

**CLASS ACTIONS AS A MEANS OF ENHANCING
ACCESS TO JUSTICE IN SOUTH AFRICA**

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ABSTRACT

21 years into democracy South Africa is marked by starkly contrasting experiences in the lives of its citizens. For some few, theirs remains a society defined by opulence and social, economic and political entitlements that accompany it. For a few beneficiaries, democracy has brought with it remarkable changes which have translated through their lives in economic, political and social empowerment and wellbeing. Accompanying these changes has been the establishment and importantly, the enhancement of access to modern political and legal democratic and participatory institutions of governance for these citizens. And yet, for the remaining majority of South Africans, their experience is marked by social and economic deprivation, poverty and vulnerability. These latter experiences are attributable to the historical legacy of colonialism and apartheid which continues to present itself in the form of persistent poverty and inequality in a 'new South Africa.' It is within this new South Africa, that this deprivation is further exacerbated by an increasingly unaccountable and unresponsive government 'at war with its citizens.' Service delivery protests, then have become a (if not the) way in which the poor and vulnerable get together as a collective, to try and take on the government in way they know how within their means, on deprivations of housing, electricity, water, sanitation, social assistance, healthcare and education. Finding an alternative legal means, whereby poor and vulnerable people themselves, may address these challenges is in the purpose of this thesis. However, the emphasis is not on addressing the plight of vulnerable groups through dependency from outside help, but on finding a means in which the agency (albeit constrained) of people to address their own concerns is recognised. The work investigates how law can enhance the collective agency of poor people to change their socio-economic circumstances. In particular I investigate how the class action, a legal device which can enable people to come together collectively as a class in litigation for the enforcement of their rights of access to housing, electricity, water, sanitation, social assistance, healthcare and education, can achieve this. I provide recommendations on legal reform on how best access to courts can be made easier through the removal of barriers for impoverished communities to collectively enforce their socio-economic rights. I position the Regulation of Gatherings Act, a legislation which is aimed at affording legal protection to protest action, as a as accessible gateway into towards class litigation.

“Class struggles seem to have metamorphosed into class actions”

D Davis and M le Roux

Precedent & Possibility: The (Ab)use of Law in South Africa (2009) Juta & Co. Ltd: Cape Town

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I grew up in the now famous township of Sharpeville, during the politically volatile transitional period of the late 1980s and early 1990s. The earlier 21 March 1960, Sharpeville massacre, etched this township into the world's public memory, over the outrage of the then government's mass murder of anti-apartheid protestors at the height of the resistance movement. The continuing uprisings, protests and massacres of the 1980s and 1990s, in this area resulted in army invasions, led to further international condemnation of South Africa, and almost caused the irretrievable breakdown of the national democratic negotiations. During this period, the exclusion of black African children from the so-called 'white schools' in the Vaal area deemed my skin colour an automatic disqualification for admission. My mother, a persistent and resilient single parent and teacher in Sharpeville, asserted my pre-constitutional right to a decent education, by relentlessly petitioning the South African Catholic Church's educational administration. Due to her efforts, I gained entrance in 1991 to an independent, Sancta Maria Convent School, in Vanderbijlpark. In his book entitled *They're Burning the Churches*,¹ Patrick Noonan, an Irish Franciscan Catholic priest, teacher, political activist, author and family friend, documents in one of his chapters the then governmental pressure earlier placed on Sancta Maria due to its 'liberal' admission policy. Against the background of flaming Sharpeville uprisings and protest action,² it was both at Sancta Maria and from observing him in awe from his pulpit on Sundays in Sharpeville, that I experienced Noonan. I had my unorthodox encounter with what he aptly describes in his book as the "spirituality of justice and peace."³ A fiery prophetic voice, of an ordinary spokesman on behalf of a defiant "God of surprises."⁴ It had been foretold that ordinary people would stand up for themselves and demand justice and peace as a right. Justice and peace were necessary to heal and advance my society. The harsh public and private realities of the apartheid regime, and the subsequent negotiations towards constitutional democracy during this difficult period, demonstrated the contrasting powers of the law. The law can be an instrument for oppression or social change for those who wield it. I was determined to become a lawyer for social change.

¹ Documents his personal experiences of his time and role in the anti-apartheid struggles in the Vaal: P Noonan "*They're Burning the Churches*" (2003).

² Historians and political analysts refer to this as the 'Reef Violence.'

³ Noonan "*They're Burning the Churches*" dedication page.

⁴ Noonan "*They're Burning the Churches*" 307.

Having stated the inspiration behind this thesis, it is befitting that I dedicate this achievement to my mother and teacher, Makhoro Elizabeth Marumo. I am thankful for having been blessed by her deeply resilient spirit, unconditional love, patience and her abundant source of inspiration. There has never been a day in my life, in which I have not been guided by, prayed for, encouraged, and celebrated by this remarkable lady. She is indeed a strong, strong steady rose. I have learnt everything I know about humanity and humility from her, and hope to be a better human being as I progress on my life's path.

In acknowledging my indebtedness for the benefit I have derived from the remarkable lives lived in the pursuit of freedom, I salute the valiant liberation giants of early black South African lawyers: Pixley Seme, Kaizana Oliver Reginald Tambo, Rolihlala Nelson Mandela, Dumasile Pearce Philemon Nokwe, Mokgonane Godfrey Pitje, Mlungisi Griffiths Mxenge and Nonyamezelo Victoria Mxenge. My early childhood curriculum involved learning about the triumphant tales of these extraordinary, yet almost mythical, legends of Africa. In dedicating their lives to the fight for the recognition of the rights of a people denied their humanity, they un-gated the law, entered it, occupied it, restructured it, corrected it, all the while refusing to be defined by laws that refused to recognise them. They ennobled the practice of law, made it universal and gave it a voice for future generations of lawyers, such as myself. Their heroism is a reminder that the world need not be taken nor left, as it was found. With this thesis, I venerate their valour.

A very special acknowledgement of gratitude goes to the Dean of the Faculty of Law, my undergraduate law lecturer, former colleague, intellectual mentor, supervisor for this thesis and friend, Dr Rosaan Kruger. She inspired my initial interest in constitutional class litigation years ago, and patiently nurtured it until it found form during our proposal drafting stage. With the writing of this thesis ours became a sacred intellectual space, a meeting of the minds, in which we could freely argue and persuade each other, knowing that our work was important toward the advancement of our constitutional democracy. This thesis has been enriched by her sharp and meticulous mind that required nothing less from me, but my absolute best.

Professor Enyinna Nwauche entered my life early in 2014, like a quiet thought enters the mind. Since then, his faith in me has always been immutably perfect, so perfect that, it dismissed any imperfect self-doubt throughout this writing process. In the presence of his friendship and love, I am an esteemed gentleman, a little more smarter and a little more capable. I relied on his perfect faith, so much, that it became my own. I thank him for giving me the language of confidence with which to articulate the power of my ideas. I will forever remain his “Shining Star.”

Professor Laurence Juma makes African intelligence and development truly international. He has, to borrow from the words of the great African academic and humanist Professor Es'kia Mphahlele, ‘affirmed Afrika.’ I thank him for his wise counsel and consistent confidence in me, that I indeed can achieve anything.

I am unable to enumerate the ways in which the young Dr Emmanuel Simo Mayeza has inspired me. An attempt would be nothing less than a futile summation of the splendour of his being. I thank him for continuously sharing his ‘big brain’ with me as we intellectually cross-crossed and traversed the universe. I thank him for walking this journey with me and for being my samaritan, whose faith in me generously quenched my thirst for inspiration, especially when the journey took me across the desert.

The intellectual challenges which Ms Brahmi Padayachi issued to me, inspired me to transform my study of law and to make it anew in a language that purposively asks again the unanswered questions of our past, thinks about the challenging questions of our present, and contemplates the better questions for our future. I thank her for being the ‘ideological defendant,’ who tested with fierce and sharp intellect, the strength of my arguments in the process of writing the thesis.

I returned to the Rhodes University Faculty of Law as an Andrew W. Mellon Scholar and lecturer from 2014 to 2015. I am indebted to my final year and penultimate year LLB students for affording me the generous credit, gift, responsibility and privilege of their minds and imagination. These extraordinary young men and women have inspired me to believe that with our collective imagination we have the authority to build a stairway to stars and to take all of humanity with us. They are our present courageous hope for the future. They have demonstrated their courage, by marching on their own two feet, asserting their post-constitutional democratic right to a decent

education. Their courage is of those who struggle on their own two feet, stumbling towards the sky, and rising again, determined.

If the arguments which I have made in this thesis do spark interest, debate or deliberation, then the work which I have put into this endeavour would have been worthwhile and well rewarded. In reading this thesis it is my hope that the reader is made to wonder about our world, but also to be freed from wonder. Because it is only in daring to think beyond our present circumstances that we capacitate ourselves, by affording ourselves, the gift of freedom (to change our reality) founded on the knowledge of the present necessity.

Above all, I thank my 'God of surprises,' who remains unyielding in His strength.

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Supreme Court Act 59 of 1959

Water Services Act 108 of 1997

ABBREVIATIONS

A	Appellate Division
ABM	<i>Abahlali Base Mjondolo</i>
AC	Appeal Court
AD	Appellate Division
AIR	All India Reports
APF	Anti-Privatisation Forum
AJ	Acting Judge
ALL SA	All South African Law Reports
ALS	Association of Law Societies
ANC	African National Congress
ARV	Anti-retroviral Treatment
Asgi-SA	Accelerated and Shared Growth Initiative for South Africa
C	Cape of Good Hope Provincial Division Law Reports
C.A.	Recueils de jurisprudence du Quebec, Cou r'appel
CAE	Centre for Adult Education
CALS	University of the Witwatersrand Centre for Applied Legal Studies
CAWP	Coalition Against Water Privatisation
CC	Constitutional Court
CCF	Concerned Citizens Forum
<i>CILSA</i>	Comparative and International Law Journal of Southern Africa
CJ	Chief Justice
COHRE	Centre on Housing Rights and Evictions
COSATU	Congress of South African Trade Unions
Co. Ltd	Limited Company
CPD	Cape Provincial Division
D	Durban and Coast Local Division (SA)
DBE	Department of Basic Education
DP	Democratic Party

DPME	South African Government's Department of Performance and Monitoring and Evaluation
E	Eastern Cape Provincial Division
Ex	Exchequer Division Law Reports
(Edms) Bpk	Private Limited Company (SA)
FBE	Free Basic Electricity Policy
FBS	Free Basic Sanitation Policy
FBW	Free Basic Water Policy
FXI	Freedom of Expression institute
ed	Edition; or Editor
eds	Editors
<i>et al</i>	and others
GEAR	Growth, Employment, and Redistribution Strategy
GN	Government Notice
J	Judge; or Justice
JA	Appeal Court Judge
JMPD	Johannesburg Metropolitan Police Department
LJ	Law Journal Reports
LLM	Master of Laws
LRC	Legal Resources Centre
MCC	Maqhaleng Concerned Citizens
MPNP	Multi-Party Negotiating Process
NP	National Party
O	Orange Free State Provincial Division Law Reports
OFWCC	Orange Farm Water Crisis Committee
OGA	Operation <i>Gcin'Amanzi</i>
OLRC	Ontario Law Reform Commission
ONT.	Ontario
OPD	Orange Free State Provincial Division
P	President (of the Constitutional Court)
para	Paragraph

paras	Paragraphs
PHD	Doctor of Philosophy
PPM	Pre-payment Water Meter
(Prop) Ltd	Private Limited Company (SA)
(Pty) Ltd	Private Limited Company (SA)
RCAG	Rail Commuter Action Group
RDP	Reconstruction and Development Programme
SA	South African Law Reports
SACP	South African Communist Party
<i>SAJHR</i>	South African Journal on Human Rights
SALC	South African Law Commission
<i>SALJ</i>	South African Law Journal
SAMWU	South African Municipal Worker's Union
SATAWU	South African Transport and Allied Workers Union
SC	Decision of the Supreme Court or Cape Supreme Court Reports
S.C.	Supreme Court
SCJ	Supreme Court Justice
S.C.R	Canada Law Reports, Supreme Court of Canada
SCA	Supreme Court of Appeal
SECC	Soweto Electricity Crisis Committee
<i>Stell LR</i>	Stellenbosch Law Review
T	Transvaal Provincial Division
t/a	Trading As
TB	Tuberculosis
TCC	Thembelihle Crisis Committee
<i>THRHR</i>	<i>Tydskrif vir Hedendaagse Romeins Hollandse-Reg</i>
<i>TLC</i>	Transitional Local Council
TPD	Transvaal Provincial Division Reports
TS	Transvaal Supreme Court Reports
<i>TSAR</i>	<i>Tydskrif vir die Suid-Afrikaanse Reg</i>
<i>Tul. J Int'l & Comp.L</i>	Tulane Journal of International and Comparative Law

USA/US	United States of America
W	Witwatersrand Local Division Law Reports
WCC	Westville Correctional Centre
WCAEC	Western-Cape Anti-Eviction Campaign
WLD	Witwatersrand Local Division Law Reports
WLR	Weekly Law Reports
ZAWCHC	Western Cape High Court

CHAPTER 1

INTRODUCTION

1.1 FICTITIOUS ACCOUNT OF THE EVENTS PRECEDING THE LITIGATION IN THE MATTER THAT HAS BEEN REPORTED AS *MAZIBUKO V CITY OF JOHANNESBURG*¹

Imagine that it is 8 o'clock on the morning of Wednesday, 17 March 2004. Ms Lindiwe Mazibuko, a single mother, living on a small property with 20 other people, hears a person knocking on the door of her house situated in Block B, Phiri, Soweto. She opens the door, to find a gentleman at her doorstep. Her first identification of him is that he is an official from the City of Johannesburg Metropolitan Municipality (Municipality), because his formal shirt bears the official municipal emblem. Mr Thomas Dlamini² introduces himself as the Municipality's community facilitator. He informs Ms Mazibuko that he would like to speak to her for a few minutes. Ms Mazibuko invites Mr Dlamini to take a seat in the living room.³

Mr Dlamini informs Ms Mazibuko that her water supply is "old and rusty"⁴ and that the Municipality is going to replace the old pipes with new ones. He hands Ms Mazibuko a later dated 24 February 2004, entitled "Decommissioning of the old secondary mid-block water supply system,"⁵ (which does not say anything about installing pre-payment water metres (PPMs)).⁶ Mr Dlamini then departs.

¹ *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W); *City of Johannesburg v Mazibuko* 2009 (3) SA 592 (SCA); *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

² Fictitious name.

³ *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) (Supreme Court of Appeal Case Number 489/08: Application for leave to appeal): Applicants' Founding Affidavit para 80.

⁴ *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) (Supreme Court of Appeal Case Number 489/08: Application for leave to appeal): Applicants' Founding Affidavit para 80; *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) para 16.

⁵ *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) (Supreme Court of Appeal Case Number 489/08: Application for leave to appeal): Applicants' Founding Affidavit para 80.

⁶ *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) (Supreme Court of Appeal Case Number 489/08: Application for leave to appeal): Applicants' Founding Affidavit para 80.

Later that same day, Ms Mazibuko is alerted when she hears construction work being undertaken outside her house. She first looks through the window of her living room, and alarmed she goes outside to find municipal workmen digging trenches. Shocked, she asks what is happening, only to be summarily informed that they are digging trenches to install PPMs.⁷ She has never before heard of PPMs and asks the workmen to explain what they are. They briefly advise her about PPMs, their purpose and functioning. She is also informed that her household will from now receive a limited amount of free water and the rest she will have to purchase and load onto the PPM to be installed. Ms Mazibuko retorts that she would never accept a PPM and angrily demands the workmen to tell Mr Dlamini that she will not allow this to happen.

Less than two weeks later, on 30 March 2004, without notification, warning nor consultation, the Mazibuko household's water supply is abruptly disconnected. A similar course of events takes place across her neighbours' homes and the rest of Phiri households.⁸

After the first few days without water, Ms Mazibuko consults her neighbours who have also had similar encounters. In the ensuing weeks without water, frustrated residents of Phiri express their mounting anger at the installation of PPMs and water disconnections, at various informal street, block, church and general community meetings. At these meetings, the community resolves to go to the offices of the Municipality to request an urgent meeting with the Municipal Mayor, Mr Amos Masondo.⁹ Failing such meeting, they conclude that they will embark on a protest action against the Municipality to demand the removal of PPMs and the provision of water. The residents of Phiri decide at these meetings that Ms Mazibuko, Ms Grace Munyai, Ms Jennifer Makoatsane, Ms Sophia Malemute, and Mr Vuzimuzi Paki,¹⁰ will go to the Municipal offices in Johannesburg to demand a meeting with Mr Masondo, on their behalf in order to make these demands known to Mr Masondo.

⁷ South African History Archive "APF: Water" <http://www.saha.org.za/apf/water.htm> (accessed on 15 September 2015).

⁸ *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) (Supreme Court of Appeal Case Number 489/08: Application for leave to appeal): Applicants' Founding Affidavit para 81; *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W) para 121.

⁹ This is the actual name of the Mayor of the City of Johannesburg Metropolitan Municipality at the time of the class action: para 4.5.1.

¹⁰ These are the names of the five applicants in the litigation who acted on their own behalf and on behalf of the community: *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W); *City of Johannesburg v Mazibuko* 2009 (3) SA 592 (SCA); *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

Ms Mazibuko, Ms Munyai, Ms Makoatsane, Ms Malemute and Mr Paki attend at the offices of the Municipality, only to be informed by Mr Dlamini that a meeting with the Mayor will not be possible. They then inform Mr Dlamini that the community has no other option but to embark on a protest action against the Municipality's decision to install PPMs and disconnect their water supply. In the course of their protest they will deliver a petition to the Mayor demanding for their water services to be reconnected and for the removal of PPMs. With the protest they intend to show the Municipality that they are seriously aggrieved and frustrated, with the hope that this will exert enough pressure, thereby forcing the Municipality to remove PPMs, stop the disconnection of water services and provide adequate services.

Why did Ms Mazibuko and her community resort to protest action as the only means of getting the attention of the Municipality, when they live in a democracy with a Constitution that allows for the enforcement of right of access to water through litigation?

1.2 MS MAZIBUKO AND HER COMMUNITY: A MICROCOSM OF THE SOUTH AFRICAN SOCIO-ECONOMIC REALITY

What the circumstances of Ms Mazibuko and her community show is that poverty means more than material deprivation. Poverty, in its relation to access to justice, is the absence of social factors that enable the poor as independent agents to exercise legal rights to better their lives.¹¹ These social factors which obstruct the agency of poor people to access to justice include ignorance of socio-economic rights,¹² the law and courts in general,¹³ and illiteracy.¹⁴ Added to these barriers are the geographical accessibility of courts,¹⁵ high costs of litigation,¹⁶ and fear of the judicial process.¹⁷

¹¹JC Mubangizi "Know Your Rights: Exploring the Connections Between Human Rights and Poverty Reduction with Specific Reference to South Africa" (2005) 21 *SAJHR* 33 at 33 and 34; M Nyenti "Access to Justice in the South African Social Security System: Towards a Conceptual Approach" (2013) *De Jure* 901 at 912-913.

¹² Mubangizi 2005 *SAJHR* 44; See also Statistics South Africa "Census 2011 Statistical Release - P0301.4" (2012) <http://www.statssa.gov.za/Publications/P030142011.pdf> (accessed 22 October 2014) 42, 50 and 51; Nyenti 2013 *De Jure* 914.

¹³ Mubangizi 2005 *SAJHR* 44; Nyenti 2013 *De Jure* 914.

¹⁴ Statistics "Census 2011" 33 and 34.

¹⁵ Nyenti 2013 *De Jure* 913-914.

¹⁶ HJ Erasmus "Cost and Fee Allocation in Civil Procedure Republic of South Africa" (2009) http://www-personal.umich.edu/~purzel/national_reports/South%20Africa.pdf 13 and 14 (accessed on 1 July 2013); M Ebadolahi "Notes: Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa" (2008) 83 *New York University Law Review* 1565 at 1567; Nyenti 2013 *De Jure* 913.

¹⁷ Loots "Standing to Enforce Fundamental Rights" (1991) 1 *SAJHR* 49.

South Africa's socio-economic context shows that due to lack of access to courts, many communities like Phiri, who have been marginalised by their socio-economic realities, often resort to protest as a means of expressing their socio-economic grievances. The common issues articulated against the government in these protests arise from deprivations of housing, electricity, water, social assistance, healthcare and education.¹⁸ Protests are therefore in essence a means by which the voiceless poor and vulnerable forcefully seek to be heard by a government that ignores them.¹⁹ The Constitution recognises protests as being part of a participative democracy, whereby protest action is an exercise of the right to freedom of assembly. The Regulation of Gatherings Act²⁰ (RGA) provides a legal framework for the exercise of this right. However, without legal knowledge Ms Mazibuko and her fellow community members also do not know about their right to freedom of assembly and consequently the RGA.²¹

In any event, voicing socio-economic demands through protests, whether or not in terms of the RGA against government, however, would serve a limited purpose for Ms Mazibuko and her community. Protests rather seldom, if ever, yield legally enforceable socio-economic outcomes that improve the lives of vulnerable communities. She and others in a similar position, will remain ignored without means of holding the Municipality legally accountable to its constitutional obligations of socio-economic service delivery.²² To overcome this lack of enforceability, I contend that where the demands of the poverty stricken have a legal basis that entitle them to approach a court to provide appropriate relief, class actions may provide a more efficient way to realise these rights by holding government to account for its fulfilment of socio-economic rights. It is for this reason that this thesis concerns itself with the enforcement of socio-economic rights through class actions. This is explicitly provided for in section 38(c) of the Constitution. However, class actions primarily concerned with the enforcement of common law or statutory rights will also be considered in so far as they affect constitutional rights. It will shown that both constitutional and other class actions raise constitutional considerations of access to courts, as protected in section 34 of the Constitution.²³ Class actions will utilise the same collective voice of the group that fuels mass

¹⁸ J Dugard and K Tissington "Civil Society and Protest in South Africa: A View from 2012" <http://socs.civicus.org/?p=3875> (accessed 1 July 2014).

¹⁹ P Alexander "Rebellion of the Poor: South Africa's Service Delivery Protests - A Preliminary analysis" (2010) 37 *Review of African Political Economy* 37.

²⁰ Act 205 of 1993.

²¹ See paragraph 5.5.

²² Alexander 2010 *Review of African Political Economy* 37.

²³ *Children's Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) para 19.

protest. By unifying all those affected in a single action, class actions like protest actions against government, have as their objective, the rendering of the systemic nature of violations publicly visible.²⁴ The power with a class action however, compared to a service delivery protest lies in the legal enforceability of the rights-based claim.²⁵ On this point Cameron JA, as he then was, in *Ngxuza*,²⁶ concluded that the class action is contextually pattern-made for South Africa. It is suited for communities “who are in a poor position to seek legal redress, either because they don't know enough or because such redress is disproportionately expensive”²⁷ against government “excess, bureaucratic misdirection and unlawful administrative methods.”²⁸ The legal enforceability of rights, provided by the class action for them becomes a “protective and assertive armour.”²⁹ The government when faced with a legal challenge will be compelled to respond, in keeping with its constitutional obligation of accountability and responsiveness.³⁰

I do not propose that class actions will resolve the multidimensional factors that cause service delivery protests, but it may go some way to the fulfilment of the constitutional promise of a better life and access to socio-economic goods. Accordingly, it will be shown that the courts have interpreted class actions as being such legal device and constitutional remedy for poor and vulnerable communities such as the Phiri community, to achieve this constitutional promise.

But how can class actions allow for access to justice for the poor and vulnerable, such as Ms Mazibuko and her community?

In 1994 the Constitution introduced class actions as a procedural legal means of enforcing constitutional rights.³¹ Shortly thereafter, in 1995 the South African Law Reform Commission

²⁴ S Liebenberg “From the Crucible of the Eastern Cape: New Legal Tools for the Poor” (2015) 3 *Speculum Juris* http://www.speculumjuris.co.za/files/pdf/SJ4214FPLiebenberg_27Jan2015.pdf (accessed on 15 March 2015).

²⁵ JS van Wyk *The need and requirements for a class action in South African law with specific reference to the prerequisites for locus standi in iudicio* (LLM Thesis: University of Pretoria 2010) 23-24.

²⁶ *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 (4) SA 1184 (SCA) para 11.

²⁷ *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 (4) SA 1184 (SCA) para 8.

²⁸ *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 (4) SA 1184 (SCA) para 11.

²⁹ *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 (4) SA 1184 (SCA) para 13.

³⁰ Section 1(d) of the Constitution of the Republic of South Africa, 1996; Liebenberg “From the crucible of the Eastern Cape” 3.

³¹ *Ngxuza v Secretary, Department of Welfare, Eastern Cape Provincial Government, Permanent Secretary, Department of Welfare* 2001 (2) SA 609 (E) para 2; *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 (4) SA 1184 (SCA) para 6; *Children's Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) para 14.

prepared a report³² for Parliament in which it proposed the procedures for instituting a class action. Parliament has to date not actioned these recommendations.

There are currently no statutory procedures nor practice directives to facilitate the institution and conducting of class actions. The current South African rules of court similarly do not provide for class actions.³³ Since 1994, judicial precedent has developed incrementally, with different standards and requirements set by different courts at different levels.³⁴

In the absence of legislative structure, the courts have had to resort to the exercise of their inherent jurisdiction in terms of section 173 of the Constitution to accommodate class actions.³⁵ The courts have established that in order to bring a class action, a preliminary application is to be made to court to certify³⁶ the action as such. The recently judicially settled requirements for certification are broadly: class definition, common claim or issue, valid cause of action, suitable representative and appropriateness of procedure.³⁷

Against the background of the requirements as outlined by the courts, I then return to Ms Mazibuko and her community to consider whether it is possible for a community such as this to move its protest from the streets and into a courtroom. To do this, I will go back and outline the transformation of the Phiri community's planned protest into a class action (from which my earlier fictitious account draws). In doing so, I consider the ensuing dialectical relationship between the protest action and the litigation. I examine whether Ms Mazibuko and her community exercised any form of agency in the litigation aimed at enforcing their right of access to water against the Municipality. From my examination, it will be seen that while the remedial power of a class action was demonstrated for the benefit of the Phiri community, Ms Mazibuko and her community exercised very little, if any, agency in 'their' case, pursued by lawyers on their behalf. This absence of agency leads me to re-imagine the case study in a useful way.

³² South African Law Commission Project 88: *The Recognition of Class actions and Public Interest Actions in South African Law* http://www.justice.gov.za/salrc/reports/r_prj88_classact_1998aug.pdf (accessed on 1 June 2013).

³³ *Children's Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) paras 14 and 16; N Kirby "South Africa" in PG Karlsgodt (ed) *World Class Actions: A Guide to Group and Representative Actions Around the Globe* (2012) 378.

³⁴ The case law is discussed in great depth in chapter three.

³⁵ *Children's Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) para 21; *Imraahn Ishmail Mukaddam v Pioneer Food (Pty) Ltd* 2013 (5) SA 89 (CC) para 2.

³⁶ *Children's Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) para 15.

³⁷ *Children's Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) para 23.

I re-imagine the case study without the external assistance offered to the community in order to see how the law can more directly and effectively enhance the capabilities of the community towards the exercise of their agency. For this purpose, I make use of the fictitious account set out at the beginning of this chapter to look at what possibilities there are to facilitate the class action being pursued by Ms Mazibuko as the representative plaintiff. I position the RGA, with its less formal procedural and regulatory framework, as a more accessible gateway for Ms Mazibuko on behalf of her community into the legal system. I apply the provisions of the RGA to the fictitious account and test the viability of three scenarios. In the first scenario, I look at whether the RGA in its current form can effectively enable the community to transform its gathering into a class action. In the second scenario, I focus exclusively on the judicial review provision of the RGA, and how this can be improved to catalyse the formation of a class action in the Magistrate's Court, as the court most accessible to local communities. In the third scenario, I consider whether the introduction of judicial oversight by Magistrates' Courts over the RGA can enable Ms Mazibuko and her community to proactively institute a class action, without first having to embark on a gathering. Having tested these scenarios, I provide recommendations on how the law can facilitate the exercise of legal agency to bring about class actions where protest demands have a basis in law as socio-economic rights claims.

1.3 PROBLEM STATEMENT

There has been limited academic commentary and discussions on class actions in South Africa. While some international scholarly works have addressed class actions in the context of access to justice³⁸ for the poor and vulnerable, very little has been done in South Africa on this aspect. The thesis will explore this dimension in the South African context. This is particularly relevant in light of rising service delivery protests, which raise important questions of access to justice for disempowered groups of South African citizens.

This thesis will tackle the following problems: what is meant by access to justice in South Africa? The thesis explores how access to justice has traditionally been defined in limited terms to mean

³⁸ The promotion of access to justice for the poor is an important consideration in the class action models of the United States of America and Canada: J Kalajdic *Access to Justice for the Masses? A Critical Analysis of Class Actions in Ontario* (LLM Thesis: University of Toronto 2009) 45-98.

access to courts. However, the element of social justice it is argued, means more than access to courts, it means effective access by people to social means by which to achieve wellbeing. It will be argued that people cannot achieve basic standards of wellbeing if as citizens of a democracy, they fail to perceive an injury or identify the cause as a legal wrong. This is coupled with the various economic, geographical, informational and psychological barriers which inhibit access to justice. Access to justice initiatives, therefore, have to confront all these barriers.³⁹

The second question then is, how can class actions potentially promote access to justice for impoverished classes of people? The study will show that class actions have emerged as “an evolutionary response to the existence of injuries unremedied by the regulatory action of the government.”⁴⁰ They have the potential to serve an important access function by affording the potential for voicing peoples’ mass grievances in an orderly fashion within the framework of the law against the government.

How then can class actions respond to the needs of groups of protesting communities on socio-economic demands and who lack the social means by which to access democratic institutions and courts for the attainment of socio-economic wellbeing? This thesis will respond to this problem by exploring how class actions can provide an antidote to the social frustration of that exists when neither courts, nor democratic institutions are inaccessible to groups of people at protest. The idea that class actions could overcome the various barriers to accessing justice, and thus serve an important social remedial function, is at the core of this thesis.

1.4 GOALS OF THE STUDY

This research sets out to achieve the following:

- (a) To examine the extent to which pre-existing collective community protest actions on common socio-economic issues can found a legal basis for certification as a class for purposes of litigation to enforce constitutional rights.

³⁹ Kalajdic *Access to Justice for the Masses?* 45-49.

⁴⁰ Kalajdic *Access to Justice for the Masses?* 45-49.

- (b) To study the initiation, conduct and resolution of class actions, and then evaluate class actions against the objectives of access to justice.
- (c) To expand on the relationship between class actions and section 34 of the Constitution as an extension of the traditional approach to standing and how this can facilitate access to courts.
- (d) To provide recommendations on the structural components of a class action model that responds to group protest demands which have a basis in law as rights claims, and enhances access to courts for poor and vulnerable communities.

1.5 RESEARCH METHODOLOGY

The research has primarily been conducted in the form of qualitative desktop and legal doctrinal approaches. Primary sources such as constitutions, legislation, working papers, rules of court and relevant case law have informed the theoretical basis of the thesis. Secondary sources such as books and academic journals in the fields of constitutionalism, procedural law, sociology, philosophy and politics; academic theses; internet materials; law commission reports and conference papers which have investigated, analysed, critiqued and explained the development of class actions in South Africa have been engaged.

Doctrinal analysis is however limited in measuring the impact and outcomes of class actions. While judicial approaches to certification of class actions are useful in helping to understand the important role of certification as a preliminary stage to accessing courts for poor and vulnerable classes, the few certification decisions do not tell us how class actions were initiated and what influenced lawyers to pursue them. To fill this gap, case studies of the *Mazibuko v City of Johannesburg*⁴¹ and *Linkside v Minister of Education*⁴² were undertaken to better understand the realities and relationships of class members and legal representatives, the barriers and impact on access to justice.

A comparative research methodology on class actions to enhance access to courts for the realisation of socio-economic rights in other jurisdictions has also been conducted. Caselaw, legislation,

⁴¹ *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W); *City of Johannesburg v Mazibuko* 2009 (3) SA 592 (SCA); *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

⁴² Case No: 3844/2013.

academic theses, journal articles and legal texts from the United States of America, Canada, Australia and India have been used.⁴³ The purpose for this has been to analyse the challenges and successes in jurisdictions where the class action and group litigation models facilitate access to courts for the poor and vulnerable.

1.6 STRUCTURE

The thesis has been divided into six chapters. Chapter one serves as an introduction. The second chapter provides a socio-economic overview of South African society and the levels of socio-economic deprivation and poverty in order to contextualise the need for class actions. The chapter concludes that service delivery protests by communities over socio-economic demands cannot provide for legally enforceable outcomes against the government, and that the class action can be a means of legal mobilisation to enhance the collective capabilities of people to achieve outcomes. This is followed in chapter three with a detailed exposition of the development of the “class nature of certain claims”⁴⁴ at common law, how the class action found express recognition in the Constitution, its judicial interpretation and application in the interests of poor and vulnerable groups at protest. The chapter sets out the requirements for certification of a class action in South African law and the remedial power of a class action for communities at protest, with the *Mazibuko*⁴⁵ class action as the prime example. Chapter four carries on from where Ms Mazibuko and her community at protest, translated their protest action into a class action to legally enforce their demands for

⁴³ The Group Litigation Order (GLO) in the United Kingdom has purposively been excluded from this comparative analysis. The reason for this is that the GLO is effectively a case management procedure for large numbers of unitary and individual actions, rather than a representative action of which this study is concerned. “Unlike a representative action, in which the resolution of the claim of the class representative determines the fate of all claims in the class, the GLO is fundamentally a collective of individual cases. It does not have a group representative.” When separate individual claims “give rise to common or related issues of fact or law,” a court can enter a GLO enabling it to manage those claims. The court has a broad discretion regarding the number of claims that can prompt a GLO. It may make a GLO where there are likely to be a number of claims giving rise to similar issues. If there are relatively few claims, the court may find that the claims can be managed without a GLO. In this sense, the GLO cannot provide access to justice for those individuals whose claims are of limited individual quantum and where the litigation cost risk far outweighs the potential value of a successful judgment. There is a Representative Rule (Civil Procedure Rule 19.6) which permits one named claimant or defendant prosecuting or defending an action on his or her behalf and on behalf of a class. The representative acts in his or her own interest and in the interest of the class on a common issue of fact or law. The class is bound by the court’s determination. The Representative Rule is rarely used within the framework of English civil procedure. The actively utilised U.S. and Canadian class action models will thus be the focal point for comparative analysis: L Harbour and J Evans “The United Kingdom” in PG Karlsgodt (ed) *World Class Actions: A Guide to Group and Representative Actions Around the Globe* (2012) 178-179; “Civil Justice Council Report: Improving Access to Justice through Collective Actions” (2008) https://www.ucl.ac.uk/laws/judicial-institute/files/Improving_Access_to_Justice_through_Collective_Actions-final_report.pdf (accessed on 16 March 2016) 32-35 and 85.

⁴⁴ C Plasket “Representative Standing in South African Law” http://globalclassactions.stanford.edu/sites/default/files/documents/south_africa_national_report.pdf (accessed 14 October 2014) 2.

⁴⁵ *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W); *City of Johannesburg v Mazibuko* 2009 (3) SA 592 (SCA); *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

water. This analysis is conducted in the form of a case study. This chapter concludes the case study by finding that whilst benevolent public interest litigation organisations were important in assisting with translating the protest action into a class action, the community did not exercise agency in bringing this about by themselves. This concern regarding the lack of agency is then addressed in chapter five. In this chapter I re-imagine the case study without the legal assistance. I consider how the law and legal process can best enhance the agency of Ms Mazibuko and her community to bring about their own class action. For this purpose, the RGA is positioned as an entry point into the legal system for the Phiri community. Within the framework of the RGA, I focus on the provision made for judicial review by the Magistrates' Court and how this can empower this court to facilitate the uptake of a class action for the administrative review of the Municipality's policy on the delivery of water services. Having considered various possibilities in terms of the RGA, this chapter concludes that judicial oversight may facilitate the proactive uptake of a class action for judicial review.

The concluding chapter six seeks to offer legislative and administrative recommendations on how the RGA can facilitate the proactive uptake of class actions by communities, for judicial review of governmental action by Magistrates' Courts in terms of the Promotion of Administrative Justice Act ⁴⁶(PAJA).

This thesis reflects the law as stated in the sources available to the author as at 21 March 2016.

⁴⁶ Act 3 of 2000.

CHAPTER 2:

SOUTH AFRICA'S SOCIO-ECONOMIC CONTEXT: DEMOCRACY'S DREAM DEFERRED?

“What happens to a dream deferred?

Does it dry up
like a raisin in the sun?
Or fester like a sore -
And then run?
Does it stink like rotten meat?
Or crust and sugar over -
like a syrupy sweet?

Maybe it just sags
like a heavy load.

Or does it explode?”¹

2.1 INTRODUCTION

Post-apartheid South Africa is ranked as an upper-middle-income country,² yet it is recorded to hold one of the highest poverty and inequality rates in the world.³ The 1994 promise laden dream of social justice in the ‘new South Africa’ remains for many, today, a dream deferred. Hughes’ question is apt in the less optimistic socio-economic milieu of South Africa. What happens to the

¹ A poem by Langston Hughes entitled “Harlem (A Dream Deferred)” <http://www.poetryfoundation.org/poem/175884> (accessed 21 October 2014).

² S Liebenberg “Chapter 9: Making a Difference: Human Rights and Development - Reflecting on the South African Experience” in B Andreassen and S Marks (eds) *Development as a Human Right: Legal, Political and Economic Dimensions* 2 ed (2010) 213.

³ South African Government’s Department of Performance and Monitoring and Evaluation’s (DPME) Development Indicators, published in 2012, the DPME when quantifying the relative inequality levels applied amongst others the Gini-coefficient. The Gini-coefficient is a measurement of the extent to which the distribution of income and or consumption expenditure among individuals or households within the economy deviates from a perfectly equal distribution. The Gini-coefficient can range from 0 (no inequality) to 1 (complete inequality). In 2010 South Africa’s Gini-coefficient reflected high levels of inequality at 0.69 and 0.65 for income and expenditure respectively. The World Bank “South Africa” (2014) <http://www.worldbank.org/en/country/southafrica/overview#1> (accessed on 6 June 2014); World Bank’s socio-economic overview of South Africa concluded on 7 April 2014; White Paper on Reconstruction and Development, GN 1954, *Government Gazette* 16085, 23 November 1994, 7; National Planning Commission “National Development Plan: Vision For 2030” (2012) 3 <http://www.npconline.co.za/medialib/downloads/home/NPC%20National%20Development%20Plan%20Vision%202030%20-lo-res.pdf> (accessed on 9 September 2014); M Aliber “Poverty Eradication and Sustainable Development” (2002) 5 *Integrated Rural and Regional Development Research Programme, Occasional Paper 1* <http://www.google.co.za/search?q=Poverty+eradication+and+Sustainable+Development&ie=utf-8&oe=utf-8&aq=t&rls=org.mozilla:en-ZA:official&client=firefox-a&channel=fflb&gferd=cr&ei=3niVU4SnN7DY8geo74HwCQ> (accessed on 9 June 2014); Department of the Presidency: The National Planning Commission “Development Indicators” (2012) 29-30 <http://www.npconline.co.za/pebble.asp?releid=123> (accessed 20 June 2013).

“distant dream”⁴ or “unfulfilled dream”⁵ of a “better life for all”⁶ ? In 1998, President Mbeki, when speculating on the future of South Africa in parliament, paraphrased Hughes, to introduce a debate on reconciliation and nation-building. Mbeki’s focus was on the expectation of poor and vulnerable communities awaiting socio-economic liberation in a ‘new South Africa.’⁷

Five years after Mbeki had addressed parliament on this issue, a spate of country-wide service delivery protests began in 2004.⁸ Service delivery protests are frequently related to communities’ dissatisfaction with government’s socio-economic service delivery. They are furthermore linked to growing dissatisfaction and frustration within communities as they struggle to engage an increasingly unresponsive government,⁹ especially when governmental institutions and courts are inaccessible¹⁰ to them. Whereas participation in formal governmental institutions can, at most, try to get the government to respond to political demands made, service delivery protests, whether held in terms of the law¹¹ or not, cannot yield socio-economic results which can translate in the improvement peoples’ living conditions. Service delivery protests can only publicly ventilate grievances against government, but they cannot hold government legally accountable to its constitutional obligations. In *Mazibuko v City of Johannesburg*,¹² decided in the context of an impoverished community’s service delivery protests for water, Tsoka J emphasised that without the legal means to enforce service delivery protest demands, the enforcement of socio-economic rights

⁴ In *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 2, Yacoob J stated that “the intolerable conditions under which many of our people are still living...brings home the harsh reality that the Constitution’s promise of dignity and equality for all remains for many a distant dream.”

⁵ From Tsoka J’s judgement in *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W) para 160, whereby he stated in the context of the right of access to water, that the denial of socio-economic rights in a democratic South Africa would amount to a denial for people to live a South African dream. Such denial would render the rights contained in the Bill of Rights a distant mirage of an unfulfilled dream.

⁶ From the speech by Mandela announcing the ANC election victory on 2 May 1994. He stated that “a better life for all” meant “creating jobs, building houses, providing education, and bringing peace and security for all.” South African History Online “Towards a People’s History” <http://www.sahistory.org.za/article/speech-nelson-mandela-announcing-anc-election-victory> (accessed on 1 September 2015); MJ Manala “‘A Better Life for All:’ A Reality or a Pipe-Dream? A Black Theology Intervention in Conditions of Poor Service Delivery in the Democratic South Africa” (2011) 109 *Scriptura* 519 at 519.

⁷ M Gevisser *The Dream Deferred: Thabo Mbeki* (2007) xxxi.

⁸ In 2005, Mbeki had brought parliament’s attention to the fact that poor service delivery, in light of the growing protests, would negatively affect the country’s political stability: M Langford “Introduction” in M Langford, B Cousins, J Dugard and T Madlingozi (eds) *Socio-Economic Rights in South Africa: Symbols or Substance?* (2014) 14; FG Netswera and S Kgalane “The Underlying Factors Behind Violent Municipal Service Delivery Protests in South Africa” (2014) 49 *Journal of Public Administration* 261 at 269.

⁹ Socio-economic Rights Institute of South Africa “An Anatomy of Dissent & Repression: The Criminal Justice System and the 2011 Thembelihle Protest” (2014) 7 http://www.seri-sa.org/images/Thembelihle_FINAL_web.pdf (accessed on 28 September 2014).

¹⁰ Socio-Economic Rights Institute of South Africa “An Anatomy of Dissent & Repression” 7.

¹¹ Regulation of Gatherings Act 205 of 1993.

¹² *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W).

will “remain a distant mirage of an unfulfilled dream.”¹³ In this chapter I start by providing an overview of South Africa’s socio-economic realities over the period from 1994 to 2014. I show that the government’s economic policy-making measures to address poverty and inequality on behalf of the poor and vulnerable majority, remove the beneficiaries of these initiatives from participating as active agents in addressing their own poverty and inequality. Service delivery protests, then are a response by the poor and vulnerable on the inadequate results of the reforms which government has sought to undertake on their behalf. The protests are also an assertion of people’s collective potential to exercise their own agency in changing their own socio-economic conditions. While service delivery protests cannot however achieve legally enforceable outcomes against government, I intend to show that they establish fertile ground for collective legal mobilisation in the form of class actions intended to legally enforce responsiveness from government.

In developing this discussion, I consider the rights-based¹⁴ and capabilities¹⁵ approaches to addressing poverty and inequality, which supplement the deficiencies of the government’s economic policies to addressing poverty. In the consideration of poverty then, these approaches move the focus away from numbers and statistics, and onto the quality of human lives.¹⁶ By focusing on human lives, the focus will be on how poor and vulnerable people can improve their lives, through their own collective agency.¹⁷ I begin by looking at the current socio-economic conditions and the effect these have on the lives of South Africans.

2.2 SOUTH AFRICA’S SOCIO-ECONOMIC CONDITION

Chaskalson P, in *Soobramoney v Minister of Health, Kwazulu-Natal*¹⁸ graphically summarised the socio-economic condition of South Africa:¹⁹

¹³ *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W) para 160.

¹⁴ J Boesen and H Sano “Chapter 3: The Implications and Value Added of a Human Rights-Based Approach” in B Andreassen and S Marks (eds) *Development as a Human Right: Legal, Political and Economic Dimensions* 2 ed (2010) 52.

¹⁵ A Sen *The Idea of Justice* (2009) 233.

¹⁶ M Nyenti “Access to Justice in the South African Social Security System: Towards a Conceptual Approach” (2013) *De Jure* 901 at 913.

¹⁷ A Sen *Development as Freedom* (2000) xiii and 3-11.

¹⁸ 1998 (1) SA 765 (CC).

¹⁹ Liebenberg *Development as a Human Right* 212.

“We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.”²⁰

In aiming to address these conditions in accordance with its constitutional obligations, the South African government has been grappling with the challenges of poverty through policy reforms since 1994.

2.2.1 SOCIO-ECONOMIC POLICIES

The national government has sought to address poverty through economic policy making alone, without considering how best to strengthen people’s capabilities to become active agents to get themselves out of their own poverty.²¹ The cornerstone of initial policy making was the 1994 Reconstruction and Development Programme (RDP). It emphasised high sustainable growth and stable macroeconomic reforms. The striking features of the RDP were its quantitative targets which included the provision of food, water, housing, employment, health, and land restitution. Subsequent to the RDP, two further government driven reforms were introduced.²² In 1996, a macro-economic strategy, the Growth, Employment, and Redistribution (GEAR) strategy was adopted to give effect to the RDP.²³ It focused on the economic growth through the promotion of trade and investment. In line with the strategy, in 1998, there was an increase in social spending on health, social welfare payments, housing, and community development.²⁴ In July 2005, the government launched the “Accelerated and Shared Growth Initiative for South Africa”²⁵ (Asgi-SA). Its primary objectives were addressing unemployment and poverty through the improvement of the

²⁰ *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC) para 8.

²¹ Langford *Socio-Economic Rights in South Africa* 6.

²² White Paper on Reconstruction and Development, GN 1954, *Government Gazette* 16085, 23 November 1994, 6-7 and 22-23.

²³ The Republic of South Africa: Department of Finance “Growth, Employment and Redistribution: A Macro-Economic Strategy” (1996) <http://www.treasury.gov.za/publications/other/gear/chapters.pdf> (accessed on 15 September 2014).

²⁴ Langford *Socio-Economic Rights in South Africa* 6-7.

²⁵ The Republic of South Africa: The Presidency “Accelerated and Shared Growth Initiative for South Africa” (2005) http://www.thepresidency.gov.za/electronicreport/downloads/volume_4/business_case_viability/BC1_Research_Material/asgisa.pdf (accessed on 15 September 2014).

country's economy and job creation.²⁶ These policy reforms were government driven for and on behalf of the poor and vulnerable majority of South Africans, without their participative involvement in their formulation.

In light of these socio-economic policies the reality is that inequality and poverty stubbornly persist for the majority of 51.8 million South African citizens.²⁷

2.2.2 SOCIO-ECONOMIC REALITIES²⁸

The citizenry is made up of the following percentages of population groups nationally: 79.2% black; 8.9% coloured; 2.5% Indian/Asian; 8.9% white; and 0.5% others.²⁹ According to the latest 2011 statistics: 26.3% of the national population was living below the R305 per month national poverty line; 38.9% below the R416 per month; and 52.3% below the R577 per month.³⁰ One of the most glaring indicators of the weak socio-economic progress is unemployment.³¹ At June 2014, the national unemployment rate of persons between the ages of 15 to 64 stood at approximately 25.5%.³² The following were the rates of unemployed persons in the following population groups between the ages of 15 and 64: 28.3% black; 25.3% coloured; 12.1% Indian/Asian; and 8.1% white.³³ Unemployment is accompanied by demographically stratified income and asset levels. In 2011, the average annual household income disparities by population group were as follows: R60 613 black; R112 172 coloured; R251 541 Indian/Asian; and R365 134 white.³⁴ With regard to assets, there has been an increase in the distribution of capital through black economic empowerment policies, but the dominance of white minority capital remains overwhelming. Efforts to ensure that redistribution is broad-based and not only for the benefit of a few black Africans are only recent. With regard to land redistribution, despite objectives to put 30% of commercial farms in black African ownership by 2014, the figure stood at 4% in 2010.³⁵

²⁶ Liebenberg *Development as a Human Right* 215.

²⁷ Department of the Presidency "Development Indicators" 31.

²⁸ Langford *Socio-Economic Rights in South Africa* 8.

²⁹ Statistics South Africa "Census 2011 Statistical Release - P0301.4" (2012) 33-34 <http://www.statssa.gov.za/Publications/P030142011.pdf> (accessed 22 October 2014).

³⁰ Department of the Presidency "Development Indicators" 31.

³¹ Langford *Socio-Economic Rights in South Africa* 8.

³² Statistics South Africa "Quarterly Labour Force Survey: Quarter 2: 2014" (2014) 4 <http://beta2.statssa.gov.za/publications/P0211/P02112ndQuarter2014.pdf> (accessed 22 October 2014).

³³ Statistics South Africa "Quarterly Labour Force Survey: Quarter 2: 2014" 4-5.

³⁴ Statistics South Africa "Census 2011 Statistical Release" 42, 50 and 51.

³⁵ Langford *Socio-Economic Rights in South Africa* 9-10.

The provision of social security has partly addressed income poverty. Almost a third of South Africans (16 million) have benefited from social assistance grants as at 30 September 2012.³⁶ R96 703 billion was spent on social assistance during the financial year of 2011/2012.³⁷ This was increased to R118 billion in 2014.³⁸ The reach of social security provision is however limited. No provision is made for social assistance for unemployed able-bodied persons between the ages of 18 and 60, despite the large number of poor, unemployed people facing long-term joblessness. People with chronic illnesses related to HIV/AIDS have not been covered by disability grants.³⁹ In addition to income poverty and social assistance, challenges are also faced in the provision of adequate housing, water, sanitation, electricity and healthcare.

In 1994, the South African government inherited a housing backlog of which the majority of households were living in informal houses in urban areas and rural areas.⁴⁰ Government funded RDP housing has however continued the apartheid spatial divide. This has further entrenched the spatial marginalisation and inaccessibility of urban social and economic institutions.⁴¹ Further compounding poverty, the pricing of basic services by municipalities rendered the poor majority of South Africans without access to water, electricity and sanitation. Informal settlements sprung as a consequence. By 1999, more than 1000 informal settlements had been established nationally. The government continues to respond to settlement growth by evictions and criminalisation of slum dwelling.⁴² By 2012, the government had invested R62 billion in housing, but the creation of socially and integrated neighbourhoods for the poor remains a challenge.⁴³

Incidental to the challenge of access to adequate housing are problems of access to water services, sanitation and electricity. The Water Services Act,⁴⁴ provides citizens with “a right of access to

³⁶ B Goldblatt and S Rosa “Chapter 9: Social Security Rights: Campaigns and Courts” in M Langford, B Cousins, J Dugard and T Madlingozi (eds) *Socio-Economic Rights in South Africa: Symbols or Substance?* (2014) 253.

³⁷ Department of the Presidency “Poverty and Inequality” 32.

³⁸ P Gordhan “Budget Speech” (2014) 11 <http://www.treasury.gov.za/documents/national%20budget/2014/speech/speech.pdf> (accessed on 3 October 2014).

³⁹ Goldblatt and Rosa *Socio-Economic Rights in South Africa* 253.

⁴⁰ National Planning Commission “National Development Plan” 34.

⁴¹ *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) para 86.

⁴² M Langford “Chapter 7: Housing Rights Litigation: *Grootboom* and Beyond” in M Langford, B Cousins, J Dugard and T Madlingozi (eds) *Socio-Economic Rights in South Africa: Symbols or Substance?* (2014) 190-191.

⁴³ National Planning Commission “National Development Plan” 34.

⁴⁴ Section 3 of the Water Services Act 108 of 1997.

water supply and basic sanitation.”⁴⁵ The minimum standard for basic water supply is 25 litres per person per day, or 6 kilolitres per household per month, available within a distance of two hundred metres of a household. Stemming from the inability by the poor to afford water, resulting in water disconnections by government,⁴⁶ in 2002, the Department of Water Affairs and Forestry instituted the Free Basic Water (FBW) policy. The FBW policy provides for at least 6 kilolitres of free basic water per household per month. However, calculated at 25 litres per person per day in poor households comprised of an average of 8 persons,⁴⁷ this is insufficient to meet household and sanitation needs. With regard to sanitation needs, the government only finalised the Free Basic Sanitation (FBS) policy in October 2008, with few municipalities having adopted it. The policy recommends an ongoing FBS component to be added to waterborne sanitation of 15 litres per person per day, calculated as 3 or 4 kilolitres of additional FBW per household per month further to the existing allocation. 15 litres per person per day for waterborne sanitation is insufficient considering that the average toilet flush uses approximately 13 litres of water. This means that poor households with waterborne sanitation are not adequately subsidised. Rural areas are worse off than poor urban areas, affected by non-delivery of basic services, with vast areas having no formal services at all. In informal settlements, houses typically do not have in-house water and sanitation services. They must rely on communal taps or water tankers.⁴⁸

Further linked to the right to adequate housing is the provision of electricity.⁴⁹ Most South Africans are unable to afford electricity, which has resulted in disconnections for many, often without notice. Since 2003, there has been a Free Basic Electricity (FBE) policy at the national level to assist impoverished households with free electricity supply of 50 kilowatt hours per month. This supply allows for usage of a small heating element for cooking or a fridge, but these appliances cannot be used in combination with other appliances.⁵⁰ In addition to the effects on housing, the lack of water, sanitation and electricity contributes to an unequal education system.

⁴⁵ Section 1(3) of the Water Services Act 108 of 1997: “Basic water supply” is defined as “the prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity of water to households, including informal households, to support life and personal hygiene.”

⁴⁶ It is estimated that between 1994 and 2001, up to 7.5 million people experienced both water and electricity disconnections, which amounted to approximately 1 million people a year. In 2003 alone, approximately 825 000 to 1.1 million people were disconnected from water services: J Dugard “Urban Basic Services” in M Langford, B Cousins, J Dugard and T Madlingozi (eds) *Socio-Economic Rights in South Africa: Symbols or Substance?* (2014) 282-283.

⁴⁷ Based on estimates of average household occupancy in South Africa: Dugard *Socio-Economic Rights in South Africa* 278; Liebenberg *Development as a Human Right* 239.

⁴⁸ Dugard *Socio-Economic Rights in South Africa* 278-283; Liebenberg *Development as a Human Right* 239.

⁴⁹ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 37.

⁵⁰ Dugard *Socio-Economic Rights in South Africa* 279-283.

The South African government inherited a racially discriminatory education system, characterised by unequal state allocation of funds.⁵¹ In 1994, the budgetary allocation per child according to population group stood at: R5403 white; R4687 Indian/Asian; R3961 coloured; and R1715 black.⁵² To address the historical inequalities, in 1996, the South African Schools Act⁵³ (Schools Act) was passed to provide for a uniform national system for the organisation, governance, and funding of public schools.⁵⁴ Despite various policy⁵⁵ measures and increasing budgetary⁵⁶ spending, the pattern of disadvantage⁵⁷ continues.⁵⁸ Historically white schools continue to be well staffed and with proper educational facilities. In contrast, the majority of black students attend rural and township

⁵¹ Mhlantla J in *MEC for Education v Governing Body, Rivonia Primary School* 2013 (6) SA 582 (CC) paras 1-2; Moseneke DCJ in *Head of Department, Mpumalanga Department of Education v Hoerskool Ermelo* 2010 (2) SA 415 (CC) paras 1-2 and 45; O'Regan J in *MEC for Education, Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC) para 121-122; C Abdoll and C Barbeton "Mud to Bricks: A Review of School Infrastructure Spending and Delivery" (2014) 1 Centre for Child Law, Pretoria University http://www.pulp.up.ac.za/pdf/2014_04/2014_04.pdf (accessed on 17 June 2015).

⁵² Department of Education *Report of the Committee to Review the Organisation, Governance and Funding of Schools* (1995) 15 cited in C McConnachie and C McConnachie "Concretising the Right to a Basic Education" (2012) 129 *SALJ* 554 at 571-572.

⁵³ Act 84 of 1996.

⁵⁴ Liebenberg *Development as a Human Right* 230; McConnachie and McConnachie 2012 *SALJ* 572.

⁵⁵ In 2003, the Department of Basic Education (DBE) acknowledged in its review of the financing, resourcing and costs of education, that there are barriers for students from low-income households, and that these are not adequately addressed. Pursuant to this review, in 2003, the DBE published a "Plan of Action: Improving Access to Free and Quality Basic Education for All." The Plan aimed to ensure that the poorest 40% of learners continue to experience improvements in the quality of schooling they receive, and that all educational barriers, including distance to schools and fees, are removed within a period of 3 years from implementation. The implementation of this Plan commenced in 2006. In 2008, the DBE published "Draft Minimum Norms and Standards for School Infrastructure." In 2012 the "Guidelines Relating to Planning for Public School Infrastructure" were published. Recently, DBE published in 2013, the "Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure": Department of Education "Report to the Minister: Review of the Financing, Resourcing and Costs of Education in Public Schools" (2003) <http://www.education.gov.za/LinkClick.aspx?fileticket=oAFdXOY5hKo%3D&tabid=452&mid=1038> (accessed on 17 June 2015); Liebenberg *Development as a Human Right* 231-232; Department of Basic Education "Plan of Action: Improving Access to Free and Quality Basic Education for All" (2003) 2 http://www.gov.za/sites/www.gov.za/files/educ_access_1.pdf (accessed on 17 June 2015); GN 1439, *Government Gazette* 31616, 21 November 2008; Department of Basic Education "Guidelines Relating to Planning for Public School Infrastructure" (2012) <http://www.gov.za/documents/guidelines-relating-planning-public-school-infrastructure> (accessed on 17 June 2015); McConnachie and McConnachie 2012 *SALJ* 570; GN 10067, *Government Gazette* 37081, 29 November 2013; Abdoll and Barbeton "Mud to Bricks" 7.

⁵⁶ The overall budget for 2013/14 for the national DBE was R17 592 billion. The budget allocation to provincial DBE was R173 454 billion. The overall budget for 2014/2015 for the national DBE was R19 680 billion and the total allocation to provincial DBE was R186 147 billion. The overall budget for 2015/2016 for the national DBE is 21.511 billion. The Minister of Finance has stated that the National Treasury will allocate R640 billion from 2015-2017: Department of National Treasury "Minister of Finance: 2015 Budget Speech" (2015) 10 <http://www.parliament.gov.za/content/speech-11.pdf> (accessed 18 June 2015); Department of Basic Education "Debate on Vote 15, Basic Education" (2015) <http://www.education.gov.za/Newsroom/Speeches/tabid/298/ctl/Details/mid/1747/ItemID/3178/Default.aspx> (accessed 18 June 2015); Department of Basic Education "Debate on Vote 14, Basic Education" (2015) <http://www.gov.za/speeches/minister-angie-motshekga-basic-education-dept-budget-vote-201516-6-may-2015-0000> (accessed 18 June 2015); South African Government "Basic Education" (2015) <http://www.gov.za/about-sa/education> (accessed 18 June 2015).

⁵⁷ The DBE in its 2010 "National Policy for an Equitable Provision of an Enabling School Physical Teaching Environment" detailed the negative impacts of inadequate facilities on learning: GN 515 *Government Gazette* 33283, 11 June 2010; McConnachie and McConnachie 2012 *SALJ* 569-570.

⁵⁸ As observed by O'Regan J in *MEC for Education, Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC) para 123.

schools, which are mostly understaffed,⁵⁹ and housed in dilapidated, over-crowded and unsafe buildings, or even under trees⁶⁰ or ‘mud schools.’⁶¹ A large number of schools lack educational facilities and have limited access to water, sanitation and electricity.⁶² As of March 2011, of the 24 793 ordinary and 359 special⁶³ schools nationally: 3544 had no electricity; 2402 had no access to water, while a further 2611 have an unreliable water supply; almost 1000 had no toilet facilities, while over 11 000 relied on pit latrines. Only 7% had stocked and functioning libraries; 10% had working computer facilities; and only 5% had functioning laboratories.⁶⁴ Continuing disparities in accessing education⁶⁵ perpetuate socio-economic disadvantage, thereby reinforcing and entrenching poverty and inequality.⁶⁶ Like education, funding disparities, infrastructural and staffing challenges are also experienced in the provision of public health services compared to private health services, despite various budgetary and legislative measures being taken.

⁵⁹ In 2013, there were approximately 11.9 million learners in more than 25 000 public schools, with 391 708 educators. Independent schools had 513 694 000 learners, taught by 33 187 educators in 1 583 schools: South African Government “Basic Education.”

⁶⁰ Abdoll and Barbeton “Mud to Bricks” 3.

⁶¹ ‘Mud schools’ are poorly constructed using mud bricks and a wooden frame, plastered with mud mixed with cow dung. In April 2013 the DBE indicated that through its “Accelerated Schools Infrastructure Delivery Initiative” (ASIDI) programme, it was going to replace 510 schools with such inappropriate structures. McConnachie and McConnachie 2012 *SALJ* 572; Abdoll and Barbeton “Mud to Bricks” 1 and 21; Department of Basic Education “Accelerated Schools Infrastructure Delivery Initiative” <http://www.dbsa.org/EN/DBSA-Operations/Proj/Pages/Accelerated-Schools-Infrastructure.aspx> (accessed 18 June 2015).

⁶² McConnachie and McConnachie 2012 *SALJ* 572; Abdoll and Barbeton “Mud to Bricks” 1.

⁶³ Schools resourced to educate learners requiring high-intensity educational and other support on either a full-time or a part-time basis. The learners who attend these schools include those who have physical or mental disabilities, serious behaviour and/or emotional problems, or health-care needs: Department of Basic Education “National Education Infrastructure Management System Report” (2011) 4 <https://edulibpretoria.files.wordpress.com/2008/01/school-infrastructure-report-2011.pdf> (accessed 17 June 2015); McConnachie and McConnachie 2012 *SALJ* 555.

⁶⁴ Department of Basic Education “National Education Infrastructure Management System Report” 1; McConnachie and McConnachie 2012 *SALJ* 555.

⁶⁵ Amongst persons aged 20 years and older the following are the levels of education attainment: 8.6% have no primary level of education (black African 10.5%; coloured 4.2%; Indian/Asian 2.9% and white 0.6%); 12.3% have some primary level of education (black African 13.9%; coloured 13.8%; Indian/Asian 6.6% and white 1.3%); 4.6% have completed primary level education (black African 4.9%; coloured 7.4%; Indian/Asian 2.8% and white 0.7%); 33.9% have some secondary level education (black African 35.5%; coloured 42.0% Indian/Asian 26.1% and white 21.4%); 28.9% have completed secondary education (black African 26.9%; coloured 25.2%; Indian/Asian 40.0% and white 39.5%); and 11.8% have higher level education (black African 8.3%; coloured 7.4%; Indian/Asian 21.6% and white 36.5%): Statistics South Africa “Census 2011 Statistical Release - P0301.4” 33 and 34

⁶⁶ *Head of Department, Mpumalanga Department of Education v Hoerskool Ermelo* 2010 (2) SA 415 (CC) para 2.

Despite various health intervention measures,⁶⁷ since 1994 to date, the life expectancy of South Africans has fallen by almost 20 years, mainly because of the rise in HIV/AIDS⁶⁸ related mortality. Child mortality rates have also risen and no improvements have been made in reducing maternal deaths. Almost 60% of maternal deaths were avoidable, of which 55% were attributed to health system failures. The quality of perinatal care in district hospitals is inadequate with more than a third of perinatal deaths attributable to avoidable health system failures. There are other communicable epidemics, especially tuberculosis (TB) which occurs in the forms of multi-drug resistant and extreme-drug resistant TBs. Non-communicable diseases, such as diabetes, cancers, kidney diseases and mental illness are leading causes of death. The government's focus on primary healthcare in public hospitals has resulted in a general deterioration of quality services available. This is while private sector spending has increased. 14% of South Africans have access to private healthcare, which constitutes more than 60% of the total spending on health. This means that the overwhelming majority of the population is dependent on the public sector health service. The public sector receives approximately 10.8% of the total government expenditure.⁶⁹

It is at local government level where municipalities are responsible for service delivery to local communities in the implementation of the national government's economic policies. In the provision of services to local communities in accordance with the government's economic policies, municipalities do not meaningfully engage community members as active participants and agents in socio-economic decision-making which affects their lives.

⁶⁷ Some of the major achievements to date have been the enactment of the National Health Act 61 of 1994 which gives citizens access to free healthcare services in the public sector. The Medical Schemes Act 131 of 1998 aims to ensure the affordability of healthcare services, whereas the Pharmacy Amendment Act 88 of 1997 is directed towards the establishment of pharmacies in rural and other underserved areas. The Medicines and Related Substances Control Act 90 of 1997 was passed with the aim of making medicines affordable. The National Patients Rights Charter aims at the improvement of the quality of healthcare. Significant policy achievements include the expansion of primary healthcare infrastructure, by doubling of government expenditure. An antiretroviral treatment roll-out programme has been considerable in addressing HIV/AIDS epidemic, albeit implemented only after massive pressure from various civil society organisations. Progress has been made in the provision of access to antenatal care (94% coverage) and skilled attendance at birth (84%), prevention of mother-to-child transmission is widely available (90% of facilities): P Jones and N Chingore "Chapter 8: Health Rights: Politics, Places, and the Need for 'Sites for Rights'" in M Langford, B Cousins, J Dugard and T Madlingozi (eds) *Socio-Economic Rights in South Africa: Symbols or Substance?* (2014) 226.

⁶⁸ National Planning Commission "National Development Plan" 80: the estimated HIV/AIDS prevalence rate in 2011 was approximately 10.6% of the population. A total number of people living with HIV/AIDS rose from 4.21 million in 2001 to an estimated 5.4 million in 2011. This number is projected to rise to 7.3 million South Africans in 2030. The highest levels are amongst the economically able people at 16.6% of those between the ages of 15 and 49 years of age.

⁶⁹ Jones and Chingore *Socio-Economic Rights in South Africa* 227-228.

2.2.3 DEMOCRATIC PARTICIPATION IN SOCIO-ECONOMIC DECISION-MAKING

Service delivery to local communities occurs at local government level. For this purpose local government has been structured as the engine of redistribution and development, and the main *locus* of democratic participation by local communities with government.⁷⁰ As at May 2011, there were 278 municipalities⁷¹ with 10 055 elected councillors. To enhance participatory democracy at local government level, the Local Government: Municipal Systems Act⁷² (Municipal Systems Act) makes provision for the establishment of ward committees and local councils. Ward committees are chaired by the ward councillor and include up to 10 committee members elected by the community to represent a diversity of interests. The ward committees primarily act as the interface between the local community and the municipality, to provide advice to the councillor, and to make recommendations on matters affecting their wards.⁷³ “In this way, ward committees are meant to be the central vehicles for community participation in decisions regarding the developmental priorities of the ward.”⁷⁴ In particular, the Municipal Systems Act⁷⁵ obliges municipalities to “cultivate a culture of municipal governance that complements formal representative government with participatory governance.”⁷⁶ It further requires municipalities to involve community members in the development of Integrated Development Plans, annual budgets, and other strategic decisions of municipalities. However, in practice, municipalities and ward committees are not fulfilling these legislative responsibilities.⁷⁷

In reality, ward committees are failing to fulfil their roles as non-partisan vehicles of community participation. This is largely because political party allegiances dominate and influence the nomination and election of committee members.⁷⁸ The result is that instead of representing a diversity of community members’ interests, political party agendas prevail over issues of service delivery. Consequently, municipalities do not meaningfully engage local communities when preparing their medium and long term development plans, annual budgets, and priorities. In most

⁷⁰ T Madlingozi “Post-Apartheid Social Movements and Legal Mobilisation” in M Langford, B Cousins, J Dugard and T Madlingozi (eds) *Socio-Economic Rights in South Africa: Symbols or Substance?* (2014) 107.

⁷¹ Madlingozi *Socio-Economic Rights in South Africa* 107.

⁷² Act 32 of 2000.

⁷³ Madlingozi *Socio-Economic Rights in South Africa* 108.

⁷⁴ Madlingozi *Socio-Economic Rights in South Africa* 108.

⁷⁵ Local Government: Municipal Systems Act 32 of 2000.

⁷⁶ Madlingozi *Socio-Economic Rights in South Africa* 108.

⁷⁷ Madlingozi *Socio-Economic Rights in South Africa* 108.

⁷⁸ Madlingozi *Socio-Economic Rights in South Africa* 108.

instances, community consultation takes place superficially at advanced stages of policy formulation, only for purposes of obtaining political buy-in and adhering to legislative requirements.⁷⁹ This lack of consultation has led to unaccountability whereby municipalities have failed to abide by basic standards of financial management. The 2009, 2010 and 2011 Auditor-General's reports into audits of local government are illustrative of this. The Auditor-General found that despite government's "Operation Clean Audit,"⁸⁰ in the 2008-2009 period, 53% of all municipalities received negative audits. They were either unable to submit their annual financial statements in time, or obtain financially unqualified or clean audits. 46% were financially unqualified, however with a high incidence of material errors and omissions in financial statements submitted for audit only 1% received clean audits. The 2009-2010 and 2010-2011 audit reports did not show improvement. During both audit periods 50% received negative audits, with 5% having received clean audits. 46% of the audits for both periods were financially unqualified, also with material errors and omissions. The Auditor-General concluded that such failures were primarily due to local government officials' failure to report on service delivery, and to account for how and why they had used funds.⁸¹

The lack of municipal accountability as required by the consultative processes of the Municipal Systems Act,⁸² shows that local government in reality perceives poverty to be a practical problem that it solves for people, and not something people solve as active agents in partnership with it.⁸³ This approach reinforces "one sided-dependency"⁸⁴ and government benevolence,⁸⁵ where unaccountable government officials regard service delivery as a favour that they do for citizens.⁸⁶ This disjuncture between the formulation and implementation of policies, with people's expectations for socio-economic reform, coupled with the closure of avenues for formal democratic

⁷⁹ Madlingozi *Socio-Economic Rights in South Africa* 108.

⁸⁰ Launched in 2009 to address the poor audit outcomes of municipalities: South African Local Government Association "Municipal Audit Outcomes 2010-2011" (2012) 13 <http://www.salga.org.za/pages/Municipalities/Municipal-Audit-Outcomes-2010-to-2011> (accessed on 18 June 2015).

⁸¹ South African Local Government Association "Municipal Audit Outcomes 2010-2011" 12-13; M Plaut and P Holden *Who Rules South Africa? Pulling the Strings in the Battle for Power* (2014) 340.

⁸² Act 32 of 2000.

⁸³ D Brand, S De Beer, I De Villiers and K Marle "Poverty as Injustice" (2013) 17 *Law Democracy & Development* 273 and 274.

⁸⁴ B Andreassen and S Marks "Introduction" in B Andreassen and S Marks (eds) *Development as a Human Right: Legal, Political and Economic Dimensions* 2 ed (2010) xxvvi.

⁸⁵ Andreassen and Marks *Development as a Human Right* xxvi.

⁸⁶ K Bentley and R Calland "Chapter 12: Access to Information and Socio-Economic Rights: A Theory of Change in Practice" in M Langford, B Cousins, J Dugard and T Madlingozi (eds) *Socio-Economic Rights in South Africa: Symbols or Substance?* (2014) 353.

participation, has been the cause of increasingly widespread service delivery protests since 2004.⁸⁷ Just over 10 years later service delivery protests are on the rise. On 7 April 2014 the World Bank report on South Africa stated that “service delivery protests by underserved groups suggest that parts of the population have become frustrated and disillusioned with the pace of reform.”⁸⁸

2.3 PROTEST ACTION

South Africa’s rising service delivery protests have been described as “a rebellion of the poor.”⁸⁹ The country “is said to experience the highest level of protests in the world.”⁹⁰ In 2005, the year Mbeki addressed parliament on this issue, the Minister of Safety and Security, reported in parliament that there were 5000 protests across the country that year. Between 2004 and 2008, there were between 7000 and 10500 public gatherings a year reported by the police, with protests accounting for the majority.⁹¹ These protests have assumed violent and non-violent forms. Ramphele refers to violence in this context as being “communication by other means”⁹² in that “some take to the streets to demand to be heard.”⁹³ Madlingozi reasons that it is not that service delivery protestors are psychologically prone to violence, but that in asserting their claims, this is the most direct means of getting the government’s attention.⁹⁴ Some of the protests featured 100 participants, while some featured as many as several thousands, spread out across the various provinces.⁹⁵ Spatially, protests have emerged as an urban phenomenon, resulting from poor and vulnerable communities’ poverty when compared to their more affluent neighbours.⁹⁶ Communities are therefore more likely to protest when they are “languishing at the periphery of municipalities.”⁹⁷ This is different to rural communities living in remote parts of South Africa. They are far away from municipal offices, do not receive services nor do they engage with local government officials.

⁸⁷ Langford *Socio-Economic Rights in South Africa* 13.

⁸⁸ The World Bank “South Africa.”

⁸⁹ Dugard *Socio-Economic Rights in South Africa* 286.

⁹⁰ Langford *Socio-Economic Rights in South Africa* 14.

⁹¹ Langford *Socio-Economic Rights in South Africa* 14.

⁹² M Ramphele *Laying Ghosts to Rest: Dilemmas of the Transformation of South Africa* (2010) 134.

⁹³ Ramphele *Laying Ghosts to Rest* 134.

⁹⁴ Nyenti and Madlingozi highlight a broader definition of access to justice. Access to justice is not limited to access to courts, but in a broader sense includes social justice and access to governmental institutions. In this regard civil society takes on a special responsibility for the achievement of justice and protest action must be seen in this context as one of the means in which it attempts to achieve this: Nyenti 2013 *De Jure* 902; Madlingozi *Socio-Economic Rights in South Africa* 96.

⁹⁵ Karamoko and Jain “Community Protests in South Africa: Trends, Analysis and Explanations” (2011) 17-18 http://www.mlgi.org.za/publications/publications-by-theme/local-government-in-south-africa/community-protests/Community_Protests_SA.pdf (accessed on 25 September 2014).

⁹⁶ Karamoko and Jain “Community Protests in South Africa” 24-25.

⁹⁷ Karamoko and Jain “Community Protests in South Africa” 25.

Protests, therefore, as a consequence of relative poverty and government expectations,⁹⁸ help explain why the most impoverished rural South African communities do not protest.⁹⁹ Alexander and Muller observed that rural communities live in a spatially secluded culture. They do not experience the same degree relative poverty that gives rise to expectations. Socially excluded, they have strong feelings of marginality, helplessness, and of not belonging:¹⁰⁰

“They are like aliens in their own country, convinced that the existing institutions do not serve their interests and needs. Along with this feeling of powerlessness is a widespread feeling of inferiority, of personal unworthiness, and discrimination...They are a marginal people who know only their own troubles, their own local conditions, their own neighbourhood, their own way of life. Usually, they have neither the knowledge, the vision nor the ideology to see the similarities between their problems and those of others like themselves elsewhere...”¹⁰¹

It can thus be deduced that when citizens have expectations of an accountable government of the people, they make demands upon it. Accordingly, communities protest because they have expectations of service delivery from the government, which expectations they find that the government to have failed to meet.¹⁰² In this regard, 36% of service delivery protests concern the demand for access to affordable or adequate housing, water (18%), electricity (18%), inadequate sanitation systems (15%), whereas the remainder of the demands concern education and healthcare. These complaints are often coupled with grievances of government corruption and lack of citizen participation in democratic decision-making.¹⁰³ The short to medium term goals of service delivery protests are aimed at compelling the government towards the expansion of socio-economic needs while meaningfully engaging communities.¹⁰⁴ In this context protest action becomes a means by which the voiceless poor and vulnerable forcefully seek to be heard by a government that ignores them.¹⁰⁵ Consequently, this tension creates the “socio-political divide between ‘citizen and subject,’

⁹⁸ Expectations from a “long history of broken promises, paternalistic attitude towards residents from provincial officials, the trumpeting of development stories that always seem to come from elsewhere, the better lives lived by richer communities in close proximity, the seeming ineffectiveness of democratic channels, inappropriate spending priorities and poor communication” as contributing to the frustration of urban communities against municipalities: Socio-economic Rights Institute of South Africa “An Anatomy of Dissent & Repression” 24.

⁹⁹ Karamoko and Jain “Community Protests in South Africa” 26.

¹⁰⁰ A Muller “Linking poverty and violence: The South African scenario” (2013) *African Journal on Conflict Resolution* 47; P Alexander “Rebellion of the Poor: South Africa’s Service Delivery Protests - A Preliminary Analysis” (2010) *Review of African Political Economy* 32.

¹⁰¹ Muller 2013 *African Journal on Conflict Resolution* 47.

¹⁰² J Dugard and K Tissington “Civil Society and Protest in South Africa: A View from 2012” <http://socs.civicus.org/?p=3875> (accessed 1 July 2014).

¹⁰³ Langford *Socio-Economic Rights in South Africa* 14.

¹⁰⁴ Madlingozi *Socio-Economic Rights in South Africa* 106-107.

¹⁰⁵ Alexander 2010 *Review of African Political Economy* 37.

with people responding by attempting to exert political influence through the development of a collective, community voice.”¹⁰⁶ By attempting to exert political influence communities are articulating “the right to be taken seriously when thinking and speaking through community organisations.”¹⁰⁷ The Constitution¹⁰⁸ gives effect to the non-violent exercise of this right through the right to freedom of assembly,¹⁰⁹ making it “entirely consistent with the ideals of a democratic society for the poor to poorest to collectively raise their demands.”¹¹⁰ In *South African Transport and Allied Workers Union v Garvas (SATAWU)*¹¹¹ the Constitutional Court specifically underlined that this right gives space to people to express collective views in order to influence matters of

¹⁰⁶ Alexander 2010 *Review of African Political Economy* 37.

¹⁰⁷ Dugard and Tissington “Civil Society and Protest in South Africa.”

¹⁰⁸ Section 34 of the Constitution, 1996.

¹⁰⁹ In *South African Transport and Allied Workers Union (SATAWU) v Garvas* 2013 (1) SA 83 (CC) paras 6-64, 66 and 120, the Constitutional Court, emphasised the importance of the right to assemble: “The right to freedom of assembly is central to our constitutional democracy. It exists primarily to give a voice to the powerless. This includes groups that do not have political or economic power, and other vulnerable persons. It provides an outlet for their frustrations. This right will, in many cases, be the only mechanism available to them to express their legitimate concerns. Indeed, it is one of the principal means by which ordinary people can meaningfully contribute to the constitutional objective of advancing human rights and freedoms.” With this right, the Constitution provides a space for poor and vulnerable people who do not have access to formal political and legal institutions, to collectively voice their grievances. It ensures that they too, as citizens in a participatory democracy, are able to assemble and express their legitimate concerns, thereby influencing amongst other issues, “the political process,” and “matters of governance and service delivery.” While the Constitution protects an assembly, the right is exercisable subject to “internal modifiers.” The Constitutional Court, stated in the regard, that it is only when there is no intention of acting peacefully and unarmed that the right loses constitutional protection. The Constitution therefore only offers protection to protests which are peaceful and unarmed. To give effect to this right, the South African legislature passed the RGA; See further footnote 29 of *South African Transport and Allied Workers Union (SATAWU) v Garvas* 2013 (1) SA 83 (CC) para 63.

¹¹⁰ Alexander 2010 *Review of African Political Economy* 37.

¹¹¹ 2013 (1) SA 83 (CC) para 120.

governance and service delivery.¹¹² The RGA¹¹³ which came into effect in 1994, gives legislative effect to the right to freedom of assembly by establishing the procedures to be followed in order to proceed with a legally protected “gathering”¹¹⁴ that is peaceful and unarmed. With legal protection afforded to service delivery protests, their increase should therefore come as a signal to government that more effective communication and public participation is needed to enhance the agency of people in addressing their own poverty and vulnerability.¹¹⁵ But can service delivery protests compel government to become more responsive to these needs?

¹¹² *South African Transport and Allied Workers Union v Garvas (SATAWU)* 2013 (1) SA 83 (CC) para 120.

¹¹³ The RGA came into being, having been necessitated by the political violence leading up to the country’s first democratic elections on 27 April 1994. There was a need to make a decisive break with the apartheid government’s restrictive laws regulating and prohibiting protest action. In 1991, President De Klerk appointed the Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation (Goldstone Commission) to advise on rules and procedures for the conduct of assembly during this transitional period. Once the Commission had provided its recommendations and draft bill to the legislature, the RGA was assented to in haste, on 14 January 1994, before the interim Constitution was assented to on 25 January 1994. Despite concerns relating to the constitutionality of some of the RGA’s provisions, it was thought “that it could be made better, but because there was not a lot of time before the election, it should become law and then changed later.” This transitory nature of the RGA was made clear by the Commission: “Not to believe that the draft bill contains any errors or that it cannot be materially improved. Indeed, appropriate amendments, may be considered necessary by a future legislature...but due to the urgency of the situation...the subject could not be deferred and...legislation is desirable even before the completion of the present period of transition.” Because there was a rush in the drafting and assent to the RGA, the Commission and legislature were concerned “that its provisions might be problematic.” This concern was such that the RGA only came into effect on 15 November 1996, years after the election. So, what was initially meant to be merely a transitory piece of legislation became a fully-fledged legislation regulating the holding of demonstrations and gatherings: African National Congress “Nelson Mandela’s statement after voting in South Africa’s First Democratic Election” <http://www.anc.org.za/show.php?id=3657> (accessed on 5 October 2015); Currie and de Waal *The Bill of Rights Handbook* 381; Freedom of Expression Institute “The right to protest” 5; L Brown, C Fijnaut, DH Foster, T Geldenhuys, C Louw, JL Olivier, CD Shearing, CJ van der Merwe, PJ Waddington and Heymann *Towards Peaceful Protest in South Africa: Testimony of Multinational Panel Regarding Lawful Control of Demonstrations in the Republic of South Africa Before The Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation* (1992) vii; M Memeza “A Critical Review of the Implementation of the Regulation of Gatherings Act 205 of 1993: A Local Government and Civil Society Perspective July 2006” (2006) 12-13 <http://fxi.org.za/PDFs/Legal%20Unit/RGAREport-Mzi.pdf> (accessed on 10 October 2015).

¹¹⁴ The RGA allows for “any association, group or body of persons, whether or not such association, has been incorporated, established or registered in accordance with any law” to hold a demonstration or gathering. The Act distinguishes a “demonstration” from a “gathering” based on the number of participants. A demonstration is made up of 15 people or less, and a gathering more than 15 people. The reason for this distinction is that a demonstration, because of its small size, is not considered a threat to public safety, whereas a gathering is considered such. Because service delivery protests are comprised of large communities of residents beyond 15 people, they are classified as gatherings. The RGA defines a “gathering” as any assembly, concourse or procession of more than 15 persons in or on any public road or any other public place or premises. The RGA states the two purposes of a gathering. Firstly, it is intended to allow an association, group or body of persons to gather, in order to discuss, attack, criticise, promote or propagate: principles, policy, actions or failure to act of any government, political party or political organisation, whether or not that party or organisation is registered in terms of any applicable law. From this flows the second purpose. This is “to form pressure groups, hand over petitions to any person, or to mobilise or demonstrate support for or opposition to the views, principles, policy, actions or omissions of any person or body of persons or institution, including any government, administration or governmental institution.” Sections 1 of the Regulation of Gatherings Act 205 of 1993; *South African Transport and Allied Workers Union (SATAWU) v Garvas* 2013 (1) SA 83 (CC) para 90.

¹¹⁵ On this point Berkhout and Handmaker wrote in 2010 that “the ANC’s massive victory in the country’s last national elections cannot obscure a continued erosion of public trust in politics and governance, and debilitating constraints such as corruption and official abuses of power. A marked increase in public protests vividly illustrates the growing impatience of ordinary South Africans who have seen too little progress.” R Berkhout and J Handmaker “Chapter 1: Introduction to Mobilising Social Justice: Critical Discussions on the Potential for Civic Action and Structural Change” in J Handmaker and R Berkhout (eds) *Mobilising Social Justice in South Africa: Perspectives from Researchers and Practitioners* (2010) 5; Bentley and Calland *Socio-Economic Rights in South Africa* 353.

2.4 LAW AND PROTEST

Service delivery protests, whether or not embarked upon in terms of the RGA, serve a limited purpose, as protests rather seldom, if ever, yield the socio-economic outcomes protestors seek. Instead, often to bring an end to protests, the government has applied the provisions of the RGA and employed the criminal justice system to declare them ‘illegal.’¹¹⁶ On this Cameron JA, as he then was, in *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza*¹¹⁷ remarked that when government invokes legal processes to impede the rightful claims of its citizens, it defies the Constitution which requires response to the needs of poor and vulnerable people. This he said, is tantamount to the government declaring “war”¹¹⁸ on its citizens.¹¹⁹ By so stating, Cameron JA points to Davis and le Roux’s term, “lawfare,”¹²⁰ which explains the relationship between the use and abuse of law by the government against its citizens, and the citizen’s use of law in response. As government increasingly uses law as a means of control, citizens as targets invoke the cry of human rights to persuade courts that law has an intrinsic quality of accountability, certainty and the recognition of the basic freedom of the individual freedom. In this way, citizens fight attempts to control them through using the law.¹²¹ Accordingly, Cameron JA found that poor and vulnerable people can collectively, as active agents, make use of the law to enforce socio-economic issues in such a way that the government cannot ignore, but be legally compelled to respond to their demands.¹²²

2.4.1 LEGAL MOBILISATION

“Legal mobilisation”¹²³ occurs when people collectively organise themselves and use the law against the government. Law is mobilised when a need is translated into a demand as an assertion of rights. The power of legal mobilisation, which Cameron JA speaks of, lies in the legal

¹¹⁶ Socio-Economic Rights Institute of South Africa “An Anatomy of Dissent & Repression” 5.

¹¹⁷ 2001 (4) SA 1184 (SCA).

¹¹⁸ *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 (4) SA 1184 (SCA) para 19.

¹¹⁹ *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 (4) SA 1184 (SCA) para 19.

¹²⁰ Davis and le Roux *Precedent & Possibility* 185.

¹²¹ Davis and le Roux *Precedent & Possibility* 185.

¹²² The Ontario Law Reform Commission published a “Report on Class Actions” in 1982. With the focus being the promotion of access to justice, the Report stated in similar terms: “by affording an opportunity for voicing mass grievances in an orderly fashion within the framework of the existing judicial system, they may provide an antidote to the social frustration that exists where neither courts nor administrative agencies are able to protect the rights of citizens on an individual basis.” J Kalajdzic *Access to Justice for the Masses? A Critical Analysis of Class Actions in Ontario* (LLM Thesis: University of Toronto 2009) 51; *The Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 (4) SA 1184 (SCA) para 19.

¹²³ Madlingozi *Socio-Economic Rights in South Africa* 92.

enforceability of demands.¹²⁴ Mobilisation on socio-economic issues to hold government accountable to its constitutional obligations introduces a rights-based response to poverty and inequality. This approach focuses on the nature of the claims that people have on the conduct of the government.¹²⁵ It seeks to position the law as a capability¹²⁶ transforming citizens from being passive beneficiaries of government welfare to becoming collectively empowered claimants.¹²⁷ By focusing on people's capabilities the rights-based approach is concerned with "strengthening the capacities of rights-holders to make their claims,"¹²⁸ "empowering people to claim their rights"¹²⁹ and empowering people to "demand justice as a right."¹³⁰ In this context then, access to justice refers to the equity with which those from differing backgrounds are able to gain from the legal system.¹³¹ In this sense, effective access means more than access to courts alone. The focus is not just on the resolution of legal disputes, but on the construction of legal disputes, on how the poor and vulnerable can perceive their problems as legal ones and articulate them as such¹³². In this regard Mubangizi and Nyenti relate poverty and a lack of access to justice to one another in a helpful way. They explain poverty to be more than a lack of material well-being. Poverty, in its relation to access to justice, is the absence of social factors that enable the poor and vulnerable to exercise legal rights to access basic needs.¹³³ These social factors that obstruct access to justice in South Africa include exclusion of the rural population,¹³⁴ ignorance of socio-economic rights,¹³⁵ the

¹²⁴ Madlingozi *Socio-Economic Rights in South Africa* 92.

¹²⁵ Boesen and Sano *Development as a Human Right* 52; Commission on Human Rights, Open-Ended Working Group on the Right to Development "Fourth Report of the Independent Expert on the Right to Development, Mr Arjun Sengupta, submitted in accordance with the Committee Resolution 2001/9" (2001) 4 *UN Doc. E/CN.4/2002/WG18.2* <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G01/164/02/PDF/G0116402.pdf?OpenElement> (accessed 22 September 2014).

¹²⁶ "Capability" is defined as what a "person manages to do or be" to achieve "functionings" (what the person succeeds in doing): A Sen *Commodities and Capabilities* (1985) 10.

¹²⁷ Boesen and Sano *Development as a Human Right* 61; Nyenti 2013 *De Jure* 903.

¹²⁸ Boesen and Sano *Development as a Human Right* 50.

¹²⁹ Boesen and Sano *Development as a Human Right* 51.

¹³⁰ Boesen and Sano *Development as a Human Right* 59; United Nations "Annual Report of the Secretary-General on the Work of the Organization" (1998) 23 *UN Doc. A/53/1 (August 1998)* <http://www.preventionweb.net/files/resolutions/N9825109.pdf> (accessed 22 September 2014).

¹³¹ Nyenti 2013 *De Jure* 903.

¹³² J Kalajdzic *Access to Justice for the Masses? A Critical Analysis of Class Actions in Ontario* (LLM Thesis: University of Toronto 2009) 47.

¹³³ JC Mubangizi "Know Your Rights: Exploring the Connections between Human Rights and Poverty Reduction with Specific Reference to South Africa" (2005) 21 *SAJHR* 33 at 33 and 34; Nyenti 2013 *De Jure* 913; J Kalajdzic *Access to Justice for the Masses? A Critical Analysis of Class Actions in Ontario* (LLM Thesis: University of Toronto 2009) 7.

¹³⁴ 45% of South Africa's national population reside in rural areas, with 75% of the poor and vulnerable portion of the population residing in rural areas: Mubangizi 2005 *SAJHR* 44; Nyenti 2013 *De Jure* 913-914.

¹³⁵ 37% of people comprising the study had never heard of the Bill of Rights, while 20% had heard of it, but did not know what its purpose was. See also Statistics South Africa "Census 2011 Statistical Release - P0301.4" 42, 50-51: Mubangizi 2005 *SAJHR* 44; Nyenti 2013 *De Jure* 914; J Kalajdzic *Access to Justice for the Masses? A Critical Analysis of Class Actions in Ontario* (LLM Thesis: University of Toronto 2009) 48.

law and courts in general,¹³⁶ and illiteracy.¹³⁷ Added to these barriers are the high costs of litigation¹³⁸ and fear of the judicial process. Litigation is complex, emotionally traumatic and time consuming.¹³⁹ In light of these social factors how can communities mobilise the law to give impetus to their protest demands?

Amidst social challenges that obstruct access to justice, service delivery protests demonstrate that communities are nonetheless able, although informally, to organise themselves¹⁴⁰ on socio-economic issues. Community members organise into clearly defined protest groups¹⁴¹ on common articulated demands. These socio-economic demands which, although not legally articulated as rights claims, may coincide with explicitly recognised socio-economic rights in the Constitution.¹⁴² Where this coincidence occurs, the Constitution has made it slightly easier for impoverished groups to gain access to courts by broadening the category of people entitled to approach the court for

¹³⁶ 49.7% of the people comprising the study had never heard of the Human Rights Commission and 54.9% had never heard of the Constitutional Court. The same results were found on the questions of whether people knew how to approach the relevant institutions if their rights were violated, or whether they knew of other people who had approached the courts: Mubangizi 2005 *SAJHR* 44; Nyenti 2013 *De Jure* 914; J Kalajdzic *Access to Justice for the Masses? A Critical Analysis of Class Actions in Ontario* (LLM Thesis: University of Toronto 2009) 48.

¹³⁷ Education is important as a social factor in that it capacitates people with the ability to be more influential in demanding their socio-economic rights, through informed criticism of public policy and articulation of their demands: J Dreze and A Sen *Hunger and Public Action* (1989) 262 and 267.

¹³⁸ Small Claims Court - there will be no cost; small to medium claim in the Magistrate's Court - R25 000 to R40 000; medium to large claim (such as a claim for R750 000) in the High Court - R450 000: HJ Erasmus "Cost and Fee Allocation in Civil Procedure Republic of South Africa" (2009) http://www-personal.umich.edu/~purzell/national_reports/South%20Africa.pdf 13 and 14 (accessed on 1 July 2013); M Ebadolahi "Notes: Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa" (2008) 83 *New York University Law Review* 1565 at 1567; J Kalajdzic *Access to Justice for the Masses? A Critical Analysis of Class Actions in Ontario* (LLM Thesis: University of Toronto 2009) 48.

¹³⁹ C Loots "Standing to Enforce Fundamental Rights" (1991) 1 *SAJHR* 49; Nyenti 2013 *De Jure* 915-916.

¹⁴⁰ Madlingozi *Socio-Economic Rights in South Africa* 106.

¹⁴¹ These social movements are, to name a few prominent examples: the Anti-Privatisation Forum (APF), Soweto Electricity Crisis Committee (SECC), the Concerned Citizen's Forum (CCF), the Western-Cape Anti-Eviction Campaign (WCAEC), Thembelihle Crisis Committee (TCC), Maqhaleng Concerned Citizens (MCC) and *Abahlali Base Mjondolo* (ABM): S Buhlungu "The Anti-Privatisation Forum: A Profile of a Post-Apartheid Social Movement" (2004) *A Case Study for the University of Kwazulu-Natal entitled: Globalisation, Marginalisation and New Social Movements in Post-Apartheid South Africa* <http://www.populareducation.co.za/sites/default/files/Buhlungu%20APF%20Research%20Report.pdf> (accessed 1 June 2015) 4-7; J Dugard and M Langford "Art or Science? Synthesising Lessons from Public Interest Litigation and the Dangers of Legal Determinism" 27 (2011) *SAJHR* 39 at 43; Socio-Economic Rights Institute of South Africa "An Anatomy of Dissent & Repression" 3 and 11-16; Madlingozi *Socio-Economic Rights in South Africa* 106-110 and 115-116; T Ngwane and N Vilakazi "Social Movement Responses to Xenophobia: A Case Study of the Soweto Electricity Crisis Committee, the Anti-Privatisation Forum and the Coalition Against Xenophobia" (2010) http://www.gcro.ac.za/sites/default/files/News_items/Xeno_reports_July2010/case_studies/7_Soweto.pdf (accessed on 1 June 2015) 10; P Dywer "The Contentious Politics of the Concerned Citizens Forum (CCF)" (2004) 9-10 *A Case Study for the University of Kwazulu-Natal entitled: Globalisation, Marginalisation and New Social Movements in Post-Apartheid South Africa* <http://www.populareducation.co.za/sites/default/files/Dwyer%20CCF%20research%20report.pdf> (accessed 1 June 2015); S Oldfield and K Stokke "Building Unity in Diversity: Social Movement Activism in the Western Cape Anti-Eviction Campaign" (2004) *A Case Study for the University of Kwazulu-Natal entitled: Globalisation, Marginalisation and New Social Movements in Post-Apartheid South Africa* <http://abahlali.org/files/Oldfield%20%20Stokke%20WCAEC%20Research%20Report.pdf> (accessed 1 June 2015); Dugard *Socio-Economic Rights in South Africa* 291.

¹⁴² Dugard *Socio-Economic Rights in South Africa* 291.

appropriate relief when their rights have been collectively infringed or threatened. In this instance, section 38(c) of the Constitution makes provision for the class action, as a legal device suited and shaped to enhancing the collective capability of poor and vulnerable people lacking the means to institute a number of individual legal actions.¹⁴³

2.5 CONCLUSION

The purpose of this chapter has been to establish the socio-economic context of South Africa as a background against which to understand the emergence of service delivery protests against the government. Amidst persistent poverty and inequality, the government's technocratic¹⁴⁴ and managerial economic policies have been unresponsive to people's expectations of public accountability and democratic participation. Marginalised communities without access to the law have consequently mobilised to articulate their demands. Their socio-economic demands on the government, which may coincide with socio-economic rights in the Constitution, have however been articulated outside of the law, with little or no outcome. Outside of the courts people have no assertive armour by which to compel the government to meet its constitutional obligations.

At this stage of the thesis I have introduced the class action briefly as a possible form of legal mobilisation. "Legal mobilisation" is defined, discussed and applied to practical facts of a class action case study¹⁴⁵ in greater depth in Chapter 4, specifically in paragraphs 4.4.1, 4.4.2 and 4.6.2. In the following chapters I will look in greater depth at the nature and relationship between class actions and service delivery protests. I will consider whether class actions can legally institutionalise¹⁴⁶ the collective mobilisation which underpins service delivery protests, in order to remove protests from the streets and into the courtrooms. I will first start with the nature of a class action as it developed from the common law until it found express recognition in section 38(c) of the Constitution.

¹⁴³ JS van Wyk *The need and requirements for a class action in South African law with specific reference to the prerequisites for locus standi in iudicio* (LLM Thesis: University of Pretoria 2010) III; Liebenberg "From the Crucible of the Eastern Cape" 2.

¹⁴⁴ Berkhout and Handmaker *Mobilising Social Justice in South Africa* 6.

¹⁴⁵ *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W); *City of Johannesburg v Mazibuko* 2009 (3) SA 592 (SCA); *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

¹⁴⁶ *S v Makwanyane* 1995 (3) SA 391 (CC) para 168; *Lesapo v North West Agricultural Bank* 2000 (1) SA 409 (CC) para 30.

CHAPTER 3:

STANDING IN THE CONSTITUTIONAL ERA:

CLASS ACTIONS AS A MEANS OF ENHANCING ACCESS TO COURTS

“the chains forged by the traditional doctrine of standing have been broken and access to justice has been made easily available for the purpose of making basic human rights meaningful for the large masses of people.”¹

3.1 INTRODUCTION

In this chapter I answer three questions: what is a class action under the Constitution? how did the class action find its way into the Constitution? and what purpose does it serve in South Africa’s constitutional democracy? In answering these questions, I will begin by setting out a general and comprehensive definition of a class action as provided by the South African case law and academic literature. I then briefly link the similarities of class actions to service delivery protests in order to establish the relationship between the two. Having done that, I go back and trace the development of the “class nature of certain claims”² at common law prior to the constitutional era. The developments of the law of civil procedure at common law form the basis upon which to consider the political and legal influences, deliberations and submissions made towards the express recognition of class actions in the interim and final Constitutions.³ Thereafter I provide a chronological discussion and interrogation of the development of the class action in South Africa. I show through the South African case law, that the class action is being modelled as a means of enhancing access to courts, primarily for poor and vulnerable groups to enforce their socio-economic rights against government.⁴ I highlight in this regard, the remedial power of the

¹ Justice Bhagwati writing on India’s broadened approach to standing: C Plasket “Representative Standing in South African Law” http://globalclassactions.stanford.edu/sites/default/files/documents/south_africa_national_report.pdf (accessed 14 October 2014) 7; G Budlender “Accessibility of Administrative Justice” (1993) *Acta Juridica* 128 at 132.

² Plasket “Representative Standing” 8.

³ V Sripathi “Constitutionalism in India and South Africa: A Comparative Study from a Human Rights Perspective” (2007-2008) 16 *Tul. J. Int’l & Comp.L.* 49 at 54.

⁴ DR Hazel “Litigating with class: Considering a potential framework for class actions in Namibia” (2014) 6 *Namibia Law Journal* 3 at 14.

*Mazibuko*⁵ class action for the enforcement of the right of access to water for an impoverished community at protest against the government. In so doing, I illustrate that the class action has purposively emerged as a tool for ensuring governmental accountability, transparency and responsiveness in fulfilling its socio-economic rights obligations.

3.2 CLASS ACTION

A class action is a legal procedure which enables the claims of a number of persons against the same defendant to be determined in one legal action. One or more persons, called the representative plaintiff or representative plaintiffs, may sue on their behalf, and/ or on behalf of a number of other persons, called the class in a single suit.⁶ If the representative plaintiff or plaintiffs are acting in their own interest, and in the interest of the class as a member of the class, the class must have a claim to a remedy for a similar alleged wrong or rights infringement to that alleged by the representative plaintiff or plaintiffs. The class members' claims share questions of law and or fact with that of the representative plaintiff or plaintiffs, referred to as the common issues. If the representative plaintiff or plaintiffs are only acting in the interests of the class members without his or her own rights being affected, then only the claims of the class are represented. In both instances only the representative plaintiff is a party to the legal action. The class members are not litigants before the court and are not identified as individual members in the litigation, but are merely described in their commonality to be identified as a class.⁷ The class members do not actively participate in the proceedings, but are bound by the outcome of the litigation on the common issues, whether favourable or adverse to the rights of class.⁸

There are two types of class actions, opt-in and opt-out class actions. With an opt-in class action, the class to be represented is confined to people who come forward and identify themselves as claimants. With an opt-out class action, the class to be represented includes all the people falling

⁵ *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W); *City of Johannesburg v Mazibuko* 2009 (3) SA 592 (SCA); *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

⁶ *Children's Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) para 16; *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC) para 15; *Glenister v President of the Republic of South Africa* 2009 (1) SA 287 (CC) para 5; Currie and de Waal *The Bill of Rights Handbook* 83: public interest actions seek to vindicate important social values that affect the society at large, whereas class actions claim specific relief on behalf of specified class members.

⁷ Names of class members are listed and attached to either a summons or founding affidavit: N Kirby "South Africa" in PG Karlsgodt (ed) *World Class Actions: A Guide to Group and Representative Actions Around the Globe* (2012) 386.

⁸ *Children's Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) para 16.

within that class, with the exclusion of those people who expressly remove themselves from the class.⁹ In South African law, a class action may be brought to enforce rights that arise from either the Constitution, common law or statute.

3.3 CLASS ACTION AND THE ENFORCEMENT OF RIGHTS

This thesis concerns itself with the enforcement of socio-economic rights through class actions. This is explicitly provided for in section 38(c) of the Constitution. However, class actions concerned with the enforcement of common law or statutory rights, cannot be ignored completely in considering class actions for the enforcement of constitutional rights. Both constitutional and other class actions raise constitutional considerations of access to courts, as protected in section 34 of the Constitution.¹⁰ This right has been identified as giving a constitutional dimension to all class actions. When groups seek to vindicate common law or statutory rights by means of a class action, they are enforcing their constitutionally protected right of access to courts. This right is of particular significance especially for poor and vulnerable groups for whom accessing courts is a challenge.¹¹ More often than not, communities who embark on service delivery protests lack the means of accessing courts.¹² How can class actions provide assistance to such communities?

3.4 CLASS ACTIONS AND SERVICE DELIVERY PROTESTS

Where service delivery protest demands found a basis in the Constitution as assertion of socio-economic rights, the law can transform such protest actions into class actions to structure and give legal enforceability to the claims. Fundamental to a class action and a protest action are similar mobilising qualities. The actions enable groups of people, whose rights have been similarly infringed by the government to mobilise in demand against the government. The class members' claims or protestors' demands are held in common. The class members are formally described in their commonality as a class in litigation, whereas the community members in a protest action unite on the commonality of their demands as a community.¹³ By unifying all those affected in a single

⁹ *Imraahn Ismail Mukkaddam v Pioneer Food (Pty) Ltd* 2013 (2) SA 254 (SCA) paras 11-14; W de Vos "Opt-in class action for damages vindicated by the Constitutional Court" (2013) 4 *TSAR* 757 at 760-761.

¹⁰ *Children's Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) para 19.

¹¹ *Children's Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) paras 19 and 20.

¹² Para 2.4.1.

¹³ Names of class members are listed and attached to either a summons or founding affidavit: N Kirby "South Africa" in PG Karlsgodt (ed) *World Class Actions: A Guide to Group and Representative Actions Around the Globe* (2012) 386.

action, class actions like protest actions may render the systemic nature of violations publicly visible.¹⁴ The power with a class action however, compared to a service delivery protest lies in the legal enforceability of the rights-based claim.¹⁵ As a starting point towards understanding the nature of a class action, I begin at the common law and trace how the class action found its way into the Constitution.

3.5 THE “SEEDS”¹⁶ OF THE CLASS ACTION AT COMMON LAW

Before the introduction of the interim Constitution, which came into effect on 27 April 1994, class actions per se were unknown to South African law.¹⁷ Prior to this date, the law of civil procedure did not make allowance for representative actions on behalf of groups of persons.¹⁸ Only individuals could litigate against each other,¹⁹ in terms of the restrictive approach to standing. The rules of civil procedure did allow for other persons with a personal, direct and substantial interest in the subject matter and outcome of the legal proceedings between the two parties to join²⁰ into or

¹⁴ S Liebenberg “From the Crucible of the Eastern Cape: New Legal Tools for the Poor” (2015) 2 *Speculum Juris* http://www.speculumjuris.co.za/files/pdf/SJ4214FPLiebenberg_27Jan2015.pdf (accessed on 15 March 2015) 3.

¹⁵ JS van Wyk *The need and requirements for a class action in South African law with specific reference to the prerequisites for locus standi in iudicio* (LLM Thesis: University of Pretoria 2010) 23-24.

¹⁶ L Baxter *Administrative Law* (1984) 671.

¹⁷ *Imraahn Ishmail Mukaddam v Pioneer Food (Pty) Ltd* 2013 (5) SA 89 (CC) para 64.

¹⁸ van Wyk *locus standi in iudicio* 8; C Theophilopoulos *et al Fundamental Principles of Civil Procedure* 2 (ed) (2008) 1; W De Vos “Is a class action a ‘classy act’ to implement outside the ambit of the constitution?” (2012) 4 *TSAR* 737 at 738.

¹⁹ E Hurter “Seeking Truth or Seeking Justice: Reflections on the Changing Face of the Adversarial Process in in Civil Litigation” (2007) 2 *TSAR* 240 at 249.

²⁰ Referred to as “joinder of necessity.” See: *Morgan v Salisbury* 1935 AD 167; *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A); *Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O); Theophilopoulos *et al Civil Procedure* 114; Rule 10 of the Uniform Rules of Court, Supreme Court Act 59 of 1959.

intervene²¹ as parties in the litigation.²² In accordance with the restrictive approach to standing, the individual interest of each litigant remained personal once a person had joined or intervened in the litigation. Whilst the civil procedural rules facilitated this private litigation, the law reports show that large groups of people were being similarly affected by government's public administrative actions in cases reported as early as 1886 on administrative law issues.²³ Consequently, the traditional restrictive approach to standing had to develop to accommodate these groups of people who sought to act on their behalf and/or on behalf of others.²⁴ The reason for this is that important socio-economic and socio-political issues of public administrative accountability and violations of life, liberty or physical integrity,²⁵ necessitated the judicial engagement with the public interest.²⁶ The courts in responding to these social changes and needs of groups of people, creatively crafted

²¹ The common law principle of intervention was drawn from Voet 5.1.37 as cited in *Vitorakis v Wolf* 1973 (3) SA 928 (W) 929E-H. See its application: *Elliot v Bax: In re Bax v South African Life Assurance Society* 1923 WLD 228; *Ex parte Ferreira Deep Supply Stores: In re Ferreira Estate Co. Ltd. V Surveyor-General of the Transvaal* 1932 TPD 271 at 275-276; *Tannenbaum's Executors and Tannenbaum v Quakley and the Liquidator of Varachia Store (Pty) Ltd* 1940 WLD 209 at 220; *Brauer v Cape Liquor Licensing Board* 1953 (3) SA 752 (C) 760; Rule 12 of the Uniform Rules of Court, Supreme Court Act 59 of 1959.

²² The requirement of there being a personal and direct interest in the litigation rendered joinder and intervention individualistic participatory procedures rather than representational procedures. A representational procedure allows a litigant to act on behalf of others without the represented parties participating in the proceedings. The litigants through joinder or intervention participated in legal proceedings as named parties to vindicate their own individual interests, as either co-plaintiffs or co-defendants. In this way, the courts sought to save legal costs, minimise the time spent in court, and eliminate multiple actions on the same questions of law or fact. In light of these objectives, joinder and intervention procedures were not far reaching. Their private and individualistic nature did not cater to public litigation that affected large groups of people nor segments of the public, who could not individually approach the courts personally: Rules 10(1) and 10(3) of the Uniform Rules of Court, Supreme Court Act 59 of 1959 highlight that the parties who seek joinder would ordinarily be able to bring the actions individually on substantially the same question of law or fact; S Pete *et al Civil Procedure: A Practical Guide Procedural Law 2* (ed) (2011) 392; DE Van Loggerenberg and PBJ Farlam *Erasmus: Superior Court Practice* (2014) B1-93 - B1-98; DE Van Loggerenberg *Erasmus: Superior Court Practice 2* ed (2016) D1-23 - D1-148; *Children's Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) para 17; AC Cilliers *et al Herbstein and Van Winsen: The Civil Practice of the High Courts and The Supreme Court of Appeal of South Africa 5* (ed) (2009) 208-211; Theophilopoulos *et al Civil Procedure* 114; *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuzza* 2001 (4) SA 1184 (SCA) para 4; Rules 10 and 12 of the Uniform Rules of Court, Supreme Court Act 59 of 1959.

²³ *Dormer v Town Council of Cape Town* (1886) 4 SC 240.

²⁴ L Baxter *Administrative Law* (1984) 645-646; Hurter 2007 *TSAR* 241.

²⁵ C Loots "Standing to Enforce Fundamental Rights" (1994) 10 *SAJHR* 49 at 51.

²⁶ In public law disputes at least one of the parties is a government entity. The subject matter of public law is the governmental action: Hurter 2007 *TSAR* 240-241; Prue Vines *Law and Justice in Australia: Foundations of the Legal System 2* ed (2008) 269.

conservative exceptions to the restrictive approach to standing, in a few narrowly defined cases.²⁷ In these cases, the courts treaded carefully in their recognition of actions based on commonly held public rights for defined groups of people. An action based on a public right was brought in the plaintiff's own individual interest. With this action, the plaintiff sought to enforce his or her personal right which was coincidental to the rights of members of the public. This coincidence converted the litigant's personal right into a public right. The outcome of the action would, by virtue of judicial precedent or application of the outcome achieved in the litigation, affect others who similarly enjoyed the public right but did not appear before court. The commonality between a group of people, centered on the enjoyment of a similar public right, created a defined group or class of persons. The courts granted standing to litigants on actions based on public rights.²⁸ In so

²⁷ The first exception arose in *Patz v Greene & Co.* 1907 TS 427 at 433. In this case, the Transvaal Supreme Court introduced the principle that, where legislation is intended to protect a defined group of members of the public, it will be presumed that a violation of the legislation will, automatically, affect individual members of that segment of the public. The result was that a member of that segment of the public would be afforded standing to challenge the violation without having to establish that a personal and direct interest has been violated. This principle was confirmed by the Appellate Division in *Director of Education, Transvaal v McCagie* 1918 AD 616 at 621 and 627; *Roodepoort-Maraisburg Town Council v Eastern Properties (Prop) Ltd* 1933 AD 87 at 98; *Smallberger v Cape Times Ltd* 1979 (3) SA 457 (C) 461-463; *BEF (Pty) Ltd v Cape Town Municipality* 1983 (2) SA 387 (C) 400D-H; *Sanchem (Pty) Ltd v Farmers Agri-Care (Pty) Ltd* 1995 (2) SA 781 (A) 790D-E, and by the Supreme Court of Appeal in *Bophuthatswana Transport Holdings v Matthyssen Busvervoer (EDMS) BPK* 1996 (2) SA 166 (SCA) 173D-E. The second exception was the standing afforded to ratepayers to challenge the actions of their local municipalities. As local municipalities provide services in accordance with legislation, they owe a statutory fiduciary duty of accountability to ratepayers. Accordingly, their decision-making powers are circumscribed and violations could be challenged. The rationale for standing to challenge the legality of municipal exercise of public power lay, in the statutory creation of a "class of ratepayers" in the jurisdiction of local municipalities. The courts granted standing to any member of the class of ratepayers to challenge local municipalities on public administrative accountability issues relating to: due administration of funds in order to prevent breaches of the duty of trust imposed on municipal councillors; interdicting the municipality from buying water rights and lands until plans and specifications had been made available to ratepayers, with a statement showing the estimated costs of the scheme; access to Council meetings and information by the municipality relating to minutes of Council meetings, municipal accounts and finances; and challenging the legality of municipal construction on a public area for the enjoyment of the public. In both exceptions, legislation created a class with standing to enforce its provisions. Any member of the class had standing without needing to establish a violation of a personal and direct interest. The legal outcome of the litigation collectively similarly affected the members of the class. The third and most expansive exception is found in the Appellate Division decision of *Wood v Ondongwa Tribal Authority* 1975 (2) SA 294 (A) 295H, 310 D-G, 311F-G, 312G-H and 313A-H. The Appellate Division found that deprivation of personal liberty was an immediate threat to the foundation of a society based on law and order, and that in cases of this nature, the interest requirement to standing must be widely construed. To be granted standing in cases of this nature, the court set out the conditions to be satisfied: firstly, the applicant must satisfy the court that the person or people are not personally able to make the application before the court; secondly, that the applicant has good reason for making the application; and thirdly, that the applicant must establish that the person or persons would have made the application personally had it been possible. The court therefore confirmed that, in appropriate circumstances based on necessity, a concerned person or organisation should be allowed to claim relief in a representative capacity, on behalf of an identified group of persons who are not practically able to approach the court themselves: *Dormer v Town Council of Cape Town* (1886) 4 SC 240 at 244-245; *Cairncross v Oudtshoorn Town Council* (1897) 14 SC 272 at 274 and 276; *Maberly v Woodstock Municipality* (1901) 18 SC 257 at 267-268; *Darlymple v Colonial Treasurer* 1910 TS 372 at 383-385; *De Villiers v The Pretoria Municipality* 1912 TPD 626 at 631; *Director of Education, Transvaal v McCagie* 1918 AD 616 at 627-628; *Bozzoli v Station Commander, John Vorster Square, Johannesburg* 1972 (3) SA 934 (W) 935 G-H; Plasket "Representative Standing" 8-10; GE Devenish *et al Administrative Law and Justice in South Africa* (2001) 462-463; Baxter *Administrative Law* 659-661; Ngcukaitobi 2002 *SAJHR* 592-593; Hoexter *Administrative Law* 500; C Loots "Keeping *Locus Standi* In Chains" (1987) 3 *SAJHR* 66 at 69.

²⁸ Loots 1987 *SALJ* 132; Devenish *et al Administrative Law* 464; C Hoexter *Administrative Law in South Africa* 2 ed (2012) 499.

doing, the courts had begun to conservatively lay the foundations for broadening standing by at least entertaining what seems to be the idea of a “class nature of certain claims”²⁹ before the Constitution. It was the constitution-drafting process which accelerated the move towards the express recognition of the class action.

3.6 THE BACKGROUND TO CLASS STANDING UNDER THE CONSTITUTION

The South African constitution-drafting process occurred in two stages. The first stage, which occurred during a period of political instability as a result of national protests and unrest leading up to the elections, stretched from February 1990 to April 1994. It is also worth mentioning, in the context of the discussion of protests in this thesis, that it was during this stage too, that while the interim Constitution was being drafted, the legislature was hastily preparing the Regulation of Gatherings Act³⁰ as an urgent means to regulate protests taking place at the time of transition. It was during this period, that the first stage of the constitution drafting process produced the draft interim Constitution, which was adopted on 18 November 1993 and came into effect on 27 April 1994. The second stage spanned from 1994, until the final Constitution was adopted on 10 December 1996, and came into effect on 3 February 1997. In light of these two stages, section 38(c) of the final Constitution must be understood by analysing how its predecessor, section 7(4)(b)(iv) in the interim Constitution came about.³¹

3.6.1 RECOGNITION OF THE CLASS ACTION IN THE INTERIM CONSTITUTION

During 1991-1993, the various political parties and non-governmental organisations comprising the Multi-Party Negotiating Process (MPNP), and the South African Law Commission (SALC)³² prepared proposals on a Bill of Rights in the interim Constitution.³³ Emanating from some of the

²⁹ Plasket “Representative Standing” 8.

³⁰ Act 205 of 1993.

³¹R Spitz and M Chaskalson *The Politics of Transition: A Hidden History of South Africa’s Negotiated Settlement* (2000) 18 and 422; C Ramaphosa “Negotiating a New Nation: Reflections on the Development of South Africa’s Constitution” in P Andrews and S Ellmann (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa’s Basic Law* (2001) 79.

³² L du Plessis and H Corder *Understanding South Africa’s Transitional Bill of Rights* (1994) 46.

³³ By May 1993, the African National Congress (ANC), the National Party (NP) and the Democratic Party (DP) had each drafted Bills of Rights: Spitz and Chaskalson *The Politics of Transition* 252.

proposals made, the then Minister of Justice, requested the SALC on 10 August 1992, to investigate the possible recognition of class actions as a means of enforcing rights in the Bill of Rights.³⁴ Shortly thereafter, on 26 September 1992, the ANC and the National Party (NP) concluded a Record of Understanding, whereby they agreed on the drafting and adoption of an interim Constitution.³⁵ In November 1992, the SALC appointed a project committee³⁶ and began its investigations. Meanwhile, the MPNP established the Technical Committee on Constitutional Issues³⁷ and the Technical Committee on Fundamental Rights,³⁸ tasked with giving legal effect to the various party-political submissions in drafting the interim Constitution.³⁹ Considering the draft Bills of Rights,⁴⁰ and comparative jurisprudence, especially of the United States of America

³⁴ South African Law Commission Project 88: *Working Paper on The Recognition of a Class Action in South African Law* 1.

³⁵ The Planning Committee of the MPNP made recommendations to the Negotiating Council on the formation of two committees of experts. One committee would deal with fundamental rights during the transition and another with the remaining constitutional issues such as the form of state, constitutional principles, the constitution-making body, provincial government and the homeland states: Spitz and Chaskalson *The Politics of Transition* 30, 45-51; Ramaphosa *The Post-Apartheid Constitutions* 77.

³⁶ Comprised of Professors De Vos and Malan of the Rand Afrikaans University; Professor Loots of the University of the Witwatersrand; Professor Delpont of the University of Pretoria; and Ms Meer of the Legal Resources Centre (LRC): South African Commission Project 88: *Working Paper on The Recognition of a Class Action in South African Law* 4-5; South African Law Commission Project 88: *Report on The Recognition of a Class Action in South African Law* 4.

³⁷ Comprised of Advocates Chaskalson, Moseneke and Ngoepe; Professors Devenish and Wiechers; Dr Venter, Cachalia, Olivier and Olivier. Spitz and Chaskalson *The Politics of Transition* 65, 68 and 254; D Davis "Deconstructing and Reconstructing the Argument for a Bill of Rights Within the Context of South African Nationalism" in P Andrews and S Ellmann (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001)198.

³⁸ Comprised of Professors Corder and du Plessis; Advocate Yacoob; Ms Nene (sociologist); and Deputy Chief State Law Advisor Grove: Davis *The Post-Apartheid Constitutions* 196 and 198; Spitz and Chaskalson *The Politics of Transition* 65, 253-254.

³⁹ Spitz and Chaskalson *The Politics of Transition* 262.

⁴⁰ du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights* 46.

(USA),⁴¹ Canada⁴² and India,⁴³ the Technical Committee on Fundamental Rights, early in May 1993,⁴⁴ embarked on drafting the Bill of Rights to the interim Constitution.⁴⁵

3.6.2 THE FORMULATION OF THE CLASS STANDING PROVISION UNDER THE BILL OF RIGHTS

The Technical Committee in formulating section 7(4)(b) initially provided standing to litigate in terms of the Bill of Rights for individuals and associations only. It was after consideration of the Democratic Party's (DP) draft Bill of Rights,⁴⁶ calling for representative standing on "behalf of a class of persons,"⁴⁷ that it "concluded that access should be widened to include representative actions by people suing on behalf of another group or person, and that there should be no requirement of strict authority in determining whether a person had legal standing."⁴⁸ The reason for this was that the whole point of section 7(4), was to expand the rules of standing in constitutional matters beyond the pre-existing common law base.⁴⁹ To manage class litigation, the Negotiating Council⁵⁰ foresaw that in future there would be a need for some sort of preliminary

⁴¹ Professor Cheadle, of the University of the Witwatersrand, and legal advisor to the ANC and the Congress of South African Trade Unions (COSATU). He was appointed onto the Ad Hoc Committee on Fundamental Rights as a representative of the ANC and South African Communist Party (SACP). His inputs were influenced by his return from sabbatical at Harvard University where he had been in contact with Tribe, the American constitutional lawyer: Spitz and Chaskalson *The Politics of Transition* 256, 271 and 407; H Ebrahim "Making of the South African Constitution" in P Andrews and S Ellmann (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001) 88. Ebrahim *The Post-Apartheid Constitutions* 88.

⁴² In 1993, the Ontario Legislature enacted the Class Proceedings Act, 1992, aimed at improving access to courts for groups of people through representative actions: J Kalajdzic *Access to Justice for the Masses? A Critical Analysis of Class Actions in Ontario* (LLM Thesis: University of Toronto 2009) 2. Corder's contributions were attributed to the influence of a six-month visit to Cape Town by a Canadian Academic, Beatty. De Vos also notes the general influence that the Canadian Charter of Rights and Freedoms had on the drafters of the Bill of Rights: Spitz and Chaskalson *The Politics of Transition* 407; De Vos "The Impact of the New Constitution Upon Civil Procedural Law" (1995) 6 *Stell LR* 34 at 39; Ebrahim *The Post-Apartheid Constitutions* 88.

⁴³ "Dr Baxi, India's leading constitutional scholar was one of the foreign experts whose advice the South African constitution-makers had elicited." Sripati highlights the Indian influence with regards to class standing: "by liberalising rules of *locus standi* and enabling any member of the public *bona fide* to commence an action on behalf of the disadvantaged class claiming legal injury, the Indian Supreme Court [*S.P. Gupta v Union of India*, A.I.R. 1982 S.C. 149,188] revolutionised access to justice. The inspirational impact of this procedural innovation is evident in the South African Bill of Rights, which provides that 'anyone acting as a member of, or in the interest of, a group or a class of persons' and 'anyone acting in the public interest' may approach the court alleging that a right in the Bill of Rights has been infringed or threatened": Sripati 2007-2008 *Tul. J. Int'l & Comp.L.* 113; Ebrahim *The Post-Apartheid Constitutions* 88.

⁴⁴ du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights* 46.

⁴⁵ Spitz and Chaskalson *The Politics of Transition* 283; Ebrahim *The Post-Apartheid Constitutions* 88.

⁴⁶ Spitz and Chaskalson *The Politics of Transition* 252 and 269; Davis *The Post-Apartheid Constitutions* 198.

⁴⁷ Spitz and Chaskalson *The Politics of Transition* 256.

⁴⁸ Spitz and Chaskalson *The Politics of Transition* 283.

⁴⁹ Spitz and Chaskalson *The Politics of Transition* 283.

⁵⁰ On 28 July 1993: Spitz and Chaskalson *The Politics of Transition* 284.

screening mechanism within section 7(4)(b)(iv).⁵¹ Corbett CJ proposed that the following requirements be met for class standing: that the applicant be a member of the particular class or group of persons; and that the applicant have the consent of the particular group or class to act on its behalf; as well as its agreement to be bound by the court's decision. The Ad Hoc Committee on Fundamental Rights, which had been established to make political decisions on the most contentious matters to arise in the Technical Committee's discussions,⁵² considered Corbett CJ's recommendations.⁵³

The Ad Hoc Committee agreed⁵⁴ with the Technical Committee that a person could bring an action "acting as a member of, or on behalf of a group or class of persons."⁵⁵ The Technical Committee made improvements to the clause so that "the notion of actions "in the interest of"⁵⁶ a group or class of persons replaced actions "on behalf of" a group or class of persons.⁵⁷ These changes were due to the submission⁵⁸ drafted by Loots⁵⁹ on behalf of the Association of Law Societies (ALS)⁶⁰ The submission explained how the concept of interest was fundamental to legal standing:⁶¹

"An applicant will be cited in its own name even where it is claiming relief in the interest of others. The reference to 'on behalf of' is problematic in that it implies the requirement of agency or authority, which means that constitutional actions may be thwarted on purely technical grounds, i.e. the lack of authority."⁶²

Having said this, the ALS also argued for associations to be permitted to bring class actions. Although the ALS' submission on class standing for associations was not explicitly introduced, according to Corder and Du Plessis, the word "person" denoted both natural and juristic persons.⁶³

⁵¹ Spitz and Chaskalson *The Politics of Transition* 284.

⁵² Established in July 1993: Spitz and Chaskalson *The Politics of Transition* 252.

⁵³ Spitz and Chaskalson *The Politics of Transition* 284.

⁵⁴ On 8 September 1993: Spitz and Chaskalson *The Politics of Transition* 284.

⁵⁵ Spitz and Chaskalson *The Politics of Transition* 284.

⁵⁶ Spitz and Chaskalson *The Politics of Transition* 284.

⁵⁷ Spitz and Chaskalson *The Politics of Transition* 284.

⁵⁸ Made to the Technical Committee on 10 October 1993: Spitz and Chaskalson *The Politics of Transition* 444.

⁵⁹ Spitz and Chaskalson *The Politics of Transition* 285 and 406.

⁶⁰ Spitz and Chaskalson *The Politics of Transition* 284; du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights* 50 and 117.

⁶¹ Spitz and Chaskalson *The Politics of Transition* 284.

⁶² Spitz and Chaskalson *The Politics of Transition* 285.

⁶³ Spitz and Chaskalson *The Politics of Transition* 285; du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights* 117-118.

When the interim Constitution came into effect on 27 April 1994, the class action thus found recognition in South African law.⁶⁴ A year later, on 9 May 1995, the new Constitutional Court heard a case⁶⁵ in which it generally interpreted section 7(4). Whilst the Constitutional Court prepared judgment in the matter, the SALC approved the publication of its Working Paper,⁶⁶ in August 1995. The Working Paper was released in October 1995 for public comment by 30 November 1995.⁶⁷ The Working paper provided preliminary recommendations on principles and procedures to facilitate class litigation to give effect to section 7(4)(b)(iv).⁶⁸

3.7 SOUTH AFRICAN LAW COMMISSION'S WORKING PAPER ON CLASS ACTIONS

The link between the work of the Technical Committee in formulating section 7(4)(b)(iv) and that of the SALC's preliminary recommendations on procedures for class litigation, is evident from the contributions made by Loots, who served on both committees. The SALC acknowledged Loots' contribution⁶⁹ as having formed the basis of the Working Paper.⁷⁰ The link is further confirmed by the common acknowledgment of class actions as a means of enhancing access to courts primarily for disadvantaged groups of people in the new South Africa.⁷¹ The SALC noted that due largely to the legacy of apartheid the majority of poor, uneducated and unsophisticated South Africans, were ignorant of their rights in a democratic state. Those who were to some extent aware, did not know how to go about enforcing their rights. They did not know where to get legal advice, and if they knew, could not afford the legal fees. An appropriate class litigation procedure, it advised, would

⁶⁴ Ramaphosa *The Post-Apartheid Constitutions*: 79; South African Law Commission Project 88: *Working Paper on the Recognition of a Class Action in South African Law* 4.

⁶⁵ *Ferreira v Levin* 1996 (1) SA 984 (CC).

⁶⁶ South African Law Commission Project 88: *Working Paper on the Recognition of a Class Action in South African Law* 1; South African Law Commission Project 88: *Report on The Recognition of Class actions and Public Interest Actions in South African Law* 1; W De Vos "Is a class action a "classy act" to implement outside the ambit of the constitution?" (2012) 4 *TSAR* 737 at 739.

⁶⁷ South African Law Commission "Twenty Fourth Annual Report" (1996) 49 www.justice.gov.za/salrc/anr/1996_ar.pdf (accessed 7 November 2015).

⁶⁸ South African Law Commission Project 88: *Working Paper on the Recognition of a Class Action in South African Law* 3-6.

⁶⁹ In 1993 Loots conducted research on class actions in the USA on behalf of the SALC: South African Law Commission "Twenty Fourth Annual Report" 49-50.

⁷⁰ South African Law Commission Project 88: *Working Paper on the Recognition of a Class Action in South African Law* 5-6; W De Vos "Reflections on the introduction of a class action in South Africa" (1996) 4 *TSAR* 639 at 641.

⁷¹ South African Law Commission Project 88: *Working Paper on the Recognition of a Class Action in South African Law* 1-6.

enable concerned individuals and organisations to approach the courts on behalf of others who would not be able to do so themselves. To achieve this, it preliminarily recommended, as a matter of urgency, that legislation and court rules be brought into effect.⁷²

Ten days prior to the date of closure of public comments on the Working Paper, the Witwatersrand Local Division on 20 November 1995, heard an application⁷³ for class standing, in the absence of court rules. After closure of public comments⁷⁴ on 30 November 1995, a few days later the Constitutional Court handed down judgment interpreting the class action under the interim Constitution

3.8 STANDING UNDER THE INTERIM CONSTITUTION

3.8.1 INTERPRETING SECTION 7(4)

In *Ferreira v Levin*,⁷⁵ (*Ferreira*) delivered on 6 December 1995, Chaskalson P and O'Regan J provided a purposive interpretation of section 7(4). Chaskalson P stated that a broad approach to standing would be “consistent with the mandate given to this Court to uphold the Constitution and which serves to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled.”⁷⁶ O'Regan J went on to situate these standing provisions within the new and enhanced role of the courts in a constitutional democracy:

“there can be little doubt that s 7(4) provides for a generous and expanded approach to standing in the constitutional context. The categories of persons who are granted standing are broader than our common law has ever permitted...This expanded approach to standing is quite appropriate for constitutional litigation...s 7(4) casts a wider net for standing than has traditionally been cast by the common law. Section 7(4) is a recognition too of the particular role played by the Courts in a constitutional democracy. As the arm of government which is

⁷² South African Law Commission Project 88: *Working Paper on the Recognition of a Class Action in South African Law* 1-2; South African Law Commission Project 88: *Report on The Recognition of Class Actions and Public Interest Actions in South African Law* 12-13; De Vos 1996 TSAR 643.

⁷³ *Beukes v Krugersdorp Transitional Local Council* 1996 (3) SA 467 (W).

⁷⁴ Comments were received from: du Plessis J; Eloff J; Hofmeyer Attorneys; Anglo American; Natal, Free State, and Gauteng Societies of Advocates; Law Development Commission of Zimbabwe; The Council of South African Bankers; Financial Services Board; Securities Regulation Panel; South African National Consumer Union; and Prologov Consultancy: South African Law Commission Project 88: *Report on the Recognition of a Class Action in South African Law* 105.

⁷⁵ 1996 (1) SA 984 (CC) para 230; South African Law Commission Project 88: *Report on The Recognition of Class actions and Public Interest Actions in South African Law* 13-14 and 17.

⁷⁶ *Ferreira v Levin* 1996 (1) SA 984 (CC) para 165; Plasket “Representative Standing”¹¹; Currie and De Waal *The Bill of Rights Handbook* 73; T Ngcukaitobi “The Evolution of Standing Rules in South Africa and Their Significance in Promoting Social Justice” (2002) 18 *SAJHR* 590 at 602-603.

entrusted primarily with the interpretation and enforcement of constitutional rights, it carries a particular democratic responsibility to ensure that those rights are honoured in our society. The role requires that access to the courts in constitutional matters should not be precluded by rules of standing developed in a different constitutional environment in which a different model of adjudication predominated. In particular, it is important that it is not only those with vested interests who should be afforded standing in constitutional challenges, where remedies may have a wide impact.”⁷⁷

Shortly after judgment in *Ferreira*,⁷⁸ the Witwatersrand Local Division,⁷⁹ handed down its judgment on 10 April 1996 in *Beukes v Krugersdorp Transitional Local Council*.⁸⁰

3.8.2 INTERPRETATION OF THE CLASS ACTION UNDER THE INTERIM CONSTITUTION

In *Beukes*,⁸¹ the Witwatersrand Local Division granted standing to a class of similarly placed municipal ratepayers. A constitutional⁸² challenge was raised against the municipality’s policy of levying “flat rate”⁸³ charges in townships within its jurisdiction, dissimilar to the higher, user-based, charges levied in formerly white residential areas. The applicant brought a class action on behalf of a class of ratepayers who sought an order declaring that it too is entitled to pay municipal rates at a flat rate.⁸⁴ The class members had all appended their names, addresses and telephone numbers to a form entitled “list of group to class action.”⁸⁵ This list served as authorisation at a meeting held, for the applicant to act on their behalf in an application to declare the administrative conduct invalid. The applicant contended that the court’s decision would also affect thousands of other similarly placed residents who were not at the meeting.⁸⁶ The Council challenged the application, stating that the applicant had not defined the class accurately enough such that the interests of its individual members could be determined.⁸⁷ It argued that the members of the class were supposed to join as co-applicants and file their own affidavits.⁸⁸ Cameron J, as he then was, rejected the Council’s

⁷⁷ *Ferreira v Levin* 1996 (1) SA 984 (CC) paras 229-230; Plasket “Representative Standing” 11.

⁷⁸ *Ferreira v Levin* 1996 (1) SA 984 (CC) 1996 (1) SA 984 (CC).

⁷⁹ *Beukes v Krugersdorp Transitional Local Council* 1996 (3) SA 467 (W).

⁸⁰ 1996 (3) SA 467 (W).

⁸¹ *Beukes v Krugersdorp Transitional Local Council* 1996 (3) SA 467 (W); South African Law Commission Project 88: *Report on The Recognition of Class actions and Public Interest Actions in South African Law* 18-20.

⁸² The applicant argued that the municipality’s conduct conflicts with the equality provisions, sections 8(1) and (2), and 178(2) in the interim Constitution: *Beukes v Krugersdorp Transitional Local Council* 1996 (3) SA 467 (W) 472C-E.

⁸³ *Beukes v Krugersdorp Transitional Local Council* 1996 (3) SA 467 (W) 471D-E.

⁸⁴ *Beukes v Krugersdorp Transitional Local Council* 1996 (3) SA 467 (W) 471D-F and 472.

⁸⁵ *Beukes v Krugersdorp Transitional Local Council* 1996 (3) SA 467 (W) 472.

⁸⁶ Ngcukaitobi 2002 18 *SAJHR* 606.

⁸⁷ *Beukes v Krugersdorp Transitional Local Council* 1996 (3) SA 467 (W) 472.

⁸⁸ Ngcukaitobi 2002 18 *SAJHR* 606.

argument. In recognising the class action he held that:

“...it seems to be plain that the group or class of persons as a member of whom and in whose interests the applicant is acting are those ratepayers of Krugersdorp within the TLC's authority who do not enjoy the benefit of "flat rate" municipal charges. It would run counter to the spirit and purport of the interim Constitution to require that persons who identify themselves as members of a group or class as a member of whom and in whose interest a litigant acts, should reiterate with formalistic precision the complaint with which they associate themselves. Even more contrary to the spirit and purport would be to require that they attest to their status or that they put in affidavits joining in the litigation. Mr De la Rey's contention that no unnecessary restrictions should be placed on the application of s 7(4)(b)(iv), and that it should be read so as to avoid obstructions on its invocation, seems to me to be correct.”⁸⁹

Cameron J confirmed O'Regan J's generous and expanded approach in *Ferreira*,⁹⁰ when he stated that standing for classes of people should not be restricted by the application of over-technical rules.⁹¹ This approach, Cameron J held, applied to all courts. In this regard he noted the importance of establishing procedures on how class standing should be proven or evidenced to the satisfaction of the courts.⁹² Less than a year after *Beukes*⁹³ was delivered, the final Constitution came into effect on 4 February 1997.

3.9 INTERPRETATION OF THE CLASS ACTION UNDER THE FINAL CONSTITUTION

When the final Constitution came into effect, the class action, under section 7(4)(b)(iv) of the interim Constitution, was incorporated, unchanged, as section 38(c).⁹⁴ The SALC⁹⁵ Report which was submitted to the Minister⁹⁶ on 12 October 1998,⁹⁷ recommended principles and procedures on how to give effect to section 38(c).

⁸⁹ *Beukes v Krugersdorp Transitional Local Council* 1996 (3) SA 467 (W) 474F-H; Plasket “Representative Standing” 20-21.

⁹⁰ 1996 (1) SA 984 (CC) para 49.

⁹¹ Plasket “Representative Standing” 21.

⁹² *Beukes v Krugersdorp Transitional Local Council* 1996 (3) SA 467 (W) 474E-F.

⁹³ *Beukes v Krugersdorp Transitional Local Council* 1996 (3) SA 467 (W).

⁹⁴ South African Law Commission Project 88: *Report on The Recognition of Class actions and Public Interest Actions in South African Law* 14,

⁹⁵ Appointed a new project committee under the chairmanship of Oliver J and with the following persons: Meer J; Advocate Gauntlet SC; Professor Loots; Mr Makgoba; Mr Mojapelo; and Mr Nkadimeng: South African Law Commission Project 88: *Report on The Recognition of Class actions and Public Interest Actions in South African Law* 5.

⁹⁶ South African Law Commission Project 88: *Report on The Recognition of Class actions and Public Interest Actions in South African Law* v, 12 and 87; S Budlender and N Ferreira “Maximising Impact: Strategies and Tactics For The Next Wave of Public Interest Litigation in South Africa: Briefing Document for Session 1: Class Actions” (2010) *Council for the Advancement of the South African Constitution* 1 at 3 www.casac.org.za (accessed 30 November 2012); De Vos 2012 *TSAR* 740.

⁹⁷ South African Law Commission “Briefing of Justice Portfolio Committee 22 February 1999” (1999) <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/1999/990222salc.htm> (accessed on 7 July 2015).

3.10 THE SOUTH AFRICAN LAW COMMISSION REPORT

The Report⁹⁸ confirmed the preliminary recommendations made in the Working Paper.⁹⁹ It dealt first with the question of who may institute a class action. The SALC found that section 38(c) in allowing a person standing, not only as a member of a class or group, but also in the interest of a group or class of persons without themselves being a member nor having an interest, in this latter circumstance introduced the notion of an “ideological plaintiff.”¹⁰⁰ By ideological plaintiff it is meant that “a person commencing the action or the person appointed as representative need not be a member of the class.”¹⁰¹ This was in contrast to the USA, Canadian and Australian models,¹⁰² where the class representative is required to be a member of the class. The SALC rejected the argument that the commonality of the legal interest between the representative and the class would ensure adequate representation of the class and prevent opportunistic representation. It found that the socio-economic milieu of South Africa called for better-resourced independent public spirited ideological plaintiffs to act on behalf of impoverished classes who lacked legal agency.¹⁰³ Access to justice was therefore an important consideration. The SALC explained as follows:

“A large percentage of the South African population is unsophisticated, poorly educated and indigent. In matters which affect such communities it will be most unlikely that a member of a class will come forward and initiate a class action. Where redress is sought in the interests of such communities it will usually be at the instance of some organisation which has the interests of the community at heart, or possibly some concerned individual. Where this is the case there is no sense at all in requiring the concerned organisation or individual to find a member of the group to act as nominal representative. Such a nominal representative might be incapable of playing a meaningful role as a representative for the group and one has the situation where the concerned organisation or individual is in fact driving the litigation but a pretence is kept up that the instructions derive from the named representatives. This presents the court with a fiction and forces the players into situations which are often not entirely honest and sometimes unethical.”¹⁰⁴

⁹⁸ Contained recommendations and draft bill: South African Law Commission Project 88: *Report on The Recognition of Class actions and Public Interest Actions in South African Law* 32-104.

⁹⁹ South African Law Commission Project 88: *Report on The Recognition of Class actions and Public Interest Actions in South African Law* 1-5.

¹⁰⁰ South African Law Commission Project 88: *Working Paper on the Recognition of a Class Action in South African Law* 29.

¹⁰¹ South African Law Commission Project 88: *Report on The Recognition of Class Actions and Public Interest Actions in South African Law* 34; South African Law Commission Project 88: *Working Paper on the Recognition of a Class Action in South African Law* 29.

¹⁰² *Children’s Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) para 46; W De Vos “Judicial activism gives recognition to a general class action in South Africa” (2013) 2 *TSAR* 370 at 377.

¹⁰³ De Vos 1996 *TSAR* 643-645.

¹⁰⁴ South African Law Commission Project 88: *Report on The Recognition of Class Actions and Public Interest Actions in South African Law* 29; De Vos 1996 *TSAR* 644.

The SALC, cognisant of the challenges of representing a class, called for certification of a class action.¹⁰⁵ Much like the screening mechanism¹⁰⁶ earlier proposed by the MPNP's Negotiating Council, the SALC recommended certification, as a "preliminary screen"¹⁰⁷ to act as a judicial safeguard. This safeguard, it proposed, would serve to prevent abuses of the action, shield the defendant from an unreasonable burden of complex and costly litigation, protect the interests of absent class members, and regulate the litigation involving groups of people. A class action could therefore be commenced by a representative on behalf of a class, but within a specified time it had to be certified by the court in order to proceed as such. The SALC proposed a two-stage approach to certification. Firstly, the representative would be required to bring an application on notice of motion supported by the particulars of claim and a statement motivating the application for certification, supported by affidavit and the necessary documents, before the court for leave to institute a class action. Once the court had certified the process as a class action and determined the procedure to be followed, the class action would proceed through the second phase to finality.¹⁰⁸ It suggested that the following factors be taken into account by courts when called upon to certify an action as a class action:

- (a) "there is an identifiable class of persons;
- (b) a cause of action is disclosed;
- (c) there are issues of fact or law which are common to the class;
- (d) a suitable representative is available;
- (e) the interests of justice so require; and
- (f) the class action is the appropriate method of proceeding with the action."¹⁰⁹

The above mentioned procedural regulatory measures were summarised as: numerosity,¹¹⁰ a preliminary merits test, commonality, adequate representation, the interests of justice,¹¹¹ and superiority. I now briefly discuss these certification requirements.

¹⁰⁵ South African Law Commission Project 88: *Report on The Recognition of Class Actions and Public Interest Actions in South African Law* 40.

¹⁰⁶ Spitz and Chaskalson *The Politics of Transition* 284.

¹⁰⁷ E Hurter "Certification: the procedure, its role in class action proceedings in Ontario and the proposed South African certification procedure" (2000) XXXIII *CILSA* 45.

¹⁰⁸ South African Law Commission Project 88: *Report on The Recognition of Class Actions and Public Interest Actions in South African Law* 39-40 and 51; De Vos 1996 *TSAR* 644-645; Hurter 2000 *CILSA* 45.

¹⁰⁹ South African Law Commission Project 88: *Report on The Recognition of Class Actions and Public Interest Actions in South African Law* 50.

¹¹⁰ Defined as "an identifiable class of two or more persons" South African Law Commission Project 88: *Report on The Recognition of Class actions and Public Interest Actions in South African Law* 41.

¹¹¹ South African Law Commission Project 88: *Report on The Recognition of Class Actions and Public Interest Actions in South African Law* 41-48.

3.10.1 CERTIFICATION REQUIREMENTS

For an action to be certified as a class action, there must be an identifiable class of persons. The class must have a *prima facie* cause of action, meaning that an applicant need only aver facts common to the class, that, if true, would establish a cause of action.¹¹² On the requirement of commonality, the SALC was recommended that the action must raise questions of fact or law common to the members of the class. It was advised that common issues should be determined together in the class action, and issues unique to individual class members should be determined individually. The representative had to be a suitable person who would fairly and adequately represent the class. The requirement was that such person should have no conflict of interest with the class members, that no individual member should unduly benefit at the expense of other class members, and that the representative has the legal resources to pursue the class action to finality.¹¹³ The “interests of justice” factor required at least that the class action must be the appropriate means of proceeding with the action. Lastly the SALC emphasised that the class action should be resorted to only where it is likely to be the appropriate method of adjudication.¹¹⁴ Once these requirements were met, it was recommended, that the court which certifies a class action should give directions as to whether the representative is required to give notice of the action to the class members.

3.10.2 NOTICE REQUIREMENTS

The following factors were recommended for consideration by the court in the determination of notice:

- (a) “the form which such notice should take;
- (b) whether the notice should give class members the right to include or exclude themselves from the action;
- (c) the way in which notice of the action is to be communicated to the class.”¹¹⁵

¹¹² See *Ex parte Minister of Justice: In re R v Jacobson and Levy* 1931 AD 466 at 478; South African Law Commission Project 88: *Report on The Recognition of Class Actions and Public Interest Actions in South African Law* 42-44.

¹¹³ Canada’s Class Proceedings Act, 1992 refers to “adequacy” of representation. The Supreme Court of Canada in *Western Canadian Shipping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 para 41 has referred to proposed representatives who will vigorously and capably represent the interests of the class, with reference to three factors: the plaintiff’s motivation, the ability to bear the costs of the litigation, and the competence of the plaintiff’s legal counsel: J Kalajdic *Access to Justice for the Masses? A Critical Analysis of Class Actions in Ontario* (LLM Thesis: University of Toronto 2009) 91.

¹¹⁴ South African Law Commission Project 88: *Report on The Recognition of Class Actions and Public Interest Actions in South African Law* vii, 47-50.

¹¹⁵ South African Law Commission Project 88: *Report on The Recognition of Class Actions and Public Interest Actions in South African Law* 54.

When deciding whether notice should be given to the members of the class and, if so, what directions are appropriate, the SALC recommended that the courts should take into account:

- (a) “the extent to which the members of the class might be prejudiced by being bound by a judgment given in an action which may not have come to their attention;
- (b) the size of the class;
- (c) the probable general level of education and understanding of the class members;
- (d) the possibility of identifying members of the class;
- (e) the type of relief claimed;
- (f) where the claim is for monetary relief, the size of each class member’s claim;
- (g) the likelihood of class members enforcing their claims individually; and
- (h) any other relevant factor.”¹¹⁶

A strict adherence to the notion of a fair trial would require that adequate notice be given to all the individual members of the class who stand to be affected by the judgment. According to this notion, the effect of a class action judgment would be procedurally unfair to those class members who had not received notice of the proceedings and, therefore, did not have an opportunity to litigate their own claims. The unsophisticated, uneducated, indigent and geographical dispersed position of the majority of South Africans, however, posed a challenge in this regard. In response to this challenge, the SALC accepted that the traditional perception of procedural fairness should be reconsidered as an individualistic notion of a procedurally fair trial. This, it recommended, should give way to, or be integrated with, a social or collective concept of due process, since this would be the only possible way to achieve judicial vindication of collective rights. According to the SALC, this justified the curtailment of the individual right to be heard, belonging to all the class members, provided it would be fully guaranteed by the class representative. In this way, the absent class members would still get a ‘hearing,’ since an adequate representative plaintiff would present the case on behalf of the class as a whole. The class members would have a better ‘day in court’ if the class action was allowed than if not, since they would most likely, due to socio-economic circumstances be unable to go to court individually.¹¹⁷

¹¹⁶ South African Commission Project 88: *Report on The Recognition of Class Actions and Public Interest Actions in South African Law* 54. According to Canada’s Class Proceedings Act, 1992, requires the courts to take into account the following factors: the cost of giving notice, the size of the individual claims, the number of the class members: J Kalajdic *Access to Justice for the Masses? A Critical Analysis of Class Actions in Ontario* (LLM Thesis: University of Toronto 2009) 125.

¹¹⁷ South African Commission Project 88: *Report on The Recognition of Class Actions and Public Interest Actions in South African Law* 55-56.

Despite the SALC's recommendations provided to parliament, parliament did not take any action. As a result, there are currently no statutory procedures nor practice directives to facilitate the institution and conducting of class actions. The current South African rules of court similarly do not regulate class actions.¹¹⁸ In the absence of legislative structure, the courts have had to resort to the exercise of their inherent jurisdiction¹¹⁹ to accommodate class actions.¹²⁰ Since 1996, judicial precedent has developed incrementally,¹²¹ with different standards and requirements set by the High Courts, Supreme Court of Appeal and Constitutional Court, to facilitate class certification. I now discuss how the courts have had to "devise *ad hoc* solutions to procedural complexities on a case by case basis."¹²²

3.11 JUDICIAL REFINEMENT OF THE CLASS CERTIFICATION REQUIREMENTS

Despite the fact that the SALC's recommendations and draft bill have not been actioned by Parliament, it will be shown that these recommendations have clearly been taken into account in the judicial development of the class action. The various courts have however, adopted varying approaches with regard to certification.¹²³

3.11.1 CERTIFICATION AND THE PRACTICAL DIFFICULTIES OF CLASS LITIGATION

Shortly after *Beukes*,¹²⁴ and the SALC's Report, *Maluleke v MEC, Health and Welfare, Northern Province*¹²⁵ (*Maluleke*), was delivered on 3 March 1999. In *Maluleke*¹²⁶ Southwood J rejected a certification application on behalf of 92 000¹²⁷ similarly placed pensioners whose grants were

¹¹⁸ Uniform Rules of Court, Supreme Court Act 59 of 1959; *Children's Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) paras 14 and 16; Kirby *World Class Actions* 378.

¹¹⁹ Section 173 of the Constitution, 1996.

¹²⁰ *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuzza* 2001 (4) SA 1184 (SCA) para 22. *Children's Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) para 21; *Imraahn Ishmail Mukaddam v Pioneer Food (Pty) Ltd* 2013 (5) SA 89 (CC) para 2.

¹²¹ *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuzza* 2001 (4) SA 1184 (SCA) para 4; *First Rand Bank v Chaucer Publications (Pty) Ltd* 2008 (2) SA 522 (C) para 598F-I; *The Trustees for the Time Being for the Children's Resource Centre Trust v Pioneer Foods (Pty) Ltd, Mukaddam v Pioneer Foods (Pty) Ltd* [2011] ZAWCHC 102 (7 April 2011) para 23.

¹²² *Children's Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) para 15.

¹²³ Budlender and Ferreira "Maximising Impact" 4.

¹²⁴ *Beukes v Krugersdorp Transitional Local Council* 1996 (3) SA 467 (W).

¹²⁵ 1999 (4) SA 367 (T).

¹²⁶ *Maluleke v MEC, Health and Welfare, Northern Province* 1999 (4) SA 367 (T).

¹²⁷ Ngcukaitobi 2002 SAJHR 606.

suspended by the government of the then Northern Province.¹²⁸ His reasons for holding that the pensioners lacked class standing to challenge the infringement of an alleged constitutional right to social assistance were: firstly, that they “constitute a group or class in only the vaguest and broadest sense - payment of their benefits was suspended;”¹²⁹ secondly, that each members’ circumstances differed; thirdly, that it was not apparent that the members of the class were aware of the litigation and were willing to be bound by it and the potential costs order.¹³⁰ This approach was narrow and not in line with *Beukes*.¹³¹

On a broader interpretation of standing in that matter, certification could have been granted. Firstly, the one common characteristic, which was that the class was suffering a similar infringement of their fundamental rights by the same respondent, was present. Secondly, each person’s circumstances were not different, as all the pensioners were prejudiced by one decision to suspend their grants. The third problem raised by Southwood J was not of the applicant’s making. No legislation had been passed to regulate class actions and class actions were unknown at common law. As a result, no statutory or common law rules existed to regulate notice to members of the class or costs orders. As the judgment would have affected the rights of a large class of pensioners, these members of the class would have to have been given some form of notice of the proceedings. This would have given them an opportunity to associate or disassociate from the proceedings. The fact that the applicant did not spontaneously create a notice procedure which met with Southwood J’s approval, ought not to have meant that the application was to be dismissed on this basis. This approach failed to promote access to court. The court should have exercised its inherent jurisdiction and ordered that notice in an appropriate form be given to the class, before dealing with the evidence, rather than dismiss the application on that basis.¹³² Froneman J, as he then was, in *Ngxuzva v Secretary, Department of Welfare, Eastern Cape Provincial Government, Permanent Secretary,*

¹²⁸ The Northern Province, Department of Health and Welfare, Social Security made a decision to suspend the payment of social assistance grants to beneficiaries. The decision related to the abuse of the social welfare system in the Northern Province and the conclusion reached that a large number of persons were fraudulently receiving benefits to which they were not entitled in terms of the system. The department concluded that the only way in which it could identify those fraudulently receiving benefits was to suspend payment and for eligible beneficiaries to apply for reinstatement: *Maluleke v MEC, Health and Welfare, Northern Province* 1999 (4) SA 367 (T) 371.

¹²⁹ *Maluleke v MEC, Health and Welfare, Northern Province* 1999 (4) SA 367 (T) 374; Plasket “Representative Standing” 22.

¹³⁰ *Maluleke v MEC, Health and Welfare, Northern Province* 1999 (4) SA 367 (T) 374C-D; Plasket “Representative Standing” 22; Ngcukaitobi 2002 *SAJHR* 606-607.

¹³¹ *Beukes v Krugersdorp Transitional Local Council* 1996 (3) SA 467 (W).

¹³² *Children’s Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) para 21; *Imraahn Ishmail Mukaddam v Pioneer Food (Pty) Ltd* 2013 (5) SA 89 (CC) para 2; Plasket “Representative Standing” 22 and 23.

*Department of Welfare*¹³³ (*Ngxuza I*) was confronted with a similar set of facts before Southwood J in *Maluleke*.¹³⁴ In his judgment handed down on 27 October 2000, Froneman J in contrast, crafted solutions to the procedural problems identified by Southwood J.

3.11.2 FINDING SOLUTIONS TO DIFFICULTIES: THE DEVELOPMENT OF CERTIFICATION REQUIREMENTS

The *Maluleke*¹³⁵ decision was criticised in *Ngxuza I*,¹³⁶ where Froneman J held that three applicants had standing to sue on behalf of an estimated 100 000 recipients of disability grants. The facts and legal issues were substantially similar to those in the *Maluleke* case.¹³⁷ Froneman J's approach echoed O'Regan J's judgment in *Ferreira v Levin*¹³⁸ where she emphasised the new role of courts in a constitutional democracy. He accordingly emphasised that the courts should interpret the class standing provision to promote access to courts where the rights of poor and vulnerable groups have been affected by government. In this way, the courts will live up to their constitutional obligation of ensuring accountability and responsiveness on the part of government.¹³⁹ Froneman J found forward-looking solutions, whereas Southwood J had previously been constrained by the practical difficulties of class litigation. Froneman J specifically held that¹⁴⁰ "the many practical difficulties associated with representative and class actions, highlighted in the *Maluleke* case, cannot justify the denial of such an action where the Constitution makes specific provisions for it."¹⁴¹

He highlighted the problems peculiar to class actions, including those associated with ensuring that only those who wish to be involved in the case are; that those who wish to be involved are given the chance to make the representations they may wish to make; and that the party representing the case

¹³³ 2001 (2) SA 609 (E).

¹³⁴ *Maluleke v MEC, Health and Welfare, Northern Province* 1999 (4) SA 367 (T).

¹³⁵ *Maluleke v MEC, Health and Welfare, Northern Province* 1999 (4) SA 367 (T).

¹³⁶ *Ngxuza v Secretary, Department of Welfare, Eastern Cape Provincial Government, Permanent Secretary, Department of Welfare* 2001 (2) SA 609 (E).

¹³⁷ The applicants challenged the Department of Welfare which suspended payments of their welfare grants, without any form of warning, prior notice or consultation. The department's intention was to weed out fraudulent claims out of the grant system by requiring every grant recipient to re-register in order to have their grants reinstated. The applicants therefore sought relief not only for themselves but on behalf of the class of similarly affected recipients: *Ngxuza v Secretary, Department of Welfare, Eastern Cape Provincial Government, Permanent Secretary, Department of Welfare* 2001 (2) SA 609 (E) 617H-I; Currie and De Waal *The Bill of Rights Handbook* 82; Ngcukaitobi 2002 *SAJHR* 606-607.

¹³⁸ *Ferreira v Levin* 1996 (1) SA 984 (CC) para 229-230.

¹³⁹ *Ngxuza v Secretary, Department of Welfare, Eastern Cape Provincial Government, Permanent Secretary, Department of Welfare* 2001 (2) SA 609 (E) 619-620.

¹⁴⁰ Plasket "Representative Standing" 23.

¹⁴¹ *Ngxuza v Secretary, Department of Welfare, Eastern Cape Provincial Government, Permanent Secretary, Department of Welfare* 2001 (2) SA 609 (E) 623B-C; Plasket "Representative Standing" 23.

adequately represents future interests.¹⁴² In response to these practical difficulties he directed that if “there is a clearly defined class of people who have been wronged in the manner required by section 38 it is no answer for either the judicial or administrative arms of government to say that it will be difficult to give them redress.”¹⁴³

Froneman J confronted the problems of certification highlighted in *Maluleke*¹⁴⁴ by resolving that the solution lay in developing new and innovative judicial responses to give effect to class actions.¹⁴⁵ He held *in casu* that the applicants had established standing. Firstly, the applicants had established a common interest that related to the infringement of a constitutional right. The applicants and the class of persons they sought to represent had all their grants suspended in the same unlawful manner by government.¹⁴⁶ The judge criticised *Maluleke*¹⁴⁷ for failing to recognise that the unlawful suspension of the class’ grants was an infringement of their right to lawful administrative action.¹⁴⁸ Secondly, the class that the applicants sought to represent was found to have been “sufficiently clear and identifiable.”¹⁴⁹ Thirdly, the applicants were members of that class. Froneman J noted how the socio-economic position of the class members was a relevant factor in favour of certification. He emphasised that the members of the class were unable to pursue their claims individually because they were in a poor position to access legal services. That in the absence of legal means of accessing courts, the poor and vulnerable class members will be unable to take unhelpful and unresponsive public administrations to court.¹⁵⁰ In these circumstances he concluded that “making

¹⁴² *Ngxuza v Secretary, Department of Welfare, Eastern Cape Provincial Government, Permanent Secretary, Department of Welfare* 2001 (2) SA 609 (E) 619D-G; South African Law Commission Project 88: *Report on The Recognition of Class actions and Public Interest Actions in South African Law* 5.

¹⁴³ *Ngxuza v Secretary, Department of Welfare, Eastern Cape Provincial Government, Permanent Secretary, Department of Welfare* 2001 (2) SA 609 (E) 625A-B; Plasket “Representative Standing” 23.

¹⁴⁴ *Maluleke v MEC, Health and Welfare, Northern Province* 1999 (4) SA 367 (T) 374C-D.

¹⁴⁵ *Ngxuza v Secretary, Department of Welfare, Eastern Cape Provincial Government, Permanent Secretary, Department of Welfare* 2001 (2) SA 609 (E) 623B-C and 625A-B; Plasket “Representative Standing” 23.

¹⁴⁶ The procedure that the department adopted to suspend the grants did not comply with the requirements of the right to procedurally fair administrative action, as envisaged in section 33(1) of the Constitution. This also resulted in the infringement of section 27(1)(c) of the Constitution, which grants everyone the right of access to “social security, including if they are unable to support themselves and their dependants, social assistance:” *Ngxuza v Secretary, Department of Welfare, Eastern Cape Provincial Government, Permanent Secretary, Department of Welfare* 2001 (2) SA 609 (E) 624G; Plasket “Representative Standing” 23-24.

¹⁴⁷ *Maluleke v MEC, Health and Welfare, Northern Province* 1999 (4) SA 367 (T); Ngcukaitobi 2002 SAJHR 608.

¹⁴⁸ Ngcukaitobi 2002 SAJHR 608.

¹⁴⁹ *Ngxuza v Secretary, Department of Welfare, Eastern Cape Provincial Government, Permanent Secretary, Department of Welfare* 2001 (2) SA 609 (E) 625E; Plasket “Representative Standing” 24.

¹⁵⁰ In this context class actions in Canada are similarly viewed as “an evolutionary response to the existence of injuries unremedied by the regulatory action of government:” J Kalajdzic *Access to Justice for the Masses? A Critical Analysis of Class Actions in Ontario* (LLM Thesis: University of Toronto 2009) 50; *Ngxuza v Secretary, Department of Welfare, Eastern Cape Provincial Government, Permanent Secretary, Department of Welfare* 2001 (2) SA 609 (E) 625E and 621F-I; Plasket “Representative Standing” 24.

it easier for disadvantaged and poor people to approach the courts on public issues to ensure that the public administration adheres to the fundamental constitutional principle of legality in the exercise of public power serves our democracy well.”¹⁵¹

In this seminal judgment, *Ngxuza I*¹⁵² laid the foundations for the essential requirements to be satisfied in future for class certification. The certification requirements resonated with the SALC’s recommendations. The judge directed that the determination of the common interest requirement sufficient to justify representation of a class would depend on the facts of each case. The common interest would have to relate to the alleged infringement of a constitutional right. Where such common interest had been established, the fact that the class members may have differing circumstances did not preclude certification. In this instance, it would be up to the defendant to raise the differing claims at the merits stage. With regard to ensuring that only those who wish to associate themselves with the class action do so, this could be achieved through the procedural requirement that the applicant give sufficient notice to all affected. In this way, they may have an opportunity to associate or disassociate themselves from the litigation by electing to opt-in or opt-out.¹⁵³ On appeal, Cameron JA, as he then was, in *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza*,¹⁵⁴ (*Ngxuza 2*) further developed these requirements into what he termed the “quintessential requisites”¹⁵⁵ for certification.

3.11.3 IDENTIFYING THE “QUINTESSENTIAL REQUISITES”¹⁵⁶ FOR CERTIFICATION

The Supreme Court of Appeal in *Ngxuza 2*,¹⁵⁷ delivered on 31 August 2001, upheld *Ngxuza 1*.¹⁵⁸ Cameron JA began his judgment by amplifying Froneman J’s previous emphasis on the socio-

¹⁵¹ *Ngxuza v Secretary, Department of Welfare, Eastern Cape Provincial Government, Permanent Secretary, Department of Welfare* 2001 (2) SA 609 (E) 623C-F and 629E-G; Plasket “Representative Standing” 24.

¹⁵² *Ngxuza v Secretary, Department of Welfare, Eastern Cape Provincial Government, Permanent Secretary, Department of Welfare* 2001 (2) SA 609 (E).

¹⁵³ *Ngxuza v Secretary, Department of Welfare, Eastern Cape Provincial Government, Permanent Secretary, Department of Welfare* 2001 (2) SA 609 (E) 624D-J.

¹⁵⁴ 2001 (4) SA 1184 (SCA).

¹⁵⁵ *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 (4) SA 1184 (SCA) para 21.

¹⁵⁶ *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 (4) SA 1184 (SCA) para 15.

¹⁵⁷ 2001 (4) SA 1184 (SCA).

¹⁵⁸ *Ngxuza v Secretary, Department of Welfare, Eastern Cape Provincial Government, Permanent Secretary, Department of Welfare* 2001 (2) SA 609 (E).

economic necessity of the class action for promoting access to courts in South Africa for the poor and vulnerable:

“It is precisely because so many in our country are in a ‘poor position to seek legal redress’ and because the technicalities of legal procedure, including joinder, may unduly complicate the attainment of justice that both the interim Constitution and the Constitution created the express entitlement that ‘anyone’ asserting a right in the Bill of Rights could litigate ‘as a member of, or in the interest of, a group or class of persons.’”¹⁵⁹

With this statement, Cameron JA provided the class action as solution to the contextual state of affairs prevailing in South Africa, as observed by Didcott J in *Mohlomi v Minister of Defence*,¹⁶⁰ and quoted by Froneman J in *Ngxuza I*:¹⁶¹

“the state of affairs prevailing in South Africa, a land where poverty and illiteracy abound and differences in culture and language are pronounced, where such conditions isolate the people whom they handicap from the mainstream of the law, where most...are either unaware of or poorly informed about their legal rights and what they should do in order to enforce those, and where access to the professional advice and assistance that they need so sorely is often difficult for financial and geographic reasons.”¹⁶²

He accordingly held that the applicants’ circumstances were tailor-made for a class action. There was a large and disparate class of claimants against the government, all poor and¹⁶³ “lacking in protective and assertive armour.”¹⁶⁴ The class members were without access to individualised legal services, they were geographically scattered throughout the Eastern Cape Province in small towns and rural areas, and each with a relatively small monetary claim suitable for judicial enforcement.¹⁶⁵ He confirmed the class’ standing on the basis that:

¹⁵⁹ *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 (4) SA 1184 (SCA) para 6.

¹⁶⁰ 1997 (1) SA 124 (CC).

¹⁶¹ *Ngxuza v Secretary, Department of Welfare, Eastern Cape Provincial Government, Permanent Secretary, Department of Welfare* 2001 (2) SA 609 (E) 621E-F.

¹⁶² These statements resonate with the Ontario Law Reform Commission’s (OLRC) for the enactment of a class proceedings legislation. The idea that class actions could overcome the various barriers that preclude potential litigants, and thus serve an important social function pervaded the Commission’s Report. Access to justice, along with judicial economy were the principal justifications. The Commission was of the view that economic, social and psychological barriers prevent many claims from being litigated. Class actions would therefore promote access to courts, thereby overcoming these barriers. In the U.S, commentators have similarly emphasised the societal need to redress wrongs that is served by class actions. For proponents of class actions, the goal is said to be the attainment of meaningful justice for the disempowered: Kalajdzic *Access to Justice for the Masses?* 51-53 and 69.

¹⁶³ *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 (4) SA 1184 (SCA) para 11; Currie and De Waal *The Bill of Rights Handbook* 82.

¹⁶⁴ *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 (4) SA 1184 (SCA) para 12; Currie and De Waal *The Bill of Rights Handbook* 82.

¹⁶⁵ *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 (4) SA 1184 (SCA) para 11.

“The complaint that the class was not adequately defined in the order of the court below is difficult to appreciate. There can be no conceptual complaint about the clarity of the group’s definition. From the point of view of practical definition, it is beyond dispute that (1) the class is so numerous that joinder of all its members is impracticable; (2) there are questions of law and fact common to the class; (3) the claims of the applicants representing the class are typical of the claims of the rest; and (4) the applicants, through their legal representatives, the Legal Resources Centre, will fairly and adequately protect the interests of the class. The quintessential requisites for a class action are therefore present.”¹⁶⁶

The Supreme Court of Appeal systematically identified the “quintessential requisites”¹⁶⁷ for certification: numerosity; commonality of fact and law; similarity of the claims; and adequate legal representation. Cameron JA emphasised that it is the needs of the poor and vulnerable and the promotion of their access to courts, which must animate our understanding of the class action. In dismissing the appeal, he was scathing of the unresponsive and unaccountable provincial government. He found that the manner in which it cancelled the grants, and its conduct in the litigation against a poor and vulnerable citizenry was tantamount to a declaration of war. The class action would therefore serve as an assertive armour.¹⁶⁸ In *Rail Commuter Action Group v Transnet t/a Metrorail, (Rail Commuter)*¹⁶⁹ delivered on 2 September 2003, Davis J and Van Heerden J, citing *Ngxuza I*¹⁷⁰ and 2,¹⁷¹ developed the law on class actions further. The Western Cape High Court, gave judicial recognition granted informally structured associations standing to represent classes in order to hold the government accountable to its constitutional obligations.

3.11.4 INFORMALLY STRUCTURED ASSOCIATIONS REPRESENTING A CLASS

In *Rail Commuter*¹⁷² individual commuters and a voluntary association, Rail Commuter Action Group (RCAG), applied for standing to represent a class of Metrorail commuters in the Western Cape. The applicants approached the court seeking declaratory and mandatory relief against

¹⁶⁶ *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 (4) SA 1184 (SCA) para 15; Plasket “Representative Standing” 25; Ngcukaitobi 2002 SAJHR 608-609.

¹⁶⁷ *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 (4) SA 1184 (SCA) para 15.

¹⁶⁸ *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 (4) SA 1184 (SCA) paras 12 and 15; Plasket “Representative Standing” 25.

¹⁶⁹ 2003 (5) SA 518 (C).

¹⁷⁰ *Ngxuza v Secretary, Department of Welfare, Eastern Cape Provincial Government, Permanent Secretary, Department of Welfare* 2001 (2) SA 609 (E) 619B-D.

¹⁷¹ *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 (4) SA 1184 (SCA) para 12.

¹⁷² *Rail Commuter Action Group v Transnet t/a Metrorail* 2003 (5) SA 518 (C).

Transnet Limited. The applicants claimed that Transnet, as an organ of State,¹⁷³ owed them duties of protection against the criminal activities of third parties on commuter trains and train stations in and around Cape Town.¹⁷⁴ The applicants' case was based on alleged breaches of statutory¹⁷⁵ and common law¹⁷⁶ duties, bolstered by the Constitution.¹⁷⁷ Transnet challenged the application on the basis that the RCAG was not a legal body¹⁷⁸ that could represent the class of commuters' interests. Whilst making reference to *Ngxuza I*¹⁷⁹ and 2,¹⁸⁰ Davis J and Van Heerden J afforded standing to the RCAG to represent the class. The judges found that the requirements outlined in *Ngxuza 2*,¹⁸¹ for a class action were present in that: firstly, the class was comprised of numerous Metrorail commuters in the Western Cape; secondly, the class commonly claimed that Transnet owed them legal duties; thirdly, the applicants' claims were typical to those of the class; fourthly, RCAG was formed at a public meeting to express a common concern by members of the class, who empowered it to legally represent them;¹⁸² and fifthly, RCAG had accordingly briefed attorneys to adequately represent the interests of the class.¹⁸³ In a similar tone to Froneman J and Cameron JA in *Beukes*,¹⁸⁴ *Ngxuza I*¹⁸⁵ and 2,¹⁸⁶ the judges granted class standing on the basis that a voluntary association "formed to protect the rights of a vulnerable constituency and with the object of holding a public body accountable to the public should, it seems, not be subjected to unnecessary restrictions before

¹⁷³ Transnet Limited is a public company that was established by statute – the Legal Succession to the South African Transport Services Act 9 of 1989 – and its only shareholder is the State: *Rail Commuter Action Group v Transnet t/a Metrorail* 2003 (5) SA 518 (C) 527I-J - 528A-B.

¹⁷⁴ *Rail Commuter Action Group v Transnet t/a Metrorail* 2003 (5) SA 518 (C) 527E-H; Plasket "Representative Standing" 26.

¹⁷⁵ Legal Succession to the South African Transport Services Act 9 of 1989: *Rail Commuter Action Group v Transnet t/a Metrorail* 2003 (5) SA 518 (C) 527G-I; Plasket "Representative Standing" 26.

¹⁷⁶ Delict and contract: *Rail Commuter Action Group v Transnet t/a Metrorail* 2003 (5) SA 518 (C) 527G-I; Plasket "Representative Standing" 26.

¹⁷⁷ Section 7(2) of the Constitution places both negative and positive duties on the State. It requires the State to respect, protect, promote and fulfil the rights in the Bill of Rights'. Section 8(1) states that the Bill of Rights 'binds the legislature, the executive, the judiciary and all organs of state.' Section 12 of the Constitution entrenches a fundamental right to freedom and security of the person which includes the right 'to be free from all forms of violence from either public or private sources': *Rail Commuter Action Group v Transnet t/a Metrorail* 2003 (5) SA 518 (C) 527G-I and 573D-E; Plasket "Representative Standing" 26.

¹⁷⁸ *Rail Commuter Action Group v Transnet t/a Metrorail* 2003 (5) SA 518 (C) 554B-F.

¹⁷⁹ *Ngxuza v Secretary, Department of Welfare, Eastern Cape Provincial Government, Permanent Secretary, Department of Welfare* 2001 (2) SA 609 (E) 619B-D.

¹⁸⁰ *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 (4) SA 1184 (SCA) para 12.

¹⁸¹ *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 (4) SA 1184 (SCA) para 15.

¹⁸² *Rail Commuter Action Group v Transnet t/a Metrorail* 2003 (5) SA 518 (C) 555D-J and 556A-F.

¹⁸³ *Rail Commuter Action Group v Transnet t/a Metrorail* 2003 (5) SA 518 (C) 527C-G.

¹⁸⁴ *Beukes v Krugersdorp Transitional Local Council* 1996 (3) SA 467 (W) 474F-H.

¹⁸⁵ *Ngxuza v Secretary, Department of Welfare, Eastern Cape Provincial Government, Permanent Secretary, Department of Welfare* 2001 (2) SA 609 (E).

¹⁸⁶ *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 (4) SA 1184 (SCA) para 12.

being heard by our Courts.”¹⁸⁷ Davis J and Van Heerden J found support from Kruger AJ who stated in *Highveldridge Residents Concerned Party v Highveldridge TLC*¹⁸⁸ (*Highveldridge*) that, to restrict voluntary associations by way of common law standing requirements

“would equally be contrary to the ideal of a vibrant and thriving civil society which actively participates in the involvement and development of a rights culture pursuant to the rights enshrined in the Bill of Rights. To hold otherwise would, in my view, be to disregard the interests of ‘the poorest in our society’ who are often not in a position where legal advice is readily accessible and who are more often than not, dependent upon action taken by informally structured associations of civil society so that legitimate issues may be addressed on their behalf.”¹⁸⁹

What is relevant from *Rail Commuter*¹⁹⁰ and worth highlighting in this chapter, is that voluntary associations, civil society groups of people and community based groups of people mobilised around a common concern, can if articulated legally, be transformed into classes for purposes of bringing class actions. The common concern of the voluntary association, civil society and community based group can be the subject of a class action, which then means that the members of the association, civil society and community group can be members of a class, with the voluntary association, civil society and community group as the class representative. This confirmed the early submission made by ALS on class standing for associations and means that, as long as a voluntary association instituted action on behalf of its members and on behalf of other interested parties, class action requirements applied.¹⁹¹ For this purpose, Kruger AJ, Davis J and Van Heerden J expressly departed from the restrictive common law definition of an ‘association’ as needing to have legal personality to sue and be sued in its name. They redefined voluntary associations to include

¹⁸⁷*Rail Commuter Action Group v Transnet t/a Metrorail* 2003 (5) SA 518 (C) 556H-I; Plasket “Representative Standing” 26.

¹⁸⁸ 2002 (6) SA 66 (T) paras 2-4, 20-27 and 35: the applicant, Highveldridge Residents Concerned Party, was a voluntary association which sought standing to institute legal proceedings against the Highveldridge Transitional Local Council. The applicant sought to institute action on behalf of its members, the residents of Lebohang Township, who were all too indigent. It claimed that the municipality’s decision to terminate the water supply constituted administrative action that was unlawful, unreasonable and procedurally unfair in terms of section 33(1) of the Constitution. Reliance was further placed on section 27 of the Constitution with regard to everyone’s right of access to sufficient water. With regard to the children, the applicant relied on 28(1)(c) which provides that every child has the right to basic nutrition, healthcare and social services, and also on section 28 (1)(d) of the Constitution to the effect that every child has the right to be protected from maltreatment, neglect, abuse or degradation. On class standing the court referred to *Ngxuza v Secretary, Department of Welfare, Eastern Cape Provincial Government, Permanent Secretary, Department of Welfare* 2001 (2) SA 609 (E) and *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 (4) SA 1184 (SCA).

¹⁸⁹ *Highveldridge Residents Concerned Party v Highveldridge TLC* 2002 (6) SA 66 (T) para 24; *Rail Commuter Action Group v Transnet t/a Metrorail* 2003 (5) SA 518 (C) 556H-J.

¹⁹⁰ *Rail Commuter Action Group v Transnet t/a Metrorail* 2003 (5) SA 518 (C).

¹⁹¹ *Highveldridge Residents Concerned Party v Highveldridge TLC* 2002 (6) SA 66 (T) para 37.

informal associations, organisations, and movements of defined groups of people mobilised around common interests.¹⁹² Accordingly, Kruger AJ found that the applicant association in *Highveldridge*,¹⁹³ whilst not a voluntary association according to the common law, but a popular movement, had standing.¹⁹⁴ *Rail Commuter*¹⁹⁵ and *Highveldridge*¹⁹⁶ therefore demonstrate the constitutional obligation on courts to give democratic impetus, to already collectively constituted voluntary associations, 'civil society and community groups' concerns on public accountability and responsiveness. Davis J and Van Heerden J distinguished between a voluntary association representing a class of persons in terms of section 38(c) and a voluntary association acting on behalf of its members in terms of section 38(e).

Both voluntary associations in *Rail Commuter*¹⁹⁷ and *Highveldridge*¹⁹⁸ were acting on behalf of their members and a wider defined group of similarly affected persons. Kruger AJ preferred to grant standing in terms of section 38(e), and standing in terms of section 38(c) in principle, in the alternative. This was incorrect in that the defined group went beyond the associations' members.¹⁹⁹ Davis J and Van Heerden J were correct in granting standing, in similar instances, in terms of section 38(c).²⁰⁰ *Rail Commuter*,²⁰¹ was later referred to, regarding threats to constitutional rights, when the Durban High Court later delivered judgment on 22 June 2006, in a class action on the enforcement of the right of access to healthcare against the government.²⁰² This case went beyond certification and demonstrated the remedial potential of a class action to enforce the right of access to healthcare whereby a structural interdict for the provision of anti-retroviral (ARV) treatment to class of HIV positive prisoners was granted.

¹⁹² *Highveldridge Residents Concerned Party v Highveldridge TLC* 2002 (6) SA 66 (T) para 25.

¹⁹³ *Highveldridge Residents Concerned Party v Highveldridge TLC* 2002 (6) SA 66 (T).

¹⁹⁴ *Highveldridge Residents Concerned Party v Highveldridge TLC* 2002 (6) SA 66 (T) para 10; Currie and De Waal *The Bill of Rights Handbook* 84.

¹⁹⁵ *Rail Commuter Action Group v Transnet t/a Metrorail* 2003 (5) SA 518 (C).

¹⁹⁶ *Highveldridge Residents Concerned Party v Highveldridge TLC* 2002 (6) SA 66 (T).

¹⁹⁷ *Rail Commuter Action Group v Transnet t/a Metrorail* 2003 (5) SA 518 (C).

¹⁹⁸ *Highveldridge Residents Concerned Party v Highveldridge TLC* 2002 (6) SA 66 (T).

¹⁹⁹ *Highveldridge Residents Concerned Party v Highveldridge TLC* 2002 (6) SA 66 (T) para 35 and 37.

²⁰⁰ *Rail Commuter Action Group v Transnet t/a Metrorail* 2003 (5) SA 518 (C) 556H-J and 557B-C.

²⁰¹ *Rail Commuter Action Group v Transnet t/a Metrorail* 2005 (2) SA 359 (CC).

²⁰² *N v Government of the Republic of South Africa* (No 1) 2006 (6) SA 543 (D) para 31; Budlender and Ferreira "Maximising Impact" 6.

3.11.5 REMEDIAL POTENTIAL OF CLASS ACTIONS

In *N v Government of the Republic of South Africa (No 1) (N)*²⁰³ the applicants brought an urgent application²⁰⁴ in which they purported to act in their own interest and in the interest of the class of prisoners who suffered from HIV at Westville Correctional Centre (WCC).²⁰⁵ They sought the following orders: access to ARV treatment; ARV treatment be made available terms of the Department of Health's operational plan and national ARV treatment guidelines; and within one week of the grant of the order furnish the court with an affidavit setting out the manner in which it intended to comply with the order. The applicants sought their orders on the grounds that the government was in breach of its obligations in terms of sections 27(1)(a),²⁰⁶ 27(2)²⁰⁷ and 35(2)(e)²⁰⁸ of the Constitution to ensure that they and the class received urgent medical treatment.²⁰⁹ The government contested the standing of the applicants to seek relief on behalf of the class. The challenge was brought on the grounds that: the applicants had not identified a clearly defined class that was unable to access treatment, there was no evidence that the prisoners were unable to join into the proceedings, and that there was no evidence that the prisoners were willing to be bound by the class order.²¹⁰ Pillay J rejected this objection and found that there was a clearly identifiable class. He held that because the applicants were disadvantaged as a result of their physical and financial restraints, it would be unreasonable to expect each prisoner with a similar case to appear independently. Furthermore, the fact that there had been approximately 110 HIV and AIDS related deaths in the preceding year, with approximately 50 seriously ill prisoners, at the time of the judgment, was sufficiently compelling to warrant class standing. The judge referred to the relevant authority on class actions,²¹¹ and reiterated Froneman J's earlier views that the class action is necessary "for making it easier for disadvantaged and poor people to approach the court on public

²⁰³ 2006 (6) SA 543 (D).

²⁰⁴ Represented by the AIDS Law Project.

²⁰⁵ *N v Government of the Republic of South Africa (No 1)* 2006 (6) SA 543 (D) paras 1-4.

²⁰⁶ "everyone has the right to have access to health care services, including reproductive healthcare."

²⁰⁷ Requires that the State must take reasonable legislative and other measures within its available resources to achieve the progressive realisation of these rights.

²⁰⁸ Provides that every sentenced prisoner has the right "to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at State expense, of adequate accommodation, nutrition, reading material and medical treatment."

²⁰⁹ *N v Government of the Republic of South Africa (No 1)* 2006 (6) SA 543 (D) paras 17 and 18.

²¹⁰ *N v Government of the Republic of South Africa (No 1)* 2006 (6) SA 543 (D) para 10.

²¹¹ *Ferreira v Levin* 1996 (2) SA 621 (CC); *Beukes v Krugersdorp Transitional Local Council* 1996 (3) SA 467 (W); *Ngxuzza v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 (2) SA 609 (E); *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuzza* 2001 (4) SA 1184 (SCA); *N v Government of the Republic of South Africa (No 1)* 2006 (6) SA 543 (D) para 7.

issues to ensure that the public administration adheres to the fundamental constitutional principle of legality in the exercise of public power.”²¹²

The court was swift in granting certification of the class action. As final relief after hearing the matter, the court then granted a structural interdict with a supervisory component on the basis that “an order which does not take into consideration the plight of other similarly situated prisoners at WCC will result in a continued denial of access to ARV treatment for them and, consequently an infringement of their constitutional rights.”²¹³ Following *N*,²¹⁴ another case which went beyond certification to demonstrate the remedial potential of a class action was *Mazibuko v City of Johannesburg*,²¹⁵ (*Mazibuko I*).

In *Mazibuko I*²¹⁶ delivered on 30 April 2008, the Witwatersrand Local Division, relying on *Ngxuza 2*,²¹⁷ directed five litigants,²¹⁸ who had initially brought litigation in their own interest and on behalf of their households against the City of Johannesburg (Municipality), Johannesburg Water (Pty) Ltd (Johannesburg Water) and the Minister of Water Affairs and Forestry (Minister)²¹⁹ for access to water,²²⁰ to proceed with a class action on their behalf and on behalf of all similarly placed community members. The litigation emerged from a series of service delivery protests for water, some protests conducted in terms of the RGA and others not. With the assistance of the Freedom of Expression Institute (FXI) and the University of the Witwatersrand Centre for Applied Legal Studies (CALs), the community proceeded with legal action in addition to the protest action, to challenge the Municipality’s Free Basic Water policy (FBW). The class²²¹ challenged the Municipality’s policy,²²² whereby it limited unpaid for water consumption through the mass installation of pre-payment water meters (PPMs). The challenge was brought on two bases: firstly,

²¹² *N v Government of the Republic of South Africa (No 1)* 2006 (6) SA 543 (D) para 10.

²¹³ *N v Government of the Republic of South Africa (No 1)* 2006 (6) SA 543 (D) para 32.

²¹⁴ *N v Government of the Republic of South Africa (No 1)* 2006 (6) SA 543 (D).

²¹⁵ [2008] 4 All SA 471 (W).

²¹⁶ [2008] 4 All SA 471 (W).

²¹⁷ *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza* 2001 (4) SA 1184 (SCA).

²¹⁸ See footnote 10 in chapter one.

²¹⁹ J Dugard and M Langford “Art of Science? Synthesising Lessons from Public Interest Litigation and the Dangers of Legal Determinism” (2011) 27 *SAJHR* 39 at 43-44.

²²⁰ Section 27(1)(b).

²²¹ Assisted by the University of the Witwatersrand Centre for Applied Legal Studies.

²²² “Operation *Gcin’Amanzi*” (“conserve water”): Dugard and Langford 2011 *SAJHR* 42.

to have the installation of PPMs declared administratively unlawful.²²³ Secondly, to have the municipality's FBW reviewed and set aside as unreasonable, due to it being insufficient to meet the basic needs of poor, multi-dwelling households where as many as 20 people per household, had to share 6 kilolitres of FBW allocation.²²⁴

Because the court directed the litigants to proceed with a class action, it had already identified the presence of the certification requirements and therefore swiftly granted class standing without needing to address the certification requirements at length. Tsoka J reasoned that the class action was necessary in the circumstances as the applicants were from a community of mostly poor, uneducated, unemployed and others suffering with HIV/AIDS. In the same way that the SALC²²⁵ had recommended, and determined in *Ngxuza 1*²²⁶ and *2*,²²⁷ the court considered the socio-economic position of the class as a factor in favour of class certification. The court found that the class members "are not aware of their legal rights, how to enforce them and how to access professional advice. The bulk of them are neither aware of nor capable of enforcing their rights."²²⁸ Consequently, the court found "the applicants are therefore entitled to act on behalf of a class of persons in similar positions to themselves."²²⁹

The High Court found in favour of the class on all challenges, declaring the PPMs unlawful and the PBW policy unreasonable. The Municipality was ordered to provide 50 litres of FBW per person per day. The respondents appealed to the Supreme Court of Appeal.²³⁰ Although the Supreme Court of Appeal upheld the appeal on 25 March 2009, it nonetheless ruled in favour of the class on two substantial grounds: finding PPMs unlawful and the FBW policy unreasonable. The Court ordered the Municipality to reformulate its policy with a view to providing 42 litres per person per day to indigent classes of residents. Notwithstanding the judgment, the applicants appealed to the

²²³ The decision to install PPMs without any prior consultation with residents violated section 4(1) of the Promotion of Administrative Justice Act 3 of 2000; the roll-out of PPMs only in poor black areas, despite evidence of debt in all areas under the jurisdiction of the municipality, amounted to unfair discrimination based on race, prohibited by section 9(3) of the Constitution; the PPMs automatic disconnection mechanism contravened the procedural protections in section 4(3) of the Water Services Act 108 of 1997, of reasonable notice and opportunity to make representation prior to disconnection; and the municipality's water by-laws do not allow for the installation of PPMs except as a punitive measure for contravening the terms of a standpipe supply of water: Dugard and Langford 2011 *SAJHR* 43.

²²⁴ Dugard and Langford 2011 *SAJHR* 43-44.

²²⁵ South African Commission Project 88: *Report on The Recognition of Class Actions and Public Interest Actions in South African Law* 55-56.

²²⁶ *Ngxuza v Secretary, Department of Welfare, Eastern Cape Provincial Government, Permanent Secretary, Department of Welfare* 2001 (2) SA 609 (E) 625E and 621F-I; Plasket "Representative Standing" 24.

²²⁷ *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 (4) SA 1184 (SCA) paras 6 and 11.

²²⁸ *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W) para 19.

²²⁹ *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W) para 20.

²³⁰ *City of Johannesburg v Mazibuko* 2009 (3) SA 592 (SCA) (*Mazibuko 2*).

Constitutional Court against the suspension of the order of invalidity regarding the PPMs.²³¹ Both local and national government had to provide the court with information justifying its water services-related planning, budgeting and problems in its policy.²³² On 8 October 2009, the Constitutional Court delivered its judgment,²³³ in which it found against the class on all grounds. Despite the judicial defeat, some material advances were made in enhancing access to water for the benefit of the class.²³⁴ Initially, the FBW policy did not allow for the extension of the free water allocation to indigent households. On 6 December 2006, five months after the application was launched in the High Court, the Municipality was compelled to adopt interim measures which into effect from March 2007. In terms of these measures, registered indigent class members received an additional 4 kilolitres of free water per month as from July 2007.²³⁵ During the litigation, a 5 year delay, of the roll-out of PPMs across the country was achieved while municipalities awaited the judicial outcome. During this time, the only other municipality with a FBW policy, eThekweni Municipality,²³⁶ decided not to install PPMs.²³⁷ Having had to justify and account for its policy in court, the Johannesburg Municipality regardless of its victory, raised the amount of FBW it provided to the poorest households to 50 litres per person per day (the amount which the class asked for). The Municipality also indicated that the new generation of PPMs to be installed would have a ‘trickler’ device. This device allows for water to trickle out, instead of ceasing completely, following exhaustion of the FBW amount, until further water credit or FBW is loaded.²³⁸

After *N*²³⁹ and *Mazibuko*,²⁴⁰ the courts acknowledged that it was not only in relation to the infringement of constitutional rights²⁴¹ that the right of access to court and the remedial potential of class actions would serve the needs of the poor and vulnerable. There was a need to extend the class action beyond the enforcement of constitutional rights to promote access to courts where the poor

²³¹ The court ruled that obliging the Municipality to remove the PPMs was an inappropriate remedy, and that a better remedy, which would safeguard residents who genuinely preferred PPMs, was to suspend the order of invalidity for a period of two years to enable the Municipality to legalise their use: J Dugard and S Liebenberg “Muddying the Waters: The Supreme Court of Appeal’s Judgment in the *Mazibuko* Case” (2009) 10 *ESR* 11 at 16; Dugard and Langford 2011 *SAJHR* 44-45.

²³² Dugard and Langford 2011 *SAJHR* 59.

²³³ *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) (*Mazibuko* 3).

²³⁴ Dugard and Langford 2011 *SAJHR* 60.

²³⁵ *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) paras 78, 81 and 93.

²³⁶ *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) para 91.

²³⁷ Dugard and Langford 2011 *SAJHR* 57-59.

²³⁸ Dugard and Langford 2011 *SAJHR* 58.

²³⁹ *N v Government of the Republic of South Africa (No 1)* 2006 (6) SA 543 (D).

²⁴⁰ *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

²⁴¹ Traverso DJP held that “as a point of departure an applicant in a class action must allege that the right enshrined in the Bill of Rights is being threatened”: *FirstRand Bank Ltd v Chaucer Publications* 2008 (2) SA 592 (C) para 24; Ngcukaitobi 2002 *SAJHR* 604.

and vulnerable sought to enforce “non-Bill of Rights”²⁴² rights. The Western Cape High Court expressly recognised class actions for enforcement of “non-Bill of Rights”²⁴³ rights.

3.12 CLASS ACTIONS FOR THE ENFORCEMENT OF “NON-BILL OF RIGHTS”²⁴⁴ RIGHTS

In *The Trustees for the Time Being for the Children's Resource Centre Trust v Pioneer Foods (Pty) Ltd, Mukaddam v Pioneer Foods (Pty) Ltd*,²⁴⁵ (*Children's Resources Centre I*) delivered on 7 April 2011, the Western Cape High Court expressly extended the institution of class actions to the enforcement of “non-Bill of Rights”²⁴⁶ rights to promote the right of access to court. This case was concerned with two applications, “the consumer”²⁴⁷ and “the distributor applications.”²⁴⁸ The consumer application was brought on behalf of a class of bread consumers who sought damages against the respondent bread producing companies for the price-fixing of bread²⁴⁹ in breach of the Competition Act.²⁵⁰ The distributors application, on the other hand, was brought on behalf of a class of distributors who distributed bread in accordance with contractual arrangements made with the same respondents. The applicant distributors claimed that they had suffered losses of profits due to the reduction of rebates and unlawful breaches of contracts arising from price-fixing of bread.²⁵¹

²⁴² *The Trustees for the Time Being for the Children's Resource Centre Trust v Pioneer Foods (Pty) Ltd, Mukaddam v Pioneer Foods (Pty) Ltd* [2011] ZAWCHC 102 (7 April 2011) para 34.

²⁴³ *The Trustees for the Time Being for the Children's Resource Centre Trust v Pioneer Foods (Pty) Ltd, Mukaddam v Pioneer Foods (Pty) Ltd* [2011] ZAWCHC 102 (7 April 2011) para 34.

²⁴⁴ *The Trustees for the Time Being for the Children's Resource Centre Trust v Pioneer Foods (Pty) Ltd, Mukaddam v Pioneer Foods (Pty) Ltd* [2011] ZAWCHC 102 (7 April 2011) para 34.

²⁴⁵ [2011] ZAWCHC 102 (7 April 2011).

²⁴⁶ [2011] ZAWCHC 102 (7 April 2011) para 38.

²⁴⁷ *The Trustees for the Time Being for the Children's Resource Centre Trust v Pioneer Foods (Pty) Ltd, Mukaddam v Pioneer Foods (Pty) Ltd* [2011] ZAWCHC 102 (7 April 2011) para 22.

²⁴⁸ *The Trustees for the Time Being for the Children's Resource Centre Trust v Pioneer Foods (Pty) Ltd, Mukaddam v Pioneer Foods (Pty) Ltd* [2011] ZAWCHC 102 (7 April 2011) para 22.

²⁴⁹ *The Trustees for the Time Being for the Children's Resource Centre Trust v Pioneer Foods (Pty) Ltd, Mukaddam v Pioneer Foods (Pty) Ltd* [2011] ZAWCHC 102 (7 April 2011) paras 1-22.

²⁵⁰ Sections 4(1)(b)(i) and (ii) of the Competition Act 89 of 1998.

²⁵¹ *The Trustees for the Time Being for the Children's Resource Centre Trust v Pioneer Foods (Pty) Ltd, Mukaddam v Pioneer Foods (Pty) Ltd* [2011] ZAWCHC 102 (7 April 2011) paras 1-22 and 99-109.

Van Zyl AJ found that these statutory breaches fell outside the scope of the Bill of Rights.²⁵² He consequently had to determine whether section 38(c) of the Constitution applied to the enforcement of rights outside of the Bill Rights.²⁵³ He concluded²⁵⁴ that the remarks made by Cameron JA in *Ngxuza 2*,²⁵⁵ “indicate that a general class action, not limited to Bill of Rights cases should be available in our law.”²⁵⁶

Upon the application of the certification requirements laid down in *Ngxuza I*²⁵⁷ and 2,²⁵⁸ and those proposed by the SALC,²⁵⁹ to the facts, Van Zyl AJ found that the applicants in the consumer application sought to represent a class of bread consumers which was too widely defined.²⁶⁰ The class included all bread consumers in South Africa who were allegedly prejudicially affected by the price-fixing of bread by the respondents.²⁶¹ Furthermore, this rendered it nearly impossible for purposes of a damages action to enable those members of the public who may qualify as members of the class to decide whether to “opt out”²⁶² or not. The effect of this would have been to render the respondents ignorant as to who qualifies and who does not. The consumer application was in addition dismissed on the basis that no cause of action was established in law.²⁶³ The distributors’ application was shortly dismissed on two grounds. Firstly, that the applicants’ reliance on section 22

²⁵² The applicants in the consumer application claimed that the anti-competitive fixing of bread prices by the respondent bread producers infringed the class of bread consumers’ constitutional rights. The applicants alleged an infringement of sections 27(1)(b) which provides that everyone has the right of access to sufficient food, and section 28(1)(c) which provides that every child has the right to basic nutrition. The applicants in the distributor application alleged that the class of bread distributors’ right to choose a trade, occupation and profession freely, as contained in section 22 of the Constitution, was infringed by the respondents: *The Trustees for the Time Being for the Children's Resource Centre Trust v Pioneer Foods (Pty) Ltd, Mukaddam v Pioneer Foods (Pty) Ltd* [2011] ZAWCHC 102 (7 April 2011) paras 70 and 110.

²⁵³ *The Trustees for the Time Being for the Children's Resource Centre Trust v Pioneer Foods (Pty) Ltd, Mukaddam v Pioneer Foods (Pty) Ltd* [2011] ZAWCHC 102 (7 April 2011) para 35.

²⁵⁴ *The Trustees for the Time Being for the Children's Resource Centre Trust v Pioneer Foods (Pty) Ltd, Mukaddam v Pioneer Foods (Pty) Ltd* [2011] ZAWCHC 102 (7 April 2011) para 117.

²⁵⁵ *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 (4) SA 1184 (SCA).

²⁵⁶ *The Trustees for the Time Being for the Children's Resource Centre Trust v Pioneer Foods (Pty) Ltd, Mukaddam v Pioneer Foods (Pty) Ltd* [2011] ZAWCHC 102 (7 April 2011) para 36.

²⁵⁷ *Ngxuza v Secretary, Department of Welfare, Eastern Cape Provincial Government, Permanent Secretary, Department of Welfare* 2001 (2) SA 609 (E) 624D-I.

²⁵⁸ *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 (4) SA 1184 (SCA) para 15;

²⁵⁹ [2011] ZAWCHC 102 (7 April 2011) paras 43 -45; South African Law Commission Project 88: *Report on The Recognition of Class actions and Public Interest Actions in South African Law* 40-50.

²⁶⁰ *The Trustees for the Time Being for the Children's Resource Centre Trust v Pioneer Foods (Pty) Ltd, Mukaddam v Pioneer Foods (Pty) Ltd* [2011] ZAWCHC 102 (7 April 2011) para 61.

²⁶¹ *The Trustees for the Time Being for the Children's Resource Centre Trust v Pioneer Foods (Pty) Ltd, Mukaddam v Pioneer Foods (Pty) Ltd* [2011] ZAWCHC 102 (7 April 2011) para 73-76.

²⁶² *The Trustees for the Time Being for the Children's Resource Centre Trust v Pioneer Foods (Pty) Ltd, Mukaddam v Pioneer Foods (Pty) Ltd* [2011] ZAWCHC 102 (7 April 2011) para 77.

²⁶³ *The Trustees for the Time Being for the Children's Resource Centre Trust v Pioneer Foods (Pty) Ltd, Mukaddam v Pioneer Foods (Pty) Ltd* [2011] ZAWCHC 102 (7 April 2011) paras 77 and 87.

of the Constitution was unmeritorious, and that there was an absence of commonality of fact and law between the class members in the breaches of contracts and reduction of rebates caused.²⁶⁴ Although both applications were dismissed on the facts, Van Zyl AJ's judgment contributed to the enhancement of access to courts for the poor and vulnerable by extending the scope of class actions, in the absence of legislation so doing.²⁶⁵ He noted with regard to the consumer application that “the primary intention of the applicants was clearly to benefit the poor and promote access by all to sufficient food.”²⁶⁶ On appeal, the Supreme Court of Appeal in *Children’s Resources Centre Trust v Pioneer Food (Pty) Ltd*²⁶⁷ (*Children’s Resources Centre Trust 2*) confirmed that both constitutional and other class actions raise constitutional considerations of access to courts, for poor and vulnerable groups.

3.13 THE RIGHT OF ACCESS TO COURTS: A CONSTITUTIONAL DIMENSION TO ALL CLASS ACTIONS

The High Court in *Children’s Resources Centre Trust*²⁶⁸ addressed both the consumer and distributor applications in one judgment, the Supreme Court of Appeal heard the appeals separately and delivered both judgments on 29 November 2012. Wallis JA in *Children’s Resources Centre*²⁶⁹ dealt with the consumer application appeal, and Nugent JA delivered judgment in the distributor application appeal in *Mukaddam v Pioneer Food Ltd*.²⁷⁰ Wallis JA’s judgment, which was delivered first on the day, provided the most conclusive guidelines on “when may a class action be brought and what procedural requirements must be satisfied before it is instituted?”²⁷¹

²⁶⁴ *The Trustees for the Time Being for the Children’s Resource Centre Trust v Pioneer Foods (Pty) Ltd, Mukaddam v Pioneer Foods (Pty) Ltd* [2011] ZAWCHC 102 (7 April 2011) paras 116 -118.

²⁶⁵ *The Trustees for the Time Being for the Children’s Resource Centre Trust v Pioneer Foods (Pty) Ltd, Mukaddam v Pioneer Foods (Pty) Ltd* [2011] ZAWCHC 102 (7 April 2011) paras 35-39.

²⁶⁶ *The Trustees for the Time Being for the Children’s Resource Centre Trust v Pioneer Foods (Pty) Ltd, Mukaddam v Pioneer Foods (Pty) Ltd* [2011] ZAWCHC 102 (7 April 2011) para 96.

²⁶⁷ 2013 (2) SA 213 (SCA).

²⁶⁸ [2011] ZAWCHC 102 (7 April 2011).

²⁶⁹ *Children’s Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA).

²⁷⁰ 2013 (2) SA 254 (SCA).

²⁷¹ *Children’s Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) paras 1 and 13.

3.13.1 WHEN MAY A CLASS ACTION BE BROUGHT?

Wallis JA, confirmed Froneman J's and Cameron JA's position on the usefulness of a class action for the poor and vulnerable.²⁷² He directed that, instead of proceeding in terms of section 38(c), the true basis for class litigation where the class is large, the claims small and the class members impecunious, is the right of access to courts in terms of section 34. The basis for this was that South Africa's socio-economic reality necessitates claims being pursued by means of a class action to promote access to courts for a large number of people who would otherwise be unable to institute individual actions. A refusal to proceed with a class action, in these circumstances, would amount to an infringement of a class members' right of access to court.²⁷³ By so stating, he significantly redefined the class action as a constitutional remedy within itself, such that "the threatened infringement of that right may be challenged by way of a class action and the appropriate remedy is to permit a class action in respect of the underlying claims."²⁷⁴ He then proceeded to lay down "the broad parameters within which class actions may be pursued and to lay down procedural requirements that must be satisfied in order to do so."²⁷⁵

3.13.2 PROCEDURAL REQUIREMENTS FOR CLASS LITIGATION

Wallis JA confirmed and justified the necessity of certification as a preliminary step. He then proceeded to lay down the following certification requirements: an identifiable class established by objective criteria; a cause of action raising a triable issue; issues of fact and/or law common to all class members; the relief sought, or damages claimed, must flow from the cause of action and must be ascertainable and capable of determination; if the claim is for damages there must be an appropriate procedure for allocating the damages to the class members; a suitable representative; and the class action must be shown to be the most appropriate means of adjudicating the claims of

²⁷²*Children's Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) para 6.

²⁷³ *Children's Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) para 19; De Vos 2013 *TSAR* 372-373.

²⁷⁴ *Children's Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) para 19; De Vos 2013 *TSAR* 372-373.

²⁷⁵ *Children's Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) para 22; De Vos 2013 *TSAR* 374.

the class members.²⁷⁶ The judge found support for these requirements in the SALC Report,²⁷⁷ Cameron JA's "quintessential requisites for a class action,"²⁷⁸ and the requisites for a class action in the American Rule 23(a) of the Federal Rules of Civil Procedure.²⁷⁹ He accordingly summarised the requirements as: "numerosity, commonality, typicality and adequate representation,"²⁸⁰ and expanded on them in application to the facts of the case.²⁸¹

3.13.3 CLASS DEFINITION

This requirement, Wallis JA made clear, does not mean that all the members of the class be individually identified.²⁸² He stated that if it were possible to identify all individual class members then it would be unnecessary to proceed with a class action, as joinder would be possible. This interpretation accords with the requirement that the class action must be the most appropriate procedure to adjudicate the class members' claims. Wallis JA went on to provide guidance on what is required when defining the class. He directed that it is necessary that the class be defined with sufficient precision, such that a particular individual's membership of the class could be objectively determined. The objective determination would be possible by examining a person's situation in light of how the class has been defined. He added that class identification was necessary because it affected the manner in which notice of the action was to given to absent class members. Potential class members must at least be able to ascertain with reasonable certainty whether they are in fact members of the class, having the choice to either opt-out or remain as part of the class.²⁸³ He then proceeded to discuss the cause of action requirement.

²⁷⁶ *Children's Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) paras 23-26; De Vos 2013 TSAR 374-375.

²⁷⁷ South African Law Commission Project 88: *Report on The Recognition of Class Actions and Public Interest Actions in South African Law* 41-50.

²⁷⁸ *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuzza* 2001 (4) SA 1184 (SCA) para 15; *Children's Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) para 27; De Vos 2013 TSAR 375.

²⁷⁹ The requisites are: "that the class is so numerous that joinder of all its members is impracticable; that there are questions of law or fact that are common to the class; that the claims of the representative parties are typical of the claims of the class; and that the representative parties will fairly and adequately represent the interests of the class." *Children's Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) para 27; De Vos 2013 TSAR 375.

²⁸⁰ *Children's Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) para 27; De Vos 2013 TSAR 375.

²⁸¹ *Children's Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) para 28; De Vos 2013 TSAR 375.

²⁸² *Children's Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) para 29.

²⁸³ *Children's Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) paras 29-32; De Vos 2013 TSAR 376

3.13.4 A CAUSE OF ACTION RAISING A TRIABLE ISSUE

Wallis JA pointed out two considerations a court must bear in mind in determining whether a proposed class action has an underlying cause of action that raises a triable issue. The first is whether an exception could be successfully raised against the claim. If so, then the claim would be “legally hopeless”²⁸⁴ and the action cannot be certified. The court then laid down a procedure similar to the one recommended by the SALC, to enable courts to make a proper assessment of the claim at certification. The procedure entails that the applicant must attach a draft particulars of claim to the application and also set out the legal basis of the proposed class action in the founding affidavit.²⁸⁵ The judge emphasised that at certification stage the applicable test is simply whether on the papers “it is plain that the claim is not legally tenable.”²⁸⁶ The second is determining whether the evidence potentially available and that evidence which is actually available to the applicant, after discovery and pre-trial procedures, is sufficient to sustain a cause of action. For the court to arrive at this determination, the applicant must set out on affidavit the evidence available, as well as evidence that he or she anticipates would become available to sustain the pleaded cause of action. The applicant must therefore demonstrate a *prima facie* case. If the applicant is unable to evidentially demonstrate a *prima facie* cause of action, then the case will be rendered “factually hopeless.”²⁸⁷

3.13.5 COMMON ISSUES OF FACT/AND OR LAW

Wallis JA directed that “there must be issues of fact, or law, or both fact and law, that are common to all members of the class and can appropriately be determined in one action.”²⁸⁸ The resolution of these issues must be central to the validity of each individual claim. For this reason, class actions

²⁸⁴ *Children’s Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) para 35; De Vos 2013 *TSAR* 376

²⁸⁵ South African Law Commission Project 88: *Report on The Recognition of Class Actions and Public Interest Actions in South African Law* 40; *Children’s Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) paras 35-39; De Vos 2013 *TSAR* 376.

²⁸⁶ *Children’s Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) para 39; De Vos 2013 *TSAR* 376

²⁸⁷ *Children’s Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) para 35; De Vos 2013 *TSAR* 377.

²⁸⁸ *Children’s Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) para 44; De Vos 2013 *TSAR* 377.

may be limited to the common issue of liability, leaving the quantification of varying damages to be dealt with by the individual class members. The common issues can therefore be certified for the entire class, and the related varying issues, to the extent common to some members of the class, may be certified in respect of smaller defined sub-classes.²⁸⁹ The guiding question in respect of the primary class or sub-class, he pointed out, should always be “whether there are common issues that can be determined that will dispose of all or a significant part of the claims by the members of the class or sub-class.”²⁹⁰ The applicant seeking certification on behalf of the class or sub-class would accordingly have to be suitable and able to adequately represent these common issues.

3.13.6 ADEQUATE REPRESENTATION

Wallis JA confirmed the SALC’s recommendation on the contextual suitability of an ideological plaintiff as representative of the class.²⁹¹ Consequently, the applicants in this case, being non-governmental organisations could represent the poor and vulnerable. Similarly, public interest organisations could adequately represent classes as did the LRC in *Ngxuza 1*²⁹² and 2,²⁹³ ALP in *N*,²⁹⁴ and CALS in *Mazibuko*²⁹⁵ The judge further confirmed the factors which the SALC²⁹⁶ had recommended courts should consider with regard to the appointment of a representative. He summarised these into two main factors. Firstly, the absence of conflicts of interest between the representative and the absent members of the class they wish to represent. Secondly, the representative must have the capacity to conduct the litigation properly, meaning: the representative must have the time, inclination and capacity to obtain the necessary evidence; the financial means; access to adequate legal representation; and if the funding will be in the form of a contingency fee

²⁸⁹ *Children’s Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) para 45.

²⁹⁰ *Children’s Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) para 45.

²⁹¹ South African Law Commission Project 88: *Report on The Recognition of Class Actions and Public Interest Actions in South African Law* 37; De Vos 2012 *TSAR* 740.

²⁹² *Ngxuza v Secretary, Department of Welfare, Eastern Cape Provincial Government, Permanent Secretary, Department of Welfare* 2001 (2) SA 609 (E).

²⁹³ *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 (4) SA 1184 (SCA).

²⁹⁴ *N v Government of the Republic of South Africa (No 1)* 2006 (6) SA 543 (D) para 1.

²⁹⁵ *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W); *City of Johannesburg v Mazibuko* 2009 (3) SA 592 (SCA); *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

²⁹⁶ South African Law Commission Project 88: *Report on The Recognition of Class Actions and Public Interest Actions in South African Law* 48-49.

arrangement,²⁹⁷ details of the arrangement must be disclosed to the court.²⁹⁸

The principles and guidelines laid down in this case have provided a comprehensive framework for class litigation. Wallis JA, however, expressed caution that the requirements were not exclusive nor exhaustive, and would have to be applied on a case-by-case basis.²⁹⁹ Although referred to in passing, the Supreme Court of Appeal, however, did not substantially address the notice to class members as one of the procedural requirements. The importance of giving notice of the proposed class action to members of the class and how this may affect their rights, as stated by the SALC, cannot be overstated. Notice, as was pointed out earlier in *Ngxuza I*,³⁰⁰ may be a complicated issue of ensuring “that only those who wish to be involved in the case are.”³⁰¹ This is especially problematic if the class is very large. The courts must tread carefully because the manner³⁰² in which notice must be given and the costs³⁰³ involved may create practical difficulties which may even threaten the continuation of a class action.³⁰⁴ On application of all the above stated certification prerequisites, the consumer application suffered a similar deficiency to that identified by Van Zyl AJ in the court *a quo*.

²⁹⁷ In Canada all counsel are compensated on a contingency fee basis and no other form of payment has been described in reported cases or academic literature. The strength of a claim is therefore of particular importance to legal representatives because of the financial risks involved in a contingency fee arrangement. This means that attorneys are more inclined take up certain class actions over others. It has been found that human rights claims or those on behalf of a small class, are less likely to be taken: *Kalajdic Access to Justice for the Masses?* 80.

²⁹⁸ The purpose for this disclosure is to prevent the abuse of class actions and contingency fees by legal representatives: *Children’s Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) paras 47 and 48; *De Vos* 2013 TSAR 377-378; *Kalajdic Access to Justice for the Masses?* 149.

²⁹⁹ *Children’s Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) para 28; *Imraahn Ismail Mukaddam v Pioneer Food (Pty) Ltd* 2013 (5) SA 89 (CC) para 65.

³⁰⁰ *Ngxuza v Secretary, Department of Welfare, Eastern Cape Provincial Government, Permanent Secretary, Department of Welfare* 2001 (2) SA 609 (E).

³⁰¹ *Ngxuza v Secretary, Department of Welfare, Eastern Cape Provincial Government, Permanent Secretary, Department of Welfare* 2001 (2) SA 609 (E) 619E.

³⁰² The applicants were ordered to publish and distribute during specified periods, the notice to the class members across the Eastern Cape by: publication in various newspapers of differing languages; broadcasting on various radio stations of differing languages; by placing the notice in a prominent position at all pension pay points and departmental welfare offices; distributing the notice to all advice offices known to applicant’s legal representatives, with a request that the notice be displayed at those offices that clients be advised of it; and distributing to churches and non-governmental organisations known to the applicant’s legal representatives: *Ngxuza v Secretary, Department of Welfare, Eastern Cape Provincial Government, Permanent Secretary, Department of Welfare* 2001 (2) SA 609 (E) 633H-I - 634A-B.

³⁰³ The applicants sought an order directing the respondents to bear the costs relating to the publication, broadcasting and distribution of the notice to the class members: *Ngxuza v Secretary, Department of Welfare, Eastern Cape Provincial Government, Permanent Secretary, Department of Welfare* 2001 (2) SA 609 (E) 632F-G.

³⁰⁴ In Canada’s early class action cases, the courts were content to publish notices in newspapers or on defendants’ websites. Later the courts became skeptical that such forms of notice were inadequate. Recently, the courts have directed that notice be given in the form of direct mailings, television and radio advertisements, and the use of third parties who have access to class members. See: *Currie v McDonald’s Restaurant of Canada Ltd.* (2005), 74 O.R. (3ed) 321 (C.A.); *Lawrence v. Atlas Cold Storage Holdings Inc.* (12 February 2009), Toronto 04-CV-263289CP (S.C.J.); *Andersen v. St Jade Medical Inc.* (3 March 2005), Court File No. 00-cv-196906CP (Ont. S.C.J.); *Condor v. Fisherman* (2002), 26 B.L.R. (3d) 281 (S.C.J.); *Kalajdic Access to Justice for the Masses?* 125-127.

Wallis JA, unlike Van Zyl AJ, found a cure to the defects of the application insofar as it related to the proposed class of consumers in the Western Cape Province. With regard to the class definition, he believed that it would be possible for the applicants to redefine the class with sufficient precision.³⁰⁵ With regard to the cause of action, he found that it had a “potentially plausible basis.”³⁰⁶ However, in light of its novelty and the issues raised for the first time on appeal, the application was remitted back to the High Court. The matter was remitted with “with appropriate directions for the delivery of further affidavits, for it to be dealt with on a complete set of papers and in light of the principles laid down in this judgment.”³⁰⁷ After *Children’s Resources Centre 2*,³⁰⁸ the Supreme Court of Appeal proceeded, in the distributors’ application appeal in *Imraahn Ismail Mukkaddam v Pioneer Food (Pty) Ltd (Mukaddam 1)*,³⁰⁹ to apply the principles laid down in this judgment. The gist of *Mukaddam 1*,³¹⁰ was determining when is the class action an appropriate procedure.

3.14 WHEN IS IT APPROPRIATE TO PROCEED WITH A CLASS ACTION?

Nugent JA, in accordance with the precedent set by Froneman J, Cameron JA and Wallis JA, stated that “the justification for recognising class actions is that without that procedural device claimants will be denied access to the courts.”³¹¹ He was thus concerned with determining the circumstances under which a class action would be the most appropriate procedure to litigate. He held that the circumstances of the distributors’ application did not warrant a class action. The class action proposed by the applicants on behalf of 100 claimants had been framed on an opt-in basis.³¹² Such people, he reasoned, would be able to litigate in the form of a joint action. He further rejected the submission that proceeding by way of a class action would immunise the representatives against personal liability for legal costs. Such liability, he found, could serve as a restraint on frivolous actions aimed at inducing defendants into settlements. Whilst not dismissing the possibility of opt-

³⁰⁵ *Children’s Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) paras 49-61, 63, 79 and 88; De Vos 2013 TSAR 378-379.

³⁰⁶ *Children’s Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) para 75; De Vos 2013 TSAR 379.

³⁰⁷ *Children’s Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) para 75; De Vos 2013 TSAR 379.

³⁰⁸ *Children’s Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA).

³⁰⁹ 2013 (2) SA 254 (SCA).

³¹⁰ 2013 (2) SA 254 (SCA).

³¹¹ *Imraahn Ismail Mukkaddam v Pioneer Food (Pty) Ltd* 2013 (2) SA 254 (SCA) para 11.

³¹² *Imraahn Ismail Mukkaddam v Pioneer Food (Pty) Ltd* 2013 (2) SA 254 (SCA) paras 11-12.

in class actions, Nugent JA added that in opt-in cases certification should only be granted in exceptional circumstances.³¹³ He, however, did not mention under what applicable exceptional circumstances. This conclusion calls for comment on the nature and ambit of an opt-in class action.³¹⁴

3.14.1 EXCEPTIONAL CIRCUMSTANCES FOR AN OPT-IN CLASS ACTION

The Constitutional Court handed down judgment in *Imraahn Ishmail Mukaddam v Pioneer Food (Pty) Ltd (Mukaddam 2)*,³¹⁵ on 27 June 2013, in which it rejected the test of exceptional circumstances for opt-in class actions laid down by Nugent JA in *Mukaddam 1*.³¹⁶ The rejection of this Supreme Court of Appeal's test was on the basis that it was at variance with the accepted certification requirements laid down by Wallis JA in the earlier judgment of the Supreme Court of Appeal judgment in *Children's Resources Centre 2*.³¹⁷ The SALC Report had also not made reference to exceptional circumstances. Without setting out what the exceptional circumstances need to be, it seems that Nugent JA decided that the economically able position of the applicants, was such that they could financially pursue legal action independently or through joinder. The basis for this socio-economic analysis of proceeding with the class action in preference to joinder, for poor and vulnerable groups, may have been drawn from *Ngxuza 2*.³¹⁸

“The cardinal difficulty with joinder ... is that it presupposes the prospective plaintiffs' advancing en masse on the courts. In most situations such spontaneity cannot arise either because the various parties who have the common interest are isolated, scattered and utter strangers to each other. Thus while the necessity for group action through joinder clearly exists, the conditions for it do not. It may not be enough for society simply to set up courts and wait for litigants to bring their complaints - they may never come. What is needed, then, is something over and above the possibility of joinder. There must be some affirmative technique for bringing everyone into the case and for making recovery available to all. It is not so much a matter of permitting joinder as of ensuring it.”³¹⁹

Nugent JA's interpretation was that the conditions for joinder existed in this case. Although the case law, discussed so far, shows that the courts are inclined to allow class actions for promoting access

³¹³ *Imraahn Ishmail Mukaddam v Pioneer Food (Pty) Ltd* 2013 (2) SA 254 (SCA) paras 11-14; W De Vos “Opt-in class action for damages vindicated by the Constitutional Court” (2013) 4 *TSAR* 757 at 760 - 761.

³¹⁴ De Vos 2013 *TSAR* 761.

³¹⁵ *Imraahn Ishmail Mukaddam v Pioneer Food (Pty) Ltd* 2013 (5) SA 89 (CC).

³¹⁶ 2013 (2) SA 254 (SCA).

³¹⁷ 2013 (2) SA 213 (SCA); *Imraahn Ishmail Mukaddam v Pioneer Food (Pty) Ltd* 2013 (5) SA 89 (CC) paras 55 and 69.

³¹⁸ *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 (4) SA 1184 (SCA).

³¹⁹ *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 (4) SA 1184 (SCA) para 10.

to courts for impecunious groups,³²⁰ this is not the sole measurement for determining appropriateness. The LRC in their capacity as *amicus curiae* in *Mukaddam 2*,³²¹ submitted that a range of factors should be taken into account to determine whether an opt-out or opt-in class action is appropriate. These factors included: the size of the class; geographic location and distribution of the class; the representatives' ability to contact the class members; the likelihood of the class members responding to a notice giving them the option to opt-in to the class; the nature of the claim; the nature of the relief sought; the consequences for a class member who fails to opt-in; and the consequences for a class member who fails to opt-out.³²² These factors are really a reiteration of those proposed by the SALC³²³ to be considered by the court when deciding whether notice should be given to the members of the class.

Through its adoption of the SALC recommendations in its quintessential requisites, the Supreme Court of Appeal in *Ngxuza 2*³²⁴ endorsed the American requirement that the class must be so numerous as to render joinder impracticable.³²⁵ A shift occurred when the Supreme Court of Appeal in *Children's Resources Centre Trust 2*³²⁶ did not expressly state 'numerosity' as a requirement. It stated that there must be an identifiable class established by objective criteria.³²⁷ The Constitutional Court in *Mukaddam 2*,³²⁸ applied the standard of what is in "interests of justice"³²⁹ in the circumstances of the case, for determining whether or not to proceed with a class action.

³²⁰ The Ontario Appeal Court in *Cloud v Canada* (AG) (2004), 73 O.R. (3d) 401 (C.A.) paras 87-88 referred to the age, economic status, and continuing emotional status of a class of deaf and blind students as strong indicators that access to justice would be enhanced by certifying the class action: Kalajdic *Access to Justice for the Masses?* 63.

³²¹ *Imraahn Ishmail Mukaddam v Pioneer Food (Pty) Ltd* 2013 (5) SA 89 (CC).

³²² *Imraahn Ishmail Mukaddam v Pioneer Food (Pty) Ltd: Amicus Curiae's Heads of Argument*: Case No: CCT131/12 para 74; De Vos 2013 TSAR 762.

³²³ *Ibid* 132.

³²⁴ *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 (4) SA 1184 (SCA) para 15.

³²⁵ De Vos suggests that joinder does not have to be impossible, but must be shown to be inconvenient taking into account all the circumstances of the case: De Vos 2013 TSAR 763.

³²⁶ *Children's Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA).

³²⁷ *Children's Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) para 26; De Vos 2013 TSAR 375.

³²⁸ *Imraahn Ishmail Mukaddam v Pioneer Food (Pty) Ltd* 2013 (5) SA 89 (CC).

³²⁹ *Imraahn Ishmail Mukaddam v Pioneer Food (Pty) Ltd* 2013 (5) SA 89 (CC) para 34; South African Law Commission Project 88: *Report on The Recognition of Class Actions and Public Interest Actions in South African Law* 47.

3.15 SETTING THE STANDARD FOR CERTIFICATION IN ALL CLASS ACTIONS: ‘IN THE INTERESTS OF JUSTICE’³³⁰

The Constitutional Court in *Mukaddam 2*,³³¹ called for the general application of the interests of justice standard, rather than the strict application of the certification requirements in determining appropriateness:

“These requirements must serve as factors to be taken into account in determining where the interests of justice lie in a particular case. They must not be treated as conditions precedent or jurisdictional facts which must be present before an application for certification may succeed. The absence of one or another requirement must not oblige a court to refuse certification where the interests of justice demand otherwise.”³³²

Jafta J, on behalf of the majority, stated that the rigid and inflexible application of the requirements was unjustifiable if it would restrict certification, where the interests of justice would otherwise call for it. He advised that the courts in determining whether or not the interests of justice call for certification, should apply these factors as a guide. He went further to state that whilst acknowledging that these factors are not exhaustive, the courts would be free to consider any factor relevant and material to the application before it.³³³ The reason for this, he stated, is that a court in making a determination on certification, exercises its inherent jurisdiction to develop the common law in the interests of justice.³³⁴ “In this way, prior certification will serve as an instrument of justice rather than a barrier to it.”³³⁵ On this point Jafta J emphasised the relationship between a class action and its promotion of the right of access to court. Similar to Wallis JA,³³⁶ he positioned the class action as being a constitutional remedy in itself for the promotion of access to courts, by emphasising the relationship between sections 34 and 38 in the Constitution.³³⁷ He stated that the promotion of access to court for people is important in a democratic society.³³⁸ The class action then, as a means through which the courts can provide access to court for litigants, should not be

³³⁰ *Imraahn Ishmail Mukaddam v Pioneer Food (Pty) Ltd* 2013 (5) SA 89 (CC) para 34.

³³¹ *Imraahn Ishmail Mukaddam v Pioneer Food (Pty) Ltd* 2013 (5) SA 89 (CC).

³³² *Imraahn Ishmail Mukaddam v Pioneer Food (Pty) Ltd* 2013 (5) SA 89 (CC) para 35.

³³³ *Imraahn Ishmail Mukaddam v Pioneer Food (Pty) Ltd* 2013 (5) SA 89 (CC) paras 37 and 47.

³³⁴ *Imraahn Ishmail Mukaddam v Pioneer Food (Pty) Ltd* 2013 (5) SA 89 (CC) paras 33-34.

³³⁵ *Imraahn Ishmail Mukaddam v Pioneer Food (Pty) Ltd* 2013 (5) SA 89 (CC) para 38.

³³⁶ See footnote 272 above.

³³⁷ *Imraahn Ishmail Mukaddam v Pioneer Food (Pty) Ltd* 2013 (5) SA 89 (CC) para 38.

³³⁸ Confirms Froneman J’s comments in *Ngxuza v Secretary, Department of Welfare, Eastern Cape Provincial Government, Permanent Secretary, Department of Welfare* 2001 (2) SA 609 (E) 619-620, when Froneman J emphasised that the class action must be interpreted to promote access to courts, thereby living up to their constitutional obligation of ensuring governmental accountability and responsiveness.

prevented by the imposition of rigid certification requirements.³³⁹

While the positioning of the class action as a constitutional remedy is clear in our law, the formulation of the interest of justice standard is subject to three criticisms.

Firstly, the courts apply their inherent jurisdiction to develop the common law and create new rules to regulate their processes. Accordingly, if a *lacuna* in procedural law arises, then the courts would have to determine whether the interests of justice require the common law to be developed in this regard. This is what the courts in developing and refining the certification requirements in the absence of procedural rules of court and legislation have been doing all along. Since the courts have comprehensively developed the common law, there would be no need for other courts when deciding certification applications to do so again. As rightly pointed out by Froneman J in his minority judgment, courts would by virtue of judicial precedent, apply the established certification criteria.³⁴⁰ It would therefore be unnecessary to re-apply the interests of justice standard. Only if a court is confronted with a novel issue at certification, for example such as *Mukkaddam 1*,³⁴¹ may it become necessary to develop the common law. The court would then apply the interests of justice standard.³⁴²

Secondly, the certification requirements are what make up a class action, if an applicant fails to meet all the requirements this means the action is then not a class action.³⁴³ The SALC rightfully stated that “the action no longer proceeds as a class action because the criteria for certification, or any of them, are no longer satisfied.”³⁴⁴ Wallis JA supports this position. He acknowledged that while the certification requirements were not exclusive, a court must be satisfied that at least the stated requirements were present before granting certification.³⁴⁵

Thirdly, the interests of justice standard applied where the courts had to develop the law in terms of section 173 of the Constitution. It is therefore an undefined standard where a court does not need to

³³⁹ *Imraahn Ishmail Mukaddam v Pioneer Food (Pty) Ltd* 2013 (5) SA 89 (CC) paras 29-37.

³⁴⁰ *Imraahn Ishmail Mukaddam v Pioneer Food (Pty) Ltd* 2013 (5) SA 89 (CC) para 67.

³⁴¹ *Imraahn Ishmail Mukaddam v Pioneer Food (Pty) Ltd* 2013 (2) SA 254 (SCA).

³⁴² De Vos 2013 TSAR 765.

³⁴³ De Vos 2013 TSAR 769.

³⁴⁴ South African Law Commission Project 88: *Report on The Recognition of Class Actions and Public Interest Actions in South African Law* vii.

³⁴⁵ *Children’s Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) para 28; De Vos 2013 TSAR 769.

develop the law. This has left uncertainty for courts as to what content courts must give to certification in the interests of justice. The SALC proposed the interests of justice as but only one of the requirements to be considered by a court during certification. The interests of justice was defined as what subsequently became known in the case law as the appropriateness requirement.³⁴⁶ Accordingly, where these requirements are not met, the court would refuse certification where proceeding with a class action would be inappropriate.³⁴⁷ The requirement for certification has therefore remained, but the court stated that “certification that must be obtained before instituting a class action must not be construed to apply to class actions in which the enforcement of rights entrenched in the Bill of Rights is sought against the State.”³⁴⁸

3.15.1 DISPENSING WITH CERTIFICATION FOR CLASS ACTIONS FOR THE ENFORCEMENT OF CONSTITUTIONAL RIGHTS AGAINST THE GOVERNMENT

With the aforementioned statement, the Constitutional Court seems to have dispensed with certification for class actions enforcing fundamental rights against the government. Having stated earlier in this chapter, the importance of certification in ensuring the protection of the parties’ interests,³⁴⁹ the majority judgment in *Mukaddam 2*³⁵⁰ must thus be criticised in three respects.

Firstly, certification should apply to regulate class actions especially against government. Governmental action broadly affects the greater citizenry, and it is precisely because of the public magnitude of such litigation and its consequences on public administration and rights, that its warrants certification. I am therefore in agreement with Mhlantla AJ’s minority judgment which she held in this regard³⁵¹ that “given the rationale for certification and the nature of the class action, the benefits of the certification process apply in all class action suits.”³⁵²

³⁴⁶ South African Law Commission Project 88: *Report on The Recognition of Class Actions and Public Interest Actions in South African Law* 47; see paras 3.10.1 above.

³⁴⁷ *Imraahn Ishmail Mukaddam v Pioneer Food (Pty) Ltd* 2013 (5) SA 89 (CC) para 38.

³⁴⁸ *Imraahn Ishmail Mukaddam v Pioneer Food (Pty) Ltd* 2013 (5) SA 89 (CC) para 40.

³⁴⁹ Certification as stated earlier in paras 3.10, 3.10.1 and 3.10.2 serves as a preliminary screen and judicial safeguard to prevent abuses of the class action, protect the defendant from being unreasonably burdened by complex and lengthy litigation, protect the interests of absent class members, ensuring that the representative does not unduly benefit at the expense of the class members, and for the court to regulate and manage class actions involving groups of people. The notice requirement is also important for the purpose of ascertaining an identifiable class for purposes of opting-in or opting-out. These requirements are important to determining who will be bound by the judgment as a member of the class. The majority judgment must be considered in light of these remarks.

³⁵⁰ *Imraahn Ishmail Mukaddam v Pioneer Food (Pty) Ltd* 2013 (5) SA 89 (CC).

³⁵¹ *Imraahn Ishmail Mukaddam v Pioneer Food (Pty) Ltd* 2013 (5) SA 89 (CC) para 61; De Vos 2013 *TSAR* 768-769.

³⁵² *Ismail Mukaddam v Pioneer Food (Pty) Ltd* 2013 (5) SA 89 (CC) para 61.

Secondly, the absence of certification would create a problematic situation similar to that which prevails in Australia which has no certification requirements.³⁵³ In Australia, the class action proceeds in the absence of certification and it continues until finalisation, unless the respondent applies to court for an order terminating the proceedings as a class action. This has the practical effect of placing the onus on the respondent to show why the case should proceed as such. The result is that class proceedings in Australia undergo numerous interlocutory applications, and significant costs and delays are experienced.³⁵⁴

Thirdly it can be argued that Jafta J's remark regarding certification in constitutional cases against the government is *obiter*, since the facts of the case before him did not concern that kind of matter. In fact the court in *Linkside v Minister of Basic Education*³⁵⁵ (*Linkside*) must have taken this view as it certified a class action for the enforcement of a constitutional right against the government after Jafta J's *obiter*. This case provides a good example of the certification requirements in an opt-in class action and I outline these to illustrate the requirements in relation to the enforcement of a constitutional right against the State.

3.16 CERTIFICATION OF AN OPT-IN CLASS ACTION ENFORCING A CONSTITUTIONAL RIGHT AGAINST THE GOVERNMENT

The factual background to *Linkside*³⁵⁶ is as follows: since 2011, the Eastern Cape Department of Basic Education failed to fill teaching vacancies at schools or to pay appointed educators. As a result, schools themselves had to appoint and pay educators. These salaries were not budgeted for, leading to a reduction in finances needed for other school activities. Non-fee paying schools did not have finances to fill their vacant posts, thus resulting in a shortage of educators or no educators at all. There were 3000 vacant posts in the province at the time of the application.³⁵⁷ The situation

³⁵³ SS Clark, J Kellam and L Cook "Australia" in PG Karlsgodt (ed) *World Class Actions: A Guide to Group and Representative Actions Around the Globe* (2012) 411; *Children's Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) para 24.

³⁵⁴ The court can discontinue a class action where: the cost of the class action outweigh costs which would be incurred in individual actions; the relief sought can be obtained by means of proceeding by means of another action rather than a class action; the class action would not provide an efficient and effective means of dealing with the claims; it is otherwise inappropriate to proceed with a class action: Clark, Kellam and Cook *World Class Actions* 411; *Children's Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) para 24.

³⁵⁵ Case No: 3844/2013.

³⁵⁶ Case No: 3844/2013.

³⁵⁷ *Linkside v Minister of Basic Education* Case No: 3844/2013 (30 May 2014) para 5-9.

turned volatile in March 2013, when parents of learners in Uitenhage temporarily closed down 16 schools in protest action against the Department, demanding that their children be educated.³⁵⁸ In its founding affidavit to the certification application for an opt-in class action, 32 schools had opted-in. An additional 58 schools opted-in after the class action was certified, increasing the class size to 90 schools. The total monetary damages claimed in respect of filling the vacancies over the 4 years was R81 445 339.99.³⁵⁹ The LRC went on to note in this affidavit, the comments made in *Mukaddam* 2³⁶⁰ about dispensing with certification where a class action is sought for the enforcement of a constitutional right against the government.³⁶¹ Whilst acknowledging these comments, the LRC was of the view that certification was nonetheless necessary as the class sought “an order establishing the initial process for the determination of the claims of such schools,”³⁶² the court’s directions on notice requirements³⁶³ and “directions regarding the further conduct of the class action proceedings”³⁶⁴ beyond certification. The importance of certification for regulating and managing the litigation, and the directions flowing from it, as discussed earlier³⁶⁵ is again highlighted. Accordingly, the LRC insisted on certification “to the extent that certification is required and in any event to achieve certainty as to the process.”³⁶⁶ In their founding affidavit, the applicants applied the certification requirements as set out in *Children’s Resources Centre 2*.³⁶⁷

The class was defined and limited to all public schools in the Eastern Cape which had vacant posts on their 2013 and 2014 educator post establishments.³⁶⁸ The *prima facie* cause of action was an infringement of the right to basic education³⁶⁹ of all learners in the province, and a breach of the Employment of Educators Act.³⁷⁰ Flowing from this, it was submitted that the determination of the claims of the class raised common issues of fact and law. The only difference between the claims of the class members was the number of vacant posts at each school, the number of unpaid educators and the remedial steps taken by each school. As the class representatives, the LRC confirmed that

³⁵⁸ *Linkside v Minister of Basic Education* Case No: 3844/2013: Founding Affidavit para 139.1

³⁵⁹ *Linkside v Minister of Basic Education* Case No: 3844/2013: Founding Affidavit: para 25.2.5.

³⁶⁰ *Imraahn Ismail Mukaddam v Pioneer Food (Pty) Ltd* 2013 (5) SA 89 (CC) para 40.

³⁶¹ *Linkside v Minister of Basic Education* Case No: 3844/2013: Founding Affidavit: para 121.

³⁶² *Linkside v Minister of Basic Education* Case No: 3844/2013: Founding Affidavit: para 120.

³⁶³ *Linkside v Minister of Basic Education* Case No: 3844/2013: Founding Affidavit: para 122.2.

³⁶⁴ *Linkside v Minister of Basic Education* Case No: 3844/2013: Founding Affidavit: para 122.4

³⁶⁵ See footnote 344 above.

³⁶⁶ *Linkside v Minister of Basic Education* Case No: 3844/2013: Founding Affidavit: para 121.

³⁶⁷ *Children’s Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) para 15.

³⁶⁸ *Linkside v Minister of Basic Education* Case No: 3844/2013: Founding Affidavit: paras 125-127.

³⁶⁹ Section 29(1)(a) of the Constitution.

³⁷⁰ Act 76 of 1998; and Regulation 6(1) of the Regulations regarding the Terms and Conditions of Employment of Educators, GN R1743, *Government Gazette* 16814, 13 November 1995; *Linkside v Minister of Basic Education* Case No: 3844/2013: Founding Affidavit: paras 125-127.

there were no conflicts of interest between itself and the class members, that it had the capacity and resources to represent the class. In support of the appropriateness of proceeding with a class action, it was submitted that the class action was the only way of proceeding with the claims. It was stated that individual schools would be financially unable to secure individual legal representation, and that their claims were too small to justify litigation.³⁷¹ Satisfied that the requirements were met and following an agreement by the parties to proceed as such, Alkema J certified the class action on 20 March 2014.³⁷² The judge then directed that notice be given to enable the schools to opt-in to the class action,³⁷³ and the matter was set down for hearing on 30 May 2014. This certification warrants further discussion as some significant points of law have been made.

The court's acceptance of the application of the certification requirements reinforced *Ngxuza I*³⁷⁴ and 2,³⁷⁵ and confirmed the comments of the majority in *Mukaddam 2*,³⁷⁶ regarding certification in a class action against the State as *obiter*. With regard to the requirement of appropriateness, the court did not require for there to be exceptional circumstances when proceeding with an opt-in class action. Furthermore, the requirement of there being an appropriate means of distribution to the class, where damages are sought, was considered in *Children's Resources Centre*³⁷⁷ as recommended by the SALC.³⁷⁸ The applicants in *Linkside*³⁷⁹ were forward-looking in seeking the appointment of claims administrators to administer the payment of the damages to the schools. Roberson J handed down judgment of 17 December 2014.

In her judgment, Roberson J emphasised that this class action was necessary because without it “the children of poor families will suffer the most because the schools they attend cannot afford to pay educators to occupy vacant posts.”³⁸⁰ The judge found in favour of the class and ordered the appointment of claims distributors to ensure implementation of the payment. This is not far off from

³⁷¹ *Linkside v Minister of Basic Education* Case No: 3844/2013: Founding Affidavit: paras 128-149.

³⁷² *Linkside v Minister of Basic Education* Case No: 3844/2013 (30 May 2014) para 3.

³⁷³ The Applicants were directed within a specified time prior to the hearing, to publish the notice in newspapers, and broadcast the notice on radio stations. The Department was directed to circulate prior to the hearing, the notice to all districts and schools, and to place it in a prominent position on its website: *Linkside v Minister of Basic Education* Case No: 3844/2013 (30 May 2014) para 3.

³⁷⁴ *Ngxuza v Secretary, Department of Welfare, Eastern Cape Provincial Government, Permanent Secretary, Department of Welfare* 2001 (2) SA 609 (E).

³⁷⁵ *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 (4) SA 1184 (SCA).

³⁷⁶ *Imraahn Ismail Mukaddam v Pioneer Food (Pty) Ltd* 2013 (5) SA 89 (CC) para 40.

³⁷⁷ *Children's Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) paras 80-87.

³⁷⁸ South African Law Commission Project 88: *Report on The Recognition of Class Actions and Public Interest Actions in South African Law* 54.

³⁷⁹ *Linkside v Minister of Basic Education* Case No: 3844/2013: Founding Affidavit: para 124.

³⁸⁰ *Linkside v Minister of Basic Education* Case No: 3844/2013 (17 December 2014) para 25.

the SALC recommendation that in dealing with damages to be awarded individually or an aggregate amount, the court may appoint a commissioner to assist the courts.³⁸¹ The court in so doing, demonstrated the remedial potential of a class action in the interests of the poor and vulnerable.

3.17 CONCLUSION

Whilst maintaining the restrictive approach to standing for individual interests, the courts at common law made exceptions where public rights in the area of administrative law were sought to be enforced against local municipalities. What is evident from these exceptions is how the courts stretched the bounds of the restrictive approach by allowing standing for litigants who sought to vindicate a public right held in common with a group of persons who did not appear before court. Further, the effect of the outcome of these cases was far reaching in that they benefitted defined classes of people. In so doing, the courts at least entertained the idea of the “class nature of certain claims,”³⁸² thereby laying the foundations for class standing, which was later given express recognition in the Constitution. At the Constitution drafting stage of South Africa’s democratic transitional period, what was at the forefront of the considerations of the drafters in broadening standing, was how best to widen access to courts for the enforcement of rights in the Bill of Rights, primarily for the disadvantaged in a new democratic South Africa. Bearing in mind that the poor mainly rely on government for socio-economic goods, the class action was in this regard, envisaged as an assertive armour to ensure public accountability, transparency and responsiveness by government in fulfilling its constitutional obligations. This important role of class actions had to be achieved whilst ensuring procedural safeguards for adequate representation of classes, without unduly burdening the courts. The SALC recommended preliminary certification procedures for class litigation, namely: class definition; a cause of action raising a triable issue; common issues of fact and law; adequate representation and notice; as safeguards. Since parliament has not actioned these recommendations, the courts have exercised their inherent jurisdiction to develop procedures to overcome practical difficulties associated with class litigation. These procedures were developed *ad hoc* on a case-by-case basis, and also drawn from the SALC’s recommendations, domestic judicial precedent and comparative law. These procedures were initially developed, in the context of class actions for the enforcement of socio-economic rights against the government in the interest of

³⁸¹ South African Law Commission Project 88: *Report on The Recognition of Class Actions and Public Interest Actions in South African Law* vii.

³⁸² Plasket “Representative Standing” 8.

poor and vulnerable classes. The remedial potential of class actions for poor and vulnerable communities at protest against the government on socio-economic demands, has in the *Mazibuko*³⁸³ and *Linkside*³⁸⁴ class actions been demonstrated. Socio-economic rights class actions, which bear similar mobilising qualities to service delivery protests, as shown, can allow for legal enforceability of these protest demands. While this is so, the interests of the classes were however, not limited to constitutional rights, but also applied to common law and statutory rights. As a result, the courts have acknowledged that when the poor and vulnerable seek to vindicate their constitutional, common and statutory rights, they are enforcing their constitution right of access to courts. This means that section 34 provides a constitutional dimension to all class actions, such that a denial to proceed with a class action can be challenged, with the remedy being the right to proceed with a class action. The class action is thus not only a legal procedure in terms of the Constitution for the enforcement of all rights, but also a constitutional remedy in itself. In the next chapter, I undertake an in-depth case study of the *Mazibuko*³⁸⁵ case and examine how the class action became a constitutional remedy for the enforcement of the right of access to water for a poor and vulnerable community which had embarked on a series of service delivery protests for water.

³⁸³ *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W); *City of Johannesburg v Mazibuko* 2009 (3) SA 592 (SCA); *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

³⁸⁴ *Linkside v Minister of Basic Education* Case No: 3844/2013.

³⁸⁵ *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W); *City of Johannesburg v Mazibuko* 2009 (3) SA 592 (SCA); *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

CHAPTER 4

UNPACKING THE MAZIBUKO CASE STUDY

LEGAL MOBILISATION: FROM PROTEST ACTION TO CLASS ACTION

“whilst the law in South Africa has proved that it can be used for the poor, it is rarely being used independently by the poor”¹

4.1 INTRODUCTION

It is now trite that the Constitution² extends the common law rules of standing by introducing class actions.³ The case law discussed in chapter 3, shows how the courts have interpreted the class action, as both a legal device and remedy, primarily suited for poor and vulnerable groups lacking the means to institute individual legal actions.⁴ In this regard, the *Mazibuko*⁵ litigation provides a relevant case study of how an impoverished community’s resistance to the installation of pre-payment water metres (PPMs), was transformed into a class action for the enforcement of the right of access to water.⁶ In unpacking this case study, I begin by tracing the development of the community’s resistance, in order to set the contextual background leading up to the litigation. This is useful in situating the decision-making, presentation and adjudication of the class action within the broader objectives of the community protest action. My focus in this regard, will be on what brought about the move from protest action to litigation. I highlight that this ‘decision’ or uptake of litigation was in fact not made by the community itself, but really made by a left-wing social movement alliance, the Anti-Privatisation Forum (APF),⁷ and public interest litigation

¹ A statement made by Mark Heywood, executive director of the AIDS Law Project: J Dugard “Courts and the Poor in South Africa: A Critique of Systemic Judicial Failures to Advance Transformative Justice” (2008) 24 *SAJHR* 214 at 225-226.

² Constitution of Republic of South Africa, 1996.

³ Detailed in chapter 3.

⁴ Class actions are similarly considered a “device” for providing meaningful justice for the disempowered groups in Canada: JS van Wyk *The need and requirements for a class action in South African law with specific reference to the prerequisites for locus standi in iudicio* (LLM Thesis: University of Pretoria 2010) III; S Liebenberg “From the Crucible of the Eastern Cape: New Legal Tools for the Poor” (2015) 2 *Speculum Juris* http://www.speculumjuris.co.za/files/pdf/SJ4214FPLiebenberg_27Jan2015.pdf (accessed on 15 March 2015); J Kalajdic *Access to Justice for the Masses? A Critical Analysis of Class Actions in Ontario* (LLM Thesis: University of Toronto 2009) 191.

⁵ *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W); *City of Johannesburg v Mazibuko* 2009 (3) SA 592 (SCA); *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

⁶ J Dugard “Civic action and legal mobilisation: the Phiri water meters case” http://www.pulp.up.ac.za/pdf/2010_10/2010_10_j_chapter4.pdf (accessed on 10 September 2015) 75.

⁷ Dugard “Civic action and legal mobilisation” 87.

organisations,⁸ the Freedom of Expression Institute (FXI) and the Witwatersrand University Centre for Applied Legal Studies (CALS). This uptake was initiated by the APF, which organised the community's early resistance to PPMs to bolster its broader political campaign against the commercialisation and corporatisation of water services in South Africa. Subsequent to the municipal clampdown of the political campaign, FXI and CALS, who identified the jurisprudential potential of the case to be made, intervened.⁹ Inspired by the case to be made, FXI and CALS persuaded APF to pursue litigation as the only remaining avenue of reviving its campaign. Upon this resort to litigation, FXI and CALS brought a legal action in the name of five residents, acting on their own behalf and on behalf of their households. It was the *court a quo*, which recognised and re-framed the standing of the applicants as representative plaintiffs acting on their own behalf, and on behalf the class of residents of Phiri community as a whole. It was upon this class recognition that the matter proceeded as a class action. In light of these developments, I then ask the following questions of the *Mazibuko*¹⁰ class action: did the community have a "voice"¹¹ in the litigation? and what active role did Mazibuko and the other representative plaintiffs actually play in the litigation? I show that while the community participated in APF's political campaign, they were alienated by the separate legal campaign which lawyers ran in the high courts without significant involvement of the community. I conclude that whilst the class action and the protest action may have dialectically reinvigorated each other towards achieving indirect material and broader systemic¹² remedies on behalf of the community, the community remained legally disempowered. Alienated from the legal process by FXI and CALS, the community did not become active legal agents in effecting 'their'

⁸ Public interest litigation organisations are domestic and/or international non-governmental organisations and networks of organisations, who specialise in public interest litigation. Public interest litigation broadly refers to legal action with the intention of establishing a legal principle or right that is of public importance and aimed at social transformation. Public interest litigators are concerned with litigation as a channel or strategy through which the voice of marginalised people can be articulated into the legal-political system, through a range of different legal actions including, individual cases, class actions and public interest actions. Legal action is therefore intended as a mechanism to make governments more responsive and accountable to legal rights of marginalised groups on social and economic issues: S Gloppen "Public Interest Litigation, Social Rights and Social Policy" *Arusha Conference: New Frontiers of Social Policy* (2005) <http://siteresources.worldbank.org/INTRANETSOCIALDEVELOPMENT/Resources/Gloppen.rev.3.pdf> (accessed on 29 November 2012); *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) para 165.

⁹ Essentially, "it is class action counsel, after all, who determine which cases to initiate." The questions then are: "why are certain cases brought as class proceedings, how many are rejected, and on what basis are these decisions made? Do these criteria constitute a new barrier to justice or do they, in fact, facilitate access to justice?" Kalajdic *Access to Justice for the Masses?* 72-73.

¹⁰ *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W); *City of Johannesburg v Mazibuko* 2009 (3) SA 592 (SCA); *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

¹¹ A voice is defined as the ability of marginalised groups to articulate their rights claims into the legal system, or have their rights adequately asserted on their behalf in a consultative manner that ensures their legal awareness: Gloppen "Public Interest Litigation, Social Rights and Social Policy."

¹² The broader impact of the litigation process on governmental policy, directly and through influencing public discourses on rights, nationally and internationally: Gloppen "Public Interest Litigation, Social Rights and Social Policy."

own social change. This has implications for the class action as a means of enhancing access to justice for and by impoverished communities.

4.2 THE BACKGROUND LEADING UP TO THE *MAZIBUKO*¹³ CLASS ACTION

4.2.1 THE MUNICIPALITY'S POLICY OF COMMERCIALISATION AND CORPORATISATION OF WATER SERVICES

As discussed in chapter 2, one of the areas that needed to be addressed in 1994 by the post-apartheid government was the legacy of vastly unequal provision of basic services, particularly water. As recognised in the Reconstruction and Development Programme (RDP), in 1994 an estimated 12 million South Africans did not have access to piped water.¹⁴ In light of this, there was an expectation by South Africans “that equalising water services would be prioritised, and that water would be recognised as a public good whose commodification would not inherently discriminate against the majority poor.”¹⁵ Whilst progress has been made in connecting previously unconnected households to the water grid, the focus since 2000 has been on cost-recovery, which has resulted in poor households being disconnected for inability to pay for water services.

The focus on cost-recovery and the increase in water disconnections was brought about by the consolidation of local government in the 2000 municipal elections.¹⁶ As a result, the national government exerted strict fiscal control on municipalities.¹⁷ In particular municipalities were under increasing pressure to become financially self-sufficient and were precluded from any deficits on their operating budgets.¹⁸ This directly affected the provision of municipal services. With water and

¹³ *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W); *City of Johannesburg v Mazibuko* 2009 (3) SA 592 (SCA); *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

¹⁴ *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) para 2; Dugard “Civic action and legal mobilisation” 76-77.

¹⁵ Dugard “Civic action and legal mobilisation” 76-77.

¹⁶ Although the commercialisation of water services gained momentum with the consolidation of local government in 2000, there were earlier policy approaches. The 1994 Water Supply and Sanitation White Paper stipulated that “where poor communities are not able to afford basic services, government may subsidise the cost of construction of basic minimum services but not the operating, maintenance or replacement costs.” Furthering this approach, the 1997 White Paper on a National Water Policy for South Africa stated that “to promote the efficient use of water, the policy will be to charge users for the full financial costs of providing access to water, including infrastructure, development and catchment management activities.” Dugard “Civic action and legal mobilisation” 78.

¹⁷ Schedule 4B of the Constitution, 1996: Dugard “Civic action and legal mobilisation” 77; J Dugard “Rights, Regulation and Resistance: The Phiri Water Campaign” (2008) 24 *SAJHR* 593 at 602.

¹⁸ In terms of section 18(1)(c) of the Local Government: Municipal Finance Management Act 56 of 2003: Dugard “Civic action and legal mobilisation” 77; Dugard 2008 *SAJHR* 606-607.

electricity services, exclusively under the mandate of government, and constituting 50% of municipal revenue, municipalities were forced to pursue a commercialised approach to water services. Water was viewed as a source of revenue rather than a public service.¹⁹

It was amidst this “financial crisis”²⁰ and “budgetary constraints”²¹ that the City of Johannesburg Metropolitan Municipality (Municipality) launched in December 1999, a corporate model of governance called “*iGoli 2002*.”²² This was a turnaround strategy for municipal financial recovery that involved the corporatisation and commercialisation of municipal services. In line with this strategy, in 2001 the Municipality established the following corporate entities: Johannesburg Water (Pty) Ltd²³ (Johannesburg Water); City Power (Pty) Ltd; and Pikitup (Pty) Ltd, as the respective water, electricity, and waste management and refuse service providers. From the Municipality’s perspective, it was essential to minimise inefficiencies and revenue losses in municipal service. One of the main problem areas identified in this regard was Soweto.²⁴ So, while households in the rich and predominately white Johannesburg suburbs continued to have unrestricted access without any pressure to conserve water, in June 2001 the Municipality devised a plan to physically restrict water consumption in Soweto in order to minimise inefficiencies and revenue losses due to communities that struggled to pay.²⁵ The water consumption was restricted to the obligatory free basic water (FBW) allocation unless households purchased additional water credit by means of PPMs.²⁶ Phiri, one of the poorest townships in Soweto, with high unemployment, and multi-dwelling properties comprised of a small house and backyard shacks per property, was chosen as the pilot project for “Operation *Gcin’Amanzi*”²⁷ (OGA). The project was approved in May 2003²⁸ and on 11 August 2003, Johannesburg Water began the bulk infrastructure construction work for the installation of

¹⁹ Dugard “Civic action and legal mobilisation” 77; Dugard 2008 *SAJHR* 602.

²⁰ *City of Johannesburg v Mazibuko* 2009 (3) SA 592 (SCA) para 37.

²¹ *City of Johannesburg v Mazibuko* 2009 (3) SA 592 (SCA) para 37.

²² Dugard “Civic action and legal mobilisation” 82.

²³ A corporation wholly owned by the Municipality. The French multinational (one of the world’s largest privatised water management firms) Suez Lyonnaise (now called GDF Suez), was awarded a five year management contract in 2001. Johannesburg Water’s management subsidiary, Johannesburg Water Management (Jowam) held a lesser management role to Suez Lyonnaise: Dugard “Civic action and legal mobilisation” 79; Dugard 2008 *SAJHR* 602-603; *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W) para 6; *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) para 5.

²⁴ Dugard “Civic action and legal mobilisation” 82; J Dugard 2008 *SAJHR* 596 and 601-602.

²⁵ Dugard “Civic action and legal mobilisation” 82.

²⁶ *City of Johannesburg v Mazibuko* 2009 (3) SA 592 (SCA) para 48; Dugard “Civic action and legal mobilisation” 84.

²⁷ “Operation Conserve Water:” SAHA “APF: Water;” *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W) para 92; *City of Johannesburg v Mazibuko* 2009 (3) SA 592 (SCA) para 48; *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) paras 13-14.

²⁸ *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) para 15.

PPMs.²⁹ In February 2004 the first phase of individual house installation began in Phiri Block B.³⁰

4.2.2 THE PHIRI COMMUNITY'S ENCOUNTER WITH OGA AND PPMs

Mazibuko,³¹ who had heard about PPMs from activists in the nearby Orange Farm informal settlement,³² told the workers that she would not accept such a system of water service delivery.³³ At the end of March 2004, without any notification, warning nor consultation,³⁴ the Mazibuko household's water supply was abruptly disconnected. It remained so until October 2004, when after having been deprived of water she desperately give up the resistance, and accepted a PPM.³⁵ At this time many other Phiri residents,³⁶ had experienced similar conditions as Mazibuko³⁷ and this had further detrimental effects on their already impoverished lives.

4.2.3 EFFECT OF PPMs ON THE COMMUNITY'S ACCESS TO WATER

OGA compromised the community's access to water in various ways. With an average of 13 or more people living in a single household, the FBW allocation was insufficient to meet basic needs. In the context of high poverty, the residents were forced to make undignified and unhealthy choices. For instance, people living with HIV/AIDS had to choose between bathing or washing their soiled sheets, and parents had to choose between washing their children before they went to school, or flushing toilets.³⁸ Even so, many households normally went for days without water because their

²⁹ *City of Johannesburg v Mazibuko* 2009 (3) SA 592 (SCA) para 48.

³⁰ Dugard "Civic action and legal mobilisation" 82-83.

³¹ The factual scenario in chapter 1 draws on this factual background to *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) para 16; see para 1.1.

³² The Municipality had earlier begun its PPM pilot project in Orange Farm informal settlement in 2001-2002, the Orange Farm Water Crisis Committee (OFWCC), an early community affiliate of APF, was formed in response: SAHA "APF: Water."

³³ *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W) para 121.

³⁴ *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W) para 112.

³⁵ *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W) paras 113-114 and 119-122; *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) para 16.

³⁶ The water supply of Munyai, who later became the third applicant in *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W), was discontinued. She accepted a standpipe rather than a PPM because she always wanted to make sure that she had access to water, even if it was outside. However, with a standpipe, which is not connected to a direct household water supply, sanitation or sewage system, the members of the households must carry buckets of water to supply the household or flush toilets. Furthermore, if a household violates the conditions of use of a standpipe, including not connecting the tap to a hose, the standpipe would be removed and a PPM installed. The Municipality conducted regular surprise checks to monitor compliance with the conditions of use: Dugard "Civic action and legal mobilisation" 84.

³⁷ Dugard "Civic action and legal mobilisation" 83-84.

³⁸ Dugard and Langford 2011 *SAJHR* 42-43 and 50; Madlingozi *Socio-Economic Rights in South Africa* 111.

FBW supply only lasted until mid-month, and there was often insufficient money to buy additional water credits. The continuous infringements to dignity and health were serious, and a direct risk to health was posed in the event of a fire. On 27 March 2005 a shack fire on the property of Paki,³⁹ caused the death of two children, when there was insufficient water to put out the fire. Unable to cope with these living conditions, community members appealed to ward councillors. When this failed they embarked on direct resistance in the form of protests.⁴⁰

4.2.4 THE COMMUNITY'S RESISTANCE TO PPMs

In August 2003, even before the first PPMs were installed, the initial digging of trenches was met with early widespread resistance. Residents such as Mazibuko, became inspired by residents and community activists of the nearby Orange Farm informal settlement, who destroyed PPMs after they were installed. As it became clear that the Municipality was unyielding in its determination to install PPMs in Phiri, opposition mounted, and gained support through the intervention of the APF.⁴¹

4.3 THE ROLE OF THE APF IN THE COMMUNITY'S RESISTANCE TO PPMs

“Established in 2000, the APF is a left-wing social movement⁴² alliance comprising affiliated community-based organisations, activists and movements, the latter group including the Soweto Electricity Crisis Committee (SECC),⁴³ and Orange Farm Water Crisis Committee (OFWCC).⁴⁴ It was formed during, and in response to the Municipality's formation of its commercialisation and corporatisation policy.⁴⁵ It brought together political activists and emerging community movements

³⁹ Paki later became the fifth applicant in *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W): Dugard “Civic action and legal mobilisation” 84-85; *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) para 144.

⁴⁰ Dugard and Langford 2011 *SAJHR* 42-43 and 50; Madlingozi *Socio-Economic Rights in South Africa* 111.

⁴¹ Dugard “Civic action and legal mobilisation” 87; T Madlingozi “Post-Apartheid Social Movements and Legal Mobilisation” in M Langford, B Cousins, J Dugard and T Madlingozi (eds) *Socio-Economic Rights in South Africa: Symbols or Substance?* (2014) 107.

⁴² Social movements are made up of collectives of marginalised people who develop a collective identity; who put forward change-oriented goals; who possess some degree of organisation; and who engage in sustained, albeit episodic, extra-institutional collective action: Madlingozi *Socio-Economic Rights in South Africa* 93.

⁴³ Dugard “Civic action and legal mobilisation” 87.

⁴⁴ SAHA “APF: Water.”

⁴⁵ Maloko, a member of the APF stated, following the establishment of Johannesburg Water: “When they introduced these pre-paid meters...and then Johannesburg Water registered as a Pty Ltd, realising that Pty is a company and managed by Suez Lyonnaise, a multinational corporate from France and then we realised that no, people are making profit out of basic services:” South African History Archive “APF: Water” <http://www.saha.org.za/apf/water.htm> (accessed on 15 September 2015).

committed to the de-commodification of basic services.⁴⁶ “Among the APF’s core objectives were: ‘a halt to all privatisation of public sector entities and return of public control and ownership; the co-ordination and intensification of anti-privatisation struggles in communities.’”⁴⁷ To further these objectives, the APF’s stated “action repertoire”⁴⁸ comprised: various forms of mass and direct action at local, provincial and national levels, regular community-based mass meetings, alliance building and solidarity activities with community organisations nationally, as well as with organised labour; door-to-door campaigning in communities; submission of memoranda of demands and policy alternatives to all levels of government; and regular, community-based report-back meetings.⁴⁹

Deeply rooted in community resistance against the commercialisation and corporatisation of public services such as water, the APF found itself well placed to take up the struggle and “become the vehicle⁵⁰ for community resistance against PPMs in Phiri.”⁵¹ Indeed, the APF-affiliated SECC, which had already campaigned against electricity and water PPMs elsewhere in Soweto, played a pivotal role in mobilising resistance in Phiri.⁵² The community’s resistance was developing into an organised resistance and political campaign, only to be met with opposition from the Municipality.

4.3.1 THE FORMATION OF THE POLITICAL CAMPAIGN AND THE MUNICIPALITY’S OPPOSITION

In the early months of the campaign, “Destroy the Meter/Enjoy Free Water,”⁵³ increasing numbers of residents joined in at APF/SECC meetings in Phiri and at the APF offices in Johannesburg. Direct acts of resistance also involved attempts at physically preventing Johannesburg Water

⁴⁶ Dugard “Civic action and legal mobilisation” 87.

⁴⁷ Dugard “Civic action and legal mobilisation” 87.

⁴⁸ “Action repertoire” is defined as the array of disruptive tactics deployed by social movements to mobilise and reactivate people when engaged in contentious politics. Disruption is the most potent weapon for social movements because it spreads uncertainty and gives leverage to weak and excluded people: Madlingozi *Socio-Economic Rights in South Africa* 96 and 107.

⁴⁹ Dugard “Civic action and legal mobilisation” 87-88.

⁵⁰ Dugard “Civic action and legal mobilisation” 88.

⁵¹ Dugard “Civic action and legal mobilisation” 88.

⁵² The APF’s earlier “Operation Khanyisa” (“Operation Turn On”) which related to the reconnection of electricity, was extended to the reconnection of water through “Operation Vulamanzi” (“Operation Water Flow”). As part of this campaign, activists had assisted thousands of households, with particular focus on pensioners and HIV positive residents, to by-pass the PPMs so that they could access an unlimited water supply. While this was deemed ‘illegal’ by the Municipality, the APF saw it as an act of re-appropriation of a public good that had ‘illegally’ been commodified and thus made unaffordable for the poor: SAHA “APF: Water.”

⁵³ Madlingozi *Socio-Economic Rights in South Africa* 93.

employees from digging trenches.⁵⁴

In response to the increasing number of direct resistance, spontaneous protests and mass action, the Municipality successfully applied to the Witwatersrand Local Division for an interdict, which was granted on 22 August 2003. The interdict banned all interference with OGA, and activists including all members of APF and SECC were interdicted from coming within 50 metres of any physical work undertaken in terms of OGA. The interdict further authorised the sheriff of the court to engage the services of a private security company to assist in preventing any violations of the terms of the interdict.⁵⁵

Under the direction of the APF/SECC, the resistance gained momentum and direct acts of resistance and spontaneous protests developed into organised mass action to the Municipality and Johannesburg Water offices. On 16 September 2003, 9 February 2004, and 9 March 2004,⁵⁶ APF/SECC filed formal notices in terms of the Regulation of Gatherings Act⁵⁷ (RGA), whereby they notified the Johannesburg Metropolitan Police Department (JMPD) and Municipality of their intended gatherings planned to take place at: the Phiri Community Hall on 20 September 2003; outside the rates and taxes offices at Jorissen Place, Johannesburg, on 3 March 2004; and to the opening of the Constitutional Court, Johannesburg, on 21 March 2004, respectively.⁵⁸

The JMPD and Municipality prohibited the gatherings for which notification was provided in terms of the RGA. It prohibited the gathering planned to be held on 20 September 2003, on the grounds that “there had been extensive damage to Council property in Phiri”⁵⁹ in a previous march by the APF/SECC; that “trenches that were intended for water pipes were damaged by participants of the march; and that construction workers were intimidated and obstructed in the performance of their duties.”⁶⁰ The letter of prohibition further stated as a ground for prohibition that the “convener,”⁶¹ of

⁵⁴ Dugard “Civic action and legal mobilisation” 88; Madlingozi *Socio-Economic Rights in South Africa* 107.

⁵⁵ Dugard “Civic action and legal mobilisation” 88; Madlingozi *Socio-Economic Rights in South Africa* 109.

⁵⁶ M Memeza “A Critical Review of the Implementation of the Regulation of Gatherings Act 205 of 1993: A Local Government and Civil Society Perspective July 2006” (2006) 16-18 <http://fxi.org.za/PDFs/Legal%20Unit/RGAREport-Mzi.pdf> (accessed on 10 October 2015).

⁵⁷ Act 205 of 1993.

⁵⁸ Memeza “A Critical Review of the Implementation of the Regulation of Gatherings Act 205 of 1993” 17-18 and 36.

⁵⁹ Memeza “A Critical Review of the Implementation of the Regulation of Gatherings Act 205 of 1993” 17.

⁶⁰ Memeza “A Critical Review of the Implementation of the Regulation of Gatherings Act 205 of 1993” 17.

⁶¹ “Any person who, of his own accord, convenes a gathering; and in relation to any organisation, any person appointed by such organisation or branch.” Section 1 of the Regulation of Gatherings Act 205 of 1993;

the APF/SECC⁶² march in Phiri did not attend a meeting called by the JMPD on 17 September 2003 in terms of the RGA. There were however no records of correspondence in this regard.⁶³

With regard to the gathering planned to be held on 3 March 2004,⁶⁴ a letter from the Municipality dated 17 February 2004, prohibited the gathering on the grounds that:

“Jorissen Place is in the centre of Braamfontein and business will be severely affected especially during lunchtime and afternoon peak. (2) Your proposed gathering will result in serious disruption of vehicular traffic because of the duration of the march, your refusal to adhere to 2 hours restriction and the number of participants. (3) The unlawful removal of prepaid meters and intimidations to contract workers tasked to lay underground water pipes. It is therefore clear that...your march will result in injury to other persons and damage to property.”⁶⁵

In relation to the planned gathering to the Constitutional Court on 21 March 2004, the APF gave notice to the JMPD on 9 March 2004, and received a letter of prohibition on 18 March 2004. The letter cited the following reasons:

“(1) Your proposed gathering will result in serious disruption of vehicular traffic because of the official opening of the Constitutional Court and the tendency of your participants who deliberately stop while marching to obstruct traffic. (2) The unlawful removal of prepaid meters and the damaging thereof by throwing them on the ground and tramping on them. (3) The making of fire in a public place with the intention of burning summonses and account statements. It is therefore clear...that your march will result in injury to other persons and damage to property. Your organisation has shown no ability to control its members in the past.”⁶⁶

These were the reasons provided, although there are no records of communication regarding meetings available, nor were meetings ever held between the conveners, JMPD and the Municipality, to discuss the gathering prior to the issuing of the prohibitions.⁶⁷ This conduct of the JMPD and the Municipality showed: “a disturbing pattern where organisations that stridently oppose the government’s macro-economic strategy and those who denounce the continued impoverishment and immiseration of the masses are finding themselves isolated and targeted by

⁶² The convener/contact person for SECC/APF in this regard was Ms Veronica Shipalane: Memeza “A Critical Review of the Implementation of the Regulation of Gatherings Act 205 of 1993” 17.

⁶³ These provisions of the RGA will be discussed in chapter 6: Memeza “A Critical Review of the Implementation of the Regulation of Gatherings Act 205 of 1993” 17.

⁶⁴ The convener was Mr Bongani Lubisi: Memeza “A Critical Review of the Implementation of the Regulation of Gatherings Act 205 of 1993” 18.

⁶⁵ Memeza “A Critical Review of the Implementation of the Regulation of Gatherings Act 205 of 1993” 18.

⁶⁶ Memeza “A Critical Review of the Implementation of the Regulation of Gatherings Act 205 of 1993” 18.

⁶⁷ Memeza “A Critical Review of the Implementation of the Regulation of Gatherings Act 205 of 1993” 18.

local municipalities and its law enforcement machinery.”⁶⁸

In reaction to these legal means employed by the Municipality and JMPD, the APF established in September 2003, a Coalition Against Water Privatisation (CAWP) to re-focus activism against PPMs under a newly configured affiliation.⁶⁹ The Municipality responded to the CAWP, by following up on the interdict with arrests. By the end of September 2003, 14 Phiri residents and activists supporting them had been charged with ‘public violence,’ ‘malicious damage to property’ and ‘incitement’ for handing out campaign flyers opposing PPMs.⁷⁰ The APF and its affiliate movements, the SECC and CAWP, had to divert much of their resources to securing bail and defending those charged. Most of the charges were dropped, but during this time, the resistance took a heavy toll on the social movements, and effectively undermined its ability stop the rollout of PPMs in Phiri.⁷¹

4.3.2 THE MUNICIPALITY’S DEFEAT OF THE COMMUNITY’S RESISTANCE AND THE APF’S POLITICAL CAMPAIGN

The inability to stop the rollout of PPMs fundamentally weakened the overall resistance campaign of the APF.⁷² Many households were left to their own devices to continue resisting the installation of the PPMs on their properties. Their ineffective resistance allowed the installation of PPMs to go ahead without disruptions. In February 2004 the first PPMs were installed. For those households that continued to refuse PPMs, the Municipality deployed a new coercive strategy: total water disconnection, which left households such as the Mazibuko household without water for months, until they surrendered. Having attempted to live without direct access to water for months, and whilst enduring intimidation by the Municipality, by the end of 2005 all households in Phiri had been forced to either accept PPMs or standpipes.⁷³

This ultimate defeat in challenging the installation of PPMs was understood by the APF/SECC/

⁶⁸ Memeza “A Critical Review of the Implementation of the Regulation of Gatherings Act 205 of 1993” 8.

⁶⁹ Setshedi, a member of the APF, explained the aim behind the formation of the CAWP: “The aim of the Coalition Against Water Privatisation was to...take the issue of water as a universal issue outside the ideology of the APF and try and draw all the people who believed that water is a human right [my emphasis]...we talk about water; we talk about something that we cannot take out of the real politics because water has become this big commodity that relates to all the issues that people are affected by.” SAHA “APF: Water.”

⁷⁰ Dugard 2008 *SAJHR* 607; Dugard “Civic action and legal mobilisation” 89.

⁷¹ Dugard 2008 *SAJHR* 607; Dugard “Civic action and legal mobilisation” 89.

⁷² Dugard “Civic action and legal mobilisation” 88; Madlingozi *Socio-Economic Rights in South Africa* 109-111.

⁷³ Dugard “Civic action and legal mobilisation” 89.

CAWP alliance to mark the lowest point in the resistance campaign.⁷⁴ The interdict, arrests, intimidation and water disconnections had struck a near-fatal blow to the resistance campaign in its entirety.⁷⁵ However, by cutting off one line of activism, the interdict shifted the resistance from the streets and into the institutional legal terrain.⁷⁶ This necessitated the uptake of another line of activism - that of rights-based litigation as a last resort to mount resistance.⁷⁷

4.4 LEGAL MOBILISATION AS A MEANS TO REVIVE THE RESISTANCE / POLITICAL CAMPAIGN

In July 2004, Deedat, an independent human rights activist and researcher, telephoned Nefale, her former colleague from CALS, informing him that in the course of her research into municipal services in Soweto, she had encountered households whose water supply had been disconnected because they had refused to accept PPMs.⁷⁸ On this information, Nefale and colleague, Dugard, also from CALS, immediately drove to Phiri, where they met with some residents who would become the future applicants in *Mazibuko*.⁷⁹ CALS had now entered the campaign, and took on an active role in its advancement.⁸⁰

4.4.1 THE ROLE OF CALS AND FXI IN EFFECTING LEGAL MOBILISATION

Over a series of weeks Nefale and Dugard went to Phiri to document household stories. Dugard wrote of this crucial point at which the uptake of rights-based litigation, or better referred to as the point of “legal mobilisation,”⁸¹ occurred:

“It soon became apparent that there was a legal case to be made. We tentatively raised this possibility with our Phiri householders, who turned out to be very keen to pursue litigation. Aware that the APF was active in Phiri, we then contacted APF co-founder Dale McKinley to discuss the litigation option. In line with APF policy, Dale took the issue back to the APF for deliberation. Recent interviews with McKinley have clarified that around this time, the APF had been contemplating defensive litigation to try to overturn the interdict. Nevertheless, according to McKinley, the idea of proactive utilisation of the law had not been contemplated until it was

⁷⁴ Dugard “Civic action and legal mobilisation” 89; Madlingozi *Socio-Economic Rights in South Africa* 111.

⁷⁵ Dugard “Civic action and legal mobilisation” 89; Madlingozi *Socio-Economic Rights in South Africa* 111-112.

⁷⁶ Madlingozi *Socio-Economic Rights in South Africa* 112.

⁷⁷ Dugard “Civic action and legal mobilisation” 89; Madlingozi *Socio-Economic Rights in South Africa* 111-112.

⁷⁸ Dugard “Civic action and legal mobilisation” 89.

⁷⁹ *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W); *City of Johannesburg v Mazibuko* 2009 (3) SA 592 (SCA); *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC); Dugard “Civic action and legal mobilisation” 89.

⁸⁰ Dugard “Civic action and legal mobilisation” 89.

⁸¹ Madlingozi *Socio-Economic Rights in South Africa* 92; Dugard “Civic action and legal mobilisation” 71, 74-75, 85, 91, 94-95.

raised by CALS. This is because, in line with CLS critiques, the APF viewed the law as entrenching inequality and protecting privilege. Until that point, the APF's only engagement with the law had been through the arrest of members and their defence against criminal charges, as well as the banning of marches. When the question of proactive use of the law was put to the APF, several options emerged. First was an outright rejection of the legal route, accompanied by a proposal to escalate the resistance to 'all-out war'. However, when it was pointed out that many of the proponents of this option did not live in Phiri and were less likely to be exposed to the full brunt of the ramifications, this option was collectively abandoned. The second option was to continue a low-intensity resistance campaign, which in discussion appeared to be compatible with the third option, litigation. The consensus position was a strategic decision to pursue litigation, but not to suspend other forms of resistance: in other words, to utilise rights as one tactic within the broader struggle against PPMs (and more broadly, against the commercialisation and corporatisation of water services). This position was put to the residents of Phiri at a mass meeting in September 2004, at which it was agreed to pursue a case."⁸²

Much like APF, a vehicle driving the resistance within the broader political campaign, legal mobilisation occurred at the instance of CALS in pursuance of its broader public interest litigation strategy of building legal jurisprudence, with careful selection of a good case to litigate.⁸³ Having identified the possibility of litigating, what would become the first high profile major test case⁸⁴ on the interpretation of the positive obligations imposed by the right of access to sufficient water in South Africa,⁸⁵ CALS pursued the litigation.⁸⁶

⁸² Dugard "Civic action and legal mobilisation" 89-90.

⁸³ The lawyer-driven case selection model of class litigation has been observed as giving rise to "entrepreneurial litigation." Entrepreneurial litigation refers to class counsel who are actively searching for legal issues ripe for class litigation, but also recruiting the plaintiffs on whose name the litigation will be pursued. For example, less than 25% of class actions reported by lawyers in Canada were classified as client-initiated. Instead actions were commenced as a result of publicly announced regulatory investigations, on referral by third parties, or as a result of a law firm's own research and investigations: J Kalajdic *Access to Justice for the Masses? A Critical Analysis of Class Actions in Ontario* (LLM Thesis: University of Toronto 2009) 73-75; Gloppen "Public Interest Litigation, Social Rights and Social Policy."

⁸⁴ Two earlier water cases, which related to the administrative disconnection of water services, deserve brief mention: *Manqele v Durban Transitional Metropolitan Council* 2002 (6) SA 409 (D) in which the court ruled against the applicant whose water supply had been disconnected for non-payment, and *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 (6) BCLR 625 (W) in which the court ordered the interim connection of water to the applicants: Dugard 2008 SAJHR 594; *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W) paras 32 and 123.

⁸⁵ In *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC), the Constitutional Court for the first time dealt with the proper interpretation of section 27(1)(b) of the Constitution. The court confirmed the jurisprudential importance of this case: *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) paras 1 and 37-38.

⁸⁶ On this point Kalajdic notes that often entrepreneurial lawyers conceive and drive class litigation unrestrained by client instructions, and with far more to gain from the litigation than their clients. Entrepreneurial class action litigation centres on the active participation of lawyers in the creative generation of legal claims. After identifying a legal wrong, entrepreneurial lawyers approach potential class members who are suspected of possessing class characteristics: Kalajdic *Access to Justice for the Masses?* 73-74 and 90.

4.4.2 LEGAL MOBILISATION: TRANSFORMING A RESISTANCE AND POLITICAL CAMPAIGN INTO A LEGAL CAMPAIGN

CALS expended great effort in influencing and convincing more so the APF, than the community, to use the court as a public forum in which to transform its political campaign into an effective and enforceable “legal campaign”⁸⁷ against the commercialisation and corporatisation of water in South Africa.⁸⁸ Essentially what CALS did was to persuade the APF that, by mobilising the community around a legal case, the APF could reap positive political effects from the litigation process, and the community would optimistically resist PPMs and gain material benefits to water.⁸⁹ This was however not easy, the reason being that CAWP and APF, both socialist-leftist social movements, were ideologically averse to rights and the law. Their punitive⁹⁰ experiences of the law and reactive litigation, confirmed their ideologically held conception of rights and the law as maintaining a pro-capitalist and anti-poor status quo. To them, ‘rights’ lacked the force of political power. Instead they espoused direct political forms of leftist resistance such as protest and mass action.⁹¹ In light of this ideological stance, the decision to resort to proactive⁹² “litigation was only taken up as a last resort following the failure of political engagement and direct protest.”⁹³ This “conscious resort”⁹⁴ to the courts as forums for “reviving”⁹⁵ the political campaign, is evident from the APF’s and the CAWP’s 2006 research report, in which they state that they:⁹⁶ “prepare for another terrain of struggle in the war against privatisation, that of the courts...As activists look to the court case as a means to revive struggle at the local level.”⁹⁷

This proactive, albeit reluctant, uptake of litigation, demonstrates the coming into effect of lawfare, whereby the courts are positively invoked as a forum in which to fight the government’s attempts at

⁸⁷ Dugard “Civic action and legal mobilisation” 89.

⁸⁸ Dugard 2008 *SAJHR* 596 and 607; Dugard and Langford 2011 *SAJHR* 43; Madlingozi *Socio-Economic Rights in South Africa* 92.

⁸⁹ Gloppen “Public Interest Litigation, Social Rights and Social Policy.”

⁹⁰ Gloppen “Public Interest Litigation, Social Rights and Social Policy.”

⁹¹ Madlingozi *Socio-Economic Rights in South Africa* 93-94; Dugard 2008 *SAJHR* 594-596 and 607; Dugard “Civic action and legal mobilisation” 91.

⁹² Madlingozi *Socio-Economic Rights in South Africa* 93; Dugard 2008 *SAJHR* 594-596 and 607.

⁹³ Dugard “Civic action and legal mobilisation” 91; Dugard and Langford 2011 *SAJHR* 50; Madlingozi *Socio-Economic Rights in South Africa* 107 and 111.

⁹⁴ Dugard “Civic action and legal mobilisation” 90.

⁹⁵ Dugard 2008 *SAJHR* 607.

⁹⁶ Dugard 2008 *SAJHR* 596 and 607; Dugard “Civic action and legal mobilisation” 91.

⁹⁷ Dugard 2008 *SAJHR* 607.

political control through the law. In 2007, Naidoo, had the following to say of the continuation of the political campaign in the form of a legal campaign: “Earlier this year, the Coalition Against Water Privatisation launched a constitutional case against the Johannesburg City Council, challenging its roll-out of prepaid water meters in Phiri, in the hope that some of the losses made in struggle could be won through courts”⁹⁸

By transforming the political campaign into a legal campaign, there was a “shift from political warfare to contest about policy, the justification thereof and the allocation of public resources, where the forum for all these conflicts became the courtroom.”⁹⁹ In this regard, this case study provides a clear illustration of how

“politics in many societies is played out more in the courts than it is in the streets, more by the use of law and its disguised violence than by unfettered brutal force, absent of any legal constraint. In an age of constitutionalism and a dominant discourse of human rights, conflicts once joined in parliaments, by means of street protests, mass demonstrations, and media campaigns, through labour strikes, boycotts, blockades, and other instruments of assertion, tend more and more - if not only, or in just the same way everywhere - to find their way to the judiciary. Class struggles seem to have metamorphosed into class actions...; people drawn together by social or material predicament, culture, race, sexual preference, residential proximity, faith, and habits of consumption become legal persons as their common complaints turn them into plaintiff’s communal identities - against antagonists who, allegedly have acted illegally against them. Citizens, subjects, governments, and corporations litigate against one another, often at the intersection of tort law, human rights law, and the criminal law, in an ever mutating kaleidoscope of coalitions and cleavages.”¹⁰⁰

Indeed, the Phiri community’s class struggle would soon metamorphose into a class action. It was early in 2005 to 2006, with a great deal of trepidation and initial half-heartedness, that the APF and CAWP entered into the institutional-legal terrain. In the initial stages of preparing the case, FXI were the attorneys of record and CALS provided the socio-legal research. APF, FXI and CALS assisted five, representative residents to prepare a case, challenging the legality and constitutionality of OGA's limitation of the FBW and the installation of PPMs. With the case preparation well underway, CALS quickly appealed to and secured, on a contingency basis,¹⁰¹ the legal representation of Advocates Trengove SC and Fourie.¹⁰² In July 2006, FXI launched *Mazibuko v*

⁹⁸ Dugard 2008 *SAJHR* 607.

⁹⁹ D Davis and M le Roux *Precedent & Possibility: The (ab)use of law in South Africa* (2009) 189.

¹⁰⁰ Davis and le Roux *Precedent & Possibility* 185.

¹⁰¹ This meant that legal fees would only be paid to counsel in the event of the applicants winning the case and the court awarding advocates’ costs in the applicants’ favour. The strength of the legal claim is of importance to CALS counsel because of the financial risks involved in a contingency fee arrangement: Dugard “Civic action and legal mobilisation” 90; Kalajdic *Access to Justice for the Masses?* 80.

¹⁰² For the duration of the litigation: *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W); *City of Johannesburg v Mazibuko* 2009 (3) SA 592 (SCA); *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

*City of Johannesburg*¹⁰³ (*Mazibuko I*) in the Witwatersrand Local Division, and from March 2007 onwards, CALS took over the litigation as the attorneys on record.¹⁰⁴

4.5 LITIGATING THE MAZIBUKO¹⁰⁵ CLASS ACTION

*Mazibuko I*¹⁰⁶ was finally heard on 3 to 5 December 2007, after more than three years of legal preparation.¹⁰⁷ It was brought as an application in the name of five community members, for their own benefit and on behalf of members of their households.¹⁰⁸ Noting that the action was in reality broadly framed as an action in the interest of the community,¹⁰⁹ Tsoka J adopted an active role in directing the applicants to rather specifically proceed with a class action on behalf of the community as a whole.¹¹⁰ The matter was then heard as a class action.

On 30 April 2008,¹¹¹ finding in favour of the class, Tsoka J delivered a scathing judgment, condemning the government's actions in a manner reminiscent of Cameron JA in *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuzu*.¹¹² Tsoka J found that the government's differentiation in the treatment of rich white suburbs and the poor black Phiri community,¹¹³ was "patronising,"¹¹⁴ in a similar way to the apartheid government. In summary, he found the treatment to be unfairly discriminatory against the Phiri community on the grounds of sex,¹¹⁵ geography and

¹⁰³ [2008] 4 All SA 471 (W).

¹⁰⁴ *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W); *City of Johannesburg v Mazibuko* 2009 (3) SA 592 (SCA); *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

¹⁰⁵ *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W); *City of Johannesburg v Mazibuko* 2009 (3) SA 592 (SCA); *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

¹⁰⁶ *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W).

¹⁰⁷ Dugard 2008 *SAJHR* 594.

¹⁰⁸ *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W) para 18.

¹⁰⁹ Dugard and Langford 2011 *SAJHR* 43.

¹¹⁰ *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W) paras 17-20.

¹¹¹ 40 year old Ms Mazibuko, who was very ill at the time of the ruling celebrated the victory. Less than a month after the judgment was handed down, she died on 21 May 2008 following a lengthy battle with a cancer related illness: J Dugard "A judge of the first water" (2008) *Mail & Guardian* <http://mg.co.za/article/2008-06-03-a-judge-of-the-first-water> (accessed on 8 December 2015); News24 archives "Waters metres activist dies" <http://www.news24.com/SouthAfrica/News/Water-metres-activist-dies-20080524> (accessed on 8 December 2015).

¹¹² 2001 (4) SA 1184 (SCA) para 19.

¹¹³ *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W) paras 154-155

¹¹⁴ *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W) para 153.

¹¹⁵ Against women, as many households in poor black areas such as Phiri are headed by women. Further that women perform many of the household chores which require water: *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W) para 159

race.¹¹⁶ The judge concluded that this generally exhibited an attitude of one-sided dependency whereby the government, without consultation, took decisions on behalf of the poor majority people of the country as “big brother felt it was good for them.”¹¹⁷

4.5.1 THE EFFECT OF THE LEGAL CAMPAIGN ON THE POLITICAL CAMPAIGN

Resonating with the discourse employed by Tsoka J, the APF and CAWP celebrated the judgment’s victory for reviving their political campaign. Emphasising the judge’s criticism of the Municipality’s “big brother approach,”¹¹⁸ McKinley praised the judgment as “historic and groundbreaking.”¹¹⁹

“The judgment ranks as one of post-apartheid South Africa’s most important legal victories for poor communities and all those who have been struggling against unilateral and profit-driven neo-liberal basic services policies...Judge Tsoka however, went beyond the legal points, recognising the racist, class, administrative and gender-based discrimination underlying the City of Johannesburg’s water policy. The judge explicitly rejected the arguments for restricting the water usage of poor communities: ‘...to expect the applicants to restrict their water usage, to compromise their health, by limiting the number of toilet flushes in order to save water is to deny them the rights to health and to lead a dignified lifestyle.’ The judge labelled the so-called ‘consultation’ with the Phiri community as, ‘more of a publicity stunt than consultation’ and criticised the City’s ‘big brother approach.’”¹²⁰

There was a further endorsement of this judgment and the court’s remedial power to bring about legal and political accountability, when the CAWP came out in support of Tsoka J following political condemnation from the then Municipal Mayor. On 15 May 2008, Mayor Masondo criticised the judgment in *Mazibuko I*¹²¹ at a press conference. On 16 May 2008, the CAWP responded in a press release entitled “Attack on High Court judgment and Judge Tsoka is unwarranted, dangerous and betrays a complete ignorance of how democracy works: This is not

¹¹⁶ In the Constitutional Court, the Municipality conceded that, “given the deep inequality that exists in South Africa, as a result of apartheid policies, any differential treatment of townships or suburbs may have a differential, and arguably adverse impact on the ground of race, and thus constitute indirect discrimination on that ground.” It also however, noted that because of the deep inequality that exists, differential treatment might often be necessary or desirable for redress. Finding that there was no unfair discrimination, the Constitutional Court cautioned that courts should not interpret legitimate government action to constitute unfair action: *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W) paras 153-155; *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) para 151.

¹¹⁷ *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W) para 153.

¹¹⁸ Dugard 2008 *SAJHR* 608; Dugard “Civic action and legal mobilisation” 91.

¹¹⁹ Dugard “Civic action and legal mobilisation” 91.

¹²⁰ Dugard 2008 *SAJHR* 608; Dugard “Civic action and legal mobilisation” 91.

¹²¹ *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W).

Zimbabwe, Mr Masondo, and you are not Robert Mugabe.”¹²² Masondo’s attacks on the judiciary were described as ‘unprecedented’, ‘vicious’, ‘unwarranted’ and ‘dangerous.’

According to Davis and le Roux the use of “the Zimbabwe example shows how a government becomes increasingly desperate for legitimacy in a global world which insists upon a commitment to legality and human rights.”¹²³ Importantly, the celebration of the judgment and defence of the judiciary, demonstrated a new-found appreciation and support for rights-based litigation as a new found resistance tactic or action repertoire of this social movement alliance. Furthermore, it revealed an ideological shift in optimism regarding the law’s potential to effect political change. This is evident from McKinley’s statement:¹²⁴

“While the judgment has already been appealed by the respondents, and will most probably go all the way to the Constitutional Court, this does not detract from the practical and social significance of its victory. It is a case which does not only have applicability to South Africa but which, by its very character, enjoins the attention and direct interest of billions of poor people around the world who are suffering under neo-liberally inspired water policies, alongside governments that are implementing such policies and their corporate allies who seek to turn water into nothing less than another profit-making stock market option.”¹²⁵

McKinley’s statement also shows that the litigation did not suspend the political campaign, that “from the onset of the legal campaign, there was a continuous dialectical relationship between the two tactical endeavours.”¹²⁶

4.5.2 THE DIALECTICAL RELATIONSHIP BETWEEN A PROTEST ACTION AND A CLASS ACTION: INTERPLAY OF THE POLITICAL AND LEGAL CAMPAIGNS

The political and legal campaigns were always intertwined, far from detracting from each other as opposing modes of resistance, they served to reinforce and reinvigorate each other.¹²⁷ Similarly, Madlingozi states that “state law intersects with, competes with, shapes and is shaped by non-State normative systems, moral codes, and non-judicial legal orderings.”¹²⁸ Having said this, Madlingozi

¹²² Dugard “Civic action and legal mobilisation” 93; Dugard 2008 *SAJHR* 609.

¹²³ Davis and le Roux *Precedent & Possibility* 186.

¹²⁴ Dugard “Civic action and legal mobilisation” 93; Dugard 2008 *SAJHR* 609.

¹²⁵ Dugard “Civic action and legal mobilisation” 93; Dugard 2008 *SAJHR* 610.

¹²⁶ Dugard “Civic action and legal mobilisation” 85.

¹²⁷ Dugard “Civic action and legal mobilisation” 85.

¹²⁸ Madlingozi *Socio-Economic Rights in South Africa* 93.

notes in this regard how the celebrated judgment in *Mazibuko I*¹²⁹ was widely interpreted by the APF as giving a legal basis its political campaign. Consider the following statement by the APF upon hearing that the judgment declared the installation of PPMs unlawful:¹³⁰ “As we speak now, members of the community of Phiri are digging up the meters and bridging [by-passing] them, and they are allowed to do so because the court ruled in their favour.”¹³¹

This, according to Mbazira, reveals the “dialectical relationship”¹³² or symbiotic “interplay”¹³³ between law and protest in *Mazibuko*¹³⁴

“In South Africa, in some cases, the protests have been pursued simultaneously with the use of the rights-based legal framework to protect and enforce the economic and social rights protected in the Constitution. This has created interplay between the legal processes and some of the protests, thereby establishing a dialectical relationship between these two as strategies. The dialectical relationship shows that litigation can be used as a tool for social mobilisation and building alliances, which was the case in *Mazibuko v City of Johannesburg*,¹³⁵ and can result in gains even when the case is lost. In spite of losing the case in the Constitutional Court, the social mobilisation exerted pressure on the City to change its approach and be more responsive to the needs of the poor”¹³⁶

Since *Mazibuko I*¹³⁷ did go all the way to the Constitutional Court, where it was overturned on 8 October 2009,¹³⁸ can it be said to have brought about any socio-economic change?

¹²⁹ *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W).

¹³⁰ Madlingozi *Socio-Economic Rights in South Africa* 112.

¹³¹ Madlingozi *Socio-Economic Rights in South Africa* 112.

¹³² Mbazira 2013 *SAJHR* 271.

¹³³ Mbazira 2013 *SAJHR* 271.

¹³⁴ *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W); *City of Johannesburg v Mazibuko* 2009 (3) SA 592 (SCA); *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

¹³⁵ 2010 (4) SA 1 (CC); Mbazira 2013 *SAJHR* 271.

¹³⁶ Mbazira 2013 *SAJHR* 271.

¹³⁷ *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W); *City of Johannesburg v Mazibuko* 2009 (3) SA 592 (SCA); *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

¹³⁸ *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) para 169.

4.6 THE REMEDIAL POWER OF THE *MAZIBUKO*¹³⁹ CLASS ACTION

Viewed holistically, the *Mazibuko*¹⁴⁰ class action was clearly about more than winning on legal points.¹⁴¹ The value of litigation should not only be judged in terms of success in litigation in the narrow sense. The fact that the Constitutional Court overturned the initial legal victory, does not detract from the systemic impact of this case in achieving broader socio-economic change in various ways.

The judicial recognition of the community as a class allowed for the grant of class standing as a remedy for a poor and vulnerable group. In this regard, the courts fulfilled their obligation of giving effect to an appropriate remedy.¹⁴²

In addition to the indirect material outcomes achieved, as discussed in the previous chapter, the High Court, Supreme Court of Appeal and Constitutional Court, enforced systemic transparency and accountability of government's policy on enhancing access to sufficient water. The litigation process further facilitated and enhanced legal rights consciousness among the community members. These benefits had the overall effect of orientating the APF towards a proactive engagement with the law in the future.

4.6.1 POLITICAL AND LEGAL TRANSPARENCY AND ACCOUNTABILITY TO THE COMMUNITY

The class action provided precedent for governmental accountability and responsiveness to the community in policy formulation and implementation. Both local and national government had to provide information and justify their water services-related selection, investigations, planning, communication, budgeting and problems in policy before the courts.¹⁴³ This in turn promoted legal

¹³⁹ *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W); *City of Johannesburg v Mazibuko* 2009 (3) SA 592 (SCA); *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

¹⁴⁰ *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W); *City of Johannesburg v Mazibuko* 2009 (3) SA 592 (SCA); *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

¹⁴¹ Dugard "Civic action and legal mobilisation" 9; Dugard 2008 *SAJHR* 608.

¹⁴² *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 69.

¹⁴³ *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) paras 78-102,143,160-163; Dugard and Langford 2011 *SAJHR* 59; Madlingozi *Socio-Economic Rights in South Africa* 112.

rights consciousness for the residents of Phiri and other similarly placed communities around the country who heard of the litigation.¹⁴⁴

4.6.2 PROMOTION OF LEGAL RIGHTS CONSCIOUSNESS

In the course of the litigation, the APF and the CAWP, through CALS, benefitted greatly from the coordination and information-sharing¹⁴⁵ gained through the *amicus curiae*¹⁴⁶ intervention of the Centre on Housing Rights and Evictions (COHRE).¹⁴⁷ This enhanced the quality of the litigation and its value beyond the courtroom.

The class action also broadly promoted legal consciousness beyond the courtroom. There was substantial coordination and information sharing around the country, among other similarly placed movements and organisations who became aware of this case.¹⁴⁸ The case drew much international attention, and thus sensitised the world to the plight of Phiri community and similar other communities in South Africa.¹⁴⁹

Legal mobilisation furthermore, allowed for the articulation of political grievances as rights claims. The class action showed that there were fundamental rights being used to redress political unfairness and inequality, and exposed how countless poor and vulnerable people were being affected each day. This was achieved by not only framing the litigation as a water services case, but also as a negative violation of both administrative justice and equality.¹⁵⁰ Framing the litigation in this manner encouraged the courts to hear the matter and hand down judgments which interrogated

¹⁴⁴ Dugard and Langford 2011 *SAJHR* 59; Madlingozi *Socio-Economic Rights in South Africa* 112.

¹⁴⁵ The factual and legal research and further socio-legal and policy research in the case included several research reports, as well as comprehensive research on international law advanced by COHRE. By the time the case was heard in the Constitutional Court, the record comprised 9000 pages, including numerous research and expert affidavits, as well as reports and articles submitted by the class and COHRE: *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W) para 13; Dugard and Langford 2011 *SAJHR* 50.

¹⁴⁶ Represented by the LRC: *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W) para 13; Dugard and Langford 2011 *SAJHR* 50.

¹⁴⁷ A leading international organisation dealing with rights to housing and water: *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W) para 13; Dugard and Langford 2011 *SAJHR* 50.

¹⁴⁸ For instance, in May 2008, the South African Municipal Workers' Union (SAMWU) announced that it would use the *Mazibuko 1* judgment as a basis for legal action against the City of Cape Town which had installed a different kind of water limiting meter: Dugard 2008 *SAJHR* 610; Dugard "Civic action and legal mobilisation" 94; Madlingozi *Socio-Economic Rights in South Africa* 109 and 112.

¹⁴⁹ Dugard and Langford 2011 *SAJHR* 59; Madlingozi *Socio-Economic Rights in South Africa* 112.

¹⁵⁰ Dugard and Langford 2011 *SAJHR* 57; Madlingozi *Socio-Economic Rights in South Africa* 92.

the government's policy. The benefit derived by the APF from this legal interrogation of the government's policy, and its subsequent refinement, can be seen from the APF's adoption of a broader proactive engagement with socio-economic rights litigation beyond *Mazibuko*.¹⁵¹

4.6.3 PROACTIVE ENGAGEMENT WITH SOCIO-ECONOMIC RIGHTS LITIGATION

After *Mazibuko 3*,¹⁵² the APF began campaigns geared towards enhancing peoples' legal capabilities through a 'Law and Organising' programme. The programme was concerned with the provision of rights education and training on the enforcement of socio-economic rights to the community.¹⁵³ While this initiative is commendable in seeking to enhance the knowledge of the community, what is evident from this discussion so far, has been the lack of exercise of agency by the residents of Phiri themselves in both the resistance and political campaign, and the legal campaign. What has become evident from this discussion is that, on the one hand the resistance and political campaigns were undertaken by the APF, and the legal campaign was undertaken by the FXI and CALS. This leads me to the following question when looking at the class action: did the community play any role in 'their' legal action? Did the *Mazibuko*¹⁵⁴ class action demonstrate the application of the legal agency or capabilities of Phiri residents to help themselves out of their own poverty and vulnerability?

4.7 WHERE WAS THE COMMUNITY IN THE *MAZIBUKO*¹⁵⁵ LITIGATION?

To answer this question, the effect of the two discussed external factors which catalysed the uptake of litigation in these circumstances must be assessed. Firstly, social movements intervened on behalf of the community, with their own broader political campaign, to act as a vehicle paving the way for a legal campaign.¹⁵⁶ Secondly, the protest demands had to elicit sufficient jurisprudential interest, to get the attention of a public interest organisation.¹⁵⁷ Accordingly, Dugard points out how

¹⁵¹ *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W); *City of Johannesburg v Mazibuko* 2009 (3) SA 592 (SCA); *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

¹⁵² *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

¹⁵³ Dugard and Langford 2011 *SAJHR* 59.

¹⁵⁴ *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W); *City of Johannesburg v Mazibuko* 2009 (3) SA 592 (SCA); *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

¹⁵⁵ *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W); *City of Johannesburg v Mazibuko* 2009 (3) SA 592 (SCA); *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

¹⁵⁶ Gloppen "Public Interest Litigation, Social Rights and Social Policy."

¹⁵⁷ Given the expensive nature of a class action, the emphasis for CALS in taking up this action was on both the novelty of the proposed action and the public interest at issue in the litigation: Kalajdic *Access to Justice for the Masses?* 80-81.

the legal assistance came about by fortuitous chance, rather than intention on the part of the community. She refers to this second factor as “the fortuitous advent of human rights lawyers from the Freedom of Expression Institute (FXI) and CALS.”¹⁵⁸ These features make this class action unique in that had the APF, FXI and CALS, not come to the assistance of the community, the class action would not have come into existence.

These contributory factors were in part brought about by Phiri’s geographical setting. Phiri, an urban township, is in very close proximity to the Johannesburg central business district, near Municipal and Johannesburg Water offices, the Universities of the Witwatersrand and Johannesburg, various governmental organisations, local and international non-governmental social, economic and human rights organisations, the Johannesburg Magistrates’ Court and the Witwatersrand Local Division. Most similarly impoverished communities in South Africa are not as geographically and strategically positioned to these institutions.

Whilst these factors were important in initiating and bringing the Phiri community to the doorsteps of the Witwatersrand Local Division, the legal campaign was really pursued by the advocates and lawyers. There is no indication that the community played an active role in the litigation.¹⁵⁹ At the same time, the political campaign which created the atmosphere surrounding the class litigation, was driven primarily by the APF on behalf of the community. This had the effect of alienating the APF and community from ‘their’ own litigation.

¹⁵⁸ Dugard “Civic action and legal mobilisation” 91.

¹⁵⁹ Kalajdic highlights in her thesis how the class’ negligible participation and lack of control over the litigation process enhance or detract from access to justice, are rarely discussed in Canadian law. The “gatekeepers” to class actions are the lawyers who determine which cases to initiate and how to conduct them. In *Chartrand v. General Motors Corp.*, [2008] B.C.J. No. 2520 (S.C.) 102, 105 and 111: the court found that the representative plaintiff who had been recruited by her lawyer into the class action had not been “actively participating” in the decision-making in the litigation, even though she had a basic knowledge of the litigation and had read the court documents. The court stated that recruitment is a factor to be considered in deciding whether the representative plaintiff can fairly and adequately represent the class. Morton J concluded that in this case, recruitment was indicative of the representative plaintiff’s passive role as a mere placeholder plaintiff for the entrepreneurial interests of her lawyer, and thus the plaintiff was “not in a position to vigorously and capably represent the interests of the class. Very similar findings were made in *Poulin v. Ford Motor Co. of Canada* (2006), 35 C.P.C. (6th) 264 (Ont.S.C.J.) paras 63 and 86 where the representative plaintiff was described as a “pawn” used by counsel who recruited him, and ultimately found to not be an adequate representative of the class as he did not know of the litigation plan and had no input: Kalajdic *Access to Justice for the Masses?* 84-85 and 87.

4.7.1 THE APF AND PHIRI COMMUNITY'S ALIENATION BY THE LEGAL PROCESS

The extent of the alienation experienced by the APF, and more so the community, from the class action, was noted by Dugard. From an interview conducted with McKinley on 10 July 2009, nearing the end of the hearing of *Mazibuko 3*,¹⁶⁰ she wrote:

“When asked to list the drawbacks of the legal route, McKinley noted the length and complexity of the process, as well as the potential to alienate activists (there is no doubt that over the five years it has taken to mount the case and to get a final hearing in the Constitutional Court, many activists have withdrawn their initial interest). McKinley and I agree that if we could relive the process, we would try to spend more time communicating with the residents of Phiri and allied activists to keep them informed about each step of the legal process.”¹⁶¹

Furthering their alienation, the APF was also aware of the practical limitations of the litigation and the ever present risk of their “disempowerment.”¹⁶² The following warning by Ngwane, an APF leader, cautioned members against allowing the victory in *Mazibuko 1*¹⁶³ to divert them from their protest action, and thus to co-opt them into the dominant neo-liberal system: “We must not allow the court victory to shift our struggle from away from mass action. We must continue to destroy the meter and not fall into bourgeoisie legalism.”¹⁶⁴ The reference to the class litigation as “bourgeois legalism”¹⁶⁵ reveals the APF’s sense of distrust of the lawyers and its disconnect from the legal process. So, whilst the dialectical relationship and interplay between law and protest, and the resultant remedial power of *Mazibuko*¹⁶⁶ are evident, Ngwane’s and McKinley’s statements reveal the underlying separation and disconnect in control over the running of the political and legal campaigns. On the one hand the legal campaign fell within the sole adversarial domain of legal practitioners, beyond the reach of the APF and the community. On the other hand, the political

¹⁶⁰ *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

¹⁶¹ Dugard “Civic action and legal mobilisation” 91.

¹⁶² There have also been accusations of “entrepreneurial litigation, vanguardism, paternalism, ventriloquism, co-option, and racism” levelled against the exclusionary conduct of public interest litigation organisations when acting on behalf of impoverished communities: Madlingozi *Socio-Economic Rights in South Africa* 113; Kalajdic *Access to Justice for the Masses?* 74.

¹⁶³ *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W); *City of Johannesburg v Mazibuko* 2009 (3) SA 592 (SCA); *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

¹⁶⁴ Madlingozi *Socio-Economic Rights in South Africa* 113.

¹⁶⁵ Madlingozi *Socio-Economic Rights in South Africa* 113.

¹⁶⁶ *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W); *City of Johannesburg v Mazibuko* 2009 (3) SA 592 (SCA); *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

campaign remained within the exclusive battlefield¹⁶⁷ of the APF and community in the streets. The parties played separate roles in their respective spheres.

Also, the fact that the community and APF, on their own interpretation of the judgment in *Mazibuko I*,¹⁶⁸ illegally dug up and bypassed the PPMs, while the case was to go on appeal, is further proof of the absence of communication between the parties. The community did not understand the responsibility of government itself to comply with the high court's order (the Municipality had to remove the PPMs),¹⁶⁹ the legal enforcement of a court order, the illegality of the community's actions, and the legal implications of the appeal processes. The community and APF defaulted to their direct resistance action repertoire of illegality. This shows that even after the uptake of litigation, they still did not have an understanding of the situation they experienced as a legal rights-violation and that there are legal remedies.¹⁷⁰

In light of this, it is thus unsurprising that the APF and community members withdrew their initial interest. Although the overlap in purpose may have been present, the inadequacy of consultation had an effect on the extent or manner of convergence of the parties' objectives. It can be seen that while the community just wanted the removal of PPMs as an immediate outcome by any means possible, the APF wanted to pursue its political campaign of changing the government's policy, and CALS wanted to win the case and build jurisprudence. There was insufficient alignment of these otherwise complementary objectives.

Furthermore, the legal practitioners did not sufficiently communicate with the community, in order to make them better understand, their power as active legal participants. They remained outsiders to the law, protesting outside the court buildings and in the streets of Phiri, while Advocates and attorneys argued on their behalf inside the courtrooms. Such disempowerment¹⁷¹ of the community over 'their' case, goes to show that "whilst the law in South Africa has proved that it can be used for the poor, it is rarely being used independently by the poor."¹⁷² This issue strikes at the core of this

¹⁶⁷ Dugard 2008 *SAJHR* 607-608; Dugard "Civic action and legal mobilisation" 91.

¹⁶⁸ *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W).

¹⁶⁹ *City of Johannesburg v Mazibuko* 2009 (3) SA 592 (SCA) para 59.

¹⁷⁰ Gloppen "Public Interest Litigation, Social Rights and Social Policy."

¹⁷¹ To what extent certification of a class action empowers, responds to citizen's needs, or fosters their ability to understand and participate within the legal system, is not directly engaged. The empowerment of litigants as part of the broader access to justice goals are peripheral to the legal dispute: Kalajdic *Access to Justice for the Masses?* 70.

¹⁷² Dugard 2008 *SAJHR* 225-226.

thesis.¹⁷³ It thus necessitates the question of how best the law in the form of a class action in a constitutional democracy, can enhance the agency of ordinary people to collectively and actively enforce their socio-economic demands themselves.

4.8 CONCLUSION

I have selected the *Mazibuko*¹⁷⁴ class action as a relevant case study of a socio-economic right class action which came out of a community service delivery protest and shown that the circumstances of the transformation from a protest action to a class action in this study were unique in two main respects. The presence of the APF, which organised the community resistance into a political campaign, and the fortuitous advent of FXI and CALS, which expended much effort to further transform the political campaign into a legal campaign. While commendable¹⁷⁵ in overcoming the community's socio-economic barriers to accessing courts, and facilitating the achievement of systemic change, the legal campaign however, perpetuated a one-sided dependency. The community was left outside protesting, as lawyers walked through the doors of the courtrooms to argue 'their' case on their behalf. I have concluded in this respect, that there needs to be more engagement by legal representatives and their represented communities because "access to justice means more than mere physical access to courts - it incorporates the ability to be effectively heard."¹⁷⁶ Whilst this may indeed be a much needed improvement in public interest litigation, for many similarly placed communities in South Africa, the fortuitous advent of APF, FXI and CALS is unlikely to occur in the first place. Many communities will remain unable to further their struggles without legal representation. The law must therefore look beyond this. Imagine that there was no APF, FXI nor CALS, the *Mazibuko*¹⁷⁷ class action would not have happened. The Municipality would have effectively defeated the community's resistance campaign, and the community without recourse, would have been forced to accept PPMs. Surely, in the absence of APF, FXI and CALS, the law in a constitutional democracy envisages that residents, such as those of Phiri should nonetheless, be able

¹⁷³ Kalajdic highlights that "for those evaluating class actions, however, these dimensions of access to justice are significant:" Kalajdic *Access to Justice for the Masses?* 70.

¹⁷⁴ *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W); *City of Johannesburg v Mazibuko* 2009 (3) SA 592 (SCA); *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

¹⁷⁵ *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) para 165.

¹⁷⁶ Dugard 2008 *SAJHR* 216.

¹⁷⁷ *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W); *City of Johannesburg v Mazibuko* 2009 (3) SA 592 (SCA); *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

to bring a class action themselves through the exercise of their own agency? The law must therefore assist and facilitate the empowerment of poor and vulnerable groups to be able to bring class actions for the enforcement of their own rights. In the next chapter I look at how the law can enable protesting communities, such as Phiri, at their own initiative to come before the courts as classes of litigants. In accordance with their obligation to promote access to courts, the courts must themselves also play an active role in easing access by assisting such communities to proactively make use of the law through class litigation. To illustrate how this can be done, in a thought experiment I remove APF, FXI and CALS from the factual background, and look at what avenues in law can be created to move the Phiri community from the point of protest, to a point where legal mobilisation in the form of a class action can occur. Essentially, how can the law get them to move on their feet from the streets to the other side?¹⁷⁸

¹⁷⁸ A-Z Lyrics “Stevie Wonder Lyrics - Big Brother” <http://www.azlyrics.com/lyrics/steviewonder/bigbrother.html> (accessed on 18 September 2015).

CHAPTER 5

RE-IMAGINING THE MAZIBUKO CASE STUDY:

THE COMMUNITY'S EXERCISE OF ITS OWN AGENCY TO BRING A CLASS ACTION

“Access to justice means more than mere physical access to courts
- it incorporates the ability to be effectively heard.”¹

5.1 INTRODUCTION

Having looked at the events leading up to the *Mazibuko* case² and how it unfolded in the previous chapter, I now continue to consider how the law can get Ms Lindiwe Mazibuko and her fellow community members (the Phiri community and similarly situated groups) to move their protest from the streets and transform this into a triable matter in a courtroom at the community's insistence. The intention being to transform the protest action into a class action with the aim of obtaining a legally enforceable outcome from a court against the Municipality. In this chapter, I focus on how the law can enable the residents of Phiri community to take initiative and exercise agency to bring their matter to court as a class. I will start by providing an illustration through which to consider the legal possibilities. This will be done by re-imagining the case study in order to bring the community to the foreground as independent agents to pursue their own matter without the assistance of the Anti-Privatisation Forum (APF), Freedom of Expression Institute (FXI) and Centre for Applied Legal Studies (CALS). Having done that, I will then focus my attention onto the Regulation of Gatherings Act³ (RGA). I argue that the RGA, with its less formal procedural and regulatory framework, is the most accessible entry point for this community into the legal system for class litigation. On this basis, I analyse three scenarios. In the first scenario, I apply the RGA in its current form to my illustration, in order to see whether the RGA can effectively enable the community to transform its gathering into a class action against the City of Johannesburg

¹ J Dugard “Courts and the Poor in South Africa: A Critique of Systemic Judicial Failures to Advance Transformative Justice” (2008) 24 *SAJHR* 214 at 216.

² *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W); *City of Johannesburg v Mazibuko* 2009 (3) SA 592 (SCA); *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

³ Act 205 of 1993.

Municipality (Municipality). In the second scenario, I focus exclusively on the judicial review provision of the RGA, and how this can be improved to catalyse the formation of a class action. In the third scenario, I consider whether the introduction of judicial oversight over the RGA can enable Ms Mazibuko and her community to proactively institute a class action, without first having to embark on a gathering.

5.2 RE-IMAGINING THE MAZIBUKO CASE STUDY

In what follows I re-visit the fictitious account involving Ms Mazibuko set out in chapter one, and use it as a re-imagined case study in this chapter.⁴ I pick up from the point where the community has decided to embark on a protest action for water against the Municipality.

5.3 PROTEST ACTION ON WATER DEMANDS / RIGHT TO FREEDOM OF ASSEMBLY REGARDING THE RIGHT OF ACCESS TO SUFFICIENT WATER

As far as the community is concerned, it is embarking on protest action to collectively express its grievance against the Municipality's installation of PPMs, disconnection of water services for those resisting the installation PPMs and the deprivations of water experienced as a result. This view is not informed by knowledge of their rights, but by what they experience. However, from a legally informed perspective, the protest demands have a legal basis. Sections 17 and 27(1)(b) of the Constitution respectively provide citizens with the right to freedom of assembly and the right of access to water. The right to freedom of assemble allows the community to publicly express their dissatisfaction regarding the adverse effects of the government's Free Basic Water (FBW) policy and "Operation *Gcin' Amanzi*"⁵ (OGA) on their lives. The right of access to water allows for the enforcement of the government's constitutional obligation for transparency, accountability and responsiveness in its policy formulation and planning aimed at fulfilling this right in terms of the Water Services Act.⁶ The RGA and the Water Services Act,⁷ give legislative effect to sections 17

⁴ See para 1.1.

⁵ *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W) para 92; *City of Johannesburg v Mazibuko* 2009 (3) SA 592 (SCA) para 48; *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) paras 13-14.

⁶ 108 of 1997.

⁷ To provide for the right of access to basic water supply: section 2(a) of the Water Services Act 108 of 1997.

and 27(b) respectively, and as such give rise to two causes of action legally enforceable against the Municipality.

Litigation brought to enforce the right of access to water could be instituted exclusively or in addition to a protest action. However, the community members without legal knowledge, do not know of these rights, the RGA⁸ nor the Water Services Act.⁹ As far as they know community protest action (legally unsanctioned) is the only means by which to demand service delivery of water in a manner that can get the attention of the Municipality. It is on this basis that Ms Mazibuko and her fellow community spokespersons inform Mr Dlamini that they intend to proceed on this course.

Having been informed of this intention, Mr Dlamini may advise them to institute legal action against the Municipality, and/or to proceed with the protest action in terms of the RGA.

⁸ The following public awareness initiatives by the Freedom of Expression Institute (FXI) and Right2Know show communities' limited knowledge of the RGA. In an attempt to educate community activists, newspaper journalists, television and radio stations, local municipal authorities and the police about the Constitution and the procedural requirements of the RGA, the FXI published in 2003, a free handbook entitled: "The Right to Protest: A Handbook for Protestors and Police." The handbook is available in hardcopy and on the FXI website. The handbook was written by an attorney at FXI. FXI then asked the Centre for Adult Education (CAE) to make it easier for people to read. FXI and CAE held workshops with communities and organisations who have been involved in protests to find out about their experiences of protests, and what they thought other communities and communities should know about protest and the law. During this process, other communities and organisations who had not been involved in protests, heard about the workshops and came. They talked about what they had heard about the law, and what they wanted to know about using the law. The In 2013, the Right2Know Campaign also published an activist's guide entitled "Protesting: Your Rights: The Regulation of Gatherings Act, Arrests and Court Processes." This guide came about as a result of the continued prohibition of protests by local municipalities and police against communities who lacked knowledge of the Constitution and the RGA. The purpose of the guide is to inform and educate "citizens of their rights and enable them to engage overzealous officials who act outside the law to suppress our freedom of assembly." The first section of the guide provides basic information about is a protected gathering in terms of the RGA, as well its procedural and regulatory framework. It is presented in the form of easily understood questions and answers setting out the rights and duties of the organisers of a gathering, local municipality and police. The second section provides activists with information on constitutional rights, especially the rights of assembly and expression, as well as the rights of arrested and detained persons. It furthermore gives a basic explanation of the court processes that may follow an arrest and what to do in that situation. The guide is also available in hardcopy and on the Right2Know website: Freedom of Expression Institute "The right to protest: A handbook for protestors and police" (2003) 1 and 4 <http://fxi.org.za/PDFs/Publications/RGAHandbook.pdf> (accessed on 4 October 2015); Right2know Campaign "R2K Activists Guide to the Right to Protest" <http://www.r2k.org.za/2013/04/09/guide2protes/> (accessed 6 October 2015); see Right2Know "Protesting: Your Rights: The Regulation of Gatherings Act, Arrests and Court Processes" http://www.r2k.org.za/wp-content/uploads/gatheringsGuide_WEB.pdf (accessed on 6 October 2015).

⁹ Act 108 of 1997.

5.4 THE MUNICIPALITY'S RESPONSES

5.4.1 LEGAL ACTION

Mr Dlamini may advise Ms Mazibuko and her fellow community members that, instead of, or in addition to, a protest, they can institute legal action against the Municipality for the enforcement of their right of access to water in terms of the Water Services Act.¹⁰ To do this, he may direct them to public interest litigation institutions from which they can obtain legal assistance.

While in theory, litigation ought to be the preferred means by which to enforce the right of access to water, practically speaking this is an unlikely outcome. It is doubtful that the Municipality would actively encourage and facilitate litigation against itself. The most possible route available to the community, with or without the assistance of Mr Dlamini, is protest action.

5.4.2 PROTEST ACTION

If the protest does not take place in terms of the RGA it will not be afforded constitutional protection. For the protest to be afforded constitutional protection as the exercise of the right to freedom of assembly, the RGA requires that notice of gathering be provided to the Municipality and the police within seven days in order to initiate the legislative procedures for a gathering.¹¹ Mr Dlamini has a legal obligation to ensure that the community is aware of the provisions of the RGA.

¹⁰ Act 108 of 1997.

¹¹ I Currie and J de Waal *The Bill of Rights Handbook* 5 ed (2005) 400.

5.5 THE COMMUNITY'S IGNORANCE OF THE RGA AND THE MUNICIPALITY'S OBLIGATION TO INFORM THE COMMUNITY

Section 3(1) of the RGA states that the person organising the “gathering,” called the “convener,”¹² must give notice to the Municipality regarding an intended gathering in terms of the Act.¹³ This presupposes that the community should know about the RGA, and thus initiate the process itself. However, accepting this presumption at face value would be contrary to the Municipality’s constitutional obligation to respect, protect, promote and fulfil the right to freedom of assembly.¹⁴ The Municipality has a negative obligation of non-interference with the community’s protest, as well as a positive obligation in terms of the RGA to balance the interests of the community and the general public ensuring that the protest action takes place peacefully and unarmed. Accordingly, by requiring the Municipality to appoint a person responsible for receiving notice, called the “responsible officer,”¹⁵ the RGA confirms the latter obligation. As the responsible officer, Mr Dlamini must inform and actively assist Ms Mazibuko and her community in complying with the RGAs provisions in preparing for their gathering.¹⁶

Let us suppose Mr Dlamini does inform Ms Mazibuko and her fellow community spokespersons of the provisions of the RGA. He informs them that in order for them to proceed with their intended protest, they must provide notice at least 7 days¹⁷ before the date of the planned gathering.¹⁸ If it is

¹² “Any person who, of his own accord, convenes a gathering; and in relation to any organisation, any person appointed by such organisation or branch.” Section 1 of the Regulation of Gatherings Act 205 of 1993.

¹³ Regulation of Gatherings Act 205 of 1993.

¹⁴ Section 7(2) of the Constitution of the Republic of South Africa, 1996.

¹⁵ “A local authority within whose area of jurisdiction a gathering is to take place or the management or executive committee of such local authority shall appoint a suitable person, and a deputy to such person, to perform the functions, exercise the powers and discharge the duties of a responsible officer.” If the municipality has not appointed a responsible person, the notice will be given to the chief executive officer of the municipality, or immediate junior will be deemed to be a responsible person: section 1 read with section 2(4)(a) of Section 1 of the Regulation of Gatherings Act 205 of 1993.

¹⁶ *South African Transport and Allied Workers Union (SATAWU) v Garvas* 2013 (1) SA 83 (CC) para 54.

¹⁷ The Commission had recommended a prior notice period of 6 days in order to allow: 2 days for local municipalities to arrange and hold meetings with the police and the convener; 2 days within which the convener or the police can apply for judicial review or appeal of any conditions imposed and for the court to decide; and 2 days thereafter for municipalities and the police to make preparations for the gathering, and also for the convener to notify the participants of the conditions under which the gathering will place: Heymann *et al Towards Peaceful Protest in South Africa* 12.

¹⁸ This 7 day notice period has been subject to criticism, that it is susceptible to being used to suppress dissent. It grants the municipality sufficient time within which to forcefully prevent protests from happening: Currie and de Waal *The Bill of Rights Handbook* 382; *South African Transport and Allied Workers Union (SATAWU) v Garvas* 2013 (1) SA 83 (CC) para 90.

not reasonably possible to give notice 7 days before such date, then it must be given at the earliest opportunity. He, however, cautions them that this is possible, provided that if notice is given in less than 48 hours, the municipality may by notice to the convener prohibit the gathering.¹⁹

Acting on Mr Dlamini's advice, Ms Mazibuko, Ms Munyai, Ms Makoatsane, Ms Malemute and Mr Paki return to Phiri and inform, as best they can, the rest of the community residents on the RGA's procedural and regulatory framework. Subsequently to this, in a series of urgent community meetings, the Phiri community residents finally decide to appoint Ms Mazibuko as the convener. In compliance with the procedural requirements of the RGA, as the convener she is to notify the Municipality of the intended gathering thereby initiating the legislative processes.

5.6 PROCEDURAL AND REGULATORY REQUIREMENTS OF THE RGA

5.6.1 NOTICE

Ms Mazibuko goes back to the Municipality and informs Mr Dlamini that she has been appointed by the community as the convener of the gathering, and has come to provide 7 days' notice. As the responsible officer appointed by the Municipality to represent it during the preparations²⁰ for the gathering, Mr Dlamini assists²¹ Ms Mazibuko to complete a notification form below:

¹⁹ The RGA is too restrictive and prone to abuse in that if notice is given less than 48 hours before the commencement of the gathering, this essentially gives the municipality unfettered discretion to issue blanket prohibitions on gatherings. It has been recommended that the RGA should provide for a quick reaction process, perhaps along the lines of a 24-48 hour period without creating the opportunity for Municipalities to impose restrictive conditions: section 3(2) of the Regulation of Gatherings Act 205 of 1993; Currie and de Waal *The Bill of Rights Handbook* 382; *South African Transport and Allied Workers Union (SATAWU) v Garvas* 2013 (1) SA 83 (CC) para 90.

²⁰ See City of Johannesburg Metropolitan Municipality "Directions to City of Johannesburg Municipal Offices, 158 Civic Boulevard, Johannesburg (Braamfontein)" <http://www.joburg.org.za/images/pdfs/directions%20to%20city%20of%20johannesburg%20offices%20metro%20centre.pdf> (accessed on 9 October 2015); Section 3(3) of the Regulation of Gatherings Act 205 of 1993; M Seloane "Chapter 1: A critical and comparative review of the Regulation of Gatherings Act" in SK Ndung'u (ed) *The Right to Dissent: Freedom of Expression, Assembly and Demonstration in South Africa* (2003) 27-28.

²¹ Section 3(1) requires the convener to give notice according to the requirements of the RGA in writing. If the convener is not able to reduce the proposed notice to writing, the responsible officer will at the request of the convener do so on his or her behalf.

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY

NOTICE UNDER REGULATION OF GATHERINGS ACT 205 OF 1993

The Responsible Officer:

Mr Thomas Dlamini

I am aware of the provisions of the Regulation of Gatherings Act 205 of 1993, and wish to notify you in terms of section 3 of the Act, of an intended gathering. The particulars are as follows:

1. Name, address and telephone numbers of convener:

Lindiwe Mazibuko, 10 Seeiso Street, Block B, Phiri, Soweto, 079 075 8439

2. The purpose of the gathering:

To complain to the Municipality about the installation of PPMs and cutting off water supply, and the failure to speak to community about its decision and actions.

3. The date, time and duration of the gathering:

23 April 2004, 13h00 on Friday, 4 hour gathering

4. The place where gathering is to be held:

Outside the Municipal Offices at 158 Civic Boulevard, Braamfontein, Johannesburg.

5. The anticipated number of participants:

Approximately 1500 participants.

6. The proposed number of, and if possible, names of the marshals who will be appointed by her and how they will be distinguished from the other participants:

We appointed 150 marshals. The list and names of these marshals is enclosed on a separate sheet of paper. The marshals will be identifiable by red armbands.

7. Where the gathering is going to take the form of a procession

- The exact and complete route of the procession:

From the taxi rank in Newtown, Johannesburg Central Business District (CBD), procession will come up Ntemi Mpiliso street and onto the Mandela Bridge. It will continue straight on Bertha / Jan Smuts. Procession will go right into Jorissen Street, pass the park on the left side of the street, further pass the BRT station (Rea Vaya Bus Stop). Then turn right onto 158 Civic Boulevard, Braamfontein, Johannesburg.

- The time and place at which the participants are going to assemble, and at which the procession is going to begin:

The participants will assemble at the taxi rank in Newtown, Johannesburg (CBD) at 10h00.

- The time and place at which the procession is going to end and the participants are going to disperse:

The procession will arrive at the Municipal offices at 13h00, and will disperse at such time as the Mayor, or a representative of the Mayor accepts our written petition.

- The manner in which the participants will be transported to the place of assembly and from the point of their dispersal:

The participants will be transported by public transport namely, buses and taxis.

- The number and types of vehicles (if any) which will form part of the procession:

There will be no vehicles.

- If a petition or any other document is to be handed over, the name of the person to whom, and the place where it is to be handed:

Our petition will be handed over to the Mayor or his representative.

Upon receipt of the notice, Mr Dlamini then consults with the “authorised member”²² of the Johannesburg Metropolitan Police Department²³ (JMPD) to discuss the proposed pre-gathering arrangements stated on the notice.²⁴

5.6.2 OUTCOME OF CONSULTATION BETWEEN THE MUNICIPALITY AND POLICE REGARDING THE NOTICE

If after such consultation, Mr Dlamini is of the opinion that negotiation with Ms Mazibuko to further discuss any aspect of the gathering is not necessary, then Mr Dlamini must inform Ms Mazibuko that the gathering may take place as per the notice. The community will then proceed with the gathering²⁵ to the Municipal offices and deliver a memorandum of their demands to Mr Dlamini.

If after 24 hours of giving notice, Ms Mazibuko has not been called to a meeting, then the gathering may take place as per the notice.²⁶ The RGA provides a presumption of compliance in this instance.

Suppose after the consultation, Mr Dlamini and Mr Nyanda are of the view that the gathering may cause “riot damage”²⁷ or that an aspect of the notice needs further discussion, Mr Dlamini then immediately calls a meeting between himself, Mr Nyanda and Ms Mazibuko.

²² A member of the police authorised to represent the police in the arrangements for the gathering: sections 2(2)(a), 2(2)(b) and 4 of the Regulation of Gatherings Act 205 of 1993.

²³ In 1996, the Public Order Policing Unit was established by the National Commissioner of Police in terms of section 17 of the South African Police Services Act 68 of 1995, to police public protests and gatherings: Ministry of Police “Policy and Guidelines: Policing of Public Protests, Gatherings and Major Events” 14 (2011) http://www.policeseecretariat.gov.za/downloads/policies/policing_public_protests_2013.pdf (accessed on 15 June 2015).

²⁴ Section 4(1) of the Regulation of Gatherings Act 205 of 1993; *South African Transport and Allied Workers Union (SATAWU) v Garvas* 2013 (1) SA 83 (CC) paras 54 and 91.

²⁵ Section 4(2)(a) of the Regulation of Gatherings Act 205 of 1993; *South African Transport and Allied Workers Union (SATAWU) v Garvas* 2013 (1) SA 83 (CC) paras 54 and 9.

²⁶ Section 4(3) Regulation of Gatherings Act 205 of 1993.

²⁷ Defined as “any loss suffered as a result of any injury to or the death of any person, or any damage to or destruction of any property, caused directly or indirectly by, and immediately before, during or after, the holding of a gathering:” Section 1 of the Regulation of Gatherings Act 205 of 1993.

5.6.3 MEETING BETWEEN THE MUNICIPALITY, THE POLICE AND MS MAZIBUKO

At the meeting, Mr Dlamini decides to impose²⁸ restrictive conditions²⁹ or prohibits³⁰ the gathering, either because the Municipality is reasonably³¹ convinced of a possible threat of riot damage, or is actually politically motivated to prevent a protest against itself. The RGA allows for judicial review of the imposition of conditions or prohibition of a gathering.

5.6.4 JUDICIAL REVIEW AND APPEAL OF THE DECISION REGARDING THE GATHERING

Section 6 of the RGA provides that within 24 hours of receipt of the decision from the Municipality, Ms Mazibuko may apply³² to the Johannesburg Magistrate's Court for judicial review of the conditions imposed or prohibition of the gathering. The drafters of the RGA chose the Magistrate's Court as the court for judicial review in order to facilitate access to court for impecunious conveners.³³ An urgent application may subsequently be made by the Municipality, the police or Ms Mazibuko, to the High Court and Supreme Court of Appeal, appealing the decision of the Magistrates' Court to allow the gathering with or without conditions.

It is unlikely that Ms Mazibuko knows how to go about making an application for review proceedings in the Magistrate's Court, I consider three scenarios on how the law can facilitate the

²⁸ Mr Nyanda may request Mr Dlamini, or Mr Dlamini may by himself, impose conditions, which are reasonable to ensure the least possible impediment to traffic and riot damage: Section 4(2)(c) and 4(4)(b) of the Regulation of Gatherings Act 205 of 1993; *South African Transport and Allied Workers Union (SATAWU) v Garvas* 2013 (1) SA 83 (CC) para 91.

²⁹ Section 4(4)(b) of the Regulation of Gatherings Act 205 of 1993; *South African Transport and Allied Workers Union (SATAWU) v Garvas* 2013 (1) SA 83 (CC) para 92.

³⁰ Section 5 of the Regulation of Gatherings Act 205 of 1993; *South African Transport and Allied Workers Union (SATAWU) v Garvas* 2013 (1) SA 83 (CC) para 92.

³¹ When credible information on affidavit is brought to the attention of Mr Dlamini that there is a threat that a proposed gathering will result in riot damage in the form of: serious disruption of vehicular or pedestrian traffic, injury to gatherers or members of the public, or extensive damage to property, and that the police and traffic officers will not be able to contain this threat, he/she must consider the prohibition of the gathering: Section 4(2) of the Regulation of Gatherings Act 205 of 1993; *South African Transport and Allied Workers Union (SATAWU) v Garvas* 2013 (1) SA 83 (CC) para 92.

³² By making an application to the clerk of the Magistrates' Court informing the clerk that she wants to make an urgent application for permission to protest. The clerk will help Ms Mazibuko to make the application: Freedom of Expression Institute "The right to protest" 18.

³³ Currie and de Waal *The Bill of Rights Handbook* 401.

court undertaking the review and assisting Ms Mazibuko in the legal process. It will be shown that administrative review of the decision made in terms of the RGA serves as a gateway leading to the review of the Municipality's decisions on the FBW policy and OGA in terms of the Water Services Act.³⁴ My ultimate goal is to show that the RGA serves as a doorway for poor and vulnerable communities to ultimately arrive at the knowledge of and enforcement of their right of access to water through a class action.

5.7 SCENARIO ONE

Scenario one starts with section 6(1)(a) of the RGA, which allows Ms Mazibuko to apply to the Johannesburg Magistrates' Court requesting the court to set aside the Municipality's decision to prohibit or impose conditions on the proposed gathering, or to amend the conditions it set. This, however, presents a challenge to the community. The likelihood of the community knowing about this review provision, or even being able, itself, to approach the Magistrates' Court for judicial review is very low, if not at all. This scenario is therefore of not much assistance to the community as they are demanding water and are not concerned with the provisions of the RGA. The right of access to water entitles the community to enforce the Municipality's constitutional obligation owed to it to justify and account on its decision-making and actions taken in terms of the Water Services Act³⁵ to promote access to water.

5.8 SCENARIO TWO

To overcome the community's aforementioned challenge, the Commission recommended that access to court be catalysed by making provision in the RGA for an extremely prompt³⁶ automatic³⁷ judicial review:

³⁴ Act 108 of 1997.

³⁵ Act 108 of 1997.

³⁶ The Commission had recommended that the review be in former Supreme Courts. This is because prior to the Promotion of Access to Justice Act 3 of 2000, the judicial review of administrative action was exercised by the High Courts and Appellate Division in terms of their inherent common law powers of review. Magistrates' Courts did not have jurisdiction to adjudicate upon administrative law matters until only after PAJA: Heymann et al *Towards Peaceful Protest in South Africa* 13; Y Burns *Administrative Law* 4 ed (2013) 68 and 309.

³⁷ Heymann et al *Towards Peaceful Protest in South Africa* 59.

“Several parties have recommended an automatic review of conditions imposed over the objection of organisers of a demonstration. This would handle the problems of lack of knowledge or access to court or counsel for some parties. We agree and recommend that in this situation the party also be referred to legal aid.”³⁸

While commendable, this recommendation was however not adopted by the legislature in the RGA. However, if the RGA had made provision for automatic review, the Magistrate’s Court could summarily dismiss the urgent application to have the prohibition or conditional authorisation set aside on the basis that: Rule 55(1) of the Magistrate’s Court Rules³⁹ requires that an application should be delivered to court on ten day’s notice, after having served notice five days prior on the Municipality.⁴⁰ Rule 55(5) states that this total fifteen day notice period may be reduced if the applicant on affidavit satisfies the court that the matter is urgent. Because the Municipality would have been notified at most 7 days prior to the date of the gathering, and would have had to make a decision within this period, the automatic review application would clash with the total fifteen day notice period in the Rules.⁴¹ This would create procedural problems between the RGA and the Magistrate’s Court Rules.⁴² The Magistrate, unfamiliar with the RGA, and applying the Magistrate’s Court Rules strictly, would turn down the convener’s application to have the prohibition or conditions set aside on procedural grounds.⁴³ To reconcile this clash, assuming that the RGA made provision for automatic review, the RGA would state that an automatic review application should be deemed as having satisfied the requirements for an urgent application in terms of the Magistrate’s Court Rules.

By facilitating urgency through automatic judicial review, access to court would be enhanced for the community as it would facilitate the uptake of the decision for review, without Ms Mazibuko who would not know how to approach the court. To cure this problem, I suggest that the Municipality be the one to provide the Magistrates’ Court with Ms Mazibuko’s notice and its decision, with reasons, for its imposition of conditions or refusal of authorisation. Upon such

³⁸ Heymann *et al Towards Peaceful Protest in South Africa* 59-60.

³⁹ Rule 55 of the Magistrate’s Court Rules, Rules Board for Courts of Law Act 107 of 1985 and Regional Courts Amendment Act 31 of 2008.

⁴⁰ Currie and de Waal *The Bill of Rights Handbook* 401.

⁴¹ Currie and de Waal *The Bill of Rights Handbook* 401.

⁴² Currie and de Waal *The Bill of Rights Handbook* 402.

⁴³ Currie and de Waal *The Bill of Rights Handbook* 401.

receipt, the court would review the Municipality's decision made in respect of the gathering. To undertake this review, the court would draw its review powers from PAJA.

5.8.1 THE ADMINISTRATIVE REVIEW JURISDICTION OF MAGISTRATES' COURTS

PAJA gives legislative effect to the constitutional "rights to just administrative action,"⁴⁴ which consists of a right to lawful, reasonable and procedurally fair administrative action and a right to be given written reasons for administrative action."⁴⁵ A court with jurisdiction to adjudicate review proceedings may do so in terms of section 6(1) of PAJA, and grant remedies in terms of section 8(1). While High Courts have such jurisdiction, Magistrates' Courts may also adjudicate such review proceedings and order remedies, provided they have been designated by the Minister by notice in the *Government Gazette*.⁴⁶

5.8.2 THE EXTENT OF THE ADMINISTRATIVE REVIEW POWERS OF MAGISTRATES' COURTS UNDER PAJA

There are constitutional limitations imposed on the powers of Magistrates' Courts. In terms of section 170 of the Constitution, Magistrates' Courts may decide any matter determined by an Act of Parliament, but may not enquire into or rule on the constitutionality of any legislation⁴⁷ or any conduct of the President. It must be understood that these limitations relate to the challenging of any law or conduct as being in direct conflict with the Constitution. These restrictions will have no bearing on their review powers in terms of PAJA. This is because in such matters, neither the direct constitutionality of legislation nor the conduct of the President is at issue.

In relation to the Mazibuko case study, there are two bases for judicial review. First, whether or not the provisions of PAJA have been complied with by the Municipality in arriving at its decision to

⁴⁴ Section 33 of the Constitution, 1996; Currie and de Waal *The Bill of Rights Handbook* 646.

⁴⁵ Currie and de Waal *The Bill of Rights Handbook* 646.

⁴⁶ Section 1 of the Promotion of Administrative Justice Act 3 of 2000 makes express provision for the inclusion of Magistrates' Courts in the definition of "court." Further an amendment (section 2 of Act 53 of 2002) makes provision for designation of Magistrates in terms of section 9A to perform the functions and duties, and exercise the powers assigned by the Promotion of Administrative Justice Act 3 of 2000 or any other law: Burns *Administrative Law* 68; I Currie and J Klaaren *The Promotion of Administrative Justice Act Benchbook* (2001) 187; Currie and de Waal *The Bill of Rights Handbook* 112-113.

⁴⁷ This includes all forms of delegated legislation: Currie and Klaaren *The Promotion of Administrative Justice Act Benchbook* 187; Currie and de Waal *The Bill of Rights Handbook* 112-113.

either impose conditions or refuse authorisation for a gathering.⁴⁸ Second, a review of the Municipality's decision to install PPMs in terms of the Water Services Act⁴⁹

But before the court undertakes either base of review, it has to determine the preliminary issue of standing. Because the community as a defined group of people intends to protest, can the court provide class standing to the residents of Phiri, thus transforming Ms Mazibuko's status from convener in terms of the RGA, and into a representative applicant in review proceedings against the Municipality as respondent?

5.8.3 CLASS STANDING UNDER PAJA

Because PAJA gives effect to a constitutional right, the standing requirements provided for in section 38 of the Constitution similarly apply in respect of PAJA.⁵⁰ In light of this "extended ambit of judicial review,"⁵¹ class standing⁵² is possible under PAJA, provided the certification requirements as outlined in chapter 4, have been met to the court's satisfaction.⁵³ In the circumstances of the case study, Ms Mazibuko as convener in terms of the RGA, would be acting on behalf of a defined group of Phiri community residents in the review proceedings, therefore

⁴⁸ At this stage, the review is limited to the RGA. The decision to install PPMs will be dealt with at para 5.8.3.3.2: Currie and Klaaren *The Promotion of Administrative Justice Act Benchbook* 188; Currie and de Waal *The Bill of Rights Handbook* 112-114.

⁴⁹ Act 108 of 1997.

⁵⁰ PAJA does not contain any standing requirements, whereas the Administrative Justice Bill of the Project Committee of the South African Law Commission contained a provision (section 1 (m)) effectively incorporating the provisions of section 38 of the Constitution into the Bill. During the parliamentary committee stage of the drafting process two possible options of incorporating section 38 were considered. The first option was incorporation through stating "anyone acting in terms of section 38 of the Constitution/any person who applies to court for judicial review of administrative action, including [upon which would follow the categories in (a) to (e)]." The second option was incorporation by stating "any person who applies to a court or a tribunal for the judicial review of an administrative action in terms of section 7/8, including [again the reference to these categories]." In "JPC 10/01/00 Administrative Justice Bill B-56 of 1999: deliberations" it is reported that the chairperson expressed the view that a reference to section 38 of the Constitution would not work as it refers to standing for the direct enforcement of rights in the Bill of Rights. He then suggested the inclusion of a phrase in a form similar to the second option. This background is also of some assistance in understanding the removal of "qualified litigant" from the Bill and its replacement with "person" in PAJA reported in "JPC 20/01/00 Administrative Justice Bill B-56 of 1999: deliberations": "The Committee agreed to remove the term 'qualified litigant' wherever it appears in the bill and to replace it with the term 'person.' This was done in order to remove ambiguity and reflect the position that the normal rules of *locus standi* (legal standing) should apply to litigants in the normal course of events:" de Ville *Judicial Review* 400-402; South African Law Commission Project 115: *Report on Administrative Justice* 20-21.

⁵¹ GE Devenish *et al Administrative Law and Justice in South Africa* (2001) 119.

⁵² Burns emphasises that class actions are important for administrative law by enhancing access to courts for groups of people: Y Burns *Administrative Law* 4 ed (2013) 592.

⁵³ de Ville *Judicial Review* 423-427; GE Devenish *et al Administrative Law* 119 and 464-468; Burns *Administrative Law* 529-532.

becoming representative applicant if the requirements for certification have been satisfied. The Magistrates' Court in determining whether the requirements for class standing are *prima facie* present, would consider the notice of the gathering provided to the Municipality.

5.8.3.1 CLASS DEFINITION

All Phiri community members who are similarly placed to Ms Mazibuko would constitute an identifiable class.⁵⁴

5.8.3.2 COMMON ISSUES OF FACT/AND OR LAW

5.8.3.2.1 COMMON ISSUES OF FACT /AND OR LAW FOUNDED ON THE RGA

The imposition of conditions or refusal of authorisation for the gathering in terms of the RGA affected the community's right to freedom of assembly.⁵⁵ This would constitute a common issue of fact and law based on the factual circumstances and the RGA respectively.

5.8.3.2.2 COMMON ISSUES OF FACT /AND OR LAW FOUNDED ON THE WATER SERVICES ACT⁵⁶

These common issues are linked to and stem from the installation of PPMs and the disconnection of water for the residents of Phiri. This constitutes a common factual issue. The deprivation of water as a result of the installation of PPMs and disconnection of water amounts to an infringement of the right of access to water, thereby giving rise to a common issue of law.

⁵⁴ Para 3.13.3.

⁵⁵ *Children's Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) para 44; De Vos 2013 *TSAR* 377.

⁵⁶ Act 108 of 1997.

5.8.3.3 CAUSE(S) OF ACTION RAISING A TRIABLE ISSUE(S)⁵⁷

5.8.3.3.1 A CAUSE OF ACTION FOUNDED ON THE RGA

The RGA, as the empowering legislation in terms of which the decision is made regarding the protest, provides a legal basis for a triable issue.⁵⁸ Further, the Magistrate will also find that the reason for the protest, being the interference by the Municipality of the community's water usage, brings to the fore an underlying cause of action.

5.8.3.3.2 A CAUSE OF ACTION FOUNDED ON THE WATER SERVICES ACT

The Magistrate in reviewing the notice submitted by Ms Mazibuko to the Municipality in terms of the RGA, will note that the purpose of the community's intended protest, is to challenge the installation of PPMs. The Magistrate, having legal knowledge, will find that this raises another more substantive cause of action. This being whether the installation of the PPMs in terms of the Water Services Act,⁵⁹ as the empowering legislation, was procedurally lawful under PAJA. This was found by the Witwatersrand Local Division,⁶⁰ the Supreme Court of Appeal,⁶¹ and the Constitutional Court⁶² in the *Mazibuko* case,⁶³ to raise a triable issue.

⁵⁷ Para 3.13.14.

⁵⁸ South African Law Commission Project 88: *Report on The Recognition of Class Actions and Public Interest Actions in South African Law* 40; *Children's Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) paras 35-39; De Vos 2013 *TSAR* 376.

⁵⁹ Act 108 of 1997.

⁶⁰ The Witwatersrand Local Division found that the installation of PPMs amounted to an administrative action. Having determined this, Tsoka J went on to review whether the administrative action was lawful, reasonable and procedurally fair. In this regard the judge found the administrative action was unlawful and unconstitutional in that neither the Water Services Act 108 of 1998 nor the by-laws authorised the Municipality to either limit, discontinue or cut off the supply of water through the installation of PPMs. For this reason, the installation of PPMs had no basis in law: *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W) paras 63-95, 104, and 111-112.

⁶¹ With reference to PAJA, the Supreme Court of Appeal confirmed the findings of the Witwatersrand Local Division that the installation of the PPMs was unlawful as it had no legal basis: *City of Johannesburg v Mazibuko* 2009 (3) SA 592 (SCA) paras 11-12 and 47-58.

⁶² Upon review in terms of PAJA, the Constitutional Court found that the decision to implement "Operation Gcin'amanzi" was authorised by a resolution of the City Council after receiving a full proposal from Johannesburg Water. This, the court concluded, had amounted to a decision by a municipal council in pursuance of legislative and executive functions, and not an administrative function. The court found that section 1 (cc) and (dd) of PAJA, expressly exclude such executive and legislative powers from the definition of an "administrative action." *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) paras 105, 127-131.

⁶³ *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W); *City of Johannesburg v Mazibuko* 2009 (3) SA 592 (SCA); *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

5.8.3.4 THE COURT'S APPROACH TO THE TWO CAUSES OF ACTION

Confronted with these two triable issues, the Magistrate would be well placed to advise Ms Mazibuko of the legal possibility of proceeding with the review of either, or both the decision in terms of the RGA and the Water Services Act.⁶⁴ To enable Ms Mazibuko to approach the court as a member of the class in review proceedings of either or both the RGA or the Water Services Act,⁶⁵ the class must have adequate representation.

5.8.4 ADEQUATE REPRESENTATION

In order to ensure adequate representation of the community, the Magistrate would be empowered to assist Ms Mazibuko to obtain legal aid.⁶⁶ In this way, an ideological plaintiff will be sourced, who can bring the class action in the Magistrates' Court on their behalf. Rule 53 of the Magistrates' Courts Rules makes provision for unrepresented litigants in civil proceedings who cannot afford legal fees to lodge an application for a Magistrates' Court to appoint a legal representative on a *pro bono* basis. This application is referred to as a *pro deo* application.⁶⁷

Because very few litigants ever make it to the clerk of the Magistrates' Court to make a *pro deo* application, or even know of its existence,⁶⁸ the Magistrate will have to proactively assist Ms Mazibuko in making this application. This would further accord with the court's obligation to ensure that there is adequate legal representation of the class to satisfy this certification requirement. The last requirement for class certification is that of appropriateness.

5.8.5 APPROPRIATENESS OF PROCEEDING WITH A CLASS ACTION

The justification for proceeding with a class action is that, without it, the Phiri community will be denied access to court.⁶⁹ Without access to court their rights cannot be enforced. The Magistrate would be guided by this standard in arriving at a finding that it would be appropriate to adjudicate

⁶⁴ Act 108 of 1997.

⁶⁵ Act 108 of 1997.

⁶⁶ Dugard 2008 *SAJHR* 223-225.

⁶⁷ Rule 53 of the Magistrate's Court Rules, Rules Board for Courts of Law Act 107 of 1985 and Regional Courts Amendment Act 31 of 2008; Dugard 2008 *SAJHR* 224.

⁶⁸ Dugard 2008 *SAJHR* 224.

⁶⁹ *Imraahn Ismail Mukkaddam v Pioneer Food (Pty) Ltd* 2013 (2) SA 254 (SCA) para 11.

the review in the form of a class action.

If the Magistrate is of the view that the class action would better be dealt with in the High Court, either in terms of PAJA or through the direct application of the Constitution, the Magistrate can preliminarily structure the class action according to the certification requirements, and then refer the matter to the High Court with reasons. This would accord with the recommendation by the South African Law Commission (SALC) that, “the court hearing the application for certification as a class action should have the power to give directions as to the appropriate division or court in which the action should be instituted.”⁷⁰ The Magistrates’ Court in adopting this more active role with regard to class actions would be promoting access to courts, thereby giving effect to section 34 of the Constitution.⁷¹

While I acknowledge the power of Magistrates Courts to refer matters, I am of the view that Magistrates’ Courts are the appropriate forums for promoting access to courts for classes of impoverished communities. These are the courts where the majority of poor and vulnerable South Africans engage with the law. They are more geographically accessible, the costs of litigation are lower, the procedures are less complex and less time consuming. Magistrates traditionally perform a more active role, than judges do in the high courts, in assisting impoverished litigants in proceedings. They can also better facilitate the relationship between marginalised groups and their legal representatives.

Support for extending this jurisdiction of the Magistrate’s Court can also be found in the SALC’s Working Paper⁷² and Report.⁷³ The SALC recommended that Magistrate’s Courts are best placed for class actions because they far more accessible geographically and financially to impoverished

⁷⁰ South African Law Commission Project 88: *Working Paper on the Recognition of a Class Action in South African Law* 69.

⁷¹ Similarly advocating for the Ministerial designation of Magistrates’ Courts as review courts in terms of PAJA, Nwauche links the exercise of these review powers with the promotion of section 34 of the Constitution. He states that, as contemplated by PAJA, this exercise would reduce the burden of judicial review before the superior courts: ES Nwauche “Administrative Bias in South Africa” (2005) 1 *PER* 1 at 31.

⁷² South African Law Commission Project 88: *Working Paper on the Recognition of a Class Action in South African Law*.

⁷³ South African Law Commission Project 88: *Report on The Recognition of Class Actions and Public Interest Actions in South African Law*.

communities, than High Courts are.⁷⁴ In support of this proposal, the SALC advised that the appropriate procedures for class litigation in the Magistrates' Courts would in future be developed by Magistrates, guided by judicial precedent from the High Court.⁷⁵

5.8.5.1 CLASS ACTION PROCEDURES IN THE MAGISTRATES' COURT

On the formulation of procedures for class litigation, the SALC was in favour of “the deferment of the extension to the lower courts to hear class actions until such time as the procedure had been in operation in the High Court and the Constitutional Court for a few years and a body of case law has been established.”⁷⁶ From my discussion of the case law in chapter 4, it is clear that procedures for class litigation have been sufficiently established in South African law. A sufficient body of caselaw has established precedent to guide class litigation in the Magistrates' Courts. The *Mazibuko*⁷⁷ cases are important in demonstrating a class action for the review of municipal action in terms of PAJA, as discussed above. A further aspect relevant to the jurisdiction of Magistrates' Courts for class litigation, is that of monetary jurisdiction. The SALC also considered this.⁷⁸

⁷⁴ South African Law Commission Project 88: *Working Paper on the Recognition of a Class Action in South African Law* 54-55.

⁷⁵ South African Law Commission Project 88: *Report on the Recognition of a Class Action in South African Law* 67-68.

⁷⁶ South African Law Commission Project 88: *Working Paper on the Recognition of a Class Action in South African Law* 54; South African Law Commission Project 88: *Report on the Recognition of a Class Action in South African Law* 67.

⁷⁷ *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W); *City of Johannesburg v Mazibuko* 2009 (3) SA 592 (SCA); *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

⁷⁸ The value limitation on civil claims in the Magistrates Courts has been increased from R100 000, which was the limit at the time of the release of the Working Paper and Report, to R300 000 in 2010. The SALC considered two possible approaches to determining the value limits on jurisdictions for class actions. The one possibility was to use the aggregate or total value of the claims of the members of the class as the determining factor. This, it found, would have the effect that most class actions would be brought in the High Court. If however, the value of the individual claims which fall within the monetary limit of the Magistrates' Court, were to be the determining factor then most class actions would proceed in the Magistrates' Courts. In the interest of promoting access to court for disadvantaged groups, the SALC suggested the latter be a deciding factor: South African Law Commission Project 88: *Working Paper on the Recognition of a Class Action in South African Law* 55-56; South African Law Commission Project 88: *Report on the Recognition of a Class Action in South African Law* vii and 69-70; Section 29(1A) of the Magistrates' Courts Act 32 of 1944 read with Schedule 2 of GN 670, *Government Gazette* 33418, 29 July 2010; S Pete, D Hulme, M du Plessis, R Palmer and O Sibanda *Civil Procedure: A Practical Guide* 2 ed (2011) 39.

5.8.5.2 MONETARY JURISDICTION

While the monetary jurisdiction of the Magistrates' Court is important for purposes of class actions where monetary damages are sought, it does not impact on this illustration. This is because the Phiri community essentially requires a judicial declaration of rights as a remedy, on the authorisation of the protest in terms of the RGA, and/or the lawfulness of the decision to disconnect their water services or install PPMs in terms of the Water Services Act.⁷⁹

5.8.5.3 REVIEWING THE MUNICIPALITY'S DECISION TAKEN IN TERMS OF THE RGA OR THE WATER SERVICES ACT⁸⁰ AND THE REMEDIES AVAILABLE IN TERMS OF PAJA

Upon the review of the Municipality's decision taken, either in terms of the RGA and/or the Water Services Act,⁸¹ the Johannesburg Magistrates' Court would be empowered to grant remedies in terms of PAJA. Section 8 of PAJA sets out the remedies available to the court. These remedies whilst codifying the common law, develop⁸² it in order to bring it in alignment with the Constitution.

Firstly, the court can grant an order directing the Municipality to either give sufficient policy reasons for its decision,⁸³ or to direct the Municipality to act in any manner that the court requires.⁸⁴ This is equivalent to the common law remedy of mandamus, or mandatory interdict, which required an administrator to comply with a statutory duty or to remedy the outcome of an unlawful administrative action. PAJA goes further than an interdict in directing the administrator to give

⁷⁹ Act 108 of 1997.

⁸⁰ Act 108 of 1997.

⁸¹ Act 108 of 1997.

⁸² Section 39(2) and 39(3) of the Constitution, 1996; Burns *Administrative Law* 548.

⁸³ Section 8(1)(a)(i) of the Promotion of Administrative Justice Act 3 of 2000; Currie and Klaaren *The Promotion of Administrative Justice Act Benchbook* 190; Burns *Administrative Law* 552.

⁸⁴ Section 8(1)(a)(ii) of the Promotion of Administrative Justice Act 3 of 2000; Currie and Klaaren *The Promotion of Administrative Justice Act Benchbook* 190; Burns *Administrative Law* 552-553.

reasons.⁸⁵ Secondly, the court may grant a prohibitory interdict against the Municipality.⁸⁶ The third remedy available is that of an order setting aside the Municipality's decision.⁸⁷ This may be combined with the remedy of remitting the matter to the Municipality for reconsideration, with or without directions.⁸⁸ In exceptional cases the court can go beyond the exercise of the power of remand. It can make an order varying the decision, correcting a defect resulting from the decision,⁸⁹ or an order directing on payment of compensation.⁹⁰ The fourth, is the power to make a declaration of rights.⁹¹ The fifth remedy is a temporary interdict or other temporary relief as part or whole of an order granted by the court.⁹² Finally, the court may make orders as to costs.⁹³ In determining which remedy is appropriate in these circumstances, the court will be guided by the standard of what is "just and equitable."⁹⁴

While an automatic judicial review of the Municipality's decision is an improvement to the first scenario, it is however not without its own difficulties. There is the possibility that the Magistrate may limit the review to the Municipality's decision on the conditions imposed or refusal for authorisation of a gathering in terms of the RGA, and not consider the review of the decision taken in terms of the Water Services Act.⁹⁵ The third scenario aims to address this latter aspect.

⁸⁵ Currie and Klaaren *The Promotion of Administrative Justice Act Benchbook* 189.

⁸⁶ Section 8(1)(b) of the Promotion of Administrative Justice Act 3 of 2000; Currie and Klaaren *The Promotion of Administrative Justice Act Benchbook* 190; Burns *Administrative Law* 556- 557.

⁸⁷ Section 8(1)(c) of the Promotion of Administrative Justice Act 3 of 2000; Currie and Klaaren *The Promotion of Administrative Justice Act Benchbook* 190; Burns *Administrative Law* 557-558.

⁸⁸ Section 8(1)(c)(i) of the Promotion of Administrative Justice Act 3 of 2000; Currie and Klaaren *The Promotion of Administrative Justice Act Benchbook* 190; Burns *Administrative Law* 557- 558.

⁸⁹ Section 8(1)(c)(ii)(aa) of the Promotion of Administrative Justice Act 3 of 2000; Currie and Klaaren *The Promotion of Administrative Justice Act Benchbook* 190; Burns *Administrative Law* 558.

⁹⁰ Section 8(1)(c)(ii)(bb) of the Promotion of Administrative Justice Act 3 of 2000; Currie and Klaaren *The Promotion of Administrative Justice Act Benchbook* 190-191; Burns *Administrative Law* 558-563.

⁹¹ Section 8(1)(d) of the Promotion of Administrative Justice Act 3 of 2000; Currie and Klaaren *The Promotion of Administrative Justice Act Benchbook* 191; Burns *Administrative Law* 563-564.

⁹² Section 8(1)(e) of the Promotion of Administrative Justice Act 3 of 2000; Currie and Klaaren *The Promotion of Administrative Justice Act Benchbook* 191; Burns *Administrative Law* 564-565.

⁹³ Section 8(1)(f) of the Promotion of Administrative Justice Act 3 of 2000; Currie and Klaaren *The Promotion of Administrative Justice Act Benchbook* 191; Burns *Administrative Law* 565-566.

⁹⁴ With this standard, PAJA has adopted the language of the Constitution: "when deciding a constitutional matter within its power, a court...may make an order that is just and equitable." Sections 8(1) and 8(2) of the Promotion of Administrative Justice Act 3 of 2000; Currie and Klaaren *The Promotion of Administrative Justice Act Benchbook* 187 and 192; Burns *Administrative Law* 549-550; Section 172(1)(b)(i) of the Constitution of the Republic of South Africa, 1996.

⁹⁵ Act 108 of 1997.

5.9 SCENARIO THREE

Section 3(4) of the RGA provides that if a municipality does not exist, or is not functioning in an area where a gathering is to be held, the convener may give notice in terms of the RGA to the Magistrate in the district within which that gathering is to take place. Such Magistrate will thereafter fulfil the functions, exercise the powers and discharge the duties of the responsible officer in terms of RGA. The RGA therefore envisages an active judicial role for the Magistrate's Courts. This third scenario builds on this possible active judicial role played by the Magistrate's Court in terms of the RGA. Inspired by this active role that the Magistrates' Court can play, I introduce the possibility of judicial oversight over the procedural and regulatory framework of the RGA, as a means of catalysing the formation of a class action for the review of the Municipality's decision in terms of the Water Services Act.⁹⁶

5.9.1 JUDICIAL OVERSIGHT

If the RGA had made provision for judicial oversight, from the initial notification stage alongside the Municipality then Ms Mazibuko would have to provide notice to either the Municipality or the Magistrates' Court.

Upon receipt of the notice, the Magistrates' Court would consider the notice to see whether a legal cause of action beyond the RGA, exists for a class action. The Municipality would wait upon the court to make its determination.

Upon finding that a cause of action based on the Water Services Act⁹⁷ exists, then the court would notify the Municipality and Ms Mazibuko of this. Ms Mazibuko will then be advised of the community's choice to approach the court for legal assistance on how to proceed with a class action for the review of the Municipality's decision to disconnect the community's water service and installation of PPMs in terms of the Water Services Act.⁹⁸ She will be advised that the class action

⁹⁶ Act 108 of 1997.

⁹⁷ Act 108 of 1997.

⁹⁸ Act 108 of 1997.

may be pursued exclusively, or concurrently with a gathering, as per the procedural requirements of the RGA. This scenario provides some benefits.

5.9.2 THE BENEFITS OF JUDICIAL OVERSIGHT

By introducing judicial oversight from the initial notification stage, the Magistrates' Court will be able to identify a cause of action giving rise to a triable issue in terms of the Water Services Act⁹⁹ at an early stage, and advise the community accordingly. This has the potential to enable the community to become proactively acquainted with litigation earlier, rather than at a later stage when review proceedings in terms of the RGA are undertaken as a reactive measure to the imposition of conditions or a refusal of authorisation.

By bringing the possibility of litigation at this early stage, Ms Mazibuko and her community may have a choice to proceed with litigation and/or protest action at an early stage. The strategic interplay between protest and law, discussed in chapter 5, may happen. In such circumstances the community will have more control as independent agents over their own litigation and gathering.

Should the community decide to proceed with a gathering, exclusively or in addition to litigation, the Magistrates' Courts' visibility at the initial notification stage will have the potential of promoting the Municipality's compliance with the provisions of the RGA.

In contrast to these benefits, there have been criticisms regarding the exercise of judicial review by Magistrates' Courts.

⁹⁹ Act 108 of 1997.

5.10 THE CRITICISM OF THE EXERCISE OF REVIEW POWERS BY MAGISTRATES' COURTS

It has been argued that whilst PAJA allows for the extension of the jurisdiction of Magistrates' Courts with such review powers and class standing, it will administratively burden the already strained magistracy.¹⁰⁰

Whilst Magistrates' Courts may practically become overburdened, by having to review and direct potential litigants in respect of class litigation, this criticism does not raise a legal argument, but rather speaks to a finance and day-to-day administration challenges. Addressing these challenges is beyond the scope of this thesis, and it is within the domain of the legislature to allocate sufficient resources for the effective administration of Magistrates' Courts.¹⁰¹ The SALC similarly acknowledged the responsibility of the legislature to provide adequate resources for the structural and institutional functioning of courts for class litigation.¹⁰² Enhancing the ability of Magistrates' Courts to promote class actions for the enforcement of constitutional rights is important for our constitutional democracy.

The importance of the constitutional jurisdiction of Magistrates' Courts was highlighted as early as 1994, by Froneman J, as he then was, in *Qozeleni v Minister of Law and Order*,¹⁰³ when he stated that it is:

“inconceivable that those provisions of [the Bill of Rights] which are meant to safeguard the fundamental rights of citizens should not be applied in courts where the majority of people have their initial and perhaps only contact with the provisions of the Constitution, namely the lower courts. Such an interpretation would frustrate its very purpose constituting a bridge to a better

¹⁰⁰ In *S v Steyn* 2001 (1) SA 1146 (CC) para 18, the Constitutional Court acknowledged that Magistrates' Courts function under great pressure, heavy case loads, long hours, difficult working conditions, relatively inexperienced legal practitioners, rudimentary library facilities, and inadequate physical working environments. Confirming these factors, Plasket was of the opinion that rather than vesting the Magistrates' Courts with this administrative review jurisdiction, it would serve the purpose of justice far better for the state to bolster its legal aid system, ensure that it functions at an acceptable level of competence and professionalism, and make it possible through funding and other means, for non-governmental public interest litigation organisations: C Hoexter *Administrative Law in South Africa* 2 ed (2012) 64; C Plasket *The Fundamental Right to Just Administrative Action: Judicial Review of Administrative Action in the Democratic South Africa* (PHD thesis, Rhodes University, 2002) 510-512.

¹⁰¹ Shortcomings in the interpretation of the provisions of the Bill of Rights. This is attributable to lack of adequate ongoing training on constitutional issues in the lower courts, and the historical, constitutional and institutional differences between superior courts and Magistrates' Courts. It is recommended that mechanisms should be put in place to facilitate the filtering-down of developments in constitutional law to Magistrates' Courts, particularly in rural areas: S Jagwanath “The Constitutional Roles and Responsibilities of Lower Courts” (2002) 18 *SAJHR* 201 at 214-216.

¹⁰² South African Law Commission Project 88: *Working Paper on the Recognition of a Class Action in South African Law* 54.

¹⁰³ 1994 (1) BCLR 75 (E); Jagwanath 2002 *SAJHR* 203.

future. It would negate the principle of accountability or justification in those courts where most of the day to day administration of justice takes place.”¹⁰⁴

Less than 4 years after this case, in March 1998, the SALC’s Discussion Paper into the “Constitutional Jurisdiction of Magistrates’ Courts”¹⁰⁵ similarly

“suggested that magistrates courts should be given a constitutional jurisdiction appropriate to their position in the court structure in South Africa. They represent the primary means of access to justice for most South Africans. An exclusion of all constitutional jurisdiction would be inappropriate...”¹⁰⁶

This report was submitted to the Minister of Justice, but nothing came of it.¹⁰⁷

Shortly thereafter, in *S v Steyn*¹⁰⁸ delivered on 29 November 2000, the Constitutional Court noted the historical division in the courts whereby less serious cases were dealt with by the Magistrates’ Courts cheaply and expeditiously, while superior courts ensured quality control by engaging in more involved adjudication. The court acknowledged the indispensable role of Magistrates’ Courts in providing access to justice, and was in favour of extending their jurisdiction.¹⁰⁹ Therefore, PAJA as a “quasi-constitutional”¹¹⁰ legislation, will allow for the extension of the jurisdiction of Magistrates’ Courts to indirectly¹¹¹ apply constitutional rights through the interpretation and enforcement of¹¹² the RGA and the Water Services Act.¹¹³

¹⁰⁴ 1994 (1) BCLR 75 (E) 83J-84A; Jagwanath 2002 *SAJHR* 203.

¹⁰⁵ South African Law Commission Project 111: *Discussion Paper on the Constitutional Jurisdiction of Magistrates’ Courts*.

¹⁰⁶ South African Law Commission Project 111: *Discussion Paper on the Constitutional Jurisdiction of Magistrates’ Courts* 25-26.

¹⁰⁷ Jagwanath 2002 *SAJHR* 221.

¹⁰⁸ 2001 (1) SA 1146 (CC).

¹⁰⁹ The court stated in this regard that “with the incremental increase of their jurisdiction over time, magistrates’ courts in South Africa do hear serious matters as well.”*S v Steyn* 2001 (1) SA 1146 (CC) paras 17-18; Jagwanath 2002 *SAJHR* 215-216.

¹¹⁰ Jagwanath 2002 *SAJHR* 212.

¹¹¹ Currie and de Waal *The Bill of Rights Handbook* 56-60.

¹¹² Jagwanath 2002 *SAJHR* 213 and 222.

¹¹³ Act 108 of 1997.

5.11 CONCLUSION

This reconstructed case study has enabled the positioning of Phiri community residents as independent agents, and for the assessment of their possible actions, in light of the avenues available to them. Without legal assistance, the most likely course to their knowledge, was to embark on a protest challenging the disconnection of their water and installation of PPMs. Upon informing the Municipality of their intended protest action, the Municipality could have informed them to either proceed with legal action challenging the municipal decision taken in terms of the Water Services Act,¹¹⁴ or a protected gathering in terms of the RGA. This is because the Water Services Act,¹¹⁵ and the RGA give effect to the rights of access to water and freedom of assembly respectively. These in turn give rise to two legally enforceable causes of action.

But because the community is not in a position to know about these legal causes of action, I have considered what the law can do to make them aware. For this purpose, I have looked at how a gathering in terms of the RGA, as the most accessible entry point into the legal system, could lead to a class action for the enforcement of these causes of action.

I started off at the RGA's preliminary notification stage, at which point the Municipality bears a legal obligation to ensure that the community is informed on how to issue notice of a gathering and comply with the procedures for the holding of a gathering in terms of the RGA. Scenario one provided that only once the Municipality imposes conditions or refuses authorisation for a gathering, can the community approach the Magistrates' Court for judicial review of this decision in terms of the RGA. Without legal means, this scenario proved to be of no assistance to the community. The second scenario looked at the introduction of an automatic review provision in the RGA to accelerate the judicial review in terms of PAJA. In order to proceed with a class action for judicial review of the municipal decision in terms of the RGA, the community residents would have to meet the class standing requirements. The Magistrates' Court in reviewing the notice of gathering for this purpose, would identify that the community's stated reasons for the gathering establish two causes of action for a class action: a cause of action in terms of the RGA and a cause of action based on the right of access to water in terms of the Water Services Act.¹¹⁶ The community would proceed

¹¹⁴ Act 108 of 1997.

¹¹⁵ Act 108 of 1997.

¹¹⁶ Act 108 of 1997.

with either cause of action or both, although at the later review stage. The third scenario looked at the introduction of judicial oversight in the RGA, whereby notice of a gathering is provided to both the Municipality and the Magistrates' Court. I have shown that this can catalyse the uptake of a class action in terms of the Water Services Act,¹¹⁷ at the initial notification stage, rather than at review stage in terms of the RGA. This scenario, as I have argued, is preferable as it can proactively promote access to courts. However, for this third scenario to be successful, legislative amendments to the RGA need to be made.

In the next chapter, I conclude my discussion and provide recommendations on how the RGA can be amended and therefore improved to give effect to scenario three. As I have shown, scenario three can better enable Ms Mazibuko and her community to proactively institute a class action.

¹¹⁷ Act 108 of 1997.

CHAPTER 6

CONCLUSION AND RECOMMENDATIONS

“This requires a new approach - one that moves from a passive citizenry receiving services from the state to one that systematically includes the socially and economically excluded, where people are active citizens of their own development, and where government works effectively to develop people’s capabilities to lead the lives they desire.”¹

6.1 INTRODUCTION

As lawyers and legal academics, we read cases with the primary purpose of extracting the legal principles established by the courts in specific or unique circumstances, for application to current or future circumstances which present themselves. In this sense, the law is a science of legal arguments founded on principles to be tested in our courtrooms. The current circumstances which have necessitated this study have been the widespread and increasing spate of violent and non-violent service delivery protests throughout South Africa. In seeking to find what solutions the law can provide in these circumstances, I have looked, amongst the caselaw on class actions discussed, specifically to the *Mazibuko* class action² as a relevant and applicable judicial precedent.

6.2 THE SIGNIFICANCE OF THE *MAZIBUKO* CLASS ACTION

In summary, the *Mazibuko* class action³ is relevant to the current circumstances in the following respects. Firstly, it is the first case to definitively interpret the basic right of access to sufficient water in South African law. Secondly, the case demonstrates how a community at protest over a socio-economic demand, which had a basis in law as a socio-economic right, could be granted certification for class litigation. This grant of certification confirms that there are fundamental similarities in the constitutive qualities of a protest action and class action, as highlighted earlier in the introductory chapter and then in chapter three.⁴ These similarities make it possible for a socio-

¹ National Planning Commission “National Development Plan: Vision For 2030” (2012) 3 <http://www.npconline.co.za/medialib/downloads/home/NPC%20National%20Development%20Plan%20Vision%202030%20-lo-res.pdf> (accessed on 9 September 2014) 1.

² *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W); *City of Johannesburg v Mazibuko* 2009 (3) SA 592 (SCA); *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

³ *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W); *City of Johannesburg v Mazibuko* 2009 (3) SA 592 (SCA); *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

⁴ Para 3.4.

economic demands protest action to be transformed into class action for the enforcement of a socio-economic right. Thirdly, this case demonstrated the power of a class action as a legal device and constitutional remedy aimed at promoting access to courts for an impoverished group, who would otherwise be unable to advance to court individually. Fourthly, this case showed the active role that courts⁵ can and should fulfil in facilitating class actions, especially in the interest of poor and vulnerable litigants, in accordance with their constitutional obligation to promote access to courts. These can all be gleaned from a reading of the case. However, ironically, what this case does not tell us, beyond the factual background relevant to establishing the legal principles, is about the human beings who have faded into the background of the case.

We call this now famous and often referred to authority in our constitutional socio-economic jurisprudence, the ‘Mazibuko class action.’ Calling it the ‘Mazibuko class action’ implies to the public mind that this now famous ‘Mazibuko’ person was a central protagonist in this important case which played itself out in a trilogy. Where is Ms Mazibuko now and does she have sufficient water today? Furthermore, where is Ms Grace Munyai, Ms Jennifer Makoatsane, Ms Sophia Malemute, Mr Vuzimuzi Paki, and the nameless class members on whose behalf ‘they’ acted? Do they have sufficient water today?

Very little is known or even written about the lives of these class representatives or their community. In contrast, there are significant legal academic and media writings, referred to in the course of this thesis, on the legal arguments made in the trilogy. Two very brief newspaper articles on the internet, reported that Ms Mazibuko, who had been very ill at the time when Tsoka J handed down judgment in *Mazibuko I*⁶ on 30 April 2008, died from a cancer related illness 21 days later. She had apparently celebrated this judgment.⁷ Not much is publicly known about the lives of the other applicants and Phiri community either.

⁵ Notably, how Tsoka J directed the applicant’s to proceed in the form of a class action as the grounds for it existed: see para 4.5.

⁶ *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W).

⁷ See footnote 109 in chapter four.

What this tells us about a class action, is that it assumes an identity of its own beyond the class representatives and class members who formed it. That is perhaps the irony of a class action. That in aiming to provide redress for persons, who would otherwise be unable to individually obtain legal redress, as a representational action it consolidates individuals into an indivisible nameless whole. It even continues despite the change of circumstances in the lives of the individual persons. Ms Mazibuko died at the conclusion of the first case in the trilogy, yet the “Mazubuko” class action lived on after her, continued to evolve, gaining momentum until it reached the Constitutional Court. The benefit of a class action therefore, must therefore accrue to the class as a whole, unlike an individual legal action whereby the litigants can die, and die with the case. With a class action, the legal challenge is continued to finality for the benefit of the group. With the help of public interest litigation organisations, the class action stretched the reach of the law beyond the applicants to their entire community. The ‘Mazibuko class action’ lived on after her to the benefit of her children and community. The word benefit connotes being a recipient of a benefit granted, without your agency. This contrasts to people as agents of change in their own lives. This was another irony revealed by this case, the class were beneficiaries in the litigation and not agents.

The case study shows clearly that whilst the courts have shown that class actions can be used for the poor, they are rarely being used independently by the poor. Surely, the law in a constitutional democracy envisages more agency from an active citizenry with rights and capabilities to enforce their own rights? The law must therefore, as I have argued, facilitate the attainment of legal agency to empower people to exercise their rights. In light of my discussions in this thesis, I now provide recommendations.

6.3 RECOMMENDATIONS

The Regulation of Gatherings Act⁸ (RGA) can be amended such that it provides that Municipalities must as starting point, inform local communities of the RGA. Municipalities in line with their constitutional obligation to facilitate the exercise of constitutional rights, the right to freedom of assembly in this instance, must publicly inform communities of the RGA. The Act⁹ could provide that Municipalities must place notices in prominent community public areas, newspapers, broadcast

⁸ Para 5.5.

⁹ Regulation of Gatherings Act 205 of 1993.

on radio or television, and other public medium and platforms, the purpose of the RGA and its procedures should communities intend to proceed with a gathering.

Having assisted the convener with completion of the notification form, as the Act¹⁰ currently requires, the RGA would also provide that such notification must be delivered by the responsible person or the convener to the local Magistrate's Court within 24 hours of completion and receipt.¹¹

The RGA would then direct that upon receipt of the notification, the Magistrate's Court be granted at maximum seven working days, or such time as the legislature deems necessary, in which to consider the notification as an urgent application for review. This of course requires the Minister to designate Magistrate's Courts as courts of review as required in terms of PAJA.¹²

The Magistrate's Court would upon receipt of the notification consider the notification and identify whether the requirements for certification of a class action for review in terms of PAJA, regarding the municipal action forming the basis of the protest demands exists. The RGA would explicitly direct the court to identify whether the socio-economic protest demand or demands have a legal basis as a socio-economic right claim or claims, for review in terms of PAJA.¹³

If the Magistrate's Court does identify the existence of a legal claim or claims which coincides with the protest demand or demands, it will have to inform both the Municipality and the convener in writing, that that such basis exists. The clerk of the Magistrate's Court will then advise the convener to attend at court to be advised by the clerk on what does a legal claim mean, what the legal process entails and how to go about making a *pro deo* application for legal representation, should the convener elect to proceed with a certification application.¹⁴ The RGA would state that the convener may further elect to proceed with an application for a gathering in terms of the RGA, according to the procedures outlined in the Act,¹⁵ in addition to a class action. The convener may also decide to pursue either a gathering or a class action. These amendments can place Ms Mazibuko and similarly

¹⁰ Regulation of Gatherings Act 205 of 1993.

¹¹ Para 5.6.

¹² Para 5.8.1.

¹³ As detailed in paragraphs 5.8.3 to 5.8.5.

¹⁴ Para 5.8.4.

¹⁵ Regulation of Gatherings Act 205 of 1993.

placed communities in a position of enhanced legal capabilities whereby they can exercise agency to help themselves out of their own poverty by demanding justice as a right.

The recommendations made in this thesis aim to make socio-economic justice more real and accessible to poor and vulnerable communities, without them having to singularly embark on prolonged protests without any other alternative. I have not discounted protest action from the picture. In fact, the dialectical relationship between protest action and litigation, as shown in the case study, makes it clear how protest action contributes to the vibrancy of a growing democracy. Gatherings are a way of bringing important issues of public interest to the public's attention. They stimulate and reinvigorate public deliberation and debate. They are the means through which our leaders are made aware, in the period between elections, that they are not fulfilling their political mandates in accordance with their constitutional obligations. What better way then to give legal enforcement to socio-economic demands than through the very legislation which aims to give effect to the exercise of the right to freedom of assembly. The proactive uptake of litigation through judicial oversight over the RGA is aimed to facilitate and accelerate access to courts for class actions. In this way, judicial oversight over the conduct of municipal decision-making, through the RGA, will in the future encourage municipalities to engage more openly with communities through democratic participation in socio-economic decision-making for the delivery of services.