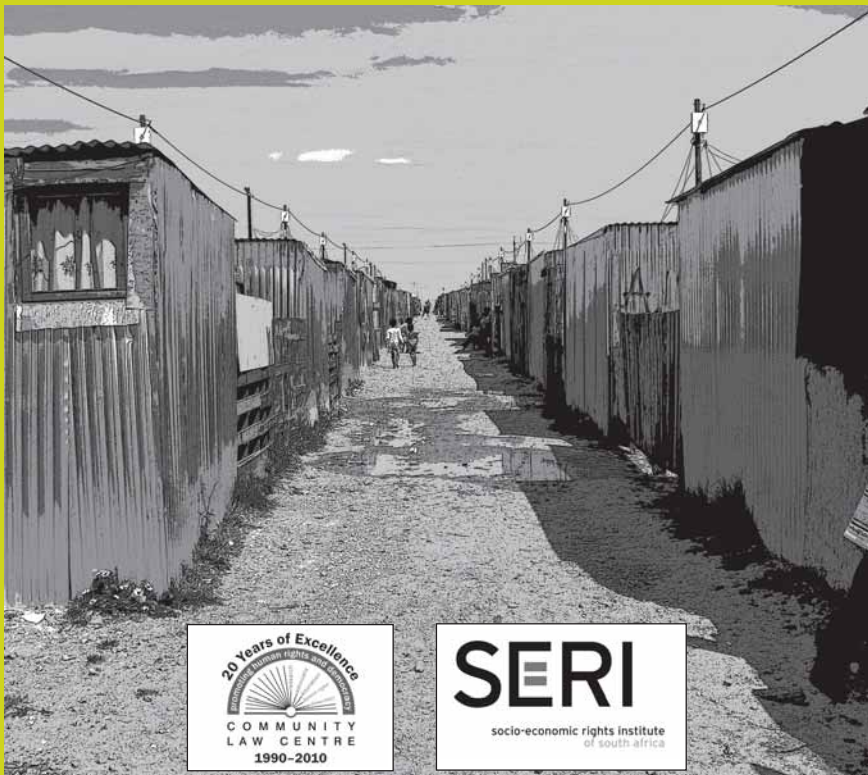


Engaging meaningfully with government on socio-economic rights

A focus on the right to housing

Lilian Chenwi & Kate Tissington



© *MARCH 2010 COMMUNITY LAW CENTRE (UNIVERSITY OF THE WESTERN CAPE)*

For permission to make copies of this booklet, please contact:

Trudi Fortuin (tfortuin@uwc.ac.za) or

Socio-Economic Rights Project (serp@uwc.ac.za)

Community Law Centre
University of the Western Cape
Private Bag X17
Bellville 7535
Tel: 021 959 2950
Fax: 021 959 2411

AUTHORS: Lillian Chenwi, Senior Researcher and Socio-Economic Rights Project Co-ordinator, Community Law Centre (CLC). Kate Tissington, Research and Advocacy Officer, Socio-Economic Rights Institute of South Africa (SERI)

PRODUCTION: PageArts

PRINTED BY: Trident Press

The authors would like to thank the participants at the workshop on meaningful engagement hosted by the Centre for Applied Legal Studies (CALs), University of the Witwatersrand on 27 July 2009, as their inputs have been useful in putting together this booklet. The CALs workshop report is available online at www.law.wits.ac.za/cals.

The authors would also like to thank Jackie Dugard and Stuart Wilson (SERI) and Gustav Muller (Law Faculty, Stellenbosch University) for their valuable comments on an earlier draft.

This booklet was made possible with financial support from the Norwegian Embassy through the Norwegian Centre for Human Rights and with supplementary funding from the Ford Foundation. The views expressed in the booklet do not necessarily represent the official views of the Norwegian Embassy, the Norwegian Centre for Human Rights or the Ford Foundation.

Contents

Cases referred to	4
Legislation and policies referred to	5
1. Introduction	6
2. What is meaningful engagement?	9
3. Is meaningful engagement the same as consultation or mediation?	10
4. What does the Constitution say about meaningful engagement?	11
5. What does South African law say about meaningful engagement?	13
6. What does international law say about meaningful engagement?	16
7. What are the objectives and subject of meaningful engagement?	18
8. When should engagement take place?	21
9. What makes engagement 'meaningful'?	22
10. What is the role of community leaders in the engagement process?	24
11. Summary of selected important decisions	25
12. Contact details	29

Cases referred to

- Abahlali* *Abahlali baseMjondolo Movement of South Africa and Another v Premier of the Province of KwaZulu-Natal and Others* Case CCT 12/09, 2009 ZACC 31 (CC)
Available online at www.saflii.org/za/cases/ZACC/2009/31.pdf
- Grootboom* *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC)
Available online at www.saflii.org/za/cases/ZACC/2000/19.pdf
- Joe Slovo* *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* Case 2009 (9) BCLR 847 (CC)
Available online at www.saflii.org/za/cases/ZACC/2009/16.pdf
- Makwanyane* *S v Makwanyane and Another* 1995 (3) SA 391 (CC)
Available online at www.saflii.org/za/cases/ZACC/1995/3.pdf
- Mamba* *Mamba and Others v Minister of Social Development and Others* CCT65/08, Court Order dated 21 August 2008 (CC)
Available online at www.constitutionalcourt.org.za/Archimages/12830.PDF
- Mazibuko* *Mazibuko and Others v City of Johannesburg and Others* 2008 JOL 21829 (W)
Available online at www.cohre.org/store/attachments/Mazibuko%20Judgment.pdf
- New Clicks* *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others* 2006 8 BCLR 872 (CC)
Available online at www.saflii.org/za/cases/ZACC/2005/14.pdf
- Olivia Road* *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others* 2008 (5) BCLR 475 (CC)
Available online at www.saflii.org/za/cases/ZACC/2008/1.pdf
- PE Municipality* *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR1268 (CC)
Available online at www.saflii.org/za/cases/ZACC/2004/7.html
- SERAC* *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* (2001) African Human Rights Law Reports 60
Available online at www1.umn.edu/humanrts/africa/comcases/155-96.html

Legislation and policies referred to

Breaking New Ground: A Comprehensive Plan for the Development of Sustainable Human Settlements (August 2004) (Breaking New Ground)

Available online at www.capegateway.gov.za/Text/2007/10/bng.pdf

Constitution of the Republic of South Africa Act 108 of 1996 (Constitution)

Available online at www.info.gov.za/documents/constitution/index.htm

Housing Act 107 of 1997

Available online at www.dhs.gov.za/Content/planned/Acts/Housing Act 107 of 1997.pdf

KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act 6 of 2007 (Slums Act)

Available online at <http://abahlali.org/files/KZN Slums Act.pdf>

Local Government: Municipal Structures Act 117 of 1998 (Structures Act)

Available online at www.info.gov.za/view/DownloadFileAction?id=70652

Local Government: Municipal Systems Act 32 of 2000 (Systems Act)

Available online at www.govanmbeki.gov.za/32of2000.pdf

National Housing Code (2000)

Available online at www.housing.gov.za/Content/The%20Housing%20Code

Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE Act)

Available online at www.dhs.gov.za/Content/planned/Acts/Prevention%20of%20Illegal%20Eviction%20from%20and%20Unlawful%20Occupation%20.pdf

Promotion of Administrative Justice Act 3 of 2000 (PAJA)

Available online at www.capegateway.gov.za/Text/2004/8/a3-00.pdf

Social Housing Policy for South Africa (July 2003)

Available online at www.dhs.gov.za/Content/legislation_policies/Social%20Housing%20Policy.pdf

Upgrading of Informal Settlements Programme (October 2004)

Available online at <http://web.wits.ac.za/NR/rdonlyres/74FBBB09-90B0-40CE-A04D-A60BCA2E18C4/0/Ch13finalversion19Oct2004InfSettleUpgrProgr.pdf>

White Paper on Housing (1994)

Available online at www.dhs.gov.za/Content/planned/Docs/Housing%20White%20Paper.pdf

1. Introduction

To make sure that service delivery is effective and has a positive impact on people's quality of life, it is important to have meaningful engagement between communities and the government. South Africa recognises the importance of engagement or participation by citizens (and non-citizens) in running the country. It has a Constitution that promotes a kind of democracy that is representative and participatory. Voting in elections is important but it is not enough. Participatory democracy means democracy that is accountable, transparent, responsive and open. Participatory democracy means democracy that makes provision for individuals and communities to take part in service delivery processes and decisions.

The Constitution says that the state must ensure that people's right to participate is made possible (realised). People need to claim this right and use it effectively.

The Bill of Rights in the Constitution protects different kinds of rights. Some of these are **socio-economic rights**, which include the right of access to:

- land
- **adequate housing**
- health care services
- sufficient food and water
- social security and social assistance.

The Bill of Rights also protects children's socio-economic rights, such as:

- basic nutrition
- shelter
- basic health care services
- social services.

The strong protection given to these rights in the Constitution is important in the fight against poverty, inequality and marginalisation.

Socio-economic rights and the right to adequate housing

When rights can be enforced by the courts, they are known as **justiciable** rights. South Africa is one of only few countries that has socio-economic rights protected in its Constitution as justiciable rights. Rights can contain both positive obligations (things that must be done by the state) and negative obligations (things that the state and others must avoid or make sure do not happen). The right to housing contains both positive and negative obligations.

The right to housing does not mean that the state must provide a house immediately to everyone free of charge on demand. Instead, it means that the state must have and implement a reasonable programme to provide everyone with access to adequate housing. This is its positive obligation. Positive obligations depend on the state's resources.

The negative obligations contained in the right to housing are to do with, for example, evictions. The state and other parties must not interfere with people's right of access to adequate housing. They should not undertake unlawful evictions. There are safeguards that protect people from being arbitrarily evicted and becoming homeless. One of the most important safeguards is meaningful engagement.

Although people have these socio-economic rights on paper, in practice it is not always possible to realise them. This is partly because there are few opportunities to participate and engage meaningfully in the government's decision-making processes, which affect the provision of services. Government officials often make decisions in a centralised way without involving local communities.

In 2009, the Department of Cooperative Governance and Traditional Affairs (COGTA) did a national assessment of local government to see the extent of problems it has in delivering services. Many problems were identified. For example:

- the breakdown of local democracy;
- poor communication and accountability relationships with communities;
- weak **community participation**; and
- community alienation caused by not giving enough attention to 'bottom-up' planning and consultative processes.

The community opposition to government that has been seen in service delivery protests and social movement resistance shows that communities do not feel they have a meaningful voice in government decision-making. They do not feel that their concerns are being heard or taken seriously.

Community participation

The Constitution, legislation and international law all say that the government has a duty to promote and facilitate community participation.

Recent court cases have emphasised that the government must 'meaningfully engage' with poor people about the provision of services, such as housing. Meaningful engagement is an important development in the approach of the courts to enforce socio-economic rights and promote active participation in service provision. Meaningful engagement is more democratic, flexible and responsive to the practical concerns that these rights raise. It can promote social change on the ground by creating a voice for the poor and marginalised in South Africa.

Some people do not know that their right to participate is protected in the Constitution, in South African legislation and in international law. They also do not know the key principles about meaningful engagement set out by the courts, especially the Constitutional Court. It is important for right-holders to know about their right to participate. They need to know what the courts have said about the duties it places on government and the process of meaningful engagement.

The courts have mostly dealt with meaningful engagement in cases to do with housing rights. (Some of these cases are explained in detail at the end of this booklet.) Therefore, this booklet focuses mainly on the right to housing when it explains the objectives, subject and process of meaningful engagement.

This booklet:

- explains what meaningful engagement is;
- tries to show the link between meaningful engagement and consultation and mediation;
- explains how meaningful engagement is protected in the Constitution, in legislation and in international law
- gives information on the objectives and subject of meaningful engagement;
- explains when engagement should take place;
- explains what the engagement should be about;
- identifies principles and guidelines that make engagement 'meaningful';
- suggests what community leaders' role should be in the engagement process;
- gives a summary of three important decisions of the Constitutional Court that deal with meaningful engagement;
- gives details of some organisations and institutions that could provide advice to people faced with evictions where engagement was not meaningful. Or they could give general advice on meaningful engagement in accessing socio-economic rights.

2. What is meaningful engagement?

The concept of 'meaningful engagement' has been around for a while, but it was first properly defined by the Constitutional Court in the *Olivia Road* case. This case was about the right to have access to adequate housing for those facing eviction from rundown buildings in the inner city of Johannesburg. The case is a good example of where engagement has worked.

In the *Olivia Road* judgment, the Constitutional Court said that meaningful engagement is 'a two-way process in which the City and those about to become homeless would talk to each other meaningfully in order to achieve certain objectives' (para 14). These objectives are explained later in this booklet. The two-way process the Constitutional Court refers to does not only apply to the particular people involved in the *Olivia Road* case, but can be applied to similar situations throughout the country.

So, more broadly, 'meaningful engagement' happens when communities and government talk and listen to each other, and try to understand each other's perspectives, so that they can achieve a particular goal. It is a 'neutral' space where people and the state can discuss and shape options and solutions to difficult issues. The meaningful engagement process should:

- be well structured, coordinated, consistent and comprehensive and not be misleading;
- take into consideration language preferences; and
- enable individuals or communities to be treated as partners in the decision-making process.

It should also be both individual and collective. It is not enough simply to consult with committees or community-based organisations (CBOs) claiming to represent communities. Nor is it enough to just consult individuals and households. The state must do both. It must also respond in a reasonable way to the contradictions and tensions that may arise between groups and individuals in a community when a socio-economic policy is put into effect.

An example is if the state has to take any action that would affect people's right to housing, water or social security. Before it takes a final decision about what action it wants to take, it must engage meaningfully with the people about the measures it has in mind. It must provide them with reasonable opportunities for their voices to be heard and to participate in the decisions that would affect their rights. Also, if the government is developing a strategy to meet its constitutional obligations of realising a specific socio-economic right, it must engage with communities at all stages of the strategy. This means it must engage with them during the decision-making, planning, implementation and evaluation processes.

What is not meaningful engagement?

If the government meets with communities simply to persuade them to accept a decision that it has already made and that it says is in their interest, this is *not* meaningful engagement. Meaningful engagement is *not* about people merely rubber-stamping government policies, 'ticking the box' of the state's legislated public participation obligation or providing 'bums on seats' to legitimate decisions that have already been taken.

3. Is meaningful engagement the same as consultation or mediation?

When people are asked for their input on matters that affect them, this is consultation. Mediation, on the other hand, takes place when people in conflict voluntarily ask an acceptable third party (a 'mediator') to help them to reach agreement on issues that divide them.

'Engagement' looks like consultation and mediation. Just like consultation, communities' views are asked for during engagement. This also acts like a check for state action. Engagement is also an alternative way to resolve a dispute, like mediation, and a way of involving those whose rights have been violated in coming up with a remedy.

It is interesting that the Constitutional Court has encouraged interested civil society organisations (CSOs) to get involved as third parties in the engagement process. The Court acknowledged that skilled and sympathetic people are needed to make engagement processes effective (e.g. see *Olivia Road*, paras 19 and 20).

At times, the courts have used the terms 'engagement', 'consultation' and 'mediation' as if they are the same thing. However, there is a basic difference between the idea of meaningful engagement, as developed by the Constitutional Court, and mere consultation.

With consultation, the person in authority (e.g. local government) asks for people's views but often makes the final decision. How much people's views are incorporated into the decision is often not clear. Meaningful engagement, on the other hand, means that the parties make final decisions *together*. Some consultations can be similar to meaningful engagement depending on the nature of the process and if it is genuine. As a result, international law, as seen below, emphasises 'genuine' consultation. This means that it goes beyond the right to be heard (*audi alteram partem*) and involves developing a long-term relationship between the state and citizens (or non-citizens).

Consultation is usually about a single decision that has to be made at a

single time. Consultation is a procedural step that is necessary to make a decision. It is more an *act* than a *process*.

Engagement, on the other hand, is a *process* of constant interchange between citizens (or non-citizens) and the state. It is about designing and implementing socio-economic programmes that affect particular communities or groups of people. So it is not simply an act that must happen before a valid legal decision is taken. It is a practice made up of a range of decisions that are necessary to design and implement a socio-economic programme.

4. What does the Constitution say about meaningful engagement?

The Constitution does not expressly use the words 'meaningful engagement'. But there are sections in it that specifically protect the right to participate in service delivery processes and decisions. In the *Olivia Road* case, the Constitutional Court said that the basis for meaningful engagement is found in the following constitutional provisions (paras 16-18):

- The preamble to the Constitution says the government has a duty to 'improve the quality of life of all citizens and free the potential of each person'.
- Section 152 says local government must provide services to communities in a sustainable way, it must promote social and economic development, and it must encourage communities and community organisations to be involved in the matters of local government.
- Section 7(2) places a duty on the state to respect, protect, promote and fulfil the rights in the Bill of Rights. The Court said that the most important are the right to human dignity and the right to life;
- Section 26(2) says **the state must act reasonably** to make sure the right of access to housing is realised.
- Section 26(3) says that 'no one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances'. Finding out what 'all the relevant circumstances' are means that meaningful engagement must happen before evictions that lead to homelessness.

Government to act reasonably

- The Constitution says the government must act reasonably in relation to the rights to health care, food, water, social security, education and land, as well as housing.

- In everything it does, government must aim to improve the quality of life of all people living in South Africa.
- One of the criteria to decide whether a government measure that is aimed at realising a right is reasonable is whether or not there was meaningful engagement. The quality of the engagement is also important.

The Constitution also says this about meaningful engagement:

- Section 33 says the government must respect **procedural fairness** when it takes administrative action that affects people's rights. The procedures that must be followed by the government when it engages with people or communities are found in sections 3 and 4 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).
- Section 195 of the Constitution states the basic values and principles that must govern public administration. They include encouraging the public to participate in policy making and providing the public with timely, accessible and accurate information.

Procedural fairness means that the government must:

- inform individuals or communities of the exact administrative action (i.e. decision that affects the rights of members of the public) it wants to take, *before* taking it;
- give adequate notice of the proposal and allow people a reasonable opportunity to make comments and representations. This can be done through public hearings as well as written comments;
- consider the public's comments and representations with an open mind;
- inform them of the administrative action taken and the reasons for it; and
- allow an appeal to be made to a higher body if the decision is unsatisfactory.

5. What does South African law say about meaningful engagement?

The basis for meaningful engagement can also be found in various laws and policies, most importantly in the areas of housing and local government.

The main law about **housing** is the Housing Act 107 of 1997. This law says that national, provincial and local government must:

- consult meaningfully with individuals and communities affected by housing development; and
- make it possible for all relevant stakeholders to participate in housing development (section 2(1)(l); see also section 9(2)(a)).

Government housing policies and strategies must emphasise the participation of affected communities in planning and implementing housing developments. This is said in the White Paper on Housing (1994), which aims to guide government's housing policy. It is also said in the National Housing Code (2000) which has guidelines about housing policy. (The Housing Code was updated in 2009 but has not yet been tabled.)

Another policy measure is the recent 'Breaking New Ground: A Comprehensive Plan for the Development of Sustainable Human Settlements' (August 2004). It is commonly known as 'Breaking New Ground' (BNG) and says that consultation and community participation are important parts of housing development. The Social Housing Policy for South Africa (July 2003) says that beneficiaries should be involved in administering and managing their housing options. It also places a duty on social housing institutions to consult with residents through meaningful participation.

Meaningful engagement is an important requirement when evictions are sought under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE Act). It is also required in all evictions in the context of housing developments (*Abahlali*, para 69 and *PE Municipality*, paras 39-45).

The PIE Act

The PIE Act protects 'unlawful occupiers' from arbitrary eviction. 'Unlawful occupiers' are people who occupy land without permission from the owner or the person in charge. This includes tenants who have had their leases terminated by their landlords. The PIE Act sets out certain things that must be done before an eviction can be granted. Section 4 of the Act, for example, says that the owner must give the unlawful occupier and the local municipality 'written and effective notice' of the eviction proceedings. This must happen at least 14 days before a court hearing of the eviction proceeding. The notice must:

- say on what grounds the eviction is being sought;
- say the date and time when the eviction proceedings will be heard; and
- inform the unlawful occupier of their right to appear before the court, defend the case, or apply for legal aid.

The PIE Act also says that a **court** must consider the rights and needs of certain vulnerable groups of unlawful occupiers. These are the elderly, children, female-headed households and the disabled. If the unlawful occupier(s) have been in occupation of the property for longer than six months, the Act says that the court must consider whether land is available to which the unlawful occupier(s) can be relocated, or whether land can reasonably be made available by the owner or the local municipality.

This is where 'meaningful engagement' is important. If a person who is evicted would otherwise become homeless, the courts have interpreted the PIE Act in a way that allows them to refuse an eviction order or to say the state must provide alternative accommodation.

These things are important to note:

- A person can only be evicted based on a court order. This order must be made after taking all relevant circumstances into account – for example, whether meaningful engagement has taken place and whether alternative accommodation should be provided;
- An individual or community can approach a court urgently, even without a lawyer, and
 - a. tell the judge that there is no court order in terms of the Constitution and the relevant eviction law e.g. PIE Act;
 - b. explain how long people have been living on the land or in the building;
 - c. explain that there has been no meaningful engagement and no alternative accommodation has been provided.
- If there is a court order for an eviction but there was no meaningful engagement before the court order was granted, those affected should urgently approach a court to explain this to the judge or magistrate.
- A court will not normally order the eviction of desperately poor occupiers if it is shown by their lawyers that homelessness would result.

Laws that establish the framework for **local government** also talk about engagement with communities. For example, section 19(2) of the Local Government: Municipal Structures Act 117 of 1998 (Structures Act) says a municipal council must review its processes for community involvement every year. Section 19(3) says it must develop mechanisms to consult the community and community organisations in performing its functions and exercising its powers. Section 16(1) of the Local Government: Municipal Systems Act 32 of 2000 (Systems Act) says local government must:

- encourage and create conditions for the local community to take part in the affairs of the municipality, including about the provision of services;
- contribute to building the capacity of local communities so they can take part in the affairs of the municipality; and
- use its resources and funds in its budget to help people to participate.

Section 17 of the Systems Act says a municipality must have appropriate mechanisms, processes and procedures so that the local community can take part in the affairs of the municipality. For example, it must hold public meetings and hearings, consultative sessions and report back to the local community. When it does this, the municipality must take into account the special needs of disadvantaged groups, such as people who cannot read or write, people with disabilities, and women.

Members of a community have the right

- to contribute to the decision-making processes of the municipality through written or oral recommendations, representations and complaints to the municipal council or another political structure;
- to ask for responses to their communications and to ask to be informed of the decisions of the council affecting their rights; and
- to demand that proceedings are open to the public (section 5(1) of the Systems Act).

6. What does international law say about meaningful engagement?

International law is important because:

- It played a key role in the drafting of the South African Constitution.
- Several rights in the Constitution are similar to those found in international treaties.
- Sections 39 and 233 of the Constitution say that courts must consider international law when they interpret the rights in the Constitution.
- The Constitutional Court has said that international law provides a framework to evaluate and understand the rights in the Constitution (*Makwanyane*, para 35).

A number of international standards say there must be engagement with right-holders or communities in the realisation of socio-economic rights. The General Comments of the United Nations Committee on Economic, Social and Cultural Rights (CESCR) are good examples. These General Comments interpret the rights in the International Covenant on Economic, Social and Cultural Rights (ICESCR). They also interpret what states must do to realise the rights in the ICESCR. South Africa has signed the ICESCR, meaning that it has committed itself to respect the ICESCR's principles.

International law says there must be extensive genuine consultation when it comes to the **right to adequate housing and in respect of proposed evictions** and proposed resettlement. Representations from affected persons and communities must be invited and considered (see General Comment 4 on the right to adequate housing (1991) paras 8 and 12; General Comment 7 on the right to adequate housing in the context of forced evictions (1997) paras 13 and 15).

Also, the United Nations Basic Principles and Guidelines on Development-Based Evictions and Displacement (2007) says that all groups and persons who might be affected have the right to relevant information and 'full consultation and participation' throughout the entire eviction process (para 38). Special measures must be taken so that all affected persons, including women and vulnerable and marginalised groups, are included in the consultation process (para 39).

The guidelines and principles also say that development processes which may lead to people being displaced from their homes must have certain things built into them (para 37). For example, the authorities must distribute relevant information in advance. Public hearings must be held on the proposed plans and alternatives. These would provide opportunities to challenge the eviction decision or present alternative proposals, and to articulate different demands and development priorities.

The CESCR also says genuine consultation is very important around the **rights to social security, water, health and work**. It says that:

- Before the state or any other third party takes any action that interferes with the rights of an individual to social security and to water, there must be an opportunity for 'genuine consultation' with those affected. Full and complete information on the proposed measures must be provided in good time (General Comment 19 on the right to social security (2008) para 78); General Comment 15 on the right to water (2003) para 56).
- The right of individuals and groups to take part in decision-making processes must be part of any policy, programme or strategy that is

developed to meet government's obligations on the rights to health, water and work (General Comment 14 on the right to the highest attainable standard of health (2000) para 54; General Comment 15 (2003) para 48; General Comment 18 on the right to work (2006) para 42).

Also, international law emphasises the right of the specific vulnerable groups mentioned in the PIE Act (such as women and the elderly) to participate in policy development and implementation. For example, article 14 of the Convention on the Elimination of All Forms of Discrimination against Women (1979) (CEDAW) says that **women have the right to participate**, on an equal basis, in development planning at all levels. South Africa has ratified CEDAW and is therefore bound by it. Also, the CESCR emphasises the **right of the elderly** to take part in formulating and implementing policies that directly affect their well-being. This is in General Comment 6 on the economic, social and cultural rights of older persons (1995) (paras 5 and 39).

Where to find international law

- The General Comments are available online at www2.ohchr.org/english/bodies/cescr/comments.htm.
- The Basic Principles and Guidelines are available online at www2.ohchr.org/english/issues/housing/docs/guidelines_en.pdf.
- CEDAW is available online at www2.ohchr.org/english/law/cedaw.htm.

At the African regional level, the African Commission on Human and Peoples' Rights has said that states must give meaningful opportunities for individuals to be heard and to participate in the development decisions that affect their communities. This is a requirement of the African Charter on Human and Peoples' Rights and was developed in the *SERAC* case (para 53). South Africa has ratified the African Charter and so it is bound by it.

7. What are the objectives and subject of meaningful engagement?

The meaningful engagement process makes sure that government carries out its constitutional obligations of realising socio-economic rights. This means that the meaningful engagement process is very important to making sure that development programmes that try to realise socio-economic rights are effective and sustainable, and that they benefit poor communities. Meaningful engagement is an expression of 'bottom-up' participatory democracy. It

promotes transparency and accountability in the realisation of socio-economic rights. It can also contribute to resolving disputes.

Understanding and respect vs. agreement

Mutual understanding, respect and accommodation of each other's concerns should be the main focus of meaningful engagement, rather than reaching an agreement (*Joe Slovo*, para 244).

Meaningful engagement also expresses the dignity of citizens (and non-citizens) in South Africa. In the *Joe Slovo* case, the Constitutional Court said that 'the requirement of engagement flows from the need to treat residents with respect and care for their dignity' (para 238; see also para 261 and 406; *Olivia Road*, paras 10-11 and *Grootboom*, para 83). The *Joe Slovo* case was about the eviction of a large informal settlement community to make way for the government's housing development programme. The Court also said in this case that 'individual engagement shows respect and care for the dignity of the individuals. It enables the government to understand the needs and concerns of individual households so that, where possible, it can take steps to meet their concerns' (para 238).

If meaningful engagement occurs *before* an eviction, it can prevent dissatisfied people from having to go to court. This means that the government and communities are having a meaningful conversation about the situation e.g. the possibility of ***in situ* upgrading** or, alternatively, relocation to an alternative site nearby. It also saves time and money in the long term. This is the ideal situation.

In situ upgrading

- *In situ* upgrades do not necessarily mean there must be relocation. They involve as little disruption to the location of dwellings as possible.
- The Upgrading of Informal Settlements Programme (October 2004), Chapter 13 of the National Housing Code, says that government funding is available to municipalities for *in situ* upgrading of informal settlements, giving security of tenure, basic municipal services, social and economic amenities and empowering residents in informal settlements. It is important to note that the Programme does say that people can be relocated and resettled because of upgrading projects, but *only if there is no other way and only in exceptional circumstances*.

- In the *Abahlali* case, the Constitutional Court said that ‘no evictions [in terms of the PIE Act] should occur until the results of the proper engagement process are known’. It said that ‘proper engagement would include taking into proper consideration the wishes of the people who are to be evicted; whether the areas where they live may be upgraded in situ; and whether there will be alternative accommodation. The engagement would also include the manner of eviction and the timeframes for the eviction’ (*Abahlali*, para 114). So eviction or relocation is always the last resort, and only after *in situ* upgrading has been considered.

If the courts order engagement, it promotes the participation of the poor in coming up with a solution. This helps in implementing a solution and makes sure that it is appropriate and sustainable. In the long term, it also saves time and money for the government and makes sure that people have full access to their socio-economic rights.

In the *Olivia Road* case, the Constitutional Court listed some of the objectives of engagement. These would apply in a situation where a municipality wants to evict people, who might be made homeless as a result. The aim of an engagement in this situation would be to determine:

- what the consequences of the eviction might be;
- whether the city could help to improve those consequences;
- whether it was possible to make the buildings safer and less of a health risk for an interim period;
- whether the city had any obligations to the occupiers; and
- when and how the city could or would carry out its obligations.

Objectives depend on context

There is no closed list of objectives of engagement. The objectives depend on the specific situation. It is not just the government that says what these objectives are.

Once a decision has been made to evict, engagement would be more about the relocation and the kind of alternative accommodation. This would obviously not be meaningful engagement best practice. In the *Joe Slovo* case, some of the issues that the parties had to engage on were (para 7(11)):

- finding out the names, details and relevant personal circumstances of those affected by each relocation;
- the exact time, manner and conditions under which the relocation would happen;
- the precise Temporary Residential Units (TRUs) to be allocated to those relocated;
- transport for those to be relocated and for their possessions;
- transport facilities to amenities such as schools, health facilities and places of work; and
- the question of permanent housing later on, including information on people's position on the housing waiting list and helping them to complete housing subsidy application forms.

About the provision of services in general, section 4(2) of the Systems Act says that the Council of a municipality should encourage involvement of the local community and consult the local community on 'the level, quality, range and impact of municipal services provided' and 'the available options for service delivery'. Consultation here is not the same as it is when a court orders a meaningful engagement process, but the principles are similar. The importance of genuine consultation in service provision is just as important as it is in eviction cases, for all of the reasons described above.

The *Mazibuko* case, for example, was about the right of access to water. The High Court said that affected individuals were not given adequate notice, were not advised of their legal rights and were not given information as to the available remedies. It said this was procedurally unfair and consultation was not adequate (paras 121-122). The case makes it clear that notices should not be issued just as a means of selling a decision that has already been made i.e. as a public relations exercise.

Responsibility of a municipality to engage

In the *Olivia Road* case, the Court said that people who are about to be evicted may be so vulnerable that they might not understand the importance of engagement. They may refuse to take part in the process. If this happens, a municipality cannot just end the process. Instead, it must try harder to engage. It can only proceed without appropriate engagement if it has made reasonable efforts and they have failed (*Olivia Road*, para 15).

8. When should engagement take place?

The Constitutional Court says that engagement should ordinarily happen before issues go to court, and not after (*Olivia Road*, para 30; *Abahlali*, para 119-120). In the context of housing, this means that no eviction proceedings should be started until the government or municipality has engaged with the people involved and others who will be affected. The Court also said in the *Abahlali* case that starting engagement after it has already been decided to begin eviction proceedings cannot be genuine or meaningful (para 120). However, in the *Joe Slovo* case, engagement was ordered as part of the requirements of an eviction order. It was related to the relocation process.

Important points to consider

- Meaningful engagement is not just something that has to be done before getting an eviction order. It is *not* simply about ticking boxes.
- How meaningful engagement takes place and what its result is have a significant impact on whether an eviction is just and equitable and in the public interest.
- It would be unconstitutional to have a law that permitted eviction proceedings to be started without reasonable or meaningful engagement.

Meaningful engagement should take place *before* policies, strategies or development projects are planned. It must also take place while they are being implemented and when they are evaluated. So it is important that government engages meaningfully with communities before deciding whether to proceed with an eviction or with any housing development or policy measure that would affect people's rights.

9. What makes engagement 'meaningful'?

The following principles and guidelines to make sure that the engagement process is meaningful have been stated in the Constitutional Court's decisions (see *Olivia Road*, paras 13-15 and 19-21; *Joe Slovo*, paras 117, 247, 238, 261, 378, 380):

- Residents or communities must be treated as partners in decision-making, instead of just having information about decisions passed down to them.
- Engagement must be done with residents or communities both individually and collectively.

- The engagement process should preferably be managed by careful and sensitive people.
- Engagement should involve other stakeholders. CSOs that support the people's claims should preferably facilitate the engagement process in every possible way. Structures must be put in place that are staffed by competent and sensitive council workers who are skilled in engagement.
- Dependable and meaningful lines of communication must be maintained. There must be open communication channels.
- The engagement must be a two-way communication process, where both parties listen and try to understand the other's perspective.
- Both sides must act reasonably and in good faith.
- The process must not be done in secret.
- Complete and accurate accounts of the process of engagement must be provided. These accounts must at least include the reasonable efforts of the municipality in the engagement.
- The engagement process must be structured, coordinated, consistent and comprehensive, especially where large numbers of people might be affected. Thus, engagement needs to be developed as a structured long-term process.
- Unplanned engagement may be appropriate in a small municipality where, for instance, an eviction or two might occur each year, but is completely inappropriate in a large municipality. This is especially so where the possible eviction forms part of a development process.
- The parties must be proactive and not only defensive. They must show some resourcefulness in seeking a solution.
- The parties must not come with narrow-minded or stubborn attitudes. They must not sabotage the engagement process by making non-negotiable, unreasonable demands.
- The parties must put aside their occasional differences and focus on common ground.

Involving other stakeholders

Involving other stakeholders in the engagement process is also supported by what the Constitutional Court has said in *New Clicks* (para 627) that 'all interested parties, not only those whose rights stand to be adversely affected, are entitled to know what government is doing, and as concerned citizens, to have an appropriate say'. More recently, in *Mamba* (para 1) the Court ordered that other stakeholders be included in the engagement process.

Other principles and guidelines that are necessary if an engagement is to be 'meaningful' include the following:

- Relevant information should be accessible and transparent. Communication must be done in a way that takes into account language preferences and the special needs of people. Participants should know in advance what would be considered in the discussion.
- Notices asking for public comments on policies, strategies and development projects should be made more accessible to communities.
- Participants must be properly identified, including beneficiaries, affected and interested parties and other stakeholders.
- The venue of engagement must be conveniently located for a majority of the participants.
- Participants should be able to speak freely.

Endorsement of agreement by the courts

- Courts would normally consider and evaluate the terms of an agreement resulting from an engagement it ordered. The failure to reach an agreement is also something the court would consider (*Joe Slovo*, para 139 and *Olivia Road*, para 30).
- However, a court will not always approve agreements that are made after an engagement (*Olivia Road*, para 30), especially where there were problems with the process.
- It is important to ask for the court's approval of an engagement agreement before it comes into operation.

10. What is the role of community leaders in the engagement process?

People who represent the communities in an engagement process have important responsibilities. They must:

- inform all members about the engagement process in good time;
- explain clearly what the issues are and what the engagement process is going to be about;
- place notices about the engagement where ordinary people can see them, to avoid anyone being excluded. These notices must take language preferences into account;

- ensure equality of representation between women and men, and between nationals and non-nationals;
- use the culture and strategies that are familiar to the community;
- facilitate the election of representatives in a fair manner. In an on-going engagement, they must make sure representatives are rotated and re-elected for each engagement;
- refer all decisions back to the community before finalisation.

Good community leaders are very important to make the engagement process a success. Their role does not end when an agreement has been reached. Their role is critical for:

- implementing a court's remedy;
- helping to relocate people to alternative accommodation; and
- liaising between members of the community, lawyers and government officials.

Role of lawyers in the engagement process

Lawyers have an important role in facilitating the conditions that are necessary for meaningful engagement. This is especially so where engagement is ordered by the court. Their role is also important once an eviction has been ordered. For example, lawyers will provide legal and policy advice, make sure that the information needed for the engagement is provided in an accessible format, and identify and empower legitimate and competent community leaders. The role of the lawyer does not end when an agreement has been reached. They are critical to make sure implementation of an agreement is fair and effective.

11. Summary of selected important decisions

Occupiers of 51 Olivia Road, Berea Township, and Others v City of Johannesburg and Others 2008 (5) BCLR 475 (CC)

Facts and decision

This case was an application to the Constitutional Court by the occupiers for leave to appeal against the Supreme Court of Appeal's (SCA) decision to allow their eviction. The SCA authorised the eviction of the occupiers of two buildings in the inner city of Johannesburg because the buildings were

unsafe and unhealthy. After the Constitutional Court heard the case and before it made a decision, it ordered the parties to engage with each other meaningfully around alleviating the plight of the applicants (the occupiers), and the provision of alternative and permanent accommodation. The parties reached an agreement, which was endorsed by the Court and later implemented. In its judgment, the Constitutional Court said that:

- A municipality must engage meaningfully with people before evicting them if they would become homeless after the eviction.
- While the City must eliminate unsafe and unhealthy buildings, it also has a constitutional duty to provide access to adequate housing. This means that it must consider the potential for people to become homeless when it decides to evict them.
- Section 12(6) of the National Building Regulations and Building Standards Act 103 of 1977 makes it a crime to stay in buildings after an eviction notice has been served by the City but before a court has ordered an eviction. This is unconstitutional because it contradicts section 26(3) of the Constitution, which prohibits arbitrary evictions.

Important points

- A municipality that evicts people from their homes without first meaningfully engaging with them acts in a way that is against the spirit and purpose of its constitutional obligations (para 16).
- Section 26(2) of the Constitution says a municipality must respond in a reasonable way to potentially homeless people with whom it engages (para 18).
- The Constitution places a duty on a municipality to engage meaningfully with people who would become homeless if it evicts them. Therefore, when a municipality is trying to evict people, a court must take into account whether there has been meaningful engagement to comply with section 26(3) of the Constitution (paras 18 and 21).

Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others 2009 (9) BCLR 847 (CC)

Facts and decision

This case was about the eviction of a large and settled community from their homes in the Joe Slovo informal settlement in Cape Town. They were evicted so that the N2 Gateway Housing Project could go ahead. This project was a pilot project to test the implementation of the BNG programme. The Constitu-

tional Court ordered that the residents who were evicted must be relocated. To make the eviction 'just and equitable', the Court also set out certain requirements:

- It specified in detail the quality and nature of the temporary housing where people were relocated to, including the provision of services and facilities.
- It ordered the respondents in the case (Thubelisha Homes, the national Minister of Housing and the Western Cape provincial Minister of Local Government and Housing) to engage meaningfully with the residents on the timeframe of the relocation and also to consult with affected residents on each individual relocation.
- It ordered the respondents to ensure that 70% of the new homes to be built at Joe Slovo were allocated to current Joe Slovo residents, or former residents who had moved to Delft previously to make way for the N2 Gateway Project.

The eviction order was suspended by the Constitutional Court. During the engagement process, it was found that there was not enough money or land available to implement the eviction order. There were also other serious flaws with the N2 Gateway Project. The possibility of *in situ* upgrading at Joe Slovo is now being investigated.

Important points

- It would be ideal for the state to engage individually and carefully with each of the families involved (para 117).
- Government must make an effort to engage with communities rather than impose decisions taken at a political level (para 166).
- When a housing programme is put into place, there must be meaningful engagement between the government and those involved (para 238).
- The process of engagement does not require the parties to agree on every issue. The goal is to find a mutually acceptable solution to the difficult issues that confront the government and residents in providing adequate housing (para 244).
- The government must engage meaningfully in terms of section 26(2) of the Constitution. It must also act fairly in terms of section 33 of the Constitution, as stated in PAJA (para 297). These two obligations must be understood together.

Facts and decision

This case was a challenge to the KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act 6 of 2007 (Slums Act). This Act aims to eliminate slums in KwaZulu-Natal. It allows for evictions without meaningful engagement. Section 16 of the Act says a municipality must start proceedings for the eviction of unlawful occupiers if the owner or person in charge of the land fails to do so within the time period stated by the MEC. This section was challenged in the *Abahlali* case. The Constitutional Court said that:

- Section 16 of the Act was unconstitutional. It gave too much power to the MEC and seriously undermined the protections in section 26(2) of the Constitution (read with other housing legislation).

Important points

- Reasonable engagement is not only required by section 26(2) of the Constitution but is also required in all evictions under the PIE Act (para 69).
- If engagement takes place after there has been a decision to institute eviction proceedings, it cannot be genuine or meaningful (paras 69 and 120).
- Proper engagement includes listening to the wishes of the people who are to be evicted. It also includes thinking about whether the areas where they live may be upgraded *in situ* and whether alternative accommodation will be provided. The engagement would also include discussions on the way the eviction will take place and the timeframes for it (para 114).

12. Contact details

Below are details of some organisations and institutions that could provide help or advice where engagement about evictions was not meaningful. They can also provide general advice on meaningful engagement in accessing socio-economic rights.

Organisation/institution /social movement	Contact details
Abahlali baseMjondolo (AbM)	Durban Suite 416 Tower B. Salisbury Centre 347-351 Dr Pixley kaSeme aka West Street Durban 4001 Tel: 031 304 6420/083 547 0474 (S'bu Zikode) Fax: 031 304 6436 Website: www.abahlali.org Cape Town Tel: 073 246 2036 (Mzonke Poni) Email: abmwesterncape@abahlali.org
Anti-Privatisation Forum (APF)	6th Floor, Vogas House 123 Pritchard Street Johannesburg 2001 Tel: 011 333 8356 Johannesburg: 082 212 6518 / 082 663 1133 East Rand: 073 948 3357 Vaal: 083 572 8993 Email: drdalet@metroweb.co.za Website: http://apf.org.za
Centre for Applied Legal Studies (CALs)	DJ du Plessis Building University of the Witwatersrand West Campus Braamfontein 2001 Tel: 011 717 8600 Fax: 011 403 2341 Email: mary.munyembate@wits.ac.za Website: www.law.wits.ac.za/cals

Community Law Centre (CLC)

New Social Sciences Building
University of the Western Cape
Modderdam Road
Bellville 7535
Tel: 021 959 2590/3708
Fax: 021 959 2411
Email: serp@uwc.ac.za
Website: www.communitylawcentre.org.za

Community Organisation
Resource Centre (CORC)/
Slum Dwellers International
(SDI)

3rd Floor Above Seven Eleven
Corner Raapenberg and Surrey Road
Mowbray 7705
Cape Town
Tel: 021 689 9408
Fax: 021 689 3912
Email: admin@courc.co.za
Website: www.courc.co.za/www.sdinet.org

Lawyers for Human Rights (LHR)

Pretoria

Kutlwanong Democracy Centre
357 Visagie Street
Pretoria 0002
Tel: 012 320 2943
Fax: 012 320 2949 / 320 7681
Website: www.lhr.org.za

Johannesburg

2nd Floor Braamfontein Centre
23 Jorissen Street (corner of Jorissen and Jan
Smuts)
Braamfontein 2001
Tel: 011 339 1960
Fax: 011 339 2665

Durban

Room S104, Diakonia Centre
20th Diakonia Avenue (formerly St. Andrews Street)
Durban 4001
Tel: 031 301 0531
Fax: 031 301 0538

Stellenbosch

Corobrick Offices
Bridge Street
Stellenbosch 7599
Tel: 021 887 1003
Fax: 021 883 3302

Legal Resources Centre (LRC)

Johannesburg

15th and 16th Floor, Bram Fischer Towers
20 Albert Street, Marshalltown Johannesburg 2001
Tel: 011 836 9831
Fax: 011 834 4273
Website: www.lrc.org.za

Cape Town

3rd Floor, Greenmarket Place
54 Shortmarket Street
Cape Town 8001
Tel: 021 481 3000
Fax: 021 423 0935

Durban

N240 Diakonia Centre
20 St Andrews Street
Durban 4001
Tel: 031 301 7572
Fax: 031 304 2823

Organisation of Civic Rights
(OCR)

Suite 304
Salisbury House
332 Smith Street
Durban 4001
Tel: 011 356 5860
Fax: 011 339 5950
Email: civicrights@ocr.org.za
Website: www.ocr.org.za

Socio-Economic Rights Institute
of South Africa (SERI)

6th Floor, Aspern House
54 De Korte Street
Braamfontein 2001
Tel: 011 356 5860
Fax: 011 339 5950

	<p>Email: kate@seri-sa.org Website: www.seri-sa.org</p>
<p>South African Human Rights Commission (SAHRC) National Office</p>	<p>29 Princess of Wales Terrace Corner of York and St Andrews Streets Parktown 2193 Johannesburg Tel: 011 484 8300 Fax: 011 484 7149 Website: www.sahrc.org.za</p>
<p>University of the Western Cape Legal Aid Clinic</p>	<p>Old Library Building University of the Western Cape Modderdam Road Bellville 7535 Tel: 021 959 2756 Fax: 021 959 2747 Website: www.uwc.ac.za</p>
<p>University of the Witwatersrand Law Clinic</p>	<p>Private Bag 3, Wits University 2050 Opposite Olive Schreiner School of Law West Campus, University of the Witwatersrand Braamfontein 2001 Tel: 011 717 8562 Fax : 011 717 8519 Website: http://web.wits.ac.za/Academic/CLM/Law/CentresClinicsResearch/WitsLawClinic/contact.htm</p>
<p>Western Cape Anti-Eviction Campaign (AEC)</p>	<p>Tel: 076 186 1408 (Ashraf Cassiem) Email: aec@antieviction.org.za antieviction@gmail.com Website: http://antieviction.org.za</p>

Note: Paralegal Advice Offices also provide advice and assistance and advice in understanding and accessing socio-economic rights.



UNIVERSITY OF THE WESTERN CAPE



UNIVERSITY OF THE WESTERN CAPE



UNIVERSITY OF THE WESTERN CAPE



20 Years of Excellence



20 Years of Excellence



20 Years of Excellence

