

CIVIC ACTION AND LEGAL
MOBILISATION: THE PHIRI
WATER METERS CASE*Jackie Dugard¹*

In South Africa everyone will say that life is not fair for the poor. Even the rich will say ... this when they are just finding more and more excuses to give more of the country's money to themselves to build all these very expensive things ... so they can feel themselves to be 'world class'. Meanwhile our children, who, like the children in Haiti and Kenya and Zimbabwe are ... burning in shack fires and dying from diarrhoea around the corner. One of the truths that people want to hide from is that in this country where everything is done in the name of the suffering of the poor, life is good for the masters of the poor but it is very unfair for the servants of the poor ... But for the dawn of justice for all to come we must accept the truth that in our country, a country where ... the law gives everyone the right to gather and to speak, in reality the poor have to make their choices from no choice. Business and politics ... are all united in their demand for our silence ... [yet] everyday we are maturing in our struggle. We were always many but every day we are more. The red river that carried me will carry us all on and on through the shooting and the lies and the unfairness and all the choices that we will have to make without choice.

Excerpt from 'When Choices Can No Longer Be Choices' by S'bu Zikode, president of *Abahlali baseMjodolo*.²

¹ This chapter is based on a contribution submitted to Palgrave as a chapter for *Social Movements and/ in the Postcolonial* and builds on two previous articles by the author (Dugard, 2008; Dugard, 2009).

² S'bu Zikode (28/02/2007) 'When Choices Can No Longer Be Choices': <http://www.abahlali.org/node/841>. Zikode is president of *Abahlali baseMjondolo* (meaning: we who live in the shacks, in isiZulu). *Abahlali* is one of the growing social movements in South Africa. Like the Anti-Privatisation Forum – the social movement dealt with in this chapter – *Abahlali* is skeptical about the overall function of law in shoring up privilege in South Africa. Yet *Abahlali* has always seen a role for law as a tactic in their broader struggle. In contrast, for the Anti-Privatisation Forum, the *Mazibuko* case was the first instance of proactively taking up litigation.



1 INTRODUCTION

In 1996 the South African post-apartheid legal order was consolidated with the enactment of the final Constitution.³ Among the constitutionally guaranteed rights is the right of access to sufficient water (section 27(1)(b) of the Constitution). The insertion of socio-economic rights, including the right to water (alongside other, more traditional civil and political rights), underscored the understanding that apartheid was as much a system of socio-economic subjugation as of civil and political tyranny. Part of this recognition was an acknowledgment of the need to redistribute water resources and services more equitably. To this end, there is a progressive legislative framework for water services that includes a national Free Basic Water (FBW) policy aimed at ensuring a lifeline amount of water per property per month,⁴ as well as a range of laws advancing a rights-based approach. However, notwithstanding such recognition and intention, when it comes to implementation, contemporary water service delivery is fraught with problems of non-participation, non-connection, disconnection and restriction. One of the main reasons for the disjuncture between frameworks and reality is the ascendancy of a neo-liberal thrust towards cost-recovery, in terms of which national government has devolved responsibility for water services to municipalities, and has steadily decreased its financial and technical support for such services. As a result, municipalities are under considerable fiscal pressure to maximise profits from water services, resulting in a preoccupation with recovering service-related costs from all areas, including poor communities. At the same time, there is no national regulation to enforce basic water standards or to ensure the protection and fulfilment of water-related rights, which adds to the perverse incentives for municipalities to view water more as a commodity than a public service.

Thus, in 2001, the City of Johannesburg formulated a project to limit water consumption in Soweto by means of the mass installation of prepayment water meters (PPMs). Called Operation *Gcin'Amanzi* (meaning 'conserve water' in isiZulu), the project was premised on the mass rollout of PPMs across Soweto, starting with a pilot in one of the poorest suburbs – Phiri. Unlike the conventional meters available throughout Johannesburg's richer suburbs, which provide water on credit with numerous procedural protections against disconnection, PPMs

³ During the period of multiparty negotiations, South Africa had an interim constitution, the Constitution of the Republic of South Africa Act 200 of 1993. It was finalised as the Republic of South Africa Constitution Act 108 of 1996 (constitution).

⁴ According to national FBW policy, each household – or at least, each poor household – should receive 6 kilolitres (6 000 litres) of free water per month. This figure is based on a calculation of 25 litres per person per day in a household of eight people. Space does not allow me to deal with all the problems of this FBW policy, save to mention two. First, there is no national regulation or enforcement of the policy, and there are many municipalities that do not provide FBW at all. Second, for those municipalities that do provide FBW, such as Johannesburg, the allocation is often insufficient to cover the basic needs of low-income households. This is particularly the case in poor township areas such as Phiri, where there are multi-dwelling households (one main house and several backyard shacks) on one property, but only one water connection. On such properties, everyone has to share the same 6 kilolitre monthly FBW allocation, which means that each person receives a woefully inadequate amount.

automatically disconnect once the (largely inadequate) FBW supply is exhausted, unless additional water credit is loaded. PPMs therefore fundamentally compromise low-income households' rights of access to water *and* equality (because PPMs are only installed in poor areas), contradicting the promises of the post-apartheid state and undermining the hopes of the residents of Phiri to become full participants in the socio-economic order. The contrast between the right to water in the constitution and the limitation of that access by means of a PPM could hardly be starker, especially in the context of the hedonistic water consumption in Johannesburg's richer, swimming-pooled (and predominantly white) suburbs. For the residents of Phiri, this apparent betrayal was too much, and, as the first trenches were being dug for the installation of the PPM infrastructure in August 2003, they embarked on a resistance campaign against PPMs. From the outset, their resistance was supported by the Anti-Privatisation Forum (APF), a socialist social movement.

In Phiri, the struggle first 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'.⁵ This was not surprising, given the influence of the APF and the political left's historical antagonism to the law and rights as legitimising privilege. However, as detailed below, such resistance only managed to delay the installation of PPMs. But, at the lowest moment, when it looked as though community resistance had failed, the APF took a strategic decision to turn to rights-based litigation, despite its ideological aversion to rights and the law. Nevertheless, not much hope was vested in the litigation process, which was viewed as a last resort. Yet, following victory in the first stage of the legal battle – the Johannesburg High Court, declared PPMs unlawful and unconstitutional on 30 April 2008 – there has been a remarkable demonstration of support for the law from the APF and others traditionally sceptical of the legal process. This is in spite of the fact that (pending the outcome of the appeals process), the order against PPMs has been suspended, suggesting that there might be more value to even contingent legal mobilisation than *de facto* outcomes alone. As Michael McCann concluded in his seminal study of the 1980s wage equity campaign in the United States, 'litigation provided movement activists an important resource for advancing their cause'.⁶ I suggest the same is true for the Phiri campaign against PPMs, in which the uptake of rights-based litigation has empowered water activists in ways that I suspect will continue to reverberate and shape struggles for water in Phiri and beyond.

In this vein (and in the same year that the City of Johannesburg formulated its plan to install PPMs in Phiri), Daria Roithmayr wrote an article entitled 'Left Over Rights', responding to Duncan Kennedy's articulation of a 'post-rights' position. Roithmayr's article advances the argument (in line with Critical Race Theory, itself an offshoot of Critical Legal Studies) that rights can be pragmatically useful 'for particular communities of colour at particular moments

⁵ Zemans, 1983: 700.

⁶ McCann, 1994: 4.

in history'.⁷ In this chapter, I develop Roithmayr's thesis, arguing that rights can be useful to the left, regardless of the ultimate outcome of litigation per se. Advocating a pragmatic approach to rights, I suggest that in contemporary South Africa, with its extreme socio-economic and racial inequalities, while in the normal course of events the law does indeed serve the interests of elites, rights-based legal mobilisation can have a predominantly positive impact on social movements representing disempowered groups, including the poor. I conclude, as Roithmayr did, that, if strategically used, rights-based legal mobilisation may in certain circumstances offer the left an additional tactic in a broader political struggle. In some instances the additional tactic might be a last resort, but it remains a useful one. Indeed, in Phiri, rights provided what S'bu Zikode has referred to as 'choice from no choice'. Nevertheless, even where litigation emerges as a tactic of desperation rather than hope, 'since rights carry with them the connotations of entitlement, a declaration of rights tends to politicise needs by changing the way people think about their discontents', legitimating claims, thereby contributing to political mobilisation and, ultimately, to political change.⁸

This chapter documents and analyses the struggle against PPMs in Phiri, focusing particularly on the uptake and utility of rights-based legal mobilisation by the APF as an ordinarily rights-adverse social movement, manifesting in the *Mazibuko* water rights case.⁹ At the time of writing, the *Mazibuko* appeal had just been heard in the Constitutional Court. The judgment was handed down on 8 October 2009. In a shock decision, which overturned the findings of two previous courts, the Constitutional Court ruled against the applicants, finding PPMs to be lawful. However, notwithstanding the final judgment, the Phiri water campaign provides an interesting case study of an impoverished community's struggle against neo-liberal policies, which has involved, but has never been dominated by, the uptake of litigation based on a human rights framework.

2 COMMERCIALISATION AND CORPORATISATION

When the post-apartheid government was swept into power by the vast majority of South Africans in 1994, its political mandate involved righting historical wrongs. One of these was the legacy of vastly unequal basic services, particularly water. As recognised by the African National Congress (ANC)'s first, expansionist economic development strategy, the Reconstruction and Development Programme (RDP), in 1994 an estimated 12 million South Africans

⁷ Roithmayr, 2001: 113.

⁸ Scheingold, 1974: 95, 131, 132, 147.

⁹ The *Mazibuko* case was heard in the Johannesburg High Court between 3 and 5 December 2007; in the Supreme Court of Appeal between 23 and 25 February 2009; and in the Constitutional Court on 2 September 2009. For the sake of ease of reference, unless otherwise indicated, I refer to the case in the cumulative sense, as *Mazibuko*. The citation of the High Court case is *Mazibuko and Others v City of Johannesburg and Others* 2008 (4) All SA 471 (W); in the Supreme Court of Appeal it is *City of Johannesburg and Others v Mazibuko and Others* 2009 (3) SA 592 (SCA); the Constitutional Case is *Mazibuko and Others v City of Johannesburg and Others* CCT 0039/09.



(approximately a quarter of the population) did not have access to piped water.¹⁰ There was an expectation that equalising water services would be prioritised, and that water would be recognised ‘as a public good whose commodification would inherently discriminate against the majority poor’.¹¹

Undoubtedly, commendable progress has been made in connecting previously unconnected households to the water grid.¹² However, in recent years such gains have been fundamentally eroded by a growing neo-liberal preoccupation with cost-recovery, which results in poor households being disconnected for inability to pay for water services. The catalyst for the increasing focus on cost-recovery and the concomitant escalation of water disconnections was the consolidation of the local government sphere of government in the 2000 municipal elections. The arrangement of three spheres of autonomous government – national, provincial and local – was itself a product of political compromise – a concession by the ANC to the other main parties (notably the Inkatha Freedom Party, with its support base in KwaZulu/Natal, and the then-Democratic Party, with its support base in Cape Town) to afford them some zone of political dominance. Part of this devolution was a constitutionally entrenched division of functions, in which water services became a local government mandate (Schedule 4B of the constitution).

Within this arrangement, national government has always exerted relatively tight fiscal control over municipalities. In particular, municipalities are under pressure to become financially self-sufficient, and they are precluded from any deficits on their operating budgets (Section 18(1)(c) of the Local Government: Municipal Finance Management Act 56 of 2003). At the same time, national government has steadily withdrawn central financial support and, following the advice of the World Bank and the International Monetary Fund, decreased grants and subsidies to local government.¹³ The effect has been directly felt on municipal services. Because basic services are one of the main sources of revenue for municipalities – electricity and water services together account for approximately 50% of aggregated municipal revenue¹⁴ – municipalities are driven to pursue a commercialised approach to water services, in which water is viewed as a source of revenue rather than a public service.

Proper implementation of the RDP mandate would have required ‘a national redistributive water pricing policy with higher unit amounts for higher-volume water consumers, especially large firms, mines and (white) farms’, as well as intervention in the ‘functioning and autonomy of local government to ensure equitable tariffs, including regulation of appropriate cross-subsidies between rich and poor consumers within a municipality’.¹⁵ Instead, social equity regulation has

¹⁰ ANC, 1994: para. 2.6.1.

¹¹ McKinley, 2005: 181.

¹² In the decade after 1994, 3.37 million households were connected to water services (South African Institute of Race Relations, 2006: 385, 422).

¹³ McKinley, 2005: 182.

¹⁴ Seidman, 2006: 8.

¹⁵ Bond and Dugard, 2008b: 6–7.

been sacrificed on the altar of neo-liberal cost-recovery and decentralised government autonomy. While the commercialisation of water services gained momentum in the wake of the consolidation of local government (2000–2001), there were ominous signs of a more neoliberal approach to water services as early as 1994: the 1994 Water Supply and Sanitation White Paper stipulated ‘where poor communities are not able to afford basic services, government may subsidise the cost of construction of basic minimum services *but not the operating, maintenance or replacement costs*’ (emphasis added).¹⁶ Similarly, the 1997 White Paper on a National Water Policy for South Africa stated: ‘to promote the efficient use of water, the policy will be to charge users for the full financial costs of providing access to water, including infrastructure, development and catchment management activities’.¹⁷

In the South African context, the commercialisation of water has entailed highlighting its role mainly as an economic good and attempting to reduce price distortions, while pursuing a limited form of obligatory means-tested subsidy – the FBW allocation.¹⁸ Crucially, it has also involved harsh enforcement of credit control (aimed at curtailing water revenue losses in poor communities), including by means of water disconnection and restriction through physical mechanisms such as flow restrictors and PPMs. At the municipal level, this has meant that almost as fast as poor households are connected to the grid in terms of the extension of infrastructure, they are disconnected because they cannot pay their monthly water bills.¹⁹

¹⁶ DWAF, 1994: 19.

¹⁷ DWAF, 1997: 4.

¹⁸ Bond and Dugard, 2008a: 5. Most municipalities pursue a means-tested approach to FBW allocation, using a registration process known as indigency registration, in terms of which poor households must prove their poverty in order to receive FBW. Initial research indicates that such indigency registers typically capture only about a fifth of formally qualifying low-income households (Tissington et al, 2008: 34–39).

¹⁹ Beyond direct observance of this phenomenon, as well as feedback from affected communities, it is hard to quantify the scale of water disconnections. This is because most municipalities, along with national government, do not keep data on disconnections or are reluctant to share such information. Furthermore, in those municipalities that have installed PPMs in poorer residential areas, any disconnection is ‘outsourced’ as a private disconnection in the person’s own home, and not part of the municipality’s administrative record (such disconnections are referred to by community-based organisations as ‘silent disconnections’). Nevertheless, some authors have managed to track water disconnections for specific periods. For example, in Smith’s 2005 study of the Cape Town and Tygerberg administrations, 159 886 households had their water disconnected for reasons of non-payment between 1999 and 2001; most of these households were in poor areas where people struggle to pay water bills. And, using national household data and data collected in a 2001 national survey, McDonald (2002) estimated that between the years 2000 and 2001, 7.5 million people experienced both water and electricity disconnections. Such data suggest that ‘the introduction of free water and electricity policies in 2001 in urban South Africa had little impact on the affordability of services for many households’ (McInnes, 2005: 21). Finally, former DWAF Director General Mike Muller conceded that in 2003 alone, 275 000 *households* were disconnected at least once from water services due to an inability to pay (Muller, 2004), which, based on a national average of around five or six people per household, amounts to approximately 1.5 million people – and this number excludes prepayment water meter disconnections for the reasons outlined above (Bond and Dugard, 2008a).

And, although the South African version of the commercialisation of water services has not entirely echoed the global trend of privatisation per se, as pointed out by Bakker,²⁰ it is 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. In some instances, this commercialisation of water services has also entailed their corporatisation. In 2001 in the City of Johannesburg, for example, water services were corporatised under the auspices of Johannesburg Water (Pty) Ltd. (Johannesburg Water), which is a ring-fenced corporation whose only shareholder is the City of Johannesburg.

Furthermore, although there are very few outright private water concessions – mainly due to popular resistance after initial attempts at private water concessions²¹ – many of the global agents of privatised water services have played pivotal roles in South Africa. For example, the French multinational (and one of the world's largest privatised water management firms), Suez (now called GDF Suez), was awarded a five-year management contract in 2001 – the first year of the corporatisation of Johannesburg's water services – under the Johannesburg Water (Pty) Ltd. management subsidiary, Johannesburg Water Management (Jowam). The result was a regressive interpretation of social equity standards, including the structure of the rising block water tariff.²² In 2003, instead of choosing the ideal structure (which would have a convex curve, starting with low-priced tariff blocks and rising very steeply at the luxury end of consumption) that would have better served lower-income households, the City adopted a relatively steep-rising concave tariff curve for water. In addition:

In 2003, the second tier of the [rising] block tariff (7 to 10 kilolitres/ household/ month) was raised by 32%, while the third tier (11–15 kilolitres/ household/ month) was lowered by 2% (during a period of roughly 10% inflation, which was the amount by which higher tier tariffs increased) ... Moreover, the marginal tariff price for industrial/ commercial users of water, while higher than residential, actually declines after large-volume consumption is reached.²³

In such domestic water tariff structures, where the lower block tariffs are dramatically increased, this impacts negatively on low-income households, making water bills unaffordable, escalating municipal debt and resulting in

²⁰ Bakker, 2007.

²¹ Bond and Dugard, 2008b: 9.

²² Although set at the local level, municipal water tariffs are meant to comply with national regulations – set out in the Norms and Standards in Respect of Tariffs for Water Services: Regulations under section 10 of the Water Services Act 108 of 1997 (20 July 2001). One of the prescribed requirements is that tariffs for metered water connections must reflect a rising block structure with three or more tariff blocks 'with the tariff increasing for the higher consumption blocks' (section 6(2)(a)). A rising block tariff structure, particularly one with a convex curve with low prices at the low levels of consumption and very high prices at the luxury end of consumption, is meant to promote social equity by cross-subsidising between the high consumption of wealthy households and the relatively lower consumption of low-income households.

²³ Bond and Dugard, 2008: 7.



increased disconnections.²⁴ And in Johannesburg, at the top end of the domestic consumption spectrum, luxury residential water consumption is not overly penalised, because such an environmental and social justice rationale might irritate wealthy users into consuming less water, thereby reducing municipal revenue. Indeed, the head of Jowam between 2001 and 2005, Jean Pierre Mas, has indicated that it would be foolish for Johannesburg Water to raise the price at the top end in an attempt to pursue more progressive cross-subsidies and ‘to promote water conservation’ among affluent households ‘who pay their water bills’, as this might reduce the company’s revenue.²⁵

Within this corporate model, water services are managed largely along commercial lines, albeit with some nationally legislated (though rarely enforced) concessions to social equity (such as the FBW allocation). 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*.²⁶ In many respects, the City of Johannesburg has led this trend, not least in its use of PPMs to limit access to water in poor households, starting with Phiri.

3 THE CITY OF JOHANNESBURG

Johannesburg has been characterised by infrastructural inequalities almost since its birth. In the early days of the gold rush, wealthy Rand-lords and the mining middle classes lived in leafy suburbs to the north of the city, and the budgets of the fledgling municipality were largely channelled towards these residents.²⁷ By the 1970s, these northern areas were well serviced and residents enjoyed lifestyles similar to those of the wealthy in many of the world’s richest countries. In stark contrast, hidden behind the mine dumps or to the south-west of the City, were townships such as Soweto (the name deriving from South Western Township). Such areas were under-serviced and predominantly poor, and essentially functioned as labour camps to service mines and industry with cheap black labour, which became part of the apartheid project from 1948, resulting in the expansion of Soweto during the 1950s and 1960s.

By the 1970s the large numbers of oppressed people in Soweto had formed an explosive mix, which was set alight by the Black Consciousness movement and the student uprisings of 1976. In an attempt to co-opt and pacify rising militancy, the city extended municipal services infrastructure to Soweto households, albeit using inferior water piping and low-amperage electricity. For water, a ‘deemed consumption’ system was operated, which meant that households were not charged according to consumption, but were rather billed a flat rate regardless of

²⁴ Bond and Dugard, 2008b: 9.

²⁵ Quoted in Smith, 2006: 29. In fact, the evidence indicates that South African luxury water users are not very responsive to price changes, suggesting that water tariffs at the top-end could be significantly raised in order to better cross-subsidise low-end usage, without resulting in rich households drastically cutting their consumption.

²⁶ Hemson, 2008: 30.

²⁷ Beavon, 2000.

how much water was consumed. From the apartheid administration's perspective, the deemed consumption system held the benefit of not requiring municipal officials to undertake monthly readings, which might expose officials to politically motivated reprisals. Moreover, despite widespread non-payment of water bills, the city rarely disconnected water supplies, fearing this would stoke militancy. Because neither credit control nor water disconnection was practiced, household arrears mounted, until by 2000, most households were deeply in debt.

When Johannesburg's first non-racial municipality – the Greater Johannesburg Metropolitan Transitional Council – was established in 1995, it almost immediately faced a fiscal crisis, related in the first instance to the enormous challenge of incorporating township and informal settlement areas into the city's administrative system, and equalising services across the city. Moreover, from 1996, residents in the rich northern suburbs (notably Sandton) had organised a rates boycott because they were 'resistant to redistributive policies which meant that wealthy areas would subsidise poorer parts of the City'.²⁸ By 1997, these financial pressures had culminated in a looming 'fiscal crisis',²⁹ which prompted a shift in municipal governance towards a more commercial cost-recovery oriented model, in line with the broader trend outlined above. Beall et al have argued that in fact the 1997 'fiscal crisis' was 'talked up' as a way of justifying metropolitan restructuring to suit market-driven demands.³⁰

Regardless of the motivation, the ultimate result was a corporate model of governance manifested in 'iGoli 2002' (launched in December 1999),³¹ a turnaround strategy for municipal financial recovery that involved the corporatisation of municipal services. In line with this strategy, and along with Johannesburg Water, City Power (Pty) Ltd. was established in 2001 as the City's electricity service provider, and Pikitup (Pty) Ltd. became the City's waste management and refuse service provider, all under the newly named City of Johannesburg Metropolitan Municipality. The new corporate governance paradigm entrenched a technocratic attitude towards municipal management, in terms of which class (still commonly overlapping with race) became the dominant determinant of marginalisation.³²

From the city's perspective, it was essential to minimise inefficiencies and revenue losses in municipal services. One of the main areas identified for attention was Soweto. Yet at the same time, the city was aware of the national FBW policy. So, while households in the rich suburbs continued to access as much water as they liked – for their gardens, swimming pools and so forth – without any direct pressure to conserve, in mid-2001 the city devised its plan to physically restrict water consumption in Soweto to the obligatory FBW allocation,

²⁸ Wafer, Dugard, Ngwenya and Sibanda, 2007: 14.

²⁹ Tomlinson, 1999: 1–39.

³⁰ Beall, Crankshaw and Parnell, 2002: 94.

³¹ *iGoli* is a colloquial word for Johannesburg (meaning place of gold in Sesotho). For an overview of the iGoli 2002 policy, see www.joburg.org.za/content/view/92/58 or www.joburg-archive.co.za/city-vision/AnnualReport02Ch3.pdf.

³² Bond, 2000.

unless the household could purchase additional water credit by means of PPMs. The high-density suburb of Phiri, one of the poorest in Soweto, with high unemployment and multi-dwelling properties (a small house and several backyard shacks per property), was chosen as the pilot project for Operation *Gcin'Amanzi*.³³

4 PREPAYMENT WATER METERS AND PHIRI

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),³⁴ Operation *Gcin'Amanzi* 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' in Soweto (Johannesburg Water, undated: 1). Whereas other municipalities had remedied deemed consumption through conventional metering, Johannesburg was determined that Soweto residents would not access more water than the FBW amount without first paying for it. According to the same undated Operation *Gcin'Amanzi* report, the City was 'intent on adopting prepayment water metering as the preferred service delivery option to be implemented in deemed consumption areas of supply' because 'prepayment can be considered to be a water management tool'.³⁵

Such demand management was perceived by the city to be critical to the objective of promoting 'savings in water purchases by Johannesburg Water',³⁶ and to the broader goal of improving the 'financial positions' of the city and Johannesburg Water.³⁷ Seeking to 'reduce demand' for water among Phiri residents, as well as to improve the city's financial position, Johannesburg Water began the bulk infrastructure construction work for the installation of PPMs in Phiri on 11 August 2003. The first phase of individual house connections began in Phiri Block B in February 2004.

Lindiwe Mazibuko (the first applicant), an unemployed single mother living on a small property with 20 people, first became aware of Operation *Gcin'Amanzi* on 17 March 2004, when a Johannesburg Water employee came to her house to tell her that her water supply system was old and rusty and needed replacing. The employee gave Mazibuko a letter entitled 'Decommissioning of the old secondary mid-block water supply system', which made no mention of PPMs. Later that day, Johannesburg Water workers started digging trenches in the pavement outside

³³ In fact, Phiri was not the first poor residential area in Johannesburg to receive prepayment water meters. Prior to Phiri, PPMs had been installed in Orange Farm informal settlement.

³⁴ This report formed part of the *Mazibuko* record, found at Bundle B vol 2 pages 439–82 of the court files, which are available at CALS.

³⁵ Johannesburg Water, undated: 3.

³⁶ *Ibid.*

³⁷ First and Second Respondents' Heads of Argument, 16 November 2007: para 17.8, Mazibuko High Court case.

her house. When she asked the workers what they were doing, they told Mazibuko that they were digging trenches to install PPMs. She had heard about PPMs from activists, and told the employees that she would never accept such a method of water delivery. At the end of March 2004, without any further notification or warning, the Mazibuko household's water supply was abruptly disconnected. It remained disconnected until October 2004, when she capitulated and asked for a PPM. Many other Phiri residents experienced a similar process around the same time, although some households were given a choice between a PPM and a standpipe (a cold water yard tap, which is not connected to the household water and sanitation supply).³⁸

From the outset, PPMs compromised Phiri residents' access to water in very tangible ways. With an average number of 13 or more people living across multi-dwelling households,³⁹ the standard FBW allocation (6 kilolitres per property per month) has always been insufficient to meet the basic needs of Phiri residents. This means that in the context of high unemployment and endemic poverty, Phiri residents are forced to make undignified and unhealthy choices. For example, people living with HIV/AIDS must choose between bathing or washing their soiled sheets, and parents must choose between washing their children before they go to school, or flushing the toilet. Even so, households such as Lindiwe Mazibuko's regularly go without water for days at a time because the FBW supply usually only lasts until mid-month, and there is often insufficient money to buy additional water credit:

The free 6 kilolitres of water per month has never lasted the entire month, since it was installed on 11 October 2004. It usually finishes any time between the 12th and 15th of each month. We can often not afford to buy further water. This means that our household is without any water for more than half of every month.⁴⁰

For the many large households in Phiri that exhaust their FBW supply before the end of the month, and are too poor to afford additional water credit, the ultimate

³⁸ For example, when her deemed-consumption water supply was discontinued, Grace Munyai (the third applicant in the *Mazibuko* case) accepted a standpipe rather than a prepayment water meter because she wanted to ensure that she would always have access to water, even if it was outside. However, with a standpipe, whenever household members need water (including for flushing the toilet – Phiri toilets are designed to be part of a waterborne sewerage system), they have to fill buckets and carry them inside. Moreover, if a household violates the conditions of a standpipe, which includes not connecting the tap to a hose, the standpipe is removed and a prepayment water meter is installed. As Grace attests, the authorities conduct regular surprise checks to ensure that she does not 'misuse' her standpipe (affidavit of Grace Munyai, 28 June 2006: <http://web.wits.ac.za/NR/rdonlyres/D3CF86E1-961F-4216-A346-70A93059A005/0/Munyai20affi.pdf>).

³⁹ Typical Phiri properties have a main brick house, which has one room, a living room, a kitchen and usually an outside toilet – title to these small 'matchbox houses' was transferred to the occupiers in the post-1994 period. Most Phiri properties also have backyard shacks, for which low monthly rentals are levied. Such shacks are generally cramped. Because the backyard shacks are not formally recognised by the city, they are not allocated separate FBW allocations. This means that all people on one property must share the one FBW allocation of 6 kilolitres per month.

⁴⁰ Founding affidavit of Lindiwe Mazibuko, 3 July 2006 para. 101: http://web.wits.ac.za/NR/rdonlyres/789545BC-025F-4046-8B82-69A63E7497D2/0/MAZIBUKO_Founding_affidavit_Final.pdf.

punishment is the PPM's automatic and sudden disconnection, which often takes households by surprise. The continuous infringements to dignity and health are serious, and a direct risk to life is posed in the event of fire. This was tragically demonstrated in a shack fire on the property of Vusimuzi Paki (the fifth applicant in the *Mazibuko* case), on 27 March 2005, which resulted in the death of two small children when there was insufficient water to put out the fire.⁴¹ More routinely, PPMs exacerbate already difficult lives by adding the stress of trying to manage with insufficient water for basic household and hygiene needs. PPMs represent the ultimate technicist solution to poverty, delegating the administrative burden of access to water to the individual household, thereby individualising 'the relationship of people to the resources necessary for life'.⁴² And yet, despite the potential for PPMs to individualise struggle, in Phiri, this blatant attempt to ghettoise poor households served to collectivise resistance, at least initially.

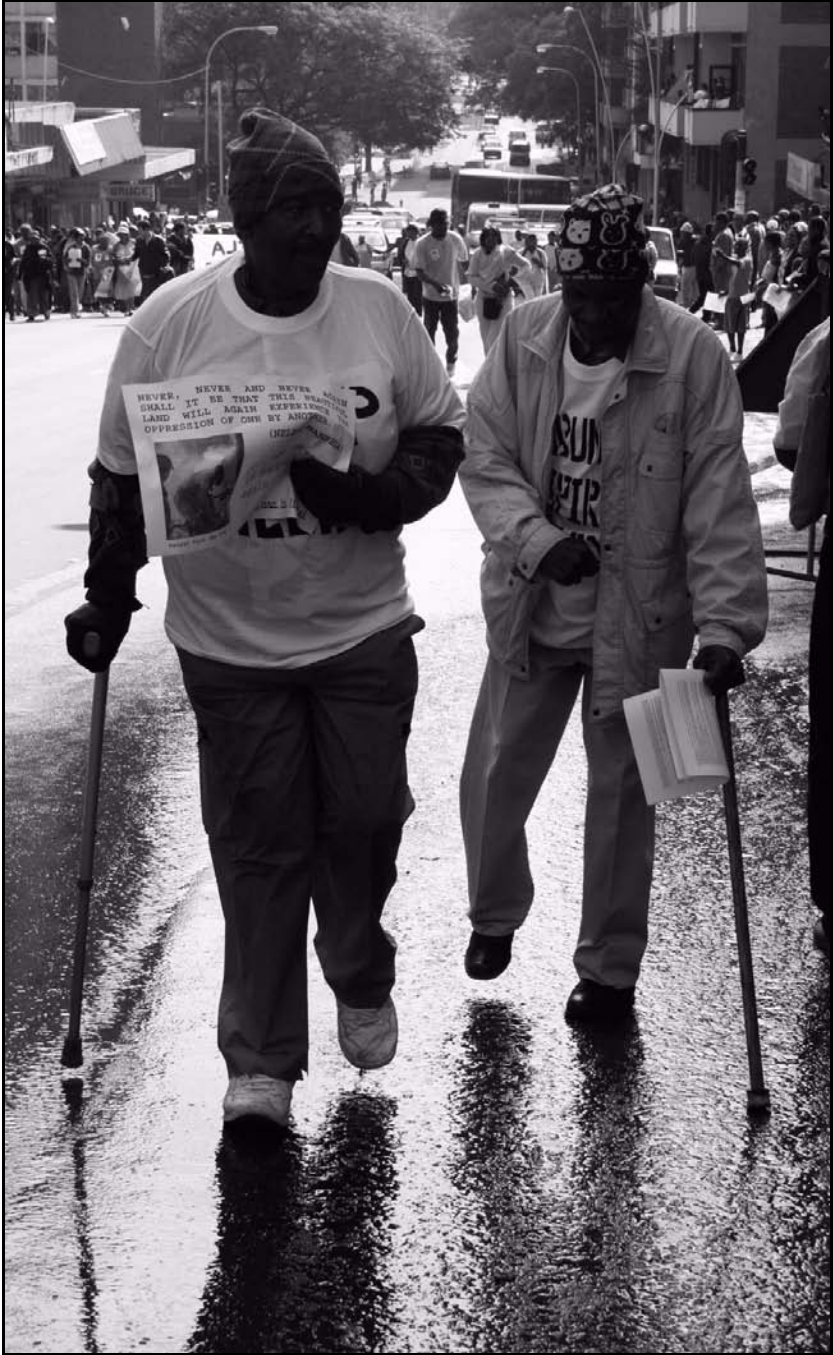
5 RESISTANCE AND RIGHTS

In delineating between resistance and rights, I do not mean to suggest that there was either a linear chronology or a separation between the two. From the onset of the legal campaign, there was a continuous dialectical relationship between the two tactical endeavours.⁴³ The legal campaign did not suspend the resistance campaign. On the contrary, one of the points of this chapter is to demonstrate that the legal campaign and the resistance campaign were always intertwined; far from detracting from each other, they served to reinforce and reinvigorate each other. I have written the sub-sections separately only because my point of entry and lens is the legal campaign, and it is difficult to merge the narratives. However, for the sub-section on rights – where I have relied on personal retrospective narratives (including my own, as part of the legal team from the outset of the legal campaign) – I have attempted to interweave my narrative with that of the APF's. The APF voice is that of Dale McKinley, and was documented in the course of a series of discussions during early July 2009, and a focused interview on 10 July 2009 (five years after taking a Phiri water rights case forward was first contemplated).

⁴¹ Two-year old Katleho Tamane and nine-year old Dimpho Tamane, who died in the blaze, had been left sleeping in the shack by their mother who had to work a night-shift and was unable to get anyone to look after her children.

⁴² Naidoo, 2007: 62.

⁴³ My ability to research the impact of the *Mazibuko* legal mobilisation on the APF was significantly limited by the fact that one of my two long-term APF interlocutors (P) – was suspended from the APF in the wake of a rape charge during early 2009. He remained suspended for the duration of my research. In discussions with other APF members, I decided not to try to pursue any research questions with P. This meant that I had to rely on written statements of the APF, as well as interviews with Dale McKinley (my other long-term intermediary), to document the APF's perspective of the *Mazibuko* journey. Fortunately, as a founding member, treasurer and de facto figurehead of the APF, McKinley was an excellent source of critical analysis. However, this limitation means that the activist perspective is not as rich as it should have been. Particularly in view of the disappointing Constitutional Court judgment, this suggests the need for further research that delves deeper into the activists' accounts and perspectives.



For Critical Legal Studies (CLS) scholars such as Mark Tushnet, Peter Gabel and Duncan Kennedy, rights are part of the machinery of law that reflects and reinforces the exercise of power by elites.⁴⁴ Consequently, the law works to domesticate poverty and need,⁴⁵ while leaving class and racial structures in place. Yet, as appreciated even within the CLS critique of law, rights have radical as well as conservative potential.⁴⁶ 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'.⁴⁷ So, while law 'in the aggregate surely tends to support hierarchical power relations', it also provides 'the opportunity or space for creative challenge'.⁴⁸ It is not necessary – as the CLS school might suggest – that law (and legal ideology) 'either straightjackets citizen imagination or disarms critical understanding'.⁴⁹ Indeed, as played out in Phiri's struggle against PPMs, reform-oriented rights mobilisation can build on and yet 'remain relatively independent of, or even defiant toward, the official, state-sanctioned legal order'.⁵⁰

Resistance

In August 2003, even before the first PPMs were installed, the initial digging of trenches for the bulk construction work met with widespread resistance. Residents such as Lindiwe Mazibuko had heard about PPM problems from residents of Orange Farm informal settlement, where such meters had recently been installed (many of which were subsequently destroyed by activists). As it became clear that the City was determined to roll PPMs out in Phiri, opposition mounted, and gained momentum through support from the APF. Established in 2000, the APF is a left-wing social movement alliance comprising affiliated community-based organisations, activists and movements, the latter group including the Soweto Electricity Crisis Committee (SECC). It was formed during the struggles against the City's commercialisation and corporatisation agenda, and brought together political activists and nascent community movements committed to the de-commodification of all basic needs. Among the APF's core objectives are: 'a halt to all privatisation of public sector entities and return of public control and ownership; the co-ordination and intensification of anti-privatisation struggles in communities'.⁵¹ The APF's stated modus comprises:

various forms of mass, direct action at local, provincial and national levels; regular mass community meetings; alliance-building and solidarity activities with community organisations outside of Gauteng as well as with organised labour; door-to-door campaigning in communities; submission of memoranda of demands and policy

⁴⁴ Tushnet, 1984; Gabel, 1984; Kennedy, 1986.

⁴⁵ Brand, 2007.

⁴⁶ See especially Tushnet, 1984.

⁴⁷ Scheingold, 1989:76.

⁴⁸ McCann, 1994: 9.

⁴⁹ *Ibid.*, 12.

⁵⁰ *Ibid.*

⁵¹ McKinley, unpublished draft: 3.

alternatives to all levels of government; and regular, community-based report-back meetings.⁵²

Deeply rooted in community struggles against the commercialisation and corporatisation of public services such as water, the APF was well placed to take up the struggle and become the vehicle for community resistance against PPMs in Phiri. Indeed, an APF-affiliate, the SECC (which had already campaigned against electricity prepayment meters elsewhere in Soweto), played a pivotal role in mobilising resistance. In the early months of the resistance campaign, increasing numbers of residents joined the struggle, swelling the numbers at APF/SECC meetings in Phiri and at the APF's office in Johannesburg's inner city, and participating in mass marches to city and Johannesburg Water offices. In addition, direct resistance involved attempting to physically prevent Johannesburg Water employees from digging trenches. Under the auspices of the APF/SECC, spontaneous protests morphed into mass action, with residents refusing to allow Johannesburg Water to continue its work. As described by activist and APF member Prishani Naidoo:

Residents came together to physically prevent the work of Johannesburg Water. They were supported in their actions by members of the Soweto Electricity Crisis Committee and the Anti-Privatisation Forum. Several altercations ensued between the police and private security hired by Johannesburg Water, and the residents.⁵³

Such altercations held the potential to derail the entire project, and, in a drastic response to the rising number of incidents of direct action, the city and Johannesburg Water successfully applied to the Johannesburg High Court for an interdict, which was granted on 22 August 2003. In terms of the interdict, any interference with Operation *Gcin'Amanzi* was banned, and activists (as well as all members of the APF and SECC) were interdicted from coming within 50 metres of any physical work undertaken by the project. The interdict also authorised the sheriff of the court to engage the services of a private security company to assist with any violations of the terms of the interdict. The APF responded in early September 2003 by establishing a Coalition Against Water Privatisation (CAWP), to re-focus activism against PPMs under a newly configured affiliation. However, the city followed up the interdict with a concerted effort to crush any opposition to PPMs, including arresting and harassing activists. By the end of September 2003, 14 residents of Phiri and activists supporting them had been charged with 'public violence', 'malicious damage to property' and 'incitement' for handing out flyers. The APF and its affiliate organisations, especially the SECC and CAWP, had to divert much energy and funding to securing bail and defending those charged. In the end, almost all charges were dropped, but battling against state repression took a heavy toll on the organisation, and effectively undermined its ability to halt the City's operations in Phiri. In turn, this failure to stop the rollout of PPMs fundamentally weakened the overall campaign.

⁵² Ibid.

⁵³ Naidoo, 2008: 58.

Although many households continued to resist the installation of PPMs on their properties, without further disruption of the Operation *Gcin'Amanzzi* operations the structural work went forward, and the first PPMs were installed in February 2004. For those households that refused to accept PPMs, the city deployed a new weapon: total water disconnection, which left households such as Lindiwe Mazibuko's without water for months until they capitulated. Having tried to live without direct access to water, and enduring intimidation by the city, by the end of 2004 most households in Phiri had been forced to accept either PPMs or standpipes. All were forced to relinquish their previously unlimited water supply, which was discontinued. By 2005, the last remaining households had given in, 'choosing' PPMs or standpipes over no water at all.

The ultimate failure to stop the installation of PPMs was perceived by the APF/SECC/CAWP alliance to mark a low point in the resistance campaign. According to a research report by the APF and CAWP:

While large numbers of families came together to physically resist the installation of the meters in the early days of [Operation *Gcin'Amanzzi*] ... 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.⁵⁴

At the time, the interdict, arrests, intimidation and water disconnections clearly struck a near-fatal blow to the campaign. Yet in retrospect, it is apparent that by cutting off one line of activism, the interdict sowed the seeds for the uptake of another line – that of rights-based litigation.

Rights

On a dreary mid-winter day in July 2004, Hameda Deedat (an activist researcher) phoned former CALS colleague Mike Nefale⁵⁵ to tell him that in the course of her research into municipal services in Soweto, she had encountered households whose water supply had been disconnected because they had refused to accept PPMs. Mike and I immediately drove to Phiri, where we met some of the future *Mazibuko* applicants. Over subsequent weeks, Mike and I went back to Phiri several times to document household stories. It soon became apparent that there was a legal case to be made. We tentatively raised this possibility with our Phiri householders, who turned out to be very keen to pursue litigation. Aware that the APF was active in Phiri, we then contacted APF co-founder Dale McKinley to discuss the litigation option. In line with APF policy, Dale took the issue back to the APF for deliberation. Recent interviews with McKinley have clarified that around this time, the APF had been contemplating defensive litigation to try to overturn the interdict. Nevertheless, according to McKinley, the idea of proactive

⁵⁴ APF and CAWP, 2006: 21.

⁵⁵ Mike was killed in a motor vehicle accident on 19 April 2009.

utilisation of the law had not been contemplated until it was raised by CALS. This is because, in line with CLS critiques, the APF viewed the law as entrenching inequality and protecting privilege. Until that point, the APF's only engagement with the law had been through the arrest of members and their defence against criminal charges, as well as the banning of marches.

When the question of proactive use of the law was put to the APF, several options emerged. First was an outright rejection of the legal route, accompanied by a proposal to escalate the resistance to 'all-out war'. However, when it was pointed out that many of the proponents of this option did not live in Phiri and were less likely to be exposed to the full brunt of the ramifications, this option was collectively abandoned. The second option was to continue a low-intensity resistance campaign, which in discussion appeared to be compatible with the third option, litigation. The consensus position was a strategic decision to pursue litigation, but not to suspend other forms of resistance: in other words, to utilise rights as one tactic within the broader struggle against PPMs (and more broadly, against the commercialisation and corporatisation of water services). This position was put to the residents of Phiri at a mass meeting in September 2004, at which it was agreed to pursue a case.⁵⁶

The conscious resort to litigation as 'another terrain of struggle' is evident in the language of the APF and CAWP's 2006 research report, which explains how the APF and CAWP 'prepare for another terrain of struggle in this war against water privatisation, that of the courts ... As activists look to the court case as a means to revive struggle at the local level'.⁵⁷ Similarly, APF and CAWP member Prishani Naidoo writes: 'Earlier this year, the Coalition Against Water Privatisation launched a constitutional case against the Johannesburg City Council, challenging its rollout of prepaid water meters in Phiri, in the hope that some of the losses made in struggle could be won through courts'.⁵⁸ Clearly, the decision to take forward the litigation was not taken lightly. According to McKinley:

[t]he battle of Phiri marked another new watershed in post-1994 water struggles. It served to not only further focus South African and international (critical) attention on the practical character and consequence of the ANC government's neo-liberal (water) policy onslaught, but also opened the door to testing the stated water service delivery commitments of relevant state policies/legislation and South Africa's constitution. For left/anti-capitalist activists, it is never an easy thing to adopt tactics that do not appear to fit into pre-configured, historically located understandings and

⁵⁶ On the legal side of things, we appealed to and were very fortunate to secure – on a contingency basis (meaning that legal fees would only be paid to counsel in the event of us ultimately winning and advocates' costs being awarded in our favour) – two outstanding advocates for the duration of the litigation, Wim Trengove, SC and Nadine Fourie. In the initial stage, when we were building the case, the Freedom of Expression Institute (FXI) were the attorneys of record for the applicants and CALS provided the socio-legal research. As such, FXI launched the case in the Johannesburg High Court in July 2006. However, from March 2007 onwards, CALS took over as the attorneys of record.

⁵⁷ APF and CAWP, 2006: 4.

⁵⁸ Naidoo, 2007: 34.

approaches to such struggle ... And so, it was in 2005–2006, with a great deal of trepidation and initial half-heartedness, that the APF and CAWP (with the assistance first, of the Freedom of Expression Institute and subsequently, the Centre for Applied Legal Studies) entered into the institutional-legal terrain of class struggle, assisting five representative Phiri residents to prepare and file a case in the Johannesburg High Court challenging the legality and constitutionality of Operation *Gcin'amanzi*'s limitation of the free basic supply of water and the installation of pre-paid water meters. The case was seen as a tactic, part of a larger, long-term strategy seeking to use all means available to ensure that water itself is seen and treated as a public resource, that water service providers remain publicly owned, managed and run and that water service delivery provides adequate, accessible and quality water to all.⁵⁹

The tactical resort to rights-based litigation indicates recognition by the social movements of the contingency of law. Evidently, the failure of traditional forms of mobilisation in Phiri hastened the APF's decision to take up a legal campaign – undoubtedly, as did the fortuitous advent of human rights lawyers from the Freedom of Expression Institute (FXI) and CALS.⁶⁰ 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', McKinley writes:

The judgment 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 labelled the so-called 'consultation' with the Phiri community as 'more of a publicity stunt than consultation' and criticised the City's 'big brother approach'.⁶¹

There was further endorsement following a public condemnation by Johannesburg Mayor Amos Masondo, in which Masondo criticised the *Mazibuko* judgment at a Johannesburg press conference, attacking Judge Tsoka 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 want to run the country they must join political parties and contest elections. In that way they can assume responsibilities beyond their

⁵⁹ McKinley, 2008.

⁶⁰ 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.

⁶¹ McKinley, 2008.



powers' (Mabuza, 15 May 2008). In a surprisingly pro-rule of law rebuttal, on 16 May 2008, the international anarchist website *anarkismo.net*⁶² carried a press release by CAWP (entitled '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 continued:

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.⁶³

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

While the judgment 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 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.

⁶² *Anarkismo.net* describes itself on the website as follows: 'We identify ourselves as anarchists and with the 'platformist', anarchist-communist or *especificista* tradition of anarchism.' 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': <http://www.anarkismo.net/about>.

⁶³ CAWP, 16 May 2008.

The CAWP and its allies are confident that the High Court judgment will be upheld and that water provision will now no longer be delivered in a discriminatory, patronising and inhumane manner.⁶⁴

6 CONCLUSION

Although it is not possible yet to assess the full impact of the *Mazibuko* legal mobilisation, it is clear that in Phiri, the tactical resort to rights-based litigation was premised on recognition of the contingency of law. The APF decision to mobilise legally following the failure of traditional forms of leftist resistance is consistent with Scheingold's proposition that rights are 'less established political facts' than potentially 'political resources' (Scheingold, 1974: 84). Given this proposition, the uptake of litigation should not be isolated and compared in zero-sum terms, but should be considered in a dialectical and potentially cumulative relationship with other tactics in the political struggle (McCann, 1994: 292).

On this basis, it is possible that the rights-based legal mobilisation has already impacted the movement activists and their fight against the commercialisation of water, through dramatising the issues and energising the struggle. While further research is necessary to properly evaluate this proposition – particularly in the light of the ultimate judgment – it seems to be supported by the APF's own analysis. According to McKinley, the APF is currently considering further proactive litigation. In his words, *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'.⁶⁵

Indeed, it is apparent that the case has played a fundamental role in reinvigorating water-related struggles around the country. For example, during May 2008, the South African Municipal Workers' Union (SAMWU) used the High Court judgment to mobilise against the City of Cape Town's attempts to install a different kind of water-limiting meter.⁶⁶ 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 High Court judgment reverberates in unanticipated and overtly political ways. For example, on 19 July, the *Mail & Guardian* online carried a story by Matuma Letsoalo entitled '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,

⁶⁴ McKinley, 2008.

⁶⁵ Interview with McKinley, 10 July 2009. When asked to list the drawbacks of the legal route, McKinley noted the length and complexity of the process, as well as the potential to alienate activists (there is no doubt that over the five years it has taken to mount the case and to get a final hearing in the Constitutional Court, many activists have withdrawn their initial interest). McKinley and I agree that if we could relive the process, we would try to spend more time communicating with the residents of Phiri and allied activists to keep them informed about each step of the legal process.

⁶⁶ Foster, 12 May 2008

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'.⁶⁷

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' (McCann, 1994: 10). As understood by Karl Marx, consciousness develops out of, rather than precedes, mobilisation, if it develops at all (McCann, 1994: 307). Given this theory, even if rights-based litigation represents a 'choice from no choice' for impoverished communities and associated social movements – or perhaps precisely because it does – it has the potential to contribute tangibly to the broader struggle for socio-economic emancipation by the left.

7 POSTSCRIPT: THE MAZIBUKO JUDGEMENT FROM THE CONSTITUTIONAL COURT

On 8 October 2009, in a profoundly conservative judgment, the South African Constitutional Court overruled the findings of the High Court and the Supreme Court of Appeal and ruled against the *Mazibuko* applicants, finding the city's policies reasonable and PPMs lawful.⁶⁸ Clearly it is too soon to assess the effect of the judgment on the APF, but initial feedback suggests that the judicial defeat has neither deterred the campaign nor discouraged further uptake of proactive litigation by the APF.⁶⁹ Moreover, as tentatively concluded in this chapter, the *Mazibuko* rights-based mobilisation has already indirectly impacted, and continues to impact, broader struggles in South Africa. The full extent of this impact can only be determined by future research.

References

African National Congress (ANC) (1994) *Reconstruction and Development Programme*. Johannesburg: Umanyano Publications.

APF Press Statement (13 August 2003), http://apf.org.za/article.php3?id_article=29.

APF and CAWP (2006) 'Lessons from The War Against Prepaid Water Meters: The Struggle Against Silent Disconnections Continues', http://apf.org.za/IMG/pdf/Final_PPM_Research_Report_-_102006-2.pdf.

⁶⁷ Letsoalo, 19 July 2008.

⁶⁸ Judgment available: <http://web.wits.ac.za/NR/rdonlyres/CEA91684-DF24-40B1-BE5A-25CB66DC289E/0/CCT3909MazibukoandothersvCityofJohannesburgandothersFINAL.pdf>.

⁶⁹ Interview with McKinley, 9 October 2009.

- Bond, P and Dugard, J (2008a) 'The Case of Johannesburg Water: What Really Happened at the Prepayment "Parish Pump"?' *Law, Democracy and Development*, 12(1), 1-28.
- Bond, P and Dugard, J (2008b) 'Water, Human Rights and Social Conflict: South African Experiences' *Law, Social Justice & Global Development*, 1, http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2008_1/bond_dugard.
- Bond, P (2000) *Elite Transition: From Apartheid to Neoliberalism in South Africa*. Pietermaritzburg and London: University of Natal Press/Pluto.
- Beall, J; Crankshaw, O and Parnell, S (2002) *Uniting a Divided City – Governance and Social Exclusion in Johannesburg*. London: Earthscan.
- Beavon, K (2000) 'Northern Johannesburg: Part of the "rainbow" or neo-apartheid city in the making?' *Mots Pluriels* 13, <http://www.arts.uwa.edu.au/MotsPluriels/MP1300kb.html>.
- CAWP (16 May 2008) '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=indigenous_struggles&type=nonanarchistpress&language=en.
- Department of Water Affairs and Forestry (DWAf) (2002) *Free Basic Water Implementation Strategy*, Version 2, <http://fbs.dplg.gov.za/fbs/site/docs/DocumentLibrary/FBW/FBWImplementStrategyAug2002.pdf?PHPSESSID=dd245e1e43caadb037d2946bfb74cd74>.
- DWAf (1997) White Paper on a National Water Policy for South Africa, <http://www.dwaf.gov.za/Documents/Policies/nwppw.pdf>.
- DWAf (1994) Water Supply and Sanitation White Paper, <http://www.dwaf.gov.za/Documents/Policies/WSSP.pdf>.
- Bakker, K (2007) 'The "Commons" versus the "Commodity": After-globalization, anti-privatization and the human right to water in the global South' *Antipode*, 39(3), 430-455.
- Bond, P and Dugard, J (2008) 'Water, Human Rights and Social Conflict: South African Experiences' *Law, Social Justice and Global Development*, 1, http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2008_1/bond_dugard.
- Coalition Against Water Privatisation (CAWP) and Anti-Privatisation Forum (APF) (2004) 'Nothing for Mahala: The forced installation of prepaid water meters in Stretford Extension 4, Orange Farm, Johannesburg, South Africa' *Research Report no. 16*, Durban: Centre for Civil Society.

- Brand, D (2005) 'The "Politics of Need Interpretation" and the Adjudication of Socio-Economic Rights Claims in South Africa' in van der Walt, AJ (ed) *Theories of Social and Economic Justice*, Stellenbosch: Stellenbosch University Press.
- Dugard, J (2009) 'Can human rights transcend the commercialization of water in South Africa?: Soweto's legal fight for an equitable water policy', Forthcoming in the *Review of Radical Political Economics* 2010.
- Dugard, J (2008) 'Rights, Regulation and Resistance: The Phiri Water Campaign' *South African Journal on Human Rights*, 24(3), 593-611.
- Foster, W (12 May 2008) 'Water wars move to Cape' *Mail & Guardian online*, <http://www.mg.co.za/article/2008-05-12-water-wars-move-to-cape>.
- Gabel, P (1984) 'The Phenomenology of Rights Consciousness and the Pact of the Withdrawn Selves' *Texas Law Review*, 62, 1563-1598.
- Gleick, H (1999) 'The Human Right to Water', *Water Policy*, 1(5), 487-503.
- Gleick, H (1996) 'Basic Water Requirements for Human Activities: Meeting Basic Needs', *Water International*, 21, 83-92.
- Hunt, A (1993) *Explorations in Law and Society: Toward a Constitutive Theory of Law*. New York: Routledge.
- Kennedy, D (1986) 'Freedom and Constraint in Private Law Adjudication: A Critical Phenomenology', *Journal of Legal Education*, 36, 518-562.
- Hemson, D (2008) 'Water for All: From Firm Promises to "New Realism"' in D. Hemson, K. Kulindwa, H. Lein and A. Mascarenhas (eds) *Poverty and Water: Explorations of the Reciprocal Relationship*, London: Zed Books.
- Johannesburg Water (undated) 'Operation GcinAmanzi Report, included in Minutes of Meeting of the Operations and Procurement Committee of Johannesburg Water', vol B 2, pp 439-82, *Mazibuko record*, Johannesburg: CALS.
- Letsoalo, M (19 July 2008) 'Masondo Next to be Axed?', *Mail & Guardian online*, <http://www.mg.co.za/article/2008-07-19-masondo-next-to-be-axed>.
- Mabuza, K (15 May 2008) 'Jozi to contest ruling on water', *Sowetan*.
- McCann, M (1994) *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization*. Chicago and London: University of Chicago Press.
- McKinley, D (2008) 'Water Struggles from Johannesburg and Beyond', http://www.anarkismo.net/newswire.php?story_id=9168.

- McKinley, D (2005) 'The Struggle Against Water Privatisation in South Africa' in Transnational Institute (TNI) (ed) *Reclaiming Public Water: Achievements, Struggles and Visions from Around the World*. http://www.tni.org/detail_page.phtml?page=books_publicwater.
- McKinley, D (unpublished draft) 'A new "home of struggle"', forwarded to me by the author.
- Mosdell, T (2006) 'Free Basic Services: The Evolution and Impact of Free Basic Water Policy in South Africa', in Pillay, U; Tomlinson, R and Du Toit, J (eds) *Democracy and Delivery: Urban Policy in South Africa*, Cape Town: HSRC Press.
- Naidoo, P (2008) 'Eroding the Commons: Prepaid Water Meters in Phiri, Soweto' *Public Citizen*, http://www.citizen.org/cmep/Water/cmep_Water/reports/southafrica/articles.cfm?ID=11991.
- Naidoo, P (2007) 'Struggles Around the Commodification of Daily Life in South Africa', *Review of African Political Economy*, 111, 57-66.
- Orange Farm Water Crisis Committee, APF and CAWP (2004) 'Destroy the Meter, Enjoy Free Water: Why we oppose the installation of prepaid water meters, given the experience in Stretford ext. 4, Orange Farm' *Research Report*, Johannesburg: Orange Farm Water Crisis Committee, APF and CAWP.
- Parliament of South Africa (2008) *Budget Analysis 2008: An Oversight Tool for Members and Committees of Parliament*, Information Services Section, Research Unit, Cape Town: Parliament of the Republic of South Africa.
- Roithmayr, D (2001) 'Left Over Rights', *Cardozo Law Review*, 22, 1113-1134.
- Scheingold, S (1989) 'Constitutional Rights and Social Change', in McCann, M and Houseman, G (eds) *Judging the Constitution: Critical Essays on Judicial Lawmaking*, Glenview Illinois: Scott, Foresman / Little Brown.
- Scheingold, S (1974) *The Politics of Rights: Lawyers, Public Policy, and Political Change*, New Haven and London: Yale University Press.
- Seidman, N (2006) 'Local government budgets and development', unpublished paper in author's possession.
- Smith, L (2006) 'Neither Public Nor Private: Unpacking the Johannesburg Water Corporatisation Model' *United Nations Research Institute for Social Development Social Policy and Development Programme Paper*, 27, [http://www.unrisd.org/unrisd/website/document.nsf/\(httpPublications\)/79F48A7BDD5CA384C12571D100257095?OpenDocument](http://www.unrisd.org/unrisd/website/document.nsf/(httpPublications)/79F48A7BDD5CA384C12571D100257095?OpenDocument).
- Tissington, K; Dettmann, M; Langford, M; Dugard, J and Conteh, S (2008) *Water Services Fault Lines: An Assessment of South Africa's Water Service and Sanitation Provision Across 15 Municipalities*. Johannesburg, Geneva and Oslo: CALS,

COHRE and NCHR, <http://web.wits.ac.za/Academic/Centres/CALS/BasicServices/ResearchReports.htm>.

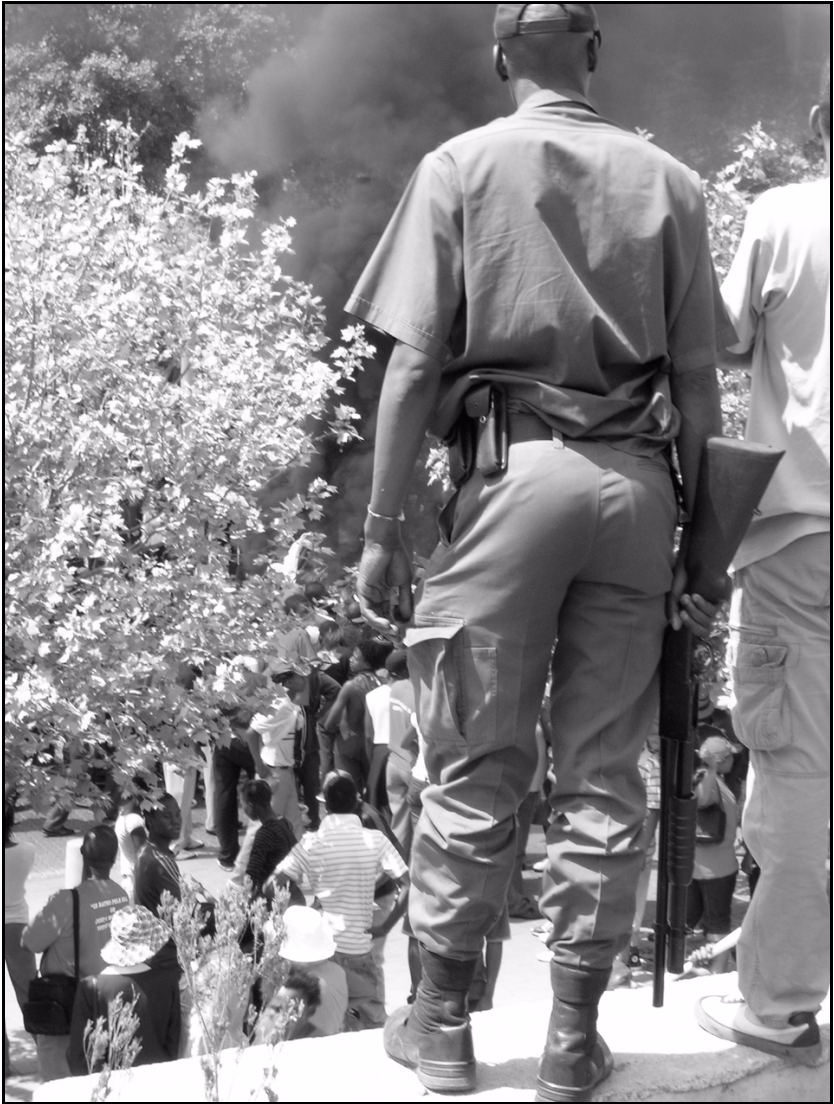
Tomlinson, R (1999) 'Ten Years in the Making: A History of the Evolution of Metropolitan Government in Johannesburg', *Urban Forum*, 10(1), 1-39.

Tushnet, M (1984) 'An Essay on Rights', *Texas Law Review*, 62, 1363-403

Wafer, A; Dugard, J; Ngwena, M and Sibanda, S (2007) 'A Tale of Six Buildings: The Lived-Reality of Poor People's Access to Basic Services in Johannesburg's Inner City', *Research Report*, Johannesburg: Centre for Applied Legal Studies (CALs), http://web.wits.ac.za/NR/rdonlyres/151249A8-4A39-41B2-80C6-896A84B67DFB/0/Tale_of_six_buildings.pdf.

Wilson, S (2004) 'Taming the Constitution: Rights and Reform in the South African Education System', *South African Journal on Human Rights*, 20(3), 418-47.

Zemans, F (1983) 'Legal Mobilization: The Neglected Role of the Law in the Political System', *American Political Science Review*, 77, 690-703.



RESISTANCE AND REPRESSION:
POLICING PROTEST IN
POST-APARTHEID SOUTH AFRICA*Marcelle C. Dawson¹*

1 INTRODUCTION

The policing of dissent has captured the attention of social movement scholars in the global North for well over a decade, but this area of enquiry remains relatively under-researched in the south. This chapter attempts to shed light on this issue in the South African context. It addresses the policing of protest primarily from the viewpoint of demonstrators.² In order to understand how the relationship between police and demonstrators plays itself out in a South African context, it is necessary to take a step back and examine the content of the actual demonstrations. Empirically, this chapter examines two themes: the nature of popular protest in democratic South Africa; and experiences of the control of dissent. To address these issues, the chapter provides a brief discussion on the struggles faced by an array of communities, concentrating on the issues of service delivery and participation. The discussion then considers protest action, paying particular attention to the Regulation of Gatherings Act (No. 205 of 1993), the techniques used by the police to squash dissent, and experiences of repression from the viewpoint of local activists.

To contextualise these themes, the chapter begins with an account of post-apartheid restructuring as far as local government and the South African Police Service are concerned. The purpose of this part of the discussion is to question the nature and extent of democratic practices within these two state bodies. The chapter then addresses the issue of the repression of resistance as discussed in the

¹ Gathering the data for this research would not have been possible without the assistance of Tendayi Sithole (Freedom of Expression Institute), Kgopotso Khumalo (University of Johannesburg), Ole Maboya (University of Johannesburg), Bongane Xeswi (community activist) and Morgan Thaba (University of Johannesburg).

² At the outset of this project, the intention was to interview police as well as demonstrators, but gaining access to the police proved unsuccessful. The research proposal was turned down by the legal department of the SAPS in Johannesburg. At the time of concluding the project, the proposal was being considered by the Management of the Gauteng Provincial Head Office. As result, the original material in this paper is drawn only from interviews with community activists.