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**DEVELOPING A COMMUNITY ENGAGEMENT MODEL AS A
NORMATIVE FRAMEWORK FOR MEANINGFUL ENGAGEMENT
DURING EVICTIONS**



Thesis submitted in fulfilment of the requirements for the award of the
Doctor of Laws (LLD) degree.

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DECLARATION

I, _____ (Student No 9306623) hereby declare that the work contained in this thesis is my own original work and that I have not previously, in its entirety or in part, submitted it to any other university for a degree.

Signature: _____

Date: _____



DEDICATION

This thesis is dedicated to all people living in informal settlements.

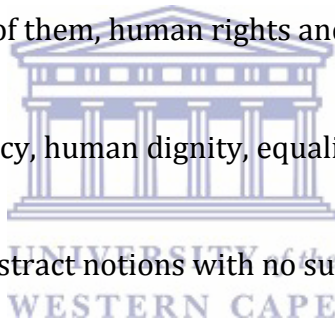
In the quest to care for themselves and their families they use any salvaged material to build shelters on land; but they have no form of security.

These are people who in many cases are exposed to the harshest conditions of life, such as poverty, disease, economic exclusion and social marginalisation.

To many of them, human rights and values, such as,

democracy, human dignity, equality and freedom

are mere abstract notions with no substantive meaning.



INSPIRATION

'There is often talk of human rights but it is also necessary

to talk of the rights of humanity.' (Fidel Castro: 1987)

'Human beings are required to be treated as human beings.' (Yacoob J: 2008)

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I also acknowledge with many thanks my illiterate mother for her encouragement, though

she never understood the rationale for multiple graduations. Her deep appreciation of the importance of education is the central pillar that defines her motherhood, as she used to walk my siblings and myself to school every day, drop us off at the school gate and walk back to work. To my brother and three sisters who offered me their unwavering support during this period, thank you very much.

The greatest sacrifice for my last two Masters degrees and this Doctoral study comes from my wife and children (Onkgopotse, Dag and G'zinn), who endured seeing me working throughout the night almost every day, sacrificing their family time. To them, all I can say, in Setswana, is: *Ke a leboga*. I have a great wife who possesses incredible passion for education; as a result she adopted a very curious and keen interest in my academic progress. Amanda Nyhila, Usindiwe Mgabe and Emeka Afrika: thanks guys for your sacrifices; and I fervently wish that this achievement by your dad will only serve to inspire you to take your education more seriously.

Undertaking postgraduate studies at the same time as serving as the Provincial Secretary of the ANC sounded crazy to many who understood the demands and scale of work that comes with the position. Therefore, my gratitude goes to all the comrades I served with in the Provincial Executive Committee for the past three years for their understanding. Not forgetting the unwavering support that I got from my immediate supervisor, the Secretary General of the ANC, comrade Gwede Mantashe. His consistent enquiry about my progress on every occasion we met, was humbling and a real source of encouragement. Lastly, the excitement of my peers in my small hometown, Petrusville in the Northern Cape, when they heard that I was pursuing Doctoral studies was also a driving force for the completion

of this project as I committed not disappoint them.

My simple advice is, that a better tomorrow for all South Africans is attainable when we make education fashionable.



KEY WORDS

Democracy

Empowerment

Evictions

Meaningful engagement

Participation

Rights to human dignity, equality and freedom

Social capital

Socio-economic rights

Transformative Empowerment Model

Unlawful occupiers



ABBREVIATIONS AND ACRONYMS

ACJ	Acting Chief Justice
AJP	Acting Judge President
ANC	African National Congress
CA	Constituent Assembly
CDX	Community Development Exchange
CESCR	Committee on Economic, Social and Cultural Rights
CLEAR	Can, Like, Enable, Asked, Respond
CODESA	Convention for a Democratic South Africa
COHRE	Centre on Housing Rights and Evictions
ConCourt	South African Constitutional Court
DMA	Disaster Management Act
DoHS	Department of Human Settlement
ESCR	Economic, Social and Cultural Rights
ESR Review	Economic and Social Rights Review
Envir and Behav	Environment and Behavior
HDA	Housing Development Agency
HIV/AIDS	Human Immuno-deficiency Virus/ Acquired Immune Deficiency Syndrome
ICCPR	International Covenant for Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDP	Integrated Development Plans
J	Judge

JP	Judge President
J. Hist. Geogr.	Journal on History and Geography
LLD	Doctor of Laws
ME	Meaningful engagement
MEC	Member of the Executive Council
NBRA	National Building Regulation Act
NP	National Party
PIE	Prevention of Illegal Eviction from Unlawful Occupation of Land Act
PISA	Prevention of Illegal Squatting Act
SAHRC	South African Human Rights Council
SALC	South African Law Commission
SAJL	South African Law Journal
SAJHR	South African Journal for Human Rights
SCA	Supreme Court of Appeal
SDS	Student for Democratic Society
Seattle J Soc Just	Seattle Journal for Social Justice
SERAC	Socio-Economic Rights Action Centre
SERI- SA	Social and Economic Rights Institute of South Africa
SOWETO	South Western Township
Stats SA	Statistics South Africa
TAC	Treatment Action Campaign
THRHR	Tydskrif vir die Hedendaagse Romeins-Hollandse Reg
UN	United Nations

UN-Habitat	United Nations Human Settlement Programme
UNCHR	United Nations Committee on Human Rights
UNCHS	United Nations Centre for Human Settlements
UNHRS	United Nations Human Rights Council
US	United States of America
UWC	University of the Western Cape



SUMMARY

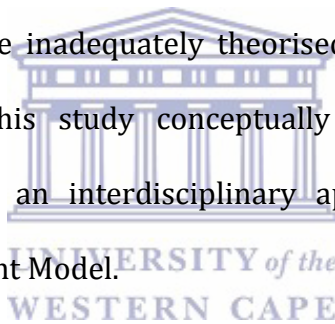
The research problem of this study is the jurisprudential inconsistency in the application of the right in section 26(3) of the South African Constitution's Bill of Rights. The inconsistency is due to inadequate conceptualisation of the substantive requirements of meaningful engagement (ME) by the South African Constitutional Court (ConCourt). The central argument is that the development of a community engagement model based on the substantive requirements of ME will enhance the application of section 26(3).

This study commences by illustrating the disempowering nature to the squatters of the apartheid evictions in South Africa. To tighten influx control, the apartheid regime introduced a battery of laws that disempowered the squatters. The apartheid-induced disempowerment of the squatters penetrated into the democratic dispensation. In the examination of the normative context of evictions post-1994, this study identifies six primary drivers for substantive involvement of the occupiers during evictions. The six primary drivers seek to address the disempowering trajectory during evictions.

The study demonstrates that the collective impact of these primary drivers gave rise to the adoption of the notion of 'meaningful engagement' by the ConCourt in *Occupiers of 51 Olivia Road*. Delivering the unanimous judgment of the Court, Yacoob J elaborated on what ME entailed and held that courts should not issue an eviction order if it is not preceded by ME. In his conceptualisation, Yacoob J correctly highlighted both the substantive and procedural aspects of ME. It is demonstrated in this study that despite the explanation by

Yacoob J, the judgments in *Residents of Joe Slovo* was in stark contrast, in many respects, to the application of ME in *Occupiers of 51 Olivia Road*. This resulted in jurisprudential inconsistency in the application of ME in subsequent ConCourt cases on evictions. Central to the jurisprudential inconsistency is the inadequate articulation of the substantive requirements of ME.

This study demonstrates that ME has both substantive and procedural requirements. Through extensive examination of case law three substantive requirements of ME are identified: empowerment, equitable participation and building of social capital. These substantive requirements are inadequately theorised in case law. Based on the three substantive requirements this study conceptually develops a six-stage community engagement model through an interdisciplinary approach. The Model is called the Transformative Empowerment Model.



The development of the Transformative Empowerment Model serves as the original contribution of this study. The Model is developed through examination and modification of two modern community engagement models, namely, the 'critical integrative model' and the 'neighbourhood model'. To address the weaknesses of these two models, the ideas of other scholars in the field of community engagement are drawn. The Transformative Empowerment Model is proposed in this study to serve as a normative framework for the application of ME during evictions.

This study demonstrates that in eviction cases in which the application of ME was closely related to the objectives of the Transformative Empowerment Model the outcomes were 'progressive' and enhanced the protection offered by section 26(3) of the Constitution. Conversely, in eviction cases in which the application of ME by the ConCourt was at variance with the objectives of the Model the outcomes were 'regressive' and weakened the protection in section 26(3) of the Constitution.

This study further shows that the values of human dignity, equality, freedom and democracy are pre-eminent in the ConCourt's conceptualisation of ME. Hence, this study interrogates whether the Transformative Empowerment Model promotes these values. In so doing, this study examines each of these values and concludes that the Model is aligned to human dignity, equality and freedom. With regard to democracy, this study demonstrates that the Model is more inclined to deliberative democracy.



CHAPTER 1

INTRODUCTION

1.1 Background to the study

The Prevention of Illegal Squatting Act¹ (PISA) empowered landowners by criminalising squatting and did not provide any safeguards for illegal occupiers. As a result, families were ruthlessly evicted for many years during the apartheid period with little or no regard for their rights. South Africa became a democracy in 1994 and the interim Constitution of the Republic of South Africa²(the interim Constitution) and the subsequent Constitution of the Republic of South Africa³ (the Constitution) brought a sense of respect for human rights. Section 26⁴ of the Constitution guarantees the right of access to adequate housing and the right against unlawful evictions. The latter, is the most frequently litigated right due to apartheid's spatial planning that confined the black majority to the periphery of the urban centres.

¹ *Prevention of Illegal Squatting Act* 52 of 1951.

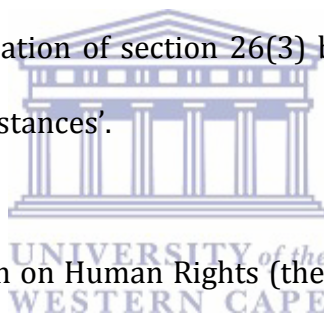
² *Constitution of the Republic of South Africa Act* 200 of 1993.

³ *Constitution of the Republic of South Africa Act* 108 of 1996.

⁴ Section 26 of the Constitution reads:

- ' 1.Everyone has the right to housing;
- 2.The state must take reasonable measures, within available resources, to achieve the progressive realization of this right;
- 3.No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'

Section 26 introduced extraordinary changes to the legal framework governing housing and evictions in South Africa, particularly protecting the most vulnerable occupiers from unlawful eviction.⁵ In its adjudication of eviction cases, the Constitutional Court (ConCourt) relies on this constitutional provision and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act⁶(PIE). PIE has three primary objectives: first that evictions were decriminalised; secondly, that adequate procedural protections were put in place to prevent arbitrary evictions; and thirdly, that substantive rights were included for courts to have regard to whether it would be ‘just and equitable’ to issue an eviction order.⁷ The introduction of the substantive requirements in PIE was meant to strengthen the application of section 26(3) by prohibiting evictions without ‘considering all relevant circumstances’.



The United Nations Commission on Human Rights (the Commission on Human Rights), which is the predecessor to the United Nations Human Rights Council, has described forced or unlawful eviction as a ‘gross violation of human rights’.⁸ The requirements of

⁵ Wilson S ‘Breaking the tie: evictions from private land, homelessness and the new normality’ (2009) 126 (2) *SALJ*: 270. See also Roux T ‘Continuity and change in a transforming legal order: the impact of section 26(3) of the Constitution on South African law’ (2004) 121 *SALJ* 466.

⁶*Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998.

⁷ Pienaar JM & Muller A ‘The impact of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 on homelessness and unlawful occupation within the present statutory framework’ (1999) 10 *Stellenbosch Law Review* 370. See also Temmers-Boggenpoel Z ‘Does method really matter? Reconsidering the role of common law remedies in the eviction paradigm’ (2014) 1 *Stellenbosch Law Review* 72.

⁸ UNCHR Resolution 1993/77 on Forced Evictions adopted unanimously on 10 March 1993, UN Doc. E/CN.4/RES/1993/77(1993) para 1.

the Constitution and PIE conform to General Comment No. 7,⁹ which contains a set of procedural protections, such as that ‘... all feasible alternatives are explored in consultation with the affected persons’.¹⁰ General Comment No 7 narrowly defines ‘consultation’ as a formal procedural requirement; as a result it does not provide an effective system at the international level to protect evictees and also does not contain any effective monitoring mechanisms.¹¹

The protection accorded to occupiers by section 26(3) and PIE against unlawful and arbitrary evictions did not instantaneously bring to an end the apartheid style of unjust evictions by the state. This could be attributed to two reasons: first, the inherent complexities of resolving eviction disputes as section 26(3) is counterpoised by the right to property enshrined in section 25 of the Constitution;¹² and secondly, the fact that PIE is a reactive legislative tool.¹³ Responding to these challenges the ConCourt creatively developed a range of adjudicative mechanisms to improve judicial enforcement of social rights, like the section 26(3) right. Dworkin,¹⁴ Sunstein,¹⁵

⁹ UN Committee on Economic, Social and Cultural Rights, *General Comment No 7: The Right to Adequate Housing (Art 11.1 of the Covenant): forced evictions* 20 May 1997 Res E/1998/22. See also *General Comment No 4: The Right to Adequate Housing (Art 11(1) of the Covenant)* 13 December 1991. Res E/1992/23 para 18 states ‘... Committee considers that instances of forced eviction are prima facie incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with relevant principles of international justice’.

¹⁰ UN CESCR *General Comment No 7* (1997) para 13.

¹¹ Christiansen EC ‘Transformative constitutionalism in South Africa: creative uses of Constitutional Court authority to advance substantive justice’ (2010) 13 *The Journal of Gender, Race & Justice* 576.

¹² Wilson S (2009) 282.

¹³ Temmers-Boggenpoel Z (2014) 74.

¹⁴ Dworkin R ‘Response to overseas commentators’ (2003) 1 *International Journal on Constitutional Law* 651.

Tushnet¹⁶ and other scholars¹⁷ appreciate the ConCourt's record of innovative decisions in the enforcement of social rights. However, the ConCourt's social rights jurisprudence, particularly its disinclination to adopt the 'minimum core' approach, has been severely criticised by scholars, such as, Brand,¹⁸ Davis¹⁹ and Bilchitz.²⁰

In 2000, in *Government of the Republic of South Africa and Others v Grootboom and Others*²¹(*Grootboom*) the lower court was uncomfortable with the failure of the municipality to engage with occupiers of New Rusts Land. On appeal the ConCourt highlighted the importance of 'engagement' between the parties to find a solution as a crucial step prior to an eviction. In 2004, the ConCourt in *Port Elizabeth Municipality v Various Occupiers*²² (*PE Municipality*) highlighted a similar requirement. In this case the Court requested the municipality to seek mediation with the occupiers.

The creative notion of 'meaningful engagement' (ME) was formalised by the ConCourt in 2008 in *Occupiers of 51 Olivia Road v City of Johannesburg (Occupiers of 51 Olivia*

¹⁵ Sunstein CR *Designing Democracy: What Constitutions Do* (2001).

¹⁶ Tushnet M *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (2008).

¹⁷ Trengrove W 'Judicial remedies for violation of socio-economic rights' (1991) 1 *ESR Review* 8 9. See also Liebenberg S *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 338; and Kende MS *Constitutional Rights in Two Worlds: South Africa and the United States* (2009).

¹⁸ Brand D 'Proceduralisation of South African Socio-economic rights jurisprudence, or "hat are socio-economic rights for?' (2003) in Botha H, van der Walt A & van der Walt J (eds) *Rights and Democracy in a Transformative Constitution* 33.

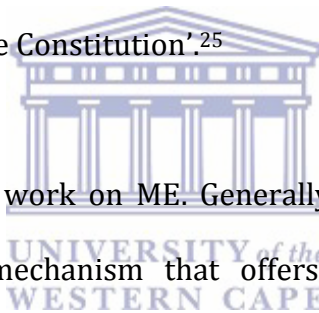
¹⁹ Davis D 'Adjudicating the socio-economic rights in the Constitution: towards "deference lite"' (2006) 26 *SAJHR* 403.

²⁰ Bilchitz D *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007).

²¹ *Government of the Republic of South Africa and Others v Grootboom and Others* (2001) (1) SA 46 (CC).

²² *Port Elizabeth Municipality v Various Occupiers* (2005) 1 SA (CC).

Road).²³ Delivering the unanimous Court decision, Yacoob J held that ‘The Constitution obliges every municipality to engage meaningfully with people who would become homeless because it evicts them’.²⁴ Yacoob J further held that courts should not uphold an application for eviction without ME. As a result, the ConCourt issued an order requiring the parties to the litigation to embark on ME with each other before it delivered its final judgment. In the final judgment Yacoob J explained what ME entailed and emphasised that the principle of democratic participation and the rights to human dignity, equality and freedom should underpin such an engagement. He further mentioned that ME is not only a procedural requirement as it expanded the concept of citizenship beyond its ‘traditional contours to include substantive benefits and entitlements as envisaged by the Constitution’.²⁵



There is a wealth of scholarly work on ME. Generally, scholars accept ME as both a procedural and substantive mechanism that offers temporary relief to unlawful occupiers.²⁶ However, there have been diverse responses from scholars on the usefulness of ME to ensure effective application of the right against illegal eviction. Liebenberg and Young argue that ME still vests considerable decision-making authority

²³ *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC).

²⁴ *Occupiers of 51 Olivia Road* para 8.

²⁵ *Occupiers of 51 Olivia Road* para 408.

²⁶ Centre for Applied Legal Studies *Workshop Report: Meaningful Engagement* (2009). See also Ray B ‘Occupiers of 51 Olivia Road: enforcing the right to adequate housing through engagement’ 2008 *HRLR* 703; Ray B ‘The eviction model: how Grootboom turned into strong-form review’ Presentation at the New York Law School (16/11/2014); Christiansen EC (2010) 600; Chenwi L & Liebenburg S ‘The constitutional protection of those facing eviction from bad buildings’ (2008) 9(1) *ESR Review* 12; Chenwi L & Tissington K *Engaging Meaningfully with Government on Socio-Economic Rights – A Focus on the Right to Housing* (2010).

in state institutions and that this repudiates inclusiveness and equitable participation in finding effective solutions for the realization of section 26(3) rights.²⁷ In contrast, Ray argues that ME gives the courts considerable procedural authority to enforce section 26(3).²⁸ All these views are partly correct with regard to the nature and usefulness of ME. However, they fail to appreciate the far-reaching implications of the substantive aspects attributed to ME by Yacoob J.²⁹ This failure is also commonplace in the case law on evictions.

Glaringly, in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*³⁰ (*Residents of Joe Slovo*) the ConCourt was divided on what constitutes ME. This was due to the failure by the Court to adequately assert the substantive dimensions of ME. As a result the Court handed down five separate concurring judgments, which disproportionately placed more emphasis on the procedural aspects of ME. The Court was mired in procedural aspects, such as, the number of meetings that took place, how many municipal officials were assigned the task to engage, and how long the engagement process took place. This resulted in considerable uncertainty about ME in the subsequent eviction cases. The uncertainty resulted in courts issuing eviction orders based on compliance with procedural aspects of ME without any serious regard to the

²⁷ Liebenberg S & Young G 'Adjudicating Social and Economic Rights: Can democratic experimentalism help?' (2015) 237 in Aliviar GH, Klare K & Williams LA (eds) *Socio-economic Rights in Theory and Practice: Critical Enquiries*. See also Chenwi L & Tissington K (2010).

²⁸ Ray B (2014) 18.

²⁹ Liebenburg S (2010) 302.

³⁰ *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 545 (CC).

impact that the evictions have on the livelihood of unlawful occupiers.³¹ This study rejects the contention that ME is purely a procedural mechanism and accepts Liebenberg's contention that ME is a useful and transformative judicial initiative with substantive implications for the application of section 26(3).³²

The primary argument in this study is that the inadequate conceptualisation of the substantive requirements of ME by the ConCourt, such as, the empowerment of the unlawful occupiers through equitable participation and building of social capital, underlies the jurisprudential inconsistency in the application of ME. The secondary argument is that the jurisprudential inconsistency can be addressed through the development of a community engagement model that is based on the substantive requirements of ME. Accordingly, this study seeks to conceptually develop a model for community engagement based on the substantive aspects of ME. The envisaged model in this study is named the Transformative Empowerment Model for Meaningful Engagement (Transformative Empowerment Model) is meant to serve as a normative framework for ME.

1.2 Research problem

The announcement of ME in *Occupiers of 51 Olivia Road* clearly foresees a change in the approach and practice of participation – specifically its duration and nature – in eviction

³¹ See *Groengras Eiendomme (Pty) Ltd v Elandsfontein Unlawful Occupants and Others* 2002 (1) SA 125 (T); *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA); *City of Johannesburg v Rand Properties (Pty) and Others* 2007 (1) SA 78 (W); *Occupiers of Olivia Road; Residents of Joe Slovo*.

³² Liebenburg S (2010) 302.

cases.³³ It is about substantive involvement to protect occupiers against the abuse of state power.³⁴ Due to inadequate articulation of the substantive requirements of ME, the judgment in *Residents of Joe Slovo* and the subsequent seven ConCourt eviction judgments between 2009 and 2014³⁵ starkly contrasted, in many respects, the application of ME in *Occupiers of 51 Olivia Road*. This jurisprudential inconsistency, which is due to inadequate conceptualisation of the substantive requirements of ME is common and constitutes the central problem of the study.³⁶ Simply put, the substantive requirements of ME were missing in the application of ME in the eviction case law.

The inherent power imbalance between the unlawful occupiers and the state in eviction processes is succinctly highlighted in literature.³⁷ Sachs J denounced the ‘top-down’ approach to engagement adopted by the state in *Residents of Joe Slovo*. Consequently, in *Abahlali BaseMjondolo*, Moseneke DCJ, writing for the majority held that substantive justice in eviction processes required some form of empowerment of the vulnerable

³³ Ray B ‘Engagement’s possibilities and limits as a socio-economic rights remedy’ (2010) 9(3) *Washington University Global Studies Law Review* 399. See also Royston K & Tissington K *Workshop Report: Meaningful Engagement* (Dec 2009).

³⁴ Christiansen C (2010) 611. See also Muller G *The Impact of Section 26 of the Constitution on the Eviction of Squatters in South African Law* 2011 (unpublished LLD Thesis, University of Stellenbosch).

³⁵ *Abahlali baseMjondolo Movement SA and Another v Premier of KwaZulu-Natal and others* 2010 (2) BCLR 99 (CC) (*Abahlali BaseMjondolo*); *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 (4) BCLR 388 (CC) (*Pheko*); *Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v Golden Thread Ltd and Others* 2012 (4) BCLR 372 (CC) (*Occupiers of Portion R25*); *Occupiers of Skurweplaas 353 JR V PPC Aggregate Quarries (Pty) Ltd and Others* 2012 (4) BCLR 382 (CC) (*Occupiers of Skurweplaas*); *Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality and Another* 2012 (9) BCLR 951 (CC) (*Occupiers of Saratoga Avenue*); *Schubart Park Residents’ Association v City of Tshwane Metropolitan Municipality* 2012 (1) BCLR 68 (CC) (*Schubart Park Residents*).

³⁶ *Occupiers, Shulani Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* 2010 (9) BCLR 911 (SCA); *SANRAL v Lwandle Residents* Western Cape Division Case No 1114/14.

³⁷ Liebenburg S & Young G (2014). See also Liebenburg S (2010) 302 and Ray B (2010) 411.

occupiers to mitigate the impact of the power disparities.³⁸ The violence and the threat of violence leading up to the eviction of occupiers in *Occupiers of 51 Olivia Road, Residents of Joe Slovo, Abahlali BaseMjondolo* and *Schubart Part Residents* unmistakably demonstrated examples of abuse of state power by the officials. Accordingly, the post-1994 dispensation, which is based on human rights renders essential the empowerment of unlawful occupiers to ensure equitable participation and building of trust relations.

1.3 Purpose of the study

The Constitution has an egalitarian and transformative vision.³⁹ The courts are enjoined in their interpretation of the Constitution to give meaning to this vision by translating it into substantive equality that results in positive changes in the lives of the poor and landless. In eviction cases power is configured against the poor and marginalised. Habib persuasively and eloquently makes the case that in such instances it is unlikely to successfully fulfil the socio-economic rights to advance the interest of the poor without a deliberate effort to empower the poor to discover and develop leverages.⁴⁰ The study argues that the lack of a community engagement model premised on the substantive requirements of ME results in the inconsistent application of section 26(3) right. This jurisprudential inconsistency adversely impacted on the ConCourt's role to promote the transformative potential of the Constitution to protect the powerless against the abuse of state power. Therefore, the purpose of this study is five fold:

³⁸ *Abahlali BaseMjondolo* para 97.

³⁹ Klare K 'Legal culture and transformative constitutionalism' (1998) 14 *SALJ* 146.

⁴⁰ Habib A 'Political power, social pacts, human rights and the development agenda' in Langford M, Cousins B, Dugard J & Madlingozi T (eds) *Socio-Economic Rights in South Africa: Symbols or Substance?* (2014).

- To examine the history of forced evictions in the apartheid South Africa.
- To examine the normative context of the right against unlawful evictions in the post-1994 dispensation in South Africa and the implications of the commitment to transformative constitutionalism.
- To examine the ConCourt's application of ME in eviction cases between 2008 and 2014.
- To conceptually develop a modified model for community engagement based on the substantive requirements of ME.
- To examine the implications of the constitutional values of democracy, human dignity, equality and freedom on the modified community engagement model.

1.4 Research questions



The primary research question in this study is: whether people in informal settlements threatened with eviction will be afforded greater protection of section 26(3) through the development of a community engagement model based on the substantive requirements of ME. To respond to the central question, the study presents five interrelated secondary questions, which are:

1. What is the historical legal and political context of forced evictions in apartheid South Africa?
2. What is the normative context for evictions in the post-1994 democratic South Africa?
3. What are the substantive requirements of ME during evictions?
4. What model of community engagement is appropriate for unlawful occupiers to

engage meaningfully?

5. What are the implications of the community engagement model on the principles of democracy and the rights to human dignity, equality and freedom?

1.5 Research arguments

The central argument of this study is that the lack of a community engagement model based on the substantive requirements of ME results in jurisprudential inconsistency, which weakens the application of section 26(3) by the ConCourt. The study has five subsidiary arguments, which are as follows:

1. That the apartheid induced forced evictions were disempowering of the squatters and created vulnerabilities that persisted beyond the 1994 democratic dispensation.
2. That the post-1994 democratic dispensation provides a framework for substantive involvement of the occupiers during evictions.
3. That ME has substantive requirements, which entail the empowerment of the occupiers through equitable participation and building of social capital.
4. That the development of a community engagement model based on the substantive requirements of ME will ensure jurisprudential consistency in the application of ME.
5. That, to improve the protection of occupiers through section 26(3) the community engagement model must promote deliberative democracy and the rights to human dignity, equality and freedom.

1.6 Significance of the study

The world is grappling with what could be fairly described as a global crisis of forced or unlawful evictions. Langford and du Plessis are of the view that these evictions have reached 'an unprecedented scale and is a global epidemic'.⁴¹ In a 2003 survey of about 60 countries the Centre on Housing Rights and Evictions (COHRE) highlights that, globally, an estimated 6.3 million people were threatened by forced eviction.⁴² Since this report there has been no recent evidence to suggest that the scale of forced evictions has declined; rather recent evidence suggests that the actual numbers are in fact on the rise.⁴³ Evictions continue to occur in conditions which are unjustifiable, and where due processes, remedies and participation of occupiers are visibly ill-defined.

South Africa has more than 11.2 million households, of which 13.6 per cent are informal dwellings.⁴⁴ The study accepts the definition of informal settlements or dwellings used by Statistics South Africa as a 'makeshift structure not approved by a local authority and not intended as a permanent dwelling, typically built with found materials (corrugated iron, cardboard, plastic, etc)'.⁴⁵ Most of these informal dwellings are built on land where there is no security for the occupants who are thus always confronted by a real threat of eviction. The extensive infrastructure development programme by the government and urban industrialisation make the situation of the occupiers more precarious.

⁴¹ Langford M & du Plessis J *Dignity in the Rubble? Forced Evictions and Human Rights Law* (2006) 17.

⁴² Centre on Housing Rights and Evictions *Forced Evictions: Violations of Human Rights – Global Survey No 9* (2003).

⁴³ Note recent evictions and threats thereof in South Africa, China, India, Kenya, Zimbabwe and Colombia.

⁴⁴ Stats SA *Statistical Release Census 2011* (2012) 50.

⁴⁵ Stats SA (2012) 71.

In dealing with eviction cases the ConCourt developed a jurisprudence that is based on ME. In *Occupiers of 51 Olivia Road* the ConCourt formalised ME as a creative mechanism to ensure that the evictees are substantively involved in seeking solutions during the eviction process. Muller eloquently argues that the explanation of ME by Jacob J in *Occupiers of 51 Olivia Road* goes beyond the common law understanding of the *audi* principle.⁴⁶ In *Residents of Joe Slovo* and the subsequent eviction cases it was apparent that there is fundamental confusion in the ConCourt as to what constitutes ME. There is extensive scholarship on this doctrinal approach of the ConCourt. The scholarly work focuses on the usefulness of ME as a procedural mechanism,⁴⁷ the jurisprudential value of ME as a procedural requirement for administrative justice⁴⁸ and the inconsistency of the ConCourt in its application of the mechanism.⁴⁹ However, none of the scholarly articles seem to conceptually engage with the substantive dimension of ME within the context of transformative constitutionalism to address the unequal power relations that inherently characterise evictions.

This study argues that ME is a procedural and substantive requirement and is principally about addressing the unequal power relations between the occupiers and

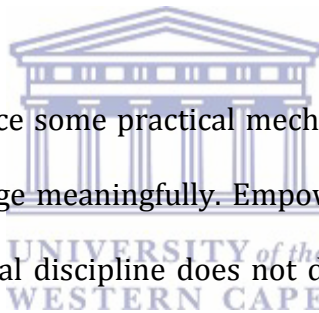
⁴⁶ Muller G 'Conceptualising meaningful engagement as a deliberative democratic partnership' (2011b) 22 *Stellenbosch Law Review* 742-758.

⁴⁷ Ray B (2010) 407. See also Pillay A *Reinventing Reasonableness: The Adjudication of Social and Economic Rights in South Africa, India and the United Kingdom* (unpublished LLD thesis University College London 2011).

⁴⁸ Van der Berg S 'Meaningful engagement: proceduralising socio-economic rights further or infusing administrative law with substance' (2013) 29(2) *SAJHR* 376-398.

⁴⁹ Landau D 'The reality of social rights enforcement' (2013) 53(2) *Harvard International Law Journal* 407.

the state in finding solutions to the occupiers' problems.⁵⁰ The study further argues that for the occupiers to engage meaningfully there is a need for the development of a community engagement model based on the substantive requirements of ME to mitigate the vulnerabilities of the occupiers. The lack of such a model for the occupiers to engage meaningfully constitutes a significant gap in the current academic literature and jurisprudence on evictions. This study seeks to fill this vacuum in academic literature by developing a conceptual community engagement model for eviction. The author is of the view that the development of such a model might result in improved application of ME by the ConCourt and might also result in the updating of General Comment No 7⁵¹ and other international mechanisms dealing with unlawful evictions.

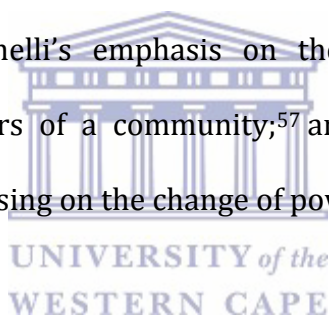


The model will seek to introduce some practical mechanisms for the empowerment of the unlawful occupiers to engage meaningfully. Empowerment appears across a range of disciplines; however, the legal discipline does not deal adequately with this notion. Hence, the development of a community engagement model will be based on an interdisciplinary approach, with theories primarily derived from human rights, social work, international development studies and political science. Such an approach is necessary for a better understanding of the polycentric socio-economic rights as they stand in a relation of mutual dependency with development. It is important to note that there are many models for community engagement. However, the study will examine only two community engagement models that are relevant for situations characterised by power disparities.

⁵⁰ *Occupiers of 51 Olivia Road* para 18.

⁵¹ UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 7: the right to adequate housing (Art. 11.1): forced evictions' 20 May 1997 Res E/1998/22.

One of these models is the 'neighbourhood model' devised by Henderson and Thomas that consists of a nine-stage process of community engagement.⁵² The other is the 'critical integrative model' developed by Stepney and Popple and which consists of a six step engagement process.⁵³ The 'critical integrative model' draws on a range of critical and transformation theories including those of Freire⁵⁴ and Gramsci.⁵⁵ The development of the community engagement model will draw on the strengths of both the 'neighbourhood model' and the 'critical integrative model', but will also develop approaches to address the weaknesses of the two models by drawing on the ideas of the following scholars: Alinsky's organisational principle on collective action to change oppressive structures;⁵⁶ Dominelli's emphasis on the establishment of egalitarian relationships amongst members of a community;⁵⁷ and Craig's evaluation model of community empowerment focusing on the change of power differences.⁵⁸



The community engagement model is intended to entail stages of practice, which will define the activities that must be carried out at each stage before and during the eviction, and the outcomes of activities at each stage. Such a model will enable the

⁵² Henderson P & Thomas D *Skills in Neighbourhood Work* 3 ed (2002).

⁵³ Stepney P & Popple K *Social Work and the Community: A Critical Context for Practice* (2008).

⁵⁴ Freire P *A Pedagogy of the Oppressed* 6 ed (1996). See also Freire P & Schor I *A Pedagogy for Liberation* (1989).

⁵⁵ Gramsci A *Selection from the Prison Notebooks* (1971).

⁵⁶ Alinsky S *Rules for Radicals* (1971).

⁵⁷ Dominelli L *Anti-Oppressive Social Work Theory and Practice* (2002). See also Dominelli L 'Empowerment: help or hindrance in professional relations' in Ford D & Stepney P (eds) *Social Work Models, Methods and Theories: A Framework for Practice* (2012) 111.

⁵⁸ Craig G 'Community capacity-building: something old, something new...?' (2004) 27 *Critical Social Policy* 341.

courts to substantively evaluate ME in eviction cases that involve informal settlements in urban areas. Improved application of ME would result in much greater protection offered by the section 26(3) right.

The overarching criterion behind the choice of models to develop the modified community engagement model is whether a model has theoretical or practical aspects that lead towards emancipatory, egalitarian or transformational community empowerment. Based on this broad criterion there are three specific reasons for selecting the 'neighbourhood model' and 'critical integrative model' in the study. One reason was to draw on the analyses of experts in community engagement whose research work primarily focuses on measures to address unequal power relations. A second reason was to explicitly identify models that deal with the empowerment process of the entire community for effective community engagement, rather than models that focus on empowerment of individuals, organisations or groups within the community. The third reason was to use models that advance the goals of an egalitarian society based on human dignity, equality and freedom.

The neighbourhood model of Henderson and Thomas is viewed in this study as being one that highlights relevant knowledge about the technical elements needed to conduct empowerment of informal settlements to engage meaningfully. Stepney and Popple's work is recognised as a model that illuminates transformational approaches to empowerment for community engagement by emphasising critical practice for tackling oppressive structures, an area that is inadequately emphasised in the conceptualisation and application of ME by the ConCourt in *Occupiers of 51 Olivia Road*. These models will assist in the development of a community engagement model to fill the gaps in the

ConCourt judicial enterprise of transformative constitutionalism to empower the vulnerable informal communities. It is important to note that the two models have both strengths and weaknesses. Therefore the study will examine the two models, their strengths and weaknesses, and then present a modified community engagement model that mitigates the weaknesses. As mentioned above, the model is primarily focused on addressing the vulnerabilities in informal settlements.

Why the focus on informal settlements? Informal settlements in South Africa remain an eyesore across major cities and people living in these areas are subjected to the most dehumanising conditions. Informal settlements consist of non-conventional housing, built without complying with legal building procedures. These settlements are usually built on the periphery of cities where land is cheap and neglected.⁵⁹ According to the United Nations Human Settlement Programme (UN-Habitat) in most cases informal settlements are better located than the housing development to which the government seeks to relocate occupiers.⁶⁰ The urban poor usually use salvaged materials like wood, tin, corrugated iron and any other found material to build these settlements. Most of these rudimentary settlements lack the basic amenities of life, such as, water supply, sanitation, drainage, waste disposal and proper road access.⁶¹ Cairncross, Hardoy and Satterthwaite assert that informal settlements are often subjected to these poor conditions, which amongst others, increase the spread of contagious diseases.⁶²

⁵⁹ UN-HABITAT *Slums: Past, Present and Future: The Critical Role of Policy* (2007). See also Mahanga MM *Urban Housing and Poverty Alleviation in Tanzania* (2002).

⁶⁰ UN-Habitat (2007) 53.

⁶¹ Stats SA (2011) 71.

⁶² Cairncross S, Hardoy JE & Satterthwaite D 'The Urban Context' in Cairncross S, Hardoy JE & Satterthwaite D (eds) *The Poor Die Young: Housing and Health in Third World Cities* (1990).



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Photograph 1: Informal Settlement in Kraaifontein, Cape Town, May 2015.



Source: own 2015

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South Africa experienced a dramatic increase in the number of households living in informal settlements in the post-1994 democratic dispensation.⁶³ This took place because the urban poor prefer to live in tactical and low to zero serviced areas, where these are located closer to opportunities for survival.⁶⁴ Furthermore, there is a link between poor housing and the environmental conditions in the informal settlements, which also reflect poverty. Poverty in informal settlements should be viewed as much

⁶³The Presidency *Towards the 20 Year Review* (2014).

⁶⁴ Marx C 'Supporting informal settlements' in Khan F & Thring P (eds) *Housing Policy and Practice in Post-Apartheid South Africa* (2003) 77.

more than a lack of income because of high unemployment.⁶⁵ It is compounded by the waning health and nutritional rates, overcrowded housing, increased school dropout levels and increased stress upon the physical and social environment of low income residents. The unacceptable conditions of informal settlements are often worsened by the constraints of the cost of land that is suitable for housing the urban poor and low income groups.⁶⁶

According to Stats SA of the 11.2 million households in South Africa 13.6 percent are informal dwelling. Khan argues that the number of people housed inadequately in South Africa is possibly higher than the Stats SA estimates.⁶⁷ The Housing Development Agency (HDA)⁶⁸ further highlights that there has not been a rapid decline in the number of households in informal settlements.⁶⁹ The Department of Human Settlements (DoHS) notes that the housing backlog in 2015 was about 2 million units and this figure is increasing despite an impressive low-cost housing delivery of more than 3.6 million houses in 20 years.⁷⁰

This study adopts the HDA and Stats SA definition of informal settlements as illegal and spontaneous settlements lacking basic services and infrastructure.⁷¹ The challenges

⁶⁵ Amin A 'The good city' (2006) 43(5) *Urban Studies* 1014.

⁶⁶ Khan F 'Supporting people's housing initiatives' in Khan F & Thring P (eds) *Housing Policy and Practice in Post-Apartheid South Africa* (2003) 11.

⁶⁷ Gobodo N *The Need for Legislation on the Eradication of Informal Settlements: Policy Options and the Way Forward* Presentation for Gauteng Province Seminar on Informal Settlements Upgrading/eradication (Johannesburg 22 October 2008).

⁶⁸ Housing Development Agency *South Africa: Informal Settlement Status* (2013).

⁶⁹ Housing Development Agency (2013) 34. See also Stats SA (2011) 71.

⁷⁰ Department of Human Settlements *Need for Adequate Shelter Estimates* (2015) 99.

⁷¹ Housing Development Agency (2013) 12.

presented by informal settlements are a global phenomenon and different terms are used to describe these settlements: *shanties* or *mkhukhu* (South Africa), *favelas* (Brazil), *aashwa'i* (Egypt) and *ciudades perdidas* (Spanish, 'lost city').⁷² Godehart and Vaughan argue that these settlements are characterised by illegality and informality, environmental hazards, poverty and vulnerability, social stress and other challenges.⁷³

Yap asserts that most of the migrants who stay in informal settlements lack the ability to succeed in the cities due to a lack of skills and education. They often become 'victims of the cities' wrath' and they present a challenge for policymakers in South Africa.⁷⁴ From the above it is quite apparent that residents in informal settlements are exposed to conditions that render them extremely vulnerable. These conditions include: poverty, lack of basic service infrastructure, poor housing, environmental degradation, health hazards, lack of skills and poor education.⁷⁵ Any threats of eviction or actual eviction have an immensely adverse impact on these vulnerable communities and will have a direct impact on their capacity to engage meaningfully. This was evident in *Grootboom*, *Occupiers of 51 Olivia Road* and *Abahlali BaseMjondolo*. Engagements are frequently accompanied by abuse of state power, which demonstrates the power imbalance.

⁷² Kramer M *Dispossessed: Life in Our Own Urban Slums* (2006).

⁷³ Godenhart S & Vaughan A *Research Reviewing the BNG in Relation to the Upgrading of Informal Settlements*. Research Paper for Theme 1 Conceptual Framework for the National Department of Housing (2013).

⁷⁴ Yap KS 'The global context of housing poverty' in Aldrich BC & Sandhu RS (eds) *Housing the Urban Poor: Policy and Practice in Developing Countries* (1995). See also Atuahene B 'Legal title to land as an intervention against urban poor in developing nations' (2004) 36(5) *The George Washington International Law Review* 1109-1179.

⁷⁵ Victor T *The Challenges of Eradicating Informal Settlements in South Africa by 2014: The Case of Seraleng Sustainable Human Settlement, Rustenburg Local Municipality, North West Province* (2009).

1.7 Research methodology

This study identifies a conceptual problem with regard to ME and as such the methodology is based on a review and analysis of literature and case law that is relevant to the subject of the study. This study relies on primary sources such as case reports dealing with section 26(3), for purposes of explaining the application of ME by the ConCourt. Through purposive sampling the researcher identified relevant case reports for such an in-depth analysis.⁷⁶ These are case reports on section 26(3) litigation that mainly involves urban informal settlements. This study makes use of both primary and secondary sources. For both sources, print and electronic forms of access are used. The primary sources of information that are utilised in the study include legislation, policies, notices and international treaties relevant to the right against unlawful eviction.⁷⁷ Secondary sources, such as, scholarly journal articles and academic books relevant to the adjudication of socio-economic rights, ME, evictions, community engagement, and community empowerment are utilised.⁷⁸

It is not necessary for the purposes of this study to use empirical data collection techniques for two reasons: first, the study is a doctrinal enquiry on the conceptualisation and application of ME by the ConCourt; and secondly, the study employs a conceptual approach for the development of the community engagement

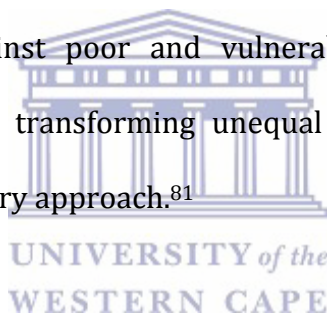
⁷⁶ Neuman WL *Social Research Methods: Qualitative and Quantitative Methods* 6 ed (2011). See also Babbie E & Mouton J *The Practice of Social Research* (2004); Babbie E *Introduction to Social Research* 5 ed (2011).

⁷⁷ Humby T, Kotze L, Du Plessis A, Du Plessis W, Barnard-Naude J, Freedman W, Mahler-Coetzee J, Bronkhorst C, Bellengere A, Swanepoel N, Karels M Keevy I & Letsoalo D *Introduction to Law and Legal Skills* (2012).

⁷⁸ Humby T et al (2012) 329.

model for ME by informal settlements.⁷⁹ Hence, this study does not employ any data collection techniques premised on empirical research.

It has been mentioned earlier in this chapter that ‘empowerment’ is an under-developed concept in legal studies. Thus, in developing the community engagement model to empower the occupiers, this study undertakes an interdisciplinary approach that encompasses law, human rights, social sciences, international development studies and political science. The mediating concepts for the interdisciplinary study are ‘community engagement’ and ‘community empowerment’. Such an approach is necessary for the development of the model as most eviction cases are characterized by a power imbalance - state action against poor and vulnerable occupiers.⁸⁰ Transformative jurisprudence, which is about transforming unequal power distribution in society, requires such an interdisciplinary approach.⁸¹



1.8 Limitations of the study

The post-1990 milieu in South Africa is characterised by the rapid growth of informal settlements due to the abolition of the influx control laws. Between 1990 and 2001 there was an approximately one thousand per cent increase in informal settlements in South Africa which accounts for a fifth of urban dwellers, and the number of planned units is considerably smaller than that required for the informal population.⁸²

⁷⁹ Welman C, Kruger F & Mitchell B *Research Methodology* 3 ed (2011).

⁸⁰ Welman C, Kruger F & Mitchell B (2011) 281. See also Neuman WL (2011) 314; and Babbie (2011) 145.

⁸¹ Roux T *The Politics of Principle: The First South African Constitutional Court 1995-2005* (2013) 73.

⁸² Langford M ‘Housing right litigation: *Grootboom* and beyond’ in Langford M, Cousins B, Dugard J & Madlingozi T (eds) *Socio-Economic Rights in South Africa: Symbols or Substance?* (2014).

Municipalities are consolidating their developmental trajectory through the formulation and implementation of their Integrated Development Plans (IDPs) and this results in an increase in the value of urban land and much more drastic responses to informal settlements are considered, which include evictions.

This study seeks to develop a community engagement model as a normative framework for ME during evictions of occupiers of informal settlements. In doing so, the study has two limitations. First, the focus is restricted to cases emanating from courts. Secondly, the focus is on cases involving eviction from informal settlements in urban areas. There are many other groups in urban areas that are confronted with serious housing right challenges, such as, renters, backyard dwellers, hostel dwellers and farm dwellers, amongst others. However, the focus of this study will be on informal settlements as such evictions in most cases involve the uprooting of established informal community settlements with varied social challenges, and ME could be a much more complex matter as it is characterised by a vertical relationship between the state and the occupiers. The limitations are only meant to make the study more manageable and do not imply that models developed in the study and the findings are not applicable to other eviction cases.

1.9 Chapter outline

The study is subdivided into eight chapters as follows:

1. The first chapter provides the introduction and the overview of this study.

2. The second chapter looks at the disempowering legal and historical context of forced evictions in South Africa. This chapter exposes the unjust social and historical context that created the precarious black urban land tenure, which led to the development of informal settlements.
3. The third chapter looks at the normative context of the right against unlawful eviction. In this chapter an extensive exposition of the right against unlawful eviction is made, and there is also a focus on the local, international and regional dimensions of the right. This chapter identifies the substantive requirements for ME: empowerment, participation and social capital.
4. The fourth chapter theorises empowerment, participation and social capital, and further explores models of community engagement. The primary objective of this chapter is to conceptually develop a community engagement model based on the substantive requirements for ME.
5. Chapter five explores the implications of the community engagement model on the ConCourt's eviction jurisprudence.
6. The sixth chapter examines the implications of the community engagement model on human dignity, equality and freedom. This chapter is further subdivided into three sub-chapters and examines the linkage of the model with each of the foundational values. The sub-division seeks to enable an intensive interrogation of whether the model promotes the rights to human dignity, equality and freedom.
7. The seventh chapter examines the implications of the community engagement model on theories of democracy and the implications for the adjudication of socio-economic rights.

8. The eighth chapter presents the conclusions, contributions and recommendations.



CHAPTER 2

THE DISEMPowering TRAJECTORY OF APARTHEID FORCED EVICTIONS

2.1 Introduction

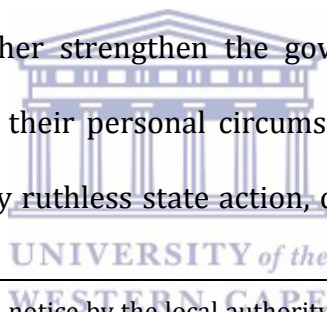
The disempowering nature of the apartheid evictions is the trademark of the influx control measures instituted by the apartheid government. Before 1994 an owner of an immovable property had a qualified right to exclude all occupiers from his land if he could prove that any right that he granted, which could be permission or a licence to occupy, had lapsed or been revoked or if he could prove that any real or personal right that entitled the occupiers to occupy the property lawfully, had been terminated. In instances where occupation was unlawful, as in cases where the occupiers never had permission or a licence to occupy the property or they did not hold any right to occupy the property, the owner could invoke the common law remedy of *rei vindicatio*. Once the requirements of *rei vindicatio* were met an eviction would be commenced. The eviction would be executed without any consideration for the circumstances of the evictees. This created the impression that the owner had an absolute right to evict all occupiers of his property without any regard for their personal circumstances.

The common law *rei vindicatio* was strengthened by a litany of legislation, such as the Slums Act 53 of 1934,¹ the Trespass Act 6 of 1959,² the Physical Planning Act 88 of

¹ This Act gave local authorities powers to declare premises or pieces of land a slum in terms of section 4(7)(a). The building or piece of land could be declared a slum area if the local authority or medical officer of health was of the opinion that a nuisance existed on the premises. When premises were declared a

1967³ and the Health Act 63 of 1977.⁴ Van der Walt argues that these laws are not unusual measures to use in order to evict people, as spatial settlement in modern urban areas requires some form of planning that takes into consideration health and available services.⁵

O'Regan⁶ and Muller⁷ produced seminal scholarly work on apartheid forced evictions and influx control measures, and in this chapter the writer leans on this scholarly brilliance to sketch the disempowering trajectory of the apartheid induced evictions. Both scholars bemoan the fact that under apartheid, the eviction laws were used to construct an urban spatial settlement that was based on race.⁸ A litany of apartheid legislation was passed to further strengthen the government position to evict and displace people irrespective of their personal circumstances or housing needs. These apartheid laws, accompanied by ruthless state action, disempowered the black African



slum the owner would be required on notice by the local authority to remove the nuisance, demolish the slum or face expropriation.

² The Act criminalised entrance to or presence on land without the permission of the owner or lawful occupier.

³ The Act prescribed procedures to be adhered to in the erection of structures for both occupation and commercial purposes. The Act criminalises non-compliance with the prescribed procedures and provides for harsh penalties, which includes demolition of the erected structures.

⁴ This Act authorises local authorities to take all 'lawful, necessary and reasonably practical measures' to maintain hygienic and clean conditions, to prevent the occurrence of nuisances and unhygienic conditions, and to prevent pollution of water or any other condition that could be harmful or dangerous to the health of any person or community.

⁵ Van der Walt AJ *Constitutional Property Law* (2005) 70-81.

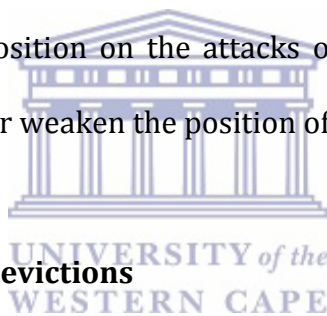
⁶ O'Regan C 'No more forced removals? An historical analysis of the Prevention of Illegal Squatting Act' (1989) 5 *SAJHR* 361-394.

⁷ Muller G *The Impact of Section 26 of the Constitution on the Eviction of Squatters in South African Law* (unpublished LLD thesis, Stellenbosch University, 2011a). See also Muller G 'The Legal-historical context of urban forced evictions in South Africa' (2013) 19 (2) *Fundamina* 367-396.

⁸ O'Regan C (1989) 363. See also Muller G (2013) 370.

majority by rendering them landless in urban areas; and this gave rise to sprawling informal settlements in South African cities.

The purpose of this chapter is to give a brief exposition of the disempowering nature of apartheid forced evictions, and it has four parts. Part one gives a context on forced evictions through a brief exposition of international instrument relevant to eviction. Part two traces the development of black land tenure in urban areas through a brief analysis of laws that informed the state action. Part three provides an overview of the powers that the Prevention of Illegal Squatting Act (PISA) accorded to private owners and the state, and in particular to local authorities, to evict and demolish structures. Part four provides a brief exposition on the attacks on *mandament van spolie* by the apartheid government to further weaken the position of unlawful occupiers.



2.2 Contextualising forced evictions

The disempowering and dehumanising impact of forced evictions generated international interest. A number of international and regional organisations have documented forced evictions and issue periodic reports on incidents that have occurred around the world or in particular regions or countries.⁹ The CESCR defines forced eviction as 'the permanent or temporary removal against their will of individuals, families and/or communities from homes and/or land which they occupy, without the

⁹ See for example *The Right to Adequate Housing: Report of the Special Rapporteur, UN Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and Protection of Minorities*, 47th Session, UN Doc E/CN4/Sub2/1995/12 (1995) at para. 47. See also *UN Sub-Committee on Prevention of Discrimination and Protection of Minorities Resolution 1997/19*. See also *Women and the Right to Adequate Housing and to Land and Property*, UN Doc E/CN4/Sub2/Res/1997/19 para 11.

provision of, and access to, appropriate forms of legal or other protection'.¹⁰ When forced evictions are executed violations of a wide range of human rights may occur because of the absence of a lawful justification for the eviction, and the improper way the eviction is carried out. The 2013 COHRE research report highlights that it is almost always the poorest segment of society, many of whom live a subsistence existence and those with the least security, who are targeted.¹¹

The Commission on Human Rights asserts that the practice of forced evictions involves the 'involuntary removal of persons from their homes or land, directly or indirectly attributable to the State'.¹² There are numerous areas of divergence on what constitutes forced eviction. However, in this study the author identifies four areas of convergence. First, forced evictions can always be attributed directly to a specific decision, legislation or policy of state or to the failure of a state to intervene to halt forced evictions by third parties.¹³ This implies that in cases of forced evictions governments are often actively involved. Secondly, there is invariably an element of force or coercion involved in forced evictions.¹⁴ This involves the irreparable demolition of the homes of affected persons, sometimes as a form of punishment for political or other activities.

¹⁰ CESCR (1997) para 3.

¹¹ COHRE (2001) 2.

¹² UN Commission on Human Rights *Fact Sheet No 25, Forced Evictions and Human Rights* (2014) 3.

¹³ Van Eerd M & Banerjee B *UN Habitat Working Paper I: Evictions, Acquisition, Expropriations and Compensation – Practices and Selected Case Studies* (2013).

¹⁴ Women Environmental Programme (WEP) *Beyond the Tears and Rubble: Ongoing Demolitions in the FCT under the New Administration* (2008).

Thirdly, almost all instances of forced evictions are planned, formulated and often announced prior to being carried out.¹⁵ For instance, it is not unusual for government declarations or judicial decisions to be issued prior to an eviction or for planned evictions to be included in government development projects or plans. Fourthly, forced evictions affect individuals and groups. They can be either mass in character or of a smaller scale. Forced evictions can, under certain circumstances and subject to specific conditions, be consistent with international human rights standards. Such evictions can be classified as 'legal evictions'. However, the Commission on Human Rights suggests that this distinction must be interpreted in a very narrow sense. As a means of distinguishing evictions which are consistent with international human rights standards and those which are not, terms such as 'arbitrary eviction', 'illegal eviction', and 'unfair evictions' are often used. The South African Constitution uses the term 'arbitrary evictions' which has the same implications as 'unlawful' or 'unfair eviction'.



The CESCR has placed considerable emphasis on forced evictions and has asserted, in its General Comment No 4, that 'instances of forced evictions are *prima facie* incompatible with the requirements of ICESCR and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law'.¹⁶ The term 'exceptional circumstances' is very important. The massive forced evictions that took place in South Africa during the apartheid era were generated by the racial oppression of black people by a white minority government. Such crude racial segregation did not constitute 'exceptional circumstance' as anticipated by General Comment No 4. The apartheid induced forced evictions ran counter to the relevant

¹⁵ Welsh D *The Rise and Fall of Apartheid* (2009) 72.

¹⁶General Comment No 4 (1991) para 18.

principles of international law, such as, human dignity, equality, non-discrimination and freedom. These forced evictions were systematically designed to disempower black people.

2.3 The disempowering trajectory of apartheid forced evictions

Most people staying in informal settlements in South Africa are black Africans. This is partly due to oppressive laws premised on racial segregation by the apartheid government before 1994. All these apartheid laws were in blatant disregard of international instruments against forced eviction. O'Regan argues that the most despised practices of the apartheid government was its sustained policy of demolishing homes and ejection of black Africans.¹⁷ Muller asserts that prior to 1994 there was 'a dual system of tenure rights and land ownership for black people in South Africa' – that is, black land tenure in urban areas and also black land tenure in rural areas.¹⁸

Land tenure refers to the terms and conditions subject to which land is held. It is a legal term and means the right to hold land, rather than the simple fact of holding or possessing land.¹⁹ This study focuses on evictions in urban informal settlements. According to Terreblanche, the modern history of urban land tenure by black Africans is characterised by a special relationship between land, labour and power.²⁰ He notes that the colonial government and white farmers enriched themselves at the expense of the colonised black majority for more than three and a half centuries by creating political

¹⁷ O'Regan C (1989) 361.

¹⁸ Muller G (2013) 370.

¹⁹ National Land Committee 'Tenure Reforms' *Gender and Media Fact Sheet* (2001).

²⁰ Terreblanche S *A History of Inequality in South Africa 1652-2002* (2002).

and 'economic power structures' that reinforced their privileged position in relation to the black majority.²¹ He argues that in the economic structure of South Africa the black people were 'proletarianised' meaning that they were reduced to a pool of cheap black labour.²²

Thompson further expatiates the analysis of Terreblanche and asserts that during the period 1910 – 1948 whites were embroiled in internal quarrels between English-speakers and Afrikaners, though they dominated every sector of the capitalist economy and did so with the use of cheap black labour.²³ The categories of 'race and class coincided closely', black people however able were subordinate to white people, however feeble.²⁴ Thompson further asserts that blacks did the manual work in the white household and the mining industry, the arable field and the factory floor.²⁵

In 1910 white people in South Africa established the Union Government that excluded the black majority. The Union Government introduced racial laws that oppressed and created conducive conditions for economic exploitation of the black majority.²⁶ For Muller, all those laws resulted in black farmers losing their land and being forced into some form of oppressive labour relationship with their white counterparts.²⁷ Some of these white farmers concluded and developed labour tenancy agreements were introduced by white farmers with black people. The intervention by the government to

²¹ Terreblanche S (2002) 6.

²² Terreblanche S (2002) 6.

²³ Thompson L *A History of South Africa* (2006).

²⁴ Thompson L (2006) 150.

²⁵ Thompson L (2006) 151.

²⁶ Terreblanche S (2002) 298-299.

²⁷ Muller G (2013) 372. Read also Muller G (2011a).

limit the number of black people that were residing on white farms disrupted the labour tenancy relationship. According to Muller, this forced many black people to return to the overcrowded apartheid created Bantustans while others chose to travel to the nearby urban centres of South Africa in search of minimum wage paying opportunities, as they were largely unskilled.²⁸ This promoted the establishment and growth of informal settlements.

Muller argues that the segregated urban settlements and the precarious urban land tenure for black people started with the Black (Urban Areas) Act 21 of 1923.²⁹ The primary objective of the Act was to ensure that black people had accommodation in or near urban areas. According to section 1(2) of the Act, an urban local authority could, with the approval of the Minister of Native Affairs, 'define, set apart and lay out' land for the 'occupation, residence and other reasonable requirements' of black people, and also 'define, set apart and lay out' any portion of a location or any other land within its jurisdiction where black people could lease a plot for the building of 'houses and huts for their own occupation'. Section 1(1)(c) of the Act provided that an urban local authority could provide buildings or huts to black people 'on such terms and conditions approved by the administrator and the Minister'. This led to the Minister or the administrator prescribing stringent conditions for black people and families within locations or native villages.

Section 5 of the Act prescribed that all black people who were employed within the jurisdiction of an urban local authority were further prohibited from obtaining

²⁸ Muller G (2013) 374.

²⁹ Muller G (2013) 376.

residence anywhere else other than in locations, native villages or native hostels.³⁰ In terms of section 5(1) any person who harboured or otherwise provided accommodation to black people in contravention of section 5(1) would be guilty of an offence. The Act furthermore prohibited owners, lessees and lawful occupiers of land from allowing the congregation of black people on their land if that land was situated within three miles of an urban authority's jurisdiction.³¹ Any person who allowed black people to congregate on their land in contravention of section 6(1) would be guilty of an offence.³² The purpose of these provisions was to ensure that black people congregated in certain clearly defined areas for purposes of domestic employment, where they could be carefully managed and could have their living conditions inspected on a regular basis. To ensure this regular inspection, section 11(1) of the Act required every urban local authority to appoint inspectors for the management of every location, native village and native hostels within its jurisdiction. Fine and Davis argue that the use of inspectors enabled urban local authorities to control in a regimented manner the accommodation required for all the black people who sought employment in urban areas.³³

³⁰ Section 5(2) of the Act exempted the following black people from this provision: (a) a registered owner of immovable property valued at 75 pounds or more; (b) a successor in title in terms of a valid will or through intestate succession; (c) a registered voter in the Cape Colony; (d) the wife, minor child, unmarried daughter or a *bona fide* dependant of the abovementioned persons; (e) a *bona fide* domestic servant that receives sleeping and sanitary accommodation from his or her employer; (f) where accommodation is provided by the employer in terms of section (1)(1)(e) of the Act; (g) a resident of a mission house, private hostel or similar institutions; (h) a resident of an area proclaimed as an approved area for black occupation; (i) a resident of a location in the Orange Free State Colony on the date that it was proclaimed as a coloured location in terms of section 27(3) of the Act; and (j) the holder of an exemption otherwise granted permanently or for a specified period.

³¹ Section 5(3) of the Act.

³² Section 6(3) of the Act. This offence was punishable with a maximum fine of 50 pounds.

³³ Fine R & Davis D *Beyond Apartheid: Labour and Liberation in South Africa* (1991).

Under severe pressure from white local authorities the government promulgated the Slums Act of 1934. The Slums Act gave the Medical Officers for Health wide-ranging powers to expropriate property that they deemed to be a health risk.³⁴ According to Jeppie the primary purpose of the Slums Act was to avoid the obstacles and delays caused by resort to the courts.³⁵ Section 1(2) of the Slums Act empowered the local authority to declare certain areas or buildings as slums. Owners, who were largely white, would then be served with notices to repair their property, reduce the number of residents or face having the occupants evicted. Failure of the owner to comply with the notice constituted an offence.³⁶ Local authorities were further authorised, upon the failure of an owner to comply with such notice, to remove the nuisance and to sell any materials in recovery of the expenses that they had incurred.³⁷

In 1948 the NP government inherited a tradition of forced evictions of black people in urban areas, and based on its policy of separate development it sought to tighten the influx control of black people and to strictly govern black urban land tenure by the promulgation, amongst others, PISA.³⁸

2.3.1 Analysis of the Prevention of Illegal Squatting Act 52 of 1951 (PISA)

The NP government enacted PISA just three years after winning elections in 1948. As a result of PISA thousands of black Africans were uprooted. PISA was preceded by the

³⁴ Jeppie S 'Reclassification: Coloured, Malay, Muslim' (2001) 118.

³⁵ Jeppie S (2001) 127.

³⁶ Section 11 of the Slums Act.

³⁷ Section 12 of the Slums Act.

³⁸ O'Regan C (1989) 362. See also Muller G (2013) 382.

enactment of the War Measures Act 13 of 1940. O'Regan highlights that the War Measures Act was due to rapid industrialisation in the war years, together with a rapid increase in the process of urbanisation without concomitant increase in the availability of urban housing for black people, this led to the emergence of informal settlements.³⁹ She further highlights that during this period the population of Johannesburg increased by 48 percent and 68 percent growth in the African population.⁴⁰

The War Measures Act empowered a magistrate to order the immediate removal of people living on land or in a building without the permission of the owner or lawful occupier, and also the demolition of any building or structures that threatened the health and safety of the general public or the maintenance of peace and good order. The presupposition of the War Measures Act was that once the people were evicted they would go back to where they came from.⁴¹ However, with nowhere else to go the evictees merely moved to an adjacent piece of land for shelter. This forced the city councils to use a range of measures to try to halt the influx of black people in search of employment in cities, which in most instances were unsuccessful.⁴² This brought the realisation that the War Measures Act was not adequate to address the problem of urban squatting as the squatter movement grew in size, and this gave rise to the

³⁹ O'Regan C (1989) 365.

⁴⁰ O'Regan C (1989) 365.

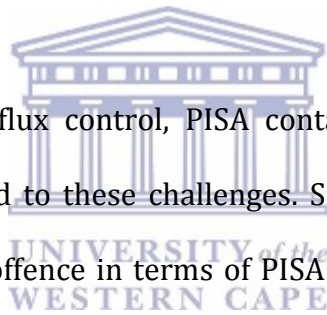
⁴¹ Hindson D (1987) 121. See also Fagan *HA Report of the Commission of Enquiry into the Disturbances at Moroka, Johannesburg, on the 30th August 1947* (1948) 25.

⁴² At the end of the South African parliamentary session in 1946, Prime Minister Jan Smuts's government appointed a Native Laws Commission, commonly known as the Fagan Commission. The Commission was tasked with investigating the rapid increase in black African migration into urban areas during the World War II period and a more liberal application of the influx control laws. The Commission presented its findings in February 1948, just three months before the elections.

promulgation of PISA to strengthen the efforts of government to stem the urban influx of black people.⁴³

Simon asserts that PISA was a brutal onslaught on the individual liberties of the black people and its enactment prioritised by the NP government in 1948.⁴⁴ The NP's apartheid policy was enforced through a package of laws that dictated every aspect of life of people based on their racial classification and PISA was one such law. The purpose of PISA was to 'provide for the prevention and control of illegal squatting on public or private land'.⁴⁵ The Act criminalised the entering of and remaining on land, buildings or structures without any lawful reason.⁴⁶

Due to the complexities of influx control, PISA contained provisions to enable the government to harshly respond to these challenges. Section 3 empowered the courts that convict any person of an offence in terms of PISA to make an order for summary



⁴³ O'Regan C (1989) 366.

⁴⁴ Simon D (1989) 123.

⁴⁵ The long title of PISA.

⁴⁶ Section 1 of PISA provides 'Save under the authority of any law, or in the course of his duty as an employee of the government or of any local authority, no person shall:-

- (a) enter upon or into without lawful reason, or remain on or in any land or building without the permission of the owner or the lawful occupier of such land or building whether such land is enclosed or not;
- (b) enter upon or into without lawful reason, or remain on or in any native location, native village or other area set aside or demarcated under the laws relating to the administration of native affairs, without the permission of the local authority or persons having due and legal control of such native location, village or area, whether such location, village or area is enclosed or not.'

Section 2(1) reads 'Any person contravening the provisions of section *one* shall be guilty of an offence and liable to a fine not exceeding twenty-five pounds, or to imprisonment for a period not exceeding three months, or to both such fine and such imprisonment.'

ejection of such a person from the land, building, native location, village or area concerned. The section also accorded broad powers to the courts to issue instructions to give effect to the said order for ejection. These instructions included powers of the courts to effect the removal of such person and his family and dependants to any other place indicated;⁴⁷ and to ensure the demolition and removal of all buildings or structures, which have been erected thereon by any such person, or on his behalf.⁴⁸

PISA further conferred unconditional powers on the native commissioner with regard to section 3(1) to arbitrarily determine a suitable place for a person that has been ejected from land.⁴⁹ PISA prohibited the collection of fees or the exercising of authority with regard to the organisation of illegal squatting.⁵⁰ It empowered the magistrate or a native commissioner to order the immediate ejection of the squatters on the basis of an affidavit submitted by an owner, lawful occupier, head of a government department, local authority or commissioner of police to the magistrate or the native commissioner that alleged that the conditions and the circumstances under which the squatters were living endangered the health and safety of the public generally.⁵¹

PISA stipulated two requirements for this immediate ejection; first, that the magistrate may consult with the local authority after receiving the affidavit,⁵² and secondly, the magistrate must be satisfied that the affidavit has been put up in a prominent place on the said land or in the vicinity of the said building accompanied by a

⁴⁷ Section 3(1)(b)(ii) of PISA.

⁴⁸ Section 3(1)(b)(iii) of PISA.

⁴⁹ Section 2 of PISA.

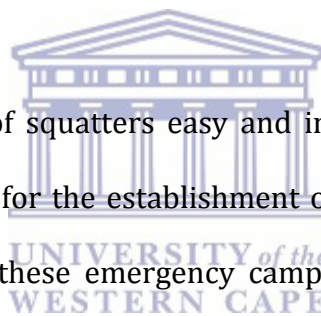
⁵⁰ Section 4 of PISA.

⁵¹ Section 5(1) of PISA.

⁵² Section 5(1)(b) of PISA.

notice informing the squatters that an application will be made to the magistrate in the district for their removal and giving the squatters at least three days notice of the intention to make such application.⁵³

From a close analysis of PISA it is apparent that consultation with the local authority was not a mandatory requirement as PISA stated that the magistrate 'may' consult with the local authority. However, the placing of the three-day notice of intention was a mandatory requirement. After placing of such notice, the squatters were entitled to be suitably represented before the magistrate by an advocate or an attorney and to reply to the affidavit.⁵⁴



PISA rendered the ejection of squatters easy and in anticipation of massive forced evictions PISA made provision for the establishment of emergency camps by the local authorities.⁵⁵ PISA stated that these emergency camps should be established for the purpose of housing homeless people and that the local authority was responsible for the maintenance, sanitation and health of the emergency camp and would also collect fees or charges as levies for the accommodation and services rendered.⁵⁶ Furthermore, PISA required the local authorities to make different provisions in respect of different areas or different classes of persons.⁵⁷ This was based on racial classification.

⁵³ Section 5(1)(b)(aa) of PISA.

⁵⁴ Section 5(1)(b)(bb) of PISA.

⁵⁵ Section 6(1) of PISA.

⁵⁶ Section 6(2)(i) of PISA.

⁵⁷ Section 6(2)(ii).

Muller asserts that the Group Areas legislation and PISA were the harshest laws passed by the NP government to ensure racial segregation in the spatial settlement of the country.⁵⁸ Welsh argues that the brutal character of apartheid urban policy could be readily inferred from an official circular issued in 1967:

'It is accepted government policy that the Bantu are only temporarily resident in the European area of the Republic, for as long as they offer their labour there. As soon as they become, for some reason or other, no longer fit for work or superfluous in the labour market they are expected to return to their country of origin or the territory of the national unit (Bantustan) where they fit in ethnically if they were not born or bred in the homeland. It must be stressed here that no stone is to be left unturned to achieve the settlement in the homelands of non-productive Bantu presently residing in the European areas.'⁵⁹

It was in the very nature of influx control to be implemented by vicious use of force against black people by the police and other officials to check that they were lawfully in a particular area. The result was extensive criminal prosecutions. Savage's calculations indicate that between 1946 and 1965 a total of 6.5 million people were prosecuted for pass law offences.⁶⁰ Suzman waged a lone battle in Parliament against the very principle of influx control, stating in 1964:

'One can only say that in the last analysis, because these laws apply only to black people – laws, which nobody would dare to impose upon white people in this country – the only conclusion one can reach is that the government does not consider black people as human beings. It does not regard a black person as a human being with normal aspirations to have a secure family life. These laws ignore all the fundamental concepts of human dignity. It strips the African of every

⁵⁸ Muller G (2013) 383.

⁵⁹ Quoted in Welsh D (2009) 62.

⁶⁰ Savage M The 'Imposition of pass laws on the African population in South Africa 1916-1984' 1986 *African Affairs* 85.

basic pretension that he has to being a human being, to being a free human being in the country of his birth and it reduces him to the level of a chattel...'⁶¹

As mentioned earlier, the initial purpose of PISA was to prevent and control illegal squatting on public and private land in urban areas. PISA was directed at black people as they were not allowed to own land in urban areas in terms of the Black Land Act 35 of 1913. This limited housing options for black people in urban areas resulted in black people resorting to the erection of shanties on land owned by white people or local authorities. PISA encapsulated draconian legislative provisions to address this problem. This section analyses and also discusses the courts' interpretation of these provisions and the responses by the government.



2.3.2 Amendments to PISA: intensifying disempowerment of the squatters

The South African government continued to enforce the policy of influx control during the 1960s and 1970s. However, the attitude of the courts as well as the structural changes in the labour markets forced the government to effect four specific amendments to PISA between 1976 and 1988. O'Regan argues that the amendments of PISA did not really prevent the growth of squatter communities or destroyed the determination of squatters to resist their removal, and employ legal strategies to oppose state action.⁶²

⁶¹ Suzman H *In No Uncertain Terms: Memoirs* (1993) 102.

⁶² O'Regan C (1989) 372.

2.3.2.1 *The first amendment of PISA: S v Peter*

*S v Peter*⁶³ is one of the most famous cases decided under the provisions of PISA and resulted in the first amendment of PISA in 1976. The appellant in this case appealed against a demolition order granted by the court *a quo* in terms of section 3 of the Act.⁶⁴ Ms Peter was one of 1000 unlawful occupiers who were evicted from a vacant stand, known as Crossroads in the Cape Peninsula, on the basis of PISA. The court *a quo* determined that the state had succeeded in proving that the appellant had wrongfully and unlawfully entered and resided on the land without the consent of the owner. In the subsequent appeal, the court determined that the Bantu Administration Board (the Board) was not the lawful occupier of the land in question, and that the owner was in fact the Cape Divisional Council (the Council). The Court concluded that no statutory authority was conferred on the Board, and that it therefore did not have the power to evict the unlawful occupiers from the land. Consequently, the conviction, sentence, eviction and demolition orders were set aside by the court.⁶⁵

The failure of the state to secure a conviction, sentence, eviction and demolition in *S v Peter* led to the first amendment of PISA on 29 June 1976 by the introduction of Prevention of Illegal Squatting Amendment Act 92 of 1976.⁶⁶ Essentially, these amendments compelled landowners and lessees to summarily demolish structures that had been built on their land, if these structures were erected without building plans that had been approved by the local council. Failure on the part of the landowner or lessee to

⁶³ *S v Peter* 1976 (2) SA 513 (C).

⁶⁴ *S v Peter* para 513.

⁶⁵ *S v Peter* para 518A.

⁶⁶ In April 1977, the Minister of Community Development, SJM Steyn introduced this amendment of PISA. He made it quite clear that the Bill was an attempt to prevent the use of litigation by squatter communities threatened with eviction. House Assembly 14 April 1977 cols 6355-6.

demolish structures, and to eject squatters amounted to an offence punishable by the imposition of a fine, or imprisonment, or both.⁶⁷ Once an owner or lessee was convicted of section 3A(2) offence he was obliged, upon the expiry of seven day period to demolish structures erected and eject the occupiers on his land at his own expense.⁶⁸ Alternatively the local authority was authorised to demolish the structures at the owner's expense.⁶⁹

Section 3A of the 1976 Amendment Act was a particularly vicious provision, because it coerced property owners to evict occupiers, and to demolish their homes by extending criminal liability to those owners who chose to turn a blind eye to the unlawful occupation of their land. Nevertheless, this stringent measure was deemed inadequate to make an impact on the growth of informal settlements by itself and, as a result, the government introduced an additional provision, section 3B. Section 3B(1)(a) empowered landowners to demolish building and structures that had been built on their land without their consent, without obtaining a court order. An owner was entitled to remove the materials from his land, once he had demolished the structures. Similar demolition powers were afforded to local authorities in relation to structures that were situated within their jurisdiction. Section 3B(1)(b) provided that an officer of the local authority had the power, without a court order, and at the expense of the owner, to demolish structures that had been erected without the consent of the land owner. Section 3B(2), which requires seven day notice of the intended demolition provided the only safeguard to the unlawful occupiers.

⁶⁷ Section 3A(2) of Act 92 of 1976.

⁶⁸ Section 3A(3) of Act 92 of 1976.

⁶⁹ Section 3A(4)(b) of Act 92 of 1976. Section 3A(4)(a) imposed criminal liability on any person who failed to comply with the provisions as contained in section 3A(3).

2.3.2.2 The second amendment of PISA: Fredericks case

*Fredericks and Another v Stellenbosch Divisional Council (Fredericks)*⁷⁰ is one of the more famous cases decided under the 1976 amendment of PISA. The case is significant because it not only illustrates the distress that unlawful occupiers experienced when faced with imminent demolition, but also the courageous attempts of legal representatives and some courts to circumvent the consequences of the provisions of PISA as amended.

The first and second applicants erected shacks on a vacant piece of land owned by the respondent, the Divisional Council of Stellenbosch (the Council). Without notifying the applicants, employees of the Council demolished their shacks and removed their possessions to unknown premises. Both applicants asserted that they had been spoliated of their property. They sought an order compelling the Council to restore to them the possessions of which they had been deprived and, further, to rebuild their shacks as they stood before the demolition.

In opposing affidavit, the Council acknowledged that it did not have the legal right to demolish the houses, as it had failed to provide the applicant with notices required by section 3B(2) of the 1976 Amendment Act. The respondent attempted to justify its action by arguing that the applicants were in unlawful occupation of the land, which amounted to trespassing. Moreover, the shacks were built in violation of building regulations, and the applicant had not obtained the necessary approval from the local authority to build the said structures.

⁷⁰ *Fredericks v Stellenbosch Divisional Council* 1977 (3) SA 113 (C).

The court reprimanded the respondent for relying on the unlawful actions of the applicants, when the Council itself had acted in 'flagrant contempt of the law' by disregarding the modest protection that PISA afforded to unlawful occupiers in general.⁷¹ It further expressed shock at the cruel treatment of the applicants and their families during the process of demolition. The court held that the respondent's conduct could not be condoned and, accordingly, it granted the *mandament van spolie* to the applicants. In so doing, the court reversed the eviction and the demolition proceedings undertaken in terms of PISA.

It is evident from *Fredericks'* decision that some legal representatives and judges relied on common law remedies and technicalities to evade the consequences of PISA. These attempts were seen as attack on the honour of the government.⁷² In response to the outcome in *Fredericks case*, legislature amended section 3B(2) to exclude the seven day notice previously granted to unlawful occupiers prior to demolition of their homes.⁷³ Consequently, to avoid criminal prosecution, landowners were compelled to immediately demolish all structures that were built or occupied on their land without their consent, without giving any form of notice to the unlawful occupiers. The legislature also introduced an ouster provision, section 3B(4)(a), which was designed to exclude the courts' discretion in instances where homes were demolished in accordance with section 3B of PISA, unless the unlawful occupier could prove that he had a right or a title to land. Section 3B(4)(a) had two interrelated purposes, namely to prevent the

⁷¹ *Fredericks* para 117.

⁷² O'Regan C (1989) 372.

⁷³ Section 3B(2) of Act 92 of 1976 was replaced with section 3B(2) of Act 72 of 1977.

court from hearing demolition cases, and to prevent occupiers from relying on the *mandament van spolie* to assert their rights.

2.3.2.3 *The third amendment of PISA: changes in the black labour market*

The third amendment of PISA was in 1980 and was necessitated by the demand in the economy for low-income labour.⁷⁴ This amendment changed the summary demolition powers of the local authorities and introduced a new regime for evictions by the courts. Muller is of the view that this amendment did not bring any form of significant relief to the precarious tenure of squatter settlements.⁷⁵

Muller and O'Regan assert that by the early 1980s the government came to appreciate the fact that growing urbanisation of black people was an inevitable and defining phenomenon of the economic landscape of South Africa and that the government lacked a comprehensive response to this development.⁷⁶ This culminated in the formulation of the notion of 'orderly urbanisation', which focused on development, housing and planning for urban growth.⁷⁷ According to Muller, the notion of 'orderly urbanisation' was 'premised on the operation of the market forces, while its purpose was to accomplish racial spatial ordering'.⁷⁸ Between 1980 and 1985 an annual average of over 200 000 Africans were arrested under the pass laws.⁷⁹

⁷⁴ Prevention of Illegal Squatting Amendment Act 33 of 1980.

⁷⁵ Muller G (2013) 383.

⁷⁶ Muller G (2013) 384.

⁷⁷ Muller G (2013) 384. See also O'Regan C (1989) 374.

⁷⁸ Muller G (2013) 385. See also Eckert JB & Crouch JC 'Distributional structures in the South African economy' (1988) 5(3) *Development Southern Africa* 286.

⁷⁹ Welsh D (2009) 118.

During 1984 unprecedented violence flared up in the country and an estimated 175 people were killed. This marked the beginning of a new cycle of protests and resistance that would last into 1987.⁸⁰ This was the context in which the NP government finally abolished influx control in 1986. This violent social unrest led to the enactment of the Abolition of Influx Control Act 68 of 1986. Sparks argues that the change in the influx laws 'was more than an admission of defeat by the apartheid government, but was finally burying apartheid'.⁸¹

2.3.2.4 The fourth amendment of PISA: abolition of influx control

The last amendment of PISA was in 1988.⁸² This amendment followed the abolition of influx control, but included measures that extended the application of PISA to include rural areas. According to Muller, this did not reflect to spirit of the Abolition of Influx Control Act.⁸³ Instead, the amendment bolstered the powers of local authorities to remove squatters and summarily demolish their homes.

O'Regan argues that the 1988 amendment of PISA was very controversial as the amendment acutely curtailed judicial authority to scrutinise the exercise of state powers encapsulated in PISA.⁸⁴ PISA remained in force until 1998 when it was repealed by section 11(1) of PIE.

⁸⁰ Gerhard MG & Glaser CL *From Protest to Challenge: Challenge and Victory 1980-1990* (2013).

⁸¹ Sparks A *The Mind of South Africa: The Story of the Rise and Fall of Apartheid* (1990) 87.

⁸² Prevention of Illegal Squatting Amendment Act 104 of 1988.

⁸³ Muller G (2013) 386.

⁸⁴ O'Regan C (1989) 372.

2.4 Attacks on *mandament van spolie* to weaken the position of the squatters

Landowners, local authorities and provincial officials were granted by section 3B of PISA the power to summarily demolish any building or structure that was erected on land without the consent of the owner or lawful occupier. The removal of the seven-day notice and its substitution with an ouster clause in 1977 prevented squatters from approaching the courts to obtain an order to prevent their eviction. The objective was to ensure that the squatters were unable to litigate by making use of the *mandament van spolie* to regain possession of their property. This amendment bolstered the position of government and encouraged the most ruthless form of demolition of the possessions of the squatters by destroying corrugated iron, plastics, wood and other materials used by the squatters to build their shacks. Temmers-Boggenpoel asserts that the application for a spoliation order to restore property after dispossession enabled the squatters to bring before the courts issues of their homelessness and vulnerability which would have never been considered under PISA.⁸⁵ The removal of this sole remedy at the disposal of the squatters weakened their position and exposed them to the most ruthless forms of abuse of state power by local authorities.

The *mandament* remedy originated in the Canon Law,⁸⁶ and was incorporated into Roman-Dutch Law and the modern South African Law. Under this remedy anyone unlawfully deprived of the peaceful and undisturbed possession of property is entitled to be restored to possession before anything else is debated or decided (*spoliatus ante*

⁸⁵ Temmers-Boggenpoel Z (2014) 74.

⁸⁶ Kleyn DG 'Possession in Zimmermann R & Visser D (eds) *Southern Cross – Civil and Common Law in South Africa* (1996) 835.

omnia restituendus est).⁸⁷ Even an unlawful possessor, such as, a fraud, thief or a robber, is entitled to the *mandament's* protection. The underlying principle is that unlawful deprivation must be remedied before the courts will decide on competing claims to the object or property. The removal of this remedy for squatters and its differentiated application in case law, particularly with regard to vulnerable occupiers, attracted debate from academic experts as to whether its primary rationale was to protect possession or to preserve order by discouraging the allure of self-help. The practical focus of this question was the brutal conduct of the police and local authorities during the eviction of squatters.

In *Jones v Claremont Municipality*⁸⁸ (Jones) the municipality irreparably destroyed the fence of the applicant, which was unlawfully erected on a piece of land. The court ordered the municipality to restore the fence that was illegally destroyed. Buchanan ACJ regarded the municipality's conduct as 'very high-handed', and said that 'by ordering them to restore this fence I wish to mark my sense of the impropriety of a public body taking the law into its own hands'.⁸⁹ In *Fredericks* the Stellenbosch Divisional Council unlawfully demolished squatters' corrugated iron homes. Diemont J issued an order requiring the municipality to 're-erect the applicants' home immediately'.⁹⁰ This entailed 'recreating shelters of approximately similar size and efficacy'.⁹¹ He considered that the order should create no practical problems for the municipality:

⁸⁷ Taitz J 'Spoliation proceedings and the grubby-handed possessor' (1981) 98 *SALJ* 36.

⁸⁸ *Jones v Claremont Municipality* (1908) 25 SC 651.

⁸⁹ *Jones* para 654-655.

⁹⁰ *Fredericks* para 116 D-E.

⁹¹ *Fredericks* para 118A.

'If the original sheets of corrugated iron cannot be found or if they have been so damaged by the bulldozer that they cannot be used, there is no reason why other sheets of iron of similar size and quality should not be used.'⁹²

The judgment in *Fredericks* attracted extensive criticism from academic commentators who disapproved of the way the *mandament* was extended. In *Rikhotso v Northcliff Ceramics (Pty) Ltd*,⁹³(*Rikhotso*) Nugent J held that a spoliation order cannot be granted if the property in issue has ceased to exist as the *mandament* was received into South African Law as a possessory remedy and not as a general remedy against unlawfulness. He observed that the *mandament* is a preliminary and provisional order and that the assumption that underlies it is that the property in fact exists and may be awarded in due course to the properly entitled party. Nugent J held that possession cannot be restored by substitution under this remedy and cautioned that:

'It was suggested that the conclusion to which I have come would encourage the destruction of property in the course of spoliation. I do not think that is correct. My conclusion is only that the *mandament van spolie* is not that remedy.'⁹⁴

In a recent case, *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others*⁹⁵(*Tswelopele*), the applicant sought an order directing the three respondents to restore the possession of the occupiers before all else (*ante omnia*) and in the interim provide them with temporary shelter. The order was sought as a result of the conduct of the officials from three government agencies in March 2006. The officials embarked on a joint operation and evicted about 100 people

⁹² *Fredericks* para 117H.

⁹³ *Rikhotso v Northcliff Ceramics (Pty) Ltd* 1997(1) SA 526 (W).

⁹⁴ *Rikhotso* para 18.

⁹⁵ *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality* (2007) SCA 70 CR SA.

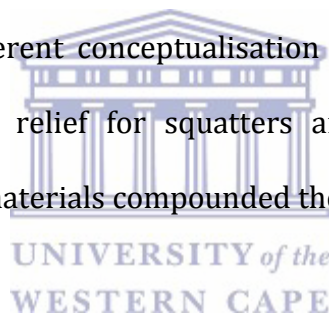
from their homes on a vacant piece of land in the Pretoria suburb of Grasfontein. The pieces of plastic and other waste materials they had salvaged from surrounding building sites to construct their rudimentary homes were burnt by the officials. Many of their belongings were destroyed. After the Court had established the unlawfulness of the conduct of the three state agencies the question was whether and what kind of relief the occupiers were entitled to obtain. The Court accepted as correct the doctrinal analysis in *Rikhotso* that the *mandament* is meant to restore physical control and enjoyment of a specified property and 'not its reconstituted equivalent'.⁹⁶

In a more recent case, *City of Tshwane Metropolitan Municipality v The Mamelodi Hostel Residents Association*⁹⁷ (*Mamelodi Hostel Residents*), the metropolitan municipality became aware that a hostel complex situated within its jurisdiction was dilapidated, unsafe and uninhabitable. Due to the appalling conditions of the hostels, the metropolitan municipality embarked on a process to address the problem. As a result the metropolitan municipality initiated negotiations with the hostel residents in order to ensure that development of Block J of the hostel commenced. An agreement was reached that the residents would evacuate the premises and that demolition of Block J would take place as the first phase of the project. The city arranged alternative accommodation for the residents to avoid their displacement. On the day of evacuation the hostel residents reneged on the agreement and refused to move out of the hostels to the alternative accommodation.

⁹⁶ *Tswelopele* para 24.

⁹⁷ *The City of Tshwane Metropolitan Municipality v The Mamelodi Hostel Residents Association* 2011 ZA SCA 277.

Under pressure to commence with the project, the city proceeded with the development by removing the roof and the roof structures of Block J. This was done while residents were still occupying the building. As a response the residents applied for a *mandament van spolie* to ensure repossession of the property destroyed as the result of the demolition. The order was granted by the lower court and confirmed by the North Gauteng High Court. The essence of the court order was that the city was precluded from any further demolitions without an eviction order in terms of PIE. The metropolitan municipality was also ordered to restore the roof structures and roof coverings to the condition they were in prior to the destruction thereof. In this case the *mandament* order was issued despite the roof having to be reconstructed with alternative materials. The different conceptualisation by the courts of the principles applicable to the *mandament* relief for squatters and the different results in its application with replacement materials compounded the situation of the squatters.



The conceptual uncertainty on the principles applicable to *mandament van spolie* further disempowered the unlawful occupiers. The attack on the *mandament van spolie*, as the only recourse at the disposal of the unlawful occupiers, rendered the unlawful occupiers more vulnerable.

2.5 Conclusion

Black farmers were dispossessed of their land by the black land tenure regime that commenced with the promulgation of the Black Act in 1923. The only option black farmers were left with to sustain their families was to enter into temporary labour tenant contracts with a white farmer 'because all the other forms of tenure were

legislated out of existence'.⁹⁸ There was a combination of two factors that encouraged people to migrate to urban centres in search of employment upon the termination of their labour tenant contracts on farms. First, there was the uncertainty of obtaining further employment as a labour tenant on another farm; and secondly, there was the undesirable prospect of having to return to overcrowded traditional or released black areas.⁹⁹

The period of intense urbanisation that followed forced the government to enact strict influx control policies to keep black people on the periphery of urban areas.¹⁰⁰ These policies prohibited black people from living in any areas other than locations, native villages and native hotels or in certain proclaimed areas if they were employed in the mining and industrial sector. Every aspect of black people's lives was meticulously regulated and recorded.¹⁰¹ The tenure of black people in the urban areas was very precarious as it was treated as temporary.¹⁰² However, black people started occupying vacant land closer to workplaces because the cost of daily travelling to workplaces was unaffordable, nor could they risk the possibility of losing their jobs through coming late.

⁹⁸ Muller G (2013) 367.

⁹⁹ Schoombee JT and Davis DM 'Abolishing influx control – fundamental or cosmetic change?' (1986) 2 *SAJHR* 208-219.

¹⁰⁰ Simon D 'Crisis and change in South Africa: implications for the apartheid city' (1989) 14(2) *Royal Geography Society* 189.

¹⁰¹ Muller G 'The legal-historical context of urban forced evictions in South Africa' (2013) 19(2) *Fundamina* 367.

¹⁰² Royston L 'The struggle for access to the city in the Witwatersrand region' in Azuela A, Duhau Eand Ortiz E (eds) *Evictions and the Right to Housing: Experience from Canada, the Dominican Republic, South Africa and South Korea* (1998) 67.

In its 1948 Manifesto the NP committed itself to protect and preserve the European character of South African cities and as a result stringent influx control policies were implemented when it came into power. The policies were meant to control the movement of black people to and from towns. The occupation of vacant land by black workers and those seeking employment in the urban economy did upset the apartheid spatial planning and as a result the government criminalised the tenure of black people in white areas by means of Group Areas legislation and PISA.

PISA was a part of a highly complex package of laws designed to control the influx of black people into urban areas. Most importantly, it was designed to create racially segregated urban areas.¹⁰³ Local authorities enforced PISA to evict marginalised black people from private and public land and also to summarily demolish their shelter under the health, safety and building regulations. PISA required private owners to demolish structures on their land without a court order, if they had been erected without their approval. PISA thus criminalised the failure by private owners to demolish unlawful structures erected on their property. These provisions were predicated on the belief that the right to property is an absolute right in South Africa. Consequently, this created the impression that ownership is a stronger right that had to be ruthlessly protected and enforced by the state.

Four amendments were effected to PISA by the apartheid government, all of which were meant to strengthen the enforcement of PISA and to disempower black people in urban areas. These amendments included measures to undermine the judiciary, as the courts

¹⁰³ Strydom J *A Hundred Years of Demolition Orders: A Constitutional Analysis* (unpublished LLD thesis, Stellenbosch University, 2012)

were the only hope for the helpless squatters who were forcefully evicted without any regard to their personal circumstances. Most of these evictions were accompanied by racial prejudice, arrests, threats of violence or actual violence and intimidation. The Group Areas legislation and PISA enabled the creation of sprawling townships consisting of shacks and informal shelters adjacent to wealthy suburbs occupied by white people. The control of influx and the regulation of black people in terms of PISA directly contributed to the overcrowded and squalid circumstances in the impoverished black townships and informal settlements. While some portions of the occupiers of these informal settlements are presently being evicted a significant proportion are daily confronted with a real threat of eviction by local authorities.

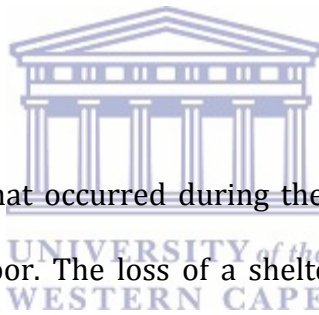
Du Plessis asserts that the evictions or threats of evictions leave the urban poor highly vulnerable and 'deepens the patterns of poverty, discrimination and social exclusion'.¹⁰⁴ Due to the global increase in the phenomenon of forced evictions, COHRE conducted empirical research in 2013 on the impact of evictions or threats of evictions in three different countries (Nigeria, India and Palestine).¹⁰⁵ The study draws some general conclusions that violence is an entrenched part of the eviction process, and that this large-scale violence is disempowering for the economically marginalised. To facilitate an analysis of the disempowerment of the occupiers, the study identifies three broad

¹⁰⁴ Du Plessis J 'Forced evictions, development and the need for community-based locally appropriate alternatives: lessons and challenges from South Africa' in Huchzermeyer M & Karam A (eds) *Informal Settlement: A Perpetual Challenge?* (2006) 176.

¹⁰⁵ Centre on Housing Rights and Evictions *Violence: The Impact of Forced Evictions on Women in Palestine, India and Nigeria* (2013).

types of violence associated with forced evictions – physical, psychological and socio-economic violence.¹⁰⁶

The forced evictions during the apartheid era in South Africa manifested all the three types of violence. Physical violence was commonly exhibited during the apartheid era evictions by the frequent use of threats, arrests, beating by security forces and the use of heavy machines like bulldozers to demolish shacks. In addition to the tangible violence described above, the black people in informal settlements were subjected to intense psychological and emotional violence during and after the eviction process. The psychological violence resulted in lowered self-esteem, feelings of helplessness, and increased tension and fear.



The socio-economic violence that occurred during the apartheid era had far-reaching consequences for the urban poor. The loss of a shelter had multiple effects on black people, the most significant of which was that it ensured the continued poverty of black people, and reinforced their position of disadvantage in society. Consequently, the ruthless enforcement of the apartheid black urban land tenure as was prescribed by the Group Areas legislation and PISA kept black people economically marginalised and disempowered. In the next chapter the study examines the normative context for evictions in the post-apartheid dispensation, the implications of the judicial commitment to transformative constitutionalism and the conceptualisation of ME by the ConCourt

¹⁰⁶ COHRE (2013) 71.

CHAPTER 3

THE POST-1994 NORMATIVE CONTEXT FOR EVICTIONS

3.1 Introduction

In chapter 2 the study shows that one of the central features of urban apartheid in South Africa was the eviction of millions of black people from their homes without their involvement in determining the conditions of such evictions. Within the urban areas freehold settlements were destroyed and black people were forced to move to townships on the periphery of the largely white cities and towns. This was done through coercive means, such as, destroying property, through arrests and deportations under the pass law system. The experience of eviction was common at one time to all informal settlement communities in South Africa. From the early 1970s, these communities were consistently engaged in struggles against attempted removals, threats of demolition and attacks.

The interim Constitution and the 1996 Constitution marked a fundamental break with the former apartheid system that disempowered the occupiers of informal settlements. The hallmark of the democratic dispensation is the empowerment of the unlawful occupiers through a human rights culture that includes a right against unlawful evictions. In its early jurisprudence on section 26 of the Constitution the ConCourt

established that the right against unlawful eviction is not a stand-alone right as it is guaranteed under the right to adequate housing.¹ The right against unlawful eviction is categorised as a socio-economic right, and poses an obligation on the state and private individuals to refrain from any activities that render people homeless.² The right of access to adequate housing is categorised as a socio-economic right, and the inclusion of these rights in the Constitution attracted an unending debate on their nature and justiciability.

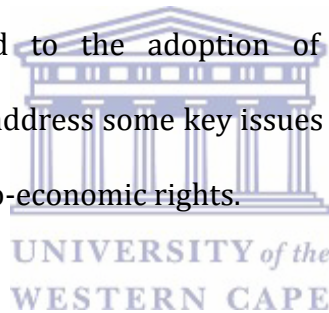
There are four objectives for this chapter: first, to briefly reflect on the current debates on the justiciability and impact of socio-economic rights; secondly, to examine the post-1994 normative context for evictions; thirdly, to explore the implications of transformative constitutionalism on the interpretation of the right against unlawful evictions; and fourthly, to dissect the notion of ME. The chapter is therefore sub-divided into six parts. Part one will provide an overview of the current debates on the inclusion of justiciable socio-economic rights in the Constitution. Part two will reflect on the right to access to adequate housing. Part three will provide an in-depth analysis of PIE as a legislative endeavour that seeks to give effect to the transformative potential of the Constitution with regard to evictions. Part four will briefly reflect on international and regional norms pertaining to the right to housing and the right against unlawful eviction. Part five will reflect on the present debates on transformative constitutionalism, which is about the use of the underlying constitutional values to address past injustices. Part six will focus on ME.

¹ *Grootboom and PE Municipality*.

² *Grootboom and Port Elizabeth Municipality*. See also *Occupiers of 51 Olivia Road*.

3.2 Justiciability and impact of socio-economic rights

Despite the dominance of the pro-justiciability views in the literature on socio-economic rights thus far, it is important for this thesis to address some central debates on the topic without running the risk of regurgitating old arguments. The logic underlying this approach can be found in Phillippe's argument that the content of socio-economic rights is dependent on how these rights are defined and implemented.³ Socio-economic rights are justiciable in South Africa but concerns about the capacity of the courts to deliver judgments on these rights has an on-going impact on how judges approach their task to give full effect to this generation of rights. Hence, this chapter begins with a brief reflection on the background to the adoption of socio-economic rights in the Constitution and also seeks to address some key issues pertaining to the debates on the justiciability and nature of socio-economic rights.



The adoption of a Constitution that uniquely entrenches a Bill of Rights that contains all categories of human rights reinvigorated debate on the nature of socio-economic rights, the capacity of the courts to enforce such rights, and whether this category of rights are rights at all. However, this move by the democratic government was also seen as a revolutionary and heroic stance.⁴ The primary concern of this thesis is the application of the notion of ME in the adjudication of eviction cases. As mentioned above, the right to housing and its ancillary right against unlawful eviction are categorised as second generation rights, and that renders it necessary for this thesis to briefly reflect on the

³ Phillippe X 'The place and recognition of socio-economic rights in France' (1998) 2 *Law Democracy and Development* 169.

⁴ Christiansen EC 'Adjudicating non-justiciable rights: socio-economic rights and the South African Constitutional Court' (2007) 38 *Colombia Human Rights Law Review* 263.

prevailing debate about the judicial review and enforcement of this generation of rights. There are three specific debates on socio-economic rights that this section seeks to cover: the actual inclusion of socio-economic rights in the Constitution; their justiciability; and their impact to address socio-economic injustice in the country.

3.2.1 Debate on constitutionalisation of socio-economic rights

The 1996 Constitution marked a significant shift from parliamentary supremacy to the constitutional supremacy that is embedded in a strong human rights tradition. The Bill of Rights in the Constitution binds all organs of state, private persons and legal entities. Sections 8(1) and (2) of the Constitution require the courts to apply or develop the common law so that it is compatible with the provisions of the Bill of Rights. Section 39 of the Constitution⁵ confers on the courts powers of interpretation, bolstered by section 172, which, amongst other things, empowers courts to declare any law or conduct inconsistent with the Constitution to be invalid to the extent of that inconsistency. With regard to remedies, the courts are empowered to make any order that is just and equitable.⁶ Roux asserts that the review powers conferred on the courts by the Constitution have far-reaching political and legal implications and that the constitutions of most developed democracies in the world, such as The United States and The United Kingdom, do not confer such strong judicial review powers on their courts.⁷ These

⁵ Section 39(1) reads: 'When interpreting the Bill of Rights, a court, a tribunal or forum

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) must consider international law; and
- (c) may consider foreign law'

⁶ Section 179 (1) (b) of the Constitution.

⁷ Roux T (2013) 123.

provisions brought about a fundamental change in the conceptualisation and understanding of the role of the courts in South Africa.

In an attempt to address the unjust apartheid past, the Bill of Rights contains a right to equality that explicitly encapsulates a substantive model, which seeks to address the unequal impact of law and conduct. This substantive equality may be applied against the state and private parties.⁸ Amongst the unique features of the Bill of Rights is that it contains both civil and political rights, commonly known as first generation rights, and socio-economic rights, commonly known as second generation rights. Of importance for this thesis is the fact that the Constitution contains a judicially enforceable right of access to adequate housing, which includes the right against unlawful eviction.⁹

During the different phases of the drafting of both the interim and final Constitutions the inclusion of the civil and political rights in the Constitution was never a contentious matter. However, there was significant and extensive debate among legal scholars, lawyers and the drafters about the constitutional status of the socio-economic rights. The protracted multi-party negotiations process that took place through the Convention for a Democratic South Africa (CODESA) protected certain socio-economic rights of children in section 30 of the interim Constitution.¹⁰ Chapter 3 of the interim

⁸ Pillay A (2011) 76.

⁹ Section 26 of the Constitution.

¹⁰ Chapter 3 (sections 7-35) of the interim Constitution entrenched a Bill of Rights. Section 30(1) states: 'Every child shall have the right-

- (a) to a name and nationality as from birth;
- (b) to parental care;
- (c) to security, basic nutrition and basic health and social services;
- (d) not to be subjected to neglect and abuse;

Constitution also contained rights with socio-economic implications, such as, the rights to equality,¹¹ human dignity,¹² economic activity,¹³ fair labour practices,¹⁴ property,¹⁵ and an environment that was not harmful to health and wellbeing.¹⁶ The inclusion of these rights as fundamental rights in the interim Constitution was the first clear indication that there was no outright rejection in CODESA of the constitutionalisation of socio-economic rights. It is, however, important to note that the interim Constitution focused on the rights that were thought to be vital for the political transition period; and thus less attention was given to the consideration of socio-economic rights.¹⁷

The first democratic elections took place in 1994. This was a watershed moment in the history of South Africa and the newly elected National Assembly and Senate sitting jointly constituted a Constitutional Assembly (CA), which was tasked with the drafting of the new constitution.¹⁸ The interim Constitution set out 34 constitutional principles, with which the new constitution had to comply.¹⁹ Important for this thesis is Principle II which prescribed that the new constitution must entrench 'accepted fundamental rights, freedoms and civil liberties' which shall be included having given due consideration to, inter alia, the fundamental rights contained in Chapter 3. The interim

(e) not to be subjected to exploitative labour practices nor to be required or permitted to perform work which is hazardous or harmful to his or her education, health or well-being.'

¹¹ Section 8 of the interim Constitution.

¹² Section 10 of the interim Constitution.

¹³ Section 26 of the interim Constitution.

¹⁴ Section 27 of the interim Constitution.

¹⁵ Section 28 of the interim Constitution.

¹⁶ Section 29 of the interim Constitution.

¹⁷ Roux T (2013) 269.

¹⁸ Section 68 of the interim Constitution.

¹⁹ Schedule 4 of the interim Constitution.

Constitution designated the ConCourt as the final arbiter on disputes on the provisions of the new constitutional text.²⁰

During the process of drafting the new constitution, the South African Law Commission (SALC) opposed the inclusion of socio-economic rights on the grounds that they are not fundamental rights and did not give rise to enforceable legal obligations.²¹ The ANC argued against this position and held that the inclusion of socio-economic rights would reflect South Africa's 'new vision and aspiration for the future'.²² While recognising that these rights posed certain difficulties in enforcement, the ANC argued that these difficulties could be overcome and that the important point was to place the state under a positive obligation to 'redress the imbalances of the past'.²³

At the same time, the Technical Committee responsible for advising the CA on socio-economic rights held the view that there were certain advantages to be derived from following the ICESCR formulation in the inclusion of socio-economic rights in the Constitution. On the one hand adopting the ICESCR formulation would help to harmonise South Africa's international and domestic obligations. On the other hand, the UN General Comments would provide a ready source of guidance on the interpretation of socio-economic rights.²⁴ The advice of the Technical Committee strengthened the position of the ANC and that led to sections 25 and 26 of the 1996 Constitution. These

²⁰ Section 70(3) of the interim Constitution.

²¹ South African Law Commission *Project 58 – Group and Human Rights: Interim Report* (1991).

²² ANC *Preliminary ANC Submission: Theme 4 Committee – Socio-economic rights* (1995) National Parliamentary Archives.

²³ ANC (1995) 27-28.

²⁴ ANC (1995) 12-14.

sections have a close resemblance to Articles 2.1²⁵ and 11.1²⁶ of the ICSECR, although they differ from the ICSECR in several respects. First, the rights themselves are qualified by the addition of the words 'have access to', and secondly, the state's duties in respect of the rights are qualified by the omission of the word 'maximum' from the phrase 'to the maximum of its available resources', and by the rephrasing of the formulation 'all appropriate means' to read 'reasonable legislative and other measures'.

The text of the draft 1996 Constitution was reviewed by the ConCourt in *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa (The First Certification)*.²⁷ In this case there were only three organisations that challenged the inclusion of socio-economic rights in the Constitution and this offered the ConCourt a unique opportunity to evaluate the various legal arguments against the inclusion and adjudication of socio-economic rights. The first objection raised was that socio-economic rights were not universally accepted, as required by *Constitutional Principle II*.²⁸ The ConCourt dismissed this argument as it had

²⁵ Article 2.1 of the ICSECR reads: 'Each States Party to the present Covenant undertakes to take steps individually and through international assistance and co-operation, especially economic and technical, to the *maximum of its available resources*, with a view of achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of appropriate measures.'*(italics my emphasis)*

²⁶ Article 11.1 of the ICSECR reads: 'The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties *will take appropriate steps* to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.'*(italics my emphasis)*

²⁷ *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa*, 1996 (1997) 2 SA 97 (CC).

²⁸ Constitutional Principle II of the interim Constitution reads: 'Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by

already ruled on the property clause. The second objection was that the enforcement of socio-economic rights would inevitably infringe on the separation of powers. In dismissing this objection the ConCourt held that there is emerging academic consensus that there was really no difference between first and second generation rights in this respect. The enforcement of both sets of rights would have budgetary implications. Accordingly, the Court held that there was no basis to object to socio-economic rights once the courts' power to review civil and political rights had been conceded.²⁹ The final objection was that socio-economic rights were not justiciable. This objection was also dismissed and the Court held: 'we are of the view that these rights are, at least to some extent, justiciable, and at the very minimum, socio-economic rights can be negatively protected from improper invasion'.³⁰



The manner in which *The First Certification* dealt with the three objections to the inclusion of socio-economic rights is commonly referred to as authority for the proposition that socio-economic rights are justiciable by the South African courts. Roux asserts that the inclusion of socio-economic rights in the 1996 Constitution was directly linked to the struggle to eradicate the socio-economic legacy of apartheid.³¹ Mubangizi agrees with Roux and further contends that the inclusion of these rights had to be seen within the unique history of South Africa and the context of widespread poverty occasioned by a historically unfair and unjust political and socio-economic system.³²

entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to, *inter alia*, the fundamental rights contained in Chapter 3 of this Constitution.'

²⁹ *The First Certification* para 77.

³⁰ *The First Certification* para 78.

³¹ Roux T (2013). See also Currie I & De Waal J *The Bill of Rights Handbook* 6 ed (2013).

³² Mubangizi JC 'The protection and enforcement of socio-economic rights in Africa: lessons from the South African experience' (2007) 15 *African Year Book of International Law* 86.

Similarly, Durojaye observes that the recognition of socio-economic rights renders the South African Constitution 'very progressive'.³³

The courts in South Africa have adopted an integrative approach to the interpretation of human rights and rejected the post-World War II rigid binary conceptualisation of rights, which is predicated on immediate/progressive realisation, positive/negative obligation or resource intensive/less intensive. The commitment to an integrative approach is repeatedly demonstrated by the courts in many judgments. For instance, in *The First Certification, Grootboom and Motswagae and Others v Rustenburg Municipality and Another*³⁴ (*Motswagae*) the Court held that the right of access to adequate housing includes, at a minimum level, the negative obligation on the state not to embark on any activities that will render people homeless or disrupt their peaceful and undisturbed possession or occupation. Hence, the question with regard to socio-economic rights in South Africa is not whether these rights are justiciable or not, but how best to go about achieving the transformative potential of the Constitution in the enforcement of this category of rights.³⁵

3.2.2 Debate on the justiciability of socio-economic rights

Socio-economic rights have traditionally been considered to be beyond the scope of adjudication by the courts as they impose positive obligations on the state, are vague, imprecise and cannot be immediately implemented due to extensive resource

³³ Durojaye E 'Turning paper promises to reality: national human rights institute and adolescents sexual and reproductive rights in Africa (2008) 26(4) *Netherlands Quarterly of Human Rights* 553.

³⁴ *Motswagae and Others v Rustenburg Municipality and Another* 2013 (2) SA 613 (CC).

³⁵ Palmer E *Judicial Review, Socio-Economic Rights and the Human Rights Act* (2007).

implications. There are scholars who argue that social rights undermine the very nature of rights, which are individual freedoms guaranteed against state interference and which are immediately enforceable and impose negative obligations on the state.³⁶ In this limited classical liberal view, freedom is limited to the absence of state interference. This thesis rejects this view of freedom as a relic of the past, which has been abandoned in both moral and political philosophy.³⁷

For instance, Sen argues for freedom that concentrates on increasing individual opportunities, capabilities or choices.³⁸ The capability approach is the normative proposition that social arrangements should be primarily evaluated according to the extent of the freedom people have to promote or achieve 'functionings' they value.³⁹ He argues that poverty, tyranny, poor economic conditions, systematic social deprivation, and poor housing are 'major sources of unfreedom'.⁴⁰ Put simply, Sen argues that progress in socio-economic standards, development or poverty eradication gives people greater freedoms.

The literature on substantive freedom is extensive in South Africa, and there is an overwhelming convergence of views that the Constitution takes a clear position against

³⁶ Kelly D 'A Life of one's own: individual rights and the welfare state' (1988) as cited in Steiner H & Alston P *International Human Rights in Context: Law, Politics, Morals* (2013) 126.

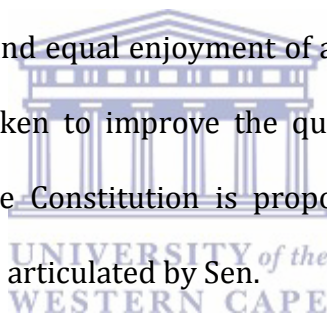
³⁷ Sen A *Development as Freedom* (1999). See also Polanyi K *The Great Transformation: The Political and Economic Origins of Our Times* (1946) 232-241.

³⁸ Sen A (1999) 67.

³⁹ Sen A (1999) 101.

⁴⁰ Sen A (1999) 3.

the narrow conception of freedom.⁴¹ The Constitution is egalitarian and transformative and seeks to create greater freedoms for people to realise socio-economic progress. The Constitution makes freedom a foundational value to test reasonableness and justifiableness of violations of the rights in the Bill of Rights, and rejects the narrow classical liberal version of freedom as being an absence of state interference. The constitutional goals set out in the *Preamble* include commitment to equal protection of the law and fundamental human rights, as well as social justice and the improvement of the quality of life of citizens. Most significantly the *Preamble* refers to the need to 'free the potential of each person'.⁴² These themes permeate the Bill of Rights – most obviously the social rights provisions and the equality provision. The Constitution states that equality 'includes the full and equal enjoyment of all rights and freedoms' and that special measures should be taken to improve the quality of life of those who were previously disadvantaged.⁴³ The Constitution is proposing a richer, deeper, broader view of freedom and equality as articulated by Sen.



Thus, once the narrow view of freedom as non-interference by the state is rejected, the argument that socio-economic rights are, as a matter of principle, non-justiciable because they encompass positive obligations becomes untenable. The deeper and richer view of freedom and equality also undermines other bases on which scholars usually

⁴¹ Durojaye E 'Advancing gender equity in access to HIV treatment through the protocol on the Rights of Women in Africa' (2006) 6 *African Human Rights Law Journal* 188-207. See also Davis DM *Twenty Years of Constitutional Democracy: A Preliminary Reflection* Address at the New York Law School, November 2014, Roux T (2010), Liebenberg S (2009), Desierto DA 'Justiciability of socio-economic rights: comparative powers, rules, and practices in the Philippines and South Africa' (2009-2010) 11 *Asian Pacific Law Journal* 114 and Kende MS (2009).

⁴² The *Preamble* of the Constitution.

⁴³ Section 1 of the Constitution.

attempt to draw a firm distinction between civil and political rights and social rights.⁴⁴ The problem of vagueness also applies to negative duties, as most of such duties are qualified and subject to limitations, and the courts need to find some means to determine what those limitations are.

Some constitutional law scholars have generally raised two objections, which they think renders undesirable or impossible the justiciability of socio-economic rights: democratic legitimacy objection and judicial competency objection. The democratic legitimacy claim relates to the contemporary counter-majoritarian dilemma of judicial review. In the context of socio-economic rights adjudication, this dilemma is compounded by the financial nature of the decisions that courts would have to make. The judicial competency claim relates to the absence of specialised and unbiased fact-finding competencies in the judiciary, and the procedural limitations that render the courts unsuited to adjudicate polycentric matters.

3.2.2.1 *Democratic legitimacy objection*

The democratic legitimacy objection to socio-economic rights is based on the argument that this category of rights does not engender negative obligations.⁴⁵ Human rights impose three duties on governments: to respect, protect and fulfil.⁴⁶ The legitimacy objection argues that socio-economic rights only give rise to an obligation to fulfil;

⁴⁴ Friedman M *Capitalism and Freedom* (1962) 67.

⁴⁵ Davis DM 'The case against inclusion of socio-economic demands in a Bill of Rights except as directive principles' (1992) 8 *SAJHR* 475 476-478. See also Tushnet M 'Social welfare and the forms of judicial review' (2003-2004) 82 *Tex L Rev* 1895-2019.

⁴⁶ Brennan M 'To adjudicate and enforce socio-economic rights: South Africa proves that domestic courts are viable option' (2009) 9 *Queensland U Tech L & Just J* 64.

whereas, civil and political rights generally impose the duty to respect and protect, and are viewed as negative rights. This means that socio-economic rights give rise to positive obligations and thus are positive rights.

Negative rights 'involves discrete cases, and their remedies implicate only a cessation of action by government beyond the scope of judicial authority'.⁴⁷ This means that the court's remedy is relatively easy to identify and apply. Conversely, it is argued that in disputes involving socio-economic rights the matter is not as simple. In order to ensure that socio-economic rights are met, the state is required to act in a positive manner. It is true that in most instances there will have to be government expenditure in order for the state to fulfil its socio-economic obligations; however, it is important to note that the same can be said of civil and political rights. Since all rights impose three obligations on the state it follows that socio-economic rights also impose negative obligations to respect and protect such rights. It is on this basis that Sepulveda submits that all human rights impose a 'continuum' or 'spectrum' of obligations.⁴⁸ On the one side of the spectrum is the obligation of non-interference by the state, and on the other side is the obligation requiring positive action.⁴⁹ Both civil and political rights therefore should be viewed through this spectrum.

Sepulveda asserts that, for remedial purposes, it is important to understand whether an obligation is either negative or positive.⁵⁰ This is so because, generally speaking,

⁴⁷ Brennan M (2009) 19.

⁴⁸ Sepulveda M *The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights* (2003) 46.

⁴⁹ Sepulveda M (2003) 47.

⁵⁰ Sepulveda M (2003) 48.

negative violations call for negative remedies, such as prohibitions, while positive violations call for positive remedies, such as mandatory injunctions. It is also true that negative remedies are thought to be less intrusive with regard to the executive and the legislature, while positive remedies may be far more intrusive.⁵¹ According to Sepulveda the courts had no problem in granting negative injunctions that prohibit certain conduct of the executive or legislature, yet they have been reluctant to issue positive or mandatory injunctions.⁵² This is so because such negative remedies do not draw the courts into the controversies generated by an order to government to undertake an affirmative action.

It is true that an order enjoining an activity by requiring the state to desist from doing something is seen as less complicated when compared to one enjoining affirmative action requiring the state to do or undo something. This means that full acceptance of socio-economic rights as engendering only positive obligations risks these rights being labelled as highly intrusive and may lead to interference in the way government is run.⁵³ However, negative violations may attract positive remedies in certain circumstances, while positive obligations may demand negative remedies.⁵⁴ Ashford cogently argues that the 'straightjacketed approach to negative obligations as equal to civil and political rights and positive obligations, as equal to socio-economic rights is mis-application of legal reasoning based on neoclassical economics'.⁵⁵ He further argues that forbidding action by way of a negative injunction may intrusively constrain government action in

⁵¹ Sepulveda M (2003) 51.

⁵² Sepulveda M (2003) 55.

⁵³ Desierto DA ' (2009 -2010) 114.

⁵⁴ Disierto DA (2009-2010) 121.

⁵⁵ Ashford R 'Using socio-economics and binary economics to serve the interest of poor and working people: what critical scholars can do to help' (2009) 1(8) *Seattle Journal for Social Justice* 167.

the same way as a mandatory injunction. Christiansen shares the same sentiments and argues that the common description of socio-economic rights as imposing only positive obligations and political rights negative obligations is flawed.⁵⁶ Many scholars largely reject this distinction.⁵⁷

Many scholars acknowledge that enforcement of political rights may also have budgetary implications, but that these do not compare to the scale of those of socio-economic rights.⁵⁸ However, Fabre⁵⁹ and Sepulveda⁶⁰ argue that there are aspects of socio-economic rights which are easier to define and less expensive to enforce. Furthermore, courts may play numerous roles in the enforcement of these rights, such as directing and overseeing implementation by government, rather than formulating the policy itself.⁶¹ The approach of the ConCourt to the question of justiciability of socio-economic rights in the *The First Certification* judgment, as discussed above, was premised on exactly this kind of rejection of a sharp distinction between the two categories of rights. The argument against justiciability based on a strict divide between the two categories of rights does not provide a strong basis from which to claim that socio-economic rights are inherently non-justiciable.

⁵⁶ Christiansen EC 'Using constitutional adjudication to remedy socio-economic injustice: comparative lessons from South Africa' (2008) 13 *UCLA of International Law and Foreign Affairs* 374.

⁵⁷ Fabre C 'Constitutionalising social rights' (1998) 6 *Journal on Political Philosophy* 264; Mureinik E 'Beyond a charter of luxuries: economic rights in the Constitution' (1992) 8 *SAJHR* 476. See also Palmer E (2007) Chapter 1 which provides a detailed overview of the division between civil and political rights and socio-economic rights, where it is cogently argued that the division is artificial.

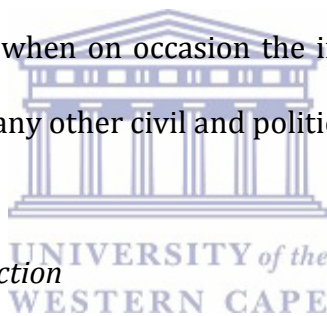
⁵⁸ Sepulveda M (2003) 33. See also Kende MS (2009) 281.

⁵⁹ Fabre C (1998) 263.

⁶⁰ Sepulveda M (2003) 35.

⁶¹ Fabre C (1998) 142. See also Sepulveda M (2009) 37.

Accordingly, Phillippe asserts that these days it serves no purpose to contrast socio-economic rights with civil and political rights due to the inter-relatedness of these rights.⁶² The inter-relatedness of the rights is harnessed by lawyers in their litigation strategies and by the courts in their judgments.⁶³ After a number of prominent cases in South Africa in which the right to equality of the poor was highly relevant but not claimed, the right formed part of the claim in *Treatment Action Campaign*. Budlender⁶⁴ explains that the right to equality was raised as a 'subsidiary claim' in many cases that involved socio-economic rights and received very little attention. He is of the view that those litigating socio-economic rights cases in South Africa should have picked up the significance of the right to equality sooner. Whiteman highlights that there are some positive steps in this direction when on occasion the interpretation of socio-economic rights encapsulates equality or any other civil and political right.⁶⁵



3.2.2.2 Judicial competency objection

The judicial competency objections to the appropriateness of adjudicating socio-economic rights focuses on problems related to the viability of the courts and appropriateness of adjudication as a means to determine social welfare entitlements. Central to this objection is the polycentric nature of the socio-economic rights, which has also been raised as an impediment to effective adjudication. In South Africa there are intricate debates about the nature and purpose of adjudication on matters on which

⁶² Phillippe X (1998) 176.

⁶³ *The Treatment Action Campaign* para 54.

⁶⁴ The Equal Rights Trust Interview with Iain Byrne and Geoff Budlender 'Socio-economic equality in the courts: the litigator's perspective' (2014) 12 *The Equal Rights Review* 76.

⁶⁵ Whiteman J 'Socio-economic disadvantage' (2014) 12 *The Equal Rights Review* 103.

judges are perceived to be ill-equipped to pronounce, and which are in effect purely matters of preference about which judges have little knowledge or expertise. Judges and scholars⁶⁶ are considerably influenced by the work of Fuller in his attempt to address fundamental questions about the appropriate scope of judicial review on polycentric matters like socio-economic rights.⁶⁷

Fuller based his formulation on the work of Michael Polanyi,⁶⁸ to set out a conception of the polycentric problem. He uses the example of a spider web to illustrate how such a problem is 'many-centred'.⁶⁹ When one pulls one strand of the web, the consequences may be felt at any point on that web because each intersecting strand 'is a distinct centre for distributing tension'.⁷⁰ Pillay suggests that a polycentric task or problem is one which has many strands, therefore an adjudicator who chooses to tamper with any of these strands cannot comprehensively predict the repercussions of his decision.⁷¹

Fuller provides this example:

'Courts move too slowly to keep up with the rapidly changing economic scene. The more fundamental point is that the forms of adjudication cannot encompass and take into account the complex repercussions that may result from any change in prices or wages.'⁷²

Accordingly, Fuller argues that in adjudicating a polycentric matter a court will not be able to guarantee all affected parties meaningful participation as the widespread

⁶⁶ King J 'The pervasiveness of polycentricity' 2008 *Public Law* 101. See also Davis D (2006) 301.

⁶⁷ Fuller L 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Journal* 353-364.

⁶⁸ Polanyi M *The Logic of Liberty: Reflections and Rejoinders* (1951) 311.

⁶⁹ Fuller L (1969) 394.

⁷⁰ Fuller L (1969) 395.

⁷¹ Pillay A (2011) 58.

⁷² Fuller L (1969) 395.

repercussions make it impossible to say who will be affected. Fuller acknowledges polycentricism to be a matter of degree, as the subject matter of any dispute is likely to contain polycentric features. However, high levels of polycentricity would make a matter unsuitable for adjudication. As explained above, Fuller understands polycentricity as a threat to the inner morality of law. As a general rule, Fuller considers the allocation of economic resources as a significantly polycentric task that should not be undertaken by courts.⁷³ This consideration of Fuller has significant adjudicative implication for socio-economic rights.

Fuller favoured managerial direction to resolve matters with significant levels of polycentricity such as socio-economic rights. He argues that the unforeseen and widespread consequences of the judicial decision renders it ineffectual and 'it is ignored, withdrawn or modified, sometimes repeated'.⁷⁴ Alternatively, the judge might choose to abandon the strict judicial process by taking into consideration facts not properly proven. Finally, the adjudicator could decide to 'reformulate the problem to make it amenable to solution through adjudicative procedures'.⁷⁵ Fuller does not offer any practical assistance to the adjudicator trying to decide how to resolve socio-economic rights as he insists that matters regarding the allocation of resources fall outside the realm of adjudication. Pillay is of the view that Fuller's argument tends to lean towards the non-justiciability doctrine.⁷⁶

⁷³ Fuller L (1969) 400.

⁷⁴ Fuller L (1969) 399.

⁷⁵ Fuller L (1969) 401.

⁷⁶ Pillay A (2011) 61.

Allison rejects Fuller's position on polycentric issues as too vague and open-ended to utilise as a principle of adjudication.⁷⁷ He argues that the resolution of even polycentric matters should be subjected to adjudication and that Fuller failed to provide an alternative to judicial resolution of such matters.⁷⁸ This study adopts Dworkin's view that judicial review strengthens democracy and that courts are fully capable to decide on polycentric issues.⁷⁹ Dworkin's view is further strengthened by Liebenberg's two profound observations in relation to the problem of polycentricity.⁸⁰ The first observation is that this problem is not only restricted to adjudication in the field of socio-economic rights. She then argues that the enforcement of most, if not all rights, has polycentric implications. The second observation is that the fact that a decision has polycentric implications does not necessarily render it unsuitable for adjudication.



3.2.3 Debate on the impact of justiciable socio-economic rights

Liebenberg suggests that if socio-economic rights in the Constitution are to amount to more than paper promises, their enforcement must have pragmatically enabled poor people to gain access to basic social services and resources needed to live a life worthy of human dignity.⁸¹ She is of the strong view that if South African courts can find innovative ways of enforcing of socio-economic rights, this might create pressure for greater urgency and more effective policies to address poverty.

⁷⁷ Allison JWF 'Fuller's analysis of polycentric disputes and the limits of adjudication' (1994) 53 *Cambridge Law Journal* 367 – 383.

⁷⁸ Allison JWF (1994) 369.

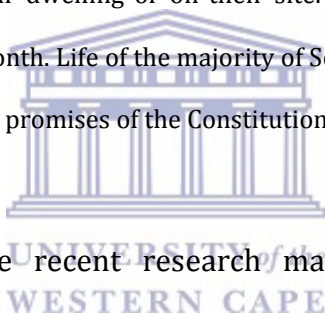
⁷⁹ Dworkin R *Taking Rights Seriously* (1977).

⁸⁰ Liebenberg S (2010) 73.

⁸¹ Liebenberg S 'South Africa's evolving jurisprudence on socio-economic rights: an effective tool in challenging poverty' (2002) 6 *Law, Democracy and Development* 160.

A review of the responses by comparative law scholars reveals contrasting views on the impact of justiciable socio-economic rights in South Africa and the role of the judiciary to enforce these rights. Tomasevski argues that justiciability, as practised thus far, has resulted in a strong disappointment with government and its leaders.⁸² At the end of the first decade of constitutionalism, Lehman described the disappointment as follows:

‘Constitutional scholars and human rights activists had high hopes for the transformative potential of the South African Constitution. Today, ten years into post-apartheid constitutional democracy approximately forty percent of South Africans remain unemployed, approximately thirty percent do not have either adequate housing or access to piped water in their dwelling or on their site. About 50% survive, somehow, on an income less than R500 per month. Life of the majority of South Africans remains appallingly hard despite socio-economic rights promises of the Constitution.’⁸³



Some other scholars in more recent research made similar observations.⁸⁴ The observation by Makdonaldo questions whether the present levels of public services delivery by government would have been worse if the Constitution did not entrench justiciable socio-economic rights.⁸⁵ He responds to the question by arguing that the broader neo-liberal economic paradigm and national politics determine the extent of the budget allocation to social welfare services, and that entrenched socio-economic

⁸² Tomasevski K ‘Strengthening pro-poor law: legal enforcement of economic and social rights’ (2012) available at www.odi.org.uk/rights (accessed 22 April 2015).

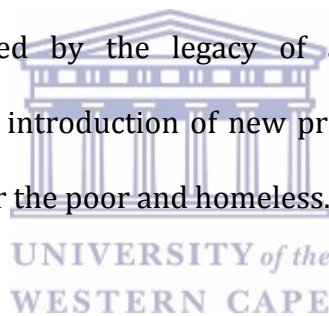
⁸³ Lehman K ‘In defense of the Constitutional Court: litigating socio-economic rights and the myth of the minimum core’ (2006) 22 *American University International Law Review* 163.

⁸⁴ Mbazira C *Litigating Socio-economic Rights in South Africa: A Choice Between Corrective and Distributive Justice* (2009) 4-5.

⁸⁵ Makdonaldo DB *Constitutionalism of the Global South: The Activists Tribunals of India, South Africa and Colombia* (2013) 88-91.

rights are merely an additional consideration. Makdonaldo argues that there are other imperatives in both the market economy and political arrangements that determine the channelling of resources by the state and that this might have nothing to do with entrenched rights.

Contrary to the above views, Kabange argues strongly that the justiciability of socio-economic rights brought about some positive impacts, but not enough to produce the expected change for millions of South Africans still living in poverty.⁸⁶ Kabange further identifies two areas in which the entrenchment of socio-economic rights had an impact. First, the psychological one, as drafters succeeded in giving hope to those who had suffered past injustices caused by the legacy of apartheid.⁸⁷ Secondly, strategic litigation, which has led to the introduction of new procedures, such as ME that have reinforced security of tenure for the poor and homeless.⁸⁸



Christiansen emphasised that the debate on the inclusion of socio-economic rights could have been resolved through one of three options: exclusion from the constitutional text; inclusion as a special category of unenforceable rights; or inclusion as mere directive principles. He argues that South Africa introduced a fourth option, which provided the world with one viable example of adjudication of socio-economic rights.⁸⁹ In his enquiry as to whether the enforcement of socio-economic rights led to improvement in the socio-economic profile of South Africans, he assesses the progress or non-progress

⁸⁶ Kabange CJN 'The South African Constitution and socio-economic rights: has justiciability made any difference?' (2014) 5-6 Presentation at a symposium at the New York Law School.

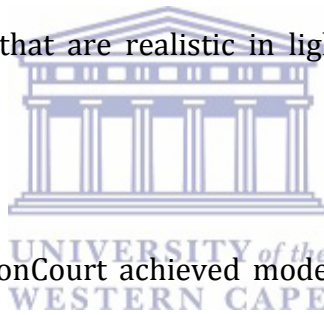
⁸⁷ Kabange CJN (2014) 30.

⁸⁸ Kabange CJN (2014) 30.

⁸⁹ Christiansen EC (2008) 375.

made by government with regard to housing, access to basic services, education and health. He concludes that there are 'qualified achievements' in the overall improvement of the quality of life in the substantive areas enumerated in South Africa's socio-economic rights provisions.⁹⁰

Reflecting on the contribution of the ConCourt to these 'qualified achievements', he cautions that it is imperative to adjust expectations, as courts cannot construct a socially just society on their own. He argues that expectations should therefore be modest in scope, particularly at the earliest stage in the development of socio-economic rights jurisprudence. He further cautions that expectations must be appropriate, by identifying forms of judicial contribution that are realistic in light of the courts' structural and institutional limits.⁹¹



Christiansen argues that the ConCourt achieved modest success that is evident in its judgments. In many judgments on socio-economic rights the Court identified when the government had not met constitutional requirements, for example, by not providing adequate programmes and procedures related to housing in *Grootboom* and *Berea Township*; healthcare in *Treatment Action Campaign*; and general social welfare in *Njongi*.⁹² He further commends the ConCourt for supporting 'non-adjudicatory remedies', such as ME, that seek to empower the poor.⁹³ However, he is very critical of

⁹⁰ Christiansen EC (2008) 393-396.

⁹¹ Christiansen EC (2008) 397.

⁹² Christiansen EC (2008) 398-399.

⁹³ Christiansen EC (2008) 402.

the ConCourt's 'self-imposed limits' that have rendered it unable to develop a substantive content for better enforcement of socio-economic rights.⁹⁴

3.2.4 Socio-economic and judicial enforcement

The current discourse indicates that both legislative and judicial decision-making are not without weaknesses in the protection and promotion of socio-economic rights. However, there is a general consensus that socio-economic rights are fit for judicial enforcement and that courts bring certain strengths for the realisation of these rights. Thus, the best understanding of Fuller's polycentricism is that it highlights limitations and does not seek to completely de-legitimise judicial enforcement of socio-economic rights. Any argument that seeks to restrict polycentric characterisation only to socio-economic rights is untenable, as civil and political rights also have the same attribute. For example, a decision that the right to life requires the abolition of the death penalty requires provision to be made for the re-sentencing of prisoners currently sentenced to death, as well as for the construction of high security prisons for those convicted of serious crimes.⁹⁵ Both have serious budgetary implications for the justice system.

Socio-economic rights also engender negative obligations while civil and political rights engender positive obligations as well. The rights in the ICCPR are not restricted to state abstinence but also extend to the obligation of the state to undertake specific activities to realise the rights. The right to life is not guaranteed by mere abstinence from

⁹⁴ Christiansen EC (2008) 385.

⁹⁵ In *Makwanyane* the Court made reference to the ripple effects that the decision will have on serving prisoners and the work of the Department of Correctional Services.

unjustifiable taking of life. It is also guaranteed by putting in place a police force to maintain law and order, having courts to prosecute those who have killed or who threaten the lives of others, and establishing hospitals to treat illnesses. In *August and Another v The Electoral Commission and Others*⁹⁶ (*August*) the ConCourt held that the right to vote as guaranteed by section 19(3) of the Constitution does impose a positive obligation upon the legislature and the executive. This is so because ‘a date for the elections has to be promulgated, the secrecy of the ballot secured and the machinery established for managing the process’.⁹⁷ The ConCourt argued that it is precisely for these reasons that the Electoral Commission was established to execute the affirmative action corresponding with the right to vote.



Notwithstanding the above, socio-economic rights demand more extensive state action in comparison to civil and political rights. In *The First Certification* the ConCourt held that at ‘the very minimum, socio-economic rights can be negatively protected from improper invasion’.⁹⁸ In most instances socio-economic rights violations emanate from failure to take positive action. Socio-economic rights violations can also occur when the state engages in prohibited action. Sepulveda’s theory of ‘spectrum of obligations’ cogently explains that a right to vote may attract more negative points while a right to health will attract more positive points. Expressed in terms of resources, respecting, protecting and fulfilling the right to adequate health care will be more expensive than the right to vote. The South African courts’ jurisprudence on human rights is congruent with Sepulveda’s thesis that all human rights attract, to a varying degree, both positive

⁹⁶ *August and Another v The Electoral Commission and Others* 1999 (3) SA 1 (CC).

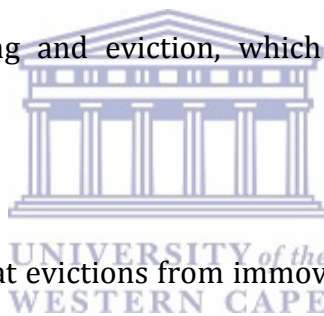
⁹⁷ *The August* para 16.

⁹⁸ *The First Certification* para 77.

and negative obligations. Pieterse argues that the entrenchment of all generations of rights with the same status is the clearest indication that the Constitution envisaged transformative constitutionalism.⁹⁹

3.3 Access to adequate housing as a fundamental right

The right of access to adequate housing is entrenched in the Constitution. As mentioned above, this right has been the most-often litigated socio-economic right in South Africa. This has led to the development of a wealth of jurisprudence in respect of housing and eviction law. The case law that developed, and the progressive legal framework resulted in a paradigm shift in housing and eviction, which Wilson describes as the 'new normality in property law'.¹⁰⁰



The new normality requires that evictions from immovable property, which might lead to homelessness, must be treated differently from all other litigation for repossession of property.¹⁰¹ Section 26 of the Constitution and PIE provide a legal framework that entails a number of significant substantive and procedural protections afforded to occupiers. At the heart of this new paradigm is the notion that land should be viewed as a resource, which may be possessed or occupied without ownership.¹⁰² The possession or occupation would result in a right of access to adequate housing, which is protected in the Constitution, and that deprivation of such possession or occupation would

⁹⁹ Pieterse M 'What do we mean when we talk about transformative constitutionalism' (2005) 20 *SAPL* 155.

¹⁰⁰ Wilson S (2009) 270.

¹⁰¹ Wilson S (2009) 288. See also Muller G (2011a) 46.

¹⁰² Wilson S (2009) 288.

constitute an incursion on the right to adequate housing.¹⁰³ The new normality also provides a framework that seeks to reconcile the opposing legal right of ownership and the rights of occupiers to adequate housing, which includes the right against unlawful evictions. This resulted in a shift away from the common law jurisprudence that revered the property right as sacrosanct and untouchable.¹⁰⁴ Accordingly, this section examines the scope of the right of access to adequate housing and the implications of PIE.

3.3.1 The scope of the right of access to adequate housing

There are more than 100 constitutions in the world that contain the right to adequate housing.¹⁰⁵ This right is enshrined in section 26 of the Constitution and it is unsurprisingly the most frequently litigated right in the context of South Africa's grossly unequal society in which a large proportion of the population has no or limited access to adequate housing. In *Grootboom* the ConCourt contrasted the formulation of the right in the Constitution with that of Article 11(1) of the ICESCR and concluded that the formulation in section 26 of the Constitution is distinct. Section 26(1) of the Constitution provides for the 'right to have access to adequate housing' and Article 11(1) provides for the 'right to adequate housing'. This difference the Court considered to be highly significant as the drafters of the Constitution were fully aware of the ICESCR phrasing at the time of drafting the Constitution and they opted to include 'access to'.¹⁰⁶

¹⁰³ Wilson S (2009) 288. See also Muller G (2011a) 48.

¹⁰⁴ SERI-South Africa *Evictions and Alternative Accommodation in South Africa: An Analysis of the Jurisprudence and Implications for Local Government* (2013) 3.

¹⁰⁵ SERI (2013) 25.

¹⁰⁶ *Grootboom* para 28.

The ConCourt held that ‘access to’ reflects the intention that the right amounted to ‘more than bricks and mortar’ but includes acquisition of land and the provision of municipal services, such as, water, energy and sanitation.¹⁰⁷ However, the ConCourt failed to embark on a substantive interpretation of the right to give it a minimum content. This could be attributed to the ConCourt’s doctrinal choice of reasonableness. According to this approach section 26(1) and (2) must be read together, with the emphasis being placed on the reasonableness of the measures that the government has taken for purposes of progressive realisation of the right within its available resources. Based on this approach by the ConCourt, there is presently no legal concept to define the scope of ‘housing’ or ‘home’ in South Africa.



The CESCR is of the view that the right should not be interpreted in a narrow and restrictive sense.¹⁰⁸ In General Comment No 4, CESCR adopted the interpretation of ‘adequate housing’ propounded by the Commission on Human Settlements and the Global Strategy for Shelter which have stated that adequate housing means ‘adequate privacy, adequate space, adequate security, adequate lighting, adequate basic infrastructure, and adequate location with regard to work and basic facilities – all at a reasonable cost’.¹⁰⁹

Liebenberg observes that the failure by the ConCourt to develop the substantive content of section 26(1) significantly emasculates its capacity to serve as a prominent institution where deliberations concerning the meaning and implications of enshrined

¹⁰⁷ *Grootboom* para 27 and *PE Municipality* para 31.

¹⁰⁸ General Comment No 4 para 7.

¹⁰⁹ General Comment No 4 para 7.

rights and values occurs.¹¹⁰ She argues that a textual analysis of the Constitution supports a substantive consideration of the nature and scope of section 26(1).¹¹¹

Section 26(2) imposes a positive obligation on the state to 'adopt reasonable legislative and other measures to achieve the progressive realisation' of the section 26(1) right. In *Grootboom* the ConCourt indicated that section 26(1) is not independent of section 26(2) and that the two subsections must always be read together.¹¹² The formulation of 'reasonable legislative or other measures' implies that there should be some standard against which government programmes are measured.

Derived directly from section 26(2) formulation was the model of reasonableness.¹¹³ The ConCourt concretised its disinclination for a minimum core and rejected the argument by the *amici curiae* that the Court develop a minimum standard for section 26. The core enquiry is whether the measures taken by the government are reasonable in facilitating the realisation of the socio-economic right in question. Liebenberg argues that this approach is designed to give the government a margin of discretion relating to the specific policy choices adopted to give effect to socio-economic rights.¹¹⁴ The Court indicated that it would assess the reasonableness of the government's conduct in the light of the social, economic and historical context, and that consideration would be given to the capacity of the institutions responsible for implementing the programme.¹¹⁵

¹¹⁰ Liebenberg S (2010) 177.

¹¹¹ Liebenberg S (2010) 180.

¹¹² *Grootboom* para 37.

¹¹³ *Grootboom* para 39.

¹¹⁴ Liebenberg S (2010) 151.

¹¹⁵ *Grootboom* para 43.

The Court emphasised human dignity as the premier value of the reasonableness standard and highlighted seven factors to be considered when reviewing the reasonableness of the policy or programme of government aimed at giving effect to socio-economic rights. First, the programme must be comprehensive, coherent and coordinated and should allocate clear responsibilities to all three spheres of government.¹¹⁶ Secondly, it must ensure that appropriate human and financial resources are deployed.¹¹⁷ Thirdly, the scope and extent of the programme must be capable of facilitating the realisation of the right.¹¹⁸ Fourthly, the programme must be reasonable both in its conception and implementation.¹¹⁹ Fifthly, the programme must be balanced and flexible in the sense that it makes provision for short, medium and long term needs.¹²⁰ Sixthly, it must be transparent and its content effectively communicated to the public.¹²¹ Lastly, the programme must devise and introduce measures that serve as immediate responses to the desperate needs of destitute people.¹²²



The assessment of the reasonableness of a government programme is further influenced by the requirement of ‘progressive realisation’ which was interpreted as follows by the ConCourt:

‘The term “progressive realisation” shows that it was contemplated that the right could not be realised immediately. But the goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realisation means that the state must take

¹¹⁶ *Grootboom* para 42.

¹¹⁷ *Grootboom* para 41.

¹¹⁸ *Grootboom* para 42.

¹¹⁹ *Grootboom* para 43.

¹²⁰ *Grootboom* para 44.

¹²¹ *Grootboom* para 123.

¹²² *Grootboom* para 44.

steps to achieve this goal. It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. Housing must be made accessible not only to a larger number of people but to a wider range of people as time progresses.¹²³

The notion of progressive realisation appreciates that the full realisation of socio-economic rights will not be achieved immediately. General Comment No 3 cautions that the notion should not be used to deprive the right of its meaning.¹²⁴ Muller argues that the notion of progressive realisation is a 'flexible device that reflects the realities of the world and which appreciates the difficulties that State Parties may face in ensuring the full realisation' of socio-economic rights.¹²⁵ In *Grootboom* the ConCourt adopted this approach to the interpretation of progressive realisation when it stated that the government must take appropriate legislative and other measures to provide for the basic needs of everyone. These steps go beyond merely enacting the appropriate legislation as the ICESCR encourages the State Parties to decide which means are most appropriate for a country, taking cognisance of its political, social and economic situation.

The notion of available resources is also a criterion used for assessing reasonableness. This obligation requires the government to make deliberate efforts to ensure that as many people as possible derive benefits from the section 26 right under the prevailing circumstances in South Africa. Regardless of the development levels of the country, there are certain obligations that the government must meet immediately to ensure that

¹²³ *Grootboom* para 45.

¹²⁴ General Comment No 3 para 9.

¹²⁵ Muller G (2011) 91.

every individual realises the right in the shortest possible time. Such obligations include, introducing measures to facilitate 'self-help' housing schemes by the affected groups,¹²⁶ giving priority to the social groups in most desperate need of housing;¹²⁷ adopting a national housing strategy which identifies resources available to meet the stated goals;¹²⁸ and effective monitoring.¹²⁹

Section 26(3) enshrines the right against unlawful eviction and imposes both negative and positive obligations on the state and private individuals. The negative obligation on the state or private individuals is to 'desist from preventing or impairing' the right of access to adequate housing.¹³⁰ The positive obligation on the state is to ensure that it enacts and enforces laws that would prevent unlawful evictions, demolition of peoples' homes, or arbitrary evictions. This positive obligation on the state must be viewed within a historical context of apartheid-style evictions and demolitions that degraded and disempowered the squatters in the country. This further requires the state to develop a legal framework on evictions and demolitions that sought to find a fine balance between the common law interest of the owners and the precarious position of the unlawful occupiers. In response to this positive obligation PIE was enacted to give effect to section 26(3) of the Constitution and as a result PIE constitutes the primary source of protection for unlawful occupiers of land against abuse of power and arbitrary evictions.

¹²⁶ General Comment No 4 para 10.

¹²⁷ General Comment No 4 para 11.

¹²⁸ General Comment No 4 para 12.

¹²⁹ General Comment No 4 para 13.

¹³⁰ *Grootboom* para 34.

3.3.2 Prevention of unlawful evictions in South Africa

Section 26(3) of the Constitution and PIE provide a number of essential procedural protections to unlawful occupiers who face eviction. As the basic point of departure, section 26(3) provides that no one may be evicted from their home or have their home demolished without a court order authorising such eviction after having due regard to 'all the relevant circumstances'.¹³¹ Muller argues that PIE expands on this requirement by stating that a court may not grant an eviction order unless it would be 'just and equitable to do so, after considering all the relevant circumstances ...'¹³²

The objectives of PIE are to prohibit unlawful evictions, to further provide procedures for the eviction of unlawful occupiers, and to repeal PISA and other obsolete laws.¹³³ From these objectives it is easy to establish that PIE seeks to prevent both illegal evictions and unlawful occupation. PIE repeals the objectionable apartheid legislation including PISA and thereby decriminalises unlawful occupation. PIE provides a framework to operationalise section 26(3) of the Constitution to restore rights that were undermined during the apartheid era evictions. The overarching objective of this framework is to provide procedural protection for unlawful occupiers.

Van der Walt is of the view that since PIE only applies to unlawful occupiers, with no right of occupation, the purpose of PIE is limited to stabilising existing unlawful

¹³¹ Muller G (2011a) 66. See also *Pheko v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC) para 35, the Court stated that section 26(3) does not permit legislation authorizing eviction without a court order.

¹³² Sections 6 and 7 of PIE.

¹³³ The long title of PIE.

occupation of land by giving a guarantee that evictions only take place when they are just and equitable.¹³⁴ This marked a significant departure from the common law position, where the supreme right of ownership entitled the owner to demand eviction regardless of the contextual or personal circumstances of the unlawful occupiers. In the new constitutional dispensation as reinforced by PIE, ownership is no longer a supreme right that triumphs automatically over the housing interest of the unlawful occupier. Instead, the eviction enquiry is subjected to substantive fairness and strict due process requirements.¹³⁵

PISA strengthened common law remedies for landowners, while disempowering occupiers by removing the common law protection at their disposal, such as the *mandament* remedy. PIE effectively reverses this position, replacing the common law remedies with strong procedural protections and substantive safeguards. This includes extra-judicial mediation of the dispute between unlawful occupiers and landowners 'by persons with expertise in dispute resolution'.¹³⁶ Muller argues that these safety measures establish threshold requirements for eviction in accordance with the principles laid down in section 26(3) of the Constitution.¹³⁷

There are three critical steps that are prescribed by PIE for the judicial process related to evictions. First, the court must establish whether the occupiers are unlawful occupiers for purposes of PIE. An unlawful occupier is a person who occupies land without the express or tacit consent of the owner or person in charge, or without any

¹³⁴ Van der Walt AJ (2005) 327.

¹³⁵ Van der Walt AJ (2005) 419.

¹³⁶ Sections 7(1) and (2) of PIE.

¹³⁷ Muller G (2011a) 105.

other right to the land.¹³⁸ The PIE definition of unlawful occupiers excludes people who are in occupation in terms of the Extension of Security of Tenure Act of 1997 and who are protected by provisions of the Interim Protection of Informal Land Rights Act 31 of 1996.

In several cases the courts stumbled on the application of the definition of an unlawful occupier. The matter was clarified in *Ndlovu v Ngcobo; Bekker and Another v Jika*¹³⁹ (*Ndlovu*) where the SCA held that PIE applies to all cases where there was no consent to occupy the property when the proceedings were instituted and where the building or structures were used as a home or to obtain some form of shelter. As a result PIE presently applies to all instances of unlawful occupation, including, land invasion, squatting and mortgagors. In *Residents of Joe Slovo*, the ConCourt further emphasised that courts cannot resort to the common law definition of consent to determine the meaning of consent for purposes of PIE, because the common law definition of consent limits the definition of unlawful occupation and thereby limits the application of PIE.¹⁴⁰

Secondly, once it has been established that the occupiers are unlawful, PIE prescribes that they must be informed of the fact that eviction proceedings are being instituted against them.¹⁴¹ Taking cognisance of the social conditions of unlawful occupiers, PIE prescribes that the notice must not only be written but must be 'effective'.¹⁴² This

¹³⁸ Section 1 of PIE.

¹³⁹ *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA).

¹⁴⁰ *Residents of Joe Slovo* para 37.

¹⁴¹ Section 4(2) of PIE prescribes: 'At least 14 days before the hearing of the proceedings contemplated in subsection (1), the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having the jurisdiction.'

¹⁴² Section 4(2) of PIE.

means that the unlawful occupiers must comprehend the full scope and impact of the proceedings underway. This requirement is also important as written notices are often defective, as they do not accurately identify the unlawful occupiers due to fluctuations in informal settlements, or because the manner in which they are served is defective. In *Cape Killarney Property Investments (Pty) Ltd v Muhamba and Others (Cape Killarney Property Investments)*¹⁴³ Brand AJA found that ‘the provision intended the notice to be authorised by the court concerned’.¹⁴⁴

Thirdly, a court may, after consideration of all relevant circumstances, order the eviction and has additional statutory powers to make any orders if it is satisfied that it would be just and equitable to do so.¹⁴⁵ PIE makes provision for three types of eviction – evictions instituted by owners, evictions instituted by organs of state and urgent evictions.¹⁴⁶ If at the time of eviction proceedings by an owner the unlawful occupation is less than six months, a court must have regard to the rights and needs of the vulnerable, such as, the elderly, children, disabled persons and female-headed households.¹⁴⁷ If the duration was longer than six months, a court must, additionally, have regard to the availability of alternative accommodation.¹⁴⁸ In *PE Municipality* the Court held that the requirement of more than six months does not take away the discretion of a court to order alternative accommodation if it would be just and equitable to do so for unlawful occupiers of less than six months.

¹⁴³ *Cape Killarney Property Investments (Pty) Ltd v Muhamba and Others* 2001 (4) SA 1222 (SCA) para 11.

¹⁴⁴ *Cape Killarney Property Investments* para 11.

¹⁴⁵ Section 4(10) of PIE.

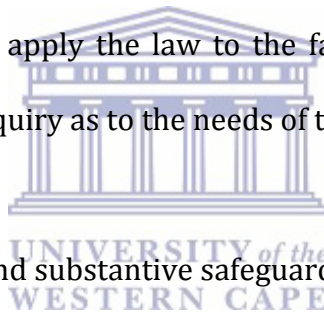
¹⁴⁶ Chenwi L *Evictions in South Africa: Relevant International and National Standards* (2008) 7-8.

¹⁴⁷ Section 4(6) of PIE.

¹⁴⁸ Section 4(7) of PIE.

3.3.3 Paradigm shift in issuing of eviction orders

Section 26 of the Constitution marked a decisive break with the past. The legal framework on evictions experienced a dramatic paradigm shift from a position where eviction orders were issued without any regard to the personal circumstances of the unlawful occupiers or the exceptional difficulties in respect of their livelihoods that may arise as a result of the evictions. At the forefront of the enquiry whether to issue an eviction order is the requirement of justice and equity. What would be just and equitable is largely determined by the circumstances of each case. The new legal framework gives the courts wide discretion as opposed to the pre-1994 dispensation when courts were expected to apply the law to the facts of the case in a mechanical manner without any further enquiry as to the needs of the occupiers.

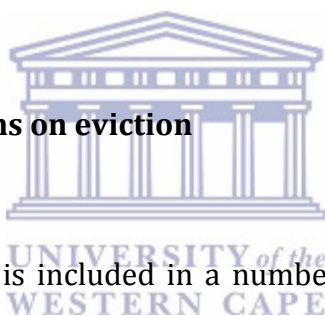


PIE provides both procedural and substantive safeguards to the unlawful occupiers. The rejection by the courts of the common law definition of consent for the purposes of PIE broadened the scope for the application of the Act.¹⁴⁹ The requirement that unlawful occupiers must receive an effective notice of the eviction proceedings is a significant procedural protection. The notice must identify them as unlawful occupiers of the property, be properly served upon them, and be in a language they will be able to understand. Furthermore, the notice must contain information regarding the date and time of the hearing and the grounds for the eviction. This gives the unlawful occupiers an opportunity to oppose the eviction application as they have a right to access legal aid to secure legal representation. All these procedural safeguards are significant to give effect to the foundational values of the Constitution, such as, dignity and equality.

¹⁴⁹ Muller G (2011a) 123.

The requirement that evictions must be just and equitable is at the heart of the substantive safeguard provided by PIE to unlawful occupiers. This requires careful consideration of the rights and the needs of the unlawful occupiers. Courts are further required to ascertain whether land or alternative accommodation is available or can reasonably be made available to the unlawful occupiers upon their eviction. Courts are also required to consider whether the local authorities with jurisdiction or the Member of the Executive Council (MEC) responsible for housing made any mediation attempts to resolve the dispute between the unlawful occupiers and the owners. These substantive safeguards arguably represent the most significant development in the law of eviction.

3.4 The International norms on eviction



The right to adequate housing is included in a number of international human rights instruments, some of which South Africa has signed or ratified. International instruments treat the right against unlawful eviction either as a 'derivative right or as an integral component of the right to adequate housing'.¹⁵⁰ As a result various bodies have developed detailed standards on eviction. Chenwi asserts that Parliament and government are obliged to incorporate these international standards into their domestic policies relevant to eviction.¹⁵¹ Section 39(1) of the Constitution obliges the courts to interpret the Bill of Rights so as to promote the values that underlie an open and democratic society, and also requires a court to take international law and foreign law into account in interpreting the rights.

¹⁵⁰ Chenwi L (2008) 5.

¹⁵¹ Chenwi L (2008) 6.

Further, section 233 of the Constitution requires the courts to interpret legislation as far as possible to be consistent with international law. In *Makwanyane*, which was the first ConCourt judgment, the Court observed that international law provides a framework within which the rights in the Constitution can be evaluated and understood. The Court held that public international law would include non-binding as well as binding law, both of which can be utilised as instruments of interpretation.¹⁵² The South African courts do not fail to refer to international law and standards when interpreting the right to adequate housing in eviction cases. For the purposes of this study, this section will briefly reflect on the relevant General Comments issued by the United Nations Committee on Economic, Social and Cultural Rights (CESCR); the resolutions on eviction by the United Nations Commission on Human Rights (UNCHR); the Basic Principles and Guidelines issued by the UN Special Rapporteur on Adequate Housing; and the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (African Commission Principles and Guidelines) issued by the African Commission on Human and Peoples' Rights (African Commission).

3.4.1 United Nations Committee on Economic, Social and Cultural Rights

The CESCR is the body that monitors the implementation of the ICSECR by the State Parties. Article 11(1) of the ICSECR enshrines the right of everyone to adequate housing and enjoins the State Parties to take appropriate steps to ensure the realisation of the right. To assist with the development of the jurisprudence on the ICSECR the CESCR

¹⁵² *Makwanyane* para 35.

issues General Comments. Though not legally binding, they have considerable weight of persuasion and are important and useful for courts and human rights bodies in the interpretation of socio-economic rights. With regard to the right to adequate housing during evictions the CESCR issued two crucial interpretive mechanisms – General Comment No 4 and General Comment No 7.

General Comment No 4 was adopted on 12 December 1991. General Comment 4 is primarily focused on the right to adequate housing and sets out three standards that are relevant for forced evictions. First, all people shall enjoy a degree of security of tenure which guarantees legal protection against forced evictions. States Parties should consequently take immediate measures 'in genuine consultation with affected people and groups' to give legal security of tenure to those people and households currently lacking such protection.¹⁵³ Secondly, the right not to be subjected to arbitrary, unlawful interference with one's home is a very important element in defining the right to adequate housing.¹⁵⁴ Lastly, forced evictions are incompatible with the ICESCR and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law.¹⁵⁵

General Comment No 7 was adopted on 16 May 1992 and primarily focuses on forced evictions, going further than General Comment 4 by detailing what governments, landlords and institutions must do to prevent forced evictions. It contains detailed procedural and substantive safeguards pertaining to forced evictions. The General

¹⁵³ General Comment No 4 para 8(a).

¹⁵⁴ General Comment No 4 para 9.

¹⁵⁵ General Comment No 4 para 18.

Comment requires State Parties to introduce legislative and other measures, with appropriate safeguards to prevent and punish forced evictions; and that all feasible alternatives are explored in consultation with the affected people.¹⁵⁶ General Comment No 7 further requires both substantive and procedural protections to be applied in relation to forced evictions, such as, 'genuine consultation with the affected people, adequate and reasonable notice, adequate information on the proposed evictions, [and] provision of legal remedies...'.¹⁵⁷

3.4.2 United Nations Commission on Human Rights

The UNCHR, predecessor to the United Nations Human Rights Council (UNHRC), monitors and publicly reports on human rights issues and violations. The UNCHR adopted a range of resolutions on forced evictions. A Resolution of 10 March 1993 affirmed that the practice of forced evictions is a gross violation of human rights, in particular the right to adequate housing.¹⁵⁸ The Resolution requires State Parties to take immediate measures at all levels to eliminate the practice of forced evictions¹⁵⁹ and requires that where such evictions takes place they must be based on 'mutually satisfactory negotiations with those affected and be consistent with their wishes, rights and needs'.¹⁶⁰

¹⁵⁶ General Comment No 7 para 14.

¹⁵⁷ General Comment No 7 para 15.

¹⁵⁸ UNCHR Resolution 1993/77: Forced evictions (adopted on 10 March 1993) para 1.

¹⁵⁹ UNCHR Resolution 1993/77 para 2.

¹⁶⁰ UNCHR Resolution 1993/77 para 4.

The UNCHR adopted another Resolution on prohibition of forced evictions on 16 April 2004.¹⁶¹ This Resolution requires State Parties to take immediate measures to prevent forced evictions and to 'ensure effective participation, consultation and negotiations with affected people in any eviction process that is otherwise deemed lawful'.¹⁶²

3.4.3 United Nations Special Rapporteur on Adequate Housing

The UN Special Rapporteur¹⁶³ developed Basic Principles and Guidelines on Development-Based Evictions and Displacement (UN Basic Principles and Guidelines) in 2007.¹⁶⁴ The UN Basic Principles and Guidelines constitute soft international law and could develop into binding customary international law obligations for South Africa. The UN Basic Principles and Guidelines define development-based evictions as including evictions that are often planned or conducted under the pretext of serving the 'public good'. Examples of such evictions include those linked to development and implementation of major infrastructure projects like dams and large-scale industrial or energy projects.¹⁶⁵ The Basic Principles and Guidelines provides detailed steps to be taken by states before, during and after evictions.

¹⁶¹ UNCHR Resolution 2004/28: Prohibition of Forced Evictions, adopted on 16 April 2004.

¹⁶² UNCHR Resolution 2004/28 para 3.

¹⁶³ The UN CHR appointed a Special Rapporteur on adequate housing in 2000 to focus on Adequate Housing as a component of the right to an adequate standard of living. The UNCHR further requested the Rapporteur to report on the status, throughout the world, of the realization of housing rights.

¹⁶⁴ UN Special Rapporteur 'Basic Principles and Guidelines on Development-Based Evictions and Displacement' (2007) Resolution UN doc A/HRC/4/18. February 2007.

¹⁶⁵ UN Special Rapporteur (2007) para 8.

The steps prescribed by the UN Basic Principles and Guidelines are similar to those proposed in General Comment No 7 except that the expression 'genuine consultation' is not used, but rather 'holding of public hearings that provides the affected people and their advocates with opportunities to challenge the eviction decision or to present alternative proposals and to articulate their demands and development priorities'.¹⁶⁶ The UN Basic Principles and Guidelines do not provide for any form of engagement with the affected people beyond the 'before an eviction' phase.

3.4.4 African Commission's Principles and Guidelines

The African Commission adopted Principles and Guidelines on the implementation of socio-economic rights in the African Charter in November 2010. The primary objective is to assist State Parties to comply with their obligations under the African Charter. The right to housing is not provided for under the African Charter. However, in *SERAC & CESR v Nigeria*¹⁶⁷ (*SERAC*) the African Commission held that the right to housing is protected in the African Charter through a combination of provisions protecting the right to property (Article 14), the right to enjoy the best standard of mental and physical health (Article 16), and the protection accorded to the family (Article 18(1)).

The Principles and Guidelines prescribe a minimum core obligation for the right to housing during evictions. The Principles and Guidelines encourage the State Parties to ensure, as a minimum core standard, that evictions 'only occur in exceptional circumstances... (a) authorised by law, (b) carried out in accordance with international

¹⁶⁶ UN Special Rapporteur (2007) para 37.

¹⁶⁷ African Commission *SERAC & CESR v Nigeria*, Com No. 155/96 (2001) para 44.

human rights law, (c) undertaken solely in the public interest, and (d) regulated so as to ensure full and fair compensation and rehabilitation'.¹⁶⁸ The Principles and Guidelines also prescribe as a minimum core standard 'fair hearing and participation for affected people to challenge the eviction decision or present alternatives'.¹⁶⁹

3.4.5 Evaluation of the international norms

The international norms prescribe some form of involvement of the affected people during the eviction process. General Comment No 7 requires that there should be 'genuine consultation', the Resolutions of the UNCHR require that there should be 'effective participation' and 'mutually satisfactory negotiations', the UN Special Rapporteur requires that there should be 'public hearings' and the African Commission requires 'fair hearing and participation'. The international framework regards the involvement of the affected people during the eviction process as crucial.

All these instruments do not merely require 'consultation', 'participation' or 'hearing'. Adjectives such as 'genuine', 'mutually satisfactory' and 'fair', are added to dictate the nature of the involvement of the affected people. The use of these adjectives seek to ensure that the involvement of the affected people is not a mere formality but a substantive part of the engagement process on a number of issues, such as the conditions of the affected people pre- and post the eviction and also looking at a possible alternative solution to eviction. The international norms require that evictions should be the last resort and should take place only in exceptional circumstances.

¹⁶⁸ African Commission Principles and Guidelines (2010) para 79(xix).

¹⁶⁹ African Commission Principles and Guidelines (2010) para 79(xxiii).

3.5 Transformative constitutionalism and interpretation of section 26(3)

The primary argument in this study is that evictions are inherently characterised by unequal power relations between the occupiers and the state and that the requirement of ME will not fulfil the transformative potential of the Constitution without the empowerment of the vulnerable occupiers. The courts in South Africa appreciate the transformative potential of the Constitution. However, the extent of the judicial commitment to the full realisation of the transformative potential of the Constitution is a highly contentious matter. This section examines the scholarly debates on transformative constitutionalism and the implications thereof for the interpretation of the right against unlawful evictions.



There is a wealth of scholarly work on transformative constitutionalism in South Africa. Klare sparked this extensive and sometimes convoluted debate in 1998 and since then about 212 journal articles have cited his work.¹⁷⁰ This excludes thousands of books, chapters in books, academic theses, unmediated articles, case law, and non-academic commentaries. The author notes this to highlight how dense the literature on transformative constitutionalism is and that its contours are constantly shifting. The author is of the view that the work of Klare and the subsequent contributions by Langa,¹⁷¹ Moseneke,¹⁷² Roux¹⁷³ and Pieterse¹⁷⁴ would suffice to capture the essence of the argument in this study.

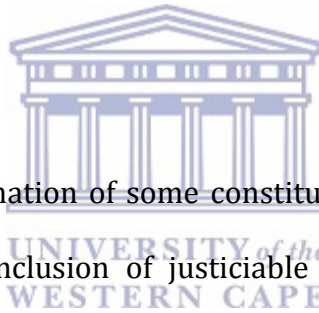
¹⁷⁰ Google Scholar (accessed 23 June 2015).

¹⁷¹ Langa P 'Transformative constitutionalism' (2006) 17 *Stellenbosch Law Review* 351.

¹⁷² Moseneke D 'The Fourth Bram Fischer Memorial Lecture: transformative constitutionalism' (2002) 18 *SAJHR* 309.

3.5.1 Klare's conceptualisation of transformative constitutionalism

The notion of transformative constitutionalism originates from Klare's article in which he describes the 1996 Constitution as transformative in content and vision. In a sincere attempt to justify the usage of the term 'transformative', Klare contrasts the usage of that term with 'reform' and 'revolution'. He argues that the term 'reform' will not adequately capture the magnitude of the transformation envisaged by the Constitution, and that 'revolution' goes far beyond the scope of the social changes contemplated by the Constitution. For Klare, transformative constitutionalism connotes an undertaking of 'inducing large-scale change through non-violent political processes grounded in law'.¹⁷⁵



Klare makes an incisive examination of some constitutional provisions, which include the foundational values, the inclusion of justiciable socio-economic rights, and the powers of judicial review. He then describes the Constitution as 'post-liberal' and therefore committed to '...wide-ranging egalitarian social transformation'.¹⁷⁶ By describing the Constitution as post-liberal he suggests that the South African Constitution went beyond the normal and standard requirements of liberal democracy such as in the US, as it is envisioned as an '... empowered model of democracy'.¹⁷⁷ For Klare, the empowered model of democracy seeks to eradicate all past injustices and

¹⁷³ Roux T 'Transformative constitutionalism and the best interpretation of the South African Constitution: distinction without a difference?' (2009) 2 *Stellenbosch Law Review* 258.

¹⁷⁴ Pieterse M (2005) 155.

¹⁷⁵ Klare K (1998) 152.

¹⁷⁶ Klare K (1998) 156.

¹⁷⁷ Klare K (1998) 153.

unequal distribution of power in society.¹⁷⁸ It is a model of democracy that protects the poor and vulnerable from abuse of power and enjoins the state with a positive obligation to ensure the improvement of the socio-economic profile of the people. In short, the Constitution has an anti-oppression vision, which favours the vulnerable and poor citizens.

Klare acknowledges that there are many ways of reading the Constitution and he does not seek to prescribe that a post-liberal reading thereof is the best. However, his purpose in the article is to add clarity to the problem created by concepts, so that a debate can ensue about a 'post-liberal, or neoliberal, or conservative or any other reading of the Constitution'.¹⁷⁹ He identifies six essential features of the Constitution which he argues support a post-liberal reading thereof, namely, socio-economic rights and a substantive conception of justice; affirmative state duties; horizontality; participatory governance; multi-culturalism; and historical self-consciousness.¹⁸⁰ He cautions about the restraints posed by the presumption that a liberal reading of the Constitution is the legal interpretation thereof and that a post-liberal reading is a political interpretation.¹⁸¹

For Klare, the drafters of the Constitution deliberately included provisions that go beyond the classical liberal doctrines, which are meant to entrench and protect individual fundamental freedoms. Klare argues that the post-liberal reading of the Constitution will give meaning to its egalitarian provisions that seek to achieve a caring

¹⁷⁸ Klare K (1998) 158.

¹⁷⁹ Klare K (1998) 152.

¹⁸⁰ Klare K (1998) 154-156.

¹⁸¹ Klare K (1998) 158.

and participatory society that transcends the historical setting of the Constitution. This historical setting is accounted for in Chapter 2 of this study. It is the historical setting of abuse of state power, of harassment, racial segregation, arrests during forced evictions. According to Klare, the Constitution is 'self-conscious' about this history. From the self-consciousness in the Constitution on the historical injustices flows the transformative vision. This transformative vision of the Constitution is enveloped in its foundation values of human dignity, equality and freedom.

Klare acknowledges the challenges that the structure and vision of the Constitution place on lawyers and particularly judges.¹⁸² In terms of the traditional conception of adjudication, judges are expected to be neutral and value-free in executing their adjudicative function, by interpreting the legal text in ways devoid of 'personal or subjective views'.¹⁸³ He further suggests that the greatest weakness of the traditional legal theory lies in its insistence on a strict separation of powers between law and politics, between 'professionally constrained legal practices and strategic pursuit of political and moral projects'.¹⁸⁴ Klare argues that the orientation of lawyers, which is attributable to their training, renders it difficult for them to consider appropriate external factors in a case. He then argues that for the proper interpretation of a post-liberal Constitution the gap between law and politics in adjudication must be closed.¹⁸⁵

¹⁸² Klare K (1998) 149.

¹⁸³ Klare K (1998) 157.

¹⁸⁴ Klare K (1998) 161.

¹⁸⁵ Klare K (1998) 163-164.

Klare further argues that there are political values that inform the constitutional text and that those values should be employed to give meaning to the text.¹⁸⁶ Therefore the most appropriate response in this regard would be for judges and lawyers to acknowledge to the public their part in shaping the social order through the use of interpretive and adjudicative tools, so that the public is aware of this, in order to promote and uphold the democratic principles of openness and accountability. Klare suggests that over-reliance on available legal materials and the ways in which things were done in earlier times constrains constitutional interpretation. This limits the achievement of democratic transformation. The implications of this argument are that lawyers and judges, as proponents of social justice, may be working against social justice through uncritical deployment of available legal materials. This is so because lawyers are conditioned to accept certain arguments as convincing and other as not.¹⁸⁷ It may then be that the legal arguments that are accepted as convincing do not advance the social justice project.



In the field of socio-economic rights the debates have been dominated by arguments of negative/positive obligation, the separation of powers doctrine, and judicial deference. Preoccupation with technical details and doctrinal approaches by the courts could derail the efforts towards transformative constitutionalism; hence Klare calls for the critical examination of the prevailing legal culture and its influence on adjudication.¹⁸⁸ Klare developed this argument by asserting that a democratic South Africa requires a transformed legal culture that is responsive to the transformative potential of the

¹⁸⁶ Klare K (1998) 159-166.

¹⁸⁷ Klare K (1998) 166-170.

¹⁸⁸ Klare K (1998) 167-168.

Constitution in order to achieve equality, advance social justice and promote the empowerment of vulnerable people. The transformative potential of the Constitution is instructive about addressing the ills of the past through empowerment of the disadvantaged, which is based on the right to equality as the premier foundational value and requires appropriate adjudicative tools that go beyond the usual realm of liberal legalism.

3.5.2 Responses to Klare's transformative constitutionalism

There have been many responses by both scholars and lawyers to the work of Klare, but, as mentioned earlier, the responses by Moseneke, Langa, Roux and Pieterse will suffice for the purposes of this study. The general orientation of all these scholars and lawyers on the transformative imperative in the Constitution is congruent with that of Klare. They agree with Klare on the inadequacy of liberal legalism to enable courts to contribute to the transformative potential of the Constitution. However, there seems to be disagreement, particularly from Roux, with regard to some propositions of Klare on how the courts should execute their adjudicative function.

Moseneke argues that the Constitution enjoins the judiciary to uphold and advance its transformative design. He explains that a momentous constitutional imperative binds not only the judiciary but also all organs of the state.¹⁸⁹ He asserts that transformative constitutionalism is about achieving substantive equality. In support of Klare, he suggests that substantive equality renders imperative a conceptualisation of a new legal order for the creation of a society different from the apartheid past that was socially

¹⁸⁹ Moseneke D (2002) 314.

degrading.¹⁹⁰ He poignantly argues that the legal content of the rights in the Constitution is derived from the foundational values of the Constitution. Thus the enquiry for substantive equality commences with the right to equality, which is the 'Constitution's focus and its organising principle'.¹⁹¹ He argues that the equality espoused by the transformative Constitution is not a mere formal but a substantive equality, and that transformative jurisprudence must commit to substantive equality.¹⁹²

Based on his argument on substantive equality, Moseneke advances the central pillar of his argument, which strikingly converges with the statements by Klare, as follows:

'An egalitarian society would not be possible unless there is total reconstruction of the power relations in society, with the consequence that human development is maximised and material imbalances redressed.'¹⁹³

Moseneke is of the view that addressing power imbalances is the central focus of the transformation project and to achieve that there is a need to maximise human development. He supports the view that the inclusion of socio-economic rights in the Constitution is one means of achieving such human development and that communities need to be empowered to give practical expression to these rights.¹⁹⁴

There is an overlapping consensus between Klare and Moseneke that strongly suggests that transformative constitutionalism requires a migration by adjudication from abstract comparison to an exploration of the actual impact of the alleged rights

¹⁹⁰ Moseneke D (2002) 315.

¹⁹¹ Moseneke D (2002) 316. See also *President of the RSA v Hugo* 1997 (4) SA 1 (CC) para 74.

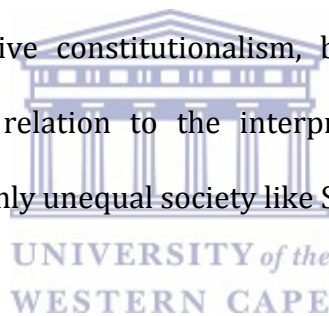
¹⁹² Moseneke D (2002) 317.

¹⁹³ Moseneke D (2002) 316.

¹⁹⁴ Moseneke D (2002) 318.

violation.¹⁹⁵ Thus decisions on the violation of constitutional rights must be seen within the context of the socio-economic conditions of the groups concerned in the light of social patterns, power relations and other systematic forms of deprivation, which may be relevant.

Moseneke's conceptualisation of transformative constitutionalism and the required adjudicative approach is squarely coterminous with the views of Klare. However, one can sense a deliberate effort by Moseneke to avoid the weighty terminology such as 'post-liberal' constitution and 'classical liberal legalism' used in Klare's work. It could be that as a sitting judge, Moseneke did not want to embark on a utopian and idealist engagement with transformative constitutionalism, but rather to engage with the practical dilemmas posed in relation to the interpretation and application of an egalitarian constitution in a highly unequal society like South Africa.



In contrast to Klare, Langa makes a profound assertion that the constitutional changes underpinned by the Constitution comprise a 'social and economic revolution'.¹⁹⁶ Unfortunately, Langa does not go further than this to explain his reasoning for defining the nature of the changes as revolutionary. The author is of the firm view that the assertion by Langa was not a throw-away statement, but that he was highly conscious of the implications thereof. The different characterisations of the transformation process by Klare and Langa reflect the divergent views and understanding of the scale and depth of the change envisaged by the Constitution.

¹⁹⁵ Moseneke D (2002) 318.

¹⁹⁶ Langa P (2006) 352.

Langa further cautions that there is no single stable understanding of transformative constitutionalism;¹⁹⁷ and in the same vein he highlights three conceptions of transformative constitutionalism. First, substantive equality predicated on improvement in the socio-economic profile of the poor and vulnerable to eradicate the legacy of apartheid, which involves a conscious effort to promote equity in all spheres.¹⁹⁸ He argues that the Constitution should not become a tool for the rich and owners of the means of production.¹⁹⁹ Secondly, acceptance of the politics of law, in which there is no longer a place for the assertion that law and politics must be kept apart. He makes reference to the transition from what he calls 'apartheid legal culture' to 'constitutional legal culture'.²⁰⁰ Thirdly, transformative constitutionalism which is not a temporary event but a permanent idea whereby new ways are constantly being explored and vulnerable people constantly uplifted and empowered.²⁰¹ Langa adopted a more radical stance in his conceptualisation of transformative constitutionalism than Moseneke, and his avoidance of using the traditional classification of the dominant legal culture in South Africa as liberal legalism, but rather labelling it as 'apartheid legal culture', is interesting. He also makes an indicative suggestion for 'constitutional legal culture'.

Pieterse argues that transformation is grounded in the constitutional text and according to him the Constitution envisages such transformation.²⁰² He sets out the constitutional

¹⁹⁷ Langa P (2006) 351.

¹⁹⁸ Langa P (2006) 353.

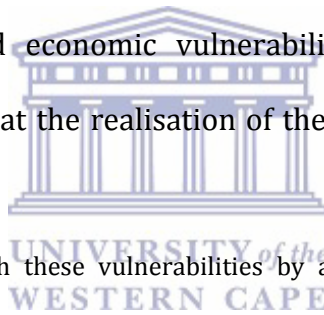
¹⁹⁹ Langa P (2006) 355.

²⁰⁰ Langa P (2006) 353.

²⁰¹ Langa P (2006) 354.

²⁰² Pieterse M (2005) 156.

provisions²⁰³ and an impressive list of references²⁰⁴ that support his argument that transformation is constitutionally sanctioned. He agrees with Klare and Moseneke on two specific aspects that are worth mentioning in this study. First, that transformation is predicated on the foundational values of the Constitution, namely, human dignity, equality and freedom; and secondly, that the transformation envisaged by the Constitution was infused both by a commitment to ensure that 'the wrongs of its apartheid past are never repeated and an undertaking to eradicate the legacy of the past'.²⁰⁵ Accordingly, Pieterse argues that the democratic understanding of transformative constitutionalism mandates achievement of both substantive equality and social justice.²⁰⁶ He elucidates that substantive equality is about eradication of the severe patterns of social and economic vulnerability and deprivation caused by apartheid.²⁰⁷ Pieterse argues that the realisation of the transformative potential would require:



'an explicit engagement with these vulnerabilities' by all the arms of the state and by the empowerment of the poor and otherwise historically marginalised sectors of society through proactive and context sensitive measures that affirm human dignity.'²⁰⁸

Pieterse explains that empowerment within the context of substantive equality would include the 'actual upliftment of the vulnerable groups' to be stakeholders in the

²⁰³ The Preamble and sections 7, 8(2), 9(2), 9(3), 36 and 39(2) of the Constitution.

²⁰⁴ De Vos A 'A bridge too far? History as context in the interpretation of the South African Constitution' (2001) 17 *SAJHR* 32; De Vos P 'Grootboom, the right of access to housing and substantive equality as contextual fairness' (2001) 17 *SAJHR* 260; Liebenberg S (2002), and van Marle K 'Transformative constitutionalism as/and critique' (2009) 20 *Stellenbosch Law Review* 286.

²⁰⁵ Pieterse M (2005) 157.

²⁰⁶ Pieterse M (2005) 156.

²⁰⁷ Pieterse M (2005) 157.

²⁰⁸ Pieterse M (2005) 159.

fulfilment of their socio-economic rights.²⁰⁹ Like Klare, Moseneke and Langa; Pieterse firmly rejects the traditional and formal conception of equality, which he argues may serve to entrench rather than challenge structural forms of domination and vulnerability within society.²¹⁰ In a nuanced manner Pieterse highlights the same dilemma of adjudication articulated by Klare, and argues that judges must 'unashamedly' and 'unequivocally' articulate the political vision in the Constitution through interpretation and concrete application.²¹¹ Pieterse is of the view that the constitutional text makes provision for adjudicative transition, which requires judges to transcend the traditional conceptions of their role within a liberal model of separation of powers.²¹²



Roux is of the view that Klare's article is riddled with 'conceptual flaws' and that it makes some unfounded assertions.²¹³ Areas of agreement between Roux and Klare will firstly be explained and then areas of disagreement addressed. Roux appreciates the work of Klare as having been a provocative intervention on the interpretation of the South African Constitution and he acknowledges that many lawyers are persuaded by his work.²¹⁴ There are several fundamental points on which Roux agrees with Klare.

The first point of agreement is that the new constitutional order requires a change from a formal to a substantive vision of law. Roux agrees fully with Klare's characterisation that the substantive vision of the Constitution is towards an empowered model of

²⁰⁹ Pieterse M (2005) 160.

²¹⁰ Pieterse M (2005) 160-162.

²¹¹ Pieterse M (2005) 164.

²¹² Pieterse M (2005) 165.

²¹³ Roux T (2009) 271.

²¹⁴ Roux T (2009) 271.

democracy with emphasis on participation.²¹⁵ Based on these features, Roux agrees with Klare that the South African Constitution should be read as a transformative constitution. Secondly, Roux is in complete agreement with Klare's observation that South African legal culture is conservative, not in the sense of political conservatism, but in the sense that it is based on 'cautious tradition of analysis common to South African lawyers of all political outlook'.²¹⁶

The starting point of Roux's disagreement with Klare is his difficulty to accept Klare's characterisation of the Constitution as 'post-liberal' because, according to Roux, liberalism is not an ideological concept with clear ideological boundaries.²¹⁷ Roux argues that at different phases of history liberalism acquired added features. He takes as an example the principle of universal adult suffrage at the end of the 19th century, which was accepted and incorporated into liberalism. The essence of Roux's argument here is that liberalism, like any other political or legal concept, does not have a rigid or static meaning, but rather that the meaning and understanding of concepts evolve. It is, however, important to note that Roux does not disagree with Klare on the transformative vision of the Constitution but disagrees with the characterization thereof as post-liberal. It is justifiable to label this argument regarding 'post-liberal' or 'liberal' as semantics because it does not change the point of convergence between the two scholars on the essence of the new constitutional dispensation.

Roux argues that it is one thing to identify certain general features of the Constitution

²¹⁵ Roux T (2009) 271.

²¹⁶ Roux T (2009) 270.

²¹⁷ Roux T (2009) 262.

and characterise it based on those features as post-liberal; however, it is quite another to read the Constitution as mandating a particular interpretive method.²¹⁸ He rejects the argument that the post-liberal reading of the Constitution as suggested by Klare is the most plausible to give full effect to the transformative vision of the Constitution. Roux strongly asserts that it is possible to read the Constitution as a transformative constitution and also to engage in a project of transformative constitutionalism through the use of interpretive methods made famous by Dworkin.²¹⁹

Roux accepts that the disproportionate influence of formalism as a legal culture in South Africa can constrain the transformative vision of the Constitution.²²⁰ However, he suggests that the most plausible reading of the Constitution is Dworkin's theory of constructive interpretation, which is based on defending one's interpretation of the Constitution on the basis of the 'political theory that justifies the constitution as a whole'.²²¹ Roux argues further that Dworkin does not deny the need for a judicial value choice, and that a judicial value choice is not necessarily incompatible with the view that legal reasoning is a distinctive mode of reasoning that is different from political reasoning. He is of the opinion that Klare's view was highly flawed in dismissing Dworkin's theory of constitutional interpretation as mere legal formalism. According to Roux, all the six essential features that Klare identified as supporting a post-liberal reading of the Constitution are also features that support the best interpretation of the Constitution using Dworkin's method.²²²

²¹⁸ Roux T (2009) 258.

²¹⁹ Roux T (2009) 259.

²²⁰ Roux T (2009) 262.

²²¹ Roux T (2009) 268.

²²² Roux T (2009) 273.

The disjuncture between Roux and Klare on the best plausible reading of the Constitution illuminates an interesting aspect of adjudication of the Constitution. For the purpose of this study it suffices to accept from both scholars the argument that South African courts are enjoined with an obligation to interpret and enforce an open-textured Constitution. In undertaking this interpretive enterprise, the courts seek to give full expression to the transformative vision of the Constitution by using the foundational values as 'organising principles' in the search for the substantive content of the rights in the Bill of Rights.²²³

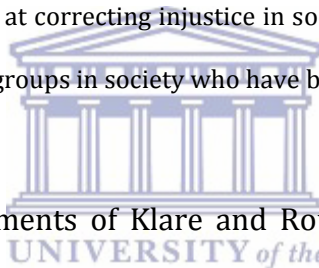
3.5.3 The implications of transformative constitutionalism on section 26(3)

From the above exposition and engagement with transformative constitutionalism there are three aspects, which are particularly important for the interpretation of the right against unlawful eviction. First, the description of the Constitution as seeking to achieve substantive equality as opposed to formal equality. Secondly, the inclusion of justiciable socio-economic rights was a sincere endeavour by the drafters of the Constitution for empowerment (what Pieterse terms 'upliftment') of the vulnerable groups by enjoining the state with a positive obligation to address the legacy of apartheid. Thirdly, for the courts to contribute towards achievement of substantive equality and empowerment of the vulnerable groups there is an imperative for adjudicative strategies, which are sensitive to the vulnerabilities of the poor.

²²³ *President of the RSA v Hugo* 1997 (4) SA 1 (CC) para 74.

There is convergence of views among scholars that at the cutting edge of constitutional transformation is substantive equality to protect the vulnerable groups and not formal equality. The argument underpinning this convergence is the recognition that formal equality is not sufficient to ensure that the vulnerable groups in society enjoy the same rights as the socially advantaged groups. Transformative constitutionalism requires that initiatives for the realisation of the rights of the vulnerable groups in society must substantively compensate for the position of disadvantage in which they find themselves. Durojaye aptly states:

‘The principle of substantive equality, of which affirmative action is a by-product, determines that people must be treated equally, paying attention to their social and economic disparities. Substantive equality is aimed at correcting injustice in society. It seeks to provide justice for the vulnerable and marginalised groups in society who have been historically disadvantaged.’²²⁴



The tension between the arguments of Klare and Roux on whether a post-liberal or Dworkinian reading of the Constitution is plausible, amounts to ‘distinction without difference’.²²⁵ Roux correctly argues that using the Dworkinian reading of the Constitution would yield the same result as the suggested post-liberal reading by Klare, and his only concern is Klare’s dismissive attitude towards a Dworkinian reading and labelling of Dworkin’s constructive interpretation as mere legal formalism. Roux is correct in that the six essential features advanced by Klare for a post-liberal reading of the Constitution also support a Dworkinian reading, so this distinction is at best superficial. What matters for the purposes of this study is the consensus, not only between Klare and Roux, but among many other scholars,²²⁶ including Moseneke, Langa

²²⁴ Durojaye E (2006) 205.

²²⁵ Note the title of Roux T (2009) article.

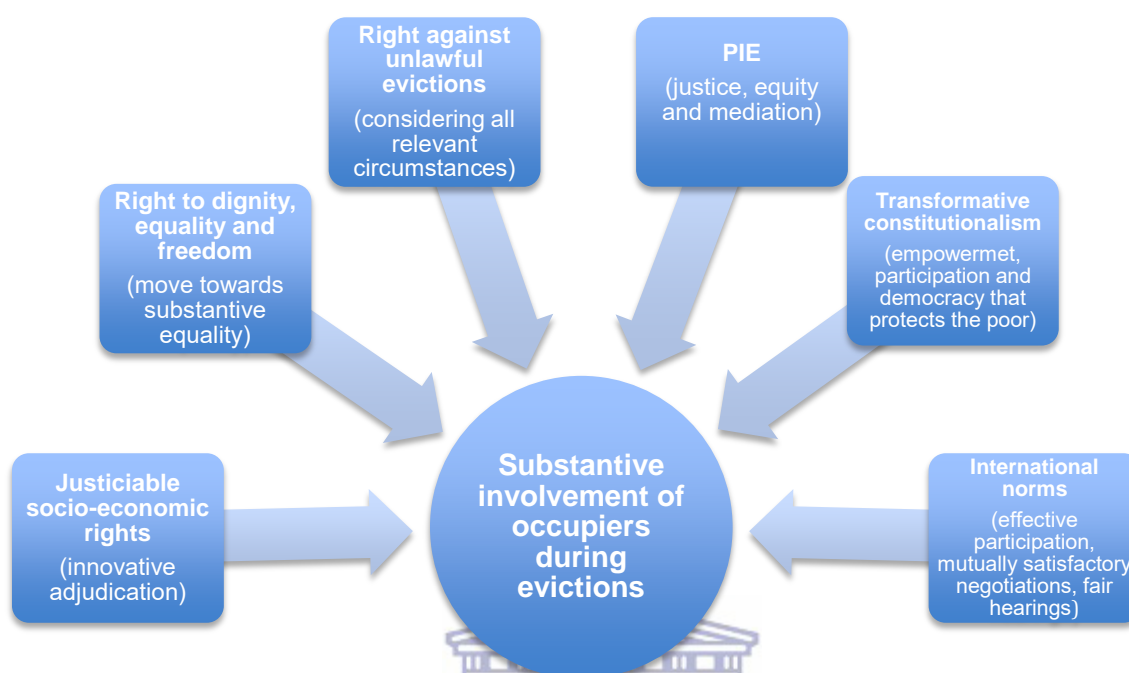
²²⁶ See van Marle K (2009), Liebenberg S (2002), De Vos P (2001) and Christiansen EC (2008).

and Pieterse, that the full expression of the transformative potential of the Constitution requires innovative adjudicative strategies that empowers and affirm the vulnerable groups in society, such as, the residents of informal settlements.

3.6 Primary drivers for substantive involvement of occupiers during evictions

From the above exposition of the normative context for evictions and the implications of transformative constitutionalism on section 26(3) of the Constitution, the study identifies six primary drivers for substantive involvement of occupiers during evictions in the post-1994 dispensation. The primary drivers are those factors in both the legal and political environment that are meant to transform the disempowering apartheid legal framework through restoring the rights of unlawful occupiers to human dignity, equality and freedom. Therefore, a primary driver is any constitutional, legal, political or international norm that emphasises meaningful involvement of occupiers during evictions.

Diagram 1: Primary Drivers for Empowerment of Occupiers



Sources: General Comment No 7, General Comment No 4, African Commission Principles and Guidelines (2010), Klare K (1998), Moseneke D (2000), Langa P (2006), Pieterse M (2005), Roux T (2009), SA Constitution 1996.

Diagram 1 illustrates the six primary drivers and their collective impact, which is substantive involvement of unlawful occupiers during evictions. The first key driver is the justiciable socio-economic rights. This study demonstrates that the arguments against the justiciability of socio-economic rights are flawed. The South African courts have adopted an integrative approach in their adjudication of rights, which entails that all rights pose both positive and negative obligations. The fact that full realisation of socio-economic rights might require more resources due to the greater degree of positive obligation that they might impose on the state than civil and political rights does not render them unsuitable for judicial review. All rights are polycentric, though to a varying degree, and courts are required to develop and adopt innovative adjudicative

tools to ensure full realisation of the more polycentric socio-economic rights. The inclusion of socio-economic rights in the Constitution underlines the need for the substantive involvement of the poor and vulnerable communities.

The second primary driver is the foundational values in the Constitution. The creative adjudicative style of the ConCourt encompasses using the open-text foundational values of human dignity, equality and freedom to give substantive meaning to the rights in the Bill of Rights. In doing so, judges must be conscious of the context of the Constitution to address the historical injustices and reconstruct the skewed distribution of power in society. The power imbalances between the occupiers and the owners or the state are an inherent feature of evictions not only in South Africa but worldwide. The foundational values require that judges, in executing their adjudicative role, should not only be conscious of the reality of the power imbalances, but should actively find ways to mediate and reconstruct the unequal distribution of power through empowerment of the vulnerable groups. The purpose of the empowerment of the affected people is to ensure equitable participation as envisioned by substantive equality in the Constitution.

The third primary driver is section 26(3) of the Constitution, which enshrines the right against unlawful eviction and enjoins the courts to consider all relevant circumstances before making an order for eviction. The occupiers are required to be actively involved and to give an exposition of all the relevant circumstances to assist the courts in their determination of whether the issuing of an eviction order is 'just and equitable'. This includes active involvement of the occupiers in the determination of the pre- and post eviction conditions – looking at possible alternatives to eviction, when and how the eviction should take place, the location of the alternative accommodation, the

conditions of relocation, and any other condition to mitigate hardships during an eviction. The requirement to consider all relevant circumstances mediates the power imbalance between the occupiers and the state and also introduces a new normality in the property relations by qualifying the right to ownership.

The fourth primary driver is PIE, which prescribes that courts can only issue eviction orders if it is 'just and equitable' to do so, and makes provision for mediation by professional mediators. This is indicative of the intention to balance the competing interests of the landowner and the occupiers. The relevant circumstances to be considered in determining whether it is 'just and equitable' to issue an eviction order are the circumstances under which the unlawful occupation took place, the availability of suitable alternative accommodation or land, and the rights and needs of the elderly, children, disabled persons and particularly households headed by women.²²⁷ This demonstrates a commitment to empower the most vulnerable in society by giving them preference.

The fifth primary driver is the political imperatives entailed by transformative constitutionalism. There is consensus amongst the five scholars on the meaning of transformative constitutionalism: that it entails approaches to transform unequal power relations. For this to happen, policies, laws, adjudicative tools and programmes must aim to provide two aspects. First, enabling conditions, in the form of social and cultural contexts within which the vulnerable groups may be able to lead their lives with dignity. Secondly, affirmative action is required in the form of temporary special measures where the vulnerable groups' needs are specifically recognised and catered

²²⁷ Section 4(6) of PIE.

for through equitable participation and the removal of oppressive measures. The objective of an egalitarian and anti-oppressive society is predicated on empowerment of the vulnerable people as a means to reconstruct the unequal distribution of power. This is what Langa refers to as a 'revolution'.²²⁸ This reconstruction seeks to ensure that there is a people-centred approach to addressing the challenges of the unlawful occupiers. The people-centred approach proceeds from the premise that occupiers of informal settlements have a better understanding of their livelihood challenges.

The sixth primary driver is the international norms. The international instruments and interpretive mechanisms provide a normative framework within which the right against unlawful eviction must be understood and interpreted. Collectively these instruments and interpretive mechanisms emphasise participation and involvement of the affected people as fundamental during evictions. The State Parties are required to take immediate measures to provide adequate procedural and substantive safeguards against abuses of power during evictions. The safeguards should be aimed at promoting equity, which, amongst others, includes mediating unequal power relations.

These primary drivers impose a positive obligation on the state to ensure substantive involvement of the occupiers during evictions. The primary drivers require that the involvement of occupiers should not be mere formality to report back decisions. Substantive involvement requires that the involvement of the occupiers should be seen as a corrective action and be accompanied by the adoption of temporary positive measures to increase opportunities for their advancement. Accordingly, substantive involvement in evictions entails the recognition of the need to mediate the inherent

²²⁸ Langa P (2006) 352.

power imbalance during evictions. The ConCourt introduced the notion of ME as a corrective measure to ensure substantive involvement of occupiers during evictions.

3.7 Meaningful engagement

In *Occupiers of 51 Olivia Road*, and the subsequent eviction cases, the ConCourt emphasised that the state must meaningfully engage with poor people. The concept of ME evolved directly from the requirement of substantive involvement of the occupiers, which is enfolded in the six-primary drivers. There are varied degrees of emphasis on the six primary drivers in the case law pertaining to the importance of substantive involvement of the occupiers during evictions. Table 1 below reflects the extent of usage by the ConCourt of the primary drivers from 2008 in *Occupiers of 51 Olivia Road*.

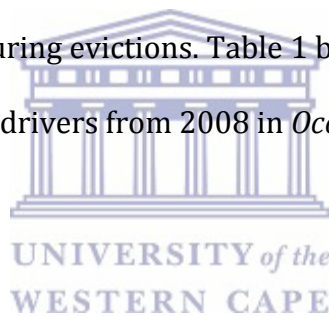


Table 1: Usage in Case Law of the Six Primary Drivers

Case	PIE	S 26(3) of the Constitution	Dignity, equality and freedom	Transformative Constitutionalism/ democracy that works for the poor	Socio-economic rights	International norms
1. <i>Occupiers of 51 Olivia Road</i>	X	X	X	X	X	X
2. <i>Joe Slovo Residents</i>	X	X	X	X	X	X
3. <i>Abahlali BaseMjondolo</i>		X	X	X	X	
4. <i>Blue Moonlight Properties</i>	X	X	X	X	X	
5. <i>Pheko</i>	X	X	X	X	X	
6. <i>Occupiers of Portion R25</i>	X	X	X	X	X	
7. <i>Occupiers of Skurweplaas</i>	X	X	X	X	X	
8. <i>Occupiers of Saratoga Avenue</i>	X	X	X	X	X	
9. <i>Schubart Park Residents</i>	X	X	X	X	X	X
	9/9	9/9	9/9	9/9	9/9	3/9

From Table 1 it is apparent that five of the six primary drivers were used in all eviction cases to justify the need for ME: PIE; section 26(3) of the Constitution; human dignity, equality and freedom; transformative constitutionalism; and justiciable socio-economic rights. However, the international norms are the least mentioned, in only three of the nine cases. The underuse of the international norms in the eviction case law is a matter of concern as international and regional norms on evictions seek to eradicate unlawful evictions. Furthermore, section 39 of the Constitution requires the courts to consider international laws and norms when interpreting the provisions of the Bill of Rights.

This study argues that the inadequate articulation of substantive requirements of ME resulted in jurisprudential inconsistency in the application of section 26(3) of the Constitution. The inconsistency resulted in spirited debates in academia regarding the usefulness of ME as a judicial mechanism in the enforcement of section 26(3) of the Constitution. Tushnet describes ME as represented in *Occupiers of 51 Olivia Road* as a 'weak form' of judicial review.²²⁹

Conversely, Liebenberg regards ME as a significant feature of the eviction jurisprudence that promotes the 'importance of procedural fairness' and facilitates 'participatory democracy' to protect the rights of the occupiers and not to pressurise them to negotiate their rights away.²³⁰ She further asserts that it is necessary for the courts to provide clear guiding principles on the nature of the obligations imposed by this 'deliberative requirement'.²³¹ Partly agreeing with Liebenberg's argument, Liebenberg and Young are of the view that ME has the potential for collaborative and deliberative decision-making processes between citizens, government and private parties.²³² However, they make the observation that ME still vests considerable decision-making authority in state institutions and does not serve as a vehicle enabling inclusive deliberations regarding the structural reforms needed to realise socio-economic rights.²³³ This underscores a need for understanding of ME as a substantive requirement, meaning that it should confer tangible benefits upon the occupiers.

²²⁹ Tushnet MV (2008) 45.

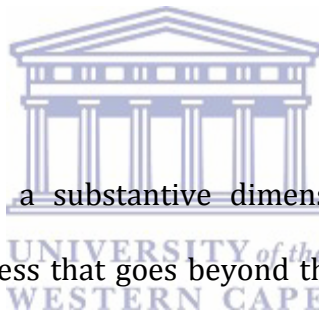
²³⁰ Liebenberg S (2010) 314.

²³¹ Liebenberg S (2010) 314-315.

²³² Liebenberg S & Young G (2014) 242.

²³³ Liebenberg S & Young G (2014) 243.

Chenwi and Tissington agree with Liebenberg that ME is about ‘participatory democracy’ which, according to them, is a democracy that makes provision for individuals and communities to take part in service delivery processes and decisions.²³⁴ Consistent with Liebenberg and Young’s view they argue that ME is a substantive safeguard to protect the occupiers against arbitrary eviction. In an early reaction to *Occupiers of 51 Olivia Road*, Chenwi asserts that ME is an effective remedy and is illustrative of the transformative potential of the Constitution.²³⁵ However, this transformative potential was limited by the failure of the ConCourt to adequately pronounce on substantive issues in its consideration of the broader interest of the community.²³⁶ According to Chenwi the most important aspect of ME is participation by those faced with eviction.²³⁷



Ray also argues that ME has a substantive dimension of equitable participation, accountability and responsiveness that goes beyond the proceduralisation of evictions by PIE.²³⁸ He identifies two forms of engagement – ‘litigation engagement’ and ‘political engagement’.²³⁹ He describes litigation engagement as engagement that happens during the course of litigation and serves as a ‘remedy-management device’.²⁴⁰ Political engagement takes place before litigation commences.²⁴¹ Ray further argues that engagement has developed principally as a part of litigation and as a result its full

²³⁴ Chenwi L & Tissington K (2010) 5.

²³⁵ Chenwi L ‘A New approach to remedies in socio-economic rights adjudication: *Occupiers of 51 Olivia Road v City of Johannesburg and Others*’ (2009) 2 *Constitutional Court Review* 371.

²³⁶ Chenwi L (2009) 392.

²³⁷ Chenwi L (2009) 381.

²³⁸ Ray B (2010) 400.

²³⁹ Ray B (2010) 399.

²⁴⁰ Ray B (2010) 413.

²⁴¹ Ray B (2010) 417.

potential has not been realised due to the lack of measures to enable the unlawful occupiers to engage meaningfully.²⁴²

According to Muller, ME is a type of public participation that transcends procedural fairness in terms of section 3 and 4 of Promotion of Administrative Justice Act 3 of 2000 (PAJA) and section 33 of the Constitution.²⁴³ He further argues that ME should be construed as ‘deliberative democratic partnership’ that results into a ‘dialogic relationship between local government and the unlawful occupiers’.²⁴⁴ Muller’s conceptualisation of ME is congruent with that of Liebenberg, Chenwi, Tissington and Young.

Chenwi and Tissington argue that the realisation of the right of access to adequate housing and its ancillary right against unlawful eviction raises practical concerns which could be addressed through a democratic, flexible and responsive approach that promotes equitable participation.²⁴⁵ In this regard, the ConCourt required that ME must be ‘structured, comprehensive and consistent’ and that the ‘vulnerable occupiers must have the ability to engage meaningfully’.²⁴⁶ What is apparent from the ConCourt was that ME should be systematic, well-planned and not adhoc or just a mere consultation or mediation.²⁴⁷ The ConCourt attributed a deeper and substantive meaning to ME. Consultation, mediation, and issuing of notices are mere procedural steps that are necessary to make a decision within ME.

²⁴² Ray B (2010) 420.

²⁴³ Muller G (2011b) 744.

²⁴⁴ Muller G (2011b) 745.

²⁴⁵ Chenwi L & Tissington K (2010) 4.

²⁴⁶ *Occupiers of 51 Olivia Road* para 56. See also the *Residents of Joe Slovo* and *Schubart Park Residents*.

²⁴⁷ Chenwi L & Tissington K (2010) 5.

According to Chenwi and Tissington consultation takes place when the state asks for the views of the people but often makes the final decision.²⁴⁸ In contrast, ME is about the parties making the final decisions together. With consultation it is often not known how much of the views of the vulnerable people is incorporated in the final decision, but with ME the right to be heard also involves developing long-term relationships among the vulnerable people, what is called social capital, and also between the vulnerable people and the state.²⁴⁹

The substantive dimension of ME found tangible expression in the emphasis of the ConCourt on a bottom-up approaches and the need to capacitate the occupiers.²⁵⁰ The ConCourt highlighted that the form of capacity building depended on the context of each specific case.²⁵¹ ME was used by the ConCourt to mediate the inherently unequal power relation between the occupiers and the state. The ConCourt did this by placing emphasis on the need for the parties to collectively determine the consequences of the eviction, how to mitigate the adverse impact, how to seek an alternative solution to eviction, how to determine the obligations which the state may have towards the occupiers and as regards possible alternative accommodation, the schedule of transport for relocation, and how to develop a structured long-term engagement strategy.²⁵²

²⁴⁸ Chenwi L & Tissington K (2010) 5.

²⁴⁹ Chenwi L & Tissington K (2010) 6.

²⁵⁰ *Occupiers of 51 Olivia Road*. See also *Residents of Joe Slovo*, *Abahlali BaseMjondolo* and *Schubark Park Residents*.

²⁵¹ *Residents of Joe Slovo*. See also *Abahlali BaseMjondolo* and *Schubark Park Residents*.

²⁵² *Residents of Joe Slovo*, *Abahlali BaseMjondolo* and *Schubark Park Residents*.

From case law it is also apparent that ME is not a once-off event, what Chenwi and Tissington refer to as ‘simply about ticking of boxes’, but should be a thorough process that takes place before the conceptualisation of the project or development that could culminate in an eviction.²⁵³ ME must also take place during the implementation and evaluation phases.²⁵⁴ Yacoob J held that during the different phases of the engagement process the occupiers must be empowered and treated as partners in decision-making, instead of just passing information to them about a decision that has been made.²⁵⁵ The need to empower the occupiers to engage meaningfully also featured prominently in *Residents of Joe Slovo, Abahlali BaseMjondolo* and *Schubart Park Residents*.

After the engagement process the courts would normally consider and evaluate the agreements reached by the occupiers and the state. It is an established procedure for the courts to endorse agreements that were concluded during ME.²⁵⁶ However, the ConCourt was reluctant to endorse agreements that were made after the engagement process, especially where there were problems, such as in *Occupiers of 51 Olivia Road*. In this case the state security apparatus employed threats of violence and actual violence against the occupiers.

In most eviction cases the informal settlements were organised and represented by community leaders. The ConCourt also evaluated the role of these leaders and structures in ensuring equitable participation by all the affected people. In *Residents of Joe Slovo* the ConCourt received reports from community representative structures that

²⁵³ Chenwi L & Tissington K (2010) 12 and *Abahlali BaseMjondolo* para 123.

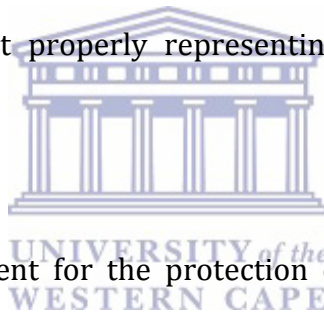
²⁵⁴ *Occupiers of 51 Olivia Road* para 41.

²⁵⁵ *Occupiers of 51 Olivia Road* para 37.

²⁵⁶ *Residents of Joe Slovo* para 139. See also *Occupiers of 51 Olivia Road* para 30.

clearly outlined the processes by which they engaged with the affected people. The attitude of the ConCourt was that the role of community structures and leaders was to facilitate engagement with the people and not to arbitrarily impose decisions on them.²⁵⁷

From the analysis of the ConCourt's application of ME, and the relevant literature on ME there are seven key considerations to note. First, the ConCourt placed the unlawful occupiers at the centre of the ME. This was demonstrated by the ConCourt's emphasis on individual and collective engagement, and the judicial practice of not endorsing any agreement if the ConCourt was of the view that the community structures, leaders or legal representatives were not properly representing the interests of the affected people.



Secondly, ME was a requirement for the protection of the rights to human dignity, equality and freedom and democracy. This emphasis by the ConCourt was always accompanied by its strong sentiment against a top-down approach, which resulted in undemocratic practices during the engagement processes. A top-down approach was a consequence of the unequal power distribution between the occupiers and the state. This power imbalance was a direct legacy of the disempowering trajectory of the apartheid evictions.

Thirdly, the ConCourt conceptualisation of ME was predominantly substantive, directed towards transformative outcomes. ME in this context went beyond mere consultation, mediation or issuing of notices and required equitable participation of the unlawful

²⁵⁷ *Residents of Joe Slovo* para 21.

occupiers. As mentioned earlier, the participation of the unlawful occupiers should not be a 'ticking of the boxes' exercise or a mere formality, but should result in a substantive involvement of the occupiers in which their views are seriously taken into consideration.²⁵⁸

Fourthly, the ConCourt favored substantive equality. This is equality that demands corrective action and equitable participation to address the past injustices. Corrective action is about the introduction of transformative measures to mediate the unequal power distribution between the occupiers and the state. This includes the need to level the playing field for the participation of the occupiers, and in which their concerns and wishes are adequately taken into consideration and included in the final decisions. Hence, in *Occupiers of 51 Olivia Road* and *Schubart Park Residents*, community meetings that were meant to inform the unlawful occupiers of the pending developments and evictions were regarded as inadequate for ME.²⁵⁹

Fifthly, the requirement that during large-scale evictions ME must be 'structured, systematic and comprehensive'.²⁶⁰ However, the ConCourt failed to elaborate on what constitutes this form of engagement.

Sixthly, engagements must be both 'individual and collective', underpinned by democratic values. The ConCourt required that the circumstances and wishes of each

²⁵⁸ Chenwi L & Tissington K (2010) 6.

²⁵⁹ *Occupiers of 51 Olivia Road*, *Residents of Joe Slovo* and *Pheko*.

²⁶⁰ *Occupiers of 51 Olivia Road* para 37, *Residents of Joe Slovo* para 65 and *Schubart Park Residents* para 33.

individual household be taken into consideration, while at the same time looking at measures to address the collective plight and challenges of the unlawful occupiers.

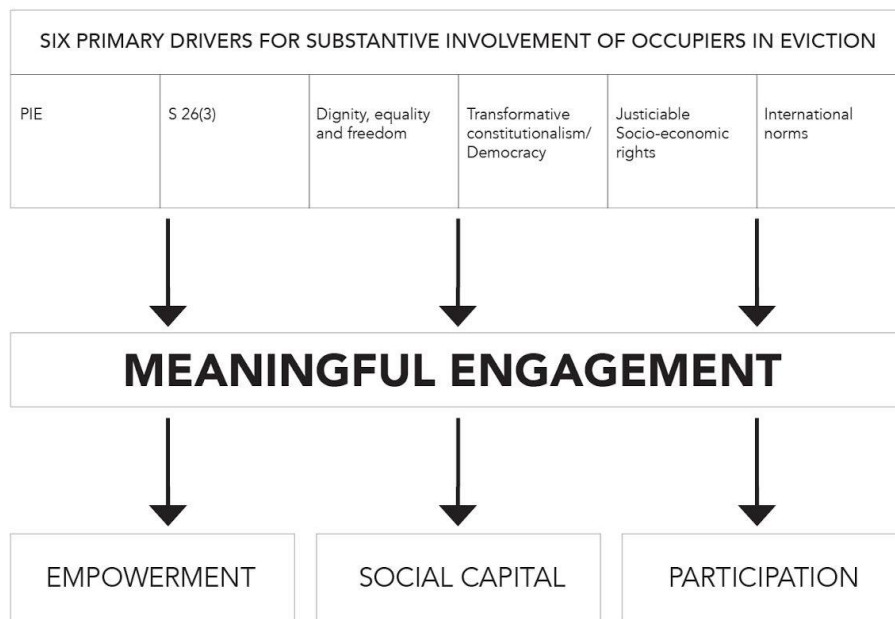
Lastly, the ConCourt held that social trust must be built among the occupiers to cushion their social vulnerability. According to Ngcobo J trust relations amongst the unlawful occupiers would constitute a social bond that might strengthen their capacity to engage more purposefully.²⁶¹ The impact of eviction is far-reaching, particularly since the victims thereof are usually the poor who are deprived of social support systems and networks. Trust and collective action among the occupiers would mitigate their vulnerable position during engagements.²⁶²

From these seven key considerations three substantive requirements for ME can be extrapolated: empowerment, participation, and social capital. These three substantive requirements are interrelated and interdependent and were highlighted by the ConCourt in its evaluation of ME in the nine eviction cases, though with a varying degree of emphasis. Underpinning the substantive requirements for ME are democracy and the rights to human dignity, equality and freedom.

²⁶¹ *Residents of Joe Slovo* para 111. See also *Schubart Park Residents* para 26.

²⁶² *Residents of Joe Slovo* para 112.

Diagram 2: The Conceptual Framework for ME



Source: Occupiers of 51 Olivia Road, Joe Slovo Residents, Abahlali BaseMjondolo, Blue Moonlight Properties, Pheko, Occupiers of Portion R25, Occupiers of Skurweplaas, Occupiers of Saratoga Avenue, Schubart Park Residents.

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Diagram 2 illustrates the six primary drivers for substantive involvement of the occupiers during eviction. As alluded to earlier PIE prescribes that evictions must be ‘just and equitable’, section 26(3) of the Constitution requires that the circumstances of the occupiers must be adequately taken into consideration before an eviction order is issued; the ConCourt held that the fundamental values of human dignity, equality and freedom require equitable participation by the occupiers; the commitment to democracy that works for the poor to address the past injustices; the enshrined justiciable socio-economic rights require innovative adjudicative methods that promote involvement of the poor in finding solutions for their socio-economic problems; and the international norms require substantive involvement of the occupiers during evictions.

The collective impact of the six primary drivers is the notion of ME. Diagram 2 further reflects the three substantive requirements for ME, which are the substantive safeguards that find dominant expression in the conceptualisation and ME by the ConCourt and in literature. The three substantive requirements are: empowerment of the unlawful occupiers; their equitable participation in the engagement process; and social capital through building relationships based on trust among the unlawful occupiers.

These substantive requirements are interrelated and interdependent. The ConCourt held that empowerment of the occupiers was essential to enhance their ability to equitably participate in the engagement process.²⁶³ The ConCourt further held that equitable participation is empowering in itself.²⁶⁴ Social capital is critical for the management of internal dynamics within informal settlements as the complexities of the engagement process could evoke mistrust amongst the occupiers. This phenomenon was present in *Residents of Joe Slovo* and *Abahlali BaseMjondolo*, where the engagement process was accompanied by state sponsored violence.

3.8 Conclusion

The principal objective of this chapter is to extensively examine the normative context of evictions in the post-1994 democratic dispensation and to explore the implications of transformative constitutionalism on the interpretation of the right against unlawful evictions. The chapter identifies six primary drivers for substantive involvement of the

²⁶³ *Residents of Joe Slovo* paras 245-246. See also *Schubark Park Residents* para 33.

²⁶⁴ *Residents of Joe Slovo* para 243. See also *Schubark Park Residents* para 36.

occupiers during evictions in the post-1994 dispensation. The primary drivers are those factors in both the legal and political environment that are meant to transform the disempowering trajectory of apartheid evictions.

The first primary driver that the chapter identifies is the inclusion in the Constitution of justiciable socio-economic rights. A brief exposition is made on the objections against the inclusion of this category of rights in the Constitution. The objections against the inclusion of socio-economic rights were that this category of rights is not universally accepted, that the enforcement of these rights would inevitably blur the separation of powers; and that the polycentric nature of these rights renders their adjudication impractical. The ConCourt in *The First Certification* dismissed all these objections, and this set a firm foundation for the justiciability of socio-economic rights. This study adopts the argument by Liebenberg,²⁶⁵ Durojaye,²⁶⁶ Kabange²⁶⁷ and Christiansen²⁶⁸ that the inclusion of socio-economic right in the Constitution sought to address the past injustices, and provides a channel through which the poor are empowered to pursue a dialogue pertaining to the realisation of their rights.

The second primary driver for substantive involvement of the occupiers identified in the chapter is section 26(3) of the Constitution, which requires adequate consideration of the circumstances of the unlawful occupiers before an eviction order is issued. The requirement of adequate consideration of the circumstances of the occupiers triggers the active involvement of the occupiers in determining those circumstances. If the

²⁶⁵ Liebenberg S (2002) 160.

²⁶⁶ Durojaye E (2006) 181.

²⁶⁷ Kabange CJN (2014) 30

²⁶⁸ Christiansen EC (2008) 375.

occupiers are not involved in determining their circumstances, the outcomes will be arbitrary and would not amount to 'adequate consideration'.

The third primary driver identified in the chapter is PIE, which requires that eviction orders must be just and equitable. This chapter demonstrates that section 26(3) of the Constitution bolstered by PIE brought about a fundamental paradigm shift from an apartheid position where evictions orders were issued without any regard to the personal circumstances of the occupiers to a new position that requires substantive involvement of occupiers. It is therefore argued that the requirements of just and equitable; and the need for adequate consideration of the circumstances of the occupiers introduced a substantive safeguard for unlawful occupiers. Arguably, this represents the most significant development in the law of evictions.



The fourth primary driver is the right to human dignity, equality and freedom. The constitutional imperative to restore the dignity of the vulnerable groups in society accompanied by the judicial permutation to substantive equality broadly define the commitment of the ConCourt to address the past injustices. There is a pronounced need for redress during evictions as they are characterised by inherent unequal power relations between the occupiers and the state. To mediate the power imbalance between the state and the occupiers, the ConCourt used human dignity and equality to propagate for meaningful and effective involvement of the occupiers during evictions. This resulted in general rejection by the ConCourt of top-down approaches during engagements, in which the occupiers were treated as 'obnoxious social nuisance'.²⁶⁹

²⁶⁹ *PE Municipality, Occupiers of 51 Olivia Road and Schubart Park Residents*.

The fifth primary driver is the judicial commitment to transformative constitutionalism. From this examination, two aspects are particularly crucial for this study. First, the inclusion of socio-economic rights demonstrates a political commitment by the drafters of the Constitution to uplift the vulnerable groups by imposing a positive obligation on the state to address the legacy of apartheid. Secondly, the appreciation of the need to build a democracy that works for the poor, through the introduction of innovative adjudicative strategies that involves the poor in the realisation of socio-economic rights. The study argues that the notion of ME is one such adjudicative strategy to empower the vulnerable occupiers.

The sixth primary driver is the international norms. General Comment 7 requires that during evictions there must be 'genuine consultations' with the occupiers and this was further bolstered by the UNCHR Resolutions that requires 'effective participation' of the occupiers to ensure mutually satisfactory solutions. These requirements are consistent with the prescriptions of the African Commission, which require that during evictions there must be a 'fair hearing and effective participation' by the occupiers. All these instruments require an involvement of the occupiers that goes beyond mere consultation, formal participation or hearings. Adjectives, such as 'genuine', 'mutually satisfactory' and 'fair', are added to indicate the need for substantive involvement of the occupiers.

The chapter demonstrates that in *Occupiers of 51 Olivia Road* the ConCourt used these primary drivers as the basis for the introduction of ME as its doctrinal approach in the adjudication of section 26(3) of the Constitution. Despite the shortcomings in the conceptualisation and application of ME, which McLean metaphorically refers to as 'one

step forward and two steps backward', the ConCourt used ME to mediate the inherent power imbalance between the occupiers and the state.²⁷⁰ The eviction judgements of the ConCourt correctly endorsed the perspective that ME entails both substantive and procedural safeguards. Through extensive examination of both the eviction case law and literature, this chapter identifies three substantive requirements underlying the theorisation of ME by the ConCourt: empowerment, equitable participation and building of social capital. These substantive requirements underpin democracy and the rights to human dignity, equality and freedom.

The inadequate conceptualisation by the ConCourt of the substantive requirements of ME resulted in the inconsistent application of section 26(3) of the Constitution. This is likely to persist in the absence of a community engagement model for ME by unlawful occupiers. To fill this vacuum in the conceptualisation of ME, in the next chapter the study employs an interdisciplinary approach to develop a conceptual community engagement model, which is based on the three substantive requirements of ME.

²⁷⁰ McLean K 'Meaningful engagement: one step forward or two back? Some thoughts on *Joe Slovo*' (2010) 3 *Constitutional Court Review* 225.

CHAPTER 4

DEVELOPING A COMMUNITY ENGAGEMENT MODEL FOR ME

4.1 Introduction

In chapter 3 the study identifies three substantive requirements for ME: empowerment, participation, and social capital. Based on these substantive requirements this chapter develops a conceptual community engagement model for ME by informal settlements. The model for community engagement developed in this chapter is named the Transformative Empowerment Model for Meaningful Engagement (the Transformative Empowerment Model).



There are two crucial terms used as organising concepts in the naming of the new model, namely, 'transformative' and 'empowerment'. The term "transformative" is used to depict the commitment of the model to the transformative vision embodied in the Constitution to address the past apartheid injustices and build a democracy that works for the poor. The term 'empowerment' is used to depict the importance of empowerment as a substantive requirement to mediate the unequal distribution of power between the occupiers and the state in the engagement process. Furthermore, it is used to underline the importance of building the capabilities of the occupiers as a means to promote their rights to human dignity, equality and freedom through equitable participation and the building of social capital.

As mentioned earlier in this study, due to the paucity of scholarly work in the legal discipline on empowerment, participation and social capital, this chapter embarks on an

inter-disciplinary approach and employs theories of the social sciences, international development studies, political science and human rights to theoretically construct the Transformative Empowerment Model. The development of this Model delivers something exceptionally rare in South African legal literature as it fuses insights and theories outside the legal discipline to engage with a complex legal precedent, namely, ME. To offer insights into the true meaning of ME this chapter engages with the contemporary scholarly debates on community empowerment, participation and social capital.

It is also stated in the preceding chapter that the ConCourt required coherent, comprehensive and structured engagements during evictions of a large number of households. During such comprehensive engagements the ConCourt required that the municipalities must appoint municipal officials who should serve as 'municipal practitioners' to facilitate the process. This requirement emerged against the backdrop of the discomfort expressed by the ConCourt that in most evictions the municipal employees who were tasked to engage with the unlawful occupiers did not possess the necessary skills to execute such an arduous and demanding task.¹ In *Residents of Joe Slovo*, Ngcobo J highlighted the need for the training of these municipal practitioners to facilitate a better engagement with the unlawful occupiers.² The development of the Transformative Empowerment Model also seeks to respond to this imperative.

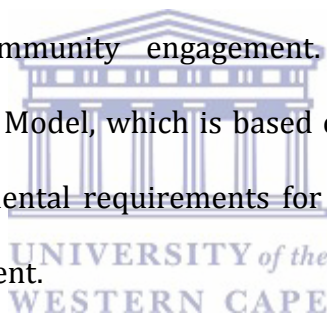
The rationale for the development of the Transformative Empowerment Model based on three substantive requirements is to serve as a normative framework for ME that

¹ *Occupiers of 51 Olivia Road, Residents of Joe Slovo and Schubart Park Residents*.

² *Residents of Joe Slovo* at para 51.

mediate the unequal power relations between the occupiers and the state pre-, during, and post eviction. The three substantive requirements are closely related and in many eviction judgments were used interchangeably. This use was due to inadequate conceptualisation of the implications of these concepts and their outcomes. A comprehensive elaboration of the implications of empowerment, participation and social capital will assist in demystifying ME.

This chapter has three parts. The first part will conceptualise the three substantive requirements empowerment, participation and social capital - to draw the relationships between them. The second part will discuss and examine the two most relevant and contemporary models of community engagement. The third part proposes a Transformative Empowerment Model, which is based on the extensive examination of literature on the three fundamental requirements for ME and the two contemporary models of community engagement.



4.2 Conceptualising empowerment, participation and social capital

As stated before, transformative constitutionalism is overwhelmingly accepted as the judicial commitment in South Africa.³ At the primary level it seeks to reconstruct the power relations in society through empowerment of the historically disadvantaged individuals, groups and communities. The commitment to redress is also found in the eviction jurisprudence of the ConCourt for empowerment and equitable participation of the historically disadvantaged and vulnerable occupiers through ME. Central to ME is the making of complex decisions before, during and after the evictions. The decisions

³ *Occupiers of 51 Olivia Road* para 32.

relate to budgets, planning, alternative accommodation, relocation strategy, and building of relationships. To realise the transformative potential of the Constitution with regard to the right against unlawful evictions, it is desirable that favourable conditions are created to enable the occupiers to meaningfully engage with the state.

This chapter will demonstrate that there are a dynamic interplay and internal influences between empowerment, participation and social capital. According to Taylor and Mayo empowerment of communities enables them to participate in the decision-making processes and programmes to control and overcome their lack of power.⁴ The same is demonstrated by Ledwith and Spingett who assert that participation, which refers to involving people, is central to empowerment and is a peremptory requirement for any community empowerment initiatives.⁵ Helliwell and Putnam suggest that building social capital, such as, trustworthiness between people and the state, is also seen as a crucial process for effective community empowerment and participation because these bring people together to achieve certain goals.⁶

4.2.1 Empowerment for ME

Empowerment is not a straightforward concept free of controversies, because it is used to describe a multitude of actions and multifaceted ideas meaning different things to different people. The concept of empowerment is used academically to theorise

⁴ Taylor P & Mayo M 'Participatory approaches in community development: transition and transformation' 2008 43(3) *Community Development Journal* 263.

⁵ Ledwith M & Spingett J *Participatory Practice: Community-Based Action for Transformative Change* (2010) 131-144.

⁶ Helliwell JF & Putnam RD 'The social context of well-being' in Hupper FA, Bayliss N & Kaverne B (eds) *The Science of Well-Being* (2005) 54.

people's relationship to power and powerlessness in society.⁷ The use of empowerment in this thesis is not distinct therefrom, as it is employed in the context of ME characterised by unequal power relations between the unlawful occupiers and the state. Empowerment has been defined as a process of activities used to change power relations, but also as a process aimed at the change of power. To change power relations from below involves transformative steps of engagement between those in power (state) and the powerless (occupiers).⁸ For any of these steps to transform the power relations, the engagement by the powerless should take the form of empowerment.⁹

This study deals specifically with community empowerment for ME and adopts the comprehensive and all-encompassing definition of the Community Development Exchange (CDX)¹⁰ as to what constitutes community empowerment. The CDX is an internationally recognised network for community development to tackle inequality and achieve social justice. CDX defines community empowerment as the 'introduction in communities of practical mechanisms and processes aimed at achieving five dimensions – confidence, inclusiveness, organised, cooperative and influential'.¹¹ These five dimensions offer a broad comprehensive definition of community empowerment. It is important to note that most South African scholars and the South Africa Community

⁷ Humphries B *Critical Perspective to Empowerment* (1996). See also Adams R *Empowerment, Participation and Social Work* 4 ed. (2008) 197-201.

⁸ Davids I, Theron F, Maphunye J & Kealeboga J (eds) *Participatory Development in South Africa: A Development Management Perspective* (2009) 87.

⁹ Theron F 'Development management practice' in Davids I et al (eds) *Participatory Developments in South Africa: A Development Management Perspective* (2009) 19-22.

¹⁰ Community Development Exchange *What is Community Empowerment* (2014) 2. It is important to note that CDX is not my acronym but a globally used one for the organization.

¹¹ Community Development Exchange (2014) 3.

Empowerment Foundation (SACEF) adopt a closely similar definition of community empowerment.¹²

The first dimension of 'confidence', is about working in ways that increase the community's knowledge and instil in it a belief that it can make a difference. The second dimension of 'inclusive', is about promoting equality of opportunities by challenging discriminatory and oppressive practices. The third is 'organised', which encompasses working in ways that bring people together around common issues and concerns in an open, democratic and accountable manner.¹³ The fourth dimension is 'cooperative', which entails working in ways that build positive relationships across the community. The last, which is 'influential', encompasses working in ways that encourage and equip the community to take part in and influence decisions and enable the community to claim its rights and have greater control over decision-making processes that affect the lives of its members. In line with the CDX definition of community empowerment Swanepoel and De Beer argue that people in informal settlements are caught in a multifaceted 'deprivation trap, which is characterised by poverty, vulnerability and powerlessness' and that their empowerment should be multi-dimensional.¹⁴

Empowerment is a process that encapsulates the development of people's capabilities to control their lives through various activities. It requires explanation of concepts to

¹² Butler G 'Fostering community empowerment and capacity building through tourism: perspectives from Dullstroom, South Africa' (2016) 14(1) *Journal of Tourism and Cultural Change* 26; Swanepoel H & De Beer F *Community Capacity Building: A Guide for Fieldworkers and Community Leaders* (1996) 26; South African Community Empowerment Foundation *The Economic Emancipation and Empowerment of Disadvantaged Communities* (2014).

¹³ Community Development Exchange (2014) 5.

¹⁴ Swanepoel H & De Beer F (1996) 18.

capture and accommodate the complex nature thereof. The main concepts, according to Adams, are: participation to engage people in the decision-making process; normalisation or social role valorisation to engage marginalised groups in movements towards self-independence; reflexivity and critical activity to understand self-activity and feed into future activity; consciousness raising to know the social context of the individual and groups; radical community work to see empowerment as a political venture that humanises oppressive circumstances; and anti-oppressive practice to promote egalitarian relations of gender, race, age and other social divisions.¹⁵

Empowerment is closely related to the political commitment to shift power relations. According to Adams, political ventures do not necessarily mean party political affiliations, as participants transcend party politics, but political activities in that they try to assess the context, risks, power differences and underlying causes of oppression, discrimination and poverty, and direct activities towards institutional change.¹⁶ In developing countries like South Africa, the empowerment of poor people is as much a political issue as anywhere else.¹⁷ Afshar argues that initiatives to change power relations in developing countries have been met with apathy, inconsistency or hostility by groups with vested interests.¹⁸

Empowerment also has a reverse face as disempowerment, posing significant challenges to the processes of capacity development. Dominelli suggests that there are

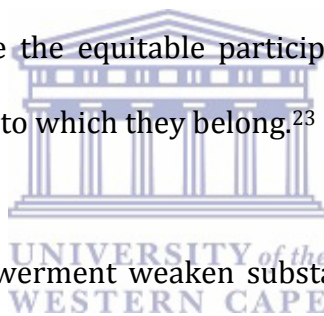
¹⁵Adams R (2008) 172.

¹⁶ Adams R (2008) 179. See also VeneKlasen L, Miller V, Clark C & Reilly M *Rights-Based Approach and Beyond: Challenge of Linking Rights and Participation* (2004) 1-52.

¹⁷ Davids et al (eds) (2009) 56-59.

¹⁸ Afshar H *Women and Empowerment: Illustrations from the Third World* (1998) 297-301.

three kinds of disempowerment.¹⁹ The first type is ‘commodified empowerment’, which creates consumers who express power by exercising choices in the market, but severely restricts the options available to the poor consumers.²⁰ This type corresponds to the neo-liberal approach to welfare, which seeks to empower people as consumers. The second is ‘tokenism empowerment’ that offers service users illusory choices rather than ‘substantial choices’.²¹ This is tokenism that provides opportunity for involvement but rarely offers decisive power to change things. The third is ‘bureaucratic empowerment’ that enables service users to obtain redress only through a complaints procedure after a service has been provided.²² According to Taylor these forms of disempowerment give ‘procedural rights’ to the poor and do not give them the status of citizens with ‘substantive rights’ that ensure the equitable participation of citizens in shaping the common purpose of the society to which they belong.²³



These three forms of disempowerment weaken substantive participation and restrict the voice of the poor to ensure ME. These disempowerments render vulnerable communities susceptible to manipulation by the state, power-holders or bureaucrats who want to legitimise their own choices rather than empower the poor through active and substantive citizen participation. Substantive equality and participation are crucial elements of the ConCourt jurisprudence on ME. The three forms of disempowerment are therefore in conflict with the transformative potential of the Constitution, although

¹⁹ Dominelli L ‘Globalising communities: player and non-players’ in Dominelli L ((ed) *Revitalising Communities in a Globalising World* (2007) 7.

²⁰ Dominelli L (2007) 8.

²¹ Dominelli L (2007) 9.

²² Dominelli L (2007) 11.

²³ Taylor M *Public Policy in the Community* (2003) 101.

the application by the ConCourt of ME in some eviction cases can be placed within one or two aspects of the disempowerment trajectory.²⁴

Empowerment enables people to act as subjects who control the conditions of their own lives. Conversely, at the same time, empowerment can be a means of reinforcing the existing power relations. Deciding whether empowerment directs itself towards liberation or oppression depends on the context of individual or personal capacity and structural resources that can develop or constrain individual choices. Thus empowerment is defined as a means to mediate power relations within tightly constrained circumstances over which the individual can have only limited leverage.²⁵

In eviction cases the unlawful occupiers have severely limited leverage, as the ownership of land is a more dominant right, although the ConCourt introduced the concept of a 'new normality in property relations' that changes the common law ownership jurisprudence of unqualified use and possession by the owner.

Without a complex analysis of how power works in relation to different people and contexts, particularly during evictions, there is a danger that ME can simply become a tool for disempowerment. A 'process of four stage empowerment' as described by Fook can be helpful.²⁶ The first stage is 'deconstruction', which entails identifying the major types of power resources, and how different players in the situation use them.²⁷ According to Butcher this is about recognising how differential access to social, political

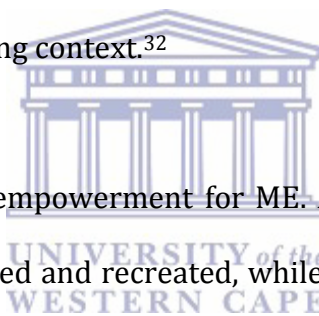
²⁴ *Grootboom and Residents of Joe Slovo*.

²⁵ Dominelli L 'Empowerment: help or hindrance in professional relations' in Ford D & Stepney P (eds) *Social Work Models and Theories: A Framework for Practice* (2000) 98.

²⁶ Fook J *Social Work: Critical Theory and Practice* (2002).

²⁷ Fook J (2002) 98.

and economic power disadvantages people.²⁸ The second is called 'resistance' and raises questions about the dominant construction of power and power relations while identifying the ways in which power is exercised, and whether these need to be changed in order to make the situation more empowering.²⁹ The third is a 'challenge' that enables poor people to make specific changes to the way they conceptualise power relations so that they are more empowering for them.³⁰ This may be about developing the necessary 'capacities and motivation' described by Butcher as being necessary to challenge the existing power relations. The last stage is 'reconstruction' that changes the existing construction of power relations and creates new ways of seeing power related practices.³¹ The process or strategies of empowerment can also vary according to the challenges of a particular working context.³²



Power is also at the centre of empowerment for ME. According to French, power is a complex force that can be created and recreated, while questioning the zero-sum game whereby power gives rise to a win-lose relationship.³³ Thus the issue of power is not simply a question of taking power away from someone else during engagements. Power can be shared and new forms of power can be created. Even though powerless people, like unlawful occupiers, lack some resources, they are not completely without power.³⁴ Powerful people are also not totally powerful. Dominelli calls this 'the power of the

²⁸ Butcher H 'Power and Empowerment: the foundation of critical community practice' in Butcher H et al (eds) *Critical Community Practice* (2007) 101.

²⁹ Fook J (2002) 101.

³⁰ Fook J (2002) 103.

³¹ Fook J (2002) 111.

³² Fook J (2002) 116.

³³ French M *The Power of Women* (1985).

³⁴ Man-Jae Y *Community Empowerment in South Korea: Towards Developing a Local Model for Practice* (Unpublished PhD Thesis, Durham University, 2011).

powerless and the powerless of the powerful'.³⁵ Outcomes of an engagement process between the powerful and powerless can go either way depending on the circumstances and resources of the participants. Therefore there is nothing predetermined. For instance, if people are poor and are from an informal settlement, they will have less access to opportunities of learning than the middle classes. But the circumstances of poor people enable them to challenge and reconstruct the unequal distribution of power through collective action. This study accepts empowerment as a practice or principle of ME for disadvantaged and excluded people.

4.2.2 Participation for ME

Empowerment and its relationship to participation is crucial. In the case law on evictions the ConCourt equated and conflated empowerment and participation of the unlawful occupiers. According to Adams³⁶ participation for ME cannot happen in isolation from a considered approach to empowering people. Accordingly, participation is a crucial element in the process of empowerment. Before the study highlights the reciprocal relationship between empowerment and participation, it is necessary to examine the meanings and types of participation.

The meanings of participation range from people participating by providing information to power-holders, to people seeking ideas and alternative solutions through information and making self-determined decisions. While comparing words with a meaning similar

³⁵ Dominelli L 'Power and powerless: prostitution and enforcement of submissive femininity' 1986 31(4) *Sociological Review* 65.

³⁶ Adams R (2008) 21.

to participation, scholars in the social sciences and international development studies have attempted to find the exact meaning of participation to ensure ME. Adams distinguishes 'involvement' from 'participation'.³⁷ According to Adams 'involvement' refers to 'the entire continuum of taking part, from a once-off consultation through equal partnership to taking control' and that 'participation' focuses on the active role of the participants in decision-making.³⁸ Participation refers to 'that part of the continuum of involvement where people play a more active part, have greater choices, exercise more power and contribute significantly to decision-making'.³⁹

Arnstein developed a model to identify the exact meaning of participation that she termed the 'ladder of citizen participation'.⁴⁰ It is a representative model that draws a distinction between participation types of citizen power whereby people can play an active role in decision-making; and participation types of tokenism whereby people participate by providing information and consulting with the power-holders as a means of legitimising previous decisions. Arnstein argues that 'there is a critical difference between going through the empty ritual of participation and having the real power needed to affect the outcome of the process'.⁴¹ In other words, meaningful participation is not a matter of course, but of deliberate intention.

³⁷ Adams R (2008) 24.

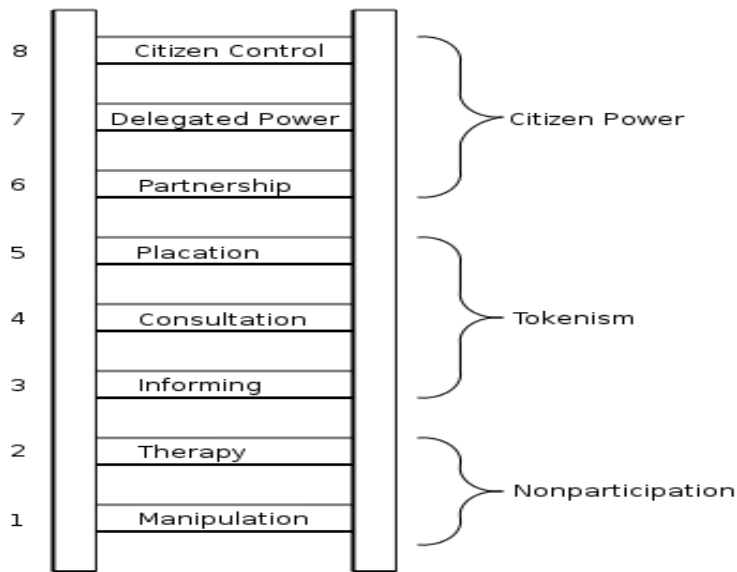
³⁸ Adam R (2008) 30.

³⁹ Adams R (2008) 31.

⁴⁰ Arnstein S 'A ladder of participation' (1969) 35(4) *Journal of the American Institute of Planners* 216.

⁴¹ Arnstein S (1969) 216.

Diagram 3: Arnstein's Ladder of Participation



Source: Arnstein S (1969) 234.

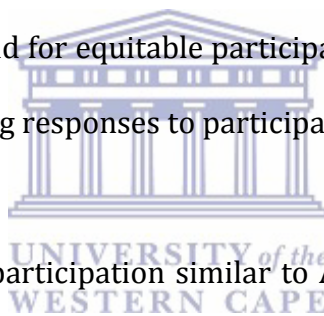


In Diagram 3 the bottom rungs of the ladder are (1) *Manipulation* and (2) *Therapy*. These two rungs describe levels of non-participation that have been contrived by some as a substitute for genuine participation. Their real objective is not to enable people to participate, but to enable power-holders to 'educate' and 'cure' the participants.⁴² Rungs (3) *Informing* and (4) *Consultation* are progress in levels of 'tokenism' that allow the vulnerable people to be informed and to have a voice. Under these conditions the vulnerable people lack the power to ensure that their views will be heeded by the power-holders. When participation is restricted to these levels, there is no follow-through, hence no assurances of changing the status quo.⁴³

⁴² Yazhen Y & Hong L 'Citizen participation in the development of the regional public management' in *Proceedings of the 2013 International Conference on Public Management (ICPM 2013)* (2013) 82.

⁴³ Enserink B & Koppenjan J 'Public participation in China: sustainable urbanization and governance' (2007) 18(4) *Management of Environmental Quality: An International Journal* 459.

Rung (5) *Placation* is simply a higher level of tokenism because the ground rules allow the vulnerable people to advise, but retain for those in power the continued right to decide. Further up the ladder are levels of citizen power with an increasing degree of decision-making. The vulnerable people can enter into a (6) *Partnership* that enables them to negotiate and engage in trade-offs with the traditional power-holders. At the topmost rungs (7) *Delegated Power* and (8) *Citizen Control*, the vulnerable people have obtained decision-making powers. Obviously, the eight-rung is a simplification but helps to illustrate the point that many judgments on eviction cases have missed – that there are significant gradations of citizen participation. Knowing these gradations would make it possible for the courts to cut through the hyperbole to better understand the increasingly strident demand for equitable participation of the vulnerable occupiers as well as the gamut of confusing responses to participation by the state.



Pretty suggests a structure of participation similar to Arnstein's model on the basis of normative criteria which distinguish between 'bad forms of participation' and 'better forms of participation'.⁴⁴ These typologies describe a ladder of participation defined by a shift from control by power-holders to control by the people. According to Cornwall's analysis, the differences are that Pretty's typology helps to clarify the need for motivation of participants as an important factor in shaping interventions; Arnstein's model, by contrast, suggests that participation is ultimately about power control.⁴⁵

⁴⁴ Pretty JN 'Participatory learning for sustainable agriculture' (1995) 23(8) *World Development* 1247.

⁴⁵ Cornwall A 'Unpacking participation: models, meaning and practice' 48(3) (2008) *Community Development Journal* 269.

Muller is of the view that participation during the process of engagement should rather be determined with reference to Arnstein's ladder of participation.⁴⁶ Muller further observes that the words employed in the Housing Act and the experiences of the unlawful occupiers in *Occupiers of 51 Olivia Road, Residents of Joe Slovo* and *Abahlali baseMjondolo* indicate that participation in housing development takes place on the first five rungs of Arnstein's participation ladder.⁴⁷

Fraser proposes four types of community participation coupled with four approaches to community work.⁴⁸ The four types are: 'economic conservative approaches' in which the forms of participation revolve around seeking anti-communitarian goals of economic interests based on an analysis of cost-benefit; the 'managerialist approaches' where participation revolves around expert-driven consultation with the community as a way to get the community to ratify experts' previous decisions; 'empowerment approaches' in which participants are involved autonomously in spaces that they create, such as, forums, websites and electronic debates, for the incremental reform of institutions; and 'transformative approaches' where full participation is present in all areas of life where people are oppressed, alienated or excluded.⁴⁹

Fraser's typology may contribute to analysing the participation of the informal settlements during evictions. However, his model fails to identify types of participation that can be manipulated by the power-holders to legitimise their rule, and from which

⁴⁶ Muller G (2011b) 753.

⁴⁷ Muller (2011b) 753.

⁴⁸ Fraser H 'Four different approaches to community participation' (2005) 40(3) *Community Development Journal* 286.

⁴⁹ Fraser H (2005) 292-298.

the term 'tyranny of participation' has been coined by Cooke and Kothari.⁵⁰ According to Cooke and Kothari, in countries with high levels of inequality like South Africa, participation can easily become a means that serves the dominant political or class interests as well as reinforcing the already existing unequal relations of power. As a result participation can be used as an instrument for the unjust exercise of power, disempowering people and preventing them from challenging prevailing hierarchies and inequalities in society.

Plummer and Taylor suggest a ladder of participation to empower ordinary people as autonomous beings.⁵¹ Their contribution highlights six forms of participation in relation to increased levels of decision-making. At its most rudimentary, 'notification participation' occurs where a state notifies citizens of its activities, such as announcing its plans in the newspapers.⁵² 'Attendance participation' refers to the situation in which the community physically attends meetings to hear about the development initiatives implemented by the state.⁵³ The third form of participation is 'expression participation', which is a stage when the public are given the opportunity to express their opinions but where the decision continues to be made by the state.⁵⁴ The fourth is the participation of communities in discourse, such as, debates and 'discussion' of ideas by encouraging the expression of individual opinions in the hope that their views will influence the authorities.⁵⁵ However, the state still has the power to make the final decision. The next

⁵⁰ Cooke B & Kothari U *Participation: The New Tyranny?* (2001).

⁵¹ Plummer J & Taylor J 'The characteristics of community participation' in Plummer J & Taylor J (eds) *Community Participation in China: Issues and Processes for Capacity Building* (2004) 34.

⁵² Plummer J & Taylor J (2004) 37.

⁵³ Plummer J & Taylor J (2004) 38.

⁵⁴ Plummer J & Taylor J (2004) 39.

⁵⁵ Plummer J & Taylor J (2004) 41.

form of participation is called 'decision-making participation', which is a phase when the people are fully involved in the decisions to be made and are able to contribute to discussions aimed at equal decision-making.⁵⁶ Finally, 'initiative participation' is a phase of participation in which communities initiate ideas and are able to mobilise themselves to make things happen.⁵⁷



⁵⁶ Plummer J & Taylor J (2004) 42.

⁵⁷ Plummer J & Taylor J (2004) 44.

Diagram 4: Plummer and Taylor's Types of Community Participation in China

Initiative/self management
Decision-making
Discussion
Expression
Attendance
Notification



Source: Plummer J & Taylor J (2004)134.

In addition to understanding participation types and their relation to decision-making, a critical analysis of different spaces created by states for participation is becoming important. Shaw argues that as a result of the development of civil society many states have opened up opportunities for participation.⁵⁸ However, the spaces for participation arranged by states can be easily manipulated or disguised in ways that serve to legitimise their policies.⁵⁹

To identify the methods of manipulation Brock, Cornwall and Gaventa use three kinds of space: 'closed', 'invited' and 'claimed'. 'Closed spaces' refer to decision-making and a policy process controlled and determined by the state.⁶⁰ 'Invited spaces' are where the people can be involved in the public discussions or policy-making processes and where civil society groups are invited by the state. These spaces are sites of participation

⁵⁸ Shaw M *Community Work: Policy, Politics and Practice* (2004) 40.

⁵⁹ Shaw M (2004) 41.

⁶⁰ Brock K, Cornwall A & Gaventa J *Power, Knowledge and Political Spaces in the Framing of Poverty Policy* (2001) 147.

where stakeholders, who are invited by the authorities, can legitimise decision-making. 'Claimed spaces' are created by people using their capacity for self-determination to decide their own agenda and make decisions that address their problems.

As it is necessary to develop a model that encourages ME between the occupiers and the state the study focuses on types of participation as a useful tool for analysing the form of participation by the occupiers. Thus this thesis draws on two models: the CLEAR (can do, like to, enable to, asked to, and responded to) model identified by Lowndes⁶¹ and Adams's model based on the ideas of Wright and Haydon.⁶² The CLEAR model is relevant to this study for three specific reasons. First, the model was developed using empirical evidence on encouraging participation by vulnerable communities. Secondly, the model has strengths that can be applied effectively to communities, as it suggests not only specific strategies to improve participation but may also be used as an evaluative tool. Lastly, the model has a grassroots perspective focusing on the ways to empower people through enhancing participation. Adams' model is also useful in improving participation, as it suggests strategies needed for people, practitioners and stakeholders relating to empowerment in a variety of cultural contexts. This model includes a reviewing system for evaluating participation. The model includes aspects of evaluating participation, which can augment the CLEAR model's weaknesses. In summary, the CLEAR model highlights that participation is most effective where vulnerable communities:

⁶¹ Lowndes V, Pratchett L & Stoker G 'Diagnosing and remedying the failings of official participation schemes: the CLEAR framework' (2006) 5(2) *Social Policy and Society* 281.

⁶² Wright P & Haydon D *Taking Part Toolkit: Promoting Real Participation of Children and Young People* (2002) 55-61.

- **'Can do'**: refers to capacity, which includes appropriate skills and resources to be able to participate effectively. These would include the ability and confidence to speak publicly and encourage other people in similar situations to support the initiatives and also access the resources, such as the internet, that facilitates such activities.
- **'Like to'**: refers to the people's sense of togetherness and willingness to engage in collective action. If people feel they are part of the community they are more willing to engage. The 'like to' factor recognises and promotes a sense of civic citizenship and solidarity with engagement on issues, such as service delivery.⁶³
- **'Enable to'**: is when people have the necessary networks and groups that can support and facilitate their participation. The existence of networks and groups that can support participation and provide a communication channel to other stakeholders is vital to participation.
- **'Asked to'**: is when people are asked to engage more often and more regularly. It should not be an ad hoc approach, which depends on the attitudes of the authorities.
- **'Responded to'**: is when people believe that their involvement is making a difference by asserting their views. People are more likely to engage if this occurs. If people perceive a lack of sincere response to their engagement it becomes difficult to secure meaningful participation.⁶⁴

Adams also proposes four systematic strategies to improve participation. As the first strategy, he proposes the introduction of a 'developing culture' that focuses on how

⁶³ Lowndes V, Pratchett L & Stoker G (2006) 286.

⁶⁴ Lowndes V, Pratchett L & Stoker G (2006) 288.

people should share beliefs about the value of empowerment and their commitment to empowerment practice.⁶⁵ Elements of such culture should include: sharing the understanding of participation among all the participants; creating champions of participation; and publicising commitments to participation. The next strategy is 'building a structure' of organisation and resources that will motivate people and provide some incentives for involvement.⁶⁶ Elements of such structure include: building organisations; resourcing the organisations; and developing appropriate strategies to support the organisations. The third strategy is 'developing effective practice' to improve participation.⁶⁷ Elements of such practice include: involving the participants in collective and individual decision-making; ensuring that participants have positive experiences of being involved; sharing positive practices of participation; and enabling participants to develop the necessary skills, knowledge and experience. The final strategy is that of 'developing an effective system for review' which means a process of monitoring and evaluating participation.⁶⁸ Key to the element of review is to establish systems to provide evidence of the proposed targets and the actual outcomes. Except for the first strategy, the other three systemic strategies include elements of the CLEAR model.

The works of Arnstein, Plummer and Taylor, and Adams's CLEAR model and Adams highlight that community participation could traditionally be broadly categorised as active, passive or interactive. Active participation is open and community members actively take part in all stages of the project. Decision-making as well as other vital

⁶⁵ Adams R (2008) 54.

⁶⁶ Adams R (2008) 55.

⁶⁷ Adams R (2008) 55.

⁶⁸ Adams R (2008) 56.

activities, such as, management as well as monitoring and evaluation of the projects, are done by the people. On the other hand, during passive participation, the community maintains a distance and is not part of the activities; they are told what is going to happen or what has happened already. Interactive participation occurs when people take part in joint analysis as well as the planning process and the members of the community improve their existing structures as well as take charge of their development process. The more recent work by Mikkelsen identifies more types of participation.⁶⁹

According to Mikkelsen, the first type of participation is passive participation. This type of participation is not what would be deemed 'real participation' in the project.⁷⁰ It typifies the top-down approach: people are only informed, probably as a way to legitimise the project. There is no true ownership of the project because people are not involved from the inception of the project.⁷¹ This type of participation is considered to be extremely undesirable for ME and is the same as Arnstein's 'nonparticipation and tokenism' and Plummer and Taylor's 'notification and attendance'.⁷²

The second type of participation, according to Mikkelsen, is participation in information giving, where people participate by answering questions posed by extractive researchers and developers.⁷³ People do have the opportunity to influence the proceedings; however, the findings are not checked for accuracy. This type is not

⁶⁹ Mikkelsen B *Methods for Development Work and Research: A New Guide for Practitioners* 5 ed (2012) 39.

⁷⁰ Mikkelsen B (2012) 42.

⁷¹ Mikkelsen B (2012) 46.

⁷² See Diagrams 3 and 4.

⁷³ Mikkelsen B (2012) 52.

entirely different from the third type of participation, that is, consultation, where people participate by consultation and decision regarding the nature of the problem, and possible ways to solve it is left entirely to the researchers.⁷⁴ Here people do not take part in the decision-making process; the onus for decision-making rest on the authorities and not the affected communities.

The fourth type of participation is functional participation, this is when people participate by forming groups or committees. These groups are seen as the means to achieve predetermined goals. The second, third and fourth types of participation are neither adequate nor desirable for ME. The fifth type of participation is interactive participation, which is about involvement in and analysis and development of plans, and in this regard participation is considered as a right and not just as a mechanical function. Groups are formed, together with partnerships, and there is use of systematic and structured learning processes.⁷⁵ Groups therefore take control of the local decisions, so that people have a stake in maintaining structures and practices. This type of participation empowers the community. The sixth type of participation, according to Mikkelsen, is optimum participation, which is about focusing closer attention on the different contexts and purposes in order to determine what form of participation makes sense.⁷⁶ The fifth and sixth types of participation are considered to be adequate for ME.

The inclination of ME is more towards the fifth type of participation, which is interactive participation. This form of participation can be ranked at the same level as Arnstein's

⁷⁴ Mikkelsen B (2012) 54.

⁷⁵ Mikkelsen B (2012) 57.

⁷⁶ Mikkelsen B (2012) 59.

'citizen power' and Plummer and Taylor 'decision-making and self-management'. This level of participation ensures substantive involvement of the occupiers in decision-making through empowerment and provides a real possibility to transform the unequal power relations between the occupiers and the state. As mentioned above, interactive participation is the most desirable form of participation for ME. It is the opposite of proceduralised participation, that Arnstein calls an 'empty ritual' or a 'mechanical function' that results in manipulation and actually non-participation of the vulnerable people.

4.2.3 Building social capital for ME

In *Occupiers of 51 Olivia Road*, *Residents of Joe Slovo* and *Abahlali BaseMjondolo* the ConCourt strongly raised the importance of building trust relations among the unlawful occupiers during evictions. In *Residents of Joe Slovo* two different community committees represented the unlawful occupiers and this was viewed as a sign of polarisation and mistrust among the unlawful occupiers. In *Abahlali BaseMjondolo* there were incidents of sponsored violence among the occupiers. Without proper organisation of the unlawful occupiers, effective participation that brings about empowerment is not likely to happen. Beresford and Hoban⁷⁷ and Fields⁷⁸ correctly argue that it is not easy for the poor to take part in development projects without first having confidence in themselves as well as having some degree of trust in the state agencies.

⁷⁷ Beresford P & Hoban M *Participation in Anti-poverty and Regeneration Work and Research: Overcoming Barriers and Creating Opportunities* (2005) 1-37.

⁷⁸ Fields J *Social Capital* 2 ed (2008) 11-17.

The concept of social capital initially appeared in a modern sense in Hanifan's work highlighting the contribution of 'goodwill, fellowship, mutual sympathy and social intercourse' to community development.⁷⁹ Although earlier writers made use of the term, social capital did not emerge as a current term to describe community empowerment until Putnam published his study in 1993 and used the term to refer to the decline in civic responsibilities in the US.⁸⁰ Bourdieu⁸¹ and Coleman⁸² also developed the concept of social capital, although their use of the term was limited, compared to Putnam.

According to Bourdieu, the extent and durability of trust relationships among the poor are crucial for their equitable participation in development programmes.⁸³ For Coleman, social capital is understood to be a valuable set of resources not only for the attainment of collective action but also for both cognitive development and to secure self-identity.⁸⁴ In the process of creating social capital he regards the existence of mutually reinforcing relations between different stakeholders and institutions as essential.

⁷⁹ Hanifan LJ *The Community Centre* (1920) 33-35.

⁸⁰ Putnam RD *Making Democracy Work: Civic Tradition in Modern Italy* (1993).

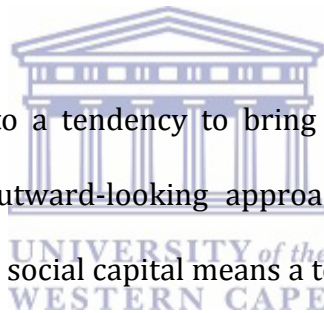
⁸¹ Bourdieu P 'The form of capital' in Richardson J (ed) *Handbook of Theory and Research for Sociology of Education* (1986) 117.

⁸² Coleman J *Equality and Achievement in Education* (1990).

⁸³ Bourdieu P (1986) 123-124.

⁸⁴ Coleman J (1990) 78.

In defining social capital, Putnam suggests three meanings. First, there are trust, norms and networks that improve the efficiency of society in facilitating co-ordinated actions.⁸⁵ Secondly, there are 'networks, norms and trust relations that enable the poor to act together more effectively to pursue shared objective'.⁸⁶ Thirdly, there are 'social networks and norms of reciprocity and trustworthiness that arise from them'.⁸⁷ Putnam then introduces a distinction between two forms of social capital, namely, bonding (exclusive) and bridging (inclusive). The former refers to a tendency to reinforce exclusive identities and maintain homogeneity through a tightly knit inward-looking network. An example of bonding social capital would be the reinforcement of exclusive identities in the informal settlements based on shared ethnic identity.



Bridging social capital refers to a tendency to bring together people across diverse social divisions through an outward-looking approach. Woolcock refers to this as 'linking social capital'.⁸⁸ Linking social capital means a tendency to reach out to different people in dissimilar situations, such as those who are entirely outside the community, thus enabling members to leverage a far wider range of resources than is available within the community. 'Linking social capital' by informal settlements during evictions would entail reaching out to civil society organisations (SERI, UWC Dullar Omar Centre, Lawyers for Human Rights), which specialise in protecting unlawful occupiers against unlawful evictions.

⁸⁵ Putnam RD 'Who killed civic America' 1996 *Prospect* 66.

⁸⁶ Putnam RD (1996) 68.

⁸⁷ Putnam RD (1996) 71.

⁸⁸ Woolcock M 'The place of social capital in understanding social and economic outcomes' (2001) 2(1) *Canadian Journal of Policy Research* 13-14.

Consistent with Putnam, Woolman contends that individuals must create voluntary networks to meaningfully engage in a truly complex, radically heterogeneous and democratic society.⁸⁹ These voluntary networks will enable them to negotiate ‘the radical heterogeneity of each’.⁹⁰ According to Woolman social capital is a function of a collective effort to build and fortify the things that matter in a community or an institution. He asserts that social capital emphasises the extent to which the ‘capacity of an individual to do anything is contingent upon the creation and maintenance of forms of association which provide both the tools and the settings for meaningful action’.⁹¹

Woolman further asserts that social capital looks at the community as a phenomenon that ‘contains the seeds for meaningful actions’, to build new associations and organisations, trust, stability and mutual understanding that enable the community to take collective risks to build something new, something different and even something revolutionary.⁹² This study subscribes to the definition of social capital as articulated by both Putnam and Woolman, that it is a relationship of trust in a community based on informal networks, social norms and practices. Both scholars are firmly of the view that the absence of social capital in a society may erode existing possibilities for social progress and protection against abuse and injustice.⁹³

⁸⁹ Woolman S *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa Basic Law* (2013).

⁹⁰ Woolman S (2013) 150.

⁹¹ Woolman S (2013) 152.

⁹² Woolman S (2013) 152.

⁹³ Woolman S (2013) 153. See also Putnam R (1996) 78, Putnam RD *Democracy in Flux: The Evolution of Social Capital in Contemporary Society* (2002).

Fields argues that Putnam's theorisation on social capital has attracted controversy as it fails to provide an adequate account of the production and maintenance of social capital.⁹⁴ Portes further argues that Putnam's theorisation on social capital is conceptually vague,⁹⁵ while Dominelli rejects it as ignoring the neoliberal context of the society it describes.⁹⁶ Despite the severe criticisms of Putnam's work, his idea of social capital has been described by Taylor as 'a concept with immense potential for filling the vacuum that capitalist analyses of society have left'.⁹⁷

The concept of social capital is more relevant in poor communities like informal settlements. When these communities are threatened with evictions, individual households rely on community networks to foster mutual support and collective action to advance their interests. These community networks are informal and can be distorted by the complex dynamics of engagement with the state. As South Africa is a highly diverse country, most urban informal settlements are a melting pot of different racial/ethnic groups and even political affiliations. As a result, building 'bridging social capital' amongst occupiers for ME is crucial, as it seeks to bring people together from diverse social backgrounds. This may enable purposive engagement by the unlawful occupiers to advance their shared interest. 'Bonding social capital' will be neither adequate nor appropriate for ME in South Africa's urban informal settlements, because those who differ along ethnic or political lines will be excluded. 'Bonding social capital'

⁹⁴ Fields J (2008) 111.

⁹⁵ Portes A 'Social Capital: Its origins and application in modern sociology' (1998) 24(1) *Annual Review of Sociology* 1.

⁹⁶ Dominelli L *Social Work: Theory and Practice for a Changing Profession* (2004).

⁹⁷ Taylor M (2003) 55.

has a real potential for polarising racially or politically diverse groups of unlawful occupiers to their great disadvantage in the engagement process.

4.2.4 The relationships between empowerment, participation and social capital

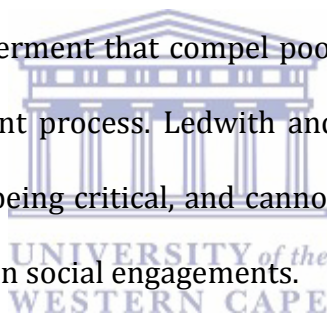
The ideas embedded in participation can encompass frameworks of empowerment as a process of developing the capacities of the vulnerable people to control their lives. The capacities of those vulnerable people could be derived from participating in programmes or projects for building such capacities. Empowerment means giving people power or enabling the people to take power to control their lives with knowledge, ability, skills, resources and authority to act. According to Thompson power can be of several types – ‘power from within’, as psychological inner strength, having confidence and ability to act; ‘power-over’, as having resources and finances to act; ‘power-to’ as the capacity of the individual to realise his will in spite of resistance; ‘power-with’ as the capacity of collective action being able to mobilise and organise for change; and ‘negotiated-power’ as the capacity of being able to compromise with power-holders for productive outcomes.⁹⁸

There can be achievement of ME by the introduction of programmes to empower people. In the empowering process, participation is regarded as an integral component and essential feature because people can create power by participating. They acquire the ability, knowledge and skills or authority to act as agents for change during ME. The capacity that people obtain through empowerment, in turn, can contribute to higher

⁹⁸ Thompson N *Power and Empowerment* (2014) 123-152.

levels of participation for decision-making, collective action for change that results in 'claimed spaces'.

However, when unlawful occupiers are not involved in empowerment opportunities, ME may be used to reinforce hegemonic perspectives and existing oppressive relations. The empowerment programmes should be aimed at strengthening critical consciousness about power relations that may impact on their lives during the engagement process. If the empowerment process does not entail critical consciousness, it may expose the unlawful occupiers to types of participation that are tokenist, manipulative and tyrannical. Being involved in these types of participation can precipitate forms of disempowerment that compel poor people to adapt to oppressive relations during the engagement process. Ledwith and Spingett⁹⁹ cogently argue that empowerment is a product of being critical, and cannot be understood without insight into the way that power works in social engagements.



To move away from tokenism participation to interactive and deliberative participation, people need to be aware of the different forms of involvement and participation. For example, a 'ladder of participation' has been identified that differentiates between 'citizen control' and 'tokenism' in the types of participation. In many instances this awareness can become the trigger for transformative participation during ME. This awareness can be reinforced by the implementation of community based learning programmes which are embedded in Freire's idea of consciousness raising to empower people on an individual basis, and conscientisation, which means developing the critical

⁹⁹ Ledwith M & Spingett J (2010) 67.

capacity for a systematic understanding of oppression and to take action to change it.¹⁰⁰ Additionally, Gramsci's notion of hegemony can also be reflected in programmes.¹⁰¹ Freire requires people to engage in conscientisation through dialogue that enables them to become aware of the oppressive structures in society, to develop capacity for critical thinking about society, and to engage in collective action for changing it.¹⁰² According to Freire, this conscientisation is conducted by 'dialogical education' between the educator and the participants, and between the participants and the world, rather than 'banking education' where the participants put their efforts into receiving and storing information that teachers deposit.¹⁰³

Gramsci requires that people criticise the hegemonic ideas of dominant groups disseminated as common sense through major institutions of a capitalist society.¹⁰⁴ Gramsci's insights help people not only to understand the subtle nature of power and the way that the dominant ideas of society infiltrate people's minds, but also to see that civil society offers an opportunity for liberating interventions through a process of critical consciousness. Furthermore, Gramsci's concept of organic intellectuals, derived from the experience of the working class and from debates with others, helps people to criticise false consciousness as the catalyst to empowerment. Like Freire, Gramsci recognises that true education is something that people do for themselves with the help of others (*power-with*) not something that is done to them by experts (*power-to*).¹⁰⁵ These community learning programmes will enable the occupiers to judge whether

¹⁰⁰ Freire P *A Pedagogy of the Oppressed* (1972) 19.

¹⁰¹ Gramsci A (1971) 142.

¹⁰² Freire P (1972) 24.

¹⁰³ Freire P (1972) 37.

¹⁰⁴ Gramsci A (1971) 56.

¹⁰⁵ Beck D & Purcell R *Popular Education Practice and Community Development Work* (2010) 62-76.

participation is empowerment which creates citizen power for ME or are disempowerments to reinforce the status quo.

According to Taylor the first step in empowering poor communities is an activity that fosters credibility among the vulnerable communities and the state.¹⁰⁶ Lowndes agrees with Taylor and asserts that when a sense of attachment and togetherness is built on the basis of trust the community people can be involved in programmes aimed at empowerment.¹⁰⁷ Increasing a sense of trust within a community can improve participation. The relationship based process of trust development 'from below' can facilitate, create and strengthen community organisation for effective engagement. The community organisation can serve as a platform to raise issues of concern, provide points of access for decision-making and mobilise collective action for change. Thus, fostering social capital as a valuable resource for securing trustworthiness is regarded as a mediating means that encourages participation and empowerment.

Jordan, on the other hand, argues that social capital can either facilitate or inhibit empowerment and participation.¹⁰⁸ For example, in the racially and politically diverse urban informal settlements in South Africa, the 'bonding social capital' that strengthens ties between people of the same ethnic origin or political affiliation can produce processes that exclude anyone deemed different. This produces an 'othering process' that creates a 'them-us' division that might lead to labelling of each other.¹⁰⁹ This was the case in *Residents of Joe Slovo*, where at the end there were two community

¹⁰⁶ Taylor M (2003) 107-109.

¹⁰⁷ Lowndes V, Pratchett L & Stoker G (2006) 285.

¹⁰⁸ Jordan B *Welfare and Well-Being: Social Value and Public Policy* (2008) 36.

¹⁰⁹ Jordan B (2008) 42.

committees that represented the unlawful occupiers. 'Othering processes' can turn social capital into a factor for exercising 'power-over' and oppressing other groups during the engagement process. In addition, social capital also has the potential to impede empowerment by reinforcing prejudice and a relationship of 'them-and-us' when it operates predominantly on the basis of cliques and factions within bonding social capital. However, social capital is seen as a good thing in empowering people and encouraging their participation for engagement with development, as it can build a strong correlation with social cohesion.¹¹⁰ For informal settlements that are threatened with evictions, bridging-social capital can be seen as important for managing diversity and maintaining community cohesion.

Additionally, it could prove difficult for empowerment and participation to be effectively exercised during ME without developing trust between the unlawful occupiers and the state. The state must demonstrate commitment to empowerment in the way it uses knowledge, indicates its intentions, displays a caring attitude, and employs positive self-disclosure.¹¹¹ In such instances municipal practitioners who are able to build social capital through community practice can promote links between empowerment, participation and social capital. Where the state is not transparent and accountable in its engagement, it is hard for empowerment and participation to be sustainable. This study argues that social capital operates as a mediating means that facilitates empowerment and participation during ME. In the next section the study examines the models of community empowerment practice which are relevant for ME.

¹¹⁰ Man-Jae Y (2011) 61.

¹¹¹ These are some of the key requirements for ME highlighted by Yacoob J in *Occupiers of 51 Olivia Road* and also by Van der Westhuizen J in *Schubart Park Residents*.

4.3 Models of community engagement

There are many models of community empowerment developed for community practice. In developing a model for ME during evictions, the study draws on several of these, ranging from Freire inspired approaches based on conscientisation to Alinsky based approaches and feminist models based on political action and equality. The study focuses on these theories because they seek to ensure ME by addressing the challenges in situations characterised by unequal power relations.

In developing the Model for ME, the study first undertakes a critical analysis of two representative models of community engagement. One is a 'neighbourhood model' developed by Henderson and Thomas that comprises a nine-stage process of community engagement.¹¹² The Henderson and Thomas model is a practical skills-based approach and pays less attention to political context and transformative outcomes. The other is a 'critical integrative model' developed by Stepney and Popple,¹¹³ which consists of a six-step process. Stepney and Popple's model draws on a range of critical and radical theories including those of Freire and Gramsci. Scrutinising the strengths and weaknesses of the two models enables the study to develop a Transformative Empowerment Model for ME by informal settlements during evictions.

The overarching criterion behind the choice of models to develop the Transformative Empowerment Model is whether a model has theoretical or practical aspects that lead towards emancipatory, egalitarian or transformative goals. Based on this broad

¹¹² Henderson P & Thomas D (2002) 22-29.

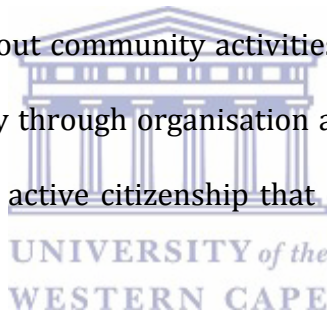
¹¹³ Stepney P & Popple K (2008) 33-41.

criterion there are three specific reasons for selecting the 'neighbourhood model' and 'critical integrative model' in the study. One reason was to draw on the analyses of experts in community empowerment whose research work primarily focuses on measures to address unequal power relations in community engagement. The second reason was to explicitly identify models that deal with the empowerment process of the entire community for effective community engagement, rather than models that exclusively focus on the empowerment of individuals, organisations or groups within the community. The third reason was to use models that advance the goals of an egalitarian society based on democracy, human dignity, equality and freedom.

Henderson and Thomas' 'neighbourhood model' contains the relevant technical elements needed to conduct the empowerment of informal settlements to engage meaningfully. Stepney and Popple's 'critical integrative model' contains transformational approaches to the empowerment of communities to engage meaningfully by emphasising the importance of critical practice and reflection for tackling oppressive structures. The transformative approach for ME advanced by Stepney and Popple is inadequately announced by the ConCourt in both *Occupiers of 51 Olivia Road* and *Residents of Joe Slovo*. As mentioned above, these two models will contribute to the development of the Transformative Empowerment Model. The Model seeks to fill the gap in the ConCourt eviction jurisprudence. It is important to note that the two models have both strengths and weaknesses, and based on that the study will develop the Transformative Empowerment Model to mitigate the weaknesses.

4.3.1 The neighbourhood model: a traditional approach to community empowerment

Henderson and Thomas emphasise the importance of neighbourhood at the micro-level and local communities. The neighbourhood means small-scale communities, and they suggest neighbourhood work as a direct face-to-face undertaking with local communities or networks to address problems in an area.¹¹⁴ One of the main reasons for using the word 'neighbourhood' is to emphasise a bottom-up practice that involves people in decision-making on policies that affect them at grassroots level. While Henderson and Thomas explicitly use the word empowerment, they define it as a concept of 'community capacity'.¹¹⁵ For them empowerment is not about transforming local structures; rather, it is about community activities aimed at active citizens with a sense of duty and responsibility through organisation and networks in the community. Their model does not consider active citizenship that creates awareness about power relations.



Henderson and Thomas's neighbourhood work is based on values such as social justice, participation, equality, learning and co-operation. Though they insist upon the centrality of these values, they also argue that 'there are identifiable skills and techniques which can be used in a multiplicity of situations regardless of theoretical or ideological stance in poor communities or neighbourhood groups'.¹¹⁶ Henderson and Thomas's process of empowering people in a neighbourhood is divided into a nine-stage process: of entering the neighbourhood; getting to know the neighbourhood;

¹¹⁴ Henderson P & Thomas D (2002) 26.

¹¹⁵ Henderson P & Thomas D (2002) 31.

¹¹⁶ Henderson P & Thomas D (2002) 31.

identifying the needs, goals and roles; making contacts and bringing people together; forming and building organisations; helping to clarify goals and priorities; keeping the organisation going; dealing with friends and enemies; and leaving and ending. Table 2 below highlights the main points of activity in each of the nine stages of community engagement.



Table 2: Henderson and Thomas's Neighbourhood Work Model

Phase	Practice aims	Practice approach
1. Entering the neighbourhood	Think about it	Orientation and information gathering Identify values, roles and community attitudes Plan approach and analyse evidence of community problem
	Negotiate entry	Establish relationships with existing groups and local people Identify roles and establish appropriate relationship with agencies involved Identify and negotiate appropriate roles for the workers' agency
2. Getting to know the neighbourhood	Justify data collection	Justify to others and plan data collection
	Data requirements	Include history, environment, residents, organisations, communications, power and leadership
	Data collection	Specify the neighbourhood clearly Scan the area broadly, visit and travel around Use the questionnaire and informal discussion, observation, written material, local history
	Analyse and interpret	Different types of reports may be required
3. Identifying needs, goals and roles	Assess problems	Describe, define, identify the extent and origins of the problem and present action around it.
	Set goals/priorities	Clarify workers' own goals and priorities
	Decide role disposition	Whether it will be local development or social planning programmes Phasing, goals and preferences Agency constraints and opportunities
	Role areas	Relations with local people, dealing with groups and transaction about group agencies
4. Making contacts and	Reasons	Possible reasons are to allow people to assess the work of the municipal practitioner

bringing people together	Process of making contact	<p>Prepare by selecting and sequencing people to talk, selecting setting for meeting, means of contact and how to present yourself</p> <p>Make contact cross-boundary, introduce yourself, agree aims of contact</p> <p>Afterwards: recall and write up, inform others, follow up</p>
	Ways of making contact	<p>Initiated by the worker: street work, probing problems, survey, petitions, public meeting</p> <p>Initiated by community workers</p>
5. Forming and building organisation	Context	<p>Community conditions: motivation, energy, barriers</p> <p>Community issues and concerns</p>
	Form organisation	<p>Check feasibility and desirability - existing groups, potential membership, time, strategy,</p> <p>Encouraging leadership, give early help, survey, group members' motivation, wider community issues, clear goals</p> <p>Building structure, tactics and strategies, group cohesion</p> <p>Public meetings</p>
6. Helping to clarify goals and priorities	Clarifying goals and identifying priorities	<p>Setting goals/objectives, identifying the criteria and considering possible actions</p> <p>Deciding priorities by the use of the nominal group technique and the Delphi technique to develop scenarios based on expert knowledge</p> <p>Making deciding together with workers and members of communities</p>
7. Keeping the organisation going	Maintaining and strengthening of organisation	<p>Providing resources and information</p> <p>Being supportive</p> <p>Co-ordinating help and making provision for outside specialists</p> <p>Planning: for future events</p> <p>Developing confidence and competence: through 'technical skills', such as, writing letters and organising petitions and political skills, such as negotiating skills with stakeholders</p> <p>Allowing local people to have equal opportunities</p>
8. Dealing with friends and enemies	Networking with other agencies	<p>Need political skills capable of negotiating with decision-makers: to be clear about the desired end - result; to select the tactics; to carry out lobbying; to consider leverage when a group is threatened; to decide skilful timing of any action</p> <p>Count benefits and costs</p>

		Keep in touch with outsiders as widely as possible Carry out practice affecting social policies with long term commitment and confidence
9. Leaving and ending	Evaluation and tasks of leaving	Evaluating effects process, performance and needs Disengagement: to help members openly discuss their attitudes and feelings Stabilising achievement: to make sure that positive change and gains will be maintained after leaving Administration: writing up records, evaluating the works, effecting closure with agencies and residents

Source: Henderson P and Thomas D (2002) 77.

4.3.2 Strengthens and weaknesses of the neighbourhood model

This model provides extensive information on the technical skills needed by community practitioners to carry out work on community engagement. These skills are necessary for ME during evictions. According to Rossetti the nine-stage process helps to dissect and classify the many different elements involved in neighbourhood work.¹¹⁷ These are clearly related to the practice and skills areas that apply to a large variety of situations, especially with regard to the fourth stage: 'making contacts and bringing people together'. Rossetti further argues that the model prescribes detailed methods and techniques of contacting people; however, these methods may give municipal practitioners an 'over-mechanistic view of them'.¹¹⁸

While the skills identified in the model provide practitioners and communities with some capabilities, Henderson and Thomas fail to consider the importance of 'power differences' between players. Excluding these considerations creates the risk of

¹¹⁷ Rossetti F 'Book Review: *Skills in Neighbourhood Work*' (2013) 17 *British Journal of Social Work* 551.

¹¹⁸ Rossetti F (2013) 552.

allowing hegemonic groups, like the state, to continue supporting and promoting the status quo. Thus the model ignores the political context and fails to connect sufficiently with production and reproduction of inequality in the wider society, which creates problems for communities. Henderson and Thomas's model has also been criticised for focusing mainly on soft issues, such as service delivery¹¹⁹ as well as for focusing on skills in ways that endorse the 'neutral apolitical individual' as a practitioner.¹²⁰ Barnes et al assert that when strategies for forming community organisations for engagement are applied to vulnerable communities without being coupled to a criterion of clear egalitarian values, they ignore power relations.¹²¹

According to Adams, the neighbourhood model makes very little mention of the ways of 'scaling-out' to increase the quality of participation, and 'scaling-up' to expand the quantity of participation when making decisions to initiate institutional change.¹²² Community empowerment for ME should be extended to the marginalised and socially excluded, but the skills needed to improve the political capacities of these groups are rarely found in the neighbourhood work process. Thus, the model does not adequately include values that are transformative.

The nine-stage process of community practice has strong advantages in offering help to community practitioners by specifically distinguishing the stages of practice, such as: setting goals and priorities for communities (third stage); setting goals and priorities after building an organisation (sixth stage); and including the stage of dealing with

¹¹⁹ Ledwith M (2005) 12.

¹²⁰ Dominelli L (2006) 26.

¹²¹ Barnes M, Newman J & Sullivan H *Power, Participation and Political Renewal* (2007) 123-176.

¹²² Adams R (2008) 197-201.

friends and enemies (eighth stage). Although Henderson and Thomas indicate that their nine stages connect with each other and can occur simultaneously, their neighbourhood model possesses sequential characteristics. The sequence is not rigid; for example, stage eight, which deals with friends and enemies, can be executed at every stage of the process of community empowerment.¹²³

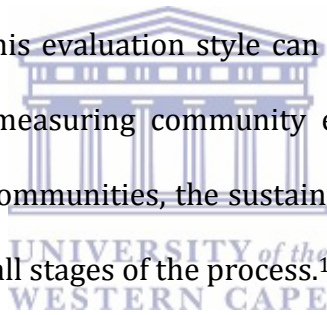
In setting out the roles of stakeholders in the community empowerment process, Henderson and Thomas favour the predominant social relations; they do not consider transforming them. They define the role of practitioners for community empowerment as providing resources and information to the vulnerable groups, being supportive, coordinating help, setting up and planning events and developing confidence and competence in an organisation and the people who can sustain it. The neighbourhood model rarely highlights the role of community practitioners as partners of the marginalised groups in the struggle to change the oppressive social structures. Dominelli¹²⁴ correctly argues that in a transformative and egalitarian society community practitioners should be activists for change of oppressive institutions and that the empowerment of the community should be directed at undermining and changing oppressive power relations.

The major weakness of the neighbourhood model is that the task of evaluating the impact of the intervention is left to the final stage. The evaluation in stage nine suggested by Henderson and Thomas is concerned with four interrelated issues and is

¹²³ Man-Jae Y (2011) 69.

¹²⁴ Dominelli L (2012) 132.

predicated on Barr and Hashagen's proposition.¹²⁵ First, it assesses what the effects or outcomes of intervention have been. In this 'process', the knowledge gained about the process of doing community empowerment work is assessed. A 'performance' assessment relating to the manner of working and the effectiveness of the practitioners, and how this accords with agency goals and 'needs', is given priority, and community needs are left for another day. This style of evaluation may be of little help in developing a framework for analysing changes in power relations. Henderson and Thomas rarely mention the methods of evaluation, such as a necessity for qualitative and quantitative methods to measure empowerment and the emancipatory impact thereof. There is no indication that the evaluation process has to engage local people from the very early stages. According to Man-Jae this evaluation style can weaken empowerment practice by ignoring key elements in measuring community empowerment, such as, 'power differences' within or outside communities, the sustainability of people's activities, and non-tokenistic participation in all stages of the process.¹²⁶



4.3.3 The critical integrative model: towards a transformative approach

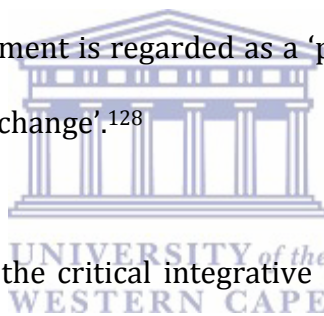
Unlike the neighbourhood model that emphasises and suggests practical skills and techniques, Stepney and Popple's 'critical integrative model' prioritises the need to identify approaches that guide the way in which community engagement and empowerment are practised. The critical integrative model sets out the characteristics of community empowerment and includes reflective, preventive and anti-oppressive

¹²⁵ Barr A & Hashagen S *ABCD Handbook: A Framework for Evaluating Community Development* (2000) 111.

¹²⁶ Man-Jae Y (2011) 68.

practice.¹²⁷ How Stepney and Popple define the concept of community empowerment deserves to be examined in this study.

Stepney and Popple regard community empowerment as having a strong element of community work because empowerment is a concept encompassing multi-level concerns with individual development, group processes and organisational change. Additionally, empowerment is seen as a concept that offers practitioners a broader context for practice and highlights issues, such as, social justice and equality. Furthermore, it has the potential to provide a framework that connects personal experiences with collective action for a more just, equal and sustainable world. Thus the theory of community empowerment is regarded as a 'paradigm for practice to address issues of justice, difference and change'.¹²⁸



To address community issues, the critical integrative model introduces the 'eco-socio approach', which incorporates analysis of structural injustices and includes full consideration of broader networks and support systems that go beyond the individual and family. Unlike the critical integrative model, the neighbourhood model concentrates on face-to-face community level interactions between people living in the communities and is not interested in action on a global level. What also differentiates the neighbourhood model from the critical integrative model is that it concentrates on technician practice at the community level; however, the critical model is integrative and combines individual empowerment with anti-oppressive strategies seeking to reduce the deleterious effects of structural inequalities upon people's lives through

¹²⁷ Stepney P & Popple K (2008) 163.

¹²⁸ Stepney P & Popple K (2008) 119.

collaboration with community members. Thus the critical integrative model favours transformative approaches rather than technicist approaches.

Stepney and Popple's model is oriented towards egalitarian and critical practice to criticise dominant market-based power that the neighbourhood model largely ignores. The critical integrative model builds on ideas from Foucault's power,¹²⁹ Dominelli's anti-oppressive practice,¹³⁰ Fook's empowering process,¹³¹ Freire's conscientisation,¹³² and Gramsci's critique of hegemony.¹³³ The model is drawn from Foucault's ideas, which involve the concept of power being embedded in the use of language, and the achievement of different meanings through discourses and negotiations. Foucault's idea is included as an element of a model that enables people to criticise dominant ideologies and raise critical consciousness through dialogical methods of empowerment whereby communities consider anti-oppressive strategies.¹³⁴ This enables the community to be conscious of its powerlessness and marginalisation rather than the psychological aspects that have been developed in the dominant discourse. In addition, this helps the community to reconstruct problems in more empowering ways as part of a strategy for change. Change, especially structural change, is regarded as an emancipatory strategy to achieve transformative outcomes.

¹²⁹ Foucault M *The Foucault Reader* (1984) 67-81.

¹³⁰ Dominelli L (2002) 82-87.

¹³¹ Fook J (2002) 54-71.

¹³² Freire P (1972) 36-49.

¹³³ Gramsci A (1971) 53-93.

¹³⁴ Stepney P & Popple K (2008) 119.

Evaluation in the critical integrative model draws primarily on Gardner's framework that emphasises the participation of vulnerable people.¹³⁵ There is a common concern about the evaluation processes and outcomes for both models. However, the critical integrative model is stronger on ensuring the participation of vulnerable and marginalised groups, exploring and managing uncertainty in the quest for deeper understanding and engaging with issues about power. The critical integrative model is grounded in the lived experiences of the community, as opposed to the neighbourhood model that uses research to collect data and is interested in how practitioners can control and conduct research rather than engage co-operatively with people.

Furthermore, unlike the neighbourhood model, the critical integrative model emphasises a preventive approach in empowering a community, and allows for intervention before the situation deteriorates. The neighbourhood model is reactive in identifying strategies of community empowerment. The critical integrative model values proactive practice that seeks to prevent disadvantaged communities from becoming abandoned and further destitute. The preventive initiatives are required to be incorporated right from the start, so that they can be 'dovetailed with protection strategies' before a crisis point is reached.¹³⁶

Along with these approaches, the critical integrative model includes practical indicators in the method of good community empowerment. The critical integrative model focuses on small-scale, bottom-up, multi-strategy partnership approaches, which are more effective than large and top-down approaches. The processes of the critical integrative

¹³⁵ Gardner F 'Critical reflection in community-based evaluation' (2003) 2(2) *Qualitative Social Work* 197.

¹³⁶ Stepney P & Popple K (2008) 121.

model comprise six stages mainly derived from the ideas and work of several intellectuals – Vickery,¹³⁷ Smale, Tuson, Wardle and Crosbie,¹³⁸ and Mayo¹³⁹. The six stages are as follows: familiarisation and information gathering; engagement and assessment; organisation, planning and partnerships; intervention in collaboration with community members; the mobilising of team resources for empowerment; and research and evaluation.



¹³⁷ Vickery A *Organising a Patch System* (1983).

¹³⁸ Smale G et al *Community Social Work: A Paradigm for Change* (1988) 12-39.

¹³⁹ Mayo M 'Competing perspectives, definitions and approaches' in Mayo M & Annette J (eds) *Taking Part? Active Citizenship and Beyond* (2010) 26-29.

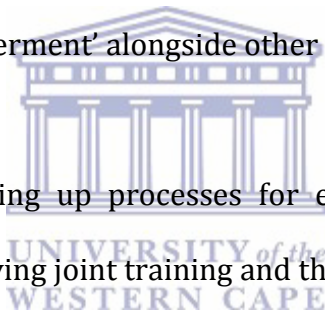
Table 3: Stepney and Popple’s Six-Stages for Community Empowerment

Phase	Aims	Opportunities
1. Familiarisation and information gathering	Initial contact Undertake a holistic assessment of needs and resources	Social audit of the community
2. Engage with key people to develop knowledge of community resources	Establish partnerships with community members, other professionals in the area Getting organised, forming groups	
3. Community planning alongside care planning and develop action plan	Contracting with the community	Aggregate data from care management
4. Develop integrative CSW models alongside other models of intervention.		
5. Effective teamwork and mentoring to provide individual support	Promote anti-oppressive strategies designed to empower the community	Joint training, utilising skills and expertise of the community Project development
6. Research and evaluation alongside monitoring and reviews	Getting feedback from the community members	Strategies for organisational change.

Source: Stepney P & Popple K (2008) 123.

The first stage involves activities in which the municipal practitioners make the initial contact with local people and collect information regarding the community. This stage is similar to the first stage in the neighbourhood model – ‘entering the neighbourhood’ and the fourth stage – ‘making contacts and bringing people together’. Based on the information gathered during the first stage, the municipal practitioners undertake a deeper and holistic assessment of the needs. After the second stage, the critical integrative model identifies a need for a social audit of the wider community to map out the full range of the needs of the community.

The third stage is to set up community plans based on the results of a social audit of the disadvantaged community. This entails working to clarify priority issues and develop action plans. While moving from the second stage to the third stage the critical integrative model requires the building of organisations and groups by forming partnerships with community members. This is included in the fifth stage of the neighbourhood model. In the process of moving from the third to the fourth stage, the critical integrative model includes the work of contracting with the community on how to conduct the project and provide opportunities for local people. After the connections to the community are made, the fourth stage is entered. This stage focuses on 'integrative community empowerment' alongside other methods of intervention.



The fifth stage is that of setting up processes for effective teamwork in order to implement an action plan involving joint training and through utilising community skills and resources. By creating effective teamwork and promoting anti-oppressive strategies, the critical integrative model leads to outcomes that empower the community. This is similar to the seventh stage of the neighbourhood model – 'keeping the organisation going' – in providing resources and people through teamwork. Anti-oppressive strategies are not included in the neighbourhood model. The final stage of the critical integrative model is to research and evaluate the practice of community empowerment by getting feedback from community members.

In the analysis of the stages it is apparent that the earlier stages seek to gather information about the people and the community by making contacts and setting up goals and plans. There is not much difference between the two models until the stage of

building organisational infrastructures. A distinct difference between the two models is that there are anti-oppressive strategies in the fifth stage of the critical integrative model. The neighbourhood model has two stages more than the critical integrative model, namely, helping to clarify goals and priorities (sixth stage); and dealing with friends and enemies (eighth stage). These two stages are activities that ought to be included in all the stages because the municipal practitioners may regard such activities as having to be checked and monitored throughout the process of empowering communities. The differences between the two models are set out in Table 4 below.



Table 4: Differences Between the Neighbourhood Model and the Critical Integrative Model

Features of the models	Neighbourhood Model	Critical Integrative Model
Stages in the model	<p>9 Stages</p> <ul style="list-style-type: none"> • Entering the neighbourhood • Getting to know the neighbourhood • Identifying needs, goals and roles • Making contacts and bringing people together • Forming and building organisations • Helping to clarify goals and priorities • Keeping the organisation going • Dealing with friends and enemies • Leaving and ending 	<p>6 Stages</p> <ul style="list-style-type: none"> • Familiarisation and information gathering • Engagement and assessment • Organisation, planning and partnerships • Intervention in collaboration with community members • Mobilising team resources for empowerment • Research and evaluation
Priority in community empowerment	Look at specific skills of the practitioners and technologies	Look at general approaches and directions based on community needs
Values of community empowerment	Technicist practice led by practitioners' capacity (<i>power to: boosting community members' self-development and building community organisation</i>)	Technicist and transformative practice led by workers with service users or other agencies (<i>power with: working in partnership</i>)
Scope of levels and contexts	Micro-scope focusing on the community level, ignoring the global context	Macro-scope (socio-economic approach) focusing on the community level including national and global contexts
Approach	Reactive approach for developing community-based self-help ignoring collective actions and community learning by critical pedagogy	Critical and proactive approach for community development by changing power structures
Evaluation of community empowerment	<ul style="list-style-type: none"> • Concerned with process as much as outcomes including performance and needs • Research controlled by practitioners who collect data 	<ul style="list-style-type: none"> • Concerned with process as much as outcomes including performance and needs • Action research with service users and marginalised groups.

	and evaluate programmes	
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Source: own 2015.

4.3.4 Strengths and weaknesses of the critical integrative model

The critical integrative model can be recognised as having extended the boundaries of the theory of community empowerment as it creates awareness of the significance of critical reflection and anti-oppressive practices within the community. There are, however, four main weaknesses in this model. The first weakness is related to the lack of detail in the various stages. For example, in the first stage of familiarisation, there is little discussion of the specific ways in which contacts and becoming acquainted with the residents of communities occur, whereas this aspect is specifically considered in the neighbourhood model. Ways of building organisational infrastructure are also not considered in the critical integrative model. As a result the critical integrative model is ignorant of the role that organisations can play in developing social capital. Social capital provides the foundation for building community capacity because it channels the energies and skills that the community members have developed from each other in a collaborative action. Without social capital, empowerment may not yield effective results. Accordingly, Man-Jae argues that the major weakness of the critical model is to assume that the anti-oppressive strategies developed in the process of community empowerment will produce the desired outcomes without developing social capital.¹⁴⁰

The second weakness relates to ignorance with regard to participation. Participation by the vulnerable community is key to its empowerment. The critical integrative model

¹⁴⁰ Man-Jae Y (2011) 97.

does not demonstrate any commitment to developing specific ways of building up community participation; it merely emphasises the need for participation and does not suggest mechanisms for promoting participation. Thirdly, the critical integrative model highlights the importance of partnership with community members and other stakeholders; but neglects the importance of supervision and monitoring of such partnerships. The critical integrative model does not include activities to develop the practitioners' expertise in supervision and monitoring.¹⁴¹ It is imperative to emphasise supervision and monitoring as a forum for reflection that allows the community members to reflect upon their experiences and emotions, and through critical reflection identify alternative responses.



The fourth weakness relates to inadequate articulation of 'transformative practice'. The critical integrative model lacks specific strategies to guide the 'negotiated process' for emancipatory change. This renders the transformational practice suggested in the critical integrative model too vague. Adams's, Dominelli's and Payne's definition of 'transformative practice' provides some assistance in developing the practice for emancipatory change.¹⁴² They assert that transformative practice involves activities that do not just move beyond the situation as it is now, but achieve change in social relations.¹⁴³ Transformative practice is creative and moves beyond both 'proceduralism', in which the practice is bound by the law and its procedures, and 'managerialism', where the practice is subjected to the priorities of, and held

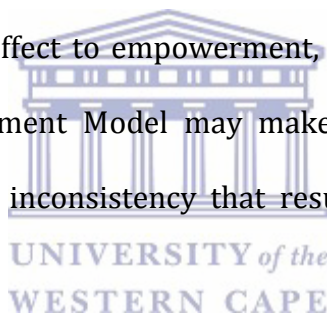
¹⁴¹ Adams R (2008) 99.

¹⁴² Adams R, Dominelli L & Payne M *Social Work Futures: Crossing Boundaries, Transforming Practice* (2005) 201.

¹⁴³ Adams R, Dominelli L & Payne M (2005) 211.

accountable by, managers and the organisation.¹⁴⁴ Furthermore, transformative practice is about community empowerment that enhances the capabilities of the poor for self-awareness, self-evaluation and self-actualisation.¹⁴⁵

Based on the analysis of the strengths and weaknesses of both community empowerment models the study will proceed to develop a transformative community empowerment model for ME by informal settlements. The Transformative Empowerment Model is meant to serve as a normative framework for ME and to ensure structured and coherent engagement during evictions. The development of the Transformative Empowerment Model will give substantive content to ME by suggesting practical mechanisms to give effect to empowerment, participation and social capital. The Transformative Empowerment Model may make a substantive contribution to addressing the jurisprudential inconsistency that results in the weak application of section 26(3) rights.



4.4 Developing a Transformative Empowerment Model

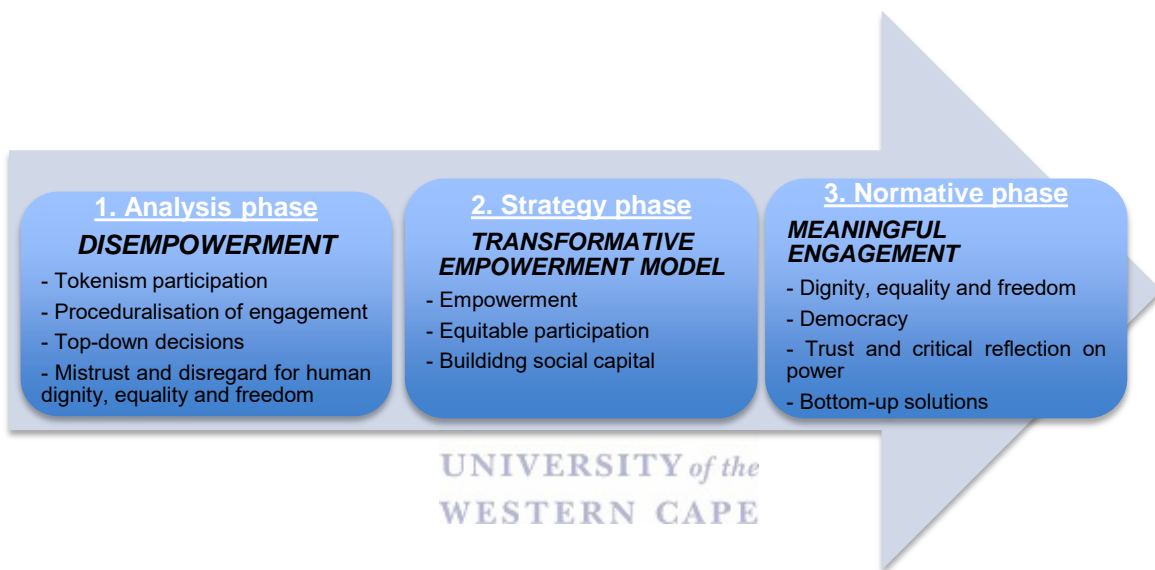
In eviction cases the unequal power relations were not subtle as most eviction cases are characterised by abuse of state power, a reluctant commitment to engagement, tokenism, and confusion among the unlawful occupiers. To transform such a situation, a model that is egalitarian and anti-oppressive must guide the engagement between the unlawful occupiers and the state. This study develops a Transformative Empowerment Model to facilitate the transition from top-down and tokenism engagement during

¹⁴⁴ Adams R, Dominelli L & Payne M (2005) 225.

¹⁴⁵ Adams R, Dominelli L & Payne M (2005) 226.

evictions to ME between the unlawful occupiers and the state. The use of the term 'transformative' is influenced by Muller's assertion that ME will 'transform the way in which government approaches housing development'.¹⁴⁶ The location of the Transformative Empowerment Model in the entire continuum of the process of change is illustrated in Diagram 5 below.

Diagram 5: The Three Component Phases for a Change Process



Source: Duvenhage (2014) 9.

Diagram 5 illustrates the three component phases of a transformative process as suggested by Duvenhage.¹⁴⁷ The aim of Diagram 5 is to locate the Transformative Empowerment Model within the three crucial and interacting phases of a change process. The first is the analysis phase that focuses on the status quo of *disempowerment* of the unlawful occupiers and seeks to answer questions, such as: where do we come

¹⁴⁶ Muller G (2011b) 757.

¹⁴⁷ Duvenhage A *The Transformation of Political Institution in Times of Change: An Analysis of Huntington's Thinking* (2014) 9.

from? Where are we today? and what is the distribution of power? and what kind of engagement takes place with regard to evictions? The third is the normative phase, which encapsulates the desired outcomes of the transformative process and the vision for the future. *Meaningful engagement* is a transformative vision, which is grounded in the Constitution, PIE and international norms. The second is the strategy phase that is aimed at addressing the question of how to get to the desired outcomes of ME and what kind of interventions are necessary to get to the desired outcomes. This study conceptualises the Transformative Empowerment Model as a strategic intervention to achieve ME.

As illustrated in Diagram 5, the Transformative Empowerment Model seeks to transform the current form of disempowering engagement during evictions, which is characterised by tokenism, non-participation, indiscrete abuse of power, exclusion and top-down decision-making. The desired outcome of the Transformative Empowerment Model is Plummer and Taylor's 'decision-making participation' that is based on bottom-up solutions, human rights, trust, critical reflection on power relations, and collective action by the unlawful occupiers.¹⁴⁸ The normative outcomes highlighted in phase three of the diagram are focused on empowerment of the occupiers as the engagement process is transformed from 'closed or invited spaces' to a 'claimed space' for self-determination by the unlawful occupiers to develop their own solutions to the eviction problems.¹⁴⁹

¹⁴⁸ Plummer J & Taylor J (2004) 151.

¹⁴⁹ Brock K, Cornwall A & Gaventa J (2001) 127.

In developing the Transformative Empowerment Model the study draws on the strengths of the neighbourhood and critical integrative models. However, neither of these models adequately articulates equalisation of power relations. To address this weakness the study draws on the work of the following experts: Adams et al's model of the reflectiveness cycle including critical reflection and critical practice;¹⁵⁰ Dominelli's inclusive research model that emphasises the power map and community participation in community profiling;¹⁵¹ Alinsky's organisational principle of collective action to change oppressive structures;¹⁵² and Dominelli's feminist organisational principle stressing egalitarian relationships among members when building and managing an organisation;¹⁵³ Freire's and Gramsci's ideas to criticise power domination in a community; and Craig's evaluation model on community empowerment focusing on the change of power differences.¹⁵⁴



Also crucial to the Transformative Empowerment Model is the development of specific strategies to improve participation and building of social capital. However, both the neighbourhood and critical integrative models scantily mention these aspects in their stages of practice. To address this weakness the study introduces some other ideas, such as: Engestrom's on reflective practice at community level;¹⁵⁵ Lowndes et al's and Adams's for improving participation;¹⁵⁶ and Dominelli's on multi-dimensionality of contexts to understand community empowerment at both the individual and group

¹⁵⁰Adams R, Dominelli L & Payne M (2005) 167.

¹⁵¹Dominelli L (2005) 232.

¹⁵²Alinsky S (1971) 51.

¹⁵³ Dominelli L (2004) 73-88.

¹⁵⁴ Craig G (2007) 351.

¹⁵⁵Engestrom Y (1992) 154.

¹⁵⁶ Lowndes V, Prachett L & Stoker G (2006) 288. See also Adams R (2008) 88-97.

levels and the emphasis on the importance of linking social capital with community empowerment.¹⁵⁷

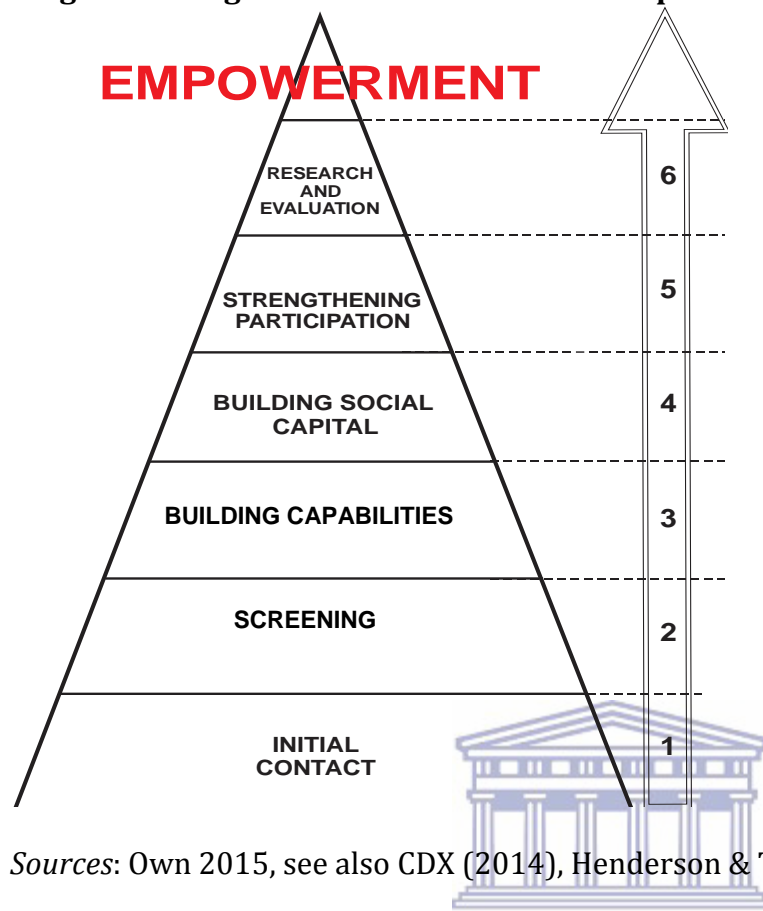
The proposed Transformative Empowerment Model is composed of a six-stage process as illustrated in Diagram 6. The six stages are overlapping and do not follow in a rigid sequential order. For example, the first stage is making contact with the unlawful occupiers, and this stage may continue up to the final stage. This suggests that the proposed model is flexible and context sensitive. The Transformative Empowerment Model is constructed in terms of practical steps that are regarded as the main tasks that should guide ME through the promotion of community empowerment during evictions.

The six stages are *initial contact, screening, building capabilities, building social capital, strengthening participation, and research and evaluation.*



¹⁵⁷ Dominelli L (2004) 63.

Diagram 6: Stages in the Transformative Empowerment Model

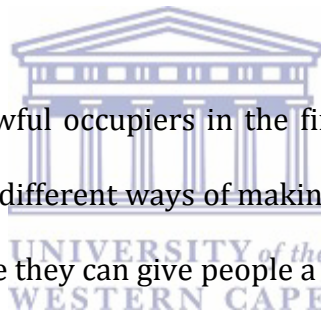


Sources: Own 2015, see also CDX (2014), Henderson & Thomas (2002), Stepney & Pople (2008), Gilchrist (2014), Man-Jae (2011), Stepney & Evans (2008).

The first stage

The *first stage*, the *initial contact*, includes orientation of the municipal practitioners in order for them to acquire the information, knowledge and skills needed for effective community engagement. This stage takes place before and after entering the informal settlement. It is important to note that Yacoob J held that human dignity required proactive engagement with the occupiers as soon as the municipality became aware of the occupation. The activities for this stage will include developing skills, and making formal and informal contacts. The primary outcomes for this stage are familiarisation with the community and developing the relevant community engagement skills for the municipal practitioners. According to Karvinen-Niinikoski, after an initial orientation, the practitioners need to continue to acquire

education to develop expertise through practice, and to be able to undertake alternative options through critical reflection.¹⁵⁸ For Adams et al. the process of becoming a critical practitioner is related to 'reflectiveness thinking' in which 'experiences and actions affect thinking, which changes subsequent actions and thinking'.¹⁵⁹ Critical reflexivity can be a tool that leads to transformative initiatives as a way of coping with multiple aspects of any situation that the practitioners deal with in informal settlements. It is valued in a Transformative Empowerment Model because it is integral to the way in which practitioners tackle the consequences of oppression and contradiction in a practical way, even though it cannot address all things effectively.



Making contacts with the unlawful occupiers in the first stage is a way to become familiar with the community. There are different ways of making contact with people, and small-scale activities are significant because they can give people a feeling of trust by giving them specific tasks to execute. According to Gilchrist, informal contacts are as important as formal ones in empowering communities.¹⁶⁰ Small-scale activities for making initial contacts are easier to implement and tend to be more acceptable to people in situations of vulnerability.

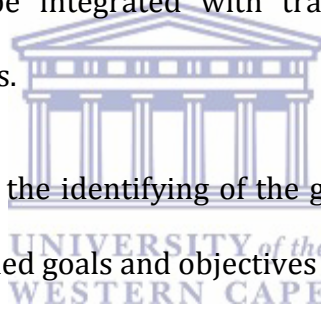
¹⁵⁸ Karvinen-Niinikoski S 'Social work supervision: contributing to innovative knowledge production and open expertise' in Gould N & Baldwin W (eds) *Social Work, Critical Reflection and the Learning Organisation* (2004) 23.

¹⁵⁹ Adams R, Dominelli L & Payne M (2005) 9.

¹⁶⁰ Gilchrist A (2014) 121-123.

The second stage

The *second stage, screening the community*, requires the municipal practitioners to develop the goals and objectives of the project, identifying issues and concerns that are important to the community, by brainstorming. The brainstorming takes place on the basis of preliminary information gathered during the first stage. The goals and objectives are examined in the context of the community's challenges and opportunities for community empowerment. During the *screening stage* significant community issues and problems should be highlighted. The primary outcomes for this stage are to examine all the political, social and economic dimensions of the informal settlement, and through brainstorming the identify community values and issues that can be integrated with transformative strategies to formulate preliminary goals and objectives.



The process does not end with the identifying of the goals and objectives, but also involves phasing and ranking the identified goals and objectives in an order of priority. This ranking of the goals and objectives should be primarily informed by the specific circumstances of the informal settlement. This practice corresponds to the third stage of Henderson and Thomas' model, namely, identifying the needs and goals. Furthermore, in a proactive way possible problems that might have a direct or indirect impact on the process of community empowerment are identified during this stage. The identified problems must also be categorised as requiring immediate, intermediate or long-term responses based on the extent of their impact on the attainment of the preliminary goals and objectives.

Identifying and setting out the values that underpin the collective action is important in practising community empowerment because these have an influence on people's conduct

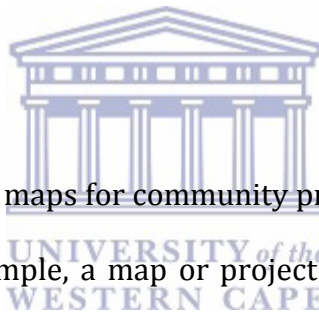
and attitudes. Community values are also crucial to the development of a Transformative Empowerment Model that is inclined towards egalitarian practice based on an emancipatory approach. According to Dominelli an emancipatory approach is predicated on values that promote social justice, equal citizenship, interdependency, solidarity, differences, and commonalities.¹⁶¹ The identified values of the community will also determine the approach for embarking on the third stage, particularly the strategy for community profiling.

The third stage

In the *third stage, building capabilities*, community profiling is carried out and the state together with the unlawful occupiers develop an action plan. The plan should be announced to all community residents. The primary activity for this stage is conducting inclusive community profiling with the unlawful occupiers to enable them to have a thorough understanding of their socio-economic and political environment. Local knowledge will be used for data collection, dissemination and use. The outcomes of this stage are data-sharing, establishment of a planning mechanism with the people, and initiation of programmes for group learning. This is similar to Henderson and Thomas's second stage of getting to know the neighbourhood. The Transformative Empowerment Model's approach differs from theirs in the ways in which municipal practitioners collect, share, and use information with local people. The Transformative Empowerment Model's approach to research is empowering as it places a high premium on the local knowledge in the collection of data, involving residents in the dissemination and use of the data collected.

¹⁶¹ Dominelli L (2004) 107.

In this stage, the findings of the research are utilised to improve the capabilities of the informal settlement, and there is an introduction of initiatives to strengthen the capacity of the occupiers for critical reflection on power dynamics. These transformative aspects are found in the work of Gardner (2003), Dominelli (2005) and Adams (2008). Somerville argues that this should include the views of the excluded to enable the practitioners to build bridges between different groups in the community.¹⁶² Burns et al suggest four kinds of activities to build capabilities. These are: enabling social interactions, like public meetings; supporting the institutional structure of communities through involvement in campaigns; expressing and promoting common values and norms, like caring for the environment; and improving the people's sense of safety, pride and belonging.¹⁶³



Dominelli suggests five types of maps for community profiling that can be presented in paper or audio-visual format, for example, a map or project website.¹⁶⁴ These are descriptions of the political parties and organisations involved in communities, as well as of the social and informational networks between people. The types of maps made by community members can describe these items.¹⁶⁵ These maps include 'neighbourhood maps' that identify: important social aspects of the informal settlement; the potential problems or concerns; and the influential people in the area and the kind of support/threat that might come from them. There are 'issues maps' that identify the problems that community members want to see addressed. A third type is 'resource maps' which indicate: the physical resources within an area; the specialist knowledge and skills of the unlawful occupiers; and the capacity of the

¹⁶² Somerville P *Understanding Community: Politics, Policy and Practice* (2011) 89-94.

¹⁶³ Burns D et al. (2001) 85-86.

¹⁶⁴ Dominelli L (2006) 132-144.

¹⁶⁵ Beck D & Purcell R (2010) 108-112.

community organisations. Finally there are 'power maps' that are used to determine: who holds power over the use of resources; ownership of land; or the informal power relationships within the community.

The fourth stage

The *fourth stage, building social capital*, is achieved through the establishment and strengthening of community organisation to address the problems of communities. The rationale for building and strengthening community organisation is to create political consciousness and a platform for solidarity to harness collective power for transformative practice.¹⁶⁶ The primary outcome for this stage is the building and strengthening of community organisation with bridging social capital. In this regard, the principles of Alinsky and Dominelli are very similar in that they emphasise: the participation of as many people as possible; the creation of egalitarian relationships among community members; and the creation of community organisations that serve as a platform for consciousness raising and collective action. The only difference between their principles is that Dominelli specifically emphasises the creation of opportunities for the participation of the most vulnerable groups in society due to concerns about the exclusion and invisibility of such groups, like women.

According to Taylor, community organisations play a significant role as 'social infrastructures' in which people's private concerns can become public.¹⁶⁷ Dominelli concurs with Taylor's view and asserts that people can develop the courage and skill to speak out in

¹⁶⁶ Alinsky S (1971) 53-87.

¹⁶⁷ Taylor R (2006) 123-131.

their own right or voice, to tackle issues, to overcome fears of participation, and to negotiate and interact with others.¹⁶⁸ Dominelli further alludes thereto that through community organisations people become competent enough to defend their interests and to build bridges across differences and promote a broader alliance for social change.¹⁶⁹ Fook amplifies Dominelli's argument and asserts that people gain the capacity to be able to embark on 'a process of empowerment that results in effective engagement'.¹⁷⁰

The *fourth stage* also focuses on the creation of community organisations by fostering trust between the unlawful occupiers and the state. An organisation needs to be effectively developed as a community resource which operates not only to achieve the functions noted above, but also to facilitate bottom-up solutions and decision-making through strengthening community learning, extending networking, and improving the quality and quantity of participation, which includes the key activities of the *fifth stage*.

This stage also includes fostering community organisations, which are created to build bridging social capital across the informal settlement. At this stage, the potential of education to act as a springboard for engagement should not be underestimated. Accordingly, various educational programmes will be needed to develop skills and impart information that helps with building the self-confidence of the unlawful occupiers. Conducting Freireian educational programmes of conscientisation by dialogue, de-individualisation, and critical thinking are

¹⁶⁸ Dominelli L (2006) 211-215.

¹⁶⁹ Dominelli L (2006) 216.

¹⁷⁰ Fook J (2002) 123.

important factors. This approach will ensure a better understanding of community issues and lead to the development of appropriate programmes and responses to empower the occupiers to become active citizens.¹⁷¹ Thus, the fourth stage is creating social capital by fostering effective organisation and mobilisation of the unlawful occupiers, and implementing programmes that are needed to increase their capacity. The social capital, in turn, acts as a springboard that lifts action from the fourth stage into the fifth.

The fifth stage

The *fifth stage, strengthening participation*, has as its main activities of this stage are the implementation of inclusive networking and critical community learning. The outcomes of this stage are interactive and equitable participation of the informal settlements and the promotion of bottom-up and collective decision-making with the state. In this stage campaigns and networking are crucial vehicles for community action and to enable people to obtain and protect their socio-economic rights. Campaigns are used in this stage to mobilise people to set an agenda that challenges social problems, and to develop the confidence and skills of the unlawful occupiers to participate in collective action.¹⁷² The activation of networks requires people to engage at several levels, from the informal to the formal.

According to Gilchrist, finding a balance between informal and formal networks is important in empowering communities for equitable participation.¹⁷³ This ensures that information that flows in and out of networks offers an opportunity to informally follow

¹⁷¹ Freire P (1971) 1-18.

¹⁷² Dominelli L (2006) 132-156.

¹⁷³ Gilchrist A (2014) 67.

up on discussions and decisions with the participants so as to hold them accountable to the wider community. Networking should extend the horizons of trust from a narrow focus that builds bonding social capital to a broader focus that creates bridging social capital between informal settlements and the state, and also to establish progressive forms of coalition across the community. Gilchrist suggests that this would require 'good meta-networking', which is the capacity to communicate across a range of different cultures; initiating interpersonal connections; monitoring relevant networks; encouraging participation in networks; and ensuring inclusive and sustainable networking by developing appropriate structures and procedures.¹⁷⁴ At the informal settlement level, it also requires bottom-up activities initiated and directed by unlawful occupiers and their organisations to build alliances to resist and change oppressive structures and relations.



The sixth stage

The *sixth stage* is the phase in which the municipal practitioners and the community carry out *research and evaluation* that monitor activities for community empowerment and assess the outcomes of such interventions on the engagement process. The primary activities would encompass discussion of outcomes and reflecting on challenges to be addressed. The main outcomes will be the identification and development of appropriate strategies that promote community empowerment for increased participation. Evaluation in the Transformative Empowerment Model follows Craig's model of evaluation and conceptual framework.¹⁷⁵ Craig's model is useful because it contains principles that can be adapted for the Transformative

¹⁷⁴ Gilchrist A (2014) 123.

¹⁷⁵ Craig G (2007) 341.

Empowerment Model. It prominently announces the importance of community development through achieving the goals of individual and collective empowerment. Craig identifies two goals of empowerment: first, is to challenge the unequal distribution of power; and secondly, to ensure equitable participation in the process of empowerment and community engagement.¹⁷⁶

Based on Craig's idea, during the *sixth stage* an appraisal will be made to establish whether the processes embarked on and mechanisms used during the five preceding stages enable the unlawful occupiers to challenge the hierarchy in the engagement process to ensure that their circumstances are adequately taken into consideration. This will entail a critical appraisal of the form of the participation by the unlawful occupiers, and whether appropriate platforms and community organisations are formed that encourage increased participation and critical engagement with the problems of the unlawful occupiers.



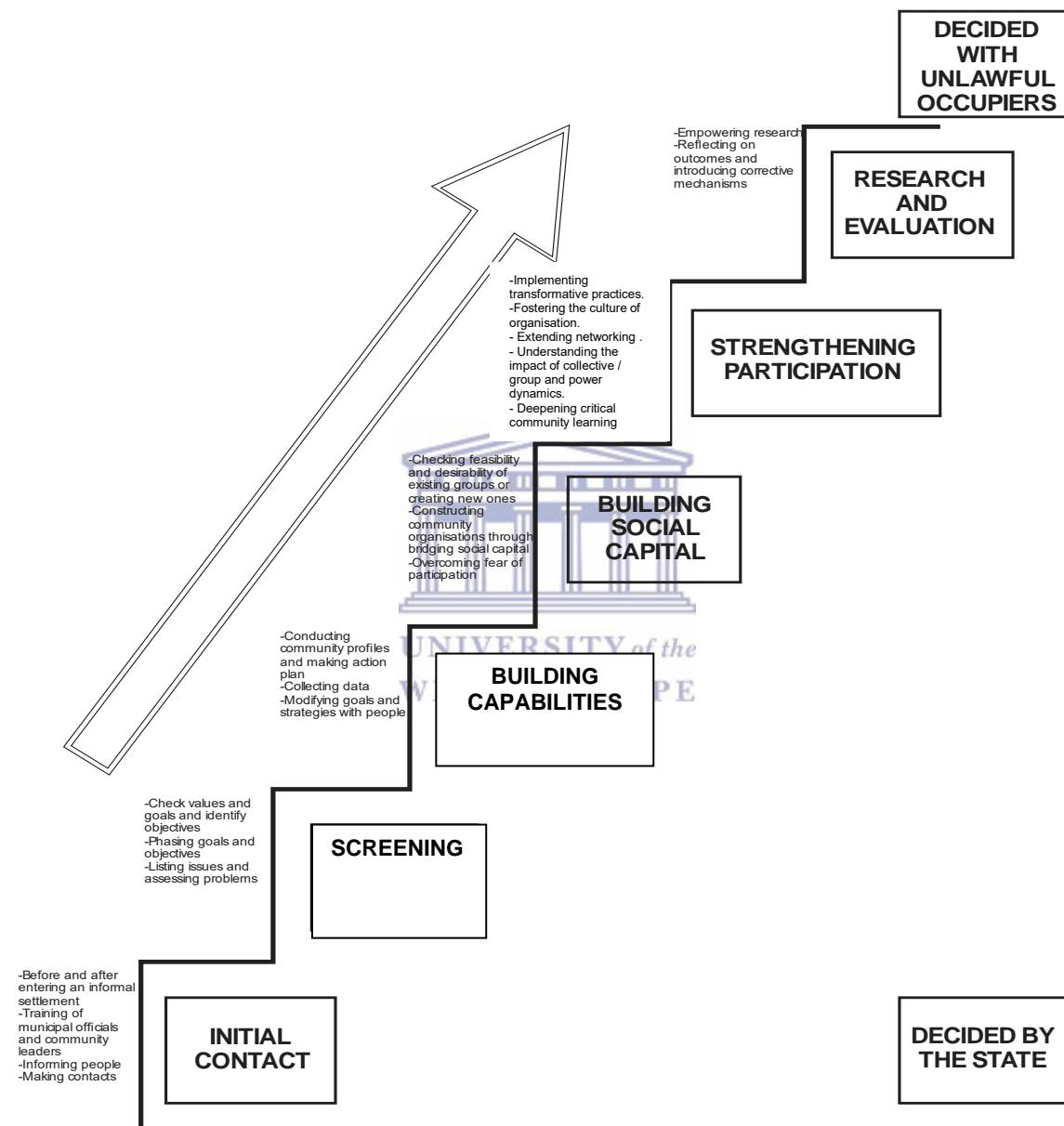
In the Transformative Empowerment Model there are four interrelated objectives to be evaluated. First, to evaluate how participation is implemented at all stages. Secondly, it is to develop qualitative indicators for community empowerment and the development of mechanisms for utilisation of the indicators. Thirdly to evaluate the process and outcomes, while at the same time being open to the possibility of having to change and adapt methodologies to changed circumstances. This is in line with the earlier assertion that the empowerment model is context sensitive. The fourth objective is to devise measures to strengthen the sustainability of participation through collective action so as to ensure that the informal settlements can engage in continuous activities and acquire

¹⁷⁶ Craig G (2007) 344.

the capacity to control their lives by being conscious of the importance of transforming the power disparities.

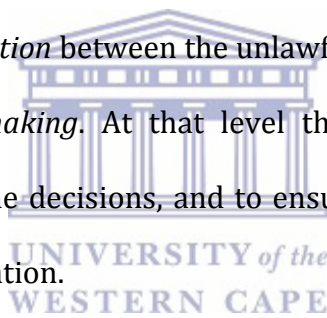


Diagram 7: Stages and Key Activities in the Transformative Empowerment Model



Sources: CDX (2014), Henderson & Thomas (2002), Stepney & Popple (2008), Gilchrist (2014), Man-Jae (2011), Stepney & Evans (2002), Craig (2007), Taylor (2003), Dominelli (2002, 2004, 2005, 2012), Karvinen-Niinikoski (2004), Lowndes et al (2006).

The lowest stage of Diagram 7 'decided by the state' illustrates participation and decision-making that is most undesirable for ME. At this stage, the state takes all the decisions with little or no regard to the circumstances of the unlawful occupiers. The upward arrow represents the progress towards attaining the highest stage, 'decided with the unlawful occupiers'. 'Decided with the unlawful occupiers' illustrates the most desirable form of engagement and gives practical expression to the CLEAR model and the five dimensions of community empowerment, as the unlawful occupiers have the *confidence* to participate in the engagement process, there is *inclusiveness* through individual engagement and collective action, the unlawful occupiers are *effectively organised*, and there is *co-operation* between the unlawful occupiers and the state which results in *collective decision-making*. At that level the unlawful occupiers are in a position to directly *influence* the decisions, and to ensure that their circumstances are adequately taken into consideration.



One of the key tasks in the *fourth stage* of the Transformative Empowerment Model is to build community organisations through bridging social capital. The building of community organisations is crucial to the Transformative Empowerment Model, as organisations serve as a common platform for deliberative engagements, shared values, and collective action for the attainment of social change. In the same vein, the Model places an emphasis on the empowering of community organisations as instruments for social change and as mechanisms to challenge structures that seek to maintain the disparity of power between the occupiers and the state.

4.5 Conclusion

The key concepts of empowerment, participation, and social capital are useful in analysing and explaining the jurisprudential inconsistency in the application of ME by the ConCourt. This is not unexpected considering the fact that the socio-economic rights jurisprudence in South Africa is still in its formative stage of development. While this study describes the concepts separately, the interrelation and interaction between the concepts is highlighted. The three concepts are so closely related that in some eviction cases Justices used them interchangeably, thereby weakening their significance.

The study accepts the CDX definition of community empowerment and argues that to achieve ME the empowerment process should be aimed at achieving five dimensions – confidence, inclusiveness, organised, co-operative, and influential. For participation to result in ME the study argues that it should be interactive and deliberative, and should also encompass critical reflection by the unlawful occupiers, as opposed to tokenism and placation. Two types of social capital are highlighted and the study argues that bridging social capital is most appropriate for ME by people in informal settlements, as it seeks to build a social bond across social differences.

To construct the Transformative Empowerment Model the study employed two community empowerment models, and modified them to suit the transformative imperative for ME. The first model that the study examines is Henderson and Thomas's neighbourhood model, which offers practical skills and knowledge on how to carry out community empowerment for effective engagement taking into consideration local challenges. The other is Stepney and Pople's critical integrative model, which includes

a combination of both technicist and transformative approaches to challenge and change the unequal distribution of power in social engagements. The development of the Transformative Empowerment Model was not limited to the two models as both models have weaknesses that could not be adequately addressed by the strengths in each one. To meet this deficiency the study reinforces the theoretical framework of the Transformative Empowerment Model with relevant ideas on community empowerment from other scholars.

The study develops a six-stage Transformative Empowerment Model for ME by the unlawful occupiers in informal settlements. The six stages are interrelated and not rigidly sequential. Within the Transformative Empowerment Model the study proposes practical mechanisms as a baseline to evaluate ME. Central to the six stages in the model is empowerment of the unlawful occupiers, ensuring interactive and deliberative participation of unlawful occupiers and the building of social capital.

The Transformative Empowerment Model is developed to serve as a normative framework for ME. The framework will guide or direct the conduct of the state when development projects are contemplated that might possibly result in the evictions from informal settlements. Accordingly, the framework will also strengthen the application and enforcement of the section 26(3) right as it provides practical mechanisms to be considered by the courts in determining whether ME, as a requirement of human dignity, equality, freedom and democracy, did take place. Chapter five will assess the implications of the Transformative Empowerment Model for the application of ME by the ConCourt from 2008 to 2014. Chapter six of the study will consider the extent to which the Transformative Empowerment Model promotes the rights to human dignity,

equality and freedom; and accordingly, chapter seven will evaluate the extent to which the model promotes and advances democracy.

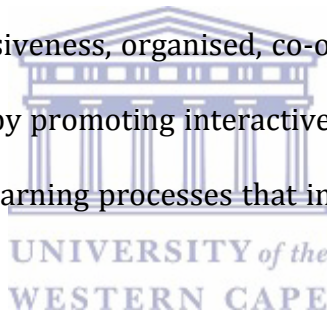


CHAPTER 5

THE TRANSFORMATIVE EMPOWERMENT MODEL AND EVICTION CASE LAW

5.1 Introduction

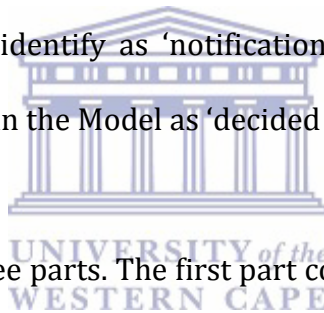
In chapter 4 the study developed a Transformative Empowerment Model based on the three substantive requirements for ME: empowerment, participation and building social capital. The development of the Transformative Empowerment Model seeks to fill the gap in the conceptualisation and application of ME by the ConCourt. To attain ME the Model proposes the introduction of practical mechanisms to achieve the five dimensions – confidence, inclusiveness, organised, co-operation and influence. The five dimensions could be achieved by promoting interactive participation, building bridging social capital, and systematic learning processes that involve the occupiers in decision-making.



Through an in-depth analysis of case law, this chapter seeks to explore the implications of the conceptualisation and application of ME by the ConCourt in relation to the Transformative Empowerment Model. The chapter does this by establishing two categories of eviction judgments. The first category consists of a collection of eviction judgments where the conceptualisation and application of ME was closely related to the objectives of the Transformative Empowerment Model. This represents the most desirable application (progressive) of ME through which the ConCourt enhanced the protection under section 26(3) of the Constitution. This form of application of ME empowered the occupiers and enabled interactive participation, which resulted in collective decision making. This is closely related to what Arnstein calls ‘citizen power’

or what Plummer and Taylor define as 'self management'.¹ This is on the same level as what is classified in the Model as 'decided with the occupiers'.

The second category consists of a collection of eviction judgments where the conceptualisation and application of ME was at variance with the objectives of the Transformative Empowerment Model. This represents the undesirable application (regressive) of ME by the ConCourt as it subjected the unlawful occupiers to disempowering forms of participation. In these conditions the vulnerable people lacked the power to ensure that their views were heeded. This form of application of ME was closely related to what Arnstein categorises as 'manipulation or therapy participation' or what Plummer and Taylor identify as 'notification or attendance'.² This is on the same level as what is classified in the Model as 'decided by the state'.



This chapter is divided into three parts. The first part covers the early application of ME by the ConCourt, which is the period from *Grootboom* to *Residents of Joe Slovo*. The second part covers the application of ME by the ConCourt in the post-*Residents of Joe Slovo* period. The last part presents a comparative evaluation of the application of ME by the ConCourt in relation to the Transformative Empowerment Model.

¹ Arnstein S (1969) 216. See also Plummer J & Taylor J (2004) 44.

² Arnstein S (1969) 216. See also Plummer J & Taylor J (2004) 44.

5.2 The early application of ME by the ConCourt

The evolution and development of eviction jurisprudence takes place through the interpretation and application by the courts of the Constitution, relevant legislation and international norms. The focus of this study is on ME as it was developed and conceptualised in *Occupiers of 51 Olivia Road* in 2008. To give a full account of ME this study also reflects on *Grootboom* and *PE Municipality*.

Grootboom was the first eviction case to be adjudicated by the then newly established ConCourt. *PE Municipality* was the first case to be adjudicated by the ConCourt after the coming into force of PIE in 1998. The two cases, which preceded *Occupiers of 51 Olivia Road*, were central to the moulding and construction of the eviction jurisprudence of the ConCourt. To lay the basis for an in-depth examination of ME the study will first briefly examine these two eviction cases as they served as the basis for the doctrinal choices made by the ConCourt.

5.2.1 *Grootboom*: first indication of the need to engage

Grootboom concerned a group of some 900 adults and children who had been living in squalid conditions and decided to illegally move onto private land on which they erected a rudimentary camp. They were evicted and left homeless during the rainy winter season in Cape Town. Their homes were bulldozed and burnt and their possessions destroyed. Many of the occupiers were not present at the time and could not salvage their personal belongings. The occupiers demanded that the government

provide them with adequate basic shelter or housing until they obtained permanent accommodation.

In its judgment the ConCourt rejected the rationality test used in *Soobramoney* and adopted a reasonableness review standard. The ConCourt held that the reasonableness of state action must be determined on the facts of each case. This enabled the ConCourt to interrogate a functional decision of the Executive by using a higher level of scrutiny. In its judgment the ConCourt held that the government housing programme was deficient, as it did not provide temporary relief for those in desperate need. The ConCourt expressed approval of the various aspects of the government's housing programme but dismissed as unreasonable the government decision to focus on medium and long-term housing aims at the expense of those people living in desperate conditions.



Although arguably self-consciously limited in scope and ambition, the ConCourt in *Grootboom* laid a solid foundation for a new order in the eviction jurisprudence in two respects. First, the ConCourt adopted reasonableness review as its doctrinal stance in the adjudication of socio-economic rights, and it rejected the argument for minimum core approach advanced by *amici curiae*. Consequently, the ConCourt held that the failure of the state to respond with care and concern to the needs of the most desperate rendered its conduct unreasonable as it 'lacked both comprehensiveness and flexibility'.³ Secondly, referring to section 26(3) of the Constitution, which requires '... considering all relevant circumstances' and the applicable international norms, the

³ *Grootboom* para 88

ConCourt observed that no effective engagement took place before the eviction and when the eviction was executed.⁴

As a result of the lack of effective engagement the eviction was executed a day earlier than ordered by the High Court, and the possessions of the occupiers were not only removed, but also destroyed and burnt. The ConCourt held that this was 'reminiscent of the apartheid style evictions and inconsistent with the Constitution'.⁵ The ConCourt accepted that rights are interrelated and are all equally important, and that this proposition has immense and practical significance in a society founded on human dignity, equality and freedom.⁶ The Court further held that if state action concerning housing is determined without regard to the rights to dignity and equality, the Constitution will 'be worth infinitely less than its paper'.⁷ After considering the international norms and protocols the ConCourt expressed its discomfort at the lack of engagement with the occupiers by municipal officials responsible for housing.⁸ The ConCourt underscored the importance of engagement by holding that such engagement is part of reasonable state action.⁹

The adoption by the ConCourt of the reasonableness review approach and its rejection of the minimum core approach attracted considerable criticism. Bilchitz argues that the reasonableness approach to socio-economic rights is conceptually flawed, as it is impossible to know whether a particular set of legislative and other measures holds out

⁴ *Grootboom* para 88.

⁵ *Grootboom* paras 88-89.

⁶ *Grootboom* para 83.

⁷ *Grootboom* para 83.

⁸ *Grootboom* para 17.

⁹ *Grootboom* para 17.

a possibility of realising a right without knowing what the content of the right is.¹⁰ Sunstein argues that the adoption of the minimum core approach by the ConCourt would have forced a fundamental re-orientation of the housing programme to the benefit of the poor and homeless.¹¹

The latest severe critique of *Grootboom* comes from Woolman.¹² He argues that the case represents a classic instance of judicial deference in the face of extraordinarily difficult institutional reform.¹³ According to Woolman the ConCourt made it clear that it could not in good faith have commended the government policy to address the housing problem as adequate under the circumstances. At the same time, the ConCourt was worried about its ability to intervene effectively in the legislative or administrative process for housing delivery. It therefore left the structure of the remedy almost entirely to government's discretion.¹⁴ Woolman points out that the ConCourt's concern about its institutional competence was entirely legitimate; however, that concern should not have dictated judicial deference. The difficulty with structural reform could be addressed through institutional mechanisms, such as, court-guided negotiations between stakeholders, to create what he terms a 'participatory bubble'.¹⁵

On the other hand, a significant number of scholars have defended the doctrinal choice made by the ConCourt. Lehmann commended the innovation by the ConCourt to adopt the reasonableness approach, as the minimum core obligation may tempt the courts to

¹⁰ Bilchitz D (2007) 76.

¹¹ Sunstein CR (2001) 161.

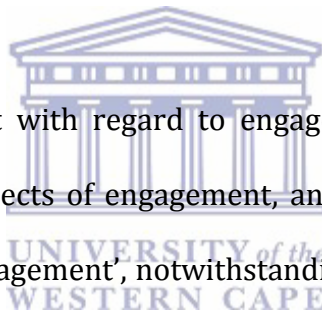
¹² Woolman S (2013) 315.

¹³ Woolman S (2013) 320.

¹⁴ Woolman S (2013) 320.

¹⁵ Woolman S (2013) 320.

usurp government policy-making functions.¹⁶ Roux argues that the reasonableness review standard as adopted in *Grootboom* was not entirely useless, as its distinct advantage is that it is grounded in the Constitution and is flexible and context sensitive.¹⁷ According to Roux, both the characterisation of the vulnerable group and the sorts of issues considered by the ConCourt in *Grootboom* are unique and needed context sensitive consideration.¹⁸ He argues that reasonableness review coupled with a structural injunction was the most suitable approach. Woolman shares the views of Roux and contends that an honest appraisal of *Grootboom* must acknowledge that the ConCourt issued a detailed order that highlighted the need for engagement and set out the facilities that ought to be provided to the Grootboom residents.¹⁹



The approach of the ConCourt with regard to engagement in *Grootboom* was more focused on the substantive aspects of engagement, and as a result the ConCourt held that there was no 'effective engagement', notwithstanding the fact that the municipality could produce evidence and records of eviction notices and several meetings with the community. The ConCourt appreciated the fact that effective engagement involves much more than mere community meetings to report back to the community. To ensure effective engagement, the ConCourt issued an order that enhanced the supervisory and monitoring role of the South African Human Rights Commission (SAHRC) over the engagement process. In addition, the ConCourt made direct reference to the need to empower the occupiers to engage effectively.

¹⁶ Lehmann K (2006) 320-324.

¹⁷ Roux T (2013) 164.

¹⁸ Roux T (2013) 292. See also Liebenberg S (2010).

¹⁹ Woolman S (2013) 321.

The application by the ConCourt of effective engagement in *Grootboom* was closely related to the objectives of the Transformative Empowerment Model as the ConCourt appreciated that effective engagement involves much more than the mere formal ritual of holding meetings with the occupiers and issuing of formal eviction notices. This approach resulted in an enhancement of the protection accorded to the unlawful occupiers under section 26(3) of the Constitution as the eviction order was set aside. However, the failure by the SAHRC to effectively monitor the implementation of the Court order rendered the *Grootboom* judgment a mere fantasy that never improved the conditions of the Grootboom community.

5.2.2 *PE Municipality*: emphasis on the need for engagement

The ConCourt's first real engagement with PIE was in *PE Municipality*. In this matter the High Court granted an eviction order for a group of 68 people, including 29 children, from privately owned land in Port Elizabeth. The municipality had sought the eviction after receiving a petition from 1600 residents of a neighbouring formal settlement and the owner of the occupied land. The municipality made alternative land in the nearby Walmer Township available to the occupiers. However, the occupiers refused to move because there was no guarantee that they would be given some measure of tenure of the alternative land. Based on this, the SCA set aside the eviction order, finding that the occupiers, many of whom had been evicted before, were entitled to expect that they would not be evicted again if they relocated to Walmer.

The municipality then applied for leave to appeal to the ConCourt, seeking a ruling that it was not required to provide alternative accommodation as a matter of course when

evicting unlawful occupiers. The basis of the application was somewhat strange, since, on the municipality's version, it had offered alternative accommodation. In a wide-ranging and sensitive judgment, Sachs J reflected on the way in which the apartheid legal order, particularly through PISA, deliberately sought to make evictions as easy as possible by weakening the position of the occupiers. He then characterised section 26(3) of the Constitution and PIE as an inversion of apartheid laws by requiring unlawful occupiers to be treated with 'dignity and respect' and not as 'obnoxious social nuisances'.²⁰

The significance of *PE Municipality* was in its fusion of three primary drivers, namely, justice and equity under PIE, transformative constitutionalism and the constitutional requirement of reasonableness as set out in *Grootboom*. According to Sachs J:

'Procedural and substantive aspects of justice and equity cannot always be separated ... one potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a proactive and honest endeavour to find mutually acceptable solutions'.²¹

He held that whenever possible, respectful face to face engagement should take place.²²

As in *Grootboom*, in *PE Municipality* the ConCourt highlighted two aspects that laid the basis for the development of the ME jurisprudence. First, the indication by the ConCourt of the imperative for engagement between the occupiers and the municipality, and secondly, the ConCourt's attempt to describe the nature of the engagement. The importance of substantive involvement of the occupiers was demonstrated by the

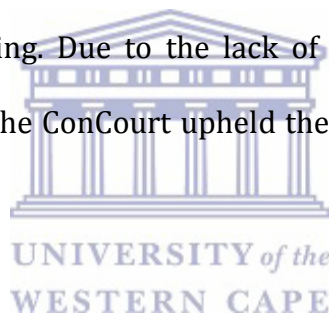
²⁰ *PE Municipality* para 41.

²¹ *PE Municipality* para 39.

²² *PE Municipality* para 39.

ConCourt in its description of nature of the engagement as ‘real participation to find of bottom-up solutions’.²³ The ConCourt held that this ‘real participation’ should involve honest endeavour to find mutually acceptable solutions through respectful face to face engagement. Though there were about five meetings and many report back sessions with the occupiers the ConCourt held that there was no ‘real participation’ of the occupiers.

The use of ‘real participation’ by the ConCourt focused on substantive involvement of the occupiers and finds resonance with the Transformative Empowerment Model. The ConCourt rejected tokenism and placation forms of participation, which do not involve the occupiers in decision-making. Due to the lack of substantive involvement of the occupiers during the eviction, the ConCourt upheld the decision of the SCA to set aside the eviction order.



The two judgments, *Grootboom* and *PE Municipality*, marked a critical turning point in the eviction jurisprudence with regard to the extent and nature of participation of occupiers during evictions. The ConCourt accorded the occupiers enhanced protection of the section 26(3) right based on the need for ‘effective engagement’ as was required in *Grootboom*, and ‘real participation’ as was required in *PE Municipality*. The use of the adjectives ‘effective’ and ‘real’ is a clear indication of the ConCourt’s commitment to substantive involvement of the occupiers as opposed to procedural compliance.

²³ *PE Municipality* para 39.

5.2.3 *Occupiers of 51 Olivia Road*: Adoption of ME

Notwithstanding the legal protections developed in *Grootboom* and *PE Municipality*, the pressure to evict the poor from urban land in an expanding economy had mounted.²⁴ In the inner city of the biggest metropolitan municipality, Johannesburg, the state embarked on an extensive regeneration programme, aimed at enticing commercial property developers to take control of urban slum properties by evicting the occupiers and then refurbishing the buildings for occupation at much higher rentals.

The City of Johannesburg Inner City Regeneration Strategy made no provision for the re-accommodation of poor and vulnerable people who were living in slum properties and who would be unable to afford the rentals of the refurbished properties. The implementation of the regeneration strategy by the City led to a litany of court challenges. *Occupiers of 51 Olivia Road* was one of those cases and is of particular importance for the development of the jurisprudence on evictions.

The applicants in this matter were several hundred occupiers of two buildings in the inner city of Johannesburg. One of the buildings was a residential block, which was earmarked for refurbishment by a property developer. The City issued a notice in terms of section 12(4)(b) of the National Building Standards and Building Regulation Act 103 of 1977 (NBRA) and then applied to the High Court for an eviction order to give effect to the notice. In the High Court, Jajbhay J dismissed the application on the basis that the City had failed to adopt a policy through which the occupiers could access affordable

²⁴ Socio-economic Rights Institute of South Africa *Evictions and Alternative Accommodation in South Africa: An Analysis of the Jurisprudence and Implications for Local Government* (2013) 14.

alternative accommodation.²⁵ The High Court held that the absence of such a policy was in breach of the obligation imposed by the Constitution on the City, and interdicted the City from evicting the occupiers until alternative accommodation had been made available to them.

On appeal the SCA set aside most of the High Court's order. The SCA held that the City's right to seek the evacuation of a building it considered unsafe was not conditional on being able to provide alternative accommodation.²⁶ As a result of this ruling the eviction order was reinstated. Nonetheless, the SCA held that the City had a constitutional obligation based on *Grootboom* to provide emergency shelter to all those who requested it on eviction. The SCA accordingly directed the City to open a register where the occupiers could register themselves for the provision of emergency accommodation once they were evicted. To avert homelessness of the occupiers, the City allocated emergency accommodation while compiling the register. The occupiers applied for leave to appeal to the ConCourt.

Two days after the application for leave to appeal was heard, the ConCourt issued an interim order aimed at ensuring that the City and the occupiers engaged with each other meaningfully on certain issues related to the eviction. The rationale for the interim order was twofold – the city and the occupiers had to engage meaningfully to resolve the differences and difficulties highlighted in the application, and they had to engage with each other in an effort to alleviate the plight of the occupiers.²⁷ After two months of

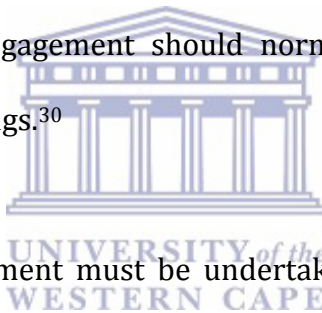
²⁵ *City of Johannesburg v Rand Properties* 2007 (1) SA 78 (W) para 1 of the Court's order.

²⁶ *City of Johannesburg v Rand Properties* 2007 (6) SA 417 (SCA).

²⁷ *Occupiers of 51 Olivia Road* para 5.

intensive negotiations with each other which were overseen by the ConCourt, the matter was finally resolved with the occupiers being offered and accepting accommodation in another building yet to be refurbished.

When the matter returned to the ConCourt, Yacoob J took the opportunity to develop and expand upon the concept of ME. The notion of ME was developed after Yacoob J took into consideration the collective impact of all the six primary drivers for substantive involvement of the occupiers.²⁸ Yacoob J mentioned that the most significant steps in the implementation of housing policy must be taken after ME with the affected people.²⁹ He held that when the state intends to remove or displace people from their existing homes, engagement should normally be a prerequisite for the institution of eviction proceedings.³⁰



Yacoob J asserted that engagement must be undertaken without secrecy and should focus on meeting the reasonable needs of the poor community and providing alternative accommodation where it was needed.³¹ Because no such engagement took place before the eviction order was issued by the SCA, the order by the SCA was set aside. What emerged clearly from the judgment was that ME is both a procedural and substantive requirement.

Furthermore, Yacoob J highlighted four substantive aspects with regard to ME. First, that the engagement should be a two-way process in which both parties should engage

²⁸ *Occupiers of 51 Olivia Road* paras 7, 10, 15, 17, 38 and 49.

²⁹ *Occupiers of 51 Olivia Road* para 9.

³⁰ *Occupiers of 51 Olivia Road* para 30.

³¹ *Occupiers of 51 Olivia Road* paras 14, 18 and 21.

each other and that there was no closed list of the objectives of engagement.³² Secondly, that the municipality must ensure that the occupiers are capacitated to avoid a 'top-down approach' during engagements.³³ Thirdly, that the people in need of housing must be encouraged to be pro-active and equitably participate in finding solutions to their challenges, and not just be purely defensive.³⁴ Fourthly, that the larger the number of people potentially to be affected by an eviction the greater the need for 'structured, consistent and careful engagements', and that this included the need for the appointment of professional people by the municipality to facilitate the engagement.³⁵

The application of ME in *Occupiers of 51 Olivia Road* was closely related to the objectives of the Transformative Empowerment Model as the ConCourt required a much more intensive form of engagement that includes the building of the capabilities of the occupiers to engage effectively. Consequently, the ConCourt issued an interim order for ME between the occupiers and the municipality to resolve certain issues related to the eviction. An intensive two-months long engagement followed, which was overseen by the ConCourt. The engagement was successful as it was able to resolve all the critical matters, including acceptance of alternative accommodation by the occupiers.

The ConCourt focused more on substantive aspects of ME in *Occupiers of 51 Olivia Road* and as a result accorded enhanced protection of the section 26(3) right to the unlawful occupiers. However, the sincere attempt by Yacoob J to theorise the notion of ME was inadequate as he failed to deepen the conceptualisation of the substantive aspects of ME

³² *Occupiers of 51 Olivia Road* para 14.

³³ *Occupiers of 51 Olivia Road* para 19.

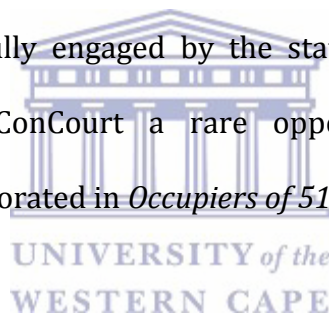
³⁴ *Occupiers of 51 Olivia Road* paras 15 and 20.

³⁵ *Occupiers of 51 Olivia Road* para 19.

by providing practical mechanisms for equitable participation and building the capabilities of the occupiers. This was a jurisprudential setback that resulted in a great deal of confusion in the subsequent cases.

5.2.4 *Residents of Joe Slovo*: differing understanding of ME

The judgment in *Residents of Joe Slovo* was delivered about a year after *Occupiers of 51 Olivia Road*. As mentioned earlier, in this case the judges delivered five different judgments. All five judgments supported the order issued by the Court, but on different grounds. One major area of difference and contention between the judges was whether the occupiers were meaningfully engaged by the state. This was a seminal case of eviction that afforded the ConCourt a rare opportunity to operationalise its conceptualisation of ME as elaborated in *Occupiers of 51 Olivia Road*.



Residents of Joe Slovo involved the eviction of a large community, the Joe Slovo informal settlement, of more than 4 300 households that comprised more than 20 000 residents. The Joe Slovo settlement began to be occupied in the early 1990s. The land was owned by the City of Cape Town and was wholly undeveloped. During the early days of the settlement apartheid police repeatedly and forcibly removed the occupants from the land and destroyed their accommodation and possessions.³⁶ The occupiers returned, defying all the odds and the persistent harassment.

During the democratic dispensation the forced removals ceased. The City adopted a more humane approach towards the residents by providing basic services, such as,

³⁶ *Residents of Joe Slovo* para 19.

water, container toilets and basic cleaning services. These services were expanded after a fire in 2000 that engulfed the informal settlement and caused extensive destruction. In addition each house was allocated a number. In 2005 another fire caused considerable damage in the area and left a huge proportion of the people homeless. After several meetings between the City and the residents of Joe Slovo the City undertook to embark on an extensive housing project in Joe Slovo that resulted in people having to move to alternative accommodation.

The project, named N2 Gateway, was officially and publicly launched in 2005. The community was kept informed about the project from its inception through discussions between the City and the representatives of the community. This was a three-phase development and poor people were to be provided with subsidised low rental accommodation in all three phases. The project generally met with the broad approval of the community whose leaders were very enthusiastic about it. The municipality identified Delft as alternative accommodation, and in 2006-2007 there were considerable efforts made to persuade the residents to relocate, but all these efforts failed.

The relocation was to enable Thubelisha Homes to proceed with phase two of the project. The residents refused to move and argued that their excitement and enthusiasm had been deflated by the City's 'broken promises' and that they found it difficult to trust the City in relation to future developments and commitments.³⁷ The first broken promise was with regard to the rental amounts of between R150 to R300 per month for the housing units constructed in phase 1 of the project, which were increased to

³⁷ *Residents of Joe Slovo* para 30.

amounts ranging between R600 to R1 050 per month. The second broken promise was that the applicants alleged that they had been promised that 70 per cent of the houses built in the Joe Slovo settlement would be allocated to the Joe Slovo residents who qualify, and that this promise was not kept. Even worse, phase 2 did not have housing units for poor people at all. Lastly, on behalf of the residents, the *amici curiae* vigorously argued that the state did not engage sufficiently.³⁸ This stalemate led to petitions and protest actions by the community and ultimately an application by the state to the Cape High Court for an eviction order. The High Court issued the order of eviction.

In the appeal to the ConCourt there was a litany of issues raised by the residents contesting whether the state had made out a case for eviction in terms of PIE. Issues in contention were whether the residents of Joe Slovo were unlawful occupiers, whether there was consent by the City for them to stay at Joe Slovo, and whether the conduct of the state was reasonable. The latter is important for this study as *Occupiers of 51 Olivia Road* had established that the requirement of reasonableness included ME between the occupiers and the state. The ConCourt upheld the eviction order made by the High Court as just and equitable but changed the terms of the High Court order.

In considering the question of whether there was ME the ConCourt reflected on all the six primary drivers as in *Occupiers of 51 Olivia Road*. Consequently, Yacoob J agreed with the residents that if in its planning of the relocation the state had been more alive to the requirements of the Constitution, PIE and international norms, more 'intensive consultation could have resulted that could have prevented the impasse'.³⁹ However,

³⁸ *Residents of Joe Slovo* para 112.

³⁹ *Residents of Joe Slovo* para 112.

Yacoob J surprisingly held that these factors in themselves were not sufficient to tilt the scale against eviction and relocation.⁴⁰ Focusing more on the procedural aspects of engagement, such as the convening of community meetings and consultations, Yacoob J seemed to suggest that the complaints about broken promises and legitimate expectations were unrelated to ME, and that such issues would be taken into account in the terms of the eviction order to be issued by the Court for ME. Consequently, Yacoob J then concluded that there was 'reasonable engagement almost all the way'.⁴¹ The judgment of Yacoob J consists of 123 paragraphs and only two paragraphs were committed to ME, which was a severely contested matter in the application for eviction.

In a separate judgment, Moseneke J specifically focused on the substantive requirements of ME and held that in considering what was just and equitable as required by PIE and the rights to human dignity and equality there should be an account of the ability of the occupiers to engage meaningfully with equal participation of all concerned. This account required a 'nuanced appreciation of the specific situation of each case'.⁴² Viewing the facts of the case Moseneke J concluded that the government did not make an effort to engage with the community at all as the government openly admitted that it had not given formal notice to the residents before the urgent eviction application. According to Moseneke J, the High Court had failed to take into consideration the lack of engagement before it issued an eviction order. As a result the High Court had also failed to take into consideration the circumstances of the residents, such as, the historical context relevant to the occupation, the period for which and the

⁴⁰ *Residents of Joe Slovo* para 112.

⁴¹ *Residents of Joe Slovo* para 116.

⁴² *Residents of Joe Slovo* paras 159-161.

circumstances under which the land was occupied, the hardship to be suffered as a consequence of the eviction order, and the alternative of an upgrade of the informal settlement without evicting the residents.⁴³

Moseneke J further held that due to the failure to engage meaningfully the relocation of the residents was not a preferred approach, but that did not mean it was unreasonable.⁴⁴ Accordingly, Moseneke J concluded that a judgment by the ConCourt that upheld the eviction order of the High Court with altered terms that included an order for ME and an undertaking that at least 70 per cent of the erected housing units would be allocated to the applicants would mitigate the unjustness of the failure to engage and the intrusion on human dignity and equality by offering a 'rock hard promise of adequate housing and restored human dignity'.⁴⁵ The inference drawn from the judgement of Moseneke J was that the lack of failure to engage may be remedied after the eviction order by issuing terms that would be favourable to the occupiers.

Making extensive reference to the transformative vision of the Constitution Ngcobo J held that the shortage of housing in South Africa was fundamentally based on the apartheid history and therefore the right of access to adequate housing and the commitment to transform society must be interpreted and understood in that context.⁴⁶ Apartheid bequeathed to the new democratic order poverty, landlessness, powerlessness and mushrooming informal settlements.⁴⁷ For Ngcobo J, ME during

⁴³ *Residents of Joe Slovo* para 161.

⁴⁴ *Residents of Joe Slovo* para 173.

⁴⁵ *Residents of Joe Slovo* para 172-174.

⁴⁶ *Residents of Joe Slovo* para 191.

⁴⁷ *Residents of Joe Slovo* para 196.

evictions entailed finding a mutually acceptable solution to addressing the difficult challenges inherited from apartheid.⁴⁸ He indicated the difficulty of ascertaining the nature and extent of the engagement that occurred from the papers presented to the Court. Nevertheless, he bemoaned the lack of compliance with the requirement of structured and co-ordinated engagement between the residents, the City, Thubelisha Housing, and the Provincial and National Governments.⁴⁹ In the same vein he emphasised the importance of trust during the engagement process, as absence thereof generated confusion and misunderstanding.

Ngcobo J further held that the string of community meetings convened by the Executive Mayor to inform the residents about the N2 project was not enough for ME, as ME required the residents to be engaged both individually and collectively in a democratic manner.⁵⁰ He highlighted that residents in informal settlements were often dependent on fragile networks to ensure livelihoods and therefore a guiding principle for evictions should be the building and preservation of 'community cohesion'.⁵¹ Therefore, ME was also meant to discourage conflict and fragmentation of already vulnerable informal communities.⁵² The approach by Ngcobo J emphasised both the procedural and substantive requirements of ME.

Notwithstanding the absence of ME, Ngcobo J upheld the eviction order for the following reasons: the residents failed to challenge the reasonableness of the N2

⁴⁸ *Residents of Joe Slovo* para 242.

⁴⁹ *Residents of Joe Slovo* paras 245-246.

⁵⁰ *Residents of Joe Slovo* para 246.

⁵¹ *Residents of Joe Slovo* para 258.

⁵² *Residents of Joe Slovo* para 258-259.

Gateway project, thousands had relocated already and were waiting for their permanent houses; the commitment to allocate 70 per cent of the houses to the qualifying residents of Joe Slovo; the provision of transport for children to attend school in Langa; and the commitment to build permanent houses in Delft for Joe Slovo residents who would not get houses from the allocated 70 per cent. Considering all these circumstances, Ngcobo J was of the view that the potential hardship of the residents was substantially ameliorated in accordance with justice and equity. He then added terms to the eviction order for ME, which had to be individualised, during the relocation.

In her judgment O'Reagan J emphasised PIE and the rights to human dignity and equality. She deplored the lack of ME between the residents and the state. Emphasising the substantive aspects of ME, O'Reagan J held that public meetings and meetings with the committees representing the residents were not adequate to engage fully and meaningfully with the residents, but that the capacity of the community to engage meaningfully must be developed.⁵³ Importantly, she observed that such large eviction and relocation processes required a 'coherent or comprehensive and meaningful strategy of engagement'.⁵⁴ Despite this observation, she held that the lack of adequate and coherent process of engagement did not render the implementation of the N2 Gateway project unreasonable. She based her conclusion on four factors.

⁵³ *Residents of Joe Slovo* para 301.

⁵⁴ *Residents of Joe Slovo* para 302.

First, that the project was a pilot one and therefore could not be implemented without controversies.⁵⁵ Secondly, there was some engagement with the applicants, although it was not as coherent and comprehensive as required.⁵⁶ Thirdly, the fact that it was not only the residents who were party to the litigation that were affected by the plan, but also thousands of other households who had already relocated and were not represented in the case.⁵⁷ Lastly, the terms of the order for eviction would seek to remedy the failure of the government to engage meaningfully. Consequently, O' Reagan J concluded that the order for eviction was not unreasonable in all the circumstances.⁵⁸

Sachs J held that ME was vital for human dignity and equality and PIE.⁵⁹ He commenced his separate judgment by making two preliminary observations. The first observation dealt with the general manner in which the courts should approach such matters and he held that formal legal logic alone would be inadequate to solve the conundrum of how to do justice on one side without imposing a measure of injustice on the other.⁶⁰ The second observation dealt with how ME could be located within the evolving jurisprudence of the right of access to adequate housing. Most importantly, he held that the eviction jurisprudence required that certain fundamental principles must govern the manner in which applications for eviction orders must be approached.⁶¹

⁵⁵ *Residents of Joe Slovo* para 302.

⁵⁶ *Residents of Joe Slovo* para 302.

⁵⁷ *Residents of Joe Slovo* para 303.

⁵⁸ *Residents of Joe Slovo* para 304.

⁵⁹ *Residents of Joe Slovo* para 378.

⁶⁰ *Residents of Joe Slovo* para 331.

⁶¹ *Residents of Joe Slovo* para 339.

Sachs J acknowledged the inadequacies in the mode of communication, but held that it cannot be said that there was no ME at all.⁶² Putting greater emphasis on the procedural aspects of engagement, Sachs J held that there was a 'surplus of engagement rather than a deficit of engagement'.⁶³ This he based purely on the number of meetings that took place and were addressed by the Executive Mayor and the municipal officials responsible for housing. Sachs J acknowledged that towards the end there appeared to have been serious inadequacies in the engagement, but asserted that what matters was the overall adequacy of the scheme as it unfolded.⁶⁴

Furthermore, Sachs J made an evaluation of the details of the project, such as, the benefits that would accrue to the residents from the project, the degree of disruption to the lives of the residents, and the kind of alternative accommodation made available. On the basis of this evaluation, he held that the faults in the mode of engagement with the residents were not of such a degree as to vitiate the reasonableness of the whole project.⁶⁵ He further held that the inadequacies in the engagement could be remedied by an order of eviction with terms that required the dignified and individualised equitable participation of the residents in relation to each stage of the process.⁶⁶

⁶² *Residents of Joe Slovo* para 378.

⁶³ *Residents of Joe Slovo* para 379.

⁶⁴ *Residents of Joe Slovo* para 380.

⁶⁵ *Residents of Joe Slovo* para 383.

⁶⁶ *Residents of Joe Slovo* paras 404 and 409.

5.2.5 Evaluation of cases: *Grootboom* to *Residents of Joe Slovo*

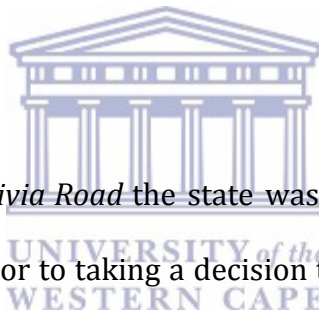
The case law evinces that the six primary drivers for substantive involvement of the occupiers during evictions were central to the introduction of ME by the ConCourt. Key to ME was the use by the ConCourt of its adjudicative function to tilt the balance of power in favour of the poor, the marginalised and the vulnerable occupiers.⁶⁷ In so doing, the ConCourt was driven by its judicial commitment to the transformative vision of the Constitution to redress the past injustices by promoting the rights to human dignity, equality and freedom.

Grootboom represents a coming of age for the ConCourt as it was able to develop its doctrinal approach with regard to adjudication of socio-economic rights. The ConCourt was also able to take advantage of the jurisprudence that had been developed by the CDESCR, notwithstanding its rejection of the minimum core approach on the basis that the concept was not adequately defined. Impressively, in *Grootboom* and *PE Municipality* the ConCourt underscored the need for engagement between the state and the unlawful occupiers during evictions, and held that this engagement was encompassed in the reasonableness of state action under section 26(2) of the Constitution. In both cases the ConCourt accorded to the occupiers better protection under section 26(3) due to its focus on the substantive aspects of engagement. In *Grootboom* the ConCourt required 'effective engagement' and in *PE Municipality* it required 'real participation' of the occupiers. Consistent with the Transformative Empowerment Model, in both cases the ConCourt held that it was the nature and extent of the engagement that determine whether it was adequate or not, and not the number

⁶⁷ Roux T (2013) 73.

of meetings, consultations or notices with the occupiers. The ConCourt dismissed the notion that the number of meetings automatically translates into effective engagement or real participation.

Based on the *Grootboom* and *PE Municipality* judgments, in *Occupiers of 51 Olivia Road* the ConCourt endorsed ME and elaborated on its conceptual basis. The Court emphasised that ME was both a procedural and substantive requirement. Ray describes the Court's approach as a hybrid between pure alternative dispute resolution mechanism and pure adjudication since it remains tied to the courts.⁶⁸ This hybrid nature, as Ray explains, enhances the legitimacy of the ConCourt and its 'norm-creating capacity'.⁶⁹



According to *Occupiers of 51 Olivia Road* the state was obliged to engage meaningfully and in a democratic manner prior to taking a decision to institute eviction proceedings, and that no eviction order should be issued until the results of a proper engagement process were known. The conceptualisation and application of ME in *Occupiers of 51 Olivia Road* were closely related to the Transformative Empowerment Model. This was underscored by Yacoob's J assertion that ME must be characterised by intensive engagements with individuals and collectives, and that the occupiers must have the necessary ability to engage meaningfully.⁷⁰ Due to the lack of ME the ConCourt set aside the decision of the SCA to reinstate an eviction order. The focus of the ConCourt on the

⁶⁸ Ray B *Extending the Shadows of the Law: Using a Hybrid Mechanisms to Develop Constitutional Norms in Socioeconomic Rights Cases* (2008) 26.

⁶⁹ Ray B (2008) 28.

⁷⁰ *Occupiers of 51 Olivia Road* para 26.

substantive aspects of ME in *Grootboom, PE Municipality and Occupiers of 51 Olivia Road* enabled it to accord better protection to the unlawful occupiers.

In *Residents of Joe Slovo* the practical and conceptual complexities of ME were laid bare as the ConCourt ordered a massive eviction, even though the state had failed to engage meaningfully with the affected people. Some of the practical complexities, as highlighted in *Residents of Joe Slovo*, were that the engagement process had to take place in respect of each phase of the eviction and relocation of more than 4 500 households.⁷¹ In this case about 95 relocations were planned to take place each week over a period of 45 weeks.⁷² Furthermore, the engagement had to take place with regard to the standard of municipal services and budget allocation for the alternative land, and there had to be a detailed account of all the relevant circumstances of the persons that would be affected by the eviction.⁷³ The residents were also required to make inputs on the post-relocation development and allocation of houses.⁷⁴ These were highly complex matters which, according to Ngcobo J, required structured and comprehensive engagements.

The failure of the ConCourt in *Occupiers of 51 Olivia Road* to provide practical mechanisms for ME was evidenced in the jurisprudential uncertainty that engulfed *Residents of Joe Slovo* as to whether or not there was in fact adequate engagement. Three of the five separate judgments in *Residents of Joe Slovo* concluded that there was no ME with the occupiers, while Sachs J concluded that there was a surplus of engagement. Contradicting his earlier assertion in *Occupiers of 51 Olivia Road*, Yacoob J

⁷¹ *Residents of Joe Slovo* para 11.

⁷² *Residents of Joe Slovo* para 14.

⁷³ *Residents of Joe Slovo* para 11.1.

⁷⁴ *Residents of Joe Slovo* para 16.2.

acknowledged that there was no 'intensive engagement' with the occupiers but held that, taking into account the number of meetings that took place between the occupiers and the state, there was indeed 'reasonable engagement'. All the five Judges highlighted the judicial imperative to promote the substantive aspects of ME; however this commitment was reduced to mere judicial rhetoric as the ConCourt issued an eviction order without ME.

In direct contrast to *Occupiers of 51 Olivia Road*, in *Residents of Joe Slovo* the ConCourt proceduralised ME and subjugated it to the commendable aims of a misconceived development that was to benefit some of the occupiers by way of permanent and adequate housing; leave an indeterminable number of occupiers in uncertainty.⁷⁵ The ConCourt compromised the protection under section 26(3) of the Constitution as the eviction order was issued without adequate consideration of the circumstances of the occupiers. The conceptualisation of ME by the ConCourt was overtly concerned with the number of meetings that took place and possible benefits to the residents of Joe Slovo rather than with the need for deliberative engagement to promote their rights to human dignity, equality and freedom. The application of ME in *Residents of Joe Slovo* was at variance with the objectives of the Transformative Empowerment Model.

The early reaction to *Residents of Joe Slovo* has been generally critical of the ConCourt's refusal to find in favour of the residents. Liebenberg describes the results as 'the largest judicially sanctioned eviction of a community in the post-apartheid period'.⁷⁶ De Vos

⁷⁵ McLean K (2011) 223.

⁷⁶ Liebenberg S *Joe Slovo evictions: vulnerable community feels the law from the top-down* *Business Day* 22 June 2009.

acknowledges that the judgment shows genuine concern for the plight of the Joe Slovo residents, but criticises the ConCourt for ‘endorsing a vanity project that seems to run counter to the government’s own housing policy’.⁷⁷ De Vos argues that a detailed engagement order could have been a back-door mechanism to force the government to engage with the residents over a revised plan. He suggests that this could have created an engagement with substantive benefits for the residents that the government failed to conduct prior to the eviction. Liebenberg is adamant that the decision was judicially unsound and criticises the Court’s ‘willingness to effectively condone the inadequate consultation process’.⁷⁸

Ray distinguishes the outcomes of *Occupiers of 51 Olivia Road* as ‘good and progressive’ compared to those of *Residents of Joe Slovo*, which he argues ‘represents mixed or regressive results’.⁷⁹ This distinction made by Ray is very useful for this study. Chenwi argues that in *Residents of Joe Slovo* the ConCourt did not take ME seriously and that its subsequent judgments on eviction showed no improvement. Chenwi suggests that the flawed finding of the ConCourt was due to inadequacies in its conceptualisation and articulation of ME.⁸⁰ Chenwi further suggests that the inadequacies are due to uncertainty regarding the substantive meaning of ME.⁸¹ In agreement with Chenwi and Liebenberg this study argues that the lack of substantive content that encompasses practical mechanisms for ME resulted in uncertainty, which left the courts to ponder about reasonableness in evaluating the adequacy of the engagement. This resulted in an

⁷⁷ De Vos P ‘A (partial) victory for Joe Slovo Residents’ (2010) available at <http://constitutionallyspeaking.co.za/a> (accessed 17 May 2015).

⁷⁸ Liebenberg S (2009) 7.

⁷⁹ Ray B (2010) 418.

⁸⁰ Chenwi L (2009) 382.

⁸¹ Chenwi L (2009) 389.

inconsistent application of ME post-*Residents of Joe Slovo*. As demonstrated hereunder, the inconsistency resulted in varied outcomes, at times to the disadvantage of the unlawful occupiers.

5.3 Post-*Residents of Joe Slovo*: a period of inconsistent application

After *Residents of Joe Slovo* there were seven eviction cases in which the ConCourt had to deal with the conceptualisation and application of ME. In these cases ME was mainly invoked as judicial precedent. From all the seven cases it is apparent that the five separate concurring judgments and the proceduralisation of ME in *Residents of Joe Slovo* caused a great deal of confusion that resulted in jurisprudential inconsistency.

5.3.1 *Abahlali BaseMjondolo*



In his exit interview as a ConCourt judge Moseneke DCJ has this to say about *Abahlali BaseMjondolo*:

‘The difficulty for me as [a] judge and as [a] human being, was the impact of the eviction on their lives, they had no alternative accommodation. More importantly the landless[ness] of [the] poor people is structural. It is not a matter of inconvenience that their homes are broken down.’⁸²

This was the first case in which the ConCourt had to test its application of ME after the disappointing judgment in *Residents of Joe Slovo*. The Abahlali BaseMjondolo Movement of South Africa, an organisation that represented thousands of people who lived in

⁸² ‘Moseneke and the duty of justice’ *Mail and Guardian* 20 May 2016, 10.

informal settlements, approached the KwaZulu-Natal High Court to challenge the constitutionality of the KwaZulu-Natal Elimination and Prevention of Re-Emergence of Slums Act (Slums Act).⁸³ The High Court dismissed the challenge to the validity of the Slums Act.

The applicants appealed to the ConCourt and raised two arguments: first, that the whole of the Slums Act was invalid as the Provincial Government had no jurisdiction to enact such a law. The ConCourt unanimously rejected this argument as misconceived. Secondly, that section 16 of the Act was unconstitutional as it gave a Member of the Executive Council (MEC) powers to publish a notice in a Provincial Gazette determining a period within which an owner or a person in charge of land or a building had to institute proceedings to evict the occupiers under PIE. If the owner or the person in charge failed, the municipality had to institute proceedings to evict the occupiers. The ConCourt was divided on this argument as to whether section 16 of the Slums Act excluded ME.

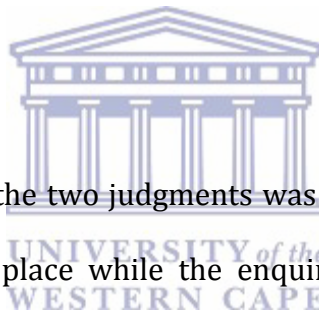
In a dissenting judgment on the second question with regard to ME, Yacoob J made reference to 'reasonable engagement' and seemed to equate reasonable engagement with ME.⁸⁴ He held that section 16 of the Slums Act is subject to all the procedural and substantive safeguards provided by the Constitution and PIE. He observed that on a proper construction of section 16 an owner would be required to comply with all the

⁸³ KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act 6 of 2007.

⁸⁴ *Abahlali BaseMjondolo* para 69

safeguards in PIE and all other relevant legislation before an order for an eviction was issued. Therefore, he held that the section was consistent with the Constitution.⁸⁵

In an opposing majority judgment, Moseneke J held that the question of the reasonableness of section 16 of the Slums Act is about whether the section allows for a 'proper engagement process'.⁸⁶ He further held that a proper engagement process 'would include taking into proper consideration the wishes of the people who are to be evicted'.⁸⁷ He held that ME would also take into consideration the manner in which the eviction would be executed and the timeframes for the eviction.⁸⁸ Based on this, he held that it was apparent on the face of it that section 16 of the Slums Act was irreconcilable with the need for ME.



The fundamental difference in the two judgments was that Yacoob J enquired whether 'reasonable engagement' took place while the enquiry by Moseneke J was whether 'proper and meaningful engagement', based on democratic participation, took place. These were two different standards of enquiry, not mere semantics. The standard of enquiry employed by Yacoob J was of lower than that of Moseneke J. The conceptualisation and application of ME by Moseneke J was closely related to the objectives of the Transformative Empowerment Model and ensured better protection for the unlawful occupiers. This judgment is in the same category as *Grootboom, PE Municipality* and *Occupiers of 51 Olivia Road*, and could be categorised as progressive application of ME. This is due to the fact that the ConCourt did not separate the

⁸⁵ *Abahlali BaseMjondolo* para 70.

⁸⁶ *Abahlali BaseMjondolo* para 114.

⁸⁷ *Abahlali BaseMjondolo* para 114.

⁸⁸ *Abahlali BaseMjondolo* para 115.

substantive and procedural safeguards in the application of ME, but placed equal emphasis on them.

5.3.2 *Blue Moonlight Properties*

Another glaring inconsistency was apparent in the *Blue Moonlight Properties* judgment, where the owner of a property in the inner city area of Johannesburg sued the occupiers for eviction in the South Gauteng High Court. The case was mainly about whether the City had an obligation to make provision for alternative accommodation during private evictions. The High Court held that the City had such an obligation and on appeal by the City the ConCourt in a unanimous judgment presented by van der Westhuizen J confirmed the ruling.⁸⁹ Van der Westhuizen J pertinently reflected on three primary drivers for substantive involvement of occupiers during evictions, namely, section 26(3) of the Constitution, PIE and human dignity. Based on these primary drivers Van der Westhuizen J held that even in cases of private evictions the City was expected 'to meaningfully engage with the occupiers as far as possible' to identify possible measures to mitigate the hardship that evictions imposed on the occupiers.⁹⁰

Although, the ConCourt concluded that there was not adequate engagement, the eviction order was issued with an order for the City to make provision for temporary accommodation for the occupiers in a location as near as possible to the area where they were evicted.⁹¹ However, the ConCourt did not make any order for ME in the

⁸⁹ *Blue Moonlight Properties* para 104.

⁹⁰ *Blue Moonlight Properties* para 78.

⁹¹ *Blue Moonlight Properties* para 104 (e) (i).

identification of such alternative accommodation. This was inconsistent with previous eviction judgments where orders for alternative accommodation were coupled with orders for ME. Coupling court orders for alternative accommodation with orders for ME was an appreciation by the ConCourt that ME does not end with the issuing of an eviction order but had to continue in order to address problems with relocation and nature of services at the alternative accommodation. This judgment is in the same category as *Residents of Joe Slovo*, which was at variance with the objectives of the Transformative Empowerment Model and represented a regressive application of ME.

5.3.3 *Pheko*

In *Pheko* the ConCourt reflected upon and reviewed the implications of PIE, section 26(3), human dignity and the inclusion of justiciable socio-economic rights in the Constitution, and set a much higher standard for ME. In this case the municipality commissioned an investigation into land in the area of Bapsfontein based on complaints about the formation of sinkholes. The various investigations concluded that the residents of the settlement should be relocated to a safe area, as the land was dolomitic. The municipality declared Bapsfontein a disaster area in terms of the Disaster Management Act⁹² (DMA) and commenced demolition and the relocation of about 150 households to a distant area where temporary accommodation was provided. When the occupiers resisted the relocation, they were forcibly removed and their houses demolished by the 'Red Ants' on the municipality's instructions. The occupiers applied to the North Gauteng High Court for an urgent interdict to stop the unlawful relocation

⁹² Disaster Management Act 57 of 2002.

and demolition. The High Court held that the relocations and demolitions were lawful because the residents were evacuated under the DMA to actually save their lives.

The residents applied for leave to appeal directly to the ConCourt, and argued that their relocation violated their right enshrined in section 26(3) and their human dignity under section 10 of the Constitution.⁹³ The municipality submitted that the occupiers were evacuated under the DMA, not under PIE, and that there was ME as they had convened three public meetings with the occupiers.⁹⁴ In contrast, SERI, an *amicus curiae*, argued that the circumstances of the case required compliance with section 26 of the Constitution and laws governing eviction.⁹⁵

In a unanimous judgement, Nkabinde J found that the municipality had acted unlawfully and contrary to section 26(3) of the Constitution by using the DMA to relocate the occupiers and demolish their houses in Bapsfontein without a court order.⁹⁶ She further held that three public community meetings, under the circumstances, could not be considered adequate for ME with the occupiers.⁹⁷ In its order the Court issued an injunction for ME with the occupiers.⁹⁸ This progressive application of ME corresponds with the objectives of the Transformative Empowerment Model that ME encapsulates a substantive dimension that goes beyond the number of meetings held with the occupiers, but focused on the nature and extent of the engagement, which included the influence the occupiers have on the decision-making processes.

⁹³ *Pheko* para 13.

⁹⁴ *Pheko* para 9.

⁹⁵ *Pheko* para 18.

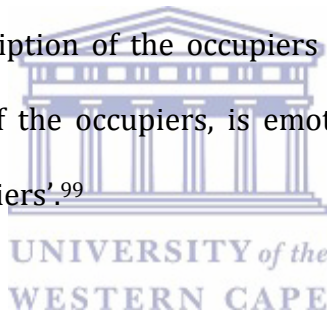
⁹⁶ *Pheko* para 45.

⁹⁷ *Pheko* para 46.

⁹⁸ *Pheko* para 53(6).

5.3.4 *Occupiers of Portion R25*

In *Occupiers of Portion R25* the ConCourt also employed a much higher standard of review with regard to ME. In this case the occupiers applied for leave to appeal against an order of the North Gauteng High Court evicting about 170 households from privately owned land on the basis that the eviction was just and equitable. During the proceedings in the High Court the City was joined but did not take part in the proceedings. Notwithstanding the absence of the City in the proceedings the High Court held that the eviction was just and equitable. The occupiers applied to the ConCourt to challenge the High Court decision. First, the ConCourt, through a unanimous judgment by Yacoob J, decried the description of the occupiers as ‘invaders’ and held that this ‘detracts from the humanity of the occupiers, is emotive and judgmental and comes close to criminalising the occupiers’.⁹⁹



Secondly, the ConCourt held that as there were a large number of households that would be affected it was obligatory for the City to be involved as there could be no ME in the absence of the City’s input on the housing situation and the possibilities of emergency housing.¹⁰⁰ The ConCourt set aside the eviction order and referred the matter back to the High Court for reconsideration after ME had taken place on how to mitigate the adverse impact on the occupiers. The Court made it clear that the City must provide all the necessary information to the unlawful occupiers during the engagement. The need for availability of relevant information to the occupiers for critical engagement is a substantive safeguard and features prominently in the Transformative

⁹⁹ *Occupiers of Portion R25* para 4.

¹⁰⁰ *Occupiers of Portion R25* para 12.

Empowerment Model, though there were no actual benefits that accrued to the unlawful occupiers.

5.3.5 *Occupiers of Skurweplaas*

In *Occupiers of Skurweplaas* the occupiers, which comprised about 200 households, appealed to the ConCourt against an order of the North Gauteng High Court that would permit PPC Aggregate to evict them before alternative accommodation was made available. The occupiers argued that such an order would render them homeless and that the eviction should be premised on the availability of alternative accommodation.¹⁰¹ In a unanimous judgment by Yacoob J the ConCourt acknowledged the inadequate engagement between the occupiers and the City of Tshwane and held that it would be just and equitable if occupiers were required to move off the land one month after the City of Tshwane had made the alternative accommodation available.¹⁰²

Strangely, the Court did not make any order for ME in the identification of alternative accommodation, relocations and gathering of information on the personal circumstances of the occupiers. In *Occupiers of 51 Olivia Road* the ConCourt held that the issue of alternative accommodation should not be subjected to arbitrary decisions by the state. The one-month reprieve that the ConCourt gave to the occupiers was totally inadequate and misdirected taking into account the elaborate nature of the engagement process. The application of ME in *Occupiers of Portion R25* was regressive and at variance with the Transformative Empowerment Model.

¹⁰¹ *Occupiers of Skurweplaas* para 7.

¹⁰² *Occupiers of Skurweplaas* para 3.

5.3.6 *Occupiers of Saratoga Avenue*

In *Occupiers of Saratoga Avenue* the ConCourt employed a very low standard of review for ME at the expense of the unlawful occupiers. In this case about 50 households brought an urgent application to vary the order made in *Blue Moonlight Properties*. The request for variation include a request for an order of the ConCourt requiring the City to make provision for temporary accommodation to a wider group of people and for the postponement of the eviction order.¹⁰³ The occupiers argued that the reason they brought the matter to the ConCourt was because the City had not meaningfully engaged with them in relation to the temporary accommodation, and they further argued that ME is a substantive requirement.¹⁰⁴ In a unanimous judgement delivered by Froneman J the application by the occupiers was dismissed and the ConCourt further held that it was not necessary to make any finding on the question of whether ME was a substantive requirement. This judgment was at variance with the objectives of the Transformative Empowerment Model and resulted in regressive application of ME.

5.3.7 *Schubart Park Residents*

The *Schubart Park Residents* judgment differed substantially from that of *Occupiers of Saratoga Avenue* in many respects as the ConCourt employed a much higher standard for application of ME. In *Schubart Park Residents* about 700 households in a residential complex in Pretoria appealed against the decision of the High Court and the SCA, which had rejected their application for the re-occupation of their homes. This was after the

¹⁰³ *Occupiers of Saratoga Avenue* para 7.

¹⁰⁴ *Occupiers of Saratoga Avenue* para 17.

City had not allowed the occupants of block C of Schubart Park back into their homes due to the need for refurbishment of the complex after riots and fires that took place during a protest by the occupants. The engagement between the legal representatives of the occupiers with the City officials came to naught.¹⁰⁵ On 23 September 2011 the North Gauteng High Court also made an order directing the parties to take steps in an attempt to reach an agreement. Instead, on 28 September 2011 the City of Tshwane removed the residents of blocks A and B. By the end of September between 3000 and 5000 people were either on the streets or in temporary shelter.¹⁰⁶

The occupiers and SERI, as an *amicus curiae*, argued that the High Court decision to dismiss the occupiers from the residence was tantamount to an eviction and contravened section 26(3) of the Constitution and PIE. The applicants also attacked the factual basis relied upon by the High Court for their dismissal from the complex and further argued that there was inadequate engagement between the City and the occupiers. Delivering the unanimous judgment, Froneman J held that orders for engagement should accompany eviction orders where provision for temporary accommodation had to be made pending final eviction.¹⁰⁷ However, he held that there is no reason why engagement orders could not be made in this case.¹⁰⁸ He asserted that many provisions of the Constitution, 'require substantive involvement in decision-

¹⁰⁵ *Schubart Park Residents* para 4.

¹⁰⁶ *Schubart Park Residents* para 8.

¹⁰⁷ *Schubart Park Residents* paras 42-43.

¹⁰⁸ *Schubart Park Residents* para 42.

making that may affect the lives of occupiers'.¹⁰⁹ Froneman J underscored the need for ME to be democratic.¹¹⁰

According to Froneman J there was an inter-relationship between different rights and the exercise of rights often results in tension, which can be best resolved by engagement between the parties.¹¹¹ This engagement should take place without preconceptions about the worth and dignity of those participating in the engagement process.¹¹² Froneman J further held that the rights to dignity, justice and equity required that the participants 'must be treated as equals'.¹¹³ He then held that the tender by the City of Tshwane of temporary accommodation was an inadequate basis for engagement as it proceeds from a 'top-down' premise which suggested that the City treated the residents as 'obnoxious social nuisances'.¹¹⁴ He set aside the eviction order and issued an order "for engagement with the applicants at every stage of the re-occupation".¹¹⁵ The several meetings between the lawyers of the occupiers and the City of Tshwane were regarded as inadequate by Froneman J as ME required organisation of the occupiers and the building of social capital among them. The judgment in *Schubart Part Residents* pertinently focused on the substantive aspects of ME and thereby offered better protection of the section 26(3) right to the occupiers. The reasoning in this case is congruent with the approach in the Transformative Empowerment Model.

¹⁰⁹ *Schubart Park Residents* para 43.

¹¹⁰ *Schubart Park Residents* para 34.

¹¹¹ *Schubart Park Residents* para 44.

¹¹² *Schubart Park Residents* para 46.

¹¹³ *Schubart Park Residents* para 49.

¹¹⁴ *Schubart Park Residents* para 50

¹¹⁵ *Schubart Park Residents* para 51.

5.3.8 Evaluation of the post-*Residents of Joe Slovo* eviction cases

In summarising the application of ME in the post-*Residents of Joe Slovo* dispensation, Ray's distinction between progressive and regressive application of ME is very useful. Ray argues that in *Occupiers of 51 Olivia Road* there was progressive application, as opposed to *Residents of Joe Slovo* in which there was regressive application, of ME. Progressive application of ME occurred in judgments in which the ConCourt did not separate the substantive and procedural safeguards of ME.¹¹⁶ In these cases the application of ME was aligned to the objectives of the Transformative Empowerment Model. The regressive application of ME occurred in cases where the ConCourt placed more emphasis on procedural aspects of ME at an expense of the substantive safeguards. This was done to the detriment of the unlawful occupiers. In these cases ME was used as a tool for disempowerment of the unlawful occupiers. The regressive application of ME is at variance with the Transformative Empowerment Model. Table 5 below highlights judgments with progressive application of ME that were congruent with *Occupiers of 51 Olivia Road* and those judgments with regressive application that were congruent with *Residents of Joe Slovo*.

¹¹⁶ Ray B (2010) 29.

Table 5: The Progressive and Regressive Application of ME in Case Law

Progressive application	Regressive application
<i>(Occupiers of 51 Olivia Road)</i>	<i>(Residents of Joe Slovo)</i>
<i>Abahlali BaseMjondolo</i>	<i>Blue Moonlight Properties</i>
<i>Pheko</i>	<i>Occupiers of Skurweplaas</i>
<i>Occupiers of Portion R25</i>	<i>Occupiers of Saratoga Avenue</i>
<i>Schubart Park Residents</i>	

Abahlali BaseMjondolo marked an impressive breakthrough in the application of ME soon after the disappointing judgment in *Residents of Joe Slovo*, as the majority judgement affirmed the substantive requirements of ME. The ConCourt highlighted the importance of developing the abilities of the unlawful occupiers to engage meaningfully. Consequently the Court declared section 16 of the Slums Act unconstitutional as it violated the constitutional requirement for ME. In a dissenting judgment, Yacoob J wrongly equated ME with mere consultation.

The positive trend in *Abahlali BaseMjondolo* was sustained in *Pheko* as the ConCourt correctly rejected the proceduralisation of ME and held that three public meetings could not be considered adequate for ME. The ConCourt held that ME was about building capacity for individual and collective engagement with the occupiers to find bottom-up solutions to their problems. The ConCourt adopted the same position in *Occupiers of Portion R25* and *Schubart Park Residents*. In *Occupiers of Portion R25*, the ConCourt set aside the eviction order and referred the matter back to the High Court for reconsideration after ME had taken place. Similarly, in *Schubart Park Residents* the

ConCourt held that ME is a substantive requirement that required effective involvement by the occupiers. The ConCourt held that this involvement was necessary at every stage of the eviction process, and that participants should be treated as equals. Despite the inadequate elaboration on the substantive aspects of ME, in *Abahlali BaseMjondolo*, *Pheko, Occupiers of Portion R25* and *Schubart Park Residents* the conceptualisation and application of ME were closely related to the objectives of the Transformative Empowerment Model, and as the result the protection offered by section 26(3) was enhanced.

In stark contrast, *Blue Moonlight Properties, Occupiers of Skurweplaas* and *Occupiers of Saratoga Avenue* represented regression in the application of ME. In all three cases the ConCourt established that there was no ME with the occupiers; nevertheless, the eviction orders of the lower courts were upheld. Furthermore, in *Occupiers of Skurweplaas* the enforcement of the eviction order was suspended for one month to give time for ME. This order went against the thrust of the majority judgment in *Residents of Joe Slovo* that ME could not take place with an eviction order 'hanging like a sword on the occupiers'.¹¹⁷ In *Occupiers of Saratoga* the ConCourt held that it was not necessary to elaborate on the question of whether or not ME was a substantive requirement. In *Blue Moonlight Properties, Occupiers of Skurweplaas* and *Occupiers of Saratoga Avenue* the ConCourt incorrectly conflated and equated ME with consultation and mediation.¹¹⁸

¹¹⁷ *Residents of Joe Slovo* para 111.

¹¹⁸ *Residents of Joe Slovo, Abahlali BaseMjondolo, Occupiers of Skurweplaas* and *Occupiers of Saratoga Avenue*.

5.4 Conclusion

The objective of this chapter is to examine the application of ME by the ConCourt against the Transformative Empowerment Model. It is fair to argue that the development of the eviction jurisprudence of the ConCourt can be adequately captured as 'crossing the river by feeling the stones' as the ConCourt stumbled in some instances in its application of ME. This was part of the trial and error experimental voyage to build a new jurisprudence predicated on the culture of respect for human rights and transformative constitutionalism.

The history of abuse through apartheid induced forced evictions provides the complex context for evictions in South Africa. Hence, the jurisprudential craftsmanship and innovation by the ConCourt in the adjudication of eviction cases must be commended. However, there is a need to strengthen this jurisprudential enterprise through scholarly contributions. That is the objective behind the development of the Transformative Empowerment Model in this study.

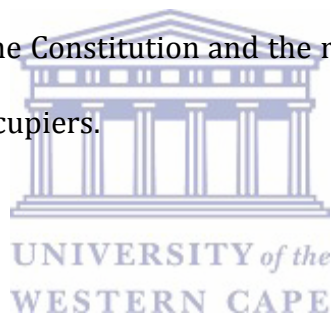
In this chapter it is demonstrated that in cases where the conceptualisation and application of ME were closely related to the objectives of the Transformative Empowerment Model the protection offered by section 26(3) was enhanced. Conversely, in cases where the application and conceptualisation of ME was at variance with the objectives of the Model the protection offered by section 26(3) was severely compromised. This resulted in the ConCourt upholding orders for eviction without adequately taking into consideration the circumstances of the occupiers.

In *Grootboom* the ConCourt held that the rights to dignity and equality introduced a new normality in property law and that the common law position of an unqualified right of ownership of property is circumscribed by the right against unlawful evictions under section 26 of the Constitution. The Court further held that reasonableness of state action during evictions would require some effective engagement with the unlawful occupiers. The ConCourt set aside the eviction order due to inadequate engagement with the occupiers. The ConCourt followed the same approach in *PE Municipality* as it set aside an eviction order due to lack of engagement with the occupiers.

Based on the judgments in *Grootboom* and *PE Municipality*, Yacoob J in *Occupiers of 51 Olivia Road* introduced the notion of ME to strengthen the protection under section 26(3). Yacoob J emphasised the substantive aspects of ME. Hence, the application of ME in this case was congruent with the objectives of the Transformative Empowerment Model and as the result the occupiers enjoyed enhanced protection under section 26(3).

In the subsequent eviction case, *Residents of Joe Slovo*, the application of ME was in stark contrast to its application in *Occupiers of 51 Olivia Road*. This resulted in a jurisprudential inconsistency, which was due to the fact that in *Residents of Joe Slovo* the ConCourt placed more emphasis on the procedural aspects of ME. The proceduralisation of ME in *Residents of Joe Slovo* was at variance with the objectives of the Transformative Empowerment Model. This weakened the protection offered by section 26(3) as the ConCourt upheld an eviction order without ME, which resulted in the ejection of Joe Slovo residents without adequate consideration of their circumstances.

The inconsistency in the application of ME caused a great deal of confusion in the post-*Residents of Joe Slovo* eviction cases. As demonstrated in *Blue Moonlight Properties*, *Occupiers of Skurweplaas* and *Occupiers of Saratoga Avenue* the confusion resulted in regressive and disappointing application of ME that weakened the protection under section 26(3) of the Constitution. Following on the judgment in *Residents of Joe Slovo*, the ConCourt in the three mentioned judgments proceduralised the application of ME to the detriment of the unlawful occupiers. In assessing the nature and the extent of the engagement the ConCourt was overtly concerned with the number of meetings or consultations that took place. This resulted in the ConCourt upholding eviction orders that exposed the unlawful occupiers to harsh conditions compromising the protection enshrined in section 26(3) of the Constitution and the rights to human dignity, equality and freedom of the unlawful occupiers.



CHAPTER 6

THE TRANSFORMATIVE EMPOWERMENT MODEL AND THE RIGHTS TO HUMAN DIGNITY, EQUALITY AND FREEDOM

6.1 Introduction

In chapter 5 the study examines the conceptualisation and application of ME in relation to the Transformative Empowerment Model. In this regard, the study identified two forms of application of ME by the ConCourt: progressive and regressive. Progressive application was in cases where the application of ME was closely aligned with the objectives of the Transformative Empowerment Model. In these cases, the protection of human dignity, equality and freedom was enhanced. In regressive application, the occupiers were subjected to untold hardship that undermined their rights to human dignity, equality and freedom. Human dignity, equality and freedom are the requirements for ME. This chapter will explore the possible impact of the Transformative Empowerment Model, as a strategic intervention, on the attainment of the rights to human dignity, equality and freedom. In so doing, the chapter will briefly reflect on the historical evolution of these values in the natural law school to highlight their significance and implications for the application of ME and the Transformative Empowerment Model.

In all nine judgments on evictions the ConCourt held that ME is a requirement based on the rights to human dignity, equality and freedom. In *Occupiers of 51 Olivia Road, Yacoob J* strongly asserted that ME must have regard for the rights to dignity and equality of the

vulnerable and poor occupiers, and that if ME does have no regard to these rights the Constitution will not be worth the paper on which it is written.¹ This assertion is consistent with the cogent argument of Dugard and Liebenberg that the courts, particularly the ConCourt, deploy the open-ended foundational values of human dignity, equality and freedom to give substantive meaning to the fundamental rights entrenched in Chapter 2 of the Constitution, particularly the socio-economic rights.²

Budlender agrees with both Dugard and Liebenberg, but decries the ineptitude of many human rights lawyers who use the rights to human dignity, equality and freedom as secondary rights in their litigations.³ He argues that the right to dignity, equality and freedom are fundamental rights and not secondary to other entrenched rights in the Constitution. He commends the ConCourt for placing the same premium on each of these interrelated values, although in *S v Mamabolo*⁴ (*Mamabolo*) the ConCourt noted that it is not an easy matter to reconcile the ‘...three conjoined, reciprocal and covalent values’ of human dignity, equality and freedom.⁵

This chapter is subdivided into four parts. The first part highlights that ‘human dignity, equality and freedom’ are values or principles primarily attributable to natural law. This part further reflects that the interpretation of human dignity, equality and freedom by the natural law school is tied up with an understanding of what is just and rational, rendering the Constitution value laden. The second part focuses on the

¹ *Occupiers of 51 Olivia Road* para 10.

² Dugard (1994) 122; Liebenberg (2010) 142.

³ Budlender (2014) 44.

⁴ *S v Mamabolo* 2001 (3) SA 409 (CC).

⁵ *Mamabolo* para 17.

conceptualisation of human dignity and explores its implications for the Transformative Empowerment Model. The third part examines the value of equality and explores its implications for the Transformative Empowerment Model. Similarly, the fourth part examines the value of freedom and explores its implications for the Transformative Empowerment Model.

6.2 Natural law and the rights to human dignity, equality and freedom

The purpose of this section is to briefly reflect on the historical evolution and enduring character of the values of human dignity, equality and freedom within the natural law school of thought. Chapter 1 of the Constitution highlights human dignity, equality and freedom as 'foundational values of the Constitution' and in *Occupiers of 51 Olivia Road*, Yacoob J asserted that these are '...the foundational values of our society that constitute the basis for meaningful engagement'.⁶ This assertion by Yacoob J renders the investigation into the theological and philosophical roots of these values necessary for this study.

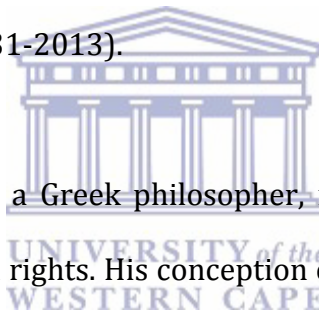
According to natural law, 'law' conceptually implies a necessary relationship with morality and specifically justice and equality. This relationship exists by nature, is therefore independent and precedes human law. The natural law concept of the rights to human dignity, equality and freedom will assist to provide a standard by which to explore the relevance of the Transformative Empowerment Model for ME. Over more than four centuries, two natural law theories evolved over two different things.⁷ One is

⁶ *Occupiers of 51 Olivia Road* para 46. See also *Grootboom* para 23.

⁷ Veitch S, Christodoulidis E & Farmer L *Jurisprudence: Themes and Concepts* (2012) 37.

the natural law theory of morality, or what is wrong or right; and the other is the natural law theory of positive law, or what is legal or illegal.

There are highly varied and compelling versions of natural law, from those of the ancient Greeks and Romans to the 18th century French philosophers. The Greek and Roman thinking exerted a profound influence on Western legal philosophy.⁸ In an attempt to illuminate the historical evolution and conception of values, such as, human dignity, equality and freedom, in the natural law school, the work of some key proponents of natural law will be briefly reviewed in chronological order: Plato (427-347 BCE), Aristotle (384-323 BCE), John Locke (1632-1704), Jean-Jacques Rousseau (1632-1704), and Dworkin (1931-2013).



In Western legal studies Plato, a Greek philosopher, is regarded as the father of the concepts of equality and human rights. His conception of equality views it as a principle of justice. Plato presents assumptions based on the relationship between ideas and reality and argues that the social function of law is to enforce through ‘coercive social edicts’, such as justice and equality, the ideal state.⁹ Justice and equality as coercive social norms found pre-eminence in the work of Plato and were overarching features thereof.

Aristotle, a student at Plato’s Academy, provided more content for Plato’s concept of justice, which encapsulates equality. According to Aristotle, ‘good, happiness and living

⁸ Veitch LS, Christodoulidis E & Farmer L (2012) 42.

⁹ Le Roux WB ‘Natural law theories’ in Roederer C & Moellendorf D (eds) *Jurisprudence* (2004 reprinted 2007) 30-32.

well' can be acquired and realized in practice, thus distancing himself from Plato's search for the transcendent idea.¹⁰ He maintains that 'anything that tends to produce or conserve happiness is just'.¹¹ In this sense Aristotle directly links justice with well-being or happiness (flourishing).¹² This political philosophy of Aristotle provides the classical roots and philosophical foundation for the contemporary test of reasonableness and proportionality under human rights law.¹³

In Cicero's analysis of how medieval Rome's legal system should function, he emphasises that 'commands shall be just'.¹⁴ Cicero goes further to highlight that the just commands will treat human beings equitably and with dignity. Similarly, Locke defines natural law as disclosing equality (common equity) as man's natural state and demonstrates the evils of absolutism.¹⁵ Locke regarded natural law as a sanctuary of higher values of equality and freedom, which must be used as a check against man-made laws. This articulation by Locke expressively brought the values of freedom and equality within the realm of natural law.¹⁶ Rousseau is even more emphatic on the issue of equality and asserts that all men in the state of nature 'are as naturally equal among themselves as were the animals of every kin'.¹⁷

¹⁰ Aristotle *Ethics* (1976) 87.

¹¹ Aristotle (1976) 54.

¹² Aristotle (1976) 102.

¹³ See in general *S v Makwanyane* 1995(3) SA 391 (CC).

¹⁴ Cicero MT *The Republic and the Laws* (1998) 151.

¹⁵ Locke J *Two Treaties of Government*. (1983) 8-12.

¹⁶ Johnson et al (2001) 147.

¹⁷ Rousseau *Discourse on Inequality* (1973) 32.

The question of whether the values of human dignity, equality and freedom can be used in the interpretation of constitutions has attracted extensive debates between natural law scholars and legal positivists. Dworkin argues that it is proper for Supreme Court judges to interpret a constitution in light of the correct principles of justice that a country tries to honour.¹⁸ Dworkin recognizes that justice and law should ultimately be unified and further argues that law and morality share an 'interdependent existence'.¹⁹ In another sense, Dworkin argues that human rights are a direct product of moral philosophy. Hence the substantive content of rights can be better understood against the background of moral philosophy.²⁰

From the above brief exposition it is apparent that human dignity, equality and freedom are overarching values that underpin natural law. According to natural law scholars, these values provide the philosophical basis for human rights and pre-date the state, and there seems to be agreement that any legal system that is bereft of these values, as a point of critique will lack credibility. These very broad values are entrenched in the Constitution, and as a result thereof, judges are authorized to resolve a case by recourse to natural law premises. The next sections will discuss these values separately in an attempt to identify the key elements of each value through examination of case law and literature.

¹⁸ Dworkin R *Law's Empire* (1986).

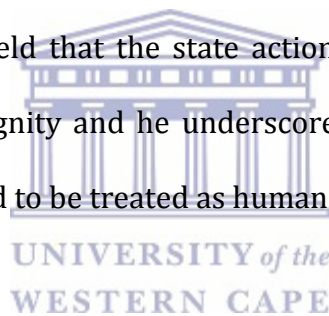
¹⁹ Dworkin R (1986) 90-91.

²⁰ Dworkin R (1986) 9.

6.3 Human dignity and the Transformative Empowerment Model

6.3.1 Conceptualising human dignity

As mentioned above, Cicero asserts that just commands of the state must treat human beings with dignity. The ConCourt in *Occupiers of 51 Olivia Road* upheld this assertion by Cicero when Yacoob J held that central to the constitutional obligation to engage meaningfully was the right to human dignity of the unlawful occupiers.²¹ According to Yacoob J, the process of engagement would work only if both sides ‘act reasonably and in good faith and that the unlawful occupiers are not treated as a faceless and obnoxious social nuisance’.²² He further held that the state action in all circumstances must pay particular regard to human dignity and he underscored this with the apt postulation that ‘human beings are required to be treated as human beings’.²³



According to Yacoob J, human dignity required proactive engagement with the occupiers as soon as the municipality became aware of the occupation. He held that, in the case, a dignified engagement would have included ‘respectful face-to-face engagement or mediation through a third party and should replace arm’s length combat by intransigent opponents’.²⁴ Human dignity further required ‘willing participation in the engagement process, which is underpinned by understanding and sympathetic care’.²⁵ Consistent with Yacoob J, in *Residents of Joe Slovo*, Moseneke J held that human

²¹ *Occupiers of 51 Olivia Road* para 18.

²² *Occupiers of 51 Olivia Road* para 20.

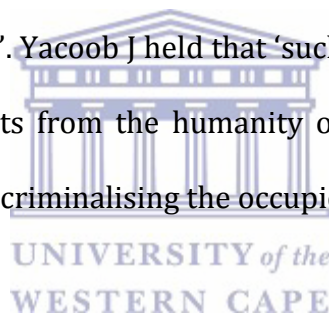
²³ *Occupiers of 51 Olivia Road* para 12.

²⁴ *Occupiers of 51 Olivia Road* para 13.

²⁵ *Occupiers of 51 Olivia Road* para 15.

dignity was a central pillar of the transformative vision of the Constitution, which required that the vulnerable occupiers possessed the 'abilities and capabilities' to properly engage.²⁶

Emphasising the importance of human dignity in *Schubart Park Residents*, Froneman J held that the engagement process should take place without any preconceptions about the worth of those who are participating.²⁷ He further held that human dignity was against the treatment of occupiers like 'anonymous squatters' automatically to be expelled.²⁸ The efforts of the ConCourt to promote the right to human dignity were also demonstrated in *Occupiers of Skurweplaas*, when Yacoob J objected to the description of unlawful occupiers as 'invaders'. Yacoob J held that 'such description of human beings is less than satisfactory, it deducts from the humanity of the occupiers, is emotive and judgmental, and comes close to criminalising the occupiers'.²⁹



As mentioned earlier, the right to dignity is entrenched under section 10 of the Constitution. Furthermore, section 1(a) of the Constitution prescribes that 'human dignity' is one of the foundational values on which the democratic dispensation was constructed. Ackermann asserts that the phrase '...everyone has inherent dignity' is an unequivocal constitutional 'proclamation about the essence of the natural person respected and protected by the Constitution'.³⁰ The attribution of human dignity as 'inherent' is in accordance with Cicero's assertion and simply means that the right is not

²⁶ *Residents of Joe Slovo* para 119.

²⁷ *Schubart Park Residents* para 45.

²⁸ *Schubart Park Residents* para 46.

²⁹ *Schubart Park Residents* paras 44-47.

³⁰ Ackermann L *Human Dignity: Lodestar for Equality in South Africa* (2012) 94.

acquired from the Constitution but predates it and that everyone is entitled to it. This means that the application of the right cannot be postponed or acquired at a later stage, but already exists in every human being.

This study finds the definition of human dignity by Ackermann and the natural law school very compelling. According to Ackermann there can be no doubt that in the context of the Constitution 'dignity' means human's worth or 'inherent human worth'.³¹ This definition correctly renders human dignity synonymous with '*menswaardigheid*' in the Afrikaans text of the Constitution and "*menschenwurde*" in Article 1(1) of the German Basic Law.³² The conceptualisation of human dignity in evictions cases by the ConCourt corresponds to this understanding of human dignity.

The work of Kant is instructive in any attempt to understand the meaning of human dignity.³³ Kant's conceptualisation of human dignity establishes a universal basis for the protection of dignity, particularly through categorical imperatives, their different formulations and their application. His commitment to the equal worth of all human beings is at the forefront of his conceptualisation that human dignity is 'the absolute, hence equal worth of all rational beings'.³⁴ Ackermann succinctly explains the use of 'the absolute' by Kant as underpinning the assertion that every human being has an absolute inner worth, because the worth; is absolute, all human beings are equal to one

³¹ Ackermann L (2012) 98.

³² Basic Law for the Federal Republic of Germany adopted by the Parliamentary Council in a public session at Bonn am Rhein on 23 May 1949 and ratified in the week of 16 to 22 May 1949. Published in the Federal Law Gazette pursuant to para (3) of Article 145.

³³ Kant I *The Moral Law: Kant's Groundwork of the Metaphysics of Morals* (1963).

³⁴ Wood AW *Kant's Ethical Thought* (1999) 6.

another with regard to this absolute worth; and this absolute inner worth is human dignity.³⁵

According to the Kantian imperative, human beings should never be treated simply as a means, but always at the same time as an end.³⁶ This implies that the involvement of informal settlements in engagements during evictions should not be used simply as a means towards an eviction, a formality to be adhered to, but should be seen as a substantive process to genuinely find appropriate collective solutions to the plight of those in informal settlements.

Kant's conceptualisation of human dignity is consistent and guided that of the ConCourt, as it used human dignity as a basic reference point in the development of its jurisprudence on the right against unlawful evictions. This was evident in *Occupiers of 51 Olivia Road* where Yacoob J expressed the view that evictions and the demolition of the makeshift houses of the poor were degrading and an affront to the inherent human dignity.³⁷ This Kantian approach to human dignity had been expressed by the ConCourt in a number of cases.³⁸ The question with regard to the Kantian theory is whether the Transformative Empowerment Model promotes human worth and ensures that the circumstances of the poor are genuinely taken into consideration.

Human dignity is one of the elements of the capability approach theory. The capability approach theory was first articulated by the Indian economist and philosopher, Sen, in

³⁵ Ackermann L (2012) 56.

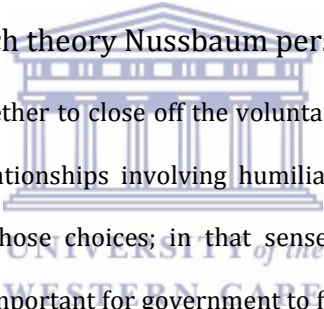
³⁶ Kant I (1963) 540-542.

³⁷ *Occupiers of 51 Olivia Road* para 16.

³⁸ *Residents of Joe Slovo* para 119. See also *Schubart Park Residents* para 45.

the 1980s and remains most associated with him.³⁹ The approach is defined by its choice of focus upon the moral significance of an individual's capability of achieving the kind of life they have reason to have.⁴⁰ A person's capability to live a good life is defined in terms of the set of valuable 'beings and doings' like being in good health or having loving relationships with others, to which they have real access.⁴¹

Nussbaum and Sen collaborated in the late 1980s, and since they are the most prolific writers on the capability approach theory and their accounts are often elided, despite significant differences. While Sen's approach is founded on enhancing individual freedoms, Nussbaum's theory is founded on respecting human dignity. Relating to dignity in the capability approach theory Nussbaum persuasively states:



'Surely we do not want altogether to close off the voluntary choices citizens may make to abase themselves or to choose relationships involving humiliation in their personal lives, however unfortunate we may think those choices; in that sense, capability remains the appropriate political goal. But [it] seems important for government to focus on policies that will actually treat people with dignity as citizens and express actual respect for them, rather than policies that would extend to citizens a mere option to be treated with dignity, but allow them also the option to be treated with humiliation. In general, the more crucial function is to attaining and maintaining other capabilities, the more entitled we may be to promote actual functioning in some cases, within the limits set by an appropriate respect for citizens' choice.'⁴²

The basic contention here by Nussbaum is that some living conditions deliver to people a life that is worthy of the human dignity they inherently possess, and others do not as

³⁹ Sen A *Equality of What?* (1979).

⁴⁰ Nussbaum MC *Creating Capabilities: The Human Development Approach* (2011). See also Alexander JM *Capabilities and Social Justice* (2008).

⁴¹ Sen A (1979) 76.

⁴² Nussbaum MC (2011) 123.

they subject people to humiliation.⁴³ In the latter case, the people still retain dignity, but it is like a promissory note whose claims have not been met.⁴⁴ Dixon and Nussbaum argue that the focus on dignity should influence policy preferences and approaches with regard to the vulnerable groups in society. They assert that in cases of dealing with vulnerable groups the focus on dignity will dictate policy choices and approaches that protect and support the capabilities of the vulnerable, rather than choices that marginalise people and treat them as passive recipients of benefits.⁴⁵ From the above it is apparent that the ConCourt understood human dignity in unmistakable Kantian terms and had regarded human dignity as human worth. Furthermore, the ConCourt in its conceptualisation of human dignity also aligned itself to Sen and Nussbaum's theory of building capabilities and mutual respect.



⁴³ Dixon R & Nussbaum MC *Abortion, Dignity and a Capability Approach* (2011). See also Dixon R & Nussbaum MC 'Children's right and a capability approach: the question of special priority' (2012) 97 *Cornell Law Review* 549.

⁴⁴ Dixon R & Nussbaum MC (2012) 555.

⁴⁵ Dixon R & Nussbaum MC (2012) 557.

Table 6: Elements of Human Dignity

Value	Elements of human dignity	Sources
Human dignity	Mutual respect	Sen (1979), Nussbaum (2011), <i>Occupiers of 51 Olivia Road</i> and <i>Residents of Joe Slovo</i> .
	Building the capabilities of the poor to engage	Sen (1979), Nussbaum (2011), <i>Occupiers of 51 Olivia Road</i> and <i>Schubart Park Residents</i> .
	Human worth	Cicero (1998), Kant (1963), Ackermann (2012), <i>Occupiers of 51 Olivia Road, Schubart Park Residents</i> and <i>Residents of Joe Slovo</i> .

Table 6 demonstrates the three key elements of human dignity deduced from both case law and literature. The Table illustrates that the articulation of human dignity by the ConCourt is the same as the understanding of the concept by the leading scholars on the subject. Collectively, Cicero, Kant, Sen, Nussbaum, Ackermann and the ConCourt emphasise three important elements for human dignity: *mutual respect*, *building capabilities*, and *human worth*. Without *mutual respect* between the occupiers and the state, genuine consideration of the plight of the occupiers is unlikely. Failure to *build capabilities* of the unlawful occupiers to engage purposefully might render their participation ineffective. *Mutual respect* and *building capabilities* reinforce the possibilities for the attainment of *human worth* (human beings must be treated as human beings), which both Kant and the ConCourt consider to be crucial for human dignity.

6.3.2 Finding the relationship between human dignity and the Transformative Empowerment Model

With regard to finding the nexus between human dignity and the Transformative Empowerment Model there are three pertinent questions this section has to address. The first question relates to the Kantian notion of human worth. Consequently the question is: whether the design of the Transformative Empowerment Model promotes and protects human worth of the occupiers in the informal settlements. The second question relates to Sen's and Nussbaum's conceptualisation of capability as an element of human dignity that enables the vulnerable people to fight for conditions that deliver a kind of life that is worthy of their dignity. The question is: whether The transformative Empowerment Model increases the capabilities of the unlawful occupiers to engage meaningfully. The last question is grounded in the assertion of Sen and Nussbaum that mutual respect, disregarding the station of an individual in society, is an essential element of human dignity. The question is: whether the Transformative Empowerment Model fosters mutual respect. Table 7 below responds to the three questions in an attempt to find the link or the relevance of the Transformative Empowerment Model in promoting human dignity.

Table 7: Elements of Human Dignity and the Transformative Empowerment Model

Foundational value	Question	Response
Human dignity	Does the Model foster <i>mutual respect</i> ?	<p>The 'basis for mutual respect is understanding of each other's circumstances'.⁴⁶ The Model allows for informal and formal engagement from the <i>first stage</i> to foster understanding of each other's circumstances. The <i>second stage</i> of the Model focuses on community screening by collecting preliminary data through brainstorming with the community members to formulate some objectives. The formulation of initial objectives with the community seeks to ensure that the process is community driven. This is in accordance with the CLEAR model 'can do' requirement.</p> <p>To promote mutual respect in the <i>third stage</i>, the community profiling is executed by using local knowledge. The <i>first, second and third stages</i> are dedicated to ensuring thorough understanding of the community. The formulation of objectives informed by the community values and needs also gives credence to mutual respect. The first three stages reinforce respect for the informal settlements that is crucial for finding bottom-up solutions to their problems.</p>
	Does the Model	The Model does promote building of capabilities.

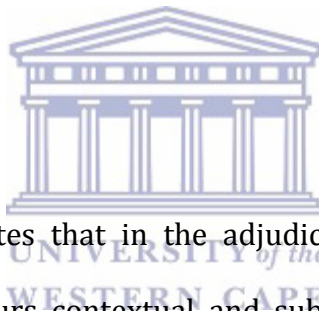
⁴⁶Nussbaum MC (2011) 45.

	<p>ensure the building of capabilities for the occupiers?</p>	<p>The third stage of the Model particularly focuses on building capabilities and emphasises the importance of local knowledge in the collection of data and the involvement of affected unlawful occupiers in the dissemination and use of such data. This is the first crucial step in the model that contributes concretely to building capabilities the vulnerable occupiers.</p> <p>The second critical step for building capabilities is sharing of data for critical appraisal through development of user-friendly maps. The 'neighbour maps' contain relevant information about the informal settlement, such as, the important social aspects, description of political parties involved and influential people and possible threats/support that might come from them. The 'issue maps' contain the immediate and intermediate problems that the occupiers of the informal settlement want to see addressed. The 'resource maps' show the physical resources within the area, the skills available and the capacity of community organisations.</p> <p>The mechanisms to build capabilities in the <i>third stage</i> are further strengthened in the fourth stage by the focus to build bridging social capital that transcends narrow sectional interests and secondly, by the introduction of educational programmes to develop skills that help build self-confidence of the occupiers and critical reflection on the power dynamics in the engagement process.</p>
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	Does the Model reinforce the value of <i>human worth</i> ?	The Model does reinforce the value of human worth as the improved understanding of the circumstances of the informal settlements could result in compassion. Human worth is promoted by the bottom-up solutions, building the capabilities of the occupiers, and building of social capital for collective action. This ensures that degrading treatment, like tokenism or manipulation, does not find expression in the engagement process.
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6.4 Equality and the Transformative Empowerment Model

6.4.1 Conceptualising equality

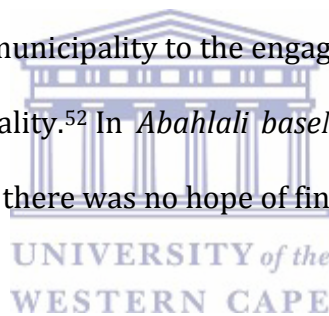


In chapter 5 the study indicates that in the adjudication of the eviction cases the ConCourt’s jurisprudence favours contextual and substantive equality and not mere formal equality. In *PE Municipality* the ConCourt defined the right to equality as ‘an independent normative value that presupposes substantive equality’.⁴⁷ This articulation by Sachs J was consistent with Plato’s and Aristotle’s idea that equality is a coercive social norm for the attainment of well-being. Furthermore, Sachs J held that the right to equality imposed an obligation on the courts not to establish ‘a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the right to ownership over the right not to be dispossessed of a home, or vice versa’.⁴⁸

⁴⁷ *PE Municipality* para 21.

⁴⁸ *PE Municipality* para 24.

Sachs J held that the right to equality required the showing of special concern when settled communities or individuals were faced with eviction, and this raised the need for 'equitable arrangements to mitigate the negative impact of the eviction'.⁴⁹ He further held that in an effort to find 'equitable arrangements', more focus should be placed on bottom-up solutions informed by 'equitable participation of occupiers as equals'.⁵⁰ This strong assertion by Sachs J was confirmed in *Occupiers of 51 Olivia Road*, Yacoob J decried the top-down decisions that were generated during the engagement process. Yacoob J asserted that the 'engagement process was a two-way process in which the City and those about to be rendered homeless would talk to each other meaningfully to find collective solutions' to the problems of evictions.⁵¹ Yacoob J further held that an unreasonable response by the municipality to the engagement process would amount to an affront to the right to equality.⁵² In *Abahlali baseMjondolo*, Moseneke J held that without equitable participation there was no hope of finding bottom-up solutions.⁵³



The use of the right to equality by the ConCourt in the eviction cases is subject to severe criticism. Davis is critical of the ConCourt's jurisprudence on the right to equality and advances this description of equality:

'Equality is too central a concept to be relegated to a secondary meaning. The courts need to look at equality as a value which seeks to promote a democratic society that recognises and promotes difference and individual as well as group diversity and thereby exhibits a

⁴⁹ *PE Municipality* para 27.

⁵⁰ *PE Municipality* para 30.

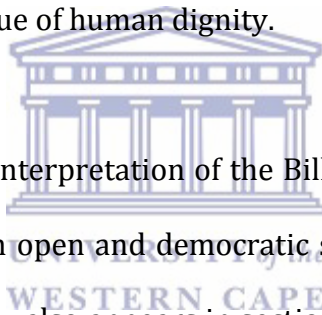
⁵¹ *Occupiers of 51 Olivia Road* para 14.

⁵² *Occupiers of 51 Olivia Road* para 21.

⁵³ *Abahlali BaseMjondolo* para 55.

commitment to ensuring that all within society enjoy the means and condition to participate significantly as citizens.⁵⁴

Duppert shares the same views and rejects the use of equality by the ConCourt as a secondary right to the right to human dignity.⁵⁵ Duppert appeals for a deeper normative value to be attached to the right to equality by the ConCourt. This study supports the trenchant criticism of the ConCourt's equality jurisprudence, and in particular of the fact that human dignity had been used to define equality. At the same time the study appreciates the interdependence and interrelation of rights, and also recognises the imperative that the right to substantive equality ought to be given a meaning independent of the value of human dignity.



The normative content for the interpretation of the Bill of Rights, at least in part, turns on the constitutional phrase 'an open and democratic society based on human dignity, equality and freedom'.⁵⁶ Equality also appears in section 9(1) of the Constitution, which states: 'Everyone is equal before the law and has the right to equal protection and benefit of the law'.⁵⁷ Section 9(2) states that equality means full enjoyment and protection of the law and the promotion of equality by means of legislation, and that the necessary steps may be taken to achieve such protection for persons or categories of persons disadvantaged by unfair discrimination.

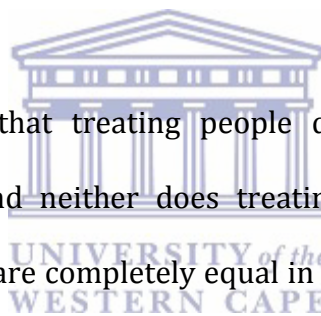
⁵⁴ Davis DM (1999) 413-414.

⁵⁵ Duppert (2006) 72.

⁵⁶ Section 39 of the Constitution.

⁵⁷ Chapter 2 of the Constitution.

Determining the meaning of 'equality' is fraught with difficulties as old as political theory itself.⁵⁸ There seems to be consensus in modern democracy, particularly liberal democracy, that equality is a good thing. However, there are divergent views on the nature and scope of the concept as it does not possess rigid conceptual boundaries. The 'right to equality' can be interpreted in various ways. Ackermann argues that 'equality' and 'equal' when applied to human beings are attributive expressions.⁵⁹ He argues that something has to be added to 'equal' to give it meaning, that means that it must be equal with respect to something else. His argument is that this something else is human dignity.⁶⁰ Accordingly, for Ackermann human worth is the criterion of reference or an attribution for equality.



Degener and Dereese argue that treating people differently is not necessarily a symptom of discrimination and neither does treating people the same amount to equality, since no two persons are completely equal in all respects.⁶¹ In agreement with this view, De Vos persuasively distinguishes between substantive and formal equality, and asserts that formal equality simply means to treat people who are the same the same, or those who are unlike as unlike.⁶² He argues that this kind of equality treats people the same irrespective of their circumstances.⁶³

⁵⁸ Woolman S (2013). See also De Vos P *Sexual Orientation, the Right to Equality in South Africa's 1996 Constitution* (Unpublished LLD thesis, University of the Western Cape, 1999).

⁵⁹ Ackermann L (2012) 20.

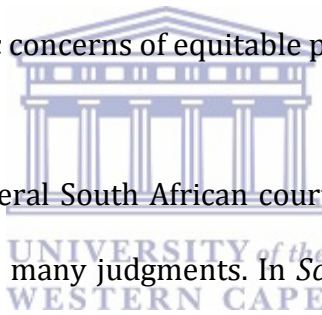
⁶⁰ Ackermann L (2012) 23.

⁶¹ Degener T & Koster-Dreese Y (eds) *Human Rights and Disabled Persons. Essays on Relevant Human Rights Instruments* (1995).

⁶² De Vos P 'Equality for all? A critical analysis of the equality jurisprudence of the Constitutional Court' (2000) 63 *THRHR* 62.

⁶³ De Vos P (2002) 13.

The centrality of substantive equality to the ME jurisprudence deserves no further elaboration in this thesis. However, ME as conceptualised by the ConCourt is not adequate for the protection of the right against unlawful evictions. Rather, it should be reinforced with the substantive and contextual concept of equality. Despite the conceptual inadequacies and the notoriously complex and elusive nature of the concept 'equality', the articulation by Friedman persuasively identifies four interrelated fundamental values which presuppose the substantive and contextual equality in the Constitution.⁶⁴ The first value emphasises individual dignity and worth; the second value is based on remedial justice that seeks to redress past discrimination; the third value is about redistributive objectives based on bottom-up solutions; and the fourth value is grounded in democratic concerns of equitable participation.⁶⁵



It is important to note that several South African courts have underscored Friedman's conceptualisation of equality in many judgments. In *Schubart Park Residents*, the Court emphasised that the importance of the right to equality is to prevent violation of human dignity and freedom. The ConCourt's jurisprudence treated human dignity and equality as different sides of the same coin. In terms of this conceptualisation any efforts to achieve equality have a direct impact on the realisation of human dignity.

The second value for substantive and contextual equality that Friedman identifies is the commitment to address the socio-economic inequalities that are the result of past injustices. This permutation is emphasised by judges in all the eviction cases, as these

⁶⁴ Friedman M *Equal Opportunity vs Equal Outcome* (2002) Part of Milton's Friedman's series "Free to Choose" (2002) available at valuesandcapitalism.com (accessed 22 September 2015).

⁶⁵ Friedman M (2002) 22-23.

cases were a stark reminder of the apartheid evictions, the gross unequal distribution of land and the draconian unjust laws of racial spatial segregation.⁶⁶ The commitment by the ConCourt to substantive equality was tailored towards addressing these historical injustices and their impact on the current generation. Therefore substantive equality, as advanced by the ConCourt is about redress.

The third of Friedman's values underlying substantive equality is the notion of distributive justice based on bottom-up solutions that give effect to the views of the vulnerable communities. This encompasses the state's positive obligation to ensure the equitable distribution of public goods to the advantage and benefit of the vulnerable groups, like informal settlements. In *Grootboom* the ConCourt applauded and commended the housing policy of the City of Cape Town but decried the failure by the City to make provision for emergency housing for those who were in desperate conditions. Accordingly, the ConCourt held that the omission in the housing policy to make provision for those in desperate need amounted to an incursion on their rights to human dignity and equality. In *Occupiers of 51 Olivia Road* the Court rejected the top-down approach that excludes the poor, and held that efforts directed at improving the conditions of the poor should be characterised by collective decision.

The fourth value underlying equality locates the idea of equitable participation as the principal instrument for attainment of substantive equality. In this context, equality goes beyond the position of the individual in relation to other individuals and focuses

⁶⁶ *Occupiers of 51 Olivia Road, Residents of Joe Slovo and Schubart Park Residents*.

on social equality.⁶⁷ Ackerman agrees with Friedman and argues that substantive equality ensures full participation and inclusion of those who are affected.⁶⁸ The imperative for equitable participation and inclusiveness is consistent with the application of ME by the ConCourt.⁶⁹

Table 8: Elements of Equality

Value	Elements of Equality	Source
Equality	Equitable participation	Friedman (2002), Ackermann (2012), <i>PE Municipality, Occupiers of 51 Olivia Road and Abahlali BaseMjondolo</i>
	Consideration of the broader context	Friedman (2002), <i>PE Municipality, Occupiers of 51 Olivia Road and Abahlali baseMjondolo.</i>
	Bottom-up solutions to problems	Friedman (2002), <i>PE Municipality, Occupiers of 51 Olivia Road and Abahlali baseMjondolo.</i>

Based on the literature and case law, Table 8 identifies three elements that can serve as catalysts for attainment of substantive equality: bottom-up solutions to problems, equitable participation and consideration of the broader context. As illustrated above ‘equitable participation’ and adequate ‘consideration of the broader context’ could result in bottom-up solutions. The imperative for bottom-up solutions is emphasised in

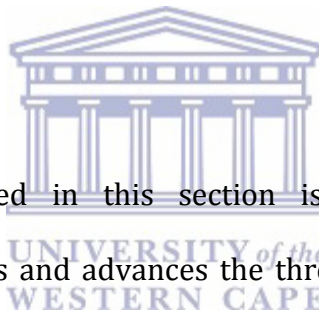
⁶⁷ Amollo R *Women Socio-economic Rights in the Context of HIV and AIDS in South Africa: Thematic Focus on Health, Housing, Property and Freedom from Violence* (Unpublished LLD thesis, University of the Western Cape, 2012).

⁶⁸ Ackerman L (2012) 29.

⁶⁹ *Occupiers of 51 Olivia Road, Residents of Joe Slovo and Schubbart Part Residents.*

many eviction cases. This underlies the need to address the unequal distribution of power between occupiers and the state. Equitable participation is to ensure that the involvement of the unlawful occupiers is not mere tokenism, placation or procedural formality. The judgments of the ConCourt on eviction and the literature on the right to equality underscore the importance of 'consideration of the context'. The political, economic and social context of the unlawful occupiers must be taken into consideration during the engagement process and failure to do so can prejudice the interests of this vulnerable group.

6.4.2 Finding the relationship between equality and the Transformative Empowerment Model



The question to be answered in this section is whether the Transformative Empowerment Model promotes and advances the three elements for substantive and contextual equality. Table 9 illustrates the connection between the Transformative Empowerment Model and the three elements of substantive equality, which are: equitable participation, consideration of the broader context and bottom-up solutions.

Table 9: Elements of Equality and the Transformative Empowerment Model

Foundational value	Question	Response
Equality	Does the Model promote equitable participation?	<p>The Model does promote equitable participation as its <i>fifth stage</i> prescribes strengthening participation. The kind of participation that the Model envisages is interactive participation in which informal settlements are actively involved in the analysis and development of an action plan for evictions. Here, participation is considered as a right and not a mere formality.</p> <p>To further strengthen participation the Model makes provision for the establishment of community organisations and the use of systematic learning processes. The role of community organisation is to serve as a platform for organisation and mobilisation of the informal settlement community to take control of local decisions. The learning processes will enable the occupiers to have informed engagements with both community organisations that represent them and the state.</p>
	Does the Model seek to ensure consideration of the broader context?	<p>The Model does seek to ensure consideration of the broader context as the <i>second and third stages</i> are crucial with regards to understanding the broader context. It is through in-depth understanding of the proper context of the informal settlement community that there could be adequate consideration of their circumstances. The <i>second stage</i> allows for</p>

		<p>screening, which includes identification of problems and concerns of the informal settlement and setting out preliminary goals and objectives through brainstorming.</p> <p>Screening is intended to lay the basis for broader contextual analysis of the informal settlement through community profiling using local knowledge for collection and dissemination of data. This process leads to better understanding of the informal settlement and opens up possibilities for a comprehensive response and consideration of the plight of the occupiers.</p>
	<p>Does the Model promote bottom-up solutions?</p>	<p>The Model does promote bottom-up solutions as the process of data collection in its <i>third-stage</i> focuses more on local knowledge of the affected unlawful occupiers and on the excluded and seldom listened to people. This process culminates in the <i>fourth stage</i>, which is building social capital. During this stage community organisations are formed as platforms to harness collective efforts to address the problems identified during the <i>third stage</i>.</p> <p>In promoting bottom-up solutions the Model seeks to ensure that the problems and solution that the community organisations will take up are generated from the grassroots level as the Model specifically focuses on creating spaces for participation of the most vulnerable groups. In the <i>fifth stage</i> the Model makes provision for strengthening participation through collective action, which includes mass-based campaigns</p>

		and use of formal and informal networks. To promote bottom-up solutions, the community organisations must have capacity to communicate across a range of different cultures to ensure an inclusive approach and also initiate bottom-up activities directed at unlawful occupiers.
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6.5 Freedom and the Transformative Empowerment Model

6.5.1 Conceptualising freedom

The value of freedom is understated in the eviction jurisprudence of the ConCourt. As mentioned earlier, in *Residents of Joe Slovo* two different committees represented the occupiers. The ConCourt accepted the reports from both committees and placed the same weight on both the reports. In his examination of the reports, Yacoob J appreciated the fact that the occupiers were organised for collective action to defend their rights. He further mentioned that the fact that there were two committees representing the occupiers should not be negatively construed as they had freedom of association.⁷⁰ Collective action is a strategy that is deployed by the vulnerable groups generally to mitigate the power imbalances and to ensure non-domination in any process of engagement. What underpins collective action is the organisation and mobilisation of the unlawful occupiers for voluntary participation in community organisations. The community organisations serve as a platform for practical expression of their right to freedom of association.

⁷⁰ *Residents of Joe Slovo* para 14.

Another aspect of the right to freedom was highlighted in *Blue Moonlight Properties*⁷¹ and *Occupiers of Skurweplaas*.⁷² In both cases the ConCourt suggested that the municipalities should have engaged with the occupiers both individually and collectively. The Court appreciated the importance of collective action to ensure maximum outcomes; however, it acknowledged that this could not be at an expense of engagement with each individual. Accordingly, the Court crystallised the freedoms of expression and choice within the context of ME. In three cases, namely, *Residents of Joe Slovo*, *Blue Moonlight Properties* and *Occupiers of Skurweplaas*, the ConCourt emphasised the importance of the rights to freedom of association and the expression of choice by the unlawful occupiers. In *Schubart Park Residents*, Froneman J confirmed the need to recognise the freedom of choice of the unlawful occupiers through determination of their choice at every stage of the engagement process.⁷³ This, according to Froneman J, was to ensure that the 'unlawful occupiers exercise self-mastery'.⁷⁴

In the discussion on the justiciability of socio-economic rights in chapter 3 this study reflects on the concept of 'freedom'. Some scholars who objected to the inclusion of justiciable socio-economic rights advanced the argument that these rights invoke positive obligations and as a result undermine the very nature of rights, which include individual freedoms guaranteed against state interference. According to this narrow classical liberal view, freedom is limited to the absence of state interference. As mentioned earlier, this study rejects this understanding of freedom as narrow construct.

⁷¹ *Blue Moonlight Properties* para 16.

⁷² *Occupiers of Skurweplaas* para 11.

⁷³ *Schubart Park Residents* para 51.

⁷⁴ *Schubart Park Residents* para 57.

The literature on substantive freedom is extensive in South Africa, and there is an overwhelming convergence of views that the Constitution takes a clear position against the narrow conception of freedom.⁷⁵ The Constitution is egalitarian and transformative, and as a result seeks to create greater freedoms for people to realise socio-economic progress. The *Preamble* refers to the need to 'free the potential of each person'.⁷⁶ The Constitution states that equality 'includes the full and equal enjoyment of all rights and freedoms' and that special measures should be taken to improve the quality of life of those who were previously disadvantaged.⁷⁷ The Constitution proposes a richer, deeper and broader view of freedom. This type of freedom is accentuated by the capability approach theory of Sen. Sen argues that social arrangements should be primarily evaluated according to the extent of the freedom people have to promote or achieve 'functionings' they value.⁷⁸ He argues that poverty, tyranny, poor economic conditions, systematic social deprivation, and poor housing are 'major sources of unfreedom'.⁷⁹

In *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell and Others*⁸⁰ (*Ferreira*) the ConCourt demonstrated the nature of the relationship between human dignity and freedom:

⁷⁵ Durojaye E 'Advancing gender equity in access to HIV treatment through the Protocol on the Rights of Women in Africa' (2006) 6 *African Human Rights Law Journal* 188. See also Davis DM (2014), Roux (2010), Liebenberg (2009), Desierto (2009) and Kende (2009).

⁷⁶ The *Preamble* of the Constitution.

⁷⁷ Section 1 of the Constitution.

⁷⁸ Sen A (1999) 101.

⁷⁹ Sen A (1999) 3.

⁸⁰ *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell and Others* 1996 (1) SA 984 (CC).

‘Human dignity cannot be fully valued unless individuals are able to develop their humanity, their “humanness” to the full extent of its potential. Each human being is uniquely talented. Human dignity has little value without freedom, for without freedom personal development and fulfilment are not possible. Without freedom human dignity is little more than an abstraction. To deny people their freedom is to deny them their dignity.’⁸¹

The question of what constitutes freedom has drawn a great deal of scholarly attention. Kant conceptualises freedom as the ‘only one innate right’ and asserts:

‘Freedom, which means independence from the constraints of another’s will, insofar as it is compatible with the freedom of everyone else in accordance with a universal law, is the sole and original right that belongs to every human being by virtue of his humanity.’⁸²

The variety of contexts in which the concept of freedom has been suggested gave rise to a number of different conceptions, and that the word simply refers to different elements in each of those contexts.⁸³ Feinberg claims that there are at least four different meanings of freedom in moral and political philosophy: the capacity to govern oneself, the actual condition of self-government, a personal ideal, and a set of rights expressive of one’s sovereignty over oneself.⁸⁴ It is fair to argue that central to all these issues highlighted by Feinberg is a conception of a person or a collective being able to act, reflect and choose on the basis of factors that are somehow known to him/her or them.

Accordingly, Marczewski argues that the basic theory of freedom entails the general sense of ‘non-domination’, which is not only based on the autonomy of the individual

⁸¹ Ferreira para 49.

⁸² Kant I (1963) 162.

⁸³ Woolman S (2013) 187.

⁸⁴ Feinberg J ‘Autonomy’ in Christman J (ed) *The Inner Citadel: Essays on Individual Autonomy* (1989).

but also has a 'communal foundation'.⁸⁵ Preventing domination is not only about rejecting coercion and stopping power from performing arbitrary actions, it is about the elimination of arbitrary power.⁸⁶ Skinner explains that the basic argument for rejection of arbitrary power is that such powers convert members of society from the 'status of a free-man into slaves'.⁸⁷ According to Marczewski, what is crucial about freedom is the influence of the affected people on decision-making, and this influence should not be due to the decision-maker's goodwill.⁸⁸ Skinner's and Marczewski's conceptualisation of freedom is congruent with that of Kant, that freedom is an innate right.

Carter persuasively identifies freedom 'as ability of self-rule'.⁸⁹ Dworkin shares the view of Carter, and further argues that the idea of self-rule contains two components: independence from manipulation of one's deliberations and choice, and the capacity to rule oneself.⁹⁰ The ability to rule oneself lies at the core of the concept of freedom, since the full deployment of that capability will entail freedom from external manipulation. Carter's and Dworkin's position is strengthened by Mackenzie's argument that freedom requires that an individual or community must be in a position to act competently based

⁸⁵ Marczewski J 'Ancient threats to modern liberties: toqueville and the contemporary debate between the Republicans and the Liberals' (2010) 17(3) *Ethical Perspectives* 449. See also Christman J 'Autonomy in moral and political philosophy' in *Stanford Encyclopaedia of Philosophy* (2015) 433.

⁸⁶ Marczewski J (2010) 453.

⁸⁷ Skinner Q 'Freedom as the absence of arbitrary power' in Laborde C & Mayner J *Republicanism and Political Theory* (2008) 85.

⁸⁸ Marczewski J (2010) 456.

⁸⁹ Carter I *The Concept of Freedom. Part II: Classical Liberalism and Contemporary Debates* (2015) 97.

⁹⁰ Dworkin R *The Theory and Practice of Autonomy* (1989) 61.

on the desires that are in some sense one's own.⁹¹ Competency includes various capacities for rational thought and self-control.⁹²

Westlund asserts that freedom must be able to connect the individual's capacity for self-trust, self-esteem and self-respect to social support.⁹³ The core argument in this approach is that freedom requires the ability to act effectively on one's own values, either as an individual or as a member of a group. According to Westlund, social support reinforces self-trust, which is required to ensure the realisation of the full enjoyment of freedom.⁹⁴ Collectively, these positive views on freedom have shifted the narrow emphasis of the philosophical approach to freedom from individual liberties to the social dimension that shapes enjoyment of freedom with broader issues of social justice.

Taylor's work endorses this positive view of freedom and sees an individual's freedom as the actualisation of the individual's 'higher self', where the community determines the nature of this higher self.⁹⁵ According to Taylor, in its most extreme form, the community becomes the social infrastructure and is in a position to pull individuals into line for the attainment of freedom.⁹⁶ This positive view of freedom is supported in this study and contradicts the conceptualisation of freedom as articulated by the classical liberal theory. Classical liberalism is a political philosophy committed to the maximum

⁹¹ Mackenzie C 'Three dimensions of autonomy: a relational analysis' in Veltman A & Piper M *Autonomy, Oppression and Gender* (2014) 15.

⁹² Mackenzie C (2014) 22.

⁹³ Westlund A 'Autonomy and self-care' in Veltman A & Piper M *Autonomy, Oppression and Gender* (2014) 181-198.

⁹⁴ Westlund A (2014) 181-198. See also Taylor R 'Kantian personal autonomy' (2005) 33(5) *Political Theory* 602.

⁹⁵ Taylor R (2005) 615.

⁹⁶ Taylor R (2005) 617.

autonomy of the individual, which is committed to negative liberties from interference by the state and non-state actors.⁹⁷ Accordingly, the classical liberal theory rejects positive freedom.⁹⁸ This study adopts the positive view of freedom, which is the conception of freedom as underpinning inclusiveness through integration of the individual into the community. This study identifies three key elements of freedom: non-domination, inclusiveness and the ability to self-rule.

Table 10: Elements of Freedom

Value	Elements	Source
Freedom	Non-domination	Marczewski (2010), <i>Residents of Joe Slovo, Blue Moonlight Properties, Occupiers of Skurweplaas and Schubart Park Residents</i>
	Inclusiveness	Westlund (2014), Skinner (2008), Richard & Sunstein (2008), <i>Residents of Joe Slovo, Blue Moonlight Properties, Occupiers of Skurweplaas and Schubart Park Residents</i>
	Ability to self-rule	Carter (2015), Dworkin (1989), <i>Residents of Joe Slovo, Blue Moonlight Properties, Occupiers of Skurweplaas and Schubart Park Residents</i>

⁹⁷ Richard R & Sunstein CR *Nudge: Improving Decisions About Health, Wealth and Happiness* (2008) 89.

⁹⁸ Paul EF, Miller FD & Paul J *Liberty and Equality* (1985) 166. See also Hayek FA 'The use of knowledge in Society' (1945) 35(4) *American Economic Review* 520 and Hayek FA 'The results of human action, but not of human design' *Studies in Philosophy, Politics and Economics* (1967) 96.

Table 10 illustrates the three elements for the attainment of substantive freedom. The first element is 'non-domination' of the unlawful occupiers in the process of engagement with the municipalities. This element is crucial as most evictions are characterised by abuse of state power, violence or threat of violence. The second element, which is 'inclusiveness', seeks to strengthen the collective action in the community without undermining the right of the individual to choose what is best for him/herself. This element recognises the power of collective action through organisation that is responsive to the different needs of the individuals who are part of the collective action. 'Non-domination' and 'inclusiveness' serve as the basis for the third element, which is the 'ability to self-rule' by the community. The ability to self-rule is the bedrock of substantive freedom.



6.5.2 Finding the relationship between freedom and the Transformative Empowerment Model

The study conceptualises freedom as positive and as an independent right, and identifies three key elements to promote the right to freedom: non-domination, inclusiveness, and ability to self-rule.

Table 11: Elements of Freedom and the Transformative Empowerment Model

Foundational value	Question	Response
Freedom	Does the Model ensure <i>non-domination</i> ?	<p>The Model seeks to empower the occupiers to mediate the power disparities, thereby ensuring non-domination in the engagement process. In the <i>third stage</i>, the Model focuses on strengthening the capacity for critical reflection on power to enable the occupiers to be aware of the dynamics of power in the engagement process and seek to change them. The <i>fourth stage</i> provides for the establishment of community infrastructure through social mobilisation and building of bridging social capital. The social infrastructure will serve as a counter-balance to the unequal power distribution.</p> <p>Strengthening the capacity of the occupiers to counter domination is succinctly articulated in the <i>fifth stage</i> of the Model, which focuses on endorsing collective group dynamics that eliminate hierarchical relations. During this stage transformative practices are implemented to deepen community learning by critical reflection on power. Campaigns will be used as a means to mobilise the people in the informal settlement to set an agenda that challenges the hierarchy and develops the confidence and skills of the occupiers to participate through collective action.</p>
	Does the	The Model seeks to foster integration of

	<p>Model foster inclusiveness?</p>	<p>individual into community from the <i>third stage</i>. During this stage, social interactions are activated through formal and informal networks and public meetings are convened. These activities lay the basis for the <i>fourth stage</i>, which is building of social capital through strengthening of networks and community organisations. During this stage, the participation of as many people as possible is fostered through building bridging social capital.</p> <p>Inclusiveness specifically targets the most vulnerable groups. The highest point of the integration is in the <i>fifth stage</i> through collective action and campaigns. Campaigns are used at this stage to mobilise the affected occupiers to be part of the group. This stage is characterised by activation of the extensive networks to get people to collectively assert their grievances. During this stage there is a focus on endorsing collective group dynamics that promote inclusiveness.</p>
	<p>Does the Model promote the ability to self-rule?</p>	<p>Self-rule will be determined by the extent to which the occupiers influence the decision-making process. The Model does promote the ability to self-rule through collective decision-making as the highest point of the transformative empowerment. The ability to self-rule through collective decision-making can only be achieved when the occupiers have the ability to engage purposefully. <i>Stage three</i> of the Model entails building of the capabilities of the occupiers for ME.</p>

		<p>What will further strengthen the ability to engage effectively is the community profiling, which is based on local knowledge. The data generated from the community profiling will empower the occupiers during the engagement process and ultimately influence the nature of the decisions that are taken.</p> <p>The Model allows for setting of goals and objectives through community engagement and the establishment of community organisations. The community organisations serve as social platforms to advance the collective objectives of the community. This gives the community an opportunity for self-determination in finding solutions to the eviction problems.</p>
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6.6 Conclusion

The question that this chapter had to address is whether the six-stage Transformative Empowerment Model promotes the rights to human dignity, equality and freedom. This chapter commences by reflecting on the historical evolution of the values of human dignity, equality and freedom in natural law. It is illustrated that the historical conception of these values in natural law was tied up with the notion of justice, and that these values were regarded as higher values, which must be used as a check against man-made laws. The inclusion of these values in the Constitution transmuted them into

positive law and helps to provide substantive meaning in the interpretation of the Bill of Rights.

To respond to the secondary research question this chapter separately discusses these values to examine and establish the key elements of each. This task entailed examining the judicial conception of these values through an in-depth analysis of case law on eviction and an analysis of authoritative scholarly literature on the subject. This enabled the study to identify key and dominant elements for each value. The key elements, depending on the degree of emphasis, are used as practical requirements to define the substantive content of these values. Furthermore, the key elements are used to establish the adequacy of the Transformative Empowerment Model to promote each value.

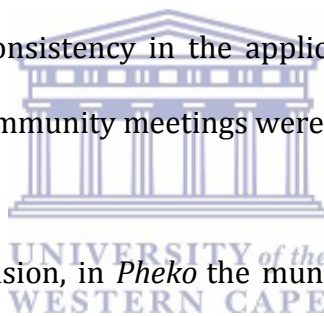
With regard to the value of human dignity, the study identifies three key elements based on the eviction case law, and the works of Kant, Sen and Nussbaum. The three elements are mutual respect, building capabilities and human worth. The study then examines whether the transformative empowerment model promotes the attainment of these elements for ultimate actualization of the right to dignity. In this chapter the study concludes that the six interrelated stages of the Transformative Empowerment Model promote and enhance the attainment of human dignity. This is due to the fact that the Model promotes attainment of collective and bottom-up decisions and also challenges the power disparities inherent in the eviction process. Building of capabilities through the use of local knowledge based research and the establishment of community organisations as social infrastructure are prominent features of the Transformative Empowerment Model that promote mutual respect, building capabilities and human worth.

With regard to the value of equality, the study examines the works of Friedman, Ackerman and De Vos to identify the key elements of equality. Three interacting elements are identified: equitable participation, consideration of the broader context, and finding of bottom-up solutions. Equitable participation is one crucial pillar of the Transformative Empowerment Model and runs across all the stages of the Model. In the *first stage*, which is initial contact, the model favors participation characterized by informal contacts with small-scale interaction. As the stages progress there is an increase in participation both in quality and quantity. The increased participation culminates in the *fifth stage* that entails massive mobilization and activation of formal and informal networks. Consideration of the broader context is also a crucial element for which that the model makes provision through promotion of the development of community profiles that involve the community in research, and data collection, dissemination and use. This chapter demonstrates that the Model is appropriately structured to promote equitable participation by occupiers, ensure adequate consideration of their broader context, and find bottom-up solutions.

The ConCourt inadequately deployed the value of freedom in the eviction judgments. Based on the extensive work by Carter, Dworkin, Westlund, Skinner and Marczewski the study identified three key elements for the value of freedom, namely, non-domination, inclusiveness and the ability to self-rule. The Transformative Empowerment Model promotes a non-domination or egalitarian paradigm in the engagement process. In all eviction cases the Court condemned top-down approaches. During the *third stage* of the Model, which is building capabilities, the occupiers are made to appreciate the importance of understanding the power dynamics in the engagement process and to

engage in collective action to change them. Building of bridging social capital among the occupiers, activation of networks, and establishment of community based organisations are important activities to promote inclusiveness. The ability of the community to self-rule will be strengthened through critical reflection, building of social capital to overcome fear of participation.

This chapter demonstrates that the different stages of the Transformative Empowerment Model entail practical mechanisms and tasks that may promote the attainment of the rights to human dignity, equality and freedom. The application of the six stages in the Model to elevate the substantive requirements of the engagement may reduce the jurisprudential inconsistency in the application of ME. In *Residents of Joe Slovo*, Sachs J held that three community meetings were adequate for ME.



In stark contrast to this conclusion, in *Pheko* the municipality met with the occupiers three times as well, but Nkabinde J concluded that this was wholly inadequate for ME.⁹⁹ Later, in *Blue Moonlight Properties*, van der Westhuizen J concluded that four community meetings were inadequate for ME.¹⁰⁰ Convening of meetings with the occupiers is a mere procedural requirement and the number of meetings convened cannot be a conclusive determinant of whether ME took place. The substantive nature of the engagements should be a determining factor as to whether the engagement process resulted in the promotion of human dignity, equality and freedom that result in adequate consideration of the circumstances of the unlawful occupiers. The Transformative Empowerment Model halts the proceduralisation of ME by the

⁹⁹ *Residents of Joe Slovo* para 213 and *Pheko* para 9.

¹⁰⁰ *Blue Moonlight Properties* para 101.

ConCourt, which is primarily informed by the number of meetings convened by the state with unlawful occupiers. In Chapter 7 this study explores the implications of the Transformative Empowerment Model for democracy.



CHAPTER 7

THE TRANSFORMATIVE EMPOWERMENT MODEL AND THE THEORIES OF DEMOCRACY

7.1 Introduction

In Chapter 6 the study conceptualises the scope of the co-njoined values of human dignity, equality and freedom, and examines the implications of the Transformative Empowerment Model on the key elements of each of these foundational values of Constitution. The study demonstrates that the Transformative Empowerment Model is aligned to the key elements of human dignity, equality and freedom. The fulcrum for these values is equitable participation of the unlawful occupiers. Participation is one of the substantive requirements on which the Transformative Empowerment Model is constructed in this study. Yacoob J held that ME was a requirement for 'democratic participation by the unlawful occupiers'.¹ In the subsequent eviction cases the ConCourt underscored this assertion and held that ME seeks to promote the democratic values and practices enshrined in the Constitution.²

The commitment of the ConCourt to democratic participation of the occupiers in the adjudication of socio-economic rights offers a possibility to address the current weaknesses of under-representation of the interests of the poor. However, the ConCourt did not elaborate what democratic participation entails with regard to evictions, except

¹ *Occupiers of 51 Olivia Road* para 22.

² *Occupiers of 51 Olivia Road* para 26, *Residents of Joe Slovo* para 189, *Schubart Park Residents* para 34 and *Pheko* para 8.

for the profound pronouncement by Yacoob J that ME espouses a ‘democracy that works for the poor’.³ The ConCourt’s commitment to democratic participation is derived from the *Preamble* of the Constitution, which sets the transformative vision of the Constitution as: ‘Heal the divisions of the past and establish a society based on *democratic values*... Lay the foundation for a *democratic* and open society... Build a united and *democratic South Africa*. Consistent with the *Preamble*, section 1 of the Constitution further prescribes that South Africa is ‘...one, sovereign and *democratic state*’. (*my emphasis*).

This chapter proffers the argument that the use by the ConCourt of ME corresponds to the requirements of deliberative democracy, thereby conferring on the right against unlawful evictions a minimum core obligation of equitable participation. The commitment by the ConCourt to equitable participation renders the Transformative Empowerment Model more relevant as it seeks to strengthen participation. This chapter is divided into two parts. The first part briefly reflects on the theories of democracy and their implications for the Transformative Empowerment Model. The second part reflects on the relationship between the Transformative Empowerment Model and deliberative democracy, and further explores the opportunities offered by deliberative engagement in the realisation of socio-economic rights.

7.2 Transformative Empowerment Model and theories of democracy

Participation in a democracy tends to be narrowly equated with democratic representation in institutions of political power. Equally significant is the increasing

³ *Occupiers of 51 Olivia Road* para 45.

importance of non-electoral representation evidenced in contemporary discussions that have challenged the idea that democracy consists solely of institutional forms of citizen representation.⁴ Wolfe persuasively conjectures that a comprehensive analysis of democracy must transcend the majoritarian model of contemporary empirical democratic theory and recognise that representation of interests depends on how relatively autonomous units (groups and individuals) exercise control and self-mastery in addressing their political and socio-economic challenges.⁵

Democracy from this viewpoint involves deliberative action directed at acquiring power on the part of groups, such as informal settlements, designed to attain results that resolve their common problems. Wolfe introduces eight types of democratic power relations and argues that the types of power are not merely artificial simplifications but relate to distinctive theoretical traditions or historical practices.⁶ A brief reflection on these eight types of power in democracy will help in the attempt to conceptualise democracy in this thesis.

The first is 'developmental democracy' and identifies power relations in which ultimate ends, such as, participation, personal self-realisation and equality, shape collective action and patterns of representation. The second is 'syndicalist democracy' which designates the imposition of power relations by agreement among participants aimed at achieving certain objectives linked to authority. The third is the 'commune democracy'

⁴ Robert AD *Dilemmas of Pluralist Democracy: Autonomy vs Control* (1982). See also Burger S *Organising Interest in Western Europe: Pluralism, Corporatism and the Transformation of Politics* (1981).

⁵ Wolfe JD 'Varieties of participatory democracy and democratic theory' (1986) 16(1) *Political Science Reviewer* 1.

⁶ Wolfe D (1986) 8.

that describes a power relation that depends on the endogenous development of class consciousness with commitment to egalitarianism and is associated with efforts to modify political institutions so that participation and citizen control can be enhanced. The fourth is 'delegate democracy' that combines an internally evolved commitment to equality and justice with a political process that is limited to a specific policy.

The fifth is 'corporatist democracy' which refers to a political relationship between the state and specialised associations involving the defence of their interest in return for moderating demands and controlling their membership. The sixth is 'consensus democracy' which encourages taking of decisions which are policy specific because the participants are fragmented and accommodative action by the political elites maintains stability and results in regressive outcomes. The seventh is the 'pluralist democracy' which involves forms of representation based on legal-rational authority and procedures that facilitate individual or group pursuit of self-interest. Its main feature is an electoral process, involving competition for office among elites. Finally, there is the 'individual democracy' which focuses on individuals acting to maximise their self-interest (utility) through rules that govern decision-making. This democracy can produce regressive results, because individual calculations are aimed at maximising personal benefits.

Therefore, in this thesis democracy is conceptualised as the manifestation of bottom-up and collective decision-making that entails a variety of power relations between relatively autonomous groups. The relatively autonomous groups in this study are the informal settlements and the state. This type of conceptualisation is made possible because the relationship between the informal settlements and the state is

characterised by power relations. The power relations determine the various patterns of control and co-ordination between the municipalities and the informal settlements. The typology of democratic power relations that correspond and are consistent with the conceptualisation of democracy in this thesis is a combination of 'development democracy', 'delegate democracy' and 'commune democracy'. This is based on the following reasons: all three are egalitarian as they seek to transform skewed power relations; they encourage collective action for the enhancement of participation for citizen control; and they promote community solidarity to change oppressive relations.

In arguably the most influential article which has been published on the Constitution, Klare defined the transformative project envisioned by the Constitution as:

'A long-term project of constitutional enactment, interpretation and enforcement committed to transforming a country's political and social institutions and power relations in a democratic, participatory and egalitarian direction.'⁷

Davis asserts that on this view courts were mandated to provide a substantive road map for the journey towards a society prefigured in the Constitution.⁸ The critical element of the post-apartheid society was political participation of all South Africans in an extensive and intensive process of social transformation to percolate into reality the political and economic vision of a truly democratic society and better life for all. There are strong reasons for making an effort to encourage citizen democratic participation. Fundamentally, participation is essential to the core meaning of democracy and good governance as it improves information flow, accountability, and gives voice to those

⁷ Klare K (1998) 150.

⁸ Davis DM (2014).

most directly affected by the public decision.⁹ In modern times there are two dominant theories of democracy and the levels of participation: ‘participatory democracy’ and ‘deliberative democracy’. The discussions on the implications of the Transformative Empowerment Model on democracy render necessary an examination of the theoretical debate on the two models of democracy.

The Transformative Empowerment Model allows for a bottom-up collective decision-making process, which is a product of critical engagement between the occupiers and the state. This means that participation in the Transformative Empowerment Model is coupled with decision-making powers, and the question is which one of the two models of democracy meets these requirements. The tension between ‘participatory democracy’ and ‘deliberative democracy’ is very much alive in contemporary comparative constitutional law scholarship and particularly in many countries that are focusing on enhancing deliberative participation procedures, such as ME in constitutional litigation. It is the diffusion of these participative models of democracy that urges a theoretical reflection that will enable this study to explore the form of participation aligned to the Transformative Empowerment Model.

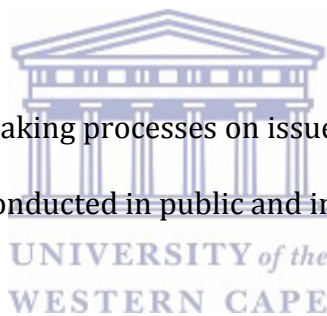
7.2.1 Participatory democracy: liberal paradigm

Participatory democracy originated and developed in the 1960s in the US inspired by the great youth movement of that decade. Mansbridge observes that the term ‘participatory democracy’ came into widespread use after 1962 when Students for a

⁹ Koryakov I & Sisk TD ‘Participatory democracy’ in Koryakov I & Sisk TD (eds) *Democracy at Local Level – A Guide for the South Caucasus* (2014) 25.

Democratic Society (SDS) in the US gave it a central place in its founding Port Huron Statement, though what the term meant at that time was unclear.¹⁰ The SDS was a protagonist of the great movement against the escalation of the war in Vietnam. The Port Huron Statement summarised the principles of participatory democracy as follows:

- An image of man as optimistic on the potential of human self-development; rejection of the notion that individuals are intrinsically incompetent and unable to govern their common life or deal with the issues affecting their common lives with a view to the long term.
- An ideal of an individual's self-determination, autonomy and independence, and at the same time the ideal of fraternity as the dominant form of social relationships.
- The idea that decision-making processes on issues having social implications and consequences must be conducted in public and in participative ways.¹¹



Kaufman's work was the first to introduce the term 'participatory democracy' into the scholarly vernacular.¹² It is from the works of Pateman and Dahl that the term acquired greater popularity and critical reconstruction.¹³ This included the development of theoretical models of participatory democracy, which includes Arnstein's ladder of citizen participation. The critical reconstruction of participatory democracy and the

¹⁰ Mansbridge J 'A Systematic approach to deliberative democracy' in Mansbridge J & Parkinson J (eds) *Deliberative Systems, Deliberative Democracy at the Large Scale* (2012).

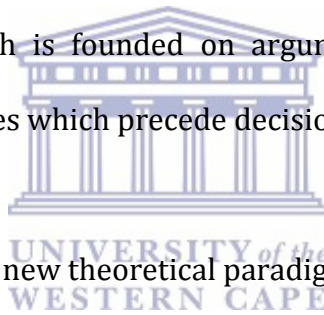
¹¹ Students for a Democratic Society *Port Huron Statement* (1962).

¹² Kaufman AS 'Human nature and participatory democracy' in Friederick CJ (ed) *Responsibility* (1960) 115.

¹³ Pateman C *Participation and Democratic Theory* (1970). See also Dahl R 'Further reflections on the elitists theory of democracy' (1966) 60(2) *The American Political Science Review* 296.

different theoretical models culminated in the emergence of the local or communitarian view of democracy against the logic of liberal democracy. The local view of democracy activated bottom-up social activism. This resulted in the idea of empowerment of the people through constructing local communities, which are capable of ruling themselves with direct forms of democracy to regain control of their own future.

These discourses on participatory democracy consider protests, complaints, advocacy, claims etc as types of participation that enabled a specific form of political decision-making to be shaped and practised by the holders of power. It is on this point that substantial differences in theoretical perspectives emerge in relation to the notion of 'deliberative democracy', which is founded on argumentative exchanges, reciprocal reason giving, and public debates which precede decisions.



7.2.2 Deliberative democracy: new theoretical paradigm

Deliberative participation is a new theoretical paradigm that developed in the early 1980s. This was marked by a transition signalled in Mansbridge's and Barber's work in the 1980s arguing for the need to look beyond participatory democracy.¹⁴ Their work focused on approaches which were, in many aspects, still within the realm of participatory democracy but introduced many aspects, thus opening the path to a deliberative democracy.

Participatory democracy and deliberative democracy cannot be equated, as the former is founded on the direct action of the citizens who exercise some power and decide

¹⁴ Mansbridge J (2012). See also Barber B *Strong Democracy: Participatory Politics for a New Age* (2011).

issues that affect their lives, while the latter sees deliberation as a step or a phase of a dialogic and discursive process for reaching decisions. According to Florida, to deliberate means to ponder the pros and cons of a possible solution to a collective problem: a process of discursive formation and transformation of political opinions and judgments, which evidently opposed to any immediate conception of democracy.¹⁵

Key to the conceptualisation of deliberative democracy is the scholarly work of two prominent legal constitutionalists, Bessette¹⁶ and Sunstein.¹⁷ The work of Bessette is unanimously considered to have introduced the term 'deliberative democracy' into scholarly jargon, and in this thesis will be complemented with the subsequent work of Sunstein, which provided a complete elaboration of the deliberative theory. According to Bessette, the deliberative democratic process requires the transformation of citizens' immediate and original preferences; and the idea that the formation of the collective will should not derive from a mere combination of interests, but from 'a process of rational, argumentative and informed public elaboration'.¹⁸ Thus, Bessette argues that the public voice cannot be immediately observed, but is something produced discursively, and elected representatives elaborate it not by virtue of any exclusive capabilities they may possess but insofar as they may capture 'the cool and deliberate

¹⁵ Florida A *Participatory Democracy versus Deliberative Democracy: Elements for a Possible Theoretical Genealogy. Two Histories, Some Intersections*. Paper presented at the 7th ECPR General Conference 4 – 7 September 2013.

¹⁶ Bessette J 'Deliberative democracy: the majority principle in the republican government' in Goldman RA & Schambra WA (eds) *How Democratic is the Constitution?* (1980) 88.

¹⁷ Sunstein RC 'The preferences and the constitution' (1984) 84(7) *Columbia Law Review* 1689.

¹⁸ Bessette J (1980) 159.

sense of the community' and what thereby emerges as the 'majority sentiment'.¹⁹ There are thus two types of public voices:

'The one is more immediate or spontaneous, uninformed and unreflective; the other is more deliberative, taking longer to develop and resting on a fuller consideration of information and arguments. It is the second type that the framers sought to promote; this is what they meant when they talked about the rule of the majority. In the service of this end, the rule of deliberative majority, political leaders were obliged to resist, at least for the time, unreflective popular sentiments that were unwise or unjust.'²⁰

The distinction between the two types of democracy made by Besette introduces another tangle: how could this deliberative majority be formed? Besette asserts that political theorists accord great importance to the deliberations of 'wise and virtuous representatives' but the connection between that deliberation and community wishes seems tenuous.²¹ How is it possible for a government decision to reflect the 'deliberate sense of community', if the function of elections is only to select virtuous men, and not to argue and debate policy issues. According to this view, a democratic and constitutional system should be based only on the capacity 'to make sound judgments regarding the virtues of political leaders, not on the ability of the people to deliberate on matters of policy'.²²

Besette's thesis seeks to re-interpret the democratic arrangements in the light of a new paradigm, which is reflective on judgment and encourages reasons for a given choice, as opposed to the immediateness of passion and selfish interest. The importance of

¹⁹ Besette J (1980) 160.

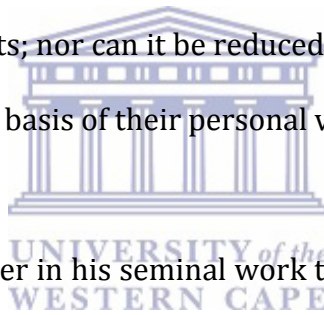
²⁰ Besette J (1980) 160.

²¹ Besette J (1980) 113.

²² Besette J (1980) 113.

Bessette's work in this thesis lies in the sharpness with which it interprets, in a deliberative light, the logic and mechanisms for the involvement of people in decision-making in accordance with the deliberative view of democracy as opposed to the narrow elitist view of democracy.

The deliberative view of democracy advances the understanding that representation is not the selection of a chosen body of virtuous and wise men, but rather a choice of representatives that are able to understand and interpret the 'deliberative sense of the community' to draw on a public and collective deliberation that expresses the sentiments of the majority. Thus, democracy cannot be seen as mere logrolling and bargaining of individual interests; nor can it be reduced to a procedure that merely aims to select political leaders on the basis of their personal virtues and abilities.

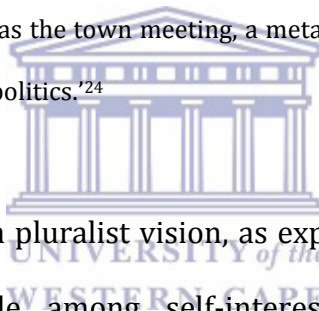


Sunstein took these views further in his seminal work that proposed a rich definition of deliberative democracy and this signalled the consolidation of deliberative democracy in the contemporary theoretical debates. At the centre of his theoretical concerns, Sunstein posed an interpretation of the American constitutional design, which openly and dramatically contrasted with that offered by the pluralist school. Sunstein's interpretation of the idea of democracy implied in the American constitutional design focused on the theme of interest groups and the connected issue of the role that 'naked' and private preferences play in the context of democratic polity.²³

²³ Sunstein RC 'Interest groups in American public law' (1985) 38(1) *Stanford Law Review* 29.

Sunstein compares two different and competing conceptions of politics, namely, the 'republican' vision and the 'deliberative' vision. He argues that the republican vision was fuelled by the principle of 'civic virtue':

'To the republicans, the prerequisite of sound government was willingness of citizens to subordinate their private interest to the general good. Politics consisted of self-rule by the people; but it was not a scheme in which people impressed their private preferences on the government. It was instead a system in which the selection of preferences was the object of the governmental process. Preferences were not to be taken as exogenous, but to be developed and shaped through politics. To the republicans, the role of politics was above all deliberative. Dialogue and discussion among the citizenry were critical features of governmental process. Political participation was not limited to voting or other simple statements of preferences. The ideal model of government was the town meeting, a metaphor that played an explicit role in the republican understanding of politics.'²⁴



This conception is opposed to a pluralist vision, as expressed in the work of Dahl, that politics mediates the struggle among self-interested groups for scarce social resources.²⁵ Therefore, in terms of the pluralist conception, people come to the political process with pre-selected interests that they seek to promote through political conflict and compromise. Thus, according to Sunstein, ensuring the democratic principle of self-rule is an attainable goal if a view is affirmed of representative government as characterised by a deliberative notion of democracy. This is where deliberation is not only produced by and among the wise and prudent men within legislative bodies, but also in society, among and by debating and deliberating citizens, and by their shaping of the public view of the common good.

²⁴ Sunstein RC (1985) 52.

²⁵ Dahl R (1966) 296.

This study can connect the three threads in the works of Bessette and Sunstein on deliberative democracy. First that deliberative democracy is transformative as it is possible to transcend a private self-interest through a deliberative process. Secondly, it renders possible collective decisions that can be made through democratic and public deliberations to advance the common good. Against this background, the contrast between the classic liberal assumption and the deliberative view is exposed. The former emphasises the sovereign nature of the individual interests, which must be protected, and the latter emphasises the common good, which must be collectively built and politically constituted. Lastly, that deliberative democratic politics find its most profound realisation in the public, discursive processes of transformation of political opinions and judgements.



7.2.3 Differences between participatory and deliberative democracy

There are dividing lines between participative democracy and deliberative democracy. In participatory democracy the distinctive feature is direct participation. However, this dimension of participation in the exercise of a decisional power is limited to its relation with the institutions of representative democracy. Here there is a close connection between politics in the participatory mode and representative democracy, identified as liberal democracy. The weaknesses of participatory democracy were influentially expressed by the 'ladder of participation' proposed by Arnstein.²⁶ In this ladder each rung denotes the different possible levels of citizens' participative involvement, depending on the degree of power they were able to exercise – from the lowest non-participation (*manipulation, therapy*) to tokenism (*information, consultation, placation*)

²⁶ Arnstein S (1969) 215.

to proper forms of citizen power (*partnerships, delegated power, community control*). The wide acceptance of Arnstein's ladder is rooted in an implicit acceptance that true participation would be that which confers power on to participating citizens. In his essay Arnstein draws a comparison between 'going through an empty ritual of participation and having the real power needed to affect the outcomes'.²⁷

Participatory democracy does not confer decisional power on citizens, and on this deliberative democracy sharply differs. Mansbridge's critical reflection on small participatory democracies introduced some essential theoretical differences between participatory democracy and deliberative democracy. She eloquently and persuasively asserts that deliberative democracy underscores the condition that could enable the practice of democracy on the basis of "consensual procedures, radical egalitarianism and face-to-face interactions based on equal respect of diverse and conflicting interest, through democratic procedures that unavoidably call for negotiations".²⁸

The outcomes of deliberative democracy as asserted by Mansbridge are largely in accordance with the outcomes of the Transformative Empowerment Model. However, her definition of deliberative democracy does not adequately emphasise equal power in decision-making processes and the issue of equitable participation as a direct exercise of that power. In the late 1980s the first elucidation by Bessette and Sunstein of deliberative democracy focused on some topics that were not covered within participatory theories: the structure of the decision-making process, the definition of deliberation as a source of democratic legitimacy; individual autonomy as capability for

²⁷ Arnstein S (1969) 216.

²⁸ Mansbridge J (2012) 71.

reflective formulation of opinion in the political sphere; and understanding of the process of transformation in the course of deliberation. Thus, deliberative democracy embraces the idea of a direct exercise of some form of power by the occupiers to effect change.

Another pillar of participatory democracy that was also reshaped by the emergence of deliberative democracy was the idea of the educational purposes of participation. Participatory democracy sees these educational purposes as a possible 'by-product' of participation.²⁹ Deliberative democracy places greater emphasis on education for consciousness raising and critical reflection on power dynamics to build the capabilities of the community to properly engage in pursuance of their common interest. For purposes of effective and purposeful deliberation, deliberative democracy makes education an essential element of participation.



7.3 Transformative Empowerment Model as fostering deliberative democracy

The enquiry into whether the Transformative Empowerment Model fosters participatory democracy or deliberative democracy can be couched in three questions. First, how much power does the form of democracy confer on the unlawful occupiers? Secondly, what effects does this power have on decision-making? Lastly, what kind of participation is derived from the form of democracy?

²⁹ Florida A (2013) 49.

With regard to the first question, on how much power the Model confers on unlawful occupiers, the theoretical tradition of participatory democracy envisages participation of the unlawful occupiers as a source of democratic legitimacy, in direct contrast to deliberative democracy, which aims at ensuring the exercise of some sort of power by the unlawful occupiers during the engagement process. There are four strengths of the Transformative Empowerment Model that find practical expression in deliberative democracy.

The first strength is that the model is more inclined towards interactive participation and draws a distinction between interactive participation, involvement and tokenism participation. As mentioned in Chapter 4, interactive participation focuses on development of the capabilities of the occupiers to critically and effectively engage with the state from the start and be part of the decision-making process.³⁰ Tokenism participation includes informing, consulting and placating the unlawful occupiers to legitimise decisions that are already made; in this situation the unlawful occupiers lack the power to ensure that the state will heed their views.

The second strength of the Transformative Empowerment Model that finds expression in deliberative democracy is the empowerment of the unlawful occupiers. Deliberative democracy highlights capacity building and critical reflection as crucial elements of participation. Similarly, the Transformative Empowerment Model seeks to capacitate the occupiers with critical reflection for consciousness raising to empower them to understand the dynamics of power and engage in collective action to change them. It also seeks to develop the skills of the occupiers to mobilise and galvanise their

³⁰Adams R (2008) 24.

individual strengths into collective action around issues of common interest and concern.

The third strength of the Transformative Empowerment Model is the development of the capacity of the unlawful occupiers through the building of bridging social capital. This is in accordance with deliberative democracy as it seeks to transcend private interest in the quest for the common good. Building social capital will generate collective action that will strengthen the position of the unlawful occupiers during the engagement process.³¹ This has the potential to directly challenge the hegemonic perspectives and existing oppressive relations. The challenging of oppressive relations through collective action will enable a shift towards 'citizen power' by which the unlawful occupiers obtain decision-making powers.



Lastly, the *sixth stage* of the Transformative Empowerment Model also allows for the development of an effective system of review, which means a process of monitoring and evaluating participation and implementation of decisions. This empowers the unlawful occupiers, as it breaks down the bureaucratic escape that the state employs in many evictions with regard to decisions taken collectively together with the unlawful occupiers.³² The Transformative Empowerment Model provides for four interrelated objectives for evaluation: how participation is implemented at all stages; qualitative indicators of community empowerment; evaluation of process and outcomes and

³¹ Fields J (2008) 113.

³² In *Residents of Joe Slovo* the municipality sought to renege on the collective decision to allocate 70 per cent of the houses in the new development to the qualifying residents of Joe Slovo. The same behaviour was demonstrated in *Schubart Park Residents* and *Pheko*, where the municipalities conclude agreements with the occupiers and subsequently demonstrate little commitment to fulfillment of those agreements.

devising measures to strengthen sustainability of participation through collective action. The power of review and evaluation strengthens the hold of the unlawful occupiers over processes and outcomes, and this is key to the equalisation of the power balance in the engagement process.

The response to the first question demonstrates that the Transformative Empowerment Model is egalitarian and seeks to mediate the power imbalance by the introduction of practical mechanisms to empower the occupiers. These mechanisms, as mentioned above, include collaborative research for community profiles, capacity for critical reflection, consciousness raising, mobilisation for collective action, and monitoring and review. It is therefore discernable that the Transformative Empowerment Model is inclined towards deliberative democracy as it seeks to ensure bottom-up solutions, which are the products of public deliberations and collective decision-making.



With regard to the second question, on the effect that power has on decision-making, the theoretical tradition of participatory democracy envisages that mere participation in the selection of the representatives is an empowerment. Floridia critiques this approach of participatory democracy as a 'narrow elitist vision' and argues that it seeks to create an impression that representation is only about selection of the 'wise men' who will deliberate on-behalf of the community.³³ In contrast, deliberative democracy envisages that the power conferred on the unlawful occupiers must produce dialogic engagements that entail bottom-up solutions and decisions that are binding.

³³ Floridia A (2013) 32.

Central to the Transformative Empowerment Model is the bottom-up decision-making process, much the same as for deliberative democracy. Both deliberative democracy and the Model envisage that the power which the unlawful occupiers acquire must be used to shape the outcomes of the ME process. This was the case in *Occupiers of 51 Olivia Road*. The extent and scale of the influence that the unlawful occupiers have on the final decision will determine the nature of the engagement. The Model makes provision for unlawful occupiers to reach high levels of participation in which collective action and critical engagement directly influence decision-making.

Regarding the third question, on what kind of participation the model of democracy promotes for the unlawful occupiers, the theoretical tradition of participatory democracy envisages the educational process of the unlawful occupiers as a mere by-product of participation. In stark contrast, deliberative democracy views the educational process as a fundamental aspect of participation and places emphasis on the development of the capacity of the unlawful occupiers for critical reflection on power relations. The approach of deliberative democracy to participation is analogous to that of the Transformative Empowerment Model as it seeks to introduce educational programmes for unlawful occupiers as a means of building their capacities for ME. Empowerment of the unlawful occupiers for equitable participation commences at the *second stage* of the Model, when community values are identified and goals and objectives are set through brainstorming. Brainstorming with community could encourage the community members to critically reflect on their circumstances.

In addition, *stage three* of the Model requires that the municipal practitioners conduct community profiling by using local knowledge for data collection, dissemination and

use. This approach compels the municipal officials to involve residents in considering their attitudes and finding out what research themes they are interested in. This process will result in collaborative research, what Beresford and Hoban call 'emancipatory research controlled by user involvement'.³⁴ It will enable the unlawful occupiers to acquire and use data to influence the final decisions through deliberative engagements, and to initiate processes that will bring about structural changes.³⁵

Furthermore, to enhance the deliberative aspect of the engagement the Transformative Empowerment Model provides for two types of educational programmes for the informal settlements: programmes that are meant to address the educational needs of the unlawful occupiers; and programmes to build the capacity of key leaders to strengthen the community organisation. The Model also distinguishes between effective and ineffective ways of learning. The less effective ones are mainly top-down style or what Freire calls 'banking educational style' whereby the educator attempts to impose his/her ideas and language onto the unlawful occupiers.³⁶ Other ineffective educational methods are those that do not advance the unlawful occupiers' interest and thereby fail to ensure voluntary participation. This results in the unlawful occupiers' non-autonomous participation, which is characterised by forced involvement in educational programmes. Interest in the education process that will result in equitable participation should be through the unlawful occupiers' own spontaneity.

³⁴ Beresford P & Hoban M (2005) 13.

³⁵ Beresford P & Hoban M (2005) 15.

³⁶ Freire P (1972) 132.

The Transformative Empowerment Model envisages that effective educational methods will be attained through consistent and continuous campaigns to change the attitudes of unlawful occupiers towards their physical environment. This will include enabling the unlawful occupiers to become aware of their own actions, thoughts, feeling, values and identities. To succeed with this type of education the Transformative Empowerment Model emphasises the importance of arranging educational programmes that reflect and cater for the residents' needs. With regard to the third question, it is evident that the Transformative Empowerment Model is more inclined towards interactive participation sustained by an education process based on critical engagement, and this is analogous to the form of participation propounded by deliberative democracy.

7.3.1 Exploring the implications for ME



This section explores the implications of deliberative democracy and the Transformative Empowerment Model for ME. The primary objective of the Transformative Empowerment Model is to achieve the five dimensions of community empowerment, which are central to ME. The first is 'confidence', which entails working in ways that strengthen the knowledge base in the informal settlement and instil confidence in the unlawful occupiers that they can make a difference. Deliberative democracy seeks to achieve this outcome by placing greater emphasis on education processes to build the knowledge base of the informal settlements for critical engagement. To enable critical engagement the Transformative Empowerment Model envisages the substantive involvement of the community in all the different stages of the Model and creates different platforms, such as, brainstorming, community meetings,

community organisation, community learning and formal and informal community networks.

The second dimension is 'inclusiveness', which entails promoting equality of opportunities by challenging discrimination and oppressive practices. Deliberative democracy is about equalisation of distribution of power among the deliberating participants. The Transformative Empowerment Model introduces practical mechanisms to combat oppressive relations in the engagement process. The *second stage* of the Model requires that the unlawful occupiers set their own goals and objectives for their participation through brainstorming. The *third stage* emphasises the importance of utilising inclusive local knowledge in the education process and is aimed at strengthening the critical reflection capacity of the unlawful occupiers. The *fourth stage* is intended to be the most important stage for inclusiveness as the focus is on building bridging social capital to ensure the involvement of a 'critical mass' of the unlawful occupiers across racial lines, political affiliations, gender and status in the community. The *fifth stage* of the Model, is the apex stage for inclusiveness. During this stage the primary focus is to strengthen participation through collective action that involves extensive mobilisation and reactivation of formal and informal networks.

The third dimension is 'organised', which encompasses working in ways that bring people together around common issues and concerns in an open, democratic and accountable manner. The essence of deliberative democracy is the possibility to transcend private interests through collective decisions that are made through democratic and public deliberations for a common good. To attain credible collective decisions requires an organisational infrastructure that will serve as a platform for such

engagements. In the Transformative Empowerment Model the building of organisational infrastructure commences in the *fourth stage* with the building of bridging social capital to ensure that there is a semblance of trust among the unlawful occupiers. However, it is important to highlight that the creation of too many community organisations is not desirable.

The fourth dimension is 'cooperative', which entails working in ways that build positive relations throughout the community. Deliberative democracy promotes the ideal of fraternity as the dominant form of social relations and rejects individual autonomy premised on egoistic individualism.³⁷ This underscores the argument in the deliberative dimension that decision-making on issues that have social implications and consequences must be concluded in a co-operative and participative way. *Stage four* of the Transformative Empowerment Model emphasises the importance of building community organisation through building bridging social capital and dismisses the use of authoritarian tendencies. The Model fosters co-operation from the *first stage*, which entails informing people and making contacts. For this stage to succeed, co-operation of the unlawful occupiers is crucial. In the *second stage* full co-operation of the unlawful occupiers is required to formulate goals and objectives. In this stage emphasis is placed on identification of community values, which is important as it helps to guide the approach of getting maximum co-operation from the unlawful occupiers without offending certain community values. Co-operation is an important dimension and runs throughout the five stages of the Model.

³⁷ Florida A (2013) 4.

The fifth dimension is 'influential', which encompasses working in ways that encourage and equip the community to take part in and influence decisions to claim their rights and have greater control on decision-making processes that affect their lives. Deliberative democracy places a premium value on bottom-up collective decisions, which are a product of rational, argumentative and informed public deliberation³⁸ The deliberative dimension emphasises the prevalence of informed and reasoned collective decisions. Consistent with deliberative democracy, the Transformative Empowerment Model seeks to reinforce and consolidate the influence of the unlawful occupiers on decision-making. Hence, the Model introduces proactive approaches, such as, building capacity for critical reflection by the unlawful occupiers, the formulation of community profiles based on local knowledge, and the building of social capital. The overall impact of these approaches is to strengthen the bargaining power of the unlawful occupiers to attain bottom-up solutions that are responsive to their circumstances.



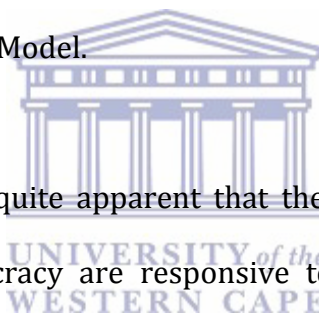
In *Occupiers of 51 Olivia Road*, Yacoob J held that ME is about 'face-to-face honest engagement' between the occupiers and the state.³⁹ Furthermore, in *Schubart Park Residents* the ConCourt held that the offer made by the municipality to the occupiers was not adequate for ME.⁴⁰ The ConCourt held that engagement is not about the municipality arbitrarily presenting an offer to the occupiers, but about a deliberative process undertaken by both the municipality and occupiers to find bottom-up solutions to the challenges of the occupiers. The Froneman J eloquently stated that occupiers must be treated as equal partners in the engagement process and their views must be

³⁸ *Florida A* (2013) 29.

³⁹ *Occupiers of 51 Olivia Road* para 51.

⁴⁰ *Schubart Park Residents* para 17.

considered and inform the decision taken. In *Residents of Joe Slovo* the ConCourt held that all the relevant information must be made available to the occupiers to enable them engage effectively.⁴¹ The ConCourt further held that development of the capabilities of the occupiers to engage more effectively is essential for ME. The Court ruled that report back meetings that were convened by the Executive Mayor and management of Thubelitsha Homes to share information with the occupiers on the N2 development were not adequate for ME.⁴² The examination of case law demonstrates that the conceptualisation of ME by the ConCourt was more inclined towards a deeper and deliberative form of engagement with the occupiers, and not mere consultation or involvement. This conceptualisation is consistent with the five dimensions of the Transformative Empowerment Model.



From the above analysis it is quite apparent that the Transformative Empowerment Model and deliberative democracy are responsive to the imperatives of ME. The empowerment of the unlawful occupiers for ME promotes their rights to human dignity, equality and freedom. Taking an empowerment approach to evictions could subdue the emotional outbursts that are associated with evictions. These outbursts result in violent public protest and protracted delays to developmental projects, with major cost implications.⁴³ In *Residents of Joe Slovo* the N12 Gateway project, which was a multi-million rand housing development project, was delayed for more than 18 months with major cost overrides. In *Schubart Park Residents* emotional outbursts led to violent

⁴¹ *Residents of Joe Slovo* para 258-259.

⁴² *Residents of Joe Slovo* para 260.

⁴³ Most cases of eviction from informal settlements are accompanied by violent protests. See *Abahlali BaseMjondolo*.

protests and the burning of one section of the residential block, compounding the problems of the occupiers.

7.3.2 Exploring the implications for socio-economic rights

This section explores the implications of the Transformative Empowerment Model and deliberative democracy for the realisation of socio-economic rights. Socio-economic rights' adjudication is becoming an increasingly more common feature of the protection of rights in democracies. There are varied types of political justification for socio-economic rights. As indicated earlier in this study one common argument is that the protection of socio-economic rights is a necessary condition for democratic participation of the poor. Put simply, for the political rights to be effectively exercised by the poor it is necessary to ensure that their material conditions characterised by socio-economic deprivation must be attended to. Liebenberg defends a more subtle form of political justification for social rights.⁴⁴ She argues that political participation will not be equitable unless it addresses the material conditions that could impede such participation. She further argues that there is a need to redress the legacy of the past, what she calls 'setting right the wrongs of the past'.⁴⁵

She argues that the 'wrongs of the past' must be understood in terms of the complex interaction of colonialism, apartheid and capitalism over four hundred years.⁴⁶ She

⁴⁴ Liebenberg S (2010) 32.

⁴⁵ Liebenberg S (2010) 25.

⁴⁶ Liebenberg S (2010) 26.

notes that the legacy of apartheid social and economic inequality is still deeply embedded in South African society and asserts:

‘Poverty and the multitude, intersecting forms of inequality in South Africa profoundly affect, not only people’s survival, health and psychological well-being, but also their ability to participate on equal terms in the shaping of our new democracy.’⁴⁷

For Liebenberg, participation as equals in the shaping of the new democracy is important. Shaping of the new democracy entails, as a key and principal task, transforming the current conditions of the poor through realisation of the socio-economic rights. Consistent with Liebenberg, Langa CJ describes the conception of transformation embedded in the Constitution as an open-ended process of on-going dialogue and contestation in the quest for a more just and equitable society, as follows:

‘Transformation is not a temporary phenomenon that ends when we all have equal access to resources and basic services and when lawyers and judges embrace the culture of justification. Transformation is a permanent ideal, a way of looking at the world that creates a space in which dialogue and contestation are truly possible, in which new ways of being are constantly explored and created, accepted and rejected and in which change is unpredictable but the idea of change is constant.’⁴⁸

Langa goes further to characterise the scale of transformation taking place in South Africa as a ‘revolution’, which for its success requires the involvement of all sectors of society.⁴⁹ This assertion on transformation affirms the importance of deliberative democracy in the effort for realisation of socio-economic rights. Consistent with this argument, Liebenberg and Young suggest that the open-endedness, the procedural

⁴⁷ Liebenberg S (2010) 27.

⁴⁸ Langa P (2006) 354.

⁴⁹ Langa P (2006) 352.

difficulties, the polycentric and amorphous nature of socio-economic rights render adjudication of this category of rights complex. They then explore whether ‘democratic experimentalism’ would succeed in delivering a realisable, democratic model of democracy. Liebenberg and Young define ‘democratic experimentalism’ as follows:

‘A collection of pragmatist-inspired proposals for fostering more deliberative, democratic institutions. Although not conceived as a program for SER adjudication *per se*, its suggestion for bringing institutions and stakeholders together to negotiate and coordinate solutions in areas as diverse as community policing, environmental standard setting, and drug treatment.’⁵⁰

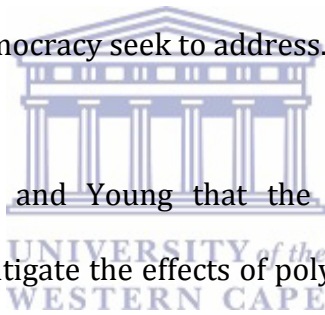
According to Liebenberg and Young this new approach invites democratic engagements, deliberations and learning about what the claimants and others care most about in terms of socio-economic rights challenges. The assumption is that such engagements will result in ‘more open, collaborative forms of decision-making’.⁵¹ They are further of the view that a court could oversee these negotiations and work to ensure the fairness of the deliberative procedures and the representativeness of all the parties. Such an approach will ‘transform polycentricity from a challenge to an aid to problem-solving’ as the connection between stakeholders will generate opportunities for learning and innovation.⁵² It is difficult to find any particular differences between democratic experimentalism and deliberative democracy. There is a striking convergence in the conceptualisation of democratic experimentalism by Liebenberg and Young, and deliberative democracy by Bessette and Sunstein. In this thesis the two notions are dealt with as being synonymous.

⁵⁰ Liebenberg S & Young G (2015) 239.

⁵¹ Liebenberg S & Young G (2015) 240.

⁵² Liebenberg S & Young G (2015) 241.

Liebenberg and Young identify two challenges of the deliberative process that can confront poor communities in the adjudication of socio-economic rights, namely, the 'bargaining disadvantage' of inequality and the 'disenfranchisement effect'.⁵³ The former holds that skewed distribution of resources undermines the ability of the poor to effectively assert and defend their interests in contentious negotiations as the rich are able to recover from setbacks in one instance of engagement. Poor people are also disadvantaged in bargaining processes because they do not have a full appreciation of their bargaining strengths and are more susceptible to exploitation during the engagement process.⁵⁴ These disadvantages highlighted by Liebenberg and Young are the same weaknesses that the Transformative Empowerment Model and the commitment to deliberative democracy seek to address.



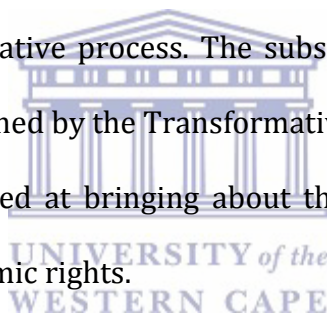
It is agreed with Liebenberg and Young that the deliberative dimension of the democratic dispensation can mitigate the effects of polycentricity in the adjudication of socio-economic rights. To mitigate the impact of polycentricity, the courts have to find creative and innovative extra-judicial means for the adjudication of socio-economic rights. The jurisprudence of ME is one such creative way that the courts devised to ensure better enforcement of the right against unlawful evictions. From this approach it is evident that the direct implications of the deliberative dimension of the Constitution will be to strengthen the adjudication of socio-economic rights.

The Transformative Empowerment Model provides for practical mechanisms on how best to engage the poor to be part of state initiatives that have direct consequences for

⁵³ Liebenberg S & Young G (2015) 251.

⁵⁴ Liebenberg S & Young G (2015) 251.

their socio-economic conditions. The Model provides for deliberative engagements predicated on equalisation of power relations by means of critical insight into power dynamics. This is consistent with Yacoob's J assertion that the poor and the landless are not 'insignificant, faceless beings' who are an 'obnoxious social nuisance' passively waiting for the government to deliver goods.⁵⁵ Application of the Transformative Empowerment Model can, to a large extent, address the two disadvantages identified by Liebenberg and Young with regard to the deliberative process. At the core of both disadvantages is the unequal distribution of power and its influence on attitudes, behaviours and ultimately the decision-making process. The Transformative Empowerment Model is modelled and designed to address the impact of the unequal power dynamics in the deliberative process. The substantive and critical engagement with power by the poor envisioned by the Transformative Empowerment Model and the deliberative processes are aimed at bringing about the needed structural reforms to realise the various socio-economic rights.



The Transformative Empowerment Model advocates for deliberative engagement by the poor in the realisation of their socio-economic rights. This form of involvement goes beyond political representation and is aimed at strengthening the capacity of the poor to engage in collective actions that seek to address their common challenges. In concluding their argument for a democratic experimentalism Liebenberg and Young argue for 'a species of a deliberative response to concerns about socio-economic rights adjudication that has clear institutional values' that promote bottom-up, collaborative decision-making by those directly affected by the social problem and injustice, instead

⁵⁵ *Occupiers of 51 Olivia Road* para 122.

of the imposition of top-down solutions.⁵⁶ These egalitarian and transformative outcomes emphasised by Liebenberg and Young are the exact outcomes that the Transformative Empowerment Model seeks to achieve.

There are three critical assumptions in the Transformative Empowerment Model underlying deliberative engagement and the realisation of socio-economic rights. First, that deliberative engagement through the Transformative Empowerment Model will facilitate the process of empowerment of the poor for the realisation of their socio-economic rights. Secondly, that deliberative engagement bolstered by the Transformative Empowerment Model will ensure integration of local knowledge in finding suitable solutions to socio-economic problems. The last assumption is that deliberative engagement will facilitate and generate a two-way learning process that will enhance an understanding and consideration of the conditions of the occupiers. Obviously, there will be limitations on the implementation and execution of the Transformative Empowerment Model but they should not imply a total rejection of the Model, but rather demand more educational processes for both the municipal practitioners and the affected people.

7.4 Conclusion

This chapter sought to locate the Transformative Empowerment Model within the theories of democracy and to investigate the implications thereof for the adjudication of socio-economic rights. The study examines the contested meanings of democracy and rejects the narrow conceptualisation of democracy that tends to narrowly equate

⁵⁶ Liebenberg S & Young G (2014) 254.

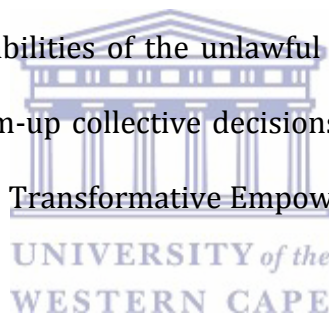
participation in democracy with political representation in institutions of political power. The study recognises the importance of non-electoral representation participation that is increasingly gaining significance and challenges the narrow conception of democracy. The study aligns itself with Wolfe's conceptualisation of democracy that transcends the contemporary majoritarian electoral representation and provides for the exercise of control and self-mastery by communities around their common interests. From this viewpoint democracy entails ensuring involvement through collective action, which is a product of social mobilisation.

The chapter briefly reflects on the eight types of power in democracy and argues that the conceptualisation of democracy in this study approximates a combination of 'development democracy', 'delegate democracy' and 'commune democracy'. This is due to the fact that all three types of power in democracy emphasise the significance of egalitarian values, encourage collective action and promote community solidarity to change oppressive relations. This is consistent with the overriding rationale of the Transformative Empowerment Model, to empower the unlawful occupiers to challenge the skewed power relations during the engagement processes.

After having considered the types of power in democracy, this chapter engages in a theoretical debates on the two models of democracy – 'participatory democracy' and 'deliberative democracy'. It is crucial for this study to unravel the differences between the two models, as the tension between them is very much alive in contemporary constitutional law scholarship. The critical point of difference between the two models is the form of decision-making. 'Participatory democracy' considers participation through protests, complaints and advocacy as a means of influencing decision-making,

which is squarely within the realm of the holders of power. In contrast, 'deliberative democracy' is a new theoretical paradigm that promotes deliberation as a step in a dialogic and discursive process to finding bottom-up solutions in a collective decision-making process.

The study argues that the 'deliberative democracy' model is more consistent with the egalitarian objective pursued by the Transformative Empowerment Model as it places greater emphasis on the importance of local knowledge in seeking to understand the informal settlement and in finding solutions to the problems. The Transformative Empowerment Model also proposes for a Freireian consciousness raising education process to strengthen the capabilities of the unlawful occupiers in their engagements with the state to ensure bottom-up collective decisions. The study further argues that deliberative democracy and the Transformative Empowerment Model are responsive to the five dimensions of ME.



On consideration of the implications of deliberative democracy and the Transformative Empowerment Model for the realisation of socio-economic rights, the study argues that deliberation and empowerment of the unlawful occupiers can mitigate the effects of the polycentric nature of socio-economic rights. Thus, the direct consequence of the deliberative dimension of the Constitution and the Transformative Empowerment Model will be the strengthening of the adjudication of socio-economic rights. The Transformative Empowerment Model provides practical mechanisms for deliberative engagement by the unlawful occupiers for the realisation of their socio-economic right.

CHAPTER 8

CONCLUSION, CONTRIBUTIONS AND RECOMMENDATIONS

8.1 Conclusions of the study

Adjudication, legal discourse and practice can make a significant contribution to the creation of a better kind of society in which unequal power relations between individuals or groups and the state are mediated. Unequal power relations cannot be accepted as normal and inevitable and the law can be one of the most effective instruments for the creation of an equitable society. This study introduces new ideas and concepts into the relatively conservative domain of legal studies with the great hope of developing a normative framework for ME that is egalitarian and pro-poor, while simultaneously not relegating to non-status the right to property. This hope is inspired by Mackinnon's timeless assertion: 'Law is not everything, but [it] is not nothing either'.¹ Pro-poor judicial commitment is deeply embedded in the eviction jurisprudence of the ConCourt and this study seeks to develop practical mechanisms through which such a commitment can be enhanced.

This is an exploratory study and the primary research question examines whether people in informal settlements threatened with evictions will be afforded better protection of section 26(3) through the development of a community engagement model based on the substantive requirements of ME. To respond to the central question, the study presents five interrelated and synergistic secondary questions:

1. What were the consequences of the historical, legal and political context of

¹ Mackinnon C *Feminism Unmodified: Discourses on Life and Law* (1987) 116.

forced evictions in apartheid South Africa?

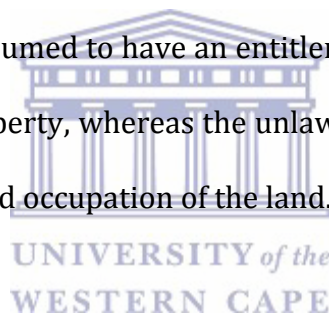
2. What is the normative context for evictions in the post-1994 democratic South Africa?
3. What are the substantive requirements for ME?
4. What model of community engagement is appropriate for unlawful occupiers to engage meaningfully?
5. What are the implications of the community engagement model on the principles of democracy and the rights to human dignity, equality and freedom?

Chapter 2 responds to the first secondary question by demonstrating the disempowering nature of apartheid evictions before 1994. The chapter seeks to ensure that the appreciation of an apartheid induced forced evictions serves as background for a deeper understanding of the need to transform South African society into one based on human dignity, equality and freedom.² Consistent with the argument in the study, the extensive examination of literature suggests that the apartheid evictions were overtly disempowering to the squatters. The disempowerment trajectory was sustained through promulgation of many laws by the apartheid regime to render the position of the squatters more precarious. The common law remedy, the *rei vindicatio*, was regarded as the most realistic remedy available to the owner of immovable property and it adopted the form of an eviction application. To succeed with a real action against squatters the owner had to merely allege and prove ownership of the property and that the property was in the possession of the defendants. The onus then shifted to the defendants to establish a valid and enforceable right of occupation, which could take the

² Muller G (2011) 316. See also *Residents of Joe Slovo*.

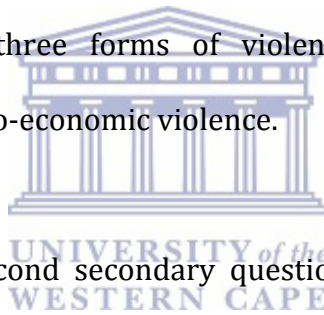
form of a real or personal right acquired in terms of legislation, or a right, permission or licence granted by the owner. If the owner proved that the right no longer existed or was no longer enforceable, the court would have no discretion to refuse the eviction order. No provision was made for consideration of the circumstances of the squatters before eviction orders were granted and this emasculated the position of the squatters.

To further the objective of keeping black people out of the urban centres, legislation and police powers were manipulated by the state to evict people under the pretext of ensuring their health, safety and security. A convergence developed in the use of eviction legislation and the *rei vindicatio*. Over time this became accepted as the normal position, as the owner was presumed to have an entitlement to the exclusive possession and undisturbed use of his property, whereas the unlawful occupiers had no legal claim on which to base their continued occupation of the land.



The increased demand for black labour and the political unrest of the 1980s resulted in changes to the black urbanisation strategy. The essence of the changes was to provide for the development of black communities outside the national states. The then Minister of Co-operation and Development was empowered to declare certain areas to be development board areas and to establish a development board for each of those areas. The board of the local township was empowered to grant competent people leasehold for a period of 99 years. The leasehold strategy had a minimal impact on reducing the wide-scale informal settlements, which were the dominant feature of the urban landscape.

The study shows that the disempowerment of squatters was further exacerbated through various attempts by the authorities to render ineffective the *mandamant van spolie* remedy, which was the only remedy available to the vulnerable squatters. This was done through the removal of the seven-day notice period and its substitution with an ouster clause to prevent squatters from approaching the courts to obtain orders to prevent their removal. The ultimate objective was to ensure that the squatters were unable to litigate by making use of the *mandamant van spolie* to regain possession of their property. This amendment strengthened the position of the state and encouraged the most ruthless forms of destruction of the possessions of squatters. The forced evictions during the apartheid era were highly abusive and left the squatters helpless as they were visited with all three forms of violence, namely, physical violence, psychological violence and socio-economic violence.



Chapter 3 responds to the second secondary question by examining the normative context of evictions in the post-1994 democratic dispensation. Consistent with the argument in this study, the chapter shows that the post-apartheid dispensation seeks to ensure substantive involvement of the unlawful occupiers during evictions. This is in stark contrast to the disempowering trajectory during the apartheid era. The chapter commences by examining the implications of the entrenched Bill of Rights in the Constitution, which contains both political rights and socio-economic rights.

There is general agreement in the literature and case law that the inclusion of socio-economic rights in the Constitution was meant to address the injustices of the apartheid era. In adjudicating socio-economic rights the ConCourt interpreted this category of rights in conjunction with the rights to human dignity, equality and freedom. The Court

was inclined towards a substantive dimension of equality, to address the unequal impact of law and conduct. The study accepts the integrative approach adopted by the ConCourt, that socio-economic rights, at a minimum level, include negative obligations on the state and that political rights require some positive action by the state. In consequence, this study rejects the classical liberal view that socio-economic rights undermine the very nature of freedom, and adopts Sen's argument that freedom is about increasing individual opportunities, capabilities or choices. Accordingly, this study demonstrates that the courts developed innovative adjudicative ways for the enforcement of socio-economic rights.

An important aspect of chapter 3 is the identification of the six primary drivers for substantive involvement of the occupiers during evictions. The first primary driver is the inclusion of justiciable socio-economic rights in the Constitution, which is crucial to addressing past injustices. The second is the foundational values in the Constitution of human dignity, equality and freedom coupled with a commitment to substantive equality. The third is the right to housing with its ancillary right against unlawful evictions, which enjoins the courts to adequately consider all relevant circumstances of the occupiers before issuing eviction orders. The determination of the relevant circumstances of the occupiers during evictions requires their active involvement.

The fourth is PIE, as it requires courts to issue eviction orders if it is just and equitable to do so and further makes provision for mediation. The fifth is the judicial imperative of transformative constitutionalism to mediate the unequal power relations in society through redress coupled with a commitment to a democracy that gives a voice to the voiceless to create an egalitarian and non-oppressive society. The last primary driver is

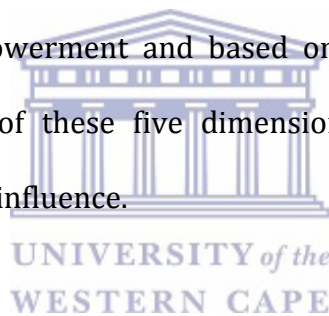
the international norms, which require states to provide adequate procedural and substantive safeguards against abuse of power during evictions through equal or effective participation of the occupiers. The primary drivers offer substantive safeguards to the unlawful occupiers by imposing a positive obligation on the state to ensure their effective involvement during evictions.

Based on the imperatives of the six primary drivers the ConCourt in *Occupiers of 51 Olivia Road* developed the notion of ME. ME was primarily conceptualised as both a substantive and procedural safeguard for the unlawful occupiers. The study shows that the five separate, but concurring judgments, in *Residents of Joe Slovo* resulted in jurisprudential inconsistency that was due to the proceduralisation of ME. Based on a rigorous analysis of the eviction case law this thesis extrapolates three interrelated and interdependent substantive requirements for ME, namely, empowerment, participation and social capital. This conclusion is consistent with the central argument of this study, that the empowerment of the unlawful occupiers through equitable participation was cardinal for ME to reverse the disempowering impact of apartheid evictions.

Underlying these three fundamental requirements for ME was the commitment by the ConCourt to substantive equality, which resulted in a general rejection of the 'top-down approach' during engagements. The anti- 'top-down approach' sentiment was pervasive in case law as the ConCourt sought to protect the unlawful occupiers against evictions reminiscent of the apartheid style. The strong sentiment against the 'top-down approach' is meant to mediate the inherent unequal power relations between the occupiers and the state. However, the inadequate conceptualisation by the ConCourt of

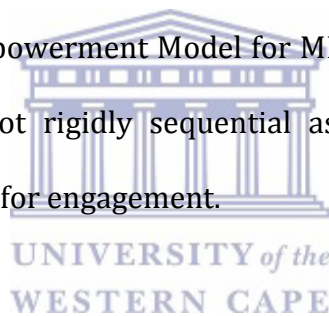
these three substantive requirements had an adverse impact on its sincere endeavour to protect the poor during eviction engagements.

In chapter 4 the study compensates for the inadequate conceptualisation and application of the substantive requirements of ME by conceptually developing a community engagement model. The model is called the Transformative Empowerment Model and is based on the three substantive requirements of ME: empowerment, participation and social capital. The chapter commences by explaining these three concepts as they are essential to understanding and explaining the jurisprudential inconsistency in the application of ME by the ConCourt. The study adopts the CDX definition of community empowerment and based on that argues that ME must be directed at the achievement of these five dimensions – confidence, inclusiveness, organisation, co-operation and influence.



The study argues that for participation to result in ME it must be interactive and encompass critical reflection by the unlawful occupiers. Tokenism and placation are forms of participation that are inadequate for ME. Two forms of social capital are identified in this study, namely, bridging (inclusive) and bonding (exclusive) social capital. This study proposes that building bridging social capital is the most appropriate response for developing trust relations among unlawful occupiers during evictions. Bridging social capital will enable the occupiers to build social bonds across social differences that might be durable and crucial for interactive participation in the engagement process.

In developing the Transformative Empowerment Model the study employs an interdisciplinary approach due to the paucity of scholarly work on empowerment, participation and social capital within the legal discipline. To develop the Transformative Empowerment Model the study examines two traditional models of community engagement - Henderson and Thomas' neighborhood model and Stepney and Popple's critical integrative model. As both models have weaknesses that cannot be adequately addressed by the respective strengths of each, the study reinforces the theoretical framework of the Transformative Empowerment Model with relevant ideas on community engagement of scholars in the disciplines of human rights law, international development studies, social work and political science. This culminates in a six-stage Transformative Empowerment Model for ME by unlawful occupiers. The six stages are interrelated and not rigidly sequential as each stage provides context-sensitive practical mechanisms for engagement.



The *first stage, initial contact*, includes the orientation of municipal practitioners, developing skills, and making formal and informal contact with the aim of familiarisation with the informal settlement. The *second stage, screening the community*, entails the development of goals and objectives, and through brainstorming identifying issues and concerns that are important to the community. The *third stage, building capabilities*, primarily encompasses developing an inclusive community profile through the utilisation of local knowledge for data collection, dissemination and use to strengthen the capacity of the unlawful occupiers for critical reflection. The *fourth stage, building social capital*, includes the establishment and building of community organisations through bridging social capital to create an egalitarian relationship among the unlawful occupiers. The *fifth stage, strengthening participation*, encompasses the

activation of community networks for collective action and critical engagement with the state. Lastly, the *sixth stage, research and evaluation*, entails joint monitoring of the activities for community engagement, assessment of the outcomes and challenges, and devising corrective measures. The Transformative Empowerment Model is developed to serve as a normative framework for ME.

The outcomes of the six stages are meant to strengthen the position of the unlawful occupiers through community learning, building community organisations as a platform for collective action, critical reflection on the engagement process, and increased participation. The ultimate objective of the transformative empowerment model is to mediate the inherent power imbalance between the occupiers and the state through empowerment of the unlawful occupiers to find bottom-up solutions to their problems. Finding bottom-up solutions to evictions problems is transformative as it locates the unlawful occupiers at the centre of finding solutions to their problems. In this sense the unlawful occupiers are not regarded as ‘obnoxious social nuisance’, but rather as active partners in finding solutions to the challenges of homelessness.³

In chapter five the study examines the implications of the Transformative Empowerment Model for the conceptualisation and application of ME by the ConCourt from 2008 to 2014. Consistent with the argument in the study, the findings show that the conceptualisation by the ConCourt of the substantive dimension of ME was inadequate. The inadequacy resulted in jurisprudential inconsistency that weakened the protection accorded by section 26(3) to unlawful occupiers. The extensive examination of *Occupiers of 51 Olivia Road* reveals that the ConCourt employed the six primary

³ *Occupiers of 51 Olivia Road*. See also *Schubart Park Residents*.

drivers for substantive involvement of occupiers to coin the concept of ME as a cardinal pillar of its eviction jurisprudence.

The ConCourt held that ME was a fundamental requirement of the transformative vision of the Constitution to ensure a democracy that works for the poor and to promote of the rights to human dignity, equality and freedom. This emphasis was inspired by the commitment of the ConCourt to undo the disempowering trajectory in evictions reminiscent of the apartheid era. Despite the extensive explanation and conceptualisation of ME by Yacoob J in *Occupiers of 51 Olivia Road*, the study demonstrates that the post-*Residents of Joe Slovo* application of ME has in most instances been characterised by jurisprudential inconsistency that weakened the application of the right against unlawful evictions. This adversely impacted on the ConCourt's commitment to the transformative vision of the Constitution as eviction orders were issued without ME, causing untold hardship to the unlawful occupiers.

The extensive examination of case law demonstrates that in eviction judgments where the conceptualisation and application of ME was closely related to the objectives of the Transformative Empowerment Model the protection offered by section 26(3) was enhanced. This means that the unlawful occupiers enjoyed better protection. Conversely, in eviction judgments where the conceptualisation and application of ME was at variance with the objectives of the Transformative Empowerment Model the protection offered by section 26(3) was weakened as the ConCourt upheld eviction orders without ME, which resulted to untold hardship on the unlawful occupiers due to inadequate consideration of their circumstances.

In *Abahlali BaseMjondolo*, *Pheko*, *Occupiers of Portion 25* and *Schubart Park Residents* the conceptualisation and application of ME by the ConCourt was closely related to the objectives of the Transformative Empowerment Model. This resulted in progressive application of ME as the protection offered by section 26(3) of the Constitution was enhanced. In these cases the ConCourt's conceptualisation of ME placed more emphasis on the importance of developing the capabilities of the occupiers, building social capital and ensuring deliberative participation. The Transformative Empowerment Model promotes deliberative participation, which cannot be conclusively measured by the number of meetings held with the occupiers by the state.

In stark contrast, in *Residents of Joe Slovo*, *Blue Moonlight Properties*, *Occupiers of Skurweplaas* and *Occupiers of Sarotoga Avenue* the ConCourt proceduralised the application of ME by exclusively focusing on the number of meetings that took place between the state and the occupiers. This was regressive application of ME and was at variance with the Transformative Empowerment Model. In all four judgments the evictions orders were upheld without there being ME with the unlawful occupiers.

The use by the ConCourt in these cases of the number of meetings convened as a conclusive indicator as to whether or not ME took place reduced its commitment to the transformative vision of the Constitution to mere judicial rhetoric. The contention in this study is that ME is deeper than and goes beyond the ritual practice of holding meetings. The study shows that the proceduralisation of ME was due to inadequate conceptualisation of the substantive aspects of ME, which resulted in a lack of practical mechanisms to build the capabilities of the unlawful occupiers to ensure deliberative

participation. The Transformative Empowerment Model seeks to address this inadequacy.

In the adjudication of eviction cases the ConCourt held that democracy and the rights to human dignity, equality and freedom are the primary values for ME. In chapter 6 the study explores whether the Transformative Empowerment Model is aligned to the values of human dignity, equality and freedom. In executing this task the chapter commences with a brief reflection on the historical evolution of human dignity, equality and freedom within the realm of natural law. This study concludes that these values originate in natural law and have been transmuted into positive law through their positing in the Constitution. There are no strict conceptual boundaries regarding what each of these values entails. This study examines each value separately to determine its key elements and thereafter assesses the implications of the Transformative Empowerment Model on the key elements. This is done through extensive examination of contemporary literature.

With regard to human dignity, the authoritative works of Kant, Sen and Nussbaum enable the study to identify three elements of human dignity: mutual respect, building capabilities of the poor, and human worth. This study finds that the six interrelated stages of the Transformative Empowerment Model promote the three elements of human dignity. Mutual respect is reinforced from the *second stage* as the community practitioners are enjoined to set community goals and objectives through brainstorming with the community and use of local knowledge to profile the community. This is further strengthened by the emphasis on collective bottom-up decisions in the *fifth stage*. Furthermore, central to the Transformative Empowerment Model is building of

the capabilities of the occupiers by improving their knowledge of their environment and consciousness raising to ensure engagement with the state on an equal footing. The ultimate objective of the model is not necessarily to avert evictions but to ensure that solutions to problems of homelessness promote human worth by adequately taking into consideration the relevant circumstances of the unlawful occupiers.

With regard to equality, the study identifies three elements, and demonstrates that the Transformative Empowerment Model promotes all of them. The three elements are equitable participation, consideration of the broader context, and bottom-up solutions. Central to the Transformative Empowerment Model is deliberative and interactive participation that seeks to challenge the unequal power relations between the occupiers and the state. The Model rejects tokenism and placation forms of participation as mere formality and empty ritual that will not bring about any substantive benefits to the lives of the unlawful occupiers. This study argues that it will be difficult to ensure equality during the engagement process without a thorough understanding of the broader context of socio-economic marginalisation and deprivation of the unlawful occupiers. Therefore, the Model emphasises the importance of appropriate training and induction for municipal workers. The Model seeks to achieve bottom-up solutions through building bridging social capital and community organisations as a social infrastructure for collective action. The building of social capital and community organisations will generate the grassroots participation and activism by the unlawful occupiers, which is key to finding bottom-up solutions.

With regard to freedom, the study further demonstrates that the Transformative Empowerment Model affirms and promotes the value of freedom. The ConCourt under-

utilised the value of freedom in its adjudication of eviction cases. The value of freedom is only mentioned in two of the nine eviction cases examined in the study, namely, *Residents of Joe Slovo* and *Schubart Park Residents*. Nevertheless, through extensive examination of the literature the study identifies three key elements of freedom, namely, non-domination, inclusiveness, and self-rule. As mentioned earlier, one of the objectives of the Transformative Empowerment Model is to ensure non-domination through mediation of the unequal power relations between the occupiers and the state. The commitment to non-domination in the Model mainly finds expression in *stages three, four and five*. In the *third stage* the model seeks to strengthen the capacity of the occupiers for critical reflection on power, and this is further strengthened in the *fourth stage* by the establishment of community organisation as a counter-balance to power. The *fifth stage* propounds practices that promote collective group dynamics to eliminate hierarchical relations.



The Model favours inclusiveness by building bridging social capital for collective action as a catalyst for bottom-up solutions. Consequently, this enables building the ability of the occupiers to self-rule. The ability to self-rule is transformative, and will be mainly determined by the levels of consciousness of the occupiers about their surroundings, and the extent of the influence they have on the decision-making processes.

In chapter seven the study locates the Transformative Empowerment Model within the two different and dominant theories of democracy, namely, participatory and deliberative democracy. The findings of the study are that ME and the Transformative Empowerment Model are not inclined towards participatory democracy. This is due to the fact that empowerment in participatory democracy is limited to the exercise of

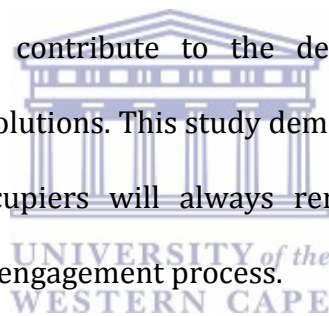
decision-making powers in relation to institutions of representative democracy. This weakness of participatory democracy is cogently expressed by the 'ladder of participation' proposed by Arnstein.

Participation as espoused by the Transformative Empowerment Model upholds Arnstein's assertion that true participation is that which confers or attributes power to the citizens. This is consistent with deliberative democracy, as participation is substantive and deeper than the politics of representation. Deliberative democracy promotes conditions that could enable the practice of democracy on the basis of consensual procedures, radical egalitarianism and face-to-face interaction based on equal respect for diverse and conflicting interests. A high premium is placed on equal power in decision-making processes. The study demonstrates that for ME to take place there should be a deliberative process that promotes grassroots involvement, bottom-up collective decisions, consciousness raising, collective action, critical reflection, and deliberative participation. The Transformative Empowerment Model makes provision for all these imperatives.

The primary research question in this study is whether there will be better application of the protection afforded by section 26(3) through the development of a community engagement model based on the substantive requirements of ME. The responses to the secondary questions suggest that the study conceptually clarifies the substantive requirements for ME. Based on the substantive requirements of ME the study develops a six-stage model with practical mechanisms for ME. In chapter 5 the study demonstrates that the unlawful occupiers are accorded better protection of the section 26(3) right in eviction judgments where the conceptualisation and application of ME is

closely related to the objectives of the Transformative Empowerment Model. It is therefore the argument of this study that the Transformative Empowerment Model and the deliberative approach will enhance the judicial application of ME. The study further shows that the application of the Transformative Empowerment Model could be extended to other socio-economic rights.

Section 26(3) entrenches the right against unlawful evictions and prescribes that the relevant circumstances of the unlawful occupiers must be adequately taken into consideration before a court issues an eviction order. The ConCourt developed the notion of ME as a means to ensure substantive involvement of the occupiers during evictions to enable them to contribute to the determination of these relevant circumstances and to identify solutions. This study demonstrates that the articulation of the circumstances of the occupiers will always remain a mystery without their substantive involvement in the engagement process.

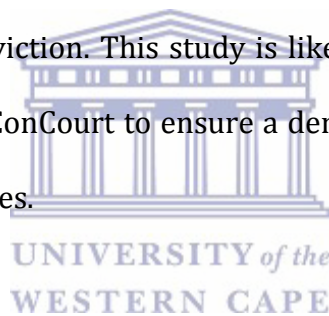


The study argues that the achievement of the goals of the Transformative Empowerment Model will strengthen the position of the unlawful occupiers and ensure that their relevant circumstances are adequately taken into consideration during eviction processes. This could be achieved through the development of community profiles based on local knowledge to ensure a comprehensive understanding of the circumstances of the unlawful occupiers. The ConCourt held that eviction of a large number of people required a 'structured, systematic and comprehensive process of

engagement'.⁴ The Transformative Empowerment Model responds to this judicial imperative as it offers a structured and systematic approach for ME.

8.2 Contributions of the study

The first contribution of this study is the creation of relative conceptual boundaries for ME by identifying the three substantive requirements underlying the notion. Extrapolation of the three substantive requirements for ME from the labyrinth of eviction case law is thus a unique finding of this study. This might help to eliminate the jurisprudential inconsistency associated with ME, thereby improving the enforcement of the right against unlawful eviction. This study is likely to add value to the pro-poor jurisprudence adopted by the ConCourt to ensure a democracy that works for the poor and that addresses past injustices.



The second contribution of the study is the conceptual development of the Transformative Empowerment Model. The development of the Model is uniquely undertaken from an interdisciplinary approach by utilising theories on community engagement in social studies, international development studies, human rights, and political science. The development of the Transformative Empowerment Model is in response to the discomfort expressed by many academic observers on the jurisprudential inconsistency associated with the application of ME. This study demonstrates that the inconsistency is primarily due to inadequate conceptualisation of the substantive requirements of ME.

⁴ See *Residents of Joe Slovo, Abahlali BaseMjondolo and Schubark Park Residents*.

The six-stage Transformative Empowerment Model encompasses practical steps for ME by the unlawful occupiers. The stages are not necessarily sequential, but are interrelated and interdependent. The practical mechanisms offered by the Transformative Empowerment Model may serve as a baseline during the adjudication of eviction cases so as to reduce the risk of inconsistency in the application of ME. The Model is not a rigid guide but is context sensitive and can be used in varied circumstances.

The third notable contribution of this study is the extensive examination of the literature on the rights to human dignity, equality and freedom. In most instances the co-joined values of human dignity, equality and freedom are conflated as a single value without clear separate boundaries and requirements. The study examines the natural law origins of these values and separately interrogates their meaning. The identification of key elements for each of the values is also a unique contribution of this study. Both in the literature and case law the discussion of these values remains hyperbole without clear and tangible determinants of what constitutes them. This often results in the conflation of the key elements of these values, and that substantively diminish their constitutional impact. A caveat therefore follows here, that while the three values of human dignity, equality and freedom are co-joined, each has its own separate substantive meaning.

8.3 Recommendations of the study

The thesis developed a pre-figurative Transformative Empowerment Model for ME by occupiers during evictions. Although ME was constructed by the ConCourt and is part of

South African jurisprudence on evictions, the need for substantive involvement of occupiers during evictions is a global imperative. This section of the conclusion chapter seeks to recommend strategies on how to apply the results of the thesis in the 'real' world both in South Africa and globally.

The first recommendation of the study is for the review of the UN Basic Principles and Guidelines on Development-Based Evictions. The review should entail alignment of the Basic Principles and Guidelines with the objectives of the Transformative Empowerment Model. This is due to the fact that the practical mechanisms proposed in the UN Basic Principles and Guidelines are inadequate to ensure substantive involvement of the affected people during evictions. The CESCR in General Comment No 4 and No 7 requires that evictions should take place with 'genuine consultation' of the affected people.⁵ This position is further strengthened by the UNCHR Resolution in 1993, which requires that evictions should be preceded by 'mutually satisfactory negotiations' with the affected people and be 'consistent with their wishes, rights and needs'.⁶

The UN Basic Principles and Guidelines entail practical measures to guide development-based evictions, and to give effect to the requirement of 'genuine consultation' as prescribed by General Comment No 4 and No 7, and to ensure 'mutually satisfactory negotiations' during evictions as required by UNCHR Resolution. However, the practical measures entailed in the UN Basic Principles and Guidelines are not adequate to ensure 'genuine consultation' and 'mutually satisfactory negotiations'. General Comment No 4

⁵ General Comment No 4 para 8(a). See General Comment No 7 para 15.

⁶ UNCHR Resolution 1993 para 4.

and No 7, and UNCHR Resolution require substantive involvement of the affected people during evictions, while the Basic Principles and Guidelines are primarily focused on the processes and procedures for involvement of the affected people. The UN Basic Principles and Guidelines do not consider as crucial the empowerment of the affected people to mediate the inherently unequal distribution of power during evictions, do not have mechanisms to improve the quality and quantity of participation, and building social capital among the affected people.

The second recommendation is for the review of the African Commission Principles and Guidelines, to align them with the objectives of the Transformative Empowerment Model. The Principles and Guidelines prescribe a minimum core standard that entails a 'fair hearing and participation' to accompany evictions.⁷ As with the UN Basic Principles and Guidelines the practical measures in the African Commission Principles and Guidelines do not provide any substantive safeguards for the affected people. The African Commission Principles and Guidelines focus on procedural requirements for evictions and do not make provision for empowerment of the affected people for interactive and deliberative participation. The African Commission Principles and Guidelines do not make provision for building of social capital among the affected people, this is necessary because vulnerable people have fragile networks which makes it difficult to build social cohesion. The failure of the African Commission Principles and Guidelines to address the substantive requirements of evictions exposes the vulnerable communities to evictions that cause untold hardships.

⁷ African Commission Principles and Guidelines (2010) para 79 (xxiii).

The third recommendation is for the introduction of appropriate training programmes for municipal officials, who serve as practitioners that facilitate the engagement with the occupiers. The training will be crucial to ensure the application of the research outcomes of this thesis in South Africa. Before discussing the nature of the training, it is important to reflect on the South African specific context that renders the implementation of the Transformative Empowerment Model necessary:

- More than 350 years of land dispossession accompanied by an oppressive culture that prevented people from criticising policies or participating in collective action to change oppressive structures.
- More than 40 years of disempowering apartheid forced evictions.
- Despite the extensive programme of land redistribution and the housing programme for the poor; of the 11.2 million households in South Africa 13.6 per cent are informal dwelling.
- Strong mistrust between the unlawful occupiers and the state.
- ME was introduced by the ConCourt, as a human rights approach to reverse the apartheid style evictions, however, its inconsistent application exposed the underdeveloped knowledge in the legal discipline regarding empowerment, participation and building of social capital.

As mentioned in Chapter 5, in the three most prominent eviction cases, *Grootboom*, *Occupiers of 51 Olivia Road* and *Residents of Joe Slovo*, the ConCourt held that in eviction cases involving a large number of households or people the municipalities must appoint municipal officials to serve as practitioners for engagement to ensure 'structured,

systematic and comprehensive engagement'.⁸ The ConCourt further held that engagements with the occupiers should not be adhoc, but should be consistent and take place even before an eviction was contemplated. In *Residents of Joe Slovo* and *Schubart Park Residents* the ConCourt further observed that the municipal officials that were employed to engage with the occupiers were not adequately skilled to undertake such laborious, arduous and complex task.⁹

Based on this shortcoming, the study recommends that municipal officials tasked with engagement of the unlawful occupiers must undergo a form of training in community engagement. The content of the training should be designed to enable them to understand the appropriate strategies to improve participation of the marginalised groups who are unlikely to be heard in the process of making decision or in meetings with policymakers. The training should focus on building knowledge that prioritise the empowerment of the occupiers through reinforcement of the following aspects of the Transformative Empowerment Model:

- The importance of empowerment of the unlawful occupiers for ME. This will involve the ability of the municipal officials to draw a distinction between the concept of 'deliberative or interactive participation' focusing on decision making and 'involvement' meaning various types of taking part in once-off consultations. This is necessary, because based on the oppressive history in South Africa the municipal workers are accustomed to top-down approaches in decision making processes during evictions. Having perceived this distinction, they can develop

⁸ *Grootboom* para 99, *Occupiers of 51 Olivia Road* para 38, and *Residents of Joe Slovo* para 258.

⁹ *Residents of Joe Slovo* para 261, and *Schubart Park Residents* 21.

context sensitive strategies that will enable the occupiers to acquire the capacity to improve their participation.

- The need by the municipal officials to appreciate the importance to improve the quality and quantity of participation by the occupiers through building of community organisations as social infrastructure, and activation of informal and formal networks.
- The training must also enable the municipal officials to appreciate the significance of values, such as, social justice and equality in empowering communities before and during the eviction process. Learning these values is important for municipal workers to transcend the apartheid style evictions by building trust relations with unlawful occupiers. Through examination of case law the study demonstrates that the municipal officials responsible for ME are not aware of the impact of advocacy in ensuring ME. They focus primarily on their role as facilitators and disregard advocacy, which critically entails 'representation' (speaking on behalf of the voiceless) and 'mobilisation' (encouraging others to speak with the voiceless).

The fourth recommendation is for the ConCourt to evaluate the whole spectrum of engagement as proposed in the Transformative Empowerment Model in determining whether or not ME took place. The Transformative Empowerment Model may serve as a benchmark for such determination, as it seeks to promote democracy and the rights to human dignity, equality and freedom of the occupiers. This thesis demonstrates that ME engagement is not about an attendance register to community meetings, but an in-depth process of conscious engagement with the unlawful occupiers to find bottom-up solutions to their problems of homelessness. This process involves conscious efforts to

develop the capacity of the unlawful occupiers to engage meaningfully and to build social capital. The narrow conception of ME, which regressively reduced this notion to a number of meetings and report back sessions, weakened the protection under section 26(3) of the Constitution. This exposed the unlawful occupiers to eviction orders without adequate consideration of their circumstances.

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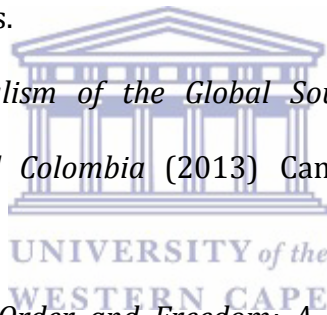
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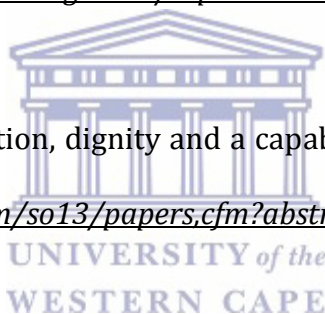
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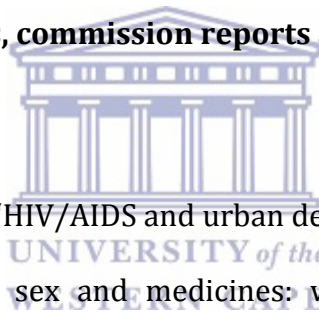
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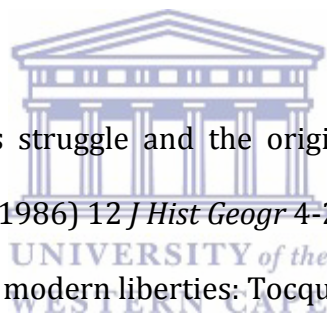
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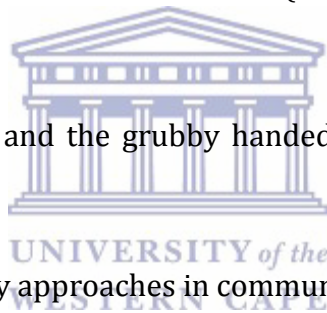
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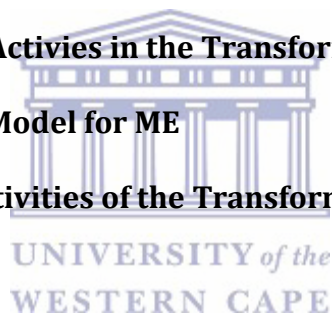
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