

## Substantive Reasoning in Administrative-Law Adjudication

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### 1. Introduction

One of the main characteristics of constitutional transformation in South Africa is what Etienne Mureinik calls the shift towards a culture of justification in which 'every exercise of power is expected to be justified'.<sup>1</sup> He argues that within such a culture, constitutional rights 'are standards of justification - standards against which to measure the justification of the decisions challenged under them'.<sup>2</sup>

The notion of justification as central to constitutional democracy in South Africa has been developed further by a number of scholars. Alfred Cockrell was one of the first to assess the 'value-based nature of constitutional adjudication' emerging from the Constitutional Court's early jurisprudence.<sup>3</sup> Cockrell's basic argument is that 'the explicit intrusion of constitutional values into the adjudicative process signals a transition from a "formal vision of law" to a "substantive vision of law" in South Africa' in terms of which judges are 'required to engage with "substantive reasons" in the form of moral and political values' as opposed to the 'formal reasons' that characterised pre-constitutional adjudication.<sup>4</sup> Subsequently, in his well-known 1998 article, Karl Klare coined the phrase transformative constitutionalism in terms of which he focused in particular on adjudication and speaks of transformative adjudication as a mechanism through which judges can contribute towards social change.<sup>5</sup> Klare's analysis has been particularly influential in both academic and judicial engagement with the notion of justification.<sup>6</sup> Central to his argument is an assessment of how judges should go about justifying the outcomes of their decisions within the framework of transformative constitutionalism. In my view Klare's analysis offers a useful normative framework to understand the Constitution's<sup>7</sup> vision of the process of societal transformation grounded in law in South Africa and which, along with Cockrell's analysis of substantive reasoning,<sup>8</sup> provides one with a standard to measure our progress towards adjudication that reflects a culture of justification.

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<sup>1</sup> E Mureinik 'A bridge to where? Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31 32.

<sup>2</sup> Mureinik (n 1 above) 33.

<sup>3</sup> A Cockrell 'Rainbow Jurisprudence' (1996) 12 *SAJHR* 1 3.

<sup>4</sup> n 3 above, 3, drawing on PS Atiyah & RS Summers *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (1987).

<sup>5</sup> KE Klare 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 146 157.

<sup>6</sup> André van der Walt talks of the 'cottage industry in constitutional theory' that has been inspired by Klare's concept, AJ van der Walt 'Normative pluralism and anarchy: Reflections on the 2007 term' (2008) 1 *Constitutional Court Review* 77 91 n 56.

<sup>7</sup> Constitution of the Republic of South Africa, 1996 (the Constitution).

<sup>8</sup> In particular that part of Cockrell's contribution that builds on Atiyah & Summers' work (n 4 above). Before I am also criticised for not realising the difference between the arguments made by Klare and Cockrell (see T Roux 'Transformative constitutionalism and the best interpretation of the South African Constitution: distinction without

The constitutional requirement of justification thus impacts particularly on courts and the adjudication process. On the one hand, courts are vehicles for enforcing justification of public power. As Liebenberg states, 'South African courts are therefore important institutions where deliberation and accountability for the fundamental normative commitments of South Africa's constitutional order are fostered'.<sup>9</sup> But on the other hand, a culture of justification also insists on a particular mode of adjudication, of legal reasoning, by the courts as set out by Klare. Transformative constitutionalism requires the exercise of judicial power to be justified as much as any other form of public power.<sup>10</sup> These two implications of a culture of justification for adjudication are indeed linked. As Liebenberg points out, the role of courts as sites of justification of public conduct in terms of the Constitution's normative framework will be undermined if adjudication itself does not reflect a culture of justification.<sup>11</sup> Courts are thus required to both extract justification and reflect justification.

Commenting on this dimension of transformative constitutionalism, Chief Justice Langa notes:

The Constitution demands that all decisions be capable of being substantively defended in terms of the rights and values that it enshrines. It is no longer sufficient for judges to rely on the say-so of parliament or technical readings of legislation as providing justifications for their decisions. Under a transformative Constitution, judges bear the ultimate responsibility to justify their decisions not only by reference to authority, but by reference to ideas and values.<sup>12</sup>

Deputy Chief Justice Moseneke puts it even more concisely when he states that 'courts should search for substantive justice'.<sup>13</sup> These comments capture an important characteristic of the courts' justificatory obligations under transformative constitutionalism. Courts are not simply required to explain their decisions, but required to provide *substantive* justification within the particular normative framework of the Constitution. Judges are thus obliged to openly and honestly tell us what the substantive bases of their decisions are, including what values, policy objectives or political considerations truly motivated a particular outcome.<sup>14</sup> Substantive legal reasoning is a key element of transformative constitutionalism.

In this article I assess the progress towards the particular mode of substantive reasoning in administrative-law adjudication that the Constitution demands with reference to two judgments handed down by the Constitutional Court on consecutive days in 2009: *Mazibuko & Others v City of Johannesburg & Others*<sup>15</sup> and *Joseph & Others v City of Johannesburg & Others*.<sup>16</sup> These two judgments

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a difference?' (2009) 20 *Stellenbosch Law Review* 258 n 4), let me point out that I am relying on Cockrell in this article only to the extent that he argues for a vision of law that allows for substantive values to directly and explicitly inform adjudication.

<sup>9</sup> S Liebenberg *Socio-economic Rights Adjudication under a Transformative Constitution* (2010) 45.

<sup>10</sup> C Hoexter 'The future of judicial review in South African administrative law' (2000) 117 *SALJ* 484 500.

<sup>11</sup> n 9 above, 47.

<sup>12</sup> Langa (n 6 above) 353.

<sup>13</sup> D Moseneke 'The fourth Bram Fisher memorial lecture: transformative adjudication' (2002) 18 *South African Journal on Human Rights* 309 316.

<sup>14</sup> Klare (n 5 above) 165; Langa (n 6 above) 353.

<sup>15</sup> 2010 4 SA 1 (CC) (*Mazibuko*).

<sup>16</sup> 2010 4 SA 55 (CC) (*Joseph*).

seem to represent contrasting approaches to legal reasoning in administrative law. It is puzzling that virtually the same bench<sup>17</sup> in two unanimous judgments within a day sends out such mixed signals regarding the appropriate ‘conception of adjudicative process and method’<sup>18</sup> under the Constitution. In my view, the progress made towards substantive reasoning in administrative-law adjudication and thus constitutional transformation in a case like *Joseph* is greatly undermined by the inconsistency between the adjudicative methods adopted in these two judgments.

The analysis of the two judgments below<sup>19</sup> is preceded by a brief exposition of the shift from formalistic to substantive legal reasoning in administrative law as the constitutional standard against which the judgments will be evaluated. But before I embark on that discussion, let me point out what this article is not about. I do not intend to assess the correctness of the outcomes in these two judgments. I also do not directly evaluate the socio-economic- or equality-rights dimensions of the cases.<sup>20</sup> In line with the narrow purpose of the article, the analysis of the cases will only focus on the administrative-law reasoning in the two judgments, that is on the analytical procedure adopted by the Court.

## 2. Substantive administrative-law reasoning

Prior to 1994 the bulk of constitutional adjudication took place in terms of administrative law.<sup>21</sup> Within a system of parliamentary sovereignty and in the absence of a justiciable bill of rights, this is not

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<sup>17</sup> The only difference between the *Mazibuko* bench and the *Joseph* bench was that Langa CJ served on the latter, but not the former.

<sup>18</sup> Klare (n 5 above) 156.

<sup>19</sup> Considerably more time will be spent analysing the *Mazibuko* judgment than that in *Joseph* for the simple reason that the *Joseph* judgment only comprised 78 paragraphs compared to the 171 of *Mazibuko*. Furthermore, the issues and arguments presented and dealt with in *Joseph* were much more focused than those in *Mazibuko*, which dealt with a large number and range of different issues.

<sup>20</sup> For a critical analysis of these aspects of especially *Mazibuko* see Liebenberg (n 9 above) 466 – 480; L Williams ‘The role of courts in the quantitative-implementation of social and economic rights: a comparative study’ and D Roithmayr ‘Lessons from *Mazibuko*: shifting from rights to commons’ in this volume. Also see D Davis ‘Book review: *Socio-Economic Rights: Adjudication under a Transformative Constitution*’ (2010) 127 *SALJ* 557–561, ‘Transformation: the constitutional promise and reality’ (2010) 26 *SAJHR* 85–95–97; P O’Connell ‘The death of socio-economic rights’ 8 July 2010 <http://ssrn.com/abstract=1636296> (accessed 4 November 2010); P Danchin ‘A human right to water? The South African Constitutional Court’s decision in the *Mazibuko* case’ 13 January 2010 <http://www.ejiltalk.org/a-human-right-to-water-the-south-african-constitutional-court%e2%80%99s-decision-in-the-mazibuko-case/#more-1848> (accessed 4 November 2010); P de Vos ‘Water is life (but life is cheap)’ 13 October 2009 <http://constitutionallyspeaking.co.za/water-is-life-but-life-is-cheap/> (accessed 8 November 2010).

<sup>21</sup> In *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others* 2000 2 SA 674 (CC) Chaskalson P emphasised that administrative-law judicial review has always been a constitutional matter. At para 33 he notes: ‘The control of public power by the Courts through judicial review is and always has been a constitutional matter. Prior to the adoption of the interim Constitution this control was exercised by the courts through the application of common-law constitutional principles.’

surprising. Administrative law thus became the ‘surrogate’ bill of rights.<sup>22</sup> Adjudication within administrative law of this era was highly formalistic, (at least in part) a reflection of the pro-executive judicial mindset of the time.<sup>23</sup> This formalism was most evident in the classification of functions, which attempted to categorise administrative action into various types and which in turn determined what the nature and scope of judicial review were in relation to the particular action.<sup>24</sup> Thus, rules of procedural fairness (particularly *audi alteram partem*) only applied to ‘quasi-judicial’ administrative action and reasonableness only to ‘judicial’ and ‘legislative’ administrative action. This approach ‘led to a form of sterile conceptualism’<sup>25</sup> or extreme formalism in administrative-law adjudication<sup>26</sup> and by extension constitutional adjudication prior to 1994. Davis described this approach as a ‘jurisprudential slot machine’ in terms of which the characterisation of the action dictated the outcome in a mechanistic fashion.<sup>27</sup>

Administrative-law adjudication is thus the ideal context in which to assess the progress of the shift towards transformative adjudication necessitated by transformative constitutionalism. It provides a clear benchmark of formalistic constitutional adjudication before the advent of constitutionalism in South Africa, which serves as point of departure to measure the shift.

Against the formalism that characterised adjudication in the previous legal order, one can position the constitutional ideal of substantive legal reasoning that is central to transformative adjudication under the new regime. In this context Cockrell with reference to Atiya and Summers usefully describes substantive reasoning as based on ‘moral, economic, political, institutional or other social consideration[s]’.<sup>28</sup> Cora Hoexter has been especially influential in promoting the notion of transformative adjudication in administrative law. In her important 2000 article Hoexter calls for variability in the application of administrative-law rules, which involves a decisive ‘movement *away* from conceptualism’ towards substantive reasoning in which judges are ‘explicit about the factors that inspire judicial intervention and non-intervention’.<sup>29</sup> More recently she has argued that transformative adjudication can be viewed as a device that may free judges from the restrictive judicial method of the past, in particular in administrative law.<sup>30</sup> She describes transformative adjudication as ‘what judges

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<sup>22</sup> See K Govender ‘Administrative law as a surrogate for human rights law’ in H Corder & L van der Vijver (eds) *Realising Administrative Justice* (2002) 45; Hoexter (n 10 above) 486; C Hoexter ‘The transformation of South African administrative law since 1994 with particular reference to The Promotion of Administrative Justice Act 3 of 2000’ unpublished PhD thesis, University of the Witwatersrand, 2009 11 – 12.

<sup>23</sup> See H Corder *Judges at work: The role and attitudes of the South African appellate judiciary 1910 – 50* (1984), ‘A century worth celebrating’ (2010) 127 *SALJ* 571; CF Forsyth *In danger of their talents: A study of the Appellate Division of the Supreme Court of South Africa from 1950 - 80* (1985); Hoexter (n 22 above) 13.

<sup>24</sup> See L Baxter *Administrative Law* (1984) 344 – 353.

<sup>25</sup> Baxter (n 24 above) 344.

<sup>26</sup> C Hoexter ‘Judicial policy revisited: Transformative adjudication in administrative law’ (2008) 24 *SAJHR* 281 287.

<sup>27</sup> DM Davis ‘To defer and when? Administrative law and constitutional democracy’ in H Corder (ed) *Comparing Administrative Justice across the Commonwealth* (2006) 34.

<sup>28</sup> n 3 above, 5.

<sup>29</sup> n 10 above, 504 (emphasis in original).

<sup>30</sup> n 26 above; also see Hoexter (n 22 above) especially chapter 4.

must do in order to achieve the aims of transformative constitutionalism'.<sup>31</sup> Central to this vision of adjudication is what she calls a 'policy of anti-formalism' that entails 'substantive and purposive rather than formalistic modes of judicial reasoning'<sup>32</sup> in terms of which judges acknowledge candidly what factors, importantly including extra-legal factors, inform their decisions.

The notion of transformative adjudication does not amount to a call for substantive reasoning to the exclusion of formal reasoning. Form plays an important role in all legal reasoning. Indeed one may argue that judges cannot get away from form in adjudication, nor should they.<sup>33</sup> Judges should not be allowed to decide cases with reference to any substantive considerations that they happen to favour, i.e. free-floating social and political preferences. The mode of reasoning that transformative adjudication requires allows for formal reasoning, but not formalism. Under this approach judges are allowed and may at times be required to decide cases narrowly with reference to concepts and the text of legal rules for example, but not in an abstract formalistic manner. Reference to form should not result in adjudication that is 'based on abstract and rigid constructs and reasoning ... unresponsive to the political and social context and power relations in society'.<sup>34</sup> Judges relying on formal reasoning should acknowledge that such forms are dependent on substantive considerations, that they are mostly contingent and do not admit to only one outcome in a particular context. Transformative adjudication calls for these substantive considerations that inform the interpretation and application of legal forms, above all context in a particular instance, to be dealt with honestly and openly in adjudication. In addition, reference to substantive considerations alone does not convert otherwise objectionable formalistic reasoning into transformative adjudication. As argued above, the particular substantive considerations informing a decision must be rooted in the Constitution's normative framework. Furthermore, the substantive reasoning must be rigorous and theoretically well-founded, that is able to stand up to critical scrutiny. It is helpful to keep in mind that one foundation of transformative adjudication is the culture of justification. It is thus justifiable substantive reasoning that lies at the heart of transformative adjudication.

The adoption of a policy of anti-formalism remains a challenge in administrative-law adjudication.<sup>35</sup> This is not only due to the lingering vestiges of the adjudicative method of the previous legal order or the formalism inherent in many administrative-law rules as they developed under common law in terms of such a method, but is reinforced by more recent developments in administrative law. The definition of administrative action<sup>36</sup> and by implication the determination of what amounts to administrative

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<sup>31</sup> Hoexter (n 26 above) 286.

<sup>32</sup> Hoexter (n 26 above) 287.

<sup>33</sup> See C Forsyth 'Showing the fly the way out of the flybottle: The value of formalism and conceptual reasoning in administrative law' (2007) 66 *Cambridge Law Journal* 325; JC Froneman 'Legal reasoning and legal culture: Our "vision" of law' (2005) 16 *Stellenbosch Law Review* 3 5-7; Hoexter (n 22 above) 37-38; Klare (n 5 above) 149, 160.

<sup>34</sup> S Liebenberg 'Socio-economic rights beyond the public/private law divide' in M Langford, J Dugard and T Madlingozi (eds) *Symbols or Substance? The Role and Impact of Socio-economic Rights Strategies in South Africa* (2012 forthcoming).

<sup>35</sup> Hoexter (n 26 above) 288.

<sup>36</sup> The definition of administrative action is found in s 1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

action reasserts excessive conceptualism and thus formalism in our new ‘constitutionalised’ administrative law. The highly technical, conceptual and ‘cumbersome’<sup>37</sup> definition of administrative action in PAJA has inhibited courts from breaking out of their old adjudicative ways. As with the classification of functions under common law, the law reports are still filled today with judgments struggling with the conceptual and formalistic question of whether administrative law applies to a particular action or not. The adjudicative focus thus still seems to be on the formal and technical application dimension of judicial review, rather than on the substance of either the applicability or content of administrative-law rules.

Perusing the judgments on whether particular action amounts to administrative action (either under PAJA or directly under s 33 of the Constitution), one finds very little substantive engagement on whether administrative-law control should apply to the particular functions and much emphasis on the technical and legalistic elements of the statutory definition and the interpretation of the term ‘administrative action’ under the Constitution. Following the identification of a list of factors in determining whether action amounts to administrative action under the Constitution in *President of the Republic of South Africa v South African Rugby Football Union*<sup>38</sup> and the slicing-up of the definition in s 1 of PAJA into various distinct elements,<sup>39</sup> it has become quite common for courts to adopt a fairly mechanistic and formalistic check-box approach to the question whether administrative-law rules apply to particular conduct. Very little attention is also paid to the content of administrative-law rules within a specific context once action is found to be administrative action.

Administrative law thus still suffers from excessive conceptualism and consequently formalism. It seems that the fundamental changes in substantive law introduced by the Constitution have not by themselves managed to shift adjudication in administrative law towards a transformative methodology, which endorses substantive reasoning that openly acknowledges the policy and political motivations behind particular outcomes. As much as it is the Constitutional Court’s role to act as final interpreter of what the Constitution means in substance and how legal rules are to comply with those substantive standards, the Court must also provide guidance to other courts on the appropriate adjudicative method under the Constitution.<sup>40</sup> Such guidance should not only flow from the Court’s express instructions on

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<sup>37</sup> *Greys Marine Hout Bay and Others v Minister of Public Works and Others* 2005 6 SA 313 (SCA) para 21.

<sup>38</sup> 2000 1 SA 1 (CC) para 143: ‘Determining whether an action should be characterised as the implementation of legislation or the formulation of policy may be difficult. It will, as we have said above, depend primarily upon the nature of the power. A series of considerations may be relevant to deciding on which side of the line a particular action falls. The source of the power, though not necessarily decisive, is a relevant factor. So, too, is the nature of the power, its subject-matter, whether it involves the exercise of a public duty and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is. While the subject-matter of a power is not relevant to determine whether constitutional review is appropriate, it is relevant to determine whether the exercise of the power constitutes administrative action for the purposes of s 33’ (footnotes omitted).

<sup>39</sup> See eg *Chirwa v Transnet Ltd and Others* 2008 4 SA 367 (CC) para 181; *Van Zyl v New National Party and Others* [2003] 3 All SA 737 (C); G Quinot *Administrative Law Cases and Materials* (2008) 211.

<sup>40</sup> See Froneman J’s remarks in *Nakin v MEC, Department of Education, Eastern Cape, & Another* 2008 6 SA 320 (Ck) para 28; and Willis J’s remarks in *Emfuleni Local Municipality v Builders Advancement Services CC and Others* 2010 (4) SA 133 (GSJ) paras 16 – 17, 30.

adjudicative method,<sup>41</sup> but also (and perhaps most importantly) from its own example. This brings me to the two 2009 judgments of *Joseph* and *Mazibuko*. In the following sections I will assess these two judgments against the need to move from a formalistic judicial methodology to substantive reasoning in administrative law.

### 3. *Joseph*

In *Joseph* the applicants were all tenants living in an apartment building in Johannesburg. Apart from rent, they also paid their landlord for their electricity use. The landlord (the fourth respondent) in turn had a contract for the supply of electricity to the building with the City of Johannesburg's wholly owned electricity services company, City Power (Pty) Ltd. The tenants thus had no direct contractual relationship with City Power. Following the accumulation of significant arrears in the landlord's payments to City Power, the electricity supply to the building was terminated. Notice of termination was given to the landlord, but not to the tenants. After a number of days without electricity supply and failed attempts to communicate with the landlord, the tenants contacted the City and were told of the landlord's arrears as the reason for disconnection. When a number of legal strategies failed to procure reconnection of the electricity supply,<sup>42</sup> the tenants approached the High Court for an order that the supply be reconnected and a declaratory order that the disconnection without notice to the tenants was procedurally unfair under PAJA.

The High Court refused both an urgent application for an order to restore electricity supply to the building pending a review application, and the subsequent application for reconnection and an order declaring the disconnection without notice to the tenants procedurally unfair.<sup>43</sup> In both instances the High Court held that the tenants had no rights that were affected by the disconnection and were thus not entitled to the relief sought. In commenting on the effect of City Power's action, the High Court noted that 'City Power has taken action against the fourth respondent, not against the occupiers'.<sup>44</sup> This conclusion followed on the reasoning that only the landlord had a contractual relationship with City Power on the basis of which City Power acted against the landlord in disconnecting the electricity supply. That it was in substance the tenants that were hit by City Power's termination of the electricity supply played no role in the High Court's reasoning.

On direct appeal to the Constitutional Court, Skweyiya J (for the Court) framed the issue to be decided as 'whether any legal relationship exists between the applicants and City Power outside the bounds of contractual privity that entitles the applicants to procedural fairness before their household electricity supply is terminated'.<sup>45</sup> The applicants argued that their constitutional rights to housing<sup>46</sup> and

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<sup>41</sup> See eg *Bernert v Absa Bank Ltd* [2010] ZACC 28; *S v Basson* 2007 3 SA 582 (CC); *Stuttafords Stores (Pty) Ltd and Others v Salt of the Earth Creations (Pty) Ltd* [2010] ZACC 14.

<sup>42</sup> These included contacting the Human Rights Commission and the Rental Housing Tribunal.

<sup>43</sup> *Darries and Others v City of Johannesburg and Others* 2009 5 SA 284 (GSJ) (*Darries*).

<sup>44</sup> *Darries* para 42.

<sup>45</sup> *Joseph* para 2.

dignity<sup>47</sup> as well as their contractual rights with the landlord were affected by City Power's decision to terminate the electricity supply and that they accordingly were entitled to procedural protection under s 3 of PAJA.<sup>48</sup> The respondents replied that no rights of the applicants were affected by City Power's decision and that they could thus not rely on PAJA.<sup>49</sup> The respondents' arguments in this regard were premised on various conceptual aspects of the definition of administrative action and the qualifications on the right to procedural fairness in PAJA<sup>50</sup> and thus invited the now familiar formalistic approach to resolving issues of this nature.<sup>51</sup> In approaching the procedural fairness question the Court noted the two-pronged nature of administrative-law procedural fairness analyses: firstly the question whether the rules of procedural fairness apply in the particular case and secondly, if so, what the content of those rules are in the context.<sup>52</sup> The Court held that the applicants were entitled to procedural fairness under PAJA and that the termination of the electricity supply without following a fair procedure vis-à-vis the tenants thus had to be set aside.

Right out of the starting blocks the Constitutional Court expressly broke with the High Court's formalistic reasoning and cut through the legalistic conceptualism that characterised the High Court's ruling in denying a relationship between the tenants and City Power. In this regard Skweyiya J noted that it is 'artificial to think of the contractual relationship between [the landlord] and City Power as being unrelated to the benefits that accrued to the applicants under this contract'.<sup>53</sup> With this statement Skweyiya J identified the real substance of the relationships at stake in this matter as his starting point and proceeded to assess the applicable legal framework against the substance of the matter, rather, as the High Court seems to have done, posit the legal framework as the starting point and assessing the substance of the case through that legal prism.

This substantive starting point is thoroughly cemented by the Court's choice to engage with the content or substance of procedural fairness rather than the formalistic and conceptual application question. In paragraph 29, Skweyiya J acknowledged the legitimacy of the respondents' administrative efficiency arguments, that is the familiar argument that courts should not impose onerous procedural burdens on state administration, but pointed out that these arguments should not determine whether rules of procedural fairness apply, but rather what the content of such rules are in a given case. With this approach the Court continued earlier judgments such as that of Cameron JA in *Logbro Properties v*

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<sup>46</sup> Constitution s 26.

<sup>47</sup> Constitution s 10.

<sup>48</sup> *Joseph* para 12.

<sup>49</sup> *Joseph* para 16.

<sup>50</sup> *Joseph* para 26. The respondents relied specifically on the element of the definition in s 1(i) of PAJA requiring the relevant decision to have a 'direct, external legal effect' and the qualification on the application of procedural fairness under PAJA in s 3(1), which requires a material and adverse effect on the particular person's rights.

<sup>51</sup> See e.g. *Joseph* para 28.

<sup>52</sup> *Joseph* para 21.

<sup>53</sup> *Joseph* para 23.

*Bedderson NO*<sup>54</sup> in taking 'important steps away from formalism and towards the substantive style of reasoning called for by the Constitution'.<sup>55</sup>

The Court's determination of the applicability of procedural-fairness rules in this case also reveals admirable substantive reasoning. Rather than engaging in highly technical and abstract conceptual analyses of terms such as 'legal effect' and 'rights' to decide whether s 3 of PAJA applies, the Court focused expressly on the substantive values and factors that inform the need for administrative justice, that is the need to apply rules of procedural fairness. In this regard the Court emphasised the need 'properly to instrumentalise principles of good governance',<sup>56</sup> the role of procedural fairness in affirming the dignity of all those affected by public action and raising the quality of decision-making,<sup>57</sup> in achieving 'a culture of accountability, openness and transparency', especially in public administration,<sup>58</sup> and to foster trust in state administration and more generally democracy,<sup>59</sup> and finally the need for effective debt collection mechanisms.<sup>60</sup> Against these factors the Court clearly and expressly justified its view that the scope of application of procedural-fairness rules under PAJA should be wide.<sup>61</sup> This approach is an illustration of what Hoexter has called the 'preferable' mode of substantive reasoning, in which courts 'decode the relevant factors, bring them out into the open, inspect them and evaluate them'.<sup>62</sup>

The Court's reasoning in this part of the judgment is not simply substantive and therefore commendable. It also contains the required justification of the substantive considerations relied upon with due regard to the formal dimensions of the applicable legal rules to make it a good illustration of transformative adjudication. Skweyiya J clearly positioned his reasoning within the formal application framework of s 3 of PAJA, particularly regarding the required impact on rights. He did not disregard the formal requirements in favour of the substantive considerations highlighted in the previous paragraph, which motivated the application of rules of procedural fairness. Instead, Skweyiya J reconceptualised the impact requirement based on existing jurisprudence relating to the relationship between citizens and local authorities.<sup>63</sup> On this theoretical foundation he proceeded to identify a number of

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<sup>54</sup> 2003 2 SA 460 (SCA).

<sup>55</sup> Hoexter (n 26 above) 292. The reasoning in *Joseph* strongly resembles that in *Logbro* in another important aspect, viz in the way that the Court in *Joseph* rejected the artificial contractual view of the parties' relationship as noted above. With this approach the Constitutional Court followed in the footsteps of *Logbro* in rejecting the highly formalistic approach of Ogilvie Thompson AJA in *Mustapha and Another v Receiver of Revenue, Lichtenburg and Others* 1958 (3) SA 343 (A) to view an essentially regulatory relationship as a purely private contractual one thereby denying the application of public-law rules of fairness. See G Quinot *State Commercial Activity: A Legal Framework* (2009) 68 – 71.

<sup>56</sup> *Joseph* para 45.

<sup>57</sup> *Joseph* para 42.

<sup>58</sup> *Joseph* paras 43. 44.

<sup>59</sup> *Joseph* para 46.

<sup>60</sup> *Joseph* paras 49 – 55.

<sup>61</sup> *Joseph* para 45.

<sup>62</sup> Hoexter (n 26 above) 293.

<sup>63</sup> *Joseph* paras 24 – 25. He specifically relied on Sachs J's innovative conceptualisation of the relationship between homeless people and public land owners in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing Rights and Evictions and Another, Amici Curiae)* 2010 3 SA 454 (CC) para 343.

constitutional and statutory provisions that construct a public-law relationship between the authority and citizens relating to service delivery in the particular context. In this relationship he consequently identified a 'public law right to receive this basic municipal service',<sup>64</sup> which in turn triggered the application of s 3 of PAJA. This is a fairly innovative and fully justified way of interpreting s 3 of PAJA. It is innovative because it does not insist on private-law rights or even fundamental rights as triggers for the application of procedural fairness, but recognises the adequacy of public-law relationships as founding rights worthy of (procedural) protection in administrative law. Skweyiya J furthermore justified his choice for this interpretation not simply by reliance on the text of the Act or the Court's authority as final interpreter of constitutional rights (including statutes giving effect to rights such as PAJA), but with reference to the clear constitutional imperatives of good governance flowing from foundational principles of the rule of law and public administration values in the Constitution.

On the content of the rules of procedural fairness, the Court also broke out of the seemingly formalistic approach adopted in s 3 of PAJA. While this provision expressly recognises the contextual variability of procedural fairness,<sup>65</sup> it nevertheless ostensibly lays down mandatory minimum requirements that administrators must meet in order for administrative action to be procedurally fair.<sup>66</sup> Rather than simply relying on 'the say-so of parliament or technical reading'<sup>67</sup> of the Act, the Court held that the values underlying procedural fairness require a contextual application of these rules and that a strict interpretation of s 3 of PAJA thus cannot be adopted. In order for a court to fulfil its role in providing guidance to administrators on how they should go about taking decisions and avoiding the need for 'circuitous litigation', s 3 is read to confer a discretion on courts as to how the minimum procedural requirements must be enforced.<sup>68</sup> This approach provides a clear basis for the continued variable application of procedural-fairness rules, which involves a substantive engagement with what a fair procedure would be in a given case. The focus is thus shifted away from a sterile enquiry of whether rules of procedural fairness apply at all and an automatic application of a fixed set of procedures if procedural fairness is held to apply.

The *Joseph* judgment thus makes an important contribution to the development of a substantive model of adjudication in administrative law. It breaks with the formalistic reasoning style of the past, but also breaks out of the formalism ostensibly reintroduced in our administrative law by PAJA and the fixation with threshold concepts under our constitutionalised administrative law. The judgment shows the proper way forward in adjudicating procedural-fairness disputes with reference to the substantive values and practical factors that motivate a particular view. Following *Joseph* there is no excuse any longer for adopting an all-or-nothing formalistic approach to either the application or content of procedural fairness as a key component of administrative justice. In a very real sense *Joseph* thus makes

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<sup>64</sup> *Joseph* para 47.

<sup>65</sup> PAJA s 3(2)(a) states that a 'fair administrative procedure depends on the circumstances of each case'.

<sup>66</sup> PAJA s 3 (2)(b) states that '[i]n order to give effect to the right to procedurally fair administrative action, an administrator ... must' take the procedural steps listed in the section, subject only to the strict departure provisions contained in s 3(4) and s 3(5).

<sup>67</sup> Langa (n 6 above) 353.

<sup>68</sup> *Joseph* para 59.

an important contribution to the further development of administrative law in the area of service delivery. Since *Joseph* can be read as largely having settled the question of the applicability of procedural fairness rules to service delivery decisions, the focus in future cases can properly now shift to the substance of the state's procedural obligations in this context. However, this model of substantive reasoning in administrative-law adjudication stands in stark contrast to the Court's judgment in *Mazibuko*.

#### 4. *Mazibuko*

*Mazibuko* dealt with the implementation of a new water provision system in Phiri in Soweto. Water was supplied to the mostly poor residents of Phiri on the basis of a flat monthly rate by the City of Johannesburg through its wholly owned water services company, Johannesburg Water (Pty) Ltd. In order to address massive water losses in this area, the City adopted a new plan for water provision in Soweto, known as Operation Gcin'amanzi. In essence the implementation of this plan in Phiri involved changing the flat rate basis of water provision to either the so-called Service Level 2 water provision or a connection with a prepayment meter. Service Level 2 amounts to 'the provision of a tap in the yard of a household which has a restricted water flow so that only 6 kilolitres of water are available monthly'.<sup>69</sup> A connection with a prepayment meter allows a set amount of free water per month plus any further water pre-paid by the resident, but shuts the water supply off when the pre-paid credits run out, at least until the next month when the basic amount of free water would again be available. Households in Phiri were individually given a free choice between these two options. However, a failure to pick either one resulted in the water supply being cut off. During the implementation of this new plan community facilitators visited each household to explain the choice between the two options and canvass the relevant household's decision. Five Phiri residents subsequently challenged the new water provision plan on a number of constitutional bases. The specific challenge relevant for present purposes was that the installation of the prepayment meters in Phiri violated principles of administrative justice.

In the High Court Tsoka J ruled in favour of the applicants.<sup>70</sup> His reasoning on the parties' administrative-law arguments is noteworthy. He held that the introduction of the prepayment meter system amounted to administrative action and was thus reviewable on administrative-law grounds.<sup>71</sup> In this determination the judge distinguished between the decision of the City's municipal council to *inter alia* make use of prepayment meters as part of its decision to adopt Operation Gcin'amanzi on the one hand and the introduction of the prepayment meters in relation to individual households on the other.<sup>72</sup> While the former decision may not be reviewable (at least not on administrative-law grounds) the judge was satisfied that the latter was indeed administrative action. He subsequently found that there was no

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<sup>69</sup> *Mazibuko* para 14.

<sup>70</sup> *Mazibuko and Others v City of Johannesburg and Others (Centre on Housing Rights and Evictions as amicus curiae)* [2008] 4 All SA 471 (W) (*Mazibuko W*).

<sup>71</sup> *Mazibuko W* paras 63, 70.

<sup>72</sup> *Mazibuko W* para 67.

legal basis for the wholesale implementation of a prepayment meter system and that it was accordingly unlawful.<sup>73</sup> He also held that the discontinuation of the water supply resulting from the functioning of the prepayment water meters was unlawful, unreasonable and procedurally unfair.<sup>74</sup> The judge rejected the respondents' arguments that the introduction of the prepayment meters did not result in a cut-off of the water supply since residents could still get access to water beyond the basic free amount against payment of a fee. The judge noted that in effect the prepayment meter system did amount to a 'limitation, discontinuation or cut off' since it left the applicants effectively without water.<sup>75</sup>

On appeal the Supreme Court of Appeal upheld the High Court's finding that the installation of the prepayment meters was unlawful.<sup>76</sup> The SCA, like the High Court, rejected the argument that the effect of the prepayment meters was not to cut off the water supply on the basis that supply was still available against payment.<sup>77</sup> The SCA noted that in substance there was no difference between the effect of the discontinuation of water by the prepayment meter when the credits ran out and the cut-off of water supplied under a credit meter by the service provider following non-payment.<sup>78</sup> Since detailed provision was made for notice and representations prior to cut-off in the case of credit meters, the Court found it objectionable that cut-off would follow automatically without any clear opportunity for making representations in the case of prepayment meters when the credits ran out.<sup>79</sup> In the Court's view the absence of any provision for notice and representations prior to cut-off under prepayment meters similar to the procedures stipulated in relation to credit meters indicated that the relevant empowering provisions did not contemplate the wholesale installation of prepayment meters.<sup>80</sup>

When the matter reached the Constitutional Court, the Court identified two major issues to be decided of which the second was 'whether the installation of pre-paid water meters by the first and second respondents in Phiri was lawful'.<sup>81</sup> This depiction of the second leg to the applicants' case is somewhat misleading since the arguments in this part went well beyond a narrow focus on lawfulness or even the broader notion of legality. The applicants also challenged the introduction and functioning of the prepayment meters on procedural fairness grounds and to a limited extent also on (administrative-law) reasonableness grounds.<sup>82</sup> The second leg of the case can thus be more accurately described as the administrative-justice challenge to the installation of the prepayment meters in Phiri.

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<sup>73</sup> *Mazibuko W* para 82.

<sup>74</sup> *Mazibuko W* paras 92, 93.

<sup>75</sup> *Mazibuko W* para 84.

<sup>76</sup> *City of Johannesburg & Others v Mazibuko and Others* 2009 3 SA 592 (SCA) (*Mazibuko SCA*) para 58.

<sup>77</sup> *Mazibuko SCA* para 55.

<sup>78</sup> *Mazibuko SCA* para 55.

<sup>79</sup> *Mazibuko SCA* para 56.

<sup>80</sup> *Mazibuko SCA* paras 56-58.

<sup>81</sup> *Mazibuko* para 6. The first issue was whether the City's water policy and in particular the level of free water provided under that policy was reasonable in accordance with s 27 of the Constitution and the applicable legislation. The Court held that the City's policy was reasonable and hence constitutional (paras 9, 169).

<sup>82</sup> See *Mazibuko* para 105.

The Court held that the installation of the prepayment meters was lawful and thus reversed the findings of the High Court and SCA.<sup>83</sup>

The reasoning in O'Regan J's judgment for the unanimous Court is interesting for a number of reasons. As a point of departure it is notable how O'Regan J almost exclusively focuses on the broad water-provision perspective, one may say the perspective of Johannesburg Water, in her framing of the 'background' to the case.<sup>84</sup> One is told of the significant water losses in Soweto and the problem of non-payment, the plans the City made in response and the ostensible success and 'customer satisfaction' of the project. Notably absent is any detailed reference to the dire personal circumstances of many of the residents and the effect of the limitation of water introduced by the project on their lives, despite the detailed submissions made in this regard.<sup>85</sup> My point is not that these latter considerations should have trumped the former or should have moved the Court to a different conclusion, but simply that the absence of any reference to these matters as a significant dimension of the substantive considerations informing this case is surprising. This raises a first red flag in relation to the reasoning of the Court in this case. One is left wondering why the Court is pointedly silent on these matters, or worse, why the Court seemingly opted to emphasise only one set of substantive considerations.

The second noteworthy aspect of O'Regan J's reasoning is what may be called the 'recasting' or reframing of the applicants' case. The Court cast the applicants' argument in favour of a specific amount of free water as a minimum core argument.<sup>86</sup> However, this is not an accurate depiction of the applicants' submissions as both Dugard<sup>87</sup> and Liebenberg<sup>88</sup> point out. Rather than arguing for a minimum core to the s 27 right, the applicants argued for the recognition of a particular substantive standard of water provision against which the respondents' conduct should be assessed in the specific context of the case at hand within the established reasonableness-review approach.<sup>89</sup> This is not the same as the minimum core argument. The Court's reframing of the applicants' argument as a minimum core one, however, largely allowed it to simply rely on precedent, in particular the rejection of the minimum core argument in earlier judgments such as *Grootboom*,<sup>90</sup> in dealing with this most challenging substantive aspect of the current matter.<sup>91</sup> In short, by utilising a fairly formalistic reasoning technique,

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<sup>83</sup> *Mazibuko* paras 9, 169.

<sup>84</sup> *Mazibuko* paras 10 – 18.

<sup>85</sup> See e.g. Applicants' Submissions paras 10 – 12, 99 – 105, 146.3, 289; Amicus Curiae's Heads of Argument paras 6 – 10 both available at <http://www.constitutionalcourt.org.za/uhtbin/cgisirsi/vQzMHkkz3V/MAIN/145660012/523/10473> (accessed 18/11/2010).

<sup>86</sup> *Mazibuko* para 52.

<sup>87</sup> 'Response to P Danchin "A human right to water? The South African Constitutional Court's decision in the *Mazibuko* case"' 17 April 2010 <http://www.ejiltalk.org/a-human-right-to-water-the-south-african-constitutional-court%E2%80%99s-decision-in-the-mazibuko-case/#more-1848> (accessed 23 November 2010).

<sup>88</sup> n 9 above, 467.

<sup>89</sup> See Applicants' Submissions (n 85 above) paras 17.2, 320 et seq.

<sup>90</sup> *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC).

<sup>91</sup> *Mazibuko* paras 53 – 56.

the Court avoided the single biggest substantive question in the case.<sup>92</sup> It is furthermore noteworthy in passing that this part of the judgment seems to endorse a decidedly formal conception of reason in terms of which the reasonableness test does not amount to much more than thin rationality. This reasoning leads to a largely process-orientated view of the enforcement of entitlements under listed socio-economic rights such as s 27.<sup>93</sup>

The formalism of the *Mazibuko* judgment is, however, most evident in the Court's reasoning on the administrative-justice (second) leg of the case, that is the challenge to the lawfulness of the installation of pre-paid water meters. It is this part of the judgment<sup>94</sup> that is most noteworthy for present purposes and that stands in such stark contrast to the *Joseph* judgment. I want to focus specifically on three aspects of this part of the judgment that illustrate the formalism of the reasoning employed by the Court. Firstly, I will deal with the Court's reading of the relevant Water Services By-laws in answering the question whether those by-laws authorise the installation of prepayment meters. Secondly, I will assess the Court's reasoning on the issue whether the functioning of the prepayment meters amount to a limitation or discontinuation of water to the residents and thirdly, I will deal with the procedural-fairness challenge of the decision to implement the prepayment water provision system.

The first issue that the Court dealt with in this part of the judgment was whether the installation of the prepayment meters was lawful in a strict sense, that is whether an empowering provision existed that authorised such installation. In reaching the conclusion that the City's Water Services By-laws did authorise the installation of prepayment meters generally, the Court employed remarkably formalistic reasoning. O'Regan J adopted the respondents' interpretation of s 3 of the by-laws.<sup>95</sup> In this interpretation the description of Service Level 3, viz. a 'metered full pressure water connection', is read to include prepayment meters, in other words 'meter' as used here is read to include prepayment and credit meters. The Court adopted this reading on the basis that it is 'textually permissible'.<sup>96</sup> This is

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<sup>92</sup> This approach in *Mazibuko* strongly resembles the Court's approach to the interaction of labour law and administrative law in the context of public employment in judgments such as *Chirwa v Transnet Ltd and Others* 2008 4 SA 367 (CC) where the majority of the Court virtually recharacterised the applicant's stated administrative-law/PAJA claim as a labour-law/LRA claim. On the basis of this reframing of the case, the Court consequently found that the High Court did not have jurisdiction over the matter. In his dissenting opinion in *Chirwa*, Langa CJ specifically noted what he called the 'mischaracterisation' of the claim by Skweyiya J for the majority (paras 157 – 159). Although he did not agree that the *Chirwa* majority indeed recharacterised the claim, Nugent JA nevertheless noted in *Makhanya v University of Zululand* 2010 1 SA 62 (SCA) para 72 that 'a claim, which exists as a fact, is not capable of being converted into a claim of a different kind by the mere use of language. Yet that is often what is sought to be done under the guise of what is called "characterising" the claim. Where that word is used to mean "describing the distinctive character of" the claim that is before the court, as a fact, then its use is unexceptionable. But when it is used to describe an alchemical process that purports to convert the claim into a claim of another kind, then the word is abused. What then occurs, in truth, is not that the claim is converted, but only that the claimant is denied the right to assert it' (footnote omitted). See C Hoexter 'Clearing the intersection? Administrative law and labour law in the Constitutional Court' (2008) 1 *Constitutional Court Review* 209 220 – 221.

<sup>93</sup> The Court's approach to the reasonableness test in socio-economic rights adjudication is an important aspect of the case and beyond the scope of this article. See generally Liebenberg (n 9 above) 472 – 480.

<sup>94</sup> *Mazibuko* paras 104 – 158.

<sup>95</sup> *Mazibuko* para 109.

<sup>96</sup> *Mazibuko* para 109.

indeed a puzzling approach. While the Court continued to note four factors in support of this reading (to which I shall presently return), those were expressly noted as 'further considerations' that 'fortified' the interpretation already arrived at,<sup>97</sup> in other words the interpretation is *reached* simply on the textually permissible test. The Court did not provide any reason why this interpretation should be favoured, or even why it should be the point of departure. One is left in the dark as to how this interpretation aligns with relevant constitutional rights, especially s 27 and more generally the constitutional commitment to social justice. The poor in Phiri are certainly substantially worse off on this interpretation, which allows for prepayment meters, than they would have been were such meters not allowed on an interpretation that would only allow credit meters for Service Level 3. On this latter interpretation water could not summarily be cut off when a customer fails to pay. The Court's interpretive approach seems particularly anti-poor and does not only leave questions unanswered, but also *raises* important questions. While the more standard formalistic approach to interpretation, namely the identification of 'clear language' at least attempts to justify its outcome on its own terms by claiming that the text itself points inevitably to one particular interpretation, the Court's 'textually permissible' test offers no such inherent justification, while implicitly recognising more than one possible interpretation. The sentiment underlying the 'textually permissible' approach is thus not necessarily formalistic, but the way in which the Court employed it in this instance roundly fails to reach the standard of transformative adjudication, since it offers very little by way of justification for the interpretation eventually adopted. The problem is thus that while one may agree that this reading is 'textually permissible', that is to say one way of reading the provision, it is not clear why this *should* be the reading. Clearly the 'textually permissible' nature of the interpretation can only be the starting point of the inquiry and the subsequent question is whether this interpretation is one that should be adopted. The latter question should be answered with reference to whether such an interpretation is the reasonable one to adopt within the normative framework of the Constitution.

This brings one to the four fortifying factors that O'Regan J noted in support of her interpretation. Do any of these four provide a substantive basis for preferring the respondents' interpretation over that of the applicants? The first and fourth factors are outright textual considerations and focus on the use of the term prepayment meters in various sections of the by-laws, including the definitions of 'meter' and 'prepayment meter'. On all of these the Court could just as easily have reached different conclusions on the text. Whether the Court's interpretations are correct or the best ones is not the issue here. The issue is that alternative interpretations seem possible and that the Court did not explain why it opted for those it did.

The second and third factors seem at first glance to be more substantive. However, the second factor turns out to be also largely textual. The Court found implicit authorisation for the installation of prepayment meters in two sections of the Local Government: Municipal Systems Act 32 of 2000 ('the Systems Act'). Firstly, the Court held that the obligation on municipalities to establish pay points for 'settling accounts and for making pre-paid for services' in s 95 of the Systems Act implicitly confers the

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<sup>97</sup> *Mazibuko* para 109.

power on municipalities to install prepayment meters for providing services, including water provision.<sup>98</sup> This interpretation seems a bit of a stretch. It is difficult to see how a general authorisation to create pay points can simply be read to confer the blanket power to charge for services in a certain manner. One would rather expect implicit authorisation in this regard to appear the other way around, that is explicit authorisation given for providing services at a charge (either on credit or prepaid) and finding implicit authorisation for the establishment of pay points to pay such charges in that explicit authorisation. The tail seems to wagging the dog under the Court's interpretation. But again, my point is not whether this is the correct or incorrect interpretation, but rather that this interpretation seems to stretch the text (and statutory interpretation generally) without any indication from the Court why one should do so.

The second provision in the Systems Act that the Court pointed to is s 8(2), which contains the familiar residual powers authorisation, stating that a 'municipality has the right to do anything reasonably necessary for, or incidental to, the effective performance of its functions and the exercise of its powers'.<sup>99</sup> The Court accordingly held that the installation of prepayment meters was reasonably incidental to the municipality's function in 'providing services to citizens in a sustainable manner that permits cost recovery' and hence authorised under s 8(2).<sup>100</sup> While this may be true, the Court provided no justification for its view that the prepayment meters are *reasonably* incidental to the noted functions of the municipality. One would expect an assessment of the incidental reasonableness, that is the reasonableness of the implication of the power, to consider all the functions of the municipality and not just one. In fact the Court concluded its reasoning on this score by stating that the 'interpretation seems constitutionally appropriate in ensuring that the City has the powers that are reasonably necessary for, or incidental to, the performance of its *functions*'.<sup>101</sup> However, the Court focused in its interpretation exclusively on the municipality's functions regarding sustainability with reference to s 152(1)(b) of the Constitution,<sup>102</sup> but omitted any reference to the other constitutionally listed functions of local government such as 'to promote social and economic development' and 'to promote a safe and healthy environment', listed in the same section,<sup>103</sup> or the development duties of local government listed in s 153<sup>104</sup> in its reasoning. Certainly for a power to be reasonably incidental to a statutory function it needs to be assessed against all the listed functions. At least some of the arguments made by the applicants and amicus curiae suggest that water provision on prepayment would be detrimental to social development and a healthy environment for the residents of Phiri, which may militate against an interpretation of the Systems Act read with the Constitution that implicitly grants the power to install prepayment meters. One is not told why the Court privileges one municipal function over the others.

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<sup>98</sup> *Mazibuko* para 110.

<sup>99</sup> *Mazibuko* para 111. On our courts' traditionally conservative approach to the interpretation of this type of empowering provision, see Quinot (n 55 above) 46 – 49.

<sup>100</sup> *Mazibuko* para 111.

<sup>101</sup> *Mazibuko* para 111 (emphasis added).

<sup>102</sup> *Mazibuko* para 110.

<sup>103</sup> Constitution s 152(1)(c) & (d).

<sup>104</sup> These include the duty to 'structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community' (s 153(a)).

Furthermore, the Court's reasoning does not explicitly deal with the condition in the residual power authorisation that the implied powers must be reasonably necessary for or incident to 'the *effective* performance of its functions'.<sup>105</sup> Powers cannot be implied under this provision simply because they are incidental to a function, but only when they are incidental to the effective performance of that function. This effectiveness requirement again necessitates some form of reasonableness enquiry. One would at least have to engage with the question how the implicit power claimed (the installation of prepayment meters here) relates to the effectiveness of performance. In my view such an enquiry should at least consider alternative ways of achieving effective performance of a function when the claimed implicit power involves adverse consequences for a guaranteed fundamental right, such as access to water. The Court's seemingly easy conclusion<sup>106</sup> that the power to install prepayment meters is implicitly granted seriously lacks engagement with the substantive considerations underlying such interpretation.

The third factor that O'Regan J noted in support of the Court's interpretation of the by-laws is the only one that expressly involves substantive considerations. She noted that the installation of the prepayment meters is 'an expensive and technically complex exercise' and as a result that it is 'improbable' that the by-laws would only authorise their use as a measure to address non-compliance by Service Level 2 customers.<sup>107</sup> No further justification for this view is offered. One is not told why such narrow authorisation would be improbable or what the ostensible connection is between 'an expensive and technically complex' system and its wide or narrow use. Could one not take the view that it is precisely because of the high technicality and cost that the by-laws do not contemplate the wide use of such devices and limit them to a narrow application, making the narrow authorisation indeed probable? While at least expressly noting substantive considerations at play, this factor also fails to provide persuasive substantive justification for the Court's interpretation.

In the final analysis of this part of the judgment it is noteworthy that the Court acknowledged the textual indications to a contrary interpretation (as accepted by the SCA), but simply rejected them as not outweighing the considerations that supported its reading.<sup>108</sup> What one finds here is mostly a match between different textual indicators (at least three of the factors identified by the Constitutional Court in favour of its interpretation are largely or purely textual and the factors noted by the SCA in support of its reasoning are all textual), which amounts to a formalistic approach to settling this question of interpretation. The only substantive considerations are those around the Court's second and third factors, namely prepayment meters as a way of 'providing services to citizens in a sustainable manner that permits cost recovery' and the ostensible need for wide use because of the technicality and costs of the system. While the latter consideration fails to provide any causal link between the substantive factors and the interpretation, the former consideration amounts to a privileging of one set of substantive considerations above the (competing) others. On both bases the Court fails to provide substantive justification for its view.

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<sup>105</sup> Systems Act s 8(2) (emphasis added).

<sup>106</sup> Note the remark that the statute 'clearly contemplates' the implicit power, *Mazibuko* para 110.

<sup>107</sup> *Mazibuko* para 112.

<sup>108</sup> *Mazibuko* paras 113 – 114.

The problem with this part of the judgment is that while one may agree that this reading is 'textually permissible', in other words it is one way of reading the provision, it is not clear why this *should* be the reading. The Court did not answer this latter question and one is left largely in the dark as to the substantive grounds, the true motivation, for adopting this interpretation. In particular there is a complete absence of discounting the applicable substantive right (s 27) in the interpretation.

The second problematic aspect of the Court's reasoning on the administrative-law challenge to the prepayment meters relates to the question whether the functioning of such meters amount to a limitation or discontinuation of water to the residents. This question arises because of the procedural requirements contained in s 4(3) of the Water Services Act 'for the limitation or discontinuation of water services'.<sup>109</sup> In stark contrast to the reasoning of both courts below, O'Regan J found that the functioning of the prepayment meters in terminating the supply of water once the credits have run out could not be said to fall under the protections contained in s 4(3).<sup>110</sup> This conclusion is reached mainly on the basis that such a termination of water supply does not amount to a 'limitation or discontinuation' as contemplated by the section.

The road to this conclusion starts out by labelling the prepayment meters' termination of water supply as a 'suspension'. This paves the way for O'Regan J to contrast such effect with 'discontinuation' as used in s 4(3), which in its 'ordinary [dictionary] meaning' means 'that something is made to cease to exist'.<sup>111</sup> Accordingly, she concludes that s 4(3) applies only when 'a permanent discontinuation or limitation of the water service' is contemplated.<sup>112</sup> Noticeably absent from her reasoning is a consideration of what 'limitation' may mean in this context. Using the same dictionary (*The Concise Oxford Dictionary of Current English*) the ordinary meaning of 'limitation' involves 'the act or an instance of limiting; the process of being limited'. Already it seems much harder to distinguish the effect of the prepayment meters from that which s 4(3) contemplates when it also refers to a limitation of water supply. It certainly seems at least possible to view the effect of the prepayment meters as an act, instance or process of limiting water supply. Furthermore, none of these definitions *necessarily* means a permanent effect on the water supply. Say the water supply is terminated today, whether under a credit meter for non-payment of the account or prepayment meter because the credits ran out, and only starts running again in a week's time following payment of the account or purchase of credits, can one not say

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<sup>109</sup> S 4(3) of the Water Services Act 108 of 1997 reads:

'Procedures for the limitation or discontinuation of water services must—

- (a) be fair and equitable;
- (b) provide for reasonable notice of intention to limit or discontinue water services and for an opportunity to make representations, unless—
  - (i) other consumers would be prejudiced;
  - (ii) there is an emergency situation; or
  - (iii) the consumer has interfered with a limited or discontinued service; and
- (c) not result in a person being denied access to basic water services for non-payment where that person proves to the satisfaction of the relevant water services authority that he or she is unable to pay for basic services.'

<sup>110</sup> *Mazibuko* paras 115 – 124.

<sup>111</sup> *Mazibuko* para 120.

<sup>112</sup> *Mazibuko* para 124.

that the supply was ‘discontinued’ or ‘limited’ for a week in the ordinary (dictionary) understanding of those words? The problem with the Court’s reasoning on this point is that it seems to deny even the existence of an alternative interpretation. It puts forward the interpretation of the section as referring only to a permanent effect as if that is the only viable reading.

In support of her interpretation, O’Regan J notes that an application of s 4(3) to prepayment meters would amount to an absurdity, because it would imply that the municipality must give notice to the resident concerned every time that credits ran out. While this may be true, the underlying assumption is that prepayment meters can (or should) be reconciled with the requirements of s 4(3), thus calling for an interpretation of s 4(3) that would allow such reconciliation. The contrary argument is of course that the functioning of the prepayment meters is in fact inherently incompatible with the procedural requirements of s 4(3) and that the meters should be declared unlawful on those grounds as the applicants argued.<sup>113</sup> The Court did not deal with this argument at all, but simply restated one part of the argument in support of its interpretation.

It may seem asinine or petty to nit-pick at the Court’s interpretation of particular statutory enactments and to second-guess the Court’s refusal to adopt alternative interpretations as I have done above, but the Court’s particular interpretive choices in this matter held important implications for its adjudicative approach. By adopting the particular reading of s 4(3) of the Water Services Act, the Court avoided an assessment of the substance of fair procedures in cases such as these altogether. This is regrettable since both the applicants and the respondents made submissions to the Court on what would constitute fair procedures in a case such as this.<sup>114</sup> The Court had an opportunity to substantially flesh out the procedural dimension of administrative justice (even though this part of the case was argued on lawfulness grounds). Rather than engaging with the important question of what fair procedures may entail in a context of high volume decision-making for which traditional, common-law notions of procedural fairness, as captured in the maxim *audi alteram partem*, seem ill-suited, the Court fell back on a formalistic and conceptual way out, which adds very little to the development of administrative justice.

The most significant problem with this part of the judgment is the Court’s seeming denial of the real impact of the prepayment meters as voiced by the High Court. As noted above the court *a quo* rejected the respondents’ arguments that s 4(3) does not apply here, stating that the prepayment meter system did amount to a ‘limitation, discontinuation or cut off’ since it left the applicants effectively without water.<sup>115</sup> Likewise, the SCA noted the real impact of the prepayment meters and accordingly found that there was no difference between the effect of the discontinuation of water by the prepayment meter when the credits ran out and the cut-off of water supplied under a credit meter by the service provider following non-payment.<sup>116</sup> The Constitutional Court’s reasoning in contrast is troubling in the way that it is restricted to a rather sterile analysis of the words and dictionary meanings

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<sup>113</sup> See Applicants’ Submissions (n 85 above) paras 233 – 237.

<sup>114</sup> See Applicants’ Submissions (n 85 above) paras 234 – 236.

<sup>115</sup> *Mazibuko W* para 84.

<sup>116</sup> *Mazibuko SCA* para 55.

of statutory terms to the exclusion of the real life effect on real people. This approach seems out of step with the vision of ‘transformative jurisprudence’ identified by Moseneke ‘which needs to contextualise violations within actual, life conditions’.<sup>117</sup>

The third issue in the administrative justice part of the judgment that I want to focus on is the Court’s treatment of the procedural fairness argument.<sup>118</sup> On this score the applicants argued that the introduction of the prepayment meters was procedurally unfair since the City did not follow the prescribed public participation processes. In this argument the applicants relied primarily on s 4 of PAJA, which provides the requirements for procedural fairness of administrative action affecting the public. The respondents replied *inter alia* that the introduction of the prepayment meters did not amount to administrative action and was thus not subject to PAJA and, even if it was, they acted fairly. The Court was confronted with a choice between formalism and substantive reasoning that has become typical of administrative-law cases as also outlined by the Court in *Joseph*. The Court could either engage with the substantive questions at stake, such as whether it is constitutionally appropriate to require the City to consult with citizens before taking a decision to change the water provision system and if so, what the nature and form of such consultation should be, or it could rely on formalistic reasoning that will decide the matter in a conceptual all-or-nothing manner. In *Mazibuko* the Court chose the latter route.

In a two-sentence paragraph the Court held that the City’s decision to adopt Operation Gcin’amanzi was an executive decision that did not amount to administrative action.<sup>119</sup> Accordingly, the decision to introduce the prepayment meters (as part of Operation Gcin’amanzi) could not be challenged on procedural-fairness grounds. In the Court’s view this was the end of the enquiry. The Court’s reasoning does not provide even a glimpse of why the specific decision to implement prepayment meters should not be subjected to administrative-law discipline. This is a good example of the overly conceptual formalistic reasoning that plagues administrative law and that is the antithesis of transformative adjudication. It offers no clues as to what ‘ideas and values’<sup>120</sup> justify the outcome, namely that the residents of Phiri whose lives are drastically affected by this decision were not entitled to participate in (and thus inform) the decision-making process. Apart from illustrating the general lack of substantive reasoning in administrative-law adjudication, this judgment also curiously retracts from the Court’s (and interestingly O’Regan J’s own) earlier jurisprudence that attempted to provide a more substantive basis for the inherently conceptual nature of administrative-law adjudication. The absence of any reference to the directly relevant judgment in *Permanent Secretary, Department of Education, Eastern Cape v Ed-U-College (PE) Inc*<sup>121</sup> is especially curious in this regard. In *Ed-U-College* O’Regan J (for the Court) provided thoroughly substantive reasoning for why particular public action should be considered as executive rather than administrative and as a result excluded from administrative-law rules and scrutiny. Based on this reasoning the Court developed an approach distinguishing between policy formulation in a broad and narrow sense to determine in particular cases whether action falls on either side of the executive-

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<sup>117</sup> Moseneke (n 13 above) 318.

<sup>118</sup> *Mazibuko* paras 127 – 134.

<sup>119</sup> *Mazibuko* para 131.

<sup>120</sup> Langa (n 6 above) 353.

<sup>121</sup> 2001 2 SA 1 (CC) (*Ed-U-College*).

administrative divide.<sup>122</sup> Any mention of this approach is conspicuously absent in *Mazibuko*.<sup>123</sup> While one deduces that the adoption of Operation Gcin'amanzi, including the decision to implement prepayment meters, amounted to policy formulation in a broad sense, the Court provides no justification for why that should be the case.

The major problem with the *Mazibuko* judgment is eventually not the outcome. People are bound to disagree on the appropriate allocation of resources, especially scarce ones like water. One obviously cannot expect the courts to provide perfect answers as to how the cake should be sliced. As O'Regan J pointed out it is not the role of courts through litigation to 'take over the tasks that in a democracy should properly be reserved for the democratic arms of government' and to 'require government to be held to an impossible standard of perfection'.<sup>124</sup> The problem with the judgment in *Mazibuko* is its failure to contribute itself to the project of transformative constitutionalism within the proper realm of the judiciary by adopting a method of reasoning that is anything but a model of transformative adjudication in administrative law.

## 5. Conclusion

The detailed analysis of the administrative-law reasoning in *Joseph* and especially *Mazibuko* above serves to illustrate the stumbling progress towards a truly substantive mode of adjudication under our Constitution. The inconsistency in reasoning, judged from this perspective, over the five judgments in the *Joseph* and *Mazibuko* matters is cause for real concern. In *Joseph* the High Court adopted a fairly formalistic approach, while the Constitutional Court showed the way by overturning that decision based on truly substantive reasoning. In its judgment the Court expressly noted the inappropriate adjudicative approach of the lower court and continued to carefully map out (in terms and by example) what mode of substantive reasoning is required under the Constitution. In stark contrast, the High Court and Supreme Court of Appeal in the *Mazibuko* matter adopted a notably substantive approach to their reasoning, while the Constitutional Court, in a puzzling judgment, overturned the judgments below on reasoning that varies between highly formalistic and substantive choices without justification. The puzzle is: what is one to make of these differences in approach. Surely one can always understand differences in outcome with reference to distinguishing facts and legal rules, but how does one explain a fundamental difference in adjudicative method?

While I have analytically focused only on adjudicative method in this article, it should be apparent that reasoning mode and outcome cannot be separated in reality. The constitutional authority of a particular outcome is directly linked to the justification of that outcome through the appropriate adjudicative method. Any outcome, even one that ostensibly promotes constitutional imperatives, must be viewed as constitutionally suspect if it is not reached in a manner that reflects a culture of

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<sup>122</sup> *Ed-U-College* para 21.

<sup>123</sup> Also see Liebenberg (n 9 above) 475.

<sup>124</sup> *Mazibuko* para 161.

justification. Reservations about the appropriateness of reasoning mode in a particular case thus automatically also cast doubt on the outcome.

One of the main dangers of inconsistency in reasoning mode is that it invites speculation as to the true basis for a particular outcome, such as that in *Mazibuko*. If the courts, or at least the Constitutional Court, consistently adopted a highly formalistic adjudicative method with high levels of deference to the other branches of state, one could understand their function and adjudicative outcomes in terms of a particular institutional viewpoint of the constitutional architecture and the judiciary's role within that framework. One would then be able to engage the judiciary for example on its executive mindedness. On the other hand, if the judiciary consistently adopted a contrary, highly interventionist approach, one could engage it on judicial activism. But without a consistent approach and more importantly, in the absence of substantive reasoning, it is simply not possible to engage the judiciary on particular outcomes, because one simply does not know why that outcome was reached. One is inevitably left speculating about the motivations behind an outcome. This state of affairs is highly destructive of the rule of law and the core notion that outcomes should be justifiable in terms of the Constitution's normative framework. The *Mazibuko* judgment clearly illustrates this danger. Given its lack of substantive justification for the eventual outcome, namely that the installation of the prepayment water meters in Phiri is constitutionally permissible, it is not surprising to find all sorts of speculation about what really motivated the Court. Such speculation includes the charge that the Court implicitly endorsed a 'neo-liberal paradigm' of service delivery<sup>125</sup> and speculation on whether it was a response to

the political turmoil resulting from the Hlophe and Zuma sagas which have buffeted the institutional legitimacy of the Court itself and focused renewed attention on the 'counter-majoritarian' nature of the Court's constitutional task, especially in the areas of equitable distribution of power and resources.<sup>126</sup>

This last comment emphasises the critical importance for the Constitutional Court to lead the way towards transformative adjudication under the Constitution at this particular point in our constitutional development and within this particular context. During the period in late 2009 when *Joseph* and *Mazibuko* were decided the Court was probably at its most vulnerable since its inception.<sup>127</sup> While the storm seems to have largely blown over, the Court still faces serious challenges to regain its high popular regard as a pillar of constitutional democracy. This challenge is perhaps most critical in the area of socio-economic rights adjudication where, as Corder notes,

the courts have to balance the exercise of their constitutional authority with an acknowledgment that the government of the day has an extremely strong electoral mandate to

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<sup>125</sup> De Vos (n 20 above).

<sup>126</sup> Danchin (n 20 above).

<sup>127</sup> At the time, the Court was still embroiled in its very public quarrel with Hlope JP, which undoubtedly impacted adversely on the Court's public image. The Court was just emerging from the most scathing political criticism since its creation, with some of its judges being labeled as 'counter-revolutionaries', see K Klare 'Legal subsidiarity & constitutional rights: A reply to AJ van der Walt' (2008) 1 *CCR* 129. And, finally, 2009 also saw the last of the original members of the Court depart, which also brought about the biggest single change in the composition of the Court. See H Klug 'Finding its place? Understanding the role of the Constitutional Court and its jurisprudence in our democracy' in this volume.

refashion the distribution of power and resources in the country, in order to try to ameliorate and begin to reverse the dreadful inequities and injustices which past regimes have perpetrated. The courts, however, must exercise care not too readily to acquiesce in the policies and plans of the executive, lest the 'executive-mindedness' of their past comes back to haunt them. The judges thus have a difficult path to tread, especially in the socio-economic sphere, in which almost by definition the polycentric quality of decisions makes the judicial process alien.<sup>128</sup>

Retreating into formalistic administrative-law based reasoning in such cases is not the answer to this challenge. The resolution is also not a simple matter of preferring substance over form, since baseless and one-sided substantive reasoning is as devoid of justification as sterile formalism. As I have tried to show in this article such approaches will only result in constitutional adjudication once again becoming a 'jurisprudential slot machine' where parties will have no idea whether their plea for constitutional justice to the Constitutional Court will be met by a *Joseph* or *Mazibuko* response. Transformative constitutionalism can never succeed as such a game of chance.

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<sup>128</sup> H Corder 'From despair to deference: Same difference?' in G Huscroft & M Taggart (eds) *Inside and Outside Canadian Administrative Law: Essays in Honour of David Mullan* (2006) 337 (footnotes omitted).