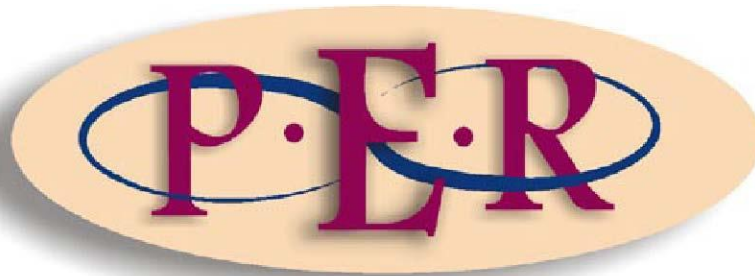


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CONSTITUTIONAL RIGHTS IN SOUTHERN AFRICAN CASE LAW**

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## **AVOIDING *MAZIBUKO*: WATER SECURITY AND CONSTITUTIONAL RIGHTS IN SOUTHERN AFRICAN CASE LAW**

**Ed Couzens\***

### **1 Introduction: The judgment in *Mazibuko v City of Johannesburg***

ometimes a judgment is given which is so significant that it attracts attention not just in its region but worldwide also. The judgment becomes one which is discussed, or at least mentioned, in every account of its field. The judgment by the Constitutional Court of South Africa in *Mazibuko v City of Johannesburg*<sup>1</sup> appears to have been one such in the field of environmental law. South African water law experienced an "apotheosis" in the late 1990s when, with the promulgation of the *National Water Act*,<sup>2</sup> private ownership of water ceased to be permissible; riparian rights ceased to exist; and two users – human beings, for a daily needs component, and the environment itself – became the only "priority users".<sup>3</sup> This appeared to signal a "sea change" in the state's attitude toward freshwater usage and the rights of people<sup>4</sup> – but the optimism of commentators concerned with environmental protection and human rights that

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<sup>1</sup> *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) (*Mazibuko*).

<sup>2</sup> *National Water Act* 36 of 1998.

<sup>3</sup> *National Water Act* 36 of 1998, Part 3: The Reserve.

<sup>4</sup> Stewart and Horsten argue that "South Africa is one of the few jurisdictions in the world that provides for an explicit right to water" with s 27(1)(b) of the *Constitution of the Republic of South Africa*, 1996 "guarantee[ing] the right to access to adequate water". Stewart and Horsten 2009 SAPR/PL 488. The full right in the *Constitution* reads:

27. Health care, food, water and social security

(1) Everyone has the right to have access to—

(a) health care services, including reproductive health care;

(b) sufficient food and water; and

(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(3) No one may be refused emergency medical treatment.

traditional heavy users<sup>5</sup> would now be protected less than would people and the environment itself<sup>6</sup> may need to be tempered after the *Mazibuko* judgment.

As the judgment has been analysed in depth by numerous writers,<sup>7</sup> its facts will be discussed here only briefly. The point of this article is in fact not to analyse the *Mazibuko* judgment itself, or at least not directly, but to consider the implications in relation to the judgment of two subsequent judgments relevant to water security-related issues in Southern Africa.<sup>8</sup> Despite the Constitutional Court's conservative ruling on payment for water services in *Mazibuko*, questions related to access to water will continue to arise and disconnections to be challenged. While a direct challenge to the *Mazibuko* ruling is unlikely in the short term, there may be ways for courts to avoid the decision and find in favour of dispossessed applicants.

The applicants in the *Mazibuko* case were residents in one of the poorest areas in Johannesburg, South Africa. The city authorities had decided to supply six kilolitres of water per month free to every account holder in the city. The applicants challenged the constitutionality of this decision on the ground that the *Constitution*<sup>9</sup> provides that everyone has the right of access to sufficient water.<sup>10</sup> The applicants argued further that it was unlawful for the city to install prepaid water meters in certain households. At issue, therefore, were the obligations which rest on the city as an organ of state.

According to the Constitutional Court, the right of access to sufficient water does not require that the state provide every person, upon demand and without more, with sufficient water. Nor does the obligation confer on any person a right to claim

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<sup>5</sup> Agriculture, industry and mining.

<sup>6</sup> According to one commentator, "water experts around the world are, not surprisingly, watching South Africa's new water law and process of water reform unfold", quoting former Minister of Water Affairs Buyelwa Sonjica as saying in 2005 that the Department's "water allocation reform" framework "reflects our efforts to ensure that in managing the water in Africa and beyond, we adopt approaches that aim to achieve broader goals of fairness and equity, poverty eradication and sustainability". Posthumus 2005 *SA Irrigation* 8.

<sup>7</sup> See, for instance, Stewart and Horsten 2009 *SAPR/PL*; and the various writers cited in s 2 of the text above.

<sup>8</sup> *City of Cape Town v Marcel Mouzakis Strümpher* 2012 ZASCA 54 (30 March 2012); and *Farai Mushoriwa v City of Harare* 2014 ZWHHC 195 (5 June, 23 July and 2 August 2013, and 30 April 2014) - see Parts 3 and 4 below.

<sup>9</sup> The *Constitution of the Republic of South Africa*, 1996.

<sup>10</sup> Section 27(1)(b) of the *Constitution*.

"sufficient water" from the state immediately.<sup>11</sup> The constitutional right requires instead that the state take reasonable legislative and other measures, progressively and within the state's available resources, to realise the achievement of the right of access to sufficient water.<sup>12</sup>

According to the Constitutional Court, the state's obligations can be enforced through the courts by requiring the state to take those steps that are required in order to meet the constitutional standard of reasonableness. A measure would be considered unreasonable if it made no provision for those persons who are in desperate need. If the state were to adopt policies which had unreasonable limitations or exclusions, then a court could order that such limitations or exclusions be removed. Further, it was held that the obligation of progressive realisation imposed a duty upon the state to review its policies continually to ensure that the achievement of the right is realised progressively.<sup>13</sup> The Constitutional Court then held, further, that an obligation rests on the state to set out clearly the targets which it hopes to achieve.<sup>14</sup>

The Constitutional Court held, in the light of the evidence presented, that it could not be said that the provision of six kilolitres of free water per household per month was unreasonable.<sup>15</sup> The applicants failed also for various reasons to establish that the introduction of prepaid water meters was unlawful.<sup>16</sup>

The Constitutional Court held generally that local government is recognised as one of the three spheres of government in the South African constitutional order. A municipal council is considered a deliberative body that exercises both legislative and executive functions and where such a council takes a decision in pursuance of its legislative and executive functions, that decision will not ordinarily be one that is of administrative nature.<sup>17</sup> According to the Constitutional Court, when the state is challenged judicially as to its socio-economic policies, then the agency in question must explain why the

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<sup>11</sup> *Mazibuko* para [57].

<sup>12</sup> *Mazibuko* para [50].

<sup>13</sup> *Mazibuko* para [67].

<sup>14</sup> *Mazibuko* para [70].

<sup>15</sup> *Mazibuko* paras [82]-[89].

<sup>16</sup> *Mazibuko* paras [105]-[157].

<sup>17</sup> *Mazibuko* para [130].

policy is reasonable; and must disclose what it did (including its investigation and research) to formulate the policy, what alternatives were considered, and the reasons why the option underlying the policy was selected. The state may be challenged judicially to account for its decisions, and must then show that the policy selected is reasonable and that it is being reconsidered in the light of its obligation progressively to realise the relevant socio-economic rights.<sup>18</sup>

## 2 Reactions to the judgment in *Mazibuko*

Reactions to the judgment have generally not been positive, to say the least. Kidd has called it a "deeply flawed judgment", pointing out that residents in the area relevant to the case were "among the poorest of the poor, and many were also suffering from HIV/Aids" – and "inability to pay the 'top-up' amount [of a prepaid meter] would mean that many people would spend a considerable part of every month with no (not limited, but absolutely no) water".<sup>19</sup>

Women, suggest Dugard and Mohlakoana, "bear the brunt of water []-related problems".<sup>20</sup> They note that merely having "greater physical access to water (through bringing water infrastructure closer to people's households) is meaningless if water remains unaffordable"<sup>21</sup> and that, quoting the 1997 White Paper on Water Services, "[i]n the context of the reform of water law, the right to equality requires equitable access by all South African to, and benefit from[,] the nation's water resources, and an end to discrimination with regard to access to water on the basis of race, class or gender".<sup>22</sup> They then explain that "the reality on the ground is that many poor South African still struggle to access water and electricity services" with such access being "largely a function of availability, affordability and amount".<sup>23</sup> Poor African women, they add, "are disproportionately affected by [] water and electricity services-related issues and continue to suffer diminished access", with this compromising their "ability

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<sup>18</sup> *Mazibuko* paras [161]-[161].

<sup>19</sup> Kidd *Environmental Law* 92.

<sup>20</sup> Dugard and Maohlakoana 2009 *SAJHR* 546-548.

<sup>21</sup> Dugard and Maohlakoana 2009 *SAJHR* 550.

<sup>22</sup> Dugard and Maohlakoana 2009 *SAJHR* 558-559.

<sup>23</sup> Dugard and Maohlakoana 2009 *SAJHR* 561.

to enjoy life and to advance socio-economically".<sup>24</sup> They then argue that women are typically the "most adversely affected by prepayment water meter-related problems" in terms of having to find the wherewithal to pay for them, and to deal with the consequences of disconnection – it is mainly women, they say, "who have to make difficult choices between going for days without water and conserving water in ways that compromise health or dignity".<sup>25</sup>

Naidoo, Thamaga-Chitja and Shimelis agree, writing that in disadvantaged communities women are an especially "marginalized group and often disconnected and alienated from water [and other] systems that might develop prosperous local food systems and sustainable livelihoods".<sup>26</sup> Their article, which focuses on disadvantaged rural communities, is a useful reminder that it is not just in urban settings (such as were contended over in *Mazibuko*) that constrained access to water is a problem – in rural settings there might even be additional problems, such as seasonal unavailability of water and greater gender disparities.<sup>27</sup>

Dugard and Mohlakoana conclude that basic services in South Africa "exist within a commendably rights-oriented framework" which "explicitly recognises historic disadvantage, including gender, and seeks to remedy this through advancing substantive equality".<sup>28</sup> However, they say, "on the ground at local government level the reality is far more complex, with low-income households facing multiple obstacles in accessing water and electricity services" – with these problems arising "because of a [] generalised exclusionary paradigm in which there is insufficient attention [given] to the needs of the poor".<sup>29</sup>

Kemerink, Ahlers and van der Zwaag, writing generally rather than particularly about *Mazibuko*, contend that the *National Water Act* "is implemented and enforced in a society thick with historically-entrenched socio-economic and political inequities" and that a decade after its introduction "access to water is still highly stratified along racial

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<sup>24</sup> Dugard and Maohlakoana 2009 *SAJHR* 561.

<sup>25</sup> Dugard and Maohlakoana 2009 *SAJHR* 564-565.

<sup>26</sup> Naidoo, Thamaga-Chitja and Shimelis 2013 *Indilinga* 302.

<sup>27</sup> Naidoo, Thamaga-Chitja and Shimelis 2013 *Indilinga* 306-307 and generally.

<sup>28</sup> Dugard and Maohlakoana 2009 *SAJHR* 572.

<sup>29</sup> Dugard and Maohlakoana 2009 *SAJHR* 572.

lines".<sup>30</sup> The dynamics, they say, "of water politics, including water law and rights, cannot be understood without also scrutinising the power relations, discourses and discursive practices that guide perceptions of water problems and proposed solutions".<sup>31</sup> They then argue that while the *National Water Act* is "comprehensive in its legislation and provides powerful legal tools to address poverty eradication and redress inequities inherited from the past", there has been "in reality little [achieved by way of] transition in the access to and control over water resources".<sup>32</sup>

Van Koppen avers that "over 95% of [South Africa's] water resources are controlled by only 0.5% of the population",<sup>33</sup> and that although post-1994 the water economy has become less White-dominated, "in terms of both clients and water professionals",<sup>34</sup> the beneficiaries of changes have "largely remained those who already benefited in the past and to a lesser extent the upcoming Black middle-class".<sup>35</sup> The "White water economy", she says, "has definitely opened up, but is hardly democratised as yet".<sup>36</sup>

Bond traces the history of the "commercialisation" of water in recent South Africa, describing commercialisation as being "viewed with great enthusiasm by the new South African government".<sup>37</sup> He explains that the process has been accompanied by various forms of protest, "including informal/illegal reconnections to official water supplies" and the "destruction of prepayment meters".<sup>38</sup> According to Bond, at one stage in early 2002 municipal officials in Johannesburg were disconnecting some 20 000 households per month from power and water in conditions that are "particularly hostile to vulnerable people". The prepayment system was inefficient,

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<sup>30</sup> Kemerink, Ahlers and Van der Zwaag 2011 *Water SA* 585.

<sup>31</sup> Kemerink, Ahlers and Van der Zwaag 2011 *Water SA* 586.

<sup>32</sup> Kemerink, Ahlers and Van der Zwaag 2011 *Water SA* 592.

<sup>33</sup> Van Koppen 2008 *Water SA* 432.

<sup>34</sup> Van Koppen 2008 *Water SA* 435.

<sup>35</sup> Van Koppen 2008 *Water SA* 436.

<sup>36</sup> Van Koppen 2008 *Water SA* 436.

<sup>37</sup> Bond 2013 *SAJHR* 129. Van Koppen supports this, arguing that historically in South Africa water has increasingly been seen as "an economic good", and that in the 1970s and 1980s the "urgency to implement the 'user pays' principle became stronger with reducing state funding when apartheid South Africa was confronted by economic stagflation, international boycotts and high state spending on the police and military to suppress the immense political protest within and outside South Africa". Van Koppen 2008 *Water SA* 434.

<sup>38</sup> Bond 2013 *SAJHR* 129.

disconnections happened without warning, and the plaintiffs in *Mazibuko* argued that the system represented a safety hazard in the event of fire.<sup>39</sup> Bond argues, however, that the residents erred in arguing their case with a focus "only upon the consumption needs of low-income residents" and without looking at a wider societal and environmental context. We need "as a first step", he concludes, "more coherent critiques of the full range of practices that undermine our ability to perceive and respect water and other aspects of nature as a commons".<sup>40</sup>

Other commentators have pointed, at least impliedly, to the *Mazibuko* case as having seen missed opportunities. Dugard and Alcaro describe the right to water for human domestic consumption as "increasingly being contested in relation to water resource conservation",<sup>41</sup> but point out that "the only water rights case to have come before the Constitutional Court, *Mazibuko*, did not include environmental rights arguments even though it involved the 'environmental' issues of the domestic use of water by multi-dwelling poor households with waterborne sanitation".<sup>42</sup>

Problems related to access to water can be expected to increase in the future. South Africa is already, according to its own Department of Water Affairs, already the 30<sup>th</sup> "driest" country in the world,<sup>43</sup> and the volatility of weather patterns which is likely to accompany changing climatic conditions is likely to have a severely negative effect on the lives of the poor. As Dugard, Lera St Clair and Gloppen point out,<sup>44</sup> it is "clear that the groups that will suffer the most from the challenges posed by climate change are those that are already suffering the negative impacts of other global challenges",<sup>45</sup> or those who have no "voice or power",<sup>46</sup> or those with "poor or no access to health,

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<sup>39</sup> Bond 2013 *SAJHR* 131-132. One of the applicants in *Mazibuko* gave evidence that two small children had died in a shack fire with neither he nor his neighbours having sufficient credit to access water to combat the fire. Dugard and Maohlakoana 2009 *SAJHR* 565.

<sup>40</sup> Bond 2013 *SAJHR* 141-143.

<sup>41</sup> Dugard and Alcaro 2013 *SAJHR* 15.

<sup>42</sup> Dugard and Alcaro 2013 *SAJHR* 31.

<sup>43</sup> Department of Water Affairs 2013/2014 [http://www.doc.gov.za/sites/www.gcis.gov.za/files/docs/resourcecentre/yearbook/2013-4Water\\_Affairs.pdf](http://www.doc.gov.za/sites/www.gcis.gov.za/files/docs/resourcecentre/yearbook/2013-4Water_Affairs.pdf).

<sup>44</sup> Dugard, Lera St Clair and Gloppen 2013 *SAJHR* 7.

<sup>45</sup> Such as "financial/economic crises, ongoing conflicts, environmental degradation and loss of biodiversity". Dugard, Lera St Clair and Gloppen 2013 *SAJHR* 7.

<sup>46</sup> Or who have no "assets or access to energy" and who are "lacking insurance for flooding or for destruction caused by severe weather events". Dugard, Lera St Clair and Gloppen 2013 *SAJHR* 7.



education, clean water and under conditions of food and labour insecurity",<sup>47</sup> among other factors.

Roithmayr argues, on the basis of *Mazibuko*, that the Constitutional Court has "embraced a neoliberal interest in cost recovery from the poor, and has declared cost recovery program[me]s constitutional even when they infringe on socio-economic rights".<sup>48</sup> According to Roithmayr, in *Mazibuko* the Court arguably rejected "the idea that affirmative socio-economic rights created some minimum core of obligation that government owed citizens, and emphasised the need to defer to government decision making in assessing the rights of access for those who could not afford water".<sup>49</sup> She then adds that the Court "found it constitutional to ration access to water based on the ability to pay, even for the country's poorest black residents"; and that, in doing so, the Court "took as its implicit baseline of reasonability [] apartheid inequalities of race and class [--] that target the poor", in effect finding "these inequalities constitutionally permissible, even though cost recovery from the poor serves to reinforce the legacy of apartheid".<sup>50</sup> Roithmayr concludes from this that it might be possible to criticise the Court for "embracing [--] cost recovery programmes that condition full and adequate access to water for the poor on the ability to pay", with "[a]ggressive cost recovery from the country's poorest [] always be[ing] antithetical to the task of dismantling persistent race and class inequality".<sup>51</sup> As with other commentators, she laments a missed opportunity, arguing that "[a]gainst the backdrop of apartheid's stratification of race and class, the Court could have ruled that the city should refrain from aggressive cost recovery targeted towards the country's poorest via pre-paid meters".<sup>52</sup>

Writing less formally, but making the accusation of the Court's "endors[ing]" a "neoliberal paradigm of water provision" which Roithmayr subsequently makes, De Vos calls the judgment "carefully argued (but to my mind utterly unconvincing)" and

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<sup>47</sup> Dugard, Lera St Clair and Gloppen 2013 *SAJHR* 7.

<sup>48</sup> Roithmayr 2010 *CCR* 317 and generally.

<sup>49</sup> Roithmayr 2010 *CCR* 323.

<sup>50</sup> Roithmayr 2010 *CCR* 324.

<sup>51</sup> Roithmayr 2010 *CCR* 325-326.

<sup>52</sup> Roithmayr 2010 *CCR* 325-326.

described it as seemingly "based on an assumption that people do not pay for water because they are bad or dishonest people" who "want something for free when they need to (and can) pay for the water" – with the judgment "fail[ing] to take account of the fact that even if we all wanted to be good little capitalists like the government wants us to be, we cannot all afford the basic necessities that would sustain our lives".<sup>53</sup> De Vos concludes that it was "previously" the Supreme Court of Appeal which "used to hand down conservative judgments which were then overturned on appeal to the Constitutional Court", but that the "latter [C]ourt" is becoming more conservative and it might eventually be the SCA which "emerge[s] as the [C]ourt championing the rights of the marginalised and downtrodden".<sup>54</sup>

There have not been many judgments of South Africa's Constitutional Court which have attracted such near-universal condemnation.

### **3 Further judgments: *City of Cape Town v Strümpher***

The case of *City of Cape Town v Strümpher*,<sup>55</sup> a judgment of the Supreme Court of Appeal (SCA), per Mthiyane DP, concerned the cutting off by the appellant City of the respondent's access to water for alleged non-payment. The respondent had alleged successfully in a Magistrates' Court that he had been unlawfully dispossessed of his lawful access to water; and had then been successful again on appeal to a full bench of the Cape High Court. The City had now appealed to the SCA. The respondent had alleged that disconnecting his water supply had constituted interference with his statutory water rights in terms of the *Water Services Act*<sup>56</sup> and had therefore constituted spoliation.<sup>57</sup> His argument was that his water supply could not be lawfully

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<sup>53</sup> De Vos 2009 <http://constitutionallyspeaking.co.za/water-is-life-but-life-is-cheap/>.

<sup>54</sup> De Vos 2009 <http://constitutionallyspeaking.co.za/water-is-life-but-life-is-cheap/>.

<sup>55</sup> *City of Cape Town v Marcel Mouzakis Strümpher* 2012 ZASCA 54 (30 March 2012) (*Strümpher*).

<sup>56</sup> *Water Services Act* 108 of 1997.

<sup>57</sup> Meaning an unlawful dispossession of property of which he had been in peaceful possession. It needs to be noted that in South African law the remedy of the *mandament van spolie*, which requires immediate restoration of possession, is available to the applicant who has been dispossessed unlawfully of property of which he had been in peaceful possession. Granting of the remedy does not include an enquiry into which party possesses any greater rights – such an enquiry is in fact irrelevant and precluded. The remedy is intended to be a response to persons "taking the law into their own hands", and (subject to certain qualifications, such as the property having been destroyed after the dispossession) operates by way of immediate restoration of the *status quo ante*.

disconnected for non-payment unless the amount by which he was in arrears had been determined judicially in favour of the City.<sup>58</sup> In response, the City argued that summary disconnection of the water supply was authorised by the City's water by-law and by its debt collection by-law. The City contended that it supplied water to the respondent in terms of a supply contract between them; and that, on the authority of an SCA decision (*Telkom SA Ltd v Xsinet (Pty) Ltd*),<sup>59</sup> the remedy of *mandament van spolie* was not available to the respondent.<sup>60</sup>

The respondent was the operator of a caravan park for permanent residents, which park had been supplied by the City with water for some 37 years up to 2007. In that year the City demanded that alleged arrears of R182 000.00 for water usage be paid within two days, failing which the water supply would be disconnected. There had been a long-running dispute over the amount, with some evidence available that the equipment which the City had used to measure the respondent's water usage was defective.<sup>61</sup> Without responding to a letter from the respondent's attorneys, dated 28 May 2007, the City disconnected the water supply on 17 August 2007. The City, in its answering affidavit, contended that the mere existence of a dispute did not assist the respondent for various reasons – including that the monthly statements which the City furnished to the respondent stipulated that payments may not be withheld even where there is a dispute. The spoliation order granted by the magistrate was, however, upheld by the CPD (full bench) – but leave to appeal to the SCA was granted.<sup>62</sup>

The primary issue on appeal, according to the SCA, was whether the City was entitled to disconnect the water supply due to non-payment of arrears, despite the dispute over liability, with the City justifying the summary disconnection on the basis, firstly, that the respondent's right to the water supply was simply a personal right founded on a contract; and, secondly, that the City's actions were authorised by its water by-law and debt collection by-law.<sup>63</sup> The City argued that the relationship between the

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<sup>58</sup> *Strümpher* para [1].

<sup>59</sup> *Telkom SA Ltd v Xsinet (Pty) Ltd* 2003 5 SA 309 (SCA). In the *Telkom* decision it was found that possession of bandwidth could not be restored using a *mandament van spolie*.

<sup>60</sup> *Strümpher* para [1].

<sup>61</sup> *Strümpher* paras [2]-[3].

<sup>62</sup> *Strümpher* paras [4]-[5].

<sup>63</sup> *Strümpher* para [6].

parties was a contractual one; and that, in terms of the *Water Services Act*,<sup>64</sup> the duty of the water service authority to provide water service is subject to an obligation on the water user to pay reasonable charges. Further, that compelling the City to supply the respondent with water would amount to nothing more than enforcing contractual rights under an agreement which could not provide a basis for granting a spoliation order.<sup>65</sup> The SCA found this argument to be "misplaced" and that the fact that a contract must be concluded by a consumer living in a municipal area does not relegate the consumer's right to water to a "mere personal right flowing from that contractual relationship". The City remains with a constitutional and statutory obligation<sup>66</sup> to supply water to users, such as the respondent user in this case. The right to water, the SCA iterated, is a basic constitutional right.<sup>67</sup> This being the case, the right to water which the respondent claimed when applying for the spoliation order was not based solely on his contract with the City, but was underpinned by his constitutional and statutory rights. This is important. Although dealing with a common law remedy, the SCA brought in considerations other than the traditional assessment of whether or not there had been an unlawful dispossession, with "merits" and considerations of "equity" being traditionally irrelevant.

The SCA then stated that this view was "fortified" by the SCA decision in *Impala Water Users Association v Lourens*,<sup>68</sup> in which a water user had obtained a spoliation order, and where the SCA had held that the Telkom case was distinguishable and personal rights flowing from the water user's contract of water supply were not merely contractual rights but had been "replaced or subsumed into rights under the National Water Act". The SCA in *Impala* therefore held that the rights to water in that case were "capable of protection by the *mandament van spolie*".<sup>69</sup>

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<sup>64</sup> *Water Services Act* 108 of 1997.

<sup>65</sup> *Strümpher* paras [7]-[8].

<sup>66</sup> The SCA referred to s 27(1) of the *Constitution*; given effect to in s 3(1) of the *Water Services Act* 108 of 1997.

<sup>67</sup> *Strümpher* para [9].

<sup>68</sup> *Impala Water Users Association v Lourens* 2008 2 SA 495 (SCA) (*Impala*).

<sup>69</sup> *Impala* para [10]. The SCA in *Impala* distinguished the *Telkom* case also on the basis that the use of bandwidth "did not constitute an incident of its use of the premises", whereas the water rights which were in issue were linked to and registered and the "use of the water was accordingly an incident of possession". *Impala* para [19].

The SCA then compared the respondent in *Strümpher* to the water users in *Impala*, saying that water users have a statutory right to the supply of water in terms of the *Water Services Act*, which imposes a duty on a water services authority to "ensure access to water services to consumers", with it following that the respondent's right to a water supply could not be classified as purely contractual. Instead, his right to a water supply was subsumed into rights under the *Water Services Act* and could not therefore be described as merely personal rights arising from a contract.<sup>70</sup>

On the issue of whether the City was authorised by the *Water Services Act* or by relevant water- or debt collection-related by-laws, the SCA held that the City (which "considered that immediate disconnection of the water supply to the respondent's property was authorised") said that "[i]n my view, the City appears to have overlooked the provisions<sup>71</sup> of the *Water Services Act*, requiring that 'the limitation or discontinuation of water services must be fair and equitable'".<sup>72</sup> The SCA was somewhat contemptuous of the City's attitude, referring to it as being "armed" with an "arsenal of statutory provisions" in reaching its conclusion that it could proceed to immediate disconnection.<sup>73</sup> In the Court's view, however, "[t]o expect the respondent to pay R182 000.00 while he is disputing the very amount erodes the principles of fairness contemplated in" the *Water Services Act* and the dispute resolution procedures;<sup>74</sup> and rejected as "flimsy" the City's "excuse", proffered during argument, for not having followed its own prescribed procedures.<sup>75</sup>

The City attempted also to rely on another SCA case, *Rademan v Moqhaka Municipality*,<sup>76</sup> to justify immediate disconnection. The SCA found this reliance "misplaced" because the case had dealt not with water supply but with the discontinuation of electricity supply to defaulters; and because there had been in that

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<sup>70</sup> *Strümpher* para [11].

<sup>71</sup> Section 4(3)(a) of the *Water Services Act* 108 of 1997.

<sup>72</sup> *Strümpher* para [14]. In the SCA's view the City had also "overlooked" its own dispute resolution provisions, as provided in its own Credit Control and Debt Collection Policy – including time limits and provision for appeal.

<sup>73</sup> *Strümpher* para [14].

<sup>74</sup> *Strümpher* para [15].

<sup>75</sup> *Strümpher* para [16].

<sup>76</sup> *Rademan v Moqhaka Municipality* 2012 2 SA 387 (SCA).

case a deliberate withholding of payment by "unhappy" defaulters.<sup>77</sup> The SCA concluded that there was no justification for the City to have cut off the respondent's water supply.<sup>78</sup>

Finally, the SCA considered whether the *mandament van spolie* was an appropriate remedy, concluding that it was, on the basis, *inter alia*, that "[t]he respondent's use of water was an incident of possession of the property" and that "[c]learly interference by the City with the respondent's access to the water supply was akin to deprivation of possession of property".<sup>79</sup>

The SCA did not in the *Strümpher* judgment mention the *Mazibuko* judgment, deciding the matter instead on the basis solely of the principles of spoliation. Nevertheless, it is interesting to consider – in the light of the *Mazibuko* judgment – the pains which the SCA took to find that water supply stood on a different basis to either bandwidth or electricity. The SCA referred several times to the constitutional nature of the right to access to water; and to the fact that rights of a contractual nature had been "subsumed" by water-related statutes – and then found in favour of the restoration of access to water. Arguably, the effect of the decision is that a Constitutional Court decision is circumvented by recourse to the common law – as influenced by constitutional principles!

#### **4 Further judgments: *Mushoriwa v City of Harare***

The writing of the present article was provoked partly by a recent judgment of the High Court of Zimbabwe, Harare,<sup>80</sup> a judgment of Bhunu J. The matter was an urgent application for a spoliation order, coupled with an interdict – the relief sought was a final order to the effect that termination by the respondent City of the applicant's water supply on the basis of a disputed water bill and in the absence of a court order constituted "unlawful self-help"; and that the respondent be interdicted from interfering with, disrupting or terminating the applicant's water supply without a court

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<sup>77</sup> *Strümpher* para [17].

<sup>78</sup> *Strümpher* para [18].

<sup>79</sup> *Strümpher* para [19].

<sup>80</sup> *Farai Mushoriwa v City of Harare* 2014 ZWHHC 195 (5 June, 23 July and 2 August 2013, and 30 April 2014) (*Mushoriwa*).

order. In the interim, the applicant sought an order directing the City to reconnect his water supply, and barring the respondent from interfering with or terminating the water supply at his premises.<sup>81</sup>

The applicant was a lawful tenant and occupier of premises in the City of Harare, the respondent municipality of which was the sole supplier of water.<sup>82</sup> In May 2013 the City sent the applicant a bill for US\$ 1 700.00 in respect of "payment for water services rendered". The applicant disputed owing that, or any other, amount – he claimed that he had always paid his bills on time, attached proof to that effect, and argued that the bill was relevant to a bulk meter external to the premises. On 31 May 2013, however, the City "unilaterally and arbitrarily" disconnected the applicant's water supply. He then brought an urgent application for a spoliatio order.<sup>83</sup> The judge hearing that application was Bhunu J himself. In his words, "[h]aving regard to the urgency of the case when seized with the matter I immediately ordered by consent of the parties restoration of the water services forthwith pending the determination of this application to avert a catastrophe as one cannot survive without water". The Court noted that the respondent "duly complied thereby ameliorating the urgency of the matter".<sup>84</sup> It is unclear what the Court meant by "duly complied", unless perhaps an undertaking was given to comply, as the Court then goes on to say that "[d]espite the existence of a lawful court order barring the respondent from disconnecting water services from the applicant's premises until the finalisation of this application, the respondent still went ahead and defiantly disconnected water services from the applicant's premises with impunity without any Court order or legal justification". The City refused also to reconnect the water supplies despite the applicant pointing out that it was in contempt of court. The Court had to intervene again and to threaten officials with imprisonment before the City authorities restored the water supply.<sup>85</sup>

According to the Court, the undisputed facts established clearly that the applicant was, prior to the dispossession, "in peaceful and undisturbed possession of the water

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<sup>81</sup> *Mushoriwa* (page) 1. The judgment does not have numerically ordered paragraphs.

<sup>82</sup> *Mushoriwa* 1.

<sup>83</sup> *Mushoriwa* 2.

<sup>84</sup> *Mushoriwa* 2.

<sup>85</sup> *Mushoriwa* 2.

connection in dispute"; and that the only issue arising was whether such dispossession was lawful. According to the Court, there was "no substance in the [City's] claim that the applicant was no longer in peaceful and undisturbed possession of the water connection because of its threats to disconnect water to the premises", as that argument "goes against public policy that no one should benefit from his own inequity". Should that argument stand, said the Court, the City would stand to "benefit from its own wrongs or inequities should the threats turn out to be unjustified or baseless".<sup>86</sup>

The dispute, said the Court, "has to do with their respective rights and obligations in respect of the provision of water to a citizen by a municipal authority", with it being agreed that the City has an obligation "to provide water and the applicant in turn is obliged to pay for it". The "point of departure", said the Court, is what happens "in the event that there is a dispute regarding payment", in which case is the City "entitled to self-help and to unilaterally cut off water supplies to a citizen without recourse to law?".<sup>87</sup> In the Court's words, the City's argument was that statutory authority<sup>88</sup> meant that it was "clothed with unfettered discretion to disconnect water supplies to a citizen at will without recourse to the courts of law".<sup>89</sup> To this argument the applicant responded that the by-law was *ultra vires* when read, *inter alia*, with s 77<sup>90</sup> of the *Constitution of Zimbabwe*.<sup>91</sup> The Court held that the effect of certain words in the legislation which the City relied upon<sup>92</sup> was "to divest the [City] of the unfettered

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<sup>86</sup> *Mushoriwa 2*.

<sup>87</sup> *Mushoriwa 3*.

<sup>88</sup> Section 8 of the *City of Harare Water By-Law* Statutory Instrument 164 of 1913, including that "[t]he council may, by giving 24 hours' notice, in writing without paying compensation and without prejudicing its rights to obtain payment for water supply to the consumer, discontinue supplies to the consumer".

<sup>89</sup> *Mushoriwa 3*. While it might seem startling at first glance to see that the authority relied on stems from 1913, this does appear to be a common problem in modern Zimbabwe. Many laws dating back to Rhodesia, especially in the areas of planning and land management, are being used by local authorities today. See, for instance, Ruwende 2014 [http://www.zimbabwesituation.com/news/zimsit\\_w\\_councils-still-to-amend-colonial-laws-the-herald/](http://www.zimbabwesituation.com/news/zimsit_w_councils-still-to-amend-colonial-laws-the-herald/).

<sup>90</sup> Section 77 of the *Constitution of Zimbabwe Amendment (No 20) Act, 2013* is headed "Right to food and water", and reads: "Every person has the right to – (a) safe, clean and potable water; and (b) sufficient food; and the State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realisation of this right".

<sup>91</sup> *Constitution of Zimbabwe Amendment (No 20) Act, 2013 (Constitution of Zimbabwe)*.

<sup>92</sup> The third Schedule to the *Urban Councils Act (Acts 21/1997, 3/2000, 22/2001, 13/2002)* [Ch 29:15], in terms of which municipal authorities are constituted. The Court pointed out that s 198(3) of the Act was to be subservient to the third Schedule to the Act, and that where the words "in



discretion upon which it seeks to rely on in justifying its unlawful conduct. Thus the [City] retained the words 'in the opinion of' in its by-law in order to unlawfully confer on itself a discretion not granted to it by the enabling parent Act".<sup>93</sup> This is somewhat convoluted, but what it comes down to is that the Court found that the City of Harare had sought to use a by-law to keep a discretion which had in fact been removed from the statute in terms of which municipal authorities are constituted – and that doing so was unlawful.

The Court then concluded, on this issue, that "when it comes to disconnection of water on account of failure to pay, the City Council's opinion does not matter. It can only disconnect water supplies on no less than 24 hours' notice upon proof that the consumer has failed to pay any charges which are due". As a consequence, the City "cannot lawfully disconnect water from a consumer unless it has established that the amount claimed is actually due", which raises the question of who is to determine whether the amount claimed is actually due or not.<sup>94</sup> The Court then lambasted the City further, suggesting that what the City "seeks to do is to oust the jurisdiction of the courts so that it can operate as a loose cannon and a law unto itself", and that it "seeks to extort money from the applicant without the bother of establishing its claim through recognised judicial process", and that "[t]he disconnection of water supplies without recourse to the courts of law is meant to arm twist and beat the applicant into submission without the bother of proving its claim in a court of law".<sup>95</sup>

The Court then iterated that the right to water "is a fundamental right enshrined in section 77 of the [C]onstitution of Zimbabwe"; and that s 44<sup>96</sup> "imposes a duty on the State and all its institutions and agencies to respect fundamental human rights and freedoms". The City, said the Court, "being a public body and institution of local government, it follows that it cannot deny a citizen water without just cause" – and

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the opinion of the Council" appeared in the Act they were absent from the Schedule. This, said the Court, was clearly a deliberate omission.

<sup>93</sup> *Mushoriwa* 4.

<sup>94</sup> *Mushoriwa* 4.

<sup>95</sup> *Mushoriwa* 4.

<sup>96</sup> Section 44 of the *Constitution of Zimbabwe* reads: "The State and every person, including juristic persons, and every institution and agency of the government at every level must respect, protect and fulfil the rights and freedoms set out in this Chapter".

"it is trite that it is the function of the judiciary to interpret and enforce the law when a citizen complains that his human rights have been violated".<sup>97</sup>

According to the Court, section 8 of the by-law<sup>98</sup> "contradicts both the Constitution and the enabling statute in more respects than one" – firstly, because it authorises the City arbitrarily to "deprive citizens of their fundamental right to water without compensation";<sup>99</sup> and secondly because it "unlawfully confers" the City with the "sole jurisdiction to arbitrarily determine the dispute without recourse to the courts of law", in the event of a disputed bill.<sup>100</sup> The latter allows the City to "be the sole arbiter in its own case contrary to the well-established common law maxim that no one should be a judge in his own case".<sup>101</sup> "It is a basic principle of our legal policy", the Court went on, "that law should serve the public interest" and, "as we have already seen, every person has a fundamental right to water". "It is therefore", the Court concluded, "clearly not in the public interest that a city council can deny its citizens water at will without recourse to the law and the courts".<sup>102</sup>

The Court then added the words "I take comfort in that the Supreme Court of South Africa in a related case of [*Strümpher*] came to the same conclusion on facts that are on all fours with this case".<sup>103</sup> Finally, the Court noted that "[t]hose in the corridors of power must not abuse their authority by usurping the functions of the courts to the detriment of innocent members of society as happened in this case".<sup>104</sup> The Court ordered, pending determination of the matter,<sup>105</sup> that the City immediately restore water to the applicant's premises; and that the City be interdicted from "interfering

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<sup>97</sup> *Mushoriwa* 5.

<sup>98</sup> Section 8 of the *City of Harare Water By-Law* Statutory Instrument 164 of 1913.

<sup>99</sup> This being "contrary to s 85 of the Constitution which entitles an aggrieved person to appropriate compensation whenever his fundamental human rights have been violated". *Mushoriwa* 6.

<sup>100</sup> This being "contrary to the provisions of s 69 of the third Schedule to the Act, as read with s 165(1)(c) of the Constitution". *Mushoriwa* 6.

<sup>101</sup> *Mushoriwa* 6.

<sup>102</sup> *Mushoriwa* 6.

<sup>103</sup> *Mushoriwa* 6.

<sup>104</sup> *Mushoriwa* 7.

<sup>105</sup> This presumably meaning that the question of whether the amount of US\$ 1 700.00 or another amount was indeed owing or not – the Court not being seized with making this determination.

with the applicant's possession of the premises by interfering with or terminating water supply".<sup>106</sup>

Of course, it might be objected that the references by the Court to the *Constitution* are *obiter*, given the Court's eventual finding on dispossession – but they go directly to the question of unlawfulness and make it clear that the Court considered unlawfulness to arise here not merely because of factual possession and dispossession. Rather, the unlawfulness arose from a combination of dispossession and breach of rights in respect of a very particular, and special, kind of property.

## 5 Conclusion

Although both judgments concerned the common law remedy of the *mandament van spolie*, a remedy in the sub-field of property law, and neither raised the *Mazibuko* case, what they arguably had in common was a concern to make the decision within the confines of the *mandament van spolie* while at the same time distinguishing between cases concerning "ordinary" property and water.

The obvious and immediate objection which could be made to the arguments outlined in the present article is that as the two cases discussed concerned the application of the *mandament van spolie* they fall inherently to be decided on the basis of common law principles relating to dispossession and unlawfulness. What is being argued, however, is that although the cases did indeed concern the *mandament van spolie*, both of them were decided on a basis other than purely that of dispossession of ordinary property.

In the *Strümpher* judgment the South African Supreme Court of Appeal made several allusions to water standing on a different footing legally to other forms of property. The Court indicated that the right to a water supply cannot be classified as "purely contractual", or be described as "merely personal rights arising from a contract", and that the right to a water supply has been subsumed into statutory rights. The Court indicated also that the "limitation or discontinuation" of water services must be "fair

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<sup>106</sup> *Mushoriwa* 7.

and equitable". Further, the Court indicated that a case involving the disconnection of water had to be distinguished from cases concerning the disconnection of electricity or of bandwidth.

In the *Mushoriwa* judgment, the Zimbabwean High Court implied clearly that its thinking was informed by the fact that the order it was being asked to make was "to avert a catastrophe as one cannot survive without water". The Court made it clear that the question to be answered was whether a municipality was entitled unilaterally to cut off supplies of water, as opposed to items of property or services in general – the implication being that the provision of water stands on a different basis in law from the provision of other services. The Court indicated that the right to water is a fundamental constitutional right held by all persons, which imposes a duty on the State and all its agencies and institutions. Finally, the Court considered the municipal legislation relied on by the respondent City to contravene the fundamental right to water.

On the one hand, the *Mushoriwa* judgment carries less weight as a judgment of first instance than the *Strümpher* judgment, which was made at the highest level. However, the judgment in *Mushoriwa* in a sense carries more weight, as a judgment not constrained directly by the Constitutional Court precedent, which has been severely criticised. Of course, it must not be forgotten that in neither case was *Mazibuko* raised – the two cases involved the common law remedy of the *mandament van spolie*. In that sense the present argument is vulnerable to the charge that the writer is erring by conflating constitutional rights issues with the principles of common law. However, it seems to the present writer that both judgments saw a court called upon to decide a common law matter bringing into its judgment constitutional rights considerations, which indicate that the Court saw the subject matter of the dispute and the rights involved as being in some way different. In this regard the Zimbabwean High Court, while indicating "obedience" to the South African Supreme Court of Appeal in *Strümpher*, was far less fettered than was the SCA in *Strümpher* – and was consequently able to go further in basing its judgment not just on common law principles but also on constitutional and human rights considerations.

There is an obvious difference between the two situations in that the *Zimbabwean Constitution* would seem to provide a stronger right than does the far more lauded South African *Constitution* – the *Zimbabwean Constitution* providing that "[e]very person has the right to – (a) safe, clean and potable water ...";<sup>107</sup> while the South African *Constitution* provides only for the "*right to have access*"<sup>108</sup> to "sufficient food and water".<sup>109</sup> Nevertheless it is instructive to consider the cases alongside each other. Although from different jurisdictions, the Zimbabwean law is considered to rest on the same basis as that in South Africa, Zimbabwean judgments have historically been reported in the South African law reports, there is much cross-referral,<sup>110</sup> and – importantly – judgments in the two jurisdictions must be informed by the same background of environmental and socio-economic issues. Such issues will concern, amongst other things, extreme poverty, wide differences between rich and poor, poor service delivery from government, a lack of environmental security, and significant water shortages.

In the Southern African context of grinding poverty, underdevelopment, governmental inefficiency, poor service delivery to the poor, and harsh environmental conditions – including gross environmental insecurity in respect of water and access to water – there will undoubtedly be many court cases to come, involving access to water. The South African Constitutional Court's judgment in the *Mazibuko* case has been widely and severely criticised, and may eventually come to be regarded as a retrogressive judgment. Until and unless it is overturned by the Constitutional Court, or by legislation, or through revised governmental policy,<sup>111</sup> courts bound by the ruling can continue to find ways to develop the jurisprudence relating to environmental and particularly water security in South Africa by clarifying the legal relationship of people

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<sup>107</sup> Section 77 of the *Constitution of Zimbabwe*.

<sup>108</sup> Own emphasis.

<sup>109</sup> Section 27(1) of the *Constitution*.

<sup>110</sup> Note the references in *Mushoriwa* to the *Strümpfer* judgment.

<sup>111</sup> With a considerable expansion of the amount of water available to the very poor, and improved delivery thereof.

with water<sup>112</sup> – and in this regard South African courts could do worse than consider the *Mushoriwa* judgment of the Zimbabwean High Court.<sup>113</sup>

It is not being argued that the *mandament van spolie* provides an alternative means to protect rights which were de-prioritised by the Constitutional Court in the *Mazibuko* case. What is being pointed out is that in the face of a ruling which has been roundly criticised, and which certainly appears to have under-recognised the limitations of the poorest members of Southern African society, litigants and the judiciary may well turn to common law remedies as a way to address issues of inequality until such time as the constitutional rights of the most vulnerable are better recognised. By treating questions of access to water differently from other property questions, courts deciding cases on the basis of common law remedies may eventually make a more valuable rights-based contribution to legal development than did the Constitutional Court in *Mazibuko*.

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<sup>112</sup> In particular, by making it clear that water as property has a status different from that of "normal" property items; and that the fundamental right of access to water, again, makes it inequitable to treat water according to basic common law principles.

<sup>113</sup> Unfortunately, subsequent media reports have indicated that the Harare City Council has continued to cut off water supplies to payment defaulters – according to one report, to approximately 11 500 defaulters between October and November 2014. Sunday Mail Reporter 2014 <http://www.sundaymail.co.zw/?p=19919>. Also see Zimbabwe Today 2014 <http://www.zimbabwetoday.org/topics/service-delivery/water-sanitation/2014/10/18/5000-water-bill-defaulters-cut-off/>. Even more recent media reports do indicate, however, that the *Mushoriwa* judgment has been followed by a Magistrates' Court (per Magistrate Vimbai Mutukwa, in case 93/2015) in the city of Kwekwe in central Zimbabwe; with an order that the water connection of a resident, one Jackie Ngulube, be restored by the City Council (or, failing the Council, by the Messenger of the Court) after it had been disconnected by the City despite his claiming to be in good standing as far as payment went. The Zimbabwean 2015 <http://www.thezimbabwean.co/news/zimbabwe-news/74635/city-of-kwekwe-ordered-by.html>; and Mhlanga 2015 <http://www.southerneye.co.zw/2015/01/26/court-orders-council-stop-disconnections/>.

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## **LIST OF ABBREVIATIONS**

CCR	Constitutional Court Review
SAJHR	South African Journal on Human Rights
SAPR/PL	SA Publiek Reg / Public Law

## **AVOIDING *MAZIBUKO*: WATER SECURITY AND CONSTITUTIONAL RIGHTS IN SOUTHERN AFRICAN CASE LAW**

**Ed Couzens\***

### **SUMMARY**

The 2009 judgment by the Constitutional Court of South Africa in *Mazibuko v City of Johannesburg* is seen by many as a watershed in the interpretation of the fundamental constitutional right of access to water. The Constitutional Court ruled that the right of access to sufficient water does not require that the state provide every person upon demand and without more with sufficient water. Nor does the obligation confer on any person a right to claim "sufficient water" from the state immediately. Reactions to the judgment have been consistently negative, with criticisms largely focusing on the Court's apparent lack of appreciation for the situation of the very poor. It is not easy, however, to overturn a decision of the Constitutional Court and South Africa will need to work within the constraints of the precedent for many years to come. It is suggested in this article that two subsequent, recent judgments (one of the Supreme Court of Appeal in South Africa, *City of Cape Town v Strümpher*, 2012, and one of the High Court in Zimbabwe, *Mushoriwa v City of Harare*, 2014) show how it might be possible for courts to avoid the *Mazibuko* precedent and yet give special attention to water-related rights. Both cases concerned spoliation applications in common law, but both were decided as though access to water supply and water-related rights allow a court to give weight to factors other than the traditional grounds for a spoliation order. It can be argued that in both cases the unlawfulness necessary for a spoliation order arose from a combination of dispossession and breach of rights in respect of a very particular and special kind of property. In the arid and potentially water-stressed Southern African region, and in the context of extreme and apparently increasing poverty, there will

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undoubtedly be more court cases to come involving access to water. Conclusions are drawn as to how the two judgments considered might offer a way to ameliorate the harsh effects of the *Mazibuko* judgment.

**KEYWORDS:** access to water; *City of Cape Town v Strümpher*; *Mazibuko v City of Johannesburg*; *Mushoriwa v City of Harare*; spoliation; water rights.