Can Human Rights Transcend the Commercialization of Water in South Africa? Soweto’s Legal Fight for an Equitable Water Policy

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Abstract

The South African Constitution guarantees the right to water, which is reinforced by a national Free Basic Water policy. However, water delivery is a local government function, which, in the absence of a national regulator, is largely operated as a commercial service. Using the lens of the Mazibuko water rights case—the first South African test case on the right to water—this article examines the conflict between a progressive rights-based model, which views water as a social good, and the commercialized model, which treats water as a source of revenue instead of a public service. The article finds in the legal iterations of the Mazibuko applicants the potential for a new, more equitable approach to water services. This is despite the setback occasioned by the ultimate legal defeat in the Constitutional Court in late-2009.

JEL codes: I31, H41, K32, Q25

Keywords

right to water, social good, commercialization, water services, South Africa

We want the water of this country to flow into a network—reaching every individual—saying: here is this water, for you. Take it; cherish it as affirming your human dignity; nourish your humanity ....

Water—gathered and stored since the beginning of time in layers of granite and rock, in the embrace of dams, the ribbons of rivers—will one day, unheralded, modestly, easily, simply flow out to every South African who turns a tap. That is my dream.

(Antjie Krog, South African author, quoted in the Preamble to the 1997 Department of Water and Forestry Affair’s White Paper on A National Water Policy for South Africa)

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Date received: June 22, 2008; accepted: April 13, 2009

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1. Introduction

At 2am on 27 March 2005, Soweto resident Vusimuzi Paki was awoken by the shouts of his neighbors who were trying to put out a fire in one of the backyard shacks on Paki’s property. Running out to assist, Paki and his neighbors tried to extinguish the fire using the prepayment water meter supply that Johannesburg Water (Pty) Ltd. had recently installed in the area. However, that month’s Free Basic Water allocation to each of the surrounding properties was soon exhausted, after which the prepayment meter water supply automatically disconnected due to insufficient water credit. Residents then resorted to scooping up ditch water with buckets in a desperate attempt to put out the fire. The fire was eventually brought under control, but not before the shack had burnt to the ground. Later that morning, when Paki’s tenant returned home from her night shift, she discovered to her horror that her two small children, who had been sleeping in the shack, had died in the blaze.

Vusimuzi Paki’s story highlights the tragedy of the prepayment water system imposed on poor people in Soweto (starting with the poorest suburb of Soweto—Phiri—where Paki lives). Beyond this are other durable water supply problems: the daily indignity and inhumanity that people in Phiri (and Soweto more broadly) have had to endure since Johannesburg Water (Pty) Ltd. installed prepayment meters as a cost-recovery measure, starting in 2004; and the prohibitively expensive price they are charged for subsequent water consumption. As Phiri resident Jennifer Makoatsane can attest, Johannesburg Water’s cost-recovery has come at the expense of Phiri residents’ basic needs and their constitutionally-guaranteed human rights.

Like most Phiri residents, Makoatsane is unemployed and desperately poor. She lives on a 150m² property with nine other people, some in her main house and others in backyard shacks. Because the city’s Free Basic Water (FBW) supply is allocated per stand and only to property-owning account-holders, Makoatsane must share the one allocation with all nine people. With so many people sharing the water, the monthly 6,000 liter—6 kiloliters (6kl)—free allocation never lasts to the end of the month even though household members now flush the toilet only once a day and bathe only every second day. Since the introduction of the prepayment meters, once the FBW allocation is exhausted (usually around the 12th day of the month), the prepayment water meter automatically disconnects the water supply until further water credit is purchased. In households like Makoatsane’s, where there is rarely enough money to purchase additional water to ensure an adequate supply, the disconnection typically lasts until the next month, when the new monthly FBW allocation is dispensed.

The automatic disconnection feature of prepayment meters is unusual and it does not occur in conventional meters (found elsewhere in Johannesburg), which supply water on credit and provide important procedural protections prior to any disconnection of the water supply. These protections—the purchase of water on credit with reasonable notice of being in arrears and of possible disconnection, along with an opportunity to make representations before there is a disconnection—are in place in conventional water supplies precisely to avoid the Phiri situation, where people are forced to go without water for days at a time because of circumstances beyond their control, including abject vulnerability and poverty. Yet, while people in Johannesburg’s richer suburbs with conventional meters continue to enjoy substantive protections prior to water disconnection,

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1The introduction draws from an earlier article co-authored with Patrick Bond: Bond and Dugard (2008a).

2In terms of bylaw 9c of the City of Johannesburg Metropolitan Municipality Water Services By-Laws (28 April 2004), where a “consumer” with a conventional meter “fails to pay the amount due,” the council “may only discontinue supply to a consumer in arrears” after pursuing all of the following specific procedures: a “final demand notice,” the “opportunity to conclude an agreement with the Council for payment of the arrears amount in installments within 14 days of the date of the final demand notice,” and hand delivering or posting to the last recorded address a “final discontinuation notice informing such consumer that the provision of water services will be discontinued.”
poverty-stricken people in Phiri with prepayment meters have been forced to forgo such procedural protections, their water supply terminates automatically and immediately on exhaustion of the FBW or credit supply.

Determined to enjoy the same rights as rich people despite their poverty, in July 2006 Paki and Makoatsane, along with three other Phiri residents, formally launched an application challenging the constitutionality and lawfulness of prepayment water meters and the sufficiency of the FBW allocation. The case, *Mazibuko and Others v the City of Johannesburg and Others*, was heard in the Johannesburg High Court between 3 and 5 December 2007. The High Court judgment was handed down on 30 April 2008. This article was originally written before the case progressed through the Supreme Court of Appeal to the Constitutional Court, where a final judgment was handed down (on 8 October 2009) that ruled against the applicants on all grounds. While the article has been updated to refer to the Constitutional Court defeat, it remains focused on the applicants’ case as presented in the High Court. This is because - for the applicants, as well as the human rights lawyers - the *Mazibuko* case was always about more than the judicial process itself. Rather, it was about legal mobilisation around, and articulation of, an alternative, rights-based, model of water service.

For the applicants and their support organizations, the *Mazibuko* case is representative of the broader struggle to secure the socio-economic rights of poor people. Moreover, as explored in this article, the case also highlights the overall commercial bias of municipal water delivery, despite the obligatory FBW allocation and some internal tariff cross-subsidization. It also reveals a clash between a rights-based conception of water as a social good and a seemingly antithetical approach in which water is viewed as an economic commodity. The failure of the post-apartheid government to appropriately regulate this fault line—evident in the resort by the Phiri community to complex and lengthy litigation—limits the government’s goal of delivering affordable water services to low- and no-income South Africans and it compromises the state’s developmental potential. Yet, in the iteration of their case before the court, the *Mazibuko* applicants have provided the beginnings of an alternative model of water services, in which water delivery strikes an appropriate, sustainable balance between the goals of social equity (providing free access to sufficient basic water for low-income households, as well as affordable rates in the subsequent tariff block) and revenue security plus water demand management (through high tariffs at the luxury end of consumption and substantial cross-subsidies between hedonistic water users and basic water users). This model, which was seized by the High Court judge in his ruling, has the potential to satisfy the needs of poor South Africans while meeting municipal cost-recovery requirements, with the added benefit of contributing to water conservation by penalizing excessive water use. In doing so, it meets criticisms from the left that the current water delivery paradigm is too commercially-driven, and the right that water should be managed and priced as an economic commodity. Disappointingly, though, this approach was not pursued by the Constitutional Court, which ruled against the applicants in the final *Mazibuko* judgment. At the time of updating this article (March 2010), it was too early to assess the broader impact of the Constitutional Court judgment on either the water struggle or rights discourse more generally. Nevertheless, it is suggested here that the rights-based model as expressed by the applicants in *Mazibuko remains valid.*

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3Although the application was formally launched in the Johannesburg High Court in July 2006, the litigation process began in 2004, with letters of demand to Johannesburg Water. The length of time it took for the case to be launched in court is an indication of how difficult it is (especially for civil society organizations and social movements) to mount a socio-economic rights case. In the end, the application comprised over 8,000 pages of record (unusually big for a South African civil case).

4*Mazibuko and Others v the City of Johannesburg and Others* 2008 (4) SA 471 (W).
2. The International and South African Right to Water Framework

Although the main international convention on socio-economic rights—the 1966 International Covenant on Economic, Social, and Cultural Rights (ICESCR) —does not explicitly list a right to water, there are several reasons to conclude that there is an international right to water. First, it is clear that without water many of the human rights (whether social, economic and cultural, or civil and political) are meaningless and that the right to water must consequently be inferred from other more general rights. These include article 11 of the ICESCR, which guarantees everyone’s right to “an adequate standard of living,” article 12 of the ICESCR, which recognizes everyone’s right to enjoy “the highest attainable standard of physical and mental health,” as well as articles 6 (right to life) and 10 (“the inherent dignity of the human person”) of the International Covenant on Civil and Political Rights (1966).

Second, more recent international instruments such as the Convention on the Elimination of All Forms of Discrimination against Women (1979), the Convention on the Rights of the Child (1989), and the African Charter on the Rights and Welfare of the Child (1990) all contain specific references to water-related rights. Third, in 2002 the United Nations Committee on Economic, Social, and Cultural Rights (CESCR) —which provides clarity on the nature and scope of the ICESCR—formulated a specific General Comment (No. 15) on the right to water, which outlines the parameters of states’ parties’ obligations. General Comment No. 15 on the right to water stresses that water is “a public good fundamental for life and health” (CESCR 2002: para. 1). Finally, as outlined by Barrett and Jaichand (2007), in 2006 the United Nations Sub-Commission on the Promotion and Protection of Human Rights adopted draft guidelines for the realization of the right to drinking water and sanitation, and in 2007 the newly established Human Rights Council (which succeeded the Office of the High Commissioner on Human Rights) commissioned a report on the right to drinking water and sanitation in international human rights law, following which the council adopted a resolution on state action required to advance access to water and sanitation (Barrett and Jaichand 2007: 545). During 2008 the Human Rights Council appointed an independent expert on the human right to water and sanitation, Ms. Catarina de Albuquerque.

The international water rights framework does not per se exclude cost-recovery for water services, nor does it stipulate the provision of free water or the public ownership of water supply. However, it does establish that everyone is entitled to affordable water: “the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses” (CESCR 2002: para. 2). General Comment 15 further stipulates:

5http://www.constitutionalcourt.org.za/uhbtbin/cgisirsi/x/0/0/5/0
6For an in-depth analysis of the international right to water see, for example, Gleick (1998).
7In relation to obligations towards rural women, article 14(2)(h) of the Convention on the Elimination of All Forms of Discrimination against Women compels states’ parties to “ensure the right to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply ....”
8Article 24(2)(c) of the Convention on the Rights of the Child obliges states’ parties to “combat disease and malnutrition … through ... the provision of adequate nutritious foods and clean drinking-water....”
9Article 24(2)(c) of the African Charter on the Rights and Welfare of the Child provides that states’ parties must ensure “the provision of adequate nutrition and safe drinking water” to children.
To ensure that water is affordable, States parties must adopt the necessary measures that may include, inter alia: (a) use of a range of appropriate low-cost techniques and technologies; (b) appropriate pricing policies such as free or low-cost water; and (c) income supplements. Any payment for water services has to be based on the principle of equity, ensuring that services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with water expenses as compared to richer households. (CESCR 2002: para. 27)

In any context of dire poverty and entrenched disadvantage, the requirement for affordable water clearly implies free water, at least in some instances. Moreover, General Comment 15 emphasizes that, in balancing any need for water to be regarded as commercial commodity, water should be “treated as a social and cultural good, and not primarily as an economic good” (CESCR 2002: para. 11).

As a late-comer to the international law arrangement, the Constitution of the Republic of South Africa Act 108 of 1996 (Constitution) stands out as one of the most progressive constitutions in the world. One of the exemplary aspects of the Constitution is the inclusion of socio-economic rights alongside more traditional civil and political rights. Enshrined in section 27(1)(b) of the Constitution is everyone’s right of access to sufficient water.

Whether civil and political or socio-economic, all rights in the Bill of Rights carry both negative and positive obligations and, according to section 7(2) of the Constitution, the “state must respect, protect, promote and fulfil the rights in the Bill of Rights.” The highest court of appeal in constitutional matters, the Constitutional Court, has confirmed the justiciability of socio-economic rights in several judgments, including *Government of the Republic of South Africa and Others v Grootboom and Others* (*Grootboom*), in which the Court stated:

Socio-economic rights are expressly included in the Bill of Rights; they cannot be said to exist on paper only … The question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in each case. (*Grootboom* 2001: para. 20)

Moreover, in South Africa rights are facilitated by a constitution with much redistributive potential. The transformative premise of the Constitution, as well as its unequivocal focus on justice, is evident in the Preamble—“we the people of South Africa, recognize the injustices of the past … we therefore … adopt this Constitution as the supreme law of the Republic so as to heal the divisions of the past and … improve the quality of life of all citizens and free the potential of each person”—and the Founding Provisions, which include in section 1(a) “human dignity, the achievement of equality and the advancement of human rights and freedoms.” In addition, as highlighted in the *Mazibuko* judgment discussed below, the equality clauses, found in section 9 of the Constitution, prohibit the state from unfairly discriminating against anyone or any group on grounds including race and ethnic or social origin (section 9(3) of the Constitution).13

12However, in June 2008 the United Nations Research Institute for Social Development (UNRISD) produced a report, based on 15 years experience of water and sanitation privatization across the world, stressing that policies promoting private sector participation in developing countries’ water supply are economically flawed because they pit foreign capital’s profit motive against domestic social development, public health, environmental concerns, and poverty reduction: http://www.irc.nl/page/37668 (accessed on 1 June 2008).

13It is all the more inexplicable that the post-apartheid government has not ratified the ICESCR. However, notwithstanding this non-ratification, the Constitutional Court clarified in the case in which it outlawed the death penalty—*S v Makwanyane and Another* 1995—that, in the context of interpreting the Bill of Rights, non-binding, as well as binding, international law is relevant (para. 35) (when interpreting the Bill of Rights, section 39(1)(b) of the Constitution compels a court to consider international law).
Taking the ambit of equality one step further, section 9(2) of the Constitution explicitly sanctions positive discrimination in the interests of equity and justice on an individual or collective basis:

Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

As it relates to water, in South Africa this justice-based human rights schema goes beyond the constitutional guarantee of access to sufficient water to encompass a range of legislation and policies aimed at protecting substantive and procedural aspects of water-related rights. Furthermore, since 2001, the water framework has included a national Free Basic Water (FBW) policy.

In September 2000 (in the wake of South Africa’s worst recorded cholera outbreak, which was precipitated by the disconnection of water supply to thousands of poor, rural, people in KwaZulu-Natal, following the commercialization of water services in the area), then Minister of Water Affairs and Forestry, Ronnie Kasrils, announced a national Free Basic Water (FBW) policy. The policy was formalized in the Department of Water and Forestry Affairs (DWAF)’s Free Basic Water Implementation Strategy Document (Version 1) in May 2001. The finalized version called for all 284 municipalities across South Africa to provide 6,000 liters (six kiloliters) of water per household per month or 25 liters per person per day of free water, at least to poor households (DWAF 2002). While setting the national FBW amount at 6 kiloliters (6kl) per household per month, the Free Basic Water policy encouraged better resourced municipalities to provide a greater amount, particularly “in some areas where poor households have waterborne sanitation” (DWAF 2002: 9).

Yet, despite this favorable rights-based framework for water services, the reality on the ground is that 16 years into democracy many poor South Africans struggle to access sufficient water, as poignantly illustrated in the Mazibuko case. One of the principal barriers to accessing sufficient water is the commercialized framework in which water services are conceived and operated at local government level. And, until the Mazibuko case it seemed that the rights-based framework was no match for the commercialized water delivery paradigm.

3. The Commercialization of Water Services at Local Government Level

When the post-apartheid government was swept into power by the vast majority of South Africans in 1994, its political mandate involved righting apartheid’s historical wrongs. One of these was the legacy of vastly unequal basic services, particularly water. In 1994 an estimated 12 million South Africans (approximately a quarter of the population) did not have access to piped water

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14While, according to section 9(3) of the Constitution the state may not discriminate unfairly, section 9(2) clarifies that positive discrimination or affirmative action, based on the objective of righting historical wrongs and advancing equality, is sanctioned and, although constituting discrimination, is not prima facie unfair discrimination.

15This includes the National Water Act 36 of 1998 and the Water Services Act 108 of 1997, as well as a range of policy documents including four white papers on water and sanitation provision.

16The commercialization of previously unlimited free water to poor rural communities in Ngwelezane (KwaZulu/Natal) resulted in the disconnection, in August 2000, of thousands of people from their previously free water supply. The first confirmed case of cholera came a few days later on 19 August (Bond and Dugard 2007: 8).

17The government’s intention to provide free basic services was first announced by President Thabo Mbeki at the Congress of South African Trade Unions (Cosatu) congress in September 2000 (Mosdell 2006).
and approximately 21 million people did not have access to adequate sanitation (ANC 1994: para. 2.6.1). There was an expectation that the African National Congress (ANC)-led government would prioritize the equalization of water services in the public interest. After all, the ANC’s 1955 Freedom Charter (which the ANC still claims as its guiding manifesto) promised: “the national wealth of our country, the heritage of all South Africans, shall be restored to the people.” Indeed, the ANC’s first macro-economic manifesto, the 1994 Reconstruction and Development Programme (RDP), explicitly recognized water “as a public good whose commodification would inherently discriminate against the majority poor” (McKinley 2005: 181).

However, while commendable progress has been made in connecting previously unconnected households to the water grid,18 in recent years an insidious trend has eroded such gains. Gaining momentum since the finalization of the local government demarcation process in 2000,19 the poor have experienced increasing water supply disconnections20 as, one by one, municipal water services have been commercialized across South Africa. Indeed, before the RDP had been given any chance to gain hold, as early as 1994, DWAF’s Water Supply and Sanitation White Paper provided an ominous indication of what was to come. The 1994 Water Supply and Sanitation White Paper stipulated that “where poor communities are not able to afford basic services, government may subsidize the cost of construction of basic minimum services but not the operating, maintenance or replacement costs” (DWAF 1994: 19, emphasis added). This principle was repeated in the subsequent, 1997, White Paper on a National Water Policy for South Africa: “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” (DWAF 1997: 4); in effect, a retreat from the progressive water premise articulated in the RDP begun almost at the same time the ANC took office. Part of this retreat has been a laissez-faire approach by government to regulating water services in the social interest: there is still no national water regulator to ensure municipal compliance with national legislation, policy, and standards.

In the absence of national regulation, the commercialization of water services has entailed “highlighting its role mainly as an economic good, attempting to reduce cross-subsidization that distorts the end-user price of water (tariff), [and] promoting a limited form of means-tested subsidization” (Bond and Dugard 2008a: 5). It has also involved focusing on 100 percent cost recovery on operating and maintenance costs, even if capital investments are subsidized. And, although the South African version of the commercialization of water services has not entirely echoed the global trend of privatization per se, many of the global agents of privatized water services have played pivotal roles in South Africa. For example, the French multinational (and one of the world’s largest privatized water management firms) Suez (now called GDF Suez) was awarded a five-year management contract in 2001—the first year of the corporatization of Johannesburg’s water services—under the Johannesburg Water (Pty) Ltd. management subsidiary, Johannesburg Water Management (Jowam).

18Poor households in Phiri have waterborne sanitation.
19According to the South African Institute on Race Relations (2006: 385, 422), in the decade after 1994, 3.37 million households were connected to water services.
20In December 2000 South Africa’s first democratic local government elections were held, marking the final stage of the institutional transition from apartheid, which had begun with the historic national and provincial elections in April 1994. Although transitional local government elections were held between 1995 and 1996, these established transitional structures, which had to be finalized through the municipal demarcation process before there could be elections to the permanent local government structures. Part of this process was consolidating a decentralized water delivery system in terms of which each of the 284 municipalities governs its own water services. While municipalities are meant to operate these services in line with the national legal and policy framework, there is no national water services regulator to ensure compliance with national standards and rights-based obligations.
Furthermore, as pointed out by Bakker (2007), it is possible to commercialize water services without privatizing 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. For example, Johannesburg Water (Pty) Ltd., which is responsible for water services delivery within the City of Johannesburg (encompassing all of Soweto, including Phiri), is a ring-fenced corporation whose only shareholder is the City of Johannesburg. Within this corporate model, water services are run along largely commercial lines, albeit with some obligatory concessions to social equity (including 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 (Hemson 2008: 30).

As illustrated by Johannesburg Water’s rollback of water services to the poverty-stricken people of Phiri since 2003 (detailed below), the vehicle for the gradual erosion of the progressive national promises of 1994 has not (directly) been international forces. Rather, it has been the domestic political reality of decentralized and under-funded local government. Couched in the constitutional imperative of local government autonomy (a political concession to nationally small but locally powerful opposition parties in the run-up to the 1994 elections), the final Constitution of 1996 ceded water and sanitation services to the local government sphere (Schedule 4B of the Constitution). Within the overall structural arrangement, local government is an autonomous sphere of government (along with provinces and national), in terms of which, each municipality has “the right to govern, on its own initiative, the local government affairs of its community” (section 151(3) of the Constitution).

However, at the same time as entrenching local government autonomy over, and responsibility for, water services, national government began to withdraw central financial support:

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21 Beyond direct observance of this phenomenon, as well as report back from affected communities, it is hard to quantify the disconnections phenomenon. This is because most municipalities do not keep data on disconnections or are reluctant to share such information. National government, too, does not collate such data. Furthermore, with more and more municipalities installing prepayment water meters in poor communities, it is even harder to track disconnections. This is because, with prepayment meters, any disconnection is “outsourced” as a “private” disconnection in the person’s own home (referred to by community based organizations 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; this amount excludes prepayment meter disconnections (Bond and Dugard 2008a).

22 This is not to suggest that South Africa has been immune from neoliberal international trends. Indeed, the South African government has clearly been profoundly influenced by World Bank and International Monetary Fund (IMF) advice. As documented by McKinley, the World Bank and the IMF advised the South African government to decrease grants and subsidies to water services providers and, specifically, the World Bank advised the South African government to introduce “a credible threat of cutting [water] services” for non-payment (McKinley 2005: 2). However, although advised to privatize water services, or at least to introduce private sector participation into water management, South Africa has resisted this global trend to privatize developing countries’ water supply.
As part of the GEAR framework,\footnote{Between 1993 and 1996, during the period of the transitional arrangement of the Government of National Unity, South Africa had an interim constitution (Constitution of the Republic of South Africa Act 200 of 1993) in which local government autonomy and functions were less explicitly addressed.} and following the neo-liberal economic advice of the World Bank, the International Monetary Fund and various Western governments, the South African government drastically decreased grants and subsidies to local municipalities and city councils and supported the development of financial instruments for privatised delivery. (McKinley 2005: 182)

Moreover, the 1998 White Paper on Local Government clarified that the constitutional provisions for municipal finance (found in sections 229 and 230 of the Constitution) are aimed at ensuring that municipalities, regardless of how poor or pressing the socio-economic needs of residents, balance their budgets. Indeed, section 18(1)(c) of the Local Government: Municipal Finance Management Act 56 of 2003, which requires the separation of annual budgets into a capital and an operational budget, precludes municipalities from borrowing to fund operational budgets (in other words, municipalities cannot incur deficits on the operational budgets). The combined effect of reducing central financial support and prohibiting operational budget deficits “pushed many municipalities, with Johannesburg at the forefront, to turn towards commercialization … of basic services as a means of generating the revenue no longer provided by the national state” (McKinley 2005: 182).

For example, in response to an escalating financial crisis, in 2000 the City of Johannesburg devised in its turnaround plan (called Igoli 2000),\footnote{The inaccurately named Growth Employment and Redistribution (GEAR) program took over from the short-lived RDP in 1996. A substantial retreat from the progressive vision of the RDP, GEAR represents a largely neoliberal economic policy shift. It remains official policy and, although it did oversee economic growth between 1996 and 2006, this growth was premised neither on creating employment nor on advancing redistribution.} the corporatization of its water services as Johannesburg Water (Pty) Ltd,\footnote{Igoli is a local word for Johannesburg, deriving from the Sesotho word for gold, egoli.} with a five-year management contract awarded to Suez. The result was a regressive interpretation of social equity standards by the City of Johannesburg. In 2003 the city adopted a relatively steep-rising concave tariff curve for water, in contrast to a convex curve starting with a larger free basic water lifeline tariff block, which would have better served the interests of lower-income residents. In addition:

In 2003, the second tier of the [rising] block tariff (7-10 kl / household / month) was raised by 32%, while the third tier (11-15 kl / household / month) was lowered by 2 % (during a period of roughly 10% inflation, which was the amount by which higher tier tariffs increased). The dramatic increase in their per-unit charges in the second block meant that there was no meaningful difference to their average monthly bills even after the first free 6 000 liters. Moreover, the marginal tariff price for industrial/commercial users of water, while higher than residential, actually declines after large-volume consumption is reached. (Bond and Dugard 2008a: 7)

Across the country, in order to break even or to still make a profit in the face of the obligation to provide FBW, many municipal water services providers introduced non-progressive tariff structures. In such structures, typically, the FBW block is followed by a very steep, concave curve, “such that the next consumption block is unaffordable to many households, leading to even higher rates of water disconnections,” and exacerbating conditions of poverty and ill-health (Bond and Dugard 2008b: 9). In such tariff structures, it is common that luxury water usage is
not overtly penalized because such environmental logic might undermine revenue. Indeed, the head of Johannesburg Water’s management company between 2001 and 2005, Jean Pierre Mas, has indicated that it would be foolish for Johannesburg Water to reduce the company’s income stream “by trying to promote water conservation” among affluent households who pay their water bills (Smith 2006: 29).26

The evolving clash between public services (such as health) and commercial imperatives (such as water revenue) resulted in an increasingly fractured relationship between local commercialized water companies and (national and provincial) health departments. As impliedly acknowledged by the National Department of Health in 1999:

It is common knowledge that lack of water and sanitation is a common cause of cholera, diarrhea or other illnesses that afflict so many in our country and that there is a relationship between various communicable diseases, including TB, and conditions of squalor. Yet we often have not structured our institutions and service delivery systems in ways that can easily respond to these realities. (Department of Health 1999)

In this environment of corporatized local government delivery, it seemed that everything was up for grabs. As was clarified during the Mazibuko case, even the seemingly progressive Free Basic Water policy introduced nationally in 2001 was based on economic, rather than social equity, rationale.

In his answering affidavit in the Mazibuko submissions in support of the City of Johannesburg, Neil Macleod (head of Water Sanitation of the eThekwini Municipality [formerly called Durban]), outlined the economic rationale for Durban’s 1997 model of free basic water provision, and he explained that this model provided the blueprint for DWAF’s subsequent national FBW policy. As outlined in Macleod’s affidavit, in 1997, having decided to address the issue of water provision to informal settlements, Durban Metropolitan Council (subsequently re-named eThekwini) found that “approximately 7 liters of water was used per person per day as this was generally the amount that an individual could physically carry and could afford” (Macleod 2007: para. 9). Based on this observation, and knowing that the average household contained 7 people, the city began to provide a 200 liter drum at the front door of each shack, which “could be filled once a day with clean drinking water … at a minimal charge” (Macleod 2007: paras. 7-11). However, during 1998, “it became apparent that the amount of money that was collected by the Council for the water supply was in fact equivalent to or less than the costs of administering the collection of the amounts from the relevant communities” and, for this reason, the city began to provide the amount for free (Macleod 2007: para. 12).

In summary, having based its calculation on how much water the average person could physically carry per day, rather than on any needs-assessment, the City of Durban proceeded to provide 200 liter drums of water to each resident of informal settlements without charge because it turned out to be cheaper to dispense the water for free than to administer the billing and payments for it. This model became the basis of the 2001 national FBW policy (Schreiner 2007: para. 114).

Once it was translated from the Durban experience to national policy and then into municipal practice across the country, one of the biggest problems was how to allocate the free water. For administrative convenience, municipalities adopted the per household per month, rather than the per person per day, formulation. However, this formula remains problematic because it does not take into account the socio-economic realities of poor urban households, such as those found in Phiri. To utilize rights-language, the household formula automatically unfairly discriminates

26In terms of Igoli 2000, each of the city’s public services was corporatized into a ring-fenced utility operated along commercial lines, with a focus on revenue collection. As such, Johannesburg Water (Pty) Ltd. became the city’s water services provider, City Power (Pty) Ltd. became the city’s electricity services provider, and Pickitup (Pty) Ltd. became the city’s waste management and refuse services provider.
against large, multi-unit, dwellings that are characteristic of poor urban areas in South Africa in that “in any such household with more than eight members, each person receives much less than even 25 [liters per person per day], exposing them to multiple health and dignity risks as well as human rights violations” (Bond and Dugard 2008b: 9).27

As pointed out by the South African Civil Society Water Caucus (a group of civil society organizations concerned with water delivery) in a submission to the parliamentary Portfolio Committee hearings on FBW, the household allocation is based on the flawed assumption that low-income users consume low amounts of water (Parliamentary Monitoring Group 2003). In reality, a multi-dwelling poor urban household must consume a relatively high amount of water for all its members to satisfy their basic water requirements to lead a dignified and healthy existence. As confirmed by the circumstances of the households in Phiri, the one-size-fits-all 6kl FBW allocation does not take the following factors into account in the context of poor urban households:

- Household size (including backyard shack tenants, who must share the same monthly FBW allocation);
- Number of dependents (often high);
- Number of employed (often low, with many households relying on social grants rather than salaries);
- Illness including HIV/AIDS, which requires additional water (often many household members are ill); and
- Water-borne sanitation with inefficient flush systems, which use around 12 liters per flush.

Notwithstanding normative problems with the FBW formula, in the Johannesburg context the nationally-imposed imperative to allocate FBW to the residents of Soweto (including Phiri) posed a specific logistical challenge caused by the non-metering of Soweto’s water supply. The City of Johannesburg elected to address this challenge in a way that also resolved the escalating water-related debt in Soweto: through the imposition of prepayment water meters.

4. The City of Johannesburg, FBW, and the Installation of Prepayment Water Meters in Phiri

Blindly following the national FBW policy—without adjusting it to local needs and resources (and despite the national policy’s explicit encouragement to better-resourced municipalities to increase the FBW allocation beyond 6kl)—the City of Johannesburg started to allocate 6kl of FBW to households each month, towards the end of 2001.29 Mindful of the administrative complexities and costs of targeting poor households in an equitable and effective way, the city opted to provide universal FBW allocation across all households, regardless of size, financial situation, or need.28

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27 In fact, the evidence suggests that 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-subsidize low-end usage, without compromising municipal revenue.

28 In fact, even in a household of eight, the six kiloliter allocation (25lcd) is insufficient to meet basic needs. In a household of eight this allocation represents just two toilet flushes a day per person, leaving no water for drinking, bathing, washing clothes, food, etc. (Bond and Dugard 2007: 9).

29 Following the High Court case, the city allocated 10kl FBW per household per month to households on the indigent register. And, in July 2009, there were major changes in the City’s FBW policy - with the aim of removing the universal allocation and targeting benefits to registered poor households - that are not discussed in this article because the new policy is extremely complicated and its impact on poor households has not been properly analyzed yet.
There was no problem in allocating FBW to richer suburbs, which all had individually-metered water supplies. However, it was not immediately possible to allocate FBW to many of the poorest township suburbs, including Phiri. For historical reasons (related to the perceived difficulties during apartheid of reading meters in politically charged townships), Soweto still had an un-metered water supply. In terms of this “deemed consumption” system, each household was billed a monthly flat-rate amount for their deemed consumption, regardless of how much water was actually consumed. The cost of this full deemed consumption amount—20kl per household per month—was too high for the majority of Soweto households, almost all of whom were in chronic debt with the municipality by 2001.

While the deemed consumption system was inequitable in that, regardless of the amount of water consumed, every household was charged the same flat rate, informally the system was acceptable to the residents because, again as a legacy of Soweto’s activist past, the municipality neither strictly enforced credit control nor did it disconnect water as a result of non-payment. From the city’s perspective, however, rising arrears and unlimited water consumption became increasingly untenable after 2000, as the imperatives of cost-recovery rapidly overlaid apartheid’s imperatives of racism.

Yet, at the same time as being overwhelmingly alarmed by the escalating municipal debt in Soweto, the city was well aware that it had to extend FBW to its intended beneficiaries, the poor. So, while households in rich suburbs continued to be able to access as much water as they liked—without any pressure to conserve—for their gardens, swimming pools, fish ponds, baths, etc.—in 2002 the city devised a plan to physically restrict water consumption in poor households to the obligatory FBW allocation (unless the household could purchase additional water credit). Calling the program Operation Gcin’Amanzi (or OGA as it is commonly referred to), which means to conserve water in isiZulu, the plan was to roll out prepayment water meters (instead of conventional credit-meters) throughout Soweto. Unlike conventional meters, which provide water on credit with numerous procedural protections against disconnection, prepayment meters automatically disconnect once the FBW amount is exhausted unless additional water credit is purchased.

According to an undated Operation Gcin’Amanzi report included in the minutes of Meeting of the Operations and Procurement Committee of Johannesburg Water (27 November 2002), OGA comprised an “immediate, intensive and comprehensive intervention on a number of fronts” that sought to remedy the problems of “over-supply,” lack of “ownership” of water consumption by residents, and “a non-payment paradigm amongst consumers” (undated Operation Gcin’Amanzi report: 1). Whereas other municipalities had remedied deemed consumption through conventional metering, the City of Johannesburg was determined to ensure that residents of Soweto would not access more water than the FBW amount without first paying for it, instead of getting the additional water on credit the way residents of mainly white neighborhoods in Johannesburg do. According to its own documentation, Johannesburg Water was “intent on adopting prepayment water metering as the preferred service delivery option to be implemented in the deemed consumption areas of supply,” because “prepayment can be considered to be a water demand management tool” (undated Operation Gcin’Amanzi report: 3). Demand management was perceived by the city to be critical to the objective of promoting “savings in water purchases by Johannesburg Water [from Rand Water]” (undated Operation Gcin’Amanzi report: 3), and to the broader goal of improving the “financial positions” of the City of Johannesburg and Johannesburg Water (First and Second Respondents’ Heads of Argument 2007: para. 17.8).

The suburb of Phiri, as one of the poorest in Soweto, was chosen as the pilot project for Operation Gcin’Amanzi. Seeking to “reduce demand” for water among Soweto residents, as well as to improve the city’s financial situation (and without consulting affected residents before taking the decision to roll out prepayment meters en masse), Johannesburg Water (Pty) Ltd. began the

However, progress was slower than anticipated because of the rising resistance from residents who had heard about the negative ramifications of prepayment meters from people in Orange Farm informal settlement. Under the auspices of the Anti-Privatization Forum and community organizations such as the Soweto Electricity Crisis Committee and Concerned Phiri Residents Committee, spontaneous protests turned into mass action, with many residents simply refusing to allow Johannesburg Water to install the meters. As a result, many residents were left without water at all for many months in 2004. Later, in desperation, most of those who refused the meters were forced into accepting standpipes, which allowed an unlimited supply of water for free (debunking the water conservation front of Operation Gcin’Amanzi) but involved much inconvenience for households because of no longer having an in-house connection; for example, people with standpipes now have to carry buckets of water to flush their toilets, which were not designed for an external water supply.

By the end of 2004 most households in Phiri had been forced to accept either prepayment meters or standpipes. All were forced to relinquish the previous unlimited water supply, which was discontinued. To sweeten this bitter prepayment meter pill, Operation Gcin’Amanzi was accompanied by municipal debt write-off, contingent on not tampering with the meter, and a publicity campaign around the extension to Phiri households of 6kl FBW supply, as was already being provided through conventional meters to the rich suburbs of Johannesburg. But there was no sweetening of the bitter effects of prepayment meters in Phiri, where most residents survive on government grants and cannot afford to spend any money on water.

One result of Gcin’Amanzi for many households is being without water for days and even weeks at a time every month. With average households of thirteen or more people, many of whom are people living with HIV/AIDS (PLWHA), the standard FBW is insufficient to meet basic needs. As a result, Phiri residents must make undignified and unhealthy choices about basic hygiene and health. For example, those caring for PLWHA must choose between bathing their patients or washing their soiled bed sheets, and parents must choose between providing their children with body washes before they go to school or flushing the toilet.

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

Despite its best public relations efforts, the city could not obscure the inequities of its water supply arrangement in Phiri. The people of Phiri were well-aware that there were no

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30 Although the city’s decision to opt for universal FBW allocation was driven by administrative concerns, coincidentally universal allocation is internationally acknowledged to be a fairer and more effective way to administer social benefits than targeted approaches. It is clear that the appropriateness of the universal allocation is a coincidence rather than a principled approach because in March 2008 the City of Johannesburg announced plans to withdraw the FBW allocation and to focus on allocating benefits including FBW only through a means-tested indigents’ register in the future. These proposals have been criticized by progressive organizations (see for example CALS 2008)
Operation *Gcin’Amanzi* projects or water conservation campaigns in rich suburbs. They were also aware that the Johannesburg rich have never had to endure punitive prepayment meters, even though many rich households serially default on their municipal bills. Before long, the city faced a rights-based challenge in the form of the *Mazibuko* application in the Johannesburg High Court.

5. The Phiri Water Rights Case: Human Rights v Commercialization

Responding to the unfair and intolerable conditions of their water supply, and supported by the Coalition Against Water Privatization (a collection of community organizations struggling against the negative effects of current water services delivery on the poor), five Phiri residents went to court on behalf of themselves, as well as everyone in the public interest. The applicants hoped to successfully challenge both the forced installation of prepayment meters and the insufficient, one-size-fits-all FBW allocation. Through such specific measures the applicants have sought, more broadly, to advance a policy reorientation towards viewing water primarily as a social good.

Regardless of the applicants’ undoubted human suffering, it is clear from its submissions in the Phiri case that the city remains overwhelmingly fixated on the principle of payment for water services. Stressing its financial responsibilities (it is important to note that nowhere in its submissions did the city argue that it does not have the resources to provide poor residents with sufficient and appropriately-administered water), the city relied on an arsenal of financial management-related legislation to suggest that its hands were tied regarding any capacity to do more for the poor. For example, in connection with its justification of the roll out of prepayment meters only to poor areas, the city argued that section 80 of the National Credit Act, pertaining to “reckless credit,” precludes the city from entering into conventional credit metered agreements with poor residents in Phiri with large municipal arrears.

Leaving aside the fact, as recognized by High Court Judge Moroa Tsoka, that in South Africa any constitutional provision—for example the right to equality or the right to sufficient water—will always trump other legislation unless it can be shown to be a limitation of the right that is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom” (section 36 of the Constitution), in advancing this credit control argument the city ignored two critical facts. First, Phiri residents with prepayment meters have already been granted a debt write-off (an incentive to “accept” the prepayment meter). Second, on the city’s own admission, the worst debtors in Johannesburg are not the poor, but are “government and institutional bodies whose payment record and responsiveness to credit control measures is poor” (Johannesburg Water Business Plans 2003-2005: 2.). Yet, there is no suggestion that the city plans to impose prepayment meters on such government and institutional bodies. Tellingly, the city’s argument about the roll out of prepayment meters was often couched in a concern about how much money has already been sunk into prepayment meters for Soweto (the city continued to roll out prepayment meters through the rest of Soweto even after the application was launched). Put plainly by Gerald Dumas, the Managing Director of Johannesburg Water, “it is really difficult to conceive of the cost of unraveling some or all of [Operation *Gcin’Amanzi*] in terms of

31In the absence of metering there is no way to allocate the FBW amount while charging for any surplus consumption. Thus, for several years FBW was allocated to households in wealthier suburbs while not being allocated to households in Soweto, which continued to be billed for the full deemed consumption amount.

32While Phiri was the pilot of Operation *Gcin’Amanzi* in Soweto, prepayment water meters had already been installed throughout Orange Farm, an even poorer informal settlement/township outside Johannesburg.
removal of meters, installation of alternative metering sources, and this would seriously impact on Johannesburg Water’s finances and sustainability” (Dumas 2007: para. 34).

In stark contrast to the city’s financial preoccupation, the applicants in the Phiri water rights case approached the issue from a basic needs and progressive human rights perspective. Using legal arguments based on the South African rights to water, equality, health, dignity, and administrative justice, the application challenged the lawfulness of the prepayment meters in terms of their failure to provide procedural protections prior to automatic disconnection. Pursuing the same rights-based approach, the application also argued that the city’s monthly FBW allocation, aiming provide each person in a household of 8 with 25 liters of water per person per day, was insufficient to meet the basic needs of urban human beings. The applicants pointed out that in Phiri, where the average property has more than 8 people (recent research shows that there is an average of 13 people per property in Phiri), each person received below the 25 liters per person per day.

Moreover, they argued that, in any event, 25 liters per person per day—just two flushes of a toilet—is insufficient to meet the basic water needs of poor people. Using the expert evidence of Gleick (2005: para. 18), a California-based expert on water rights and sufficiency, the application argued that the city should provide 50 liters of FBW per person per day to cover basic cleaning, hygiene, drinking, cooking, and sanitation needs. Based on extensive research Gleick (1996) asserts that the minimum water requirement to ensure a basic standard of living is 50 liters per capita per day (lcd), broken down as follows:

- Minimum for drinking: 5lcd
- Basic sanitation: 20lcd
- Basic bathing: 15lcd
- Basic food preparation: 10lcd

**TOTAL** 50lcd

The reality is that in Phiri, many people have to survive on far less than the 25 lcd that the RDP promised as a short-term emergency measure (ANC 1994: para. 2.6.6). According to the World Health Organisation (WHO 2003: 3), access to water of around 20lcd carries with it a “high level of health concern” and is insufficient to cover “laundry/bathing unless carried out at source.”

Beyond securing their right of access to sufficient water, for the people of Phiri and their supporters, the case has always represented a challenge to the degradation of the progressive potential of the Freedom Charter, the RDP, and the human rights framework by local government technocrats who have come to dominate South African hydro-politics. As such, it provides the beginnings of an alternative water delivery paradigm.

### 6. Towards a Progressive Rights-Based Model of Water Delivery

On the morning of 30 April 2008 Johannesburg High Court Judge Moroa Tsoka handed down judgment in the Mazibuko matter to a packed court, which rapidly broke out into exclamations of jubilation as the orders were read out. Finding for the applicants, the judge lambasted the city for its “intimidatory and presumptive” approach to the poor and for its impermissible unfair discrimination in forcibly installing prepayment water meters only in a poor, predominantly black, suburb. The judge, moreover, found that the allocated amount of FBW was insufficient to meet the basic needs

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33This section draws from an article co-authored with Patrick Bond: Bond and Dugard (2008a).
of the households in Phiri. The judgment consequently ordered the City of Johannesburg to provide the applicants and all similarly placed residents of Phiri with:

- A free basic water supply of 50 liters per person per day
- The option of a metered supply installed at the cost of the city.

The judgment, which is remarkable for its appreciation both of the law and the plight of poor people, is entirely compatible with a rights-as-transformation model. Such a model is rooted in an understanding of power relations and structural inequalities. Although viewing water primarily as a social good, such a model incorporates a redistributive conception of water as a commercial good at the level of luxury consumption. Although the specifics of this model were not canvassed by the judge, the details were considered by the applicants’ representatives and lawyers.

Broadly, such an equitable model would valorize the social value of water as a public service, e.g. public health benefits, gender equity, environmental protection, and geographic desegregation (Bond and Dugard 2008a). The model should incorporate the following features:

- Equality of services and fair administrative action should govern water delivery, which should be inherently linked to the Constitution’s founding values and objectives. Poor people should not suffer the kind of unfair discrimination based on race (and class) that the people of Phiri have had to endure.
- Everyone’s constitutional right to have access to sufficient water involves economic, as well as physical, access to water. Everyone should be assured of an adequate universal, per person per day allocation of FBW. This could be “reclaimed” by wealthier households through higher tariffs for luxury consumption.
- As ordered by the High Court judge, the per person per day allocation could take as a minimum Gleick’s 50lcd allocation, but it should move as quickly as possible away from this minimum level towards a more generous FBW allocation, especially where water-borne sanitation is involved.
- Such a universal FBW allocation could be financed through a slowly rising but ultimately steeply convex curve of tariffs, with very expensive tariffs for hedonistic consumption (thereby also contributing to water demand management objectives in a way that does not adversely affect the poor).
- Prepayment water meters should be outlawed everywhere in South Africa, as they have been made illegal in the United Kingdom (Barrett and Jaichand 2007).
- In recognition of the fact that water disconnections can place good health, hygiene, and dignity at serious risk, water disconnections more generally (outside of prohibited prepayment meters) should be regulated in the public good. Water supplies should not be disconnected for an inability to pay for water services. Disconnection should not be enforced in respect of poor, vulnerable, and marginalized people, and people receiving social grants. As detailed by Smets (2002, 2007), in many European countries water disconnection is illegal or never enforced and in many more there are specific protections for poor, vulnerable, and marginalized groups.34
- Universal access to water and sanitation should be prioritized and should not be subjected to cost-recovery rationale.
- There should be a general campaign of debt forgiveness in relation to poor people’s municipal accounts.

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7. Conclusion

In the context of rising dissatisfaction with, and protest over, the post-apartheid government’s failure to equitably roll out basic services (including adequate access to water), the Phiri water rights case represents the hope of rights-based legal mobilization over commercialized water delivery models. It also reflects a new iteration of water services in South Africa, driven by public participation and social good. Within such a model, while local conditions would be taken into account (including municipal ability to cross-subsidize from wealthy households), the priority would be to ensure that everyone in South Africa has access to a safe, affordable, continuous, and adequate water supply regardless of socio-economic status or location, and notwithstanding the extent of redistribution necessary to achieve this objective. The fact that the litigation ultimately failed is a setback, but it does not derail the struggle. Nor does it obliterate the rights-based model, which has a life beyond the court room.

Declaration of Conflicting Interests

The author(s) declared no potential conflicts of interests with respect to the authorship and/or publication of this article.

Financial Disclosure/Funding

The author(s) received no financial support for the research and/or authorship of this article.

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35Of these rights-based arguments, Judge Tsoka focused on the sufficiency argument in his judgment. Accepting Peter Gleick’s international expertise (which the city had unfoundedly questioned), the judge ordered the city to provide 50 liters of FBW per person per day to the applicants and others similarly situated in Phiri.

36Smets notes that when French courts have to rule on a water disconnection case for non-payment, they usually order the reinstatement of the water supply “to protect health and human dignity,” and many French municipal mayors have decided no longer to disconnect water supplies to poor people (2007: 8)


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