

CONCEPTUALISING “MEANINGFUL ENGAGEMENT” AS A DELIBERATIVE DEMOCRATIC PARTNERSHIP

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1 Introduction

Nearly four years ago the Constitutional Court introduced a new concept into the law of evictions. After hearing oral argument in *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg*¹ (“*Occupiers of 51 Olivia Road*”) the Constitutional Court issued an interim order² that directed the parties “to engage with each other meaningfully”.³ In this case the City of Johannesburg sought to evict approximately 400 people from six buildings in terms of the fire bylaws of the City, section 20 of the Health Act 63 of 1977 and section 12(4)(b) of the National Building Regulations and Building Standards Act 103 of 1977. The occupiers opposed the application because an eviction and relocation to an informal settlement on the outskirts of the city would destroy their livelihood strategies that depended on being able to conduct informal trading, domestic work and recycling in the inner city of Johannesburg.

The Court explained that the purpose of this engagement order was to determine whether the values of the Constitution of the Republic of South Africa, 1996 (“the Constitution”), the constitutional and statutory obligations of the City, and the rights of the applicants could direct the parties to resolve the dispute of the application amicably.⁴ The engagement between the parties also had to determine whether the plight of the applicants would be alleviated if the dangerous and ailing buildings that they occupied could be

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¹ 2008 3 SA 208 (CC)

² The interim order was issued on 30-08-2007 *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg (Interim Order 30 August 2007)* (CCT 24/07) ZACC (30-08-2007) *Constitutional Court of South Africa* <www.constitutionalcourt.org.za/Archimages/10731.PDF> (accessed 17-11-2011) (“Interim Order”).

³ Order 1

⁴ Order 1

upgraded.⁵ Furthermore, the interim order directed the parties to report back to the Court on the results of the engagement between them.⁶ This engagement process resulted in the parties reaching an agreement⁷ on the interim measures that the City would take to improve the living conditions on the properties⁸ and the status of the City’s eviction application against the occupiers.⁹ The Court subsequently endorsed this agreement.¹⁰

Five months later, the Court, in its judgment explained that a municipality would be acting in a manner that was generally at odds with the spirit and purpose of a range of constitutional obligations if it evicted people from their homes without first meaningfully engaging with them.¹¹ The Court explicitly linked meaningful engagement with the obligation to take reasonable legislative and other measures within its available resources to provide access to adequate housing.¹² The Court affirmed its interpretive approach to the right of access to adequate housing by also linking the obligation to engage with the right to human dignity¹³ and the right to life.¹⁴ Finally, the Court linked meaningful engagement with the obligations that municipalities have to strive towards the provision of services in a sustainable manner,¹⁵ the promotion of social and economic development,¹⁶ and the involvement of communities and community organisations in the affairs of local government.¹⁷

The Court makes it plain in these reasons for the engagement order that homelessness as a result of eviction is still a very real possibility for many people. Local authorities should therefore engage with these people before any decision is taken on the formulation and implementation of a housing policy or programme that will inevitably lead to their eviction and relocation.

The Court proceeded to define meaningful engagement as “a two-way process” in which a local authority and those that stand to be evicted would

⁵ Order 2

⁶ Order 3

⁷ The parties reached the agreement on 29-10-2007 *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg (Agreement 29 October 2007)* (CCT 24/07) ZACC (29-10-2007) (“Agreement”)

⁸ Cl 1 1 1

⁹ Cl 1 1 2

¹⁰ The order was issued on 05-11-2007 *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg (Order 5 November 2007)* (CCT 24/07) ZACC (05-11-2007) <www.constitutionalcourt.org.za/Archimages/11584.PDF> (accessed 17-11-2011)

¹¹ *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) para 16 See s 19 of the Local Government: Municipal Structures Act 117 of 1998; ss 16(1) and 17 of the Local Government: Municipal Systems Act 32 of 2000 See further the UN Committee on Economic, Social and Cultural Rights *General Comment No 4: The Right to Adequate Housing* (1991) UN Doc E/1992/23 paras 8, 12; UN Committee on Economic, Social and Cultural Rights *General Comment No 7: The Right to Adequate Housing: Forced Evictions* (1997) UN Doc E/1998/22 paras 13, 15

¹² S 26(2) of the Constitution; s 9(1)(a)(i) of the Housing Act 107 of 1997

¹³ S 10 of the Constitution provides that “[e]veryone has inherent dignity and the right to have their dignity respected and protected” See *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 83; S Liebenberg “The Value of Human Dignity in Interpreting Socio-Economic Rights” (2005) 21 *SAJHR* 1 1-31

¹⁴ S 11 of the Constitution provides that “[e]veryone has the right to life”

¹⁵ S 152(1)(b) of the Constitution

¹⁶ S 152(1)(c)

¹⁷ S 152(1)(e)

talk to each other meaningfully in order to achieve certain objectives.¹⁸ The Court held further that meaningful engagement had the potential to contribute towards the resolution of disputes and “to increased understanding and sympathetic care”¹⁹ if both the local authority and those that stand to be evicted grappled with the issues that pertain to the achievement of housing development objectives.²⁰

The Court found that the constitutional obligations of local authorities dictate that they should initiate the engagement process and continue to make reasonable efforts to engage unlawful occupiers when their initial efforts are resisted or rebuffed.²¹ The Court foresaw that the unlawful occupiers will acquiesce in this process if it is managed by “careful and sensitive people”²² with experience in housing matters. This process would enable a municipality to explore the vast range of possibilities that are available on the continuum spanning from eviction without more to the provision of permanent housing.²³ The Court found that the nature and extent of the engagement process would be determined by the underlying purpose of the eviction and the number of people that stand to be affected by the eviction.²⁴ Yacoob J noted that the City of Johannesburg should have been conscious of the fact that their Inner City Regeneration Strategy would have drastic consequences for its rapidly increasing poor population and that it would require “structured, consistent and careful engagement” with all the affected parties.²⁵

The Court further underscored that the engagement process must be conducted in good faith and any attempt by the unlawful occupiers to derail the engagement process through unreasonable demands or by adopting an intractable attitude should not be tolerated.²⁶ The Court emphasised this point by clearly stating that

“[p]eople in need of housing are not, and must not be regarded as a disempowered mass”.²⁷

In conclusion, the Court noted that the constitutional value of openness should guide the engagement process so as to avoid the destructive allure of secrecy by ensuring that “a complete and accurate account of the process

¹⁸ *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) para 14. L Chenwi & K Tissington *Engaging Meaningfully with Government on Socio-Economic Rights – A Focus on the Right to Housing* (2010) 9 observe that the objectives will depend on the specific situation. They add that the government should not be the only party to determine what these objectives should be or how such objectives could be achieved.

¹⁹ *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) para 15.

²⁰ See also Centre for Applied Legal Studies *Workshop Report: Meaningful Engagement* (2009) 30-32 <http://web.wits.ac.za/NR/rdonlyres/D1176AF9-340B-413B-AF79-2F1152BE0CDA/0/MeaningfulEngagementreport_Dec09.pdf> (accessed 07-03-2010).

²¹ *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) para 15.

²² Para 15.

²³ Para 18.

²⁴ Para 19.

²⁵ Para 19.

²⁶ Para 20.

²⁷ *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) para 20. See also T Ross “The Rhetoric of Poverty: Their Immorality, Our Helplessness” (1991) 79 *Geo LJ* 1499-1547.

of engagement, including at least the reasonable efforts of the municipality within that process” is considered the norm.²⁸

In this article I wish to engage with Yacoob J’s contention that the need for meaningful engagement could be inferred from the applicant’s contention that the decision to evict constituted administrative action which required the occupiers to be heard before the decision was taken.²⁹ I am intrigued by this point because later in the judgment Yacoob J seems to contradict himself when he states that the obligation to engage meaningfully with occupiers who would be rendered homeless after an eviction was “squarely grounded” in section 26(2) of the Constitution. To my mind the question is whether, and to what extent, there is an intersection or duplication between the concept of meaningful engagement, in terms of section 26(2) of the Constitution; and procedurally fair administrative action, in terms of section 33(1) of the Constitution.³⁰ The aim of this article is to show that firstly, procedural fairness is not the same as meaningful engagement from a conceptual and doctrinal point of view; and secondly, meaningful engagement should be construed as a deliberative democratic partnership between local authorities and unlawful occupiers.

2 Procedural fairness

2.1 Administrative action affecting the public

The Promotion of Administrative Justice Act 3 of 2000 (“PAJA”), like meaningful engagement, provides adequately for public participation with both individuals or a specific household of unlawful occupiers, in terms of

²⁸ *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) para 21

²⁹ Para 9 In *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes (Centre on Housing Rights and Evictions, Amici Curiae)* 2010 3 SA 454 (CC) O’Regan J added that “the obligation to engage meaningfully imposed by s 26(2) of the Constitution should be understood together with the obligation to act fairly imposed by s 33 of the Constitution, as spelt out in PAJA” (para 297)

³⁰ In *Minister of the Interior v Bechler* 1948 3 SA 409 (A) 451 the former Appellate Division of the High Court defined the theory of natural justice as “the stereotyped expression which is used to describe those fundamental principles of [procedural] fairness which underlie every civilised system of law” These principles have been reduced over time to the maxims *nemo iudex in sua causa* and *audi alteram partem* which constitute the core of fair administrative action The *audi* principle affords people the opportunity to participate in decisions that will affect them by apprising the administrative functionary of additional facts and possible alternatives that might influence the outcome of those decisions This ensures the legitimacy of the decision because the quality and rationality of the decision is enhanced through respect for the dignity and worth of the people that stand to be affected The application of the *audi* principle to administrative action was limited during the era of parliamentary sovereignty by the illogically rigid classification of administrative functions and the focus on decisions that prejudicially affected the property or liberty of an individual However, towards the end of apartheid the Appellate Division changed this position dramatically by introducing the doctrine of legitimate expectation in South African law See *Administrator, Transvaal v Traub* 1989 4 SA 731 (A) Since then the courts have retreated from the narrow and formalistic approach to natural justice to embrace a broader and more flexible duty to act fairly in all cases This change of direction gained constitutional legitimacy with the inclusion of a right to just administrative action in s 24 of the Constitution of the Republic of South Africa Act 200 of 1993 and s 33(1) of the Constitution S 33(1) of the Constitution states that “[e]veryone has the right to administrative action that is lawful, reasonable and procedurally fair” The Promotion of Administrative Justice Act 3 of 2000 was enacted to give effect to s 33(1) of the Constitution

section 3,³¹ and with a community of unlawful occupiers, in terms of section 4,³² who stand to have their right of access to adequate housing adversely affected by the administrative decision to evict. Section 4 of PAJA concerns administrative action that “materially and adversely affects the rights of the public”.³³ This is an innovative provision that incorporates new procedures for public participation into the general administrative law that has nearly no equivalent in the common law.³⁴ However, this provision is “somewhat enigmatic”³⁵ because it is uncertain what the precise relationship is with administrative action “which materially and adversely affects the rights or legitimate expectations of any person” in terms of section 3 of PAJA.

Mass³⁶ argues that sections 3 and 4 are linked because there is no longer a need to limit the application of the *audi* principle if the aim is to “create a culture of accountability, openness and transparency in public administration”.³⁷ Mass accordingly insists that there is a very close link between section 4 and the more general requirements for procedural fairness in section 3(2)(b). She finds support for this argument in the fact that that section 4 does not contain all the requirements stipulated in section 3(2)(b).

³¹ S 3(2) of PAJA reads:

- (a) A fair administrative procedure depends on the circumstances of each case
- (b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1) –
 - (i) adequate notice of the nature and purpose of the proposed administrative action;
 - (ii) a reasonable opportunity to make representations;
 - (iii) a clear statement of the administrative action;
 - (iv) adequate notice of any right of review or internal appeal, where applicable; and
 - (v) adequate notice of the right to request reasons in terms of section 5”

³² S 4(1) of PAJA reads:

- “In cases where an administrative action materially and adversely affects the rights of the public, an administrator, in order to give effect to the right to procedurally fair administrative action, must decide whether –
 - (a) to hold a public inquiry in terms of subsection (2);
 - (b) to follow a notice and comment procedure in terms of subsection (3);
 - (c) to follow the procedures in both subsections (2) and (3);
 - (d) where the administrator is empowered by any empowering provision to follow a procedure which is fair but different, to follow that procedure; or
 - (e) to follow another appropriate procedure which gives effect to section 3”

³³ S 1 of PAJA defines “public” as “any group or class of the public”

³⁴ Decisions that affected large numbers of people were usually classified as “legislative” administrative action during the pre-democratic era and therefore the *audi* principle did not apply to them. In *South African Roads Board v Johannesburg City Council* 1991 4 SA 1 (A) Milne JA rejected the classification of administrative functions as either “quasi-judicial”, “purely administrative” or “legislative”. Milne JA proposed:

“[T]hat a distinction should be drawn between (a) statutory powers which, when exercised, affect equally members of the community at large and (b) those which, while possibly also having a general impact, are calculated to cause particular prejudice to an individual or particular group of individuals. Here I use the word ‘individual’ to include a legal *persona* such as a corporation or a local authority, clothed with corporate personality; and the word ‘calculated’ to mean not ‘intended’ but ‘likely in the ordinary course of things’ to have this result” (12E-G) (original emphasis)

The effect was that cases which fell into the first category (the equivalent of s 4 of the PAJA) would not attract procedural fairness while cases which fell into the second category (the equivalent of s 3 of the PAJA) would attract procedural fairness unless a statutory provision specifically provided otherwise

³⁵ C Hoexter *Administrative Law in South Africa* (2007) 364

³⁶ C Mass “Section 4 of the AJA and Procedural Fairness in Administrative Action Affecting the Public: A Comparative Perspective” in C Lange & J Wessels (eds) *The Right to Know – South Africa’s Promotion of Administrative Justice and Access to Information Acts* (2004) 63

³⁷ Preamble of PAJA

She therefore submits that section 4 cannot be freestanding because it is an incomplete provision that must be interpreted with recourse to the more general provisions for procedural fairness contained in section 3. The effect is that the relationship between sections 3 and 4 is “one of *lex generalis* and (incomplete) *lex specialis*”.³⁸ Mass argues further that this approach to the relationship between sections 3 and 4 promotes the spirit, purport and objective of the right to just administrative action much better than one founded on the semantic distinctions drawn between administrative action affecting “any person” and administrative action affecting “the public”.³⁹

Currie and Klaaren point to the drafting history of section 4 in support of their argument that this provision is completely freestanding.⁴⁰ Currie and Klaaren argue that the Justice and Constitutional Development Portfolio Committee severed the link between clauses 4 and 5 of the South African Law Reform Commission’s Draft Bill⁴¹ (currently sections 3 and 4 of PAJA) by changing the heading of clause 4 from “procedurally fair administrative action” to “procedurally fair administrative action affecting any person”. This, according to Currie and Klaaren, “created two separate and unrelated procedural fairness regimes”.⁴² Administrative action with a particular effect would then fall under the purview of section 3, while administrative action with a general effect would fall under the purview of section 4.⁴³

This approach to the relationship between section 3 and 4 is problematic because there is no statutory right to procedural fairness for administrative action affecting the public parallel to that of section 3(1). Currie and Klaaren argue that the most helpful interpretation is to read “the right to procedurally fair administrative action” in section 3(1) as indirectly creating a general right to procedural fairness. This general right to procedural fairness would then also shape the minimum requirements administrators must adhere to in instances of administrative action affecting the public, since the requirements of section 3(2)(b) would simply not apply.⁴⁴

Hoexter also points to the drafting history of section 4 in support of her argument that this provision is not linked to section 3. Hoexter notes that the Justice and Constitutional Development Portfolio Committee mistakenly left a reference to section 3 in section 4(1)(e) during its amendment process. Hoexter attributes this to poor drafting and recommends that the reference should simply be expunged through the amendment of section 4.⁴⁵ Hoexter also notes that there are minimum requirements for procedurally fair administrative action in section 4 similar to those contained in section 3(2)

³⁸ Mass “Section 4 of the AJA” in *The Right to Know* 66-67

³⁹ 67

⁴⁰ I Currie & J Klaaren *The Promotion of Administrative Justice Act Benchbook* (2001) 110-113

⁴¹ South African Law Reform Commission *Administrative Justice Project 115 Report* (1999) <www.justice.gov.za/salrc/reports/r_ptj115_aja_1999aug.pdf> (accessed 30-01-2010)

⁴² Currie & Klaaren *Benchbook* 113

⁴³ This is in accordance with the distinction that Milne JA made in *South African Roads Board v Johannesburg City Council* 1991 4 SA 1 (A) 12E-G

⁴⁴ Currie & Klaaren *Benchbook* 113

⁴⁵ Hoexter *Administrative Law* 369

(b).⁴⁶ Finally, Hoexter argues that the attempted uncoupling of the two provisions and the narrower focus of section 3 is indicative of the “gulf” that exists between sections 3 and 4.⁴⁷

The fact remains that section 4(1)(e) contains a reference to section 3 that cannot be ignored. Mass provides a workable approach that links sections 3 and 4 through this “hangover” of the South African Law Reform Commission’s Draft Bill.⁴⁸ According to this approach an administrator will not be required to superficially classify an administrative action affecting “any person” in terms of section 3 or administrative action affecting “the public” in terms of section 4 when it is clear that the administrative action affects both “any person” and “the public”.⁴⁹ Currie and Klaaren conceded this point when the administrative action presents itself in along the factual lines of *South African Roads Board v Johannesburg City Council*.⁵⁰ In this case the South African Roads Board declared an existing road a toll road. Currie and Klaaren explain that this decision would have a particular impact (section 3 of PAJA) on the Johannesburg City Council because it would have to upgrade its current roads infrastructure and increase maintenance to support the additional traffic congestion caused by motorists choosing alternative routes. The decision would also have a general effect (section 4 of PAJA) on all the motorists’ freedom of movement.

The result will be exactly the same where a local authority evicted a community of unlawful occupiers. The decision will have a particular impact on the surrounding local authorities because they would have to expand their housing programmes while also having a general impact on the community’s right of access to adequate housing. Hoexter confirms that “decisions with a general impact often have a special impact on particular people”.⁵¹

Furthermore, Mass does not focus disproportionately on the supposed intention of the legislature or its poor drafting abilities. Instead, her approach constitutes a purposive interpretation of the right to just administrative action that gives effect to the constitutional value of openness by making simpler and more efficient ways of public participation possible to the poor population of South Africa. While it is clear that PAJA provides simple and efficient forms of public participation it remains unclear whether these forms of participation follow the contours of meaningful engagement.

2 2 Participation procedures in section 4 of PAJA

It is clear from the structure of section 4 that a notice and comment procedure or a public inquiry or both are the default options available to an administrator.⁵² However, section 4 does not provide specific instructions for an administrator to guide her in deciding which procedure to follow. Currie

⁴⁶ 375

⁴⁷ 375

⁴⁸ Currie & Klaaren *Benchbook* 130

⁴⁹ 116

⁵⁰ 1991 4 SA 1 (A)

⁵¹ Hoexter *Administrative Law* 368

⁵² Mass “Section 4 of the AJA” in *The Right to Know* 73

and Klaaren recommend that the following criteria should be used to decide the appropriate procedure:⁵³ the geographic impact; and the subject matter of the proposed administrative action. A notice and comment procedure is based on the consideration of written submissions, which makes it more suited to administrative action on general issues with national or regional impact. A public inquiry is driven by hearing testimony at a particular place on a given time, which makes it more suited to administrative action on specific issues with a local impact. Mass adds that the following criteria could also be helpful:⁵⁴ the cost and efficiency of the procedure; and the size and duration of the process. A notice and comment procedure is often simple and cheap because the administrator may not delegate her powers and consequently the procedure does not require many logistical arrangements. Public inquiries have the potential to be very complex and expensive because the administrator may delegate her powers to “a suitably qualified person or panel of persons”⁵⁵ who will conduct the public hearing.

A proposed decision to evict a community of unlawful occupiers will have a very specific impact on that particular community and could possibly extend to the surrounding local authorities as the unlawful occupiers move into other jurisdictions to find a place to stay. According to the abovementioned guidelines, circumstances of this nature will require conducting a public inquiry.

Regulation 5 of the Promotion of Administrative Justice Act, 2000: Regulations on Fair Administrative Procedures⁵⁶ adds a new dimension to a public inquiry that may be invaluable to unlawful occupiers that stand to be evicted. The aim of Regulation 5 is to provide assistance to communities “consisting of a considerable proportion of people who cannot read or write or who otherwise need special assistance”.⁵⁷ Hoexter explains that

“[t]his regulation sets out special steps to be taken to solicit the views of such people where they are likely to be affected by administrative action that may be taken as a consequence of a public inquiry. These steps may include the holding of public or group meetings where the issues are explained and views recorded, a survey of public opinion and the provision of secretarial assistance.”⁵⁸

This goes beyond the common law understanding of the *audi* principle and embraces the constitutional value of openness in a way that ensures broader public participation.⁵⁹

The public hearing will still be the core institutional feature of the public inquiry. While a public hearing is an effective way of obtaining the views and proposals of a community, it may be too adversarial⁶⁰ in the housing context to ascertain anything of significance regarding the rights and needs of the community given that the impact of an eviction on the lives of the poor may

⁵³ Currie & Klaaren *Benchbook* 120

⁵⁴ Mass “Section 4 of the AJA” in *The Right to Know* 73-74

⁵⁵ S 4(2)(a) of PAJA

⁵⁶ Published in GN R 1022 in GG 23674 of 31-07-2002

⁵⁷ 5

⁵⁸ Hoexter *Administrative Law* 372

⁵⁹ Mass “Section 4 of the AJA” in *The Right to Know* 74

⁶⁰ 78

preclude any meaningful interchanges. It is similarly problematic to expect impoverished communities to make effective use of a notice and comment procedure.

In these instances an administrator may follow “another appropriate procedure which gives effect to section 3”⁶¹ Mass suggests that this provision allows an administrator to interact with “the public” on an individual bases by affording them a distinct opportunity to make representations or to follow other innovative procedures like “consultations, mediation, and negotiated rule-making”⁶². These procedures require participation on a much smaller scale and their inquisitorial nature makes them cheaper and more efficient.⁶³

This section shows that the public inquiry procedure provided for in terms of section 4 of PAJA could satisfy the need for two way interaction between the local government and the unlawful occupiers, good faith interaction between the parties, and a transparent account of the interaction process. However, what section 4 fails to ensure is that the public inquiry will achieve certain objectives, lead to the resolution of disputes by increasing mutual understanding and respect, or ensure that the process is initiated and driven by skilled local government officials.

2 3 Procedural fairness does not equal meaningful engagement

In *Occupiers of 51 Olivia Road and Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*⁶⁴ (“*Residents of Joe Slovo*”) the *amici curiae*⁶⁵ argued that procedural fairness relates to the notion of participatory democracy because it ensured that individuals had an active role state administration.⁶⁶ In *Doctors for Life International v The Speaker of the National Assembly*⁶⁷ the Constitutional Court explained that participation represents a powerful response to the legacy of apartheid by ensuring that excluded voices are empowered in wider participatory processes.⁶⁸ This

⁶¹ S 4(1)(e) of PAJA

⁶² Mass “Section 4 of the AJA” in *The Right to Know* 78

⁶³ C Hoexter, R Lyster & A Currie *The New Constitutional and Administrative Law II: Administrative Law* (2002) 49

⁶⁴ 2010 3 SA 454 (CC)

⁶⁵ In both cases the *amici curiae* were the Community Law Centre from the University of the Western Cape and the Centre on Housing Rights and Evictions (COHRE) from Geneva, Switzerland *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg (Submissions of the Amici Curiae: Community Law Centre (UWC) and Centre on Housing Rights and Evictions (COHRE))* (CCT 24/07) ZACC (17-08-2007) *Constitutional Court of South Africa* <www.constitutionalcourt.org.za/Archimages/10661.PDF> (accessed 07-03-2010) (“*Occupiers of Olivia Road amici submissions*”) *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes (Submissions of the Amici Curiae: Community Law Centre (UWC) and Centre on Housing Rights and Evictions (COHRE))* (CCT 22/08) ZACC (30-07-2008) *Constitutional Court of South Africa* <www.constitutionalcourt.org.za/Archimages/12720.PDF> (accessed 07-03-2010) (“*Residents of Joe Slovo amici submissions*”)

⁶⁶ *Occupiers of Olivia Road amici submissions* para 136; *Residents of Joe Slovo amici submissions* para 167

⁶⁷ 2006 6 SA 416 (CC)

⁶⁸ I understand deliberative democracy to be a form of participatory democracy. The central tenet of participatory democracy is that participation in public debate and dialogue has transformative potential provided the participants in the process remain open-minded, are held accountable for their views, and do not evade the reality of deep structural inequalities. See S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 28-34

conception of participatory democracy creates a unique link between the obligation of government to respect, protect and promote the fundamental rights in the Constitution and the right of excluded voices to access adequate housing. Section 4 of PAJA enables local government to fulfil this duty because “the public are likely to participate most robustly when their rights are materially and adversely affected”.⁶⁹ Nedelsky explains that procedural fairness “offers the potential for providing subjects of bureaucratic power with some effective control as well as a sense of dignity, competence, and power”.⁷⁰

This must be understood against the background that administrative decisions are often taken in stages⁷¹ and that procedural fairness must only be observed during the stage where a final decision is made.⁷² Hoexter notes that it would be impossible to have an efficient administration if it had to “provide full-scale hearings at every stage”.⁷³ This is supported by the fact that “administrative action”⁷⁴ must have a “direct” effect. The likelihood that preliminary decisions do not require the observance of procedural fairness is amplified by “pre-democratic reasoning”⁷⁵ which dictates the interpretation of the requirement that a right must be “adversely” affected by the administrative action.⁷⁶

This conceptualisation of the *audi* principle is especially problematic in the housing context given that any investigation into the living conditions of unlawful occupiers or the upgrading of their informal settlement could result in the lodging of an eviction application and relocation to another site that is far away from *inter alia* employment opportunities. Put differently, any investigation without procedural fairness not only has the potential to aggravate the already insecure existence of the unlawful occupiers, but could also erode the fundamental values of accountability, responsiveness and openness⁷⁷ upon which our democracy is founded.⁷⁸ This is demonstrated unmistakably by the events leading up to the *Occupiers of 51 Olivia Road*,

⁶⁹ K Govender “An Assessment of Section 4 of the Promotion of Administrative Justice Act 2000 as a Means of Advancing Participatory Democracy in South Africa” (2003) 18 *SAPL* 404 409

⁷⁰ J Nedelsky “Reconceiving Autonomy: Sources, Thoughts and Possibilities” (1989) 1 *YJLF* 7 27

⁷¹ Hoexter *Administrative Law* 392

⁷² See *Chairman, Board on Tariffs and Trade v Brenco Inc* 2001 4 SA 511 (SCA) paras 71-72

⁷³ Hoexter *Administrative Law* 393

⁷⁴ S 1 of PAJA defines “administrative action” as

“any decision taken, or any failure to take a decision, by – (a) an organ of state, when – (i) exercising a power in terms of the Constitution or a provincial constitution; or (ii) exercising a public power of performing a public function in terms of any legislation; or (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect ...”

⁷⁵ Hoexter *Administrative Law* 396

⁷⁶ In *R v Ngwewula* 1954 1 SA 123 (A) 127F Centlivres CJ explained that preliminary inquiries, according to pre-democratic reasoning, did not “prejudicially affect ... the property or liberty of an individual” because it was “purely administrative” in nature and, as such, did not require the observance of procedural fairness unless it was explicitly required by legislation. See Hoexter *Administrative Law* 351-353; *Law Society, Northern Provinces v Maseka* 2005 6 SA 372 (B) 382D-E

⁷⁷ S 1(d) of the Constitution

⁷⁸ See E Mureinik “Reconsidering Review: Participation and Accountability” (1993) *Acta Juridica* 35; G Quinot “Snapshot or Participatory Democracy? Political Engagement as Fundamental Human Right” (2009) 25 *SAJHR* 392

*Residents of Joe Slovo and Abahlali baseMjondolo Movement SA v Premier of the Province of Kwazulu-Natal*⁷⁹ (“*Abahlali baseMjondolo*”) cases, where the applicants alleged that the conduct of municipal officials towards them had been characterised by tactics aimed at persuading them to accept the plans that the government had for their future, threats of violence when they did not succumb to these tactics, attacks on their person when they denounced the government plans which were made without addressing their concerns or incorporating their proposals, and announcements that decisions had been taken about their future. These examples of abuse of power and blatant disregard for the inputs of the unlawful occupiers at the beginning of multi-stage decision making processes may fail to pass constitutional muster in the sense that they fall short of the lawful, reasonable and procedurally fair administrative action that the drafters of the Constitution had in mind or could even be excluded because it is executive action. The fact remains that these actions are common and reflect the lived reality of what the right to just administrative action amounts to for many poor people. *Occupiers of 51 Olivia Road, Residents of Joe Slovo and Abahlali baseMjondolo* demonstrate that disastrous results can flow from preliminary inquiries into the housing conditions of unlawful occupiers where procedural fairness is not observed.

It is furthermore important to note that procedural fairness only applies to “administrative action”. The definition of “administrative action” explicitly excludes “the executive powers or function of the Provincial Executive” – which includes the powers referred to in sections 126 and 139 of the Constitution⁸⁰ – and the executive powers or functions of a municipal council.⁸¹ These exclusions are significant in the housing context because section 126 of the Constitution enables a MEC responsible for housing in a specific province to assign any power or function in terms of section 7 of the Housing Act to a municipality. Section 139 of the Constitution, on the other hand, obliges a MEC responsible for housing in a specific province to intervene where a municipality is unable or unwilling to fulfil its obligations in terms of section 9 of the Housing Act. Section 156 of the Constitution provides that municipalities have executive authority in respect of, and the right to administer all matters listed in, Schedule 4B and 5B of the Constitution which, significantly, includes the provision of electricity and gas reticulation; water and sanitation; local amenities; refuse removal, refuse dumps and solid waste disposal; and street lighting. The result is that many housing related decisions are excluded from the operation of PAJA because they are considered to be of an executive nature. Meaningful engagement would therefore play an important role in adjudicating this category of decisions that do not require the observation of procedural fairness in terms of PAJA. This is where meaningful engagement transcends procedural fairness.

⁷⁹ 2010 2 BCLR 99 (CC)

⁸⁰ Subs (bb) of the definition of “administrative action” in s 1 of PAJA

⁸¹ Subs (cc) of the definition of “administrative action” in s 1 of PAJA

3 Meaningful engagement as deliberative democratic partnership

Both the Housing Act and meaningful engagement flow from section 26(2) of the Constitution. Section 2(1)(b) and (1)(l) of the Housing Act lay the foundation for the establishment of a dialogic relationship between the executive and other role players in housing development which could be a useful reference for the interpretation of meaningful engagement. The general principles contained in these provisions concretise into obligations that require municipalities to ensure that they promote the resolution of conflicts that arise in the housing development process,⁸² and facilitate and support the participation of other role players in the housing development process.⁸³ However, these general principles and obligations stop short of ensuring that the dialogue is managed by careful and sensitive people who will continue to make good faith efforts to engage so as to ensure that an increased understanding of the interests involved and sympathetic care for the unlawful occupiers are developed. Meaningful engagement therefore clearly foresees a change in the approach to and practice of participation – specifically its duration and nature – in housing development.

In *Occupiers of 51 Olivia Road* the Constitutional Court stated that meaningful engagement should ordinarily be initiated before litigation commences⁸⁴ because the outcome of the engagement process will be important for any court in determining whether it would be just and equitable to grant an eviction order.⁸⁵ In *Residents of Joe Slovo* the Court ordered the parties to engage on certain issues as part of the final order.⁸⁶ Meaningful engagement therefore requires the fostering of participation over a long period of time that commences with the conceptualisation of a plan, policy or piece of legislation, and culminates with the implementation and preservation of such plan, policy or legislation.⁸⁷

Participation during this process cannot be characterised by manipulation, threats of violence, and similar announcements which the applicants in *Occupiers of 51 Olivia Road*, *Residents of Joe Slovo* and *Abahlali baseMjondolo* attested to because it would be at odds with the dialogic, transparent, “structured, consistent and careful”⁸⁸ engagement that the Constitutional Court described. The nature of the participation during the engagement process should rather be determined with reference to the ladder of citizen participation that Arnstein developed in the housing context from

⁸² S 9(1)(e) of the Housing Act

⁸³ S 9(2)(a)(vi)

⁸⁴ *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) para 30

⁸⁵ *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) para 18 See also *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) para 338

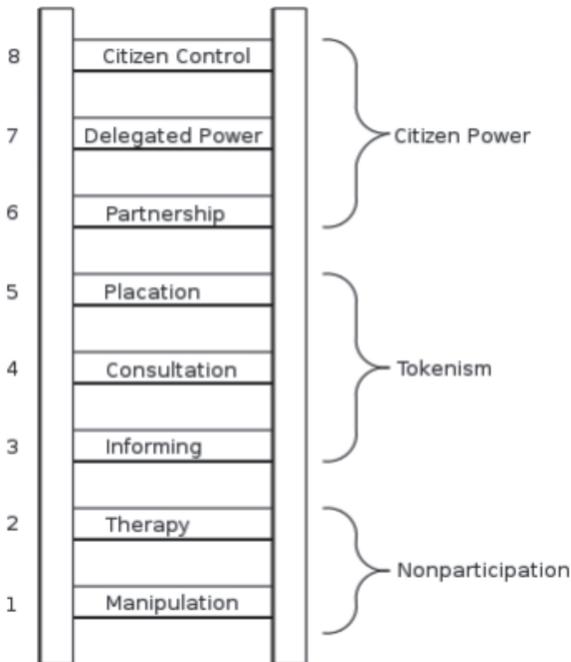
⁸⁶ See *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) para 7 order 5

⁸⁷ See Chenwi & Tissington *Engaging Meaningfully with Government* 21

⁸⁸ *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) para 19

the terminology used in federal programmes of the United States of America that are directed at *inter alia* urban renewal.⁸⁹

The ladder consists of eight rungs, with each rung representing a form of participation. The bottom two rungs – manipulation⁹⁰ and therapy⁹¹ – describe levels where no participation takes place. These rungs are used as a substitute for genuine participation because the objectives of these forms of participation are to educate and cure citizens.⁹² The following three rungs – informing,⁹³ consultation⁹⁴ and placation⁹⁵ – describe levels of tokenism where citizens are informed of government plans and may voice their concerns regarding these plans. Arnstein notes that these rungs do not ensure citizens that their concerns will be heeded and as such do not confer any real power to effect a change in the *status quo*.⁹⁶ The final three rungs – partnership,⁹⁷ delegated powers⁹⁸ and citizen control⁹⁹ – describe levels of citizen power, where citizens are afforded increasing degrees of decision-making power “by which they can induce significant social reform” and which “[enable] them to share in the benefits of the affluent society”.¹⁰⁰



⁸⁹ SR Arnstein “A Ladder of Citizen Participation” (1969) 35 *Journal of the American Institute for Planners* 216

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The terminology used in the Housing Act and the experiences of the unlawful occupiers in *Occupiers of 51 Olivia Road, Residents of Joe Slovo* and *Abahlali baseMjondolo* indicates that participation in housing development currently occurs on the first five rungs of the participation ladder.¹⁰¹ Conversely, the description of meaningful engagement indicates that it could not extend to the final two rungs of the participation ladder because that would have the effect of delegating or abdicating the constitutional duties of the executive to the unlawful occupiers. It is therefore clear that partnership, as a form of participation, most closely resembles the contours of meaningful engagement.

Arnstein explains that partnership, as a form of participation, would only work for as long as all the possible parties to the partnership find it useful to maintain the partnership.¹⁰² The possible parties to an engagement process – the community that stands to be affected by the eviction and the government – will find it useful to maintain this partnership if their concerns and limitations are appreciated as legitimate and real. However, this will only occur if the parties, their legal representatives and other possible parties re-evaluate their respective roles.

A community cannot be allowed to persist with unreasonable demands and must rather focus its energy and resources on electing a community leader or committee that is empowered with a clear mandate to organise and mobilise the community. The community leader or committee must ensure that communication with the community is done in clear language and in a culturally appropriate manner. The community leader or committee must be able to engage openly with other parties and ensure that all outcomes of any engagement are referred back to the community for approval before finalisation.¹⁰³

The legal representatives of the community must be prevented from approaching the case with so much vigour that they prejudice the rights of their clients. Instead, the legal representatives must ensure that they obtain a clear mandate from the community so as to position themselves as the secondary voice to the community leaders during the engagement process. This will not only ensure the fostering of a trust relationship between the community leaders and the legal representatives, but will also allow the legal representatives to facilitate the mobilisation and organisation of the community.¹⁰⁴

¹⁰¹ In *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC), Sachs J observed that

“[t]he evidence suggests the frequent employment of a top-down approach where the purpose of reporting back to the community was seen as being to pass on information about decisions already taken rather than to involve the residents as partners in the process of decision-making itself” (Para 378, footnote omitted)

¹⁰² Arnstein (1969) *Journal of the American Institute for Planners* 221 The ladder of citizen participation provides a systematic characterisation of the types of participation that I found useful when evaluating the opposing accounts of the nature and duration of the public participation that took place in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC), *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) and *Abahlali baseMjondolo Movement of South Africa v Premier of KwaZulu-Natal* 2010 2 BCLR 99 (CC)

¹⁰³ Centre for Applied Legal Studies *Workshop Report: Meaningful Engagement* 37

¹⁰⁴ 38

Non-governmental organisations will also have to ply their advocacy¹⁰⁵ and research skills to support the engagement process. They can do so by facilitating the organisation and mobilisation of the community; ensuring that the legal representatives of the community are properly informed of existing international norms and examples from comparative jurisdictions that can be relied on to develop the law and, finally, providing a court with a range of statistical data and budgetary information that may not appear in the papers of the parties.¹⁰⁶

The government cannot be allowed to persist with its intractable institutional and bureaucratic attitude which dictates that all people living in intolerable conditions must be viewed as criminals or “at least to some degree as morally degenerate”.¹⁰⁷ The government must rather ensure that it trains careful and sensitive officials to engage with communities in a manner that is characterised by access to information, flexibility, reasonableness, and transparency so that it can fulfil its constitutional and statutory obligations to provide access to adequate housing.

Conceived in this way, meaningful engagement is a type of public participation that transcends procedural fairness in terms of section 33 of the Constitution and sections 3 and 4 of PAJA in two ways. First, the process of meaningful engagement occurs over a long period of time, as opposed to the moment of decision-making in multi-staged administrative decision-making. Second, the nature of the participation required by meaningful engagement for it to be meaningful mandates the forging of a partnership between the government and the occupiers. It is only through the fostering of this long term relationship that unlawful occupiers will be able to rise above the often misconceived perceptions of being helpless, passive and weak recipients of government largesse.¹⁰⁸

4 Conclusion

Meaningful engagement creates a space for public participation that transcends procedural fairness in terms of PAJA. In this space the unlawful occupiers are required to appreciate the budgetary and policy challenges of providing for a range of interests, while the government must listen and respond with compassion to the plight of the urban poor.¹⁰⁹ Meaningful engagement must be viewed as an innovative mechanism for enforcing socio-economic rights.¹¹⁰ In the long term individual engagement processes will create an incentive to develop the “multi-faceted and robust housing policies that section 26 arguably requires”¹¹¹ by incorporating the range of housing

¹⁰⁵ See B Ray “Occupiers of 51 Olivia Road: Enforcing the Right to Adequate Housing Through ‘Engagement’” (2008) 8 *HRLR* 703 711 for an explanation of why it is significant that the Constitutional Court envisaged an active role for civil society in the engagement process

¹⁰⁶ Centre for Applied Legal Studies *Workshop Report: Meaningful Engagement* 39

¹⁰⁷ 42

¹⁰⁸ See Nedelsky (1989) *YJLF* 27

¹⁰⁹ See Chenwi & Tissington *Engaging Meaningfully with Government* 9

¹¹⁰ Ray (2008) *HRLR* 708

¹¹¹ 709

needs of unlawful occupiers. Meaningful engagement requires government to take certain positive steps without mandating it to implement a specific court-directed housing development programme. The immediate remedial effect is that the unlawful occupiers may be able to retain their existing access to housing – with some improvements to render it safer and more suitable for human habitation – or to gain access to alternative accommodation that is of a relatively better standard.¹¹²

Furthermore, meaningful engagement ensures that a dialogic relationship is established between the local government and the unlawful occupiers.¹¹³ This is preferable to a relationship which requires judicial intervention and control. The effect is that meaningful engagement will ensure that government appreciates the nature and scope of its constitutional and statutory obligations to provide access to adequate housing. Meaningful engagement will transform the way in which government approaches housing development projects in the sense that it will have to appraise itself of, *inter alia*: firstly, the full range of consequences that could flow from the proposed housing development; secondly, what will be required to alleviate the plight of those living in deplorable conditions and, finally, the cost and extent of interim measures it may need to take.

The only way in which this will happen is if both government and the unlawful occupiers approach the engagement process in good faith and with a renewed appreciation of their respective roles. This will ensure that the engagement process that creates the space for public participation and dialogue is open, honest and transparent. Proceeding from this foundation will make it easier for the parties to find common ground and thereby foster an increased understanding and appreciation by unlawful occupiers of the limitations of government while simultaneously enabling government to respond to the plight of the unlawful occupiers with sympathetic care and concern.

In *Residents of Joe Slovo* the Constitutional Court made it clear that meaningful engagement could even have a role to play at the remedial stage of litigation in relation to controlling the effects of an eviction order. While engagement at this stage should by no means be viewed as a substitute for the engagement that precedes litigation, engagement at this stage could focus on the upgrading of the properties where the unlawful occupiers currently reside in order to make it safer or more suitable for human habitation.¹¹⁴ However, engagement at this stage¹¹⁵ will invariably pertain to the details

¹¹² See *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg (Agreement 29 October 2007)* (CCT 24/07) ZACC (29-10-2007) cls 5-13; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) para 7 order 10

¹¹³ In *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC), Sachs J observed that “[w]hen all is said and done, and the process [meaningful engagement] has run its course, the authorities and the families will still be connected in ongoing constitutional relationships” (para 408)

¹¹⁴ See *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg (Interim Order 30 August 2007)* (CCT 24/07) ZACC (30-08-2007) orders 1 and 2

¹¹⁵ The recent judgment of the Constitutional Court in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes (Centre on Housing Rights and Evictions as Amici Curiae)* 2011 7 BCLR 723 (CC) illustrates that meaningful engagement at this late stage may not bear any fruits

of the eviction,¹¹⁶ possible relocation to temporary accommodation,¹¹⁷ and ultimately the provision of permanent alternative accommodation.¹¹⁸

SUMMARY

Nearly four years ago the Constitutional Court created the concept of “meaningful engagement” in *Occupiers of Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC). The Constitutional Court described meaningful engagement as a “two-way process” in which a local authority and those that stand to be evicted would talk to each other meaningfully in order to achieve certain objectives. This article questions whether, and to what extent, there is an intersection or duplication between meaningful engagement, in terms of section 26(2) of the Constitution of the Republic of South Africa, 1996, and procedural fairness, in terms of section 33(1) of the Constitution and sections 3 and 4 of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”). It is argued that meaningful engagement cannot be synonymous with procedural fairness because the definition of “administrative action” in section 1 of PAJA would limit the application of meaningful engagement by excluding executive action from its ambit. Furthermore, both the envisaged nature and duration of engagement ensures that meaningful engagement transcends procedural fairness. It is therefore argued that meaningful engagement should rather be construed as a deliberative democratic partnership between local government and unlawful occupiers. This partnership demands that all the parties, including legal representatives and NGO’s, involved in evictions should re-appreciate their respective roles. Finally, it is posited that meaningful engagement is a welcome addition to South African law because it has the potential of fostering increased understanding and appreciation by unlawful occupiers of the limitations of government while simultaneously enabling government to respond to the plight of the unlawful occupiers with sympathetic care and concern.

¹¹⁶ See *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) para 7 orders 4-7, 11-15

¹¹⁷ Orders 8-10

¹¹⁸ Orders 17-20