

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

**Ed Couzens\***

### **SUMMARY**

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

---

\* Ed Couzens. BA Hons LLB (Wits) LLM Environmental Law (Natal and Nottingham) PhD (KZN). Associate Professor, University of Sydney, Sydney Law School, Australia; Attorney of the High Court, RSA. E-mail: ed.couzens@sydney.edu.au. Thanks are due to both Meda Couzens and Victor Nkiwane for their assistance with the research. The author has participated in the research project "Legal Framework to Promote Water Security" (WATSEC), financed by the Academy of Finland (268151).

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

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