Art or Science? Synthesising Lessons from Public Interest Litigation and the Dangers of Legal Determinism

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Abstract

In 2008, one of the largest funders of human rights organisations in South Africa, the Atlantic Philanthropies, published which identified several factors for optimal public interest litigation. Despite the relative density of organisations that conduct public interest litigation in South Africa, there has been little critical engagement with the findings of this report. Yet this exercise is pertinent given the growing reliance by South African civil society organisations on such litigation to resolve systemic failures by the state together with the ever more pressing requirement for grantees to prove the strategic value of the turn (or return) to the courts. This article aims to contribute to the discussion about the uptake and value of public interest litigation by problematizing one possible reading of the Atlantic Philanthropies report’s analysis and testing these through the lens of two recent cases concerning the disconnection of municipal services: Mazibuko (water) and Joseph (electricity). In doing so, it reveals another type of disconnection: that the public impact litigation process is generally too unpredictable and diffuse for it to be adequately assessed through a formulaic or scientific approach. At the same time, it has more potential for social change than covered in the Atlantic Philanthropies report. The second half of the paper advances a more expansive, contextualised and responsive framework for conceptualising the role of public impact litigation and assessing its impact. The proposed framework takes into account structural conditions of power, agency in the form of social mobilisation and the role of public interest litigation in constituting “politics by other means”.

1

INTRODUCTION

To find a form that accommodates the mess, that is the task of the artist

— Samuel Beckett

What is the value of public interest litigation? And how should legal practitioners and social movements act strategically in order to maximise its impact, particularly in a way that advances social change? Despite the relatively high number of public interest litigation organisations in South Africa, there is surprisingly little scholarship that reflects systematically on such questions. A notable exception is the

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3 Some literature (including comparative) has sought to draw out potential lessons from individual or samples of cases in South Africa: see M Heywood, 'Preventing Mother to Child HIV Transmission in South Africa: Background, Strategies and Outcomes of the TAC Case against the Minister of Health', South African Journal on
recent study commissioned by the Atlantic Philanthropies and prepared by Gilbert Marcus and Steven Budlender.\(^1\) The report evaluated a select number of cases and strategies and concluded that there are various factors “essential” to ensuring “that public interest litigation succeeds and achieves maximum social change”.\(^2\) Litigious success requires: proper organisation of clients, an overall long-term strategy, coordination and information sharing, timing, research, characterisation, and follow-up. Achievement of maximum social change requires that litigation strategies must be accompanied by broader strategies, in particular: information campaigns, advice and assistance outside litigation and the use of social mobilisation and advocacy.

At the same time, the two authors engage in a more nuanced discussion beneath the starkly drawn headlines. They recognise that not all of these factors may be sufficient or, to a lesser extent, always necessary. They warn about a formulaic approach to strategic litigation, a “painting by numbers”.\(^3\) However, it is still worth casting a critical eye over these factors. Amongst South African human rights lawyers and beyond, it is not uncommon to find similar criteria articulated as ‘lessons learned’, rules of thumb’ - and the authors have publicly described them as ‘highly effective habits. And this evidence-based discourse is slowly spreading to donors as they require grantees to establish how funding for litigation will not only generate the promised outputs, but real impact.\(^4\) Moreover, these lessons have been heavily influenced by the outcomes of two seminal South African cases, *Grootboom* and *Treatment Action Campaign* – which also constitute two of the three cases analysed by Gilbert and Budlender. It is not apparent though whether the latter case provides a replicable or always desirable model for public interest litigation.

This article takes the Atlantic Philanthropies Report (APR), as a point of departure for exploring how we should conceive lessons learned from public interest litigation. Is it a matter of science or of art? A case of ticking some boxes or distilling form in the chaos of litigation and life? It proceeds as follows. In Sections II and III, we examine the recommendations from the APR through the lens of two recent Constitutional Court cases concerning municipal services: *Mazibuko*\(^5\) (water) and *Joseph*\(^6\) (electricity). While both cases concerned poor people challenging the disconnection of public services, both cases were decided very differently and have resonated in different ways in practice. These differential outcomes in the same field provide useful scope for testing whether the strategic assumptions in APR model hold. From this examination it is evident that there is no necessary correlation between the strategic decisions

\(^1\) Ibid. para. 117. [APR]
\(^2\) Ibid. para. 179.
\(^3\) Langford (note 3 above) draws some similar conclusions, in a review of socio-economic rights litigation strategies in 20 jurisdictions, but equally notes the various paradoxes behind many of them.
\(^5\) Mazibuko and Others v City of Johannesburg and Others 2010 (4) SA 1 (CC) (Mazibuko).
\(^6\) Leon Joseph and Others v City of Johannesburg and Others 2010 (4) SA 55 (CC) (Joseph).
of litigators and winning in court; although some of the APR factors do correlate with post-judgment impact.

The second half of the article attempts to move beyond a mechanistic logic to see litigation in its dynamic and broader context. In Section III, we propose a more expansive model for analysing the impact and, concomitantly, the role or value of public interest litigation, which explicitly draws the socio-political dimension into the frame. The greatest potential of public interest litigation can lie beyond the spatial and doctrinal confines of the courtroom where, in the social realm, its impact can be extremely diffuse and under certain conditions destabilising of power relations and public perception. Section IV then delves into the deeper assumption, which pervades the report’s recommendations and broader discourse - that the form of legal mobilisation by the Treatment Action Campaign represents an ‘ideal type’. In our view, it is not clear that this model is always realistic or even necessary. It might in fact contribute to unrealistic expectations from the courts. We propose that a more responsive model needs to be equally supported; one that responds to diverse legal opportunities in less-than-ideal conditions. This article is thus a plea to pursue a socio-legal studies approach to public interest litigation and its evaluation, both by litigators and funders.

II MAZIBUKO AND JOSEPH: AN OVERVIEW

Although both cases primarily dealt with disconnections of basic services and the legal representation in both cases was provided by the Centre for Applied Legal Studies (CALS), Mazibuko and Joseph are significantly different in terms of applicant strategy, legal framing, judicial outcome and social impact. They consequently raise questions about the identification, predictability and assessment of public interest cases.

Mazibuko was grounded in an explicit right - the right of access to water in section 27 of the Constitution of the Republic of South Africa Act 108 of 1996 (Constitution). It was brought by five poor residents of Soweto, with household incomes of around R1 000 per month, on behalf of themselves and all similarly situated households, as well as everyone in the public interest. The legal challenge formed part of a broader mobilisation around access to water, which was supported throughout by the Anti-Privatisation Campaign (APF). Despite succeeding in the Johannesburg High Court and winning their substantive claims in the Supreme Court of Appeal (SCA), the applicants lost in the Constitutional Court on all grounds. Yet, notwithstanding the judicial loss, there have been some important direct and indirect gains from the litigation process, which are outlined below.

Joseph, which concerned the disconnection of electricity to a building occupied by tenants, was considered by the legal team to be a much riskier case than Mazibuko, which CALS also litigated. This is

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10 The APR considers the TAC case (Treatment Action Campaign v Minister of Health (No. 2) 2002 (5) SA 721 (CC) (TAC)) and related campaign to be the ideal model for public interest litigation. In this article we italicise TAC where we are referring to the case only. Otherwise, we refer to TAC without italicisation, to refer to the broader model, encompassing the legal mobilisation as well as the litigation.

11 Mazibuko was a relatively more complex case with a number of legal challenges, whereas Joseph was more narrowly framed. Nonetheless, at the centre of both was the issue of un-procedural disconnection from basic municipal services.


13 Now called the South Gauteng High Court.
because there is no explicit right to electricity in the Constitution and the case was not part of a broader social movement campaign. Furthermore, the applicants earned between R3 000 and R4 000 per household per month, making them less poor than the Mazibuko applicants, and not comprising the most vulnerable socio-economic grouping that the Constitutional Court has expressed a desire to protect in its previous socio-economic rights judgments. Nevertheless, it was thought that Joseph would gain legal ground in the wake of Mazibuko, which was launched two years before Joseph. As it turned out, both Part A and Part B applications of Joseph in the South Gauteng High Court were unsuccessful, but the applicants were granted leave to appeal directly to the Constitutional Court, where the Court decided in their favour despite all of these factors. However, by the end of 2010, the order for reconnection of the electricity supply has to date not been enforceable although it has had some indirect impacts.

**Mazibuko**

In 2001, the City of Johannesburg formulated a project to limit unpaid-for water consumption in Soweto by means of the mass installation of prepayment water meters (PPMs). Called Operation *Gein’Amanzi* (meaning to conserve water in isiZulu), the project started with a pilot in Phiri, one of the poorest suburbs of Soweto. Unlike the conventional meters available throughout Johannesburg’s richer suburbs, which provide water on credit with numerous protections against unfair disconnections, PPMs automatically disconnect once the Free Basic Water (FBW) supply is exhausted. The only alternative is to purchase additional water credit, which leaves poor households in practice without water for days on end each month (a fact not in dispute in the case).

Determined not to accept PPMs, the Phiri community embarked on a course of direct resistance against the rollout. However, the resistance was critically undermined after the City secured a wide-ranging interdict. Activists were prohibited from coming within 50 meters of any PPM operations and private security companies were authorised to assist in managing any infringements of these terms. This effectively put an end to the direct activism. With this avenue of protest effectively closed off, the community turned to the option of rights-based litigation as a tactic to challenge PPMs (together with the “standpipe” yard taps that the City offered some residents as an alternative to PPMs). In doing so, they turned part of the struggle into legal mobilisation - understood as the point at which “a desire or want is translated into a demand as an assertion of one’s rights”.

Although the litigation was brought by five residents, it was explicitly framed as public interest litigation and it was supported by the Anti-Privatisation Forum (APF), a leftist social movement that opposes the privatisation, commercialisation and corporatisation of basic services. The legal case was formulated around two aspects of the City’s water services that adversely affected residents’ access to water: PPMs; and the City’s FBW policy, which was insufficient to meet the basic needs (including waterborne

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14 See especially Government of the Republic of South Africa v Grootboom and Others 2001 (1) SA 46 (CC) (*Grootboom*) paras. 52, 63, 68 and 95, which establish that for a programme to be reasonable, it must cater for those in desperate need.

15 In 2001, the national Department of Water Affairs and Forestry (DWAF) formulated a FBW policy, according to which each household (but particularly poor households) was to receive 6 kilolitres (kl) of water per month for free (i.e., 25 litres of water per person per day in a household of 8 people). This was subsequently consolidated in regulation 3(b) of the Regulations Relating to Compulsory National Standards and Measures to Conserve Water made under sections 9(1) and 73(1)(j) of the Water Services Act 108 of 1997, GN R509 of 8 June 2001.


sanitation) of poor, multi-dwelling households where as many as 20 people had to share the one 6kl FBW allocation. Thus the applicants approached the court to have PPMs declared unlawful and the FBW policy reviewed and set aside as unreasonable because it was insufficient to meet basic needs in the Phiri context.

The case was launched in the Johannesburg High Court on 12 July 2006 with the City of Johannesburg, Johannesburg Water Pty (Ltd) and the Minister of Water Affairs and Forestry as respondents. On 30 April 2008, Justice Tsoka ruled in favour of the applicants on all grounds, declaring PPMs unlawful and unconstitutional and the City’s FBW policy unreasonable: The City was ordered to provide the applicants and all similarly positioned residents with 50 litres of FBW per person per day. On being notified that the respondents intended to appeal, the Mazibuko applicants attempted to convince the other parties to agree to launch an application for leave to appeal directly to the Constitutional Court, but they refused. Instead, the case first went to the SCA which upheld the appeal on 25 March 2009. However, the SCA nonetheless ruled in favour of the Phiri residents on the two substantial grounds: finding PPMs unlawful (largely on the grounds that the City’s bylaws did not allow their installation as a first measure but rather only when a household had contravened the conditions of service of a standpipe) and the City’s FBW policy unreasonable. It ordered the City to reformulate its policy with a view to providing 42 litres per person per day to indigent residents of Phiri. Notwithstanding the SCA’s ruling against the City on both PPMs and the FBW policy, the Phiri residents decided to appeal the judgment to the Constitutional Court because they felt there were serious problems with the SCA’s order, particularly its suspension of the

18 The applicants’ PPM challenge was based on a number of legal arguments including the following: the decision to install PPMs in Phiri without any prior consultation with residents violated section 4(1) of the Promotion of Administrative Justice Act 3 of 2000; the rollout of PPMs only in poor black areas, despite the evidence of bad debt in all areas, amounted to unfair discrimination based on race, prohibited by section 9(3) of the Constitution; the PPM’s automatic disconnection mechanism contravenes the procedural protections (reasonable notice and opportunity to make representation prior to disconnection) of section 4(3) of the Water Services Act 108 of 1997 (Water Services Act); and the City’s water bylaws do not allow for the installation of PPMs except as a punitive measure for contravening the terms of a standpipe supply. This list is not exhaustive – see applicants’ heads of argument in the Constitutional Court: http://web.wits.ac.za/NR/rdonlyres/61317CD0-6821-4DC6-A1E6-7823D3140981/0/MazibukoApplicantsfinalwrittensubmission24July2009.pdf

19 While a commendable move in terms of making water more affordable for poor households, it is strongly arguable that the amount of FBW (25 litres of water per person per day in a household of 8 people) is insufficient to meet the basic needs of multi-dwelling poor urban households for two reasons. First, among others, an international expert on water sufficiency, Peter Gleick, estimates that the minimum amount of water required to meet basic health and dignity-related needs is 50 litres per person per day (‘Basic Water Requirements for Human Activities: Meeting Basic Needs, Water International vol. 21(2) (1996) pp. 83-92). Second, in poor urban suburbs such as Phiri one stand (household) typically comprises a main house and several backyard shacks. This means that there are often as many as 20 people relying on the one FBW allocation, as was the case for Lindiwe Mazibuko, the lead applicant in the Mazibuko case. This can reduce the effective allocation to 10 litres of water per person per day (an average flush of the toilet uses more than this amount in one go). The FBW challenge was based mainly on section 27 of the Constitution, which recognises the right of access to water. The applicants, supported by the amicus curiae – the Centre on Housing Rights and Evictions (COHRE) – thus argued for 50 litres per person per day. The applicants also raised arguments that the tariff for the second block of water (the block after the FBW block, i.e., the first block water users had to pay for) was too high and unaffordable, but this argument in particular did not gain any traction in any of the hearings.

20 Mazibuko and Others v City of Johannesburg and Others 2008 (4) All SA 471 (W) (Mazibuko High Court judgment).

21 City of Johannesburg and Others v Mazibuko and Others 2009 (3) SA 592 (SCA) (Mazibuko SCA judgment).

22 For a critique of the SCA judgment, see J Dugard and S Liebenberg, ‘Muddying the Waters: The Supreme Court of Appeal’s judgment in the Mazibuko case’, ESR Review vol. 10(2) (2009), pp 11-17.
order of invalidity regarding PPMs.\(^{23}\) The government applied to cross-appeal and the case was heard in the Constitutional Court on 2 September 2009.

On 8 October 2009 the Constitutional Court delivered its judgment, ruling against the Phiri residents on all grounds.\(^{24}\) The judgment was not anticipated by the legal team and its findings in constitutional and administrative law have been the subject of academic critique.\(^{25}\) In particular its “deferential and normatively thin concept of reasonableness review”\(^{26}\) and its characterisation of PPMs as not violating entrenched procedural protections have been criticised.\(^{27}\) Nevertheless, despite the judicial defeat, there have been some unanticipated outcomes of the case, as discussed in Section IV.

**Joseph**

On 8 July 2008, City Power (Pty) Ltd\(^{28}\) disconnected the electricity supply to a low-rent residential building in Johannesburg called Ennerdale Mansions. The low-income residents of Ennerdale Mansions received no prior notice of the disconnection. As it transpired, although residents had been keeping up with their electricity payments, paid to the landlord in terms of their rental agreements, the landlord had not passed on these payments and owed the municipality approximately R400 000. Finding themselves without electricity and being told by City Power that they would have to pay the entire arrears before their electricity supply would be restored, the applicants approached the South Gauteng High Court. They launched an application on 21 July 2008 that sought the reconnection of the electricity supply and an order declaring that they were entitled to procedural fairness in the form of notice and an opportunity to make representations to City Power before the electricity supply was terminated. The High Court (in both Part A and B applications)\(^{29}\) denied the applicants such relief, and they applied for leave to appeal directly to the Constitutional Court on 30 April 2009. As summarised in the Constitutional Court judgment of 9 October 2009, the crux of the case was “whether any legal relationship exists between the applicants and City Power”,\(^{30}\) or what “relationship, if any” is there “between City Power as a public service provider and users of the service with whom it has no formal contractual relationship”.\(^{31}\)

The applicants argued that, even if they were not protected by the utility contract, a relationship did exist between the tenants and the City, in terms of their right to receive electricity. They based this claim on electricity being a component of the right, inter alia, of access to housing, arguing that such right was materially and adversely affected by the termination of electricity supply, thus grounding their claim in

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\(^{23}\) The SCA suspended its order of invalidity regarding PPMs, giving the City two years in which to “legalise the use of prepayment water meters in so far as it may be possible to do so” para. 62 of the Mazibuko SCA judgment (note 20 above).

\(^{24}\) Mazibuko is the second judgment in the Court’s history of socio-economic rights adjudication in which it did not grant any relief to the applicants (the first was Soobramoney v Minister of Health, KwaZulu-Natal 1998 (1) SA 765 (CC) (Soobramoney), the Court’s first socio-economic rights case).


\(^{26}\) Liebenberg, ibid, p. 480.

\(^{27}\) I Quinot (forthcoming) ...

\(^{28}\) City Power (Pty) Ltd (City Power) is the City of Johannesburg’s main electricity supplier.

\(^{29}\) Part A was an urgent application for the immediate reconnection of electricity supply, which was dismissed by the High Court on 3 September 2008. Part B again sought the reconnection of the electricity supply, plus an order declaring that the disconnection of the electricity supply without notice was unlawful. Judgment for Part B was delivered by the High Court on 3 April 2009.

\(^{30}\) Joseph (note 7 above) para. 2.

\(^{31}\) Ibid, para. 24.
section 3 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The Constitutional Court ruled in the applicants’ favour, finding that they could rely on PAJA’s procedural protections, and ordering the tenants’ electricity supply to be reconnected and severing the words “without notice” from bylaw 14(1) of the City of Johannesburg’s electricity bylaws.

Somewhat surprisingly, the Court did not base its decision on linking electricity to the right to housing, as argued by the applicants. Instead, the Court essentially created a new socio-economic right – the right to basic municipal services, as well as a public order right to electricity. In doing so, the Court opened the space to base a claim on the right to basic municipal services. Unfortunately, however, this did not bring any direct relief to the applicants, who remained without electricity. This is because, in the time it took for the case to reach the Constitutional Court, vandals had stripped the building of its electrical wiring, meaning that it was no longer possible for the City to reconnect without incurring considerable expenses, which neither the City nor the landlord was willing to incur. Nevertheless, in the wake of the judgment, the Socio-Economic Rights Institute of South Africa (SERI) was able to ensure the reconnection of electricity to low-income residents of Soweto, who had been disconnected in similar circumstances, by using the Joseph precedent.

III WINNING IN COURT: THE APR MODEL AND MAZIBUKO AND JOSEPH

The APR proposes that there are “seven factors essential to ensuring that public interest litigation” is successful in judicial outcome and, combined with other strategies, can effect social change. These headlines seem to firstly suggest a causal relationship between the essential factors and winning in court and secondly that such victories are a minimum condition for effecting social change through litigation. While the authors are more graduated in their analysis in relation to this first proposition it is worth testing the first six court-oriented factors against the Mazibuko and Joseph cases and contrasting this with the judicial outcomes of each case. This analysis reveals that public interest litigation is more contextually specific and complex than implied by a fixed set of legally-defined criteria, and that there is (for better or worse) not necessarily any correlation between lining up a case and the judicial outcome although there may be a weak correlation across a larger sample of cases.

32 Section 3 of PAJA requires procedural fairness whenever administrative action “materially and adversely affects” a right or legitimate expectation of any person”.
34 Joseph (note 7 above) paras 34-55 (the Court based the right to basic municipal services on section 73 of the Municipal Systems Act 32 of 2000, read with section 152 of the Constitution).
35 It was estimated that the cost to re-wire the building would be around R200 000.
38 APR (note 4 above) p. 119.
39 The seventh criterion is ‘Follow-up’. For the APR, follow-up after the litigation is critical to “translating the legal success into practical benefits” (ibid, p. 138).
Criterion 1: Proper organisations of clients

In the APR model, public interest litigation works best when “the client is an organisation with a direct interest in the matters being litigated, rather than, for example, a few disparate individuals” and when “the client plays an active and engaged role – rather than allowing legal representatives to make key decisions without proper client input”.40 According to Gilbert and Budlender, this is partially to ensure that settlements do not derail broader public interest objectives and partially to ensure that cases are relevant to people on the ground. Finally, having client groups involved in litigation facilitates “proper follow-up after the litigation”, including monitoring and report-back regarding enforcement of judicial orders.41

Turning to the cases examined in this article, in Mazibuko, although the direct clients were from poor households in Phiri, the litigation was anchored in a social movement, the APF, and a broader campaign against the commercialisation of water services. The litigation was explicitly brought in the public interest. In Joseph this was not the case, as the applicants were ‘disparate individuals’ who were litigating only to have their electricity reconnected. Apart from the strategic considerations of the legal team, the litigation was not grounded in any broader movement or campaign. For the purposes of the comparison, we therefore tick this criterion for Mazibuko and do not tick it for Joseph.

Criterion 2: Overall long-term strategy

For the APR, the optimal public interest litigation tactic is to mount “a series of cases, brought on different but related issues over a substantial period” with the earlier cases acting “as a vital building block for the more complex and difficult later cases”.42 Both Joseph and Mazibuko were not instances of a single case - both were litigated by CALS, which is a repeat player with a long history of litigating human rights issues.43 But this criterion is more applicable to Mazibuko than Joseph, because CALS had gained much from other repeat players in the form of amicus curiae Centre on Housing Rights and Evictions (COHRE), represented by the Legal Resources Centre (LRC), another repeat player with three decades experience of public interest litigation.

While building on other electricity disconnection cases that had been settled, Joseph was partly conceived in the shadow of Mazibuko, and was expected to be heard in the Constitutional Court after Mazibuko.44 As it turned out, Joseph progressed directly to the Constitutional Court and was heard before Mazibuko, demonstrating that the best-laid strategic plans can come unstuck in the vicissitudes of litigation process. In other words, while Mazibuko was meant to be one of the stepping stones for Joseph, it did not work out this way. So, we tick this criterion for Mazibuko and do not tick it for Joseph.

Regrettably, what is somewhat lost in the APR formula is that advocacy and mobilisation, rather than litigation, might drive an overall long-term strategy in which litigation only plays a small, though critical, part. In this situation, a single case might achieve a lot of impact if pinned to a broader, non-litigious, campaign. And, while it is true that “repeat player” litigators might have an advantage over “one-
shotters”, the repeat player advantage can be achieved in a number of ways, such as through providing litigation support to a range of similar organisations (e.g. social movements).

**Criterion 3: Coordination and information sharing**

The APR notes that it is “crucial that there be proper information sharing and coordination among different organisations” to ensure the best use of resources and that cases are not undermined by conflicting cases being brought by other organisations.  

The coordination and information sharing aspect was particularly evident in Mazibuko, which was litigated by CALS and benefitted hugely from the amicus curiae intervention of COHRE, a leading international organisation dealing with rights to housing and water, as represented by the LRC. In addition, throughout the lengthy course of the litigation, there was substantial coordination and information sharing among other civil society movements and organisations working on local government service delivery. We therefore tick this criterion for Mazibuko. In respect of Joseph, this was largely not the case. Because the case moved unexpectedly quickly from the High Court directly to the Constitutional Court in a matter of a year, there was neither the time, nor the need for extensive co-ordination and information sharing as Joseph was quite a narrowly defined legal case. Therefore we do not tick this criterion for Joseph.

**Criterion 4: Timing**

According to the APR, “litigation should not commence until and unless the climate is right and until the relevant evidence is in place”. More specifically, the climate is right only after “the political route has failed”.

This is a difficult criterion to engage with, not least because timing, as conceived by the APR, depends on the time frame of analysis. In relation to TAC, which the APR considers a “shining example as to how litigation – when run properly and as part of a series of broader strategies – can achieve social change”, we suggest that it is not that easy to test whether the TAC’s decision to wait for four years while engaging the government regarding mother-to-child transmission of HIV/AIDS was the right decision. Specifically, were the infections and deaths caused from mother-to-child transmission during this time acceptable casualties of the strategic waiting game? Moreover, we suggest that some issues are especially difficult to assess on this axis. When, for example, is the timing right for poor people to get a better deal in South Africa? How long should people call for better living conditions including access to adequate housing and basic services before it is the right time to litigate? Should we wait until there are 20 protests per month or when there are 200 or 2 000? At which point do we acknowledge that political processes, particularly as relating to rights that depend on local government delivery, are systemically failing?

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45 APR (note 4 above) p. 130.  
46 Ibid p. 133.  
48 TAC (note 8 above).  
49 The APR (note 4 above) stated that “Prime among [the difficult decisions concerning timing] was the decision not to proceed with the litigation when the government appeared to be making some progress, and later the decision to follow counsel’s advice that the litigation would likely not succeed unless and until the Medicines Control Council registered Nevirapine for use to prevent MTCT. These decisions were agonising given the lives at stake and provoked criticism from some of the TAC’s allies. Nevertheless, with hindsight, they were absolutely correct.” (p. 135).  
50 Although difficult to quantify, it has been estimated that in 2009 there were in the region of 19.8 protests per month in South Africa, meaning that South Africa has the highest number of protests in the world (H Jain (August 2010) ‘Community Protests in South Africa: Trends, Analysis and Explanations’ Local Government Working Paper
Notwithstanding such concerns, even the relatively high threshold of the APR – “using litigation to achieve social change only when the political route has failed” – was met in the Mazibuko case, where activists and residents only resorted to litigation after resisting the rollout of PPMs in every possible political form, including appealing to ward councillors and taking to the streets. Litigation was only taken up as a last resort following the failure of political engagement and direct protest. And, in line with the criterion, once the decision to litigate was taken, evidence was secured from a number of experts including the international expert on water sufficiency. Thus, seemingly, the timing criterion should be ticked for Mazibuko. In contrast, the timing criterion should not be ticked for Joseph, which moved immediately to litigation. And, because of its swift movement through the judicial system, Joseph ended up in the Constitutional Court before the prior disconnections case, Mazibuko (even though Mazibuko had first entered the judicial system in July 2006, two years before Joseph did).

Criterion 5: Research

The APR uncontroversially notes that legal and factual research is a critical facet of public interest litigation (arguably, this is true for all litigation). Certainly both Mazibuko and Joseph were grounded in factual and legal research and further socio-legal and policy research that included several research reports, as well as the comprehensive research on international law advanced by the amicus curiae. By the time it was heard in the Constitutional Court, the Mazibuko record comprised 9 000 pages, including numerous research and expert-based affidavits, as well as reports, articles etc., many of which were submitted by the applicants and the amicus curiae. Joseph was able to take advantage of the significant in-house research capacity of CALS. However, there was less available research and expertise (both within CALS and elsewhere) on electricity than on water. And, again, it was arguably less necessary to include extensive research for this narrowly-defined case. Here we tick the research criterion for Mazibuko and mark it as partially fulfilled for Joseph.

Criterion 6: Characterisation

According to the APR:

> A substantial component of any successful case is the ‘characterisation debate’. This is particularly the case given that a particular case – especially when in the public eye – might be viewed and perceived in multiple ways by courts and the public.

The report goes on to argue that it is “extremely important for those involved in public interest litigation to demonstrate to both courts and the public that the issues at stake are critical, that there are fundamental rights being used to redress unfairness and inequality rather than perpetrate it and that there are countless


51 APR (note 4 above) p. 134.


54 APR (note 4 above) p. 137.
real people being affected on a daily basis”.

Regarding Mazibuko and Joseph, all attempts were made to demonstrate that Mazibuko was a critical case. It was characterised not only (or even primarily) as a water services case but was also framed as a negative violation of both administrative justice and equality. CALS and the APF made extensive use of the media to demonstrate that issues of fairness, governance, democratic participation and equity underlined the litigation, so we tick the characterisation criterion for Mazibuko. The same cannot be said for Joseph, which was characterised as a water rights case (electricity as implied by the right to housing), in the full knowledge that there is no explicit right to electricity in the Constitution and that, at the time it was launched, the seemingly easier case of water rights (Mazibuko) had not yet been decided, so we do not tick the characterisation criterion for Joseph.

This criterion perhaps deserves more critical attention than the others. This is because, as a contextual examination of Mazibuko and Joseph reveals, however professional and experienced the legal team, the way a case is characterised by the lawyers is not necessarily how a court will characterise a case. Indeed, in its reception and adjudication of the case, a court might pursue a wholly different legal and factual framing to that proposed by the legal team. Regarding the two cases examined here, although both cases concerned municipal disconnections, the Court (re)characterised Mazibuko as a positive rights claim for additional free water, which it misunderstood as an attempt by the applicant to re-open the minimum core content approach to socio-economic rights. And it (re)characterised Joseph as a case about the negative infringement of administrative justice principles in relation to municipal services.

Yet, as Pierre de Vos has commented, the simple difference between the two cases was that in Mazibuko, very poor households were not paying for water, whereas in Joseph, relatively better off households were paying for electricity. According to De Vos, the Court’s decisions have in effect endorsed a “pay-as-you-go” model of municipal services that favoured the applicants in Joseph. So, while the Joseph applicants characterised their application as a housing rights case, the Court reformulated it as a negative violation of municipal systems, and its judgment sought to remedy the situation of paying tenants having their electricity supply disconnected without notice. Whereas in Mazibuko, the Court eliminated the disconnection aspect by ruling that PPMs “suspend” rather than discontinue the water supply, thereby evading the procedural protections in the Water Services Act, and re-characterised the case as overwhelmingly a positive obligations claim. Thus, in both cases the Constitutional Court was able to sidestep the applicants’ own characterisation of their cases to pursue its own fame and legal logic.

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56 Mazibuko (note 6 above) paras. 52-57.
57 P de Vos “Water is life (but life is cheap)” (13 October 2009) Constitutionally Speaking blog: http://constitutionallyspeaking.co.za/water-is-life-but-life-is-cheap/
58 Mazibuko (note 6 above) para. 120. De Vos (ibid) notes that, in interpreting the words in section 4(3) of the Water Services Act not to apply to PPMs – because PPMs result only in “temporary suspension”, whereas the legislation sought to provide protection only in cases of “permanent discontinuation” (paragraph 120 of the Mazibuko judgment) - the Court must have ignored the word “limit”, “which could surely not mean anything but the ‘temporary suspension in supply’”. De Vos further notes that, in relying on this interpretation, the Court has rendered the protection of the Water Services Act meaningless in that, according to this logic, the Act’s protection only applies in cases prior to the permanent disconnection of the water supply.
According to the above examination, which is represented in tabular form for ease of reference in Table 1 below, all the APR criteria were fulfilled for Mazibuko, and the majority were not fulfilled for Joseph. A score of yes is given 1 and a partial score is given 0.5.

Table 1: Comparison of Mazibuko and Joseph across the APR criteria

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Mazibuko</th>
<th>Joseph</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Proper organisations of clients</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>2. Overall long-term strategy</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>3. Co-ordination and information sharing</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>4. Timing</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>5. Research</td>
<td>Yes</td>
<td>Partially</td>
</tr>
<tr>
<td>6. Characterisation</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Score out of 6</td>
<td>6</td>
<td>0.5</td>
</tr>
</tbody>
</table>

According to our analysis, Mazibuko scores 6 and Joseph scores 0.5. Yet, as outlined in section II, the judicial outcomes were negative for Mazibuko and positive for Joseph. So, for these two cases – the only water and electricity services-related cases to have come before the Constitutional Court to date – the six litigation-specific factors of the APR model were clearly not the decisive ones! It is of course possible to argue that the Mazibuko case was simply legally flawed from the outset. In other words, despite the presence of all six APR factors, it was never going to win. However, taking this line of argument relies on accepting the court’s re-interpretation and re-characterisation of the case; which was quite different from the applicants framing and focus. The response of commentators to the Mazibuko case suggests there are a number of problematic lines of reasoning in the judgment that suggest that earlier jurisprudence was not properly applied or was re-interpreted or narrowed considerably. Moreover, it won on all grounds in the High Court and on substantive grounds in the SCA, which does make the final Constitutional Court decision surprising, particularly given the respective reputations and rationales of the different courts.

We can only speculate about which other factors might have been decisive in these cases. It may be that other ‘demand-side’ (societal) factors may be missing from the APR analysis that would have explained such a result. Or it may be that the ‘supply-side’ – the court itself – is not such a static and benevolent actor as presupposed in the APR analysis. Some authors have warned about the inherent liberal formalism in the Grootboom and TAC judgments.59 The Court also seems to demonstrate a rather romantic approach to poverty, which might explain the different outcomes in Mazibuko and Joseph. The court may have also been uncomfortable with the type of social movement behind the case, which was significantly more leftist than others which have reached the Constitutional Court. This might suggest that civil society and

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academia need to devote more extra-legal and institutional attention to ensuring that the Court is committed to a transformatory rather than a classical liberal interpretation of the Constitution.60

Another response may be that both Mazibuko and Joseph were sui generis and that other cases demonstrate that these six essential rules are likely to be correlated with judicial outcomes. However, an analysis of recent Constitutional Court cases on socio-economic rights and equality rights does not necessarily reveal this. For example, the six criteria would most likely be met for Abahlali base Mjondolo61 and Thubelisha Homes.62 In Abahlali the Court found that a section of a provincial law making forced evictions of slum-dwellers obligatory was contrary to the constitutional right to housing. In Thubelisha Homes, the applicants lost - a forced eviction was sanctioned. However, a series of standards was set out for alternative accommodation and their exactitude, combined with a mobilised community and the loss of the provincial government to an opposition party, seems to have prompted the parties to agree on in situ slum upgrading and the Constitutional Court to eventually rescind the eviction order.63

And in another recent case, Nokotyana, none of the criteria was arguably met but the applicants did not lose on all grounds. They did not achieve orders compelling the municipality to provide more toilets and high mast street lighting but managed to secure an order directing the municipality to take a decision within 14 months on whether it would upgrade the settlement under Chapter 13 of the Housing Code.64 In Tongoane (a case that would certainly meet all criteria), the Constitutional Court struck down the Communal Land Rights Act 11 of 2004 in its entirety.65 But this was on procedural grounds. The High Court had found that the legislation undermined gender equality and security of tenure but the Constitutional Court simply ruled that the correct legislative procedure had not been followed and declined to address the broader human rights issues that generated the challenge. Thus, following the Constitutional Court’s judgment, the potential social change implications from the judgment were potentially limited.

This is all to say that the APR criteria do not to have sufficient explanatory power on their own to predict the judicial outcomes of the two cases examined in this article. Thus one should exercise some caution in using the principles in deciding which cases to pursue, how to pursue them and what kinds of litigation to fund. There are appears to as much art as science in shaping a case that will pass constitutional muster.

IV TOWARDS A SOCIO-LEGAL FRAMEWORK FOR ASSESSING IMPACT66

From our analysis, the judicial outcomes for Mazibuko and Joseph were seemingly precisely the opposite of what might have been expected from the APR formula. But what about the second aspect of the APR equation: maximising social change i.e. impact? The authors curiously do not define social change or

61 Abahlali base Mjondolo v Premier of KwaZulu Natal Province and Others 2010 (2) BCLR 99 (CC) (Abahlali).
62 Residents of the Joe Slovo Community, Western Cape v Thubelisha Homes and Others 2010 (3) SA 454 (CC) (Thubelisha Homes).
63 This was despite the authorities request for it to be maintained despite the political decision to begin the slum upgrading process: Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (CCT 22/08) [2011] ZACC 8 (31 March 2011)
64 Nokotyana and Others v Ekurhuleni Municipality 2010 (4) BCLR 312 (CC) (Nokotyana).
65 Stephen Segopotso Tongoane and Others v Minister for Agriculture and Land Affairs and Others 2010 (6) SA 214 (CC). See description of civil society strategy in B Cousins and R Hall ‘Rights without Illusions: The Potential and Limits of Rights in Securing Rural Land Tenure’ in Symbols or Substance (note 36 above).
66 The expanded model we advance in this section for assessing the impact of public interest litigation has been developed further in ____________________.
impact or map out how litigation interfaces with it. The authors do though they set out three other key strategies, which they see as complementing public interest litigation:

- Conducting public information campaigns to achieve rights awareness,
- Providing advice and assistance outside litigation to assist persons in claiming their rights,
- Making use of social mobilisation and advocacy to ensure that communities are actively involved in asserting rights inside and outside the legal environment.  

They therefore emphasise that “public interest litigation be seen as merely one facet – albeit an important one – of broader, more varied efforts to achieve social mobilisation and change.”

However, in the main, they view social change from a largely materialist or neorealist perspective, where a judgment is “effective if it has produced an observable change in the conduct of those it directly targets”. This is often the focus in lawyerly analyses of impact, with a focus on changes in material conditions of the applicants or law and policy. It is most evident in the APR’s analysis of TAC, viewed as the most successful case examined in the report, in which the Constitutional Court ordered the government to remove the restrictions preventing the provision of Nevirapine to prevent mother-to-child-transmission of HIV/AIDS. Yet, the report does not examine how TAC has affected social behaviour and, specifically whether the case has had any impact on the structural social condition of patriarchy, which underpins the extraordinarily high HIV/AIDS infection rate among women in South Africa. The analysis by some authors is that this struggle is very much ongoing at the local level and different strategies are being used to address it. The APR does hint at this broader plane of impact when it acknowledges that, while the gay and lesbian rights litigation has succeeded in achieving the legal recognition of same-sex partnerships regarding sexual intercourse, immigration, adoption and social security benefits, there is still a “massive gulf between this legal recognition and the attitude of many ordinary South Africans on these issues”. While direct (or indirect) material impacts are hugely important, absent from the frame is any examination of the role of law as a politicising agent in the dialectical relationship between structures of power (whether social, political or socio-economic) and the agency of social actors. In other words, what is missing is recognition that, particularly when mobilised by communities, social movements and groups other than lawyers, the legal platform can serve to powerfully politicise issues, and thereby to have a much more profound and lasting impact than the issuing of a judgment, by effectively constituting “politics by other means”. We argue that in order to bridge the apparent disconnection between law and society in the APR model there needs to be an explicit recognition of the less material role of law as a politicising – or enabling – agent and that, precisely for this reason, public interest litigation should not be viewed in a win or lose binary, especially when litigation has been rooted in broader mobilisation.

The APR neither considers whether a losing case might have a public interest impact (and thereby potentially affect social change), nor advances a coherent analysis of impact. Nevertheless, there is a growing scholarship on how, where litigation is anchored in mobilisation, it can have substantial impact.

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67 APR (note 4 above) pp. 94-113.  
68 Ibid p. 106. [APR]  
71 Abel (note 1 above).
regardless of the judicial outcome. Michael McCann, amongst others, stressed that, in these circumstances, the resultant legal mobilisation can resonate beyond the limits of the legal process by contributing to the empowerment of civil society and energising movements.\textsuperscript{73} In addition, in recent years there has been a move to develop a more nuanced and contextual analysis of the impact of litigation that incorporates much more than simply the material effects arising from a judicial decision.\textsuperscript{74} César Rodríguez-Garavito, for example, points out that litigation can result in “changes in ideas, perceptions and collective social constructs relating to the litigation’s subject matter ... in sociological terms, they imply cultural or ideological alterations with respect to the problem posed by the case”.\textsuperscript{75} Here, Rodríguez-Garavito goes some way towards recognising the politicising potential of litigation.

We take this one step further by explicitly drawing into the frame an acknowledgment of the role of litigation as a political and politicising process. Thus, in our model, we incorporate a category of impacts that we refer to as enabling, denoting the empowering effects of litigation as creating the potential for transformative change. Like the symbolic effects in Rodríguez-Garavito’s model, this category refers to changes in ideas, perceptions and collective social constructs. However, we include changes in opportunities as well. Enabling impacts are therefore understood as changes in socio-political assets (resources available for social groups) that have the potential to contribute to political and, ultimately, structural change by providing greater leverage in civil society’s engagement with the state (or even private power). This approach begins to grapple with the critique that rights-based approaches have traditionally neglected the dimension of power – that is to say that rights discourse has over-emphasised the agency of actors and under-emphasised the structures of dominating power (whether these are social, political or economic).\textsuperscript{76} By implicitly acknowledging the difficulties of securing structural change and the unlikelihood of a single judgment to do such on its own, this model proposes that the ultimate utility of litigation could lie in its empowering – or enabling – potential.

Finally, we see the enabling potential for litigation to be greatly bolstered when it is rooted in broader mobilisation, a kind of litigation-plus model of change. However, as a point of departure with the APR, we view the ultimate value of such legal mobilisation as being its role in politicising the issues at stake. In this model, which is graphically set out in Table 2 below, the material and enabling effects are set out on the vertical axis and the judicial and mobilisation components are set out on the horizontal axis. The components of the model are not intended to be either exhaustive or necessary. Nor is the model meant to be a prescription on how to do public interest litigation. Rather, the model provides a more open-ended frame for analysing the deeper impact of litigation, particularly where litigation is accompanied by legal mobilisation.

### Table 2: A typology of impact for rights-based litigation

<table>
<thead>
<tr>
<th>Judicial process</th>
<th>Legal mobilisation process</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Enabling</strong></td>
<td><strong>Enabling</strong></td>
</tr>
<tr>
<td>• Crystallising issues and increasing the visibility of the problem;</td>
<td></td>
</tr>
<tr>
<td>• Providing publicly-accessible information</td>
<td>• Galvanising activists and creating new coalitions;</td>
</tr>
<tr>
<td></td>
<td>• Sensitising the media and raising public awareness about the validity of the problem;</td>
</tr>
</tbody>
</table>

\textsuperscript{73} M McCann, \textit{Rights at Work: Pay Equity Reform and the Politics of Legal Mobilisation} (Chicago: Chicago University Press, 1994).

\textsuperscript{74} See Rodríguez-Garavito (note 71) and C Rodríguez-Garavito (2012) “Enforcement or Impact? Theory and the case of Colombia” in M Langford, C Rodríguez-Garavito and J Rossi (ed) \textit{Making it Stick: Compliance with Social Rights Judgments in Comparative Perspective} (forthcoming).

\textsuperscript{75} Ibid p. 4.

relating to structural problems in the social, socio-economic or political sphere;
• Clarifying or redefining the litigation terrain in terms of problems, possibilities and precedents;
• Conferring perceptions of authority/legitimacy for rights-based initiatives;
• Providing a dramatic platform for airing grievances;
• Allowing greater tactical options for civil society formations;
• Changing attitudes among civil society players towards rights-based options.

<table>
<thead>
<tr>
<th>Material</th>
<th>• Direct changes to material conditions, law or policy ordered by court;</th>
<th>• Material effects of the enabling impacts of legal mobilisation.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>• Changes to material conditions resulting indirectly from judicial process.</td>
<td></td>
</tr>
</tbody>
</table>

Applying this analytical framework to Mazibuko, it is clear that there are much more profound impacts than implied by the APR model. As has been argued elsewhere, and notwithstanding the judgment, the litigation has had a positive impact on the APF/CAWP, and possibly on water campaigns more broadly, by reinvigorating and energising struggles against the commercialisation of basic services. This occurred not least through the delay (for several years) of the rollout of prepayment water meters across the country while municipalities waited for the outcome of the litigation. In the words of APF founder, Dale McKinley, Mazibuko “provided something to organise around; hope and recognition after having been fucked over by the police – it became the centre of mobilisation and reinvigorated the struggle, as well as catalysing political discussions and refining strategy”.78

Other unanticipated outcomes of the litigation were highlighted by Mazibuko applicant, Grace Munyai. When phoned from the Constitutional Court regarding the judgment, Grace’s response was: “I’m so sorry for you”, followed by a short pause, and: “but do you know I’m going to be on TV tonight?” Grace’s response speaks to her muted concern about the judgment per se - along with most Phiri residents who destroyed their prepayment water meters (or standpipes), she had destroyed her standpipe following the victorious High Court judgment and so was able to access sufficient water. But, more than this, Grace’s response indicates the value she placed on her struggle having been acknowledged in the mainstream media. The litigation provided a voice to Grace and the community of Phiri, where the political realm had failed them.

Finally, in something of a surprise, despite the judicial defeat there have actually been material impacts from the Mazibuko judgment. This clearly was a direct result of the politicisation of the issues during the legal mobilisation process. These impacts include the fact that, as a direct result of the politicisation surrounding the litigation, the City raised the amount of FBW it provides to the poorest households in

77 For example Dugard (note 51 above).
78 Interview with D McKinley (10 July 2009), cited in ibid, p 94.
Johannesburg to 50 litres per person per day (the amount the applicants asked for). The City also indicated that the new generation of PPMs it plans to install from the end of 2010, will have a ‘trickler’ device. This means that, following the exhaustion of the FBW amount, the water supply will not completely cease but, rather, it will come out as a trickle until further credit/FBW is loaded. Moreover, the City has undertaken that as part of the new rollout of PPMs, it will not to prosecute anyone for bypassing their PPM or standpipe. In effect, this means that the applicants and community have received the relief they litigated over, but through legal mobilisation rather than the judicial process.

The APF is alive to the reality that the litigation process delivered much more than the judicial decision. Not only in terms of material outcomes but also by tilting the balance in favour of the community through politicising the ongoing process of engagement and contestation between civil society and government. Acting on this, the APF has pursued more rights-based litigation in the year following the judicial defeat than ever before *Mazibuko*. And, for a movement that has traditionally been highly sceptical of rights, the APF has now conceptualised a tactical approach to rights-based mobilisation through a “Law and Organising” programme, which provides training to social movement leadership in how to use rights to advance struggles for socio-economic justice. The categories of impact for *Mazibuko* are represented in Table 3.

**Table 3: A typology of impact for Mazibuko**

<table>
<thead>
<tr>
<th>Judicial process</th>
<th>Mobilisation process</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Enabling</strong></td>
<td><strong>Mobilisation process</strong></td>
</tr>
<tr>
<td>- Crystallised community discontent against PPMs as a rights violation;</td>
<td>- Created a new coalition, CAWP;</td>
</tr>
<tr>
<td>- Provided a high-profile and long-running platform for the struggle against PPMs;</td>
<td>- Public opinion was raised about usage, pricing and equity of water services;</td>
</tr>
<tr>
<td>- Provided a huge amount of information on water services-related planning, budgeting and problems;</td>
<td>- The media was sensitised to struggles by poor to access basic services;</td>
</tr>
<tr>
<td>- Reinvigorated water rights activists and the APF specifically;</td>
<td>- The issues of PPMs and access to sufficient water in Soweto were politicised;</td>
</tr>
<tr>
<td>- “Voice” was given to water rights struggles;</td>
<td></td>
</tr>
<tr>
<td>- High Court victory legitimised struggle and conferred a sense of authority for destroying PPMs to access sufficient water;</td>
<td></td>
</tr>
<tr>
<td>- APF decision to use litigation as one of its tactics – part of “law and organising” agenda going forward, in contrast to previously antagonistic stance to law and rights.</td>
<td></td>
</tr>
<tr>
<td><strong>Material</strong></td>
<td></td>
</tr>
<tr>
<td>- Provided five years’ respite in imposition of PPMs elsewhere in South Africa, during which time some municipalities – notably eThekwini - took political decisions not to install PPMs.</td>
<td>- Additional FBW has been made available to the poorest households;</td>
</tr>
<tr>
<td></td>
<td>- PPMs have been fitted with a ‘trickler’ device so that there is no longer an automatic disconnection following the exhaustion of the FBW amount;</td>
</tr>
<tr>
<td></td>
<td>- The City has undertaken not to prosecute anyone for</td>
</tr>
</tbody>
</table>

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79 This is in terms of the City’s Expanded Social Package, and applies up to a monthly household limit of 15 kilolitres. When the case was launched, the City provided a maximum of 6 kilolitres of FBW per household per month to poor households.

80 As a socialist movement, the APF has historically regarded rights as elite-serving. See for example Dugard in Handmaker and Berkhout (eds.), note 51 above, pp. 87-88.
Regarding Joseph, it has not been possible to implement the Constitutional Court’s order for the reconnection of electricity. This is despite follow-up by the legal team (as required in the APR’s seventh litigation criterion) although the APR authors would have predicted such difficulties given their emphasis elsewhere on the importance of pre-judgment social mobilisation for enforcement. Nonetheless, there has been significant impact. Access to electricity has been defined as a rights-issue, a new right to municipal services has been created, assumedly with all the administrative justice protections of public services, and a precedent has been created to challenge subsequent electricity disconnection cases, starting with Chiawelo. Moreover, Joseph publicised systemic problems with the City’s billing, thereby raising awareness of the links between service delivery and municipal governance. There has also been a wide-reaching material change in that the City of Johannesburg can no longer disconnect tenants’ electricity supply without notice. These effects are represented in Table 4.

<table>
<thead>
<tr>
<th>Judicial process</th>
<th>Legal mobilisation process</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Enabling</strong></td>
<td>None</td>
</tr>
<tr>
<td>• Publicised systemic problems in municipal governance relating to credit control;</td>
<td></td>
</tr>
<tr>
<td>• Defined electricity as a rights issue;</td>
<td></td>
</tr>
<tr>
<td>• Created new right to municipal basic services;</td>
<td></td>
</tr>
<tr>
<td>• Created a precedent for litigating other electricity disconnection cases.</td>
<td></td>
</tr>
<tr>
<td><strong>Material</strong></td>
<td>None</td>
</tr>
<tr>
<td>• City bylaws changed to remove ability to disconnect tenant’s electricity supply without notice;</td>
<td></td>
</tr>
<tr>
<td>• Created a right to electricity.</td>
<td></td>
</tr>
</tbody>
</table>

From these analyses, it is evident that both the judicial outcomes and the impact of Mazibuko and Joseph have had a life of their own way beyond the criteria established in the APR. This suggests not only that a ‘losing’ case may resonate positively in terms of rights discourse and mobilisation but also that it may be overly restrictive to pursue a preconceived set of criteria when ‘choosing’ which cases to take up. This is especially the case where such criteria limit their frame of impact to the implementation of judicial orders. In Mazibuko, despite the judicial defeat, legal mobilisation has ensured approximately the same advances in access to water as expected from the case itself. In Joseph, despite the judicial win, the reconnection of electricity to the building has not been possible due to extensive damage caused in the interim.

V A RESPONSIVE MODEL

The cases analysed in this article indicate that litigation is unpredictable but that, especially when linked to legal mobilisation, it has the potential for diverse and reverberating impact. We do not yet suggest another formula for public interest litigation. Inevitably, litigation is always context-specific and judicial outcome is hard to predict. This makes us somewhat suspicious about the manner in which the Atlantic Philanthropies used the TAC case as a model for all its recommendations on litigation-related strategy. The APR follows a classical approach of pitting Grootboom against TAC, which correlates the higher impact

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81 Chiawelo (note 35 above).
in the latter with its superior socio-legal mobilisation. Putting aside the question of *Grootboom*’s impact,\(^{82}\) it is not always clear though that this strategy is realistic or necessary. It may even blind us to alternatives or condition courts to presume that all future cases, particularly those concerning positive obligations, will resemble such a case and strategy. In other words, the TAC model may represent the ‘Rolls Royce’ of litigation strategy but may not always be affordable, practical, necessary or even desirable.

In our view, that there are four main dangers in blindly applying such a model. The first is that it blinkers donors and lawyers to the remarkable contributions that the ‘local’ and ‘unorganised’ – the subaltern - can make out of dire circumstances. The TAC and APR model presumes that sophisticated and coordinated national political advocacy can precede litigation. In many cases, particularly those at the local or provincial level, this may simply not be possible. Many socio-economic rights are realised through local and provincial governments and their policies and strategic alliances may be more difficult to form across class or location. This is partly acknowledged by the APR authors in their discussion of the *Grootboom* case.\(^{83}\) But the authors overlook the other side of the coin - the remarkable impacts of the housing and evictions rights cases from a comparative analysis. Poor and small communities with minimal legal support and funding have been able to not only achieve victories in the Constitutional Court but in a significant number of cases they have successfully resisted eviction, improved their housing situation (and that of surrounding communities), reformed national policy and legislation and forced local municipalities to develop innovative and replicable housing policies and practices.\(^{84}\) Small interventions in such cases – such as *amicus curiae* briefs or professional representation – have often helped the case leverage a greater level of impact. Ideally, these cases could be planned in advance but they are usually prompted by the immediacy of forced eviction or other violations. There is consequently a strong motivation to using all possible tactics, including the full range of legal strategies, in order to prevent eviction. Thus, a public interest litigation model that is more responsive to these cases and helps them utilise the energy of the struggle to garner wider social change could and should be supported.

The second is that ‘public interest litigation’ doesn’t necessarily need to start with a case. It can start with a judgment. This has been the experience of some major cases in India (right to food) and Colombia (rights of internally displaced persons). In both cases, there was little social mobilisation or information sharing across coalitions in the lead-up the decision. However, the judgments helped stimulate country-wide social mobilisation and public interest litigation in order to ensure enforcement.\(^{85}\) This was partly helped in these cases but the supervisory orders of the courts but part of the mobilisation and post-judgment litigation went beyond this. Thus, one needs to imagine (and fund) socio-legal strategies in the court arena that may begin at this point. *Joseph* is a case in point. The strategy disobeyed all the APR litigation rules but created a significant judicial victory. The lack of a social movement and broader legal

\(^{82}\) Langford argues that the impact of *Grootboom* has been seriously undervalued in terms of its material impacts in housing policy and delivery of services to informal settlements and symbolic perceptions due to the recognition of residents of urban informal settlements as rights-holders. Moreover, the Grootboom community has now secured permanent housing, which appears to be earlier than originally planned. See M Langford, ‘Housing Rights Strategies: Grootboom and Beyond’, in M. Langford et al. (eds.), *Symbols or Substance* note 36 above. However, Budlender and Marcus do provide a more in-depth analysis of the impact of the *Grootboom* judgment than many other commentators and provide important insights into its origins.

\(^{83}\) APR (note 4 above) pp. 43-67.

\(^{84}\) See Langford (note 82 above) for a full discussion of seven forced eviction cases where the majority produced these wider effects.

coalition or community supporting the case could be overcome if NGOs and social movements were more ready to capitalise on, and to respond to, these sudden opportunities.

The third is that, while we and the APR authors have championed the importance of social mobilisation, it is not always necessary and may even be harmful. High-profile campaigns may be less helpful if the litigants have been victims of deeply held community prejudices. In such situations, for example regarding migrants’ access to socio-economic rights, the quiet nature of court proceedings may allow such individuals to assert their rights and permit indecisive and electorate-conscious governments to defer to the courts in order to make unpopular decisions.

The fourth is that pursuit of the TAC model can distract attention from ensuring judicial and court reform to ensure that the supply-side of litigation can work more effectively. Bruce Wilson has demonstrated how the Constitutional Court in Costa Rica has helped engineer remarkable social change through its judgments in the almost complete absence of organised civil society. The reason for this is found in the flexible procedures for accessing the court, the ability to access immediate orders and the court’s own unrelenting follow-up procedures. While it is not conceivable that South Africa could or should follow the Costa Rica model, lessons can be learnt in ensuring that courts are more responsive, particularly in rural and poorer areas. The APR does acknowledge the extreme difficulty of social mobilisation for litigation in rural areas (noting the rise and fall of social movements) and the creative Nkuzi case which successful a right to legal aid in rural eviction cases (and was partly implemented). However, the rules of the game in rural areas have not necessarily changed with the advent of some legal aid support – commercial farmers are more adept at using the legal procedures. Thus, policy (and litigation) strategies could be more focused on ensuring that courts are more responsive to litigants, wherever they find themselves, with or without a social movement.

VI CONCLUSION

In 1995, the first year of democratic rule in South Africa, Rick Abel noted that “law has been a terrain of political contestation throughout South African history” and rhetorically asked: “is the law, like war, merely politics by other means?” Writing in 2011, seventeen years after the advent of democracy, but in one of the most unequal societies in the world, we find Abel’s comment and question to be just as relevant. Under apartheid jurisprudential debates waged about the role of law under an authoritarian regime. Today similar debates are beginning to emerge about the role of rights in the context of extreme social and economic inequality. We believe that rights-based public interest litigation can be a relevant and effective resource in struggles to forge a more equal society. But in order to reveal the real value of rights-based public interest litigation, the frame needs to be widened to take many more factors into account than dealt with in the model as epitomised by the APR.

The above examination of Mazibuko and Joseph indicated the complexity of the causal connection between public interest litigation and both successful judicial outcome and maximal social impact. Regarding successful judicial outcome, while various factors are relevant in specific cases (particularly retrospectively), the litigation process is too unpredictable to rely on any pre-conceived formula. As
Mazibuko has shown, you can tick all the conventional boxes and still lose in court. Or, as Joseph has shown, you can sometimes win in court without ticking all the boxes.

This is not to imply that there are not better or worse ways to do public interest litigation. Clearly, the more immersed in the area you are litigating, the better. As with any kind of litigation, this includes conducting ongoing research, coordinating with stakeholders and learning from being a repeat player. In this respect, there is mounting evidence that civic action requires long-term strategic thinking based on thorough contextual and structural analyses. However, as evidenced in Mazibuko, such factors might not be enough to ensure a successful judicial outcome. Judicial outcome depends ultimately on the judges themselves. In this regard, studying trends and patterns might offer some clues as to how judges might adjudicate. However, in the case of the South African Constitutional Court, particularly in relation to socio-economic rights claims such as those pursued in Mazibuko and Joseph, the Court’s jurisprudence is still too sparse and inconclusive to provide concrete direction.

Regarding impact, litigation’s enabling effects can be just as important, or more so, than the material effects, regardless of the judicial outcome. As noted by Michael McCann, although litigation campaigns “do not translate automatically into the social change desired, they can help redefine the terms of the dispute among social groups, both in the short-term and the long-term”. This politicising effect of public interest litigation can alter the perceptions of different social actors in government, media and society, which, over time, can lead to profound social change. In Rodriguez-Garavito’s words:

All of this implies that, even when judges’ holdings are contrary to the positions of those promoting social change, judicial [and linked mobilisation] processes can nonetheless generate transformative effects by increasing visibility of the problem in the media or by creating lasting bonds between activist organisations. These alliances can outlast the decision and lead to collective political actions that promote the same cause in context other than the courtroom...

And we have argued that the TAC model behind the APR criteria needs to be critically examined. While it is a highly desirous model, a ‘Rolls Royce’ of sorts, equal attention should be given to other ‘responsive’ forms of public interest litigation and advocacy. Especially those actions which enable speedy and strategic responses to litigation initiated by ‘disparate’ individuals and communities, follow up ‘other litigant’s’ judgments with socio-legal mobilisation and work towards a more responsive court system that can more axiomatically spur individual justice and broader social change should receive such attention.

In the final analysis, the closed system of legal logic proposed by the APR model is too limited to either account for judicial decisions or to capture the full role and impact of public interest litigation. The implication for public interest lawyers is that they, too, need to take more, rather than less, into account when making strategic choices about litigating. This is because litigation, especially when anchored in social mobilisation, has far more potential than merely realising material changes. As acknowledged by social movement theory, the impact of collective action is as much about influencing the climate of ideas

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91 Between 1995 and 2008 there were only six socio-economic rights judgments. Between 2008 and 2009, there was a spurt of socio-economic rights judgments, with six judgments handed down prior to four judges retiring in October 2009. These two “waves” of socio-economic rights adjudication have been analysed by S Wilson and J Dugard, in M Langford et al. (eds.) Symbols or Substance note 36 above.
92 McCann (note 69 above) p. 283.
93 Rodriguez-Garavito (note 70 above) p. 3.