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BEYOIND LAWS AND POLICIES: THE RELEVANCE OF COMMUNITY PARTICIPAITON IN THE REALISATION OF SOCIOECNOMIC RIGHTS IN SOUTH AFRICA

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1. Introduction

About two decades into democracy, socio-economic rights concerns still plague the South African society. The strong protection given to socio-economic rights in the South African Constitution is instrumental to the fight against poverty, which is a visible consequence of apartheid. Another consequence is socio-economic exclusion of the majority of South Africans, particularly blacks, when it comes to decision-making processes affecting their lives. The Constitution postulates a society based on social justice, democracy and fundamental human rights, in which everyone's life is improved and their full human potential is realised.

The reality of South Africa, however, is that this promise is far from being realised. Vulnerable and marginalised groups such as the poor, women, young people and children do not yet experience the quality of life that the Constitution envisages for all. In addition, they are not often involved in decision-making processes that affect their daily life. Of recent the South African Constitutional Court has developed a rich jurisprudence emphasise n the need for policy makers to engage with community members towards the realisation of socioeconomic rights.

Against this backdrop, this paper will explore the importance of engaging with vulnerable groups in disadvantaged communities to ensure the realisation of their constitutional rights. Based on CLC's experience engaging with people in informal settlements, the paper will argue that beyond progressive laws and policies, there is a need to facilitate meaningful engagement between people in disadvantaged communities and policy makers in order to

improve their living conditions. In essence, the rights of vulnerable groups are more likely to be truly realised in an environment where they are allowed to participate in decision-making affecting their lives. This is consistent with one of the recent reports of the UN Special Rapporteur on extreme poverty and human rights where she emphasized that the participation of people in poverty in decision-making not only ensure their views to be heard but also helps in deepening democracy.. The paper will draw experience from other jurisdiction such as India where participation of vulnerable groups in decision making has helped in the realisation of their human rights.

2. The Socioeconomic Rights Provisions of the South African Constitution

The South African Constitution of 1996 is regarded as one of the most progressive constitutions in the world. This is largely due to its transformative nature and its explicit recognition of socioeconomic rights. The transformative agenda of the Constitution is aimed at correcting the ills and inequality perpetuated by the obnoxious Apartheid regime. Upon becoming a democratic country in 1994, South Africa inherited long years of institutionalised inequality and disparities, which was evidenced by the differences in the standard of living enjoyed by the white and black population. Indeed, Ngwena and Cook have noted that 'income, geographical location, and most importantly, race or ethnicity have been the arch determinants of the quantity and quality' of life enjoyed by South Africans for the greater part of the twentieth century.[1] The Constitution announces its transformative agenda in its preamble when it declares that the essence of the Constitution is to 'Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights'. It further affirms that it envisages a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law.' These provisions are no doubt unambiguous indication of the drafters of the Constitution to usher in a new Constitution founded on principles of equality and participation. Noting the importance of a transformative constitution Loenen[2] has noted as follows:

> 'a meaningful and convincing interpretation of the concept of discrimination starts from its historical genesis as principle directed at protecting groups, which have suffered from structural disadvantage, from patterns of exclusion, and not just from one negative incidental impact… Sensitive groups thus need stronger protection against classification with a negative impact… Such an asymmetrical conception of discrimination acknowledges harm caused by measures which disadvantage vulnerable and subordinate groups is, indeed, a greater evil which merits more suspicion than measures which disadvantage power and otherwise privilege groups.

[1] C Ngwena and R Cook Rights Concerning Health' in C Heyns and D Brand Socioeconomic Rights in South Africa (2005)

[2] T. Leonen, ' The Equality Clause in the South African Constitution: Some Remarks from A Comparative Perspective' (1997) *South African Journal on Human Rights* 401, 408

In order for the Constitution to realize its transformative agenda it is essential that it meets the needs of the people. To this effect, the recognition of socioeconomic rights in the Constitution is intended to serve as a soothing balm to the injuries and injustice meted out to large majority of the population. The explicit recognition of socioeconomic rights in the Constitution did not come on a platter of gold. Indeed it was heralded by heated debates between those who strongly opposed to this approach and others who vigorously support their inclusion in the Constitution. Reasons for opposing the inclusion of these sets of rights in the constitution were as pedantic as anachronistic. Opponents of the inclusion of socioeconomic rights in the Constitution argue that it will not only over-stretch the resources of a country just emerging from isolation as a result of Apartheid but will also unduly permits the judiciary an incursion into the powers of other organs of governments.[3] These are more or less familiar opposition to the recognition of socioeconomic rights. One of the foremost opponents of socioeconomic rights Lon Fuller has argued that socioeconomic rights should not be made subject of judicial interpretation since judges are not competent to decide on policy issues.[4] Using the metaphor of a spider's webs, he argues that adjudication on socioeconomic rights may have implications for other unanticipated challenges. It is important to note that while the opposition to the inclusion of socioeconomic rights as justiciable sets of rights in the South African Constitution were fierce, many of the opponents of these rights did agree to its inclusion as mere directive principles without being legally enforceable.

On the other side of the argument were commentators that may be regarded as apologists of socioeconomic rights. Essentially, these commentators persuasively argue that given the dark historical past of the country and the need to restore hope and aspiration to the teeming population of this rainbow nation, failure to include socioeconomic rights as justiciable rights in the constitution will amount to a fundamental omission. Leading this argument is Murenik, where he noted in his seminal article 'Beyond the Charter of luxuries: Economic Rights in the Constitution' that failure to include socioeconomic rights as legally enforceable rights in the

[3] See for instance, C Scott & P MacKlem 'Constitutional ropes of sand or justiciable guarantees? Social rights in a new South African Constitution' (1992) 141 *University of Pennsylvania Law Review* 1; D Davis 'The case against inclusion of socio-economic demands in a bill of rights except as directive principles' (1992) 8 *South African Journal on Human Rights* 475; N Haysom 'Constitutionalism, majoritarian democracy and socio-economic rights' (1992) 8 *South AfricanJournal on Human Rights* 451

[4] L.L. Fuller, 'The Forms and Limits of Adjudication', Harvard Law Review 92 (1978):
353–409, at 394.

Constitution, rather than include them as directive principles and to give recognition to only civil and political rights, will render the Bill of Rights in the Constitution as 'mere luxuries'.[5] It has further been argued that adjudication on socioeconomic rights promote interactions between the organs of government and further deepen democratic culture.[6]

It should be noted that the socioeconomic rights provisions in the Constitution are inspired by the International Covenant on Economic, Social and Cultural Rights (ICESCR). Although South Africa has signed but not ratified the Covenant, the Constitutional Court in a number of cases has invoked the principles and standards developed by the Committee on Economic, Social and Cultural Rights in some of its General Comments. The first attempt at legal recognition of socioeconomic rights was reflected in the interim Constitution where rights to fair labour practices, nutrition, healthcare and social services, social security and education were all protected.[7] During this period an action was brought before the Constitutional Court to ascertain whether socioeconomic rights are justiciable. In response to this, the Constitutional Court unequivocally declared that socioeconomic rights are as important as civil and political rights and that they could be subject to judicial interpretation.[8]

Although socioeconomic rights recognized in the Constitution are scattered in various provisions,[9] they are broadly guaranteed in two main sections of the Constitution- 26 and 27. Section 26 (1) guarantees the right of everyone to access to housing. On the other hand section 26 (2) enjoins the government to take reasonable legislative steps and measures subject to maximum available resources towards the progressive realization of the right to housing. Section 26 (3) prohibits arbitrary eviction of any individual unless carried out in accordance with the law. The internal limitation clause contained in section 26 (2), which is repeated in section 27 (2), is modeled on article 2 of the International Covenant on Economic,

[5]E Mureinik 'Beyond a charter of luxuries: Economic rights in the Constitution' (1992) 8 *South African Journal on Human Rights* 464.

[6] A. An-Na'im', 'To Affirm the Full Human Rights Standing of Economic, Social & Cultural Rights', in Economic, Social Cultural Rights in Practice, ed. Y. Ghai and J. Cottrell (London: INTERRIGHTS, 2004), 7.

[7] See K Maclean *Constitutional Deference, Courts, and Socioeconomic Rights in South Africa* (2014)

[8] See *First Certification Judgment: Ex Parte Chairperson of the Constitutional Assembly in Re Certification of the Constitution of the Republic of South Africa 1996*, 1996 4 SA 744 (CC)

[9] See for instance sections 28 relating to socioeconomic rights of children and 35 relating to socioeconomic rights of prisoners,

Social and Cultural Rights (ICESCR).[10] In explaining the nature of obligations imposed by section 26 (2), the Constitutional Court in the landmark case of *Republic of South Africa* v *Groothboom*[11] has noted that in order for the government to meets its obligations as recognized in the Constitution, mere enactment of laws and adoption of polices will not suffice. Rather the government must ensure that steps and measures taken towards the fulfillment of its housing rights obligations must be reasonable. It noted further that for such measures and steps to pass the reasonable test, they must address the needs of those vulnerable and at dire needs of housing. The Constitution Court refused to apply the minimum core content of the right to housing to determine the nature of the government obligation, stating that it lacked the experience similar to the Committee on ESCR to do so. Rather the Court was more comfortable in assessing government's obligation to realize the housing to housing through the reasonable test. Some commentators have spared no ilk in criticizing the approach of the Constitutional Court which tends to shy away from applying the minimum core content to socioeconomic rights guaranteed in the Constitution.

More importantly, the Court explained that the right to adequate housing does not impose the obligation to build houses for all but rather obligates the government to promote or facilitate the enjoyment of this right. According to the court, the right to housing means more than mere 'mortals' and 'bricks' but includes the provision of necessary amenities (including water, sanitation and electricity) required to ensure a dignified living. In so many other cases decided after *Grootboom* the Constitutional Court has attempted to further clarify the nature and content of the right to housing guaranteed in the Constitution. Some of these cases are discussed in detailed below.

In addition, to the right to health guaranteed in section 27 (1), section 27 contains a number of rights including rights to water, food and social security. The discussion here will merely focus on the interpretation provided by the court to the right to health. The first socioeconomic rights case- *Soobramoney* case[12]-decided by the Constitutional Court after the adoption of the 1996 Constitution dealt with the interpretation of section 27 (2) of the

[10] International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966; GA Res 2200 (XXI), UN Doc A/6316 (1966) 993 UNTS 3 (entered into force 3 January 1976).
[11] *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19, 2001 (1) SA 46 (CC),

[12] *Soobramoney v Minister of Health (Kwazulu-Natal)* (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997) .

Constitution. In that case the Court was called upon to determine whether the refusal of treatment to a 40-year old man suffering from renal failure and in need of dialysis was in violation of his right to health guaranteed in the Constitution. The plaintiff had argued that refusal of treatment to him constituted a violation of his right to life guaranteed in section 11 and the right to emergency treatment in section 27 (3). In response to Mr. Soobramoney's claim, the government had argued that given limited resources and the chronic nature of Mr. Soobramoney ailment, it would be unsustainable to provide treatment for him at government expense when the state resources could have been better utilised for people in need of less expensive treatment. In other words, the government adopted the rationality test to deny Mr. Soobramoney treatment he needed.

This case has remained subject of severe criticisms by commentators. As the first socioeconomic rights case decided by the Constitutional Court, it is often regarded as a bad precedent for the realization of socioeconomic rights. Due to the complex nature of the *Soobramoney* case, it will not be fair to use it as the benchmark for assessing the commitments of the Constitutional Court to the realisation of socioeconomic rights. Ngwena has argued that while the court may have reached the right conclusion in the case, the means towards reaching this conclusion are less satisfactory and convincing.[13]

The Constitution Court would seem to have made amend for its faltering start in *Soobranoney* when it had another opportunity to examine the nature of the government obligations in section 27 in the celebrated *Treatment Action Campaign* case. [14] In the *Treatment Action Campaign* case, the Conditional Court was called upon to examine whether the antiretroviral therapy programme of the government, which limited access to ARV to people in need to 18 pilot sites and research centres, was reasonable. Building on the *Groothboom* case, the Court found that given the threats to lives posed by the HIV epidemic, there was no justification for the government to limit access to ARV to 18 sites as this amounted to failure on the part of the government to fulfil its obligation under section 27 (2) of the Constitution. In arriving at its judgment, the Court made references to different General Comments-particularly General Comments 3 and 14- of the Committee on ESCR in assessing measures and steps taken by the government to meet its obligations regarding the right to health.

3. Legislation on Socioeconomic Rights

In order to give teeth to the socioeconomic rights contained in the Constitution, the government has taken steps to enact important pieces of legislation towards the realisation of these rights. The paper will focus on legal framework to realise the rights to health and housing. In addition, to the constitutional provision on housing, significant efforts have be made to translate the various Constitutional provisions to reality. Some of the important

[13] C Ngwena 'Access to anti-retroviral therapy to prevent mother-to-child transmission of HIV as a socio-economic right: An application of section 27 of the Constitution' (2003) 18 *South African Public Law* 83.

[14] *Minister of Health v Treatment Action Campaign and Others* 2002 10 BCLR 1033 (CC).

pieces of legislation enacted by the government include, the National Housing Act, the the National Housing Code of 2000, the Prevention of Illegal Eviction form Unlawful Occupation of 1998 (PIE Act).

The National Housing Act serves as the umbrella legislation regulating housing in the country. It provides that national, provincial and municipalities governments must consult meaningful with individuals and communities affected by housing development. It further provides that the three tiers of government must make it possible for relevant stakeholders to participate in housing development.[15]

The PIE Act contains provisions protecting unlawful occupiers from arbitrary eviction. It outlines steps that must be complied with before an eviction can take place. More importantly, section 4 of the Act provides that the owner of a property must give unlawful occupier and the local municipality 'written effective notice' of the eviction proceedings. This must contain the grounds for the eviction, the date and time the eviction will likely takes place and inform the unlawful occupier of their rights to appear before the court to defend In addition, the Act requires the court to consider all relevant circumstances, particularly the rights of vulnerable and marginalised groups, before an eviction is granted. And where an unlawful occupier has been in occupation for up to six months, the court would need to consider alternative accommodation to which the unlawful occupier can be moved to.

With regard to realising the right to health the government has enacted the following pieces of legislation; National Health Act of 2003, Choice on Termination of Pregnancy Act, The White Paper on the Transformation of the health sector, the Patient Charter just to mention a few.

Despite the arrays of laws and policies to realise socioeconomic rights in the country, gaps exist between what is on paper and the living conditions of the people. For instance, it is estimated that over 4 million housing backlogs exit. Millions of South Africans are still without adequate access to housing, water and sanitation. The numbers of South Africans living in informal settlements have increased in leaps and bounds over the years as the gap between the rich and the poor has continued to widen. Indeed, South Africa with a Gini-coefficient of 0.7 in 2008 is said to be one of the most unequal societies in the world.[16] The attendant frustration and disillusionment is evidenced in the persistent daily service delivery protests. Some of which have turned very violent and even resulted in loss of lives. A case in point in this regard is the Adries Tetane's case-who was beaten to death by the police for

[15] See sections 2 (1) and 9 (2) of the Housing Act 107 of 1997

[16] N Beur 'Entrenched inequality threatens SA's future' available at http://mg.co.za/article/2012-07-24-entrenched-inequality-of-opportunity-threatens-sas-future (accessed on 11 November 2014)

participating in a service delivery protest in Fricksburg, Free State in April of 2011. Part of the challenges in meeting the housing needs of the people are attributed to communication gaps between policy makers and community members. A research carried out by the Community Law Centre and the Socio-economic Rights Institute of South Africa to assess laws, policies and programmes on housing allocation systems in the country has revealed gaps between existing laws and implementation

4. Participation as a human right

The right to participation can be found in numerous international and regional human rights instruments. These include among others the Universal Declaration of Human Rights (arts. 21 and 27), the International Covenant on Civil and Political Rights (art. 25), the International Covenant on Economic, Social and Cultural Rights (arts. 13.1 and 15.1), the Convention on the Elimination of All Forms of Discrimination Against Women (arts. 7, 8, 13(c) and 14.2), the International Convention on Elimination of All Forms of Racial Discrimination (art. 5(e)(vi)), the Convention on the Rights of the Child (arts. 12 and 31), the Convention on the Rights of Persons with Disabilities (arts. 3(c), 4.3, 9, 29 and 30), the International Convention on the Rights of All Migrant Workers and Members of their Families (arts. 41 and 42.2), the United Nations Declaration on the Right to Development (arts. 1.1, 2 and 8.2) and the United Nations Declaration on the Rights of Indigenous Peoples (arts. 5, 18, 19 and 41).

The right to participation has further received attention of the different treaty monitoring bodies as evidenced in the development of this right in their General Comments and Recommendations. For instance, the Human Rights Committee has noted that the right to participation in the conduct of public affairs covers "all aspects of public administration, including the formulation and implementation of policy at international, national, regional and local levels"[17] Also, the Committee on Economic, Social and Cultural Rights in some of its General Comments has elaborated on the right to participation in the enjoyment of socioeconomic rights. In its General Comment 4 and 7, the Committee has noted that there is need for extensive consultation to realise the right to adequate housing, particularly in relation to evictions. The Committee has noted that representatives of people to be affected as a result of eviction need to be consulted before eviction take place. [18]

With regard to the enjoyment of the right to social security and water, the Committee has noted that before a state or an individual takes any action that may interfere with the enjoyment of the rights to water and social security, there is need for a genuine ne consultation with those likely to be affected.[19] Also, with regard to the enjoyment of the right to health the Committee has noted that it is imperative that individuals and groups take part in

[17] (CCPR/C/21/Rev.1/Add.7, para.5
[18] See paras 8 and 12 of General Comment 4 and paras 13 and 15 of General Comment 7
[19] See para 56 of General Comment 15 on the right to water 2003; and para 78 of General Comment 19 on Social Security 2008

the development of laws, policies and programmes relating to the right to health in order for a government to meet its obligation to realise this right.[20]

At the regional level, article 13 of the African Charter on Humana and Peoples' Rights recognises the right of everyone to participate in the government of the day. Also, the article 9 of the Protocol to the African Charter on the Rights of Women guarantees the right of women to participate in the political life of their countries. Article 2 of the African Charter on Democracy and Election all contain provisions relating to participation of citizens in the affairs of their governments. .

The UN Special Rapporteur on extreme poverty and human rights have identified the essential elements of participation to include respect for dignity, autonomy and agency; non-discrimination and equality; transparency and access to information, accountability and empowerment.[21] According to the Special Rapporteur 'Lack of participation in decision-making and in civil, social and cultural life is thus recognized by the international community as a defining feature and cause of poverty, rather than just its consequence,' She noted further that through meaningful and effective participation, people are able to exercise their autonomy, agency and sel-determination.[22]

5. The Concept of meaningful Engagement as developed by the Constitutional Court

The Constitutional Court in a number of a cases relating to eviction has developed the concept of meaningful engagement as a means of facilitating participation of vulnerable and marginalised groups in decision-making that affect their lives. According to the court, any attempt to proceed on eviction process must be preceded by series of meaningful engagement meetings with the people likely to be affected by the eviction. The reason for this position of the court is to ensure that people facing evictions are treated with dignity and afforded the opportunity to air their views on the provision of alternative accommodation. Some of the notable cases that have come before the court dealt with the interpretation of the provision of sections 26 (3) of the Constitution which provides that 'No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'

The first attempt at conceptualising the notion of meaning engagement was in the *Port Elizabeth Municipality case.*[23] In that case the applicant sought the eviction of about 68 people including children, who occupy twenty nine shacks they have erected on privately

[20] See para 54 of General Comment 14 on the right t the highest attainable standard of health 2000
[21] See the Report of UN Special Rapporteur on extreme poverty and human rights on the right to participation of people living in poverty' submitted to the UN General Assembly 2013
A/HRC/23/6

[22] Ibid para 14
[23] P*ort Elizabeth Municipality v Various Occupiers* (CCT 53/03) [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC)

owned land (the property) within the Municipality. At the time that the proceedings were instituted the occupiers had on their version been living for periods ranging from two to eight years on the property. Most of the occupiers had come there after being evicted from other land. The occupiers had indicated that they were willing to move if they were relocated to an alternative land. The Municipality had provided an alternative place known as Walmer Township. However, this was rejected by the people on the grounds that the place is unsafe and there is no guarantee they would not be evicted again from the place. The High Court had ruled in favour of the Municipality claiming that the people had illegally occupied the land and in the interest of the public they should be removed. On appeal to the Supreme Court, the decision of the High Court was overturned; thereafter the mater proceeded to the Constitutional Court. In its ruling, the Constitutional Court upheld the decision of the Supreme Court and noted that dialogue is a key element of democratic culture which should be encouraged at all times and in every situation. According to the Court 'Wherever possible, respectful face-to-face engagement or mediation through a third party should replace arms-length combat by intransigent opponents'.[24] The Court further ruminates on the importance of mediation and dialogue in a democratic society as South Africa as follows:

> In South African conditions, where communities have long been divided and placed in hostile camps, mediation has a particularly significant role to play. The process enables parties to relate to each other in pragmatic and sensible ways, building up prospects of respectful good neighbourliness for the future. Nowhere is this more required than in relation to the intensely emotional and historically charged problems with which PIE deals. Given the special nature of the competing interests involved in eviction proceedings launched under section 6 of PIE, absent special circumstances it would not ordinarily be just and equitable to order eviction if proper discussions, and where appropriate, mediation, have not been attempted.[25]

The Court admits that sometimes a difficult balance needs to be struck regarding the right sof unlawful occupier of land and that of the land owner, it however believes that this balance can be better struck through dialogue initiated by the court. Thus it noted as follows:

> The managerial role of the courts may need to find expression in innovative ways. Thus, one potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a proactive and honest endeavour to find mutually acceptable solutions. Wherever possible, respectful face-to-face engagement or mediation through a third party should replace arm's-length combat by intransigent opponents."[26]

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While it can be argued that the foundation for the development of the concept of meaningful engagement was laid in the *Port Elizabeth Municipality* case, it was in the *Occupier of 51*

[24] Para 39
[25] See para 43
[26] Id at para 39.

Olivia Road case[27] the Constitutional Court was able to expound more on this concept. In that case, the City of Johannesburg applied to the High Court for the eviction of about 400 residents who were occupying a dilapidated building on the basis that the building was unsafe and unhealthy. The High Court refused to evict the occupiers, but instead ordered the City to remedy its housing programme which was found to be inadequate. The Supreme Court of Appeal upheld the appeal by the City and granted eviction on condition that the City would provide alternative accommodation to those who would be rendered homeless. On appeal to the Constitutional Court, the parties were ordered to engage meaningfully with each other with a view to addressing the possibilities of short-term steps to improve current living conditions and of alternative accommodation for those who would be rendered homeless. The parties reached consensus that the City would not eject the occupiers, that it would upgrade the buildings and that it would provide temporary accommodation. In addition, the parties agreed to meet and discuss permanent housing solutions. An agreement was reached by the parties and made an order of court by this Court. In explaining the need for engagement, the Court reasons as follows:

> Engagement has the potential to contribute towards the resolution of disputes and to increased understanding and sympathetic care if both sides are willing to participate in the process. People about to be evicted may be so vulnerable that they may not be able to understand the importance of engagement and may refuse to take part in the process. If this happens, a municipality cannot walk away without more. It must make reasonable efforts to engage and it is only if these reasonable efforts fail that a municipality may proceed without appropriate engagement.[28]

According to the Court, some of the objectives of engagement in the context of a city wishing to evict people who might be rendered homeless consequent upon the eviction would be to determine—

(a) what the consequences of the eviction might be;

(b) whether the city could help in alleviating those dire consequences;

(c) whether it was possible to render the buildings concerned relatively safe and conducive to health for an interim period;

(d) whether the city had any obligations to the occupiers in the prevailing circumstances; and

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[27] Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others (24/07) [2008] ZACC 1; 2008 (3) SA 208 (CC) ; 2008 (5) BCLR 475 (CC) (19 February 2008)

[28] Para 15

(e) when and how the city could or would fulfil these obligations.[29]

The Court went further to explain that meaningful engagement is a constitutional requirement and that every municipality intending to embark on an eviction must engage meaningfully with people who would become homeless as a result of eviction. It notes further that a fundamental question the Court should ask a municipality that has instituted an eviction suit is whether such a municipality has engaged meaningfully with the people to be rendered homeless in accordance with section 26 (3) of the Constitution. Implicit in this statement is that, evidence of meaningful engagement is a condition precedent to any application for an eviction.[30] This position was reaffirmed in the *Abathali* case where the Court noted that 'No evictions in terms of the PIE Act should occur until the results of the proper engagement process are known.'[31] In explaining what amounts to a proper engagement, the court notes that 'proper engagement would include taking into proper consideration the wishes of the people who are to be evicted, where the areas where they live may be upgraded in situ, and whether there will be alternative accommodation.'[32] In essence, it would seem to proceed on an eviction without first engaging with the people likely to be rendered homeless will not only amount to acting in bad faith but will also undermine the spirit and intent of the Constitutional requirements on meaningful engagement.

It should be noted, however, that the Constitutional Court has not been consistent with its application of the meaningful engagement concept. For instance, while in the Olivia Road and *Abathlali* cases, the Court would seem to suggest that meaningful engagement is a condition precedent to embarking on evictions, in the *Joe Slovo* case the Court allowed an eviction of a large number of people without evidence of prior engagement but subsequently ordered meaningful engagement on how the eviction processes should be implemented.[33] Commentators like Liebenberg have criticised this approach of the court noting that it may give room for uncertainty and create unnecessary confusion regarding the obligations of

[29] Para 14

[30] For more detailed discussion on the Constitutional Court approach to meaningful engagement see B Ray, *Engagement's Possibilities and Limits As a Socioeconomic Rights Remedy*, 9 Wash. U. Global Stud. L. Rev. 399 (2010); B Ray 'Proceduralisation's triumph and engagement's promise in socio-economic rights litigation' (2011) *South African Journal of Human Rights* 107; L Chenwi and K Tissington Engaging meaningfully with government on socioeconomic rights' (2010 Community Law Centre)

[31] *Abahlali Basemjondolo Movement SA and Another v Premier of the Province of Kwazulu-Natal and Others* (CCT12/09) [2009] ZACC 31; 2010 (2) BCLR 99 (CC) (14 October 2009)

[32] Para 114

[33] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* (CCT 22/08) [2009] ZACC 16; 2009 (9) BCLR 847 (CC) ; 2010 (3) SA 454 (CC) (10 June 2009)

government departments or institutions in protecting the rights of vulnerable and marginalised groups.[34]

6. Meaningful Engagement as a tool for realising socioeconomic Rights: The Experience of the Community Law Centre

CLC was established in 1990 and has worked extensively, from an advocacy and knowledge-base, in promoting and protecting the rights of vulnerable people. It was established on the belief that our constitutional order must promote good governance, socio-economic development and the protection of the rights of vulnerable and disadvantaged groups. Given the need for regional integration to encourage development in Africa, CLC also seeks to advance human rights and democracy in this context.

Based on high quality research, CLC engages in policy development, advocacy and educational initiatives, focusing on areas critical to the realisation of human rights and democracy in South Africa and abroad. Furthermore, CLC is part of extensive CSO networks promoting human rights in South Africa - some of a formal and others of an informal nature.

Through its programmes on socio-economic rights, children and women's rights, and prison reform, CLC's core activities are:

- High quality and cutting-edge research, developing jurisprudence and policy;
- Developing policies and legislation for organs of state,
- Informing public debate on law reform;
- Education and training of state officials, civil society and students;
- Assisting in constitutional litigation on key issues.

In the area of access to justice and socio-economic rights, CLC, through it socio-economic rights and local government programmes, has worked extensively in promoting and protecting socio-economic rights of the poor and marginalised, and in promoting public participation in service delivery. It has worked on strengthening participatory democracy at local government level and in raising awareness about the principles and standards in relation to meaningful engagement. It has also organised workshops and roundtable discussions around public participation and meaningful engagement attended by both government officials and civil society. CLC has recently produced a publication 'engaging meaningfully with government on socio-economic rights (2010)', which is currently being distributed.

Through its amicus interventions, CLC has also influenced the jurisprudence of the Constitutional Court and the Supreme Court of Appeal in seminal cases on housing rights, health care and social security. This resulted in the development of jurisprudence that is responsive to the needs of the poor and the vulnerable. Some of the cases also resulted in the

[34] S Liebenberg 'Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of 'meaningful engagement' (2012) *African Human Rights Law Journal* 1.29

development of key principles and standards vital in ensuring that engagement with communities is meaningful / reasonable, and did in fact involve the poor in the formulation of remedies that advance their housing rights as was the case in *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others* (2008), in which we intervened as *amicus.* CLC has also made submissions on laws, policies and programmes to various public institutions and international bodies and also facilitated the participation of communities/organisations in policy development discussions. For instance, in the development of the policy on special needs at the local government (City of Cape Town) level, CLC facilitated the involvement of community-based organisations in this process through its project on women's access to housing.

A key strength is CLC's ability to apply its research to critical issues pertaining to the transformation of the South African society. It has also produced accessible resource, information and educational materials on socio-economic rights. These have provided civil society with the necessary knowledge needed to hold government accountable. One of the most outstanding achievements in this regard is the production of the *ESR Review*, a publication that brings socio-economic rights debate from the margins to the mainstream in a more accessible manner, highlighting relevant case law, policy and legislative reviews, and international developments related to socio-economic rights that are important in advancing the rights of the vulnerable.

In the past few years, CLC has organised series of meaningful engagement meetings/roundtables involving vulnerable and marginalised groups in informal settlements and government officials and policy makers at national, provincial and municipal levels other stakeholders such as community based organizations and other civil society groups. People from informal settlements such as Blikiessdrop, Khayelitsha, Joe Slovo and Mitchell's Plain have all participated in some of our meaningful engagement meetings. The meetings more or less adopt a facilitative approach and avoid formal presentations. Participants are led to discuss important issues relating to their socioeconomic rights

CLC has also adopted the method of visiting community in informal settlements to empower them about their rights and the need for them to engage with policy makers in the realisation of their rights. Community town meetings and focus group discussion have been held to educate community people about their socioeconomic rights how these rights can be better realised. The focus group discussions are often targeted at specific groups where various issues affecting their rights are discussed.

These meaningful engagement meetings have been significant due to the following reasons:

- Thy have empowered people in informal settlements to be aware of their rights and how to claim them
- They have made policy makers and government officials to be more alive to their responsibilities in realising ESR

- They have facilitated cordial dialogues between vulnerable and marginalised groups and government officials on issues relating to socioeconomic rights
- They have made government's officials to internalise the need for dialogue with vulnerable groups in informal settlements on issues relating to their socioeconomic rights, particularly the right to housing.
- They have boosted the confidence of vulnerable groups and empowered them to have a say in decision-making that may affect their socioeconomic lives.
- They have built trust between policy makers and people in informal settlements and led to a situation where government's policies and programmes have received support from the community members and paved way for smooth implementation

7. Conclusion

While laws and policies are crucial to the realisation of socioeconomic rights, they may become empty promises unless people that will be affected by the laws and policies are carried along with the designing and implementation of these laws. In a historically unequal society such as South Africa, the progressive nature of the Constitution may not suffice in transforming the lives of vulnerable and marginalised groups. It will be necessary that policy makers treat people with dignity and continue to dialogue with them with a view to meeting their needs. The concept of meaningful engagement as developed by the Constitutional Court in eviction cases, can serve as a good model for ensuring the views of vulnerable groups to be heard. More importantly, it serves as a good opportunity to deepen democratic culture and bridge the gaps that often exist between the ruled and the rulers.