

# Face to face: Sachs on restorative justice

Ann Skelton\*

## Introduction

This article explores the restorative justice jurisprudence of Justice Albie Sachs.<sup>2</sup> The judgments highlighted are *Dikoko v Mokhatla*,<sup>3</sup> the *Port Elizabeth Municipality v Various Occupiers*<sup>4</sup> and *S v M (Centre for Child Law as Amicus Curiae)*.<sup>5</sup> Sachs himself links these together in his book *The strange alchemy of life and law* in chapter three which is entitled 'A man called Henri: Truth, reconciliation and justice'.<sup>6</sup>

The man called Henri was the government operative who took part in the preparations for the planting of the bomb that injured Sachs in 1988. Shortly before he was about to give evidence at the Truth and Reconciliation Commission<sup>7</sup> about the operational plans for the explosion and to seek amnesty for his role in this act, Henri requested a meeting with Sachs. The meeting took place in Sachs's chambers at the Constitutional Court, and Sachs reveals a sense of curiosity about Henri:

I was not sure why he had come to tell me this. I wanted to know more about him. Who was this person, whom I had never seen until that moment, who did not know me, who had no anger towards me, whom I did not hate, for whom I was just a figure-head, who had tried to extinguish my life?

At the end of their meeting, Sachs says he cannot, at that stage, shake Henri's hand. He admits to repressing what he calls a 'cheap emotion', an urge to say something like 'I can't shake your hand because you can see what happened to the hand I once upon a time used for greeting people'. Perhaps, he says, after Henri has been to the TRC, has told his story and helped the country, perhaps then, he can shake his hand.

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\*BA LLB LLD. Director, Centre for Child Law, University of Pretoria.

<sup>2</sup>In this article I will sometimes be speaking about Albie Sachs as a Judge of the Constitutional Court, in which case I refer to him as Sachs J, and at other times I will be speaking about Albie Sachs the author, or the man, in which case I refer to him as Sachs.

<sup>3</sup>2006 6 SA 235 (CC); 2007 1 BCLR 1 (CC) (hereafter '*Dikoko*').

<sup>4</sup>2005 1 SA 217 (CC); 2004 12 BCLR 1268 (CC) (hereafter '*Port Elizabeth Municipality*').

<sup>5</sup>2007 2 SACR 539 (CC); 2007 12 BCLR 1312 (CC) (hereafter '*S v M*').

<sup>6</sup>The story about Henri was first published in Sachs 'His name was Henry' in James and Van de Vijver *After the TRC: Reflections on truth and reconciliation in South Africa* (2000) 97.

<sup>7</sup>Hereafter TRC.

## The concept of restorative justice

Before discussing the cases where Sachs J develops the notion of restorative justice in the South African legal context, a brief explanation of the concept is required. There is now widespread agreement on the meaning of restorative justice<sup>8</sup> – there is even an internationally recognised set of United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters.<sup>9</sup> The definition of ‘a restorative process’ included in the Basic Principles is any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator. Restorative processes may include mediation, conciliation, conferencing and sentencing circles.<sup>10</sup>

The South African legislature recently defined restorative justice in the Child Justice Act as an approach to justice that aims to involve the offender, the victim, the families concerned and community members to collectively identify and address harms, needs and obligations through accepting responsibility, making restitution, taking measures to prevent a recurrence of the incident and promoting reconciliation.<sup>11</sup>

These definitions clearly describe restorative justice in the context of crime. However, as we will see from Sachs J’s own judgments, crime is not the only context where restorative justice approaches can be applied. Restorative justice has a special resonance with African customary law processes,<sup>12</sup> where disputes are treated in much the same way whether they are civil or criminal, and this tendency to avoid a strong distinction between civil and criminal wrongs is also a feature of restorative justice.<sup>13</sup> Acceptance of responsibility, making restitution and promoting harmony are the key outcomes desired in all kinds of disputes. Sachs’s work in Mozambique (from 1976 to 1988) focused on establishing ‘people’s courts’ that

<sup>8</sup>See further Skelton and Batley (‘Restorative justice: A contemporary review’ (2008) 21/3 *Acta Criminologica* 37) who make the case that restorative justice is a well understood concept, that its theory and practice have been substantially documented internationally and that it has withstood critical analysis.

<sup>9</sup>These guidelines were adopted at the 11<sup>th</sup> session of the United Nations Commission on Crime Prevention and Criminal Justice in Vienna in 2002.

<sup>10</sup>Article 2. The Basic Principles are available at [www.un.org/docs/ecosoc/documents.asp?file=189](http://www.un.org/docs/ecosoc/documents.asp?file=189).

<sup>11</sup>Section 1 of Act 75 of 2008.

<sup>12</sup>Kgosimore ‘Restorative justice as an alternative way of dealing with crime’ (2002) *Acta Criminologica* 69; Skelton and Frank ‘Conferencing in South Africa: Returning to our future’ in Morris and Maxwell (eds) *Restorative justice for juveniles: Conferencing, mediation and circles* (2001) 103-120; Roche ‘Restorative justice and the regulatory state in South African townships’ (2002) *British Journal of Criminology* 514; Skelton ‘Restorative justice as a framework for juvenile justice reform: A South African perspective’ (2002) *British Journal of Criminology* 496; Skelton and Frank ‘How does restorative justice address human rights and due process issues?’ in Zehr and Toews (eds) *Critical issues in restorative justice* (2004) 203-214; Tshehla ‘The restorative justice bug bites the South African criminal justice system’ (2004) *SACJ* 1.

<sup>13</sup>Skelton ‘Tapping indigenous knowledge: Traditional conflict resolution, restorative justice and the denunciation of crime in South Africa’ (2007) *Acta Juridica* 228-246.

blended African customary procedures with modern democratic principles.<sup>14</sup> The connection between African approaches to justice and restorative justice has also been referred to when explaining why South Africa chose the route of the TRC to address the transgressions of the past.<sup>15</sup> The interim Constitution, drafted by the negotiating parties in 1993,<sup>16</sup> provided the rationale for the Truth and Reconciliation Commission. The epilogue<sup>17</sup> to the interim Constitution claimed that the Constitution established a foundation for South Africans to transcend the divisions of the past which had generated human rights violations and left behind the legacies of hatred, fear, guilt and revenge. These violations and legacies would be addressed 'on the basis that there is a need for understanding but not for vengeance, a need for reparation but not retaliation, a need for *ubuntu* but not for victimisation'.<sup>18</sup> The details of the criticisms of the TRC are beyond the scope of this article.<sup>19</sup> The TRC may have been an imperfect model of restorative justice, but nevertheless, it represents restorative justice 'writ large'.

## The elements of restorative justice

In the *Dikoko* judgment Sachs J described the following elements of restorative justice:

- encounter;
- reparation;
- reintegration; and
- participation.<sup>20</sup>

He explained that encounter – which he also refers to as dialogue – enables the victims and offenders to talk about the hurt caused and how the parties are to get on in future. Interestingly, in *The strange alchemy of life and law*, Sachs

<sup>14</sup>Sachs and Honwana Welch *Liberating the law: Creating popular justice in Mozambique* (1990) 124-132; Sachs 'Changing the terms of the debate: A visit to a popular tribunal in Mozambique' (1984) *Journal of African Law (JAL)* 99.

<sup>15</sup>Tutu *No future without forgiveness* (1999) 51-52; Boraine *A country unmasked* (2000); Maepa 'The Truth and Reconciliation Commission as a model of restorative justice' in Maepa (ed) *Beyond retribution: Prospects for restorative justice in South Africa* (2005) 66-75; Villa-Vicencio 'A different kind of justice: The South African Truth and Reconciliation Commission' (1999) *Constitutional Justice Review* 403; Llewellyn and Howse 'Institutions for restorative justice: The South African Truth and Reconciliation Commission' (1999) *University of Toronto LJ* 355.

<sup>16</sup>Act 200 of 1993.

<sup>17</sup>The epilogue is sometimes referred to as the 'post-amble' to the interim Constitution. The word 'epilogue' is drawn from Mahomed DP in *Azanian People's Organisation (AZAPO) v The President of the Republic of South Africa* 1996 4 SA 671 (CC).

<sup>18</sup>Constitution of the Republic of South Africa Act 200 of 1993.

<sup>19</sup>Parmentier 'The South African Truth and Reconciliation Commission: Towards restorative justice in the field of human rights' in Fattah and Parmentier (eds) *Victim policies and criminal justice on the road to restorative justice* (2001) 401-428; Llewellyn 'Doing justice in South Africa: Restorative justice and reparation' in Doxtader and Villa-Vicencio (eds) *To repair the irreparable: Reparation and reconstruction in South Africa* (2004) 167.

<sup>20</sup>*Dikoko* (n 3) para 114.

relates the story of his meeting with Henri under the single word rubric: Encounter. Encounter is sometimes also referred to in restorative justice as 'engagement'.

The second element of restorative justice, reparation, is described as focusing on 'repairing the harm that has been done rather than on doling out punishment'. The third element is reintegration into the community, which 'depends on the achievement of a mutual respect for and mutual commitment to one another'. The fourth element is participation, which 'presupposes a less formal encounter between the parties that allows other people close to them to participate'.

The above brief descriptions of the concept of restorative justice and its elements provide a basis from which to explore the judgments in which Sachs J has made reference to restorative justice. Although the first judgment to be discussed below does not include the words 'restorative justice', an argument will be made that the concept is indeed central to Sachs J's reasoning in the case.

### *Port Elizabeth Municipality*

The first matter in which Sachs J began to develop his restorative justice approach was the *Port Elizabeth Municipality* case.<sup>21</sup> This case arose when the Port Elizabeth Municipality applied for an order to evict a group of people living, for a number of years, in shacks they had erected on privately owned land. In principle, they were prepared to move if offered suitable alternative land, but they had rejected an earlier offer by the Municipality to move them to an area the occupiers claimed was crime-ridden and unsuitable. The Municipality was concerned that if they provided the alternative land, the occupiers would in effect have been allowed to jump the official queue and upset the orderly, comprehensive process of providing housing. They accordingly evicted the occupants, and the High Court upheld that eviction order. The appeal was later set aside by the Supreme Court of Appeal, and so a further appeal was brought to the Constitutional Court.

Writing for a unanimous court, Sachs J found a way to infuse the Prevention of Illegal Eviction Act<sup>22</sup> with restorative justice values. 'We are not islands unto ourselves'<sup>23</sup> was the memorable starting point offered by Sachs J. He went on to assert that the whole constitutional order is imbued with the African philosophy of *ubuntu*,<sup>24</sup> and this combines individual rights with a communitarian philosophy. Sachs J envisaged a role for the courts to develop a dignified model for the

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<sup>21</sup>(N 4).

<sup>22</sup>Prevention and Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (hereafter PIE).

<sup>23</sup>*Port Elizabeth Municipality* (n 4) para 37.

<sup>24</sup>Mokgoro ('Ubuntu and the law in South Africa' (1998) *Buffalo Human Rights Law Review* 15) explains that *ubuntu* does not lend itself to simple definition, nor is it easily translated into English. It is commonly explained by way of drawing together strands of concepts such as *ubuntu ngumuntu ngabantu* which can be translated as 'a person is a person through other people'. *Ubuntu* is the Nguni word and its seSotho equivalent is *botho*. In seSotho 'a person is a person through other people' may be translated as *motho ke motho ba batho ba bangwe*.

sustainable reconciliation of the competing interests involved<sup>25</sup> whereby the courts would encourage the parties to 'engage with each other in a proactive and honest endeavour to find mutually acceptable solutions'. Sachs J proposed that wherever possible, 'respectful face-to-face engagement or mediation through a third party should replace arms-length combat by intransigent opponents'.<sup>26</sup> Sachs J pointed out that compulsory mediation has gained ground in modern legal systems, although he hastened to add that while participation in the process can be made compulsory, the parties cannot be compelled to reach a settlement.<sup>27</sup> Sachs implied that through mediation the occupiers would gain dignity and they would no longer be treated as a faceless or anonymous group to be expelled.<sup>28</sup> There would be lower costs and tensions would be ameliorated.<sup>29</sup> In the light of all this, the Chief Justice issued directions providing an opportunity for argument about the appropriateness of the Constitutional Court ordering mediation.<sup>30</sup> The parties were unenthusiastic, and Sachs J reluctantly found that too much water had flowed under the bridge for mediation to be successfully attempted at that late stage.<sup>31</sup> He nevertheless expressed the view that the courts could consider whether mediation had been undertaken as a pertinent factor in deciding whether an eviction order would be just and equitable, and could, in appropriate circumstances, order the parties to attempt mediation.<sup>32</sup> Sachs J continued to hold out the hope that a settlement could be reached. In finding against the Municipality regarding the eviction, he pointed out that the finding did not preclude further attempts to find a satisfactory conclusion, and that the municipality should try to secure a settlement through the appointment of a skilled negotiator acceptable to all sides.

Although Sachs J did not use the words 'restorative justice' in the *Port Elizabeth Municipality* judgment, he nevertheless promotes some of the key elements. He suggested that there should be an encounter – in the form of mediation. It is an approach that eschews winners and losers, but rather aims to create a platform for social justice that will be achieved through dialogue and compromise. Reintegration into the community is key, which depends on the achievement of a mutual respect for and mutual commitment to one another – Sachs J expressed this as 'we are not islands' and he expressly linked this to the communitarian philosophy of *ubuntu*.<sup>33</sup> Participation is emphasised in the judgment, so that the occupiers can express their views, and thus emerge as individuals rather than a faceless group of poverty stricken people.

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<sup>25</sup>*Port Elizabeth Municipality* (n 4) para 37.

<sup>26</sup>*Id* para 39.

<sup>27</sup>*Id* para 40.

<sup>28</sup>*Id* para 41.

<sup>29</sup>*Id* para 42.

<sup>30</sup>*Id* para 44.

<sup>31</sup>*Id* para 47.

<sup>32</sup>*Ibid*.

<sup>33</sup>*Id* para 37. This paragraph is cited by Sachs himself in *Dikoko* (n 3) para 113.

## *Dikoko*

The *Dikoko* case deals with restorative justice in a more direct way. The case dealt with a civil claim for damages arising from defamation. The Applicant sought leave to appeal against a judgment of the Pretoria High Court which had held that he had defamed the Respondent, and ordered him to pay R110 000. At the time of the incident the Applicant was the Executive Mayor and the Respondent was the Chief Executive Officer of the Southern District Municipality. The defamation arose when the Applicant, who had incurred cell phone charges grossly in excess of the official limit, was called to account before the provincial government Standing Accounts Committee. The Applicant made allegations to the effect that the Respondent had trumped up the charges for political reasons. The High Court found that the statement was defamatory, and rejected the Applicant's argument that speech was protected by privilege. The judgment of the Constitutional Court split up in various different ways, the details of which are not relevant to the current discussion. On the issue of *quantum*, the majority of the court upheld the award of a substantial claim of financial damages. Whilst Mokgoro J wrote the majority judgment in this matter, she found herself in the minority (together with Sachs J and Nkabinde J) on the issue of *quantum*. She held that the amount awarded was excessive, and that the court should have set an amount of R 50 000 instead.

Sachs then penned a separate judgment that focused on a restorative justice approach. He made the point that dignity cannot be restored through disproportionate punitive monetary claims, and that apology is a more powerful tool and one in keeping with African notions of *ubuntu* and our constitutional commitment to dignity.<sup>34</sup> He proposed a remedial shift in the law of defamation from a preoccupation with monetary awards towards a more flexible approach that encourages apology,<sup>35</sup> and towards the goal of repair rather than punishment.<sup>36</sup> Sachs J objected to a person's reputation being treated as a commodity.<sup>37</sup> The real solution for injury to reputation is 'vindication by the Court' of his or her reputation in the community. The greatest prize, according to Sachs J, is 'to walk away with head held high, knowing that even the traducer has acknowledged the injustice of the slur'.<sup>38</sup>

The concept of 'vindication' looms large in the *Dikoko* judgment. Sachs J pointed out that it is not the award of damages, but the finding in favour of the integrity of the complainant that 'vindicates his or her reputation'. This resonates with other writing about the importance of vindication in restorative justice. What

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<sup>34</sup>At this point in the judgment, Sachs J includes a quote about the spirit of *ubuntu* from his earlier judgment in *Port Elizabeth Municipality* (n 4 para 37), indicating that he sees the reasoning in that judgment as linked to the reasoning in this one. It is also a reminder that *ubuntu* and restorative justice are linked in Sachs's mind.

<sup>35</sup>*Dikoko* (n 3) para 105.

<sup>36</sup>*Id* para 113.

<sup>37</sup>*Id* para 109: 'Unlike businesses, honour is not quoted on the Stock Exchange'.

<sup>38</sup>*Ibid*.

victims most often seek through a justice process is vindication. This is an instinctive emotional response in human beings, and is often misunderstood as a need for vengeance. In a successful restorative justice process many victims experience a validation of their traumatic experience, and this often commences or advances their healing. The need for vindication stems from the need to have dignity restored.<sup>39</sup>

### *S v M*

The case of *S v M*<sup>40</sup> is better known for its contribution to child law jurisprudence, which is the focus of two other articles in this collection.<sup>41</sup> This article, however, will be highlighting another important theme in the *S v M* judgment – restorative justice. M had been sentenced by the Regional Court to four years direct imprisonment. On appeal, the High Court had set aside the direct prison term and replaced it with a sentence of correctional supervision in terms of section 276(1)(i). This meant that M would have to serve at least one sixth of her sentence in prison before the head of the prison could use his or her discretion to release her on correctional supervision. Sachs J described correctional supervision as ‘a multifaceted approach to sentencing comprising elements of rehabilitation, reparation and restorative justice’.<sup>42</sup> The judge also quoted an observation by the South African Law Commission<sup>43</sup> to the effect that community sentences, in which reparation and services to others are prominent components, form part of an African tradition. This is an echo of the connection that Sachs frequently makes between modern restorative justice approaches, *ubuntu* and traditional African justice solutions. The first judgment in which he did so was *S v Makwanyane*,<sup>44</sup> where he stressed the importance of including all the legal sources that underpin our constitutional values, especially African customary law and approaches. In *Port Elizabeth Municipality* Sachs J described *ubuntu* as being ‘part of the deep cultural heritage of the majority of the population’. In *Dikoko* he made this link between *ubuntu*, restorative justice and African traditional justice approaches: ‘*Ubuntu-botho* is highly consonant with rapidly evolving international notions of restorative justice. Deeply rooted in our society, it links up with world-wide striving to develop restorative justice systems of justice

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<sup>39</sup>Skelton ‘The influence of the theory and practice of restorative justice in South Africa with specific reference to child justice’ LLD thesis UP (2005) 243.

<sup>40</sup>*S v M* (n 5).

<sup>41</sup>See also Skelton ‘Severing the umbilical chord: A subtle jurisprudential shift regarding children and their primary caregivers’ (2008) 1 *Constitutional Court Review* 351.

<sup>42</sup>*S v M* (n 5) para 59.

<sup>43</sup>The South African Law Commission (hereafter SALC) is now the South African Law Reform Commission (hereafter SALRC), but the report which the court referred to was published whilst the SALRC was still the SALC.

<sup>44</sup>1995 3 SA 391 (CC); 1995 6 BCLR 665 (CC).

based on reparative rather than purely punitive systems'.<sup>45</sup> Later in the same paragraph he identified a *nexus* between restorative justice and African customary law processes. He pointed out that restorative justice concepts harmonise well with the traditional forms of dispute resolution in our country that are underpinned by the philosophy of *ubuntu-botho*.

In *S v M*, Sachs J described further aspects of the SALC report on a 'sentencing framework', including information about specific legislative provision that had been made in other jurisdictions for a wide range of community-based sentences, including participation in victim-offender mediation and family group conferencing, which are prominent forms of restorative justice.

Sachs J went on to point out that another advantage of correctional supervision is that it keeps open the option of restorative justice in a way that imprisonment cannot do. Central to the notion of restorative justice is the recognition of the community rather than the criminal justice agencies as the prime site of crime control. One of its strengths is that it rehabilitates the offender within the community, without the negative impact of prison and the damaging disruption of the family.<sup>46</sup>

Sachs J determined that there was sufficient information before the Constitutional Court to set aside the sentence and replace it with a new sentence (rather than refer it back to the court *a quo*). In deciding on an appropriate sentence Sachs J evaluated a full range of issues. When it came to the issue of restitution or compensation to the victims of the frauds that she had committed, the judge noted that her offer to repay the persons she defrauded appeared to be genuine and realistic. Sachs J went on to make the important point that repayment would have special significance if M was required to make the repayments 'on a face-to-face basis'.<sup>47</sup> This could be hard for her, Sachs J noted, but restorative justice 'ideally requires looking the victim in the eye and acknowledging wrongdoing'. Restoration of relationships is central to Sachs J's approach here, and it is reminiscent of the idea that we are not islands. People are connected to one another, and crime ruptures normal relationships. Sachs J expressed the view that by meeting face-to-face with the people she has harmed M will take part in a process of acknowledgement and reconciliation that will remove the 'silent brand

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<sup>45</sup>*Dikoko* (n 3) para 114.

<sup>46</sup>*S v M* (n 5) para 62. Sachs J cited Batley (in Maepa (ed) *Beyond retribution: Prospects for restorative justice in South Africa* (2005) available at <http://www.iss.co.za/pubs/Monographs/No111/Chap2.htm> at ch 2) where he points out that although there are a number of definitions of restorative justice, they all contain the following three principles: (1) crime is seen as something that causes injuries to victims, offenders and communities and it is in the spirit of *ubuntu* that the criminal justice process should seek the healing of breaches, (2) the redressing of imbalances and the restoration of broken relationships; and (3) not only government, but victims, offenders and their communities should be actively involved in the criminal justice process at the earliest point and to the maximum extent possible; and in promoting justice, the government is responsible for preserving order and the community is responsible for establishing peace.

<sup>47</sup>*S v M* (n 5) para 72.



of criminality' that imprisonment would bring. Instead, through such meetings, trust would be restored, amends would be made and M would be reintegrated into the community.<sup>48</sup>

Sachs J added that simply paying back would not be sufficient and that M would be required to do a substantial amount of community service to mark and respond to the extent of her 'depredations on the community'.<sup>49</sup> The objective, he observed, should be for her to do truly useful work so that both she and the community would feel rewarded. He also added that counselling was required.<sup>50</sup>

Before handing down the final order, the Court weighed up several factors. On the one hand, M had organised her life and become a productive citizen during the seven years since she committed the offences. It was in the public interest to reduce the prison population where possible. To compel her to undergo imprisonment, the Court found, 'would be to indicate that community resources are incapable of dealing with her moral failures', and he did not believe that this was correct. Nor did the Court believe 'that the community should be seen simply as a vengeful mass uninterested in the moral and social recuperation of one of its members'. This reveals to the reader a glimpse of Sachs J's views on the subject of vengeance – a favourite theme in his writing, in which his own 'soft vengeance' was not about retribution, but rather about completing what was started, about survival and endurance.<sup>51</sup> Viewed through the eyes of Sachs J the community becomes more than just a crowd of vengeful people wanting to see the casting out of all who commit crimes. Rather, the community includes people who are interested in seeing those who can repair the harm they have done return and become functioning members of society.

## **The influence of Sachs J's restorative justice jurisprudence**

The article has thus far considered how Sachs J has explored and applied a restorative justice approach in his judgments. The question that is now posed is the extent to which this jurisprudence has affected the judgments of other courts. In order to determine the influence that Sachs J's restorative justice jurisprudence has had, it is necessary to look for case law which acknowledges this strand of his judicial writing.<sup>52</sup>

### ***Mediation and meaningful engagement in housing law***

Van der Walt has described the approach of Sachs J in *Port Elizabeth Municipality*

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<sup>48</sup> *Ibid.*

<sup>49</sup> *Id* para 73.

<sup>50</sup> *Ibid.*

<sup>51</sup> Sachs 'Soft vengeance of a freedom fighter' (1990).

<sup>52</sup> Paragraph 74.

as 'context-sensitive and reform-friendly'.<sup>53</sup> Van der Walt's interpretation of the judgment is that courts not only have the discretion to consider a wide range of circumstances in order to render an eviction just and equitable but, more specifically, that courts are under an obligation to do so.<sup>54</sup> The approach set out in *Port Elizabeth Municipality* has been followed in a number of subsequent judgments which have required 'meaningful engagement' prior to an eviction being carried out. The courts have followed the view that a failure to attempt such engagement is a relevant factor to take into account in deciding on the lawfulness of an eviction.

The first reported judgment to follow the mediation approach laid down by Sachs J in *Port Elizabeth Municipality* was in the High Court matter of *Cashbuild (South Africa)(Pty)Ltd v Scott*.<sup>55</sup> Poswa J took the view that the legislature did not intend the law to confer a discretion regarding whether or not to mediate in eviction matters, but rather intended such mediation as a requirement. The facts in *Cashbuild* were such that Poswa J was unable to decide whether there was a dispute as the application before the court was unopposed. In the circumstances, mediation was not ordered, but the judgment clearly endorsed Sachs J's approach.<sup>56</sup>

In *Lingwood v Unlawful Occupiers*<sup>57</sup> the High Court ordered the parties to mediate, based directly on the *dictum* of Sachs J in *Port Elizabeth Municipality*. The Court stressed that parties involved in PIE litigation must engage in mediation, and all reasonable steps should be taken to achieve an agreed mediated solution.<sup>58</sup> The Court also followed Sachs J's *dictum* that one of the relevant circumstances in deciding whether an eviction order would be just and equitable would be whether mediation had been tried.

The approach of Sachs J is further supported in *Lingwood* on the point that, in appropriate circumstances, the courts should themselves order parties to mediate.<sup>59</sup> In *Lingwood* the Court decided that ordering the parties to mediate would be appropriate as the parties had not entered into any negotiations or attempted any mediation and that the occupiers had previously paid rental in respect of their occupation of the property. The court was of the view that the parties might yet find mutually acceptable solutions.<sup>60</sup>

The Constitutional Court has itself had several occasions, subsequent to *Port Elizabeth Municipality*,<sup>61</sup> on which to reflect about mediation in the context of eviction. In these judgments, the Court has mostly adopted the terminology of

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<sup>53</sup>Van der Walt *Constitutional property law* (2009) 350.

<sup>54</sup>*Ibid.*

<sup>55</sup>2007 1 SA 332 (T) (hereafter *Cashbuild*).

<sup>56</sup>See also *Sailing Queen Investments v The Occupants La Colleen Court* 2008 6 BCLR 666 (W), which cites *Port Elizabeth Municipality* (n 3) with approval.

<sup>57</sup>2008 3 BCLR 325 (W) (hereafter *Lingwood*)

<sup>58</sup>*Id* para 33.

<sup>59</sup>*Ibid.*

<sup>60</sup>*Id* paras 34-35.

<sup>61</sup>*Port Elizabeth Municipality* (n 4).

'meaningful engagement' which includes mediation. The concept of meaningful engagement was first established in the case of *Government of the Republic of South Africa v Grootboom*.<sup>62</sup> It is the duty on the State to engage in consultation with affected persons in the context of housing, and particularly, where threatened with eviction.

The first Constitutional Court judgment subsequent to *Port Elizabeth Municipality*<sup>63</sup> that dealt with meaningful engagement was *Occupiers of 51 Olivia Road and 197 Main Street v City of Johannesburg*<sup>64</sup> where the Court held that engagement is a two-way process in which the city and those threatened with homelessness would talk to each other meaningfully in order to achieve certain objectives.<sup>65</sup> The Court further pointed out that engagement has the potential to contribute towards the resolution of disputes and to increase understanding and sympathetic care if both sides are willing to participate in the process.<sup>66</sup>

In the *Olivia Road* case the Constitutional Court made an interim order, referring the parties to engage meaningfully prior to considering the constitutional challenge.<sup>67</sup> In setting out the reasons for granting that interim order the Court referred to the *Grootboom*<sup>68</sup> and the *Port Elizabeth Municipality*<sup>69</sup> cases where the Court had specifically recommended meaningful engagement. The Court went on to set out guidelines regarding the circumstances under which and the manner in which engagement must be applied.<sup>70</sup> These guidelines have been repeatedly referred to in subsequent Constitutional Court judgments on housing matters.

Once again, in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*<sup>71</sup> the Constitutional Court readily applied the concept of engagement and went even further by emphasising the need for engagement to continue during the relocation process and related matters.<sup>72</sup> Although members of the Court in *Residents of Joe Slovo* differed about whether there had in fact been sufficient engagement on the facts, all the Judges emphasised the need and importance to adhere to this process. In dealing with meaningful engagement, the Judges reaffirmed the principles and guidelines enunciated in *Olivia Road*.<sup>73</sup>

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<sup>62</sup>2001 1 SA 46 (CC) (hereafter *Grootboom*) para 87.

<sup>63</sup>*Port Elizabeth Municipality* (n 3).

<sup>64</sup>2008 3 SA 208 (CC) (hereafter *Olivia Road*).

<sup>65</sup>*Id* para 14.

<sup>66</sup>*Id* para 15.

<sup>67</sup>The challenge was raised against s 12(6) of the National Building Regulations and Building Standards Act 103 of 1997 as far as it related to evictions.

<sup>68</sup>*Grootboom* (n 62).

<sup>69</sup>*Port Elizabeth Municipality* (n 4).

<sup>70</sup>*Olivia Road* (n 64) paras 13-24.

<sup>71</sup>2009 9 BCLR 847 (CC) (hereafter *Residents of Joe Slovo*).

<sup>72</sup>*Id* para 247 and sub para 7 of the court order.

<sup>73</sup>*Olivia Road* (n 64).

In the case of *Abahlali Basemjondolo Movement SA and Sibusiso Zikode v The Premier of the Province of Kwazulu-Natal*<sup>74</sup> the principle of meaningful engagement is reiterated. In this matter, the majority of the Constitutional Court found section 16 of the Elimination and Prevention of the Re-emergence of Slums Act<sup>75</sup> to be unconstitutional because it would make it easier to evict people in informal settlements and that their evictions would happen without meaningful engagement. Yacoob J disagreed with the majority regarding the constitutionality of the impugned section, but his reason was that if the eviction process is carried out in accordance with the Court's earlier jurisprudence regarding meaningful engagement, then the law itself is not necessarily unconstitutional.<sup>76</sup> It is evident that although there was a dissent in this matter, the court was in agreement on the application of the meaningful engagement requirements.

### *Restorative justice in criminal matters*

With regard to restorative justice in the criminal context an important reported case is *S v Saayman* 2008 1 SACR 393 (E). In the commercial crimes court of Port Elizabeth, the accused, Mrs Saayman, had pleaded guilty and was convicted of six counts of fraud amounting to a total value of R13 387.21. The frauds committed by her had led to certain of the complainants, whose identities she had fraudulently used, being black-listed by the Credit Bureau, thereby causing them embarrassment and inconvenience.

In sentencing the accused the regional court magistrate had indicated that he wanted the sentence to provide some measure of relief for the victims of the crime.

The magistrate imposed a suspended sentence linked to correctional supervision, and he added a further condition that Mrs Saayman should stand out in the open, to ask for forgiveness from the victims, by standing in the entrance to the commercial crimes court, under supervision of a police official. She was required to stand there for fifteen minutes on a specified date, holding a placard bearing an apology to victims. When an application for leave to appeal was brought before the magistrate he explained that what the Court was attempting to achieve was 'to try and restore the relations between the parties by assisting the accused to tender an apology in public to the complainants'.

The questions that were central to the review proceedings<sup>77</sup> in the High Court were firstly, whether the condition imposed by the magistrate accorded with restorative justice principles and secondly, whether it passed constitutional muster.

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<sup>74</sup>[2009] ZACC 31 (hereafter *Abahlali Basemjondolo*).

<sup>75</sup>Act 6 of 2007 (hereafter the Slums Act).

<sup>76</sup>*Abahlali Basemjondolo* (n 74) para 54. At para 69 Yacoob J refers directly to *Port Elizabeth Municipality*.

<sup>77</sup>Mrs Saayman initially appealed against the condition of her sentence but then withdrew the appeal. Due to its concern over the constitutionality of the condition, the High Court decided to deal with the matter on review.

The Court found that the order, as creative and well-intentioned as it may have been, did not comply with restorative justice principles, and that it was unconstitutional on the basis that it infringed the right to dignity. Pickering J (Nepgen J concurring) distinguished between 'stigmatising shaming' and 'reintegrative shaming',<sup>78</sup> and found that the condition of sentence had the effect of stigmatising and of violating the accused's right to dignity.

Pickering J traced the jurisprudence on restorative justice in South Africa, making reference to various *dicta* of Sachs J in *Dikoko* and *S v M*.<sup>79</sup> The court went on to make the point that according to Sachs J restorative justice should ideally involve an encounter between the offender and the victim, 'looking the victim in the eye and acknowledging wrongdoing', thus echoing the words of Sachs J in *S v M*.<sup>80</sup> This, the court pointed out, could not be achieved by the magistrate's conditional order, because the victims would not have participated in any way, they would not have been present whilst she stood displaying the placard. The court found that the magistrate had in fact missed an opportunity to impose a condition of suspension that was compatible with restorative justice, and the condition was set aside.

## Conclusion

The approach of Sachs J in the *Port Elizabeth Municipality* case has left a considerable legacy in the law regarding the right to housing. Despite the fact that neither section 26(2) of the Constitution, nor PIE, nor other relevant legislation such as the Slums Act expressly require reasonable engagement, the Constitutional Court has persistently maintained that reasonable engagement is part of what is reasonably required by section 26(2) of the Constitution, and that it is also mandatory in all evictions under PIE. In fact, it is now clear that all applicants for eviction must engage reasonably before instituting eviction proceedings. A failure to do so will be a negative factor for consideration when deciding whether an eviction was lawful. The Courts have not shied away from ordering parties to mediate where such an order is appropriate.

In the criminal justice sphere, the *Saayman* case is important as it has given a substantial interpretation of the concept of restorative justice, and guards against misuse or incorrect application of its principles. The judgment relied directly on Sachs J's jurisprudence in *Dikoko* and in *S v M*. Sachs J's insights

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<sup>78</sup>The Court relied on the writing of Braithwaite 'Setting standards for restorative justice' (2002) 42 *British Journal of Criminology* 563-577.

<sup>79</sup>The Court also referred to the unreported judgment of Bertelsmann J in *S v Maluleke* (and the *Maluleke* case referred to *S v Shilubane*). These judgments, though they had been handed down two years earlier, were then reported at the same time as the *Saayman* case as *S v Shilubane* 2008 1 SACR 295 (T) and *S v Maluleke* 2008 1 SACR 49 (T).

<sup>80</sup>*S v M* (n 5) para 72.

have proved to be foundational, and have provided a sound basis for future development of restorative justice approaches in (and alongside) the criminal justice system.

## Postscript

Sachs is fond of prologues, epilogues and postscripts in his writing. He even famously added a postscript about the importance of hearing the voices of children at the end of his judgment in *Christian Education South Africa v Minister of Education*.<sup>81</sup> Taking a leaf from his stylistic book, it is fitting to end this article by returning to the conversation between Sachs and Henri which was described at the beginning.

The reader may still be wondering whether Sachs did in fact shake Henri's hand after he had been to tell his story at the TRC. The answer is: He did.<sup>82</sup>

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<sup>81</sup>2000 4 SA 757 (CC); 2000 1 BCLR. 1051 (CC).

<sup>82</sup>Sachs *Strange alchemy of life and law* (2009) 94.