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**The mechanism of meaningful engagement in socio-economic rights cases as an enabler for the realisation of transformation and capacity building of the poor**

Mini-Dissertation Submitted in Partial Fulfilment of the Requirements for the  
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## **DEDICATION**

This mini-dissertation is dedicated to my family, especially my husband Barry Augus and my two daughters Tarryn and Tathum Augus for their love, support and constant encouragement during this research.



## **ACKNOWLEDGEMENTS**

First and foremost I would like to thank my Heavenly Father for giving me the faith and strength to complete a life-long dream. I would also like to thank Professor Danie Brand who accepted me as his student and offered me his mentorship during this research. I am truly grateful for the valuable comments that have guided me towards this accomplishment.



## **SUMMARY**

Chapter 1 of this mini-dissertation comprises of a general introduction that outlines the methodological framework of this research. It comprises of a hypothesis, assumptions, research questions and the research approach adopted to gather evidence and investigate the proposed topic. It is followed by the motivation for the research, background information and an overview of the literature review on meaningful engagement. Lastly I define and discuss some key concepts which are pertinent to the topic of meaningful engagement.

In Chapter 2 I conceptualise the concept of meaningful engagement where after I discuss how the concept of meaningful engagement originated within the South African context. This chapter also gives an overview of how the concept of meaningful engagement was developed by the South African courts in litigating housing rights cases as a mechanism to assist the poor in protecting their socio-economic rights.

In Chapter 3 I explore, identify and discuss the additional benefits of meaningful engagement.

In Chapter 4 I determine and discuss how the additional benefits generated by the mechanism of meaningful engagement could enhance the capacity and transform the lives of poor communities when engaging meaningfully with government to resolve their housing rights disputes.

Chapter 5 of this mini-dissertation comprises of general and core conclusions, as well as some recommendations.



## **ABBREVIATIONS USED**

**UDHR** – Universal Declaration of Human Rights

**ICESCR** – International Covenant on Economic, Social and Cultural Rights

**NGOs** – Non-Governmental Organisations

**SER's** – Socio-Economic Rights



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## CHAPTER 1 - INTRODUCTION

### 1 INTRODUCTION

Socio-economic rights (SER's) were incorporated into international treaties and conventions, at the time as a second category of human rights after World War II.<sup>1</sup> These rights included rights such as adequate access to food, water, housing, education and health care.<sup>2</sup> Protection and fulfilment of these rights are of particular importance to the poorest and disadvantaged of society, because they are dependent on these rights for their survival. Edgar, for example argues that “full realisation of SER's rights is imperative in overcoming challenges of poverty, marginalisation and underdevelopment.”<sup>3</sup> This is also one of the main reasons why socio-economic rights have been recognised in various international and regional human rights instruments such as the Universal Declaration of Human Rights (UDHR)<sup>4</sup> and the African Charter on Human and People's Rights (African Charter)<sup>5</sup> as important human rights. They place *inter alia* positive responsibilities upon governments – in addition to the duty to respect, also the duties to protect and fulfil them and are provided for in Articles 22 to 27 of the UDHR.<sup>6</sup> The African Charter also guarantees several socio-economic rights which are provided for in articles 15, 16, 17, 18, 22 and 24.<sup>7</sup> According to the South African Constitution the socio-economic rights contained in the Bill of Rights are enforceable and should be implemented by the government.<sup>8</sup> The government has a duty to respect, protect, promote and fulfil the socio-economic rights as described in the Bill of Rights.

Brand argues that socio-economic rights such as access to housing and access to medical care place a positive duty on the government to ensure that they gradually realise these rights for all people by taking appropriate measures given the resources at its disposal.<sup>9</sup>

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<sup>1</sup> D Ahmed and E Bulmer *Socio-economic rights: international IDE Constitution builder primer* 9 (2017) 8.

<sup>2</sup> K Moyo *The jurisprudence of the South African Constitutional Court on socio-economic rights* (2016) 2.

<sup>3</sup> Unpublished: N Edgar 'An analysis of the approach of the African Commission to the socio-economic rights provision of the African Charter: a comparative analysis with European and inter-American regional systems' unpublished Master's thesis, University of the Western Cape, 2015 2. (This does not conform with PULP Rules for Theses citation)

<sup>4</sup> Universal Declaration of Human Rights (UDHR).

<sup>5</sup> African Charter on Human and People's Rights (African Charter).

<sup>6</sup> Articles 22, 23, 24, 25 and 26 of the UDHR.

<sup>7</sup> Articles 15, 16, 17, 18, 22 and 24 of the African Charter.

<sup>8</sup> D Brand and C Heyns 'Socio-economic rights in South Africa' *Introduction to socio-economic rights in the South African Constitution* (2005) 3-5.

<sup>9</sup> D Brand and C Heyns 'Socio-economic rights in South Africa' *Introduction to socio-economic rights in the South African Constitution* (2005) 3-5.

Rights such as the right to basic education, basic housing and basic medical care are basic rights that are not subjected to gradual realisation and place a negative duty on government and any other party not to interfere with people's right to enjoy these rights.<sup>10</sup> The duty to promote places another positive duty on government and requires government to create favourable conditions to for example advance people's right to enjoy housing. The duty to fulfil requires the state to adopt appropriate legislative and other measures to ensure full realisation of socio-economic rights. The obligation to fulfil the right to housing is therefore legally enforceable in a court of law.<sup>11</sup>

According to Samart "South Africa has emerged as a country to envy and emulate when it comes to the attitude of its constitutional mandate in respect of socio-economic rights."<sup>12</sup> South Africa became a democratic republic in 1994 after many years of injustices and suppression of human rights caused by the apartheid system. To correct these injustices and overcome social exclusion of the poor, socio-economic rights became enforceable under the South African Constitution of 1996. Moyo confirms that the "Constitution explicitly seeks to heal the divisions of the past and that it wants to establish a society based on democratic values, social justice and fundamental human rights and improve the quality of life for all citizens and free the potential of each person."<sup>13</sup> To embrace the constitutional vision of a democratic and transformed society where all people are treated with respect and assisted in a dignified way, the South African Courts developed the mechanism of meaningful engagement. The idea of meaningful engagement is relevant to housing rights enforcement and was developed by the Courts more specifically in dealing with housing rights cases.<sup>14</sup> The purpose was to create a process that requires government to engage meaningfully with communities affected by policy decisions that may involve eviction and could leave affected communities homeless.<sup>15</sup> Liebenberg and

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<sup>10</sup> D Brand and C Heyns 'Socio-economic rights in South Africa' *Introduction to socio-economic rights in the South African Constitution* (2005) 3-5.

<sup>11</sup> K Tissington 'Towards an SER Matrix: monitoring the progressive realisation of socio-economic rights in South Africa: a review of housing policy and development in South Africa since 1994' (2010) 14-15 <http://spii.org.za/wp-content/uploads/2013/12/review-of-the-right-to-housing.pdf> (Accessed 20 June 2018).

<sup>12</sup> Unpublished: N I Samart 'The role of the judiciary towards enforcement of socio-economic rights in Africa: lessons from South Africa' unpublished Master's thesis, University of Pretoria, 2015 11.

<sup>13</sup> K Moyo 'Review of implementation of Constitutional Court decisions on Socio-economic rights' 2013 6 [https://www.fhr.org.za/files/2513/8503/8604/FHR\\_Report.doc\\_May\\_2013\\_K\\_Moyo\\_ED.pdf](https://www.fhr.org.za/files/2513/8503/8604/FHR_Report.doc_May_2013_K_Moyo_ED.pdf) (Accessed 17 June 2018).

<sup>14</sup> L Chenwi 'Implementation of housing rights in South Africa: approaches and strategies' (2015) 24 (4) *Journal of Law and Social Policy* 78.

<sup>15</sup> T Monare and A Mayet 'Twenty years of South African Constitutionalism: constitutional rights, judicial independence and transition to democracy conference' Conference held 13-16 November 2014 at New York Law

Quinot confirm that “meaningful engagement as described by the Constitutional Court refers to a two-way process in which local authority and those facing eviction would talk to each other meaningfully in order to achieve certain objectives.”<sup>16</sup> A further critical aspect of meaningful engagement is that it may provide affected communities with additional benefits that could enhance their capacity and ultimately transform their lives.

The purpose of Chapter 1 is to describe the hypothesis and present assumptions in respect of the specific research problem. Thereafter I formulate the research questions that need to be answered and explain what research approach I adopt for the purpose of gathering evidence and investigating the proposed topic in order to answer the research questions. This will be followed by the motivation or justification for the research, and then I provide some background information on meaningful engagement. I then continue with the literature review in order to summarise and give an overview of the current theoretical contributions, findings and knowledge found in various journal and newspapers articles, text books, reports and case law pertaining to the topic of meaningful engagement. Lastly, I define and discuss key concepts such as socio-economic rights, justiciability of socio-economic rights, meaningful engagement, transformation, and equality, all of which are relevant to my research problem.

## 1.1 HYPOTHESIS

To address the past and to deliver on its promise of generating a more even society, socio-economic rights have been included in the South African Constitution as justiciable rights. Liebenberg affirms that “South Africa’s Constitution is among a handful of countries which integrated economic and social rights as legally enforceable rights.”<sup>17</sup> This means that people, especially the poor and previously disadvantaged may go to court to challenge any government action that deprives them the enjoyment of resources, opportunities or their socio-economic rights.

The right to access housing is considered as an important human and socio-economic right, which is provided for in Section 26 of the South African Constitution.<sup>18</sup> Section 26 of

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School. <http://www.nylsalawreview.com/wp-content/uploads/sites/16/2014/11/Mayet-Monare.pdf> (Accessed 15 April 2018).

<sup>16</sup> S Liebenberg and G Quinot ‘*Law and Poverty: perspectives from South Africa and beyond*’ (2012) 316.

<sup>17</sup> S Liebenberg ‘South Africa has a model Bill of Rights: but it doesn’t seem that way’ *Mail and Guardian*’ 21 March 2017 1 <https://mg.co.za/article/2017-03-21-south-africa-has-a-model-bill-of-rights-but-it-doesnt-seem-that-way> (Accessed 22 September 2017).

<sup>18</sup> Constitution of the Republic of South Africa (1996).

the Constitution specifically declares that everyone shall have the right to access adequate housing and furthermore provides that no person may be forced, removed or displaced from his or her home without a court order as stipulated in Subsection 26 (3) of the Constitution.<sup>19</sup> This means that every citizen, irrespective of their background or financial status have the right to exercise this right and therefore no one may be left homeless, arbitrarily. Despite the aforementioned promises and commitments embedded in the Constitution, vulnerable or disadvantaged people or communities often remain subjected to living in poor conditions and left homeless due to forced evictions as seen in housing rights cases such as *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) (*PE Municipality*),<sup>20</sup> *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 3 SA 208 (CC) (*Olivia Road*),<sup>21</sup> *Abahlali Basemjondolo Movement of South Africa and Another v Premier of Kwazulu-Natal and Others* 2009 SA 31 (CC) (*Abahlali*),<sup>22</sup> *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 545 (CC) (*Joe Slovo*),<sup>23</sup> and *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 SA 104 (CC) (*Blue Moonlight*).<sup>24</sup>

In an attempt to give effect to the transformative idea of the Constitution, the Constitutional Court, in adjudicating the above-mentioned housing rights cases, introduced the mechanism of meaningful engagement. Chenwi maintains that “the notion of meaningful engagement is relevant to housing rights enforcement and has been referred to mainly in housing rights cases.”<sup>25</sup> The main objective of this mechanism is to force government to effectively engage with the affected communities when government action is threatening to impact the enjoyment of their socio-economic rights. The significance of meaningful engagement is that it gives poor people, who often have limited or no access to resources or mechanisms that could assist them to exercise their rights, the opportunity to voice their concerns and protect themselves against being left hopeless and homeless.

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<sup>19</sup> Constitution of the Republic of South Africa (1996).

<sup>20</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC).

<sup>21</sup> *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 3 SA 208 (CC).

<sup>22</sup> *Abahlali Basemjondolo Movement of South Africa and Another v Premier of Kwazulu-Natal and Others* 2009 SA 31 (CC).

<sup>23</sup> *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 545 (CC).

<sup>24</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 SA 104 (CC).

<sup>25</sup> L Chenwi ‘Implementation of housing rights in South Africa: approaches and strategies’ (2015) 24 (4) *Journal of Law and Social Policy* 78.

A further critical aspect of meaningful engagement is that it creates additional opportunities for vulnerable people to develop and enhance their capacity. Williams, in her article “The right to housing in South Africa: an evolving jurisprudence” similarly argues that the doctrine of meaningful engagement has significant potential for widespread empowerment.<sup>26</sup>

## 1.2 ASSUMPTIONS

Socio-economic rights have been developed with the specific purpose of ensuring that those in need have appropriate access to resources, services and opportunities that could help them to live a decent life and improve the quality of their own lives. This is one of the main reasons why “socio-economic rights are recognised and protected in the Bill of Rights and the justiciability of those rights is not disputed.”<sup>27</sup> Having access to housing means having reasonable access to other important basic needs such as water, schools, hospitals or transport which in return could produce well established communities with a steady income. The safeguarding of the socio-economic rights of the most poor, especially the right to access housing, is therefore of critical importance to create a changed society as envisioned by our Constitution. Meaningful engagement as developed by the Courts in housing rights cases is a key mechanism to ensure that people are not unfairly deprived of their right to access housing without giving them some sort of opportunity to engage with and state their case to those who threaten to remove, displace or demolish their homes. Previous research and the literature on housing rights cases have shown that the mechanism of meaningful engagement is also capable of generating additional benefits for vulnerable people. Chenwi, for example, is of opinion that “individuals and communities can influence and shape policies and priority setting in relation to the provision of housing through meaningful engagement.”<sup>28</sup> Liebenberg also believes that meaningful engagement can “facilitate participation by communities in resolving conflicts and implementing policies and programmes.”<sup>29</sup> Wilson on the other hand emphasises that “negotiations in the *Olivia Road* case had to achieve the re-

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<sup>26</sup> LA Williams ‘The right to housing in South Africa: an evolving jurisprudence’ (2014) 45 (3) *Columbia Human Rights Law Review* 827.

<sup>27</sup> E Grant ‘Human dignity and socio-economic rights’ (2013) 33 *Liverpool Law Review* 254.

<sup>28</sup> L Chenwi ‘Implementation of housing rights in South Africa: approaches and strategies’ (2015) 24 (4) *Journal of Law and Social Policy* 79.

<sup>29</sup> S Liebenberg ‘Engaging the paradoxes of universal and particular in human rights adjudication: the possibilities and pitfalls of meaningful engagement’ (2012) 12 *African Human Rights Law Journal* 26.

accommodation of the occupiers in safe and decent accommodation”.<sup>30</sup> Miriyoga argues that “government is to initiate the engagement process and by extension provide information on its plans and programmes whenever contestations on housing policies, plans or projects arise between government and the community.”<sup>31</sup> The above mentioned arguments demonstrate that if the process of engagement is executed effectively, it may provide the affected communities with additional benefits such as influencing government decision-making and policies, obtaining important government information, gaining knowledge of government processes, and even developing other skills such as negotiation and problem solving skills.

I am of opinion that even though the main objectives of meaningful engagement is to force government to engage with communities who face eviction and prevent vulnerable people from being displaced or deprived of access to housing, the additional benefits are also essential if we want to create a fundamental new society that is much more equal. In this dissertation I emphasise how the additional benefits generated by meaningful engagement can transform and enhance the capacity and lives of the affected communities.

### **1.3 RESEARCH QUESTIONS**

The purpose of this dissertation is to answer the following research questions:

Question 1

What additional benefits are produced by the mechanism of meaningful engagement?

Question 2

To what extent do the additional benefits of meaningful engagement in housing rights cases enhance the capacity of the poor?

Question 3

To what extent does the mechanism of meaningful engagement in housing rights cases relate to transformation?

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<sup>30</sup> S Wilson ‘Planning for inclusion in South Africa: the state’s duty to prevent homelessness and the potential of meaningful engagement’ (2011) 22 *Urban Forum* 276.

<sup>31</sup> Unpublished: L Miriyoga ‘Information without power? exploring the challenges and opportunities in the usage of the Promotion of Access to Information Act no 50 of 2000 (PAIA) as a potent tool for advancing socio-economic justice in South Africa’ unpublished Master’s thesis, University of Cape Town, 2011 28-29.



## 1.4 RESEARCH APPROACH

Research methodology refers to the how dimension of research, in other words “how evidence is gathered, analysed and presented.”<sup>32</sup> The research methodology to be adopted to investigate and answer the research problem is desktop or library research. A critical literature review will be done by consulting textbooks, journal articles, newspaper articles, unpublished dissertations and South African case law on socio-economic rights pertaining to the specific topic of this research.

## 1.5 MOTIVATION FOR THE RESEARCH

The literature indicates that meaningful engagement was developed by the courts with the intention to give those who have often been deprived and faced exclusion to resources and mechanisms that could assist them to exercise their housing rights the opportunity to protect themselves against being left homeless. Liebenberg claims that meaningful engagement gives those without lawful title and facing eviction from their home a voice in proceedings that could leave them without a roof over their heads.<sup>33</sup> Many scholars, for example Watt, have argued that meaningful engagement is an innovative remedy, which was developed by the South African courts to grant appropriate relief to affected communities in the instances of an eviction order.<sup>34</sup> Meaningful engagement as developed by the courts and more specifically the Constitutional Court in adjudicating housing rights cases is an attempt by the courts to use their remedial powers in a manner that could allow for a society where vulnerable people are empowered and given a fair opportunity to voice their concerns when threatened with action that could leave them homeless or displaced.<sup>35</sup> The mechanism of meaningful engagement, if effectively applied, can also produce additional benefits for vulnerable people, which could enhance their productive capacity and ultimately help them transform their lives. These additional benefits could potentially impact positively on the quality of life of the poor and empower them to develop and increase their productive capacity in a manner that could improve their lives socially, economically and culturally.

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<sup>32</sup> S Koma and M Nkwana *Research methodology NME 702* (2015) 17.

<sup>33</sup> S Liebenberg ‘Participatory approaches to socio-economic rights adjudication: tentative lessons from South African evictions law’ (2014) 32 (4) *Nordic Journal of Human Rights* 327.

<sup>34</sup> Unpublished: NR Watt ‘A critical examination of meaningful engagement with regard to education law’ unpublished Master’s thesis, University of Pretoria, 2014 3.

<sup>35</sup> L Chenwi ‘Implementation of housing rights in South Africa: approaches and strategies’ (2015) 24 (4) *Journal of Law and Social Policy* 78-79.

## 1.6 BACKGROUND

Rapatsa highlights that the South African Constitution “carried with it, a progressive agenda of transformation geared towards changing all spectrums of society, with specific emphasis on altering social and economic conditions of ordinary South Africans, particularly the previously disadvantaged communities.”<sup>36</sup> Although reasonable efforts have been made since 1996 by the South African government and Courts to ensure a more even society by means of realising the socio-economic rights of previously disadvantaged and poor people, “evictions have continued to affect the most socially, economically, environmentally and politically disadvantaged of society.”<sup>37</sup> Confronted with losing what constitutes their homes, many individuals and communities have turned to the courts to resist evictions.<sup>38</sup> To give effect to the transformative vision of the Constitution, the Constitutional Court in adjudicating housing rights cases such as *Olivia Road*<sup>39</sup> and *PE Municipality*<sup>40</sup> established the mechanism of meaningful engagement, forcing government to engage with affected communities when its actions threaten their socio-economic rights.

The court in *Olivia Road*<sup>41</sup> importantly emphasised that engaging meaningfully with those facing homelessness is an important process that derives from various Constitutional provisions such as the right to life, human dignity and housing.<sup>42</sup> The Court furthermore in the *PE Municipality* case held that failing to engage and giving those standing to lose what is called a house a chance to state their case, would play an important factor in the decision of whether or not to grant an eviction order.<sup>43</sup> The reasoning of the Court in above-mentioned cases illustrates that meaningful engagement is an attempt by the courts to contribute towards our Constitution’s vision of a democratic, transformed society. The mechanism creates a platform to empower vulnerable people whose socio-economic

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<sup>36</sup> M Rapatsa ‘South Africa’s transformative Constitution: from civil and political rights doctrines to socio-economic rights promises’ (2015) 5 (2) *Juridical Tribune* 209.

<sup>37</sup> T Monare and A Mayet ‘Twenty years of South African Constitutionalism: constitutional rights, judicial independence and transition to democracy conference’ conference held 13-16 November 2014 at New York Law School. <http://www.nyislawreview.com/wp-content/uploads/sites/16/2014/11/Mayet-Monare.pdf> (Accessed 15 April 2018).

<sup>38</sup> M Strauss and S Liebenberg ‘Contested spaces: housing rights and evictions law in post-apartheid South Africa’ (2014) 13 (4) *Planning Theory* 435.

<sup>39</sup> *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 3 SA 208 (CC).

<sup>40</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC).

<sup>41</sup> *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 3 SA 208 (CC).

<sup>42</sup> M Strauss and S Liebenberg ‘Contested spaces: housing rights and evictions law in post-apartheid South Africa’ (2014) 13 (4) *Planning Theory* 437.

<sup>43</sup> *PE Municipality* para 43.



rights are threatened or critically affected or infringed by government action to express their concerns and protect themselves against displacement and homelessness.

## 1.7 LITERATURE REVIEW

“The literature review helps to determine whether the level of existing knowledge leads to a clear cut prediction that you wish to test or to one or more research questions.”<sup>44</sup> A literature review introduces the researcher to the various experts and scholars in the field of the topic to be investigated. The literature review gives the researcher in-depth knowledge of the concepts, ideas, viewpoints and arguments of the various researchers on the subject to be investigated.

### 1.7.1 LITERATURE REVIEW ON MEANINGFUL ENGAGEMENT AS DEVELOPED IN SOUTH AFRICAN HOUSING RIGHTS CASES

McLean states that “the idea of meaningful engagement in eviction cases has its predecessor in two decisions of *PE Municipality* and *Olivia Road* and marks an important development in the Court’s approach to remedies in the context of the adjudication of socio-economic rights.”<sup>45</sup> The mechanism of meaningful engagement implies an innovative approach whereby the Courts assist especially vulnerable people, who are facing infringement of their socio-economic rights. The mechanism as developed by the Courts allow them to exercise their remedial powers in a way that ensures democratic processes of participation and involvement. Vulnerable individuals can realise socio-economic rights such as the right to access suitable housing.<sup>46</sup> Fuo also argues that “the right to public participation is a very important component of South Africa’s democracy especially taking into consideration the fact that the majority of the population was previously excluded from governance processes.”<sup>47</sup> Meaningful engagement not only protects people’s right to access housing but could also be seen as a key driver of participatory democracy because it gives people and communities from poor and disadvantaged backgrounds the platform to actively engage in discussions with

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<sup>44</sup> KB Adams ‘Academic coaching and writing’ (2016) <https://academiccoachingandwriting.org/academic-writing/academic-writing-blog/iv-write-your-literature-review> (Accessed 29 September 2017).

<sup>45</sup> K McLean ‘Meaningful engagement: one step forward or two back? some thoughts on *Joe Slovo*’ (2010) 3 (1) *Constitutional Court Review* 232.

<sup>46</sup> L Chenwi ‘Implementation of housing rights in South Africa: approaches and strategies’ (2015) 24 *Journal of law and Social Policy* 79.

<sup>47</sup> ON Fuo ‘Direct democracy in post-apartheid local government: making an over-ambitious legal framework responsive to the needs of impoverished South Africans’ IACL World Congress held 16-20 June 2014 : University of Oslo (2014) 6.

government and other role players whose actions or policies threaten the enjoyment of their socio-economic rights.

Pillay furthermore argues that in the case of *Olivia Road* “the Court’s order brought about participation by those people living in the buildings in devising a solution to the housing crisis they were experiencing.”<sup>48</sup> Chenwi and Tissington are also of the opinion that “if the courts order engagement, it promotes the involvement of the poor in coming up with a solution.”<sup>49</sup> Engaging meaningfully with communities who face infringement of their socio-economic rights may give them the opportunity to become involved in challenges that affect, threaten or deprive them of their right to exercise and enjoy socio-economic rights, as well find appropriate solutions to overcome these challenges.

Ray proclaims that “enforcing social rights through engagement can democratize local government processes by creating the opportunity for local communities to organise and engage with government on their terms.”<sup>50</sup> The active involvement of citizens in issues that directly affect them additionally creates an avenue for vulnerable people and communities to use their power and inputs to influence government priorities and develop appropriate government policies in matters affecting their humanness, existence and future. Lawrence similarly emphasises that “Liebenberg promotes meaningful participation and that it is not only an expression of the dignity of the citizen, but is indispensable in ensuring that the design and implementation of programmes, to realise socio-economic rights, are effective and sustainable.”<sup>51</sup> This means that the poor could through the mechanism of meaningful engagement ensure that their needs are given priority and that they are accorded full and sustainable access to suitable housing resources.<sup>52</sup>

Effective public involvement and input in government processes and decision making therefore plays a vital role in influencing, and shaping government priorities and policies towards effective realisation of the intended development goals of the country and its

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<sup>48</sup> A Pillay ‘Toward effective social and economic rights adjunction: the role of meaningful engagement’ (2012) 10 (3) *I,CON* 733.

<sup>49</sup> L Chenwi and K Tissington *Engaging meaningfully with government on socio-economic rights: a focus on the right to housing* Community Law Centre: University of the Western-Cape (2010) 19.

<sup>50</sup> B Ray *Engaging with social rights: procedure, participation and democracy in South Africa’s second wave* (2016) 321.

<sup>51</sup> Unpublished: R Lawrence ‘The impact of supervisory order and structural interdicts in socio-economic rights cases in South Africa’ unpublished Master’s thesis, University of the Western Cape, 2013 44.

<sup>52</sup> T Monare and A Mayet ‘Twenty years of South African Constitutionalism: constitutional rights, judicial independence and transition to democracy conference’ Conference held 13-16 November 2014 at New York Law School. <http://www.nyslawreview.com/wp-content/uploads/sites/16/2014/11/Mayet-Monare.pdf> (Accessed 15 April 2018).

people. This process furthermore holds the potential for more transparent, contested and acceptable public policies. Chenwi confirms this by maintaining that “generally speaking, engagement and participation are both processes through which individuals and communities influence policy-making, priority setting and access to goods and services, amongst others.”<sup>53</sup> Justice Ncgobo in *Joe Slovo* also emphasised that “meaningful engagement between government and the affected residents is the key element that must be met when implementing any programme giving effect to socio-economic rights.”<sup>54</sup> The high court in the *Blue Moonlight* case for example requested the city of Johannesburg to take measures to address the inadequacies in its housing policy and to report to the court on the necessary measures that will be taken in order to address the inadequacies in the housing policy that were seen to be unconstitutional.<sup>55</sup>

Giving the most marginalised and disadvantaged the opportunity to raise concerns and give inputs on policy matters that affect them does not only create a sense that these citizens are seen as valued partners in the policy making process, but it gives them a genuine opportunity to access government information that may have an impact on their lives. Miriyoga correctly asserts that the expression “information is power; holds true in the process of meaningful engagement.”<sup>56</sup> This means citizens have the right to be informed of government decisions that affect their socio-economic rights. Section 195 (1) of the South African Constitution<sup>57</sup> also explicitly compels government action to be transparent and accountable. Engaging meaningfully with those whose socio-economic rights are affected could thus play a vital role in intensifying efforts towards accessing government information and holding government responsible and accountable for any action or inaction.

Access to government information related to socio-economic rights issues such as government plans on housing developments furthermore ensures that affected communities are able to evaluate whether government action is indeed in line with the

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<sup>53</sup> L Chenwi ‘Meaningful engagement in the realisation of socio-economic rights: the South African experience’ (2011) 26 *South African Public Law* 130.

<sup>54</sup> *Joe Slovo* para 238.

<sup>55</sup> K Moyo ‘Review of implementation of Constitutional Court decisions on Socio-economic rights’ 2013 43 [https://www.fhr.org.za/files/2513/8503/8604/FHR\\_Report.doc\\_May\\_2013\\_K\\_Moyo\\_ED.pdf](https://www.fhr.org.za/files/2513/8503/8604/FHR_Report.doc_May_2013_K_Moyo_ED.pdf) (Accessed 17 June 2018).

<sup>56</sup> Unpublished: L Miriyoga ‘Information without power? exploring the challenges and opportunities in the usage of the Promotion of Access to Information Act no 50 of 2000 (PAIA) as a potent tool for advancing socio-economic justice in South Africa’ unpublished Master’s thesis, University of Cape Town, 2011 27.

<sup>57</sup> Section 195 (1) of the South African Constitution 1996.

Constitution's vision of delivering services to improve the quality of lives of the neediest of society. According to Chenwi "the meaningful engagement remedy is a progressive and effective remedy capable of promoting social transformation and enhancing participatory democracy and transparency and accountability in delivery of socio-economic goods and services."<sup>58</sup> This also implies that those entrusted with public resources for the development of the country and its people need to take accountability for their actions or inactions.

In *PE Municipality* the Court held that "it would ordinarily not be just and equitable to order eviction if proper discussions, and where appropriate mediation, have not been attempted."<sup>59</sup> Engaging effectively with communities whose socio-economic rights are endangered because of government or private action or policy also lays the foundation for the vulnerable and most disadvantaged of society to negotiate or bargain on the issues that may affect them. This is also the fundamental idea of equality, namely to ensure that the most vulnerable enjoy a level playing field that would give them a fair chance of fighting for the rights that could improve their wellbeing. The mechanism of meaningful engagement therefore reaffirms the Constitutional obligation of creating a society where power and treatment is equal, irrespective of background or financial status. Such equality is critical for a transformed society.

Ray reports that "in *Joe Slovo*, first it shows that courts can use engagement to return some measure of control to the parties following a substantive decision on the merits in a socio-economic rights case".<sup>60</sup> Poor people are often powerless and limited in choice and participation of government processes, mainly due to their economic situation and status. Through meaningful engagement, poor people can exercise greater influence and expand their limited control and decision-making power over the resources and government processes that affect their socio-economic rights. It furthermore provides the platform for poor people to direct government decision making towards actions that could transform their own lives.

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<sup>58</sup> L Chenwi 'A new approach to remedies in socio-economic rights adjudication: occupiers of 51 Olivia road and others v city of Johannesburg and others' (2009) 2 *Constitutional Court Review* 373.

<sup>59</sup> *PE Municipality* para 43.

<sup>60</sup> B Ray 'Proceduralisation's triumph and engagement's promise in socio-economic rights litigation' (2011) 27 *South African Journal on Human Rights* 111.

## 1.8 CONCEPT CLARIFICATIONS

The under-mentioned concepts are defined.

### 1.8.1 SOCIO-ECONOMIC RIGHTS

To address the past and guarantee a government system that is responsive to the needs of specifically the poor people of South Africa, socio-economic rights have been entrenched in the Constitution as justiciable rights. According to Brand “socio-economic rights create entitlements to material conditions for human welfare – they are rights to things such as food, water, healthcare services and shelter, rather than rights to vote, or speak, or associate.”<sup>61</sup> The aim of socio-economic rights is to ensure that the most vulnerable and marginalised groups of society such as the poor have access to these resources as mentioned by Brand which could assist them to transform their lives and live a decent life. “Socio-economic rights have also been recognised by various international human rights instruments as important human rights.”<sup>62</sup>

### 1.8.2 JUSTICIABILITY OF SOCIO-ECONOMIC RIGHTS

Liebenberg claims that “South Africa’s Constitution is amongst a handful of countries which integrated socio-economic rights as legally enforceable rights.”<sup>63</sup> Socio-economic rights are of significant importance to the poor because they are the people that often face discrimination and social exclusion because of their poor circumstances. According to the South African Constitution socio-economic rights are justiciable and enforceable through the legal system. This means that vulnerable people and groups such as the poor have the right to access the courts when government or private action threatens to deprive them of their right to enjoy and exercise their socio-economic rights.

### 1.8.3 THE CONCEPT OF MEANINGFUL ENGAGEMENT

The concept of meaningful engagement has been developed by the Courts in adjudicating housing rights cases such as *PE Municipality*<sup>64</sup> and *Olivia Road*.<sup>65</sup> A consistent theme

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<sup>61</sup> D Brand ‘Introduction to socio-economic rights in the South African constitution’ [http://www.chr.up.ac.za/chr\\_old/centre\\_publications/socio/book/Chapter%201-Introduction.pdf](http://www.chr.up.ac.za/chr_old/centre_publications/socio/book/Chapter%201-Introduction.pdf) (Accessed 27 April 2017).

<sup>62</sup> S Khoza *Socio-economic rights in South Africa: a resource book* (2nd ed) (2007) 19.

<sup>63</sup> S Liebenberg ‘South Africa has a model Bill of Rights but it doesn’t seem that way’ *Mail and Guardian* 21 March 2017 [1https://mg.co.za/article/2017-03-21-south-africa-has-a-model-bill-of-rights-but-it-doesnt-seem-that-way](https://mg.co.za/article/2017-03-21-south-africa-has-a-model-bill-of-rights-but-it-doesnt-seem-that-way) (Accessed 22 September 2017) .

<sup>64</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

<sup>65</sup> *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 (3) SA 208 (CC).

throughout the literature is that the concept of meaningful engagement as developed by the Court in housing rights cases refers to a process that requires mandatory engagement between government and citizens whose socio-economic rights are threatened by means of forced eviction. It therefore implies a process where the affected parties are fully involved in discussions and negotiations in order to settle or resolve a dispute.

#### **1.8.4 CAPACITY ENHANCEMENT OF THE POOR**

Capacity enhancement also referred to as capacity building or development can be conceptualised or defined in various ways. According to Wilhelm and Mueller “capacity enhancement has been defined in multiple ways; its ultimate purpose is to leave behind better skilled and oriented individuals, more responsive and effective institutions, and a better policy environment for pursuing development goals.”<sup>66</sup> Hope endorses that “there are several definitions or conceptualisations of capacity development.”<sup>67</sup> He continues to argue that capacity enhancement can be defined as “the enhancement of the competency of individuals and local communities to engage in activities in a suitable manner for positive development such as poverty reduction, improvements of governance quality, or meeting the millennium development goals for example.”<sup>68</sup> For the purpose of this research, capacity enhancement will refer to promoting the abilities of the poor to improve and strengthen their potential, knowledge, skills, confidence, decision making power and finding solutions to overcome the challenges that threaten or deprive them of their right to enjoy and exercise their socio-economic rights.

#### **1.8.5 TRANSFORMATION**

Quinot states that “one of the main characteristics of constitutional transformation in South Africa is what Etienne Mureinik called the shift towards a culture of justification, in which every exercise of power is expected to be justified.”<sup>69</sup> The purpose of transformation within the South African context is to create a more just and equitable society, especially after apartheid. This vision has also been fundamental to the country’s Constitution since 1994. The constitution of South Africa, including its Bill of Rights, is considered one of the

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<sup>66</sup> V Wilhelm and SD Mueller ‘Capacity enhancement at the institutional level: three case studies in telecommunications’ *Capacity enhancement briefs sharing best practices and lessons learned* (2003)2. Available from: <https://openknowledge.worldbank.org/handle/10986/9709> (Accessed 1 October 2017).

<sup>67</sup> KR Hope ‘Capacity development for good governance in developing countries: some lessons from the field’ (2009) 32 *International Journal of Public Administration* 729.

<sup>68</sup> KR Hope ‘Capacity development for good governance in developing countries: some lessons from the field’ (2009) 32 *International Journal of Public Administration* 730.

<sup>69</sup> G Quinot ‘Substantive reasoning in administrative-law adjudication’ (2010) 3 *Constitutional Court Review* 111.

most progressive constitutions in the world. One can therefore assume that the main purpose of transformation within the South African context is to restore the injustices of the past and to ensure that every citizen, irrespective of economic or social background, are given fair and equal opportunities to develop socially, economically and culturally.

### **1.8.6 EQUALITY**

Within the South African context, equality is one of the most important constitutional values. The main reason for this is to address the socio-economic disadvantages, exclusion and injustices that some people or communities have experienced in the past. This is also why the concept of equality is seen as such a revolutionary concept. The post-apartheid government has also been clear about its commitment and strives towards creating an equal society.

### **1.8.7 NON-GOVERNMENTAL ORGANISATIONS (NGO'S)**

Non-governmental organisations (NGO's) are voluntary or non-profit organisations that function independently from the state. They focus on a broad spectrum of issues ranging from human rights, environmental or labour issues that may impact the environment or the development and human rights of people.<sup>70</sup> NGO'S have become key actors in responding to poverty and related issues that may affect human rights.<sup>71</sup> The literature on socio-economic rights cases has pertinently stressed that NGO's have an important role to play by assisting the poor to protect socio-economic rights.

### **1.8.8 LOCAL GOVERNMENT**

Local government is an important element of a democratic government.<sup>72</sup> Local government has the constitutional responsibility to ensure that the communities within its jurisdiction are provided with efficient, effective and appropriate basic municipal services such as housing, water and sanitation. They play a critical role in improving the lives of the poor. Their actions and policies should thus always be development orientated in order to benefit the broader society and more especially the poor and previously disadvantaged.

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<sup>70</sup> N Bernaz and I Pietropaoli 'The role of non-governmental organisations in the business and human rights treaty negotiations' (2017) 9*Journal of Human Rights Practice* 289.

<sup>71</sup> S Matthews 'The role of NGOs's in Africa: are they a force for good?' *The Conversation* 25 April 2017 Available from: <https://theconversation.com/the-role-of-ngos-in-africa-are-they-a-force-for-good-76227> (Accessed 30 July 2018).

<sup>72</sup> Unpublished: O Madumo 'An evaluation of the functioning of metropolitan municipal councils in Gauteng, South Africa' unpublished PhD thesis, University of Pretoria 2017 1.

## 1.9 CONCLUSION

Socio-economic rights such as the right to access food, water, housing, healthcare and education are included in the South African Constitution with the vision of improving the quality of life of the poor and previously disadvantaged and creating a more even and democratic society. These rights are legally enforceable in a court of law, which means the courts have the capacity to play a significant role in promoting the Constitution's vision of a transformed society. Since 1996 the courts, especially the Constitutional Court has made reasonable efforts to assist with realising this transformed vision of the Constitution. In litigating housing rights cases such as *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 1 SA 46 (CC) (*Grootboom*),<sup>73</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) (*PE Municipality*),<sup>74</sup> *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 3 SA 208 (CC) (*Olivia Road*),<sup>75</sup> *Abahlali Basemjondolo Movement of South Africa and Another v Premier of Kwazulu-Natal and Others* 2009 SA 31 (CC) (*Abahlali*),<sup>76</sup> *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 545 (CC) (*Joe Slovo*),<sup>77</sup> and *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 SA 104 (CC) (*Blue Moonlight*)<sup>78</sup> the Constitutional Court developed the mechanism of meaningful engagement in an effort to exercise their remedial powers in a way that it creates the opportunity for poor people to actively engage with those who threaten their right to access housing.

A constant finding in the literature is that the mechanism of meaningful engagement as intended by the Court implies an innovative approach that necessitates government or any other role players to first talk and discuss their plans with affected communities before implementing an eviction order. The reason for this is to ensure that those facing eviction, which in most of the cases are the poor people, are not deprived of their socio-economic rights, leaving them homeless or without any alternative accommodation. The literature furthermore emphasises that meaningful engagement is a mechanism that may produce other potential benefits for the affected communities such as enhancing participation in

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<sup>73</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 1 SA 46 (CC).

<sup>74</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC).

<sup>75</sup> *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 3 SA 208 (CC).

<sup>76</sup> *Abahlali Basemjondolo Movement of South Africa and Another v Premier of Kwazulu-Natal and Others* 2009 SA 31 (CC).

<sup>77</sup> *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 545 (CC).

<sup>78</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 SA 104 (CC).



government decision making, obtaining important government information, influencing and shaping government policies, promoting the involvement of communities in devising solutions for their problems, and promoting the values of human rights. These benefits could ultimately give poor people the productive capacity to accelerate their economic development and transform or improve the quality of their own lives.

## CHAPTER 2 - DEVELOPMENT OF THE MECHANISM OF MEANINGFUL ENGAGEMENT

### 2.1 INTRODUCTION

The purpose of this chapter is not to criticise the application of the mechanism of meaningful engagement as applied by the Courts, but rather to show how the concept originated within the South African context and how it was developed and adopted by the Courts in dealing with housing rights cases. I therefore firstly attempt to conceptualise the concept of meaningful engagement. Thereafter I discuss and give an overview of how the concept of meaningful engagement originated within the South African context and then lastly I discuss how the concept was developed as a mechanism by the South African courts in dealing with socio-economic rights cases.

#### 2.1.1 CONCEPTUALISING MEANINGFUL ENGAGEMENT

Chenwi and Tissington argue that “at times the courts have used concepts such as mediation, consultation and meaningful engagement as if they are the same thing.”<sup>79</sup> The concept of meaningful engagement is often used interchangeably with concepts such as mediation and consultation. Although there are some similarities between these concepts such as fostering citizens’ inputs, dialogue and dispute resolution, they do differ significantly. Van Wyk describes mediation as a process that is often used by the courts in cases that require a third party to negotiate a settlement between two parties in a conflict situation.<sup>80</sup> Chenwi and Tissington say “with consultation, the person in authority (e.g. local government) asks for people’s views but often makes the final decision”.<sup>81</sup> This implies that consultation is an act that involves asking people for their inputs on matters that concerns them but there are no guarantees that these inputs may be incorporated in the final decision-making processes. Van der Berg emphasises that Ray refers to meaningful engagement as a process that “could constitute an effective and valuable tool for the poor, to vindicate their socio-economic rights.”<sup>82</sup>

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<sup>79</sup> L Chenwi and K Tissington Engaging meaningfully with government on socio-economic rights: a focus on the right to housing Community Law Centre: University of the Western-Cape (2010) 10.

<sup>80</sup> J Van Wyk ‘The role of local government in evictions’ (2011) 14 (3) *Potchefstroom Electronic Law Journal* 65.

<sup>81</sup> L Chenwi and K Tissington Engaging meaningfully with government on socio-economic rights: a focus on the right to housing Community Law Centre: University of the Western-Cape (2010) 10.

<sup>82</sup> S Van der Berg ‘Meaningful engagement: proceduralising socio-economic rights further or infusing administrative law’ (2013) 29 *South African Journal on Human Rights* 383.

McLean also points out that in the *Joe Slovo* case it was confirmed that meaningful engagement suggests “the residents must be informed on a range of issues, including the purpose of relocation, consequences of relocation and how permanent housing would be provided to the affected communities.”<sup>83</sup> Meaningful engagement is thus more than just asking people for their inputs or having discussions in order to reach an agreement, as the case is with consultation and mediation. Meaningful engagement implies a process where the involved parties are brought together for dialogue on the attainment of justice for those whose socio-economic rights are being threatened. Executed in a meaningful manner, such engagement can be a continuous, collaborative process of communication and interaction whereby affected communities are informed beforehand what government plans to do, when they plan to do it, how they plan to do it, what impact it may have on their lives and what alternatives are available to secure their socio-economic rights. Meaningful engagement is an on-going process that provides affected parties with the opportunity to actively participate in the decision-making process from the beginning of the dispute until a proper solution has been reached.

### **2.1.2 THE ORIGIN OF MEANINGFUL ENGAGEMENT WITHIN THE SOUTH AFRICAN CONTEXT**

Strauss and Liebenberg contend that the Constitution symbolises a long-term commitment to constitutional enactment, interpretation and enforcement that is aimed at encouraging participation and equal transformation of the South African society.<sup>84</sup> The South African Constitution of 1996 envisions and provides for a democracy that promotes and fosters the active involvement of all its citizens in decisions and actions that may affect their lives. The underlying reasons for this are to ensure inclusiveness of the neediest of society as well as making sure that their development needs are adequately addressed and provided for. Various sections within the Constitution emphasise the importance of meaningful engagement. Chenwi and Tissington maintain that even though the Constitution does not specifically make use of the words meaningful engagement, the basis for meaningful engagement can also be found in a number of sections and provisions within the

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<sup>83</sup> K McLean ‘Meaningful engagement: one step forward or two back? some thoughts on *Joe Slovo*’ (2010) 3 (1) *Constitutional Court Review* 237.

<sup>84</sup> M Strauss and S Liebenberg ‘Contested spaces: housing rights and evictions law in post-apartheid South Africa’ (2014) 13 (4) *Planning Theory* 431.

Constitution.<sup>85</sup> The Constitutional Court in hearing the case of *Olivia Road* similarly proclaimed that the basis for meaningful engagement can be found in sections 152, 7(2), 26(2), 26(3) of the Constitution.<sup>86</sup> Section 152 of the Constitution<sup>87</sup> for example stresses the importance of community engagement and involvement in the matters of local government. Section 26(3) likewise encourages meaningful engagement with communities before evictions that could leave them homeless. Section 195 of the Constitution<sup>88</sup> also encourages the involvement of citizens in public policy making.

Apart from the Constitutional provisions or sections mentioned above, a number of South African laws and policies also underline the importance of meaningful engagement with the people affected by any government action. The Housing Act 107 of 1997<sup>89</sup> requires national, provincial and local government to consult meaningful with all relevant stakeholders and communities affected by housing developments. The Breaking New Ground Comprehensive Plan for Development of Sustainable Human Settlements of 2004<sup>90</sup> also underlines the importance of community engagement in housing development projects. The Social Housing Policy of South Africa of 2003<sup>91</sup> likewise places a duty on social housing institutions to engage with occupants through meaningful engagement. Sections 19 (2) and 19 (3) of the Local Government Municipal Structures Act 117 of 1998<sup>92</sup> requires of municipal councils to review their processes and develop systems to ensure community involvement before exercising their powers. These Constitutional sections, policies and laws prove that the concept of meaningful engagement “has a long standing legal basis within South Africa’s Constitution.”<sup>93</sup>

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<sup>85</sup> L Chenwi and K Tissington Engaging meaningfully with government on socio-economic rights: a focus on the right to housing Community Law Centre: University of the Western-Cape (2010) 11.

<sup>86</sup> L Chenwi and K Tissington Engaging meaningfully with government on socio-economic rights: a focus on the right to housing Community Law Centre: University of the Western-Cape (2010) 11.

<sup>87</sup> Section 152 of the Constitution of Republic of South Africa 1996.

<sup>88</sup> Section 195 of the Constitution of Republic of South Africa 1996.

<sup>89</sup> Housing Act 107 of 1997.

<sup>90</sup> Breaking New Ground Comprehensive Plan for Development of Sustainable Human Settlements of 2004 [http://abahlali.org/files/Breaking%20new%20ground%20New\\_Housing\\_Plan\\_Cabinet\\_approved\\_version.pdf](http://abahlali.org/files/Breaking%20new%20ground%20New_Housing_Plan_Cabinet_approved_version.pdf) (Accessed 27 January 2018).

<sup>91</sup> Social Housing Policy of South Africa of 2003.

<sup>92</sup> Government Municipal Structures Act 117 of 1998.

<sup>93</sup> ‘Roundtable discussion on meaningful engagement in the realisation of socio-economic rights’ 4 March 2010 [file:///C:/Users/u04285433/Downloads/Meaningful%20Engagement%20in%20the%20Realisation%20of%20Socio-Economic%20Rights%20-%20seminar%20report%20\(8\).pdf](file:///C:/Users/u04285433/Downloads/Meaningful%20Engagement%20in%20the%20Realisation%20of%20Socio-Economic%20Rights%20-%20seminar%20report%20(8).pdf) (Accessed 15 March 2018).

## 2.2 THE NOTION OF MEANINGFUL ENGAGEMENT AS DEVELOPED BY THE SOUTH AFRICAN COURTS IN LITIGATING HOUSING RIGHTS CASES

As pointed out by Liebenberg the notion of “meaningful engagement has emerged in the context of South African evictions law.”<sup>94</sup> Meaningful engagement “constitutes an important development in socio-economic rights jurisprudence as a prerequisite or remedy for an order of eviction”.<sup>95</sup> The idea is that there should be a process of engaging meaningfully with affected communities when they face displacement or homelessness due to an eviction order. Since the complainants in socio-economic rights cases are mostly vulnerable and disadvantaged people,<sup>96</sup> the notion of meaningful engagement holds the prospect of giving the courts the opportunity to play a vital role in securing relief for these people when they are faced with displacement or being left homeless. This is then also a manifestation of the Courts’ intention to play “a more democratically defensible role”, as emphasised by Pillay.<sup>97</sup>

The report on the roundtable discussion hosted by the Socio-Economic Rights Project of the Community Law Centre and Socio-Economic Rights Institute of South Africa on 04 March 2010 also upholds that “it is important to promote meaningful engagement, as it recognises the core importance of fostering participation and gives content to the right of participation of the poor.”<sup>98</sup> The mechanism of meaningful engagement therefore gives the Courts the grounds to respond effectively to the needs of disadvantaged people who face homelessness by means of evictions. This furthermore implies that if meaningful engagement is applied as intended by the Courts, namely to engage with affected communities and to give them a meaningful opportunity to voice their concerns and fears before an order of eviction is implemented, it embraces the transformative vision of the South African Constitution. Many scholars such as Chenwi, Pillay and Van der Berg claim that the idea of meaningful engagement was first suggested by the Court in its decision of

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<sup>94</sup> S Liebenberg ‘Participatory approach to socio-economic rights adjudication: tentative lessons from South African evictions law’ (2014) 34 (4) *Nordic Journal of Human Rights* 312.

<sup>95</sup> S Van der Berg ‘Meaningful engagement: proceduralising socio-economic rights further of infusing administrative law with substance’ (2013) 29 (2) *South African Journal on Human Rights* 381.

<sup>96</sup> S Van der Berg ‘Meaningful engagement: proceduralising socio-economic rights further of infusing administrative law with substance’ (2013) 29 (2) *South African Journal on Human Rights* 387.

<sup>97</sup> A Pillay ‘Toward effective social and economic rights adjudication: the role of meaningful engagement’ (2012) 10(3) *I.CON* 749.

<sup>98</sup> ‘Roundtable discussion on meaningful engagement in the realisation of socio-economic rights’ 4 March 2010 [file:///C:/Users/u04285433/Downloads/Meaningful%20Engagement%20in%20the%20Realisation%20of%20Socio-Economic%20Rights%20-%20seminar%20report%20\(8\).pdf](file:///C:/Users/u04285433/Downloads/Meaningful%20Engagement%20in%20the%20Realisation%20of%20Socio-Economic%20Rights%20-%20seminar%20report%20(8).pdf) (Accessed 15 March 2018).

the case, *Government of Republic of South Africa v Grootboom (Grootboom)*.<sup>99</sup> In its judgement in the *Grootboom* case, the Court said that “they expected municipality officials in charge of housing to engage with the residents facing eviction”.<sup>100</sup> This judgement has thus provided the Courts with the grounds to develop the concept of meaningful engagement into a mechanism that could potentially assist poor people with protecting themselves against displacement or homelessness due to forced removals.

Liebenberg is of opinion that “the Constitutional Court’s decision in the case of *Port Elizabeth Municipality v Various Occupiers (PE Municipality)*, laid the foundation for meaningful engagement to be adopted by the South African Courts in eviction applications potentially resulting in homelessness.”<sup>101</sup> This specific case involved the eviction of 68 unlawful occupiers of privately owned land in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 Of 1998.<sup>102</sup> “The Constitutional Court in *PE Municipality* enunciated various important aspects that a court would have to consider prior to authorising an eviction order.”<sup>103</sup> The Court recognised the value of meaningful engagement and reasoned that it would ordinarily not be just and equitable to order eviction, if proper discussions and where appropriate mediation, have not been implemented.<sup>104</sup> The Court maintained “that encouraging and requiring the parties involved to meaningfully engaged with each other, in a proactive and honest endeavour would possibly be a dignified and effective approach of finding mutually accepted solutions and sustainable resolutions to resolve the dispute between them.”<sup>105</sup> Although it appeared that no meaningful engagement occurred between the municipality and the community affected by the *PE Municipality* eviction proceedings, the Court notably emphasised that meaningful engagement is a valuable mechanism that does not only protect those who face forced removals from being left homeless but also underpins their right to be treated with respect and dignity.<sup>106</sup>

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<sup>99</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 1 SA 46 (CC).

<sup>100</sup> *Grootboom* para 87.

<sup>101</sup> S Liebenberg ‘Participatory approaches to socio-economic rights adjudication: tentative lessons from South African evictions law’ (2014) 32 (4) *Nordic Journal of Human Rights* 321.

<sup>102</sup> *PE Municipality* para 1.

<sup>103</sup> M Clark ‘Evictions and alternative accommodation in South Africa: an analysis of the jurisprudence and implications of local government’ (2013) 36.

<sup>104</sup> *PE Municipality* para 39-43.

<sup>105</sup> *PE Municipality* para 39-43.

<sup>106</sup> *PE Municipality* para 29.

The notion of meaningful engagement that emerged from the *PE Municipality* case was however first fully articulated and applied as a substantive remedy in the case of *Occupiers of 51 Olivia Road (Olivia Road)*.<sup>107</sup> In 2009 the Constitutional Court in adjudicating the housing rights case *Olivia Road*<sup>108</sup> used the mechanism of meaningful engagement as a means to prevent the state from leaving about four hundred people homeless or without solutions to alternative accommodation. The residents of Olivia Road resisted removal from buildings that were classified as unsafe and unhealthy by the government. The Court ordered the city and residents of Olivia Road to meaningfully engage and find solutions to the existing problem.<sup>109</sup> The Court especially held that “where the state sought an eviction order that could leave people homeless, the Court had to consider whether the state had engaged with those people.”<sup>110</sup>

The Court furthermore strongly emphasised that the outcomes of the engagement process would play an important factor in the final decision of the Court and requested the state to report the outcome of the engagement by means of an affidavit and within a specific timeframe.<sup>111</sup> The Court’s decision to apply the notion of meaningful engagement to ensure the residents of Olivia Road are given a fair chance to be heard and to determine whether the state has taken all reasonable steps to prevent infringement of the residents right to access housing is illustrative of a justice system that is committed towards achieving a transformed society as intended by the South African Constitution. The fact that the Court fully described how and what is expected of the engagement process also contributed significantly towards developing the concept of meaningful engagement as an established mechanism that is focused on bringing relief to those facing eviction.

The case of *Abahlali Basemjondolo Movement of South Africa and Another v Premier of Kwazulu-Natal and Others (Abahlali)*<sup>112</sup> once again underscores the significance and value of engaging meaningfully with communities when government action threatens to impact on and deprive them of the enjoyment of their socio-economic rights such as having access to a home or place to live in. A shack dweller organisation called Abahlali

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<sup>107</sup> S Liebenberg ‘Participatory approaches to socio-economic rights adjudication: tentative lessons from South African evictions law’ (2014) 32 (4) *Nordic Journal of Human Rights* 322.

<sup>108</sup> *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 (3) SA 208 (CC).

<sup>109</sup> *Olivia Road* para1.

<sup>110</sup> *Olivia Road* para18.

<sup>111</sup> *Olivia Road* para 29 and para 5.

<sup>112</sup> *Abahlali Basemjondolo Movement of South Africa and Another v Premier of Kwazulu-Natal and Others* 2009 SA 104 (CC).

contested the Kwazulu-Natal Slums Act, 6 of 2007. “Section 16 of the act made it obligatory for proceedings to be instituted for unlawful occupiers to be evicted.”<sup>113</sup> The Slums Act therefore made it considerably easy for municipalities and owners of state land to institute forced removals against people living in various informal settlements in Kwazulu-Natal, leaving them homeless without making any attempts to first discuss and explain the forced removals with the affected communities. The Constitutional Court in this case again referred to meaningful engagement as an important element and a process that is necessary when government action is expected to infringe upon people’s socio-economic rights. The Court for example stated that “applicants for eviction must engage reasonably before instituting eviction proceedings.”<sup>114</sup> Justice Yacoob in his ruling even went so far to say that “the obligation to engage meaningfully with those who face eviction does not only fall on the state, but it also fell on private parties seeking eviction.”<sup>115</sup> According to Clarke the Court in *Abahlali* also maintained that “proper engagement would mean comprehensive assessment of the needs of the affected community.”<sup>116</sup> In dealing with this case the Court further clarified the mechanism of meaningful engagement, by explaining that government should have first talked and have discussions with the affected people about what they wanted to do, how they wanted to do it, when they were planning to do it and how their actions were going to impact or affect the enjoyment of the socio-economic rights of the affected community.<sup>117</sup>

The Constitutional Court’s jurisprudence on meaningful engagement was further developed in the housing rights case of *Joe Slovo*.<sup>118</sup> The case is well known for its judgement that is seen to have provoked several criticism by legal scholars “because the quality and extent of the engagement was of some concern”<sup>119</sup> as argued by Pillay. The case however also contributed significantly to the body of knowledge or jurisprudence on meaningful engagement by once again demonstrating the importance of meaningful

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<sup>113</sup> *Abahlali Basemjondolo Movement of South Africa and Another v Premier of Kwazulu-Natal and Others* 2009 SA 104 (CC).

<sup>114</sup> *Abahlali Basemjondolo Movement of South Africa and Another v Premier of Kwazulu-Natal and Others* 2009 SA 104 (CC).

<sup>115</sup> *Abahlali Basemjondolo Movement of South Africa and Another v Premier of Kwazulu-Natal and Others* 2009 SA 104 (CC).

<sup>116</sup> M Clark ‘Unpacking the urban land question: housing and evictions know the law, know your rights’ (2014) 2 *The People’s Law Journal* 16.

<sup>117</sup> *Abahlali Basemjondolo Movement of South Africa and Another v Premier of Kwazulu-Natal and Others* 2009 SA 104 (CC).

<sup>118</sup> *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 545 (CC).

<sup>119</sup> A Pillay ‘Toward effective social and economic rights adjudication: the role of meaningful engagement’ (2012) 10 (3) *I.CON* 733.



engagement and what does not constitute meaningful engagement. The case concerns an application for the eviction and relocation of about 20 000 residents from an informal settlement in the Western Cape, known as Joe Slovo to an area situated in the suburbs of the Western Cape called Delft. This was done “to make way for low-cost housing”<sup>120</sup> as stated by McLean. The eviction order was initiated because the intended plan of the government was to do away with all informal settlements as proposed by its Breaking New Ground housing policy. A private company, namely Thubelisha Homes Ltd was assigned to manage and implement the renovations by means of the N2 Gateway project.

Although the living conditions in the settlement was described as unsafe and unhealthy, the residents objected to the eviction order due to the failure of the government to make good on certain promises. The government for example promised the residents that the majority of the new houses in Delft would be allocated to them and that the rentals for the new houses would not exceed an amount of R300, which was considered affordable by the residence. The residents further argued that the relocation to Delft would be costly and it would also mean giving up their established community and means of survival. The *Joe Slovo* residents also claimed that they had never received any official communication as regards the eviction.

Even though the Court still allowed the eviction to take place, based on reasons that were seen fit by the Court it demanded of the state and residents to continue engaging meaningfully with each other on certain issues pertaining to the relocation. “A divided Constitutional Court laid down five separate concurring judgements that emphasised the importance of meaningful engagement with the community in determining the fairness of a project that could leave them homeless.”<sup>121</sup> The Court also argued that the state adopted a top down approach to engagement and criticised this manner of decision making whereby state officials one-sidedly made decisions without properly consulting or involving the community in the decision making structures. Judge O’Regan furthermore argued that “the consultation with the occupiers was inadequate and did not constitute real and meaningful engagement.”<sup>122</sup> The case particularly confirms that a top-down approach

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<sup>120</sup> K McLean ‘Meaningful engagement: one step forward or two back? some thoughts on *Joe Slovo*’ (2010) 3 *Constitutional Court Review* 224.

<sup>121</sup> M Clark and T Esterhuizen ‘Remembering the transformative mandate: an analysis of twenty years of housing and eviction jurisprudence in South Africa’ Twenty years of South African Constitutionalism conference held 13-16 November 2014 at New York Law School (2014) <http://www.nyislawreview.com/wp-content/uploads/sites/16/2014/11/Esterhuizen.pdf> (Accessed 25 July 2018).

<sup>122</sup> *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 545 (CC).

does not constitute meaningful engagement, because it does not give those who face infringement of their socio-economic rights a real and fair opportunity to voice their concerns.

The case of *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd (Blue Moonlight)*<sup>123</sup> dealt with the eviction of “about 86 vulnerable and poor people in unlawful occupation of a property called Saratoga Avenue in Berea in the City of Johannesburg”<sup>124</sup>. The owner who bought the property with the purpose of redeveloping it for commercial use sought an eviction order based on his right to own property.<sup>125</sup> The unlawful occupiers, who were very poor and in some cases had been rendered homeless before, resisted the eviction and argued that “they would become homeless because of the evictions.”<sup>126</sup> They had lived on the property for a number of years and further contended that they have the right to remain living on the property until they were provided with alternative accommodation. The Court had to deal with the “questions of whether it is just and equitable to evict poor, unlawful occupiers from private property and what state obligations are entailed in such a practice.”<sup>127</sup>

The owner of Blue Moonlight approached the High Court for an eviction order to remove the occupiers. The High Court granted the eviction order and found that the City’s housing policy was unconstitutional and ordered the city to remedy the defect by providing the occupiers with temporary, alternative accommodation.<sup>128</sup> The City was also ordered to pay rental to the owner of the property for the continued occupation of the building by the occupiers. The City appealed the decision of the High Court that declared part of their housing policy unconstitutional and requested them to pay rent to the owner of the property. The Supreme Court of Appeal set aside the order to pay rent, but upheld the High Court’s decision that the City’s housing policy was unconstitutional and it was therefore obligated to provide the poor residence with alternative housing.

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<sup>123</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 SA 104 (CC).

<sup>124</sup> K Moyo ‘Review of the implementation of Constitutional court decisions on socio-economic rights’(2013) 43. [https://www.fhr.org.za/files/2513/8503/8604/FHR\\_Report.doc\\_May\\_2013\\_K\\_Moyo\\_ED.pdf](https://www.fhr.org.za/files/2513/8503/8604/FHR_Report.doc_May_2013_K_Moyo_ED.pdf) (Accessed 17 June 2018)

<sup>125</sup> G S Dickinson ‘Blue Moonlight rising: evictions, alternative accommodation and a comparative perspective on affordable housing solutions in Johannesburg’ (2011) *South African Journal on Human Rights* 468.

<sup>126</sup> M Clark ‘The urban land question: housing and evictions know the law, know your rights’ (2014) 2 *The People’s Law Journal* 19.

<sup>127</sup> J Dugard ‘Beyond Blue Moonlight: the implications of judicial avoidance in relation to the provision of alternative housing’ (2014) *Constitutional Court Review* 267.

<sup>128</sup> R Tulk and B Dewar ‘South Africa: City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another (CCT 37/11) (2011) ZACC 33 (1 December 2011): a practitioner’s note 2012 23 July 2012.

On 08 March 2012 the occupiers of Saratoga Avenue crossed-appealed and brought an urgent application to the Constitutional Court based on an anticipated non-compliance by the City failing to provide them with temporary accommodation.<sup>129</sup> The occupiers relied strongly on the argument that the order should have incorporated an implicit obligation on the City to engage meaningfully with them in the process of eviction. The Court maintained that meaningful engagement was only ordered in cases where the state was the party seeking eviction and ordered to provide alternative accommodation. The Court further maintained that “in this case there was an important third party involved, namely the building owner.”<sup>130</sup> It was clear that neither the occupiers nor the city made reasonable efforts to meaningfully engage with the building owner in the process of finding alternative accommodation and about the date of eviction. This court case brings another dimension to the application of the mechanism of meaningful engagement by stressing that engagement cannot be meaningful without the participation of all the involved parties. Failure to engage with all affected parties is essential and this was also one of the reasons why the application did not succeed and was dismissed. The case demonstrated that whether meaningful engagement has occurred between all the interested parties is critical and an important consideration in eviction cases.

## 2.3 CONCLUSION

The South African Constitution envisages and provides for a democracy that encourages meaningful involvement of citizens in decisions that may impact the enjoyment of their socio-economic rights. The reason for this is to ensure the voices of the poor and previously disadvantaged of society are heard in matters that affect their lives and wellbeing. Various sections within the Constitution as well as a number of South African laws and policies underscore the importance of meaningful engagement. This confirms that the notion of meaningful engagement has a long standing legal basis within the Constitution.

Meaningful engagement is often used interchangeably with other concepts that are focused on bringing people together for discussion on issues that need their inputs, such as consultation and mediation. However, a clear distinction exists between meaningful

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<sup>129</sup>*The Occupiers of Saratoga Avenue v The City of Johannesburg Metropolitan Municipality and Blue Moonlight Properties 39 (PTY) LTD* 2012 9 SA (CC).

<sup>130</sup>*The Occupiers of Saratoga Avenue v The City of Johannesburg Metropolitan Municipality and Blue Moonlight Properties 39 (PTY) LTD* 2012 9 SA (CC).

engagement and concepts such as consultation and mediation. Of vital importance is that meaningful engagement gives the poor who were previously excluded from decisions or plans that may infringe or deprive them of their socio-economic rights, such as the right to have a roof over their heads a meaningful voice to protect them against being left homeless.

In the context of South African evictions law, the notion of meaningful engagement also emerged as a mechanism to assist the poor in protecting their socio-economic rights. In litigating various housing rights cases such as *Grootboom*,<sup>131</sup> *PE Municipality*,<sup>132</sup> *Olivia Road*,<sup>133</sup> *Abahlali*,<sup>134</sup> *Joe Slovo*<sup>135</sup> and *Blue Moonlight*<sup>136</sup> that dealt with communities facing homelessness due to eviction orders, the Courts not only contributed to developing the body of knowledge or jurisprudence on meaningful engagement but developed a mechanism that could bring relief, empower and transform the lives of the poor.

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<sup>131</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 1 SA 46 (CC).

<sup>132</sup> *Port Elizabeth Municipality v Various Occupiers* 2001 1 SA 217 (CC).

<sup>133</sup> *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 3 SA 208 (CC).

<sup>134</sup> *Abahlali Basemjondolo Movement of South Africa and Another v Premier of Kwazulu-Natal and Others* 2009 SA 31 (CC).

<sup>135</sup> *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 545 (CC).

<sup>136</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 SA 104 (CC).

## CHAPTER 3 - EXPLORING THE ADDITIONAL BENEFITS OF MEANINGFUL ENGAGEMENT

### 3.1 INTRODUCTION

As mentioned in the previous two chapters, meaningful engagement was developed by the Courts as a mechanism to ensure those facing evictions are given an opportunity to be fully involved in discussions and negotiations with government in order to state their case and to protect their Constitutional right to access housing. In this chapter I explore, identify and discuss the additional benefits of meaningful engagement.

#### 3.1.1 ENGAGEMENT AS A TOOL TO ACCESS IMPORTANT GOVERNMENT INFORMATION

Although access to information as supported by the South African Constitution and the Promotion to Access Information Act (PAIA) 50 of 2000<sup>137</sup> is important for its own purposes; it also has the potential to ensure engagement of citizens in government decision making processes is indeed meaningful. Access to information is a core element for effective engagement. According to Arko-Cobbah and Olivier this view is reaffirmed by Ndungwane who is of opinion that “for engagement to be meaningful, citizens must be given appropriate information when we want to achieve a government system of good governance that is truly transformative and sustainable”.<sup>138</sup> Generally speaking within the governance and political environment meaningful engagement refers to relatively sustained and systematic interaction between stakeholders.<sup>139</sup> To make this engagement process meaningful would thus require that all parties have adequate access to information.

According to Liebenberg, in the case of *Joe Slovo* the Court pointed out that meaningful engagement “promotes the reciprocal duty of citizens to be active, participatory and responsible and to make their own individual contributions towards the benefits and entitlements that they want to claim.”<sup>140</sup> The affected communities would only be able to

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<sup>137</sup> Promotion of Access to Information Act no 50 of 2000 (PAIA) Available from: [https://www.saps.gov.za/resource\\_centre/acts/downloads/promotion\\_of\\_access\\_act2\\_2000.pdf](https://www.saps.gov.za/resource_centre/acts/downloads/promotion_of_access_act2_2000.pdf) (Accessed 15 July 2018).

<sup>138</sup> A Arko-Cobbah and C D Olivier ‘South Africa’s access to information legislation and socio-economic rights: civil society and meaningful engagement as drivers’ (2016) 34 (1) *Mousaion* 158.

<sup>139</sup> B Holmes ‘Citizens’ engagement in policy-making and the design of public services’ (2011) 12 1 *Parliamentary Library, Department of Australia, Department of Parliamentary Services* 13.

<sup>140</sup> S Liebenberg ‘Social audit raises issues around the right to sanitation’ *GroundUp* 29 October 2014 Available from: <https://mg.co.za/article/2014-10-22-social-audits-as-a-tool-to-realise-the-right-to-sanitation> (Accessed 4 August 2018).

effectively contribute and make reasonable demands and decisions during the negotiation and engagement processes of eviction if they are provided with relevant and adequate information by municipalities. This means for meaningful engagement to play an effective role in the attainment of SER's, poor and vulnerable communities need to be given proper access to information that could assist them to prepare themselves fully in negotiating a policy or plan that affects their rights.<sup>141</sup> The voices of communities facing evictions can only be effectively expressed when they have appropriate and sufficient information to engage with local government. The South African Constitution furthermore requires of government to commit itself to the principles of openness, transparency, quality and integrity. If those affected by evictions are not properly informed about the decisions and plans that impact their rights, they will have very limited power to state their case or have their needs met and that would make the transformative idea of the meaningful engagement mechanism worthless.

Miriyoga argues that “information is power holds true in the meaningful engagement process.”<sup>142</sup> One of the key principles of meaningful engagement is that affected communities must be given access to relevant information that would allow them to prepare effectively for negotiation discussions. Having suitable access to information about socio-economic issues can serve as a gateway for the enjoyment of people's socio-economic rights.<sup>143</sup> Miriyoga contends that meaningful engagement as intended by the Courts provides communities affected by evictions an enabling environment to gain valuable information related to the government's housing plans and programmes and to assess the reasonableness of these plans.<sup>144</sup> The Court in the *Olivia Road* case explicitly declared that “secrecy is counterproductive to engagement”.<sup>145</sup> The Court accentuated that engagement is a two-way process and it must be done in an open and transparent manner, providing the affected residents with complete and accurate accounts of the

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<sup>141</sup> ON Fuo ‘Public participation in decentralised government in Africa: making ambitious constitutional guarantees more responsive’ (2015) 15 *African Human Rights Law Journal* 185.

<sup>142</sup> Unpublished: L Miriyoga ‘Information without power? Exploring the challenges and opportunities in the usage of the Promotion of Access to Information Act no 50 of 2000 (PAIA) as a potent tool for advancing socio-economic justice in South Africa’ unpublished Master's thesis, University of Cape Town, 2011 28-29.

<sup>143</sup> M Dimba ‘Access to information as a tool for socio-economic justice’ Available from: [http://www.fesmedia-africa.org/uploads/media/DW\\_GMF\\_Mukelani\\_Dimba\\_ATI\\_and\\_socio\\_economic\\_justice\\_01.pdf](http://www.fesmedia-africa.org/uploads/media/DW_GMF_Mukelani_Dimba_ATI_and_socio_economic_justice_01.pdf) (Accessed 11 July 2018).

<sup>144</sup> Unpublished: L Miriyoga ‘Information without power? Exploring the challenges and opportunities in the usage of the Promotion of Access to Information Act no 50 of 2000 (PAIA) as a potent tool for advancing socio-economic justice in South Africa’ unpublished Master's thesis, University of Cape Town, 2011 28-29

<sup>145</sup> *Olivia Road* para 21.

process.<sup>146</sup> Meaningful engagement therefore has the potential to create opportunities for communities to gain or demand valuable information in their discussions or meetings with government. This reasoning by the Court confirms Miriyogo's argument that meaningful engagement provides communities affected and involved in eviction proceedings with enormous opportunities to obtain or demand important information related to the housing plans and programmes of government that they could use to the benefit of protecting their socio-economic rights and directing government action towards the attainment of their right to access housing.

Meaningful engagement has the potential to move beyond the traditional and sometimes superficial engagement processes where information regarding socio-economic decisions is just passed onto citizens. For communities to be able to engage meaningfully and enter into informed dialogue with government and its institutions about decisions affecting their socio-economic rights and to hold government answerable for their actions or inactions, they need to be informed when government or its institutions have to explain and justify their decisions and actions or inactions. Meaningful engagement thus provides communities affected by evictions with the space to demand information that could assist them in preparing beforehand for their discussions with government and that would empower them to express and state their case more effectively. Gaining access to information through meaningful engagement would not only enable communities to effectively protect and claim their socio-economic rights but it could produce other benefits for these communities which could transform and improve the quality of their lives.

### **3.1.2 ENGAGEMENT AS A MECHANISM TO INFLUENCE AND SHAPE GOVERNMENT POLICIES AND PRIORITIES**

Meaningful engagement is used by the courts to facilitate engagement and bring relief for communities facing homelessness due to evictions. Ray is of the opinion that a robust engagement process may even create a procedure for putting direct pressure on the political branches to develop policies sensitive to Constitutional obligations.<sup>147</sup> Individuals and communities can therefore influence and shape inter alia, policies and priority setting

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<sup>146</sup> *Olivia Road* para 14.

<sup>147</sup> B Ray 'Extending the shadow of the law: using hybrid mechanisms to develop constitutional norms in socio-economic rights cases' (2008) 21 Centre for Human rights and Global Justice working paper 35.

in relation to the provision of housing through meaningful engagement.<sup>148</sup> This means that a further benefit or advantage that is produced by the mechanism of meaningful engagement is that it may cause substantive changes to government policy over a period of time.<sup>149</sup> Pillay argues that in both the *Olivia Road* and *Joe Slovo* cases the discussions initiated by meaningful engagement between the parties involved led to important changes in government policy and action over a period of time.<sup>150</sup>

The *Olivia Road* case in particular illustrated that when there is a lack of engagement with citizens whose socio-economic rights are endangered because of government action, the court may order the government to discontinue such action.<sup>151</sup> This reasoning by the court facilitates and gives recognition to ordinary people's right to participate and genuinely use their voices to influence policy decisions to produce the results that they wish for. In *Olivia Road*, the partial settlement between the government and residents resulted in broader changes in the City's inner-city housing policy. Through meaningful engagement, the City agreed to put on hold its eviction attempts which were strongly motivated by the provisions of the National Building Regulations and Building Standards Act 103 of 1977. The specific act authorised a municipality to demolish any building that is deemed unsafe and unhealthy. The residents of *Olivia Road* refused to leave the buildings, despite the fact that it was unsafe and unhealthy because their location granted them access to economic opportunities which were detrimental for their survival and economic wellbeing. One of the outcomes of the agreement reached due to the engagement with the residents was that the municipality agreed to take steps to rather make the buildings safer and the living conditions of the residents more acceptable.<sup>152</sup> The engagement process contributed to the City being prevented from using its health and safety legislation in a manner that could have deprived the residents of a roof over their heads or prospects of advancing economically. There were significant positive outcomes for the residents of *Olivia Road*.<sup>153</sup> According to Himlin this is exactly what the process of meaningful

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<sup>148</sup> L Chenwi 'Implementation of housing rights in South Africa: approaches and strategies' (2015) 24 (4) *Journal of Law and Social Policy* 79.

<sup>149</sup> A Pillay 'Toward effective social and economic rights adjudication: the role of meaningful engagement' (2012) 10 (3) *J.CON* 753.

<sup>150</sup> A Pillay 'Toward effective social and economic rights adjudication: the role of meaningful engagement' (2012) 10 (3) *J.CON* 750.

<sup>151</sup> A Pillay 'Toward effective social and economic rights adjudication: the role of meaningful engagement' (2012) 10 (3) *J.CON* 745.

<sup>152</sup> J van Wyk 'The role of local government in evictions' (2011) 14 (3) *Potchefstroom Electronic Journal* 63.

<sup>153</sup> *Occupiers of 51 Olivia Road v City of Johannesburg 2008 3 SA 208 (CC)*



engagement requires, namely that it must be possible for affected citizens to influence a decision, even after it has technically already been made.<sup>154</sup>

Ray states that as a whole, the *Joe Slovo* judgement could serve as an example where the court used engagement to give back control to parties over policy details after deciding the substantive issues.<sup>155</sup> In the *Joe Slovo* case the Court made it clear that in order to determine the circumstances and needs of the affected community, the government had an on-going constitutional responsibility to engage with the affected community. In this case the Court order for engagement combined with a detailed supervisory order forced the government to reconsider its plans. The engagement reports submitted by the government to the Court in the months after the eviction order specified the feasibility and the intention of the government to pursue an on-site upgrade of the Joe Slovo settlement.<sup>156</sup>

Engagement in this case gave the *Joe Slovo* residents the capacity to continue fighting for their demand for an on-site improvement of the settlement, instead of being displaced through relocation. The government was furthermore forced to acknowledge that its original programme had multiple flaws and it became clear that if they had in the first place made proper efforts to effectively enter into discussions with the community before implementing eviction proceedings they could have determined beforehand whether on-site improvement of the settlement was really feasible or not.<sup>157</sup> This shows that the process of making binding decisions allows citizens to have adequate opportunity, and equal opportunity, for expressing their preferences as to the final outcome.<sup>158</sup> This furthermore confirms that engagement can be structured in such a manner that it can force government to reconsider its priorities and policies to deliver solutions essential for specific issues.<sup>159</sup>

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<sup>154</sup> B Himlin 'Thoughts on meaningful engagement from an NGO perspective' 2009 <http://www.planact.org.za/wp-content/uploads/2014/11/3.-NGO-Thoughts-on-Meaningful-Engagement.pdf> (Accessed 20 August 2018).

<sup>155</sup> B Ray 'Engagement's possibilities and limits as a socio-economic rights remedy' (2010) *Washington University Global Studies Law Review* 414.

<sup>156</sup> M Strauss and S Liebenberg 'Contested spaces: housing rights and evictions law in post-apartheid South Africa (2014) 13 (4) *Planning Theory* 441.

<sup>157</sup> M Strauss and S Liebenberg 'Contested spaces: housing rights and evictions law in post-apartheid South Africa (2014) 13 (4) *Planning Theory* 441.

<sup>158</sup> S Liebenberg 'Participatory approaches to socio-economic rights adjudication: tentative lessons from South African evictions law (2014) 32 (4) *Nordic Journal of Human Rights* 316.

<sup>159</sup> M Strauss and S Liebenberg 'Contested spaces: housing rights and evictions law in post-apartheid South Africa' (2014) 13 (4) *Planning Theory* 440.

In *PE Municipality* the Court dismissed the local authority's appeal against the refusal of the implementation of the eviction order based on the municipality's failure to listen and consider the needs and problems of the occupiers.<sup>160</sup> The Court also stressed that under no circumstance should what is called a person's home be destroyed unless municipalities have made proper provision for any type of alternative accommodation for the residents, even if they are unlawful occupiers. The Court notably mentioned that people who face evictions have housing rights which are enshrined and protected by the Constitution. The significance of this reasoning by the Court is that even though seen as unlawful occupiers, the actual housing needs and circumstances of these residents must guide government and its institutions when executing and implementing any housing or development policies. This further subjects the municipality to the obligation to engage meaningfully with the affected communities in order to listen and determine how government policy will impact the lives and well-being of these already vulnerable communities. Pillay affirms that "where the state sort and ejection or eviction order that could leave people homeless, a court had to take into account the question of whether the authorities had engaged with those people in deciding whether the state satisfied its section 26 (2) obligations."<sup>161</sup> The municipality is thus obligated to give affected communities a proper chance to express their preferences and priority needs before implementing a decision to evict. Meaningful engagement provides an ideal process and perfect opportunity for poor communities affected by evictions to influence the development and implementation of government policies to achieve the results they wish for.<sup>162</sup>

### **3.1.3 ENGAGEMENT AS A TOOL TO INCREASE ACCESS TO BASIC GOODS AND SERVICE DELIVERY**

Liebenberg contends that having engaged with occupiers of buildings it wishes to evict; a municipality is required to respond reasonably to the needs and circumstances of the occupiers.<sup>163</sup> In a country such as South Africa where the Constitutional culture is vested in rectifying the past injustices, it is of critical importance that those who have previously been excluded and deprived are provided with basic goods and services that could

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<sup>160</sup> S Liebenberg 'Participatory approaches to socio-economic rights adjudication: tentative lessons from South African evictions law' (2014) 32 (4) *Nordic Journal of Human Rights* 322.

<sup>161</sup> A Pillay 'Toward effective social and economic rights adjudication the role of meaningful engagement' (2012) 10 (3) *I.CON* 733.

<sup>162</sup> *Blue Moonlight* para 96.

<sup>163</sup> S Liebenberg 'Participatory approaches to socio-economic rights adjudication: tentative lessons from South African evictions law (2014) 32 (4) *Nordic Journal of Human Rights* 316.

empower them to improve their lives. The judgement of the *Blue Moonlight* case confirms that a municipality has the obligation to structure its administration, budgeting and planning processes in such a manner that it is capable of giving priority to the basic needs of the community.<sup>164</sup> When implementing eviction proceedings, the municipalities cannot simply escape their constitutional and developmental responsibilities. They must do everything possible to ensure that alternative accommodation is available and that affected communities are provided with the basic core municipal services such as health care, transportation, electricity, water and schools that are needed for their survival. In the *Joe Slovo*<sup>165</sup> case the engagement order required the municipality to provide health facilities and transport to the affected residents from their temporary accommodation units to schools and places of work.

In *Olivia Road* the Court held that the government is obliged to engage individually and collectively with those who face homelessness by means of eviction order in order to respond reasonably to their needs and concerns.<sup>166</sup> The Court pointed out that the City has the constitutional commitment to encourage the involvement of the community in local government issues, provide them with services in sustainable manner and encourage their social and economic development.<sup>167</sup> The agreement reached through engagement, resulted in the municipality agreeing to provide the Olivia Road community with chemical toilets, refuge bags and the cleaning and sanitation of the buildings as well as installing fire extinguishers in the buildings. This also shows that meaningful engagement in the *Olivia Road* case paved the way to enhance the affected communities' access to basic municipal goods and service, necessary for their survival.

The *Abahlali* case further illustrates the link between engagement and access to basic services for those facing infringement of their socio-economic rights. The judgement confirmed that engagement cannot be meaningful unless the state ensures that those whose socio-economic rights are affected by government action are provided with basic services such access to housing, electricity, transport and sanitation in order to continue to exist. The Court found that proper engagement would require comprehensive assessment

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<sup>164</sup> *Blue Moonlight* para 97.

<sup>165</sup> *Joe Slovo* para 7.

<sup>166</sup> K Moyo 'The jurisprudence of the South African Constitutional Court on socio-economic rights' 18.

<sup>167</sup> T Monare and A Mayet 'Twenty years of South African Constitutionalism: constitutional rights, judicial independence and transition to democracy conference' conference held 13-16 November 2014 at New York Law School. <http://www.nylslawreview.com/wp-content/uploads/sites/16/2014/11/Mayet-Monare.pdf> (Accessed 15 April 2018) 29.

of the needs of the affected community.<sup>168</sup> Pillay confirms that engaging meaningfully with each other will provide government officials and right holders with opportunities to solve problems regarding access to social and economic goods.<sup>169</sup> This provides evidence that if engagement is executed effectively with all relevant role players it will provide the poor with opportunities to access the most basic goods and service such as housing, health care and transport that may ultimately promote their social and economic development. Meaningful engagement can raise awareness about the particular circumstances of poor communities affected by evictions. Their specific needs can be highlighted, resulting in the key benefit of forcing government to provide them with the much-needed basic goods and services.

### **3.1.4 ENGAGEMENT AS A TOOL TO FACILITATE NEGOTIATION AND INCREASE THE BARGAINING POWER OF THE POOR**

In eviction cases, the courts recommended that the parties involved in a housing dispute use negotiation as an intervention method to resolve the opposing interests between them. Negotiation is a process whereby the parties involved discuss or bargain to reach an agreement.<sup>170</sup> According to the *PE Municipality* judgement, 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 proactive and honest endeavour to find mutually acceptable solutions.<sup>171</sup> Negotiation is an essential component of the mechanism of meaningful engagement and reinforces the idea that ordinary citizens must be given genuine opportunities to participate in public affairs that concern them.

In the majority of the eviction cases the Court held that in deciding whether it's just and equitable to grant an eviction order they look at whether serious negotiations had taken place by giving all parties involve an equal opportunity to be heard. The *PE Municipality* judgement furthermore emphasised that whether effective negotiations had taken place with equal opportunities for the consideration of the concerns, inputs and needs of all parties concerned constitutes a relevant factor in determining whether it's just and

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<sup>168</sup> Socio-Economic Rights Institute of South Africa (SERI) 'Informal settlements and human rights in South Africa' 2018 25 <https://www.ohchr.org/Documents/Issues/Housing/InformalSettlements/SERI.pdf> (Accessed 22 August 2018).

<sup>169</sup> A Pillay 'Toward effective social and economic rights adjudication the role of meaningful engagement' (2012) 10 (3) *I,CON* 733.

<sup>170</sup> Unpublished: J Cerreti 'Sources of negotiation power in environmental conflicts: the case of oil extraction in the Ecuadorian Amazon' unpublished Master's thesis, University of Vermont, 2006 4.

<sup>171</sup> K McLean 'Meaningful engagement: one step forward or two back? some thoughts on Joe Slovo' (2010) 3 *Constitutional Court Review* 233.

equitable to grant an eviction order.<sup>172</sup> The Court held that “it would be unfair and against the spirit of the South African Constitutional culture to order eviction in cases where proper discussions, and where appropriate mediation, have not been attempted.”<sup>173</sup> This not only reinforces a commitment to democracy but also creates an opportunity for ordinary citizens to negotiate and bargain with government on issues that impact their socio-economic privileges

In *Olivia Road*, the Court referred to meaningful engagement as two-way process whereby the local authorities and those to be affected by evictions would talk to each other meaningfully with the purpose of achieving certain objectives.<sup>174</sup> Muller also points out that the parties in *Olivia Road* were directed by the Court to engage meaningfully with each other to resolve the difficulties of the application in an amicable manner.<sup>175</sup> Meaningful engagement as developed by the courts places great emphasis and creates the opportunity for parties involved in housing disputes to discuss and negotiate mutually accepted solutions. One can argue that the initial intention of the Court is to encourage a cooperative framework through a process of negotiation whereby the government and affected communities work together in partnership to find solutions that will meet the goals and needs of both the government and the specific community, before resorting to the Court for a solution.

As stated in *Olivia Road*, meaningful engagement requires the affected parties to engage with each other reasonably and in good-faith. Rigid attitudes or non-negotiable, unreasonable demands would undermine the deliberative process.<sup>176</sup> The courts have mentioned that the purpose of the negotiation process which should preferably be consensual is to achieve the best possible outcomes for both the communities affected by evictions and the government or to at least achieve an outcome that is acceptable for both parties.

Legal scholars are also concerned, however, that affected communities may lack the necessary skills to effectively enter into negotiations with government, resulting in unequal bargaining power. The courts have emphasised that to mitigate the effect of unequal

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<sup>172</sup> *PE Municipality* para 30.

<sup>173</sup> *Port Elizabeth Municipality v Various Occupiers* 2001 1 SA 217 (CC).

<sup>174</sup> *Olivia Road* para 14.

<sup>175</sup> Unpublished: G Muller ‘The impact of section 26 of the Constitution on the eviction of squatters in South African law’ unpublished PhD thesis, University of Stellenbosch, 2011 257.

<sup>176</sup> *Olivia Road* para 20.

bargaining power especially for those communities with weaker capacity to engage with government, civic or non-governmental organisations that are better equipped should assist the affected communities in the negotiation process.<sup>177</sup> Williams also says that civil or non-governmental organisations should contribute to the transformative process by supporting the affected communities with legal guidance and assistance to overcome any extreme power imbalances. She warns that if this does not happen then the mechanism of meaningful engagement would become pointless.<sup>178</sup> This will also ensure that the affected communities don't become disempowered and jeopardise any of the benefits they entitled to when entering into negotiations with government. The communities of *Olivia Road, Abahlali and Joe Slovo* were highly organised and worked closely with social movements that assisted them in the negotiation process.<sup>179</sup> Meaningful engagement thus supports and delivers the benefit of establishing a process of negotiation which can lead to increased bargaining power for the poor to exercise greater influence over those who hold power and control the country's critical resources and development agenda.

### **3.1.5 ENGAGEMENT AS AN INSTRUMENT TO ENSURE RESPECT FOR HUMAN RIGHTS PRINCIPLES**

Respect for human rights implies treating all people, irrespective of their status or background, in a dignified manner. According to Liebenberg, South African law places a legal responsibility on municipalities to ensure their planning embraces a wide range of social and human rights considerations.<sup>180</sup> The mechanism of meaningful engagement emphasises the legal responsibility of municipalities to ensure that their actions and programmes do not result in vulnerable people being displaced, left without a roof over their heads or treated in a manner that is contradictory to human rights or the values enshrined in the South African Constitution.

Due to South Africa's past history the poor, previously disadvantaged and marginalised people were deprived of many basic human rights.<sup>181</sup> Poor people were often excluded,

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<sup>177</sup> Olivia Road para 20.

<sup>178</sup> L A Williams 'The right to housing in South Africa: an evolving jurisprudence' (2014) 45 (3) *Columbia Human Rights Law Review* 834.

<sup>179</sup> L Chenwi 'Implementation of housing rights in South Africa: approaches and strategies' (2015) 24 (4) *Journal of Law and Social Policy* 86.

<sup>180</sup> S Liebenberg 'Engaging the paradoxes of the universal and particular in human rights adjudication: the possibilities and pitfalls of meaningful engagement' (2012) 12 *African Human Rights Law Journal* 273.

<sup>181</sup> Unpublished: J Davy 'Assessing public participation strategies in low-incoming housing: the Mamre housing project' unpublished Master's thesis, University of Stellenbosch, 2006 1.

denied a say, harassed and threatened with violence and uncertainty when facing evictions. The South African Constitution is therefore guided by human rights principles and embraces people's rights to socio-economic entitlements in order to create a better living for those who suffered hardships due to past injustices. Socio-economic rights give people, especially the poor and most vulnerable of society, access to those basic services and needs, such as housing, that are necessary to lead a decent life.<sup>182</sup> According to Majale "housing is a critical factor in determining the general quality of life for all people."<sup>183</sup>

Eviction cases have shown that force evictions may have a profound impact on the lives of the poor, such as destroying their livelihoods, leaving them homeless and crippling their chances of developing socially and economically. Van Wyk correctly asserts that municipalities should thus always perform and execute their duties with insight and a sense of humanity and treat those within their area of jurisdiction with respect, care and concern for their circumstances.<sup>184</sup> This is also in line with the objective of the right to human dignity, namely that all people must be treated as human beings with appropriate respect and care for their dignity.<sup>185</sup> The mechanism of meaningful engagement developed in eviction cases embraces this view. According to the *Olivia Road* case, "meaningful engagement can be seen as an expression of people's dignity in *Olivia Road*."<sup>186</sup>

In *Blue Moonlight*, the Court also stated that when evicting desperately poor occupiers it is necessary to show additional sympathy by taking into consideration the circumstances of these people.<sup>187</sup> This reasoning by the Court further emphasised that it is important to treat communities affected by evictions in a dignified manner. Applying the mechanism of meaningful engagement in the *Joe Slovo* case, the Court also emphasised concerns for the protection of the human rights of the affected residents. Recognising respect for the occupiers' human dignity, the Court accentuated that vulnerable people are equally worthy of being respected and that evictions if implemented should be done in a caring and

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<sup>182</sup> A Arko-Cobbah and C D Olivier 'South Africa's access to information legislation and socio-economic rights: civil society and meaningful engagement as drivers' (2016) 34 (1) *Mousaion* 158.

<sup>183</sup> M Majale 'Improving access to adequate and affordable housing for urban poor through an integrated approach' International Conference: Toronto 24-27 June 2004.

<sup>184</sup> J van Wyk 'The role of local government in evictions' (2011) 14 (3) *Potchefstroom Electronic Law Journal* 72.

<sup>185</sup> *Olivia Road* para 10.

<sup>186</sup> L Chenwi 'Meaningful engagement in the realisation of socio-economic rights: the South African experience' (2011) 26 *South African Public Law* 140.

<sup>187</sup> *Blue Moonlight* para 53 and 100.

compassionate manner. To do away with the injustices of the past it is not only important to assist the poor in having access to socio-economic rights, but it is equally important to treat them in a manner that embraces respect for their human rights. Meaningful engagement therefore requires that evictions take place in a manner that is consistent and reinforces the values and commitment of the South African Constitution towards human rights. This means that meaningful engagement delivers the benefit of embracing respect for human rights and principles such as human dignity.

### **3.2 CONCLUSION**

The idea of meaningful engagement emerged from housing rights cases that dealt with evictions. It was developed as a mechanism to force government to have discussions with affected communities before effecting evictions. In this chapter I have explored, identified and discussed the additional benefits generated by the mechanism of meaningful engagement. It illustrated that engagement can provide communities affected by evictions with benefits such as accessing important government information, influencing and shaping government priorities and policies, increasing their access to basic goods and service delivery, increasing their negotiation and bargaining power and encouraging respect for human rights principles such as human dignity. In the chapter below, I discuss how these additional benefits identified in this chapter can enhance the capacity and transform the lives of the poor.



## **CHAPTER 4 - DISCUSSING HOW THE ADDITIONAL BENEFITS OF MEANINGFUL ENGAGEMENT ENHANCE THE CAPACITY AND TRANSFORM THE LIVES OF THE POOR**

### **4.1 INTRODUCTION**

In the previous chapter, I have explored and identified the additional benefits that are produced by the mechanism of meaningful engagement as developed by the South African courts in litigating housing rights cases. In this chapter, I determine and discuss how these benefits could enhance the capacity and transform the lives of affected communities when engaging and entering into discussions with government to resolve their housing disputes.

### **4.2 ACCESS TO INFORMATION AS A TOOL TO ENHANCE THE CAPACITY OF THE POOR**

As seen in Chapter 3 of this mini-dissertation, there is sufficient evidence that the mechanism of meaningful engagement can provide the poor with opportunities to access information needed to protect, maintain and attain their socio-economic privileges. Accessing information is a powerful mechanism that embraces the concept of participatory democracy and holds the potential of bringing many other benefits such as transferring knowledge and power to poor people, equipping them to effect change by channelling their voices into decision making and demanding their socio-economic rights from their governments.<sup>188</sup>

#### **4.2.1 ASSISTING THE POOR IN CLAIMING THEIR SOCIO-ECONOMIC PRIVILEGES**

Without information it is impossible for people to defend their socio-economic rights, make informed decisions or meaningfully participate in decision making processes that impact the enjoyment of their socio-economic rights.<sup>189</sup> One of the conditions of meaningful engagement is that it must be structured in such a way that all parties concerned are able to access information relevant to the specific housing dispute in order to effectively contribute to decision-making and resolution processes. The Court requires a municipality that wants to implement eviction proceedings to provide the targeted community with explanations and reasons for its decision of eviction. This means affected communities should, during the engagement process, be given a reasonable flow of information on

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<sup>188</sup> C Burgman et al *Our rights our information: empowering people to demand rights through knowledge* (2007) 11.

<sup>189</sup> A Arko-Cobbah and CD Olivier 'South Africa's access to information legislation and socio-economic rights: civil society and meaningful engagement as drives' (2016) 34 *Mousaion* 154.

housing issues such as how the state will help to alleviate the consequences of evictions, availability of land, alternative accommodation and future housing developments of the state. Accessing this type of information would be a powerful tool in the hands of everyday people.<sup>190</sup> Having access to suitable information empowers communities to better understand what rights they have, what benefits they are allowed to claim and what actions they need to take to claim and exercise their rights. Affected communities would not only be empowered to claim their socio-economic privileges but also create a solid foundation for a legal right to know about government policies, decisions and activities as well giving them the chance of positioning themselves to effectively enter into discussions with government and confront the circumstances they found themselves in.<sup>191</sup>

#### **4.2.2 INFORMATION AS A TOOL TO ENSURE GOVERNMENT TRANSPARENCY AND ACCOUNTABILITY**

The right to access information is described as a unique human right that is fundamental for the functioning of democracy and to advance the democratic principles of openness, fairness and accountability as prescribed by the South African Constitution. Chenwi argues that meaningful engagement is a progressive and effective remedy that is capable of improving transparency and accountability in the delivering of socio-economic goods and services.<sup>192</sup> In *Olivia Road*, the Court announced that the process of engagement must be characterised by transparency because secrecy makes the engagement process pointless.<sup>193</sup> The Court hereby implies that the poor must be given adequate and meaningful information to make the engagement process effective. The Court continued to say that eviction proceedings further required of a municipality to provide the affected community with detailed and accurate account of the process of engagement.<sup>194</sup>

Accessing information is interchangeably linked with accountability. If government has to explain how and why they have embarked on certain actions such as implementing evictions against people, they need to provide the affected citizens with information as to

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<sup>190</sup> A Arko-Cobbah and CD Olivier 'South Africa's access to information legislation and socio-economic rights: civil society and meaningful engagement as drives' (2016) 34 *Mousaion* 155.

<sup>191</sup> Unpublished: L Miriyoga 'Information without power? exploring the challenges and opportunities in the usage of the Promotion of Access to Information Act no 50 of 2000 (PAIA) as a potent tool for advancing socio-economic justice in South Africa' unpublished Master's thesis, University of Cape Town, 2011 13-14.

<sup>192</sup> L Chenwi 'A new approach to remedies in socio-economic rights adjudication: occupiers of 51 Olivia Road and Others v City of Johannesburg and Others' 2 *Constitutional Court Review* 373.

<sup>193</sup> *Olivia Road* para 21.

<sup>194</sup> *Olivia Road* para 21.

why they decided to take or implement such decisions. This provides the poor with an opportunity to become aware of, and knowledgeable about, the plans of their local governments and they may keep them answerable for any wrongdoing or inaction. Informed citizens are better empowered to scrutinise the performance of government and this may increase the prospects of government delivering on its developmental responsibilities. In *Olivia Road*, transparency was recognised as one of the institutional features and normative objectives of meaningful engagement. This may translate to an environment of openness and accountability where those usually disempowered by a lack of information are now given the ability to access information on the work and performance of government. This environment of openness, where poor people are informed, allows them to scrutinise government's housing plans and they can force government to remain responsive to their needs and desires. In the *Joe Slovo* trial, housing authorities were for example forced to clarify their breach of the agreement to give 70% of the new houses to former Slovo residents.<sup>195</sup> Meaningful engagement strengthens the principle of accountability in that it requires government to take responsibility for its actions and act in a manner that promotes the general welfare of its citizens. Information is thus powerful tool in doing away with the injustices of the past and encouraging fair, efficient and accountable government administration and action.

#### 4.2.3 PROMOTING SHARED-DECISION MAKING AND INCREASED RESPONSIVENESS

Britz correctly asserts that without access to relevant and usable information, it becomes impossible to make informed decisions and effectively address people's needs.<sup>196</sup> Without adequate information and knowledge on issues that impact their lives, communities would not be able to contribute meaningfully to the engagement process or to make informed decisions that could lead to the attainment of their socio-economic rights. Chenwi and Tissington confirm that engagement can only be meaningful if affected communities can access relevant information.<sup>197</sup> The principle of meaningful engagement therefore emphasises that when evictions are to be implemented, the voices of all role players should equally be heard in an attempt to find acceptable solutions. Both the *Olivia*

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<sup>195</sup> A Pillay 'Toward effective social and economic rights adjunction: the role of meaningful engagement' (2012) 10 (3) *I.CON* 751.

<sup>196</sup> Unpublished: JJ Britz 'A critical analysis of information poverty from a social justice perspective' unpublished PhD thesis, University of Pretoria, 2007 77.

<sup>197</sup> L Chenwi and K Tissington Engaging meaningfully with government on socio-economic rights: a focus on the right to housing Community Law Centre: University of the Western-Cape (2010) 23.

*Road*<sup>198</sup> and *Joe Slovo*<sup>199</sup> cases emphasise that residents affected by eviction proceedings must be treated as equal partners in decision-making, instead of only being given information about decisions that have already been taken.<sup>200</sup> The Court in *Joe Slovo* also clearly articulated that the community must be seen and participate as equal partners in the decision-making process itself.<sup>201</sup>

One of the key findings in the *Abahlali* case was that proper and meaningful engagement can only happen when communities whose socio-economic privileges are being infringed upon are given a genuine chance of participating in decision-making processes.<sup>202</sup> This idea of meaningful engagement represents a major shift from the superficial engagement that happens in most cases only after government has already decided on its course of its action. Fuo also mentions that “in *residents of Joe Slovo Community*, Justice Ncgobo asserted that implementing any programme giving effect to socio-economic rights, the key element which must be met is meaningful engagement between the government and residents”.<sup>203</sup> The mechanism of meaningful engagement emphasises equal opportunity to be heard and enjoy socio-economic rights. This means affected communities have the opportunity to become respected partners in the policy making process. The ability to access information relevant to their housing needs enhances the capabilities and capacity of the poor so that they are able to share in the power of government when it comes to making decisions that could impact and benefit their lives. They therefore have the power to change their position in society by participating and sharing meaningfully in public affairs, decision-making and dispute resolutions that affect them.

Participation of the poor in policy decision-making would not only mean that they are recognised as fully-fledged citizens who can meaningfully contribute to the development process but it would also lead to more effective policies to overcome issues of social exclusion and poverty.<sup>204</sup> When the poor access information they could effectively inform strategic and developmental decisions as well as determining if government action is indeed directed towards efficient and effective attainment of their socio-economic needs.

<sup>198</sup> *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 3 SA 208 (CC).

<sup>199</sup> *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 545 (CC).

<sup>200</sup> L Chenwi and K Tissington *Engaging meaningfully with government on socio-economic rights: a focus on the right to housing* Community Law Centre: University of the Western-Cape (2010) 23.

<sup>201</sup> *Joe Slovo* para 378.

<sup>202</sup> *Abahlali* para 69 and 120.

<sup>203</sup> ON Fuo ‘Constitutional basis for the enforcement of executive policies that give effect to socio-economic rights in South Africa’ (2013) 16 (4) *Potchefstroom Electronic Law Journal* 17.

<sup>204</sup> A Claeys et al *Engaging the poor in policy-making on poverty and social exclusion in Flanders (Belgium)* 2001 127.

The order to engage meaningfully with the affected residents of *Joe Slovo* included giving the residents information about their current position on the housing waiting list. The affected communities now had a better chance of getting proper responses or actions from government regarding their socio-economic privileges in terms of housing. This kind of empowerment is possible through the application of the mechanism of meaningful engagement and is crucial for creating a fundamental new society where all citizens are given the same dignity in decision making and service delivery processes.

#### 4.2.4 INFLUENCING AND SHAPING GOVERNMENT PRIORITIES AND POLICIES

The primary aim of government should always be to develop policies that promote the broad social and economic development of its people. Van Wyk also argues that Section 26 (2) of the Constitution places an obligation on municipalities to develop policies, plans and programmes for the areas under their control and that set out development and housing goals.<sup>205</sup> Van Wyk further argues that suitable information regarding the existence of housing available to the poor is critical because it obligates a municipality to determine what its priorities are with regard to the overall planning and housing programme and the situation of the specific occupiers.<sup>206</sup> The idea is that by increasing citizens' voices through various participation methods such as meaningful engagement citizens should be allowed to contribute towards finding solutions to realise their socio-economic needs. The *Joe Slovo* case reinforced the belief that citizens are to be allowed and seen as important allies who can contribute toward developing solutions to their circumstances and directing public policy making processes.<sup>207</sup> The *Joe Slovo* engagement resulted in the deeply problematic plan of the government to be abandoned and respect for community participation in a non-discriminatory manner was affirmed.<sup>208</sup> The *Joe Slovo* engagement order forced government to involve the affected community on certain issues such as time, manner, conditions and type of alternative accommodation which provided them with a back-door mechanism to enter into discussions with government for a revised plan that would be more suitable for their needs.<sup>209</sup>

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<sup>205</sup> J Van Wyk 'The role of local government in evictions' (2011) 14 (3) *Potchefstroom Electronic Law Journal* 59.

<sup>206</sup> J van Wyk 'The role of local government in evictions' (2011) 14 (3) *Potchefstroom Electronic Law Journal* 58.

<sup>207</sup> *Joe Slovo* para 49.

<sup>208</sup> A Pillay 'Toward effective social and economic rights adjunction: the role of meaningful engagement' (2012) 10 (3) *I.CON* 750.

<sup>209</sup> B Ray 'Engagement's possibilities and limits as a socio-economic rights remedy' 2010 9 (3) *Washington University Global Studies Law Review* 412.

Chenwi asserts that “generally speaking, engagement and participation are both processes through which individuals and communities influence policy-making, priority setting and access to goods and services, amongst others.”<sup>210</sup>In *Olivia Road*, the order for engagement resulted in an agreement that required the government to develop a concrete plan for permanent housing in consultation with the occupiers.<sup>211</sup>This shows that effective and meaningful engagement plays a critical role in giving the voices of all groups of society a platform to be heard and actively influence government priorities and policies toward effective realisation of their needs and intended developmental goals. The mechanism of meaningful engagement thus encourages and creates room to accommodate the views of the poor and especially to emphasise their living conditions. The poor could ultimately also be empowered to stop the government and its institutions from creating and implementing conflicting policies, as in the *Olivia Road* and *Abahlali* cases and force them to design and implement policies that are in line with the views and socio-economic development needs of the poor. Through meaningful engagement, the poor can develop the power to force government to create and deliver more transparent and acceptable public policies that contribute to transforming their lives.

#### 4.2.5 ENCOURAGING EQUALITY IN PUBLIC POLICY

The mechanism of meaningful engagement also creates conditions that can help ensure that the needs of specific marginalised groups such as those with disabilities and limited power such as women and children are considered when government implement decisions or policies. The *Joe Slovo* case pointed out that the vulnerability of groups such as the elderly, children, people with disabilities and households where women are the breadwinners must be taken into consideration when deciding whether an eviction order can be implemented.<sup>212</sup> Amongst the occupiers to be evicted in the *Blue Moonlight* case was a child with a disability, and two pensioners and women who were the breadwinners of their households. The *Blue Moonlight* judgement therefore also made specific reference to their needs and pointed out that homelessness would have a disastrous impact on their

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<sup>210</sup> L Chenwi ‘Meaningful engagement in the realisation of socio-economic rights: the South African experience’ (2011) 26 *South African Public Law* 130.

<sup>211</sup> A Pillay ‘Toward effective social and economic rights adjunction: the role of meaningful engagement’ (2012) 10 (3) *I.CON* 741.

<sup>212</sup> *Joe Slovo* para 104.

lives.<sup>213</sup>This particular reasoning by the Court in both the eviction cases of *Joe Slovo* and *Blue Moonlight* shows that government policies should equally take into consideration the needs of groups and people who have experienced hardships due to past injustices such as exclusion, marginalisation and discrimination factors that have always been key elements in contributing to inequality.

Majale states that “housing is a critical factor in determining the general quality of life for all people and uneven access to adequate and affordable housing is an important aspect of inequality in many cities in South Africa.”<sup>214</sup>The right to housing is especially vital for the survival of the poor and marginalised. Considering the negative effects that evictions may have on their well-being it is important that they are not forcefully removed from their livelihoods without due consideration for their specific needs. Meaningful engagement gives the marginalised of society a voice and creates the conditions for them to equally participate in public life and decision-making that impacts their lives. Assisting the marginalised of society to have access and enjoy the most basic rights such as having access to housing will help them to achieve equality. Ensuring, through the mechanism meaningful engagement, that disadvantaged people such as the poor and marginalised are not forcefully removed from their livelihood, can be seen as an important step to bring relief and ensure that they are given an opportunity to continue functioning and working towards their economic and social development in order to ultimately achieve equality. The right to equality is closely related to socio-economic rights and underlines the fact that all people irrespective of their background or financial status must be able to enjoy their rights without any discrimination or unfair treatment.

This is a profoundly empowering process that builds the capacity of marginalised groups to develop a strong and effective voice to enter into discussions with their local government to affect solutions and changes needed to improve their lives. This also then means that as a marginalised group of people they can equally influence the distribution of resources, government’s strategic planning, and local and national policies in a way that benefits their particular needs and that would ultimately allow them to live independently.

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<sup>213</sup>*Blue Moonlight* para 92.

<sup>214</sup> M Majale ‘Improving access to adequate and affordable housing for urban poor through an integrated approach’ International Conference: Toronto held 24-27 June 2004 [http://www.urbancentre.utoronto.ca/pdfs/housingconference/Majale\\_Improving\\_Access.pdf](http://www.urbancentre.utoronto.ca/pdfs/housingconference/Majale_Improving_Access.pdf) (Accessed 20 June 2017).

### 4.3 TRANSFORMING THE LIVES OF THE POOR THROUGH INCREASED ACCESS TO BASIC GOODS AND SERVICES

Access to basic services and goods is vital for all citizens, and it is especially important for the poor and marginalised who have been deprived equal access and enjoyment of these goods and services due to South Africa's history of apartheid.<sup>215</sup> According to Meyer South-Africa's post-apartheid development policy is focused on effective and efficient delivery of basic services such as water, sanitation, housing, electricity and health services to those who have historically been deprived of such services.<sup>216</sup> The history of South Africa is characterised by a local government system that was biased and rife with a culture of exclusion and deprivation. Government displaced poor people to areas where it was difficult for them to access basic services and benefits or participate in economic activities that could improve the quality of their lives. Improving the lives of the poor became one of the main priorities of the newly established democratic South Africa.

#### 4.3.1 IMPROVED SERVICE DELIVERY OUTCOMES FOR THE POOR

The government promised to transform the lives of people by providing them with effective, accessible, and quality goods and services.<sup>217</sup> Local government was consequently entrusted with the important responsibility to ensure the growth and development of the people living within its area of responsibility. Housing is of vital importance as it satisfies many different human needs.<sup>218</sup> According to Meyer, housing delivery and transfer of ownership plays a vital role in lifting the poor out of poverty and granting them access to resources.<sup>219</sup> The *PE Municipality* judgement explained the government's duty to provide alternative accommodation to unlawful occupiers facing eviction by stressing that even though a municipality is not constitutionally obligated to prevent homelessness, the principles of justice and equity necessitate a court to be reluctant in granting an eviction order against relatively settled occupiers, unless they are provided with reasonable

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<sup>215</sup> Unpublished: NA Mabitsele 'The impact of service delivery on the quality of lives of the community of Protea South, Soweto in Johannesburg in Gauteng Province South Africa' unpublished, Master's thesis, University of Limpopo 2012 16.

<sup>216</sup> DF Meyer 'The impact of housing and basic service delivery on low-income communities in South-Africa: the case of the Northern Free State Region' (2014) 5 (13) *Mediterranean Journal of Social Sciences* 11.

<sup>217</sup> Unpublished: SA Macanda "An analysis of rural development in the Eastern Cape: a case study of Intsika municipality' unpublished Master's thesis, University of the Western Cape 2014 vii.

<sup>218</sup> Unpublished: T Rapeleng 'An evaluation of the right to access adequate housing in Joe Moroleng local municipality, South Africa' unpublished Master's thesis, University of Free State 2013 1.

<sup>219</sup> DF Meyer 'The impact of housing and basic services delivery on low-income communities in South-Africa: the case of the Northern Free State Region' (2014) 5 (13) *Mediterranean Journal of Social Sciences* 12.



alternative accommodation.<sup>220</sup> In all the eviction cases, the courts recognised and pertinently stressed that it is not just and fair to implement evictions when the municipality fails to consider the basic needs of the communities affected by its decision of eviction, such as housing. The residents of *Olivia Road* contested their eviction based on the fact that the eviction would result in them being homeless.<sup>221</sup> Considering and providing for the basic needs of affected communities, such as housing and other basic municipal services are weighty factors from the court's perspective, when deciding to grant government permission to implement a decision to evict people from their houses.

The fact that the municipality made no real efforts to consider the needs and circumstances of the occupiers in the *PE Municipality* case, led to the Court's decision that it would not be fair or reasonable to evict the occupiers.<sup>222</sup> The Court pointed out that the local authorities were to enter into discussions with the affected community concerning their basic needs which included the quality, safety and location of the proposed alternative accommodation.<sup>223</sup> The affected residents should have been provided with alternative accommodation and the basic services and goods necessary for their survival when the municipality plans evictions. Providing poor communities with access to goods such as housing is critical for allowing their households to function and operate independently in society. The *Blue Moonlight* judgement confirmed that municipalities have a constitutional obligation to structure their budgeting and planning processes in such a manner that it prioritises communities' basic needs and provide affected communities with alternative accommodation in emergency housing crises.<sup>224</sup>

According to Tshitereke, the reality of living in informal settlements means limited or no access to basic public services such as sanitation and electricity.<sup>225</sup> Access to adequate sanitation is for example not only fundamental to a person's dignity but also critical for the social and mental well-being of a person.<sup>226</sup> The order for engagement in the *Olivia Road* case resulted in temporary measures to provide the affected residents with alternative

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<sup>220</sup> *PE Municipality* para 28.

<sup>221</sup> M Strauss and S Liebenberg 'Contested spaces: housing rights and evictions law in post-apartheid South Africa' (2014) 13 (4) *Planning Theory* 437.

<sup>222</sup> *PE Municipality* para 59.

<sup>223</sup> *PE Municipality* para 53-58.

<sup>224</sup> *Blue Moonlight* para 97.

<sup>225</sup> C Tshitereke 'The importance of adequate housing' 10 October 2008 *Mail and Guardian* Available from: <https://mg.co.za/article/2008-10-10-the-importance-of-adequate-housing> (Accessed 21 August 2018).

<sup>226</sup> K Tissington 'Basic sanitation in South Africa: a guide to legislation, policy and practice' 2011 13 Available from: [http://www.nwu.ac.za/sites/www.nwu.ac.za/files/files/pfl/documents/SERI\\_Guide\\_to\\_Basic\\_Sanitation\\_Jul11.pdf](http://www.nwu.ac.za/sites/www.nwu.ac.za/files/files/pfl/documents/SERI_Guide_to_Basic_Sanitation_Jul11.pdf) (Accessed 20 August 2018).

housing, make the two buildings safer, and provide toilets, potable water, waste disposal services, and fire-extinguishers. The municipality was also required to clean and sanitise the properties.<sup>227</sup> The outcome of the *Olivia Road* agreement furthermore resulted in the residents being provided with goods and services such as protection against eviction from their alternative accommodation, access to sanitation, transportable water, and electricity for heating, lighting and cooking whilst waiting for permanent accommodation.<sup>228</sup>

When affected communities as in the *Olivia Road* case are provided with increased access to basic service delivery, they become better able to protect themselves and their families from the social ills and miserable conditions that homelessness can bring. Access to accommodation and basic municipal services not only strengthens the affected communities' potential for social and economic development but also increases their security. They become better protected against the effects of being homeless such as being exposed to violence or the risk of their dwellings being burnt down by fires. The dwellings of homeless people are often built of extremely flammable recycled materials.<sup>229</sup> Access to goods and services such as suitable alternative housing and basic services that include safety services minimises the risk of fire outbreaks that often threatens the lives of the poor.

The order for engagement in *Joe Slovo* included providing the affected residents with basic services such as transport facilities from their alternative accommodation units to schools, health facilities and places of work. The Court also maintained that local government would be responsible for providing the residents with a safe and healthy environment.<sup>230</sup> The Court notably pointed out that the municipality must structure its administration, financial and planning processes in a sustainable manner that would enable them to prioritise the basic needs of the community and promote their social and economic development.<sup>231</sup> Van Wyk argues that by ensuring the provision of services to communities in a sustainable manner the Constitution assures that government delivers on its mandate of rendering services in an efficient and effective manner to encourage social

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<sup>227</sup> L Chenwi 'Implementation of housing rights in South Africa: approaches and strategies' (2015) 24 (4) *Journal of Law and Social Policy* 82.

<sup>228</sup> L Chenwi 'Implementation of housing rights in South Africa: approaches and strategies' (2015) 24 (4) *Journal of Law and Social Policy* 83.

<sup>229</sup> C Tshitereke 'The importance of adequate housing' 10 October 2008 *Mail and Guardian* Available from: <https://mg.co.za/article/2008-10-10-the-importance-of-adequate-housing> (Accessed 21 August 2018)

<sup>230</sup> *Joe Slovo* para 348.

<sup>231</sup> *Joe Slovo* para 348.

and economic development.<sup>232</sup> Meaningful engagement provides the poor and vulnerable with increased access to quality goods and services such as housing, transport and safety as illustrated in the afore-mentioned housing rights cases. Such access may empower and transform the lives of communities affected by evictions.

#### 4.3.2 IMPROVING THE QUALITY OF THE LIVES OF THE POOR

Madumo argues that local government is responsible for the quality of lives of the people in their area of jurisdiction. Matters related to socio-economic development that they are expected to pursue are of critical importance to the community.<sup>233</sup> Providing affected communities with increased access to the much-needed basic goods and services also creates an enabling environment to improve the quality of lives of the affected communities.

The Court in *Blue Moonlight* instructed the municipality to accommodate the affected community in an area as close as possible to where they were residing at the time of eviction.<sup>234</sup> The Court also found that the occupiers in the *PE Municipality* case had chosen to live on the land in dispute because it granted them easy access to work opportunities and other social services. The occupiers in *Joe Slovo* fought their eviction on the basis of government's failure to engage with them prior to its decision to evict them. They argued that the eviction would further disadvantage them as an already poor community and it would impact the little access they have to social goods and services that assisted them in living fairly tolerable lives. They further argued that the eviction proceedings would disrupt their children's schooling as well as the fragile networks and support systems necessary for their survival.<sup>235</sup> The residents of *Olivia Road* also argued that they were too poor to afford alternative accommodation and that their current location provided them access to financially viable opportunities in the City which they would lose were they to be evicted.<sup>236</sup>

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<sup>232</sup> J Van Wyk 'The role of local government in evictions' (2011) 14 (3) *Potchefstroom Electronic Law Journal* 73.

<sup>233</sup> Unpublished: O Madumo 'An evaluation of the functioning of metropolitan municipal councils in Gauteng, South Africa' unpublished PhD thesis, University of Pretoria 2017 1.

<sup>234</sup> *Blue Moonlight* para 104.

<sup>235</sup> M Strauss and S Liebenberg 'Contested spaces: housing rights and evictions law in post-apartheid South Africa' (2014) 13 (4) *Planning Theory* 440.

<sup>236</sup> M Strauss and S Liebenberg 'Contested spaces: housing rights and evictions law in post-apartheid South Africa' (2014) 13 (4) *Planning Theory* 437.

In principle, living in an area close to where they have established themselves as a community means that meaningful engagement does not isolate the occupiers from their established livelihood opportunities and social services. Meaningful engagement can empower poor communities to hold on to the economic opportunities, social services, relationships and assets that they may have developed over the years. They can continue to access goods and services and economic opportunities, and so maintain their job opportunities and steady income as they continue to utilise social services available to improve their well-being. This will not only empower them to protect the little economic independence they may have managed to achieve but also assist them in improving the quality of their lives and developing their human capabilities to function more effectively as an established community that can grow and function independently, economically and socially.

#### **4.4 NEGOTIATION AS A TOOL TO ENHANCE THE CAPACITY OF THE POOR**

Negotiation in the case of housing disputes is more than just finding solutions to specific problems. Such talks also involve deliberating on how best to redistribute resources and share responsibilities arising from the dispute. As such negotiations have an important part to play in helping people increase their bargaining power and develop and improve their skills, knowledge and social networks, all of which can bring important changes to their lives.<sup>237</sup>

##### **4.4.1 STRENGTHENING THE BARGAINING POWER OF THE POOR**

Maiese maintains that negotiation in its simplest form implies dialogue between parties involved in a dispute with the aim of negotiating a solution to their problems.<sup>238</sup> Negotiation is a process that requires of people to talk to one another in an effort to find appropriate resolutions for their opposing interests. According to Rathgeber, negotiation is a consensual bargaining process where parties attempt to reach an agreement on a dispute.<sup>239</sup> This means that negotiation may be used as an alternative resolution to resolve disputes without any costly legal processes. Many legal scholars express concern about negotiation processes without any proper legal framework between the government

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<sup>237</sup> A Engel and B Korf 'Negotiation and mediation techniques for natural resource management' 2005 2 Available from: [file:///C:/Users/u04285433/Downloads/NegotiationandMediationTechniquesforNaturalResourceManagement\\_FAO2005%20\(1\).pdf](file:///C:/Users/u04285433/Downloads/NegotiationandMediationTechniquesforNaturalResourceManagement_FAO2005%20(1).pdf) (Accessed 17 August 2018).

<sup>238</sup> M Maiese 'What is negotiation' October 2003 <https://www.beyondintractability.org/essay/negotiation> (Accessed 12 August 2018).

<sup>239</sup> B Rathgeber 'Negotiation' <http://brenrathgeber.ca/negotiation/> (Accessed 12 August 2018).

and vulnerable people or affected communities. Scholars such as Chenwi argue that vulnerable and poor people sometimes lack proper knowledge and skills and may even embark on negotiations without being aware of their legitimate entitlements and this may result in challenges of inequality in bargaining power or them placing a lot of faith in the bona fides of government officials.<sup>240</sup> Brand is also of the opinion that for the parties in socio-economic rights cases to negotiate the court should set the normative framework by authoritatively determining the validity of the parties conflicting claims.<sup>241</sup> He however continues to reason that “if judgement is pending the parties are obliged to negotiate without authoritative indication of the legitimate goals of their engagement.”<sup>242</sup>

The Court in *Olivia Road* also recognised that the residents may lack negotiation skills and that this could potentially result in power imbalances.<sup>243</sup> The Court nevertheless also stressed that this power imbalance can be remedied by the involvement of civil society organisations. The duty of civil organisations to get involve in matters of local government and local community issues stems from Section 152(1) of the Constitution,<sup>244</sup> that obligates such organisations to assist those in need. Ray is also of opinion that civil organisations have broader perspectives and will understand how the results of negotiations may affect the broader policy environment.<sup>245</sup> He further contends that civil organisations have the requisite resources and staying power to increase the negotiation power of vulnerable communities affected by evictions.<sup>246</sup> The significance of this is that civil or non-governmental organisations could potentially assist communities affected by evictions to strengthen their bargaining power when they enter into negotiations with the government on issues that directly impact their socio-economic rights and their lives. Mbazira importantly points out that new democratic space have been created to respond

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<sup>240</sup> L Chenwi ‘Implementation of housing rights in South Africa: approaches and strategies’ (2015) 24 (4) *Journal of Law and Social Policy* 82.

<sup>241</sup> L Chenwi ‘Democratising the socio-economic rights-enforcement process’ in Garcia et al *Social and economic right-enforcement process* (2015) 186.

<sup>242</sup> L Chenwi ‘Democratising the socio-economic rights-enforcement process’ in Garcia et al *Social and economic right-enforcement process* (2015) 186.

<sup>243</sup> B Ray ‘Engagement’s possibilities and limits as a socio-economic rights remedy’ (2010) *Washington University Global Studies Law Review* 403.

<sup>244</sup> Section 152 (1) of the Constitution of 1996.

<sup>245</sup> B Ray ‘Engagement’s possibilities and limits as a socio-economic rights remedy’ (2010) *Washington University Global Studies Law Review* 422.

<sup>246</sup> B Ray ‘Engagement’s possibilities and limits as a socio-economic rights remedy’ (2010) *Washington University Global Studies Law Review* 423.

to democracy deficits.<sup>247</sup> Meaningful engagement creates this kind of democratic space whereby communities affected by infringement of their socio-economic rights can mobilise themselves with the assistance of civil or non-governmental organisations to increase their negotiation and bargain power and achieve their desired outcome.

The *Abahlali* case is an example of how the community can be mobilised by means of civil, non-governmental or people movements to increase their negotiation and bargaining power to achieve the results they desire. *Abahlali* emerged as a movement comprising of local residents in shack settlements from Durban, and are fighting battles that involve the struggle for justice and housing rights of shack dwellers.<sup>248</sup> According to Birkinshaw, *Abahlali*'s work shows that strength and solidarity is possible when a community organises around a shared commitment to equality, democracy, and independence.<sup>249</sup> As mentioned by Huchzermeyer "Abahlali made sure not to let the enemy's approaches and language dominate the shack dwellers."<sup>250</sup> The *Abahlali* movement played a critical role in the *Abahlali* case by ensuring that the legal arguments of the residents were constructed correctly in order to convince the Court that the Slums Act should be declared unconstitutional. This kind of mobilisation together with Court judgements such as in *PE Municipality* where the Court specifically stressed the importance of negotiations in meaningful engagement cases shows that meaningful engagement may enable the poor to enter into negotiations with government as a force to be reckoned with.

The *Olivia Road* case likewise confirms that when sufficient opportunities are created for vulnerable people and their representatives to engage meaningfully with government, it could give them the opportunity to expand their limited control and enhance their bargaining power. According to Engel and Korf, in order to control the outcomes in decision making processes such as negotiation, some degree of power sharing is necessary, otherwise it would become difficult for the parties to engage meaningfully and

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<sup>247</sup> C Mbazira 'Grootboom: A paradigm of individual remedies versus reasonable programmes' (2011) 26 *South African Public Law Journal* 69.

<sup>248</sup> Unpublished: BD Ntseng 'Knowledge production in for action: A case study of Abahlali Basemjondolo Movement' unpublished Master's thesis, University of Kwazulu-Natal 2014 23.

<sup>249</sup> M Birkinshaw 'Rights, democracy, social movements: Abahlali baseMjondolo – a living politics' 18 <http://abahlali.org/node/3203/> (Accessed 12 August 2018).

<sup>250</sup> M Huchzermeyer 'Debates invoking Lefebvre's right to the City in South Africa today: a response to Walsh' (2014)18 (1) 43 *City* (Accessed 18 August 2018).

find mutually acceptable solutions.<sup>251</sup> Being able to negotiate may give those affected by evictions the power to bargain more effectively to assure that their immediate basic needs such as shelter, food, health and security are met. In the case of *Olivia Road*, the Court stated that municipalities must not view vulnerable groups and individuals as a disempowered mass, but be encouraged to be active participants in finding solutions to their problems.<sup>252</sup> The Court gave an interim order that forced the government and the city to enter into negotiations in order to find solutions for their specific problems. The *Olivia Road* case produces further evidence that meaningful engagement as a mechanism can significantly increase the negotiation and bargaining power of the poor.

Through meaningful engagement, the occupiers of *Olivia Road* were able to negotiate with government to agree to solutions specific to their needs. Liebenberg asserts that the outcome of engagement in *Olivia Road* was a comprehensive settlement agreement between the parties.<sup>253</sup> The *Olivia Road* negotiations have resulted in benefits that were mutually accepted by both the occupiers and the municipality.<sup>254</sup> Cerreti argues that in a process of negotiation the strategies should take into account the interests and objectives of all parties concerned.<sup>255</sup> To have achieved this result means that the affected community should have had some power or influence to have effectively bargained for the benefits or outcomes they wished for. This confirms that meaningful engagement can give the poor a real opportunity to effectively negotiate on their terms for socio-economic privileges and ensure that government and other role players respond adequately to their demands and needs. The opportunity to increase their negotiation and bargaining power could further allow them to develop other valuable skills that are linked to negotiation processes, including problem solving skills and developing their existing knowledge on public affairs.

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<sup>251</sup> A Engel and B Korf 'Negotiation and mediation techniques for natural resource management' 2005 2 Available from: [file:///C:/Users/u04285433/Downloads/NegotiationandMediationTechniquesforNaturalResourceManagement\\_FAO2005%20\(1\).pdf](file:///C:/Users/u04285433/Downloads/NegotiationandMediationTechniquesforNaturalResourceManagement_FAO2005%20(1).pdf) (Accessed 20 August 2018).

<sup>252</sup> *Olivia Road* para 20.

<sup>253</sup> S Liebenberg 'Engaging the paradoxes of the universal and particular in human rights adjudication: the possibilities and pitfalls of meaningful engagement' 2012 12 *African Human Rights Law Journal* 15.

<sup>254</sup> *Olivia Road* para 25-26.

<sup>255</sup> Unpublished: J Cerreti 'Sources of negotiation power in environmental conflicts: the case of oil extraction in the Ecuadorian Amazon' unpublished Master's thesis, University of Vermont, 2006 7.

#### 4.4.2 EXPANDING THE KNOWLEDGE AND SKILLS OF THE POOR THROUGH NEGOTIATION

The main goal of people-centred development approaches is to provide people with the freedom to unleash their creative capabilities as opposed to being passive receivers of development efforts.<sup>256</sup> Giving poor, marginalised and disadvantaged people an opportunity to engage with government in an organised manner during planning and decision making processes, empowers them. Williams argues that the notion of meaningful engagement has significant potential for empowerment by bringing local knowledge into the decision making processes.<sup>257</sup> The poor are better equipped with knowledge and experiences of their own circumstances and can therefore provide a clearer picture of their specific needs which means that they would best know what solutions will be appropriate to address their needs and circumstances.

The *Olivia Road* judgement also illustrated the importance of the principle of participatory, deliberative democracy in resolving conflicts involving constitutional rights.<sup>258</sup> The problems relevant to the case were resolved by means of engagement by the government and the occupiers. The occupiers had gained significant insight and knowledge on how local government operates, including housing and policy decisions. Allowing people to participate in policy and decision-making processes empowers them to gain confidence in their own knowledge and skills to solve problems.<sup>259</sup> During the negotiation and engagement processes they become aware of government developments and procedures which may broaden their knowledge about decision-making, budgeting and public policy processes and procedures. They may also become more aware and understand their rights better. When people understand and know what their rights are, they are better prepared to enter into discussions with government and negotiate with more confidence to protect what is rightfully theirs. This means that when communities are given a real opportunity to negotiate with government on issues that impact their lives, they should be provided with opportunities to develop their individual capacities and enhance their knowledge and skills.

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<sup>256</sup> Unpublished: NA Mchunu 'The link between poor public participation and protests: the case of Khayelitsha' unpublished, Master's thesis, University of Stellenbosch 43.

<sup>257</sup> L Williams 'The right to housing in South Africa: an evolving jurisprudence' (2014) 45 (3) *Columbia Human Rights Law Review* 827.

<sup>258</sup> M Strauss and S Liebenberg 'Contested spaces: housing rights and evictions law in post-apartheid South Africa' (2014) 13 (4) *Planning Theory* 437.

<sup>259</sup> Unpublished: NA Mchunu 'The link between poor public participation and protests: the case of Khayelitsha' unpublished, Master's thesis, University of Stellenbosch 43.



Liebenberg also reports in an opinion piece how the Social Justice Coalition used local community members in a project that arose from a social assessment on the right to sanitation in Khayelitsha. The local community members were educated on various aspects of sanitation, how to conduct social audits of sanitation, and refuse removal services. The work also entailed educating and training the residents of Khayelitsha on policy and budgetary frameworks, developing questions and monitoring criteria, capturing information in collaboration with volunteers, and analysing results.<sup>260</sup> She argues that this is exactly the outcome that genuine active citizen involvement should bring.<sup>261</sup> The significance of this lies in the fact that it underscores how participation in capacity building processes such as negotiation helps the poor to overcome fear and develop a belief in their own skills and capacities. This in return could improve their self-esteem and confidence as they use their newly gained skills to eventually drive their own development and express their views and concerns with more self-confidence regarding issues that affect them. Allowing the poor to participate in participatory processes such as negotiation holds significant power in empowering and transforming the lives of local communities.

#### **4.4.3 DEVELOPING SOCIAL NETWORKS THROUGH THE PROCESS OF NEGOTIATION**

The poor experience social exclusion more strongly because being homeless and on the street without a roof over one's head, also means a lack of support and social networks. Social networks consist of relationships that are developed through various forms of communication and connections and may support extensive, complex and dynamic systems of change, influence or interaction.<sup>262</sup> Informal relations between community members affected by evictions may develop and such interaction could result into many benefits for these communities. When people are connected it provides a basis for collective action and shared-care between community members. A crisis such as facing homelessness may cause communities to stand in solidarity and establish a bond of camaraderie to fight their situation more effectively. It can strengthen their social networks which can result in them gaining new forms of support and friendships as well as other

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<sup>260</sup> S Liebenberg 'Social audits and the right to sanitation' 22 October 2014 *GroundUp* Available from: [https://www.groundup.org.za/article/social-audits-and-right-sanitation\\_2372/](https://www.groundup.org.za/article/social-audits-and-right-sanitation_2372/) (Accessed 20 August 2018).

<sup>261</sup> S Liebenberg 'Social audits and the right to sanitation' 22 October 2014 *GroundUp* Available from: [https://www.groundup.org.za/article/social-audits-and-right-sanitation\\_2372/](https://www.groundup.org.za/article/social-audits-and-right-sanitation_2372/) (Accessed 20 August 2018)

<sup>262</sup> A Gilchrest and P Kyprianou 'Social networks, poverty and ethnicity' 2011 3 [https://www.researchgate.net/profile/Paul\\_Kyprianou/publication/265285177\\_Social\\_networks\\_poverty\\_and\\_ethnicity/links/56d0209608ae4d8d64a1f918/Social-networks-poverty-and-ethnicity.pdf](https://www.researchgate.net/profile/Paul_Kyprianou/publication/265285177_Social_networks_poverty_and_ethnicity/links/56d0209608ae4d8d64a1f918/Social-networks-poverty-and-ethnicity.pdf) (Accessed 16 March 2018).

transformative benefits such as a heightened sense of community.<sup>263</sup> Generally when communities are fighting a cause in solidarity, generosity and resources become more excessively available and those who are economically more independent would share or borrow resources more easily to those who experience financial or hardship crises. Community members may inspire others such as the youth in their thinking and this may provide avenues out of crime or employment. Social networks may also extend beyond the connection of individuals within a particular community to other individuals or organisations outside their own community.

Through the negotiation process the poor can for example develop new partnerships with independent local organisations and policy-makers that have their interests at heart. It is true that the poor are confronted with more complexity and meet with greater barriers to participate in society. The process of negotiation could therefore assist communities affected by evictions to overcome social exclusion by creating opportunities for them to meet and develop new relationships or partnerships with volunteers, activists or people movements that may raise public awareness of their situation. They can use these relationships or support networks to become better informed or influencing them to assist solving their community problems. According to Arko-Cobbah and Olivier, the goals of informal groups and organisations that function independently from the state such as ethnic, community and faith-based organisations and others are to encourage the various interests in society and support citizens to collectively express their interests.<sup>264</sup> Jaysawal also maintains that people-centred approaches that provide a framework for citizens' engagement in government decision making processes deliver benefits to the poor, arising from their relationships with social networks such as public education and mass awareness and empowerment to access justice and advocacy services.<sup>265</sup>

#### **4.5 USING HUMAN RIGHTS PRINCIPLES TO TRANSFORM THE LIVES OF THE POOR**

Rights such as human dignity is critical to do away with the injustices of the past and for building or creating the newly proposed South Africa where everyone is provided with the

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<sup>263</sup> A Davies and J Simon 'The value and role of citizen engagement in social innovation: a deliverable of the project: the theoretical, empirical and policy foundations for building social innovation in Europe' 2013.

<sup>264</sup> A Arko-Cobbah and CD Olivier "South Africa's access to information legislation and socio-economic rights: civil society and meaningful engagement as drivers' (2016) 34 (1) *Mousaion* 156.

<sup>265</sup> N Jaysawal 'Civil society, democratic space and social work' (2013) 3 *Sage Open* 4.

opportunities associated with a democratic state.<sup>266</sup> In applying the mechanism of meaningful engagement in housing rights cases the South African courts have pertinently emphasised that housing is undeniably part of ensuring people's human dignity is respected because housing gives people some form of social protection and safety to live dignified lives.

#### 4.5.1 PROMOTING RESPECT FOR HUMAN DIGNITY

People's self-worthiness and self-esteem are profoundly affected if they are treated of a lesser value because of whom and what they are or where they live. According to Article 1 of the Universal Declaration of Human Rights (UDHR) everyone, irrespective of their background or status are born free and are equal worth of being treated in a dignified manner.<sup>267</sup> Human dignity lies at the heart of human rights and is an important consideration that involves the way in which people are treated, and the nature of their living conditions.<sup>268</sup> The right to access housing is central to respecting people's dignity and well-being because it affords them a better quality of life. Human dignity is thus much more than just treating people with respect, compassion and empathy. It means recognising and respecting the right of all citizens to have a decent place to live in, their right to participate in matters that affects their socio-economic privileges and giving them access to the much-needed basic socio-economic goods and services such as housing, water, electricity and food that they need for their survival and well-being.

The *Joe Slovo* case emphasised that the requirement of engagement originates from the need to treat the residents with respect and care for their dignity.<sup>269</sup> The mechanism of meaningful engagement embraces the fundamental human dignity of the poor and marginalised by saying that the voices of the poor and their circumstances matter and that they may not be left hopeless or homeless as a result of evictions. Liebenberg also points out that decision making processes that allow for citizen's engagement promotes human dignity because people are given a voice in decisions that impact their lives and well-

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<sup>266</sup> O Fuo 'The significance of the constitutional values of human dignity, equality and freedom in the realisation of the right to social protection in South Africa' ANCL-RADC Conference held 20 January 2011, Morocco 3 [https://www.ancl-radc.org.za/sites/default/files/images/the\\_significance\\_of\\_the\\_constitutional\\_values\\_of\\_human\\_dignity\\_equality\\_and\\_freedom\\_full\\_paper\\_by\\_oliver\\_fuo.doc](https://www.ancl-radc.org.za/sites/default/files/images/the_significance_of_the_constitutional_values_of_human_dignity_equality_and_freedom_full_paper_by_oliver_fuo.doc) (Accessed 14 July 2018).

<sup>267</sup> Universal Declaration of Human Rights Available from: [https://www.ohchr.org/EN/UDHR/Documents/UDHR\\_Translations/eng.pdf](https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf) (Accessed 24 January 2018).

<sup>268</sup> Housing Development Agency 'Implementation of emergency housing' 2012 31.

<sup>269</sup> *Joe Slovo* paras 238 and 244.

being.<sup>270</sup> The *Olivia Road* judgement confirmed that a municipality who evict people from their homes without first engaging meaningfully with them is acting in a manner that is at odds with the spirit and purpose of the Constitution.<sup>271</sup> In *PE Municipality* the Court endorsed this view by explaining that amongst others local government also has the constitutional responsibility to ensure that all people have a right to be treated with dignity and respect.<sup>272</sup> Despite the fact that the order for eviction was granted by the Court in *Joe Slovo*, it also included measures to render the eviction more humane.<sup>273</sup> This means that municipalities must integrate human rights considerations in their planning and ensure that human rights principles such as human dignity and fairness are adhered to when executing their policies and development projects.

The mechanism of meaningful engagement embraces the right to housing and dignity and proclaims that evicting people and exposing them to the dangers of being homeless will be contrary to the spirit and values of the Constitution.<sup>274</sup> Failure to ensure that the basic needs of people affected by evictions such as accessing housing and other important basic needs such as access to water, sanitation and electricity is met, would according to the objectives of mechanism of meaningful constitute a violation of people's right to be treated in a manner that shows respect for their personhood and their right to live a respectable life. In deciding whether it's fair and reasonable to evict people from their homes, the Court in *Joe Slovo* even went so far as to state that the particular vulnerability of groups such as the elderly, children, people with disabilities and households where women are the breadwinners constitute and should be considered as a relevant circumstance as described by Section 6 of the Constitution.<sup>275</sup> The need to respect the human dignity of vulnerable groups were likewise emphasised in the *Abahlali* judgement.<sup>276</sup> Recognising the rights of the most marginalised and vulnerable when they are faced with challenges and powerless situations means that meaningful engagement

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<sup>270</sup> S Liebenberg 'Social audits and the right to sanitation' 22 October 2014 *GroundUp* Available from: [https://www.groundup.org.za/article/social-audits-and-right-sanitation\\_2372/](https://www.groundup.org.za/article/social-audits-and-right-sanitation_2372/) (Accessed 20 August 2018).

<sup>271</sup> G Muller 'Conceptualising meaningful engagement as a deliberative democratic partnership' (2011) 3 *Stellenbosch Law Review* 745.

<sup>272</sup> *PE Municipality* para 10.

<sup>273</sup> K Tissington (2010) 'Towards an SER Matrix: monitoring the progressive realisation of socio-economic rights in South Africa: a review of housing policy and development in South Africa since 1994' 21 <http://spii.org.za/wp-content/uploads/2013/12/review-of-the-right-to-housing.pdf> (Accessed 20 June 2018).

<sup>274</sup> *Olivia Road* para 16.

<sup>275</sup> *Joe Slovo* para 104.

<sup>276</sup> S Liebenberg 'Participatory approaches to socio-economic rights adjudication: tentative lessons from South African evictions law' (2014) 32(4) *Nordic Journal of Human Rights* 327.

acknowledges that the rights of these particularly vulnerable groups of society are equally worth of being respected and considered important when deciding to grant an eviction order.

Treating the poor as respectable citizens by showing respect for what is called their homes, giving all members of society the opportunity to voice their opinions and concerns and allowing them to participate in processes that may result in solutions for the issues and challenges that they are faced with is an important step in promoting and institutionalising the principle of human dignity through the mechanism of meaningful engagement. Engaging meaningfully with communities who are challenged with forced eviction or displacement because of government or private action or policy unquestionably encourages respect for human dignity. If people's human dignity is respected it does not only mean that people are empowered to access and sustain their homes and livelihoods but they would feel recognised and valuable as human beings. This could have major positive effects such as promoting their psychological well-being and giving them hope to be recognised as equal citizens.

#### **4.5.2 ENCOURAGING A SYSTEM OF GOOD GOVERNANCE**

A system of good governance is critical for the promotion and protection of human rights. Human rights cannot be respected or enjoyed without a system of good governance. The Office of the United Nations High Commissioner for Human Rights maintains that “good governance requires of government and its institutions to use their power and execute their duties in a manner that is transparent and accountable, and encourages the participation of the public.”<sup>277</sup> Human rights therefore reinforce good governance and require government to create an environment that is conducive for people to exercise and enjoy their human rights without any discrimination. In a democratic country such as South Africa, a system of good governance means that government and especially local government has a duty as imposed by the Constitution to ensure that it conducts its business in a manner that mirrors and embraces the vision of a democratic nation that is committed to respecting the rule of law, equally treating all people with respect and dignity, irrespective of background or economic status and allowing all people a fair opportunity to actively participate in decisions that impact their lives. Such an environment is critical for the poorest and most vulnerable in society. Human rights therefore force a government

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<sup>277</sup> UN-OHCHR ‘Good Governance Practices for Protection of Human Rights’ 2007 2.

and especially local government to act in a manner that is consistent with a system of good governance.

Bosire argues that there is increasing recognition of the role of local government in the protection and realisation of human rights obligations.<sup>278</sup> Local government is the sphere that is closest to the people and their powers speak to several of the socio-economic privileges and rights of local communities.<sup>279</sup> Local government is the distinct sphere of government that has been tasked by the Constitution with the responsibility to ensure that it delivers on its mandate of providing communities in its area of responsibility with basic and other services such as housing, water, food, electricity and sanitation that can significantly contribute to improving the quality of lives of its residents. This technically means that local governments and municipalities must adopt policies and programmes that foster the development of especially the poor and that such policies and programmes should not violate or impede their rights and socio-economic privileges. This consequently also means that municipalities must provide services in a sustainable, accountable, fair and transparent manner and that their actions should not leave the already vulnerable in a further state of despair. It further guarantees the right of citizens to participate in local government issues that impact their lives and socio-economic rights. In *Olivia Road* the court announced that failure by a municipality to effectively engage with the residents or provide an unreasonable outcome in the engagement process would be considered as a weighty factor in determining whether or not to grant an eviction order.<sup>280</sup>

Local government must therefore consider what should be done and how it should be done, taking into consideration the human rights of affected communities and their capacity as well as the obligations that the government has towards realising their developmental obligations and the socio-economic rights of the poor. Liebenberg is also of opinion that efforts to ensure the incorporation of human rights into policies would strengthen deliberative democracy.<sup>281</sup> Human rights would require that a system of good governance implement its priorities and decisions in a manner that considers the human rights of the citizens. The judgments in the eviction cases discussed in previous chapters

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<sup>278</sup> CM Bosire 'Local government and human rights: building institutional links for the effective protection and realisation of human rights in Africa' (2011) 11 *African Human Rights Law Journal* 147.

<sup>279</sup> ON Fuo 'Public participation in decentralised government in Africa: making ambitious constitutional guarantees more responsive' (2015) 15 *African Human Rights Law Journal* 171.

<sup>280</sup> *Olivia Road* para 21.

<sup>281</sup> S Liebenberg 'Engaging the paradoxes of universal and particular in human rights adjudication: the possibilities and pitfalls of meaningful engagement' (2012) 12 *African Human Rights Law Journal* 29.

of this mini-dissertation show that municipalities cannot just displace or leave people homeless without giving them an opportunity to voice their concerns and needs and providing them with alternative housing.

Acting in accordance to a system of good governance suggests that a municipality has to perform and execute its responsibilities in a fair and reasonable manner in dealing with potentially homeless people.<sup>282</sup> This implies taking into consideration the needs and circumstances of those who are facing homelessness and ensuring that they are not deprived of the enjoyment of their socio-economic rights. As confirmed in the *Abahlali* judgement, in the case of people facing evictions, the municipality must ensure that engagement includes taking the wishes of those who are about to become homeless into account.<sup>283</sup> Human rights can be used as a tool to promote and encourage a system of good governance that equally respects the socio-economic rights of the poor and provide service services which can transform and improve the quality of their lives.

#### 4.5.3 COMPELLING GOVERNMENT TO MEET ITS MINIMUM CORE OBLIGATIONS

Brand holds that socio-economic rights such as food, water, healthcare services and shelter create entitlements to material conditions for humane welfare.<sup>284</sup> These socio-economic rights have been developed to ensure that the poor and disadvantaged of society have adequate access to resources and opportunities that could assist them to live a decent life. This is one of the main reasons why socio-economic rights have been recognised as important human rights by various international and regional human rights instruments such as the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>285</sup> and the African Charter on Human and People's Rights (African Charter).<sup>286</sup> These rights are of particular importance to the poor in overcoming issues of poverty, marginalisation and exclusion. Government must therefore take appropriate action to ensure all citizens are able to enjoy and exercise these rights.

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<sup>282</sup> L Chenwi and K Tissington 'Engaging meaningfully with government on socio-economic rights: a focus on the right to housing' Community Law Centre: University of Western Cape (2010) 25.

<sup>283</sup> *Abahlali Basemjondolo* para 114.

<sup>284</sup> D Brand 'Introduction to socio-economic rights in the South African Constitution' [http://www.chr.up.ac.za/chr\\_old/centre\\_publications/socio/book/Chapter%201-Introduction.pdf](http://www.chr.up.ac.za/chr_old/centre_publications/socio/book/Chapter%201-Introduction.pdf) (Accessed 27 April 2017).

<sup>285</sup> International Covenant on Economic, Social and Cultural Rights Available from: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx> (Accessed 5 July 2018).

<sup>286</sup> African Charter on Human and Peoples' Rights Available from: [http://www.achpr.org/files/instruments/achpr/banjul\\_charter.pdf](http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf) (Accessed 5 July 2018).

The International Covenant on Economic, Social and Cultural Rights (ICESCR) confirms that governments have a duty to ensure fulfilment and enjoyment of the socio-economic rights of their citizens.<sup>287</sup> According to Mbazira, there is no doubt that the full realisation of socio-economic rights requires resources.<sup>288</sup> This means that the ability of the government to improve or advance the realisation of people's socio-economic rights, such as access to housing is subject to the availability of resources. The covenant, whilst recognising that the availability of resources may be a potential constraint to the enjoyment of people's socio-economic rights, at the same time places an obligation on states to ensure that they at least meet or realise the minimum core obligations of their people, including housing, food, water, education and health care. The ultimate aim is then to at least ensure that governments take care of those socio-economic rights that are of significant importance for the survival of the poor. This further implies that that when a government imposes evictions that will leave people homeless it should take every step necessary to ensure that it meets its minimum core obligations such as providing them with alternative accommodation and other basic services.

In the case of *Blue Moonlight*, the city argued that they were not able to provide the unlawful occupiers with additional housing because of financial constraints. The court was unmoved by the city's argument that it does not have the financial means to provide the occupiers with alternative accommodation.<sup>289</sup> The Court made it clear that a municipality must respect the occupiers' right to access housing and fulfil its minimum core obligation of providing the occupiers with a roof over their heads and that a lack of availability of resources may not be used as an excuse to violate the occupiers right to access housing.<sup>290</sup> Although the court granted the eviction order they still considered the occupiers' right to access housing and forced the government to commit to its minimum core obligations. This is an important step for the institutionalising of human rights and socio-economic privileges.

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<sup>287</sup> Article 2 (1) of International Covenant on Economic, Social and Cultural Rights Available from:

<sup>288</sup> Unpublished: C Mbazira 'The enforcement of socio-economic rights in the African human rights system: drawing inspiration from the International Covenant on Economic, Social and Cultural Rights and South Africa's evolving jurisprudence' unpublished Master's thesis, University of Pretoria 2003 16.

<sup>289</sup> *Blue Moonlight* para 71-74.

<sup>290</sup> *Blue Moonlight* para 96.



## 4.6 CONCLUSION

This chapter illustrated how the additional benefits of meaningful engagement as identified in Chapter 3 could contribute to enhancing the capacity and transforming the lives of the poor. Access to government information can empower the poor to claim their socio-economic rights, encourage shared decision-making and increase government responsiveness. It creates space for the poor to become respected partners in policy making and encourages equality in policy making. Increased access to goods and services may lead to improved service delivery outcomes for the poor as well as improving the quality of lives of the poor, whilst negotiation can strengthen the bargaining power of the poor, expand their skills and knowledge and opportunities to build social networks that could assist them in transforming their lives. Meaningful engagement encourages an environment where people are treated with respect and dignity; it encourages a system of good governance and compels government to meet its minimum core obligations.

## CHAPTER 5 - CONCLUSION AND RECOMMENDATIONS

### 5 INTRODUCTION

The focus of this mini-dissertation was to explore and determine how the additional benefits of meaningful engagement enhance the capacity and transform the lives of the poor. I first had to explore and identify what additional benefits are produced by the mechanism of meaningful engagement. Secondly I determined and discussed how the identified additional benefits of meaningful engagement enhance the capacity and transform the lives of the poor. Based on the research and the evidence gathered, this chapter draws general and core conclusions and proposed some recommendations.

#### 5.1 GENERAL FINDINGS

During this research it was found that meaningful engagement emerged from housing rights cases as a mechanism to bring relief to poor communities who were about to become homeless. The idea was that the courts give effect and contribute to the transformative dream of the South African Constitution by facilitating public participation in cases where people stand to be displaced or lose their homes.

The mechanism of meaningful engagement creates a platform for the voices of those who have limited or no access to resources to fight and protect the enjoyment of their socio-economic rights as contained and promised in the South African Constitution.

Housing rights cases such as *PE Municipality*,<sup>291</sup> *Olivia Road*,<sup>292</sup> *Abahlali*,<sup>293</sup> *Joe Slovo*,<sup>294</sup> and *Blue Moonlight*<sup>295</sup> played a significant role in the development of the mechanism of meaningful engagement. The judgements of each of these cases significantly contributed to the development of the body of knowledge and jurisprudence on meaningful engagement.

A decision to evict communities without first talking to them may result in the Court preventing such action to take place or to refuse the granting of an eviction order,

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<sup>291</sup>*Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC).

<sup>292</sup>*Occupiers of 51 Olivia Road v City of Johannesburg* 2008 3 SA 208 (CC).

<sup>293</sup>*Abahlali Basemjondolo Movement of South Africa and Another v Premier of Kwazulu-Natal and Others* 2009 SA 31 (CC).

<sup>294</sup>*Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 545 (CC).

<sup>295</sup>*City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 SA 104 (CC).

especially if it is going to impact the lives and the socio-economic rights of communities such as the right to access housing.

The courts, municipalities as well as civic and non-governmental organisations all have a crucial role to play in ensuring engagement with affected communities are meaningful.

### 5.1.1 CORE FINDINGS

The mechanism of meaningful engagement creates the space and facilitates participation of ordinary, poor citizens in public affairs that affects their lives and impacts the enjoyment of their socio-economic rights.

The engagement process produces many positive benefits to poor communities affected by evictions. These benefits could enhance the capacities of poor communities and empower them to transform their lives. The mechanism of meaningful engagement produces the following additional benefits:

- meaningful engagement is a tool to access important government information;
- meaningful engagement can be used as a mechanism to influence and shape government priorities;
- meaningful engagement increases access to basic goods and service;
- meaningful engagement is a tool to facilitate negotiation and increase the bargaining power of the poor and
- meaningful engagement is an instrument to ensure respect for human rights principles

Capacity building means providing opportunities for people to drive and shape their own development and change processes.<sup>296</sup> In addition to providing the poor with a platform to express their views and influence change, the additional benefits generated or produced by the mechanism of meaningful engagement have produced the following critical elements that profoundly contributes and empowers the poor to effect the change necessary to transform their lives, namely access to information, proper and meaningful inclusion and participation of affected communities, sharing of government power, accountability and openness, access to basic core services such as housing, water and

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<sup>296</sup> Unpublished: EFA Mazibuko 'The participation of women rural areas in development projects for sustainable livelihoods: a case of community groups in Maqongqo area, Kwazulu –Natal province' unpublished Master's thesis, University of Stellenbosch, 2017 48.

sanitation and electricity, good governance, and respect for the human dignity of all people.

The research has further produced evidence that through the additional benefits produced by the mechanism of meaningful engagement the capacity of the poor can be improved through the learning opportunities that can be provided to them during the engagement processes. Empowerment implies that communities must be able to drive their own development. This fact has also been emphasised in the eviction cases referred to in this mini-dissertation. To develop the power and confidence to drive their own development, communities must be empowered through building skills and abilities that would empower them to take the necessary action and decisions that are needed to protect their socio-economic rights and secure their development. The process of negotiation that is generated by means of meaningful engagement creates opportunities to develop and expand the personal skills and knowledge of communities involved in eviction cases.

The spaces that are created for the active participation and involvement of affected communities in the engagement, negotiation and decision making processes by means of meaningful engagement also create conditions conducive for social learning. Another important benefit of social learning is the ability to afford the affected communities a platform to genuinely express their views for the delivery of policy outcomes that will benefit and improve their lives.<sup>297</sup>

Being able to access housing and basic core services will not only allow people to live decent lives but also to become more self-sufficient which means they will have more chances to access economic opportunities for financial growth and independence. Being provided with alternative accommodation close to the place where they resided and granting them access to goods and services assisted the affected communities of the eviction cases discussed in this mini-dissertation with opportunities to sustain current economic opportunities. This may hold the potential of them becoming financially self-sufficient and less dependent on government for assistance.

This research also produced evidence that the additional benefits generated by meaningful engagement create an environment conducive for empowerment by encouraging a system

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<sup>297</sup> Unpublished: EFA Mazibuko 'The participation of women rural areas in development projects for sustainable livelihoods: a case of community groups in Maqongqo area, Kwazulu –Natal province' unpublished Master's thesis, University of Stellenbosch, 2017 47.

of good governance where local governments are forced to respect the affected community's rights to participation, human dignity and access to housing.

Meaningful engagement produces additional benefits that enhances the participation capacity of the poor, their personal capacities and potential economic opportunities to goods and service that can transform their lives socially and economically.

### 5.1.2 RECOMMENDATIONS

Based on the information and analysis gathered the following recommendations are proposed.

In order to effectively contribute to building the capacity of communities to actively participate in their own development, it is necessary for the courts, local government and non-governmental organisations to properly facilitate and support affected communities during the engagement processes. They each have a critical role to fulfil in making the engagement process meaningful and transformative.

The courts should exercise supervisory jurisdiction over the engagement process. Liebenberg rightly argues that this would ensure that the Court oversee the engagement process and make sure that the outcome of the agreement reached is in line with the initial intention of the Court, namely to necessitate government to first enter into dialogue with affected communities to give them a chance to state their case before embarking on a decision to evict.<sup>298</sup>

Local government should create a space that will allow for genuine participation and proper involvement of communities affected by evictions in order to give them a proper chance to effectively voice their concerns and express their preferences. In other words, they should engage with the community in a manner that is characterised by fullness of information, flexibility, reasonableness and transparency.<sup>299</sup>

Non-governmental organisations should also fulfil their constitutional responsibility and support affected communities by providing them with assistance in terms of giving them legal information and advice on the entitlements and socio-economic rights that they

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<sup>298</sup> S Liebenberg 'Engaging the paradoxes of universal and particular in human rights adjudication: the possibilities and pitfalls of meaningful engagement' 2012 12 *African Human Rights Law Journal* 1-28.

<sup>299</sup> G Muller 'Conceptualising meaningful engagement as a deliberative democratic partnership' (2011) 22 *Stellenbosch Law Review* 742-757.

entitled to, so that they can effectively and properly express their views, protect their rights and access the benefits produced by the mechanism of meaningful engagement.<sup>300</sup>

## 5.2 CONCLUSION

The mechanism of meaningful engagement produces additional benefits that create an enabling environment to make it possible for poor communities affected by evictions to empower themselves. That enabling environment includes a space to gain important government information, access basic goods and services, to share in government decision-making and to develop the networks and skills and knowledge necessary to effectively express their views, effect change and demand their socio-economic rights.

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<sup>300</sup> L A Williams 'The right to housing in South Africa: an evolving jurisprudence' (2014) 45 (3) *Columbia Human Rights Law Review* 834.



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