

# Washington University Global Studies Law Review

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VOLUME 9

NUMBER 3

2010

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## ENGAGEMENT’S POSSIBILITIES AND LIMITS AS A SOCIOECONOMIC RIGHTS REMEDY

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### I. INTRODUCTION

In February 2009, the Constitutional Court of South Africa (the “Court”) developed an innovative remedy in housing rights cases that it termed “engagement.”<sup>1</sup> In its most basic form, engagement requires municipalities to use negotiation or mediation when it becomes clear that the adoption of a new policy will require evicting residents.<sup>2</sup> But the Court’s description of

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1. *Occupiers of 51 Olivia Road, Berea Township v. City of Johannesburg (Olivia Road)* 2008 (5) BCLR 475 (CC) (S. Afr.).

2. *Id.*

engagement envisions much broader application and imposes potentially far-reaching obligations on municipalities and other levels of government. At the same time, engagement offers a potentially powerful tool to civil society organizations active in socioeconomic rights issues.

Since first developing engagement in *Olivia Road*,<sup>3</sup> the Court has used the remedy in only a handful of cases.<sup>4</sup> In one case, the Court unsuccessfully attempted to use engagement to resolve an urgent dispute over the timeframe and terms for closing camps that housed refugees of the xenophobic violence that wrecked South Africa in May 2008.<sup>5</sup> In a second case, the Court used engagement to give residents some measure of control over the implementation<sup>6</sup> of what one commentator called “the largest judicially sanctioned eviction of a community in [South Africa’s] post-apartheid period.”<sup>7</sup> These two cases, together with *Olivia Road*, offer important lessons for understanding both the untapped potential of engagement as well as its limits.

This Article first analyzes the Court’s three engagement decisions. It then divides engagement into two different categories—litigation engagement and political engagement—and offers suggestions for transforming the process into a more effective remedy in each category. Drawing on the work of Charles Epp, this Article argues that political engagement, if structured correctly, offers the greatest potential as an effective mechanism for enforcing socioeconomic rights. Realization of that potential will require a sustained commitment by civil society organizations active in socioeconomic rights issues and a shift from using engagement as a litigation tactic to using it as a tool for political advocacy.

3. *Id.*

4. *Mamba v. Minister of Soc. Dev.* 2008, Case No. CCT 65/08 (CC) (S. Afr.); *Residents of Joe Slovo Community Western Cape v. Thubelisha Homes (Joe Slovo)* 2009 (9) BCLR 847 (CC) (S. Afr.). As this Article goes to press, the Court recently discussed, but did not use the remedy in one other case, *Abahlali baseMjondolo Movement S. Afr. v. Premier of KwaZulu-Natal* 2010 (2) BCLR 99 (CC) (S. Afr.). A recently published report on engagement contains a useful overview and discussion of many of the issues this Article raises. See Lauren Royston & Kate Tissington, *Workshop Report: Meaningful Engagement* (Dec. 2009), available at [http://web.wits.ac.za/NR/rdonlyres/D1176AF9-340B-413B-AF79-2F1152BE0CDA/0/Meaningfulengagementreport\\_Dec09.pdf](http://web.wits.ac.za/NR/rdonlyres/D1176AF9-340B-413B-AF79-2F1152BE0CDA/0/Meaningfulengagementreport_Dec09.pdf).

5. *Mamba*, Case No. CCT 22/08, ¶¶ 1–2, 5.

6. *Joe Slovo*, 2009 (9) BCLR 847.

7. Sandra J. Liebenberg, *Joe Slovo Eviction: Vulnerable Community Feels the Law from the Top Down*, BUSINESS DAY, June 22, 2009, <http://www.businessday.co.za/articles/content.aspx?id=73812>.

## II. THE ENGAGEMENT CASES

### A. Olivia Road: *A Successful Engagement*

*Olivia Road* began as a series of emergency applications in the Witwatersrand High Court<sup>8</sup> by the City of Johannesburg to evict over three hundred people from six properties in inner-city Johannesburg.<sup>9</sup> The City sought these evictions as part of a broader regeneration strategy, one aspect of which was the identification, clearance, and ultimate redevelopment of over two hundred “bad” buildings—with some 67,000 occupants—in the inner-city district.<sup>10</sup>

Several civil society groups and NGOs coordinated the residents’ challenge to these evictions with tremendous initial success.<sup>11</sup> The High Court rejected the City’s eviction application and issued a broad order holding that the City had violated section 26 of the Constitution, the right to access to adequate housing, by pursuing these evictions without a plan to house the evicted residents.<sup>12</sup> The court also enjoined the City from seeking to evict the residents, and ordered it to develop a plan for housing the litigants and other residents, as required by *Gov’t of S. Afr. v. Grootboom*, the court’s first housing rights decision.<sup>13</sup> But, on appeal, the intermediate appellate court, the Supreme Court of Appeal (“SCA”), reversed the High Court’s order and held that the evictions were constitutionally permissible and triggered only a very limited responsibility by the City to relocate the displaced residents.<sup>14</sup>

The residents appealed the SCA’s order to the Constitutional Court, which accepted the application in May 2007.<sup>15</sup> The Court heard oral argument on August 28, 2007, and two days later issued its first

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8. The High Court of South Africa: Witwatersrand Local Division.

9. *City of Johannesburg v. Rand Props. (Pty) Ltd.* (*City of Johannesburg High Ct.*) 2006, Case No. 04/10330, ¶ 2 (HC, Witwatersrand Local Div.) (S. Afr.).

10. See CTR. ON HOUS. RIGHTS & EVICTIONS, ANY ROOM FOR THE POOR? FORCED EVICTIONS IN JOHANNESBURG, SOUTH AFRICA 41–46, 60–64 (2005), [http://www.cohre.org/store/attachments/Any\\_Room\\_for\\_the\\_Poor\\_8Mar05.pdf](http://www.cohre.org/store/attachments/Any_Room_for_the_Poor_8Mar05.pdf) (describing the regeneration plan and the practice of forced evictions) [hereinafter ANY ROOM?].

11. See *id.*

12. *City of Johannesburg High Ct.*, Case No. 04/10330, ¶ 52.

13. *Id.* ¶¶ 3–4. In *Grootboom*, another eviction case, the Constitutional Court held that the housing policies at the national, provincial, and local levels were unconstitutional because they lacked any plans for dealing with the emergency needs of citizens facing eviction, and required the government to develop plans for dealing with such situations. *Gov’t of the Rep. of S. Afr. v. Grootboom* 2000, Case No. CCT 11/00 (CC) (S. Afr.).

14. *City of Johannesburg v. Rand Props. (Pty) Ltd.* 2007 SCA 25 (SCA) (S. Afr.).

15. See Interim Order dated 30 Aug. 2007, *Occupiers of 51 Olivia Road, Berea Township v. City of Johannesburg* 2007, Case No. CCT 24/07 (CC) (S. Afr.).

“engagement” order requiring the parties to “engage with each other meaningfully . . . in an effort to resolve the differences and difficulties aired in this application in the light of the values of the Constitution, the constitutional and statutory duties of the municipality and the rights and duties of the citizens concerned.”<sup>16</sup> The Court also ordered the parties to file affidavits with the Court approximately one month later, reporting the results of the negotiations.<sup>17</sup>

After engaging over several months, the parties eventually reached a partial settlement that largely granted the residents the terms they had sought and won at the High Court, and also incorporated provisions for broader change in the City’s inner-city housing policy.<sup>18</sup> Among other things, the City agreed to cease its eviction attempts and to take specific measures to make the existing buildings safer and more habitable by cleaning the buildings and providing sanitation services, access to water, and functioning toilets.<sup>19</sup> Before relocating the residents from the buildings designated for redevelopment, the City agreed to refurbish several other buildings in inner-city Johannesburg and to provide essential services at reasonable cost.<sup>20</sup> Finally, the City agreed to continue to engage on longer-term solutions to the housing crisis.<sup>21</sup>

The parties returned to the Court seeking not only approval of the specific terms of the settlement, but also a decision on the larger issue central to the case: whether the City had a plan that complied with *Grootboom*’s requirements.<sup>22</sup> While the settlement largely remedied the concerns of individual residents, the *Grootboom* issue was key to whether the litigation would have effect beyond these specific individuals. At this point, both sides viewed the settlement as important but subsidiary to the plan issue, and many expected the Court to use this decision as an opportunity to clarify and possibly expand the substantive requirements of section 26 as it had done in a very tentative manner in *Grootboom*.<sup>23</sup> The City argued that a plan it had developed as the litigation progressed was adequate, and the Court should

16. *Id.* ¶ 1.

17. *Id.* ¶ 3.

18. Agreement dated 29 Oct. 2007, *Occupiers of 51 Olivia Road, Berea Township v. City of Johannesburg* 2007, Case No. CCT 24/07 (CC) (S. Afr.).

19. *Id.* ¶¶ 2–4.

20. *Id.* ¶¶ 5–8.

21. *Id.* ¶ 18.

22. See Brian Ray, *Extending the Shadow of the Law: Using Hybrid Mechanism to Develop Constitutional Norms in Socioeconomic Rights Cases*, 2009 UTAH L. REV. 797, 822.

23. See *id.* at 824 (discussing the differences between the Court’s enforcement approach in *Grootboom* and *Olivia Road*).

approve it.<sup>24</sup> The residents argued that the City failed to consult them or others on the plan and that the Court should order further briefing on the issue.<sup>25</sup>

To the surprise of both sides, in its final opinion and order issued several weeks later, the Court refused to address the *Grootboom* issue.<sup>26</sup> Instead, the Court formalized the engagement process that resulted in the settlement in this case into a constitutional requirement for all future cases where eviction is a possibility. The Court first located engagement within several constitutional provisions, including the state's obligation to "encourage the involvement of communities and community organizations in local government," as well as the rights to human dignity and life.<sup>27</sup> The Court then described in more specific terms what engagement should entail.

First, the Court re-emphasized that engagement is part of the broader reasonableness requirement it had established in *Grootboom* and that reasonableness may in some situations require "mak[ing] permanent housing available and, . . . provid[ing] no housing at all. The possibilities between these extremes are almost endless."<sup>28</sup>

Second, in most cases, and in particular where a large-scale program is involved, engagement cannot be "ad hoc."<sup>29</sup> This means that whenever government begins a long-term planning process like the City of Johannesburg's redevelopment project, the entity responsible must build engagement into that process from the outset. Long-term engagement of this type will require a cadre of "competent sensitive council workers skilled in engagement."<sup>30</sup> In other words, key bureaucratic and administrative structures must incorporate engagement and engagement training. The government has an obligation to use those resources to engage well before litigation is even a possibility.

Third, the Court acknowledged the vulnerability of citizens facing evictions and their need for skilled representation.<sup>31</sup> To deal with this power imbalance, the Court specifically recognized that civil society groups have a constitutional role to play: "Civil society organizations that support the

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24. See *Olivia Road*, 2008 (5) BCLR 475, ¶¶ 32–34.

25. *Id.*

26. *Id.*

27. *Id.* ¶ 16.

28. *Id.* ¶ 18.

29. *Id.* ¶ 19.

30. *Id.*

31. *Id.* ¶ 15.

peoples' claims should preferably facilitate the engagement process in every possible way."<sup>32</sup>

Finally, the Court required the government to develop and maintain a public record of each engagement so that courts could later review not only the outcome but also the engagement process.<sup>33</sup> Emphasizing that “secrecy is counter-productive to the process of engagement,” the Court stated “the provision of a complete and accurate account of the process of engagement including at least the reasonable efforts of the municipality with that process would ordinarily be essential.”<sup>34</sup> Courts are then empowered to review “[w]hether there had been meaningful engagement between a city and the resident about to be rendered homeless.”<sup>35</sup> The Court emphasized that failure to meaningfully engage can by itself—irrespective of the substantive merits of the policy requiring eviction—be the basis for a court to deny an eviction request: “The absence of engagement or the unreasonable response of a municipality in the engagement process would ordinarily be a weighty consideration against the grant of an eviction order.”<sup>36</sup>

*Olivia Road* represents the high watermark for engagement to date. Although real engagement occurred extremely late in the process—literally after the parties had left the courthouse—it nonetheless was highly effective in obtaining substantial relief with genuine commitment to the remedy from both sides. As discussed in Part III, below, the procedural posture of the case, in particular the High Court’s injunction, played an important role in the effectiveness of engagement in this case.

The Court’s next two attempts at ordering engagement were less successful, although the process remains incomplete in one of those cases. After describing those two cases, Part III compares and contrasts them with the extraordinary success of *Olivia Road*. It then divides the different situations in which engagement can be used into two broad categories and offers suggestions for making engagement a more effective remedy in each.

### B. Mamba: *A Failed Engagement*

This second case provides an example of the Court extending engagement to a new context: closure of refugee camps by the Gauteng government.<sup>37</sup> The Court’s reliance on engagement to deal with a highly charged and urgent

32. *Id.* ¶ 20.

33. *Id.* ¶ 21.

34. *Id.*

35. *Id.* ¶ 22.

36. *Id.* ¶ 21.

37. *Mamba*, Case No. CCT 22/08, ¶ 2.

situation is strong evidence of its commitment to this remedy. But the final result—complete refusal by the provincial government to meaningfully engage—illustrates the problems with over-reliance on engagement, and more specifically the risks of using engagement to deal with a rapidly changing situation where the government faces fewer formal constraints and has strong incentives to implement its original policy.

The violent xenophobic protests that began in Johannesburg and extended to Durban and Cape Town in May 2008 displaced tens of thousands of people in South Africa.<sup>38</sup> Provincial governments in several areas, including Gauteng, which covers Johannesburg, established temporary camps to provide security and shelter for victims of the violence. Several NGOs and other organizations provided logistical and financial support to the relief effort and began working with provincial and local governments on medium- and long-term solutions for the camp residents.<sup>39</sup>

Once the violence subsided, an urgent debate developed over how to deal with the refugees that remained in the temporary camps. Advocates for the refugees argued that simple closure posed real risks to the refugees and would also fail to deal with the systemic issues that gave rise to the violence.<sup>40</sup> Several provincial governments, however, characterized the violence as isolated incidents and sought to close the camps soon after the attacks subsided.<sup>41</sup>

The Gauteng government was among the most aggressive in these efforts, initially ordering closure of several camps by the end of July 2008 and later extending that deadline to August 15, 2008.<sup>42</sup> Several organizations, led by

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38. See, e.g., CoRMSA NEWSLETTER (Consortium for Refugees & Migrants in S. Afr. [CoRMSA], Johannesburg, S. Afr.), Dec. 19, 2008, at 1 (“As we come to the end of a turbulent year, let us reflect on what has been an extremely challenging year for us all. We witnessed the widespread violent xenophobic attacks on foreign nationals from January which then culminated in the now infamous May attacks.”), available at <http://www.cormsa.org.za/wp-content/uploads/2009/05/CoRMSA-NEWSLETTER-11.pdf>.

39. See, e.g., *Xenophobia Stakeholders Meeting*, CoRMSA NEWSLETTER (CoRMSA, Johannesburg, S. Afr.), May 9, 2008 (“On 17th April, a number of civil society organisations and one government department met to discuss further issues relating to the spate of xenophobic attacks that have plagued the country.”), available at <http://www.cormsa.org.za/wp-content/uploads/2009/05/CoRMSA-NEWSLETTER-10.pdf>.

40. See, e.g., Press Release, CoRMSA, CoRMSA Calls for Government to Publish Reintegration Plan for Victims of Xenophobic Violence (Aug. 1, 2008), available at <http://www.cormsa.org.za/press/press-statements/> (follow “CoRMSA Calls for Government to Publish Reintegration Plans for Victims of Xenophobic Violence” hyperlink).

41. See, e.g., Fundile Majola, ‘No More Attacks Now, Camps Must Close’, CAPE ARGUS, Oct. 2, 2008, <http://www.capeargus.co.za/index.php?fSectionId=3571&fArticleId=io11222952764116R122>.

42. Press Release, CoRMSA, *supra* note 40; see also Press Release, CoRMSA, Wits Law Clinic and CoRMSA Launch Legal Action against Government to Ensure Sustainable Reintegration Process (Aug. 4, 2008), available at <http://www.cormsa.org.za/press/press-statements/> (follow “Wits Law

the Consortium for Refugees and Migrants in South Africa (CoRMSA), an umbrella organization that includes several of the organizations active in the relief efforts, pressed the government to delay the closures until it developed and published a reintegration plan.<sup>43</sup> When the government ignored their request and publicly announced plans to move forward with the closures, CoRMSA sued for an injunction to stop the closures.<sup>44</sup>

After losing at the High Court,<sup>45</sup> the refugees sought direct access to the Constitutional Court even though the Court was in recess.<sup>46</sup> The Court held an emergency hearing on the application the following Monday, August 18, 2008 and issued an interim order on August 21.<sup>47</sup> The Order temporarily prohibited complete closure of the camps, subject to certain limitations, including the right to consolidate shelters and to deport illegal immigrants.<sup>48</sup> But it also required, in language nearly identical to the *Olivia Road* engagement order, that the parties

engage with each other meaningfully and with all other stakeholders as soon as it is possible for them to do so in order to resolve the differences and difficulties aired in this application in the light of the values of the Constitution, the constitutional and statutory obligations of the respondents and the rights and duties of the residents of the shelters.<sup>49</sup>

Paragraph 5 of the Order specified that the engagement should include “[o]ther role players,” including several NGOs that had provided support to the camps.<sup>50</sup> As in *Olivia Road*, the Court also required the parties to report the results of the engagement to the Court within several weeks.<sup>51</sup>

The Gauteng government adopted a narrow reading of the Order and refused outright to negotiate a reintegration plan with CoRMSA and others. Instead, the provincial government read the August 21 Order as requiring merely that it keep the refugees and the groups listed in the Order apprised of

Clinic and CoRMSA Launch Legal Action against Government to Ensure Sustainable Reintegration Process” hyperlink).

43. Press Release, CoRMSA, *supra* note 40.

44. Press Release, CoRMSA, *supra* note 42.

45. *Mamba v. Minister of Soc. Dev.* 2008, Case No. 36573/08 (HC, Pretoria Provincial Div.) (S. Afr.).

46. *No Decision on Refugees’ Application*, INDEPENDENT ONLINE, Aug. 14, 2008, [http://www.iol.co.za/index.php?set\\_id=1&click\\_id=13&art\\_id=nw20080814091112509C499285](http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=nw20080814091112509C499285).

47. Order dated 21 Aug. 2008, *Mamba*, Case No. CCT 65/08, ¶ 1 (CC) (S. Afr.).

48. *Id.*

49. *Id.*

50. *Id.* ¶ 5.

51. *Id.* ¶ 3.

its continued plans for closing the camps and moved forward with the closure process.<sup>52</sup>

Following a hearing in September, the Constitutional Court tried to force engagement once again, but with little success. The Court issued another interim order requiring the government to maintain the camps and continue engagement under the guidelines of the August 21 Order.<sup>53</sup> But the Gauteng government persisted in its narrow view of the Court's orders and began closing the camps without consulting a reintegration plan.<sup>54</sup> On October 16, 2008, CoRMSA withdrew the application and the case was dismissed as moot.<sup>55</sup>

*Mamba* demonstrates that engagement will not always result in the kind of successful settlement produced in *Olivia Road*. The critical questions are what made the difference in these two cases and how the procedural posture of each case played a significant role. In *Olivia Road*, the High Court's initial injunction put a stop to the City's eviction process.<sup>56</sup> Additionally, while the SCA's judgment permitted the City to resume evictions, it still placed restrictions on that ability and imposed certain costs that required revising the original policy. Once the case reached the Constitutional Court, the City was already well on its way to instituting a revised policy, and the engagement order gave the residents and the groups representing them sufficient leverage to force the City to take seriously their views on the policy.

*Mamba* presented precisely the opposite situation. The High Court found no basis for a challenge to the closures; there was no intermediate appellate review and the refugees asked the Constitutional Court to address a fluid situation with almost no substantive record.<sup>57</sup> Under those circumstances, it was quite easy for the Gauteng government to treat engagement as nothing

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52. Duncan Breen's Sept. 2008 Affidavit in Terms of Paragraph 3 of the Court Order dated 21 Aug. 2008, *Mamba*, Case No. CCT 65/08, ¶¶ 8, 22, 31–43 (describing the sequence of events following the order and concluding: "In my view one cannot describe [the single meeting the Gauteng government attended] as a 'meaningful engagement' as required by the Constitutional Court order.").

53. See Order dated 16 Sept. 2008, *Mamba*, Case No. CCT 65/08, ¶ 1 (CC) (S. Afr.) (renewing Order dated 21 Aug. 2008 to maintain camps and continue engagement); Press Release, CoRMSA, Postponement of Constitutional Court Case Presents Opportunity to Address Concerns of Shelter Residents on Reintegration (Sept. 17, 2008), available at [http://www.cormsa.org.za/press/press\\_statements/](http://www.cormsa.org.za/press/press_statements/) (follow "CoRMSA Postponement of Constitutional Court Case Presents Opportunity to Address Concerns of Shelter Residents on Reintegration" hyperlink).

54. See *Refugees Turfed Out of Their Tents*, INDEPENDENT ONLINE, Oct. 6, 2008, [http://www.iol.co.za/index.php?set\\_id=1&click\\_id=3069&art\\_id=nw20081006172807464C184214](http://www.iol.co.za/index.php?set_id=1&click_id=3069&art_id=nw20081006172807464C184214).

55. Press Release, CoRMSA, Consortium for Refugees and Migrants in South Africa Withdraws Constitutional Court Case; Calls for a Thorough Review of Disaster Management Mechanisms (Oct. 16, 2008), available at [http://www.cormsa.org.za/press/press\\_statements](http://www.cormsa.org.za/press/press_statements) (follow "CoRMSA Withdraws Constitutional Court Case" hyperlink).

56. See discussion *supra* at note 12 and accompanying text.

57. See discussion *supra* at notes 12–17 and accompanying text.

more than the equivalent of a formal notification requirement rather than the real consultation that the Court plainly expected.

These differences highlight the political nature of engagement and its dependence on sufficient incentives for the political branches to take the process seriously. The ambiguity inherent in engagement provides ample opportunity for resistance and, without additional political constraints, allows the government to fail to take it seriously in many situations without real political cost. The Gauteng government's narrow reading of what engagement requires exemplifies this weakness.

These differences also suggest that courts must use the remedy in ways that both encourage the political branches to take it seriously and also permit stronger court intervention where appropriate. I discuss these possibilities in Part III, below.

More broadly, the *Mamba* result reinforces the need to develop engagement as a structured long-term process, rather than relying on it solely as an ad hoc remedy during an ongoing case. As the Court emphasized in *Olivia Road*, engagement will work best where it is built into the policy development process from the start.<sup>58</sup> This is the basis for what I call "political engagement," developed in Part III.B, below.

Pushing engagement back into the policy-development process raises difficult questions. For example, at what level of government and at what point in the process does it make sense to engage, and with whom should the authorities engage? In the Court's most recent—and as yet incomplete—engagement effort, Justice Sachs' critiques of the failed engagements that led to the litigation provide some starting points for answering those questions. In Part III.B, I describe those critiques and then, drawing on Charles Epp's studies of administrative implementation of rights, I offer suggestions for how engagement might be developed into more of a political tool rather than merely a litigation tactic.

### C. Joe Slovo: *Refining Engagement*

The Court's most recent decision incorporating engagement involved the City of Cape Town's major redevelopment project along the N2 Highway, the principal north-south corridor leading into Cape Town.<sup>59</sup> The project required the eviction and relocation of over 4,000 families living in an informal community known as the Joe Slovo settlement to Delft, an area

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58. *Olivia Road*, 2008 (5) BCLR 475, ¶ 19.

59. *Joe Slovo*, 2009 (9) BCLR 847. See also *Thubelisha Homes v. Various Occupants (Joe Slovo High Ct.)* 2008, Case No. 13189/07, ¶ 7 (HC, Cape of Good Hope Provincial Div.) (S. Afr.).

much further from the city where many of the residents worked.<sup>60</sup> This project was part of the *Breaking New Ground* policy—a broader national policy developed following *Grootboom* to redevelop informal settlements throughout the country—and was intended to serve as a model for other similar projects.<sup>61</sup>

Many of the residents originally embraced the plan, in part because the City and the developer promised that most of them would be entitled to return to the new development and acquire new low-cost rental housing.<sup>62</sup> But when the first of the three phases of the project was complete, none of the houses were allocated to the lowest rental range the residents say they were promised.<sup>63</sup> In addition, phase 2 included no housing for low-income residents, only “bonded housing,” i.e., market-rate housing for purchase through a mortgage.<sup>64</sup>

Upset at what they called the “broken promises” of the first two phases, the residents began to organize both formal and informal protests against the development.<sup>65</sup> The local, regional, and national governments, along with the developer, Thubelisha Homes, brought an emergency application in the Cape High Court seeking an injunction ordering the eviction of the residents under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, known as “PIE.”<sup>66</sup>

The High Court issued a decision permitting the relocations to proceed and denying the residents relief shortly after the Constitutional Court issued its opinion in *Olivia Road*.<sup>67</sup> The judge made passing reference to the engagement requirement and, in a parenthetical aside, found that the numerous meetings the City Council held with residents “along with multiple averments in the court papers of meetings and/or consultations that were held with residents of Joe Slovo indicates that there was a sufficient amount of engagements . . . regarding this matter.”<sup>68</sup>

The residents appealed directly to the Constitutional Court.<sup>69</sup> Several of the same groups that were active in organizing the residents in *Olivia Road*

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60. *Joe Slovo*, 2009 (9) BCLR 847, ¶ 125 (Moseneke, DCJ).

61. *Id.* ¶ 24 (Yacoob, J.); *id.* ¶ 327 (Sachs, J.).

62. *Id.* ¶ 327 (Sachs, J.); *id.* ¶¶ 31–33 (Yacoob, J.).

63. *Id.* ¶¶ 31–34 (Sachs, J.).

64. *Id.* ¶ 32 (Yacoob, J.); *id.* ¶ 371 (Sachs, J.).

65. *Id.* ¶ 34 (Yacoob, J.); *id.* ¶¶ 327, 376–378 (Sachs, J.).

66. *Id.* ¶ 15 (Yacoob, J.).

67. *Joe Slovo High Ct.*, Case No. 13189/07.

68. *Id.* ¶ 24.

69. See Pearlie Joubert, ‘It’s Our Duty Not to Be Silent’, MAIL & GUARDIAN ONLINE, Aug. 24, 2008 (“In a surprise move, the Constitutional Court gave the community permission to challenge the

submitted amicus curiae briefs to the Constitutional Court in which they argued specifically that the City of Cape Town failed to adequately engage with the residents.<sup>70</sup> The Court granted those groups permission to present this issue at oral argument.<sup>71</sup> During the hearing, the Deputy Chief Justice Dikgang Moseneke, in a move reminiscent of *Olivia Road's* interim order, suggested the amici were correct by “interven[ing] to suggest that the parties talk to each other and advise the court on a ‘just and equitable’ solution.”<sup>72</sup>

Unlike in *Olivia Road*, however, this last-ditch effort at resolving the issues through negotiation failed, and the Court issued its decision in June, 2009.<sup>73</sup> The decision consists of five different opinions spanning 221 pages. All five opinions agree that neither section 26 nor the PIE protects the residents from eviction, and all five also concur in the final order that prescribes a structured eviction process requiring engagement with the residents to determine most of the significant details for eviction and relocation.<sup>74</sup>

Early reaction has been generally critical of the Court’s refusal to find in favor of the residents. Sandra Liebenberg describes the result as “the largest judicially sanctioned eviction of a community in [South Africa’s] post-apartheid period.”<sup>75</sup> Pierre de Vos, while acknowledging in his blog that “the judgment shows a genuine concern for the plight of the Joe Slovo residents,” criticizes the substantive holdings as failing to expect “the state to act in an honest manner and to cater also for the most vulnerable and poor members of a well-established community whose area is to be upgraded.”<sup>76</sup>

From the perspective of the success of the engagement remedy, *Joe Slovo* represents a mixed result. It is clear that at least some members of the Court hoped that engagement would work as it did in *Olivia Road*, relieving them of the responsibility for deciding the difficult substantive issues presented in the case; Justice Moseneke’s reported remarks are evidence of that.<sup>77</sup> Justice

ruling and approach it without going through the Supreme Court of Appeal.”), <http://www.mg.co.za/printformat/single/2008-08-24-its-our-duty-not-to-be-silent>.

70. See *id.* (noting that “[t]he community law centre of the University of the Western Cape and the Centre on Housing Rights for Evictions were admitted as friends of the court, in support of the resident’s [sic] right to be properly consulted before being evicted.”).

71. See Further Directions dated 15 Aug. 2008, *Joe Slovo*, Case No. CCT 22/08 (CC) (S. Afr.).

72. Joubert, *supra* note 69.

73. *Joe Slovo*, 2009 (9) BCLR 847.

74. *Id.* ¶¶ 4–5 (Yacoob, J.).

75. Liebenberg, *supra* note 7.

76. Constitutionally Speaking, <http://constitutionallyspeaking.co.za/joe-slovo-case-the-good-the-bad-and-the-mostly-unstated/> (June 14, 2009).

77. See *supra* text accompanying note 72.

Sachs also mentioned these efforts in passing, and participants in the case confirm that the Court urged the parties to engage following oral argument.<sup>78</sup>

But the residents of *Joe Slovo* were in a different position than those in *Olivia Road* and had good reasons to resist further engagement. First, as Justice Sachs pointed out, the government's attempts at engagement up to that point were characterized by "frequent employment of a top-down approach where the purpose of reporting back to the community was seen as being to pass on information about decisions already taken rather than to involve the residents as partners in the process of decision-making itself."<sup>79</sup> This, combined with their sense that the government had deceived them about the terms of the project, hardened the residents' position over time and left them less willing to trust either that the government would negotiate seriously or would fulfill whatever commitment resulted from the negotiations.<sup>80</sup>

More importantly, unlike the *Olivia Road* squatters, most of whom had no significant attachment to the specific buildings in which they were living, the *Joe Slovo* residents were part of a long-standing community that would be significantly disrupted even if the government honored the commitment to permit seventy percent of the residents to return to the new development. One critical issue in the case was whether the PIE even applied to these residents because the City had granted them implicit consent to reside there over the long course of the community's development.<sup>81</sup> If the City had granted such consent, then the eviction procedures under PIE would not apply. The residents felt strongly that they deserved a definitive court ruling on that specific *legal* question before they should be forced to negotiate with the government over the terms of the redevelopment and relocation.<sup>82</sup>

In the end, the Court was forced to decide that issue without the benefit of an agreement by the parties. It did, however, make engagement a centerpiece of the eviction process that it ordered in the case, and, by doing so, strengthened the residents' bargaining position significantly. Liebenberg emphasizes that the Court was "[n]ot content to rely on vague guarantees regarding the nature of the alternative accommodation to be provided at Delft," and instead "stipulated detailed standards with which the 'temporary accommodation units' in Delft had to comply, including the provision of

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78. See *Joe Slovo*, 2009 (9) BCLR 847, ¶ 399 (Sachs, J.) (noting that "after extensive argument at the hearing, the Court invited the parties to attempt to reach an agreed solution").

79. *Joe Slovo*, 2009 (9) BCLR 847, ¶ 378 (Sachs, J.).

80. *Id.*

81. *Id.* ¶¶ 356–358.

82. Interview with Sandra J. Liebenberg, Professor of Law, Stellenbosch University, in Stellenbosch, S. Afr. (Mar. 5, 2009).

services and facilities.”<sup>83</sup> The Court also ordered the government to honor its commitment to allocate seventy percent of low-cost housing at Joe Slovo to the relocated communities.<sup>84</sup>

With that background of settled terms in place, the Court then ordered the government to engage with the residents on the specifics of relocation and included a detailed agenda of the items on which the residents must be consulted. These include specifics such as “the exact time, manner and conditions” of each relocation and “[t]he precise temporary residential accommodation units” allocated to each resident.<sup>85</sup> The Court also retained jurisdiction over the case requiring the parties to report the results of these engagements and also granting explicit permission for any party to seek relief directly from the Court “[s]hould this order not be complied with by any party, or should the order give rise to unforeseen difficulties . . . .”<sup>86</sup>

De Vos argues that the detailed engagement order, in particular the range of issues on which the government is required to consult, combined with the Court’s retention of jurisdiction, may be a back-door mechanism for forcing the government to engage with the residents over a revised plan. This would create the policy-development engagement that the government failed to conduct prior to the eviction.<sup>87</sup> Liebenberg is less convinced that the decision is a positive one for the residents and has criticized the Court for its “willingness to effectively condone the inadequate consultation processes” in the case.<sup>88</sup> Nonetheless, she approves of the greater control the Court is exercising over the engagement process.<sup>89</sup> Both observations show that, regardless of one’s view of the Court’s decisions on the substantive legal issues, the engagement order in the case represents an important development of the remedy and its use in a new context. As I discuss in the following sections, the innovations the Court introduced in this order, in particular a more specific agenda and stronger oversight, represent important refinements that can make the remedy more effective over time.

### III. TOWARDS POLITICAL ENGAGEMENT

The varying degrees of success of the engagement processes in these three cases point toward both the limits of engagement and engagement’s

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83. Liebenberg, *supra* note 7.

84. *Id.*

85. *Joe Slovo*, 2009 (9) BCLR 847, ¶ 7 (terms 11.2–11.3).

86. *Id.* ¶ 7 (term 21).

87. Constitutionally Speaking, *supra* note 76.

88. Liebenberg, *supra* note 7.

89. *Id.*

potential as an innovative remedy. In the following sections I divide engagement into two categories: litigation engagement—the form that it has taken in the three cases described above—and political engagement—the form that I think the Court hopes will develop and that has the greatest potential for transforming engagement into an effective tool for socioeconomic rights enforcement.

#### *A. Litigation Engagement*

Two of the three cases discussed above, *Olivia Road* and *Mamba*, illustrate engagement operating during the course of litigation, what I call “litigation engagement.” *Joe Slovo* provides a slightly different variation: engagement as a remedy-management device in litigation. I group all three together despite this difference because a comparison of the circumstances of each case and the roles the Court played in the engagement process provides a basis for improving the effectiveness of this remedy in other litigation contexts.

In *Olivia Road* engagement worked extraordinarily well; in *Mamba* it failed completely. Why the difference? Several points are immediately apparent. First, the engagement in *Olivia Road* was ordered after the government was already committed to changing the challenged policy, in part because of the injunction issued by the High Court. Second, the litigation was far advanced, and both sides had already been negotiating as part of that litigation for an extended time and understood the positions and arguments of the other side. Third, the parties had the benefit of two lower court orders, one of which favored the residents and the other the government.

The *Mamba* situation was quite different. The Gauteng government was firmly committed to closure and had already moved forward with implementing that policy. The refugees were forced to bring an emergency application, and the only lower court review resulted in a cursory two-page order that did not seriously address the issues raised. Finally, the engagement order was sufficiently ambiguous that the government could interpret it conservatively.

These differences suggest several elements that are important for litigation engagements to succeed. First, courts must view engagement as an iterative process and actively manage that process. Where the parties fail to reach agreement, the public-reporting requirement will create a record that the court can assess for both substantive progress on the issues and also party compliance with the obligation to engage meaningfully. The court can then decide—as happened in *Mamba*—whether further engagement is likely to resolve any of the outstanding issues. The court can also consider changing

the terms of the engagement. The range of options is limitless but might include, for example, appointing a mediator or ordering the inclusion (or even removal) of interested groups from the process.

The engagement order in *Joe Slovo* offers some useful examples of the kind of control a court might exercise over the process in a litigation engagement to improve the prospects for success. The order included an agenda for the engagement that specified seven issues for discussion.<sup>90</sup> Among other things, the parties were required to decide “[t]he exact time, manner and conditions [of relocation]” and “[t]he precise temporary residential accommodation units” for relocation.<sup>91</sup> While it would not be possible for a court in a litigation engagement where the primary issues like whether relocation will occur to structure the engagement agenda with the same degree of specificity as in *Joe Slovo*, it is easy to imagine a court controlling the engagement agenda in a similar fashion by listing the issues the parties must address and then requiring them to report back on each.

The court may also determine that some issues are not susceptible to further engagement and that definitive resolution of them would enhance the prospect for resolution of other issues in the case through engagement. For example, in *Mamba*, the Court could have held that closure of the camps required a reintegration plan but ordered engagement to determine the details of such a plan. Doing so would have prevented closure before engagement and created the kind of pressure to change policy that the High Court injunction did in *Olivia Road*.

*Joe Slovo* again provides some examples of this sort of increased court control. As Liebenberg notes, the Court was unwilling to trust the government with the details of the relocation to Delft and therefore established specific terms in the order while using engagement to determine other details.<sup>92</sup> This kind of partial determination of the substantive issues can break a logjam in negotiations and also alter the bargaining positions of the parties.

Combining engagement with partial determination of substantive legal issues also answers the concern raised by the residents in *Joe Slovo*, that parties sometimes have the right to a definitive court judgment on a controlling issue in the case. Taken as a whole, the *Joe Slovo* decision is really an example of the court using engagement to give back control to parties over policy details after deciding the substantive issues.

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90. *Joe Slovo*, 2009 (9) BCLR 847, ¶ 7 (terms 11.1–11.7).

91. *Id.* ¶ 7 (terms 11.2–11.3).

92. Liebenberg, *supra* note 7.

Taking this more active role will be particularly important where, as in *Mamba*, the government is firmly committed to the challenged policy. In a less fluid situation, it is also possible for a court to signal the parties during the hearing on its preliminary assessment on the merits of a particular issue without definitively resolving the issue before ordering further engagement. This can have a similar effect in altering the bargaining position of each side while still leaving the broadest range of options open for engagement.

Second, courts must be willing to impose sanctions on parties who fail to meaningfully engage. In *Mamba*, the Court should have retained more direct control after ordering engagement to ensure compliance with the process. Although plainly correct when considering the plight of the refugees' involved in the case, the refugees' decision not to persist with the appeal eliminated the possibility for the Court to impose sanctions on the government for its failure to meaningfully engage. For litigation engagements to succeed, courts must be willing to impose sanctions for procedural failures like the one in *Mamba*. 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."<sup>93</sup>

The result in *Olivia Road* demonstrates that this kind of repeated engagement with active court management and the possibility of sanctions for failing to engage can make the process more effective. The Constitutional Court recognized this in the judgment noting that "[t]he deciding factor in this case . . . was that engagement was ordered by this Court, and the parties had been asked to report back on the process while proceedings were pending before it."<sup>94</sup>

This iterative process also puts courts in a better position to make substantive policy decisions where engagement fails. The public record created through these engagements will give the court the benefit of detailed proposals and justifications from each side and also an account of how positions changed during the course of the engagement.<sup>95</sup> In addition, once this process has developed over time, courts will also have the benefit of

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93. *Olivia Road*, 2008 (5) BCLR 475, ¶ 21.

94. *Id.* ¶ 30.

95. Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1439 (1991) (In the case of court-imposed remedies following deliberation, "[t]he court's remedial decision . . . will be informed by the data, diversity of perspective, and reasoning produced by the deliberations.").

records of other engagements and can consider the similarities and differences of this particular situation.

Finally, when ordering engagement in the context of an ongoing dispute courts, at least in the short term, should be more willing to enjoin the challenged activity and retain supervisory jurisdiction to ensure the process works. This is exactly what the court did in *Joe Slovo*,<sup>96</sup> and, although the results of that increased control are not yet clear, it is plausible that the Court took these steps in recognition that the result in *Mamba* was likely due in part to the lack of more direct court management.<sup>97</sup> These examples of increased agenda control, more direct management, and an increased willingness to impose sanctions all represent potentially important innovations in the engagement process. They should send a message to lower courts that they must do more than merely reflexively order engagement, and instead carefully consider how to structure the process in each case.

Increasing court control over the process, imposing sanctions for failure to engage, and a willingness to order temporary injunctions during engagement should all enhance the effectiveness of the remedy but come at the cost of diminishing the flexibility of the process. The characteristics just described will turn what at this point looks like a novel innovation into something much more like the standard role courts have taken for decades in the U.S. in large structural reform cases.<sup>98</sup>

Mark Tushnet has described the kind of litigation engagement represented by *Olivia Road* and *Mamba*—a court-ordered and structured negotiation among affected parties—as a type of “weak-form” review.<sup>99</sup> Weak-form review has the advantage of making judicial review more democratic by incorporating the views of the political branches in the interpretation of constitutional rights.<sup>100</sup> Remedies like engagement rely on the political branches and citizens themselves, not courts, to develop the terms of the remedy. This transforms the process of constitutional enforcement into something that looks more like a political than a judicial process while still retaining a role for courts ensuring that constitutional values are enforced.

96. See discussion *supra* notes 80–93 and accompanying text.

97. *Joe Slovo*, 2009 (9) BCLR 847, ¶¶ 16, 21.

98. See, e.g., ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* 223–28 (2003) (describing and critiquing judicial management of public institutions).

99. See MARK V. TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* 248 (2008) (“[A]nother characteristic [of weak-form review] might be judicial encouragement of negotiations among affected parties over the contours of a more detailed plan, which the courts might ratify rather than develop independently.”).

100. *Id.* at 228; *id.* at 264 (“[W]eak-form judicial review respects the right, grounded in democratic theory, for majorities to prevail . . .”).

To retain these benefits of engagement in a litigation setting while still assuming sufficient control to make the remedy work, courts must strike a balance as they manage the process and decide how much control to assume at each point. The flexibility inherent in engagement will allow each judge to adjust the level of control they assume at different points in the case; the possibility of repeated engagements offers opportunities to refine the process both within each case and across cases over time.

In spite of this flexibility, it is likely that litigation engagements will turn out to be the least interesting and probably least important form of engagement. Under the right circumstances and with careful and creative management of the process, successes like *Olivia Road* are possible, but once litigation starts, often it will be difficult for courts to create the right mix of incentives for the parties to reach the kind of agreement that resulted from the *Olivia Road* engagement.

Litigation engagements also run the greatest risk of depriving the parties of their right to have a court decide important legal issues. This concern was raised directly by several advocates involved in the *Joe Slovo* case.<sup>101</sup>

Perhaps more importantly, the ultimate result in *Joe Slovo*, like the *Mamba* decision, highlights the risk in relying exclusively on this kind of indirect remedy without ever developing the substantive requirements of section 26 directly. Mark Tushnet, citing Cass Sunstein's discussion of constitutional development in post-Soviet countries, argues that "[c]oupling strong rights with weak remedies, particularly when those remedies are rarely deployed . . . may be a formula for producing cynicism about the constitution."<sup>102</sup> Each of these cases was viewed by many as an important opportunity for the Court to develop the substantive requirements of section 26. The success of engagement in *Olivia Road* showed that engagement might succeed in getting parties and the political branches to do this themselves. But the critical reaction to the Court's approval of the evictions in *Joe Slovo* and the patent failure of engagement in *Mamba* show that engagement's success will depend on the Court occasionally making substantive determinations about what section 26 and these other rights require.

### *B. Political Engagement*

In *Olivia Road* the Court emphasized that, to work effectively, "engagement [should ordinarily] take place before litigation commences

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101. Interview with Sandra J. Liebenberg, *supra* note 82.

102. TUSHNET, *supra* note 99, at 252.

unless it is not possible, or reasonable to do so because of urgency or some other compelling reason.”<sup>103</sup> I call this form of engagement “political engagement.” Extending engagement beyond a litigation aspect and turning it into an administrative requirement offers the greatest potential for making the remedy a meaningful tool for implementing section 26 and other socioeconomic rights.

Although the Court first called for political engagement in *Olivia Road*, beyond the broad outlines described above, it did not detail what this kind of engagement should look like. At several points in his opinion in *Joe Slovo*, Justice Sachs began describing some of the features of political engagement that provide starting points for articulating the requirements for this use of engagement. First, Sachs praised the commitment in the Breaking New Ground Policy (“BNG”) to “a reinvigorated contract with the people and partner organisations for the achievement of sustainable human settlements” but then went on to criticize the authorities’ failure to implement that commitment by involving citizens in the planning process.<sup>104</sup>

In a footnote, Sachs explained that political engagement must always include affected citizens as genuine partners, not mere recipients of state aid. Sachs warned that the BNG’s emphasis on “mobilizing” communities “risks treating the communities as recipients of state largesse to be informed of the benefits they are about to receive, rather than [sic] as active partners engaged with the authorities in developing programmes and finding solutions . . . .”<sup>105</sup>

Sachs went on to identify several specific problems with the engagements that did occur as the development process progressed. First, he noted the lack of a clear chain of command among the different governmental entities involved: “There were simply too many rather than too few protagonists on the side of the authorities. At different stages the occupants had to engage with national and then with provincial and finally with local entities.”<sup>106</sup> Second, he cited the shifting and, at times competing, policy objectives of the different players that confused the residents and led to their sense that the government had broken its promises about the availability of low-cost housing.<sup>107</sup>

Finally, Sachs emphasized the backstop role of the courts in ensuring that political engagements live up to the requirements of the Constitution and implementing legislation, like the PIE. Sachs described section 26 and the

103. *Olivia Road*, 2008 (5) BCLR 475, ¶ 30.

104. *Joe Slovo*, 2009 (9) BCLR 847, ¶ 378 (Sachs, J.).

105. *Id.* ¶ 117 n.49 (Sachs, J.).

106. *Id.* ¶ 379 (Sachs, J.).

107. *Id.*

PIE as providing a “safety net” because “[u]ltimately, no resident could be compelled to leave Joe Slovo except in terms of a court order . . . .”<sup>108</sup> Sachs later emphasized that the court’s role in reviewing the process was not limited to administrative review; instead, a court “would be hearing the matter *de novo* (from scratch), and making up its own mind whether the justice and equity requirements of PIE had been met.”<sup>109</sup> This would involve “consider[ing] all relevant circumstances, and giv[ing] a full hearing to the occupiers.”<sup>110</sup>

*Joe Slovo* confirms the somewhat ambiguous message in *Olivia Road* that the Court expects government at all levels to build engagement into the policy development process. Together these cases establish the broad contours of political engagement. Affected citizens must be treated as partners, not aid recipients; authorities must consult with relevant civil society organizations, who, in turn are to act as facilitators of this process.

Political engagement also requires considerable coordination and administrative planning by the government. Some form of employee training program for engagement is necessary. Where multiple governmental entities are involved, they must coordinate with each other in the engagement. Finally, authorities must establish a system for creating and preserving a record of each engagement.

Courts themselves must also develop procedures for evaluating the engagement process for compliance with these requirements. And, when an engagement fails and the parties resort to litigation, courts must be prepared to enforce the engagement requirements through sanctions.

These broad contours firmly establish that political engagement is now a constitutional requirement and give citizens and civil society groups important leverage to demand a role in policy development, but they leave open many difficult questions about what such engagements would look like. For example, following *Mamba*, is the Gauteng government required now to engage with the same NGO’s on emergency plans for responses to potential future crises? Should the refugees who remain in South Africa have a voice? If another municipality, like Durban, decides to begin a similar redevelopment plan, with whom must it engage and at what point in the policy-planning process?

The three engagement cases the Court has decided leave these questions open. But these decisions point to two important features of engagement that may begin to answer these questions. First, engagement is more than an ad

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108. *Id.* ¶ 382 (Sachs, J.).

109. *Id.* ¶ 393 (Sachs, J.).

110. *Id.*

hoc alternative dispute resolution mechanism limited to a particular case; engagement imposes long-term systematic obligations on the state. The contours of those obligations will be developed over time as municipalities and other levels of government conduct more engagements and begin to build the engagement infrastructure I discuss below.<sup>111</sup>

Second, NGOs, public-interest lawyers, and others have a constitutional role to play in developing the responsibilities that engagement imposes on the state. These cases open the door for groups active on socioeconomic rights issues to argue for a more direct role earlier in the development of policies that implicate these rights. Past experience demonstrates that pressure from these groups is necessary for developing political enforcement mechanisms,<sup>112</sup> and the Court's engagement decisions should increase the leverage of these groups because authorities know they are now required to consult them when developing socioeconomic policy or risk sanction by the courts.

Up to this point, engagement has developed principally as part of litigation. Interviews with at least one of the advocates who represented key organizations indicate that, following *Olivia Road*, engagement is often viewed as a tactic for delaying evictions.<sup>113</sup> A standard argument deployed in many eviction cases is that the entity seeking eviction has failed to meaningfully engage as required by *Olivia Road* and PIE before attempting to evict.<sup>114</sup> This use of engagement creates some prospect for actual resolution if and when a court actually orders the parties to engage. But it is simply a standardized version of the litigation engagements described above and, while offering the benefits of that form of engagement, does not realize the full potential of this innovation.

Charles Epp's work on the development of what he calls "administrative-rights policies" in the U.S. is useful for considering how engagement could develop beyond a litigation tactic and into an effective tool for political enforcement of socioeconomic rights. Epp argues, "[i]n the modern state, rights are empty promises in many contexts unless they are given life in

111. For a discussion of the potential for individual engagements to serve as precedents for the procedural requirements of engagement see Ray, *supra* note 22.

112. Mark Heywood's description of the Treatment Action Campaign's multi-pronged efforts, which included not only legal action, but also political and public advocacy campaigns to change the government's HIV/AIDS policies, is the best example of this. See Mark Heywood, *Preventing Mother-to-Child HIV Transmission in South Africa: Background, Strategies and Outcomes of the Treatment Action Campaign Case Against the Minister of Health*, 19 S. AFR. J. HUM. RTS. 278 (2003).

113. Interview with Adrian Friedman, Advocate for the Legal Resources Centre, in Johannesburg, S. Afr. (Mar. 3, 2009).

114. *Id.*

administrative policies and practices.”<sup>115</sup> He has documented a shift in a range of areas in which “U.S. administrative governance became significantly, even dramatically more rights-focused; the rights policies at the heart of the change became institutionalized and integrated into government agencies in substantial administrative depth.”<sup>116</sup>

Epp describes the “dominant theoretical explanation of administrative-rights policies [as one] that views the policies as the expression of institutional models developed in the face of ambiguous threats from the legal environment, particularly threats of legal liability.”<sup>117</sup> He argues that this model is incomplete, however. Drawing on the work of Mark Galanter and his own empirical studies of the perceptions about litigation of key administrators, Epp argues that in order for those threats to result in administrative change, they must be supported by the kind of resources, organization, and long-term planning that Galanter argues have permitted the “haves” to succeed in influencing administrative policy over time.<sup>118</sup> Epp argues that “have-nots” can succeed in institutionalizing rights-policies at the administrative level in the same way as the “haves,” provided that they acquire resources and develop similar, long-term strategies “aimed at ‘playing for the rules,’ rather than aiming only for short-term success in the case at hand.”<sup>119</sup>

In addition, however, Epp notes that litigation itself is merely a catalyst for the more influential process of developing “forward-looking, defensive policies and actions” to minimize these threats.<sup>120</sup> This has three dimensions. First, these policies typically involve increased attention to the legal dimensions of policies represented by the addition of lawyers or legal experts in policy discussions.<sup>121</sup> Second, they result in what Epp calls the “systematization of procedures.”<sup>122</sup> This includes procedures for identifying and remedying potential violations and also procedures for consistently investigating and resolving claims that actually arise.<sup>123</sup> Third, this forward-looking response involves increased training regarding the legal

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115. Charles R. Epp, *Implementing the Rights Revolution: Repeat Players and the Interpretation of Diffuse Legal Messages*, LAW & CONTEMP. PROBS., Spring 2008, at 41, 42.

116. *Id.* at 43.

117. *Id.*

118. *Id.* at 44 (citation omitted).

119. *Id.* at 44 (citing Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC’Y REV. 95, 141–44 (1974)).

120. Epp, *supra* note 115, at 49.

121. *Id.* at 49–50.

122. *Id.* at 50.

123. *Id.*

responsibilities of each employee.<sup>124</sup> Epp captures all three dimensions and their relationship to the threat of litigation in a quote from one administrator: “Responding to the whole litigation area is like a comprehensive program: you need a comprehensive policy that covers everything, from getting good legal advice, to planning for known risks, to training employees, to insurance coverage, to being responsive to citizens’ complaints.”<sup>125</sup>

What I have called political engagement is actually a process that the Court hopes will result in the kind of administrative reform described by Epp. Recognizing the limitations of any single judgment in achieving systematic change, as well as the practical problems inherent in court control over complicated policies and programs, the Court developed engagement as a mechanism for making socioeconomic rights enforcement a principally political, rather than legal, effort.<sup>126</sup> Epp’s work suggests that the Court’s focus on administrative enforcement is appropriate and could result in a genuine shift toward rights-sensitive policies.

Several aspects of the remedy also reflect Epp’s emphasis on the need for the pressure by organized interest groups backed by the threat of legal sanctions to generate change at the administrative level. First, the Court’s requirement in *Olivia Road* that authorities must include civil society organizations in the engagement process recognizes the key role that repeat players can play in the policy development. After *Olivia Road*, these groups now have a constitutionally sanctioned role to play that should give them leverage to insist on consultation relatively early in planning processes. These advocacy groups will have broader perspectives and will understand how the results of these individual negotiations may affect the broader policy landscape. More importantly, these groups have the resources and staying power to “play for rules” as Epp emphasizes is key to having an effect on policy.<sup>127</sup> Epp notes in his interviews that “[r]espondents universally recognized the significance of the relative organizational ‘staying power’ (as one put it) of a litigant or potential litigant.”<sup>128</sup>

Second, the engagement requirement itself is designed as a process for creating this legal pressure by organized interest groups. In addition to giving these groups a seat at the policy table, by requiring authorities to engage in a systematic manner during any long-term planning process, the Court has

124. *Id.*

125. *Id.* at 51.

126. For a more general discussion of the Court’s emphasis on political enforcement of socioeconomic rights, see Brian Ray, *Policentrism, Political Mobilization and the Promise of Socioeconomic Rights*, 45 STANFORD J. INT’L L. 151 (2009).

127. Epp, *supra* note 115, at 44.

128. *Id.* at 48.

created a procedural requirement for forcing government to pay attention to rights claims outside of litigation. When starting any planning process, authorities must now incorporate engagement into that process and consider the likely claims that affected citizens and their representatives might raise. The Court's threat that a failure to engage meaningfully in the process may itself be sufficient for a court to deny a government's request to enforce a policy—even where the policy itself is otherwise unobjectionable—is a powerful incentive for authorities to take those claims seriously. The public-reporting requirement reinforces that threat by creating a record that a court can review for procedural compliance.

The Court's requirement that government must treat engagement as a systematic requirement should result in the creation of standardized processes that Epp identified as key to the development of administrative-rights policies in the U.S.<sup>129</sup> Following these three cases, authorities must develop structured, long-term approaches to engagement and build plans for engagement from the start of any redevelopment process. This forces those municipalities to pay consistent attention to the requirements of section 26 and establish processes for identifying and resolving potential violations ahead of time as well as for dealing with citizen claims in the engagement itself.

Thus far I have described engagement's effects on government as primarily defensive. But the systematization that Epp describes also has potential benefits for government by giving authorities control over when to engage and under what circumstances. As I have explained elsewhere, the *Olivia Road* situation presents a useful example of this effect.<sup>130</sup> If the City takes seriously the obligations the Court has described, it should now incorporate a structured engagement review process into the inner-city redevelopment plan. This plan will force the City to decide whether a particular building or set of buildings requires redevelopment and to assess the potential cost of engaging with the residents in light of the benefits it was required to provide the residents in *Olivia Road*. This permits the City to take control over what interventions to make in light of its overall budget and policy priorities.

Finally, the Court has explicitly called for government to begin incorporating the training processes that Epp identified as having the most significant effect in developing administrative-rights policies.<sup>131</sup>

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129. *Id.* at 49–50.

130. *See* Ray, *supra* note 22.

131. *See* Epp, *supra* note 115, at 50 (noting that “[e]ven without prodding several [respondents] identified [regularized training] as the most significant effect.”).

Transforming engagement into a political tool, however, will require creative and persistent effort by the groups who have built the foundations for it through litigation in these and other cases. As Epp emphasizes, changes at the administrative level require substantial resources and “staying power” to become repeat players that capture the attention of policymakers throughout the administrative apparatus.<sup>132</sup>

The Court’s engagement decisions provide three important aids to that effort. First, they acknowledge a constitutional role for civil society organizations that those organizations can use to work for recognition outside of litigation and earlier in the policy-development process.

Second, the Court has emphasized that government is constitutionally required to develop administrative structures for engagement. These are precisely the type of administrative changes Epp attributes to the development of administrative-rights policies.<sup>133</sup> Civil society organizations should use their constitutionally sanctioned role to advocate not only for specific policy changes but also for these types of generic administrative-system changes—things such as engagement training for employees and the creation of something like an engagement department in key executive-branch agencies.

Finally, these groups should continue to use litigation as a mechanism for developing the political side of engagement, but with increased attention to the need for the structural changes just described. For example, in the next major eviction case, it makes sense to argue not only that the authorities have failed to engage the residents they seek to evict, but also that this specific failure is the result of a broader lack of compliance with the Court’s orders in *Olivia Road* and *Joe Slovo*. The court could then order engagement both on the specific issues in the case and the administrative changes necessary to provide for meaningful engagement in future cases.

#### IV. CONCLUSION

Despite their ubiquity in modern constitutions, socioeconomic rights raise significant institutional competence and separation of powers concerns that make judicial enforcement a challenging task.<sup>134</sup> Courts both are ill-equipped to deal with the complex policy issues raised by these rights and lack the democratic legitimacy of the political branches when making the inevitable tradeoffs among competing priorities required when setting socioeconomic

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132. *Id.* at 48.

133. *Id.* at 49.

134. *See generally* Ray, *supra* note 126.

policy. The South African Constitutional Court has taken a different approach and in doing so has led the way in developing innovative remedies that both recognize the challenges inherent in enforcing socioeconomic rights while still preserving the ability of courts to play a role in ensuring that these rights are not merely empty promises.

Despite its record of innovation, the critics of the Court charge it with “proceduralizing” these rights; demoting them to a kind of lower-class status among rights, deserving only of a limited review for administrative reasonableness rather than full-blown judicial enforcement.<sup>135</sup> These critics correctly note that—with a few relatively small exceptions—the Court has consistently refused to intervene in substantive policy when enforcing rights.<sup>136</sup>

Engagement is the Court’s latest—and perhaps most promising—innovation in this area. If it remains merely a litigation tool, engagement still offers substantial benefits over traditional litigation but likely will not provide a real answer to the Court’s critics. But, if civil society groups, NGOs, and public interest law firms take up the opportunity that the Court has created by using engagement as a judicially enforceable tool and demand a voice and a role in policy development, engagement holds real promise as an effective mechanism for enforcing these rights.

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135. See, e.g., Marius Pieterse, *Resuscitating Socio-Economic Rights: Constitutional Entitlements to Health Care Services*, 22 S AFR. J. HUM. RTS. 473, 473–74 (2006) (“[T]he Court’s rejection of what can be called a ‘minimum core approach’ to the enforcement of ss 26(1) and 27(1) of the Constitution in favour of an administrative law-like ‘reasonableness approach’ . . . has been much lamented.”); David Bilchitz, *Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socioeconomic Rights Jurisprudence*, 19 S AFR. J. HUM. RTS. 1, 8–10 (2003); Danie Brand, *The Proceduralisation of South African Socio-Economic Rights Jurisprudence, or ‘What Are Socio-Economic Rights For?’*, in RIGHTS AND DEMOCRACY IN A TRANSFORMATIVE CONSTITUTION 41 (Henk Botha et al. eds., 2003) (describing the Court’s approach as “limited”).

136. See, e.g., Brand, *supra* note 135, at 41.