

Brian Ray NYLS draft. Please do not cite or circulate without contacting me:
b.e.ray@csuohio.edu

Chapter 7 The Eviction Model: How *Grootboom* Turned Into Strong-Form Review

Chapter 5 analyzed the string of eviction-related decisions beginning in 2011 in which the Court relied on constitution-enforcing legislation—most often PIE—to avoid or delay a potential eviction and also developed a range of procedural powers courts can employ to manage evictions. These decisions are consistent with the other second-wave cases because they all feature substantively limited analyses and an emphasis on procedural rights and remedies. At the same time, however, the Court also exhibited an increasing confidence when working within the confines of this approach by consistently intervening to stop evictions that could result in homelessness and by expanding its power to manage eviction processes to protect the interests of poor people.

This chapter first summarizes the two basic components of the enforcement approach these cases represent—shorthanded as the “eviction model”: (1) enforcing *Grootboom* through PIE (or other legislation) by temporarily enjoining eviction until alternative accommodation is available; and (2) expanding the procedural powers of courts in eviction cases to obtain information about housing planning and resources and manage the cases in rights-protective ways that ensures access to temporary accommodation and could lead to broader policy change.

Both components reflect *Port Elizabeth’s* style of managerial judging rather than the abstract, programmatic approach of *Grootboom*. The first transforms *Grootboom’s* weak, programmatic declaration into an individually enforceable principle that section 26(3) rights at least temporarily trump section 25 property rights where the state is unable

Brian Ray NYLS draft. Please do not cite or circulate without contacting me:
b.e.ray@csuohio.edu

to provide temporary accommodation to potential evictees.¹ The second uses legislation like PIE as the basis for a set of robust, but largely procedural, protections that give courts broad powers to manage evictions in individual cases.²

The Court's demonstrated willingness to stop evictions until temporary accommodation is available is the core of this model. As Chapter 5 described, by enforcing this limited but strong right through a temporary injunction, courts directly enforce section 26(3) and indirectly protect the occupiers' section 26(2) rights to continued occupation until an alternative is available. Amplified by the range of procedural powers these cases also established this aspect of the eviction model gives courts considerable power to protect poor people's interests without developing broad constitutional principles or scrutinizing government policies and so stays within the general limits of the second-wave cases.

Malcolm Langford describes the substantive move that turned *Grootboom* into a limited but strong individual right as a kind of "jujitsu."³ In these cases the Court addresses negative infringements of section 26(3) in ways that implicitly establish positive entitlements under section 26(2), including both the right to temporary accommodation and, in some instances, permanent housing. By purporting to enforce only the negative aspect of section 26(3), however, the Court does not explicitly

¹ Wilson, 'Breaking the Tie' at 278-79.

² Steve Kahanovitz was among the first to identify the significant procedural protections the Court's application of PIE in *Port Elizabeth* created. See Steve Kahanovitz, 'An Urban Slice of PIE: the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act in South Africa,' Case Study prepared for the *Global Report on Human Settlements 2007* (2007). Sandra Liebenberg has analyzed these protections extensively as part of a "new paradigm" for evictions law that could form the basis for a more substantive section 26 jurisprudence. See Liebenberg, *Socio-Economic Rights* Chapter 27.

³ Langford, 'Housing Rights Litigation,' at 207.

Brian Ray NYLS draft. Please do not cite or circulate without contacting me:
b.e.ray@csuohio.edu

articulate these positive-right implications and so avoids the strong justiciability concerns it consistently sought to avoid in the second-wave cases.

The enhanced procedural powers these cases established strengthen the indirect positive-rights effects of enforcing section 26(3) by allowing a court to scrutinize the underlying policies at issue. The Court has already used these powers to sketch out an important set of principles governing both the eviction process itself and the state's obligations to budget and plan for evictions. Thus far these principles are still largely procedural in the sense that they do not require specific services or expenditures. Instead they enhance the state's obligation to justify its policies and create indirect leverage for forcing change in those policies. Lower courts could expand these principles through careful attention to PIE's factors and their constitutional basis in section 26.

Even greater substantive potential, however, lies in combining the strengthened procedural requirements these cases established with carefully structured meaningful engagement orders to directly address the broader housing-policy questions that the Court consistently has refused to revisit following *Grootboom*. The implicit expectation where a court intervenes to stop an eviction is that the municipality will change its policies and reallocate its resources to provide temporary accommodation so that the eviction can proceed. As *Pheko* illustrates, a structured engagement process could make that expectation explicit and also give occupiers, private landowners and civil society groups a voice in deciding what changes are necessary to satisfy PIE and balance competing rights under sections 26 and 25. The Court's use of engagement to give the parents greater input into alternative school placements and transportation options in *Juma Musjid* provides another illustration of the substantive potential of engagement.

Brian Ray NYLS draft. Please do not cite or circulate without contacting me:
b.e.ray@csuohio.edu

Structured engagement orders like these also could go further by including a municipality's overall housing-policy and budgeting processes in the engagement agenda. *Blue Moonlight's* analysis of the City of Johannesburg's policy-planning and budgeting processes established that courts can inquire into these broader issues when asked to issue an eviction order. Initiating an engagement process that considers those structural issues rather than only the measures necessary to resolve a particular case would build on *Blue Moonlight* and give communities and their representatives an even greater role in changing policies that affect their interests. The more structured use of engagement in *Schubart Park* and especially *Juma Masjid* provide the starting points for expanding engagement in these ways.

After describing these two aspects of the eviction model, this chapter identifies possibilities for adapting the model to enforce other social rights. *Grootboom* is now widely recognized as an unusual example of the Court establishing a broadly applicable substantive principle.⁴ Moreover, eviction cases may be particularly suitable for this kind of limited strong-form role. Nonetheless, the eviction model is consistent with the broader patterns in the second-wave cases Chapter 6 identified, and it could be the basis for the Court to take a stronger role in other contexts while still working within those overall constraints. The free-standing right to receive municipal services *Joseph* recognized provides one obvious doctrinal basis for extending this role. The Court's education-rights cases also provide evidence of the Court adopting a stronger procedurally focused role to enforce other social rights.

⁴ Cite Wilson

Brian Ray NYLS draft. Please do not cite or circulate without contacting me:
b.e.ray@csuohio.edu

Finally, I consider some possible limits to this model, in particular the concern that the Court may be unwilling to continue to exercise even the incremental substantive authority the eviction model establishes. The Court's failure to carefully apply PIE in constitutionally attentive ways in *Blue Moonlight's* companion cases as well as its refusal to exercise jurisdiction to enforce its order in *Blue Moonlight II* provide some support for this concern. The practical problems litigants have faced enforcing several of these decisions also highlight the limits of direct court intervention. Finally, the internal debate in *Zulu* illustrates how the third-generation eviction cases will test these limits in the future. This discussion sets up the argument in the next Chapter that deploying meaningful engagement to address underlying institutional and policy issues could begin to address these limitations.

***Grootboom's* Transformation**

Writing in 2009 after *Olivia Road* and *Joe Slovo*, Stuart Wilson described what he called the “new normality” of property rights in South Africa. The traditional common law conception was replaced with a deep-seated constitutional conflict between the right to private property in section 25 and the prohibition against arbitrary eviction in section 26(3). Those seemingly irreconcilable rights were fighting a “war of attrition” in the new constitutional order.⁵ Section 26(3) began to gain the advantage in this war with *Grootboom's* seemingly modest principle that the state address emergency housing needs and *Port Elizabeth's* transformation of that principle into a tool for wide-ranging enforcement of PIE. These two decisions laid the groundwork for a new substantive

⁵ Wilson, ‘Breaking the Tie’ at 271.

Brian Ray NYLS draft. Please do not cite or circulate without contacting me:
b.e.ray@csuohio.edu

understanding of the relative rights of property owners and poor occupants of their land as well as a set of robust procedural powers to enforce those rights.⁶

Grootboom's reputation as a paradigmatic example of weak-form review rests on the Court's limited declaration that gave the political branches the power to determine how to satisfy the broad requirement that policies address emergency housing needs and how to balance those needs against section 25. This strong-right/weak remedy combination democratized enforcement of section 26 because it only minimally constrained the state's discretion to determine how to balance property rights and section 26(3) in the new constitutional order.⁷ At the same time, the role the Court adopted looked like it would be only the first step towards a much greater substantive—but importantly still democratic—elaboration of section 26 over the long term through an ongoing dialogue between the courts and the legislature and executive. Numerous analyses of *Grootboom* have identified it as the start of just such a productive democratic dialogue and even called it a canonical example of weak-form review.⁸

In spite of the growing number of eviction cases the Court has decided in the second wave, the kind of substantively rich, iterative conversation that weak-form review promises over what *Grootboom*'s principle entails and whether particular policies or legislation comply with it or other aspects of section 26 has almost completely failed to materialize. Instead the Constitutional Court has demonstrated a marked reluctance to revisit *Grootboom* or to interpret the housing legislation and policies that have emerged in response to that decision to further elaborate a set of constitutional principles. As

⁶ Ibid. at 273. Liebenberg identifies this same shift. See *Socio-Economic Rights* Chapter 27

⁷ Cite Tushnet, Landau, Dixon, Liebenberg

⁸ Cite Landau, Garavito.

Brian Ray NYLS draft. Please do not cite or circulate without contacting me:
b.e.ray@csuohio.edu

Chapters 4 and 5 described, the Court was faced with several opportunities to consider whether and how new housing legislation or policies promulgated in response to *Grootboom* complied with its broad requirements and section 26 more generally. In each case, the Court resorted to developing new or enforcing existing procedural rights or remedies that failed to materially advance a substantive conversation over the meaning of section 26.⁹

In each of these later eviction cases the Court has relied on *Grootboom*'s core principle that the state is obligated to address emergency housing needs in tandem with PIE to enforce section 26 directly by temporarily stopping evictions until the government provides alternative accommodation. Instead of applying some combination of weak rights and remedies, these cases enforce a strong right to alternative accommodation in all (or almost all) cases with strong but temporary injunctive relief.

These cases also established a range of procedural powers courts can exercise in eviction cases that build on the meaningful engagement requirement in *Olivia Road*. These include the power to join other government entities and relevant parties and to require government officials to report not only their efforts to provide accommodation in a specific case but also their general planning and budgeting processes.

This combination of the power to stop an eviction and to require detailed information regarding housing-policy and budgeting processes creates a procedurally focused version of strong-form review. These cases combine the strong substantive principle that evictions trigger a nearly unqualified obligation to provide alternative

⁹ cite cases.

Brian Ray NYLS draft. Please do not cite or circulate without contacting me:
b.e.ray@csuohio.edu

accommodation with the strongest remedy—an injunction temporarily stopping the eviction until alternative accommodation is available.¹⁰

The principle is substantively strong and individually enforceable but severely limited in scope. It strengthens *Grootboom* by transforming it from a general obligation to develop new policies into a specific requirement to provide services directly in the form of temporary accommodation.¹¹ But it does not further elaborate what section 26 requires. Rather than continuing a democratic dialogue between the court and the government over the meaning of section 26, this principle effectively cuts off consideration of whether and how section 26 should be interpreted on the specific facts in each case, including the state’s efforts to develop constitutionally compliant policies. In other words, rather than weak-form dialogue, *Grootboom*’s clearest legacy is a model that applies a tightly circumscribed version of strong-form review.

Port Elizabeth laid the groundwork for this transformation of *Grootboom*’s weak remedy into a strong, individually enforceable right. *Port Elizabeth* first shifted from section 26 to PIE as the principal mechanism for addressing housing-rights claims in eviction cases. This created a democratic basis for the stronger interventions that followed and minimized the separation-of-powers concerns that the Court identified in *Grootboom*. Second, although the Court in *Port Elizabeth* analyzed at some length the “constitutional matrix” of PIE, it focused on the flexibility of PIE’s multi-factor test and the need for creative judicial management to reach humane solutions rather than on establishing constitutional or even statutory principles.

¹⁰ Or, in cases like *Pheko* where the eviction occurred and return is temporarily impossible, the Court has deployed the same procedural authority to ensure the state provides an adequate alternative.

¹¹ See Wilson, ‘Breaking the Tie’ at 275-76 (

Brian Ray NYLS draft. Please do not cite or circulate without contacting me:
b.e.ray@csuohio.edu

Notably the more definitive constitutional principles that *Port Elizabeth* established in the constitutional discussion are primarily examples of this flexibility. The Court found that section 26(3) is not self-enforcing and permits evictions even where homelessness will result and that in combination section 25 and 26 strike a careful balance requiring fact-specific resolution on a case-by-case basis.¹² The Court included substantial qualifiers throughout the judgment that hint at more concrete limits. Most significantly, it cautioned that a court should be “reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available” even if only interim accommodation.¹³ But the overall approach is designed to leave options open in each case.

The Court also emphasized that judges are required to go behind claims of general statistical progress and consider the actual circumstances of people challenging their eviction. Here, however, the emphasis was not on establishing a broad-based section 26 principle for challenging government policy but instead on “reasonable application of judicial and administrative statecraft” to avoid human distress.¹⁴ The power to protect individuals facing eviction permits a court to intervene even in a case challenging clearly constitutional policy that houses the maximum number of people in the most efficient way but nonetheless permits short-term homelessness. That intervention, however, is limited to managing the details and timing of the actual eviction to protect the human dignity of the people involved. It does not include ordering changes to the policy.¹⁵

¹² *Port Elizabeth* (note__above) at 20-23.

¹³ *Ibid.* 28.

¹⁴ *Ibid.* 29.

¹⁵ *Ibid.* 29. Sachs says that the existence of a policy designed to house the maximum amount of people in the most efficient way would ‘go a long way towards establishing a

Brian Ray NYLS draft. Please do not cite or circulate without contacting me:
b.e.ray@csuohio.edu

The stronger authority the Court asserted in *Port Elizabeth* thus didn't primarily involve constitutional interpretation but instead rested on this creative and flexible judicial role that is keenly sensitive to the situation of real people facing homelessness and that actively works to mitigate that situation in individual cases. Justice Sachs described powerful tools judges can use in this role, including the possibility of blocking the government from evicting a person and ordering the government to devise a humane solution. Moreover, this shift to addressing the specific situations of individuals facing homelessness transformed *Grootboom's* exclusively programmatic remedy into a limited individual remedy.¹⁶

That same emphasis on individual situations, however, also avoids easily identifiable constitutional principles that apply in future cases. *Grootboom's* focus on overall policies essentially ignored the specific circumstances of the plaintiffs in the case but set a significant precedent that has shaped legislation, policy and a substantial jurisprudence around evictions.¹⁷ *Port Elizabeth* sets up an approach designed to do the opposite. Rather than identify concrete constitutional or statutory requirements, judges balance a set of "interactive, complementary and mutually reinforcing" rights through "a close analysis of the actual specifics of each case."¹⁸

The Eviction Model

context that would ensure that a proposed eviction would be just and equitable. It falls short, however, *from being determinative of whether and under what conditions an actual eviction order should be made in a particular case.*' Id. (emphasis added).

¹⁶ cite *Grootboom* and secondary sources.

¹⁷ Liebenberg points out that this programmatic focus was enabled by the settlement that the parties reached addressing their specific situation. [cite book].

¹⁸ Id. at 35.

Brian Ray NYLS draft. Please do not cite or circulate without contacting me:
b.e.ray@csuohio.edu

The eviction model closely tracks the judicial role *Port Elizabeth* prescribes. The model incorporates two complementary roles that give courts considerable authority to enforce section 26: (1) the power to intervene directly through a combination of *Grootboom* and PIE (or other statutes) to temporarily stop evictions based on the strong principle that evictions are never permissible unless alternative accommodation is available; and (2) procedural tools to closely manage the dispute, including by ordering meaningful engagement, joining relevant government entities (and others) and requiring those entities to submit information about policy-planning and budgeting processes related to housing.

The first role turns *Port Elizabeth's* suggestion that courts should be reluctant to order evictions where no alternative accommodation is available into a strong principle that occupiers' section 26(3) rights temporarily trump property owner's section 25 rights in all such cases. The second expands the managerial role *Port Elizabeth* recognized by creating explicit procedural powers that allow courts to more effectively resolve eviction challenges in rights-protective ways.

Both roles establish concrete obligations on the state that are connected to section 26 and so involve some indirect substantive elaboration of the right to housing. But the substantive principles the Court has developed operate primarily to strengthen its procedural authority under the eviction model. This is first because they do not depend on—and indeed risk actively constraining—any further elaboration of either PIE or section 26. The principle that PIE never permits eviction without temporary accommodation allows a court to stop an eviction without analyzing PIE's factors or saying anything about section 26. A court also can join other parties, order parties to

Brian Ray NYLS draft. Please do not cite or circulate without contacting me:
b.e.ray@csuohio.edu

submit information and structure and manage an engagement process without further elaboration of either the statute or the constitution.

The combination gives courts substantial powers to manage eviction processes in ways that could prompt state parties to change policies and reallocate resources to make accommodation available in the short-term. But by focusing on the eviction process itself rather than on the policies that either prompted the eviction or resulted in the state's failure to provide housing, the model largely abandons the potential for broader dialogue over the relationship between section 26 and housing policy that *Grootboom* initiated. Instead the Court limits its role largely either to preventing negative infringements that disrupt existing access to housing or, more often, to ensuring that the state provides alternative accommodation and otherwise executes an eviction in a more humane, dignity-protective way.

Incremental Substantive Development

Port Elizabeth's description of a keenly sensitive court willing to step in to protect individual dignity in every eviction case enforces section 26 without entangling courts in the much messier task of assessing the constitutional adequacy of housing legislation and policy. Asserting the power to deny an eviction—and especially to deny it even where there's no apparent constitutional defect in the overall legislation or policy—carves out a significant form of judicial power. By intervening directly, courts can protect individuals and enforce section 26(3) without questioning the underlying legislative or executive policies.

Evictions lend themselves particularly well to the exercise of this kind of case-specific procedural authority. Even where temporary accommodation is available, an

Brian Ray NYLS draft. Please do not cite or circulate without contacting me:
b.e.ray@csuohio.edu

eviction means displacing a person and disrupting their life in dignity-compromising ways. Merely by delaying the eviction process, a court addresses the most urgent aspects of the constitutional claims evictions raise. By making the delay temporary, however, a court can avoid analyzing both the reasons for the decision to evict as well as the policies behind that decision. This power to grant significant, immediate relief that places only limited and temporary constraints on executive and legislative power thus turns the deference to legislative and executive substantive decisions required by *Mazibuko* into a tool for strong enforcement of the procedural authority it recognized.

The opportunity to play a stronger role while still avoiding the justiciability concerns fits the patterns Chapter 6 identified and explains the Court's shift from *Grootboom's* more substantive analysis to *Port Elizabeth's* hands-on, procedural approach. Those same patterns suggest that the Court is unlikely to build explicitly on *Grootboom* to engage even in a weak-form substantive dialogue over section 26. Nonetheless, the eviction model offers at least modest potential for greater substantive development of section 26 while still operating within the limited judicial role Chapter 6 described. *Port Elizabeth* and *Blue Moonlight* are the best examples of the Court developing constitutionally focused legislative interpretations that could build into a this more substantive jurisprudence.

While *Port Elizabeth's* constitutional analysis largely reinforced the flexible management role Justice Sachs described, the Court's explicit identification of the constitutional issues at stake and also its integration of constitutional and statutory analysis in the interpretation of PIE provides a model that could, over time, incrementally develop more substantive constitutional principles in eviction cases. *Blue Moonlight's*

Brian Ray NYLS draft. Please do not cite or circulate without contacting me:
b.e.ray@csuohio.edu

constitutionally attentive analysis of the statutes and policies at issue in that case applied *Port Elizabeth* to reinforce several important principles that were implicit in earlier cases and also to extend them in modest but significant ways, in particular by explicitly recognizing that municipalities have independent planning and budgeting obligations under the Housing Act.¹⁹ Both cases—and this general approach—reflect the kind of flexible, context-specific elaboration Liebenberg argues could develop out of the Court’s existing jurisprudence.²⁰

Blue Moonlight’s companion cases, *PPC Quarries* and *Golden Thread*, provided opportunities to continue this more substantive mode of analysis in the way Liebenberg advocates. The Court could have engaged in an extensive analysis of the factual differences among these cases and how those differences changed the PIE analysis in light of section 26’s overarching principles.

Both decisions clearly reinforce two of the central constitutional principles *Blue Moonlight* established: (1) municipalities have an obligation to provide and fund emergency housing even for people rendered homeless from privately-instituted evictions; and (2) PIE may constitutionally limit private landowner’s section 25 rights to evict even unlawful occupiers where those occupiers may be rendered homeless. But there was no meaningful comparative analysis of the cases and even individually very little discussion of the specific facts.

If we put all three decisions together and compare their facts, it is possible to identify some implicit extensions of *Blue Moonlight*. When it comes to municipal obligations, *Blue Moonlight* stops with the principle that a city’s complete failure to

¹⁹ Cite *Blue Moonlight*.

²⁰ Cite Liebenberg.

Brian Ray NYLS draft. Please do not cite or circulate without contacting me:
b.e.ray@csuohio.edu

consider homelessness from private evictions during its planning process renders the resulting policy unconstitutional. In combination, *PPC Quarries* and *Golden Thread* lay the groundwork for arguing that municipalities are obligated not just to consider these situations in their budget and planning processes but actually to provide alternative accommodation through their own resources in some situations possibly irrespective of whether the planning processes were themselves constitutional.

Furthermore, the simple fact that the Court temporarily stopped the eviction in each case should mean that under each particular factual configuration PIE's factors dictate striking the balance between section 26(3) and section 25 in favor of the occupiers. Courts applying PIE in future cases under similar facts could build on these cases to develop a set of principles for more precisely striking that balance by identifying which facts matter in the outcome and why.

The Court's failure to closely analyze the PIE factors in *PPC Quarries* and *Golden Thread*, however, missed the opportunity to explicitly engage in this more substantive analysis. The Court provided no direct comparison of the cases and very limited discussion of which facts were significant under PIE's factors. In this respect the decisions are consistent with the Court's general reluctance to engage with the substance of the social rights in the second-wave cases and underscore the risk that the eviction model could fail to develop in a more substantive direction.

The accretion of fact-specific principles into a set of harder constitutional standards that work within PIE's framework depends on careful and specific attention to not only the constitutional dimensions but also the statutory factors themselves. The Court's analyses lack that interpretive precision and depth. In *PPC Quarries*—where the

Brian Ray NYLS draft. Please do not cite or circulate without contacting me:
b.e.ray@csuohio.edu

Court’s direct order could have provided the most authoritative guidance—the Court tells us only that the combination of a property owner with no short-term plans for using the land and the absence of evidence the City would fail to provide alternative accommodation reasonably quickly mattered in the PIE analysis. The summary treatment of even those factors and the failure to specifically analyze other, seemingly significant but countervailing factors such as the existing interdict and the relatively short time-frame of the occupation provides very little guidance as to how to balance those same factors under different circumstances. The lack of any comparative analysis across the three cases at all to explain why the City in this case was required to provide accommodation

Golden Thread is somewhat better on this score. The Court’s detailed recounting of the facts the High Court considered (with occasional commentary) gives some indirect hints that these facts were legitimate considerations, and his conclusion that the landowner’s lack of short-term plans to use the land should have significance in the PIE analysis reinforces the significance of this fact.²¹ But the opinion explicitly refused to engage with the High Court’s PIE analysis. Sweeping aside the applicants’ “various interesting submissions and criticis[ms]” of the judgment, Justice Yacoob limited the issues he would address to the High Court’s failure to order “the City to provide particulars of the applicant’s housing situation and whether the City could provide

²¹ See *Golden Thread* [8] (the High Court “remarked, correctly in my view, that it was unfortunate” the occupiers “had not said anything about the conditions that existed whence they came.” 18. “It is of some significance in this context that *Golden Thread* has not put the land to any use, nor is there any evidence that it intends to subject the land to use in the foreseeable future.”)

Brian Ray NYLS draft. Please do not cite or circulate without contacting me:
b.e.ray@csuohio.edu

emergency housing” and whether mediation was appropriate.²² The Court’s order was then limited to requiring the City to provide this information. Nothing in the judgment suggests the High Court should reweigh PIE’s substantive factors or how it should do so. The only real question left for the High Court on remand is whether to order the City to provide alternative accommodation in light of the information the City must now provide. This seems to assure the occupiers will obtain temporary accommodation, but it neither provides a model for careful exposition of PIE or a sense for how to weigh the same facts in another case.

This lack of specific analysis strengthens the principle that courts should never order eviction without alternative accommodation by essentially treating PIE’s other factors as irrelevant. The Court’s functional elimination of PIE’s distinction between long and short-term occupation in *Golden Thread* reinforces the impression that PIE’s provisions do not qualify the state’s obligation to provide accommodation in every eviction case. The applicants in *PPC Quarries* and *Golden Thread* argued for the Court to adopt exactly that principle, and the results in each case are consistent with it.²³ But the Court specifically refused to take up that argument in *Golden Thread* and tied the order *PPC Quarries* to “the specific circumstances of this case” without saying much about which circumstances mattered or why.

For courts trying to take seriously the mandate to apply PIE’s test on the facts of each case, the dearth of specifically identified reasons for why the City incurred the obligation to provide accommodation provides little additional guidance.²⁴ It also

²² *Golden Thread* (note__above) at 12-13.

²³ Applicants’ Heads at 72 (*Golden Thread*) and 88 (*PPC Quarries*).

²⁴ Compare SCA judgment in *Changing Tides* (and maybe cite Shanelle’s piece)

Brian Ray NYLS draft. Please do not cite or circulate without contacting me:
b.e.ray@csuohio.edu

suggests that these results may be better viewed as instances of ad hoc court management to bring some measure of dignity and humanity into messy situations attributable as much to informal factors such as the City's extreme and persistent recalcitrance and the parties' concessions. In either case, the failure to develop a careful analysis missed the potential for establishing an interpretive approach that could begin to develop an incremental substantive jurisprudence based on *Blue Moonlight*.

As chapter __ noted, these decisions thus mirror *Maphango* more than *Blue Moonlight* itself in the sense that all three decisions deliberately avoid substantive analyses that could create broadly applicable principles. A similar reluctance to engage head-on with the substantive implications of the eviction model is evident in the majority opinion in *Zulu*. As Justice van der Westhuizen's concurrence pointed out, there seemed little reason for the majority to limit its holding to permitting the occupiers to intervene and refuse to address the constitutionality of the interim order itself. The majority in both *Maphango* and *Zulu* clearly wanted to reach only the issues directly necessary to leave open the possibility for the claimants to secure some relief and to avoid resolving the cases in ways that would limit its options in future cases.

Even where courts do nothing more than continue to stop evictions until temporary accommodation is available and manage the cases in rights-protective ways, that creates a significant tool for enforcing both 26(3) directly and 26(2) indirectly by implicitly recognizing the new normality Wilson described in 2009. But as Wilson also recognized, simply permitting illegal occupiers to remain on existing land until a

Brian Ray NYLS draft. Please do not cite or circulate without contacting me:
b.e.ray@csuohio.edu

municipality can find temporary accommodation is not a sustainable solution in the long term.²⁵

On the one hand, the situations that lead to these standoffs typically involve poor people living in desperate conditions who the state has failed to provide even the most basic fulfillment of their housing rights.²⁶ Equally problematic, the increasing number of court decisions applying this model to prevent evictions has not prompted systematic reform even within relatively well-resourced municipalities like the City of Johannesburg.²⁷

If municipalities continue to be unable to provide even temporary accommodation for extended periods of time, private landlords in cases like *Blue Moonlight* are likely to return to court to seek to proceed with the evictions raising the more difficult questions that the Court has so far managed to avoid.²⁸ Combining structured meaningful engagement orders with the broader procedural powers these cases recognized could begin to address these broader issues

Procedural Authority and Engagement

The enhanced procedural powers the Court recognized in these cases and the meaningful engagement requirement the Court established in *Olivia Road* considerably strengthen a court's role beyond the basic power to stop an eviction until the state provides alternative accommodation. On a procedural level these tools expand the scope of the issues a court can seek to manage when resolving a particular case. Adding state

²⁵ Wilson, 'Breaking the Tie' at 282.

²⁶ Ibid.

²⁷ cite SERI materials

²⁸ See Langford, 'Housing' at 218, n. 62.

Brian Ray NYLS draft. Please do not cite or circulate without contacting me:
b.e.ray@csuohio.edu

parties and ordering them to submit detailed policy and budget information are significant tools in their own right.

As Wilson notes, simply joining municipalities to an eviction from private land proceeding turns a formerly purely private action into a public law matter that implicates the constitutional protections of section 26.²⁹ It also configures the case so that the court can take into account the state's constitutional obligations when deciding how best to balance the occupiers' rights against the private owner's. Incorporating the authority to order the state to provide information about its policies and resources gives the court even more options and requires municipalities to justify claims that they lack the resources to provide housing in a particular case. Combining those powers with a structured engagement order could extend judicial power beyond an individual case and into those larger policy questions.

By ordering parties to address the underlying policy issues rather than simply come to an agreement on alternative accommodation in a single case, a court also can use these powerful procedural tools to develop some substantive protections. In the first instance a set of procedural norms could flesh out both the process for negotiating alternative accommodation and the baseline requirements for such accommodation. The occupiers in *Blue Moonlight* attempted to use *Joe Slovo's* detailed engagement order in precisely this way arguing it established a set of minimum requirements for emergency accommodation following an eviction.³⁰ A consistent focus on the underlying policy and

²⁹ 'Breaking the Tie' at 284-85. Cite Gustav Muller and Sandra Liebenberg 'Developing the law of joinder in the context of evictions of people from their homes' (2013) 29 *SAJHR* __

³⁰ Cite *Blue Moonlight II* heads.

Brian Ray NYLS draft. Please do not cite or circulate without contacting me:
b.e.ray@csuohio.edu

budgeting process in individual engagements could turn eviction litigation into a forum for negotiating housing policy more generally and thus for enforcing section 26 outside of PIE. Rather than simply negotiating the details of the accommodation provided in an individual case, the parties, supported by civil society groups joined to the negotiation, could also address longer-term municipal plans and budgets.

These powers focus on the negotiation process itself and so put an even greater emphasis on procedural control over substantive interpretation of constitutional and statutory principles. This creates the risk that courts will continue to avoid directly elaborating constitutional or statutory norms in favor of managing individual cases. The meaningful engagement requirement formalized and expanded the managerial role *Port Elizabeth* established, but it also expressly disconnected that role from substantive interpretation of either PIE or section 26. Like PIE, engagement gives courts a tool to manage the effects of social-welfare policies in individual cases. Unlike PIE, however, which creates the case-specific opportunities to interpret the statutory factors just described, engagement focuses solely on the process the state used to develop a challenged policy. For this reason engagement in many respects represents the culmination of the shift towards proceduralization that characterizes the second-wave.

The procedural authority to join state parties and order state entities to report on the resources available for housing as well as their policy-planning and budget process shares this same procedural focus. This authority expands judicial power to scrutinize government decision-making processes without identifying statutory or constitutional requirements related to the substantive entitlements themselves.

Brian Ray NYLS draft. Please do not cite or circulate without contacting me:
b.e.ray@csuohio.edu

As the eviction cases going back to *Olivia Road* illustrate, however, exercising these procedural powers can have significant substantive effects.³¹ Moreover, as Chapter 5 identified, where the Court is able to focus on procedure it has demonstrated increased confidence in its capacity to adopt a stronger role precisely because it can minimize the justiciability concerns and operate within the constraints *Mazibuko* identified. This comes at some risk that the Court will give undue deference to the substantive decisions at issue and unduly limit the scope of its authority—a risk that *Mazibuko* illustrates. But the eviction model has the potential both to limit the risk of deference and to create opportunities for courts to take a more substantive role when exercising these procedural powers.

To begin with, simply by stopping an eviction until a municipality provides temporary accommodation and joining the municipality to the case sets up a situation that requires some substantive change to existing housing policy. In *Olivia Road*, the City ultimately agreed to provide a broad range of services in spite of initially taking the position that it could provide none.³²

The Court's determination in *Blue Moonlight* that a private landowner's right to evict temporarily could be trumped by the section 26(3) rights of illegal occupiers to allow a municipality to find temporary accommodation is premised on only a temporary delay in eviction. This assumes that the municipality will change its policy or reallocate resources to provide temporary accommodation in a relatively short period of time. All three of the *Blue Moonlight* cases incorporate this same assumption that the

³¹ Pieterse has noted that substantive fulfillment of a right is often a side-effect of the Court's procedural remedies and cites *Joe Slovo* as an example. 'Procedural Relief, Constitutional Citizenship and Socio-Economic Rights,' 28 SAJHR 359, 371 (2012).

³² Cite agreement and Wilson's article discussing problems in implementation.

Brian Ray NYLS draft. Please do not cite or circulate without contacting me:
b.e.ray@csuohio.edu

municipalities in each case will reconsider their claims that no resources are available to house the people threatened with eviction and find some solution that provides housing at least in the short term.³³

Adding the procedural power to require a municipality to survey the needs of the people facing eviction and to provide information regarding its existing housing plans and the resources available to house those people enhances the potential for this exercise of procedural control to prompt substantive change in several ways. First, merely requiring a municipality to formally report on its policy and budgeting processes incentivizes close scrutiny of those processes to ensure they comply with the obligations section 26, the Housing Act and PIE impose. Second, courts can use that information themselves to identify specific solutions to a particular case and also to give the occupiers and their representatives the power to argue for an alternative.

More broadly, courts can use that information to move beyond the particular facts of a case and identify systemic failures to comply with constitutional or statutory obligations that might have resulted in the unavailability of housing. *Blue Moonlight's* analysis of the Housing Act and rejection of the City's resource arguments because its budgeting process failed to recognize the obligation to plan for the needs of people evicted from private property establishes the power for courts to interrogate and order changes to the underlying substantive policies in eviction cases.

The leverage the eviction model creates to indirectly produce broader policy changes is the same leverage Duncan Kennedy argues anti-eviction groups could use to capture some of the economic surplus for communities that are being evicted from inner-

³³ Cite language from each case.

Brian Ray NYLS draft. Please do not cite or circulate without contacting me:
b.e.ray@csuohio.edu

city land because it is slated for new higher-value development.³⁴ Kennedy hypothesizes a range of substantive benefits a community—or the government on the community’s behalf—could extract from a private developer that reflects part of the increased value. In the eviction model, a court judgment temporarily delaying eviction combined with the expectation the state will provide alternative accommodation creates a similar kind of leverage to bargain for beneficial policy changes.

Meaningful engagement provides a formal basis for exercising these procedural powers that strengthens the control courts can exercise and enhances the potential for substantive policy change. The eviction model begins with a temporary injunction that, as just noted, creates a strong incentive for a municipality to change its policies to provide temporary relief. In private-eviction cases that incentive is strengthened by the landowner’s interest in obtaining an eviction order. By ordering engagement among the occupiers, the municipality and the landowner, and also possibly other government entities and private organizations, a court can maintain a procedural role but still guide the substantive direction of the process.

The engagement order in *Joe Slovo* offers some useful examples of the kind of control a court might exercise over the engagement process to push for this kind of substantive change.³⁵ The order included an agenda for the engagement that specified seven issues for discussion.³⁶ Among other things, the parties were required to decide

³⁴ Duncan Kennedy, “Comment on Anti-eviction and Development in the Global South,” in Lucie E. White & Jeremy Perelman, eds., *Stones of Hope: How African Activists Reclaim Human Rights to Challenge Global Poverty* (2011), 41.

³⁵ As chapter __ discusses the Court’s failure to exercise this control by requiring further engagement over the relocation decision itself was a missed opportunity to establish even greater procedural authority.

³⁶ *Joe Slovo*, *supra* note 3, at paras. 11-11.7.

Brian Ray NYLS draft. Please do not cite or circulate without contacting me:
b.e.ray@csuohio.edu

“the exact time, manner and conditions [of relocation]” and “the precise temporary residential accommodation units” for relocation.³⁷ By identifying specific substantive issues the engagement has to address, a court first indicates the issues it considers relevant to the constitutional and statutory claims. Doing so at least implicitly interprets those rights in ways that could be applied in other analogous cases.

Second, establishing a specific substantive agenda can shift the balance of power in the negotiations by forcing the municipality to address issues it might have refused to negotiate over and potentially to provide concessions on those or other issues as a result. Several analyses of *Joe Slovo II* suggest that the City’s policy reversal was resulted in large part from the constraints the Court’s order placed on both the process for relocating residents and the final development.³⁸

A court also can combine engagement with resolution of specific substantive issues. The engagement would then focus on the remaining issues and establish a framework or implementing the final resolution. The Court’s ruling in *Joe Slovo* that 70% of the new development would be reserved for displaced residents is an example of this combination.³⁹ Likewise the two engagement orders in *Juma Masjid* assumed the province was required to provide local placements for the children and were designed to implement that requirement in a way that gave their parents some meaningful input in the decision. The Court’s engagement orders in *Pheko* and *Schubart Park* followed the same model because it rested on the ruling that the original relocation order could only be

³⁷ *Id.* at paras. 11.2-11.3.

³⁸ Cite analyses

³⁹ Liebenberg Op. Ed., *supra* note 5.

Brian Ray NYLS draft. Please do not cite or circulate without contacting me:
b.e.ray@csuohio.edu

temporary and required restoring the residents to their homes or providing alternatives as soon as possible.

To make engagement and these procedural tools effective, courts must be willing to closely scrutinize the engagement process for compliance with the principles *Olivia Road* identified. The Court recognized this in *Olivia Road* when it required a record of engagement efforts by municipalities and emphasized that “[t]he absence of any engagement or the unreasonable response of a municipality in the engagement process would ordinarily be a weighty consideration against the grant of an ejectment order.”⁴⁰

Finally, the eviction cases demonstrate that all of these procedural tools are more effective where a court, at least initially, exercises greater control by enjoining the challenged activity and overseeing the engagement process. The Court’s willingness to exercise this kind of control in *Joe Slovo* appears to have played a significant role in the City’s change in policy. In contrast, the Court’s refusal to reassert control in *Blue Moonlight II* made the order much less effective and resulted in protracted enforcement litigation in the High Court.⁴¹ Increasing court control over the process, imposing sanctions for failures to engage and deploying temporary injunctions during engagement each could enhance the effectiveness of the remedy.

By deploying engagement and these related procedural powers in a more structured and assertive way courts also could expand the incremental substantive potential of the eviction model in two ways. First, by refining and expanding *Olivia Road’s* criteria, courts can develop procedural requirements that could be used in other cases even absent engagement. As noted above, the occupiers in *Blue Moonlight* argued

⁴⁰ *Olivia Road*, *supra* note 1, at para. 21.

⁴¹ Cite Resident’s heads in Dlada case at paras 20-21 and Hlophe order.

Brian Ray NYLS draft. Please do not cite or circulate without contacting me:
b.e.ray@csuohio.edu

the *Joe Slovo* engagement order established a substantive baseline for negotiations over alternative accommodation.⁴² Second, close scrutiny and careful analysis of the agreements reached in successful engagements can begin the same kind of case-specific but flexible elaboration of section 26 that is possible through a more explicit analysis of the PIE factors advocated above. This kind of careful analysis is likely to come as part of a formal endorsement of the resulting agreement that can would reinforce its connection to section 26 and thus its precedential effect.⁴³

Several features of the process the Court described in *Olivia Road* could further enhance the substantive potential of structured engagements. First the Court's requirement that the state involve civil society organizations in the engagement process brings broader perspectives into it. Civil society organizations active on housing issues will understand how the results of these individual negotiations may affect the broader policy landscape. Thus these groups can negotiate for policy changes that extend beyond the individuals involved in the specific engagement. At the same time, they can help alleviate the disparity in bargaining capacity between the municipality and vulnerable populations. The active and sustained role that the growing number of social-rights advocacy organizations chapter __ identifies groups have played in eviction and service-delivery cases illustrates the importance of systematically including civil society organizations in the engagement process.⁴⁴

For civil society organizations to effectively and legitimately fulfill this role will require close and careful coordination with local communities and social movements to

⁴² Cite *Blue Moonlight II*. SERI has developed advocacy and education materials that make this same argument. [get handbook].

⁴³ I am grateful to Sandra Liebenberg for this point.

⁴⁴ See Chapter _

Brian Ray NYLS draft. Please do not cite or circulate without contacting me:
b.e.ray@csuohio.edu

ensure civil society organizations genuinely facilitate direct access to government rather than merely representing their views. Steven Friedman and Eusebius McKaiser have noted that the systematic exclusion of the majority of citizens from civil society organizations under apartheid has resulted in relatively shallow connections between most civil society organizations and the majority of poor South Africans.⁴⁵ While acknowledging that groups active on poverty issues have engaged in much greater grassroots organizing and also that several social movements based in poor communities like Abahlali base Mjondolo have emerged and started to serve the same function, they argue civil society needs to continue to expand its grassroots constituency to provide an effective voice for local communities.⁴⁶

The public-reporting requirement reinforced by the progressive realization requirement in section 26(2) could allow individual engagements to establish broad norms through the same incremental process as careful interpretation of PIE's factors. Progressive realisation requires, at a minimum, that the state cannot decrease the level of benefit provided without substantial reason.⁴⁷ The public-reporting requirement requires municipalities to document their engagement efforts and also the result of any engagement. Citizens in a subsequent dispute will have access to that result and can

⁴⁵ Friedman and Eusebius McKaiser, 'Civil society and the post-Polokwane South African state: assessing civil society's prospects of improved policy engagement' (

⁴⁶ *Ibid.* at 17-19, 40-41.

⁴⁷ *See Grootboom, supra* note 105, at para 45. The Court adopted the interpretation of "progressive realisation" put forth in paragraph 9 of the general comment to Article 2.1 of the International Covenant on Economic, Social and Cultural Rights: "Moreover, any deliberately retrogressive measures . . . would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources." *Id.*

Brian Ray NYLS draft. Please do not cite or circulate without contacting me:
b.e.ray@csuohio.edu

argue that it establishes a minimum level of benefit from which any municipality cannot depart without substantial justification.

The reasonableness and resources limitations in section 26 give the government flexibility to argue either that a different level of benefit or modified program is more appropriate to address the particular circumstances in that dispute, but it must support those claims in the engagement process. During engagement, residents and civil society groups will have the opportunity to argue for alternatives not considered by the government that may adequately address the basis for that modified program or diminished benefit.

Up until this point the Court's controversial decision to link the substantive right to the internal limitations clause when interpreting socioeconomic rights has been largely criticized as diminishing its force.⁴⁸ But through engagement, the progressive-realisation qualifier has the potential to act as a tool for giving section 26 substantive content. Content, however, that is developed through negotiations among the state, affected citizens and civil society groups rather than mandated by courts. By managing a process through which these other actors engage with the state to develop substantive requirements that fulfill section 26 courts can operate within the confines of the role *Mazibuko* described while still effectively enforcing section 26 directly and over time develop a set of generalizable principles.

For this structured approach to engagement to work effectively requires not only a process for documenting the individual engagements, which the Court recognized, but

⁴⁸ See, e.g., Bilchitz, *supra* note 1113, at 9 (arguing in the context of the section 27 right to health care that the Court's approach "is guilty of failing to integrate ss 27(2) and (1): it focuses the whole inquiry on s 27(2) without providing a role for s 27(1).).

Brian Ray NYLS draft. Please do not cite or circulate without contacting me:
b.e.ray@csuohio.edu

also a publicly accessible repository of those reports. This will give municipalities the longitudinal information they will require to make engagement more than a merely ad hoc process. More importantly, access to the results of engagements is necessary for individual engagements to serve as potential precedents for future engagements and also to allow for public assessment of the results.

Civil society can play a key role here as well. Groups that are consistently involved in engagements can both be a repository for successful engagements and advocate for rules and procedures to provide broader public access. Those same groups can, in turn, use those records as the basis for negotiations in subsequent engagements.

Finally courts could incorporate a more substantive analysis of the constitutional and statutory grounds for approving individual engagements in the same way *Port Elizabeth* and *Blue Moonlight* incorporated substantive statutory and constitutional analyses when applying PIE. *Olivia Road* specifically recognized the need for courts to carefully review the substantive results of each engagement process noting that “[i]t will not always be appropriate for a court to approve all agreements entered into consequent upon engagement.”⁴⁹ If courts explicitly identify the statutory and constitutional norms at stake and how a particular settlement satisfies those norms they can elaborate and refine them across cases. Doing so will complement and expand the close analysis of PIE’s factors in the initial decision to issue a temporary injunction and order engagement.

Over time, then, engagement can establish a generalizable, but still flexible, set of both process norms and substantive requirements for section 26 that can be applied and modified in later cases. The public-reporting requirement permits broad access to these

⁴⁹ *City of Johannesburg Const. Ct.*, *supra* note 10, at para. 30.

Brian Ray NYLS draft. Please do not cite or circulate without contacting me:
b.e.ray@csuohio.edu

norms. The involvement of civil society helps ensure that the government does not depart from these norms in later cases and that modifications are justified by the particular circumstances in each case. The continuing obligation to engage in social rights cases creates an incentive for the government to incorporate these norms into policy development more generally and also to consult with civil society groups and communities when developing those policies.

There is, of course, always the possibility that state entities will decide to engage in bad faith. This could happen in one of several ways. First a municipality could simply refuse to engage. Second, it could go through the motions of engagement without offering any serious concessions and without seriously justifying that refusal beyond simply saying it lacks the resources. A more subtle alternative is if the city goes through the motions of engagement using facially reasonable excuses for refusing to provide additional benefits, such as increased demands from other sectors or legitimate differences in the situations between one set of residents and another that are in fact pretexts.

Those cases will likely end up in court and the question will be how a court should deal with this kind of recalcitrance once identified. In the first two scenarios—outright refusal or obvious bad faith—it makes sense for the court, at least initially, to order further engagement with additional court control. The court also could exercise the authority *Olivia Road* recognized to reject a challenged policy not on substance but on the procedural ground that the public authorities failed to adequately engage in the policy-development process. The public-reporting requirement will give the court the benefit of a record from which it can assess the process itself and order the parties to

Brian Ray NYLS draft. Please do not cite or circulate without contacting me:
b.e.ray@csuohio.edu

return to the bargaining table with specific modifications. These could include a broad range of things, including appointing one of the Chapter 9 institutions with specific expertise to act as a mediator or, less dramatically, ordering more inclusive consultations with groups that were either excluded or not sufficiently included.⁵⁰

The option to modify the specific process also gives the court an opportunity, without directly interpreting section 26, to signal the parties in general terms through informal discussions or formal statements on the record what it thinks section 26 might require in a particular situation and in light of previous engagements. This technique draws on engagement's relationship to alternative dispute resolution techniques and gives courts the kind of informal power to guide the parties to a constitutionally compliant substantive outcome without definitively resolving a particular issue.

Both *Olivia Road* and *Joe Slovo* provide modest evidence that this kind of repeated engagement under specific court pressure could work, even where a municipality initially ignores its obligations. In *Olivia Road* the very specific pressure Court exerted forced the city to engage more seriously. In a left-handed compliment, the Court deliberately "commended [the City] for the fact that its position became more humane as the case proceeded through the different courts, and for its ultimate reasonable response to the engagement order."⁵¹ Later in the judgment, the Court itself highlighted the fact that direct court pressure to engage and report back was "the deciding factor" that moved the City to make concessions.⁵² But the Court went on to emphasize its preference that "engagement take place before litigation commences unless it is not

⁵⁰ Cite Chapter 9.

⁵¹ *Olivia Road* para. 28.

⁵² *Ibid.* para 30.

Brian Ray NYLS draft. Please do not cite or circulate without contacting me:
b.e.ray@csuohio.edu

possible to do so because of urgency or some other compelling reason.”⁵³ In *Joe Slovo* the City reversed its decision to relocate the residents and agreed to upgrade the existing site in large part due to the challenges it faced in complying with both the substantive requirements the Court imposed and the task of engaging individually with each resident.⁵⁴

Juma Masjid and the enforcement proceedings in *Pheko* offer further examples where the Court exercised more structured control to push for rights-protective outcomes but also highlight the problems sustained government resistance can create. The sequenced engagement orders in *Juma Masjid* allowed the Court to move in a different direction once it was apparent the parties could not agree on continuing the lease. As discussed below, in *Pheko* the Court has backed up its softer initial engagement order with more specific substantive orders and also ordered specific municipal officers to participate in the stalled process.

The final outcomes in these cases are still unknown and raise the question what happens in cases where the process breaks down completely, or the municipality persists in refusing to offer a reasonable program? As an initial matter, the Court has structured the engagement process to try and avoid this result. In particular, the possibility for more direct court control over a renewed engagement process just described will at least ensure that complete breakdown is only possible if the municipality takes an extremely hard line

⁵³ *Id.*

⁵⁴ cite

Brian Ray NYLS draft. Please do not cite or circulate without contacting me:
b.e.ray@csuohio.edu

over time. In extreme cases courts can threaten contempt proceedings. Several lower courts have taken this route to force municipalities to take their obligations seriously.⁵⁵

Nonetheless, when faced with repeated refusals to engage seriously (or simply a good-faith impasse) a court will have to assert more extensive control over the process. The key characteristics of engagement—its extended nature, the public reporting requirement, and the political control it creates—leaves the court in a much better position to assume that role for several reasons.

First, the court now has a substantial record before it of proposals and counter-proposals, including detailed justifications by the municipality. This enhances the informational base to assess the competing claims and thereby reduces the institutional competence concerns.⁵⁶ In addition, once this process has developed over time, the court will also have the benefit of records of other engagements and can consider the similarities and differences of this particular situation.

Second, in state-initiated engagements, the city will have decided in advance to engage with this particular set of residents. Presumably this choice will have taken into account the larger context of the city's other responsibilities and priorities, and therefore ordering expenditures will not be as potentially disruptive as it would if the case were brought directly by residents. In other words, the political control engagement creates should give the court more flexibility to order some substantive benefit where warranted because it was a political decision to target these groups. For the same reason, any court-ordered relief to a specific set of residents will avoid the queue-jumping problem that the

⁵⁵ See SERI Report at 41. http://www.seri-sa.org/images/Evictions_Jurisprudence_Nov13.pdf

⁵⁶ *Olivia Road* at para 30 (noting that engagement ordinarily should take place well before litigation commences).

Brian Ray NYLS draft. Please do not cite or circulate without contacting me:
b.e.ray@csuohio.edu

Court has been concerned with and used as a reason to avoid ordering individual relief in other cases.⁵⁷ In this way, engagement enhances the power to individually enforce section 26 in ways that extend beyond the initial injunction.

The success of engagement as a procedural mechanism for developing broader substantive norms depends on courts applying it more often and more consistently over time and across different cases. It also requires a more structured and deliberate development of the procedures for engagement. A critical mass of successful engagements is required to begin the incremental substantive development that moves beyond individual case resolution. Developing that critical mass depends to a large degree on courts establishing structured mechanisms for engagement by government, civil society groups and citizens.

Extending the Eviction Model

The eviction cases are the best examples of the more authoritative role the Court has appeared willing to adopt in the second-wave cases when enforcing procedural rights and remedies. In the eviction model that authority is tied directly to the substantive principle that *Grootboom* first recognized and also to the procedural configuration of eviction cases, which allow for temporary but strong judicial interventions without extensive substantive elaboration of section 26 or PIE.

⁵⁷ See *Grootboom* para. 92 (“This judgment must not be understood as approving any practice of land invasion for the purpose of coercing a state structure into providing housing on a preferential basis to those who participate in any exercise of this kind. Land invasion is inimical to the systematic provision of adequate housing on a planned basis.”); *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd; President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd*, (2004) (6) SA 40 (SCA), para. 23 (discussing the “queue-jumping” problem identified in *Grootboom*).

Brian Ray NYLS draft. Please do not cite or circulate without contacting me:
b.e.ray@csuohio.edu

These aspects explain in large part why eviction cases have occupied a significant portion of the Court's social-rights docket in the second-wave. The jujitsu that turned *Grootboom's* principle into an individually enforceable right to resist an eviction invites legal action in every eviction case. By issuing a temporary injunction to delay an eviction, courts can intervene to protect occupiers' rights without directly second-guessing or even closely scrutinizing executive or legislative actions.

Nonetheless, it's possible to adapt this formula and extend that more authoritative role to enforce the negative dimensions of other social rights in ways that have positive effects. *Joseph's* recognition of a general right to service delivery provides the obvious starting point for applying this model to other basic-services cases. *Juma Masjid* reinforces *Joseph* first because the Court recognized the state's obligation to identify specific policies and measures for providing alternative access to services guaranteed under the social rights and second because it applied a series of meaningful engagement orders to directly manage the case to reach a resolution to ensured continued access.

Juma Masjid also is part of a string of recent education-related cases where the Court has employed a largely procedural framework similar to the eviction model.⁵⁸ These decisions illustrate another area where courts easily could adapt the eviction model.

Joseph and Basic Services

David Bilchitz argues that the right to receive municipal services in *Joseph* is best understood as grounded in a community-based, relational conception of the government-

⁵⁸ Cite ed cases.

Brian Ray NYLS draft. Please do not cite or circulate without contacting me:
b.e.ray@csuohio.edu

citizen relationship.⁵⁹ That conception elevates the relationship beyond a purely commercial one in which citizens are merely consumers of state-services and the right to receive services is specifically conditioned in the duty to pay for those services. Instead, the right represents a deeper relationship, grounded in the founding value of *ubuntu*, with a broad range of reciprocal duties and obligations.⁶⁰

Joseph recognized that this relationship requires “the government to act in a manner that is responsive, respectful and fair when fulfilling its constitutional and statutory obligations.”⁶¹ Notably, the Court, in addition to *ubuntu*, connected this relationship to democracy, emphasizing that “procedural fairness” in local government is “crucial therefore not only for the protection of citizens rights but also to facilitate trust in the public administration and in our participatory democracy.”⁶²

The strong presumption against deprivation of existing access to essential services the Court recognized in both *Jaftha* and *TAC* reinforces *Joseph*'s principle and establishes a basis for courts to scrutinize the underlying policies and budgets connected to individual disconnections. The Court in *Joseph* deliberately skirted that issue in favor of recognizing the more general—and largely procedural—right to receive municipal services. But subsequent cases relying on that more general right can bring *Jaftha* and *TAC* back into play by raising that presumption as part of their objections to a disconnection. Individuals facing service termination should be able to argue not only that the disconnection was the result of procedural unfairness in their specific case—as

⁵⁹ David Bilchitz, ‘Citizenship and Community: Exploring the right to receive basic municipal services in *Joseph*,’ 3 Const. Ct. Rev. 45 (2010).

⁶⁰ *Ibid.*

⁶¹ *Joseph*, para 46.

⁶² *Ibid.*

Brian Ray NYLS draft. Please do not cite or circulate without contacting me:
b.e.ray@csuohio.edu

Joseph recognized—but also that the underlying policies and/or the implementation process generally fails to meet statutory or constitutional requirements.

The procedural powers the Court has developed in the eviction context likewise easily could apply in other service-disconnection or limitation cases to expand the range of options for a court. To begin with, *Joseph* itself provides for a minimum 14-day notice of service termination and the right to make representations objecting to the termination. This creates a more limited version of the temporary injunction that is critical in eviction cases. More broadly, where a municipality proceeds with termination without giving notice and waiting at least 14 days, that should itself be grounds for a temporary injunction by a court.

In situations where a municipality complies with the notice and 14-day delay, *Joseph* recognized that the level of procedure required will vary in each case. This provides a formal legal analogue to PIE's multi-factor test and opens the door to bring court challenges arguing that the process was inadequate in each case. In addition to arguing that the pre-termination procedure was inadequate these cases could also argue that the underlying policies and processes failed to meet the broad requirements *Joseph* itself articulated for government action and also to raise other substantive and procedural defects.

Courts in either kind of case could order the government temporarily to restore service and issue engagement orders that are designed to resolve both the immediate dispute over the legality of the termination and to examine the underlying policy challenges. As in the eviction cases, courts also could join necessary state parties and

Brian Ray NYLS draft. Please do not cite or circulate without contacting me:
b.e.ray@csuohio.edu

require them to provide reports on the policy and budgeting processes necessary to address these underlying questions.

Marius Pieterse, while sympathetic to Bilchitz's analysis, argues that a more accurate reading of *Joseph* is that the Court adopted a neo-liberal notion of "market citizenship" where government obligations are conditioned on citizens' duties to pay for services.⁶³ He points out that this reading is consistent with *Mazibuko*'s refusal to find the installation of prepaid meters negatively infringed the right to water because they cut off service automatically. The Court found instead that because the Phiri residents, which it referred to as "customers," could restore service themselves simply by paying for it there was no negative infringement.⁶⁴

Bilchitz's reading of *Joseph* and the stronger citizen-state relationship he identifies provides stronger support for extending the eviction model to other basic services. But because the model relies on the robust procedural protections that flow from the right to receive municipal services rather than the more substantive claims the Court perceived to be at issue in *Mazibuko* either reading could support this approach.

In *Mazibuko* the Court adopted the language of the more limited consumer-model to avoid recognizing an argument that it had recharacterized as leading directly to expanded service provision. As noted above, the Court in *Joseph* also refused to address the negative-infringement argument but went on to recognize the largely procedural right to receive municipal services. This interpretive move mirrors those the Court made in *Olivia Road* and *Maphango* because in all three cases the Court invented or considerably expanded an existing right to bring into play a procedure that has the potential to protect

⁶³ Pieterse, 'Procedural Relief,' at 375-76.

⁶⁴ *Ibid.* at 376.

Brian Ray NYLS draft. Please do not cite or circulate without contacting me:
b.e.ray@csuohio.edu

poor people but doesn't provide immediate substantive relief. In *Joseph* finding a negative infringement of section 26(3) would have come much closer to expanding services by directly requiring reconnection whereas the right to municipal services simply gives the tenants the opportunity for reconnection. Applying PAJA's protections was one step removed from the 26(3) argument because it mandated only additional process (and notably a diminished process at that). It thus represented a purely procedural route.

The eviction model reflects that same procedural paradigm that keeps courts out of direct substantive decisions. The relatively strong intervention of a temporary injunction in many cases is necessary to enable that additional process. In the basic services context that is likely to involve temporary reconnection. But reconnection in under those circumstances still fits within the procedural paradigm because it involves only temporary restoration of services contingent on the outcome of that process. The court is thus not responsible for the ultimate decision whether to extend services only for the incidental temporary restoration required to for the government to obtain the information necessary to make that decision itself.

Limits of the Eviction Model

The eviction model illustrates the Court's greater willingness to enforce procedural rights and remedies and also how that procedural focus could have both incremental substantive effects and provide a basis for addressing systemic policy and budgeting issues that go beyond individual cases. The Court's decisions establish these more substantive and stronger procedural opportunities and the general patterns in the second-wave suggest the Court could be willing to take them up in later cases.

Brian Ray NYLS draft. Please do not cite or circulate without contacting me:
b.e.ray@csuohio.edu

Nonetheless, these same cases also contain some worrying signs that the eviction model might result in an only truncated version of that stronger role.

Substantive Limits

The appeal of the eviction model from the perspective of the procedural approach of the second-wave cases is that it gives courts the power to indirectly enforce section 26 without further elaborating *Grootboom's* basic principle and without directly reversing legislative or executive judgments or policies. A court simply delays the eviction temporarily and then structures a process intended to resolve the situation and possibly to effect broader changes but without dictating that resolution or ordering those changes. But exercising the procedural authority to delay evictions without at least articulating the case-specific factors that require a delay in each case masks the real role that the court plays and stymies the potential for that role to incorporate even modest substantive constitutional development.⁶⁵

Justice Yacoob's opinions in the two companion cases to *Blue Moonlight* illustrate this problem. The cases expand the circumstances where courts can delay evictions without elaborating either the constitutional or statutory bases for that expansion. Both cases purport to apply *Blue Moonlight's* principle that PIE's multi-factor test can sometimes justify a court limiting private property rights by temporarily delaying an eviction. But *Blue Moonlight* only started the process of analyzing those factors, and, rather than elaborating that analysis, these two cases largely ignore PIE. The result is a de facto general rule—or at least a presumption—applicable in every case that courts will not order evictions from private land—regardless of the circumstances and

⁶⁵ See Liebenberg, *Socioeconomic Rights*, 180; Pieterse, 'Procedural Relief' at 371.

Brian Ray NYLS draft. Please do not cite or circulate without contacting me:
b.e.ray@csuohio.edu

with no reference to the PIE factors—until the municipality can provide alternative accommodation.

This strong, but temporary, right works within the Court’s existing reluctance to develop expansive substantive interpretations in social-rights cases. The Court maintains a seemingly context-limited approach that operates within the separation-of-powers and institutional-competence boundaries it has set for itself but nonetheless begins to develop a strongly pro-poor jurisprudence that extends across cases. But this unacknowledged and unanalyzed strong-form approach is, in some respects, the worst of both worlds.

On the one hand it eliminates the democratic benefits of a judicial-legislative partnership by effectively displacing PIE with a de facto rule that fails to even acknowledge, much less attempt to balance, the constitutional issues at play. More significantly, a rule like this misses the opportunity for the Court to build on the active interpretive role it adopted in *Blue Moonlight* and that could form the basis of a genuinely substantive approach to enforcing section 26 and other social rights. By always stopping an eviction regardless of the factual circumstances, the Court is able to assert procedural control without analyzing the particular facts, how they interact with PIE’s criteria or what section 26 requires. While this creates an important tool for protecting poor people from evictions, it provides no foothold either as a matter of judicial process or constitutional substance for extending those protections beyond the eviction context because it’s not grounded in any broader set of principles.

The second-wave eviction cases clearly have pushed eviction law in pro-poor directions and established important new tools for advocates representing potential evictees. In this respect, there is no question the Court has played a significant role

Brian Ray NYLS draft. Please do not cite or circulate without contacting me:
b.e.ray@csuohio.edu

facilitating real change. But if the Court continues to focus not only on eviction cases but also the procedural aspect of managing the eviction process over the substantive policies causing evictions it risks running into a dead end that easily could lead to the deference its critics predict.

One solution to that problem is for courts more consistently to embrace the incremental substantive role this Chapter described and possibly to expand that role in the ways Liebenberg and others advocate.⁶⁶ Another route is for the Court to take a more active and structured role in addressing the underlying policies at play in these cases. The next chapter takes up that possibility and argues that an expanded version of meaningful engagement can provide the framework for doing so.

Procedural Limits

The protracted enforcement battles that have ensued in the wake of both *Blue Moonlight* and *Pheko* provide a set of instructive examples for examining the limits of the procedural side of the eviction model but also the potential for more structured deployment of meaningful engagement to at least partially address those limits. The problems with enforcement in both cases illustrate the deep-seated institutional and cultural hurdles courts face getting municipal governments to comply with their social-rights obligations. Addressing those systemic issues calls for more creative application of the extensive procedural powers the eviction cases have established. The Court in *Pheko* started down that road and was at least able to continue pressing the Ekhureleni Municipality for compliance by pairing engagement with direct orders. The Court's refusal to order engagement in *Blue Moonlight* arguably magnified the problems the High

⁶⁶ Cites.

Brian Ray NYLS draft. Please do not cite or circulate without contacting me:
b.e.ray@csuohio.edu

Court has been forced to address. In spite of this, the High Court recently has started to exercise the stronger managerial control available under the eviction model and gone even further than the Constitutional Court by identifying the underlying systemic issues that the City of Johannesburg has displayed dating back to *Olivia Road*.

The Court's role in enforcing *Pheko* presents a stark contrast to *Blue Moonlight* and shows the need for further explicit development of the procedural side of the eviction model. As with *Blue Moonlight*, the occupiers in *Pheko* encountered significant problems enforcing the order but here the Court intervened several times issuing new orders to push the process forward. The case remains pending before the Court and so the final outcome is uncertain but the stronger role the Court played seems likely to force an outcome that provides relief to the residents.

Over several years following the order, the Ekhureleni municipality repeatedly failed to provide alternative land and the parties returned to the Court several times for follow-up orders. In its most recent order on August 28, 2014, the Court found the Municipality in breach of its constitutional obligations, ordered it to show cause why the Mayor and City Manager should not be joined in the case and required it to identify any other officials responsible for complying with the orders to provide housing in the case. It also required the City to file yet another report by late November 2014 detailing steps it had taken to comply with the earlier orders including purchasing and developing land to provide permanent housing to the residents.⁶⁷

⁶⁷ August 28, 2014 Order, available at http://www.serisa.org/images/280814_Pheko_Order.pdf. [check pending SCA judgment in Pheko per Sandy's suggestion]

Brian Ray NYLS draft. Please do not cite or circulate without contacting me:
b.e.ray@csuohio.edu

The stronger management role the Court developed in this enforcement sequence tracks the active role the High Court eventually developed on its own in *Blue Moonlight*. Both cases illustrate the potential for courts to use this management role to provide concrete relief in specific cases and advance the positive aspect of section 26 and other rights in eviction cases. But they also demonstrate the significant challenges courts face where the state resists compliance. The next chapter takes up both aspects and argues that extending meaningful engagement to reach the underlying institutional issues behind that resistance could help resolve it and maximize the substantive effects of this managerial role.

In a follow-up proceeding to *Blue Moonlight* the Court rejected the opportunity to use meaningful engagement in ways that might have prevented serious problems with implementation that later developed.⁶⁸ With the deadline for relocation fast approaching and no real communication from the City, the occupiers filed an urgent application with the Court requesting that it enforce or modify its original order.⁶⁹ Among other things, the modifications they sought included a delay in the eviction date and a ruling that the original order required the City to meaningfully engage the Occupiers over the details of the relocation.⁷⁰

The Court rejected the application on formal procedural grounds characterizing it as “the usual ‘set aside and replace’ kind of order made in an appeal” that “effectively became an order of the High Court.”⁷¹ It also distinguished the order in *Joe Slovo* where

⁶⁸ *Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality and Another* [2012] ZACC 9, 2012 (9) BCLR 951 (CC) (“*Blue Moonlight I*”).

⁶⁹ *Ibid.* at para 1.

⁷⁰ *Ibid.* at paras 5-6.

⁷¹ *Ibid.* at para 8.

Brian Ray NYLS draft. Please do not cite or circulate without contacting me:
b.e.ray@csuohio.edu

it had retained jurisdiction and issued a detailed engagement requirements as an unusual example “that made clear the Court itself chose to regulate and oversee their execution.”⁷² Finally it declined to consider whether orders like this one that condition eviction on the provision of temporary accommodation implicitly require meaningful engagement over the specific conditions of that accommodation as the *Joe Slovo* order required.⁷³

The Court’s refusal to follow *Joe Slovo*’s example and exercise some control over the enforcement process in *Blue Moonlight* resulted in considerable problems implementing the judgment. In June 2012 the occupiers secured a High Court order requiring the City of Johannesburg to provide accommodation before they were evicted. The city failed to provide accommodation by the deadline and instead filed a report with the court stating it lacked the resources to satisfy the order.⁷⁴ The occupiers then brought a new action to enforce the accommodation order. The High Court confirmed the original order, and once again required the city to report back by 20 March 2013 providing details on the accommodation it would provide. In this second report, the city stated it was still unable to provide accommodation and requested an indefinite delay.⁷⁵

Following this second report the High Court “invit[ed]” the Executive Mayor, City Manager and Director of Housing to attend a hearing to address concerns about the city’s reports. Among other things the court was concerned that the city waited eight months after the original High Court order to even begin identifying accommodation; its

⁷² Ibid. at para 12.

⁷³ Ibid. at paras 16-18.

⁷⁴ cites

⁷⁵ *Hlophe v City of Johannesburg*, [2013] ZAGPJHC 98, (3 May 2013) at paras 1-20 (“*Hlophe*”) (describing the procedural history).

Brian Ray NYLS draft. Please do not cite or circulate without contacting me:
b.e.ray@csuohio.edu

reports the court were prepared by lawyers rather than officials with substantive expertise in “planning, budgetary, town planning, urban development and housing”; and the reports focused on excuses rather than finding a substantive solution.⁷⁶

The court concluded that the reports “indicate an attitude on the part of the city which is only very reluctantly (if at all) compliant with the directions of the Constitutional Court.”⁷⁷ Rather than giving the city yet another opportunity to find accommodation in this case, the court instead ordered the city to answer detailed questions about its overall emergency housing program and policies, including identifying the “structure or structures [that] implement the housing arrangements required to be implemented in the *Blue Moonlight* case, with reference to the personnel involved, skills available, liaison undertaken, time availed from other duties, management and direction of implementation.”⁷⁸ It also insisted the city could not simply identify alternative accommodation “and then state it is unnecessary to answer” these programmatic questions.⁷⁹

In other words, the High Court embraced the broader procedural powers the Constitutional Court established in its eviction cases to order the city to identify its overall *capacity* and describe its general planning process for meeting the ongoing obligations *Blue Moonlight* imposed. In doing so, the court recognized that the city’s failure here was merely a symptom of this broader lack of capacity and refusal to take seriously its obligation to plan and budget in ways that sought to develop that capacity. As the judge explained it, her pointed questions were “premised upon a view that

⁷⁶ Ibid at para 21.

⁷⁷ Ibid para 22

⁷⁸ Ibid Order para 2.a.iii

⁷⁹ Ibid para 32.

Brian Ray NYLS draft. Please do not cite or circulate without contacting me:
b.e.ray@csuohio.edu

management towards an outcome must be planned, focused and directed toward that outcome” and sought “to address the many difficulties and problems upon which the City relies to explain its failure to take any concrete steps over the past eleven months towards compliance with the court order.”⁸⁰

The judge’s detailed questions and focus on the city’s general capacity to fulfill the obligations created by *Blue Moonlight* is an example of the procedurally active role the eviction model establishes and illustrates the model’s potential to extend beyond individual disputes. The judge’s insistence that the city answer questions about its overall structures, personnel and planning for housing delivery reflects a concern with moving beyond individual disputes to get at the root causes behind them. The eviction model is based on the basic premise that municipalities have an obligation to independently consider and develop the capacity for implementing their obligations under section 26. These decisions also recognize that the state is required to incorporate attention to its constitutional responsibilities into its planning and budgeting processes.

Conclusion

The eviction model illustrates the rich potential for even a highly proceduralized approach to allow courts first to prevent deprivations of existing access to resources protected by each of the social rights and also to exercise managerial control to begin to address broader policy and budgeting issues. Finally, legislative balancing tests like PIE offer some modest potential for courts incrementally to develop a more substantive set of principles without implicating strong separation-of-powers concerns.

⁸⁰ Ibid para 33.

Brian Ray NYLS draft. Please do not cite or circulate without contacting me:
b.e.ray@csuohio.edu

The Court's consistent refusal to permit eviction where alternative accommodation is unavailable and authoritative approach in these decisions creates significant leverage for poor communities and social-rights advocates to expand the procedural side of the model. The tools the Court has recognized—including mandatory joinder of government entities and the power to require detailed policy and budgeting information—have set the state for using individual cases as platforms to press for not only individual resolutions but also for a voice in those broader processes. Meaningful engagement provides a useful framework for that expansion while permitting courts to maintain a largely procedural role.

The Court's shift back towards deference in cases like *Mazibuko* and failure to fully develop this potential itself in cases like *Joe Slovo* where it had the opportunity to do so illustrate that the internal limitations and political environment will continue to shape and limit the Court's role and that case selection could play an important role in developing and cementing this broader approach.

The Court's own limits highlight the fact that litigation is limited in its capacity to activate the full potential of the social rights, especially the need for policies that are not only tied to emergency situations like evictions and service cutoffs. The well-documented resistance by even well-resourced municipalities to accept the obligations the Court has imposed in these cases reinforce the limits of litigation and point to the need for leverage that produces more consistent, long-term pressure for reform. The next chapter explores the possibility for meaningful engagement to provide a vehicle for that kind of pressure.