

All rise in Court! The battle against corporate profiteering, corruption and dispossession: Lesotho and Johannesburg at a legal cross roads over water.

Abstract:

Water has become a burning issue in civil society organizations in Southern Africa; this paper seeks to lay out key debates and developments in the on-going debate over mega-Dams Projects such as the Lesotho Highlands Water Project. The paper is a desk-top analysis of key opinion makers on this issue. Secondly; the paper seeks to reflect on the impact of commodified water services to the residents of Gauteng's largely black township of Soweto and the raging legal challenges currently underway in South African courts. There is a somewhat ironic twist to developments in civil society challenges to the controversial project in Lesotho as compared to those underway instituted by residents of Phiri- Soweto against Johannesburg Water company. The paper does not offer hard clean cut solutions but merely tries to open the space for dialogue between civil society efforts cutting across the two countries.

'28But thou shalt say unto them, This is a nation that obeyeth not the voice of the LORD their God, nor receiveth correction: truth is perished, and is cut off from their mouth.

29Cut off thine hair, O Jerusalem, and cast it away, and take up a lamentation on high places; for the LORD hath rejected and forsaken the generation of his wrath.

30For the children of Judah have done evil in my sight, saith the LORD: they have set their abominations in the house which is called by my name, to pollute it.

31And they have built the high places of Tophet, which is in the valley of the son of Hinnom, to burn their sons and their daughters in the fire; which I commanded them not, neither came it into my heart.'

Jeremiah 7 (King James Version)

Introduction

Water has become a focal and dynamic terrain from through which the intercourse of forces are articulating and defining new theoretical and actual contents to the concept of 'civil society' in occupied Azania (South Africa); this paper seeks to lay out key debates and developments in the on-going discussion over mega-Dams Projects such as the Lesotho Highlands Water Project. The paper will compare this to current global discourses on civil society and consider the implications of the struggle against water privatisation currently underway in Gauteng's largely Black township of Soweto (Phiri). Thirdly; the discussion is based on a comprehensive desk-top analysis of key opinion makers on this issue as well as personal interactions. Fourth; the paper seeks to challenge popular assumptions about progressiveness of notions like 'civil society' 'free-market democracy' and the inevitability of rationalised commodification of water services on the rest of the continent (Aethiopia¹). The paper will consider the situation of the residents of Gauteng's largely Black township of Soweto (Phiri) focusing on the legal challenges currently underway in Johannesburg High Court.

The paper will consider ironic fact that both 'civil society struggles' remain confined in courtroom walls, albeit under different circumstance in each country. The paper does not offer hard clean cut solutions but merely tries to open the space for dialogue over the developments of and between civil society efforts cutting across the two countries; in order to highlight stark continuities in current efforts to toward an alternative approach in so far as Liberal conceptions of citizen/customer/person underlie current right-based discourse of civil society and 'liberalising gesture of neo-colonial state.

The Historical Specificity of the Western perspective.

In Greek mythology we read of the great Ethiopian king, Cepheus, whose fame was so great that he and his family were immortalized in the stars. The wife of King Cepheus was Queen Cassiopeia, and his daughter, Princess Andromeda. The star groups of the celestial sphere, which are named after them, are called the ROYAL FAMILY – (the constellations: CEPHEUS, CASSIOPEIA and ANDROMEDA.)²

1 The Ancient name land mass called Africa; the name describes the original civilisation of human-kind whose capital lay in the upper sections of the Nile River near the borders of modern Southern Sudan and Uganda, ancient Ethiopia Kush the land of the first Pharaohs.

2. Jackson J. G: Ethiopia and the Origin of Civilization Part 2 - 1939

The entire ancient world, including the ancient Greeks celebrated Imhotep. Even Hippocrates so called Greek Father of modern medicine was a devotee of Imhotep the Prince of Peace.³ Scientists examining documents dating back more than 3,500 years have confirmed that the origins of modern medicine lie in ancient Egypt and not with Hippocrates and the Greeks. The medical papyri were written in 2,500BC – 1,000, thousands of years before Hippocrates was born.

The Western perspective of modern Europe can be traced to the Roman Empire. The most important pillar of the Roman Empire was the body Roman law which remains the foundation modern Western Property Law. The Roman Empire differed from other High Civilizations such as Aethiopian Empire, Egypt and China; which preceded Rome by millenniums in the ancient world.

The large scale acquisition of wealth and slaves was attained through use of the state. Roman aristocrats has permanent hunger for acquiring ever increasing quantities of land through the use of brute might of the Imperial state; aristocrats accumulated wealth and territory. With every territory conquered was accompanied by the Roman law including laws around private property of Roman invaders in the territory this was the case across the length and breadth of the Empire⁴.

Regarding what it means to be a modern subject Marshal Berman had this definition; “(modern subjects) are moved at once by a will to change- transform both themselves and their world- by terror or disorientation and disintegration, of life falling apart... To be modern is to live a life of paradox and contradiction. It is to be overpowered by immense bureaucratic organizations that have the power to control and often to destroy all communities, values and lives.”⁵

Frederic Nietzsche noted; “Humanity does not gradually progress from combat to combat until it arrives at universal reciprocity, where rule of law finally replaces warfare: humanity installs each of its violences in a system of rules and thus proceeds from domination to domination.”⁶

It is noteworthy that in his lifetime; Karl Marx was very critical of the concept of ‘civil society’, arguing that civil society was central to the overall development of the

3 Uwechia, J: Ancient African Medicine, Egypt (Khemit) and the World.

4 See also the discussion provided by: Rosenberg, J: The empire of civil society: a critique of the realist theory of international relations, London, 1994.

5 Berman, M: All that is solid melts into air: The experience of modernity. (1982) New York: Penguin Books, 1988.

6 Nietzsche from Genealogy and History, quoted in Honneth, A, ‘Foucault’s Theory of Society: A Systems-Theoretic Dissolution of the Dialectic of Enlightenment’ in Kelly, M (ed) Critique and Power (MIT Press, 1994) p. 157

global capitalist system. Because the concept claimed political space of generalized freedom in spite of contradictory and contending interests in political society seen through the lens of political economy.⁷

In recent history; the collapse of the Berlin Wall in 1989, has been termed a turning point in contemporary history. The adoption of capitalist accumulation strategies by countries such as Eastern European, China and South Asian countries this was/is presented as the final triumph of Western perspective i.e. Capitalist liberal democracy⁸. This view held that the internationalized 'free market' of late twentieth century capitalism has ascended without doubt as the means through which all prior enclaves that stood outside the capitalist system were to be integrated into the "borderless' and global system of consumption and production.⁹

The Asian financial crisis of 1997 gave an illustration of the criss-crossing of social and market relationships intra-and- inter nations and regions. But it also exposed the underlying 'corruption' that came to be termed: Cronystic Asian Style Capitalism.¹⁰ This brand of capitalism was found lacking of the so called; efficiency, transparency and robustness characteristic of 'Western' capitalism. These sentiments smack of Conrad-isque characterization of the spheres understood to lie outside the 'West'. The Asian crisis was then characterized as Cronystic, opaque and corrupt practices which represented a 'continental exception'; of a rather sound world economic system. Needless to mention the string of crisis that have followed the 'Asian Tomcats'. The USA finally having to taste the sour juices of her Liberal Democracy orthodoxy: perpetual war and economic recession.

However there is no doubt of the global connectedness of the world economic system perhaps an accessible example in this regard is the world food system. This important element of human survival is controlled by a hegemonic network of transnational economic institutions and corporations which function along same old colonial trade relations in local, regional and national food supply and production; Imperialist pathologies of exploitation of largely black labour, economic exclusion and oppression. This is increasingly becoming true of water; with the same corrupt profiteering motives that which these multi-national forces have so articulately displayed. The dismembering of local culture and identities by homogenizing person/ customer/ citizen food culture through standardizing 'staples' across the

⁷ Mohan, G: The disappointment of Civil Society: the politics of NGO intervention in Northern Ghana. 2001, <http://www.sciencedirect.com>

⁸ See the work of Fukuyama, F: *The End of History and the Last Man* (1992), publ. Penguin .

⁹ Dickens et al. 2001 In Wong, L 'Globalizing' Management Theories: Knowledge, Ignorance and the Possibility of a Postcolonial Critique, <http://rauli.cbs.dk/index.php/cjas/article/viewFile/42/51>

¹⁰ Ibid1. pp 41.

globe such as the case of maize-meals in much of Africa and S. America. In the words of Wong: “the steady displacement of collective social institutions and customary practices of social regulation is gradually extinguishing the traditional ways of life of disparate populations leaving us poorer both culturally and ecologically”¹¹

As Wong, notes in his study: 'Michael Doyle is of the opinion that colonialism is a potential outcome of imperialism; settler governments are better at administrating colonies than those that are largely based in the metropolis with only indirect administration. Wong points out that Edward Said further developed the ideas of Doyle , through arguing that imperialism and colonialism are complementary ideologies, these ideologies moved from an ethic believed, in Said's words “that certain territories and people require and beseech domination” the two ‘processes re-enforced each other . He notes further that both ideas are premised on the idea of evolutionary superiority of one society and its moral entitlement to subjugate all inferior ones – and are applied to achieve the same discriminatory outcome – foreign rule over a sovereign people.¹²

At this stage it becomes important to dissect some rational claims to truth that Western Liberal democratic perspective clings to. For this we will use the work of Rafe Champion on his work in the critical liberalism philosophy of Karl Popper. Briefly, Popper developed a theory of the “Dogmatic Structure”; which he claimed runs through all traits of liberal ideology. Most traits of liberal ideology shared a common history of an attachment to one or the other religious function.¹³

He was of the view that most liberal theory can be broadly divided in ‘organs’ for knowledge production and re-production. These can be reduced to (associated with) crudely; empiricist approach/discipline and rationalist approach/discipline. Popper points out an important observation regarding these approaches/disciplines; both are constantly seeking more authoritative sources of belief (more proof of the divinity of man over the Almighty).

As a result, the approaches generate a lot of ‘critical’ debate against each other, but this debate says nothing of authoritarian framework (neo-colonial western liberal democracy) and they share the key assumptions of this authoritarian framework.¹⁴ A later scholar of Popper; Bill Bartley pushed Popper's views further by noting that

¹¹ Ibid2. pp 41.

¹² Dickens et al. 2001 In Wong, L 'Globalizing' Management Theories: Knowledge, Ignorance and the Possibility of a Postcolonial Critique; <http://rauli.cbs.dk/index.php/cjas/article/view>

¹³ <http://www.mises.org/article.aspx?Id=689&month=32>

“Dogmatic Structure underlying liberalism’s theories of knowledge which demands that rationalised positive (human) justifications as the only criterion for true belief.¹⁵ Though I differ with conclusions/suggestions offered by Popper and Bartley¹⁶, their arguments offer an insightful glimpse into the psyche liberal reason.

Background to the Lesotho Highlands project

The Lesotho Highlands Water Project LHWP was first proposed in 1954; however it went into operation in 1986, through a treaty signed between the then South African Apartheid government and military regime in Lesotho. Since then, a key social concern surrounding this project has been associated with whether the socio-economic benefits of such a mega project can outweigh the overwhelming criticism surrounding the now established fact of large scale corporate corruption in the dam's construction process¹⁷, or whether indeed as it has been repeatedly pointed out by various social sectors that the LHWP¹⁸ typifies a more profound corruption of the South African water provision system which has led to outbreaks of social unrest particularly in Phiri, Soweto.

The objective here is to link the production of water as a commodity in Lesotho; a situation whereby multinational corporations profited from construction contracts to the difficulties of the many both in Lesotho and South Africa in carrying the social and economic expense for overpriced water, how this can be attributed to the dams that were potentially unnecessary.

It is well documented fact that many thousands of Basotho Highlands residents have been displaced¹⁹, Soweto residents have pointed out that the cost charged for water has had an adverse effect on their ability to consume water, the price of water has on average risen five times higher than previously²⁰ as a result of the higher cost paid by South African government to divert Gauteng’s water supplies from the first two Lesotho dams, Katse and Mohale. These two dams derive their water from the Senqu River, which runs along the Southern border of Namibia which is shared with

¹⁷ See the work of Tricarico A. The Lesotho Highlands Water Project, Massive Dams for Massive Disasters, Reform the World Bank Campaign. In which the author provides a compelling account of top end corrupt practices. The article can also be found on this electronic link: <http://www.ipocafica.org/cases/highlands/worldbank/index.htm>

¹⁸ Hatchard, J: International Businesses: International Corruption: International Action. taken from seminar papers of the OU Law Program: Law Seminar Series notes. 2000

Concern is focused on the situation in some sections in the Township of SOWETO, South Africa.

¹⁹ Weisfelder Richard F. Lesotho and the Inner Periphery in the New South Africa; 1992 in *The Journal of Modern African Studies*, Vol. 30, No. 4.

²⁰ Anti-Privatisation Forum (APF) & others (2004). NOTHING FOR MAHALA'; The forced installation of prepaid water meters in Stretford, Extension 4, Orange Farm, Johannesburg - South Africa. Centre for Civil Society Research Report 16: 1-30.

South Africa; the mouth of this river originates in Lesotho and covers a distance of 1800 kilometres through South Africa, where it is called the Gariep River. The river connects with the Atlantic Ocean at mouth of the Orange River. In South Africa, the river is a major tributary the Vaal River, which carries nearly 23 % of the total surface water of South Africa. If the Lesotho Highlands Water Project (LHWP) were to be completed; it would be constituted by a total of five-dams; this in turn will translate to up to 40% of the water diverted through the Senqu river basin to South Africa's Vaal river system in Gauteng Province.

Lesotho has lowlands in the west of the country at a height of 1500 - 1700 m above sea level, the land level rises from the foothills in the central area and finally to the Maluti Mountains in the east, this mountain range continues into South Africa where it is called the Drakensberg. The country receives roughly 800 millimeters per year in the western part of the country with the eastern part receiving up to 1200 millimeters per year²¹.

The Lesotho Highlands Water Project is a project with many dimensions; it serves the combined objective of selling water to South Africa and generating hydro power to meet Lesotho's electricity needs²². The LHWP covers the 1990-2017 periods. It consists of water transfer component and a hydropower component.²³

The desire for Lesotho's water was formerly expressed in the 1960's where two feasibility studies were carried out. Both failed because agreement could not be reached between the two governments on payment for water exports.²⁴ However, a new feasibility study was launched. In 1979 a preliminary study recommended a 70cm/sec. water transfer scheme, as well as a hydropower generation component, reflecting Lesotho's desire to replace electricity imports with locally produced energy.²⁵ The final feasibility study (1983) concluded there were no unsolvable environmental, socio- economic or legal difficulties²⁶. It measured the quantities of water available for transfer, dimensioned the dams, tunnels and hydropower facilities, and prepared cost estimates.

Water sales from the project are Lesotho's single largest source of foreign exchange, and account for 75% of the country's budget. During recent droughts, Lesotho has seen its own crops shrivel as its water was shipped to South Africa. Multiple tributaries in the watershed would be dammed if all dams in the project were

²¹ Hall, S: Ecosystem Services in the Gariep Basin; an Ecosystem Services Approach, 1998, taken from electronic copy on: www.millenniumassessment.org.

²² Taken from: *Dams and Development: A New Framework for Decision-Making 2000*. A Report of the World Commission on Dams.

²³ Ibid1

²⁴ Molle, F and Berkoff, J: *Cities versus Agriculture: Revisiting Inter-sectoral Water Transfers, Potential Gains and Conflicts*. 2002. Comprehensive Assessment of Water Management in Agriculture.

²⁵ ibid

²⁶ www.american.edu/ted/Lesotho.HTM

completed. Two of the dams, the 180-meter-high Katse ("Phase 1A") and the 145-meter-high Mohale ("Phase 1B"), are complete.

In 1944 field surveys and drilling were initiated; this resulted in a report to the South African Government in 1948 which proposed a project comprising amongst others, a diversion dam on the Orange River as well as a diversion canal and tunnel underneath the divide to the Great Fish River valley, with a branch canal to the Sundays River valley²⁷. The first White Paper on the project was tabled in Parliament in 1951 and the actual development was started soon thereafter²⁸.

The Senqu River originates in Lesotho on the South African side it is called the Orange River, this is an international waterway and it forms the boundary between the RSA and Namibia. If the LWHP was to be completely implemented, more than 40% of the total estimated yield of the Senqu River basin would be diverted to South Africa.

This project is a large inter-basin water-transfer scheme which includes five proposed dams, 200 kilometers of tunnels blasted through the Maluti Mountains, and a 72-megawatt hydropower plant that will supply power to Lesotho. It is one of the world's largest infrastructure projects under construction today. The project's primary purpose is to transfer water to Gauteng Province, the industrial heartland of South Africa²⁹

Therefore, a generous margin is also left to meet future water-based developments of Namibia. It has to be noted that in 1983 guerilla violence took place in Northern Lesotho the main bone of contention was around the Lesotho Rivers providing water to South Africa's Apartheid regime.

Management of the LHWP

The scheme is being managed by the Lesotho Highlands Development Authority (LHDA), which is responsible for resettlement and compensation issues, environmental protection and overall construction management. In South Africa, the project is overseen by the Department of Water Affairs and Forestry (DWAF) through the Trans Caledon Tunnel authority. The Joint Permanent Technical Commission (JPTC) was established to represent both countries³⁰.

²⁷ Frost A; McIntyre R C; Papefus E B; Weiss O; 1946. The discovery and prospecting of a potential gold field near Odendaalsrust in the Orange Free State, Union of South Africa.

²⁸ www.dwaf.gov.za

²⁹ Potgiter, L: Raising the bar on big dams; Making the case for dam policy reform at the European Investment Bank. (2007). CEE Bankwatch Network.

³⁰ Document of The World Bank; Report No. 17727-LSO, PROJECT APPRAISAL DOCUMENT, April 30, 1998.

In late 1997, the end-user for the project's water, Rand Water, revealed that it had done a preliminary study which showed Mohale Dam could be delayed 8–20 years by implementing water-conservation measures. NGOs and the World Bank attempted to obtain the study, but neither Rand Water nor the Department of Water Affairs was forthcoming with the information. Despite strong evidence that Mohale dam could be delayed, the South Africa and Lesotho governments proceeded with the project one year ahead of schedule³¹.

Technically; Phase 1A constitutes a 182 meter high Katse Dam releasing water which will be diverted through a 48 kilometer tunnel, the process would in turn generate 72 megawatts of energy through a hydroelectric plant, whose bulk output would then be distributed within Lesotho; the water emerging from the plant would be channeled into a reservoir backed up behind the second dam – the 55 meter high 'Muela dam from which water would be delivered through a 16 kilometer delivery tunnel to South Africa's Ash River and on to Gauteng Province. Katse was completed during 1995, with its reservoir filling during the 1995/96 rainy season. The first water was transferred to South Africa in January 1998 with the first electricity distributed later that year³².

Demand-side Management- refers to the situation where a utility or local authority that provides a public service (e.g. provides clean drinking water), affects the rate and manner in which the service is used by the consumer, this management activity is called Demand Side Management (DSM). This management tool was stubbornly accepted as an effective means to discourage excessive water consumption on the side of Gauteng.³³ It is often argued by officials that; reduced water demands in South Africa, can delay to the second and third phases indefinitely. If initiated, Phase 2 will focus on the construction of the Mashai Dam on the Senqu River from whose reservoir water would be pumped up into the Katse Reservoir³⁴. Phase 3 would involve construction of the Tsoelike Dam below Mashai with water pumped into the Mashai Reservoir. No estimates exist as to the number of people who would require physical relocation if all three³⁵ phases were completed, but the total population affected by Phase 1 approaches 200,000. Of these about three-fourths are

³¹ A Brief History of Africa's Largest Water Project. www.internationalrivers.org

³² Ibid1

³³. Brandes, O.M and Maas T: *Developing Water Sustainability Through Urban Water Demand Management 2004*. The POLIS Project on Ecological Governance. University of Victoria, BC

³⁴ Ibid1

³⁵ Lang,C, Hildyard, N, Geary,K and Grainger,M: *Dams Incorporated The Record of Twelve European Dam Building Companies*; 2000 Swedish Society for Nature Conservation

residents of downstream communities affected by radically reduced Senqu River flows³⁶.

It is estimated that about 30,000 village residents who have been living in reservoir catchments basins, are facing an uncertain future where their guarantee of sustenance and self reliance for food have been attacked by the new dammed realities; loss of winter grazing as well as loss of thatching grass due to decreased river water, the micro ecosystem has been threatened by lower water yields, fuel wood also have decrease and reproduced at a slower rate because there is less water, medicinal plants and other common property resources.³⁷

Once again, Scudder notes that the impact of phase A1 affected at least 133 villages in the Katse and 'Muela local catchments where upto 121 villages were in the Katse area. Indeed the effect of this mega-development should not only be read in terms the number of displaced alone but also massive disturbance of the social relations of valley residents, these included the fact that 'Muela project works did not require physical removal of the village residents however, many (100 homesteads losing arable land), many had to move from their original abodes, futher back to make way for project roads³⁸.

It is estimated that about 3,357. Loss of at least 3,000 hectares of grazing and other common property resources affected approximately 90 percent. Though the large majority of households have been classified as poor by many anthropologist researchers, this is a somewhat problematic or least misleading classification since accoding to a study conducted by Sechaba research consultancy where it was ascertained that many villagers in the catchment areas were: largely self sufficient in producing food. Only 13 percent, did not own productive fields, however, they remained self sustaining being dependent on share cropping or loan of arable land, while 80 percent of households owned livestock. The proportion of female-headed households was approximately 30 percent.³⁹

In the main Mohale impact area an estimated 700 households in 84 villages will lose about 725 hectares of arable land, with the project reducing grazing land, including the most valuable winter grazing, by approximately 1,635 hectares. Katse reservoir filling involved the resettlement of 73 households, while physical removal due to Mohale project works and reservoir filling can be expected to involve up to 400 households⁴⁰.

³⁶World Development Report 1992, DEVELOPMENT INDICATORS, World Development Report 1992, Development and the Environment Published for the World Bank

³⁷ Chefa, Lehlohonolo Gabriel interview- (2007)

³⁸ Scudder .T: The Lesotho Highlands Water Project (2003) and Laos' Nam Theun 2 Dam (2003 with 2005 updating) (Unpublished Manuscript)

³⁹ Ibid1. (Notes on Sechaba research)

⁴⁰ Ibid2

According to available documents from the World Bank on this mega project (LHWP), the implementation and planning show that the structure is very very complicated. In Lesotho an implementation agency and inacted legislation in 1986 that legitimized a treaty: Lesotho Highlands Development Authority (LHDA), In the Republic of South Africa the responsible agency was the Trans-Caledon Tunnel Authority (TCTA) . these two structures reported to the Joint Permanent Technical Commission (JPTC-the Commission) which is representative of stake holders from South Africa and Lesotho, a joint secretary, and separate secretariats based in Maseru, the capital of Lesotho. ⁴¹

The 1986 (LHWP) Treaty, provides very clear stipulations that both Authorities were could not take executive dicisions without the the express approval of (JPTC) Commission, the dicisions include budgets, design of project infrastructure and all tendering procedures, implementation plans for each phase, annual and short term operational and maintenance plans, and appointment of staff, auditors, consultants, contractors and other senior personnel.⁴²

Dam	River	Catchment Area km ²	Mean Annual hm ³	Run-Off m ³ /s
Katse	Malibamats'o	1 860	656	20.8
Mohale	Senqunyane	938	367	11,6
Mashai	Senqu	7 977	1 569	49.7
Tsoelike	Senqu	10 375	1 891	59.9

Source: *Lesotho Highlands Water Project: Boehm Christian and Hall David, 1999.LHWP, Contract LHDA 648,Consulting Services for the Establishment and Monitoring of the Instream Flow Requirements for River Courses Downstream of LHWP Dams; Socio-Economic Survey. Report No.648-25.*

Corrupt practice as a modus operandi

The LHWP's contracts have been marred by charges of corruption, this has focused more detailed attention to the 'legitimate' parties to this deal; key among these is the World Bank and its oversight involvement in the Lesotho deal. The Word Bank along with her business associations approved and supported the project. Masupha Sole the water project's former chief executive was first to be implicated, in 1999, a civil case brought in Lesotho against the Project, this action kicked the flood gates open and culminated into a criminal trial that implicates 12 of the world's largest construction corporations.

⁴¹Report No:ICR168, Document of The World Bank, 2007. Water & Urban 1 Country Department Africa Region. www.worldbank.org.

⁴² Matlosa, K: *Changing Socio-Economic setting of the Highlands regions as a result of Lesotho Highlands Water Project, 1998, Transformations (vol:38).*

At the moment the author is aware of two convictions (there may be more), Acres International, a Canadian engineering consulting firm, and Lahmeyer International, a German engineering consulting firm, have been convicted of bribing Sole to give them favorable contracts, and debarred from the Bank. Sole is currently serving a 15-year prison sentence.⁴³

The key funders for LHWP include the World Bank; bilateral aid agencies from France Germany and the UK; the European Investment Bank; the UK Commonwealth Development Corporation; commercial banks as well as a number of loan guarantees from five UK companies: Balfour Beatty, Kier, Stirling, Kvaerner Boving and ABB Generation's UK subsidiary. For a details of the funding arrangements see (Lang, C, Hildyard, N, Geary, K and Grainger, M: *Dams Incorporated The Record of Twelve European Dam Building Companies*; 2000 Swedish Society for Nature Conservation)⁴⁴

Upon revelations of corruption charges; the British house of commons had this to say;

*"British taxpayers have underwritten loans to UK contractors involved in the project – including those implicated in bribery – to the tune of £66 million. Gibb, Balfour Beatty and their partners received EU grants. The EU along with the World Bank are so determined that this criminal trial should be a watershed for international trade that they have offered to pay for Lesotho's prosecution."*⁴⁵

However; the UK Export Credits Guarantee Department, the agency at first denied that Balfour Beatty, one of the companies it supported, was being prosecuted. Not with standing this, civil society organizations have demanded the suspension of all implicated companies from applying for more credits to run international projects.

The overall cost of such a project are so massive, the building of the two Dams on their own has had an effect of raising the average price of a drop of water by a factor of five. What, then, were the implications of the project for the low-income people of Johannesburg meant to consume the water? As even the World Bank conceded, the impact of the higher price of water was disproportionately felt by lower-income people who consumed water in the first consumption block (who suffered a 39% real increase during the late 1990s), and far less by higher-income people consuming far more water in the fourth block (only 24% increase)⁴⁶.

⁴³ www.trc.org.ls/trc_programmes/water_justice

⁴⁴ Lang, C, Hildyard, N, Geary, K and Grainger, M: *Dams Incorporated The Record of Twelve European Dam Building Companies*; 2000 Swedish Society for Nature Conservation

⁴⁵ Select Committee on International Development: Appendices to the Minutes of Evidence, APPENDIX 1: RECENT CASES OF CORRUPTION INVOLVING UK COMPANIES AND UK-BACKED INTERNATIONAL FINANCIAL INSTITUTIONS.2001. www.parliament.uk

⁴⁶ Bond; P: *Accumulation by Dispossession in Africa False Diagnoses and Dangerous Prescriptions*.

Hence we can now ask, was the corruption identified above limited to the ways in which multinational corporations and corrupt state officials cream profits in the construction stage? Or was there a more systematic corruption based upon the establishment of a water system that reinforced urban inequality inherited from apartheid?

To quote the words of Mr. Olav Kjørven, director of energy and environment group, Bureau for Development Policy, United Nations Development Program:

“There is no development possible without water, and there is no healthy ecosystem that does not depend on water for its survival. We are convinced that water is not only vital for life and essential for development, but also a priority for contributing to the achievement of all of the Millennium Development Goals, or MDGs. We ask ourselves can poverty and hunger be eradicated or maternal health improved, or child mortality reduced, or gender inequalities addressed without improved access to water and sanitation? The answer is no”⁴⁷.

The Socio economic impacts of LHWP on Basotho

Ongoing political turmoil since shortly after independence in 1966 has been partially responsible for increasing national poverty along with major changes in the South African economy that have reduced employment opportunities for migrant laborers. Under such circumstances, a legitimate question is whether or not this small country, which also is one of the 50 poorest in the world, has the institutional capacity to plan, implement and maintain the social and environmental components of one of the five largest infrastructure projects currently under construction in the world. Such doubts concerning institutional capacity partially explain the micro-management approach of the Commission.

In 1991 the Panel stated that “...unnecessary delays have stalled implementation of various RDP projects for more than a year...delays in implementing such components ... as rural Sanitation, village water supply, and construction communities have actually caused worsening living conditions in certain villages.”⁴⁸ Though such delays were attributed to both LHDA and the Commission, the Panel concluded:

Cornell Conference on the Ethics of Globalization Sponsored by the Poverty, Inequality, and Development Initiative, Society for the Humanities, Center for the Study of Economy and Society, Provost's Fund and the Institute for the Social Sciences Ithaca, 2007.

⁴⁷ *The Global Water Crisis : Evaluation of U.S. strategies for enhancing access to clean water and sanitation;* Briefing and hearing before the Committee on International Relations; House of representatives one hundred ninth Congress, Session 1 June 29, 2005.

⁴⁸ Sechaba Consultants 2000: 28. <http://www.sechaba.co.ls>

“That protracted arguments within the JPTC [the Commission] over what is compensation and what is rural development have not only been non-productive but also counter-productive because of resulting delays in approval, assignment of financial responsibility, and, especially, initiation and implementation.” The Panel also referred to “unwarranted interference, pressure and criticism from individuals and other divisions within LHDA, and from within the Commission, upon the Environment Division which were having an adverse effect on morale”.⁴⁹

In April 1995 the Panel reported “Once again the Panel must reiterate its view that even with implementation of the Rural Development Plan, it will not be easy to meet the requirements of the LHWP Treaty and LHDA. Each potential development option that is ignored, and especially options that deal with arable land, significantly increases the chances of failure.”⁵⁰ The same point was reiterated in June 1996: “Implementation of the Rural Development Plan has been deficient to date in terms of LHDA and Commission responsibilities under the 1986 LHDA Order. This is especially true in regard to restoring the living standards of villages, households and individuals more adversely affected by LHWP implementation.”

Referring to local complaints, as well as quoting criticism from Panel reports, the International Rivers Network (IRN) and Environmental Defense (ED), in a September 28, 1995 letter to the World Bank’s Vice President for the Africa Region, also requested that the legitimate concerns of affected villagers be “rectified before impoundment commences.”⁵¹

Educational facilities in the Highlands including the Katse and Mohale basins are the worst in Lesotho. While schools in the lowlands and foothills have piped water and latrines, most in the Highlands do not. According to Sechaba’s *Poverty and Livelihoods in Lesotho 2000 report*, poor school attendance is “intimately related to the deficit in school facilities” (page 8) as well as the lack of trained teachers. The Highlands also have the highest out-migration rate in the country, those moving have not had the education necessary for getting jobs; as a result “employment levels continue to decline in the remote villages” (*ibid*).

The neo-liberal agenda and capitalist state formation in post-democratic South Africa (Occupied Azania).

The task is to work out the dialectic of our age- we cannot just ‘apply’ the dialectic as a given. The actual forces of revolution, the poor, workers, Blacks, youths and women produce the dialectic through their daily struggles against the barbarism of capitalist logic. For the challenge facing us today as was for Marx, is to read the

⁴⁹ <http://www.sechaba.co.ls>

imperatives imposed by the market in its unending drive towards capital accumulation always within context of the specificities of history and class relations, of time and place⁵².

The transition to liberal democracy was accompanied by a project of neo-liberal restructuring of Capital in occupied Azania. It led also to its (Capital) deeper integration into the global markets. Albo points out echoing Marx; Capitalist development always spreads through imitation and emulation as competitive imperatives are incorporated into the strategies of social actors- with the bourgeoisie "fashioning a world in its own image"-but always within its own institutional context in the class struggle⁵³. Much less than a step towards an egalitarian future; the new Republic of South Africa marks a transition in the Capitalist development project; albeit with a few *tata machance* black exploiters. A proper incorporation into globalization mode aimed at opening up African societies to further reliance on the market as the dominant prefigure of all social relations.

The neo-liberal attacks on the poor have been captured by the resurgence in community mobilization. The emerging social movements have been mooted as a response to the deepening difficulty to meet the basic requirements for life- for the majority of Black particularly African communities.

We have lived through a period of internally generated globalization, where the State has actively sided with major business groups that have dominated the South African economy⁵⁴. The new Republic of South Africa adopted orthodox economic policy strategies in order to encourage further integration into the global Capitalist markets.

Since the declaration of GEAR in 1996, more than half a million jobs have been lost in the formal economy, a clear attack on the bargaining strength for a labor movement caught up with "struggling for jobs" (real wages of those in permanent employment have increased). All of this is explained away as necessary consequences of "adjustment" to globalization. At first we were told that GEAR is an urgent attempt to stem the rapid decline in the value of the Rand, in order to increase investor confidence the country needs to make explicit its conformity with the orthodoxies of international Capitalist markets. (Bond, 2005⁵⁵)

As Kelly⁵⁶(1993) noted; financial liberalisation had begun under Botha government and the Reserve Bank 'independence' had been enshrined as part of the new political

⁵³ Albo, G; *Contesting the 'NEW CAPITALISM'*. Problematising Resistance, Center for Civil Society research reports, Vol2, 2005.

⁵⁴ Carmody, P; *Between Globalisation and (post) Apartheid: the Political Economy of Restructuring in South Africa*. Taken from Journal of Southern African Studies, Vol28, 2002.

⁵⁵ Bond, P; *Elite Transition*. 2001

⁵⁶ Kelly, MV; *Financial institutions in South Africa*. 1993.

dispensation; further that this was seen as important in renewing access to private capital markets. The State is increasingly characterized by institutionalized dependence on global forces; so much so that the State appears autonomous from domestic social forces but that autonomy is substituted by a substantial dependence on global forces⁵⁷. It liberalizes the economy to maintain investor confidence and uses the global market to discipline all productive capital and labour. The State thus uses its power in order to constrain its power. As it globalizes, the governments' development strategies are increasingly dependent on private sector and financial markets.⁵⁸

Capitalist globalization project undertaken by the State of the RSA has resulted in a fundamental rescaling of the social forces that have been driving the uneven economic development from the national state/market complex into the global market. What Bond calls "elite transition"? Capitalist globalization is continuing to widen the gap between those that have been historically dispossessed and those to continue to profit from the status quo. Carmody argues further that the globalization strategies of South African conglomerate corporations have gone further than any other transnational worldwide. Five of the largest Anglo American, Old Mutual, SA Breweries, Billiton and Dimension Data collective control about 55% of all shares in the JSE. All of these corporations have shifted their primary stock market listings and corporate headquarters to London in the past decade. Hesse, 2001⁵⁹ This observation proves that both South Africa's colonial and Apartheid history is being re-inscribed in the current neo-liberal push for economic restructuring. Once again London has established herself as the dominant command and control center for the South African economy.

Under liberal democracy no matter how loudly the virtues of equality can be shouted; obvious socio-economic disparities continue to deepen, the logic of this system encourages citizens to think that this is a normal consequence of a regime that leaves them free to pursue their material interests in a free market. As Tocqueville noted modern democracies mean the end to great revolutions. Democracy does not lead to deepening class war rather; it allows for the deployment of 'gentle customs' and appeasement of social conflict in favor of existing power relations in society. Sameness reigns supreme and Otherness previously embodied in those without a part, is denied since everyone is included in a political order that refuses the idea that anything can exist outside of it⁶⁰. This danger I see in a language that refuses to acknowledge the contingent nature of the current political settings in Occupied

⁵⁷ Carmody, P; *Between Globalisation and (post) Apartheid: the Political Economy of Restructuring in South Africa*. Taken from Journal of Southern African Studies, Vol28, 2002.

⁵⁸ Adler, G & Webster E; *Introduction: Consolidating Democracy in a Liberalising World- Trade Unions and democratization in South Africa, 1958-1997*. 2000

⁵⁹ Hesse, P; *Foreign direct Investment in South Africa*, 2001.

⁶⁰ Labelle, G; *Two re-foundation projects of democracy in contemporary French philosophy- Cornelius Castoriadis and Jacques Ranciere*. Philosophy & Social Criticism, Vol.27. 2001.

Azania⁶¹. This has the effect of condemning the dispossessed to either repeat society's dominant discourses or remain in their ghettos of silence⁶².

Keeping in mind that the whole history of the modern world has been characterized by the insatiable greed of Capitalism, the sub-continent of India was 'owned' by the British East India Company, Indonesia and greater Azania by the Dutch East India Company, most of East Africa was 'owned' by British East Africa Company and the Congo was a one man corporation. In this new global phase private Capital wants to subject the entire globe to shape the third world in the image of the West. Through taking the initiative to globalize from within, the new Republic of South Africa has posed itself to be the first territory to become a fully-fledged corporate colony. What Ngugi wa Thiong terms: a *corporony* (Ngugi; 2006⁶³).

Thus the efforts being initiated by emerging social movements seem to be infant steps towards once again, changing the terrain, in a discontinuous and eruptive fashion by self consciously placing themselves on the outside of the liberal democratic consensus, inclined to an absolute break from the narrative of betrayal and elite reconfiguring. The challenge seems posed to be the radical re-founding of perspectives that can challenge the dominant political discourses particularly in the Left; in a way that unmasks the violence and lawlessness of their origins and their lack of legitimacy on the ground.

The struggle for affordable water in Phiri, Soweto.

The impacts of the Lesotho Highlands Water Project have been felt most strongly by the black residents of the urban townships such as in the South West of the city of Johannesburg (Soweto) in the Republic of South Africa. Some analysts have attributed this to the persuasiveness of the argument to the city taking heed to calls for an orientation towards demand side management in order to control Gauteng's thirst for Lesotho's water and therefore postpone the extension in to Phase 2-5 of the Highlands water mega-project which would culminate in building of further three giant dams in the Highlands of Lesotho.

The end- user of Lesotho's water is corporatised city water utility; Johannesburg Water (JW). Johannesburg Water, using the discourse of sustainable development has initiated the program of connecting all dwellings within the historically black townships onto pre-paid water system. The said motivations are the desire reduces water wastage. The strategy is a cold faced saving technique for the city. Prior to the installation of the meters average household consumption of water for most households in Soweto stood an approximately 67 KL per household per month. The new prepaid technology has been set average 6KL per household per month. The

⁶¹ Meaning the land belonging to the children of those whose cries the Most High hears.

⁶² Ibid1 p114

⁶³ Ngugi; Wizard of the Crow, p.746. 2006

sustainability rationale is advanced environmentally; based on the argument that the Republic of South Africa has very scarce water resources; and financial sustainability is based on the city's need to recover the costs of providing a service; many Soweto residents largely do not pay their rates therefore accumulate debt in service arrears.⁶⁴

The city acknowledges that the practice of separate and unequal development is still prevalent; that black locations have basically rotting water and sanitation infrastructure in urgent need for upgrades to sewage networks and individual property water infrastructure⁶⁵.

Operation Gcin' Amanzi is a mass water saving campaign launched by Johannesburg Water in 2003. At the heart of this strategy the installation of pre-payment water metering device (pre-paid water meter) so (to quote the language of Jo'burg water) "as to completely do away with practice of deemed consumption approach to water provision". The pre paid meter comes customized with technology which will eventually dispense the pre-programmed 6000-10 000 kL of Free Basic Water (FBW) to each household every month; if this amount should run out, then it is up to individual households to ensure that they buy credits and stock more water.^{66#67}

Jo'burg water proclaims proudly that the reductions in household consumption of water, has translated to approximately 14.7 million kL of water and 26.5 million kWh of electricity in money terms this translates to US\$6.8 million "savings". Johannesburg water is banking on saving a further R270 million (US\$45) for bulk water purchases. This actually means that the Operation Gcin' Amanzi can recuperate initiating costs within three years.

⁶⁴ Proceedings of the Workshop on Water and Politics: *Understanding the Role of Politics in Water Management*. Marseille, 26-27 February 2004.

⁶⁵ Please read analysis offered by Reena Parikh in her Senior Honors Thesis entitled: *THE COMMODIFICATION OF WATER IN SOUTH AFRICA: A CASE STUDY OF WESTCLIFF, DURBAN*; College of Arts & Sciences 2006; Boston College, Where she provides a comparative account in the case of the City of Durban; KwaZulu-Natal; RSA.

⁶⁶ CITY OF JOHANNESBURG 2004/05 ANNUAL REPORT Annual Performance Report (s), www.joburg-archive.co.za/2006.

⁶⁷ On 30 April 2008, the Johannesburg high court Judge MP Toska, passed the ruling that: prepayment water meter system unconstitutional, free basic water to be increased to 50L per person per day in Phiri. The Judge ordered City of Johannesburg remove of prepayment meters if residents demand this. The judgment is historical since it is the first instance whereby the constitutional right to water has explicitly been raised. The Judge found that increasing the free basic water supply would not put significant strain on the City's water and financial resources, especially if free basic water already supplied to rich households is redistributed to the poor. The news was received excitedly by members of the Coalition against Water Privatisation.

Perhaps the finest research detailing Johannesburg communities' resistance to commodified existence and the forced installation of the pre-paid water meters is Naidoo and Fiil-Flynn research report 'Nothing for Mahala'; The forced installation of prepaid water meters in Stretford, Extension 4, Orange Farm, Johannesburg, South Africa by The Coalition Against Water Privatisation (South Africa), the Anti-Privatisation Forum (South Africa) and Public Citizen (USA) 2004.

The report concludes:

“Prepaid water meters have started to have devastating effects on the social fabric of communities as water has to be paid for now. Traditional and cultural practices celebrated in community and collective action and spirit (e.g. funerals and weddings) are slowly being eroded as people can no longer afford to pay for the large amounts of water needed at such occasions. As the relationship of people to water has been individualised by the prepaid meters, unequal relationships amongst residents in Stretford, Extension 4 and between these residents and people from other extensions in Orange Farm have started to develop. For example, neighbors are no longer able to share water and suspicion develops over use of and access to water. The general lack of water necessary for the basic survival of households puts untold pressures on social relations as fights over gaining access to water surface in communities and in households. There are often gendered effects of such pressures e.g. increases in domestic violence... Far from facilitating the delivery of the 6 kilolitres of free water to residents in Stretford, Extension 4, the prepaid meters are often technically deficient, and the amount of 6 kilolitres is insufficient for the basic needs of the average household. This is borne out by the fact that a significant number of residents seek alternative sources of water or buy water units over and above the 6 kilolitres of free water.

The Water Services Act requires service providers to give reasonable notice if it intends to limit or discontinue water services, and the provider must take the ability to pay into account. Prepaid water meters, with or without the access to 6 kilolitres, clearly violates such provisions”.⁶⁸

The battle for water has been taken to the High Court of Johannesburg where movements are challenging the adequacy of the allocation of 6000kl per household per month that Johannesburg water has offered. In July 2006, five residents of Phiri, a poor community in Soweto, South Africa, brought an application before the Johannesburg High Court to challenge the amount of free basic water supplied. The applicants have requested the Court to declare that the decisions of Johannesburg

⁶⁸ Naidoo and Fiil-Flynn 2004. research report 'Nothing for Mahala'; The forced installation of prepaid water meters in Stretford, Extension 4, Orange Farm, Johannesburg, South Africa by The Coalition Against Water Privatisation (South Africa), the Anti-Privatisation Forum (South Africa) and Public Citizen (USA)

Water to limit free basic water supply to 6,000 per household per month is unconstitutional and unlawful⁶⁹. The allocation of this amount is challenged as being insufficient. In addition, the applicants are challenging the installation of pre-paid water meters which automatically switch the water supply off once the limit has been reached, unless the customer pays for more.

Section 27(1)(b) of the Constitution of the Republic of South Africa ⁷⁰guarantees the right of access to sufficient water. The court case represents an effort by first the primary applicants but perhaps also the united social movement's voice to challenge Johannesburg council's current provisions of on the amount of free basic water supplied to the residents of Phiri, the applicants are strongly arguing that this arbitrary amount of 6KL is grossly insufficient to meet basic needs of avarae households in Soweto; Phiri in particular. Among the experts testifying is the Dr Gleick who is of the opinion is that 50 litres per person per day should be the minimum starting point⁷¹ to provide people in the applicants' position with access to sufficient water.

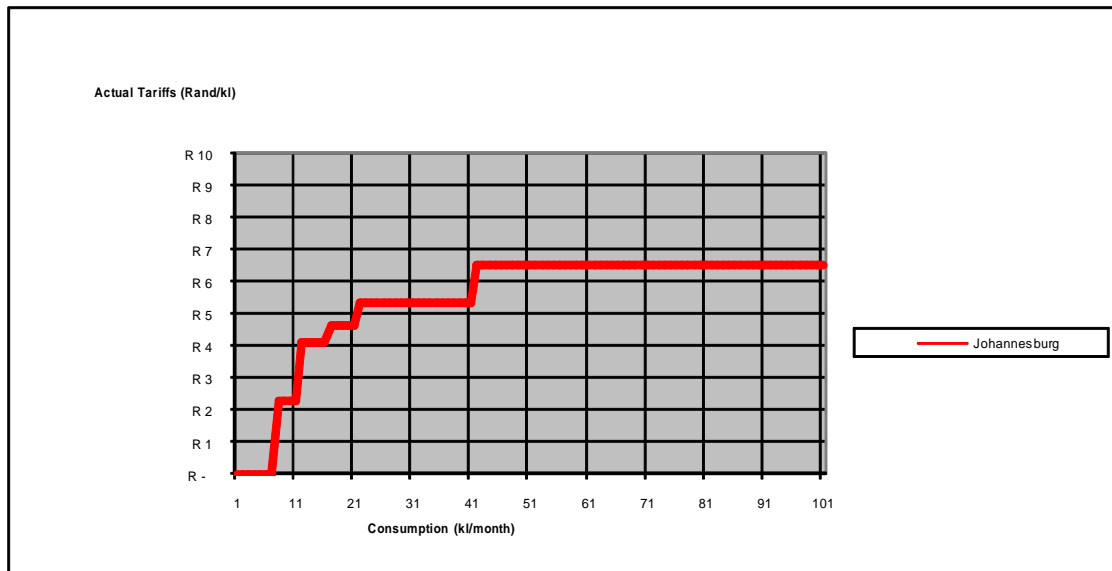
The insufficiency is compounded by the fact that it is based on an amount per household per month rather than per person per day. The free allocation of 6,000 litres per household per month is calculated on the basis of providing 20 litres per day per person to a presumed household of eight people. But research undertaken by the Coalition against Water Privatisation in 2004, found that the average Phiri household comprises 16 people.

Moreover, the rising price of water from the second consumption block leads to disconnections. The tokenistic 6000 liters runs out quickly for large households, and then the City of Johannesburg charges extremely high prices for the next block, while holding the price increase to zero after 40 kl/hh/month. This is a strongly pro-rich bias in water pricing which the CAWP has also raised in its lawsuit.

⁶⁹THE HIGH COURT OF the REPUBLIC OF SOUTH AFRICA (WITWATERSRAND LOCAL DIVISION) Case no: 06/13865 In the matter between LINDIWE MAZIBUKO First applicant GRACE MUNYAI Second applicant JENNIFER MAKOATSANE Third applicant SOPHIA MALEKUTU Fourth applicant VUSIMUZI PAKI Fifth applicant and THE CITY OF JOHANNESBURG First respondent JOHANNESBURG WATER (PTY) LTD Second respondent MINISTER OF WATER AFFAIRS AND FORESTRY Third respondent REPLYING AFFIDAVIT. (Available online @ apf.org.za)

⁷⁰ Section 27(1) (b) of Constitution of the Republic of South Africa, 1996.

⁷¹ www.righttowater.org.uk



In addition, Professor Desmond Martin, President of the HIV Clinicians Society, says that there is a need for more water on a daily basis for people living with HIV/AIDS than for non-HIV infected individuals, in order to ensure their health, standard of living and dignity.

In March 2004, Johannesburg Water introduced 'Operation Gcin'amanzi', a multi-million rand project to upgrade the water infrastructure. Residents argue that they have been persuaded to accept prepayment meters as the 'only' option available besides total disconnection. They had previously been supplied with unlimited water for a flat-rate. According to an earlier statement by Johannesburg Water, the new arrangement reduces the overall average cost to households by about 100 rand per month - from the previous flat rate of 149 rand per month to an average of 39.58 rand per month.

Yet, with the imposition of the prepayment meters, large households in Phiri are often without water for up to two weeks at a time each month because they claim they cannot afford to purchase additional water once the free basic supply is exhausted.

For the last three years Phiri has seen considerable community mobilisation in what residents call their 'battle for water'. Between March 2004 and July 2006, letters of demand were sent to Johannesburg Water and settlement meetings were pursued, but no resolution to the crisis was found. It was in this context that the current application was served in the Johannesburg High Court of South Africa.

Residents have come together into a coalition known as Coalition against Water Privatisation (a collection of community organizations and progressive NGOs struggling against the negative effects of current water policies on the marginalised, such as the Centre for Applied Legal Studies (CALS) at the University of the Witwatersrand and the Freedom of Expression Institute (FXI).

The applicants, who have strong support from their organisations, believe that this case to be the test to the value of Constitutionally-guaranteed rights; in the context of crony capitalism and the desperate struggle to survive that increasing numbers of Africans are faced with.

The five applicants and their support organizations say they intend to bring this case on behalf of their individual households and those of all residents of Phiri, as well as in the public interest. The Court is being asked to order Johannesburg Water to provide a free basic water supply of 50 litres per person per day, and the option of a credit-metered supply installed at the cost of the City of Johannesburg, to the residents of Phiri, Soweto.

There are mixed feelings about the strength of a legal strategy that may well run for a long time with the backing of large water corporations and the muscle of the state. However the case remains an important turning point in the struggle to free water from the grips of multinational profiteers.

Concluding remarks

Viriava and Naidoo provide useful data. By 1994 election compromise, 12 million Azanians had no access to clean drinking water. 21 million people did not have adequate sanitation, 10% had no toilet of any kind.⁷² The authors also make the point that in these circumstances, a drive towards commercialization may have the effect of increasing exclusion on basis of economic affordability. The results are potentially disastrous especially in a context where some provinces are recorded to have up to 34% of the persons/customers/ citizens without access to toilets. The authors note that the only means to afford Black people who have been historically and systematically excluded from service infrastructure, is through a de-humanising stigmatizing “indigence policy”. This policy makes exceptions for families or households that can scientifically and with legal documentation that could qualify them for exemptions where some of their basic services can be subsidized. The inherent limitations of this policy of course are that at the moment of writing this article, there exists no general or national policy on indigence across Azania; as a

⁷² Naidoo, P and Veriava, A; (2004) People before profits? A review of development and social change. *Development Update* Vol. 4. No. 4. 1-22

result access is determined by the market and no responsibility on the side of the government⁷³.

Perhaps it would be fitting to end with the words of advice from that founder of modern day social movements, Marcus Mosiah Garvey when he reminds us that:

“Cowardice has disappeared from the world. Men have died in this world war so quickly and so easily that those who desire liberty today do not stop to think of death, for it is regarded as the price which people in all ages will have to pay to be free; that is the price the weaker people of Europe have paid; that is the price the Negro must pay some day.”⁷⁴

⁷³ Ibid 1. pg 41

⁷⁴ Garvey, M.M (ed): Advice of the Negro to Peace Conference; The Negro World, November 30, 1918

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