Les Cahiers de droit

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Volume 51, Number 3-4, septembre–décembre 2010

URI: https://id.erudit.org/iderudit/045722ar
DOI: https://doi.org/10.7202/045722ar

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Publisher(s)

Faculté de droit de l'Université Laval

ISSN

0007-974X (print)
1918-8218 (digital)

Explore this journal

Cite this article

Humby, T. & Grandbois, M. (2010). The Human Right to Water in South Africa and the *Mazibuko* Decisions. *Les Cahiers de droit*, *51*(3-4), 521–540. https://doi.org/10.7202/045722ar

Article abstract

The right of access to sufficient water in the South African Constitution has for long been regarded as progressive in a global context where the human right to water is still a subject of contention. In its recent decision handed down in the *Mazibuko* matter, the South African Constitutional Court interpreted the right of access to sufficient water for the first time and clarified the nature of the State's obligations which flow from this right. It also commented upon the role of the courts in adjudicating the human right to water. This article describes the passage of the Mazibuko matter and the manner in which the lower courts interpreted the right of access to "sufficient water" as well as outlining the Constitutional Court's decision in the context of access to water services provision in South Africa.

The Human Right to Water in South Africa and the *Mazibuko* Decisions

Tracy HUMBY* and Maryse GRANDBOIS**

The right of access to sufficient water in the South African Constitution has for long been regarded as progressive in a global context where the human right to water is still a subject of contention. In its recent decision handed down in the Mazibuko *matter, the South African Constitutional Court interpreted the right of access to sufficient water for the first time and clarified the nature of the State's obligations which flow from this right. It also commented upon the role of the courts in adjudicating the human right to water. This article describes the passage of the Mazibuko matter and the manner in which the lower courts interpreted the right of access to "sufficient water" as well as outlining the Constitutional Court's decision in the context of access to water services provision in South Africa.*

La reconnaissance du droit d'accès à l'eau dans la Constitution sud-africaine de 1996 apparaît comme une mise en œuvre progressiste du droit fondamental des populations à l'eau potable, alors que la reconnaissance de ce droit fait encore l'objet de réticences dans de nombreux pays. Aussi la décision rendue par la Cour constitutionnelle dans l'affaire Mazibuko *était-elle très attendue en droit comparé de l'eau. La Cour constitutionnelle y interprète pour la première fois l'étendue du droit d'accès à l'eau et clarifie les obligations de l'État sud-africain en cette matière. Elle se*

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***Les Cahiers de Droit*, vol. 51, n^os^ 3-4, septembre-décembre 2010, p. 521-540**

prononce aussi quant au rôle des tribunaux dans la mise en œuvre du droit fondamental à l'eau. Les auteurs s'intéressent ici à l'importance de la décision Mazubiko *en ce qui a trait à l'interprétation du droit à l'eau dans un contexte socioéconomique de pénurie.*

The recognition of a right of access to "sufficient" water in the South African Constitution[1] and the policies and laws that have subsequently been developed to implement this right[2] have attracted a fair amount of interest

1. *Constitution of the Republic of South Africa 1996*, Act No. 108 of 1996, Government Gazette No. 17678, vol. 378, 18-12-1996. Section 27 (1) (b) of the South African Constitution states that "[e]veryone has the right to have access to […] sufficient food and water". Section 27 (2) goes on to provide that "[t]he state must take reasonable legislative and other measures within its available resources, to achieve the progressive realization of each of these rights."
2. These include : Republic of South Africa, Department of Water Affairs and Forestry, *Water Supply and Sanitation Policy. White Paper. Water – An Indivisible National Asset*, Cape Town, November 1994, [Online], [www.dwaf.gov.za/Documents/Policies/WSSP.pdf] (19 May 2010) ; Republic of South Africa, Department of Water Affairs and Forestry, *White Paper on a National Water Policy for South Africa*, Pretoria, April 1997, [Online], [www.dwaf.gov.za/Documents/Policies/nwpwp.pdf] (19 May 2010) [hereinafter "1997 White Paper"] ; *Water Services Act*, Act No. 108 of 1997,

in the literature on the human right to water[3]. While the South African rights-based approach has been described as progressive and innovative, the way in which it could function to alleviate large-scale water poverty in South Africa has remained unclear in the absence of judicial interpretation of the right. In particular, it was uncertain whether the right would be interpreted as an entitlement to a specified quantity of water — with a corresponding obligation on State or private entities to immediately provide such quantity ; or as an expectation that the State would progressively ensure access to sufficient water over time — with a corresponding obligation on the State to take measures to progressively realize the right and to account therefore[4]. In its recent decision in the Mazibuko matter, the

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Government Gazette No. 18522, vol. 390, 19 - 12 - 1997 [hereinafter "WSA"] ; *National Water Act*, Act No. 36 of 1998, Government Gazette No. 19182, vol. 398, 1998-08-26 ; Republic of South Africa, Department of Water Affairs and Forestry, *Free Basic Water Implementation Strategy*, version 2, August 2002, [Online], [www.dwaf.gov.za/Documents/FBW/FBWImplementStrategyAug2002.pdf] (19 May 2010) [hereinafter "FBW Policy"] ; Republic of South Africa, Department of Water Affairs and Forestry, *Strategic Framework for Water Services. Water is Life, Sanitation is Dignity*, September 2003, [Online], [www.dwaf.gov.za/Documents/Policies/Strategic%20Framework%20approved.pdf] (19 May 2010) ; Republic of South Africa, Department of Water Affairs and Forestry, *National Water Resource Strategy. Our Blue Print for Survival*, 1st ed., Pretoria, September 2004, [Online], [www.dwaf.gov.za/Documents/Policies/NWRS/Default.htm] (19 May 2010).

3. See : Andrew Allan, "A Comparison Between the Water Law Reforms in South Africa and Scotland : Can a Generic National Water Law Model be Developed from These Examples ?", (2003) 43 *Nat. Resources J.* 419 ; Erik B. Bluemel, "The Implications of Formulating a Human Right to Water", (2004) 31 *Ecology L.Q.* 957, 978 ; Malgosia Fitzmaurice, "The Human Right to Water", (2006-2007) 18 *Fordham Envtl. L. Rev.* 537, 573 ; Rose Francis, "Water Justice in South Africa : Natural Resources Policy at the Intersection of Human Rights, Economics and Political Power", (2005-2006) 18 *Geo. Int'l Envtl. L. Rev.* 149 ; Amy Hardberger, "Life, Liberty, and the Pursuit of Water : Evaluating Water as a Human Right and the Duties and Obligations it Creates", (2005) 4 *Northwestern Journal of International Human Rights* 331, 351 ; Andrew L. Magaziner, "The Trickle Down Effect : The Phiri Water Rights Application and Evaluating, Understanding, and Enforcing The South African Constitutional Right to Water", (2007-2008) 33 *N.C.J. Int'l L. & Com. Reg.* 509 ; Ramin Pejan, "The Right to Water : The Road to Justiciability", (2004) 36 *Geo. Wash. Int'l L. Rev.* 1181, 1194 ; Anna R. Welch, "Obligations of State and Non-State Actors Regarding the Human Right to Water Under the South African Constitution", (2005) 5 *Sustainable Development Law & Policy* 58 ; and Dinara Ziganshina, "Rethinking the Concept of the Human Right to Water", (2008) 6 *Santa Clara Journal of International Law* 113, 118.

4. See R. Francis, *supra*, note 3, 153 and 187-192, who, with remarkable insight, predicted that the South African right would be interpreted as a governmental obligation to the population rather than the right of an individual to a specified quantity of water.

South African Constitutional Court has now provided clarity that the latter interpretation prevails[5].

Given limited space in this particular issue, we focus on only the first of the two main issues raised in the *Mazibuko* matter, namely the question as to what constituted access to "sufficient" water and whether the State was under a constitutional duty to provide such a specified quantum[6]. This article provides an account of this aspect of the *Mazibuko* matter as it proceeded through the South African courts and an evaluation of the consequences the Constitutional Court's decision on this aspect holds for access to water in South Africa. This raises the broader issue of how the courts can contribute to social transformation and how the South African Constitutional Court has positioned itself in this regard. Our view is that given the context of water poverty and water governance in South Africa, the Constitutional Court's stance is prudent and appropriate.

In order to contextualize the discussion properly, we first provide a brief overview of the state of water poverty in South Africa and the steps taken by the South African State to alleviate this situation.

1 Contextualization of Access to Water Services in South Africa

1.1 Water Poverty in South Africa

The interpretation of the human right to water in *Mazibuko* must be understood within the context of a number of difficult realities. South

5. See *Mazibuko and others* v. *City of Johannesburg and others*, [2009] ZACC 28 (S. Afr. Const. Ct.), [2010] 3 B. Const. L.R. 239 [hereinafter "CC decision"], in which O'Regan J. delivered the decision of the unanimous court. The matter was first heard in the High Court before Tsoka J. as *S.* v. *Mazibuko*, [2008] ZAGPHC 106 (Wit. Local Div.), [2008] 4 All S.A. 471 [hereinafter "HC decision"]. The City of Johannesburg subsequently took the case on appeal to the Supreme Court of Appeal in *City of Johannesburg and others* v. *Mazibuko and others*, [2009] ZASCA 20 (S. Afr. S.C.), [2009] 8 B. Const. L.R. 791 [hereinafter "SCA decision"]. The applicants then appealed to the Constitutional Court as the highest court in South Africa on constitutional matters. All of these judgments are available on the open resource website of the South African Institute for Legal Information at [www.saflii.org].

6. We have thus not covered the courts' deliberations on the other main legal issue, namely whether the installation of pre-payment meters (PPM) by the City of Johannesburg/ Johannesburg Water in the district of Phiri amounted to a "retrogressive" measure, nor interesting sub-issues such as whether the steps the State had taken to curb water losses in Phiri constituted discrimination on the basis of race.

Africa is a water-scarce, and water-stressed country[7]. Rainfall is less than the world average and is unevenly distributed[8]. Historically, the areas of greatest industrial and economic activity — and thus the most populous and most in need of the provision of water services — are situated at the start of small erratic streams, rather than large reliable rivers[9].

While ensuring physical access to water services is thus challenging in many regions of the country, economic access is also problematic. Levels of poverty[10] and unemployment[11] are high and the country hosts the largest number of persons living with HIV/Aids in the world[12]. In Johannesburg,

7. 1997 White Paper, *supra*, note 2, p. 13. At the time of writing, the White Paper noted that with a population of 42 million people, South Africa was on the verge of the international definition of "water stress", with just 1200 kl available per person per year. As the South African population is now officially estimated at around 49 million people, that threshold has probably been exceeded and South Africa qualifies as a water stressed country.
8. *Id.*
9. *Id.*, p. 14. Worryingly, in these regions water resources are also under significant threat of contamination. Acid mine drainage, emanating from the long history of gold mining on the Witwatersrand Reef as well as current coal mining operations to the north, is emerging as a potentially catastrophic problem with long-term consequences. See : Sipho Masondo, "Exclusive : City Faces Acid Deluge. Toxic Minerals and Acids at Dangerous Level", *The Times*, 11 March 2010, [Online], [www.timeslive.co.za/local/article351475.ece] (22 May 2010) ; Sipho Masondo, "Mining Devastating SA's Farms. How Rampant Mining Is Destroying the Farms in SA's Breadbasket", *The Times*, 24 January 2010, [Online], [www.timeslive.co.za/news/article275637.ece] (22 May 2010). Poorly-maintained sewerage works – the responsibility of local authorities – are a significant source of pollution as well. See for instance : Prega Govender and Kea' Modimoeng, "Hartbeespoort's Water Woes. Sewage Spills Turn Scenic Dam into Rotting Cesspool", *The Times*, 7 March 2010, [Online], [www.timeslive.co.za/sundaytimes/article341477.ece] (22 May 2010) ; Sapa, "Water Affairs Misses Cluster Briefing", *The Times*, March 1st, 2010, [Online], [www.timeslive.co.za/local/article331865.ece] (22 May 2010).
10. South Africa was ranked 85th out of 135 countries on the Human Poverty Index 2009. This Index focuses on the proportion of people below certain threshold levels in each of the dimensions of the human development index. One of these is the percentage of people not using an improved water resource. In South Africa this is estimated to be 7 percent of the population : see United Nations Development Programme, *Human Development Report 2009. Overcoming Barriers : Human Mobility and Development*, "South Africa. The Human Development Index – Going Beyond Income", [Online], [hdrstats.undp.org/en/countries/country_fact_sheets/cty_fs_ZAF.html] (23 May 2010).
11. The country's official unemployment rate is around 25 percent. See Esmarie Swanepoel, "Informal Jobs Prop Up Q4 Employment Figures after Big '09 Losses", *Engineering News*, 9 February 2010, [Online], [www.engineeringnews.co.za/article/sa-unemployment-rate-falls-slightly-in-q4-2010-02-09] (23 May 2010).
12. More than 5 million people in South Africa are estimated to be infected with HIV. See : Chinua Akukwe, "Aids Fight in Africa", 22 February 2010, [Online], [http ://allafrica.com/stories/201002221159.html] (23 May 2010) ; Statistics South Africa, *Statistical Release P0302. Mid-Year Population Estimates 2009*, 27 July 2009, [Online],

the location in which the dispute in *Mazibuko* played out, there were approximately 3.2 million people living in about a million households in 2001 (the date of the last official census). A shocking 50 percent of these households were very poor, with an income of less than R1 600 (approximately $215 USD) per month[13].

When the African National Congress (ANC) came into power after the country's first democratic elections in 1994, it was estimated that between 12 and 14 million people had no access to safe water at all[14]. As a result of the appalling policy of apartheid, the racial profile of the water-deprived was, and still is, overwhelmingly black. However, as was made apparent in the *Mazibuko* matter, the legacy of apartheid is complex. Apartheid urban planning — which was underpinned by the spatial principle of segregating people of different races — went together with inferior levels of water service provision as well as inferior administrative systems to account for such service. Paradoxically, this sometimes meant that access to water services — albeit of a poor quality — was not limited by ability to pay. For instance, in the area of Phiri, Soweto, the district in Johannesburg where the applicants in the *Mazibuko* case reside, water piping was initially laid down in the 1940s and 50s. Inappropriate materials[15] and sub-standard engineering[16] resulted in a "chaotic[17]" water reticulation infrastructure and

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[www.statssa.gov.za/publications/P0302/P03022009.pdf] (23 May 2010). Not only does HIV devastate the income-earning capacity of households, it also – as was pointed out in the *Mazibuko* decision (see, for instance, SCA decision, *supra*, note 5, par. 36) – increases the need for water in the home.

13. CC decision, *supra*, note 5, par. 7. There is no reason to believe that this statistic has changed significantly in the intervening years. Ensuring economic access to water services in such conditions is thus very challenging even though it is contended that the City of Johannesburg is one of the *most* capacitated and well-resourced municipalities in South Africa. See CENTRE FOR APPLIED LEGAL STUDIES, CENTRE ON HOUSING RIGHTS AND EVICTIONS and NORWEGIAN CENTRE FOR HUMAN RIGHTS, *Water Services Fault Lines. An Assessment of South Africa's Water and Sanitation Provision Across 15 Municipalities*, by Kate TISSINGTON and others, Johannesburg, October 2008, Johannesburg, Centre for Applied Legal Studies, p. 35, [Online], [web.wits.ac.za/NR/rdonlyres/14D413A0-9CA8-40A7-9428-4B7545548C05/0/WaterServicesReport_web_Nov08.pdf] (23 May 2010) [hereinafter "Water Services Report"].
14. 1997 White Paper, *supra*, note 2, p. 15.
15. Steel piping was used without regard to its capacity to withstand corrosion. Many of these pipes had already corroded in the 1980s, resulting in water leakages. See CC decision, *supra*, note 5, par. 11.
16. The piping system laid down in areas such as Phiri had fundamental technical problems in that there were incompatibilities in pressure systems, resulting in fractures and innumerable leaks in primary and secondary water reticulation. See SCA decision, *supra*, note 5, par. 47.
17. *Id.*

enormous wastages of water. Residents in Phiri had water piped to each household and were charged for a "deemed" consumption of 20 kilolitres (kl) of water per household per month on a flat rate basis of R68.40 (approximately $9.21 USD[18]). However, the actual monthly "consumption" of households in Soweto was estimated at 67 kl per household per month — officials not being able to separate actual consumption from water lost through faults in the infrastructure. Moreover, the rate of payment of the flat rate in areas of "deemed consumption" was less than 10 percent[19]. Johannesburg Water (the state-owned water services provider in Johannesburg) thus estimated that while between one third and one quarter of all the water it purchased was distributed to Soweto, only 1 percent of its revenue was generated from this region[20]. This was regarded as unsustainable and prompted the City of Johannesburg and Johannesburg Water to develop a plan to change water usage in Soweto. Elements of this plan — which came to be known as Operation Gcin' amanzi (to save water) — came under scrutiny in the *Mazibuko* matter, particularly the amount of free water allocated to each household or, put conversely, the extent to which residents were now expected to pay for services.

1.2 Steps taken by the State to Alleviate Water Poverty

The courts' judgment of the reasonableness of the efforts taken by the City of Johannesburg and Johannesburg Water to curb unsustainable water usage in Phiri, Soweto must be seen against the policy and legislative framework for water resources and water services provision established in South Africa since 1994. Given space constraints only those aspects most significant to the ensuing discussion are highlighted[21].

The first major policy theme of the post-1994 framework is the decentralization of both the management of water resources[22] and the provision

18. CC decision, *supra*, note 5, par. 11 : "The deemed consumption system was used as the basis for water charges in all residential areas in [Johannesburg] that had been set aside [for black people] under the apartheid system".
19. Officials for the City of Johannesburg ascribe this to the so-called "culture of non-payment" that took root in the 1980s as a form of resistance to apartheid. See SCA decision, *supra*, note 5, par. 47.
20. CC decision, *supra*, note 5, par. 12.
21. For more comprehensive overviews, see Water Services Report, *supra*, note 13, p. 12-14, and R. Francis, *supra*, note 3, 160-177.
22. The *National Water Act*, *supra*, note 2, is based on the philosophy of integrated water management. South Africa has been divided into 19 water management areas and a catchment management agency (CMA), comprising representatives of the users in each area, must be established for each area. The CMAs, of which only a few have been established, are envisaged to gradually take over the role of managing the water resources

of water services[23] from the national level of government to regional or local levels. In the case of water services, the duty to provide such rests primarily on water services authorities, which are metropolitan, district or local municipalities or rural councils[24]. There are vastly differing levels of capacity amongst these authorities, both as regards engineering and administrative expertise. In many authorities there is a critical lack of capacity, particularly as regards civil engineering — the profession most integral to the enormous required extension of water services. In 2007 Allyson Lawless completed a 24-month study on civil engineering staff in local government in which she found that since the late 1980s there had been a *net loss* of 70 to 90 civil engineers in local government per year. Assuming a population of 47 million, this means that on average there are 3 civil engineers in local government per 100 000, a significant drop from the average of 21+ per 100 000 in the previous apartheid regime. Moreover the majority of experienced civil engineers are in their late 50's or older, which raises critical questions around skills transfer[25]. In 2008 the South African Society of Civil Engineers, in a presentation to the relevant Parliamentary Portfolio Committee, revealed that a significant number of local authorities have *no* civil engineering professional support[26]. However, the

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in each water management area. The role of the national agency – the Department of Water and Environmental Affairs – is envisaged to shift from that of operator and provider of water schemes to regulator of both the management of water resources and the provision of water services. See Water Services Report, *supra*, note 13, p. 15-17.

23. The policy of decentralizing water services provision to municipalities flows from the Constitution. The Constitution constitutes government in terms of three "spheres": National, provincial and local (*Constitution of the Republic of South Africa 1996*, *supra*, note 1, section 40). Local government has law-making and executive authority in respect of water and sanitation services, limited to potable water supply systems and domestic waste-water and sewage disposal systems (section 156 (1) and (2) read with Schedule 4, Part B of the Constitution). It exercises this authority concurrently with national and provincial government who may govern this area by establishing frameworks within which municipalities must function, monitoring their performance and intervening when municipalities are failing to perform their constitutional obligations. The *Water Services Act*, *supra*, note 2, is a clear instance of such "framework" legislation.
24. *Id.*, s. 11 (1), read with the definition of "water services authority" in s. 1 (xx).
25. Allyson Lawless, *Numbers & Needs in Local Government. Civil Engineering – the Critical Profession for Service Delivery*, Midrand, South African Institution of Civil Engineering, 2007. See the media release regarding this publication at [www.saice.org.za/Portals/0/pdf/publications/pr-nn2.pdf].
26. See Anthony Turton, "The National Pollution Problem Facing South Africa's Water Resources and Ecosystems: Three Strategic Water Quality Issues To Consider" (Keynote address for the Council for Scientific and Industrial Research (CSIR) Conference "Science: Real and Relevant", CSIR International Convention Centre, Brummeria, Pretoria, 18 November 2008) [unpublished]. Controversially, Professor Turton was prevented from delivering this address by his employer, the CSIR, and

City of Johannesburg, a metropolitan authority, is probably one of the most well-resourced water services authorities and the best performing[27].

The WSA emphasizes, however, that all spheres of government have a duty to ensure the efficient, equitable and sustainable provision of water supply and sanitation services[28] and confers powers on, for instance, the national Minister responsible for water, to establish compulsory national standards relating to a variety of matters[29]. In 2001, the Minister published the envisaged compulsory national standards, including regulation 3 (b) on the minimum standard for "basic water supply" services, being the level of service required in order to support life and for purposes of personal hygiene[30]. According to regulation 3 (b) "basic water supply services" constitutes a minimum quantity of potable water of 25 litres per person per day or 6 kl per household per month[31].

The second major policy thrust of the post-1994 framework is the attempt to balance the use of water as a social and an economic good[32]. Essentially, the South African government has sought to secure cost recovery for the provision of water services[33] whilst at the same time

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was later suspended and relieved of his duties. The controversial aspect of the address however, related to the showing of pictures relating to xenophobic violence and not to the claims regarding the lack of engineering capacity in South African local authorities.

27. In terms of the "Blue Drop" Report recently released by the Department of Water Affairs, the City of Johannesburg emerged as the leading "blue drop performer". See Republic of South Africa, Department of Water Affairs and Forestry, *Blue Drop Report 2010. South African Drinking Water Quality Management Performance*, 19 April 2010, [Online], [www.dwaf.gov.za/Documents/blueDrop.pdf] (24 May 2010) [hereinafter "Blue Drop Report"].
28. *Water Services Act*, *supra*, note 2, preamble.
29. *Id.*, ss. 9 and 10.
30. *Id.*, s. 1 (iii) ; *Regulations Relating to Compulsory National Standards and Measures to Conserve Water*, GN R509, Government Gazette nº 22355, 08-06-2001.
31. *Id.* The standard in regulation 3 (b) is based on an average household size of 8 people. However, in Phiri, because many poor stand-holders let out their properties to even poorer tenants the average household size is closer to 16 people per stand.
32. An analysis of the various policy and legislative mechanisms by which this balancing act is conducted is beyond the scope of this article. There is extended criticism, however, of the national government's perceived failure to properly finance the devolution of water services to the local sphere of government, which thus impacts on their capacity to provide water as a social good and encourages them to rely on cost recovery mechanisms to the detriment of poor users. See R. Francis, *supra*, note 3, 172-176, and Water Services Report, *supra*, note 13, p. 18-24 and 31-61.
33. The *Water Services Act*, *supra*, note 2, ss. 11 (1) and 11 (2) (d), provides that water services authorities are duty-bound to provide consumers within their jurisdictions with *affordable access* to water services, and articulates a concomitant duty on the part of consumers to *pay reasonable charges* for their water use.

ensuring a level of free basic services[34]. One of the cornerstones of this policy is the national government's Free Basic Water (FBW) Strategy[35] which was initially announced in February 2001. This is a national policy aimed at providing a normative context for the exercise, by water services authorities at the local level, of their constitutional and statutory power to set water tariffs[36]. The FBW Strategy indicates that the volume of water identified as basic for survival—i.e. the standard incorporated in regulation 3 (b) of 6 kl of water per household per month—should be allocated freely[37]. The Strategy, however, emphasizes flexibility in the implementation of the policy, suggesting that in some areas water services authorities may not be able to provide even the 6 kl per month considered as basic, whereas in others this amount can be adjusted upward to take into account waterborne sanitation[38]. It repeatedly stresses, however, that the continued extension of water services to those people who do not have access to any improved water service remains the priority, and that the FBW policy should not detract from this goal[39].

Based on the FBW Strategy, the City of Johannesburg decided in 2001 to allocate 6 kl of free water per month to all accountholders irrespective of whether they were rich or poor[40]. The manner in which these 6 kl were delivered to Phiri was bound up with Operation Gcin'amanzi and entailed the use of both flow restriction devices and, in some cases, pre-payment meters[41]. Essentially this meant that all stands in Phiri were given physical

34. R. Francis, *supra*, note 3, 170, trenchantly criticizes the South African government for embracing the policy of cost recovery, arguing that it "has had devastating effects on the majority of the populace, leading to substantially increased household debt, widespread water cutoffs, citizen unrest, and a nationwide cholera epidemic". She also argues, at 178-182, that the FBW Strategy has a number of regressive aspects, including lack of financial support on the part of national government and the insufficiency of the minimum quantity of water defined by the government as necessary for survival.
35. FBW Policy, *supra*, note 2.
36. *Id.*, p. 9.
37. *Id.*, p. 8.
38. *Id.* Whilst the FBW Strategy celebrates flexibility in the setting of water tariffs and the implementation of the free basic water policy, the compilers of the Water Services Report, *supra*, note 13, p. 31, and 32, are critical of the disparities amongst municipalities in this regard. They found that some municipalities are not implementing the FBW Policy at all, and that those which were allocating free basic water were allocating different quantities and using different targeting methods. However, this flexibility was envisaged by the Strategy and was seen as desirable.
39. FBW Policy, *supra*, note 2, p. 7.
40. HC decision, *supra*, note 5, par. 3.
41. The first level of service provided a tap within 200 m of each dwelling. In this case the tap had no flow restriction device because it was assumed that residents would not be able to physically transport more than 6 kl of water from the tap to their dwellings. The

and economic access to 6 kl of water per month[42]. At the same time as access was being provided in the former "deemed consumption" area of Phiri in this way, more than 100 000 households in Johannesburg were still without any form of access.

2 The Mazibuko Decisions

2.1 The Applicants' Claims

Basing their claim on the right to sufficient water in section 27 (1) (b) of the Constitution, the applicants — who were all poor residents of the district of Phiri — sought the review and setting aside of the City of Johannesburg's decisions to limit the amount of free basic water to 6 kl of water per household per month and to deliver this free allocation in the area of Phiri by way of flow restriction devices such as pre-payment meters. They argued that an amount of 50 litres of water per person per day is necessary for a dignified existence, that the City of Johannesburg should accordingly provide each of the applicants and any other similar resident of Phiri with this amount free of charge and, in addition, offer the installation of a credit meter at the cost of the City[43].

The respondents, being the City of Johannesburg and Johannesburg Water, contended that they were not under a constitutional obligation to provide *any* water free of charge. Rather their obligation was to provide "basic water", i.e. 6 kl of water per household per month at a fee[44].

This stand-off set the scene for the courts to deliberate upon the nature of the State's obligations under section 27 of the Constitution.

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second level of service provided a tap in the yard of each stand which had a restricted flow so that only 6 kl of water was available monthly. The third level of service was a metered connection which, in the case of Phiri residents, could only be a pre-payment meter. The first 6 kl of water per month was dispensed freely and thereafter residents had to buy credits. As part of Operation Gcin'amanzi, residents were offered a choice between the second and third levels of service. See CC decision, *supra*, note 5, par. 14.

42. However, when this allocation was used up, residents who had a tap in their yards were deprived of physical access, whilst those who had pre-payment meters had to purchase credits to ensure their continued access. This factor was related to the courts' deliberations on the lawfulness of the installation of pre-payment meters, which is not considered further in this article.
43. See HC decision, *supra*, note 5, par. 11.
44. *Id.*, par. 30.

2.2 The Right to "Sufficient" Water and the State's Duty to Fulfill the Right

2.2.1 The High Court Decision

The applicants achieved a substantial measure of success in the court of first instance[45]. Although the Johannesburg High Court found that regulation 3 (b) was not in itself unconstitutional in that it established a *minimum* standard for the provision of water services[46], it found the City of Johannesburg's restriction of its free basic water allocation to 6 kl per household per month, based on a deemed average of 8 people per household, "woefully insufficient[47]". Tsoka J. was persuaded by the evidence tendered by the applicants that the standard should instead be an allocation of 50 litres per capita per day (lpcd)[48]; i.e. the judge disagreed with both the quantum set by the City and its method of targeting. The judge

45. In addition to the court's finding on the allocation of free basic water, it found that the installation of pre-payment meters in Phiri was unlawful.

46. When the matter was initially heard in the High Court, the applicants – in addition to attacking the constitutionality of the City of Johannesburg's decision – also contended that regulation 3 (b) was unlawful and unconstitutional; i.e. they also challenged the law at a national level. This challenged failed, however, because the High Court found that basic water supply as defined in regulation 3 (b) was a *minimum* standard and that different water services authorities – depending on their resources – could be expected to exceed this minimum (see HC decision, *supra*, note 5, par. 47-54). The applicants did not pursue this particular claim when the matter was subsequently heard in the Supreme Court of Appeal and the Constitutional Court. This was potentially problematic for the applicants' case because it raised the issue of constitutional subsidiarity; i.e. whether the applicants were entitled to rely on a constitutional right when legislation has been enacted to give effect to the right. The general principle is that in this case the applicant should first challenge the legislation as being inconsistent with the Constitution. The Supreme Court of Appeal found that regulation 3 (b) did not "cover the field"; i.e. the applicants could still rely on section 27 (1) (b) of the Constitution as the basis for their claim (see SCA decision, *supra*, note 5, par. 13). The Constitutional Court decided it was not necessary to rule upon this issue, but noted that ordinarily it would be difficult to claim that a policy, which is based on a legal guideline, is unconstitutional and lawful in the absence of also claiming that the legal guideline is unconstitutional and unlawful (see CC decision, *supra*, note 5, par. 76).

47. HC decision, *supra*, note 5, par. 179.

48. In an affidavit submitted by Peter Gleick, the allocation of 50 lpcd was broken down as follows: (a) a minimum drinking water requirement of approximately 5 lpcd, taking into account the hotness and dryness of the South African climate; (b) a requirement of 20 lpcd for basic sanitation (but with the possibility of this increasing to more than 75 lpcd where the houses are connected by inefficient conventional sewage systems, as is often the case in South African townships); (c) a basic requirement of 15 lpcd for bathing – living in an urban area the residents of Phiri could not rely on rivers for bathing; and (d) 10 lpcd for food preparation and cooking, given that Phiri residents' food was likely to be bought from lower quality outlets. See HC decision, *supra*, note 5, par. 171.

was particularly swayed by the argument that Phiri residents, because they were reliant on waterborne sanitation, required a higher allocation of free basic water[49]. Expecting the residents to limit the number of toilet flushes to save water would be denying them the right to health as well as a dignified lifestyle[50]. The judge also placed considerable store in the evidence that people suffering from HIV/Aids required more water than those not afflicted by the virus and that their caregivers were constantly expected to wash their hands[51]. In this context, the judge held, "waterborne sanitation is a matter of life and death[52]". The method of targeting households rather than people was found to be unreasonable in that any policy based on a deemed average of 8 persons per household automatically disadvantaged households larger than this size[53].

The judge also assumed, in an uncomplicated fashion, that the City of Johannesburg was under a constitutional obligation to provide the amount thus deemed to constitute "sufficient water" free of charge to all the applicants and other similarly situated residents of Phiri. In this regard he relied on General Comment No. 15 (2002)[54] of the United Nations Committee on Economic, Social and Cultural Rights. He pointed out that the "effect" of concepts such as "availability" and "accessibility" in terms of the Comment, "is that the right to water must be accessible equally to the rich as well as to the poor and to the most vulnerable members of the population[55]". In this context the State was under an obligation to provide the necessary water services on a non-discriminatory basis[56]. In finding thus, Tsoka J. recognized that he was, in effect, supporting the notion of a "minimum core obligation" in relation to water services, which he held, surprisingly, to be not inconsistent with the Constitutional Court's decisions in prior cases

49. *Id.*, par. 169 : was common cause that it takes 10-12 litres to flush a toilet in areas where there is waterborne sewage.
50. *Id.*, par. 179.
51. *Id.*, par. 172 and 173 : see in this regard the evidence submitted by the President of the South African HIV Clinicians Society.
52. *Id.*, par. 179.
53. *Id.*, par. 168.
54. Committee on Economic, Social and Cultural Rights, *General Comment No. 15 (2002). The Right to Water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, Doc. N.U. E/C.12/2002/11 (20 January 2003), [Online], [www.unhchr.ch/tbs/doc.nsf/0/a5458d1d1bbd713fc1256cc400389e94/$FILE/G0340229.pdf] (28 May 2010) [hereinafter "General Comment No. 15"].
55. HC decision, *supra*, note 5, par. 36.
56. *Id.*

involving socio-economic rights such as the Grootboom[57] and Treatment Action Campaign[58] decisions.

2.2.2 The decision in the Supreme Court of Appeal

The respondents subsequently appealed this decision to the Supreme Court of Appeal and achieved some measure of success[59]. Like the High Court, the Supreme Court of Appeal read section 27 (1) (b) and section 27 (2) as establishing a two-stage process of interpretation : in the first stage, the court was required to determine what constituted "sufficient" water and, thereafter, to determine whether the State had taken reasonable measures to progressively realize what had thus been determined as sufficient.

Referring to General Comment No. 15, the court emphasized that a right of access to sufficient water cannot be anything less than a right of access to the quantity of water that is required for dignified human existence[60]. However it tinkered with the High Court's finding that 50 lpcd constituted access to "sufficient" water, finding that only 3 lpcd was necessary for fluid replacement under average temperate climate conditions, and that only 15 lpcd was required for waterborne sanitation[61] — thus bringing the allocation deemed "sufficient" to 42 lpcd[62].

As a matter of law, the Supreme Court of Appeal found that a water services authority such as the City of Johannesburg is obliged, within its available resources, to provide 42 lpcd freely if residents are unable to pay for this amount[63]. As the City of Johannesburg had formulated its free basic

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57. *Government of the Republic of South Africa and others* v. *Grootboom and others*, [2000] ZACC 19 (S. Afr. Const. Ct.), [2000] 11 B. Const. L.R. 1169 [hereinafter "Grootboom decision"]. The Grootboom decision concerned the right of access to housing.
58. *Minister of Health and others* v. *Treatment Action Campaign and others (No. 2)*, [2002] ZACC 15 (S. Afr. Const. Ct.), [2002] 10 B. Const. L.R. 1033, which concerned the right of access to housing. It is interesting that Tsoka J. could have reached this decision when it was stated in this case (par. 35) : "It is impossible to give everyone access even to a 'core' service immediately. All that is possible, and all that can be expected from the state, is that it act reasonably to provide access to the socio-economic rights identified in sections 26 and 27 on a progressive basis."
59. Like the High Court, the Supreme Court of Appeal also found that the installation of pre-payment meters was unlawful.
60. *Id.*, par. 17.
61. *Id.*, par. 23-24.
62. *Id.*, par. 24.
63. *Id.*, par. 29-30. Factors relevant to the court's decision here included the *Water Services Act*, *supra*, note 2, s. 4 (3) (c), which provided that procedures for the limitation and discontinuation of water services must not result in a person being denied access to basic

water policy on the assumption that it was not under any constitutional obligation to provide free basic water, that policy was materially influenced by an error of law and had to be set aside[64]. However, unlike the High Court, the Supreme Court of Appeal held that without knowing what the cost implications of ordering the City to provide 42 lpcd to all its residents who cannot afford to pay for such water, and without expertise to deal with the logistical problems of such an order, "it would be irresponsible for a court to usurp the function of the City and to itself revise the City's free water policy[65]". It therefore simply ordered the City of Johannesburg to reformulate and adopt a water policy that was reasonable, based on the court's interpretation of section 27 (1) (b)[66]. As an interim measure it ordered the City to provide all households registered on its Indigents Register with an amount of 42 lpcd free of charge[67].

2.2.3 The Constitutional Court decision

The applicants appealed against the Supreme Court of Appeal's findings to the Constitutional Court (the highest court in constitutional matters), requesting an order that essentially reinstated the order of the High Court. And it is here that things, unfortunately, fell apart for them. For not only did the Constitutional Court, contrary to both the previous courts, unanimously find that the installation of pre-payment water meters in Phiri was lawful, it also found that the City's free basic water policy was reasonable[68].

In reaching this conclusion, the Constitutional Court found that the State was under no constitutional obligation to provide any *particular* amount of water in terms of section 27 (1) (b) of the Constitution. Drawing attention to the manner in which it had interpreted the constitutional text in its decisions in *Grootboom* and *Treatment Action Campaign*, it rejected the two-stage process of interpretation, stressing that the obligations which flow from section 27 (1) (b) are qualified by section 27 (2) *from the start*. Thus, the court held: "it is clear that the right does not require the state upon demand to provide every person with sufficient water without more; rather it requires the state to take reasonable legislative and other measures

services if that person can prove, to the satisfaction of the water services authority, that he or she is unable to pay for such services.

64. SCA decision, *supra*, note 5, par. 38.
65. *Id.*, par. 42.
66. *Id.*, par. 43.
67. *Id.*, par. 46.
68. CC decision, *supra*, note 5, par. 9.

progressively to realize the achievement of the right of access to sufficient water, within available resources[69]."

The court clarified that it had rejected the "minimum core" argument in both the *Grootboom* and *Treatment Action Campaign* cases but pointed out that what the applicants were asking for in *Mazibuko* in fact went beyond the minimum core, as they were asking for the amount deemed necessary for a dignified life. They expressly rejected the argument that the court should adopt a quantified standard determining the content of the right and not merely its minimum content[70].

Although the court justified their interpretive approach on the basis of the constitutional text, it is clear that contextual factors also played a major role in their decision. The court highlighted that at the time the Constitution was adopted millions of South Africans did not have access to the basic necessities of life. It was not expected, nor could it have been, that the State could immediately provide those necessities. The purpose of entrenching the socio-economic rights in the South African Constitution, the court said, "was thus to ensure that the state continue to take reasonable legislative and other measures progressively to achieve the realization of the rights to the basic necessities of life[71]." The entitlement that flows from section 27 and similar rights then, is simply an entitlement to hold the State accountable to progressively take measures to ensure that all enjoy the basic necessities of life. In this regard they noted with approval that the City of Johannesburg had in fact continued to revise its policies relating to free basic water, specifically by reshaping its indigent policy, whilst the various court actions had unfolded over the years[72]. They also pointed out that fixing a specific quantified amount could be rigid and counter-productive as what is deemed "sufficient" could change over time. The concept of reasonableness in section 27 (2) allowed for a proper assessment of context in determining whether the State's actions were unreasonable[73].

Secondly, the court stressed that it is ordinarily institutionally inappropriate for a court to pronounce on the precise steps required to fulfill socio-economic rights. Not only are the legislature and executive best placed to investigate social conditions in the light of available budgets to determine what targets are achievable in relation to socio-economic rights, they are also the institutions of government which are democratically accountable

69. *Id.*, par. 50.
70. *Id.*, par. 52-56.
71. *Id.*, par. 59.
72. *Id.*, par. 94-97.
73. *Id.*, par. 60.

for the choices they make[74]. The primary role of the courts was to serve as a forum of accountability. Thus the positive obligations imposed by socio-economic rights on the State would be enforced where it took *no steps* to realize these rights or where the steps taken by the State were unreasonable. Drawing together its findings in *Grootboom* and *Treatment Action Campaign*, the court concluded that a policy would be unreasonable if it made no provision for those most desperately in need, or if it was based on unreasonable limitations or exclusions[75].

Applying this interpretation of section 27 (1) (b) to the question of the reasonableness of the City of Johannesburg's free basic water policy, the Court found that none of the grounds of unreasonableness raised by the applicants could be upheld[76].

3 Analysis

3.1 A Failed Opportunity ?

What are the likely consequences of the Constitutional Court's decision on this aspect of the *Mazibuko* matter for access to sufficient water in South Africa ? One could argue that the decision is disappointing : a missed opportunity to quantify the notion of "sufficient" water in its intersections with both the rights to dignity and life, and a failed chance to advance social transformation by articulating a positive, independent, self-standing, directly enforceable right to a specific quantity of free water from the State[77]. This is not to argue that the Constitutional Court should have undertaken detailed economic decision-making and management of social programs : as is evident from the position adopted by the Supreme Court of Appeal, the Constitutional Court could have adopted the standard demanded by the applicants and then ordered the City of Johannesburg to revise its free basic water policy on this basis. However, we do argue that the Constitutional Court has failed to align itself in this context with the most vulnerable and marginalized members of society ; that it

74. *Id.*, par. 61.
75. *Id.*, par. 67.
76. *Id.*, par. 82 : the applicants' claim that the policy was unreasonable rested on five considerations : the fact that 6 kl per month was allocated to both rich and poor ; that the 6 kl was allocated per stand rather than per person ; that the 6 kl free water policy was based on a misconception because the City did not consider itself bound to provide any free water to citizens ; that the 6 kl amount was insufficient for large households ; and that the 6 kl amount was inflexible.
77. *Id.*, par. 48-49, or my use of the terms "positive", "independent", "self-standing" and "directly enforceable".

has failed to see or easily dispensed with arguments relating to the heavy toll the City of Johannesburg's FBW policy exacted upon individuals, and instead favoured arguments relating to the administrative difficulties of implementing a more differentiated system of free basic water allocation. For instance, in regard to the argument that 6 kl of free basic water was insufficient for large households, the Court conceded that there are often a greater number of people living per stand than the assumed average number underlying the 6 kl allocation (8 people per stand). Yet, to establish a universal per person (as opposed to per stand) allowance, it held, "would administratively be extremely burdensome and costly, if possible at all[78]." In this, and many other points, the Constitutional Court thus failed to emerge as a defender of the poorest of the poor.

In failing thus, one could also argue that the Constitutional Court has undermined the enforcement of the human right to water in South Africa. Given the Court's stance on section 27 (1) (b), individuals and groups might very well be discouraged from seeking refuge in the constitutional protection and thus refrain from bringing test cases before the courts. The potential gain arising from the entitlement to hold the State to account for its progressive realization of the right is perhaps not worth the effort of engaging in a time-consuming, lengthy and expensive process of litigation. Without so-called "test cases", the promise of section 27 (1) (b) will remain unfulfilled and unenforced. Ultimately, the legitimacy of the system of socio-economic rights and the capacity of the Constitutional Court and other courts to uphold such rights and advance actual physical and economic access to water services could be called into question.

3.2 An Appropriate Decision

For a number of reasons, however, we believe that the Constitutional Court's decision was not a failed opportunity. Rather, given the circumstances of water poverty and water governance in South Africa, it was both prudent and appropriate.

If the Constitutional Court had linked the right of access to sufficient water to a specific quantity, the applicants as well as all similarly situated residents of Phiri would have been entitled to either claim this quantity directly from the City of Johannesburg, or to claim that the City would revise its free basic water policy such that this quantity is allocated. In one of the most well-resourced municipalities in South Africa, this interpretation and enforcement of section 27 (1) (b) might be possible to fulfill, but

78. *Id.*, par. 89.

what of the many, under-resourced, struggling municipalities that make up the bulk of the sphere of local government in South Africa? If the right of access to sufficient water requires an allocation of 50 lpcd, then surely the residents of Cacadu District Municipality in the Eastern Cape or Dihlabeng Local Municipality in the Free State[79] should be able to successfully institute and successfully prosecute a similar claim? Given the resource constraints outlined above regarding, in particular, civil engineering capacity in South African municipalities, would such court orders be implemented within a reasonable time, if at all?

Our view is that they would not and this — much more than a perceived failure on the part of the Constitutional Court to articulate a minimum core in relation to the right of access to sufficient water — would drastically undermine the fragile consensus and faith in the constitutional system of human rights on which the South African democracy is based. The scale of the development challenge in South Africa has rightfully been stressed in discussions on the human right to water: the extending of access to scarce water resources to millions of people across vast stretches of land. But the fact that this task had to be undertaken by a neonate State — one in which the notion of local government as an independent sphere of government was entirely new — is under-emphasized. This is the underlying subtext of the Constitutional Court's continued assertion, in its socio-economic jurisprudence, that the socio-economic rights enshrined in the Constitution do not give rise to an immediately enforceable self-standing right to a quantified socio-economic resource. The ongoing trials and tribulations of this neonate State in relation to its environmental jurisdiction are understudied[80], but as teachers of various State environmental law engaged with multiple process of civil society activism centered on the many progressive environmental laws passed since 1994[81], we are constantly confronted with the inability of departments to function as the custodians of natural

79. The Cacadu District Municipality scored 26.9 per cent in the Blue Drop Report, *supra*, note 27, p. 25, whilst the Dihlabeng Local Municipality scored an even more paltry 04.9 percent (*id.*, p. 50).

80. These trials and tribulations include a high turnover of staff in environmental authorities, inexperience, political interference, the complexity of the environmental laws themselves in relation to the system of co-operative governance the South African Constitution establishes amongst national, provincial and local spheres of government, amongst others.

81. The latest instance of this is the development of a Joint Civil Society Legal Strategy to Promote Environmental Compliance, Transparency and Accountability in Mining for which a 2 - day planning workshop was held at the University of the Witwatersrand from 13 – 14 May 2010. See [Online], [cer.org.za/?page_id=265] for more information on this project.

resources the legislation calls them to be. This tends to undermine the legitimacy of environmental law.

In light of this, we believe that the Constitutional Court was correct in placing the *responsibility* for ensuring the right of access to sufficient water on the executive branch of government ; in holding that the executive can be *called upon to account* for its implementation thereof ; but also in *withholding* from imposing an unenforceable standard. In developing States a major, if not *the* major challenge, is to ensure respect for the rule of law in relation to environmental regulations and this requires a not too great disparity between what the law states, and how it is — and can be — implemented. It is no use having beautifully-worded progressive laws on paper that are never enforced.

This raises the question whether it might not have been more appropriate, in seeking to advance access to water services in South Africa, to bring under Constitutional Court scrutiny, the legal, institutional and financial context within which local authorities operate to provide access to sufficient water. Would it not have been more effective to challenge the manner in which the national government has funded the free basic water policy ? Or perhaps, the failure to devise a coherent strategy for ensuring recruitment and retention of civil engineers in local authorities ? Fortunately, the decision in *Mazibuko* has not closed the door to these challenges. If anything, by indicating that the executive is constitutionally obligated to progressively ensure access to sufficient water, the Constitutional Court's decision has brought these issues into sharp relief.