UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

THE IMPACT OF THE ENGAGEMENT PRINCIPLE ON THE RIGHT TO HAVE ACCESS TO ADEQUATE HOUSING: FROM REASONABLENESS TO ENGAGEMENT

By

Giteya Tambwe

Submitted in accordance with the requirements for the degree of:

Masters of Laws

Faculty of Law

University of Pretoria

Supervisor: Prof. Danie J. BRAND

January 2018

© University of Pretoria

ACKNOWLEDGEMENTS

May all the thanks be given to the Almighty God the Lord Jesus Christ who has walked by my side throughout these past years and has provided for me in so many different ways including; strength, wisdom, finances and knowledge.

I am forever grateful to my husband, Dr Joseph Tambwe and my children (Joe, Glory, Archange and Cherubin) for encouraging me to study. I acknowledge and appreciate the sacrifices that they have endured while I was writing this dissertation. Their contribution to this work is beyond measure. May God richly bless them.

I would like to thank my supervisor, Professor D. Brand, for his patience and guidance. This work is his too. I appreciate his availability to supervise this work. May he find here the expression of my profound gratitude.

I thank Professors J. Malan and J. Lubuma for their advice and encouragement. The doors of their respective offices have always been open to me.

The financial assistance of National Research Fund (NRF) towards this research is hereby acknowledged. I submit that opinions expressed and conclusions arrived at, are my own and are not necessarily to be attributed to the NRF.

It will be impossible to thank everyone who has helped me. May all of you find here the expression of my gratitude.

© University of Pretoria

UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

DECLARATION

I declare that *"The Impact Of The Engagement Principle On The Right To Have Access To Adequate Housing: From Reasonableness To Meaningful Engagement"* is my own work and that all the sources that I have used or quoted have been acknowledged to the best of my ability, by means of complete references.

Keywords: Right to housing, reasonableness, meaningful engagement, impact-infringement, remedy, unlawful occupiers, requirement, dialogue, progressive realisation, constitution, South Africa, communal relations, Ubuntu.

© University of Pretoria

ABSTRACT

The adjudication of socio-economic rights has brought a new dimension in the South African legal landscape, and Courts, especially the Constitutional Court, which have been entrusted with the mandate of giving effect to the rights enshrined in the Bill of Rights.

In its attempt to fulfil this constitutional mandate, the Constitutional Court has to devise remedies that give relief to rights infringements; meaningful engagement is one such remedy. Since its inception in the*Port Elizabeth*[1]case, meaningful engagement has become a *conditio sine qua none* in the litigation of claims that involve housing rights. Meaningful engagement has been applied subsequently both as a requirement and as a remedy in many cases, even in claims involving the right to education.

This dissertation seeks to evaluate the impact that the principle of meaningful engagement has had on the progressive realisation of the right to have access to adequate housing as entrenched in Section 26 of the Constitution.

[1]*Port Elizabeth Municipality v VariousOccupiers 2004 SA 7 (ZACC).*

© University of Pretoria

DEDICATION

I dedicate this work to the memory of my late daughter Lorraine Matangi Tambwe and of my late father Roger Kikango.

© University of Pretoria

TABLE OF CONTENTS

Page

Acknowledgements i
Declaration ii
Abstract iii
Dedication iv

CHAPTER 1: Introduction

1.1 Background 8
1.2 Research Question 9
1.3 Methodology and Scope 10
1.4 Concluding Remarks 11

CHAPTER 2: Reasonableness And The Right To Have Access To Adequate Housing

2.1 Introduction 12
2.2 Reasonableness in Housing Cases: The Case of Grootboom 13
2.2.1 Case Background 13
2.2.2 The Judgement And its Critics 14
2.3 Reasonableness and Separation of Powers Doctrine 18
2.4 Concluding Remarks 20

CHAPTER 3: Meaningful Engagement

3.1 Introduction and Background 22
3.2 Meaningful Engagement: A Requirement or a Remedy? 23
3.3 The Impact of Meaningful Engagement in the Progressive Realisation Of the Right to Adequate Housing 31
3.4 Engagement as a Tool of Participatory Democracy in the South African Litigation Process 34

© University of Pretoria

3.5 Engagement as a Judicial Deference Tactic 39

3.6 Meaningful Engagement in Education Rights 42

3.7 Concluding Remarks 45

CHAPTER 4: From Reasonableness to Engagement

4.1 Parallel Between Reasonableness and Meaningful Engagement 47

4.1.1 Introduction 47

4.1.2 Parallels 47

4.2 The Shift From Reasonableness to Engagement 49

4.2.1 Reasonableness 49

4.2.2 Meaningful Engagement 50

4.3 Concluding Remarks 51

CHAPTER 5: Conclusion and Way Forward 52

BIBLIOGRAPHY 55

© University of Pretoria

CHAPTER ONE: INTRODUCTION

"Everyone has the right to have access to adequate housing."[2]

1.1 BACKGROUND

Of all the socio-economic rightsin the South African Constitution,[3] the right to have access to adequate housing, enshrined in section 26 of the Constitution, has been the most heavily litigated. With the enforcement of socio-economic rights as set out in Section 38 of the Constitution, people have the right to approach the courts to seek redress when their socio-economic rights have been violated. Thus, the courts, especially the Constitutional Court, have constantly been trying to find appropriate ways of giving effective remedies in cases of socio-economic rights claims. Meaningful engagement was born out of this effort, as on many occasions, the Constitutional Court was called upon to adjudicate claims involving infringements of section 26. In the context of housing litigation, the claim that comes most before the courts is that of eviction from illegally occupied land (*Grootboom, Joe Slovo, Ngomane, Port Elizabeth)* or buildings (*Olivia Road, Blue Moonlight*).[4]

As will be seen below, meaningful engagement was not the first principle that the Constitutional Court came up with in its attempt to remedy housing right infringements. In the first case post 1996 on the right to have access to adequate housing, the Constitutional Court applied reasonableness as a criterion for the adjudication of socio-economic rights.[5] I will give

[2]Section 26 (1) of the Constitution of the Republic of South Africa, 1996, (thereinafter The Constitution).

[3] Constitution of the Republic of South Africa, 1996 ('the Constitution'). In addition to the right to housing (section 26), the Bill of Rights contains also health care rights (see *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC)*; Minister of Health v Treatment Action Campaign and Others* 2002 (5) SA 721 (CC) for examples of cases dealing with these rights); rights to food and water (*Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC)); educational rights; and rights of access to land.

[4]*Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC); *Residents of Joe Slovo Community*, *Western Cape v Various Occupiers* 2005 (1) SA 217 (CC)*; Ngomane and Others v Govan Mbeki Municipality* 2016 (12) BCLR 1528 (CC)*; Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* 2012 (2) SA 104 (CC).

[5] *Government of the Republic of South Africa and Others v Grootboom* 2001 (1) SA 46 (CC).

© University of Pretoria

an overview of the reasonableness criterion as applied by the Court in the *Grootboom* case in Chapter two of this dissertation.

As for the term "meaningful engagement", it was first used in the *Port Elizabeth* case[6] where the Court held the following:

"…The procedural and substantive aspect of justice and equity cannot be separated. One potentially dignified and effective mode of achieving sustainable reconciliation 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. Whenever possible, respectable face-to-face engagement or mediation through a third party should replace arm's-length combat by intransigent opponents"[7].

Although the Court started with the reasonableness criterion as an adjudicative tool to evaluate government action, legislation and policy on housing, meaningful engagement has become a *conditio sine qua non* in housing litigation.

In this dissertation I intend to evaluate the rise and the impact of meaningful engagement process at the expense of the reasonableness criterion in housing litigation.

1.2 RESEARCH QUESTION

The adjudication and justiciability of socio-economic rights under the 1996 Constitution have brought a new dimension into the South African legal landscape. Courts, particularly the Constitutional Court, have been entrusted with the mandate to craft new remedies so as to give effect to the rights enshrined in the Bill of Rights. In its effort to fulfil this mandate, the Constitutional Court has devised meaningful engagement as both a requirement and a constitutional remedy in order to give relief to housing right infringements. Since 2004, meaningful engagement is the new criterion by which housing claims are decided. The question is, "What impact does the engagement principle have in the realisation of the right to have access to adequate housing?"

---

[6] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).
[7] *Port Elizabeth* para 39.

© University of Pretoria

The ultimate objective of the right enshrined in Section 26 is for the homeless, who seek redress from the Court, to have access to housing.

1) Does meaningful engagement play a positive role with regards to the above-mentioned objective?
2) Why does the Court ask people whose rights have been violated, to negotiate with those who have infringed their rights?
3) Is meaningful engagement an adequate remedy to housing right infringements or is it another form of judicial avoidance or deference?
4) Where does the conflict arise in the realisation of the right to have access to adequate housing?
5) Is housing a right or a conflict?

These are but a few of the questions that this dissertation will address.

1.3 METHODOLOGY AND SCOPE

Although there have been a great number of judgments on housing in the South African Court, in this dissertation, I focus solely on judgments rendered by the Constitutional Court, referred to as the "Court".

My approach is a Constitutional one, as I review constitutional case law and the scholarly work of prominent writers on the Constitution and on the topic. The method undertaken will be a critical evaluation of the Constitutional Court's decisions in the few cases where the engagement principle was applied.

Because of time constraints and the intricacy of the subject, I do not intend to do an in-depth study of the principle of meaningful engagement. The main focus of this work is to evaluate the impact that the concept could possibly have had on the progressive realisation of the right to have access to adequate housing as provided by Section 26 of the Constitution, since *Grootboom.* An in-depth study of all the cases decided by the Court is also beyond this dissertation.

© University of Pretoria

1.4 OVERVIEW

The next chapter will focus on reasonableness and its impact on the right to have access to adequate housing. I will also discuss the way this concept was applied by the Court in housing litigation, its relationship with the separation of powers doctrine and its critics thereof.

In chapter three, I will discuss the principle of meaningful engagement as applied in housing and education rights litigation., its impact on the adjudication and the realisation of the rights enshrined in sections 26 and 29 of the Constitution and the critics levelled against it by various writers such as Liebenberg, Brand, Ngang and Chenwi. I will also touch on the participatory role of meaningful engagement in the resolution of conflicts born out of housing and education rights infringement. Its use as a judicial deference manoeuvre will also be discussed for a better understanding of some of the Court's judgments.

Parallels between reasonableness and meaningful engagement will be drawn in chapter four; and chapter five will unpack the findings and conclusions of this work.

© University of Pretoria

CHAPTER TWO: REASONABLENESS AND THE RIGHT TO HAVE ACCESS TO ADEQUATE HOUSING

"The right that is recognised in Grootboom is a right to demand that the state adopt a reasonable program."[8] Fons Coomans.

2.1 INTRODUCTION

It is understood that no serious study of constitutional jurisprudence on the socio-economic right to housing would be complete without reference being made to the principle of reasonableness. This is because the first claim that came before the Court on the right to have access to adequate housing, as set out in section 26 of the Constitution, was decided on reasonableness as a criterion of review.[9] Since *Grootboom,* the evolution of reasonableness as a standard of review has been held as one of the most significant developments in the jurisprudence under the Constitution of the Republic of South Africa, 1996.[10]

Of the many authors that have written on reasonableness as a standard of review,[11] I believe that Fons Coomans's book on the assessment of "reasonableness" has been of great use in understanding the Constitutional Court's approach when it comes to the application of reasonableness in housing claims.[12]According to Coomans, the South African Constitutional Court developed reasonableness as a standard of review for assessing compliance with constitutional obligations in the area of social and economic rights by the South African

---

[8] Fons Coomans "Reviewing Implementation of Social and Economic Rights: An assessment of the 'Reasonableness' Test as Developed by the South African Constitutional Court." ZaöRV 65 (2005), htt://www.zaoerv.de. Max-Planck-Institute-für äuslandisches öffentliches Recht und Völkrrecht. https://scholar.google.co.za . Accessed on March 7 2017.
[9]*Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC)
[10]Such as Geo Quinot and Sandra Liebenberg "Narrowing the Band: Reasonableness Review in Administrative Justice and Socio-economic Rights Jurisprudence in South Africa." (2011) 11 *Stellenbosch Law Review* 639.
[11]Geo Quinot & S.Liebenberg 'Narrowing the Band: Reasonableness Review in administrative Justice and Socio-Economic Rights in South Africa' (2011) 22 *Stellenbosch Law Review* 640; CR.Sunstein 'Social and Economic Right? Lessons from South Africa' (2011) 11 Constitutional Forum130; C. Steinberg 'Can Reasonableness protect the Poor?: A review of Socio-Economic Rights Jurisprudence.'(2006) 123 *South African Law Journal* 264; D.Brand 'Judicial deference and democracy in socio-economic rights cases in South Africa.' (2011) 22 *Stellenbosch Law Review* 614; M.Kende 'The South African Constitutional Court's embrace of Socio-Economic Rights: A comparative Perspective.' (2003) 6 *Chapman Law Review* 137.
[12]Coomans 165.

© University of Pretoria

government.[13]Whether reasonableness has been an effective judicial tool for the realisation of the right enshrined in section 26 of the Constitution is a question that this study has undertaken to address.

2.2 REASONABLENESS IN HOUSING CASES: THE CASE OF *GROOTBOOM*

2.2.1Case background

The *Grootboom* case[14]came from the High Court on appeal to the Constitutional Court in 2000. For the purpose of this dissertation, only the judgment of the Constitutional Court is of importance, as it is not in the scope of this study to delve deeply into the whole case.

The applicants were a group of people who were rendered homeless because theywere evicted from their informal homes that were situated on private land; the land was earmarked for formal low-cost housing.[15]What is not often said about this case, and which is of importance for the evaluation of reasonableness, is that the Court found that many of these evictees had applied for subsidized low-cost housing from the municipality and had been on the waiting list for as long as seven years. Despite numerous enquiries from the municipality, no definite answer was given to them. Clearly, it was going to be a very long wait. These people were also previously living in intolerable and appalling conditions in another informal settlement called Wallacedene before moving to "New Rust", where they were evicted.[16]

The second observation is that most of these people were very poor and earned very little or no income; and half of the population were children.[17] It is therefore understandable that they took legal action against the municipality when it refused to provide them with adequate basic temporary shelter or housing on state-owned land.

The Court relied on the judgment in the *Certification* case,[18] and held that socio-economic rights were indeed justiciable. The Court also held that what was difficult to determine was not

[13]Coomans 168.
[14] *Grootboom* (see note 9 above)
[15]*Grootboom* para 4.
[16]*Grootboom* para 8.
[17]*Grootboom* para 7.
[18]*Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC).

© University of Pretoria

the justiciability of the rights but the question of "how socio-economic rights should be enforced" (our emphasis).[19]This also explains why the Court adopted the case-by-case approach in the adjudication of socio-economic rights; *in casu*, the right to have access to adequate housing as entrenched in Sections 26 and 28 on which Miss Grootboom and her fellows based their application. Section 26 of the Constitution provides as follows:

(1) Everyone has the right to have access to adequate housing.

(2) The State must take reasonable legislative and other measures within its available resources to achieve the progressive realisation of this right;

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

Section 28 states the following, (for the purpose of this study), among other things:

(1) Every child has the right

(c) To basic nutrition, shelter, basic health care services and social services;

(2) A child's best interests are of paramount importance in every matter concerning the child.

2.2.2The Judgment and its Critics

In handing down the judgment, the Court held that the real question in terms of the Constitution was whether the measures taken by the State to realise the right afforded by Sections 26 and 28 were reasonable.[20]In the language of the Court, reasonable measures, whether legislative or other, must be a coherent public housing program directed towards the progressive realisation of Sections 26 and 28 rights; all this, within the State's available means.[21] The Court further held that in any challenge based on Section 26 in which it is argued that the State has failed to meet the positive obligations imposed upon it by Section 26(2), the question will be whether measures taken by the State are reasonable. A Court considering reasonableness will not

[19]*Grootboom* para 20.
[20]*Grootboom* para 33
[21]*Grootboom* para 41.

© University of Pretoria

enquire whether more desirable or favourable measures could have been adopted, or whether money could have been better spent. Only reasonable measures will meet the requirement, the Court stated.[22]

With regards to legislatives measures, the Court held that mere legislation was not enough. The State is obliged to act to achieve the intended result. Policies and programs implemented by the Executive must also be reasonable both in their conception and in their implementation. Programs must be balanced and flexible, and must make appropriate provision for attention to housing crisis.[23]

Although the Court made every effort to give a sound judgment, it ignored the point that I have made above, that the people in *Grootboom* had applied on numerous occasions for low cost housing and that they were being evicted because the municipality had earmarked the land on which they had settled for the very purpose for which Miss Grootboom and her peers were fighting in court. The Court could have ordered that the New Rust community be the prime beneficiary of the program as they had been on the waiting list for more than seven (7) years. In dealing with the justiciability and the enforcement of socio-economic rights to have access to housing in *Grootboom*, the Court should not have forgotten the main objective of its inclusion in the Constitution. The Court ought always to remember that the aim of rights adjudication is to try by all means to move towards the progressive realisation of the said right. The question then remains whether reasonableness, as an acclaimed review criterion, did help the homeless in *Grootboom* and many others thereafter to have access to adequate housing.

From the Court's judgment, Fons Coomans contends that the main advantage of the reasonableness test is to provide a flexible tool for assessing the realisation of social and economic rights that takes into account the characteristics of the domestic situation and local context. Coomans thinks that reasonableness is in this regard a realistic standard of review. It is in this context, he opines, that the question of the inequalities of the past and the availability of

[22] *Grootboom* paras 41 & 54
[23] *Grootboom* paras 42 & 43.

© University of Pretoria

the resources find their excuses or explanation.[24]For the proponents of reasonableness, this standard of review is a tool that helps in the justification of government policy.

Mureinik refers to it as a "culture of justification".[25]The government should be required to evaluate its policies and programs on housing and make the report available for public scrutiny. In *Grootboom,* the Court found that the government's program on housing was neither reasonable nor efficient.

For Lillian Chenwi, any measure aimed at the progressive realisation must aim at meeting the short, medium and long term needs, for it to pass the test of reasonableness.[26]In *Grootboom,* however, the realisation of the right to housing was not seen as an immediate occurrence. Coomans laments that the right that is recognised in *Grootboom* is a right to demand that the State adopt a reasonable program, not that the applicants be provided with housing. From the perspective of the claimant, this is disappointing because, in most cases, it will not help him or her.[27]The right to housing here is not seen as an individual right that can be enforced immediately. As for Danie Brand, the Court in *Grootboom* indicated that the purpose of the test was simply to determine whether a measure under evaluation falls within the bounds of reasonableness and not to determine what would be the problem at hand. He contends that the *Grootboom* Court declined to prescribe a specific solution to the problem of emergency shelter provision to the state on grounds of institutional capacity concerns, as a form of deference to the legislature and executive.[28]

The Court also failed to determine the precise contours and content of the measures to be adopted.[29]This reasoning prompted the Court to leave the choice of addressing the social problem to the other relevant branch of government, namely the executive. It also informs the Court's case-by-case approach in the enforcement of the socio-economic right to have access to

[24]Coomans 181.
[25]Etienne Mureinik "A Bridge to where? Introducing the Interim Bill of Rights." (1994) 10 *South African Journal on Human Rights* 31-34.
[26]Lillian Chenwi, 'Unpacking "Progressive Realisation, its Relation to Resources, Minimum Core and Reasonableness, and some Methodological Considerations for assessing compliance." (2013) 3 *De Jure*742.
[27]Coomans 188.
[28]Danie Brand 'judicial Deference and Democracy in Socio-Economic Rights cases in South Africa.' (2011) 22 Stellenbosch Law Review 619.
[29]Danie Brand (see note 29 above) 619.

© University of Pretoria

adequate housing, as this approach neither grants nor recognises individual and immediate relief. Disappointing also is the fact that the Court failed to identify the content of the right arising from Section 26, which should have served as a legal basis for assessing the impact of reasonableness.[30] The case-by-case approach prevents the judicial system from building a system of precedent in the South African socio-economic jurisprudence and, as Sandra Liebenberg puts it, reasonableness prevents the Court from developing the substantive content of socio-economic rights because the program of the government in question complies with the abstract standard of reasonableness. Thus, the Court avoided addressing the initial principled engagement together with the purpose and fundamental values of the rights in question, and the impact of the violation on the applicants. Reasonableness does not engage substantively with the nature and the content of socio-economic rights such as the right to housing. It avoids an inflexible position and creates a continuous chance of challenging various socio-economic rights violations and deprivations.[31]

With regard to the view above, I submit that reasonableness has done little in improving the livelihood and the conditions of the homeless section of the South African population. In *Grootboom*, the Court, applying reasonableness, held clearly that neither section 26 nor section 28 entitled the respondents to claim shelter or housing immediately upon demand.[32]To borrow Fons Coomans' words, the reasonableness review has brought less than what Ms.Grootboom and her co-respondents may have hoped for. All that reasonableness has achieved is to allow the Court to lay the foundations for its adjudication of future socio-economic claims, and to do away with the frequently heard argument that courts are ill-equipped to assess the realisation of socio-economic rights.[33] Therefore, reasonableness appears to be a mere evaluation tool, not a robust remedy that could foster the progressive realisation of section 26 and 28 rights.

The fact that Miss Grootboom died a homeless person twenty (20) years after the landmark judgment was handed down, speaks volumes on what reasonableness has achieved in the lives of the people, who first, braved the government and took the State to court to claim their

[30]Coomans 182.
[31]Sandra Liebenberg '*Socio-Economic Rights: adjudication under a transformative constitution.*'(ed)Juta (2010) 173-174.
[32]*Grootboom* para 95.
[33] Coomans (note 8 above) 194.

© University of Pretoria

constitutional right to have access to adequate housing. This is the irony of the application of reasonableness in the first housing claim.

Another case where reasonableness was applied is *Joe Slovo.*[34]In casu, the question as to whether the eviction was just and equitable was decided by analysing whether it constituted a reasonable measure to give effect to the right to housing. The Court decided that the eviction was reasonable even in the absence of meaningful engagement with the community, upon the condition that adequate alternative accommodation was provided and that the occupiers' expectation that 70% of the houses in the new development would be allocated to them. The Court further found that the applicants were unlawful occupiers under domestic legislation, and that the respondents had acted reasonably in seeking to promote the right of access to adequate housing. In *Joe Slovo* reasonableness seems to have been applied in such a way as to give effect to the expectations of the residents, instead of delving into the question whether the policy was appropriate to the community's objectively established needs.[35]

As with *Grootboom,* reasonableness did little for the Joe Slovo Community. The *Joe Slovo* judgment is be studied below, when I touch on the question of meaningful engagement.

2.3 REASONABLENESS AND THE SEPARATION OF POWERS DOCTRINE

One of the main critiques of the *Grootboom* judgment and thus of the reasonableness standard of review, focuses on the supposed overt deference shown by the court towards the executive. To show that the reasonableness test requires the court to defer to the other branches of government for matters of policy and choices, the *Grootboom*court recognised that the legislative and the executive branches of government were solely responsible for the implementation of socio-economic rights. Instead of supervising the declaratory order it made, the Court handed this task to the Human Rights Commission. The Commission was entrusted with the responsibility of monitoring and reporting on the compliance by the State with its section 26 obligation.[36]This attitude shows that the court, in *Grootboom*, was more concerned

[34]*Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC).
[35] https://www.escr-net.org/caselaw/2011/residents-joe-slovo-community-western-cape-v-thubelisha-home.
[36]Grootboom paras 96 & 97. See also Brand (note 30 above) 621

© University of Pretoria

with establishing a relationship of collaboration between the state and the judiciary. Murray Wesson recognizes that the court acted in this fashion because it was at the beginning of its constitutional mandate as set by the 1996 Constitution.[37]In an apparent extension of the State's discretion, the court recognised that it was poorly qualified to dictate how the State should attend to the needs of people without shelter. Here I submit, again, that the court could have pointed the municipality to the fact that Ms Grootboom and her peers were on the waiting list for more than seven years already and should have been given priority for the low-cost houses to be built on the site of their informal settlement. Furthermore, the court refused to play a supervisory role in the implementation of the *Grootboom* judgment, stating its lack of capacity.

I agree with Carol Ngang in his plea for a judicial enforcement that should be seen as a complementary strategy to the political objective of social transformation, rather than as an oppositional force to the proper functioning of government. He opines that, because of this deferential attitude, the court has been left with the option to either abdicate its role in the transformation process or to safeguard that role and to sometimes encroach onto the political domain. In *Grootboom,* the court opted for the first option, thus putting unnecessary pressure on the effective functioning of the court and retarding the constitutional vision of social transformation.[38]

As Cummings puts it, judicial enforcement constitutes a key strategy for the protection and the empowerment of dispossessed groups, particularly when political channels of realisation become unavailable, ineffective, inaccessible or insufficient like in *Grootboom.*[39]The tension created by the improper application of the doctrine of separation of powers has produced unnecessary restrictions on the proper functioning of the court as a complementary mechanism in the transformation process, preferring to err on the side of abdication as a way of managing the strained politico-judicial relationship.[40]

---

[37]Murray Wesson "*Grootboom* and Beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court." (2004) 20 *SAJHR* 284.
[38]Carol Ngang "Judicial Enforcement of socio-Economic Rights in South Africa and the Separation of Powers Objection: The Obligation to Take 'Other Measures' " (2014) 14 *African Human Rights Law Journal* 32.
[39]S. Cumming and D. Rhodes "Public interest litigation: Insights from Theory and Practice." (2009) 36 *Fordham Urban Law Journal* 612.
[40]Ngang (note 35 above) 26.

© University of Pretoria

With regards to housing, Kameshni Pillay contends that the *Grootboom* case has been narrowly interpreted, with the result that there has been little tangible or visible change in housing policy so as to cater for people who find themselves in desperate and crisis situations.[41]

In light of the above, I submit that Sections 165 and 173 of the Constitution gives tremendous power and legitimacy to the courts to encroach into the terrain of the political organs of the state when necessary, because the political decision to give socio-economic rights constitutional recognition also gives the courts the power to enforce the court's legitimacy in matters of enforcement and, therefore, negates any breach of the principle of separation of powers.

I agree with Fons Coomans who commends reasonableness as a useful and flexible tool in assessing the realisation of socio-economic rights in general, and the right to have access to adequate housing in particular. Coomans lauds the merit of reasonableness as a test that acknowledges that the State is not required to do the impossible and a tool that helps in the justification of government policy. He opines that reasonableness is effective in making the monitoring of the implementation of constitutional qualified provisions on socio-economic rights more tangible; and that helps to enhance the justiciability of these rights. In his view, reasonableness does away with the hurdle of separation of powers.[42] However, I would argue that the main objective of the justiciability of socio-economic rights to have access to adequate housing is for the Court to help the homeless to get redress when their rights have been infringed. In order words, the adjudication of the right enshrined in section 26 must move progressively towards the realisation of this right. To this end, reasonableness has not played a significant role.

2.4 CONCLUDING REMARKS

In this chapter, I have argued that the Constitution grants the courts, the Constitutional Court in particular, the widest review powers, including a broader scope in the enforcement of socio-economic rights. That is why the *Grootboom* judgment was welcomed and lauded by many. However, as scholars started to evaluate this judgment, the shortcomings of the principle of reasonableness on which the case was decided began to emerge.

[41]K. Pillay "Implementing *Grootboom*: Supervision Needed." (2002) 3 *ESR Review* 1-2.
[42]Coomans (note 8 above) 186.

© University of Pretoria

Some of these shortcomings are the case-by-case approach adopted by the court in *Grootboom*, the deferential attitude of the court towards other branches of government and the fact that reasonableness does not recognize an immediate and individual right to the litigant nor apply to all policies directed to rights realisation.[43]As of today, the effectiveness of reasonableness seems to have faded away.

Is it for this reason that meaningful engagement has taken centre stage in the adjudication of socio-economic rights, as it is used both as an alternative to reasonableness[44] and as part of the reasonableness standard?[45]

In the following chapter, I will focus on meaningful engagement as applied by the Court in housing and education claims.

[43]Sandra Liebenberg "The Right to Social Assistance. The implication of *Grootboom* for Policy Reform in South Africa" (2001) 17 *South African Journal of Human Rights* (2001) 255.
[44] Meaningful engagement was used as a way of settling a case before it is adjudicated on. See *Olivia Road* case below.
[45] In *Mazibuko*, meaningful engagement was used as a yardstick to measure the reasonableness of the city of Johannesburg's water policy.

© University of Pretoria

CHAPTER THREE: MEANINGFUL ENGAGEMENT

"When the violation of a right is challenged in Court, the result of positive adjudication should equally amount to the same material things promised by the right in question."[46] *Carol Ngang*

3.1 INTRODUCTION AND BACKGROUND

In this chapter, I intend to shed some light on the way meaningful engagement has been applied by the Court in housing and education litigation, and whether engagement is an effective tool in securing the right to have access to adequate housing. To this end, I will briefly study a few judgments that dealt with the infringement of the right to housing as well as the right to education.

Apart from what the Constitutional Court has provided as definition of meaningful engagement, many scholars have also tried to formulate, in their own words and understanding, various definitions of the concept of engagement. Thus, according to Benjamin Bradlaw, engagement is a mechanism used for the enforcement of the strongly participative version of democracy that the Constitutional Court identified inthe *Doctors for Life* and *Matatiele* cases.[47]Engagement gives courts a tool for enforcing those rights that require structured, long-term engagement with local communities that goes beyond the existing formal mechanisms and that could make local government genuinely responsive to their views and needs. Bradlaw contends that engagement creates a form of legal liability that focuses directly on institutional policies and practices.[48]

For Sandra Liebenberg, meaningful engagement is an innovative type of mandatory order given by the Court, requiring the parties to engage with each other with a view of exploring mutually acceptable solutions to the dispute.[49]

---

[46] Carol Ngang 'Judicial enforcement of socio-economic rights in South Africa and the separation of powers objection: The obligation to take 'other' measures.' 2 African Human Rights Law Journal 32 [2014].
[47]*Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC); *Matatiele Municipality and Others v President of South Africa and Others* 2006 (5) SA 47 (CC).
[48] Benjamin Bradlaw "Beyond a legal Framework for 'Meaningful Engagement' in South Africa". SDI Bulletin (March 11, 2010) WWW.Sdinet.org/blog/2010/03/11/Sdi-bulletin=beyond-a-legal-fr/. 312-313.
[49] Liebenberg (see note 30 above) 418-419.

© University of Pretoria

In my opinion, the view that poor and homeless people must resolve the “dispute” with the state in order to access the right enshrined in Section 26 of the Constitution is, in itself, questionable. While I acknowledge the hurdles that come with the litigation of socio-economic rights, I also wonder why people who turn to courts because their rights have been infringed have to negotiate with those who are responsible for the violation of their rights. In the language of the Court in*Port Elizabeth Municipality*, it is clear that engagement or mediation through a third party should replace arm’s-length combat by intransigent opponents.[50]If one is to extrapolate, this means that engagement should replace litigation or court proceedings. This would, in my view, ruin the justiciability characteristic of socio-economic rights.

In his address at the University of Cape Town, Ngcobo CJ has labelled this process of debating with a view to find a common ground as an expression of an on-going dialogue embedded in the principle of Ubuntu that regulates the interaction between human beings in traditional African societies.[51]In my view, it is this dialogue that has become an important part, a *conditio sine qua non* in the litigation process of the constitutional right to have access to adequate housing.

In the context of litigation on the right to housing, meaningful engagement may be understood as a process by which both parties try to come to an understanding on how rights and policy can meet. It is then that the right to housing of the homeless is met in a sustainable way, through government policy on housing. Debating on how to resolve conflicts that stem from homelessness is a delaying tactic. The Constitution gives the right to have access to adequate housing to every South African; litigation that does not substantiate this obligation fails the poorest among the poor.

3.2 MEANINGFUL ENGAGEMENT: A REQUIREMENT OR A REMEDY?

In this section, four different judgments of the Constitutional Court on housing or eviction claims where meaningful engagement was applied are studied, with the view of ascertaining whether it was applied as a remedy or as a requirement.

[50]*Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

[51] Sandile Ngcobo “Constitutional Dialogue: A Framework for Understanding Co-operative Government.” Address at University of Cape Town. 4 April 2011.www.dgru.uct.ac.za>dgru>downloads.

© University of Pretoria

In the first case, that is *Port Elizabeth Municipality,* the Court held that a key factor in determining the fairness of an eviction is whether proper discussion has been attempted. This would entitle unlawful occupiers who seek to have access to housing, to participate in the process of finding a just solution to the conflict between their housing rights and the property rights of the landowners or the State.[52]

In *Port Elizabeth*, although the Court stressed the importance of parties to engage meaningfully with each other to avoid costly and lengthy litigation, the Court failed to order mediation and to retain jurisdiction, which would have ensured a just and equitable outcome. Regrettably, engagement did not happen, the Court simply made mention of it. Stu Woolman laments that *Port Elizabeth Municipality* reflects a wasted opportunity for a shared constitutional interpretation.[53]

In *Occupiers of 51 Olivia Road,*[54]the Court revisited the principle of meaningful engagement that it failed to apply in *Port Elizabeth Municipality.* After the hearing of the application for leave to appeal and arguments in the matter, the Court issued an interim order requiring the City and the occupiers to engage with each other meaningfully in an effort to resolve the differences and difficulties aired in the application.[55]

It is in light of the *Olivia Road* judgment that meaningful engagement became a pre-requisite or a requirement. In this case, the process of engagement was made an interim order, a process that happened before litigation, but after the hearing of the application. A municipality would therefore be required to provide a complete and accurate account of the process of engagement or, at least, the reasonable efforts of the municipality in any eviction proceedings.[56] Failure to engage could constitute a weighty consideration against the grant of an eviction order, the Court held.[57] As a requirement, the Court emphasized that engagement must take place before

[52]*Port Elizabeth Municipality*. Para 41- 43.
[53] Stu Woolman "The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law' (ed) Juta 2013.
[54] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC).
[55]*Olivia Road,* Para 1.
[56]*Olivia Road*, Para 2. See also Sandra Liebenberg "Engaging the Paradoxes of the Universal and Particular in Human Rights Adjudication: The Possibilities and the Pitfalls of 'Meaningful Engagement'." (2012) 12 *African Human Rights Law Journal* 17.
[57]*Olivia Road*, Para 21.

© University of Pretoria

litigation commences, unless it is not possible or reasonable to do so because of the urgency or some other compelling reasons.[58]

Danie Brand criticizes the way in which the Court ordered engagement right at the onset of the litigation process. He sees a deferential manoeuvre on the Court's part that works as an obstacle against effective enforcement of socio-economic rights, mainly the right to adequate housing. He argues that meaningful engagement was originally intended to be issued as a remedy only once the normative and legal parameters of a case had been established by the Court; not at the beginning of the trial.[59] Brand contends that the Court cannot simply cross from the merits to a model of review by replacing normative engagement with an interpretation of rights and procedural requirements.

In the same vein, Sandra Liebenberg opines that meaningful engagement, applied in this fashion, runs a real danger of descending into an unprincipled, normatively empty process of local dispute settlement.[60] Of interest to this dissertation is the question of whether the claim of the homeless people involved in this litigation was addressed, as one may never forget that the ultimate constitutional objective of housing litigation is the progressive realisation of the right entrenched in Section 26 of the Constitution and to give substance to that right.

Joe Slovo is a particular and more complicated case that took more time to litigate. In this case, the process of engagement was evoked in a remedial context. Another eviction had taken place and like in *Grootboom*, the land was earmarked for a major housing development: the N2 Gateway Project.[61] Liebenberg notes that as the emphasis was placed on bonded housing, the housing opportunities became inaccessible to the majority of Joe Slovo community; if one has to consider their average income.[62]

---

[58]*Olivia Road*, Para 1.
[59]Danie Brand "Courts, Socio-Economic Rights and the Transformative Politics" Unpublished LLD thesis, University of Stellenbosch, 2009 162-4.
[60] Sandra Liebenberg 'Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of 'meaningful engagement'. African Human Rights Law Journal 1-29 Volume 12 No 1 2012
[61]*Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC).
[62] S. Liebenberg (see note 57 above) 21

© University of Pretoria

To resolve the conflict born out of the eviction proceedings, the Court ordered, among other recommendations, an ongoing engagement between the residents and the respondents concerning various aspects of the eviction and relocation process. The Court also stipulated that no person may be moved unless alternative accommodation has been provided. The requirements set out by the Court included the following:

1. Individual engagement with households before their move (time-table for move and provision of assistance to move their possessions)'
2. Adequate schools and clinics on the relocation site,
3. The accommodation had to be ensured at the point of eviction.

Like in Olivia Road, the parties were ordered to report back to the Court on the implementation of the order and the allocation of permanent housing opportunities to those affected by the order, as directed by the Court.[63]At the end, the result of meaningful engagement was a big disappointment because of the power difference between the parties. Moreover, the Court did very little to get involved in the process, in total contrast to what it did in *Olivia Road*. Sachs J has this to say about the fiasco of the process:

"There can be no doubt that there were major failures of communication on the part of the authorities. The evidence suggests the frequent employment of a top-down approach where the purpose of reporting back to the community was seen as being to pass on information about decisions already taken rather than to involve the residents as partners in the process of decision-making itself."[64]

The extent to which the Court was prepared to condone the flawed and defective engagement process in this case is a far cry from its more robust affirmation of what the impact of a lack of meaningful engagement should be on the granting of an eviction order, says Liebenberg.[65]Moreover, the eviction order was not executed. Then, in the period between the hearing of the case and the handing down of the judgment, the Democratic Alliance (DA) took control of the Western Cape Province from the African National Congress (ANC). The control over funding of subsidised housing projects also passed from the ANC to the DA. The DA-led

[63]*Joe Slovo*, Paras 5, 11, 16,17.
[64]*Joe Slovo*, Paras 378.
[65]S. Liebenberg (see note 57 above) 25.

© University of Pretoria

municipality agreed to look again at upgrading the settlement on site, an option the previous provincial government told the Court was impossible, but which the applicants had sought all along. This change of position was largely due to the difficulty that the new provincial government would have in complying with the stringent conditions set out in the Court order.[66]

Used as a remedy in *Joe Slovo,* the efficacy of this flawed engagement is still to be proven. As of now, it is sufficient to say that although the court found that there had been little or no engagement as ordered, it upheld the eviction, the implementation of which was subjected to the applicants being relocated to temporary resettlement units and to the recommendation that 70 per cent of the new homes that are to be built on the site of Joe Slovo informal settlement should be allocated to Joe Slovo residents.[67]

Commenting on *Joe Slovo,* Kate Tissington laments that the Gateway project was never conceived or implemented in a reasonable manner, and the mass eviction that the Municipality sought in its name was equally unreasonable. She submits that the court was completely naive and out of touch with reality and that it failed in its duty to adjudicate on socio-economic rights by compromising itself in the implementation of wrongly interpreted government policy. Tissington states that the Court, wittingly or not, has effectively allowed government to get away with a national project that was misconceived from the start, because it (the Court) did not follow the process as set out in section 36 of the Constitution.[68]

With the Court refusing to condemn the eviction of Joe Slovo residents to Delft, meaningful engagement was no longer a pre-requisite in the resolution of conflict born out of eviction. The Court shamelessly turned a blind eye to the inadequacies so acknowledged in the engagement process. Liebenberg laments, and rightly so, that *Joe Slovo* is a retreat from the Court's holding in *Olivia Road.*

---

[66] http://www.escr-net.org/caselaw/2011/residents-joe-slovo-community-western-cape-v-thubelisha-home.

[67] *Joe Slovo,* Para 17.

[68] Kate Tissington "The deficiency of reality in the *Joe Slovo* judgment." Abahlali.org/node/5379. 15 June 2009.

© University of Pretoria

In *Abahlali*[69] meaningful engagement became, once more, the main principle on which eviction cases will be decided. In *Abahlali,* meaningful engagement is a requirement and a remedy altogether. Unlike other cases, *Abahlali* did not deal with the eviction *per se,* but with the constitutionality of a proposed provincial legislation that contemplated the elimination and the prevention of slums in the Province of KwaZulu-Natal; and its potential impact on the lives of those affected.[70]The application was brought by the Durban based shack-dwellers movement Abahlali baseMjondolo (ABM).

The purpose of this Act was three-fold:

1. The progressive elimination of slums.
2. To take measures for the prevention of the re-emergence of slums.
3. Upgrading and control of existing slums.

All looked good and encouraging, except for Section 16 of the Act which contemplated the start of eviction proceedings on unlawful occupiers by the municipality if the owner or person in charge of the land failed to do so within the period prescribed by the Provincial Member of the Executive Council (MEC) for local government, housing and traditional affairs.

This meant that the right of occupiers not to be evicted from their homes without an order of court would be infringed if Section 16 was to be passed as law. One of the reasons for the application was the fear that the impugned section violated Section 26(2) of the Constitution; it precluded meaningful engagement between municipalities and unlawful occupiers. The appellants were concerned that the Act would make it easier to evict people in informal settlements without meaningful engagement or suitable alternative accommodation, thus rendering them homeless.

Moseneke, DCJ, held that Section 16 of the Act was unconstitutional and invalid. The court further held that no eviction in terms of the PIE Act should occur until the results of the engagement process were known. The court affirmed that eviction or relocation was a solution of a last resort that should be considered only if an *in situ* upgrading has been in consideration.

[69]*Abahlali Basemjondolo Movement SA v Premier of KwaZulu-Natal and Others* 2010 (2) BCLR 99 (CC).
[70] The Elimination and Prevention of Re-emergence of Slums Act of 2007.

© University of Pretoria

In the court's view, a genuine engagement should take place before the decision to institute eviction proceedings is taken. A proper engagement includes taking the needs of the people or individuals who will be affected into account.

The *Abahlali* case was applauded because it gave the homeless people an opportunity to once again become the centre of the proceedings.[71] Applied in this fashion, meaningful engagement can give hope to the homeless as their informal settlement could be upgraded and transformed into proper and suitable accommodation.

All is not smooth sailing with engagement, though, as Shanelle Van der Berg observes. She states that meaningful engagement has been praised as an innovative development that overcomes certain problems related to judicial deference; and has been equally criticized as abolition and further proceduralisation of socio-economic rights adjudication. Meaningful engagement has developed into both a requirement for a reasonable government policy as well as a remedy where inadequate or no engagement occurred prior to litigation. Van der Berg contends that meaningful engagement should firstly be conceived as a requirement and as a remedy only where the first requirement has not been met.[72]

Ngomane is a more recent case that dealt with another eviction from Govan Mbeki municipality.[73] The occupiers had erected structures, which they used as their dwellings on municipal properties without the consent of the Govan Mbeki municipality. After receiving a court order for the eviction in terms of Section 26(3), the Municipality evicted the occupiers in October 2013. The evictees subsequently took refuge in the community hall and in a local primary school. They made several attempts to meet with the municipality officials in order to find an amicable solution. Like in *Joe Slovo* and *Grootboom* mentioned above, the majority of the occupiers had been on the Municipality's housing waiting list since 2002, but had not received any housing.

In response to their plea, the officials stated that the occupiers should return to where they came from. The occupiers, most of whom were evicted by their landlords, considered this option as

[71] Shanelle Van der Berg "Meaningful Engagement: Proceduralising socio-economic rights further or infusing administrative law with substance." (2013) 29 *SAJHR* 98.
[72]Van der Berg (note 72 above) 11.
[73]*Ngomane and Others v Govan Mbeki Municipality* 2016(12) BCLR 1528 (CC).

© University of Pretoria

an ineffective one, and in May 2014, they took occupation of Extensions 21 and 25 Kinross and also of the Zondagskraal 125/S farm. This prompted the municipality to bring an urgent application to the Gauteng High Court Division, Pretoria, for the eviction of the occupiers from the properties; and also for an interdict prohibiting the community from erecting shacks on the properties in the future. The high court set aside a rule *nisi* against the applicants for the removal of about 200 families and proceeded to order ordinary eviction proceedings in terms of Section 4 of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act (PIE). The occupiers appealed the High Court's ruling to the Constitutional Court.

The Constitutional Court, granting leave to appeal, held that the Municipality and the applicants were required to engage with each other meaningfully in order to come up with a reasonable solution, which accords with the applicants' rights and the Municipality's obligations under Section 26 of the Constitution.

To facilitate such engagement, the Municipality was to positively seek the participation of the applicants and choose reasonable measures that would facilitate engagement. The Court demanded that meaningful engagement should occur as soon as possible. It further held that, should a resolution not be reached, and should the Municipality again seek to evict the applicants, compliance with the order would be relevant to whether the Municipality fulfilled its obligations under the PIE Act 19 of 1998.

This case presents many similarities with *Olivia Road* and *Abahlali,* with meaningful engagement securing its status, both as a remedy and a requirement. The ultimate question, here too, remains whether the process of engagement, as applied in this case, has helped the homeless to have access to the housing they so desperately needed. As in all the cases above (except in *Abahlali),* the Court ordered its engagement and the homeless got no immediate relief to their claim.

The next section will focus on whether meaningful engagement can save the homeless through constitutional litigation.

© University of Pretoria

3.3 THE IMPACT OF MEANINGFUL ENGAGEMENT IN THE PROGRESSIVE REALISATION OF THE RIGHT TO ADEQUATE HOUSING

As highlighted in the discussion above, most of the Constitutional Court's rulings of housing violation claims have evolved around the principle of meaningful engagement as a new litigation tool. In this section, I aim to shed some light on whether engagement on its own, as applied by the court, is able to achieve the substantial and progressive realisation of the right to adequate housing.

The results of the cases studied in this research show that meaningful engagement has mostly helped the occupiers of land either to be temporarily relocated without forced eviction (*Olivia Road*), get proper alternative temporary accommodation (*Olivia Road*), remain on the land they have unlawfully occupied without any improvement being made to their conditions (*Ngomane)* or be ordered to vacate the land altogether (*Joe Slovo).*I submit that, although the principle of engagement has the potential to contribute towards the resolution of disputes and to increased understanding and sympathetic care between the parties, the Court's judgments have failed to give the right of access to adequate housing the kind of normative and substantive content that would help develop the law on adequate housing.[74]This is because, from the start, the right to have access to housing is not seen as an individual right that can be enforced immediately.

The closest that the Court came to giving substance to the right entrenched in Section 26 was in *Olivia Road* when proper alternative accommodation was granted to the occupiers pending permanent houses. In *Olivia Road,* meaningful engagement had a positive impact on the progressive realisation of the right to adequate housing as the run-down buildings that the occupiers were living in were revamped to ensure safety. Although the Court was criticized for ordering the engagement process before it could hear the arguments of the parties, Olivia Road was deemed as a successful story.

All the above judgments emphasise the need for the state to always engage meaningfully with the poor and respond reasonably to their needs. The Court's encouragement of dialogue between the parties and its endorsement of the resulting agreement was also lauded as a way of

[74] Brian Ray "*Occupiers of 51 Olivia Road v City of Johannesburg*: Enforcing the Right to Adequate Housing through 'Engagement'" (2008) 8 *Human Rights Law Review* 703-713.

© University of Pretoria

obtaining meaningful implementation with minimal Court intervention as well as side-stepping politically sensitive questions related to the role of the judiciary in social policy. But the question of a beneficial jurisprudence that would positively affect persons in a similar position remains unanswered. It also remains unclear whether the Court has the means to follow up on the resolutions taken during the engagement process and whether these resolutions are implemented. The fact that informal settlements continue to mushroom on the outskirts of big cities calls for answers to this question: what has been the impact of the engagement process in the adjudication of housing claims?

Stu Woolman contends that indications exist that the Court's insistence on forcing parties to enter into settlement agreements which are then ratified by the Court could have a perverse effect on the quality of inner city dwellings. The doctrine, applied in this fashion can lead to the absence of engagement altogether.[75]For engagement to have the potential to contribute towards the resolution of disputes and to increased understanding and care, Woolman suggests that both sides must be willing to participate in the process. It is interesting, when he makes mention of meaningful engagement (for the purpose of this section), that Woolman speaks of the resolution of conflicts, and not of the realisation of the right to housing. This suggests that the adjudication of socio-economic rights is directed towards the resolution of potential conflicts that arise when people are evicted from their homes and not towards finding solutions to homelessness.

I agree with Lilian Chenwi, in submitting that litigation should not be about the state's plans or programmes on housing, but rather about the state's failure or omission to plan and budget for the progressive realisation of the right to have access to housing. Chenwi states that all the eviction cases highlight the failure of the government's policies to have regard to emergency housing needs,[76]or housing in general. She believes that the people of South Africa have the right to challenge policies, legislation (*Abahlali*) and programmes that fail to realise their rights progressively.

This means that the right to housing requires the government to make every effort to realise this right and to take steps in that direction. Section 7(2) provides that the state must respect,

[75]Woolman (see note 50 above) 329.

[76] Lillian Chenwi and Kate Tissington "Engaging Meaningfully with Government on Socio-economic Rights in South Africa: A Focus of the Right to Housing''. 2010 Community Law Centre (University of the Western Cape) Rights Institute of South Africa. 46-47.

© University of Pretoria

protect, promote and fulfil the rights in the Bill of Rights, read with Section 26(2). Nowhere in the Constitution is it stated that the right to have access to adequate housing is a conflict, and that its adjudication should require lengthy debates. When it is understood that conflicts do arise in the realisation process, those conflicts arise from the infringement of the right and the frustration thereof, not because of the right *per se.*

One example of such frustration is the fallacy of the waiting list as evidenced in a research conducted by the Socio-Economic Rights Institute of South Africa in 2014. In this research, Kate Wilkinson revealed that the concept of a rational waiting list for housing as stated in the *Grootboom* and *Joe Slovo* cases was a myth, that no prioritisation of those in the greatest need existed and that no waiting list was available. This research found that there were a range of highly differentiated, sometimes contradictory policies and systems in place to respond to housing needs. It noted that the system lacks transparency and was marred by corruption.[77]

Likewise, Mary Tomlinson's report in 2015 states that from 300 in 1993, the number of informal settlements across the country was at 2225 in 2015, which is a sharp increase.[78] This report showed a bigger backlog in housing delivery than in 1993. It is submitted that the state has shifted its effort from building houses to upgrading informal settlements when illegal invasion of land or building continues to take place.[79]

While I acknowledge that meaningful engagement applied as a requirement in housing cases has the advantage of bringing homeless people and the state together in order to resolve conflicts born out of illegal occupation of land or buildings on one hand, and on the other hand, to help the state understand the plight of those affected by the eviction process; I also worry that the root-causes of homelessness have not received the attention they deserve, although through adjudication, in site upgrading of informal settlements has taken place. The influx of citizens to the city in search of a better life is but one of the main causes of homelessness as people abandon their houses in rural areas to come to the city where they settle on state-owned or private land.

---

[77] Kate Wilkinson'FACTSHEET:The Housing situation in South Africa.' 9/05/2014https://africacheck.org/factsheets/factsheet-the-housing-situation-in-south-africa.
[78] Mary Tomlinson "South Africa's Housing Conundrum." *Liberty Bulletin* no 4, 2015/6 October 2015/issue 20.
[79] What is themed 'in situ upgrading' and considered as a remedy in the *Abahlali* and *Joe Slovo* cases.

© University of Pretoria

Government policies should focus on building better schools, clinics, hospitals, and shopping centres in the rural areas. Tax incentives to private investment, job training such as mechanics, electricians, plumbing, and building skills should be encouraged so as to keep people from leaving their village for the city. Affordable, low-income housing should be a priority in rural areas rather than near the cities as was the case in *Joe Slovo*.

If this does not happen, those in urgent need of housing can only act with frustration and will have nowhere to turn but to the court for relief. We shall return to the role that the Constitutional Court needs to play, pursuant to its constitutional mandate, in the progressive realisation of the right of Section 26, by applying the principle of meaningful engagement. Let us first turn to engagement as a tool of participatory democracy. Will this participatory element of meaningful engagement help to secure the progressive realisation of the right to have access to adequate housing?

3.4 ENGAGEMENT AS A TOOL OF PARTICIPATORY DEMOCRACY IN THE SOUTH AFRICAN LITIGATION PROCESS

As shown in the previous section, meaningful engagement gives the homeless the opportunity to participate in finding solutions in conflicts that arise from housing claims. As the act of building democratic politics where all can realize their rights and their citizenship is one of the greatest challenges of our age,[80] the justiciability and the adjudication of socio-economic rights are some of these challenges that require that marginalized and excluded actors, namely the people, participate meaningfully in institutionalised participatory forces. For their participation to result in an actual shift, new rules and decision-making processes that will encourage actors to participate must be crafted to encourage social mobilization that pushes for fairer distribution of available resources. And for people to be able to exercise their political agency, they need to first recognize themselves as citizens rather than seeing themselves as beneficiaries or clients.[81] The government is not in the business of doing charity to the people it governs. Its role is to fulfil the constitutional imperative of healing the divisions of the past, establishing a society based on democratic values, social justice and fundamental rights, improving the quality of life

[80]Andrea Cornwall and Vera Schattan P. Coelho *Spaces for change?: The politics of citizen participation in new democratic arenas*(ed) (2007) London: Zed Books 1.
[81]Cornwall and Schattan P. Coelho (note 74 above) 8.

© University of Pretoria

of all citizens and freeing the potential of each person.[82] The government will achieve this mandate by devising sound policies, programmes and reasonable legislative measures that help free that potential. Meaningful engagement can hardly help the government in fulfilling this overbearing mandate.

From the outset, meaningful engagement has emerged as a tool for conflict resolution in claims arising from rights infringement. The Court orders the parties to talk to each other and to try find amicable solutions to the conflict that concerns them, far from the courtrooms.

Stu Woolman beautifully captures this role of meaningful engagement in what he calls 'participatory bubbles'. He states that participatory bubbles convey among other qualities, the idea of limited participatory democracy regarding the content of individual constitutional norms and their application to the subject-matter in specific, and often times sensitive, institutional contexts. For Woolman, these participatory bubbles of processes of participation and negotiation are a natural part of ongoing social interactions.[83]In other words, they are normal occurrences and are not part of a litigation process. They are useful in sustaining inter-communal relations, as Koos Malan suggests.[84] Hence, Woolman recommends that both sides participate in good faith. To ensure better outcomes of this participative democracy, and because the engagement process takes place *ex curia*, Woolman pleads for the courts to be alive to the possibility that the power imbalances reflected in adversarial process may be replicated in the engagement process[85]

That is why it is important that the Court should retain supervision over the process to ensure a proper outcome. The Court should also ensure that, as a participatory tool, meaningful engagement is not limited to the initial parties to litigation. Other interested stakeholders, such as *amici curiae* or Non-Government Organizations (NGO) may participate in the problem-solving process, for a greater elicitation of information and normative legitimacy of any decision.

Engagement, as Woolman contends, enables the parties to learn more about particular problems

---

[82]The Preamble of the Constitution of the Republic of South Africa 1996.
[83]Woolman (see 50 above) 208.
[84] Koos Malan "The suitability and unsuitability of *ubuntu* in constitutional law-inter-communal relations versus public office-bearing." (2014) *De Jure* 231-256.
[85]Woolman (see note 50 above) 210.

© University of Pretoria

that force the immediate litigation and the political and social process that govern their lives, whereas the state learns something about the communities that they govern,[86] with engagement becoming a forum where ordinary people can have the opportunity to challenge government policy choices by enhancing community-participation in debates and negotiations. This thus fosters a culture of accountability and conflict-resolution to problems that affect them. This formula was applied in *Abahlali.*

With that said, the first question that comes to mind is: why do people who turn to courts for the infringement of their constitutional right to housing need to negotiate with those who have infringed that right in the first place? The right to access to adequate housing is just that, a right, not a conflict. Most of the time, the homeless people facing eviction have no alternative than to turn to courts in the hope of stopping the violation of their right. They are people who need social justice from the courts. Thus, when it is a valuable way of finding a solution in other forms of conflict, it is not evident that meaningful engagement is an effective remedy for those seeking the Court's help for access to housing as it does not further the realisation of the right to housing.

Meaningful engagement, like the principle of Ubuntu, can be beneficial in inter-communal law where legal certainty is less required. The rising number of illegal occupations of land and of cases litigated in our courts speaks volumes about whether the remedies devised by the Court in the adjudication of socio-economic rights in general, and the right to have access to adequate housing in particular, are effective.

Sandra Liebenberg contends that meaningful engagement, while it can facilitate the participatory and deliberative values of the Constitution in the realisation of socio-economic rights, can also present a real challenge. She states that these context-specific negotiated orders benefit only those persons and institutions who are parties to the litigation as it happens in most eviction cases.[87] From the case study above, it cannot be established beyond a reasonable doubt that meaningful engagement has contributed significantly in the realisation of socio-economic rights as Liebenberg states.

---

[86]Woolman (see note 50 above) 327.
[87]S. Liebenberg 'Socio-Economic Rights: adjudication under a transformative constitution'(ed) Juta & Co. Ltd (2010) 423.

© University of Pretoria

The case-by-case approach used by the Court in all eviction cases, instead of taking a holistic approach to the problem, has been one of the hindrances to giving substance to the right to housing. The case-by-case approach has the danger of dragging the problem of housing without a practical solution to the underlying causes of homelessness, nor a real normative jurisprudence, sound legal principles or a reliable system of precedence, as is the case with other branches of public or private law. I concur with Liebenberg in stating that the Court needs to develop relevant legal principles that apply to similar cases by substantively interpreting the right to housing (and other socio-economic rights). Otherwise, meaningful engagement takes place in what she calls, 'a normative vacuum'. This would leave disadvantaged groups vulnerable to being pressured by more powerful counterparts, such as government officials, companies or rich people, to negotiate away their constitutional rights.[88]

The use of engagement before the ligation process as the Court recommended in *Olivia Road* is reminiscent of the decisionism doctrine. In terms of this doctrine, considerations of policy and institutional politics may justify deviation from the rule of law in general, and the law of rights in particular, of which the Constitution is the primary source. In conflicts between opposing members of the community, decisionism does not concern itself with individuals and their rights, but with broader communal relations.[89]

In *Olivia Road* the Court ordered the parties to engage with each other meaningfully in an effort to resolve the differences and difficulties aired in the application, right after the hearing of the application for leave to appeal and argument in the matter.[90] In this case, the Court ignored the constitutional factors in the litigation process of socio-economic rights as set out in Section 36 of the Constitution. These factors would have determined whether the state has infringed the right to housing of the occupiers. The limitation clause, that is section 36, provides as follows:

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, considering all relevant factors, including:

[88] S. Liebenberg (see note 84 above) 423-424.
[89] Koos Malan "The rule of law versus *decisionism* in the South African constitutional discourse." (2012) *De Jure* 272-305.
[90] *Olivia Road*, Para 5.

© University of Pretoria

(a) the nature of the right,

(b) the importance of the purpose of the limitation,

(c) the nature and extent of the limitation,

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

Therefore, in its adjudication of socio-economic rights, the court must go back to what the Constitution says with regards to the limitation of the right. It must not avoid applying the "law of socio-economic rights" as codified in the Constitution in pursuance of a best decision that will keep the peace among the court, the government and the people.

The only positive outcome in *Olivia Road* and all the other subsequent cases is the fact that the court ordered the parties to report back on the results of the engagement, warning that the content of their report will be an important element in the judgment.[91] It is clear here that this warning of the court played a crucial role in the outcome of the engagement process. However, the irregularities that were reported in the *Joe Slovo* case[92] can be a wake-up call to the danger of using engagement as an efficient mechanism of litigating socio-economic rights in general, and the right to access to housing in particular. Therefore, without thecourt's involvement, the imbalance in the bargaining power of the parties that Liebenberg warns about, the lack of proper information on state's housing policy, the cost of litigation, and the legal representative's incapacity to interact with his clients could endanger the very process of meaningful engagement.

If engagement is to be effective, it must be an ongoing process where the dialogue is continuous, constructive criticism is allowed and mutual awareness is encouraged, as Lucy A. Williams puts it.[93] Though she praises meaningful engagement as having significant potential both for popular empowerment and for improving public administration by bringing local knowledge into the decision-making process as the court held in *Port Elizabeth Municipality*,

---

[91] *Olivia Road*, Para 5.
[92] *Joe Slovo.*
[93] Lucy A. Williams 'The Right to Housing in South Africa: An Evolving Jurisprudence' (2014) 45 (3) *Columba Human Rights Law Review* 835.

© University of Pretoria

she also states that, for meaningful engagement to be effective, the court must articulate in detail a structure to govern the process, set specific goals and put in place a mechanism for judicial oversight of the results of such engagement.[94] She also pleads for the need for legal assistance and other expertise to avoid the danger of the engagement becoming a fallacy or a counterfeit of justice.

With regard to the above, I suggest that engagement should take place with the participation of all the stakeholders in litigation. In other words, the government should engage not only with the occupiers, but also with the court and the legal representatives. The court, as will be seen below, has the constitutional and legitimate mandate to encroach onto the province of the other organs of state for the purpose of enforcing the rights enshrined in the Bill of Rights. By engaging with the court and the legal representatives in sharing information and advice, the argument about the court's institutional competence will fall away. The realisation of the right to housing will become a team project where the government, the people and the judiciary work together for the same cause and the same goal, instead of seeing each other as opponents.

So far, although meaningful engagement has stopped the eviction, it has not secured the right to housing or security of tenure of the occupiers. It has not helped them get the houses they so desperately need to the extent of illegally invading land or buildings.[95]

The next section will look into the role of the court in the general scheme of housing right adjudication. Can the court save the homeless?

3.5 ENGAGEMENT AS A JUDICIAL DEFERENCE TACTIC

The discussion on the case law has shown that the court's approach to socio-economic rights has been a mixed bag. The South African Constitution clearly mandates that every court, tribunal and forum must, when interpreting the Bill of Rights, promote the values that underlie an open and democratic society based on human dignity, equality and freedom; and when developing common or customary law, promote the spirit, purport and objects of the Bill of Rights.[96] The South African Constitutional Court must heed this constitutional imperative

---

[94]Williams (see note 90 above) 827.
[95]Williams (see note 90 above) 827.
[96] Section 39 (1-2) of the Constitution.

© University of Pretoria

through their work in socio-economic rights cases to advance the kind of democracy envisaged in the Constitution.[97]

Brian Ray states that constitutional avoidance arises mostly in cases where socio-economic rights are enforced through procedural remedies that do not grapple with the substantive content of the right at stake. He cites 'meaningful engagement' as a relevant example of such remedy. Ray contends that remedies such as meaningful engagement detract from the decision's potential to add value to judicial precedent.[98]

In the same line of thinking, Danie Brand, who contends that South African courts can play an important role in socio-economic rights realisation because of their being located within the political space between the state and the impoverished groups and people,[99]states that:

'From the point of view of claimants, deference has so far in our courts' socio-economic jurisprudence, operated as an obstacle to effective enforcement, leading in those cases where claims are successful to attenuated forms of relief and explicitly forming the basis for rejection of claims in the few cases so far where claims have been unsuccessful'.[100]

Brand opines that judicial deference both reflects a concept of democracy at odds with the Constitutional vision of democracy and, actively counteracts the construction of that constitutional democracy. That vision is a limited and inappropriate response to the problem of democratic legitimacy of review in socio-economic rights cases.[101]

Brand believes that judges can shape the focus of the contestation between civil society and the state. He also thinks that judges cannot divest themselves of the responsibility for the outcomes that they generate simply by stating that they apply the law as it stands. He is of the view that judicial responsibility for the results generated by adjudication opens judicial work to transformative political evaluation and engagement by use of broad, flexible, multi-part

---

[97] Danie Brand 'Courts, Socio-Economic Rights and the Transformative Politics.', Unpublished LLD thesis, University of Stellenbosch, 2009.
[98] Brian Ray "Evictions, Avoidance and the transformational impulse". Presentation at a seminar of Socio-economic Rights & Administrative Justice Research Group at University of Stellenbosch. April 29, 2013.
[99] Brand (see note 98 above) 30.
[100] Danie Brand 'Judicial deference and Democracy in Socio-Economic Rights Cases in South Africa (2011) 22 *Stellenbosch Law Review* 614-616.
[101] Brand (see note 101 above) 615.

© University of Pretoria

standards in constitutional adjudication.[102]

The way in which the remedy of engagement has been applied in eviction cases suggests that the Court has used this 'avoidance technique' to deal with long term housing problems by only concentrating its decision on the case before it. This is evident in *Abahlali* where the Court refused to pronounce directly on the constitutionality of government housing policy in the name of the separation of powers doctrine. It is hard to understand this approach of the Constitutional Court when the Constitution itself gives the courts broad power in their mandate to protect and promote socio-economic rights.

As Carol Ngang notes, the obligation attributed to the courts relating to the enforcement of these rights becomes relevant when the state fails in its commitment or decides to use its powers to deny the people their socio-economic rights. This obligation is set out in Section 34 of the Constitution, which provides for the right of access to courts.[103] Account being taken of Section 34, engagement that orders illegal occupiers to find solutions to their plight with a local government that is more resourced than the poor, is not a proper way to advance the realisation of the right to housing as it is unlikely that the government will be independent and impartial. Therefore, courts are bound to find proper yet efficient remedies to achieve the social transformation envisaged by the Constitution. Section 34 gives to the homeless people of South Africa the right to challenge government policies and programmes, even legislative bills that fail to realise their right to adequate housing progressively.

The test of housing rights infringements set out by the Court in *Abahlali* is the fear of eviction. The presence of any fear of eviction in any legislation or conduct of the executive can trigger an application in the court of law. These are tremendous powers given to the courts. Courts are, therefore, constitutionally mandated to determine whether social policies are consistent with the rights in the Bill of Rights and to be part of the solution in the realisation of these rights.

Carol Ngang contends that within the context of a constitutional democracy, the courts are equally mandated and have practically demonstrated potential to contribute to the achievement

[102] Brand (see note 98 above) 210.
[103] Section 34 provides that: 'Everyone has the right to have any dispute that can be resolved by application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'.

© University of Pretoria

of envisaged social change.[104] Restricting the role of the courts limits the purpose of judicial enforcement and leads to a delay in the constitutional vision of social transformation. This opinion can be proved by the increasingly high number of land invasion and eviction cases that come before our courts. Although the Court has made a tremendous impact in the adjudication of the right to adequate housing, it has also been hesitant and reticent to assume the wide mandate entrusted to it by the Constitution, especially at the remedy stage of the litigation process, by deferring either to the legislator or to the executive. This has led the Court to make orders, such as meaningful engagement, that do little to promote the progressive realisation of the right to adequate housing. It seems that the Court is keen to cure the symptoms and not the disease itself. From all the above, I have tried to show that, although engagement is an innovative remedy, it is also another form of judicial avoidance or judicial deference that takes away the constitutionally legitimate powers of the courts, thus rendering them ineffective in providing appropriate relief to the poor.

It is now established that meaningful engagement has become an important principle in the adjudication of the socio-economic right to have access to adequate housing. And the Court has a central role to play in the realisation of the right to have access to adequate housing. In the next section, I give an overview of the application of meaningful engagement in education rights litigation. I will show that meaningful engagement has played a significant role in the realisation of the right to education.

3.6 MEANINGFUL ENGAGEMENT IN EDUCATION RIGHTS

Meaningful engagement has taken such a prominent place in the adjudication of the right to have access to adequate housing that it is now applied in the right to education as enshrined in Section 29 of the South African Constitution.[105] In this regard, Sandra Liebenberg has done impressive work that goes beyond the application of this constitutional requirement/remedy in housing claims. She writes that the need for remedial innovation is particularly acute in the context of school governance disputes, which implicate the complex set of educational rights

[104] Carol C. Ngang 'Judicial enforcement of socio-economic rights in South Africa and the Separation of Powers objection: the obligation to take 'other measures' (2014) 14 *African Human Rights Law Journal* 32.
[105] Section 29 (1) (a) provides as follows: "everyone has the right to basic education, including adult basic."

© University of Pretoria

entrenched in Section 29 of the Constitution.[106] What follows is an overview of the three cases that dealt respectively with the issues of pregnancy, language and admission policies adopted by the governing bodies of these particular schools; and in which the Constitutional Court emphasised the importance of engagement and cooperation between the parties.

In *Hoërskool Ermelo,* the Court dealt with the question of the school language policy after the Head of the Mpumalanga Provincial Department of Education revoked the function of Hoërskool Ermelo, a public school, to determine the language policy of the school. Ermelo High School has refused to enrol 113 grade 8 learners on condition that the learners accept to be taught in Afrikaans. An interim committee was appointed to change the language policy in terms of section 22 (1) and (3) and section 25(1) of the South African Schools Act 84 of 1996.[107]

The court noted that the new language policy was adopted without consultation with relevant stakeholders mainly the governing body, the teaching staff, the learners and parents, but it did not order an express engagement process. Instead, the court ordered that the Provincial Education Department embark on an information gathering and broad consultative process for it to comply with the supervisory order requiring it to plan and report on the steps that it was taking to satisfy the demand for the grade 8 places in the new school year. Liebenberg notes that the court delivered no further judgment after issuing its supervisory orders or guidelines on the follow-up of the remedy.[108]

The pregnancy policy came into the spotlight in *Welkom High School* when two pregnant learners were prohibited from returning to the school. Policies applied by the school violated among other rights, the right of these learners to basic education as they were refused access to education due to their pregnancies. The Head of the Department of Education ignored internal mechanisms and resorted to self-help by ordering that the learners be readmitted to the school. The court ordered the schools and the Head of the Department to engage meaningfully with

[106] Sandra Liebenberg "Remedial Principles and Meaningful Engagement in Education Rights Disputes." (2016) Potchefstroom Electronic Law Journal, 19: 1-43, doi: http: //dx.doi.org/10.17159/1727-3781/2016/v119i0a739. Accessed on google scholar.sun.ac.za on April 20, 2017.
[107] *Head of Mpumalanga department of Education v Hoërskool Ermelo* 2010 2 SA 415 (CC).
[108] Liebenberg(see note 107 above) 19

© University of Pretoria

each other in order to give effect to the order requiring the revision of the school policies to protect the learners' 'best interests'.[109] Here too, the court issued a no follow-up judgment consequent upon its supervisory orders. No public judgment exists on whether the parties complied with the procedural obligation imposed upon them to engage with each other. Likewise, there was no broader guidance for the benefit of similarly affected learners on the implication of the Constitution and the school Act for school pregnancy policies.[110]

Although the judgment was deemed successful because of its reasoned remedial decision-making, Liebenberg laments that the shortcomings observed above prevented the full potential of the engagement remedy to be realized.[111]

The *Rivonia Primary School* case deals with admission policies in public schools. A grade 1 learner had been refused the opportunity to be registered at a public school, and at the parent's complaint, the Head of the Department of Education overturned the Principal's decision and instructed the school to admit the learner with immediate effect. The Principal refused to obey and was subsequently subject to a disciplinary hearing for insubordination.[112]

In a majority decision, the court highlighted the critical role of engagement.It held that a duty for proper engagement arose wherein a provincial department required a school to admit more learners than the limits stated in the school's admission policy. The court held that the provincial Education Department retained ultimate authority over admissions in terms of both the Schools Act and the provincial education regulations. The court further held that the department's power had to be exercised reasonably and in a procedurally fair manner, affording the principal the opportunity to address the department on the matter.[113]

Liebenberg submits that no specific remedial order was issued. She opines that the judgment failed to develop the potential of collaborative engagement as a remedy to redress the structural

[109] *Head of the Department of Education, Free State Province v Welkom High School* 2014 2 SA 228 (CC).
[110] Liebenberg (see note 107 above) 25-28.
[111] Liebenberg (see note 107 above) 29.
[112] Liebenberg (see note 107 above) 29-30. See also *Rivonia Primary School* Paras 9-20.
[113] Liebenberg (see note 107 above) 30-31. See also *Rivonia Primary School* Paras 69-71.

© University of Pretoria

barriers facing learners in accessing quality education.[114]

In all these cases, meaningful engagement provided a structured, participatory remedial process for amending schools to give effect to the right of learners to education on a non-discriminatory basis. I also submit that meaningful engagement has worked better in education rights litigation than in housing adjudication. This may be attributed to the fact that the conflicts that have arisen so far from education claims have not directlyaffect the government's budget. They are of a purely communitarian nature, as they mainly involve rules and regulations with engagement helping in the process of amending policies and redressing deeply entrenched patterns of institutional resistance to fundamental change. However, the fact that the Court did not issue judgment or follow-up to its orders takes away the efficacy of engagement as a remedy that would impact on the realisation of the right to education. The case to case approach adopted in the Hoërskool Ermelo case prevents the court from setting a culture of precedent that would benefit the South African legal system.

I concur with Owen Fiss in contending that reliance on party negotiation and agreement in the remedial process whether in housing or in education claims, may tempt the Court into abdicating their responsibilities to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes. The public interest dimension of constitutional rights enforcements may be sacrificed when parties settle for peace instead of pursuing justice.[115]

The apparent success of engagement in education rights litigation may be attributed to the fact that these cases had no budgetary consequences as compared to housing claims. However, it can be noted that the Court used the same deferential tactic in its adjudication process and in its application of meaningful engagement.

3.7 CONCLUDING REMARKS

In this chapter, I have undertaken, through a case review, to show the impact that the innovative principle of meaningful engagement has had on the adjudication of the right to have access to adequate housing, its various applications and the role of the Court in the overall scheme of

[114] *MEC for Education v Governing Body of Rivonia Primary School* 2013 6 SA 582 (CC).
[115] Owen Fiss "Against Settlement" (1984) Volume 93 Yale Law Journal 1073.

© University of Pretoria

constitutional adjudication of the right entrenched in section 26 of the Constitution. I have also given an overview of the application of the same principle in education rights claims and how the Court fared.

In the next chapter, I will focus on the parallels that exist between reasonableness and meaningful engagement. This will help to understand the meeting points of the two principles that are applied in housing rights litigation.

© University of Pretoria

CHAPTER FOUR: FROM REASONABLENESS TO ENGAGEMENT

"If this machinery (government) does not redress all or most grievances, or is not capable of doing so, then we are surely entitled to a reassessment."[116]

4.1 PARALLELS BETWEEN REASONABLENESS AND MEANINGFUL ENGAGEMENT

4.1.1 INTRODUCTION

In the previous chapter, I have shown the different ways in which the Court has applied the principle of meaningful engagement in housing rights claims and the impact, positive or otherwise, that the principle has had on the realisation of that right. I have also highlighted the role and the constitutional mandate of the Court in the adjudication process. Chapter Four gives a comparative view of the two principles.

In its constitutional capacity to interpret the rights in the Bill of Rights, the Court has developed the criterion of reasonableness and the principle of meaningful engagement in the attempt to give substance to the rights embedded in the Constitution. Courts are mandated in Section 172 (1) (b) to make any order that is just and equitable while interpreting the rights in the Bill of Rights in terms of Section 39. In the first case on housing infringement, the Court applied reasonableness as a criterion of evaluating government policy, programmes and legislation. Soon after, the Court turned to engagement as a requirement and remedy in the litigation of the same right and also in education infringement rights. This is an overview of parallels between the two principles as applied by the Court in most housing rights claims litigation.

4.1.2 PARALLELS

While reasonableness is expressly mentioned in a few of the rights' formulations[117] and was applied in most rights claims after the adoption of the 1996 Constitution as a criterion for the evaluation of government policy;[118] meaningful engagement was crafted out of the need to

---

[116] Norman Lewis and Patrick Birkinshaw 'When the Citizens complain-Reforming Justice and *Administration.'* (ed) Philadelphia: Open University Press 1993.
[117]Sections 26, 27, 28 of the Constitution.
[118]*Treatment Action Campaign, Grootboom, Soobramoney*.

© University of Pretoria

resolve conflicts in housing right claims.

When reasonableness is applied to evaluate government policy and legislative and other measures in pursuance of the progressive realisation of socio-economic rights in general, and the right to housing in particular, meaningful engagement is the requirement without which no eviction can take place. Fons Coomans states that reasonableness empowers the Court to question and critically assess the latitude and conduct of government authorities from the perspective of the constitutional value of human dignity and the needs of people in desperate need of housing.[119] By contrast, meaningful engagement seems to take that power away, as the Court endorses the conclusions of the engagement process and in most cases, it fails to hand down a judgment after it has accepted the resolutions of the parties in the engagement process. Carol Ngang, Danie Brand and Brian Ray are among those who lament this overt abdication of the Court in cases where engagement was applied.

Reasonableness is an administrative law principle that promotes transparency in legal reasoning, accountability and is consensus-oriented. Reasonableness implies a rights-conscious social policy, planning and budgeting process and puts the onus on the government to take positive measures towards the realisation and protection of the relevant right, *in casu*, the right to have access to adequate housing. As far as reasonableness is concerned, government may not remain passive when there are people within its jurisdiction lacking housing. Therefore, in terms of reasonableness, infringement stems from the presence or absence of legislation, social programmes or policies. In evaluating government policy, social programmes and legislation, the application of reasonableness steers the state towards the realisation and the protection of section 26 rights. Reasonableness is said to be consensus-oriented.[120]

Meaningful engagement, on the other hand, stems from the audi alteram partem (hearing the other side) common law principle, which helps in resolving conflicts among parties in a litigation process. It has the advantage, so the Court says, of cutting litigation costs and its duration, and promoting peace among litigants. Meaningful engagement promotes participative democracy and would be of effect in inter-communal dispute resolutions. The principle of

[119]Coomans (note 8 above) 186.
[120] Geo Quinot and Sandra Liebenberg "Narrowing the Band: Reasonableness Review in Administrative Justice and Socio-Economic Rights Jurisprudence in South Africa" (2011) 22 (3) *Stellenbosch Law Review* 640-651.

© University of Pretoria

engagement, as applied by the Court in housing litigation, does not take into account the factors set by the Constitution in Section 36 for the limitation of any socio-economic right, including the right to have access to adequate housing. Meaningful engagement does not challenge housing policy, programmes or legislation. Like reasonableness, engagement is consensus-oriented.

With that said, reasonableness and meaningful engagement are both regarded as deferential tactics that have prevented the Court from giving full expression to the right to adequate housing. By applying both concepts, the Court refrains from engaging substantively with the nature and the content of the right to housing and creates a continuous chance of challenging rights violations. Neither reasonableness nor meaningful engagement grant individual relief to the claimants.

4.2 THE SHIFT FROM REASONABLENESS TO ENGAGEMENT

Giving substance to a violated right is what the Court seeks when crafting a new remedy, because the need for the redress of grievances born out of rights infringement is a basic social necessity. As Norman Lewis and Patrick Birkinshaw submit, a failure to provide effective redress is not only indicative of a failure of legitimate democratic expectations, but it is also viewed as symptomatic of other shortcomings of various levels of seriousness. This includes the provision of services, lack of accountability for the exercise of power and of efficiency and effectiveness in administration; a lack of public procedures to develop policy and to overview its implementation, and to carry out an open performance review.[121] The justiciability of socio-economic rights has been devised for the very purpose of monitoring government performance in the progressive implementation of policy on housing and other rights. In South Africa, the power to adjudicate on rights infringement is vested in the courts, especially the Constitutional Court, which is mandated to exact justice against the state in claims of rights violations. To this end, the Court has devised, through litigation, two principles on which claims based on the socio-economic right to have access to adequate housing are decided:

4.2.1 **Reasonableness,** which was applied in the first case on housing (*Grootboom and Joe Slovo*) as a standard in assessing the government's compliance with its constitutional

[121] Lewis and Birkinshaw (see note 108 above)15.

© University of Pretoria

socio-economic rights obligations. In fact, reasonableness was applied in most socio-economic rights claims post-apartheid. As shown in this work, reasonableness concerned itself primarily with the action or policy of the government on housing by evaluating whether the steps taken and/or the legislation applied by the state are reasonable and whether they contributed to the realisation of the right to housing. It has emerged, through this research, that reasonableness was just an evaluation tool of the impact,which did not help the homeless to access the right to adequate housing.

The ever-growing number of cases on housing that havecome before the Court after *Grootboom*, the mushrooming of illegal settlements and the fact that Miss Grootboom herself died as a homeless person and many others after her, sustains the view that reasonableness did not foster the progressive realisation of the right afforded by Section 26 of the South African Constitution. It can be submitted that the Court came to the same realisation, and thus, shifted its strategy.

4.2.2 In the *Port Elizabeth* case, the Court suggested that litigation should be avoided in favour of an engagement that would be an affordable mechanism for the adjudication of housing claims. It is evident from the *Port Elizabeth* judgment that the Court viewed meaningful engagement as a replacement or substitute to the litigation process. In cases where engagement was applied, the Court ordered the process right after hearing the application and before hearing submissions by the parties, to give effect to the Court's reasoning.[122]

In *Olivia Road* and all the subsequent claims on housing, the Court was no longer evaluating government policy on housing, but ordering parties in litigation to engage with one another to find solutions to the housing dilemma and eviction conflicts thereof. Meaningful engagement was now used as a requirement, a sort of *conditio sine qua none* in eviction cases. As time progressed, the principle was erected to new heights so as to become an innovative remedy in housing and education rights claims. *In fine*, meaningful engagement, applied both as a requirement and as a remedy, has replaced reasonableness as the first requirement in housing

[122] See *Olivia Road, Joe Slovo, Ngomane, Abahlali*.

© University of Pretoria

litigation. Gone are the days where the Court did a thorough evaluation of government's policy and programmes with regards to housing. It seems that the Court is only concerned with making the citizens participate in peace-making processes. The progressive realisation of the right to adequate housing, which should be at the heart of rights litigation, seems to be a by-gone dream.

4.3 CONCLUDING REMARKS

From the study of thecases above and through the writings scholars, I understand that reasonableness and meaningful engagement have more in common than it is apparent, and are not necessarily two separate things. In some cases (*Olivia Road, Abahlali, Ngomane, Port Elizabeth*), the Court has made it clear that engagement and the state's efforts at engagement are factors to take into account to determine the reasonableness of measures. That is why the Court has used engagement as an alternative way in which to resolve disputes, on the one hand, and as a form of remedy on the other. In addition to this, both reasonableness and meaningful engagement have been used as a pre-requisite in housing litigation.

As constitutional tools, both reasonableness and meaningful engagement have failed to give substance to the right to have access to adequate housing. Apart from being used as a deferential tactic that helps the Court to abdicate its constitutional transformative mandate, reasonableness and meaningful engagement have also allowed the Court to relinquish its role as the defender and protector of rights.

This brings me to the conclusion that the impact of these principles towards the realisation of the right to have access to adequate housing has not been felt by the claimants in housing litigation. If the constitutional imperative of accessing adequate housing is to be afforded to everyone as set out in section 26 of the Constitution, the Court will have, therefore, the obligation to craft more effective remedies.

© University of Pretoria

CHAPTER 5: CONCLUSION AND WAY FORWARD

The ultimate objective of the justiciability of the rights in the Bill of Rights is to provide relief to claimants. Through the process of litigation, the Constitutional Court has designed meaningful engagement as a mechanism by which relief to housing rights infringement claims can be provided.

In this work, I have undertaken to evaluate, through case law and legal literature, the impact of the meaningful engagement on the progressive realisation of the right to have access to adequate housing as entrenched in Section 26 of the Constitution.

I have found, from the start, that the right under study was not seen as an individual right that could be immediately enforced. The Court, in applying meaningful engagement in a case-by-case fashion, robs the South African legal system of a precedent. Precedent creates a basis for reference for future similar claims, as it is the case in other branches of law such as criminal or private law.

In addition to the above, I have found that the principle of meaningful engagement is a mixture of the law of inter-communal relations and the theory of decisionism; the application of which does not follow the steps of rights adjudication as set out in section 36 of the Constitution.

No matter what the facts are, the Court has sent parties to litigation to have a meaningful dialogue (engagement) and come back with a solution that would be subsequently made an order of court.

Thus far, engagement has played the role of a participative democracy tool, in resolving conflicts that arose during eviction processes and engaging with government officials, without securing the right to housing or security of tenure of the occupiers. Like reasonableness before it, meaningful engagement has had little impact on the right to housing, in that it has not helped the homeless complainants to get the houses that they so desperately needed to the point of taking the government to court.

© University of Pretoria

To address the absence of the impact of meaningful engagement on the realisation of the right to housing, I submit that the process of litigation should not be about the state's plans or programmes on housing but rather about establishing the government's failure or omission to plan and budget on housing. Housing, as a central right, calls for an adjudication that follows what I call "the rule of socio-economic rights law" as entrenched in Sections 34 and 39 of the Constitution.

The Court must do away with institutional capacity and legitimacy considerations that may justify its deviation from the law of rights as expressly entrenched in the Constitution of the Republic.

In shifting its strategy from what the state should have done to what the state has in fact done to realise the right to housing, the Court would address the problem of state prioritisation of the right and the backlog in housing delivery. More importantly, in adjudicating on housing claims, the Court should encourage the state to devise and implement policies that focus on building better schools, clinics, hospitals, universities, shopping centres and other facilities in rural areas; as it is understood that people leave their homes in the rural areas in the hope of finding a better life in the cities. Tax incentives to private investment in rural South Africa, job training and service delivery (water, electricity and refuse removal) should be encouraged and will go a long way in securing the right to housing, (affordable and low-cost housing) in rural areas; and should thus become the government's priority.

Above all, team effort is needed. The legislature, the executive and the judiciary are branches of the same government and work toward the achievement of the same governmental goals. The progressive realisation of the right to access to adequate housing must bring together government officials, the homeless people of South Africa, members of civil society and civil organisations, legal actors, policy experts on affordable housing, investors and non-governmental organisations that care for poor and homeless people.

Like every other branch of government in this constitutional project of building a better life for all South Africans, the Court must heed the constitutional call to give relief to the homeless people when they turn to it for social justice. By playing an active role in the adjudication of the

© University of Pretoria

UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

right to have access to adequate housing, the Court will do away with its deferential tactics and become part of the solution in the realisation of the right enshrined in Section 26 of the Constitution. The Court will thus become the last bastion of the poor when their rights are violated.

As for meaningful engagement, I suggest that it should be applied as a mechanism of regulating interactions in inter-communal relations while we wait for the Court to craft a more robust remedy that will give substantial relief to claimants of housing rights, and other socio-economic rights infringements. The solution may lie somewhere between the combination of reasonableness, engagement and a purposive-transformative interpretation of the Bill of Rights.

© University of Pretoria

BIBLIOGRAPHY

- **Articles**

- Brand, D "Judicial Deference and Democracy in Socio-Economic Rights Cases in South Africa." (2011)22 (3) *Stellenbosch Law Review*614.
- Chenwi, L "Unpacking Progressive Realisation, its Relation to Resources, Minimum Core and Reasonableness, and some Methodological Considerations for assessing Compliance." (2013)3 *De Jure Law Journal*742.
- Chenwi, L and Tissington, K "Engaging Meaningfully with the Government on Socio-Economic Rights in South Africa: A focus on the Right to Housing." 2010 Community Law Centre (University of the Western Cape). Socio-economic Rights Institute of South Africa (SERI). https://scholar.google.co.za. Accessed on 20 February 2017.
- Coomans, F "Reviewing Implementation of Social and Economic Rights: An assessment of the "Reasonableness" Test as Developed by the South African Constitutional Court." ZaöRV 65 (2005), htt://www.zaoerv.de. Max-Planck-Institute-für äuslandisches öffentliches Recht und Völkrrecht.https://scholar.google.co.za . Accessed on 7 March 2017.
- Cumming, S and Rhodes, D "The Public Interest Litigation: Insight from Theory and Practice." (2008)36 *Fordham Urban Law Journal* 603.
- Fiss, OM "Against Settlement." (1984) 93 *Yale Law Journal* 1073.
- Liebenberg, S "Engaging the Paradoxes of the Universal and Particular in Human Rights Adjudication: The Possibilities and Pitfalls of Meaningful Engagement." (2012) 12(1)*African Human Rights Law Journal* 1
- Liebenberg, S "Remedial Principles and Meaningful Engagement in Education Rights Disputes." (2016) Potchefstroom Electronic Law Journal, 19: 1-43, doi: http: //dx.doi.org/10.17159/1727-3781/2016/v119i0a739. https://scholar.google.co.za . Accessed on April 20, 2017.
- Liebenberg, S "The Right to Social Assistance. The implementation of *Grootboom* for Policy Reform in South Africa." (2001)17(2) *South African Journal on Human Rights* 232.
- Malan, K "The Rule of Law versus Decisionism in the South African Constitutional Discourse." (2012) 2*De Jure*272

© University of Pretoria

- Malan, K "The Suitability and Unsuitability of Ubuntu in Constitutional Law:Inter-communal Relations versus Public Office-bearing." (2014) 2 *De Jure* 231.
- Mureinik, E "A Bridge to Where? Introducing the Interim Bill of Rights." (1994) 10 (1)*South African Journal on Human Rights*31.
- Ngang, C "Judicial Enforcement of Socio-Economic Rights in South Africa and the Separation of Powers Objection-The Obligation to take "Other Measures." (2014) 2*AHRJ* 32.
- Ngcobo, S "Constitutional Dialogue: A Framework for Understanding Co-operative Government." Address at the University of Cape Town. 4April 2011.www.dgru.uct.ac,za>dgru>downloads. Accessed on March 16, 2017.
- Pillay, K "Implementing Grootboom: Supervision Needed." (2002) 3 (1) *ESR Review* 13.
- Quinot, G and Liebenberg, S "Narrowing the Band: Reasonableness Review in Administrative Justice and Socio-Economic Rights Jurisprudence in South Africa." (2011)22 (3) *Stellenbosch Law Review* 639.
- Ray, B "Evictions, avoidances and the transformational impulse" Presentation at a seminar of socio-economic Rights & Administrative Justice Research at University of Stellenbosch. April 29, 20135 Constitutional Court Review. www.constitutionalcourtreview.co.za/wp...evictions-avoidances-and-the-transformational-impulse/pdf.
- Ray, B "Occupiers of 51 Olivia Road v City of Johannesburg: Enforcing the Rights to Adequate Housing Through 'Engagement'." (2008) 8 *Human Rights Law Review* 159
- Tissington, K "The deficiency of reality in the *Joe Slovo* judgment". Abahlali.org/node/5379. 15 June 2009.
- Tomlinson, M "South Africa's Housing Conundrum." Liberty Bulletin No 4, 2015 Issue 20.
- Wesson M "*Grootboom* and Beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court." (2004) 20*SAJHR 284*.
- Wilkinson, K "FACTSHEET:The Housing situation in South Africa." 9/05/2014https://africacheck.org/factsheets/factsheet-the-housing-situation-in-south-africa/.
- Williams, LA "The Right to Housing in South Africa; An Evolving Jurisprudence." (2014) 45 *Columbia Human Rights Law Review*816

- **Books, theses, dissertations**

- Brand, D "Courts, Socio-Economic Rights and the Transformative Politics." Unpublished LLD

© University of Pretoria

thesis, University of Stellenbosch, 2009.

- Lewis, N and Birkinshaw, P (eds)*When the Citizens Complain- Reforming Justice and Administration*Open University Press (1993) Buckingham, Philadelphia.
- Liebenberg, S*Socio-Economic Rights: Adjudication Under a Transformative Constitution*(2010)Cape Town: Juta
- Woolman, S*The Selfless Constitution: Experimentation and Flourishing as Foundation of South Africa's Basic Law*(2013) Cape Town: Juta

• **Cases**

- *Abahlali Basemjondolo Movement of SA v Premier of KwaZulu-Natal and Others* 2010 (2) BCLR 99 (CC).
- *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC).
- *Government of the Republic of South Africa and Others v Grootboom* 2001 (1) SA 46 (CC).
- *Head of Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (2) SA 415 (CC).
- *Head of the Department of Education, Free State Province v Welkom High School* 2014 (2) SA 228 (CC).
- *Matatiele Municipality and Others v President of South Africa and Others* 2006 (5) SA 47 (CC).
- *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC).
- *MEC for Education v Governing Body of Rivonia Primary School* 2013 (6) SA 582 (CC).
- *Minister of Health v Treatment Action Campaign* (TAC) 2002 (5) SA 721 (CC).
- *Ngomane and Others v Govan Mbeki Municipality* 2016 (12) BCLR 1528.
- *Occupiers of 51 Olivia Road, Berea Township and 107Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA (CC).
- *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).
- *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC).
- *Soobramoney v Minister of Health, KwaZulu*-Natal 1998 (1) SA 765 (CC).

© University of Pretoria

- **Internet sources**

- https://www.escr-net.org/caselaw/2011/residents-joe-slovo-community-western-cape-v-thubelisha-home. 14 October 2017.

- **Legislation**

- Elimination and Prevention of Re-emergence of Slums Act, 2007.
    - The Constitution of the Republic of South Africa, 1996.

© University of Pretoria