This is particularly the case for Mazibuko, which was rooted in a much broader struggle by the Anti-Privatisation Forum (APF) to increase access to water, and has had some quite surprising effects despite

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48 This is largely because the ANC - which had publicly lambasted the Democratic Alliance in Cape Town for delivering non-enclosed toilets in Makhaza informal settlement, Khayelitsha - was embarrassed after the media revealed that, in the ANC-controlled Free State municipality of Moqhaka, residents of Rammulotsi township had been left with open toilets since 2003. One of the interesting aspects about the Rammulotsi case is that the residents had not made much of a fuss about the toilet issue between 2003 and 2011 but it was due to pre-elections media exposure that the ANC moved in to rectify the situation, indicating just how opaque the link is between material conditions and politics. Another interesting emerging fact is that, when questioned as to why the toilets had remained open for so long, Moqhaka’s executive mayor, Mantebu Mokgosi, responded that he had requested funding from the province and national government in 2006, and that “they haven’t responded, but we still have hope that they will respond” (Masondo, 10 May 2011), which points to the perennial problem of under-funding for services in poor municipalities and also hints at problems of accountability and ineffective inter-governmental relations.

49 While a senior researcher at the Centre for Applied Legal Studies (CALS), I was part of the Mazibuko and Joseph applicants’ legal teams.
the judicial defeat. Indeed, *Mazibuko* illustrates that real gains can be made through legal mobilisation conducted in the wings of litigation, especially if such mobilisation is advanced as a means in itself beyond the spatial, temporal and professional constraints of the courtroom.

All three cases have been discussed in the chapter by Wilson and Dugard on the Constitutional Court’s socio-economic rights jurisprudence, but they are summarised here for the purposes of this chapter’s analysis. I begin with *Joseph*, as the only judicial victory of the three cases, but in which the impact was largely limited to the judicial process as there was no legal mobilisation entailed. I then move to *Mazibuko*, in which the Court ruled against the applicants on all grounds and did not order any relief. Yet, in this case there have been numerous benefits deriving from the litigation process broadly defined as incorporating the associated mobilisation by the APF, including some material effects. I end with *Nokotyana*, which falls between the two in that there was a limited form of legal mobilisation by the Harry Gwala community and, although the Court did not grant the requested remedies, it did order some relief.

In analysing the effects of these cases, and largely informed by *Mazibuko*, I propose an impact model for human rights litigation that goes beyond the effects of the judicial process to incorporate the effects of legal mobilisation - understood as the process whereby “a desire or want is translated into a demand as an assertion of one’s rights” (Zeemans, 1983: 690-703) and is championed as part of a broader social struggle - to the extent that there has been any mobilisation in the case under review. For the purposes of this model, I define legal mobilisation quite precisely as referring to a rights-based campaign by a social movement or social grouping that includes non-litigation tactics (even where this involves unlawful actions), alongside litigation. Thus I do not consider the mere, and exclusive, uptake of litigation by individuals or a group (such as occurred in the case of *Joseph*) to be a mobilisation process. While, generally, legal mobilisation might not involve litigation at all (e.g. the protests described above), here I am analysing legal mobilisation within a litigation-inclusive model. It is possible that, at a later date, the legal mobilisation axis of impact could be applied to analysing local protests. For the moment, however, it is too soon to see any clearly identifiable causal effects. Given that the time-frames for the current wave of protests and the cases examined in this chapter are similar, this possibly points to litigation being a quicker tactical path than non-litigation, but more research is necessary to draw such a conclusion (and not all issues can or should be litigated).
I pursue this approach in line with the interpretive approach of Michael McCann (McCann, 1994) in order to take into account the process whereby rights-based litigation, whether resulting in judicial victory or defeat, helps to redefine the socio-political terms of engagement between the state or private actors and civil society, thereby creating the potential for transformative change. To this end, I have adapted César Rodríguez-Garavito’s model (2011) outlined in the Introduction of the book to expansively analyse the impact of rights-based litigation (broadly defined as the judicial process plus any parallel mobilisation processes to advance the claims made in the case). I see this process comprising enabling and material components as set out in Table 1.

Table 1: A Typology of Impact for Rights-Based Litigation

<table>
<thead>
<tr>
<th></th>
<th>Judicial process</th>
<th>Legal mobilisation process</th>
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<tbody>
<tr>
<td><strong>Enabling</strong></td>
<td>• Crystallising issues and increasing the visibility of the problem;</td>
<td>• Galvanising activists and creating new coalitions;</td>
</tr>
<tr>
<td></td>
<td>• Providing publicly-accessible information relating to structural problems in</td>
<td>• Sensitising the media and raising public awareness about the</td>
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<tr>
<td></td>
<td>the social, socio-economic or political sphere;</td>
<td>validity of the problem;</td>
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<td></td>
<td>• Clarifying or redefining the litigation terrain in terms of problems,</td>
<td>• Politicising the problem;</td>
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<td></td>
<td>possibilities and precedents;</td>
<td>• Monitoring any judicial orders to maximise enforcement.</td>
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<td></td>
<td>• Conferring perceptions of authority/legitimacy for rights-based initiatives;</td>
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<td></td>
<td>• Providing a dramatic platform for airing grievances;</td>
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<td></td>
<td>• Allowing greater tactical options for civil society formations;</td>
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<td></td>
<td>• Changing attitudes among civil society players towards rights-based options.</td>
<td></td>
</tr>
<tr>
<td><strong>Material</strong></td>
<td>• Direct changes to material conditions, law or policy ordered by court;</td>
<td>• Material effects of the enabling impacts of legal mobilisation.</td>
</tr>
<tr>
<td></td>
<td>• Changes to material conditions resulting indirectly from judicial process.</td>
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</tbody>
</table>

50 This schema and analysis has also been developed in Dugard and Langford (2011).
The parallel judicial and legal mobilisation processes that make up this expanded conceptualisation of rights-based litigation are reflected on the table’s horizontal axis. Obviously, not all rights-based litigation is accompanied by legal mobilisation. But legal mobilisation is included here because it was a relevant aspect in both Mazibuko and Nokotyana, and might have more general traction in line with the tentative proposition that litigation rooted in legal mobilisation can achieve greater impact than that without. If the Mazibuko case is anything to go by, the focus of legal mobilisation need not be the judicial decision per se but, rather, litigation can provide a stage to crystallise, highlight, publicise and politicise struggles (i.e. litigation can be a means rather than an end). Certainly, from the three cases under review here, there is no correlation between mobilisation and judicial outcome, as evidenced by the fact that in Joseph there was no legal mobilisation and the decision was favourable, and in Mazibuko there was substantial legal mobilisation and the decision was unfavourable. But, as detailed below, there does seem to be a significant correlation between legal mobilisation and broader impact.

Whereas Rodríguez-Garavito sees effects on the vertical axis as material or symbolic, I use the term enabling for the latter category, as it denotes more assertively the empowering effect of litigation as creating the potential for transformative change. Like the symbolic effects in Rodríguez-Garavito’s model, this category refers to changes in ideas, perceptions and collective social constructs (Rodríguez-Garavito (2012), but I include changes in opportunities as well. Enabling impacts are therefore understood as changes in socio-political assets (resources available for social groups) that have the potential to contribute to political and, ultimately, structural change by providing greater leverage in civil society’s engagement with the state (or even private power). Material impacts are changes in material conditions, including living conditions, but also changes in law and policy.

I have excluded Rodríguez-Garavito’s direct and indirect effects axis of comparison as, in this more fluid model where there are parallel processes and tactics, it is hard to delineate direct from indirect effects, not least because the enabling effects of the judicial process can contribute to the enabling effects of the mobilisation process; and the enabling effects of the mobilisation process certainly influence the material impact of the mobilisation.
6.1 Joseph

On 8 July 2008, City Power (Pty) Ltd disconnected the electricity supply to a residential building in Johannesburg called Ennerdale Mansions. The low-income residents of Ennerdale Mansions received no prior notice of the disconnection. As it transpired, although residents had been keeping up with their electricity payments, paid to the landlord in terms of their rental agreements, the landlord had not passed on these payments to the City and owed City Power approximately R400 000. Finding themselves without electricity and being told by the City that they would have to pay the entire arrears before their electricity supply would be restored, the applicants approached the South Gauteng High Court seeking the reconnection of the electricity supply and an order declaring that they were entitled to procedural fairness in the form of notice and an opportunity to make representations to City Power before the electricity supply was terminated. The High Court (in both Part A and B applications) denied the applicants such relief and they appealed to the Constitutional Court. As summarised in the Constitutional Court judgment, the crux of the case was “whether any legal relationship exists between the applicants and City Power”, or what “relationship, if any” is there “between City Power as a public service provider and users of the service with whom it has no formal contractual relationship”.

The applicants argued that, even if they were not protected by the utility contract, a relationship did exist between the tenants and the City, and they had a right to notice prior to disconnection of electricity services in terms of section 3 of PAJA by virtue of electricity being a component of the their right, inter alia, of access to housing. The Constitutional Court ruled in the applicants’ favour, finding that they could rely on PAJA’s procedural protections, and ordering the tenants’ electricity supply to be reconnected and severing the words “without notice” from bylaw 14(1) of the City of Johannesburg’s electricity bylaws. Somewhat surprisingly, the Court did not base its decision on linking electricity to the right to housing, as argued by the applicants. Instead, the Court essentially created a new socio-economic right – the right to basic municipal services. Nevertheless, in creating this new

51 Part A was an urgent application for the immediate reconnection of electricity supply. Part B again sought the reconnection of the electricity supply, plus an order declaring that the disconnection of the electricity supply without notice was unlawful.
52 Joseph para 2.
53 Ibid, para 24.
54 Joseph paras 34-55 (the Court based the right to basic municipal services on section 73 of the Municipal Systems Act, read with section 152 of the Constitution).
right, the Court opened up the potential to base a claim on the right to basic municipal services.

Unfortunately, however, this has not brought any direct relief to the applicants, who remain without electricity. This is because, in the time it took for the case to reach the Constitutional Court, vandals had stripped the building of its electrical cables, meaning that it was no longer possible for the City to reconnect without incurring considerable expenses, which it was unwilling to incur.

Yet, on the enabling axis, access to electricity has been defined as a rights-issue, a new right to municipal services has been created, supposedly with all the administrative justice protections of public services, and a precedent has been created to challenge subsequent electricity disconnection cases, starting with Chiawelo.55 Moreover, Joseph publicised systemic problems with the City’s billing, thereby raising awareness of the links between service delivery and municipal governance. There has also been a wide-reaching material change in that the City of Johannesburg can no longer disconnect tenants’ electricity supply without notice. These effects are represented in Table 2.

**Table 2: A Typology of Impact for Joseph**

<table>
<thead>
<tr>
<th>Enabling</th>
<th>Legal mobilisation process</th>
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<tbody>
<tr>
<td>Judicial process</td>
<td>Legal mobilisation process</td>
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<tr>
<td></td>
<td>None</td>
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<tr>
<td></td>
<td>None</td>
</tr>
<tr>
<td>Material</td>
<td>City bylaws changed to remove ability to disconnect tenant’s electricity supply without notice.</td>
</tr>
</tbody>
</table>

6.2 Mazibuko

In 2001, the City of Johannesburg formulated a project to limit unpaid-for water consumption in Soweto by means of the mass installation of prepayment water meters (PPMs). Called Operation Gein’Amanzi (meaning to conserve water in isiZulu), the project started with a pilot in Phiri, one of the poorest suburbs of Soweto. Unlike the conventional meters available throughout Johannesburg’s richer suburbs, which provide water on credit with numerous protections against unfair disconnections, PPMs automatically disconnect once the (inadequate) Free Basic Water (FBW) supply is exhausted, unless additional water credit is purchased and loaded, leaving poor households without water for days on end each month.

Determined not to accept PPMs, the Phiri community embarked on a course of direct resistance against the rollout, attempting to physically stop contractors from installing the PPM infrastructure. However, the resistance was critically undermined after the City secured a wide-ranging interdict that prohibited activists from coming within 50 metres of any PPM operations and authorising private security companies to assist in managing any infringements of these terms, which effectively put an end to the direct activism. As this avenue of protest appeared to be closed off, the community turned to the option of rights-based litigation as one of the tactics to challenge PPMs (along with the ‘standpipe’ yard taps that the City offered some residents as an alternative to PPMs).

In doing so, they embarked on a legal mobilisation process in terms of which the litigation formed part of a wider rights-based struggle against PPMs that included meetings, marches, media exposure and bypass (a form of civil disobedience that entails removing the offending technology – whether PPM or standpipe – and connecting to the main water supply, thereby restoring the unlimited water supply).

Although the litigation was brought by five residents, it was explicitly framed as public interest litigation and it was supported by the APF, a leftist social movement that opposes the privatisation, commercialisation and corporatisation of basic services. The crystallisation of

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56 For an analysis of the interplay between direct resistance and the Mazibuko legal battle see Dugard (2009).
57 The true scale of PPM and standpipe bypass in Soweto is not known, but it has been unofficially estimated that by early-2010 approximately a third of all PPMs and standpipes installed in Soweto between 2003 and 2006 have been bypassed (the figures for standpipes are not available). I include bypass as part of legal mobilisation because, certainly following the uptake of litigation, it was articulated in terms of being necessary to advance the right of access to sufficient water (i.e. a criminal justice “necessity” defence). The incidences of bypass rocketed after the High Court victory, with many residents perceiving this judgment as providing the legal authority to destroy PPMs and standpipes.
issues as a right to water problem also gave rise to a new social movement, affiliated to the APF, the Coalition Against Water Privatisation (CAWP). The legal case was formulated around two aspects of the City’s water services that adversely affected residents’ access to water: PPMs; and the City’s FBW policy, which was insufficient to meet the basic needs (including waterborne sanitation) of poor, multi-dwelling households where as many as twenty people had to share the one 6kl FBW allocation. Thus the applicants approached the court to have PPMs declared unlawful and the FBW policy reviewed and set aside as unreasonable because it was insufficient to meet basic needs in the Phiri context.

The case was launched in the Johannesburg High Court on 12 July 2006 and heard between 3 and 5 December 2007. The ruling of 30 April 2008 found in the applicants’ favour on all grounds, declaring PPMs unlawful and unconstitutional and the City’s FBW policy unreasonable and ordering the City to provide the applicants and all similarly positioned residents with fifty litres of FBW per person per day. However, the judgment was immediately appealed to the SCA, where it was heard from 23-25 February 2009. The resultant SCA judgment of 25 March 2009 upheld the appeal, yet ruled in favour of the Phiri residents on the two substantial grounds: finding PPMs unlawful (largely on the grounds that the City’s bylaws did not allow their installation as a first measure but rather only when a household had contravened the conditions of service of a standpipe) and the City’s FBW policy unreasonable, and ordering the City to reformulate its policy with a view to providing forty-two litres per person per day to indigent residents of Phiri.

Notwithstanding the SCA’s ruling against the City on both PPMs and the FBW policy, the Phiri residents decided to appeal the judgment to the Constitutional Court because they felt

58 The applicants’ PPM challenge was based on a number of legal arguments including the following: the decision to install PPMs in Phiri without any prior consultation with residents violated section 4(1) of PAJA; the rollout of PPMs only in poor black areas, despite the evidence of bad debt in all areas, amounted to unfair discrimination based on race, prohibited by section 9(3) of the Constitution; the PPM’s automatic disconnection mechanism contravenes the procedural protections (reasonable notice and opportunity to make representation prior to disconnection) of section 4(3) of the Water Services Act; and the City’s water bylaws do not allow for the installation of PPMs except as a punitive measure for contravening the terms of a standpipe supply. This list is not exhaustive – see applicants’ heads of argument in the Constitutional Court: http://web.wits.ac.za/NR/rdonlyres/61317CD0-6821-4DC6-A1E6-7823D3140981/0/MazibukoApplicantsfinalwrittensubmission24July2009.pdf
59 The FBW challenge was based mainly on section 27 of the Constitution. The applicants, supported by the amicus curiae – the Centre on Housing Rights and Evictions (COHRE) - argued for fifty litres per person per day, in line with international standards.
60 The judgment of the High Court - Mazibuko and Others v City of Johannesburg and Others case no 06/13885 (Mazibuko High Court judgment).
61 The judgment of the SCA - City of Johannesburg and Others v Mazibuko and Others case no 489/08 (Mazibuko SCA judgment).
62 For a critique of the SCA judgment see Dugard and Liebenberg (July 2009).
there were serious problems with the SCA’s order, particularly its suspension of the order of invalidity regarding PPMs. The appeal was heard in the Constitutional Court on 2 September 2009.

On 8 October 2009 the Constitutional Court delivered its judgment, ruling against the Phiri residents on all grounds. Nevertheless, despite the judicial loss, there have been some unanticipated outcomes of the case that confirm the analyses of legal mobilisation being about more than simply the judicial outcome.

Notwithstanding the judgment, the litigation has had a positive impact on the APF/CAWP, and possibly on water campaigns more broadly, by reinvigorating and energising struggles against the commercialisation of basic services (not least by delaying for several years the rollout of prepayment water meters across the country while municipalities waited for the outcome of the litigation). In the words of APF founder, Dale McKinley, Mazibuko “provided something to organise around; hope and recognition after having been fucked over by the police – it became the centre of mobilisation and reinvigorated the struggle, as well as catalysing political discussions and refining strategy”. Other unanticipated outcomes of the litigation were highlighted by Mazibuko applicant, Grace Munyai. When I tearfully phoned her from the Constitutional Court to tell her that we had lost, Grace’s response was: “I’m so sorry for you”, followed by a short pause, and: “but do you know I’m going to be on TV tonight?” Grace’s response speaks to her muted concern about the judgment per se - along with most Phiri residents who destroyed their prepayment water meters (or standpipes), she had bypassed her standpipe following the victorious High Court judgment and so was able to access sufficient water. But, more than this, Grace’s response indicates the value she placed on her struggle having been acknowledged in the mainstream media: the litigation provided a voice to Grace and the community of Phiri, where the political realm had failed them.

63 The SCA suspended its order of invalidity regarding PPMs, giving the City two years in which to “legalise the use of prepayment water meters in so far as it may be possible to do so” para. 62 of the SCA judgment.01C4CA00F2AE/0/MazibukoSCAjudgment_25March09.doc

64 Mazibuko is the second judgment in the Court’s history of socio-economic rights adjudication in which it did not grant any relief to the applicants (the first was Soobramoney v Minister of Health, KwaZulu-Natal 1998 (1) SA 765 (CC) (Soobramoney), the Court’s first socio-economic rights case). For a critique of the Mazibuko judgment see S Liebenberg (2010) pp. 466-480 and P De Vos (13 October 2009), who argues that one of the reasons for the seemingly contradictory stance on water disconnections in Mazibuko and electricity disconnections in Joseph, is that the Court endorsed a “pay as you go” model of municipal services and was more inclined to rule in favour of residents who were paying for services (Joseph) than those that were not (Mazibuko).

65 Interview with D McKinley (10 July 2009), cited in Dugard (2010: 94).
Finally, in something of a surprise, there have actually been material impacts from the Mazibuko judgment, despite the judicial defeat, and clearly as a direct result of the politicisation of the issues during the legal mobilisation process. These include the fact that, as a direct result of the politicisation surrounding the litigation, the City has raised the amount of FBW it provides to the poorest households in Johannesburg to fifty litres per person per day (the amount the applicants asked for), and it has indicated that the new generation of PPMs it plans to install from the end of 2010 will have a ‘trickler’ device, meaning that following the exhaustion of the FBW amount the water supply will not completely cease but, rather, it will come out as a trickle until further credit/ FBW is loaded. Finally, the City has undertaken that as part of the new rollout of PPMs, it will not to prosecute anyone for bypassing their PPM or standpipe. In effect, this means that the applicants and community have received the relief they litigated over, but through legal mobilisation rather than the judicial process.

The APF is alive to the reality that the litigation process delivered much more than the judicial decision. Not only in terms of material outcomes but also by tilting the balance in favour of the community through politicising the ongoing process of engagement and contestation between civil society and government. Acting on this, the APF pursued more rights-based litigation in the year following the judicial defeat than ever before Mazibuko, including mounting several proactive housing rights related cases that challenge the use of trespass legislation as a way to get around evictions proceedings. And, for a movement that has traditionally been highly sceptical of rights, the APF has now conceptualised a tactical approach to rights-based mobilisation through a “Law and Organising” programme, which provides training to social movement leadership in how to use rights to advance struggles for socio-economic justice. The categories of impact for Mazibuko are represented in Table 3.

<table>
<thead>
<tr>
<th>Enabling</th>
<th>Judicial process</th>
<th>Mobilisation process</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Crystallised community discontent against PPMs as a rights violation;</td>
<td>Created a new coalition, CAWP;</td>
</tr>
<tr>
<td></td>
<td>Provided a high-profile and long-</td>
<td>Public opinion was raised about usage, pricing and equity of water services;</td>
</tr>
</tbody>
</table>

66 This is in terms of the City’s Expanded Social Package, and applies up to a monthly household limit of fifteen kilolitres. When the case was launched the City provided a maximum of six kilolitres of FBW per household per month to poor households.

67 As a socialist movement, the APF has historically regarded rights as elite-serving. See for example Dugard (2009).
running platform for the struggle against PPMs;  
- Provided a huge amount of information on water services-related planning, budgeting and problems;  
- Reinvigorated water rights activists and the APF specifically;  
- Voice was given to water rights struggles;  
- High Court victory legitimised struggle and conferred a sense of authority for destroying PPMs to access sufficient water;  
- APF decision to use litigation as one of its tactics – part of ‘law and organising’ agenda going forward.

| Material | • Provided five years’ respite in imposition of PPMs elsewhere in South Africa, during which time some municipalities – notably eThekwini - took political decisions not to install PPMs. | • Additional FBW has been made available to the poorest households;  
• PPMs have been fitted with a ‘trickler’ device so that there is no longer an automatic disconnection following the exhaustion of the FBW amount;  
• The City has undertaken not to prosecute anyone for bypassing PPMs or standpipes. |

6.3 *Nokotyana*

In the Constitutional Court, *Nokotyana* was an application for leave to appeal against the judgment of the South Gauteng High Court. The applicants, residents of Harry Gwala informal settlement in Ekurhuleni, had approached the High Court for an order against the Ekurhuleni Metropolitan Municipality to install communal water taps, temporary sanitation facilities, refuse collection and high-mast lighting in key areas pending a decision by the MEC for Local Government and Housing, Gauteng on whether the settlement would be upgraded to a formal township.

The residents had been mobilising for years to have the settlement upgraded, through the Harry Gwala Civic Committee and going back to the Tent-town Residents Committee dating from 1993 (which had in fact secured a written undertaking from the then Wattville Town
Council for an in situ upgrading on 24 November 1993. Following years of fraught engagement with the municipality, including an attempt to evict the residents without a court order, the Ekurhuleni Municipality submitted a proposal to the MEC in August 2006, but no decision had been taken, prompting the residents to turn to the litigation. Based on an agreement by the Municipality in the High Court to provide taps and refuse collection, the High Court ordered the provision of these services. However, the High Court dismissed the applicants’ claim for temporary sanitation and for high-mast lighting.

The applicants appealed the decision to the Constitutional Court basing their claim, inter alia, on section 26’s right of access to adequate housing, as encompassing the rights to basic sanitation and electricity. In April 2009, in the run-up to the Constitutional Court hearing (September 2009), the municipality adopted a policy in terms of which they offered the residents one chemical toilet per ten families. During the Constitutional Court hearing, counsel for the municipality indicated such toilets could be installed by October 2009 (one month following the hearing), and that the municipality would not object to this offer being made an order of Court. In the court proceedings, the residents rejected this offer, arguing for one Ventilated Improved Pit latrine (VIP) per household (based on standards in Regulation 2 of the Water Regulations), as well as high-mast lighting to enhance security. Ultimately, despite ordering the MEC to take a final decision on Ekurhuleni’s application in terms of Chapter 13 of the National Housing Code to upgrade the status of the Harry Gwala Informal Settlement within fourteen months of the Court order, the Court dismissed the appeal.

Almost a year after the judgment, the decision to upgrade Harry Gwala was being held up by the need to investigate the environmental impact of the settlement on a local bull-frog population, and basic services remain as inadequate as ever. However, in February 2011, following persistent pressure from the community and its lawyers, the Gauteng Provincial Housing Department notified the applicants that a decision on whether there will be an in situ upgrade will be made by June 2011. And, notwithstanding this pending decision, on 4 February 2011, some high mast lighting was installed in Harry Gwala, despite this not being

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68 Email from Moray Hathorn of Webber Wentzel Attorneys, 21 February 2011.
70 *Nokotyana* p 30 (the *Nokotyana* judgment has page numbers without paragraph numbers).
71 Email from Moray Hathorn of Webber Wentzel Attorneys, 23 August 2010.
72 Email from Moray Hathorn of Webber Wentzel Attorneys, 15 February 2011.
ordered by the judgment. Similarly, chemical toilets have been rolled out, with the municipality apparently making an exception and providing more than the 1 in 10 toilets they had offered in court.73

Thus, although residents still do not have adequate access to housing or basic services, there have been limited material effects including the two additional water taps and refuse collection secured in terms of the High Court order. More recently, chemical toilets and some high mast lighting have been provided, seemingly arising from the ongoing mobilisation by the Harry Gwala community. There have also been enabling effects, including the public exposure in the court record of the unacceptably long time the municipality sat without taking a decision on upgrading Harry Gwala and the framing of inadequate sanitation for the first time as a rights-issue. It is also evident that the process of taking up litigation has exposed the residents of Harry Gwala to the possibility of holding government accountable by means of litigation, and this might result in further rights-based mobilisation in the future. In the meantime, other communities in nearby informal settlements view the decision as empowering them to ask for clarification on upgrading and basic services74 and it seems that in the near future a decision will finally be taken about the settlement’s upgrading. These effects are represented in Table 4.

Table 4: A Typology of Impact for Nokotyana

<table>
<thead>
<tr>
<th>Enabling</th>
<th>Judicial process</th>
<th>Mobilisation process</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>• Highlighted the intransient problem of municipal failure to take a decision regarding the upgrading of informal settlements;</td>
<td>• Community has become aware of the potential gains that can be made by litigation in terms of securing executive decisions.</td>
</tr>
<tr>
<td></td>
<td>• Defined sanitation as a rights-based issue</td>
<td>• Community has monitored the report-back process and continued to pressurise government to enforce the decision;</td>
</tr>
<tr>
<td></td>
<td>• Required the municipality to report back on its decision on whether to upgrade.</td>
<td></td>
</tr>
</tbody>
</table>

73 Email from Professor Marie Huchzermeier, School of Architecture and Planning, University of the Witwatersrand, 2 March 2011.
74 Email from Malcolm Langford, 29 January 2012, on the basis of interviews with residents in Makause informal settlement. See also chapter on housing rights in this volume.
As outlined in this section, there have been mixed results from the three basic services-related cases that have come before the Constitutional Court. In terms of judicial outcome, in two out of the three cases the applicants lost, but it is too early to draw conclusions about whether the seemingly erratic judicial outcomes reflect trends in the Court’s adjudication. In any event, in all three cases the broader impact has been more diverse than perhaps predicted. In *Mazibuko*, despite the judicial defeat, legal mobilisation has ensured approximately the same advances in access to water as expected from the case itself. In *Nokotyana*, although the Harry Gwala residents continue to suffer with inadequate access to water and sanitation, it seems that the constant pressure of community mobilisation will secure a decision on upgrading in the near future. And, in *Joseph*, despite the judicial win, the reconnection of electricity to the building has not been possible due to extensive damage caused in the interim. These cases indicate that litigation is unpredictable but that, especially when linked to legal mobilisation, has the potential for diverse and reverberating impact. This is neither to suggest that litigation without legal mobilisation is without value, nor that litigation with mobilisation will result in a judicial victory. Certainly, the three cases examined in this chapter challenge such simplified assertions. Rather, I argue that litigation is always context specific and judicial outcome is hard to predict. But mobilisation can play a role in politicising issues and leveraging power in society’s engagement with the state. Evidently, litigation - and particularly rights-based litigation - is about much more than the judgment, and some of the enabling effects of the litigation (whether judicially won or lost) have been highlighted in this chapter. However, any conclusions about the medium or longer term impact of such litigation, especially in terms of its potential to affect structural change, can, only a year after the judgments, at best be tentative.
7. Conclusion

Writing in 2010 Richard Pithouse noted:

[O]ur democracy has failed in a variety of respects many of which come down to the fact that it has always been an elite deal that excludes the majority from substantive access to its political and economic benefits … the massive rate of popular protest is one sign that the time when an elite deal could be passed off as real democratisation will soon be up”; and warned: “... if we don’t find a way to move a serious and rational discussion of the question of substantive equality to the centre of our politics we’ll be left with the sorry spectacle of the politics of big men trying to rally their troop behind nothing but the promise of their protection on their turf” (Pithouse, 2010).

The fault-lines Pithouse writes about are blatantly evident in water, electricity and sanitation services, where there are vast inequalities within and between municipalities; with rich households enjoying abundant water for sprinklers and swimming pools while poor households share communal taps, pit latrines and water tankers or suffer with prepayment water meters and no electricity.

While basic service inequities are not the only factor behind local protest, they are one of the dominant common features. Likewise, basic services-related test case litigation has also begun to challenge the gulf between poor and rich worlds in South Africa. The impact of these challenges is still unclear, and current incidents of resistance are still too de-linked from each other and from the central political and economic sphere to directly impact national politics. However, there is potential in the contestation and politicisation of protest and test case litigation that political elites might become fragile and structural concessions may be made. Whether this gives rise to genuine democratic alternatives or further polarisation and repression will largely depend on continued patient work “of democratising society from below” by organising “powerful and mass based democratic alternatives from the ground up” (Pithouse, 2010). Rights-based protest, litigation and advocacy can play an important role in this still unfolding revolution. And socio-economic rights, whether as symbols of a better society or substantive tactics for activists to use in communities and courtrooms, are part of the arsenal civil society can use as both a shield and a sword in the ongoing struggle to transform South Africa.
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