CURRENT DEVELOPMENTS

RIGHTS, REGULATION AND RESISTANCE: THE PHIRI WATER CAMPAIGN

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ABSTRACT

At the national level, South Africa has one of the most progressive water rights-related legal and policy frameworks in the world, which includes a right to water and a national Free Basic Water strategy. This implies an approach in which water is viewed as a social and developmental good, and is regulated as such. Yet, despite being required to monitor municipal compliance with all water-related norms and standards, the Department of Water Affairs and Forestry is still developing a National Water Services Regulation Strategy and has not yet agreed on an appropriate model of regulation. In the meantime, at the local government level where water delivery occurs, municipalities are under acute pressure to become financially self-sufficient and recover service-related costs from all areas, including poor communities. As a result, cost-recovery and maximising revenue from water services, rather than social or developmental benefit, have become the focus of water services delivery. Within this commercialised paradigm, water is viewed and regulated primarily as an economic good, albeit with some obligatory concessions to social justice. In the City of Johannesburg this has entailed the imposition of a punitive mechanism for credit control — the prepayment water meter — across Soweto, starting in the poorest Soweto suburb, Phiri, in 2004. The evolving clash between water needs and prepayment meter regulation has given rise to local community resistance which, in turn, has been instrumentally channelled into water rights litigation by an otherwiselaw-averse coalition of leftist social movements. There are early signs that the Mazibuko case, although not concluded, has changed negative perceptions of the law among coalition members and reinvigorated the water campaign. This implies a wider role for rights-based legal mobilisation in socio-economic struggles, and even among actors that are traditionally sceptical about the role of law and rights in society.

I INTRODUCTION

At around two o’clock in the morning on 27 March 2005, Phiri resident Vusimuzi Paki awoke to the shouts of a tenant, who was trying to put out a fire in one of the other backyard shacks on Paki’s property. Assisted by

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neighbours, the first crucial minutes were spent trying to extinguish the fire using the pre-paid water meter supply that the Johannesburg Water company had recently installed to control the residents’ water supply. However, the water pressure was insufficient to make much impact on the fire and, after a while, the pre-paid meter water supply automatically disconnected due to insufficient water credit. Residents were then forced to scoop up ditch water with buckets in a desperate attempt to put out the fire. More minutes passed. One neighbour tried to telephone the police at Moroka police station but no one answered the phone. After battling for an hour, residents finally put out the fire, but not before the shack had burnt to the ground. It was only after Paki’s tenant returned home from her night shift that everyone discovered to their horror that her two small children had been sleeping in the shack. They both died in the fire.¹

‘Water is life, sanitation is dignity’. So begins the Department of Water Affairs and Forestry (DWAF)’s 2003 Strategic Framework for Water Services.² So, too, begins the judgment of Johannesburg High Court Judge Moroa Tsoka in the recent water rights case, Mazibuko v City of Johannesburg (Mazibuko),³ in which the City of Johannesburg’s water regulation polices were found to compromise the Strategic Framework for Water Services promise and violate the residents’ right of ‘access to sufficient water’.⁴ Specifically, Tsoka J found the City’s installation of prepayment water meters⁵ in Phiri, Soweto, to be unlawful and unconstitutional,⁶ particularly as it restricted water to an unreasonable Free Basic Water (FBW) supply that was insufficient to meet basic needs.⁷ The City was ordered to provide all applicants and similarly placed residents of Phiri with the option of a conventional credit metered water supply at the City’s cost, as well as 50 litres of FBW per person per day (roughly double the existing allocation for a household of eight persons).⁸

Mazibuko is the first major test case on the positive obligations imposed by the right of access to sufficient water in South Africa.⁹ The application

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³ Mazibuko v City of Johannesburg (Mazibuko), Johannesburg High Court case no 06/13865 (as yet unreported), judgment of 30 April 2008 [2008] ZAGPHC 128.
⁵ Technically, the prepayment water meters were installed by the City’s water services provider, Johannesburg Water (Pty) Ltd. (Johannesburg Water), which, although corporatised, is publicly-owned, with the City as the only shareholder. For the sake of convenience, I use the term ‘City’ broadly to encompass Johannesburg Water. Prepayment water meters are sometimes referred to as pre-paid water meters or PPMs. In this article I use ‘prepayment water meters’ or ‘prepayment meters’.
⁶ Mazibuko (note 3 above) para 183.4.
⁷ Ibid paras 169 and 181.
⁸ Ibid para 183.
⁹ Two other water cases, both related to the administrative disconnection of water services, deserve mention: Manqele v Durban Transitional Metropolitan Council 2002 (60 SA 409 D & CLD) (in which the judge ruled against the applicant whose water supply had been disconnected for non-payment) and Residents of Bon Vista Mansions v Southern Metropolitan Local Council 2002 (6) BCLR 625 (W) (in which the judge ordered the interim re-connection of water to the applicants).
was brought by five desperately impoverished residents of the poorest suburb of Soweto, Phiri, on behalf of all similarly placed residents of Phiri and everyone in the public interest. The applicants challenged the City’s forcible imposition of prepayment water meters as constituting an unfair means of economic regulation aimed at restricting poor Soweto residents’ water supply to the inadequate FBW amount unless they pay for the additional water vouchers in advance of their water consumption. As set out by the applicants in the Mazibuko founding affidavit and reply, the City’s attempt to regulate residents’ water consumption in ways that fundamentally violated their rights was compounded by the failure to offer acceptable alternatives to the prepayment meter system. Households that refused to change to the prepayment water meter system were offered an outside tap with no connection to the waterborne sewerage system as the only alternative. When it was heard in the Johannesburg High Court, 3 to 5 December 2007, the application represented over three years of rights-based legal preparation by CALS in concert with a coalition of community organisations and social movements, the Coalition Against Water Privatisation (CAWP).

The High Court judgment was handed down on 30 April 2008. Finding the underlying basis for the introduction of the prepayment meters to be credit control that had only been imposed in ‘the historically poor black areas and not the historically rich white areas’, Tsoka J ruled that the ‘introduction of the prepayment meters discriminates on the basis of colour, amounting to unfair discrimination that is unconstitutional and unlawful. Moreover, finding prepayment meters to be an unreasonable denial of the applicants’ constitutional rights, Tsoka J concluded:

To deny the applicants the right to water is to deny them the right to lead a dignified human existence, to live a South African dream: To live in a democratic, open, caring, responsive and equal society that affirms the values of dignity, equality and freedom. The denial would perpetuate the decades long poverty, deprivation, want and undignified existence of the recent past. The Bill of Rights guaranteed in the Constitution would, as a result of the denial, remain a distant mirage of unfulfilled dream. The denial is unconstitutional and therefore unlawful.

If the judge’s critical pronouncements about the City’s regulation of water services to poor areas are accepted, how has DWAF — tasked as it is to monitor every municipal water services institution to ensure compliance with applicable standards — allowed such an iniquitous system to perpetu-

11 Until February 2007, the applicants’ attorney of record was the Freedom of Expression Institute (FXI), with whom CALS worked closely, providing the necessary social and legal research. In February 2007 FXI withdrew as attorney of record, and CALS took over this role too.
12 The Coalition Against Water Privatisation is a coalition of community-based organisations and social movements, which is located within a broader coalition of social movements, the Anti-Privatisation Forum (APF). Both CAWP and the APF are socialist in orientation.
13 Mazibuko (note 3 above) paras 154-5.
14 Ibid para 160.
15 Section 62(1) of the Water Services Act 108 of 1997.
ate? The answer is that, beyond formulating a baseline national FBW policy (though never intervening to enforce it), DWAF has not engaged its regulatory function in the social interest, to intervene when municipalities fail to protect poor people’s water-related rights. Indeed, as outlined below, for the most part DWAF has sacrificed its social regulation function at the altar of municipal autonomy.

DWAF defines water regulation as ‘a set of rules and functions that ensure a balance of interest between government as custodian of water, providers and citizens through ensuring compliance with minimum norms and standards’. Yet, despite the obvious importance of ensuring that poor people receive adequate safe and affordable water, until now there has been no national regulation of the social aspect of water services. This has meant that municipalities have been left to regulate water services as they see fit. In the City of Johannesburg the balance has been overwhelmingly tilted in favour of economic rather than social regulation, with prepayment meters being imposed on the poorest suburbs as a means of restricting access to water for poor people, without any investigation of whether the national FBW allocation was sufficient to meet basic needs. This has led to the violation of rights alluded to by Tsoka J above, which DWAF has not only failed to mitigate but has, in fact, defended through its continued opposition of the Mazibuko application.

In the absence of national social regulation, communities have been left to suffer the consequences of municipal economic regulation, or to directly resist them. In Phiri, residents chose to resist the imposition of prepayment water meters. They were supported by the APF, a socialist social movement, which is very active in the area. At first, resistance took the form of direct protest rather than ‘legal mobilisation’, defined by Frances Zemans as the point at which ‘a desire or want is translated into a demand as an assertion of one’s rights’. The initial focus on direct protest is not surprising, given the influence of the APF and the political left’s historical antagonism to the law and rights, which are viewed as preserving existing power relations, legitimising privilege and entrenching socio-economic inequality.

However, as detailed below, such resistance was successful only in delaying the installation of prepayment meters, not stopping it. But, at the lowest moment when it looked like community resistance had failed, a newly-established APF-affiliated organisation, CAWP took a strategic decision to turn to rights-based litigation, despite its ideological aversion to rights and the law. The CAWP/APF decision to mobilise legally following the failure of

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17 Leave to appeal to the Supreme Court of Appeal was granted on 9 September 2008.


20 Although the Mazibuko litigation has been organised by CAWP, the APF continues to exert substantial influence over the campaign. Both are socialist movements, CAWP being a social movement within the broader APF social movement.
traditional forms of leftist resistance is consistent with Stuart Scheingold’s proposition that rights are less ‘established political facts’ than potentially useful ‘political resources’. 21 Nevertheless, from the outset, not much hope was vested in the litigation process, which was clearly viewed as a last resort against prepayment meters. Yet, as examined in Part IV, following the High Court victory, there has been a remarkable demonstration of support for the law from CAWP and other traditional sceptics. This is despite the fact that (pending an appeal), the order against prepayment meters is suspended, suggesting that there might be more value to even contingent legal mobilisation than de facto outcome alone. As Michael McCann concluded in his seminal study of the 1980s wage equity campaign in the United States of America, I observe that, in Phiri, litigation has ‘provided movement activists an important resource for advancing their cause’. 22 For the water campaign activists, this resource is the substantial legitimacy derived from legal authority, which I suspect will continue to empower and shape struggles for water in Phiri and beyond.

The Mazibuko judgment is currently being appealed by all three respondents (the City of Johannesburg, Johannesburg Water (Pty) Ltd and DWAF) to the Supreme Court of Appeal. However, notwithstanding a final resolution of the matter, the Phiri water campaign provides an interesting case study of the uptake and utility of legal mobilisation based on the water rights framework.

II THE WATER RIGHTS FRAMEWORK

Internationally, and even more so in the South African context, there can no longer be any doubt that, at least theoretically, there is a right to water. Water is an essential service and without safe and affordable access to sufficient water, all other rights are meaningless. Within the human rights lexicon — which recognises the inherent indivisibility of all rights — as well as practically, the right to water is intrinsically linked to other rights such as the right to healthcare. Humans cannot survive without water and, with insufficient or unsafe intake of water they compromise their health and hygiene, exposing themselves to cholera, diarrhoea, parasitic infestations and HIV/AIDS-related infections.

(a) International law

Although the main international convention on socio-economic rights — the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) — does not explicitly list a right to water, there are several reasons to conclude that there is an international right to water. 23 First, without water many of the human rights (whether social, economic and cultural, or civil and

22 M McCann Rights At Work: Pay Equity Reforms and the Politics of Legal Mobilisation (1994) 4.
political) are meaningless, implying that the right to water must be inferred from other more general rights. These more general rights include art 11 of the ICESCR, which guarantees everyone’s right to ‘an adequate standard of living’, art 12 of the ICESCR, which recognises everyone’s right to enjoy ‘the highest attainable standard of physical and mental health’, as well as arts 6 (right to life) and 10 ‘the inherent dignity of the human person’ of the International Covenant on Civil and Political Rights (1966).

Second, more recent international instruments — such as the Convention on the Elimination of All Forms of Discrimination against Women (1979), the Convention on the Rights of the Child (1989) and the African Charter on the Rights and Welfare of the Child (1990) — all contain specific references to water-related rights. Third, in 2002 the United Nations Committee on Economic, Social and Cultural Rights (CESCR), which provides clarity on the nature and scope of the ICESCR, formulated a specific General Comment (No. 15) on the right to water, which outlines the parameters of states parties’ obligations. General Comment No. 15 on the right to water stresses that water is ‘a public good fundamental for life and health’.

Fourth, in 2006 the United Nations Sub-Commission on the Promotion and Protection of Human Rights adopted draft guidelines for the realisation of the right to drinking water and sanitation, and in 2007 the newly established Human Rights Council (which succeeded the Office of the High Commissioner on Human Rights) commissioned a report on the right to drinking water and sanitation in international human rights law, following which the Council adopted a resolution on state action required to advance access to water and sanitation. Finally, during 2008 the Human Rights Council appointed an Independent Expert on the human right to water and sanitation.

The international water rights framework does not per se exclude cost-recovery for water services, nor does it stipulate the provision of free water or the

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24 In relation to obligations towards rural women, article 14(2)(h) of the Convention on the Elimination of All Forms of Discrimination against Women compels states parties to ‘ensure the right to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply …’.

25 Article 24(2)(c) of the Convention on the Rights of the Child obliges states parties to ‘combat disease and malnutrition … through … the provision of adequate nutritious foods and clean drinking-water …’.

26 Article 14(2)(c) of the African Charter on the Rights and Welfare of the Child provides that states parties must ensure ‘the provision of adequate nutrition and safe drinking water’ to children.


public ownership of water supply. However, it does establish that everyone is entitled to affordable water: ‘the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses’. General Comment No. 15 further stipulates:

To ensure that water is affordable, States parties must adopt the necessary measures that may include, inter alia: (a) use of a range of appropriate low-cost techniques and technologies; (b) appropriate pricing policies such as free or low-cost water; and (c) income supplements. Any payment for water services has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with water expenses as compared to richer households.

In any context of dire poverty and entrenched disadvantage, the requirement for affordable water clearly implies access to sufficient and uninterrupted free water where people are unable to pay for water. Moreover, General Comment No. 15 emphasises that, in balancing any need for water to be regarded as a commercial commodity, water should be ‘treated as a social and cultural good, and not primarily as an economic good’.

There is not as much international law guidance on the uptake of prepayment water meters, which remains quite unusual because of the severity of their automatic disconnection function. During the 1990s private water companies in the United Kingdom did try to introduce prepayment water meters. However, following a legal challenge — R v Director General of Water Services, ex parte, Lancashire County Council, Liverpool City Council, Manchester City Council, Oldham Metropolitan Borough Council, Tameside Metropolitan Borough Council and Birmingham City Council — these were declared unlawful because they failed to afford a hearing prior to the automatic disconnection. Moreover, recently, in the recommendations of his 29 February 2008 report to the United Nations on his mission to South Africa (during 2007), outgoing United Nations Special Rapporteur on adequate housing, Miloon Kothari, concluded the following about prepayment water meters:

The Special Rapporteur highlights the importance that water has in the fulfilment of the right to the highest attainable standard of health, the right to adequate housing and the right to adequate food; he believes the prepayment meters may, as implemented currently, severely compromise the realisation of numerous human rights and be contrary to the constitutional principles guaranteeing the right to housing and the right to water. The Government should

31 However, in June 2008 the United Nations Research Institute for Social Development (UNRISD) produced a report, based on 15 years experience of water and sanitation privatisation across the world, stressing that policies promoting Private Sector Participation in developing countries’ water supply are economically flawed because they pit foreign capital’s profit motive against domestic social development, public health, environmental concerns and poverty reduction: <http://www.irc.nl/page/37668>.
32 CESCR (note 27 above) para 2.
33 Ibid para 27.
34 Ibid para 11.
35 However, in recent years South African companies have begun to export prepayment meter technology to other African countries, including Ghana.
reconsider this policy and associated financial arrangements, in order to further improve its efforts to ensure the equitable access of all to water.  

(b) South African law and policy

One of the exemplary aspects of the Constitution is the inclusion of socio-economic rights alongside more traditional civil and political rights. Among the socio-economic rights included in the Constitution is everyone’s right ‘to have access to sufficient water’. Whether civil and political or socio-economic, all rights in the Bill of Rights carry both negative and positive obligations and, according to s 7(2) of the Constitution, the ‘state must respect, protect, promote and fulfil the rights in the Bill of Rights’. The highest court of appeal in constitutional matters, the Constitutional Court, has confirmed the justiciability of socio-economic rights in several judgments, including Government of the Republic of South Africa and Others v Grootboom and Others, in which the Court stated:

Socio-economic rights are expressly included in the Bill of Rights; they cannot be said to exist on paper only … The question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case. Moreover in South Africa rights are facilitated by a Constitution with much transformative potential. The transformative nature of the Constitution, as well as its unequivocal focus on the achievement of equality, is evident in the Preamble — ‘we the people of South Africa, recognise the injustices of the past … we therefore … adopt this Constitution as the supreme law of the Republic so as to heal the divisions of the past and … improve the quality of life of all citizens and free the potential of each person’ — and the Founding Provisions, which include in s 1(a) ‘human dignity, the achievement of equality and the advancement of human rights and freedoms’. In addition, as highlighted in the Mazibuko judgment, the equality clauses, found in s 9(3) of the Constitution, prohibit the state from unfairly discriminating against anyone or any group on grounds including ‘race … social origin, colour …’.

38 It is all the more inexplicable that the post-apartheid government has not ratified the ICESCR. However, notwithstanding this non-ratification, the Constitutional Court clarified in the case in which it outlawed the death penalty — S v Makwanyane (1995 (3) SA 391 (CC)) — that, in the context of interpreting the Bill of Rights, s 39(1)(b) compels a court to consider non-binding, as well as binding, international law (para 35).
39 Section 27(1)(b) of the Constitution. As with all other socio-economic rights — apart from the right to basic education, as well as those socio-economic rights pertaining specifically to children (the right to basic education and children’s rights are not qualified by the ‘progressive realisation’ or ‘within available resources’ criteria) — the state must take ‘reasonable legislative and other measures, within its available resources, to achieve the progressive realisation’ of the right of access to sufficient water (s 27(2)).
41 While, according to s 9(3) of the Constitution the state may not discriminate unfairly, s 9(2) clarifies that positive discrimination or affirmative action, based on the objective of righting historical wrongs and advancing equality, is sanctioned and, although constituting discrimination, is not prima facie unfair discrimination.
Supplementing the right to equitable services, s 33 of the Constitution provides everyone with the right to just administrative action that is ‘lawful, reasonable and procedurally fair’. Water reticulation is a public service that constitutes administrative action. Further clarifying this right, s 3(2)(b) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) sets out the requirements for procedural fairness, including (i) adequate notice of proposed action, (ii) reasonable opportunity to make representations, (iii) a clear statement of the administrative action, (iv) adequate notice of any right to internal appeal where applicable, and (v) adequate notice of the right to request reasons in terms of s 5.

As it relates to water, this justice-based human rights schema goes beyond the constitutional guarantee of access to sufficient water, to encompass a range of legislation and policies aimed at protecting substantive and procedural aspects of water-related rights and services. Using similar language to PAJA, the Water Services Act 108 of 1997 provides in s 4(3) that:

Procedures for the limitation or discontinuation of water services must — (a) be fair and equitable, (b) provide for reasonable notice of intention to limit or discontinue water services and for an opportunity to make representations … and (c) not result in a person being denied access to basic water services for non-payment, where that person proves, to the satisfaction of the relevant water services authority, that he or she is unable to pay for basic services.

In terms of the City of Johannesburg’s by-laws, Regulation 9c of the City of Johannesburg Metropolitan Municipality Water Services By-Laws (28 April 2004) stipulates a lengthy and complex notification processes if the City proposes to disconnect water services. This includes several formal notifications and invitations to make representations prior to any disconnection. A series of policy documents, two White Papers and one draft White Paper reinforce the importance of water as a social good.

Furthermore, since 2001, the water framework has included a national FBW policy. The national FBW policy was first announced by then Minister of Water Affairs and Forestry, Ronnie Kasrils, in August 2000, in the wake of South Africa’s worst recorded cholera outbreak, which was precipitated by the disconnection of water supply to thousands of poor, rural, people in KwaZulu-Natal, following the commercialisation of water services in the area.

The


policy was formalised in DWAF’s Free Basic Water Implementation Strategy Document (Version 1) in May 2001. The finalised (2002) version called for all 284 municipalities across South Africa to provide 6 000 litres (six kilolitres) of water per household per month or 25 litres per person per day of free water, at least to poor households.\(^\text{45}\) While setting the national FBW amount at 6 kilolitres (6kl) per household per month (or 25 litres per person per day), the FBW policy encouraged better resourced municipalities to provide a greater amount, particularly “in some areas where poor households have waterborne sanitation”.\(^\text{46}\)

Yet, despite this favourable rights-based framework for water services, the reality on the ground is that 14 years into democracy, many poor South Africans struggle to access sufficient water, as poignantly illustrated in the Mazibuko case. One of the principal barriers to accessing sufficient water is the commercialised framework in which water services are conceived and regulated at local government level. Of particular concern, is the regulation of poor people’s water consumption to unacceptably low levels through unacceptably punitive mechanisms such as the prepayment meter, which functions as an automatic credit control enforcement and water consumption reduction device.

Clearly, no matter how conducive the legal and policy framework, the translation of rights into practice usually requires some form of official oversight, or it relies on concerted civic action. In the absence of any social regulation or intervention by DWAF on behalf of victims of iniquitous and inequitable practices by municipal water service providers, enforcement of water-related rights has largely depended on civic action campaigns. The first such water campaign — which was not framed in rights-language but nonetheless was triggered by social equity concerns — occurred between 1996 and 2000 in reaction to indications that the government planned to encourage the wholesale privatisation of water services.\(^\text{47}\) It appears that the Mazibuko case might signal a second water campaign wave, this time explicitly rights-framed and litigation-driven, in response to municipalities’ carte blanche to regulate water consumption in poor communities through water disconnections and restrictions.

## III Water Regulation in Soweto

Within the institutional structure of government, each municipality has ‘the right to govern, on its own initiative, the local government affairs of


\(^{46}\) Ibid 9. Poor households in Phiri have waterborne sanitation, usually in the form of outside toilets.

\(^{47}\) The first water campaign was mounted by civil society and social movement groupings such as the South African Municipal Workers Union, Rural Development Services Network, APF and the Soweto Electricity Crisis Committee. It is probable that this campaign, which focused on social protest and popular resistance, was behind the government’s apparent U-turn on privatising water services and at least partially responsible for DWAF’s adoption in 2001 of a national FBW policy. See for example Bond & Dugard (note 44 above).
its community’. Schedule 4B of the Constitution clarifies that water and sanitation services are local government matters, to be managed on each municipality’s own initiative. This right to govern water and sanitation services is something of a double-edged sword for many municipalities, for two related reasons. First, since 1996 central support for water services in the form of grants and subsidies to local government has been drastically reduced. Second, as is made clear in the 1998 White Paper on Local Government, the constitutional provisions for municipal finance (found in s 229 of the Constitution) in effect prohibit municipalities from borrowing money to fund deficit budgets — s G1.2 of the 1998 White Paper on Local Government stresses that this constitutional provision ‘effectively prohibits deficit budgeting at the local sphere’. As a result, the decentralisation of the responsibility for water delivery has left municipalities with ‘more to do but with fewer resources’.

On the ground at the local government level, the combined effect of reducing central financial support and prohibiting deficit budgeting, ‘pushed many municipalities, with Johannesburg at the forefront, to turn towards commercialisation … of basic services as a means of generating the revenue no longer provided by the national state’. This commercialisation of water services at the local government level has not commonly taken the form of outright privatisation. However, it is very possible to commercialise water services without privatising them. This has certainly been the case in South Africa, where most water services remain publicly-owned but where water is viewed primarily (and even ideally) as an economic good and delivery is dominated by cost-recovery considerations.

For example, Johannesburg Water (Pty) Ltd (Johannesburg Water), which is responsible for water services delivery within the City of Johannesburg (encompassing all of Soweto), is a ring-fenced corporation whose only shareholder is the City of Johannesburg. It was set up under the Companies Act 61 of 1973 to ‘run like a business’ with its own board of directors. Within this corporatised model, water services are run along largely commercial

48 Section 151(3) of the Constitution.
51 McKinley (note 49 above) 182.
52 For an expansion on the issue of commercialised water delivery in South Africa see Bond & Dugard (note 44 above).
54 Smith (note 50 above) 11.
55 Under corporatisation, all direct costs incurred in water delivery (indirect costs such as environmental and health-related costs are not incorporated into the model) are ring-fenced under the corporation and insulated from political interference — this involves transforming water services into a business with a corporate, rather than public services, culture (see Smith, note 51 above).
lines, albeit with some obligatory concessions to social equity — specifically the nationally-determined FBW allocation.\textsuperscript{56} Indeed, across South Africa and gaining ground particularly in bigger metropolitan areas, water has become more of an economic product and less of a public health-related service.\textsuperscript{57} Concomitantly, cost-recovery imperatives, including reducing water consumption in poor areas, have come to dominate the post-apartheid water delivery regulatory regime.

(a) Apartheid (non)regulation: The deemed consumption flat-rate system

Under apartheid’s racist logic, which trumped any economic logic, it was more important to minimise political protest than to secure payment for water services. As such, while households in white suburbs had metered water supplies, Soweto households were each charged a monthly flat-rate for the consumption of 20 kilolitres (kl), regardless of the volume of water consumed. This ‘deemed consumption’ system was inefficient and inequitable — every household was charged the same monthly amount whether it consumed five or 40 kl — and made neither financial nor environmental sense. However, the deemed consumption system held the benefit for apartheid managers of meaning minimal exposure to politically charged township residents because there were no meters to be read. Moreover, in an attempt to curtail further politicisation within Soweto, the Johannesburg municipality neither strictly enforced credit control, nor did it disconnect water as a result of non-payment. This is why, although formally unfair, the deemed consumption system was not resisted by residents and it was allowed to continue, with municipal arrears mounting unchecked each month. By the time of the new political dispensation in 1994, the decades of municipal neglect had resulted in chronic debt, with Soweto households collectively owing the City millions of rand.

(b) Post-apartheid economic regulation: The prepayment metered credit control system

In 2000, as municipalities across the country were suffering as a result of the withdrawal of subsidies from central government, the City of Johannesburg experienced a fiscal crisis.\textsuperscript{58} Loss of revenue from Soweto was not the main cause of the fiscal crisis, which was more heavily impacted by a sustained...

\textsuperscript{56} At the time of corporatising water delivery in Johannesburg, a Contract Management Unit (CMU) was established to oversee equity issues. However, as pointed out by Laila Smith, the CMU (which was later collapsed and resurrected within the City’s Infrastructure and Services Department without any resultant improvements in effectiveness) was never able to enforce social regulation, playing much more of a contract facilitator than an oversight role vis-à-vis Johannesburg Water (Pty) Ltd. Smith (note 50 above, 11).


\textsuperscript{58} R Tomlinson ‘Ten Years in the Making: A History of the Evolution of Metropolitan Government in Johannesburg’ (Date) 10 Urban Forum 1.
rates boycott in the rich northern suburbs of Johannesburg. Nonetheless, from the City’s perspective, it became increasingly important to minimise inefficiencies in water and electricity so that, in the first instance, full cost-recovery could be achieved and, ideally, these services could provide much needed revenue to contribute to the City’s costs more broadly (along with rates). In this context, escalating arrears and unlimited water consumption in Soweto became increasingly untenable as the imperatives of cost-recovery rapidly overlaid apartheid’s imperatives of racism.

Yet, at the same time the City was aware of its obligation to ensure access to FBW for the poor. So, while households in rich suburbs continued to be able to access as much water as they liked — for their gardens, swimming pools, fish ponds, baths, etc. — without any direct pressure to conserve, in 2002 the City devised a plan to physically restrict water consumption in poor households to the obligatory FBW allocation, unless the household could purchase additional water in the form of water credit vouchers. Calling the programme Operation Gcin’Am a nzi (OGA), the plan was to rollout prepayment water meters (instead of conventional credit-meters) throughout Soweto. Unlike conventional meters, which provide water on credit with numerous

59 Starting in 1996, residents of the rich (white) areas of Johannesburg, including Sandton, embarked on a rates boycott in protest against the City’s post-apartheid policy of cross-subsidising poor areas through higher rates levied in richer areas.

60 Hypothetically, higher tariffs at the top end of water consumption can be used as a form of pressure to conserve water. However, Johannesburg’s water tariff structure is not sufficiently convex to either deter hedonistic water consumption or ensure sufficient volumes of affordable water for low-income households. Johannesburg’s tariff structure appears to be focused more on limiting low-income household water consumption to the first, zero-rated FBW, block (through a disproportionately high price for the second block) and maximising revenue from luxury water consumption (through relatively high, but non-deterrent tariffs at the top end), than effecting water conservation. Indeed, the head of Johannesburg Water’s management company between 2001 and 2005, Jean Pierre Mas, has indicated that it would be foolish for Johannesburg Water to reduce the company’s income stream ‘by trying to promote water conservation’ among affluent households who pay their water bills (Smith (note 51 above) 29). Regardless of Jean Pierre Mas’s sentiments, it is obviously important to build water conservation criteria into tariff structures. However, to ensure social, as well as environmental justice the water conservation objective should be focused on luxury users who, in any event, consume the vast majority of domestic water on a per capita basis. This can be achieved in a way that also makes overall financial sense, through a convex curve with a high degree of cross-subsidy between low- and high-income users across per capita consumption bands. For an explanation of the ways in which water tariff structures can be manipulated to reflect social justice at the lower end of per capita consumption, environmental justice at the top end of per capita consumption, and still be cost-effective, see K Tissington, M Dettmann, M Langford, J Dugard & S Conteh ‘Water Services Fault Lines: An Assessment of South Africa’s Water and Sanitation Provision across 15 Municipalities’, CALS, Centre on Housing Rights and Evictions (COHRE) and Norwegian Centre for Human Rights (NCHR) (2008), 44-6, <http://web.wits.ac.za/NR/rdonlyres/14D413A0-9CA8-40A7-9428-4B7545548C05/0/WaterServicesReport_web_Nov08.pdf>. It should also be noted that the only water conservation education undertaken by the City of Johannesburg comprises banners and pamphlets in poor areas, yet it is rich consumers who use most domestic water on a per capita basis. Finally, because low-income households are often large and multi-dwelling — with many people on the same property sharing one water connection — water tariffs and specifically FBW arrangements need to reflect this reality through a per capita per day allocation rather than a per household per month allocation.

61 This means to conserve water in isiZulu. Affected households were not fooled by the water conservation smokescreen as they were aware that there was no such drive to force households in rich areas to conserve water — they knew that OGA was essentially about credit control.
procedural protections against disconnection, prepayment meters automatically disconnect once the FBW amount is exhausted unless additional water credit is loaded.

According to an undated Operation Gcin’Amanzi Report included in the minutes of Meeting of the Operations and Procurement Committee of Johannesburg Water (27 November 2002), OGA comprised an ‘immediate, intensive and comprehensive intervention on a number of fronts’ that sought to remedy the problems of ‘over-supply’, lack of ‘ownership’ of water consumption by residents and ‘a non-payment paradigm amongst consumers’.

Whereas other municipalities had remedied deemed consumption through conventional metering, the City of Johannesburg was determined to ensure that residents of Soweto would not access more water than the FBW amount without first paying for it, instead of getting the additional water on credit the way residents of mainly white neighbourhoods in Johannesburg do. According to its own documentation, Johannesburg Water was ‘intent on adopting prepayment water metering as the preferred service delivery option to be implemented in the deemed consumption areas of supply’, because ‘prepayment can be considered to be a water demand management tool’.

Demand management was perceived by the City to be critical to the objective of promoting ‘savings in water purchases by Johannesburg Water [from Rand Water]’, and to the broader goal of improving the ‘financial positions’ of the City and Johannesburg Water.

The suburb of Phiri, as one of the poorest in Soweto, was chosen as the pilot project for OGA. Seeking to ‘reduce demand’ for water among Phiri residents, as well as to improve the City’s financial situation (and without consulting affected residents before taking the decision to rollout prepayment meters en mass), Johannesburg Water began the bulk infrastructure construction work for the installation of prepayment meters in Phiri on 11 August 2003. Individual house connections began in February 2004. However, progress was slower than anticipated because of the rising resistance from residents who witnessed the suffering spread as prepayment meters were rolled out across Phiri.

IV COMMUNITY RESISTANCE IN SOWETO

From the moment of their installation, prepayment meters compromised Phiri residents’ access to water in very tangible ways, and they continue to do so. With an average number of 13 or more people living across multi-dwelling
households, the standard FBW amount has always been insufficient to meet basic needs in Phiri. As a result, Phiri residents are forced to make undignified and unhealthy choices about basic hygiene and health. For example, People Living with HIV/AIDS must choose between bathing or washing their soiled bed sheets, and parents must choose between providing their children with body washes before they go to school or flushing the toilet.

For the many large households in Phiri who exhaust their FBW supply before the end of the month and are too poor to afford additional water credit, the ultimate punishment is the prepayment meter’s automatic and immediate disconnection, which often takes households by surprise. If the disconnection occurs during the night or over a weekend when water credit vendors are closed, the household has to go without water until the shops are open again. If the household does not have money for additional water, it must borrow either money or water from neighbours in order to survive. The continuous infringements to dignity and health are serious, and a direct risk to life is posed in the event of a fire, as witnessed in the devastating consequences of the fire on Vusimuzi Paki’s property (set out above).

(a) The failure of direct protest

Responding to these conditions, in 2003 a number of community-based organisations affiliated to the dominant social movement in the area, the APF, created a new organisation to coordinate water-related resistance: CAWP, which became a new (closely aligned) APF affiliate in its own right. Under the auspices of CAWP, spontaneous protests turned into mass action, with many residents simply refusing to allow Johannesburg Water to install the meters. However, many of the households that refused to accept prepayment water meters were left without water at all for six months in 2004. Others faced intimidation and arrest for resisting the installation of prepayment meters. Later, in desperation, most of those who refused the meters were forced into accepting standpipes, which allow an unlimited supply of water for free (debunking the water conservation pretext of OGA) but involve much inconvenience for households because of no longer having an in-house connection. Those with standpipes have to carry buckets of water to flush their toilets, which were not designed for an external water supply.

Having tried to live without direct access to water and enduring harassment by the City for most of 2004, by the end of 2004 most households in Phiri had been forced to accept either prepayment meters or standpipes. All were forced to relinquish the previous unlimited water supply, which was discontinued. By 2005 the last resisting households had capitulated, ‘accepting’ prepayment

66 Most Phiri properties have backyard shacks, where separate households live. The City’s FBW policy does not cater for backyard shack residents, meaning that the main household’s FBW allocation must be shared with all people on the property.

meters or standpipes over no water at all. The ultimate failure to resist the installation of prepayment meters was perceived by the APF and CAWP to mark the demise of the direct protest phase of the struggle against prepayment water meters. According to a research report by the APF and CAWP:

While large numbers of residents came together to physically resist the installation of the meters in the early days of [OGA] ... over time, arrests, fines, intimidation and threats have resulted in a decline in resistance. The very threat of being cut off from water completely for refusing to sign onto the system led to many residents signing onto the system begrudgingly ... Today, activists bemoan the fact that it is difficult to call a successful mass meeting in Phiri ..."
that water service providers remain publicly owned, managed and run and that water service delivery provides adequate, accessible and quality water to all …

The tactical resort to rights-based litigation indicates recognition by the social movements of the contingency of law. As appreciated by Critical Legal Studies scholars, rights have radical as well as conservative potential. In Stuart Scheingold’s words, ‘rights, like the law itself, do cut both ways — serving at some times and under some circumstances to reinforce privilege and at other times to provide the cutting edge of change’. There are certainly indications that, at the same time as protest began to flounder in Phiri, the APF was beginning to move in the direction of legal mobilisation. For example, an April 2003 APF press statement about the government’s school fees policy was titled ‘The ANC Government’s GEAR Policy Is Denying Our Right To Free, Quality Education!’. The failure of traditional forms of mobilisation in Phiri hastened the APF’s decision to take up a legal campaign, as, undoubtedly, did the fortuitous advent of human rights lawyers from the FXI and CALS, who became aware of the prepayment water meter problem in the course of community work in the area.

What is perhaps more surprising than the recognition of the contingency of law among legal sceptics, is the celebration of law by such actors since the legal victory in the High Court. For example, referring to the judgment as ‘historic and groundbreaking’ Dale McKinley writes:

The judgement ranks as one of post-apartheid South Africa’s most important legal victories for poor communities and all those who have been struggling against unilateral and profit-driven neo-liberal basic service policies … Judge Tsoka however, went beyond the legal points, recognising the racial, class, administrative and gender-based discrimination underlying the City of Johannesburg’s water policy. The judge explicitly rejected the arguments for restricting the water usage of poor communities: ‘… to expect the applicants to restrict their water usage, to compromise their health, by limiting the number of toilet flushes in order to save water is to deny them the rights to health and to lead a dignified lifestyle.’ The judge labeled the so-called ‘consultation’ with the Phiri community as, ‘more of a publicity stunt than consultation’ and criticised the City’s ‘big brother approach’.

There was further left-leaning endorsement following a public condemnation by Johannesburg Mayor, Amos Masondo, in which Masondo criticised the Mazibuko judgment at a Johannesburg press conference, attacking Tsoka J as follows:

Judges are not above the law … We cannot have a situation where a judge wants to take over the role of government. Judges must limit their role to what they are supposed to do. If they

75 The role of lawyers in advocating the legal mobilisation course should not be ignored. Nevertheless, throughout the years, the Mazibuko legal team has attempted to ensure that legal mobilisation is driven by the clients and their support movements, rather than by ourselves.
76 McKinley (note 71 above).
want to run the country they must join political parties and contest elections. In that way they can assume responsibilities beyond their powers.\textsuperscript{77}

In a surprisingly pro-rule of law rebuttal, on 16 May 2008, the international anarchist website, anarkismo.net,\textsuperscript{78} carried a press release by CAWP — titled ‘Attack on High Court judgment and Judge Tsoka is unwarranted, dangerous and betrays a complete ignorance of how democracy works: This is not Zimbabwe Mr Masondo, and you are not Robert Mugabe’ — in which Masondo’s attacks on the judiciary were described as ‘unprecedented’, ‘vicious’, ‘unwarranted’ and ‘dangerous’, the press release continuing:

Mr. Masondo — unless you made your statements while dreaming that you were in a country like Zimbabwe where there is no meaningful democracy, where the judiciary is treated with contempt and where the government thinks that it is the law, then you would know that a democratically elected government (at whatever level) like we have in South Africa has no power beyond that given to it by the people themselves. No one has given the government the right to unilaterally interpret and determine any right contained in the Constitution. No one has given the government the right to unilaterally pronounce that any law it passes is sacrosanct.

Yes Mr. Masondo, we still have a functioning democracy in our country (as weak as it might be at times). One of the benefits of that democracy — underpinned by the Constitution — is that laws and government action can be challenged through the courts by any individual citizen or collection of citizens and, if such a challenge is successful, those laws and action can be reviewed and changed. That is one of the key essences of the democratic principle of the limitation of powers.

Mr. Masondo, your right to appeal Judge Tsoka’s ruling is a component of that limitation process but you can claim no unilateral right to limit Judge Tsoka’s ruling simply because you are an elected politician. The ruling might, or might not be, overturned/changed, but any outcome is for the Constitutional Court to decide, not you or the government you claim to represent. You show your contempt for our hard won democracy Mr. Masondo when you make dangerous claims that you and your government are above it.\textsuperscript{79}

Finally, in an apparent new-found endorsement of litigation as a tactic, and a surprising optimism over its potential to affect socio-economic change, McKinley concludes:

While the judgement has already been appealed by the respondents, and will most probably go all the way to the Constitutional Court, this does not detract from the political and social significance of this victory. It is a case which does not only have applicability to South Africa but which, by its very character, enjoins the attention and direct interest of billions of

\textsuperscript{77} K Mabuza ‘Jozi to Contest Ruling on Water’. Sowetan (15 May 2008).

\textsuperscript{78} Anarkismo.net describes itself on the website as follows: ‘We identify ourselves as anarchists and with the ‘platformist’, anarchist-communist or especifista tradition of anarchism. We broadly identify with the theoretical base of this tradition and the organisational practice it argues for, but not necessarily everything else it has done or said, so it is a starting point for our politics and not an end point’. In terms of its objectives, according to the website, ‘Anarchism will be created by the class struggle between the vast majority of society (the working class) and the tiny minority that currently rule. A successful revolution will require that anarchist ideas become the leading ideas within the working class. This will not happen spontaneously. Our role is to make anarchist ideas the leading ideas or, as it is sometimes expressed, to become a ‘leadership of ideas’, <http://www.anarkismo.net/about>.

\textsuperscript{79} CAWP ‘Attack on High Court judgment and Judge Tsoka is unwarranted, dangerous and betrays a complete ignorance of how democracy works: This is not Zimbabwe Mr Masondo, and you are not Robert Mugabe’, <http://www.anarkismo.net/newswire.php?story_id=8914&topic=indigenousstruggles&type=nonanarchistpress&language=en>. 
poor people around the world who are suffering under neo-liberally inspired water policies, alongside the governments that are implementing such policies and their corporate allies who seek to turn water into nothing less than another profit-making stock market option.

The CAWP and its allies are confident that the High Court judgement will be upheld and that water provision will now no longer be delivered in a discriminatory, patronising and inhumane manner.80

V Conclusion

Obviously, with an appeals process underway, the full impact of the Mazibuko litigation still has to be felt (notably the judgment’s order has been suspended pending the appeals process). Nor is it clear yet whether the Phiri water campaign will encourage further uptake of proactive litigation by CAWP and its affiliates. However, it is apparent that notwithstanding the final outcome of the litigation, the case has already played a fundamental role in reinvigorating water-related struggles around the country. For example, during May the South African Municipal Workers’ Union (SAMWU) announced that it would use the Mazibuko judgment as a basis for legal action against the City of Cape Town (which has recently installed a different kind of water-limiting meter).81

It has also provided erstwhile sceptics with a platform for viewing at least some manifestations of the law as potentially progressive. Indeed, Mazibuko has quickly achieved almost mythical status and the effects of the judgment continue to reverberate in unanticipated ways. For example, on 19 July 2008 the Mail & Guardian Online carried a story by Matuma Letsoalo titled ‘Masondo Next to be Axed?’, in which the author suggested that Amos Masondo may be the next mayor to be fired (following the ‘abrupt departure of Ekurhuleni mayor Duma Nkosi’). According to the author, the writing on the wall in Masondo’s case has come in the form of accusations from the regional ANC that Masondo ‘undermin[es] the region when taking important decisions’, specifically, ‘for failing to inform the regional leadership of his decision to challenge a Johannesburg High Court ruling on pre-paid water meters’.82

If my observations are correct, it is possible that, regardless of the ultimate outcome of the Mazibuko case, the rights-based legal mobilisation has already impacted on the movement activists and the struggle against economic water regulation more generally. While cautioning that legal mobilisation is not a linear or predictable process, McCann notes that it can ‘matter for building a movement, generating public support for new rights claims, and providing leverage to supplement other political tactics’.83 As understood by Karl Marx, consciousness develops out of, rather than precedes, mobilisation, if it develops at all.84

80 McKinley (note 71 above).
83 McCann (note 22 above) 10.
84 Ibid 307.