

A critical examination of ‘meaningful engagement’ with regard to education law

By

Natasha René Watt

Submitted in partial fulfilment of the requirements for the degree
LLM

13 October 2014

Table of contents

Chapter 1: Introduction.....	3-7
-------------------------------------	------------

Chapter 2: The introduction and development of ‘meaningful engagement’ in housing litigation

2.1 Introduction.....	8
2.2 Statutory framework on meaningful engagement	
2.2.1 The Constitution.....	8-9
2.2.2 Housing legislation.....	9-10
2.3 Case law on meaningful engagement	
2.3.1 <i>Grootboom</i> case.....	10
2.3.2 <i>Port Elizabeth Municipality</i> case.....	10-11
2.3.3 <i>Olivia Road</i> case.....	11-14
2.3.4 <i>Joe Slovo</i> case.....	14-16
2.3.5 <i>Joe Slovo II</i> case.....	16-17
2.3.6 <i>Abahlali</i> case.....	17
2.3.7 <i>Schubart Park</i> case.....	18
2.4 Conclusion.....	18-19

Chapter 3: The introduction and development of ‘meaningful engagement’ in education litigation

3.1 Introduction.....	20-21
3.2 Case law on meaningful engagement	
3.2.1 <i>Hoërskool Ermelo</i> case.....	21-23
3.2.2 <i>Juma Masjid</i> case.....	24-25
3.2.3 <i>Welkom High School</i> case.....	26-30
3.2.4 <i>Rivonia Primary School</i> case.....	30-33
3.3 Conclusion.....	33-36

Chapter 4: The relationship between public school governing bodies and state authorities and their corresponding powers and duties

4.1 Introduction.....	37
4.2 The Constitution.....	37-38
4.3 The South African Schools Act.....	38
4.4 Role players as envisaged by the Schools Act	
4.4.1 The school and school governing body (SGB).....	39-40
4.4.2 The principal.....	40-41
4.4.3 Member of the Executive Council (MEC) and Head of the Provincial Department of Education(HOD).....	41-42
4.4.5 Minister of Basic Education.....	42
4.5 Conflict of role players' interests and powers.....	42-45
4.6 Potential power differentials and their effect on meaningful engagement.....	45-47
4.7 Conclusion.....	47-49
Chapter 5: Conclusion.....	50-55
Bibliography.....	56-60

Chapter 1: Introduction

‘A 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. Wherever possible, respectful face-to-face engagement or mediation through a third party should replace arms-length combat by intransigent opponents.’

Sachs J, *Port Elizabeth Municipality v Various Occupiers* 2004(12) BCLR 1268 (CC) para 39.

‘Meaningful engagement’ is an innovative remedy, which was created and developed by the Constitutional Court in terms of its broad remedial powers to ‘grant appropriate relief’ and to ‘make any order that is just and equitable’.¹

Moseneke DCJ has stated that this allows courts to:

‘...forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties...by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements’.²

He goes further in describing this approach as a valuable one, which ‘advances constitutional justice, particularly by ensuring that the parties themselves become part of the solution’.³

Liebenberg describes meaningful engagement as a ‘participatory constitutional remedy’, which stimulates direct engagement between parties in socio-economic rights litigation.⁴ Our Constitution promotes a kind of grassroots democracy, which is participatory in nature. Chenwi and Tissington describe participatory democracy as democracy which is ‘accountable,

¹ The Constitution of the Republic of South Africa, 1996 (hereafter “the Constitution”) section 38 and 172(1)(b).

² *Head of Mpumalanga Department of Education v Hoërskool Ermelo* 2010(2) SA 415 (CC) (hereafter ‘*Hoërskool Ermelo*’) para 97.

³ *Hoërskool Ermelo* para 97.

⁴ Liebenberg ‘Deepening democratic transformation in South Africa through participatory constitutional remedies’ (forthcoming) 2014 *National Journal of Constitutional Law* 13.

transparent, responsive and open’ and makes provision for ‘individuals and communities to take part in service delivery processes and decisions’.⁵ They argue that meaningful engagement between communities and government is important in ensuring effective service delivery.⁶ Cornell and Muvangua make the following submission:

‘Sustainable reconciliation is only possible through direct participatory democracy in which everyone in the community must have a voice and must be heard. Thus participatory democracy is organic to the communities in conflict and it is the actual voices of the human beings involved in the conflict that must be heard in order to enable genuine reconciliation between the parties.’⁷

The primary aim of this dissertation is to determine the potential of ‘meaningful engagement’ in an education litigation context. The question of whether this remedy is appropriate and effective will be examined. The goal of this dissertation is to make recommendations with regard to unlocking the potential of this remedy and making it more effectual between the parties concerned.

Meaningful engagement is not a new concept in our law and was first introduced by the Constitutional Court in the eviction cases of *Government of the Republic of South Africa v Grootboom* (hereafter ‘*Grootboom*’)⁸ and *Port Elizabeth Municipality v Various Occupiers* (hereafter ‘*Port Elizabeth Municipality*’)⁹. The case of *Occupiers of 51 Olivia Road, Berea Township and 187 Main Street Johannesburg v City of Johannesburg* (hereafter ‘*Olivia Road*’) provided a simplistic definition of meaningful engagement as ‘a two way process in which the city and those about to become homeless would talk to each other meaningfully in order to achieve certain objectives’.¹⁰ Housing

⁵ Chenwi and Tissington ‘Engaging meaningfully with government on socio-economic rights – A focus on the right to housing’ (2010) 6.

⁶ Chenwi and Tissington (2010) 6 and 7.

⁷ Cornell and Muvangua *Ubuntu and the Law – African ideals and postapartheid jurisprudence* (2012) 17.

⁸ 2001 (1) SA 46 (CC) (hereafter ‘*Grootboom*’).

⁹ 2004 (12) BCLR (CC) (hereafter ‘*Port Elizabeth Municipality*’)

¹⁰ 2008 (3) SA 208 (CC) (hereafter ‘*Olivia Road*’) para 14.

litigation jurisprudence has shown that ‘meaningful engagement’ has been applied as a prerequisite factor in determining whether it is ‘just and equitable’ to grant an eviction, furthermore the Court has ordered ‘meaningful engagement’ in a provisional and remedial context. In chapter 2 of my dissertation I discuss the introduction and development of ‘meaningful engagement’ in housing litigation. This chapter is important because it illustrates how the Constitutional Court initially created this remedy and how it has developed through subsequent housing litigation jurisprudence. The aim of chapter 2 is to determine what ‘meaningful engagement’ encompasses, how it originated and how it should be applied. This will then serve as a framework for understanding ‘meaningful engagement’ and how it should be applied in an educational context.

Meaningful engagement is a relatively new concept with regard to education law in South Africa; therefore there is a need for research in this area. In chapter 3 of my dissertation I examine the introduction and development of ‘meaningful engagement’ in education litigation. Most of the educational disputes that our Courts have adjudicated stem from a power struggle between school governing bodies and education authorities. The heart of the problem concerns the powers of provincial departments to override or depart from policies adopted by school governing bodies. The Constitutional Court has in several cases emphasised that their relationship should be one of co-operation where they should work hand-in-hand in finding a solution. In order to facilitate co-operation the Court has on a number of occasions ordered meaningful engagement between the parties in order to find a solution. The aim of this chapter is to determine how the courts have applied this remedy, whether it has been effective and whether the courts have given guidance as to how the parties should undergo the engagement.

A discussion of the case law shows that the court by means of a ‘criterion for reasonable state action’ has applied meaningful engagement.¹¹ Meaningful engagement has formed part of interim and final remedial orders which have

¹¹ Liebenberg(2014) 27.

normally been coupled with a supervisory order where the parties have to report back to the court on the outcomes of the engagement process.¹²

There is a trend in our law to use mediation as it is seen as a way for parties to come up with their own tailor made solution, which has the potential of being a “win-win” situation for both parties. One cannot underestimate the benefits of undergoing mediation and that is why our Magistrates Courts have launched a pilot project of compulsory court based mediation of civil disputes.¹³ Sachs J in *Port Elizabeth Municipality* highlights that compulsory mediation has become a common feature in modern systems and importantly notes that in court ordered mediation ‘the compulsion lies in participating in the process, not reaching a settlement’.¹⁴ One of the reasons for mediation failure is that the power differentials between the parties are too great, it is therefore important that this be explored. In Chapter 4 of my dissertation I will be dealing with the power relationship between school governing bodies on the one hand and educational authorities on the other. This will help to determine whether meaningful engagement is an appropriate remedy to be used by parties in educational litigation

It is important to have this debate on meaningful engagement, as it is a remedy, which the courts have continually applied in housing litigation and more recently education litigation. I undertake a critical examination of the remedy of ‘meaningful engagement’ in housing and more specifically education disputes. This project is literature based and specifically focuses on case law. Other important sources include the Constitution, legislation, journal articles and textbooks.

It is important to note that the Constitutional Court has used the terms ‘meaningful engagement’, ‘mediation’ and ‘consultation’ interchangeably as if they are one and the same. However, Chenwi and Tissington submit that there are differences. They define ‘consultation’ as a process where people

¹² Liebenberg(2014) 27.

¹³ Boule ‘Promoting rights through court-based ADR?’ (2012) *SAJHR* 13-14.

¹⁴ *Port Elizabeth Municipality* para 40.

are asked for their input on matters which affect them but are not involved in the final decision making process.¹⁵ They furthermore define ‘mediation’ as a voluntary process where persons in conflict would appoint a mediator to help them reach an agreement.¹⁶ Chenwi and Tissington argue that ‘meaningful engagement’ looks like both ‘consultation’ and ‘mediation’ and that this alternative dispute resolution mechanism enables the parties make final decisions together.¹⁷ It is submitted that ‘meaningful engagement’ and ‘procedural fairness’ share similar characteristics but they are not the same thing. ‘Meaningful engagement’ should be seen as a process of continuous negotiations and engagement, using a ‘bottom-up approach’ in all actions even if they don’t constitute ‘administrative action’. It is submitted that procedural fairness on the other hand is a requirement in the fulfilment of just administration and is only applicable with regard to administrative action.

In Chapter 5 of my dissertation there is a conclusion with recommendations. These recommendations will be two fold. On the one hand they will be directed at determining when it is appropriate to order ‘meaningful engagement’ and on the other, how to make ‘meaningful engagement’ a more effective remedy between the parties in conflict.

¹⁵ Chenwi and Tissington (2010) 10.

¹⁶ *Supra*.

¹⁷ *Supra*.

Chapter 2: The introduction and development of ‘meaningful engagement’ in housing litigation

2.1 Introduction

Meaningful engagement with regard to housing litigation is not a new concept in our law. The purpose of this chapter is to show how the Constitutional Court initially developed the concept and how it has been moulded through subsequent housing litigation cases. An examination of the relevant sections of the Constitution, Housing Legislation and case law is necessary to fully understand what meaningful engagement encompasses, how it originated and how it should be applied.

2.2 Statutory framework on meaningful engagement

2.2.1 The Constitution¹⁸

The Constitution never specifically refers to the words ‘meaningful engagement’ but it is submitted that it could be inferred from a number of sections.¹⁹ The Constitutional Court in *Olivia Road* held that the basis of ‘meaningful engagement’ could be found in the preamble to the Constitution, which says that the government has a duty to ‘improve the quality of life of all citizens and free the potential of each person’.²⁰ Furthermore, section 7(2), places a duty on the State to ‘respect, protect, promote and fulfil the rights in the Bill of Rights’ of which the most important are the right to life and dignity.²¹ Furthermore, section 152 places a duty on local government to, ‘provide services to communities in a sustainable manner, promote social and economic development, and encourage the involvement of communities and community organisations in matters of local government’.²² The Court held that in light of these constitutional provisions a municipality which evicts

¹⁸ The Constitution of the Republic of South Africa Act 108 of 1996 (hereafter ‘The Constitution’)

¹⁹ Chenwi and Tissington(2010) 11.

²⁰ *Olivia Road* para 16.

²¹ *Olivia Road* para 16; The Constitution section 7(2).

²² *Olivia Road* para 16; The Constitution section 152.

persons from their homes without meaningfully engaging with them acts in a manner which goes against the spirit and purpose of the constitutional obligations placed upon them.²³ Lastly, the Court refers to sections 26(2) and (3) which provide that the State must act reasonably in realising the right to housing and when dealing with evictions, no one may be evicted without a court considering all the relevant circumstances and giving an order.²⁴

Yacoob J stresses in his judgment that the Constitution obliges every municipality to engage meaningfully with persons who are facing homelessness and a circumstance that a court must take into account in determining compliance with the requirement of reasonableness in section 26(3) is if there had been meaningful engagement.²⁵

2.2.2 Housing legislation

The legislature has enacted various pieces of legislation to give effect to the right to housing in section 26 of the Constitution, some of which make indirect reference to 'meaningful engagement'.²⁶ The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (hereafter 'PIE Act')²⁷ regulates the process of eviction of unlawful occupiers from land or housing.²⁸ In terms of this Act courts are vested with a discretion based on 'justice and equity' in determining whether an eviction order should be granted or not.²⁹ In the case of *Port Elizabeth Municipality* the court held that in terms of the PIE Act, 'it would not ordinarily be just and equitable to order eviction if proper discussion, and where appropriate, mediation, had not been attempted'.³⁰

²³ *Olivia Road* para 16.

²⁴ *Olivia Road* para 17 and 18.

²⁵ *Olivia Road* para 18.

²⁶ 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* 1 13.

²⁷ Act 19 of 1998 (hereafter 'PIE Act').

²⁸ Liebenberg (2014) *National Journal of Constitutional Law* (forthcoming) 13.

²⁹ Liebenberg (2012) 12 *African Human Rights Law Journal* 1 14.

³⁰ *Port Elizabeth Municipality* para 43.

The Housing Act³¹ also makes reference to ‘meaningful engagement’.³² Section 2(1)(l) obliges all spheres of government to ‘consult meaningfully with individuals and communities affected by housing development’ and ‘facilitate active participation of all relevant stakeholders in housing development’.³³

2.3 Case law on meaningful engagement

2.3.1 Grootboom case

The concept of meaningful engagement was first introduced in housing litigation in the case of *Grootboom*. The Court held that they expected officials of the municipality responsible for housing, to engage with persons who were in illegal occupation and facing eviction.³⁴ The Court also stated that when evaluating the reasonableness of State action the inherent dignity of human beings must be taken into account and if not, the Constitution would be worth ‘infinitely less than its paper’.³⁵

2.3.2 Port Elizabeth Municipality case

The concept of meaningful engagement was further developed in the case of *Port Elizabeth Municipality* but unfortunately not yet properly defined.³⁶ This case involved an eviction order sought by the Port Elizabeth Municipality against a group of impoverished black people living in twenty-nine shacks erected on privately owned land.³⁷ Sachs J for the Court in his judgment eloquently said that, ‘the Constitution and PIE confirm that we are not islands unto ourselves’.³⁸ Sachs J placed a great deal of emphasis on mediation in his judgment and said that courts should encourage and require parties to ‘engage with each other in a proactive and honest endeavour to find mutually

³¹ Act 107 of 1997 (hereafter ‘The Housing Act’).

³² Chenwi “‘Meaningful engagement’ in the realization of socio-economic rights: The South African experience’ (2011) 26 *SA Public Law* 128 136.

³³ The Housing Act section 2(1)(l).

³⁴ *Grootboom* para 87.

³⁵ *Grootboom* para 83.

³⁶ Chenwi (2011) 26 *SA Public Law* 128 138.

³⁷ *Port Elizabeth Municipality* para 1.

³⁸ *Port Elizabeth Municipality* para 37.

acceptable solutions'.³⁹ Sachs J went further in saying that where possible, 'respectful face-to-face engagement or mediation through a third party should replace arms-length combat'.⁴⁰ The Constitutional Court recognised that in resolving a dispute between the parties, it is important for them to meaningfully engage before litigation.⁴¹ Sachs J highlighted some advantages of mediation, that it reduces expenses and tensions between parties which accompany litigation, the process allows parties to relate to each other in 'pragmatic and sensible ways' and furthermore, 'promotes respect for human dignity'.⁴² In this case Sachs J with much apprehension, came to the conclusion that mediation would not be appropriate for the parties as 'too much water had flowed under the bridge' and at that point most of the advantages of mediation had been lost.⁴³ However, courts were cautioned in future litigation to be reluctant to grant orders of eviction as being just and equitable if no reasonable steps had been taken to obtain a mediated solution.⁴⁴ The approach as set out in this case has been followed in many subsequent judgments. The courts have required there to be 'meaningful engagement' before granting an order of eviction and if there was no 'meaningful engagement' it would be a relevant factor to be taken into account in determining whether it was just and equitable to grant the eviction.⁴⁵

2.3.3 Olivia Road case

The case of *Olivia Road* is the leading precedent when it comes to 'meaningful engagement'. In this case the concept was further developed, defined and used successfully as a remedy between the parties. This case involved an appeal lodged by more than 400 occupiers of so called 'bad buildings' against the Supreme Court of Appeal's decision to allow their

³⁹ *Port Elizabeth Municipality* para 39.

⁴⁰ *Port Elizabeth Municipality* para 42.

⁴¹ McLean 'Meaningful engagement: one step forward of two back? Some thoughts on Joe Slovo' (2010) 3 *Constitutional Court Review* 223 233.

⁴² *Port Elizabeth Municipality* para 43.

⁴³ *Port Elizabeth Municipality* para 47.

⁴⁴ *Port Elizabeth Municipality* para 61.

⁴⁵ Skelton 'Face to face: Sachs on restorative justice' (2010) 25 *SA Public Law* 94 103.

eviction. The SCA held that their occupation constituted a threat to their health and safety.⁴⁶ After the Constitutional Court had heard arguments from the parties but before it made a decision, the Court ordered in the interim that the parties meaningfully engage in an attempt to resolve the differences and difficulties between them and alleviate the plight of the occupiers.⁴⁷ The parties subsequently reached a comprehensive settlement agreement, which was then later endorsed by the Court.⁴⁸

Yacoob J in his judgment defined meaningful engagement as ‘a two-way process in which the city and those about to become homeless would talk to each other meaningfully in order to achieve certain objectives’, he further emphasised that there is no closed list of objectives of engagement.⁴⁹ Chenwi notes that engagement must be tailored to the particular circumstances of each situation and be done both on an individual and collective basis.⁵⁰ Yacoob J opines that if both sides were willing to participate in the engagement process reasonably and in good faith it would have the potential of resolving the dispute and would create a sense of understanding and care between the parties.⁵¹ Finally it was mentioned that secrecy is counter-productive to the process of engagement.⁵² Yacoob J, rightfully so, refers to the power differentials between the municipality and the people to be evicted. He says that the municipality must make reasonable efforts to engage with these vulnerable persons as they might not understand the process and may refuse to take part in it.⁵³ Yacoob J suggests that civil society organisations should facilitate the engagement process.⁵⁴

⁴⁶ *Olivia Road* para 1.

⁴⁷ *Olivia Road* para 5.

⁴⁸ *Olivia Road* para 6.

⁴⁹ *Olivia Road* para 14.

⁵⁰ Chenwi ‘A new approach to remedies in socio-economic rights adjudication: occupiers of 51 Olivia Road and Other v City of Johannesburg and Others’ (2009) 2 *Constitutional Court Review* 371 380.

⁵¹ *Olivia Road* para 15 and 20.

⁵² *Olivia Road* para 21.

⁵³ *Olivia Road* para 15.

⁵⁴ *Olivia Road* para 20.

Liebenberg submits that the Court's judgment is a 'welcome affirmation of the principle of participatory, deliberative democracy in resolving conflicts involving constitutional rights such as housing'.⁵⁵ However, Liebenberg warns us that there is a real danger that, 'meaningful engagement as an adjudicatory strategy may descend into an unprincipled, normatively empty process of local dispute settlement'.⁵⁶ Furthermore she opines that a normative framework is essential in enabling the parties, the public and the courts (if engagement ultimately breaks down) to assess whether the processes and outcomes of the engagement were consistent with the Constitution.⁵⁷

It is submitted that three important aspects emerged from this case. Firstly, meaningful engagement between the parties is a circumstance to be considered by the court in terms of section 26(3) of the Constitution.⁵⁸ Secondly, the absence of an engagement or an unreasonable response by the municipality in the engagement process would weigh greatly against them in the granting of an eviction order.⁵⁹ Lastly, the Court emphasised that the process of engagement should take place before litigation commences unless it is not reasonable to do so because of compelling reasons.⁶⁰ As Chenwi argues, 'this case established a more robust approach to enforcing housing rights than was previously evident (...) [with] the emphasis on meaningful engagement prior to eviction decisions being made'.⁶¹

With regard to costs the Court ordered the city to pay the applicants' costs because it stated that the proceedings would have been avoided if there had been meaningful engagement before litigation commenced.⁶² It is submitted that this case demonstrates that the Court will take a dim view of the City if meaningful engagement was only attempted after litigation had commenced,

⁵⁵ Liebenberg (2012) 12 *African Human Rights Law Journal* 1 18.

⁵⁶ Liebenberg (2012) 12 *African Human Rights Law Journal* 1 19.

⁵⁷ Liebenberg (2012) 12 *African Human Rights Law Journal* 1 20.

⁵⁸ *Olivia Road* para 23.

⁵⁹ *Olivia Road* para 21.

⁶⁰ *Olivia Road* para 30.

⁶¹ Chenwi (2009) 2 *Constitutional Court Review* 371 392.

⁶² *Olivia Road* para 53.

this is why they awarded a costs order against them. Budlender has said positive things about engagement orders by saying that, 'our experience has been that an order for "engagement" and, where necessary, report[ing] back to the court, can be surprisingly effective in achieving resolution of disputes which had seemed utterly intractable'.⁶³

2.3.4 Joe Slovo case

In the Constitutional Court case of *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* (hereafter 'Joe Slovo')⁶⁴ the concept of meaningful engagement featured once again. This case involved an eviction application brought against 20 000 residents of a large, informal settlement known as Joe Slovo.⁶⁵ The reason for the eviction was to make way for the development of better-quality housing (the so called 'N2 Gateway Project') as the conditions of living in Joe Slovo were described as 'deplorable' and 'unfit for reasonable human habitation'.⁶⁶

In this case five judgments were handed down in which they all supported the same order for eviction but for different reasons. It was argued by the amicus curiae in this case that the State did not engage meaningfully with the applicants and that development at Joe Slovo on site without the relocation of the applicants was a feasible option.⁶⁷ Yacoob J, however, held that those factors within themselves were not sufficient to tilt the scale against the eviction and relocation.⁶⁸ Yacoob J found that the engagement submissions had been taken into account because the respondents were directed to engage meaningfully with the applicants during the relocation process.⁶⁹ As Muller observes, this judgment makes it clear that meaningful engagement

⁶³ Budlender 'The Judicial Role in Cases Involving Resource Allocation' paper delivered at a Conference of the Middle Temple, Cape Town, September 2010 (accessed on 28 August 2014) <<http://www.sabar.co.za/law-journals/2011/april/2011-april-vol024-no1-pp35-38.pdf>> 3.

⁶⁴ 2010 (3) SA 454 (CC) (hereafter 'Joe Slovo').

⁶⁵ *Joe Slovo* para 8.

⁶⁶ *Joe Slovo* para 24.

⁶⁷ *Joe Slovo* para 112.

⁶⁸ *Joe Slovo* para 113.

⁶⁹ *Supra*.

could play a role in the remedial stage of litigation however; this should not be viewed as a substitute from engagement that precedes litigation.⁷⁰

Moseneke DCJ held that the respondents did not give the residents the courtesy and respect of meaningful engagement, which is a prerequisite for an eviction order under the PIE Act.⁷¹ However, Moseneke DCJ found that it was just and equitable to grant the order for eviction but that it had to be coupled with a further order guaranteeing a specified portion of housing allocated to the applicants within a process of meaningful engagement.⁷²

Ngcobo J held that if, in the best judgment of the government, it is necessary to relocate people, a court should 'be slow to interfere with their decisions as long as it is still reasonable in terms of section 26(2) and just and equitable under PIE'.⁷³ Ngcobo J held that meaningful engagement was critical when it came to the relocation process.⁷⁴ The Court found that the eviction order was just and equitable even in the absence of meaningful engagement prior to litigation. McLean argues this constitutes 'an even narrower conception of reasonableness in section 26(2) of the Constitution'.⁷⁵

Sachs J held that there were major failures of communication on the part of the authorities and that evidence suggested a 'frequent employment of a top-down approach where the purpose of reporting back to the community was seen as being to pass on information about decisions already taken, rather than to involve the residents as partners in the process of decision making itself'.⁷⁶ Liebenberg argues that this top-down approach to engagement is a retreat from the structured and reciprocal deliberative process, which the court followed in *Olivia Road*.⁷⁷ Sachs J further held that, 'meaningful engagement

⁷⁰ Muller 'Conceptualising "meaningful engagement" as a deliberative democratic partnership' (2011) 22 *Stellenbosch Law Review* 742 757.

⁷¹ *Joe Slovo* para 167.

⁷² *Joe Slovo* para 175.

⁷³ *Joe Slovo* para 253.

⁷⁴ *Joe Slovo* para 262.

⁷⁵ McLean (2010) 3 *Constitutional Court Review* 223 241.

⁷⁶ *Joe Slovo* para 378.

⁷⁷ Liebenberg (2012) 12 *African Human Rights Law Journal* 1 23.

between the authorities and those who may become homeless as a result of government activity, is vital to the reasonableness of the government activity' however, he found that even though there was a lack of consultation, it could not be said that no meaningful engagement took place.⁷⁸ Liebenberg makes the observation that all the judgments seem to accept that even though there were defects in the engagement process prior to litigation these would be mitigated by a 'combination of detailed substantive safeguards and orders of meaningful engagement at the remedial stage'.⁷⁹

The Court was therefore willing to condone the deficiencies in the consultation process because the objectives of the housing project outweighed the defects in the consultation process.⁸⁰ In *Olivia Road* the Court laid down a principle that absence of meaningful engagement would weigh greatly against the state in seeking an eviction order. It is submitted that this principle was diluted in *Joe Slovo*. Liebenberg argues that meaningful engagement on the interpretation in *Olivia Road* constitutes a substantive normative criterion derived from section 26 of the Constitution and that *Joe Slovo* represents a retreat from that principle.⁸¹ In *Joe Slovo* as opposed to *Olivia Road* meaningful engagement was used in the remedial phases to ensure participation in the eviction order and not as a normative principle.⁸² Liebenberg concludes that the judgment of *Joe Slovo* was normatively weak but contained strong remedial safeguards.⁸³

2.3.5 Joe Slovo II case

The case of *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* (hereafter '*Joe Slovo II*')⁸⁴ was brought subsequently to the decision in *Joe Slovo*. In this case it was contended that circumstances had changed and there were second thoughts as to whether the relocation

⁷⁸ *Joe Slovo* para 379.

⁷⁹ Liebenberg (2014) *National Journal of Constitutional Law* (forthcoming) 17.

⁸⁰ Chenwi (2011) 26 *SA Public Law* 128 147.

⁸¹ Liebenberg (2012) 12 *African Human Right Law Journal* 1 23.

⁸² *Supra*.

⁸³ Liebenberg (2012) 12 *African Human Right Law Journal* 1 23.

⁸⁴ 2011 (7) BCLR 723 (CC) (hereafter '*Joe Slovo II*').

order of the Court was still appropriate and effective.⁸⁵ There were concerns about the social, financial and legal impact of the relocation order on the Joe Slovo residents as opposed to an on site upgrading at Joe Slovo.⁸⁶ The Court discharged the eviction order it granted in *Joe Slovo*. Liebenberg states that the irony of this case is inescapable. She persuasively argues that if the necessity of evicting the residents had been properly investigated through meaningful engagement with the community and their expert advisors, the litigation that was costly and time-consuming might have been avoided.⁸⁷

2.3.6 Abahlali case

In the case of *Abahlali baseMjondolo Movement of South Africa and Another v Premier of the Province of Kwazulu-Natal and Others* (hereafter 'Abahlali')⁸⁸ the concept of meaningful engagement was reiterated. This case concerned the validity of section 16 of the Kwazulu-Natal Elimination and Prevention of the Re-emergence of Slums Act⁸⁹ as the Act made it significantly easier to evict persons in informal settlements without the need for meaningful engagement.⁹⁰ Yacoob J in his majority judgment stated that due to the judgments made by the Court reasonable engagement is not only required by means of section 26(2) of the Constitution but also mandate in all eviction under the PIE Act.⁹¹ Yacoob J held that, 'all applicants for eviction must engage reasonably before instituting eviction proceedings' and furthermore, if it can be seen during the engagement process that the property can be upgraded without the eviction of the unlawful occupiers the municipality cannot institute eviction proceedings.⁹²

⁸⁵ *Joe Slovo II* para 6.

⁸⁶ *Joe Slovo II* para 7.

⁸⁷ Liebenberg (2012) 12 *African Human Right Law Journal* 1 24.

⁸⁸ 2010 (2) BCLR 99(CC) (hereafter 'Abahlali').

⁸⁹ Act 6 of 2007.

⁹⁰ *Abahlali* para 3.

⁹¹ *Abahlali* para 69.

⁹² *Supra*.

2.3.7 Schubart Park case

The case of *Schubart Park Resident' Association v City of Tshwane Metropolitan Municipality* (hereafter '*Schubart Park*')⁹³ concerned applicants who had been unlawfully deprived of their homes in terms of section 26(3) of the Constitution and were claiming an order of spoliation. In this case the Court ordered supervision and engagement even though they were normally only applied in eviction orders.⁹⁴ The Court found that these orders could be made in terms of section 38 of the Constitution because in this circumstance it was necessary and appropriate to make such an order. The Court held that meaningful engagement with the applicants should be provided for at every stage of the reoccupation process.⁹⁵ The Court furthermore made provision for a reporting back process to the High Court in terms of an agreement made between the parties in terms of the engagement.⁹⁶

2.4 Conclusion

It is submitted that a substantial framework has been developed with regard to 'meaningful engagement' in housing litigation. When examining the above-mentioned cases it is evident to see that for meaningful engagement to be successful it should preferably commence before litigation. As Sachs J highlighted in *Port Elizabeth Municipality* there are many advantages to mediation but the success of mediation is at its 'highest when the outcome of litigation is at its most uncertain'.⁹⁷ I am in agreement with Muller when he submits that the dialogic relationship established between local government and unlawful occupiers during engagement is preferable to a relationship which requires judicial intervention and control.⁹⁸

It is further submitted that the interpretation in *Olivia Road* should be favoured over the interpretation in *Joe Slovo* with regard to meaningful engagement not occurring before litigation. A dim view should be taken of the State if they did

⁹³ 2013 (1) SA 323 (CC) (hereafter '*Schubart Park*').

⁹⁴ *Schubart Park* para 42.

⁹⁵ *Schubart Park* para 51.

⁹⁶ *Schubart Park* para 53.

⁹⁷ *Port Elizabeth Municipality* para 47.

⁹⁸ Muller (2011) 22 *Stellenbosch Law Review* 742 757.

not reasonably attempt to engage with the community and this should count heavily against them when determining whether it is 'just and equitable' to grant the eviction.

For the engagement process to work meaningfully, the parties must be willing to participate in its process but cannot be forced into coming to an agreement. It is submitted that if the State does not reasonably attempt to engage with the community and during the litigation proceedings it comes to the Courts attention that this matter could have been resolved by means of that process, a cost order should be awarded against the state, which occurred in the case of *Olivia Road*. The reason for this is that the case could have been avoided in totality if the parties had undergone meaningful engagement prior to litigation. If the State is faced with the prospects of being awarded a cost order against them this might give them the extra motivation to meaningfully engage with the community before attempting litigation. I am in agreement with Muller when he argues that government should train careful and sensitive officials to engage with communities in a manner, which is 'characterised by access of information, flexibility, reasonableness and transparency'.⁹⁹

Liebenberg argues that courts should not abdicate their role in developing and enforcing normative parameters within which the engagement process should occur.¹⁰⁰ She goes further in arguing that through reporting back to courts and exercising supervisory jurisdiction over the engagement process the court can control the process and outcome of the engagement and make sure that the agreement reached is in line with the normative parameters and goal initially set by the court.¹⁰¹ I am in agreement with Liebenberg that the court should provide normative guidelines to the parties. At the very least courts should on a case-by-case basis give the parties certain objectives to be achieved in the engagement process.

⁹⁹ Muller (2011) 22 *Stellenbosch Law Review* 742 757.

¹⁰⁰ Liebenberg (2012) 12 *African Human Rights Law Journal* 1 27.

¹⁰¹ Liebenberg (2012) 12 *African Human Rights Law Journal* 1 28.

Chapter 3: The introduction and development of ‘meaningful engagement’ in education litigation

3.1 Introduction

Meaningful engagement is a relatively new concept with regard to education law in South Africa and that is why it is important for us to examine how the courts have applied this concept in education litigation. In the United States this is not a new concept and is referred to as ‘non-court-centric judicial review’.¹⁰² Isaacs submits that this non-court centric approach is a way in which one could formulate a remedy, which contributes to actual change in education without involving the court in the ‘day-to-day reorganisation’ of complex bodies.¹⁰³ This approach requires parties to remedy the issues between themselves in accordance with ‘constitutional principles set down by the court’.¹⁰⁴ The Court is therefore not central to the formulation or implementation of the new educational policy.¹⁰⁵

Most of the educational disputes that our Courts have adjudicated stem from a power struggle between school governing bodies and education authorities. The heart of the problem concerns the powers of a provincial department to override or depart from policies adopted by a school governing body. The Constitutional Court has in several cases emphasised that their relationship should be one of co-operation where they should work hand-in-hand in finding a solution. However, according to Serfontein and de Waal practice does not mirror effective cooperation.¹⁰⁶ In order to facilitate co-operation the Court has on a number of occasions ordered meaningful engagement between the parties in order to find a solution.

¹⁰² Isaacs ‘Realising the right to education in South Africa: lessons from the United States of America’ (2010) 26 *SA Journal of Human Rights* 356 374.

¹⁰³ *Supra*.

¹⁰⁴ *Supra*.

¹⁰⁵ *Supra*.

¹⁰⁶ Serfontein and de Waal ‘The effectiveness of legal remedies in education: A school governing body perspective’ (2013) *De Jure* 45 55.

The purpose of this chapter is to examine case law where meaningful engagement was ordered in education litigation. An examination will be done as to when meaningful engagement was first introduced in education litigation, how the Courts have applied meaningful engagement, whether it has been successful and whether the Court has provided any guidance as to the use of the concept in an educational context.

3.2 Case law on meaningful engagement

3.2.1 Hoërskool Ermelo case

The case of *Head of Mpumalanga Department of Education v Hoërskool Ermelo* (hereafter '*Hoërskool Ermelo*')¹⁰⁷ concerned a dispute between education authorities on the one side and Hoërskool Ermelo and its School Governing Body (hereafter 'SGB') on the other. The dispute arose when a number of black students, wanting to be taught in English, were refused admission to the school on the basis of the schools language policy, which stated that Afrikaans was the only medium of instruction at the school.¹⁰⁸ The Provincial Head of Department of Education (hereafter 'HOD') proceeded to revoke the powers of the SGB and appointed an interim committee to redraft the language policy of the school.¹⁰⁹ The legal question before the Court was whether the HOD could lawfully revoke the function of the SGB to determine a language policy and confer this function on an interim committee?¹¹⁰

In terms of the South African Schools Act (hereafter 'Schools Act')¹¹¹ the SGB is vested with the power to determine a school's language policy.¹¹² In terms of section 22 of the Schools Act the HOD has the power to withdraw a function of a SGB subject to reasonable grounds and procedural fairness requirements.¹¹³ Therefore the HOD may withdraw the language policy

¹⁰⁷ 2010 (2) SA 415(CC) (hereafter '*Hoërskool Ermelo*').

¹⁰⁸ *Hoërskool Ermelo* para 1.

¹⁰⁹ *Hoërskool Ermelo* para 22.

¹¹⁰ *Hoërskool Ermelo* para 1.

¹¹¹ Act 84 of 1996 (hereafter 'Schools Act').

¹¹² Schools Act section 6(2).

¹¹³ Schools Act section 22.

functions of a SGB if there are reasonable grounds to do so and the requirements of procedural fairness have been fulfilled.¹¹⁴ In terms of section 25 of the Schools Act the HOD may appoint persons to perform the functions of a SGB if the SGB had ceased or failed to perform its functions in terms of the Act.¹¹⁵ Therefore the purpose of section 25 is to allow persons to take the place of an 'ineffective or dysfunctional governing body whilst arrangements are made for the election of another governing body'.¹¹⁶ In this case there were no grounds to indicate that the SGB had ceased or failed to perform the function of adopting a language policy.¹¹⁷ The Court opined that if an HOD did not approve of a schools language policy it could not be equated with the SGB having ceased or failed to perform the function of enacting the policy.¹¹⁸ The Court held that the actions of the HOD were impermissible, as he had combined his powers in terms of sections 22 and 25 of the Schools Act.¹¹⁹ The Court went further in finding that sections 22 and 25 regulated two unrelated situations and that the sections could not be applied selectively or collectively.¹²⁰ Therefore the Court found that the HOD had acted unlawfully and contrary to the principle of legality.¹²¹ Therefore the HOD did not have the power to appoint an interim committee to perform the function to develop a new language policy and therefore the language policy devised by the interim committee was declared void.¹²²

The Court went further in making a supervisory order that the SGB review its current language policy in light of the Constitution and Schools Act and report back to the Court by way of affidavit on the steps it had taken in reviewing the policy.¹²³ The Court gave two reasons as to why the SGB should revisit its language policy. Firstly, the Court emphasised that the SGB should take

¹¹⁴ *Hoërskool Ermelo* para 64.

¹¹⁵ Schools Act section 25.

¹¹⁶ *Hoërskool Ermelo* para 85.

¹¹⁷ *Hoërskool Ermelo* para 86.

¹¹⁸ *Supra*.

¹¹⁹ *Hoërskool Ermelo* para 87.

¹²⁰ *Hoërskool Ermelo* para 88.

¹²¹ *Hoërskool Ermelo* para 89.

¹²² *Hoërskool Ermelo* para 93.

¹²³ *Hoërskool Ermelo* para 102.

cognisance of not only the interests of its own learners but also the interests of the broader community and needs of other learners.¹²⁴ Daniel and Greytak argue that by insisting that the interests of the community be balanced with the interests of Hoërskool Ermelo's current students the Court 'exhibited its ability to use procedural neutrality as a means of reforming South Africa's public schools'.¹²⁵ Secondly, the SGB should have regard to the 'dwindling enrolment numbers' of students wanting to be taught in Afrikaans and the high demand of learners wanting to be taught in English.¹²⁶ The Court also ordered the HOD to report back to it on the steps it had taken to meet the demand for English students in Ermelo for the following year.¹²⁷

According to Van Der Vyver the end result of this case was that the language policy at Hoërskool Ermelo was amended and now the school caters for both English and Afrikaans speaking students¹²⁸. Liebenberg submits that even though meaningful engagement did not feature specifically in this judgment it did pave the way for emphasis on co-operative governance and engagement in subsequent education litigation cases.¹²⁹ On an interesting side note Serfontein and De Waal conducted a study where they telephonically interviewed consenting members of Hoërskool Ermelo's SGB after the Constitutional Courts order was given. The interviewed members of the SGB indicated that they found the court order to be effective and that their current relationship with the HOD was a good one.¹³⁰ After conducting the qualitative dimension of their article they concluded that the legal remedies provided by courts were effective in remedying battles between SGBs and HODs concerning language policies at public schools'.¹³¹

¹²⁴ *Hoërskool Ermelo* para 99.

¹²⁵ Daniel and Greytak 'Recognising situatedness and resolving conflict: Analysing US and South African education law cases' 2013 *De Jure* 24 42.

¹²⁶ *Hoërskool Ermelo* para 100.

¹²⁷ *Hoërskool Ermelo* para 106.

¹²⁸ Van der Vyver 'Constitutional protection of the right to education' (2012) 27 *SA Public Law* 326 336.

¹²⁹ Liebenberg(2014) *National Journal of Constitutional Law* (forthcoming) 21.

¹³⁰ Serfontein (2013) *De Jure* 45 59.

¹³¹ Serfontein (2013) *De Jure* 45 62.

3.2.2 Juma Masjid case

The case of *Governing Body of Juma Masjid Primary School v Essay NO* (hereafter '*Juma Masjid*')¹³² concerned the eviction of a public school conducted on private property.¹³³ This case is interesting to examine because it straddles both eviction and education litigation and was the first education case that dealt specifically with the concept of meaningful engagement. The dispute in this case arose when the Minister of the Executive Council for Education (hereafter 'MEC') failed to conclude an agreement in terms of the Schools Act, which set out the terms and conditions of tenancy with the Juma Masjid Trust.¹³⁴ The relationship between the education authorities and the trustees broke down after numerous payments were made by the Juma Masjid Trust with regard to the school, with the understanding that they would be reimbursed by the Department but never were. The Department made undertakings to pay the outstanding amounts but they never materialised.¹³⁵ The Court made a provisional order, which set aside the order of eviction ordered by the High Court. The order stated that the MEC, the Trustees and the SGB had to meaningfully engage with one another in order to try to resolve the dispute by concluding a section 14 agreement.¹³⁶ The aim of the order was that an agreement would be reached between the parties through meaningful engagement in order to try and keep the school open.¹³⁷

The parties underwent engagement but the parties unfortunately failed to reach an agreement and the dispute remained unresolved.¹³⁸ Skelton submits that although the engagement was not fruitful it was a significant indication that the Court wanted the parties if possible to find their own solution to the

¹³² 2011 (8) BCLR 761 (CC) (hereafter '*Juma Masjid*').

¹³³ *Juma Masjid* para 1.

¹³⁴ Schools Act section 14.

¹³⁵ *Juma Masjid* para 14.

¹³⁶ *Juma Masjid* para 74.

¹³⁷ Skelton 'How far will the courts go in ensuring the right to a basic education' (2012) 27 *SA Public Law* 392 396-397.

¹³⁸ *Juma Masjid* para 75.

problem.¹³⁹ The MEC was also ordered to report back to the court on steps it had taken to secure alternative placement for the learners. This report indicated that the learners would be accommodated at specified primary schools in the district and that the MEC would have to close the school down by the end of 2010.¹⁴⁰ In the Court's final judgment it was held that it was just and equitable to grant an eviction order.¹⁴¹

Liebenberg argues that even though the Court did not give reasons as to why it ordered meaningful engagement in its provisional order it was 'clearly designed to prompt direct interactions between all three major role-players – the MEC, Trust and SGB – in reaching a constitutionally compliant resolution of a dispute threatening the learners' right of a basic education'.¹⁴² Skelton submits that by ordering meaningful engagement the courts become 'central to a normative debate, based on detailed information about the actual problems in the education system'.¹⁴³ Skelton goes further in saying that with meaningful engagement 'the courts can be part of the solution, but will draw on the parties and even other civil society role players to find solutions and to monitor the outcomes of court decisions'.¹⁴⁴

It is submitted that a reason as to why engagement did not work in this case is because when the parties had come to court too much water had flowed under the bridge, which would have made meaningful engagement rather difficult. It is further submitted that if the parties had undergone meaningful engagement before commencing with litigation the outcome would have had a stronger possibility of being a more tailor made "win-win" situation for all instead of the school being evicted.

¹³⁹ Skelton 'The role of the courts in ensuring the right to a basic education in a democratic South Africa: a critical evaluation of recent education case law' (2013) *De Jure* 1 7.

¹⁴⁰ *Supra*.

¹⁴¹ *Juma Masjid* para 79.

¹⁴² Liebenberg(2014) *National Journal of Constitutional Law* (forthcoming) 21.

¹⁴³ Skelton(2012) 392 400.

¹⁴⁴ *Supra*.

3.2.3 Welkom High School case

The case of *Head of Department of Education v Welkom High School and Others* (hereafter '*Welkom High School*')¹⁴⁵ involved pregnancy policies adopted by the SGBs of Welkom and Harmony High School, which provided for the exclusion of learners from their school in the event that the learner fell pregnant.¹⁴⁶ A learner from each school fell pregnant and in terms of the schools' pregnancy policies, were told that they could not return to school for the remainder of the year in which their children were born. The practical effects of the pregnancy policies were that the learners were not able to write their year-end examinations and this in turn forced them to repeat a year of schooling.¹⁴⁷ In both cases the Free State HOD sent letters to the principals of the schools instructing them to allow the learners back with immediate effect.¹⁴⁸ In both cases the students were readmitted to school but the respondents were of the opinion that the Free State HOD did not have the authority to instruct the principals to readmit the learners notwithstanding their respective pregnancy policies.¹⁴⁹ The Constitutional Court was faced with two issues to decide firstly, whether the HOD had the power to instruct the principals to ignore policies adopted by the governing bodies of the schools and secondly, to what extent the Court could address the concerns about the unconstitutionality of the pregnancy policies.¹⁵⁰

In the main judgment Khampepe J held that the SGBs did have the power to adopt the pregnancy policies pursuant to their responsibility for governance and implementation of codes of conduct at their respective schools.¹⁵¹ She further held that the HOD had acted unlawfully as he purported to usurp the power to formulate policies, which he did not have. Furthermore, the HOD was obliged by the rule of law to adhere to the remedial mechanisms provided

¹⁴⁵ 2013 (9) BCLR 989(CC) (hereafter '*Welkom High School*').

¹⁴⁶ *Welkom High School* para 6.

¹⁴⁷ *Welkom High School* para 8 and 15.

¹⁴⁸ *Welkom High School* para 11 and 19.

¹⁴⁹ *Welkom High School* para 14 and 21.

¹⁵⁰ *Welkom High School* para 28 and 29.

¹⁵¹ *Welkom High School* para 105 ; Schools Act sections 16 and 20.

for in the Schools Act.¹⁵² Therefore if the HOD was concerned about the pregnancy policies he should have acted in terms of the Schools Act or approached the courts for appropriate relief.¹⁵³ In casu the HOD simply ignored the pregnancy policies and undertook policy-formulation without undergoing the processes in section 22 or 25 of the Schools Act.¹⁵⁴ The actions of the HOD were therefore found to be unlawful.¹⁵⁵

Khampepe J highlighted in her judgment that co-operative governance is a foundational principle to our Constitution and that this principle had also been incorporated into section 22 of the Schools Act. It was therefore mandatory for HODs and governing bodies to act in partnership with one another.¹⁵⁶ Khampepe J emphasised that this partnership relationship should be characterised by 'consultation, co-operation in mutual trust and good faith'.¹⁵⁷ This tends to remind us of the judgment of *Olivia Road* where Yacoob J opined that if both sides were willing to participate in the engagement process reasonably and in good faith it would have the potential of resolving the dispute and would create a sense of understanding and care between the parties.¹⁵⁸ Khampepe J went further and held that, 'the goal of providing high-quality education to all learners and developing their talents and capabilities are connected to the organisation and governance of education'.¹⁵⁹ Instead of making an order with regard to the invalidity of the pregnancy policies, Khampepe J made an order in terms of her broad remedial powers in terms of the Constitution.¹⁶⁰ The SGBs were ordered to review their pregnancy policies in light of the substantive constitutional concerns highlighted in the judgment and to accomplish this they had to meaningfully engage with the HOD and report back to the Court on the responsible steps they had taken to review the

¹⁵² *Welkom High School* para 105; Schools Act sections 22 and 25.

¹⁵³ *Welkom High School* para 76; Schools Act section 22.

¹⁵⁴ *Welkom High School* para 82.

¹⁵⁵ *Welkom High School* para 105.

¹⁵⁶ *Welkom High School* para 121.

¹⁵⁷ *Welkom High School* para 124.

¹⁵⁸ *Olivia Road* para 15 and 20.

¹⁵⁹ *Welkom High School* para 124.

¹⁶⁰ The Constitution section 172(1)(b).

pregnancy policies.¹⁶¹ Khampepe J ended off her judgment by strongly encouraging the parties to rather engage in consultation with one another and to employ the remedial mechanisms in the Schools Act before resorting to further litigation if a dispute was to arise with regard to the revised policies.¹⁶²

In a separate but concurring judgment Froneman and Skweyiya JJ placed great emphasis on the learners' best interests and on the process of meaningful engagement between the parties. They were of the opinion that the parties rushed to court and engaged in a power play battle and lost sight of the fact that the 'best interests of the children at the schools were of paramount importance and that the powers of the SGB and the HOD were subservient to the children's needs'.¹⁶³ It was held that the favoured approach is one which places the learners' best interests at the starting point and then parties engage with one another looking at the bigger picture that 'their interactions may best serve the learners' interests in the future'.¹⁶⁴ Froneman and Skweyiya JJ held 'that there is a constitutional obligation on the partners in education to engage in good faith with one another on matters of education before turning to courts'.¹⁶⁵ This reminds us of the case of *Port Elizabeth Municipality* where the Constitutional Court recognised that in resolving a dispute between the parties, it is important for them to 'meaningfully engage' before litigation.¹⁶⁶

Froneman and Skweyiya JJ further held that the parties in this case should have engaged with one another in good faith and that if they had it might have prevented their long journey through the courts.¹⁶⁷ Therefore it is submitted that in the case of *Welkom High School* the Court seems to take a step in the direction that if parties have not tried to meaningfully engage before coming to court, the court would take a negative view of that failure.

¹⁶¹ *Welkom High School* para 125.

¹⁶² *Welkom High School* para 126.

¹⁶³ *Welkom High School* para 132.

¹⁶⁴ *Welkom High School* para 134.

¹⁶⁵ *Welkom High School* para 135.

¹⁶⁶ *Port Elizabeth Municipality* para 47.

¹⁶⁷ *Welkom High School* para 135.

Froneman and Skweyiya JJ further held that SGBs and HODs are organs of state and are therefore bound by section 41(1)(h) of the Constitution which places an obligation on them to co-operate with one another in mutual trust and good faith and to assist and support one another in matters of common interest and to avoid legal proceedings against one another.¹⁶⁸ The facts show that there was considerable confusion on the national and provincial sphere of government as to who had the power to determine pregnancy policies and what the content of these policies should be.¹⁶⁹ Froneman and Skweyiya JJ held that the channels of communication between the parties were ineffective and that this situation ‘cried out for good faith engagement, based on mutual trust, to find common ground and seek a solution to the problem’, unfortunately the opposite in this case happened.¹⁷⁰ Instead of approaching the situation on the premise of engagement and co-operation the parties ‘dug in their heels’.¹⁷¹ It was held that the HOD was under the obligation to engage with the SGB in good faith before pursuing litigation.¹⁷²

Froneman and Skweyiya JJ held that both parties’ behaviour failed to meet the requirements of co-operative engagement and in their opinion, if the HOD had engaged with the SGB in co-operation, diligence and in good faith the instructions would not have been necessary.¹⁷³ The Justices emphasised that ‘timeous planning and sustained communication between the parties are the most powerful barriers against these type of disputes arising and the learner’s interest being compromised in the process’.¹⁷⁴ Furthermore even if a crisis arises where there is a need for immediate redress ‘the duty to engage, co-operate and communicate in good faith does not dissolve’.¹⁷⁵ Froneman and Skweyiya JJ conclude by saying that they supported the order of review of the pregnancy policies but added that the SGBs and HOD must keep in their mind their duty to engage with one another and when reporting back to the Court

¹⁶⁸ *Welkom High School* para 141; the Constitution section 41(1)(h).

¹⁶⁹ *Welkom High School* para 159.

¹⁷⁰ *Supra*.

¹⁷¹ *Welkom High School* para 160.

¹⁷² *Welkom High School* para 164.

¹⁷³ *Welkom High School* para 165.

¹⁷⁴ *Welkom High School* para 166.

¹⁷⁵ *Supra*.

on the progress made in review, ‘the learners’ best interests should lie at the heart of any solution reached’.¹⁷⁶

In summary the case of *Welkom High School* highlighted very important aspects of meaningful engagement. Firstly, for engagement to be truly meaningful the parties must engage with one another in good faith. Secondly, for engagement to be the most successful it must take place before litigation and if not, there is a possibility that the court will take a dim view on the parties. Lastly, meaningful engagement can directly be linked to the best interests of the child principle and if parties don’t try to meaningful engage with one another in coming up with a solution, the interests of the children involved will potentially be threatened.

3.2.4 Rivonia Primary School case

The case of *MEC for Education and Others v Governing Body, Rivonia Primary School and Others*¹⁷⁷ (hereafter ‘*Rivonia Primary School*’) concerned the powers of the Provincial Department in relation to an admission policy adopted by its SGB. The SGB had determined that the capacity of learners that could be admitted to Grade 1 for that year would be 120 learners. The capacity as per the admission policy had been reached and a prospective Grade 1 learner was refused admission on that basis.¹⁷⁸ In accordance with Rivonia Primary’s tenth-day statistics report it showed that there were approximately 25 learners per grade 1 class and the Gauteng HOD took the view that notwithstanding the schools admission policy they had the capacity to admit the additional learner.¹⁷⁹ The Gauteng HOD proceeded to overturn the decision to refuse the admission of the learner and instructed the school to admit the learner immediately. This initiated a power struggle between the school and the Gauteng HOD, which ultimately lead to a situation where the principal’s admission function was withdrawn and department representatives

¹⁷⁶ *Welkom High School* para 167.

¹⁷⁷ 2013 (6) SA 582 (CC) (hereafter ‘*Rivonia Primary School*’).

¹⁷⁸ *Rivonia Primary School* para 9.

¹⁷⁹ *Rivonia Primary School* para 12.

physically placing the Grade 1 learner in a classroom.¹⁸⁰ The principal was later subjected to a disciplinary hearing in which she was given a final warning and a month's salary deduction.¹⁸¹

The legal questions before the Court were whether the HOD had any powers with regard to the admission of learners.¹⁸² Furthermore, whether the HOD was empowered to depart from the admission policy and if so, whether he exercised that power in a procedurally fair manner.¹⁸³ In terms of the Schools Act a SGB is vested with the power to determine a schools admission policy.¹⁸⁴ However, the applicant submitted that this power should not be overstated.¹⁸⁵ The Schools Act goes further in recognising that the provincial department plays a direct role in the application for admission of learners in public schools. An application for the admission of a learner to a public school is made to the department and if the admission is unsuccessful they are responsible to give parents reasons for such a refusal.¹⁸⁶ Furthermore the Schools Act allows parents to appeal decisions of admission refusal to the MEC who is then authorised to overturn the decision.¹⁸⁷ Therefore the Court held that even though SGBs have the power to determine the admission policy of the school, individual decisions for admission of learners are taken only provisionally at a school level.¹⁸⁸ In the main judgment Mhantla AJ held that in this case the HOD had the power in terms of the Schools Act to admit the learner who had been refused admission.¹⁸⁹ Mhantla AJ held that this case was distinguishable from *Welkom High School* as in that case the HOD had no authority to ignore the relevant schools' policies in terms of the Schools Act.¹⁹⁰

¹⁸⁰ *Rivonia Primary School* para 14.

¹⁸¹ *Rivonia Primary School* para 15.

¹⁸² *Rivonia Primary School* para 33.

¹⁸³ *Supra*.

¹⁸⁴ Schools Act section 5(5).

¹⁸⁵ *Rivonia Primary School* para 27.

¹⁸⁶ Schools Act sections 5(7) and 5(8).

¹⁸⁷ Schools Act section 5(9).

¹⁸⁸ *Rivonia Primary School* para 44.

¹⁸⁹ *Rivonia Primary School* para 53.

¹⁹⁰ *Supra*.

Mhlantla AJ held that the general position was that admission policies must be applied flexibly and if there are good reasons to depart from the policy, it will always be open to the principal or the HOD to do so, however this decision must always be exercised in a procedurally fair manner.¹⁹¹ Mhlantla AJ found that the HOD did not act in a procedurally fair manner, as he should have ‘afforded the school an opportunity to make representations, and respond to the tenth-day statistics report, before the learner was forcibly placed in the school’.¹⁹² Mhlantla AJ highlighted that the parties seemed to ignore the partnership-and-cooperation framework envisaged in the Schools Act.¹⁹³ Mhlantla AJ emphasised that co-operation is the general norm when it comes to disputes between SGBs and education authorities.¹⁹⁴

The Court went further in saying that ‘such cooperation is rooted in the shared goal of ensuring that the best interests of learners are furthered and the right to a basic education is realised’.¹⁹⁵ Mhlantla AJ held that where a provincial department requires a school to admit learners over and above their capacity as stated in their admission policy, there must be proper engagement between all the parties affected.¹⁹⁶ The Court held that there was a connection between the best interests of the child and the duty on the parties to meaningfully engage with one another in attempting to reach an amicable solution.¹⁹⁷ Mhlantla AJ stressed that because the parties failed to meaningfully engage with one another and reach an agreement, the learner was caught up in the middle of the parties’ disagreement and was regrettably physically placed at a desk, which may well have been very traumatising for her.¹⁹⁸ It is for this reason that she highlighted that ‘the principle of co-operative governance is not merely a tool to ensure smoother inter-governmental relations, but one which has a direct effect on the people whom

¹⁹¹ *Rivonia Primary School* para 56 and 58.

¹⁹² *Rivonia Primary School* para 68.

¹⁹³ *Supra*.

¹⁹⁴ *Rivonia Primary School* para 69.

¹⁹⁵ *Supra*.

¹⁹⁶ *Rivonia Primary School* para 72.

¹⁹⁷ *Rivonia Primary School* para 77.

¹⁹⁸ *Supra*.

the government services'.¹⁹⁹ Mhlantla AJ concluded in saying that the parties could have done more to prevent the need for litigation and that an organ of state cannot use its powers to strong-arm others furthermore, that parties should be working together in a partnership in finding solutions and 'resorting to court with every skirmish is not going to help in that process'.²⁰⁰

In summary this case takes the standpoint that it is distinguishable from the cases of *Hoërskool Ermelo* and *Welkom High School*. In terms of sections 5(7) to (9) of the Schools Act the 'department maintains ultimate control over the implementation of admission decisions' and it was held that this constituted the distinguishing factor in this case.²⁰¹ In the case of *Hoërskool Ermelo* the actions of the HOD were unlawful, as section 25 of the Schools Act was incorrectly invoked, as the SGB had not become 'ineffective' or 'dysfunctional'.²⁰² In the case of *Welkom High School* the actions of the HOD were considered unlawful, as the HOD did not have the power to simply ignore the SGBs pregnancy policies and undertake policy formulation without using the remedial mechanisms found in sections 22 or 25 of the Schools Act.²⁰³ It is submitted that in all the cases the Court found that the education department did not act reasonably and in a procedurally fair manner. Furthermore all the cases emphasised the importance of meaningful engagement and co-operative governance.

3.3 Conclusion

It is submitted that for meaningful engagement to work between the parties they should be working hand-in-hand with one another in good faith to solve the issues between themselves and not against one another in a power struggle. As was seen in the cases of *Welkom High School* and *Juma Masjid* meaningful engagement is directly related to the constitutionally entrenched principle of the best interests of the child and if the parties do not attempt to

¹⁹⁹ *Rivonia Primary School* para 77.

²⁰⁰ *Rivonia Primary School* para 78.

²⁰¹ *Rivonia Primary School* para 52 and 53.

²⁰² *Hoërskool Ermelo* para 85.

²⁰³ *Welkom High School* para 82 and 105.

meaningfully engage with one another they are jeopardising the children's' interests in the matter.

It is further submitted that for meaningful engagement to be successful in education cases, parties should engage with one another before litigation. It is important to take note that SGBs are organs of state and are therefore bound by the constitutional principle of co-operative governance.²⁰⁴ In terms of section 41(1)(h) of the Constitution organs of state and all spheres of government must 'co-operate with one another in mutual trust and good faith' by 'avoiding legal proceedings against one another'.²⁰⁵ It is submitted that meaningful engagement is an alternative dispute resolution mechanism, which has the power to avoid litigation in totality.

Before courts impose meaningful engagement in the interim, as was the case in *Juma Masjid*, they should look at the relationship between the parties to determine whether it would be probable for the parties to engage with one another in good faith. There is always the possibility that 'too much water flowed under the bridge' between the parties which would make ordering meaningful engagement in the interim ineffective and inappropriate. It should be noted that when it comes to meaningful engagement it is only effective if both parties are willing to engage in the process by means of compromise and creative thinking. This in turn will hopefully enable the parties to come up with a solution. Isaacs submits that meaningful engagement not only 'creates the possibility for close scrutiny and heightened accountability' between the parties but also has the potential for parties to tackle the problem with more energy and capacity.²⁰⁶

It is evident in the above-mentioned cases that when the parties engage in a power struggle with one another they become so consumed with the idea of 'who has the power'; they lose sight of developing a solution that would be in the best interests of the children involved. If the parties approach the situation

²⁰⁴ Serfontein(2013) *De Jure* 45 56.

²⁰⁵ The Constitution section 41(1)(h).

²⁰⁶ Isaacs(2010) 26 *SA Journal of Human Rights* 356 377.

by ‘digging in their heels’ they don’t comply with the spirits of co-operation and engagement and in turn create a situation of confusion, misunderstanding and ultimately mistrust.

The case law also illustrates a picture of education authorities taking the law into their own hands by instructing schools not to comply with their policies instead of using the remedial mechanisms available to them in the Schools Act. This in turn creates a relationship of dictatorship as apposed to a relationship of partnership as envisaged in the Schools Act. This approach also makes it difficult for the parties to engage with one another and inevitably leads to a power struggle situation.

It is submitted that education authorities and SGBs should not underestimate the power of engagement, if it is done in a manner where both parties engage in good faith. Engagement has a greater potential of providing a tailor made ‘win-win’ situation as apposed to the normal situation of ‘win-lose’ found in most litigation matters. With meaningful engagement, parties are more equipped than courts to come up with creative and just solutions. In *Rivonia Primary School* Mhlantla AJ summarises the problem well in saying:

‘The Constitution provides us with a reference point – the best interests of our children. The trouble begins when we lose sight of that reference point – when we become more absorbed in staking out the power to have the final say, rather than in fostering partnerships to meet educational needs of children’.²⁰⁷

I agree with Skelton when she submits the it is likely that courts will increasingly allow for remedies which are more participatory in nature, such as meaningful engagement. She further submits that participatory remedies have the potential to find lasting solutions that in turn ensure the right to basic education. Skelton cautions that remedies should be crafted in their own context and should ‘broaden and not narrow the scope of the right’.²⁰⁸ I agree with Isaacs when he says that non-court centric remedies ‘encourage

²⁰⁷ *Rivonia Primary School* para 2.

²⁰⁸ Skelton(2012) 27 SA Public Law 392 408.

democratic participation’ and stimulate grassroots democracy’.²⁰⁹ What is important for courts to remember is whether the remedy they apply is effective between the parties, if not, they ‘undermine respect for the courts, for the rule of law and the Constitution itself.’²¹⁰

I find it appropriate to conclude this chapter with a quote from Budlender:

‘Many rights problems are not solved overnight. You cannot wish for a court order that will solve the school system like waving a magic wand. But a proper interaction between the government, civil society and the courts can go a very long way in taking us away from systemic breakdown towards the systematic enforcement and realisation of the rights in the Constitution’.²¹¹

²⁰⁹ Isaacs(2010) 26 *SA Journal of Human Rights* 256 378.

²¹⁰ Roach and Budlender ‘Mandatory relief and supervisory jurisdiction: when it is appropriate, just and equitable?’ (2005) 112 *SA Law Journal* 325 351.

²¹¹ Budlender ‘The Role of the Courts in Achieving the Potential of Socio-Economic Rights’ (2007) 8 *ESR Review* 9 10.

Chapter 4: The relationship between public school governing bodies and state authorities and their corresponding powers and duties

4.1 Introduction

In this chapter the powers and duties of school governing bodies and state authorities will be examined. The Constitution and the Schools Act will be assessed to determine what their powers and duties are in relation to one another. It will be shown that there are different role-players in the delivery of education and that their relationship with one another can in certain circumstances lead to conflict. It will be submitted that one of the reasons for this conflict is that the duties of SGBs and education authorities are not always the same and that there is uncertainty between them as to who has the power and this in turn leads to a power struggle between them. An examination of case law will determine who the Constitutional Court has found to have the final say in these conflicts. It should be noted that one of the reasons for mediation failure is that the power differentials between the parties are too great, it is therefore important that this be explored.

The ultimate purpose of this chapter is to define all the role-players powers and to determine whether 'meaningful engagement' is an appropriate order to be issued in education litigation, considering their relationship with one another and possible power differentials.

4.2 The Constitution

Section 29 of the Constitution guarantees the right to basic education. In the case of *Juma Masjid* Nkabinde J held that this right is immediately realisable and not subject to an internal limitation requiring the right to be 'progressively realised' within 'available resources' and subject to 'reasonable legislative measures'.²¹² Unlike some other socio-economic rights, this right is

²¹² *Juma Masjid* para 37.

immediately enforceable and can only be limited in terms of section 36 of the Constitution.²¹³

4.3 The South African Schools Act

The Schools Act was enacted to provide a practical legal framework in which the right to education in the Constitution could be realised.²¹⁴ The Schools Act reflects the political and constitutional changes in South Africa post 1994, replacing our previous education system with a democratic education system.²¹⁵ Joubert and Bray describe this democratic education system as a system of 'decentralisation, devolution of authority and the involvement of various partners in education'.²¹⁶ The consequence of this democratic education system is that many functions and powers have devolved to school governing bodies.²¹⁷

Since the introduction of the Schools Act SGBs have been allocated a wide range of functions that used to be the sole responsibility of the Department of Education.²¹⁸ The preamble to the Schools Act recognises a partnership between the State, learners, educators and parents in the organisation, governance and funding of schools. In the case of *Welkom High School* Khampepe J refers to the Schools Act in saying that:

[The Schools Act] makes clear that public schools are run by a partnership involving school governing bodies (which represent the interests of parents and learners), principles, the relevant HOD and MEC, and the Minister. Its provisions are carefully crafted to strike a balance between the duties of these partners in ensuing an effective education system.²¹⁹

²¹³ Skelton(2013) 46 *De Jure* 1 4.

²¹⁴ Joubert 'The Constitution as a limitation on government power in educational contexts' (2012) 27 *SA Public Law* 379 382.

²¹⁵ Joubert and Bray *Public School Governance in South Africa* (2007) 30.

²¹⁶ *Supra*.

²¹⁷ Oosthuizen et al *Aspects of Education Law* (2009) 277.

²¹⁸ Joubert and Bray(2007) 47.

²¹⁹ *Welkom High School* para 36.

4.4 Role players as envisaged by the Schools Act

4.4.1 The school and school governing body (SGB)

Local government has no direct responsibility with regard to providing schooling in South Africa and therefore schools themselves are seen as the unit at which local governance takes place.²²⁰ Schools are juristic persons and therefore school governing bodies are needed to act on their behalf and for the benefit of the school community.²²¹ Woolman and Fleisch describe a SGB as a ‘fourth level of government’.²²²

In terms of the Schools Act the SGB is vested with the governance of the school and stands in a position of trust towards the school.²²³ School governance can be defined as determining policy and rules by which a school is organised and controlled.²²⁴ A SGB can be comprised of 3 categories of members: elected members, the principal and co-opted members. Elected members could be comprised of parents of the learners, educators of the school, staff members and learners.²²⁵ Serfontein submits that by granting parents and learners the opportunity to make decisions regarding the education of the youth, participatory democracy is enhanced.²²⁶

The Schools Act specifically empowers SGBs to determine admission and language policies of the school however; this is subject to applicable provisions of the Constitution, the Schools Act, relevant provincial legislation and norms and standards promulgated by the Minister.²²⁷ SGBs are also empowered to determine rules for religious observances, the schools code of conduct and handle school finances.²²⁸ In the case of *Welkom High School*

²²⁰ Joubert(2012) 384.

²²¹ Oosthuizen(2009) 43.

²²² Woolman and Fleish *The Constitution in the classroom – law and education in South Africa 1994-2008* (2009) 168.

²²³ Section 16 of the Schools Act.

²²⁴ Oosthuizen(2009) 42.

²²⁵ Section 23 of the Schools Act.

²²⁶ Serfontein(2013) 51.

²²⁷ Section 5 and 6 of the Schools Act.

²²⁸ Joubert(2012) 384.

Khampepe J described a governing body as being ‘akin to a legislative authority within the public-school setting, being responsible for the formulation of certain policies and regulations, in order to guide the daily management of the school and to ensure an appropriate environment for the realisation of the right to education’.²²⁹ Joubert and Bray submit that the two most important functions of a SGB are to promote the schools best interests and to provide quality education for all the learners enrolled at the school.²³⁰

Since the enactment of the Schools Act, the Act has been amended on an annual basis mostly to prescribe and limit the democratic decision making functions of a SGB. As Joubert and Bray argue, this then leads to a situation where governing bodies find themselves in an uneasy position: ‘on the one hand, being in partnership with the state but, on the other with the state through its governmental structures, constantly limiting and changing powers allocated to [them]’.²³¹

4.4.2 The principal

Joubert and Prinsloo describe principals as being the ‘most important link in the education chain’. They are the ‘link between education authorities and all other participants in the school’.²³² In terms of section 16 of the Schools Act the professional management of a school must be undertaken by the principal of a public school under the authority of the HOD.²³³ Joubert and Prinsloo define professional management as the ‘day-to-day administration and organisation of teaching and learning at the school and the performance of the departmental responsibilities that are prescribed by law’.²³⁴ In the case of *Welkom High School* Khampepe J illustrated the difference between SGBs and principals by saying that, ‘by contrast, a principal’s authority is more executive in nature, being responsible (under the authority of the HOD) for the

²²⁹ Welkom High School para 63.

²³⁰ Joubert and Bray(2007) 41.

²³¹ Joubert and Bray (2007) 48.

²³² Joubert and Prinsloo *Education Law- A practical guide for educators* (2001) 81.

²³³ Schools Act section 16(3).

²³⁴ Joubert and Prinsloo (2001) 42.

implementation of applicable policies (whether promulgated by governing bodies or the Minister, as the case may be) and the running of the school on a day-to-day basis'.²³⁵

The principal is also an *ex officio* member of the SGB representing the interests of the State.²³⁶ Therefore in practice, the principal has to watch over two interests firstly, the interests of the Provisional Education Department when functioning as a member of the SGB and secondly, the interests of the SGB when dealing with the Provincial Education Departments.²³⁷ Van Der Merwe submits that the fulfilment of this dualistic role is much easier said than done.²³⁸

Van Der Merwe makes the following submissions with regard to the relationship between the Principal of a public school and the SGB.

'Proper governance, control and management of a school make the difference between a functional and a dysfunctional school. The importance of the relationship between a principal and the governing body for the proper functioning of a school cannot be overemphasised. This relationship can often be impaired by interference from an education department acting as the principal's employer'.²³⁹

4.4.3 Member of the Executive Council (MEC) and Head of the Provincial Department of Education (HOD)

The MEC for education and the HOD are the representatives for provincial government. The MEC bears the obligation to establish and provide public schools and together with the HOD they exercise executive control over public schools through principals.²⁴⁰ The delivery of schooling is primarily a provincial matter, which is subject to norms and standards laid down by the

²³⁵ *Welkom High School* para 63.

²³⁶ Van Der Merwe 'The constitutionality of section 16A of the South African Schools Act 84 of 1996' (2013) *De Jure* 237 241.

²³⁷ Joubert and Prinsloo *The Law of Education in South Africa- Second Edition* (2009) 74.

²³⁸ Van Der Merwe (2013) *De Jure* 237 242.

²³⁹ *Supra*.

²⁴⁰ *Hoërskool Ermelo* para 56.

Minister of Basic Education in the national sphere.²⁴¹ The MEC and the HOD are under an obligation to ensure that there are enough school places available for every child to attend school within their province.²⁴²

In terms of the Schools Act the HOD is empowered to intervene in public school affairs in two instances. Firstly, section 22 empowers the HOD to withdraw any function exercised by a SGB if reasonable grounds exist to do so, subject to procedural fairness requirements.²⁴³ In *Hoërskool Ermelo Moseneke DCJ* held that once a function had been properly withdrawn it would vest in the HOD.²⁴⁴ Secondly, section 25 empowers an HOD to intervene if a SGB fails to perform its functions. In such a case the HOD is empowered to appoint persons to perform all such functions.²⁴⁵ In *Welkom High School Khampepe J* summarises the position as follows:

‘section 22 regulates the situation where a school governing body has purported to exercise its functions, but has done so in a manner warranting intervention, whereas section 25 obtains where a school governing body has failed to perform its functions, in whole or in part’.²⁴⁶

Unfortunately it becomes apparent in case law that HODs have not utilised these remedial sections. Instead they have taken the law into their own hands and have instructed principals to ignore policies drafted by SGBs and have not adhered to procedural fairness requirements.

4.4.5 Minister of Basic Education

National government is represented by the Minister of Basic Education who has the primary duty to set uniform norms and standards for all public schools in South Africa.²⁴⁷ The Minister is under the duty to ensure that education policies of the government are implemented.²⁴⁸

²⁴¹ Joubert(2012) 27 SA Public Law 379 383.

²⁴² *Rivonia Primary School* para 71.

²⁴³ The Schools Act section 22.

²⁴⁴ *Hoërskool Ermelo* para 87.

²⁴⁵ The Schools Act section 25.

²⁴⁶ *Welkom High School* para 48.

²⁴⁷ *Hoërskool Ermelo* para 56.

²⁴⁸ Joubert (2012) 27 SA Public Law 379 383.

4.5 Conflict of role players' interests and powers

As has been illustrated above the fundamental duty of education authorities is to ensure that all persons in the country have their right to basic education realised. On the other side of the coin SGBs have a duty to act in the best interests of their school and ensure that their students receive the best quality education. At times these duties clash with one another, which ultimately leads to a conflict situation. Woolman and Fleish highlight this situation as follows:

'The challenges brought against and on behalf of SGBs reflect the fundamental tension between largely affluent communities attempting to protect their privilege and a state attempting to advance its own interest as well as the interest of South Africa's many disadvantaged learners'.²⁴⁹

In *Hoërskool Ermelo* Moseneke DCJ made the following significant finding:

'The governing body of a public school must in addition recognise that it is entrusted with a public resource which must be managed not only in the interests of those who happen to be learners and parents at the time, but also in the interest of the broader community in which the school is located, and in the light of the values of our Constitution'.²⁵⁰

As case law illustrates there have been many occasions where a power struggle has ensued between education role-players, which has led to a conflict situation. The question, which keeps coming back to the court, is whether education authorities can override or depart from policies enacted by SGBs.²⁵¹

The first case of the trilogy of school-related cases is that of *Hoërskool Ermelo*. In this case the HOD challenged the school's single-medium language policy as it excluded English-speaking learners. The HOD then appointed an interim committee to redraft the language policy to cater for both English and Afrikaans learners. Moseneke DCJ held that the SGB had the primary power to determine a school's language policy however this power is subject to the

²⁴⁹ Woolman and Fleish (2009) 169.

²⁵⁰ *Hoërskool Ermelo* para 80.

²⁵¹ *Rivonia Primary School* para 46.

Constitution, Schools Act or any other provincial law.²⁵² Moseneke DCJ went further in saying that this power must be understood 'within the broader constitutional scheme to make education progressively available and accessible to everyone, taking into consideration what is fair, practicable and enhances historical redress'.²⁵³ Moseneke DCJ held that HODs may on reasonable grounds withdraw a school's language policy however this does not mean that they 'enjoy untrammelled power' to do so.²⁵⁴ HODs must exercise this power on reasonable grounds and 'observe meticulously the standard of procedural fairness.'²⁵⁵

Welkom High School dealt with a pregnancy policy adopted by the SGB, which had exclusionary effects on pregnant learners. In this case the HOD issued instructions to the principal to readmit the learner notwithstanding the pregnancy policy. Khampepe J held that education authorities were not empowered to adopt pregnancy policies and that SGBs were empowered to do so in terms of their governance responsibilities and their authority to adopt a code of conduct.²⁵⁶ The Court found that the instructions given by the HOD were unlawful and not in line with the remedies available to education authorities in the Schools Act.²⁵⁷

The latest instalment to the trilogy is *Rivonia Primary School*, which dealt with the power of education authorities to depart from a SGBs admission policy. Mhlantla AJ held that admission policies should be applied flexibly and if there are good reasons to depart from the policy it is always open to the principal or the HOD to do so.²⁵⁸ Mhlantla AJ however submits that when a decision is taken to overturn the admission decision of a principal or to depart from a

²⁵² *Hoërskool Ermelo* para 61.

²⁵³ *Supra*.

²⁵⁴ *Hoërskool Ermelo* para 71-73.

²⁵⁵ *Hoërskool Ermelo* para 73.

²⁵⁶ *Welkom High School* para 70.

²⁵⁷ *Welkom High School* para 82.

²⁵⁸ *Rivonia Primary School* para 56.

schools admission policy, it must be done in a reasonable and procedurally fair manner.²⁵⁹

It is submitted that in all three of the above cases the HOD acted in a manner above the law. In *Hoërskool Ermelo* the HOD incorrectly invoked section 25 of the Schools Act when it had no application. In *Welkom High School* the HOD did not comply with the provisions of section 22 and therefore his actions were unlawful. It is submitted that if the HODs had correctly complied with the remedial mechanisms found in sections 22 or 25 of the Schools Act, including the requirements of procedural fairness their actions would have been considered lawful. In *Hoërskool Ermelo and Welkom High School* the Court found that the HODs had no legal basis in terms of the Schools Act to override the SGBs language or pregnancy policies and therefore their actions were considered unlawful and contrary to the principle of legality. This is distinguishable from the case of *Rivonia Primary School* where the Court found that the HOD did have the power to admit a learner who had been refused admission to a public school on the basis of section 5(7)-(9) of the Schools Act. This was decided even though the SGB had the power to determine the schools admission policy in terms of section 5(5). It should be noted that the common feature in all the cases above is that it was found that the HOD had acted unreasonably and in a procedurally unfair manner.

4.6 Potential power differentials and their effect on meaningful engagement

An important question, which must now be explored, is whether meaningful engagement is an appropriate order to be issued if there are potential power differentials between the parties. As illustrated above the powers and duties of SGBs and education authorities vary from one another. Isaacs importantly highlights that 'where power relations between the parties are asymmetrical the granting of such a remedy [meaningful engagement], unless deliberately structured and monitored by the court, will favour the financially more powerful

²⁵⁹ *Rivonia Primary School* para 58.

and better organised litigant'.²⁶⁰ Liebenberg extends on this point by saying that 'a real danger exists that bargaining disparities and pressures to settle for less than beneficiaries are constitutionally entitled will result in agreements that do not vindicate the constitutional rights at issue'.²⁶¹ She is of the opinion that this problem can partially be addressed in eviction matters by combining supervisory orders of meaningful engagement with interim forms of relief such as making provision for legal and other services to support a community in the engagement process.²⁶² It is submitted that the same can be applied to education disputes where it can be seen that a SGB is in a position of inferiority to education authorities, provision should be made to put them on a more equal footing when it comes to the engagement process. If this is done there is a greater possibility that their engagement will be more effective and meaningful. Isaacs seems to be in agreement when he submits that the public may 'develop political power through a civil-society campaign. In such a case compelling government to account meaningfully to that sector and the public at large – or to include them in the remedial stage – could be a powerfully coercive remedy'.²⁶³

Fleish makes the following conclusions about our primary school system:

"After the end of apartheid – South Africa has not one, but two education 'systems'. The first 'system' is well resourced, consisting of former white and Indian schools, and a small but growing independent sector... Enrolling the children of the elite, white-middle and new black middle-classes... The second school 'system' enrolls the vast majority of working-class and poor children. Because they bring their health, family and community difficulties with them into the classroom, the second primary school 'system' struggles to ameliorate young people's deficits in institutions that are themselves less than adequate."²⁶⁴

This illustrates that our public education system seems to be divided between the small majority of well resourced, privileged, functioning former model C

²⁶⁰ Isaacs(2010) 26 *SA Journal of Human Rights* 356 384.

²⁶¹ Liebenberg(2014) *National Journal of Constitutional Law* (forthcoming) 28.

²⁶² *Supra*.

²⁶³ Isaacs(2010) 26 *SA Journal of Human Rights* 356 376.

²⁶⁴ Woolman and Fleish (2009) 129.

schools and a vast majority of poor functioning and under resourced schools. It is submitted that most of the cases that get brought to court in terms of conflicts between SGBs and education authorities are brought by the well-resourced former model C schools and not the vast majority of poor schools. Post-Apartheid SGBs were granted greater autonomy which Woolman and Fleish submit was largely driven by the fundamental democratic commitment of the African National Congress to grassroots politics.²⁶⁵ It is submitted that the minority of former model C schools have used this power well but the majority of poor schools have struggled, as the chances of them having well educated or professionally qualified SGB members who have knowledge of the law or the rights of the SGB are slim. This in turn leads to an even greater power differential situation. It is submitted that this demonstrates that power is not simply factual but also political.

4.7 Conclusion

It has been shown that section 29 of the Constitution obliges the State to provide basic education to all persons and that this right is immediately enforceable. This in turn falls to the HOD and MEC to ensure that there are enough school places available for children in their Province. It is therefore submitted that it is their duty to ensure that the right to basic education is realised. On the other hand a SGB has the duty to act in the best interests of the school and to provide quality education to their learners. This then leads to a situation where these role players have different duties when it comes to providing education.

It was shown that principals play a dualistic role and act as an intermediary mechanism between the Provincial Education Department and SGBs. When a conflict ensues between them principals seem to be stuck between a rock and a hard place and are the ones that seem to ultimately face disciplinary action.²⁶⁶ Davies submits that conflicts should be anticipated when it is

²⁶⁵ Woolman and Fleish (2009) 5.

²⁶⁶ See *Rivonia Primary School*.

expected of principals to implement departmental policy which clashes with the views of the governing body.²⁶⁷

The enactment of the Schools Act has empowered SGBs with wider powers than they previously had. This goes hand in hand with the vision of the Schools Act that these role players should work in partnership with one another in the realisation of the right to education. It is submitted that to be in a partnership one needs to be on an equal footing however, the constant amendments to the Schools Act limiting SGBs powers leads to a situation contrary to a partnership. To make matters worse case law has illustrated a picture of HODs taking the law into their own hands and acting contrary to the rule of law by not using the remedial mechanisms available to them in the Schools Act. It is submitted that this is not only unlawful but undermines the concept of partnership envisaged by the Schools Act.

The Constitutional Court has clarified that SGBs have the power to enact language²⁶⁸, pregnancy²⁶⁹ and admission policies²⁷⁰ however this is subject to the Constitution, Schools Act and any other provincial legislation. In the case of *Welkom High School* Khampepe J starts off her judgment by saying:

‘State functionaries, no matter how well-intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, and has long been enshrined in our law.’²⁷¹

I agree with the finding made by Khampepe J. If education authorities do not agree with policies enacted by SGBs they should not take the law into their own hands but should utilise the remedial mechanisms available to them in the Schools Act.

²⁶⁷ *Davies Administration of the Education System and School Governance* (2008) 59.

²⁶⁸ See *Hoërskool Ermelo* case.

²⁶⁹ See *Welkom High School* case.

²⁷⁰ See *Rivonia Primary School* case.

²⁷¹ *Welkom High School* para 1.

It is submitted that in most instances there will be a possibility of power differentials between SGBs and education authorities. This however can be combated by putting mechanisms in place for SGBs to be placed on the same footing as education authorities. Liebenberg and Isaacs recommend the use of supervisory orders coupled with meaningful engagement and the use of civil society organisations in the process of meaningful engagement. In *Olivia Road* Yacoob J also made reference to this by stating that ‘civil society organisations that support the people’s claims should preferably facilitate the engagement process in every possible way’.²⁷² It is further submitted in in such a case an impartial 3rd party (the mediator) should be called upon to try and facilitate the engagement process. This way the mediator can try to facilitate a situation where all persons are heard in the engagement process and that one party does not undermine another.

²⁷² *Olivia Road* para 20.

Chapter 5: Conclusion

As was stated in the introductory chapter, the primary aim of this dissertation was to determine the potential of ‘meaningful engagement’ in an education litigation context and to provide recommendations to determine when it is appropriate to grant the remedy and how to make the engagement process between the parties more effective.

In chapter 2 it was shown that a substantial framework has been developed with regard to ‘meaningful engagement’ in housing litigation. It was indicated that ‘meaningful engagement’ has the potential to be very effective between the parties when trying to resolve disputes amongst themselves. This was the most evident in the case of *Olivia Road*. The Constitutional Court also highlighted some important aspects with regard to meaningful engagement. The first aspect was that for meaningful engagement to be successful it should preferably commence before litigation.²⁷³ Furthermore, for the engagement process to be meaningful the parties must both be willing to participate in its process in good faith.²⁷⁴

In chapter 3 it was shown that meaningful engagement has recently been applied in education litigation. In the cases of *Welkom High School* and *Juma Musjid* the court directly related meaningful engagement to the best interest of the child principle. If parties fail to meaningfully engage with one another they are endangering the children’s interests in the matter. It was further shown that SGBs and education authorities are organs of state and are therefore bound by the principle of co-operative governance. This in turn means that they should ‘cooperate with one another in mutual trust and good faith’ by ‘avoiding legal proceedings against one another’. It was illustrated by means of the *Juma Musjid* case that in some instances meaningful engagement can be rendered ineffective between the parties if ‘too much water had flowed under the bridge’. It was further shown that when parties engage in a power

²⁷³ See *Port Elizabeth Municipality, Olivia Road, Joe Slovo and Abahlali*.

²⁷⁴ See *Port Elizabeth Municipality and Olivia Road*.

struggle with one another they lose sight of crafting a solution, which would be more advantageous for all the parties concerned. It was further shown that meaningful engagement encompasses many benefits for the parties concerned as apposed to litigation. It is submitted that SGBs and education authorities should not underestimate the potential of meaningful engagement in resolving their disputes and ensuing a good long standing relationship with one another.

In chapter 4 the relationship between SGBs and state authorities and their corresponding powers and duties were discussed. It was submitted that there would always be a possibility of power differentials between SGBs and education authorities in conflict situations. It was shown that these power differentials could be combated by putting mechanisms in place for SGBs to be placed on the same footing as education authorities. Liebenberg and Isaacs made very important recommendations in this regard that courts when making meaningful engagement orders should couple them with supervisory orders.²⁷⁵ Other recommendations included the involvement of civil society organisations and mediators in the engagement process.²⁷⁶

It is submitted that when it comes to the advantages and disadvantages of 'meaningful engagement' the advantages far outweigh the disadvantages. This alternative dispute resolution mechanism has the potential to allow the parties who are more equipped than the courts, to come up with creative and just solutions which are tailor made and potentially 'win-win'. Although this remedy has not to date been effective in avoiding education litigation in totality as a provisional order, it has shown a lot of promise at the remedial stage of litigation. With the help of the preceding case law and reputable authors opinions I have developed recommendations with regard to 'meaningful engagement' in an educational context.

²⁷⁵ Isaacs(2010) 26 *SA Journal of Human Rights* 356 384 ; Liebenberg(2014) *National Journal of Constitutional Law* (forthcoming) 28.

²⁷⁶ *Supra*.

The recommendations address two aspects. On the one hand they will be directed at determining when it is appropriate to order 'meaningful engagement' and on the other, how to make 'meaningful engagement' a more effective remedy between the parties in an educational context.

When will it be appropriate to order meaningful engagement?

In determining whether it is appropriate to order meaningful engagement the court must do this on a case-by-case basis. In some cases such as *Juma Masjid* it was evident that 'too much water had flowed under the bridge' between the parties. This then led to a situation where engagement was ineffective. It is very important to note that meaningful engagement is only effective if both parties are willing to engage, compromise and think creatively in its process, this in turn will hopefully enable the parties to come up with a solution. If however the relationship between the parties has soured to such an extent that it would be improbable that they resolve the matter on their own, meaningful engagement should not be ordered. This is why Sachs J in *Port Elizabeth Municipality* reluctantly found that mediation would be inappropriate if ordered between the parties.²⁷⁷

As discussed in chapter 4 of my dissertation, in most cases there will be power differentials between SGBs and education authorities. This then leads us to the question whether it would be appropriate to order 'meaningful engagement' in such a situation? It is a commonly known fact that one of the reasons for mediation failure is that the power differentials between the parties are too great and therefore mediation is rendered inappropriate. However, it is submitted that even though there are potential power differentials this should not negate the courts from ordering it, as long as it is ordered with procedural safeguards. Liebenberg and Isaacs have recommended that in such cases courts should order meaningful engagement coupled with a supervisory order furthermore civil society organisations should be involved in the process of engagement.²⁷⁸ I further submit that

²⁷⁷ *Port Elizabeth Municipality* para 47.

²⁷⁸ Isaacs(2010) 384 26 *SA Journal of Human Rights* 356 ; Liebenberg(2014) *National Journal of Constitutional Law* (forthcoming) 28.

when it comes to the engagement process they should be an impartial 3rd party (mediator) who can be called upon to facilitate the engagement process. This way the mediator can facilitate a situation where all parties are heard in the engagement process and that one party does not undermine another.

How to make meaningful engagement more effective?

For meaningful engagement to be truly effective it must be entered into before litigation takes place. This has been highlighted in several of the cases discussed. I am in agreement with Liebenberg where she argues that 'when cases do come before the courts, judges must be willing to attach real consequences to a failure by the parties to respect these deliberative criteria in their interactions'.²⁷⁹ One possible way to ensure that meaningful engagement is entered into before litigation is to consider awarding cost orders against education authorities in cases where this has not occurred.²⁸⁰ If education authorities do not reasonably attempt to engage with schools and SGBs and during the litigation process it comes to the Courts attention that this matter could have been resolved by means of that process, a cost order should be awarded against them, which was evident in the case of *Olivia Road* where the court made a cost order against the State. If education authorities are faced with the prospects of being awarded a cost order against them this might give them the extra motivation to meaningfully engage with schools and SGBs before attempting litigation. Another way is for courts to take an unfavourable view of the party who did not reasonably engage when deciding to grant an order or not.

Liebenberg argues that the court should develop and enforce normative parameters within which the engagement process should occur. This coupled with a supervisory order will enable the court to control the process and outcome of the engagement and make sure that the agreement reached is in

²⁷⁹ Liebenberg(2014) *National Journal of Constitutional Law* (forthcoming) 36.

²⁸⁰ It should be noted that this could even be extended to private individuals such as the private trust in the case of *Juma Masjid*.

line with the normative parameters and goals initially set by the court.²⁸¹ It is submitted that at the very least a court should on a case-by-case basis give parties objectives to be achieved in the engagement process. Liebman and Sabel argue that 'if the framework is too intrusive, it suffocates local innovation. If it is merely indicative, local action is uncoordinated, and parents, teachers and students are left guessing about what they need to do to please authorities'.²⁸²

It is submitted that the Schools Act should be amended to make provision for a clause dealing with dispute resolution.²⁸³ The clause could specifically state that if a dispute ensues between any of the role players they are not permitted to institute litigation against one another before they have undergone mediation in the meaningful engagement process.²⁸⁴ It is furthermore submitted that the use of a specialised impartial third party mediator would have the potential to make meaningful engagement more effective. In such an instance the mediator could facilitate the process and see to it that negotiations take place in a fair manner to all parties concerned.²⁸⁵

²⁸¹ Liebenberg(2014) *National Journal of Constitutional Law* (forthcoming) 29 and 34.

²⁸² Isaacs (2010) 378; Liebman and Sabel 'A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform' (2003) 28 *New York University Review of Law and Social Change* Fn 214.

²⁸³ It is important that a forum be established to deal with these disputes. Another possible solution could be to extend the scope of an already established forum called the Education Labour Relations Council (ELRC). This is an independent council, which deals with the resolution of labour disputes in the education sector. They provide dispute and management (and prevention) services. For more information on the ELRC visit <http://www.elrc.org.za>.

²⁸⁴ Regulations would also have to cover the situation where one party refuses to undergo mediation.

²⁸⁵ It is submitted that if the Schools Act is amended to include mediation in the engagement process the regulations will have to regulate the costs in the matter. In such a case it can be argued that because the schools are public schools the State should bear the costs of mediation. Another possibility is that the State employs a panel of independent mediators that deal specifically with these disputes and are paid on rates to be prescribed.

Sachs J is famous for his well thought out, eloquently written judgments. I started my dissertation with a quote he made in the *Port Elizabeth Municipality* judgment and find it appropriate to round it off with another:

‘Money that otherwise might be spent on unpleasant and polarising litigation can better be used to facilitate an outcome that ends a stand-off, promotes respect for human dignity and underlines the fact that we all live in a shared society.’²⁸⁶

Word count (footnotes included): **16744 words**

²⁸⁶ *Port Elizabeth Municipality* para 42.

Bibliography

Books

Cornell D and Muvangua N (editors) *Ubuntu and the Law – African ideals and post apartheid jurisprudence* Fordham University Press: New York (2012)

Davies EH *Administration of the Education System and School Governance* CELP: Pretoria (2008)

Joubert R and Bray E (Editors) *Public School Governance in South Africa* CELP: Pretoria (2007)

Joubert R and Prinsloo S *Education Law – A practical guide for educators* Van Schaik Publishers: Pretoria (2001)

Joubert R and Prinsloo S *The Law of Education in South Africa* 2ed. Van Schaik Publishers: Pretoria (2009)

Botha P, Roos MC, Rossouw JP and Smit MH *Aspects of Education Law* 4ed. Oosthuizen IJ(editor) Van Schaik Publishers: Pretoria (2009)

Woolman S and Fleish B *The Constitution in the classroom – law and education law in South Africa 1994-2008* PULP: Pretoria (2009)

Journal articles

Boulle L 'Promoting rights through court-based ADR?' (2012) 28 *South African Journal on Human Rights* 1-13

Budlender G 'The role of the courts in achieving the potential of socio-economic rights' (2007) 8 *ESR Review* 9-11

Chenwi L 'A new approach to remedies in socio economic rights adjudication: Occupiers of 51 Olivia Road and Other v City of Johannesburg and Others' (2009) 2 *Constitutional Court Review* 371-393

Chenwi L "Meaningful engagement" in the realization of socio-economic rights: The South African experience' (2011) 26 *SA Public Law* 128-156

Daniel TK and Greytak S 'Recognising situatedness and resolving conflict: Analysing US and South African education law cases' (2013) 46 *De Jure* 24-44

Isaacs D 'Realising the right to education in South Africa: lessons from the United States of America' (2010) 26 *SA Journal of Human Rights* 356-385

Joubert R 'The Constitution as a limitation on government power in educational contexts' (2012) 27 *SA Public Law* 379-391

Liebenburg S '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* 1 1-29

Liebman J and Sabel C ' A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform' (2003) 28 *New York University Review of Law and Social Change* 1-130

McLean K 'Meaningful engagement: one step forward or two back? Some thoughts on Joe Slovo' (2010) 3 *Constitutional Court Review* 223-242

Muller G 'Conceptualising "meaningful engagement" as a deliberative democratic partnership' (2011) 22 *Stellenbosch Law Review* 742-758

Roach K and Budlender G ' Mandatory relief and supervisory jurisdiction: when it is appropriate, just and equitable?' (2005) 112 *SA Law Journal* 325-351

Serfontein M and de Waal E ' The effectiveness of legal remedies in education: A school governing body perspective' (2013) 46 *De Jure* 45-62

Skelton A 'Face to face: Sachs on restorative justice' (2010) 25 *SA Public Law* 94-107

Skelton A 'How far will the courts go in ensuring the right to a basic education?' (2012) 27 *SA Public Law*: 392-408

Skelton A 'The role of the courts in ensuring the right to a basic education in a democratic South Africa: a critical examination of recent education case law' (2013) 46 *De Jure: Education Law in a Democracy* 1-23

Van der Merwe S 'The constitutionality of section 16A of the South African Schools Act 84 of 1996' (2013) 46 *De Jure* 237-350

Van der Vyver JD 'Constitutional protection of the right to education' (2012) 27 *SA Public Law* 326-343

Forthcoming article

Liebenberg S 'Deepening democratic transformation in South Africa through participatory constitutional remedies' (forthcoming) 2014 *National Journal of Constitutional Law* 1-40

South African Case Law

Abahlali baseMjondolo Movement of South Africa and Another v Premier of the Province of Kwazulu-Natal and Others 2010 (2) BCLR 99(CC)

Head of Mpumalanga Department of Education and Another v Hoërskool Ermelo 2010 (3) BCLR 177 (CC)

Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC)

Governing Body of the Juma Musjid Primary School v Essay NO 2011 (8) BCLR 761 (CC)

Head of Department, Department of Education, Free State Province v Welkom High School 2013 (9) BCLR 989 (CC)

MEC for Education v Governing Body of the Rivonia Primary School 2013 (6) SA 582 (CC)

Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg 2008 (3) SA 208 (CC)

Port-Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC)

Residents of Joe Slovo Community, Western Cape v Thubelisha Homes 2010 (3) SA 454 (CC)

Residents of Joe Slovo Community v Thubelisha Homes 2011 (7) BCLR 723 (CC)

Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality 2013(1) SA 323 (CC)

South African Legislation

The Constitution of the Republic of South Africa Act 108 of 1995

The Housing Act 107 of 1997

Kwazulu-Natal Elimination and Prevention of the Re-emergence of Slums Act 6 of 2007

Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998

South African Schools Act 84 of 1996

Papers/reports

Budlender G 'The Judicial Role in Cases Involving Resource Allocation' paper delivered at a Conference of the Middle Temple, Cape Town, September 2010 (accessed on 28 August 2014) <<http://www.sabar.co.za/law-journals/2011/april/2011-april-vol024-no1-pp35-38.pdf> >

Chenwi L and Tissington K 'Engaging meaningfully with government on socio-economic rights – A focus on the right to housing' (2010) *Community Law Centre (CLC) University of Western Cape SERI* 1-31