

‘Meaningful engagement’ in the realisation of socio-economic rights: The South African experience

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1 Introduction

One of the key concerns, evidenced from South Africa’s socio-economic rights jurisprudence, that has impacted negatively on the realisation of socio-economic rights in the country, especially at grass roots level, has been the inability or limited opportunities for participation of, and reasonable engagement with, a majority of the population in decision making processes of government and in the provision of services. More often than not, government officials have assimilated the Apartheid system where decisions are made in a centralised bureaucracy without involving local people. This is despite the Constitution’s contemplation of a participatory democracy that is accountable, transparent, responsive and open and makes provision for the participation of society in decision-making processes. In 2009, the South African Department of Cooperative Governance and Traditional Affairs initiated a national assessment of local government to determine the extent of problems in relation to service delivery. Some of the problems identified included a break-down of local democracy, poor communication and accountability relationships with communities, weak community participation, and community alienation caused by insufficient attention to ‘bottom-up’ planning and consultative processes.¹ In addition, based on research conducted in an informal settlement in Cape Town, South Africa, Lemanski attributes the failures of both government and market interventions to address local level poverty largely to the exclusion of poor people from projects and planning.² In addition, Williams writes that community

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¹Department of Cooperative Governance and Traditional Affairs *State of Local Government in South Africa: Overview Report* (2009) 4, 72 and 73.

²Lemanski ‘Houses without community: Problems of community (in)capacity in Cape Town, South Africa’ (2008) 20 *Environment and Urbanization* 393 at 393.

participation in post-apartheid South Africa is largely spectator politics with communities becoming endorsers of pre-designed planning programmes.³ There is, therefore, a need to promote the effective participation of communities in the service delivery processes of government in line with the tenets of participatory democracy. This should be promoted not just as a legal requirement or a means to an end, but as something more substantial – as a fundamental right,⁴ an important component of South Africa's democracy (explained subsequently), and as an important notion in relation to the upliftment and empowerment of the poor.

Meaningful engagement is thus an important development in the South African Constitutional Court's approach to enforcing socio-economic rights and fostering effective participation in service provision. It has featured prominently in recent decisions of South African courts – the Constitutional Court in particular – as a process through which substantive entitlements can be defined and implemented for specific groups of people. Broadly speaking, as explained elsewhere, meaningful engagement occurs when communities or individuals and the government talk and listen to each other, in order to achieve certain objectives. The objective of any engagement is context sensitive. Put differently, meaningful engagement requires the state to pay particular attention to its constitutional responsibilities when it develops policies and programmes and in the provision of services, and to effectively seek and consider the views of beneficiaries. It is thus a neutral space where people and the state can discuss and shape options and solutions to difficult issues.⁵ Meaningful engagement is more democratic and more flexible and responsive to the practical concerns that socio-economic rights raise. By providing individuals and communities with an opportunity to influence the development and implementation of socio-economic policies and programmes, meaningful engagement would ensure that they are active stakeholders rather than just passive recipients of socio-economic goods and services.

In order to understand what meaningful engagement is and is not, the concept needs to be distinguished from other concepts such as participation, consultation and mediation. Though it is, at first glance, similar to these concepts, meaningful engagement as developed by the Constitutional Court goes beyond mere participation, consultation or the right to be heard.

Generally speaking, engagement and participation are both processes through which individuals and communities influence policy-making, priority

³Williams 'Community participation: Lessons from post-apartheid South Africa' (2006) 27 *Policy Studies* 197 at 197.

⁴The right of participation is implicit in the South African Constitution, as it is derived from various constitutional provisions that speak to participation. See, eg, s 152 and s 195 of the Constitution. Also, constitutional rights such as freedom of expression, access to information and just administrative action are important to enable, support and strengthen participation.

⁵Chenwi and Tissington *Engaging meaningfully with government on socio-economic rights: A focus on the right to housing* (2010) 9.

setting and access to goods and services, amongst others. However, it is possible to participate in policy development and implementation without being engaged. Participation is thus used in this article in conjunction with qualifications such as 'effective', 'full' and 'active', implying that participation between the state and individuals or communities must fulfil certain criteria (for example, those stated by the Constitutional Court later in this article in relation to meaningful engagement) in order for it to be considered 'meaningful' or 'effective'. Meaningful engagement thus goes beyond mere participation. It recognises the core importance of fostering active participation and gives content to the right of participation of the poor while embracing other democratic principles such as transparency and accountability. It is therefore capable of promoting social change on the ground as it creates a voice for the marginalised and impoverished.

Furthermore, as stated elsewhere, though similar in some respects, there are also basic differences between meaningful engagement, consultation and mediation.⁶ Consultation is usually a condition precedent to one discrete decision at one given moment. It is usually a procedural step necessary to make a decision. It is, therefore, more an *act* than a *process*. Engagement on the other hand, refers to a process of constant interchange between citizens and the state in the design and implementation of a socio-economic programme affecting a particular community or group of people. It is accordingly not simply an act necessary prior to taking a valid legal decision; it is a practice constitutive of a range of decisions necessary to design and implement a socio-economic programme. It is, however, important to note that some consultations can amount to meaningful engagement depending on the nature of the process and if it is genuine. As a result, international law, as seen below, emphasises 'genuine' consultation, which goes beyond mere consultation or *audi alteram partem* (that is, the right to be heard), and involves the fostering of a long-term relationship between the state and citizens or non-citizens. The use of the qualification 'genuine' is seen to imply meaningful consultation. Mediation, on the other hand, is a process in which parties in conflict voluntarily enlist the services of an acceptable third party (a 'mediator') to assist them in reaching agreement on issues that divide them.⁷ Like mediation, engagement is also an alternative form of resolving a dispute and a means of involving those whose rights have been violated in the formulation of a remedy. At times, the courts have used engagement, consultation and mediation interchangeably, that is, substituting one for the other.

This article examines the concept of meaningful engagement as developed by the courts and the obligations of the state in the engagement process.

⁶*Id* 10.

⁷The Constitutional Court, as seen subsequently, has encouraged interested civil society organisations to get involved as third parties in the engagement process, and acknowledges that skilled and sympathetic people are needed in order for the process to be effective. For further reading on mediation, see Nupen 'Mediation' in Pretorius (ed) *Dispute resolution* (1993) 39.

Meaningful engagement has been dealt with mostly in cases involving housing rights. The article thus focuses largely on these cases but also highlights other cases in which the concept has been considered. The article also considers how the concept fits within the constitutional and socio-economic rights legislative frameworks (specifically in the area of housing and local government) as well as the international human rights framework. In considering the engagement cases, the article highlights key principles or points from the judgments that are relevant in making engagement more effective in the realisation of the socio-economic rights of the poor.

It is important to note that meaningful engagement is not only required in relation to the realisation of socio-economic rights or in the conceptualisation of legislative and other measures aimed at the progressive realisation of these rights. It is also a remedial model. While emphasising the need for meaningful engagement in the realisation of socio-economic rights, the South African Constitutional Court has also developed it as a remedy in cases where socio-economic rights have been infringed or are threatened. These two approaches to the use of meaningful engagement should thus be distinguished. While the first approach is illustrated in this article, the housing rights jurisprudence considered alludes to the remedial context, where meaningful engagement has been triggered by plans to evict.

2 Legal basis of meaningful engagement

2.1 *Relevant international law and meaningful engagement*

Generally, South African courts have considered international law in their rulings in socio-economic rights cases.⁸ While the Constitutional Court has considered international law and standards in some of its socio-economic rights rulings⁹ in two of the cases in which it further developed the concept of meaningful engagement, the Court did not consider international law. Notwithstanding this omission, it is vital, and considering the importance attached to international law in the Constitution,¹⁰ to understand how meaningful engagement fits within the international human rights framework. This would also be useful in a

⁸How, and instances where, the courts have considered international law in socio-economic rights cases has been considered quite comprehensively in Kapindu *From the global to the local: The role of international law in the enforcement of socio-economic rights in South Africa* Socio-Economic Rights Project Research Series 6 (2009) <http://www.communitylawcentre.org.za/clc-projects/socio-economic-rights/research-series>.

⁹See, eg, *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) para 26 (hereafter *Grootboom*), where the Court examined the relevant provision in the International Covenant on Economic, Social and Cultural Rights *vis-à-vis* the Constitution. The Court also explained the importance of international law and standards (both binding and non-binding) in the interpretation of the rights in the Constitution.

¹⁰See, eg, s 39 of the Constitution.

determination of whether the national jurisprudence is developing in harmony with international human rights law. This article does not, however, delve into this determination.

A number of international standards require engagement with right holders or communities in the realisation of socio-economic rights. This section focuses on standards at the United Nations (UN) and African regional levels. The general comments of the Committee on Economic, Social and Cultural Rights (CESCR) in relation to housing, social security, health, water and work, for instance, are instructive in this regard. The terminology 'genuine consultation' is employed in most of the standards; while others refer to effective participation in decision making processes.

In relation to the right to adequate housing and in respect of proposed evictions and proposed resettlement, international law requires (extensive) genuine consultation in which representations from affected persons and communities are invited and considered. The procedural protections which should be applied in relation to evictions include an opportunity for genuine consultation with those affected, as stated by the CESCR.¹¹ Also, the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities has urged governments to ensure that there is effective participation, consultation and negotiation with the affected persons or groups when adopting measures to give full protection against unreasonable eviction.¹² In addition, the UN 'Basic Principles and Guidelines on Development-Based Evictions and Displacement' (UN Basic Principles and Guidelines) state that:

All potentially affected groups and persons, including women, indigenous peoples and persons with disabilities, as well as others working on behalf of the affected, have *the right to relevant information, full consultation and participation throughout the entire process*, and to propose alternatives that authorities should duly consider.¹³

Most importantly, special measures may need to be taken to ensure that all affected persons, including women and vulnerable and marginalised groups, are included in the consultation process.¹⁴ Furthermore, elements that must be built into development processes that may result in the displacement of people from their homes as stipulated in the UN Basic Principles and Guidelines include: public hearings on the proposed plans and alternatives; effective dissemination by the authorities of relevant information in advance; a reasonable period for

¹¹See CESCR General Comment no 4 *The right to adequate housing* 1991-12-13, UN doc E/1992/2 paras 8(a) and 12; CESCR General Comment no 7 *The right to adequate housing: Forced evictions* 1997-05-20, UN doc E/1998/22 paras 13 and 15.

¹²UN Sub-Commission on Prevention of Discrimination and Protection of Minorities Resolution 1997/6 on forced evictions, 1997-08-22 para 3.

¹³Contained in UN doc A/HRC/4/18, 2007-02-05 (Annex 1) para 38 (emphasis added).

¹⁴UN doc A/HRC/4/18 para 39 (emphasis added).

public review of, comment on, and/or objection to the proposed plan; opportunities and efforts to facilitate the provision of legal, technical and other advice to affected persons about their rights and options; and the holding of public hearing(s) that provide(s) affected persons and their advocates with opportunities to challenge the eviction decision and/or to present alternative proposals and to articulate their demands and development priorities.¹⁵

Genuine consultation has also been emphasised in relation to the right to social security and water. The CESCR has stated that an opportunity for genuine consultation with those affected, and timely and full disclosure of information on proposed measures are among the procedural protections to be applied before any action that interferes with the rights of an individual to social security and to water, is carried out by the state or by any other third party.¹⁶ The CESCR has further stated that the right of individuals and groups to participate in decision-making processes, must be an integral component of any policy, programme or strategy developed to discharge governmental obligations in relation to the rights to health, water and work.¹⁷ This includes effective involvement of communities in the definition of priorities, decision-making, planning, implementation and evaluation of the strategy.¹⁸

International law further emphasises the right of specific vulnerable groups to participate in policy development and implementation. Article 14 of the Convention on the Elimination of All Forms of Discrimination against Women, 1979 (CEDAW) guarantees women's right to participate on an equal basis in development planning at all levels. The CESCR has further reiterated the right of the elderly to take part in formulating and implementing policies that directly affect their well-being.¹⁹

At the African regional level, the African Commission on Human and Peoples' Rights has also placed emphasis on meaningful engagement in the realisation of socio-economic rights. The Commission has observed that articles 16 (the right to enjoy the best attainable state of physical and mental health) and 24 (the right

¹⁵UN doc A/HRC/4/18 para 37.

¹⁶CESCR General Comment no 19 *The right to social security* 2008-02-04, UN doc E/C 12/GC/19 para 78 (the CESCR also recommended that the selection by states of a core group of social risks and contingencies be done after a wide process of consultation, para 59(a)); CESCR General Comment no 15 *The right to water* 2003-01-20, UN doc E/C 12/2002/11 para 56.

¹⁷CESCR General Comment no 14 *The right to the highest attainable standard of health* 2000-08-11, UN doc E/C 12/2000/4, para 54 (states are also required to provide adolescents with a safe and supportive environment that ensures the opportunity to participate in decisions affecting their health, para 23); CESCR General Comment no 15, para 48 (states are also required to give individuals and groups full and equal access to information concerning water, water services and the environment, held by public authorities or third parties); CESCR General Comment no 18 *The right to work* 2006-02-06, UN doc E/C 12/GC/18, para 42.

¹⁸CESCR General Comment no 18 para 42.

¹⁹CESCR General Comment no 6 *The economic, social and cultural rights of older persons* 1995-12-08, UN doc E/1996/22 paras 5 and 39.

to a general satisfactory environment favourable to one's development) of the African Charter on Human and Peoples' Rights require states to provide 'meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities'.²⁰ It has found informing community members of an impending project as a *fait accompli*, not giving them an opportunity to shape the policies or their role in it, and failing to provide full information resulting in community representatives being in unequal bargaining power, not to constitute effective participation.²¹

2.2 South African law and meaningful engagement

The legal basis for meaningful engagement can also be found in the Constitution and other pieces of legislation and policies on specific rights as well as on local government. This section focuses on housing legislation and policies.²²

2.2.1 The Constitution

The duty to engage meaningfully is located within certain constitutional provisions.²³ First, section 152 of the Constitution obliges local government to 'ensure the provision of services to communities in a sustainable manner',²⁴ 'promote social and economic development',²⁵ and to 'encourage the involvement of communities and community organisations in the matters of local government'.²⁶ This duty is also located within the state's duty to 'improve the quality of life of all citizens and free the potential of each person' contained in the Preamble to the Constitution; the government's obligation to respect, protect, promote and fulfil the rights in the Bill of Rights provided in section 7(2) of the Constitution; the right to dignity in section 10 of the Constitution; and the right to life in section 11 of the Constitution. A municipality that ejects people from their homes without first meaningfully engaging with them would therefore be acting in a manner that is broadly at odds with the spirit and purpose of these constitutional obligations.²⁷

²⁰*The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* Communication 155/96 (2001) *African Human Rights Law Reports* 60 (ACHPR 2001) para 53.

²¹*Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, Communication 276/2003 (ACHPR 2010) [unreported], paras 281 and 282. The Commission found the failure to guarantee effective and meaningful participation of communities in projects that affect them to constitute a violation of the right to development as well as the right to property (see paras 228, 241, 283 and 289).

²²It is important to note that there is also the National Framework for Participation 2007, which is a policy framework for public participation in South Africa.

²³See *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 5 BCLR 475 (CC) para 16 (hereafter *Olivia Road*), where the provisions are outlined.

²⁴Section 152(1)(b).

²⁵Section 152(1)(d).

²⁶Section 152(1)(e).

²⁷See *Olivia Road* (n 23) para 16.

Meaningful engagement is further grounded in the government's obligation to act reasonably when adopting and implementing measures aimed at the progressive realisation of socio-economic rights.²⁸ Every step that the government takes must be consistent with this obligation.²⁹ Thus, for a measure to be reasonable, it would have to be ascertained whether meaningful engagement had taken place, as explained further in the subsequent section of this article dealing with the relevant jurisprudence.³⁰

In addition, section 195 of the Constitution lays down basic values and principles that must govern public administration. It provides that public administration must be governed by democratic values and principles contained in the Constitution, including encouraging the public to participate in policy making and providing the public with timely, accessible and accurate information.³¹ Section 195 is thus one of the bases of meaningful engagement.

Also, section 33 of the Constitution requires government to respect procedural fairness when taking any administrative action. Government decisions to evict and relocate people, for instance, would amount to an administrative action and must therefore be lawful, reasonable and procedurally fair. Section 33 of the Constitution has been fleshed out in sections 3 and 4 of the Promotion of Administrative Justice Act,³² which place further duties on administrators generally and sets out the manner in which administrators are to fulfil their constitutional obligations when implementing legislation and policies. The sections give important guidance on the nature of the duty to engage. For example, section 4 speaks to the holding of a public inquiry and a proper consideration of the inputs received. Sections 3 and 4 of PAJA are aimed at ensuring a proportional balance of competing interests; implying that the effect of an administrative action has to be balanced against the need to take measures aimed at realising socio-economic rights.³³ Generally, the procedural fairness requirements would facilitate rational and accurate decision making in the provision of socio-economic goods and services, as it provides an opportunity for the voices of individuals and communities to be heard before final decisions are made.

²⁸This obligation is stated in, eg, ss 26(2) and 27(2) of the Constitution.

²⁹*Grootboom* (n 9) para 82.

³⁰See *Olivia Road* (n 23) para 17; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2009 9 BCLR 847 (CC), para 378 (hereafter *Joe Slovo*); and *Mazibuko v City of Johannesburg* 2010 3 BCLR 239 (CC) paras 133 and 134 (hereafter *Mazibuko*). Reasonable engagement was considered in these cases in determining the reasonableness of the government's measure towards the realisation of the socio-economic rights in question.

³¹Sections 195(1)(e) and (g).

³²Act 3 of 2000 (hereafter PAJA).

³³Quinot 'An administrative law perspective on "bad building" evictions in the Johannesburg inner city' (2006) 8/1 *ESR Review* 25 at 27.

2.2.2 Housing legislation

The key legislation in this area is the Housing Act,³⁴ which obliges all spheres of government – national, provincial and local – to ‘consult meaningfully with individuals and communities affected by housing development’ and ‘facilitate active participation of all relevant stakeholders in housing development’.³⁵ Meaningful engagement is also an important requirement when evictions are sought under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act,³⁶ which spells out a number of procedural standards to be followed when evicting unlawful occupiers. Meaningful engagement is mandated for all evictions under the PIE Act.³⁷ The nature of the competing interests involved in eviction proceedings under the PIE Act would make it not just and equitable to order an eviction if proper discussions, and where appropriate, mediation, have not been attempted.³⁸

With regard to policy measures in the area of housing, the White Paper on Housing,³⁹ which is aimed at guiding government’s housing policy, and the National Housing Code,⁴⁰ containing guidelines in respect of housing policy, requires that government housing policies and strategies place specific emphasis on promoting the effective participation of affected communities in the planning and implementation of housing developments. Other policy measures such as the Comprehensive Plan on Sustainable Human Settlements, commonly referred to as ‘Breaking New Ground in Housing Delivery’ (BNG), see consultation and community participation as a key component of housing development.⁴¹ The Social Housing Policy for South Africa requires participation by beneficiaries in the administration and management of their housing options and further expects social housing institutions to consult with residents through meaningful participation.⁴²

³⁴Act 107 of 1997.

³⁵Section 2(1)(l) of the Housing Act. See also s 9(2)(a).

³⁶Act 19 of 1998 (hereafter PIE Act).

³⁷This was confirmed by the Constitutional Court in *Abahlali Basemjondolo Movement SA v Premier of KwaZulu-Natal* 2009 4 BCLR 422 (CC) para 69 (hereafter *Abahlali*).

³⁸See *Port Elizabeth Municipality v Various Occupiers* 2004 12 BCLR 1268 (CC) para 43 (hereafter *PE Municipality*).

³⁹National Department of Housing *White Paper: A New Housing Policy and Strategy for South Africa* (1994) <http://www.housing.gov.za/Content/planned/Docs/Housing%20White%20Paper.pdf>.

⁴⁰Section 4. Adopted in 2000 <http://www.housing.gov.za>. A new Housing Code is currently awaiting Ministerial approval.

⁴¹National Department of Housing *Breaking New Ground: A comprehensive plan for the development of sustainable human settlements* (2004) <http://www.capegateway.gov.za/Text/2007/10/bng.pdf>.

⁴²National Department of Housing *A social housing policy for South Africa: Towards an enabling environment for social housing development* (2003) http://www.housing.gov.za/Content/legislation_policies/Social%20Housing%20Policy.pdf.

2.2.3 Local government legislation

The Local Government: Municipal Structures Act⁴³ requires a municipal council to annually review its processes for community involvement and must develop mechanisms to consult the community and community organisations in performing its functions and exercising its powers.⁴⁴ The Local Government: Municipal Systems Act⁴⁵ is more extensive, devoting its chapter 4 to community participation. Local government is required to 'encourage, and create conditions for, the local community to participate in the affairs of the municipality', including in relation to the provision of services;⁴⁶ contribute to building the capacity of local communities to enable them participate in the affairs of the municipality;⁴⁷ and to use its resources and annually allocate funds in its budget for the purpose of fostering participation.⁴⁸ A municipality is obliged to establish appropriate mechanisms, processes and procedures to enable the local community to participate in the affairs of the municipality, including providing for public meetings and hearings, consultative sessions and report-back to the local community.⁴⁹ In doing this, the municipality must take into account the special needs of disadvantaged groups, including people who cannot read or write, people with disabilities, and women.⁵⁰ Communication of information concerning community participation must be done in a manner that takes into account language preferences and the special needs of people.⁵¹ The Council of a municipality is required to encourage involvement of the local community and consult the local community on 'the level, quality, range and impact of municipal services provided by the municipality, either directly or through another service provider' and 'the available options for service delivery'.⁵² Members of a community have the rights to contribute to the decision-making processes of the municipality, to submit written or oral recommendations, representations and complaints to the municipal council or another political structure, to prompt responses to their written or oral communications, to be informed of the decisions of the council affecting their rights, and to demand that proceedings be open to the public.⁵³

⁴³Act 117 of 1998.

⁴⁴Sections 19(2) and (3).

⁴⁵Act 32 of 2000.

⁴⁶Section 16(1)(a).

⁴⁷Section 16(1)(b).

⁴⁸Section 16(1)(c).

⁴⁹Section 17(2).

⁵⁰Section 17(3).

⁵¹Section 18.

⁵²Section 4(2).

⁵³Sections 5(1)(a), (b),(c) and (e).

3 The courts and meaningful engagement

3.1 *The engagement cases*

The Constitutional Court and some lower courts have made very important points about meaningful engagement and its importance in the realisation of socio-economic rights, particularly in the context of the right to adequate housing. This section focuses largely on the decisions of the Constitutional Court. However, reference is also made to relevant lower court decisions.

The Constitutional Court first made reference to engagement in *Grootboom*, the first case in which it enforced the right of access to adequate housing. This case concerned a group of children and adults who had been evicted from private land, and while camping on a sports field, they approached the courts to enforce their right of access to adequate housing. The Constitutional Court held that in reviewing compliance with the state's positive obligation to progressively realise the right of access to housing within available resources, a court will consider whether the measures taken towards this end are reasonable.⁵⁴ The Court found the state's housing programme not to be reasonable as it did not make reasonable provision for those in desperate need of housing – those with no roof over their head, no access to land, and who are living in intolerable conditions or crisis situations. The Court ordered the state to adopt, implement and supervise a comprehensive and coordinated programme that addresses effectively the situation of those desperately in need of housing.⁵⁵ Regarding the children, the Court held that the primary obligation to provide for children's needs lies with their parents and on the state only when such children have been removed from the care of parents.⁵⁶

With regard to meaningful engagement, the Court held that it expected officials of a municipality responsible for housing to engage with people as soon as they became aware of their (illegal) occupation of land. It then expressed disappointment at the failure of the municipality to make some effort to resolve the problems faced by the residents on a case-by-case basis following an investigation of their circumstances.⁵⁷

⁵⁴For a measure to be reasonable, the Court held, it must be comprehensive, coherent, inclusive, balanced, flexible, transparent, properly conceived and properly implemented, and make short-, medium- and long-term provision for those in desperate need or in crisis situations. The measures must further clearly set out the responsibilities of the different spheres of government and ensure that financial and human resources are available for their implementation (*Grootboom* (n 9) paras 37 and 41-43).

⁵⁵*Grootboom* (n 9) para 99.

⁵⁶*Grootboom* (n 9) paras 73-74 and 77-78. As the children in this case were under the care of their parents or families, the Court further decided that the state must provide the legal and administrative infrastructure necessary to ensure that children are given the protection intended by s 28 of the Constitution, dealing with, amongst others, children's right to shelter.

⁵⁷*Grootboom* (n 9) para 87.

In its subsequent decision in *Minister of Public Works v Kyalami Ridge Environmental Association*,⁵⁸ the Constitutional Court also made some important points regarding engagement. This case involved the government's decision to house people who had been displaced by severe floods. The government's plan was to establish a transit camp on state-owned land, with the aim of moving the people to permanent housing once it becomes available.⁵⁹ The Constitutional Court relied on section 26 of the Constitution, on the right to have access to adequate housing, to justify the government's action. It stated that in terms of this right, the national government had the duty to ensure that laws, policies, programmes and strategies were adequate to meet the state's obligation to provide access to adequate housing. The Court held with reference to *Grootboom*, that this obligation included the need to facilitate access to temporary relief for people who were living in intolerable conditions and for people who were in crisis due to such natural disasters as floods and fires, or because their homes were under threat of demolition.⁶⁰ The Court, therefore, found the government's decision to be lawful, as it was intended to give effect to its constitutional obligations.

On engagement, the Court was of the view that principles of good government include finding an appropriate method to inform affected persons of its plans and engaging them in discussion and planning at an early stage of a project.⁶¹ The Court, however, did not find the absence of such consultation and engagement to amount to an invalidation of the government's decision, as the government was merely fulfilling its constitutional obligation and would in effect inhibit the government from taking a decision that had to be taken urgently.⁶²

The Constitutional Court elaborated on engagement in *PE Municipality* but did not properly define the process. This case related to an eviction application by the Port Elizabeth Municipality against a group of adults and children, who had illegally occupied private undeveloped land within the municipality's jurisdiction. The application was based on section 6 of the PIE Act, which allows an organ of state to institute proceedings for the eviction of an unlawful occupier within its area of jurisdiction.⁶³ The Court found that the municipality was obliged to provide alternative accommodation or land prior to an eviction.⁶⁴ It was of the view that the state has to take reasonable steps to get an agreed mediated solution and to provide suitable alternative accommodation particularly for vulnerable groups such as the elderly, children, disabled persons and female-headed households.⁶⁵

⁵⁸2001 3 SA1151 (CC) (hereafter *Kyalami Ridge*).

⁵⁹*Id* paras 3-4.

⁶⁰*Id* paras 38-40,

⁶¹*Id* para 111.

⁶²*Id* paras 110 and 111.

⁶³*PE Municipality* (n 38) paras 1-2.

⁶⁴*Id* paras 29-30, 39-47 and 56-59.

⁶⁵*Id* paras 30 and 61.

Thus evictions cannot proceed without a proper relocation plan based on genuine consultation.

The Court found the municipality's lack of engagement in any discussions with the occupiers, in order to identify their particular circumstances or needs, to be at odds with its constitutional obligations.⁶⁶ It held that:

In seeking to resolve the above contradictions, the procedural and substantive aspects of justice and equity cannot always be separated. The managerial role of the courts may need to find expression in innovative ways. Thus one potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a pro-active and honest endeavour to find mutually acceptable solutions. Wherever possible, respectful face-to-face engagement or mediation through a third party should replace arms-length combat by intransigent opponents.⁶⁷

The Court added that the obligation to engage lies in participation in the process and not in reaching a settlement.⁶⁸ The Court went on to describe the benefits of engagement, which include a reduction in the costs of litigation, decreasing tensions, narrowing the areas of dispute and 'facilitating mutual give-and-take'.⁶⁹ The engagement process also 'enables parties to relate to each other in pragmatic and sensible ways, building up prospects of respectful good neighbourliness for the future'.⁷⁰ The Court thus held that 'a court involved in future litigation involving occupiers should be reluctant to accept that it would be just and equitable to order their eviction if it is not satisfied that all reasonable steps had been taken to get an agreed, mediated solution'.⁷¹ The Court further observed that respectful face-to-face engagement or mediation processes are useful in facilitating an outcome that ends a stand-off, promotes respect for human dignity and underlines the fact that we all live in a shared society.⁷²

Meaningful engagement has also been seen as an expression of people's dignity in *Olivia Road*. This is the leading case on meaningful engagement, as it is where the Constitutional Court first properly defined the concept. The Court also goes a step further by developing meaningful engagement as a remedy, thus taking the responsibility to forge innovative remedies to heart.⁷³ The *Olivia Road*

⁶⁶*Id* paras 45, 56 and 61.

⁶⁷*Id* para 39.

⁶⁸*Id* para 40.

⁶⁹*Id* para 42.

⁷⁰*Id* para 43.

⁷¹*Id* para 61.

⁷²*Id* para 42.

⁷³The Constitution gives courts wide remedial powers to grant appropriate and effective remedies in socio-economic rights cases. They may grant 'appropriate relief, including a declaration of rights' (s 38), and when deciding a constitutional matter, 'must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency' and 'may make any

case was a challenge of several aspects of the City of Johannesburg's (the City) practice of evicting residents of so called 'bad' buildings for health and safety reasons. At the core of the case were the provisions of the National Building Regulations and Building Standards Act⁷⁴ that empower local authorities to issue a notice to occupiers to vacate premises when they deem it necessary for the safety of any person.⁷⁵ Failure to comply with such a notice constitutes a criminal offence for which the offender can be fined up to R100 for each day of non-compliance.⁷⁶ After hearing the case, but before handing down judgment as is ordinarily the case, the Constitutional Court issued an interim order. The order required the parties to 'engage with each other meaningfully' in an attempt to resolve the issues in the application and alleviating the plight of the occupiers by making the buildings as safe and conducive to habitation as was reasonably practicable; and report back to the Court. The interim order reads:

- 1 The City of Johannesburg and the applicants are required to engage with each other meaningfully and as soon as it is possible for them to do so, in an effort to resolve the differences and difficulties aired in this application in the light of the values of the Constitution, the constitutional and statutory duties of the municipality and the rights and duties of citizens concerned.
- 2 The City of Johannesburg and the applicants must also engage with each other in an effort to alleviate the plight of the applicants who live in the two buildings concerned in this application by making the buildings as safe and as conducive to health as is reasonably practicable.
- 3 The City of Johannesburg and the applicants must file affidavits before this Court on or before 3 October 2007 reporting on the results of the engagement between the parties as at 27 September 2007.⁷⁷

In line with its view in *PE Municipality*, the Constitutional Court observed that it would be inappropriate to grant any eviction order against the occupiers, in the circumstances of this case, unless there had at least been some effort at meaningful engagement.⁷⁸ The Court subsequently handed down judgment after the parties had reached a settlement and submitted it to the Court.⁷⁹ The Court endorsed the

order that is *just and equitable*' (s 172(1) emphasis added). The courts thus have the responsibility to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal (see *Fose v Minister of Safety and Security* 1997 7 BCLR 851 (CC) para 69 (hereafter *Fose*)).

⁷⁴Act 103 of 1977 (hereafter NBRSA).

⁷⁵Section 12(4)(b) of the NBRSA.

⁷⁶Section 12(6) of the NBRSA. The Constitutional Court found this automatic criminal sanction attaching to a failure to comply with a s 12(4)(b) notice to be at odds with s 26(3) of the Constitution which prohibits arbitrary evictions (*Olivia Road* (n 23) para 49). The Court then read words into the act to allow for judicial oversight in the eviction of people in terms of the NBRSA (*Olivia Road* (n 23) paras 54, and 47-51).

⁷⁷Interim Order, dated 2007-080-30, reproduced in *Olivia Road* (n 23) para 5.

⁷⁸*Olivia Road* (n 23) para 22.

⁷⁹Agreement, signed on 2007-10-29, referred to in *Olivia Road* (n 23) paras 24-26.

settlement agreement on the basis that it represented a reasonable response to the engagement process.⁸⁰ The Court recalled its position in *Grootboom* that reasonable state action implies that human beings be treated with respect and care for their dignity.⁸¹ In defining meaningful engagement, the Court held that '[e]ngagement is a two-way process in which the City and those about to become homeless would talk to each other meaningfully in order to achieve certain objectives'.⁸² The City should have thus engaged meaningfully with the occupiers both individually and collectively as a minimum requirement, as it ought to have been aware of the possibility, or even the probability, that people would become homeless as a direct result of their eviction at its instance.⁸³ The Court went further to spell out the objectives of such engagement, while emphasising that there is no closed list of the objectives. It would be to: ascertain what the consequences of the eviction might be; whether the City could help in alleviating the situation of those in dire need; whether it was possible to render the buildings concerned relatively safe and conducive to health for an interim period; whether the City had any obligations to the occupiers in the prevailing circumstances; and when and how the City could or would fulfil these obligations.⁸⁴

The Court also clarified the constitutional basis for meaningful engagement as stated earlier in this article, which included section 26(2) of the Constitution, on the government's obligation to adopt reasonable measures aimed at the progressive realisation of the right to have access to adequate housing.⁸⁵ Though the Court's decision was not based on the reasonableness test developed in *Grootboom*, by citing section 26(2) as one of the bases for meaningful engagement, the Court thus, it is argued, grounds the engagement process in the reasonableness concept and expands the reasonableness criteria to include meaningful or reasonable engagement in the context of an eviction. This argument is supported by later decisions of the Court, explained below.

The Court further made other important new points about the engagement process. The Court held that:

⁸⁰The agreement contained interim measures to secure the safety of the building and provide the occupiers with alternative accommodation in the inner City of Johannesburg. The interim measures to improve the conditions in the two buildings pending relocation to the alternative accommodation included the provision, at the City's expense, of toilets, potable water, waste disposal services, fire extinguishers and a once-off operation to clean and sanitise the properties. The City and the occupiers agreed that the alternative accommodation would consist of, at least, security against eviction, access to sanitation, access to potable water, and access to electricity for heating, lighting and cooking. It was further agreed that, once relocated, the occupiers would occupy the temporary shelter until suitable permanent housing solutions were developed for them. It was also agreed that the nature and location of permanent housing options would be developed by the City in consultation with the occupiers.

⁸¹*Olivia Road* (n 23) paras 10-11.

⁸²*Id* para 14.

⁸³*Id* para 13.

⁸⁴*Id* para 14.

⁸⁵*Id* paras 16-18.

[T]he larger the number of people potentially to be affected by eviction, the greater the need for structured, consistent and careful engagement. Ad hoc engagement may be appropriate in a small municipality where an eviction or two might occur each year, but is entirely inappropriate in the circumstances prevalent in the City.⁸⁶

Engagement must thus be tailored to the particular circumstances of each situation and be done both individually and collectively. The Court added that it 'must be understood that the process of engagement will work only if both sides act reasonably and in good faith'.⁸⁷ In this regard, Ray has observed that there is always the possibility that a municipality will decide to engage in bad faith either through refusing to engage or it could go through the engagement without offering any serious concessions to residents and without seriously justifying that refusal beyond simply saying it lacks the resources.⁸⁸ He suggests, and rightly so, that in such cases, the court could order further engagement with additional court control and find the government liable for violation of the constitutional rights on procedural grounds.⁸⁹ Whether this would in fact work when the political will is completely absent remains to be seen. In the case of *Mamba v Minister of Social Development*,⁹⁰ concerning the closure of camps that housed refugees from the recent xenophobic violence in South Africa, the provincial government was, however, not willing to engage meaningfully, proceeding with closure of the camps without consultation on a reintegration plan. Further attempts by the Court to force the engagement were futile. The Constitutional Court in this case had directed the parties 'to engage with each other meaningfully and with all other stakeholders as soon as it is possible for them to do so in order to resolve the differences and difficulties aired in this application in the light of the values of the Constitution, the constitutional and statutory obligations of the respondents and the rights and duties of the residents of the shelters'.⁹¹

The Constitutional Court in *Olivia Road* further held that:

[S]ecrecy is counter-productive to the process of engagement. The constitutional value of openness is inimical to secrecy ... the provision of a complete and accurate account of the process of engagement including at least the reasonable efforts of the municipality within that process would ordinarily be essential.⁹²

The requirement of making the process public is crucial as it makes room for interested individuals or groups to appraise the process and the result of the engagement. With regard to the involvement of other stakeholders in the process, the Court stated that the engagement process should preferably be managed by

⁸⁶*Id* para 19.

⁸⁷*Id* para 20.

⁸⁸Ray *Extending the shadow of the law; Using hybrid mechanisms to develop constitutional norms in socioeconomic rights cases* Working Paper 21: Centre for Human and Global Justice (2008) 35.

⁸⁹*Ibid*.

⁹⁰CCT65/08 (hereafter *Mamba*). The case was subsequently withdrawn as it had become moot.

⁹¹*Id* Court Order dated 2008-08-21 para 1.

⁹²*Olivia Road* (n 23) para 21.

careful and sensitive people on its side so as to ensure that a municipality is able to engage meaningfully with poor, vulnerable or illiterate people.⁹³ Structures that are staffed by competent and sensitive council workers who are skilled in engagement have to be put in place.⁹⁴ The Court added that 'civil society organisations that support the peoples' claims should preferably facilitate the engagement process in every possible way'.⁹⁵ The Constitutional Court also recognised the importance of involving other role players in the engagement process in the *Mamba* case, where as stated above, the Constitutional Court required the parties to engage with each other meaningfully and with all other stakeholders.⁹⁶

Involving other stakeholders in the meaningful engagement process is in line with South Africa's democracy as envisioned in the Constitution. The Constitutional Court has explained the kind of democracy envisioned in the Constitution in *Doctors for Life International v The Speakers of the National Assembly*.⁹⁷ This case related to the role of the public in the law-making process. It concerned the constitutionality of four Bills related to health issues, on the ground of the failure of parliament to fulfil its constitutional obligation to facilitate public involvement when it passed the Bills.⁹⁸ The Constitutional Court held that a defining feature of the democracy that is contemplated in the Constitution is one that is not only representative but also contains participatory elements.⁹⁹ The Court added that the foundation of representative democracy would be meaningless without public participation and 'participation by the public on a continuous basis provides vitality to the functioning of representative democracy'.¹⁰⁰ The Court in *Doctors for Life* thus emphasised the government's obligation to ensure that the public effectively participates in legislative processes.¹⁰¹ It saw this duty as a manifestation of the right to political participation in international law and of importance to the achievement of constitutional values and goals.¹⁰² The Court then held that 'the obligation to facilitate public involvement is a material part of the law-making process' and that '[f]ailure to comply with this obligation renders the resulting legislation invalid'.¹⁰³

The participatory democracy envisioned in the Constitution has also been explained in *Minister of Health v New Clicks South Africa (Pty) Ltd*.¹⁰⁴ This case dealt with regulatory measures in relation to medicines. In particular, it concerned

⁹³*Id* para 15.

⁹⁴*Id* para 19.

⁹⁵*Id* para 20.

⁹⁶*Mamba* (n 90) para 1.

⁹⁷2006 12 BCLR 1399 paras 111 and 116 (hereafter *Doctors for Life*).

⁹⁸*Id* paras 1-2.

⁹⁹*Id* paras 111 and 116.

¹⁰⁰*Id* para 115.

¹⁰¹*Id* paras 112-117.

¹⁰²*Id* paras 108-109.

¹⁰³*Id* para 209.

¹⁰⁴2006 8 BCLR 872 (CC) paras 111, 625 and 627 (hereafter *New Clicks*).

a pricing system for medicines and Scheduled substances published by the Minister of Health. The Court underscored the importance of people to have a say in what the government is doing.¹⁰⁵ It held that:

Because transparency and responsiveness relate more to the broad character of the workings of our democracy than to doing justice to an individual, all interested parties, not only those whose rights stand to be adversely affected, are entitled to know what government is doing, and as concerned citizens, to have an appropriate say.¹⁰⁶

The Court's approach of involving other stakeholders in the remedial process and making the process public mirrors other remedial models that speak to participation of those affected in the remedy formulation process. For instance, the 'experimentalist' approach of remedial decision making by Sabel and Simon is a deliberative process that allows for on-going stakeholder participation. The stakeholders are expected to listen to each other in good faith and remain open to learning. It further requires that the policies, norms and results of the process be transparent, that is made public.¹⁰⁷ The process can thus enhance democratic accountability to diverse stakeholders since transparency is an accountability norm. Also, Sturm's 'deliberative model of remedial decision making' speaks to the participation of other stakeholders that might be responsible for or affected by the remedial outcome.¹⁰⁸ Mbazira has, however, cautioned against diluting the remedial process or unnecessarily slowing it down through wide stakeholder participation to the extent that remediation is lost.¹⁰⁹

¹⁰⁵*Id* para 607.

¹⁰⁶*Id* para 627.

¹⁰⁷Sabel and Simon 'Destabilization rights: How public litigation succeeds' (2004) 117 *Harvard LR* 1015 at 1067-1072. The experimentalist approach tries to get as many stakeholders as possible involved in the determination of an appropriate solution, not just the parties to the case. With this approach, the parties first come together to negotiate a remedial plan, with the goal of consensus, and other interested stakeholders can join. The court may appoint a mediator and the stakeholders meet in person. The rules that emerge from this remedial negotiation stage are provisional as they are continuously reassessed and revised during the negotiation process. The policies, norms and results must be transparent, that is, made public.

¹⁰⁸Sturm 'A normative theory of public law remedies' (1991) 79 *Georgetown LJ* 1355 at 1427-1431 and 1433. With the deliberative model of remedial decision-making, the stakeholders are not limited to the parties but include others that might be responsible for or affected by the remedial outcome. With this approach, the mediation process begins with the court determining liability and then setting up a mediation process, which has three stages – pre-negotiation, negotiation, and implementation. In the pre-negotiation stage, the judge performs several functions including assisting in identifying stakeholders and a mediator and outlining the characteristics of the process by which they are to attempt to craft a remedy. If consensus is reached, the agreement is then presented to the court, which then holds a public hearing on the proposed remedy, evaluates the adequacy of the remedy, and then issues an opinion.

¹⁰⁹Mbazira *Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice* (2009) 217.

It is worth noting also that meaningful engagement as a remedy in *Olivia Road* further surmounts concerns around the separation of powers and issues of polycentricity in socio-economic rights adjudication, giving the government some leeway in policy-decision making, while embracing other democratic principles such as transparency and accountability. Similarly, Brand has stated that meaningful engagement 'holds great promise, both because it potentially resolves the problems of institutional capacity and institutional relations attaching to remedies in socio-economic rights cases ... and because it provides a mechanism for the powerful legitimation by courts of transformative political action'.¹¹⁰

Despite the progressive points made on meaningful engagement in *Olivia Road*, the Constitutional Court, in the *Joe Slovo* case, found that the defective engagement processes in the case did not vitiate the decisions taken by the government. This case concerned the eviction of a large informal settlement community to make way for formal housing under the government's housing development project. While ordering the eviction of the community, the Constitutional Court emphasised the obligation of the state to provide alternative accommodation, which is derived from *Grootboom*, *PE Municipality* and subsequent cases.¹¹¹ The Court was prescriptive as regards the nature of the alternative accommodation to be provided, providing detailed standards that the accommodation must comply with. It also emphasised the obligation on states to engage meaningfully with communities faced with eviction and was specific as to the issues to be included in such an engagement.¹¹²

Despite its misgivings about the engagement process that took place prior to the litigation – finding serious faults and inadequacies in the process – the Court went ahead to order the mass eviction. The Court did not see in-situ upgrading of the Joe Slovo settlement as feasible, and thus ordered the mass eviction of the community in accordance with a time table provided by the government.¹¹³ It ordered engagement as one of the mitigating aspects to render the eviction 'just and equitable'.¹¹⁴ The Court ordered the eviction despite the flawed engagement on the basis that the beneficial ends of low-income housing development had to be considered when condemning this 'deplored' deficiency.¹¹⁵ Yacoob J, while finding that there had been reasonable engagement, stated that:

It is certainly true that the state could and should have been more alive to the human factor and that more intensive consultation could have prevented the impasse that had resulted. Having given these issues careful consideration, I do not think that these factors in themselves are sufficient to tilt the scale against eviction and relocation.¹¹⁶

¹¹⁰Brand *Courts, socio-economic rights and transformative politics* LLD thesis UN (Stellenbosch) (2009) 137.

¹¹¹*Joe Slovo* (n 30) para 7.

¹¹²*Id* paras 5 and 7.

¹¹³*Id* para 7.

¹¹⁴*Id* para 7(10).

¹¹⁵*Id* paras 112, 113, 117, 167, 301, 302, 280 and 284.

¹¹⁶*Id* para 113.

Moseneke J, on the other hand, did not find the engagement that took place to be reasonable.¹¹⁷ O'Regan J noted the government's acknowledgement that there was not a coherent or adequate process of consultation and its failure to engage fully and meaningfully with the occupiers and others affected by the housing development but that such failure does not render the implementation of the project unreasonable, considering the extent of inadequate housing and the attempts being made to deal with this crisis.¹¹⁸

Sachs J also found serious faults with the engagement process noting that '[t]he evidence suggests the frequent employment of a top-down approach where the purpose of reporting back to the community was seen as being to pass on information about decisions already taken rather than to involve the residents as partners in the process of decision-making itself'.¹¹⁹ He, however, held that the inadequacies do not necessarily nullify the whole process, as what matters is the overall adequacy of the scheme as it unfolded.¹²⁰

The Court was thus willing to condone the inadequate consultation processes merely on the basis that the objectives of the housing development project in question outweighed the defects in the consultation process. In this regard, Liebenberg has observed, and rightly so, that the willingness to condone inadequate engagement processes would result in South Africa's socio-economic rights jurisprudence failing to foster the values of participatory democracy that lie at the heart of transformative developmental processes.¹²¹ The top-down engagement that had taken place was contrary to the Court's view in *Olivia Road* that engagement should be structured and consistent. By condoning the flawed engagement, the Court failed to take seriously its own insight that procedure and substance are inextricably linked.¹²² Liebenberg has further pointed out that unless the courts are serious about ensuring that meaningful engagement does not become a meaningless *cliché*, the realisation of socio-economic rights in South Africa will exhibit all the flaws of a top-down approach in which the intended beneficiaries have little say in development or in determining the nature of what is delivered to them.¹²³

Despite endorsing inadequate engagement processes, the Court provided a detailed engagement order including a range of issues on which the government is required to effectively consult on, which it pointed out were not exhaustive.¹²⁴ These included: ascertaining the names, details and relevant personal circumstances of

¹¹⁷*Id* paras 166-167.

¹¹⁸*Id* paras 301-302 and 304.

¹¹⁹*Id* para 378.

¹²⁰*Id* paras 379-380.

¹²¹Liebenberg *Socio-economic rights adjudication under a transformative constitution* (2010) 309-310

¹²²*Id* 309.

¹²³Liebenberg 'Joe Slovo eviction: Vulnerable community feels the law from the top down' (2009) 22 June *Business Day* <http://www.businessday.co.za/articles/Content.aspx?id=73812>.

¹²⁴*Joe Slovo* (n 30) paras 5 and 7(11).

those who are to be affected by each relocation; the exact time, manner and conditions under which the relocation of each affected household will be conducted; the precise temporary residential accommodation units to be allocated to those persons to be relocated; transport for those to be relocated; transport for their possessions; transport facilities from the temporary residential accommodation units to amenities, including schools, health facilities and places of work; and in due course, permanent housing to those relocated to temporary residential accommodation units, including information on the resident's current position on the housing waiting list, and the provision of assistance to those relocated with the completion of application forms for housing subsidies.¹²⁵

The Court also reiterated some points on meaningful engagement contained in its previous jurisprudence. Similar to its position in *Olivia Road*, it observed that:

[t]he requirement of engagement flows from the need to treat residents with respect and care for their dignity ... individual engagement shows respect and care for the dignity of the individuals. It enables the government to understand the needs and concerns of individual households so that, where possible, it can take steps to meet their concerns.¹²⁶

In line with its decision in *PE Municipality*, the Court held that '[m]utual understanding and accommodation of each others' concerns, as opposed to reaching an agreement, should be the primary focus of meaningful engagement'.¹²⁷ The requirement of good faith in the process, stated in its previous jurisprudence, was also emphasised in the *Joe Slovo* case, where the Court held:

What must be stressed, however, is that the process of engagement does not require the parties to agree on every issue. What is required is good faith and reasonableness on both sides and the willingness to listen and understand the concerns of the other side. The goal of meaningful engagement is to find a mutually acceptable solution to the difficult issues confronting the government and the residents in the quest to provide adequate housing. This can only be achieved if all sides approach the process in good faith and a willingness to listen and, where possible, to accommodate one another.¹²⁸

The Court further grounds meaningful engagement in the reasonableness concept, by considering it in its determination of whether an eviction was a reasonable measure to facilitate the government's housing development programme. It held that meaningful engagement between authorities and those who may become homeless as a result of government activity is vital to the reasonableness of the government activity.¹²⁹

¹²⁵*Id* para 7(11).

¹²⁶*Id* para 238.

¹²⁷*Id* para 244.

¹²⁸*Ibid*.

¹²⁹*Id* para 378.

It should be noted that the Constitutional Court subsequently issued an order suspending the evictions of the Joe Slovo residents, based on the government's concern that the relocation might end up costing more than upgrading of the Joe Slovo settlement and the lack of a plan to accommodate those who would not benefit from the new houses. Recently, the Court issued another judgment discharging the eviction order since the government had taken no adequate steps to carry it out; and the circumstances on which it was based have ceased to exist. The government's intention had shifted to undertaking an in-situ upgrade instead. There had also been little or no engagement in relation to the relocation process and possibility of any future engagement on the relocation was unlikely.¹³⁰

The Constitutional Court has also considered adequate public consultation in determining the reasonableness of pre-paid water meters (PPMs) and the City of Johannesburg's free basic water (FBW) policy in the *Mazibuko* case.¹³¹ This case concerned the sufficiency of the City of Johannesburg's FBW policy and the lawfulness of PPMs. The High Court and Supreme Court of Appeal in the case had both found in favour of the applicants, finding PPMs to be unlawful and also that the 25 litres per person per day water allocation was insufficient. The High Court found 50 litres of water per person per day to constitute sufficient water in terms of section 27(1) of the Constitution guaranteeing the right of access to sufficient water. The Supreme Court of Appeal found 42 litres of water per person per day to be sufficient. Conversely, the Constitutional Court did not find it appropriate to give a quantified content to what constitutes 'sufficient water' because it is a matter for the government to decide.¹³²

One of the arguments of the applicants in the *Mazibuko* case in relation to the unlawfulness of PPMs was that the City failed, as required by section 4 of PAJA, to hold a public enquiry or a notice and comment procedure before implementing the decision to introduce PPMs.¹³³ The Constitutional Court did not find the installation of PPMs to be administrative action that is reviewable under PAJA, but as an exercise of executive powers to determine how services should be implemented.¹³⁴ The Court considered the consultation processes that had taken place with communities, as stated in the City of Johannesburg's argument to this effect, in determining the reasonableness of the City's water policies. The Court then noted that there were extensive consultation processes held through formal structures representing the community, particularly ward committees and

¹³⁰See *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2011 ZACC 8, Judgment handed down on 2011-03-31.

¹³¹*Mazibuko* (n 30) paras 133 and 134. For a discussion of this case, see Liebenberg (n 121) 466-480. See also Heleba 'The right of access to sufficient water and the Constitutional Court's judgment in *Mazibuko*' (2009) 10/4 *ESR Review* 12.

¹³²*Mazibuko* (n 30) para 61.

¹³³*Id* para 127.

¹³⁴*Id* paras 130-131.

meetings held by ward councillors on the extent of the policies and how they would be implemented.¹³⁵ In making this ruling, the Court disregarded the applicant's argument, which the High Court accepted, that there was no consultation prior to the making of the decision. The High Court had found that the affected individuals were not given adequate notice, were not advised of their legal rights and were not given information as to the available remedies, which was procedurally unfair and rendered the consultation inadequate.¹³⁶

In the *Abahlali*¹³⁷ case, a constitutional challenge to the KwaZulu-Natal Elimination and Prevention of Re-Emergence of Slums Act,¹³⁸ the Constitutional Court again emphasised the importance of meaningful engagement in its judgment. The Slums Act aimed to eliminate slums in the province of KwaZulu-Natal and allowed for evictions without meaningful engagement, among other things. Section 16 of the Act was specifically challenged as it made it compulsory for municipalities to institute eviction proceedings for eviction of unlawful occupiers where the owner or person in charge of the land fails to do so within a time period prescribed by the Member of the Executive Council for Local Government, Housing and Traditional Affairs (the MEC) of the province of KwaZulu-Natal. After finding that the provincial government had the competence to pass the Act,¹³⁹ the Court found section 16 of the Act to be unconstitutional, as it gave too much power to the MEC and undermined the protections in section 26(2) of the Constitution read with the PIE Act and other housing legislation.¹⁴⁰ The Court found that the compulsion in the Act 'erodes and considerably undermines the protections against arbitrary institution of eviction proceedings'.¹⁴¹ It found the power given to the MEC to issue a notice to be 'overbroad and irrational', and thus 'seriously invasive of the protections against arbitrary evictions' in section 26(2) of the Constitution read with the PIE Act and national housing legislation.¹⁴²

The Court's decision emphasises the importance for those seeking eviction to engage reasonably with those to be affected before instituting eviction proceedings, a requirement that is mandated by both the Constitution and the PIE Act.¹⁴³ Yacoob J in the minority judgment further observed that '[i]f it appears as a result of the process of engagement, for example, that the property concerned can be upgraded without the eviction of the unlawful occupiers, the municipality

¹³⁵*Id* paras 133 and 167.

¹³⁶*Mazibuko v City of Johannesburg* 2008 JOL 21829 (W) paras 121-122.

¹³⁷For further reading on this case, see Chenwi 'Housing rights of "slum" dwellers at stake' (2009) 10 (1) *ESR Review* 25-28; and Chenwi 'Slums Act unconstitutional' (2009) 10 (4) *ESR Review* 9-12.

¹³⁸Act 6 of 2007 (KZN Slums Act).

¹³⁹See *Abahlali* (n 37) paras 20-40, 97-98 and 100-101.

¹⁴⁰*Id* paras 112, 116, 118, 122 and 128-129.

¹⁴¹*Id* para 112.

¹⁴²*Id* para 118.

¹⁴³*Id* paras 69, 79 and 113-114.

cannot institute eviction proceedings. This is because it would not be acting reasonably in the engagement process.¹⁴⁴ The requirement of engagement is important as it could have a material impact on the question of whether an eviction is just and equitable and on the issue of whether the eviction is in the public interest.¹⁴⁵

The lower courts have also held that it would not be just and equitable to grant an eviction where meaningful engagement had not taken place. A case in point is that of *Lingwood Michael v The Unlawful occupiers of R/E of Erf 9 Highlands*.¹⁴⁶ The case concerned the rights of unlawful occupiers and the obligations of the state and property owners in private eviction applications. The High Court noted the necessity and importance of parties involved in eviction litigation to engage in an endeavour to achieve mutually acceptable solutions, as stressed in *PE Municipality*.¹⁴⁷ The purpose of such engagement would also be to achieve the underlying philosophy of the PIE Act, which is 'to promote the constitutional vision of a caring society based on good neighbourliness and shared concern' and that is in line with the spirit of *ubuntu*.¹⁴⁸ Since the parties in the case had not engaged in any negotiations or attempted any mediation, the Court accordingly refused an eviction order and postponed the matter *sine die*, and ordered the joinder of the City of Johannesburg (the Municipality) by virtue of its constitutional and statutory duties and the commencement of mediation.¹⁴⁹ The Court then directed the parties 'to engage in mediation in an endeavour to exploring all reasonable possibilities of securing suitable alternative accommodation or land and/or of achieving solutions mutually acceptable to the parties'.¹⁵⁰

3.2 *Post-litigation engagement: Distinguishing the two approaches*

As stated earlier and as illustrated in the foregoing discussions in this article, meaningful engagement can either be used in the realisation of socio-economic rights in general or can be used as a remedy where socio-economic rights have

¹⁴⁴*Id* para 69.

¹⁴⁵*Id* para 79.

¹⁴⁶2008 3 BCLR 325 (W) (hereafter *Lingwood*).

¹⁴⁷*Id* paras 33 and 37.

¹⁴⁸*Id* para 37.

¹⁴⁹*Id* para 38.

¹⁵⁰*Id* para 38. With regard to emerging practice on meaningful engagement in the High Courts, see also *Sailing Queen Investments v The Occupants La Colleen Court* 2008 6 BCLR 666 (W); *Blue Moonlight Properties v The Occupiers of Saratoga Avenue* 2009 1 SA 470 (W); and *City of Johannesburg Metropolitan Municipality v Blue Moonlight* case no 338/10, 2011 ZASCA 47. These cases highlight the need for government to assist in resolving disputes through meaningful engagement. They also underscore the need for individualised assessment of the needs and circumstances of occupiers faced with evictions – a point that is also accentuated in *Olivia Road* and *Joe Slovo* – which I argue can only be effectively done if the government engages meaningfully with the occupiers.

been infringed or are threatened. However, two approaches need to be distinguished when using meaningful engagement as a remedy, once litigation has commenced. It is important to distinguish the two approaches since they could have an impact on the outcome of post-litigation engagement and whether it was in fact meaningful.

As seen from the Constitutional Court's decisions discussed above, engagement should ordinarily take place before litigation 'unless it is not possible to do so because of urgency or some other compelling reason'.¹⁵¹ However, the approach of the Court differs as to when engagement should be ordered once litigation has commenced. The Constitutional Court's approach in *Joe Slovo* can be distinguished from that in *Olivia Road* in that, in the former, engagement was ordered before the Court issued its judgment, but with the latter, engagement was ordered with the judgment.

The question therefore is whether it is appropriate to order engagement before or after determining the legal issues? The jurisprudence of the courts does not provide an answer to this question. I have discussed this question elsewhere but it is worth restating the points here.¹⁵² With the Court's approach in *Olivia Road*, the parties get into the engagement without normative parameters, not knowing their legitimate entitlements. In *Joe Slovo*, the parties know their legal entitlements before getting into the engagement. The Court's approach in *Olivia Road* can be distinguished from Sturm's deliberative model of remedial decision-making mentioned above, where the mediation process begins with the court determining liability and then setting up a mediation process. The Court thus first defines the normative parameters of the process and the liability norms that have been violated.¹⁵³

The Court's approach in *Olivia Road* could pose difficulties in that the parties get into the engagement without knowing their legal entitlements, yet the inequality in bargaining power between the state and its citizens continues to exist. This could result in the engagement being unsuccessful or not meaningful, especially in cases where the poor are not represented by competent lawyers. First defining the normative parameters of the process and the liability norms that have been violated prior to the engagement process could be useful in curbing this power imbalance. The Court should thus be mindful of this power imbalance when ordering meaningful engagement before issuing a judgment in future cases and also of the fact that inadequate knowledge impacts negatively on beneficiary power. It could, however, be argued that the Court, to a limited extent, recognised this power imbalance concern in *Olivia Road* when it observed that '[i]t will not always be appropriate for a court to approve all agreements entered into

¹⁵¹*Olivia Road* (n 23) para 30.

¹⁵²See Chenwi 'A new approach to remedies in socioeconomic rights adjudication: *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others*' (2009) 2 *Constitutional Court Review* 371 at 384-387.

¹⁵³Sturm (n 108) 1427-1431.

consequent upon engagement'.¹⁵⁴ Brand has argued that meaningful engagement between the state and occupiers facing eviction only makes sense if it is granted after at least the legal issues in a case have been decided. This is because:

Parties to a dispute approach a court presumably because they have themselves been unable to resolve that dispute amicably. They want, and can legitimately expect the court to determine authoritatively which of their conflicting claims are valid, so that a practical solution to their dispute can be found on that normative basis ... Not only does this set the limits within which engagement may operate, it also, importantly, places the parties to the negotiation, with their rights and duties now authoritatively determined and with the end goals of the negotiation clear, on an equal footing.¹⁵⁵

Brand also discusses a number of consequences of issuing the meaningful engagement while the judgment is still pending, including the fact that the parties had to negotiate without an authoritative indication of their legitimate goals of engagement and the consequent refusal by the Court to consider certain issues.¹⁵⁶ Another difficulty with regard to ordering engagement while judgment is still pending, as evidenced from *Olivia Road*, is that it results in the Court shifting very important issues to the engagement process that it should have decided on, thus diminishing the Court's interpretative role. Despite noting a number of outstanding issues that remained in dispute following the engagement process,¹⁵⁷ the Court did not proceed to consider them. Instead, the Court did not find it necessary to consider, for instance, the question of the City of Johannesburg's housing plan and policies though the parties had indicated that they had not been able to reach agreement on the question relating to the City's housing plan and policies. The Court hoped that the negotiations would continue in good faith.¹⁵⁸ Ray has argued that the Constitutional Court's approach in *Olivia Road* pushes the responsibility of developing the substantive content of the right to have access to adequate housing into the political sphere.¹⁵⁹ Dugard also states that the Court's failure to address the outstanding issues has resulted in a failure to 'tackle the policies and practices at the core of the vulnerability of poor people living in locations earmarked for commercial developments' and to 'establish critical rights-based safeguards for extremely vulnerable groupings'.¹⁶⁰

¹⁵⁴*Olivia Road* (n 23) para 30.

¹⁵⁵Brand (n 110) 162-163.

¹⁵⁶*Ibid.*

¹⁵⁷These included the City's failure to formulate and implement a housing plan for the occupiers and other similarly situated persons; the City's policy in dealing with persons occupying 'bad' buildings; the review of the City's decisions to issue notices to the occupiers; the applicability of PIE; and the reach and applicability of ss 26(1), 26(2) and 26(3) of the Constitution. See *Olivia Road*, para 31.

¹⁵⁸*Olivia Road* (n 23) para 34.

¹⁵⁹Ray (n 88) 26.

¹⁶⁰Dugard 'Courts and the poor in South Africa: A critique of systematic failure to advance transformative justice' (2008) 24 *SAJHR* 214-238 237-238.

Though when engagement should be ordered could impact on the success of an engagement, the success of the engagement in *Olivia Road* was largely due to the fact that the unlawful occupiers were represented by very competent lawyers and both parties were willing to engage. As illustrated in the *Mamba* case, stated above, where there is no political will, engagement becomes challenging. The Court also attributes the success of the case to the direct pressure it put on the parties to engage and report back: 'The deciding factor in this case in my view was that engagement was ordered by this Court, and the parties had been asked to report back on the process while the proceedings were pending before it'.¹⁶¹

It is important to contrast the approach in *Olivia Road* with that in *Joe Slovo* where the Constitutional Court ordered engagement in addition to addressing the legal issues in the case, thus providing the parties with a normative basis for the engagement. The key question is whether this helped the residents. On the one hand, it could be argued that determining the resident's entitlement to 70% of the new homes to be built and specifying the quality of alternative accommodation to be provided in addition to ordering meaningful engagement corrects power imbalances by providing the residents with an authoritative indication of what they are legitimately entitled to. On the other hand, it could be argued that the residents would have been better off if meaningful engagement was ordered before the judgment. This might have created some anxiety on the part of the state about whether the court will agree to the relocation to Delft and might have forced the state to explore the possibility of a move to a place closer to Joe Slovo, as was the case in *Olivia Road* where the alternative accommodation was provided within the city. However, the fact that the engagement was ordered in addition to a determination of substantive issues gives some degree of control to the parties and can alter the bargaining positions of the parties to the benefit of the residents. It could be argued that this has in fact been the case as the eviction order, as stated earlier, was subsequently suspended and then discharged. Furthermore, looking at the *Joe Slovo* case, meaningful engagement in the remedial stage, following the determination of substantive issues, could be useful in getting civil society involved in monitoring and reporting on the implementation of supervised eviction orders or structural interdicts, as opposed to limiting the reporting process just to the government and the Court.

4 Conclusion

This article has considered the legal and jurisprudential analysis of how the courts, particularly the Constitutional Court, have developed the notion of meaningful engagement. It can be used in the process of adopting and implementing measures to realise these rights or in the remedial stage where

¹⁶¹ *Olivia Road* (n 23) para 30.

these rights have been infringed or are threatened. The jurisprudence considered illustrates that meaningful engagement can be vital in the enforcement of socio-economic rights and the promotion and strengthening of constitutional democracy.

Meaningful engagement recognises the core importance of fostering participation and gives content to the right of participation by those faced with violation of their socio-economic rights. It fits into the Constitutional Court's vision of the kind of democracy the South African Constitution establishes, and is an expression of bottom-up participatory democracy. Meaningful engagement is not only encouraged because it is a legal requirement but also because it would ensure that development plans and services are more relevant to local needs and conditions. Engagement would also encourage communities to have control over their own lives and livelihoods. Ray adds that engagement can be an incentive for government to develop the kind of multi-faceted and robust housing policies that section 26 of the Constitution arguably requires.¹⁶² Reasonable engagement could thus be relevant in solving the problems of service delivery and to achieving public and democratic accountability.

Furthermore, the laws and cases considered underline a number of principles and guidelines that are relevant in ensuring that engagement is meaningful. These include, amongst others: treating communities as partners in decision making processes; providing complete and accurate accounts of the engagement process; having a well-structured, coordinated, consistent and comprehensive process and ensuring accessibility; ensuring that relevant information is accessible and transparent; approaching the process with openness; and respect for constitutional rights and values not just in relation to the process but also the outcome must be consistent with rights and values. The nature and extent of engagement must also be context-sensitive. The cases further reflect the growing perception that judicial review can be regarded as a form of 'dialogue'.¹⁶³

By ordering engagement as a remedy, South African courts – the Constitutional Court in particular – are exercising their remedial powers in such a way that allow for democratic processes of consultation and dialogue to occur in the realisation of socio-economic rights. Also, engagement at the remedial stage, as seen from the *Joe Slovo* case, could be a useful tool to mitigate the effects of a negative court ruling. This case, though raising some concerns about the ease at which the Constitutional Court would condone flawed engagement processes; on the other hand, it is illustrative of the readiness of the Court to intervene where the government fails to comply with an engagement order. This

¹⁶²See, generally, Ray '*Occupiers of 51 Olivia Road v City of Johannesburg: Enforcing the right to adequate housing through "engagement"*' (2008) 8 *Human Rights LR* 703-713.

¹⁶³See Roach '*Constitutional, remedial and international dialogues about rights: The Canadian experience*' (2004) 40 *Texas International LJ* 537, that refers to a number of cases from the Canadian Supreme Court and articles by Canadian, US, UK and Australian legal scholars that support this perception.

is evidenced from the Court's recent judgment discharging the eviction order on the basis that, among other things, there had been little or no engagement and future engagement is unlikely. Meaningful engagement, if implemented effectively, would improve and strengthen democratic accountability in the provision of socio-economic goods and services, which could in turn pave the way for improved realisation of socio-economic rights and addressing poverty¹⁶⁴ in South Africa.

¹⁶⁴Voicelessness and powerlessness are increasingly seen as components of poverty (see Lemanski (n 2) 395). Meaningful engagement creates a voice for the marginalised and impoverished.