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## Courts, Capacity and Engagement: Lessons from Hlophe v. City of Johannesburg

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# ESR

## REVIEW

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# ESR

## REVIEW

# Editorial

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This issue of the *ESR Review* coincides with the celebration of Human Rights Day in Africa on 21 October, which commemorates the coming into force of the African Charter on Human and Peoples' Rights (the African Charter).

The African Charter, which is almost universally ratified by member states of the African Union, was adopted in 1981 but came into force on 21 October 1986.

It was one of the earliest regional human rights instruments to guarantee, in one document, civil and political rights as well as economic, social and cultural rights. The African Charter has been celebrated for its comprehensive approach to human rights including the promotion and protection of individual, social and people's rights. In a continent where millions of people are deprived of access to basic social amenities such as water, electricity, sanitation and employment, the African Charter could not have come at a better time.

Sadly, however, more than three decades after the African Charter came into force, the living conditions of many people in Africa have not really improved. Many people still live in abject poverty, lack access to housing, employment and health care services.

There is a disconnect between what is guaranteed in the African Charter and the realities of many Africans. Thus, the articles in this issue of the *ESR Review* address some of the socio-economic rights issues that are important in improving the living conditions of many Africans.

Brian Ray's article assesses the decision of the court in *Hlophe v City of Johannesburg* on the importance of meaningful engagement in eviction cases in South Africa. It lauds the court's decision, which emphasised the need for provincial governments to adopt a proactive and reasonable plan of action in evictions.

Wouter van Ginneken's article addresses the importance of social protection in combating poverty. He argues that social protection is a human rights issue and urges states to adopt and implement comprehensive national social protection floors, which must address food security, health care, education, water sanitation, housing and social security.

This issue also includes a book review by Ebenezer Durojaye and updates on recent developments on human rights at the international and African regional levels.

We hope you will enjoy reading it.

Dr Ebenezer Durojaye (Editor)



## Courts, capacity and engagement

### Lessons from *Hlophe v City of Johannesburg*

Brian Ray

I cannot and do not claim to have any knowledge of town planning, urban development, provision of housing or budgeting therefore or management of large corporations. But I do believe the questions to which I require answers will propel the City into (if not a whirl) at least a flow of directed and focused action (*Hlophe v City of Johannesburg*, [2013] ZAGPJHC 98, 3 May 2013, at para 27) (*Hlophe*).

*This disclaimer was part of a remarkable judgment by Judge Kathy Satchwell of the South Gauteng High Court in a case addressing the City of Johannesburg's repeated failures over a period of 11 months to comply with an order to house a group of people facing eviction from a privately owned building in the city centre.*

The case was one of the first applying the Constitutional Court's holding in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another*, (2) BCLR 150 (CC) (1 December 2011) (*Blue Moonlight*) that municipalities have an independent obligation to plan and budget for the emergency accommodation needs of people evicted from private property. The City also was the defendant in that case, and so its repeated failures to accommodate the occupants in *Hlophe* demonstrated a broader failure to implement the planning, budget and policy requirements that flowed from *Blue Moonlight*. Judge Satchwell recognised this and issued a complex order that attempts to grapple, at a systemic level, with the root causes of the City's general inability to fulfil its obligations under section 26.

In this short comment I'll use the case and this innovative order to argue that the systemic approach it reflects is an appropriate expansion of a more intrusive procedural role for courts to enforce the social rights provisions. I'll argue further that the meaningful engagement requirement that was first applied in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others*, 2008 (5) BCLR 475 (CC) (19 February 2008) (*Olivia Road*) provides both a doctrinal framework and an institutional mechanism for that expansion. Courts applying engagement have thus far failed to fully exploit this procedural authority. Judge Satchwell's order shows that courts can and should seek to identify the root causes of government's failure to fulfil its obligations under section 26 and other rights. But she, too, missed the opportunity to take the next step by invoking the procedural

authority that engagement creates to craft and manage a process that directly addresses the bureaucratic and administrative failures her questions aim to identify.

I'll start in the middle of the case's complicated procedural history and skip over some details to simplify the story. Relying on *Blue Moonlight*, the occupants in June 2012 secured a High Court order requiring the City of Johannesburg to provide accommodation before they were evicted. The City failed to provide accommodation by the deadline and instead filed a report with the court stating it lacked the resources to satisfy the order. The occupants then brought the *Hlophe* action to enforce the accommodation order. The High Court confirmed the original order, and once again required the City to report back, this time by 20 March 2013, providing details on the accommodation it would provide. In this second report, the City stated it was still unable to provide accommodation and requested an indefinite delay.

Following this second report Judge Satchwell 'invit[ed]' the Executive Mayor, City Manager and Director of Housing to attend a hearing to address her concerns about the City's reports. Specifically, the judge was concerned that:

- officials from legal departments rather than officials with substantive expertise in 'planning, budgetary, town planning, urban development and housing' prepared both reports;
- the City detailed its overall mission and planning processes, accommodation provided to other people and budgetary constraints but provided no information on possible accommodation for the occupants;
- the reports were in essence '*pleas in misericordiam*' seeking to excuse the City's failure;
- the first report showed that the City had not attempted to take steps to comply with the original order and instead 'the past and present were simply described and the future hoped for'; and
- the second report showed that the City waited eight months after the original order (and 14 months after *Blue Moonlight*) to take even the most preliminary steps towards finding accommodation (*Hlophe* para 21).

Referring to *Blue Moonlight*, she concluded that the reports 'indicate an attitude on the part of the City which is only very reluctantly (if at all) compliant with the directions of the Constitutional Court' (*Hlophe* para 22). Rather than giving the City yet another opportunity to find accommodation in this case, she instead ordered the City to answer detailed questions about its overall emergency housing programme and policies, including identifying the:

● The case recognises the futility of repeatedly ordering the City to deliver a service it failed to adequately plan and budget to deliver ●●

structure or structures [that] implement the housing arrangements required to be implemented in the *Blue Moonlight* case, with reference to the personnel involved, skills available, liaison undertaken, time availed from other duties, management and direction of implementation (*Hlophe* Order para 2.a.iii).

She insisted the City could not simply identify alternative accommodation 'and then state it is unnecessary to answer' these programmatic questions (*Hlophe* para 32).

In other words, Judge Satchwell ordered the City to identify its overall capacity and describe its general planning process for meeting the ongoing obligations that *Blue Moonlight* imposed. In doing so, she recognised that the City's failure here was merely a symptom of this broader lack of capacity and of its refusal to take seriously its obligation to plan and budget in ways that sought to develop that capacity. As the judge explained it, her pointed questions were 'premised upon a view that management towards an outcome must be planned, focused and directed toward that outcome' and sought 'to address the many difficulties and problems upon which the City relies to explain its failure to take any concrete steps over the past eleven months towards compliance with the court order' (*Hlophe* para 33). The list of concerns about the City's reports that the judge cited made essentially the same point: its failure to recognise the need to develop the expertise and administrative infrastructure necessary to meet its constitutional obligations, not only in this case but across the board in similar situations, made it futile to continue to demand compliance with the specific order only in this case.

Judge Satchwell's detailed questions and focus on the City's general capacity to fulfil the obligations created by *Blue Moonlight* reflects the kind of procedurally active role that the Constitutional Court first described in *Port Elizabeth Municipality v Various Occupiers*, 2004 (12) BCLR 1268 (CC) (1 October 2004) (*Port Elizabeth*) and then developed into the meaningful engagement requirement in *Olivia Road*. Justice Albie Sachs in *Port Elizabeth* called for courts 'to go beyond [their] normal functions, and to engage in active judicial management' when addressing the kind of 'ongoing, stressful, law-governed social process[es]' that social rights claims frequently raise. *Olivia Road* grounded that role in the meaningful engagement requirement that gives courts the authority to examine not only the substance of social welfare programmes but also the process government used to develop them. There the Constitutional Court identified a free-standing constitutional ob-

ligation for government to consult with people affected by social policy and civil society groups representing their interests. In describing the core features of engagement, the Constitutional Court insisted that the government's obligation goes beyond simple ad-hoc consultation once litigation arises and requires an administrative infrastructure and trained personnel to provide opportunities for ongoing consultation throughout the policy-development process.

Judge Satchwell's insistence that the City answer questions about its overall structures, personnel and planning for housing delivery reflects a similar concern with moving beyond individual disputes to get at the root causes behind them. Both *Olivia Road* and *Hlophe* rest on the basic premise that municipalities have an obligation to independently consider and develop the capacity for implementing their obligations under section 26. Both decisions also recognise that fulfilling these obligations requires incorporating attention to them into broader planning processes. *Olivia Road* emphasised the democratic- and dignity-enhancing effects of consulting with people directly affected by state policies and programmes. *Hlophe* recognises that planning must include a range of technical expertise relevant to housing delivery.

But neither case developed the full potential of this stronger procedural role to address the root causes *Hlophe* identifies. *Olivia Road* focused on humanising and managing individual evictions, and meaningful engagement has largely remained a case-management device with only ancillary effects on broader planning. The Court's criteria for engagement, including detailed reporting on engagement efforts, the need for training in the engagement, and especially its insistence that engagement should begin early in any large-scale policy development, give courts the power to require changes not just to the substance of policies but to the way municipalities develop them. *Olivia Road's* key insight is that courts can and should sometimes intervene in overall processes, not just in individual cases.

Judge Satchwell's order in *Hlophe* and especially her insistence on obtaining detailed general information even if the City finally complied with the housing order shifts the focus in precisely that direction. Rather than asking only why the City failed these plaintiffs, the order notes the clear link between this failure and others and the futility of repeatedly ordering the City to deliver a service it failed to adequately plan and budget to deliver. Throughout the judgment Satchwell repeated the need for the City to address 'planning, budgetary, town planning, urban development and housing' issues (*Hlophe* para 21.a). She also highlighted the City's extensive foot-dragging in the face of *Blue Moonlight's* clear holding that it is required to plan and budget for these situations:

The City has had potential indication of its general responsibilities for a period of some 38 months and final indication of its specific responsibilities for a period of some 16 months (*Hlophe* para 5).

As she explained, the point of demanding information

about the City's technical capacity and planning process is to 'propel the City into (if not a whirl) at least a flow of directed and focused action' to deal comprehensively with the problem of emergency housing (*Hlophe* para 27).

But Judge Satchwell stopped short of actually intervening in these larger issues. In other parts of the judgment she took a constrained view of the scope of her authority as largely limited to resolving this case. Most telling in this respect, the judge insisted that the only purpose of her questions was the 'provision of temporary accommodation for these applicants sooner rather than later' (*Hlophe* para 33, emphasis added). This echoed her scathing critique of the City's presentation of its general efforts to house evictees as irrelevant to the original order that required only details of the 'solution achieved' to the applicants' own pending homelessness (*Hlophe* para 21.c). By limiting engagement to a set of case-specific issues and only asking questions about the City's overall capacity, Judge Satchwell was left merely hoping to 'propel' the City itself to solve these structural problems.

Connecting *Hlophe* and *Olivia Road* moves past the mistaken perception that courts' authority is or should be limited to resolving case-specific issues in social rights cases. Rather than stopping with what was, in effect, an attempt to embarrass the City by exposing its failure to take the necessary steps to satisfy *Blue Moonlight*, a court could use the procedural power engagement provides to initiate and manage a process designed to force the City to make those same changes directly. This wouldn't, as Judge Satchwell worries, require a court itself to take on the significant technical issues involved. Instead, the engagement order could incorporate consultation with experts in each of the fields she identified.

The Constitutional Court has already expanded the engagement requirement to some extent in ways that lay the groundwork for doing this. Most recently, in *Schubart Park Residents Association v City of Tshwane Metropolitan Municipality*, 2013 (1) BCLR 68 (CC) (9 October 2012) (*Schubart Park*) Justice Froneman recognised the expansive scope of engagement. He noted that '[n]ormally supervision and

engagement orders accompany eviction orders where they relate to the provision of temporary accommodation pending final eviction' but found 'there is no reason why they cannot be made in other circumstances where it is appropriate and necessary' (*Schubart Park* para 42.) In both *Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality and Another*, 2012 (9) BCLR 951 (CC) (24 May 2012) and its unreported order in *Mamba and Others v Minister of Social Development and Others*, 78 CCT65/08 (Court Order dated 21 August 2008), the Court ordered outside organisations to participate in and facilitate the engagement processes.

Like *Hlophe*, the engagement orders in these cases ultimately focused on resolving case-specific issues or implementing case-specific orders. They did not directly address the systemic problems at play and the outside parties had some stake in the outcome. Engagement's true potential lies in the authority it creates for courts to order the government and plaintiffs to consult with experts in the kinds of issues Judge Satchwell's incisive questions identify – housing delivery, urban planning and budgeting – and to structure solutions on a larger scale, with the aim of creating broader processes and building general capacity to address the root causes of the situations that lead to specific litigation. Judge Satchwell's innovative order recognises the need for courts to take this next step but missed the possibility of using engagement as the vehicle to insist on those changes. The City of Johannesburg is not unique in its failure to address its social rights obligations on a broader scale. *Hlophe* paves the way for other courts in other cases to craft processes that bring government, poor people, civil society and other experts together to begin working on the logistical and budget challenges of fulfilling the promise of social rights.

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