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Residents of Joe Slovo Community v Thubelisha Homes and Others: The Two Faces of Engagement

Brian E. Ray

Cleveland State University, b.e.ray@csuohio.edu

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Residents of Joe Slovo Community v Thubelisha Homes and Others: The Two Faces of Engagement

Brian Ray*

1. Introduction

In its most recent housing-rights decision, *Residents of Joe Slovo Community v Thubelisha Homes and Others (Joe Slovo)*,¹ the South African Constitutional Court ('the Constitutional Court') approved the eviction of nearly 20,000 residents of an informal settlement north of Cape Town as part of a major redevelopment of the N2 Highway known as the 'N2 Gateway Project'. The decision—with its echoes of the mass displacements of the apartheid era—disappointed housing-rights advocates who had hoped the Constitutional Court would extend its landmark decision in *Government of the Republic of South Africa v Grootboom*,² where it held that the City of Cape Town and other government entities failed to meet their obligations to ensure adequate access to housing as required by section 26 of the South African Constitution.³

By most accounts, the N2 Gateway Project was plagued from the start by bureaucratic mismanagement and an almost complete failure to meaningfully consult residents on the relocation process and their prospects for obtaining

*Assistant Professor of Law, Cleveland-Marshall College of Law, Cleveland, OH 44115, USA
(brian.ray@law.csuohio.edu).

1 *Residents of Joe Slovo Community v Thubelisha Homes and Others (Joe Slovo)* [2009] ZACC 16.

2 2000 (11) BCLR 1169 (CC); [2000] ZACC 19.

3 Section 26 states: '(1) Everyone has the right to have access to adequate housing. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation 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.'

housing in the planned development. The Constitutional Court highlighted these failures throughout the judgment but nonetheless approved the Government's plans to move forward with the project. In a partial victory for the residents, however, the Constitutional Court imposed stringent conditions on the relocation process and deployed a substantially strengthened version of the 'engagement' requirement it had first developed in an earlier eviction case, *Occupiers of 51 Olivia Road, Berea Township and Others v City of Johannesburg and Others (Olivia Road)*.⁴

At its core is a simple requirement that government consult with residents before evicting them, as engagement offers a creative and flexible tool for advocates of socio-economic rights to enforce these provisions through both political and legal channels. But the government's failure to engage meaningfully earlier in the planning process for the N2 Gateway Project illustrates the risks inherent in the flexibility of engagement. Absent adequate court oversight, engagement can easily turn into nothing more than a requirement that government inform residents of its redevelopment plans. The Constitutional Court in *Joe Slovo* recognised these two 'faces' of engagement and strengthened the remedy by adding components that increase the transparency of the process and enhance court control. This note first describes the engagement remedy, briefly summarises the key features of the *Joe Slovo* litigation and then analyses the innovations that the Constitutional Court introduced in its decision.

2. Olivia Road and the Engagement Requirement

The Constitutional Court first developed the engagement remedy in its judgment in *Olivia Road* delivered in February 2008. Like *Joe Slovo*, the *Olivia Road* case involved a challenge by residents of an informal community to the eviction programme of a major municipality that was part of a broader redevelopment programme. The City of Johannesburg planned to clear so-called 'bad' buildings in an effort to revitalise and redevelop the city centre.⁵ The High Court issued an injunction stopping the programme completely, but the Supreme Court of Appeal reversed that order and permitted the evictions to proceed provided the government offered temporary accommodation to the displaced residents. When the case reached the Constitutional Court, it issued a surprising interim order following oral argument requiring the parties to 'engage' with each other to try and resolve the dispute. That process was remarkably successful and resulted in a settlement that provided the residents with most of the relief they had sought and laid the groundwork for continued

⁴ 2008 (5) BCLR 475 (CC); [2008] ZACC 1.

⁵ For a more detailed summary and analysis of *Olivia Road*, see Ray, 'Occupiers of 51 Olivia Road: Enforcing the Right to Adequate Housing through "Engagement"', (2008) 8 *Human Rights Law Review* 703.

engagement over the larger issues of inner-city housing among the City, the residents and the civil society organisations involved in the litigation.

In its final order approving the settlement, the Constitutional Court, to the parties' surprise, refused to address arguments regarding the City's broader obligations under section 26 left open by the settlement and instead held that 'engagement' is a constitutional requirement in all eviction cases. The Constitutional Court went on to identify several key characteristics of engagement. First, engagement is a flexible remedy, and courts should craft each engagement order to meet the specific needs of each case. Second, engagement must be systematic and not *ad hoc*. Here, the Constitutional Court specifically emphasised that any redevelopment plan like that of the City of Johannesburg must incorporate engagement into the planning process from the start. Third, civil society organisations must be included in the process as facilitators and representatives of vulnerable citizens. Finally, the State must keep a detailed public record of each engagement effort so that a court can review those efforts if the process breaks down.

3. The *Joe Slovo* Decision

The *Joe Slovo* case demonstrates the Constitutional Court's most recent use of engagement, and is one of only three cases in which it has employed the remedy.⁶ The case involved the City of Cape Town's major redevelopment project along the N2 Highway, the principal North–South corridor leading into Cape Town.⁷ The project required the eviction and relocation of over 4,000 families, living in an informal community known as the Joe Slovo settlement, to a hastily developed Temporary Relocation Area in Delft, an area much further from the city where many of the residents worked.⁸ This project was part of the *Breaking New Ground* policy—a broader national policy developed following *Grootboom* to redevelop informal settlements throughout the country and was intended to serve as a model for other similar projects.⁹

Many of the residents originally embraced the plan, in part because the City and the developer promised that most of them would be entitled to return to the new development and rent at low-cost the new housing.¹⁰ But when the first of the three phases of the project was complete, none of the houses were allocated to the low rental bracket the residents claim they were promised.

6 The third case, *Mamba v Minister of Social Development* CCT 65/08, involved a challenge to the Gauteng Government's closure of temporary refugee camps for victims of the xenophobic violence that South Africa experienced in the spring of 2008.

7 *Joe Slovo*, supra n. 1. See also, *Thubelisha Homes and Others v Various Occupants and Others* (13189/07) [2008] ZAWCHC at para. 7 (*Joe Slovo High Court*).

8 *Joe Slovo*, supra n. 1 at para. 125 (Moseneke DCJ).

9 Ibid. at para. 25 (Yacoob J) and para. 327 (Sachs J).

10 Ibid. at para. 327 (Sachs J) and paras 31–33 (Yacoob J).

In addition, Phase 2 included no housing for low-income residents, only 'bonded housing', that is, market-rate housing for purchase through a mortgage.¹¹

In response to these 'broken promises,' the residents began to organise both formal and informal protests against the development, culminating in a major protest in September 2007 in which residents blocked access to the N2 Highway.¹² The State and the developer, Thubelisha Homes, brought an emergency application in the Cape High Court seeking an injunction ordering the eviction of the residents under the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 1998, known as 'PIE'.¹³

The High Court issued a decision permitting the relocations to proceed and denying the residents relief shortly after the Constitutional Court issued its opinion in *Olivia Road*. The High Court opened with praise for the State's increased sensitivity 'to the constitutional values underpinning any development project' and criticism of the residents' resort to self-help in protesting the relocation.¹⁴ A central issue in the case was the State's failure to fulfil its promise to provide 70% of the housing developed on the Joe Slovo site to the displaced residents.¹⁵ Phase 1 failed to meet this goal, and the developer refused to commit to fulfilling it in Phase 2 of the project.¹⁶ This promise was just one of several unfulfilled commitments that the residents argued demonstrated at best insufficient consultation and at worst bad faith by the State and the developer. The High Court gave short shrift to these arguments concluding, in a highly technical discussion, that the residents had no 'legitimate expectation' to the promised housing because they were unlawful occupants of the territory.¹⁷

The High Court made only passing reference to the newly established engagement requirement. After noting that *Olivia Road* requires courts to examine whether a redevelopment process included engagement with residents subject to eviction, the High Court found that the residents' own claims that the State in a series of meetings promised to allocate 70% of the houses in Phase 1 to them was itself evidence of sufficient engagement with the residents.¹⁸

The residents appealed directly to the Constitutional Court. Several of the same groups that were active in organising the residents in *Olivia Road* submitted *amicus curiae* briefs to the Constitutional Court in which they argued

11 Ibid. at para. 32 (Yacoob J) and paras 371 and 373–4 (Sachs J).

12 *Joe Slovo High Court*, supra n. 7 at para. 16. See also, *Joe Slovo*, supra n. 1 at para. 34 (Yacoob J) and paras 327 and 376–8 (Sachs J).

13 *Joe Slovo*, supra n. 1 at para. 15 (Yacoob J).

14 See *Joe Slovo High Court*, supra n. 7 at para. 16.

15 Ibid. at paras 69–76.

16 Ibid. at para. 72.

17 Ibid. at paras 75–6.

18 Ibid. at para. 24.

specifically that the City of Cape Town had failed to adequately engage with the residents.¹⁹ The Court granted those groups permission to present this issue at oral argument.²⁰ During the hearing, Deputy Chief Justice Dikgang Moseneke suggested that further engagement might resolve the case.²¹

No further negotiations occurred, however, and the Constitutional Court delivered its judgment in June 2009. The decision consists of five different opinions spanning 221 pages. All five opinions concur in the final order that prescribes a structured eviction process requiring engagement with the residents to determine most of the significant details for eviction and relocation.²² In addition to the unanimous order, all of the Justices rejected—but for substantially different reasons—the residents' core contention that the length of their occupation combined with the City of Cape Town's periodic provision of services and efforts to improve the living conditions in the settlement constituted uninterrupted consent for their occupation of the land. Justice Yacoob, joined by Justices Langa and Van der Westhuizen, agreed with the City that it had never consented to the occupation. But Justices Ncobo, Moseneke, O'Regan and Sachs each wrote separately to emphasise that, as Justice Sachs describes it, 'the community lawfully occupied the land with the knowledge, acquiescence and support of the [City] Council, but on the understanding that their occupation would be of a temporary nature pending the provision by the state of adequate housing.'²³

Despite their differences over the issue of consent, all of the opinions agreed on two key points. First, each emphasised the failure of State authorities to adequately communicate with the residents as the project moved forward. Justice Sachs was the most forceful on this point:

There can be no doubt that there were major failures of communication on the part of the authorities. The evidence suggests the frequent employment of a top-down approach where the purpose of reporting back to the community was seen as being to pass on information about decisions already taken rather than to involve the residents as partners in the process of decision-making itself.²⁴

19 See *Joe Slovo*, supra n. 1, noting that '[t]he community law centre of the University of the Western Cape and the Centre for Housing Rights and Evictions were admitted as friends of the court, in support of the residents right to be properly consulted before being evicted.'

20 See Mamba, Further Directions by the Chief Justice, 15 August 2008, available at: <http://www.constitutionalcourt.org.za/uhtbin/cgiisirs/8dgHpyueX6/MAIN/0/57/518/0/D2-CCT22-08> [last accessed 14 January 2010].

21 Joubert, 'It's our duty not to be silent', *Mail & Guardian*, 24 August 2008, available at: <http://www.mg.co.za/article/2008-08-24-its-our-duty-not-to-be-silent> [last accessed 13 January 2010].

22 *Joe Slovo*, supra n. 1 at paras 4–5 (Yacoob J).

23 Ibid. at para. 329 (Sachs J).

24 Ibid. at para. 378 (Sachs J).

Justice Ngcobo found that the State attempted to engage at various points with the residents but the lack of coordination by the entities involved confused the residents causing 'mistrust [that] has prevented any meaningful engagement on relocation from taking place without the intervention of this Court.'²⁵ And Justice O'Regan observed that 'much of the heat that has been generated in this case has been generated because the respondents did not engage fully and meaningfully with the applicants and the other communities who have an interest in the housing project.'²⁶

Second, all of the opinions found that the High Court's order completely failed to address this communication breakdown, and that the Constitution required a much more structured order that included consultation with the residents on the details of the relocation process. On this point each of the judgments—and the unanimous order—highlighted the engagement process the Constitutional Court had established in *Olivia Road* as a critical requirement. Justice Moseneke concluded his concurrence finding that the eviction order was just and equitable only because it was paired 'with a further order guaranteeing that the applicants shall be allocated the specified proportion of the new houses... within a process of meaningful engagement with the people who are the subject of the eviction and relocation order.'²⁷ Justice Ngcobo similarly identified engagement as 'crucial' to a relocation process 'that is fair to the residents and that has regard to the Constitution.'²⁸

The unanimous order reflected this consensus that the evictions would only be constitutional if the process included meaningful engagement with the residents. The Constitutional Court specifically noted that its decision that eviction was just and equitable in this case was predicated on the key differences between its order and the largely unqualified eviction order issued by the High Court. It highlighted three principal differences between the two orders. First, the Constitutional Court's order required the City to allocate at least 70% of the new homes to the displaced residents. Second, it specified the quality of the temporary housing in Delft. Finally, the Constitutional Court required 'an ongoing process of engagement between the residents and the respondents concerning the relocation process.'²⁹

In contrast to its earlier engagement orders, which did not include detailed instructions for the engagement process itself, here the Constitutional Court imposed a relatively specific structure. First, it ordered engagement on three broad issues: the date the relocation would begin, the timetable for the process and 'any other relevant matter.'³⁰ The Court then established an even more

25 Ibid. at para. 247 (Ngcobo J).

26 Ibid. at para. 301 (O'Regan J).

27 Ibid. at para. 175 (Moseneke J).

28 Ibid. at para. 261 (Ngcobo J).

29 Ibid. at para. 5.

30 Ibid. at para. 7.5.

specific agenda of seven issues for the engagement. These include details such as '[t]he exact time, manner and conditions' of each relocation and '[t]he precise temporary residential accommodation units' allocated to each resident.³¹ Finally, the Constitutional Court retained jurisdiction over the case requiring the parties to report the results of these engagements and also granting explicit permission for any party to seek relief directly from it '[s]hould this order not be complied with by any party, or should the order give rise to unforeseen difficulties'.³²

4. Engagement After *Joe Slovo*

Early reaction to the decision has been generally critical of the Constitutional Court's refusal to find in favour of the residents. Kate Tissington, a researcher at the Centre for Applied Legal Studies who was active in the litigation, wrote a scathing critique of the judgment describing the Constitutional Court as 'completely naive and out of touch with reality, failing at its duty to adjudicate on socio-economic rights compromised by bad implementation of wrongly interpreted government policy'.³³ The Legal Resources Centre issued a press release describing the result as mixed, but highlighting the fact that it 'is the largest judicially sanctioned eviction of a community in post-apartheid South Africa'.³⁴ Pierre De Vos, while acknowledging that 'the judgment shows a genuine concern for the plight of the Joe Slovo residents,' criticised the substantive holdings as failing to expect 'the state to act in an honest manner and to cater also for the most vulnerable and poor members of a well-established community whose area is to be upgraded'.³⁵ Sandra Liebenberg, in an opinion editorial published by *Business Day*, expressed similar concerns. After noting that the detailed requirements of the Constitutional Court's order were a marked improvement over the High Court's order, Liebenberg said that 'the willingness to effectively condone the inadequate consultation processes raises serious concerns'.³⁶

31 Ibid. at paras 11.2–11.3.

32 Ibid. at para. 21.

33 Tissington, 'South Africa: Joe Slovo Residents Let Down by Court', *all Africa.com*, 26 June 2009, available at: <http://allafrica.com/stories/printable/200906260735.html> [last accessed 13 January 2010].

34 Legal Resources Centre, 'Residents of Joe Slovo Lose and Win in the Constitutional Court', 16 June 2009, available at: <http://www.lrc.org.za/press-releases/1008-2009-06-16-residents-of-joe-slovo-lose-and-win-in-the-constitutional-court-lrc> [last accessed 13 January 2010].

35 De Vos, 'Joe Slovo Case: The Good, the Bad and the (mostly) Unstated', *Constitutionally Speaking*, 14 June 2009, available at: <http://constitutionallyspeaking.co.za/joe-slovo-case-the-good-the-bad-and-the-mostly-unstated/> [last accessed 13 January 2010].

36 Liebenberg, 'Joe Slovo Eviction: Vulnerable Community Feels the Law from the Top Down', *Business Day*, 22 June 2009, available at: <http://www.businessday.co.za/articles/Content.aspx?id=73812> [last accessed 14 January 2010].

The ambivalence these reactions express over the judgment reflect to a large degree the Constitutional Court's own emerging recognition that, while engagement can be a powerful mechanism for protecting human dignity and enforcing socio-economic rights, the flexibility and indeterminacy that give it that potential also pose the risk that it can, as Liebenberg describes it, 'become a meaningless platitude in realising socioeconomic rights.'³⁷ The deeply flawed 'consultation' that led to the *Joe Slovo* litigation illustrates that over-reliance on procedural mechanisms like engagement for enforcement of these rights without sufficient court control, and periodic substantive interventions can permit the government to ignore the obligations the Constitution imposes. At the same time, the tightly controlled and structured engagement process the Constitutional Court established to minimise the harsh effects of the eviction also demonstrate the continued potential that the remedy has for enforcing socio-economic rights.

The Constitutional Court's evident enthusiasm for the remedy is understandable. While it expressed support for using this kind of negotiation or mediation in earlier cases, the Constitutional Court always stopped short of actually ordering it in a particular case. Its first experiment with the process in *Olivia Road* was incredibly successful, resulting in a settlement that both sides were committed to and that clearly protected the rights of the evictees and offered the prospect for broader policy changes.³⁸

Engagement also fits well within the Constitutional Court's clear reluctance to dictate specific policy changes when faced with a challenge based principally on one of the socio-economic rights provisions of the Constitution. Like the declaratory judgment in *Grootboom* and the constitutional-damages remedy in another eviction case, *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd*,³⁹ engagement by itself has only an indirect effect on specific policies, leaving the details up to the political branches. Indeed, engagement as used in *Olivia Road*, where the Court itself had not yet decided any of the substantive issues in the case, offers an even less directive mechanism than either constitutional damages or a declaration because it does not require a ruling on the merits.

Joe Slovo is consistent with this pattern. As Tissington points out, the Constitutional Court appears to have largely accepted the Government's decision to go forward with the N2 Gateway Project, and its determination that re-location of the residents rather than *in situ* upgrade was the only feasible way

37 Ibid.

38 See Ray, *supra* n. 4. See also Tissington, 'Challenging Inner City Evictions Before the Constitutional Court of South Africa: The Occupiers of 51 Olivia Road case', (2008) 5 *Housing and ESC Rights Law Quarterly* 1.

39 2005(8) BCLR 786 (CC); [2005] ZACC 5. Although the Constitutional Court held that it need not address whether Section 26 was implicated in *Modderklip*, it cited Section 26 throughout the decision.

to accomplish the project's goals. The Constitutional Court was also unwilling—despite clear recognition of the Government's failure to negotiate meaningfully with the residents—to halt a government project of this magnitude in order to rectify the serious procedural defects in the planning process.⁴⁰ Both aspects of the decision highlight the Constitutional Court's reluctance to use these rights—either the substantive or procedural dimensions—to alter in any significant manner a policy or programme that is well underway.

But the Constitutional Court's engagement order suggests an increased understanding that more muscular oversight by the judiciary is critical to developing the engagement process into an effective enforcement mechanism. The principal advantage to a more robust engagement process that incorporates judicial control is that it creates a procedure for placing direct pressure on the political branches to develop policies sensitive to constitutional obligations and thus preserves litigation as a tool for citizens and civil society to press for increased attention to socio-economic rights. At the same time, by focusing on the procedural rather than substantive dimensions of socio-economic rights, engagement permits courts to refrain from dictating policy specifics.

In *Olivia Road*, the Constitutional Court ordered engagement over the eviction order at a point where the Government was already considering adopting a revised plan for inner-city development and had stopped pursuing the challenged eviction policy. This set the stage for the successful negotiation that ultimately resulted. In that context, the very general engagement order combined with an obligation to report back to the Constitutional Court was sufficient by itself to trigger reconsideration of the challenged policy and good-faith negotiation over how to develop a revised policy consistent with the obligations section 26 imposes. But, following a disastrously ineffective engagement order in another case,⁴¹ the Constitutional Court in *Joe Slovo* recognised the need to structure the engagement order in ways that enhanced the accountability of the parties to the negotiation.

The Constitutional Court's order adopts several innovations that can be adapted in future socio-economic rights cases to improve the effectiveness of this novel remedy, including a detailed agenda for the engagement, a baseline

40 See Liebenberg, *supra* n. 36, stating that '[a] few of the judges held that the laudable objectives and greater good of the N2 Gateway project outweighed the defects in the consultation process. It would be too burdensome to expect higher standards from the state in these circumstances.'

41 *Mamba v Minister of Social Development*, *supra* n. 6. In *Mamba*, the Constitutional Court ordered the Gauteng Government to engage with a group of foreign national refugees displaced by the xenophobic violence that swept through parts of South Africa in the spring of 2007 over closure of the camps where they were housed. The Government effectively ignored the order and treated it as requiring it to merely report to the residents and others the progress of its closure plans.

substantive interpretation and more direct court oversight of the process. Increasing control over the details of the negotiation agenda accomplishes two things: first, it establishes a substantive framework for the negotiation that forces the parties to bargain over key aspects of the challenged policy. Rather than leaving it to the parties to develop their own agenda, the Court decides which issues are most important and subject to potential concessions. Most critically, in the *Joe Slovo* case, the Government is required to negotiate the overall timetable for the relocation and the precise terms of the relocation for each individual and family. This creates considerable leverage for the residents to negotiate a process that is attentive to their constitutional rights on both a group and an individual level.

Greater transparency is also possible with a more detailed agenda. This is particularly important if the negotiations break down and the parties return to the Constitutional Court for resolution. The public-record requirement the Constitutional Court established in *Olivia Road* already requires the State to keep detailed records of the process. An order that includes a detailed list of negotiation items will require a detailed account of precise negotiations over each individual item. This will create an even more robust record on which a court faced with a negotiation impasse can determine whether to order further engagement—possibly with a revised agenda—or to order substantive relief on the basis of the information disclosed during the structured negotiation.

The Constitutional Court's substantive decision that the project must reserve at least 70% of the new housing stock for the displaced residents is also a significant innovation. In its earlier uses of the remedy, the Constitutional Court ordered engagement before addressing any issue on the merits. Here, the Court effectively determined that the parties' own negotiations resulted in a commitment to reserve 70% of the housing stock for the displaced residents, and that the Government failed to fulfil it in the first two phases of the project. By taking this aspect of the policy off the table in the engagement, the Court both resolved a key issue in the case and also enhanced the bargaining position of the residents by requiring the Government to take seriously their demands over the relocation process.

This aspect of the decision also highlights the flexibility of engagement. Courts can deploy it alone, as happened in *Olivia Road*, or in combination with a range of substantive remedies on select issues in the case. This flexibility to decide which issues are appropriate for resolution by engagement and which require immediate court resolution gives courts further power to structure the remedy in a way that is most likely to be effective in each case.

Finally, the Constitutional Court's decision to retain jurisdiction increases the likelihood that the parties will engage meaningfully because failure to do so runs the direct risk of court sanction. By controlling the process and

permitting the parties to seek its intervention during the engagement process over relocation, the Constitutional Court has provided the residents with an important lever to force the State to do more than merely report on the progress of implementation.

5. Conclusion and Post-script

Several weeks after issuing its decision in *Joe Slovo*, the Constitutional Court quietly suspended its order ‘until further notice’ in response to a report submitted by the Western Cape Minister for Housing that stated he had ‘grave concerns’ that the relocation plan might be more expensive than an onsite upgrade of the Joe Slovo settlement.⁴² In a news report on the suspension order, a special adviser to the National Human Settlements Minister said that he ‘thought it best that the evictions be postponed to allow the government time to consult with residents.’⁴³

In the end, then, it appears that De Vos’ assessment was correct: the Constitutional Court’s engagement order—while on its face an approval of the Government’s decision to relocate the residents—in fact opened the door to renegotiating the decision itself. The above quotations acknowledge that the engagement order forced the State to reconsider its approach to housing in the *Joe Slovo* case and that it is now seriously considering adopting the residents’ proposal and plans to continue to consult them on possible revisions to the plan. This result illustrates the power of a well-structured engagement order to change social and economic policy. Although the Court ultimately gave the State permission to proceed with relocation, by conditioning it on engagement with the residents over the details, the State was forced to carefully consider the relative costs and benefits of the plan, and it now appears likely the State will change course. Courts considering engagement in future cases should draw lessons from the specific characteristics of the *Joe Slovo* order that arguably contributed to this success, in particular the enhanced court oversight and more specific agenda, as well as the Court’s substantive resolution of specific issues.

Further refinement of the *Joe Slovo* engagement model holds promise for the remedy to develop into an effective enforcement mechanism in socio-economic rights litigation, but the real potential for engagement lies elsewhere. The Constitutional Court described engagement in *Olivia Road* as a mechanism to make social and economic rights a salient part of the policy development

42 Majavu, ‘Evictions Suspended – Shack Dwellers Reprieved’, *Sowetan*, 4 September 2009, available at: <http://www.sowetan.co.za/News/Article.aspx?id=1060093> [last accessed 14 January 2010].

43 Ibid.

process.⁴⁴ Although it did not employ engagement in its most recent socio-economic rights decision, the Constitutional Court re-emphasised that these rights play a primarily political role:

[L]itigation of [the positive obligations imposed by social and economic rights] fosters a form of participative democracy that holds government accountable and requires it to account between elections over specific aspects of government policy.⁴⁵

Engagement has the potential to radicalise that political role even further by giving citizens and civil society groups the right to demand consultation from the outset of any policy development process. The right to consultation at the very beginning of the process offers much greater opportunity to meaningfully affect policy and to ensure appropriate attention to the obligations these rights impose than litigation challenging the implementation of an existing policy.

44 For a preliminary account of how engagement could be developed as a tool for political advocacy, see Ray, 'Engagement's Possibilities and Limits as a Socioeconomic Rights Remedy', (2010) 9 *Washington University Global Studies Law Review* (forthcoming).

45 *Mazibuko and Others v City of Johannesburg and Others* CCT 39/09 [2009] ZACC 28, at para. 160.