

## **Business Day**

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Crucial leaks in mayor's attack on water ruling  
Sandra Liebenberg

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THE attack by Johannesburg mayor Amos Masondo on the judgment of Judge Moroa Tsoka in the Phiri water case is premised on a number of misconceptions about the role of the judiciary in enforcing the Bill of Rights in the constitution.

First, when judges are called upon to adjudicate whether law or conduct of a public or private institution infringes a right in the Bill of Rights, they are not “making policy” or playing a political role as suggested by Masondo. They are fulfilling a constitutional duty imposed by the country’s supreme law to interpret these rights and to grant appropriate relief to those whose rights are violated.

There may of course be legitimate debate about whether the judge got it right, and this is an important part of public discourse and debate in a democratic society. As is the case with legislation and policy, court judgments should also be exposed to robust critique and debate. This is fundamental to a vibrant democracy.

However, it is an entirely different matter to call into question, as Masondo has done, the duty of judges to interpret constitutional rights and to grant effective remedies in the cases that come before them. The suggestion that, in performing this role, judges are acting as though they are “above the law” or that they should form a political party if they wish to govern the land undermines the fundamental principle of the rule of law. It also contributes nothing to democratic debate about the meaning and implications of constitutional rights for the governance of our country.

If Johannesburg feels that Tsoka got it wrong in Phiri water case (*Mazibuko and Others versus The City of Johannesburg*), it is entitled to point out what it considers to be the legal flaws in the judgment and can pursue its remedy of appeals to the fullest extent. It should avoid, however, questioning the indisputable duty of judges to interpret and apply the law without fear, favour or prejudice.

Second, the enforcement of all human rights — whether formally classified as civil and political, or as economic, social and cultural — will have policy implications for the state. This may entail the abolition of the death penalty, upholding the right of women to terminate their pregnancies, pronouncing on affirmative action programmes or requiring the state to ensure that people’s basic human needs are met.

While the courts must respect the doctrine of separation of powers and the institutional roles and competencies of the legislative and executive branches of government, they are also constitutionally mandated to check whether policy and legislation is consistent with the Bill of Rights. As the Constitutional Court pointed out in the *Treatment Action Campaign* case, the courts have a constitutional duty “to consider whether in formulating and implementing policy the state has given effect to its constitutional duties”. If a court finds in a given case that the state has failed to do this, “it is obliged by the constitution to say so”. Insofar as this

“constitutes an intrusion into the domain of the executive, it is an intrusion mandated by the constitution itself”.

The constitution itself was adopted through a democratic process as the country’s highest law, and must be respected and promoted by senior public officials. This illustrates the fundamental importance for policy makers to consider the human rights implications of their policies during the phase of designing policy and to ensure that the processes of formulating policy involves genuine participation by affected beneficiaries. If a court points out constitutional defects in particular policies, it ill behoves public authorities to question their right to do so.

Finally, it should be remembered that the African National Congress (ANC) was fully in support of the inclusion of both socioeconomic rights and the right to just administrative action as justiciable rights in the Bill of Rights. In fact, many senior ANC members played an internationally renowned role in laying the foundations for the inclusion of these rights in the Bill of Rights. Socioeconomic rights embody the dreams and aspirations of those who fought for a transformed society — one in which there would not only be political freedom, but also socioeconomic justice for the poor.

Instead of viewing the courts’ role in enforcing these rights as an unwelcome intrusion, Johannesburg should understand that this is part of the “constitutional conversation” between courts, the government and civil society on how best to realise human rights. Rather than detracting from democratic politics, the judicial enforcement of human rights enriches constitutional democracy. The city should view judicial intervention in cases such as Mazibuko as an opportunity for research and reflection on whether its policies are consonant with the Bill of Rights. This will enable a more constructive dialogue on whether we as South Africans are meeting our constitutional commitments to the poor.

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## **Business Day**

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Masondo takes on 'water' judge  
Sibongakonke Shoba

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General Reporter

CITY of Johannesburg mayor Amos Masondo yesterday launched a scathing attack on the judiciary, saying judges must leave policy issues to the government and must not interfere.

The attack was directed at Johannesburg High Court Judge Moroa Tsoka , who ruled that the installation of prepaid water meters in Phiri, Soweto — without the choice of all available supply options — was unconstitutional and unlawful.

Masondo said the municipality was not against the judiciary, but judges must not take the role of the government.

“Judges are not above the law. We don’t want judges to take the role of Parliament, the role of the national council of provinces, the role of the legislature and the role of this council. Judges must limit their role.”

He said although the municipality respected Tsoka’s decision, the city believed he was wrong and intended to lodge an appeal with the Supreme Court of Appeal.

Tsoka, in a landmark judgment, ordered that Phiri residents be supplied with 50l of free basic water per person a day, up from the current 25l, and that they be given a choice of an ordinary credit water meter.

Masondo said the judgment was distorted as the municipality was already providing 50l a day to households on the indigence register and who had fewer than seven people.

Tsoka had said the consultation process before the meters were installed was inadequate. However, Masondo said numerous meetings were held in Phiri and pamphlets were distributed. “The majority of people are happy with the roll-out of the system, it’s only a few.”