ART OR SCIENCE? SYNTHESISING LESSONS FROM PUBLIC INTEREST LITIGATION AND THE DANGERS OF LEGAL DETERMINISM

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ABSTRACT

In 2008, one of the largest funders of human rights organisations in South Africa, the Atlantic Philanthropies, published a report that identified several factors for optimal public interest litigation. Despite the relative density of organisations that conduct public interest litigation in South Africa, there has been little critical engagement with its findings. Yet this exercise is pertinent given the growing reliance by South African civil society organisations on litigation to resolve systemic failures by the state, together with the ever more pressing requirement from donors to prove the strategic value of the turn (or return) to the courts. This article aims to contribute to the discussion about the uptake and value of public interest litigation by problematising the premises and recommendations of the Atlantic Philanthropies Report (APR). The report’s analysis is tested, partly through the lens of two recent cases concerning the disconnection of municipal services – Mazibuko (water) and Joseph (electricity) – revealing another type of disconnection: that the public impact litigation process is generally too unpredictable and diffuse for it to be adequately assessed through a formulaic or scientific approach. At the same time, it has more potential for social change than covered in the APR. The article therefore advances a more expansive, contextualised and responsive framework for conceptualising the role of public interest litigation and assessing its impact. The proposed framework takes into account structural conditions of power, agency in the form of social mobilisation and the role of public interest litigation in constituting ‘politics by other means’.

I INTRODUCTION

To find a form that accommodates the mess, that is the task of the artist.

– Samuel Beckett

What is the value of public interest litigation? And how should legal practitioners and social movements act strategically in order to maximise its impact, particularly in a way that advances social change? Despite the relatively high number of public interest litigation organisations in South Africa, there is surprisingly little scholarship that reflects systematically on such ques-

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2 Cited in D Hesla The Shape of Chaos: An Interpretation of the Art of Samuel Beckett (1971).
A notable exception is the recent study commissioned by the Atlantic Philanthropies and prepared by Gilbert Marcus and Steven Budlender. The report evaluated three selected cases and concludes that various strategic factors are ‘essential’ to ensuring ‘that public interest litigation succeeds and achieves maximum social change’. According to the report, if victory is to be attained in the courts and beyond, the litigation strategy requires: (1) proper organisation of clients; (2) an overall long-term strategy; (3) coordination and information sharing amongst different actors; (4) timing of the filing of cases; (5) in-depth research; (6) case characterisation; and (7) follow-up. In addition, the report surmises that the achievement of maximum social change requires that litigation is accompanied by broader strategies, in particular: information campaigns, advice and assistance outside litigation and the use of social mobilisation and advocacy.

At the same time, the report’s authors engage in a more nuanced discussion beneath their starkly drawn headlines. They recognise that not all of these factors may be sufficient or, to a lesser extent, always necessary and warn about a formulaic, ‘painting by numbers’ approach to strategic litigation. However, it is still worth casting a critical eye over these criteria. Among South African human rights lawyers and beyond, it is not uncommon to find similar criteria articulated as ‘lessons learned’ or ‘rules of thumb’. Indeed, the report’s authors have described the report’s criteria as ‘the seven habits of highly effective public interest litigators’. Such evidence-based or ‘best-practice’-based discourse has also spread to donors as they require grantees to establish how funding for litigation will not only generate the promised outputs, but real impact.

This article therefore takes the Atlantic Philanthropies Report (APR), as a point of departure for exploring how we should conceive the lessons learned from public interest litigation. Is it a matter of science or of art? Is it a case of...
ticking some boxes or acquiring a form in the chaos of litigation and social life? In attempting to answer such questions, the article proceeds as follows. Part II sets out two recent Constitutional Court cases concerning municipal services – Mazibuko9 (water) and Joseph (electricity)10 – that provide a lens through which we begin our examination of the recommendations from the APR. While both cases deal with poor people challenging the disconnection of public services, they were decided very differently and have resonated in different ways in practice. These differential outcomes to similar legal questions provide a useful platform for testing whether the strategic assumptions in the APR model hold. Part III thus examines whether the APR criteria for successful litigation held in these cases (and briefly others), surmising that there is no necessary strong correlation between the strategic decisions of litigators and winning in court, although some of the APR factors do correlate better with the post-judgment impact.

The second half of the article attempts to move beyond a mechanistic logic to see litigation in its dynamic and broader context. In part IV, we propose a more expansive model for analysing the impact and, concomitantly, the role or value of public interest litigation, which explicitly draws the socio-political dimension into the frame. As we see it, the greatest potential of public interest litigation can lie beyond the spatial and doctrinal confines of the courtroom where, in the social realm, its impact can be extremely diffuse and under certain conditions destabilising of power relations and public perception. Part V then delves into the deeper assumption, which pervades the APR’s recommendations and broader discourse: that the form of legal mobilisation by the Treatment Action Campaign (TAC) represents an ‘ideal type’.11 In our view, it is not clear that this model is always realistic or even necessary. It might in fact contribute to unrealistic expectations, including from the courts. We propose that a more responsive model also needs support; one that is receptive to diverse legal opportunities in less-than-ideal conditions. This article is thus a plea to both litigators and funders to pursue a socio-legal studies approach to public interest litigation and its evaluation.

II Mazibuko and Joseph: An Overview

Although both cases primarily dealt with disconnections of basic services12 and the legal representation in both cases was provided by the Centre for Applied Legal Studies (CALS), Mazibuko and Joseph are significantly differ-

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9 Mazibuko v City of Johannesburg 2010 (4) SA 1 (CC) (Mazibuko CC judgment).
11 The APR considers the TAC case (Treatment Action Campaign v Minister of Health (No 2) 2002 (5) SA 721 (CC)) and related campaign to be the ideal model for public interest litigation. In this article we use the italicised TAC to denote the broader model encompassing the case, as well as the legal mobilisation and campaign around it. We use TAC without italics to refer to the social movement itself.
12 We acknowledge that Mazibuko was a relatively complex case with a number of legal arguments. Nonetheless, at the centre of both cases was the issue of un-procedural disconnection from basic municipal services.
ent in terms of applicant strategy, legal framing, judicial outcome and social impact. They consequently raise questions about the identification, predictability and assessment of public interest cases.

*Mazibuko* was grounded in an explicit right – the right of access to water in s 27 of the Constitution of the Republic of South Africa, 1996. It was brought by five poor residents of Soweto, with household incomes of around R1,000 per month, on behalf of themselves and all similarly situated households, as well as everyone in the public interest. The legal challenge formed part of a broader mobilisation around access to water, which was supported throughout by the Anti-Privatisation Campaign (APF).\(^{13}\) Despite succeeding in the Johannesburg High Court\(^{14}\) and winning their substantive claims in the Supreme Court of Appeal (SCA), the applicants lost in the Constitutional Court on all grounds. Yet, notwithstanding the judicial loss, there have been some important direct and indirect gains from the litigation process, which are outlined below.

*Joseph*, which concerned the disconnection of electricity to a building occupied by tenants, was considered by CALS to be a much riskier case than *Mazibuko*. This is because there is no explicit right to electricity in the Constitution and the case was not part of a broader social movement campaign. Furthermore, the applicants earned between R3,000 and R4,000 per household per month, making them less poor than the *Mazibuko* applicants, and not comprising the most vulnerable socio-economic grouping that the Constitutional Court has expressed a desire to protect in its previous socio-economic rights judgments.\(^{15}\) Nevertheless, the legal team thought that *Joseph* would gain legal ground in the wake of *Mazibuko*, which was launched two years before *Joseph*. As it turned out, both Part A and Part B applications of *Joseph* in the South Gauteng High Court were unsuccessful, but the applicants were granted leave to appeal directly to the Constitutional Court, where the case was heard some four months before *Mazibuko*, and the court decided in their favour (the order was handed down a day after the *Mazibuko* order) despite all of these factors. However, as of mid-2011, the order to reconnect the electricity supply has not been enforceable, although it has had some indirect impacts discussed below and in part IV.

(a) *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 prepaid water meters (PPMs). Called Operation *Gcin’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

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\(^{14}\) Now called the South Gauteng High Court.

\(^{15}\) See especially Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC) paras 52, 63, 68 & 95, which establish that for a programme to be reasonable, it must cater for those in desperate need.
Johannesburg’s richer suburbs, which provide water on credit with numerous protections against unfair disconnections, PPMs automatically disconnect once the Free Basic Water (FBW)\(^{16}\) supply is exhausted. The only alternative is to purchase additional water credit, which leaves poor households in practice without water for days on end each month (a fact not in dispute in the case).

Determined not to accept PPMs, the Phiri community embarked on a course of direct resistance against the roll-out. However, the resistance was critically undermined after the City secured a wide-ranging interdict. Activists were prohibited from coming within 50 meters of any PPM operations and private security companies were authorised to assist in managing any infringements of these terms. This effectively put an end to the direct activism. With this avenue of protest effectively closed off, the community turned to the option of rights-based litigation as a tactic to challenge PPMs (together with the ‘standpipe’ yard taps that the City offered some residents as an alternative to PPMs).\(^{17}\) In doing so, they turned part of the struggle into legal mobilisation – understood as the point at which ‘a desire or want is translated into a demand as an assertion of one’s rights’.\(^{18}\)

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 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 20 people had to share the one six-kilolitres FBW allocation. Thus the applicants approached the Court to have PPMs declared unlawful\(^{19}\)

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16 In 2001, the national Department of Water Affairs and Forestry (DWAF) formulated a FBW policy, according to which each household (but particularly poor households) was to receive six kilolitres (kl) of water per month for free (ie, 25 litres of water per person per day in a household of eight people). This was subsequently consolidated in reg 3(b) of the Regulations Relating to Compulsory National Standards and Measures to Conserve Water made under ss 9(1) & 73(1)(j) of the Water Services Act 108 of 1997, GN R509 of 8 June 2001.


19 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 s 4(1) of the Promotion of Administrative Justice Act 3 of 2000; the roll-out 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 s 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 s 4(3) of the Water Services Act 108 of 1997; and the City’s water by-laws 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://www.wits.ac.za/cals/11037/centre_for_applied_legal_studies.html#>
and the FBW policy reviewed and set aside as unreasonable because it was insufficient to meet basic needs in the Phiri context.\textsuperscript{20} The case was launched in the Johannesburg High Court on 12 July 2006 with the City of Johannesburg, Johannesburg Water Pty (Ltd) and the Minister of Water Affairs and Forestry as respondents. On 30 April 2008, Justice Tsoka ruled in favour of the applicants on all grounds, declaring PPMs unlawful and unconstitutional and the City’s FBW policy unreasonable. The City was ordered to provide the applicants and all similarly positioned residents with 50 litres of FBW per person per day.\textsuperscript{21} On being notified that the respondents intended to appeal, the Mazibuko applicants attempted to convince the other parties to agree to launch an application for leave to appeal directly to the Constitutional Court, but they refused. Instead, the case first went to the SCA which upheld the appeal on 25 March 2009.\textsuperscript{22} However, the SCA nonetheless ruled in favour of the Phiri residents on the two substantial grounds: finding PPMs unlawful (largely on the grounds that the City’s by-laws 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. It ordered the City to reformulate its policy with a view to providing 42 litres per person per day to indigent residents of Phiri.\textsuperscript{23} 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. This was because they felt there were serious problems with the SCA’s order, particularly its suspension of the order of invalidity regarding PPMs, that they did not want to

\textsuperscript{20} While a commendable move in terms of making water more affordable for poor households, it is strongly arguable that the amount of FBW (25 litres of water per person per day in a household of eight people) is insufficient to meet the basic needs of multi-dwelling poor urban households for two reasons. First, among others, an international expert on water sufficiency, Peter Gleick, estimates that the minimum amount of water required to meet basic health and dignity-related needs is 50 litres per person per day (‘Basic Water Requirements for Human Activities: Meeting Basic Needs’ (1996) 21(2) Water International 83. The World Health Organization has likewise found that 50 litres means low health risks while 20 litres a day carries high health risks; J Bartram & G Howard ‘Domestic Water Quantity, Service Level and Health: What should be the Goal for Water and Health Sectors’ (2002). Second, in poor urban suburbs such as Phiri one stand (household) typically comprises a main house and several backyard shacks. This means that there are often as many as 20 people relying on the one FBW allocation, as was the case for Lindiwe Mazibuko, the lead applicant in the Mazibuko case. This can reduce the effective allocation to ten litres of water per person per day (an average flush of the toilet uses more than this amount in one go). The Mazibuko FBW challenge was based mainly on s 27 of the Constitution, which recognises the right of access to water. The applicants, supported by the amicus curiae – the Centre on Housing Rights and Evictions (COHRE) – thus argued for 50 litres per person per day. The applicants also raised arguments that the tariff for the second block of water (the block after the FBW block, ie the first block water users had to pay for) was too high and unaffordable, but this argument in particular did not gain traction in any of the hearings.

\textsuperscript{21} Mazibuko v City of Johannesburg 2008 (4) All SA 471 (W) para 183.5 (Mazibuko High Court judgment).

\textsuperscript{22} City of Johannesburg v Mazibuko 2009 (3) SA 592 (SCA) (Mazibuko SCA judgment).

\textsuperscript{23} For a critique of the SCA judgment, see J Dugard & S Liebenberg ‘Muddying the Waters: The Supreme Court of Appeal’s Judgment in the Mazibuko Case’ (2009) 10 ESR 11.
leave un-addressed. The government applied to cross-appeal and the case 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. The judgment was not anticipated by the legal team and its findings in constitutional and administrative law have been the subject of academic critique. In particular its ‘deferential and normatively thin concept of reasonableness review’ and its characterisation of PPMs as not violating entrenched procedural protections have been criticised. Nevertheless, despite the judicial defeat, there have been some unanticipated outcomes of the case, as discussed in part IV.

(b) Joseph

On 8 July 2008, City Power (Pty) Ltd disconnected the electricity supply to a low-rent 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 and owed the municipality approximately R400,000. Finding themselves without electricity, with an absconded landlord, and being told by City Power that they would have to pay the entire arrears before their electricity supply would be restored, the applicants approached the South Gauteng High Court. They launched an application on 21 July 2008 that sought 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 applied for leave to appeal directly to the Constitutional Court on 30 April 2009. As summarised in the Constitutional Court judgment of 9 October 2009, the crux of

24 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’ Mazibuko SCA judgment (note 22 above) para 62.
25 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), the Court’s first socio-economic rights case).
29 City Power (Pty) Ltd is the City of Johannesburg’s main electricity supplier.
30 Part A was an urgent application for the immediate reconnection of electricity supply, which was dismissed by the High Court on 3 September 2008. 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. Judgment for Part B was delivered by the High Court on 3 April 2009.
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, in terms of their right to receive electricity. They based this claim on electricity being a component of the right, inter alia, of access to housing, arguing that such right was materially and adversely affected by the termination of electricity supply, thus grounding their claim in s 3 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). 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 by-law 14(1) of the City of Johannesburg’s electricity by-laws.

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, as well as a public order right to electricity. In doing so, the Court opened the space to base a claim on the right to basic municipal services. Unfortunately, however, this did not bring any direct relief to the applicants, who remained 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 wiring, meaning that it was no longer possible for the City to reconnect without incurring considerable expenses, which neither the City nor the landlord was willing to incur. Nevertheless, in the wake of the judgment, the Socio-Economic Rights Institute of South Africa (SERI) was able to ensure the reconnection of electricity to low-income residents of Soweto, who had been disconnected in similar circumstances, by using the Joseph precedent. And, more generally, the case defined electricity as a rights issue and publicised systemic problems in municipal basic services billing and services.

31 Joseph (note 10 above) para 2.
32 Ibid para 24.
33 Section 3 of PAJA requires procedural fairness whenever administrative action ‘materially and adversely affects a right or legitimate expectation of any person’.
35 Joseph (note 10 above) paras 34–55 (the Court based the right to basic municipal services on s 73 of the Municipal Systems Act 32 of 2000, read with s 152 of the Constitution).
36 It was estimated that the cost to re-wire the building would be around R200,000.
III WINNING IN COURT: THE APR MODEL AND MAZIBUKO AND JOSEPH

The APR proposes that there are ‘seven factors essential to ensuring that public interest litigation’ is successful in judicial outcome and, combined with other strategies, can effect social change. These headlines seem to suggest two propositions. First, a causal relationship between the essential factors and winning in court; and, second, that such victories are a precondition for effecting social change through litigation. As acknowledged, the authors are more graduated in their discussion of the first proposition but it is worth testing it (particularly regarding the first six court-oriented factors) against the Mazibuko and Joseph cases and contrasting this with the judicial outcomes of each case. This analysis reveals that public interest litigation is more contextually specific and complex than implied by a fixed set of legally-defined criteria, and that there is (for better or worse) not necessarily any correlation between lining up a case and the judicial outcome although there may be a weak correlation across a larger sample of cases (such as in the APR).

(a) Criterion 1: proper organisation of clients

In the APR model, public interest litigation works best when ‘the client is an organisation with a direct interest in the matters being litigated, rather than, for example, a few disparate individuals’ and when ‘the client plays an active and engaged role – rather than allowing legal representatives to make key decisions without proper client input’. According to Marcus and Budlender, this is partially to ensure that settlements do not derail broader public interest objectives and partially to ensure that cases are relevant to people on the ground. Finally, the APR authors explain that having client groups involved in litigation facilitates ‘proper follow-up after the litigation’, including monitoring and report-back regarding enforcement of judicial orders.

Turning to the cases examined in this article, in Mazibuko, although the direct clients were from poor households in Phiri, the litigation was anchored in a social movement, the APF, and a broader campaign against the commercialisation of water services. The litigation was explicitly brought in the public interest. In Joseph this was not the case, as the applicants were ‘disparate individuals’ who were litigating only to have their electricity reconnected. Apart from the strategic considerations of the legal team, the litigation was not grounded in any broader movement or campaign. For the purposes of the comparison, we therefore tick this criterion for Mazibuko and do not tick it for Joseph.

38 This section partly draws on J Dugard ‘Basic Services in Urban South Africa: Rights, Reality and Resistance’ in M Langford, B Cousins, J Dugard & T Madlingozi (eds) Symbols or Substance: The Role and Impact of Socio-Economic Rights Strategies in South Africa (forthcoming 2011).
39 APR (note 4 above) 119.
40 The seventh criterion is ‘Follow-up’. For the APR, follow-up after the litigation is critical to ‘translating the legal success into practical benefits’ (ibid 138).
41 Ibid 119.
42 Ibid 123–5.
(b) Criterion 2: overall long-term strategy

For the APR, the optimal public interest litigation tactic is to mount ‘a series of cases, brought on different but related issues over a substantial period’ by ‘repeat players’, with the earlier cases acting ‘as a vital building block for the more complex and difficult later cases’. Both Joseph and Mazibuko were not instances of a single, ‘one-shot’ case – both were litigated by CALS, which is a repeat player with a long history of litigating human rights issues. But this criterion is more applicable to Mazibuko than Joseph, because CALS had gained much from other repeat players in the form of amicus curiae COHRE, represented by the Legal Resources Centre (LRC), another repeat player with three decades’ experience of public interest litigation.

While building on other electricity disconnection cases that had been settled, Joseph was partly conceived in the shadow of Mazibuko, and was expected to be heard in the Constitutional Court after Mazibuko. As it turned out, Joseph progressed directly to the Constitutional Court and was heard before Mazibuko, demonstrating that the best-laid strategic plans can come unstuck in the vicissitudes of litigation process. In other words, while Mazibuko was meant to be one of the stepping stones for Joseph, it did not work out this way. So, we tick this criterion for Mazibuko and do not tick it for Joseph.

Regrettably, what is somewhat lost in the APR formula is that advocacy and mobilisation, rather than litigation, might drive an overall long-term strategy in which litigation only plays a small, though critical, part. In this situation, a single case might achieve a lot of impact if pinned to a broader, non-litigious, campaign. And, while it is true that repeat player litigators might have an advantage over one-shotters, the repeat player advantage can be achieved in a number of ways, such as through providing litigation support to a range of similar organisations (for example, social movements).

(c) Criterion 3: coordination and information sharing

The APR notes that it is ‘crucial that there be proper information sharing and coordination among different organisations’ to ensure the best use of resources and that cases are not undermined by conflicting cases being brought by other organisations. The coordination and information-sharing aspect was particularly evident in Mazibuko, which was litigated by CALS and benefitted hugely from the amicus curiae intervention of COHRE, a leading international organisation dealing with rights to housing and water, as represented by the LRC. In addition, throughout the lengthy course of the litigation, there was

43 Ibid 128.
44 Ibid.
45 It is also worth noting that both cases benefited from expert legal counsel, themselves repeat players in constitutional litigation. But this factor was more pronounced in Mazibuko, where Wim Trengove SC and Nadine Fourie were involved in formulating the case from the outset in 2004. Whereas, in Joseph, legal counsel was brought in quite late for Part A (only for the hearing), and changed for Part B, where Steven Budlender and Adrian Friedman represented the applicants.
46 See discussion in part II.
47 APR (note 4 above) 130.
substantial coordination and information sharing among other civil society movements and organisations working on local government service delivery. We therefore tick this criterion for Mazibuko. In respect of Joseph, this was largely not the case. Because the case was reactively motivated (against a specific disconnection) and moved unexpectedly quickly from the High Court directly to the Constitutional Court in a matter of a year, there was no time for extensive coordination and information sharing in Joseph. Therefore we do not tick this criterion for Joseph.

(d) Criterion 4: timing

According to the APR, ‘litigation should not commence until and unless the climate is right and until the relevant evidence is in place’.

In its general iteration, this is a difficult criterion to engage with, not least because timing, as conceived by the APR, depends on the time-frame of analysis. In relation to TAC, which the APR considers a ‘shining example as to how litigation – when run properly and as part of a series of broader strategies – can achieve social change’, we suggest that it is not that easy to conclude whether the TAC’s decision to wait for four years while engaging the government regarding mother-to-child transmission (MTCT) of HIV/AIDS was the right decision. Specifically, were the infections and deaths caused from MTCT during this time acceptable casualties of the strategic waiting game? Moreover, some issues may be especially difficult to assess on this axis. When, for example, is the timing right for poor people to get a better deal in South Africa? How long should people call for acceptable living conditions including access to adequate housing and basic services before it is the right time to litigate? Should we wait until there are 20 protests per month or when there are 200 or 2,000? At which point do we acknowledge that political processes, particularly as relating to rights that depend on local government delivery, are systemically failing? However, moving to the more specific claim, we agree that demonstrating a sufficient exhaustion of politi-

48 Ibid 133.
49 Ibid 134.
50 TAC (note 11 above).
51 The APR (note 4 above) states: ‘Prime among [the difficult decisions concerning timing] was the decision not to proceed with the litigation when the government appeared to be making some progress, and later the decision to follow counsel’s advice that the litigation would likely not succeed unless and until the Medicines Control Council registered Nevirapine for use to prevent MTCT. These decisions were agonising given the lives at stake and provoked criticism from some of the TAC’s allies. Nevertheless, with hindsight, they were absolutely correct’ 135.
52 Although difficult to quantify, it has been estimated that in 2009 there were in the region of 19.8 protests per month in South Africa, meaning that South Africa has the highest number of protests in the world (H Jain ‘Community Protests in South Africa: Trends, Analysis and Explanations’ (2010) Local Government Working Paper Series 1 3.. See also P Alexander ‘Rebellion of the Poor: South Africa’s Service Delivery Protests – A Preliminary Analysis’ (2010) 37(2) Review of African Political Economy 25; and Dugard (note 38 above).
cal routes is important. Empirical research tends to confirm greater judicial responsiveness in the face of clear political failures.\(^{53}\)

Notwithstanding such concerns, the specific timing criterion – ‘using litigation to achieve social change only when the political route has failed’\(^{54}\) – was met in the Mazibuko case, where activists and residents only resorted to litigation after resisting the roll-out of PPMs in every possible political form, including appealing to ward councillors and taking to the streets.\(^{55}\) Litigation was only taken up as a last resort following the failure of political engagement and direct protest. And, in line with the criterion, once the decision to litigate was taken, evidence was secured from a number of experts including a leading expert on water sufficiency. Thus, seemingly, the timing criterion should be ticked for Mazibuko. In contrast, the timing criterion should not be ticked for Joseph, which moved immediately to litigation. And, because of its swift movement through the judicial system, Joseph ended up in the Constitutional Court before the prior disconnections case, Mazibuko (even though Mazibuko had first entered the judicial system in July 2006, two years before Joseph did).

(e) **Criterion 5: research**

The APR uncontroversially notes that legal and factual research is a critical facet of public interest litigation (arguably, this is true for all litigation). Certainly both Mazibuko and Joseph were grounded in factual and legal research and further socio-legal and policy research that included several research reports,\(^{56}\) as well as the comprehensive research on international law advanced by the amicus curiae. By the time it was heard in the Constitutional Court, the Mazibuko record comprised 9,000 pages, including numerous research and expert-based affidavits, as well as reports, articles etc, many of which were submitted by the applicants and the amicus curiae. Joseph was able to take advantage of the significant in-house research capacity of CALS. However, there was less available research and expertise (both within CALS and elsewhere) on electricity than on water. And, again, the case moved too quickly through the judicial system to line up and include extensive research. Here we tick the research criterion for Mazibuko and mark it as partially fulfilled for Joseph.

(f) **Criterion 6: characterisation**

For the APR:

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53 See the concluding chapter in Gauri & Brinks (note 3 above).
54 APR (note 4 above) 134.
A substantial component of any successful case is the ‘characterisation debate’. This is particularly the case given that a particular case – especially when in the public eye – might be viewed and perceived in multiple ways by courts and the public.\(^{57}\)

The report goes on to argue that it is ‘extremely important for those involved in public interest litigation to demonstrate to both courts and the public that the issues at stake are critical, that there are fundamental rights being used to redress unfairness and inequality rather than perpetrate it and that there are countless real people being affected on a daily basis’.\(^{58}\) Regarding Mazibuko, all attempts were made to demonstrate that it was a critical case. It was characterised not only (or even primarily) as a water services case but was also framed as a negative violation of both administrative justice and equality. Moreover, CALS and the APF made extensive use of the media to demonstrate that issues of fairness, governance, democratic participation and equity underlined the litigation, so we tick the characterisation criterion for Mazibuko. The same cannot be said for Joseph, which was characterised as a right to electricity case (as implied by the right to housing), in the full knowledge that there is no explicit right to electricity in the Constitution and that, at the time it was launched, the seemingly easier case of water rights (Mazibuko) had not yet been decided. At the same time, though, the Joseph case concerned households completely without a service while in the Mazibuko case, access was heavily but not fully limited, which potentially made the legal-factual narrative somewhat easier to navigate. We therefore provide half a tick for Joseph.

This criterion perhaps deserves more critical attention than the others. This is because, as a contextual examination of Mazibuko and Joseph reveals, however professional and experienced the legal team, the way a case is characterised by the lawyers is not necessarily how a court will characterise a case. Indeed, in its reception and adjudication of the case, a court might pursue a wholly different legal and factual framing to that proposed by the legal team. Regarding the two cases examined here, although both cases concerned municipal disconnections, the Court (re)characterised Mazibuko predominantly as a positive rights claim for additional free water, which it misunderstood as an attempt by the applicant to re-open the minimum core content approach to socio-economic rights.\(^{59}\) And it (re)characterised Joseph as a case about the negative infringement of administrative justice principles in relation to municipal services.

Yet, as Pierre de Vos has commented, the simple difference between the two cases was that in Mazibuko, very poor households were not paying for water, whereas in Joseph, relatively better off households were paying for electricity. According to De Vos, the Court’s decisions have in effect endorsed a ‘pay-as-you-go’ model of municipal services that favoured the applicants

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57 APR (note 4 above) 137.
58 Ibid 138.
59 Mazibuko (note 9 above) paras 52–7.
in *Joseph*. So, while the *Joseph* applicants characterised their application as a housing rights case, the Court reformulated it as a negative violation of municipal systems, and its judgment sought to remedy the situation of paying tenants having their electricity supply disconnected without notice. Whereas in *Mazibuko*, the Court eliminated the disconnection aspect by ruling that PPMs ‘suspend’ rather than discontinue the water supply, thereby evading the procedural protections in the Water Services Act, and re-characterised the case as overwhelmingly a positive obligations claim. Thus, in both cases the Constitutional Court was able to sidestep the applicants’ own characterisation of their cases to pursue its own frame and legal logic.

***

According to the above examination, which is represented in tabular form for ease of reference in Table 1, all the APR criteria were fulfilled for *Mazibuko*, and the majority were not fulfilled for *Joseph*. A score of yes is given 1 and a partial score is given 0.5.

**Table 1: Comparison of *Mazibuko* and *Joseph* across the APR criteria**

<table>
<thead>
<tr>
<th>Criteria</th>
<th><em>Mazibuko</em></th>
<th><em>Joseph</em></th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Proper organisation of clients</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>2. Overall long-term strategy</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>3. Coordination and information sharing</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>4. Timing</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>5. Research</td>
<td>Yes</td>
<td>Partially</td>
</tr>
<tr>
<td>6. Characterisation</td>
<td>Yes</td>
<td>Partially</td>
</tr>
<tr>
<td>Score out of 6</td>
<td>6</td>
<td>1</td>
</tr>
</tbody>
</table>

According to our analysis, *Mazibuko* scores six and *Joseph* scores one. Yet, as outlined in part II, the judicial outcomes were negative for *Mazibuko* and positive for *Joseph*. So, for these two cases – the only water and electricity services-related cases to have come before the Constitutional Court to date – the six litigation-specific factors of the APR model were clearly not the decisive ones!

It is of course possible to argue that the *Mazibuko* case was simply legally flawed from the outset. In other words, despite the presence of all six APR factors, it was never going to win. However, taking this line of argument relies on accepting the Constitutional Court’s re-interpretation and re-characterisation of the case; which was quite different from the applicants framing and focus.

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60 P de Vos ‘Water is Life (but Life is Cheap)’ (13 October 2009) Constitutionally Speaking blog <http://constitutionallyspeaking.co.za/water-is-life-but-life-is-cheap/>.

61 *Mazibuko* (note 9 above) para 120. De Vos (ibid) notes that, in interpreting the words in s 4(3) of the Water Services Act not to apply to PPMs – because PPMs result only in ‘temporary suspension’, whereas the legislation sought to provide protection only in cases of ‘permanent discontinuation’ (para 120 of the *Mazibuko* CC judgment) – the Court must have ignored the word ‘limit’, ‘which could surely not mean anything but the “temporary suspension in supply”’. De Vos further notes that, in relying on this interpretation, the Court has rendered the protection of the Water Services Act meaningless in that, according to this logic, the Act’s protection only applies in cases prior to the permanent disconnection of the water supply.
Indeed, the response of commentators to the Mazibuko case suggests there are a number of problematic lines of reasoning in the judgment that suggest that earlier jurisprudence was not properly applied or was re-interpreted or narrowed considerably. Moreover, it won on all grounds in the High Court and on substantive grounds in the SCA, which does make the final Constitutional Court decision surprising, particularly given the respective reputations and rationales of the different courts.

We can only speculate about which other factors might have been decisive in these cases. It may be that other ‘demand-side’ (societal) factors may be missing from the APR analysis that would have explained such a result. Maybe it is the art of combining the factors? Or dropping some of them?

Maybe the ‘supply-side’ – the court itself – is not such a static and benevolent actor as presupposed in the APR analysis. Some authors have warned about the latent liberal formalism in the Grootboom and TAC judgments, which seems to have blossomed in Mazibuko. The Court also seems to demonstrate a rather romantic approach to poverty, which might explain the different outcomes in Mazibuko and Joseph. The Court may have also been uncomfortable with the type of social movement behind the case, which was significantly more leftist than others that have reached the Constitutional Court such as the TAC. This might suggest that civil society and academia need to devote more extra-legal and institutional attention to ensuring that the Court is committed to a transformative rather than a classical liberal interpretation of the Constitution.

Another response may be that both Mazibuko and Joseph were sui generis and that other cases demonstrate that these six essential rules are likely to be correlated with judicial outcomes. However, an analysis of four recent Constitutional Court cases on socio-economic and equality rights does not necessarily reveal this. For example, the six criteria would most likely be met for Abahlali base Mjondolo and Thubelisha Homes. In Abahlali base Mjondolo, the Court found that a section of a provincial law making forced evictions of slum dwellers obligatory was contrary to the constitutional right to housing. In Thubelisha Homes, the applicants lost – a forced eviction was sanctioned. However, a series of standards in the latter case was set out for alternative accommodation and their exactitude, combined with a mobilised community and the loss of the provincial government to an opposition party, seems to have prompted the parties to agree on in situ slum upgrading and the Constitutional Court to eventually rescind the eviction order.

In Nokotyana, arguably none of the criteria was met but the applicants did not lose on all
grounds – they did not achieve orders compelling the municipality to provide more toilets and high mast street lighting but managed to secure an order directing the municipality to take a decision within 14 months on whether it would upgrade the settlement under Chapter 13 of the Housing Code. In Tongane (a case that would certainly meet all criteria), the Constitutional Court struck down the Communal Land Rights Act 11 of 2004 in its entirety. But this was on procedural grounds. The High Court had found that the legislation undermined gender equality and security of tenure but the Constitutional Court simply ruled that the correct legislative procedure had not been followed and declined to address the broader human rights issues that generated the challenge. Thus, following the Constitutional Court’s judgment, the potential social change implications from the judgment were potentially limited.

All this goes to demonstrate that the APR criteria do not have sufficient explanatory power on their own to predict the judicial outcomes, certainly of the two cases examined in this article. This suggests that public interest litigators and funders, respectively, should exercise some caution in using the principles in deciding which cases to pursue and how to pursue them, and what kinds of litigation to fund. There appears to be as much art as science in shaping a case that will pass constitutional muster. Or as the 19th century Prussian/German Field Marshall Helmuth von Moltke put it, ‘No battle plan ever survives first contact with the enemy’.

IV TOWARDS A SOCIO-LEGAL FRAMEWORK FOR ASSESSING IMPACT

From our analysis, the judicial outcomes for Mazibuko and Joseph were seemingly precisely the opposite of what might have been expected from the APR formula. But what about the second aspect of the APR equation: maximising social change, ie impact? The APR authors curiously neither define social change/impact, nor map out how litigation interfaces with it. They do, though, set out three other key strategies, which they see as complementing public interest litigation:

- Conducting public information campaigns to achieve rights awareness;
- Providing advice and assistance outside litigation to assist persons in claiming their rights;
- Making use of social mobilisation and advocacy to ensure that communities are actively involved in asserting rights inside and outside the legal environment.

68 Nokotyana v Ekurhuleni Municipality 2010 (4) BCLR 312 (CC).
71 The model we advance in this part for assessing the impact of public interest litigation has been developed further in Dugard (note 38 above) and advanced somewhat differently in M Langford ‘Housing Rights Strategies: Grootboom and Beyond’ in Langford et al (note 38 above).
72 APR (note 4 above) 94–113.
In doing so, the APR emphasises that ‘public interest litigation be seen as merely one facet – albeit an important one – of broader, more varied efforts to achieve social mobilisation and change.’ 73 However, in the main, the report views social change from a largely materialist or neorealist perspective, which has been described as viewing a judgment as ‘effective if it has produced an observable change in the conduct of those it directly targets.’ 74 This is often the focus in lawyerly analyses of impact: has there been a change in the material conditions of the applicants or law and policy? And it is most evident in the APR’s analysis of TAC, viewed as the most successful case examined in the report, in which the Constitutional Court ordered the government to remove the restrictions preventing the provision of Nevirapine to prevent MTCT of HIV/AIDS. Yet, the report does not examine how TAC has affected social behaviour and, specifically whether the case has had any impact on the structural social condition of patriarchy, which underpins the extraordinarily high HIV/AIDS infection rate among women in South Africa. In this respect, the analysis by some scholars is that this struggle is very much ongoing at the local level and different strategies are being used to address it. 75 The APR does more successfully hint at this broader plane of impact in its consideration of gay and lesbian rights litigation, where it acknowledges that, while this litigation has succeeded in achieving the legal recognition of same-sex partnerships regarding sexual intercourse, immigration, adoption and social security benefits, there is still a ‘massive gulf between this legal recognition and the attitude of many ordinary South Africans on these issues’. 76

While direct (or indirect) material impacts are hugely important, absent from the APR frame is any examination of the role of law as a politicising agent in the dialectical relationship between structures of power (whether social, political or socio-economic) and the agency of social actors. In other words, what is missing is recognition that, particularly when mobilised by communities, social movements and groups other than lawyers, the legal platform can serve to powerfully politicise issues, and thereby to have a much more profound and lasting impact than the issuing of a judgment, by effectively constituting ‘politics by other means’. 77 We argue that in order to bridge the apparent disconnection between law and society in the APR model there needs to be an explicit recognition of the less material role of law as a politicising – or enabling (or destabilising) – agent and that, precisely for this reason, public interest litigation should not be viewed in a win or lose binary, especially when litigation has been rooted in broader mobilisation.

The APR neither considers whether a losing case might have a public interest impact (and thereby potentially affect social change), nor advances

73 Ibid 106.
76 APR (note 4 above) 41.
77 Abel (note 1 above).
a coherent analysis of impact. Nevertheless, there is a growing scholarship on how, where litigation is anchored in mobilisation, it can have substantial impact regardless of the judicial outcome. Michael McCann, amongst others, has stressed that, in these circumstances, the resultant legal mobilisation can resonate beyond the limits of the legal process by contributing to the empowerment of civil society and energising movements. In addition, in recent years there has been a move to develop a more nuanced and contextual analysis of the impact of litigation that incorporates much more than simply the material effects arising from a judicial decision. César Rodríguez-Garavito, for example, points out that litigation can result in ‘changes in ideas, perceptions and collective social constructs relating to the litigation’s subject matter … in sociological terms, they imply cultural or ideological alterations with respect to the problem posed by the case’. Here, Rodríguez-Garavito goes some way towards recognising the politicising potential of litigation.

We take this one step further by explicitly drawing into the frame an acknowledgment of the role of litigation as a political and politicising process. Thus, in our model, we incorporate a category of impacts that we refer to as enabling, denoting the empowering effects 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. However, we 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). This approach begins to grapple with the critique that rights-based approaches have traditionally neglected the dimension of power – that is to say that rights discourse has over-emphasised the agency of actors and under-emphasised the structures of dominating power (whether these are social, political or economic). By implicitly acknowledging the difficulties of securing structural change and the unlikelihood of a single judgment to do such on its own, this model proposes that the ultimate utility of litigation could lie in its empowering – or enabling – potential.

Finally, we see the enabling potential for litigation to be greatly bolstered when it is rooted in broader mobilisation, a kind of litigation-plus model of change. However, as a point of departure with the APR, we view the ultimate

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78 M McCann Rights at Work: Pay Equity Reform and the Politics of Legal Mobilisation (1994).
79 See Rodríguez-Garavito (note 74 above).
80 Ibid. Of course, this is not to deny that there may be negative impacts from litigation – whether material or enabling. For example, successful litigation may contribute to demobilising a movement, narrowing the space for articulating the content of rights or catalysing a political backlash. However, the focus in this section is on mapping a range of potential impacts, albeit with a focus on positive ones. For a discussion of potential and actual negative impacts from litigation in a comparative and South African context see the analysis and findings by the authors in Langford et al (note 38 above).
value of such legal mobilisation as being its role in politicising the issues at stake. In this model, which is graphically set out in Table 2, the material and enabling effects are set out on the vertical axis and the judicial and mobilisation components are set out on the horizontal axis. The components of the model are not intended to be either exhaustive or necessary. Nor is the model meant to be a prescription on how to do public interest litigation. Rather, the model provides a more open-ended frame for analysing the deeper impact of litigation, particularly where litigation is accompanied by legal mobilisation.

**Table 2: A typology of impact for rights-based litigation**

<table>
<thead>
<tr>
<th>Enabling</th>
<th>Judicial process</th>
<th>Legal mobilisation process</th>
</tr>
</thead>
<tbody>
<tr>
<td></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 the social, socio-economic or political sphere;</td>
<td>Sensitising the media and raising public awareness about the validity of the problem;</td>
</tr>
<tr>
<td></td>
<td>Clarifying or redefining the litigation terrain in terms of problems, possibilities and precedents;</td>
<td>Politicising the problem;</td>
</tr>
<tr>
<td></td>
<td>Conferring perceptions of authority/legitimacy for rights-based initiatives;</td>
<td>Monitoring any judicial orders to maximise enforcement.</td>
</tr>
<tr>
<td></td>
<td>Providing a dramatic platform for airing grievances;</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Allowing greater tactical options for civil society formations;</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Changing attitudes among civil society players towards rights-based options.</td>
<td></td>
</tr>
<tr>
<td>Material</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>
<td></td>
</tr>
</tbody>
</table>

Applying this analytical framework to *Mazibuko*, it is clear that there are much more profound impacts than implied by the APR model. As has been argued elsewhere, and 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. This occurred not least through the delay (for several years) of the roll-out 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’.83

Other unanticipated outcomes of the litigation were highlighted by *Mazibuko* applicant, Grace Munyai. When phoned from the Constitutional Court regarding the judgment, 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 destroyed 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.

Finally, in something of a surprise, despite the judicial defeat there have actually been material impacts from the *Mazibuko* judgment. This clearly was as a result of the politicisation of the issues during the legal mobilisation process. These impacts include the fact that, as a direct result of the politicisation surrounding the litigation, the City raised the amount of FBW it provides to the poorest households in Johannesburg to 50 litres per person per day (the amount the applicants asked for).84 The City has also indicated that the new generation of PPMs it plans to install will have a ‘trickler’ device. This means 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. Moreover, the City has undertaken that as part of the new roll-out of PPMs, it will not 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 has pursued more rights-based litigation and campaigning in the year following the judicial defeat than ever before *Mazibuko*. And, for a movement that has traditionally been highly sceptical of rights,85 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 strug-

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83 Interview with D McKinley (10 July 2009), cited in Dugard ibid 94.
84 This is in terms of the City’s Expanded Social Package, and applies up to a monthly household limit of 15 kilolitres. When the case was launched, the City provided a maximum of six kilolitres of FBW per household per month to poor households.
85 As a socialist movement, the APF has historically regarded rights as elite-serving. See for example Dugard (note 55 above) 87–8.
gles for socio-economic justice. The categories of impact for *Mazibuko* are represented in Table 3.

**Table 3: A typology of impact for Mazibuko**

<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-running platform for the struggle against PPMs;</td>
<td>Public opinion was raised about usage, pricing and equity of water services;</td>
</tr>
<tr>
<td></td>
<td>Provided much information on water services-related planning, budgeting and problems;</td>
<td>The media was sensitised to struggles by poor to access basic services;</td>
</tr>
<tr>
<td></td>
<td>Reinvigorated water rights activists and the APF specifically;</td>
<td>The issues of PPMs and access to sufficient water in Soweto were politicised.</td>
</tr>
<tr>
<td></td>
<td>‘Voice’ was given to water rights struggles;</td>
<td></td>
</tr>
<tr>
<td></td>
<td>High Court victory legitimised struggle and conferred a sense of authority for destroying PPMs to access sufficient water;</td>
<td></td>
</tr>
<tr>
<td></td>
<td>APF decision to use litigation as one of its tactics – part of ‘law and organising’ agenda going forward, in contrast to previously antagonistic stance to law and rights.</td>
<td></td>
</tr>
<tr>
<td>Material</td>
<td>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.</td>
<td>Additional FBW has been made available to the poorest households;</td>
</tr>
<tr>
<td></td>
<td></td>
<td>PPMs have been fitted with a ‘trickler’ device so that there is no longer an automatic disconnection following the exhaustion of the FBW amount;</td>
</tr>
<tr>
<td></td>
<td></td>
<td>The City has undertaken not to prosecute anyone for bypassing PPMs or standpipes.</td>
</tr>
</tbody>
</table>

Regarding *Joseph*, it has not been possible to implement the Constitutional Court’s order for the reconnection of electricity. This is despite follow-up by the legal team (as required in the APR’s seventh litigation criterion) although the APR authors would have predicted such difficulties given their emphasis elsewhere on the importance of pre-judgment social mobilisation for enforcement. Nonetheless, there has been significant impact. Access to electricity has been defined as a rights-issue, a new right to municipal services has been created, assumedly with all the administrative justice protections of public services, and a precedent has been created to challenge subsequent electricity disconnection.
cases, starting with *Chiawelo.*\(^{86}\) 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 4.

**Table 4: A typology of impact for Joseph**

<table>
<thead>
<tr>
<th>Enabling</th>
<th>Judicial process</th>
<th>Legal mobilisation process</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>• Publicised systemic problems in municipal governance relating to credit control; • Defined electricity as a rights issue; • Created new right to municipal basic services and a public order electricity right; • Created a precedent for litigating other electricity disconnection cases.</td>
<td>• None</td>
</tr>
<tr>
<td>Material</td>
<td>• City by-laws changed to remove ability to disconnect tenant’s electricity supply without notice.</td>
<td>• None</td>
</tr>
</tbody>
</table>

From these analyses, it is evident that both the judicial outcomes and the impact of *Mazibuko* and *Joseph* have had a life of their own way beyond the criteria established in the APR. This suggests not only that a ‘losing’ case may resonate positively in terms of rights discourse and mobilisation but also that it may be overly restrictive to pursue a preconceived set of criteria when ‘choosing’ which cases to take up. This is especially the case where such criteria limit their frame of impact to the implementation of judicial orders. 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 *Joseph*, despite the judicial win, the reconnection of electricity to the building has not been possible due to extensive damage caused in the interim.

V A Responsive Model

The cases analysed in this article indicate that litigation is unpredictable but that, especially when linked to legal mobilisation, it has the potential for diverse and reverberating impacts. We do not suggest yet another formula for public interest litigation. Inevitably, litigation is always context-specific and judicial outcome is hard to predict. This makes us somewhat suspicious about the manner in which the Atlantic Philanthropies used the *TAC* case as a model for all its recommendations on litigation-related strategy. The APR partly follows a classical approach of pitting *Grootboom* against *TAC*, which correlates the higher impact in the latter with its superior socio-legal mobilisation. Putting

\(^{86}\) *Chiawelo* (note 37 above).
aside the question of *Grootboom*’s impact, it is not always clear though that this strategy is realistic or necessary. It may even blind us to alternatives or condition courts to presume that all future cases, particularly those concerning positive obligations, will resemble such a case and strategy. In other words, the TAC model may represent the ‘Rolls Royce’ of litigation strategy, but may not always be affordable, practical, necessary or even desirable.

In our view, there are four main dangers in blindly applying such a model. The first is that it blinkers donors and lawyers to the remarkable contributions that the ‘local’ and ‘unorganised’ – the subaltern – can make out of dire circumstances. The TAC and APR model presumes that sophisticated and coordinated national political advocacy can precede litigation. In many cases, particularly those at the local or provincial level, this may simply not be possible. Many socio-economic rights are realised through local and provincial governments and their policies and strategic alliances may be more difficult to form across class or location. This is partly acknowledged by the APR authors in their discussion of the *Grootboom* case.

But the authors overlook the other side of the coin – the remarkable impacts of the housing and evictions rights cases. In the field of housing, poor and small communities with minimal legal support and funding have been able to not only achieve victories in the Constitutional Court, but in a significant number of cases they have successfully resisted eviction, improved their housing situation (and that of surrounding communities), reformed national policy and legislation and forced local municipalities to develop innovative and potentially replicable housing policies and practices. Small interventions in such cases – such as amicus curiae briefs or professional representation – have often helped the case leverage a greater level of impact. Ideally, these cases could be planned in advance but they are usually prompted by the immediacy of forced evictions or other violations. There is consequently a strong motivation towards using all possible tactics, including the full range of legal strategies, given the consequences. Thus, a public interest litigation model that is more responsive to these cases and helps them utilise the energy of the struggle to garner wider social change could and should be supported.

The second is that ‘public interest litigation’ does not necessarily have to start with a case. It can start with a judgment. This has been the experience of some cases in India (for example, right to food) and Colombia (for example, rights of internally displaced persons). In both cases, there was little social mobilisation or information sharing across coalitions in the lead-up to the decision. However, the judgments helped stimulate country-wide social mobi-

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87 Langford (note 71 above) argues that the impact of *Grootboom* has been undervalued in terms of its material impact on the community (it led to speedier than planned access to permanent housing) as well as broader policy and possibly symbolic effects. Likewise, Liebenberg (note 26 above) 399-409, notes the deep transformative impact that *Grootboom* has had on evictions law in South Africa. However, Budlender & Marcus do provide a more in-depth analysis of the impact of the *Grootboom* judgment than many other commentators and provide important insights into its origins.

88 APR (note 4 above) 43–67.

89 See Langford (note 71 above) for a full discussion of seven forced eviction cases where the majority produced these wider effects.
lisation and follow-up litigation to ensure enforcement. This was certainly assisted by the supervisory orders of the courts, but the post-judgment legal mobilisation went beyond the initial orders and/or process.

Thus, one needs to imagine (and fund) socio-legal strategies in the court arena that may begin at the point of judgment. Joseph is a case in point. The strategy disobeyed all the APR litigation rules but created a significant judicial victory. The lack of a social movement and broader legal coalition or community supporting the case could be overcome (even now as we write) if non-governmental organisations and social movements were more ready to capitalise on, and to respond to, these sudden opportunities.

The third is that, while we and the APR authors have championed the importance of social mobilisation, it is not always necessary and may even be harmful. High-profile campaigns may be less helpful if the litigants have been victims of deeply held community prejudices. In such situations, for example regarding migrants’ access to socio-economic rights, the quiet nature of court proceedings may allow such individuals to assert their rights and permit indecisive and electorate-conscious governments to defer to the courts in order to make unpopular decisions.

The fourth is that pursuit of the TAC model can distract attention from ensuring judicial and court reform. The supply-side of litigation may need to be pushed to make it work more effectively. Bruce Wilson has demonstrated how the Constitutional Court in Costa Rica has helped engineer remarkable social change through its judgments in the almost complete absence of organised civil society. The reason for this is found in the flexible procedures for accessing the court, the ability to access immediate orders and the court’s own unrelenting follow-up procedures. While South Africa may not follow the Costa Rican approach, lessons can be learnt in ensuring that courts are more responsive, particularly in rural and poorer areas. The APR does acknowledge the extreme difficulty of social mobilisation for litigation in rural areas (noting the rise and fall of social movements) and the creative Nkuzi case, which successfully grounded a right to legal aid in rural eviction cases (and was partly implemented).

However, the rules of the game in rural areas have not necessarily changed with the advent of some legal aid support – commercial farmers are simply more adept at using the legal procedures. Thus, policy (and litigation) strategies could be more focused on ensuring that courts are more responsive to litigants, wherever they find themselves, with or without a social movement.


VI CONCLUSION

In 1995, the first year of democratic rule in South Africa, Rick Abel noted that ‘law has been a terrain of political contestation throughout South African history’ and rhetorically asked: ‘is the law, like war, merely politics by other means?’ Writing in 2011, 17 years after the advent of democracy, but in respect of one of the most unequal societies in the world, we find Abel’s comment and question to be just as relevant. Under apartheid, jurisprudential debates waged about the role of law under an authoritarian regime. Today similar debates are beginning to emerge about the role of rights in the context of extreme social and economic inequality. We believe that rights-based public interest litigation can be a relevant and effective resource in struggles to forge a more equal society. But in order to reveal the real value of rights-based public interest litigation, the frame needs to be widened to take many more factors into account than dealt with in the model as epitomised by the APR.

The above examination of Mazibuko and Joseph has indicated the complexity of the causal connection between public interest litigation and both successful judicial outcome and maximal social impact. Regarding successful judicial outcome, while various factors are relevant in specific cases (particularly retrospectively), the litigation process is too unpredictable to rely on any pre-conceived formula. As Mazibuko has shown, you can tick all the conventional boxes and still lose in court. Or, as Joseph has shown, you can sometimes win in court without ticking all the boxes. This is not to imply that there are not better or worse ways to do public interest litigation. Clearly, the more immersed in the area you are litigating, the better. As with any kind of litigation, this includes conducting ongoing research, coordinating with stakeholders and learning from being a repeat player. In this respect, there is mounting evidence that civic action requires long-term strategic thinking based on thorough contextual and structural analyses. These are habits worth acquiring. However, as evidenced in Mazibuko, such factors might not be enough to ensure a successful judicial outcome. Judicial outcome depends ultimately on the judges themselves. In this regard, studying trends and patterns might offer some clues as to how judges might adjudicate. However, in the case of the South African Constitutional Court, particularly in relation to socio-economic rights claims such as those pursued in Mazibuko and Joseph, the Court’s jurisprudence is still too sparse and inconclusive to provide concrete direction.

Regarding impact, we have argued that litigation’s enabling effects can be just as important, or more so, than the material effects, regardless of the judicial
outcome. As noted by Michael McCann, although litigation campaigns ‘do not translate automatically into the social change desired, they can help redefine the terms of the dispute among social groups, both in the short-term and the long-term’. This politicising effect of public interest litigation can alter the perceptions of different social actors in government, media and society, which, over time, can lead to profound social change. In Rodríguez-Garavito’s words:

All of this implies that, even when judges’ holdings are contrary to the positions of those promoting social change, judicial [and linked mobilisation] processes can nonetheless generate transformative effects by increasing visibility of the problem in the media or by creating lasting bonds between activist organisations. These alliances can outlast the decision and lead to collective political actions that promote the same cause in context other than the courtroom …

And we have argued that the TAC model behind the APR criteria needs to be critically examined. While it is a highly desirous model, a ‘Rolls Royce’ of sorts, equal attention should be given to other ‘responsive’ forms of public interest litigation and advocacy – especially those actions that enable speedy and strategic reactions to litigation initiated by ‘disparate’ individuals and communities; follow up ‘other litigant’s’ judgments with socio-legal mobilisation; and work towards a more receptive court system that can more axiomatically spur individual justice and broader social change.

In the final analysis, the closed system of legal logic proposed by the APR model is too limited to either account for judicial decisions or to capture the full role and impact of public interest litigation. The implication for public interest lawyers is that they, too, need to take more, rather than less, into account when making strategic choices about litigating. This is because litigation, especially when anchored in social mobilisation, has far more potential than merely realising material changes. As acknowledged by social movement theory, the impact of collective action is as much about influencing the climate of ideas in the efforts of social movements to contrast a collective identity and contribute to associational life, as it is about realising concrete policy changes. It is important that public interest litigation donors, too, acknowledge the broader role for public interest litigation and do not reduce evaluations to superficial formulas. Successful public interest litigation is not about ticking boxes. Nor is it only about winning in court. It is not a science. At best it is a craft that requires long-term engagement with a much larger range of factors than the traditional legalist approach suggests. In short, when contextually located and especially when anchored in broader mobilisation, public interest litigation can constitute politics by other means.

97 McCann (note 78 above) 283.
98 Rodríguez-Garavito (note 74 above).