

# **A new approach to remedies in socio-economic rights adjudication: *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others***

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## **Abstract**

This case note examines the case of *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others* in the context of existing constitutional jurisprudence and its contribution to the development of effective remedies for socio-economic rights violations and to promoting the transformative promise of the South African Constitution as well as democracy. It is argued that the meaningful engagement remedy is a progressive and effective remedy that is capable of promoting social transformation and enhances participatory democracy. However, the transformative potential of *Olivia* is limited by the Constitutional Court's avoidance - which I characterise as sheer unwillingness as opposed to judicious avoidance or minimalism - to deal with some key issues that the parties could not agree on.

## **1 Introduction**

Establishing an appropriate and effective remedy for the breach of a right is a challenge in rights adjudication.<sup>1</sup> Fashioning remedies for socio-economic rights violations is an even bigger challenge.<sup>2</sup> South African courts have, accordingly, been given wide remedial powers to grant appropriate and effective remedies in socio-economic rights cases. The courts may grant 'appropriate relief, including a declaration of rights'<sup>3</sup> and when deciding a constitutional matter, 'must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency' and 'may make any order that is *just and equitable*'.<sup>4</sup> In addition, the Constitutional Court has accentuated the importance of developing effective remedies as well as innovative remedies if necessary for the infringement of constitutional rights. The Court stated as follows:

... In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it

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<sup>1</sup> D Budlender 'The role of the courts in achieving the transformative potential of socio-economic rights' (2007) 8(1) ESR Review 9, 10.

<sup>2</sup> See generally, K Roach 'Crafting remedies for violations of economic, social and cultural rights' in J Squires, M Langford and B Thiele (eds.) *The road to a remedy: Current issues in the litigation of economic, social and cultural rights* (2005) 111-126 [University of New South Wales Press].

<sup>3</sup> Section 38 of the Constitution.

<sup>4</sup> Section 172(1) of the Constitution. Emphasis added.

be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to “forge new tools” and shape innovative remedies, if needs be, to achieve this goal.<sup>5</sup>

Liebenberg has observed that this requirement is of particular importance in socio-economic rights adjudication as it concerns the poor who often lack access to legal services and are not able to engage in on-going litigation in order to secure an effective remedy.<sup>6</sup> The case of *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others*,<sup>7</sup> on the right to have access to adequate housing<sup>8</sup> in the context of an eviction, is a good example of the Constitutional Court taking the responsibility to forge innovative remedies to heart. After hearing the case, instead of subsequently handing down its judgment as is ordinarily the case, the Constitutional Court issued an interim order requiring the parties to ‘engage with each other meaningfully’ and report back to the Court.<sup>9</sup> The Court subsequently handed down judgment after the parties had reached a settlement and submitted it to the Court.

This case note<sup>10</sup> examines the Court’s interim order and judgment in the context of existing constitutional jurisprudence and its contribution to the development of effective remedies for socio-economic rights violations and to promoting the transformative promise of the South African Constitution. The note does not engage in an analysis of the economic and political context leading up to the case<sup>11</sup> or the administrative law aspects of the case.<sup>12</sup> The note further, very succinctly, draws attention to how the case fits into the Constitutional Court’s vision of the kind of democracy the South African Constitution establishes. The note also, albeit briefly, considers two other remedial models – experimentalist model and deliberative model of remedial decision making - and the extent to which meaningful engagement mirrors these models.<sup>13</sup> It is argued that the meaningful engagement remedy is a progressive and effective remedy that is capable of promoting social transformation and enhances participatory democracy and transparency and accountability in the delivery of socio-economic goods and services. However, the

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<sup>5</sup> *Fose v Minister of Safety and Security* 1997 7 BCLR 851 (CC), para 69 (*Fose*).

<sup>6</sup> S Liebenberg ‘South Africa: Adjudicating social rights under a transformative Constitution’ in M Langford (ed) *Social rights jurisprudence: Emerging trends in international and comparative law* (2008) 97 [Cambridge University Press].

<sup>7</sup> 2008 5 BCLR 475 (CC) (*Olivia*).

<sup>8</sup> Guaranteed in section 26 of the Constitution.

<sup>9</sup> Interim Order dated 30 August 2007, reproduced in *Olivia* (n 7 above) para 5. The interim order is discussed subsequently.

<sup>10</sup> This case note draws from a previous consideration of the Constitutional Court’s judgment in a co-authored article, L Chenwi and S Liebenberg ‘The constitutional protection of those facing eviction from “bad buildings”’ (2008) 9(1) *ESR Review* 12.

<sup>11</sup> This has been dealt with concisely by Wilson. See S Wilson ‘A new dimension to the right to housing’ (2006) 7(2) *ESR Review* 9, 10-15.

<sup>12</sup> Administrative law aspects of the case have been discussed in G Quinot ‘An administrative law perspective on “bad building” evictions in the Johannesburg inner city’ (2007) 8(1) *ESR Review* 25.

<sup>13</sup> Other remedial models not considered in this case note include: the bargaining model; traditional adjudicative model; the legislative or administrative hearing model; the expert remedial formulation model; and the consensual remedial formulation model. For a discussion of these models, see SP Sturm ‘A normative theory of public law remedies’ (1991) *Georgetown Law Journal* 1355, 1365-1376; C Mbazira *Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice* (2009) 183-192 [Pretoria University Law Press].

transformative potential of the *Olivia* case is limited by the Constitutional Court's avoidance - which I characterise as sheer unwillingness as opposed to judicious avoidance or minimalism - to deal with some key issues that the parties could not agree on.

## 2 The facts and decisions

The *Olivia* case was a challenge of several aspects of the City of Johannesburg's (the City) practice of evicting residents of so called 'bad' buildings for health and safety reasons. In fact, evictions are a regular occurrence in South Africa, threatening a range of human rights including the rights to dignity, adequate housing, life and health, among others. The most controversial of these evictions have been those that are development-based,<sup>14</sup> as was the case in *Olivia*, where the City's vision is to mould Johannesburg into an 'African World Class City' and transform the inner city's 'sink-holes' (dilapidated or 'bad' buildings, or run-down areas) into modern, commercially sustainable and visually attractive 'ripple ponds' (regenerated areas) as contained in its Inner City Regeneration Strategy (ICRS) that was launched in 2003. The strategy involves, among others, the identification of bad buildings, which are homes to thousands of desperately poor people with the intention of closing them down, which implies the eviction of those occupying the buildings.<sup>15</sup>

At the core of the *Olivia* case were the provisions of the National Building Regulations and Building Standards Act (NBRA)<sup>16</sup> that empowers local authorities to issue a notice to occupiers to vacate premises when they deem it necessary for the safety of any person.<sup>17</sup> Failure to comply with such a notice constitutes a criminal offence for which the offender can be fined up to R100 for each day of non-compliance.<sup>18</sup> The Constitutional Court was therefore faced with reconciling respect for the inadequate accommodation which these people living on the margins have managed to secure, and the statutory powers and duties of local authorities to ensure that conditions of accommodation do not constitute a threat to the safety of these persons.

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<sup>14</sup> The former United Nations (UN) Special Rapporteur on adequate housing, Miloon Kothari, defined development-based evictions as including 'evictions that are often planned or conducted under the pretext of serving the "public good"'. See Basic Principles and Guidelines on Development-Based Evictions and Displacement, para 8, contained in Report of the UN Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, 5 February 2007, A/HRC/4/18, Annex 1.

<sup>15</sup> The Inner City Regeneration Strategy has been discussed in detail by COHRE and concisely by Wilson; hence I do not attempt to do the same here. See Centre on Housing Rights and Evictions (COHRE) *Any Room for the Poor? Forced Evictions in Johannesburg, South Africa* (2005) 20-21 and 41-45 <[http://www.cohre.org/store/attachments/Any\\_Room\\_for\\_the\\_Poor\\_8Mar05.pdf](http://www.cohre.org/store/attachments/Any_Room_for_the_Poor_8Mar05.pdf)>; and Wilson (n 10 above) 10-11;

<sup>16</sup> Act 103 of 1977 (NBRA).

<sup>17</sup> Section 12(4)(b) of the NBRA.

<sup>18</sup> Section 12(6) of the NBRA.

When the case commenced at the High Court, the City sought the eviction of over 300 people from six properties in the inner city.<sup>19</sup> Some of the occupiers have been in occupation of the properties for as long as 10 years.<sup>20</sup> The City relied on section 12(4)(b) of the NBRA, which reads:

- (4) If the local authority in question deems it necessary for the safety of any person, it may by notice in writing, served by post or delivered -

...

- (b) Order any person occupying or working or being for any other purpose in any building, to vacate such building immediately or within a period specified in such notice.

Jajbhay J delivered the High Court's judgment on 3 March 2006, in which he issued a declaratory order, finding the City's housing programme not to be in compliance with its constitutional and statutory obligations, and ordered the City to devise and implement a comprehensive and co-ordinated programme to deal with the housing crisis of the people in the inner city. Pending the implementation of the programme or the provision of suitable adequate alternative accommodation, the eviction of the occupiers could not take place.<sup>21</sup> A crucial aspect of the High Court's judgment was its situation of the right to have access to adequate housing alongside the right to work and to a livelihood, even though the right to work is not expressly guaranteed in the South African Constitution.<sup>22</sup> Hence, according to the High Court, the right of access to adequate housing implies a right to housing at a specific location within a reasonable distance of livelihood opportunities.

Both the City and the occupiers were dissatisfied with the High Court's judgment, hence approached the Supreme Court of Appeal (SCA), which handed down its judgment on 26 March 2007.<sup>23</sup> Based on the finding that the buildings they occupied were unsafe and unhealthy, the SCA upheld the City's right to evict residents of 'bad' buildings in terms of the NBRA when it deemed it necessary for health and safety reasons, which as the Court held, was not dependent upon it being able to provide alternative accommodation to the occupants.<sup>24</sup> It also held that alternative accommodation must not be at a specific location (the inner city in this case) as the Constitution does not give a person a right to housing at state expense at a locality of that person's choice.<sup>25</sup> Notwithstanding, the SCA observed that the state has a duty to give due regard to the relationship between location of residence and the place where persons can earn or try to earn their living.<sup>26</sup> The City was ordered to provide temporary accommodation to those occupiers who were in

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<sup>19</sup> *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2006 (6) BCLR 728 (W) (*Rand Properties* (W)). I have discussed the High Court case elsewhere, see L Chenwi 'Advancing the right to adequate housing of desperately poor people: City of Johannesburg v. Rand Properties (2006) 14(1) *Human Rights Brief* 13.

<sup>20</sup> *Rand Properties* (W) (n 19 above) para 19.

<sup>21</sup> *Rand Properties* (W) (n 19 above) para 67.

<sup>22</sup> *Rand Properties* (W) (n 19 above) para 64.

<sup>23</sup> *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 (6) BCLR 643 (SCA) (*Rand Properties* (SCA)).

<sup>24</sup> *Rand Properties* (SCA) (n 23 above) paras 5 and 78.

<sup>25</sup> *Rand Properties* (SCA) (n 23 above) para 44.

<sup>26</sup> *Rand Properties* (SCA) (n 23 above) para 44.

desperate need of housing assistance in terms of the Emergency Housing Programme.<sup>27</sup> The temporary accommodation was to consist of a place where they could live without the threat of another eviction in a waterproof structure that was secure against the elements and with access to basic sanitation, water and refuse services; and its location to be determined after consultation with every occupier that requested it.<sup>28</sup> As argued elsewhere, this aspect of the SCA's judgment affirms the constitutional commitment to establishing a society that values human dignity and requires everyone to be treated with care and concern.<sup>29</sup>

More than 400 occupiers of two buildings in the inner city of Johannesburg, not satisfied with the SCA judgment, appealed to the Constitutional Court, challenging the correctness of the judgment in granting an order for their eviction on the finding that the buildings they occupied were unsafe and unhealthy.<sup>30</sup> This broad question, as observed by the Constitutional Court, encapsulated five contentions: (1) section 12 of the NBRA was inconsistent with the Constitution because it provided for arbitrary evictions without a court order; (2) the City's decision to evict was unfair because it was taken without giving the occupiers a fair hearing; (3) the administrative decision to evict was not reasonable in all the circumstances as it did not take into account the fact that the occupiers would be homeless after the eviction; (4) section 26(3) of the Constitution precluded their eviction; and (5) the standards set by the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE)<sup>31</sup> were applicable to these evictions.<sup>32</sup> The question 'whether the City's housing programme made reasonable provision for the occupiers or for the many thousands of people living in deplorable conditions within the inner city' was raised in a counter application.<sup>33</sup>

The Constitutional Court handed down its judgment on 19 February 2008, which emphasises the need for evictions to be consistent with the Constitution and gives effect to South Africa's constitutional commitment to housing rights. It affirms the obligation on local authorities, in all evictions, to seek reasonable ways to avoid homelessness by engaging meaningfully with the affected communities. It also underscores the obligation to provide suitable alternative accommodation when

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<sup>27</sup> The Emergency Housing Programme (entitled Housing Assistance in Emergency Circumstances) was adopted in 2004 in response to the Constitutional Court's decision in *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) (*Grootboom*), in which the Court ordered the state to adopt, implement and supervise a comprehensive and coordinated programme that addressed effectively the situation of those desperately in need of housing. The Emergency Housing Programme aims to assist groups of people faced with urgent housing problems, such as evictions or threatened evictions, by providing temporary assistance in the form of municipal grants, which will enable municipalities to respond to emergencies by providing secure access to land, boosting infrastructure and basic services, and improving access to shelter through voluntary relocation and resettlement. The programme is incorporated in the National Housing Code as chapter 12.

<sup>28</sup> *Rand Properties* (SCA) (n 23 above), paras 4 and 78.

<sup>29</sup> L Chenwi 'Putting flesh on the skeleton: South African judicial enforcement of the right to adequate housing of those subject to evictions' (2008) 8(1) *Human Rights Law Review* 105, 133.

<sup>30</sup> *Olivia* (n 7 above) para 1.

<sup>31</sup> Act 19 of 1998.

<sup>32</sup> *Olivia* (n 7 above) para 7.

<sup>33</sup> *Olivia* (n 7 above) para 8.

dealing with people who will find themselves in desperate or crisis situations if such accommodation is not provided upon eviction. The Court further decided the constitutionality of the automatic criminal sanction in section 12(6) of the NBRA attaching to a failure to comply with a section 12(4)(b). Section 12(6) read as follows:

Any person who contravenes or fails to comply with any provision of this section or any notice issued thereunder, shall be guilty of an offence and, in the case of a contravention of the provisions of subsection (5), liable on conviction to a fine not exceeding R100 for each day on which he so contravened.

The Court found this provision to be in conflict with section 26(3) of the Constitution, which guarantees the right not to be evicted without an order of court made after considering all the relevant circumstances, and therefore unconstitutional.<sup>34</sup> However, instead of setting aside the provision, the Court found it just and equitable to cure this constitutional defect by using the intrusive remedy of reading-in words into section 12(6) of the NBRA so as to provide for judicial oversight of evictions in terms of the legislation. The section will therefore be read with the following proviso: 'This subsection applies only to people who, after service upon them of an order of court for their eviction, continue to occupy the property concerned'.<sup>35</sup> The Court based its choice of reading-in on the fact that it was appropriate to encourage people to leave unsafe or unhealthy buildings in compliance with a court order for their eviction.<sup>36</sup>

### **3 'Meaningful engagement' and other remedial models**

#### **3.1 'Meaningful engagement' remedy**

The approach of the Constitutional Court in developing an effective remedy in *Olivia* was quite unique. Two days after hearing arguments in the case, the Constitutional Court issued an interim order, crafted in general terms, forcing the parties to be constructive: It is worth restating the order here:

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

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<sup>34</sup> *Olivia* (n 7 above) para 49.

<sup>35</sup> *Olivia* (n 7 above) para 54.

<sup>36</sup> *Olivia* (n 7 above) para 50.

4. Account will be taken of the contents of the affidavits in the preparation of the judgment in this matter for the issuing of further directions, should this become necessary.<sup>37</sup>

The Court was of the view that it would be inappropriate to grant any eviction order against the occupiers, in the circumstances of this case, unless there had at least been some effort at meaningful engagement.<sup>38</sup> The time in the interim order was extended twice before the City and the occupiers reached a settlement,<sup>39</sup> which was endorsed by the Constitutional Court on 05 November 2007 on the basis that it represented a reasonable response to the engagement process.<sup>40</sup> The agreement contained interim measures to secure the safety of the building and provide the occupiers with alternative accommodation in the inner City of Johannesburg. The interim measures to improve the conditions in the two buildings pending relocation to the alternative accommodation included the provision, at the City's expense, of toilets, potable water, waste disposal services, fire extinguishers and a once-off operation to clean and sanitise the properties. Similar to the SCA's order, the City and the occupiers agreed that the alternative accommodation would consist of, at least, security against eviction, access to sanitation, access to potable water, and access to electricity for heating, lighting and cooking. It was further agreed that, once relocated, the occupiers would occupy the temporary shelter until suitable permanent housing solutions were developed for them. It was also agreed that the nature and location of permanent housing options would be developed by the City in consultation with the occupiers.

The agreement underscored the importance of the provision of suitable alternative accommodation in eviction cases, especially for those who are desperately poor and vulnerable and therefore cannot provide for themselves. The question of alternative accommodation and its location is discussed subsequently. Furthermore, the interim order is illustrative of the crucial role interim interdicts or supervisory orders could play in providing interim relief resulting in a final remedy.<sup>41</sup>

The Constitutional Court had underscored the importance of engagement in its earlier decisions. In *Grootboom*, for instance, the Court expressed disappointment at the failure of the municipality to make some effort to resolve the problems faced by the residents on a case-by-case basis following an investigation of their circumstances.<sup>42</sup> In its subsequent decision in *Port Elizabeth Municipality v Various Occupiers*, the Constitutional Court held:

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

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<sup>37</sup> Interim Order dated 30 August 2007, reproduced in *Olivia* (n 7 above) para 5.

<sup>38</sup> *Olivia* (n 7 above) para 22.

<sup>39</sup> Agreement signed on 29 October 2007.

<sup>40</sup> The Constitutional Court, in fact, commended the City for its response and for adopting a more humane approach as the case proceeded through the different courts. See *Olivia* (n 6 above) para 28.

<sup>41</sup> *Mbazira* (n 13 above) 175.

<sup>42</sup> *Grootboom* (n 27 above) para 87.

mediation through a third party should replace arms-length combat by intransigent opponents.<sup>43</sup>

The Court, however, goes a step further in *Olivia* by developing 'meaningful engagement' as a remedy.<sup>44</sup> It further elaborated on the duty to engage meaningfully in its judgment. The Court located this duty within the City's constitutional obligations to provide services to communities in a sustainable manner, promote social and economic development and encourage the involvement of communities and community organisations in matters of local government;<sup>45</sup> to fulfil the objectives in the Preamble to the Constitution; to respect, protect, promote and fulfil the rights in the Bill of Rights;<sup>46</sup> and the states obligation to act reasonably in section 26(2) of the Constitution.<sup>47</sup> The Court also highlighted the significance of the 'need to treat human beings with the appropriate respect and care for their dignity to which they have a right as members of humanity' as well as the right to life.<sup>48</sup> The Court found it unconstitutional for a municipality to evict people from their homes without first meaningfully engaging with them.<sup>49</sup>

Though the Constitutional Court's decision was not based on the reasonableness test developed in *Grootboom*,<sup>50</sup> it is argued that in citing section 26(2) as one of the basis for meaningful engagement, the Court thus grounds the engagement process in the reasonableness concept and expands the reasonableness criteria to include meaningful (or reasonable) engagement in the context of an eviction. This reading is supported by subsequent decisions of the Constitutional Court. In *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others*, for instance, reasonable engagement was considered in determining whether an eviction was a reasonable measure to facilitate the government's housing development programme.<sup>51</sup> The Court in *Lindiwe*

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<sup>43</sup> 2004 12 BCLR 1268 (CC) para 39 (*PE Municipality*).

<sup>44</sup> A similar approach had previously been used by the High Court in *Lingwood Michael and Another v The Unlawful occupiers of R/E of Erf 9 Highlands* 2008 3 BCLR 325 (W), where the High Court noted the necessity and importance of parties involved in eviction litigation to engage in an endeavour to achieve mutually acceptable solutions (para 33). Since the parties in the case had not engaged in any negotiations or attempted any mediation, the Court accordingly refused an eviction order and postponed the matter *sine die*, and ordered the joinder of the City of Johannesburg (the Municipality) by virtue of its constitutional and statutory duties and the commencement of mediation (para 37).

<sup>45</sup> Section 152(1) of the Constitution. See *Olivia* (n 7 above) para 16.

<sup>46</sup> Section 7(2) of the Constitution.

<sup>47</sup> *Olivia* (n 7 above) para 17. Section 26(2) of the Constitution requires the state to take reasonable legislative and other measures to realise the right of access to adequate housing.

<sup>48</sup> *Olivia* (n 7 above) paras 10 and 16.

<sup>49</sup> *Olivia* (n 7 above) para 14.

<sup>50</sup> *Grootboom* (n 27 above) paras 41-42.

<sup>51</sup> Case CCT 22/08, 2009 ZACC 16 (*Joe Slovo*). The Court also observed that 'it would have been ideal for the state to have engaged individually and carefully with each of the thousands of the families involved' but that 'reasonableness involves realism and practicality' (para 117). For a discussion of this case, see L Chenwi and Kate Tissington "sacrificial lambs" in the quest to eradicate informal settlements: The plight of Joe Slovo residents' (2009) 10(3) *ESR Review* 18.

*Mazibuko and Others v City of Johannesburg and Others* also considered adequate public consultation in determining the reasonableness of pre-paid water meters.<sup>52</sup>

Reverting to *Olivia*, on the basis that the City ought to have been aware of the possibility, or even the probability, that people would become homeless as a direct result of their eviction at its instance, the Court held that it should therefore have engaged meaningfully with the occupiers both individually and collectively as a minimum requirement under such circumstances.<sup>53</sup> The objectives of such engagement would be to ascertain what the consequences of the eviction might be, whether the City could help in alleviating the situation of those in dire need, whether it was possible to render the buildings concerned relatively safe and conducive to health for an interim period, whether the City had any obligations to the occupiers in the prevailing circumstances, and when and how the City could or would fulfil these obligations.<sup>54</sup>

The Court went further to make some very important new points about the engagement process. Meaningful engagement has to be tailored to the particular circumstances of each situation, 'the larger the number of people potentially to be affected by eviction, the greater the need for structured, consistent and careful engagement'.<sup>55</sup> It should also not be shrouded in secrecy, 'the provision of a complete and accurate account of the process of engagement including at least the reasonable efforts of the municipality within the process would ordinarily be essential'.<sup>56</sup> This requirement is crucial as it makes room for interested individuals or groups to appraise the process and result of the engagement.

An important aspect of the meaningful engagement remedy is that it recognises the core importance of fostering participation and gives content to the right of participation by those faced with eviction. The remedy fits into the Constitutional Court's vision of the kind of democracy the South African Constitution establishes. In *Doctors for Life International v The Speakers of the National Assembly and Others*, the Court stated:

Commitment to principles of accountability, responsiveness and openness shows that our constitutional democracy is not only representative but also contains participatory elements. This is a defining feature of the democracy that is contemplated.<sup>57</sup>

These two aspects, as the Court held, are mutually supportive, as the foundation of representative democracy would be meaningless without public participation and 'participation by the public on a continuous basis provides vitality to the functioning of representative democracy'.<sup>58</sup> In *Minister of Health and Another NO v New Clicks*

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<sup>52</sup> Case CCT 39/09 [2009] ZACC 28 (*Mazibuko*), paras 133 and 134. For a discussion of this case, see S Heleba 'The right of access to sufficient water and the Constitutional Court's judgment in *Mazibuko*' (2009) 10(4) *ESR Review* 12.

<sup>53</sup> *Olivia* (n 7 above) para 13.

<sup>54</sup> *Olivia* (n 7 above) para 14.

<sup>55</sup> *Olivia* (n 7 above) para 19. With regard to the *Olivia* case, the Court found *ad hoc* engagement to be entirely inappropriate.

<sup>56</sup> *Olivia* (n 7 above) para 21.

<sup>57</sup> *Doctors for Life International v The Speakers of the National Assembly and Others* 2006 12 BCLR 1399 paras 111 and 116 (*Doctors for Life*).

<sup>58</sup> *Doctors for Life* (n 57 above) para 115.

*South Africa (Pty) Ltd and Others*, the Constitutional Court also accentuated that the Constitution contemplates participatory democracy that is accountable, transparent, responsive, open and makes provision for the participation of society in decision-making processes.<sup>59</sup> The Court further observed that '[t]he principle of consultation and involvement has become a distinctive part of our national ethos'.<sup>60</sup> Meaningful engagement thus lies at the heart of our democracy and enhances the possibilities for the kind of participatory democracy that form part of the constitutional vision of democracy. Davis has also observed that the concept of engagement 'represents a further development of the principles of accountability and participation that can be employed by the homeless against the hitherto absolute power of property'.<sup>61</sup> The Court in *Olivia* thus contributes to the promotion of participatory citizenship by the poor and recognises and enhances the dignity of the poor. One of the advantages of participation by those affected in the remedy formulation process is that it facilitates implementation of the remedy.<sup>62</sup>

The meaningful engagement remedy further surmounts concerns around the separation of powers and issues of polycentricity in socio-economic rights adjudication,<sup>63</sup> giving the government some leeway in policy-decision making, while embracing other democratic principles such as transparency and accountability. Meaningful engagement is thus a progressive and effective remedy that, as seen from Bishop's consideration of remedies, goes beyond supervisory remedies,<sup>64</sup> and could further develop in future cases as it is grounded in the Constitution. Ray adds that engagement can be an incentive for government to develop the kind of multi-faceted and robust housing policies that section 26 arguably requires.<sup>65</sup>

The Constitutional Court has, however, not taken meaningful engagement remedy seriously in its subsequent decision in *Joe Slovo*. Despite its misgivings about the engagement process that took place prior to the litigation – finding serious faults and inadequacies in the process - the Court went ahead to order the mass eviction, as the beneficial ends of low-income housing development had to be

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<sup>59</sup> 2006 8 BCLR 872 (CC) paras 111, 625 and 627 (*New Clicks*).

<sup>60</sup> *New Clicks* (n 59 above) para 625.

<sup>61</sup> D Davis 'Socioeconomic rights: Do they deliver the goods?' (2008) 6 *International Journal of Constitutional Law* 687, 706. Davis also notes that 'the concept of engagement, as developed by the Court, may be exquisitely vague in its attempt to strike a balance between property rights and the rights of the homeless'.

<sup>62</sup> *Mbazira* (n 13 above) 211-212 and 215. The *Olivia* case is now seen as one of the few cases that show that the state can be compliant after all due to the, comparatively, short time frame within which the judgment was enforced. 450 occupiers have, reportedly, voluntarily been moved to more decent housing, with water, electricity and sanitation facilities. See L Royston, M Hathorn and S Wilson 'Victory for engagement in relocation from San Jose' *Business Day* 9 September 2008.

<sup>63</sup> See also D Brand *Courts, socio-economic rights and transformative politics* (2009) 137 [Doctor of Laws Thesis, University of Stellenbosch], in which he states that meaningful engagement 'holds great promise, both because it potentially resolves the problems of institutional capacity and institutional relations attaching to remedies in socio-economic rights cases ... and because it provides a mechanism for the powerful legitimation by courts of transformative political action'.

<sup>64</sup> M Bishop 'Remedies' in S Woolman, T Roux and M Bishop (eds.) *Constitutional law of South Africa* (2008) 9-199 [Juta & Co Ltd].

<sup>65</sup> See, generally, B Ray '*Occupiers of 51 Olivia Road v City of Johannesburg*: Enforcing the right to adequate housing through "engagement"' (2008) 8(4) *Human Rights Law Review* 703-713, which analyses the use of engagement in enforcing the right to adequate housing in the context of *Olivia*.

considered when condemning this 'deplored' deficiency.<sup>66</sup> The Court was willing to condone inadequate consultation processes merely on the basis that the objectives of the housing development project in question outweigh the defects in the consultation process. In response to this, Liebenberg has pointed out that unless the courts are serious about ensuring that meaningful engagement does not become a meaningless *cliché*, the realisation of socio-economic rights in South Africa will exhibit all the flaws of a top-down approach in which the intended beneficiaries have little say in development or in determining the nature of what is delivered to them.<sup>67</sup> Notwithstanding the concerns in *Joe Slovo*, the Court was more robust as regards the engagement process, providing a detailed engagement order including a range of issues on which the government is required to consult, which it pointed out were not exhaustive.<sup>68</sup>

### 3.2 Other remedial models

This section briefly considers other remedial models that speak to participation of those affected in the remedy formulation process, and the extent to which the meaningful engagement remedy mirrors these models. The section focuses on 'experimentalist' approach and the 'deliberative model of remedial decision making'.

The experimentalist approach, as defined by Sabel and Simon, 'emphasizes ongoing stakeholder negotiation, continuously revised performance measures, and transparency', and 'combines more flexible and provisional norms with procedures for ongoing stakeholder participation and measured accountability'.<sup>69</sup> With the experimentalist approach, the parties first come together to negotiate a remedial plan and other interested stakeholders can join. The goal of the negotiation is consensus. The court may appoint a mediator and the stakeholders meet in person. The rules that emerge from this remedial negotiation stage - 'rolling-rule regime' - are provisional as they are continuously reassessed and revised during the negotiation process. The policies, norms and results of this regime must be transparent, that is made public.<sup>70</sup> The advantage of this approach is that it tries to get as many stakeholders as possible involved in the determination of an appropriate solution,<sup>71</sup> and not just the parties to the case. The meaningful engagement remedy thus reflects some aspects of the experimentalist approach, particularly participation and accountability.

The 'deliberative model of remedial decision making' developed by Sturm forces the court and participants to take account of the norms of legitimate remedial

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<sup>66</sup> *Joe Slovo* (n 51 above) paras 112, 117, 167, 301, 302, 280 & 284.

<sup>67</sup> S Liebenberg, 'Joe Slovo eviction: Vulnerable community feels the law from the top down' (2009) *Business Day*, 22 June. Available on <http://www.businessday.co.za/articles/Content.aspx?id=73812>.

<sup>68</sup> *Joe Slovo* (n 51 above) paras 5 and 11.

<sup>69</sup> CF Sabel and WH Simon 'Destabilization rights: How public litigation succeeds' (2004) *Harvard Law Review* 1015, 1016 & 1019.

<sup>70</sup> Sabel and Simon (n 69 above) 1067-1072.

<sup>71</sup> Bishop (n 64 above) 9-195. Bishop also noted that there is no one set of orders that comprises the experimentalist approach.

decision making. The role of the court under this model is 'to structure a deliberative process whereby the stakeholders in the public dispute develop a consensual remedial solution using reasoned dialogue, and to evaluate the adequacy of this process and the remedy that it produces'<sup>72</sup> The mediation process begins with the court determining liability and then setting up a mediation process, which has three stages – 'prenegotiation, negotiation, and implementation'. With this model, the court first defines the normative parameters of the process and the liability norms that have been violated. Then the prenegotiation stage, where the judge performs several functions including assisting in identifying stakeholders and a mediator and outlining the characteristics of the process by which they are to attempt to craft a remedy. The stakeholders are not limited to the parties but include others that might be responsible for or affected by the remedial outcome. If a consensus is reached, the agreement is then presented to the court, which then holds a public hearing on the proposed remedy, evaluates the adequacy of the remedy, and then issues an opinion.<sup>73</sup>

While acknowledging some similarities between Sturm's model and the Constitutional Court's meaningful engagement remedy, Ray has described the Court's approach as a hybrid between pure alternative dispute resolution process and pure adjudication since it remains tied to the courts. This hybrid nature, as Ray added, enhances both its legitimacy and its norm creating capacity.<sup>74</sup>

Notwithstanding, an aspect of the meaningful engagement remedy, which can be distinguished from Sturm's model, and that could pose difficulties is that the Court orders engagement before it decides on the legal issues or determine liability. The Constitutional Court emphasised that engagement should ordinarily take place before, and not after, litigation commences.<sup>75</sup> However, once litigation has commenced, is it appropriate to order engagement before determining the legal issues? With the Court's approach, the parties get into the engagement without normative parameters, not knowing their legitimate entitlements. Yet the inequality in bargaining power between the state and its citizens continue to exist. This could result in the engagement being unsuccessful or not meaningful, especially in cases where the poor are not represented by competent lawyers. The aspect of the deliberative model where the court first defines the normative parameters of the process and the liability norms that have been violated prior to the engagement process could thus be useful in curbing this power imbalance. Notwithstanding, the Court should be mindful of this power imbalance when ordering meaningful engagement in future cases. Arguably, the Court thus, to a limited extent, recognise this concern in *Olivia* when it observed that '[i]t will not always be appropriate for a court to approve all agreements entered into consequent upon engagement'.<sup>76</sup>

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<sup>72</sup> Sturm (n 13 above) 1427.

<sup>73</sup> Sturm (n 13 above) 1427-1431 and 1433.

<sup>74</sup> See B Ray *Extending the shadow of the law; Using hybrid mechanisms to develop constitutional norms in socioeconomic rights cases* (2008) Working Paper 21, Centre for Human and Global Justice, 26-27.

<sup>75</sup> *Olivia* (n 7 above) para 30.

<sup>76</sup> *Olivia* (n 7 above) para 30.

Brand has gone further to suggest that meaningful engagement between the state and occupiers facing eviction only makes sense if it is granted after at least the legal issues in a case have been decided, stating that:

Parties to a dispute approach a court presumably because they have themselves been unable to resolve that dispute amicably. They want, and can legitimately expect the court to determine authoritatively which of their conflicting claims are valid, so that a practical solution to their dispute can be found on that normative basis ... Not only does this set the limits within which engagement may operate, it also, importantly, places the parties to the negotiation, with their rights and duties now authoritatively determined and with the end goals of the negotiation clear, on an equal footing.<sup>77</sup>

The success of the negotiation in the present case was largely due to the fact that the unlawful occupiers were represented by very competent lawyers and both parties were willing to engage. However, as illustrated in a subsequent case where the Constitutional Court attempted to use engagement, it will not always result in a successful settlement as was the case in *Olivia*. In *Mamba and Others v Minister of Social Development and Others*, concerning the closure of camps that housed refugees from the recent xenophobic violence in South Africa, the Constitutional Court directed the parties

... to engage with each other meaningfully and with all other stakeholders as soon as it is possible for them to do so in order to resolve the differences and difficulties aired in this application in the light of the values of the Constitution, the constitutional and statutory obligations of the respondents and the rights and duties of the residents of the shelters<sup>78</sup>

The provincial government was, however, not willing to engage meaningfully, proceeding with closure of the camps without consultation on a reintegration plan; and further attempts by the Court to force the engagement were futile. Ray has observed, based on a consideration of *Olivia* and *Mamba*, that engagement is dependent on sufficient incentives for the political branches to take the process seriously and *Mamba* 'reinforces the need to develop engagement as a structured long-term process, rather than relying on it solely as an ad hoc remedy during an ongoing case'.<sup>79</sup>

However, the question regarding when it is best suited for a court to order engagement once litigation has commenced still remains unclear. In the *Joe Slovo* case, the Constitutional Court ordered engagement in addition to addressing the legal issues in the case, thus providing the parties with normative basis for the engagement.<sup>80</sup> Whether this helped the residents is questionable. On the one hand, it could be argued that determining the resident's entitlement to 70% of the new homes to be built and specifying the quality of alternative accommodation to be provided in addition to ordering meaningful engagement corrects power imbalances

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<sup>77</sup> Brand (n 63 above) 162-163. He also discusses a number of consequences of issuing the meaningful engagement while the judgment is still pending, including the fact that the parties had to negotiate without an authoritative indication of their legitimate goals of engagement and the consequent refusal by the Court to consider certain issues.

<sup>78</sup> CCT65/08, Court Order dated 21 August 2008, para 1 (*Mamba*). The case was subsequently withdrawn as it had become moot.

<sup>79</sup> See B Ray 'Engagement's possibilities and limits as a socioeconomic rights remedy' (nd) 11 [http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=brian\\_ray](http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=brian_ray)>, which discusses the limits and potential of engagement in the context of *Olivia*, *Mamba* and *Joe Slovo*, and offers suggestions on how engagement could be further developed.

<sup>80</sup> *Joe Slovo* (n 51 above).

by providing the residents with an authoritative indication of what they are legitimately entitled to. On the other hand, it could be argued that the residents would have been better off if meaningful engagement was ordered before the judgment, which might have created some anxiety on the part of the state on whether the court will agree to the relocation to Delft and might have forced the state to explore the possibility of a move to a place closer to Joe Slovo, as was the case in *Olivia* where the alternative accommodation was provided within the city. However, the fact that the engagement was ordered in addition to a determination of substantive issues can alter the bargaining positions of the parties to the benefit of the residents.

A key point highlighted in both models is the need to involve a wide range of stakeholders in the engagement process. This would be in line with the Constitutional Court's view in *New Clicks* that

[b]ecause transparency and responsiveness relate more to the broad character of the workings of our democracy than to doing justice to an individual, all interested parties, not only those whose rights stand to be adversely affected, are entitled to know what government is doing, and as concerned citizens, to have an appropriate say.<sup>81</sup>

The Court also recognised the importance of involving other role players in the case of *Mamba and Others v Minister of Social Development and Others*.<sup>82</sup> However, as Mbazira has cautioned, one must guard against diluting the remedial process or unnecessarily slowing it down through wide stakeholder participation to the extent that remediation is lost.<sup>83</sup>

#### 4 Alternative accommodation and its location

Though there is no unqualified constitutional duty on the state to ensure that in no circumstances should an eviction take place unless alternative suitable accommodation or land is made available, recent South African jurisprudence demonstrates that the duty to respect and protect the right to have access to adequate housing essentially implies a right to alternative accommodation on eviction, where the evictees are not able to obtain this through their own effort.<sup>84</sup>

In *Olivia*, contrary to the SCA,<sup>85</sup> the Constitutional Court affirmed that local authorities have a duty to consider the availability of suitable alternative accommodation or land in deciding whether to proceed with an eviction in terms of the NBRA. It found it regrettable that in making the decision to evict, the City did not take into account the fact that the people concerned would be rendered homeless.<sup>86</sup> In line with its decision in *Grootboom* in relation to government departments working

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<sup>81</sup> *New Clicks* (n 59 above) para 627.

<sup>82</sup> *Mamba* (n 78 above) paras 1 and 5.

<sup>83</sup> Mbazira (n 13 above) 217.

<sup>84</sup> G Budlender, 'The right to alternative accommodation in forced evictions' in J Squires, M Langford and B Thiele (n 2 above) 136.

<sup>85</sup> The SCA had concluded that the right of local authorities to act under section 12(4)(b) did not necessarily depend on the right of access to adequate housing, that did not mean that it was 'neither appropriate nor necessary for a decision-maker to consider at all the availability of suitable alternative accommodation or land when making a section 12(4)(b) decision'. See *Olivia* (n 7 above) para 43.

<sup>86</sup> *Olivia* (n 7 above) para 44.

together in the provision of housing, the Court held that the various departments in a municipality could not function separately 'with one department making a decision on whether someone should be evicted and some other department in the bureaucratic maze determining whether housing should be provided'<sup>87</sup> The Court therefore found the SCA to be incorrect in finding no fault with the City's failure to consider the availability of suitable alternative accommodation, as section 26 of the Constitution and section 12(4)(b) of the NBRA had to be read together. The Court's position in this regard avers the relevance of section 26 of the Constitution to all eviction decisions including those taken under health and safety legislation.<sup>88</sup>

The Court's judgment in *Olivia* is however silent on the question of the location of the alternative accommodation based on the fact that it formed part of the agreement. Though it could be argued that considering this point was no longer relevant as the Court ordered meaningful engagement, some guidelines on it would have been helpful, especially in relation to subsequent cases. As noted earlier, the High Court situated the right to have access to adequate housing alongside the right to work and to a livelihood.<sup>89</sup> The SCA, though of the view that the Constitution does not give a person a right to housing at state expense at a locality of that person's choice, did order that the City should determine the location of the alternative accommodation after consultation with those affected.<sup>90</sup> Despite the varying views on this issue, the Constitutional Court did not consider whether the right of access to adequate housing requires a consideration of location in the provision of alternative accommodation. Considering, for instance, the general difficulties in finding available land especially in urban areas, it would, of course, be challenging if a court specifically orders that. However, the Constitutional Court should have defined the elements to be considered in determining the location of alternative accommodation such as proximity to livelihood opportunities and distance from original site, which have been emphasised at the international level.<sup>91</sup>

In its subsequent decision in *Joe Slovo*, the Constitutional Court again fails to suitably engage with the question of the location of alternative accommodation, ordering the relocation of residents far away from the original accommodation, with socio-economic implications and contrary to international standards on evictions.<sup>92</sup> The *Joe Slovo* case, however, illustrates that what constitutes suitable alternative accommodation is a rather important issue as the Court was prescriptive regarding the quality and nature of alternative accommodation: it should be at least 24m<sup>2</sup>; serviced with tarred roads; individually numbered for purposes of identification; have walls constructed with Nutec; have a galvanised iron roof; be supplied with pre-paid electricity; be situated within reasonable proximity of a communal ablution facility; make reasonable provision for fresh water and for toilet facilities with water-borne

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<sup>87</sup> *Olivia* (n 7 above) para 44.

<sup>88</sup> Liebenberg (n 6 above) 95.

<sup>89</sup> *Rand Properties (W)* (n 19 above) para 64.

<sup>90</sup> *Rand Properties (SCA)* (n 23 above) para 44.

<sup>91</sup> The Basic Principles and Guidelines (n 14 above) para 43, for instance, state that alternative housing should be situated as close as possible to the original place of residence and source of livelihood of those evicted.

<sup>92</sup> See Chenwi and Tissington (n 51 above) 22.

sewerage.<sup>93</sup> Notwithstanding, it should be noted that the agreement between the parties in *Olivia* makes provision for alternative accommodation within the city, despite the City's objection in the lower courts to provide alternative temporary accommodation within the inner city. The agreement ultimately acknowledged principles such as proximity to livelihood opportunities and distance from original site. The High Court's view on the interrelatedness of the right to housing, livelihood and the right to work therefore finally came to light in the agreement.

## 5 Judicious avoidance or sheer unwillingness?

The Constitutional Court's judgment is noteworthy for its avoidance to engage with a number of disputed issues. Despite noting a number of outstanding issues that remained in dispute, the Court did not proceed to consider them. These included the City's failure to formulate and implement a housing plan for the occupiers and other similarly situate persons, the City's policy in dealing with persons occupying 'bad' buildings, the review of the City's decisions to issue notices to the occupiers, the applicability of PIE, and the reach and applicability of section 26(1), 26(2) and 26(3) of the Constitution.<sup>94</sup> Is this judicious avoidance or sheer unwillingness?

Judicious avoidance' or 'decisional minimalism', as described by Currie, is when courts seek only to decide the narrow constitutional issues and leave things open by limiting the width and depth of judicial judgments.<sup>95</sup> Roederer, in response to Currie's judicious avoidance, observed that judicious avoidance amounts to a presumption of minimalism or under-theorising' and minimalism implies narrow decisions in terms of their impact and shallow in terms of justification.<sup>96</sup> Arguably, the Constitutional Court's approach is, however, different from judicious avoidance as discussed by Currie and Roederer - it was not about deciding narrow constitutional issues or shallow justification, but sheer unwillingness on its part to deal with the issues and its preference of shifting the issues to the negotiation process.

The Court did not find it necessary to consider the question relating to the City's housing plan because the agreement between the parties dealt with the issue of temporary accommodation and the agreement further states that permanent housing solutions will be developed in consultation with the occupiers.<sup>97</sup> Instead, the Court shifts these issues to the engagement process with the hope that the

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<sup>93</sup> *Joe Slovo* (n 51 above) para 7(10).

<sup>94</sup> *Olivia* (n 7 above) para 31.

<sup>95</sup> See generally I Currie 'Judicious avoidance' (1999) 15 *South African Journal of Human Rights Law* 138, where this principle is discussed in greater detail. See also CR Sustein 'Foreword: Leaving things undecided' (1996) 110 *Harvard Law Review* 4, where decisional minimalism is discussed.

<sup>96</sup> C Roederer 'Judicious engagement: Theory, attitude and community' (1999) 15 *South African Journal of Human Rights Law* 486.

<sup>97</sup> *Olivia* (n 7 above) para 32-36. The Court was also of the view that it could not address the question of whether the City has acted reasonably in the process with regard to its housing plans. In this regard, see Brand (n 63 above) 167, where he discredits this argument stating that the Court is not barred from dealing with issues raised before it for the first time and in any case constitutional consistency of the City's approach to dealing with the problem of homelessness and inadequate housing in the inner city was not raised for the first time in the Constitutional Court.

negotiations would continue in good faith,<sup>98</sup> though the parties had indicated that they have not been able to reach agreement on the question relating to the City's housing plan and policies. Hence, the constitutionality of the City's approach to housing the poor and vulnerable has been left open, despite the fact that it is an issue that affects not just the occupiers before it but other similarly situated persons. Furthermore, because the Court did not explain the relationship between the three subsections of section 26 and evictions, as argued elsewhere, it is thus not clear why it reasoned that the duty to consider all relevant circumstances prior to issuing a section 12(4)(b) eviction notice arose from section 26(2) and not section 26(3) of the Constitution.<sup>99</sup> The Court's approach thus pushes the responsibility of developing the substantive content of section 26 into the political sphere.<sup>100</sup> Also, by avoiding to consider the applicability of PIE in situations of evictions for alleged health and safety reasons as well as the administrative justice arguments on procedural fairness guaranteed under section 33 of the Constitution and the Promotion of Administrative Justice Act,<sup>101</sup> as again argued elsewhere, the Court has failed to establish a clear legal framework that would govern all future evictions on health and safety grounds.<sup>102</sup>

Arguably, engagement thus appears to diminish the Court's interpretative role. The Court's desire to avoid engaging with the outstanding issues resulted in its failure to develop the right to housing jurisprudence beyond its decision in *Grootboom*, especially in the context of evictions pursuant to health and safety legislation. Another consequence noted by Dugard is the resultant failure to 'tackle the policies and practices at the core of the vulnerability of poor people living in locations earmarked for commercial developments' and to 'establish critical rights-based safeguards for extremely vulnerable groupings'.<sup>103</sup>

It is important to also note that previous decisions of the Constitutional Court have been characterised by a display of scholarship in which historical, social and economic context, comparative jurisprudence and international law have featured prominently.<sup>104</sup> However, unlike the High Court and its previous jurisprudence, the absence of an analysis of the historical, social and economic context of the occupation of buildings in the inner city of Johannesburg is noticeable and the Constitutional Court failed to support its reasoning by referring to the rich body of international law standards and jurisprudence on development-based evictions, in spite of the clear injunction in the Constitution<sup>105</sup> to consider international law in interpreting the Bill of Rights. As mentioned earlier, basic principles and guidelines on development based evictions have been developed at the UN level that would be

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<sup>98</sup> *Olivia* (n 7 above) para 34.

<sup>99</sup> Chenwi and Liebenberg (n 10 above) 16.

<sup>100</sup> Ray (n 74 above) 26.

<sup>101</sup> Act 3 of 2000 (PAJA).

<sup>102</sup> Chenwi and Liebenberg (n 10 above) 16.

<sup>103</sup> J Dugard 'Courts and the poor in South Africa: A critique of systematic failure to advance transformative justice' (2008) 24 *South African Journal on Human Rights* 214-238, 237-238.

<sup>104</sup> In *PE Municipality* (n 43 above) and *Grootboom* (n 27 above), for example, the Constitutional Court provided a rich contextual analysis.

<sup>105</sup> Section 39 of the Constitution.

of relevance to South Africa and were canvassed in the submissions of the *amici* in the case.<sup>106</sup> As argued elsewhere, such a consideration is relevant as it might reveal creative alternative approaches to a particular problem consistent with human rights norms and values.<sup>107</sup>

## 6 Conclusion

As illustrated in this case note, the Constitutional Court in *Olivia* establishes a more robust approach to enforcing housing rights and a new trend in the emphasis on meaningful engagement prior to eviction decisions being made. *Olivia* also underscores the obligation to consider all relevant circumstances, including the availability of suitable alternative accommodation or land, in deciding whether to proceed with an eviction, and the requirement of judicial oversight over all evictions. It confirms that compliance with legal requirements for eviction is necessary but not sufficient. It thus, reaffirms and elaborates the basic principles governing evictions laid down by the Court's earlier decision in *PE Municipality*.<sup>108</sup>

*Olivia* further reaffirms the Constitution's transformative role and is illustrative of the Constitutional Court's transformative performance. As observed by Gloppen, a court's transformative performance is 'their contribution to the altering of structured inequalities and power relations'.<sup>109</sup> Through the forced engagement, the Court has contributed to social inclusion of the poor, disadvantaged and marginalised people in remedial decision making. Thus, as De Vos has observed, 'authorities cannot act in a bureaucratic and heartless fashion when they deal with human beings – even when they are called upon to enforce the law and even when those people they are dealing with have acted illegally'.<sup>110</sup> The implication of *Olivia* is that local authorities have to adopt a people-centred approach to evictions that is respectful of the rights of occupiers and must incorporate housing needs as part of any long term housing development strategy.

The transformative potential of the case is, however, limited by, first, the Constitutional Court's failure to use the opportunity to pronounce on potentially transformative issues that were outstanding. Second, the meaningful engagement remedy in *Olivia* did not take into consideration broader interests, as the outcome is limited to the individuals before the Court. The Court does not also deal with how meaningful engagement will operate in case of urgent eviction proceedings. Furthermore, the Court does not set guidelines for municipalities in the determination of the location of alternative accommodation.

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<sup>106</sup> The *amici* were the Community Law Centre and the Centre on Housing Rights and Evictions.

<sup>107</sup> Chenwi and Liebenberg (n 10 above) 16

<sup>108</sup> *PE Municipality* (n 43 above).

<sup>109</sup> S Gloppen 'Courts and social transformation: An analytical framework' in R Gargarella, P Domingo and T Roux (eds.) *Courts and Social transformation in new democracies: A institutional voice for the poor?* (2006) 35-59, 38 [Ashgate Publishing Limited].

<sup>110</sup> P de Vos 'Constitutional Court cleverly "solves" eviction dilemma – or not?' <http://constitutionallyspeaking.co.za/constitutional-court-cleverly-solves-evictions-dilemma>.

The judgment, notwithstanding, represents another important affirmation of the significance of the right to housing of those living in precarious conditions on the margins of our society and respect for their dignity. It also accentuates and enhances participatory democracy. It further shows the Constitutional Court's willingness to enforce a more substantive standard that promotes constitutional values and expansively advance a more generous notion of justice.<sup>111</sup> As observed by Liebenberg, this case, among other housing cases, illustrates that when laws or conduct that deprive poor people of existing access to socio-economic rights are at issue, the Court is willing to apply a stringent standard.<sup>112</sup>

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<sup>111</sup> EC Christiansen 'Due regard for Constitutional values: The South African Constitutional Court and substantive justice' <[http://www.ialsnet.org/meetings/constit/papers/ChristiansenEric\(USA\).pdf](http://www.ialsnet.org/meetings/constit/papers/ChristiansenEric(USA).pdf)>.

<sup>112</sup> Liebenberg (n 6 above) 95.