

# **The potential of meaningful engagement in realising socio-economic rights: Addressing quality concerns**

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## **Declaration**

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**April 2019**

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## Summary

The advent of the Constitution of the Republic of South Africa, 1996 (“the Constitution”) was a major milestone for South Africa in terms of redressing the atrocities of apartheid. While this has resulted in major developments, remnants of apartheid are still present and can be seen in the continuation of vast socio-economic inequalities. Access to housing and education still remains elusive to many South Africans, as indicated by the recent service delivery and higher education protests. Developing effective mechanisms for realising these rights is thus a high priority, including in the context of socio-economic rights litigation and adjudication. The doctrine of meaningful engagement developed by the Constitutional Court in housing and education rights cases offers a potentially innovative method for government, communities and other stakeholders to pursue the realisation of socio-economic rights. However, the potential of this participatory approach to socio-economic rights realisation remains contested, and its efficacy in practice has not yet been determined. A key challenge to its efficacy in realising the normative commitments of socio-economic rights concerns the quality of the engagement that occurs between organs of state and various stakeholders.

In light of the above, this thesis investigates the role that the quality of meaningful engagement plays in enhancing its efficacy as a mechanism to realise socio-economic rights. The thesis examines the justifications posited for using meaningful engagement as well as the importance of quality in achieving these justifications. Evaluative criteria for assessing the quality of engagement are developed. In addition to evaluating the quality of meaningful engagement in South Africa’s housing and education rights jurisprudence, the thesis examines meaningful engagement in an extra-judicial context, focusing on the #FeesMustFall Movement. The thesis concludes by making recommendations on how the quality of meaningful engagement could be improved, drawing on diverse theoretical literature pertaining to participatory democracy and critical theory.

## Opsomming

Die aanvang van die Grondwet van die Republiek van Suid-Afrika, 1996 (“die Grondwet”) was ’n groot mylpaal vir Suid-Afrika in die regstelling van die gruweldade wat tydens apartheid gepleeg is. Alhoewel hierdie gebeurtenis belangrike ontwikkelings tot gevolg gehad het, is die effek van apartheid steeds sigbaar deur die teenwoordigheid van voortgesette sosio-ekonomiese ongelykhede. Toegang tot behuising en onderwys bly ontwykend vir baie Suid-Afrikaners, soos aangedui deur die onlangse diensverskaffing en hoër onderwys betogings. Die ontwikkeling van effektiewe meganismes vir die verwesenliking van hierdie regte is dus ’n hoë prioriteit, insluitend in die konteks van sosio-ekonomiese regte-litigasie en beregting. Die leerstuk van betekenisvolle onderhandeling wat deur die Konstitusionele Hof in sake wat handel oor die reg op behuising en onderwys, ontwikkel is, bied ’n potensieel innoverende metode waardeur die regering, gemeenskappe en ander belanghebbendes die realisering van sosio-ekonomiese regte kan nastreef. Die potensiaal van hierdie deelnemende benadering tot sosio-ekonomiese regte-realisering bly egter betwis, en die doeltreffendheid daarvan in die praktyk is nog nie bepaal nie. ’n Belangrike uitdaging vir die doeltreffendheid van die prosesse wat daarop gemik is om die normatiewe verpligtinge van sosio-ekonomiese regte te verwerklik, het betrekking tot die gehalte van die onderhandeling wat tussen staatsorgane en verskeie belanghebbendes plaasvind.

In die lig hiervan, ondersoek hierdie tesis die rol wat gehalte speel om betekenisvolle onderhandeling ’n meer doeltreffende meganisme te maak om sosio-ekonomiese regte te verwesenlik. Die tesis ondersoek die regverdigings wat vir die gebruik van betekenisvolle onderhandeling aangevoer word sowel as die belang van gehalte om hierdie regverdigings te bereik. Kriteria vir die beoordeling van die gehalte van onderhandeling word ontwikkel. Benewens die evaluering van die gehalte van betekenisvolle onderhandeling in Suid-Afrikaanse regspraak wat oor die reg op behuising en onderwys handel, ondersoek die tesis betekenisvolle onderhandeling in ’n buite-geregtelike konteks, met die fokus op die #FeesMustFall Movement. Die tesis sluit af deur aanbevelings te maak oor hoe die gehalte van betekenisvolle onderhandeling verbeter kan word, met verwysing na ’n diverse teoretiese literatuur rakende deelnemende demokrasie en kritiese teorie.

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## Table of contents

<b>Declaration</b> .....	ii
<b>Summary</b> .....	iii
<b>Opsomming</b> .....	iv
<b>Acknowledgments</b> .....	v
<b>CHAPTER 1: INTRODUCTION</b>	
<b>1 1 Research Problem</b> .....	1
1 1 1 Introducing meaningful engagement.....	3
1 1 1 1 The creation of meaningful engagement.....	3
1 1 1 2 Meaningful engagement and the Constitution.....	6
<b>1 2 Research aims and hypotheses</b> .....	9
<b>1 3 Methodology</b> .....	9
<b>1 4 Outline of chapters</b> .....	9
<b>CHAPTER 2: MEANINGFUL ENGAGEMENT IN SOCIO-ECONOMIC RIGHTS DECISION-MAKING: JUSTIFICATIONS AND QUALITY</b>	
<b>2 1 Introduction</b> .....	11
<b>2 2 The value of participation for South Africa’s constitutional democracy</b> ...11	
<b>2 3 The role of and justifications for meaningful engagement in socio- economic rights realisation</b> .....	14
2 3 1 Assisting the realisation of socio-economic rights.....	15
2 3 2 Judicial management tool.....	18
2 3 3 Democratises the socio-economic rights enforcement process.....	21
<b>2 4 Quality of meaningful engagement</b> .....	25
2 4 1 Arnstein’s ladder of participation.....	26
2 4 2 Depth and breadth of participation.....	28
2 4 3 Sturm’s norms for participation.....	28
2 4 4 General principles.....	29
<b>2 5 Conclusion</b> .....	30
<b>CHAPTER 3: MEANINGFUL ENGAGEMENT IN SOUTH AFRICAN HOUSING AND EDUCATION JURISPRUDENCE</b>	
<b>3 1 Introduction</b> .....	32
<b>3 2 The nature and quality of engagement in housing cases</b> .....	33
3 2 1 <i>Port Elizabeth Municipality v Various Occupiers</i> (“ <i>Port Elizabeth Municipality</i> ”).34	
3 2 1 1 Case overview.....	34

3 2 1 2	Nature and rationale of engagement.....	34
3 2 1 2 1	Balancing tool.....	34
3 2 1 2 2	Addressing informational deficits.....	35
3 2 1 2 3	Improving the quality of decisions made by the parties.....	36
3 2 1 2 4	Giving effect to human dignity.....	36
3 2 1 2 5	Review standard versus remedy.....	37
3 2 1 3	Quality of engagement prior to the case.....	38
3 2 1 3 1	Tokenistic engagement.....	38
3 2 1 3 2	Failure to stimulate cooperation and outcome validity.....	40
3 2 1 3 3	Timing of engagement and the importance of extra-judicial engagement.....	40
3 2 2	<i>Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg</i> (“ <i>Olivia Road</i> ”).....	41
3 2 2 1	Case overview.....	41
3 2 2 2	Nature and rationale of engagement.....	42
3 2 2 2 1	Giving effect to the City’s constitutional obligations and the reasonableness requirement.....	42
3 2 2 2 2	Balancing normative and procedural considerations.....	42
3 2 2 3	Quality of engagement.....	43
3 2 2 3 1	Court ordered engagement: The achievement of “outcome validity” achieved and the need for good faith engagement.....	43
3 2 2 3 2	Implementation and post-implementation: Tokenistic engagement.....	46
3 2 2 3 3	Unequal bargaining power.....	46
3 2 2 3 4	Timing of engagement and the importance of extra-judicial engagement.....	47
3 2 3	The <i>Joe Slovo cases</i> .....	49
3 2 3 1	Case overview.....	49
3 2 3 2	Nature and rationale of engagement.....	51
3 2 3 2 1	Giving effect to dignity and responding to the calls for engagement.....	51
3 2 3 2 2	Addressing informational deficits.....	52
3 2 3 2 3	Balancing competing interests and determining reasonableness.....	53
3 2 3 2 4	Providing a voice for marginalised and excluded groups.....	54
3 2 3 3	Quality of engagement.....	54
3 2 3 3 1	Tokenistic engagement.....	54
3 2 3 3 2	The importance of stakeholder inclusion.....	56
3 2 3 3 3	Timing and the importance of extra-judicial engagement.....	58

3 2 4 The <i>Pheko</i> cases.....	59
3 2 4 1 Case overview.....	59
3 2 4 2 Nature and rationale of engagement .....	61
3 2 4 3 Quality of engagement .....	61
3 2 4 3 1 Lack of engagement .....	61
3 2 4 3 2 Unequal bargaining power.....	62
3 2 5 <i>Schubart Park City of Tshwane Metropolitan Municipality</i> (“ <i>Schubart Park</i> ”).....	63
3 2 5 1 Case overview.....	63
3 2 5 2 Nature and rationale of engagement.....	65
3 2 5 2 1 Remediating the informational deficit.....	65
3 2 5 2 2 Giving effect to dignity.....	65
3 2 5 3 Quality of engagement .....	65
3 2 5 3 1 Tokenistic engagement .....	65
3 2 5 3 2 The need to recognise difference.....	66
3 2 6 Insights on meaningful engagement in housing cases.....	66
<b>3 3 The nature and quality of engagement in education cases.....</b>	<b>67</b>
3 3 1 <i>Governing Body of the Juma Masjid Primary School v Essay N.O.</i> (“ <i>Juma Masjid</i> ”).....	67
3 3 1 1 Case overview.....	67
3 3 1 2 Nature and rationale of engagement .....	68
3 3 1 3 Quality of engagement.....	69
3 3 1 3 1 Tokenistic engagement .....	69
3 3 1 3 2 The importance of extra-judicial engagement.....	69
3 3 2 <i>Head of Department, Department of Education, Free State Province v Welkom High School; Head of Department, Department of Education, Free State Province v Harmony High School</i> (“ <i>Welkom</i> ”).....	70
3 3 2 1 Case overview.....	70
3 3 2 2 Nature and rationale of engagement.....	71
3 3 2 2 1 Cooperative governance and balancing of interests.....	71
3 3 2 2 2 Balancing normative and procedural considerations.....	72
3 3 2 2 3 Improving the quality of decisions and democratising the process.....	73
3 3 2 3 Quality of engagement.....	74
3 3 2 3 1 Ineffective engagement .....	74
3 3 2 3 2 The importance of stakeholder inclusion.....	75

3 3 2 3 3	The need to recognise difference.....	76
3 3 2 3 4	The importance of extra-judicial engagement.....	76
3 3 3	Insights on meaningful engagement in education cases.....	77
<b>3 4</b>	<b>Conclusion.....</b>	<b>78</b>
<b>CHAPTER 4: THE POTENTIAL OF EXTRA-JUDICIAL ENGAGEMENT</b>		
<b>4 1</b>	<b>Introduction.....</b>	<b>82</b>
<b>4 2</b>	<b>Understanding the potential of extra-judicial engagement.....</b>	<b>84</b>
4 2 1	The definition and sources of extra-judicial engagement.....	84
4 2 2	Litigation versus political engagement.....	87
<b>4 3</b>	<b>Understanding extra-judicial engagement through #FMF.....</b>	<b>88</b>
4 3 1	Background on #FMF.....	88
4 3 2	Tokenistic engagement and an unwillingness to engage.....	92
4 3 3	Unequal bargaining power.....	98
4 3 4	Including relevant stakeholders and recognising difference.....	101
4 3 4 1	Political differences.....	103
4 3 4 2	Racial differences.....	103
4 3 4 3	Difference and patriarchy.....	104
4 3 4 4	Difference in the response by #FMF at different universities.....	105
4 3 4 5	Difference and intersectionality.....	106
4 3 4 6	Conclusion.....	109
4 3 5	Representation.....	110
<b>4 4</b>	<b>Conclusion.....</b>	<b>112</b>
<b>CHAPTER 5: TOWARDS QUALITY ENGAGEMENT</b>		
<b>5 1</b>	<b>Introduction.....</b>	<b>114</b>
<b>5 2</b>	<b>Rethinking meaningful engagement: Addressing the quality concerns..</b>	<b>114</b>
5 2 1	Understanding power disparities to remedy unequal bargaining power and tokenistic engagement.....	114
5 2 1 1	The link between power and knowledge.....	115
5 2 1 2	Power and accepted forms of communication.....	120
5 2 1 3	The link between power and interests.....	122
5 2 2	The use of representatives.....	124
5 2 3	Incorporating difference in the meaningful engagement process.....	128
5 2 3 1	The essentialist approach and the need to recognise intersectionality.....	129
5 2 3 2	The relational approach.....	131

5 2 4 Recognising the role of voice and the inclusion of stakeholders.....	132
5 2 5 The role of space.....	136
<b>5 3 Recommendations</b> .....	<b>137</b>
<b>5 4 Conclusion</b> .....	<b>142</b>
<b>CHAPTER 6: CONCLUSION</b> .....	<b>145</b>

## Chapter 1: Introduction

### 1 1 Research Problem

South Africa's history is littered with various forms of discrimination and oppression which have caused and perpetuated socio-economic inequalities for the majority of the country. The most notable example of this is the atrocities associated with colonialism which introduced massive dispossession of land and segregation.<sup>1</sup> These grossly unjust practices were then consolidated by the system of apartheid which played a major role in restructuring patterns of wealth and political power in favour of the white minority.<sup>2</sup> The subjugation of people of colour during apartheid affected *inter alia* their access to resources, good quality of life and education.<sup>3</sup> This in turn affected the future acquisition of wealth and resources and the attainment of good living standards, thus perpetuating socio-economic disparities.<sup>4</sup> While the advent of the Constitution of the Republic of South Africa, 1996 ("the Constitution") and the acceptance of a democratic system have allowed for major developments to remedy the past, the legacy of colonialism and apartheid still live on in the continuation of vast socio-economic inequalities.<sup>5</sup>

According to the Constitutional Court ("the Court") in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes ("Joe Slovo")*,<sup>6</sup> "between 1963 and the late 1980s, a period where forcible evictions were most frequent, South Africa saw approximately 3.5 million people forcibly removed".<sup>7</sup> The Court quoted as follows from Bundy's comments on these statistics:

"There is a sense in which these appalling figures have been cited so often that we are used to them: that we cease to realise their import, their horror – what they mean in terms of degradation, misery, and psychological and physical suffering".<sup>8</sup>

An attempt to rectify this has been made by Parliament through various pieces of legislation which aim to protect the interests of people living on land unlawfully.<sup>9</sup> However, it is still possible for evictions to take place legally with consequences

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<sup>1</sup> JS Modiri "The Grey Line In-Between the Rainbow: (Re) Thinking and (Re) Talking Critical Race Theory in Post-Apartheid Legal and Social Discourse" (2011) 26 *Southern African Public Law* 177 178.

<sup>2</sup> 185.

<sup>3</sup> 178.

<sup>4</sup> 178.

<sup>5</sup> 183.

<sup>6</sup> 2010 3 SA 454 (CC).

<sup>7</sup> Para 68.

<sup>8</sup> Para 168.

<sup>9</sup> Para 169.

equally as devastating for those affected as was the case under the apartheid regime.<sup>10</sup> Statistics from more recent years paint a sombre picture, especially given the fact that these are the realities 24 years after the first democratic election. A recent general household survey indicated that 12.4% of households still rely on a variety of informal housing arrangements, such as informal settlements.<sup>11</sup> The poorest 50% of the population, who earn about 10% of all income, own no measurable wealth at all, and studies have shown that inequality within the majority black population far exceeds overall inequality.<sup>12</sup> Despite the clearly dire state of the lives of the majority of the people in South Africa, Professor Bundy's comment still rings true, and the fact remains that people are desensitised to these types of statistics without realising the immense suffering involved.<sup>13</sup> Multiple eviction cases have been brought before the courts since the first democratic election, and while courts are now placing an emphasis on protecting the interests of those being evicted and finding them alternative housing, these cases can still span over several years with many serious consequences for the evictees.<sup>14</sup> Displacements also leave evictees unsure of their future and adversely affect their access to jobs, welfare services, social support structures and educational institutions.<sup>15</sup>

Recent protest action has been seen in the "service-delivery" protests by people living in informal settlements and other poverty-stricken areas in South Africa as well as, in certain cases, in the rejection of trade unions by workers.<sup>16</sup> These protests signal inequality and unequal access to socio-economic services in South Africa. They are also indicative of government's failure in not only providing adequate service delivery but also in facilitating civic participation with the aim of realising socio-economic rights.

In line with this, the #FeesMustFall ("#FMF") student protests of 2015 caused huge upheaval in the higher education sector as it brought the plight of people unable to afford tertiary education to the forefront.<sup>17</sup> However, students at poorer institutions

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<sup>10</sup> Para 169.

<sup>11</sup> Statistics South Africa *Statistical Release P0318: General Household Survey* (2014) 34-35.

<sup>12</sup> A Orthofer "South Africa Needs to Fix its Dangerously Wide Wealth Gap" (09-10-2016) *ENCA* 1 <<http://www.enca.com/opinion/south-africa-needs-to-fix-its-dangerously-wide-wealth-gap>> (accessed 20-05-2017).

<sup>13</sup> *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) para 168.

<sup>14</sup> Para 168.

<sup>15</sup> Para 168.

<sup>16</sup> S Liebenberg "The Democratic Turn in South Africa's Social Rights Jurisprudence" in KG Young (ed) *The Future of Economic and Social Rights* (forthcoming, 2019) 1 1.

<sup>17</sup> *Minister of Basic Education v Education for All* 2016 4 SA 63 (SCA).

catering almost exclusively for black students (such as the Cape Peninsula University of Technology, Fort Hare University and the Tshwane University of Technology) have been protesting higher education fees since 1994.<sup>18</sup> The higher education protests illustrate the fact that apartheid-era inequalities have not been addressed, and that decisions made after the formal end of apartheid have in fact entrenched inequalities.<sup>19</sup> A key example of this is the attempt to level academic playing fields through the merger process which hoped to improve historically black universities by merging them with historically white institutions.<sup>20</sup> However, these mergers have arguably deepened inequality as suggested by the increase in protest action.<sup>21</sup> These protests indicate that marginalised and vulnerable groups are demanding to participate in decisions which directly affect their lives.<sup>22</sup> They also suggest that government created institutional spaces of representation and participation as well as the much-utilised “top-down” approach to participation, are being rejected.<sup>23</sup>

### 1 1 1 Introducing meaningful engagement

#### 1 1 1 1 The creation of meaningful engagement

The above-mentioned statistics, in conjunction with the rising number of protests, indicate the need for critical reflection on the judiciary’s response to socio-economic rights claims. Although everyone is guaranteed constitutional rights, such as access to adequate housing and education, these rights are in reality not realised for a large majority of people. This is illustrated by the statistics relating to people without housing,<sup>24</sup> as well as by the #FMF protests, which raised the issue of lack of access to

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<sup>18</sup> N Davids “#FeesMustFall: History of South African Student Protests Reflects Inequality’s Grip” (10-10-2016) *Mail and Guardian* 1 <<https://mg.co.za/article/2016-10-10-feesmustfall-history-of-south-african-student-protests-reflects-inequalitys-grip>> (accessed 15-05-2017).

<sup>19</sup> 1.

<sup>20</sup> 1.

<sup>21</sup> 1.

<sup>22</sup> S Liebenberg “The Democratic Turn in South Africa’s Social Rights Jurisprudence” in KG Young (ed) *The Future of Economic and Social Rights* (forthcoming, 2019) 1 2.

<sup>23</sup> 2.

<sup>24</sup> C Rule-Groenewald, F Timol, E Khalema & C Desmond “More than Just a Roof: Unpacking Homelessness” (07-09-2015) *Human Sciences Resource Center* 1 <[www.hsrc.ac.za/en/review/hsrc-review-march-2015/unpacking-homelessness](http://www.hsrc.ac.za/en/review/hsrc-review-march-2015/unpacking-homelessness)> (accessed 20-05-2017).

higher education.<sup>25</sup> However, this issue extends beyond higher education and also affects access to basic education.<sup>26</sup> A range of socio-economic rights cases, heard since the first democratic election, highlight the vast inequalities which are still present in South Africa as a result of apartheid.<sup>27</sup> According to Liebenberg, “human rights remain a significant discursive and mobilising force against systemic forms of marginalisation and structural injustice”.<sup>28</sup> The importance of participation was highlighted in *Doctors for Life International v The Speaker of the National Assembly*,<sup>29</sup> which held that participation allows excluded voices to be empowered in wider participatory processes.<sup>30</sup> This is especially important given the exclusion of the majority of South Africa from participating in decision-making processes under apartheid.<sup>31</sup>

Thus, while constitutional adjudication is a potential avenue to rectify problems such as lack of access to adequate housing or education, opportunities for participation and meaningful engagement have been limited when realising socio-economic rights, and decisions are made by government officials without involving the community.<sup>32</sup> The failure to involve citizens in decision-making processes is contrary to the participatory democracy envisioned by the Constitution.<sup>33</sup> Given the clear displays of unhappiness of many citizens, there is a dire need to address the underlying problems relating to socio-economic inequalities so that citizen participation is promoted rather than stifled.

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<sup>25</sup> *Minister of Basic Education v Education for All* 2016 4 SA 63 (SCA) para 3. It is however important to note the distinction between housing rights and education rights, as the latter are immediately realisable whereas the former are “progressively realisable”: see para 36. See *Juma Masjid Primary School v Essay NO* 2011 8 BCLR 761 (CC) para 37. There is no internal limitation to s 29(1)(a) of the Constitution compared to s 26(2) which limits the right by stating that it should be “progressively realised” within “available resources” subject to “reasonable legislative measures”. See also F Veriava “The Limpopo Textbook Litigation: A Case Study into the Possibilities of a Transformative Constitutionalism” (2016) 32 *SAJHR* 321 334.

<sup>26</sup> *Minister of Basic Education v Education for All* 2016 4 SA 63 (SCA) para 3. Access to education and more specifically, quality education, especially for people of colour, is one of the major issues stemming from apartheid that has still not been addressed. See *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 paras 45-47.

<sup>27</sup> S Liebenberg “The Democratic Turn in South Africa’s Social Rights Jurisprudence” in KG Young (ed) *The Future of Economic and Social Rights* (forthcoming, 2019) 1 18.

<sup>28</sup> S Liebenberg “Engaging the Paradoxes of the Universal and Particular in Human Rights Adjudication: The Possibilities and Pitfalls of Meaningful Engagement” (2012) 12 *African Human Rights Law Journal* 1 1.

<sup>29</sup> 2006 6 SA 416 (CC).

<sup>30</sup> Para 244.

<sup>31</sup> Para 244.

<sup>32</sup> L Chenwi “Meaningful Engagement’ in the Realisation of Socio-Economic Rights: The South African Experience” (2011) 26 *Southern African Public Law* 128 128.

<sup>33</sup> 128.

One such way of achieving this is by using the Court's role and power to develop novel remedies to ensure that appropriate relief is provided. This was affirmed in *Fose v Minister of Safety and Security* ("*Fose*"),<sup>34</sup> in which it was held that "courts have a particular responsibility...and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal", especially given the fact that "so few have the means to enforce their rights through the courts".<sup>35</sup> In line with this responsibility, the Constitutional Court developed the innovative remedy of meaningful engagement in various cases relating to evictions as well as school governance and access to adequate education.<sup>36</sup> However, meaningful engagement is not only a remedy, but can also function as a constitutional review standard. As the Court noted in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* ("*Olivia Road*"),<sup>37</sup> section 26(2) of the Constitution places a duty on the State to engage with potential evictees in order to fulfil the section's reasonableness requirement.<sup>38</sup> Thus, courts have to consider whether the State engaged with potential evictees to determine whether the section 26(2) obligations have been fulfilled.<sup>39</sup>

Chenwi describes meaningful engagement as a process in which communities or individuals communicate and engage with the government with the aim of achieving specific objectives.<sup>40</sup> It thus requires government to focus on its constitutional responsibilities and consider the views of those affected when developing policies and programmes and when providing services.<sup>41</sup> As such, the development of this doctrine is significant as it promotes active participation in the process of realising socio-economic rights. It is also a democratic and flexible process which can respond to the practical realities of these cases.<sup>42</sup>

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<sup>34</sup> 1997 3 SA 786 (CC).

<sup>35</sup> Para 69.

<sup>36</sup> S Liebenberg "The Democratic Turn in South Africa's Social Rights Jurisprudence" in KG Young (ed) *The Future of Economic and Social Rights* (forthcoming, 2019) 1 1. See also for example *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC); *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC); *Juma Musjid Primary School v Essay NO* 2011 8 BCLR 761 (CC) and *Head of Department of Education v Welkom High School* 2013 9 BCLR (CC).

<sup>37</sup> 2008 3 SA 208 (CC).

<sup>38</sup> Para 17.

<sup>39</sup> Para 18.

<sup>40</sup> L Chenwi "Meaningful Engagement' in the Realisation of Socio-Economic Rights: The South African Experience" (2011) 26 *Southern African Public Law* 128 129.

<sup>41</sup> 129.

<sup>42</sup> L Chenwi & K Tissington *Engaging Meaningfully with Government on Socio-Economic Rights: A Focus on the Right to Housing* (2010) 8.

It is important to note that, while meaningful engagement has similar characteristics to processes such as mediation and consultation, it differs in crucial respects. Consultation involves government asking for people's views and opinions on the decision.<sup>43</sup> However, these views do not necessarily carry much weight and the final decision often lies with the government. In contrast, meaningful engagement should involve all the relevant parties engaging reasonably and in good faith to reach a mutually acceptable decision.<sup>44</sup> While the final decision lies with government, it must be informed by the affected people's concerns.<sup>45</sup> Consultation is also often seen as a step or a singular act necessary to make a decision whereas meaningful engagement is an ongoing process.<sup>46</sup> Mediation refers to a process of parties resolving conflict by voluntarily appointing a third party, the mediator, to assist them in reaching an acceptable decision.<sup>47</sup> While third parties, such as civil organisations, can be involved in the process of meaningful engagement to facilitate the process,<sup>48</sup> it can also take place without them.<sup>49</sup>

#### 1 1 1 2 Meaningful engagement and the Constitution

Meaningful engagement is not mentioned expressly in the Constitution, but it has been derived from a number of sections contained therein.<sup>50</sup> In *Olivia Road* it was held that the use of meaningful engagement could be inferred from the preamble to the Constitution, which states that the government has a duty to "improve the quality of life of all citizens and free the potential of each person".<sup>51</sup> Section 7(2) of the Constitution holds that the State has a duty to "respect, protect, promote and fulfil the rights in the Bill of Rights" and the Court emphasised that the rights to life and dignity are particularly important in this regard.<sup>52</sup> Section 152 of the Constitution further states

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<sup>43</sup> L Chenwi "Meaningful Engagement' in the Realisation of Socio-Economic Rights: The South African Experience" (2011) 26 *Southern African Public Law* 128 128.

<sup>44</sup> 2010 3 SA 454 (CC) para 243.

<sup>45</sup> Para 243.

<sup>46</sup> L Chenwi & K Tissington *Engaging Meaningfully with Government on Socio-Economic Rights: A Focus on the Right to Housing* (2010) 11.

<sup>47</sup> L Chenwi "Meaningful Engagement' in the Realisation of Socio-Economic Rights: The South African Experience" (2011) 26 *Southern African Public Law* 128 130.

<sup>48</sup> *Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) para 20.

<sup>49</sup> L Chenwi "Meaningful Engagement' in the Realisation of Socio-Economic Rights: The South African Experience" (2011) 26 *Southern African Public Law* 128 130.

<sup>50</sup> L Chenwi & K Tissington *Engaging Meaningfully with Government on Socio-Economic Rights: A Focus on the Right to Housing* (2010) 11.

<sup>51</sup> 2008 3 SA 208 (CC) para 16.

<sup>52</sup> Para 16.

that local government has a duty to “provide services to communities in a sustainable manner, promote social and economic development, and encourage the involvement of communities and community organisations in matters of local government”.<sup>53</sup> Thus, when taking these sections into account, the Court held that municipalities that evict people without first meaningfully engaging with them will be acting in contravention of the spirit and purpose of the constitutional duties placed on them.<sup>54</sup>

Section 195 of the Constitution provides for the democratic values and principles governing public administration.<sup>55</sup> These include encouraging public participation in policy making as well as ensuring that accurate information is timeously made accessible to the public.<sup>56</sup>

In addition, there is also a plethora of Constitutional Court cases which affirm peoples’ right to be engaged in decisions affecting their lives.<sup>57</sup> The Court has held that “participation and engagement are central to our constitutional project, a reflection of our ‘negotiated revolution’”.<sup>58</sup> Meaningful engagement has also resulted in a movement towards using a participatory democratic approach in realising socio-economic rights by seeking alternatives to the formal institutional spaces ordinarily used for public participation.<sup>59</sup> It was held in *Doctors for Life v Speaker of the National Assembly*<sup>60</sup> that participatory democracy can play a vital role in levelling the socio-economic and political disparities which are present across South Africa.<sup>61</sup>

The idea of meaningful engagement was introduced in *Government of the Republic of South Africa v Grootboom* (“*Grootboom*”)<sup>62</sup> where the Court stated that housing officials from the municipality were expected to engage with people facing eviction as

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<sup>53</sup> Para 16.

<sup>54</sup> Para 16.

<sup>55</sup> L Chenwi “Meaningful Engagement’ in the Realisation of Socio-Economic Rights: The South African Experience” (2011) 26 *Southern African Public Law* 128 135.

<sup>56</sup> S195(1), (e) and (g).

<sup>57</sup> See *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC) para 55; *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC) para 65; *South African Broadcasting Corp Ltd v National Director of Public Prosecutions* 2007 1 SA 523 (CC) paras 27-29; *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign and Another as Amici Curiae)* 2006 2 SA 311 (CC) para 113; *Khumalo and Others v Holomisa* 2002 5 SA 401 (CC) para 21; *The Citizen 1978 (Pty) Ltd v McBride (Johnstone and Others, Amici Curiae)* 2011 4 SA 191 (CC) para 141 and *South African Transport and Allied Workers Union and Another v Garvas* [2012] ZACC 13 para 66.

<sup>58</sup> *Mashavha v President of the Republic of South Africa* 2005 2 SA 476 (CC) para 20.

<sup>59</sup> S Liebenberg “The Democratic Turn in South Africa’s Social Rights Jurisprudence” in KG Young (ed) *The Future of Economic and Social Rights* (forthcoming, 2019) 1 6.

<sup>60</sup> 2006 6 SA 416 (CC).

<sup>61</sup> Para 115

<sup>62</sup> 2001 1 SA 46.

a result of illegal occupation.<sup>63</sup> Subsequently, the idea was developed in *Port Elizabeth Municipality v Various Occupiers* (“*Port Elizabeth Municipality*”)<sup>64</sup> which dealt with the interpretation of the requirements of the Prevention of Illegal Evictions and Unlawful Occupation of Land Act 19 of 1998 (“PIE”). The Court considered the overarching criterion in PIE, that an order of eviction must be “just and equitable”, and recognised the tensions between housing rights and property rights. It was held that:

“[a] 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”.<sup>65</sup>

The importance of meaningful engagement prior to litigation was recognised,<sup>66</sup> and its importance in avoiding the polarising conflict of litigation emphasised.<sup>67</sup>

There have also been various cases relating to section 29 of the Constitution dealing with school governance disputes.<sup>68</sup> These cases are particularly important as they address the tension between rectifying apartheid’s legacy in education and upholding the integrity of local school governance.<sup>69</sup>

However, although meaningful engagement holds potential as a tool to realise socio-economic rights, an investigation needs to be conducted into the actual “meaningfulness” of the engagement and whether it is being implemented in line with the standards developed in the jurisprudence. This is especially important given the clear unhappiness displayed by people in relation to the lack of service delivery as well as the demand for an increase in participatory spaces as discussed above. In order to do this, the quality of engagement in the various cases will have to be assessed as successful engagement is mainly dependant on the quality of the deliberations and decision-making process.<sup>70</sup>

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<sup>63</sup> Para 87.

<sup>64</sup> 2005 1 SA 217 (CC).

<sup>65</sup> Para 44.

<sup>66</sup> Para 45.

<sup>67</sup> Paras 39 and 42.

<sup>68</sup> *Governing Body of Juma Masjid Primary School v Essay NO* 2011 8 BCLR 761 (CC) & *Head of Department of Education v Welkom High School* 2013 9 BCLR (CC). See also S Liebenberg “Remedial Principles and Meaningful Engagement in Education Rights Disputes” (2016) 19 *PER/PERJ* 1 2.

<sup>69</sup> 2.

<sup>70</sup> See J Habermas *The Inclusion of the Other* (1998) & SJ Spano *Public Dialogue and Participatory Democracy: The Cupertino Community Project* (2001) 27. See also A Fung & EO Wright “Deepening Democracy: Innovations in Empowered Participatory Governance” (2001) 29 *Politics & Society* 5 18 & 25.

## 1 2 Research aims and hypotheses

The overarching research question that this thesis aims to answer relates to the role that the quality of meaningful engagement plays in the realisation of socio-economic rights. This will be answered by investigating the role that meaningful engagement and more specifically, the quality thereof, plays in realising socio-economic rights. This thesis has four research aims to assist in answering the research question. Firstly, this thesis aims to determine the justifications posited for using meaningful engagement as well as the importance of quality in achieving said justification. Secondly, it aims to analyse the development of meaningful engagement in the South African jurisprudence in order to evaluate the quality of meaningful engagement in realising socio-economic rights against the backdrop of the vast socio-economic inequalities that exist in South African society.<sup>71</sup> Thirdly, it aims to investigate the potential of extra-judicial engagement in realising socio-economic rights as well as whether extra-judicial engagement is also subject to quality concerns. This will be achieved by analysing the #FMF movement and protests. Finally, it aims to address any quality concerns that arise from the analyses and evaluations by providing potential solutions and recommendations thereto.

The hypothesis underlying this thesis is that meaningful engagement can help remedy the current socio-economic disparities by improving the realisation of socio-economic rights. However, there is scope for further development of this doctrine, especially in relation to the quality of meaningful engagement.

## 1 3 Methodology

This thesis will provide an in-depth analysis of case law relating to meaningful engagement within the contexts of housing and education. This analysis will be used to map out the development of meaningful engagement and to establish areas that still need to be developed. Applicable legislation on housing and education will also be referred to throughout this thesis. Academic literature relating to meaningful engagement will be used to assess the potential and shortfalls of this doctrine. This will consist mainly of books and journal articles. Literature on participatory remedies will also be consulted.

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<sup>71</sup> JS Modiri "The Grey Line In-Between the Rainbow: (Re) Thinking and (Re) Talking Critical Race Theory in Post-Apartheid Legal and Social Discourse" (2011) 26 *Southern African Public Law* 177 183.

In order to obtain a holistic picture of meaningful engagement and the quality thereof, the #FMF movement will be used to investigate the attempts made at extra-judicial engagement and the quality thereof. Academic studies, journal articles as well as newspaper interviews and articles, depending on their academic value, will be used to conduct this investigation into the engagement surrounding the #FMF protests.

#### **1 4 Outline of chapters**

Chapter 2 will provide the theoretical basis for analysing and evaluating the doctrine of meaningful engagement in the current South African jurisprudence by exploring the role that meaningful engagement plays in realising socio-economic rights. It will also investigate the importance of the quality of meaningful engagement in ensuring that socio-economic rights are realised. This investigation will be used to develop criteria to assess the quality of engagement in the various housing and education cases.

Chapter 3 will then analyse and evaluate meaningful engagement in the judicial context by examining case law relating to housing and education rights in view of the criteria developed in the previous chapter. Various shortfalls relating to the implementation of meaningful engagement will also be highlighted

Chapter 4 will focus on extra-judicial engagement and will explore the role that it can play in realising socio-economic rights. This will be done by using the #FMF movement to investigate the quality of the attempts at engagement in this context.

Chapter 5 will address the shortfalls highlighted in the previous two chapters relating to the implementation of meaningful engagement in the judicial and extra-judicial context. Potential solutions to these shortfalls will then be discussed and recommendations will be made for the way forward. Concepts relating to bargaining power, inclusion of stakeholders, difference and plurality of voices, representation and participatory spaces will be discussed.

The final chapter will summarise the main findings and implications of this thesis and identify areas where further research and investigation is required.

## **Chapter 2: Meaningful engagement in socio-economic rights decision-making: Justifications and quality**

### **2 1 Introduction**

This chapter investigates the role that participation and meaningful engagement play in facilitating the realisation of socio-economic rights. It aims to provide a theoretical understanding of the justifications for using participation to aid socio-economic rights realisation. It also aims to highlight the role that quality of participation plays in the effective realisation of socio-economic rights. These insights will be used to develop evaluative criteria against which meaningful engagement can be assessed. In order to do this, this chapter will examine why and how meaningful engagement has been used in socio-economic rights jurisprudence. This will be achieved by exploring the value of participation for South Africa's constitutional democracy. Following this, an investigation will be conducted into the value of participation and the justifications posited for the use of meaningful engagement in socio-economic rights adjudication. Finally, the importance that quality engagement plays in the realisation of socio-economic rights will be addressed.

### **2 2 The value of participation for South Africa's constitutional democracy**

It is sometimes argued that political participation in modern democracies tends to be episodic and expressed primarily through the exercise of voting rights for legislative bodies through periodic elections.<sup>1</sup> It is thus unsurprising that there have been calls for the creation of "deliberative spaces", which are spaces in which meaningful public dialogue and debate can occur.<sup>2</sup> It is due to these criticisms that citizen participation, public engagement, dialogue and deliberation have gained attention and momentum<sup>3</sup>

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<sup>1</sup> JR Parkins & RE Mitchell "Public Participation as Public Debate: A Deliberative Turn in Natural Resource Management" (2005) 18 *Society and Natural Resources* 529 530.

<sup>2</sup> 529.

<sup>3</sup> C Bateup "The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue" (2006) 71 *Brooklyn Law Review* 1109 1110. See also JR Parkins & RE Mitchell "Public Participation as Public Debate: A Deliberative Turn in Natural Resource Management" (2005) 18 *Society and Natural Resources* 529 529.

in the last few decades and have been implemented more frequently both in international<sup>4</sup> human rights and national<sup>5</sup> constitutional jurisdictions.<sup>6</sup>

Domestically, the Constitutional Court of South Africa (“the Court”) has held that participation and, more specifically, engagement are fundamental to South Africa’s constitutional project, and that they resonate with precolonial, traditional methods of public participation.<sup>7</sup> The right of people to participate in decisions affecting their lives has been affirmed by the Court in multiple areas, such as in legislative,<sup>8</sup> executive<sup>9</sup> and administrative processes.<sup>10</sup> *Doctors for Life International v The Speaker of the National Assembly* (“*Doctors for Life*”),<sup>11</sup> which concerned the role of the public in legislative processes, highlighted the importance of participation in light of the legacy of apartheid, and held that the validity of participation is dependent on the deliberate inclusion of vulnerable voices.<sup>12</sup> This is of particular significance given that, under the oppressive apartheid regime, the majority of South Africans were denied opportunities to participate in various facets of life, including in the making of the laws governing them.<sup>13</sup> *Doctors for Life*<sup>14</sup> also illustrated the role that participation plays in enhancing the dignity of the participants by allowing their voices to be heard and considered when decisions affecting them are made.<sup>15</sup>

The Court also stated that continuous public participation contributes to a well-functioning representative democracy and that representative democracy would be meaningless without public participation.<sup>16</sup> The Court emphasised the government’s

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<sup>4</sup> See the UNGA (UN General Assembly) Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, UN doc A/RES/63/117 (2008), adopted by the United Nations General Assembly, 10 December. See also C Bateup “The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue” (2006) 71 *Brooklyn Law Review* 1109 1110. Participatory democracy and constitutional dialogic theories have gained interest in countries such as the United States of America and Canada.

<sup>5</sup> For example, under the procedural requirement of ss 3 and 4 of the Promotion of Administrative Justice Act 3 of 2000.

<sup>6</sup> S Liebenberg “Participatory Justice in Social Rights Adjudication” (2018) 18 *Human Rights Law Review* 623 623.

<sup>7</sup> *Mashavha v President of the Republic of South Africa* 2005 2 SA 476 (CC) para 20.

<sup>8</sup> See *Doctors for Life v The Speaker of the National Assembly* 2006 6 SA 416 (CC); *Matatiele Municipality v President of the Republic of South Africa* 2007 6 SA 477 (CC); and *Land Access Movement of South Africa v Chairperson of the National Council of Provinces* 2016 5 SA 635 (CC).

<sup>9</sup> See *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC), which dealt with victim-participation in special pardons for people convicted of politically motivated crimes.

<sup>10</sup> *Joseph v City of Johannesburg* 2010 4 SA 55 (CC).

<sup>11</sup> 2006 6 SA 416 (CC).

<sup>12</sup> Para 234.

<sup>13</sup> *Doctors for Life v The Speaker of the National Assembly* 2006 6 SA 416 (CC) para 112.

<sup>14</sup> 2006 6 SA 416 (CC).

<sup>15</sup> Para 115.

<sup>16</sup> Para 115.

duty to promote and ensure effective public participation in legislative processes as it is important for achieving the values and goals enshrined in the Constitution.<sup>17</sup> Democratic participation is thus valuable as it assists in achieving government's obligation to respect, protect and promote constitutional rights.<sup>18</sup>

Furthermore, the Court held that public participation in the law-making process fosters democracy and promotes pluralistic accommodation aimed at creating laws that have an increased chance of wide acceptance and efficacy in practice.<sup>19</sup> *Minister of Health v New Clicks South Africa (Pty) Ltd* ("New Clicks"),<sup>20</sup> which dealt with the regulation of medicines, also highlighted the importance of allowing citizens to have a voice and be heard in relation to government action.<sup>21</sup> Participation provides a platform for people's voices to be heard in decisions affecting them.<sup>22</sup> It also promotes accountability between the government and rights-holders as it forces government to justify its actions, policies and programmes.<sup>23</sup> This feeds into the culture of justification that grounds South Africa's transformative project.<sup>24</sup>

There are also a range of rich legislative tools and policies which give effect to participatory democracy in South Africa, such as the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"); the Integrated Development Plans under the Municipal Systems Act 32 of 2000;<sup>25</sup> and the ward councillors structure in the Municipal Structures Act 117 of 1998.<sup>26</sup> These require government to develop and implement procedures and spaces for participation relating to all aspects of policy development and planning.<sup>27</sup> For instance, section 3(2)(b) of PAJA requires that administrative

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<sup>17</sup> Para 103.

<sup>18</sup> Section 7(2) of the Constitution of the Republic of South Africa, 1996.

<sup>19</sup> *Doctors for Life International v The Speaker of the National Assembly* 2006 6 SA 416 (CC). See also C Bateup "The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue" (2006) 71 *Brooklyn Law Review* 1109 1142.

<sup>20</sup> 2006 2 SA 311 (CC).

<sup>21</sup> Paras 111-112 and 627.

<sup>22</sup> G Muller "Conceptualising 'Meaningful Engagement' as a Deliberative Democratic Partnership" (2011) 22 *Stell LR* 742 751.

<sup>23</sup> S Wilson "Planning for Inclusion in South Africa: The Duty to Prevent Homelessness and the Potential of Meaningful Engagement" (2011) 22 *Urban Forum* 265 267.

<sup>24</sup> See E Mureinik "A Bridge to Where? Introducing the Interim Bill of Rights" (1994) 10 *SAJHR* 31 32 & KE Klare "Legal Culture and Transformative Constitutionalism" (1998) 14 *SAJHR* 146 147.

<sup>25</sup> Chapter 5, ss 23-37.

<sup>26</sup> Ss 72-78.

<sup>27</sup> B Ray *Engaging with Social Rights* (2016) 275. See also J De Visser *Developmental Local Government: A Case Study of South Africa* (2005) 99-111; C Mbazira "Service Delivery Protests, Struggle for Rights and the Failure of Local Democracy in South Africa and Uganda: Parallels and Divergences" (2013) 29 *SAJHR* 251-275 and L Piper & L Navdvi "Popular Mobilization, Party Dominance and Participatory Governance in South Africa" in L Thompson & C Tapscott (eds) *Citizenship and Social Movements: Perspectives from the Global South* (2010) 217.

action be procedurally fair, give affected persons adequate notice of the action, and afford them a reasonable opportunity to make representations. However, the fact that there are still calls for participation from citizens indicates that there is a problem with the implementation and quality of participation under these participatory structures and plans.

### **2.3 The role of and justifications for meaningful engagement in socio-economic rights realisation**

Participation has been used more specifically in socio-economic rights adjudication<sup>28</sup> through the use of meaningful engagement. As explained in the introduction, this is an innovative mechanism for socio-economic rights realisation which fosters public participation in policy development and implementation.<sup>29</sup> According to Wilson, meaningful engagement refers to various participatory processes, such as deliberative discussions or consultations between parties, invoked when a socio-economic rights programme threatens communities.<sup>30</sup> Liebenberg has noted that engagement, as required by the courts, is more extensive compared to the formal institutional spaces for public participation in other contexts.<sup>31</sup> Rather than relying on the ballot box or high-level interaction with legislative processes, it aims at stimulating direct engagement between the government and the rights-holders.<sup>32</sup> Meaningful engagement has also been linked to government's obligations to provide services in a sustainable manner; to promote effective and responsive socio-economic development; and to involve communities and community organisations in the processes that affect them.<sup>33</sup> Meaningful engagement can thus assist in the realisation of socio-economic rights through the judicial enforcement of socio-economic rights

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<sup>28</sup> Meaningful engagement has been used in housing and education cases both as a review standard and a remedy.

<sup>29</sup> Socio Economic Rights Project of Community Law Centre and the Socio-Economic Rights Institute of South Africa *Report on the Roundtable Discussion on Meaningful Engagement in the Realisation of Socio-Economic Rights* (2010) 1 1. See also S Liebenberg "Participatory Justice in Social Rights Adjudication" (2018) 18 *Human Rights Law Review* 623 623.

<sup>30</sup> Socio Economic Rights Project of Community Law Centre and the Socio-Economic Rights Institute of South Africa *Report on the Roundtable Discussion on Meaningful Engagement in the Realisation of Socio-Economic Rights* (2010) 1 11-12; L Chenwi "Democratizing the Socio-Economic Rights Enforcement Process" in Alvair-Garcia et al (eds) *Social and Economic Rights in Theory and Practice: Critical Inquiries* (2014) 178 179.

<sup>31</sup> S Liebenberg "The Democratic Turn in South Africa's Social Rights Jurisprudence" in KG Young (ed) *The Future of Economic and Social Rights* (forthcoming, 2019) 1 6.

<sup>32</sup> 6.

<sup>33</sup> G Muller "Conceptualising 'Meaningful Engagement' as a Deliberative Democratic Partnership" (2011) 22 *Stell LR* 742 743.

which would occur when courts order meaningful engagement as a remedy to give effect to their judgment. It can also serve as a policy tool in the realisation of socio-economic rights through legislative and administrative measures and the interaction between the two. This would occur when policies or structures, such as the ones mentioned in the previous section, require participation in relation to policy development and planning.<sup>34</sup>

However, questions remain as to how meaningful engagement fits into the Court's model for socio-economic rights adjudication as well as what the underlying values are.<sup>35</sup> In order to investigate these questions, the justifications for using meaningful engagement in socio-economic rights adjudication need to be examined. A number of justifications have been posited for the use of participation and, more specifically, for the use of meaningful engagement in socio-economic rights adjudication. These justifications will be discussed below.

### 2 3 1 Assisting the realisation of socio-economic rights

Brand has argued that one of the ways to increase the realisation of socio-economic rights is to enhance the political capacities and participatory spaces of marginalised groups to allow them to assist in determining outcomes, policies and programmes affecting their lives.<sup>36</sup> This can be achieved through meaningful engagement which allows for voices to be included in the process of realising socio-economic rights; increases the legitimacy of decisions; allows for more flexible and responsive solutions; and improves the quality of decisions made. These justifications will be elaborated on below.

Firstly, meaningful engagement allows those affected by a decision to have a voice in the decision-making process. This is important for the realisation of socio-economic rights because not consulting all the relevant stakeholders can result in judgments relating to policies having major consequences for large groups of people without

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<sup>34</sup> See part 2 2 of this chapter.

<sup>35</sup> A Pillay "Toward Effective Social and Economic Rights Adjudication: The Role of Meaningful Engagement" (2012) 10 *International Journal of Constitutional Law* 732 734.

<sup>36</sup> JFD Brand "Writing the Law Democratically: A Reply to Theunis Roux" in S Woolman & M Bishop (eds) *Constitutional Conversations* (2008) 101; S Liebenberg "Engaging the Paradoxes of the Universal and Particular in Human Rights Adjudication: The Possibilities and Pitfalls of Meaningful Engagement" (2012) 12 *African Human Rights Law Journal* 1 9; L Chenwi "Democratizing the Socio-Economic Rights Enforcement Process" in Alvaire-Garcia et al (eds) *Social and Economic Rights in Theory and Practice: Critical Inquiries* (2014) 178 193.

allowing them to be heard.<sup>37</sup> It is for this reason that involving all the necessary stakeholders is important to resolving informational deficits experienced by the courts.<sup>38</sup> Informational deficits stem from the fact that socio-economic rights cases are often complex and polycentric in nature and courts are often too far removed from the issues to be able to provide responsive solutions to the diverse issues.<sup>39</sup> Addressing this lack of information by including those affected by the decision results in more just solutions being reached. These solutions are tailored to the particularities of the dispute and thus better received by those affected.<sup>40</sup> This is because the participants are more knowledgeable of the local needs and are in a better position than courts, who are often unresponsive to the underlying systemic problems that result in socio-economic rights disputes.<sup>41</sup> Therefore, the measures taken are more suited to local needs and contexts<sup>42</sup> which strengthens their legitimacy.<sup>43</sup> Increased legitimacy promotes efficacy and public compliance with the decisions or policies implemented as compared to policies arising from unilateral government action.<sup>44</sup>

The legitimacy of decisions taken is further enhanced through the justification of the decisions on the basis of substantive human rights reasoning, rather than on bargaining or reasoning that hides and furthers the unequal power dynamics between the parties.<sup>45</sup> Cohen and Sabel refer to the substantive human rights reasoning as

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<sup>37</sup> S Liebenberg "Participatory Approaches to Socio-Economic Rights Adjudication: Tentative Lessons from South African Evictions Law" (2014) 32 *Nordic Journal of Human Rights* 312 316. J Gaventa & G Barrett "So What Difference Does It Make? Mapping the Outcomes of Citizen Engagement" *IDS Working Paper* 347 1 12 & 13. A Fung & EO Wright "Deepening Democracy: Innovations in Empowered Participatory Governance" (2001) 29 *Politics & Society* 5 18 & 26.

<sup>38</sup> S Liebenberg "Participatory Justice in Social Rights Adjudication" (2018) 18 *Human Rights Law Review* 623 632.

<sup>39</sup> See part 2 3 2 of this chapter.

<sup>40</sup> S Liebenberg "Engaging the Paradoxes of the Universal and Particular in Human Rights Adjudication: The Possibilities and Pitfalls of Meaningful Engagement" (2012) 12 *African Human Rights Law Journal* 1 5. A Fung & EO Wright "Deepening Democracy: Innovations in Empowered Participatory Governance" (2001) 29 *Politics & Society* 5 18 & 26. J Gaventa & G Barrett "So What Difference Does It Make? Mapping the Outcomes of Citizen Engagement" *IDS Working Paper* 347 1 12. SP Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1381.

<sup>41</sup> S Liebenberg "Engaging the Paradoxes of the Universal and Particular in Human Rights Adjudication: The Possibilities and Pitfalls of Meaningful Engagement" (2012) 12 *African Human Rights Law Journal* 1 5.

<sup>42</sup> 27. See also A Fung & EO Wright "Deepening Democracy: Innovations in Empowered Participatory Governance" (2001) 29 *Politics & Society* 5 18 & 26; J Gaventa & G Barrett "So What Difference Does It Make? Mapping the Outcomes of Citizen Engagement" *IDS Working Paper* 347 1 12.

<sup>43</sup> S Liebenberg "Participatory Justice in Social Rights Adjudication" (2018) 18 *Human Rights Law Review* 623 630. See also J Gaventa & G Barrett "So What Difference Does It Make? Mapping the Outcomes of Citizen Engagement" *IDS Working Paper* 347 1 13.

<sup>44</sup> S Liebenberg "Participatory Justice in Social Rights Adjudication" (2018) 18 *Human Rights Law Review* 623 630.

<sup>45</sup> 11.

“constitutional reasons”: considerations that are of paramount importance to the decision-making process due to their affirmation of the “close connection to the standing of citizens as free and equal members of political society”.<sup>46</sup>

Secondly, given the ongoing nature of socio-economic rights cases and their constant evolution, meaningful engagement also provides more flexible and responsive solutions that can be adapted when circumstances change.<sup>47</sup> In this way, the interpretations of rights and remedies are more attuned and responsive to the fluid lived experiences of those affected and the changing dynamics of socio-economic rights cases.<sup>48</sup>

Thirdly, meaningful engagement also results in more informed and thus better quality decision being made,<sup>49</sup> given that a more holistic picture with all relevant arguments is presented to the decision-maker.<sup>50</sup> This promotes transparency<sup>51</sup> and accountability<sup>52</sup> when providing socio-economic goods and services.<sup>53</sup> It also contributes to reducing tension and litigation costs by narrowing areas of dispute.<sup>54</sup>

Furthermore, meaningful engagement addresses general concerns raised about the lack of participatory opportunities and the often negligible amount of engagement in decision-making processes of government and in service delivery.<sup>55</sup> The limitation of participatory opportunities, specifically at grassroots levels, often hinders the realisation of socio-economic rights<sup>56</sup> and can have a negative effect on the quality of the policies or programmes adopted.<sup>57</sup> Courts and litigation for their part generally do

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<sup>46</sup> J Cohen and C Sabel “Directly-Deliberative Polyarchy” (1997) 3 *European Law Journal* 313 327.

<sup>47</sup> S Liebenberg “Participatory Justice in Social Rights Adjudication” (2018) 18 *Human Rights Law Review* 623 630.

<sup>48</sup> S Liebenberg “Participatory Approaches to Socio-Economic Rights Adjudication: Tentative Lessons from South African Evictions Law” (2014) 32 *Nordic Journal of Human Rights* 312 316.

<sup>49</sup> L Chenwi “Democratizing the Socio-Economic Rights Enforcement Process” in Alvair-Garcia et al (eds) *Social and Economic Rights in Theory and Practice: Critical Inquiries* (2014) 178 179. S Liebenberg “Participatory Justice in Social Rights Adjudication” (2018) 18 *Human Rights Law Review* 623 628.

<sup>50</sup> 628.

<sup>51</sup> 628.

<sup>52</sup> J Gaventa & G Barrett “So What Difference Does It Make? Mapping the Outcomes of Citizen Engagement” *IDS Working Paper* 347 1 41.

<sup>53</sup> S Liebenberg “The Democratic Turn in South Africa’s Social Rights Jurisprudence” in KG Young (ed) *The Future of Economic and Social Rights* (forthcoming, 2019) 6.

<sup>54</sup> L Chenwi “Democratizing the Socio-Economic Rights Enforcement Process in Alvair-Garcia et al (eds) *Social and Economic Rights in Theory and Practice: Critical Inquiries* (2014) 178 181.

<sup>55</sup> L Chenwi “‘Meaningful Engagement’ in the Realisation of Socio-Economic Rights: The South African Experience” (2011) 26 *South African Public Law* 128 128.

<sup>56</sup> This is linked to various factors such as the above-mentioned problem of solutions not being suited to the specific context due to judges being too far removed from the situation.

<sup>57</sup> L Chenwi “‘Meaningful Engagement’ in the Realisation of Socio-Economic Rights: The South African Experience” (2011) 26 *South African Public Law* 128 128.

not serve as effective participatory spaces as they involve a narrow range of parties and the specialised nature of the legal rules and processes hampers meaningful engagement.<sup>58</sup>

### 2 3 2 Judicial management tool

Within the specific context of the adjudication of socio-economic rights, meaningful engagement is also said to be an innovative way to develop the managerial role of the courts.<sup>59</sup> This is particularly important given the adjudicative challenges that have been raised in relation to the role of the court, specifically in socio-economic rights cases.<sup>60</sup> These concerns relate to balancing normative and procedural considerations, institutional legitimacy, polycentricity concerns and judicial competence.<sup>61</sup> The potential for meaningful engagement to mitigate these concerns will be discussed below.

Meaningful engagement can play a role in balancing the normative and procedural considerations involved in socio-economic rights cases.<sup>62</sup> Critics of the use of the reasonableness approach<sup>63</sup> in socio-economic rights cases have argued that this approach fails to engage with the substantive normative content of socio-economic rights and the responsibilities which they impose.<sup>64</sup> This is because the reasonableness approach permits courts to avoid providing substantive normative content to socio-economic rights and the focus is instead placed on the procedural consideration of whether or not the reasonableness requirement was met.<sup>65</sup> Meaningful engagement can be used to circumvent this problem by allowing the court to decide on the normative goals and values attached to the right in question, while

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<sup>58</sup> S Liebenberg "Participatory Approaches to Socio-Economic Rights Adjudication: Tentative Lessons from South African Evictions Law" (2014) 32 *Nordic Journal of Human Rights* 312 313.

<sup>59</sup> L Chenwi "Democratizing the Socio-Economic Rights Enforcement Process" in Alvair-Garcia et al (eds) *Social and Economic Rights in Theory and Practice: Critical Inquiries* (2014) 178 181.

<sup>60</sup> S Liebenberg "Participatory Approaches to Socio-Economic Rights Adjudication: Tentative Lessons from South African Evictions Law" (2014) 32 *Nordic Journal of Human Rights* 312 319.

<sup>61</sup> 319.

<sup>62</sup> S Liebenberg "The Democratic Turn in South Africa's Social Rights Jurisprudence" in KG Young (ed) *The Future of Economic and Social Rights* (forthcoming, 2019) 19.

<sup>63</sup> S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 131-223; D Bilchitz "Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence" (2003) 19 *SAJHR* 1-26 & C Steinberg "Can Reasonableness Protect the Poor? A Review of South Africa's Socio-Economic Rights Jurisprudence" (2006) 123 *SALJ* 264-284.

<sup>64</sup> D Brand "The Proceduralisation of South African Socio-Economic Rights Jurisprudence or 'What Are Socio-Economic Rights For?'" in H Botha, A J van der Walt & J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2004) 33-56.

<sup>65</sup> S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 173.

leaving the policy considerations to the parties involved (i.e. the relevant organs of state and the rights-holders).<sup>66</sup> For example, courts can hand down participatory structural orders, such as meaningful engagement or participatory structural interdicts, in which parties must find solutions to the remaining issues through a participatory process to give effect to the court's normative judgment. This assists in alleviating concerns relating to lack of grassroots participation in socio-economic rights adjudication, as it cultivates democratic participation aimed at investigating the contextual implications of the socio-economic rights in question.<sup>67</sup> However, criticisms have also been raised in relation to courts using meaningful engagement to avoid defining the substantive normative goals and purposes of socio-economic rights as discussed later in this chapter.<sup>68</sup>

Meaningful engagement is also a potential avenue to mediate between, and where possible, reconcile competing interests,<sup>69</sup> such as the rights to housing and property in eviction cases.<sup>70</sup> This can be achieved by involving the various stakeholders (often the government, the rights-holders and civil society organisations) in the process of formulating innovative solutions through relating to each other.<sup>71</sup> This can then assist in decreasing tensions and promoting better relationships for the future. It can also decrease litigation costs if structured correctly,<sup>72</sup> and narrow areas of disputes while facilitating mutual give and take.<sup>73</sup>

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<sup>66</sup> S Liebenberg "The Democratic Turn in South Africa's Social Rights Jurisprudence" in KG Young (ed) *The Future of Economic and Social Rights* (forthcoming, 2019) 19.

<sup>67</sup> 19.

<sup>68</sup> See part 2 4 4 of this chapter.

<sup>69</sup> *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality* 2013 1 SA 323 (CC) para 44.

<sup>70</sup> S Liebenberg "Participatory Approaches to Socio-Economic Rights Adjudication: Tentative Lessons from South African Evictions Law" (2014) 32 *Nordic Journal of Human Rights* 312 313.

<sup>71</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 41.

<sup>72</sup> Para 42. See also L Chenwi "'Meaningful Engagement' in the Realisation of Socio-Economic Rights: The South African Experience" (2011) 26 *South African Public Law* 128 140.

<sup>73</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) Para 42. See also L Chenwi "'Meaningful Engagement' in the Realisation of Socio-Economic Rights: The South African Experience" (2011) 26 *South African Public Law* 128 140.

Meaningful engagement also addresses separation of powers<sup>74</sup> and institutional competence concerns.<sup>75</sup> This is achieved by removing courts from the initial direct policy development and instead allowing the government, in conjunction with the rights-holders, to decide on these matters.<sup>76</sup> Courts thus do not play pre-emptive roles in defining policies aimed at realising socio-economic rights.<sup>77</sup> Instead, meaningful engagement stimulates deliberations between various branches of government, rights holders and civil society organisations.<sup>78</sup> As such, government becomes a co-creator of the measures to be taken, thus circumventing arguments of judicial overreach.<sup>79</sup> The court may return to a stronger normative role later in the deliberation process once parties are closer to reaching a mutually agreed upon solution.<sup>80</sup> Therefore, courts are still able to play an important role in realising and protecting socio-economic rights while maintaining respect for the legislature and executive's democratic mandate and institutional expertise in developing and implementing socio-economic policies.<sup>81</sup> This links to the shift towards "dialogic" or "social conversation" accounts of judicial review, in which the judiciary engages in a continuous dialogue with the legislature and executive, the rights holders, as well as civil society organisations with the aim of protecting rights.<sup>82</sup>

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<sup>74</sup> C Bateup "The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue" (2006) 71 *Brooklyn Law Review* 1109 1110 & 1118. MC Dorf "Legal Indeterminacy and Institutional Design" (2003) 78 *NYUL Review* 875 978.

<sup>75</sup> See *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC) para 58; *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 10-41 and *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) para 60. Institutional capacity concerns relate to courts being hesitant to interfere with policy decisions as the legislature and executive are considered to be better equipped to make those choices. It has been argued that courts do not have the constitutional mandate nor the institutional expertise to hand down orders affecting governmental policies. A Pillay "Toward Effective Social and Economic Rights Adjudication: The Role of Meaningful Engagement" (2012) 10 *International Journal of Constitutional Law* 732 733.

<sup>76</sup> S Liebenberg "Participatory Approaches to Socio-Economic Rights Adjudication: Tentative Lessons from South African Evictions Law" (2014) 32 *Nordic Journal of Human Rights* 312 319.

<sup>77</sup> 319.

<sup>78</sup> 319.

<sup>79</sup> A Pillay "Toward Effective Social and Economic Rights Adjudication: The Role of Meaningful Engagement" (2012) 10 *International Journal of Constitutional Law* 732 733.

<sup>80</sup> S Liebenberg "Participatory Approaches to Socio-Economic Rights Adjudication: Tentative Lessons from South African Evictions Law" (2014) 32 *Nordic Journal of Human Rights* 312 319.

<sup>81</sup> A Pillay "Toward Effective Social and Economic Rights Adjudication: The Role of Meaningful Engagement" (2012) 10 *International Journal of Constitutional Law* 732 732.

<sup>82</sup> 736.

Meaningful engagement also mitigates concerns about polycentricity<sup>83</sup> and judicial competence by expanding the range of participants involved in litigation and thereby broadening the court's information on the matter.<sup>84</sup> Additionally, "pluralistic accommodation" is promoted which has the potential to enhance the quality, rationality and legitimacy<sup>85</sup> of socio-economic rights decision-making.<sup>86</sup> This is achieved by allowing decision makers to hear all perspectives on the issue, thus enabling them to obtain a more holistic view on the problem.<sup>87</sup> In this way, it can assist in adjudicating complex, polycentric socio-economic rights cases by ascertaining novel solutions that are specific to the issues at hand.<sup>88</sup> It thus represents a shift away from attempts to find a "homogenizing solution" for each case and instead recognises the need for pluralist solutions.<sup>89</sup>

### 2 3 3 Democratises the socio-economic rights enforcement process

Chenwi argues for the democratisation of the socio-economic rights enforcement process given the link between socio-economic rights and democracy.<sup>90</sup> This argument is derived from rights and values such as dignity, equality and freedom, relevant to achieving democracy and social transformation.<sup>91</sup> According to Chenwi, democratising this process necessitates a movement away from the traditional, formal

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<sup>83</sup> See L Fuller "The Forms and Limits of Adjudication" (1978) 92 *Harvard LR* 353 394-404. Social problems are also constantly evolving and comprise of complex, polycentric issues thus making it difficult for courts to hand down judgments that best suit specific situations as they may not be aware of all the relevant facts or facts may have changed during the case or after the case but prior to implementation. As such, it has been argued that courts are often too far removed from the diverse issues to be responsive to how various policies and programmes may impact the various stakeholders who are differently situated.

<sup>84</sup> A Pillay "Toward Effective Social and Economic Rights Adjudication: The Role of Meaningful Engagement" (2012) 10 *International Journal of Constitutional Law* 732 736.

<sup>85</sup> *Doctors for Life v The Speaker of the National Assembly* 2006 6 SA 416 (CC) para 115.

<sup>86</sup> S Liebenberg "Participatory Justice in Social Rights Adjudication" (2018) 18 *Human Rights Law Review* 623 628.

<sup>87</sup> 628.

<sup>88</sup> S Liebenberg "Participatory Approaches to Socio-Economic Rights Adjudication: Tentative Lessons from South African Evictions Law" (2014) 32 *Nordic Journal of Human Rights* 312 320.

<sup>89</sup> JFD Brand "Judicial Deference and Democracy in Socio-Economic Rights Cases in South Africa" (2011) 22 *Stell LR* 614 628.

<sup>90</sup> L Chenwi "Democratizing the Socio-Economic Rights Enforcement Process" in Alvair-Garcia et al (eds) *Social and Economic Rights in Theory and Practice: Critical Inquiries* (2014) 178 181. JFD Brand "Writing the Law Democratically: A Reply to Theunis Roux" in S Woolman and M Bishop (eds) *Constitutional Conversations* (2008) 101 & S Liebenberg "Engaging the Paradoxes of the Universal and Particular in Human Rights Adjudication: The Possibilities and Pitfalls of Meaningful Engagement" (2012) 12 *African Human Rights Law Journal* 1 9.

<sup>91</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) paras 39, 42 & 43. See also L Chenwi "Democratizing the Socio-Economic Rights Enforcement Process" in Alvair-Garcia et al (eds) *Social and Economic Rights in Theory and Practice: Critical Inquiries* (2014) 178 179.

adjudication model<sup>92</sup> to a more cooperative, participatory and flexible model of engagement between the government and the relevant stakeholders.<sup>93</sup> As such, Chenwi argues that the enforcement process should be centred around and informed by democratic values and principles such as, *inter alia*, dignity, accountability, responsiveness and transparency.<sup>94</sup> This can be achieved by meaningful engagement as will be elaborated on below.

Firstly, in line with the idea of democratising the socio-economic rights enforcement process, meaningful engagement aims to place human dignity at the centre of attempts to reconcile the different interests involved in these types of cases.<sup>95</sup> As noted previously, the Court in *Doctors for Life*<sup>96</sup> has held that participation in the legislative process enhances the “civic dignity” of participants<sup>97</sup> and stops the blockage of information to citizens about policies and public affairs affecting them.<sup>98</sup> In this case, civic dignity relates to citizens’ general right to voice their opinion on laws to which they will be subject once they are enacted. Dignity is even more directly implicated in socio-economic rights cases, where decisions and outcomes have a direct impact on specific individuals and groups. In this context, it is vital to ensure that the dignity of those directly impacted is taken into account and that the engagement process is more vigorous and extensive compared to once-off opportunities to comment on the desirability of a law. In this way, participation combats concerns about the beneficiaries of said rights being disrespected or stigmatised by the plans or programmes developed to realise their rights.<sup>99</sup>

The Court has also highlighted the link between the reasonableness of state action and the need to treat people with dignity and respect.<sup>100</sup> Ngcobo J emphasised the importance of participation in promoting open and transparent processes, which play

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<sup>92</sup> Which is often characterised by a the lack of popular engagement and dialogue.

<sup>93</sup> L Chenwi “Democratizing the Socio-Economic Rights Enforcement Process” in Alvair-Garcia et al (eds) *Social and Economic Rights in Theory and Practice: Critical Inquiries* (2014) 178 179. See also F Cleaver “Paradoxes of Participation: Questioning Participatory Approaches to Development” (1999) 11 *Journal of International Development* 597 597.

<sup>94</sup> L Chenwi “Democratizing the Socio-Economic Rights Enforcement Process” in Alvair-Garcia et al (eds) *Social and Economic Rights in Theory and Practice: Critical Inquiries* (2014) 178 179.

<sup>95</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 39. See also S P Sturm “A Normative Theory of Public Law Remedies” (1990) 79 *Geo LJ* 1355 1393.

<sup>96</sup> 2006 6 SA 416 (CC).

<sup>97</sup> Para 234.

<sup>98</sup> S Liebenberg “The Democratic Turn in South Africa’s Social Rights Jurisprudence” in KG Young (ed) *The Future of Economic and Social Rights* (forthcoming, 2019) 1 7.

<sup>99</sup> S Liebenberg “Participatory Justice in Social Rights Adjudication” (2018) 18 *Human Rights Law Review* 623 626.

<sup>100</sup> *Doctors for Life International v The Speaker of the National Assembly* 2006 6 SA 416 (CC) para 115.

a vital role for those who are disempowered and face social and economic disparities.<sup>101</sup> Furthermore, Sachs J highlighted the relationship between participation and dignity, equality and tolerance.<sup>102</sup> It is not only important to give effect to the dignity of those affected but also to ensure that the process through which socio-economic rights are realised is informed by the values of human dignity, freedom and equality.<sup>103</sup> Thus, meaningful engagement provides various opportunities for the enforcement of the socio-economic rights process to be democratised by making human dignity the focal point of the process.

Secondly, the democratic value of equality is also entwined in the socio-economic rights enforcement process through meaningful engagement by enabling marginalised groups to gain leverage to demand the institutional reform required to address the various polycentric issues surrounding socio-economic rights adjudication.<sup>104</sup> This is achieved by affording minority groups a voice in political processes.<sup>105</sup> Overall, it is an important development capable of advancing socio-economic rights realisation and social change by creating a voice for the excluded and marginalised to address structural patterns of exclusion and marginalisation.<sup>106</sup> Rights-holders become more than mere passive recipients of rights, and instead are active participants who help shape policies and decisions that have a direct impact on their lives.<sup>107</sup> In this way, meaningful engagement also gives effect to people's autonomy, as it allows the participants to be and feel less subject to the arbitrary power of others (such as organs of state). Instead, they can be and feel more able to influence the direction of their own life.<sup>108</sup>

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<sup>101</sup> Para 115.

<sup>102</sup> Para 234.

<sup>103</sup> S Liebenberg "Participatory Justice in Social Rights Adjudication" (2018) 18 *Human Rights Law Review* 623 625.

<sup>104</sup> B Ray *Engaging with Social Rights: Procedure, Participation and Democracy in South Africa's Second Wave* (2016) 310.

<sup>105</sup> *Doctors for Life International v The Speaker of the National Assembly* 2006 6 SA 416 (CC) para 234.

<sup>106</sup> Socio Economic Rights Project of Community Law Centre and the Socio-Economic Rights Institute of South Africa *Report on the Roundtable Discussion on Meaningful Engagement in the Realisation of Socio-Economic Rights* (2010) 1 2. See also A Fung & EO Wright "Deepening Democracy: Innovations in Empowered Participatory Governance" (2001) 29 *Politics & Society* 5 26.

<sup>107</sup> S Liebenberg "Participatory Justice in Social Rights Adjudication" (2018) 18 *Human Rights Law Review* 623 627. See also F Cleaver "Paradoxes of Participation: Questioning Participatory Approaches to Development" (1999) 11 *Journal of International Development* 597 598.

<sup>108</sup> S Liebenberg "Participatory Justice in Social Rights Adjudication" (2018) 18 *Human Rights Law Review* 623 628. See also J Gaventa & G Barrett "So What Difference Does It Make? Mapping the Outcomes of Citizen Engagement" *IDS Working Paper* 347 1 27.

Meaningful engagement also has the potential to counteract power and wealth disparities resulting from disproportionate political influences.<sup>109</sup> This is especially important given South Africa's history of silencing and marginalising the socially, economically or politically disadvantaged.<sup>110</sup> In this way, meaningful engagement gives effect to collective agency as it aids in eliminating the barriers prohibiting the excluded from participating and allows them to demand inclusion within existing and future social rights programmes.<sup>111</sup>

Thirdly, Ray has argued that participatory processes such as meaningful engagement can catalyse wider institutional reforms in line with idea of transformative constitutionalism.<sup>112</sup> This is of great importance in enforcing the more expansive obligations linked to the transformative vision of socio-economic rights.<sup>113</sup> Often, the underlying causes of socio-economic rights violations are systemic and require a series of structural reforms over time.<sup>114</sup> Participatory adjudication methods such as meaningful engagement have the potential to stimulate these types of reforms while mitigating concerns such as separation of powers as discussed above.

Meaningful engagement in socio-economic rights adjudication thus holds the potential to encourage extra-judicial participation by enabling civil society and community stakeholders to participate in the socio-economic rights enforcement process.<sup>115</sup> It also assists in circumventing "the polarising conflict of litigation"<sup>116</sup> and fosters the building of relationships between divided parties.<sup>117</sup>

It is important to note that the above-mentioned justifications are interlinked and interdependent. This interdependence is furthered by the fact that values such as dignity, equality and freedom should inform and give substance to all rights, including socio-economic rights as well as the processes by which they are realised.<sup>118</sup> The fact

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<sup>109</sup> *Doctors for Life International v The Speaker of the National Assembly* 2006 6 SA 416 para 115.

<sup>110</sup> Para 234.

<sup>111</sup> S Liebenberg "Participatory Justice in Social Rights Adjudication" (2018) 18 *Human Rights Law Review* 623 627. See also A Fung & EO Wright "Deepening Democracy: Innovations in Empowered Participatory Governance" (2001) 29 *Politics & Society* 5 26.

<sup>112</sup> B Ray "Engagement's Possibilities and Limits as a Socioeconomic Rights Remedy" (2010) 9 *Wash U Global Stud L Rev* 399 421.

<sup>113</sup> S Liebenberg "Participatory Approaches to Socio-Economic Rights Adjudication: Tentative Lessons from South African Evictions Law" (2014) 32 *Nordic Journal of Human Rights* 312 319.

<sup>114</sup> 320.

<sup>115</sup> B Ray *Engaging with Social Rights: Procedure, Participation and Democracy in South Africa's Second Wave* (2016) 306-316.

<sup>116</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 42.

<sup>117</sup> Para 43.

<sup>118</sup> See *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)* 2005 3 SA 280 (CC) para 21:

that participation plays a role in giving effect to human rights values such as dignity is intrinsically linked to justifications relating to enhancing the legitimacy and efficacy of decisions made.<sup>119</sup>

Given the above-mentioned justifications, it can be argued that meaningful engagement lies at the heart of participatory democracy, and that it holds great potential for enhancing the possibilities for participatory democracy.<sup>120</sup> It allows all the relevant stakeholders (such as *inter alia* those directly affected by a decision, the government and civil society organisations) to deliberate in order to achieve innovative solutions to the problem at hand.<sup>121</sup> While participation and meaningful engagement cannot replace the need for courts to interpret the substantive content of rights and the obligations linked thereto, it plays a crucial role in giving effect to these obligations by giving government insight into how proposed measures may impact various rights holders.

It is clear from the above discussion that meaningful engagement holds great potential in the realisation of socio-economic rights. However, in order to ensure that these justifications are being achieved and that meaningful engagement is not merely used as a tick box approach,<sup>122</sup> the quality of the engagement process needs to be investigated.<sup>123</sup>

## 2 4 Quality of meaningful engagement

It has been established that meaningful engagement offers numerous benefits that can assist in the realisation of socio-economic rights while also functioning as a judicial management tool and contributing to democratising the socio-economic rights enforcement process. However, mere participation can and must be distinguished

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“The values enunciated in section 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution.”

<sup>119</sup> S Liebenberg “Participatory Justice in Social Rights Adjudication” (2018) 18 *Human Rights Law Review* 623 626.

<sup>120</sup> L Chenwi “Democratizing the Socio-Economic Rights Enforcement Process” in Alvair-Garcia et al (eds) *Social and Economic Rights in Theory and Practice: Critical Inquiries* (2014) 178 184. B Ray “Proceduralisation’s Triumph and Engagement’s Promise in Socio-Economic Rights Litigation” (2011) 27 *South African Journal on Human Rights* 109 114.

<sup>121</sup> L Chenwi “Democratizing the Socio-Economic Rights Enforcement Process” in Alvair-Garcia et al (eds) *Social and Economic Rights in Theory and Practice: Critical Inquiries* (2014) 178 184.

<sup>122</sup> There is always the possibility that meaningful engagement will become just another administrative requirement that parties do not take seriously and merely go through the motions without actually engaging meaningfully.

<sup>123</sup> F Cleaver “Paradoxes of Participation: Questioning Participatory Approaches to Development” (1999) 11 *Journal of International Development* 597 598.

from engaging meaningfully.<sup>124</sup> Authors like Spano and Habermas have argued that successful participation is mainly dependent on the quality of the deliberations and decision-making process.<sup>125</sup> Participation can take on multiple forms and can serve a variety of interests.<sup>126</sup> It is therefore important to be able to understand these forms as well as the interests served in order to evaluate how effective the engagement process is in realising socio-economic rights. This section will explore various forms of participation as well as models of evaluating participation and attempt to import some of the insights and use them to derive principles and values that are important to ensure that engagement is meaningful. These principles and values will be used in the next chapter to analyse the quality of meaningful engagement in the South African constitutional jurisprudence in housing and education cases.

#### 2.4.1 Arnstein's ladder of participation

Arnstein has created a ladder of participation which depicts the various levels and types of participation with citizen power at the top of the ladder, tokenism in the middle and non-participation at the bottom of the ladder.<sup>127</sup> This ladder of participation can serve as evaluative criteria to assess the quality of meaningful engagement. Citizen power includes aspects such as citizen control, delegated power and partnership.<sup>128</sup> Tokenism consists of consultation, informing and placation.<sup>129</sup> Non-participation includes manipulation and therapy.<sup>130</sup> Arnstein's ladder of participation ultimately depicts a distribution of power from authorities to the participants, thus emphasising the importance of power dynamics in the engagement process.<sup>131</sup>

In terms of the bottom rung, manipulation and therapy are termed "non-participation" because they are extremely weak attempts to convince stakeholders that

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<sup>124</sup> L Chenwi "Democratizing the Socio-Economic Rights Enforcement Process" in Alvair-Garcia et al (eds) *Social and Economic Rights in Theory and Practice: Critical Inquiries* (2014) 178-182. See also J Gaventa & G Barrett "So What Difference Does It Make? Mapping the Outcomes of Citizen Engagement" *IDS Working Paper* 347 1-35.

<sup>125</sup> See J Habermas *The Inclusion of the Other* (1998) & SJ Spano *Public Dialogue and Participatory Democracy: The Cupertino Community Project* (2001) 27. See also A Fung & EO Wright "Deepening Democracy: Innovations in Empowered Participatory Governance" (2001) 29 *Politics & Society* 5 18 & 25.

<sup>126</sup> SC White "Depoliticising Development: The Uses and Abuses of Participation" (1996) 6 *Development in Practice* 6-6.

<sup>127</sup> SR Arnstein "A Ladder of Citizen Participation" (1969) 35 *JAIP* 216-217.

<sup>128</sup> 217.

<sup>129</sup> 217.

<sup>130</sup> 217.

<sup>131</sup> A Cornwall "Unpacking 'Participation': Models, Meanings and Practices" (2008) 43 *Community Development Journal* 269-271. Aspects of power dynamics will be explored in a later chapter.

they are participating. However, stakeholders are instead merely manipulated or educated to support the proposed plans and as such, no real participation occurs.

The middle rung of the ladder describes tokenistic participation and includes informing, consultation and placation.<sup>132</sup> Informing participants of their rights and the various options available to them is important as a first step but should not be a “one-way flow of information” and is thus still seen as a weaker form of participation.<sup>133</sup> Placation permits stakeholders to have a voice in the decision-making process but allows those in power (for example government) to have the final word on the legitimacy and feasibility of the decision.<sup>134</sup> It is thus a façade for engagement as participants are placated or appeased by the feeling that they have engaged when in actual fact, their opinions and interests will not be taken into account when making decisions.<sup>135</sup> Tokenism is considered to be participation which allows the disempowered to have a voice and to be heard.<sup>136</sup> Here, parties to the engagement process partake in the interest of inclusion but this form of participation is seen as tokenistic as it is often unclear whether their interests are, in fact, taken into account on a practical level. Thus, it must be ensured that participation is not used merely to legitimate pre-planned decisions as it can become extremely problematic when parties realise that their voices are not truly being taken into account.<sup>137</sup> This can cause them to become despondent and unwilling to participate as they notice a pattern of having their interests and concerns ignored.<sup>138</sup> This further results in participants losing faith in the process of engagement which in turn delegitimises future engagement attempts as well as the potential impact such attempts may have on the realisation of the socio-economic rights in question.<sup>139</sup> A large amount of post-apartheid participation politics seem to fall under this category where parties must endorse pre-designed programmes and are often manipulated into consensus.<sup>140</sup>

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<sup>132</sup> SR Arnstein “A Ladder of Citizen Participation” (1969) 35 *JAIP* 216 217.

<sup>133</sup> 219.

<sup>134</sup> 219.

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<sup>136</sup> SC White “Depoliticising Development: The Uses and Abuses of Participation” (1996) 6 *Development in Practice* 6 8.

<sup>137</sup> SR Arnstein “A Ladder of Citizen Participation” (1969) 35 *JAIP* 216 217.

<sup>138</sup> 217.

<sup>139</sup> SC White “Depoliticising Development: The Uses and Abuses of Participation” (1996) 6 *Development in Practice* 6 6.

<sup>140</sup> JJ Williams “Community Participation: Lessons from Post-Apartheid South Africa” (2006) 27 *Policy Studies* 197 197.

The top rung involves a transfer of power from those with control to the disempowered.<sup>141</sup> For example, with partnerships, power is redistributed through negotiations and decisions are made jointly.<sup>142</sup> Delegation allows for disempowered stakeholders to have delegated powers and citizen control relates to disempowered groups having full control of planning specific programmes or policies.<sup>143</sup>

#### 2 4 2 Depth and breadth of participation

An important aspect of meaningful engagement is ensuring that all the relevant stakeholders are included.<sup>144</sup> However, deciding which people and groups should be included and excluded can be an extremely complicated process. As such, another way to assess different types of participation is to examine its depth and breadth.<sup>145</sup> Participation at all stages of the process is considered to be deep participation.<sup>146</sup> The breadth - wide or narrow - relates to the range of people consulted.<sup>147</sup> For example, deep participation can remain narrow if only a small number of interest groups are included.<sup>148</sup> At the same time, participation can include a wide range of interest groups who are merely consulted, thus making it shallow participation.<sup>149</sup> This form of assessment depicts the intersections between inclusion and exclusion as well as the various degrees of participation.<sup>150</sup>

#### 2 4 3 Sturm's norms for participation

Sturm has provided various norms and characteristics against which the quality of public law remedies can be assessed.<sup>151</sup> These norms and characteristics can be of great value when assessing the quality of meaningful engagement as engagement is often embedded in participatory structural interdicts. The first aspect of her discussion

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<sup>141</sup> SR Arnstein "A Ladder of Citizen Participation" (1969) 35 *JAIP* 216 217 218.

<sup>142</sup> 225.

<sup>143</sup> 226-227.

<sup>144</sup> JR Parkins & RE Mitchell "Public Participation as Public Debate: A Deliberative Turn in Natural Resource Management" (2005) 18 *Society and Natural Resources* 529 532.

<sup>145</sup> A Cornwall "Unpacking 'Participation': Models, Meanings and Practices" (2008) 43 *Community Development Journal* 269 276.

<sup>146</sup> 276.

<sup>147</sup> 276.

<sup>148</sup> 276.

<sup>149</sup> 276.

<sup>150</sup> 276.

<sup>151</sup> SP Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1410.

deals with participation and will be used to derive another set of principles against which meaningful engagement can be evaluated.<sup>152</sup>

Firstly, Sturm holds that all the relevant stakeholders must participate in the process in order for it to be meaningful.<sup>153</sup> Secondly, she notes that the representatives of the various individuals or groups must be accountable and responsive to those that they represent.<sup>154</sup> Thirdly, Sturm states that the forms of engaging or interacting used in the deliberation process must stimulate involvement, cooperation, education, and consensus.<sup>155</sup> Fourthly, the deliberation process should mitigate bargaining and resource disparities.<sup>156</sup> Finally, the engagement process should respect government's integrity.<sup>157</sup>

#### 2.4.4 General principles

Although there are numerous ways to assess the quality of participation, it has been posited that four general principles are important to evaluate participatory approaches.<sup>158</sup> The first principle is that the deliberative process must achieve "democratic validity" by including those stakeholders who are affected and by taking into account their dignity.<sup>159</sup> The second principle concerns "dialogical validity" which is achieved if stakeholders, especially marginalised and excluded groups, are able to engage free from constraints and coercion.<sup>160</sup> The third principle relates to "process validity" which is achieved if there was adequate time to deliberate and if all the relevant information was provided in an accessible manner.<sup>161</sup> The final principle deals with "outcome validity" which is achieved if engagement is effective and meets the diverse needs of the stakeholders.<sup>162</sup> "Outcome validity" can also be linked to the realisation of the socio-economic rights in question. Thus, regardless of the depth of participation, if the socio-economic rights have not been realised, "outcome validity" would not have been achieved. In relation to this, various academics such as McLean

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<sup>152</sup> 1410.

<sup>153</sup> 1410.

<sup>154</sup> 1410.

<sup>155</sup> 1410.

<sup>156</sup> 1410.

<sup>157</sup> 1410.

<sup>158</sup>C Corus & JL Ozanne "Stakeholder Engagement: Building Participatory and Deliberative Spaces in Subsistence Markets" (2012) 65 *Journal of Business Research* 1728 1730.

<sup>159</sup> 1730.

<sup>160</sup> 1730.

<sup>161</sup> 1730.

<sup>162</sup> 1730.

have raised criticisms about courts using meaningful engagement as an excuse to avoid defining the normative goals and purposes of socio-economic rights by leaving the issues to be resolved by the parties through engagement.<sup>163</sup> In order for meaningful engagement to be effective in achieving “outcome validity” and in realising socio-economic rights, the above criticism needs to be guarded against and courts should ensure that effect is given to the substantive normative goals of these rights.

## 2 5 Conclusion

This chapter illustrated the value of participation in South Africa’s constitutional democracy. It also briefly highlighted the various legislative policy tools that give effect to participation in South Africa. Furthermore, it explored the recent increase in the use of participation as well as the justifications posited for utilisation of meaningful engagement in socio-economic rights cases. These justifications can be divided into three broad themes. The first theme relates to the ability of meaningful engagement to assist in the realisation of socio-economic rights. Meaningful engagement achieves this by including voices and increasing legitimacy; providing flexible and responsive solutions; and increasing the quality of decisions. The second theme features meaningful engagement as a judicial management tool in which meaningful engagement balances normative and procedural considerations; balances competing rights; addresses separation of powers and institutional competence concerns; and addresses polycentricity and judicial competence concerns. The third theme relates to meaningful engagement democratising the socio-economic rights enforcement process. Meaningful engagement assists with this by giving effect to human dignity providing a voice for marginalised and excluded groups and holding potential for wider institutional reform.

Furthermore, this chapter highlighted that the quality of meaningful engagement is important to achieve the justifications associated with engagement and it investigated the ways in which the quality of engagement can be assessed. A set of criteria for evaluating the quality of engagement was derived based on Arnstein’s ladder of participation; the depth and breadth of participation; Sturm’s norms for participation and general principles for participation. These criteria will be used in the next chapter to analyse how meaningful engagement was used in the socio-economic rights

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<sup>163</sup> K McLean "Meaningful Engagement: One Step Forward or Two Back? Some Thoughts on Joe Slovo" (2010) 3 *Constitutional Court Review* 223 239.

jurisprudence in light of the justifications discussed in this chapter. Additionally, an analysis of the nature and quality of engagement in these cases will be conducted.

## Chapter 3: Meaningful engagement in South African housing and education rights jurisprudence

### 3 1 Introduction

The previous chapter explored the role that participation and meaningful engagement have played in various areas of the law. More specifically, it explored the various functions that meaningful engagement serves in socio-economic rights realisation. It also highlighted how the quality of engagement can impact upon its efficacy in realising socio-economic rights. While various theoretical justifications for meaningful engagement have been postulated, there is a need to investigate whether or not the practical implementation of meaningful engagement lives up to the theoretical justifications for its role. This will be done by analysing and evaluating South Africa's meaningful engagement jurisprudence in terms of the principles derived in the previous chapter. This chapter will investigate the reasons that meaningful engagement was employed in each case as well as what the background, judgment, and aftermath of the judgment suggest regarding the quality of the engagement in the relevant case. The cases discussed in this chapter relate to Constitutional Court judgments on housing and education rights, as these are the areas in which the concept of meaningful engagement has mainly been deployed and developed. However, meaningful engagement has been ordered in other areas of the law for example in *Mamba v Minister of Social Development*<sup>1</sup> which dealt with the closure of refugee camps in Gauteng<sup>2</sup> as well as in *Beja v Premier of the Western Cape*<sup>3</sup> which related to unenclosed toilets.<sup>4</sup> In the context of housing cases, the need for parties to meaningfully engage was also referred to in *Melani v City of Johannesburg*,<sup>5</sup> which dealt with the upgrading of informal settlements,<sup>6</sup> and *Daniels v Scribante*,<sup>7</sup> which related to improvements to a farmworker's dwelling.<sup>8</sup> Furthermore, there are a range of cases brought under the Extension of Land Security Tenure Act 62 of 1997 ("ESTA")

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<sup>1</sup> [2008] ZAGPHC 255.

<sup>2</sup> Para 2.

<sup>3</sup> 2011 10 BCLR 1077 (WCC).

<sup>4</sup> Paras 9-21.

<sup>5</sup> 2016 5 SA 67 (GJ)

<sup>6</sup> Para 1.

<sup>7</sup> 2017 4 SA 341 (CC).

<sup>8</sup> Paras 4-10.

which also refer to the need meaningfully engage in these contexts.<sup>9</sup> In relation to education cases, while not expressly mentioning meaningful engagement, *Minister of Basic Education v Basic Education for All*,<sup>10</sup> had a range of implications for structural positive measures in education rights.<sup>11</sup> This case dealt with the government's failure to provide school learners with textbooks.<sup>12</sup> The Court granted a comprehensive declaratory order in which the government's obligation to provide learners with prescribed textbooks was confirmed.<sup>13</sup> In ensuring that government fulfils its duty in terms of this judgment, the various stakeholders involved (government officials, teachers and civil society organisations) would need to enter into discussions and engage meaningfully in order to develop a coordinated strategy to ensure textbook delivery. Similarly, *Madzodzo v Minister of Basic Education*,<sup>14</sup> dealt with a failure to provide school furniture and ordered the respondents to *inter alia* establish a "Furniture Task Team" and invite schools to submit their furniture needs to said task team.<sup>15</sup> These cases thus interpret the right to basic education as more than mere access to education. Instead, ancillaries to education such as textbook and furniture provision are deemed necessary to fulfil the right to education. In order to ensure that these ancillaries to education are properly provided to all students timeously, there will be a need for the various stakeholders involved to engage on the matters and ascertain the most effective strategies for implementation. This provides scope for meaningful engagement to take place to ensure that the right to education is properly realised. It is thus important to note that the discussions on the rationales behind engagement and the quality thereof extend beyond the cases discussed in this thesis. The first part of this chapter will focus on meaningful engagement in the housing context while the following section will discuss meaningful engagement in the education context.

### **3 2 The nature and quality of engagement in housing cases**

This part of the chapter will investigate the role that meaningful engagement played in the various housing cases. This will be done by exploring the nature of and rationale

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<sup>9</sup> See for example *Miradel Street Investments CC v Mnisi* [2017] ZALCC 13 & *Erasmus v Mtenje* [2018] ZALCC 12.

<sup>10</sup> 2016 4 SA 63 (SCA).

<sup>11</sup> For more information on these implications, see F Veriava "The Limpopo Textbook Litigation: A Case Study into the Possibilities of a Transformative Constitutionalism" (2016) 32 *SAJHR* 321-343.

<sup>12</sup> 2016 4 SA 63 (SCA) paras 11-17.

<sup>13</sup> Para 52.

<sup>14</sup> 2014 3 SA 441.

<sup>15</sup> Paras 1 and 4.

for engagement in each case. The quality of engagement in each case will also be investigated.

### 3 2 1 *Port Elizabeth Municipality v Various Occupiers* (“*Port Elizabeth Municipality*”)<sup>16</sup>

#### 3 2 1 1 Case overview

*Port Elizabeth Municipality* dealt with the eviction of 68 occupiers (including 23 children) from private property known as Lorraine (“Lorraine”) by the Municipality.<sup>17</sup> This application was based on section 6<sup>18</sup> of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (“PIE Act”).<sup>19</sup> The majority of the occupiers relocated to Lorraine after being evicted from other properties, and stayed there for periods ranging from two to eight years.<sup>20</sup> The occupiers were willing to relocate provided that reasonable notice was given and that alternative accommodation was made available.<sup>21</sup> The Municipality proposed Walmer Township<sup>22</sup> as a site of alternative accommodation, but this was rejected by the occupiers due to high crime rates, overcrowding and the fear of being once again vulnerable to eviction without any security of occupation.<sup>23</sup>

#### 3 2 1 2 Nature and rationale of engagement

##### 3 2 1 2 1 Balancing tool

Although meaningful engagement was not ordered in this case, *Port Elizabeth Municipality* provided the jurisprudential foundations for the introduction of the use of meaningful engagement in eviction cases.<sup>24</sup> Sachs J illustrated the Court’s new role in these type of cases, which is to maintain the balance between illegal evictions and unlawful occupation.<sup>25</sup> Furthermore, a balance also needs to be struck between the

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<sup>16</sup> 2005 1 SA 217 (CC)

<sup>17</sup> Para 1. For a detailed summary of the case, see L Chenwi “Meaningful Engagement’ in the Realisation of Socio-Economic Rights: The South African Experience” (2011) 26 *South African Public Law* 128 139-140.

<sup>18</sup> This section allows eviction proceedings to be instituted by organs of state against unlawful occupiers within said organ of state’s jurisdiction.

<sup>19</sup> 2005 1 SA 217 (CC) paras 1-2.

<sup>20</sup> Para 2.

<sup>21</sup> Para 2.

<sup>22</sup>At the time of the proceedings, it was unclear which government department owned this area of land.

<sup>23</sup> 2005 1 SA 217 (CC) para 2.

<sup>24</sup> See also *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 para 88 which discussed the concept of mediation in relation to identifying alternative land.

<sup>25</sup> 2005 1 SA 217 (CC) para 20.

right to housing and the right to property.<sup>26</sup> Balancing these rights involves taking into account all the interests and factors involved in each case. Sachs J highlighted the fact that when resolving these competing interests, a separation between the normative and procedural considerations cannot always be attained and thus the courts may need to manage the resolution thereof in innovative manners.<sup>27</sup> One of the ways that this can be achieved sustainably, according to Sachs J, is to require and encourage the parties to the case to meaningfully engage with each other.<sup>28</sup> This should be done with the aim of obtaining mutually acceptable solutions.<sup>29</sup> He further stated that:

“[w]herever possible, respectful face-to-face engagement or mediation through a third party should replace arms-length combat by intransigent opponents.”<sup>30</sup>

The need to balance competing interests is of particular importance given the nature of the competing interests in eviction cases and, as such, it will be unlikely for courts to find evictions just and equitable unless the parties have attempted to meaningfully engage<sup>31</sup>

### 3 2 1 2 2 Addressing informational deficits

When discussing the potential that mediation holds, Sachs J noted the need to take all the relevant interests and factors into account.<sup>32</sup> Thus it can be inferred that one of the reasons to use meaningful engagement is to ensure a more thorough and accurate way of obtaining the necessary information relating to, *inter alia*, the circumstances surrounding the occupation and the potential eviction and relocation. Meaningful engagement also mitigates informational deficits, relating to the abovementioned circumstances, experienced by judges in these types of case. For example, when obtaining suitable accommodation, it is important to consider the realities of the people affected.<sup>33</sup> Sachs J listed various factors which would need to be taken into account

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<sup>26</sup>Paras 19, 23 and 32. See also *Port Elizabeth Municipality v People’s Dialogue on Land and Shelter* 2000 2 SA 1074 (SECLD). Sachs J holds that courts should not attempt to establish a hierarchy of rights but rather, they should balance and reconcile the opposing claims.

<sup>27</sup> 2005 1 SA 217 (CC) para 39.

<sup>28</sup> Para 39.

<sup>29</sup> Para 39.

<sup>30</sup> Para 39.

<sup>31</sup> Para 43.

<sup>32</sup> Para 23.

<sup>33</sup> Para 29. Sachs J held that measures adopted relating to housing programmes cannot work only on a theoretical basis and that if they fail to respond to the needs of the most vulnerable, they will probably be considered unfair.

under section 26(3) of the Constitution.<sup>34</sup> These factors include *inter alia* the availability of alternative land in the case of private versus public land; the intended use for the land; the motivation for settling on the land; the degree of emergency or desperation of the potential evictees and whether or not there was plausible belief of consent to stay on the land.<sup>35</sup> These factors illustrate the extent of information required in these cases and that the type of information is often not at the disposal of the courts and would require various parties' inputs. This emphasises the need for not only meaningful engagement to remedy the court's informational deficit but also the involvement of various parties to the engagement process in order to ensure that all the relevant information is provided and that it is accurate.

### 3 2 1 2 3 Improving the quality of decisions made by the parties

Meaningful engagement can help circumvent the aggravating effects on parties which arise due to the combative nature of court cases.<sup>36</sup> Litigation usually results in parties focusing on their own rights and interests without considering the opposing parties' rights and interests and can often result in stalemates in which parties are unwilling to agree on solutions.<sup>37</sup> This can be avoided by allowing the parties to come together and by narrowing the areas of dispute between them through the engagement order thus ensuring that parties focus on the issues at hand and reach quality decisions on the specified matters.<sup>38</sup> Sachs J stated that mutual concessions and compromises should be facilitated and that the process can result in new solutions to stalemates that may not have been achieved in a court setting.<sup>39</sup> Meaningful engagement also has the potential to reduce litigation costs.<sup>40</sup> The money saved can then be used to implement solutions reached through engagement that foster respect for human dignity.<sup>41</sup>

### 3 2 1 2 4 Giving effect to human dignity

The judgment in *Port Elizabeth Municipality* underscored the importance of meaningful engagement in realising the dignity of potential evictees against the

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<sup>34</sup> Para 26.

<sup>35</sup> Para 26.

<sup>36</sup> Para 42.

<sup>37</sup> Para 42.

<sup>38</sup> Para 42.

<sup>39</sup> Para 42.

<sup>40</sup> See part 2 3 1 of chapter 2.

<sup>41</sup> 2005 1 SA 217 (CC) para 42.

backdrop of pre-democratic evictions conducted under the Prevention of Illegal Squatting Act 52 of 1951 (“PISA”) where illegal squatting was a criminal offence.<sup>42</sup> Sachs J highlighted the role that PISA played in dispossessing land from black people, thus creating residential segregation and spatial apartheid.<sup>43</sup> He also emphasised how these evictions impaired the dignity of black people.<sup>44</sup> It is against this backdrop that the PIE Act was adopted with the purpose of rectifying the above-mentioned abuses and ensuring that future evictions took place in line with the values of the Constitution.<sup>45</sup> Specifically, people facing evictions have to be treated with dignity and respect and what was previously a depersonalised process that ignored the circumstances of those being evicted, must now be replaced with humanised processes which emphasise fairness.<sup>46</sup>

Of utmost importance in these processes is ensuring that the participants must be treated with dignity and that the actual processes of meaningful engagement are dignified. This can be achieved by ensuring that the engagement process allows for individualised treatment of those being evicted and special consideration for vulnerable groups.<sup>47</sup> Allowing for individualised treatment allows those affected to reclaim their dignity and be part of decisions which affect their lives.<sup>48</sup> It also illustrates how important meaningful engagement is in a South African context given the history of division and hostility as it can allow parties to relate to each other in pragmatic and sensible ways, building up prospects of respectful good neighbourliness for the future.<sup>49</sup> This is of extreme importance in light of the “intensely emotional and historically charged problems” which are brought to the surface by PIE.<sup>50</sup>

### 3 2 1 2 5 Review standard versus remedy

Sachs J also discussed the dual purpose of mediation which can be used as a review standard and a remedy.<sup>51</sup> Engagement will be used as a review standard when considering whether meaningful engagement was implemented in order to determine

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<sup>42</sup> Para 8.

<sup>43</sup> Paras 9 and 10.

<sup>44</sup> Para 10.

<sup>45</sup> Para 11.

<sup>46</sup> Para 12.

<sup>47</sup> Para 13.

<sup>48</sup> See part 2 3 3 of chapter 2.

<sup>49</sup> 2005 1 SA 217 (CC) para 37.

<sup>50</sup> Para 43.

<sup>51</sup> Paras 39-43.

whether the eviction is reasonable, just and equitable in terms of section 6 of the PIE Act interpreted in light of section 26 of the Constitution.<sup>52</sup> It can also be invoked as a remedy by the Court when ordering the parties to meaningfully engage in appropriate circumstances.<sup>53</sup>

### 3 2 1 3 Quality of engagement prior to the case

#### 3 2 1 3 1 Tokenistic engagement

The engagement in *Port Elizabeth Municipality* occurred prior to the court case and was very minimal. It was evident that the Municipality did not attempt to engage with the occupiers, regardless of the fact that they were only 68 people.<sup>54</sup> No attempts were made to ascertain the individual circumstances or needs of each occupier.<sup>55</sup> The Municipality did not address the occupiers' suggestions of Seaview and Fairview as potentially suitable alternative land and instead stated that they did not have any duty to provide suitable alternative accommodation above and beyond the Housing Programme they developed.<sup>56</sup> They asserted that the occupiers should register for said programme, even though it could take years for houses to be provided to them.<sup>57</sup> Furthermore, the occupiers stayed on the land in question for years before any action was taken by the Municipality and only superficial attempts were made to determine the circumstances of the occupiers.<sup>58</sup> The Municipality also refused to negotiate with the occupiers unless an eviction order was granted.<sup>59</sup>

It can be concluded that the quality of engagement that took place prior to the case was weak and ineffective.<sup>60</sup> In terms of Arnstein's ladder, the engagement would be classified as tokenistic and, in some stages, it would fall under manipulation and therapy which are the bottom two rungs of the ladder as discussed in chapter 2.<sup>61</sup> These rungs are considered to be non-participative as the aim is to convince the stakeholders that the predetermined plans are the best without obtaining any input

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<sup>52</sup> Section 6 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

<sup>53</sup> 2005 1 SA 217 (CC) para 43.

<sup>54</sup> Para 52.

<sup>55</sup> Para 52.

<sup>56</sup> Para 54.

<sup>57</sup> Para 55.

<sup>58</sup> Para 57.

<sup>59</sup> Para 46.

<sup>60</sup> Para 46.

<sup>61</sup> See chapter 2 part 2 3 1. See also SR Arnstein "A Ladder of Citizen Participation" (1969) 35 *JAIP* 216 218-219.

from said stakeholders.<sup>62</sup> This is exactly what the Municipality attempted to do with the occupiers as discussed above.

The fact that there were only nine households and three single people involved in the case meant that individualised engagement was possible and that the circumstances of each person should have been taken into account instead of employing a blanket approach.<sup>63</sup> The Municipality contended that the occupiers did not apply for housing under their “comprehensive housing development programme” but an important question that seems to have been neglected is why the occupiers did not apply for formal housing.<sup>64</sup> The Municipality should have investigated or, at the very least, enquired into the reasons for not applying, especially given the disruption on their lives due to all the previous evictions. Another aspect which is unclear from the judgment is whether and how this new housing programme made use of meaningful engagement. The Municipality could have also investigated what solutions the landowners could contribute.<sup>65</sup>

The lack of significant attempts to engage meaningfully, especially given the fact that they were such a small group who were genuinely homeless, resulted in Sachs J finding that the eviction order was not just and equitable.<sup>66</sup> However, Sachs J emphasised that this did not mean that parties were not expected to attempt to find a solution acceptable to all.<sup>67</sup> Should this be impossible, the Municipality should have appointed “a skilled negotiator acceptable to all sides”.<sup>68</sup> Furthermore, Sachs J stressed the importance of mediation in future cases and held that courts should hesitate to conclude that an eviction order is just and equitable if meaningful engagement was not attempted.<sup>69</sup> Thus, mediation, which later developed specifically into meaningful engagement, was developed as a review standard for granting evictions.<sup>70</sup>

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<sup>62</sup> 218-219.

<sup>63</sup> 2005 1 SA 217 (CC) para 46.

<sup>64</sup> Para 3.

<sup>65</sup> Para 46.

<sup>66</sup> Para 59.

<sup>67</sup> Para 61.

<sup>68</sup> Para 61.

<sup>69</sup> Para 61.

<sup>70</sup> Para 61.

### 3 2 1 3 2 Failure to stimulate cooperation and outcome validity

The above discussion on the engagement that occurred prior to the case is also indicative of a failure to comply with Sturm's requirement that the engagement process must stimulate involvement, cooperation, education, and consensus.<sup>71</sup> This failure stemmed from the tokenistic engagement and the rejection of their responsibilities on the part of the Municipality as discussed above. The engagement prior to the case was also a rejection of the Court's requirement that engagement should occur in good faith. Furthermore, in terms of the general principles, "outcome validity"<sup>72</sup> was not met given the fact that the parties had to turn to the courts to resolve the dispute.

### 3 2 1 3 3 Timing of engagement and the importance of extra-judicial engagement

The fact that the occupiers in *Port Elizabeth Municipality* had moved onto the property in question after they were previously evicted from other properties<sup>73</sup> is indicative of the vicious cycle for those without secure land tenure, and also highlights the underlying structural problem relating to housing. Thus, there is a clear need for meaningful engagement to be implemented in a more systematic manner compared to the current *ad hoc* approach in which meaningful engagement only occurs once the situation has escalated to the point where an eviction is necessary. Had there been proper engagement from the first eviction, the need for court involvement could have potentially been avoided. This speaks to the importance of the timing of engagement as well as the potential of extra-judicial engagement. Meaningful engagement can thus play an important role in an extra-judicial context in relation to the formulation of housing programmes and housing emergency plans. This will go a long way to avoiding the recurrence of continuous housing and eviction disputes caused by lack of proper planning and engagement.

Sachs J noted that many of the advantages of engagement are lost if it only occurs once an appeal is heard.<sup>74</sup> These include the fact that it no longer saves money, or avoids the delays that come with court cases. Engagement undertaken at such a late stage also fails to circumvent the hostility of litigation.<sup>75</sup> Furthermore, Sachs J noted that there is an increased chance of success of engagement when the outcome of

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<sup>71</sup> SP Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1410.

<sup>72</sup> See chapter 2 part 2 3 4.

<sup>73</sup> 2005 1 SA 217 (CC) para 2.

<sup>74</sup> Para 47.

<sup>75</sup> Para 47.

litigation is uncertain.<sup>76</sup> In this case, the parties did not demonstrate support for engagement, and Sachs J found that the relationship between the parties was too damaged for mediation to be successful.<sup>77</sup> However, the lack of engagement was still used as a weighty factor as to whether or not it was just and equitable to order an eviction.<sup>78</sup>

### 3 2 2 Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg (“Olivia Road”)

#### 3 2 2 1 Case overview

*Olivia Road*<sup>79</sup> dealt with an attempted eviction of approximately 400 occupiers by the City of Johannesburg.<sup>80</sup> The basis for the eviction was that the buildings were unsafe and unhygienic and thus in contravention of various municipal health and safety regulations including, *inter alia*, the National Building Regulations and Standards Act 103 of 1977 (“NBRSA”).<sup>81</sup> An interim order was issued two days after the Constitutional Court heard the application for leave to appeal.<sup>82</sup> This interim order required the applicants and the City to meaningfully engage in order to resolve the issues and differences arising from the application.<sup>83</sup>

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<sup>76</sup> Para 47.

<sup>77</sup> Para 47.

<sup>78</sup> Para 47.

<sup>79</sup> 2008 3 SA 208 (CC).

<sup>80</sup> Para 1. For detailed analyses of this case, see: S Liebenberg “Engaging the Paradoxes of the Universal and Particular in Human Rights Adjudication: The Possibilities and Pitfalls of Meaningful Engagement” (2012) 12 *African Human Rights Law Journal* 1 14-17; B Ray “Engagement’s Possibilities and Limits as a Socio-Economic Rights Remedy” (2010) 9 *Washington University Global Studies Law Review* 399 401-404; L Chenwi “Meaningful Engagement’ in the Realisation of Socio-Economic Rights: The South African Experience” (2011) 26 *South African Public Law* 128 140-144 and A Pillay “Toward Effective Social and Economic Rights Adjudication: The Role of Meaningful Engagement” (2012) 10 *International Journal of Constitutional Law* 732 733-734.

<sup>81</sup> 2008 3 SA 208 (CC) para 1. These proceedings were part of the Inner City Regeneration Strategy which aimed to evict approximately 67 000 from properties in similar unsafe and unhygienic conditions.

<sup>82</sup> Para 5.

<sup>83</sup> Para 5. The parties were also required to report back to the court on the outcome of the engagement process, and this was taken into account by the Court in deciding the matter.

### 3 2 2 2 Nature and rationale of engagement

#### 3 2 2 2 1 Giving effect to the City's constitutional obligations and the reasonableness requirement

Yacoob J located the need for meaningful engagement within the context of the City's constitutional obligations towards the inhabitants of Johannesburg.<sup>84</sup> He also highlighted human dignity and the right to life as important to the eviction proceedings.<sup>85</sup> In light of the various constitutional obligations, Yacoob J stated that a City that evicts people without meaningfully engaging with them would be contravening these obligations.<sup>86</sup>

Yacoob J also related the need for meaningful engagement to the reasonableness requirement under section 26(2) of the Constitution.<sup>87</sup> In order for this requirement to be met, each step in the process of providing housing must be reasonable.<sup>88</sup> Section 26(2) also requires that the response of the municipality that engages with potential evictees must be reasonable.<sup>89</sup> What qualifies as a reasonable response will vary depending on the circumstances of the case.<sup>90</sup> The Constitution therefore obliges every municipality to engage meaningfully with people who would become homeless before it evicts them.

#### 3 2 2 2 2 Balancing normative and procedural considerations

Although an agreement was reached through engagement, there were various remaining issues in dispute. These issues related to *inter alia* the City's failure to formulate and implement a housing plan for other people in similar situations and the City's policy relating to "bad-buildings".<sup>91</sup> However, the Court declined to decide on these matters, barring one.<sup>92</sup> Instead, the Court chose to allow the parties to resolve the remaining issues through engagement, regardless of the occupier's allegations

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<sup>84</sup> Para 16. Yacoob J held that the City had an obligation to encourage community and community organisations' involvement in matters of local government as well as to fulfil the various objectives contained in the preamble to the Constitution. These included, *inter alia*, improving the quality of all citizen's lives, and respecting, protecting, promoting and fulfilling the rights contained in the Bill of Rights.

<sup>85</sup> Para 16.

<sup>86</sup> Para 16.

<sup>87</sup> Para 17. See also *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 para 82.

<sup>88</sup> 2008 3 SA 208 (CC) para 17.

<sup>89</sup> Para 18.

<sup>90</sup> Para 18.

<sup>91</sup> See para 31 for a list of the remaining issues in dispute.

<sup>92</sup> Para 48.

that previous engagement on the remaining matters had failed.<sup>93</sup> Thus there was a failure on the Court's part to engage with the substance of the constitutionality of the City's housing programme.<sup>94</sup> This speaks to the criticism that engagement is sometimes employed by the courts to avoid giving normative and substantive content to the rights at hand.<sup>95</sup>

### 3 2 2 3 Quality of engagement

#### 3 2 2 3 1 Court ordered engagement: The achievement of "outcome validity" and the need for good faith engagement

The criterion of "outcome validity" <sup>96</sup> was achieved in this case as the engagement process resulted in an agreement being reached by the applicants and the City, barring a few remaining issues which were left to the Court to decide.<sup>97</sup> The agreement concluded as a result of the engagement resolved two aspects of the dispute.<sup>98</sup> The first related to the interim measures that the City would take to improve the condition of the buildings and make them more safe and habitable.<sup>99</sup> The second related to the issue of the eviction application. This was resolved by the Municipality undertaking to provide alternative accommodation pending the provision of permanent housing.<sup>100</sup> The provision of the alternative housing was to be determined in consultation with the occupiers.<sup>101</sup> The nature and standard of the alternative accommodation was detailed in the agreement, as was the rental calculation.<sup>102</sup>

The occupiers asserted that adjudication was necessary on the matter of the City's failure to develop a housing plan for them and those who may be similarly evicted from unsafe buildings.<sup>103</sup> Furthermore, they contended that this lack of a proper plan undermined the engagement process on permanent housing.<sup>104</sup> The Court found it

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<sup>93</sup> K McLean "Meaningful Engagement: One Step Forward or Two Back? Some Thoughts on Joe Slovo" (2010) 3 *Constitutional Court Review* 223 238.

<sup>94</sup> 238.

<sup>95</sup> See chapter 2 part 2 3 4.

<sup>96</sup> See chapter 2 part 2 3 4.

<sup>97</sup> 2008 3 SA 208 (CC) para 6.

<sup>98</sup> Para 24.

<sup>99</sup> Paras 24-25. The interim measures included installing chemical toilets and fire extinguishers; cleaning and sanitising the buildings; delivering of refuse bags and closing problematic lift shafts.

<sup>100</sup> Paras 24 and 26.

<sup>101</sup> Para 26.

<sup>102</sup> Para 26.

<sup>103</sup> Para 32.

<sup>104</sup> Para 33.

unnecessary to adjudicate on the issue relating to the lack of a housing plan given that the City had undertaken to develop solutions in relation to permanent housing in collaboration with those affected.<sup>105</sup> Yacoob J held that the contention that the negotiations were tarnished by a lack of concrete housing plans was an insufficient reason and that it can be assumed that engagement would continue in good faith.<sup>106</sup> According to him, the agreement reached through engagement on the temporary accommodation was indicative of the fact that the City would engage meaningfully when the situation called for it in the future.<sup>107</sup> He also stated that a general evaluation of the current housing plan would be premature and undesirable considering it would result in an abstract review.<sup>108</sup> Instead, the High Court should be approached with specific allegations should any issues arise in the future.<sup>109</sup>

Furthermore, in terms of quality, Yacoob J held that meaningful engagement would only be effective if all parties acted reasonably and in good faith.<sup>110</sup> Thus those who would be affected by an eviction order should not aggravate the engagement process with unreasonable demands.<sup>111</sup> However, they should also not be treated as a disempowered mass by the Municipality.<sup>112</sup> Instead, according to Yacoob J, they should be encouraged to be pro-active in the engagement process. In this regard, Yacoob J highlighted the importance of civil society organisations in assisting and facilitating the engagement process.<sup>113</sup> The requirement that those affected by the eviction should be proactive indicates that, in terms of Arnstein's ladder of participation, engagement should entail more than the first two rungs of the ladder.<sup>114</sup>

Muller holds that meaningful engagement best fits under the partnership rung of Arnstein's ladder.<sup>115</sup> He based this on the Constitutional Court's description of meaningful engagement in the various cases coupled with the Housing Act, which envisions a dialogic relationship between the stakeholders involved in housing

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<sup>105</sup> Para 34.

<sup>106</sup> Para 34.

<sup>107</sup> Para 34.

<sup>108</sup> Para 35.

<sup>109</sup> Para 35.

<sup>110</sup> Para 20.

<sup>111</sup> Para 20.

<sup>112</sup> Para 20.

<sup>113</sup> Para 20.

<sup>114</sup> SR Arnstein "A Ladder of Citizen Participation" (1969) 35 *JAIP* 216 217. See also chapter 2 part 2 3 1 for a discussion on Arnstein's ladder.

<sup>115</sup> G Muller "Conceptualising 'Meaningful Engagement' as a Deliberative Democratic Partnership" (2011) 22 *Stell LR* 742 755.

development.<sup>116</sup> The partnership rung can also assist with unequal bargaining power as it envisages a redistribution of power through negotiations between those with the power and those without.<sup>117</sup> For example, in the case of evictions, the power would be distributed from the Municipality to the potential evictees through the engagement process.

Yacoob J also held that secrecy is damaging to the engagement process and that the process should be based on the constitutional values of openness and transparency.<sup>118</sup> The successful outcome of this case can also be attributed to the fact that the parties were willing to engage in good faith and that the residents were well-represented by competent lawyers.<sup>119</sup>

This case has been seen as the model example for successful meaningful engagement.<sup>120</sup> However, concerns have been raised about the engagement process by the lawyer involved in the case. These concerns will be delineated in the section below. The Court endorsed the agreement because it constituted a reasonable attempt at engagement.<sup>121</sup> Yacoob J commended the City for becoming more humane as the case progressed as well as for the engagement process that occurred which resulted in the agreement.<sup>122</sup> This was the first case in which the Court approved an agreement and where the Court's approval was required before the agreement could come into effect.<sup>123</sup> The parties also reported back to the Court in compliance with said order.<sup>124</sup> However, Yacoob J noted that court approval of similar agreements would not always be appropriate and that it is the municipality's responsibility to ensure that the engagement process is reasonable.<sup>125</sup>

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<sup>116</sup> 753-755.

<sup>117</sup> SR Arnstein "A Ladder of Citizen Participation" (1969) 35 *JAIP* 216 216.

<sup>118</sup> 2008 3 SA 208 (CC) para 21.

<sup>119</sup> L Chenwi "'Meaningful Engagement' in the Realisation of Socio-Economic Rights: The South African Experience" (2011) 26 *South African Public Law* 128 144.

<sup>120</sup> B Ray "Engagement's Possibilities and Limits as a Socio-Economic Rights Remedy" (2010) 9 *Washington University Global Studies Law Review* 399 403.

<sup>121</sup> 2008 3 SA 208 (CC) para 28.

<sup>122</sup> Para 28.

<sup>123</sup> Para 29.

<sup>124</sup> Para 29.

<sup>125</sup> Para 30.

### 3 2 2 3 2 Implementation and post-implementation: Tokenistic engagement

Although *Olivia Road* has been seen as an example of successful meaningful engagement given the fact that an agreement was reached, Wilson<sup>126</sup> has highlighted some of the problems related to the implementation of said agreement.<sup>127</sup> These problems stemmed from a six month delay in the implementation of the agreement.<sup>128</sup> The temporary accommodation was supposed to be provided to the occupiers by February 2008.<sup>129</sup> However, this only materialised in mid-August 2008.<sup>130</sup> During this time, the City did not engage meaningfully with the occupiers regarding the delay.<sup>131</sup> Further problems arose after the temporary accommodation was provided as the City failed to implement crucial aspects of the agreement.<sup>132</sup> These aspects related to failures to install a dwelling partitioning and maintain the accommodation as well as attempts by the City to back-date rentals.<sup>133</sup> These issues caused further proceedings to be instituted in the High Court.<sup>134</sup> There were also no attempts on the City's part to engage on the matter of permanent housing.<sup>135</sup> This is of extreme concern given that the Court found no reason to believe that the City would not engage reasonably in the future.<sup>136</sup>

### 3 2 2 3 3 Unequal bargaining power

Yacoob J highlighted the importance of recognising the vulnerabilities of those affected in order for engagement to be effective.<sup>137</sup> He held that those affected may be so vulnerable that they are unable to comprehend how important meaningful engagement is, and thus refuse to partake.<sup>138</sup> However, municipalities would still be

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<sup>126</sup> Stuart Wilson of the Socio-Economic Rights Institute of South Africa was one of the lawyers involved in the *Olivia Road* case.

<sup>127</sup> S Wilson "Planning for Inclusion in South Africa: The State's Duty to Prevent Homelessness and the Potential of "Meaningful Engagement" (2011) 22 *Urban Forum* 265 278.

<sup>128</sup> 278. Various reasons have been posited for these delays, one of which was tardy implementation on the City's part.

<sup>129</sup> 278.

<sup>130</sup> 279.

<sup>131</sup> 278.

<sup>132</sup> 280.

<sup>133</sup> 280.

<sup>134</sup> 280.

<sup>135</sup> 280.

<sup>136</sup> 2008 3 SA 208 (CC) para 35.

<sup>137</sup> Para 15.

<sup>138</sup> Para 15.

obliged to reasonably attempt to meaningfully engage with them.<sup>139</sup> This speaks to the need to ensure “dialogical validity” as discussed in Chapter 2.<sup>140</sup>

Sachs J also highlighted the role that civil society organisations can play in assisting with engagement with vulnerable groups and held that the process of engagement should be managed by these types of organisations who are able to navigate the sensitive terrain associated with the conflicts in these cases.<sup>141</sup>

### 3 2 2 3 4 Timing of engagement and the importance of extra-judicial engagement

Engagement was highly effective in reaching an agreement in this case even though it occurred at an extremely late stage in the proceedings. Yacoob J held that the reason for the success of this case was the fact that the engagement and report back were ordered prior to the Court deciding on the matter and while proceedings were still pending.<sup>142</sup>

Yacoob J highlighted the fact that the City did not make any effort to engage with the applicants prior to bringing the matter to court.<sup>143</sup> He noted that the City must have been cognisant of the fact that the eviction would lead to the homelessness of the applicants.<sup>144</sup> As such, meaningful engagement should have taken place with the applicants, both individually and collectively.<sup>145</sup>

He also emphasised that courts must take into account whether reasonable attempts were made by the Municipality to meaningfully engage with those being evicted before granting an eviction order.<sup>146</sup> Thus the Municipality is required to have complete and accurate records of the steps that it has taken to engage meaningfully with those affected.<sup>147</sup> A lack of engagement or any reasonable attempts at engagement would result in the court taking a negative view on the municipality and be a significant factor against granting an eviction order.<sup>148</sup>

He emphasised the importance of extra-judicial engagement by drawing on *Grootboom* in which the Court held that the Municipality had a duty to engage with the

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<sup>139</sup> Para 15.

<sup>140</sup> See chapter 2 Part 2 3 4.

<sup>141</sup> 2008 3 SA 208 (CC) para 15.

<sup>142</sup> Para 30. See also B Ray “Engagement’s Possibilities and Limits as a Socio-Economic Rights Remedy” (2010) 9 *Washington University Global Studies Law Review* 399 404.

<sup>143</sup> 2008 3 SA 208 (CC) para 10.

<sup>144</sup> Para 10.

<sup>145</sup> Para 10.

<sup>146</sup> Para 21.

<sup>147</sup> Para 21.

<sup>148</sup> Para 21.

occupiers in that case once it had become aware of the situation.<sup>149</sup> He further held that the Municipality was obliged to investigate each occupier's circumstances well in advance, before there was a need to approach the courts.<sup>150</sup> However, the Municipality failed to do this, resulting in the settlement expanding rapidly.<sup>151</sup> He stressed the need for meaningful engagement to occur prior to litigation, unless the matter is urgent or it is not reasonable to do so.<sup>152</sup>

Furthermore, Yacoob J addressed the concern that meaningful engagement would be impractical in all cases similar to *Olivia Road*, given the fact that approximately 67 000 people in Johannesburg lived in unsafe buildings at the time and would also be subject to evictions.<sup>153</sup> He disagreed, and held to the contrary, that the City's Regeneration Strategy, adopted in 2003, should have included meaningful engagement so that it could have taken place from the moment the strategy was implemented.<sup>154</sup> Had this been done, the number of people who needed to be evicted and their circumstances would have been clearer and thus more appropriate action could have been taken.<sup>155</sup> Yacoob J held further that the bigger the group of people to potentially be evicted, the more important it is to have structured, consistent and careful engagement.<sup>156</sup> Thus, as highlighted in the discussions on *Port Elizabeth Municipality*, *ad hoc* engagement is not sufficient unless it is a small municipality with minimal evictions every year.<sup>157</sup> This once again speaks to the need for extra-judicial engagement. However, it also raises the question as to how state authorities should design effective engagement processes with large groups so as to ensure that all voices are heard, without placing unnecessary and lengthy time constraints on the process of housing delivery. These issues will be addressed in the next chapter.

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<sup>149</sup> Para 11. See also *Government of the Republic of South Africa and Others v Grootboom* 2001 1 SA 46 (CC) para 87.

<sup>150</sup> 2008 3 SA 208 (CC) para 11.

<sup>151</sup> Para 11.

<sup>152</sup> Para 30.

<sup>153</sup> Para 19.

<sup>154</sup> Para 19.

<sup>155</sup> Para 19.

<sup>156</sup> Para 19.

<sup>157</sup> Para 19.

### 3 2 3 The *Joe Slovo* cases

#### 3 2 3 1 Case overview

*Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* (“*Joe Slovo 1*”)<sup>158</sup> dealt with an application by the residents of Joe Slovo (“the applicants”)<sup>159</sup> to the Constitutional Court for direct leave to appeal an eviction order that was granted by the Western Cape High Court.<sup>160</sup> Five judgments were prepared in this case, all of which supported the final order in which the eviction was granted.<sup>161</sup> The legal questions in this case related to, firstly, whether a case for eviction was made by the respondents<sup>162</sup> in terms of the PIE Act.<sup>163</sup> Secondly, the question of whether the respondents acted reasonably<sup>164</sup> under section 26 of the Constitution was raised.<sup>165</sup> The eviction was sought in order to develop better quality housing<sup>166</sup> in the Joe Slovo Informal Settlement Area (“Joe Slovo”).<sup>167</sup> To achieve this, approximately 20 000 residents (4386 households) needed to be relocated from Joe Slovo in order to make way for the N2 Gateway project (“N2 project”) which was part of the *Breaking New Ground* (“BNG”) policy.<sup>168</sup> The applicants were ordered to vacate Joe Slovo on the

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<sup>158</sup> 2010 3 SA 454 (CC).

<sup>159</sup> The applicants were represented by two committees. The Community Law Centre of the University of the Western Cape and the Centre on Housing Rights and Evictions were admitted as *amici curiae*.

<sup>160</sup> 2010 3 SA 454 (CC) para 2. For a detailed case analysis, see S Liebenberg “Engaging the Paradoxes of the Universal and Particular in Human Rights Adjudication: The Possibilities and Pitfalls of Meaningful Engagement” (2012) 12 *African Human Rights Law Journal* 1 21-22 and B Ray “Engagement’s Possibilities and Limits as a Socio-Economic Rights Remedy” (2010) 9 *Washington University Global Studies Law Review* 399 408-410.

<sup>161</sup> 2010 3 SA 454 (CC) paras 1 and 5. Each judgment sets out the various reasons for which the final order should be granted. It must be noted that this eviction order differs to the one granted by the High Court. Firstly, the Court ordered the respondents to ensure that 70% of the new houses built at Joe Slovo are allocated to the current residents or those who resided there but moved elsewhere upon commencement of the N2 Gateway Housing Project. Secondly, the order is highly detailed and specific regarding the quality of temporary accommodation to be provided after eviction. Thirdly, the order mandates the parties to partake in an ongoing process of engagement with regard to the relocation process.

<sup>162</sup> The respondents were namely Thubelisha Homes (who were in charge of developing the new housing), the Minister for Housing and the Minister of Local Government and Housing, Western Cape.

<sup>163</sup> 2010 3 SA 454 (CC) paras 3, 125 and 176. The PIE inquiry revolved around whether the residents were “unlawful occupiers” under PIE at the time the eviction proceedings were launched, and whether it was just and equitable to grant an eviction order. All five judgments accepted, although for different reasons, that the applicants were “unlawful occupiers” under PIE and that the respondents acted reasonably in seeking the eviction.

<sup>164</sup> 2010 3 SA 454 (CC) para 9.

<sup>165</sup> Para 3.

<sup>166</sup> See para 24. The living conditions prior to the new development were described as overcrowded, unhygienic, unsafe and overall deplorable, despite the improvements made by the City. The materials used to build the makeshift accommodation were also described as unsuitable and were a fire hazard.

<sup>167</sup> Paras 8 and 125.

<sup>168</sup> Paras 8, 25, 156 and 183. BNG is a national policy aimed at eliminating informal settlements across South Africa.

condition that temporary relocation units (“TRU’s”) were provided to them.<sup>169</sup> Furthermore, the applicants and respondents were ordered to meaningfully engage through their representatives with the aim of reaching an agreement on the various remaining issues.<sup>170</sup> The respondents were also ordered to engage with all affected residents in relation to each relocation that had to occur.<sup>171</sup> This engagement had to occur at least one week prior to the relocation schedule and had to include various issues, including the names and relevant circumstances of those affected by the relocation; the exact TRU allocated to those relocated; the need for transport and the prospects of permanent housing allocations.<sup>172</sup> The parties were also ordered to report back to the Court on the implementation of the order as well as the prospects of allocation of permanent housing to those affected.<sup>173</sup> Furthermore, the respondents undertook to build at least 1500 *BNG* houses and were ordered by the Court to report back to the parties and the Court within 14 days if this number was likely to change.<sup>174</sup>

A subsequent case, *Residents of Joe Slovo Community, Western Cape v Thebelisha Homes and Others (“Joe Slovo 2”)*<sup>175</sup> dealt with an application to have the eviction and supervisory order in *Joe Slovo 1*<sup>176</sup> discharged on the basis that circumstances had changed. This case was heard 21 months after the initial order was granted.<sup>177</sup> It is important to note that, according to the order in *Joe Slovo 1*, the relocation order was to begin two months after the supervised eviction was handed down and was to end approximately ten months later.<sup>178</sup> Various extensions were requested and granted by the parties as they were unable to reach an agreement on the implementation of the eviction order by the dates stipulated in the initial court order.<sup>179</sup> The Court discharged the order made in *Joe Slovo 1*, barring one paragraph which related to costs.<sup>180</sup>

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<sup>169</sup> Para 7.

<sup>170</sup> Paras 7 and 139. These issues included the commencement date of the relocation; the timetable for the relocation process and any other matter which the parties deemed relevant to engage upon. In the event of any agreement being reached from the engagement process, it had to be placed before the Court for consideration as to whether it was appropriate.

<sup>171</sup> Para 7.

<sup>172</sup> Para 7.

<sup>173</sup> Para 7.

<sup>174</sup> Para 7.

<sup>175</sup> 2011 7 BCLR 723 (CC).

<sup>176</sup> 2010 3 SA 454 (CC).

<sup>177</sup> 2011 7 BCLR 723 (CC).

<sup>178</sup> Para 4.

<sup>179</sup> Para 5. For more information on the extensions and reports, see paras 5-15.

<sup>180</sup> Para 37. This was based on the large number of people affected; the fact that the government failed to execute the eviction order under the first judgment; and that there did not seem to be any intention

### 3 2 3 2 Nature and rationale of engagement

#### 3 2 3 2 1 Giving effect to dignity and responding to the calls for engagement

In a similar vein to his judgment in *Olivia Road*, Yacoob J in *Joe Slovo 1* highlighted the City's constitutional obligations towards the applicants as well as other vulnerable groups in similar situations. Specifically, he highlighted the City's obligation to ensure that vulnerable groups are treated with care, concern and dignity.<sup>181</sup>

He also discussed the *amici curiae*'s arguments that there was insufficient meaningful engagement; that an *in situ* development was possible; and that the provision of housing should integrate the human factor and not just concern itself with "bricks and mortar".<sup>182</sup> However, he came to the conclusion that the above-mentioned considerations were not enough to preclude an eviction order given that the project was so extensive and already underway, and that over 1000 people had already been relocated.<sup>183</sup> Furthermore, the order for meaningful engagement in relation to the temporary relocation of the Joe Slovo community was said to alleviate the allegations of lack of proper consultation prior to the case.<sup>184</sup> Thus, Yacoob J concluded that, provided the eviction and relocation took cognisance of the dignity and safety of the residents, the eviction and relocation would be just and equitable.<sup>185</sup>

Ngcobo J also held that the need for meaningful engagement stems from the requirement of treating the residents with respect, care and dignity.<sup>186</sup> More specifically in this case, engagement was important because of the number of people that needed to be relocated.<sup>187</sup> Thus, the City was obliged to meaningfully engage with the residents on an individual and collective level in order to afford them dignity.<sup>188</sup>

Ngcobo J also held that engagement must be individualised which requires the parties to put aside their differences and concentrate on common ground, namely, the provision of housing to those living in desperate conditions.<sup>189</sup> He held that in order to

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on any of the parties' part to continue with it. The order also could not be fulfilled as mentioned above and the circumstances which resulted in the eviction order no longer existed.

<sup>181</sup> 2010 3 SA 454 (CC) para 76. See also *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) paras 29 and 39 and *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) paras 44 and 82.

<sup>182</sup> 2010 3 SA 454 (CC) para 112.

<sup>183</sup> Paras 112 and 259.

<sup>184</sup> Para 112.

<sup>185</sup> Paras 114 and 119.

<sup>186</sup> Para 238.

<sup>187</sup> Para 238.

<sup>188</sup> Para 238.

<sup>189</sup> Para 261.

achieve this, the residents had to be treated with dignity and respect and their concerns had to be heard and accommodated as far as possible.<sup>190</sup>

Sachs J confirmed that the City had a wide discretion with regard to managing housing programmes, as long as it was reasonable as per the City's housing objectives.<sup>191</sup> However, he held that the City still needed to ensure that those affected were treated fairly and with dignity by affording them opportunities to participate in the meaningful engagement process.<sup>192</sup> Sachs J also echoed the sentiments of the Court in *Port Elizabeth Municipality and Grootboom* regarding the need for government obligations to be fulfilled in a manner that gives effect to the dignity and humanity of those affected.<sup>193</sup> Furthermore, he stated that the City cannot focus merely on developing these housing programmes. Instead, their obligations extended to ensuring that their conduct and programmes respect those affected.<sup>194</sup>

### 3 2 3 2 2 Addressing informational deficits

Engagement also allowed the government to obtain information about the needs and concerns of each household in order to better fulfil their obligations towards them.<sup>195</sup> Ngcobo J held that meaningful engagement between the government and the residents was central to the implementation of the relocation.<sup>196</sup> He referred to General Comment No. 7 of the United Nations Committee on Economic, Social and Cultural Rights ("CESCR"),<sup>197</sup> which sets out the requirements which must be fulfilled before evictions can occur.<sup>198</sup> These requirements include, *inter alia*, the need for genuine consultation with those affected; the provision of adequate and reasonable notice prior to the date of eviction and the provision of information relevant to the eviction of those affected.<sup>199</sup> Ngcobo J held that this is a useful guide for determining the City's obligations during evictions.<sup>200</sup> He also held that the "genuine consultation" requirement of the CESCR is in line with the meaningful engagement required by

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<sup>190</sup> Para 261.

<sup>191</sup> Para 403.

<sup>192</sup> Para 403.

<sup>193</sup> Para 406.

<sup>194</sup> Para 406.

<sup>195</sup> Para 238.

<sup>196</sup> Para 238.

<sup>197</sup> UN Committee on Economic, Social and Cultural Rights (CESCR) "General Comment No. 7" on "The Right to Adequate Housing (Art.11.1): Forced Evictions" 20 May 1997, E/1998/22.

<sup>198</sup> 2010 3 SA 454 (CC) para 236.

<sup>199</sup> Para 236.

<sup>200</sup> Para 237.

South African courts.<sup>201</sup> Furthermore, this requirement is also in line with the Court's jurisprudence on the PIE Act.<sup>202</sup> Therefore, he emphasised the need to follow General Comment No. 7 in cases such as this one.<sup>203</sup>

### 3 2 3 2 3 Balancing competing interests and determining reasonableness

Sachs J also alluded to the need to reconcile competing rights and interests as well as the procedural and normative issues.<sup>204</sup> In doing so, he made reference to *Port Elizabeth Municipality* and *Olivia Road* in which the interrelation between procedure and substance was noted and expanded to culminate into the introduction of meaningful engagement as one of the prerequisites for just and equitable evictions.<sup>205</sup> Sachs J held that meaningful engagement assists with balancing the issues mentioned above by allowing the parties to obtain practical solutions based on their needs and interests. The Court's role is to define the scope of what constitutes as just and equitable.<sup>206</sup> This implies that, when considering evictions, courts should apply the reasonableness enquiry as well as determine whether the obligation to engage meaningfully was fulfilled by the parties.<sup>207</sup>

Yacoob J found the eviction to be reasonable and held that the City had reasonably engaged with the residents thus rendering the policy, as a whole, reasonable.<sup>208</sup> However, Moseneke DCJ, O'Regan and Sachs JJ held that there had been insufficient engagement but nevertheless concurred that the eviction order should be granted.<sup>209</sup> The reasoning behind this included the fact that *inter alia* it was a pilot project and it is unsurprising that the implementation thereof was subject to problems; some engagement was present albeit incoherent and incomprehensive as well as misleading at some stages; the thousands of other households also affected by the plan needed to be considered especially given the fact that they had already cooperated; and the eviction order remedied the failure of the City to engage by ordering them to engage with the residents on the relocation process.<sup>210</sup> In this regard,

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<sup>201</sup> Para 237.

<sup>202</sup> Para 237.

<sup>203</sup> Para 237.

<sup>204</sup> Para 334.

<sup>205</sup> Paras 334 and 338.

<sup>206</sup> Para 338.

<sup>207</sup> Para 338.

<sup>208</sup> 2010 3 SA 454 (CC) para 17.

<sup>209</sup> Paras 167, 301 and 384.

<sup>210</sup> Paras 202-203.

the Court failed to properly assess the reasonableness of state action and used meaningful engagement as a justification for this failure.<sup>211</sup> The Court also demonstrated an unnecessary level of deference in relation to the Municipality's insistence that an eviction was necessary as opposed to an *in situ* upgrade.<sup>212</sup>

### 3 2 3 2 4 Providing a voice for marginalised and excluded groups

Sachs J also highlighted the role of meaningful engagement in ensuring that citizens who are subject to marginalisation and exclusion can take part in processes that affect them. This allows them to contribute to the solutions as opposed to having someone else speak for them.<sup>213</sup>

### 3 2 3 3 Quality of engagement

#### 3 2 3 3 1 Tokenistic engagement

The quality of engagement in *Joe Slovo 1* was weak as the residents were merely informed of pre-planned decisions and the state did not keep up their end of the bargain with regard to many of the promises made. Moseneke DCJ emphasised the need to engage meaningfully as opposed to merely imposing decisions that were already made on the residents.<sup>214</sup> Thubelisha also became more aggressive later in the project in their attempts to convince the residents to relocate.<sup>215</sup> However, the applicants were unwilling to move due to the reports from residents who had voluntarily relocated and complained of lack of access to transport, high crime levels and lack of employment opportunities.<sup>216</sup>

The failure of engagement coupled with the broken promises<sup>217</sup> relating to the cost and allocation of housing was what resulted in the relationship between the residents and the government deteriorating. This was also a failure of a key component of the *BNG* programme, namely, to move "towards a reinvigorated contract with the people and partner organisations for the achievement of sustainable human settlements".<sup>218</sup>

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<sup>211</sup> K McLean "Meaningful Engagement: One Step Forward or Two Back? Some Thoughts on Joe Slovo" (2010) 3 *Constitutional Court Review* 223 228.

<sup>212</sup> 228.

<sup>213</sup> 2010 3 SA 454 (CC) para 408.

<sup>214</sup> Para 166. See also *Mnisi and Others v City of Johannesburg* [2009] ZAGPJHC 55 para 21 where it was held that a profound difference exists between merely informing the community of pre-planned decisions versus meaningfully engaging with them to obtain solutions upon which they agree.

<sup>215</sup> 2010 3 SA 454 (CC) para 222.

<sup>216</sup> Para 222.

<sup>217</sup> Paras 31-33.

<sup>218</sup> Paras 167 and 378.

Sachs J noted that these major failures were the fault of the government.<sup>219</sup> Furthermore, he held that a top-down and unilateral approach to engagement was often used which involved informing residents about decisions that had already been taken as opposed to actually involving them as equals in the decision-making process.<sup>220</sup> Liebenberg has also criticised this top-down approach and argued that it was a departure from the type of engagement envisioned by the Court in *Olivia Road*.<sup>221</sup> The type of participation which took place and gave rise to the circumstances in *Joe Slovo 1* would fall under the tokenism rung of Arnstein's ladder in which the engagement does not allow the parties to engage as equals but is merely tokenistic in the sense that a façade of engagement is created without actually allowing the residents to have an impact on the decisions taken.

However, it is important to note that Ngcobo J emphasised the fact that meaningful engagement does not equate to the parties agreeing on each and every issue, and that, while decisions should be informed by the residents' concerns, the final decision lies with the government.<sup>222</sup> Thus, while engagement should involve more than tokenistic actions, it does not necessarily fall into the top two rungs of Arnstein's ladder which deals with citizen control and delegated power as discussed in chapter 2.<sup>223</sup> Instead, the process necessitates good faith and reasonableness as well as a readiness to listen, accommodate and understand from all parties.<sup>224</sup> The aim is thus to find mutually acceptable solutions to the conflict.<sup>225</sup>

The outcome of *Joe Slovo 2* suggests that, had engagement been conducted in good faith from the beginning, it could have circumvented the need for litigation. As previously mentioned, various reports were filed by the City in which extensions were requested given the fact that no agreement was reached.<sup>226</sup> One of the concerning portions of the reports was the fact that the Member of Executive Council for Housing and Local Government in the Western Cape ("MEC") requested a postponement of

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<sup>219</sup> Para 378.

<sup>220</sup> Paras 378 and 384.

<sup>221</sup> S Liebenberg "Engaging the Paradoxes of the Universal and Particular in Human Rights Adjudication: The Possibilities and Pitfalls of Meaningful Engagement" (2012) 12 *African Human Rights Law Journal* 1 23.

<sup>222</sup> 2010 3 SA 454 (CC) para 244.

<sup>223</sup> See chapter 2 part 2 3 1.

<sup>224</sup> 2010 3 SA 454 (CC) para 244.

<sup>225</sup> Para 244.

<sup>226</sup> 2011 7 BCLR 723 (CC) para 5. For more information on the extensions and reports, see paras 5-15.

the eviction order as he was having doubts as to whether it was necessary to relocate the residents at all and thus whether the eviction order was appropriate.<sup>227</sup> This was linked to concerns relating to the cost and timing of the eviction.<sup>228</sup> Ironically, concerns were also raised by the City in the reports with regard to the financial and social impact of an eviction on the Joe Slovo residents compared to an *in situ* upgrade.<sup>229</sup> They stated that an *in situ* upgrade had been suggested and the idea was received positively by the residents.<sup>230</sup> Furthermore, the reports stated that workshops and consultations with the Joe Slovo community would be conducted.<sup>231</sup> This led to the decision that an *in situ* upgrade should be implemented using an intensive process of engagement. This is essentially what the residents asked of the Court in *Joe Slovo 1*, approximately a year and a half prior to this case. Had engagement been properly conducted on the possibility of the *in situ* upgrade, the need for the eviction and costly and time-consuming litigation could have been circumvented.<sup>232</sup> Instead, the various parties could have invested their time and money on the project.<sup>233</sup> This once again highlights the necessity of meaningful engagement in cases like these, especially given the ever-changing circumstances of which courts may not always be aware.

### 3 2 3 3 2 The importance of stakeholder inclusion

The respondents to this case admitted that the process of engagement with the occupiers was incoherent and inadequate.<sup>234</sup> However, there clearly was engagement between those affected and the government. This included various public meetings in Joe Slovo relating to the N2 Project.<sup>235</sup> Meetings also took place between Thubelisha and the representatives of the community.<sup>236</sup> Thus although there was engagement between the parties, it is indisputable that many of the problems caused resulted from the government's failure to engage fully and meaningfully with those affected.<sup>237</sup>

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<sup>227</sup> Para 7.

<sup>228</sup> Para 6.

<sup>229</sup> Para 6.

<sup>230</sup> Para 11.

<sup>231</sup> Para 11.

<sup>232</sup> S Liebenberg "Engaging the Paradoxes of the Universal and Particular in Human Rights Adjudication: The Possibilities and Pitfalls of Meaningful Engagement" (2012) 12 *African Human Rights Law Journal* 1 24.

<sup>233</sup> 24.

<sup>234</sup> 2010 3 SA 454 (CC) para 301.

<sup>235</sup> Para 301.

<sup>236</sup> Para 301.

<sup>237</sup> Para 301.

O'Regan J held that this lack of coherent engagement should be condemned.<sup>238</sup> Ngcobo J held that it was not easy to establish the nature and extent of the engagement in this case from the papers. However, what was apparent was that those affected were addressed on several occasions by an array of people after the project was launched.<sup>239</sup> O'Regan J held that one of the problems was that the N2 Project involved numerous decisions at various levels of government which resulted in unstructured engagement.<sup>240</sup>

The number of different parties that engaged with the residents was problematic and it is unsurprising that misunderstandings and confusion occurred given that there was an increased likelihood of conflicting information being conveyed.<sup>241</sup> This links to the depth and breadth of participation as discussed in chapter 2 and is indicative of wide, but shallow participation.<sup>242</sup> This shallow participation could have been prevented had the meaningful engagement been structured and coordinated and had representatives been properly used.<sup>243</sup> In this way, the mistrust could have been prevented, which in turn would have resulted in meaningful engagement on the relocation being possible without court intervention.<sup>244</sup> This also speaks to the problem noted previously of how to properly use representatives and how to engage with multiple stakeholders without confusion and time delays.

Ultimately, O'Regan J found that the failure to engage properly was not sufficient grounds to deny the eviction order.<sup>245</sup> This is because of the fact that the N2 Project was one of the first of this type of housing development under the new housing policy.<sup>246</sup> It also aimed to cater for extremely large numbers of people and was a pilot project, thus making the chances of implementation without any issues unrealistic.<sup>247</sup> Furthermore, engagement and consultation did take place, albeit incoherent and sometimes misleading.<sup>248</sup> O'Regan J also noted that one of the biggest factors

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<sup>238</sup> Para 301.

<sup>239</sup> Para 245.

<sup>240</sup> Para 298. These decisions included the initial adoption of the project by provincial and national government; the City's decision to support the plan and relocate the occupiers for implementation; and the decision to furnish the occupiers with alternative accommodation and the details surrounding their relocation.

<sup>241</sup> Para 247.

<sup>242</sup> See chapter 2 part 2 3 2.

<sup>243</sup> 2010 3 SA 454 (CC) para 247.

<sup>244</sup> Para 165.

<sup>245</sup> Para 302.

<sup>246</sup> Para 302.

<sup>247</sup> Para 302.

<sup>248</sup> Para 302. The occupiers were misled regarding the allocation of housing in phase 1.

mitigating the lack of coherent engagement was the fact that the N2 Project affected thousands of households who already cooperated and not just the applicants.<sup>249</sup>

### 3 2 3 3 3 Timing and the importance of extra-judicial engagement

The *Joe Slovo* cases demonstrate that engagement will not always produce the successful agreement yielded in *Olivia Road*.<sup>250</sup> One of the main differences between the two cases was the timing of the order for engagement.<sup>251</sup> Meaningful engagement in *Olivia Road* was ordered prior to the Court deciding on the substantive issues of the case, whereas in *Joe Slovo*, it was ordered after the Court had already decided on the substantive issues and granted the relocation order.

There are debates as to whether this was beneficial to the residents. One of the arguments posited is that the timing was advantageous as the residents' entitlements were determined,<sup>252</sup> and that this assisted in correcting power imbalances.<sup>253</sup> However, Ray has argued that had the engagement been ordered prior to the judgment, it may have put pressure on the government as they would be uncertain whether the relocation order would be granted, which would force them to explore other options as in *Olivia Road*.<sup>254</sup>

He also argued that the fact that the engagement in *Olivia Road* was ordered while the final outcome of the case was still pending gave the residents and their representatives leverage to compel the City to engage properly and take their concerns seriously.<sup>255</sup> This, coupled with the fact that the parties had to report back to the Court, put pressure on them to engage properly.<sup>256</sup> This is also illustrative of the

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<sup>249</sup> Para 303.

<sup>250</sup> B Ray "Engagement's Possibilities and Limits as a Socio-Economic Rights Remedy" (2010) 9 *Washington University Global Studies Law Review* 399 403.

<sup>251</sup> L Chenwi "'Meaningful Engagement' in the Realisation of Socio-Economic Rights: The South African Experience" (2011) 26 *South African Public Law* 128 154.

<sup>252</sup> For example, the specifications relating to the quality of the TRU's as well as the 70% allocation of housing to the residents.

<sup>253</sup> L Chenwi "'Meaningful Engagement' in the Realisation of Socio-Economic Rights: The South African Experience" (2011) 26 *South African Public Law* 128 154.

<sup>254</sup> B Ray "Engagement's Possibilities and Limits as a Socio-Economic Rights Remedy" (2010) 9 *Washington University Global Studies Law Review* 399 414. See also L Chenwi "'Meaningful Engagement' in the Realisation of Socio-Economic Rights: The South African Experience" (2011) 26 *South African Public Law* 128 154.

<sup>255</sup> B Ray "Engagement's Possibilities and Limits as a Socio-Economic Rights Remedy" (2010) 9 *Washington University Global Studies Law Review* 399 407. See also L Chenwi "'Meaningful Engagement' in the Realisation of Socio-Economic Rights: The South African Experience" (2011) 26 *South African Public Law* 128 154.

<sup>256</sup> L Chenwi "'Meaningful Engagement' in the Realisation of Socio-Economic Rights: The South African Experience" (2011) 26 *South African Public Law* 128 154.

political nature of engagement and the power dynamics that underlie these types of processes.<sup>257</sup>

However, in *Joe Slovo*, the Court ordered engagement after deciding on the substantive issues of the cases. Ray points out that, regardless of all the deficiencies, the Court made engagement central to the eviction order and thus strengthened the residents' bargaining power.<sup>258</sup> Liebenberg also notes that the Court did not merely accept ambiguous undertakings regarding the provision of alternative accommodation but instead insisted on clearly defined standards for the accommodation.<sup>259</sup>

As mentioned previously, *Joe Slovo* had been occupied by various people for an extremely lengthy time. Some of the residents had lived there for 15 years, and alleged that they had not been ejected or told that they were unlawfully occupying the area.<sup>260</sup> They were also provided with various services by the City, which they asserted exceeded emergency services. The City should have made efforts to engage with them from the beginning when the services were first provided to them.<sup>261</sup> Had the parties meaningfully engaged from the beginning of the project, the involvement of courts could have been circumvented.<sup>262</sup>

As held in *Port Elizabeth Municipality and Olivia Road*, extra-judicial engagement is crucial in these types of cases. Given the multitude of areas like *Joe Slovo* across South Africa that will probably go through similar processes of upgrading or relocation, a proper strategy needs to be developed in which proper quality engagement is a crucial aspect.

### 3 2 4 The *Pheko* cases

#### 3 2 4 1 Case overview

*Pheko v Ekurhuleni Metropolitan Municipality* ("*Pheko*")<sup>263</sup> concerns the lawfulness of the removal of the applicants and the demolition of their homes after the area in

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<sup>257</sup> B Ray "Engagement's Possibilities and Limits as a Socio-Economic Rights Remedy" (2010) 9 *Washington University Global Studies Law Review* 399 407.

<sup>258</sup> 411.

<sup>259</sup> S Liebenberg "Joe Slovo Eviction: Vulnerable Community Feels the Law from the Top Down" *Business Day* 1 (22-06-2009) <http://www.businessday.co.za/articles/content.aspx?id=73812> (accessed 12-09-2018).

<sup>260</sup> 2010 3 SA 454 (CC) paras 43, 125 and 156.

<sup>261</sup> Para 43.

<sup>262</sup> K McLean "Meaningful Engagement: One Step Forward or Two Back? Some Thoughts on *Joe Slovo*" (2010) 3 *Constitutional Court Review* 223 237.

<sup>263</sup> 2012 2 SA 598 (CC).

which they stayed in was declared a disaster area under the Disaster Management Act 57 of 2002 due to the presence of sinkholes.<sup>264</sup> The applicants were the former residents of the Bapsfontein Informal Settlement (“Bapsfontein”) and the respondent was the Ekurhuleni Metropolitan Municipality (“the Municipality”).<sup>265</sup> The Socio-Economic Rights Institute of South Africa (“SERI”) was *amicus curiae* to the case.<sup>266</sup> The Constitutional Court held that the removal of the applicants was unlawful and that the Municipality was obliged to provide the applicants with temporary accommodation.<sup>267</sup> An order was made for the Municipality to meaningfully engage with the applicants in identifying suitable alternative accommodation.<sup>268</sup>

*Pheko v Ekurhuleni Metropolitan Municipality (No 2)* (“*Pheko 2*”)<sup>269</sup> relates to contempt of court proceedings after the Municipality failed to comply with the order handed down in *Pheko*.<sup>270</sup> The parties to this case were the same as those in *Pheko*.<sup>271</sup> The Court found that the Municipality and its attorney were not in contempt of the order handed down in *Pheko*, and the Executive Mayor, the Member of Executive Council for Human Settlements, the Head of Department for Human Settlements as well as the Municipality Manager were joined to the proceedings for the purposes of implementing the order in *Pheko*.<sup>272</sup>

*Pheko v Ekurhuleni Metropolitan Municipality (No 3)* (“*Pheko 3*”)<sup>273</sup> dealt with an application for the Constitutional Court to relinquish its supervisory jurisdiction and refer the matter back to the High Court to deal with the remaining disputes.<sup>274</sup> The Court ultimately transferred the matter back to the High Court after hearing evidence. Certain elements<sup>275</sup> of the *Pheko* order were discharged and the matter was transferred back to the High Court to determine the remaining issues regarding the identification of alternative accommodation for the Mayfield Community.<sup>276</sup>

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<sup>264</sup> Para 1.

<sup>265</sup> Para 4.

<sup>266</sup> Para 4.

<sup>267</sup> Para 9.

<sup>268</sup> Para 53.

<sup>269</sup> 2015 5 SA 600 (CC).

<sup>270</sup> Para 3.

<sup>271</sup> Para 5.

<sup>272</sup> Para 68.

<sup>273</sup> 2016 10 BCLR 1308 (CC).

<sup>274</sup> Para 2.

<sup>275</sup> Paragraphs 6-8 of the original *Pheko* order was discharged.

<sup>276</sup> 2016 10 BCLR 1308 (CC) para 46.

Furthermore the High Court had to supervise the relocation of the Mayfield Community as well as the housing project for the N12 Community.<sup>277</sup>

### 3 2 4 2 Nature and rationale of engagement

Meaningful engagement was incorporated in the remedial order in this case as the Court ordered the Municipality to meaningfully engage with the applicants in relation to the identification of alternative accommodation.<sup>278</sup> No specific reason was given for the order of meaningful engagement but it can be deduced that it was ordered to remedy the informational deficits relating to the suitability of land for housing development given the dolomite-related instability.<sup>279</sup> Furthermore, there was confusion relating to the ownership of the land proposed as alternative accommodation by the applicants.<sup>280</sup>

### 3 2 4 3 Quality of engagement

#### 3 2 4 3 1 Lack of engagement

One of the main elements of the order was that the parties meaningfully engage on finding alternative accommodation, and that both parties submit reports to the Court detailing their progress.<sup>281</sup> In line with this, the Municipality consulted with the applicants who were organised in two groups, namely the N12 Community and the Mayfield Community.<sup>282</sup> The first report filed by the Municipality indicated that the N12 Community was happy with the proposed areas of relocation and that they were adequately consulted.<sup>283</sup> However, the Mayfield Community would only relocate to the proposed land if they were provided with permanent housing equipped with running water and sewerage facilities, which, at the time, was problematic due to issues with land use planning.<sup>284</sup> The Municipality held that it would await further instructions from the Constitutional Court. No solutions were provided for the Mayfield Community's concerns.<sup>285</sup>

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<sup>277</sup> Para 46.

<sup>278</sup> Para 53.

<sup>279</sup> Para 6.

<sup>280</sup> Para 6.

<sup>281</sup> 2015 5 SA 600 (CC) para 7.

<sup>282</sup> Para 8.

<sup>283</sup> Para 8.

<sup>284</sup> Para 8.

<sup>285</sup> Para 8.

The Municipality was ordered to file various reports addressing the relocation of the N12 Community as well as the issues raised by the Mayfield Community.<sup>286</sup> However, these reports never materialised.<sup>287</sup> As a result, the contempt proceedings were launched.<sup>288</sup> The Court issued a *rule nisi* in which it ordered the Municipality to relocate the N12 Community and report back on the progress made in terms of this as well as the previously mentioned issues.<sup>289</sup>

The Mayfield Community expressed concerns relating to their negotiations with the Municipality and stated that they were dissatisfied with the quality of consultations that had taken place.<sup>290</sup> This dissatisfaction stemmed from the fact that no efforts were made to further engage on the concerns raised<sup>291</sup> and no attempts were made by the Municipality to find solutions to the problems.<sup>292</sup>

### 3 2 4 3 2 Unequal bargaining power

In relation to the contempt case, the Municipality held that it was not aware of the various directions because their attorneys were relocating their offices and did not receive the relevant correspondence.<sup>293</sup> Prior to the hearing, SERI requested that the Municipal Manager and the Executive Mayor be joined to the proceedings.<sup>294</sup> The joinder application resulted in a series of affidavits that revealed a shocking trend of government officials shirking their responsibilities and attempting to shift their duties to other officials.<sup>295</sup> For example, the Mayor held that he was not responsible for the day-to-day functions of the Municipality. The Municipal Manager stated that the Gauteng Department of Human Settlements was responsible. The Regional Head of the Provincial Department held that she did not object to being joined but that she did not think it was necessary given that prior to these proceedings, neither the MEC nor the Provincial Department had any knowledge of this case.<sup>296</sup> Furthermore, she stated that the recalcitrance of the Provincial Department was mitigated by the fact that, even

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<sup>286</sup> Para 10.

<sup>287</sup> Para 10.

<sup>288</sup> Para 12.

<sup>289</sup> Para 15.

<sup>290</sup> Para 9.

<sup>291</sup> These concerns related to the issue of permanent housing and the provision of running water and sewerage.

<sup>292</sup> Para 8.

<sup>293</sup> Para 13.

<sup>294</sup> Para 14.

<sup>295</sup> Paras 16-22

<sup>296</sup> Para 21.

though the Provincial Department was unaware of the original court order or of the failure of the Municipality to engage with the relevant parties, the main concern was the housing needs of the applicants and the government's responsibility to respond thereto.<sup>297</sup>

The Court found this acknowledgement to be genuine given the consensus reached at the subsequent meetings between the Municipality and the Provincial Department.<sup>298</sup> Consensus was reached on *inter alia* the fact that these parties would work on identifying land for the Mayfield Community and relocating the N12 Community.<sup>299</sup>

The above paragraphs illustrate the lack of accountability on the Municipality's part in terms of their duty to engage and provide alternative accommodation. This is extremely concerning given the large number of people affected by this case and the fact that it affected their daily living, dignity and security.<sup>300</sup> What is even more concerning is that these cases spanned from 2011 to 2016. Thus, the applicants were living in uncertainty for almost five years.

The government officials in question not only had the responsibility to comply with the court orders relating to access to housing, but also held the power of the applicants' lives and futures in their hands. This highlights the importance of power dynamics in these cases and the need for representatives to help alleviate the effects of power differentials

### 3 2 5 *Schubart Park City of Tshwane Metropolitan Municipality* ("Schubart Park")<sup>301</sup>

#### 3 2 5 1 Case overview

This case dealt with residents requesting to reoccupy their houses after being removed due to urgent circumstances.<sup>302</sup> Schubart Park is a residential complex, consisting of four blocks.<sup>303</sup> The electricity and water were cut off in September 2011.<sup>304</sup> In response, numerous residents protested about the quality of living at

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<sup>297</sup> Para 23.

<sup>298</sup> Para 23.

<sup>299</sup> Para 23.

<sup>300</sup> Para 63.

<sup>301</sup> 2013 1 SA 323 (CC)

<sup>302</sup> Para 1.

<sup>303</sup> Para 2. However, at the time of litigation, the buildings' condition had deteriorated, and the City was unaware of the identity of the numerous occupants.

<sup>304</sup> Para 2. During this time, approximately 700 families occupied three of the blocks

Schubart Park.<sup>305</sup> This involved residents burning tyres, starting fires and stoning vehicles and the police.<sup>306</sup> This resulted in two fires in one of the blocks. As a result, the streets surrounding Schubart Park were cordoned off by the police and the residents were removed and prohibited from returning by the police.<sup>307</sup>

The applicants approached the High Court for an order allowing them to return to Schubart Park but this application was dismissed.<sup>308</sup> The parties were ordered to meet as soon as possible to engage on the needs of the applicants and to formulate a draft order to that effect.<sup>309</sup> However, no agreement was reached<sup>310</sup> and at the beginning of October, the High Court handed down an order confirming the arrangements to provide immediate assistance to the applicants.<sup>311</sup>

This case was decided on appeal to the Constitutional Court and SERI was admitted as an *amicus curiae* to the proceedings.<sup>312</sup> The Court upheld the appeal, and declared that the High Court orders did not equate to an eviction order and that the residents must be allowed to reoccupy their homes as soon as possible.<sup>313</sup> The Court also ordered the applicants and the Municipality to engage meaningfully via their representatives on various issues surrounding the reoccupation.<sup>314</sup> These issues included the identification of residents who were removed; the date when the residents would be allowed to return; the provision of alternative accommodation in the interim period; and the measures taken to assist the residents in returning to Schubart Park and in providing them with the services requested.<sup>315</sup>

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<sup>305</sup> Para 3.

<sup>306</sup> Para 3.

<sup>307</sup> Para 3.

<sup>308</sup> Paras 5-6. The High Court ordered the City and the Minister to provide temporary accommodation to the applicants by means of a tender.

<sup>309</sup> Para 6. This was to be furnished to the Court the next day.

<sup>310</sup> Para 8. However, during this time, the residents staying in the other blocks were also removed in the weeks following the postponement. Overall, approximately 3000-5000 people were left homeless or in temporary shelter by the end of September.

<sup>311</sup> Para 9. The order also stated that those affected could accept the tender which would then serve as an order between the City, the Minister and the residents who accepted the tender.

<sup>312</sup> Para 16.

<sup>313</sup> Para 53.

<sup>314</sup> Para 53.

<sup>315</sup> Para 53.

### 3 2 5 2 Nature and rationale of engagement

#### 3 2 5 2 1 Remediating the informational deficit

Froneman J acknowledged that supervision and engagement orders are normally granted in cases where there is an eviction order and where the engagement relates to the temporary accommodation.<sup>316</sup> However, he found that the circumstances in this case were appropriate and necessitated meaningful engagement, especially given that the proceedings took place more than a year after the removal of the residents.<sup>317</sup> The process of identifying and finding the residents who needed to return to their homes required cooperation between the City and said residents.<sup>318</sup> This would require information to which the Court would not have access.

#### 3 2 5 2 2 Giving effect to dignity

Froneman J also emphasised the role that meaningful engagement plays in giving effect to the dignity of those involved as held in *Port Elizabeth Municipality and Olivia Road*.<sup>319</sup> He held that the Court's previous remarks on meaningful engagement in eviction orders are also relevant to the current case as their right to dignity and to be treated as equals was violated when they were removed from their homes and prohibited from returning for an extensive period.<sup>320</sup> This was further exacerbated by the fact that they were essentially evicted without a court order.<sup>321</sup> Thus, Froneman J held that there was a need for engagement to occur at each stage of the reoccupation process and that, given the uncertainty of how long this process would take, there was also a need for supervision by the High Court regarding the progress made.<sup>322</sup>

### 3 2 5 3 Quality of engagement

#### 3 2 5 3 1 Tokenistic engagement

Froneman J held that the tender made by the City did not constitute proper engagement between the parties as it was a top-down approach in which the City

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<sup>316</sup> Para 42.

<sup>317</sup> Para 42.

<sup>318</sup> Para 42.

<sup>319</sup> Para 46. See also *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) paras 41 and 56 and *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) para 20-21.

<sup>320</sup> 2013 1 SA 323 (CC) para 49.

<sup>321</sup> Para 49.

<sup>322</sup> Para 51.

decided unilaterally on the time frames relating to the residents' return.<sup>323</sup> This is similar to the remarks made about the engagement in *Joe Slovo*.<sup>324</sup> It is once again indicative of tokenistic engagement as the residents were merely informed of decisions already taken by the government. Their participation did not necessarily result in their views being taken into account.

### 3 2 5 3 2 The need to recognise difference

This case highlighted the need to recognise difference as the City had a history of treating all residents as nuisances and associating them with crime and lawlessness.<sup>325</sup> While this may have been the case for some of the residents, proper engagement should have been conducted in order to determine which residents were actually involved in criminal activities.<sup>326</sup> This highlights the danger of treating groups of people in a homogenous manner, and the need to investigate the different circumstances that people face. This will assist in ensuring that the quality of meaningful engagement is strong given the large and diverse groups of people that these cases often deal with. Concepts of incorporating difference will be explored in the next chapter.

### 3 2 6 Insights on meaningful engagement in housing cases

The above case discussions have highlighted the importance of engagement in housing cases. It is clear that the justification for the use of meaningful engagement posited in chapter 2 also feature in the judgments. These justifications include using meaningful engagement as a balancing tool, addressing informational deficits, improving the quality of decisions made by the parties, giving effect to dignity and providing a voice for marginalised and excluded groups. However, it is clear that there are still numerous areas of the engagement process, in terms of the quality thereof, that require attention. One of the reoccurring issues in all of the cases discussed was that of municipalities being unwilling to engage or engaging in a tokenistic fashion in which the interest of the potential evictees were not taken into account. What is more concerning is the fact that problems with tokenistic engagement were seen even after

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<sup>323</sup> Para 50.

<sup>324</sup> 2010 3 SA 454 (CC) paras 378 and 384.

<sup>325</sup> 2013 1 SA 323 (CC) para 50.

<sup>326</sup> Para 50.

an agreement was reached through engagement in *Olivia Road*.<sup>327</sup> Another reoccurring problem was the importance of timing of engagement and the need for parties to take extra-judicial engagement more seriously as seen in *Port Elizabeth Municipality, Olivia Road* and *Joe Slovo*. In line with this, a more structured approach to engagement needs to be developed especially given the various housing regeneration strategies that will result in further evictions being necessary. Unequal bargaining power between parties was also present in cases such as *Pheko*, which resulted in the quality of engagement being of a low standard.<sup>328</sup> Additionally, *Joe Slovo* highlighted the importance of stakeholder inclusion as well as the problems that can arise when too many stakeholders are involved.<sup>329</sup> This signals a need to find a balance between the depth and breadth of engagement. Lastly, *Schubart Park* emphasised the need to recognise difference in the engagement process and not to treat communities as homogenous groups.<sup>330</sup>

Meaningful engagement has also been used in education cases and, accordingly, the next section will investigate the ways in which it has been used in these cases as well as the quality thereof.

### 3 3 The nature and quality of engagement in education cases

3 3 1 *Governing Body of the Juma Musjid Primary School v Essay N.O. (“Juma Musjid”)*<sup>331</sup>

#### 3 3 1 1 Case overview

*Juma Musjid* relates to the eviction of a public school from private property.<sup>332</sup> It illustrates the tensions that can arise between the right to education and property rights.<sup>333</sup> The applicants in this case were the Governing Body of the Juma Musjid School (“SGB”) as well as the parents, guardians and caregivers of the children enrolled at the school during 2010.<sup>334</sup> The respondents were the Trustees of the Juma Musjid Trust (“the Trustees”), the Member of the Executive Council for Education for

<sup>327</sup> See part 3 2 2 3 2 of this chapter.

<sup>328</sup> See part 3 2 4 3 2 of this chapter.

<sup>329</sup> See part 3 2 3 3 2 of this chapter.

<sup>330</sup> See part 3 2 5 3 2 of this chapter.

<sup>331</sup> 2011 8 BCLR 761 (CC).

<sup>332</sup> Para 1.

<sup>333</sup> Para 7.

<sup>334</sup> Para 8.

KwaZulu-Natal (“the MEC”), the Superintendent General of the Department for KwaZulu Natal and the Minister for Education.<sup>335</sup> The Centre for Child Law and the Socio-Economic Rights Institute were *amici curiae* to the case.<sup>336</sup> The dispute related to the failure of the MEC to conclude an agreement relating to the tenancy terms and conditions<sup>337</sup> as required by the South African Schools Act 84 of 1996 (“Schools Act”). The Constitutional Court found that the Trustees had a constitutional obligation under section 29(1) of the Constitution to respect the learners’ right to basic education.<sup>338</sup> Furthermore, the Constitutional Court made a provisional order for the MEC to engage meaningfully with the Trustees and the SGB.<sup>339</sup> This engagement was aimed at resolving the disputes relating to the conclusion of the agreement under section 14 of the Schools Act<sup>340</sup> as well as the MEC’s progress on securing alternative placement for the learners at the school.<sup>341</sup> The MEC was also required to report back to the Court on the progress made in relation to the above-mentioned issues.<sup>342</sup>

### 3.3.1.2 Nature and rationale of engagement

It has been argued by Liebenberg that although no specific reason was given by the Court for the meaningful engagement order, it was aimed at facilitating discussions between the major stakeholders in the case, namely the SGB, the MEC and the Trust, with the hopes of a mutually accepted solution being reached.<sup>343</sup> This would assist with realising the rights in question as the quality of the decision would be enhanced given that those knowledgeable on the matter would be making the decisions. The engagement order also assisted with informational deficits relating to the relocation needs of the learners.

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<sup>335</sup> Para 9.

<sup>336</sup> Para 10.

<sup>337</sup> Para 1.

<sup>338</sup> Para 2.

<sup>339</sup> Para 3.

<sup>340</sup> The Trust allowed the Department to run the public school on its property in terms of section 14(1) of the Act. However, the Trustees alleged that their permission was subject to the conclusion of a written agreement between themselves and the MEC under section 14(1). This agreement never materialised, which then resulted in the dispute.

<sup>341</sup> Para 3.

<sup>342</sup> Para 3.

<sup>343</sup> S Liebenberg “Remedial Principles and Meaningful Engagement in Education Rights Disputes” (2016) 19 *PER/PEJL* 1 20.

### 3 3 1 3 Quality of engagement

#### 3 3 1 3 1 Tokenistic engagement

The Trust was willing to conclude the section 14 agreement on multiple occasions but the Department was uncooperative.<sup>344</sup> Extensive negotiations were entered into between the Trust and the Department, at the instance of the Trust, prior to the eviction order being sought in the High Court.<sup>345</sup> For example, concerns were expressed by the SGB about the school's closure and the Department's obligation to provide alternative premises.<sup>346</sup> However, the MEC responded by stating that the Trust could refuse to sign the agreement and eject the Department from the property.<sup>347</sup> The Trust then gave notice to the Department and the SGB to vacate the premises.<sup>348</sup> The Department agreed to do so but did not after being requested to on two separate occasions.<sup>349</sup>

Various negotiations were undertaken with the aim of minimising the adverse effects on the learners' rights.<sup>350</sup> However, the Department took an uncompromising stance in relation to the outstanding rent and the reimbursement of expenses.<sup>351</sup> Even after the provisional order for engagement was made, no agreement was reached by the parties.<sup>352</sup> Nkabinde J held that it would be unfair to expect the Trust to attempt to engage indefinitely with the Department given their recalcitrant attitude.<sup>353</sup> Thus, in this case, it was found that the Trust was reasonable in seeking the eviction given its efforts to engage.<sup>354</sup>

#### 3 3 1 3 2 The importance of extra-judicial engagement

The importance of extra-judicial engagement was highlighted by Nkabinde J's criticism of the failure of the MEC to furnish the High Court with information regarding the steps to be taken to provide alternative education to those affected.<sup>355</sup> She stated

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<sup>344</sup> 2011 8 BCLR 761 (CC) para 63.

<sup>345</sup> Para 63.

<sup>346</sup> Para 63.

<sup>347</sup> Para 63.

<sup>348</sup> Para 63.

<sup>349</sup> Para 63.

<sup>350</sup> Para 64.

<sup>351</sup> Para 64.

<sup>352</sup> Para 64.

<sup>353</sup> Para 75.

<sup>354</sup> Para 75.

<sup>355</sup> Para 47.

that the MEC wasted time and effort by failing to deal with the issues properly.<sup>356</sup> She went further to state that the Department should have attempted to deal with these issues in accordance with its constitutional mandate under the Schools Act.<sup>357</sup> Had this been done, the need for court involvement would probably have been circumvented.<sup>358</sup>

3 3 2 *Head of Department, Department of Education, Free State Province v Welkom High School; Head of Department, Department of Education, Free State Province v Harmony High School (“Welkom”)*<sup>359</sup>

### 3 3 2 1 Case overview

*Welkom* concerns the constitutionality of pregnancy policies, in terms of which certain pregnant learners had been excluded from school.<sup>360</sup> The legal question related to the power of the Head of a Provincial Department of Education (“HOD”) to lawfully instruct the principal of a public school to ignore policies adopted by the school’s governing body if the HOD considers those policies to be unconstitutional.<sup>361</sup> The applicant in this case was the Free State HOD<sup>362</sup> and the respondents, who had sought an interdict in the Free State High Court, Bloemfontein, were Welkom and Harmony High School.<sup>363</sup> The interdict was granted by the High Court. On appeal, the SCA upheld the High Court order subject to certain limitations.<sup>364</sup> Equal Education and the Centre for Child Law were *amici curiae* to the case.<sup>365</sup>

The Court found that the pregnancy policies were “*prima facie* unconstitutional” and ordered the schools to engage meaningfully with the HOD in an attempt to revise said policies.<sup>366</sup> They were then obliged to report back to the Court with the revised policies.<sup>367</sup>

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<sup>356</sup> Para 47.

<sup>357</sup> Para 47.

<sup>358</sup> Para 47.

<sup>359</sup> 2014 2 SA 228 (CC).

<sup>360</sup> Para 6.

<sup>361</sup> Para 1.

<sup>362</sup> Para 3.

<sup>363</sup> Paras 2 and 4.

<sup>364</sup> Para 2.

<sup>365</sup> Para 5.

<sup>366</sup> Para 7.

<sup>367</sup> Para 7.

### 3 3 2 2 Nature and rationale of engagement

#### 3 3 2 2 1 Cooperative governance and balancing of interests

This case deals with the delicate interrelation between learners' rights to receive education and not be unfairly discriminated against on the grounds of pregnancy, and the obligations of co-operative governance between various organs of state in fulfilling their obligations in line with the relevant constitutional provisions and legislative framework.<sup>368</sup> The legislative framework relevant to this case is the Schools Act that governs the various relationships between the different role players involved in education.<sup>369</sup> This Act emphasises that public schools must be governed in a partnership between school governing bodies, principals, the relevant HOD and MEC as well as the Minister.<sup>370</sup> Each of these partners has specific rights and duties in line with the particular interests that they represent.<sup>371</sup>

The provisions<sup>372</sup> of the Act ensure that a balance is struck between each role player's duties, thus aiming to ensure that the education system is effectively managed.<sup>373</sup> Section 8 is of particular importance as it makes provision for school governing bodies to adopt codes after conducting consultative processes in which learners, parents and educators are involved.<sup>374</sup> Thus the Schools Act and its underlying ethos of cooperative governance are in line with meaningful engagement.

Khampepe J concluded that the Schools Act does not give authority to the HOD to ignore the school's pregnancy policies. Instead, what the Schools Act requires is that the HOD engage meaningfully with the school governing bodies regarding the pregnancy policies.<sup>375</sup> Accordingly, the HOD would only be authorised to intervene after he had engaged and shared his concerns with the schools unless it was a matter of urgency.<sup>376</sup>

Meaningful engagement was ordered as a remedy in this case due to the parties' failure to engage and consult with each other effectively about the various issues,

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<sup>368</sup> Para 33.

<sup>369</sup> Para 36.

<sup>370</sup> Paras 36, 49 and 61. See also *Hoërskool Ermelo v Head of Department of Education: Mpumalanga* 2009 3 SA 422 (SCA) para 56 and *MEC for Education, Kwa-Zulu Natal v Pillay* 2008 1 SA 474 (CC) for a discussion on this partnership.

<sup>371</sup> 2014 2 SA 228 (CC) para 49.

<sup>372</sup> Paras 37-48 delineate the relevant sections important to this case.

<sup>373</sup> Paras 36 and 49.

<sup>374</sup> Para 45.

<sup>375</sup> Para 73.

<sup>376</sup> Paras 77 and 146.

particularly in the light of the foundational tenet of cooperative governance underlying the Schools Act.<sup>377</sup> Khampepe J highlighted the point made in *MEC for Education, Kwa-Zulu Natal v Pillay* (“*Pillay*”)<sup>378</sup> in which O’Regan J stressed the importance of partnership and cooperation in managing schools as well as the more general role that it can play in dispute resolution in South Africa.<sup>379</sup>

### 3 3 2 2 2 Balancing normative and procedural considerations

This case also highlighted the role that meaningful engagement can play in balancing normative and procedural considerations as discussed in chapter 2.<sup>380</sup> This was illustrated through the Court’s need to deal with the constitutionality of the pregnancy policies, which was problematic because, according to the schools, the pregnancy policies were not before the court and the matter dealt solely with the power of the HOD to instruct the principals to ignore the pregnancy policies.<sup>381</sup> This position was accepted by the High Court as well as the Supreme Court of Appeal. Khampepe J disagreed with this position and was willing to identify the underlying issue at hand.<sup>382</sup> In this regard, she referred to *Hoërskool Ermelo v Head of Department of Education: Mpumalanga*<sup>383</sup> which held that the Court may order any remedy that is just and equitable and “that would place substance above form by identifying the actual underlying dispute between the parties”.<sup>384</sup> However, she stated that the Court did not have sufficient information to decide on the substantive content of the policies given the fact that the schools had not made submissions on the constitutionality of said policies.<sup>385</sup> She thus found that the learners’ rights to education and equality were only violated *prima facie*.<sup>386</sup> The Court therefore failed to determine and address the substantive issue pertaining to the learners’ right to equality and education.<sup>387</sup> Instead, the focus was on procedure with, at best, tentative remarks on the underlying

<sup>377</sup> Paras 120 and 121. See also *Schoonbee v MEC for Education, Mpumalanga* 2002 4 SA 877 (TPD) para 883E-G.

<sup>378</sup> 2008 1 SA 474 (CC).

<sup>379</sup> 2014 2 SA 228 (CC) para 122. See also *MEC for Education, Kwa-Zulu Natal v Pillay* 2008 1 SA 474 (CC) para 185.

<sup>380</sup> See chapter 2 part 2 3 2.

<sup>381</sup> 2014 2 SA 228 (CC) para 3.

<sup>382</sup> Para 107.

<sup>383</sup> 2009 3 SA 422 (SCA).

<sup>384</sup> Para 97.

<sup>385</sup> Para 110.

<sup>386</sup> For an analysis of the findings of Khampepe J, see S Fredman "Procedure or Principle: The Role of Adjudication in Achieving the Right to Education" (2013) 6 *Constitutional Court Review* 165 170.

<sup>387</sup> 172.

substantive rights to education and equality.<sup>388</sup> This links to concerns discussed in chapter 2 that meaningful engagement can be used to avoid substantive definitions of the content of socio-economic rights instead of assisting with this problem.<sup>389</sup>

In contrast, Zondo J, in his dissenting judgment,<sup>390</sup> treated the dispute relating to the powers of the HOD and SBG and the substantive issue of the constitutionality of the policies excluding pregnant learners from school as inherently interlinked.<sup>391</sup> He held that the case did not only deal with a power play resulting from a dispute between the two parties.<sup>392</sup> Instead, the case also related to the validity of the unconstitutional policies.<sup>393</sup> Furthermore, he disagreed that the case should be decided on the principles of cooperative governance and meaningful engagement given the fact that parties had not raised this point.<sup>394</sup> Instead, he averred that the appeal of the HOD should have been upheld based on the fact that the HOD had a legal obligation as well as the power to protect the pregnant learners' constitutional rights.<sup>395</sup> According to Zondo J, the HOD also had the duty and power to prevent the unconstitutional policies from being implemented.<sup>396</sup> Thus the minority judgment attempted to determine and address the underlying substantive right to education and equality.

### 3 3 2 2 3 Improving the quality of decisions and democratising the enforcement process

Engagement was also ordered to provide clarity and information on the content of the pregnancy policies because of the confusion relating thereto.<sup>397</sup> In a concurring separate judgment, Froneman and Skweyiya JJ held that there was a need for engagement and cooperation in order to understand each party's duties and to coordinate their efforts with a view to producing a policy that is practical and context-sensitive, ensuring that the learners' best interests are taken into account.<sup>398</sup> Khampepe J emphasised how crucial cooperative governance and engagement is in

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<sup>388</sup> 197.

<sup>389</sup> See chapter 2 part 2 3 4.

<sup>390</sup> Three other justices concurred with this judgment.

<sup>391</sup> S Fredman "Procedure or Principle: The Role of Adjudication in Achieving the Right to Education" (2013) 6 *Constitutional Court Review* 165 171.

<sup>392</sup> 171.

<sup>393</sup> 171.

<sup>394</sup> Para 264.

<sup>395</sup> Paras 249 and 251.

<sup>396</sup> Paras 249 and 251.

<sup>397</sup> 2014 2 SA 228 (CC) para 119.

<sup>398</sup> Para 134.

South Africa's democratic dispensation. Furthermore, she acknowledged its role in encouraging grassroots democracy<sup>399</sup> by involving school governing bodies and all other stakeholders.<sup>400</sup>

### 3 3 2 3 Quality of engagement

#### 3 3 2 3 1 Ineffective engagement

Communication between the parties in this case was ineffective. There were initial attempts on the provincial department's part to engage with the school governing bodies. This was done by furnishing the governing bodies with the Circular as well as by requesting them to reconsider excluding the students.<sup>401</sup> However, later actions on the part of the HOD as well as the school governing bodies were indicative of bad faith engagement. This included the issuing of instructions by the HOD to the principals without first engaging properly in line with cooperative governance as well as the failure of the parties to come to an agreement in the subsequent meetings.<sup>402</sup>

Confusion was created in the documents governing pregnancies at schools in that the school governing bodies drafted their policies in terms of the Measures for the Prevention and Management of Learner Pregnancy ("Measures")<sup>403</sup> which stated that learners cannot be re-admitted to a school in the same year in which they left school as a result of being pregnant.<sup>404</sup> The school governing bodies asserted that they were unaware that the HOD had a contrary stance until the disputes became known and the HOD furnished the governing bodies with a circular stating that learners could not be expelled from schools due to pregnancies.<sup>405</sup> This caused confusion and sparked debate at a national and provincial level.<sup>406</sup>

Khampepe J held that the attempts made at cooperation were superficial. Furthermore, attempts at engaging and resolving the issues were hindered by the Harmony governing body threatening the HOD with going to the media after one of

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<sup>399</sup> See *Hoërskool Ermelo v Head of Department of Education: Mpumalanga* 2009 3 SA 422 (SCA) para 185.

<sup>400</sup> 2014 2 SA 228 (CC) para 123.

<sup>401</sup> Para 164.

<sup>402</sup> Paras 164 and 165.

<sup>403</sup> Department of Education "Measures for the Prevention and Management of Learner Pregnancy" (2007). These Measures were never published in the Government Gazette.

<sup>404</sup> 2014 2 SA 228 (CC) para 154.

<sup>405</sup> Paras 154 and 156.

<sup>406</sup> Paras 155 and 159.

their meetings.<sup>407</sup> Other meetings resulted in no agreements being reached and the meeting organised by FEDSA never even occurred.<sup>408</sup>

Froneman and Skweyiya JJ held that the circumstances of the case necessitated meaningful engagement to find a solution, but instead the opposite occurred.<sup>409</sup> The parties were stubborn and defiant and instead of attempting to cooperate and engage, they resorted to litigation.<sup>410</sup> This aggravated the confusion and misunderstandings and resulted in mistrust between the parties.<sup>411</sup> The principles of cooperative governance were completely ignored.<sup>412</sup>

Froneman and Skweyiya JJ accordingly found that the parties' conduct failed to conform to the requirements of cooperative governance and engagement. Furthermore, they held that, had the HOD cooperated and engaged in good faith, the need for the issuing of instructions could have been circumvented.<sup>413</sup> They also emphasised the role that proper planning and sustained engagement could have played in avoiding these types of dispute in which the learners' interests were ultimately compromised.<sup>414</sup>

Furthermore, they held that this case highlighted the difficulties that arise when parties lose patience with each other and rush to courts. In this specific case, this resulted in the best interests of the child being compromised and instead, turned into a power play between the parties.<sup>415</sup> In all the allegations and rebuttals, the parties spoke past each other as opposed to communicating effectively in line with meaningful engagement and cooperative governance.<sup>416</sup>

### 3 3 2 3 2 The importance of stakeholder inclusion

This case has been criticised for its lack of broad stakeholder inclusion given the fact that only the HOD and the schools were ordered to engage with each other.<sup>417</sup> Effective meaningful engagement on the pregnancy policies would necessitate the involvement of a broader range of stakeholders and expertise.<sup>418</sup> Liebenberg suggests

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<sup>407</sup> Para 120.

<sup>408</sup> Para 120.

<sup>409</sup> Para 159.

<sup>410</sup> Para 160.

<sup>411</sup> Para 160.

<sup>412</sup> Para 161.

<sup>413</sup> Para 165.

<sup>414</sup> Para 166.

<sup>415</sup> Para 132.

<sup>416</sup> Para 133.

<sup>417</sup> S Liebenberg "Remedial Principles and Meaningful Engagement in Education Rights Disputes" (2016) 19 *PER* 1 25.

<sup>418</sup> 25.

that these stakeholders could include representatives of the pregnant learners as well as the school governing bodies; the Commission for Gender Equality; the Human Rights Commission and any non-governmental organisations with an interest in gender equality, the right to education or children's rights.<sup>419</sup>

The inclusion of a broader range of stakeholders also had the potential to assist with ensuring that the engagement resulted in a broader systemic influence on school pregnancy policies throughout South Africa as opposed to just on the parties to the case.<sup>420</sup> Furthermore, it assists with obtaining responsive solutions and increases the quality of decisions as well as the legitimacy thereof as discussed in chapter 2.<sup>421</sup> Concerns relating to separation of powers, institutional competence and polycentricity are also addressed by ensuring the inclusion of all relevant stakeholders.<sup>422</sup>

### 3 3 2 3 3 The need to recognise difference

Khampepe J held that school governing bodies are best placed<sup>423</sup> to formulate pregnancy policies as they would be knowledgeable on the specific school's circumstances and would thus be able to create a tailor-made policy as opposed to a general policy for all schools created by another education role player.<sup>424</sup> She illustrated this by noting the different requirements that pregnancy policies would have in girls-only schools compared to co-educational schools.<sup>425</sup> The same would apply for well-resourced schools that have funds for larger-scale counselling and medical services as opposed to schools that are not as well-resourced.<sup>426</sup> This alludes to the need to take these different educational contexts into account in these types of cases.

### 3 3 2 3 4 The importance of extra-judicial engagement

Extra-judicial engagement should have taken place, specifically given that codes of conduct should only be adopted once the learners, parents and educators of the school have been consulted. There was no evidence in this case to show that this had occurred.<sup>427</sup> Froneman and Skweyiya JJ agreed that the various role players are

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<sup>419</sup> 25.

<sup>420</sup> 26.

<sup>421</sup> See chapter 2 part 2 3 1.

<sup>422</sup> See chapter 2 part 2 3 2.

<sup>423</sup> 2014 2 SA 228 (CC) para 66.

<sup>424</sup> Para 67.

<sup>425</sup> Para 67.

<sup>426</sup> Para 67.

<sup>427</sup> Para 231.

constitutionally mandated to engage in good faith with each other before approaching the courts.<sup>428</sup> Furthermore, they stated that had this been done properly, litigation could have been avoided.<sup>429</sup>

Khampepe J also found that the concerns raised about the constitutionality<sup>430</sup> of the pregnancy policies were serious and necessitated that the Court deal with them.<sup>431</sup> Of particular concern is the fact that the policies differentiated between male and female learners as male learners in Welkom only got a “leave of absence” if the pregnant learner was able to prove that he was the unborn baby’s father.<sup>432</sup> Harmony had even more overt differentiation in that only the pregnant learners or those who gave birth had to leave school.<sup>433</sup> There were no consequences for the equally responsible male counterparts as they were allowed to continue with their education.<sup>434</sup> The learners’ right to education was also violated in that the policies forced them to repeat up to a whole year of school and even though they may theoretically return, many learners were unable to afford the extra year of school.<sup>435</sup> According to statistics from Harmony, two-thirds of learners affected by the policies did not return.<sup>436</sup>

The pregnancy policies thus stigmatised pregnancy and violated the learners’ rights to human dignity, privacy and bodily and psychological integrity as they obliged students to report their pregnancy to the school. Fellow learners were obliged to do the same if they suspected that a learner was pregnant.<sup>437</sup> Proper extra-judicial meaningful engagement on these matters with all the relevant stakeholders could have helped combat the stigmas, gender stereotypes and double standards related to pregnancies. However, the policies in this case gave the schools and parents no opportunity to evaluate what was in the best interests of the pregnant learner.<sup>438</sup>

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<sup>428</sup> Para 135.

<sup>429</sup> Para 135.

<sup>430</sup> Concerns were raised by the HOD as well as the *amicus curiae* that the policies violated the learners’ constitutional rights to equality, basic education, human dignity, privacy as well as bodily and psychological integrity. Furthermore it was contended that the policies were excessively rigid and thus did not take cognisance of the child’s best interests as required by section 28 of the Constitution.

<sup>431</sup> 2014 2 SA 228 (CC) para 101. *Hoërskool Ermelo v Head of Department of Education: Mpumalanga* 2009 3 SA 422 (SCA) para 97 was used as authority where it was held that a just and equitable remedy under section 172(1)(b) would require courts to place substance above form and identify any underlying disputes between the parties. See paras 113-118 for specific allegations regarding the constitutionality of the pregnancy policies.

<sup>432</sup> 2014 2 SA 228 (CC) para 113.

<sup>433</sup> Para 113.

<sup>434</sup> Para 113.

<sup>435</sup> Para 114.

<sup>436</sup> Para 114.

<sup>437</sup> Para 115.

<sup>438</sup> Para 116.

### 3 3 3 Insights on meaningful engagement in education cases

The above discussion has emphasised the importance of cooperative governance in realising the right to education and the fact that cooperative governance requires meaningful engagement between the various stakeholders involved in each case. Meaningful engagement is also useful in the education context as it assists with improving the quality of decisions and democratising the process as discussed earlier.<sup>439</sup> These cases also illustrate the role that meaningful engagement can play in the developing and amending of education policies, especially given the polycentric nature of these types of cases.<sup>440</sup> Education policies which are created through collaborative efforts are more likely to be well-received by those affected by the policy thus increasing their legitimacy.<sup>441</sup>

However, these cases were also indicative of the fact that there is a need to strengthen the communication between government stakeholders to help circumvent future confusion, as was seen in *Welkom*. Furthermore, *Welkom*, illustrated the interaction between meaningful engagement and the substantive analysis of the content of education rights. In this regard, the majority judgment failed to give effect the substantive rights underlying this case. Similar to *Olivia Road*, this raises the concern that instead of assisting with the balancing of normative and procedural considerations, meaningful engagement is actually being used by the Court to avoid giving substantive definitions of the content of rights and the underlying normative values thereof.<sup>442</sup> While Khampepe J attempted to remedy this, she did not declare the policies invalid and thus allowed for the possibility of the SGB's continuing to exclude pregnant learners.<sup>443</sup> The failure to declare the policies invalid resulted in the rights of the pregnant learners, a vulnerable group, being side-lined.<sup>444</sup>

These cases also highlighted similar quality concerns with meaningful engagement that were found in the housing contexts. These problems relate to tokenistic engagement, inclusion of stakeholders and the need to recognise difference. Furthermore, in line with the housing jurisprudence, the Constitutional Court has

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<sup>439</sup> See part 3 3 2 2 2 of this chapter.

<sup>440</sup> S Liebenberg "Remedial Principles and Meaningful Engagement in Education Rights Disputes" (2016) 19 *PER/PEJL* 1 36-37.

<sup>441</sup> 36. See also Chapter 2 part 2 2 2 4.

<sup>442</sup> See chapter 2 part 2 3 4.

<sup>443</sup> S Fredman "Procedure or Principle: The Role of Adjudication in Achieving the Right to Education" (2013) 6 *Constitutional Court Review* 165 197.

<sup>444</sup> 197.

emphasised the importance of extra-judicial engagement. These problem areas will be elaborated on in the next chapter two chapters.

### 3 4 Conclusion

The above discussion indicates that meaningful engagement has the potential to play a crucial role in realising socio-economic rights as well as in achieving the various justifications posited for the use thereof. The case analyses and evaluations have highlighted various guiding principles that the Court has identified as important for meaningful engagement processes. *Port Elizabeth Municipality* has illustrated the preference for face-to-face engagement or mediation and the need for equality of voice for those involved in the engagement process.<sup>445</sup> *Olivia Road* highlighted the need for structured, consistent and context-sensitive engagement. It should also be conducted individually as well as collectively and all parties should act in good faith with the values of transparency, reasonableness and openness in mind. Furthermore, parties should have complete and accurate accounts of the engagement process. Cognisance must be taken of vulnerable groups and as such, sensitive and competent people, such as civil society organisations should manage the engagement process.

The *Joe Slovo* cases emphasise the need for coherent and structured meaningful engagement that counters top-down or tokenistic approaches. Instead, meaningful engagement should focus on getting the parties to reach a mutual understanding in which each party's concerns are accommodated.

The *Pheko* cases raised the problems that arise when there is a lack of political will on the government's side. They were also indicative of how long these types of cases can take when engagement is not conducted in good faith and when there is unequal bargaining power. These cases show how pointless meaningful engagement is if it cannot be properly enforced, and if those who are vulnerable have no power to enforce it.

The importance of timing of engagement was also highlighted and the Court has held that extra-judicial engagement is of extreme importance and should occur unless there are compelling or urgent reasons why it cannot occur.<sup>446</sup> The difference that

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<sup>445</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) and L Chenwi "Democratizing the Socio-Economic Rights Enforcement Process" in Alvair-Garcia et al (eds) *Social and Economic Rights in Theory and Practice: Critical Inquiries* (2014) 178 182.

<sup>446</sup> L Chenwi "Democratizing the Socio-Economic Rights Enforcement Process" in Alvair-Garcia et al (eds) *Social and Economic Rights in Theory and Practice: Critical Inquiries* (2014) 178 184.

timing has can be seen in *Olivia Road* and *Joe Slovo*, as discussed above.<sup>447</sup> This is also indicative of the political nature of engagement and the need for incentives for the government to take it seriously.

The need to balance procedural and normative concerns was raised in relation to *Olivia Road* and *Welkom*. Although balancing normative and procedural considerations is one of the justifications posited for the use of meaningful engagement in socio-economic rights, the Court in both these cases used meaningful engagement to avoid giving substantive definitions to the content of the socio-economic rights in question. Even though these cases concerned socio-economic rights with positive duties to protect, promote and fulfil said rights, the majority judgments of these two cases exercised too much restraint and failed to give effect to the rights in question. Courts should thus be willing to interpret the substantive content of rights and the obligations linked thereto. Failure to do this may lead to “outcome validity”<sup>448</sup> being compromised if parties are to determine the content of rights without the assistance of a court.<sup>449</sup>

Important factors for successful engagement include the need for judicial supervision over the process; requiring reporting back from the parties to ensure accountability;<sup>450</sup> the need for courts to impose sanctions on parties who fail to meaningfully engage; and the need for a long-term, structured process of engagement to be developed as opposed to *ad hoc*, court-ordered engagement. If the above-mentioned principles are not followed, the effectiveness of meaningful engagement in realising socio-economic rights and democratising the implementation process is undermined.<sup>451</sup>

Thus, the case discussions highlighted the potential that meaningful engagement holds in realising socio-economic rights and also illustrated that the quality of the engagement is vital to its efficacy in achieving its various purposes. It is clear from the fact that only one case, *Olivia Road*, resulted in an agreement being reached, after

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<sup>447</sup> 185.

<sup>448</sup> See chapter 2 part 2 3 4.

<sup>449</sup> JFD Brand “Judicial Deference and Democracy in Socio-Economic Rights Cases in South Africa” (2011) 22 *Stell LR* 614 637.

<sup>450</sup> B Ray “Engagement’s Possibilities and Limits as a Socio-Economic Rights Remedy” (2010) 9 *Washington University Global Studies Law Review* 399 413.

<sup>451</sup> L Chenwi “Democratizing the Socio-Economic Rights Enforcement Process” in Alvair-Garcia et al (eds) *Social and Economic Rights in Theory and Practice: Critical Inquiries* (2014) 178 183.

which further problems relating to implementation arose,<sup>452</sup> that there is a long road ahead when it comes to how meaningful engagement is conceptualised and implemented. Accordingly, ways to ensure the depth and quality of meaningful engagement need to be investigated.

Specifically, these cases highlight the problems relating to power dynamics, issues of voice and representation, the need to incorporate relevant stakeholders, to take differences into account in stakeholder groups, and to take into account the type of engagement as depicted under Arnstein's ladder of participation. Measures need to be put in place to ensure that engagement is not just a formalistic requirement but instead something more substantial.<sup>453</sup> These areas of concern and potential solutions thereto will be explored in the next chapter.

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<sup>452</sup> See part 3.2.2.3.1 of this chapter. See also B Ray "Engagement's Possibilities and Limits as a Socioeconomic Rights Remedy" (2010) 9 *Wash U Global Stud L Rev* 399 403.

<sup>453</sup> L Chenwi "Democratizing the Socio-Economic Rights Enforcement Process" in Alvair-Garcia et al (eds) *Social and Economic Rights in Theory and Practice: Critical Inquiries* (2014) 178 181. See also *Mnisi v City of Johannesburg* paras 30-31.

## Chapter 4: The potential of extra-judicial engagement

### 4 1 Introduction

The previous chapter analysed and evaluated the Constitutional Court's meaningful engagement jurisprudence. It investigated the rationale for using engagement as well as the quality of engagement in different cases. The chapter identified various problem areas relating to the current implementation of meaningful engagement. These included problems relating to tokenistic engagement, power dynamics, inclusion of parties and the need to recognise difference. The timing of engagement processes, and the need for extra-judicial engagement to be taken more seriously by the parties were also common themes in the judgments discussed. However, there is a need to explore in greater depth the role that extra-judicial engagement can play in the realisation of socio-economic rights. While extra-judicial engagement holds the potential to address some of the shortfalls highlighted in the judicial context, there is a need to investigate whether extra-judicial engagement is subject to similar shortfalls to those highlighted in the context of judicial engagement in the previous chapter.

This chapter will first explore the role that is assigned to extra-judicial engagement in terms of socio-economic rights judgments as well as other sources, such as legislation, which encourage the use of extra-judicial engagement. The second part of this chapter will then consider the #FMF protests, which provide a recent example of a dispute concerning a socio-economic right which included attempts at extra-judicial engagement. The purpose of this consideration is to identify the dynamics and kinds of issues that arise in the context of extra-judicial engagement.

The value of using the #FMF protests to investigate quality concerns relating to engagement lies in the fact that the attempts at meaningful engagement used in this context related to section 29(1)(b) of the Constitution which states that: "[e]veryone has access to further education, which the state, through reasonable measures, must make progressively available and accessible". These protests concerned the economic accessibility of higher education.<sup>1</sup> The protests also related to broader issues relating to the content and context of higher education such as *inter alia* calls

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<sup>1</sup> The #FMF protests related to students demanding, *inter alia*, free tertiary education. See also UN Committee on Economic, Social and Cultural Rights "General Comment No. 13" on The Right to Education (1999) E/C.12/1999/10 & K Sital, JE Getgen, and SA Koh "Enhancing Enforcement of Economic, Social, and Cultural Rights using Indicators: A Focus on the Right to Education in the ICESCR" (2010) 32 *Hum Rts Q* 253-310.

for the decolonisation of the curriculum and adopting effective mechanisms to end race- and gender-based violence and discrimination. The basis for engagement in this context can be inferred from section 29(1)(b) read with constitutional values such as dignity, equality, transparency and accountability. It can also be inferred from the socio-economic rights judgments discussed in the previous chapter where the Constitutional Court encouraged extra-judicial engagement prior to approaching courts.<sup>2</sup>

The #FMF movement raised fundamental questions about diversity, stakeholder involvement, inequality of power and representation. The fact that these protests occurred in different universities across South Africa also means that the attempts at meaningful engagement are useful to investigate the role that difference and diversity played given the varying demands made at different universities' due to the different university contexts. This will be elaborated on later in this chapter.<sup>3</sup> Furthermore, the diversity of universities and students involved in the protests and engagement also led to greater challenges with regard to identifying who the relevant stakeholders were and who had the capacity to speak on behalf of whom.

Problems relating to representation in the #FMF context were also raised by the #FMF movement due their unhappiness with the current representative structures in universities and the legitimacy thereof. While the housing cases also raised challenges relating to diversity, the inclusion of multiple stakeholders and representation, these challenges were greater during the #FMF protests given the fact that it occurred on a national scale. In comparison to the #FMF protests, the education cases discussed in the previous chapter were less complicated as the main stakeholders who were ordered to engage were the School Governing Bodies and the Department of Education. Thus, the #FMF protests can be used to illustrate the problems that can arise with relation to the accommodation of diversity and the use of representatives.

Additionally, engagement that occurred during the #FMF protests was as a result of the supporters of the movement calling for engagement. There was no court-ordered engagement throughout the protests. Thus, it can provide valuable insights

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<sup>2</sup>*Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC); *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC); *Juma Masjid Primary School v Essay N.O* 2011 8 BCLR 761 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) & *Head of Department, Department of Education, Free State Province v Welkom High School*; *Head of Department, Department of Education, Free State Province v Harmony High School* 2014 2 SA 228 (CC).

<sup>3</sup> See part 4 3 4 of this chapter.

into the potential and challenges of engagement processes in the absence of judicial oversight. It can also highlight the difficulties relating to dealing with power differentials without the courts to oversee the process of engagement.

## 4 2 Understanding the potential of extra-judicial engagement

### 4 2 1 The definition and sources of extra-judicial engagement

As noted in the introduction of this chapter, one of the reoccurring shortfalls identified in the case analyses related to the timing of engagement, and the need for parties to take extra-judicial engagement more seriously.<sup>4</sup> Given the potential significance of the role of meaningful engagement in an extra-judicial context, there is a need to investigate what extra-judicial engagement is and the legal sources that support it.

Extra-judicial engagement refers to deliberative engagement between conflicting parties which occurs outside of litigation. For example, the engagement expected to be undertaken prior to approaching a court would be extra-judicial engagement.<sup>5</sup> Thus, the engagement that occurs before evicting a group of people, as required by the Constitutional Court, would be considered to be extra-judicial engagement. The requirement to engage prior to turning to litigation implies that there is an obligation on the government to independently institute meaningful engagement processes as early as feasibly possible in policy or programme development processes that have an impact on people's socio-economic rights.<sup>6</sup> In this regard, Muller states that:

“Meaningful engagement extends beyond the court and 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.”<sup>7</sup>

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<sup>4</sup> *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC); *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC); *Juma Masjid Primary School v Essay N.O* 2011 8 BCLR 761 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) & *Head of Department, Department of Education, Free State Province v Welkom High School; Head of Department, Department of Education, Free State Province v Harmony High School* 2014 2 SA 228 (CC).

<sup>5</sup> B Ray “Engagement's Possibilities and Limits as a Socioeconomic Rights Remedy” (2010) 9 *Wash U Global Stud L Rev* 399 417. See also *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 3 SA 208 (CC) para 21 & *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 47.

<sup>6</sup> *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 3 SA 208 (CC) para 30.

<sup>7</sup> G Muller “Conceptualising 'Meaningful Engagement' as a Deliberative Democratic Partnership” (2011) 22 *Stell LR* 742 753.

This statement also implies that meaningful engagement is an ongoing process which should occur after litigation to ensure that the implementation of the solutions, programmes or policies continue after litigation has ended.

The significance of engagement prior to socio-economic rights litigation was first raised by the court in *Olivia Road* where Yacoob J emphasised the need for courts to take into account whether reasonable attempts were made by the Municipality to meaningfully engage with those being evicted before granting an eviction order.<sup>8</sup> He further held that Municipalities should keep complete and accurate records of the steps taken to engage meaningfully with those affected and that the court would take a negative view if municipalities did not make reasonable attempts to engage.<sup>9</sup>

More specifically, Yacoob J in *Olivia Road* emphasised the importance of meaningful engagement in developing and implementing strategies and programmes relating to housing.<sup>10</sup> This is particularly important given the number of people living in similar conditions to the parties involved in the eviction cases discussed. Many of the judgments stressed that *ad hoc* engagement was insufficient and that had proper engagement been conducted, the need for court involvement could have been circumvented.<sup>11</sup> This would involve developing administrative structures and including engagement training for those involved in the process.<sup>12</sup> Civil society organisations would also play a crucial role at all stages of the engagement.<sup>13</sup>

The education cases highlighted the importance of extra-judicial engagement in line with cooperative governance under the Schools Act 84 of 1996.<sup>14</sup> Furthermore, the potential of engagement to deal with underlying issues such as the stigmas and biases related to pregnancies was also highlighted.<sup>15</sup> This indicates that there is an overall

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<sup>8</sup> 2008 3 SA 208 (CC) para 21.

<sup>9</sup> Para 21.

<sup>10</sup> Para 19.

<sup>11</sup> Paras 10, 11, 19, 21 and 30. See also *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 47 & *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) para 43. With regard to the importance of extra-judicial engagement, see also chapter 3 part 3 2 1 3 3, part 3 2 2 3 4 and part 3 2 3 3 3.

<sup>12</sup> H Botha "Democratic Participation and the Separation of Powers" in H Botha, N Schaks & D Steiger (eds) *Das Ende des Repräsentativen Staates? Demokratie am Scheideweg - The End of the Representative State? Democracy at a Crossroads* (2016) 385 396.

<sup>13</sup> 396.

<sup>14</sup> *Head of Department, Department of Education, Free State Province v Welkom High School; Head of Department, Department of Education, Free State Province v Harmony High School* 2014 2 SA 228 (CC) paras 36, 49 and 61. See also *Hoërskool Ermelo v Head of Department, Mpumalanga Department of Education* 2009 3 SA 422 (SCA) para 56 & *MEC for Education, Kwa-Zulu Natal v Pillay* for a discussion on this partnership.

<sup>15</sup> See chapter 3 part 3 3 2 3 4.

need for a more structured approach to engagement to be taken in which extra-judicial engagement is ensured.

Extra-judicial engagement can also be derived from other legal sources, apart from the judgments discussed. For example, the Housing Act 107 of 1997 (“the Housing Act”) states that government must consult meaningfully with those affected by housing development.<sup>16</sup> The Housing Act also states that housing development must be based on integrated development planning.<sup>17</sup> Chapter 4 of the Municipal Systems Act 32 of 2000 (“the Municipality Systems Act”) provides for the development of community participation in local governance and the provision of municipal services. The National Housing Code (“the Housing Code”) contains an Integrated Development Plan for Housing (“IDP Housing”) which also provides for participation during housing development processes.

Chapter 13 of the Housing Code, which deals with *in situ* upgrading of informal settlements, states that it is based on community participation. Furthermore, the importance of extra-judicial engagement in the upgrading of informal settlements was also emphasised in *Melani and the Further Residents of Slovo Park Informal Settlement v City of Johannesburg*.<sup>18</sup> This case was heard in the High Court and dealt with the use of the Upgrading of Informal Settlements Programme (“UISP”) in the provision of adequate housing.<sup>19</sup> The Court held that the UISP envisioned an approach that minimised the disruption of pre-existing communities.<sup>20</sup> Instead, it aims to foster engagement between the residents and government.<sup>21</sup> Furthermore, the importance of the UISP was emphasised by the Court and it was held that the City’s failure to apply the UISP in this case was unlawful and that at the very least, the City should have considered the applicability of the UISP, given that it is the framework to be applied when dealing with informal settlements, as opposed to dismissing the possibility of an *in situ* upgrade.<sup>22</sup> Once again, the importance of meaningful engagement prior to making decisions relating to relocation was emphasised.<sup>23</sup>

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<sup>16</sup> Part 1 section 1(c).

<sup>17</sup> Part 1 section 1(c)(iii).

<sup>18</sup> 2016 5 SA 67 (GJ).

<sup>19</sup> Para 9.

<sup>20</sup> Para 34.

<sup>21</sup> Para 34.

<sup>22</sup> Paras 42-43

<sup>23</sup> Paras 46-47.

In a recent report on informal settlement upgrading, the UN Special Rapporteur on the Right to Adequate Housing emphasised the role of the right to participation and inclusion in this regard.<sup>24</sup> The Report of the Special Rapporteur states that the participation of the residents of settlements which are being upgraded, is crucial to the implementation thereof and that residents should participate at all stages of the upgrading process.<sup>25</sup>

There are thus various legal sources that require and facilitate extra-judicial engagement. The next section will focus on the difference between judicial and extra-judicial engagement, the importance of extra-judicial engagement and the role that it can play in realising socio-economic rights.

#### 4 2 2 Litigation versus political engagement

Ray has posited that ongoing engagement prior to litigation, as described above, can be viewed as “political engagement”.<sup>26</sup> This type of engagement extends beyond litigation and becomes an administrative requirement which, according to Ray, holds the greatest potential as an effective method for realising socio-economic rights, provided that it is correctly structured.<sup>27</sup> In order for this potential to be reached, engagement must be used as a tool for political advocacy and not just as a litigation tactic.<sup>28</sup> It also requires continuous efforts on the part of civil society organisations.

Ray makes a distinction between “litigation engagement” and “political” or extra-judicial engagement.<sup>29</sup> According to Ray, litigation engagement is the court-ordered engagement as seen in, for instance, *Olivia Road* and *Joe Slovo*.<sup>30</sup> He argues that in order for litigation to be successful, the Court must be willing to impose sanctions for failure to meaningfully engage and to maintain a supervisory jurisdiction for ongoing disputes.<sup>31</sup> However, he argues that litigation engagement is not the most effective form of engagement as it requires very specific circumstances and court management

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<sup>24</sup> Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context (“Report of the Special Rapporteur Report”) UNGA (2018) A/73/310/Rev.1 Section B Art 18-22.

<sup>25</sup> Section B Art 18-22.

<sup>26</sup> B Ray “Engagement's Possibilities and Limits as a Socioeconomic Rights Remedy” (2010) 9 *Wash U Global Stud L Rev* 399 418.

<sup>27</sup> 400.

<sup>28</sup> 400.

<sup>29</sup> 413.

<sup>30</sup> 413.

<sup>31</sup> 415.

in order to obtain successful outcomes once litigation has begun.<sup>32</sup> Rather, Ray posits that “political engagement” or extra-judicial engagement, has the highest chance of effectively realising socio-economic rights.<sup>33</sup>

Thus, extra-judicial engagement holds great potential for realising socio-economic rights and can help circumvent the need for litigation. However, given that Chapter 3 highlighted various shortfalls relating to the quality of judicial engagement, there is a need to investigate whether extra-judicial engagement is subject to similar pitfalls as those highlighted in the judicial context. This investigating will analyse attempts at extra-judicial engagement and assess the quality thereof in order to answer the abovementioned questions. These attempts at engagement can thus be used to investigate concerns about the quality of engagement in an extra-judicial context in order for recommendations to be made for the way forward.

The discussion will be limited to the information surrounding the calls for engagement and the responses thereto and will not discuss the merits or legitimacy of the actual protests, or the underlying campaigns for free higher education. The discussion relating to the #FMF movement will thus mainly relate to the themes extrapolated in relation to the quality of judicial engagement namely, unequal bargaining power, tokenistic engagement, the inclusion of relevant stakeholders, and the need to recognise difference. These themes will be explored in the section below.

### **4 3 Understanding extra-judicial engagement through #FMF**

#### **4 3 1 Background to #FMF**

Briefly, the #FMF protests consisted of a diverse group of students across South Africa who protested in 2015 and 2016, calling for *inter alia*<sup>34</sup> a zero-percent increase

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<sup>32</sup> 417.

<sup>33</sup> 417.

<sup>34</sup> For more information on the list of demands by the students involved in #FMF, see M Langa, S Ndelu, Y Edwin & M Vilakazi (Commissioned by Centre for the Study of Violence and Reconciliation) *#Hashtag: An Analysis of the #FeesMustFall Movement at South African Universities* (2017) 6,13 & 35.

in study fees in 2016, as well as free, decolonised tertiary education.<sup>35</sup> These protests began due to the fact that, while progress had been made, the education system is still stacked against black students.<sup>36</sup> Only approximately 50% of students who start primary school progress to matric and the highest failure rates are seen in rural provinces.<sup>37</sup> Thus, the number of black matric students who qualify for university is extremely low in comparison to other groups and those who do qualify, struggle to get funding and are often forced into debt in order to attend university.<sup>38</sup> #FMF members contended that poor students are excluded from tertiary education or disadvantaged to the extent that they cannot afford fees and other costs relating to tertiary education.<sup>39</sup> Thus, the protests also dealt with the right to higher education under section 29(1)(b) of the Constitution, which the government must, through reasonable measures, make progressively available and accessible.

These protests culminated with a demonstration at the Union Buildings, after which President Jacob Zuma (“the President”) announced a zero-percent fee increase.<sup>40</sup> In 2016, the movement continued and called for allocation of greater budgetary resources to higher education. However, students had different views<sup>41</sup> as to how this money should be spent and divisions in the movement began to surface.<sup>42</sup>

Adam Habib, the Vice-Chancellor of the University of Witwatersrand, emphasised the achievements of the #FMF movement as well as the speed at which it achieved

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<sup>35</sup>Hotz v University of Cape Town 2018 1 SA 369 (CC) para 1. R Hodes “Questioning ‘Fees Must Fall’” (2016) 116 *African Affairs* 140 140. See also VL Mpatlanyane *New Student Activism after Apartheid: The Case of Open Stellenbosch* Master of Arts thesis, Stellenbosch University (2018) 14; E Mutekwe “Unmasking the Ramifications of the Fees-Must-Fall-Conundrum in Higher Education Institutions in South Africa: A Critical perspective” (2017) 35 *Perspectives in Education* 142 142 & SABC “Students Divided Over Fees Must Fall Outcome” (24-10-2015) SABC 1 <<http://www.sabc.co.za/news/a/06d982004a5172109061db6d39fe9e0c/Students-divided-over-Fees-must-fall-outcome-20151024>> (accessed 14-09-2018). It is important to note that “free decolonised tertiary education” has a different timeline to the zero-percent increase demand. The proposed timeline for the former is as soon in the students’ lifetime as possible.

<sup>36</sup> G Nicholson “Student Protest: Only the Start of a Greater Pain” (17-09-2018) *The Daily Maverick* 1 <<https://www.dailymaverick.co.za/article/2016-09-28-student-protests-only-the-start-of-greater-pain/#.WSHEJ2iGPIU>> (accessed 16-09-2018).

<sup>37</sup> 1.

<sup>38</sup> 1.

<sup>39</sup> SM Muller “Free Higher Education in South Africa: Cutting Through the Lies and Statistics” (24-01-2018) *The Conversation* 1 <<https://theconversation.com/free-higher-education-in-south-africa-cutting-through-the-lies-and-statistics-90474>> (accessed: 11-28-2018).

<sup>40</sup> 1.

<sup>41</sup> Hotz v University of Cape Town 2017 2 SA 485 (SCA) para 1.

<sup>42</sup>D Mekuto “Gordhan Must Prioritise Education Funding: Youth” (22-02-2017) SABC 1 <<http://www.sabc.co.za/news/a/1681fe80402934c587cbeff8e0b8bbd7/Gordhanundefinedmustundefin edprioritiseundefinededucationundefinedfunding:undefinedYouth-20172202>> (accessed 17-09-2018).

the zero-percent increase.<sup>43</sup> He also acknowledged the role that social activism played in highlighting barriers in accessing higher education experienced by poor (still mostly black) students.<sup>44</sup>

A Commission of Inquiry into Higher Education and Training (“the Commission”) was established in 2016 by the President with the aim of acquiring knowledge relating to the fees dispute and more specifically, the feasibility of free higher education in South Africa.<sup>45</sup> The final report was received by the President in July 2017 in which the Commission found that free higher education was not feasible due to insufficient funds and that a cost-sharing model should be implemented in relation to the funding of university students.<sup>46</sup> However, in December 2017, the President announced that government would fully subsidise free tertiary education for “poor and working class students”.<sup>47</sup> According to the President, this subsidised education would be provided from 2018 for first year students registered at public universities.<sup>48</sup> Furthermore, he held that the financial assistance would be in the form of grants and not loans.<sup>49</sup> This announcement was thus completely contrary to the recommendations made by the Commission in their final report.

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<sup>43</sup> T Madala “Real Victims of Student Uprisings are the Poor” (17-01-2016) *The Sunday Independent* 1 <<https://www.iol.co.za/sundayindependent/real-victims-of-student-uprisings-are-the-poor-1971992>> (accessed: 21-10-2018). See also T Luescher “Towards an Intellectual Engagement with the #Studentmovements in South Africa” (2016) 43 *Politikon* 145 145 & M Langa, S Ndelu, Y Edwin & M Vilakazi (Commissioned by Centre for the Study of Violence and Reconciliation) *#Hashtag: An Analysis of the #FeesMustFall Movement at South African Universities* (2017) 9.

<sup>44</sup> T Madala “Real Victims of Student Uprisings are the Poor” (17-01-2016) *The Sunday Independent* 1 <<https://www.iol.co.za/sundayindependent/real-victims-of-student-uprisings-are-the-poor-1971992>> (accessed: 21-10-2018).

<sup>45</sup> The Daily Vox “Fees Commission Report: Ten Things You Need to Know” (13-11-2017) *Mail & Guardian* 1 <<https://mg.co.za/article/2017-11-13-fees-commission-report-ten-things-you-need-to-know>> (accessed: 30-10-2018).

<sup>46</sup> Commission of Inquiry into Higher Education and Training *Report of the Commission of Inquiry into Higher Education and Training to the President of the Republic of South Africa* 551. The Commission recommended that an income-contingent loan scheme should be used.

<sup>47</sup> A Areff & D Spies “Zuma Announces Free Higher Education for Poor and Working Class Students” (16-12-2017) 1 *News24* <<https://www.news24.com/SouthAfrica/News/zuma-announces-free-higher-education-for-poor-and-working-class-students-20171216>> (accessed: 28-11-2018). According to the President, the definition of “poor and working class students” for purposes of the subsidy is students that are:

“currently enrolled in Technical Vocational Education and Training Colleges or university students from South African households with a combined annual income of up to R350 000 by the 2018 academic year.”

Furthermore, this amount would be revised periodically in consultation with the Minister of Finance.

<sup>48</sup> A Areff & D Spies “Zuma Announces Free Higher Education for Poor and Working Class Students” (16-12-2017) 1 *News24* <<https://www.news24.com/SouthAfrica/News/zuma-announces-free-higher-education-for-poor-and-working-class-students-20171216>> (accessed: 28-11-2018).

<sup>49</sup> 1.

In February 2018, Finance Minister Malusi Gigaba addressed the way forward with regard to the provision of free tertiary education in his budget speech where he stated that funds to the value of R57 billion over the next three years were to be allocated to the free education fund.<sup>50</sup> The National Student Financial Aid Scheme (“NSFAS”) was also revised and will now aid in providing free tertiary education for “poor and working class students”.<sup>51</sup> This new scheme will be introduced over the next three years and was to be applied specifically to first year students who qualified in 2018. According to Gigaba, more than 760 000 students would be funded through the new bursary scheme.<sup>52</sup>

It is noteworthy that the demand for a zero-percent increase in 2015 was only met after student protests resulted in university shut-downs after reports of isolated instances of violence and disruption.<sup>53</sup> This protest action taken by students occurred after there was a general lack of response to multiple calls from students for meaningful engagement with university management.<sup>54</sup> Thus, even though the protest action ultimately resulted in the 0% increase in 2016, the universities’ responses to calls for meaningful engagement are indicative of problems similar to those highlighted in chapter 3 including *inter alia* tokenistic engagement, unequal bargaining power, a lack of recognition of difference as well as representation. The following sections examine how these defects in the qualitative aspects of meaningful engagement manifested themselves in the context of the #FMF movements.

The #FMF protests can thus provide valuable information with regard to the quality of extra-judicial engagement as they involved attempts at extra-judicial engagement between students and management from various universities across South Africa in an effort to find solutions to the various abovementioned issues raised in relation to tertiary education fees and access to higher education. A study was commissioned by the Centre for the Study of Violence and Reconciliation (“the CSVr study”) to obtain

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<sup>50</sup> T Tshwane “Finally: How Government Plans to Fund Free Education” (21-02-2018) *Mail & Guardian* 1 <<https://mg.co.za/article/2018-02-21-finally-how-government-plans-to-fund-free-education>> (accessed 28-11-2018).

<sup>51</sup> 1.

<sup>52</sup> 1.

<sup>53</sup> G Nicholson “Student Protest: Only the Start of a Greater Pain” (17-09-2018) *The Daily Maverick* 1 <<https://www.dailymaverick.co.za/article/2016-09-28-student-protests-only-the-start-of-greater-pain/#.WSHEJ2iGPIU>> (accessed 16-09-2018).

<sup>54</sup> S Mulaudzi “Stellenbosch Students Pepper Sprayed, Manhandled in #FeesMustFall Protest” (16-09-2016) *City Press* 1 <<http://city-press.news24.com/News/stellenbosch-students-peppersprayed-manhandled-in-feesmustfall-protest-20160916>> (accessed 19-09-2018). However, some universities, such as WITS and UCT, attempted engagement as will be elaborated.

more information on the student protests which took place during 2015 and 2016. This study focussed on the experiences of students at nine South African universities and can thus be used to investigate the quality of engagement in these contexts. This investigation will be conducted in the following sections.

#### 4.3.2 Tokenistic engagement and an unwillingness to engage

A common theme that emerged from the CSVr study was that #FMF members across universities felt that management engaged with them on a tokenistic level - in the sense that the engagement that took place was a façade and did not really have any impact on the decisions made.<sup>55</sup> This was illustrated at Stellenbosch University (“SU”) where members of the #FMF movement alleged that their calls for engagement with the rector, Professor Wim De Villiers, were ignored and that, instead, he sent “staff members of colour” to engage with the #FMF members.<sup>56</sup> They complained that they merely wanted to enter into dialogue but that de Villiers refused to speak to them and that he asserted that he engaged with student leaders but it was unclear as to who he was referring to.<sup>57</sup>

Various “sit-ins” and occupations of buildings occurred during the #FMF protests, especially after the announcement in October 2015 that fees would be increased by 11.5% in 2016.<sup>58</sup> These occupations were held in an attempt to get university managements to engage with the #FMF members on the proposed increase. However, instead of engagement, the students were met with police forces and private security ambushing them and locking them in the buildings.<sup>59</sup> Additionally, #FMF members were interdicted from occupying administrative buildings by university managements and faced incarceration if they did not vacate buildings.<sup>60</sup> This is once again indicative of university managements being unwilling to engage with students.<sup>61</sup>

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<sup>55</sup> On tokenistic participation, see chapter 2 part 2.3.1. See also SR Arnstein “A Ladder of Citizen Participation” (1969) 35 *JAIP* 216-217.

<sup>56</sup> W Pretorius & K Ngoepe “Students Stage Sit-In against Fees at Stellenbosch University” (14-09-2016) 1 *News24* <<https://www.news24.com/SouthAfrica/News/students-stage-sit-in-against-fees-at-stellenbosch-university-20160914>> (accessed: 28-11-2018).

<sup>57</sup> 1.

<sup>58</sup> VL Mpatlanyane *New Student Activism after Apartheid: The Case of Open Stellenbosch* Master of Arts thesis, Stellenbosch University (2018) 92.

<sup>59</sup> 94.

<sup>60</sup> 94.

<sup>61</sup> 122.

Another example at SU can be seen when the need for a transformation office for marginalised students was raised by the SU #FMF members.<sup>62</sup> In response to this, the Equality Unit was established at SU in 2016.<sup>63</sup> However, prior to this happening, a white, queer man was appointed as the director of the Equality Unit.<sup>64</sup> While this aids in queer representation and understanding, it does not assist with black representation and was contrary to the requests made by students for a black professional to be in charge of this Unit.<sup>65</sup> Students raised concerns about how the person holding the position in question would manage issues relating to marginalised students.<sup>66</sup> Furthermore, they contended that their opinions were disregarded in light of the fact that the appointment was made without any consultation with the students.<sup>67</sup> This resulted in the students, specifically black students, feeling unacknowledged and unrecognised in the university space, and is illustrative of a lack of understanding of the heterogeneity of the student body on the part of SU.<sup>68</sup> Another problem with tokenistic engagement was that when meetings did take place, oftentimes decisions would be made and then changed without informing the students.<sup>69</sup>

Frustrations about unresponsive or unsatisfactory responses by university management emerged frequently throughout the CSVr study. This included, *inter alia*, vice-chancellors rejecting attempts to engage by student leaders or failing to attend scheduled meetings.<sup>70</sup> Members of the #FMF movement at the University of Limpopo (“UL”) contended that their university’s management was unwilling to engage with them or create spaces for engagement.<sup>71</sup> Instead, management unilaterally decided to shut the campus down.<sup>72</sup> This is interesting as at most other universities, it was the members of #FMF who wanted to shut down the university.

It is important to note that some universities, such as the University of Witwatersrand (“Wits”), Rhodes University (“Rhodes”) and the University of Cape

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<sup>62</sup> 135.

<sup>63</sup> 135.

<sup>64</sup> 135.

<sup>65</sup> 135.

<sup>66</sup> 135-136.

<sup>67</sup> 135-136.

<sup>68</sup> 135.

<sup>69</sup> M Langa, S Ndelu, Y Edwin & M Vilakazi (Commissioned by Centre for the Study of Violence and Reconciliation) *#Hashtag: An Analysis of the #FeesMustFall Movement at South African Universities* (2017) 80.

<sup>70</sup> 8.

<sup>71</sup> 116.

<sup>72</sup> 116.

Town (“UCT”), attempted to engage with the student leaders. For example, Wits attempted to make use of mediators to negotiate a solution. However, this was unsuccessful. In addition, a series of consultations took place at Wits relating to the fee increase.<sup>73</sup> However, students involved in these consultations stated that the process illustrated that there was a lack of transparency on the university’s part as requests by the students for information relating to projections on fees were dismissed by the Chief Financial Officer.<sup>74</sup> The reason for this dismissal was that it would be impossible to get the necessary information to formulate projections.<sup>75</sup> However, during this time, a post-graduate accounting student in consultation with other stakeholders at Wits formulated projections relating to the fees dilemma.<sup>76</sup> The students thus felt that the consultation was tokenistic and that they were only allowed to partake to feel included without actually being allowed to engage meaningfully or being properly informed of what was happening.<sup>77</sup>

Furthermore, the motives behind these attempts as well as the proposed rules of engagement were questioned and problematised by more vocal groups within the movement.<sup>78</sup> The reason behind this was most likely due to previous negative experiences with management. For example, even prior to #FMF, students at various universities such as the Tshwane University of Technology (“TUT”) and UL complained that university management was aloof and distant when attempts were made to engage with them on the fees issue.<sup>79</sup> Additionally, many student leaders that were interviewed for the CSVR study stated that they were often undermined and alienated at Council meetings where discussions on student grievances were kept short and made subject to voting.<sup>80</sup> Students often lost these votes due to being a minority in the Council.<sup>81</sup> Thus, overall, members of #FMF felt that there was no good

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<sup>73</sup> A Habib “Op-Ed: The Politics of Spectacle – Reflections on the 2016 Student Protests” (5-12-2016) *Daily Maverick* 1 < <https://www.dailymaverick.co.za/article/2016-12-05-op-ed-the-politics-of-spectacle-reflections-on-the-2016-student-protests/>> (accessed: 01-12-2018).

<sup>74</sup> M Langa, S Ndelu, Y Edwin & M Vilakazi (Commissioned by Centre for the Study of Violence and Reconciliation) *#Hashtag: An Analysis of the #FeesMustFall Movement at South African Universities* (2017) 144-145.

<sup>75</sup> 144-145.

<sup>76</sup> 144-145.

<sup>77</sup> 144-145.

<sup>78</sup> E Mutekwe “Unmasking the Ramifications of the Fees-Must-Fall-Conundrum in Higher Education Institutions in South Africa: A Critical Perspective” (2017) 35 *Perspectives in Education* 142 147.

<sup>79</sup> M Langa, S Ndelu, Y Edwin & M Vilakazi (Commissioned by Centre for the Study of Violence and Reconciliation) *#Hashtag: An Analysis of the #FeesMustFall Movement at South African Universities* (2017) 53.

<sup>80</sup> 136.

<sup>81</sup> 136.

faith engagement.<sup>82</sup> Those universities that were unresponsive to calls for engagement were also accused of being insensitive and unsympathetic to the protesters and their cause.<sup>83</sup> This caused a breakdown in the relationship between students involved in the protests and university managements, which then made it difficult for compromises to be reached and resulted in the students resorting to violence.<sup>84</sup>

These feelings were aggravated when university managements distanced themselves from the students by enlisting the services of the police and private security. Universities claimed that the reason behind this choice was to protect property as well as the academic programme. However, the effect that it had was to instil fear which was also indicative of an unwillingness<sup>85</sup> to listen and negotiate.<sup>86</sup> Universities also made use of interdicts, which students felt contradicted university managements' claims of being willing to negotiate and engage on the matters and resulted in distrust and anxiety across university campuses.<sup>87</sup>

Additionally it resulted in the students distrusting management, which marred future attempts at engagement.<sup>88</sup> For example, students at the University of Kwa-Zulu Natal ("UKZN") made multiple calls for engagement but received no response from management apart from a statement in which it was communicated that management had increased security on campuses.<sup>89</sup> These feelings of distrust and not being heard can lead to the students being unwilling to engage in future contexts. Furthermore, the distrust on the students' part were so profound that many of those interviewed for studies on #FMF were initially hesitant to partake as they feared that the researcher

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<sup>82</sup> K Tissington "Between Praxis and Paralysis: The Relationships between Legal NGOs and Social Movements" in U Duyar-Kienast, G Kienast, A Ley and K Teschner (eds) *TRIALOG: A Journal for Planning and Building in the Third World* (2010) 56 57.

<sup>83</sup> M Langa, S Ndelu, Y Edwin & M Vilakazi (Commissioned by Centre for the Study of Violence and Reconciliation) *#Hashtag: An Analysis of the #FeesMustFall Movement at South African Universities* (2017) 24 & 144.

<sup>84</sup> 24.

<sup>85</sup> K Tissington "Between Praxis and Paralysis: The Relationships between Legal NGOs and Social Movements" in U Duyar-Kienast, G Kienast, A Ley and K Teschner (eds) *TRIALOG: A Journal for Planning and Building in the Third World* (2010) 56 57.

<sup>86</sup> M Langa, S Ndelu, Y Edwin & M Vilakazi (Commissioned by Centre for the Study of Violence and Reconciliation) *#Hashtag: An Analysis of the #FeesMustFall Movement at South African Universities* (2017) 80 & 144-146.

<sup>87</sup> 9.

<sup>88</sup> 80.

<sup>89</sup> 89.

was an informer or spy for the university.<sup>90</sup> These feelings of distrust and the effect it has on the engagement process will be expanded on in the next chapter.

Apart from tokenistic engagement on the part of university managements, #FMF members also accused government members of being unwilling to engage on the issues raised.<sup>91</sup> There was a need for government and university managements to engage with students without resorting to the use of police or private security.

Unwillingness to engage could also be seen from smaller factions within the #FMF movement. For example, according to Habib, the move to shutdown universities instead of continuing to attempt engagement was instigated by a small faction within the movement that was allegedly controlled by one of the political parties.<sup>92</sup> Students at Wits called for engagement in the form of a peace rally which was attended by many academics, including Habib.<sup>93</sup> However, during the rally, one of the #FMF members called for Habib to leave.<sup>94</sup> Although the said member indicated that Habib should be afforded an opportunity to leave himself, a small group of #FMF members surrounded Habib, verbally abused him and then proceeded to take over the rally.<sup>95</sup> There were also allegations that certain student leaders, specifically at Wits, had private engagements with management and subsequently begged them not to expose these engagements.<sup>96</sup> Similar to what was noted in chapter 3 in relation to judicial engagement, the parties in this situation should have been willing to reach a compromise when deciding on solutions as opposed to being unwilling to engage or aggravating the tensions.<sup>97</sup>

Additionally, the former deputy chief justice Dikgang Moseneke organised the Higher Education National Convention (“the Convention”) which was scheduled to take place in February 2018.<sup>98</sup> This convention aimed to provide a platform for students, university managements, civil society groups and businesses to discuss the higher

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<sup>90</sup> 49-50.

<sup>91</sup> 117.

<sup>92</sup> A Habib “Op-Ed: The Politics of Spectacle – Reflections on the 2016 Student Protests” (5-12-2016) *Daily Maverick* 1 <<https://www.dailymaverick.co.za/article/2016-12-05-op-ed-the-politics-of-spectacle-reflections-on-the-2016-student-protests/>> (accessed: 01-12-2018).

<sup>93</sup> 1.

<sup>94</sup> 1.

<sup>95</sup> 1.

<sup>96</sup> 1.

<sup>97</sup> See chapter 3 part 3 2 2 3 1.

<sup>98</sup> F Msindisi “National Convention Aims to Solve the Crisis in Higher Education” (02-02-2017) *City Press* 1 <<https://city-press.news24.com/News/national-convention-aims-to-solve-the-crisis-in-higher-education-20170202>> (accessed: 02-12-2018).

education crisis.<sup>99</sup> However, this Convention was cancelled after students disrupted the proceedings and denied the Minister of Higher Education, Blade Nzimande, an opportunity to speak.<sup>100</sup> Students also threw chairs and water bottles around and called for the removal of white people who were at the Convention.<sup>101</sup> The actions of these factions resulted in the engagement process being marred and thus hindered attempts at obtaining solutions to the fees dilemma. This speaks not only to problems with parties who are unwilling to engage but also to issues about representation which will be elaborated on later in this chapter.

The above discussion has highlighted various examples of tokenistic engagement and an unwillingness to engage on the part of university managements as well as certain groups of the #FMF movement during the #FMF protests. This tokenistic engagement and unwillingness to engage resulted in the quality of the engagement being affected. In terms of Arnstein's ladder, tokenistic engagement is considered to be a weaker form of participation, as discussed in chapter 2.<sup>102</sup> This type of engagement is inconsistent with Sturm's third requirement for quality engagement, namely that engagement must stimulate involvement, cooperation, education and consensus.<sup>103</sup> Tokenistic engagement often results in stakeholders, in this case the #FMF members, becoming despondent and unwilling to participate as they grow tired of their interests and concerns being ignored.<sup>104</sup> In fact, certain #FMF members were already hesitant to engage with management and were suspicious of their motives for wanting to engage due to previous negative experiences. The weak quality of engagement in this case thus caused distrust on the part of #FMF members and could impair future attempts at engagement on the matter of tertiary education fees. Finally, the tokenistic engagement exhibited during the #FMF protests was contrary to the principle of "process validity"<sup>105</sup> as there was inadequate time set out for deliberations and often, information relating to fees was inaccessible to the #FMF members and students in general.

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<sup>99</sup> 1.

<sup>100</sup> A Janse van Rensburg & J de Villiers "Higher Education Convention Cancelled after Chaos" (18-03-2017) *News24* 1 <<https://www.news24.com/SouthAfrica/News/higher-education-convention-cancelled-after-chaos-20170318>>.

<sup>101</sup> 1.

<sup>102</sup> See chapter 2 part 2 3 1.

<sup>103</sup> See chapter 2 part 2 3 3.

<sup>104</sup> SR Arnstein "A Ladder of Citizen Participation" (1969) 35 *JAIP* 216 217.

<sup>105</sup> See chapter 2 part 2 3 4.

### 4.3.3 Unequal bargaining power

The #FMF protests also illustrated the problem of unequal bargaining power in extra-judicial engagement, as even though #FMF members called for engagement, the universities ultimately had the power and the option to ignore them without any consequences. An academic study on the #FMF movement at Stellenbosch described the frustration of SU #FMF members in the following terms:

“We’ve sent countless lengthy emails to management to try and get the university to engage in an open and transparent way but it hasn’t helped. We don’t have the power to make this happen and it feels like our backs are against the wall.”<sup>106</sup>

Concerns were also raised in relation to the Student Representative Councils (“SRC”) as many students felt that the mere inclusion of student representatives on formal institutional decision-making bodies such as the SRC did not automatically result in meaningful and equal participation within these bodies, and between these bodies and other university structures (for example, between management and council).<sup>107</sup> This is indicative of the fact that the mere inclusion of certain groups, in this case, students, within formal decision-making processes, does not equate to the equal distribution of power amongst stakeholders.<sup>108</sup>

Unequal bargaining power was also seen when the majority of the universities made use of security, court interdicts<sup>109</sup> and the institution of disciplinary procedures<sup>110</sup> against students involved in the #FMF movement.<sup>111</sup> Concerns were raised by the students and even some lecturers that the interdicts were drafted in very broad and vague terms.<sup>112</sup> Furthermore, at some universities,<sup>112</sup> even students who were protesting

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<sup>106</sup> S Mulaudzi “Stellenbosch Students Pepper Sprayed, Manhandled in #FeesMustFall Protest” (16-09-2016) *City Press* 1 <<http://city-press.news24.com/News/stellenbosch-students-peppersprayed-manhandled-in-feesmustfall-protest-20160916>> (accessed 19-09-2018).

<sup>107</sup> VL Mpatlanyane *New Student Activism after Apartheid: The Case of Open Stellenbosch* Master of Arts thesis, Stellenbosch University (2018) 54.

<sup>108</sup> 54.

<sup>109</sup> Students served with interdicts were also barred from accessing various campus facilities such as internet access and access to residences. See M Mortlock “Stellenbosch University Students Slapped with Interdict Feel Victimized” (22-09-2016) *EWN* <<https://ewn.co.za/2016/09/22/Stellenbosch-University-students-slapped-with-interdict-say-feel-victimized>> (accessed 01-10-2018). M Langa, S Ndelu, Y Edwin & M Vilakazi (Commissioned by Centre for the Study of Violence and Reconciliation) *#Hashtag: An Analysis of the #FeesMustFall Movement at South African Universities* (2017) 9.

<sup>110</sup> 13.

<sup>111</sup> E Mutekwe “Unmasking the Ramifications of the Fees-Must-Fall-Conundrum in Higher Education Institutions in South Africa: A Critical Perspective” (2017) 35 *Perspectives in Education* 142 143.

<sup>112</sup> M Langa, S Ndelu, Y Edwin & M Vilakazi (Commissioned by Centre for the Study of Violence and Reconciliation) *#Hashtag: An Analysis of the #FeesMustFall Movement at South African Universities* (2017) 104.

peacefully were interdicted.<sup>113</sup> For example, at Rhodes University, students who were peacefully protesting sexual violence were interdicted without any notice that the proceedings were being brought against them.<sup>114</sup> The presence of police and private security guards also became a norm on many campuses during these times.<sup>115</sup> Many students felt silenced by the security presence and claimed that the tactics employed by the universities were similar to those used in the apartheid regime.<sup>116</sup> These tactics included using cameras on campus to surveil the students.<sup>117</sup>

Stun grenades, water cannons and tear gas were used to disperse crowds of protesters, regardless of whether the protests were peaceful or not and those who resisted were arrested.<sup>118</sup> For example, when a group of students from SU passively gathered at the entrance of SU's library, the University retaliated with violence.<sup>119</sup> Students attempted to keep the door open but were met with private security shoving, kicking and groping students.<sup>120</sup> There were also reports of police using rubber bullets, tear gas and stun grenades.<sup>121</sup> Students were effectively silenced by the university's use of these tactics and there was no opportunity to meaningfully engage.

Unequal power dynamics were also noted in relation to the actions taken by private security.<sup>122</sup> Students felt that the private security had unbridled power and were allowed to infringe upon their constitutional rights without any consequences.<sup>123</sup> This

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<sup>113</sup> 104.

<sup>114</sup> 101.

<sup>115</sup> E Mutekwe "Unmasking the Ramifications of the Fees-Must-Fall-Conundrum in Higher Education Institutions in South Africa: A Critical Perspective" (2017) 35 *Perspectives in Education* 142 143.

<sup>116</sup> 143.

<sup>117</sup> M Langa, S Ndelu, Y Edwin & M Vilakazi (Commissioned by Centre for the Study of Violence and Reconciliation) *#Hashtag: An Analysis of the #FeesMustFall Movement at South African Universities* (2017) 43.

<sup>118</sup> 25. C Naicker "From Marikana to #Feesmustfall: The Praxis of Popular Politics in South Africa" (2016) 1 *Urbanisation* 53 58-59. For a detailed report on the injuries sustained by #FMF members as a result of the use of police and private security, see SERI *A Double Harm: Police Misuse of Force and Barriers to Necessary Health Care Services* (2017).

<sup>119</sup> S Mulaudzi "Stellenbosch Students Pepper Sprayed, Manhandled in #FeesMustFall Protest" (16-09-2016) *City Press* 1 <<http://city-press.news24.com/News/stellenbosch-students-peppersprayed-manhandled-in-feesmustfall-protest-20160916>> (accessed 19-09-2018).

<sup>120</sup> 1.

<sup>121</sup> SABC "Students Divided Over Fees Must Fall Outcome" (24-10-2015) *SABC* 1 <<http://www.sabc.co.za/news/a/06d982004a5172109061db6d39fe9e0c/Students-divided-over-Fees-must-fall-outcome-20151024>> (accessed 14-09-2018).

<sup>122</sup> M Langa, S Ndelu, Y Edwin & M Vilakazi (Commissioned by Centre for the Study of Violence and Reconciliation) *#Hashtag: An Analysis of the #FeesMustFall Movement at South African Universities* (2017) 76.

<sup>123</sup> 76.

was made possible by the fact that they generally dressed in plain black clothes without any company or individual names to report and hold accountable.<sup>124</sup>

This is illustrative of the uneven power dynamics which were present during the #FMF protests and which resulted in calls for meaningful engagement being silenced. This intensified problems relating to students feeling excluded in the university space as the militarisation of campuses further alienated and silenced black voices through violence.<sup>125</sup> Students also alleged that the police targeted specific students just because they were black and that some students were shot at with rubber bullets while just walking on campus.<sup>126</sup> It can also be seen as having the effect of dehumanising black students and viewing them as problems to universities and governments.<sup>127</sup> The students alleged that while they were not completely faultless in the breakdown of negotiations, the fact that management held the power meant that they should have acted with restraint. This point is extremely important as it highlights the uneven bargaining power present during the attempts at engagement, especially given the fact that university managements held students' education in their hands and had the power to determine whether or not certain students went to prison.<sup>128</sup>

However, it is important to note that the #FMF movement became more prone to violence towards the end of 2015. This violence included threats to and assault of staff and other students as well as arson.<sup>129</sup> Furthermore, #FMF members disrupted lectures and test venues and some destroyed test scripts.<sup>130</sup> While these actions were probably resorted to out of frustration at the inadequate responses by university managements and government, they cannot be condoned and ultimately, they resulted in attempts at engagement being hindered.

These examples of unequal bargaining power contributed to the low quality of engagement during the #FMF protests. Firstly, the bargaining disparities contravene Sturm's fourth principle which states that the engagement process should mitigate bargaining and resource disparities.<sup>131</sup> Secondly, it goes against the principle of

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<sup>124</sup> 76.

<sup>125</sup> 34-35.

<sup>126</sup> 42-43.

<sup>127</sup> 42-43.

<sup>128</sup> 75-76. Some students were prevented from accessing residence or from even being on campus.

<sup>129</sup> A Habib "Op-Ed: The Politics of Spectacle – Reflections on the 2016 Student Protests" (5-12-2016) *Daily Maverick* 1 < <https://www.dailymaverick.co.za/article/2016-12-05-op-ed-the-politics-of-spectacle-reflections-on-the-2016-student-protests/> > (accessed: 01-12-2018).

<sup>130</sup> 1.

<sup>131</sup> See chapter 2 part 2 3 3.

“dialogical validity which states that marginalised and excluded groups should be able to engage without any constraint or coercion.<sup>132</sup> Thirdly, the unequal bargaining power resulted in voices being silenced, which hinders the ability of meaningful engagement to obtain legitimate, responsive and flexible solutions as not all the interests are taken into account when obtaining a solution.<sup>133</sup> It also violates the stakeholders’, in this case, the #FMF members’, right to dignity.<sup>134</sup>

#### 4 3 4 Including relevant stakeholders and recognising difference

The attempted engagements relating to the substance of the students demands for a zero-fee increase during the #FMF protests also exhibited problems relating to the lack of inclusion of relevant stakeholders. These problems stemmed from the fact that certain parties were unwilling to participate in negotiations or engagement processes as well as the fact that there was a failure to recognise and accommodate differences within the #FMF movement which resulted in certain groups being excluded from the engagement process. Both of these aspects will be discussed below.

In terms of the first problem, the first crucial stakeholder that was missing at many of the universities was the university managements and government officials,<sup>135</sup> due to the problems discussed in the first part of this section.<sup>136</sup> Secondly, student participation often fluctuated and was dependent on various factors such as exam timetables, academic holidays and student turnover, all of which affected the continuity and unity of the movement.<sup>137</sup> These problems affected the quality of engagement by compromising the depth and breadth of participation.<sup>138</sup> The fact that not all the relevant stakeholders were involved at all stages of the engagement process resulted in the engagement being narrow.<sup>139</sup> Furthermore, the fact that the engagement that took place was mainly at a tokenistic level, as discussed in the previous section, is

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<sup>132</sup> See chapter 2 part 2 4 4.

<sup>133</sup> See chapter 2 parts 2 3 1.

<sup>134</sup> See chapter 2 part 2 3 2.

<sup>135</sup> Habib has noted that the government lacked political leadership in relation to the fees dilemma and although there were attempts at engagement by the Department of Higher Education and Training, other government departments were not willing to engage on the matter. See A Habib “Op-Ed: The Politics of Spectacle – Reflections on the 2016 Student Protests” (5-12-2016) *Daily Maverick* 1 <<https://www.dailymaverick.co.za/article/2016-12-05-op-ed-the-politics-of-spectacle-reflections-on-the-2016-student-protests/>> (accessed: 01-12-2018).

<sup>136</sup> See part 4 2 1 of this chapter.

<sup>137</sup> VL Mpatlanyane *New Student Activism after Apartheid: The Case of Open Stellenbosch* Master of Arts thesis, Stellenbosch University (2018) 37.

<sup>138</sup> See chapter 2 part 2 4 2.

<sup>139</sup> See chapter 2 part 2 4 2.

indicative of shallow participation as the students were not given a chance to properly engage.<sup>140</sup> The problems relating to lack of inclusion of stakeholders also contravene Sturm's norm that all relevant stakeholders should participate in the engagement process.<sup>141</sup> It also goes against the principle of "democratic validity" which states that all relevant stakeholders who are affected must be included.<sup>142</sup> The exclusion of stakeholders also led to problems with solutions as once again, any solutions obtained were not flexible or responsive to the needs of all the stakeholders and the legitimacy thereof would also be questionable.<sup>143</sup> It also ignores the need to give effect to the dignity of those involved in the engagement process.<sup>144</sup>

However, the inclusion of relevant stakeholders within the #FMF movement was also problematic due to the fact that the #FMF movement was not homogenous and this resulted in tensions forming within the group.<sup>145</sup> Different groups within the movement had different ideologies and goals.<sup>146</sup> Initially, the #FMF movement saw widespread support across race and gender lines.<sup>147</sup> However, although the #FMF movement seemed like a united front, differences in political ideologies, gender identity, sexual orientation and race resulted in factions forming within the movement.<sup>148</sup> Thus, the united front of students began to display cracks, as some members of the group felt excluded, and consequently left the movement.<sup>149</sup> Further differences can be seen in the various university protests and responses to the fees dilemma. As such, it is necessary to discuss the way in which difference played a role in the inclusion or exclusion of stakeholders as well as in the responses to the fees dilemma at the different universities.

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<sup>140</sup> See chapter 2 part 2 4 2.

<sup>141</sup> See chapter 2 part 2 4 3.

<sup>142</sup> See chapter 2 part 2 4 4.

<sup>143</sup> See chapter 2 part 2 3 1.

<sup>144</sup> See chapter 2 part 2 3 3.

<sup>145</sup> VL Mpatlanyane *New Student Activism after Apartheid: The Case of Open Stellenbosch* Master of Arts thesis, Stellenbosch University (2018) 36 & 128. S Badat "Deciphering the Meanings and Explaining the South African Higher Education Student Protests of 2015–16" (2016) 1 *Pax Academica* 71 98.

<sup>146</sup> M Langa, S Ndelu, Y Edwin & M Vilakazi (Commissioned by Centre for the Study of Violence and Reconciliation) *#Hashtag: An Analysis of the #FeesMustFall Movement at South African Universities* (2017) 56.

<sup>147</sup> 104-105. R Hodes "Questioning 'Fees Must Fall'" (2016) 116 *African Affairs* 35, 140 & 148.

<sup>148</sup> M Langa, S Ndelu, Y Edwin & M Vilakazi (Commissioned by Centre for the Study of Violence and Reconciliation) *#Hashtag: An Analysis of the #FeesMustFall Movement at South African Universities* (2017) 58.

<sup>149</sup> N Joseph "Dangerous Minds: Rather than Creating an Alliance, Fees Must Fall is Limiting Free Speech at South Africa's Universities, Leaving Some Early Supporters Disheartened" (2017) 46 *Index on Censorship* 18 18-19.

#### 4 3 4 1 Political differences

Division was created along political lines<sup>150</sup> as many students involved in the movement were affiliated with different political groups such as *inter alia* the Economic Freedom Fighters (“the EFF”), the Democratic Alliance (“the DA”) and the Pan Africanist Student Movement of Azania (“PASMA”).<sup>151</sup> For example, at the University of the Western Cape (“UWC”), members of the South African Students Congress (“SASCO”) withdrew from the movement but were leading the SRC.<sup>152</sup> The reason for their withdrawal was their affiliation with the African National Congress (“the ANC”) and their hesitance to go against the government.<sup>153</sup> However, they were viewed as sell-outs by the remaining members of the movement for not partaking.<sup>154</sup> Furthermore, non-participation from members of certain political groups was also associated with their perceived socio-economic background.<sup>155</sup> For example, members of the Democratic Alliance Students Organisation (“DASO”) also did not partake in the movement and many students felt that this was linked to the fact that the majority of the DASO students hailed from affluent backgrounds and lived in suburbs as opposed to students who were members of other political organisations, who lived predominantly in townships.<sup>156</sup> Furthermore, members of DASO were labelled as white-dominated and racist due to their association with the DA.<sup>157</sup>

#### 4 3 4 2 Racial differences

Racial differences also resulted in divisions.<sup>158</sup> Membership of the #FMF movement was continuously changing.<sup>159</sup> One student noted that many white students were involved in the beginning of the movement.<sup>160</sup> However, as time progressed, these white students started opting out.<sup>161</sup> Various reasons have been posited for this. Some members asserted that white students and academics found the movement to be too

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<sup>150</sup> M Langa, S Ndelu, Y Edwin & M Vilakazi (Commissioned by Centre for the Study of Violence and Reconciliation) *#Hashtag: An Analysis of the #FeesMustFall Movement at South African Universities* (2017) 39, 110 & 142.

<sup>151</sup> 9.

<sup>152</sup> 36.

<sup>153</sup> 36.

<sup>154</sup> 36.

<sup>155</sup> 36.

<sup>156</sup> 36.

<sup>157</sup> 34.

<sup>158</sup> 104-105.

<sup>159</sup> 71.

<sup>160</sup> 71.

<sup>161</sup> 71.

political and wanted the focus to be on the fees as opposed to deeper class and race issues.<sup>162</sup>

Another reason which resulted in racial divisions was that white students were “attacked for being white” thus causing them to stop supporting the #FMF movement.<sup>163</sup> An audio file was sent at Wits forcing white people to join the movement and stating that a white student must be killed in order for the movement to be taken seriously.<sup>164</sup> This resulted in many white students feeling threatened and this undoubtedly contributed to their falling participation in the movement.<sup>165</sup>

#### 4 3 4 3 Difference and patriarchy

Gender differences also resulted in the movement being ruptured. Many students felt that the movement was dominated by male students and that students who did not conform to gender norms were excluded. A sub-movement, #PatriarchyMustFall, was also created at some universities during the time of #FMF.<sup>166</sup> This movement aimed at highlighting the patriarchal, sexist and violent heteronormative culture within the #FMF movement and which dominated most universities. However, the issues that were important to the movement began to change with time. Initially, problems relating to patriarchy and sexuality were high on the agenda in 2015 but in 2016, less emphasis was placed on these matters.<sup>167</sup> This has been linked to the fact that male students took up a more prominent role in leading the group and female and queer voices were less audible.<sup>168</sup> Thus some #FMF members left due to the movement itself being oppressive to women and LGBTQIA+ people and biased towards predominantly male black cisgender heterosexual bodies.<sup>169</sup>

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<sup>162</sup> 104-105.

<sup>163</sup> 105.

<sup>164</sup>G Nicholson “Student Protest: Only the Start of a Greater Pain” (28-09-2017) *The Daily Maverick* 1 <<https://www.dailymaverick.co.za/article/2016-09-28-student-protests-only-the-start-of-greater-pain/#.WSHEJ2iGPIU>> (accessed 16-09-2018).

<sup>165</sup> 1.

<sup>166</sup> M Langa, S Ndelu, Y Edwin & M Vilakazi (Commissioned by Centre for the Study of Violence and Reconciliation) *#Hashtag: An Analysis of the #FeesMustFall Movement at South African Universities* (2017) 71.

<sup>167</sup> 72.

<sup>168</sup> 72 & 141.

<sup>169</sup> VL Mpatlanyane *New Student Activism after Apartheid: The Case of Open Stellenbosch* Master of Arts thesis, Stellenbosch University (2018) 65 & 128.

#### 4 3 4 4 Differences in the responses by #FMF at different universities

Difference was also noted in terms of the differing circumstances across campuses. For example, distinctions must be made between historically white universities and historically black universities as they have differing needs, resources and responses. Sometimes, these differences can be seen within a single institution, for instance in the UKZN where two universities, the University of Natal and the University of Durban-Westville, were merged in 2004<sup>170</sup> in an attempt to integrate an under-resourced university with a better-resourced university.<sup>171</sup> Even though the campuses merged, they still have different rates of growth and development.<sup>172</sup> For example, Howard College was seen as more developed with better infrastructure as it was part of a historically white university and thus well-funded under apartheid.<sup>173</sup>

The difference between campuses can also be seen in the demands of the students.<sup>174</sup> For example, students at the Pietermaritzburg campus asked for areas of their campus to be renovated in a similar fashion to areas in the Westville campus as they felt that the two campuses had double standards in terms of the facilities provided.<sup>175</sup> Furthermore, students at the Soshanguve campus of the Tshwane University of Technology (“TUT Soshanguve”), while also protesting about fees, had other issues on their campus relating to lack of access to basic services and facilities.<sup>176</sup> This included *inter alia* lack of running water and electricity in accommodations and buildings that needed maintenance.<sup>177</sup> These divides led to under- or misrepresentation of certain members’ views.<sup>178</sup>

The responses of students to university management were also different. Students at the Pietermaritzburg campus responded more violently compared to other campuses.<sup>179</sup> This was attributed to the fact that the Pietermaritzburg campus had a

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<sup>170</sup> M Langa, S Ndelu, Y Edwin & M Vilakazi (Commissioned by Centre for the Study of Violence and Reconciliation) *#Hashtag: An Analysis of the #FeesMustFall Movement at South African Universities* (2017) 84.

<sup>171</sup> 84.

<sup>172</sup> 85.

<sup>173</sup> 85.

<sup>174</sup> 85.

<sup>175</sup> 85.

<sup>176</sup> 50.

<sup>177</sup> 50.

<sup>178</sup> 65.

<sup>179</sup> 85.

large portion of Humanities students who were more politically-conscious and aware of the social inequalities present at different campuses and in society as a whole.<sup>180</sup>

Another difference relates to the media coverage of black universities who had been protesting about matters similar to those which surfaced in #FMF but were only recognised once historically white universities such as the UCT and SU also began raising these issues.<sup>181</sup> For example, at UL, students have a history with challenging university management in relation to fee increments.<sup>182</sup> These challenges resulted in disadvantaged students, who formed the majority of the student base, being fully funded through the National Student Financial Aid Scheme (“NSFAS”).<sup>183</sup> As a result, students of UL were not part of the #FMF protests until much later, as they perceived historically white universities as arrogant.<sup>184</sup>

#### 4 3 4 5 Difference and intersectionality

During the #FMF protests, there were calls for education to be more inclusive, intersectional and decolonised.<sup>185</sup> In terms of intersectionality, students attempted to highlight the importance of the intersections of class, race and gender.<sup>186</sup> Students held that fee increases would result in a “double exclusion” for black students given that they were already excluded by the university culture in historically white universities.<sup>187</sup> Furthermore, students raised issues concerning the current education system, which they argued perpetuated colonial knowledge-systems, thereby continuing the systematic privileges of white students and lecturers. They also asserted that the current curriculum does not represent black students and that there

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<sup>180</sup> 85.

<sup>181</sup> 84.

<sup>182</sup> 108-109.

<sup>183</sup> 108-109.

<sup>184</sup> 108-110.

<sup>185</sup> M Ndlovu "Fees Must Fall: A Nuanced Observation of the University of Cape Town, 2015–2016" (2017) 31 *Agenda* 127 127. VL Mpatlanyane *New Student Activism after Apartheid: The Case of Open Stellenbosch* Master of Arts thesis, Stellenbosch University (2018) 128.

<sup>186</sup> M Langa, S Ndelu, Y Edwin & M Vilakazi (Commissioned by Centre for the Study of Violence and Reconciliation) *#Hashtag: An Analysis of the #FeesMustFall Movement at South African Universities* (2017) 8. See chapter 5 part 5 2 3 1 for a discussion on intersectionality. See also K Crenshaw "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color" (1991) 43 *Stan LR* 1241-1299 & J Conaghan "Intersectionality and the Feminist Project in Law" in E Grabham, D Cooper, J Krishnadas & D Herman (eds) in *Intersectionality and Beyond: Law, Power and the Politics of Location* (2008) 21-48.

<sup>187</sup> VL Mpatlanyane *New Student Activism after Apartheid: The Case of Open Stellenbosch* Master of Arts thesis, Stellenbosch University (2018) 128.

is a need for education which is inclusive of and empowers black people.<sup>188</sup> The calls for decolonised education related to transforming the curriculum to include a more Afrocentric approach. The majority of the #FMF members felt that the current curriculum was too Eurocentric which resulted in the university culture alienating black students and academics.<sup>189</sup> Thus, there was a need to focus more on African knowledge and experience.<sup>190</sup>

However, it is interesting to note that calls for decolonised education differed at UL compared to previously white universities such as Wits and UCT.<sup>191</sup> Instead of wanting a decolonised curriculum with emphasis on the experiences of black people, UL students called for a curriculum which was standardised across the country and which mirrored the Wits and UCT curriculums.<sup>192</sup> The reason behind this was that students at UL felt that the education that they received was sub-standard and perpetuated the apartheid legacy by grooming them to be teachers and nurses.<sup>193</sup> This is interesting as these students are calling for assimilation into historically white, Eurocentric pedagogies, which was the very element being rejected by black students at historically white universities such as UCT and Wits.<sup>194</sup> This illustrates the fact that even the calls to decolonisation are not homogenous, and that it depends on the circumstances at each university.<sup>195</sup>

Overall, the calls for decolonised education did not only relate to a more inclusive curriculum but also addressed the way in which students are taught and the

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<sup>188</sup> M Ndlovu "Fees Must Fall: A Nuanced Observation of the University of Cape Town, 2015–2016" (2017) 31 *Agenda* 127-128. M Langa, S Ndelu, Y Edwin & M Vilakazi (Commissioned by Centre for the Study of Violence and Reconciliation) *#Hashtag: An Analysis of the #FeesMustFall Movement at South African Universities* (2017) 39 & 114.

<sup>189</sup> M Langa, S Ndelu, Y Edwin & M Vilakazi (Commissioned by Centre for the Study of Violence and Reconciliation) *#Hashtag: An Analysis of the #FeesMustFall Movement at South African Universities* (2017) 114.

<sup>190</sup> 114. On decolonising curricula, see also T Madlingozi "Social Justice in a Time of Neo-Apartheid Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribution" (2017) 123 *Stell LR* 135-139; H Savo "Decolonisation of Higher Education: Dismantling Epistemic Violence and Eurocentrism in South Africa" (2016) 1 *Transformation in Higher Education* 1-8; A Mbembe "Decolonizing the University: New Directions" (2016) 15 *Arts and Humanities in Higher Education* 29-45; J Modiri "The Time and Space of Critical Legal Pedagogy" (2016) 27 *Stellenbosch Law Review* 507-534.

<sup>191</sup> M Langa, S Ndelu, Y Edwin & M Vilakazi (Commissioned by Centre for the Study of Violence and Reconciliation) *#Hashtag: An Analysis of the #FeesMustFall Movement at South African Universities* (2017) 108-109.

<sup>192</sup> 108-109 & 113.

<sup>193</sup> 108-109 & 113.

<sup>194</sup> 114.

<sup>195</sup> 108-109.

composition of the lecturers and staff.<sup>196</sup> Furthermore, it related to the renaming of university buildings after black South African leaders as opposed to the current names which honoured white historical figures who played a leading role during colonialism and apartheid.<sup>197</sup> Thus, decolonised education also relates to the “physical and social reconstruction of the university space”.<sup>198</sup>

Issues relating to language and institutionalised culture were also emphasised.<sup>199</sup> Language was a particularly important aspect at historically Afrikaans universities such as SU.<sup>200</sup> Black students felt that learning in Afrikaans puts them at a disadvantage and gives white Afrikaans students an unfair advantage.<sup>201</sup> Similar sentiments were shared at the University of Free State (“UFS”) where the language policy separated English and Afrikaans classes, thus resulting in “a white Afrikaans university” and “a mainly black English university”.<sup>202</sup> This exacerbated the racism and exclusion that black students experienced on campus.<sup>203</sup> This led to calls for attention to be paid to the issue of integration of black and white students.<sup>204</sup> Language was also a common theme at UKZN where students were unhappy with the fact that Afrikaans is still a common feature and where they asserted that Zulu should instead, be the language used in lectures.<sup>205</sup>

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<sup>196</sup> 39 & 85.

<sup>197</sup> 39 & 85.

<sup>198</sup> 39 & 85.

<sup>199</sup> 39 & 85.

<sup>200</sup> 39. T Luescher, L Loader & T Mugume “#FeesMustFall: An Internet-Age Student Movement in South Africa and the Case of the University of the Free State” (2017) 44 *Politikon* 231 236. R Hodes “Questioning ‘Fees Must Fall’” (2016) 116 *African Affairs* 140 140. C Naicker “From Marikana to #Feesmustfall: The Praxis of Popular Politics in South Africa” (2016) 1 *Urbanisation* 53 54-55. Prior to #FMF, students at SU formed a movement called Open Stellenbosch in which feelings of exclusion, marginalisation and intimidation were expressed by students who formed part of the black minority at the previously Afrikaans university. Of particular concern was the fact that they had to attend lectures presented in Afrikaans which, for many of these students, was a language which they did not understand or speak.

<sup>201</sup> M Langa, S Ndelu, Y Edwin & M Vilakazi (Commissioned by Centre for the Study of Violence and Reconciliation) *#Hashtag: An Analysis of the #FeesMustFall Movement at South African Universities* (2017) 39.

<sup>202</sup> T Luescher, L Loader & T Mugume “#FeesMustFall: An Internet-Age Student Movement in South Africa and the Case of the University of the Free State” (2017) 44 *Politikon* 231 235.

<sup>203</sup> M Langa, S Ndelu, Y Edwin & M Vilakazi (Commissioned by Centre for the Study of Violence and Reconciliation) *#Hashtag: An Analysis of the #FeesMustFall Movement at South African Universities* (2017) 39.

<sup>204</sup> T Luescher, L Loader & T Mugume “#FeesMustFall: An Internet-Age Student Movement in South Africa and the Case of the University of the Free State” (2017) 44 *Politikon* 231 235. S Badat “Deciphering the Meanings and Explaining the South African Higher Education Student Protests of 2015–16” (2016) 1 *Pax Academica* 71 80.

<sup>205</sup> M Langa, S Ndelu, Y Edwin & M Vilakazi (Commissioned by Centre for the Study of Violence and Reconciliation) *#Hashtag: An Analysis of the #FeesMustFall Movement at South African Universities* (2017) 86.

Thus, the need to account for intersectionality was a crucial theme that emerged from the CSVR study and will be further explored in the next chapter. However, it is interesting to note that within the movement, certain narratives and voices were privileged over others and the intersection of class, race and gender that the students were trying to highlight resulted in divisions within the movement.<sup>206</sup> This was a result of, *inter alia*, the lack of intersectional structuring of, for example, leadership within in the movement.

#### 4 3 4 6 Conclusion

The above-mentioned issues of difference were not properly dealt with by the relevant parties involved in the fees debate (namely the members of the #FMF movement, university managements and the various education government officials). This resulted in the nuances of the fees dilemma, as well as the overarching dilemma of access to higher education, being missed. This in turn hindered the engagement process and made finding solutions more difficult as the problems were not clearly delineated given that different groups wanted different outcomes. It also resulted in narrow participation as not all interest groups were included.<sup>207</sup> Additionally, it led to a contravention of Sturm's principle that all relevant stakeholders must participate<sup>208</sup> as not properly accommodating difference leads to the silencing of certain voices, which is ironically, one of the issues the movement claimed to be fighting against.

Furthermore, the lack of accommodation of difference resulted in the creation of sub-divisions within the movement. This was illustrated through the above discussions on difference; although the group was united in their call for 0% increase of tertiary education fees, there were various voices within the group with different motives which led to divisions in the movement.<sup>209</sup> This ultimately caused distrust and destabilised the movement.<sup>210</sup> The ability of meaningful engagement to include a variety of voices and increase legitimacy was thus hampered.<sup>211</sup> The lack of proper accommodation of

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<sup>206</sup> M Ndlovu "Fees Must Fall: A Nuanced Observation of the University of Cape Town, 2015–2016" (2017) 31 *Agenda* 127 128. M Langa, S Ndelu, Y Edwin & M Vilakazi (Commissioned by Centre for the Study of Violence and Reconciliation) *#Hashtag: An Analysis of the #FeesMustFall Movement at South African Universities* (2017) 8.

<sup>207</sup> See chapter 2 part 2 4 2.

<sup>208</sup> See chapter 2 part 2 4 3.

<sup>209</sup> R Pather "Wits #FeesMustFall: A Movement Divided" (05-04-2016) *Mail and Guardian* 1 <<https://mg.co.za/article/2016-04-05-wits-fees-must-fall-a-movement-divided>> (accessed 18-09-2018).

<sup>210</sup> VL Mpatlanyane *New Student Activism after Apartheid: The Case of Open Stellenbosch* Master of Arts thesis, Stellenbosch University (2018) 52.

<sup>211</sup> On inclusion of voice and increasing legitimacy, see chapter 2 part 2 3 1.

difference also meant that, should solutions have been reached, the quality thereof would have been low. Solutions would not have been as flexible and responsive given the fact that not all the stakeholders' interests were involved.<sup>212</sup>

Overall, the #FMF protests highlighted the importance of taking into account multiple differences among participants, as a failure to do so can result in a breakdown of relationships between parties. While the accommodation of difference is needed to enhance meaningful engagement and foster understanding, the way in which difference is conceptualised by the stakeholders (in this case, the #FMF members, university managements and government officials) can be crucial to whether understanding is actually achieved. The protests also illustrates how difference can perpetuate division amongst participants in the engagement process as opposed to fostering unity, thus hindering the quality of engagement as discussed above. Thus, the way in which difference is taken into account by the stakeholders involved is important. If this is done incorrectly, it can serve to privilege the voice of the majority, thus promoting the exclusion of marginalised voices and vulnerable groups.<sup>213</sup> The incorporation of difference will be further explored in the next chapter in order to understand how best to structure meaningful engagement to ensure that differences are properly accommodated.

#### 4 3 5 Representation

The issue of representation was also highlighted in the #FMF protests as the movement began as a response to allegations that student representative structures failed to represent the needs and interests of vulnerable and marginalised students.<sup>214</sup> Another issue raised was that access to and enrolment in higher education still predominantly reflects historic inequalities along the lines of gender,<sup>215</sup> historically white-elite languages, class and race which results in certain groups being inadequately represented.<sup>216</sup> Questions relating to representation were also raised with regard to the relationship between SU's SRC and the #FMF members given their

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<sup>212</sup> See chapter 2 part 2 3 1.

<sup>213</sup> IM Young *Inclusion and Democracy* (2000) 81.

<sup>214</sup> VL Mpatlanyane *New Student Activism after Apartheid: The Case of Open Stellenbosch* Master of Arts thesis, Stellenbosch University (2018) 18.

<sup>215</sup> It is important to note that in relation to gender, enrolment in higher education is not the only problem. There are deeper underlying problems relating to the position of women at universities as well as issues relating to transgender and non-binary identities.

<sup>216</sup> VL Mpatlanyane *New Student Activism after Apartheid: The Case of Open Stellenbosch* Master of Arts thesis, Stellenbosch University (2018) 18.

different approaches to representing the interests of the student body.<sup>217</sup> Members of the #FMF movement felt that the SRC did not adequately represent all the interests of the student body, especially given its diverse nature.<sup>218</sup>

Rhodes University also saw #FMF members distrusting and not recognising their SRC as valid representatives as they viewed SRC members as being paid by the university. The #FMF members thus asserted that the SRC members were merely extensions of the university against which they were fighting.<sup>219</sup>

Issues of representation were also brought up as students felt that the racial composition of the lecturing staff furthered exclusion as the majority of the lecturers were white, coloured and Asian, with only a few African lecturers.<sup>220</sup> Furthermore, the majority of the support staff are black. This signals racial inequality as the racial comparison between academic and support staff still reflects historic “roles” for black people as non-educational, menial workers.<sup>221</sup> Students felt unrepresented in lectures and in the university space in general especially given that lecturers of other races were unable to understand their situations as black students.<sup>222</sup> In relation to representation within the movement, students felt that representation is important, and that the identity of voices present and heard in the discourse makes a difference.<sup>223</sup> However, as discussed in the previous section, many groups were unrepresented and excluded by other factions within the movement.

As pointed out in chapter 3, representatives can play an important role in combating tokenistic engagement and levelling bargaining disparities. However, the issues exhibited during the #FMF protests in relation to representatives illustrate the fact that the way in which representatives are used is important to ensure quality engagement. The representation that occurred during the attempted engagements, specifically

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<sup>217</sup> 57.

<sup>218</sup> 57.

<sup>219</sup> M Langa, S Ndelu, Y Edwin & M Vilakazi (Commissioned by Centre for the Study of Violence and Reconciliation) *#Hashtag: An Analysis of the #FeesMustFall Movement at South African Universities* (2017) 107.

<sup>220</sup> 65. S Badat “Deciphering the Meanings and Explaining the South African Higher Education Student Protests of 2015–16” (2016) 1 *Pax Academica* 71 88.

<sup>221</sup> M Langa, S Ndelu, Y Edwin & M Vilakazi (Commissioned by Centre for the Study of Violence and Reconciliation) *#Hashtag: An Analysis of the #FeesMustFall Movement at South African Universities* (2017) 65. S Badat “Deciphering the Meanings and Explaining the South African Higher Education Student Protests of 2015–16” (2016) 1 *Pax Academica* 71 88.

<sup>222</sup> M Langa, S Ndelu, Y Edwin & M Vilakazi (Commissioned by Centre for the Study of Violence and Reconciliation) *#Hashtag: An Analysis of the #FeesMustFall Movement at South African Universities* (2017) 33-34.

<sup>223</sup> 72.

within the #FMF movement failed to comply with Sturm's norm that representatives should be accountable and responsive to those that they represent.<sup>224</sup> The fact that the representatives within the movement excluded certain groups from the engagement process is problematic as not all interests were represented thus making it narrow participation.<sup>225</sup> It also affected the legitimacy, quality, responsiveness and flexibility of any solutions that may have been agreed upon.<sup>226</sup> Overall, it affected the "outcome validity" of engagement as no concrete solutions were reached in terms of the realisation of the right to higher education and all the issues relating thereto.

#### 4 4 Conclusion

It is clear that there are various sources, apart from the judgments discussed in chapter 3, which advocate for the use of engagement. The above discussion has emphasised the importance of and turn towards extra-judicial engagement in realising socio-economic rights and more specifically, the importance of the quality thereof. The #FMF protests illustrated that extra-judicial engagement is also subject to shortfalls similar to those affecting the quality of engagement in a judicial context as discussed in Chapter 3. The various stakeholders involved in the fees debate (namely, the factions within the #FMF movements, university managements and government officials) clearly failed to fully comprehend the "richness and complexity" of the #FMF protests and this resulted in the protests becoming violent in 2016.<sup>227</sup> This failure related to the stakeholders' lack of understanding in relation to the diversity of the students and their varied contexts.

This discussion also highlighted the role that courts can play in supervising engagement and ordering corrective measures to remedy some of the problems with engagement in the extra-judicial context. However, this corrective role is only possible if the courts themselves take the quality concerns seriously and are willing to impose sanctions on parties for failing to adhere to quality standards.

Meaningful engagement could have played a crucial role in circumventing the need for violence had quality concerns been taken into account by the #FMF members, university managements and government officials when attempting to structure

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<sup>224</sup> See chapter 2 part 2 4 3.

<sup>225</sup> See chapter 2 part 2 4 2.

<sup>226</sup> See chapter 2 part 2 3 1.

<sup>227</sup> M Langa, S Ndelu, Y Edwin & M Vilakazi (Commissioned by Centre for the Study of Violence and Reconciliation) *#Hashtag: An Analysis of the #FeesMustFall Movement at South African Universities* (2017) 88.

engagement processes. These quality concerns related to tokenistic engagement, an unwillingness on the part of stakeholders to engage, unequal bargaining power, the need to take difference into account and representation. These themes are similar to the ones identified in the previous chapter in relation to judicial engagement. As such, there is a need to further analyse these concepts so that they can inform the design and implementation of engagement processes with a view to improving their quality. This will be the focus of the next chapter.

## **Chapter 5: Towards quality engagement**

### **5 1 Introduction**

The previous chapter investigated the potential that extra-judicial engagement holds in realising socio-economic rights. It also highlighted the fact that extra-judicial or, “political engagement” as Ray terms it, is potentially an even stronger tool than judicial or “litigation engagement” when it comes to realising socio-economic rights. This type of engagement could also be used in combination with judicial engagement to aid in the realisation of socio-economic rights. However, various shortfalls have been identified in relation to meaningful engagement which occurred in the contexts of the socio-economic rights jurisprudence analysed in chapter 3 and the illustrative example of extra-judicial engagement in the context of the #FMF movement discussed in chapter 4. These areas included problems relating to tokenistic engagement, power dynamics, inclusion of parties and the need to recognise difference. Thus, although chapter 2 highlighted the potential of the creation and development of the meaningful engagement doctrine in assisting with the realisation of socio-economic rights, the fact that these quality concerns are present in both the judicial and extra-judicial context suggests the need to rethink the way in which meaningful engagement is conceptualised and implemented in order to address these shortfalls and strengthen meaningful engagement in realising socio-economic rights. In light of the above, this chapter aims to explore potential solutions to address the problematic implementation of meaningful engagement in an attempt to strengthen the role of meaningful engagement in realising socio-economic rights. This will be done by focusing on the quality concerns which were highlighted in Chapters 3 and 4. The following section will explore potential solutions to address the concerns raised in the previous chapter with regard to the quality of meaningful engagement in socio-economic rights cases.

### **5 2 Rethinking meaningful engagement: Addressing the quality concerns**

#### **5 2 1 Understanding power disparities to remedy unequal bargaining power and tokenistic engagement**

One of the shortfalls identified in the previous two chapters related to power disparities in the engagement process which resulted in unequal bargaining power and tokenistic approaches to engagement. This section will analyse various

dimensions of power disparities, and identify strategies for mitigating these disparities in both a judicial and extra-judicial context.

### 5 2 1 1 The link between power and knowledge

Research in participation has often highlighted the importance of the relationship between power and knowledge within the participation process.<sup>1</sup> Critics of conventional research into participation argue that structural relationships of power within the participation process are often neglected.<sup>2</sup> More specifically, there is a need to investigate the way in which these power relationships are maintained through monopolies of knowledge.<sup>3</sup> This investigation is crucial when assessing the meaningfulness of engagement and its efficacy in realising socio-economic rights and fulfilling the other justifications posited in chapter 2.<sup>4</sup> Participants often fear that the process will be co-opted into the existing dominant power relations.<sup>5</sup> For example, in *Joe Slovo*, the residents were merely informed of pre-planned decisions as opposed to actually being part of the decision making process and having their opinions taken into account.<sup>6</sup> Thus, partaking in the process of meaningful engagement does not necessarily result in power being shared equally between participants. This was one of the concerns raised by #FMF members, as discussed in the previous chapter.<sup>7</sup> This is especially true if engagement only takes place on a tokenistic level where interests and concerns are shared but never materialise into any action,<sup>8</sup> a common occurrence as exhibited in many of the cases such as *Port Elizabeth Municipality*, *Olivia Road*, the *Joe Slovo cases*, *Schubart Park* and *Juma Masjid*.<sup>9</sup> Tokenistic engagement was also present at many universities during the #FMF protests.<sup>10</sup> This is something that meaningful engagement needs to guard against in order to ensure that “dialogical validity”<sup>11</sup> is achieved and that parties can engage free from constraints and coercion.

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<sup>1</sup> J Gaventa & A Cornwall “Power and Knowledge” in P Reason & H Bradbury (eds) *Handbook of Action Research: Participative Inquiry and Practice* (2001) 70 70.

<sup>2</sup> 70.

<sup>3</sup> 70.

<sup>4</sup> See chapter 2 parts 2 3 1 - 2 3 3.

<sup>5</sup> JJ Williams “Community Participation: Lessons from Post-Apartheid South Africa” (2006) 27 *Policy Studies* 197 202. See also Chapter 4 part 4 3 3 4 & VL Mpatlanyane *New Student Activism under Apartheid: The Case of Open Stellenbosch* Masters of Arts thesis, Stellenbosch University (2018) 54.

<sup>6</sup> 2010 3 SA 454 (CC) para 222.

<sup>7</sup> Para 378.

<sup>8</sup> SC White “Depoliticising Development: The Uses and Abuses of Participation” (1996) 6 *Development in Practice* 6 6.

<sup>9</sup> See chapter 3 parts 3 2 1 3 1, 3 2 2 3 2, 3 2 3 3 1, 3 2 5 3 1 & 3 3 1 3 1.

<sup>10</sup> See chapter 3 parts 3 2 1 3 1, 3 2 2 3 2, 3 2 3 3 1 & 3 2 5 3 1 as well as Chapter 4 part 4 3 2.

<sup>11</sup> See chapter 2 part 2 4 4.

Power can also play a large role in determining whose voice or knowledge is heard and accepted as well as the way in which problems are framed.<sup>12</sup> For example, in *Joe Slovo 1*, the residents asserted that an *in situ* upgrade should have been implemented.<sup>13</sup> This assertion was ignored by the government as well as the Court and instead, an eviction order was granted.<sup>14</sup> However, once the government suggested an *in situ* upgrade, it was accepted.<sup>15</sup>

It is also important to understand that when entering into engagement, different levels and types of knowledge exist. Frequently, certain forms of knowledge are deemed more acceptable or legitimate than others.<sup>16</sup> For example, scientific and technocratic knowledge is often privileged over local forms of knowledge. This so called “legitimate knowledge” obscures other less dominant forms of knowledge and silences the voices behind them.<sup>17</sup> An example of this can be seen in the calls for decolonised education during the #FEMF protests in response to the privileging of Eurocentric knowledge over Afrocentric knowledge.<sup>18</sup> It is important to ensure that these less dominant forms of knowledge are also heard during the engagement process. The Constitutional Court has held, specifically in the context of evictions, that those who are about to be evicted should not be treated as a disempowered mass by the government.<sup>19</sup> Instead, they should be encouraged to be proactive in the engagement process. This would include the need for the government, and any other stakeholders in these types of cases, to listen to and take into account the opinion of those affected even if their input is considered to be a less dominant form of

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<sup>12</sup> J Gaventa & A Cornwall “Power and Knowledge” in P Reason & H Bradbury (eds) *Handbook of Action Research: Participative Inquiry and Practice* (2001) 70 70.

<sup>13</sup> 2010 3 SA 454 (CC) para 112.

<sup>14</sup> Paras 112 and 259.

<sup>15</sup> 2011 7 BCLR 723 (CC) para 11.

<sup>16</sup> J Gaventa & A Cornwall “Power and Knowledge” in P Reason & H Bradbury (eds) *Handbook of Action Research: Participative Inquiry and Practice* (2001) 70 71. See also T Madlingozi “Social Justice in a Time of Neo-Apartheid Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribution” (2017) 123 *Stell LR* 135-139; H Savo “Decolonisation of Higher Education: Dismantling Epistemic Violence and Eurocentrism in South Africa” (2016) 1 *Transformation in Higher Education* 1-8; A Mbembe “Decolonizing the University: New Directions” (2016) 15 *Arts and Humanities in Higher Education* 29-45; J Modiri “The Time and Space of Critical Legal Pedagogy” (2016) 27 *Stellenbosch Law Review* 507-534; M Foucault *Discipline and Punishment* (1977) & M Foucault *The History of Sexuality, Part 1* (1977).

<sup>17</sup> J Gaventa & A Cornwall “Power and Knowledge” in P Reason & H Bradbury (eds) *Handbook of Action Research: Participative Inquiry and Practice* (2001) 70 74.

<sup>18</sup> M Langa, S Ndelu, Y Edwin & M Vilakazi (Commissioned by Centre for the Study of Violence and Reconciliation) *#Hashtag: An Analysis of the #FeesMustFall Movement at South African Universities* (2017) 114.

<sup>19</sup> 2008 3 SA 208 (CC) para 20.

knowledge. This will avoid tokenistic engagement as the interests of those affected will actually be taken into account and it will help avoid situations like the one that occurred in *Joe Slovo 1* where the potential solution of an *in situ* upgrade was suggested by the residents but ignored until the government suggested it almost a year and a half later.<sup>20</sup>

A failure to address the privileging of certain forms of knowledges can hinder the ability of meaningful engagement to realise socio-economic rights as it negates the purpose of including marginalised voices<sup>21</sup> and results in tokenistic engagement. This in turn affects the ability of meaningful engagement to assist in increasing the quality of decisions.<sup>22</sup> This is because a holistic picture of the scenario cannot be presented if the voices of certain people are not heard due to the fact that their knowledge is not being recognised as “legitimate”. This problem was seen in many of the cases as discussed in chapter 3 as well as chapter 4 and, as previously mentioned, civil society organisations should play an active role in combating these problems and ensuring that all interests are properly heard and considered.<sup>23</sup>

Furthermore, the conventional spaces<sup>24</sup> of engagement as well as the way in which engagement is conducted, are often foreign to certain groups of people, where the process is premised on assumptions that are not shared by all participants.<sup>25</sup> The production of knowledge and the way in which engagement is structured can thus lead to the creation of biases in which only certain voices can enter the discussions while others are delegitimated.<sup>26</sup> This is linked to the way in which knowledge is produced and who participates in the production process.<sup>27</sup> For example, when management attempted to engage with students at certain universities, the motives and proposed rules of engagement were questioned by #FMF members.<sup>28</sup> This speaks to the need to ensure that engagement is structured properly and that the rules of engagement are clearly defined and agreed upon by all parties prior to the engagement process

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<sup>20</sup> Paras 112 and 259.

<sup>21</sup> See chapter 2 part 2 3 1.

<sup>22</sup> See chapter 2 part 2 3 1.

<sup>23</sup> 2008 3 SA 208 (CC) para 20.

<sup>24</sup> See part 5 2 5 of this chapter.

<sup>25</sup> IM Young *Inclusion and Democracy* (2000) 53.

<sup>26</sup> J Gaventa & A Cornwall “Power and Knowledge” in P Reason & H Bradbury (eds) *Handbook of Action Research: Participative Inquiry and Practice* (2001) 70 71.

<sup>27</sup> 71.

<sup>28</sup> E Mutekwe “Unmasking the Ramifications of the Fees-Must-Fall-Conundrum in Higher Education Institutions in South Africa: A Critical perspective” (2017) 35 *Perspectives in Education* 142 147. See also chapter 4 part 4 3 2.

commencing. In the context of extra-judicial engagement, this should be done by the stakeholders involved (for example, in the case of #FMF, the students, university managements and government officials). In relation to judicial engagement, the engagement structuring and rules of engagement should be determined by the courts in collaboration with the parties and their representatives.

Power can also affect which matters come to light during the engagement process.<sup>29</sup> Parties in a position of power are able to manipulate the process of engagement by withholding knowledge or influencing awareness of grievances, thus prohibiting certain matters from reaching the discussions.<sup>30</sup> The *Pheko* cases were indicative of this problem as the Municipality in this case held the power but delayed the relocation process by shirking their duties and passing on the blame to various government officials.<sup>31</sup>

The fact that engagement has a higher chance of success if it is ordered while the final outcome is pending and if the court maintains supervision and requires report backs is also illustrative of the political nature of engagement and is illustrative of the courts' role in counteracting power disparities.<sup>32</sup> The interdicts, disciplinary action and police force used in the #FMF protest were also illustrative of power disparities as it resulted in the students' voices being silenced.<sup>33</sup> Many of the #FMF members also felt intimidated after universities made use of private security and police forces which resulted in many members leaving the movement.<sup>34</sup> If unequal bargaining power is not guarded against, it can lead to a culture of silence of the oppressed and defeat the

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<sup>29</sup> J Gaventa & A Cornwall "Power and Knowledge" in P Reason & H Bradbury (eds) *Handbook of Action Research: Participative Inquiry and Practice* (2001) 70 71.

<sup>30</sup> 71.

<sup>31</sup> 2015 5 SA 600 (CC) paras 16-22

<sup>32</sup> B Ray "Engagement's Possibilities and Limits as a Socio-Economic Rights Remedy" (2010) 9 *Washington University Global Studies Law Review* 399 407. See also L Chenwi "Meaningful Engagement' in the Realisation of Socio-Economic Rights: The South African Experience" (2011) 26 *South African Public Law* 128 154.

<sup>33</sup> M Langa, S Ndelu, Y Edwin & M Vilakazi (Commissioned by Centre for the Study of Violence and Reconciliation) *#Hashtag: An Analysis of the #FeesMustFall Movement at South African Universities* (2017) 13. M Mortlock "Stellenbosch University Students Slapped with Interdict Feel Victimised" (22-09-2016) *EWN* 1 <<https://ewn.co.za/2016/09/22/Stellenbosch-University-students-slapped-with-interdict-say-feel-victimised>> (accessed 01-10-2018). M Langa, S Ndelu, Y Edwin & M Vilakazi (Commissioned by Centre for the Study of Violence and Reconciliation) *#Hashtag: An Analysis of the #FeesMustFall Movement at South African Universities* (2017) 9.

<sup>34</sup> M Langa, S Ndelu, Y Edwin & M Vilakazi (Commissioned by Centre for the Study of Violence and Reconciliation) *#Hashtag: An Analysis of the #FeesMustFall Movement at South African Universities* (2017) 49-50.

purpose of engagement.<sup>35</sup> It also goes against the principle of “process validity”<sup>36</sup> which states that all the relevant information relating to the situation should be provided to all the stakeholders.

Knowledge and expertise can also influence the way in which people express their concerns as well as the extent to which people are heard and taken seriously.<sup>37</sup> Institutional conditions can often lead to participants feeling intimidated and subsequently result in unwillingness to participate.<sup>38</sup> This is illustrated in a quote from a young black businesswoman who says:

“Black people do not participate because they feel inferior to white people. Participation requires special knowledge and Black people do not have the necessary knowledge to engage white people on matters such as health”.<sup>39</sup>

This speaks to the importance of access to information when realising socio-economic rights. Access to information is vital for people to be able to enforce their rights.<sup>40</sup> However, parties to socio-economic cases often still experience “information poverty” in relation to the content of rights and the remedies available to them.<sup>41</sup> This is indicative of unequal bargaining power but also of tokenistic engagement and should be guarded against. Representatives can play an important role in ensuring that parties have access to the necessary information for the realisation of their rights and courts should also order parties to furnish all relevant information to all parties if need be.

Problems with lack of access to information also materialised in relation to the #FMF protests where students requested information relating to the fees structure at universities but were denied said information by management.<sup>42</sup>

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<sup>35</sup> J Gaventa & A Cornwall “Power and Knowledge” in P Reason & H Bradbury (eds) *Handbook of Action Research: Participative Inquiry and Practice* (2001) 70 71.

<sup>36</sup> See chapter 2 part 2 4 4.

<sup>37</sup> JJ Williams “Community Participation: Lessons from Post-Apartheid South Africa” (2006) 27 *Policy Studies* 197 205.

<sup>38</sup> 206.

<sup>39</sup> A Cornwall & VS Coelho *Spaces for Change? The Politics of Citizen Participation in New Democratic Arenas* (2007) 12.

<sup>40</sup> K Bently & R Calland “Access to Information and Socio-Economic Rights: A Theory of Change in Practice” in M Langford & T Madlingozi (eds) *Socio-Economic Rights in South Africa* (2014) 341 341.

<sup>41</sup> 341.

<sup>42</sup> See M Langa, S Ndelu, Y Edwin & M Vilakazi (Commissioned by Centre for the Study of Violence and Reconciliation) *#Hashtag: An Analysis of the #FeesMustFall Movement at South African Universities* (2017) 144-145. See also chapter 4 part 4 3 2.

The quote also illustrates how internalisation of norms which value certain knowledges can result in people silencing themselves.<sup>43</sup> People living in poverty are often subject to discrimination and excluded from society.<sup>44</sup> Entering participatory spaces can be intimidating for impoverished groups, and, and how they engage may be perceived as incoherent or irrelevant to other parties.<sup>45</sup> This illustrates that what is seen as the norm for deliberation is in fact culturally-specific and can serve to silence or devalue some people's perspectives.<sup>46</sup> The importance of participatory spaces will be explored later in this chapter.

Fear of specific knowledge or ideas being laughed at or mocked during the engagement process can also lead to non-participation. Instead, a plurality of knowledge forms should be allowed and is crucial for the attainment of truly meaningful engagement.<sup>47</sup> Thus the engagement process needs to recognise and accommodate different types of knowledge. Meaningful engagement does not necessarily entail the reversal of power relations but rather the strengthening of the bargaining power of those in weaker positions.<sup>48</sup> This will ultimately allow vulnerable groups that engage with, for example, government, to have stronger positions in the engagement process relating to socio-economic rights disputes. For example, had the residents of Joe Slovo had a stronger position in terms of bargaining power, their requests for engagement to resolve the issues may have been taken more seriously and the subsequent case could have been circumvented.<sup>49</sup>

## 5 2 1 2 Power and accepted forms of communication

Certain forms of communication may be privileged over others, and culturally specific norms of articulateness can devalue certain narratives.<sup>50</sup> Norms of speech which include using formal language that is well-formed and structured are often privileged over hesitant or circuitous statements.<sup>51</sup> This is important to note especially

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<sup>43</sup> A Cornwall & VS Coelho *Spaces for Change? The Politics of Citizen Participation in New Democratic Arenas* (2007)12.

<sup>44</sup> 13.

<sup>45</sup> 13.

<sup>46</sup> 13.

<sup>47</sup> J Gaventa & A Cornwall "Power and Knowledge" in P Reason & H Bradbury (eds) *Handbook of Action Research: Participative Inquiry and Practice* (2001) 70 70.

<sup>48</sup> S Hickey & G Mohan "Towards Participation as Transformation: Critical Themes and Challenges" in S Hickey and G Mohan (eds) *Participation: From Tyranny to Transformation* (2004) 3 14.

<sup>49</sup> *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) paras 114 and 119.

<sup>50</sup> IM Young *Inclusion and Democracy* (2000) 38.

<sup>51</sup> 38.

when dealing with socio-economic rights cases as these cases often involve poor, vulnerable and illiterate people as held in *Olivia Road*.<sup>52</sup> Of particular importance is the level of education of participants (such as potential evictees) and language barriers as these factors will assist in circumventing the privileging of certain norms of communication and articulateness as well as mitigating unequal bargaining power.

Privileging dispassionate or unemotive forms of communication in the name of objectivity is another symptom of unequal bargaining power.<sup>53</sup> Oftentimes, expressions of emotion such as anger or hurt, for example, are considered to detract from the reasoning behind any assertions.<sup>54</sup> Similarly, bold gestures or expressions of nervousness are also construed as signs of weakness and lack of objectivity.<sup>55</sup> This was one of the issues raised by #FMF members who asserted that it is extremely important that all voices are heard, regardless of whether they sound angry or even sometimes aggressive. Furthermore, they stated that these voices should be understood in light of the generations of oppression and dispossession.<sup>56</sup> Similar issues could also arise in the context of eviction cases, especially given the vicious cycle of evictions that those without secure land tenure have to undergo, as discussed in chapter 3.<sup>57</sup> Given the amount of disruption and turmoil that potential evictees have to endure, it would be unsurprising if emotive forms of communication arise during the process of engagement. Thus, meaningful engagement should reject idea of a sharp dichotomy between emotion and reasoning.<sup>58</sup> Framing issues in new ways to incorporate difference and challenge existing perspectives can be a potential solution.<sup>59</sup> By opening the process to include a plurality of voices and perspectives, the process will be more democratic and less skewed by the pre-existing biases relating to knowledge and resources.<sup>60</sup>

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<sup>52</sup> *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) para 15.

<sup>53</sup> IM Young *Inclusion and Democracy* (2000) 39.

<sup>54</sup> 39.

<sup>55</sup> 39.

<sup>56</sup> N Joseph "Dangerous Minds: Rather than Creating an Alliance, Fees Must Fall is Limiting Free Speech at South Africa's Universities, Leaving Some Early Supporters Disheartened" (2017) 46 *Index on Censorship* 18 21.

<sup>57</sup> See chapter 3 part 3 2 1 3 3 & *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 2.

<sup>58</sup> IM Young *Inclusion and Democracy* (2000) 39.

<sup>59</sup> JJ Williams "Community Participation: Lessons from Post-Apartheid South Africa" (2006) 27 *Policy Studies* 197 206.

<sup>60</sup> J Gaventa & A Cornwall "Power and Knowledge" in P Reason & H Bradbury (eds) *Handbook of Action Research: Participative Inquiry and Practice* (2001) 70 71.

The role of language is also vital, especially in South Africa, given the fact that there are eleven official languages. Additionally, there are many unofficial languages that have no official linguistic recognition, which signals further ostracisation. Language plays a crucial role in conveying the correct information between parties who speak different languages.<sup>61</sup> It is also important because of the hierarchal power relations embedded in language.<sup>62</sup> Language can be used to shape and reinforce dominant relations of power and also influence the experience and results of the participation process.<sup>63</sup> This is important when dealing with housing and education cases as, once again, the parties to the case could be people who are illiterate<sup>64</sup> or who do not have a dominant language (such as English as a first or even second language). Thus the engagement process should make provision for this by, for example, providing translators in order to ensure that all participants (such as potential evictees) understand what is being said and are comfortable in responding. In this way, participants are placed on a more equal level thus mitigating bargaining disparities and increasing the quality of the engagement.

Language was also a crucial aspect of the #FEMF protest given that it is still a barrier to access to education and more specifically, successful higher education.<sup>65</sup> This is because of the lack of development of African languages as academic and scientific languages given the fact that English and Afrikaans is not the home language of many students entering higher education spaces.<sup>66</sup> Thus, the use of Afrikaans at many universities led to many black students being put at a disadvantage and feeling excluded in the university space.<sup>67</sup>

### 5 2 1 3 The link between power and interests

Power is involved in determining which interests are favoured over others as well as in the construction of the participation process and the actual interests

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<sup>61</sup> JJ Williams "Community Participation: Lessons from Post-Apartheid South Africa" (2006) 27 *Policy Studies* 197 206.

<sup>62</sup> 206.

<sup>63</sup> 208.

<sup>64</sup> *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) para 15.

<sup>65</sup> See chapter 4 part 4 3 4 5.

<sup>66</sup> L Makalela "Our Academics are Intellectually Colonised": Multilingualing and Fees Must Fall" (2018) 36 *Southern African Linguistics and Applied Language Studies* 1 3.

<sup>67</sup> M Langa, S Ndelu, Y Edwin & M Vilakazi (Commissioned by Centre for the Study of Violence and Reconciliation) *#Hashtag: An Analysis of the #FeesMustFall Movement at South African Universities* (2017) 39 & 86. See also Chapter 4 part 4 3 4 5.

themselves.<sup>68</sup> Power played a big role with regard to the interests of the #FMF members especially given that there were conflicting views within the movement.<sup>69</sup> For example, the fact that the movement was dominated by cisgender men resulted in issues relating to sexuality and patriarchy being side-lined.<sup>70</sup> Additionally, factions within in the movement<sup>71</sup> attempted to assert their interests, based on, *inter alia*, political motives over others' thus silencing the interests of other groups within the movement.<sup>72</sup>

Furthermore, parties may request certain things during the engagement process because of the social context in which they live in. For example, women in community upliftment projects may request sewing machines, which reflects the wider division of labour along gender lines.<sup>73</sup> In the context of socio-economic rights litigation, this problem can also stem from a lack of access to information, as discussed above as parties may not be aware of their rights or possible remedies available to them. In the context of housing cases, this could be due to the fact that parties are often poor, uneducated and vulnerable and thus lack information to their basic rights and remedies. When dealing with education cases, parties may be too young to understand their rights and remedies. In both cases, representatives would play an important role in assisting these vulnerable groups and combating the power disparities mentioned above.

However, the problem relating to power and interests can also emanate from parties' experiences and expectations based on previous development projects.<sup>74</sup> The fact that people do not suggest other needs or interests does not necessarily mean that they do not have them but rather that they lack confidence in being able to have their needs met.<sup>75</sup> The existence of interests often reflects the power relations in wider

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<sup>68</sup> SC White "Depoliticising Development: The Uses and Abuses of Participation" (1996) 6 *Development in Practice* 6 12.

<sup>69</sup> See chapter 4 part 4 3 4.

<sup>70</sup> M Langa, S Ndelu, Y Edwin & M Vilakazi (Commissioned by Centre for the Study of Violence and Reconciliation) *#Hashtag: An Analysis of the #FeesMustFall Movement at South African Universities* (2017) 72.

<sup>71</sup> 36, 56, 58 & 128. See also S Badat "Deciphering the Meanings and Explaining the South African Higher Education Student Protests of 2015–16" (2016) 1 *Pax Academica* 71 98.

<sup>72</sup> A Habib "Op-Ed: The Politics of Spectacle – Reflections on the 2016 Student Protests" (5-12-2016) *Daily Maverick* 1 <<https://www.dailymaverick.co.za/article/2016-12-05-op-ed-the-politics-of-spectacle-reflections-on-the-2016-student-protests/>> (accessed: 01-12-2018). See also chapter 4 part 4 3 2.

<sup>73</sup> SC White "Depoliticising Development: The Uses and Abuses of Participation" (1996) 6 *Development in Practice* 6 13.

<sup>74</sup> 13.

<sup>75</sup> 13.

society but may also be shaped by the participation process itself.<sup>76</sup> For example, previous experiences with co-option of the participation process can result in parties being unwilling to partake in later attempts of meaningful engagement.<sup>77</sup> This was illustrated in the *Joe Slovo* cases when the residents refused to relocate after the government broke promises in relation to *inter alia* the allocation of housing.<sup>78</sup> It was also illustrated in the #FMF protests as the protests were a result of distrust in the institutions and concerns that the universities could not or would not resolve issues relating to marginalised groups' wellbeing.<sup>79</sup>

Representatives can play a role in combating some of the problems discussed above relating to power and co-option. However, representation can also result in problems, which will be examined in the next section. The importance of the types and uses of spaces to mitigate power disparities will also be briefly discussed in a later section.

## 5 2 2 The use of representatives

The Court in *Olivia Road*<sup>80</sup> held that there is a need for civil society members and people skilled in engagement to be involved in the process.<sup>81</sup> One of the factors impacting effective community participation is a lack of organisation or disunity of local communities.<sup>82</sup> This can give rise to representation of these communities by "leaders" who do not have the consent of the community or of significant groups in the community such as women.<sup>83</sup> Lack of trust in representatives can hinder or even decrease participation.<sup>84</sup> The #FMF movement was initiated due to members alleging that student representative structures failed to properly represent vulnerable and marginalised students.<sup>85</sup> There were also further problems relating to certain groups within the movement being excluded and unrepresented during the attempted

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<sup>76</sup> 12.

<sup>77</sup> 13.

<sup>78</sup> 2010 3 SA 454 (CC) para 31.

<sup>79</sup> VL Mpatlanyane *New Student Activism after Apartheid: The Case of Open Stellenbosch* Master of Arts thesis, Stellenbosch University (2018) 56-57.

<sup>80</sup> 2008 3 SA 208 (CC).

<sup>81</sup> Para 19 and 20.

<sup>82</sup> JJ Williams "Community Participation: Lessons from Post-Apartheid South Africa" (2006) 27 *Policy Studies* 197 210.

<sup>83</sup> 210. See chapter 4 part 4 3 4 3.

<sup>84</sup> 204.

<sup>85</sup> VL Mpatlanyane *New Student Activism after Apartheid: The Case of Open Stellenbosch* Master of Arts thesis, Stellenbosch University (2018) 18 & 57. See chapter 4 part 4 3 5.

engagements relating to #FMF as discussed in chapter 4.<sup>86</sup> An increase in advocacy groups standing in solidarity with poor communities is therefore needed and can help combat unequal power relations,<sup>87</sup> as held in *Olivia Road*, provided that the concerns relating to adequate representation are dealt with as discussed below.<sup>88</sup>

This need for proper representation is particularly important when dealing with socio-economic rights cases because, in the context of evictions, for example, the communities involved can be extremely large as in the case of *Joe Slovo* where approximately 20 000 residents needed to be relocated.<sup>89</sup> For quality to be of a high standard in these cases, participation needs to be deep (engagement should occur at all stages of the process) and wide (all interest groups should be included in the engagement process).<sup>90</sup> However, when dealing with such a large number of people, ensuring that each and every voice and interest is accounted for and represented is problematic and can result in time delays as discussed in chapter 2. In this case, representatives need to ensure that they are as thorough as possible and extra-judicial engagement can play an important role in assisting the courts, especially in the context of housing cases when developing and implementing regeneration strategies and upgrading informal settlements. Thus, extra-judicial engagement should occur as early as possible in these situations, as held by the court in the cases discussed in chapter 3, and trade-offs will have to be made in terms of the length of this process to ensure quality solutions. However, in the case of urgent situations, the quality of engagement may have to be compromised to some extent to ensure that solutions are reached as quickly as possible. Reasonable attempts to engage should still be made in these cases, which would include attempting to ensure deep and wide participation as far as possible.

A similar dilemma in terms of the wideness of engagement is present in terms of the debate surrounding access to higher education and the fees relating thereto as it affects stakeholders across the country. There is thus a need for large scale engagements to take place on this matter, as suggested by various individuals

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<sup>86</sup> See chapter 4 part 4 3 4.

<sup>87</sup> JJ Williams "Community Participation: Lessons from Post-Apartheid South Africa" (2006) 27 *Policy Studies* 197 206.

<sup>88</sup> 206.

<sup>89</sup> 2010 3 SA 454 (CC) paras 8, 25, 156 & 183.

<sup>90</sup> See chapter 2 part 2 4 2.

including *inter alia*, Dikgang Moseneke, Yvonne Mokgoro and Malusi Mpulwana.<sup>91</sup> However, given the number of stakeholders involved (the students, university managements and government officials), there will once again be trade-offs between the depth and breadth of participation. This trade-off will have to be discussed and agreed upon by the abovementioned stakeholders when structuring engagement and the rules thereof.

There is also a need for sensitive people to facilitate the participation process as current social relations influence how local knowledge is constructed.<sup>92</sup> For example, when accommodating a plurality of voices, naturally some of these voices will differ and contradict each other. In these cases, the ideological construct of “national interest” is often used by government to reach consensus, thus not incorporating difference effectively in the process.<sup>93</sup> For example, in *Joe Slovo*, the government was adamant that a relocation was necessary and that further engagement before relocating would result in the entire N2 Gateway project (“N2 project”) being held up.<sup>94</sup> They averred that, as a result, thousands of other people who were part of the N2 project would be adversely affected.<sup>95</sup> Thus, the purported interests of the masses were used as a justification to disregard a different solution. However, this solution was what was actually implemented after *Joe Slovo 2*.<sup>96</sup> The concepts relating to incorporating difference effectively in the engagement process will be elaborated on in the next section.

It is also important to note that when involving civil society organisations, the legitimacy of these organisations to speak for others must be determined.<sup>97</sup> In relation to judicial engagement, this legitimacy should be determined by the court in collaboration with the parties involved in the case. The requirement of reporting back can play an important role in ensuring the legitimacy and accountability of representatives. In the context of extra-judicial engagement, the various stakeholders

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<sup>91</sup> See A Habib “Op-Ed: The Politics of Spectacle – Reflections on the 2016 Student Protests” (5-12-2016) *Daily Maverick* 1 <<https://www.dailymaverick.co.za/article/2016-12-05-op-ed-the-politics-of-spectacle-reflections-on-the-2016-student-protests/>> (accessed: 01-12-2018).

<sup>92</sup> JJ Williams “Community Participation: Lessons from Post-Apartheid South Africa” (2006) 27 *Policy Studies* 197 206.

<sup>93</sup> 207.

<sup>94</sup> 2010 3 SA 454 (CC) para 108.

<sup>95</sup> Para 108.

<sup>96</sup> See chapter 3 part 3 2 3 3 1.

<sup>97</sup> A Cornwall & VS Coelho *Spaces for Change? The Politics of Citizen Participation in New Democratic Arenas* (2007) 8.

should agree upon representatives. This is linked to Sturm's norm for participation that representatives should be accountable and responsive to those that they represent. These organisations need to ensure that they facilitate the representation of a plurality of perspectives and measures must be taken to ensure that specifically marginalised perspectives are heard.<sup>98</sup> They need to be able to take responsibility and be accountable for the engagement process as well as facilitate and co-ordinate this process.<sup>99</sup> There is a need for them to have the correct training and knowledge base.<sup>100</sup> For example, representatives should be able to communicate with those involved in a language<sup>101</sup> that they understand and are comfortable with. They should also be aware of the circumstances and backgrounds of those involved in the case so as to better understand their needs. The success of engagement also depends on the supportive processes that aid in building and nurturing the capacity of the voices of the participants.<sup>102</sup> When planning engagement processes, it is important to establish who is involved in the decision-making process and at which stage of the process they are involved. Courts, in conjunction with the parties to the case, should decide on this in the context of judicial engagement. In relation to extra-judicial engagement, the relevant stakeholders should determine this before beginning the engagement process. This will depend on the circumstances surrounding each engagement process, but ideally, exactly which decisions the participants must engage on should be delineated from the outset so as to avoid confusion.<sup>103</sup> This will also strengthen any future long-term strategies or approaches that are developed which will assist in a more structured approach to the realisation of socio-economic rights.

The question of representation also relates to which voices are being heard in the process.<sup>104</sup> Voice is important as often, the voices of privileged and powerful groups dominate engagement processes, which perpetuates the exclusion and

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<sup>98</sup> 8.

<sup>99</sup> JJ Williams "Community Participation: Lessons from Post-Apartheid South Africa" (2006) 27 *Policy Studies* 197 209.

<sup>100</sup> 209.

<sup>101</sup> See part 4 2 1 2 of this chapter for more information on language and accepted forms of communication.

<sup>102</sup> A Cornwall "Unpacking 'Participation': Models, Meanings and Practices" (2008) 43 *Community Development Journal* 269 275.

<sup>103</sup> 280.

<sup>104</sup> A Cornwall "Introduction: New Democratic Spaces? The Politics and Dynamics of Institutionalised Participation" (2004) 35 *IDS Bulletin* 1 4.

marginalisation of others as was seen during the #FMF protests.<sup>105</sup> Representation will ultimately affect whether engagement will serve to make changes in the lives of those whose voices need to be heard and, if done correctly, will assist in levelling power inequalities. These concerns relating to representation also illustrate the levels of difference that need to be considered. The way in which these differences are incorporated into the engagement process will be explored below.

### 5 2 3 Incorporating difference in the meaningful engagement process

*Schubart Park*<sup>106</sup> and *Welkom*<sup>107</sup> highlighted the need to take into account difference in the engagement process given that the groups involved in the cases consisted of people who did not necessarily share the same interests or goals.<sup>108</sup> *Schubart Park* highlighted the need to investigate the different circumstances that people face and to avoid treating groups as homogenous in the contexts of evictions.<sup>109</sup> *Welkom* illustrated the need to take into account the different educational contexts when dealing with education cases.<sup>110</sup> It is particularly important to be cognisant of difference as some forms of participation can deepen the exclusion of certain groups unless specific efforts are made to include them.<sup>111</sup> Recognising difference can aid in avoiding new patterns of dominance emerging in situations where some participants in the engagement process play a more active role than others.<sup>112</sup> Recognising difference also assists with realising socio-economic rights as it helps ensure inclusion of voices and also relates to achieving flexible and responsive situations as discussed in Chapter 2.

Ignoring difference can lead to some people devaluing their own life choices and convictions because they do not conform to what is perceived as the norm.<sup>113</sup> Overall, it hampers meaningful discussions and removes the motivation and ability for the

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<sup>105</sup> IM Young "Difference as a Resource for Democratic Communication" in J Bohman and W Rehg (eds) *Deliberative Democracy: Essays on Reason and Politics* (1997) 383 383.

<sup>106</sup> 2013 1 SA 323 (CC).

<sup>107</sup> 2014 2 SA 228 (CC).

<sup>108</sup> Para 67 & 2016 10 BCLR 1308 (CC) para 50.

<sup>109</sup> See chapter 3 part 3 2 5 3 2.

<sup>110</sup> See chapter 3 part 3 3 2 3 3.

<sup>111</sup> A Cornwall "Unpacking 'Participation': Models, Meanings and Practices" (2008) 43 *Community Development Journal* 269 277.

<sup>112</sup> SC White "Depoliticising Development: The Uses and Abuses of Participation" (1996) 6 *Development in Practice* 6 9.

<sup>113</sup> IM Young "Difference as a Resource for Democratic Communication" in J Bohman and W Rehg (eds) *Deliberative Democracy: Essays on Reason and Politics* (1997) 383 386.

State, rights holders and civil society organisations to solve problems together.<sup>114</sup> The disintegration of the #FMF movement was a result of the fact that the differences within the movement were not properly accommodated as discussed in chapter 4.<sup>115</sup> Failing to understand the relevant dimensions of difference can also hinder attempts at engagement and result in housing or education policies that do not cater for the needs of the various groups involved in the cases. This will be expanded on below.

### 5 2 3 1 The essentialist approach and the need to recognise intersectionality

There are various approaches to incorporating difference, one of which is the essentialist approach.<sup>116</sup> This approach groups people based on essential attributes shared by the members of that group. Thus, to belong to a group, one must possess these essential attributes and it is assumed that all members share common interests or goals.<sup>117</sup> However, Young has argued that, when using difference as a resource, appeals to the common good can lead to the privileging of dominant views within the group.<sup>118</sup> Furthermore, this approach denies similarities shared with people outside the group which perpetuates social divisions and fragmentation.<sup>119</sup> For example, in the context of eviction cases, the participants involved are often labelled as “the poor and marginalised”, thus conflating their interests.<sup>120</sup> In contrast to this characterisation, they are generally a fairly large and heterogeneous group with differing occupations, genders and religions, amongst other characteristics.<sup>121</sup> The same can be held for education cases, as highlighted in *Welkom* where Khampepe J noted the need for different pregnancy policies depending on the type of school.<sup>122</sup> Attempting to achieve consensus within what is perceived as a unified group holds the danger of assumed common visions and purposes detracting from difference thus moving away from pluralistic and equitable solutions.<sup>123</sup> For example, social movements are often

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<sup>114</sup> 384.

<sup>115</sup> See Chapter 4 part 4 3 4.

<sup>116</sup> IM Young *Inclusion and Democracy* (2000) 81.

<sup>117</sup> 83.

<sup>118</sup> 81.

<sup>119</sup> 89.

<sup>120</sup> A Cornwall “Unpacking ‘Participation’: Models, Meanings and Practices” (2008) 43 *Community Development Journal* 269 278.

<sup>121</sup> 278.

<sup>122</sup> 2014 2 SA 228 (CC) para 67.

<sup>123</sup> J Gaventa & A Cornwall “Power and Knowledge” in P Reason & H Bradbury (eds) *Handbook of Action Research: Participative Inquiry and Practice* (2001) 70 75.

regarded as a unified group.<sup>124</sup> This is one of the theorised reasons that the #FMM movement broke down. The movement started as a united front in their goal for free, quality, decolonised education but the diversity of the group<sup>125</sup> and the differing opinions were not properly accommodated by the various stakeholders which led to divisions within the movement.<sup>126</sup> This highlights the tensions between shared experiences or goals and conflicting experiences or goals.

The essentialist approach ignores the existence of intersectionality by ignoring differentiation within and across groups and the fact that people relate to a plurality of social groups.<sup>127</sup> Intersectionality relates to how social categorisations, for example race, gender and class, are interlinked and influence the degrees of cultural oppression experienced by certain individuals or groups.<sup>128</sup> For example, the group “women” can be further differentiated by race, religion, class and age.<sup>129</sup> Ignoring intersectionality results in normalising and silencing the experiences of others within the group.<sup>130</sup> Acknowledging the intersectionality of Black women means recognising the intersection of racism and sexism. This intersection can produce tensions, constraints and situations which cannot be equated to the experiences of being white and a woman or being black and a man.<sup>131</sup> A case study on forest management in Uttaranchal, India, dealt with the participation of marginalised groups, specifically women.<sup>132</sup> This study found that while women were included in the forest management schemes, new forms of exclusion emerged and that traces of power structures, upon which the forest management institutions were based, remained.<sup>133</sup> The women involved in the participation process found it difficult to voice their views due to cultural

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<sup>124</sup> S Badat “Deciphering the Meanings and Explaining the South African Higher Education Student Protests of 2015–16” (2016) 1 *Pax Academica* 71 92-93.

<sup>125</sup> 98.

<sup>126</sup> See Chapter 4 part 4 3 4.

<sup>127</sup> IM Young *Inclusion and Democracy* (2000) 88.

<sup>128</sup> K Crenshaw “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics” (1989) *University of Chicago Legal Forum* 139 141-147.

<sup>129</sup> IM Young *Inclusion and Democracy* (2000) 88.

<sup>130</sup> 89. See also K Crenshaw “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics” (1989) *University of Chicago Legal Forum* 139 141-147; J Conaghan “Intersectionality and UK Equality Initiatives” (2007) 23 *South African Journal on Human Rights* 317 318 which discuss, *inter alia*, the intersection between race and sex for Black women as well as the implications thereof.

<sup>131</sup> IM Young “Difference as a Resource for Democratic Communication” in J Bohman and W Rehg (eds) *Deliberative Democracy: Essays on Reason and Politics* (1997) 383 393.

<sup>132</sup> A Cornwall “Introduction: New Democratic Spaces? The Politics and Dynamics of Institutionalised Participation” (2004) 35 *IDS Bulletin* 1 3.

<sup>133</sup> 4.

barriers, fear and lack of self-confidence.<sup>134</sup> In order for true participation to occur, a deep understanding of the various aspects of the women's identities is needed. This would include their gender, culture and social standing, amongst other factors. The same would hold true for socio-economic rights litigation and for extra-judicial engagement relating thereto especially given the diverse nature of South Africa. In order for policies, programmes or strategies that are developed through engagement to be responsive to all the interest groups involved, the recognition of intersectionality needs to be incorporated into the engagement process. The importance of intersectionality as well as the exclusion that results if it is not taken into account was emphasised during the #FMF protests as discussed in chapter 4.<sup>135</sup>

These examples highlight the need to examine and understand the impacts that the intersectionality of race, gender, class and other factors can have so as to gain a better understanding of how various types of discrimination and oppression can affect the meaningful engagement process.<sup>136</sup>

#### 5 2 3 2 The relational approach

Young has argued that a better approach to engaging with difference is the relational approach.<sup>137</sup> This approach constructs groups as a collective of people who are differentiated from others based on factors such as structures of power and privilege, specific practices and special needs, amongst others.<sup>138</sup> The focus is not on grouping people based on specific attributes such as race or gender but rather it groups people based on the relationship between the members standing in the group in comparison to others.<sup>139</sup> It is based on the idea that there are different perspectives on social life based on different experiences that stem from certain advantages or disadvantages. Advantages and disadvantages in life can be broadly classified into two categories: "hierarchal differences" and "egalitarian differences". The former relates to *inter alia* differences based on resources and power allocations. The latter deals with differences based on *inter alia* race and gender. The relational approach does not imply rigid boundaries that distinguish all members of the group from other

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<sup>134</sup> 4.

<sup>135</sup> Chapter 4 part 4 3 4 5. See also VL Mpatlanyane *New Student Activism after Apartheid: The Case of Open Stellenbosch* Master of Arts thesis, Stellenbosch University (2018) 128.

<sup>136</sup> JS Modiri "The Grey Line in-between the Rainbow: (Re)thinking and (Re)talking Critical Race Theory in Post-Apartheid Legal and Social Discourse" (2011) *Southern African Public Law* 177 183.

<sup>137</sup> IM Young *Inclusion and Democracy* (2000) 90.

<sup>138</sup> 90.

<sup>139</sup> 90.

groups. Instead it recognises and affirms intersectionality between and within groups.<sup>140</sup> Using the social positioning of group differentiation allows members of various groups to gain shared perspectives on social life and experiences.<sup>141</sup> It was demonstrated in chapter 4 that rigid groupings were formed which caused a breakdown in communication between groups during engagement. This formation of rigid groupings resulted in the relational differences within groups being ignored and ultimately led to the members of the various groups within the #FMF movement being divided. It is thus possible that had the relational approach been followed during the #FMF protests, the divisions between and within groups may have been reduced, with stakeholders possibly reaching a more nuanced understanding of the various levels of problems that students were facing. Using this approach when dealing with socio-economic rights cases will also assist in ensuring that solutions to and policies or strategies for, for example, education and housing cases, are responsive to the various intersectional needs and interests.

However, it must be noted that even when differing interests are taken into account, participation is rarely a flawless process and usually involves contestation.<sup>142</sup> It often has underlying tensions relating to who is involved in the process and on whose terms the engagement takes place.<sup>143</sup> Thus, there is also a need to investigate which voices are included in the process.

#### 5 2 4 Recognising the role of voice and the inclusion of stakeholders

While emphasis has been placed on the importance of allowing different narratives and voices to be heard,<sup>144</sup> involvement in the engagement process does not equate to having a voice.<sup>145</sup> This was illustrated in the *Joe Slovo* cases where a top-down approach was taken to engagement and residents were merely informed of predetermined plans as opposed to being active participants in the engagement

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<sup>140</sup> 91.

<sup>141</sup> IM Young "Difference as a Resource for Democratic Communication" in J Bohman and W Rehg (eds) *Deliberative Democracy: Essays on Reason and Politics* (1997) 383 385.

<sup>142</sup> A Cornwall "Unpacking 'Participation': Models, Meanings and Practices" (2008) 43 *Community Development Journal* 269 275.

<sup>143</sup> SC White "Depoliticising Development: The Uses and Abuses of Participation" (1996) 6 *Development in Practice* 6 6.

<sup>144</sup> J Gaventa & A Cornwall "Power and Knowledge" in P Reason & H Bradbury (eds) *Handbook of Action Research: Participative Inquiry and Practice* (2001) 70 74.

<sup>145</sup> A Cornwall "Unpacking 'Participation': Models, Meanings and Practices" (2008) 43 *Community Development Journal* 269 278.

process.<sup>146</sup> Participants need to feel comfortable expressing themselves and need to believe that their voice will be heard and taken into account.<sup>147</sup> In order to ensure that the voices translate into influence, various efforts need to be made from above and below.<sup>148</sup> Responsiveness and accountability are needed from authorities and strategies are needed from below to support collectives.<sup>149</sup>

The authenticity of participants' voices also needs to be ensured. Often, powerless groups echo the voices of the powerful either to comply out of fear or due to internalisation of dominant views or values.<sup>150</sup> This needs to be guarded against as it will simply result in a perpetuation of the *status quo*.<sup>151</sup> For example, in relation to the housing cases discussed in chapter 3, failing to ensure that all voices are properly heard in the development of housing policies and long-term approaches that are developed through engagement would render said policies and approaches meaningless if they merely reinforced the status quo. As noted in the *Welkom* case, stigmas and biases relating to pregnancies will also be perpetuated if new and relevant voices are not included.<sup>152</sup>

When addressing the question of who participates, it is also important to take note, not only of who is excluded, but also of who excludes themselves.<sup>153</sup> These factors are usually referred to as "internal exclusions".<sup>154</sup> It is rare for an entire community to take part in the engagement process as, for example, some may be too young or too old.<sup>155</sup> For example, in the context of education cases, students involved may be too young to fully participate by themselves or may not understand the importance or implications thereof. Furthermore, equal political participation between men and women is still lacking and various hypotheses have been posited in an attempt to explain this, one of which is the situational explanation.<sup>156</sup> This relates to the

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<sup>146</sup> 2010 3 SA 454 (CC) para 166. See also chapter 3 part 3 2 3 3 1.

<sup>147</sup> A Cornwall "Unpacking 'Participation': Models, Meanings and Practices" (2008) 43 *Community Development Journal* 269 278.

<sup>148</sup> 278.

<sup>149</sup> 278.

<sup>150</sup> J Gaventa & A Cornwall "Power and Knowledge" in P Reason & H Bradbury (eds) *Handbook of Action Research: Participative Inquiry and Practice* (2001) 70 75.

<sup>151</sup> 76.

<sup>152</sup> 2014 2 SA 228 (CC) paras 101 & 113-114. See also chapter 3 part 3 3 2 3 4.

<sup>153</sup> A Cornwall "Unpacking 'Participation': Models, Meanings and Practices" (2008) 43 *Community Development Journal* 269 275.

<sup>154</sup> IM Young *Inclusion and Democracy* (2000) 53.

<sup>155</sup> SC White "Depoliticising Development: The Uses and Abuses of Participation" (1996) 6 *Development in Practice* 6 12.

<sup>156</sup> MK Jennings "Gender Roles and Inequalities in Political Participation: Results from an Eight-Nation Study" 1983 36 *The Western Political Quarter* 364 364.

characteristics of women's life space. It is argued that roles such as wife, mother and child-carer can inhibit women's ability to partake in the engagement process due to, *inter alia*, time and financial constraints as well as the fact that, often, these roles are perceived as not being worth listening to.<sup>157</sup> In relation to this, various literature<sup>158</sup> has acknowledged the need to take into account gender differences when determining housing needs, especially given the increase in female-headed households coupled with factors such as rising levels of poverty, the HIV/AIDS epidemic, lack of legal knowledge and the housing crisis, all of which have had catastrophic consequences for vulnerable and marginalised groups, such as women living in poverty.<sup>159</sup> *Grootboom* highlighted the importance of taking cognisance of the historical, social and economic context of access to housing when addressing the housing crisis.<sup>160</sup> In terms of historical context, access to housing for women, more specifically African women, has been limited throughout history by oppressive laws and policies stemming from colonialism and apartheid.<sup>161</sup> Various social factors have also influenced women's access to housing.<sup>162</sup> These factors include *inter alia* patriarchy, customary and religious laws and practices, domestic violence and HIV/AIDS.<sup>163</sup> In relation to economic factors, studies have shown that African women, on average, have a higher rate of unemployment and earn less when employed, in comparison to men.<sup>164</sup> These contexts and factors should inform solutions, policies and programmes which are developed in relation to access to housing. Policies and programmes ultimately developed should be gender-specific as opposed to gender neutral.<sup>165</sup> It is also important to ensure that intersectionality is also accounted for as women are not a homogenous group. For example, women with HIV/AIDS would need housing in close

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<sup>157</sup> 364.

<sup>158</sup> See for example, A Venter and L Marais "Gender and Housing Policy in South Africa: Policy and Practice in Bloemfontein" (2006) 34 *Journal of Family Ecology and Consumer Sciences* (2006) 69-79; K Pillay, R Manjou, E Paulus, D Budlender & S Liebenberg "Rights, Roles and Resources: An Analysis of Women's Housing Rights – Implications of the Grootboom Case" *Research Report for Women's Budget Project and IDASA* (2002) 1-39, N Ghandi "Gender and Housing" (1987) 22 *Economic and Political Weekly* 1994-1997; C Ndinda *Women's Participation in Housing Delivery in South Africa: The Extent of Empowerment in Post-1994 Era, With Specific Reference to Case Studies in KwaZulu-Natal* PhD dissertation (2002).

<sup>159</sup> K Pillay, R Manjou, E Paulus, D Budlender & S Liebenberg "Rights, Roles and Resources: An Analysis of Women's Housing Rights – Implications of the Grootboom Case" *Research Report for Women's Budget Project and IDASA* (2002) 5.

<sup>160</sup> 5.

<sup>161</sup> 5.

<sup>162</sup> 5.

<sup>163</sup> 5.

<sup>164</sup> 5.

<sup>165</sup> 35.

proximity or with easy access to health facilities and other support structures.<sup>166</sup> Women with disabilities would need houses which are designed to cater for said disability.<sup>167</sup>

There is also generally a strong tendency for levels of participation to decline with time.<sup>168</sup> This could be as a result of the disillusionment with the results (or lack thereof) of participation.<sup>169</sup> Parties could also have negative perceptions or experiences relating to language barriers and fear of government.<sup>170</sup> For example, the residents in *Joe Slovo*,<sup>171</sup> while initially happy with the project, later became dissatisfied because of “broken promises” relating to rental amounts and housing allocations.<sup>172</sup> This ultimately resulted in the residents feeling deceived, which made them less trustful about the government’s role in the engagement process.<sup>173</sup>

Another reason for a decline in participation is that people actively choose to spend their time on other things or because of other responsibilities that may require their time.<sup>174</sup> The latter is extremely important to consider in meaningful engagement cases where the parties often come from impoverished communities and where, for example, breadwinners of the family may not have time to partake in the engagement process. For example, during the #FMF protests participation in the movement fluctuated during exam times or holidays as some members chose to prioritise their studies or go home during that time.<sup>175</sup> Thus, the timing of the engagement is also important to avoid non-participation and cognisance should be taken of factors such as work hours, school times and travelling times.<sup>176</sup> Furthermore, the location in which the engagement takes place is also important and must be accessible to all parties involved. Location and

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<sup>166</sup> 12.

<sup>167</sup> 12.

<sup>168</sup> SC White “Depoliticising Development: The Uses and Abuses of Participation” (1996) 6 *Development in Practice* 6 11.

<sup>169</sup> 11.

<sup>170</sup> JJ Williams “Community Participation: Lessons from Post-Apartheid South Africa” (2006) 27 *Policy Studies* 197 204.

<sup>171</sup> 2010 3 SA 454 (CC).

<sup>172</sup> Paras 30-32.

<sup>173</sup> B Ray “Engagement’s Possibilities and Limits as a Socio-Economic Rights Remedy” (2010) 9 *Washington University Global Studies Law Review* 399 411.

<sup>174</sup> SC White “Depoliticising development: The Uses and Abuses of Participation” (1996) 6 *Development in Practice* 6 11.

<sup>175</sup> VL Mpatlanyane *New Student Activism after Apartheid: The Case of Open Stellenbosch* Master of Arts thesis, Stellenbosch University (2018) 37.

<sup>176</sup> A Cornwall “Unpacking ‘Participation’: Models, Meanings and Practices” (2008) 43 *Community Development Journal* 269 279.

space can also play a crucial role in mitigating power disparities and will be discussed below.

## 5.2.5 The role of space

Some of the above-mentioned problems relating to voice and power can be addressed by using space to level the playing field. It is counter-productive for parties to enter unfamiliar spaces with unfamiliar customs and terminology in which they are treated as subordinates.<sup>177</sup> This can lead to participants not wanting to actively engage on matters as they do not feel that it is a safe space.<sup>178</sup> The importance of “invited” versus “invented spaces” is crucial.<sup>179</sup> “Invited spaces” refer to spaces created by government or other parties in which the participants are invited to engage.<sup>180</sup> While the intentions behind these spaces may be good, the spaces and opportunities to engage are inevitably structured and owned by those who created them. Spaces that participants create for themselves are different in character from “invited spaces”.<sup>181</sup> They generally contain significantly fewer power differentials.<sup>182</sup> They are crucial to marginalised groups as the solidarity and safeness of the space can increase their confidence and strengthen their voice.<sup>183</sup>

Meaningful engagement mostly takes place in “invited spaces” and, as such, it is important for courts to take note of where the engagement process takes place. Non-participation is likely to occur if the process takes place in areas associated with cultures or groups that the participants do not belong to or in which they are unfamiliar or uncomfortable.<sup>184</sup> For example, a school might seem like a neutral place in which to engage, but schools are not necessarily a familiar space to everyone, and preconceived ideas relating to this space may stop prospective participants from wanting to enter.<sup>185</sup> Spaces for engagement should also be easily accessible for all participants. For example, in the context of eviction cases, proximity of the space of

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<sup>177</sup> JJ Williams “Community Participation: Lessons from Post-Apartheid South Africa” (2006) 27 *Policy Studies* 197 206.

<sup>178</sup> 210.

<sup>179</sup> A Cornwall *Beneficiary, Consumer, Citizen: Perspectives on Participation for Poverty Reduction* (2000) 22.

<sup>180</sup> 22.

<sup>181</sup> 22.

<sup>182</sup> 24.

<sup>183</sup> 24.

<sup>184</sup> A Cornwall “Unpacking ‘Participation’: Models, Meanings and Practices” (2008) 43 *Community Development Journal* 269 279.

<sup>185</sup> 279.

engagement should be taken into account for those who do not have cars or time to travel far due to work or home obligations.

Space can contribute to one's mental state of mind based on the "bodily experience" one has in the relevant space.<sup>186</sup> For example, the language and mode of communication, the names of buildings and the racial and gender make-up of the space can all impact the mental perception and construction of spaces.<sup>187</sup> Spaces should not be seen as neutral as they can form the basis for the inclusion and exclusion of certain groups.<sup>188</sup> This issue was brought up during the #FMM protests as many #FMM members felt that the university space was alienating and uninviting to students of colour especially given that buildings were often named after oppressors such as historical role-players in the oppressive apartheid regime.<sup>189</sup> The occupation and renaming of various buildings was resorted to in order to assert the presence of black students who felt overlooked in the university as they felt that they lacked ownership and proper participation in the spaces within the universities.<sup>190</sup>

### 5.3 Recommendations

The above section expanded on the shortfalls highlighted in the previous two chapters and explored potential solutions thereto with the aim of strengthening meaningful engagement in realising socio-economic rights. Based on the above discussions on the potential ways to address the shortfalls identified in Chapters 3 and 4, there is a clear need to address the concerns relating to quality and to delineate the rules of engagement.<sup>191</sup> This section will provide recommendations for the way forward, with a view to maximising the potential of meaningful engagement in realising socio-economic rights.

Firstly, in order for parties to take meaningful engagement seriously, both in a judicial and extra-judicial context, there is a need for thorough policies and frameworks

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<sup>186</sup> VL Mpatlanyane *New Student Activism after Apartheid: The Case of Open Stellenbosch* Master of Arts thesis, Stellenbosch University (2018) 9.

<sup>187</sup> 9.

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<sup>189</sup> M Langa, S Ndelu, Y Edwin & M Vilakazi (Commissioned by Centre for the Study of Violence and Reconciliation) *#Hashtag: An Analysis of the #FeesMustFall Movement at South African Universities* (2017) 39 & 85.

<sup>190</sup> VL Mpatlanyane *New Student Activism after Apartheid: The Case of Open Stellenbosch* Master of Arts thesis, Stellenbosch University (2018) 56-57.

<sup>191</sup> M Langa, S Ndelu, Y Edwin & M Vilakazi (Commissioned by Centre for the Study of Violence and Reconciliation) *#Hashtag: An Analysis of the #FeesMustFall Movement at South African Universities* (2017) 102.

to be developed in which provision is made for these quality concerns to be addressed.<sup>192</sup> However, as has been emphasised throughout this thesis, there are clearly different levels and types of meaningful engagement that are required depending on the situation. For example, some cases will require more extensive engagement on a wider range of issues, due to the complexity of the matter, as would be the case with #FMF discussions. However, depending on the circumstances, the final decision would ultimately still lie with the government in some cases as held in *Joe Slovo*.<sup>193</sup>

Thus there is a need for a coordinated and coherent policy which contains guiding principles to be developed. However, the stakeholders in each case would need to ensure that the specificities and circumstances of their case be taken into account and then tailor the engagement process thereto. This policy should delineate exactly what meaningful engagement should entail, based on what the Constitutional Court has held in its various judgments. Furthermore, in the case of judicial engagement, courts should clearly define the normative parameters as well as the procedural standards of engagement.<sup>194</sup> This can be done through participatory structural interdicts in which the relevant parties' responsibilities and entitlements are outlined.<sup>195</sup> This assists with mitigating power disparities between parties<sup>196</sup> and also ensures that the engagement process is aimed at remedying specific issues.<sup>197</sup> It also provides a framework for evaluating the engagement that occurs in order to determine the quality and success thereof.<sup>198</sup>

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<sup>192</sup> While various policies and frameworks exist in relation to participation, there is still a need for a comprehensive framework or policy which takes into account the quality concerns highlighted throughout this thesis. See for example: Department of Planning, Monitoring and Evaluation "A Framework for Strengthening Citizen-Government Partnerships for Monitoring Frontline Service Delivery" (2013); Department of Public Service and Administration "Guide on Public Participation in the Public Service" (2014) & South African Legislative Sector "Public Participation Framework for the South African Legislative Sector" (2013) as well as the various local government policies such as: Nelson Mandela Bay Municipality "Public Participation Policy" (2014) & Cederberg Municipality "Public Participation Policy" (2015).

<sup>193</sup> 2010 3 SA 454 (CC) para 243.

<sup>194</sup> SP Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1428.

<sup>195</sup> S van der Berg A Capabilities Approach to the Judicial Review of Resource Allocation Decisions Impacting on Socio-Economic Rights LLD dissertation, Stellenbosch University (2015) 320. See also S Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1429.

<sup>196</sup> S Liebenberg "Participatory Approaches to Socio-Economic Rights Adjudication: Tentative Lessons from South African Evictions Law" (2014) 32 *Nordic Journal of Human Rights* 312 329.

<sup>197</sup> SP Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1429.

<sup>198</sup> S Liebenberg "Engaging the Paradoxes of the Universal and Particular in Human Rights Adjudication: The Possibilities and Pitfalls of 'Meaningful Engagement'" (2012) 12 *AHRLJ* 1 23. See also D Brand Courts, Socio-Economic Rights and Transformative Politics LLD dissertation, Stellenbosch University (2009) 162–164.

Once an agreement is reached, the courts have the option to approve or reject the agreement. Should the parties be unable to reach consensus on all the matters, they can revert back to the court who will then decide on the remaining matters.<sup>199</sup> The court will still be able to reach an informed and holistic decision on the matter as it would have access to the records of the engagement that took place and will thus be privy to the various arguments and opinions.<sup>200</sup> Civil society organisations and public interest lawyers should also play a role in developing these policies considering the role that they play in meaningful engagement, as discussed throughout this thesis.<sup>201</sup>

Secondly, courts should make use of their wide remedial powers to ensure that effective relief is granted in socio-economic rights cases.<sup>202</sup> In this regard, courts can make use of declarations of invalidity,<sup>203</sup> severance<sup>204</sup> and “reading in remedies”<sup>205</sup> to ensure that the normative substantive content to the rights are defined and given effect to. For example, a declaration of invalidity of the pregnancy policies in *Welkom* coupled with an engagement order could have ensured that the substantive content of the underlying rights to education and equality were given effect to by the declaration while still ensuring that procedural considerations were met through engagement. Courts could also combine meaningful engagement with a declaration of rights order.<sup>206</sup> This will assist with the abovementioned problem of balancing normative and procedural concerns while also assisting with power disparities by determining the entitlements of those with less power prior to engagement. Courts should also provide substantive interpretations of the rights in questions as well as the corresponding obligations on parties to ensure the realisation of said rights.<sup>207</sup> This can assist in ensuring that parties who are in similar situations know what their rights

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<sup>199</sup> SP Sturm “A Normative Theory of Public Law Remedies” (1990) 79 *Geo LJ* 1355 1439.

<sup>200</sup> 1439.

<sup>201</sup> B Ray “Engagement’s Possibilities and Limits as a Socioeconomic Rights Remedy” (2010) 9 *Wash U Global Stud L Rev* 399 422.

<sup>202</sup> See S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 380.

<sup>203</sup> See S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 381-382 for more information on declarations of invalidity.

<sup>204</sup> See S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 382 for more information on severance.

<sup>205</sup> See S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 383-388 for more information on “reading in”.

<sup>206</sup> See S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 397-409 for more information on declaration of rights orders.

<sup>207</sup> See S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 423-424.

entail and seek remedies accordingly.<sup>208</sup> It can also help circumvent the need for further litigation by clarifying the obligations of the parties.<sup>209</sup> A failure to provide a substantive evaluation of the rights in question will result in meaningful engagement being unable to provide appropriate and effective relief thus jeopardising the criterion of “outcome validity”.<sup>210</sup> Additionally, courts can make use of reporting orders and participatory structural interdicts in conjunction with meaningful engagement orders.<sup>211</sup> This combination can be used to give effect to the realisation of socio-economic rights by allowing parties to design new policies and programmes or to implement existing ones.

Thirdly, tokenistic engagement and unequal bargaining power need to be guarded against. This can be achieved by requiring parties to report back to the court on the engagement process and more specifically, about issues relating to representation and how the engagement process was structured to include marginalised and excluded voices and to mitigate tokenistic engagement and power disparities. Additionally, there should be consequences for engagement of a low quality such as, in the context of eviction cases, refusing to sanction an eviction or granting a cost order against the Municipality for a failure to engage meaningfully. Furthermore, there is a need to ensure that all the relevant stakeholders are included and that they are afforded equal opportunities to be heard and make an impact on the decisions as opposed to being subject to tokenistic engagement in which they merely endorse pre-planned decisions.<sup>212</sup> The decision as to which stakeholders are important to the engagement should be decided by the Court in conjunction with the parties to that case.<sup>213</sup> Provision should also be made within government departments to ensure that the correct officials are available and trained to engage on matters that could arise, especially with regard to housing given the large amount of regeneration strategies in

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<sup>208</sup> 424.

<sup>209</sup> 424.

<sup>210</sup> 424. See chapter 2 part 2 4 4 for the discussion of outcome validity.

<sup>211</sup> See S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 424-438 for more information on reporting orders and structural interdicts.

<sup>212</sup> 418.

<sup>213</sup> SP Sturm “A Normative Theory of Public Law Remedies” (1990) 79 *Geo LJ* 1355 1429.

place as well as in the context of upgrading informal settlements.<sup>214</sup> Government officials should also receive training for engagement and there is a need for coordination when matters concern various spheres of government.<sup>215</sup>

Differences between stakeholders should be properly accommodated through the use of representatives and by structuring the engagement process in a way that incorporates differences using the relational approach, as discussed earlier in this chapter so as to better improve the engagement process as opposed to causing further division. As held in *Olivia Road*, representatives play a crucial role in addressing these issues, and civil society organisations should be called upon to assist and facilitate in these types of cases.<sup>216</sup> However, checks need to be put in place to ensure that the representatives are actually representing the interests of everyone they claim to speak for and measures should be put in place to ensure accountability and transparency. For example, when requiring the parties to report back, the court should request that the report must contain a section delineating the role that the representatives played in the engagement process and sanctions should be put in place should representatives have failed to adequately represent everyone's interests. Furthermore, representatives need to have proper training to be able to deal with situations that may arise during the engagement process as discussed earlier in this chapter.<sup>217</sup>

Fourthly, as discussed in chapters 3 and 4, the timing of engagement is of extreme importance and given the political nature of engagement, another way to mitigate power disparities is to order engagement before the court decides on the matter. However, this would once again depend on the circumstance of each case and ideally, the parties should have engaged meaningfully prior to approaching the courts. In line with *Olivia Road*, should the parties fail to do this, courts should take a negative view on the party at fault and should, for example, impose cost orders or refuse to grant

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<sup>214</sup> *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) made reference to the City's Regeneration Strategy and the fact that approximately 67 000 people in Johannesburg living in similar situations would also be subject to evictions. Furthermore, *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) was also indicative of the broader underlying systemic problem as the occupiers had been previously evicted from other properties on various occasions.

<sup>215</sup> B Ray "Engagement's Possibilities and Limits as a Socioeconomic Rights Remedy" (2010) 9 *Wash U Global Stud L Rev* 399 419.

<sup>216</sup> *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 3 SA 208 (CC). B Ray "Engagement's Possibilities and Limits as a Socioeconomic Rights Remedy" (2010) 9 *Wash U Global Stud L Rev* 399 422.

<sup>217</sup> See part 5 2 2 of this chapter.

eviction orders as a penalty to deter future parties from failing to engage prior to resorting to litigation.<sup>218</sup>

Fifthly, the courts need to take the quality concerns seriously themselves. The courts, in conjunction with the executive and the legislature, need to develop a clear set of evaluative criteria for quality engagement processes in order to ensure that the above-mentioned requirements are being met and sanctions should be put in place should any of the stakeholders fail to adhere to the requirements.<sup>219</sup> For example, as mentioned above, the pronouncement of the normative parameters when using structural interdicts can serve as a framework for the courts to evaluate the engagement that occurred. Reporting back to the courts on the process of engagement should also be mandatory to assist with this requirement and to ensure transparency and accountability.<sup>220</sup> This set of evaluative criteria can be incorporated into the policy or framework for quality engagement.

Furthermore, engagement should not merely feature in the judicial context but should be extended to the extra-judicial context by making it an administrative requirement. It should thus be mandatory in future policy development processes relating to socio-economic rights.<sup>221</sup> According to Ray, this approach offers the greatest potential for meaningful engagement to be successful in realising socio-economic rights as it places a long-term systematic duty on government to realise these rights while giving effect to participatory governance.<sup>222</sup> Courts should thus consider denying the enforcement of a policy if there was a failure to meaningfully engage in the development of the policy, regardless of the fact that there are no other objective problems with the policy.<sup>223</sup> Only once these recommendations are put into action, can there be greater institutional support for quality engagement processes in both the judicial and extra-judicial contexts.

#### **5 4 Conclusion**

The above discussions have explored potential ways to mitigate the shortfalls highlighted in chapter 3. In terms of judicial engagement, there is a need for courts to

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<sup>218</sup> 2008 3 SA 208 (CC) para 21.

<sup>219</sup> See part 5 2 2 of this chapter.

<sup>220</sup> B Ray "Engagement's Possibilities and Limits as a Socioeconomic Rights Remedy" (2010) 9 *Wash U Global Stud L Rev* 399 423.

<sup>221</sup> 419.

<sup>222</sup> 418 & 420.

<sup>223</sup> 423.

use their wide remedial powers to ensure that effective relief is granted in socio-economic rights cases.<sup>224</sup> This is particularly important especially given the fact that parties involved in these types of cases are often impoverished; lack access to legal services; and are unable to approach courts to secure effective remedies.<sup>225</sup> Thus, courts should make use of other constitutional remedies in conjunction with meaningful engagement to increase the quality of engagement and maximise the realisation of the rights in question. As discussed above, courts should make use of declarations of invalidity, severance, “reading in remedies”, declaration of rights orders, reporting orders and participatory structural interdicts in conjunction with meaningful engagement to ensure that the quality of engagement is of a high standard and the rights in questions are realised. Furthermore, courts should avoid ordering meaningful engagement without providing a substantive analysis of the rights in question. Courts should also take the quality concerns related to engagement seriously and develop a set of evaluative criteria to assess the quality of engagement. Furthermore, they should be willing to impose sanctions should parties fail to comply with the criteria for quality engagement.

There is also a need for a policy or framework to be developed which delineates what is expected from parties when meaningfully engaging. This policy or framework should incorporate the solutions to the quality concerns discussed in this chapter. This would include recommendations that deal with the need to understand power disparities; the need to ensure that representatives are used in the correct manner and are trained to deal with the quality concerns that may arise; the need to recognise and include different voices and opinions in the engagement process by using the relational approach; and the need to understand the role that space can play in engagement processes. Evaluative procedures need to be put in place to ensure that engagement is consistent with the recommendations and sanctions, such as cost orders, should be imposed should parties fail to adhere to the recommendations for quality engagement.

Incorporating the above-mentioned aspects into the engagement process can assist in strengthening its function in realising socio-economic rights. However, in order for these aspects to be properly incorporated, there is a need for a more

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<sup>224</sup> See S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 380.

<sup>225</sup> 380.

structured approach to be taken to engagement. Ray has argued that the State is required to develop “structured, long-term approaches” in which engagement is integrated throughout the process.<sup>226</sup> This signals the importance of extra-judicial engagement in realising socio-economic rights and the need employ judicial engagement in conjunction with extra-judicial engagement to maximise the realisation of socio-economic rights. If this is done correctly, it could address the issues highlighted in Chapters 3 and 4. Thus, the recommendations provided in this chapter serve as guiding principles that should be incorporated into a framework or policy document to assist with meaningful engagement processes that take place in the future.

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<sup>226</sup> B Ray “Engagement’s Possibilities and Limits as a Socioeconomic Rights Remedy” (2010) 9 *Wash U Global Stud L Rev* 399 423.

## Chapter 6: Conclusion

This thesis has explored the role that meaningful engagement can play in realising socio-economic rights. It has done so by exploring the various reasons posited for the use of meaningful engagement in socio-economic rights cases. Furthermore, it has sought to highlight the importance of the quality of the engagements that take place in order to ensure that these rights are effectively realised and that meaningful engagement is not just used in a tick-box or mechanistic manner. Investigations relating to the quality of engagement were conducted in both the judicial and extra-judicial context. These investigations raised various concerns relating to the quality of the current implementation of meaningful engagement. Thus, potential solutions to these quality concerns as well as recommendations for the way forward when implementing meaningful engagement were provided. The shortfalls that were identified also confirm concerns that have been raised by authors such as Williams and Chenwi regarding the quality of engagement and the fear that meaningful engagement will become, like most participation in post-apartheid South Africa, “spectator politics” in which participation is just for show and where participants merely endorse pre-designed plans.<sup>1</sup> Therefore, there is a need to promote engagement that is in line with the proposed recommendations in order to ensure that the quality concerns are remedied.<sup>2</sup>

This thesis also illustrated the important role that extra-judicial meaningful engagement can play in realising socio-economic rights. This can be seen as a powerful mechanism for enforcing socio-economic rights, as it forces government to be cognisant of its obligations and requires engagement with communities, student groups and other social formations before approaching courts.<sup>3</sup> If done correctly, this can eradicate, or at least diminish, the need for court involvement.<sup>4</sup> Thus, government would be forced to incorporate engagement as part of its long-term policies or strategies in the context of socio-economic rights. As such, meaningful engagement

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<sup>1</sup> JJ Williams “Community Participation: Lessons from Post-Apartheid South Africa” (2006) 27 *Policy Studies* 197 197. See also L Chenwi “‘Meaningful Engagement’ in the Realisation of Socio-Economic Rights: The South African Experience” (2011) 26 *South African Public Law* 128 129.

<sup>2</sup> JJ Williams “Community Participation: Lessons from Post-Apartheid South Africa” (2006) 27 *Policy Studies* 197 197. See also L Chenwi “‘Meaningful Engagement’ in the Realisation of Socio-Economic Rights: The South African Experience” (2011) 26 *South African Public Law* 128 129.

<sup>3</sup> B Ray “Occupiers of 51 Olivia Road v City of Johannesburg: Enforcing the Right to Adequate Housing through “Engagement” (2008) 8 *Human Rights Law Review* 703 707.

<sup>4</sup> 707.

can assist in the long-term development of multi-faceted, robust policies which give effect to socio-economic rights.<sup>5</sup> This expansion to extra-judicial engagement was highlighted when the Court held that large cities would require long-term strategies for “structured, consistent and careful engagement”.<sup>6</sup> In this way, the courts have enhanced remedial powers as the government has to defend both the policy developed and the process through which that policy is implemented.<sup>7</sup>

By promoting a dialogic relationship between the government branches and the various stakeholders, meaningful engagement will aim to ensure that government appreciates the nature and scope of its constitutional and statutory duties to advance the various socio-economic rights in question.<sup>8</sup> It will also transform government’s approach to socio-economic rights realisation and force the different branches to consider the various potential consequences of programmes or policies before developing and implementing them.<sup>9</sup> Furthermore, it will allow them to determine what is necessary to alleviate the hardships linked to the deprivation of various socio-economic rights and to assess the potential cost and interim measures required.<sup>10</sup>

Meaningful engagement should thus still be implemented in the judicial context, in line with the recommendations, as such engagement will still be important as a judicial management tool should future cases arise.<sup>11</sup> However, extra-judicial engagement should be developed alongside judicial engagement. If these two types of engagement are developed properly, they hold great potential to assist in not only the realisation of socio-economic rights, but also in allaying concerns relating to the absence of genuine participatory democracy in South Africa.<sup>12</sup> However, in order to use engagement as a political tool as described by Ray, there is a need for consistent and coordinated efforts from the courts and the government to ensure that the foundations that have been laid down by the jurisprudence are strengthened.

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<sup>5</sup> 709.

<sup>6</sup> *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 3 SA 208 (CC) para 19.

<sup>7</sup> B Ray “Occupiers of 51 Olivia Road v City of Johannesburg: Enforcing the Right to Adequate Housing through “Engagement” (2008) 8 *Human Rights Law Review* 703 711.

<sup>8</sup> G Muller “Conceptualising ‘Meaningful Engagement’ as a Deliberative Democratic Partnership” (2011) 22 *Stell LR* 742 757.

<sup>9</sup> 757.

<sup>10</sup> 757.

<sup>11</sup> B Ray “Engagement’s Possibilities and Limits as a Socio-Economic Rights Remedy” (2010) 9 *Washington University Global Studies Law Review* 399 424.

<sup>12</sup> S Badat “Deciphering the Meanings and Explaining the South African Higher Education Student Protests of 2015–16” (2016) 1 *Pax Academica* 71 82.

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