

MEANINGFUL ENGAGEMENT: ONE STEP FORWARD OR TWO BACK? SOME THOUGHTS ON *JOE SLOVO*

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1 Introduction

The principle of ‘meaningful engagement’ developed in the judgment of *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing Rights and Evictions and Another, Amici Curiae)* 2010 (3) SA 454 (CC) (*Joe Slovo*), and earlier cases, has, in some instances, been lauded as a positive development in the evolving evictions jurisprudence.¹ This case note critically examines that assumption.

The note begins with an overview of the reasoning of the Constitutional Court in the various judgments handed down in *Joe Slovo*. It then examines what the concept of meaningful engagement adds to the process undertaken when organs of state decide if and how to evict communities of poor people, and questions whether the procedural requirements it spells out contribute to the existing requirements mandated by natural justice. The note then looks at the effect of the use of meaningful engagement on the adjudication process itself, concluding that meaningful engagement is often used by the Court to avoid having to decide difficult matters.

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¹ See, for instance, S Fredman *Human rights transformed: Positive rights and positive duties* (2008) 121-122 discussing the interim order of the Constitutional Court in *Olivia Road* (n 47 below).

2 *Joe Slovo*

The judgment in *Joe Slovo* concerned an application for the eviction and relocation of 4 386 households (approximately 20 000 residents) from the Joe Slovo informal settlement to an area known as Delft, to make way for a low-cost housing development.² The conditions in the Joe Slovo settlement were described as ‘deplorable’ and ‘unfit for reasonable human habitation’,³ yet Joe Slovo is regarded as more favourably located than Delft, and the majority of residents preferred to remain there. The High Court ordered that the occupiers were to be evicted according to a schedule provided by the Court and that the state was to report back to the Court every two months on the implementation of the order and the allocation of permanent housing to those affected by the order.⁴ The residents appealed this decision directly to the Constitutional Court.

In the Constitutional Court, the Court found that there were two distinct issues before it: first, whether the applicants were properly evicted in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (the PIE Act); and second, whether the state had acted reasonably in seeking the eviction of the applicants. On the first question, the majority of the Court found that the applicants were ‘unlawful occupiers’ (as defined in the PIE Act) at the time that eviction proceedings were instituted, and that this triggered an obligation to seek an eviction in terms of that Act.⁵ And on the second, the majority found that the state had been reasonable in seeking the eviction and had acted justly and equitably in doing so.⁶ The Court consequently ordered an eviction in terms of the PIE Act.

Five judgments were handed down, all supporting the same order, but for different reasons. The Court ordered the eviction of the applicants but subject to certain conditions, including relocation to temporary residential units in another location. A time-table, over the subsequent twelve-month period was attached to the order as an annexure, detailing the date by which households would be relocated,

² *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Others (Centre on Housing Rights and Evictions & Another, Amici Curiae)* 2010 3 SA 454 (CC) (*Joe Slovo*) para 8.

³ *Joe Slovo* (n 2 above) para 24.

⁴ *Thubelisha Homes & Others v Various Occupants & Others* Case No 13189/07, Western Cape High Court, Cape Town, 10 March 2008, unreported. For a discussion of the High Court decision, see L Chenwi ‘Upgrading of informal settlements and the rights of the poor: The case of Joe Slovo’ (2008) 9(3) *ESR Review* 13. Chenwi notes the failure of the High Court to consider the obligation on the state to engage meaningfully prior to seeking an eviction order (17). See also B Ray ‘Residents of Joe Slovo Community v Thubelisha Homes & Others: The two faces of engagement’ (2010) 10 *Human Rights Law Review* 360 362-363.

⁵ *Joe Slovo* (n 2 above) para 4.

⁶ *Joe Slovo* (n 2 above) para 5.

beginning 17 August 2009, and setting weekly deadlines for the relocation of a number of households.⁷ The Court also ordered the parties to engage meaningfully with each other if they wished to agree on a different time-table for the dates of relocation, and for this engagement to be completed by 30 June 2009 – three weeks after the handing down of the order.⁸ The parties were then to place their agreement, assuming they arrived at one, before the Court on 7 July 2009, and the Court would consider whether this was an appropriate order or not, and whether to give effect to it.

In addition to the general engagement on the time frame for relocation, the state was ordered to engage with each affected resident who was to be relocated at least a week prior to the relocation.⁹ While this deadline was fairly tight, it had the benefit of putting the state on terms to negotiate with the occupiers if they wished to amend the court-imposed time-table for relocation and meaningful engagement prior to such relocation.

The Court distinguished its order from that of the High Court as follows:

The main differences between the High Court order and the order made by this Court are the following. First, this Court's order imposes an obligation upon the respondents to ensure that 70% of the new homes to be built on the site of the Joe Slovo informal settlement are allocated to those people who are currently resident there or who were resident there but moved away after the N2 Gateway Housing Project had been launched. Secondly, this Court's order specifies the quality of the temporary accommodation in which the occupiers will be housed after the eviction; and thirdly, this Court's order requires an ongoing process of engagement between the residents and the respondents concerning the relocation process.¹⁰

2.1 Eviction in terms of the PIE Act

The first main issue before the Court dealt with whether an eviction ought to be granted in terms of the PIE Act. In this regard, the question of whether the occupiers could have been said to have occupied the land owned by the City of Cape Town 'with consent' is important since the eviction order could be granted in terms of the PIE Act only if it was established that the residents occupied the settlement 'without consent'. The residents claimed they had either

⁷ See Annexure A of the order.

⁸ *Joe Slovo* (n 2 above) para 7. The order was handed down on 10 June 2009.

⁹ *Joe Slovo* (n 2 above) para 7.

¹⁰ *Joe Slovo* (n 2 above) para 5.

express or tacit consent to occupy, and that they were therefore not unlawful occupiers.

This issue was treated differently in the various judgments. On the facts, Yacoob J (with the concurrence of Langa CJ and van der Westhuizen J) found that they did not have the municipality's consent.¹¹ In doing so, he adopted a narrow, private law approach to the question of consent, one which the other judges clearly found to be inappropriate in the circumstances. Moseneke DCJ, for instance, while not explicitly referring to the decision of Yacoob J, impliedly describes Yacoob J's approach as a 'mechanistic application of legal rules of private law in a terrain which is clearly intended to give fulsome protection derived from the Bill of Rights'.¹²

Moseneke DCJ, O'Regan and Sachs JJ, by contrast, in separate judgments, found that the municipality had, through its actions, given the applicants tacit consent,¹³ but that this consent had been terminated through the actions of the city in taking the decision to implement the N2 Gateway Project and its engagement with the residents in this regard.¹⁴ Ngcobo J, too, found that the residents were 'allowed to remain on the land until suitable alternative accommodation to alleviate their plight could be found' and during this period could not be said to be unlawful occupiers. It was only after they were requested to move to Delft that their occupation become one without consent.¹⁵ Later in his judgment, however, he fudges this distinction, finding that the 'branding' of the occupiers as 'unlawful', in the context of South Africa's history, is an affront to their dignity:

It seems to me that on the facts and the circumstances of this case, it is not necessary to first 'brand' residents as 'unlawful occupiers' before they may be relocated. This is inimical to the foundational values of human dignity as evidenced by the provisions of sections 26 and 25 of the Constitution. It would be more consonant with human dignity of landless people to pose the questions whether it is in the public interest and thus just and equitable to evict the residents for the purposes of implementing the government plan aimed at providing the residents with adequate housing. To this extent I have grave doubts whether the provisions of section 6(1) of PIE are the appropriate vehicle for dealing with the situation of the residents in this particular case.¹⁶

¹¹ *Joe Slovo* (n 2 above) para 72-83.

¹² *Joe Slovo* (n 2 above) para 146. See also the decision of O'Regan J para 351.

¹³ *Joe Slovo* (n 2 above) paras 149, 278 & 358 respectively.

¹⁴ *Joe Slovo* (n 2 above) paras 160, 286-290 & 359-360 respectively.

¹⁵ *Joe Slovo* (n 2 above) para 180. Ngcobo J's reasoning differs from that of Moseneke DCJ in that he found that the municipality's performance of its obligations in providing basic services to residents in *Joe Slovo* did not, in and of itself, constitute consent to occupy land: as above, paras 209-211.

¹⁶ *Joe Slovo* (n 2 above) para 218.

Notwithstanding these reservations, Ngcobo J held that '[e]ffect must, however, be given to the statute [PIE] that the government has resorted to in order to secure the eviction and the relocation of the residents.'¹⁷ The effect of this reasoning is unclear: it would appear to imply that notwithstanding a finding that the residents were not 'unlawful occupiers' within the meaning of the PIE Act since the term 'unlawful' was inimical to their dignity the PIE Act would be applied to effect their eviction.¹⁸ If applied by the lower courts, this approach would effectively widen the net of those facing eviction – provided it could be shown it was just and equitable to evict the occupiers. This reasoning is problematic since the unlawfulness of occupation is a substantive jurisdictional fact which must be present before an eviction is granted.¹⁹ The judgment, however, is in the minority, so is unlikely to have any practical effect.²⁰

A further requirement for an eviction to be granted under the PIE Act is whether it would be 'just and equitable' to do so.²¹ There was some disagreement between the judges on whether it would be 'just and equitable' to grant an eviction in these circumstances. Yacoob J was fairly easily satisfied that an eviction to make way for a low-cost housing development would be just and equitable,²² while Moseneke DCJ (with the concurrence of Sachs J) was clear that he only considered the eviction just and equitable in these circumstances as the applicants themselves would benefit directly from the development.²³ Otherwise, for Moseneke DCJ, the 'eviction and relocation order would have made the residents of Joe Slovo sacrificial lambs to the grandiose national scheme to end informal settlements when the residents themselves stood to benefit nothing by way of permanent and adequate housing for themselves.'²⁴

2.2 The reasonableness of the decision to evict

The second issue before the Court (and to some extent overlapping with the requirement that it be just and equitable to order the eviction) was whether the policy choice which necessitated the

¹⁷ *Joe Slovo* (n 2 above) para 219.

¹⁸ *Joe Slovo* (n 2 above) para 291 for the response of O'Regan J to this finding.

¹⁹ See also S Liebenberg *Socio-economic rights adjudication under a transformative constitution* (2010) 306.

²⁰ The judgment of Ngcobo J is concurred in by Moseneke DCJ and Sachs J. Interestingly, Moseneke DCJ and Sachs J also concur in the separate judgments of each other, in which there is a clear finding that the municipality had withdrawn its consent to occupy, meaning that the residents were 'unlawful occupiers' as defined within the four corners of the PIE Act. It is difficult to reconcile the reasoning of these three judgments in this regard.

²¹ Section 6(1) of the PIE Act.

²² *Joe Slovo* (n 2 above) para 116.

²³ *Joe Slovo* (n 2 above) paras 138-139.

²⁴ *Joe Slovo* (n 2 above) para 138.

eviction, that is, the decision to develop the area in the manner chosen, was reasonable. For reasons to be elaborated below, it is at this level that the Court displayed an undue level of deference to the policy choices of the state, and failed to engage in a proper assessment of the reasonableness of state action. In doing so, the notion of ‘meaningful engagement’ was used to plaster over the divisions between the occupiers and the province.

Part of the dispute between the parties was over the type of housing which was to be developed in the N2 Gateway Project, and whether the residents of *Joe Slovo* would themselves benefit from the Project. The State has in place a number of different housing programmes, which include the development of so-called ‘RDP houses’ (or more recently referred to as ‘BNG housing’, which is given, free of charge, to qualifying beneficiaries, with certain beneficiaries being required to make a financial contribution); social housing (subsidised rental housing to qualifying beneficiaries in housing stock managed, generally, by non-profit organisations, and constructed with government subsidies); credit-linked subsidised housing (partially subsidised housing, where the beneficiary is required to finance, usually through a mortgage bond, the bulk of the cost of the house); emergency housing (temporary shelter to be provided to those who find themselves in emergency situations) and informal settlement upgrading programmes (where informal settlements are upgraded *in situ* and all occupants thereby benefit, and subsidised construction of houses follows later for qualifying households).²⁵ The majority of residents of *Joe Slovo* would not be able to afford the rentals associated with social housing or finance associated with the credit-linked subsidy.²⁶

The state appears to have changed the type of housing to be developed in the N2 Gateway Project over time, and some of this confusion is reflected in the judgments. The judgment of Yacoob, for instance, states that the Project is to consist of social housing (that is, subsidised rental housing) and credit-linked bonded housing.²⁷ According to Yacoob, then, no RDP housing was to be built, and by definition, the development would exclude most of the occupiers in *Joe Slovo* who could not afford the rental, and who would not qualify for mortgage finance. The judgment by Ngcobo J, by contrast, relying on the High Court papers, states that the majority of housing

²⁵ See K McLean ‘Housing’ in S Woolman *et al* (eds) *Constitutional law of South Africa* (2006) 55-4 - 55-30 for a discussion of the various types of housing programmes available in South Africa.

²⁶ *Joe Slovo* (n 2 above) para 251; L Chenwi & K Tissington ‘“Sacrificial lambs” in the quest to eradicate informal settlements: The plight of *Joe Slovo* residents’ (2009) 10(3) *ESR Review* 18 23.

²⁷ *Joe Slovo* (n 2 above) para 30.

opportunities would be BNG houses.²⁸ Here, Ngcobo J is clearly referring to what are known as ‘RDP houses’ which are based on an ownership model. Ngcobo states that ‘[w]hen completed, the project will have constructed 9 500 houses in Delft and 1 885 in Joe Slovo.’²⁹

This is the crux of the dispute and is set out in the fifth judgment of Sachs J. It would appear that the applicants claimed that they were informed that the Project would consist of RDP housing, and that they had been promised that 70 per cent of the houses would be allocated to qualifying residents of the Joe Slovo community.³⁰ At some point, the Project shifted and emphasis was placed on social (rental) housing, and bonded (or credit-linked) housing, which would be unaffordable for the majority (over 80 per cent) of residents in Joe Slovo. With regard to social (rental) housing, the residents of Joe Slovo settlement claim that they were initially promised that the rental would be between R 150 and R 300 per month – rates that were simply unsustainable, and presumably never seriously intended³¹ – and it was on this basis that they originally agreed to relocate for the first phase of the N2 Gateway project.³²

O’Regan J clarifies that it was only after the hearing that the state ‘informed the Court that no fewer than 1 500 *Breaking New Ground* permanent houses would be built at *Joe Slovo*’ in phase 2 and 3 of the development.³³ This undertaking is expressly included as part of the order of the Court, and puts an obligation on the state to inform the Court, within 14 days of the order being handed down, as to whether this was likely to change.³⁴ Yet it is unclear whether what is referred to here is ‘RDP housing’ (that is, housing given to qualifying beneficiaries who would become the owner of the housing) or social (rental) housing. It would appear to be the latter, as order 17 of the order, defines *BNG* houses as ‘low-cost government housing available at low rentals’. If this is so, it is unclear how the provision of social housing will benefit the vast majority of the residents of Joe Slovo.

In assessing the reasonableness of the N2 Gateway development, Yacoob J followed the test established in *Grootboom*, finding that the applicants’ eviction was just and equitable in the circumstances, and

²⁸ *Joe Slovo* (n 2 above) para 206 n 18.

²⁹ *Joe Slovo* (n 2 above) para 206 n 18.

³⁰ *Joe Slovo* (n 2 above) para 373.

³¹ McLean (n 25 above) 55-29 - 55-30 discusses the problems with social housing in this regard, pointing out that social housing, as currently defined and implemented, was never intended, and could never cater for the housing needs of the poorest segments of society. See the judgment of Ngcobo J para 251 where he acknowledges that the residents had complained that the majority could not afford the rental needed in social housing.

³² *Joe Slovo* (n 2 above) para 374.

³³ *Joe Slovo* (n 2 above) para 308.

³⁴ *Joe Slovo* (n 2 above) para 11 order 18.

'constitute[d] a measure to ensure the progressive realisation of the right to housing within the meaning of section 26(2) of the Constitution.'³⁵ Moreover, the state had acted reasonably in engaging with the community,³⁶ and the policy, as a whole, was therefore reasonable. Yacoob J's reasoning is summed up in the following passage:

It is true, as is emphasised by the amici, that this relocation would entail immense hardship. I have considerable sympathy with the applicants, but there are circumstances in which this court and all involved have no choice but to face the fact that hardship can only be mitigated but can never be avoided altogether. The human price to be paid for this relocation and reconstruction is immeasurable. Nonetheless it is not possible to say that the conclusion of the City of Cape Town, to the effect that infrastructural development is essential in the area and that the relocation of people is necessary, is unreasonable. There are circumstances in which there is no choice but to undergo traumatic experiences so that we can be better off later. Significantly, they are ameliorated by the state undertaking to provide transport and to ensure that schooling is available to children, and that people moved to Delft can get to work.³⁷

Moseneke DCJ, O'Regan and Sachs JJ, by contrast, found that there had not been meaningful engagement,³⁸ yet proceeded nonetheless to concur with the order granting an eviction.³⁹ The following passage from O'Regan J's judgment is illustrative:

The question we have to ask in this case is whether the failure to have a coherent and meaningful strategy of engagement renders the implementation of the plan unreasonable to the extent that the respondents have failed to establish a right to evict the occupiers. On balance I think not. First, we cannot ignore that this is one of the first attempts at a housing development in terms of the new housing policy. Given the huge numbers of people living in inadequate or makeshift housing in Cape Town (and indeed many of our municipalities), and given the fact that this is a pilot project, it is not surprising that it has not been implemented without controversy. Secondly, it is clear that the respondents have engaged in some consultation with the applicants, although they admit that it has not been coherent or comprehensive and that at times it has been misleading

Thirdly, a consideration that to my mind weighs heavily in the balance is that it is not only the occupiers who are affected by the plan. Thousands of other households have already co-operated with the respondents in the hope that their co-operation will hasten the building of the housing

³⁵ *Joe Slovo* (n 2 above) para 115 (footnote omitted).

³⁶ *Joe Slovo* (n 2 above) para 117.

³⁷ *Joe Slovo* (n 2 above) para 107. See similar statements by Moseneke DCJ para 174.

³⁸ *Joe Slovo* (n 2 above) paras 167, 301 & 384 respectively.

³⁹ *Joe Slovo* (n 2 above) paras 167, 303 & 384 respectively.

project and result in their receiving permanent housing. Refusing an order of eviction in this case might give some temporary relief to the applicants, but it would be against the interests of those waiting anxiously in Delft and in back yards in Langa for the houses to be built. Finally, the order of eviction that is made can seek to remedy, at least to some extent, the failure of government to engage meaningfully in consultation with the applicants up to this stage.⁴⁰

Consequently, despite a finding that there was a failure to engage meaningfully, the end was found to justify the means. The Court ordered that the parties then engage meaningfully on the eviction process, in part to cure the deficiencies of a failure to engage on the decision to evict itself.

2.3 Subsequent developments

During the time between the hearing of the matter, and judgment being handed down, political events overtook the dispute. In the Western Cape provincial government elections of 22 April 2009, the African National Congress (ANC) was unseated by the Democratic Alliance (DA), which received 51.4% of the vote. The N2 Gateway Project was a provincial project, driven by the ANC-led national and provincial government. With the change in provincial government, new political voices emerged.

In addition to political shifts, the project itself also began to unravel. In the beginning of August 2009, and after judgment had been handed down, reports began to emerge that Parliament's Standing Committee on Public Accounts (SCOPA) was questioning the management and financing of the N2 Gateway Project. A number of irregularities were noted, including an estimated shortfall of R1,7 billion. In addition, SCOPA noted that the housing types provided were mis-matched to community needs and affordability.⁴¹ On 6 August 2009, in the wake of SCOPA investigations, a newspaper article reported that the N2 Gateway Project had been driven by politicians who had placed unrealistic timeframes and demands on housing officials to build the project, despite city officials voicing their concerns.⁴² City officials complained that the project had been 'driven from a political level that totally ignored all protests from the

⁴⁰ *Joe Slovo* (n 2 above) paras 302-303.

⁴¹ 'Scopa postpones N2GP hearings', IOL, 7 August 2009 available at <http://www.news24.com/Content/SouthAfrica/News/1059/fcb6e5aed1454c3aba19e76021> (accessed 30 August 2009).

⁴² "'Unrealistic" expectations for N2 housing' IOL, 6 August 2009 available at http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=nw20090806133722965C68004 (accessed 30 August 2009).

administration' and that officials had been given the option of either resigning or doing their best.⁴³

On 24 August 2009, the Court, issued a new order suspending the evictions 'until further notice'. This order was reported to have been granted after the Western Cape MEC for housing Bonginkosi Madikizela submitted a report to the Court saying that he had 'grave concerns' that the massive relocation may well cost more than it would to upgrade *Joe Slovo*.⁴⁴ Madikizela was reported to have said that the Constitutional Court order had not made provision for those who would be left in Delft after Joe Slovo had been upgraded as there were not enough housing units to accommodate all of the original Joe Slovo residents.⁴⁵

3 Meaningful engagement: One step forward?

The idea of meaningful engagement in evictions cases, has its predecessor in the two decisions of *PE Municipality*,⁴⁶ and *Olivia Road*,⁴⁷ and marks an important development in the Court's approach to remedies in the context of the adjudication of socio-economic rights.

PE Municipality concerned the eviction, by the Port Elizabeth Municipality, of 68 unlawful occupiers in terms of PIE.⁴⁸ The Constitutional Court noted that courts exercise a discretion in granting eviction orders in terms of section 6 of PIE, and that, in exercising their discretion, courts must take into account 'all relevant circumstances'. This would include whether it was just and equitable to order an eviction, and part of this determination was whether there had been any mediation in terms of section 7 of PIE. Section 7(1) and (2) of PIE reads:

(1) If the municipality in whose area of jurisdiction the land in question is situated is not the owner of the land the municipality may, on the

⁴³ As above.

⁴⁴ A Majavu 'Evictions suspended – shack dwellers reprieved' Sowetan, 4 September 2009 available at <http://www.sowetan.co.za/News/Article.aspx?id=1060093> (accessed 7 September 2009).

⁴⁵ For similar criticism of the judgment made at the time, see K Tissington 'Joe Slovo residents let down by court' Pambazuka, 25 June 2009 available at <http://www.pambazuka.org/en/category/comment/57232> (accessed 7 September 2009) and S Liebenberg 'Joe Slovo eviction: Vulnerable community feels the law from the top down' Business Day, 22 June 2009 available at <http://www.businessday.co.za/Articles/Content.aspx?id=73812> (accessed 7 September 2009).

⁴⁶ *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) paras 39-43.

⁴⁷ *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg & Others* 2008 3 SA 208 (CC).

⁴⁸ For a detailed discussion of *PE Municipality*, see Liebenberg (n 19 above) 273-279.

conditions that it may determine, appoint one or more persons with expertise in dispute resolution to facilitate meetings of interested parties and to attempt to mediate and settle any dispute in terms of this Act: Provided that the parties may at any time, by agreement, appoint another person to facilitate meetings or mediate a dispute, on the conditions that the municipality may determine.

(2) If the municipality in whose area of jurisdiction the land in question is situated is the owner of the land in question, the member of the Executive Council designated by the Premier of the province concerned, or his or her nominee, may, on the conditions that he or she may determine, appoint one or more persons with expertise in dispute resolution to facilitate meetings of interested parties and to attempt to mediate and settle any dispute in terms of this Act: Provided that the parties may at any time, by agreement, appoint another person to facilitate meetings or mediate a dispute, on the conditions that the said member of the Executive Council may determine.

(3) Any person may request the municipality to appoint one or more persons in terms of subsections (1) and (2), for purposes of those subsections.

Sachs J's vision of mediation in *PE Municipality* is as an alternative to litigation, and is consequently slightly different to the requirement to engage meaningfully prior to taking a decision to evict:

[39]... one potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a proactive and honest endeavour to find mutually acceptable solutions. Wherever possible, respectful face-to-face engagement or mediation through a third party should replace arm's-length combat by intransigent opponents.

...

[45] In my view, s 7 of PIE is intended to be facilitative rather than exhaustive. It does not purport, either expressly or by necessary implication, to limit the very wide power entrusted to the court to ensure that the outcome of eviction proceedings will be just and equitable. As has been pointed out, s 26(3) of the Constitution and PIE, between them, give the courts the widest possible discretion in eviction proceedings, taking account of all relevant circumstances. One of the relevant circumstances in deciding whether an eviction order would be just and equitable would be whether mediation has been tried. In appropriate circumstances, the courts should themselves order that mediation be tried.⁴⁹

Hence, in *PE Municipality*, the Constitutional Court recognised the importance of meaningful engagement prior to litigation, in an

⁴⁹ *PE Municipality* paras 39 & 45 (footnotes omitted).

attempt to resolve the dispute. In Sandra Liebenberg's words, the importance of *PE Municipality*,

lies in its insistence that unlawful occupiers, who enjoyed minimal rights under the previous legislative and common-law regime, are now the bearers of constitutional rights, specifically the housing rights in s 26. This confers on them interrelated procedural and substantive protections in the context of legal steps to evict them from their homes.⁵⁰

In *Olivia Road*, the concept of meaningful engagement was developed further. *Olivia Road* concerned an eviction application by the City of Johannesburg to evict a number of people occupying several buildings in the inner city of Johannesburg.⁵¹ The application was brought in terms of section 12(4)(b) of the National Building Regulations and Building Standards Act 103 of 1997 (NBRA), the Health Act 63 of 1977, and the City's fire by-laws, for an order to 'evacuate' the respondents on the grounds that the buildings being occupied were unfit for human habitation, were dangerous and unhygienic, that evicting them would promote public health and safety, and that their eviction would reverse inner-city decay in terms of the Johannesburg Inner City Regeneration Strategy.⁵² The application was opposed on two main grounds: first, that the respondent's right of access to adequate housing in section 26(1) of the Constitution would be infringed if the eviction order were to be granted; and second, that the City had failed to meet its positive obligations to achieve the progressive realisation of the right of access to adequate housing, and was therefore prevented from evicting the respondents.⁵³

In the High Court, Jajbhai J found in favour of the respondents and dismissed the application. He also issued a declaratory order regarding the applicant's failure to comply with its constitutional obligations, and placed an obligation on the municipality not to evict the respondents until such time as it had 'developed a pragmatic, constructive and coherent programme [to] deal with the predicament that the respondents [had] to endure'.⁵⁴ The declaratory order of the High Court is far-reaching in its implications for the City's housing

⁵⁰ Liebenberg (n 19 above) 277.

⁵¹ The High Court judgment is reported as *City of Johannesburg v Rand Properties (Pty) Ltd & Others* 2007 1 SA 78 (W). For a discussion of the High Court decision, see S Wilson 'A new dimension to the right to housing' (2006) 7(2) *ESR Review* 9.

⁵² *Rand Properties* (n 51 above) paras 2-5.

⁵³ *Rand Properties* (n 51 above) paras 10-15; and see n 47 above, para 7. The respondents also opposed the application on the grounds that the provisions of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 ought to be applicable to the eviction of the respondents; that the applicant had infringed the respondents' rights to just administrative action in failing to afford them a hearing prior to taking a decision to evict them; and that section 12 of the NBRA was unconstitutional.

⁵⁴ *Rand Properties* (n 51 above) para 67.

policy, and displays little deference to the City in its policy-making exercise. It does, however, remain at the level of a declaratory order, and there are no direct orders for the City to amend its housing policy, or to report back to the Court on how it has done so. In this sense, the order has little bite.

The City then appealed to the Supreme Court of Appeal.⁵⁵ The Supreme Court of Appeal reversed the judgment of the High Court, finding that the deprivation of unsafe housing did not amount to an infringement of the right of access to adequate housing,⁵⁶ but that the eviction itself triggered an obligation on the City to provide emergency basic shelter to those who then found themselves in a crisis situation.⁵⁷ Consequently, the Court found that section 12 of the NBRA was not unconstitutional.⁵⁸ The Court therefore granted an eviction order against the occupiers, but ordered the City to provide housing assistance in terms of the Emergency Housing Programme set out in Chapter 12 of the National Housing Code.⁵⁹

The decision of the Constitutional Court⁶⁰ in the subsequent appeal took a different approach to the two previous orders in dealing with the City's housing policy and focussed on the decision-making process of state institutions prior to taking a decision to evict. In short, the Court required the City to engage meaningfully with the occupiers prior to taking a decision to evict them. The failure of the City to engage meaningfully with the occupiers was not only the substantive finding of the Court, but also its remedy: two days after the hearing before the Constitutional Court, the Court ordered the parties to engage with one another to attempt to reach a settlement over the issues raised on appeal and on ways to improve the safety of the buildings occupied by the appellants. The parties were then to file affidavits on the outcome of these discussions, and these were to be considered by the Court in handing down its final judgment.⁶¹

⁵⁵ The decision is reported as *City of Johannesburg v Rand Properties (Pty) Ltd & Others* 2007 6 SA 417 (SCA) (*Rand Properties SCA*).

⁵⁶ *Rand Properties SCA* (n 55 above) para 46.

⁵⁷ *Rand Properties SCA* (n 55 above) para 47.

⁵⁸ *Rand Properties SCA* (n 55 above) paras 51-56.

⁵⁹ *Rand Properties SCA* (n 55 above) para 78. The Emergency Housing Programme was established in order to give effect to the obligation elucidated by the Constitutional Court in the *Grootboom* decision, that the State's policy was unconstitutional to the extent that it failed to cater for those in desperate need. See McLean (n 25 above) 55-20 - 55-24 for a discussion of the policy and its weaknesses.

⁶⁰ For a detailed discussion of the Constitutional Court decision in *Olivia Road*, see L Chenwi 'A new approach to remedies in socio-economic rights adjudication: *Occupiers of 51 Olivia Road & Others v City of Johannesburg & Others*' (2009) 2 *Constitutional Court Review* 371; and Liebenberg (n 19 above) 296-303.

⁶¹ *Olivia Road* (n 47 above) para 5. The parties did, in fact, reach a settlement agreement which was made an order of court on 5 November 2007. The quality of accommodation provided by the City of Johannesburg in terms of that settlement

The Court thus recognised the value of rendering explicit an obligation on municipalities to engage meaningfully prior to instituting eviction orders. The Court located this obligation within the constitutional obligation of the state to act reasonably in section 26(2) of the Constitution,⁶² and 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’.⁶³

In the light of [the] constitutional provisions [to respect, protect, promote and fulfil the rights in the Bill of Rights] a municipality that ejects people from their homes without first meaningfully engaging with them acts in a manner that is broadly at odds with the spirit and purpose of the constitutional obligations set out in this paragraph taken together.⁶⁴

The Court explained the obligation to engage meaningfully as follows:

Engagement is a two-way process in which the City and those about to become homeless would talk to each other meaningfully in order to achieve certain objectives. There is no closed list of the objectives of engagement. Some of the objectives of engagement in the context of a city wishing to evict people who might be rendered homeless consequent upon the eviction would be to determine:

- (a) what the consequences of the eviction might be;
- (b) whether the city could help in alleviating those dire consequences;
- (c) whether it was possible to render the buildings concerned relatively safe and conducive to health for an interim period;
- (d) whether the city had any obligations to the occupiers in the prevailing circumstances; and
- (e) when and how the city could or would fulfil these obligations.

The obligation on state institutions to engage meaningfully prior to taking a decision to institute eviction proceedings is therefore an important one, and adds a significant requirement to the existing jurisprudence on the reasonableness of state action developed in *Grootboom*. As Sandra Liebenberg has put it:

In many respects, the Constitutional Court judgment is a welcome affirmation of the principle of participatory, deliberative democracy in resolving conflicts involving constitutional rights such as housing. The Court derived a general obligation on public authorities to consult

agreement is the subject of further litigation: *Khetani & Others v City of Johannesburg* (as yet unheard).

⁶² *Olivia Road* (n 47 above) para 17. In doing so, the Court links the obligation to engage meaningfully, with the obligation to act reasonably as developed in *Grootboom*.

⁶³ *Olivia Road* (n 47 above) para 10.

⁶⁴ *Olivia Road* (n 47 above) para 16 (footnotes omitted).

meaningfully with persons whom they seek to evict from their homes directly from various constitutional provisions, particularly s 26. A failure to engage meaningfully is to be treated by courts as a weighty consideration against the grant of an eviction order.⁶⁵

It is therefore concerning that the reasoning of the majority in *Joe Slovo* undermines the gains won in *Olivia Road* in finding, in essence, that even though meaningful engagement did not occur, the ends justify the means in ordering an eviction. In doing so, the Court found that provided the government policy is found to be sufficiently laudable, it is permissible for the state to ride rough-shod over the requirement of meaningful engagement. The Court therefore failed to 'take seriously [its] own insight that procedure and substance are inextricably linked'.⁶⁶ Ngcobo J, for instance, citing *Olivia Road*, found that where people are to be evicted in circumstances such as those in *Joe Slovo*, the residents must be informed and consulted on a wide range of issues, including the purpose of the relocation, consequences of the relocation and how those who cannot be accommodated in the developed area will be provided with permanent housing.⁶⁷ Nevertheless, he emphasised that 'the process of engagement does not require the parties to agree on every issue', and that '[u]ltimately, the decision lies with government.'⁶⁸ For Ngcobo J, it would appear that the central problem between the parties was the lack of meaningful engagement: and if this had occurred, the residents would have understood and accepted the project, and there would have been no need for the courts to have become involved.

The importance of meaningful engagement appears, in the decision of *Joe Slovo*, to be unravelling, as the Court was prepared to grant an eviction order in the absence of prior meaningful engagement. The order of the Court, however, is more flexible than past orders in allowing any party, unhappy that the order is not being complied with, to approach the court.⁶⁹ Moreover, the parties were directed to file affidavits by 1 December 2009 setting out a report on the implementation of the order and the allocation of 'permanent housing opportunities to those affected by the order'.⁷⁰

⁶⁵ Liebenberg (n 19 above) 301.

⁶⁶ Liebenberg (n 19 above) 309.

⁶⁷ *Joe Slovo* (n 2 above) para 242.

⁶⁸ *Joe Slovo* (n 2 above) para 244.

⁶⁹ *Joe Slovo* (n 2 above) para 7 order 21.

⁷⁰ *Joe Slovo* (n 2 above) para 7 order 16.

4 Or two steps back?

Notwithstanding the waxing and waning of the obligation to engage meaningfully, the question remains as to whether the concept really adds anything to our jurisprudence? In this section, it is suggested that far from doing so, the language of meaningful engagement masks a deferential retreat to procedural fairness considerations, to use the language of administrative law. In focussing on whether the parties have meaningfully engaged, the Constitutional Court failed to engage with the substantive right, or even the ‘reasonableness’ of the right (substantive fairness) and has retreated into an even narrower approach to the review of socio-economic rights in focussing on procedural fairness alone.

4.1 Failure to engage on substantive issues

The failure of the Court to engage in substantive review is illustrated well in *Olivia Road*, in the failure of the Court to engage with the substance of the attack on the constitutionality of the City’s housing policy and in seeking to resolve the dispute through encouraging the parties to settle. The Court noted that there were a number of outstanding issues between the parties which remained in dispute, namely, the failure of the City to formulate and implement a housing plan for persons similarly situated to the appellants; the City’s policy in dealing with so-called ‘bad-buildings’; the constitutionality of section 12(4)(b) of the NBRA; the review of the City’s notices to the occupiers; the applicability of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998; and the ‘reach and applicability of sections 26(1), 26(2) and 26(3) of the Constitution’.

Despite identifying all of these remaining disputes, the Court declined to decide all but one of them, preferring to leave their resolution to the ‘negotiations’ between the parties – even where the occupiers complained that they had not been able to reach agreement previously. The following extract provides a sample of the Court’s reasoning:

It is not necessary for this court to consider the question of ‘permanent housing solutions’ for the occupiers. The city has agreed that these solutions will be developed in consultation with them. The complaint by the occupiers that negotiations have been marred by unclear and inconcrete housing plans is not in my view a sufficient reason for this court to consider this question at this stage ... It is the duty of both parties to continue with the process of negotiation and for the occupiers

or the city to approach the High Court if this course becomes necessary.⁷¹

Hence, the Court (rather optimistically) fails to decide the critical issue, that is, the constitutionality of the City's approach to housing the occupiers (and those similarly situated), and leaves it open to be resolved through consensus and negotiation.

The only (rather narrow) issue which was decided by the Court was the constitutionality of the criminal sanction imposed in the event of non-compliance with the section 12 notices issued in terms of the NBRA, where there was no court order ordering the eviction. The Court held that the absence of a court order was the flaw in the section, and cured the defect by reading in a phrase that the criminal sanction may only be imposed where a court order for eviction had been issued.⁷² The only other finding of substance was that the City was found to have been obliged to consider the potential homelessness of the occupiers in making a decision on whether or not to issue the notice ordering vacation of the building.⁷³

This course of action of the Court signals an apparent desire to avoid engaging with the primary dispute before it at all. In this sense, the approach of the Court is different to 'judicial avoidance', or minimalism, where courts seek only to decide the narrow constitutional issues before it;⁷⁴ rather, it appears to be a more extensive unwillingness to decide the issue at all. This approach of the Court is inconsistent with transparency in judicial reasoning, and amounts to an abdication, or unwillingness to engage in judicial scrutiny.⁷⁵

4.2 Procedural fairness

The second criticism of the concept of 'meaningful engagement' is that it is difficult to know how it amounts to anything more than *audi alteram partem* (*audi*).⁷⁶ The right to *audi* is today codified in sections 3 and 4 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) which provides for a diverse set of procedures to ensure

⁷¹ *Olivia Road* (n 47 above) para 34.

⁷² *Olivia Road* (n 47 above) paras 47-51 & 54.

⁷³ *Olivia Road* (n 47 above) paras 43-46.

⁷⁴ I Currie 'Judicious avoidance' (1999) 15 *South African Journal on Human Rights* 138.

⁷⁵ For similar sentiments, see P de Vos 'A (partial) victory for Joe Slovo residents' available at <http://constitutionallyspeaking.co.za/?p=1112> (accessed 30 September 2009).

⁷⁶ For a discussion of the Supreme Court of Appeal's failure to protect the procedural fairness rights of the occupiers in *Olivia Road*, see G Quinot 'An administrative law perspective on "bad building" evictions in the Johannesburg inner city' (2007) 8(1) *ESR Review* 25-28.

that those affected by administrative action are properly ‘heard’ prior to a decision which amounts to administrative action, and which affects them, being taken. What would be needed to give effect to affected persons’ section 3 and 4 rights under PAJA, will depend on the circumstances of each matter and what the fairness of those circumstances demand.⁷⁷ Given the importance of the interests at stake, it is arguable that in giving effect to a person’s or community’s *audi* rights when that person or community faces eviction, an organ of state must participate in a sustained engagement with those to be affected by an eviction – as required under sections 3 and 4 of PAJA.

If this is so, it is not clear that meaningful engagement adds anything to the existing obligation to engage in *audi* (assuming that a decision to evict by an organ of state amounts to administrative action under PAJA) – meaningful engagement may, in fact, be narrower.⁷⁸ In *Joe Slovo*, the Court (after finding that the state had previously failed to engage meaningfully with the community) did not set the decision aside, but ordered the state to engage with affected occupiers on a narrow range of issues: the order requires all of the occupiers in the community to leave their homes, but for the parties to engage meaningfully *one week prior to the relocation*, on the names and details of those affected, the time of the relocation, transport requirements, the provision of transport to amenities, and the ‘prospect’ of allocation of permanent housing. One would imagine that such limited engagement, with so little bargaining power and an eviction a *fait accompli*, would be cold comfort for those facing eviction.

Brian Ray is more optimistic in his assessment of the contribution of the Court’s order to engage on the details of the eviction. He writes:

But the Constitutional Court’s engagement order suggests an increased understanding that more muscular oversight by the judiciary is critical to developing the engagement process into an effective enforcement mechanism. The principal advantage to a more robust engagement process that incorporates judicial control is that it creates a procedure for placing direct pressure on the political branches to develop policies

⁷⁷ See, for instance, *Du Preez v Truth and Reconciliation Commission* 1997 3 SA 204 (A) 231-233; *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 2 SA 91 (CC) para 39; *President of the Republic of South Africa v South African Rugby Football Union* 2000 1 SA 1 (CC) para 219; *Permanent Secretary, Department of Education and Welfare, Eastern Cape v Ed-U-College (PE) (section 21) Inc* 2001 2 SA 1 (CC) para 19; *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 3 SA 1151 (CC) para 101; *Chairman, Board of Tariffs and Trade v Brenco Inc* 2001 4 SA 511 (SCA) paras 13 & 14; and *Zondi v MEC for Traditional and Local Government Affairs* 2005 3 SA 589 (CC) paras 113-114.

⁷⁸ *Joe Slovo* (n 2 above) paras 299-300, where O’Regan J discusses this possibility, without deciding it, and comments that it may be ‘unduly burdensome’.

sensitive to constitutional obligations and thus preserves litigation as a tool for citizens and civil society to press for increased attention to socio-economic rights. At the same time, by focussing on the procedural rather than substantive dimensions of socio-economic rights, engagement permits courts to refrain from dictating policy specifics.⁷⁹

It is, however, precisely this focus on procedural fairness, rather than substantive reasonableness which is complained of. In *Joe Slovo*, the *amici curiae* (the Community Law Centre and the Centre on Housing Rights and Evictions) located the right to meaningful engagement in, *inter alia*, General Comment 7 of the Committee on Economic Social and Cultural Rights, which deals with forced evictions, as part of an argument that procedural safeguards must be met before evictions are ordered.⁸⁰ Paragraph 13 of General Comment 7 provides that:

States parties must ensure, prior to carrying out any evictions, and particularly those involving large groups, that all feasible alternatives are explored in consultation with the affected persons, with a view to avoiding or at least minimising, the need to use force.

These procedural safeguards were not intended to replace a substantive engagement with the question of whether it is just and equitable to order an eviction. They were intended to add additional procedural safeguards. The Court, however, has seemingly gone some way to collapsing the procedural and substantive questions, finding that when the state has met its obligations to engage meaningfully, the eviction is, by and large, just and equitable. In *Joe Slovo*, the Court went further, finding the eviction to be just and equitable even in the absence of meaningful engagement. By focusing solely on the concept of meaningful engagement, the Court has retreated to an even narrower concept of reasonableness in section 26(2) of the Constitution.

5 Conclusion

The approach of the Constitutional Court to meaningful engagement in the decision of *Joe Slovo* represents a retreat into a narrow consideration of procedural fairness. In *Olivia Road*, the Court failed to engage with the 'hard' issues, preferring instead to refer the matter back to the parties to attempt to sort it out between themselves. In *Joe Slovo*, however, the Court ordered a massive eviction, even where the state had failed to engage meaningfully with those affected by its decision. In a context where the Constitution

⁷⁹ Ray (n 4 above) 368.

⁸⁰ Heads of argument of the *amici curiae* filed before the Constitutional Court, paras 50-52 available at <http://www.constitutionalcourt.org.za/Archimages/12720.PDF> (accessed 30 September 2009).

guarantees that no one will be evicted from their home without a court order made after considering all relevant circumstances, this failure is regrettable.

It is suggested that the concept of meaningful engagement, while important for rendering explicit an obligation to consult with those affected by eviction, masks a further retreat by the Court in its differential treatment of socio-economic rights. The reasonableness test developed in *Grootboom*,⁸¹ at its minimum, was an administrative law substantive reasonableness review.⁸² *Joe Slovo* marks a pre-occupation with procedural fairness, in an assessment of whether the eviction was just and equitable; at the same time, the 'laudable' aims of a misconceived development were used to trump those very procedural fairness rights.

⁸¹ *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 1 SA 46 (CC).

⁸² CR Sunstein *Designing democracy: What constitutions do* (2001) 234.